Ethics and the Megafirm

Abe Krash

Senior Partner, Arnold & Porter, Washington, DC

Follow this and additional works at: http://lawecommons.luc.edu/luclj

Part of the Legal Ethics and Professional Responsibility Commons

Recommended Citation

Available at: http://lawecommons.luc.edu/luclj/vol16/iss3/7
Ethics and the Megafirm

ETHICS AND THE MEGAFIRM — I

Abe Krash

I. A GROWING INTEREST IN LEGAL ETHICS

This lecture series confirms once again the intense interest in legal ethics in the American legal community and especially in the law schools. I would like to discuss some of the reasons for the present extraordinary interest in professional ethics before I address some specific ethical problems faced by large firms.

The concern with issues of ethical standards is a relatively recent development. Until about twenty years ago, there was little interest in questions of professional ethics. It was a subject usually reserved for after-dinner speeches, most of which were platitudinous and boring. What is the explanation for this current attention to ethical issues?

One factor which produced a more serious interest in the question of professional standards was the United States Supreme Court decisions in the late 1950's and early 1960's expanding the constitutional requirements in criminal cases. For example, the 1963 decision in the *Gideon* case holding that indigent defendants

---

* The following is an edited lecture given by Mr. Krash at the Baker & McKenzie Foundation Inaugural Lecture Series, Inquiry into Contemporary Problems of Legal Ethics, Spring 1984, Loyola University of Chicago Law School. Some background information has been provided in footnotes to the main speaker’s lecture, which have been written by the Law Journal Research Assistant, Lisa Kraemer. Following Mr. Krash’s remarks are edited lectures given by John P. Heinz and Richard Lee. These remaining two lectures are offered as responses to, or extensions of, the main lecture.


1. *Gideon* v. Wainwright, 372 U.S. 335 (1963). In *Gideon*, a unanimous Court overruled *Betts* v. *Brady*, 316 U.S. 445 (1942), which had required states to appoint counsel for indigent criminal defendants in non-capital cases only where special circumstances would make trial without counsel “offensive to the common and fundamental ideas of fairness.” *Gideon*, an indigent, was convicted of a noncapital felony in a Florida court after requesting and being denied appointed counsel. In reversing the denial by the Florida Supreme Court of *Gideon’s* petition for habeas corpus, the United States Supreme Court expressly discarded the special circumstances rule as a limitation on the right to appointed counsel. On remand, *Gideon*, represented by counsel, was acquitted. See A. LEWIS, GIDEON’S TRUMPET 227-38 (1964). The Model Code of Professional
in state felony prosecutions are constitutionally entitled to the assistance of counsel and other rulings by the Court led to the participation of more lawyers in criminal cases. A by-product of the heightened concern with the administration of criminal justice was increased attention to the difficult ethical issues facing both prosecutors and defense counsel in criminal proceedings.

At about the same time, controversy and litigation began in connection with the lawyer referral plans adopted by a number of labor unions to assist their members in obtaining legal representation. In several cases during the 1960's, the Supreme Court recognized the attorney's duty to provide legal services for those unable to pay. *Model Code of Professional Responsibility* EC 2-25, EC 8-3 (1983) ("*Model Code*").

Another decision from the Warren Court that expanded the constitutional requirements in criminal cases was Griffin v. Illinois, 351 U.S. 12 (1956), where the Court invalidated a system of criminal appeals in state courts that effectively barred indigent persons from appellate review because of their financial inability to purchase transcripts of the trial courts' proceedings. In announcing the judgment of the Court, Justice Black uttered a proposition that was to be heard again in the later years of the Warren Court: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19.

In addition to enlarging the rights to counsel in criminal trials appeals, the Warren Court extended the adversary process into areas of the system where adversary proceedings were previously unknown or rarely employed. Illustrations include recognition of rights to counsel in probation revocation proceedings, Mempa v. Rhay 389 U.S. 128 (1967) (Court held probationer is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing); right to counsel in juvenile court, *In re Gault* 387 U.S. 1 (1967) (Court held that due process requires that, in a proceeding which may result in commitment of a juvenile to an institution, the child and his parent must be notified of the child's right to be represented by counsel, paid for by the government if they cannot afford it).

Other important Warren Court cases include Miranda v. Arizona, 384 U.S. 436 (1966) (prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination); Escobedo v. Illinois, 378 U.S. 478 (1964) (expanding rights to counsel in pretrial stages of criminal proceedings); Mapp v. Ohio, 367 U.S. 643 (1961) (applying exclusionary rule to the states and holding that evidence obtained by searches and seizures in violation of the Constitution is inadmissible in a state court). See generally Y. Kamisar, W. LaFave & J. Israel, Modern Criminal Procedure (1980).

