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The Emergence of "Law Consultants"

Cover Page Footnote

Professor of Law, New York Law School. Thanks to Elizabeth Chambliss, Tai-Heng Cheng, Denny Curtis, Stephen Ellmann, Diane Fahey, Bruce Green, Seth Harris, Kim Krawiec, Beth Noveck, Mitt Regan, Judith Resnik, Meg Reuter, and Richard Schottenfeld for helpful conversation and suggestions on earlier drafts. Thanks also to Rosalie Sanderson for her tireless efforts in locating sources.

THE EMERGENCE OF “LAW CONSULTANTS”

*Tanina Rostain**

INTRODUCTION

In May 2006, Kroll, a global risk consulting firm, announced that Kathleen Bisaccia, a senior attorney in the Enforcement Division of the Securities Exchange Commission (SEC), was joining the firm as Managing Director of its Business Intelligence and Investigations Division.¹ Ms. Bisaccia, the press release stated, was responsible for conducting corporate internal investigations in all areas of federal securities laws. As Kroll’s Web site emphasizes, the firm does not offer legal services.² According to the firm, Ms. Bisaccia was not practicing law in her new capacity, but working as a consultant.

A year earlier, *HR Magazine*, a periodical for human resources professionals, published an article touting a “new breed” of employment lawyers—employment law consultants.³ According to the article, recent developments in employment law have put the onus on employers to focus on preventive and investigative procedures in connection with potential discrimination and sexual harassment claims.⁴ Given these developments, the article advised employers to consider hiring employment law consultants as an alternative to traditional counsel. As the article suggested, law consultants, who have legal training and employment practice experience, are especially well suited to offer employee training and engage in internal investigations.⁵

* Professor of Law, New York Law School. Thanks to Elizabeth Chambliss, Tai-Heng Cheng, Denny Curtis, Stephen Ellmann, Diane Fahey, Bruce Green, Seth Harris, Kim Krawiec, Beth Noveck, Mitt Regan, Judith Resnik, Meg Reuter, and Richard Schottenfeld for helpful conversation and suggestions on earlier drafts. Thanks also to Rosalie Sanderson for her tireless efforts in locating sources.

1. Press Release, Kroll, Inc., Senior SEC Enforcement Official Joins Kroll’s San Francisco Office (May 1, 2006), available at <http://www.krollworldwide.com/news/releases/index.aspx?id=13523>.

2. See *id.* (indicating that Kroll does not perform legal work).

3. Michael Sullivan & Carrie Garcia, *Under a Different Shingle: There’s a New Breed of Employment Lawyer in the Market—The Employment Law Consultant*, *HR Magazine*, Mar. 2005, at 119.

4. *Id.*

5. *Id.*

It is too soon to tell whether these stories are a harbinger of widespread change in the legal profession,⁶ but their appearance does coincide with other signs that various forms of consulting among lawyers are on the rise. During the last decade, law firms have begun to offer an array of nonlawyer consulting services alongside traditional legal services.⁷ There is also evidence that some lawyers are going a step further, eschewing traditional lawyer-client relationships and the organizational umbrella of law firms to join consulting and professional service firms or put out their own shingles as "law" consultants. Lawyers who work at corporate risk management firms and employment law consultants appear to represent two such consulting subspecialties. These lawyers offer investigative, compliance, and other law-related services outside the confines of the attorney-client relationship.

In calling their services consulting, lawyers are joining the large cadre of nonlawyer consultants who, since the mid-twentieth century, have advised business on an array of problems. Business consulting today includes managerial, compliance, investigative, computer, creativity, and risk assessment consulting. While these services involve varied types of specialized knowledge, a common characteristic is the fundamentally contractual nature of the relationship with clients. Unlike traditional professions such as medicine and law, consulting is not regulated by the state. Consultants do not have to satisfy educational or other licensing requirements; nor are they governed by enforceable codes of ethics or subject to meaningful malpractice liability.

In marketing their services under a consulting model, lawyers are decoupling their legal expertise from traditional professional institutions and, in particular, those that attach to the representation of clients.⁸ Law consultants do not practice law; rather, they market their knowledge and skills outside the framework of attorney-client relationships. Lawyers-by-

6. There appear to be no systematic data on how many law-trained professionals are framing their services as consulting services; nor is it easy to determine what specific services fall under this term. In my research, I did not come across any cases or ethics opinions involving law consultants, other than those dealing with lawyers acting as expert witnesses. See *infra* note 127 and accompanying text. Currently, there are no published studies of lawyers in alternative or hybrid careers.

7. See Robert W. Denney, *Law Firm Diversification*, in Stephen J. McGarry, *Multidisciplinary Practices and Partnerships: Lawyers, Consultants and Clients* § 8.01 (Stephen J. McGarry ed., 2002); see also Robert Eli Rosen, "We're All Consultants Now": *How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 *Ariz. L. Rev.* 637 (2002). An analogous trend among lawyers can be detected in connection with the rise of the abusive tax shelter market. During the market's peak at the end of the twentieth century, significant numbers of tax lawyers joined accounting firms, investment banks, and specialized boutiques not to practice law, but to design tax shelter "products" intended for sale to high wealth individuals and corporations. See Tanina Rostain, *Travails in Tax: KPMG and the Tax Shelter Controversy*, in *Legal Ethics: Law Stories* 89, 90-91 (Deborah L. Rhode & David Luban eds., 2006).

8. Professional institutions are the formal rules, informal norms, and organizational structures that characterize the legal profession. See generally Eliot Freidson, *Professional Powers: A Study of the Institutionalization of Formal Knowledge* (1986).

training have long been members of management consulting firms such as McKinsey & Company and Booz, Allen & Hamilton.⁹ But today's law consultants, unlike managerial consultants, provide services that bear significant similarities to services provided by lawyers within attorney-client relationships.

The discussion below explores the regulatory incentives that may make law consulting an increasingly attractive model within which to market legal expertise. The first section places law consulting in the larger context of business consulting and the compliance industry. The next section speculates on why law consulting may be on the rise. In certain spheres of business activity, the benefits of the attorney-client relationship may be diminishing. In particular, for corporate clients, the value of retaining counsel may be decreasing with the weakening of the protections afforded by the attorney-client privilege and work-product doctrine. In addition, positive benefits flow to corporations from hiring a law consultant rather than retaining a lawyer. Because law consultants position themselves outside the regulatory framework that governs attorney-client relationships, clients can use them in ways that they cannot use traditional counsel. Most significantly, they can avoid rules intended to protect employees and other third parties. From the perspective of law consultants, opting out of client representation gives them the freedom to move unhindered in the private market for legal services. Because they are not engaging in client "representation," their obligations to clients are principally defined through contract, and they can argue that they are not bound by the broad fiduciary duties that apply to attorney-client relationships, nor subject to malpractice liability.

The conclusion considers some of the normative implications of law consulting. Because no systematic data exist, it is too early in my view to take a strong normative stance. (Among other things, we do not know whether law consulting is on the rise, whether it is a unified phenomenon, as I suggest here, or whether it has the characteristics I propose.) It is important, nevertheless, to consider what effects law consulting might have on the interests and values that professional regulation is intended to protect. Law consulting appears to pose minimal risk to corporate clients, who are typically sophisticated purchasers of legal and law related services. As corporations have insisted, they are capable of safeguarding their own interests through appropriate contractual provisions. A more serious concern is how third parties will fare under a law consultant regime, but one that is likely to be difficult to address.

The effects of a law consulting regime on law compliance within corporations are also an important consideration. Professional regulation and the institutions of law practice in which the rules are imbedded are in a

9. From early on, managerial consulting firms have included lawyers among their partners and recruited among law school graduates. See *infra* note 17 and accompanying text.

loose way supposed to foster lawyers' commitment to an internal perspective in law.¹⁰ Whether law consultants are less likely than traditional corporate lawyers to care about the public values embodied in law is unclear. It is tempting to think that the decision to opt out of the regulatory framework that governs legal practice is evidence that law consultants are in effect adopting a "Holmesian" bad man approach that focuses on "risk management" over compliance with law in a fuller—or "Fuller's"—sense.¹¹ But the rise of compliance consulting suggests a more complicated picture. The types of compliance mechanisms and modalities called for under new regulatory regimes—and the interdisciplinary discourses they generate—undermine the distinction between the internal and external perspective in law. Consequently, whether law consultants (and other corporate actors charged with overseeing compliance) are taking an internal or external perspective is probably beside the point. The benefits and harms of law consulting are part of the larger question—currently hotly debated in legal academic circles—of whether compliance regimes themselves are effective in inducing corporations to engage in meaningful compliance with legal mandates.¹²

I. BUSINESS CONSULTING

A. *The Professionalization of Managerial Consulting*

Management consulting, the most successful and deeply entrenched form of business consulting in the world, emerged in the United States to take advantage of market opportunities created by legislation enacted in the

10. Or so several participants in this Symposium would argue. See, e.g., William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 Fordham L. Rev. 1453 (2006); W. Bradley Wendel, *Lawyers, Citizens, and the Internal Point of View*, 75 Fordham L. Rev. 1473 (2006).

11. See Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. Cal. L. Rev., 1273, 1280-88 (1998); see also David Luban, *Asking the Right Questions*, 72 Temp. L. Rev. 839 (1999).

12. Some scholars have applauded the proliferation of compliance mechanisms (and a compliance industry to implement them) as part of a new "soft law" approach to corporate regulation, under which regulated entities are motivated to internalize legal mandates. See, e.g., Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); David A. Dana, *The New "Contractarian" Paradigm in Environmental Regulation*, 2000 Ill. L. Rev. 35 (2000); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. Rev. 875 (2003); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543 (2000); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 Colum. L. Rev. 458 (2001). Others are more skeptical of these claims, raising questions about their empirical validity. See, e.g., Lauren B. Edelman, Sally Riggs Fuller & Iona Mara-Drita, *Diversity Rhetoric and the Managerialization of Law*, 106 Am. J. Soc. 1589 (2001); Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Rights in the Workplace*, 27 Law & Soc'y Rev. 497 (1993); Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 Wash. U. L.Q. 487, 497 (2003); John R. Sutton et al., *The Legalization of the Workplace*, 99 Am. J. Soc. 944 (1994).

wake of the Great Depression.¹³ As Christopher McKenna has documented, after the passage of the Glass-Steagall Act,¹⁴ commercial banks were required to abandon nonbanking activities, including consultative and reorganizational activities. While investment banks were not prohibited from engaging in management consulting, SEC regulations required underwriters to obtain external due diligence on securities issues and reorganizations. Accounting firms, meanwhile, were prohibited from engaging in certain activities that undermined their capacity to perform independent audits.¹⁵ This legal landscape created an opening for management consulting to emerge. Beginning in the mid-1930s, management consulting firms significantly expanded and grew in number.¹⁶ During subsequent decades, these firms, which began as partnerships among lawyers, accountants, and engineers, were routinely retained by executives of American companies to conduct studies of organization, strategy, and operations.¹⁷ American consulting firms, led by McKinsey & Company, Booze, Allen & Hamilton, and Cresap, McCormick & Paget, had a hand in reorganizing the largest companies of the day, pioneering such organizational and managerial innovations as corporate divisions and "corporate culture."¹⁸ By the mid-1960s, these firms dominated the world for business advice, having played a central role in the Americanization of international corporations.¹⁹

In contrast to the established professions, managerial consultants not only did not seek a monopoly from the state to regulate entry into the profession, they actively opposed state certification and other formal barriers to entry.²⁰ Consultants achieved status not as members of a specific profession but as members of particular firms.²¹ As their importance as business advisors to corporate America grew, elite consulting firms elected informal processes of credentialing that relied on firm-wide standards of ethics and competence. As McKenna observes, "[P]rofessional prestige within management consulting accrued not to individual consultants, but to the prestigious firms that enforced high standards."²²

Having earlier resisted licensure, management consultants were subsequently unable to control which advisors held themselves out as consultants. Without a regulatory monopoly, managerial consultants did

13. See Christopher D. McKenna, *The World's Newest Profession: Management Consulting in the Twentieth Century* 62-63 (2006) [hereinafter *The World's Newest Profession*]; Christopher D. McKenna, *The Origins of Modern Management Consulting*, 24 *Bus. & Econ. Hist.* 51, 54-55 (1995).

