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# Privatizing Professionalism: Client Control of Lawyers' Ethics

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# PRIVATIZING PROFESSIONALISM: CLIENT CONTROL OF LAWYERS' ETHICS

*Christopher J. Whelan\* & Neta Ziv\*\**

## INTRODUCTION

The nature of the lawyer-client relationship is “one of the most contested areas of professional ethics.”<sup>1</sup> In the corporate client “hemisphere”<sup>2</sup> of legal practice, and especially in the global marketplace, studies have suggested that the traditional model of the lawyer, as an independent professional, exercising professional judgment, has all but disappeared. At best, there is “commercialized professional[ism]”;<sup>3</sup> at worst, lawyers are “more akin to a cog in a machine.”<sup>4</sup>

Deborah Rhode, for example, has argued that law firms have become tainted with commercialism, to the detriment of their lofty professionalism.<sup>5</sup> Robert Gordon has noted that the client-centered focus of lawyers is in danger of reducing their public professional obligations to virtually zero:

Lawyers have come to feel genuinely affronted and indignant when any authority tries to articulate a public obligation of lawyers that may end up putting them at odds with clients. We have no public obligations, they

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1. ANDREW BOON & JENNIFER LEVIN, *THE ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES* 178 (2d ed. 2008).

2. *See generally* JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 127–69 (1982) (chapter on “The Hemispheres of the Legal Profession”).

3. GERARD HANLON, *LAWYERS, THE STATE AND THE MARKET: PROFESSIONALISM REVISITED* 123 (1999).

4. BOON & LEVIN, *supra* note 1, at 187. *See generally* MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: TRANSFORMATION OF THE BIG LAW FIRM* (1991) (analyzing the organizational structure and incentives for lawyers in large law firms).

5. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 9 (2000).

claim; we are private agents for private parties . . . our loyalties to clients must be absolute and undivided.<sup>6</sup>

Gordon refers to this as a libertarian ideology that “privatizes the lawyer’s role.”<sup>7</sup> In this context, “[i]ndependence from the client . . . is generally not a legitimate aspiration for the bar.”<sup>8</sup> In place of independence, there is a moral interdependence between lawyer and corporate client.<sup>9</sup>

The question then arises: what kind of ethics do large corporate clients want of their lawyers?<sup>10</sup> No one doubts the commercial pressures of legal practice in general and corporate legal practice in particular,<sup>11</sup> and the impact these can have on lawyers’ ethical conduct. One possibility is that corporations “want litigators who will press for every advantage and counselors who will exploit every regulatory loophole, not lawyers who feel bound by nebulous duties that supposedly arise from being an officer of the court.”<sup>12</sup> But it is possible to envisage corporate clients that might be willing to subordinate their immediate commercial interests to the lawyers’ professional responsibilities, or who see “ethical behavior as important to their long-term commercial stability and . . . profitability.”<sup>13</sup>

In order to probe into the relationship between global corporations and their lawyers, we have examined clients’ Outside Counsel Guidelines (OC Guidelines or Guidelines), or other formal terms of engagement, as well as informal norms that shape the relationship between lawyers and clients. Our main finding is that corporate clients, and in particular global corporations, are gaining influence and control over lawyers’ practices at a scope significantly above and beyond what had been customary in the past.<sup>14</sup> In particular, norms relating to lawyers’ practice that had formerly been under the domain of professional and state bodies, or left to the discretion of lawyers and their firms, are increasingly incorporated into

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6. Robert W. Gordon, *A Collective Failure of Nerve: The Bar’s Response to Kaye Scholer*, 23 LAW & SOC. INQUIRY 315, 320 (1998).

7. *Id.* at 321.

8. Evan A. Davis, *The Meaning of Professional Independence*, 103 COLUM. L. REV. 1281, 1281 (2003).

9. See Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 520 (1994).

10. ADRIAN EVANS, ASSESSING LAWYERS’ ETHICS: A PRACTITIONERS’ GUIDE 16 (2011).

11. See Anthony T. Kronman, *Professionalism*, 2 J. INST. FOR STUDY LEGAL ETHICS 89, 90 (1999) (“[A] new and aggressive culture of commercial values . . . is spreading through the profession as a whole.”). See generally MILTON C. REGAN JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004) (analyzing the divergence of a lawyer’s commercial interests and ethical obligations).

12. Milton C. Regan, *Taxes and Death: The Rise and Demise of an American Law Firm*, in *STUDIES IN LAW, POLITICS AND SOCIETY: LAW FIRMS, LEGAL CULTURE, AND LEGAL PRACTICE* 107, 108–09 (Austin Sara ed., 2010).

13. EVANS, *supra* note 10, at 16.

14. Research by Robert Eli Rosen observes changes in corporate clients’ structures, management styles, and culture as the locus from which to analyze lawyers’ practices. See 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). We join this approach, while focusing mainly on material that addresses lawyers’ conduct—namely, OC Guidelines—though in the broader context of corporate clients’ altering ethics and policies.

“guidelines,” “procedures,” “codes of conduct,” “manuals,” or “best practices” memoranda, which lawyers are expected to follow.

The topics incorporated in the guidelines vary to a great extent. They include instructions that by tradition have been part of bilateral negotiations between lawyers and clients, namely fees and billing terms; but they also incorporate directives on topics that have constituted the core of lawyers' ethics, such as conflicts of interest, client confidentiality, and professional conduct during litigation and discovery proceedings. They also relate to matters that have been part of law firms' business prerogatives, such as workplace employment diversity or “work-life balance/family friendly” employment policies. In some instances, we have identified guidelines that require lawyers to act as “gatekeepers” for the client, and to report misbehavior of corporate officers to management. Many codes and guidelines include an expectation that their lawyers act “ethically” and with “integrity,” an interesting point in and of itself, as one would think that this requirement ought to be obvious. These guidelines and norms are not the outcome of private negotiation between lawyer and client, but are imposed unilaterally upon lawyers retained by the corporate client. Thus they are evolving into a new kind of regulation, this time by private clients, hence the notion of “privatizing professionalism.” We are interested in learning about this form of control and how it is affecting the practice of lawyers, including law firm structure, the management of lawyers' multiple loyalties (to clients, third parties, and others), their relationship with professional bodies (law societies) and the state, and their claim for professional autonomy.

This Article demonstrates that in some cases the guidelines clearly protect the direct and immediate interests of the client, as recognized in conventional corporate law and lawyers' ethics. In other words, lawyers are expected to maximize the interests and benefits of their corporate clients (financial, reputational, etc.), regardless of potential adverse consequences to others. But there are also rules that do not strictly follow this rationale. These include workplace diversity requirements in outside counsel law firms, prohibitions on using obstructive and coercive tactics in litigation, the duty to protect the integrity of the justice system, the duty to consider and favor negotiation and alternative dispute resolution (ADR) over contentious adversarial strategies, and the general duty to act “ethically.”

In order to discuss this development, we draw upon two theoretical paradigms and bodies of literature: (1) the regulation of the legal profession, which we suggest that OC Guidelines should be considered a part of; and (2) the changing roles of inside versus outside counsel in corporate practice. We then present an overview of our research findings, which are based on a review of over twenty sets of Guidelines (summarized in an Appendix), and interviews with twenty in-house and outside lawyers and general counsel in the United States, the United Kingdom, and Israel. Following this, we set out some of the main elements of Walmart's Outside Counsel Procedures, since they illustrate just how detailed and ambitious such procedures can be. Finally, we argue that OC Guidelines constitute a

form of “privatized professionalism,” and consider some of the implications of this conceptualization.

### I. LAWYERS’ REGULATION

The changing nature of lawyers’ regulation has received much attention in recent years. Some have addressed the topic prescriptively and normatively—asking about the best arrangement for lawyers’ regulation.<sup>15</sup> Others have been descriptive—telling us about past, current, and future arrangements that will govern lawyers’ terms of professional engagement.<sup>16</sup> Comparative perspectives have tied particular arrangements to the historical, cultural, and political conditions of law and lawyers in a particular society and country,<sup>17</sup> as part of globalization and the changing role of the market and the state.<sup>18</sup> The topic has been related to developments in technology<sup>19</sup> and changes in legal culture.<sup>20</sup>

Whatever the methodology, this research most often discusses the question of lawyers’ regulation through a paradigmatic dichotomy of *state regulation versus self-regulation*. Under this paradigm, the field of lawyers’ regulation is confined to a continuum: on one end, there is a strong system of autonomous regulation by the profession’s institutions (mainly law societies but also courts), while at the other end, the profession is regulated by state bodies, including legislatures (federal and state), administrative agencies, and the civil courts.

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15. See, e.g., Eli Wald, *Should Judges Regulate Lawyers?*, 42 MCGEORGE L. REV. 149 (2010); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

16. See, e.g., Rosen, *supra* note 14; Eli Wald, *Federalizing Legal Ethics, Nationalizing Law Practice, and the Future of the American Legal Profession in a Global Age*, 48 SAN DIEGO L. REV. 489 (2011); Alice Woolley, *Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation* (July 3, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1877884>.

17. See, e.g., 1 LAWYERS IN SOCIETY: THE COMMON LAW WORLD (Richard L. Abel & Philip S.C. Lewis eds., 2005); 2 LAWYERS IN SOCIETY: THE CIVIL LAW WORLD (Richard L. Abel & Philip S.C. Lewis eds., 2005); CHRISTINE PARKER, *JUST LAWYERS: REGULATION AND ACCESS TO JUSTICE* (1999); Susan Saab Fortney, *Tales of Two Regimes for Regulating Limited Liability Law Firms in the US and Australia: Client Protection and Risk Management Lessons*, 11 LEGAL ETHICS 230 (2009); David McQuoid-Mason, *Access to Justice in South Africa: Are There Enough Lawyers?*, 22 WINDSOR Y.B. ACCESS JUST. 213 (2003); Amit M. Sachdeva & Sachin Sachdeva, *The Indian LLP Law: Some Concerns for Lawyers and Chartered Accountants*, 92 SEBI & CORP. L. 1 (2009); Neta Ziv, *Regulation of Israeli Lawyers: From Professional Autonomy to Multi-institutional Regulation*, 77 FORDHAM L. REV. 1763 (2009).

18. See generally Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 NW. J. INT’L L. & BUS. 487 (2003); Laurel S. Terry, *The European Commission Project Regarding Competition in Professional Services*, 29 NW. J. INT’L L. & BUS. 1 (2009); Christopher J. Whelan, *The Paradox of Professionalism: Global Law Practice Means Business*, 27 PENN. ST. INT’L L. REV. 465 (2008).

19. See generally RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2009) (describing how emerging technologies have radically changed the legal field).

20. See generally Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go?*, 23 GEO. J. LEGAL ETHICS 1119 (2010) (analyzing how public opinion is shaping legal culture).

David Wilkins mapped the regulatory systems in the United States.<sup>21</sup> These mechanisms shift from “self-regulatory” schemes (disciplinary proceedings) via administrative control, oversight (institutional), and court-based norm setting (liability controls) to legislative interventions. Fred C. Zacharias has argued that the claim for self-regulation is a “misnomer,” and that the legal profession in the United States had always been heavily regulated by a variety of state and federal institutions.<sup>22</sup> When John Leubsdorf claimed that legal ethics are “falling apart,” he meant that regulating lawyers’ conduct is not done by “the state or states in which the lawyer is acting,” but also by “state and federal legislators, administrators, and others.”<sup>23</sup> Thus the state has been a central part of this discussion.