2. The basic issue was the extent to which an organization may see that its members have competent legal counsel without running afoul of the prohibitions against the unauthorized practice of law and the solicitation of legal business. Seall, Legal Ethics—Solicitation of Legal Business—Constitutional Right of Union Members to Advise Injured Workers to Obtain Legal Advice and to Recommend Specific Lawyers Does Not License the Soliciting of Legal Employment, 40 Notre Dame Law. 477, 481 (1965); see also Holland & Watson, Resolved: That Labor Unions Should Be Prohibited from Recommending Specific Attorneys to Their Members and Their Families for Legal Services, 20 Ark. L. Rev. 261 (1966).

The most common arguments are that solicitation results in excessive litigation, fraudulent claims, corruption of public officials, detriment to the legal profession and harm to
Court rejected arguments that plans of this sort violated the rules against solicitation of clients and the unauthorized practice of law.\(^3\)

Other factors which I think magnified the interest in legal ethics were the rising demand that legal services be available to persons of moderate income\(^4\) and the growth of group legal service plans.\(^5\)

\(^3\) See \textit{NAACP v. Button}, 371 U.S. 415 (1963), which held that the NAACP could solicit litigants for the purpose of bringing civil rights actions and have an attorney represent them. The Supreme Court ruled that resort to the courts in the area of civil rights was a form of political expression which could not be foreclosed by states' enactment of statutes prohibiting the solicitation of litigants to bring civil rights actions. \textit{Id.} at 429.


\(^5\) The organized bar has strongly resisted group legal service plans. During the
These developments spawned ethical questions with respect to such topics as advertising by lawyers. In addition, the criticism which was leveled at the bar by Ralph Nader, the rise of the con-

1950's, the Canons of Professional Ethics imposed disciplinary sanctions and sought injunctive relief to prevent the operation of group legal service plans. Group legal service plans included prepaid and other plans in which an organized method for providing legal services for a group was implemented. The activity of the bar association was severely curtailed after four Supreme Court decisions held that under the first amendment consumers of legal services have the absolute right to organize in order to retain counsel of the choice under their own terms. See United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971); United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); Brotherhood of R.R. Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964); NAACP v. Button, 371 U.S. 415 (1963). The ABA has been criticized for "erec[ing] significant new barriers for consumers in an attempt to control the operation of group legal service plans in a way that is financially most profitable for the bar." Morrison, Bar Ethics: Barrier to the Consumer, TRIAL, March-April 1975, at 14.

Morrison identifies the largest affront to the consumer interest to be the prohibition of closed panel legal service plans. Such plans are similar to group health care plans. A group engages a law firm to take on all of the work covered by the plan. While the individual's choice of attorneys is limited to those employed by the plan, the advantage is in terms of opportunities for cost savings which are simply unavailable under the traditional means of providing legal services. The Model Code Disciplinary Rules now prohibit such plans unless there is an option for each member to obtain an attorney of his choice outside the plan and to have the plan pay that attorney at least the reasonable cost to the group had the member used retained counsel. MODEL CODE DR 2-103(D)(4)(e).

The ability to control costs is undermined by this provision. Costs cannot be calculated without knowledge of how many beneficiaries will exercise their option to opt-out. Morrison predicts that this dilemma will lead many groups to select an open panel plan, which he claims is precisely what the bar wants. While the open panel plan allows members to select any attorney to perform the work, the opportunities for quality control and cost reduction are lost. Morrison, supra, at 14.


Unsafe at any Speed does more than shift to the auto industry the onus of explaining how built-in dangers were designed to reach the public. "It raises some intriguing questions about the role which the judicial process has played and may yet play in the regulation of automobile design." Book Review, supra, at 1134. Nader criticizes lawyers for their failure to use the legal system to pressure the auto industry into designing safer cars. The role of the lawyer as an engineer of social change has come into sharp focus. Yet courts can only decide the issues after individual petitioners bring suit, either as plaintiffs seeking relief or as defendants in criminal actions following deliberate, unlawful acts.

sumer movement, and various events during the civil rights move-
ment of the 1960's\(^8\) inspired a great deal of discussion concerning
the public responsibilities of the bar.

The emergence of the class action device in antitrust and securi-
ties cases also contributed to heightened interest in ethical issues.
The large fees awarded to counsel in some cases, contrasted with
the relatively modest amounts received by class members, aroused
considerable criticism of the bar.\(^9\)

Another factor that intensified the interest in professional ethics
was the dramatic events of Watergate, which involved wrongdoing
by a number of high government officials who were lawyers.
Watergate provoked a great deal of criticism of legal education and
of the profession generally, and gave considerable momentum to a
reexamination of legal ethics.\(^10\)

There is still another consideration which may explain the
heightened interest in professional ethics. The economic order and
the practice of law have become enormously complex. It is simply
no longer sufficient to be an honorable person in order to be an
ethical lawyer. For example, even a lawyer of the utmost integrity
would not know without instruction which steps he must take or
may take when a client he is representing engages in unlawful con-
duct. Under what circumstances may counsel disclose the client’s
misconduct, and to whom may he do so? The ongoing debate with
respect to the proposed Model Rules of Professional Conduct
(“Model Rules”) dealing with this particular subject confirms the
subtlety and difficulty of the question.\(^11\) My point is that some
education in ethical standards is now an indispensable part of the

Storey, the Vice Chairman of the Commission, points out that lawyers have a special
responsibility for leadership in the resolution of the problems examined by the Commis-
sion’s Report. \textit{Id.}

The task of resolution of the problems of discrimination . . . to say nothing
of prejudice, has but barely been begun. Their resolution will require great under-
standing by many people and much constructive leadership by those who now
have an insight into the problems. Lawyers have a special responsibility in this
respect.

