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# Law Firm Ethics in the Shadow of Corporate Social Responsibility

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## I. INTRODUCTION

The notion that corporations should conduct their businesses in ways that respect the societies in which they operate has been widely discussed and analysed in recent years. Although concepts such as “Corporate Social Responsibility” (CSR) and “Corporate Citizenship” are highly contested,<sup>1</sup> the reality is that many corporations are engaged in activities which go far beyond Milton Friedman’s well-known claim that “there is one and only one social responsibility of business . . . to increase its profits so long as it stays within the rules of the game . . . .”<sup>2</sup> As the American Law Institute put it: “Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business, . . . may take into account ethical considerations that are reasonably regarded as appropriate to the reasonable conduct of business.”<sup>3</sup> Corporations are thus integrating social and environmental concerns in their business operations and in their interaction with their stakeholders.<sup>4</sup> Some apply human rights standards as part of corporate activities,<sup>5</sup> or direct their workers to adhere to fair business practices.<sup>6</sup> As a result, the social and ethical responsibilities of

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1. Jeremy Moon, Andrew Crane, & Dirk Matten, *Can Corporations be Citizens? Corporate Citizenship as a Metaphor for Business Participation in Society*, 15 BUS. ETHICS Q. 429, 432-34 (2005). See generally, CORPORATE SOCIAL RESPONSIBILITY: READINGS AND CASES IN A GLOBAL CONTEXT (Andrew Crane, Dirk Matten, & Laura J. Spence eds., 2008); Symposium, *Corporate Social Responsibility: Paradigm or Paradox?*, 84 CORNELL L. REV. 1133 (1999).

2. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (40th anniversary ed. 2001); cited in Milton Friedman, *The Social Responsibility of Business is to Increase Profits*, N.Y. TIMES MAG., 13 Sept. 1970 at SM17.124.

3. PRINCIPLES OF CORPORATE GOVERNANCE § 2.01(b)(2) (1994).

4. Commission of the European Communities, *Promoting a European Framework for Corporate Social Responsibility*, at 18, COM (2001) 366 final (July 18, 2001); Commission of the European Communities, *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility*, at 2 n.1, COM (2006) 136, final, (Mar. 22, 2006).

5. For example, the Apple Supplier Code of Conduct instructs all suppliers to “uphold the human rights of workers, and treat them with dignity and respect as understood by the international community.” Apple, Inc., *Apple Supplier Code of Conduct*, available at [http://images.apple.com/supplierresponsibility/pdf/Supplier\\_Code\\_of\\_Conduct\\_V3\\_1.pdf](http://images.apple.com/supplierresponsibility/pdf/Supplier_Code_of_Conduct_V3_1.pdf). The Code also prohibits “discriminat[ion] against any worker based on race, color, age, gender, sexual orientation, ethnicity, disability, religion, political affiliation, union membership, national origin, or marital status in hiring and employment practices such as applications for employment, promotions, rewards, access to training, job assignments, wages, benefits, discipline, and termination.” *Id.*

6. General Electric’s “The Spirit and the Letter” is a comprehensive Code of Conduct that covers topics such as prohibition of “improper payments,” preventing money-laundering, compliance with competition and anti-trust laws, environment and safety protection, and community support. General Electric, *The Spirit and the Letter*, GECOMPANY.COM, Table of Contents, available at <http://files.gecompany.com/gecom/citizenship/pdfs/TheSpirit&TheLetter.pdf>.

corporations have become “key issues” in discussions about their societal role.<sup>7</sup>

The “socially responsible” activities in which corporations engage are many and varied, which may explain why there is no consensus on a single definition of CSR. Are they truly voluntary or are they the result of external pressures?<sup>8</sup> More importantly, though, the motivations for what might be regarded as CSR activities are also difficult to pin down.<sup>9</sup> Are they designed to “do good,” however defined, or are they adopted in order to help the company do well by doing good? Ronen Shamir, for example, sees CSR as a manifestation of “world capitalism”—a mechanism that facilitates the transformation of CSR from a device imposed *on* the market into one which becomes an element *of* the market, thus fusing profitability and social benevolence.<sup>10</sup> Hence, we are talking about “market embedded morality,” in which the ethics and morality of corporate activities strengthens and sustains their immediate market interests and in the long run reinforces visions of neo-liberal citizenship and responsible social action.<sup>11</sup> What is clear is that CSR has been institutionalized as a business issue, and often discussed in the context of profitability and other business and financial advantages such activities may render to the corporation.<sup>12</sup>

CSR practices apply not only to the corporation itself, but also to its suppliers. Through chain of supply policies, corporations impose socially responsible norms to which their suppliers must adhere. CSR practices are also beginning to incorporate legal services procured by the corporation from outside counsel; hence corporations are gaining increasing control over the work of lawyers in a variety of areas, some of which had traditionally been under the control of the state or of law societies and bar associations.

In this paper, we examine the development of CSR practices involving outside counsel and its implications for lawyers’ professionalism. In section II, we describe the phenomenon of CSR as part of global capitalism and private regulation, with a focus on chain of supply policies applied to lawyers’ services. Section III describes and analyzes the main areas in which CSR policies pertain to lawyers—namely Outside Counsel Guidelines regarding diversity and flex time employment requirements, ethics and the justice system, ADR, and reporting and gate keeping. Section IV provides further analysis. Section V then discusses the implication of such developments on notions of professionalism,

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7. Doreen McBarnet, *introduction to THE NEW CORPORATE ACCOUNTABILITY* 9, 9 (Doreen McBarnet, Aurora Voiculescu, & Tom Campbell, eds., 2007).

8. *Id.* at 10, nn.3-5.

9. BRYAN HERRIGAN, *CORPORATE SOCIAL RESPONSIBILITY IN THE TWENTY-FIRST CENTURY: DEBATES, MODELS AND PRACTICES ACROSS GOVERNMENT, LAW AND BUSINESS* 20-21, 23 (2010).

10. Ronen Shamir, *Socially Responsible Private Regulation: World Culture or World-Capitalism?*, 45 *LAW & SOC’Y REV.* 313, 331 (2011).

11. Ronen Shamir, *The Age of Responsibilization: on Market Embedded Morality*, 37 *ECON. AND SOC’Y* 1, 1-19 (2008).

12. McBarnet, *supra* note 7, at 10.

and questions assumptions about lawyers' independence against global capitalism, where social norms are increasingly considered market assets. We conclude by expressing cautious optimism about the power of the market to redefine lawyers' public commitments.

## II. CSR, CHAINS OF SUPPLY, AND OUTSIDE COUNSEL GUIDELINES

Corporate Social Responsibility is a form of private regulation. Private regulation is an amalgam of norms originating in private corporations that aim to set behavioral standards in an array of contexts.<sup>13</sup> Under this paradigm, state and public instruments of authority lose their monopoly status and compete in the market of authorities with soft-law instruments such as guidelines, codes, and standards.<sup>14</sup> Professor Tim Bartley describes this system as encompassing "coalitions of non-state actors," who take part in a comprehensive web of norm-setting activities. They "codify, monitor, and in some cases certify firms' (i.e., industrial and commercial entities) compliance with labor, environmental, human rights or other standards of accountability."<sup>15</sup> These new forms of "global governance" fill the vacuum left by the lack of formal regulatory capacity at the global level.

As global corporations and other large corporate entities institutionalize, refine and redefine their CSR policies, they may also assume responsibility for their business partners, including their suppliers.<sup>16</sup> Some have begun to regulate other commercial actors with which they conduct business and make them part of their own socially responsible policies and commitments. Hence codes of conduct imposed upon suppliers are part of this global governance regime and form a system of private regulation.<sup>17</sup> Indeed, the supply chains used by corporations are often not regulated by public law. Instead, corporations regulate their suppliers through standard setting and contracts.

Requirements that are "traditionally the subject of government regulation," including environmental standards, workers' rights and the like are replacing public governance through private contracting with corporations' chains of

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13. See Larry Cata Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739, 1739 (2007).

14. Shamir, *supra* note 11, at 314 (stating that the "novelty of CSR is that it encourages commercial and civic entities to promulgate social and environmental norms that were heretofore thought to be the domain of public authorities in general and of state governments in particular").

15. Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 AM. J. SOC. 297, 298 (2007).

16. See, e.g., European Commission, *Sustainable and Responsible Business: Corporate Social Responsibility*, available at [http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm) (last visited Oct. 6, 2012).

17. See, e.g., Miles Kahler & David A. Lake, *Globalization and Governance*, in GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION 1-30 (Miles Kahler & David A. Lake eds., 2003).

suppliers, in what has been characterised as the “New Wal-Mart Effect.”<sup>18</sup> In this way, private regulation is turned into a transnational phenomenon. “Chain of supply” policies, under which corporations demand that their suppliers meet standards similar to those imposed upon themselves, are thus key to understanding the impact of CSR practices on notions of lawyers’ professionalism.<sup>19</sup>

One area in which corporations, particularly global corporations, are exercising this mechanism of control is private legal practice. Since many corporations now utilize outside law firms to conduct their legal affairs,<sup>20</sup> they have developed “guidelines,” “procedures,” “codes of conduct,” “manuals,” or “best practices” memoranda (hereinafter “guidelines”) through which they apply obligations upon these lawyers.

Norms concerning lawyers’ professional practice that had formerly been under the domain of law societies and state bodies, or left to the discretion of lawyers and their firms, are increasingly incorporated into these guidelines, which lawyers are expected to follow.

