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Robert Eli Rosen  
*University of Miami Law School*

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# The Inside Counsel Movement, Professional Judgment and Organizational Representation

ROBERT ELI ROSEN\*

## I. WHAT IS AN ENLIGHTENMENT?

Inside counsel—lawyers who are employees of private business corporations—now are being called “corporate counsel.” Once they were “house counsel,” “tame” and “kept” lawyers.<sup>1</sup> In forsaking organizational independence—the mantle of the free professional<sup>2</sup>—they once subjected themselves to the accusation of having sold their professional souls, if not their human ones, for a mess of pottage.<sup>3</sup> Once castigated, inside counsel reportedly now are accorded not only “admiration and respect” by their corporate employers<sup>4</sup> but also “growing prestige” within the bar.<sup>5</sup>

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\* Associate Professor, University of Miami Law School. This paper was drafted while Professor Rosen was a Fellow in the Program in Ethics and the Professions at Harvard University. It has benefited from the comments of Arthur Applbaum, Mary Coombs and Elizabeth Leiman.

Unidentified quotations from lawyers reported in this essay derive from a study of the provision of legal services to six major manufacturing companies reported in R. Rosen, *Lawyers in Corporate Decision-Making* (1984) (unpublished dissertation available in the University of California-Berkeley library). That research was made possible by the support of the American Bar Foundation and the Thomasin and Abigail Bellah Foundation.

1. In the 1920's, inside counsel were known as “kept” counsel. Hickman, *Corporate Legal Departments and Retained Counsel*, in *FUNCTIONS OF CORPORATE LEGAL DEPARTMENTS* 1, 2 (1961). In the 1930's, they were known as “house” counsel. *Id.* “[A] generation or more ago . . . he was a ‘tame lawyer,’” Berle noted in 1955. Berle, *The Changing Role of the Corporation and its Counsel*, 10 *REC. AM. B. CITY N.Y.* 266, 267 (1955). Since 1945, inside counsel have been claiming that they should be called “corporate counsel.” Hickman, *supra*, at 2; see also Chayes & Chayes, *Corporate Counsel and the Elite Law Firm*, 37 *STAN. L. REV.* 277, 277 (1985) (arguing the enhanced conception of “corporate counsel” is warranted).

2. A “free profession” is a profession “conceived as an esoteric art practiced by a closed group of people, each having relations to a number of separate clients, and each collecting his own fees.” Hughes, *Education for a Profession*, in *SEVEN QUESTIONS ABOUT THE PROFESSION OF LIBRARIANSHIP* 39 (1962), quoted in E. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 293 (1969).

3. See, e.g., R. NELSON, *PARTNERS WITH POWER: SOCIAL TRANSFORMATIONS OF THE LARGE LAW FIRM* 56 (1988) (outside counsel's attitudes); Davis, *Reflections of a Kept Lawyer*, 53 *A.B.A. J.* 349 (1967) (inside counsel's perception).

4. McClements, *What a CEO Expects from Corporate Counsel*, 4 *ACCA DOCKET* 20, 20 (1986); see also *infra* note 6.

5. Chayes & Chayes, *supra* note 1, at 277 n.1 (without supplying data); see also C. WOLFRAM, *MODERN LEGAL ETHICS* 736 (1986); Maher, *Corporate Counsel Come in From the Cold*, *CAL. LAW.*, Nov. 1984, at 42, 43 (based on informal survey). These discussions emphasize that inside counsel's increased status is of recent vintage. See, e.g., C. WOLFRAM, *supra* at 736

The first subject of this paper is the popular and scholarly reports that explain and justify inside counsel's new-found success. What is the relationship between inside counsel's new role within business and their increased standing within the legal profession? Inside counsel's answer to this question is that in the modern corporate legal department they are exercising high-quality professional judgment. Inside counsel qualify the response that their professional gains derive from their having gained corporate power. They emphasize that their exercises of corporate power are guided and constrained by their professional judgment. This response forces us to consider the relation between professional judgment and corporate goals: In what ways can a legal practice that is conjoined with corporate power merit professional respect?

Supposedly, corporations value and empower inside counsel because of their professional judgment. Their enhanced standing within the profession rests on this claim. It qualifies fears of inside counsel being captured by their corporate employers, suggesting that corporations normally require inside counsel to make decisions in accordance with proper professional judgment. This affirms inside counsel's increasing professional standing; they are exercising their professional judgment and thereby influencing corporate political choices. I am interested in the meaning of inside counsel's enhanced corporate and professional standing. What are its political and ethical implications? Do inside counsel lay claim to power over their client's political choices? Does their power extend beyond preventing corporate illegalities, and reach the choice between the various legally proper goals and commitments the corporation might adopt? What needs for legal service lead corporations to hire and empower inside counsel? Assuming that professional standing ought to comport with professional ethics, to what is the profession committed by granting increased status to inside counsel?

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("At one time, studies indicated" low status (citing Slovak, *Giving and Getting Respect: Prestige and Stratification in a Legal Elite*, 1980 AM. B. FOUND. RES. J. 31)). Yet in 1955, Berle claimed that inside counsel already had gained increased standing: "[A] generation or more ago [inside counsel's] standing was lower than the supposedly free, independent practitioner. Few students of the corporate picture would today make so invidious a comparison." Berle, *supra* note 1, at 267. *But see* Schneyer, *Professionalism and Public Policy: The Case of House Counsel*, 2 GEO. J. LEGAL ETHICS 449 (1988) (cases split on whether the court ought to treat inside counsel differently than outside counsel); Slovak, *supra* (inside counsel are second-class citizens within the profession even though they are the corporation's legal strategists, and they exercise control over outside counsel).

By setting out inside counsel's justification for their increased prestige, this essay aims to assist the profession and its members to decide which inside counsel deserve high status. For purposes of exposition, I will assume that inside counsel's professional standing has improved. I discount the claim that inside counsel are not performing ethically. I assume that increases in inside counsel's standing comports with perceptions of their ethical action. I make these assumptions to describe how professional honor ought to, even if it currently does not, follow professional ethics. I pose the question, even if inside counsel acted as they claim, ought they be praised?

How ought the profession assist lawyers in the responsible exercise of their power in corporate politics?

Answering these questions requires determining what corporate powers inside counsel command in their work. The second subject of this paper is an examination of their work. Reports highlight that inside counsel's new role includes preventive law practice and their management of outside counsel. If corporations use inside counsel for these tasks, what corporate needs for legal services are thereby revealed and what corporate powers do the legal department and its members obtain? Proper performance of these tasks, reports claim, justify inside counsel's enhanced professional status. If the profession accepts this claim, what is the degree of influence over corporate goals that a lawyer may accept?

In the concluding section, I temporarily leave the subject of corporate needs to address the question of whether the profession ought to limit the corporate power its members accept. Some social and historical evidence suggests it should not. This evidence includes: (1) how the profession valued its most influential members in the past, (2) the claims of inside counsel, (3) the profession's changing attitude toward inside counsel, and (4) the fact that corporations choose to grant power to members of the legal profession. Notwithstanding this evidence, lawyers and scholars have argued that the profession ought to limit its members' claims to corporate power.

Corporate needs may be relevant to answering the question of how much influence lawyers may have with their corporate clients. Corporations appear to require that lawyers be managers, not employees. If so, lawyers' corporate power may be the necessary consequence of their legal practice. My claim is more restrained, recognizing that the profession has power to decline client demands. Inside counsel's claims to professional standing challenge the profession to confront the political role of professional judgment in serving corporate clients. As a first step in meeting this challenge, I conclude by analyzing how the Model Rules of Professional Conduct does not offer adequate answers to what constitutes responsible organizational representation.

My first task then is to flesh out the claims that support inside counsel's new status.

#### *A. Reports from Inside Counsel's Age of Enlightenment*

According to reports, inside counsel increasingly claim not only prestige, but also power. Corporations, elite law firms and the bar respond to decisions made by inside counsel. Exercising leadership, inside counsel supply direction to these organizations.

Corporate leaders report their greater reliance on corporate legal departments and praise the departments' improving quality.<sup>6</sup> Indicating increases

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6. *E.g.*, Creedon, *Lawyer and Executive—The Role of the General Counsel*, 39 *BUS. LAW.*

in inside counsel's power within the corporation, the size and budgets of the corporate legal departments of many of the major clients of elite law firms apparently have been growing.<sup>7</sup> Seeking quality lawyers, corporate

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25 (1983) and sources cited therein; see also *Corporate Attorneys Going to 'Preventive Law,'* New Jersey L.J., Aug. 7, 1980, at 8, col. 3 (The survey shows top corporate executives seek more assistance from the legal staff and "a far more active role." "[Seventy-four] percent [of top executives surveyed] stat[ed] that the legal staff should initiate involvement in corporate activities.").

7. E.g., A. LYNCH, T. TILGHMAN & R. BERKOW, NATIONAL SURVEY OF CORPORATE LAW DEPARTMENTS COMPENSATION AND ORGANIZATION PRACTICES (8th ed. 1985) [hereinafter ARTHUR YOUNG SURVEY], see also *What Clients Want*, AM. LAW., Nov. 1985, at 5, 6 (survey finds increasing legal department budgets).

Reports in the legal press have claimed that the numbers of inside counsel quadrupled between 1962 and 1982, Ayre, *In House—Better than Ever*, Nat'l L.J., Feb. 15, 1982, at 11, col. 1 (reporting a survey conducted by the Boise Cascade Company) and nearly doubled between 1973 and 1983, Lynch, *Moving the Law Inside at Mass Mutual*, A.B.A. J., Feb. 1984, at 45 (reporting a Harvard Law School study of select large corporations). Chayes and Chayes cite a 1983 Arthur Young study, commissioned by The Commission on the Corporate Law Departments of the Association of the Bar of the City of New York, of a select 183 corporations showing an average growth of 29% between 1977 and 1982. Chayes & Chayes, *supra* note 1, at 277 n.1. *But see* Pashigian, *Regulation, Preventive Law, and the Duties of Attorneys*, in THE CHANGING ROLE OF THE CORPORATE ATTORNEY 3, 7 (W. Carney ed. 1982) ("The ratio of lawyers employed in the legal-service industry to lawyers employed in for-profit companies has been constant from 1950 to 1970. These results will be a surprise to those lawyers who have read reports of the growth of corporate law departments."); Glasser, *Legal Department Surveys Deserve Word of Caution*, Legal Times of Wash., Mar. 30, 1981, at 13, col. 1 (noting "misleading data" being circulated because of sample choice and data collection methods).

The largest data base on the profession, that employed in the American Bar Foundation's *Lawyer Statistical Report*, from data generated by Martindale-Hubbell, Inc., reports on lawyers working in private industry. B. CURRAN, THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s 19 (1985) [hereinafter B. CURRAN, REPORT]. Lawyers reported as working in private industry include lawyers who do not work for corporate legal departments. "Sixty-three percent of lawyers in companies that employed four or more lawyers and maintained legal departments worked in other departments or divisions." *Id.* at 21. Consequently, this data may not be sufficiently pointed to ascertain whether the numbers of inside counsel have been growing. But it does suggest a different picture than that portrayed in the legal press. While the numbers of lawyers employed by private industry has been increasing, so too has the absolute number of lawyers. Between 1970 and 1980, there was a 40% increase in the number of lawyers working in private industry, but the profession as a whole increased by 53%. *Id.* at 4, 19. Of the entire legal population, the percentage of lawyers practicing in private industry was 10% in 1960, 11% in 1970, and 10% in 1980. *Id.* at 12. The most recent *Report* indicates that the profession as a whole increased in size by 21% between 1980 and 1985 and that only 9.7% of the total lawyer population was employed by private industry in 1985. B. CURRAN, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE LEGAL PROFESSION IN 1985, at vii, 3 (1986).

The American Bar Foundation data suggest that the great increase in the percentage of the profession practicing in private industry occurred prior to 1960. Since 1960, this data shows that around 10% of the bar have been salaried employees of private industry. In 1951, approximately 5% of the profession were comparably employed. A. BLAUSTEIN & C. PORTER, THE AMERICAN LAWYER: A SUMMARY OF THE SURVEY OF THE LEGAL PROFESSION 8 (1954). Nevertheless, the size of the corporate legal departments of significant clients of elite law firms may have been growing. This discussion, except where otherwise noted, is limited to generalizations about the largest corporations because these "have traditionally been the anchor clients

legal departments are beginning to see the merit in setting compensation "using private law firm standards."<sup>8</sup>

According to reports, the modern, "innovative corporate law department . . . plays a key role in the corporate decision making process."<sup>9</sup> First, inside counsel have become involved in corporate planning, strategic decisionmaking and auditing. Corporate legal risks and needs are anticipated, spotted and resolved by the corporate legal department.<sup>10</sup> Second, legal work that poses significant risks for the corporation no longer passes as a matter of course to outside counsel.<sup>11</sup> Inside counsel at major corporations are no longer depicted as second-rate lawyers dependent on the guidance of outside counsel. Inside counsel now are characterized as possessing the knowledge and training necessary to handle complex and important legal matters.<sup>12</sup> Third, having been granted managerial responsibilities for their

of the large, elite law firms." Chayes & Chayes, *supra* note 1, at 278. In 1980, 49% of all lawyers employed by private industry worked at a company listed in the Fortune 500 or the Fortune 50 for their industry. B. CURRAN, REPORT, *supra* at 19.

8. Liggio & Edelstein, *Introduction: Managing the Corporate Law Department*, in *MANAGEMENT FOR IN-HOUSE COUNSEL: TECHNIQUES, TOOLS, APPROACHES* vii, ix (M. Goldblatt ed. 1985); Berkow & Tilghman, *New Compensation Strategies Needed for In-House Counsel*, Nat'l L.J., Nov. 10, 1986, at 15, col. 1 (legal departments can respond to increases in outside firm compensation levels by increasing corporate benefits, including performance related bonuses). *But see* Pashigian, *supra* note 7, at 14-16 (salary comparisons between other corporate professionals and inside and outside counsel do not indicate upgrading of inside counsel quality).

9. ARTHUR YOUNG SURVEY, *supra* note 7, at 5. "The innovative corporate law department is no longer merely a coordinator of outside counsel, but is significantly expanding its role in corporate legal and business activities. *Id.* "[D]erived from Arthur Young's experience in consulting with corporate law departments," *id.*, the survey profiles innovative legal departments as "examples of the modern corporate law department as it is evolving," *id.* at 4, "with the intention of providing guidance to other departments." *Id.*; *see also* J. AYRE, *CORPORATE LEGAL DEPARTMENTS: STRATEGIES FOR THE 1980s* 95 (1984) (CEO's want lawyers on senior management team).

10. Chayes & Chayes, *supra* note 1, at 280-89.

11. The inside counsel who was reported to have said, "[W]e do have a general rule, that the larger the project or the problem, the more likely we'll go outside," Slovak, *Working for Corporate Actors: Social Change and Elite Attorneys in Chicago*, 1979 AM. B. FOUND. RES. J. 465, 481, was indicating that his legal department was not a modern, "innovative" one. *See* ARTHUR YOUNG SURVEY, *supra* note 7, at 5.

12. At innovative companies, "[s]enior and mid-level positions are filled by highly qualified and experienced attorneys who operate with independence . . ." ARTHUR YOUNG SURVEY, *supra* note 7, at 6. Perhaps the clearest indicator of perceived increases in inside counsel quality is that elite firms are now recruiting laterally from corporate legal departments. Ayre, *supra* note 7, at 11, col. 1 (The 1981 Boise Cascade Survey found "that of 113 lawyers leaving those [corporate legal departments surveyed] in the past three years, 34 went into private practice as partners, five went into private practice as associates." *Id.* at 24, col. 1); Lieber, *Corporate Law: Where the Action Is*, in *MANAGEMENT FOR IN-HOUSE COUNSEL: TECHNIQUES, TOOLS, APPROACHES* 23, 24 (M. Goldblatt ed. 1985) ("[I]t has become commonplace for attorneys to move from corporations to law firms, something virtually unheard of in the past. A case in point is that of Harold Barron, Bendix' former general counsel, who became a partner in the Chicago firm of Arnstein, Gluck, Lehr, Barron & Milligan after leaving Bendix.").

corporation's legal function,<sup>13</sup> inside counsel have emerged as purchasers of outside firm services and monitors and auditors of outside counsel's work.<sup>14</sup> It is inside counsel, not executives, who now retain outside counsel. Inside counsel also organize outside counsel's work as well as their contacts with the client organization.<sup>15</sup> And they appraise outside counsel to determine, at least, whether they should again be retained.<sup>16</sup> In short, inside counsel have become actors with power to determine the legal work the corporation receives.<sup>17</sup>

Outside practitioners who proclaim, in marketing and managing their firm, their capacity and willingness to work with this "new breed"<sup>18</sup> of inside counsel both confirm these reports and promote the spread of the breed.<sup>19</sup> Carrying large fixed costs and rapid growth potential, elite firms have responded to the emergence of inside counsel as purchasing agents for their services by entering "beauty contests" and bidding wars with their elite rivals.<sup>20</sup> Perhaps more remarkably, given professional pride, elite prac-

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13. Slovak, *supra* note 11, at 477.

14. *Id.* at 481.

15. J. AYRE, *supra* note 9, at 138, 146; R. NELSON, *supra* note 3, at 58.

16. J. HEINZ & E. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 367-68 (1982).

17. R. NELSON, *supra* note 3, at 263. *But see* Pashigian, *supra* note 7, at 16 ("These results suggest that . . . the type of legal work performed in law departments [has not changed] sufficiently to require an improvement in the *relative* quality of corporate attorney." (emphasis in original)).

One general counsel summarized the legal department's emerging role by listing "client expectations of corporate legal services in the 1990s":

- (i) an increasing reliance upon corporate legal staffs with a corresponding increase in their size and responsibilities;
- (ii) accountability of the general counsel as a corporate manager (and that has far-ranging implications for those blithe spirits who are reluctant to respond to managerial expectations for increased professional efficiency);
- (iii) new and different corporate expectations regarding the use of outside counsel, perceived both from the standpoint of the office of general counsel and senior management;
- (iv) development of an internal legal compliance system which is the very foundation of corporate preventive law;
- (v) creation of informal dispute resolution mechanisms as alternatives to litigation;
- (vi) increasing emphasis upon legislative and regulatory initiatives; and perhaps most important of all,
- (vii) continuing responsibility for anticipating change and assisting corporate managers in addressing change.

*Corporate Legal Practice in the 1990s: Directions and Challenges*, 37 *BUS. LAW.* 683, 685 (1982) (remarks of George W. Coombe, Bank of America general counsel).

18. Chayes & Chayes, *supra* note 1, at 277.

19. *See, e.g.*, *THE CORPORATE COUNSELOR'S DESKBOOK* (D. Block, A. Hoddinott, Jr. & M. Epstein eds. 1982). "The goal of the *Corporate Counsellor's Deskbook* is to ensure that we [inside and outside counsel] start down the road of teamwork successfully." Banks & Millstein, *Law Firm's and Corporate Law Departments: An Introduction*, in *THE CORPORATE COUNSELOR'S DESKBOOK*, *supra*, at 6.3.

20. Flaharty, *Comparison Shopping Hits the Law*, *Nat'l L.J.*, Oct. 31, 1983, at 1, col. 4. It is unclear whether this commercial behavior is commensurate with professional standards when the contest's judge is a professional colleague, an inside counsel, who can informedly evaluate the claims advanced.

tioners allow inside counsel to make decisions not only about "the objectives of the representation"<sup>21</sup> but also about the "scope of services [to be] provided by"<sup>22</sup> outside counsel.<sup>23</sup> Accounts of emerging inside-outside counsel relations emphasize that elite firms need to be willing to respond to direction by those lawyers who know and determine what the client needs—inside counsel.<sup>24</sup> In this regime for organizing practice, elite law firms will process legal work that has been pre-digested and organized by clients' legal departments, even to providing opinions based on data presented to outside counsel as purely hypothetical.<sup>25</sup> So long as inside counsel assume responsibility, many outside counsel supposedly will cede strategic control to the corporate legal department, even to sometimes giving up first-seat at trial.<sup>26</sup> Whether out of fear of biting the hand that feeds them, or because of ethical duties to provide the service the client requests,<sup>27</sup> elite practitioners

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21. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(c) (1983) [hereinafter RPC] (authorizing the limiting by the client of the objectives of the representation). Of course, any agreement must not involve the lawyer in violating the *Rules of Professional Conduct*, including Rule 1.1's competency requirements. *Id.* at Rule 1.2 comment 5.

22. *Id.* at Rule 1.2(c) (making scope limits permissive with client consent). Of course, any agreement must not involve the lawyer in violating the *Rules of Professional Conduct*, including Rule 1.1's competency requirements. *Id.* at Rule 1.2(c) comment 5.

23. At "innovative" legal departments, "[t]he department manages the use of outside counsel and is in control of outside counsel with regard to their responsibilities, authorities, and costs." ARTHUR YOUNG SURVEY, *supra* note 7, at 5; see also, CHAYES & CHAYES, *supra* note 1, at 290 ("If there is to be a division of responsibility, an internal lawyer will be responsible for the cut.").

24. J. AYRE, *supra* note 9, at 121 (Inside counsel is "primarily responsible for all strategic or tactical decisions [and] is, in effect, the lead counsel on the case and, in the event of a disagreement in professional judgment, his will prevails."); A. CHAYES, *MANAGING THE CORPORATE LEGAL FUNCTION: THE LAW DEPARTMENT, OUTSIDE COUNSEL, AND LEGAL COSTS* ch. 7 (1985).

25. See Boston Bar Ass'n Comm. on Professional Responsibility, Op. 79-3, *reprinted in* BOSTON B.J., May 1980, at 24 (outside counsel receiving permission to draft opinion based on hypothetical information, if clearly labelled as such).

26. Meatty, *Taking the Lead in Litigation: New Paths to Inside/Outside Counsel Cooperation*, 5 ACCA DOCKET 26 (1987); see also A. CHAYES, *supra* note 24, at § 7.04; Chayes, Greenwald & Winig, *Managing Your Lawyers*, HARV. BUS. REV. Jan.-Feb. 1983, at 84, 91.

27. "The client has ultimate authority to determine the purposes to be served by legal representation . . . . A clear distinction between objectives and means sometimes cannot be drawn . . . ." RPC, *supra* note 21, at Rule 1.2 comment 1. "A lawyer shall abide by a client's decisions concerning the objectives of representation . . . ." *Id.* at Rule 1.2(a). "In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected." *Id.* at Rule 1.2 comment 1. The responsibility for determining means falls to the lawyer because of the esoteric nature of legal knowledge: Clients do not have the necessary information to determine "technical and legal tactical issues" because "a lawyer ordinarily cannot be expected to describe trial or negotiation strategy in detail." *Id.* at Rule 1.4 comment 2.

The emergence of corporate legal departments may have changed expectations for what communications clients can demand. With knowledgeable inside counsel, outside counsel may have no continuing justification for assuming responsibility for technical and tactical decisions, but rather should "consult with the client as to the means . . . to be pursued." *Id.* at Rule 1.2(a). *But see infra* Section III(b).



do not openly challenge, and indeed vie for, relationships in which inside counsel have become "the client."<sup>28</sup>

Within the profession too, inside counsel appear to have an increasingly powerful and respected voice. No longer second-class citizens, inside counsel now are elected to and serve on important bar committees.<sup>29</sup> Corporate legal departments compete with elite law firms not only for experienced lawyers but also for recruits from elite law schools.<sup>30</sup> And, the professional voice that once disparaged inside counsel for their lack of independence appears to have been silenced.<sup>31</sup> During a period in which the profession is concerned about increasing commercialism's fueling of lawyer temptation to deviate from ethical standards, the profession does not raise a voice against the prestige and power being accorded to its members who choose to practice as corporate employees.<sup>32</sup>

28. J. HEINZ & E. LAUMANN, *supra* note 16, at 367-68 n.90; Chayes & Chayes, *supra* note 1, at 290.

29. Hershman, *What Inside Counsel Look for in a Private Firm*, in CORPORATE CLIENTS AND THEIR LAWYERS: A COLLOQUY 57, 58 (1986) (Remarks of Mendes Hershman, elite firm partner, formerly a general counsel); Strasser, *Corporate Counsel Flex New Muscles*, NAT'L L.J., Nov. 25, 1985, at 3, col. 2 (inside counsel now are represented on the Advisory Committee on Private International Law to the Department of State); see also ARTHUR YOUNG SURVEY, *supra* note 7, at 6 (At "innovative" law departments, "[t]he department encourages on-going professional and educational activities.").

30. J. AYRE, *supra* note 9, at 42 ("In a 1981 Boise Cascade survey, fifteen top law schools indicated that corporate recruiting at these schools increased at an average annual rate of 4.5 percent for the period 1977-81."). At innovative law departments, "[s]enior associates and partners are recruited from leading law firms for senior corporate positions [and an] attempt is made to hire junior attorneys from leading law schools." ARTHUR YOUNG SURVEY, *supra* note 7, at 6.

31. See, e.g., Chayes & Chayes, *supra* note 1 (praising inside counsel). In response to the formation of an organization to advance inside counsel's interests, speaking for the ABA's Corporation, Banking, and Business Law Section, its chairman defensively said, "We should examine ourselves, and we are." Middleton, *Corporate Counsel Form Own Association*, 68 A.B.A. J. 408, 408 (1982).