\textit{Id.} at 107-08.

472 (1980); Kramer v. Scientific Control Corp., 534 F.2d 1085, 1090-91 (3d Cir.), \textit{cert.}

\(^10\) \textit{See, e.g.,} Kelly, \textit{Education for Lawyer Competency: A Proposal for Curricular

\(^11\) \textit{See, e.g.,} Debate among members of the House of Delegates, mid-year meeting of
training of every lawyer.¹²

There may also be some deeper cultural phenomena which account for the current fascination with ethical issues. Chief Justice Stone once observed that the literature of every age portrays a chronic distrust of lawyers.¹³ However, that distrust—the public's general resentment of lawyers—may have reached new levels of intensity in our time,¹⁴ in part because of the abnormally high number of lawyers,¹⁵ the power lawyers have enjoyed, and the

---


¹³ Chief Justice Stone wrote:

We cannot brush aside this lay dissatisfaction with lawyers with the comforting assurance that it is nothing more than the chronic distrust of the lawyer class which the literature of every age has portrayed. It is, I fear, the expression of a belief too general and too firmly held for us to shut our eyes to it.

Stone, The Public Influence of the Bar, 48 HARV. L. REV. 1, 3 (1934); see also, e.g., W. SHAKESPEARE, HENRY VI Part II, Act IV, Scene II, line 86: "The first thing we do, let's kill all the lawyers."


A 1974 American Bar Association poll found that 68% of the public believed that lawyers charged more for their services than they were worth; 60% believed that lawyers work harder for wealthy, influential clients than for others; 82% believed that many matters could be handled as well and cheaper by accountants, bank officers, and insurance agents; and 42% believed that lawyers are not concerned about doing anything about the bad apples in the legal profession. Burger, supra, at 379 (citing B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC 231-34 (1977)).

A 1977 Gallup poll found that only 26% of the sample rated honesty and ethical standards of lawyers as being high or very high, while 27% rated lawyers honesty and ethical standards low or very low. These results were substantially lower than those for members of the clergy, medical doctors, engineers, college teachers, bankers, police, journalists, undertakers, business executives, building contractors and others. Lawyers did rank higher than members of Congress, realtors, labor union leaders, state office holders, advertising practitioners and car salesmen. Burger, supra, at 379 (citing G. GALLUP, HONESTY AND ETHICAL STANDARDS OF LAWYERS 1196-97 (1978)). The Gallup Opinion Index 17 (JAN. 1978) (Report No. 150); see also S. ROPER, THE ROPER REPORTS, 1977, 123-25 (1977); S. ROPER, THE ROPER REPORTS, 1978, 63-65 (1978).

Chief Justice Burger suggests that the public's perception of lawyers and the polls' results are, to some degree, due to age-old suspicions of the jargon and technicality in the professions, and to a failure to understand that lawyers are specialists who become identified with the interests they represent. Chief Justice Burger states that it is inevitable that lawyers, to some extent, become scapegoats. He closes his discussion, however, with the above quote from Justice Stone. See supra note 13.

¹⁵ The American Bar Association membership department estimates that it has ap-
highly publicized fees and income received by some lawyers. The preoccupation of the bar with ethical standards may be a reaction to this attitude. More fundamentally, perhaps, the tendency in our culture to question all established institutions and to challenge settled ways of doing things has provoked reexamination of accepted habits and attitudes. Socrates said that the unexamined life is not worth living, and we should accordingly welcome such reexamination even if the process makes us uncomfortable.

II. THE EFFECT OF ECONOMIC DEVELOPMENT ON THE STRUCTURE AND OPERATION OF LAW FIRMS

I propose to discuss some issues of legal ethics from the perspective of a lawyer in a large metropolitan law firm. Some ethical questions confronting large law firms are unique, or at the very least, some issues are presented in a context which creates special problems. It is, of course, true that the standards of ethical conduct are the same for the solo practitioner and for a partner in one of the large law firms on Wall Street or La Salle Street. We do not have one code of professional standards for lawyers in small firms and a different code for lawyers in large firms. For example, every lawyer has a duty to safeguard the confidences and secrets of his client, to keep the funds and property of his clients separate from his own personal assets or his firm's assets, not to assist a

proximately 627,000 members nationwide. Of course, since the ABA is a voluntary organization, the actual number of lawyers in the United States is higher.

In 1983, the number of registered attorneys in Illinois was 43,116. ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION 1983 ANNUAL REPORT 3 (1984).