Whether these chains of supply practices originate from the corporations themselves or they are a reaction to state practices of procurement and outsourcing which require supplies to meet certain standards, legal services are being considered as any other good purchased by the corporation. And since lawyers have come to be treated as other “suppliers,” outside counsel guidelines need to be understood not just as a private arrangement between two individual parties who wish to settle on their terms of engagement,<sup>21</sup> but as a form of private regulation.<sup>22</sup>

As we have demonstrated in an earlier paper, the topics included in such guidelines vary to a great extent.<sup>23</sup> Although the guidelines consist of instructions that are traditionally part of bilateral negotiations between lawyers and clients, namely fees and billing terms, they also incorporate directives on topics that

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18. Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913, 918 (2007).

19. Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137, 2137 (2010).

20. The largest 5% of corporations control more than half of the \$100 billion corporate legal services market. Eighty percent of this market is controlled by 200 General Counsels. Mark Harris, *From the Experts: Seize the Day*, CORP. COUNS. (Sept. 20, 2011).

21. To be sure, contract and regulation are not dichotomous. As Collins suggests, contract may be one of the methods of private regulation. HUGH COLLINS, *REGULATING CONTRACT* (1999). In addition, the boundaries of contract and regulation become murky when “the power of the purse” mixes with a regulatory function. See generally CHRISTOPHER MCCRUDDEN, *BUYING SOCIAL JUSTICE: EQUALITY, GOVERNMENT PROCUREMENT AND LEGAL CHANGE* (2007) (discussing procurement activities by governments). We recognize this point; nevertheless, in the context of lawyer client relationship, this relationship had been formed by way of the traditional mode of contract, governed by “public” regulation by law societies or states.

22. Shamir, *supra* note 11, at 19. GLOBALIZATION AND GOVERNANCE (Aseem Prakash & Jeffrey A. Hart eds., 1999).

23. Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers’ Ethics*, 80 FORDHAM L. REV. 2577 (2012).

constitute the core of lawyers' ethics, such as conflict of interests, client confidentiality, and professional conduct during litigation and discovery proceedings. They also relate to matters that have been part of law firms' business prerogatives, such as workplace employment diversity or "work-life balance/family friendly" employment policies. In some case studies, we have identified guidelines that require lawyers to act as "gatekeepers" for the client, and to report misbehavior of corporate officers to management. Many guidelines state that they expect their lawyers to act "ethically" and with "integrity"—an interesting point in and of itself, as one would think such requirements ought to be obvious.

In some cases, the guidelines clearly protect the direct and immediate interests of the client, as recognized in conventional corporate law and lawyers' ethics. In other words, lawyers are expected to maximize the interests and benefits of their corporate clients (financial, reputational, and so on), regardless of potential adverse consequences to others. But there are also requirements that do not straightforwardly abide by this rationale. These include workplace diversity requirements in outside counsel law firms, prohibition on using obstructive and coercive tactics in litigation, and duties to protect the integrity of the justice system, to consider and favor negotiation and ADR over contentious adversarial strategies, and in general to act "ethically."

At first sight, obligations of this sort seem to deviate from the dominant approach to legal representation. They do not necessarily further the immediate interests of the client and more so, appear to foster concerns beyond those of the client. However, as will be discussed ahead, these guidelines do not abide by the private client/third party dichotomy, nor by the self-interest/altruistic divide. They embody a mixture of norms that target multiple objectives and a variety of audiences: some promote the direct interests of the corporate client, others address the needs of other stakeholders.

In other words, when lawyers provide professional legal services to their corporate clients, they are increasingly bound by a set of norms and codes of conduct that embody notions of "social responsibility" that originate from their clients' understanding of their own social responsibility. No wonder that outside counsel have become "sensitive to client preferences."<sup>24</sup> As explained above, most CSR requirements we have examined are imposed upon lawyers as part of the corporation's "chain of supply" policies, aimed at ensuring that all its commercial activities are bound by these "socially responsible" norms. This "market embedded morality" appears to be a suitable framework for these norms: the ethics and morality of corporate activities strengthens and sustains their immediate market interests. While these developments are not yet typical and

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24. Donald C. Langevoort, *Getting (Too) Comfortable: In-House Lawyers, Enterprise Risk and the Financial Crisis*, at 2 (Georgetown Law & Econ. Research Paper No. 11-27, 2011), available at <http://ssrn.com/abstract=1932398> (referring to Marc Galanter & William D. Henderson, *The Elastic Tournament: The Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867 (2008)).

only partially empirically substantiated, they bear wider theoretical implications on the relationship between lawyers and global corporations, as they provide clear examples of the reworking of traditional relationships between lawyers, clients, and regulatory regimes.

### III. OUTSIDE COUNSEL GUIDELINES AND CORPORATE SOCIAL RESPONSIBILITY

In this section, we focus on those parts of Outside Counsel Guidelines that address broad societal concerns. We set these out in four broad categories. The first is (A.) workplace diversity and flex-time requirements. While promoting diversity in the legal profession has become commonplace, very different approaches have been adopted in Guidelines. Some involve the provision of information and education about diversity. Others are more prescriptive and mandatory, and intrude much more directly into law firm practice. In addition to setting out some of these approaches, we provide as a case study Walmart's diversity and flex-time requirements. The second category is (B.) general and specific ethical requirements to promote and support the system of justice. These also range in approach, with some using general, aspirational language, and others addressing more specific issues such as the discovery process. The third and fourth categories we deal with more briefly. They are (C.) policies to consider and favor negotiation and ADR over contentious adversarial strategies and (D.) reporting and gate-keeping duties.

Data collected for this article, which is based on a review of over twenty sets of Outside Counsel Guidelines and interviews with twenty in-house and outside lawyers and general counsel in the United States, the United Kingdom and Israel, confirms the significant role played by in-house counsel in ensuring compliance with these procedures. Their once inferior professional status has been elevated and now they allocate, guide, control, and supervise the work of outside counsel. They also often play a key role in the procurement of outside law firms.<sup>25</sup> They have been encouraged to use their client's economic power to exercise this control.<sup>26</sup> Hence "studying the in-house world today is central to the study of professional responsibility more generally."<sup>27</sup>

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25. David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney/Client Relationship*, 62 CURRENT LEGAL PROBLEMS 669 (Colm O'Conneide ed., 2009). In-house counsel "normally have absolute control over the selection and management of outside counsel." Omari Scott Simmons & James D. Dinnage, *Inkeepers: A Unifying Theory of the In-House Counsel Role*, 41 SETON HALL L. REV. 77, 114 (2011); see also Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC'Y REV. 457 (2000).

26. Harris, *supra* note 20.

27. Langevoort, *supra* note 24, at 3.

## A. DIVERSITY

A significant number of the corporations in our study have enhancing diversity within their outside counsel firms as one of their stated objectives. Some diversity programs have been around for a long time. For example, AT&T's Global Supplier Diversity Program began in 1968.<sup>28</sup> However, in the United States, the proliferation of diversity initiatives may reflect the strength of the "legal diversity movement" that has been around for only a decade or two. Charles Morgan, General Counsel of AT&T, is credited with the idea of encouraging corporations to request, in their retention guidelines, that outside counsel advance the cause of diversity.

Morgan's target audience was the members of the Association of General Counsels. Originally, the Association comprised the top 100 manufacturing corporations in the United States. Subsequently, other corporations—including banks, insurance companies, and service companies—joined its ranks. Morgan would report regularly to the Association on the progress being made—the number of corporations adopting the diversity pledge—and believed that the pledge was having an impact.

The American Corporate Counsel Association (ACAA) also promotes diversity. ACCA's mission includes creating an environment that will help to "instill diversity as a core value throughout ACCA."<sup>29</sup> As part of this mission, ACCA assists corporate-counsel members to retain more diverse outside counsel. To do so, ACCA has developed an "Outside Counsel of Color Locator System." The organization's mission includes a "push to encourage hiring and retention at the highest levels of authority, and not simply at entry level."<sup>30</sup>

As a result of Outside Counsel Guidelines, arguably, the diversity initiative has become "the most institutionalized promotion of higher ethical standards."<sup>31</sup> Many corporations also view diversity as being in their own commercial interests. Lucent Technologies Law Department, for example, stated that diversity provides the company with "a competitive advantage through high-quality, cost-effective law services."<sup>32</sup> Noting that "Women Minority Disabled Veterans Business Enterprise" (WMDVBE)<sup>33</sup> law firms charge "generally lower"

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28. CALIFORNIA MINORITY COUNSEL PROGRAM, DIVERSITY BUSINESS MATTERS: 2011 CORPORATE PROGRAMS SUPPORTING BUSINESS FOR DIVERSE OUTSIDE COUNSEL 4 (2011); see also Erik Cummins, *Diversity: A Defining Goal of AT&T's Legal Team*, 2010 BAR ASS'N OF S.F., S.F. ATTORNEY 33.

29. *Corporate Counsel*, LAWYERS FOR ONE AMERICA, (Nov. 8, 2012, 3:59) [http://www.lfoa.org/barnone/barnone\\_declaration\\_corp.html](http://www.lfoa.org/barnone/barnone_declaration_corp.html).