But see Auerbach, *Can Inside Counsel Wear Two Hats?*, HARV. BUS. REV. Sept.-Oct. 1984, at 80. Auerbach's criticism of inside counsel, however, ought to be distinguished from earlier castigations of inside counsel's lack of independence. Auerbach's claim is a more limited one. He argues that a lawyer who has been involved in the strategic planning of a project may not be as objective as one newly coming to the project. The problem is that involvement in a project's planning "involves putting on a management hat that may be difficult to remove in the legal review stage." *Id.* at 81. This argument does not depend on nor derive from the employee status of inside counsel. Free professionals encounter the same difficulty when they act as directors: "[I]f he makes a decision as a director to support a proposition, it might be personally difficult to advise convincingly the other board members to review earnestly the legal factors militating against it." Note, *Corporate Counsel on the Board of Directors: An Overview*, 10 CUM. L. REV. 791, 797 (1980) (citing Mundheim, *Should Code of Professional Responsibility Forbid Lawyers to Serve on Boards of Corporations for Which They Act as Counsel*, 33 BUS. LAW. 1507, 1509 (1978) (discussing responsibilities of outside counsel)); see also Rostow, *The Lawyer and His Client*, 48 A.B.A. J. 146, 147 (1962), quoted in Note, *supra*, at 830 n.161 ("[P]rofessional counsel should never represent a judgment upon the wisdom of counsel's own acts as part of management.").

32. Currently the ABA is attempting to gain support, both professional and public, for

Popular and scholarly reports offer explanations and justifications for inside counsel's new professional power and prestige. According to one view, inside counsel merit their new status because of the quality of their professional judgment: Inside counsel possess knowledge of their clients that other lawyers—those who practice as free professionals—do not, and they use this knowledge to deliver high quality professional judgments on their clients' behalf. Inside counsel can use the information, organizational power, and trust they obtain from being part of the client organization to participate in corporate planning, anticipating legal problems and maintaining legal compliance. Inside counsel can use their client knowledge and corporate power to provide cost-effective legal services themselves and to monitor the work elite firms bill to the client. When inside counsel practice preventive law and manage outside counsel, according to this view, they merit professional esteem because they advance client goals, bring the law's norms to bear on corporate action and insure against opportunistic behavior by outside counsel.<sup>33</sup>

According to this justification, inside counsel have gained professional power and status not because they have gained corporate power and status, but because they use it wisely, in a professional manner. Elite firm practitioners do not curry their favor and join them on bar committees because they are successful men and women. Inside counsel's enhanced professional status derives from the quality of their professional work and their having become the carriers of professional power into the executive suites. According to this justification, then, the rising professional standing of inside counsel stems from their using professional judgment to influence clients.<sup>34</sup>

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various attempts to reduce lawyer temptations to unethical action. See ABA COMMISSION ON PROFESSIONALISM, " . . . IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986). The Commission concludes that "lawyers must avoid identifying too closely with their clients." *Id.* at 28. At least on this point, the development of corporate legal departments suggests that the bar is unable to win elite corporate support for its efforts. Not much hope for the success of the ABA efforts can be gleaned from large corporations switching work and responsibilities from organizationally independent lawyers. Rather than relying on professional controls, these clients apparently prefer to impose their own controls to constrain lawyer behavior.

33. Cf. Chayes & Chayes, *supra* note 1. The Chayes' introduce this justification as a newly emerging, evolving idea, carried by a new breed of inside counsel. *Id.* at 280. But since at least the early 1950's, inside counsel have been decrying the undervaluing of their services and emphasizing the positive contributions their knowledge of corporate facts and people can make to preventive law practice and to the work of outside counsel. See, e.g., A. BLAUSTEIN & C. PORTER, *supra* note 7, at 48-49; Maddock, *The Corporation Law Department*, 30 HARV. BUS. REV. 119 (1952). This, then, is not so much a newly minted justification as it is a newly accepted argument. See *infra* notes 72-76 and accompanying text.

34. Cf. CANONS OF PROFESSIONAL ETHICS CANON 32 (1908) (A lawyer "advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law.").

In sum, this is depicted as inside counsel's age of enlightenment.<sup>35</sup> Corporate legal departments are emerging from the tutelage of outside law firms. Their self-incurred reliance on elite law firm judgments is giving way. No longer lacking resolution and courage, inside counsel exercise their own powers with advice from, but not at the direction of, outside counsel. Inside counsel's once disparaged capacities for professional judgment have been freed from disabling restrictions and they now are accorded deserved dignity by both business and the bar.<sup>36</sup>

Inside counsel's age of enlightenment, like all enlightenments, is depicted as an inevitable progress. The movement of lawyers into the employ of corporate clients and client-imposed controls on outside counsel are taken as inevitable rationalizations of the market for corporate legal services. They are responses to corporations recognizing that legal services constitute a regular and sizeable part of their budget.<sup>37</sup> Given corporate interests in reducing costs and increasing the efficient receipt of legal information, corporate reliance on elite firm practitioners is a remnant of an age of self-incurred dependency.<sup>38</sup>

35. A grandiloquent image to characterize grandiloquent claims. Consider, for example, the following claims for inside counsel:

[The issue is] not just inside staff vs. outside counsel. Either one can work well. The issue is authority, responsibility and accountability. . . . Executives need answers. They need decisions. They need lawyers who are truly accountable for their influence on decisions. . . .

. . . .

In my experience, the biggest cause of tension between managers and lawyers is the lawyer who loves the authority but is totally unwilling to take the responsibility or any accountability.

Bays, *Management and the Law: Equal Partners in Business*, in *CORPORATE CLIENTS AND THEIR LAWYERS: A COLLOQUY 46* (1986) (Remarks of Karl D. Bays, Chairman of Baxter Travenol Laboratories, Inc.).

[T]he true role of the lawyer in commerce and industry [is] as an integral part of the management team, whether he is an in-house lawyer or in private practice and brought in on an ad hoc basis. . . .

. . . In the past, management has coddled lawyers by allowing them to stay at arms length from business decisions. . . . In the future, lawyers will have to develop the sophistication in business management which will allow them to be invited into the planning process.

. . . [I]n-house solicitors . . . should not merely . . . fulfill the corporate legal need, but also . . . exercise their skills in fulfilling the wider need for involvement in corporate planning, strategy, and the setting of objectives.

McKinney, *Corporate Clients Want Outside Lawyers To Be More Than Technicians*, in *CORPORATE CLIENTS AND THEIR LAWYERS: A COLLOQUY 12, 13* (1986) (Remarks of Luther C. McKinney, Senior Vice-President, Law and Corporate Affairs, Quaker Oats Company).

36. This paragraph tracks the definition of an age of enlightenment found in Kant, *What is Enlightenment?*, in *ON HISTORY 3* (1963).

37. J. HEINZ & E. LAUMANN, *supra* note 16, at 366; Robinson & Confer, *Soaring Fees Spur Dramatic In-House Growth*, *Nat'l L.J.*, Mar. 30, 1981, at 1, col. 3.

38. Slovak, *supra* note 11, at 482.

Today's motto is "Retain lawyers and not law firms."<sup>39</sup> This motto indicates that quality is carried by its bearer and that not all elite law firm lawyers possess necessary professional judgment. When lawyers of quality can be hired inside, it suggests that both inside and outside counsel can possess and maintain professional judgment and it raises the possibility that legal departments can control the quality of lawyers' judgment at least as well as do elite firms.<sup>40</sup> It still may be the case that particular outside counsel have necessary expertise or superior powers of judgment and that elite firms must be hired when independent market intermediaries are sought, but there are no general advantages that stem from independent professional organization.<sup>41</sup> And the advantages elite law firms garner by their professional status, for example their ability to recruit the very best and brightest, may be offset by the disadvantages to the client incurred because free professional organization both distances lawyers from their clients and inhibits fee negotiations. In sum, the emerging patterns appear to be an inevitable rationalization of corporate legal services away from bilateral monopolies toward a competitive market in which alternative suppliers are plentiful and may be hired either on a spot contract or an employment basis.<sup>42</sup>

In inside counsel's age of enlightenment, the ethical advantages that supposedly derived from outside counsel's organizational independence are

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39. M. STEVENS, *POWER OF ATTORNEY: THE RISE OF THE GIANT LAW FIRMS* 41 (1987) (outside counsel viewpoint); Hershman, *What Inside Counsel Look For in a Private Firm*, in *CORPORATE CLIENTS AND THEIR LAWYERS: A COLLOQUY* 64 (1986); Maher, *supra* note 5, at 46 (both inside and outside counsel viewpoints); *see also* Brill, *Toward a New Excellence*, *AM. LAW.*, Nov. 1983, (supplement) at 3 ("Most clients hire lawyers, not law firms.").

40. Wolfram explains inside counsel's increased status as resulting from the move inside of quality lawyers. The same individuals who would once have been prestigious outside counsel now are serving as inside counsel. C. WOLFRAM, *supra* note 5, at 736-37. For this explanation to be a justified account of inside counsel's increased status, professional quality must be carried by its bearer. It must not depend, for example, on the organization in which the lawyer practices. *But see* J. CARLIN, *LAWYERS' ETHICS* ch. 6 (1966); E. SMIGEL, *supra* note 2. Lawyers of the quality who are now moving inside, it must be assumed, do not require the discipline of the elite firm because their professional commitments are strong.

41. This does not mean that there are no reasons—economic, ideological and professional—to practice in an independent elite firm. Elite firms may offer greater rewards, status or opportunities for developing specific expertises. It does mean that it is claimed, without rebuttal, that there is no moral superiority to practicing as a free professional. *See sources cited supra* note 5.

42. *Cf.* Gilson & Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 *STAN. L. REV.* 313, 359-60 (1985) (in bilateral monopoly, law firms can gain the benefits deriving from client investment in start-up costs). *But see* *What Clients Want*, *supra* note 7, at 6 (In *American Lawyer* survey "109 out of 239 respondents . . . still turn to one firm as their primary outside counsel. Perhaps one reason for this loyalty is that these relationships have a lot of history behind them . . ."); *cf. infra* notes 119-20 and accompanying text.

dismissed as primitive dreams and fears.<sup>43</sup> The ethical superiority of organizationally independent practice is dismissed as a chimera: "[R]esearch indicates that through the process of advocating the interests of clients, large-firm attorneys come to strongly identify with them. It is highly unlikely, therefore, that lawyers in large law firms will act as an independent voice that checks the self-interest of clients."<sup>44</sup> Given elite firm compensation patterns, furthermore, it is argued that individual outside counsel are economically dependent on maintaining their clients' continuing good will.<sup>45</sup> Fears of inside counsel's constrained ethical autonomy, it also is claimed, are delusions. The high quality of lawyers now being hired inside, according to this view, guarantees high ethical standards.<sup>46</sup> Inside counsel who work within the large and complex organizations of our major corporations, some further argue, possess the necessary organizational independence to exercise autonomous professional judgment.<sup>47</sup>

In the next section I begin by criticizing the view that inside counsel's enlightenment is an inevitable development. I then describe two approaches that provide an alternative account of inside counsel's changed status. I suggest that both of these approaches reveal inadequacies in reports of inside counsel's enlightenment and provide directions for further research. Nonetheless, neither suggest what ought to be the profession's response to inside counsel's changing status. To that end, I suggest that the reports in this section ought to be understood as broadsides in a political movement. I suggest that holding inside counsel to the aspirations of this movement should be a first step in an appropriate professional response to claims of inside counsel's enlightenment.

### B. *An Inside Counsel Movement Account of Professional Judgment and Power*

The fact that current relations in corporate legal practice vary, and often do not support reports that we are witnessing inside counsel's age of

43. These dismissals feed on the consciousness of transformations in large firms and the commercialization of the market discussed elsewhere in this Symposium. See generally *The Growth of Large Law Firms and Its Effect on the Legal Profession and Legal Education*, 64 IND. L.J. 423 (1989).

44. R. NELSON, *supra* note 3, at 5. But see Brint, *The Political Attitudes of Professionals*, 11 ANN. REV. SOC. 384 (1985) (arguing that both similarities and differences between the biases of business and professional actors is locally and historically sensitive). Nelson's research on outside counsel attitudes and his claim that in an "increasingly competitive market, [outside counsel] are less likely than ever to play a mediating role with respect to client demands" leave him and outside counsel little basis for criticizing inside counsel who choose to practice in "the most constrained organizational environment[s]." R. NELSON, *supra* note 3, at 263.

45. R. NELSON, *supra* note 3, at 250-51 (billing partners); Mundheim, *supra* note 31, at 1509 (partners as directors).

46. See *supra* notes 6 & 40.

47. Chayes & Chayes, *supra* note 1, at 312 ("Many in-house lawyers live in a culture which favors professional independence far more than does the culture of many law firms."). Consequently, while it may have taken an Elihu Root to say "no" to robber barons, today an inside counsel is all that is normally needed to say "no" to the organization men and women who control the modern corporation.

enlightenment, only gives slight pause to those proclaiming this age. Because these relationships are inevitable, it is not too soon to "mourn the undermining of" the old order.<sup>48</sup> But, claims that certain structures of relationships are inevitable ought always to be treated skeptically. Many different structures can fulfill required functions.<sup>49</sup> And, if cross-national evidence is amassed, we would discover that variety, not uniformity, marks the structures by which legal services are supplied to major corporations.<sup>50</sup>

The claim of inevitability to inside counsel's enlightenment overlooks alternatives to present arrangements. It assumes uncritically that the market for corporate legal services cannot reorganize itself again. It is not at all clear either that the market is as it has been described or that it cannot be reshaped.<sup>51</sup> Outside counsel may respond to the competition of corporate legal departments by varying their services and fee structures.<sup>52</sup> New inter-organizational linkages may be devised to facilitate communication.<sup>53</sup> And

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48. *Id.* at 304; see also Slovak, *supra* note 11. Using broad social categories, "welfarism and corporativism," *id.* at 498, Slovak determines that inside counsel are fated to the practice as described in the account of the age of enlightenment: They will become, if they are not already, corporate "institutional personnel," *id.* at 490, even though his analysis is based on a survey which found that 43.4% of inside counsel respondents claimed to have a narrow role that did not include assuming business responsibility, *id.* at 483.

49. Cf. Kagan & Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399 (1985) (distinguishing the functions lawyers perform—summarized in the images of the "influential and independent counselor," "conduit," "insurer," and "manipulator"—from changing structural conditions—summarized in four hypotheses). Close contact with the client may be a prerequisite for fulfilling the function of the influential and independent counselor role, see *id.* at 427-28, but both organizationally dependent and independent structures of practice can support close contact. After all, it was not too long ago that it was assumed that outside counsel had high quality business judgment and the ear of management. *Id.* at 405-11.

50. See LAWYERS IN SOCIETY (R. Abel & P. Lewis eds. 1988).

51. In part II of this essay, I discuss the market as described by those claiming that this is inside counsel's age of enlightenment. To the extent this description is inaccurate, there may be reasons for resisting inside counsel's increased status and power other than those detailed herein. I have chosen to take the hardest case possible for finding grounds for resistance: inside counsel's own claims.

52. Cost controls have been adopted by some large firms. Lewin, *Fall in Income at Big Firms*, N.Y. Times, Nov. 15, 1983, at D2, col. 1. Some outside firms have found that routine cases are useful training tools for their junior attorneys and have been willing to engage in price competition with corporate legal departments to obtain this work. *The New Balance of Power: The Changing Relationship Between Inside and Outside Counsel*, AM. LAW. NOV. 1986, (Pull-out Management Report) at 5, 20 (comments of Irwin Gubman, Senior Vice-President and Associate General Counsel, Bank of America) [hereinafter *The New Balance of Power*]. To decrease the costs of acquiring knowledge of corporate activities, increased uses of paralegals and retainer agreements also are possible. See, e.g., Freer, *Taking Over the In-House Functions*, Nat'l L.J., Oct. 21, 1985, at 14, col. 1 (law firm using support staff to offer on a contract basis government relations work that is less costly than can be provided by legal departments).

53. See, e.g., Culter, *The Role of the Private Law Firm*, 33 BUS. LAW. 1549, 1550-51 (1978) (two-partner sign-off rule to gain advantages of independence, while allowing one partner to move closer to client); Ranh, *In-House, Outside Counsel: Can They Bridge the Gap?*, Nat'l L.J., Sept. 10, 1984, at 1, col. 3 (junior legal department lawyers "joining" elite firm training programs for associates).

shifting business fortunes or philosophies can compromise corporate commitments to a strong staff function for legal services.<sup>54</sup> Perhaps most fundamentally, the legal profession may reconstruct the market for its services; any claim that market demand inevitably shapes "the way in which law is practiced"<sup>55</sup> denies the profession's power to shape its own market. To the extent that the bar has power and wants to exercise it to control its market to further professional norms, it remains possible to suppose current market practices are not inevitable and ask whether they advance professional goals.

The inevitability of inside counsel's age of enlightenment is buttressed by the dismissal of a difference in the ethical behavior of inside and outside counsel. This dismissal amounts to the claim that the profession's ethical socialization processes (regardless of whether they are strong or weak) are not affected by whether a lawyer works in a professional or a commercial firm, and assumes that lawyers of quality are above ethical sully. Were this true, the bar's concern with the commercialization of elite firms would be difficult to sustain.<sup>56</sup>

The research denying the ethical worth of independent lawyering, indicating the similarity of outside counsel and client biases, assumes that the law is more than marginally different from the subjects it regulates. It also assumes that clients would give their trust to lawyers whose political views differ from their own.<sup>57</sup> Whatever the ethical influence of lawyers on their clients is likely to have been or to be, it will be at the margin. But, at the margin, the same research suggests that outside counsel have some autonomous influence that inside counsel may not: Outside counsel appear to be able to draw on the independence of their firms because only in the smallest percentage of cases do elite law firm attorneys resign because they were unable to convince the client to follow their directions.<sup>58</sup> Nor are outside

54. Ranh, *In-House Counsel Hit by Economy*, Nat'l L.J., Nov. 22, 1982, at 1, col. 4 (recession freezing all staff hires, including inside counsel's); cf. Byrne, Zellner & Ticer, *Caught in the Middle: Six Managers Speak Out on Corporate Life*, BUS. WEEK, Sept. 12, 1988, at 80 (cover title: *Middle Managers: Are They An Endangered Species?*) (firing middle managers as corporate philosophy changes).

55. Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151, 151 (1987).

56. See *supra* note 32.

57. Nelson summarizes his findings as showing that "[g]iven an unconstrained power to change the law, the majority would change the law to suit the interests of their clients. . . . The notion that lawyers struggle with clients over fundamental questions about the common good is simply wrong." R. NELSON, *supra* note 3, at 247, 258. But would this notion be accepted by lawyers, experts in the capacities of relevance to contain conflict, without necessarily inhibiting change?

58. *Id.* at 254 (2.17% of 16.22%). As Robert Nelson understands, it could be argued that [his data on low percentage of cases in which outside counsel refused an assignment or potential work for ethical reasons] is too crude a measure to be meaningful, for it does not include all instances in which lawyers infused value preferences into advice or made other more subtle efforts to change

counsel as dependent economically on specific clients as inside counsel. The argument that outside and inside counsel are equally dependent on corporate economic largesse forgets that, even if individual decisions are costly, firms can socialize and buffer their members' decisions,<sup>59</sup> and assumes that other firms will not reward ethical behavior.<sup>60</sup> And the dismissal of fears about the ethics of inside counsel because they work for major corporations assumes, I suspect, too much about either the ethics of big business or the power of the profession to discipline capital.

Having noted the new status of inside counsel, and having rejected the view that it constitutes an inevitable development, how, then, can we understand what appears to be happening in the legal profession? Two different groups of explanations suggest themselves as alternatives to that of an age of enlightenment. The first group looks at corporate influence over the legal profession. It sees inside counsel's changing status as a response to corporate requirements, and the profession's willingness to accommodate them. The second group looks at inter- and intra-professional conflicts. It sees inside counsel's changing status as a response to the varying power of different professional groups. Both highlight weaknesses in the account of an age of enlightenment. Yet neither is pointed to explaining what ought to be the Bar's normative response to inside counsel's changed status. After describing these accounts, I draw on them to suggest a basis for such a normative inquiry.

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their clients' positions.

*Id.* at 256.

In noting the low percentage of refusals for "ignored lawyer's advice," I am suggesting that Nelson's respondents communicated to him not their subservience to clients, but their strength to get clients to agree with their professional judgments. Nelson's data would have found low ethical influence for a lawyer who described his work as follows:

The people I deal with happily listen to what I say. I've never been confronted by a situation where I say, 'This is the law and if you do x, you will wreck havoc on your company,' and they don't listen. My job is to tell people what the law is and by the force of my personality convince them that is the way to go. It works.

*Cf.* Kagan & Rosen, *supra* note 49, at 405-11 (informal survey finds examples of autonomous influence by outside counsel).

59. Work from the 1960's on the large law firms emphasized that law firms helped maintain professional ethics. See J. CARLIN, *supra* note 40; E. SMIGEL, *supra* note 2. Competitive pressures may have accentuated divergent accounts of what constitutes professionalism, leading to divergent organizational structures at the large firms. R. NELSON, *supra* note 3. Nonetheless, the large firm "pledges its *entire* reputation behind the quality of the services rendered by each of its specialized departments." Gilson & Mnookin, *supra* note 42, at 365 (emphasis in original). Consequently, it has an incentive to socialize its members and support their professional decisions. By contrast, the corporate legal department need only maintain its reputation with one buyer.

60. The support outside counsel receive for upholding ethical standards might be indicated by proposals to upgrade the support inside counsel currently receive. See Slovak, *The Ethics of Corporate Lawyers: A Sociological Approach*, 1981 AM. B. FOUND. RES. J. 753, 773 (recommending offering employment services and revolving loan funds for inside counsel whistle-blower).



The first group of explanations appeals to corporate influence over the profession. Inside counsel's changing professional status, one version goes, results from corporate power to determine professional status. Either corporate clients are patrons with power over the profession, or the corporate sector of the profession has chosen to cater to the interests of large corporations.<sup>61</sup> A more focused explanation might accept that the Bar is not generally subject to corporate control, but nonetheless explain why it doesn't defend itself against increasing patterns of heteronomous organization.<sup>62</sup> This explanation would show corporate power's continuous influence over how corporate lawyers are organized. The emergence of elite law firms, according to this view, coincided with the need for a fantasy of lawyer's independence to legitimate emerging capitalistic institutions.<sup>63</sup> The emergence of corporate legal departments simply reflects decreasing corporate need for the legitimation afforded by independent lawyering.

These explanations sublimate the ethical significance of organizational independence to corporate power. They suggest that the free professional ideal is the stuff of after-dinner speeches, not social history: While organizational independence might reduce temptation, lawyers do not challenge client needs. While organizational independence might give elite firm practitioners the status of institutional actors in major corporations, this status is not necessarily generative of ethical action and depends on corporate requirements.

In emphasizing that organizational independence does not guarantee ethical behavior, these explanations support inside counsel's claim to a changed status. Inside counsel's claims cannot be dismissed simply because they do not practice under conditions of organizational independence. Organizational independence is an insufficient criteria for determining the allocation of professional honor. The ethical significance of organizational independence depends on other factors. Elite firm independence may have been ethically functional in a period in which the legal profession was striving to develop autonomy to influence robber baron clients; or, independence may have been only of hegemonic importance in extending the power of predatory capitalism. It may be that improvements in professional socialization, transformations in elite law firms, corporate commitments to responsible behavior, or the emerging organizational power of corporate legal departments, affects the ethical significance of practicing as a free professional. These

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61. J. HEINZ & E. LAUMANN, *supra* note 16, at 365, 367.

62. From the profession's perspective, lawyers who are corporate employees have a heteronomously organized practice because they are directly subject to the control of both professional and corporate rewards and sanctions.

63. Gordon, "The Ideal and the Actual in the Law": *Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51 (G. Gawalt ed. 1984).

additional factors support Elliot Freidson's argument about the general value of the free professional ideal:

When all is said and done, the very concept of self-employment is misleading in a market economy. In a market economy one's labor is a commodity whether one sells it to an employer or to a customer. . . . Surely the more critical matter is the relationship one has to the market . . . [w]hen one's goods or services are so valuable on the market as to make consumers supplicants, then one can exercise considerable control over the terms, conditions, content, and goals of one's work. But when one's goods or services are not in heavy demand, then one can only be a desperate supplicant of indifferent consumers or employers.<sup>64</sup>

History is a good antidote to assuming that just because inside counsel are not organizationally independent, their claims to increased professional standing ought to be challenged.<sup>65</sup> It was not too long ago that practice in elite firms was seen as not only insufficient, but also detrimental to ethical service. As a Wall Street lawyer told Erwin Smigel in the early 1960's, "I think it is definitely less professional to work for an [outside law firm] organization. . . . I think a professional man should have contact with a client, and should not be an intermediary." Another lawyer thought it was problematic that "[t]he client in most firms is considered the firm's client—not the practitioner's." A third lawyer told Smigel that the large firm lawyer's "dependence on other specialists limits independent decisions."<sup>66</sup> Although inside counsel might find comfort in these arguments, abstracting them from the other forces operating in concrete contexts leads to after-dinner speeches, not quality analysis. Concrete studies of contexts of practice that include more than just the one variable of organizational dependence are necessary. Understanding lawyers' ethical autonomy from clients requires detailed study both of what lawyers do and under what conditions they make these choices.<sup>67</sup>

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64. E. FREIDSON, *PROFESSIONAL POWERS: A STUDY OF THE INSTITUTIONALIZATION OF FORMAL KNOWLEDGE* 125, 124 (1986).

