Law Firm Ethics in the Shadow of Corporate Social Responsibility

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Cover Page

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I. Introduction

The notion that corporations should bear some responsibility to conduct their businesses in ways that respect the societies in which they operate has been widely discussed and analysed in recent years. Although concepts such as ‘Corporate Social Responsibility’ (CSR) and ‘Corporate Citizenship’ are highly contested, the reality is that many corporations are engaged in activities which on the face of it go far beyond Milton Friedman’s well-known claim that “there is one and only one social responsibility of business - … to increase its profits so long as it stays within the rules of the game …” Corporations are integrating social and environmental concerns in their business operations and in their interaction with their stakeholders. As a result, the social and ethical responsibilities of corporations have become “key issues” in the discussions about their societal role.

The ‘socially responsible’ activities in which corporations engage are many and varied, which may explain why there is no consensus on a single definition of CSR. More importantly, though, the motivations for what might be regarded as CSR activities are also difficult to pin down. Are they designed to ‘do good,’ however defined, or are they adopted in order to help the company do well by doing good? Are they truly voluntary or are they the result of external pressures? What is clear though is that CSR has been “institutionalised” as a business issue, and often

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6 McBarnet et al, supra note 4.
discussed in the context of profitability and other business and financial advantages they may render to the corporation.\textsuperscript{7}

Shamir sees CSR as part of/a manifestation of "world capitalism" - a mechanism that facilitates the transformation of CSR from a device which is imposed \textit{on} the market into one which becomes an element \textit{of} the market.\textsuperscript{8} Under this paradigm state and public instruments of authority such as laws and rules lose their monopoly status and compete in the market of authorities with soft-law instruments such as guidelines, codes, and standards.\textsuperscript{9} However, this is a "market embedded morality", meaning that the ethics and morality of corporate activities strengthens and sustains their immediate market interests and in the long run reinforces visions of neo liberal citizenship and responsible social action.\textsuperscript{10}

Global corporations reacting to these norms in the name of social responsibility enter into transactions within transnational "chains of supply". Corporations use supply chains in order to do their business, but supply chains often are not regulated by public law, especially when global in nature, but by the corporations themselves. They do this by standard setting and by contracts with suppliers.

As MNCs and other large corporate entities institutionalize, refine and redefine their CSR policies they may also assume responsibility for their business partners including their suppliers.\textsuperscript{11} Some have begun to regulate other commercial actors with which they conduct their business, and make them part of their own socially responsible policies and commitments. A mix of social, economic and legal factors may induce corporations to impose "socially responsible" standards upon their suppliers. Requirements that are “traditionally the subject of government regulation”, including environmental standards, workers' rights and the like are replacing public governance through private contracting with corporations' chains of suppliers, in what has been

\textsuperscript{7} McBarnet, \textit{supra} note 4, at 10.


\textsuperscript{9} \textit{Id} at 314, stating that the “novelty of CSR is that it encourages commercial and civic entities to promulgate social and environmental norms that were heretofore thought to be the domain of public authorities in general and of state governments in particular.”


\textsuperscript{11} European Commission, Corporate Social responsibility: Encouraging Best Behaviour”, available at: \url{http://ec.europa.eu/enterprise/library/ee_online/art 11_en.htm}
characterised as the “New Wal-Mart Effect”. In this way, private regulation is turned into a transnational phenomenon. "Chain of supply" policies, under which corporations demand that their suppliers meet standards similar to those imposed upon themselves, are thus key to understanding the phenomenon we are exploring.

Hence codes of conduct imposed upon suppliers are part of this global governance regime and form a system of private regulation. Private Regulation is an amalgam of norms originating in private corporations that aim to set behavioral standards in an array of contexts. Bartley describes this system as encompassing "coalitions of non-state actors", who take part in a comprehensive web of norm-setting activities. They "codify, monitor, and in some cases certify firms’ (i.e., industrial and commercial entities) compliance with labor, environmental, human rights or other standards of accountability". Due to the lack of formal regulatory capacity at the global level, this situation calls for new forms of “global governance”.

One area in which corporations, particularly global corporations, are exercising this mechanism of control is private legal practice, in reference to their outside counsel. Since many corporations nowadays utilize the services of lawyers by way of outside law firms to conduct their legal affairs, they have developed "guidelines", "codes" or other forms of engagement through which they apply obligations upon these lawyers. Norms concerning lawyers' professional practice that had formerly been under the domain of law societies and state bodies, or left to the discretion of lawyers and their firms, are increasingly incorporated into "guidelines", "procedures", "codes of conduct", "manuals" or "best practices" memorandum promulgated by private corporations (hereinafter – "guidelines"), which lawyers are expected to follow.

16 The largest 5% of corporations control more than half of the $100 billion corporate legal services market. 80% of this market is controlled by 200 General Counsels: Mark Harris, From the Experts: Seize the Day, Corporate Counsel, Sep. 20, 2011.
Whether these chain of supply practices originate from the corporations themselves or they are a reaction to state practices of procurement and outsourcing which require supplies to meet certain standards, the point we underscore in this context is that legal services are being considered as any other good purchased by the corporation. And since lawyers have come to be treated as other "suppliers", their codes too form part of this new private regulatory system. These Outside Counsel Guidelines need to be understood not just as a private arrangement between two individual parties who wish to settle on their terms of engagement, but a form of "private regulation".

