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Preventing Misconduct by Promoting the Ethics of Attorneys' Supervisory Duties

Irwin D. Miller*

I. INTRODUCTION - PUNISHING ATTORNEY MISCONDUCT

After disciplining a relatively new attorney for violating the code of ethics, the court added this postscript to an otherwise routine disciplinary case:

There remains . . . a disturbing aspect to this case. . . . [T]here is evidence of concern to all attorneys. . . . In the future . . . this attitude of leaving new lawyers to "sink or swim" will not be tolerated. . . . Had this young attorney received the collegial support and guidance expected of supervising attorneys, this incident might never have occurred. . . . "This sorry episode points up the need for a systematic, organized routine for periodic review . . . ."1

Disciplinary opinions like this one must be particularly troubling to new lawyers and law students preparing to graduate. The young attorney who was left to "sink or swim" in this "sorry episode," sank. He was suspended from the practice of law for three

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Indirect thanks and appreciation is also owed to the authors of a special project which empirically showed a high consumer demand for law review articles concerning legal ethics. Max Stier, et al., Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges, 44 STAN L. REV. 1467, 1468, 1499-1500 (1992) (finding that in a survey of randomly selected attorneys, professors, and judges, legal ethics was one of only three subjects that received support for greater attention in law reviews from all three subgroups, with ethics ranking second among all subjects requested by practicing attorneys).

1 In re Yacavino, 494 A.2d 801, 803 (N.J. 1985) (quoting In re Barry, 447 A.2d 923, 926 (N.J. 1982) (Clifford, J., dissenting)). For a more detailed discussion of Yacavino and Barry, see infra Part II.D.
years\(^2\) and will carry the stigma of professional discipline with him for the remainder of his career. The supervisory attorneys in the firm, chastised by the court for failing to give the young attorney the "collegial support and guidance" which may have prevented the young attorney's misconduct, went about their business of practicing law. Describing this lack of supervision as a "disturbing aspect" of the "sorry episode," the court issued its warning that such a neglectful attitude toward supervisory duties would not be tolerated in the future. In questioning whether the legal profession has heeded the court's warning, this article advocates initially preventing attorney misconduct by promoting the ethical rules governing the supervision of attorneys.

While the bar's ultimate goal is to prevent professional misconduct, its efforts and methods to accomplish this prophylactic goal are mostly indirect. The bar generally regulates under the premise that disciplining individual attorneys for breaches of professional ethics will prevent future professional misconduct by other attorneys. In other words, at least one objective of attorney punishment\(^3\) is deterrence.\(^4\) Accordingly, the disciplinary bar's\(^5\) mission of promoting a more ethical legal profession is partially accomplished. Without such a punitive disciplinary system,\(^6\) public

\(^2\) Yacavino, 494 A.2d at 804.

\(^3\) Punishment, however, is not a stated purpose of disciplining attorneys. "As the courts have noted, while sanctions imposed on a lawyer obviously have a punitive aspect, nonetheless, it is not the purpose to impose . . . sanctions for punishment." STANDARDS FOR IMPOSING LAWYER SANCTIONS Standard 1.1 cmt. (A.B.A. 1992) [hereinafter MODEL SANCTIONS]. Almost all jurisdictions claim that punishment is not a purpose of professional discipline. Mary M. Devlin, The Development of Lawyer Disciplinary Procedures in the United States, 7 GEO. J. LEGAL ETHICS 911, 938-39 & n.213 (1994) (citing cases which disclaim punishment as a purpose of discipline).

\(^4\) CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 81, 124-25 (1986). See MODEL SANCTIONS, supra note 3, Standard 1.1 cmt. (stating that the "primary purpose is to protect the public" but noting that another purpose of imposing sanctions is to "educate other lawyers and the public, thereby deterring unethical behavior among all members of the profession" (citing In re Carroll, 602 P.2d 461 (Ariz. 1979); Florida Bar v. Lord, 433 So. 2d 983 (Fla. 1983); Committee on Prof. Ethics & Conduct of the Iowa State Bar Ass'n v. Gross, 326 N.W.2d 272 (Iowa 1982)); see also Devlin, supra note 3, at 937-38 n.212 (citing cases which mention deterrence as a purpose of attorney discipline).

\(^5\) Throughout this article, unless the context indicates otherwise, the term "bar," "organized bar" and "disciplinary agency" refers to that agency of a state's bar responsible for disciplining attorneys for violations of the state's ethical code of conduct. The term "practicing bar" refers to attorney practitioners as a whole.

\(^6\) The disciplinary system has been studied several times at the national level. See, e.g., COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 9 (1991) [hereinafter MCKAY REPORT]; SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AMERICAN BAR ASS'N, PROBLEMS
outcry against lawyers might be loud enough to mark the end of the profession's privilege of self-regulation.

Notwithstanding the value of professional punishment, the current process of sanctioning individual attorneys for breaches of ethical norms can be supplemented with efforts geared directly toward the initial prevention of attorney misconduct. The responsibility of "self-regulation" of the legal profession encompasses more than the bar's efforts at setting standards of conduct, passively receiving complaints about individual attorney violations, imposing appropriate sanctions for ethical breaches, and hoping that the other "regulatees" get the message and are sufficiently deterred from engaging in similar misconduct. This largely punitive approach creates an instinctively hostile regulatory climate. It pits the disciplinary bar against (at least some members of) the practicing bar, thereby fostering distrust and a desire to maintain a comfortable distance. Viewed in this way, "self-regulation" means little more than "self-policing" with the organized bar acting out its role as police and with individual attorneys viewing themselves as suspects.7

Moreover, the disciplinary bar's role remains largely passive and reactive until it learns of professional misconduct,8 at which time the disciplinary process is triggered. The practicing bar's role in self-regulation is similarly passive. Aside from their own responsibility for complying with the ethics codes, attorneys' ethical responsibilities for their intra-firm colleagues' conduct is too limited. By eliciting the aid of the practicing bar in preventing misconduct, the disciplinary bar can take an important step forward. The regulatory framework is already in place. The notion that attorneys be more actively involved with respect to their colleagues' ethical conduct has been recognized by the bar, but its potential remains unfulfilled. This recognition, embodied as an affirmative ethical duty, imposes on attorneys a form of supervisory responsibility for

7 This article advocates prevention (as a means of obviating punishment) but simultaneously recommends increasing disciplinary enforcement of ethics provisions aimed at prevention which, in a sense, simply advocates more punishment. This paradox is only superficially accurate. Disciplinary enforcement of prevention rules is initially necessary as a means of accomplishing the end result of motivating the practicing bar to engage in meaningful preventive efforts. Doing so then prevents misconduct which ultimately eliminates the need for punishment. See also infra Part VI (recommending regulatory methods outside of any disciplinary context).

8 WOLFRAM, supra note 4, at 100.
their intra-firm colleagues' ethical conduct. Unfortunately, this responsibility has received inadequate attention. Each case of professional misconduct that is prevented by properly exercising attorneys' supervisory duties potentially means one less client complaint to the bar, one less case of client harm, and one less attorney punished. Ultimately, instilling this sense of collective responsibility and increased accountability makes the legal profession "self-regulating" in a more genuine and meaningful way.

The American Bar Association's (the "ABA") Model Rules of Professional Conduct contain an important, yet largely overlooked rule of ethics which explicitly addresses the issue of the intra-firm supervisory responsibilities of lawyers. Model Rule 5.1 directly addresses this responsibility by imposing an affirmative and independent duty on partners and other supervisory lawyers to take reasonable steps designed to assure compliance with ethical rules by the firm's attorneys. In other words, it mandates an affirmative "duty to supervise" other attorneys for their ethical

9 This article primarily deals with supervision designed to prevent instances of unintentional and avoidable misconduct rather than intentional, calculated misconduct. However, proper supervisory procedures would make it more difficult for an attorney to engage in intentional misconduct and would assist in the detection (and correction) of intentional misconduct at a much earlier time. Similarly, detection of unintentional misconduct through supervision creates an opportunity for earlier and easier correction. See infra note 86.

10 The sheer number of complaints is staggering. "Each year, about 110,000 people call the State Bar [of California] to complain about California attorneys." Nancy McCarthy, Lawyers' Mortal Sins: The Best Way to Tick Off Clients, CAL. ST. BJ., May 1994, at 1.

11 MODEL RULES OF PROFESSIONAL CONDUCT (1993) [hereinafter MODEL RULES].

12 MODEL RULES, supra note 11, Rule 5.1. There was no direct counterpart to this duty in the predecessor Model Code of Professional Responsibility. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983) [hereinafter MODEL CODE]. Professor Wolfram called the absence of a general duty of supervision in the Model Code "regrettable." WOLFRAM, supra note 4, at 882. As to the Model Code's oversight, Professors Hazard and Hodes explain:

No disciplinary rule of the Code of Professional Responsibility even tangentially addressed the important questions of whether and when one lawyer is responsible for overseeing the conduct of another. This deficiency resulted from the "single lawyer, single client" assumption which animated the Code, an assumption no longer comporting with modern realities and accordingly abandoned in the Rules of Professional Conduct.


13 MODEL RULES, supra note 11, Rule 5.1.

14 Model Rule 5.1 does not state the obligation as a "duty to supervise." Rather, the
conduct with respect to the rules. Noting that competency is a legal and ethical duty, supervision for ethical conduct under Model Rule 5.1 encompasses supervising for competency. Model Rule 5.2, a corollary to Rule 5.1, dictates the independent responsibility of subordinate lawyers to comply with the rules of ethics. These provisions of the Model Rules which create affirmative duties directly relating to the ethical conduct of fellow attorneys provide the ethical framework necessary to focus on prevention.

Part II looks at the recent alarm over lawyer competency and the role of the practicing bar in supervising new attorneys. Law practice today is increasingly conducted in firms and organizations consisting of many attorneys, which indicates a greater need for promoting supervision within the law firm. This need is examined in the context of what has been referred to as the educational continuum. The transition from law school to basic competency to practice law is an important training period. Accordingly, Part II reviews recently made ABA recommendations calling for more active involvement by the established practicing bar in this regard.

Part III examines the rules governing supervisory duties of attorneys in an intra-firm setting. Model Rule 5.1 addresses the responsibility of partners and direct supervisory lawyers to make reasonable efforts to ensure the ethical conduct of firm lawyers. Unfortunately, too little attention has been paid to this important provision of the Model Rules because a straightforward reading of the Rule suggests that it was specifically designed to prevent ethical violations from occurring. The bar's expectations for concept is expressed as requiring reasonable efforts to ensure that the other lawyers conform to the Rules of Professional Conduct. The terms "supervise," "duty to supervise," "supervisory duties," "supervisory responsibility," and similar expressions used throughout this article refer to the affirmative obligations of reasonably assuring ethical conduct of lawyers as set forth in Model Rule 5.1.

15 MODEL RULES, supra note 11, Rule 1.1.
16 Id. Rule 5.2. See HAZARD & HODES, supra note 12, § 5.2:101, at 778.
17 See infra note 37.
18 See infra Part II (referring to the MacCrate Report).
19 Obviously, learning to think like a lawyer does not immediately translate into competently practicing like one.
20 See infra Part II (referring to the MacCrate Report).
21 MODEL RULES, supra note 11, Rule 5.1.
23 In 1980, when the proposed Model Rules of Professional Conduct were being
partners and individual supervisory attorneys, to whom this Rule is
directed, can be sent through the traditional disciplinary machin-
ery. This can be accomplished simply by increasing disciplinary
enforcement of Rule 5.1 as it currently exists. In proper cases, the
bar can impose sanctions against individual partners and individual
supervising attorneys for failing to provide reasonable supervision
of subordinate attorneys in violation of the affirmative ethical duty
currently mandated in Model Rule 5.1. Stepping up enforcement
efforts in this traditional way and relying on the general deterrent
value of disciplinary sanctions, the bar can accomplish a policy of
couraging supervision within law firms.24

Part IV examines the preventive goal from the perspective of
the supervised or subordinate lawyer.25 Achieving the goal of pre-
vention should not be solely the responsibility of supervising attor-
neys. Indeed, the ultimate responsibility for ethical conduct be-
ongs to the subordinate. Model Rule 5.2 suggests that the
subordinate's active role in seeking supervision becomes an indis-
ispensable part of achieving the goal of prevention. Fulfilling the
relative responsibilities of both supervising and subordinate attor-
neys envisioned in Model Rules 5.1 and 5.2 can be encouraged by
the bar's explicit recognition of "Supervisory Conditions." This
regulatory approach emphasizes and fosters competency, collabora-
tion, joint ethics problem-solving, and generally heightens ethical
awareness in the practice environment.

Part V recommends a non-traditional but potentially effective
approach by which the disciplinary bar can promote this policy of
prevention in law firms. Good faith preventive efforts depend on
overall law firm policy with respect to supervisory responsibilities,
firm operating procedures, structural safeguards, and other organi-
zational oversight. Therefore, Part V recommends that the supervi-

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studed and analyzed, Professor Ted Schneyer asked a simple question: "Is Rule [5.1]
designed solely to fix responsibility for infractions once they occur, or is it a prophylactic
measure as well?" Theodore J. Schneyer, The Model Rules and Problems of Code Interpretation
and Enforcement, 1980 AM. B. FOUND. RES. J. 939, 948. Some 15 years later, the question
posed by Professor Schneyer, now Chair of the Section on Professional Responsibility of
the Association of American Law Schools, has yet to be decisively answered, at least with
respect to current regulatory efforts by the bar. See infra Part VI (suggesting a method
for implementing the prophylactic purpose of the rule, since using it solely to fix disci-
plinary liability for completed misconduct is wasting a good part of the rule's potential).

24 See supra note 7 (discussing the inherent contradiction of advocating prevention
by advocating punishment).

25 The term "associate" is also used in this article to refer to the supervised or sub-
ordinate attorney.
Attorneys' Supervisory Duties

Supervisory responsibilities now applicable only to individual lawyers also be directed to the law firm as a whole, the breach of which will subject the firm to appropriate sanctions. Since supervision is, in many ways, a function of firm-wide structure and policy which transcends individual conduct, the disciplinary bar should be allowed the option to proceed against the firm in instances where the firm has failed to provide reasonable supervision.

Disciplinary enforcement against the firm involves a fundamental policy change in the regulation of the legal profession. Disciplinary sanctions have traditionally been directed only against individual attorneys for their individual ethical violations rather than against the organization in which the attorney practices. However, recent persuasive arguments have called for the expansion of regulatory policy to allow for the imposition of professional sanctions against the law firm as an entity. The influential Committee on Professional Responsibility of the Association of the Bar of the City of New York responded to these arguments by recommending changes in the state's ethics rules that would permit law firm sanctions, potentially ushering in a radically new disciplinary era. The Committee submitted its recommendations to New York's appellate divisions, which are studying these proposals and are responsible for amending the state's ethics rules. Part V discusses these recent developments and concludes that since supervisory duties involve policy decisions at the firm-wide level, disciplinary officials should be able to enforce sanctions against the firm,

26 See Ted Schneyer, Professional Discipline for Law Firms?, 77 CORNELL L. REV. 1 (1991) (advocating the expansion of disciplinary jurisdiction to cover the law firm as a whole by analogizing professional discipline of law firms to criminal liability of organizations).

Professor Schneyer, the leading proponent of law firm discipline, advocates a form of vicarious disciplinary responsibility of the law firm for the misconduct of the firm's lawyers. This article is not as ambitious; it advocates disciplinary responsibility of the law firm for the misconduct of the law firm in violating a firm-directed ethical duty to provide reasonable supervision. Thus, this article does not advocate general vicarious law firm disciplinary responsibility but urges that firm discipline be imposed as a result of the firm's independent violation of this specific firm-directed rule. See infra Part V.

27 Association of the Bar of the City of New York, Committee on Professional Responsibility, Discipline of Law Firms 48 REC. A.B. CITY N.Y. 628 (1993) [hereinafter NEW YORK REPORT]. During the preparation of the New York Report, the Committee was chaired by Fordham University School of Law Professor Daniel Capra.


as an entity, to promote an overall policy of prevention within the profession.

Part VI likewise departs from traditional regulatory policy in recommending that the bar promote supervisory duties outside of any disciplinary context. After all, the rule contemplates affirmative action on the part of attorneys to whom the rule applies independent of any suspected or actual misconduct; therefore, the bar should similarly assume this preventive approach. The bar’s methods should not rely solely on punishing firms into supervising their lawyers, but rather should assist firms in doing so. The bar can avoid exacerbating an already punitive regulatory climate by taking a much more proactive approach to furthering supervision. Encouraging law firms to examine their supervisory roles in advance of and with a goal of preventing problems accomplishes a positive, prophylactic approach to lawyer regulation and deemphasizes the usual punitive hindsight tactic.

The bar can assist firms by promulgating “Supervisory Guidelines” that describe some methods, procedures and techniques of an effective law firm prevention/supervisory program. These “Supervisory Guidelines” would give firms guidance and serve as a starting benchmark for firms to conduct a self-analysis to gauge their level of commitment to these ideals. The bar’s true prophylactic goals could then be accomplished by periodically requiring firms to submit to the bar some form of a report describing their customized supervisory/prevention program.

The ultimate purpose in increasing the disciplinary enforcement of supervisory duties is to prevent misconduct. One danger that exists in this approach is the possibility of reinforcing and deepening a resistant “us against them” regulatory environment, at least from the perspective of supervisory attorneys and law firms. While subordinate attorneys are perhaps the primary and direct beneficiaries of enhanced supervisory duties, supervisory attorneys and law firms will also reap benefits, both tangible and intangi-

30 In evaluating how great this proposal actually departs from traditional regulatory policy, it must be borne in mind that Model Rule 5.1 does not require the occurrence of any misconduct as a prerequisite to fulfilling supervisory duties.
31 An obvious tangible benefit from increasing supervision is the corresponding decrease in civil liability exposure. Under most circumstances, general principles of partnership law and respondeat superior would make law firms vicariously liable for the wrongdoing of the firm’s lawyers. See RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE §§ 5.1-5.7, at 261-84 (3d ed. 1989 & Supp. 1993); WOLFRAM, supra note 4, at 255-37. Additionally, negligent supervision may be a basis for civil liability. See Dresser Indus., Inc. v. Digges, No. CIV.JH-89-485, 1989 WL 139234 (D. Md. Aug. 30, 1989) (holde-
ble.\textsuperscript{32} The bar's true message in promoting supervisory duties is simply to reinforce the notion that as members of this self-regulating profession, attorneys must increase their accountability for the ethical conduct of their fellow members.\textsuperscript{33}

II. ATTORNEY COMPETENCY AND THE ROLE OF THE PRACTICING BAR

One frequently discussed aspect of the legal profession is lawyer competency. This section shows that members of the practicing bar can promote attorney competency simply by fulfilling their existing ethical duty of supervision. Perhaps the greatest benefit the legal profession can realize from embracing supervisory duties is a fundamental increase in the quality of legal services rendered to clients.