16. See, e.g., Cutting Legal Fees, National Law Journal, Mar. 21, 1984, at 12. Federal Judge Joseph McGlynn produced a 468-page opinion that addressed extraordinary legal fees claimed by attorneys in an antitrust suit against 15 manufacturers of fine paper. Judge McGlynn reduced by 80% a 20.8 million dollar fee request. The National Law Journal referred to the opinion as "an eloquent statement concerning the problem of legal fees." Id. at 12; see also Appellate Judges Question $100,000 Fee in $1,500 Case, National Law Journal, July 11, 1984, at 4.

17. The Preliminary Statement to the Model Code describes the Model Code as a body of fundamental ethical principles to "be uniformly applied to all lawyers regardless of the nature of their professional activities." (footnotes omitted) The drafters found this approach necessary because of the impossibility of foreseeing every problem that might arise in the many varieties of legal practice. The Model Code does contain some rules applicable to specific segments of legal practice, such as public service activities (DR 8-101, 9-101), litigation (DR 7-106), and group legal services (DR 2-103(D)). However, there are no specific rules for the megafirm attorney in comparison to the small firm attorney. See Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1321 (7th Cir.), cert. denied, 439 U.S. 955 (1978).

18. Canon 4 of the Model Code provides: "A lawyer should preserve the confidences and secrets of a client." See MODEL CODE DR 4-101; see also MODEL RULES Rule 1.6.

19. MODEL CODE EC 9-5, DR 9-102; MODEL RULES Rule 1.15.
client in fraudulent conduct, to conform to certain standards in dealing with adversary parties and opposing counsel, and not to deceive a court or tribunal before whom he appears. These precepts apply to all lawyers, whatever the size of their firms.

However, some ethical issues are of concern to small firms but are of little concern to large firms. For example, most large law firms are not concerned with the issue of advertising, which is an issue of legitimate concern to many smaller firms.

On the other hand, some ethical questions are of peculiar concern to larger firms. In a small firm, the partners are likely to know one another personally and to be knowledgeable about one another’s practice. But in a law firm with eighty, ninety or a hundred partners, separated in branch offices which are located throughout the world, that kind of knowledge is simply impossible. Yet, the misconduct of one partner can result in enormous damage to the institution. Consider, for example, the injury to a prominent New York law firm resulting from the failure of one partner to comply faithfully with documentary discovery orders in a large antitrust case. Or consider the implications for a large law firm with a substantial practice in the securities area if the conduct of one of the partners is publicly challenged by the Securities and Exchange Commission. How does one insure that all of the partners will adhere to high ethical standards?

In exploring ethical problems unique to large firms, it is helpful to describe some recent developments that affect the structure and the operations of large law firms. The profession is changing. Economic events are altering the sociology of the bar, and those changes in our profession have an extremely important bearing on ethical issues.

To begin with, there has been an explosion in recent years in the size of law firms. In 1978, there were about eighty law firms in the United States that had over 100 lawyers. In 1983, there were 180 such law firms. There are sixty firms in the United States that now have over 200 lawyers. Five years ago only one law firm in the country employed more than 300 lawyers. At present, there are seventeen law firms in the United States that have more than

---

20. Model Code EC 8-5, DR 7-102(B); Model Rules Rules 3.3(a)(1), (2), (4), (b), 3.9, 4.1(b), 1.6(b), 1.2(d).
22. Model Code EC 7-20, EC 7-32, DR 7-106; Model Rules Rule 3.3.
When I began to practice law in Washington, D.C. in 1950, the city’s largest law firm had about sixty lawyers. Today that same law firm has over 200 lawyers, and there are three other law firms in Washington, D.C. with more than 150 lawyers.

A development related to this remarkable increase in the size of law firms, and the growth in the number of large firms, is the tremendous expansion of branch offices. Twenty years ago, a few law firms had small branch offices in London or Paris. Today, however, many law firms have branch offices in various cities throughout the country. Many of these branch offices in themselves are substantial law firms. It has been estimated that about one-fourth of all the lawyers in the country’s 100 largest law firms now work in branch offices. An examination of the list of the fifty largest law firms in the United States shows that forty-six out of the top fifty law firms in the country have branch offices in Washington, D.C. The development of branch offices, I suggest, has important implications with respect to professional standards and to ethical issues.

What has emerged is the national law firm. It is not necessarily a firm with branches in many cities. Rather, it is an institution with a staff of lawyers and supporting personnel, capable of handling virtually any legal problem for clients located throughout the country. There is a willingness by the firm to dispatch lawyers to any city to handle those problems. Indeed, most of these large law firms are now international law firms. They represent clients throughout the world, and on any given day, partners and associates may be working in half a dozen countries.

There has been a parallel development of great consequence: the expansion of the internal law departments in the country’s large corporations. The major petroleum companies, the large banks, insurance firms, chemical companies and some large manufacturing companies now have in-house legal departments consisting of several hundred lawyers. These in-house corporate departments have attained very high levels of expertise and capability. Some internal law departments now handle large-scale litigation and major transactions. Those are areas which not so long ago were thought to be the exclusive province of outside counsel.