30. *Id.*

31. Telephone Interview with Dan Sandman, Former General Counsel, U.S. Steel (May 17, 2011).

32. LAWYERS FOR ONE AMERICA, *supra* note 29.

33. WMDVBE is a term for a diversity standard often used by public and government entities in procurement procedures. See, e.g., *Report on Utility Procurement of Goods, Services and Fuel from Women-, Minority-, and Disabled Veteran-owned Business Enterprises*, 2006 CAL. PUB. UTIL. COMM'N, available at <http://docs.cpuc.ca.gov/published/Report74155.htm>.

rates but have “very talented named partners,” Pacific Gas & Electric Company (PG&E) stated that “diversity makes good sense.”<sup>34</sup> Microsoft’s diversity plan encapsulates the motivations for this policy. The plan is based on three “core convictions”:<sup>35</sup> (1) diversity in legal teams is a business necessity; (2) the legal profession’s progress in expanding diversity has been slow;<sup>36</sup> and (3) “we’re in this together.” This latter point is expressed in the following, technically inaccurate but, very interesting terms by Microsoft’s General Counsel, Brad Smith: “corporate legal departments are of course the client when it comes to working with large law firms,”<sup>37</sup> but we work “collectively as part of a common team. To a huge degree we have common needs.”<sup>38</sup> The strong commitment to diversity and inclusion is explained by D. Wayne Watts, General Counsel of AT&T: “I fundamentally believe that it is absolutely the right thing to do from the standpoint of the lawyers in the legal department, for the company itself, and for its shareholders.”<sup>39</sup>

### 1. DIVERSITY PROMOTING PRACTICES

Corporations have adopted a variety of approaches to promoting diversity in the legal profession. Some corporations monitor their spending on legal services. PG&E, for example, spent over 30% of their 2009 outside counsel budget for litigation on certified WMDVBE law firms.<sup>40</sup> PG&E also measures and reports its spending with women and minorities at “majority owned law firms.” In 2009, this came to just under 10%.<sup>41</sup> Southern California Gas Company (SoCalGas) and San Diego Gas & Electric (SDG&E) similarly record their spending with women and minority-owned law firms. In 2009, this constituted 10.4% of the utilities’ total legal spend.<sup>42</sup> Forty-eight percent of the utilities’ total spend was with minority and female attorneys at majority-owned law firms in 2009.<sup>43</sup>

Some corporations seek merely to educate and inform. BellSouth Corporation Legal Department, for example, has a Diversity Committee that focuses primarily on “sharing the message of diversity to the legal community at large.”

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34. LAWYERS FOR ONE AMERICA, *supra* note 29.

35. CALIFORNIA MINORITY COUNSEL PROGRAM, *supra* note 28, at 26.

36. *Id.* at 27. According to Brad Smith, General Counsel, writing in 2008, only 18% of the partners of the nation’s law firms are women; only 5.4% minorities. *Id.*

37. *Id.* at 28.

38. *Id.*

39. See Kara Mayer Robinson, *AT&T: Diversity in Focus*, 12 DIVERSITY & THE BAR 18, 23 (2010), available at <http://www.mcca.com/index.cfm?fuseaction=page.viewPage&pageID=2043>.

40. CALIFORNIA MINORITY COUNSEL PROGRAM, *supra* note 28, at 34.

41. *Id.* at 38. Of the \$37.1 million spent with law firms, about \$28.8 million was spent with majority owned law firms. Of this amount, \$2.5 million was spent with women, minorities or disabled veteran attorneys and paralegals. *Id.*

42. *Id.* at 42. If one particularly large litigation case is removed from the figures, the percentage would have been 22%. *Id.*

43. *Id.* at 44.

The Department does this in a variety of ways, including holding an event that “brought together senior in-house lawyers from a wide variety of Fortune 500 companies to address issues and challenges relating to implementing and maintaining diversity initiatives in the legal profession.”<sup>44</sup> The event focused on exchanging “practical ideas on how to promote diversity in corporate legal departments[,] as well as in law firms retained by legal departments.”<sup>45</sup> The Department met with Mayer, Brown & Platt and corporate chief legal officers of Comerica, Illinois Tool Works, Northern Trust Corporation, United Airlines, and Walgreens to explain the Statement of Principle on Diversity in the Workplace to which 293 companies have signed.<sup>46</sup> The Statement’s signatories acknowledged that “promoting diversity is essential to the success of our respective businesses. It is also the right thing to do.”<sup>47</sup>

Similarly, in 1999, Lucent Technology’s General Counsel contacted and met with managing attorneys from eight of Lucent’s top-billing outside counsel firms. The purpose was to “establish an on-going dialogue that confirmed Lucent’s commitment to diversity and to determine the level of commitment from the firms visited.”<sup>48</sup>

However, many corporate clients are far more prescriptive in imposing diversity requirements on their outside counsel, or in establishing mandatory reporting requirements. Some years ago, General Motors sent letters to over 700 of its outside law firms directing them to include women and lawyers of color on GM legal projects.<sup>49</sup> Bank of America added a reporting requirement in its 2011 version of its Outside Counsel Guidelines. Wells Fargo Bank, which retains around thirty minority-owned law firms each year for its legal work,<sup>50</sup> requires that all its firms “regularly report” overall minority lawyer statistics, and “mandates monthly reports indicating the dollar amount of the bill attributable to the work of minority partners and/or associates on each matter.”<sup>51</sup> Similarly, to monitor outside counsel’s diversity commitment, Wachovia outside counsel are requested to submit certain information regarding the use of women and minorities as well as other relationship data.

International Paper (IP) Company’s Counsel Retention Policy also calls on outside counsel to provide a copy of the firm’s policy regarding diversity, to return a questionnaire, and update in-house General Counsel on progress towards increasing diversity and how these efforts may affect IP.<sup>52</sup> The questionnaire asks

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44. LAWYERS FOR ONE AMERICA, *supra* note 29.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

how many attorneys there are in the firm, and how many are women, African American, Hispanic, Native American, Asian Pacific, or Asian Indian. The firm is asked to describe its recent actions to increase diversity within the firm, including efforts to actively recruit women and minorities; to identify any women and minority partners and/or associates within the firm and to describe whether they have recently worked on International Paper matters, or would be qualified to do so; and finally, to state whether the firm has participated in diversity programs sponsored by the ABA, the National Bar Association, the Hispanic Bar Association, or other organizations, or has recently participated in any minority job fairs.<sup>53</sup>

Another example is Bank of America (BoA), whose Outside Counsel Guidelines also address the issue of “Minority and Women Outside Counsel.” This reflects the BoA Code of Ethics which has a section on “Diversity and Inclusion,”<sup>54</sup> and the BoA website which states that “[d]iversity and inclusion are central to our company’s core values.”<sup>55</sup> The Bank of America Legal Department has also established a Diversity Business Council to promote diversity within the department. A subcommittee of the Council initiates and monitors departmental efforts related to diversity issues in outside counsel retention. The aim in the Outside Counsel Guidelines is to “promote the use of outside counsel reflecting the diversity of Bank of America’s customers and associates.”<sup>56</sup> BoA provides its associates with a list of minority- and women-owned law firms and “encourages its attorneys and its clients to use them.”<sup>57</sup> BoA expects its outside counsel to have women and minority partners and associates who will work on BoA matters.

The wording in the 2009 and 2011 versions of BoA’s Outside Counsel Guidelines on Diversity has been altered. It is worth setting out the 2009 version in full:

Bank of America desires to encourage and expand the inclusion of minorities and women within and among all law firms in the United States providing legal services to Bank of America. To this end, Bank of America sponsors regional and local programs designed to enhance the development and opportunities of women and minority attorneys.

The Legal Department, as part of its diversity mission, places a strong emphasis on partnering with those U.S. law firms and legal service providers that share Bank of America’s vision for increased diversity in the U.S. legal profession. In virtually all of our interactions with outside law firms, diversity is a front and center topic of discussion. Now more than ever, during times when financial

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53. *Id.*

54. BANK OF AM. CORP., CODE OF ETHICS 10 (2012).

55. *Diversity and Inclusion*, BANK OF AM., [http://careers.bankofamerica.com/learnmore/diversity.asp?cm\\_mmc=General\\_-\\_vanity\\_-\\_diversity\\_-\\_NA](http://careers.bankofamerica.com/learnmore/diversity.asp?cm_mmc=General_-_vanity_-_diversity_-_NA) (last visited Sept. 30, 2012).

56. LAWYERS FOR ONE AMERICA, *supra* note 29.

57. *Id.*

institutions and law firms face new and different pressures, conflicting priorities, and economic challenges, the Department feels strongly that it is imperative to reinforce the joint mission of diversity. The Legal Department expects the same level of commitment from its outside law firms in the U.S. now and in the future.<sup>58</sup>

The 2011 version omits the first paragraph entirely. It also omits the sentence beginning “In virtually . . . discussion.” It replaces the words “Now more than ever, during times . . .” with “During present times . . .”<sup>59</sup>

On the face of it, the 2011 version appears to downgrade the issue. Not only is the wording less aspirational, it has been moved from the body of the Procedures in the 2009 version into an Appendix in the 2011 version. However, there is a sting in the tail. The 2011 version adds the possibility of a reporting requirement: “For law firms in the United States, the Department may require a quarterly report of use of minority and women attorneys on all Company matters.”<sup>60</sup>

These kinds of reporting requirements appear to have had an impact. In 2006, Gap Inc. established a formal approach to its law firm diversity strategy. A “key component”<sup>61</sup> of the strategy has been the “Gap Inc. Law Firm Diversity Survey,” which Gap requires its U.S. based firms to complete.<sup>62</sup> This identifies the number of diverse and female attorneys in firms at all levels. In the 2010 survey, Gap inquired into law firms’ flexible work arrangements for the first time.<sup>63</sup>

Gap reports that law firms are responsive to completing the survey and do make changes needed to improve on “unacceptable statistics.”<sup>64</sup> Gap describes its approach as “a twist on the proverbial ‘carrot and stick’ approach!”<sup>65</sup> First, Gap sets out the expectation for improvement and threatens the loss of business over time. It gives an example of a small boutique law firm located in a state with a proportionally large Hispanic population. The firm had “notably poor” diversity numbers. After a “conversation” with Gap, the firm joined the local Hispanic Bar Association and later hired a Hispanic associate.<sup>66</sup> Gap favors this “proactive” approach.

