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LAW FIRM DISCIPLINE IN SINGAPORE

Corporate liability for an employee or officer's wrongdoing is not a controversial concept in Singapore. However, it has largely yet to find clear application to the realm of legal professional ethics and ethical breaches by lawyers. By and large, where there are ethical breaches, it is the individual lawyer who is disciplined, and not the firm in which he practices. This article seeks to introduce the Singapore reader to "law firm discipline", the concept of disciplining law firms as entities to ensure compliance with legal ethics rules, and explores, by reference to the existing regime, the extent to which they have or have not, knowingly or unknowingly, been embraced and adopted in Singapore. In this regard, it is suggested that simple reforms to the existing regime can be adopted to create a coherent and functional application of law firm discipline in Singapore.

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I. Introduction

1 The doctrine of *respondeat superior* or the notion of corporate liability for the wrongdoings of an entity's constituent members, officers and employees is not unfamiliar to Singapore lawyers as a modern legal concept. In the Singapore regulatory framework, some examples that spring to mind may include the following: the Securities Industry Council may sanction entities for breaches of the Singapore Code on Take-overs and Mergers;[1] the Monetary Authority of Singapore may sanction banks and financial institutions for their officers' non-compliance with notices;[2] and the Accountants Act allows for disciplinary proceedings to be brought against accounting firms.[3] In contrast, the disciplining of legal service providers in Singapore continues largely to eschew the disciplining of entities – disciplinary proceedings under the Legal Profession Act traditionally applied and continues to apply only to individual practitioners.

1 Securities and Futures Act (Cap 289, 2006 Rev Ed) Pt VIII (grandfathered from the Securities Industry Act (Cap 289, 1985 Ed)); Monetary Authority of Singapore, *Singapore Code on Take-overs and Mergers* (25 March 2016).

2 Banking Act (Cap 19, 2008 Rev Ed) s 55.

3 Accountants Act (Cap 2, 2005 Rev Ed) Pt VI.

2 On 13 January 2014, the Committee to Review the Regulatory Framework of the Singapore Legal Services Sector ("Committee"), comprising senior members of the Singapore Judiciary and leaders of several large law firms in Singapore, issued its final report on its recommendations on the reform of the regulatory framework of the legal services industry in Singapore.[4] Later that year in November, many of the recommendations of the Committee were passed into law by Parliament by way of amendments to the Legal Profession Act.[5] Broadly speaking, the amendments sought to reform the registration, licensing, regulation and disciplinary regimes for legal services providers in Singapore, creating a uniform framework for Singapore lawyers, foreign lawyers, Singapore law practices and foreign law practices, where they had hitherto been governed by a patchwork of different institutions and regulators.[6] One issue raised by the Committee in the course of its January 2014 report which had not attracted any significant attention was a concept known as "entity regulation".[7] One might have thought that this presented the opportunity for careful consideration of what this entailed and whether and to what extent it ought to be adopted in the disciplinary landscape for legal services providers in Singapore. The Committee did not appear to do so. It concluded, in no more than two short paragraphs, that "entity regulation" ought not to extend to issues of "professional standards and ethics" but ought to be confined only to "compliance with business criteria".[8]

3 "Entity regulation", which is sometimes also known as "law firm regulation" or "law firm discipline" (this article will use the phrase "law firm discipline"), is in fact not a novel concept, albeit that it has not been thoroughly considered in the Singapore context (if at all). Indeed, there is a mature body of American literature on the subject spanning at least the past two decades. There is no doubt that, as will be shown, there are arguments both for and against law firm discipline. To this end, it is

4 *Committee to Review the Regulatory Framework of the Singapore Legal Services Sector* (Final Report) (13 January 2014) (Chairperson: Chief Justice Sundaresh Menon).

5 Legal Profession (Amendment) Act 2014 (Act 40 of 2014).

6 See generally the second reading speech by Minister for Law, K Shanmugam on the Legal Profession (Amendment) Bill (Bill 36 of 2014) in *Singapore Parliamentary Debates, Official Report* (4 November 2014), vol 92 (K Shanmugam, Minster for Law).

7 *Committee to Review the Regulatory Framework of the Singapore Legal Services Sector* (Final Report) (13 January 2014) (Chairperson: Chief Justice Sundaresh Menon) at paras 64–65.

8 *Committee to Review the Regulatory Framework of the Singapore Legal Services Sector* (Final Report) (13 January 2014) (Chairperson: Chief Justice Sundaresh Menon) at paras 64–65: "[t]he Committee noted the concerns expressed by members of the legal fraternity … that regulation at the entity level … should not impinge on matters relating to professional conduct which were already dealt with under the framework for individual regulation".

ultimately a policy decision for the regulators of the Singapore legal industry whether and to what extent law firm discipline ought to be implemented. However, this article seeks, by articulating some of the arguments for law firm discipline, and by reviewing the existing ethical and disciplinary framework existing in Singapore in this light and from this perspective, to raise a more thorough and serious consideration as to whether, as a maturing if not mature industry and profession, law firm discipline is something that ought to be implemented in a wider and more principled basis in Singapore.

4 Parts IIA and IIB of this article[9] will provide to readers who may not be familiar with the concept a simple introduction[10] of law firm discipline, including what it means and the arguments for it, and of its possible operation by making reference to the facts of Singapore cases of potential ethical breaches by lawyers in Singapore. In part IIC,[11] some of the arguments against law firm discipline will be explored, and it is suggested that they may be overstated and should not completely discourage proper consideration into whether it can or ought to be implemented in at least *some* way or form given the nature and reality of legal practice today. Part IID[12] will introduce to readers a "thinner" (and perhaps more palatable) conception of law firm discipline, namely, the implementation of ethical infrastructures in law practices. Finally, with the context set, in part III,[13] the following will be examined: the existing professional conduct rules and disciplinary regime (including the new and recent 2014/2015 enactments) as they apply in Singapore; the extent to which they have (knowingly or unknowingly) embraced law firm discipline (or not); and, what they suggest about the acceptance of law firm discipline as a feasible and applicable concept in Singapore. Further, with reference to the conclusions on the existing regime in Singapore, some areas suitable for immediate reform to create a coherent and functional system of law firm discipline in Singapore will also be proposed.

9 See paras 6–11 and 12–18 below respectively.

10 Needless to say, given the mature body of literature the subject of law firm discipline has generated in the US, the introduction in this article should not be taken as exhaustive of the issues, and anyone seriously interested in the subject ought to study the available literature. A simple introduction to the subject is offered in this article only to facilitate the subsequent discussion on the existing regime in Singapore.

11 See paras 19–23 below.

12 See paras 24–26 below.

13 See paras 27–44 below.

II. What is law firm discipline?

5 Traditionally and historically, the disciplinary jurisdiction over lawyers in common law countries is exercised only on individuals and not entities or law firms. This was and continues (largely) to be so in Singapore.[14] For this reason, where there is professional or ethical misconduct, any disciplinary liability is personal to that lawyer only, and the firm in which he practices, as a whole, will not be made liable.[15] It is important, for reasons which will be expanded on below, however, to note also that, traditionally and historically, common law jurisdictions had largely shown a dislike for and banned the incorporation of legal practices. Legal practices were, by and large, carried on in the form of sole proprietorships or partnerships of individual lawyers. This was true also in Singapore where, before 2000, a lawyer could only practice only either on his own account, in a partnership, or as an employee.[16] However, in 2000, following a global trend of allowing the corporatisation of law firms, and following the recommendations of the Law Reform Committee's Sub-Committee on Corporatisation of Law Partnership in 1999,[17] Parliament amended the Legal Profession Act to allow for the provision of legal services through law corporations.[18] The Legal Profession Act was then again amended in 2005 to allow for the provision of legal services through limited liability partnerships.[19] This development in 2000 and 2005 is noteworthy in so far as it also marked the start of the growth of the modern large law firm in Singapore[20] as had already started as a global trend elsewhere in the world but especially in the US. It is in this context of the corporatisation and

14 Section 71(3) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA") (pre-2014, *ie*, before the amendments by way of the Legal Profession (Amendment) Act 2014 (Act 40 of 2014)) provides that disciplinary proceedings may be taken against any "advocate and solicitor", while s 71(14) under the present LPA provides that disciplinary proceedings may be taken against any "regulated legal practitioner, person admitted under section 15 or regulated non-practitioner".