25. See National Law Journal, Sept. 19, 1984, at 2. Among the top 100 firms, 93 had out-of-state branches. 22.7% of their lawyers were working in branch offices, up from 13.7% in 1978.
The developments I have described exert a great deal of economic pressure on large law firms. Such firms have a high fixed overhead. A staff of partners and associates that has been carefully recruited and trained at great expense over a period of years cannot simply be dismantled and readily reassembled as the occasion requires. The firm has to be maintained. There is a need for a steady stream of legal work. That requirement in turn increases the pressures on the firm to maintain satisfactory relations with existing clients and at the same time to generate new legal business.

The competition for that legal business has become intense. It has become commonplace for the general counsel of large corporations to interview three, four or even five law firms before retaining one firm to handle a particular substantial matter. There is tremendous and understandable concern about the costs of legal services. Most corporate law departments operate under budgets, and bills from private law firms for services are closely monitored.

The consequence of these financial pressures and the competition among large law firms was vividly described recently by a Washington lawyer, Gerald Rosberg, in these words:

Most of us as decent people want to live up to the expectations that others have of us. Thus, when the client says, "I want your help, I want you to do this for me, I come to you because I think you're the best," there is a powerful impulse to do what the client wants, to deliver and not to say, "I'm sorry, I have to draw the line, I can't do that." The lawyer wants to be in a position of saying, "What you want, I can do it for you. I'm as good as you think I am. I have lived up to your expectations." Sometimes that can induce a lawyer to engage in questionable conduct.27

My submission is this: The economics of the legal profession—the growth of law firms with hundreds of partners, associates, and support staff, and annual budgets amounting to tens of millions of dollars—and most especially the intense competition for legal business among the firms—generate pressures to compromise with high standards of professional conduct. The practice of law is a business, but it is also something more. The law is a learned profession with a great tradition and special responsibilities. The challenge confronting large law firms is how to maintain high professional standards in the face of these enormous pressures.

III. SOME SPECIFIC ETHICAL PROBLEMS IN MEGAFIRMS: CONFLICTS OF INTEREST

Some of the difficulties in the ethics area experienced by large firms emerge in situations involving conflicts of interest. Can the firm undertake to represent Client A if it is presently representing or has in the past represented Client B? Conflicts questions probably absorb more of the time and energy of the professional ethics committees in large law firms than any other single issue.

A small law firm may occasionally confront a conflict of interest problem, but I think it is fair to say that the problem is fundamentally different for a large law firm. The tremendous number of clients served by most major law firms together with the diversity and the continuously changing nature of the activities of those clients enhances the possibilities that there will be a conflict. Moreover, the large number of partners makes it vastly more difficult to ascertain whether the representation of a new client presents a conflict.

There need to be adequate procedures in place in a large firm to deal with conflicts issues. These conflict of interest issues can provoke rancorous and embittered disputes among the partners. On the one hand, if the existing client is a relatively small entity and the potentially new client holds out promise as a large source of revenue for the firm, there is a tendency on the part of some partners to construe conflicts very narrowly indeed. On the other

28. MODEL CODE Canon 5 provides: "A lawyer should exercise independent professional judgment on behalf of a client."

MODEL CODE DR 5-101(A) provides: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

MODEL CODE DR 5-105 provides in part:

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent, professional judgment on behalf of each.

In situations where an attorney's independent judgment is impaired by the interests of another client, partners in the firm may not accept the employment. DR 5-105(D); see also MODEL RULES Rule 1.7.
hand, the argument that a conflict precludes the new representation may be invoked if the affairs of an existing client are supervised by an older and powerful partner and the new client is a party who is being brought to the firm by a young partner.

If divisive arguments are to be avoided or minimized, the definitive resolution of conflict issues must be entrusted to a committee—or at least to a respected partner whose judgments will be accepted in good grace. Large firms also need to devise procedures for detecting the existence of conflicts in a timely fashion. Effective utilization of the computer may ameliorate some of these problems.

The problems of ascertaining whether there is a conflict are aggravated by the existence of branch offices. One of the most widely discussed conflict cases in recent years arose when a Chicago firm took on a litigation matter without knowledge that the lawyers in its Washington branch had handled a project which was allegedly incompatible with such representation. 29

The conflict of interest issues have become more subtle and com-

29. Westinghouse Elec. Corp. v. Kerr-McGee Corp. 580 F.2d 1311 (7th Cir.), cert. denied, 439 U.S. 955 (1978). In Westinghouse, the Seventh Circuit disqualified the plaintiff's attorney, Kirkland & Ellis, a large prestigious law firm with offices in Chicago and Washington. The Westinghouse disqualification arose from Westinghouse's antitrust suit against various uranium producers. Kirkland's Washington office had prepared a report for the American Petroleum Institute ("API"), a trade organization whose membership included several of the defendants in the antitrust action. Kirkland also represented the plaintiff in the suit. API moved for the firm's disqualification on the grounds that Kirkland was their attorney and therefore could not represent their adversary. Specifically, the defendants claimed that by receiving confidential information from the individual members of API, Kirkland had entered into an attorney-client relationship with them. They contended that the Code of Professional Responsibility required that Kirkland be disqualified from representing Westinghouse.