Since the mid-1990s, literature on regulation has embarked upon the implications of globalization and world capitalism as overarching, hegemonic ideologies that affect regulation in general, and that of the legal profession in particular. From this direction, lawyers have increasingly been exposed to pressures to renounce their special status and privileges, as their professional knowledge is not considered different from that of any other profession.<sup>24</sup> Lawyers are being treated as any other “service provider”; in fact, “the service providers paradigm” is replacing the professional paradigm.<sup>25</sup> As Laurel Terry describes, this shift has been induced by the European Union, NAFTA (through the Office of the U.S. Trade Representative), the 1994 General Agreement on Trade in Services (GATS), and the World Trade Organization.<sup>26</sup> Their shared position has been that lawyers ought to be regulated under the general “disciplines” (i.e., market regulation) of service providers, with no distinctive regulatory status.<sup>27</sup> Although not states in the traditional structure, these institutions, agreements, and fora are heavily state-dominated. This approach was met with objection from bar associations and law societies, including the American Bar Association (ABA), the Council of Bars and Law Societies of Europe (CCBE), and the Japan Federation of Bar Associations (JFBA).<sup>28</sup> These organizations were particularly concerned with the approach that addresses lawyers’ regulatory arrangements in tandem with non-lawyer service providers.<sup>29</sup>

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21. See Wilkins, *supra* note 15, at 805–09 (discussing mechanisms for addressing lawyers’ misconduct).

22. Fred C. Zacharias, *The “Self-Regulation” Misnomer*, in REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS 188 (Kieran Tranter et al. eds., 2010); see also Fred C. Zacharias, *The Myth of Self Regulation*, 93 MINN. L. REV. 1147 (2009).

23. John Leubsdorf, *Legal Ethics Falls Apart*, 57 BUFF. L. REV. 959, 959 (2009).

24. Laurel S. Terry, *The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers,”* 2008 J. PROF. LAW. 189; John Flood, *Will There Be Fallout from Clementi? The Global Repercussions for the Legal Profession After the UK Legal Services Act 2007*, (Miami-Fla. Eur. Union Ctr. Jean Monnet/Robert Schuman Paper Series, Volume 8, No. 6, 2008) available at <http://www6.miami.edu/EUCenter/publications/FloodLong08ClementiEdi.pdf>; see also Whelan, *supra* note 18.

25. Terry, *supra* note 24, at 189.

26. *Id.* at 190–93.

27. *Id.* at 194.

28. See *id.* at 193.

29. See *id.*

Thus, from a state-based or a transnational viewpoint, the discourse about the changing nature of lawyers' regulation has for the most part meant a reallocation of power between the profession and the state.<sup>30</sup> In this Article, we shift the gaze from the state–self-regulation dichotomy to global and multinational corporations. We ask if and how these “new regulators” are shaping (de facto or potentially) “the business of law,” and what their impact is on lawyers' professionalism.

At this point, it is appropriate to ask whether the guidelines imposed by corporations upon their lawyers are in fact a regulatory regime, rather than a contract, similar to agreements that lawyers have always entered into with clients. Contracts are often a type of regulation; indeed, they are just one example of “private lawmaking.”<sup>31</sup>

From a theoretical perspective, we can employ Julia Black's definition of regulation as “the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard setting, information—gathering and behavior—modification.”<sup>32</sup> This definition views regulation as de-centered, extending beyond state institutions, and creating a variety of forms and relationships between civil society, state, and private (market) actors. Under this definition, an entity can be both a regulator and regulated, depending on the context.<sup>33</sup> Thus these OC Guidelines need to be understood not just as a private arrangement between two individual parties who wish to settle on their terms of engagement.

Looking at OC Guidelines and codes of conduct through this lens, we may be facing multiple regulatory systems applying to lawyers simultaneously. Inasmuch as these documents address issues that are also governed by state disciplinary rules or law societies' ethical codes, they may contain different standards of behavior than the “ordinary” rules. At times, they set heightened standards toward clients as compared with traditional ethical codes; at others, they complement them with duties toward non-clients that are often absent from the traditional codes. We

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30. See Christopher J. Whelan, *Ethics Beyond the Horizon: Why Regulate the Global Practice of Law?*, 34 VAND. J. TRANSNAT'L L. 931 (2001). One variation of this state–profession dichotomy is the work of John Flood on global law firms and their response to the profession–state re-division of power. Flood argues that global law firms have become so powerful that they are out of regulatory reach of both the state regulator and the professional law society (or other professional institution). Instead, they develop internal self-regulatory mechanisms and ethics committees. This is yet another manifestation of soft law, a voluntary code of conduct similar to Corporate Social Responsibility (CSR) self-governance systems. See John Flood, *The Re-landscaping of the Legal Profession: Large Law Firms and Professional Re-Regulation*, 59 CURRENT SOC. 507 (2011).

31. Michael J. Powell, *Professional Innovation: Corporate Lawyers and Private Lawmaking*, 18 LAW & SOC. INQUIRY 423 (1993).

32. Julia Black, *Critical Reflections on Regulation*, 27 AUSTL. J. ON LEGAL PHIL. 1, 26 (2002).

33. A corporate client defines norms that apply to itself, thus acting as a regulatee (although these norms are “soft” and not binding), and at the same time it applies norms upon others, acting as a regulator.

believe what we are witnessing is indeed a new model, often labeled as “private regulation.”<sup>34</sup> Private regulation is an amalgam of norms originating in private corporations that aims to set behavioral standards in an array of contexts. Tim Bartley describes this system as encompassing “coalitions of nonstate actors,” who take part in a comprehensive web of norm-setting activities.<sup>35</sup> They “codify, monitor, and in some cases certify [commercial] firms’ compliance with labor, environmental, human rights, or other standards of accountability.”<sup>36</sup> Global corporations reacting to these norms (often in the name of social responsibility) enter into transactions within transnational “chains of supply,” turning private regulation into a transnational phenomenon.<sup>37</sup> Due to the lack of formal regulatory capacity at the global level, this situation calls for new forms of “global governance.”<sup>38</sup> Hence codes of conduct imposed upon suppliers are part of this global governance regime and form a system of private regulation.<sup>39</sup> As we have seen, lawyers have come to be treated as other “suppliers”; thus, their codes also form part of this new private regulatory system.

## II. INSIDE AND OUTSIDE COUNSEL

Since the 1990s, the division of professional labor between inside and outside counsel has been altered significantly.<sup>40</sup> Tasks once performed by outside law firms are increasingly under the responsibility of inside counsel.<sup>41</sup> Corporate counsel often “micro-manage” outside counsel.<sup>42</sup> Their once-inferior status has been elevated and they now allocate, guide, control, and supervise the work of outside counsel.<sup>43</sup> The new role of inside counsel has spurred intensive deliberations about their professional independence and power vis-à-vis corporate clients.<sup>44</sup>

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34. See generally Ronen Shamir, *Socially Responsible Private Regulation: World Culture or World-Capitalism?*, 45 LAW & SOC’Y REV. 313 (2011) (analyzing the phenomenon of corporate social private regulation in light of globalization).

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

36. *Id.*

37. *Id.*

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

39. See *id.*

40. See, e.g., Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955 (2005); Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 EMORY L.J. 1201 (1997); Omari Scott Simmons & James D. Dinnage, *Imkeepers: A Unifying Theory of the In-House Counsel Role*, 41 SETON HALL L. REV. 77 (2011).

41. See generally Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC’Y REV. 457 (2000) (identifying the ideal roles for inside counsel in corporations).

42. Interview with Thomas E. Spahn, Partner, McGuire Woods LLP (June 19, 2011).

43. Nelson & Nielsen, *supra* note 41, at 457–58.

44. See generally DeMott, *supra* note 40; Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011 (1997); Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983 (2005); Suzanne Le

As inside counsel gain more relative power and influence, their relationship with outside counsel is altered. In the past, general counsels “have shown remarkably little interest in the internal management or practices of the law firms they employed.”<sup>45</sup> However, Suzanne Le Mire and Christine Parker discuss the growing evidence that corporations with large in-house legal departments convey high ethical expectations of their external lawyers:

In-house counsel closely supervise and monitor the services provided by external lawyers with a particular focus on ensuring that external lawyers fulfil their ethical responsibilities to the corporate client . . . . The combined market power and technical legal expertise of corporate clients with in-house legal departments means that they have the capacity to hold their external lawyers accountable to ethical responsibilities more consistently and reliably than can the clients of sole practitioners and lawyers in smaller law firms.<sup>46</sup>

This means that it is essentially the corporate client that sets the tone for the ethical behavior of its lawyer: the higher the ethical standard of the client, the better the chances that its lawyers behave ethically.

This is hardly surprising. The harder challenges come about when the officers of the corporate client wish to act unethically. The question then becomes whether lawyers’ professional core values and ethical obligations can impede upon actual or proposed misconduct, and prevent misdeeds. As the cases of Enron and other corporate scandals have shown, lawyers have not been able or willing to thwart their powerful clients, and in the most difficult and disturbing circumstances, they either did not play this buffering role or failed in their attempts to do so.<sup>47</sup>

In the discussion of lawyers’ role in corporate ethics, the focus of inquiry had been the place of lawyers’ professional independence and public commitments in preventing misconduct.<sup>48</sup> In other words, it was assumed that clients would “behave badly” and the question had been if lawyers had enough power, independence, awareness, consciousness, will, tools, and support to act according to their acclaimed professional ideals.

Our inquiries have provided an opportunity to examine these relationships from a different angle. We have identified some corporate clients that have adopted a policy of “good social behavior” and wish to

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Mire & Christine Parker, “*Keeping It In-House: Ethics in the Relationship Between Large Law Firm Lawyers and Their Corporate Clients Through the Eyes of In-House Counsel*,” 11 LEGAL ETHICS 201 (2008).

45. David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2111 (2010).

46. Le Mire & Parker, *supra* note 44, at 202. Note, though, that large corporate clients use both large and small law firms. Indeed, their influence on the latter may be even greater than on the former.

47. See Christopher J. Whelan, *Some Realism About Professionalism: Core Values, Legality, and Corporate Law Practice*, 54 BUFF. L. REV. 1067, 1075–81 (2007).

48. See generally ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER (Nancy B. Rapoport et al. eds., 2d ed. 2009) (detailing the roles of lawyers in major corporate scandals).

impose it upon outside counsel. The apparatus through which this is done is the inside counsel. In some cases, inside counsel draft the corporation's Corporate Social Responsibility (CSR) policy (including OC Guidelines) and retain a great deal of power over outside law firms. Inside counsel are usually familiar with the culture of large law firm practice, and thus become the central means of enforcing the corporation's CSR policy.

In sum, in the context of "corporate private regulation," the role of inside counsel becomes vital in ensuring compliance with the corporate client's norms, and requires new structural and substantive positioning vis-à-vis outside counsel.<sup>49</sup>

### III. CLIENT GUIDELINES, PROCEDURES, AND REQUIREMENTS OF OUTSIDE COUNSEL

OC Guidelines, requirements, and procedures are commonplace,<sup>50</sup> but there is a wide variety in terms of their scope, content, and form. Some OC procedures are lengthy; others not. Some corporate counsel took the view that "no one reads" long, detailed guidelines; others stated that guidelines are "a living document with genuine expectations."<sup>51</sup> In this section, we present central findings of OC Guidelines and other requirements imposed by clients on their lawyers. These findings are based on the following sources: a review of OC Guidelines found on the internet; a review of guidelines and documents provided to us through direct contacts and/or interviews with in-house counsel, outside counsel, and officers of corporations; and complementary information obtained in interviews of those mentioned above.

We cover all of these sources because they provide a more complete picture of the normative landscape we are exploring. Formal guidelines may understate (or overstate) what the company is actually doing. The guidelines might set a broad standard, and include directives such as "strive to hire minority lawyers" or "committed to the highest ethical standards," which on their face are too general to be enforced. Several OC Guidelines and corporate general codes of conduct refer to following the spirit rather than just the letter of the law; at times, they are backed by mechanisms to implement these objectives.

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49. In this Article, we are not looking at the role of so-called independent "standby" board counsel, that is, counsel hired specifically to be responsible to board members or an audit committee. Cf. 2006 NAT'L DIRS. INST., THE INCREASING ROLE OF INDEPENDENT "STANDBY" BOARD COUNSEL.