65. Cf. Schneyer, *supra* note 5, at 457 (the law of lawyering is influenced improperly by untested assumptions about how "different settings" determine lawyer ethics).

66. E. SMIGEL, *supra* note 2, at 297, 305-06. Smigel concluded that these problems were mitigated because at the Wall Street firms "the norms sponsor independence" and the lawyer who must conform to these organizational rules can "remain professionally 'free.'" *Id.* at 314. *But see* R. NELSON, *supra* note 3.

67. Hazard, *Reflections on Four Studies of the Legal Profession*, 13 *SOC. PROBS.* 46, 48, 52-53 (Special Issue 1965). For example, Karl Llewellyn berated corporate practice because it "develops within itself a business point of view." Laumann & Heinz, *Specialization and Prestige in the Legal Profession: The Structure of Deference*, 1977 *AM. B. FOUND. RES. J.* 155, 205 (quoting Karl Llewellyn). By this, Llewellyn was not just condemning the economic incentives of law firms. Llewellyn also considered what it is that lawyers do: A lawyer can craft "beautiful" inventions and can thereby become "a precious social engineer." K. LLEWELLYN, *THE BRAMBLE BUSH* 146, 147 (1930). Llewellyn is misquoted when his point is taken to favor a practice organized for less economic dependency. Llewellyn's point is that any

The explanations of corporate power over the profession also suggest directions for inquiry into inside counsel's claims. They remind us that having high corporate and professional status did not guarantee that elite firm practitioners responsibly influenced their corporate clients. The age of enlightenment justification for inside counsel's status emphasizes their status and power within the corporation to assure us that their self-mastery results in ethical service. The explanations of corporate power caution against accepting uncritically the claim that "the lawyer who has the ear of the corporate officer has a superior claim to [professional] power."<sup>68</sup>

But, these explanations also leave no room for a professional response. If corporate power determines professional standing, then for professional prestige to comport with ethical action, the profession must wait for changes in corporate needs. This is clearly overstated. If the profession can respond, however, it must address the question posed by the explanations of corporate power: Is it inside counsel's work, or their patron, that justifies their increased status? This question can only be answered by closely examining how lawyers respond to client demands in their work. Corporate power over the profession is not irrelevant to such an examination. Co-optation is an ever present possibility in what appears to be an independent response. But neither is corporate power conclusive. The profession's abilities to define proper service is a strength forgotten by claims that corporations determine professional status. In the presence of corporate power, the profession's capacities for linking professional prestige to honorable service are at issue. After presenting another group of explanations, I will return to developing an account of the service to which the profession commits itself in valuing inside counsel.

A second group of explanations also provides an alternative to the account of the inevitability of inside counsel's age of enlightenment. These explanations focus on the historical roots of this "new breed" of inside counsel. There always are many ways to explain history. One way might describe past interactions between managers, inside counsel, outside counsel and professional competitors, such as accountants and investment advisors.<sup>69</sup> Another might focus on changes in the composition of intra-professional power.<sup>70</sup> Changes within elite firms may explain the increased power and

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practice that obscures the law's "poetry" by "bread and butter" distorts a lawyer's exercise of craft. *Id.* at 119-29; cf. Hazard, Pearce & Stempel, *Why Lawyers Should be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1113 n.109 (1983) (Llewellyn is critical of equating ethics with altruism).

68. J. HEINZ & E. LAUMANN, *supra* note 16, at 367.

69. Cf. A. ABBOTT, *THE SYSTEM OF PROFESSIONS: AN ESSAY ON THE DIVISION OF EXPERT LABOR* (1988) (a sociological account of expert work and how professions compete and command work and status).

70. Cf. T. HALLIDAY, *BEYOND MONOPOLY: LAWYERS, STATE CRISES, AND PROFESSIONAL EMPOWERMENT* (1987).

status of inside counsel.<sup>71</sup> Or, an intra-professional mobilization of inside counsel may be relevant. One constant emerges from all of these possibilities: Corporate legal departments' gains may be explained as the historically contingent result of the movement of various forces within and outside the Bar.

Describing these movements might help the profession decide what strategies can be employed to resist inside counsel's gains. But, unless it is assumed that prior patterns are superior, these explanations do not indicate that resistance is required. From them, for example, we cannot tell whether the empowerment of inside counsel's voice reveals the inclusiveness of the profession or its inability to control disintegrative forces. For what these explanations emphasize is the misnomer in speaking of a very differentiated constellation of individuals, groups and forces as "the profession." To decide whether inside counsel deserve increased professional standing requires choosing a standpoint on inter- and intra-professional conflict. The age of enlightenment by claiming its own inevitability seeks to obscure the need for the profession to decide its own character. What is needed are grounds against which to assess the claims of inside counsel's enlightenment, while recognizing that these grounds are contested terrain.

The starting point I choose is one that views the inside counsel movement as a political movement within the legal profession. In presenting reports of inside counsel's age of enlightenment, I relegated to the footnotes whatever evidence I have that the reports of inside counsel's increased prestige and power are inaccurate,<sup>72</sup> for I take these reports to be political broadsides of an "Inside Counsel Movement" to influence what power and prestige inside counsel win in their many struggles with outside counsel and the large corporations.<sup>73</sup> If the Inside Counsel Movement has a central structure, it is the American Corporate Counsel Association.<sup>74</sup> I do not take "the development" of this organization to

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71. The rise of the new breed of inside counsel, for example, may have coincided with shifts in power within elite law firms away from the business departments toward litigation. Litigation attorneys seeking to gain and maintain power within their firms might have supported both inside counsel emerging as purchasing agents and the movement inside of the powerful business lawyer. More generally, in an age of elite firm commercialism, it may have been difficult to maintain the ethical superiority of free professional practice. For example, the attack on outside counsel fees and the emphasis that corporate legal budgets were swelling might have induced outside counsel not to place their ethics in question against inside counsel's.

72. See *supra* notes 5, 6-7 & 31.

73. In a rare recognition of inside counsel's mobilization, Fred Strasser notes that the allure of the inside counsel role has grown by "a shift in perception promoted by an increasingly organized in-house bar." Legal departments become more attractive to "talented and experienced attorneys" because of "[t]he much-heralded move . . . to increase use of in-house counsel to cut legal bills" and by the selling of inside counsel work as "a richer diet of legal fare." Strasser, *The In-House Lure Gets Stronger*, Nat'l L.J., July 22, 1985, at 1, col. 4.

74. The American Corporate Counsel Association (ACCA) was officially formed in March,

be an "indication of the growing prestige of corporate counsel."<sup>75</sup> Rather, I take its development to be an indicator of professional mobilization: The American Corporate Counsel Association is part of a political movement to consolidate and extend inside counsel interests within both business and the profession.<sup>76</sup>

In short, I suggest that the changing role of inside counsel might be viewed as the subject and outcome of intra-professional political activity, rather than as the inevitable development of social and economic forces.<sup>77</sup> I suggest a political analysis of changes in the inside counsel role for two different reasons. First, it allows for the avoidance of unwarranted empirical claims. A political analysis underscores that participant observations may be self-interested. It does not take a lawyer to know that self-reports may contain and project an agenda.<sup>78</sup> Second, a political analysis emphasizes that the Inside Counsel Movement articulates "sentiments,"<sup>79</sup> by which its political successes might be gauged.

The Inside Counsel Movement articulates claims for why inside counsel deserve professional respect and power. What are these sentiments? What would the profession be committing itself to by accepting them? Certainly, detailed study of work in varying contexts of practice is needed. But we also need to determine what indicators ought to be incorporated in such studies. If we need to take a position on what ought to be professional values in a divided profession, assessing the Inside Counsel Movement by its own claims is a valid starting point.

1982. Middleton, *supra* note 31, at 408. Its membership is limited to inside counsel: "Individuals who are engaged in the active practice of law on behalf of organizations in the private sector and who do not hold themselves out to the public for the practice of law shall be eligible for membership." ACCA, BYLAWS, Article II (Membership) (as amended January, 1983). Currently the ACCA claims that it is a 7,400 member organization and is still growing. Cox, *ACCA Seeks 'New Wave' of Members*, Nat'l L.J., Nov. 28, 1988, at 3, col. 1. The ACCA's goals include "[r]epresentation of the corporate counsel perspective." ACCA, CHAPTER MANUAL 2 (1986-87). The Inside Counsel Movement has been very lucky in acquiring that necessary mobilization weapon, the press. The *ACCA Docket* is published by the organization. Regular columns on inside counsel appear throughout the legal press and BNA inaugurated its *Corporate Counsel Weekly* on January 8, 1986.

75. Chayes & Chayes, *supra* note 1, at 277 n.1.

76. Cf. Middleton, *supra* note 31, at 408 ("We have needs that are not serviced," explained the ACCA's first board chairman, Robert Banks, General Counsel to the Xerox Corporation).

77. *But see* A. TOURAINE, THE VOICE AND THE EYE: AN ANALYSIS OF SOCIAL MOVEMENTS 77 (1981) (A political movement that controls "historicity" thereby becomes inevitable). *See also id.* at 94-96 (distinguishing cultural from social movements).

78. *See, e.g.*, Lerner, *Interviewing Frenchmen*, 62 AM. J. SOC. 187 (1956).

79. "What constitutes the special character of the study of social movements is therefore its relation to the analysis of change and social conflict. . . . Social movements . . . possess both *structure*—some organization of people—and *sentiments*—beliefs about what ought to be and what will come to pass." Gusfield, *Introduction: A Definition of the Subject*, in PROTEST, REFORM, AND REVOLT: A READER ON SOCIAL MOVEMENTS 1, 8 (J. Gusfield ed. 1970) (emphasis in original); *see also* Killian, *Social Movements*, in HANDBOOK OF MODERN SOCIOLOGY 426, 430 (R. Faris ed. 1964) (social movements as collective behavior to promote or resist change).

Like the accounts of the normative desirability of organizational independence, the accounts offered by the Inside Counsel Movement bear greater resemblance to after-dinner speeches, than social history. Both offer synthetic, functional accounts of the relation between social organization and moral action that discounts the other forces that determine action. As a sociological account of professional action, descriptions of the determination of ethical action by certain forms of organizing practice are "naive."<sup>80</sup> Like the alternative dispute resolution movement, with its over-statement of the strengths of deformalization,<sup>81</sup> the Inside Counsel Movement undoubtedly is incorrect to assume that the advantages of substituting inside for outside counsel do not vary by context, matter or personnel involved. However, it would be too easy to dismiss the Inside Counsel Movement by pointing to exceptions to its claims. What we need first is to see what values it suggests ought to be realized before we conclude that none are realized or that their cost outweighs their benefit.

The Inside Counsel Movement can exert professional power, even if its claims as sociological explanations are inadequate. After-dinner speeches are not without their influence. Even after discounting their self-congratulatory and self-serving aspects, they constitute rhetoric that can influence professional responses to current constraints. Only if the profession had no power to define its own direction and mission would these accounts be purely reifying abstractions. And, the legal profession, like others, can define what constitutes "honorable" service.<sup>82</sup> The Inside Counsel Movement's claims are part of that defining process.

The remarkable fact about the Inside Counsel Movement's sentiments — its justifications for inside counsel's increased status and power — is that they value inside counsel performing the legal work that elite lawyers once claimed and for whose proper performance the free professional form of organization was claimed to be necessary.<sup>83</sup> Certainly, there are economic advantages that can be captured by lawyers practicing in in-

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80. A. ABBOTT, *supra* note 69, at 316.

81. Simon, *Legal Informality and Redistributive Politics*, 19 CLEARINGHOUSE REV. 384 (1985).

82. A. CARR-SAUNDERS & P. WILSON, *THE PROFESSIONS* 403-04 (1982); R. PAVALKO, *SOCIOLOGY OF OCCUPATIONS AND PROFESSIONS* 101 (1971); Bucher & Stelling, *Characteristics of Professional Organizations*, 10 J. HEALTH & SOC. BEHAV. 3, 5 (1969) reprinted in *COLLEAGUES IN ORGANIZATION: THE SOCIAL CONSTRUCTION OF PROFESSIONAL WORK* 121, 125 (R. Blankenship ed. 1977).

83. Compare, e.g., Subak, *Special Problems of Inside Counsel*, 33 BUS. LAW. 1433, 1434 (1978) (The inside counsel "can be and is a powerful force for ethical corporate conduct . . . because the law so often embodies our society's ethical judgments. By training, interest, and background, a lawyer is more often than not a thinking animal, pretty well attuned to what is right and what is wrong.") with Lorne, *The Corporate and Securities Adviser, The Public Interest, and Professional Ethics*, 76 MICH. L. REV. 423, 426 (1978) (elite partners are or have played a "role as confidant of management, exercising independent judgment and moral suasion to affect client behavior . . .").

dependent firms.<sup>84</sup> And elite firm practitioners' provision of independent information may advance legal interests.<sup>85</sup> But the ethical worth of organizational independence was traditionally justified by its effects on lawyers' abilities to influence clients as their "influential and independent counselors" for those questions where trade-offs were possible between client goals and legal compliance.<sup>86</sup> Independence was thought to be necessary to protect the professional judgment of such counselors, who also are "institutional personnel" who "enjoy access to organizational decision-making processes capable of committing substantial quantities of resources to particular courses of action."<sup>87</sup> And now, inside counsel claim to be better able to assume the role of influential and independent counselor.<sup>88</sup>

Viewed from one perspective, then, the claims of the Inside Counsel Movement are to be assessed by determining whether the movement inside of the work that was felt to require organizational independence—work which ethically challenged outside counsel and whose proper performance merited praise—increases or decreases the profession's capacity for ethical action. The Inside Counsel Movement can be supported if inside counsel exercise independent professional judgment in their capacity as influential counselors to their corporations and expand opportunities for lawyers to so act. From one perspective, the question for the Inside Counsel Movement is "Does the new breed of inside counsel enhance the profession's capacities for responsibly influencing corporate action?"

This perspective, however, is obscured by the Inside Counsel Movement. In the enlightenment account of inside counsel's changed role, politics is absent, functional homeostasis is restored, and qualitative change comes to an end. In their self-mastery, inside counsel neutrally advance both corporate and professional values. Client goals are fixed and known to

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84. Practicing in an independent law firm may create market opportunities: Having a range of clients may make outside counsel valuable monitors of legal developments. Possessing organizational independence may allow lawyers to capture work that depends on the existence of market intermediaries; they can provide opinions insured by their independent reputations.

85. These legal interests may be in conformance with ethical duties if the legal system is ethically justifiable.

86. This point is developed in Kagan & Rosen, *supra* note 49; see also J. HURST, *THE GROWTH OF AMERICAN LAW* 310-11 (1950) ("In such men as Elihu Root or Louis D. Brandeis the bar of the United States developed a type of leader peculiarly its own. Such men mingled the roles of barrister, solicitor, business advisor, and statesman."); E. SMIGEL, *supra* note 2, at 159-60; Redlich, *Should A Lawyer Cross the Murky Divide?*, 31 *BUS. LAW.* 478 (1975); Saunders, *Law and Business: Cornerstones of Our Economy*, 48 *A.B.A. J.* 152, 155 (1962) (discussing lawyer's expanding responsibilities in business). *But see* W. HARBAUGH, *LAWYERS' LAWYER: THE LIFE OF JOHN W. DAVIS* 197-203, 263-64 (1973) (Davis avoided affecting client goals, even when serving on their boards); Rostow, *supra* note 31, at 148 (a lawyer ought to "maintain the boundaries of his position").

87. Slovak, *supra* note 11, at 471.

88. *See id.*

inside counsel who then manage outside counsel to comport with these goals. The entire process by which goals emerge through the provision of legal services, and the consequent professional judgment necessarily required, is slighted in the emphasis on outside counsel's supposed potential for opportunistic behavior. Similarly the need for judgment in securing corporate compliance is diminished by equating the presence of preventive law programs with compliance. When it is remembered that compliance is not all or nothing, the precariousness of inside counsel supplying such programs reappears, instead of disappearing behind the term "preventive law," with its laden notions that such practice secures compliance. In sum, enlightened corporate counsel may not be able to remain constant to professional goals while performing the services assigned them by their clients. Inside counsel's age of enlightenment not only denies that organizational independence is necessary for professional action, it also assumes that the service of honorable professionals as influential corporate actors is apolitical, requiring only knowledge of the law, resolution, and courage.

On the other hand, inside counsel's expanded role reminds us that legal service can be political. It can involve getting clients to make decisions, influencing the goals they select and engaging them about the level at which they will comply with the law. Inside counsel's claims to increased professional standing highlight the political content of professional judgment. Our inherited professional vision accords respect to the lawyers whose influential judgments are responsible ones. To the extent that outside counsel have given up this work to inside counsel, they appear to have forsaken much of the ethical inheritance of our profession. It may be that a lawyer can claim to be "just a law lawyer."<sup>89</sup> But the Inside Counsel Movement suggests that such a lawyer does not satisfy corporate demands for legal service. "Just law lawyers" deliver services that require the development of corporate legal departments to supply essential legal services that they do not furnish.

Evaluating the claim of the Inside Counsel Movement requires addressing what constitutes honorable professional service. Do corporate clients need lawyers who are not "just law lawyers"? Ought the profession accord lawyers who so practice respect? What corporate power may be accorded to those with professional judgment?

In the second section of this essay, I address these questions by analyzing the work inside counsel perform as it is depicted in the reports of inside counsel's age of enlightenment. Reports of inside counsel's age of enlightenment stress the emergence of inside counsel's self-mastery. But inside counsel exercise their power in response to corporate demands. In the next section, I examine the account of the market for corporate

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89. W. HARBAUGH, *supra* note 86, at 263 (statement concerning J.W. Davis).



legal services that supposedly inevitably leads to the emergence of enlightened inside counsel.<sup>90</sup> To the extent this account is accepted, it tells us something not only about what inside counsel do but also about what corporate clients need from their lawyers. It describes reasons corporate clients demand and purchase professional judgment.<sup>91</sup>

The second section, then, is an analysis of corporate demand for legal services. But, professionals to some extent can define what they supply independent of client demand.<sup>92</sup> In the concluding section of this essay, I return to the questions of whether the profession ought to accept the work corporate clients demand and the power they repose on their lawyers.

What is an enlightenment? Inside counsel's enlightenment includes both their empowerment and the inclusion of newly powerful voices within the profession. Both of these may be desirable. But inside counsel's enlightenment results not only in powers being exercised in public arenas of discourse, like courts, but also in the private halls of capital, where not only the claims of reason speak.<sup>93</sup> Consequently, inside counsel's professional judgment might only emerge from its tutelage "to make knowledge serve the dominant means of production."<sup>94</sup> Before according professional standing to self-directed inside counsel, we need to determine whether they have extended too far professional claims and whether their "awakening of the self is paid for by the acknowledgment of power as the principle of all relations."<sup>95</sup>

The desirability of the patterns of legal practice that are now proclaimed must be determined by examining their justification: Inside counsel's power as outside counsel's "client" and their corporate responsibilities enables a superior realization of professional values. This requires understanding the work inside counsel perform. It also requires assessing the relations that are emerging between inside and outside counsel to discover how professional values are sustained between them and in their relation with the client. These are the subjects of the rest of this essay.

90. To emphasize again, the market arrangements favored by the Inside Counsel Movement are not inevitable. In "managed markets," the efficiencies of internal organization are available through purchases across an organization boundary. Butler & Carney, *Managing Markets: Implications for the Make-Buy Decision*, 20 J. MGMT. STUD. 213 (1983). Under changed conditions, internal organization may be replaced by purchases across a market. Wright, *The Make-Buy Decision and Managing Markets: The Case of Management Buy-Outs*, 23 J. MGMT. STUD. 443 (1986).

91. Cf. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 241 (1984) (arguing that surprisingly we lack an account of such reasons and providing one for limited aspects of corporate work).

92. See *supra* note 82 and accompanying text.

93. Cf. I. KANT, *supra* note 36, at 5-6 (arguing that in private realms, enlightenment may not serve ethics as well as obedience).

94. Horkheimer, *Vernunft und Selbsterhaltung*, quoted in M. JAY, *THE DIALECTICAL IMAGINATION* 258 (1973).

95. M. HORKHEIMER & T. ADORNO, *DIALECTIC OF ENLIGHTENMENT* 9 (1972).

## II. CONSUMER IMPOSED CONTROLS AND CORPORATE POWER IN LEGAL SERVICE

The subject of this section is the work of inside counsel. Its purpose is to explore how their work involves them in corporate politics. Certainly inside counsel at different corporations have been given or have won differing powers. At some, perhaps all inside counsel do is provide the corporation with information about the corporation's legal obligations and the illegalities posed by corporate plans. Yet, I hope to demonstrate that inside counsel's claims that they can responsibly exercise professional judgment in the tasks delegated to them—especially in their management of outside counsel and in practicing preventive law—makes a claim to broader corporate powers: Their work requires that they influence corporate goals and commitments. That is, the justification of inside counsel's increased status in the profession rests on their becoming significant political players in the corporations they serve.

To demonstrate inside counsel's corporate powers, I analyze their work from the perspective of the corporation they serve. This perspective stresses corporate economic interests, not public interests. I assume that inside counsel's corporate powers derive from corporate needs. I make this assumption to sketch the narrowest possible justification for a finding that professional legal service requires corporate power. I do this in order to highlight that it is clients, not lawyers, who appear to demand that inside counsel assume responsibility for corporate goal choice.

A corporation may purchase input factors from others or may vertically integrate to produce them itself. For much of this century, the largest American corporations<sup>96</sup> routinely chose the former course to meet significant needs for legal service. Today, corporations are vertically integrating legal services rather than purchasing all their requirements across a market. How can we account for this change in the behavior of sophisticated purchasers of legal services?

Corporations do not uniformly or consistently decide whether their legal work should be performed inside, by their corporate legal department, or outside, by an elite law firm. Nor are there any extensive empirical studies of these decisions. Yet, as described above, general patterns have been claimed to be emerging.<sup>97</sup> These patterns are the subject of this section.

The emergence of alternate sources of supply may affect consumer behavior. To some extent, elite firms once were retained because they

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96. See *supra* note 7.

97. The same patterns discussed here are discussed, for example, in Chayes & Chayes, *supra* note 1.

were the only source for quality legal services. Corporations didn't vertically integrate for legal services because they couldn't purchase the necessary factors. The labor market for corporate lawyers was segregated: Lawyers who had the ability to practice in elite law firms wouldn't consider employment as inside counsel.<sup>98</sup> But corporate legal departments now are able to recruit lawyers who would have secure futures in elite law firms.<sup>99</sup>

Undoubtedly, differences remain in the quality of individual inside and outside counsel. These differences explain some corporate purchase decisions. But since lawyers of quality now practice both inside and outside the large corporations, the emerging aggregate patterns in the allocation of work between legal departments and elite firms cannot be explained simply by where a quality lawyer can be found.<sup>100</sup>

Nor are the emerging patterns in the allocation of work explained by the emergence of two tracks in which lawyers with some types of professional expertise move inside and others remain outside.<sup>101</sup> The emerging patterns do not follow traditional conceptions of legal task, forum or subject matter. Inside counsel write briefs, appear before administrative bodies, and handle highly specialized tax matters. Outside attorneys counsel clients, plan audit programs and give business planning advice. Work undoubtedly is allocated to a lawyer of quality, but technical expertise is normally not determined by where the lawyer currently practices.

The work of inside counsel at the largest corporations has three clearly discernable elements. First, inside counsel substitute for outside counsel. They perform the legal work—be it securities, regulatory, mergers and acquisitions or litigation—that might be performed by outside counsel. Second, they manage outside counsel. They are corporate “purchasing agents” for outside legal services, deciding whether and which outside counsel should be retained. They organize, monitor and audit the work performed by outside counsel. Third, they engage in “preventive law.” They organize, monitor and audit corporate operations.

To explain the work inside counsel perform, in this section I analyze the emerging allocation of work between inside and outside counsel as a “make” or “buy” decision. I assume these choices represent the decisions of an emerging “governance structure” which the corporation imposes

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98. The segregation was due to both material and ideal factors. Outside firms offered both the possibility of greater financial rewards and the status of being at the apex of the profession.

99. Gilson & Mnookin, *supra* note 42, at 382.

100. Speaking of “the allocation of work” should not obscure the fact that responsibilities over a particular case, matter, or transaction also are being divided.

101. The one exception is that work, such as the furnishing of opinion letters, in which the lawyer functions as a market intermediary and therefore requires an independent reputation, is tracked to outside firms.

in response to the contracting problems it encounters in obtaining services from lawyers.<sup>102</sup> I make this assumption in order that my explanation of inside counsel's work derives from corporate needs. I proceed by assuming that in allocating work between inside and outside counsel corporations make choices that depend on the comparative functionality to them of purchasing legal services from a vertically integrated unit and from an external organization.<sup>103</sup>

Such an analysis of the allocation of work between inside and outside counsel suggests that large corporate consumers have found it necessary to impose controls on those most professionally competent attorneys, the elite firm lawyers. Why are these controls in place? If outside counsel provide professional service, what functions can they serve?<sup>104</sup>

That the leading corporations have established governance structures for their corporate legal services, incurring the costs of developing corporate legal departments, suggests that outside counsel, absent consumer controls, do not efficiently supply what their corporate clients require. Assuming professionally-directed lawyers at the elite firms, the emergence of client-imposed governance structures places in question the adequacy of professional standards for client service, at least as applied to large corporate clients. Detailing the governance structures clients impose is the subject of this section. In the concluding section of this paper, I turn to the standards the profession imposes for organizational representation.