15 Tan Yock Lin, *The Law of Advocates and Solicitors in Singapore and West Malaysia* (Butterworths Asia, 2nd Ed, 1998) at pp 768–769 (albeit that this was written before the advent of the corporatisation of legal practices in Singapore).

16 Legal Profession Act (Cap 161, 1997 Rev Ed) s 26(1)(*a*) (pre-2000, *ie*, before the amendments by way of the Legal Profession (Amendment) Act 2000 (Act 4 of 2000)).

17 Law Reform Committee, *Final Report of the Sub-Committee on Corporatisation of Law Partnerships* (10 February 1999) (Chairperson: Arfat Selvam).

18 Legal Profession (Amendment) Act 2000 (Act 4 of 2000).

19 Legal Profession (Amendment) Act 2005 (Act 41 of 2005).

20 In a 2001 government census, only five law firms were found to have more than 80 lawyers: see Singapore Department of Statistics, *Census of the Legal Industry and Profession 2001* (Singapore, 2003) at p 31. In 2016, the largest domestic law firm in Singapore had 377 lawyers, and each of the five largest law firms had more than 200 lawyers: see "Asia's Top 50 Largest Law Firms" *Asian Legal Business* (24 November 2016) at p 37.

growth in size of the modern law firm that the concept of law firm discipline took root.

A. Law firm discipline as opposed to individual discipline

6 In an article in the Cornell Law Review published in 1991, Prof Ted Schneyer was amongst the first to make the case for a disciplinary regime that targets not only individual lawyers, but against law firms as well.[21] Prof Schneyer argues, in the context of ethical breaches by lawyers in large law firm in the US, that:[22]

> Given the evidentiary problems of pinning professional misconduct on one or more members of a lawyering team, the reluctance to scapegoat some lawyers for sins potentially shared by others in their firm, and especially the importance of a law firm's ethical infrastructure and the diffuse responsibility for creating and maintaining that infrastructure, a disciplinary regime that targets only individual lawyers in an era of large law firms is no longer sufficient. Sanctions against firms are needed as well.

7 Prof Schneyer posits, by analogy to theories of corporate criminal liability and society's growing reliance on criminal sanctions on business corporations to shape corporate activity, that similar application of that theory can be employed to promote ethical practice in law firms.[23] Prof Schneyer puts it very plainly, thus: the "chief reason to allow disciplinary authorities to proceed directly against law firms is prophylaxis – the promotion of firm practices that prevent wrongdoing by individual lawyers".[24]

8 The arguments for law firm discipline are complex, but they may perhaps be understood best and most simply through considering, as a simple demonstration, Prof Andrew Perlman's paradigmatic example as follows:[25]

> A partner asks [a] young lawyer to review a client's documents to determine what needs to be produced in discovery. In the stack, the associate finds a 'smoking gun' that is clearly within the scope of discovery and spells disaster for the client's case. The associate reports

21 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1.

22 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 11.

23 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 24–26.

24 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 14.

25 Andrew M Perlman, "Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology" (2007–2008) 36 Hofstra L Rev 451.

> the document to the partner, who without explanation tells the associate not to produce it. The associate asks the partner a few questions and quickly drops the subject when the partner tells the associate to get back to work.

9 In this situation, it would be easy to suggest that the associate should rightly be disciplined (on an individual basis) for what is his own ethical failing to disclose the "smoking gun" document regardless of the partner's instructions otherwise, if not whistle-blow against the partner's unethical behaviour. But this ignores the context of practice in a large law firm. Social psychologists call this "the fundamental attribution error" in that "situational forces are often more powerful predictors of human behaviour than dispositional traits like honesty".[26] Disciplining the lawyer would not change or cure the root of the problem, that being the context and circumstances of the young associate working in a large law firm and the associated pressures which led to his ethical failings. These may include a lack of an obvious and accessible whistle-blowing regime for reporting unethical behaviour[27] or, indeed, a culture of unnecessary deference to partners that the firm cultivates amongst its associates.[28] Suffice it to say, this paradigmatic example serves to starkly illustrate, in a way perhaps not altogether unfamiliar to anyone who has ever worked in a large law firm, that disciplining individual lawyers may not in every case achieve the desired outcomes of the disciplinary process.[29]

10 Prof Schneyer further argues that, in as much as theories of corporate criminal liability acknowledge that corporate wrongdoing may sometimes be regarded as "inherently structural" and that there is the "danger of scapegoating" particular agents even where he may not be root of the harm-causing conduct,[30] it is similarly wrong to completely ignore the reality that "bureaucratic failings and collective decisions" can play significant causal roles in unethical conduct in law firms.[31] In this

26 Andrew M Perlman, "Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology" (2007–2008) 36 Hofstra L Rev 451 at 453.

27 See Alex B Long, "Whistleblowing Attorneys and Ethical Infrastructures" (2009) 68 Md L Rev 786.

28 The associate might conceivably think: "Do I defy the partner and risk my job if he is upset with me? Can I afford that in today's difficult job market?"

29 Prof Andrew Perlman's example is used in this article as a "paradigmatic" example, but only in the hope of this eliciting an intuitive understanding of the concept of law firm discipline. At the same time, it is acknowledged that there are arguments against imposing liability against the firm in this situation; this point is examined at n 86 below.

30 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 24–25.

31 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 25.

regard, the arguments for law firm discipline cannot be unfamiliar to the modern Singapore lawyer familiar with theories of corporate attribution and liability. The idea, thus, according to Prof Schneyer, is that by imposing liability on the corporation, the management or the owners of the corporation are more likely to be incentivised to prevent, detect or remedy such wrongdoing than if the individual agent is penalised without such penalty passing to the corporation.[32]

11 Distilled to its simplest terms, disciplining law firms as a means to incentivising its managers and owners to promote firm practices that prevent wrongdoing by individual lawyers may be thought to be effective because two of its outcomes, namely, bringing the firm adverse publicity[33] and imposing fines on a law firm,[34] both of which "speak" to the firm as an economic entity (which is the reality for the modern law firm). As regards the former, while it is easy to say that an indictment of the individual lawyer necessarily also brings adverse publicity for the law firm, it is equally easy to imagine the law firm escaping the consequences because "the disciplined lawyer [may be simply] regarded as a 'bad apple' [and] the opprobrium attached to that [lawyer] may not tarnish [his] firm".[35] Therefore, where individual lawyers are disciplined, they may be simply expelled and, even if not, are but one of many in the firm and may not have sufficient influence to promote the necessary organisational change. As for the latter, this flows from the recognition of the law firm as an economic and business enterprise, money being the common currency.[36] Indeed, the jurisdiction to impose monetary penalties on individual lawyers for ethical breaches is not new or

32 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 25.

33 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 33–34.

34 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 31–32.

35 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 34.

36 Consider the observations of Prof Anthony Kronman that more and more so in the modern law firm, the most obvious common denominator between partners of a firm has become, necessarily, economic pursuit: Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Belknap Press of Harvard University Press, 1993) at pp 295–297. This is all the more stark in the Singapore context today given the introduction, through the 2014 amendments to the Legal Profession Act (Cap 161, 2009 Rev Ed), of legal disciplinary practices (an alternative business structure) in which non-lawyer managers and employees will be permitted to be owners and share in its profits; see also Andrew Boon, "Professionalism under the Legal Services Act 2007" (2010) 17 *International Journal of Legal Profession* 195 for a discussion on the ethical regulation of alternative business structures in the UK context following the enactment of the UK Legal Services Act 2007 (c 29) permitting the same.

unfamiliar to Singapore.[37] However, unless the penalty is passed on to the law firm so as to adversely affect firm profits, there may not be any real incentive for institutional change to be implemented.[38]

B. Examples of ethical breaches in Singapore and how law firm discipline would have applied

12 The concept of law firm discipline can apply across a wide variety of ethical breaches. Prof Schneyer himself, in his article, shares "five well-publicized incidents involving misconduct in large law firms"[39] which he references as incidents in favour of the consideration of law firm discipline.[40] Those examples should not be seen as peculiar to only the large US law firms referenced. The sorts of breaches referred to are equally imaginable in the Singapore context where, as noted, with the corporatisation of legal practices, the number of large law firms and their size have grown steadily over the years.[41] In this part, three examples drawn from recent cases in Singapore are considered.