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

In some cases the guidelines clearly protect the direct and immediate interests of the client, as recognized in conventional corporate law and lawyers' ethics. In other words, lawyers are expected to maximize the interests and benefits of their corporate clients (financial, reputational, and so on), regardless of potential adverse

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17 To be sure, contract and regulation are not dichotomous. As Collins suggests, contract may be one of the methods of private regulation (Hugh Collins, Regulating Contract, 1999). In addition, the boundaries of contract and regulation become murky when "the power of the purse" mixes with a regulatory function, as described by Christopher McCrudden in Buying Social Justice: Equality, Government Procurement and Legal Change (2007), discussing procurement activities by governments. We recognize this point; nevertheless in the context of lawyer client relationship, this relationship had been formed by way of the traditional mode of contract, governed by "public" regulation by law societies or states.
19 Christopher J. Whelan and Neta Ziv, Privatizing Professionalism: Client Control of Lawyers’ Ethics, Fordham Law Review, forthcoming
consequences to others. But there are also requirements that do not straightforwardly abide by this rationale. These include workplace diversity requirements in outside counsel law firms, prohibition on using obstructive and coercive tactics in litigation, the duty to protect the integrity of the justice system, to consider and favor negotiation and ADR over contentious adversarial strategies, and in general to act "ethically". At first sight, obligations of this sort seem to deviate from the "Dominant Approach" to legal representation; they do not necessarily further the immediate interests of the client and more so, appear to foster concerns beyond those of the client. However, as will be discussed ahead, these guidelines do not abide by the private client/third party dichotomy, nor by the self-interest/altruistic divide. They embody a mixture of norms that target multiple objectives and a variety of audiences: some promote the direct interests of the corporate client, other address the needs of other stakeholders.

In this paper we focus on Outside Counsel Guidelines that have been developed as part of the corporations' CSR policies, and try to understand how these corporations view the role of their outside counsel in carrying out these socially responsible norms. Under the theoretical framework explained above, we consider these guidelines as a form of regulation of lawyers' professional conduct. In other words, when lawyers provide their professional legal services to their corporate clients they are increasingly bound by a set of norms and codes of conduct that embody notions of "social responsibility" which had originated through their clients' understanding of their own social responsibility. No wonder that outside counsel have become “sensitive to client preferences.”

Most CSR requisites we have examined are imposed upon lawyers as part of the corporation's "chain of supply" policies, aimed at ensuring that all its commercial activities are bound by these "socially responsible" norms. This "market embedded morality", mentioned above, appears to be a suitable framework for these norms. It seems that the ethics and morality of corporate activities strengthens and sustains their immediate market interests and in the long run reinforces visions of neo liberal citizenship and responsible social action. While these developments are not

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

II. Outside Counsel Procedures and Corporate Social Responsibility

In this section, we focus on those parts of OC Procedures that address broad societal concerns. We set these out in three broad categories: workplace diversity requirements; general and specific ethical requirements to promote and support the system of justice; and policies to consider and favor negotiation and ADR over contentious adversarial strategies.

It should be noted that in-house counsel play a significant role in ensuring compliance with these procedures. Their once inferior professional status has been elevated and nowadays they allocate, guide, control, and supervise the work of outside counsel. They also often play a key role in the procurement of outside law firms; they “normally have absolute control over the selection and management of outside counsel.” They have been encouraged to use their client’s economic power to exercise this control. Hence “studying the in-house world today is central to the study of professional responsibility more generally.” Data collected for this article, which is based on a review of over twenty sets of Outside Counsel Guidelines and interviews with twenty in-house and outside lawyers and general counsel in the United States, the United Kingdom and Israel, clearly supports this development.

1. Diversity

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23 Mark Harris, General Counsel, you hold the purse strings. Go for it”, Corporate Counsel Sept 20, 2011.
24 Langevoort, supra note 20, at 3.
A significant number of the corporations in our study have diversity performance as one of their stated objectives. Some diversity programs have been around for a long time. For example, AT&T’s Global Supplier Diversity Program began in 1968. However, in the United States, the proliferation of diversity initiatives may reflect the strength of the ‘legal diversity movement’ that has been around for only a decade or two. The person credited with the idea of encouraging corporations to request, as part of their overall retention guidelines, that OC advance the cause of diversity was Charles Morgan, General Counsel of AT&T.

The audience that Charles Morgan targeted was the members of the Association of General Counsels. Originally, this comprised the top 100 manufacturing corporations in the United States. Subsequently, however, other corporations – banks, insurance companies, service companies and so on – have joined the ranks of this organization. Morgan would report regularly to the Association on the progress being made – the number of corporations adopting the diversity pledge – and believed that the pledge was having an impact.

Diversity has also been promoted by the American Corporate Counsel Association (ACAA). ACCA’s “mission” includes creating an environment that will help to “instil diversity as a core value throughout ACCA”.

As part of this mission, ACCA assists corporate counsel members to retain more diverse outside counsel. This includes a “push to encourage hiring and retention at the highest levels of authority, and not simply at entry level.” ACCA has developed an ‘Outside Counsel of Color Locator System’ designed to help ACCA members locate outside counsel of color suitable for specific projects.

As a result of OC Procedures, arguably, the promotion of diversity has become “the most institutionalised promotion of higher ethical standards.” Many corporations, however, also view diversity as being in their own commercial interests. Lucent

27 Id. at 2.
28 Dan Sandman, former General Counsel at US Steel, telephone interview,
Technologies Law Department, for example, state that diversity provides the company with “a competitive advantage through high-quality, cost-effective law services.”

Noting that the rates at WMDVBE law firms are “generally lower” but have “very talented named partners”, Pacific Gas & Electric state that “Diversity makes good sense.”

Apparently, the 293 companies which signed the Statement of Principle on Diversity acknowledged that “promoting diversity is essential to the success of our respective businesses. It is also the right thing to do.”

Microsoft’s diversity plan encapsulates the motivations for this policy. The plan is based on three “core convictions”: diversity in legal teams is a business necessity; the legal profession’s progress in expanding diversity has been slow; and “we’re in this together”. This latter point is expressed in the following, technically inaccurate but, very interesting terms: “corporate legal departments are of course the client when it comes to working with large law firms, but we work “collectively as part of a common team. To a huge degree we have common needs.”

His “strong commitment” to diversity and inclusion is expressed as follows: “I fundamentally believe that it is absolutely the right thing to do from the standpoint of the lawyers in the legal department, for the company itself, and for its shareholders.”

Many corporations have taken up the idea of promoting diversity in the legal profession, adopting between them a variety of approaches. Some corporations monitor their spending on legal services. Pacific Gas and Electric Company, for

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29 Lawyers for One America, supra note 26 at 21.