Basic competence among its individual members has long been one of the bar's goals. One approach of achieving that goal is making competence an ethical duty, the breach of which theoretically subjects individual attorneys to discipline.\textsuperscript{34} The success of achieving competence through the threat of discipline is questionable.\textsuperscript{35} Recognizing and acting more directly upon the underlying partners liable for the misconduct of another partner, based on vicarious liability, and based on negligence of the partners in failing to monitor the firm's billing practices.

The decreasing separation between legal and ethical liability should be a motivating development to monitor for ethical conduct. See Ann Peters, Note, \textit{The Model Rules as a Guide for Legal Malpractice}, 7 GEO. J. LEGAL ETHICS 609 (1993) (discussing the relationship between violations of the Model Rules and establishing malpractice liability); Emily Couric, \textit{The Tangled Web: When Ethical Misconduct Becomes Legal Liability}, A.B.A. J., Apr. 1993, at 64; see also Schneyer, \textit{supra} note 26, at 37-40 (discussing why a law firm's civil liability exposure does not entirely eliminate the need for a system of law firm discipline).

\textsuperscript{32} See Susan Bryant, \textit{Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession}, 17 VT. L. REV. 459 (1993) (discussing some of the intangible benefits from forming closer professional relationships in a working environment); see also \textit{At the Breaking Point: A National Conference on the Emerging Crisis in the Quality of Lawyers' Health and Lives - Its Impact on Law Firms and Client Services} 1991 A.B.A. YOUNG LAWYERS DIVISION 4, 5 (reporting attorney frustration and dissatisfaction with lack of training, feedback and mentoring in the firm).

\textsuperscript{33} As Professor Wolfram explained:

In a law firm, professional pride, the threat of liability, fear of censure or dismissal by clients, and concern for high-quality legal services for clients dictate that junior lawyers be supervised in their work.

\textit{Wolfram, supra} note 4, at 880.

\textsuperscript{34} \textit{MODEL RULES, supra} note 11, Rule 1.1. Disciplinary enforcement of competency is limited. \textit{See Wolfram, supra} note 4, at 190-91.

\textsuperscript{35} See Susan R. Martyn, \textit{Lawyer Competence and Lawyer Discipline: Beyond the Bar?}, 69
lying reasons for incompetence are critically important. At least one of those underlying reasons is that many newly admitted attorneys lack basic skills necessary for competency simply because they are inexperienced and receive inadequate on-the-job training, guidance and supervision. Rule 5.1 of the Model Rules of Professional Conduct, requiring supervision for compliance with all the Model Rules, includes supervision for Rule 1.1's ethical duty of competency. The vague and distant threat of professional discipline remains a blunt attack on the problem, whereas supervision for competency serves as a direct assault.

One major thrust of a recently completed comprehensive study of legal education and the legal profession addressed attorney competency. The ABA Section of Legal Education and Admissions to the Bar created a task force to conduct the study, and it issued its findings in a report entitled "Legal Education and Professional Development - An Educational Continuum," (the "MacCrate Report" for Robert MacCrate, Chair of the Task Force and former president of the ABA). The MacCrate Report, concurring with earlier studies, concluded that law school does not fully prepare graduates for the practice of law. Recent debate

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GEO. L.J. 705 (1981) (finding that the threat of professional discipline is generally not effective in promoting competence); Edmund B. Spaeth, Jr., To What Extent Can a Disciplinary Code Assure the Competency of Lawyers?, 61 TEMP. L.Q. 1211, 1215-16 (1988) (noting general agreement that the legal profession has failed to ensure its own competence through the fear of discipline).


37 SECTION ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992) [hereinafter MACCRATE REPORT].

The MacCrate Report contains a wealth of demographic and other information about the legal profession. By using statistics from Barbara A. Curran, The Legal Profession in the 1980s: A Profession in Transition, 20 LAW & SOC'Y REV. 19 (1986) and American Bar Foundation, Lawyer's Statistical Report (Supp. 1988), the MacCrate Report produced a table showing, among other things, a movement in law firm size from smaller to larger practice units and a drop in the percentage of sole practitioners. Less than one-third of all lawyers were sole practitioners in 1988. MACCRATE REPORT, supra, at 32-33. See also Schneyer, supra note 26, at 4-5 (noting the recent increase in the ratio of inexperienced associates to partners indicates an increasing need for supervision).


39 See id. at 21 & n.1 (citing prior studies primarily focusing on legal education).
on the MacCrate Report's findings have focused on the role of law schools in rectifying the problem. The gap between law school and practice may narrow as some law schools implement various MacCrate Report recommendations. However, it would be unrealistic and misguided to place the full blame and burden on formal legal education. Law schools cannot be expected to graduate seasoned practitioners. Furthermore, law students do not believe that they will be ready to practice immediately upon graduation. Proficiency comes with practical experience and the practicing bar must help bridge the gap between school and practice by providing guidance and supervision to its new members. Fulfilling the existing supervisory responsibilities is a good starting point for furthering the profession's goal of competency.

Momentum is growing for law schools to implement the findings of the MacCrate Report by providing more practice orientation to legal education. At its 1994 mid-year meeting, the ABA House of Delegates endorsed more practical training by law

40 Not surprisingly, there is disagreement as to the extent of the problem and the willingness to take action. For example, the ABA and the National Conference of Bar Examiners are generally opposed to regulations which dictate curriculum. MACCRATE REPORT, supra note 37, at 275. The State Bar of California rejected a proposal requiring bar applicants to have completed 90 hours of instruction in lawyering skills before admission. Id.

Many law schools will ignore the recommendations and make no curricular changes. For example, Dean Stone of the University of Chicago School of Law believes most of Chicago's law graduates will be employed in firms that will teach lawyering skills. Jane Easter Bahls, Jump Start: A New ABA Report Suggests How Law Schools Should Prepare Students for Practice, STUDENT LAWYER, Apr. 1993, at 19-20 ("Chicago trains people who will never go off and practice without close supervision - it would be irresponsible if they did.").


Law schools' curriculum and law students' course choices must be partially attentive to the bar examination. "The traditional bar examination does nothing to encourage law schools to teach and law students to acquire . . . fundamental lawyering skills . . . ." MACCRATE REPORT, supra note 37, at 278. A few states (California, Colorado and Alaska) have a performance test component to the bar examination which attempts to measure applicants' analytical and writing skills. Id. at 280.

42 "In a recent survey of student members of the ABA General Practice Section, only 18% of the students reported that law school adequately prepares them to practice with little or no supervision." Bahls, supra note 40, at 19. Practitioners also know that "[a] lawyer fresh from law school simply is not prepared for . . . day-to-day practice." Gerry Malone & Donald S. Akins, The 10 Commandments for Training New Lawyers, A.B.A. J., June 1984, at 58.
schools. The delegates approved a report drafted by the Illinois State Bar Association which provided a “checklist for an ideal law school curriculum,” purportedly derived from the MacCrate Report. This action suggests a cure can be found by revising law schools’ curricula. However, this approach was too one-sided even for Robert MacCrate, who told the delegates that “the Illinois bar report overlooks the ‘central message’ of the MacCrate Report - that legal educators and members of the bar are engaged in the common enterprise of developing competent lawyers.” MacCrate believed that the Illinois bar report was unbalanced because it focused primarily on the responsibilities of law schools; he added that “[e]ducation of lawyers must be seen as a continuum.” His offer of a substitute amendment at the ABA mid-year meeting failed; apparently, a majority of the delegates want law schools, rather than the practicing bar, to be primarily responsible for training lawyers how to practice law. As the profession moves from MacCrate study to MacCrate implementation, a great opportunity would be lost if the law schools are primarily targeted for change while the practicing bar’s responsibility for narrowing the gap is overlooked.

Sharing responsibility for competency with practicing attorneys is not shifting the burden where it does not properly belong.

45 Id.
46 Id. at 30 (emphasis added).
47 Id.
48 Id.
49 Id.
51 The ethical codes have always expressed such responsibility of the practicing bar. Prior to the clear mandate of Model Rule 5.1, Model Code provisions addressed the role of the practicing bar in aspirational ways. Attorneys have an ethical responsibility to “assist in maintaining the . . . competency of the legal profession.” MODEL CODE, supra note 12, Canon 1. Similarly, attorneys have a “positive obligation to aid in the continued improvement of . . . post-admission legal education.” Id. EC 1-2. Practicing attorneys can promote competency by being positive role models for new attorneys, by maintaining high standards of professional conduct for themselves and by encouraging such standards in others, including partners and associates. Id. EC 1-5.
Rather, it is sensible to convey this responsibility to supervising attorneys. Attorneys with supervisory duties are close to the source of problems in law practice and are directly able to influence attorney behavior. An attorney’s colleagues within his or her law firm are major influences on a new attorney. The disciplinary bar’s vague threat of punishment for incompetence has an indirect and detached relationship to a lawyer’s daily professional activities. Placing more responsibility on the practicing bar to assure the basic competence of its lawyers recognizes this reality. Law firms are in a better position than the regulating bar to teach, train and monitor the performance of individual attorneys. Recognizing this potential, the legal profession should promote supervisory obligations of lawyers in firms. The MacCrate Report’s findings and recommendations should not be lost on the practicing bar in a rush to target law schools as the panacea.

The MacCrate Report identifies ten separate skills of law practice. Arguably, all of the skills that relate to competent law practice can best be learned and refined in the context of a practice setting under the guidance of an experienced attorney/supervisor. Within this context, the practicing bar can exercise its supervisory responsibilities to fulfill its portion of the educational continuum. In doing so, two areas of particular importance that relate to the profession’s obligations of supervision should be emphasized. Specifically, Skill No. 9, entitled “Organization and Management of Legal Work,” speaks directly and indirectly to an inexperienced lawyer’s need for supervision and guidance. Skill No. 9 recommends that supervisory attorneys develop a system which fosters a collaborative work environment for subordinate attorneys. Such

Interestingly, the Model Rules of Professional Conduct for Federal Lawyers adds the following subparagraph to its counterpart to Rule 5.1:

(c) A Federal lawyer, who is a supervisory lawyer, is responsible for ensuring that the subordinate lawyer is properly trained and is competent to perform the duties to which the subordinate lawyer is assigned.


52 The ten fundamental lawyering skills identified by the MacCrate Report are: (1) problem-solving; (2) legal analysis and reasoning; (3) legal research; (4) factual investigation; (5) communication; (6) counseling; (7) negotiation; (8) litigation and alternative dispute-resolution procedures; (9) organization and management of legal work; and (10) recognizing and resolving ethical dilemmas. MacCrate Report, supra note 37, at 135-207.

53 Id. at 199-203.

54 Id. at 201 (Skill No. 9 - Organization and Management of Legal Work). See also Bryant, supra note 32, at 472 (finding that attorneys’ joint efforts and a collaborative
a system should include conscientious organization and ongoing management of an associate’s legal work assignments.\textsuperscript{55} For example, Skill No. 9 recommends that a supervising attorney, when delegating work to an associate, convey the purpose and nature of the task, the amount of time that should be spent on it, and the urgency of any deadlines.\textsuperscript{56} The supervising attorney should then be available to give the associate guidance during the project, monitor the associate’s progress to ensure that the work is correctly completed in a timely manner, and provide feedback and constructive criticism during and after the assignment is completed.\textsuperscript{57}

By encouraging this type of supervision and mentoring of subordinate attorneys, the bar can better achieve its goal of competence. Supervising attorneys are able to determine areas of weakness in their subordinates. They are in the best position to respond immediately to any weaknesses by providing constructive criticism and instruction. They can also take appropriate and timely corrective action if the circumstances so require. Since supervising attorneys are able to determine the underlying reasons for subordinates’ weaknesses, they can assist in making necessary corrections. More importantly, this type of ongoing supervision prevents mishaps before they occur and allows opportunities for rectifying any potential problems at early correctable stages.\textsuperscript{58} It remains simple common sense to delegate partial responsibility for competence to the experienced members of the practicing bar. The MacCrate Report’s recognition of supervisory skills as an essential ingredient to successful law practice is a significant step toward realizing a more competent bar.

The MacCrate Report addressed another area specifically concerned with supervising for ethical conduct. Skill No. 10, entitled “Recognizing and Resolving Ethical Dilemmas,” addresses the need to identify and solve ethical problems that arise in practice.\textsuperscript{59} During the course of any assignment, methods should be in place to assist lawyers in recognizing and resolving ethical dilemmas.\textsuperscript{60}

\textsuperscript{55} MACCRATE REPORT, supra note 37, at 201.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} In contrast, the bar’s disciplinary process is relegated to imposing sanctions well after the consequences of any misconduct or incompetence have occurred. See infra note 86 (discussing duty to correct consequences of misconduct).
\textsuperscript{59} MACCRATE REPORT, supra note 37, at 203-07.
\textsuperscript{60} Id. at 203-05.
Every lawyer should become familiar with the local rules of professional conduct and “[q]uestion and research the legal propriety of practices before employing them.” The MacCrate Report recommends that such a collaborative search to resolve ethical dilemmas likewise applies to supervising attorneys. Despite the fact that a supervisor has engaged in practices “long accepted by lawyers within the particular field of practice,” those practices should not continue without question. When attorneys have ethical questions, they should not only look to the rules of ethics for guidance, but also seek the advice of other attorneys within the firm.

In addition to addressing skills necessary in law practice, the MacCrate Report identified four fundamental values to which every lawyer should aspire. One of those values targets the profession’s obligations to its newest members. Specifically, Value No. 3, entitled “Striving to Improve the Profession,” recommends that experienced lawyers assist in the training of new lawyers. “[T]he profession depends upon its members to assist in the enterprise of educating new lawyers and preparing them for practice.” Accordingly, the MacCrate Report suggests several ways experienced lawyers can assist in the development of new lawyers, including participation in the training and support for new lawyers in one’s own law office.

Again, as stated by Robert MacCrate, a good part of the MacCrate Report’s fundamental message regarding the practicing bar is that experienced practitioners must embrace their roles as mentors, teachers and supervisors. Training and supervision by

61 Id. at 204.
62 Id. at 205.
63 Id.
64 The four attorney values are: (1) providing competent representation; (2) striving to promote justice, fairness and morality; (3) striving to improve the profession; and (4) enhancing professional self-development. Id. at 207-21.
65 Id. at 216.
66 Id. (citing MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1993); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 1-2 (1983)).
68 See Robert MacCrate, Preparing Lawyers to Participate Effectively in the Legal Profession, 44 J. LEGAL EDUC. 89 (1994) (“The central message of the [MacCrate Report] is that legal educators . . . and practicing lawyers . . . are engaged in a common enter-
experienced attorneys is necessary to help new lawyers "understand what they do not know, to grasp the limited nature of their education and background in the law," so that new lawyers can begin to dispel their "paralyzing feeling of incompetence." The quest for competent and ethical law practice obviously does not end with law school, but rather is a continuing obligation of the practicing bar. Since the MacCrate Report has recognized the important role of experienced attorneys in the professional development of new attorneys, the organized bar should focus on implementing the report’s findings and recommendations applicable to the practicing bar. The existing ethical duty of supervision is an ideal vehicle for encouraging the practicing bar to fulfill its role in the educational continuum.

III. INTRA-FIRM SUPERVISORY DUTIES

A. General Scheme of Supervisory Duties

Model Rule of Professional Conduct 5.1 governs the responsibilities of lawyers who, directly and indirectly, supervise other law-

69 MACCRATE REPORT, supra note 37, at 217 (quoting AMERICAN LAW INSTITUTE-AMERICAN BAR ASS'N COMMITTEE ON CONTINUING PROF. EDUC., ENHANCING THE COMPETENCE OF LAWYERS 75 (1981)).

70 MACCRATE REPORT, supra note 37, at 217.

71 Although it is likely that most legal educators are aware of the findings and recommendations of the MacCrate Report, it is unlikely that many practitioners are equally informed.

72 Some transition programs do exist. The MacCrate Report did find that a variety of programs for newly-admitted attorneys have been established in private law firms, general counsel offices and government agencies. MACCRATE REPORT, supra note 37, at 286. Although these “on-the-job” or “in-house” programs are utilized exclusively for the members of these organizations, they do represent meaningful developments in the training of new lawyers. Id. at 286-87.

These “in-house” programs are likely to include many of the following aspects: mentoring; orientation; substantive presentations; monitoring of work assignments; placing work in transactional context; training in lawyering skills and values. Id. at 299-300. While the MacCrate Report was generally complimentary of these types of transition programs, the MacCrate Report had several specific criticisms regarding these programs and was concerned whether they were adequate to meet the professional needs of many new lawyers. Id. at 300-01. Furthermore, the MacCrate Report expressed concern for the plight of new lawyers who are not beneficiaries of any such programs: “But if the recruits for these legal organizations are getting needed or highly useful training, what of the much larger number of new attorneys who begin practice . . . in offices that do not provide such training?” Id. at 300. See also id. at 314-16 (describing in-house training programs and noting an important element of these programs is training senior attorneys to be more effective supervisors by having associates evaluate partners’ abilities to supervise effectively).
yers. The rule applies to law firm partners, shareholders in a professional corporation, lawyers who supervise in a corporate legal department or government agency, and lawyers who have direct supervisory authority over other lawyers within a firm. Although the Model Code of Professional Responsibility contains no direct counterpart to Rule 5.1, common disciplinary law partially and occasionally filled the gap by disciplining supervisory attorneys. However, such discipline usually occurred only in egregious cases. Emerging from the decisional law was essentially an ethi-

73 Model Rule 5.3 governs supervisory responsibilities of lawyers over nonlawyer assistants and "substantially parallels" the duties contained in Rule 5.1. HAZARD & HODES, supra note 12, § 5.3:101, at 784. The supervisory responsibilities of lawyers over nonlawyers are not specifically addressed in this article.

74 MODEL RULES, supra note 11, Rule 5.1 cmt.


Although the Model Code does not state an overall supervisory obligation analogous to Rule 5.1, it does state an obligation of a lawyer to exercise reasonable care to prevent associates from disclosing client confidences and secrets and from making impermissible extra-judicial statements. MODEL CODE, supra note 12, DR 4-101(D) & DR 7-107(J). See also id. Preliminary Statement ("A lawyer should ultimately be responsible for the conduct of . . . associates in the course of the professional representation of the client.").