14. Banking Act of 1933, ch. 89, 48 Stat. 162 (repealed in part 1999).

15. *The World's Newest Profession*, *supra* note 13, at 17.

16. *Id.* at 17-19.

17. *Id.* at 113-14. Leading consulting firms also imported their managerial and organizational expertise into government agencies and nonprofits. See *id.* at 111-14.

18. *Id.* at 192-94.

19. See *id.* at 181-86.

20. *Id.* at 198-99.

21. See *id.* at 198-203.

22. *Id.* at 199; see also *id.* at 192-215.

not have the power to limit what types of services fell under the consulting mantle. As the market for specialized knowledge shifted to other areas during the latter part of the twentieth century, the term "consulting" was appropriated by other groups to characterize the sale of expertise unbundled from the provision of goods and services. During the 1990s, computer support specialists turned into "computer consultants;" stockbrokers became "financial consultants;" and a variety of other providers of business advice adopted the consultant title.

B. *The Rise of the Compliance Consulting Industry*

1. Regulatory Compliance Regimes

The rise of the compliance consulting industry dates to the promulgation of the Federal Organizational Sentencing Guidelines (OSGs) in 1991.²³ Before the 1990s, compliance had been an episodic and industry-specific focus in business. With the passage of the OSGs, which set forth a schedule of sentences for corporations convicted of federal crimes, the implementation of internal compliance programs became an abiding corporate concern.²⁴ Under the guidelines, "an effective program to prevent and detect violations of [the] law" substantially mitigates the penalties imposed on companies convicted of a crime.²⁵ The guidelines set forth steps for designing, implementing, and operating an effective compliance program. These include establishing standards and procedures, designating compliance personnel and allocating resources, communicating compliance standards, disciplining failures to comply or oversee compliance, and regularly updating the compliance program.²⁶ During the last fifteen years, a host of compliance professionals, including lawyers and ethics consultants, have developed services that tailor these broad mandates to different types of organizations operating in different industries.

Although the OSGs were the first and most important incentive for the adoption of internal compliance mechanisms, there have been similar developments in a variety of regulatory settings. In recent years, the Environmental Protection Agency (EPA) and Occupational Safety and Health Administration (OSHA) have developed self-audit policies that encourage the implementation of compliance programs to deal with

23. Amendments to the Sentencing Guidelines for United States Courts, 56 Fed. Reg. 22,762 (May 16, 1991).

24. See Corporate Compliance Comm., Am. Bar Ass'n (ABA) Section of Bus. Law, *Corporate Compliance Survey*, 60 Bus. Law. 1759 (2005) [hereinafter *Corporate Compliance Survey*]. The origins of the Organizational Sentencing Guidelines date to the "defense contracting scandal of the mid-1980s." See Krawiec, *supra* note 12, at 497.

25. U.S. Sentencing Guidelines Manual § 8C4.1.1 (2004).

26. U.S. Sentencing Guidelines Manual § 8B2.1; see also *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 969-70 (Del. Ch. 1996) (stating that the failure to implement a compliance program may constitute a breach of a director's fiduciary obligations).

environmental and workplace risks.²⁷ The USA Patriot Act requires financial institutions to establish anti-money laundering programs.²⁸ The Health Information Protection Act (HIPA) requires health care providers to develop compliance programs to safeguard the confidentiality, integrity, and security of health information.²⁹ SEC regulations require investment companies and advisors to implement compliance programs designed to prevent violations of the securities laws.³⁰ Under Department of Justice (DOJ) policy, the existence of a compliance program before an alleged criminal violation or the implementation of one afterwards are factors in the Department's decision to charge a company for criminal violations by their employees or agents.³¹

Internal compliance mechanisms gained added momentum with the passage of the Sarbanes-Oxley Act in 2002. Under the Act, a public company is required, for example, to disclose information about its internal controls over financial reporting, the company's conduct, its ethics codes, and the structure of its audit committee.³² The statute also requires companies to install whistleblower protections, including confidential mechanisms for employees to be able to report suspected fraud.³³

A parallel trend has occurred in case law interpreting federal antidiscrimination provisions. Under U.S. Supreme Court precedent, the existence of a compliance program can in certain circumstances function as a defense to punitive damages for violations of federal discrimination law

27. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000) (Environmental Protection Agency (EPA) regulations); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violation, 60 Fed. Reg. 66,706 (Dec. 22, 1995) (same); *see also* Final Policy Concerning the Occupational Safety and Health Administration's Treatment of Voluntary Employer Safety and Health Self-Audits, 65 Fed. Reg. 46,498, 46,502 (July 28, 2000); U.S. Environmental Protection Agency, EPA Audit Policy, www.epa.gov/compliance/incentives/auditing/auditpolicy.html (last visited Nov. 7, 2006). For comprehensive surveys of compliance regimes, *see Corporate Compliance Survey*, *supra* note 24; Krawiec, *supra* note 12, at 510-15.

28. 31 U.S.C. § 5318(h)(1)(2) (Supp. I 2001).

29. 42 U.S.C. §§ 1320d-2(d)(2); 1320d-5(b)(3)(A); Health Insurance Reform: Security Standards, 45 C.F.R. §§ 160, 162, 164 (2006); Standards for Privacy of Individually Identifiable Health Information, *id.* §§ 160, 164.

30. *See* 17 C.F.R. § 270.38a-1 (2005); *id.* § 275.206(4)-7.

31. *See* Memorandum from Deputy Attorney General Eric Holder to All Heads of Department Components and U.S. Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999) [hereinafter Holder Memorandum], *available at* <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>.

32. 15 U.S.C. §§ 7262, 7264, 7265 (Supp. II 2002); *see also* 17 C.F.R. §§ 229.308, 229.401, 229.406 (2005).

33. *See* 15 U.S.C. § 78j-1. Various private entities have also enacted compliance standards. *See Corporate Compliance Survey*, *supra* note 24, at 1776-79. For example, the New York Stock Exchange requires member organizations to promulgate codes of conduct that cover not only senior officers but also directors and employees of the company. *See id.* at 1777.

under the Civil Rights Act of 1991.³⁴ In a similar vein, the Court has held that in certain supervisory hostile environment cases, an employer can escape liability by showing that it exercised reasonable care to prevent harassment.³⁵ One factor that goes toward establishing this defense is the existence of antiharassment policies and internal complaint procedures.

2. The Compliance Industry

The onus on companies to develop internal compliance structures to address various regulatory agendas has given rise to a bewildering array of compliance consulting services. The large professional service firms established themselves in the “ethics consulting” market soon after the promulgation of the OSGs in the early 1990s.³⁶ More recently, they have emphasized compliance services related to financial regulation. In the late 1990s, for example, they significantly expanded their regulatory-compliance consulting groups to address the needs of financial services firms to implement compliance systems under increasingly complex securities laws.³⁷ After the passage of Sarbanes-Oxley, these firms have underscored services related to compliance with Section 404, which requires effective controls over financial reporting.³⁸ As KPMG’s Web site notes, regulatory compliance mandates call for the expertise of

34. See *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 545 (1999). Employers can rely on the existence of a compliance program to demonstrate good faith to avoid punitive damages based on the actions of agents acting within the scope of their employment.

35. *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998). This defense is only available in cases in which the harassment did not result in a tangible employment action, such as firing, demotion, or reduction of pay. A showing that the employer exercised reasonable care—in effect had an appropriate compliance program—is a necessary but not sufficient condition to establish this defense. The defense fails if the victim availed herself of the program and the program proved ineffective.

36. See Lynnette Khalfani, *As Employers Focus on Ethics Training Cottage Industry for Consultants Grows*, Wall St. J., Aug. 12, 1996, at B4; Kimberly Reeves, *Corporate Ethics Policies Needed in Modern Business*, Austin Bus. J. Nov. 14, 1997, available at <http://austin.bizjournals.com/austin/stories/1997/11/17/focus7.html>. The emergence of the compliance industry is illustrated in the career trajectory of Winthrop Swenson, former Deputy General Counsel to the Federal Sentencing Commission. Mr. Swenson played a central role in the development of the Federal Organizational Sentencing Guidelines (OSGs), chairing the staff task force advisory committee that drafted the guidelines. In 1996, he left the government to join KPMG’s new compliance/consulting practice. See Compliance Systems Legal Group, *About Our Firm*, Attorney Bios, Winthrop M. Swenson, Partner, <http://www.cs1g.com/swenson.html> (last visited Nov. 7, 2006). When he joined KPMG, the firm’s compliance services were industry specific and dispersed throughout the organization. Telephone Interview with Winthrop M. Swenson, Partner, Compliance Systems Legal Group, in Warwick, RI (Sept. 22, 2006) [hereinafter Swenson Interview].

37. See Paul Beckett, *Accountants Boost Consulting Services on Complying with Securities Laws*, Wall St. J., July 20, 1998, at B5.

38. See, e.g., KPMG, Sarbanes-Oxley Section 404, <http://www.kpmg.com/Services/Advisory/RAS/Services/RCS/RServices/Sox404.htm> (last visited Nov. 13, 2006); PriceWaterhouseCoopers, Sarbanes-Oxley Compliance, <http://www.pwc.com/extweb/service.nsf/docid/BE3AE945AE3901F085257013005ADD5E> (last visited Nov. 13, 2006).

multidisciplinary teams with industry specific knowledge.³⁹ By far the largest players in this market, the Big Four firms also seek to address companies' other compliance needs, offering investigative and industry specific services that include compliance consulting for the health care, telecommunications, and utilities industries.⁴⁰

Competing with the professional service firms are a slew of smaller—some much smaller—consulting groups. Some of these firms have positioned themselves as "ethics consultants." In 2006, two lawyers with corporate and employment law practice experience launched the Business Ethics Consulting Group, which offers companies assistance in implementing ethics programs.⁴¹ Whether such small firms will succeed is unclear, but their appearance suggests that their founders believed that the market for ethics services will continue to grow. Other firms, such as Ethics Point and Global Compliance Services, have specialized in offering confidential hotline services, based in internet capabilities, to field and follow up on employee complaints and tips. Hotline providers have enjoyed significant growth since the whistleblower protections in Sarbanes-Oxley were enacted.⁴² Employment law consulting firms, for their part, seek to combine human resources and employment law expertise to address companies' compliance needs in the employment area, providing diversity and sexual harassment training and investigative services.⁴³

39. See KPMG, *supra* note 38; see also KPMG, ERP Controls Integration: Sustaining Compliance While Implementing Change (2006), available at <http://www.kpmg.com/NR/rdonlyres/2FF8A99F-7375-46AB-B0E9-9D9B9365ED67/0/ControlsIntegration.pdf> (describing integration of controls into software installation or upgrade).