AT&T appears to take a more systematic approach. AT&T’s corporate goal is to procure 21.5% of its total procurement from diversity-owned enterprises.<sup>67</sup> The company’s legal department has the same 21.5% goal for using MWVBE

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58. BANK OF AMERICA LEGAL DEPT., OUTSIDE COUNSEL PROCEDURES 10 (Oct. 2009).

59. BANK OF AMERICA LEGAL DEPT., OUTSIDE COUNSEL PROCEDURES 20 (Jan. 2011).

60. *Id.*

61. CALIFORNIA MINORITY COUNSEL PROGRAM, *supra* note 28, at 9.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. CALIFORNIA MINORITY COUNSEL PROGRAM, *supra* note 28, at 4.

law firms. The department encourages the hiring of diverse outside counsel in its engagement letters, which “put firms on notice that they need to push diversity in their representation of AT&T.”<sup>68</sup>

All law firms “report their timekeeping and billing in a software platform that requests specific information at the time-keeper level.”<sup>69</sup> Thus, the company, through its Legal Diversity Committee, initiated in 2007 by AT&T’s General Counsel,<sup>70</sup> monitors the billable hours of “racial minority, women and LGBT lawyers and paralegals.”<sup>71</sup> Through an automated invoicing system, AT&T tracks the diversity profiles of all those who work on AT&T matters.<sup>72</sup> Outside firms fill out a profile indicating the diversity of the staff, including who is the lead attorney and who is the relationship partner. With the cooperation of the firm, the system can break down the hours billed by different groups, including women, minorities and members of the lesbian, gay, and transgender communities. The metrics are summarized into a data report that is reviewed personally by AT&T’s General Counsel.<sup>73</sup>

AT&T thus receives “meaningful data” regarding the law firm’s internal diversification. For example, AT&T discovered that approximately 32% of hours billed are by women, 18% by minorities and 1% by members of the LGBT community.<sup>74</sup> Of the 222 relationship partners identified, 39 are women; 33 minorities.<sup>75</sup> AT&T also tracks its expenditures with MWVBE law firms.

As a result, AT&T is able to compare a “firm’s diversity metrics over time and with peer firms” and to track “the diversity of relationship partners and partners with leadership roles on specific matters.”<sup>76</sup> The company then advises law firms—over 550 letters were mailed in June 2010—“of monitoring, accountability and improvement expectations, and recognizes those with best performance.”<sup>77</sup> This enables AT&T to “influence the pipeline of diverse lawyers moving into leadership positions at law firms.”<sup>78</sup>

Law firms that bill above a threshold are treated as a relationship partner from whom AT&T requests “an even greater diversity commitment.”<sup>79</sup> These firms have to show that money spent on AT&T’s behalf also goes to support MWVBE businesses. It is unclear whether AT&T “penalizes” firms that are not meeting standards. Jeffrey E. Lewis, general attorney and Associate General Counsel,

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68. *Id.* at 5.

69. *Id.*

70. *Id.* at 6.

71. *Id.* at 5.

72. Cummins, *supra* note 28, at 34.

73. Robinson, *supra* note 39, at 20.

74. *Id.*

75. *Id.*

76. CALIFORNIA MINORITY COUNSEL PROGRAM, *supra* note 28, at 5.

77. *Id.*

78. *Id.* at 7.

79. *Id.* at 5.

referring to AT&T Services, states that the goal is “to improve transparency and coordination, as well as improve the firms’ diversity metrics.”<sup>80</sup> However, one of our interviewees at AT&T told us that compliance is monitored via “how we are billed, how we are treated both tactically and ethically by our counsel. We see it in the diversity of the lawyers who are assigned to us” and that any firm violating AT&T Outside Counsel Guidelines “would be subject to dismissal.”<sup>81</sup>

An even more proactive approach has been adopted by Microsoft. In 2008, Microsoft launched its “Law Firm Diversity Program” that uses a “pay for performance” approach. Under the plan, Microsoft’s seventeen “Premier Preferred Provider” law firms are eligible for an additional 2% quarterly or annual bonus in legal fees by achieving “concrete diversity results.”<sup>82</sup> Firms qualify if they increase the hours worked on Microsoft matters by minority lawyers (including women) by 2% or by increasing the total number of minority attorneys by 0.5%.<sup>83</sup> Microsoft imposes reporting requirements on the firms that take part. It also “strongly encourages” firms to include “Openly Gay, Lesbian or Bi[s]exual attorneys in their definition of diverse attorneys,”<sup>84</sup> although it recognizes that may not be legally permissible in some states.

Coca-Cola also has an incentive scheme to promote diversity. In 2008, the legal department created an annual award, “Living the Values.”<sup>85</sup> The first recipient in 2008 was Shook, Hardy and Bacon, a 500 lawyer law firm of which 55 are minorities and 200 are women; 35 of the women and 24 of the minority lawyers are partners.<sup>86</sup> Shook Chairman, John F. Murphy, agreed with the suggestion that “increased legal business” should be “the prize.”<sup>87</sup> Indeed, according to John Lewis Jr., Coca-Cola’s senior managing litigation counsel at the time, “[t]hose firms that most closely align with these values are those firms that will do better with us over time.”<sup>88</sup> Coca-Cola sends out questionnaires assessing the firms’ commitment to diversity and inclusion. Information is provided about the “commitment of senior management; representation of minorities and women in the firm generally and in leadership; success in hiring, development, promotion and retention of minority and women associates; creative partnering arrangements with minority and women-owned firms, and rigor in firm-wide ownership and participation in diversity programming.”<sup>89</sup>

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80. Robinson, *supra* note 39, at 21.

81. Interview with confidential source, AT&T (May 2011).

82. CALIFORNIA MINORITY COUNSEL PROGRAM, *supra* note 28, at 26.

83. See *Microsoft Pays for Diversity*, THE BLT: THE BLOG OF LEGAL TIMES (July 24 2008), available at <http://legaltimes.typepad.com/blt/2008/07/microsoft-pays.html>.

84. CALIFORNIA MINORITY COUNSEL PROGRAM, *supra* note 28, at 30.

85. Katherine Hayes Tucker, *Coke’s Counsel Get Diversity Directive*, LAW.COM (April 17, 2008), <http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=900005508910>.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

One of the interesting features of the Coca-Cola story is that it had a “painful encounter” with a racial discrimination class action in 1999 filed by current and former African-American employees.<sup>90</sup> The case was settled in 2000 and was followed by an oversight program by an independent District Judge. In 2005, the legal division elevated diversity as part of the corporation’s “mission status.”<sup>91</sup> According to Geoff Kelly, the goal of the legal department is “to become the gold standard for inclusion and fairness and, once there, to use it as a platform for relentless improvement.”<sup>92</sup>

## 2. WALMART: A CASE STUDY IN DIVERSITY AND FLEX-TIME REQUIREMENTS

One of the most ambitious diversity programs we discovered was the 2010 version of the Walmart Outside Counsel Procedures. Indeed, Walmart’s Legal Department claims to have established “an extremely strong brand in the diversity arena” since 2004.<sup>93</sup> Walmart’s approach encompasses both direct and indirect support for diversity within law firms, including the introduction of flex-time policies and procedures for the appointment of Relationship Partners.

Walmart measures outside law firms’ diversity not only “by good faith efforts and results.”<sup>94</sup> A broad set of detailed requirements are also imposed: “We measure law firm diversity by: overall law firm demographics; demographics of the firm’s Walmart team, good-faith efforts exhibited by the firm.”<sup>95</sup> The latter is defined further: “Good-faith efforts include, but are not limited to: having an active diversity committee, implementing a diversity plan, attending and sponsoring diversity events, increasing efforts to develop and retain women and minority attorneys, investing in the future of the profession (e.g. pipeline efforts).”<sup>96</sup> Walmart encourages Outside Counsel to utilize qualified diverse attorneys as appropriate when staffing Walmart matters.<sup>97</sup> Walmart’s diversity requirements are supplemented in significant ways. First, Walmart Guidelines state that “We are equally committed to promoting balanced work arrangements, as set out in our internal Flex-Time Policy.”<sup>98</sup> Under this policy, attorneys should be allowed to work a flexible or reduced-hours schedule, work from home, or job share.

Flex-time was first introduced within Walmart before becoming a requirement

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90. *Id.*

91. *Id.*

92. *Id.*

93. CALIFORNIA MINORITY COUNSEL PROGRAM, *supra* note 28, at 61.

94. *Id.* at 63.

95. WALMART LEGAL DEPARTMENT, OUTSIDE COUNSEL GUIDELINES 7 (Sept. 2010) (on file with authors).

96. *Id.* at 8.

97. *Id.* at 14. For more on Walmart diversity efforts, see Sheri Qualters, *Flextime Among the New Criteria for Clients’ Evaluation of Law Firms*, LAW.COM (Oct. 27, 2009), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202434954310>.

98. WALMART LEGAL DEPARTMENT, *supra* note 95, at 8.

for outside counsel in the 2010 Guidelines.<sup>99</sup> The development may have been influenced by the National Association of Women Lawyers survey which highlighted the challenges that women, especially women of color, face to advance their careers in the legal profession. It followed the participation of Jeff Gearhart, Executive Vice President and General Counsel, in the Project for Attorney Retention's Annual Diversity and Flexibility Connection Conference:

Balanced work schedules for attorneys are part of the business case for diversity at Walmart and we believe they will come to matter more and more to other large consumers of legal services for a number of reasons. First, attrition rates in large law firms, even in good economic times, are upwards of 20%—more than double those in most industries. The loss of a talented associate or partner due to the absence of balanced work arrangements results in lost institutional knowledge from both a firm and client perspective. This is not only disruptive to the continuity of work, it is also expensive—both to the law firm losing the attorneys and to the clients to whom the firm passes on those costs.

