Background Essay

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The changing role of the General Counsel as Lawyer-Statesman has at least four broad elements.

--The scope of the general counsel's job has greatly expanded beyond a corporation's compliance with law to include ethics, values, reputation, public policy, public communications, risk, including geopolitical risk, general crisis manager and, ultimately, corporate citizenship.

--The general counsel has replaced the senior partner in the major law firm as the primary counselor to the CEO and the board of directors--- and is a core member of the corporation's business team.

--Power has shifted from outside law firms to general counsel and inside legal departments as corporate lawyers have forced law firms to compete for business and as skilled inside lawyers "manage" major matters with law firms, rather than just handing such matters over to firms. The inside counsel movement has not just transformed corporate law departments: it is one of the factors which has led to major changes in law firms, especially Big Law.

--General Counsel must be a strong leader of very large entities which may include functions other than law---such as taxes, trade, environmental programs, public affairs---and thus must have a variety of organizational skills

This greatly enhanced role of the General Counsel in large transnational companies is made possible by a number of trends which have occurred over the past 25 years. The future growth of the General Counsel role in major global corporations -- and its spread to smaller and medium sized companies both in the U.S. and in national jurisdictions outside the U.S. -- will depend on the continuation of those trends.

1) The attractiveness and prestige of the General Counsel position has meant that GCs have increasingly been hired from the upper reaches of government and private practice:

-- A former U.S. Attorney General (William Barr -- Verizon), a former Deputy Attorney General (Larry Thompson -- Pepsi), distinguished former federal appeals court (Michael Luttig -- Boeing) and district court judges (Sven Holmes -- KPMG), a former White House counsel (David Leitch --

Ford), former heads of the SEC Enforcement Division (Gary Lynch -- Morgan Stanley, now EVP Bank of America, and Steve Cutler -- JP Morgan) now all serve, or have served, as chief legal officers of major American companies.

-- Similarly, law firm partners in their forties and fifties have been -- and are being -- recruited away from their firms to General Counsel positions: e.g. David Bernick -- Phillip Morris (Kirkland & Ellis); Paul Cappuccio -- Time Warner (Kirkland & Ellis); Amy Schulman -- Pfizer (PLA Piper); John Schultz -- HP (Morgan Lewis); Brad Smith -- Microsoft (Covington & Burling); Doug Melamed -- Intel (WilmerHale).

2) This remarkable upgrade in the quality of General Counsel has increased the status and prestige of inside lawyers and has made it possible to hire superb lawyers from outside the company to serve as heads of large business divisions or as heads of specialty functions (tax, environment, trade, antitrust, mergers and acquisitions, labor and employment, intellectual property). Indeed, larger companies are developing specialty practice groups, headed by nationally recognized practitioners, which rival law firm practice groups.

3) As a result of this increase in inside talent, the General Counsel has become, in many cases, the chief legal advisor to the CEO and to the board of directors, replacing the venerable senior partner from the great law firm. The General Counsel is a member of the core management team, and as business and society issues have become of ever greater importance to corporations, has come to have comparable status to the Chief Financial Officer in some major companies.

4) To attract this talent, corporations have been willing, at least for the General Counsel and division and lead specialist lawyers, to meet market pay, although some of that compensation may be in the form of deferred equity which may lose (or increase) its value. *Corporate Counsel*, an American magazine for inside lawyers, each year publishes a table of highly paid General Counsels in US companies, and it can only get this information because many GCs are among the companies' five most highly compensated executives whose pay packages must be disclosed, per government regulation, in the annual Proxy Statements.

5) The new inside lawyers -- who now have skills equal to their peers in outside law firms -- have begun to manage actively major issues staffed by joint inside/outside teams. Not only has power over control of matters shifted in a number of instances, but inside lawyers have also sought to break up old monopolies (when single firms represented companies on a broad range of matters) and introduce competition among firms. Moreover, corporations are outsourcing, both in the U.S. and in foreign jurisdictions, key functions -- like paralegal work or document reviews in one-off cases -- for which they had been, in their view, grossly overcharged by law firms. Thus, the new inside lawyers forged new cooperation on *matters* with outside firms and fostered new competition on *money*. As noted above, today both corporations and law firms are trying to develop new strategic

alliances in which financial incentives are aligned and value and quality, rather than sheer hours billed, are emphasized. But this shift in power has also led to many of the problems in law firms today: cut-throat competition, focus on profits per equity partner, single-minded focus on billable, collectible hours which distort the lives of associates, non-equity partners and partners, high associate discontent and turnover, questions about whether Big Law focused on global empires, high profits per partner and high leverage (the ratio of non-equity partners to equity partners) can survive---or whether only a few will survive.