40. See, e.g., Deloitte & Touche LLP, Regulatory Consulting for the Life Sciences and Health Care Industry, http://www.deloitte.com/dtt/section_node/0%2C1042%2Csid%25253D115213%2C00.html (last visited Nov. 8, 2006); Deloitte & Touche LLP, Regulatory Consulting for the Technology, Media, and Telecommunications Industry, http://www.deloitte.com/dtt/section_node/0,1042,sid%253D115215,00.html (last visited Nov. 8, 2006); Deloitte & Touche LLP, Regulatory Consulting for the Utilities, http://www.deloitte.com/dtt/section_node/0%2C1042%2Csid%25253D115216%2C00.html (last visited Nov. 8, 2006); KPMG, Fraud and Misconduct, <http://www.kpmg.com/Services/Advisory/FAS/Issues/Fraud/> (last visited Nov. 7, 2006). Describing its compliance services broadly, KPMG's Web site advertises "compliance health checks and reviews," and "help[ing] management reduce the risk of regulatory intervention." See KPMG, Regulatory & Compliance Services, <http://www.kpmg.com/Services/Advisory/RAS/Services/RCS/RCS.htm> (last visited Nov. 7, 2006). In a similar vein, PriceWaterhouseCoopers offers "independent assurance of regulatory compliance" and "assessment[s] of [a company's] current and future regulatory risk profile and impact of new regulations." See PriceWaterhouseCoopers, Regulatory Compliance and Reporting, <http://www.pwc.com/extweb/service.nsf/docid/D9DDD3F7AF139A8085257013005A395D> (last visited Nov. 8, 2006).

41. See Business Ethics Consulting Group, About Us, <http://www.businessethicsconsulting.com/about.html> (last visited Nov. 7, 2006); Business Ethics Consulting Group, Business Ethics, <http://www.businessethicsconsulting.com/services.html#ethics> (last visited Nov. 7, 2006).

42. See James C. Hyatt, *Birth of the Ethics Industry*, Bus. Ethics Online, Summer 2005, http://www.business-ethics.com/current_issue/summer_2005_birth.html.

43. See Sullivan & Garcia, *supra* note 3. During the last few years, several organizations of compliance specialists have appeared. They include the Society of

The prompt investigation of suspected or alleged employee wrongdoing is an important dimension of a compliance program. Arguing that corporate investigations are better outsourced than conducted in house or by a company's lawyer, risk management firms have occupied a fast-growing niche in this area. Kroll, a leader in risk management services, was founded by a former prosecutor in 1972 and developed a global presence providing investigative due diligence on behalf of corporate clients engaged in mergers and acquisitions during the 1980s.⁴⁴ Through a series of acquisitions in the 1990s, Kroll expanded into a full service global risk management firm. Today, it offers forensic accounting, background screening, drug testing, security engineering, corporate advisory and restructuring, and electronic-data recovery services.⁴⁵ Its nearly four thousand employees include former prosecutors, CIA and FBI agents, and private investigators, accountants, and information technology specialists.⁴⁶ As part of its business advisory services, Kroll provides "independent and objective" investigations into suspected employee wrongdoing and fraud.⁴⁷ In 2004, the corporate intelligence industry was estimated to be a one

Corporate Compliance & Ethics (SCCE), an international nonprofit organization launched in the early 2000s, which sponsors a yearly institute dedicated to addressing emerging compliance issues. See Society of Corporate Compliance and Ethics, <http://www.corporatecompliance.org/events/events.htm> (last visited Nov. 8, 2006). In 2006, the SCCE for the first time offered an exam to become a "Certified Compliance and Ethics Professional" (CCEP). See Press Release, Soc'y of Corporate Compliance and Ethics, Certification for Fast-Growing Compliance and Ethics Profession Available in September 2006 (July 13, 2006), available at <http://www.corporatecompliance.org/about/pdfs/2006/PRcertificationCCEP.pdf>. According to the society, a CCEP is a "professional with knowledge of relevant regulations and expertise in compliance processes sufficient to assist corporate industries to understand and address legal obligations and promote organizational integrity through the operation of effective compliance programs." *Id.* By offering certification, the SCCE is providing a market advantage to compliance consultants who can demonstrate expertise. It is also enhancing its own status by becoming a credentialing institution.

Smaller compliance service firms may be able to compete with the large professional services firms because of recently enacted limits on the non-audit services that accountants are permitted to provide to their audit clients under Sarbanes-Oxley. See Strengthening the Commission's Requirements Regarding Auditor Independence, Securities Act Release No. 8183, Exchange Act Release No. 47,265, Public Utility Holding Co. Act Release No. 27,642, 68 Fed. Reg. 6006 (Feb. 5, 2003) (codified at 17 C.F.R. pts. 210, 240, 249, and 274 (2003)), available at <http://www.sec.gov/rules/final/33-8183.htm>.

44. See Kroll, Inc., History, <http://www.kroll.com/about/history> (last visited Nov. 7, 2006) [hereinafter Kroll, History].

45. *Id.* In 2004, Kroll, Inc. was acquired by Marsh & McLennan Companies and became one of its operating units. When Marsh ran into regulatory and legal difficulties in 2004, Michael Cherkavsky, the former CEO of Kroll, was named the president and CEO of Marsh. See Press Release, Marsh & McLennan Cos., Jeffrey W. Greenberg Resigns as Chairman and CEO of MMC Michael Cherkavsky Named President and CEO (Oct. 25, 2004), available at http://www.mmc.com/news/pressReleases_209.pdf.

46. See Kroll, History, *supra* note 44.

47. Kroll offers investigative services in areas such as civil and criminal fraud, management/employee fraud and theft, electronic crimes, secret commissions and kickbacks, and criminal defense investigations. See Kroll, Inc., Investigations, Financial Advisory, and Intelligence, <http://www.kroll.com/services/ifai/> (last visited Nov. 7, 2006).

hundred billion dollar business.⁴⁸ The success of Kroll and competing investigative firms has spawned several recent entrants into this market.⁴⁹

Compliance consulting—like consulting more broadly—is not a focus of professional regulation. Compliance consultants and their clients define the formal relationships between them contractually. Typically, terms of engagement cover the scope of services and include general guarantees of confidentiality and protections of clients' intellectual property, as well as limits on consultants' liability.⁵⁰

3. The Porous Boundaries Between Law Practice and Compliance Consulting

Compliance consultants—both those with and without a law degree—take the position that they can opt out of the regulatory regime that governs law practice, because they do not represent clients. To avoid any appearance to the contrary, compliance consulting firms emphasize that they offer consulting and not legal services, and lawyers working at such firms take pains to avoid any suggestion that they are providing legal advice.⁵¹ They do not provide legal opinions, nor do they identify themselves as lawyers.⁵²

Although compliance consultants do not hold themselves out to be practicing law, some of their services bear more than a passing resemblance to activities traditionally considered law practice and, in particular, the provision of legal advice. Yet, with one exception, there have been no publicized complaints that compliance consultants are involved in the unauthorized practice of law or, in the case of those licensed to practice in the state in which they offer services, are in violation of ethics rules.⁵³ The

48. See Thor Valdmanis, *Sleuthing Comes to This Pair Naturally, Investigators Keep Their Firm Lean, Mean*, U.S.A. Today, Oct. 11, 2004, at B6.

49. Other risk consulting firms include Vance International, Inc., formally DSFX and now a division of Garda, see Vance Int'l, Inc., <http://www.vanceglobal.com/> (last visited Nov. 24, 2006), and two newer firms, Fortress Global Investigations and Citigate Global Intelligence & Security. See *New International Security Solutions Company Formed by High-Profile Former FBI and CIA Officials, Prosecutors*, PR Newswire Ass'n, Mar. 13, 2003; *Edward J. Kuriansky Joins Citigate Global Intelligence and Security*, Bus. Wire., May 29, 2002. Vance offers internal corporate investigations as well as employment law consulting and other services. See Vance Int'l, Inc., Services, Investigations, <http://www.vanceglobal.com/whatwedo/services/investigation/> (last visited Nov. 7, 2006).

50. Swenson Interview, *supra* note 36.

51. See, e.g., Press Release, Kroll, Inc., *supra* note 1. The most cautious firms, while listing the educational background and legal experience of their lawyer employees, do not list their Juris Doctor degree after their name. See, e.g., Kroll, Inc., Kathleen Bisaccia, <http://www.kroll.com/services/ifai/professionals/bisaccia/> (last visited Nov. 1, 2006); Kroll, Inc., Robert Brenner, <http://www.kroll.com/services/ifai/professionals/bbrenner/> (last visited Nov. 7, 2006).

52. Swenson Interview, *supra* note 36.

53. If a nonlawyer engages in the provision of legal services, she is subject to prosecution for engaging in the unauthorized practice of law, which is prohibited in all states. See ABA Standing Comm. on Lawyers' Responsibility for Client Protection, 1994 Survey on the Unauthorized Practice of Law Nonlawyer Practice (1996) (surveying

absence of attempts by the bar or courts to locate compliance within the boundaries of law practice is rooted in the history and policy underlying prohibitions against unauthorized practice as well as the multidisciplinary expertise often required by regulatory compliance mandates.