Reversing the district court, the Seventh Circuit held that an attorney-client relationship existed between the individual members of the API and Kirkland. The court found that Kirkland's concurrent relationship with both Westinghouse and individual members of the API violated Canons 4, 5 and 9 of the Model Code. Because of these violations, Kirkland was forced to cease its representation of Westinghouse in the antitrust action even though the representation had generated $2.5 million in legal fees.

The Seventh Circuit rejected the idea that the realities of modern legal practice required a more flexible approach. "[T]here is no basis for creating separate disqualification rules for large firms even though the burden of complying with ethical considerations will naturally fall more heavily upon their shoulders." 580 F.2d at 1321.

plex as large business organizations have become more diversified. A great corporation may have operations in six or seven different industries. It is the practice of the general counsel of those corporations to divide the legal work among a number of different law firms. The tax department of a large law firm may be retained to represent one subsidiary in a particular matter, while another large law firm represents the same subsidiary with respect to product liability problems. The international department of one of these firms may be asked to represent an altogether different company, in a foreign arbitration claim against another subsidiary of the existing client. Different lawyers of the firm would be engaged on the various matters if they were taken on, and essentially those matters involve different businesses. Yet there is a substantial likelihood under the existing rules that the law firm would be barred from taking on matters for the second client in the situation I have described.30

The traditional rationale for conflict rules is that lawyers have a duty of loyalty to their clients.31 There is also the concern that the confidences of the client may be disclosed, to the client's disadvantage.32 Moreover, independent professional judgment may be adversely affected if a lawyer or a firm tends to represent clients antagonistic to one another. There is the appearance of impropriety.33

Obviously, these are vital considerations. However, there is an air of unreality about these arguments and theories as applied to a three-hundred-lawyer firm. The lawyers in the tax department are unlikely to share confidences about particular matters with the litigation partners. It is extremely doubtful that the zeal or dedication of either the tax lawyers or the litigation lawyers would be affected if the firm were representing both clients in the situation I have described.

The increasing mobility of lawyers creates conflicts problems. A lawyer may shift from Firm A to Firm B; the second firm may have

30. “A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client.” MODEL CODE Canon 5; see also MODEL RULES Rule 1.7.
31. MODEL RULES Rule 1.7 comment 1.
32. “A Lawyer Should Preserve the Confidences and Secrets of a Client.” MODEL CODE Canon 4; MODEL RULES Rule 1.6.
clients with interests adverse to clients of the former firm. The moving lawyer's knowledge of the affairs of firm A's clients may be imputed to his new partners at firm B, leading to disqualification of the firm. Special rules have been developed for lawyers employed by the federal government who resign to engage in private practice. These rules are designed to safeguard the integrity of the government's legal operations without frustrating the ability of the government to attract competent lawyers who would be deterred from government service if they could not utilize their expertise after leaving the government.

Various solutions have been proposed to deal with conflicts problems. It would be theoretically possible to erect an internal Chinese wall to preclude communication between various

---

34. If an ethical conflict is found sufficient to disqualify an individual attorney, then under DR 5-105(D) "no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment." See also MODEL RULES Rule 1.10. In particular, confidences and secrets obtained by a single attorney are presumed to be shared by all attorneys in the firm. See, e.g., Schloetter v. Roiloc, Inc. 546 F.2d 706, 710 (7th Cir. 1976); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754 (2d Cir. 1975).

In Schloetter, the attorney was disqualified. The court found that disqualification of the firm was within the discretion of the court, even though the firm had rebutted an inference that an attorney, who had once represented plaintiff in a related matter and later joined the firm representing defendant, had passed confidential information to present members of his former firm before leaving. Such discretion for the court was thought necessary because of the appearance of impropriety, because it appeared that the attorney continued to be "associated" with the firm, and because subject matters in former and present representations were closely related.

In Silver, the lawyer was not disqualified. A young associate had left a large law firm to join another firm. Subsequently, the second firm represented the plaintiff in an action against a party represented by the attorney's previous employer-firm and the defendant filed a motion to disqualify the plaintiff's firm. Satisfied that the associate during his tenure at defendant's first firm had not been exposed to any matter substantially related to the subject matter of the pending action, the court held that disqualification of the firm was not required.

35. See MODEL CODE DR 9-101(B); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 (1975); Revolving Door, 445 A.2d 615 (D.C. Cir. 1982).