31 Lawyers for One America, supra note 26, at 34.
32 Id. at 8-9
33 Id. at 10.
34 Id. at 13.
35 Id. at 14. According to Brad Smith, General Counsel, writing in 2008, only 18% of the partners of the nation’s law firms are women; only 5.4% minorities. Id.
36 Id. at 15 (Brad Smith).
37 Id. (Brad Smith).
38 Id.
example, report that they spent over 30% of their 2009 OC budget for litigation on certified WMDVBE law firms.\textsuperscript{39} PG&E also measures and reports its spending with women and minorities at ‘majority owned law firms.” In 2009, this came to just under 10%.\textsuperscript{40} Southern California Gas Company (SoCalGas) and San Diego Gas & Electric (SDG&E) similarly record their spending with women and minority-owned law firms. In 2009, this constituted 10.4% of the utilities’ total legal spend.\textsuperscript{41} 48% of the utilities total spend was with minority and female attorneys at majority owned law firms in 2009.\textsuperscript{42}

Some corporations seek merely to educate and inform. BellSouth Corporation Legal Department, for example, has a Diversity Committee which focuses primarily on “sharing the message of diversity to the legal community at large”. It does this in a variety of ways, including holding an event which “brought together senior in-house lawyers from a wide variety of Fortune 500 companies to address issues and challenges relating to implementing and maintaining diversity initiatives in the legal profession.”\textsuperscript{43} Exchanging practical ideas on how to promote diversity in corporate legal departments as well as in law firms retained by legal departments was the focus of this event.\textsuperscript{44} The Department met with Mayer, Brown & Platt and corporate chief legal officers of Comerica, Illinois Tool Works, Northern Trust Corporation, United Airlines, and Walgreens to explain the Statement of Principle on Diversity in the Workplace to which 293 companies have signed.\textsuperscript{45} Companies which signed the Statement acknowledged that “promoting diversity is essential to the success of our respective businesses. It is also the right thing to do.”\textsuperscript{46}

Similarly, In1999, Lucent Technology’s General Counsel contacted and met with managing attorneys from eight of Lucent’s top-billing OC firms. The “purpose was to

\textsuperscript{39} Id.at 34.
\textsuperscript{40} Id. at 38. Of the $37.1 million spent with law firms, about $28.8 million was spent with majority owned law firms. Of this amount, $2.5 million was spent with women, minorities or disabled veteran attorneys and paralegals. Id.
\textsuperscript{41} Id. at 42. If one particularly large litigation case is removed from the figures, the percentage would have been 22%. Id.
\textsuperscript{42} Id. at 44.
\textsuperscript{43} Id. at 8
\textsuperscript{44} Id.
\textsuperscript{45} Id. at 8-9
\textsuperscript{46} Id. at 10.
“establish an on-going dialogue that confirmed Lucent’s commitment to diversity and to determine the level of commitment from the firms visited.”

However, many corporate clients are far more prescriptive and mandatory in imposing diversity requirements on their OC. Some years ago, General Motors sent letters to over 700 of its outside law firms directing them to include women and lawyers of color on GM legal projects. Some require law firms to report on their diversity efforts. Indeed, Bank of America added a reporting requirement in its 2011 version of its OC Procedures. Wells Fargo Bank, which retains around 30 minority-owned law firms each year for its legal work, requires that all its firms “regularly report” overall minority lawyer statistics, and “mandates monthly reports indicating the dollar amount of the bill attributable to the work of minority partners and/or associates on each matter.” Similarly, to monitor OC’s diversity commitment, Wachovia OC are requested to submit certain information re use of women/minorities as well as other relationship data.

International Paper Company’s Counsel Retention Policy also calls on OC to provide a copy of the firm’s policy regarding diversity, to return a questionnaire and update in-house General Counsel on progress towards increasing diversity and how these efforts may affect IP. The Policy illustrates some of the information collected.

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

47 Id. at 21.
48 Id. at 16.
49 Id. at 23.
50 Id. at 23.
51 Id. at 17.
52 Id. at 18-20.
Another example is Bank of America (BoA), whose OC Procedures also address the issue of “Minority and Women Outside Counsel”. This reflects the BoA Code of Ethics which has a section on “Diversity and Inclusion”, and the BoA website which states that “diversity and inclusion are central to our company’s core values.” Bank of America Legal Department has also established a Diversity Business Council to promote diversity within the department. A subcommittee of the Council initiate and monitor departmental efforts related to diversity issues in OC retention. The aim in the OC Guidelines is to “promote the use of outside counsel reflecting the diversity of Bank of America’s customers and associates.” BoA provides its associates with a list of minority and women-owned law firms and “encourages its attorneys and its clients to use them.” BoA expect its OC to have women and minority partners and associates who will work on BoA matters.

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

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

The Legal Department, as part of its diversity mission, places a strong emphasis on partnering with those U.S. law firms and legal service providers that share Bank of America’s vision for increased diversity in the U.S. legal profession. In virtually all of our interactions with outside law firms, diversity is a front and center topic of discussion. Now more than ever, during times when financial institutions and law firms face new and different pressures, conflicting priorities, and economic challenges, the Department feels strongly that it is imperative to reinforce the joint mission of diversity. The Legal

54 Available at http://careers.bankofamerica.com/learnmore/diversity.asp?cm_mmc=General--vanity--diversity--NA.
55 Lawyers for One America, supra note 26, at 6.
56 Id.
Department expects the same level of commitment from its outside law firms in the U.S now and in the future.\textsuperscript{57}

The 2011 version omits the first paragraph entirely. It also omits the sentence beginning “In virtually …discussion.” It replaces the words “Now more than ever, during times …’ with “During present times…”\textsuperscript{58}

On the face of it, the 2011 version appears to downgrade the issue. Not only is the wording less aspirational, it has been moved from the body of the Procedures in the 2009 version into an Appendix in the 2011 version. However, there is a sting in the tail. The 2011 version adds the possibility of a reporting requirement:

“For law firms in the United States, the Department may require a quarterly report of use of minority and women attorneys on all Company matters.”\textsuperscript{59}