Prohibitions against unauthorized practice initially targeted nonlawyers who appeared in court on behalf of clients.⁵⁴ During the 1930s, the scope of unauthorized practice was expanded to encompass the preparation of legal documents and the provision of legal advice.⁵⁵ Historically, the organized bar has justified its efforts to limit the practice of law to lawyers on the ground that this restriction furthered the public interest. According to the bar, lay people needed to be protected from unethical and incompetent conduct by individuals who were purporting to provide legal services without meeting the bar's high standards for competence and ethics.⁵⁶ In other words, the justification for unauthorized practice restrictions is that they are needed to address the market failure that stems from individual clients' incomplete knowledge about the type of service they need or quality of service they are receiving. This rationale does not carry over easily to the corporate consumer context. Not surprisingly, there have been few, if any, cases involving claims that nonlawyers were impermissibly providing legal services to corporations, even during active periods of unauthorized practice enforcement. In general, corporate clients are presumed to make sophisticated choices about the legal and law-related services they need.⁵⁷

definitions of "practice of law" in fifty states). These prohibitions cover unlicensed persons as well as lawyers who are not licensed in the state. If a lawyer licensed in a state engages in law practice with a nonlawyer, she is subject to ethical prohibitions against assisting in the unauthorized practice of law, *see* Model Rules of Prof'l Conduct R. 5.5 (2005), and to prohibitions against sharing fees or becoming partners with nonlawyers. *See* Model Rules of Prof'l Conduct R. 5.4; *see also infra* note 109-111 and accompanying text. The exception was a complaint against two of the big professional service firms in 1997. That year, the Texas Unauthorized Practice of Law Committee launched an investigation to determine whether Arthur Andersen and Deloitte & Touche were engaged in unauthorized practice of law in connection with their tax advisory services. *See* Elizabeth MacDonald, *Texas Probes Andersen, Deloitte on Charges of Practicing of Law*, Wall St. J., May 28, 1998, at B15. A year later, the complaint was dismissed. *See* Tom Herman, *A Special Summary and Forecast of Federal and State Tax Developments*, Wall St. J., July 29, 1998, at A1; *see also* William D. Elliot, *Unauthorized Practice of Law: Failure of Proof or Failure of Will*, 81 Tax Notes 517 (1998). Tax is an especially treacherous battle-ground to wage unauthorized practice battles because lawyers and accountants have overlapping jurisdictions in the tax area. *See, e.g.*, Circular No. 230, 31 C.F.R. 10.3 (2005) (defining who may practice before the Internal Revenue Service).

54. *See* Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors—or Even Good Sense?*, 1980 Am. B. Found. Res. J. 159, 180-81. The classic critique of unauthorized practice provisions is Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1 (1982).

55. Christensen, *supra* note 54, at 191-93.

56. *See, e.g.*, Charles W. Wolfram, *Modern Legal Ethics* 829-34 (1986).

57. *See* Susan Hackett, *The Corporate Client's Perspective: Legal Services for Clients Who Do Business in the Twenty-First Century*, in *Multidisciplinary Practices and Partnerships: Lawyers, Consultants and Clients*, *supra* note 7, § 12.02(1) (describing the

While the bar was unable to challenge the provision of legal services by nonlawyers to corporations through unauthorized practice provisions, it attempted to address the problem indirectly when the question of loosening restrictions on multidisciplinary practices (MDPs) arose in the early twenty-first century. At the time, large professional service firms, which already employed significant numbers of lawyers as consultants, and large segments of the legal profession sought to convince the American Bar Association to eliminate limitations on partnerships and fee sharing among lawyers, accountants, and others.⁵⁸ Although the committee appointed to study the issue recommended a rule change, opponents of multidisciplinary practice successfully argued that such partnerships would undermine the "core values" of the profession, in particular, the duties of loyalty and confidentiality and the capacity to provide independent judgment.⁵⁹ As the growth of the compliance industry attests, MDP opponents won the battle, but lost the war. Lawyers have continued to provide law-like services at large professional service firms and in other partnerships with nonlawyers, but do it within the framework of consulting. As it turns out, corporations do not care how their service providers characterize the relationship, so long as they provide the services that are needed.⁶⁰

The incentives for corporations to purchase multidisciplinary services are created by compliance regimes themselves, which in many instances require

American Corporate Counsel Association's position that "clients have the right (and they are sophisticated enough to exercise it) to choose whatever service providers they wish to engage to solve their problems"). The bar would also encounter doctrinal difficulties in claiming that compliance services constitute the practice of law. Since the 1930s, courts and the bar have struggled and failed to draw a clear boundary between the provision of legal advice and similar services that do not constitute legal practice. See ABA Comm'n on NonLawyer Practice, *NonLawyer Activity in Law-Related Situations: A Report with Recommendations* 20-22 (1995). The most recent attempt by the bar to delineate the scope of practice occurred in 2002-03, when Alfred P. Carlton, Jr., then-President of the American Bar Association, commissioned a task force to develop a model definition of the practice of law. After a year's study, the task force decided not to propose a comprehensive definition, but concluded that "each jurisdiction's definition should include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity." ABA, *Report of Task Force on the Model Definition of the Practice of Law* 13 (2003), available at http://www.abanet.org/cpr/model-def/taskforce_rpt_803.pdf. The task force's effort was widely criticized as unfairly broad and unworkable. See Tamara Loomis, *Defining Law Practice*, N.Y. L.J., Jan. 9, 2003, at 5. Even the Federal Trade Commission and Justice Department got involved, suggesting that the definition of law practice originally proposed by the task force constituted anticompetitive behavior under the Sherman Act. See Adam Liptak, *U.S. Opposes Proposal to Limit Who May Give Legal Advice*, N.Y. Times, Feb. 3, 2003, at A11.

58. See ABA, *Comm'n on Multidisciplinary Practice, Report to the House of Delegates* (1999), available at <http://www.abanet.org/cpr/mdp/mdpfinalreport.html>.

59. See Wendy Davis, *ABA Emphatically Rejects MDPs*, Nat'l L.J., July 24, 2000, at A5. For an elaboration of the legal profession's core values in the context of the MDP debate, see N.Y. State Bar Ass'n, *Report of Special Committee on Multi-Disciplinary Practice and Legal Profession, Preserving the Core Values of the American Legal Profession* (1999), available at <http://www.law.cornell.edu/ethics/mdp.htm>.

60. See Hackett, *supra* note 57, § 12.02 (legal profession should recognize reality that corporations buy multidisciplinary services as needed).

the deployment of multidisciplinary expertise. Consider, for example, the implementation of compliance mechanisms under the anti-money laundering provisions of the USA Patriot Act.⁶¹ It is difficult to view these mandates as involving isolated questions of legal interpretation requiring only, or primarily, legal expertise. These provisions require corporations to integrate into their business operations routinized procedures, checks, and processes—mechanisms or “controls”—that work automatically, eliminating, to the extent possible, human fallibility and the opportunity for undetected misuse, misappropriation, and other malfeasance. To operationalize these legal requirements, a company must implement computer-based systems that monitor the flow of money in and out of the business and detect suspicious transactions.⁶² The design of such systems interweaves legal, financial, and software expertise. In the same vein, the implementation of self-audit mechanisms under EPA regulations calls for a mix of legal, environmental, and engineering expertise.⁶³ The crafting of effective ethics codes and internal complaint procedures requires not only legal knowledge, but also managerial expertise about the incentives and behavior of employees in large organizations.⁶⁴ Recognizing that compliance expertise is not primarily legal, regulations that require the designation of internal compliance personnel as part of a compliance program do not specify that the corporate officer or employee in question be a lawyer or have a law degree.⁶⁵

Current regulation situates compliance services in various multidisciplinary fields, thus underscoring the permeability of the boundary between legal and other types of expertise. Lawyers who sell their services within a consulting model seek to exploit this porousness. So long as they avoid any appearance that they are offering legal services, ethics rules suggest that they can safely do so.⁶⁶ ABA Model Rule of Professional Conduct 5.7, in particular, makes clear that a lawyer must follow the rules of professional conduct when offering “law-related” services under two circumstances: (1) if these services are offered in circumstances that are indistinct from the provision of legal services, or (2) if provided separately,

61. See 31 U.S.C. § 5318(h)(1)(2) (Supp. I 2001); see also 15 U.S.C. §§ 7262, 7264, 7265 (Supp. II 2002) (financial controls under Sarbanes-Oxley); 17 C.F.R. §§ 229.308, 229.406, 229.401 (2005).

62. As the steps for effective compliance under the OSGs make clear, compliance can never be fully automated. The regulatory guidance offered under the OSGs, like other compliance mandates, requires the designation of personnel whose responsibility is overseeing compliance. See U.S. Sentencing Guidelines Manual § 8B2.1 (2004).

63. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000) (EPA regulations); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (Dec. 22, 1995) (same).

64. Swenson Interview, *supra* note 36.

65. See, e.g., U.S. Sentencing Guidelines Manual § 8B2.1.

66. The ABA Model Rules of Professional Conduct presume that the services provided by an attorney to a client involve representation. See, e.g., Model Rules of Prof'l Conduct pmbl., R. 1, 2 (2005).

the lawyer has failed to take measures to ensure that a person obtaining the law-related services knows that the services are not legal services and do not carry the protections of the attorney-client relationship.⁶⁷ By implication, this provision allows lawyers in other circumstances to provide law-related services without being bound by the rules, so long as they are clear that they are not providing legal services.⁶⁸ Like unauthorized practice prohibitions more generally, Model Rule 3.7 is intended to protect clients who may become confused about a lawyer's duties with regard to law-related services, when these are offered alongside legal services. This risk is almost entirely absent when it is a corporation that is purchasing the services at issue and dictating the contractual terms that will govern the relationship.⁶⁹

In this section, I have described the rise of business consulting and the more recent appearance of compliance services as a subspecies of consulting. The next section turns to the question of why lawyers might want to recast themselves as law consultants. My discussion focuses on the regulatory incentives that weigh in favor of lawyers' selling their services within a consulting framework as compared to an attorney-client relationship and explores these incentives in the specific context of investigative services.⁷⁰ Investigative services have become a booming market for law consultants as well as lawyers in corporate firms.⁷¹ The reputational benefits of retaining an elite corporate firm to represent a corporation and conduct an internal investigation remain high, and corporate lawyers are likely to continue to control the lions' share of the investigative market for some time. The regulatory benefits, however, may be tipping in favor of companies opting out of attorney-client relationships and hiring law consultants.

67. Model Rules of Prof'l Conduct R. 5.7. Under Rule 5.7(b), "law related services" are "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer."

68. John S. Dzienkowski & Ronald D. Rotunda, *Legal Ethics: Lawyers Deskbook of Professional Responsibility* § 5.7-2 (2006)

69. Professor Linda Galler has suggested that law-related services offered by a lawyer are governed by the ethics rules. See Linda Galler, *Problems in Defining and Controlling the Unauthorized Practice of Law*, 44 Ariz. L. Rev. 773, 778-79 (2002). The language of Rule 5.7 makes clear, however, that the rules only apply in situations where there is a risk of potential confusion.

70. The focus on regulatory incentives is not meant to exclude other explanations, based on quality of life, work satisfaction, or pay differential, that might lead lawyers to join compliance consulting firms over traditional corporate law firms. There is no data on how these two settings compare across these variables.

71. In the criminal context, internal investigations have become a growth area for defense lawyers, particularly those with prior experience as prosecutors, and many elite law firms have started to list corporate investigations among the services they offer. See Andrew Longstreth, *Double Agent: In the New Era of Internal Investigations, Defense Lawyers Have Become Deputy Prosecutors*, Am. Law., Feb. 2005, at 68-69. Although they enjoy the lions' share of the market, firms like Kroll are beginning to make inroads. *Id.* In the employment context as well, law consultants are competing with lawyers in law practice. See Sullivan & Garcia, *supra* note 3, at 119-20.