13 First, consider the case of *Law Society of Singapore v Seah Li Ming Edwin*[42] ("*Seah Li Ming*"). There, two partners of a law firm were charged with, *inter alia*, acting in conflict of interests.[43] The complainant was the victim of personal injuries resulting from a road traffic accident.[44] On 10 September 2003, in a signed letter to the complainant, one of the two partners confirmed that the firm was acting for him in relation to his claims against the motorists or the insurers of the other two vehicles involved in the accident.[45] However, on 15 September, the firm separately informed the complainant's insurer that it was acting for the rider of the other motorcycle involved in the same accident.[46] Following this, the firm sent a letter to the complainant discharging itself from acting for him.[47] Unexpectedly, as this was a case of acting in conflict of interests of two clients plain and simple, the two partners

37 Legal Profession Act (Cap 161, 2009 Rev Ed) ss 88(1) and 98(1)(*c*).
38 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 25.
39 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 1–3.
40 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 3.
41 This point is examined at para 5 above.
42 [2007] 3 SLR(R) 401.
43 *Law Society of Singapore v Seah Li Ming Edwin* [2007] 3 SLR(R) 401 at [2].
44 *Law Society of Singapore v Seah Li Ming Edwin* [2007] 3 SLR(R) 401 at [7].
45 *Law Society of Singapore v Seah Li Ming Edwin* [2007] 3 SLR(R) 401 at [10].
46 *Law Society of Singapore v Seah Li Ming Edwin* [2007] 3 SLR(R) 401 at [10].
47 *Law Society of Singapore v Seah Li Ming Edwin* [2007] 3 SLR(R) 401 at [10].

admitted, *inter alia*, the said charges.[48] The disciplinary committee of The Law Society of Singapore ("Law Society") found sufficient gravity existed for action to be taken against the two partners and took out an application to the Court of Three Judges to make absolute an order to show cause.[49] In mitigation, on the conflict of interests charges, the two partners urged, *inter alia*, that cognisance be taken of the fact that the firm was then relocating and upgrading its computer systems, and, as a result, their online conflict search program was not fully operational, therefore precluding a computerised conflict search.[50]

14 Granted, *Seah Li Ming* involved what appeared to be a two-man firm and not the archetypal large law firm. But the same problems could conceivably occur in a large firm as well, where, in fact, the problem may be compounded, given that the large number of partners, teams or departments in a large law firm may mean that one lawyer is not necessarily aware of the businesses of another even though they practise under the same name. It is for this reason that most large law firms resort to computers, databases and conflict-checking software to ensure compliance with conflict of interest rules.[51] Who, however, should be blamed where there is a failure of the conflict-checking software or its use[52] (as was the case in *Seah Li Ming*), bearing in mind that the lawyers in breach may well be otherwise none the wiser? Indeed, in such a case, says Prof Schneyer, the problem is not the lack of "ethical sensibilities of the lawyers immediately involved", but the "lack of an adequate mechanism for identifying conflicts".[53] Pinning the blame or sanctioning the individual lawyers for the breach instead of the firm as a whole may not properly incentivise the firm to improve its conflict-checking software or improve its internal policies *vis-à-vis* the proper utilisation of the available software.

48 *Law Society of Singapore v Seah Li Ming Edwin* [2007] 3 SLR(R) 401 at [13], but the remaining charges against the two partners are not relevant for the present purposes.

49 *Law Society of Singapore v Seah Li Ming Edwin* [2007] 3 SLR(R) 401 at [19].

50 *Law Society of Singapore v Seah Li Ming Edwin* [2007] 3 SLR(R) 401 at [14].

51 Susan P Shapiro, "Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life" (2003) 28 *Law & Social Inquiry* 87.

52 Qualitative empirical research suggests that even with such systems in place, a large number of law firms may continue to be hampered by "flawed conflict detection" systems as well as the failure to "solicit all the information they need" to begin with: see Lee A Pizzimenti, "Screen Verité: Do Rules about Ethical Screens Reflect the Truth about Real-life Law Firm Practice?" (1997) 52 U Miami L Rev 305 at 324 and 333.

53 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 10.

15 Second, *ANB v ANC*[54] involved allegations that a certain solicitor had sanctioned or encouraged his clients to undertake "hacking" activities to procure evidence for proceedings in which they acted. *ANB v ANC* concerned a husband and a wife embroiled in divorce proceedings.[55] After she had moved out of the matrimonial home, the wife allegedly gained unauthorised access to the home when the husband was overseas with their children.[56] Through a "private investigator" known as Dennis Lee, she obtained information from the husband's personal notebook computer which she found in the home[57] before replacing it.[58] She then attempted to adduce some of that information retrieved as evidence in the divorce proceedings. This prompted the husband to apply to the High Court to enjoin the wife from using the information, claiming breach of confidence. Relevantly, it was alleged in the proceedings (and there was some evidence suggesting) that the private investigator, Dennis Lee, had been recommended to various clients of lawyers practising at the family bar, including the solicitor for the wife in this case, identified by the court only as "FSF", who practised in the firm identified only by the anonymised acronym, "AND".[59] Quite apart from the substantive issues relating to injunctive relief decided by the court, the judge referred the matter to the Attorney-General's Chambers "for investigation into the possible commission of various crimes",[60] and noted that he took "a dim view of solicitors who sanction, let alone encourage, their clients' involvement in such illicit activities as 'hacking'".[61] On 3 February 2017, the wife was convicted by a district court of computer misuse and theft and of abetting Dennis Lee to commit computer misuse.[62] To date, there does not appear to be any publically-available records on any action against the solicitor, FSF, or the firm, AND, or as to whether the allegations against them of encouraging or sanctioning the illegal "hacking" have any truth in them.

16 Assume, however, that FSF and AND were to some degree complicit in the "hacking" – should this be a case where only FSF is considered as having breached his ethical duties? If Dennis Lee was a person frequently recommended to FSF's and AND's clients, as alleged,

54 [2014] 4 SLR 747; see also the appeal therefrom to the Court of Appeal in *ANB v ANC* [2015] 5 SLR 522.
55 *ANB v ANC* [2014] 4 SLR 747 at [4].
56 *ANB v ANC* [2014] 4 SLR 747 at [10] and [12].
57 *ANB v ANC* [2014] 4 SLR 747 at [13].
58 *ANB v ANC* [2014] 4 SLR 747 at [14].
59 *ANB v ANC* [2014] 4 SLR 747 at [19] and [75(b)].
60 *ANB v ANC* [2014] 4 SLR 747 at [25].
61 *ANB v ANC* [2014] 4 SLR 747 at [80].
62 Elena Chong, "Woman Fined for Abetting Private Eye to Access Data in Ex-husband's Laptop" *The Straits Times* (3 February 2017).

were there other lawyers in AND who knew of the potential illegal activities including FSF's partners or the associates working for him (as there were likely to be given the modern practice of practising in teams of lawyers rather than individually) and if so, why did they not seek to stop the association with Dennis Lee or report the potential illegality? Was it because FSF was a lawyer of significant influence in the firm such that, like the young associate in Prof Perlman's example above,[63] the associates found it difficult to whistle-blow? Did or should AND have had internal whistle-blowing policies for reporting suspected illegal or wrongful practices? These are questions which cannot be answered given there are no public records of substantive proceedings against FSF or AND.[64] However, they serve to illustrate that in many cases of potential ethical breaches which would otherwise be pinned on an individual lawyer, including one as serious as illegal conduct on the part of the individual lawyer, there is usually a potential case to be made separately that there are wider structural reasons attributable to the firm as an entity that may be causative of the breaches which may not be addressed if only the individual lawyer is disciplined.