These kinds of reporting requirements appear to have had an impact. In 2006, Gap Inc. established a formal approach to its law firm diversity strategy. A “key component”\textsuperscript{60} of the strategy has been the “Gap Inc. Law Firm Diversity Survey” which Gap requires its U.S. based firms to complete.\textsuperscript{61} This identifies the number of diverse and female attorneys in firms at all levels. In the 2010 survey, Gap intended to inquire into law firms’ flexible work arrangements for the first time.\textsuperscript{62}

Gap reports that law firms are responsive to completing the survey and do make changes needed to improve on “unacceptable statistics.”\textsuperscript{63} Gap describes its approach as “a twist on the proverbial ‘carrot and stick’ approach!”\textsuperscript{64} First, Gap sets out the expectation for improvement and threatens the loss of business over time. It gives an example of a small boutique law firm located in a state with a proportionally large Hispanic population. The firm had “notably poor” diversity numbers. After a “conversation” with Gap, the firm joined the local Hispanic Bar Association and later hired a Hispanic associate.\textsuperscript{65} Gap favors this “proactive” approach.

\begin{footnotes}
\item[57] Bank of America Outside Counsel Procedures (2009), Section VI, at 10.
\item[58] Id. (2011), Appendix I E.
\item[59] Id. (2011), Appendix I E, p. 20
\item[60] Lawyers for One America, supra note 26, at 9
\item[61] Id.
\item[62] Id.
\item[63] Id.
\item[64] Id.
\item[65] Id.
\end{footnotes}
A more systematic approach appears to be taken by AT&T. AT&T’s corporate goal is to procure 21.5% of its total procurement from diversity-owned enterprises. The company’s legal department has the same 21.5% goal for using “minority, women and disabled veterans business enterprise” (MWVBE) law firms. The department encourages the hiring of diverse OC in its engagement letters, which “put firms on notice that they need to push diversity in their representation of AT&T.”

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

AT&T thus receives “meaningful data” regarding the law firm’s internal diversification. For example, AT&T discovered that approximately 32% of hours billed is by women, 18% by minorities and 1% by members of the LGBT community. Of the 22 relationship partners identified, 39 are women; 33 minorities. AT&T also tracks its expenditures with MWVBE law firms.

As a result, AT&T is able to compare “firm’s diversity metrics over time and with peer firms” and to track “the diversity of relationship partners and partners with

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67 Id. at 5.
68 Id. p. 6.
69 Id. p. 5.
70 Cummins, supra note 25, at 34.
72 Id.
73 Id.
leadership roles on specific matters.” The company then advises law firms –over 550 letters were mailed in June 2010 – “of monitoring, accountability and improvement expectations, and recognizes those with best performance.” This enables AT&T to “influence the pipeline of diverse lawyers moving into leadership positions at law firms.”

Law firms that bill above a threshold are treated as a relationship partner from whom AT&T requests “an even greater diversity commitment.” These firms have to show the money spent on AT&T’s behalf also go to support MWVBE businesses. It is unclear whether AT&T “penalizes” firms that are not meeting standards. Jeffrey E. Lewis, general attorney and associate general counsel referring to AT&T Services states that the goal is “to improve transparency and coordination, as well as improve the firms’ diversity metrics.” However, one of our interviewees at AT&T told us that compliance is monitored via “how we are billed, how we are treated both tactically and ethically by our counsel. We see it in the diversity of the lawyers who are assigned to us” and that any firm violating AT&T OC Guidelines “would be subject to dismissal.”

An even more proactive approach has been adopted by Microsoft. In 2008, Microsoft launched its “Law Firm Diversity Program” that uses a “pay for performance” approach. Under the plan, Microsoft’s 17 “Premier Preferred Provider” law firms are eligible for an additional 2% quarterly or annual bonus in legal fees by achieving “concrete diversity results.” Firms qualify if they increase the hours worked on Microsoft matters by minority lawyers (including women) by 2% or by increase the total number of minority attorneys by 0.5%. Microsoft imposes reporting requirements on the firms that take part. It also “strongly encourages” firms to include “Openly Gay, Lesbian or BiSexual attorneys in their definition of diverse attorneys,” although it recognizes that may not be legally permissible in some states.

74 Id. at 5.
75 Id.
76 Id. at 7.
77 Id. at 5.
78 MCCA, supra note 71, at 2.
79 Confidential interview, May 2011.
80 MCCA, supra note 71, at 12
82 MCCA, supra note 71, at 17
Coca-Cola also has an incentive scheme to promote diversity. In 2008, the legal department created an annual award, “Living the Values.”[83] The first recipient was Shook, Hardy and Bacon, a 500 lawyer law firm of which 55 are minorities and 200 are women; 35 of the women and 24 of the minority lawyers are partners.[84] According to John Lewis Jr, “Those firms that most closely align with these values are those firms that will do better over time”[85] by being rewarded with “increased legal business.”

Coca-Cola sends out questionnaires assessing the firms’ commitment to diversity and inclusion. Information is provided about the commitment of senior management, representation of minorities and women in the firm generally and in leadership, success in hiring, development, promotion and retention of minority and women associates, creative partnering arrangements with minority and women-owned firms, and rigor in firm-wide ownership and participation in diversity programming.[86]

One of the interesting features of the ‘Coca-Cola’ story is that it had a “painful encounter” with a racial discrimination class action in 1999 filed by current and former African-American employees. The case was settled in 2000 and was followed by an oversight program by an independent District Judge. In 2005, the legal division elevated diversity as part of the corporation’s “mission” status. According to Geoff Kelly, the goal of the legal department is “to become the gold standard for inclusion and fairness and, once there, to use it as a platform for relentless improvement.”[87]

Wal Mart’s Legal Department claims to have established “an extremely strong brand in the diversity arena” since 2004.[88] Wal Mart measures outside law firms’ diversity not only “by good faith efforts and results.”[89] A broad set of detailed requirements are also imposed: “We measure law firm diversity by: overall law firm demographics; demographics of the firm’s Wal Mart team, good-faith efforts exhibited by the firm.” (p.7) The latter is defined further: “Good-faith efforts include, but are not limited to:

[84] Id.
[86] Id.
[87] Id.
[88] Id. p. 48.
[89] Id. p. 50.
having an active diversity committee, implementing a diversity plan, attending and sponsoring diversity events, increasing efforts to develop and retain women and minority attorneys, investing in the future of the profession (e.g. pipeline efforts).” (p.8) Wal Mart “encourages OC to utilize qualified diverse attorneys as appropriate when staffing Wal Mart matters.” (p. 14)  

Wal-Mart’s Diversity requirements are supplemented in significant ways. First, Wal Mart Guidelines state that “We are equally committed to promoting balanced work arrangements, as set out in our internal Flex-Time Policy.” (p.8) 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 Wal Mart before becoming a requirement for OC in the 2010 Guidelines. 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. It followed the participation of Jeff Gearhart, Executive Vice President and General Counsel, in the Project for Attorney Retention’s Annual Diversity and Flexibility Connection Conference:

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

Moreover, the absence of flex-time arrangements have been shown to have seriously detrimental effect on the careers of women and minorities. In fact,

90 For more on WalMart diversity efforts, see http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202434954310
91 Wal Mart Legal News, 1:2, Nov 2009, p. 1
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.”  

Many law firms used by Wal Mart are small, 2-3 partner firms providing localised services and local counsel in areas such as land use and casualty and tort. In these firms, a flex-time requirement is fairly redundant. However, many of the large firms, providing more complex services, are large firms where the billable hour requirement amongst other pressures makes flexible working time something they might be reluctant to introduce. Wal Mart therefore may be able to influence a different approach to this work-life balance issue.

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

In the recent Guidelines, Wal Mart 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 US-based attorneys. It backed up this demand with the threat to terminate its relationship with any firm that has not implemented such a policy by said date, unless the firm has communicated “an acceptable reason why the implementation of such a policy his not practical.”

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

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92 Id.
94 Id. at 9
Wal Mart has regular contact with their RP’s via email or telephone. In addition, every other year Wal Mart holds a two-day conference attended by RPs and a few other lawyers from the firm. On the first day, in plenary sessions, the CEO and General Counsel speak about general expectation and so on. On the second day, there are ‘break-out’ sessions within the various subject areas.

The list of five possible RPs the OC will be asked by Wal Mart to produce “must contain at least one attorney of color, at least one female attorney, and at least one attorney who works on a flexible work schedule, provided the firm has at least one such attorney.” 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, it can be seen that the Wal Mart OC Guidelines address the lack of equal opportunity within the legal profession and law firm.

The significance of this is enhanced by Wal Mart’s requirement that the Wal Mart RP shall receive full ‘Origination Credit’ for all Wal Mart work coming into the firm. This requirement is enforced by Wal Mart 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 and is considered to be a major intrusion into the internal affairs of the law firm.

The Origin Credit Certification requirement reflects the fact that the Wal Mart legal department understand the way law firms work and reward their partners. The “coin of the realm” in law firms depends upon who is the person that has the relationship with the client. Many of the large law firms have many corporate clients. Wal Mart believes that this requirement regarding credit increases the likelihood that Wal Mart will be viewed as an important client and the RP receiving credit should reflect that. However, this also helps convert the rhetoric of diversity and Flex-Time into more of a reality.

95 Id. at 10.
96 The firm “shall annually certify in writing before January 31 of each year that the Wal Mart RP have received or will receive full credit for all Wal Mart work brought into the firm in the preceding twelve-month period and that no such work has been disseminated within the firm without the knowledge and consent of the Wal Mart RP. Such certification shall be provided by the firms’ Chairperson, Managing Partner, General Counsel, Chief Financial Officer, or such other person in a position of firm leadership. In no instances shall the Wal Mart RP be required to provide the aforementioned certification.” (id. at 10).
Wal-Mart claims to have assigned, since 2005, women and lawyers of color, or both, to be relationship partners with its key law firms which has “translated to a shift of millions of dollars in legal business that was previously in the hands of white male partners to deserving women and minority partners.”

Through its Origination Certification requirement, in 2006 Wal Mart was able to shift over $60 million of OC spend annually to the control of women and minority relationship partners “simply by taking over the process of selecting those relationship partners.” Recently, Wal Mart received anecdotal evidence that the initiative was not working as intended: relationship partners selected by Wal Mart were “being cut out of the loop in the process of work being directed to the firm and thereby not receiving the origination credit they deserved.”

The revised OC Guidelines therefore instituted a requirement that all firms certify (by the CFO or managing Partner of the firm) that the Wal Mart relationship partner did in fact receive origination credit. Wal Mart includes diversity as one of its three yardsticks for measuring OC (the others being cost effectiveness and performance). Firms that score poorly “would be ineligible to receive new matters.”

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

Of course, we cannot verify the actual impact of these policies. Indeed, in California, the California Minority Counsel Program believes that “More action is especially needed when it comes to opportunities for diverse outside counsel to attract business from corporate clients.” While this is not the only element of the “diversity dialogue,
it remains among the most important.”103 However, there is no doubt that these OC requirements represent a major intrusion into the internal affairs of law firms. Moreover, they may directly affect the lives and careers of lawyers. And some, at least, clearly have made the promotion of diversity an important mission.

2. Ethics and the System of Justice

Several corporations address general and specific issues relating to lawyers’ ethics and the system of justice. 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 ethical standards at all times” linked this requirement to its general Code of Business Conduct, which includes directives regarding insider trading, respecting privacy of business partners and consumers, prohibiting engagement in unfair, deceptive or misleading practices and fair competition.

In some corporations lawyers' terms of engagement are included under "ethical" and CSR directives that apply to suppliers.104 GE, for example, has a broad directive for all its suppliers: the corporation's "Integrity Guide for Suppliers, Contractors and Consultants"105 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,106 and concludes with a prohibition on the use of subcontractors or other third parties to evade legal requirements applicable to the supplier.