Moreover, the absence of flex-time arrangements have been shown to have seriously detrimental effect on the careers of women and minorities. In fact, minority female lawyers have the highest attrition rate of any group of lawyers and we are beginning to understand that a lack of work/life balance may play a major role for many of these attorneys.<sup>100</sup>

Many law firms used by Walmart are small: two-to-three partner firms providing localised services and local counsel in areas such as land use, casualty, and tort. In these firms, a flex-time requirement is fairly redundant.<sup>101</sup> However, many of the firms that provide Walmart with more complex services are large firms where the billable hour requirement—amongst other pressures—makes flexible working time something such firms might be reluctant to introduce. Walmart therefore may be able to influence a different approach to the work-life balance issue.

Flexible schedules may be in the interests of Walmart as well as those individuals who benefit from them, another example of enlightened self-interest: "We believe such arrangements promote attorney retention, facilitate the implementation of alternative-fee arrangements, and create a more balanced work environment."<sup>102</sup> They also prevent the loss of institutional knowledge and create a more balanced and inclusive work environment.

In the recent Guidelines, Walmart set a deadline of February 1, 2011 for firms to implement flex-time policies that the law firm deems appropriate for the firm

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99. See *Walmart Announces Flex-Time Requirements for Outside Law Firms*, 1 WALMART LEGAL NEWS 1,2 (Nov. 2009).

100. Jeff Gearhart, General Counsel's Message, 1 WALMART LEGAL NEWS 1, 1 (Nov. 2009).

101. Interview with Jeff Gearhart, Walmart General Counsel (Jun. 13, 2011).

102. WALMART LEGAL DEPARTMENT, *supra* note 95, at 8.

and its US-based attorneys. It backed up this demand with the threat to terminate its relationship with any firm that has not implemented such a policy by said date, unless the firm has communicated “an acceptable reason why the implementation of such a policy is not practical.”<sup>103</sup>

Secondly, the significance of these diversity and flex-time commitments is reinforced by Walmart’s requirements regarding Relationship Partners (RPs) and the way they are chosen. The RP is the primary contact with the law firm and manages the relationship. Walmart places much reliance on their RPs. He or she is also “responsible for the law firm’s compliance with these Guidelines.”<sup>104</sup> The RP’s duties include “taking demonstrable steps to advance diversity” and monitoring as well as advising on conflicts of interest.

Walmart has regular contact with their RPs via email or telephone. In addition, every other year, Walmart holds a two-day conference attended by RPs and a few other lawyers from the firm. On the first day, in plenary sessions, the CEO and General Counsel speak about general expectations. On the second day, there are “break-out” sessions within the various subject areas.

The list of five possible RPs Walmart will ask the outside counsel to produce “must contain at least one attorney of color, at least one female attorney, and at least one attorney who works on a flexible work schedule, provided the firm has at least one such attorney.”<sup>105</sup> Given that it has historically been more difficult for women and minorities to develop large and sustained books of business, when compared with their white male counterparts,<sup>106</sup> it can be seen that the Walmart Outside Counsel Guidelines address the lack of equal opportunity within the legal profession and law firm.

The significance of this is enhanced by Walmart’s requirement that the Walmart RP shall receive full “Origination Credit” for all Walmart work coming into the firm. This requirement is enforced by Walmart demanding, from a senior member of the firm, a certificate that the RP has received or will receive the credit. This is known as Origination Credit Certification and is considered to be a major intrusion into the internal affairs of the law firm.<sup>107</sup>

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103. WALMART LEGAL DEPARTMENT, *supra* note 95 at 8.

104. *Id.* at 9.

105. *Id.* at 10.

106. Interview with Jeff Gearhart, *supra* note 101.

107. The firm:

shall annually certify in writing before January 31 of each year that the Walmart RP have received or will receive full credit for all Walmart work brought into the firm in the preceding twelve-month period and that no such work has been disseminated within the firm without the knowledge and consent of the Walmart RP. Such certification shall be provided by the firms’ Chairperson, Managing Partner, General Counsel, Chief Financial Officer, or such other person in a position of firm leadership. In no instances shall the Walmart RP be required to provide the aforementioned certification.

WALMART LEGAL DEPARTMENT, *supra* note 95, at 10.

The Origination Credit Certification requirement reflects the fact that the Walmart legal department understands the way law firms work and reward their partners. The “coin of the realm” in law firms is client development. Many large law firms have many corporate clients. Walmart believes that this requirement regarding credit increases the likelihood that Walmart will be viewed as an important client and the RP receiving credit should reflect that. However, this also helps convert the rhetoric of diversity and flex-time into a reality.<sup>108</sup>

Walmart claims to have assigned, since 2005, women and lawyers of color, or both, to be Relationship Partners with its key law firms. This has “translated to a shift of millions of dollars in legal business that was previously in the hands of white male partners to deserving women and minority partners.”<sup>109</sup> Through its Origination Credit Certification requirement, Walmart was able to shift over \$60 million of outside counsel funds spent annually to the control of women and minority relationship partners in 2006 “simply by taking over the process of selecting those relationship partners.”<sup>110</sup> Recently, Walmart received anecdotal evidence that the initiative was not working as intended: Relationship Partners selected by Walmart were “being cut out of the loop in the process of work being directed to the firm and thereby not receiving the origination credit they deserved.”<sup>111</sup> The revised Outside Counsel Guidelines therefore instituted a requirement that all firms certify (by the CFO or managing Partner of the firm) that the Walmart Relationship Partner did in fact receive origination credit.<sup>112</sup> Walmart includes diversity as one of its three yardsticks for measuring outside counsel—the others being cost effectiveness and performance. According to Walmart, firms that score poorly “would be ineligible to receive new matters.”<sup>113</sup>

In September 2010, Walmart added flex-time requirements in support of its diversity programs and claimed that, mainly through its partnership with the Project for Attorney Retention (PAR), it “has become one of the primary drivers of the issue of balanced work arrangements in the legal profession.”<sup>114</sup> Changes in the Outside Counsel Guidelines require external law firms to develop and implement flex-time policies and require that at least one partner on a flexible work schedule be included among the names of the five candidates firms are required to submit for consideration for Relationship Partner. The list must also

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108. It has been estimated that in many firms origination credit ranges between 20% and 25% of billings, with credit in some firms as high as 33%. JOAN C. WILLIAMS & VETA T. RICHARDSON, *NEW MILLENNIUM, SAME GLASS CEILING? THE IMPACT OF LAW FIRM COMPENSATION SYSTEMS ON WOMEN* 33 (2010) (citing JOEL A. ROSE, *HALLMARKS OF A WELL-CONCEIVED PARTNER COMPENSATION SYSTEM*, IOMA'S REPORT ON COMPENSATION & BENEFITS FOR LAW OFFICES 5 (2009)).

109. CALIFORNIA MINORITY COUNSEL PROGRAM, *supra* note 28, at 50.

110. *Id.*

111. *Id.*

112. *Id.* at 63-64.

113. *Id.* at 64.

114. *Id.* at 63.

contain a woman and a person of color.

Of course, we cannot verify the actual impact of these policies. Indeed, in California, the California Minority Counsel Program believes that “[m]ore action is especially needed when it comes to opportunities for diverse outside counsel to attract business from corporate clients.”<sup>115</sup> While this is not the only element of the “diversity dialogue, it remains among the most important.”<sup>116</sup> However, there is no doubt that these requirements represent a major intrusion into the internal affairs of law firms. Moreover, they may directly affect the lives and careers of lawyers. And some, at least, clearly have made the promotion of diversity an important mission.

## B. ETHICS AND THE JUSTICE SYSTEM

Several corporations have policies that address issues of lawyers’ ethics and the justice system. For some corporations, the terms of engagement with outside counsel are included under CSR directives or ethics policies that apply to all the corporation’s suppliers.<sup>117</sup> GE, for example, has a broad directive for all its suppliers: The corporation’s “Integrity Guide for Suppliers, Contractors and Consultants”<sup>118</sup> includes detailed requirements on issues such as minimum age of employees, prohibition of forced labor, environmental compliance, health and safety, and human rights of employees,<sup>119</sup> and it concludes with a prohibition on the use of subcontractors or other third parties to evade legal requirements applicable to the supplier.

Apple’s “Supplier Code of Conduct” also has broad requirements regarding workers and human rights (including freedom of association, bargaining and unionizing), health and safety standards, environmental protection and ethics, which includes requirements regarding maintaining fair business standards, whistle blower protection, community engagement, protection of intellectual property, and non-tolerance of corruption.<sup>120</sup> Apple undertakes audits, some of which are “surprise audits,” of suppliers’ facilities. In 2011, there were 229

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115. *Id.* at 1.

116. *Id.*

117. See, e.g., *AT&T Global Supplier Diversity*, AT&T, available at <http://www.att.com/gen/corporate-citizenship?pid=17724> (last visited Sept. 30, 2012).

118. See *Integrity Guide*, Gen. Elec., available at [http://files.gecompany.com/gecom/citizenship/pdfs/ge\\_integrity\\_guide\\_suppliers\\_2009.pdf](http://files.gecompany.com/gecom/citizenship/pdfs/ge_integrity_guide_suppliers_2009.pdf).

119. This section includes the following requirements: Human Rights: Failure to respect human rights of Supplier’s employees; failure to observe applicable laws and regulations governing wage and hours; failure to allow workers to freely choose whether or not to organize or join associations for the purpose of collective bargaining as provided by local law or regulation; failure to prohibit discrimination, harassment and retaliation.