6) As senior leaders in corporations, with broad scope in a very demanding environment, General Counsel are assuming much more risk and responsibility. As a result, in addition to increased rewards, General Counsels are increasingly in the gun-sights of regulators and enforcers. More inside lawyers have been sanctioned or indicted in the last 15 years than in the past.

7) The "U.S. General Counsel Model" and the U.S. trends described above are beginning to take root in international jurisdictions, not just in Europe but also in Latin America and Asia. These developments will, of course, have their own cultural dimensions and will produce important variations on the U.S. model. Progress may be slow due to a number of factors such as tradition (inside lawyer has largely ministerial role and reports to head of finance), lawyer-client privilege (not apply to inside lawyers in Europe due to supposed "lack of independence") and business attitudes toward lawyers/law (Japan). But, many changes are afoot, and this is a critical aspect of an "convergence with differences" across the globe relating to the chief legal officer, as well as many other aspects of legal systems.

In sum, in the course of a generation, General Counsels' prestige, status, compensation, power and position at the core of major transnational corporations have been transformed. But, this enhanced role will only continue, and be expanded at other companies and in other parts of the world, if boards of directors and CEOs see the value of a strong inside team working closely with business leaders. They must be willing both to pay for talent and to carry the legal headcount.

A strong case can be made that a talented, sophisticated inside legal team -- that is part of the company culture, understands its rhythms and personality, and is in the daily flow of business -- is far more effective, and far more cost-effective, than outside counsel can possibly be in helping the company achieve both high performance and high integrity. In difficult economic times, there is always the call to cut costs by cutting headcount. While the legal function can never be immune from a relentless quest for productivity, it is very short-sighted of business leaders to use the traditional meat-axe ("10 percent down") and either push costs (which will be higher) outside or degrade the core goals of performance with integrity which can lead to far greater, even catastrophic, costs down the road.

REMARKS

The State Department Legal Adviser's Office: Eight Decades in Peace and War

HAROLD HONGJU KOH*

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* The Legal Adviser, U.S. Department of State; Martin R. Flug '55 Professor of International Law, Yale Law School (on leave). This is a footnoted and lightly edited version of remarks originally delivered on March 3, 2011, as the keynote address at the Georgetown University Law Center conference on "Law & U.S. Foreign Policy: Perspectives on 80 Years of the Office of the Legal Adviser." I am deeply grateful to Dean William M. Treanor, a great law dean and an exceptional lawyer, public servant, and human being, for joining with President David Caron and Executive Director Betsy Andersen of the American Society of International Law to make this historic conference possible. Let me also thank Professor Jane Stromseth and Jessica Schau of Georgetown, as well as my State Department colleagues Counselor on International Law Sarah Cleveland, Assistant Legal Advisers Todd Buchwald and Stephen Pomper, and my special assistants Kimberly Gahan, David Pozen, Aaron Zelinsky, and David Zionts for the time and energy they devoted to making this day possible. Finally, I dedicate this lecture to the lawyers of L, including future L attorney (and perhaps someday Legal Adviser) Samuel Bulman Pozen. Sam was born on the very day that I delivered these remarks and so will himself turn 80 on L's 160th birthday—which is an event I very much hope to see in person.