36. Firms faced with the possibility of disqualification attempt to rebut the presumption of imputed knowledge by adopting "Chinese walls" or "screens" designed to create an impermeable barrier to intrafirm exchange of confidential information. These procedures aim to isolate the disqualification to the lawyer or lawyers infected with the privileged information that is the source of the ethical problem, and thereby allow other attorneys in the firm to carry on the representation free of any taint of misuse of confidences. Typical procedures include prohibiting the attorney with the confidence from having any connection with the case or receiving any share of the fees attributable to it, banning transfer of relevant documents to or from the attorney and avoiding all relevant discussions with the tainted attorney, restricting access to files, educating all members of the firm as to the importance of the wall, and providing total separation, organizationally and physically, of attorneys working on conflicting matters. See MODEL RULES Rule
lawyers within a firm. However, the courts have generally been
skeptical of the use of Chinese walls within a firm because, as a
practical matter, they are difficult to monitor.

A few firms have attempted to deal with conflict problems by
asking clients at the time of retainer to execute a waiver of certain
types of future conflicts. It seems to me one thing to ask a party to
waive an existing conflict when all of the circumstances are known
to that party. It is a very different matter, however, to ask a client
to waive a possible future conflict involving unidentified parties

1.11. See generally Note, The Chinese Wall Defense to Law-Firm Disqualification, 128 U.
PA L. REV. 677, 678 (1980).

37. The assumption that a lawyer's knowledge of a client's confidences and secrets is
shared by all the other lawyers in his or her firm was more realistic when law firms were
smaller and less specialized. Today, however, the validity of an irrebuttable presumption
of shared confidences is open to question. See, e.g., Note, Disqualification: "Screening"
to Rebut the Automatic Law Firm Disqualification Rule, 82 DICK L. REV. 625, 628 (1978)
[hereinafter cited as Note, Screening]; Note, Unchanging Rules in Changing Times: The
Canons of Ethics and Intra-Firm Conflicts of Interest, 73 YALE L.J. 1058, 1069 (1964);
Kesselhaut v. United States, 555 F.2d 791 (Ct. Cl. 1977); see supra note 36.

Some courts have taken a pragmatic approach and circumvented this presumption by
finding that the attorney did not really "represent" the client in the ordinary sense, but
merely worked on peripheral matters. See, e.g., Silver Chrysler Plymouth, Inc. v.
Chrysler Motors Corp., 518 F.2d 751, 756-57 (2d Cir. 1975); Note, Screening, supra, at
682 n.24. The court in Silver observed:

[It] would be absurd to conclude that immediately upon their entry on duty
. . . [associates of large law firms] become the recipients of knowledge as to the
names of all the firm's clients, the contents of all files relating to such clients,
and all the confidential disclosures by client officers or employees to any lawyer
in the firm. Silver, 518 F.2d at 753-54.

The court held that the presumption of imputed knowledge was rebuttable and found
"reason to differentiate for disqualification purposes between lawyers who become heav-
ily involved in the facts of a particular matter and those who enter briefly on the periph-
ery for a limited and specific purpose relating solely to legal questions." Id. at 756.

38. See Armstrong v. McAlpin, 625 F.2d 433 (2d Cir. 1980); Westinghouse Elec.
Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.) (court refused to recognize the
"wall" theory as modifying the presumption that actual knowledge of one or more law-
yers in a firm is imputed to each member of that firm and the court found that there
existed a very reasonable possibility of improper professional conduct despite all efforts to
segregate the two groups of lawyers), cert. denied, 439 U.S. 955 (1978); MODEL CODE
Canon 9, EC 9-3, DR 2-110(B)(3), DR 5-105, DR 9-101(B); see also Central Milk Produc-
ts, Corp. v. Sentry Food Stores, Inc., 573 F.2d 988, 991-93 (8th Cir. 1978) (discussion
of screening procedures not to be construed as approving practice that probes "outer
limits of . . . professional conduct"); Hull v. Celanese Corp., 513 F.2d 568, 571-72 (2d Cir.
1975) (screening argument "somewhat technical" and overlooked "the spirit of Ca-
non 9"); W. E. Bassett Co. v. H. C. Cook Co., 201 F. Supp. 821, 824 (D. Conn. 1961)
(firm disqualified although it "took particular pains" to segregate disqualified partner),
aff'd per curiam, 302 F.2d 268 (2d Cir. 1962); Note, Screening, supra note 37, at 678.

Note that the Model Rules have included screening procedures under Rule 1.11, "Suc-
cessive Government and Private Employment."
and unknown circumstances. Such waivers, in my view, are of questionable validity.

The various developments I have mentioned—the diversification of large business organizations, the atomization of their legal work, and the growth of large law firms with 100 or more partners and literally hundreds of clients—are producing tensions with the existing conflict rules and may well produce some modification of those rules in the years ahead. The question is whether changes can be made that will not compromise the client’s right to receive completely dedicated representation and will not weaken the guarantee of no disclosure of the client’s confidences and secrets. Changes which erode those principles, in my view, are unlikely to be acceptable.