76 See, e.g., Vaughn v. State Bar of Cal., 494 P.2d 1257, 1263 (Cal. 1972) (holding that an attorney is not responsible for every detail of office procedure, but has supervisory responsibility for work of office staff); Moore v. State Bar of Cal., 396 P.2d 577, 581 (Cal. 1964) (suspending an attorney for culpable negligence in completely failing to supervise an affiliated lawyer's handling of a case); In re Weinberg, 518 N.E.2d 1037, 1040 (Ill. 1988) (public censure of supervising attorney for failing to more closely supervise an office-sharing inexperienced attorney's brief writing deadline); In re Schelly, 446 N.E.2d 236 (Ill. 1983) (failing to adequately supervise disbarred attorney working as a law clerk); In re Weston, 442 N.E.2d 236 (Ill. 1982) (disciplining attorney for failing to adequately supervise work delegated to associate); In re Brown, 59 N.E.2d 855, 858-59 (Ill. 1945) (finding that a partner's knowledge of a kickback scheme warrants suspension); In re Pollack, 536 N.Y.S.2d 437 (N.Y. App. Div. 1989) (attorney censured for failing to adequately supervise an associate attorney regarding handling of estate funds); In re Fata, 254 N.Y.S.2d 289, 290 (N.Y. App. Div. 1964), appeal denied, 208 N.E.2d 790 (N.Y. 1969) (holding that a partner, where a claim of ignorance was impossible to believe, has a duty to supervise another partner's billings); In re Gladstone, 229 N.Y.S.2d 663, 666 (N.Y. App. Div. 1962), appeal denied, 187 N.E.2d 480 (N.Y. 1962) (finding attorney disciplinarily responsible for a partner's fraudulent misconduct when the attorney knew or should have known or when it was inconceivable that he did not know, of the partner's misconduct); In re Neiman, 214 N.Y.S.2d 12, 15 (N.Y. App. Div. 1961) (finding that misconduct was due to attorney's "careless reliance" on his subordinates and "lax supervision"); In re Berlant, 328 A.2d 471, 474 (Pa. 1974) (sanctioning the supervising attorney when associate falsified contingent fee arrangement, because the court drew the inference that the supervisor had knowledge based on all the circumstances). For a discussion of other leading cases imposing discipline on the unsupervised subordinate attorney but "warning" the supervisory attorneys of their duties, see infra Part III.D.
cal duty of reasonable supervision, the breach of which subjected the negligent supervisor to professional discipline. In determining whether the supervisor's negligent supervision warranted discipline, the courts relied on a variety of factors, including the type and magnitude of the subordinate's misconduct, the supervisor's objective or subjective knowledge of the subordinate's misconduct, and the degree of the supervisor's carelessness and neglect. Although common themes appear in the case law, the scope of supervisory responsibility under such law appears relatively limited and narrow, at least as compared to the ethical obligations eventually codified in Model Rule 5.1.

Imposing an independent and affirmative duty in the Model Rules to oversee the ethical conduct of another lawyer represents an important change from the predecessor Model Code, and an improvement over sporadic case law development. The official comment to Rule 5.1 explains the overall purpose of imposing such a monitoring requirement: the "ethical atmosphere of a firm can influence the conduct of all its members and a lawyer having authority over the work of another may not assume that the subordinate lawyer will inevitably conform to the Rules." Initially, however, it must be noted that generally a lawyer is not subject to discipline for the misconduct of another lawyer on the basis of imputed liability. The legislative history of the Model Rules clarified this limiting principle. Rule 5.1 was intended to establish the principle of supervisory responsibility without introducing vicarious liability. Delegating work to subordinates is a prac-

77 Hazard and Hodes refer to these new duties as a "major innovation" of the Model Rules. HAZARD & HODES, supra note 12, § 5:101, at 765. See supra note 12.
78 MODEL RULES, supra note 11, Rule 5.1 cmt.
79 ANNOTATED MODEL RULES, supra note 75, at 447 (emphasis added) (citing E. REICH, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 153 (1987) [hereinafter Legislative History]). See Stewart v. Coffman, 748 P.2d 579 (Utah App. 1988) (noting that Rule 5.1 does not impose vicarious disciplinary responsibility on a lawyer who has not participated in or ratified a violation of the rules). Similarly, the legislative history of Model Rule 5.1(c)(1) reflects the drafters' intent not to introduce vicarious liability concepts regarding lawyers' supervisory duties. Model Rule 5.1(c)(1) provides:

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved.

MODEL RULES, supra note 11, Rule 5.1(c)(1) (emphasis added). The legislative history of the Model Rules indicates that the requirement of "knowledge of specific conduct" in Rule 5.1(c)(1) was purposefully added to avoid creating liability in courts which might
tical matter and Rule 5.1 does not make partners or supervisory lawyers "guarantors of the professional conduct of their subordinates." On the other hand, this limitation does not strip the Rule of serving its important function. Partners and other supervisory lawyers may not "simply muddle along, relying on the hoped-for ethical probity of their associates and just plain luck." Although Rule 5.1 does not impose vicarious liability on a lawyer who has not ratified or participated in the substantive violation of the rules, it does impose an "enhanced" standard of accountability.

This standard essentially creates independent and affirmative duties on partners and supervisory attorneys to make reasonable efforts to assure the ethical conduct of other lawyers in the firm. The general rule against vicarious discipline is preserved. On the other hand, the independent duty of reasonable supervision in

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construe the word "ratify" as requiring only constructive knowledge. "The amendment was intended to remove any possibility of supervisory responsibility being imposed on a lawyer who had no knowledge of specific conduct." LEGISLATIVE HISTORY, supra, at 154. See infra notes 83, 221.

80 Annotated Model Rules, supra note 75, at 447 (noting that "a lawyer is not subject to bar discipline on a theory of vicarious responsibility when there is no evidence or finding that he should have been aware of and guarded against a possible impropriety" (citing In re Corace, 213 N.W.2d 124, 127 (Mich. 1973))).

With respect to senior lawyers assigning work and responsibility to junior lawyers, Professor Hazard cautions: "[D]elegation is one thing, abdication is something else." Geoffrey C. Hazard, Jr., Firm Culture Sets the Tone on Behavior, NAT'L L.J., Feb. 20, 1989, at 15, 18.


82 Hazard & Hodes, supra note 12, § 5.1:201, at 770.

83 Id. § 5.1:101, at 768. Lawyers who order or ratify misconduct are disciplinarily responsible for the ordered or ratified misconduct. MODEL RULES, supra note 11, Rules 5.1(c)(1), 8.4(a). See supra note 79 (discussing the prerequisite to disciplinary responsibility that the ratifying lawyer have actual knowledge, not mere constructive knowledge, of the "ratified" misconduct).

Rule 5.1 is affirmative and absolute; the failure to provide such reasonable supervision constitutes the lawyer's own independent violation which is the unethical conduct warranting professional discipline. The circumstances usually found in the common disciplinary law cases, such as the extent of the subordinate's misconduct and the supervisor's cognition, are not required elements according to Model Rule 5.1's statement of supervisory responsibility.

Rule 5.1 has two separate functions. The first function, found in Rules 5.1(a) and 5.1(b), is to establish a duty on the part of partners (Rule 5.1(a)) and direct supervisory lawyers (Rule 5.1(b)) to make reasonable efforts to ensure that all lawyers (in the case of partners) and subordinate lawyers (in the case of direct supervisory lawyers) abide by the Rules of Professional Conduct. Based on a fair reading of Rule 5.1, this affirmative duty applies regardless of the actual occurrence of any misconduct or of any knowledge or suspicion of any misconduct. Its simple yet unmistakable purpose is to prevent misconduct by requiring reasonable supervision in some form, which might include structural safeguards, internal monitoring or organizational oversight. This primary function of Rule 5.1 is purely prophylactic; the secondary function of Rule 5.1 is briefly discussed in this footnote.

B. Indirect Supervisory Responsibility of All Partners

Rule 5.1(a) provides a general statement of supervisory duties which applies to all partners in a firm. It reads:

A partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable

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See supra note 76 and accompanying text.

86 The purpose of the unusual practice of calling specific attention in the text to a footnote is to illustrate by its relegation to a footnote that the second function of Rule 5.1, although important, is nonetheless ancillary to its primary function. The primary function is prevention; its ancillary function is remedial and curative. Rule 5.1(c)(2) establishes an ethical duty to rectify the harm that has already occurred as a result of a lawyer's misconduct if a partner or direct supervisory lawyer knows of the misconduct at a time when its consequences can be avoided or mitigated. Arguably, the duty to rectify consequences of misconduct often arises because supervision failed to prevent the misconduct from occurring. The duty to remedy has been included in the general scheme of Rule 5.1 as an ethical responsibility of partners and direct supervisory lawyers, and admittedly there is some correlation between prevention and cure. Yet, since the remedial function found in Rule 5.1(c)(2) is ancillary to prevention, its footnote status for the purpose of sharply contrasting the two separate functions is appropriate. Prevention is primary; cure is important, but ancillary. See infra note 221 and accompanying text.
assurance that all lawyers in the firm conform to the Rules of Professional Conduct.\textsuperscript{87}

By imposing a general duty on partners to supervise the conduct of the other lawyers in the firm, the rule recognizes that the duty to prevent unethical behavior within the firm is a matter of both direct and indirect supervision.\textsuperscript{88} Since partners are indirectly responsible for all legal work done in the firm,\textsuperscript{89} it is not unreasonable to impose overall responsibility for the ethical conduct of all lawyers in the firm. Therefore, failure to make reasonable preventive efforts theoretically subjects every partner to professional discipline regardless of the partner's remoteness from the violating attorney, regardless of the partner's knowledge or suspicion of any misconduct and technically, regardless of any misconduct at all.\textsuperscript{90}

\textsuperscript{87} MODEL RULES, supra note 11, Rule 5.1(a).


\textsuperscript{89} MODEL RULES, supra note 11, Rule 5.1 cmt. "[E]very responsible member of the firm shares in the firm's collective responsibility for the firm's work." WOLFRAM, supra note 4, at 881.

\textsuperscript{90} Hazard and Hodes provide two illustrative cases, both of which describe theoretical possibilities rather than enforcement reality. The first case illustrates a partner's violation of Rule 5.1(a) when the partner is remote from the violating attorney, the violation occurs innocently, and the violation is immediately corrected. Partner L in a 3-partner, 10-associate firm, handles the firm's real estate cases and does no litigation. An associate agrees to represent a plaintiff and files a nuisance action against C. Later, C complains that another associate in the firm was handling a workers' compensation suit for C. The first associate, not knowing about the conflict of interest, immediately withdrew from handling the nuisance suit. (Model Rule 1.10(a) disqualified the first associate from handling a matter directly adverse to C, a client of the firm.) Partner L knew nothing about the associate's violation, but nevertheless was in violation of Rule 5.1(a) because the firm as a whole had no system for avoiding conflicts of interest. All the partners, including L, are responsible for creating such a system. HAZARD & HODES, supra note 12, § 5.1:202, at 771.

The second case illustrates a partner's violation of Rule 5.1(a) in the absence of any substantive violation of any rule of professional conduct. Partner L learns that one of the partners in the firm had not read the Rules of Professional Conduct that had recently been adopted by the supreme court of the state where the firm practices. Although neither Partner L nor the other partner has violated any substantive provision of the rules, they have both violated Rule 5.1(a)'s duty to make reasonable efforts to ensure conformance with the Rules of Professional Conduct. "At a minimum, such 'efforts' must include a directive that all the firm's lawyers study the rules. The fact that lawyers in the firm have otherwise obeyed the rules is a fortuitous circumstance which does not obviate compliance with Rule 5.1(a)." Id. §§ 5.1:202, 5.1:203, at 772-772.1.
A closer examination of Rule 5.1(a) is helpful in understanding its potential scope. The Rule begins with, "[a] partner in a law firm . . ."\(^91\) All partners share the firm-wide preventive obligations.\(^92\) The terminology section preceding the Model Rules defines a "partner" as "a member of a partnership and a shareholder in a law firm organized as a professional corporation."\(^93\) Thus, the general duty to have "measures" in place for ethical compliance appears to apply only to partners of traditional law firms and shareholders of professional corporations.\(^94\) Heads of corporate legal departments and governmental legal agencies are surprisingly not included as "managing" attorneys who logically should bear the same overall level of responsibility as do traditional law firm partners and shareholders. Instead, the supervisory responsibilities within corporate legal departments and governmental legal agencies are those described only in Rule 5.1(b),\(^95\) not Rule 5.1(a). There is no rule which squarely places overall entity-wide responsibility on heads of corporate legal departments or governmental legal agencies. Furthermore, there seems to be no particular reason for exempting business and government from this overall entity-wide monitoring requirement.\(^96\)

The term "reasonable" is an important defining element of partners' supervisory duties. It appears twice in Rule 5.1(a): "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance . . ."\(^97\) While use of "reasonable" twice plac-

\(^{91}\) MODEL RULES, supra note 11, Rule 5.1(a) (emphasis added).

\(^{92}\) All partners are "supervisory' lawyers per se" for purposes of Rule 5.1(a). HAZARD & HODES, supra note 12, § 5.1:201, at 770. Attempting to clarify any ambiguity in the use of the words "a partner," Illinois has revised its Rule 5.1 to read that "each partner" shall make reasonable efforts to ensure the firm has in effect measures giving reasonable assurance . . . ." Overton, supra note 12, at 435.

\(^{93}\) MODEL RULES, supra note 11, Terminology [6]. A "law firm," however, is defined as "a lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization." Id. Terminology [3]. The fact that the definition of a "law firm" includes in-house corporate lawyers adds to the ambiguity regarding the coverage of Rule 5.1(a). See infra notes 115-18 and accompanying text.

\(^{94}\) HAZARD & HODES, supra note 12, § 5.1:201, at 770. See infra notes 115-18 and accompanying text.

\(^{95}\) Rule 5.1(b) describes the supervisory responsibilities of lawyers (partner or non-partner) with direct supervisory authority over another lawyer. See infra Part III.C.

\(^{96}\) Professor Wolfram describes Rule 5.1(a)'s exclusion of senior lawyers in corporate general counsel offices and government legal offices as unfortunate. WOLFRAM, supra note 4, at 882 n.25. For further discussion of the coverage of Rule 5.1, see infra notes 115-18 and accompanying text.

\(^{97}\) MODEL RULES, supra note 11, Rule 5.1(a) (emphasis added).
es even greater uncertainty on what efforts are to be made and what level of assurance is required, the term clarifies that Rule 5.1(a) was never intended to make partners guarantors of subordinates' professional conduct. Exactly what constitutes "reasonable efforts" or "reasonable assurance" within the meaning of Rule 5.1(a) "can depend on the firm's structure and the nature of its practice," and "can take many forms, so long as they are reasonably calculated to eliminate or inhibit violations." Whereas informal supervision may suffice in a small firm, a larger firm may require more formalized supervisory procedures. If the nature of the practice involves difficult ethical problems, even more exacting supervision may be "reasonably" necessary. Reasonable efforts might include continuing legal education in professional ethics, implementing a system for anonymous referral of ethical problems to a special committee, and instituting office procedures for surfacing and solving ethical problems. Whatever reasonable measures are eventually instituted, they should be directed to all the lawyers in the firm, associates and partners alike.

The last element of Rule 5.1(a) refers to reasonable efforts toward compliance with "the Rules of Professional Conduct," which obviously includes all of the Rules. The ethical duty of com-

98 A partner must only make reasonable efforts to ensure that the firm has the measures in place. An individual partner who makes "reasonable" yet unsuccessful efforts may not be in violation of Rule 5.1(a), even though the firm has no measures in place.

Generally, "reasonable," when used in reference to attorney conduct denotes the conduct of a reasonably prudent and competent lawyer. MODEL RULES, supra note 11, Terminology [7].

99 Id. Rule 5.1 cmt.

100 HAZARD & HODES, supra note 12, § 5.1:201, at 770.

101 MODEL RULES, supra note 11, Rule 5.1 cmt.

102 Id.

103 Id. See COMMISSION ON PROFESSIONALISM, supra note 67, at 273 n.82 (suggesting that Rule 5.1 actually requires in-house ethics committees); Jonathan M. Epstein, Note, The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm, 7 GEO. J. LEGAL ETHICS 1011 (1994) (noting that, although not required by Rule 5.1, valuable benefits are realized by in-house ethics committees).

104 HAZARD & HODES, supra note 12, § 5.1:101, at 769 (describing the requirement as "in general, the creation of an atmosphere of attention to matters of professional ethics"). See also Spaeth, supra note 35, at 1239 (quoting MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1(a) (1993) as requiring that lawyers "maintain a continuing, general situation ... in which there will always be 'in effect measures giving reasonable assurance' that all lawyers in the firm ... will act in conformity with the rules.").


106 MODEL RULES, supra note 11, Rule 5.1(a).
petence is of particular importance because it may be overlooked as merely a matter of potential malpractice, not ethics. Model Rule 1.1 provides that a lawyer shall provide competent representation, which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Competency, as a matter of professional ethics, deserves special attention in the area of supervision because of the likelihood that a subordinate attorney will be inexperienced, and may not be capable of independently carrying out the matters delegated to him or her. It may be difficult and awkward for subordinates to confess to supervisors that they need help in performing certain legal tasks. Therefore, the obligations of a partner under Rule 5.1(a) require efforts to institute measures that reasonably assure the basic competency of all legal work done by lawyers in the firm. Although supervision for competent representation would normally occur at the level of direct supervisor/associate, partners' obligations under Rule 5.1(a) would be to institutionalize procedures and policies that mandate reasonable ongoing supervision.

Regardless of the Rule's form, coverage or clarity, the intention and ultimate purpose of the Rule is obvious. Unmistakably, Rule 5.1(a) is designed to affirmatively motivate partners to institute policies and safeguards at the firm-wide level that reasonably assure ethical conduct by all attorneys in the firm. The implemented safeguards and procedures need not actually guarantee conformance, but should constitute reasonable measures designed to prevent misconduct and promote ethical conduct at the firm-wide level.