Introduction

Today we commemorate the 80th birthday of the State Department's Office of the Legal Adviser. This event marks both a personal and professional celebration for so many of us who have been associated with this remarkable office over the years. The conference has generated a fascinating and diverse set of comparative, historical, and intragovernmental insights into the office's unique contributions to the shaping and interpreting of international law. The last time I addressed an audience from the American Society of International Law (ASIL), during my first year in this job, I spoke about the role of the Legal Adviser and some of the current challenges we face.[1] At this birthday gathering, let me focus on what has made the Office of the Legal Adviser—or "L," as it is affectionately known in the State Department—such a critical and respected part of the U.S. government. Put another way, who are the distinctive people, and what are the distinctive traditions, norms, and practices, that have made L the distinctive legal institution it has become?

This event marks a particularly auspicious moment to consider this question, given the recent publication of a book by Michael Scharf and Paul Williams that shines welcome light on the history of the office and its unique role at the intersection of international law and U.S. foreign policy.[2] The book offers a fascinating read and includes interviews with all of the living Legal Advisers, seven of whom (not counting myself) have joined us at this conference: John Bellinger, Will Taft, David Andrews, Conrad Harper, Davis Robinson, Roberts Owen, and Herb Hansell.

At any anniversary party, you review the past, assess the present, and toast the future. So let me share some reflections on "L Past, L Present, and L Future."

I. "L Past": Office Canons

I am the 22nd American to serve as Legal Adviser at the Department of State, a list that includes leading figures in the worlds of international law and policy.[3]

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1. Harold Hongju Koh, Legal Adviser, Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), *available at* http://www.state.gov/s/l/releases/remarks/139119.htm.

2. Michael P. Scharf & Paul R. Williams, Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser (2010).

3. For the complete list, see Appendix 1.

The first Legal Adviser, Green Haywood Hackworth, went on to serve as the judge of U.S. nationality on the International Court of Justice (ICJ), a position later held by two other members of our office, former Deputy Legal Advisers Stephen Schwebel and Joan Donoghue, both of whom are also present here.

That fact alone should tell you that over the years, the Legal Adviser's Office has been so much more than the Legal Adviser. The heart and soul of the office has never been the politically appointed lawyers who have served at the Secretary of State's right hand (a group I will call "Political L"). Rather, the heart of L has been the dedicated career lawyers who have served as Deputy Legal Advisers, Assistant Legal Advisers, and Attorney-Advisers, supported by an extraordinary career staff (a group I will collectively call "Career L"). One measure of the relative importance of these two sets of positions is that Green Hackworth, the longest-serving Legal Adviser, served fifteen years under Presidents Hoover, Roosevelt, and Truman, a record no Legal Adviser will likely ever match. But many career attorneys—including all four of our current deputies, Principal Deputy Mary McLeod, Jim Thessin, Jonathan Schwartz, and Sue Biniaz—have served in L for years longer than that.[4] And there is a third face of L, which I will call "Scholarly L," that includes our many alumni who have gone on to become professors and scholars of international law, as well as our attorneys who make time to teach on top of their heavy workloads.[5] At any given time, the Counselor on International Law, a position currently held by Professor Sarah Cleveland of Columbia Law School, is the living embodiment of Scholarly L.[6] L is one of the only components of the U.S. government that has, in the position of the Counselor, a resident scholar in the field who is fully integrated into the office's work.

My thesis today will be that what has helped make L the renowned institution it has become is the unique creative synergy among these three faces of the Legal Adviser's Office—Political L, Career L, and Scholarly L—with Career L being a particularly dominant force. The interaction among these three lawyerly groups and instincts has, in turn, generated a rich set of traditions, customs, expectations, and norms that together ensure L's quality, integrity, and relevance.

With that background, let me quickly tour L's early years before turning to the current period. To start with a surprise, we have brought you here on something of a pretext. Strictly speaking, this is not our 80th birthday at all. In fact, this is our 163rd year! For it was in 1848 that William Hunter, Jr. was

4. Since this speech was delivered, Jim Thessin was sworn in as the U.S. Ambassador to the Republic of Paraguay. Taking over his Deputy Legal Adviser position is Richard Visek, an L veteran of more than a decade.

5. For a partial list of L alumni now in teaching, see Appendix 2. For a list of L attorneys who teach part-time, see Appendix 3.