50. Rees W. Morrison, *Hot-Button Issues in Outside Counsel Guidelines*, N.Y. L.J., Jan. 12, 2009, at 24 ("All but the smallest law departments have guidelines that they distribute to outside counsel.").

51. Interview with General Counsel and Head of Risk Management, London law firm (Sept. 2011) (it is notable that law firms designate positions of this sort).

A. *Processes and Means of Applying Guidelines and Requirements upon Outside Counsel*

As demonstrated in the Appendix, some corporations have formal, well-established guidelines or codes of conduct applying to lawyers retained as OC. However, the process under which law firms are retained as outside counsel is also telling of the reworking of conventional patterns of the lawyer–corporate client relationship. Interviews with corporations and clients reveal that retention of a law firm is often conducted as part of the corporation’s procurement activities.<sup>52</sup> The European Bank for Reconstruction and Development, for example, publishes information about “outside counsel services” under the following hierarchical rubrics: “Working with us/Procurement/Outside Counsel services.”<sup>53</sup>

In the most blatant expression of this trend, lawyers in one U.K. firm stated that the same corporate department purchases “loo rolls” (toilet paper) and legal services.<sup>54</sup> Some corporations utilize tenders or Request for Proposals for outside counsel, which then become the formal documents under which lawyers would be regulated; others initiate contacts with law firms, asking them to submit proposals to be retained by the corporation. Under these procurement procedures, law firms may be required to provide information about the firm and its employees.<sup>55</sup> The point we would like to underscore is that whether through prescribed outside counsel guidelines, formal procurement procedures, or business negotiations, the terms of retention of lawyers’ services are being standardized and treated similar to other procurements of goods or services. Conditions of retention are then converted into the new regulatory scheme that applies to lawyers.

B. *Obtaining Information About Law Firms’ Business and Employees*

During the procurement process, and often as part of their reporting duties, law firms are required to provide detailed information about their business affairs, staff, administrative practices, and employment policies. This is a trend to which some law firms are not easily getting accustomed, and some consider it to be an unreasonable intrusion into their business prerogatives. In our reviews of OC Guidelines and interviews of inside and outside counsel we have come across the following data that law firms are asked to provide as a condition for working with the corporate client: staff and structure (partners, associates, paralegals); profitability and revenues; employees’ background check for criminal and credit records; permission to conduct drug testing of employees (upon hiring and subsequently at client request); employee computer security conduct requirements (shut down and

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52. *Id.*; Interview with General Counsel at an Israeli company that develops electro-optic systems (Mar. 2011).

53. *Outside Counsel Services*, EUR. BANK FOR RECONSTRUCTION & DEV., <http://www.ebrd.com/pages/workingwithus/procurement/ocs.shtml> (last updated Feb. 16, 2011) (OC services appear in the same rubric as project procurement, consultancy services, and corporate procurement).

54. Interview with London law firm partner (Sept. 2011).

55. *See infra* Part III.B.

lock computers); financial auditing; the duty to award full credit for all corporate client's work coming into the firm to a designated "Relational Partner" (which must be selected from a "diverse pool" of candidates);<sup>56</sup> the general ethical record of the firm and its lawyers (even if not related to work with the corporate client); employees' freedom to join trade unions; environmental policies; limitations on working hours, including those of the lawyers;<sup>57</sup> information security and IT auditing; and whistleblowing policies and protection.

Not all corporations impose all of these requirements, but there is a definite pattern whereby corporate clients become more involved and obtain a higher level of control over many aspects of law firm conduct. While in the past, corporate client control had been concerned only with the legal services it received from its lawyers (through billing arrangements and the like), this is changing. Corporate clients are involving themselves in areas of operation that are only remotely connected to the law. Some of them can be associated with the client's interest, such as information security or law firm auditing. Others seem to originate from the client's CSR (or other) policies, such as recycling requirements or freedom to join trade unions. Still others can fulfill both criteria, such as diversity and work-life balance requirements.

### C. Length, Content, and Scope

At one end of the spectrum, we found lengthy documents containing detailed requirements in many areas of operation: billing, fee arrangements and control over expenses, minute activity reporting and detailed coordination requirements with inside counsel, data collection on law firm practices, information security instructions, litigation policy, media contacts, diversity requirements, conflicts of interests, and confidentiality. Examples of this include Walmart and Bank of America.<sup>58</sup> At the other end, there were very brief guidelines for outside counsel, running just two or three pages, intended to be "user-friendly" and practical, such as a two-page laminated document that could be placed on everyone's desk. Such guidelines, issued for example by a multinational beverage company and

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56. See *infra* Part III.C.

57. See *infra* Part III.J.

58. Interestingly, some non-corporate clients also have OC Procedures. One example is the State of New Jersey Department of Law & Public Safety. DEP'T OF LAW & PUB. SAFETY, OFFICE OF N.J. ATT'Y GEN., OUTSIDE COUNSEL GUIDELINES (2011); see also *infra* Appendix (listing the State of Minnesota and Maricopa County College as non-corporate clients with OC requirements). New Jersey's OC are expected to represent the state "with integrity, professionalism, and a sense of urgency in resolving legal problems," and in accordance "with the highest ethical standards." DEP'T OF LAW & PUB. SAFETY, *supra* at 1, 4. The guidelines deal with several ethical issues, including conflicts of interest, confidentiality, litigation and advice matters, contingency fee litigation, pleadings and motions, settlement, and ADR. It may well be that public agencies are adopting methods and standards set by global corporations, a part of an overall neoliberal worldview.

the Export-Import Bank of the United States,<sup>59</sup> contained general instructions on engagement, conflicts of interest, and ethical standards, followed by issues such as diversity goals, case management, and billing procedures. A mid-length version is Wachovia Corporation's Legal Division General Guidance.<sup>60</sup> OC firms and their lawyers have to agree to follow the requirements, terms, and conditions of Wachovia's OC Guidelines. Lawyers are expected to deliver "high quality, cost-effective legal services."<sup>61</sup> The ethical issues discussed in the policy include conflicts of interest (broadly defined), attorney-client privilege, confidentiality, adverse publicity and contacts with the media, and instructions regarding "defensive litigation," including settlement, pleadings, discovery, appeals, and lawyer diversity.<sup>62</sup>

#### D. Specific Versus General Codes

Many large corporations have general Codes of Conduct or CSR Reviews, either in addition to OC Guidelines or as exclusive documents that apply across the organization. These include Bank of America,<sup>63</sup> Boeing,<sup>64</sup> GE,<sup>65</sup> Merck,<sup>66</sup> and Coca-Cola.<sup>67</sup> Documents of this sort provide a wide framework potentially affecting ethical conduct by OC. One multinational beverage corporation we studied had a very short set of guidelines for OC, but in addition to requiring OC to "maintain the highest

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59. *See Guidelines for Representation of Ex-Im Bank by Outside Counsel in Finance Matters*, EXPORT-IMPORT BANK U.S., <http://www.exim.gov/products/policies/OutsideCounselGuidelines.pdf>.

60. Wachovia, Legal Division General Guidance (on file with authors). Wachovia was taken over by Wells Fargo in 2008. Wells Fargo Legal Division's Engagement of Outside Counsel is similar in length and content (though not identical) to Wachovia's. Sections deal with retention, diversity, conflicts, attorney-client privilege, confidentiality, the media, and compliance. *See Legal Division – Engagement of Outside Counsel*, WELLS FARGO, <https://www.wellsfargo.com/about/corporate/legal/engagement> (last visited Apr. 21, 2012).

61. *Id.*

62. *Id.*

63. BANK OF AMERICA, CODE OF ETHICS ii (2012), available at <http://phx.corporate-ir.net/phoenix.zhtml?c=71595&p=irol-govconduct> (follow "Code of Ethics" hyperlink) ("The Code is based on our company's Core Values. . . . The Code of Ethics provides the guidance we need to translate our values into action as we compete in the marketplace and engage with customers, clients, shareholders, vendors and each other.").

64. BOEING, ETHICAL BUSINESS CONDUCT GUIDELINES 4, available at [http://www.boeing.com/companyoffices/aboutus/ethics/ethics\\_booklet.pdf](http://www.boeing.com/companyoffices/aboutus/ethics/ethics_booklet.pdf) ("We will always take the high road by practicing the highest ethical standards."); *id.* at 5 ("The highest standards of ethical business conduct are required of Boeing employees.").

65. GE, 2009 CITIZENSHIP REPORT: RENEWING RESPONSIBILITIES 36, available at [http://files.gecompany.com/gecom/citizenship/pdfs/ge\\_2009\\_citizenship\\_report.pdf](http://files.gecompany.com/gecom/citizenship/pdfs/ge_2009_citizenship_report.pdf) ("The GE commitment to perform with integrity . . . . is guided by our integrity policy, The Spirit & The Letter . . .").

66. MERCK, LOOKING AHEAD: 2009-2010 CORPORATE RESPONSIBILITY REVIEW 15 (2010), available at <http://www.merckresponsibility.com/downloads/Merck-2009-CSR-Report.pdf> ("[T]o ensure Merck achieves its business goals while meeting the letter and spirit of the complex regulatory framework in which we operate.").

67. COCA-COLA, CODE OF BUSINESS CONDUCT: ACTING WITH INTEGRITY AROUND THE GLOBE (Apr. 2009), [http://www.thecoca-colacompany.com/ourcompany/pdf/COBC\\_English.pdf](http://www.thecoca-colacompany.com/ourcompany/pdf/COBC_English.pdf).

ethical standards at all times,” also linked this to its Code of Business Conduct.

In some corporations, lawyers’ terms of engagement are included under “ethical” and CSR directives that govern suppliers.<sup>68</sup> GE, for example, has a broad directive for all of its suppliers: the corporation’s “Integrity Guide for Suppliers, Contractors and Consultants”<sup>69</sup> includes detailed requirements on issues such as minimum age of employees, prohibition of forced labor, environmental compliance, health and safety, and human rights of employees,<sup>70</sup> and concludes with a prohibition on the use of subcontractors or other third parties to evade legal requirements applicable to the supplier.<sup>71</sup> Apple’s “Supplier Code of Conduct” also has broad requirements regarding workers and human rights (including freedom of association, bargaining, and unionizing), health and safety standards, protecting the environment, and “ethics.”<sup>72</sup> Ethics includes maintaining fair business standards, whistleblower protection, community engagement, protection of intellectual property, and no tolerance of corruption.<sup>73</sup> Although these codes apply to all suppliers, including lawyers, our main focus will be on norms that address lawyers distinctively.

#### *E. Goals and Objectives of Outside Counsel Guidelines*

A review of guidelines, as well as interviews with law firms and inside counsel, reveal a mixture of underlying motives; however, in most cases, cost-effectiveness is emphasized. Bank of America’s litigation philosophy, for example, illustrates this duality: “1. Advocacy: Bank of America, while maintaining strong advocacy positions, seeks to facilitate the cost-effective resolution of claims. 2. High Ethics: Outside counsel representing Bank of America is expected at all times to maintain the highest ethical standards. Coercive, dilatory or obstructive tactics are not to be used.”<sup>74</sup> In general, outside counsel are instructed “to uphold[] high standards of professional and ethical conduct, and to ensur[e] timely, responsive, and cost-effective service.”<sup>75</sup>

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68. See, e.g., *Supplier Diversity*, AT&T, <http://www.att.com/gen/corporate-citizenship?pid=17724> (last visited Apr. 21, 2012).

69. See *Integrity Guide for Suppliers, Contractors and Consultants*, GE (Sept. 2009), [http://files.gecompany.com/gecom/citizenship/pdfs/ge\\_integrity\\_guide\\_suppliers\\_2009.pdf](http://files.gecompany.com/gecom/citizenship/pdfs/ge_integrity_guide_suppliers_2009.pdf).