C. Direct Responsibility of Supervisory Attorneys

While Rule 5.1(a) establishes the general supervisory responsibility of partners for firm-wide ethical conduct, Rule 5.1(b) establishes a similar duty for any lawyer having direct supervisory authority over any other lawyer. It reads:

107 Id. Rule 1.1. See supra Part II.
108 MODEL RULES, supra note 11, Rule 1.1.
109 See supra Part II.
110 See infra notes 182-84 and accompanying text.
111 "Supervisors . . . are required to supervise the junior lawyers' compliance with ethical standards as well as their professional performance." HAZARD & HODES, supra note 12, § 5.1:101, at 769 (emphasis added). See supra note 51.
112 See Schneyer, supra note 26, at 8 (noting that the firm's organization, policies and procedures constitute the ethical infrastructure of the firm).
A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.\textsuperscript{113}

Rule 5.1(b) applies to partners (but only with respect to direct subordinates) and non-partners who have direct supervisory authority over other lawyers. Any lawyer who delegates responsibility to subordinates must provide reasonable supervision of those subordinates.\textsuperscript{114}

Although the Rule itself carefully distinguishes between the duties of a partner in Rule 5.1(a) and the duties of a direct supervisory lawyer in Rule 5.1(b), the official comment to Rule 5.1 seems to obliterate any distinction between paragraphs (a) and (b) by discussing them together:

Paragraphs (a) and (b) refer to lawyers who have supervisory authority over the professional work of a firm or legal department of a government agency. This includes members of a partnership and the shareholders of a law firm organized as a professional corporation; lawyers having supervisory authority in the law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm.\textsuperscript{115}

The official comment confuses rather than clarifies.\textsuperscript{116} Nevertheless, the legislative history of the Model Rules indicates that there is a distinction, noting that Rule 5.1(a) was intended to address the duty of a partner while "paragraph (b) applied to a non-partner in a firm and to a lawyer in an organization that was not a partnership, such as the law department of a corporation."\textsuperscript{117} As noted, only partners and shareholders of traditional law firms appear to have firm-wide supervisory duties under Rule 5.1(a); their counterparts in business and government have no such gen-

\textsuperscript{113} Model Rules, supra note 11, Rule 5.1(b). Whether a lawyer has supervisory authority over another lawyer is a question of fact. Id. cmt.

\textsuperscript{114} See supra note 76.

\textsuperscript{115} Model Rules, supra note 11, Rule 5.1 cmt.

\textsuperscript{116} Similarly, the discussion regarding reasonable efforts mandated in Rule 5.1(a) and Rule 5.1(b) was merged in the official comment to the Rule: "[t]he measures required to fulfill the responsibility prescribed in paragraphs (a) and (b) . . . ." Model Rules, supra note 11, Rule 5.1 cmt. Presumably, there is a difference between a partner's efforts to fulfill Rule 5.1(a) and a direct supervisory lawyer's efforts to fulfill 5.1(b). See supra notes 97-112 and accompanying text; infra notes 119-20 and accompanying text.

\textsuperscript{117} Legislative History, supra note 79, at 154. See Hazard & Hodges, supra note 12, § 5.1:301, at 773.
eral duty. This distinction makes little sense. Recognizing that the need to supervise for ethical conduct is a matter of entity-wide indirect responsibility, the general duty in Rule 5.1(a) represents good policy for traditional law firms and should apply similarly in legal departments of government and business.118

Other distinctions between Rules 5.1(a) and 5.1(b) concern the scope of responsibility and the extent of ongoing efforts. These distinctions make practical sense. Each partner is responsible for instituting firm-wide measures for all attorneys in the firm, including co-partners. Once reasonable measures are in place, the partner's ongoing obligations under Rule 5.1(a) arguably would be limited to checking periodically that the measures promoting ethical conduct are working reasonably well. Presumably, these measures operate to provide reasonable assurance of ethical compliance. The duty to institute these measures applies based on partner status, without regard to the existence of any direct supervisory relationship or actual authority over any lawyers in the firm. The duty to implement properly these partner-insti-
tuted measures rightfully falls on those attorneys with direct supervisory authority.

A direct supervisory lawyer is responsible under Rule 5.1(b) for reasonable ongoing efforts to ensure the ethical conduct of his or her direct subordinates, but is not responsible for instituting measures for the firm as a whole. In addition, a direct supervisory lawyer, unlike a partner,119 is only concerned with attorneys directly under his or her control, and is not responsible for ensuring professional conduct of attorneys outside of this direct supervi-
sor/subordinate relationship. Requiring general measures exclusive-
ly from partners is appropriate. Rarely will a non-partner be in a

118 Mary Daly, Fordham University School of Law Professor and Director of the Stein Institute of Law and Ethics, noted the apparent contradiction between the text of Rule 5.1 and the official comment and acknowledged that "at first glance" and "on its face," Rule 5.1(a) excludes in-house counsel. Mary C. Daly, Ethical Challenges for Law Departments in the Twenty-First Century, in SEVENTH ANNUAL INSTITUTE ON CORPORATE LAW DEPARTMENT MANAGEMENT: CONTROLLING AND REDUCING COSTS (PLI Corporate Law and Practice Course Handbook Series No. B4-7046, 1993). Professor Daly believes, based on the intent of the drafters of the Model Rules to establish an organizational check on lawyers' ethics, in-house counsel would be included in the coverage of Rule 5.1(a). Id. at 2-3. "It is im-
possible to imagine a valid reason for exempting in-house counsel from the reach of [Model Rule 5.1(a)]." Id. at 3 (also discussing which in-house counsel positions would be analogous to a partner for purposes of Rule 5.1(a)).

119 However, a partner can obviously be both a partner to whom Rule 5.1(a) applies as well as a direct supervisory lawyer to whom Rule 5.1(b) applies (with respect to the partner's direct subordinates). See HAZARD & HODES, supra note 12, § 5.1:101, at 769.
position to effect general firm-wide measures addressing potential issues of professional responsibility. While it makes sense to hold direct supervisory lawyers responsible for ongoing efforts to monitor their direct subordinates, it would be inappropriate to expect him or her to establish firm-wide measures.

As indicated earlier, distinctions in the letter of the Rule are not as important as the spirit of the Rule. The spirit is prevention of attorney misconduct through reasonable supervision and the bar needs to send this message more clearly in varying ways. The question of whether that message has been sent through disciplinary cases remains somewhat uncertain.

D. Enforcement Against Individual Supervisory Attorneys

The effectiveness of Rule 5.1 in preventing misconduct depends upon the importance attributed to the Rule by partners and individual supervisory attorneys and their good faith attempts to comply with the Rule's intended purpose. Individual supervisory attorneys will increase their (supervisory) efforts if the bar imposes appropriate sanctions for failing to provide the required level of reasonable supervision. This section examines whether the bar has sent that message through its traditional disciplinary machinery in cases involving lack of supervision. This section concludes that the lack of disciplinary cases actually enforcing the requirements of these mandatory supervisory rules evidences a regrettable neglect and recommends that disciplinary efforts increase.

Underenforcement cannot be explained by the lack of opportunity to examine supervisory duties in a disciplinary context. Arguably, every case of professional discipline, other than cases against sole practitioners, raises the question of whether reasonable (preventive) measures (Rule 5.1(a)) were in effect and whether reasonable (preventive) efforts (Rule 5.1(b)) were made. The fundamental policy question of prevention is raised frequently enough to have generated more disciplinary case discussion. The relative handful of disciplinary cases disapproving of blatant

120 Cf. Danny P. Richey, Guidelines and Techniques for Leading and Managing the Litigation Team, 19 Ohio N.U. L. Rev. 23, 48-50 (1992) (discussing, in a litigation team setting, the differences between delegating (assigning tasks and authority to others) and supervising (insuring that work is handled correctly by others)).

121 See infra Part V (discussing enforcement against the law firm as a whole).

122 But see Schneyer, supra note 26, at 6-8 (discussing the infrequency of disciplinary actions against large and medium-sized firms and analyzing possible explanations).
lack of supervisory efforts\textsuperscript{123} is not the kind of strong message that should be sent considering the great value to be gained by preventing misconduct through supervision.

This section will use a recent event as a vehicle for showing the current state of disciplinary enforcement of Rule 5.1. Constance Vecchione, assistant Massachusetts bar counsel, recently stated at a meeting of the National Organization of Bar Counsel that the bar has enforced Rule 5.1.\textsuperscript{124} Ms. Vecchione was instructing fellow bar counsel on ethics rules and case law "that can help . . . make disciplinary cases stick against . . . senior attorneys"\textsuperscript{125} and stated that attorneys in law firms truly are their "'brother's [and sister's] keeper[s].'''\textsuperscript{126} Implying that preventing misconduct is an important goal, she indicated that "[e]ven in cases where there is no knowledge of developing problems, the responsibility of the supervising lawyer has been seen as absolute."\textsuperscript{127} Expressing her belief that the supervisory duties under Rule 5.1 (and related duties under Model Rules 5.2 and 5.3) have been enforced, she supported her conclusion by citing three disciplinary cases: \textit{In re Barry},\textsuperscript{128} \textit{In re Yacavino},\textsuperscript{129} and \textit{In re Weston}.

Ms. Vecchione's audience consisted primarily of bar counsel responsible for enforcement of states' ethics rules. Therefore, these cases are examined here to determine whether disciplinary agencies are, in fact, adequately armed with precedent for the future enforcement of Rule 5.1. Also, examining the details of a few cases in which lack of supervision contributed to professional misconduct shows the value of prevention within a factual context. While these three cases suggest that some attention has been given to supervision in disciplinary cases, interpreting them as indicative of the bar's commitment to vigorous enforcement of Rule 5.1 against supervisory attorneys is overly optimistic. These cases are not the only disciplinary opinions concerning supervisory duties. Nonetheless, combining these cases with others still fails to show

\textsuperscript{123} See supra note 76 and accompanying text.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} 447 A.2d 923 (NJ. 1982).
\textsuperscript{129} 494 A.2d 801 (NJ. 1985).
\textsuperscript{130} 442 N.E.2d 296 (Ill. 1982).
that the ethical duty of supervision has received the attention that it deserves.\(^{131}\)

The first case, *In re Barry*, involved a disciplinary action against an associate who handled a significant number of matters in a grossly negligent manner.\(^{132}\) Although the court concluded that the associate lacked an intent to defraud,\(^{133}\) and that he made full disclosure and cooperated completely in resolving the clients’ matters, the court suspended him for three months.\(^{134}\) Upon discovering the problem, the firm immediately expedited the cases or settled with clients whose matters had been neglected; in so doing, no client sustained pecuniary loss.\(^{135}\)

Although the court acknowledged that the law firm’s lack of supervision over its associate contributed to the misconduct, it did not seriously criticize the firm.\(^{136}\) The court said:

> We are not unmindful of nor insensitive to the stressful work conditions in which respondent found himself. The record once again raises the problem of what can happen to younger lawyers in thriving firms who are given important responsibilities in recognition of their demonstrated abilities. Sometimes the demands of those responsibilities are beyond the lawyer’s capacity. Natural talent is no substitute for years of practice and the crucible of experience. Respondent does not seek to place on his employers the blame for his quandary, nor would this record satisfy us that it should be laid there.\(^{137}\) But the problem remains, and we trust that the bar shares our concern that newly admitted attorneys in a law firm should be given

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\(^{131}\) See *supra* note 76 and accompanying text. Not only the disciplinary bar, but the practitioner leaders of the profession also need to examine their own efforts to comply with Rule 5.1.

As the leaders of the profession contemplate improvement of professionalism, they should address whether Rule 5.1 is being observed as it should be. At the very least, they should make sure that it is being observed within their own firms and law departments.


\(^{132}\) *Barry*, 447 A.2d at 925.

\(^{133}\) *Id.*

\(^{134}\) *Id.* at 926.

\(^{135}\) *Id.* at 924. By taking this “corrective action,” the firm fulfilled its duty under Rule 5.1(c)(2) to mitigate consequences of misconduct. See *supra* note 86.

\(^{136}\) *Id.* *Barry* was decided under the Model Code when supervisory duties as set forth in the Model Rules had not yet been established. Thus, any supervisory responsibility of intra-firm attorneys was a matter of common (disciplinary) law.

\(^{137}\) The subordinate attorney remains fully accountable for the misconduct, and lack of supervision, standing alone, will generally not mitigate the sanction. See *infra* Part IV.
guidance and supervision by their senior colleagues.\(^{138}\)

In contrast, the dissenting opinion placed less blame on the respondent and placed more responsibility on the principals of the law firm to have prevented the misconduct:

The conclusion is inescapable that a considerable measure of blame for respondent's predicament must fall on the shoulders of the principals in the law firm that employed him, even though he does not seek to place it there . . . . [The] respondent "was given numerous files to handle with little or no guidance." It is simply inexcusable to impose on a fledgling lawyer the total responsibility for clients' affairs without some regular supervision. *It is not enough that the principals be available if needed.* This sorry episode points up the need for a systematic, organized routine for periodic review of a newly admitted attorney's files. The "sink or swim" approach is ill-suited to a high volume professional operation.\(^{139}\)

As signaling serious enforcement of Model Rule 5.1, *Barry's* precedential value is limited: (1) the case was a disciplinary action against the wrongdoing, unsupervised, subordinate attorney, and not a disciplinary action against any of the firm's attorneys for failing to supervise; (2) the majority opinion, while mildly critical of the law firm's unsupervised practice environment, explicitly placed no blame on the firm for the respondent's misconduct; (3) the harsher criticism of the principals of the law firm for disregarding supervisory duties was in the dissenting opinion; and (4) the case was not an interpretation of Rule 5.1. While *Barry* (particularly the dissenting opinion) should cause principals in law firms to consider their supervisory duties, interpreting it as strong authority for the proposition of imposing sanctions on neglectful supervisory attorneys is not entirely accurate.

The second case, *In re Yacavino,\(^{140}\)* was also a decision by the New Jersey Supreme Court in a disciplinary action against the unsupervised, subordinate attorney. In *Yacavino*, a relatively new attorney of a twenty lawyer firm was "left virtually alone and unsupervised"\(^{141}\) in one of the firm's branch offices. He received a three year suspension for forging a court order to conceal his neg-

\(^{138}\) *Barry*, 447 A.2d at 925.

\(^{139}\) Id. at 926 (Clifford, J., dissenting) (emphasis added). According to the dissent, merely being available, if needed, does not satisfy a reasonable supervision standard, which suggests that supervision is a proactive and ongoing process.

\(^{140}\) 494 A.2d 801 (N.J. 1985).

\(^{141}\) Id. at 803.
ligent handling of an adoption.\textsuperscript{142} \textit{Yacavino}, as a typical disciplinary opinion, recited the specific acts of attorney misconduct, identified the violated code sections and imposed an appropriately harsh sanction. To its credit, the court was moved to look beyond Yacavino’s misconduct and examine other circumstances that may have contributed to his unethical behavior. Indeed, the court recalled the warning it issued just three years earlier in the dissenting opinion in \textit{Barry} regarding lack of supervision by a law firm’s principals:

There remains, however, a disturbing aspect to this case that must be mentioned. Without mitigating respondent’s fault,\textsuperscript{143} there is evidence of concern to all attorneys involved in the episode. According to his testimony, respondent was left virtually alone and unsupervised. . . . The office was lacking in the essential tools of legal practice. Partners rarely attended the office; no member of the firm inquired as to the status of the office matters. . . . In the future, however, this attitude of leaving new lawyers to “sink or swim” will not be tolerated. Had this young attorney received the collegial support and guidance expected of supervising attorneys, \textit{this incident might never have occurred}. . . . “This sorry episode points up the need for a systematic, organized routine for periodic review of a newly admitted attorney’s files.”\textsuperscript{144}

As in the dissenting opinion in \textit{Barry}, the court in \textit{Yacavino} was quite disturbed by the law firm’s callous disregard of its supervisory duties. Its warning to firms that the “sink or swim” attitude toward new lawyers would not be tolerated in the future is definitely a promising development. Nevertheless, the fact remains that the attorney sanctioned in \textit{Yacavino}, as in \textit{Barry}, was the unsupervised, subordinate attorney, not the neglectful supervisor(s). Although the principals of the firm were warned and seriously criticized, no one was sanctioned or disciplined for failing to supervise the respondent.\textsuperscript{145} Consequently, both \textit{Barry} and \textit{Yacavino}

\begin{itemize}
\item \textsuperscript{142} Id. at 801-02.
\item \textsuperscript{143} Unsupervised, subordinate attorneys should again take note that they remain responsible for their misconduct. As the court pointed out, the fact that lack of supervision caused or contributed to the misconduct will generally not be considered as a mitigating factor in a disciplinary proceeding against the subordinate. See infra Part IV.
\item \textsuperscript{144} \textit{Yacavino}, 494 A.2d at 803 (quoting \textit{In re Barry}, 447 A.2d 923, 926 (N.J. 1982) (Clifford, J., dissenting) (emphasis added)). The court observed the ultimate value of supervision by speculating that the incident might never have occurred had there been proper supervision. This article began with edited portions of this passage. See supra note 1 and accompanying text.
\item \textsuperscript{145} In addressing the fact that no disciplinary charges were filed in \textit{Yacavino} against
should be much more troubling, from a disciplinary standpoint, to unsupervised, subordinate attorneys than to the supervisory principals of law firms. *Barry* and *Yacavino* are, at best, indirect sources of authority for disciplinary efforts aimed at enforcing supervisory duties against attorneys responsible for supervising.

Although *Yacavino* was decided under the Model Code,\(^{146}\) by the time the court's decision was rendered, New Jersey had adopted the Model Rules. Prospectively armed with the codified version of supervisory duties expressed as an affirmative ethical obligation in Model Rule 5.1, the court's (future) wake-up call to supervising attorneys should ring even louder:

Our Rules of Professional Conduct now make clear the ethical responsibility of a supervising attorney to take reasonable efforts to ensure "that all lawyers [in the organization] conform to the Rules of Professional Conduct." Under that Rule it is the supervising attorney's responsibility to assure that each lawyer in the organization diligently carries out the firm's contracts of employment with clients.\(^{147}\)

Thus, although *Yacavino* does not stand as direct authority for enforcement of supervisory duties against supervising attorneys, it undoubtedly advocates such thought and represents future disciplinary policy.\(^{148}\)

\(^{146}\) *Yacavino*, 494 A.2d at 803.
\(^{147}\) *Id.* at 803-04 (citation omitted).
\(^{148}\) On the other hand, four years after *Yacavino* 's stern warning to supervisory attorneys, the New Jersey Supreme Court had the opportunity to show that it meant what it said. The court suspended a supervised attorney for misrepresenting the status of a client's estate matter. The attorney was assigned to an area of law in which he "did not move with complete ease or confidence." Although better than ignoring altogether the unsupervised practice setting, the court merely issued yet another warning:

We wish not to be unfair to the firm . . . . For today's purposes it is sufficient that we express our sense of unease over the extent to which the supervising firm carried out its end of the arrangement. [The attorney was previously ordered to practice in a supervised setting.] The occasion affords us the opportunity to remind the bar that when lawyers take on the significant burdens of overseeing the work of other lawyers, more is required than that the supervisor simply be "available."