120. See APPLE SUPPLIER CODE OF CONDUCT (2010), available at [http://images.apple.com/supplier-responsibility/pdf/Supplier\\_Code\\_of\\_Conduct\\_V3\\_3.pdf](http://images.apple.com/supplier-responsibility/pdf/Supplier_Code_of_Conduct_V3_3.pdf).

audits, an 80% increase over 2010.<sup>121</sup> Despite this, however, there has been “criticism over how the workers are treated,”<sup>122</sup> which raises a general question about the effectiveness of such Codes. In response, Apple for the first time ever recently published its list of suppliers.<sup>123</sup>

One multinational beverage corporation we studied had a very short set of Outside Counsel Guidelines, but in addition to requiring outside counsel to “maintain the highest ethical standards at all times,” the corporation linked this requirement to its general Code of Business Conduct, which includes directives regarding insider trading, respecting privacy of business partners and consumers, prohibiting engagement in unfair, deceptive, or misleading practices and fair competition.

Other corporations have general policies that ask suppliers, including outside counsel, to adhere to universal principles, such as the Universal Declaration of Human Rights,<sup>124</sup> or demand lawyers’ adherence to the “highest ethical standards.”<sup>125</sup> Other corporations, for example Bank of America and the European Bank for Reconstruction & Development, also direct lawyers not to use “[c]oercive, dilatory or obstructive tactics” and discourage protracted motion practice.<sup>126</sup>

Although the policies mentioned above apply to all suppliers, our study focused mainly on corporate guidelines that address lawyers distinctively and attend specifically to lawyers’ professional conduct. The most prominent are directives contending with “over-zealous” adversarial representation, and duties towards the justice system and towards the adversary during litigation.

For example, Walmart has specific litigation guidelines that contain some of the most far-reaching limitations on the “legal toolkit” of its outside counsel. It instructs Walmart’s lawyers to

- Honor the spirit, intent, and requirements of all rules of civil procedure and rules of professional conduct[;]

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121. APPLE SUPPLIER RESPONSIBILITY 2012 PROGRESS REPORT (2012), available at [http://images.apple.com/supplierresponsibility/pdf/Apple\\_SR\\_2012\\_Progress\\_Report.pdf](http://images.apple.com/supplierresponsibility/pdf/Apple_SR_2012_Progress_Report.pdf).

122. *Apple Published Supplier Details for the First Time*, BBC NEWS BUSINESS (Jan. 15, 2012), <http://www.bbc.co.uk/news/business-16570765>.

123. See APPLE SUPPLIERS 2011 (2012), available at [http://images.apple.com/supplierresponsibility/pdf/Apple\\_Supplier\\_List\\_2011.pdf](http://images.apple.com/supplierresponsibility/pdf/Apple_Supplier_List_2011.pdf).

124. See, e.g., *Statement of Principles on Human Rights*, GEN. ELEC., (2009), [http://www.ge.com/files\\_citizenship/pdf/ge\\_statement\\_principles\\_human\\_rights.pdf](http://www.ge.com/files_citizenship/pdf/ge_statement_principles_human_rights.pdf) (last visited Nov. 8, 2012). The Statement recognizes that GE will endeavor to promote the recognition of basic human rights as defined in the Universal Declaration on Human Rights. The Apple Supplier Code of Conduct similarly refers to human rights as recognized under international human rights law: “Suppliers must uphold the human rights of workers, and treat them with dignity and respect as understood by the international community.” APPLE SUPPLIER CODE OF CONDUCT, *supra* note 120.

125. See Whelan & Ziv, *supra* note 23, at Appendix.

126. *Id.*

- Conduct themselves in a manner that enhances and preserves the dignity and integrity of the system of justice[;]
- Adhere to the principles and rules of conduct that further the truth-seeking process so that disputes will be resolved in a just, dignified, courteous, and efficient manner[;]
- Make reasonable responses to discovery request and not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-privileged information[;]
- Make good faith efforts to resolve disputes concerning pleadings and discovery[;]
- Agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect Walmart's legitimate rights[; and]
- Prepare and submit discovery requests that are limited to those requests reasonably necessary for the prosecution or defense of an action and not for the purpose of placing an undue burden or expense on another party[.]<sup>127</sup>

Although some of these points are open to interpretation and clearly require the exercise of professional judgment, the sanction for failing to adhere to these standards in connection with Walmart litigation is set out in no uncertain terms: "*Walmart will terminate its relationship.*"<sup>128</sup>

The discovery section in the guidelines goes into some detail:

- "Form objections [to discovery requests] are to be avoided. All objections must fully articulate the legal and factual basis for the objection."<sup>129</sup>
- Acting ethically When Conducting Discovery: "Outside Counsel are expected to make informed, ethical decisions with respect to discovery responses. [Outside Counsel] are required to conduct discovery in a manner that enhances and preserves the dignity and integrity of the justice system. Under no circumstances shall Outside Counsel engage in or encourage a violation of any discovery or ethical rule concerning the timely and appropriate disclosure of information to which a litigant is entitled."<sup>130</sup>
- "Sanctions for discovery violations will not be tolerated and may result in the immediate termination of Outside Counsel."<sup>131</sup>

These standards were the largely unchanged from the earlier guidelines. However, the 2010 guidelines require outside counsel to report significant developments on "any orders granting such discovery motions or awarding

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127. WALMART LEGAL DEPARTMENT, *supra* note 95, at 18.

128. *Id.* (emphasis in original).

129. *Id.* at 22.

130. *Id.*

131. *Id.* at 23.

sanctions.”<sup>132</sup>

It is not surprising that a significant topic in Walmart’s guidelines is lawyers’ conduct in the discovery process. Historically, Walmart had a reputation for repeated sanctions for discovery-related issues. This reputation may have been the result of unethical behavior, but it is also possible that the company was simply inundated with discovery requests and, as a result, found it difficult to keep up with them. For example, Walmart reported that it had been sued 4,851 times in the year 2000, or once every two hours; juries decided a case in which Walmart was a defendant about six times every business day; and Walmart lawyers listed 9,400 open cases.<sup>133</sup>

This probably explains why, about five years ago, Walmart established a Litigation Support Group, within the Litigation Group, with the sole task of processing discovery requests.<sup>134</sup> As one interviewee from a firm representing Walmart told us, the “whole philosophy has changed—we do care if we are sanctioned.”<sup>135</sup> Possibly as a result of this, since 2008, no firm has been terminated because of discovery sanctions.

### C. ADR

Many corporations have adopted policies that promote the use of alternative dispute resolution (ADR). More than 600 corporations have adopted the policy statement of the Center for Public Resources (CPR),<sup>136</sup> which is a major conduit for the promotion of non-court resolution of business disputes between member companies in the United States. CPR members must attempt to resolve disputes outside court and through the auspices of the organization, which offers many different forms of mediation.

It appears that many corporations, including Fannie Mae and Universal Underwriters Group have included a similar preference for ADR in their Outside Counsel Guidelines. For example, Bank of America’s Outside Counsel Guidelines stated that BoA “strongly supports” the use of ADR: “[m]ediation, binding arbitration and other forms of alternative dispute resolution have proven very beneficial to Bank of America.”<sup>137</sup> Although the 2011 version deletes these words, it still states that ADR “should be considered at the outset of any

132. *Id.* at 19.

133. Richard Willing, *Lawsuits a volume business at Wal-Mart*, USA TODAY (Aug. 13, 2001), <http://www.usatoday.com/news/nation/2001/08/14/walmart-usat.htm>.

134. Interestingly, in the UK, Herbert Smith “outsourced” the management of all its discovery work to Belfast, Northern Ireland. David Gold, *Litigators Must Adapt to New Practices or Perish*, THE TIMES (LONDON), Sept. 15, 2011.

135. Interview with confidential source, Walmart (June 13, 2011).

136. Todd B. Carver & Albert V. Vondra, *Alternative Dispute Resolution: Why It Doesn’t Work and Why It Does*, HARVARD BUS. REV., May-June 1994 at 120, available at <http://hbr.org/1994/05/alternative-dispute-resolution-why-it-doesnt-work-and-why-it-does/ar/1>.

137. BANK OF AMERICA LEGAL DEPARTMENT, OUTSIDE COUNSEL PROCEDURES 12 (Oct. 2009).

engagement and periodically thereafter.”<sup>138</sup> Walmart also encourages use of ADR techniques “in appropriate circumstances. Outside counsel should proactively identify and bring to the attention of the PIC all opportunities to utilize ADR.”<sup>139</sup>

#### D. REPORTING AND GATE-KEEPING

Some Outside Counsel Guidelines include explicit references to legislation that applies to the corporation and/or to lawyers. The most frequent is reference to the Sarbanes–Oxley Act (SOX),<sup>140</sup> which refers both to corporate obligations as well as to lawyers’ “up the ladder” reporting duties. Wachovia, for example, before it was taken over by Wells Fargo, incorporated within its guidelines a reporting duty that exists in SOX.<sup>141</sup> Others refer to “anti-corruption” legislation or legislation and regulation regarding “abusive tax shelters.”<sup>142</sup> A large Israeli law firm, for example, has been required to commit—under the Foreign Corrupt Practices Act—that it will not:

[P]ay, offer, or promise to pay or authorize the payment directly or indirectly . . . anything of value to any government official . . . political party . . . [or] candidate for political office for the purpose of inducing or rewarding favorable action . . . in any commercial transaction or in any governmental matter.”<sup>143</sup>

A rather unique obligation to act as “gate-keeper” is imposed by Walmart upon its outside counsel, expecting lawyers to oversee Walmart’s own personnel. In this case, the corporation’s Outside Counsel Guidelines require that the lawyer not only defy an unethical instruction of a corporate associate, but also report the incident to a designated corporate officer (“up the ladder” reporting duties).