Corporate allocation of work between inside and outside counsel, I will suggest, is determined according to a governance structure that responds to the presence of three contractual problems. First, under current market conditions, corporations have found it necessary to control the fees incurred for legal services. Inside counsel substitute for outside counsel because elite firms are not able or willing to renegotiate their fee structures. Second, corporations have found it necessary to control outside counsel's work to insure that it furthers corporate goals. Inside counsel have become purchasing agents because elite law practitioners do not

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102. I am assuming that "governance structures line up with the needs of transactions in a discriminating way." O. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* 117 (1985). "The efficiency hypothesis . . . is that vertical integration will occur selectively rather than comprehensively, that mistaken vertical integration can rarely be sustained, and that more efficient modes will eventually supplant less efficient modes—though entrenched power interests can sometimes delay the displacement." *Id.* at 236.

I do not claim that the current governance structure is inevitable. Outside and inside counsel can alter the conditions under which they contract with their clients. *See supra* notes 51-55 and accompanying text & note 90.

103. I do not claim that what corporations find efficient is socially or professionally desirable or efficient. An efficiency assumption highlights inefficiencies. Whether we ought to eliminate these inefficiencies is a separate question. Oberschall & Leifer, *Efficiency and Social Institutions: Uses and Misuses of Economic Reasoning in Sociology*, 12 *ANN. REV. SOC.* 233, 250 (1986).

104. *Cf.* Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 *WIS. L. REV.* 639.

adequately and efficiently determine the client's objectives for the representation. Third, corporations have found it necessary to control outside counsel because their work assumes levels of legal compliance at variance with the commitments of client organizations. Inside counsel practice preventive law because elite firm practitioners do not adequately or efficiently alter the services they provide to comport with corporate interests in legal compliance. In short, contractual problems emerge not only with respect to fees, but also with respect to client goals and commitments.

In the traditional view of legal services, the lawyer-client transaction would be planned, adapted and monitored by lawyers.<sup>105</sup> The client was served by the lawyer being in charge.<sup>106</sup> The lawyer would take the client's problem and plan a response. As events unfolded, the lawyer would monitor developments and adapt their actions in response. Implementation of client interests, goals and commitments were guaranteed by professional ethics. Points of friction that developed during the transaction would be either eliminated by lawyers or maintained to safeguard public interests.

The professional ideal suggests that transactional problems are resolved not contractually by governance structures, but by professional standards. These standards are the pre-contractual elements of contracts between lawyers and their clients. Professionalism defines proper performance and substitutes stewardship for opportunism.<sup>107</sup> Instead of the "aggressive pursuit of individual interests," where a trader cannot "be presumed to act in the interests of the firm" and is "associated with the 'other side' and where his motives are regarded suspiciously,"<sup>108</sup> the professional presumably pursues the client's interest,<sup>109</sup> serves the enterprise as an entity,<sup>110</sup> does not distort or fail to disclose relevant information<sup>111</sup> and does not make false or empty threats or promises.<sup>112</sup> Moreover, potential conflicts between lawyer and client presumably are quickly and effectively

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105. See Baston, *Control and the Lawyer-Client Relationship*, 6 J. LEGAL PROF. 7, 16-19 (1981) (discussing traditional lawyer control model).

106. D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974) (arguing that the traditional conception of lawyer control does not serve personal injury client interests).

107. For efficient transactions, "any organizational form must reduce either the ambiguity of performance evaluation or the goal incongruence between parties." Ouchi, *Markets, Bureaucracies, and Clans*, 25 ADMIN. SCI. Q. 129, 135 (1980). Professionalism reduces the ambiguity by determining proper performance and aligning professional and client interests. M. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* 198 (1977) (professionalism increases efficiency of bureaucratic organization); see also RPC, *supra* note 21 at Rule 1.2(a) (lawyers are ethically required to implement legitimate client goals concerning the representation).

108. O. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 29-30 (1975).

109. RPC, *supra* note 21, at Rule 1.2(a); cf. *id.* at Rule 1.14.

110. *Id.* at Rule 1.13.

111. *Id.* at Rule 1.4.

112. *Id.* at Rule 1.2(e) comment 6, 7.

settled, on terms set not by the power balances of peculiar situations, but by professional norms of client service.<sup>113</sup>

The substitution of client-imposed for professionally-inculcated governance structures, consequently, can be read in two quite distinct ways. The emergent governance structures might reveal that clients of lawyers, like clients of other possessors of skill, are subject to the hazards of lawyer opportunism. They also might reveal decreasing safeguards against the hazards of client opportunism.<sup>114</sup>

For the purposes of this analysis, I assume that the governance structures have emerged to improve the quality of legal services that clients receive. I make this assumption because I wish to assess the strongest case for inside counsel's increased standing within the profession. I address the work inside counsel perform as it has been described in popular and scholarly reports: Inside counsel have superior knowledge of corporate facts and people and this allows them to perform high quality legal work. It certainly may be the case that corporate clients strive to keep information from their lawyers and allocate their legal work to disempower lawyers, enabling corporate pursuit of improper ends. To the extent this is true, there are additional grounds for questioning client-imposed governance structures. But it is the power corporations do cede to inside counsel that requires analysis in order to assess what the profession commits itself to when it accords increased professional standing to the new breed of corporate counsel.

#### *A. Inside Counsel as Substitutes: Contractual Problems with Respect to Fees*

Given a choice between suppliers of the same product, corporations will select the less expensive supplier. Under current market conditions,

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113. *Id.* at Rule 1.16.

114. "[O]pportunism refers to the incomplete or distorted disclosure of information, especially to calculated efforts to mislead, distort, disguise, obfuscate, or otherwise confuse." O. WILLIAMSON, *supra* note 102, at 47.

The absence of lawyer opportunism is equivalent to the claim that lawyers will not fail to fully inform the client. The absence of lawyer opportunism is ethically mandated. RPC, *supra* note 21, at Rule 1.4.

The presence of client opportunism is equivalent to the claim that clients will fail to fully inform the lawyer. The presence of client opportunism creates risks that lawyers will be unwittingly involved in conduct or assistance that is not permitted by law. It also creates risks that lawyers, who are not fully informed, will not adequately serve the client. Because of their ignorance, clients cannot judge what their lawyer needs to know. Client-imposed controls consequently can be self-defeating. In their absence, clients receive the benefits of professional controls. Clients are protected, for example, by the confidentiality rules, from lawyers misusing the information they obtain during the course of the representation. But clients are not ethically mandated to reveal all to their lawyers. Nor are lawyers currently duty-bound to reduce client opportunism. Their obligations prevent them only from knowingly engaging in conduct or assistance that is not permitted by law. *Id.* at Rule 1.2(d),(e).

routine legal work, demanding minimal innovation, often is more cheaply produced internally than purchased in the market from outside counsel. Elite law firms have made significant investments in their reputation. Their hourly rate includes a surcharge, a price premium, reflecting these investments.<sup>115</sup> When outside firms will not negotiate their hourly rate or vary their costs,<sup>116</sup> corporations may find it more cost-effective to do routine work inside.<sup>117</sup> When competition between outside firms does not drive down their prices, the availability of corporate legal departments to substitute for outside firms results in corporations purchasing routine work from outside firms largely to meet the problems of peak and excess demand.<sup>118</sup>

Cost controls also explain why corporations use inside counsel for idiosyncratic work. The delivery of legal services requires and creates client-specific assets. When these assets are developed by an outside counsel, the corporation can capture them by re-hiring the lawyer or firm. Although confidentiality and conflict-of-interest rules bar the misuse of these assets and limit competitors who might vie for lawyer time, the

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115. Smith & Cox, *The Pricing of Legal Services: A Contractual Solution to the Problem of Bilateral Opportunism*, 14 J. LEGAL STUD. 167 (1985).

116. It is not always true that outside firms will not negotiate their rates. See *supra* notes 52-53 and accompanying text.

117. Whether or not it is cost-effective will depend on a number of considerations: There are the direct costs of salaries. Law firms buy lawyer time at wholesale and sell it at retail to their clients. If a corporation itself can buy lawyers' time at wholesale rates, it can compete with the salaries offered by outside firms. But, whether a lawyer's time can be utilized must be considered. In creating a legal department, the corporation creates an inventory of lawyers' time. This inventory is extremely perishable. It has no shelf life. If not used, it must be written off. Thus, it is not cost-effective to hire inside lawyers if a substantial part of their time will go unutilized. Indirect costs also will affect whether a corporate legal department is cost-effective. There is significant overhead in maintaining a corporate legal department. Not only must lawyers be paid, but so must paralegals, secretaries, investigators, and other support services. Furthermore, a law library, offices, computers, copy services and the like must be bought and maintained. In deciding to move legal work inside, these costs must be taken into account. The cost-effectiveness of employing inside counsel also depends on the productivity rate that can be maintained inside, as compared to outside. Outside firms maintain productivity by linking career success to billings. When lawyers are inside, more subtle and flexible incentives can be created. As my colleague Stephen Halpert suggested to me, associates at outside firms don't receive bonuses from clients for their work.

118. Outside counsel are employed in response to the legal department's manpower shortages. Some work, like due diligence work on acquisitions, requires a herd of associates, not available inside the legal department. Other problems require legal research time not available inside. Other work requires constant tending. As one inside counsel told me in explaining the allocation of work at her corporation:

Mergers and acquisitions work is handled outside. You can't break off a couple of months to do that. There are always phone calls on my desk from managers who want my attention. Mergers and acquisition work flows outside now not because we don't have the expertise to do it. It is not so much a question of expertise as of being able to set aside a block of time to concentrate on that work. I can't take the time and let my other work go. We don't have sufficient back-up attorneys to take care of the fires.

corporation faces the hazard that the outside counsel may be unavailable for re-hire.<sup>119</sup> By developing a corporate legal department, the corporation can reduce this risk. It also can improve its position in bargaining about the cost of making further draws on these investments.<sup>120</sup>

When work is neither routine nor idiosyncratic, cost controls do not necessarily favor using inside counsel. Innovative work may be purchased more cheaply from outside counsel who can recoup their investments in developing expertise from a number of clients.<sup>121</sup> Other work may require legal expertise for which the corporation does not have sufficient demand to make it cost-effective to support a lawyer who maintains a proficiency in that specialization.<sup>122</sup> And yet other legal expertise may be sufficiently in demand but not be cost-effective to bring inside because it is tangential to the specialties of others in the legal department so that the expert becomes demoralized.<sup>123</sup>

Discussion of the economics under which inside counsel can be cost-effective substitutes for outside counsel ought not to obscure the fact that some legal services are non-substitutable. The allocation of some work reflects the fact that legal service is personal service. Corporate legal departments may invest in innovation. Elite firms' knowledge of markets, industries and regulatory channels may be obtained by a corporation from competing professionals, such as investment bankers, trade-association officials or business and regulatory consultants. But, there still may be just a few individuals who drafted the legislation, understand the full range of transactional possibilities, or have the required mastery of materials or possess the necessary contacts. To the extent that legal service depends on such non-generalized personal capital, it must flow to where that capital resides.

The allocation of other legal work reflects the fact that some legal service is not personal service. This work "may be performed at the

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119. The conflict rules mitigate this hazard by reducing the market of clients available to the lawyer. Nonetheless, knowledgeable associates may be unavailable, both because they exit the firm and because the firm may rotate them through different projects. Less often, partners, who have a number of clients, may be unavailable to handle the problem on the client's schedule.

120. R. NELSON, *supra* note 3, at 68; Gilson & Mnookin, *supra* note 42, at 359-60.

121. O. WILLIAMSON, *supra* note 102, at 143, 158-59 (the advantages of vertical integration as asset specificity increases assumes that "the innovative potential is slight").

122. For example, the corporation will not bring inside specialists in real estate zoning work if it does not need an inventory of lawyers' time in that specialty. The same reason explains why a corporation may hire outside counsel who are knowledgeable about local customs and practices.

123. *The New Balance of Power*, *supra* note 52, at 20 (comments of Irwin Gubman, Senior Vice-President and Associate General Counsel, Bank of America) (lawyers left department when their work was "not central to the work of the legal department [because] the lawyers . . . had no direct career path [and the lawyer] managers who were supervising them were people who had no subject matter expertise in that area").



client's direction but [is] for the primary purpose of establishing information for the benefit of third parties . . . ."<sup>124</sup> This work requires the lawyer not to be engaged in the traditional confidential relationship of lawyering, but rather, like an accountant, to be a reputational intermediary who can insure her work by a reputation established independently from the client's.<sup>125</sup> Inside counsel, consequently, can't provide these services.

*B. Inside Counsel as Outside Counsel Managers: Contractual Problems with Respect to the Objectives of the Representation*

It seems to me perfectly obvious that a description that assumes goals come first and action comes later is frequently radically wrong. Human choice behavior is at least as much a process for discovering goals as for acting on them.

James March<sup>126</sup>

When investments are made during the course of contracting in transaction-specific assets, even in a competitive market of bidders, the winning bidder may be able to engage in opportunistic behavior because the buyer's investments cannot be transferred readily to an alternate supplier.<sup>127</sup> In the professional ideal, this opportunistic behavior is limited by professional loyalty: Professionals honor client trust and do not take advantage of their relations with clients.<sup>128</sup> Professional rules limiting withdrawal, for example, decrease risks that ex post fee disagreements would deprive the buyer of the transaction-specific assets he paid for creating.

Nonetheless, the need for inside counsel to be purchasing agents, according to popular accounts, derives from outside counsel exploiting their winning bidder advantages by running up the number of hours they charge.<sup>129</sup> Elite firms' interests in maximizing their billings, rather than

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124. RPC, *supra* note 21, at Rule 2.3 comment 1.

125. Compare Gilson, *supra* note 91, at 288-93 (discussing reputational intermediary), 290-91 (equating lawyer's role as gatekeeping reputational intermediary with that played by independent accountant), 291 n. 135 (literature on accountant-type independence being required for the role to be efficiently performed) with *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984) (distinguishing lawyer's confidential service from accountant's public service).

126. March, *The Technology of Foolishness*, in *AMBIGUITY AND CHOICE IN ORGANIZATIONS* 69, 72 (1971).

127. O. WILLIAMSON, *supra* note 102, at 76 (market processes do not dispel opportunistic conduct because first movers disadvantage substitute suppliers).

128. See, e.g., RPC, *supra* note 21, at Rule 1.5 comment 3. ("An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest.")

129. See, e.g., Dockser, *Companies Rein in Outside Legal Bills*, *Wall St. J.*, Nov. 9, 1988, at B1, col. 4; see also sources cited *supra* note 37.

client needs, allegedly guide their delivery of services. Consumer advocate Ralph Nader even ran a seminar for big business leaders in which outside counsel's detailed work during the course of the representation was lambasted as not only unnecessary to the corporate purchaser but also an unjustifiable tax on individual consumers when these costs were passed on.<sup>130</sup>

There undoubtedly are too many firms whose working principle, as one lawyer told me, is "Research until you abuse the client." But outside counsel fees also are not as low as they could be because clients choose to hire "Rolls-Royce legal services" when all they need to reach their desired destination is a "Ford." And outside counsel's focus on the positive marginal utility of additional work, and slighting of its cost to the client, may stem not from greed but from otherwise beneficial commitments to precision, accuracy and completeness.

Inside counsel certainly can play a role in keeping a rein on outside fees. They can explain to the corporation why more expensive lawyering is not necessarily better given their needs. They can remind outside counsel that the corporate purse is not a basket of plenty. But this is not the only role they play in managing outside counsel.

Corporations use inside counsel to impose a budgeting process on outside counsel. At many corporations, outside counsel are required not only to sign a retainer agreement, whereby they accept corporate cost controls, but also to negotiate a budget for their services with the corporate legal department.<sup>131</sup> The budgeting process does signal corporate interest in outside counsel minimizing the fees they charge. But evidence suggests that the budgeting process is required by the corporation for reasons other than to reduce the risk that outside counsel will exploit their winning bidder advantages and run up their fees. First, if budgeting were designed to control for this, since the winning bidder's opportunism arises *ex post*, the process would not be, as it is, conducted largely *ex ante*.<sup>132</sup> Second, for all the discussion of "value-billing techniques" to decrease outside counsel's incentives to engage in opportunistic behavior, most budgets still are based on the hourly fee.<sup>133</sup> Third, charges over

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130. Nader *Offers Business Legal Fee Tips*, N.Y. Times, April 13, 1981, at D1, col. 1.

131. A. CHAYES, *supra* note 24, at § 7.06.

132. *The New Balance of Power*, *supra* note 52, at 6 (comments of Charles Morgan, Vice-President and Senior Corporate Counsel, Kraft, Inc.).

133. Cook, *Hourly Fees Still the Key*, Nat'l L.J., Nov. 7, 1988, at S-2. This evidence also might indicate that the hourly fee better serves the corporation as a mode of contracting. However, the ABA apparently is not convinced. *Id.*; see Smith & Cox, *supra* note 115 (Cost of supply is determined by an hourly fee in order to solve the problem of bilateral opportunism: In a fixed fee contract, the firm would have an incentive to depreciate service quality and the client to understate its problem. An hourly fee with reputational signaling is a preferable arrangement for both parties.).

budget are expected.<sup>134</sup> Fourth, the budgeting process operates more to aid inside counsel's search for outside counsel with whom they can establish good relations than as a selector of the lowest bidder.<sup>135</sup>

The budgeting process serves to establish a relation in which outside counsel understand that inside counsel is their "client." Putting outside counsel through the paces of setting up a budget, the legal department establishes its power to manage outside counsel. Inside counsel first "circumscribe and scrutinize the legal work they refer to outside counsel."<sup>136</sup> Then, during the course of the representation, inside counsel approve deviations from the budget, authorizing more work and deciding what direction it ought to take.<sup>137</sup> Evidence suggesting that budgetary controls are weak reinforces the understanding that "[c]ost estimating is a natural *consequence* of the scoping and planning process. . . . The litigation budget serves . . . as a tool to formulate strategy."<sup>138</sup>

The allocation of work to inside counsel to manage outside counsel, established through the budgeting process, responds to the fact that outside counsel may perform work of limited or negative utility to the corporation. But, the contracting problem it solves is not just outside counsel's winning bidder advantages. Inside counsel become "the client"

134. As one general counsel stated, "Typically, neither inside counsel nor outside counsel really expects that the budget targets will be met, and they rarely are. Budgeting is important almost exclusively as a signal to outside counsel that the client is concerned about legal costs." Lochner, *Comment*, 37 STAN. L. REV. 305, 308 (1985).

135. See A. CHAYES, *supra* note 24, at § 7.01 (selection of outside counsel determined more by quality of work and responsiveness to legal department than costs bid); *cf. id.* at § 7.06 ("A budget process should: compel planning; provide performance criteria; and promote communication and coordination," not fix costs).

This point may be driven home by remembering that eliminating first-class air travel was one of the targets for budgeting. *Reading the Riot Act to Outside Counsel*, BUS. WEEK, Feb. 22, 1982, at 39. Nonetheless, corporations have not found that the budgeting process eliminates its use by outside counsel, even though it is a readily accountable item. See *Fear of Flying . . . Coach*, AM. LAW., Nov. 1980, at 5. In part, this is because many corporations will pay for first-class travel if legal department approval can be obtained: It is a proper subject for ex post negotiation. For example, "Foremost-McKesson will reimburse only for coach class travel unless unusual circumstances justify otherwise (if services for Foremost-McKesson must be performed for the substantial portion of the trip and were not necessitated by the press of other work) and advance approval is given by the Law Department." PRACTICING LAW INST., *Outside Counsel Letter*, in THE COORDINATION AND MANAGEMENT OF MAJOR LITIGATION 29, 33 (1982). I would suggest first-class air travel continues to be used because this negotiation turns more on whether outside counsel have been perceived as responsive to the legal department than on who should bear the risk that the overhead of an office-in-the-sky has not been fully factored into the hourly fee.

136. A. CHAYES, *supra* note 24, at § 7.01.

137. "[E]laborate program budgeting tools" have been developed allowing the corporate legal department to "require explanations and approval for deviation from the budgetary plan" not so much to guarantee service within predicted costs as to have a "basis for formal decision analysis" of the progress of outside counsel's increasingly "defined scope of work." Chayes & Chayes, *supra* note 1, at 292.

138. A. CHAYES, *supra* note 24, at § 7.06 (emphasis added).

of outside counsel in response to the difficulties of transmitting corporate interests to outside counsel.

The corporate legal department's role may be justified by outside counsel opportunism, but its function also is to efficiently communicate objectives for outside counsel's representation.<sup>139</sup> Inside counsel translate corporate "understandings" to outside counsel and monitor whether outside counsel "understand" client needs. Managing the communication between outside counsel and the corporation, corporate legal departments can efficiently audit whether outside counsel implement the decisions taken elsewhere in the corporation. Apparently without inside counsel, outside counsel often either imputed interests to corporate clients or engaged in costly negotiations with the various responsible corporate actors to determine what were these interests.

The costs of outside counsel acquiring corporate information suggests that inside counsel also are utilized because they are cheap runners. Rather than searching, perhaps without success, for the corporate actors who possess the relevant information, need to know the status of the representation, or can make the appropriate decision, outside counsel can direct their questions to an inside counsel who can more efficiently search for the relevant corporate actor. Buffering outside counsel communications with corporate actors, the corporate legal department also can reduce the costs incurred by management involvement in the legal process. With often professed relief for getting lawyers "out of their hair," corporate actors can delegate responsibilities to the legal department and concentrate on applying themselves to their perceived primary mission. The "[c]entralization of control"<sup>140</sup> over communications with outside counsel in the legal department can reduce the cost of transmitting information, especially for corporations, as one outside counsel put it, that "are so compartmentalized and sub-compartmentalized that you don't know who to ask."

Understanding the corporation's contracting problem with outside counsel as one of information cost, however, does not explain why inside counsel apparently have become powerful corporate actors. Translating and running only require inside counsel to develop "well established

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139. *Accord* Chayes & Chayes, *Corporate Counsel and the Control of the Corporate Legal Function* 36 (Oct. 21, 1986) (draft) ("The budget process may not be an effective tool of cost control, as we saw above, but it serves as an effective vehicle for isolating and defining tactical and strategic issues for decision by the general counsel."); *see also* XEROX CORPORATION 17 (Harvard Law School, Program on the Legal Profession case study) (comments of Robert S. Banks, Vice-President and General Counsel of Xerox Corporation).

140. Chayes & Chayes, *supra* note 1, at 290. Their study of major corporations found that "[i]n over half of the corporations surveyed" no manager or outside counsel attempted a "circumvention of legal department control." *Id.*

relations and channels of communication with key operating personnel and familiarity with sources of information and with short- and longer-term corporate goals and strategies and the like."<sup>141</sup> For these roles, they do not need corporate power and status. Nonetheless, in the modern corporate legal department, inside counsel are not only managers of outside counsel, but also business managers. They need to be "in a position to . . . alter [the corporation's] practices" by developing "the necessary communication and relationship of confidence" with other managers.<sup>142</sup> They must be able to become organizational leaders who can "exploit the necessary contacts with the affected corporate operations."<sup>143</sup> Inside counsel not only translate and run. They determine corporate goals and organize corporate decisionmaking with respect to its legal services.

Inside counsel's corporate power arises because information costs are not the only difficulties corporations face in transmitting their interests to outside counsel. Inside counsel gain corporate power because of the uncertainties in determining the corporation's legal interests. To manage these uncertainties, corporations require that inside counsel do more than efficiently communicate to outside counsel the interests of other corporate actors. They require that inside counsel make corporate choices and decide how corporate choices about their legal interests are made.

The emergence of powerful corporate legal departments can be understood by considering again the charge of outside counsel opportunism. If sophisticated business people can't efficiently communicate their needs to sophisticated lawyers, which client can? Ours is a client-serving profession. How can we justify requiring clients to hire an interpreter so that we understand what they need? And, how can we justify imposing on clients the costs of monitoring for lawyer mistranslations?

Translation services for corporate clients, it might be suggested, are necessary costs occasioned by the attempt to capture the benefits of specialization. The large corporate client requires the most specialized, and costly, legal services. To articulate and implement the insights and innovations of these specialists, less-costly intermediaries can be hired. If these intermediaries are vertically integrated within the corporation, the knowledge they accumulate can more likely be captured by the corporation.

This response downplays how sensitive legal advice is to changes in facts. It slights inside counsel's role by expressing professional judgments as things to be translated, not the subjects of intense negotiations with clients about the meaning of different constellations of fact. As one outside counsel explained:

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141. A. CHAYES, *supra* note 24, at 4-6.

142. *Id.* at 7-16.

143. *Id.* at 7-15.

If the General Counsel tries to be an intermediary, it is not cost effective. It is difficult to have specialist information conveyed to a generalist and then conveyed to someone who is not a lawyer. For example, if a client wants to do an acquisition and he wants to have a feel about financing, I can talk to the treasurer. He is a specialist and it is better to have a specialist talk to him, rather than having a generalist from the legal department step in. If we don't talk directly, it is very inefficient and a lot of information is lost in the process. Legal problems are not discrete. The inside lawyer can't pick my brain and then exclude me. A generalist may not know what facts can't be changed without great problems. There are a lot of quirks in the law which produce unexpected results. A good inside counsel calls a specialist and hands it over to them. Just like I do with other people in my firm.