*In re Ritger*, 556 A.2d 1201, 1203 (N.J. 1989) (citing *In re Barry*, 447 A.2d 923 (N.J. 1982) (Clifford, J., dissenting)). Curiously, the *Ritger* court did not even mention *Yacavino* or Model Rule 5.1, which was heralded in *Yacavino* as the disciplinary weapon of the future.
The third case, *In re Weston*, most closely stands for the proposition that a supervisory attorney has disciplinary responsibility for failing to supervise an associate attorney. In *Weston*, the bar disciplined a neglectful supervisory attorney who served as the administrator of an estate. Instead of handling the matter himself, he assigned it to an associate whom he considered to be competent. However, the associate neglected the assignment for many years, thereby causing financial losses to the client. Unlike *Barry* and *Yacavino*, *Weston* was actually a disciplinary action against the delegating and would-be supervising attorney.

The attorney's proposed defense to disciplinary charges was that he was unaware of his associate's neglect. He argued that, although he may be responsible for the financial losses that occurred, he should not be "personally or ethically responsible" for his associate's misconduct. The court rejected his defense that it was his associate who had committed the violations: "Respondent's contention that his duties and extensive travels . . . left him little time to supervise the attorneys in his office is not persuasive." Further, the court concluded that "an attorney cannot avoid his professional obligations to a client by the simple device of delegating the work to others," and explained that "[a] lawyer's primary obligation is to . . . clients, and neither [other] duties nor a belief in the competency of subordinates is sufficient to justify inadequate supervision, particularly after knowledge of the existence of problems is acquired."

As stated earlier, *Weston* comes close to standing for the principle that a supervisory attorney has disciplinary responsibility for failing to supervise the conduct of a subordinate attorney. However, the court somewhat diluted the impact of the case by discussing the respondent attorney's own misconduct (apart from his

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149 442 N.E.2d 236 (Ill. 1982).
150 Id. at 237.
151 Id. at 238.
152 Id. at 237.
153 The attorney originally did not respond to the disciplinary complaint against him. Later, he requested a remand to consider the charges in light of his defense. The court refused his request to remand for a hearing but discussed his "proposed" defense. *Id.* at 238-39.
154 Id. at 238.
155 Id. at 239.
156 Id. at 239 (quoting *In re Ashbach*, 150 N.E.2d 119 (Ill. 1958)).
157 Id. (emphasis added). This should not be interpreted as imposing any knowledge requirement as a prerequisite to the duty of supervision under Rule 5.1.
supervisory failures) in neglecting the client's matter after he was aware his associate had mishandled the matter. Weston noted that the probate court had previously ordered the supervising attorney to appear and when he did not, removed him as administrator of the estate. The supervisory attorney knew that his associate was not properly administering the estate. Had the supervisor acted in a timely manner, a major part of the financial loss could have been avoided.\textsuperscript{158} In other words, the court's imposition of sanctions was based, in part, on the supervisor's own professional misconduct which occurred after he realized that his associate was neglecting the client's matter.

Weston was \textit{not} disciplined solely for failing to provide reasonable supervision even though much of the court's discussion did center on this deficiency. Indeed, the case was decided under the Model Code which contained no counterpart to Model Rule 5.1.\textsuperscript{159} These factors partially diminish Weston's precedential value as support for disciplining attorneys solely for lack of supervision.

Although these cases indicate a trend toward enforcement of the duty to supervise, their direct precedential value is limited. Furthermore, a more serious problem is that this smattering of cases (even in combination with others) spanning years of experience with the Model Rules is not the kind of strong statement that could be and should be forthcoming from the disciplinary bar. Notwithstanding these shortcomings, Ms. Vecchione's suggestions to bar counsel regarding disciplinary enforcement of supervisory duties is an important step forward, and shows that the bar is moving in the right direction (prevention).

Since disciplinary actions against individual partners and supervisory attorneys for failing to supervise within the meaning of Rule 5.1 are not plentiful, it is important to examine reasons which might explain the scarcity of disciplinary cases addressing supervision. Imposing disciplinary sanctions against individual attorneys for failing to supervise subordinate attorneys may simply be an unrealistically difficult undertaking. While disciplinary officials may be comfortable imposing sanctions for acts of commission which violate ethics rules, they may be hesitant to discipline attor-

\textsuperscript{158} In this sense, the attorney also violated the duty to correct consequences of known misconduct as set forth in Model Rule 5.1(e)(2). \textit{See supra} note 86.

\textsuperscript{159} On the other hand, this factor arguably strengthens the future precedential value of the case. Weston serves as reasonably persuasive authority for a duty to supervise, even without the authority of any codified ethical duty (i.e., Rule 5.1).
neys for "innocent" acts of omission. So long as Model Rule 5.1 limits supervisory responsibilities to individual partners and individual supervisory attorneys, enforcement efforts will remain weak. Proceeding against an individual partner or individual supervising attorney for failing to supervise a subordinate attorney remains a theoretical possibility but not a practical one. As the individual supervising attorney or partner becomes more remote, the less likely the bar is to make that individual attorney a disciplinary target. Because of these and other reasons, the bar's task of enforcing Rule 5.1 against individual attorneys is understandably difficult.

Nevertheless, the bar's disciplinary efforts could improve. The bar should, in appropriate cases, impose sanctions against individual attorneys for breaching the ethical duty of reasonable supervision. Enforcement of Rule 5.1(a) against partners would encourage law firm partners and shareholders in professional corporations to undertake a careful examination of the preventive measures in effect at the firm and of their reasonableness under the circumstances. Similarly, enforcement of Rule 5.1(b) would require tracing the subordinate attorney's violation to a (responsible) direct supervisory attorney, and then determining whether that supervisory attorney provided reasonable supervision under the circumstances. Admittedly, disciplinary investigations involving these types of efforts might be difficult and expensive. Yet, if the legal profession is to reap the benefits of prevention through supervision, the disciplinary bar must better utilize its traditional disciplinary weapons and impose the full range of sanctions against individual attorneys in appropriate cases.

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160 See Schneyer, supra note 26, at 17-20.
161 See id. (discussing the difficulty in singling out any one or more culpable partners as disciplinary targets and noting that it is unrealistic to discipline all the partners).
162 For a more complete explanation of these reasons, see infra Part V (leading to the recommendation of addressing reasonable supervision to the firm and disciplining the firm for inadequate supervision).
163 Technically, every case of professional discipline not involving a sole practitioner presents an opportunity to consider the issue of supervision.
164 The bar can establish positive and negative incentives to motivate partners and supervisory attorneys to institute preventive "Supervisory Conditions" in their firms. This can be accomplished by rewarding or punishing their efforts through the use of aggravating and mitigating factors in adjusting sanctions. See infra notes 185-91 and accompanying text.
IV. INDEPENDENT RESPONSIBILITY OF SUBORDINATE ATTORNEYS

Rule 5.2 addresses the duties of an associate or subordinate lawyer. This section explores whether Rule 5.2 can operate to make subordinate attorneys more actively responsible for the extent of supervision they receive. One can view Rule 5.2 as serving to encourage associates to question the ethical atmosphere in which they practice. Furthermore, Rule 5.2 serves to motivate subordinate attorneys to consider consciously their own independent ethical obligations and in doing so, whether additional supervision and guidance is necessary to fulfill their ultimate obligation of ethical conduct. Subordinate attorneys should not perceive their role as passive with respect to supervision.

Since the duty of partners and supervising attorneys is to supervise subordinates' compliance with the Rules of Professional Conduct, the role of the subordinate within the hierarchy of the firm is presumably to obey the supervising attorney and partner.\textsuperscript{165} As Rule 5.2(b) points out, however, a subordinate attorney's defense that he or she was merely "following orders" allows the subordinate, only in limited circumstances, to escape disciplinary responsibility for his or her misconduct resulting from following the supervisor's wrongful orders. Ultimately, it operates to "fix" liability, but underneath that effect lies the purpose of encouraging subordinates to challenge questionable orders received from superiors in an attempt to prevent misconduct which might otherwise occur by blindly following orders.

Essentially, a subordinate's "following orders" defense depends on the reasonableness of the order. If the order is reasonable (\textit{but} later turns out to be professional misconduct), the subordinate may obey the reasonable order without disciplinary responsibility. If the order is not reasonable (\textit{and} later turns out to be profes-


\textsuperscript{166} See Schneyer, supra note 22, at 948 (questioning, in a similar way, whether Rule 5.1 was meant to prevent misconduct or "fix" responsibility once misconduct has occurred).
sional misconduct), the subordinate proceeds at his or her own risk and bears disciplinary responsibility for following the supervisor's unreasonable order. Applying this rule places final responsibility on the subordinate to determine, prior to following the supervisor's order, the reasonableness of the order under the limited disciplinary immunity afforded under Rule 5.2.

Because the subordinate bears ultimate disciplinary responsibility, Rule 5.2 should prompt subordinates to seek out effective guidance and supervision from superiors or others when a question of professional conduct is raised, whether the ethical question is raised by an affirmative order of a superior or by the passive neglect of supervisory attorneys. Seeking guidance within the firm on whether a particular proposed course of conduct is ethically proper creates an "atmosphere of attention to matters of professional ethics" and illustrates the importance of the subordinate's role in fostering a firm's ethical infrastructure. Thus, disallowing a subordinate's "following orders" defense represents sound policy for encouraging resolution of ethical questions within the firm.

Although Rule 5.2 is entitled "Responsibilities of a Subordinate Lawyer," its first provision actually describes the responsibilities of all lawyers. Rule 5.2(a) states that a "lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person." All attorneys, including subordinate attorneys, are responsible for their own misconduct even if it occurred at the direction of a supervisor, and even if the attorney acquiesced from a fear of loss of employment.

167 This is the language used by Hazard & Hodes to describe the purpose of Rule 5.1. HAZARD & HODES, supra note 12, § 5.1:101, at 769. The same purpose underlies Rule 5.2.

168 In fact, the term "subordinate lawyer" is not even used in Rule 5.2(a).

169 MODEL RULES, supra note 11, Rule 5.2(a). The Rule says "another person." Compare a lawyer's independent duties under Rule 5.2(a) with Rule 5.4(c) which states that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." Id. Rule 5.4(c) (emphasis added). "Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client." Id. Rule 5.4 cmt.

170 WOLFRAM, supra note 4, at 883 (noting that a subordinate's misconduct is not excused even when the lawyer who orders the misconduct has "hire-or-fire or similar organizational power over the subordinate"). See, e.g., Attorney Grievance Comm'n v. Kahn, 431 A.2d 1336, 1351 (Md. 1981) (noting that the high ethical standards and professional obligations of an attorney may never be breached even if the attorney's employ-
er directs the action and threatens to dismiss the lawyer); In re Knight, 281 A.2d 46, 47-48 (Vt. 1971) (holding that an inexperienced attorney, although dominated by an experienced supervising attorney and afraid of losing his job, is disciplined for participating in an entrapment scheme).

One author has suggested that, by implication, this rule requires the subordinate attorney to report the supervisory attorney to the bar when the supervisor issues an order which the subordinate, under Rule 5.2, would be required to disobey. L. Harold Levinson, Ethics Inside the Law Firm, Do It My Way or You're Fired, 36 VAND. L. REV. 847, 852 (1983) (book review).

Limited civil protection may be available to attorneys who are fired from their firms for acting in accordance with the rules of ethics. In a recent case of first impression, the New York Court of Appeals held that a lawyer who was discharged for insisting that his law firm report the professional misconduct of a colleague could pursue an action for breach of contract. Wieder v. Skala, 609 N.E.2d 105 (N.Y. 1992). Attorney Wieder had knowledge of professional misconduct of a colleague at the firm which he was required to report to the bar under NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1990). Wieder informed the firm's partners so that they could report the matter to the bar. They refused to do so and threatened Wieder that they would fire him if he reported it. Wieder, 609 N.E.2d at 106. At Wieder's persistence, the firm finally reported the matter to the bar. Id. Ultimately, Wieder was fired, allegedly for forcing the firm to file the required report. Id. The court declined to create a public policy exception to New York's strong employment-at-will doctrine regarding the tortious wrongful discharge cause of action, but upheld his cause of action for breach of contract. Id. Thirteen legal ethics and labor law experts and the Bar Association of the City of New York had filed briefs of amicus curiae in support of attorney Wieder. Andrew Blum, The Dangers of Upholding Legal Ethics, NAT'L L.J., Nov. 2, 1992, at 8.

By providing even this limited form of civil protection from wrongful discharge, the Wieder rule should operate to give subordinate attorneys some (en)couragement to (1) refuse improper orders generally and (2) insist that serious acts of intra-firm attorney misconduct be reported to the bar. While the fear of being reported would presumably inhibit wrongdoing, a more direct way to prevent misconduct is through supervision. Had the firm properly supervised Larry Lubin, the violating lawyer who was eventually reported and the direct cause of Wieder's dilemma, Lubin's misconduct may have been completely prevented or at least uncovered and corrected much earlier. Wieder's problems with his firm may never have arisen if Larry Lubin had been properly supervised (potentially preventing his misconduct).

Conversely, reporting is a response to past and completed misconduct. Moreover, reporting is required only for serious acts of misconduct (under the Model Rules but not so limited under the Model Code) and reporting would actually be prohibited, in most cases absent client consent, if it involved the disclosure of confidential information. MODEL RULES, supra note 11, Rule 8.3; MODEL CODE, supra note 12, DR 1-103. See In re Himmel, 533 N.E.2d 790 (Ill. 1988) (suspending an attorney for not reporting misconduct as required by the Model Code). Attorney compliance with the reporting rule has been and likely will remain notoriously low. For further commentary on Himmel and the reporting rule, see Irwin D. Miller, Breaking the Written Code of Silence in Legal Malpractice Settlements, 6 GEO. J. LEGAL ETHICS 187 (1992) (condemning, as a form of disciplinary blackmail, attorneys' threats to report malpracticing attorneys in the negotiation and settlement of legal malpractice cases); Ronald Rotunda, The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel, 1988 U. ILL. L. REV. 977.

Whether encouraged to report by limited civil protection (Wieder rule) or motivated by fear of discipline for not reporting (Himmel rule), the reporting rule's premise that attorneys will refrain from misconduct from a fear of being reported requires closer scrutiny. Viewed from an intra-firm perspective, reporting colleague misconduct simply may not
This rule unequivocally disposes of any “Nuremberg” defense in which a subordinate attempts to deny responsibility because he or she was merely acting in accordance with the orders of a superior. 171 In a larger sense, however, this rule of independent responsibility simply states an obvious and paramount duty of professional conduct: each lawyer is ultimately responsible for his or her own actions. 172

While Rule 5.2(a) independently binds all attorneys to the Rules of Professional Conduct, Rule 5.2(b) does provide subordinate lawyers with a limited “following orders” defense. Rule 5.2(b) states that a “subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer’s reasonable resolution of an arguable question of professional duty.” 173 Since “application of the rules [of ethics] often involves subtle matters of judgment and discretion,” 174 any lawyer (subordinate or supervisor) behaving in accordance with a reasonable interpretation of an arguable issue of professional conduct should not suffer disciplinary action. 175 From that practical perspective Rule 5.2(b), like Rule 5.2(a), is sensible but provides nothing too substantial. Providing this form of limited disciplinary immunity 176 does, however, help resolve a subordinate’s dilemma by explicitly permitting subordinate lawyers to defer to a superior’s reasonable resolution of an arguable question of professional duty.

The Comment to Rule 5.2 suggests that allowing the subordinate to defer to the supervisor’s reasonable resolution is a practical matter because, faced with alternatives in resolving a dilemma, “someone has to decide upon the course of action.” 177 On
the other hand, subordinates deferring too readily to a supervisor’s resolution of an ethical question means that a subordinate’s independent duty under Rule 5.2(a) can become too easily compromised. The question becomes a matter of determining how much latitude should be allowed in the subordinate’s determination of reasonableness and, therefore, how much compromising of the subordinate’s independent ethical duty mandated by Rule 5.2(a) should be allowed.

A subordinate’s duty of independent ethical conduct under Rule 5.2(a) takes precedence over the limited permission to defer under Rule 5.2(b) with respect to inadequate supervision. In other words, subordinates may not defer to a supervisor’s failure to supervise properly. Failing to supervise is not a reasonable resolution of an arguable question of professional duty, and a subordinate should not be afforded disciplinary immunity for misconduct occurring in the unsupervised practice setting.

The subordinate’s independent duty of competency can be used as an illustration. Recall partners’ and supervising attorneys’ ethical obligation to supervise under Rule 5.1. In the context of supervision and application of Rule 5.2, the subordinate has an independent duty to take necessary steps, including seeking supervision, to ensure that the subordinate is providing competent legal services to the client. The subordinate’s duty of competency applies regardless of the level of supervision he or she is receiving. Therefore, tying the subordinate’s independent duty of competency to his or her evaluation of the firm’s supervisory conditions is, admittedly, difficult. Yet, the underlying purpose behind making this connection is to elevate the subordinate’s passive acceptance

cannot agree on a course of action.” HAZARD & HODES, supra note 12, § 5.2:301, at 780.

178 The supervisor must be willing to explain any order so that the subordinate can determine whether to obey under Rule 5.2. Levinson, supra note 170, at 853. The willingness of the supervisor to explain the resolution to the subordinate is important because knowledge of whether a violation will occur marks the transition from Rule 5.2(a) to 5.2(b). HAZARD & HODES, supra note 12, § 5.2:301, at 780. While Rule 5.2(b) grants the subordinate lawyer a limited immunity when acting on the orders of a supervisory lawyer, the element of “knowledge” is important in that grant of limited immunity.

[A] subordinate lawyer may justifiably be able to claim, in some cases, that his violation was not “knowing” because it was urged by his or her supervisor. But even this principle must have limits; in cases of indisputable violation, a subordinate lawyer may not hide behind his superior’s wrongful direction and claim lack of knowledge.

Id. § 5.2:100, at 778.