70. This section cautions against the following:

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

*Id.* at 3.

71. *Id.* at 4.

72. See *Apple Supplier Code of Conduct*, APPLE 1–5 (2010), [http://images.apple.com/supplierresponsibility/pdf/Supplier\\_Code\\_of\\_Conduct\\_V3\\_3.pdf](http://images.apple.com/supplierresponsibility/pdf/Supplier_Code_of_Conduct_V3_3.pdf).

73. *Id.* at 5–6.

74. BANK OF AMERICA, OUTSIDE COUNSEL PROCEDURES 12 (2011), available at <http://www.bankofamerica.com/suppliers/files/legalprocedures.pdf>.

75. *Id.* at 3.

A clear impression drawn from interviews with law firms is that if “doing good” corresponds with “doing well” for the corporation, the higher the probability the policy will be enforced. This seems to be the case with diversity requirements: they are not only “the right thing to do,” but also are considered good business practice.<sup>76</sup> Likewise, what seems to be fair litigation policy (early and prompt conflict resolution, preference for settlements, avoidance of combative discovery practices, prohibition of protracted motion practice), can be regarded as good ethical standards as well as good business tactics.<sup>77</sup> This “market-embedded morality,” as coined by Ronen Shamir,<sup>78</sup> seems to be a suitable framework for these norms. It seems that the ethics and morality of corporate activities strengthen and sustain their immediate market interests and, in the long run, reinforce visions of neoliberal citizenship and responsible social action.<sup>79</sup>

#### F. Finances: Billing, Fees, and Costs

Most OC Guidelines include provisions about the financial arrangements between lawyers and corporations. Indeed, some of the surveyed guidelines include instructions on these issues only. They contain detailed instructions about the need to report on and get approval of litigation strategy, staffing (limit on the number of lawyers on a case), litigation motions, appeal procedures, billing arrangements (hourly or other), expenses and reimbursements (travel, mail, telephone calls, photocopying)—all to be handled via arranged structures determined by the client. No doubt the close supervision of lawyers’ fees and expenses is a relatively novel development, the outcome of a shift in law firm structure and modes of practice vis-à-vis corporate clients.<sup>80</sup> We consider these arrangements not for their own sake, but as part of the all-encompassing transformation in the lawyer–corporate client relationship: as clients gain more control over lawyers’ practices and dictate the terms of their work as part of their overall business operations, instructions about billing and ethical practices are often part of the same engagement record.

#### G. Customary Ethical Topics

Some OC Guidelines include directives relating to conflicts of interest and confidentiality. These instructions cover topics that traditionally have been under the jurisdiction of law societies and promulgated through

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76. Interview with in-house counsel (July 2011).

77. See, e.g., Walmart, Bank of America, Fannie Mae, Universal Underwriters Group, and the State of Minnesota, *infra* Appendix.

78. See Ronen Shamir, *The Age of Responsibilization: On Market-Embedded Morality*, 37 *ECON. & SOC.* 1 (2008).

79. See *id.* at 4.

80. The literature on changes in law firm structure and law firm client relations is vast. See, e.g., Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 *STAN. L. REV.* 1689 (2008); Larry E. Ribstein, *The Death of Big Law*, 2010 *WIS. L. REV.* 749.

disciplinary rules.<sup>81</sup> However, a significant number of guidelines address them and set new standards for lawyers' conduct. It is beyond the scope of this Article to provide a detailed account comparing disciplinary standards and those included in OC Guidelines; however, an overview of selected documents and interviews with law firms demonstrates that conflict-of-interest norms are included to set a heightened standard for lawyers by their clients.

Boston Scientific Corporation (a company that develops "innovative medical solutions") requires that its OC refrain not only from direct conflicts (regarding information and data obtained within the lawyer-client relationship), but also from indirect and positional conflicts.<sup>82</sup> The corporation lists over forty competitor companies that OC may not represent, "regardless of the nature of the representation," without first receiving permission from the corporation.<sup>83</sup> A large beverage company holds the same policy regarding its main competitor.<sup>84</sup> The Export-Import Bank of the United States has a detailed appendix for conflicts of interest that specifies in minute detail what it considers a "potentially adverse or divergent interest," restricting a lawyer who has worked with them from subsequent representation.<sup>85</sup> One partner that we interviewed noted that banks are particularly strict regarding conflict-of-interest rules, while oil

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81. Rules promulgated on conflicts and confidentiality by Law Societies were never exclusive, of course, and there had always been indirect regulation of them by courts, such as when they were asked to disqualify lawyers during representation due to a conflict of interest. See SUSAN R. MARTYN & LAWRENCE J. FOX, *TRAVERSING THE ETHICAL MINEFIELD: PROBLEMS, LAW, AND PROFESSIONAL RESPONSIBILITY* 262, 263 (2004) ("In the half past century, however, courts have examined most conflicts of interest in the context of motions to disqualify lawyers. . . . [L]itigation over the past 50 years has left no doubt that courts can, and should, disqualify lawyers when their conduct threatens the fairness of a judicial proceeding."). Courts have also addressed conflicts in criminal proceedings, for example when defendants argued that the right to effective assistance of counsel has been violated due to conflict of interest of his lawyer or a violation of the lawyer's duty of confidentiality. See Case Comment, *Criminal Law—Conflicts of Interest—First Circuit Rules that a Defendant Whose Lawyer Had a Conflict that the Judge Should Have Known About Must Show Adverse Effect to Receive a New Trial.*—Mountjoy v. Warden, New Hampshire State Prison, 115 HARV. L. REV. 938 (2002). On confidentiality, see McClure v. Thompson, 323 F.3d 1233, 1242–43 (9th Cir. 2003).

82. See BOS. SCI. CORP., *PARTNERSHIP GUIDELINES FOR MATTER HANDLING AND BILLING PRACTICES* § G (2011) (on file with authors) ("It is important that you are sensitive to both direct conflicts and indirect conflicts, i.e., conflicts that may arise from your firm's advocacy of other clients' positions which conflict with BSC's business objectives. If your firm is designated as a 'BSC preferred provider,' we expect that the firm will not take public positions adverse to BSC (e.g., in litigation or administrative proceedings). Your firm cannot participate in any manner in any lawsuit against BSC."). A lawyer from a large U.S. firm admitted that restrictions regarding "positional conflicts" are potentially problematic. Interview with Thomas E. Spahn, *supra* note 42.

83. BOS. SCI. CORP., *supra* note 82, § G.

84. Interview with general counsel of large beverage company ("[I]f you want to work with us don't work with them.").

85. EXPORT-IMPORT BANK OF U.S., *supra* note 59, at 4. This term refers to "cases in which the other party is the borrower or a provider of subordinated financing or other financing having rights to payment, collateral or voting other than on a *pari passu* basis in the proposed Ex-Im Bank Financing." *Id.*

and gas companies have less stringent policies.<sup>86</sup> He noted that law firms have lost business not due to professional rules, but rather to clients' stricter rules on conflicts. In sum, we see that conflicts of interest receive much attention in the lawyer–corporate client relationship.

To be sure, conflict rules are at the core of the lawyer–client relationship and have always been central in lawyers' ethics. The issue here is the growing control of corporate clients in delineating the scope of representational restrictions deriving from conflicts, *as they define them*.

A similar process occurs with respect to confidentiality requirements, which are regularly included in OC Guidelines.<sup>87</sup> In this context, it is worth noting requirement: first, “information security” prerequisites that clients impose on lawyers (usually before they are retained).<sup>88</sup> One interviewee noted that bank clients wanted to check the security of confidential bank information on law firm computers and systems—and did so via on-site audits. The second is binding OC to specific confidentiality and privacy requirements of clients, such as bank privacy laws<sup>89</sup> (such as the U.S. Gramm-Leach-Bliley Act).<sup>90</sup>

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86. Interview with London law firm partner (Aug. 2011).

87. *See, e.g.*, BANK OF AMERICA, *supra* note 74, at 4 (requiring OC to “follow all statutory and regulatory provisions relating to privacy, confidentiality and nondisclosure of customer records, proprietary information of Bank of America, and other privileged or confidential information, including without limitation information or data protection laws and regulations”).

88. Bank of America, for example, obligates its OC to use procedures and systems designed to (1) ensure the security, integrity and confidentiality of Bank of America proprietary and customer information; (2) protect against any anticipated threats or hazards to the security or integrity of such information; (3) protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to Bank of America or any person that is the subject of such information; and (4) ensure the proper disposal of such information.

*Id.* at 18.

89. *See, e.g.*, Wachovia, *supra* note 60 (“Outside Counsel is expected to ensure that non-public, proprietary and/or confidential information is protected and is not used or communicated in violation of banking, securities, or other applicable laws and regulations, or contrary to any applicable agreements or ethical standards. For example, the Gramm-Leach-Bliley Act imposes restrictions on the disclosure of non-public personal information by financial institutions and on recipients of such information from financial institutions and imposes certain information security obligations on financial institutions.”).

90. *See* Gramm-Leach-Bliley Financial Modernization Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (codified in scattered sections of 12 & 15 U.S.C.). The D.C. Circuit has ruled that lawyers are not “financial institutions” under the Gramm-Leach-Bliley Act, thus they are not obligated to comply with the law’s privacy obligations. *ABA v. FTC*, 430 F.3d 457, 470–71 (D.C. Cir. 2005). However, lawyers are likely to be regarded as “service providers” when they represent financial institutions, and may be required to provide contractual assurances about their information security practices and, in particular, the steps they are taking to protect any personal information they may acquire in the course of their representation. *See* Peter Muckelstone & Stuart Louie, *Lawyers as “Service Providers” Under the Gramm-Leach-Bliley Act*, PRIVACY & SEC. L. BLOG (Jun. 8, 2006), <http://www.privsecblog.com/2006/06/articles/financial-institutions/lawyers-as-service-providers-under-the-grammleachbliley-act/>.

#### H. Compliance with Specific Laws that Bind Lawyers and/or Clients

Some OC Guidelines (as well as procurement documents) include explicit reference to legislation that applies to the corporation and/or to lawyers. The most frequent reference is to the Sarbanes-Oxley Act<sup>91</sup>—corporate obligations as well as lawyers' "up the ladder" reporting duties.<sup>92</sup> Wachovia, for example, incorporates within its guidelines a reporting duty that exists in the Sarbanes-Oxley Act.<sup>93</sup> Other OC Guidelines require that the firm abide by legislation and regulation regarding corruption<sup>94</sup> and "abusive tax shelters."<sup>95</sup> In accordance with a policy of this sort, a large Israeli law firm has been required to provide a written acknowledgement to its client that it will not "pay, offer, or promise to pay or authorize the payment directly or indirectly [of] . . . anything of value to any government official . . . political party . . . candidate for political office for the purpose of inducing or rewarding favourable action . . . in any commercial transaction or in any governmental matter."<sup>96</sup>

#### I. General Ethical Duties, Duties Toward Third Parties, Gatekeeping, and Whistleblowing

In interviews and some OC Guidelines, we came across instructions that appear to be concerned with interests other than those of the client. To begin with, some general guidelines ask suppliers (lawyers included) to adhere to universal principles, such as the Universal Declaration of Human Rights.<sup>97</sup> Others demand lawyers' adherence to "highest ethical standards."<sup>98</sup> However, there are a number of corporations that attend

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91. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C.).

92. See *infra* Part III.I.

93. See Wachovia, *supra* note 60 ("Wachovia is also committed to conducting its business in accordance with the highest ethical standards. . . . If Outside Counsel reasonably believes that a material violation of law may have occurred, is occurring or is about to occur at or involving Wachovia, as set forth in Section 307 of the Sarbanes-Oxley Act of 2002 and the SEC Rules promulgated thereunder . . . Outside Counsel must immediately and confidentially contact a Deputy General Counsel or Wachovia's General Counsel and the responsible Legal Division Lawyer.").