Apple's "Supplier Code of Conduct" also has broad requirements regarding workers and human rights (including freedom of association, bargaining and unionizing), health & safety standards, protecting the environment and "ethics". In this context

103 Id. at 1.
104 See, for example, AT&T Supplier Diversity policies (http://www.att.com/gen/corporate-citizenship?pid=17724).
106 This section includes the following requirements: Human Rights: Failure to respect human rights of Supplier’s employees; Failure to observe applicable laws and regulations governing wage and hours; Failure to allow workers to freely choose whether or not to organize or join associations for the purpose of collective bargaining as provided by local law or regulation; Failure to prohibit discrimination, harassment and retaliation.
"ethics" includes – maintaining fair business standards, whistle blower protection, community engagement, protection of IP, and non-tolerance of corruption.107

There also exist some general guidelines that ask suppliers (lawyers included) to adhere to universal principles, such as The Universal Declaration of Human Rights.108 Others demand lawyers' adherence to "highest ethical standards".109

Although these codes apply to all suppliers, including lawyers, our main focus will be on norms that address lawyers distinctively, and attend specifically to lawyers’ professional conduct. The most prominent are directives contending with "over-zealous" adversarial representation, duties towards the justice system and towards the adversary during litigation.

Some corporations (though not many) have specific litigation guidelines that limit lawyers' "legal toolkit". Wal Mart has the most far reaching instructions to its OC, who are instructed to

- “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 request and not interpret them in an artificially restrictive manner so as to avoid disclosure of relevant and non-privileged information
- Make good faith efforts to resolve disputes concerning pleadings and discovery

Apple supplier Code of Conduct similarly refers to human rights as recognized under international human rights law; “Suppliers must uphold the human rights of workers, and treat them with dignity and respect as understood by the international community".
109 See Whelan and Ziv, supra note 19, at Appendix.
- Agree to reasonable requests for extension of time and waiver of procedural formalities when doing so will not adversely affect Wal Mart’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

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 in connection with Wal Mart litigation is set out in no uncertain terms: “Wal Mart will terminate its relationship”.110

It is not surprising that a significant area concerns pertains to the discovery process. Historically, Wal Mart had a reputation for being sanctioned not infrequently for discovery-related issues. This reputation may have been the result of unethical behaviour, but it is also possible that the company was simply inundated with discovery requests and, as a result, found it difficult to keep up with them. For example, Wal Mart reported that it had been sued 4,851 times in the year 2000, or once every two hours; juries decided a case in which Wal Mart was a defendant about six times every business day; and Wal Mart lawyers listed 9,400 open cases.111

This probably explains why, about five years ago, Wal Mart established a Litigation Support Group, within the Litigation Group, with the sole task of processing discovery requests.112 As one interviewee put it to us, the “whole philosophy has changed – we do care if we are sanctioned.”113 Possibly as a result of this, since 2008, no firm has been terminated because of discovery sanctions.

The Discovery section goes into some detail:

- “Form objections [to discovery requests] are to be avoided. All objections must fully articulate the legal and factual basis for the objection.”114

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110 Wal-Mart Outside Counsel Procedures, supra, note 93, at 18, emphasis in original.
111 USA Today, 13 August 2001.
112 Interestingly, in the UK, Herbert Smith ‘outsourced’ the management of all its discovery work to Belfast, Northern Ireland, The Times, 15 September 2011.
113 Interview, 13 June 2011.
114 Wal-Mart Outside Counsel Procedures, supra note 93, at 22, emphasis in original.
- Acting ethically When Conducting Discovery: “OC are expected to make informed, ethical decisions with respect to discovery responses. … 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.”

These standards were the largely unchanged from the earlier Guidelines. However, the 2010 Guidelines requires OC to report significant developments on “any orders granting such discovery motions or awarding sanctions.”

Other corporations, for example Bank of America and The European Bank for Reconstruction & Development also direct lawyers to not to use "Coercive, dilatory or obstructive tactics" and discourage protracted motion practice.

3. ADR

Another key area for promoting non-traditional approaches to litigation has been the development of ADR. In the United States, a major conduit for this has been the Center for Public Resources. The goal of the center is non-court resolution of business disputes between member companies. CPR offers many different forms of mediation and members are bound to try and resolve disputes outside court and through the auspices of CPR. More than 600 corporations adopted the CPR policy statement.

It appears that many corporations, including Fannie Mae and Universal Underwriters Group have included a similar preference for ADR in their OC Guidelines. Bank of

115 Id. at 22, emphasis in original.
116 Id. at 23, emphasis in original.
117 Id. at (p. 19)
118 Whelan and Ziv, supra note 19, at Appendix.
America, for example, “strongly supports” the use of ADR: “Mediation, binding arbitration and other forms of alternative dispute resolution have proven very beneficial to Bank of America.” Although the 2011 version deletes these words, it still states that ADR “should be considered at the outset of any engagement and periodically thereafter.” Wal Mart also encourages use of ADR techniques “in appropriate circumstances. Outside counsel should proactively identify and bring to the attention of the PIC all opportunities to utilize ADR.”

4. Reporting and Gatekeeping

Some OC Guidelines include explicit reference to legislation that applies to the corporation and/or to lawyers. The most frequent is reference to the Sarbanes-Oxley Act (SOX), which refer both to corporate obligations as well as lawyers' "up the ladder" reporting duties. Wachovia, for example, incorporates within its guidelines a reporting duty that exists in SOX. Others are "anti corruption" laws, which the firm commits to abide by legislation and regulation regarding "abusive tax shelters". A large Israeli law firm, for example, has been required to commit – under The Foreign Corrupt Practices Act - that it will not "pay, offer, or promise to pay or authorize the payment directly or indirectly... anything of value to any government official... political part... candidate for political office for the purpose of inducing or rewarding favourable action... in any commercial transaction or in any governmental matter".

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120 BoA Outside Counsel Procedures, 2009, Section VII B. 5
121 Id. 2009 and 2011, Section VII B. 5
122 Wal-Mart Outside Counsel Guidelines, supra note 93 , at 25
124 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.