179 MODEL RULES, supra note 11, Rule 1.1.
of being inadequately supervised to the same level of actively following clearly wrongful orders. Under many circumstances, the subordinate's action or inaction is equally blameworthy from the perspective of the resulting harm to a client, and thus to the profession. If a subordinate understands and believes that his or her passive deference to inadequate supervision is as potentially unethical as following clearly wrongful orders, a subordinate is much more likely to take corrective measures.

The subordinate's independent professional duty to render competent legal services to clients is not an arguable question within the meaning of Rule 5.2(b). If the subordinate lacks the time, training, resources, or expertise to represent the client competently, or if the subordinate is not receiving adequate guidance or supervision in the handling of clients' matters, the subordinate is obligated to correct that situation to avoid potential ethical breaches. To correct the deficient practice setting, the subordinate may need to bring the matter to the attention of his or her supervisor. Rule 5.2(b) obligates the supervisor to provide a reasonable resolution of the issue of professional duty raised by the subordinate. The subordinate's permission to defer to the supervisor's resolution (within the meaning of Rule 5.2(b) disciplinary immunity) is dependent upon the reasonableness of the resolution. The only reasonable resolution under these circumstances is for the supervisor to take positive steps to ensure that the subordinate is properly supervised. The subordinate's obligation under Rule 5.2(b) is to determine whether the steps taken by the supervisor are reasonable under the circumstances.

Applying this obligation would normally require that the subordinate perceive his or her own weaknesses and advise the supervisor of the situation. Placing a burden on subordinates to confess their limitations and request supervisory assistance is difficult.
but subordinates must take at least initial responsibility to rectify a practice setting in which lack of supervision is contributing to questionable representation. Placing some of the burden of adequate supervision on the subordinate is sensible since the subordinate is in the better position to determine his or her own limitations and the supervisor may not be objective.\textsuperscript{183}

If subordinates recall that the duty of basic competency under Rule 1.1 and the independent duty of ethical conduct under Rule 5.2(a) exposes them to sanctions, subordinates should seek necessary supervision and guidance. Similarly, supervisors have an incentive to discover whether the subordinates within their scope of supervisory responsibilities are receiving adequate supervision and guidance. The supervisor's potential liability under Rule 5.1 for failing to supervise provides an incentive to correct the situation especially after it has been brought to his or her attention by the subordinate. Likewise, the subordinate's hesitancy to alert the supervisor should be reduced by the belief that his or her self-disclosure reduces the supervisor's exposure to a Rule 5.1 violation.\textsuperscript{184}

These principles extend beyond issues of competency and can be applied broadly to encompass a subordinate's independent duty of ethical conduct generally. From the bar's view, if disallowing a subordinate's "following orders" defense represents good disciplinary policy, the converse in a passive context must also be encouraged. If the subordinate's misconduct occurs (or its potential exists) as a result of not following orders because the supervisor has

\textsuperscript{183} See Gross, supra note 165, at 304-06. Professor Gross notes that lack of time and skill fall outside the scope of those arguable questions to which an associate can defer to the judgment of the supervisor because the supervisor is not in as good a position to objectively judge the situation as is the associate. The associate is in a better position than the firm to evaluate his or her knowledge of a subject and the time he or she has to devote to it. Moreover, the supervisor may not be objective from a financial self-interest perspective. Therefore, the associate should not escape liability because he or she followed the supervisor's or partner's instructions. \textit{Id.} at 306.

\textsuperscript{184} The supervisor may simply not know or fully appreciate the subordinate's situation.
not provided a reasonable degree of supervision (in violation of 5.1), the subordinate must bear responsibility for allowing the misconduct (or potential misconduct) to occur as a result of not being properly supervised. If the subordinate received inadequate supervision and guidance which contributed to the subordinate's misconduct, then disallowing the subordinate's (proposed) defense of being unguided and unsupervised applies as strongly as disallowing a "following wrongful orders" defense.

If the level of supervision provided is inadequate, Rule 5.2(b) does not permit the associate to accede to the supervisor's failure to provide reasonable supervision. The supervisor's failure to provide adequate supervision is not a reasonable resolution of an arguable question of professional duty within the meaning of Rule 5.2(b), especially after the subordinate has raised the concerns. Not only is the supervising attorney breaching the affirmative duties of Rule 5.1, but the subordinate who continues to practice under these conditions does so at his or her own risk and should not be immune from disciplinary responsibility under Rule 5.2(b). Since "following wrongful orders" in an active context is a meritless defense, then "following no orders" in a passive context should similarly fail.

Translating this policy of "subordinate responsibility to be supervised" into disciplinary policy is problematic. Disciplinary authorities faced with imposing sanctions for professional misconduct committed by unsupervised subordinates have difficult choices to make. On one hand, disciplinary officials could be harsh and decline to consider any extenuating circumstances and hold subordinates strictly accountable for their misconduct. In fact, this disciplinary approach probably best serves a policy of encouraging subordinates to seek supervision by inducing the fear of full disciplinary exposure. Yet, depending on the circumstances surrounding the misconduct, an attorney's inexperience and status as a subordinate within the hierarchy of the firm intuitively warrants some compassion. Further, these situations raise the question

185 Indeed, subordinate attorneys should recall that the disciplinary opinions that have considered a subordinate's wrongdoing in the context of lack of supervision generally have been unsympathetic to the subordinate's plight. See, e.g., Yacavino, 494 A.2d at 803 (cautioning supervisory attorneys to provide adequate supervision but imposing professional discipline on subordinate attorney regardless of lack of supervision, stating "[w]ithout mitigating respondent's fault"); Barry, 447 A.2d at 925 ("Respondent does not seek to place on his employers the blame for his quandary, nor would this record satisfy us that it should be laid there."). See also supra Part III.D.
whether the misconduct could have been prevented under a more closely supervised setting, a responsibility belonging primarily, and at least initially, to direct supervisors and partners under Rule 5.1. Holding the subordinate fully responsible for misconduct that may have been preventable by adequate supervision is unbalanced because responsibility should be shared with the neglectful supervisor. Yet, disciplinary policy must also encourage subordinates to be responsible for the level of supervision within which they practice, especially in light of a subordinate’s deferent inclinations.

Reducing a subordinate’s natural reluctance and allocating responsibility more fairly can be accomplished by adjusting sanctions through the use of mitigating and aggravating factors. The ABA has promulgated standards incorporating mitigating and aggravating factors for consideration in determining an appropriate sanction.\(^{186}\) Mitigating factors include any circumstances surrounding the misconduct that might justify a reduction in the sanction that would otherwise be imposed.\(^{187}\) Conversely, aggravating factors include circumstances that justify increasing the degree of discipline.\(^{188}\) The ABA’s list of mitigating and aggravating circumstances does not specifically include consideration of the organizational status of the disciplined attorney as either that of a subordinate or supervising attorney.\(^{189}\) The hierarchical status of the violating attorney, standing alone, should generally neither mitigate nor aggravate a sanction for professional misconduct.

On the other hand, the ABA standards should explicitly recognize “Supervisory Conditions” operating within the firm as either mitigating or aggravating an otherwise appropriate sanction. Legitimizing such factors would enable a disciplinary court to examine the supervisory circumstances and fashion policy accordingly. “Supervisory Conditions” or circumstances, which indicate the

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186 “In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors: (a) the duty violated; (b) the lawyer’s mental state; and (c) the actual or potential injury caused by the lawyer’s misconduct; and (d) the existence of aggravating or mitigating factors.” MODEL SANCTIONS, supra note 3, Standard 3.0.

187 MODEL SANCTIONS, supra note 3, Standard 9.3 (describing in Standard 9.32 a list of some thirteen possible mitigating factors).

188 MODEL SANCTIONS, supra note 3, Standard 9.2 (describing in Standard 9.22 a list of eleven factors which may be considered in aggravation).

189 The Model Sanctions loosely allude to the status of the violating attorney by including inexperience in the practice of law as a mitigating factor. MODEL SANCTIONS, supra note 3, Standard 9.32(f) (citing In re Price, 429 N.E.2d 961 (Ind. 1982)). Additionally, the Model Sanctions recommend that the violating attorney’s substantial experience in the practice of law can be an aggravating factor. Id. Standard 9.22(i) (citing John F. Buckley, 2 Mass. Att’y Dis. Rep. 24 (1980)).
subordinate's good faith efforts to prevent the misconduct by seeking supervision, should be affirmatively encouraged by explicitly recognizing such actions as mitigating. Conversely, "Supervisory Conditions" or circumstances that suggest a subordinate's lack of attention to his or her obligation to seek supervision when necessary, should be discouraged by considering such inaction or conscious disregard to be an aggravating factor.

Similarly, these proposed "Supervisory Conditions" could also operate to adjust sanctions that might otherwise be imposed on partners and supervisory attorneys. Indeed, supervisory attorneys should be rewarded for implementing positive "Supervisory Conditions" (by recognizing positive conditions as a mitigating factor) and punished for their lack of supervision (by recognizing negative supervisory conditions as an aggravating factor). By providing incentive and motivation in the form of disciplinary rewards and punishments through mitigating and aggravating factors, the bar can encourage both supervisory and subordinate attorneys to consciously consider "Supervisory Conditions" as an important preventive component of their law practice settings.

Some disciplinary opinions have considered similar types of circumstances as bases for determining an appropriate sanction, but haphazardly and without a clearly expressed policy goal in mind. Prevention is the policy goal. Specific recognition of

190 See, e.g., Blue v. United States Dep't of the Army, 914 F.2d 525, 546 (4th Cir. 1990) (imposing Rule 11 sanctions on the senior trial attorney, but not on the inexperienced junior attorney to whom the senior attorney had delegated a complex case, immediately prior to trial); In re Petty, 627 P.2d 191 (Cal. 1981) (defrauding insurance companies, clearly wrongful conduct, not excused by youth or inexperience); In re Callahan, 442 N.W.2d 1092, 1095 (Ind. 1982) (noting that age and inexperience are not mitigating factors where subordinate participated and profited in extortion scheme); Attorney Grievance Comm'n v. Boehm, 446 A.2d 52 (Md. 1982) (holding that misappropriation is not excused by inexperience); Attorney Grievance Comm'n v. Kahn, 431 A.2d 1336, 1351 (Md. 1981) (not mitigating sanction even when subordinate attorney is threatened with being fired for not following unethical order); Attorney Grievance Comm'n v. O'Neill, 400 A.2d 415, 447 (Md. 1979) (mitigating the sanction based on attorney's youth and inexperience); In re Mogel, 238 N.Y.S.2d 683, 685 (N.Y. App. Div. 1963) (mitigating sanction because attorney did not initiate nor actively continue the misconduct); In re Moore, 312 S.E.2d 1, 3 (S.C. 1984) (mitigating sanction of subordinate attorney, based on inexperience, for following orders of supervising attorney; not mitigating sanction of supervising attorney who had been in practice more than twenty years); In re Knight, 281 A.2d 46, 48 (Vt. 1971) (not mitigating sanction because subordinate attorney did not withdraw when the opportunity arose); see also Laws. Man. on Prof. Conduct (ABA/BNA), at 101:3203 ((citing McMorris v. State Bar, 623 P.2d 781 (Cal. 1981); Disciplinary Board v. Amundson, 297 N.W.2d 433 (N.D. 1980); In re Kennedy, 649 P.2d 110 (Wash. 1982)) noting that a lawyer's excuse that he or she had taken on too much work will generally
"Supervisory Conditions" as a legitimate mitigating and aggravating factor provides disciplinary agencies with a flexible formula to promote that policy goal more coherently. By explicitly including "Supervisory Conditions" as a mitigating and aggravating consideration for disciplinary agencies to use for and against both subordinate and supervising attorneys, the level of supervision within a firm becomes a legitimate and concrete consideration. Finally, the increased exposure is invaluable. Each disciplinary opinion that applies "Supervisory Conditions" as mitigating or aggravating, reminds subordinates and supervisors alike of their respective roles in preventing misconduct.\(^9\)

V. ENFORCEMENT OF SUPERVISORY DUTIES AGAINST LAW FIRMS

In conjunction with strengthening enforcement efforts against individual supervisory attorneys\(^9\)\(^2\) and encouraging subordinate attorneys to share supervisory responsibility,\(^9\)\(^3\) disciplinary enforcement of supervision can be accomplished by another means. Since supervisory duties involve both the efforts of individual supervising attorneys as well as the efforts of law firm management to create supervisory policy, the law firm as an entity should also be accountable for disciplinary purposes. Therefore, this section of the article advocates that supervisory duties currently addressed to only individual attorneys, also be directed to the law firm as a whole. Violating a firm-directed ethical duty of reasonable supervision would subject the firm to appropriate professional discipline.

Regulation of the bar has never included the imposition of professional discipline on law firms, but recent developments suggest such expansion may be forthcoming. In a recent, important law review article, Professor Ted Schneyer pointed to one significant shortcoming of the current attorney disciplinary system: its single focus on individual attorneys.\(^9\)\(^4\) He noted that existing disciplinary rules predominately regulate only individual attorney behavior. Therefore, disciplinary agencies target only individual attor-

\(^{191}\) The flexibility of adjusting sanctions upward and downward, which create positive and negative compliance incentives, can also be used in sanctioning the law firm as a whole for violations of a firm-directed reasonable supervision rule. See infra Part V; see also supra note 164.

\(^{192}\) See supra Part III.D.

\(^{193}\) See supra Part IV.

\(^{194}\) Schneyer, supra note 26, at 4.
neys in imposing sanctions for ethical breaches.\textsuperscript{195} He argues that such a limited disciplinary regime is no longer sufficient in an era of law firms and simply does not comport with the reality of modern law practice.\textsuperscript{196} To overcome this gap in attorney regulation, Professor Schneyer proposes an expanded disciplinary system which allows for the imposition of appropriate disciplinary sanctions on law firms.\textsuperscript{197} While Professor Schneyer advocates generally a form of vicarious disciplinary responsibility of the law firm, this article is limited to arguing for expanding the ethical duty of reasonable supervision to the firm, the breach of which constitutes the firm’s independent violation justifying discipline. Since supervision of subordinate attorneys concerns both law firm policy and individual attorneys’ efforts, the option to enforce supervisory responsibilities against the firm is particularly suitable for this prophylactic rule.\textsuperscript{198}

With respect to enforcement of supervisory duties against individual attorneys, Professor Schneyer explains that the prospects of using Model Rule 5.1 as a disciplinary response vary inversely with firm size.\textsuperscript{199} The larger the organization, the worse the prospects, since enforcement against individuals is difficult because the individual attorneys are effectively insulated by the size and bureaucracy of the firm.\textsuperscript{200} Conversely, the smaller the organization, the better the prospects of enforcing Rule 5.1 since the individual attorney purportedly “responsible” for supervising can be identified more easily in a smaller, less complex organization of lawyers.\textsuperscript{201} Yet even in smaller firms, Professor Schneyer speculates that the bar might be reluctant to impose the stigma of professional disci-

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{195}] Id.
\item[\textsuperscript{196}] See id. at 4-8 (noting that the nature of group practice creates a kind of informal immunity from discipline, and as a result, lawyers in firms are rarely disciplined, partly because of evidentiary problems in assigning blame to particular attorneys).
\item[\textsuperscript{197}] Id. at 11.
\item[\textsuperscript{198}] Rule 5.1 addresses the supervisory responsibilities of “a partner” (Rule 5.1(a)) and a “lawyer having direct supervisory authority over another lawyer” (Rule 5.1(b)). MODEL RULES, supra note 11, Rule 5.1. Therefore, current enforcement efforts could only target individual partners and individual supervisory lawyers. See also Deborah L. Rhode, Institutionalizing Ethics, 44 CASE W. RES. L. REV. 665, 700-02 (1994) (discussing the value of systems for internal oversight in legal organizations: “Where rule violations involve organizational failures, such as inadequate supervision . . . , the organization should be accountable.”).
\item[\textsuperscript{199}] Schneyer, supra note 26, at 18.
\item[\textsuperscript{200}] Id. at 4-6.
\item[\textsuperscript{201}] Id. at 18.
\end{enumerate}
\end{footnotesize}
pline on "innocent" lawyers for "merely negligent omissions." Moreover, in medium and large size firms, the reluctance to discipline for Rule 5.1 violations is even greater. In a larger setting, the attorneys who "did nothing" are even more remote and isolated from the misbehaving attorney than in a smaller setting. Worse yet, in cases where the firm completely lacks supervisory measures, the difficulties in singling out any particular partner or supervising attorney as an appropriate disciplinary target means the bar does nothing and Rule 5.1 remains largely unenforced. Professor Schneyer's speculation regarding the difficulties of enforcing Rule 5.1 against individual attorneys or partners is evidenced by the scarcity of case law on point.

Professor Schneyer's persuasive arguments for expanding the bar's disciplinary horizons to the law firm as an entity were recently recognized and, if acted upon, will make New York the first state to allow for the professional discipline of the law firm as a whole. In a twenty-page report, the Committee on Professional Responsibility of the Association of the Bar of the City of New York (the "New York Report") cited with approval the regulatory deficiencies noted in Professor Schneyer's article. As a result, the New York Report recommends three provisions of the state's ethics code be directed to the law firm as a whole. The report further recommends appropriate sanctions for enforcement purposes. Acceptance in New York strongly portends widespread discussion regarding the merits of the proposal.

While New York's appellate divisions, responsible for making any such changes, are studying the proposals, the New York Report's recommendations are receiving national exposure. For example, a recent ABA Journal article (partially entitled "Promoting Better Supervision") characterized the proposed changes in New York's disciplinary rules as "sweeping." Noted ethics ex-

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202 Id.
203 See id. at 18-19 (describing In re Yacavino, 494 A.2d 801 (N.J. 1985) as a case illustrating the problem of a firm having no monitoring procedures at all, rather than the problem of a supervisory lawyer following firm procedures poorly); see also supra Part III.D.
204 "With . . . larger firms, [Model Rule] 5.1(a) has so far been a disciplinary dead letter." Schneyer, supra note 26, at 19.
205 See infra notes 220-24 and accompanying text.
pert, Professor Stephen Gillers, expressed his belief that "[t]he new rules would be a means of catching up with reality . . . " and that the proposal "takes several giant steps in expanding [vicarious disciplinary responsibility] concepts and applying them to the whole entity, not just the individual." These recent developments show promise in creating a new disciplinary weapon for enforcing Model Rule 5.1's supervisory duties.