II. REGULATORY INCENTIVES

The capacity to offer legal expertise outside the bounds of attorney-client relationships affords law consultants significant flexibility in the ways in which they organize their practice, which can draw on expertise in various areas, and how they structure their relationships with corporate clients. Law consultants can offer their service within the umbrella of the attorney-client relationship or outside of it. When law consultants are hired and supervised by corporate counsel or an outside law firm retained by a corporation to conduct an investigation, they function as agents of the company's attorneys. As agents, they offer the same benefits as counsel who hired them and have the same obligations with regard to the investigation at hand.⁷² Alternatively, law consultants can sell their investigative services directly to a company. In this second scenario, they are not constrained by the ethics rules that govern the conduct of counsel representing a company.⁷³ Because of their flexibility, law consultants are able to offer investigative services that complement the legal services offered by attorneys representing corporations. They are also able to compete with traditional corporate firms in the market for investigative services by selling these services directly.

Why would a corporate client want to buy investigative services directly from a law consultant rather than retain counsel? Historically, the benefits conferred by the attorney-client relationship outweighed the downside of limits on the attorney's conduct imposed by professional regulation. Recent regulatory developments regarding the attorney-client privilege and work-product doctrine in the investigative context have diminished the value of hiring counsel. Coupled with the benefits of avoiding ethics rules, these developments have increased the attractiveness to a corporation of hiring a law consultant to conduct internal investigations instead of using in-house counsel or an outside law firm.

A. *Diminished Benefit of Attorney-Client Relationships*

One of the most important benefits to clients of entering into an attorney-client relationship has been the protections of the attorney-client privilege and work-product immunity.⁷⁴ These evidentiary protections, reinforced by attorneys' concomitant obligation of confidentiality, created a zone of privacy over many of the internal activities of corporations. Under the attorney-client privilege, corporate clients are able to shield from discovery communications with counsel made for the purpose of giving or obtaining legal advice.⁷⁵ In a similar vein, the work-product doctrine protects

72. See *infra* notes 97-98 and accompanying text.

73. See *infra* notes 99-100 and accompanying text.

74. Others include the reputational benefits of hiring a lawyer over a consultant. These may have declined as well.

75. See *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950).

materials prepared by an attorney in anticipation of litigation from discovery.⁷⁶ Unlike natural persons, corporations do not enjoy a right against self-incrimination under the Fifth Amendment. Nevertheless, they have often been able to rely on the attorney-client privilege and work-product immunity to keep much internal information confidential. The protections of the attorney-client privilege and work-product doctrine are more robust than contractual guarantees of confidentiality alone. A person who has promised to keep information confidential can still be required by court order to disclose that information. The evidentiary privileges, in contrast, protect against a person being compelled through formal process to disclose covered information.⁷⁷

During the last two decades of the twentieth century, corporations were able to invoke the attorney-client privilege and work-product immunity to prevent discovery of the processes and results of internal investigations initiated by a company's attorney. In 1981, in *Upjohn Co. v. United States*,⁷⁸ the Supreme Court provided an expansive view of the types of communications between a company's attorney and its employees that would be subject to the privilege, rejecting the position that the privilege only applied to communications between counsel and employees who controlled the corporation, such as executives and high-level managers.⁷⁹ The Court reasoned that a narrow interpretation "not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law."⁸⁰ Although not bound by federal law, many state jurisdictions followed *Upjohn's* lead in giving a broad application to the privilege.⁸¹ Many courts have also adopted a broad view of the work-product doctrine, holding that materials prepared "because of litigation"—even if they were prepared as part of a business transaction—were covered.⁸²

Upjohn successfully prevented discovery of employee interviews conducted at the behest of the company's general counsel for the purpose of determining whether its employees had engaged in violations of the Foreign Corrupt Practices Act.⁸³ As the Supreme Court emphasized in *Upjohn*, in

76. See, e.g., Fed. R. Civ. P. 26(b)(3).

77. 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 2291 (John T. McNaughton ed., 4th ed. 1961).

78. 449 U.S. 383 (1981).

79. *Id.* at 392.

80. *Id.*

81. See Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* 106-07 (2001).

82. *United States v. Chevron Texaco Corp.*, 241 F. Supp. 2d 1065, 1082 (N.D. Cal. 2002); see also *In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998); *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998); *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 976-77 (7th Cir. 1996); *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1258 (3d Cir. 1993); *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992).

83. *Upjohn*, 449 U.S. at 386-89.

theory, the privilege only prevents communications from being discovered, not underlying facts.⁸⁴ In practice, things are different. A company's invocation of the privilege and work-product immunity, coupled with its prerogative to limit access to employees through the no-contact rule,⁸⁵ creates significant obstacles for government authorities or private parties who seek to uncover corporate wrongdoing.⁸⁶

Since the turn of the century, the privilege has been under pressure from various directions. While the scope of the doctrine itself has not changed, incentives to waive attorney-client and work-product protections have increased. Beginning in the late 1990s and escalating with the corporate scandals of 2001-02, government authorities have become more aggressive in their oversight of companies suspected of wrongdoing through criminal investigations and enforcement actions. To facilitate the uncovering of possible corporate wrongdoing, they have conditioned lenient treatment on

84. *Id.* at 395-96 (citing *Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962)).

85. Model Rules of Prof'l Conduct R. 4.2 (2005). Rule 4.2 prohibits a lawyer from contacting a client whom the lawyer knows is represented by counsel in a matter. Applied in the corporate context, it would arguably prohibit government lawyers from directly contacting employees who may be involved in a matter under investigation without permission of counsel that has been retained in the matter. The application of Rule 4.2 to government lawyers and their agents has been the subject of some controversy. Government lawyers have long argued that criminal investigations would be severely impeded if they had to abide by the Rule. *See, e.g.*, Ethical Standards for Attorneys for the Government (Reno Rules), 28 C.F.R. § 77.1 (1999). In 1998, the U.S. Court of Appeals for the Eighth Circuit held that the Justice Department did not have the authority to issue rules that superseded the state ethics rules on this subject. *See United States v. McDonnell Douglas Corp.*, 132 F.3d 1252 (8th Cir. 1998). That same year, Congress passed the McDade Amendment, which provided that lawyers for the federal government are "subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in the State." 28 U.S.C. § 530B (2000). Under ABA Model Rule of Professional Conduct 3.4(f), a lawyer is permitted to request an employee of a client to refrain from voluntarily providing information to another party so long as the lawyer "reasonably believes that the person's interests will not be adversely affected by refraining from giving such information." Model Rules of Prof'l Conduct R. 3.4(f)(2) (2005). Companies are also able to exert indirect pressures to discourage employees from cooperating with investigations.

86. In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter many obstacles that arise from the nature of the corporation itself. As a Department of Justice memorandum notes,

It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired.

Memorandum from Larry Thompson, Deputy Attorney Gen., to Heads of Dep't Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm [hereinafter Thompson Memorandum].

waiver.⁸⁷ In the employment sphere, the defenses described above create positive incentives for employers to waive the privilege in connection with investigations of employees' claims of wrongdoing.⁸⁸ The result of these converging trends is that the attorney-client and work-product protections are arguably less valuable to corporations than a decade ago.

1. Criminal Investigations and Regulatory Enforcement Actions

Corporations have been under increasing pressure to waive attorney-client and work-product protections in the context of criminal investigations. Although the practice of turning over the results of internal investigations to the government in the hope of avoiding prosecution or penalties is not new, the pressures have increased. In determining whether an organization itself should be charged with a crime, its cooperation, including its willingness to waive privileges, is a factor in the charging decision.⁸⁹ This approach was formally recognized in a memorandum issued in 1999 by then-Deputy Attorney General Eric H. Holder and reaffirmed and expanded four years later.⁹⁰ In 2004, waiver of privileges was also recognized in the Federal Organizational Sentencing Guidelines as a factor supporting a finding that a corporation had cooperated with the government to qualify for a reduction of sentence.⁹¹

87. *Report of the American Bar Association's Task Force on the Attorney-Client Privilege*, 60 Bus. Law 1029, 1043 (2005) [hereinafter *Task Force Report*].

88. See *infra* notes 35-36 and accompanying text.

89. *Task Force Report*, *supra* note 87, at 1044; Longstreth, *supra* note 71, at 72.

90. The Holder Memorandum stated,

One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors, and employees and counsel.

Holder Memorandum, *supra* note 31, at 192; see also Thompson Memorandum, *supra* note 86. In the fall of 2006, the waiver provisions of the Thompson Memorandum came under mounting criticism. See *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations Before the S. Comm. on the Judiciary*, 109th Cong. (2006), available at <http://judiciary.senate.gov/hearing.cfm?id=2054>; Letter from Former Justice Department Officials to Alberto Gonzales (Sept. 5, 2006), available at <http://www.acca.com/public/attyclientpriv/agsept52006.pdf>.

91. See U.S. Sentencing Guidelines Manual § 8C2.5 (2004). As comment 12 notes, "Waiver of attorney-client privilege and of work-product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." *Id.* cmt. 12. Although the sentencing guidelines are advisory, courts are still required to consider them. *United States v. Booker*, 543 U.S. 220 (2005); *United States v. Fanfan*, 542 U.S. 963 (2004). In April 2006, the U.S. Sentencing Commission voted to amend the corporate sentencing guidelines to eliminate the incentive for prosecutors to require disclosure of privileged information as a condition of receiving credit for cooperating with the government. See Statement, Michael S. Greco, President, ABA, Re: U.S. Sentencing Commission Vote Rescinding 2004 Privilege Waiver Amendment (Apr. 6, 2006), available at <http://www.abanews.org/statementsletters/sttwaiver.html>.

Regulatory authorities have pursued analogous policies in other areas. In 2004, the SEC signaled that it would consider a company's waiver of the attorney-client and work-product privileges in connection with internal reviews in determining whether to bring an enforcement action against the company for violations of federal securities laws.⁹² Taking a similar tact, the EPA and the DOJ have offered to settle claims of violations of environmental and other regulatory law in exchange for investigative reports containing privileged information.⁹³

The value of the attorney-client privilege has been further diluted by courts' insistence on a strict approach to waiver in the context of government investigations. Since the 1990s, corporations, with the support of government agencies who want to encourage cooperation, have sought to persuade courts to adopt a selective waiver rule, under which a company would be able to waive the privilege for purposes of cooperating in a government investigation without thereby waiving it as to private parties.⁹⁴ A majority of jurisdictions that have considered the issue have rejected this approach, adhering to the view that waiver as to one party—even if the party is the government and it has entered into a confidentiality agreement with the corporation—implies waiver as to all parties.⁹⁵ As a result, after a corporation cooperates with the government and discloses privileged information, it has no capacity in subsequent litigation to safeguard this information from discovery by private parties.

Investigations have become a booming business for corporate law firms, but lawyers in these practices no longer conduct internal investigations with the expectation that they will fall within the protections of the attorney-client privilege and work-product immunity. To the contrary, many

92. See Securities and Exchange Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release. No. 44,969, 76 S.E.C. Docket 296 (Oct. 23, 2001), available at <http://www.sec.gov/litigation/investreport/34-44969.htm>; see also Stephen M. Cutler, Dir., Div. of Enforcement, SEC, The Themes of Sarbanes-Oxley as Reflected in the Commission's Enforcement Program, Remarks at UCLA School of Law (Sept. 20, 2004), available at <http://www.sec.gov/news/speech/spch092004smc.htm>.