125 Bank of America OC Guidelines, Appendix I: Considerations for firms supporting U.S.-based businesses/matters: “Bank of America Corporation and its affiliates (“Bank of America”) requests law firm support in their efforts to meet its obligations under U.S. Treasury regulations regarding the disclosure and reporting of “potentially abusive tax shelters... Each failure to disclose or report a reportable transaction may result in significant penalties.”

A rather unique obligation to act as "gate-keeper" is imposed by Wal Mart upon its outside counsel, expecting lawyers to oversee its own personnel. In this case corporation’s Outside Counsel Guidelines require that the lawyer not only defy an unethical instruction of a corporate associate, but also report the incident to a designated corporate officer ("up the ladder" reporting duties). Under a section entitled "ethics" OC is instructed as follows: "If Outside Counsel believes that a Wal-Mart Associate (including any Legal Department personnel) has or will engage in illegal or unethical activity as a representative or agent of the Company, the most senior Outside Counsel responsible for the matter through which such activity is discovered must immediately and confidentially contact the RLDA (or a Wal-Mart Associate General Counsel or General Counsel, as appropriate). No Wal-Mart Associate has authority to instruct Outside Counsel to act in an unethical manner in connection with any Wal-Mart matter". In other words, OC are being used as a mechanism to monitor improper behavior of the client's agents, turning them into "lawyers - gate keepers". This brings us back - full circle – to defining lawyers as owing heightened and special duties within the now completely privatized "soft legal system". 127

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

Not surprisingly, however, given that one of the major elements in most OC Procedures is the control of billing, many terms and conditions, including those falling under the heading of ‘socially responsible,’ are designed to achieve cost-

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127 See American Bar Association, Model Rules of Professional Conduct (2011) MR 1.13 – Organization as client) and SOX.
effectiveness. Bank of America, for example, seeks to facilitate the “cost-effective” resolution of claims and instructs OC to ensure “cost-effective service.” Similarly, Wal Mart expects its OC to provide “the highest quality legal services in the most cost-effective manner.”

The claim that socially responsible policies help the company to “do well by doing good” is also expressed by many corporations and interviewees. As Wal Mart Guidelines put it: “Diversity is not just about doing the right thing”, it is the company’s interests: “we believe that a culturally sensitive, diverse workplace is better able to serve our needs and produce better results.”

Indeed, 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 considered good business practice.

Indeed, one large company explains that its "Legal Division is committed to making diversity a competitive advantage within our organization by, among other things, ensuring that our internal workforce and the outside lawyers working on our matters reflect the diverse community that is our consumer base … Law firm partners will also be expected to provide periodic reporting … evidencing progress in alignment to the Company’s diversity goals.”

Likewise, what seems to be fair litigation policy (early and prompt conflict resolution, preference for settlements, avoidance of coercive, dilatory or obstructive discovery proceedings, prohibition of protracted motion practice), can be regarded both as good ethical stands, as well as good business tactics. Arguably, inasmuch as OC Procedures refer to notions of "good citizenship", at the same time they have also been transformed into "market assets" of the corporation, i.e., have become a commodity in their commercial activity. CSR codes, guidelines and norms are ever more becoming an inherent element in corporations' business opportunities and risk-management tactics. They are coined in terms of "cost effectiveness" and "good business". In fact in the codes we examined there is reference to "high ethical standards" and "cost

128 Regan and Heenan, supra note 13.
129 Wal Mart Outside Counsel Guidelines, supra note 93, at 7.
130 Interview with American General Counsel, July 2011.
131 Id.
effectiveness” in the same breath; to commitments to social diversity (employing women and minorities) as a means not only for fairness but also for "better business results". This entanglement between "doing what is right" and "doing well" permeates the codes of conduct. They also appear in the interviews we conducted with GC and others in a number of these corporations.

III. Professional Regulation, Lawyers' Independence and CSR

What lessons can we draw from the corporate practices we have identified to the question of lawyers' ethics and professionalism? In this section we suggest three ways to connect between the more traditional understandings of the lawyer client relationship and CSR as manifested by outside counsel guidelines described above. The first conflates the traditional notion of lawyer independence from the client, by questioning its suitability to serve as a model for ethical discourse; the second builds on this analysis by focusing on the role of in-house counsel; the third suggests to look at legal ethics as an "asset" in the market for legal services.

1. CSR and Lawyers' Independence from Clients
Robert Rosen proposes that in order to better understand lawyers who represent large corporations a paradigmatic shift ought to be made. Traditionally, lawyers' conduct has been discussed under what he labels "the independence model". The "independence model" - which closely relates with the notion of professionalism - assumes that lawyers are bound by a set of norms, rules, ideals and standards under which they maintain the capacity to act independently of their clients and that allow them to deviate from their clients' demands. Their independence enables them to render opinions and employ their discretion autonomously, and abide by norms that embody the unique values of the profession as a carrier of public ideals.132

Bound within this model, explains Chambliss, the literature has focused on lawyers' inability to meet the model in real life situations, concentrating on lawyers' ethical misconduct, caused by the excessive influence exhorted by their clients over lawyers' professional discretion.\textsuperscript{133} The vast literature on lawyers and the Enron case clearly abides by this paradigm.\textsuperscript{134}

Rosen then suggests "debunking" the independence model, and adopting instead a different paradigm, which assumes that lawyers are committed to their clients, and continue to inquire "how they handle these commitments". He claims that the commitment model not only better depicts the reality under which lawyers for corporations actually work, but that it opens up new possibilities to talk about ethics as a political project in which lawyers "choose sides", and then attempt to negotiate the scope of their engagement.\textsuperscript{135} Under this view we draw attention to the "organizational needs and capacities" of clients. We connect between the lawyers and these "needs and capacities", thus making them part of the client's enterprise rather than 'cops' or 'counselors', to use the terms coined by Nelson & Nielsen.\textsuperscript{136}

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

\textsuperscript{133} Elizabeth Chambliss, Measuring Law Firm Culture, in Law Firms, legal Culture and legal Practice (A. Sarat, ed., 2010), 1, 3. Some literature then attempts to explain lawyers' inability to act independently (see, for example, K. Kirkland, Ethics in Large Firms: The Principle of Pragmatism (2005), explaining "how bureaucratic legal workplaces shape lawyers' ethical consciousness", at 634); or describe the cognitive process they undergo to justify this stand: Kath Hall, The power of rationalization to influence lawyers’ decisions to act unethically 11 (2) Legal Ethics 137 (2009).