6. For a list of Counselors on International Law, see Appendix 4. Since this speech was delivered, Sarah Cleveland has returned to teaching at Columbia, and was succeeded as Counselor by Professor William Dodge of the UC Hastings College of the Law.

reportedly first appointed to the position of Claims Clerk to give legal advice to the State Department. Before then, as we understand it, the early Secretaries of State—Thomas Jefferson, James Monroe, James Madison—did their own international legal work, which is what one might expect from people so well versed in the law of nations.[7] But by the mid-19th century, what we now call "citizen-to-state claims"—claims by U.S. citizens against foreign states and vice versa—had proliferated to the point that they threatened to overwhelm the Secretary and his small staff. And so in 1848 the position of Claims Clerk was created, only to be superseded, some twenty years later, by the position of Examiner of Claims.[8] The Examiner of Claims was placed under the Attorney General's supervision when the Department of Justice was established in 1870,[9] and the Examiner's work soon extended to legal issues ranging far beyond simple claims, to broader questions of private and public law, citizenship, the laws of war and the laws of prize, as well as boundary disputes and treaty interpretation. In 1891, the Examiner of Claims became the Solicitor, still a Department of Justice employee, and the Solicitor functioned as "the law officer" of the State Department until 1931.[10] But even with the loftier title of Solicitor, giving legal advice to the State Department was not a full-time job. As proof, one of the early Solicitors, Fred Nielsen, held the Solicitor's post even while simultaneously leading Georgetown's football team to back-to-back conference titles!

Finally, eighty years ago, on February 23, 1931, an Act of Congress—Public Law 71-715, or the Moses-Linthicum Act, as every schoolchild knows—abolished the Office of the Solicitor and created today's Office of the Legal Adviser.[11] The statute pointedly spelled "Adviser" with an "e," in homage to our ancestral cousin "The Legal Adviser" of the Foreign and Commonwealth Office (FCO) of Her Majesty's Government, a position currently held by our dear friend and colleague Sir Daniel Bethlehem.[12] Like his British counterpart, the American Legal Adviser, supported initially by a staff of twenty or so,[13] was intended to provide legal advice on all problems, domestic and international, that might arise in the course of the Department's activities.

The first Legal Adviser, Green Hackworth, made clear that the Legal Advis-

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7. Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 634 (1962).

8. Robert E. Dalton, The Office of the Legal Adviser 2 (undated) (unpublished manuscript) (on file with author). As my footnotes reflect, the history in this section draws heavily on the above-cited internal paper prepared for another purpose by longtime Assistant Legal Adviser for Treaty Affairs, former Counselor, and L legend Bob Dalton, to whom I am indebted for his priceless research and analysis.

9. Bilder, *supra* note 7.

10. Dalton, *supra* note 8.

11. An Act for the Grading and Classification of Clerks in the Foreign Service of the United States of America, and Providing Compensation Therefor, Pub. L. No. 71-715, § 30, 46 Stat. 1207, 1214 (1931).

12. Since this speech was delivered, Sir Daniel Bethlehem has stepped down as FCO Legal Adviser and been replaced by Iain Macleod.

13. Dalton, *supra* note 8, at 3.

er's Office would not only serve as a general counsel to the Department but would also act as a government-wide contributor to and defender of international law. In his pioneering tenure, Hackworth established important and enduring foundational traditions of the office. Hackworth was known as (1) an *independent* (2) *expert on and scholar of international law*, publishing a celebrated series of *Digests of International Law* in the early 1940s.[14] Hackworth was also (3) *nonpartisan*, serving in both Republican and Democratic administrations; had a (4) *wide-ranging remit* across the Department's entire workload;[15] gave (5) *legal advice that was sensitive to the clients' policy objectives*; and took (6) *the long view*, always seeking to advance the best long-term interests of the State Department as an institution rather than the interests of any particular individual or administration. "It is our aim," Hackworth wrote, "that the Department of State should be uninfluenced by considerations of momentary expediency or by doctrines that are not calculated to stand the test of good conscience, fair dealing, and sound principle of law and practice."[16] Finally, Hackworth set the basic contours of the position by being politically savvy without politicizing, that is, by (7) *balancing the concerns of politics and the law*. During his tenure, on the one hand, Hackworth clearly and firmly identified legal constraints and respected *stare decisis*, while on the other hand, he remained ready to look for other legally available options if Department principals sought to change course.