93. See, e.g., *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002); Letter from Steven Schell, Partner, Black Helterling LLP, to ABA Task Force on Attorney-Client Privilege (Feb. 10, 2005), available at <http://www.abanet.org/buslaw/attorneyclient/publichearing20050211/testimony/2005211000000.pdf>.

94. See, e.g., *McKesson HBOC, Inc. v. Adler*, 562 S.E.2d 809, 811-12 (Ga. Ct. App. 2002) (discussing the SEC's amicus brief in support of allowing waiver of the privilege for purposes of cooperating in its investigation); see also Securities and Exchange Committee Report Pursuant to Section 704 of the Sarbanes-Oxley Act of 2002, at 45 (2003), available at <http://www.sec.gov/news/studies/sox704report.pdf> (recommending that legislation be enacted recognizing selective waiver in connection with government investigations).

95. See, e.g., *In re Columbia/HCA Healthcare Corp.*, 293 F.3d 289; *United States v. Mass. Inst. of Tech.*, 129 F.3d 681 (1st Cir. 1997); *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409 (Fed. Cir. 1997); *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988), cert. denied, 490 U.S. 1011 (1989); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981).

companies are hiring attorneys to oversee investigations in contemplation of handing over details to the government.⁹⁶ In effect, a new type of investigation practice has emerged.

The transformation of investigative services has created opportunities for risk consulting firms, which can offer corporate clients significant flexibility in how investigations are conducted. Consultants and their clients have two options for structuring their relationship. A law consultant can be hired by general counsel or a law firm to conduct an investigation to assist in the formulation of legal advice. In this scenario, the results of the consultant's investigation is covered by the attorney-client privilege and work-product doctrine under long-standing doctrine that extends the privilege to agents of counsel.⁹⁷ Conversely, he is subject to the same duties of confidentiality and avoidance of conflicts as other agents of the attorney.⁹⁸

Alternatively, a law consultant can be hired directly by a company to conduct an investigation to provide business advice or testify as an expert witness. In this second scenario, the communications with the law consultant would not be considered privileged.⁹⁹ The loss of this protection, however, would be outweighed by the advantages to the corporate client and law consultant of avoiding an attorney-client relationship.¹⁰⁰ The growing irrelevance of privilege in this area, coupled with the benefits of escaping the attorney-client relationship, has made it possible for risk consulting firms to compete—as well as cooperate—with traditional law firms to provide investigative services.¹⁰¹

96. Longstreth, *supra* note 71, at 70, 72.

97. See *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961).

98. Model Rules of Prof'l Conduct R. 5.3 (2005).

99. See, e.g., *2,022 Ranch, L.L.C. v. Superior Court*, 7 Cal. Rptr. 3d 197, 213-14 (2003) (finding factual investigations done by an in-house claims adjuster licensed to practice law not subject to attorney-client privilege); see also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-407 (1997).

100. See *infra* notes 109-30 and accompanying text.

101. Kroll, Inc., Investigations, Financial Advisory and Intelligence, <http://www.krollworldwide.com/services/ifai> (last visited Nov. 8, 2006). Their clients include not only private multinational corporations, but also state and federal agencies, foreign financial institutions, and nonprofits. *Id.*

The attorney-client privilege is also under pressure from auditors who are subject to heightened obligations to detect wrongdoing in publicly traded companies. Historically, a tension always existed between an auditor's need to obtain internal information from a company to attest to its financial statements and a lawyer's obligation to keep information about the company confidential. The professions resolved this problem through joint professional standards that allowed auditors to obtain adequate assurances from a company's attorneys about its potential liabilities while limiting auditors' need to have access to documents subject to privilege. See Documents Subject to Lawyer-Client Privilege, AU § 9337(4) (Am. Inst. of Certified Pub. Accountants (AICPA) 1977); ABA, Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information 8 (1977), available at <http://www.abanet.org/buslaw/attorneyclient/policies/aicpa.pdf>.

In response to the financial reporting scandals that came to light in 2001, new regulations place an onus on auditors to identify and appropriately address suspected fraud. Under SAS 99, a new standard adopted by the AICPA in 2002, an auditor is required, *inter alia*, to

2. Waiver of Privilege in the Employment Law Context

In the employment arena, investigations are also an important dimension of compliance, functioning as part of a defense to show that an employer “exercised reasonable care to prevent and correct promptly any sexually harassing behavior.”¹⁰² Both before and after the Supreme Court’s decisions in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, lower courts routinely held that an employer’s prompt workplace investigation of an employee’s complaint was a factor in

identify the risk factors signaling possible fraud and respond appropriately. Consideration of Fraud in a Financial Statement Audit, SAS 99, AU § 316 (Am. Inst. of Certified Pub. Accountants 2002).

In 2004, the Public Company Accounting Oversight Board (PCAOB), the new agency charged with overseeing audits of publicly traded companies, issued standards that encourage more rigorous scrutiny in audits. PCAOB, Auditing and Related Professional Practice Standards, Auditing Standard No. 2: An Audit of Internal Control over Financial Reporting Conducted in Conjunction with an Audit of Financial Statements (Mar. 2004); Auditing Standard No. 3: Audit Documentation (June 2004), available at http://www.pcaob.org/Rules/Rules_of_the_Board/Auditing_Standard_3.pdf; see also Codification of Statements on Auditing Standards, AU § 9326.22 (Am. Inst. of Certified Pub. Accountants Apr. 2003) (regarding support for tax matters). For a detailed discussion, see David M. Brodsky et al., The Auditor’s Need for the Client’s Detailed Information vs. The Client’s Need to Preserve the Attorney-Client Privilege and Work Product Protection: The Debate, The Problems and Proposed Solutions (2004), available at <http://www.abanet.org/buslaw/attorneyclient/publichearing20050211/testimony/brodsky2.pdf>; see also Sue Reisinger, *Your Papers Please*, Corporate Counsel, June 2006, at 78. In addition, regulators have signaled their intent to scrutinize and sanction auditors that fail to catch fraud by their clients. See Brodsky et al., *supra*, at 4-8; Hackett, *supra* note 57; *Task Force Report*, *supra* note 87, at 1053. Attorneys themselves may also feel pressure to disclose privileged information to auditors to avoid liability for “misleading” an accountant engaged in an audit. See 17 C.F.R. § 240.13b2-2(b)(1) (2003); John K. Villa, *Audit Letter Responses in the Wake of Sarbanes-Oxley*, ACC Docket, Oct. 2003 at 164, 168.

In this strengthened regulatory climate, auditors are requesting documents that had previously been considered off limits under the attorney-client privilege or work-product immunity. Considerable uncertainty exists as to the scope and application of waiver doctrines in the context of documents provided by attorneys in response to auditor requests. See *Task Force Report*, *supra* note 87. In addition, courts have divided on the issue of whether the work-product protection is waived in these circumstances. Compare *Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113, 115 (S.D.N.Y. 2002) (recognizing the waiver of work-product immunity), with *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 229 F.R.D. 441 (S.D.N.Y. 2004). Attorneys representing corporations have also been subject to mounting pressures to reveal client wrongdoing to government authorities. In 2003, the organized securities bar barely defeated an attempt by the Securities Exchange Commission (SEC) to enact a rule pursuant to section 307 of Sarbanes-Oxley that would have required lawyers to make a noisy withdrawal to the SEC, if a corporation’s board of directors failed to address a lawyer’s report of evidence of fraud. See Susan P. Koniak, *When the HurlyBurly’s Done: The Bar’s Struggle with the SEC*, 103 Colum. L. Rev. 1236 (2003). In the wake of the abusive tax shelter problem, Congress enacted section 815 of the American Jobs Creation Act, which requires lawyers involved in creating and promoting abusive tax shelters to maintain and disclose client lists to the Internal Revenue Service. See 26 U.S.C.A. §§ 6111, 6112 (West 2005).

102. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 745 (1998). An employer also had to show that “the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided.” *Faragher v. Boca Raton*, 524 U.S. 775, 807 (1998).

avoiding vicarious liability for sexual harassment.¹⁰³ Applying a parallel principle, at least one state court has held that a workplace investigation can constitute a defense against a claim of wrongful discharge.¹⁰⁴

Under well-established doctrine, when an employer asserts as a defense that it conducted a prompt investigation in response to a harassment complaint, it is waiving any claims of privilege as to the investigation. In claiming that it conducted an appropriate investigation, an employer is putting the details of the investigation at issue and cannot shield any aspects, including communications with counsel overseeing the investigation, from discovery.¹⁰⁵

As with internal investigations of financial improprieties by risk management consultants, employment law consultants and their clients can choose whether or not to structure their relationship under the umbrella of the attorney-client relationship.¹⁰⁶ Engaging a law consultant with practice experience to investigate for the purpose of providing business advice or testifying as an expert witness has no obvious drawbacks and arguably confers benefits not available in an attorney-client relationship.

B. *Advantages of the Consulting Relationship*

An important advantage of consulting is that lawyers who are not representing clients can opt out of professional regulation. As described above, risk management firms and employment law consultants characterize their services as consulting, business, or investigative services.¹⁰⁷ By describing their work as non-legal, law consultants escape the broader fiduciary responsibilities that lawyers owe their clients. Their services do not fall within the ambit of the rules that govern lawyers' conduct, which presume an attorney-client relationship; nor are law consultants subject to significant professional liability.¹⁰⁸ Instead, their obligations are defined by contract and agency law. As a result, consulting relationships afford clients and lawyers much greater leeway than attorney-client relationships.

103. *Swenson v. Potter*, 271 F.3d 1184, 1193-94 (9th Cir. 2001); *Dougherty v. Henderson*, 155 F. Supp. 2d 269 (E.D. Pa. 2001).

104. *See Cotran v. Rollins Hudig Hall Int'l, Inc.*, 948 P.2d 412 (Cal. 1998).

105. *See, e.g., Walker v. County of Contra Costa*, 227 F.R.D. 529 (N.D. Cal. 2005); *Brownell v. Roadway Package Sys., Inc.*, 185 F.R.D. 19 (N.D.N.Y. 1999); *Harding v. Dana Transp., Inc.*, 914 F. Supp. 1084 (D.N.J. 1996).

106. *See Sullivan & Garcia, supra* note 3, at 122-23.

107. *See supra* notes 51-52 and accompanying text. Kroll's Web site notes that it advises clients on how to proceed after it has conducted investigations. *See Kroll, Inc., supra* note 101.

108. The Rules of Professional Conduct, adopted in some version in most states, presume and are organized around attorney-client relationships.