\textsuperscript{135} Nelson and Nielsen, supra, note 22.
But what if this assumption is challenged, or at least complicated. What if we acknowledge that clients are not only pursuing short term self interests with disregard to others, but that they have, at the least, mixed motives and at times benign objectives? And even if we accept that CSR is largely a "market based morality", it still may bring about positive outcomes. Then the "loss" entailed in debunking independence is mitigated.

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

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

It is interesting to note that one of the findings in the research conducted by Chambliss is that what matters most to lawyers is the "culture" of the law firm in which they work. Culture is described as "working conditions" (first and foremost pressure for extensive billable hours), tolerance (or lack thereof) of interpersonal abuse at the office, team work, etc. In other words, within law firms topics such as diversity or flex-work policies seem to be as significant to lawyers as the more traditional ethical issues.\textsuperscript{137} There is no reason to expect a different finding within the

\textsuperscript{137} Chambliss, \textit{supra}, note 133 at 20-22.
lawyer–corporate client relationship, strengthening the upside of lawyers' engagement in issues of this sort.

2. In-house Counsel and CSR

This analysis can also be applied to in-house counsel where the ‘independence from client model’ has become increasingly difficult to sustain. The role of in-house counsel may once have reflected the professional ideal, but there is undoubtedly pressure on them now to become “entirely the corporation’s agent rather than an emissary from the legal system.”138 Although “formally trained as lawyers”, general counsel may experience a “change in consciousness” from the ‘professional’ to one who is “fully aligned with the entrepreneurial attitude of other corporate employees.”139

In practice, general counsel are “effectively senior corporate managers whose goal is to optimize the benefit of a fixed legal budget.”140 Large corporate clients spend vast sums of money on legal services and many in-house counsel play a key role in the procurement of outside counsel; indeed, the “purchasing power is disproportionately centralized among a few hundred general counsel.”141 Their “strong incentives to minimize costs temper their guild-preservation mentality;”142 they also appear to reinforce the threats to lawyer independence both in-house and outside counsel.

Here again, however, CSR may call for a reassessment. Corporate activities are monitored by a variety of public and private sources; global corporations are vulnerable to reputational harm if there is a breach of CSR policy.143 Therefore, “[a]voiding improper conduct which could hurt the [corporation’s] reputation and trigger significant legal fees is an important business function.”144 In-house counsel are more aware than most of their corporate manager counterparts of these legal

139 Ribstein, id., referring to Nielsen and Nelson, supra, note 22.  
141 Id.  
142 Ribstein, supra, note 138.  
144 Ribstein, supra, note 138.
obligation and public accountability sources. In response, many corporations develop regulatory regimes and responsible business policies in order to protect reputational capital and protect the corporation.\textsuperscript{145} Outside Counsel Procedures which, as we have seen, privatize professionalism\textsuperscript{146} and reinvent ‘Professional Responsibility’ as ‘Social Responsibility’, can be viewed as one example. Professionalism may be enhanced via the imposition of Outside Counsel Procedures that reinforce reputational capital and thereby serve not only the corporation but, where they exist, the corporation’s CSR policies. Technology enables corporate clients to monitor not only the costs of outside counsel but also their compliance with CSR policies. In-house lawyers therefore may enthusiastically embrace the professional aspects of Outside Counsel Procedures. Outside Counsel Procedures allow them to reconcile both their professional aspirations and their corporate role and to justify their role both internally and externally.

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

However, in the neo-liberal era, as forces of unification, deregulation and competition have reigned, lawyers – increasingly being considered as service providers - are under threat to lose their special privileges. As a result the claim for "professionalism" is been transformed and converted into a leveraged business consideration. UK lawyers have claimed, for example, that loss of "professional independence" (one of the core attributes of professionalism) would be detrimental to their international market

\textsuperscript{145} Zadek, \textit{supra}, note 143.
\textsuperscript{146} Whelan and Ziv, \textit{supra} note 19.
competitiveness and will put them at a business disadvantage.\textsuperscript{147} Hence here too we see that the claim for professionalism, ethical duties, public commitments and the like are conflated with the world of business.

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

Accordingly, lawyers can identify with, engage in and commit to their client's goals and means of operation. If Wal Mart, Coca Cola, Bank of America and GE pride themselves with their advanced CSR policies and see them as a commercial asset, there is no reason why their outside counsel cannot so the same.\textsuperscript{148} Ultimately, we are talking about similar interests and values: integrity of the justice system, diversity and pluralism, respect for unprotected consumers – these are values that coincide with traditional notions of "professionalism", albeit now invigorated as market assets.

\textbf{Conclusion}

CSR is becoming mainstream. Corporations present their citizenship, or stewardship or sustainability policies and reports as a standard part of their business profile. Whether or not these are self-promotion or market embedded, they go beyond the ‘letter’ of legal requirements \textit{imposed on} these corporations and are \textit{now imposed by} them upon others. Within a global market economy that increasingly maintains that there is "nothing special about lawyers" and “nothing unique about legal services,”\textsuperscript{149} the combination of CSR policies and Outside Counsel Guidelines may transform the substantive norms as well as the regulatory framework under which lawyers work. We suggest this may become an opportunity to redefine professionalism, an opening for lawyers to negotiate with their clients what is perhaps the oldest question lying at the core of their practice: the relationship between law, lawyers and justice.

\textsuperscript{148} For an example of a global law firm embracing Corporate Responsibility, aspiring to a “positive, inclusive and diverse culture, see \url{www.freshfields.com/_download/aboutus/cr/CR_Report-2010-2011.pdf}. This document includes reference to pro bono, social inclusion and business and ethics.
\textsuperscript{149} See Whelan, supra note 147, at 470.