Perhaps this outside counsel is wrong. Inside counsel might be able to translate without loss: communicating with both outside counsel and corporate actors, like the treasurer, posing the questions and prompts each raises. But, as this outside counsel understands, this is not what is done. First, in managing outside counsel's work, inside counsel limit the questions and information outside counsel supply. Second, in centralizing control over legal services in the legal department, inside counsel manage what options other corporate actors explore. The basis for this outside counsel's complaint is precisely the mission inside counsel have: To use their professional judgment and knowledge of the company to determine which "quirks" need research, which potential constellation of facts need to be explored. Surely, inside counsel receive information from outside counsel and other corporate actors. But, they are not just translators. They are managers. They have responsibility for collecting, filtering and selecting information and determining what legal work the corporation receives.<sup>144</sup>

Translation is not a neutral process: The constitution of information nets and the creation of relationships with different corporate actors and outside counsel affects what communications need to be translated and consequently what are discovered to be organizational goals.<sup>145</sup> Because information is costly and legal decisions must be made with uncertainty, corporations turn to inside counsel not just to translate between corporate actors and outside counsel, but also to determine what needs to be explained.<sup>146</sup>

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144. See also *supra* note 35.

145. See, e.g., J. PFEFFER & G. SALANCIK, *THE EXTERNAL CONTROL OF ORGANIZATIONS* 89 (1978) ("[T]he organization responds to what it perceives and believes about the world [which] is largely determined by the existing organizational and informational structure of the organization.").

146. See *supra* notes 23-26 & 28.

Outside counsel comment on the gap between the powers inside counsel wield and the explanation that inside counsel are translators. Outside counsel sometimes admit the need for generating a corporate choice and the difficulties they encounter in its absence: For example:

Too frequently, no upper level management individual is involved in the question of bringing a case or settling it. It is rare, except where the company's survival is at stake, to have real input from divisional or senior management as to whether the case should be quickly resolved, whether there should be management to management contact early on, or so on. Normally, senior management doesn't focus on the case until depositions are noticed of senior management people. Cases get settled only when things are directed at the top management people who have the power to make a settlement decision. If they could be gotten to focus much earlier, it would save great expenditures.

With the introduction of inside counsel this was to change. Yet, today outside counsel complain: "Frequently, inside counsel has no more input from management than outside counsel has. Inside counsel try to take management's pulse by osmosis. While inside counsel believe they have a better view of management, it is based on what they perceive about the company rather than having the question put to the company." This complaint loses its force to the extent that inside counsel are managers, who assume responsibility not only for translating decisions that have been taken elsewhere, but also for making them themselves.<sup>147</sup> With the introduction of corporate legal counsel, corporate legal policy is determined as are other corporate policies: by managers. Inside counsel are not just communication buffers between outside counsel and management. They are the managers of the corporate legal function. When inside counsel manage outside counsel, as an outside counsel observed, "[we] talk to businessmen for information but work through inside counsel on business questions." When outside counsel ask inside counsel "business questions," they ought to recognize that inside counsel have responsibility for how they are answered.

To explore inside counsel's role, consider an elite firm products liability litigator who felt most business questions answered themselves: "I don't feel it is necessary to tell them that if they have had a thousand lawsuits it's necessary to change the product on my thousand and one. Supposedly

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147. The scope of their managerial responsibilities may vary. It may be carefully limited. As a divisional vice-president reported:

No one wants to make a decision about a small case which is pretty much seen as a nuisance that the lawyers are handling. Then we leave the legal department to their own devices to work things out with the outside counsel. If it is of substantial importance to the company, I get involved. I have a decision that anything over \$100,000 needs my clearance, if not, they make their own decisions.

someone has thought about that. They know the costs and have decided not to change." This lawyer has technical expertise; you can give him a case with low uncertainty about the effectiveness of his advocacy. But he is assuming a great deal about the client. He doesn't recognize that information might get lost, that decisions might not be made or properly reviewed. He is imputing corporate goals, rather than ascertaining whether decisions have been reached. His service doesn't help organize the client to confront the problem. He lacks the judgment Lon Fuller thought made the lawyer of service to the client: He doesn't recognize that the corporation might need "communication out of channels."<sup>148</sup> He ignores the frailties of client organization.<sup>149</sup>

The frailties of organization, in addition to the uncertainties of translation, help explain why corporations need inside counsel managers. Outside counsel are not as well situated as inside counsel to determine efficiently corporate goals from their client contacts. And outside counsel are not able, at least efficiently, to respond to the organizational frailties legal representation exposes and to organize the corporate organization to address such problems and their changing complexities through the course of the representation. A corporate legal department may more efficiently than outside counsel recognize and respond to the presence of organizational frailties. Staff are common organizational responses to the need to supply information and force decisions by "communication out of channels."<sup>150</sup>

Legal departments emerge, in part, to minimize the costs of securing a corporate decision. And, in securing that decision, the lawyer must exercise judgment about whom to contact and what authority to seek. Corporations employ inside counsel not only as runners and translators, but also as managers.

Inside counsel gain power by their control over a subject area: How they collect, select and filter information will affect corporate action. By

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148. Fuller, *The Role of the Lawyer in Labor Relations*, 41 A.B.A. J. 342, 344 (1955): One of the great handicaps the American corporation has . . . lies in the clogging up of the lines of communication. Though communication 'through channels' is not the fetish it is in the military, there is a strong tendency to insist on it, and the result is an inevitable distortion . . . Here is a significant opportunity for real service by the lawyer. Without any threat to corporate morale, he can cut through hierarchic lines of communication . . .

149. For a review of the literature, see Noll, *Government Administrative Behavior: A Multidisciplinary Survey*, in *THE CHANGING OF BUSINESS ROLE IN SOCIETY* 297 (G. Steiner ed. 1976).

150. H. WILENSKY, *ORGANIZATIONAL INTELLIGENCE* 47 (1957); cf. Ruder, *A Suggestion for Increased Use of Corporate Legal Departments in Modern Corporations*, 1 *L'JURISTE DE L'ENTREPRISE* 28 (Comm. droit et view des affaires 1968): "Free and open discussions are possible and usual between the executive personnel and inside counsel . . . In other words the inside counsel can have a kind of amalgamating effect between the divisions and units of the company and he can thus be a very positive influence."



controlling contacts between outside counsel and corporate managers, like the treasurer, inside counsel exercise power. Inside counsel also gain power because it is their job to determine how to respond to organizational frailties: How and whom they engage in "communication out of channels" affects what decisions the corporation reaches. By determining how to answer previously unasked questions, like those signalled by a caseload of product liability suits, inside counsel exercise power.

This description of the uncertainty of decisions about the goals of legal representation and the ways in which choices depend on whether and how the legal department exercises power does not distinguish legal decisions from other decisions at large corporations. Most organizational goals emerge as "political resultants."<sup>151</sup> Corporate goals are dynamically sensitive to what "satisfies" the coalitions that emerge in, but are not determined by, the corporate organization.<sup>152</sup> Centralizing control over legal services may allow corporate goals to be brought more efficiently to bear on legal decisions, but these politically dynamic goals are themselves influenced by the process through which they emerge. With the emergence of corporate legal departments, client goals are discovered that are different from those that would have emerged in their absence. Perhaps more important, the centralization of control in the corporate legal department means that decisions are made that might never have been.

What distinguishes inside counsel's power is the claim that it rests on professional judgment. Rather than hiring managers to decide corporate goals in legal service, the Inside Counsel Movement argues, corporations ought to hire high-quality lawyers: Unlike managers, inside counsel can apply their professional judgment to determining corporate goals.<sup>153</sup> Rather than hiring outside counsel to serve the corporation, the Inside Counsel Movement argues, inside counsel ought to be outside counsel's "client."<sup>154</sup> Since inside counsel are specialists in the legal needs of their corporation, they can manage outside counsel's ignorance: They can assume responsibility for organizing, monitoring and auditing outside counsel's work.<sup>155</sup> Corporations need decisionmakers with power to allocate corporate re-

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151. "[R]esultants in the sense that what happens is not chosen as a solution to a problem but rather results from compromise, conflict, and . . . unequal influence[.] [P]olitical in the sense that the activity from which decisions and actions emerge is best characterized as bargaining along regularized channels among individual members . . ." G. ALLISON, *THE ESSENCE OF DECISION* 162 (1971) (emphasis in original).

152. On organizations as coalitions of groups with divergent claims and interests united in a continuous bargaining process, see R. CYERT & J. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* 27 (1963); F. KAST & J. ROSENZEWIG, *ORGANIZATION AND MANAGEMENT: A SYSTEMS AND CONTINGENCY APPROACH* 41-42 (3d ed. 1979).

153. See *supra* note 6.

154. See *supra* note 28.

155. See Slovak, *supra* note 11, at 481.

sources in response to its legal problems and they are best served, the Inside Counsel Movement claims, by hiring members of the legal profession whose judgment is enhanced by knowledge of corporate facts and people.<sup>156</sup>

Whether these claims are justified, reported corporate demand for inside counsel services supports them. Corporations appear to need lawyers to manage their legal representations. Corporations appear to demand that lawyers decide corporate goals for their representations and cede power to lawyers to determine how these political resultants are to be reached. Whether this corporate demand and corporate power are compatible with professional responsibilities is discussed in the concluding sections of this essay.

### C. *Inside Counsel as Preventive Law Practitioners: Contracting Problems with Respect to Corporate Commitments*

As in the management of outside counsel, in preventive law practice, corporations rely on inside counsel to implement and determine corporate interests.<sup>157</sup> At one level, the analysis of the corporate power involved in this work seems more direct: Lawyers practicing preventive law prevent corporate illegalities. Preventive law includes responsibilities for "programmatic prevention"<sup>158</sup> and, if violations are uncovered, the responsible auditor needs to marshal the power to have them corrected.

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156. See *supra* note 35.

157. Lawyers engage in preventive law practice in response to managerial requests. These requests emerge from the practical needs for planning. See Stichnoth & Dolan, *Management Strategies for the Corporate Counsel*, in *MANAGEMENT FOR IN-HOUSE COUNSEL: TECHNIQUES, TOOLS, APPROACHES* at 113, 114 (M. Goldblatt ed. 1985) (managers criticize lawyers who do not anticipate problems). They also may emerge from managers seeking to meet their obligations to comply with the law. "[E]ven if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business . . . is obliged to the same extent as a natural person, to act within the boundaries of the law . . ." AMERICAN LAW INSTITUTE, *PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE: RESTATEMENT AND RECOMMENDATIONS* Rule 2.01 (Tent. Draft 1 1982). "[D]ollar liability is not a 'price' that can ethically be paid for the privilege of engaging in legally wrongful conduct. [Compliance] should not rest simply on past precedents or an unduly literal reading of statutes and regulations . . ." *Id.* at Rule 2.01 comment f. Manager's obligations are supported by the auditing requirements of various regulatory programs. For a list of relevant regulatory legislation, see Chayes & Chayes, *supra* note 1, at 285 n.15.

Although assisting clients to meet their compliance obligations might suggest a professional duty, even inside counsel apparently have no ethical responsibility to engage in a preventive legal practice. The initial Kutak Commission draft, for example, read: "A general counsel, however, has neither the duties of an internal investigator of the client nor ultimate responsibility for courses of action undertaken by the client." Initial Draft of Ethics Code Rewrite Committee, Rule 2.5 (not adopted), *quoted in* Ferrara & Steinberg, *The Role of Inside Counsel in the Corporate Accountability Process*, 4 *CORP. L. REV.* 3, 14 n.33 (1981).

158. Chayes & Chayes, *supra* note 1, at 284-89. Preventive law includes more than just preventing illegalities, as the Chayes' article and the discussion below emphasizes.

At one level, the allocation of preventive law work to inside counsel also seems clear: Inside counsel receive this work because their location within the corporation makes them better able than outside counsel to maintain the various lines of communication that uncover questionable practices.<sup>159</sup> Inside counsel's superior abilities derive from their general knowledge of corporate facts and people. It also derives from the likelihood that more disclosures will be made to them because other corporate actors assume they share common loyalties. As one inside counsel put it: "An outside lawyer simply could not move freely within a corporate structure any more than an alien substance can be tolerated by the human body."<sup>160</sup>

This understanding of inside counsel's preventive law practice, however, mischaracterizes both the power inside counsel exercise and the reason they are preferred to outside counsel. Inside counsel are not policemen. It is a mistake to describe the lawyer's mandate and the corporate goal as "comprehensive compliance."<sup>161</sup> Preventive law practice involves not only the question of whether illegalities will be prevented, but also at what level the corporation will comply. This requires the lawyer to act less "in the role of a policeman . . . than an ally in an effort to run the company profitably and legally."<sup>162</sup>

The practice of preventive law requires the lawyer to enter the corporate process where the balancing of corporate interests occurs. The allocation of this work to inside counsel derives from not only their access to corporate lines of communication, but also their understanding of the corporation's levels of commitment to legal compliance and their involvement in the processes by which these commitments are formed and changed. To have a preventive law program, then, corporations ought

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159. Inside counsel stress that they are engaged in preventive law because of their "familiarity with the company" and "flexibility." Chayes & Chayes, *supra* note 1, at 293 (survey result).

This allocation also may be explained by the fact that, until recently, there has not been much push for preventive legal practice by outside counsel: "[O]utside counsel's desire to avoid the appearance of generating business may deter outside counsel from taking an active role in anticipating legal problems and suggesting preventive measures even when outside counsel is charged with overall responsibility for the corporation's legal affairs." Special Committee on Management and Organization of the Practice of the Profession, *The Management and Organization of a Corporation's Legal Affairs*, in *MANAGEMENT FOR IN-HOUSE COUNSEL: TECHNIQUES, TOOLS, APPROACHES* at 71 (M. Goldblatt ed. 1985).

160. Forrow, *The Corporate Law Department: Counsel to the Entity*, 34 *BUS. LAW.* 1797, 1812 (1979).

161. Chayes & Chayes, *supra* note 1, at 289.

162. Beckenstein & Gabel, *Antitrust Compliance: Results of a Survey of Legal Opinion*, 51 *ANTITRUST L.J.* 459, 477 (1983). Not only inside counsel, but all other internal auditors work best as allies, not policemen. See L. SAWYER, *THE MANAGER AND THE MODERN INTERNAL AUDITOR: A PROBLEM SOLVING PARTNERSHIP* 5 (1979) ("The time has come for the internal auditor to equip himself to be more than an after-the-fact critic and to become at last a counselor and advisor to the treadmill problem-beset manager.').

not, and many don't, employ the "veto power of counsel."<sup>163</sup> Instead they rely on developing the political power of a corporate constituent, its legal department.

The essential point about legal auditing is that when the corporation is committed to legal compliance, lawyers are not involved in auditing.<sup>164</sup> While lawyers, both inside and outside, may be involved in designing compliance programs, given uncontested corporate commitments, auditing passes to functional specialists: accountants, product liability, safety, environmental and other specialists. These specialists can better carry the obligations of detecting and policing violations.<sup>165</sup>

Lawyers are involved in preventive law practice when corporate commitments become contestable. This may occur because particular needs suggest seeking a variance from the corporate or legal standards, current operations are revealed to carry more risks than anticipated, or the corporation's commitments otherwise become subject to review.<sup>166</sup> Then, "legal and business issues go hand in hand and are inextricably inter-

163. Beckenstein & Gabel, *supra* note 162, at 463; cf. E. BARDACH & R. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS 79-80 (1982).

[T]he tendency of businessmen [is] to think of regulation as an ongoing process of encountering problems and searching for cost-effective solutions. . . . Accustomed to trying to achieve their goals in the face of competing concerns of other departments and workers, managers expect the problem solving to proceed through negotiation and compromise, according to a 'morality of cooperation,' rather than by legal fiat.

*Id.*

164. Cf. Chayes & Chayes, *supra* note 1, at 287 (For "[e]nvironmental, safety, and various employee programs . . . lawyers may be partially supplemented or wholly supplanted by nonlegal staff.>").

165. See, e.g., Giannotti, *The Environmental Assessment Program*, Nat'l L.J., Nov. 21, 1983, at 14, col. 1. But see A. CHAYES, *supra* note 24, at 6-7 ("No company has enough lawyers to implement the many programs that ought to reach to the tips of business operations. Therefore, in every program, non-legal personnel are relied upon for implementation.>").

166. Giannotti, *supra* note 165. Giannotti lists the following matters in which the legal department becomes involved:

- \* a variance in environmental standards or requirements affecting facilities or operations
- \* adverse publicity or adverse community relations
- \* notices of violation or advisory actions by regulatory agencies regarding environmental control matters or permit compliance
- \* legal actions, either by or against the company
- \* identified risks to the environment
- \* interference with continued production or marketing of any product because of environmental considerations
- \* substantial incremental expenditures or loss of business related to events or situations caused by environmental considerations
- \* problems where a technical solution exists, but which would impose a significant financial burden threatening the financial viability of the facility or operations
- \* problems where the staff cannot identify either remedial technology or cost of correction.

*Id.* at col. 2-3.

twined."<sup>167</sup> When lawyers engage in preventive law auditing, they face conflicts between managerial definitions of corporate interests, managerial incentives and contestable corporate policies.<sup>168</sup>

In response to conflicts about corporate commitments to compliance, lawyers respond with three broad categories of controls.<sup>169</sup> Lawyers practice preventive law by: (1) reducing managerial discretion by integrating the compliance program with the company's incentive system and standard operating procedures; (2) maintaining managerial discretion but incorporating educational programs to inform managers of legal risks;<sup>170</sup> and (3) conditioning managerial discretion by supplying counselors when decisions are made.<sup>171</sup> The corporation's need for managerial discretion and its attitude toward legal risk, not the technical law, determine which type of control is employed.<sup>172</sup>

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167. R. JONES, *PRACTICE PREVENTIVE CORPORATE LAW* 74 (1985). Consequently, lawyers must engage, according to March and Simon's distinction, not in "bargaining" but in "politics." In "bargaining," the differences between the goals of the parties are assumed to be irreconcilable. In "politics," goals are assumed to be complex and lawyers can have influence because they engage in conflict that "legitimizes [the] heterogeneity of [corporate] goals." J. MARCH & H. SIMON, *ORGANIZATIONS* 131 (1959).

168. For example, a lawyer is called in after a non-lawyer technical specialist has provided a manager with one interpretation of legal requirements, and one or the other is seeking a second opinion. The problem for the lawyer is to maintain managerial initiative without compromising corporate compliance commitments. Sometimes, increasing technical certainty about legal requirements will resolve the dispute. Normally, however, the lawyer is called in because the incentives facing the manager and the specialist differ, indicating contested corporate goals. At issue is a corporate decision about what risks to take or costs to incur. A corporate policy is being decided.

169. Cf. Gruner, *Improving the Effectiveness of Corporate Counsel: An Information Processing Analysis*, 9 J. CORP. L. 217, 230 (1984) (distinguishing rules that mandate action, training programs and consultation procedures). The varied and shifting determinants of managerial discretion require that the legal department be flexible in its choice of auditing modes. Hence, there is a great deal of role ambiguity about what lawyers should do in preventive law practice. J. DONNELL, *THE CORPORATE COUNSEL: A ROLE STUDY* 173 (1970).

170. Gavin, *The Educational Function of a Corporate Legal Department*, 16 BUS. LAW. 370, 372 (1961).

171. Corporate legal departments often emphasize that their most important function is to facilitate consultation with managers. See, e.g., Aibel, *Successful Teaming of Inside and Outside Counsel to Serve the Corporate Client*, 38 BUS. LAW. 1587, 1588 (1983).

172. This determination is not necessarily related to a choice to violate the law. Most often, it is related to corporate needs for adaptiveness:

The in-house counsel at Biogen explained that if protecting the company's intellectual property were his only concern, employees would not be permitted to write academic papers or speak at conferences. "But the reason we can attract such high-calibre scientists," he said, "is that we run the place like a university—we let our employees publish and talk. This freer atmosphere makes for a more difficult legal situation, no doubt about it, but it's essential from a business perspective. It sure would be a lot easier for me to say, 'No way.' Instead, I make a decision every time the issue comes up."

Samuelson, *The Entrepreneurial In-House Lawyer*, SLOAN MGMT. REV., Winter 1987, at 59, 61.

Inside counsel are allocated the practice of preventive law because internal auditing requires convergent expectations.<sup>173</sup> For preventive law, the corporation needs lawyers who (1) can bring information to bear at legally-significant decision nodes,<sup>174</sup> and (2) can be trusted to understand the governance system within the corporation.<sup>175</sup> Auditors must be responsive to the incentives, cultures, and risk-preferences of the actors from whom compliance is sought.<sup>176</sup>

Corporations need lawyers who need not either play policeman or rely on reducing managerial discretion. They need this to maintain both corporate adaptiveness and the "positive alliance" between corporate actors.<sup>177</sup> Practicing preventive law by instituting "procedures to reduce management discretion where there is [a] legal risk" is "counterproductive."<sup>178</sup> Needed instead is "a judgment that properly balances some of

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173. Cf. O. WILLIAMSON, *supra* note 108, at 25. Preventive law lawyers, like good regulators, must "understand their [managers'] concerns, problems, and motivations" because better "compliance most of the time can be secured in most premises if one persuades the occupier of the need for compliance as a matter of good practice, rather than to avoid conflict with the law." E. BARDACH & R. KAGAN, *supra* note 163, at 127, 133.

174. Gruner, *supra* note 169.

175. A typical legal department missions statement requires lawyers to "assist in compliance with all applicable laws, regulations and mandated company policy." Fischer, *The Changing Role of Corporate Counsel*, 4 J. L. & COMMERCE 45, 49 (1984) (concerning the recent experience of the Alcoa legal department). It is no accident that the compliance mission jointly tracks company policy and the law. Regardless of the congruence between corporate policies and legal requirements, auditing requires "assessing the organizational context surrounding business decisions and practices . . . . [C]orporate legal departments . . . [must] interact well with other corporate departments and organizations. . . . [C]orporate counsel [must be able] to identify changes in a corporation's organizational structures that are likely to reduce or increase the corporation's potential liability." Gruner, *supra* note 169, at 218. The lawyer's function is one of strategic planning. J. AYRE, *supra* note 9, at 95. Hence, the corporate legal department must have input where corporate decisions are made. See *id.* at 17-19. Inside counsel are judged both on their "involvement in business area" and "[k]nowledge of company-wide procedures, practices, and policies." *Id.* at 57; see also Middlebrook & Groothuis, *Aetna Profile: Managing, Evaluating the Law Department* in MANAGEMENT FOR IN-HOUSE COUNSEL: TECHNIQUES, TOOLS, APPROACHES 119, 120 (M. Goldblatt ed. 1985) (law department first to spot conflict between divisions).

176. Chayes and Chayes are correct: Compliance efforts "reflect corporate style and culture." Chayes & Chayes, *supra* note 1, at 30. But they both claim more coherence for corporations than they possess and ignore the dynamic nature of corporations. There are corporate cultures, not one culture. Corporations also have conflicting policies and diverging histories. Most importantly, practicing preventive law not only reflects but also creates corporate policies because compliance work by lawyers—not technical specialists—is poised where acceptable levels of risk and corporate norms are contested.

177. Beckenstein & Gabel, *supra* note 162, at 462. The preventive law lawyer, like the good inspector, "learns how to develop . . . community resources to gain information and support through the use of a mixture of force and service, threats and appeals to reason, toughness and teaching." E. BARDACH & R. KAGAN, *supra* note 163, at 126 (citation omitted).

178. E. BARDACH & R. KAGAN, *supra* note 163. It is counterproductive because managers will evade control that demands "a loss of discretion, a constraint, and an admission of limited autonomy." J. PFEFFER & G. SALANCIK, *supra* note 145, at 94-95.

the business considerations with the legal considerations."<sup>179</sup> A veto power over illegalities is not needed. What is needed is the ability to maintain and condition managerial discretion. What is required from the lawyer is the ability to convince others about what is in their own and the corporate interest.

Practicing preventive law thus requires judgment about the corporate processes in which expectations about managerial actions are managed. It requires engaging managers, not as an executive with veto power, but as a manager among others. The practice of preventive law thus requires a willingness to alter one's own expectations and work in a process that the lawyer cannot control.<sup>180</sup> Outside counsel are not employed because they cannot acquire the necessary convergent expectations and customize their work to match and develop corporate commitments to legal compliance as efficiently as inside counsel.

By making lawyers into managers, the corporation controls what lawyers deliver while it broadens the tasks they perform. Inside counsel practicing preventive law draw on various resources made available to them by their sharing "convergent expectations" with other employees. Their presence and their practice highlights the fact that corporate expectations (embodied in policies, cultures, norms, etc.) are internally divergent. It is the inside counsel's abilities to affect these expectations that corporations rely on in using them for preventive law.<sup>181</sup>

Of course, co-optation of inside counsel is possible.<sup>182</sup> It is not at all clear that corporate legal departments are properly organized to either practice

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179. R. JONES, *supra* note 167, at 75. This balancing occurs because legal risks are but part 3007of the risks managers face and the legal risks are no more uncertain than are the other risks. See R. MILES, C. SNOW, A. MEYER & H. COLEMAN, ORGANIZATIONAL STRATEGY, STRUCTURE, AND PROCESS 202-03 (1978) (survey of managers in food processing and electronics industries).