17 Third and finally, we consider the facts of *Deepak Sharma v Law Society of Singapore*[65] ("*Deepak Sharma*") which involved allegations of "overcharging". Deepak Sharma was the husband of a prominent surgeon, Dr Susan Lim.[66] In previous proceedings, disciplinary action was brought by the Singapore Medical Council ("Council") against Lim, which eventually led to her conviction and suspension.[67] There, the Council was represented by one of Singapore's largest law firms, WP.[68] At the conclusion of those proceedings, Lim was ordered to pay the Council's costs of the proceedings.[69] WP, thus, submitted three bills of costs for taxation for a total of $1,007,009.37.[70] On taxation, the costs were taxed down to $370,000.[71] Sharma, claiming to be an interested party having funded his wife's litigation against the Council, lodged complaints to the complaints panel of the Law Society against two lawyers of WP, AY, a senior counsel, and MH, his partner.[72] The complaint was that AY and MH were guilty of "improper conduct and/or conduct unbecoming of an honourable profession" by reason of

63 This point is examined at para 8 above.
64 There was also no indication, conclusive or otherwise, as to the truth of the allegations against FSF or AND.
65 [2017] 1 SLR 862; see also the first instance decision from which this appeal arose, at *Deepak Sharma v Law Society of Singapore* [2016] 4 SLR 192.
66 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [5].
67 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [10].
68 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [11].
69 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [10].
70 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [11].
71 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [12] and [13].
72 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [14].

"charging bills of costs against [Lim] which were clearly exorbitant", as evidenced, he said, by the large reduction of the bills on taxation.[73] A review committee ("RC") of the Law Society dismissed the complaint against AY but referred part of the complaint against MH to an inquiry committee for further inquiry.[74] Dissatisfied, Sharma applied for leave for judicial review, for a quashing order against the RC's decision.[75] Sharma's application was ultimately rejected by the Court of Appeal.[76]

18 What is relevant for the present discussion, though, is that one of the grounds on which the RC dismissed the complaint against AY was on the basis of a clarification from WP, *inter alia*, that AY was "not involved in drawing up the Bills of Costs or the taxation proceedings", this clarification leading to the conclusion that there was, thus, no misconduct on his part.[77] It is not clear the extent to which the RC received evidence regarding AY's involvement other than WP's assertion but, with respect, its decision on this ground potentially raises the spectre of a law firm disavowing itself of wrongdoing by pinning any possible blame as being the fault of an individual errant lawyer (potentially, MH in this example). The problem may be also more acute in the sphere of billing.[78] In *Deepak Sharma*, the bills of costs were presented, it was claimed, on the basis of the actual hourly rates as incurred by the solicitors involved.[79] There is considerable debate on the negative ethical impact on lawyers that time-based billing may have.[80] Consider, however, that time-based billing as a practice, and the expectations that come with it, are often imposed not as a personal choice of particular lawyers but by the firm (as an entity) on all of its

73 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [14]; note also that the Court of Appeal observed that this was not a case of "overcharging involving a lawyer and his client", since Deepak Sharma was not a client of WP, AY or MH – that relevance of that distinction is not important for the purposes of the present discussion, but see the court's judgment at [39]–[51].

74 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [15].

75 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [21].

76 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [71].

77 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [19] and [20]: the legal validity of this ground was not considered by the Court of Appeal given that it found that Deepak Sharma's application failed on other grounds – see the court's judgment at [70].

78 Although it is acknowledged that *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862, as noted by the court, was not a case of a lawyer overcharging his client, see n 69 above.

79 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [18] and [26].

80 Christine Parker & David Ruschena, "The Pressures of Billable Hours: Lessons from a Survey of Billing Practices inside Law Firms" (2011) 9 U St Thomas LJ 619 at 620 and fnn 2 and 3: the authors conclude, from a survey of lawyers in law firms in Queensland, Australia, that in addition to the billable hours regime, lawyers' perceptions of billing targets as performance indicators contributes to the propensity to engage in unethical behaviour.

lawyers. This being the case, if there was an allegation of a lawyer overcharging his client,[81] would it be right that a senior lawyer of the firm (and the firm) should be absolved simply on the basis that he was "not involved in drawing up the [bill]", or should the firm as an entity (if not the senior lawyer who perhaps should have had oversight), which imposed those time-based billing practices, not be potentially on the hook as well?

C. Arguments against law firm discipline in the respondeat superior *conception*

19 It cannot be claimed that the examples in part IIB[82] above lead inexorably to the conclusion that law firm discipline must be implemented (and they do not). However, they serve to show in the Singapore context that there is value in the possibility of disciplining law firms to regulate ethical behaviour even in instances of breaches that we are familiar with. For all the discussion above, the concept of law firm discipline does have its detractors, especially in so far as Prof Schneyer conceives of it in the *respondeat superior* or vicarious liability sense.[83] Intuitively compelling as Prof Schneyer's proposal may be, especially when the parallel is drawn with corporate liability, his provocative proposal, made more than 20 years ago now, has hardly caught on.

20 The common arguments against law firm discipline in the *respondeat superior* conception are not difficult to appreciate. In a response to Prof Schneyer's proposal for law firm discipline in the *respondeat superior* sense, Prof Julie O'Sullivan puts forward several countervailing arguments.[84] First, it is arguable that it is in most cases difficult to determine whether a particular ethical breach is attributable to the organisational failings of the law firm such as to justify imposing liability on it. Let us return to Prof Perlman's example of the young associate and his encounter with the "smoking gun" document.[85] As much as it is easy to posit from anecdotal experience that the young associate in that example might have been the subject of (unarticulated) pressures which led him to his ethical failings in not disclosing the "smoking gun", from a prosecuting authority's point of view, such intuitive conclusions alone may be insufficient to justify the exercise of discretion in favour of prosecutorial action. Evidentially, it would be

81 This, again, was not the case in *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862.

82 See paras 12–18 above.

83 See paras 6–11 above.

84 Consider, in particular, Prof Julie O'Sullivan's response to Prof Ted Schneyer's proposal: Julie R O'Sullivan, "Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal" (2002) 16 Geo J Legal Ethics 1.

85 This point is examined at para 8 above.

difficult to establish where firm "culture" crosses the line from being simply unhealthy to being blameworthy to justify imposing liability on the firm as a whole.[86] Second, given the difficulty in being certain as to when firm liability is justified, the *respondeat superior* standard may be "overboard" if it applies to all ethical violations rather than to only those violations that a firm has a real chance of policing and controlling.[87] In this regard, law firms which may have in place law-abiding cultures may be placed together with firms whose management are in disarray and, therefore, be unfairly stigmatised.[88] The argument goes, thus, that this is a system which, as described, inherently fails to discriminate fault and blameworthiness.[89] Third, it is suggested that it is not altogether clear that law firm discipline will effectively lead to its stated outcomes of incentivising the implementation of good firm policies[90] (that is, as a matter of empirical fact).

21 With respect, in so far as Prof O'Sullivan's response to Prof Schneyer is a response to the fundamental merits of law firm discipline, it is suggested that it misses the larger point. Put simply, the debate between Prof Schneyer and Prof O'Sullivan, as presented, approximates the debates of theorists of corporate law regarding corporate criminal liability. With apologies for the obvious oversimplification, Prof Schneyer's proposal for law firm discipline should best be viewed as founded primarily on its *prophylactic nature*.[91] As Prof Schneyer notes with reference to the American Bar Association's Model Rules of Professional Conduct, the use of prophylactic rules in legal ethics regimes is not new and already exists in modern legal ethics rules.[92] The examples referred to by Prof Schneyer[93] have similar counterparts in the Singapore context. Lawyers in Singapore are not allowed to commingle

86 Julie R O'Sullivan, "Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal" (2002) 16 Geo J Legal Ethics 1 at 30–31: "how would one prove that a 500-person law firm … as an entity, promotes wrongdoing? … When would a firm culture that requires from its lawyers long hours and hard-hitting advocacy be deemed to have crossed the line from a culture shared by many large firms into a culture that 'causes' over-billing or deceptions to the court?"

87 Julie R O'Sullivan, "Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal" (2002) 16 Geo J Legal Ethics 1 at 37–38.