Using the reasoning in Professor Schneyer's article, the New York Report initially explains why it is appropriate to aim some disciplinary rules at law firms' conduct rather than solely at individual attorneys' conduct. Professor Schneyer's article recognizes three reasons for the practical difficulties in enforcing certain rules against individual attorneys. These practical problems make the enforcement of supervisory duties particularly difficult. First, it is often difficult to determine which particular attorney is at fault. For example, in a large firm setting where legal tasks are often accomplished in teams, tracing blame to an individual attorney is particularly difficult. Identifying the responsible supervisory attorney(s) is problematic. Second, assuming that the difficulties of assigning blame could be solved through tracing efforts by the bar, there might still be reluctance to sanction a particular attorney for ethical transgressions that others might also commit while carrying out the firm's business. As a result, no attorneys are disciplined. Third, no single lawyer may, in a disciplinary sense, have responsibility for ethical transgressions. Rather, the law firm's organizational and operating procedures, or lack thereof, may be the culprit. When the firm's "ethical infrastructure" may be more to blame than individual lawyers' lack of "ethical


207 Reske, supra note 206, at 32.

208 Id.

209 Schneyer, supra note 26, at 8-9; NEW YORK REPORT, supra note 27, at 631.

210 Professor Schneyer explains that the bar's reluctance to sanction these lawyers stems from a "fear of making them scapegoats for others in the firm." Schneyer, supra note 26, at 10.

211 Id.; NEW YORK REPORT, supra note 27, at 631-32.

212 Schneyer, supra note 26, at 10 (referring to a firm's policies and operating procedures).
sensibilities," disciplinary responsibility is properly directed toward the firm rather than individuals. Beyond the practical difficulties in enforcing disciplinary rules against only individual attorneys, fundamental policy reasons support a more comprehensive system of attorney regulation. Rather than simply expanding disciplinary targets to include law firms, the New York Report recognizes that collective responsibility promotes the important policy goal of prevention and states:

This Committee believes that the Disciplinary Rules should set forth and enforce standards for law firm conduct which will minimize the chances that lawyers practicing in firms will violate the Disciplinary Rules. More emphasis on law firm (as distinct from individual lawyer) responsibility in the Disciplinary Rules should also help firms avoid exposure to legal liability for conduct which could have been avoided.

Further amplifying the fundamental goal of prevention, two notions at the heart of attorney regulation should be noted. (1) Improving the Practice Environment—The possibility of a disciplinary sanction against the firm should discourage ethical violations by creating a more ethical atmosphere. The mere threat of direct discipline against the firm creates a meaningful incentive for the principals of the firm to improve firm-wide compliance with ethical rules directed at the firm, as well as those directed at individual attorney conduct. (2) Self-policing—The possibility of law firm discipline makes compliance with disciplinary rules a collective effort within the firm. Making ethics a collective effort "further[s] the model of self-governance which is a cornerstone of the legal profession," and creates "an incentive to be attendant to ethical lapses by attorneys within the firm, as well as to firm-wide prac-

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213 Id.
214 Id. at 10-11; NEW YORK REPORT, supra note 27, at 632.
215 NEW YORK REPORT, supra note 27, at 628-29.
216 Id. at 629. See also Lisa G. Lerman, Lying to Clients, 138 U. PA. L. REV. 659, 743-44 (1990) (discussing interviews with lawyers who suggested that it was partly their firms' structure and atmosphere that fostered deception to clients).
217 In its discussion of the effect of improving the practice environment, the New York Report quotes from the official comment to Model Rule 5.1: "The ethical atmosphere of a firm can influence the conduct of its members." NEW YORK REPORT, supra note 27, at 629 (quoting MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.1 cmt. (1993)).
218 NEW YORK REPORT, supra note 27, at 629.
Practices which may encourage, or insufficiently regulate, the possibility of individual ethical violations.\textsuperscript{219}

Proper supervision is a key ingredient in enhancing ethical law firm conduct. New York’s current partial adoption of its Rule 5.1 counterpart\textsuperscript{220} does not expressly mandate an affirmative and independent supervisory duty on partners and direct supervisory lawyers as does Rule 5.1. New York’s version makes a lawyer disciplinarily responsible for another lawyer’s ethical violation only if the lawyer has supervisory authority over the violating lawyer, knew or should have known of the conduct at a time when its consequences could be avoided, and fails to take corrective action.\textsuperscript{221} This limited form of responsibility is insufficient. It essentially creates only a duty to correct misconduct which has already occurred; it not only fails to cover cases where no supervisory authority exists,\textsuperscript{222} but also ignores areas of law practice which are the responsibility of the entire firm rather than an individual supervising attorney. In such cases, supervision is a matter of “collective effort and should be reinforced by collective responsibility.”\textsuperscript{223}

For example, supervision of attorney work product requires sound firm-wide policies and the extent of supervision of subordinate lawyers is essentially a firm-wide decision. Therefore, the law firm as a whole should be accountable for adequate supervision. Stressing that the purpose of supervision is to foster prevention, the New York Report recommends that an entire new section to the state’s current version of its counterpart to Model Rule 5.1 be added:

\textsuperscript{219} Id. at 630.

\textsuperscript{220} New York never adopted the Model Rules of Professional Conduct but instead retained a version of the Model Code of Professional Responsibility. GILLERS & SIMON, supra note 22, at 731.

\textsuperscript{221} NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY DR 1-104 (1990). New York’s limited version essentially adopts only the remedial function (the duty to correct) found in Model Rule 5.1(c)(2). See supra notes 79, 86. New York’s version explicitly states that the corrective duty arises when the lawyer not only knows but “should have known” of the misconduct, whereas Model Rule 5.1(c)(2) only provides for the duty to correct when the lawyer “knows” of misconduct. Arguably, the “should have known” language in New York’s version creates a higher standard and encompasses a “duty to know,” and therefore a general duty to supervise (as a way of fulfilling the “duty to know”) would be implied. See HAZARD & HODES, supra note 12, §§ 400-04, at lxxiv-xxx (discussing “knowledge” requirement in ethics rules).

\textsuperscript{222} NEW YORK REPORT, supra note 27, at 630.

\textsuperscript{223} Id. at 631.
A *law firm* shall *adequately* supervise the work of all partners, [and] associates . . . who work at the firm. The degree of supervision required is that which is *reasonable* under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter, and the likelihood that ethical problems might arise in the course of working on the matter. Partners are responsible for supervision of each other’s work as well as the work of associates, and every lawyer’s . . . work should be supervised to some degree. Depending upon the circumstances, *adequate* supervision may include steps such as review of work product, discussion of disclosure issues and other client problems, review of billing practices, periodic performance reviews, and informal or formal auditing of records concerning disposition of client funds and expense reimbursements.224

A disciplinary rule, affirmative and independent, mandating a “reasonable” or “adequate” degree of supervision would be most effective and enforceable when directed to the law firm as a whole. A “reasonable” supervision standard, while perhaps creating some interpretive challenges for disciplinary agencies, best serves the overall goal of encouraging compliance without establishing an unfair and unrealistic standard of vicarious disciplinary liability for others’ professional misconduct.

A reasonable supervision rule directed to the firm differs (at least conceptually) from pure vicarious disciplinary liability. Disciplinary enforcement imposed against the firm results from the firm’s independent violation of its affirmative duty to provide a reasonable degree of supervision. In this way, the existing and accepted concept of supervisory responsibility, without vicarious liability, is fortified and made enforceable by its extension to the firm in recognition of the collective nature of the duty. At the

224 *Id.* at 638 (emphasis added) (proposing a new paragraph B as an addition to NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY DR 1-104 (1990)). The proposed rule requires “adequate” supervision (or “reasonable under the circumstances”) as a standard for purposes of discipline; the rest of the rule provides instructive guidance as to what reasonable supervision might entail. See infra notes 225-27 and accompanying text.

In addition to the specific recommendation to expand DR 1-104 to firms, the New York Report recommends firms be included in two other specific code provisions: (1) DR 5-105(E) (proposed section requiring that law firms keep accurate records of clients and a system for checking those records to ensure avoidance of conflicting representations); and (2) DR 9-102(I) (proposed section requiring that law firms implement procedures for the proper management of client funds). NEW YORK REPORT, *supra* note 27, at 639-41.
same time, pure vicarious disciplinary responsibility for others' professional misconduct, firmly rejected in the original formulation of Model Rule 5.1, remains rejected. Limiting the scope of a firm's disciplinary exposure to breaching a firm-directed reasonable supervision rule falls somewhat short of Professor Schneyer's more expansive proposal of vicarious law firm discipline. Nevertheless, a firm-directed reasonable supervision rule conceptually similar to the one proposed in the New York Report substantially accomplishes the goal of preventing misconduct through reasonable supervision. Going beyond a well-enforced, firm-directed reasonable supervision rule to a system of vicarious disciplinary liability may be unrealistic as well as unnecessary to accomplish a significant prevention policy.\footnote{225}

\footnote{225}{\textit{The New York Report, however, seems to tread somewhat cautiously beyond its proposed rule requiring reasonable supervision by law firms for work-related activities. It also recommends a catch-all disciplinary rule for law firms:}}

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[A]n additional Disciplinary Rule should be enacted stating that, under appropriate circumstances, a law firm . . . may be disciplined for a violation by one of its lawyers of any of the Disciplinary Rules.
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NEW YORK REPORT, \textit{supra} note 27, at 642 (emphasis added) (explaining that such a rule is necessary to encourage more aggressive, firm-wide compliance with all of the rules). The New York Report does not explain what circumstances would warrant disciplining the firm as a whole, but a broad interpretation intimates a system of true vicarious law firm discipline as advocated by Professor Schneyer.
\end{quote}
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Professor Schneyer explains that a system of vicarious law firm discipline would need to resolve whether a due diligence defense would be allowed. A due diligence affirmative defense would essentially operate to allow the firm to exonerate itself by showing it had implemented reasonable safeguards to prevent the misconduct. Professor Schneyer offers two possibilities: (1) disallowing a due diligence defense and seeking only modest law firm sanctions in many cases; or (2) allowing a due diligence defense, not for exoner-ation, but only for purposes of determining an appropriate sanction. Schneyer, \textit{supra} note 26, at 29-31.

Professor Schneyer seems to express a slight preference for not allowing a due diligence defense (and imposing only modest sanctions) because of the difficulties disciplinary agencies would have in determining if the law firm acted diligently to prevent the misconduct. \textit{Id.} at 30. He cautions that due diligence determinations would be costly and unreliable and law firms do not yet have standardized monitoring techniques. \textit{Id.} Adding to the difficulties of determining whether a law firm acted reasonably to prevent the misconduct is the reaction of the law firm to the disciplinary process. If a system of disciplining law firms is devised, Professor Hazard believes that law firms will aggressively defend against disciplinary charges. Schneyer, \textit{supra} note 26, at 29 n.168 (citing letter from Geoffrey C. Hazard, Jr. to Ted Schneyer (Feb. 12, 1991) (on file with the CORNELL LAW REVIEW)).

Notwithstanding these difficulties, enforcing a firm-directed rule of reasonable supervision requires, by definition, that determinations of "reasonableness" be made. A rule of "strict disciplinary liability" for supervision of work-related activities (i.e., no due diligence or "reasonableness" defense but only mild sanctions for violations) might insufficiently motivate firms to implement supervisory policy when they know that, despite all reason-
While reasonableness embraces a proper standard against which a law firm’s supervisory efforts should be evaluated for disciplinary purposes, the scope of lawyers’ activities to which those supervisory efforts are directed must be sufficiently broad. The New York Report’s proposed rule of reasonable supervision requires the firm to “adequately supervise the work of all partners, [and] associates who work at the firm.”\textsuperscript{226} Admittedly, requiring the firm to provide a reasonable degree of supervision for all work-related activities encompasses a great deal. Violations of any work-related disciplinary rule would, by extension, always implicate the supervision rule by raising the question of whether the firm reasonably supervised in an effort to prevent that work-related violation. Viewed in this way, the New York Report’s proposed supervision rule operates as a partial “integrating ‘master rule;’”\textsuperscript{227} partial because it integrates only those ethics rules relat-
ing to "work" into the "master rule" of supervision. Rules not relating to "work" presumably would not be subject to any supervision requirement. In this sense, the firm has no overall supervisory duty for ethics rules falling outside the parameters of "work"-related activities. Depending upon how a disciplinary agency might interpret ethics code sections for purposes of supervision (work-related or not), some rules would be subject to a law firm supervision requirement whereas some rules might be excluded from firm-wide supervisory responsibility.

This approach creates uncertainty for both firms and for the bar. Additionally, excluding some rules as not work-related and therefore not subject to law firm supervision is inconsistent with promoting a policy of collective responsibility for ethical conduct. Indeed, even Model Rule 5.1 states a supervisory responsibility for all the Rules of Professional Conduct. Requiring supervision for all work-related activities does clarify that important and broad area of ethical conduct and therefore should explicitly be included in a firm-directed reasonable supervision rule. On the other hand, to avoid uncertainty as to which ethics rules require supervision and to promote a fuller prevention policy, a reasonable supervision requirement should cover all the rules of professional conduct.

A disciplinary rule requiring that firms provide reasonable supervision necessitates bar enforcement power over law firms. No enforcement mechanism to sanction firms currently exists and without effective enforcement procedures, disciplinary rules directed at firms would remain aspirational. The harsh sanctions of disbarment and suspension would not be realistically appropriate for use against a firm; on the other hand, the traditional sanctions of private reprimand and public censure are suitable, and would be effective sanctions for enforcement of firm-directed rules.

Ideally, the bar's enforcement capabilities would also be enhanced with the power to impose monetary fines in appropriate cases. Recognizing, however, that the bar's extension of disciplinary jurisdiction over law firms is relatively groundbreaking, the power to impose monetary fines on law firms would constitute a

the meaning of 8.4(a).
228 NEW YORK REPORT, supra note 27, at 634.
229 Id. at 635.
230 Cf. Schneyer, supra note 26, at 36-37 (suggesting conditional probation for firms could be a proper sanction under certain conditions).
further departure from traditional disciplinary philosophy. Indeed, though the culpability of a single attorney arguably can be more accurately and more directly assessed than that of a firm, the ABA has historically rejected monetary fines against individual attorneys. "Fines are not an appropriate sanction,"231 primarily because the imposition of monetary fines may imply the proceedings are criminal. In advocating law firm fines, Professor Schneyer evaluated the bar's traditional opposition and argued that such objections are "flimsy"232 and a "makeweight."233 Regardless of the suitability of fines against individual attorneys, they are a particularly appropriate sanction against the law firm as a whole. "Fines 'speak' a corporation's language."234

The New York Report acknowledged that disbarment and suspension are not suitable sanctions against an entire firm,235 but did recommend, with little discussion,236 that a disciplinary

231 Model Sanctions, supra note 3, Standard 2.8 cmt. In explaining why monetary fines are not suitable sanctions against individual attorneys, the ABA has stated:

Fines are punitive and criminal in nature and should be avoided. The use of fines in discipline . . . matters might be deemed to imply that the proceedings are criminal in nature and require proof beyond a reasonable doubt, trial by jury, and other standards of criminal due process.


232 Id. at 26, at 32.


234 Schneyer, supra note 26, at 32. See also Paul E. Fiorelli, Fine Reductions Through Effective Ethics Programs, 56 Alb. L. Rev. 403 (1992) (discussing potential reduction of criminal penalties, available under the Federal Sentencing Guidelines, to organizations that implement effective compliance/prevention programs, to encourage companies to exercise due diligence in developing programs designed to prevent organizational criminal violations).


236 The New York Report noted the recent amendments to Rule 11 of the Federal Rules of Civil Procedure which now allow for a monetary sanction against the law firm as a whole. The amendment abolished the old rule established by Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989), in which old Rule 11 was construed literally holding that the plain language of Rule 11 allowed for the imposition of sanctions against only the attorneys signing the frivolous papers and not the law firm as a whole. The public policy argument that lost in Pavelic & LeFlore was that the threat of law firm exposure to sanctions would create a greater incentive for the firm to establish internal monitoring procedures designed to prevent Rule 11 violations. The Pavelic & LeFlore Court did not reject the merits of the policy argument but felt constrained by the plain language of Rule 11. The Rule 11 amendments show that the policy goal of creating law firm incentives to prevent violations ultimately prevailed.
agency be authorized to "censure, or, in the appropriate circumstances, fine any law firm ... when the law firm as a whole is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor or any conduct prejudicial to the administration of justice."  

The power to impose monetary fines on law firms would supply substantial enforcement power to disciplinary agencies. Monetary fines can be adjusted upward or downward on a case by case basis allowing disciplinary agencies the flexibility to apply various mitigating and aggravating circumstances on an individual basis. Since law firm supervisory failings would range from mild to severe, monetary fines could be scaled accordingly, thereby enabling disciplinary agencies to promote more accurately supervisory policy at the disciplinary level.

Nevertheless, deeply-rooted historical bias against monetary fines should not curtail a conceptual debate on the overall merits of law firm discipline. It would be extremely unfortunate for a system of law firm discipline to be rejected because of substantial opposition against monetary fines, especially considering the fact that fines might be unnecessary to enforce firm-directed supervisory duties in particular. Controversy over an enforcement tool which may not be widely used or even necessary to achieve the underlying goals should not stall or defeat the concept of law firm discipline. The sanctions of private reprimand and public censure, traditional enforcement methods which would presumably create less controversy or opposition, are also available.

Public censure alone might be an effective sanction, at least with respect to some segments of the market. A public censure

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237 New York Report, supra note 27, at 637 (recommending amendment to Judiciary Law Section 90(2)). The New York Report did not recommend the power to impose fines on individual attorneys.

238 The same can be said with respect to fine-tuning other aspects of disciplining firms, such as allowing a due diligence defense or not. See supra note 225.

239 A private reprimand rather than a public censure might be appropriate under circumstances showing a breach of supervisory duties with mitigating circumstances. The firm would then be on a form of notice to correct its supervisory deficiencies or risk a public censure.

240 See Schneyer, supra note 26, at 33-36 (discussing adverse publicity as an enforcement tool against law firms); see also Rhode, supra note 198, at 701-02 (noting that research on white-collar crime suggests that publicity of organizational sanctions has deterrent value).