I have dwelt upon conflicts issues because in my experience they constitute the most common ethical problem facing large firms. Needless to add, large firms face a myriad of other ethical questions. For example, what types of arrangements may a law firm make with non-lawyers on projects that call for both legal and other professional skills? To what extent may a law firm restrict a partner or associate who leaves the firm in representing the firm’s existing clients? In “big case” litigation that tends to be handled by larger firms, there may be troublesome ethical issues connected with propounding discovery requests and in responding to such demands from adversaries. Relations with the press have generated all kinds of questions. Many of these ethical issues must be resolved with great speed amid intense pressures.

IV. PUBLIC INTEREST AND THE MEGAFIRM

Finally, I would like to speak briefly about the public interest responsibilities of large law firms. I regard this as an important aspect of professional ethics. Ethical issues are not limited to prohibitions. There is an affirmative aspect to legal ethics. Almost no one would dissent from the proposition that law firms as institutions have some responsibilities with respect to the administration of justice. The issue, of course, concerns the scope of those responsibilities and how they should be discharged. On that issue there is no consensus.

The Model Code of Professional Responsibility, which was issued in 1969, and the new Model Rules address the public responsibilities of individual lawyers but not the responsibilities of law firms. The Model Code exhorted every lawyer to participate indi-
Ethics and the Megafirm

9individually in providing legal services for those unable to pay. The recently proposed Model Rules addresses this issue in the most general words. Rule 6.1 states: “A lawyer should render public interest legal service.” It goes on to say that a lawyer may discharge this responsibility by providing services without fee or at reduced fee to persons of limited means or by public service in a variety of ways, such as governmental service. The Model Rules, however, are silent about the obligations of law firms as such. There is acceptance of the principle that the bar has an obligation to provide representation for the poor in both civil and criminal matters, but the responsibility is assigned to the individual lawyer.

Large law firms make substantial financial contributions to various agencies that provide legal services for those unable to pay. This support is important, but I do not believe that law firms adequately discharge their public service responsibilities just by making financial contributions to worthwhile causes. The obligation is greater than that. I submit that law firms, as institutions, have an obligation to advance the discharge of the public service responsibilities of both partners and associates. Large law firms usually have committees with respect to such matters as compensation, conflicts of interest, and the hiring of associates. The firms should also have a pro bono committee which would see to it that lawyers of the firm are encouraged and assisted in engaging in some form of public service.

In other words, I suggest that large law firms as institutions have an affirmative duty if Rule 6.1 is to be meaningful and not just a verbal flourish. The lawyers in the firm should be informed, in substance: “The firm recognizes your ethical responsibilities under Rule 6.1. Every lawyer in the firm may take some reasonable percentage of his regular working time to meet those responsibilities. The firm will give you reasonable assistance in meeting those responsibilities.” A pro bono committee can serve as a clearinghouse for requests for assistance made to the firm by various organizations. It can offer suggestions to lawyers in the firm for things they might do. It can put lawyers in the firm in contact with various groups who are in need of pro bono assistance. And it can make certain that lawyers in the firm have the necessary staff support and resources which are required for effective representation.

It is true that, in a fundamental sense, improvements in the administration of justice are the responsibility of the bar as a whole
and not just of individual lawyers or particular law firms. But the large law firms, by reason of their tremendous resources and influence, have a responsibility to provide leadership.

It seems appropriate to say a last word to the students—to the lawyers of the future. During the era of the counter-culture and the Viet Nam War, younger lawyers pressed the nation's law firms to expand the scope of their pro bono activities. Young men and women who then came to the law firms were intensely interested in public service activities. When they would apply, they would ask: "What is the firm doing in the pro bono area? What are my opportunities going to be in the pro bono area if I join your firm?" They were interested, of course, in when they were going to be elected partners, as all new associates are, but they asked those other questions, too. Those young lawyers exercised an enormous influence on the law firms of the country.

Regrettably, the interest in public service legal work appears to have declined among both older and younger lawyers. Many of the law school graduates who apply to firms such as my own appear to be indifferent about pro bono work. There have been many theories advanced to explain this change in attitude. Whatever the explanation, the young lawyers are not prodding or challenging the law firms as they once did. I suggest that the large law firms, or at least a good number of them, will respond to requests and to urgings of the younger lawyers for an opportunity to engage in some public service legal work. That requires, however, some courage and initiative on the part of the young lawyers. There are exciting and challenging things for lawyers to do in many different areas of our society. Justice Holmes said that "one may live greatly in the law as elsewhere." He was right.

ETHICS AND THE MEGAFIRM — II

Richard D. Lee*

I.

I would like to add an overlay to the remarks that Mr. Krash made with regard to the megafirm. Mr. Krash has described very carefully and very thoughtfully a number of the ethical problems that are faced by the megafirm. I think there is an additional set of

* Mr. Lee is a Professor of Law, Temple University School of Law; Director of Professional Development, Baker & McKenzie, 1980-1983; B.A. 1957, Stanford University; J.D. 1960, Yale University.