1. Advantages to Corporations

The most obvious and significant advantage to corporations is the capacity to purchase multidisciplinary investigative services from a single source. Practicing lawyers are subject to rules that prohibit splitting fees with nonlawyers, forming partnerships with nonlawyers, and reporting to nonlawyers.¹⁰⁹ These rules limit the organizational forms that firms can adopt and preclude the appointment of nonlawyers to managerial positions or as partners. Law consultants are not subject to these constraints and can organize their practices in the most efficient form, teaming up with professionals from other disciplines to sell their services. While law firms are not precluded from hiring nonlawyers, they cannot offer them managerial positions or partnership.

The capacity to bring in a team with varied expertise has significant appeal to companies. With the increased complexity of corporate financial and legal transactions, internal investigations benefit from different disciplinary competencies. Faced with questionable internal activity that may span different countries and involve intricate computer and accounting operations, a large multinational company will want a team of investigators that includes law enforcement agents, accountants, information technology experts, intelligence experts, and lawyers.¹¹⁰ Unlike law firms, consulting firms offer the advantage of firm specific knowledge, which team members develop by working together over time on different assignments, and enjoy lower transactions costs that they can pass on as lower prices to clients.¹¹¹

A further benefit to corporate clients is the possibility of avoiding regulation that impinges on lawyers' actions vis-à-vis third parties. The most salient rule in the context of corporate investigations is the requirement that, in communicating with employees of a corporate client, a lawyer must make clear the identity of her client and the client's right to reveal statements made by employees.¹¹² These "Corporate Miranda" or "Upjohn" warnings, as they are known, are intended to protect the

109. Model Rules of Prof'l Conduct R. 5.4 (2005). The history and justifications for this prohibition are discussed in Bruce A. Green, *The Disciplinary Restrictions on Multidisciplinary Practice: Their Derivation, Their Development, and Some Implications for the Core Values Debate*, 84 Minn. L. Rev. 1115 (2000), and Ted Schneyer, *Multidisciplinary Practice, Professional Regulation, and the Anti-Interference Principle in Legal Ethics*, 84 Minn. L. Rev. 1469, 1510-14 (2000).

110. See Kroll, Inc. *supra* note 101; see also James Cox, *More Firms Hire Sleuths to Avoid Nasty Surprises: Due Diligence Checks Become Routine Before Many Corporate Deals*, USA Today, June 26, 2001, at B1. In international investigations, investigative consulting firms deploy the expertise of "ex-FBI, CIA, IRS, DEA, and Secret Service Agents; former police, prosecutors, customs agents, federal marshals and military intelligence experts; veterans of Britain's M16, Europe's Interpol or the Royal Canadian Mounted Police; and lawyers, forensic accountants, database specialists and journalists." *Id.*

111. On the value of firm-specific knowledge and skills generally, see Seth D. Harris, *Coase's Paradox and the Inefficiency of Permanent Strike Replacements*, 80 Wash. L.Q. 1185, 1250-52 (2002).

112. Model Rules of Prof'l Conduct R. 1.13(f) (2005).

employee from a lawyer's inappropriate influence. They require a lawyer to explain that she represents the company not the employee, the attorney-client privilege belongs to the company, and the company can disclose anything said by the employee.¹¹³ The rule also prohibits an attorney from giving legal advice to an employee. If the lawyer's warnings are not clear, she runs the risk of employees' claiming that the attorney-client privilege belongs to them, or even that the lawyer represented them.¹¹⁴ An employee who refuses to cooperate in an employer's investigation is in danger of being fired, but the warnings function at the very least to signal to an employee that his interests may not be aligned with those of his employer and that he should be cautious about what he reveals.

A law consultant retained to conduct a corporate investigation can structure his relationship with the company to avoid this requirement. If a consultant is hired by a law firm to assist in rendering legal advice, he is required to provide *Upjohn* warnings, as would any other agent of the lawyer.¹¹⁵ But if he is hired directly by the company under the guise of conducting an investigation for purposes of testifying or to render business advice, or his work is not directed by the company's general counsel, his services will not fall within an attorney-client relationship. Since a consultant does not "represent" a corporate client, he can use his legal expertise on the client's behalf while appearing independent of its

113. See David Hechler, *Know Your Lines: Do You Need to Use a Script When Telling Employees of Their Rights in an Internal Investigation?*, Corporate Counsel, Feb. 2006, at 17.

114. Compare *United States v. Hart*, No. 92-219, 1992 WL 348425, at *1 (E.D. La. 1992) (stating that employees of a company who reasonably believed the company's attorneys were representing them were entitled to assert attorney-client privilege with regard to disclosures made to attorneys), with *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969) (holding that even though the employee reasonably believed his employer's lawyers represented him, the employee was not entitled to assert the attorney-client privilege as to communications with lawyers).

115. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 97-407 (1997). In a 1997 formal opinion, the ABA Standing Committee on Ethics and Professional Responsibility considered two possible guises in which a lawyer might be retained by a law firm as an expert consultant. When a lawyer is hired to provide "expert legal advice" to a firm and its client in a matter, she occupies the role of cocounsel and is bound by all the duties that apply to lawyers representing a client. See *id.* at 1. When, on the other hand, a lawyer is retained to testify as an expert witness, no attorney-client relationship has been formed. Agency and other law may govern the lawyer's conduct, but not the Rules of Professional Conduct. *Id.*; see also *Equal Employment Opportunity Comm'n v. Exxon Corp.*, 202 F.3d 755 (5th Cir. 2000) (concluding that former government attorneys were not prohibited by ethics rules from testifying as expert witnesses for private parties in connection with the matter they previously handled on behalf of the government); *Estate of Sexton v. Comm'r of Internal Revenue*, Nos. 19418-98, 3076-99, 2003 WL 403063 (U.S. Tax Ct. 2003) (finding that the attorney hired by the IRS to provide an expert report did not represent the IRS for purposes of determining conflicts of interest). Investigative consulting firms, which are not holding themselves out as lawyers, would presumably argue that they do not offer legal advice and therefore never occupy the role of cocounsel. Their obligations would therefore be governed exclusively by agency law and the terms of the consulting contract.

interests.¹¹⁶ As *HR Magazine* notes, because of their legal training and background, employment law consultants “know the right questions to ask” and “how to ask questions to elicit the most thorough and relevant information.”¹¹⁷ At the same time, they are often viewed as “more neutral and employee-friendly than the company’s outside litigation counsel.”¹¹⁸

In general, a company will have a stake in having an investigation of alleged wrongdoing appear independent. When accused of sexual harassment, an employer will want to persuade a trier of fact (as well as other employees involved in the incident) that the subsequent investigation was neutral, prompt, and thorough.¹¹⁹ In the same vein, a company suspected of criminal or regulatory violations will want to persuade government authorities that its investigation was designed to ferret out improprieties, not hide them.¹²⁰

An employer’s interest in showing that it took prompt action in response to a charge of wrongdoing, however, will often run counter to an employee’s interests. In a case of suspected employee malfeasance, a corporation has a strong interest in identifying and isolating an individual wrongdoer, so that it is absolved of responsibility as a whole. Law consultants hired by employers will have this interest in mind when conducting investigations. Because they can appear independent of corporate interests, they are particularly well suited to elicit damaging admissions from employees.¹²¹

Law consultants can also elicit information from outside third parties without operating under the rules that constrain attorneys representing clients in these situations. Under Rule 4.2, a lawyer representing a client in a matter cannot communicate with a person whom he knows is represented by counsel in that matter, and under Rule 4.3, he cannot give the appearance that he is disinterested when dealing with a person who is not represented by counsel. These rules reflect the concern that a lawyer, whose tendency is to put his client’s interests first, will unduly influence a third person to make damaging statements or otherwise act against her own interests.

116. While Rule 1.13(f) is written with an attorney-client relationship in mind, it is arguably applicable when a law consultant seeks to invoke her authority as a lawyer in her dealings with employees of the company. Were she to identify herself as a lawyer in such interactions, she would presumably be required to explain that she was hired by the employer. Even though she was hired in a consulting capacity, her self-identification as an attorney would create a risk that an employee would unduly defer to her judgment on the assumption that the attorney has the employee’s interests in mind.

117. See Sullivan & Garcia, *supra* note 3, at 122.

118. *Id.*

119. *Id.*

120. Longstreth, *supra* note 71, at 72.

121. A law consultant, like any other person, cannot actively mislead an employee or third person without running afoul of tort or criminal law. See, e.g., Damon Darlin, *Ex-Chairwoman Among 5 Charged in Hewlett Case*, N.Y. Times., Oct. 5, 2006, at A1. In this context, tort and criminal law impose lower standards than the Model Rules of Professional Conduct.

There is no reason to think that consultants will not give the same priority to their clients' interests, but they are not bound by the same prohibitions.

A further benefit of law consultants is their availability to serve as expert witnesses at trial. Lawyers are not permitted to be advocates on behalf of clients in cases in which they are likely to be necessary witnesses.¹²² Under the Rules, if, after conducting an investigation on behalf of a client, a lawyer's testimony is required in a case, she must forego representing the client and shift into a different role. In practice, the shift from advocate to witness makes lawyers uncomfortable, and they avoid the role of witness whenever they can.¹²³ Law consultants, in contrast, make it a point of stressing their expertise in conducting independent investigations under the assumption that they will present their findings at trial.¹²⁴

2. Advantages to Consultants

In addition to the flexibility of multidisciplinary practice, law consultants enjoy other benefits that flow from the general absence of fiduciary obligations to clients. Among the more significant of these duties is the obligation to avoid representing conflicting interests, formalized in the conflict-of-interest rules.¹²⁵ Rules 1.7 and 1.8 proscribe conflicts that undermine a lawyer's loyalty to a client or impair her capacity for independent judgment. Rule 1.9, which addresses obligations to former clients, prohibits representations in which confidential information obtained from a client in an earlier matter can be used to its disadvantage in the second matter.¹²⁶

Consultants do not labor under the same restrictions. Consider a corporate investigation undertaken to develop expert testimony for trial. As a potential witness, a law consultant does not have an obligation to avoid conflicts with a client after the work for which he has been retained has been completed.¹²⁷ Law consultants who provide business advice have

122. Model Rules of Prof'l Responsibility R. 3.7 (2006).

123. See Longstreth, *supra* note 71, at 73.

124. See Sullivan & Garcia, *supra* note 3, at 122 (employment law consultants can serve as "prepared, professional witnesses"); see, e.g., Kroll Worldwide, Case Studies, http://www.krollworldwide.com/services/investigations/case_studies/ (last visited Nov. 8, 2006).

125. Model Rules of Prof'l Conduct R. 3.7 (2005).

126. Model Rules of Professional Conduct R. 1.10(a) applies most of these prohibitions to lawyers working in the same firm. Although Rule 1.9 is less concerned with loyalty than with the misuse of confidential information, a residual concern for loyalty remains in the prohibition against a lawyer's taking on a representation against a former client that involves work done on its behalf. See Model Rules of Prof'l Conduct R. 1.10(a) cmt. 1.