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138. Compare *id.*, with BANK OF AMERICA LEGAL DEPARTMENT, OUTSIDE COUNSEL PROCEDURES (Jan. 2011).

139. WALMART LEGAL DEPARTMENT, *supra* note 95, at 25.

140. See generally the Sarbanes–Oxley Act of 2002, Pub .L. No. 107-204, 116 Stat. 745.

141. See WACHOVIA GENERAL GUIDANCE (on file with author).

Wachovia is also committed to conducting its business in accordance with the highest ethical standards . . . . If Outside Counsel reasonably believes that a material violation of law may have occurred, is occurring or is about to occur at or involving Wachovia, as set forth in Section 307 of the Sarbanes-Oxley Act of 2002 and the SEC Rules promulgated thereunder (see 17 CFR § 205), Outside Counsel must immediately and confidentially contact a Deputy General Counsel or Wachovia’s General Counsel and the responsible Legal Division Lawyer. *Id.*

142. BANK OF AMERICA LEGAL DEPARTMENT (2011), *supra* note 137, at 18, (“Bank of America Corporation and its affiliates (‘Bank of America’) requests law firm support in their efforts to meet its obligations under U.S. Treasury regulations regarding the disclosure and reporting of ‘potentially abusive tax shelters . . . Each failure to disclose or report a reportable transaction may result in significant penalties.’”).

143. The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1, *et seq.* The Export-Import Bank of the United States clarifies its commitment to adherence to anti-corruption laws. See, e.g., *Foreign Corrupt Practices Act (FCPA) and Other Anti-bribery Measures*, EXPORT-IMPORT BANK U.S., <http://www.exim.gov/products/policies/ForeignCorruptPracticesActFCPAandAnti-briberyMeasures.cfm> (last visited Oct. 5, 2012).

Under a section entitled “Ethical Conduct,” outside counsel is instructed as follows:

If Outside Counsel believes that a Walmart Associate (including any Legal Department personnel) has or will engage in illegal or unethical activity as a representative or agent of the Company, that person must immediately and confidentially contact the AGC-OCM (or a Walmart Associate General Counsel—Section Head or General Counsel, as appropriate). No Walmart associate has authority to instruct Outside Counsel to act in an unethical manner in connection with any Walmart matter.<sup>144</sup>

In other words, outside lawyers are being used as a mechanism to monitor improper behavior of the client’s agents, turning them into “lawyers–gate keepers.” This brings us back—full circle—to defining lawyers as owing heightened and special duties within the now completely privatized “soft legal system.”<sup>145</sup>

#### IV. ANALYSIS

A wide variety of motivations for these “socially responsible” aspects of Outside Counsel Guidelines can be identified. A good example of this is Walmart’s approach to ADR in order to achieve conciliatory settlements. In the past, Walmart had a reputation for contesting and aggressively disputing every claim made against it. However, it was recognized that this resulted not only in a reputational loss, but was also an enormous financial burden on the company. A more conciliatory and less aggressive stance could address both these problems.

Not surprisingly, however, given that one of the major elements in most Outside Counsel Guidelines is the control of billing, many terms and conditions, including those falling under the heading of “socially responsible,” are designed to achieve cost-effectiveness.<sup>146</sup> Bank of America, for example, seeks to facilitate the “cost-effective” resolution of claims and instructs outside counsel to ensure cost-effective service. Similarly, Walmart expects its outside counsel to provide “the highest quality legal services in the most cost-effective manner possible.”<sup>147</sup>

Many corporations and interviewees also indicate that socially responsible policies help the company to “do well by doing good.” As Walmart Guidelines put it: “Diversity is not just about doing the right thing,” it is in the company’s interests: “we believe that a culturally sensitive, diverse workplace is better able to serve our needs and produce better results.”<sup>148</sup>

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144. WALMART LEGAL DEPARTMENT, *supra* note 95, at 15.

145. See MODEL RULES OF PROF’L CONDUCT R 1.13 (2009) (Organization as client); see also Sarbanes–Oxley Act, *supra* note 140.

146. See generally Regan & Heenan, *supra* note 19.

147. WALMART LEGAL DEPARTMENT, *supra* note 95, at 6.

148. *Id.*, at 7.

Indeed, a clear impression drawn from interviews with law firms is that, if “doing good” corresponds with “doing well” for the corporation, there is a higher probability that the policy will be enforced. This seems to be the case with diversity requirements: They are not only “the right thing to do,” but also considered good business practice.<sup>149</sup> Indeed, one large company explains that its:

Legal Division is committed to making diversity a competitive advantage within our organization by, among other things, ensuring that our internal workforce and the outside lawyers working on our matters reflect the diverse community that is our consumer base . . . Law firm partners will also be expected to provide periodic reporting . . . evidencing progress in alignment to the Company’s diversity goals.<sup>150</sup>

Likewise, what seems to be fair litigation policy—early and prompt conflict resolution, preference for settlements, avoidance of coercive, dilatory or obstructive discovery proceedings, prohibition of protracted motion practice—can be regarded both as good ethical standards, as well as good business tactics.

Arguably, inasmuch as Outside Counsel Guidelines refer to notions of “good citizenship,” they have also been transformed into “market assets” of the corporation, i.e., have become a commodity in their commercial activity. CSR codes, guidelines and norms are ever-more becoming an inherent element in corporations’ business opportunities and risk-management tactics. They are phrased in terms of “cost effectiveness” and “good business” practices. In fact the codes we examined refer to “high ethical standards” and “cost effectiveness” in the same breath.<sup>151</sup> Similarly, they refer to commitments to social diversity (employing women and minorities) as a means not only for fairness but also for “better business results.” This entanglement between “doing good” and “doing well” permeates the codes of conduct. They also appear in the interviews we conducted with general counsels and others in a number of these corporations.

## V. PROFESSIONAL REGULATION, LAWYERS’ INDEPENDENCE, AND CSR

What lessons can we draw from the corporate practices we have identified to the question of lawyers’ ethics and professionalism? In this section we suggest three ways to connect the more traditional understandings of the lawyer client relationship and CSR as manifested by Outside Counsel Guidelines described above. The first conflates the traditional notion of *lawyer independence* from the client by questioning its suitability to serve as a model for ethical discourse; the

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149. Interview with American General Counsel (July 2011).

150. *Id.*

151. See, e.g., BANK OF AMERICA LEGAL DEPARTMENT (2011), *supra* note 137, at 1 (“The Department employs highly skilled outside counsel who have a strong commitment to the success of Bank of America, to upholding standards of professional and ethical conduct, and to ensuring timely, responsive and cost-effective service.”).

second builds on this analysis by focusing on the role of *in-house counsel*; the third suggests to look at *legal ethics as an “asset” in the market for legal services*.

#### A. CSR AND LAWYERS' INDEPENDENCE FROM CLIENTS

Robert Rosen proposes that, in order to better understand lawyers who represent large corporations, a paradigmatic shift ought to be made. Traditionally, lawyers' conduct has been discussed under what he labels “the independence model.” The independence model—which closely relates with the notion of professionalism—assumes that lawyers are bound by a set of norms, rules, ideals and standards under which they maintain the capacity to act independently of their clients and that allow them to deviate from their clients' demands. Their independence enables them to render opinions and employ their discretion autonomously, and abide by norms that embody the unique values of the profession as a carrier of public ideals.<sup>152</sup>

Bound within this model, explains Elizabeth Chambliss, the literature has focused on lawyers' inability to meet the model in real life situations, concentrating on lawyers' ethical misconduct, caused by the excessive influence exerted by their clients over lawyers' professional discretion.<sup>153</sup> The vast literature on lawyers and the Enron case clearly abides by this paradigm.<sup>154</sup>

Rosen then suggests debunking the independence model, and adopting instead a different paradigm, which assumes that lawyers are committed to their clients, and continue to inquire “how they handle these commitments.” He claims that the commitment model not only better depicts the reality under which lawyers for corporations actually work, but that it opens up new possibilities to talk about ethics as a political project in which lawyers “choose sides,” and then attempt to

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152. Robert E. Rosen, *Rejecting the Culture of Independence: Corporate Lawyers as Committed to Their Clients*, 52 *STUD. L. POL. & SOC'Y (SPECIAL ISSUE: LAW FIRMS, LEGAL CULTURE & LEGAL PRAC.)* 33 (2010). The question of independence has permeated the debate on lawyers' ethics. See, e.g., Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. REV.* 1 (1988); David B. Wilkins, *Who Should Regulate Lawyers*, 105 *HARV. L. REV.* 801 (1992).

153. Elizabeth Chambliss, *Measuring Law Firm Culture*, 52 *STUD. IN L., POL. & SOC'Y (SPECIAL ISSUE: L. FIRMS, LEGAL CULTURE, & LEGAL PRAC.)* 1, 3 (2010). Some literature then attempts to explain lawyers' inability to act independently. See, e.g., Kimberly Kirkland, *Ethics in Large Firms: The Principle of Pragmatism*, 4 *U. MEM. L. REV.* 631, 634 (2005) (explaining “how bureaucratic legal workplaces shape lawyers' ethical consciousness”). Some literature describes the cognitive process they undergo to justify this stand. See, e.g., Kath Hall & Vivien Homes, *The Power of Rationalization to Influence Lawyers' Decisions to Act Unethically* 11(2) *LEGAL ETHICS* 137 (2008).