94. The Export-Import Bank of the United States, for example, clarifies its commitment to adherence to anti-corruption laws. See *Foreign Corrupt Practices Act (FCPA) and Other Anti-bribery Measures*, EXPORT-IMPORT BANK U.S., <http://www.exim.gov/products/policies/ForeignCorruptPracticesActFCPAandAnti-briberyMeasures.cfm> (last updated July 23, 2010).

95. See BANK OF AMERICA, *supra* note 74, at 18.

96. Interview with law firm compliance officer (Apr. 2011).

97. See *Statement of Principles on Human Rights*, GE (2009), [http://www.ge.com/files\\_citizenship/pdf/ge\\_statement\\_principles\\_human\\_rights.pdf](http://www.ge.com/files_citizenship/pdf/ge_statement_principles_human_rights.pdf) ("GE, as a business enterprise, promotes the advancement of fundamental human rights. We support the principles contained in the Universal Declaration on Human Rights, remaining mindful that it is primarily addressed to nations. GE has joined with other companies to find practical ways of applying within the business community the broad principles established in the Declaration."); see also APPLE, *supra* note 72, at 1 ("Suppliers must uphold the human rights of workers, and treat them with dignity and respect as understood by the international community.").

98. See BANK OF AMERICA, *supra* note 74, at 10.

specifically to lawyers' professional conduct. The most prominent are directives contending with "over-zealous" adversarial representation, as well as duties to the justice system and to the adversary during litigation.

Some corporations (though not many) have specific litigation guidelines that limit lawyers' "legal toolkit." No doubt Walmart has the most far-reaching instructions to its OC,<sup>99</sup> but other corporations also direct lawyers to not use "coercive, dilatory or obstructive tactics" and discourage protracted motion practice.

Many corporations demand that lawyers representing them utilize ADR measures, strive to achieve settlements, assess the case to see the strength of defense and decide on strategy accordingly, and generally manage cases in a way that is both more conciliatory and cost-effective.<sup>100</sup> These dual goals are not contradictory. Walmart's past reputation as a business that contested and aggressively disputed every claim not only resulted in a reputational loss, but was also an enormous financial burden; thus a more conciliatory and less aggressive stance might serve both interests.<sup>101</sup>

Finally, some corporations impose upon their outside lawyers' direct "gatekeeping" requirements when they encounter improper behavior of corporate officers or staff. Walmart expects its OC to go beyond that standard, stating under "Ethical Conduct" instructions:

If Outside Counsel believes that a Walmart associate (including any Legal Department personnel) has or will engage in illegal or unethical activity as a representative or agent of the Company, that person must immediately and confidentially contact the [Responsible Legal Department Attorney (RLDA)] (or a Walmart Associate General Counsel-Section Head or General Counsel, as appropriate). No Walmart Associate has the authority to instruct Outside Counsel to act in an unethical manner in connection with any Walmart matter.<sup>102</sup>

In other words, OC are being used as a mechanism to monitor improper behavior of the client's agents, turning them into "lawyers-gatekeepers."

Whether guidelines of this sort aim to achieve more efficient and cost effective management of caseload, their mere existence is novel and quite an astounding development. They represent a set of practices that seems to stand in contrast with the recognized and often infamous professional

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99. See *infra* Part IV.

100. See Bank of America, Fannie Mae, Universal Underwriters Group, Wachovia Group, Walmart, Zurich Insurance, The Export-Import Bank of America, *infra* Appendix.

101. See, e.g., Zurich, LITIGATION MANAGEMENT: GUIDELINES FOR DEFENCE COUNSEL 3, available at <http://www.zurich.com/NR/rdonlyres/E4145DF3-23EF-48CC-93A6-07D10F1B791F/0/LMG.pdf> ("Zurich expects to work with defence counsel and its insureds to achieve the best result for the insured in an efficient and cost-conscious manner consistent with the law firm's ethical obligations. Nothing contained herein is intended to nor shall restrict counsel's exercise of independent professional judgment in rendering legal services for the insured or otherwise interfere with any ethical directive governing the conduct of counsel.").

102. WAL-MART STORES INC., OUTSIDE COUNSEL GUIDELINES (U.S. FIRMS) 15 (2010) (on file with authors) [hereinafter WALMART GUIDELINES].

culture of zealous, adversarial representation, and thus take part in shaping an alternative professional ethos and normative ethical landscape.

*J. Diversity and Work–Life Balance Requirements*

A large number of corporations require OC to include women and minorities in the staff providing legal services; some also refer to “social background.”<sup>103</sup> During procurement procedures, firms are to provide information on staff makeup, as well as policies relating to diversity. Diversity is conceptualized not just as the right thing to do, but also as a sound business strategy. As the general counsel of a multinational retailer corporation explained, its Legal Division

is committed to making diversity a competitive advantage within our organization by, among other things, ensuring that our internal workforce and the outside lawyers working on our matters reflect the diverse community that is our consumer base . . . . Law firm partners will also be expected to provide periodic reporting . . . . evidencing progress in alignment to the Company’s diversity goals.<sup>104</sup>

Some corporations are satisfied with their OC making a good faith effort to recruit, retain, and promote qualified women and minorities; others require a detailed report on these efforts, or impose an even stricter requirement that the list of Relationship Partner candidates includes a designated number of women, minorities, and partners on flex-time.<sup>105</sup>

It seems that diversity requirements are becoming one of the standard terms of engagement. In 2011, Walmart accompanied its Diversity Guidelines with “flex-time” requirements.<sup>106</sup> The rationale for adding this condition was that women and minorities are often at a disadvantage when working hours are long and inflexible;<sup>107</sup> it is also possible that lawyers who are not overworked can provide a better service.

#### IV. WALMART

Walmart is an important source of work for OC; as of 2009, it used about 680 outside law firms, both large and small.<sup>108</sup> Walmart itself has thirteen different legal divisions, all with their own budgets and financial accountability. They cover areas such as real estate, international affairs, Sam’s Club (a chain of membership-only retail warehouse clubs owned and operated by Wal-Mart Stores, Inc.), corporate affairs and government,

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103. Interview with London law firm partner, *supra* note 54 (social background is a requirement imposed by Morgan Stanley upon its OC).

104. Interview with general counsel (June 13, 2011).

105. The benefit that this has for candidates is reinforced by a requirement (which is monitored) that the RP receive all credit for the work brought into the firm. *See infra* note 130 and accompanying text.

106. *See infra* Part IV.A.2; *cf.* Interview with personnel at London law firm (Sept. 2011) (stating that they have encountered requirements under which associates must not work more than ten hours a day).

107. *See infra* note 127 and accompanying text.

108. *See* Meredith Hobbs, *On the Same Page*, LEGAL WK., Apr. 21, 2011, at 14.

litigation, and class actions. The Walmart OC Guidelines therefore provide a means of managing these diverse relationships efficiently and with as much specificity as possible.

The Guidelines also may be seeking to address a reputation that Walmart wishes to change. Walmart had a reputation for aggressively pursuing litigation even when it would have been cheaper to settle. In 1999, Judge James Mehaffy accused Walmart of “thwarting, obfuscating and obstructing” court procedure, and threatened to fine Walmart \$18 million for withholding an internal study of parking lot security sought by a woman who was abducted from a Walmart parking lot.<sup>109</sup> The corporation also had a “long history of refusing to negotiate with plaintiffs” as well as a policy of “scrimping on legal costs.”<sup>110</sup>

However, these policies appear to have changed dramatically following the appointment of more experienced in-house lawyers.<sup>111</sup> The changes are reflected in Walmart’s OC Guidelines, which were revised most recently in 2010. They “supersede previously issued guidelines”<sup>112</sup> and are one of the longest and most exhaustive sets of guidelines we came across in our research. The new Guidelines were designed to be more user-friendly, increase efficiencies, reduce costs, and raise the level of the diversity initiatives. They now comprise three parts: a thirty-three-page set of guidelines; a sixteen-page Invoicing Addendum; and two Appendices which run for forty-seven pages.<sup>113</sup>

The Guidelines “set forth the expectations [Walmart] has of its outside law firms and define an effective working relationship with Walmart. All attorneys and professional staff who work on matters for Walmart must be familiar with these Guidelines . . . . [They] constitute the terms under which Outside Counsel are engaged.”<sup>114</sup> The contents reveal the very broad coverage of the Guidelines. They include sections on diversity and flex-time, engaging OC, Wal-Mart’s relationship partner, conflicts of interest, staffing, confidentiality, ethical conduct, malpractice insurance, file retention, e-mail, information security, media contact, gifts and gratuities, evaluation and feedback, audits, managing litigation, pleadings and motions, discovery, settlement and ADR, filing appeals, managing non-litigation matters, and invoicing for fees and expenses.<sup>115</sup> The latter is supplemented by the Invoicing Addendum.

The expectations of OC are set out in general terms at the beginning:

Walmart expects . . . Outside Counsel . . . to provide the Company with the highest quality legal services in the most cost-effective manner possible. We expect Outside Counsel to stress integrity, professionalism,

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109. Richard Willing, *Lawsuits Follow Growth Curve of Wal-Mart*, USA TODAY, Aug. 14, 2001, at A1.

110. DeMott, *supra* note 40, at 972–73 (quoting Catherine Aman & Gary Young, *Wal-Mart Shifting Litigation Strategy*, NAT’L L.J., Sept. 30, 2002, at A29).

111. *Id.* at 974.

112. WALMART GUIDELINES, *supra* note 102, at 6.

113. *Id.*

114. *Id.*

115. *Id.* at 2–5.

a sense of urgency in resolving legal problems, and sensitivity to protecting and honoring the three fundamental principles that have contributed to our success: respect for the individual, service to our customers and a constant striving for excellence.<sup>116</sup>

OC are also expected to demonstrate commitment to diversity, including honoring flexible work schedules, responsiveness and timely communication with in-house attorneys, working knowledge of Walmart's business and legal goals, and compliance with OC Guidelines.<sup>117</sup>

OC are also entitled to expectations of Walmart's behavior. They can expect from Walmart, among other things: cooperation with OC, feedback, a commitment to professionalism and integrity in working with OC, demonstration of Walmart's three basic beliefs, working knowledge of Walmart's business and legal goals, demonstrated commitment to diversity, including honoring flexible work schedules, and compliance with OC Guidelines.<sup>118</sup>

There are two features of the Guidelines that are particularly significant. The first is related to requirements regarding operational aspects of the OC firm, which include guidelines relating to diversity, flex-time, and Relational Partners. The second addresses Outside Counsel's conduct during professional activity. We will look at each in turn.

#### A. Law Firm Operation

##### 1. Diversity

The commitment to diversity "both internally and in its [OC] hiring practices" appears to go far beyond mere rhetoric.<sup>119</sup> As the Guidelines put it, "Diversity is not just about doing the right thing," it is in Walmart's own interest: "we believe that a culturally sensitive, diverse workplace is better able to serve our needs and produce better results."<sup>120</sup>

This belief is followed by a series of detailed requirements: law firm diversity is measured by "[o]verall law firm demographics," "[d]emographics of the firm's Walmart team," and "[g]ood-faith efforts exhibited by the firm."<sup>121</sup> The latter is defined as including "[h]aving an active diversity committee," "[i]mplementing a diversity plan," "[a]ttending and sponsoring diversity events," "[i]ncreasing efforts to develop and retain women and minority attorneys," and "[i]nvesting in the future of the profession (e.g., pipeline efforts)."<sup>122</sup> Walmart "encourages Outside

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116. *Id.* at 6.

117. *Id.* at 7.

118. *Id.* at 7–8.

119. *Id.* at 7.

120. *Id.*

121. *Id.*

122. *Id.* at 8.

Counsel to utilize qualified diverse attorneys as appropriate when staffing Walmart matters.”<sup>123</sup>

## 2. Flex-Time

Walmart Guidelines state, “[W]e are equally committed to promoting balanced work arrangements, as set out in our internal Flex-Time Policy.”<sup>124</sup> Under this policy, attorneys should be allowed to work a flexible or reduced-hours schedule, work from home, or job share.