180. One outside counsel explained why he avoided practicing preventive law by claiming that "compliance is a state of mind. The state of mind of the CEO is crucial. If the CEO wants it, there it will be." Unpacking his anthropomorphisms, he is stating that he was unwilling to become attuned to the various expectations for the behavior of different corporate actors that the corporation institutes or wishes to institute. Where outside counsel have been involved in preventive law, it is where they can ignore the dilemma of maintaining varying levels of managerial discretion. For example, outside counsel provide educational preventive law programs. These packages can be marketed across a broad range of companies.

Of course, outside counsel's relative lack of involvement is not inevitable. As one outside counsel put it, "if a federal judge who enters an antitrust consent decree would require a firm of the judge's selection to make an audit in five years and report to the court," it would change the current allocation of auditing work between inside and outside counsel. "A few regulatory agencies," he continued, "can change all this [the current allocation] very quickly."

181. Like Williamson, I do not "mean to suggest that internal audits are unproblematic . . . Internal auditing is subject to corruption. . . . If all the relevant organizational alternatives are equally or more severely flawed, the observation that internal audits are imperfect lacks comparative institutional significance." O. WILLIAMSON, *supra* note 102, at 155 n.18.

182. For a discussion of the various ways in which internal auditors may foster illegalities, see Marx, *Ironies of Social Control: Authorities as Contributors to Deviance through Escalation, Nonenforcement and Covert Facilitation*, 28 Soc. PROBS. 221 (1981).

preventive law or manage outside counsel in accordance with professional duties. Both areas of work force them to confront the moral dilemmas of practice. Further research is needed on the actual contexts of their practice before we can understand the quality of professional judgment exercised by inside counsel who lack organizational independence. But it is clear that their work necessarily involves them in influencing corporate goals and commitments. And for this work to be done properly, inside counsel need the power to mobilize corporate decisionmaking processes and to negotiate about the trade-offs between legal compliance and corporate goals. Whether or not inside counsel actually satisfy the ethical charge imposed on them, the Inside Counsel Movement describes lawyering in which professional judgment both is a political force in the corporations served and is backed, not only by the force of law, but by inside counsel having attained corporate power.

### III. "WHO IS THE CLIENT?" AS A QUESTION OF PROFESSIONAL JURISDICTION

#### A. *The Challenge of the Inside Counsel Movement*

The Inside Counsel Movement advises corporations that the modern corporate legal department which manages outside counsel and practices preventive law must be staffed by high-quality, well-paid lawyers.<sup>183</sup> Lawyers who manage outside counsel and practice preventive law ought to earn high professional status and power, the Inside Counsel Movement lobbies the profession.<sup>184</sup> Corporations are counseled to employ lawyers for tasks that require making mixed law/business decisions.<sup>185</sup> The profession is mobilized to recognize inside counsel as high quality lawyers whose professional judgment is enhanced by their corporate knowledge.<sup>186</sup>

Inside counsel are not to be understood, the Inside Counsel Movement claims, as half lawyers/half businessmen. They are not half-breeds, but new breeds of lawyers.<sup>187</sup> By bringing high-quality lawyers inside, corporations improve the legal services they receive. They ought not seek lawyers willing to doff their professional "hats" for business ones.<sup>188</sup> They need high quality lawyers whose advice improves with organizational involvement.

The Inside Counsel Movement depends on the claims that managing outside counsel and practicing preventive law are legal tasks: Developing

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183. See *supra* notes 6-8 and accompanying text.

184. See *supra* notes 29-33 and accompanying text.

185. R. JONES, *supra* note 167, at 74-75.

186. See *supra* note 5 and accompanying text.

187. See *supra* note 18 and accompanying text.

188. See *supra* note 31 and accompanying text.



corporate goals and commitments are part of corporate legal practice. The enlightened inside counsel knows that for legal work, as for the work of other professions, "technical autonomy contains within itself the right, indeed, the necessity, to perform supervisory and policy-making functions."<sup>189</sup> Their involvement in business need not compromise their professional standing because managing outside counsel and other corporate actors "are not intrinsically managerial tasks but rather tasks intrinsic to discretionary work."<sup>190</sup> It is not because inside counsel are managers, but because they are lawyers that they must "formulate, determine and effectuate management policies."<sup>191</sup> In other words, the Inside Counsel Movement is advancing a "jurisdictional claim": Managing outside counsel and practicing preventive law are within the legal profession's "jurisdiction."<sup>192</sup>

The extent of this jurisdictional claim requires an inspection of the tasks that are an intrinsic part of the work the Inside Counsel Movement claims. Managers of outside counsel are not just translators and runners. Practitioners of preventive law are not just policemen. As the two previous sections explained, both are participants in the political process through which the corporation chooses its goals. Managers of outside counsel communicate out of channels and constitute channels for communication and decisionmaking. Preventive law practitioners restructure expectations about the strategic importance of legal contingencies. In order to accomplish the work for which they are employed, inside counsel need to be "institutional personnel," empowered by their corporations to be involved in formulating, influencing and implementing corporate goals and commit-

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189. E. FREIDSON, *supra* note 64, at 154.

Professional employees possess technical autonomy or the right to use discretion and judgment in the performance of their work. In order actually to exercise that technical autonomy during the course of work they must from time to time be able to exercise some degree of both supervisory and policy-making authority. Furthermore, within certain limits, they must be able to select the work they do and decide how to do it.

*Id.*

190. *Id.* at 149.

191. Ford Motor Co., 66 N.L.R.B. 1317, 1322 (1946) (as test to determine whether employee is a manager or a proper member of a rank and file bargaining unit), *cited with approval in* NLRB v. Bell Aerospace Co., 416 U.S. 267, 276 (1974). Freidson argues that since professional work requires some supervisory and policy-making authority, *see supra* note 189, labor law ought not use the power "to formulate, determine and effectuate management policies" as the test of whether a professional is an employee or a manager. E. FREIDSON, *supra* note 64, at 152-55. Instead, he suggests that the test ought to be whether the professional has power over "resource allocation decisions." *Id.* at 154.

192. Andrew Abbott introduces the concept of jurisdiction to explore the shifting links between professions and the tasks they carry out: "For some, the relation between professions and their work is simple. There is a map of tasks to be done and an isomorphic map of people doing them. Function is structure. But the reality is more complex; the tasks, the professions, and the links between them change continually." A. ABBOTT, *supra* note 69, at 35. Jurisdictional claims argue that certain tasks ought to be allocated, sometimes exclusively, to a particular profession. *Id.* at 59.

ments and "capable of committing substantial quantities of resources to particular courses of action."<sup>193</sup>

Inside counsel may be organizationally dependent, but not, the Inside Counsel Movement claims, thereby less worthy of professional praise. Not kept, not tame, not house-broken, but enlightened: Inside counsel use their professional judgment, enhanced by their understanding of corporate needs, to autonomously evaluate and influence the corporation that employs them. Members of the corporate legal department are not professional *employees*, who might deserve to be treated as second-class citizens within the profession. They are professionals with the power of managers, able if necessary to affirm their professional responsibilities and alter their corporation's "resource allocation decisions."<sup>194</sup> Without such corporate power, they would be "helpless and dependent because they [would] have no control over the "economy" of the organization that employs them."<sup>195</sup> But they attain such power because their work necessarily involves them in how the corporation selects its goals and commitments. And, because they are staff with power, they can be so involved, without compromising their professional ethics.<sup>196</sup>

Analysis of the work inside counsel prize reveals that a broad and ambitious jurisdictional claim for the legal profession is being advanced by the Inside Counsel Movement. In claiming that lawyers ought to manage outside counsel and practice preventive law, the Inside Counsel Movement claims that legal practice includes work in which lawyers use their judgment

193. Slovak, *supra* note 11, at 471, 490.

[T]he general counsel [is one of an] organization's institutional personnel [who] act as articulators of their own organization to those others who constitute the relevant social environment. More specifically, such personnel face both inward and outward vis-a-vis their own organizations; they must plead for, negotiate, and perhaps seize resources and positions for their organizations in the larger social structure while they simultaneously counsel, direct, and demand from their own organizations sufficient levels of performance to attain their goals with normatively prescribed means.

*Id.* at 490.

194. E. FREIDSON, *supra* note 64, at 154 (offering test for deciding if professional is supervisor, and not a proper member of the employees' bargaining unit).

195. *Id.* at 155; cf. M. LARSON, *supra* note 107, at 27-28. Like inside counsel, salaried engineers engaged new tasks:

[T]he function of the engineer was dual, at once technical and economic. Cost being an inherent criterion of the 'rightness of the technical solution,' the civil engineer was expected to advise on the practicability and profitability of new projects, and sometimes he was also expected to engage in promotional activities.

*Id.* at 27. But, engineers usually performed these functions as subordinate employees. *Id.* at 28.

196. Cf. Goldner & Ritti, *Professionalization as Career Immobility*, 72 AM. J. SOC. 489 (1967) (corporate engineers claiming power to affect corporate goals). For a discussion of the various ways in which staffs obtain power over "the line," see D. KATZ & R. KAHN, *THE SOCIAL PSYCHOLOGY OF ORGANIZATIONS* (1966); R. GOLEMBIEWSKI, *ORGANIZING MEN AND POWER: PATTERNS OF BEHAVIOR AND THE LINE-STAFF MODELS* (1967).

for altering their clients' objectives, not just for carrying out orders from clients. Inside counsel, in other words, lay claim to the jurisdiction of the "influential and independent counselor."<sup>197</sup>

If this jurisdictional claim is a "radical" one,<sup>198</sup> it apparently is one which is accepted by the elite business community. According to reports, the large corporations increasingly rely on and trust lawyers' judgment, especially inside counsel's, over a wide range of issues.<sup>199</sup> Corporations cede to lawyers supervisory and managerial responsibilities for their legal function.<sup>200</sup> They include lawyers in the groups choosing their strategic plans. That corporations employ lawyers—whether they hire outside or inside counsel—to practice as "influential and independent counselors" apparently indicates corporate need for a legal profession that assumes jurisdiction to engage in "diagnosis, inference, and treatment"<sup>201</sup> of corporate goals and commitments.

Within the profession, too, there is support for the jurisdictional claim of corporate legal departments. This support comes from at least three sources: first, those whose voices constitute the Inside Counsel Movement; second, those who have changed their attitudes about the professional power and prestige inside counsel deserve; and third, those who have prized those elite firm practitioners who served their clients as "influential and inde-

197. See *supra* notes 83-88; cf. Slovak, *supra* note 11, at 488-89 (inside counsel as "strategist," outside counsel as "tactician").

198. Post, *On Professional Prerogatives*, 37 STAN. L. REV. 459, 462 (1985) (responding to the presentation of the influential and independent counselor role in Kagen & Rosen, *supra* note 49). It is not clear to what extent inside counsel perform new tasks. "The [transactional planning] skills are familiar to business-counseling lawyers." A. CHAYES, *supra* note 24, at § 6.01.

Corporate lawyers move to less charted waters when the legal planning is not tied to specific transactions. . . .

. . . [T]he trend still is for [inside] counsel to go further than the traditional corporate lawyer and provide a wide range of [strategic planning] advice on the legal and regulatory environment—present and projected—that will affect the feasibility, cost and timeliness of those projects. . . .

. . . The programmatic [prevention] approach has little in the way of analogy to traditional corporate law practiced by law firms. . . . All of this represents a large-scale and increasingly sophisticated area of legal practice that generally has no parallel in law firm practice.

*Id.* at § 6.02-.03. Regardless of whether or not inside counsel perform new tasks, they claim and are perceived to be engaged in the practice of law. For a discussion of the various tests for determining what constitutes "the practice of law," see Note, *Is Divorce Mediation the Practice of Law? A Matter of Perspective*, 75 CAL. L. REV. 1093, 1096-1109 (1987).

199. See *supra* notes 6 & 9.

200. "The general counsel . . . has both the right and responsibility to insist upon early legal involvement in major transactions that will raise significant legal issues. This is important leverage." Chayes & Chayes, *supra* note 1, at 281.

201. A. ABBOTT, *supra* note 69, at 40 (defining the "cultural aspect" of jurisdictional claims).

pendent counselors.” For example, Harold Williams is not just a zealous regulator, but is a supporter of the sentiments articulated by the Inside Counsel Movement in castigating “the mistaken belief—ultimately corrosive of the bar, the corporation and private enterprise itself—that anything which is not illegal is within the realm of the acceptable” and in advancing the claim that “lawyers—along with their more mundane responsibilities—must be architects of the accountability process which provide the corporate structure with the discipline necessary for effective decision-making.”<sup>202</sup>

But within the profession there also is some opposition to the Inside Counsel Movement’s jurisdictional claims. At least one scholar has argued that the “influential and independent counselor role” exceeds “professional prerogatives.”<sup>203</sup> But more important, outside counsel restrict the profession’s jurisdictional claims in normatively defining proper professional action by their own work. As an elite firm business lawyer argued:

Clients want to know what it is to comply and how far they can go in a certain area. It would be a conflict of our responsibility to the client if we would factor in their responsibility to the public and it would be a conflict of our responsibility to the profession if we would factor in their business realities.

Or, as another elite firm practitioner explained about the proper role of a litigator: “Our job is simply to advise the client about the legal risks. The effect of the case on employee development and morale is the client’s concern. It is not ours. Yes, it is important to the client, but we don’t think about it.” Why? A managing partner offered the following argument: “I believe decisions should be made by the client . . . . The biggest problem is that everybody would like someone else to make their decisions. I try not to do that.”

These lawyers define the proper professional role by what William Simon has called the lawyer “kiss-off[s]”:<sup>204</sup> “I’d like to help, but my hands are tied;”<sup>205</sup> “I’d like to help, but it’s not my job;”<sup>206</sup> “Things are not as bad as you think.”<sup>207</sup> Even if these kiss-offs were supported philosophically,<sup>208</sup> they deny the claims voiced by the Inside Counsel Movement and supported

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202. H. Williams, Address to the ABA Section of Corporation, Banking and Business Law (Aug. 5, 1980), reprinted in *SEC Chairman’s Remarks on Corporate Lawyer Responsibilities*, Legal Times of Wash., Aug. 11, 1980, at 24, cols. 1, 3.

203. Post, *supra* note 198.

204. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29.

205. *Id.* at 44 n.29 (“the Positivist kiss-off”).

206. *Id.* at 75 n.100 (“the Purposivist kiss-off”).

207. *Id.* at 102 n.156 (“the Ritualist kiss-off”).

208. *See id.* (rejecting their philosophical support).

by their corporate employers. It is little wonder, then, that inside counsel accuse such lawyers of engaging in unprofessional behavior.<sup>209</sup>

In response, outside counsel may suggest that the corporate legal department, like other organizational divisions, can be seized by a territorial imperative and seek to expand the contingencies in which it plays an institutional role. But lawyers, they claim, have no responsibility to start influencing the "economy" of the corporations they serve. Indeed, so acting would take them out of the profession's jurisdiction and mandate.

The Inside Counsel Movement thus challenges the profession to take a side on whether lawyers ought to be "influential and independent counselors." If, for example, preventive law programs extend too far the profession's jurisdictional claims, because they may require lawyers being complicit in too much non-compliance, then the profession might want to resist the Inside Counsel Movement. On the other hand, the profession might support a jurisdictional claim to the independent and influential counselor role. It might recognize that professional judgment involves not only expertise but also political judgment about how to exercise corporate leadership.<sup>210</sup>

It certainly is correct that the profession cannot give its members the power of institutional personnel in elite corporations. The profession must battle for corporate power both collectively and through the actions of its members. Lawyers play a part in formulating and effectuating corporate policy, but the part they play must be negotiated in each context. Of course,

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209. As one inside counsel noted, outside counsel, especially "younger lawyers don't have a sense of entrepreneurial or client responsibility . . . They're dealing solely with legal issues . . . They don't have the broad view. They have no desire to deal with personal relationships. It's just, 'I'll do my work to the best of my ability, and that's it.'" Maher, *supra* note 5, at 47 (quoting Berne Rolston, former outside counsel). Another inside counsel reports:

I have seen innumerable instances in which the outside counsel has given strong advice with a clear understanding that it would not be followed by the corporate management. The lawyer has then left it as a management decision, done nothing to prevent the action, and continued to represent the corporation.

Fortunately, or unfortunately, [inside counsel] for a corporation do not have the privilege of avoiding responsibility for the ultimate action of the corporation. Creighton, *Inside v. Outside*, AM. LAW., Nov. 1984, at S-6.

210. Professor Post argues that the influential role requires more than professional expertise and threatens to de-politicize the matters with which it deals. Post, *supra* note 198, at 463, 464. The analysis here accepts the first point. Inside counsel in exercising influence make political choices. They do not merely apply their expertise. They vie in corporate political processes over issues for which there is not one determinate answer. They need corporate power. This analysis emphasizes the political role of corporate lawyering and if taken seriously should counter the prediction which is Professor Post's second argument. Recognizing the political nature of the corporation and the lawyer's role as one of the actors therein ought to forestall an understanding of lawyer's work in which corporate social responsibility "slips from the arena of public discussion, and its roots in ethics and public policy fade from public awareness." *Id.* at 464. On the contrary, the fact that corporations need influential lawyers, whose work in particular contexts is open to evaluation by both professional and corporate norms, might provide possibilities for raising questions about what degree of control ethics and public policy ought to have in corporate decisionmaking.

this negotiation occurs against a backdrop of professional claims.<sup>211</sup> But, the profession cannot cede to its individual practitioners power that it doesn't possess, in particular, corporate power. That power must be won and maintained.

However, the profession can choose to support jurisdictional battles. The jurisdictional claims of a profession need to be maintained by a series of initiatives and responses in a competitive market and a diversified profession.<sup>212</sup> It is a characteristic of professions that they challenge boundaries maintained by social structures, and the capacity to do so marks strong professions.<sup>213</sup> As Talcott Parsons reminded us, professions are committed to authority stemming from the "specificity of function,"<sup>214</sup> not from that which "is distributed and institutionalized in terms of office,"<sup>215</sup> as in bureaucracies, or in "the 'terms of the contract,'"<sup>216</sup> as in contractual relations. The role of the professions in the social structure, their social significance, depends on their increasing possibilities for realizing value by re-aligning the structural boundaries maintained by these different bases of authority.<sup>217</sup> The jurisdictional claims of professional groups are needed to "throw much light on important strains and instabilities" in current organizational arrangements.<sup>218</sup>

If the Inside Counsel Movement's jurisdictional claims are to be maintained, support from the profession will be needed. Like elite firm partners who have become investment bankers, or inside counsel who have become managers, lawyers in the corporate legal department may find greater rewards in identifying themselves as law managers, not corporate counsel. And non-lawyer legal consultants might substitute for inside counsel.<sup>219</sup> Lawyers who serve individuals are beset by competition by lay competitors, such as do-it yourself publishers and title insurance companies. Lawyers

211. In negotiations between professionals and their employers about the scope and conditions of professional work, "self respect, reputation, and career are at stake. . . . [T]he negotiation takes place from a position of professional worth and values and involves a whole rhetoric of professional claims." In comparable negotiations with non-professional employees, at stake is merely "convenience and ease on the job." Bucher & Stelling, *supra* note 82, at 5-6.

212. See A. ABBOTT, *supra* note 69; see also, Johnstone, *The Unauthorized Practice Controversy, A Struggle Among Power Groups*, 4 U. KAN. L. REV. 1 (1955).

213. A. ABBOTT, *supra* note 69, at 280-314. One justification for unauthorized practice of law enforcement is that a strong profession guards against encroachments. See Johnstone, *supra* note 212. Of course, client interests might suggest that some work ought to leave the profession's jurisdiction.

214. T. PARSONS, *The Professions and Social Structure*, in *ESSAYS IN SOCIOLOGICAL THEORY* 38 (Rev. ed. 1954).

215. *Id.* at 39.

216. *Id.*

217. *Id.* at 47-49.

218. *Id.* at 49.

219. One lesson from Japan is that a bar can be organized so that only the smallest percentage of law graduates become lawyers.

who serve corporations also face sophisticated competition from management consultants, investment bankers, accountants, safety engineers, and the managers with whom they deal, among others. It ought not to be forgotten that not too long ago in the history of the profession it was opined that "[p]robably in the aggregate more investment advice is given by lawyers than by all other advisors combined."<sup>220</sup>

At the least, the Inside Counsel Movement challenges the profession to decide whether to include service as corporate institutional actors within the elite lawyer's "self-concept" and "image."<sup>221</sup> The inclusion of this role is maintained by the rising status of inside counsel. It also is maintained by identifying outside counsel with the clients they serve (for example, Covington & Burling is not South African Airway's firm).<sup>222</sup> But it is at risk where the kiss-offs are taken to normatively define the profession's jurisdictional claims.

The challenge of the Inside Counsel Movement can be seen in miniature by focusing on the appellation it prefers to that of inside counsel: "corporate counsel."<sup>223</sup> This name has a denotation that extends beyond members of corporate legal departments. Those elite firm practitioners who serve on corporate boards of directors sometimes also are called "corporate counsel."<sup>224</sup>

In the period in which inside counsel claim to be "corporate counsel," it is increasingly urged that outside counsel "should cherish our independent judgment to the utmost, and that independence is impaired if we become a director of a company of which we are also counsel."<sup>225</sup> To protect themselves from temptations, outside counsel are urged to withdraw from corporate boards.<sup>226</sup> The integrity of the profession seems to be strengthened when outside counsel protect their independence and refuse to serve on corporate boards.

Is the profession served if outside counsel are just going to be replaced on corporate boards by inside counsel? The lawyer-director, after all, was

220. *Investment Trusts and Investment Companies, 1940: Hearings on S. 3580 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 76th Cong., 3d Sess. pt. 1, 27, 712 (1940) (statement of Douglas T. Johnston, Vice President of the Investment Counsel Association of America) quoted in *Lowe v. SEC*, 472 U.S. 181, 195 n.38 (1984).

221. Cf. E. SMIGEL, *supra* note 2, at 255-56 (analyzing the importance of pride to the operations of the large law firm).

222. J. GOULDEN, *THE SUPERLAWYERS* 51-52 (1971).

223. See *supra* note 1.

224. See, e.g., Note, *supra* note 31 (analyzing duties as directors of outside general counsel in terms of the duties of "corporate counsel-directors").

225. Cary, *Professional Responsibility in the Practice of Corporate Law—The Ethics of Bar Associations*, 29 REC. AM. B. CITY N.Y. 443, 446 (1974). See generally sources cited in Riger, *The Model Rules and Corporate Practice—New Ethics for a Competitive Era*, 17 CONN. L. REV. 729, 743 n.54 (1985).

226. See, e.g., Riger, *supra* note 225, at 745-46.

to be appointed so he could combine his legal knowledge with "the knowledge of the company and the insight which he gains in his position" to advance responsible corporate action.<sup>227</sup> Inside counsel, as we have seen, supposedly are employed by corporations for just this reason. Won't they claim the seat on the Board given up by outside counsel? What does the profession gain by substituting one high-status lawyer for another whose professional status reportedly is not qualitatively different from that of elite firm practitioners?<sup>228</sup> And, if the argument is accepted that lawyer-directors need independence, doesn't the profession decrease its capacities for ethical action by supporting the substitution of organizationally dependent for organizationally independent lawyers? Outside counsel who refuse to serve on corporate boards may relieve themselves from facing difficult choices. But for the profession, isn't this just a Pontius Pilate solution?

Instead of arguing that outside counsel ought not serve on corporate boards because their independence might be compromised, it might be argued that lawyers ought not so serve because it involves them in making decisions that extend beyond the profession's jurisdiction. Regardless of whether or not economic temptations make conscientious law firm practitioners reluctant to serve on corporate boards, perhaps the profession ought not to esteem such service because lawyers ought not be important political actors within corporations.<sup>229</sup> Because directors are required to make mixed legal/business judgments and decide corporate policies, it might be argued, it is inappropriate for lawyers to serve as directors, and only appropriate for them to be called on as consultants to offer that which is within the profession's jurisdiction, legal advice.<sup>230</sup>

On the other hand, the Inside Counsel Movement claims that lawyers can gain the corporate power necessary so that their professional judgment is not compromised and influences the corporation toward legal ends. And, whatever outside counsel do, corporations will hire lawyers to serve on their boards because they recognize the need for lawyerly judgment. The Inside

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227. Note, *supra* note 31, at 792.

228. I know of no discussion of the lawyer-director issue that recognizes that, at best, the efforts to suggest that it is ethically improper for outside counsel to serve on boards might result merely in their substitution by inside counsel. Other discussions do not appear to recognize that the profession successfully has made a jurisdictional claim for the work lawyer-directors perform. Corporations appear to feel they need lawyers, employing inside counsel when it is more efficient, to be institutional personnel.

229. A comparison with the medical profession might be useful to support this argument. Certainly, a doctor serving as Surgeon General of the United States can be an esteemed member of her profession. But, the medical profession certainly doesn't include within its esteemed elite a Dr. Scholl or a doctor serving as an institutional actor at a health food, let alone a tobacco, company.

230. See Mundheim, *supra* note 31, at 1514-15 (remarks of Sonde and Bialkin, participants in panel discussion) (legal advice should not be influenced by business judgment); Rostow, *supra* note 31, at 147-48.



Counsel Movement challenges the profession to confront the inconsistency between the increased status it accords inside counsel and its claims that outside counsel ought to withdraw from corporate boards. It also challenges the profession to decide whether it will override client demands for lawyers to be influential and independent counselors.