154. See, e.g., *Symposium: Enron: Lessons and Implications Introduction*, 8 *STAN. J.L. BUS. & FIN.* 1 (2002); Final Report of Neal Batson, Court-Appointed Examiner at app. C at 15, *In Re Enron Corp.*, (Bankr. S.D.N.Y. 2003) (No. 01-16034 [hereinafter Final Report]); NANCY B. RAPOPORT, JEFFREY D. VAN NIEL & BALA G. DHARAN EDs, *ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER* (2d ed. 2009)); Christopher J. Whelan, *Some Realism About Professionalism*, 54 *BUFF. L. REV.* 1067 (2007).

negotiate the scope of their engagement.<sup>155</sup> Under this view we draw attention to the organizational needs and capacities of clients. We connect between the lawyers and these needs and capacities, thus making them part of the client's enterprise rather than "cops" or "counselors," to use the terms coined by Nelson & Nielsen.<sup>156</sup>

It is not an easy step to abandon the independence model, or the professional paradigm. Partly this is so because this model assumes that lawyers' values are "better" or "higher" than those held by their clients. While the client only pursues self-interest, the lawyer carries finer ideals, which are linked to "the interests of justice." Accordingly, forgoing the professional model entails a loss, and it is something we wish to avoid.

But what if this assumption is challenged, or at least complicated? What if we acknowledge that clients are not only pursuing short term self-interest with disregard to others, but that they have, at the least, mixed motives and at times benign objectives? And even if we accept that CSR is largely a "market based morality," it still may bring about positive outcomes. Then the loss entailed in debunking independence is mitigated.

If we accept this premise and continue to explore the organizational dynamics, needs, and interests of the client, then lawyers' regulation by CSR mechanisms becomes more tenable. In other words, instead of trying to save the independence model, we concentrate on the client's standards of behavior and redefine the way lawyers engage, negotiate, and leverage their professional stance with their clients. CSR is a terrain in which this model can be applied, not only when it is geared towards non-lawyers, but also, perhaps especially, when it is imposed upon them.

To be sure, corporations leverage their economic power to impose upon their law firms norms which the firms must abide by. As we have shown, many codes of conduct include consequential measures for not obeying the guideline norms, namely the loss of the corporation as a client. But can lawyers have a say about these CSR norms? Is there space for engagement and negotiation between lawyers and their clients? This, perhaps, is the new challenge of professionalism: rather than lingering within the independence model which seems untenable, to redefine lawyers' input in the new order of corporate social responsibility.

It is interesting to note that one of the findings in the research conducted by Chambliss is that what matters most to lawyers is the "culture" of the law firm in which they work. Culture is described as working conditions (first and foremost pressure for extensive billable hours), tolerance (or lack thereof) of interpersonal abuse at the office, team work, etc. In other words, within law firms topics such as diversity or flex-work policies seem to be as significant to lawyers as the more

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155. Rosen, *supra* note 152, at 37-38.

156. Nelson & Nielsen, *supra* note 25.

traditional ethical issues.<sup>157</sup> There is no reason to expect a different finding within the lawyer-corporate client relationship, strengthening the upside of lawyers' engagement in issues of this sort.

## B. IN-HOUSE COUNSEL AND CSR

This analysis can also be applied to in-house counsel where the independence model has become increasingly difficult to sustain. The role of in-house counsel may once have reflected the professional ideal, but there is undoubtedly pressure on them now to become "entirely the corporation's agent rather than an emissary from the legal system."<sup>158</sup> Although "formally trained as lawyers," general counsel may experience a "change in consciousness" from the professional to one who is "fully aligned with the entrepreneurial attitude of other corporate employees."<sup>159</sup>

In practice, general counsel are "effectively senior corporate managers whose goal is to optimize the benefit of a fixed legal budget."<sup>160</sup> Large corporate clients spend vast sums of money on legal services and many in-house counsel play a key role in the procurement of outside counsel; indeed, the "purchasing power is disproportionately centralized among a few hundred general counsel."<sup>161</sup> Their "strong incentives to minimize costs temper their guild-preservation mentality;"<sup>162</sup> they also appear to reinforce the threats to lawyer independence, both in-house and outside counsel.

Here again, however, CSR may call for a reassessment. Corporate activities are monitored by a variety of public and private sources; global corporations are vulnerable to reputational harm if there is a breach of CSR policy.<sup>163</sup> Therefore, "[a]voiding improper conduct which could hurt the [corporation's] reputation and trigger significant legal fees is an important business function."<sup>164</sup> In-house counsel are more aware than most of their corporate manager counterparts of these legal obligations and public accountability sources. In response, many corporations develop regulatory regimes and responsible business policies in order to protect reputational capital and protect the corporation.<sup>165</sup> Outside

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157. Chambliss, *supra* note 153, at 20-22.

158. Larry E. Ribstein, *Delayering the Corporation*, 3 (Ill. Law, Behav. and Soc. Sci. Res. Papers Series, Paper No. LBSS11-39, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1970376](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1970376). See also Nelsen & Nielson, *supra* note 25.

159. Ribstein, *supra* note 158 (referring to Nelsen & Nielson, *supra* note 25).

160. William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 Md. L. Rev. 373, 381 (2011).

161. *Id.*

162. Ribstein, *supra* note 158.

163. SIMON ZADEK, *THE CIVIL CORPORATION: THE NEW ECONOMY OF CORPORATE CITIZENSHIP* 63 (2007).

164. Ribstein, *supra* note 158.

165. ZADEK, *supra* note 163.

Counsel Guidelines, which as we have seen, privatize professionalism<sup>166</sup> and reinvent professional responsibility as social responsibility, can be viewed as one example. Professionalism may be enhanced via the imposition of Outside Counsel Guidelines that reinforce reputational capital and thereby serve not only the corporation but, where they exist, the corporation's CSR policies. Technology enables corporate clients to monitor not only the costs of outside counsel but also their compliance with CSR policies. In-house lawyers therefore may enthusiastically embrace the professional aspects of Outside Counsel Guidelines. Such guidelines allow in-house counsel to reconcile both their professional aspirations and their corporate role and to justify their role both internally and externally.

### C. ETHICS AS A MARKET ASSET

The dual nature of CSR described above—as intrinsically good or as a market asset—manifests itself in a parallel discourse on lawyers' ethics and their claim for "professionalism." Traditionally, lawyers' ethics have been one way by which the profession manifested its commitment to public service or public ideals. Lawyers' ethical obligation to promote justice (or the justice system) or to put the interests of their clients first, served as the justification to bestow upon the legal profession unique privileges and exceptional protection (for example autonomy and a system of self-regulation).

However, in the neo-liberal era, as forces of unification, deregulation, and competition have reigned, lawyers—increasingly considered service providers—are under threat to lose their special privileges. As a result the claim for professionalism has been transformed into a leveraged business consideration. UK lawyers have claimed, for example, that the loss of professional independence (one of the core attributes of professionalism) would be detrimental to their international market competitiveness and put them at a business disadvantage.<sup>167</sup> Hence, here too we see that the claim for professionalism, ethical duties, public commitments, and the like are conflated with the world of business.

In this sense, the "world capitalism" and "market-embedded morality" paradigms of CSR *and* the claim for lawyers' professionalism, although originating from differing starting points, have merged into a market-business framework. They are both commodities that play a role in a competitive global market.

Accordingly, lawyers can identify with, engage in, and commit to their client's goals and means of operation. If Walmart, Coca Cola, Bank of America and GE pride themselves on their advanced CSR policies and see them as a commercial

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166. Whelan & Ziv, *supra* note 23.

167. Christopher J. Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27 PENN ST. INT'L L. REV. 465 (2009).

asset, there is no reason why their outside counsel cannot do the same.<sup>168</sup> Ultimately, we are talking about similar interests and values: integrity of the justice system, diversity and pluralism, and respect for unprotected consumers. These are values that coincide with traditional notions of professionalism, albeit now invigorated as market assets.

## VI. CONCLUSION

CSR is becoming mainstream. Corporations present their citizenship, stewardship, or sustainability policies and reports as a standard part of their business profile. Whether or not these are self-promotion or market-embedded, they go beyond the letter of legal requirements *imposed on* these corporations and are now *imposed by* them upon others. Within a global market economy that increasingly maintains that there is “nothing special about lawyers” and “nothing unique about legal services,”<sup>169</sup> the combination of CSR policies and Outside Counsel Guidelines may transform the substantive norms as well as the regulatory framework under which lawyers work.

The significance of this should not be underestimated. What kind of “professionalism” do corporate clients want? How is this different from the traditional framework of professional self-regulation? What if there is a conflict between the requirements of public and private regulatory regimes? Which one is enforceable, legally, professionally or otherwise? These and other questions can lead one to speculate on how professionalism will be redefined by CSR and Guidelines. Their application to some lawyers and law firms rather than others might also accelerate the trend to legal professional stratification. On the other hand, we suggest this may create an opportunity to redefine professionalism, an opening for lawyers to negotiate with their clients regarding what is perhaps the oldest question lying at the core of their practice: the relationship between law, lawyers, and justice.

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168. For an example of a global law firm embracing Corporate Responsibility, aspiring to a “positive, inclusive and diverse culture,” see FRESHFIELDS BRUCKHAUS DERINGER, CORPORATE RESPONSIBILITY REPORT 2011 19 (2011), available at [http://www.freshfields.com/\\_download/aboutus/cr/CR\\_Report-2010-2011.pdf](http://www.freshfields.com/_download/aboutus/cr/CR_Report-2010-2011.pdf). This document includes reference to pro bono, social inclusion and business and ethics.

169. See Whelan, *supra* note 167, at 470.



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