Flex-time was first introduced within Walmart before becoming a requirement for OC in the 2010 Guidelines.<sup>125</sup> The development may have been influenced by the National Association of Women Lawyers survey, which highlighted the challenges women, especially women of color, face to advance their careers in the legal profession.<sup>126</sup> The implementation of flex-time followed the participation of Jeff Gearhart, Walmart’s Executive Vice President and General Counsel, in the Project for Attorney Retention’s Annual Diversity and Flexibility Connection Conference:

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

Moreover, the absence of flex-time arrangements has been shown to have seriously detrimental effect on the careers of women and minorities. In fact, minority female lawyers have the highest attrition rate of any group of lawyers and we are beginning to understand that a lack of work/life balance may play a major role for many of these attorneys.<sup>127</sup>

Many law firms used by Walmart are small, two- to three-partner firms providing localized services and local counsel in areas such as land use, casualty, and tort. In these firms, a flex-time requirement is fairly redundant. However, many of the large firms that Walmart uses might be reluctant to introduce flexible working time because of billable hour

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

124. WALMART GUIDELINES, *supra* note 102, at 8.

125. *Walmart Announces Flex-Time Requirements for Outside Law Firms*, WALMART LEGAL NEWS 1, 2 (Nov. 2009), <http://walmartlegal.rfi-walmart.com/WalmartLegal-Newsletter.pdf>.

126. *See* NAT’L ASS’N OF WOMEN LAWYERS, REPORT OF THE FOURTH ANNUAL NATIONAL SURVEY OF THE PROMOTION AND RETENTION OF WOMEN IN LAW FIRMS (Oct. 2009), *available at* <http://nawl.timberlakepublishing.com/files/2009%20Survey%20Report%20FINAL.pdf>.

127. WALMART LEGAL NEWS, *supra* note 125, at 1.

requirements and other pressures. Walmart therefore may be able to influence a different approach to this work-life balance issue.

Flexible schedules may be in the interests of Walmart as well as of those individuals who benefit from them, another example of enlightened self-interest: "We believe such arrangements promote attorney retention, facilitate the implementation of alternative-fee arrangements, and create a more balanced work environment."<sup>128</sup> They also prevent the loss of institutional knowledge and create a more balanced and inclusive work environment.

In the recent Guidelines, Walmart set a deadline of February 1, 2011 for firms to implement flex-time policies that the law firm deems appropriate for the firm and its U.S.-based attorneys.<sup>129</sup> It threatened to terminate its relationship with any firm that did not implement such a policy, unless the firm communicated "an acceptable reason why the implementation of such a policy is not practical."<sup>130</sup>

### 3. Relationship Partners

The significance of these diversity and flex-time commitments is reinforced by Walmart's requirements regarding Relationship Partners (RPs) and the way they are chosen. The RP is the primary contact at the law firm and manages the relationship. Walmart relies on its RPs, who are responsible for compliance with the Guidelines.<sup>131</sup> The RP's duties include "[t]aking demonstrable steps to advance diversity" and "monitoring and advising on conflicts of interest."<sup>132</sup>

The OC firm must produce a list of five possible RPs, which "must contain at least one attorney of color, at least one female attorney, and at least one attorney who works on a flexible work schedule, provided the firm has at least one such attorney."<sup>133</sup> Given that it has historically been more difficult for women and minorities to develop large and sustained books of business, when compared with their white male counterparts, the Walmart OC Guidelines address the lack of equal opportunity within the legal profession.

The significance of this is enhanced by Walmart's requirement that the Walmart RP shall receive full "Origination Credit" for all Walmart work coming into the firm. This requirement is enforced by Walmart demanding, from a senior member of the firm, a certificate that the RP has received or will receive the credit. This is known as Origin Credit Certification,<sup>134</sup> and is a substantial incursion into the internal affairs of the law firm.

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128. WALMART GUIDELINES, *supra* note 102, at 8.

129. *Id.*

130. *Id.*

131. *See id.* at 9.

132. *Id.*

133. *Id.* at 10.

134. *Id.* (The firm "shall annually certify in writing on or before January 31 of each year that the Walmart [RP has] received or will receive full credit for all Walmart work brought into the firm in the preceding twelve-month period and that no such work was disseminated

This requirement reflects the fact that the Walmart legal department understands the way law firms reward their partners. The “coin of the realm” in law firms depends upon who has the relationship with the client. Many of the large law firms have numerous corporate clients. Walmart believes that this credit requirement helps convert the rhetoric of diversity and flex-time into a reality.

## *B. Professional Conduct*

### 1. Ethical Conduct

The second highly significant area of interest in the Guidelines concerns the ethical standards required of OC. Once again, as with so many of the OC Guidelines, there appears to be a degree of high “rhetoric.” But here, too, there is also some attempt to make these a reality.

The rhetoric in the introduction to the Guidelines is repeated later on in the section on Ethical Standards: “Walmart conducts its business in accordance with the highest ethical standards and expects the same of its [OC].”<sup>135</sup> Furthermore, “[a]ll OC are required to adhere to Walmart’s Statement of Ethics.”<sup>136</sup> However, there are many more specific requirements, some of which reinforce or expand upon ABA Model Rules.

To begin with, Walmart includes a broad definition of circumstances in which a conflict of interest arises. The OC Guidelines prohibit OC from representing Walmart in any matter in which a conflict of interest exists, and includes not only actual, potential, or other conflicts as defined by any applicable code of professional responsibility or rules of professional conduct. It broadens conflict of interest to include whatever Walmart may conclude is a conflict of interest, “if Outside Counsel represents a significant competitor.”<sup>137</sup>

However, ethics are not confined to the traditional topics included in ethical codes. The OC Guidelines incorporate matters that are usually regulated by the state. For example, OC are required by Walmart to report illegal or unethical activity.<sup>138</sup> In those circumstances, there is a duty to immediately and confidentially contact authorized personnel at Walmart.<sup>139</sup>

In addition, when it comes to representing Walmart in litigation, the Guidelines go from broad aspiration into great detail, and instruct OC to:

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within the firm without the knowledge and consent of the Walmart [RP]. Such certification shall be provided by the firm’s Chairperson, Managing Partner, General Counsel, Chief Financial Officer, or other such person in a position of firm leadership. In no instances shall the Walmart [RP] be required to provide the aforementioned certification.”)

135. *Id.* at 15.

136. *Id.*; see also WALMART STATEMENT OF ETHICS (rev. Sept. 2008), available at [http://walmartstores.com/media/cdnpull/statementofethics/pdf/U.S\\_SOE.pdf](http://walmartstores.com/media/cdnpull/statementofethics/pdf/U.S_SOE.pdf).

137. WALMART GUIDELINES, *supra* note 102, at 11.

138. See *id.* at 15.

139. *Id.* (reporting should be made to the “AGC-OCM (or a Walmart Associate General Counsel–Section Head or General Counsel, as appropriate)”).

Honor the spirit, intent, and requirements of all rules of civil procedure and rules of professional conduct

Conduct themselves in a manner that enhances and preserves the dignity and integrity of the system of justice

Adhere to the principles and rules of conduct that further the truth-seeking process so that disputes will be resolved in a just, dignified, courteous, and efficient manner

Make reasonable responses to discovery requests and not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-privileged information . . .

Make good faith efforts to resolve disputes concerning pleadings and discovery

Agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect Walmart's legitimate rights

Prepare and submit discovery requests that are limited to those requests reasonably necessary for the prosecution or defense of an action and not for the purpose of placing an undue burden or expense on another party.<sup>140</sup>

Although some of these guidelines are open to interpretation and clearly require the exercise of professional judgment, the sanction for failing to adhere to these standards is set out in no uncertain terms: "*Walmart will terminate its relationship . . .*"<sup>141</sup>

## 2. Discovery Proceedings

Historically, Walmart had a reputation for being sanctioned for discovery-related issues. This reputation may have been the result of unethical behavior, but it is also possible that the company was simply inundated with discovery requests and, as a result, found it difficult to keep up with them. Walmart reported that it had been sued 4,851 times in the year 2000, or once every two hours; juries decided a case in which Walmart was a defendant about six times every business day; and Walmart lawyers listed 9,400 open cases.<sup>142</sup>

This probably explains why, about five years ago, Walmart established a Litigation Support Group, within the Litigation Group, with the sole task of processing discovery requests.<sup>143</sup> As one interviewee put it, the "whole philosophy has changed—we do care if we are sanctioned."<sup>144</sup> Since 2008, no firm has been terminated because of discovery sanctions.

The Discovery section goes into some detail:

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140. *Id.* at 18.

141. *Id.*

142. Willing, *supra* note 109.

143. Compare, for example, that in the United Kingdom, Herbert Smith "outsourced" the management of all its discovery work to Belfast, Northern Ireland. David Gold, *Litigators Must Adapt to New Practices or Perish*, THE TIMES, Sept. 15, 2011, at 63.

144. Interview with general counsel, *supra* note 104.

*Form objections [to discovery requests] are to be avoided. All objections must fully articulate the legal and factual basis for the objection. . . .*

Outside Counsel are expected to make informed, ethical decisions with respect to discovery responses . . . . [and] are required to conduct discovery in a manner that enhances and preserves the dignity and integrity of the justice system. *Under no circumstances shall Outside Counsel engage in or encourage a violation of any discovery or ethical rule concerning the timely and appropriate disclosure of information to which a litigant is entitled. . . .*

*Sanctions for discovery violations will not be tolerated and may result in the immediate termination of Outside Counsel.*<sup>145</sup>

These standards were unchanged from the earlier Guidelines. However, the 2010 Guidelines require OC to report significant developments involving “[a]ny orders granting such discovery motions or awarding sanctions.”<sup>146</sup>

### 3. Settlement and Alternative Dispute Resolution

A fourth area of significance is the section on settlement and ADR: “Walmart encourages early settlement discussions when the settlement of a litigated matter is ‘the right thing to do’ under the circumstances.”<sup>147</sup> It encourages the use of ADR: “Outside Counsel should proactively identify and bring to the attention of the PIC all opportunities to utilize ADR.”<sup>148</sup>

### 4. Monitoring Performance

Ongoing relationships with OC are developed, and OC performance is monitored, in a number of ways. The in-house lawyers within the various divisions who are responsible for sending work to OC have fairly regular contact. Walmart also has an Office of OC Management which may also have contact with OC. In addition, every other year, Walmart holds a two-day OC conference. The CEO and General Counsel attend the first day, during which Walmart’s expectations—as well as feedback from OC—are presented. On the second day, there are smaller sessions within each specialist subject area.<sup>149</sup>

The Walmart Guidelines are probably the most exhaustive that we have come across. We have been told that relationships with particular law firms have been terminated under the Guidelines. The most common reason for termination has been “ethical lapses” by OC. The current view of Walmart is that the company cannot afford any sort of taint from an ethical standpoint. It wants to avoid being sanctioned for tactical as well as

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145. WALMART GUIDELINES, *supra* note 102, at 22–23.

146. *Id.* at 19.

147. *Id.* at 24.

148. *Id.* at 25.

149. Walmart OC Guidelines serve as a training model for the Association of Corporate Counsel. *See, e.g., Value Practice: Walmart Performance Evaluation*, ASS’N CORP. COUNSEL, <http://www.acc.com/legalresources/resource.cfm?show=39926> (last visited Apr. 21, 2012).

reputational reasons. Therefore, where OC fall short of the ethical standards expected, even if the sanctions received by OC are unrelated to Walmart representation, the relationship with the firm will be limited or even terminated. In addition, firms have been terminated because they did not adapt as quickly as Walmart required to the diversity expectations.