Whether the profession can maintain a jurisdictional claim for lawyers being influential corporate actors is a question of fact.<sup>231</sup> Whether it ought to impose restrictions on its jurisdictional claims is a normative question. Ought the ideal and practice of the independent and influential counselor be supported by the profession?<sup>232</sup>

A pragmatic answer might address whether it would be better for inside counsel to see themselves as law managers, rather than corporate counsel with high professional status. It also might address whether inside counsel's influential advice ought to be relinquished to others, as the profession has relinquished investment advice to others. If so, the argument has not been made. The Inside Counsel Movement has been welcomed within the profession and inside counsel's capabilities for meeting professional standards has been acclaimed.<sup>233</sup>

Assuming that independent and influential counselors do more good than harm,<sup>234</sup> the rejection of this role is best supported by appeals to client

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231. *But see* Larson, *On the Nostalgic View of Lawyers' Role: Comment on Kagan and Rosen's 'On the Social Significance of Large Law Firm Practice,'* 37 STAN. L. REV. 445 (1985) (arguing that it is inevitable given corporate needs that lawyers will not be called upon to play an influential role).

232. For a different answer to this question, see Kagan & Rosen, *supra* note 49.

233. Inside counsel's recognition is consistent with professional history: The jurisdictions inside counsel now claim, the profession once claimed for outside counsel, who were praised for influencing corporate choices by their professional judgments. *See supra* notes 86, 148 & 217 and accompanying text. Unless inside counsel stand where giants once trod or inside counsel's lack of organizational independence results in their co-optation, rejecting inside counsel's claims would sever the profession from its historic claim of moral and social significance for its members who challenged the boundaries of professional jurisdiction in becoming trusted advisors of management.

234. I cannot prove this assumption. I only have three indicators that it might be true. First, there are examples of positive benefit flowing from lawyer influence and the low reported incidence of the manipulator role. *See Kagan & Rosen, supra* note 49. Second, there is the use of *in terrorem* decrees, rather than closely defined regulations, by courts seeking to stimulate lawyers to be influential corporate actors. *See, e.g., In re Carter & Johnson*, Exchange Act Release No. 34-17597, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847 (Feb. 28, 1981). The third evidence I have is that inside counsel, by playing the influential and independent counselor role, have gained professional status. As this paper is written to hold the profession to its ideals, I take this to indicate that inside counsel are realizing professional values.

Nevertheless, it may be that overall lawyer influence has a negative effect. This may result from inadequacies in the law or the spread of overcompliance. *Cf. R. KAGAN & E. BARDACH, supra* note 163 (regulators demanding strict legal compliance may do more harm than good). It also may result because businessmen or safety engineers are more committed to legal and moral norms than are their lawyers, bearers of an amoral morality. *Cf. Pepper,*

autonomy: Clients ought to have the autonomy to use lawyers for the special purposes (within the law) they choose. Whatever validity this argument generally has, it is at its weakest when applied to large corporate organizations.<sup>235</sup> And, this argument is not empirically supported by current corporate demands. Large corporate clients have not rejected lawyers being influential corporate actors. In an era in which clients employ inside counsel to be institutional personnel, it is not lawyer's exercising influence over their clients that is paternalistic. It is the profession's rejection of the independent and influential counselor role that bespeaks paternalism.

It might be argued that corporate demand for inside counsel is not a valid indicator of autonomous choice because corporate decisions have been distorted by lawyers' claims of broad jurisdiction. But even if we were to assume that large corporations' consumer power is constrained by the profession, the premise that they would not hire lawyers but for the profession's claims is not well supported by the reports of the Inside Counsel Movement. Rather than resisting broad claims by the legal profession, clients are giving new tasks and responsibilities to inside counsel.

While the tradition of the professions has been that "the client, unlike the customer, is not always right,"<sup>236</sup> there has been a movement in recent years toward a consumer model of professionalism.<sup>237</sup> The appeal to consumer power, as the Rules of Professional Conduct demonstrates,<sup>238</sup> however, must be balanced against proper professional interests. Control over the services supplied is a basic and justifiable part of the professionalization

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*The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (arguing that lawyers ought to adopt an amoral morality). Furthermore, more harm than good may result because lawyers actually have little influence so that the dominating result of lawyers claiming influence is the mystification of predatory capitalism. Cf. Gordon, *supra* note 63.

But even if, in the past, lawyers have not merited moral praise, the influential and independent counselor role creates possibilities for the profession to realize value, and this essay is directed toward that realization. Cf. Lorne, *supra* note 83, at 429 ("While there are no reliable data, it is clear that most corporate lawyers try to persuade their clients to operate in a socially desirable manner . . .").

235. M. DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY (1986) (corporation's autonomy rights are only derivative from the autonomy rights of their constituents); Rhode, *Ethical Perspective on Legal Practice*, 37 STAN. L. REV. 589, 595-605 (1985) (criminal defense paradigm for legal ethics inappropriate as applied to large corporations).

236. Marshall, *The Recent History of Professionalism in Relation to Social Structure and Social Policy*, in CLASS, CITIZENSHIP, AND SOCIAL DEVELOPMENT 164 (1965).

237. See Leubsdorf, *Three Models of Professional Reform*, 67 CORNELL L. REV. 1021, 1023, 1026-35 (1982); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977). For the professions generally, see Illich, *Disabling Professions*, in DISABLING PROFESSIONS (1977); Barber, *Control and Responsibility in the Powerful Professions*, 93 POL. SCI. Q. 599 (1978).

238. See, e.g., RPC, *supra* note 21, at Rule 1.7(a) (client consent does not cure all conflicts).

project.<sup>239</sup> How far this project constrains “the scope and nature of the lawyer’s representation” and expands matters that are “related to the representation” is defined both by individual professionals and by professional processes.<sup>240</sup>

In the current situation, if the profession were to limit its jurisdictional claims and lawyers striving to elite status were not willing to be influential actors, clients’ first response would be to hire less professionally directed lawyers. The Inside Counsel Movement claims that when high-status lawyers refuse to assume influential corporate roles, clients receive lesser quality service. The rejection of its claims in the name of consumer power insures that clients, until lawyers are replaced by other specialists, will receive less professional service. Again, the Inside Counsel Movement challenges the profession to articulate why lawyers ought not play a political role in client decisionmaking. It challenges the profession either to affirm the burden of the profession’s past claims or to articulate why resistance to the Inside Counsel Movement does not deny past claims to the moral and social significance of the practice of the influential and independent counselor role.

It perhaps is not inappropriate to personalize the challenge of the Inside Counsel Movement. The analysis here suggests the following: Any member of the legal profession who accords increased respect to lawyers working in corporate legal departments, perhaps someone like yourself, is recognizing the political nature of professional judgment; lawyers influence not only corporate actions to comply with the law, but also corporate goals and commitments beyond the law’s dictates. This recognition, I hope, includes demanding ethical responsibilities in the exercise of this influence. The Inside Counsel Movement thus has led the most surprising group of people to recognize that corporate lawyers function as responsible politicians. Beyond the ideology of procedural justice, discussion is required by the Inside Counsel Movement of what are the demands of the political responsibility which the profession exercises and praises.

### *B. Rule 1.13: Organizational Representation and Corporate Power*

“Who is the Client?” is a question that arises whenever professional judgment is pitted against client directives. It does not arise, at least with any compelling difficulty, when the lawyer and client are agreed on what

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239. See M. LARSON, *supra* note 107, at ch. 4 (basis of professionalization project is to define supply); Garth, *Independent Professional Power and the Search for a Legal Ideology with a Progressive Bite*, 62 IND. L.J. 183 (1987) (legal profession justifiably has power to limit what is supplied).

240. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988) (providing examples).

the lawyer ought to do. It arises when the client questions the lawyer's diagnoses of the client's problem, her inferences about what needs to be known about or is relevant to the problem, or her recommendations as to how to treat the problem.<sup>241</sup> Then the lawyer and client both claim jurisdiction to determine how the lawyer's work should proceed. The question "Who is the client?" arises because law is a client-serving profession, so that professional work is not determined only by the professional's judgment, but also by exercises of the client's autonomy rights to control the lawyer's service.<sup>242</sup>

The shared jurisdiction of lawyers and clients over lawyers' actions has two basic constraints. First, regardless of who is the client, the client's power is restricted by the profession's exclusive control over certain jurisdictional areas: The lawyer may not engage in certain work regardless of client directions.<sup>243</sup> Second, compliance with client directives requires the lawyer to ascertain that client decisions are made autonomously, as for example, by being informed choices.<sup>244</sup>

Like a lawyer serving individuals, a lawyer serving organizations is bound by the profession's claim to exclusive jurisdictional control: Organizational representation, according to the Rules of Professional Conduct, "does not limit or expand the lawyer's responsibility" to not engage in prohibited actions.<sup>245</sup> But, unlike a lawyer serving individuals, a lawyer serving an organization cannot readily ascertain the client's decision. In all representation, ascertaining client decisions is difficult because the client is not only autonomous from the lawyer but also dependent on her. Lawyers can influence clients. But, the test of improper influence—whether the client is deprived of the right to make an autonomous decision—normally is unproblematically defined for individual legal service by legal and cultural norms for the "comprehending and responsible adult."<sup>246</sup> When organizational lawyers' professional judgments are pitted against the directives of corporate actors, however, the test is more difficult, because it is not an autonomous actor which is being served, but a corporation.<sup>247</sup>

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241. Cf. *supra* text accompanying note 210.

242. See *supra* note 27 (discussing client's rights over lawyer actions).

243. See, e.g., RPC, *supra* note 21, at Rule 1.2(e).

244. See *id.* at Rule 1.4, 1.14 (on determining the client's decisions). In determining what are client decisions, the lawyer needs to ascertain that the client's reasoning processes meet minimal standards. Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454.

245. RPC, *supra* note 21, at Rule 1.13 comment 6.

246. *Id.* at Rule 1.4 comment 3.

247. *Id.* at Rule 1.13(a). The problem for the lawyer might be described as one of how to "resolve the conflict between the dictates of loyalty to a professional ideal, to a transcendent and nebulous client, and to immediate colleagues and possibly close personal friends." Slovak, *supra* note 60, at 757. Assuming professional loyalty, the question boils down to how the claims of a lawyer's judgment are put into effect when the lawyer and corporate agent both have claims to ascertain and influence what are the corporate interests.

In addressing the problem of organizational representation, Rule 1.13 of the Model Rules of Professional Conduct<sup>248</sup> addresses both the scope of the profession's jurisdictional claims and the manner in which the lawyer ascertains the organization's decisions. The following analysis of the Rule begins with a brief discussion of the profession's exclusive jurisdictional claims. This analysis draws on the facts about corporate legal service developed in the previous sections. Thereafter, it addresses two major problems with interpretations of Rule 1.13. The Rule sets forth a minimal claim to exclusive jurisdiction that the Comment inexplicably interprets as defining the maximal extent of a lawyer's jurisdictional claims. The scope thereby set out does not accord with the jurisdictional claims made by inside counsel and that apparently are accepted by their corporate employers. Furthermore, in defining how client decisions are ascertained, the Rule relies on a hierarchical chain-of-command that bears little relation to the dynamics of large organizations. To make these points, the discussion returns to client demands for the new breed of inside counsel. To that extent, this argument only addresses organizational representation of large corporate clients. Consequently, this argument may be limited to indicating that although Rule 1.13 has been praised for affirming inside counsel's "professional status and stature,"<sup>249</sup> it neither supports the Inside Counsel Movement's jurisdictional claims nor their actions to maintain and gain corporate power. But, to the extent the Movement's claims are supported by our general knowledge of organizations,<sup>250</sup> this argument has a further reach.

The problem is that Rule 1.13 can be interpreted as offering a metaphysics that is inappropriate to organizational life. To hold, for example, that the client is "a distinct entity, clearly definable and the source of identifiable lines of authority"<sup>251</sup> is both descriptively false and normatively ignorant. It assumes that goals come first and action comes later.<sup>252</sup> Most important, it assumes that organizational goals are decided independently both of how its legal services are organized and what lawyers actually do. The Rule asks "Do organizations have goals?" The Rule appears to answer that goals emerge from and are ascertained by the client's formal organizational chart.

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248. RPC, *supra* note 21, at Rule 1.13.

249. Pirsig, Book Review, 1986 N. ILL. U. L. REV. 133, 139 (reviewing G. HAZARD & W. HODES, *THE LAW OF LAWYERING* (1985)).

250. See *supra* notes 145, 149, 150-52, 162-63, 167 & 177-79 and accompanying text.

251. ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 350 (1988) (D.C. Bar Association Opinion identifying agency not "public interest" or "entire government" as government lawyer's client).

252. See March, *supra* note 126. Rule 1.13 appears to present a hierarchical command structure as embodying the norms of a "comprehending and responsible" organization. Cf. *supra* text accompanying note 246. For organizational comprehension or response to their environments, including the legal one, such norms are neither descriptive of our major corporate organizations nor deemed desirable by current organizational theory. See, e.g., sources cited *supra* at notes 145, 150, 152, 163 & 179 and *infra* at notes 273 & 276.

Organizational analysts know this is descriptively false. They suggest that the proper questions for determining "Who is the client?" are: "Who sets organizational goals, and How are organizational goals set?"<sup>253</sup> These questions place ethical responsibilities on those involved in the goal-setting processes, not on an abstracted agency that limits responsibility by "identifiable lines of authority."

With respect to the profession's claims to exclusive jurisdiction, Rule 1.13 grants to lawyers professionally backed power to require the corporate hierarchy to ratify agent decisions: For a limited class of actions,<sup>254</sup> the lawyer has the professional obligation to force "reconsideration"<sup>255</sup> all the way up to "the highest authority that can act in behalf of the organization."<sup>256</sup>

As such, the Rule does not so much guide organizational representation as indicate the procedure to be followed in withdrawing from representation. The Rule is a sensible solution for the case on which much professional attention has been focussed: when the corporate board rejects the lawyer's recommendations.<sup>257</sup> In other cases, as noted in the discussion of preventive law, seeking a veto by formal review threatens to breach the trust necessary for continuing lawyer-client relations.<sup>258</sup> As Professor Gillers puts it, the Rule tells the lawyer that "[y]our responsibility to a corporate client who is gravely wronged is to be silent and walk away."<sup>259</sup>

In most cases, the Rule is, at best, irrelevant or, at worse, counterproductive. As staff or consultants, lawyers often are called upon to contest managerial decisions. They need more effective power than demanding hierarchical review.<sup>260</sup> To the extent then that the lawyer is directed to seek

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253. W. SCOTT, ORGANIZATIONS: RATIONAL, NATURAL AND OPEN SYSTEMS 264 (1981).

254. The Rule defines the exclusive jurisdictional claims to which the Rule applies as those matters that are "related to the representation that is a violation of a legal obligation to the organization, or a violation of the law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization." RPC, *supra* note 21, at Rule 1.13(b). The scope of the profession's exclusive jurisdiction may be drawn too narrowly. See, e.g., Gillers, *Model Rule 1.13(c) Gives the Wrong Answer to the Question of Corporate Counsel Disclosure*, 1 GEO. J. LEGAL ETHICS 289 (1987).

255. When a corporate actor is "engaged in action, intends to act or refuses to act in a matter." RPC, *supra* note 21, at Rule 1.13(b).

256. *Id.* at Rule 1.13(b)(1), (3). This process may involve bringing in support from "a separate legal opinion." *Id.* at Rule 1.13(b)(2).

257. See, e.g., G. HAZARD, ETHICS IN THE PRACTICE OF LAW 43-68 (1978).

258. See *supra* notes 162-63 & 177-79 and accompanying text; see also Kaplan, *Some Ruminations on the Role of Counsel for a Corporation*, 56 NOTRE DAME L. REV. 873 (1980). To be influential with clients, a lawyer "must avoid being perceived within the corporate hierarchy as an officious tale-telling intermeddler." *Id.* at 878.

259. Gillers, *supra* note 254, at 304.

260. See *supra* Section II(b), (c); see also Gillers, *supra* note 254, at 299 n.47 ("The corporate lawyer, like any supervisor, who comes across pilferage or minor expense account padding would, absent explicit contrary instruction, enjoy implied authority to caution the actor without having to report him.").

review of subordinate decisions through hierarchical channels, the Rule will deprive many lawyers of the corporate power reposed in them to operate outside hierarchical channels. It will stifle their abilities to influence corporate actors. Better, then, that the Rule's emphasis on corporate hierarchy be taken as largely irrelevant, and that the use of hierarchical channels is only suggested as one way to pursue corporate compliance for those exceptional cases where formal review better complies with the Rule's directive to "minimize disruption of the organization."<sup>261</sup>

Rather than interpreting the Rule as only setting forth directives when the corporate board approves illegalities, the Rules' comments and the notes that accompanied its 1981 Draft suggest that the Rule also defines the maximal limits of corporate lawyers' jurisdiction. The 1981 Draft Legal Background Notes state: "The boundaries of the lawyer's proper concern, and thus the scope of his professional obligation, are marked by the law defining the authority . . . vested in the . . . agents of the organization."<sup>262</sup> This restriction of a lawyer's proper jurisdictional claims is supported by the Comment to the Rule:

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. . . . Clear justification should exist for seeking review over the head of the constituent normally responsible for it.<sup>263</sup>

In other words, lawyers are only to challenge agents who have "no authority."<sup>264</sup> Organizational representation "does not require challenging . . . decisions [that] are properly within the scope of the other agent's authority."<sup>265</sup> It certainly is the case that where an agent has no authority to take the contemplated action for the corporation that the lawyer, within "the scope of his professional obligation," may require that the act be ratified. But why ought "[t]he boundaries of the lawyer's proper concern [be] marked by the law defining the authority of [other] agents?"

The justification is that corporate agents have a right to act without lawyer second-guessing, fenced by what constitutes breaches of the law<sup>266</sup>

261. RPC, *supra* note 21, at Rule 1.13(b). Rule 1.13(b)(1) to (3) are offered as "measures among others." *Id.*

262. ABA Commission on Evaluation of Professional Standards, Model Rules of Professional Conduct, Notes on Rule 1.13 (Proposed Final Draft 1981), *reprinted in* Slovak, *supra* note 60, at 781-94 [hereinafter 1981 RPC Draft]. The Notes criticize the Code of Professional Responsibility because its "provisions do not define the areas of decisionmaking with which the lawyer should be professionally concerned . . ." *Id.* at 790.

263. RPC, *supra* note 21, at Rule 1.13 comment 4.

264. 1981 RPC Draft, *supra* note 262, at 790 ("[A]gents have no authority *supra* seek illegal ends or employ unlawful means.").

265. *Id.* at 791.

266. RPC, *supra* note 21, at Rule 1.13 comment 4 ("[D]ifferent considerations arise when the lawyer knows that the organization may be substantially injured by action of constituent that is in violation of law.").

or of their fiduciary duties.<sup>267</sup> In this argument, the language of the Rule that an organizational actor is not just a "person connected with the entity,"<sup>268</sup> but is a "constituent"<sup>269</sup> of the corporate body takes on an implication it cannot hold. Corporate agents are taken to be constituents possessing rights bestowed by the corporation by whatever is its current allocation of responsibility and channels for review. According to the Comment, the organization has a clearly defined hierarchy that must be respected by the lawyer it employs.<sup>270</sup>

The problem with this understanding is that it gives too much rigidity to dynamic corporate bodies. Corporate actors certainly are bearers of their own rights; they are people. Consequently, serving organizational clients generates conflict of interest problems.<sup>271</sup> But, corporations do not bestow rights on their agents.<sup>272</sup> To its actors, the corporation allocates power, which for them is a dynamic, shifting resource.<sup>273</sup> The jurisdictional limits established in the Comment transforms the powers corporations give their agents into rights as against lawyers.

It may be true that exercises of state power to resolve disputes ought to take place by testing rights in prescribed channels. It is not at all clear however that organizational clients are best served by adopting a comparable system for dispute resolution. Consider, for example, what jurisdictional claims and responsibilities for raising disputes corporations place on their managers. How would a corporation treat a manager who saw a serious problem and decided not to do anything about it because it was outside his job definition?<sup>274</sup> How should a corporation treat a manager who failed to

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267. *Id.* ("Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest.").

268. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (1981) [hereinafter CPR].

269. RPC, *supra* note 21, at Rule 1.13(a).

270. Lawyers should act through "prescribe[d] channels for such review." *Id.* at Rule 1.13 comment 4.

271. *Id.* at Rule 1.13(d), (e).

272. This does not deny that the law may impose duties, and correlative rights, on particular members of the corporate governance structure. *See, e.g.,* REVISED MODEL BUSINESS CORP. ACT § 8.30 (1984) (duties of directors).

273. *See supra* notes 151-52 and accompanying text; *see also* M. CROZIER, *THE BUREAUCRATIC PHENOMENON* (1964); H. SIMON, *ADMINISTRATIVE BEHAVIOR* 220-22 (1947); O. WILLIAMSON, *CORPORATE CONTROL AND BUSINESS BEHAVIOR* 41-53 (1970); Lazarsfeld & Menzel, *On the Relationship between Individual and Collective Properties*, in *A SOCIOLOGICAL READER ON COMPLEX ORGANIZATIONS* 499 (A. Etzioni ed. 1969) (corporate power operates not through individual choice but through complex decision processes).

274. *Compare* RPC, *supra* note 21, at Rule 1.13(b) (limiting duties to matters "related to the representation") with *Corporate Attorneys Going to Preventive Law*, *supra* note 6 (in a survey of Fortune 500 top executives, 74% responded that "the legal staff should initiate involvement in corporate activities").



warn the corporation because he was not certain that it would be substantially injured?<sup>275</sup>

Managers and inside counsel have more responsibility and discretion to define their jurisdiction than the Rule gives lawyers. Managers understand the presence of conflict is endemic in business and that, although hierarchical review threatens disruption, to get along, you don't have to go along.<sup>276</sup> The problem in solving conflict by using hierarchical channels is that conflict "is a function of disagreement over the reality of interdependence."<sup>277</sup> When "the lawyer validly assumes that his client has directed him to defer to the decisions of his co-agents,"<sup>278</sup> she denies the interdependence that the corporation has sought to establish by hiring lawyers.

The "areas of decision-making with which the lawyer should be professionally concerned"<sup>279</sup> set forth by the 1981 Notes and Comment to the Rule do not comport with those claimed by the Inside Counsel Movement. The Movement's justification originates in clients who hire lawyers to make "[d]ecisions concerning policy and operations." Restricting lawyers' jurisdiction by other agents' authority both fails to recognize inside counsel's practice, which involves them within the jurisdiction of other agents in mixed law/business questions, and undermines their claims to be recognized as high status lawyers. If professional jurisdiction is so limited, inside counsel, like lawyers who have left the profession to become business managers, practice outside of the profession's concerns.

Rule 1.13 speaks as if lawyers had no corporate power. The profession cannot cede to its lawyers corporate power, but it can attempt to take away power and responsibilities imposed on its members by clients. May a lawyer challenge a corporate decision within another agent's authority? If the lawyer has not won the power to determine the decision, must the lawyer withdraw her jurisdictional claim? When a lawyer possesses requisite corporate power, there is no "problem of conflict between a lawyer's professional judgment and that of an organization officer or employee."<sup>280</sup> Except to the extent she unethically wields her power,<sup>281</sup> ought not, as inside counsel claim, the lawyers' "allegiance to the entity"<sup>282</sup> include using whatever corporate power they possess?

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275. Compare RPC, *supra* note 21, at Rule 1.13(b) (requiring that the lawyer "know" and using "substantial injury" as one test for initiating action) with J. DONNELL, *supra* note 169, at 83 (executives want inside counsel advice on corporate social responsibility) and Stichnoth & Dolan, *supra* note 157 (managers criticize lawyers who do not anticipate problems).

276. P. LAWRENCE & J. LORSCH, ORGANIZATION AND ENVIRONMENT 222 (1967); Thomas & Schmidt, *A Survey of Managerial Interest with Respect to Conflict*, 1976 ACAD. MGMT. J. 315. For a discussion of the general functionality of conflict, see L. COSER, THE FUNCTIONS OF SOCIAL CONFLICT (1956); G. SIMMEL, CONFLICT AND THE WEB OF GROUP-AFFILIATIONS (1955).

277. V. THOMPSON, MODERN ORGANIZATION 108 (1977).

278. G. HAZARD & W. HODES, *supra* note 249, at 234.

279. 1981 RPC Draft, *supra* note 262, at 790.

280. *Id.*

281. For example, if the corporate actors with whom the lawyer deals are not personally

The language of the Rule might be interpreted to support such a reading. Rule 1.13(b) instructs the lawyer to proceed by balancing against each other the need for action,<sup>283</sup> the lawyer's responsibilities<sup>284</sup> and the various responsibilities weighing on the corporate agent.<sup>285</sup> From this, it might be inferred, as the Inside Counsel Movement claims, that "the lawyer and other agents of the entity are on the same legal footing [and may proceed by] overruling, if need be, the views of other highly placed agents."<sup>286</sup> Although this formulation attempts to give lawyers more power than they might be able to win,<sup>287</sup> it recognizes that lawyers' jurisdiction with respect to their corporate clients is won in struggles over the scope of a lawyers' responsibilities.