88 Julie R O'Sullivan, "Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal" (2002) 16 Geo J Legal Ethics 1 at 38.

89 Julie R O'Sullivan, "Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal" (2002) 16 Geo J Legal Ethics 1 at 38–39.

90 Julie R O'Sullivan, "Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal" (2002) 16 Geo J Legal Ethics 1 at 41–63.

91 This point is examined at para 5 above.

92 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 14–15.

93 The examples suggest, perhaps, the universality of some legal ethics rules.

their own funds with client funds,[94] and this is not because commingling is itself an "evil", but because doing so may "tempt lawyers to treat client funds as their own".[95] Under the Singapore rules, where one lawyer in a firm holds confidential information of a former client, another lawyer in the same firm is barred from acting for a new client where, *inter alia*, that new client has or may reasonably be expected to have an interest adverse to the former client and that information of the former client may reasonably be material to the representation of the new client.[96] This rule is also prophylactic in that it seeks to avoid the risk of the lawyer holding the confidential information being tempted to communicate that information to the others in the firm.[97] If we accept the value of adopting certain ethical rules for their prophylactic effect, then it is hard to see why the concept of law firm discipline ought not to be seriously considered for implementation if only for similar prophylaxis.

22 Some of Prof O'Sullivan's objections may also be overstated in as much as her concerns can easily be tempered by practical and commonsensical exercise of prosecutorial discretion on the part of the relevant enforcement authorities. A complete rejection of the *respondeat superior* standard of law firm discipline may be to throw the proverbial baby out with the bathwater. While it may be difficult, at first blush, in most cases, to determine with certainty that a law firm's organisational failings were causative of the individual lawyer's ethical failing such that the law firm ought to be held responsible, to thus reject in a wholesale manner the possibility of disciplining law firm would be to unduly discount the cases where this was obvious or where, through investigations, clear evidence of organisational failings was uncovered. As for the argument of the risk of the prosecuting authorities indiscriminately proceeding against the law firm instead of the individual lawyer responsible only because to make out such a case would be easier than investigating to identify the particular agent responsible, this is, if anything, more an indictment of the prosecuting

94 Legal Profession (Solicitors' Accounts) Rules (Cap 161, R 8, 1999 Rev Ed).

95 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 14, citing Charles W Wolfram, *Modern Legal Ethics* (West Publishing Company, 1986) at pp 79–144.

96 Legal Profession (Professional Conduct) Rules 2015 (S 706/2015): save that the new position under these 2015 rules now allow the lawyer to act for the new client where there are "adequate safeguards" to protect the former client's confidential information and these are notified to the former client.

97 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 15, citing Charles W Wolfram, *Modern Legal Ethics* (West Publishing Company, 1986) at pp 79–144.

authorities (or confidence in them)[98] than an attack on law firm discipline as a workable concept.

23 All that said, it is appreciated that the implementation of law firm discipline would represent a fundamental paradigm change in the system of disciplining ethical breaches as we have long understood it. Understandably, the prevailing sentiment remains that, as Prof O'Sullivan says, proponents for such change bear the burden of persuasion.[99] Therefore, until that burden appears to be satisfactorily discharged, the *status quo* will stand. This notwithstanding, we must also appreciate that the *status quo* may perhaps be nothing more than a function of history – as Prof Schneyer suggests, "[t]he traditional focus on individuals has probably resulted from the system's jurisdictional tie to licensing, which the state requires only for individuals, and from the system's development at a time when solo practice was the norm".[100] This is patently no longer the case, either in most of the mature common law jurisdictions or in Singapore, where the corporatisation of law practices was first allowed almost 17 years ago now and where, as a result, the large Singapore law firm is today not only very much a familiar creature but the prevailing context in which a large number of lawyers practice.[101]

D. Law firm "ethical infrastructures"

24 If a *respondeat superior* standard of law firm discipline is considered too far-reaching in its conception to be adopted, one middle ground which has seen some more than modest success (and acceptance) is the imposition on law firms to implement "ethical infrastructures" in their organisations. "Law firm ethical infrastructures", as succinctly explained by Prof Christine Parker, refer to the "formal and informal management policies, procedures and controls, work team cultures, and habits of interaction and practice that support and encourage ethical behaviour".[102] One might perhaps view this as a "thinner" conception of law firm discipline. Where the *respondeat superior* standard of law firm discipline can be criticised as being overly broad in so far as it potentially punishes a law firm as an organisation for ethical breaches

98 There has not been any suggestion that the authorities responsible for prosecuting disciplinary proceedings against lawyers in Singapore have been anything but even-handed in the discharge of their duties.

99 Julie R O'Sullivan, "Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal" (2002) 16 Geo J Legal Ethics 1 at 22.

100 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 4.

101 This point is examined at para 5 above.

102 Christine Parker *et al*, "The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour" (2008) 31 UNSWLJ 158 at 172; *cf* Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1.

which it had no realistic chance of preventing,[103] this conception is of a lower order, imposing only duties on law firms to positively put in place desirable organisational infrastructures to facilitate ethical behaviour by its lawyers.

25 Although the academic expression of the concept of ethical infrastructures in its modern conception to be imposed on law firms is recent, it, as a concept, it is submitted, is of much older pedigree. Writing in the 1990s as the phenomenon of large law firms in the US grew, Prof Anthony Kronman, in his impassioned monograph chronicling what he saw as the declining standards of legal practice, *The Lost Lawyer*,[104] observed that in the 1960s, lawyers in law firms often found solidarity in social commonalities like race, sex and religion, and from that often found common understandings of what behaving appropriately meant.[105] We oftentimes hear lawyers speaking of their firm "cultures" acting as controls against unethical behaviour, and these have been described as controls which help "insulat[e] the firm from the crudest forms of economic pressure[,] giving more latitude for ethical … conduct".[106] Fast-forwarding 30 years, however, Prof Kronman observed that the size of firms had increased[107] and with it came a shift in the relationship between partners.[108] The increased numbers meant greater heterogeneity (not a bad thing *per se*),[109] leading to the most obvious lowest common denominator between partners being economic pursuit.[110] With weakened bonds comes decreased ethical discipline in the form of informal sanctions between partners[111] and, accordingly, with such counter-pressures removed, an increasing incentive to succumb to the natural tendencies[112] to engage in borderline ethical

103 This point is examined at para 20 above.

104 Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (The Belknap Press of Harvard University Press, 1993).

105 Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (The Belknap Press of Harvard University Press, 1993) at pp 291–292.

106 Robert W Gordon, "The Ethical Worlds of Large-firm Litigators: Preliminary Observations" (1998) 67 Fordham L Rev 709 at 716.

107 Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (The Belknap Press of Harvard University Press, 1993) at pp 274–276.

108 Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (The Belknap Press of Harvard University Press, 1993) at p 291.

109 Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (The Belknap Press of Harvard University Press, 1993) at p 294.

110 Anthony T Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession (The Belknap Press of Harvard University Press, 1993) at pp 295–297.

111 Robert W Gordon, "The Ethical Worlds of Large-firm Litigators: Preliminary Observations" (1998) 67 Fordham L Rev 709 at 718.

112 Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (The Belknap Press of Harvard University Press, 1993); see also and generally Banks McDowell, *Ethical Conduct and the Professional's Dilemma: Choosing Between Service and Success* (Quorum Books, 1991) ch 4.

behaviour for one's own profit.[113] Law firm ethical infrastructures may, thus, be seen as an attempt to legislate those internal institutional checks organic and inherent in a close-knit partnership of lawyers which may no longer exist as strongly in the reality of today's legal practice in the modern law firm.

26 There are many possible forms of law firm ethical infrastructures. One can imagine, in its most simple form, the requirement of putting in place sensible policies and systems within the working environments of law firms to ensure basic compliance with standard practices designed to deter inadvertent breaches of the applicable ethical rules. Other forms may involve positive efforts to ensure compliance with ethical rules, for example, by conducting in-house seminars to continually educate and remind lawyers of their obligations. Amongst other suggestions, Prof Elizabeth Chambliss suggests, specifically, the idea of the appointment of an "ethics partner" in law firms, who will "be especially responsible for monitoring compliance with professional regulation".[114] Such a position would very much resemble the office of a compliance officer or department commonplace in most large corporations today.