## V. ANALYSIS

Lawyers' ethical judgments are typically made in private and are unobservable. The opportunities for external monitoring by regulators are limited. It is no wonder that professional codes and external regulation play such a small part in the lives of large firm lawyers. Failures are rarely identified until things have gone seriously wrong.<sup>150</sup> This is why some scholars call for lawyers to exercise their "professional conscience"<sup>151</sup> or to act in a self-aware manner with integrity<sup>152</sup> when making ethical choices.

However, other scholars question whether this is realistic, at least with respect to ethics in large law firms, since "[c]onsulting an internal moral compass is foreign to the large firm lawyers' habit of mind."<sup>153</sup> Similarly, the "rush to judgment" of lawyers' conduct that routinely follows major "crises"<sup>154</sup> in the legal profession also mostly ignores the context of corporate legal practice.<sup>155</sup> These limitations apply across the ethical landscape: when client interests are at stake—and, more critically, when lawyers need to balance client interests with the public interest.

Lessons can be learned from the Enron case: not only did Enron's general counsel consider his in-house legal department to be a "world-class" in-house law firm,<sup>156</sup> Enron was also advised by Arthur Andersen, then one of the "Big 5" accounting firms, and overseen by a "top-notch" board of directors.<sup>157</sup> Most experts believed that Enron had "a state of the

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150. See generally RICHARD L. ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (2008) (detailing ethics cases brought against lawyers); W.H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 *LAW & SOC. INQUIRY* 243 (1998) (discussing the Kaye Scholer ethics case).

151. Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 *GEO. WASH. L. REV.* 1, 21–22 (2005).

152. See Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 *FORDHAM L. REV.* 1629 (2002).

153. See, e.g., Kimberley Kirkland, *Ethics in Large Firms: The Principle of Pragmatism*, 35 *U. MEM. L. REV.* 631, 729–30 (2005).

154. See, e.g., ENRON AND OTHER CORPORATE FIASCOS, *supra* note 48; Eli Wald, *Lawyers and Corporate Scandals*, 7 *LEGAL ETHICS* 54, 59 (2004).

155. Whelan, *supra* note 47, at 1067–68.

156. Final Report of Neal Batson, Court-Appointed Examiner, *In re Enron Corp.*, No. 01-16034 (Bankr. S.D.N.Y., Nov. 4, 2003), app. C, at 15. Enron had 250 attorneys most of whom had between eight and seventeen years of legal experience when they joined. *Id.* at 16.

157. The directors reflected a wide range of business, finance, accounting, and government experience and included "a group of men and women who were highly successful in their professional careers." Final Report of Neal Batson, *supra* note 156, at 56–57; see also Whelan, *supra* note 47, at 1098.

art Code of Conduct.”<sup>158</sup> No wonder outside counsel, dealing with complex transactions on the direction of such a sophisticated client ultimately deferred to in-house counsel and to Enron itself, even when there was concern about some of the legal ramifications.<sup>159</sup> Thus prospects that lawyers could act as “gatekeepers” on behalf of the public, and become watchdogs and whistleblowers of their clients, seem a long way off in practice.<sup>160</sup> It is unlikely that the changes in legal education so often prompted by such crises will change things either.<sup>161</sup>

The privatizing of professionalism may therefore offer a new method with additional tools for the effective monitoring of lawyer ethical conduct. External regulators cannot effectively monitor the behavior of individual lawyers or law firms, but corporate clients can. Not only can clients, especially in-house counsel, monitor lawyer conduct directly and indirectly, they have the leverage to direct and to manage particular behavior. Our research suggests that this is what many corporate clients actually do.

The division of function between barristers and solicitors in England presents a basis for comparison. Just as the barrister is instructed and monitored by the sophisticated “professional client”—the solicitor—OC work can be monitored by in-house counsel. The barrister knows that the work will be assessed and evaluated by someone who knows what should be done and what could have been done by the barrister. The same is true for OC. Unlike the individual client–lawyer relationship, there is no informational asymmetry preventing assessment by the client of the quality of legal service.<sup>162</sup> Clients of global law firms are “expert buyers of legal services;”<sup>163</sup> large corporate clients are very sophisticated when it comes to telling OC what they want.

In addition, in-house lawyers have a close relationship with their OC; they are repeat players.<sup>164</sup> Moreover, pressures on OC to deviate from ethical norms, which may come from lay officers of the corporate client, may be diluted by intermediary in-house lawyers.<sup>165</sup> In short, they are in a

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158. Jennifer Schaller, *Almost Ten Years After the Enron Meltdown: More Costs, More Prosecution, More Compliance?*, NAT'L L. REV. (July 7, 2010), <http://www.natlawreview.com/article/almost-ten-years-after-enron-meltdown-more-costs-more-prosecution-more-compliance>.

159. Whelan, *supra* note 47, at 1096–99.

160. Sung Hui Kim, *Naked Self-Interest? Why the Legal Profession Resists Gatekeeping*, 63 FLA. L. REV. 129, 132 (2011); Geoffrey Miller, *From Club to Market: The Evolving Role of Business Lawyers*, 74 FORDHAM L. REV. 1105, 1106–07 (2005).

161. Arnold Rochvarg, *Enron, Watergate and the Regulation of the Legal Profession*, 43 WASHBURN L.J. 61, 67, 88–90 (2004).

162. C.G. Veljanovski & C.J. Whelan, *Professional Negligence and the Quality of Legal Services—An Economic Perspective*, 46 MOD. L. REV. 700, 704–05 (1983).

163. Alexia Garamfalvi, *England Poised to Reform Legal Market*, LAW.COM (Aug. 10, 2006), <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1155114327477> (quoting Brian McDonnell, an associate with the London office of Hunton & Williams).

164. As many as twenty Vinson & Elkins lawyers joined Enron's in-house legal department, including a former partner, James Derrick, Enron's general counsel since 1991. Brenda Sapnio Jeffreys, *V&E Closes Book on Enron*, LEGAL TIMES, Mar. 11, 2002, at 16.

165. Kim, *supra* note 44, at 1001–26.

unique institutional position to impose, monitor, and enforce ethical standards.

Large firm and global lawyers also face the reality of “double deontology,” the fact that ethical conduct rules vary between different jurisdictions. Practitioners may have to be aware of and abide by local rules. Even within single jurisdictions, the days of requiring all lawyers to adhere to the same professional code—despite the multiplicity and diversity of legal practice and practitioners—may be over.<sup>166</sup> Privatizing professionalism enables clients to set their own standards and make sure their lawyers abide by a single set of standards, no matter where they practice.

However, privatizing professional responsibility promises even more than this. Scholars have emphasized the need for an “ethical infrastructure” in law firms.<sup>167</sup> Large corporate clients and their in-house legal teams can, via OC procedures, force firms to create such an infrastructure.<sup>168</sup> We have seen that special committees have had to be formed, new systems of monitoring have been introduced, certification and reporting requirements have been imposed. One firm has even been subjected to inspection and on-site audit. In other words, OC procedures can influence the organizational structure and culture within law firms.

Some of the in-house general counsel we interviewed stated that part of the rationale for imposing ethical obligations on their OC was that they knew exactly what the realities were in large firm practice. They knew about the pressures on associates in terms of work-life balance, billing, the desire to make partner, and so on. The pressures to deviate from ethical conduct in the name of making profits and bringing in business included, according to a “big firm” partner in Australia, “inflating time sheets, undertaking such unnecessary research, exaggerating the need to review everything during discovery, undertaking overzealous due diligence processes, and other practices.”<sup>169</sup> He went on: “[W]e cheat and lie to make ends meet. We act dishonestly as a matter of course. We do it because we have no choice.”<sup>170</sup> It is not surprising that increasing bureaucratization within large firms and the existing criteria for personal lawyer success is a threat to traditional notions of professionalism.<sup>171</sup> With

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166. Andrew M. Francis, *Legal Ethics, the Marketplace and the Fragmentation of Legal Professionalism*, 12 INT'L J. LEG. PROF. 173, 175 (2005).

167. Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 692 (2002); Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the “Ethical Infrastructure” of Law Firms*, 39 S. TEX. L. REV. 245, 246 (1998).

168. See Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559, 560–61 (2002); Anthony E. Davis, *The Emergence of Law Firm General Counsel and the Challenges Ahead*, 20 PROF. LAW., no. 2, 2010 at 1 (noting that there are very few large law firms that do not now have a full-time general counsel to manage the firm's compliance with professional regulation).

169. EVANS, *supra* note 10, at 36–37.

170. *Id.* at 37.

171. Kirkland, *supra* note 153, at 730.

a picture as stark as this, perhaps privatizing professional responsibility is the only viable alternative for clients as well as the only way possible to achieve professionalism and ethical accountability.

There are other reasons for OC Guidelines. Large corporate clients are often concerned with protecting their reputations.<sup>172</sup> The conduct of the lawyers they hire can adversely affect that reputation, hence the desire to police conduct. Wilkins has noted that one of the benefits that corporations receive when they hire OC is “the legitimacy that lawyers receive by virtue of their status as officers of the legal system.”<sup>173</sup> Clients also get the benefit of attorney-client privilege, something that in many parts of the world, in-house lawyers cannot offer.<sup>174</sup> It is no wonder that some of the procedures reinforce professional obligations to the system.

Another context for the transformation of professional responsibility via OC procedures is CSR, which is based on notions of community accountability. There may be sound reasons for this. Corporations, especially publicly held corporations, have a relatively high degree of public accountability. They are subject to scrutiny in a variety of forums, from regulators, such as the SEC in the United States, to public interest groups worldwide. Corporations are certainly more publicly accountable than private law firms, which are normally LLPs and owned by members of the firm. And while law firms seek to create a positive public image, for example through their pro bono activities,<sup>175</sup> the pressure on corporations is greater. Thus, the in-house legal department at a publicly held corporation is likely to have a very different worldview than the private law firm. They will be influenced by the culture in which they operate—one that is publicly accountable. That may be why the questions being asked of corporations in a world of CSR—including questions about diversity and how the corporation is benefitting society—will be asked of the in-house legal department along with everybody else.

Corporations have the resources and, possibly, the motivation to promote lawyers’ ethics alongside other social and community norms. Their power to instigate positive as well as negative change should not be underestimated, as our study has shown. More than traditional sources of professional regulation, corporations have the information and resources that other regulators lack. Corporate “regulators” also have a power to control that is not necessarily constrained by concerns about legal legitimacy, democratic accountability, or rule-of-law rhetoric. Of course, one must always be realistic and perhaps skeptical of OC procedures. Just

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172. Kevin T. Jackson, *Global Corporate Governance: Soft Law and Reputational Accountability*, 35 *BROOK. J. INT’L L.* 41, 45 (2010).

173. Wilkins, *supra* note 45, at 2118.

174. *See, e.g.*, Case C-550/07, *Akzo Nobel Chemicals, Ltd. v. Comm’n* (Sept. 14, 2010), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=82839&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1397857> (decision of the European Court of Justice).

175. One interviewee from a law firm welcomed the reporting requirements imposed on his firm regarding pro bono activities and diversity because “we can brag about ourselves.” Interview with London law firm partner, *supra* note 54.

as professional codes of conduct can be legitimately viewed as designed to achieve contradictory objectives—on the one hand, effective self-regulation, high ideals, and real discipline with effective sanctions; on the other, an attempt to control the market or a sham—the same may be true of OC procedures. However, we feel confident in claiming that many of the procedures are more than mere rhetoric,<sup>176</sup> and in attributing to these procedures a significant impact on large law firms, which the firms themselves generally resent even if they sometimes also acknowledge their usefulness. Indeed, OC procedures have a number of significant advantages over professional codes.