127. A lawyer who is employed as an expert witness by a client does not assume the duties implicit in an attorney-client relationship and is not bound by the rules prohibiting conflicted representation. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 97-407 (1997). A lawyer who first represents a client and then later becomes an expert in litigation against the former client is in a different situation. In this second scenario, the lawyer continues to have residual obligations to the former client. See *Patriot Scientific Corp. v. Moore*, 178 F. App'x 18 (Fed. Cir. 2006) (disqualifying a lawyer who represented a

available an analogous argument that because they are not providing legal representation, they are not required to follow the conflict rules.

Consulting firms will often abide by the prohibitions against conflicts. In many matters, consultants are acting as agents of law firms and are therefore required to follow the ethics rules; in other matters, it is good business sense to avoid conflicts that can compromise long-standing relationships. Generally, though, consultants enjoy greater flexibility around conflicts. To the extent that conflict rules are intended to protect clients' interests in safeguarding confidential information, corporate clients protect these interests in the consulting context by requiring consultants to agree to confidentiality provisions.

A final important benefit to law consultants is the ability they likely enjoy to avoid malpractice liability. Courts have not addressed the specific question of whether law consultants can be sued for malpractice, but the principles that underlie the development of professional liability suggest that if courts are confronted with the issue they will likely hold that law consultants are not subject to suit in tort. Professional malpractice is a long-standing exception to the basic principle that a service purchaser's remedy for failure to provide the services agreed upon lies exclusively in contract. Courts have recognized an exception for professional liability because lawyers and other professionals have fiduciary responsibilities to clients that stem from the special role and status afforded these professions in American society. Applying this logic, courts have generally refrained from holding that consultants are subject to suit for malpractice. In the computer consulting context, for example, they have tended to hold that the exclusive remedy available to plaintiffs is contractual.¹²⁸ Courts have reasoned that computer consultants are not liable in tort because computer consulting lacks the characteristics of a recognized profession. In particular, it lacks a shared requirement of formal training, state licensing standards and enforceable ethics codes.¹²⁹ The absence of these characteristics makes it difficult to determine an appropriate standard of care or to infer a fiduciary relationship, which is the traditional basis for finding professional liability.¹³⁰ This same analysis applies to law

former client in a patent dispute from serving as an expert witness in a related case against the former client).

128. See, e.g., *Hosp. Computer Sys. v. Staten Island Hosp.*, 788 F. Supp. 1351 (D.N.J. 1992); *Analysts Int'l Corp. v. Recycled Paper Prod., Inc.*, No. 85 C 8637, 1987 WL 12917 (N.D. Ill. 1987); *Richard A. Rosenblatt & Co. v. Davidge Data Sys. Corp.*, 743 N.Y.S.2d 471 (App. Div. 2002); *RKB Enters. v. Ernst & Young*, 582 N.Y.S.2d 814 (App. Div. 1992). In some cases, courts have held that professionals who provide consulting alongside professional services are liable for violation of professional standards of care. See *Diversified Graphics Ltd. v. Groves*, 868 F.2d 293 (8th Cir. 1989) (finding an accounting firm providing computer consulting services liable for violations of accounting professional standards); *Fort Wash. Res. v. Tannen*, 846 F. Supp. 354 (E.D. Pa. 1994) (finding a doctor providing consulting services liable for violation of medical standards of care).

129. See *Hosp. Computer Sys.*, 788 F. Supp. at 1361.

130. The formal characteristics that define professional status give rise to the fiduciary obligations owed by professionals to their clients. In general, courts find fiduciary

consultants who—like consultants more generally—do not assume fiduciary duties to their clients but define their obligations to clients through contract.

III. THE RISE OF LAW CONSULTANTS: SOME IMPLICATIONS

Today, corporate lawyers practicing in firms continue to provide most law-related services to corporations.¹³¹ But some day, perhaps in the not too distant future, corporations may decide that it is in their interest to purchase legal services in a form that is unbundled from attorney-client relationships. As one corporate counsel has emphasized, "Clients increasingly understand that they don't have to hire or retain lawyers if they are not serving their needs well."¹³² The emergence of law consultants makes it clear that the attorney-client relationship in the corporate context is not a necessary feature of the American legal landscape. To the contrary, it is the product of laws that require corporations to retain lawyers to conduct certain kinds of business or confer other benefits to corporations when they enter into attorney-client relationships. With the rise of compliance regulatory regimes, there are vast areas of corporate regulation that may end up ceded to compliance consultants. In the long run, law consultants, with their ready access to multidisciplinary expertise, may be better suited to assist corporations in responding to the demands created by these regulatory regimes.

The rise of a law consulting regime benefits corporations, who can purchase useful multidisciplinary expertise at less cost and replicate the protections offered by attorney-client relationships through contractual provisions. Third parties may not fare as well. Unlike lawyers who represent clients, law consultants are not required to refrain from using their expertise and authority in ways that may harm the interests of employees and other third parties. But, assuming that this is a serious risk, it is difficult to envision a successful regulatory strategy to address it. The bar might seek—in the name of protecting third parties—to reframe the meaning of legal practice more broadly so as to encompass the activities of law consulting. There is little evidence, however, that the current rules provides meaningful protection to third parties from undue influence of lawyers. Proposing an expanded definition of law practice would also meet significant resistance on a variety of other grounds, including its detrimental

relationships between commercial parties when there is unequal bargaining power between the parties and an unusual degree of dependency and trust. Educational requirements, licensing, and an ethics code engender a degree of trust in a professional that removes the relationship from the realm of conventional contractual dealings. See Richard A. Glaser & Leslee M. Lewis, *Redefining the Professional: The Policies and Unregulated Development of Consultant Malpractice Liability*, 72 U. Det. Mercy. L. Rev. 563, 573-80 (1995).

131. This is at best an educated guess. As mentioned earlier, there are no data that break out compliance consulting services from all consulting services purchased by corporations. We accordingly do not know whether companies are spending more on traditional legal services or compliance consulting services.

132. Hackett, *supra* note 57, § 12.12(1).

effects on the capacity of the public to obtain access to the legal system. Given the long history of failed attempts to define law practice broadly, a move by the bar to bring law consulting under the umbrella of law practice is not likely to be successful.¹³³

An alternative approach would be to regulate law consulting separately. It is difficult to imagine, though, where the political will to enact such regulation would originate. Historically, consultants have shown no interest in creating or participating in a regulatory regime, and there are no signs that that this has changed. Without their collaboration, the imposition of a regulatory framework from above is not likely to work.

A final consideration is the effect of law consulting on legal compliance by corporations. In recent months, the corporate bar has sought to reassert its central role in eliciting lawful corporate behavior in response to government attempts to weaken the value of the attorney-client privilege. In the spring of 2005, a task force of the ABA issued a widely circulated report that emphasized the privilege and work-product doctrine.¹³⁴ In April 2006, corporate lawyers convinced the Federal Sentencing Commission to alter the OSGs so that waiver of the privilege was no longer considered a condition of cooperation; and in September 2006, the Senate Judiciary Committee conducted hearings during which the Justice Department's approach, formalized in the Thompson Memorandum, was roundly criticized by witnesses, including prominent members of the corporate bar, and members of the committee itself.¹³⁵

As the arguments advanced by the corporate bar reveal, the importance of the attorney-client privilege is premised on its capacity to further social values. The privilege not only exists to assist counsel in formulating legal advice; it is also intended to create a zone of privacy that lawyers are supposed to use to convince corporate clients to abide by the law.¹³⁶ According to the bar, the privilege encourages corporate employees to be forthcoming with lawyers, who can, in turn, give informed advice to the company and assist it in its good faith attempts to comply with the law.¹³⁷

The argument for strengthening privilege relies on one model of legal compliance under which attorneys mediate between legal mandates and their clients' interests to persuade clients to engage in law-abiding behavior. Under this traditional model, corporate lawyers are assumed to take an internal perspective on law—in which they engage in a good faith attempt to interpret laws consistent with their purposes—and convince their clients

133. See *supra* notes 54-57 and accompanying text.

134. See *Task Force Report*, *supra* note 87.

135. During the hearing, Deputy-Attorney General Paul McNulty assured the committee that the department would revisit its policies with a view to revising those that impinge on the attorney-client privilege. See *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations Before the S. Comm. on the Judiciary*, 109th Cong. 5, 10 (2006) (testimony of Deputy Attorney General Paul J. McNulty).

136. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981). For the classic critique, see Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1 (1998).

137. *Task Force Report*, *supra* note 87.

to do likewise. The view that lawyers and their clients are fundamentally inclined to respect law has become increasingly discredited as each new corporate scandal has come to light. Starting with Enron and continuing with Adelphia, Global Crossing, Livent, Qwest, TV Azteca, and Waste Management—to name just a few—lawyers have been found to be complicit in corporate wrongdoing, either by actively assisting their clients to break the law or turning a blind eye. In response to this wave, the organized bar has done little more than advance rationalizations to absolve the lawyers involved from responsibility.¹³⁸ Given this recent history, it is not surprising that regulatory authorities continue to experiment with a different model.

This alternative model, suggested by many regulatory regimes, requires that companies provide a form of self-executing compliance throughout their business operations. Under this model, compliance functions are no longer centralized but dispersed throughout the company through the designation of appropriate compliance personnel and the promulgation of self-audit mechanisms, ethics codes, and complaint procedures that effectively delegate compliance responsibilities to all employees. While a lawyer representing the company may have an important role in assuring that appropriate compliance mechanisms are implemented, overseeing a company's compliance functions does not fall under the mantle of corporate counseling, as once understood.

The question of whether lawyers and other employees who are responsible for instituting compliance mechanisms inside corporations take an internal or external perspective on the law may not make sense under this second model. As compliance functions become disseminated and dispersed inside large organizations, the discourse in which they are framed is likely to assume characteristics drawn from other areas of expertise. In particular, this discourse is likely to incorporate criteria of validity that look quite different from attempts to discern the meaning of law.¹³⁹ Whether a company has instituted effective financial controls under Sarbanes-Oxley, for example, may be less a question of whether the company's lawyer has interpreted the statute correctly and more a question of how the company's financial oversight systems measure against criteria of effectiveness borrowed from accounting and computer science: Is the company using the most effective software to track its monetary activities? By requiring the internalization of compliance inside organizations, these regulatory regimes dissolve the line between legal and other types of expertise. If, as I suggest, compliance regimes generate a multidisciplinary discourse whose primary site is not law, then the question of whether a law consulting regime is

138. See, e.g., Robert W. Gordon, *A New Role for Lawyers?: Counselor After Enron*, 35 Conn. L. Rev. 1185, 1189, 1195-97 (2003); see also Koniak, *supra* note 101.

139. As Lauren Edelman has shown, in the human resources area, legal mandates focusing on racial, gender, and ethnic diversity have been translated into a managerial discourse that emphasizes intersubjective differences, many of which are not recognized legally. See Edelman, *supra* note 12.

likely to strengthen or undermine law abiding behavior by corporations cannot be separated from the larger question of whether the new style of corporate governance reflected in the compliance movement is effective in eliciting meaningful compliance with legal mandates. My guess is that the answer depends on the specific compliance methods involved as well as the substantive context, but I leave this issue to another day.