The balancing suggested by the language of the Rules leaves lawyers and clients to negotiate about jurisdiction and power. This recognizes that the profession can avoid transforming agent power into rights against lawyers, but the profession has only a limited role to play in giving lawyers corporate power. However, this balancing provides no guidance as to what ought to be "the scope and nature of the lawyer's representation" or how to "proceed as is reasonably necessary in the best interest of the organization."<sup>288</sup>

Rather than defining maximal jurisdictional claims, Rule 1.13 should permit lawyers to negotiate with corporate actors about the extent of their jurisdictional claims to influence the client organization so long as corporate accountability is not thereby compromised. Lawyers ought to serve organizations as they and their clients agree, not only as enforcers of the corporate hierarchy when agents exceed their authority. To meet this end, the language setting forth maximal jurisdictional claims ought to be dropped. In its stead, language such as the following should be inserted:

An attorney serving an organization should develop a strategy for legal problem solving in collaboration with the constituents of the organiza-

represented, the lawyer must satisfy the requirements of Rule 4.3. RPC, *supra* note 21, at Rule 4.3 (dealing with unrepresented persons).

282. CPR, *supra* note 268, at EC 5-18.

283. RPC, *supra* note 21, at Rule 1.13(b) ("In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences . . . the apparent motivation of the person involved . . . and any other relevant considerations.").

284. *Id.* ("the scope and nature of the lawyer's representation").

285. The lawyer is to consider the responsibilities imposed on the manager by the client's hierarchical organization ("the responsibility in the organization . . . of the person involved") and by the client's political organization ("the policies of the organization concerning such matters"). *Id.*

286. G. HAZARD & W. HODES, *supra* note 248, at 241, *quoted in* Pirsig, *supra* note 249, at 137-38; *cf.* 1981 RPC Draft, *supra* note 262, at 787 ("[a] lawyer, like other employees or agents of an organization, is a co-agent").

287. "It places organization counsel in a powerful and controlling position which neither an organization nor its counsel is likely to contemplate or accept." Pirsig, *supra* note 249, at 138.

288. RPC, *supra* note 21, at Rule 1.13(b).

tion. This strategy should be reasonably related to the goals and resources of the organization. In obtaining consent from corporate constituents to pursue this strategy, lawyers should strive to minimize disruptions to the organization caused by their responsibilities weakening the corporate structures needed for effective decision-making.<sup>289</sup>

This provision would base lawyer assumptions of corporate power on consent. It would guide their work by service to the entity. Perhaps most significantly, it would emphasize that the duty to "minimize disruptions" imposed by Rule 1.13(b) relates not to the need to maintain the corporate hierarchy, but to the maintenance of corporate information nets and decisionmaking capacities.<sup>290</sup>

This addition to the Rule is compatible with the growth of inside counsel. It affirms professional standards of client service in whatever work lawyers undertake for their organizational clients. But it does not define the scope of proper jurisdictional claims. In part this lack of specificity is required because, as institutional personnel, lawyers cannot negotiate the scope of their representation except by abstractions about their functions.<sup>291</sup> Formally, corporations may make staff-line distinctions. Staff may forswear their allegiance to a hierarchical order, pledging to be carriers of only neutral information.<sup>292</sup> But managers and their corporations know that valuable staff members negotiate their own jurisdiction.<sup>293</sup> To gain the advantages of informal auditing, if not the benefits of collaboration, corporations give staffs functional job descriptions and a manipulable hierarchical position within the corporation. Similarly, the scope of lawyers' jurisdictional claims cannot be precisely defined. But, the profession needs to legitimate sufficient jurisdiction so that lawyers can determine what best comports with their professional requirements:

The lawyer is in the best position to choose his next step. . . . What is required, in short, is some prompt action that leads to the conclusion that the lawyer is engaged in efforts to correct the underlying problem, rather than having capitulated to the . . . client. . . . The lawyer's continued interaction with his client will ordinarily hold the greatest promise of corrective action. So long as a lawyer is acting in good faith

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289. This paragraph is modelled on A MODEL PEER REVIEW SYSTEM 17 (Discussion Draft 1980) ("Section 4: Strategy Formation"), quoted in Garth, *supra* note 104, at 646 n.39.

290. Cf. Gillers, *supra* note 254, at 299-309 (Rule 1.13 ought to protect corporate decision-making).

291. Lawyers, both inside and outside, are part of a corporation's "shadow-staff" who utilize overlapping lines of authority to second-guess actions that cannot be rigorously delimited. Cf. Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1153-54 (1977) (discussing mini-boards).

292. Allen, *The Line-Staff Relationship*, 17 MGMT. REC. 346 (1955).

293. Goldner, *The Division of Labor: Process and Power*, in POWER IN ORGANIZATIONS 97 (M. Zald ed. 1970).

and exerting reasonable efforts to prevent violations . . . his professional obligations have been met.<sup>294</sup>

By adopting language which constrains the expansion of lawyers' jurisdictional claims by the maintenance of corporate accountability processes, the Rule can recognize that lawyers are not just servants to the organizational hierarchy, but may be included as political actors therein. It leaves open the question of whether the profession ought to restrict or develop how its practitioners' professional judgments exercise political power within an organization. To prevent unprofessional exercises of power, the profession ought to detail not only how lawyers need to proceed within its exclusive jurisdiction, but also when and how clients and lawyers may share jurisdiction, as in mixed law/business decisions.<sup>295</sup>

The second issue of organizational representation is ascertaining what constitutes corporate decisions. Rule 1.13 appears to define organizational decisions by imposing a hierarchical decisionmaking structure. As the discussion of preventive law practice emphasized, this often is not appropriate to guide lawyer action. Instead, the Rule ought to incorporate provisions that prevent lawyers from unethically utilizing their position in the process by which organizations reach decisions.<sup>296</sup>

One provision that needs to be incorporated in the Rule would address outside counsel's duties in regard to the powerful corporate legal departments, who have become their "clients" in fact. Certainly, outside counsel's work can be improved when it is managed by a knowledgeable inside counsel. But outside counsel's duties are to serve the organization, not inside counsel. And the emergence of corporate legal departments as powerful corporate actors may frustrate outside counsel serving the corporation.

Both inside and outside counsel appear to accept that inside counsel have become the "client." As a general counsel said: "I don't purchase outside counsel for the company. I purchase outside counsel for me." As an outside counsel put it: "For all practical purposes, the General Counsel is the client. He tells you what he wants done. He is the conduit to the executives . . . . He initials your bills for payment. You basically have to make him happy." Outside counsel may recognize that this situation serves to increase the corporate power of corporate legal departments,<sup>297</sup> but generally don't

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294. *In re Carter & Johnson*, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) 82,847 at 84,172, quoted in Kaplan, *supra* note 258, at 881-82.

295. Cf. Simon, *supra* note 240.

296. For example, lawyers should not engage in negotiations that do not respect the autonomy rights of the individual organizational actors with whom they deal. See *supra* notes 244 & 281.

297. As an outside counsel complained,

I would prefer having close business relationships with executives. With many clients, they buy legal services just like they buy cardboard boxes. You can't buy relationships. They are valuable and important in legal work. But the General Counsel has an interest in stopping these relationships to increase his own power.

As an inside counsel put it, "By spreading the apples around, outside counsel don't stick their noses in management policies and try to call the shots."

accept that this poses ethical difficulties for them: "We don't negotiate with clients about structuring their relation with us," one outside counsel said. Another recognized the potential problem, but denied responsibility: "Many general counsel give outside counsel too narrow a charge. That's a problem for the corporate legal department and the corporation, not for the outside law firm." Yet, the ethical responsibilities continue, as one outside counsel voiced:

If outside counsel are bridled, will we stand up? The tradition of outside counsel independence was associated with spending the client's money freely. Now, we have to work out a responsible partnership. Outside counsel can't simply say, "I work for the inside lawyer. I don't work for the company." We must create a strong professional relationship with inside counsel giving us greater opportunities for independence.

Outside counsel's creation of a proper relationship with inside counsel needs support from the ethics rules. In the current situation, creating such a relationship means biting the hand that feeds outside counsel. It requires overcoming the natural inclination to buck responsibility and not criticize fellow members of the bar.<sup>298</sup> And, it would require outside counsel to focus on the costs that inhere in the benefits of being able to deal only with the corporate legal department and thus avoid negotiating with managers, and "yield[ing] judgment of what is wanted to those amateurs who receive the services."<sup>299</sup> Norms need to emerge to prevent, in inside counsel's age of enlightenment, power becoming the determiner of relations between outside lawyers and inside counsel.<sup>300</sup>

Outside counsel's capacity to perform ethically is enhanced when inside counsel allow that "a lawyer who is asked to give an opinion in respect to one aspect of a transaction is entitled to look at anything and everything he wants to that might possibly bear on that transaction."<sup>301</sup> But outside counsel tend to respond to the structure of their engagement, and complain: "The system is set up to keep really knowledgeable people from getting together." Consider the case of settlement. Corporations rely on their corporate legal departments to decide when to settle a case because the appropriateness of a settlement is hard to evaluate. But the legal depart-

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298. Cf. Pierce, *The Code of Professional Responsibility in the Corporate World: An Abdication of Professional Self-Regulation*, 6 U. MICH. J. L. REF. 350, 352-53 (1973).

299. E. HUGHES, *MEN AND THEIR WORK* 54 (1958):

It is characteristic of many occupations that the people in them, although convinced that they themselves are the best judges, not merely of their own competence but also of what is best for the people for whom they perform services, are required in some measure to yield judgment of what is wanted to those amateurs who receive the services.

*Id.*

300. See *supra* note 95.

301. Forrow, *Special Problems of Inside Counsel for Industrial Companies*, 33 BUS. LAW. 1453, 1466-67 (1978).

ment's mission is to keep down legal costs. This creates an incentive to settle, especially when the legal department is charged back for litigation costs, but not settlement costs. Inappropriate settlements also may result because many corporations view litigation as a legal department failure, especially when it involves management having to sit for depositions. Will outside counsel be concerned about the self-interest of the legal department and insure that settlements serve the corporate client? Norms must emerge to coordinate the work of inside and outside counsel so that outside counsel continue to serve the corporation as an entity, not the legal department.

The art of management includes legitimizing one's goals, securing allies, and deflecting criticism. Increasingly, inside counsel are allocating work to outside counsel to increase the legal department's managerial authority. Outside counsel are used not for their expertise or innovative potential, but "to play the heavy with management," "to be a policeman," and "to take some of the heat." Outside counsel also are used to protect inside counsel from their own mistakes<sup>302</sup> and to distance the inside lawyer and legal department from representations in which their conflicting roles as lawyer and employee become apparent.<sup>303</sup>

Through these uses of outside counsel, the corporate legal department solidifies its power within the corporation. The power of corporate legal departments, like that of other departments, is a shifting resource. With shifts in management philosophy or particularly bad experiences, managers may lose the confidence of other corporate actors which is necessary to retain their power. Many corporations, for example, rely on very expensive independent business consultants for significant decisions. The increasingly sophisticated use of outside counsel as backstops to inside counsel's managerial power, however, suggests that the success of the inside counsel movement will be difficult to derail. Outside counsel services can be used by a corporate legal department to maintain its power even when corporate accountability processes are being undermined. Norms need to emerge to prevent outside counsel from thus providing work that does not serve the interests of their corporate clients.

A provision might be added to Rule 1.13 to prevent outside counsel from immunizing inside counsel's power in order to maintain organization's

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302. In one case, the legal department drew up a contract with terms that placed the corporation at a disadvantage. In contesting the contract, the legal department went outside so that the inside counsel who negotiated the contract would not have to admit their mistake to the other side and to the managers. Management ignorance was made possible by the centralization of control over the legal function in the legal department. Management ignorance also was maintained by outside counsel who did not request their involvement.

303. In one case, outside counsel was retained to argue for a zoning variance in the face of community opposition. The legal department went outside, not because it lacked expertise, but because it wanted to provide a target outside the corporation for community resentment. Outside counsel's independence was hired to lessen corporate responsibility for its lawyers' actions.

accountability processes. Following the language of Rule 5.1 and 5.2, which refer to responsibilities in and for the allocation of work within law firms, I would suggest adding the following to Rule 1.13:

(a) A lawyer who provides services to an organization is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A lawyer who provides services to an organization shall make reasonable efforts to ensure that the organization has in effect measures giving reasonable assurance that the legal work done for it conforms to the rules of professional conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the rules of professional conduct if:

(1) The violation reasonably should have been known and does not result from a reasonable resolution of an arguable question of professional responsibility, and

(2) The violation occurs in a matter on which both have responsibilities and the conduct is known at a time when its consequences can be avoided or mitigated, but the lawyer fails to take reasonable action.

The addition of these provisions impose responsibility on outside counsel for the work performed by the inside counsel who have become their "clients." Today, outside counsel do not take responsibility for inside counsel's work, while inside counsel take both business and professional responsibility for their own conduct.<sup>304</sup> Clients have shown their willingness to incur the costs of monitoring outside counsel, why ought the profession not require monitoring of inside counsel?

If proper professional work is being performed, requiring lawyers to be their "brothers' keepers" on the representation likely would impose minimal monitoring costs on clients and not produce disabling contentiousness. After all, inside counsel's management of outside counsel while producing some "chafing," apparently has not resulted in lasting friction.<sup>305</sup> The adoption of this rule will impose costs, but they may be appropriate to maintain professional standards of client service.

What the adoption of these provisions does affect is the ability of lawyers to limit their responsibilities. Today, outside counsel, without loss of professional pride, can limit their representation and rely on inside counsel to insert their work into the corporation's continuum of decisionmaking. As long as inside counsel assume responsibility, outside counsel will let the legal department organize their work, including providing service that is based on hypothetical facts and determined by inside counsel's strategic judgments.<sup>306</sup>

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304. Inside counsel are subject to corporate sanctions for inadequate performance. Although unlikely, inside counsel also are subject to malpractice liability, RPC, *supra* note 21, at Rule 1.8(h), and professional sanctions for violations of professional rules.

305. Maher, *supra* note 5, at 44.

306. See *supra* notes 21-27.

These provisions recognize that "at the heart of the matter [of lawyer responsibility in organizational representation] is whether lawyers ethically may accept limited engagements."<sup>307</sup> Despite reports of various horror stories, one scholar has concluded that "no demonstrable need has been shown" to incur the attendant costs.<sup>308</sup> Yet, the development of powerful corporate legal departments suggests that the need does exist.<sup>309</sup> Admittedly, the adoption of these provisions would "be diametrically opposed to the developing trend of separating advocates from advisers . . . in an era of increasing specialization . . ." <sup>310</sup> But this trend creates possibilities for an imbalance of professional power over client power that the profession ought to address.

To the extent that inside counsel is now outside counsel's client, the adoption of these provisions would require that outside counsel discuss with inside counsel how to determine corporate goals and the ways in which their operations promote legal compliance. These discussions would help determine whether organizationally dependent inside counsel have been captured. Outside counsel ought to examine how inside counsel's work has been limited by corporate managers, just as outside counsel ought to examine how their own work has been organized and predigested. Outside counsel also ought to assess how much responsibility the legal department can assume or delegate without compromising itself, just as outside counsel ought to discuss with inside counsel how much responsibility over its own work it can professionally cede.

Of course, during the course of their representation, elite lawyers now may negotiate with inside counsel about the goals, the work, and the responsibilities proffered to them by inside counsel. As a matter of fact, it may very well be the case that even when inside counsel is accepted as "the client," outside counsel influence how inside counsel organize the provision

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307. Lorne, *supra* note 83, at 482. In an innovative approach to the problems of rendering opinions, this article directs inquiry toward a broad range of issues:

The specific questions that arise out of that larger inquiry range from whether the adviser may render limited advice to whether a lawyer may be publicly associated with an essential element of a transaction without being to some degree responsible for the transaction as a whole. Somewhere in between those questions lies the issue of the adviser's obligation to examine and pass on the work of other counsel with greater responsibility for the entire transaction.

*Id.* at 482-83.

308. *Id.* at 485-86.

309. For one horror story that stemmed from failing to integrate the emerging division of labor, see R. GANDOSSY, *BAD BUSINESS: THE OPM SCANDAL AND THE SEDUCTION OF THE ESTABLISHMENT* 228 (1985).

(Division of labor is a necessary part of organizational life, but all too often the divided units do not work together. They may work on the same deals for the same client, and they may rely on each other, but they frequently have very different interests. They are more segmented than they are an integrated whole.)

310. Lorne, *supra* note 83, at 485.



of legal services. They may question inside counsel's statements about client goals, what work ought to be performed and who ought to perform it.

It is a consequence of the position argued for in this paper that if such negotiations now are occurring, they raise fundamental issues of professional ethics. How client goals are determined, how the scope of representation is limited and who should have responsibility for actions relating to the representation are questions whose answers ought to comport with the values of professional service, whether lawyers are negotiating with lawyers or with non-lawyer clients. The answers to these questions are not pre-determined by the goals organizations have. They influence what goals emerge for the corporation. The answers require determining "Who sets organizational goals?" and "How are organizational goals set?"<sup>311</sup>

I do not assume that ethical demands force negotiation about these questions to reach only one set of outcomes. A responsible elite practitioner, for example, might agree to work on a hypothetical set of facts when dealing with one legal department but not another. I do assume that the outcomes ought to depend on the capacities of the client, legal department, and the elite firm. The outcomes ought to maximize and not weaken "the corporate structures needed for effective decision-making."<sup>312</sup> Whether inside counsel ought to be able to bind the client, becoming outside counsel's "client" in fact, ought to depend on the organizational capacities revealed during such negotiations.

#### IV. CONCLUSION: SPECIALIZATION AND THE DIVISION OF LABOR

Chief Justice Rehnquist reports that an important consequence of the growth of large firms has been "an increasing degree of specialization" and that "[t]here seems to be little doubt on the part of those in practice that specialization both serves the client and succeeds in maximizing the firm's income."<sup>313</sup> The Chief Justice notes his concern that increasing specialization decreases lawyer work satisfaction and calls for empirical research by law school faculty to verify his anecdotal evidence that legal practice has become "more like drudgery."<sup>314</sup>

Concerns about the specialization of legal work have been voiced throughout the history of the American legal profession.<sup>315</sup> Specialization has been

311. See *supra* text accompanying note 253.

312. See *supra* text accompanying note 289.

313. Rehnquist, *supra* note 55, at 153-54.

314. *Id.* at 152, 154.

315. Chief Justice Rehnquist supposedly is detailing changes that occurred during "the past generation," but over 50 years ago similar concerns over similar changes were expressed by a prior Chief Justice and a prior *Indiana Law Journal* author:

The changed character of the lawyer's work has made it difficult for him to

linked to a variety of ills. Chief Justice Rehnquist's concerns about the decreased satisfaction of increasingly well-paid and specialized lawyers join the concerns voiced by others about the effects of specialization on legal development,<sup>316</sup> the professional status of lawyers,<sup>317</sup> the public influence of the bar,<sup>318</sup> and client service.<sup>319</sup>

The diversity of concerns linked to specialization ought to give pause. Can specialization be so influential? Or, might it be an "ideological devil,"<sup>320</sup> blocking thought? The rhetoric of anti-specialization, I suggest, reveals not only Faustian wishes,<sup>321</sup> but also a less tragic resistance to those conventional, "natural" limits that restrict our abilities to do and be more.<sup>322</sup> It is a rhetoric than has given voice to the moral motives of a variety of professional leaders. But analysis of specialization must recognize that it is a product of social differentiation. The appropriateness of specialization depends on capacities for harnessing the disintegrative forces social differentiation unleashes. Analysis of specialization ought to direct attention to the division of labor in which specialized services are but one part.

Chief Justice Rehnquist's concern with the specialization of elite firm practitioners needs to be balanced by attention to the integrative capacities of powerful corporate legal departments. Whether client needs and public interests are advanced by client demand for and outside counsel provision

contemplate his function in its new setting, to see himself and his occupation in proper perspective. . . . The demands of practice are more continuous and exacting. He has less time for reflection upon other than immediate professional undertakings.

Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 6 (1934).

[T]hese traditional standards of the game which we have adopted are something of very great value to civilization, and that instead of allowing them to be wasted down in the flood of pioneer competitive business, go-getting, eager salesmanship and advertising, we should hold fast to them as we hold fast to our homes.

Cohen, *Fiduciaries—Corporate and Lawyers*, 7 IND. L. J. 295, 316 (1932). For nineteenth century criticisms, see R. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 26, 230-31, 266, 280-90 (1984). For example, Richard Henry Dana, Jr., in 1859 described himself as a specialist by employing the image of "the master of a small coasting vessel, that hugs the shore," unlike the republican generalist Choate who was "a great homeward bound Indian, freighted with silks and precious stones, spices and costly fabrics . . . with the nation's flag at her mast-head, navigated by the mysterious science of the fixed stars." *Id.* at 287.

316. See, e.g., J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 55-60 (1966).

317. See, e.g., J. MATTHEWS, RUFUS CHOATE: THE LAW AND CIVIC VIRTUE 44-45 (1980).

318. See, e.g., Stone, *supra* note 315.

319. See, e.g., Swaine, *The Impact of Big Business on the Profession: An Answer to Critics of the Modern Bar*, 35 A.B.A. J. 89, 168-69 (1949) (answering the "indictment").

320. G. SIMMEL, *On the Concept and Tragedy of Culture*, in THE CONFLICT IN MODERN CULTURE AND OTHER ESSAYS 27 (1968).

321. V. THOMPSON, MODERN ORGANIZATIONS viii (2d ed. 1977) ("Some people approach the problem of bringing knowledge and authority together by [urging] 'generalists' rather than specialists. A little thought will disclose all such proposals to be essentially regressive—a search for a hero or a magic helper.").

322. It is thus a recurring theme in critical theory. See Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW 281 (D. Kairys ed. 1982).

of specialized services will depend on the manner in which inside and outside counsel work are integrated. Analysis of the proper allocation of work and responsibilities between inside and outside counsel needs to incorporate both the governance problems corporations face and the jurisdictional claims the profession supports. As this essay has argued, outside and inside counsel need "an entire system of rights and duties which link them together in a durable way."<sup>323</sup>

Studies of the division of labor in the sociological tradition always have been studies of morality. Empirical studies of work degradation and reform, of labor discontent, or of economic stratification and power are linked to theoretical studies which see in the division of labor not only partial integrations, but also "the essential condition of social solidarity" and "the foundation of the moral order."<sup>324</sup> Whether or not sociologists admit the critical task in which they are engaged, their work, as the self-proclaimed positivist Durkheim noted, is in "the service that thought can and must render . . . in fixing the goal that we must attain."<sup>325</sup>

We might assume that over time economic forces will clarify and stabilize relations between inside and outside counsel. Norms will emerge to guide inside and outside counsel relations and the division of labor between them. But, as Durkheim noted, we must render service in fixing such norms. Will economic forces guarantee proper corporate service? Will the reciprocities developed comport with public norms? Will outside counsel's specialization and the emergence of the General Counsel as purchasing agent decrease the ability of lawyers to realize value by serving as influential and independent counselors? Furthermore, will the division of labor leave room for the public function of the bar—its ability to support and sustain proper jurisdictional claims and the law reform activities which have engaged lawyers in the past?

Economically generated reciprocities, may develop norms which don't meet the high demands of professionalism. Conformity, excessive concern with income and consumption are generally available alternatives to satisfaction with the intrinsic rewards of professional work. Professionalism is a challenge, not the natural result of market forces.

Nor will this challenge be met by focussing on the weakness of legal professionalism. When legal ethics focuses on restraining temptation, as for example by demanding organizational independence, it fails to justify the continued autonomy of the profession. Clients will impose governance structures to manage lawyer autonomy. We must be forthright about the basic problem of the professions: Why should professionals have power?

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323. E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 406 (1964).

324. *Id.* at 400, 401.

325. *Id.* at 409.

And, as the Inside Counsel Movement challenges, lawyer power as exercised includes corporate power. The strength of the profession, its jurisdictional claims to transcend organizationally-defined boundaries, requires addressing the organizational power commanded by professional judgment.

The rules of ethics, like those of etiquette, can become impoverished in two different ways: (1) When, in the context of their application, they impose unjustified power; and (2) When, in the context of their application, they fail to exercise needed power. To determine whether I am being gracious, for example, requires an analysis of the power I am wielding and that I am failing to exercise. Similarly, defining the ethical demands on my activities as a lawyer requires an understanding of what I do with the power available to me.

The claim of the Inside Counsel Movement requires that we develop conceptions of proper professional power in corporate politics.<sup>326</sup> The virtue of lawyers subject to intra-firm processes is not based on professional independence. If they are ethical, their virtue lies in their exercising professional judgment to direct corporate powers. Their challenge reminds us that professionalism demands not only the study of the frailties of temptation, but also the study of the possibilities for political power.

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326. One might expect organizational power to appear in discussions of legal counseling. But, the casebooks on counseling deal with personal psychology, not organizational power. The counseling problem is depicted as one of dealing with psychologically weak businessmen who are "frustrated," or have "clammy hands." H. FREEMAN, *LEGAL INTERVIEWING AND COUNSELING: CASES WITH COMMENT* 171, 186 (1964). As David Riesman notes, "It seems to me that people can practice law in either a huge Wall Street firm or alone on State Street and never face any of the kinds of experiences described in these reports." *Id.* at 70. For a criticism of the psychological basis of this work, see Simon, *Homo Psychologicus: Notes on a New Legal Formalism*, 32 *STAN. L. REV.* 487 (1980).