Like professional codes, OC procedures combine different types of obligations. There are “principles” which call for professional judgment, such as the general directive to follow the highest ethical standards. There are “standards,” which stress particular virtues, such as instruction prohibiting coercive, dilatory, or obstructive tactics in litigation. Finally, there are “rules,” which prescribe specific conduct in much more detail, such as the rules on billing and conflicts of interest. Achieving compliance with standards and principles is not impossible, but is much more difficult than with rules. This is because “standards” and “principles” are, by their very nature, more vague and open to interpretation. In practice, sanctions for non-compliance with professional codes, although theoretically possible in all cases, are in practice likely only when there is a breach of specific rules.

Unlike professional codes, however, the enforcement of all obligations in OC procedures can be much more effective. This is because large corporate clients do not have to justify their decision to impose the ultimate sanction: termination of the relationship. A good example of this would be the rules on conflicts of interest to be found in both professional codes and OC procedures. Rules on conflicts of interest require law firms to reject clients in many circumstances; the firms do not like these rules as a result. Indeed, London firms “have been notorious in seeking to circumvent them at times.”<sup>177</sup> By contrast, not only are OC procedure provisions on conflicts generally wider in scope than professional codes, the threat of losing the client in the event of a breach can act as a much more powerful deterrent. One interviewee called the conflict rules imposed by clients “a nightmare”<sup>178</sup>

#### CONCLUSION

Governance is concerned with the ways in which conduct and behavior can be monitored and regulated. It can take many forms, both formal, such as through government and law, and informal, for example through communities or the market. Corporations, however, can also constitute a

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176. See Lisa M. Fairfax, *Easier Said than Done? A Corporate Law Theory for Actualizing Social Responsibility Rhetoric*, 59 FLA. L. REV. 771, 771 (2007) (“[C]orporate rhetoric has a greater connection to corporate behaviour than most would presume.”).

177. BOON & LEVIN, *supra* note 1, at 120.

178. Interview with London law firm partner, *supra* note 54.

form of governance, such as when they impose minimum labor or environmental standards through their supply chains. As Ronen Shamir notes, with CSR, what researchers are “witnessing is not merely a transformation of the technologies of government but also an expansion and transformation of the very means of governing.”<sup>179</sup> When corporate clients start regulating OC conduct, they are exercising governance. OC procedures also constitute an expansion and transformation of the means of governing lawyers’ ethics. This process reallocates power between state, markets, and civil society. It affects the regulation of the legal profession, the lawyer-client relationship, and the structure of the legal services field.<sup>180</sup>

On the one hand, privatizing professionalism threatens the traditional professional mode of self-regulation, and calls into question the core professional value of lawyer independence. In addition, the notion that corporate clients are determining the public responsibilities of private lawyers is initially unsettling. Yet, the profession’s record of living up to its own public aspirations has been questionable. What is emerging through OC procedures appears to be a blurring of lines between different modes of governance and the construction of a new interdependence among different governance structures. But to the extent that professionalism has been privatized, it arguably has also been revived and enhanced. While there may be self interest in OC procedures, this frequently incorporates visions of professionalism to which OC and their firms must adhere. We have seen calls for lawyers to be “guardians of corporate ethical responsibility”;<sup>181</sup> we did not expect to see corporations being guardians of lawyers’ ethical responsibility. Yet privatizing professionalism appears to be the reality for large corporate clients. It is therefore a form of regulation that needs to be included in any future theories of lawyer professionalism.

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179. Shamir, *supra* note 34, at 332.

180. Jonathan Beaverstock et al., *The Long Arm of the Law: London’s Law Firms in a Globalizing World Economy*, 31 ENV’T & PLANNING A 1857 (1999); Jonathan Beaverstock, et al., *Geographies of Globalization: United States Law Firms in World Cities*, 21 URB. GEOGRAPHY 95, 95–120 (2000).

181. Colin Marks & Nancy B. Rapoport, *The Corporate Lawyer’s Role in a Contemporary Democracy*, 77 FORDHAM L. REV. 1269, 1293 (2009).

**APPENDIX**

<i>Corporation</i>	<i>Means of oversight</i>	<i>General approach to ethics</i>	<i>Billing</i>	<i>Conflict of interest and confidentiality</i>	<i>Content</i>	<i>Comments</i>
Anonymous client	Contract with Israeli law firm HFN	No		HFN commits to notification if the lawyer takes official position that may affect client	HFN commits to nonpayment (bribery) of government officials	Excerpt of contract referred by HFN, part of U.S. legislation regarding bribery of public officials
Apple	Apple supplier Code of Conduct (2009) (General code)	Yes, very broad	No	Yes	Includes workers and human rights, health & safety, environment, and ethics	Not designed specifically for lawyers
Bank of America	Outside Counsel Procedures	"Litigation Philosophy": Cost effectiveness; maintaining "highest ethical standards"	Yes	Confidentiality, including the Gramm-Leach-Bliley Act; compliance with SOX, regulation regarding tax shelters	Litigation: Coercive, dilatory, or obstructive tactics not to be used; discourages protracted motion practice; early consideration of ADR and settlements	Engagement of minorities & women as Outside Counsel
Boston Scientific Corporation	Partnership Guidelines for Matter Handling and Billing Practices for Outside Counsel	None	Yes	Confidentiality and Conflicts (lists competitors)		Extremely detailed supervision over legal activities
Del Monte Corporation	Guidelines for Outside Counsel	None	Yes	Only cost-control mechanisms		Although labeled as OC guideline, it refers only to litigation management in terms of cost reduction; no ethical reference

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European Bank for Reconstruction & Development	Procurement Policy & Rules	Observance of the highest standards of transparency and integrity		General eligibility requirements	Prohibition of coercive practice, collusive practice, corrupt practice, fraudulent practice	There is a selection process for OC; no explicit reference to lawyers as consultants; EBRD confined by UN resolutions and cannot transfer money if violates them; no mentioning of ethics in considering selection of providers
Fannie Mae	Engagement of counsel letter	None	Yes	None	Prefer negotiations, postpone sale if client cooperative	Letter relates to trial counsel handling foreclosure; FM retains full control of case handing
General Electric (GE)	The Spirit & the Letter; Integrity Guide for Suppliers, Contractors and Consultants	"Committed to unyielding Integrity and high standards of business conduct in everything we do, especially in our dealings with GE suppliers, contractors and consultants"		N/A	Highest ethical standards in terms of regulatory compliance, HR, labor, environment, business ethics, IP, trade, require honesty and fairness	May not use subcontracting and third parties to evade duties; no explicit reference to lawyers
Israeli Electronic Co.	Outside Counsel manual	Affirmative action employer and encourages OC to adhere to such policies	Yes, cost effectiveness and excellence to be reconciled. Litigation to be resolved expeditiously , using ADR. Legal motions & discovery to be reduced <i>as a cost effective strategy</i> (not philosophy)	Conflict of interest		All reference to litigation strategies (ADR, discovery, motions) as part of costs reduction and efficiency considerations
John Deere	Billing guidelines for OC	None	Yes	None		

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Maricopa County Community College District	Guidelines for Outside Counsel	MCCCD hires OC based on firm's expertise and high ethical standards	Yes			
Multinational beverage Company	Guidelines for Outside Counsel (June 1 2011)	OC must maintain the highest ethical standards at all times and be in full compliance with the Company's Code of Conduct	Yes	Conflicts of interest		Diversity: "The Company expects that all of its vendors (including law firms) will leverage diversity as a business imperative. To this end, the Legal Division is committed to making diversity a competitive advantage within our organization by, among other things, ensuring that our internal workforce and the outside lawyers working on our matters reflect the diverse community that is our consumer base. . . . Law firm partners will also be expected to provide periodic reporting . . . evidencing progress in alignment to the Company's diversity goals."
Stanford University	Guidelines for Stanford Outside Counsel	None	Yes, strict	None		Basic principles are costs and efficiency. No reference to ethics, integrity, etc.
State of Minnesota	Policy Governing Retention of Outside Counsel	Company requires outside counsel to comply with Rules of Professional Conduct and the highest ethical standards	Yes	Conflict of interest, confidentiality	Coercive, delaying, or obstructive tactics shall not be used	
State of New Jersey	Outside Counsel Guidelines (2011)	OC expected to represent State "with integrity, professionalism and a sense of urgency"; expects "the highest ethical standards"	Yes, in detail	Conflicts of interest, confidentiality (including confidentiality agreement), ADR		Relationship will be terminated if any OC fails to adhere to the ethical standards

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The Export-Import Bank of the United States	Guidelines for Representation of Ex-Im Bank by Outside International Counsel in Finance Matters (April 2006)	Guidelines intended to supplement any professional or ethical obligations applicable to Firm's professional staff, including D.C. Rules of Professional Conduct	Yes	Conflict of interest, confidentiality		Failure to comply with the Guidelines may result in termination and disqualification in the future
Universal Underwriters Group	Litigation Best Practices for Our Defense Counsel	No	Yes, strict oversight and instructions.	Yes, control over handling litigation	Interrogatories and document requests: standard forms are default. If counsel feels that this is unnecessary, settlement is to be considered and encouraged.	In general, quite combative
Wachovia Corporation	General Guidance for Outside counsel	"Provide excellent legal services in a timely and cost-effective manner <i>following the highest ethical standards</i> "		High quality, cost-effective legal services; confidentiality (including bank privacy legislation)	<p>Ethics: "Wachovia is also committed to conducting its business in accordance with the highest ethical standards . . . If Outside Counsel reasonably believes that a material violation of law may have occurred, is occurring or is about to occur at or involving Wachovia, as set forth in Section 307 of the Sarbanes-Oxley Act of 2002 and the SEC Rules promulgated thereunder (see 17 CFR §205), Outside Counsel must immediately and confidentially contact a Deputy General Counsel or Wachovia's General Counsel and the responsible Legal Division Lawyer."</p> <p>Diversity: "Wachovia encourages the retention of minorities and women by all law firms providing legal services to Wachovia. . . . Wachovia expects that Outside Counsel will have professional women and minorities work on its legal matters. To monitor Outside Counsel's diversity commitment, Wachovia requests Outside Counsel to submit certain information regarding the use of women and minorities, as well as other relationship data to the extent available."</p>	Matters relating to litigation proceedings (discovery, depositions, pleading, etc.) are referred to only in the context of in-house supervision and approval; No mention of litigation "policy" or "principles"

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Walmart	Outside Counsel Guidelines	“Outside Counsel are not just providers of services but are vital partners in our success. It is critical that Outside Counsel share the commitment of the Walmart Legal Department to providing the Company with the highest quality legal services in the most cost-effective manner possible. We expect Outside Counsel to stress integrity, professionalism. . . .” General requirement for “Ethical Conduct” and reporting requirements	Yes, detailed.	Conflict of interest; confidentiality	Diversity: “We expect Outside Counsel to make a good faith effort to recruit, retain, and promote qualified women and minorities . . .”  Managing Litigation: the most detailed expectations for ethical conduct relate to adversary and court. “Honor the spirit, intent, and requirements of all rules of civil procedure and rules of professional conduct; Conduct themselves in a manner that enhances and preserves the dignity and integrity of the system of justice; Adhere to the principles and rules of conduct which further the truth seeking process so that disputes will be resolved in a just, dignified, courteous and efficient manner; Make reasonable responses to discovery.”	Detailed guidelines for litigation in general: Early Case assessment and case management; encouragement of early settlement resolution
Zurich Insurance	Guidelines for Claims Defense Counsel	The company “expects to work with claims defense counsel and its customers to achieve the best result for the customer in an efficient and cost-conscious manner consistent with the law firm’s ethical obligations. Nothing contained herein is intended to nor shall restrict counsel’s exercise of independent professional judgment in rendering legal services for the insured or otherwise interfere with any ethical directive . . . .”	Yes	Description of goal: “We seek to achieve consistent and efficient processes yet also to manage, not merely process, our cases. . . . Where there is no defense to a claim or where there is a significant risk of an adverse finding against an Insured, all efforts should be made to effect settlement as early as possible. . . .”		Restrictions in cases where there is no defense are versed as part of the policy to resolve cases quickly rather than acting ethically