Thus, in his very person, the founding Legal Adviser combined and captured the political, career, and scholarly faces of L that I have mentioned. By the time Hackworth handed over the reins in 1946 to join the ICJ as the American judge, L's status and significance within the U.S. government had grown tremendously, a trend only to be fed further by the post-World War II rise of international law and institutions.

During the Cold War, L's size and role expanded quickly, with Herman Phleger emerging as another transformational Legal Adviser in the middle of the 1950s. Phleger knew and worked closely with both Secretary of State John Foster Dulles and President Dwight D. Eisenhower. Perhaps his greatest victory was bureaucratic. Phleger resisted the so-called "Wristonization" movement, which attempted to fold much of the Department's Civil Service, including L, into the career Foreign Service.[17] In staving off Wristonization, Phleger reaf-

14. GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW (8 vols., 1940–44). By the device of numbering these office traditions, I seek deliberately to highlight unwritten "Canons of L" that I had sensed from the outside but had not come to understand fully until I began to serve in the Legal Adviser's Office.

15. Even today, when we have two Deputy Secretaries of State and dozens of other important policy principals, the Legal Adviser is perhaps the only official besides the Secretary of State herself with such a Department-wide remit.

16. Dalton, *supra* note 8, at 4.

17. *Id.* at 5. The so-called Wriston Report of 1954 recommended that the State Department integrate its Civil and Foreign Service Officers. Phleger foresaw that L's independence would be compromised if the office were absorbed into the Foreign Service; as a result of his successful efforts to stave off this

firmed another critical L tradition: (8) *Its career lawyers would not report directly to their policy clients, but rather to their managing attorney and the Legal Adviser*. Thus, the office would function like a law firm, not as a disconnected assortment of lawyers embedded in their client bureaus. The Legal Adviser, moreover, would report directly to the Secretary—to whom Phleger demanded a direct line. This arrangement preserved L's identity as (9) *an office of professional international lawyers*, not just diplomats who are legally trained, thereby nurturing the creative tension between Career L and Political L that continues to this day. The bureaucratic procedures institutionalized during the postwar period reaffirmed an additional plank of the Legal Adviser's work: that (10) *L must be kept in the loop*. As Professors Scharf and Williams explain in their book, it is now well established within the Department that "virtually no foreign policy decision can be made without first receiving clearance from L, and no delegation can be sent to an international negotiation or international organization without a representative of L."[18]

Under President John F. Kennedy, Legal Adviser and renowned Harvard Law School Professor Abram Chayes refined that last plank, insisting not only that L be kept in the loop on important matters but also that its attorneys (11) *be "in at the takeoff"* of a new foreign policy episode, in order to help establish the legal and political legitimacy of the actions that follow. It was only because he was in at the takeoff that Chayes could, for example, develop the now-famous "defensive quarantine" theory that authorized the use of a naval cordon to remove the threat of Soviet missiles in Cuba. As Chayes later recalled in an oral history:

> [I]t was very important for both the validity of the [U.S. government] decision, the subsequent justification, and the mobilization of support that the legal considerations were taken fully into account during the decision-making process. Somebody did not just make the decision and then call the lawyer in and ask the lawyer to cook up some sort of legal theory to defend it.[19]

Both Chayes and his Deputy and successor, Leonard Meeker, had close access to their principals. In his personal recollections, Meeker describes how, in February 1961, he received a direct call from none other than the new President, John F. Kennedy, who was hugely exercised about a mutiny on a Portuguese ship. "Kennedy's first reaction was, this is piracy; our Navy should step in."[20]

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fate, L's "professional identity remained that of a lawyer rather than a lawyer-diplomat." *Id.*; *see also* Bilder, *supra* note 7, at 636 n.7 (explaining that the decision not to integrate L with the Foreign Service was "important in retaining the Office's status and independence").

18. SCHARF & WILLIAMS, *supra* note 2, at xix.

19. *Living History Interview with Abram Chayes*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 459, 480 (1997).