III. Law firm discipline and the existing professional conduct rules and disciplinary regime in Singapore

27 Given the reality of the similar corporatisation of law practices in Singapore and the steady growth in size of the large law firm in Singapore, to what extent has our disciplinary landscape for legal services providers in Singapore adopted law firm discipline? A review of the existing professional conduct rules and disciplinary regime in Singapore[115] suggests, surprisingly, a partial acceptance of law firm discipline. However, its application as gleaned from the rules and

113 Robert W Gordon, "The Ethical Worlds of Large-firm Litigators: Preliminary Observations" (1998) 67 Fordham L Rev 709 at 718.

114 Elizabeth Chambliss, "The Nirvana Fallacy in Law Firm Regulation Debates" (2005) 33 Fordham Urb LJ 119 at 129–130; various writers have supported this idea of the "ethics partner", and Prof Christine Parker *et al*, suggests that its potential benefits include that having the position institutionalised may provide channels for "reporting up" potential ethical issues, that it signals to members of the firm that it is serious about ethical behaviour and that the ethics partner may function as the repository for ethics information and the go-to for answers on ethical queries: Christine Parker *et al*, "The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour" (2008) 31 UNSWLJ 158.

115 It should be noted that this review is not concerned with rules and regulations concerning "business criteria" such as those relating to licensing of entities, naming of entities and regulating of alternative business structures and legal disciplinary practices and collaborations between local and foreign practices.

statutes is inconsistent and, with respect, incoherent. In this regard, this part of the articlealso suggests some simple reforms to the Legal Profession Act[116] ("LPA") and the Legal Profession (Professional Conduct) Rules 2015[117] ("PCR 2015") to rationalise and create a more articulate application of law firm discipline in Singapore.

A. Imposing ethical obligations on law practices under the Legal Profession (Professional Conduct) Rules 2015

28 Notwithstanding the 2014 Committee's conclusion that "entity regulation" ought not to extend to issues of the "professional standards and ethics" but ought to be confined only to "compliance with business criteria",[118] the PCR 2015,[119] promulgated under s 71(2) of the LPA, after the implementation of the Committee's recommendations, purported to create significant ethical obligations on law firms as entities. In particular, the PCR 2015 expressly provides that the parts concerning obligations relating to the relationship with the client (in relation to, *inter alia*, client money, fees and conflict of interests),[120] management of law practices,[121] touting and publicity[122] and third-party funding[123] apply to "law practices" in addition to the individual "legal practitioner".[124] Additionally, numerous rules in the PCR 2015 by their express language purport to impose duties on "law practice[s]" directly in addition to the duties owed by the individual legal practitioner. This was a significant expansion from the position under the pre-2015 Legal Profession (Professional Conduct) Rules,[125] which provided for obligations on the part of "law practices" only in relation to a very limited number of issues pertaining mainly to touting and publicity.[126]

116 Cap 161, 2009 Rev Ed.

117 S 706/2015.

118 *Committee to Review the Regulatory Framework of the Singapore Legal Services Sector* (Final Report) (13 January 2014) (Chairperson: Chief Justice Sundaresh Menon) at para 64–65.

119 Legal Profession (Professional Conduct) Rules 2015 (S 706/2015).

120 Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) rr 3(5)(*a*) and 3(5)(*b*), applying Div 2 of Pt 3.

121 Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) r 3(3), applying Pt 4.

122 Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) rr 3(7)(*b*) and 3(7)(*c*), applying Pt 5.

123 Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) rr 3(8)(*b*) and 3(8)(*c*), applying Pt 5A.

124 This is save for the obligations relating to the management of law practices, which apply to "law practices" only.

125 Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2009 Rev Ed) (pre-2015, *ie*, before the replacement with the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015)).

126 Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2009 Rev Ed) rr 11A and 11B.

29 In expanding ethical obligations to apply to law practices as entities, the PCR 2015 implicitly recognises that there are certain ethical obligations which may be better expressed by imposing them on law practices as entities rather than only on the individual legal practitioner. That said, the scope of the obligations imposed on law practices under the PCR 2015 is also illuminative. Notably, these areas of obligations may be described as the obvious areas in respect of which law practices may put in place policies and guidelines to regulate individual behaviour. For instance, the problem of conflict of interests is one that afflicts itself firm-wide more than on individual legal practitioners,[127] and, similarly, management and publicity are endeavours usually undertaken as single undertakings by the entire firm and not individually. As Prof Adam Dodek has described such obligations, "advertising, solicitation, client intake, conflicts of interest, retainer agreements" are areas where "the law firm [acts as] an independent actor exerting significant influence on the practice of law".[128] On the flipside, the PCR 2015 declined to expand the obligations relating to traditionally personal duties of a legal practitioner, such as those of honesty, competence, diligence and confidentiality[129] and his personal interactions with others[130] and the court,[131] to law practices. One view may be that these are duties which a law practice as an entity will not as effectively be able to regulate through organisational or institutional infrastructures. All in all, the PCR 2015 does not implement law firm discipline in a blanket *respondeat superior* sense, but instead, appears to have drawn a line in the sand in applying it only in relation to areas where it is perhaps more clear that it may be effective in regulating conduct.

30 However, promising as they may be, the PCR 2015 rules purporting to apply ethical rules to law practices are, unfortunately, on closer inspection, largely dead letter. Notwithstanding the expansion by the PCR 2015, the 2014 amendments to the Legal Profession Act did not extend the jurisdiction for disciplinary proceedings beyond the individual legal practitioner[132] to apply to law practices. How then, can

127 This point is examined at para 13 above, in relation to *Law Society of Singapore v Seah Li Ming Edwin* [2007] 3 SLR(R) 401.

128 Adam Dodek, "Regulating Law Firms in Canada" (2011) 90 Can Bar Rev 383 at 387–389.

129 Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) Div 1 of Pt 2, which r 3 does not cause to be applied to law practices.

130 Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) Divs 2 and 3 of Pt 2 and Divs 3, 4 and 5 of Pt 3, which r 3 does not cause to be applied to law practices.

131 Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) Div 1 of Pt 3, which r 3 does not cause to be applied to law practices.

132 Legal Profession Act (Cap 161, 2009 Rev Ed) s 71(14) ("[d]isciplinary proceedings may be taken against any regulated legal practitioner, person admitted under

(*cont'd on the next page*)

the ethical obligations imposed on law practices by the PCR 2015 be enforced? There are presently three existing means under the LPA which may possibly be applied towards such end. First, s 71(15) of the LPA (a new provision enacted in 2014) provides that the Director of Legal Services ("DLS") may exercise powers including suspending or revoking a licence, ordering the payment of a penalty of up to $100,000 or issuing warnings against law practices,[133] for contraventions of any rules made under s 71(2)(*c*), namely, such rules relating to "the management of every Singapore law practice, every Joint Law Venture, every Formal Law Alliance, every Qualifying Foreign Law Practice and every licensed foreign law practice". Second, ss 142(2) and 157(2) of the LPA provide that where the business of a limited liability partnership or law corporation, respectively, is "conducted in a manner unbefitting an honourable profession, and such conduct cannot be attributed to the act or omission of any particular individual … whose identity is known", each of the partners or directors shall be liable to such disciplinary proceedings as are applicable to them. Third, ss 144(1)(*b*) and 160(1)(*b*) of the LPA provide that where the business of a limited liability partnership or law corporation, respectively, has "been conducted in a manner unbefitting the profession", they may be wound up.