California law firms may "someday" suffer the negative publicity of having their firms' name publicized along with the sanctioned attorney. A specially-appointed committee studied the California bar's disciplinary system and recently recommended "sweeping
that a particular law firm fails to supervise its associates may be perceived by clients, not merely as an "uneventful" ethical transgression, but as a quality control issue. Many clients may choose to select law firms on the basis of quality of work product as evidenced by a firm's commitment to its duties of supervision. Potential clients may be dissuaded from retaining law firms whose legal work product has been placed in question by a public censure. By raising the specter of unreliability of legal work-product due to a lack of associate supervision, clients might seek representation from a "supervising" law firm. Thus, the potential of adverse publicity as reflective of the quality of a firm's legal servic-

changes to create a leaner and meaner state disciplinary machine." Changes Sought to Streamline California Disciplinary System, [10 Current Reports] Laws. Man. on Prof. Conduct (ABA/BNA) 294-95 (Oct. 5, 1994) (emphasis added). The Committee, chaired by Arthur Alarcon, a Ninth Circuit senior justice, presented the recommendations to the state bar on August 29, 1994. Id. at 295. One such proposal recognizes the importance of entity responsibility:

In order to put more bite behind the disciplinary system's bark, the committee recommended that the law firm affiliation of a sanctioned attorney be published, along with whether or not the lawyer has ended that affiliation. Identification of the law firm would not be unfair, the committee suggested, and would help to end the misapprehension that only solo practitioners are disciplined.

Id. This proposal was considered to be controversial and will be delayed pending further study.

James E. Towery, a member of the State Bar Board of Governors, is the head of the task force charged with implementing these recommendations. Id. at 296. He will present some recommendations to the Board of Governors in late October, 1994, but the more controversial proposals will be delegated to task forces for further study and will not be presented to the Board until March, 1995. "[T]he proposal that the lawyer's firm affiliation be published upon the imposition of discipline proved controversial and was deferred." Id.

The fact that this proposal was considered controversial suggests the potential value of adverse law firm publicity as an effective enforcement weapon. If such a proposal is adopted, law firms would be more seriously motivated to prevent attorney misconduct to avoid any reputational loss incurred by the negative publicity.

The California proposal does not impose vicarious disciplinary liability on the firm on the basis of a rule violation by a firm attorney, nor does it impose direct disciplinary liability on the firm for violation of a firm-directed rule. On the other hand, while the California proposal neither vicariously nor directly targets the firm on either of these bases, it may nevertheless be equally effective in motivating firms to prevent misconduct by imposing the burden and reputational threat of this indirect form of "associational" disciplinary responsibility. What Professor Schneyer, the New York Report, and this article are ultimately attempting to do through direct "substantive" proposals might be substantially accomplished through California's indirect "procedural" proposal.

241 See Schneyer, supra note 26, at 12-13 (noting that firms could compete for clients by standing on their ethical track records, and that ethical attorneys would be encouraged to stay and "bask in the firm's discipline-free ethical reputation," thereby promoting law firm stability).
es should motivate firms in the private sector to comply with firm-directed supervisory rules.

Although a method of effective enforcement is integral to a system of law firm discipline, debate should focus on the underlying merits, at least for the time being. Imposing responsibility on the firm as a whole to institute reasonable supervisory measures is a sensible approach to achieving preventive goals, even in the face of enforcement difficulties and uncertainties. As the New York Report explains:

The Code has always contained some Disciplinary Rules which are not often enforced by disciplinary sanction. But the Disciplinary Rules are about more than practical enforceability. We firmly believe that the vast majority of lawyers seek to comply with Disciplinary Rules because they are in the Code of Professional Responsibility, and independent of the actual threat of discipline. Indeed, this notion is at the heart of a system of self-regulation. We believe that the vast majority of lawyers want to act ethically. The function of the Code of Professional Responsibility is to help them do so. In our view, the instructive function served by the Disciplinary Rules is more important to the profession than is the fact that the Rules are used as a basis for discipline. As we have stated, the function of the proposed amendments is to help law firms avoid civil and other liability by requiring them to improve firm-wide practices and procedures.

The thrust of this comment is that the bar should be assisting firms in achieving professionalism in practice, irrespective of the threat of discipline. One way the bar could do so is by taking a proactive approach to regulation, especially toward a policy goal of prevention through supervision.

VI. PROACTIVE ENFORCEMENT OF SUPERVISORY DUTIES

Although encouraging law firms to embrace supervisory duties through fear of disciplinary exposure is a necessary component of

242 "[T]he process of turning the [New York] report into ethics rules could take years and its major value right now 'is to get the bar discussing the important ideas it contains.'" Reske, supra note 29, at 32 (quoting New York University School of Law Professor Stephen Gillers).

243 NEW YORK REPORT, supra note 27, at 643 n.14 (citing an attorney's duty to report another attorney's misconduct as an example of a Disciplinary Rule which has rarely resulted in the imposition of sanctions). See supra note 170.

244 Id. at 643.
the regulatory process, it is also arguably reactive and punitive. Undoubtedly, firms will increase their supervisory and monitoring efforts to avoid disciplinary sanctions. Yet, fear-induced supervision might create defensively initiated measures meeting bare minimum disciplinary standards. Moreover, without proactive efforts, regulation is largely accomplished on a case by case punitive basis resulting in a piecemeal body of common (disciplinary) law defining reasonable efforts and adequate supervisory measures within the meaning of compliance with Model Rule 5.1. A spotty case by case disciplinary approach uses precious bar resources, takes time to develop and assumes the effectiveness of a general deterrence theory. Beyond the shortcomings of a purely reactive and punitive approach, punishing individual attorneys, firms, or both, as a "compliance through fear" mechanism deepens an "us against them" regulatory climate and represses any genuine sense of self-regulation. Thus, this section of the article advocates that the bar proactively promote supervisory duties outside of any disciplinary context. Proactive bar efforts promote the spirit and achieve the preventive goals underlying Rule 5.1. By expanding the bar's activities in this manner, the legal profession embraces genuine self-regulation.

This proactive approach requests that firms make a good faith self-analysis of their supervisory measures that reasonably ensure lawyers at the firm conform to the rules of ethical conduct. A firm's heightened awareness of its ethical environment resulting from its own evaluation is a valuable step toward true self-regulation. Through this ethical self-analysis, a firm would consider not only the ways in which it attempts to prevent problems, but would also consider ways in which the firm deals, directly and indirectly, with problems which have occurred or which might occur. Directly confronting these issues raises them to a conscious level, leading the firm to reevaluate practice methods which may have become routine and unquestioned.

Rule 5.1 constitutes a pure prophylactic rule requiring preventive measures aimed at the initial prevention of any misconduct.

245 The spotty development of interpretive disciplinary law has been observed. At least twenty-four jurisdictions do not even publish an opinion in all discipline cases. MCKAY REPORT, supra note 6, at 47. "The failure of courts, state discipline boards, and hearing committees to publish opinions results in a lack of precedent to guide the bar and in a failure of disciplinary law to develop." Id. Even published cases often fail to specify the full reasoning behind the sanctions. "The lack of articulated reasons for imposing particular sanctions results in a lack of guidance to the bar . . . ." Id.
Neither the letter nor the spirit of Rule 5.1 requires the actual occurrence, knowledge or suspicion of professional misconduct within a firm as a prerequisite to triggering supervisory duties. Its application, however, realistically comes into play, if ever, only after misconduct has occurred within the firm. It is likely that too few disciplinary opinions would be generated to prompt firms to compare their own supervisory efforts with those that failed to meet minimum standards, as discussed in those disciplinary opinions.\textsuperscript{246} Relying solely on discipline means the preventive, prophylactic intent underlying Rule 5.1 is substantially lost. By asking firms and supervisory attorneys to evaluate in advance of any problems, the preventive measures in effect, the reasonable efforts that are made, and their implementation procedures, provides an opportunity for firms to evaluate hidden assumptions and make appropriate changes where necessary. A law firm’s efforts in this regard, done outside of any disciplinary forum or threat, would significantly advance the preventive purposes behind the supervisory duties.

Aside from the fear of exposure to disciplinary sanctions, inducing a firm to conduct this ethical self-examination in good faith can be accomplished. A simple compliance reporting system which requires firms periodically to report to the bar their supervisory procedures and efforts accomplishes this proactive approach to self-regulation.\textsuperscript{247} Firms’ reports to the bar would necessitate their conscious attention to preventive strategies.\textsuperscript{248} This proactive approach accomplishes several goals: (1) firms would recognize the importance of their supervisory measures and efforts as a valuable tool in preventing misconduct; (2) firms would use the compliance reporting opportunity to review their formal and informal supervisory measures and efforts; (3) the bar sends an important message to the profession about the importance of attorneys’ and firms’ roles in effective and true self-regulation; (4) as the bar

\begin{footnotes}
\item[246] See supra Part III.D; note 245 and accompanying text.
\item[247] For an example of a successful, proactive prophylactic measure in the specific area of client trust funds, see MCKAY REPORT, supra note 6, at 53-56 (noting that state regulations involving trust account overdraft notification, record-keeping and random audit rules have proven effective in deterring misconduct involving client trust funds and further noting that "[r]ather than being a regulatory burden on honest practitioners, these requirements have instead provided useful guidance on proper accounting procedures.").
\item[248] See Spaeth, supra note 35, at 1294 (advocating that requiring reports would cause lawyers to institute internal monitoring procedures and would assist the bar in enforcing Model Rule 5.1).
\end{footnotes}
gathers information about ways in which different types and sizes of firms internally monitor for ethical compliance, the bar could disseminate information about firms’ collective experiences; and (5) the bar could review individual firms’ measures against accepted standards and offer guidance in advance of problems.249

Although proactive self-regulation of this type might be opposed by some law firms as being intrusive,250 a simple reporting system asks firms to do no more than describe how they comply with the absolute and affirmative duty under Rule 5.1.251 Considering the value to the profession, law firms should not consider submission of a report regarding their Rule 5.1 compliance methods to be heavy-handed onerous over-regulation.252 Arguably, the form of the report is immaterial. It could be in narrative form, a bar supplied form, or embodied in a firm operating and procedures manual. A significant benefit would be realized simply because attorneys with managerial responsibilities would consciously consider the affirmative duty and its application in their firms. The intrusion is minimal, the benefits are real, and the burden is a small price to pay for the privilege of self-regulation.

Establishing an effective prevention/supervisory program need not be a guessing game for law firms, nor should it be. Proper methods for complying with Model Rule 5.1, however, remain vague to law firms as well as to disciplinary agencies.253 The lan-

249 See Schneyer, supra note 26, at 31 (suggesting the bar could proceed against those firms "whose reports reveal clear inadequacies" and explaining that "[i]f firm infrastructure is clearly deficient, a disciplinary agency should no more wait for harm to result than the police should wait for a driver with obviously poor brakes to hit someone before stopping him.").

Although reviewing and evaluating each firm's report might not be practically possible, the requirement of a report would require law firm introspection and achieve valuable self-evaluation for the firm. The report, even in the absence of the bar's review of it, is beneficial. See supra notes 249-44 and accompanying text.

250 The bar's scrutiny and a law firm's report of its Rule 5.1 techniques might be expensive and intrusive. Schneyer, supra note 23, at 948. Nevertheless, mandatory firm reports would not be nearly as intrusive as other regulatory methods such as a lawyer peer review program. Schneyer, supra note 26, at 41 n.247.

251 A law firm's opposition to describing how it complies with an existing affirmative ethical duty is itself troubling.

252 By comparison, Mandatory Continuing Legal Education (MCLE) requirements have been adopted in most states, many of which require individual attorneys to do much more than file a report. By mid-1992, 38 states had imposed MCLE requirements. MACCRATE REPORT, supra note 37, at 310. Although MCLE requirements are intended to maintain the competency of attorneys, there is little evidence regarding that effect. Id. at 311. See supra Part II.

253 In discussing the monitoring requirements imposed by Rule 5.1, Professor Schneyer explains: "At present, the 'efforts' necessary and the measures that would give
guage of Model Rule 5.1 is drafted around a standard of reasonableness. The official Comments provide minimal guidance and the few existing disciplinary opinions primarily describe supervisory failures—what not to do, rather than describing model or workable supervisory programs.

The bar can help eliminate uncertainties about supervisory obligations by providing guidelines describing reasonable supervisory measures under Rule 5.1. Such guidelines would assist firms in implementing programs designed to accomplish the underlying intent. A more detailed description of Rule 5.1 compliance suggestions will encourage firms and supervisory attorneys to institute concrete programs to reduce or avoid any disciplinary responsibility for an attorney’s misconduct. In any disciplinary proceeding, the firm’s “Supervisory Program,” as reported to the bar, could serve as a starting place for determining the firm’s potential disciplinary exposure.

In conjunction with suggestions and recommendations from all segments of the practicing bar, the bar could develop and promulgate “Supervisory Guidelines” that describe standards, some broad and some appropriately specific, for compliance with supervisory obligations. The Supervisory Guidelines provided by the bar would primarily facilitate a law firm’s efforts in establishing an effective Supervisory Program. The Supervisory Guidelines would serve as a resource for a law firm’s self-analysis and assist the firm in preparing its periodic report to the bar. Mandating specific supervisory details within Rule 5.1 (as a matter of discipline) would be inappropriate micro-managing, not only because of its intrusiveness into law firm governance, but also because it fails to appreciate the differences in firms’ circumstances.

Supervisory Guidelines need not carry the weight of a disciplinary rule in order to be effective. A firm’s disciplinary exposure for inadequate supervision could still be determined by the broader “reasonable” standard currently contained in Model Rule 5.1. The New York Report’s recommended addition to DR 1-104 of New York’s Code of Professional Responsibility (New York’s coun-

254 See supra Parts III.A-C.
255 See supra note 76; Part III.D.
256 While specific requirements would give firms notice of their precise obligations, few of the requirements would likely be appropriate for all firms. Schneyer, supra note 26, at 27-28.
terpart to Rule 5.1) serves as an example of providing specific
guidance for complying with the rule while retaining the broader
“adequate” or “reasonable” supervision standard for disciplinary
purposes.257

Differences in law firm structure, size, specialties and other
law firm characteristics would not make Supervisory Guidelines
useless. The operative provisions of the current requirements of
Model Rule 5.1 (“reasonable efforts” and “measures giving reason-
able assurance”) can be made more meaningful in a practical
setting through broadly drafted guidelines describing an effective
program from conceptual and practical perspectives. Individual
firms can evaluate the suitability and value of various Supervisory
Guidelines as they relate to a firm’s unique characteristics. In this
way, Supervisory Guidelines would provide instructive information
for each individual firm to consider adopting. Each firm’s con-
sciously considered and individually tailored Prevention/Supervisory Program, as periodically reported to the bar,
would immeasurably assist in achieving the underlying prophylactic
goals of Model Rule 5.1.

A firm’s Prevention/Supervisory Program would also operate
to inform supervising attorneys of their specific obligations and ar-
eas of responsibility to identified subordinate attorneys. Concrete
firm policies and procedures will replace vague notions of supervi-
sory duties. Actual methods and procedures for implementation by
individual supervising attorneys will result. Thus, individual supervi-
sing attorneys will know what is expected of them and how to
fulfill the firm’s expectations for the supervision of their subordi-
nate attorneys.

Perhaps even more important than a supervising attorney’s
understanding of the firm’s expectations of him or her is the
awareness by subordinate attorneys of what they should and can
expect in the way of being supervised. When subordinate attorneys
are aware, in advance, of overall firm policies and understand the
role of their supervising attorneys, subordinate attorneys can facili-

257 See supra note 224 and accompanying text (stating the proposed rule). While the
law firm “shall adequately supervise . . . [t]he degree of supervision required is that which
is reasonable under the circumstances.” NEW YORK REPORT, supra note 27, at 638 (empha-
sis added). The proposed rule provides what might be considered “Supervisory Guide-
lines” in that it suggests: (1) factors to take into consideration, such as experience of
subordinate and the likelihood that ethical problems will arise; (2) specific areas for
review, such as work product and billing practices; and (3) the scope of supervision, such
as review of associates’ and partners’ work. Id.
tate the supervisory process. Subordinate attorneys will be less hesitant to seek guidance and assistance from their supervisors if they know that supervision of subordinates has been consciously adopted and concretely transformed into law firm policy and made a defined responsibility of identified supervisory lawyers. Advance understanding by subordinates of consciously adopted supervisory procedures in the firm should reduce the subordinate’s natural hesitancy to approach his or her supervisor. The subordinate will actually be assisting the supervisor in fulfilling his or her duties as defined by the firm. Over time, supervising attorneys’ fulfillment of the firm’s explicit expectations, coupled with subordinate attorneys’ conscious efforts to have their supervisory needs and expectations met, will become the organizational culture. Eventually, these practices will become the norm throughout the profession.

The bar’s goal of preventing misconduct can be accomplished by proactive means outside of any disciplinary context. This kind of approach is particularly suitable for ethical rules unmistakably designed with a prophylactic purpose. The duty of reasonable supervisory responsibility illustrates such a rule. The bar’s publishing of “Supervisory Guidelines” would aid firms in developing their customized “Supervisory/Prevention Program.” Firms’ periodic reporting to the bar will increase compliance in firms, thereby preventing misconduct in an ethical and collaborative setting.

VII. CONCLUSION—PREVENTING ATTORNEY MISCONDUCT

The short-term prospects for achieving genuine self-regulation in the legal profession are bright. An important starting point in attaining a meaningful notion of self-regulation begins by recognizing that behind the ultimate concern of the attorney/client relationship lies a supervising attorney/subordinate attorney relationship. In a broader sense, the ethical environment of the law firm as a whole is implicated. Preventing misconduct by promoting attorneys’ supervisory duties fosters this ethical law firm atmosphere.

The long-term prospects are even brighter. Subordinate attorneys will be influenced by the positive role-model of supervision and guidance they experienced and enjoyed. One day they will become supervisory attorneys who will in turn provide positive role-modeling for their subordinates; the cycle perpetuates. Fulfilling supervisory duties helps create this collaborative setting, which
produces a new generation of even more ethically conscious attorneys. Genuine self-regulation of the legal profession involves not just being accountable for one’s own professional conduct today; it also requires accepting responsibility for tomorrow by mentoring and nurturing the next generation.

This article began with a quotation from a disciplinary opinion expressing concern that the whole “sorry episode” of attorney misconduct could have been prevented had the “young attorney received the collegial support and guidance expected of supervising attorneys.” The court cautioned the profession that an attitude of leaving new lawyers to “sink or swim” would not be tolerated in the future. Although the warning was issued ten years ago, it remains a promising ideal. The legal profession can begin enjoying the court’s vision of the future by embracing a policy goal of preventing misconduct by promoting the ethics of attorneys’ supervisory duties.

258 See supra note 1 and accompanying text.