31 There are three major issues with this scheme of things as it stands. First, it is arguable that the DLS's powers under s 71(15) against law practices would not apply to breaches of the ethical duties purported to be imposed on law practices by the PCR 2015 because those rules do not relate to "management" of the law practice. Second, in so far as employing ss 142(2) and 157(2) of the LPA is concerned, the phrase "manner unbefitting an honourable profession" is of uncertain ambit. The Court of Three Judges has held that the phrase carries the flavour of a "catch-all",[134] but no well-demarcated and certain definition can be discerned from the case law. The mere breach of an ethical obligation imposed by the PCR 2015 is unlikely to amount to conduct unbefitting an honourable profession on the part of the law practice, and more serious conduct is likely to be required. This being the case, the instances in which those ethical obligations imposed by the PCR 2015 on law practices can be enforced directly is limited. Third, the sanctions under ss 142(2) and 157(2) (providing for disciplinary proceedings against each partner or director) and ss 144(1)(*b*) and 160(1)(*b*) (providing for winding-up of the limited liability partnership or law

section 15 or regulated non-practitioner who contravenes any rules made under subsection (2)"), keeping the position under s 71(3) of the Legal Profession Act (Cap 161, 2009 Rev Ed) (pre-2014, *ie*, before the amendments by way of the Legal Profession (Amendment) Act 2014 (Act 40 of 2014)) unchanged.

133 These powers are provided under ss 133, 145, 161, 174 and 175 of the Legal Profession Act (Cap 161, 2009 Rev Ed).

134 *Law Society of Singapore v Ng Chee Sing* [2000] 1 SLR(R) 466 at [40].

corporation) may in all likelihood be disproportionate to the obligations imposed by the PCR 2015. In contrast, the disciplinary regime applicable against individual legal practitioners variously provides for the power of the Council of the Law Society to impose warnings, reprimands or penalties up to $10,000,[135] and the power of the Supreme Court to impose penalties of up to $100,000 and censures against the individual against whom due course is shown.[136] In most cases, no such middle-ground sanctions can be imposed on law practices since, as noted above, s 71(15) arguably does not apply unless the rule is one concerning "management" of the law practice. This being the case, ss 142(2) and 157(2) as well as ss 144(1)(*b*) and 160(1)(*b*) of the LPA, taken together as the only operating provisions, are both inappropriate and ineffective to enforce the law practice's obligations created by the PCR 2015. Therefore, in as much as the PCR 2015 purports to impose obligations on law practice, there is no real means by which to enforce them.

32 Finally, that ss 142(2) and 157(2) of the LPA provide for disciplinary proceedings against all of the partners or directors only where the conduct in question "cannot be attributed to the act or omission of any particular individual … whose identity is known" is confusing and, with respect, unprincipled. On the one hand, this standard recognises, as Prof Schneyer argues, that there may be cases where it is difficult to pin blame for professional conduct on individual lawyers and, thus, sanctions against a wider entity is necessary.[137] On the other, instead of disciplining the firm as an entity, the standard purports to allow sanctions to be imposed on all the partners and directors in their individual capacities. In doing so, ss 142(2) and 157(2) overreach in that they unduly punish the partners and directors by imposing the consequences and stigma of disciplinary proceedings on their individual names when it is already acknowledged that the conduct in question cannot be attributed to any one of them individually.

B. Suggested reforms: Creating a functional and coherent framework for operation of law practices' ethical obligations under Legal Profession (Professional Conduct) Rules 2015

33 The disconnect between the PCR 2015 in creating ethical obligations on law practices as entities and the lack of a coherent legislative regime for disciplining law practices may perhaps be explained by the manner in which the rules in the PCR 2015 are

135 Legal Profession Act (Cap 161, 2009 Rev Ed) s 88(1).
136 Legal Profession Act (Cap 161, 2009 Rev Ed) ss 36S(1), 82B(1), 83(1) and 83A(1).
137 Ted Schneyer, "Professional Discipline for Law Firms?" (1991–1992) 77(1) Cornell L Rev 1 at 11; this point is examined at para 6 above.

promulgated. The rules in the PCR 2015 as promulgated are made by an extra-legislative body known as the "Professional Conduct Council" ("PCC") comprising senior members of the Judiciary and practitioners[138] pursuant to a power delegated to it by s 71(2) of the LPA. The decision to create, in the PCR 2015, explicit ethical obligations on the part of law practices as entities was, therefore, a decision not necessarily of Parliament but collectively by the said members of PCC.[139] Bearing in mind the collective eminence of the members of PCC, it can be argued that these rules are themselves a strong endorsement for the concept of law firm discipline (especially from the view of the legal profession in Singapore as a self-regulating one). Indeed, in so far as these rules are not supported by the required legislative provisions to give them effect and teeth, this appears to be a case where Parliament has failed to go far enough in endorsing the concept of law firm discipline even though there is clear support for it by the fraternity and industry.[140]

34 In the light of PCC's endorsement of the concept of imposing ethical duties on law practices as entities, Parliament ought to consider seriously matching that endorsement by recognising the same under the primary legislation, the LPA, by providing the necessary legislative framework for enforcing them. Happily, this needs not be by complex amendments to the LPA. All that needs to be done is primarily for s 71(14) of the LPA to allow for disciplinary proceedings to be taken, in addition to its existing application to the individual legal practitioner, against law practices, and for provision for the similar sanctions which can be imposed on individual legal practitioners pursuant to these disciplinary proceedings to be extended to be imposable on law practices also. In doing so, not only would Parliament be giving the ethical rules purported to be imposed by PCC on law practices under

138 These refer to the Chief Justice, the Attorney-General, the president of the Law Society of Singapore, a judge of the Supreme Court appointed by the Chief Justice, the Presiding Judge of the Family Justice Courts, the Presiding Judge of the State Courts, at least one and not more than three advocates and solicitors appointed by the Chief Justice, at least one and not more than three foreign lawyers appointed by the Chief Justice, not more than two other persons appointed by the Chief Justice and a person appointed by the Minister for Law: Legal Profession Act (Cap 161, 2009 Rev Ed) s 71(1).

139 Putting aside, for present purposes, considerations as to whether these rules made by the Professional Conduct Council imposing ethical obligations on law practices are, it could be argued, *ultra vires* s 71(2) of the Legal Profession Act (Cap 161, 2009 Rev Ed).

140 Albeit that this appears contradictory to the perfunctory conclusion in the *Committee to Review the Regulatory Framework of the Singapore Legal Services Sector* (Final Report) (13 January 2014) (Chairperson: Chief Justice Sundaresh Menon) at paras 64–65, which purports to be based on "concerns expressed by members of the legal fraternity", that "entity regulation" ought not to extend to issues of the "professional standards and ethics" but ought to be confined only to "compliance with business criteria".

the PCR 2015 teeth, it would also be affording the same due process to which individual practitioners are entitled under the existing regime to law practices as entities. This latter outcome is also particularly important given that the common experience is that disciplinary proceedings relating to ethical duties typically stem from complaints, some meritorious, many not, and if a law practice is to be subject to similar disciplinary sanction, their interests and rights ought also to be protected through the proper due process, instead of being subject to summary determinations as would be the case where the disciplinary powers were wielded by an administrator such as the DLS.[141]

C. Responsibilities in relation to management and operation of law practices

35 The PCR 2015 also introduced a new r 35 governing the responsibilities in relation to the management and operation of law practices imposed on the members of management of law practices. Rule 35(4) of the PCR 2015 provides as follows:[142]

> The management of a law practice must take reasonable steps to ensure that the law practice has in place adequate systems, policies and controls for ensuring that the law practice, and the legal practitioners working in the law practice, comply with the applicable written law, and any applicable practice directions, guidance notes and rulings issued under section 71(6) of the Act or by the Council or the Society, relating to —
>
> (*a*) client's money;
>
> (*b*) conflicts of interests; and
>
> (*c*) client confidentiality.

36 In gist, r 35(4) creates an obligation to put in place ethical infrastructures to ensure the law practices and the legal practitioners in it comply with their ethical obligations, albeit only *vis-à-vis* the three stated areas of "client's money", "conflicts of interests" and "client confidentiality". It is submitted that this new rule signals recognition in Singapore of law firm ethical infrastructures as an effective means for regulating and facilitating ethical behaviour. It recognises that some ethical breaches may be better prevented by creating environments conducive for compliance than by traditional *ex post* sanctions.

141 For example, presently under Legal Profession Act (Cap 161, 2009 Rev Ed) s 71(15), for contravention of rules relating to "management"; this point is examined at para 30 above.

142 Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) r 35(4).

37 Again, as much as the enactment of this new r 35(4) is promising in the recognition of the concept of law firm ethical infrastructures in Singapore, it arguably does not go far enough. It is also, unfortunately, not clear why this is so.

38 First, the obligation is imposed personally on the "management of a law practice". In relation to law practices, "management" refers "the partners or directors of the law practice who have been notified to the [Law] Society [as being a member of management]" or, if no notification has been made, "all the partners or directors".[143] In this regard, "management" may be limited to only the person or group of persons who have been designated as bearing such responsibilities. On one view, while it is ordinarily expedient for the management functions of a law practice to be delegated to one person or a group of persons, this should not necessarily mean that only they should be liable to be disciplined should there be a failure of those management-type obligations (such as those under r 35(4)). Rather than leaving the possibility (real or imagined) of scapegoating the individual members of management, passing the penalty to the law practice as an entity will further incentivise proper shareholder/owner-oversight[144] over management (even if the other shareholders/owners do not directly participate in management).

39 Second, r 35(4) of the PCR 2015 is limited in its application only to the three areas of "client's money", "conflicts of interests" and "client confidentiality". It is not clear, but it may well be, again, that the rationale for limiting the obligation under r 35(4) to these three areas is because it is thought that these are areas in respect of which formal systems, policies and controls can most obviously help facilitate compliance with the rules.[145] That said, this is somewhat out of sync with the perambulatory principles stated in r 35(1), which are intended to guide the interpretation of the rule. Principle (*a*) in r 35(1), in fact, goes so far as to acknowledge the efficacy of ethical infrastructures not only in relation to the three areas listed in r 35(4) but generally, expressing in general terms that there is a need to "provide a working environment which prioritises competence, professionalism and ethical consciousness on the part of every individual working in the law practice". In so limiting r 35(4) of the PCR 2015 to only three areas of

143 Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) rr 35(8)(*b*) and 35(8)(*c*).

144 This point is examined at para 11 above.

145 These are all areas which can benefit from application of easily implementable and standard "systems, policies and controls", *eg*, implementing signatory controls over disbursements of client's money, commissioning proper conflict checking software, and ensuring proper information technology security measures to safeguard clients' confidential information from external online threats.

application despite Principle (*a*), however, the rule diminishes the incentive of management of law practices to independently deliberate and conceive further internal systems, policies and controls useful in other contexts for their law practices.

D. Suggested reforms: Recalibrating responsibility for management to the law firm as an entity and widening its scope of application

(1) Recalibrating management as a responsibility of the law practice instead of only of members of management

40 In as much as the legal fraternity may be ready to accept the imposition of responsibilities for ethical conduct on law practices in at least the limited manner as expressed in the present iteration of the PCR 2015, there is no coherent reason why, when it comes to the responsibility for putting in place adequate systems, policies and controls under r 35, it is only the *individual* legal practitioner who is a member of management and not the law practice as an entity that bears the same. After all, these are arguably matters more of an institutional than ethical nature, in that they do not impose ethical duties in the ordinary sense but only oblique formal duties to create infrastructures supporting ethical conduct. At minimum, the duties in respect of management as stated under r 35 of the PCR 2015 should, in addition to the individual legal practitioner manager, be imposed on law practices as entities as well.

(2) Widening the scope of r 35 of the Legal Profession (Professional Conduct) Rules 2015

41 Happily, the imposition of the requirement to implement ethical infrastructures in law practices is something which has seen real application (and with success) in New South Wales ("NSW"), Australia. Indeed, the successful experience in NSW should be a ringing endorsement for the implementation of rules requiring law practices to implement appropriate systems, policies and controls for a wider ambit of areas of ethical compliance than as presently enacted in Singapore under r 35(4) of the PCR 2015.

42 Enacted in 2004, s 140(3) of the NSW Legal Profession Act 2004[146] ("NSW LPA 2004") created the obligation on all incorporated

146 Act 112 of 2004.

legal practices to appoint at least one "legal practitioner director" to, *inter alia*:[147]

> [E]nsure that appropriate management systems are implemented and maintained to enable the provision of legal services by the incorporated legal practice:
>
> (a) in accordance with the professional obligations of Australian legal practitioners and other obligations imposed by or under this Act, the regulations or the legal profession rules, and
>
> (b) so that those obligations of Australian legal practitioners who are officers or employees of the practice are not affected by other officers or employees of the practice.

43 Because "appropriate management systems" was not defined under the NSW LPA 2004, the Office of the Legal Services Commissioner ("OLSC") worked with the relevant stakeholders and identified a set of ten objectives considered to be fundamental and which the "appropriate management systems" should address.[148] The ten areas were: (1) negligence; (2) communication; (3) delay; (4) liens/file transfers; (5) cost disclosure/billing practices, termination of retainer; (6) conflict of interests; (7) records management; (8) undertakings; (9) supervision of practice and staff; and (10) trust account regulations.[149] Notably, unlike r 35(4) of the PCR 2015, neither s 140 of the NSW LPA 2004 itself nor OLSC's guidelines limited the application of s 140 to only a small number of areas. In a 2010 paper, Prof Parker *et al* conducted an empirical study on the effects of requiring firms to self-assess their own implementation of "appropriate management systems" with the guidance of the regulator and possible review, and

147 Legal Profession Act 2004 (Act 112 of 2014) s 140(2) (note that the statute has since been repealed and replaced by the New South Wales Legal Profession Uniform Law Application Act 2014 (No 17 of 2014), and the equivalent provision is s 34); for an understanding of the regime under the former, see Christine Parker, Tahlia Gordon & Steve Mark, "Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37 *Journal of Law and Society* 466.

148 Christine Parker, Tahlia Gordon & Steve Mark, "Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37 *Journal of Law and Society* 466.

149 Christine Parker, Tahlia Gordon & Steve Mark, "Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37 *Journal of Law and Society* 466; see also Office of the Legal Services Commissioner, "Practice Management" <http://www.olsc.nsw.gov.au/Pages/lsc_practice_management/lsc_practice_management.aspx/> (accessed 5 June 2017).

found that it led to a decrease in complaints rates by an extremely commendable "full two thirds".[150]

44 Law firm ethical infrastructures are intended to function not as fool-proof measures but only *ex ante* to "support and encourage ethical behaviour"[151] of lawyers in the particular context of the particular law practice. In fact, in so far as they impose only the minimal (and oblique) obligation of putting in place systems, policies and controls (and no more), it can be argued that the burden on law practices in this regard is unlikely to be a heavy one. The benefits, on the other hand, as shown by the experience in NSW, can potentially be significant. This being the case, and especially since it already has (limited) application in Singapore under r 35(4) of the PCR 2015, there is surely merit in promoting a wider rather than narrower conception of law firm ethical infrastructures. Again, in the Singapore context, this needs not require complex amendments to the existing regime. The framework already exists. All that is required is that the limitation under r 35(4) of the PCR 2015 of its application to only the three areas of "client's money", "conflicts of interests" and "client confidentiality" be removed or for the number of areas of its application be expanded.

IV. Conclusion

45 It is undeniable that the context of legal practice has changed considerably. With that, it is perhaps time that the *status quo* with regard to the traditional models of only disciplining individual lawyers should be properly reconsidered. There are good reasons to believe that some form of law firm discipline will better promote ethical compliance in the legal services industry. While the question as to the appropriate degree of acceptance of the concept is one of policy which perhaps may, ultimately, only be answered through a view being taken by the lawmakers and the regulators, it cannot be gainsaid that there are obvious merits to the adoption of law firm discipline in promoting ethical compliance amongst legal services providers especially in response to the changing environment of the industry today. Indeed, as has been shown from a review of the existing professional conduct rules, the concept of law firm discipline has recently seen acceptance in Singapore, even if it is not clear that such acceptance was a conscious decision on the part of the lawmakers and regulators. To this end, it is submitted that, in the meanwhile, and at minimum, the existing

150 Christine Parker, Tahlia Gordon & Steve Mark, "Regulating Law Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales" (2010) 37 *Journal of Law and Society* 466.

151 Christine Parker *et al*, "The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour" (2008) 31 UNSWLJ 158 at 172.

disciplinary regime in the Singapore legal services industry ought to be reviewed to ensure a basic coherence in the implementation of law firm discipline in Singapore.