20. Leonard C. Meeker, Recallings (Mar. 2001) (unpublished manuscript at 326) (on file with author). Meeker explained to the President "that piracy was when *others boarded a ship* and took it over . . . . Kennedy rather impatiently found this a technical legal answer. But he did not order the Navy to seize the ship." *Id.* at 326–27.

So you see, I am not the only modern Legal Adviser to have considered piracy issues.

In the 1960s, Chayes and his deputies Tom Ehrlich and Andreas Lowenfeld also helped develop another enduring L tradition: (12) *L's connection to the legal academy*, which has actively fostered what I have called Scholarly L. Chayes, Ehrlich, and Lowenfeld all returned to law teaching after their service in government, and they wrote publicly about the Cuban Missile Crisis as exemplifying an approach to law they called "International Legal Process." Their work became the foundation for the so-called "Process School of International Law," of which I have been an academic member.[21] In 1962, a young lawyer in L's economic affairs section, future Wisconsin Law Professor Richard Bilder, wrote an important and enduring article about the Office of the Legal Adviser in the *American Journal of International Law*, in which he described L as serving in nearly all of its current roles: counselor, draftsman, advocate and negotiator, internal judge, and most of all, international law expert.[22]

Like many L alumni, Richard Bilder went on to become a distinguished law professor, thereby exemplifying that L is historically influential not just inside the government but outside as well, as a training ground for international lawyers and scholars.[23] To this day, we remain connected to the academy in ways that enrich the office's ability to determine U.S. views on international law, similar to the role that the Justice Department's Office of the Solicitor General and Office of Legal Counsel have played with respect to U.S. constitutional law. That tradition has been reinforced by the scholarly engagement of Legal Advisers through their writing and lecturing;[24] through their close ties to learned societies, especially ASIL; through their own advisors, including Counselors on International Law drawn from the academy and Advisory Committees on Public and Private International Law that have a heavily academic composition; and through their unique audience, which includes both foreign legal advisers and international legal academics—not to mention the fact that a number of Legal Advisers, including myself, have been either part-time or full-time professors of international law.

The office's reputation for rigorous international legal analysis and scholarship has almost certainly contributed to another important L tradition, exemplified by Leonard Meeker's successor as Legal Adviser, John ("Jack") Stevenson. During the Vietnam War, in May of 1970, Stevenson gave an important speech

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21. *See, e.g.*, ABRAM CHAYES ET AL., INTERNATIONAL LEGAL PROCESS (2 vols., 1968); *see also* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2617–29 (1997) (describing the evolution of the International Legal Process view).

22. Bilder, *supra* note 7, at 639–41.

23. *See* SCHARF & WILLIAMS, *supra* note 2, at 18 ("The Office of the Legal Adviser also serves as a training ground of sorts for future professors of public international law. L alum, including the Legal Advisers, have contributed substantially to the body of public international law scholarship, with more than 1,000 articles and books authored by former L lawyers.").

24. A partial list of publications by Legal Advisers may be found at the back of Scharf and Williams's volume. *Id.* at 285–90.

outlining the Nixon Administration's position on the international legal justification for its military operations in Cambodia.[25] As Stevenson explained,

> [i]t is important for the Government of the United States to explain the legal basis for its actions, not merely to pay proper respect to the law, but also because the precedent created by the use of armed forces in Cambodia by the United States can be affected significantly by our legal rationale.[26]

From a historical perspective, the most notable aspect of this speech was not that it was legally correct—in fact, its legal correctness has been significantly challenged—but rather, the simple fact that the speech was made. By laying out the Administration's legal theory in a public forum, Stevenson gave American citizens and legislators, as well as the international community, a fuller opportunity to assess that theory and to test the government's actions in light of it. The speech reflected and solidified what I will call (13) *the Legal Adviser's Duty to Explain*: the important transparency norm that senior U.S. government lawyers, and the Legal Adviser of the Department of State in particular, are expected not just to give legal advice in private but also to explain in public the international legal basis for what the United States has done.[27] The Duty to Explain is particularly important in the field of international law, given the central, constitutive role that this body of law assigns to state practice. Chayes, Meeker, and Stevenson, each in his own way, demonstrated the capacity of U.S. Executive Branch lawyers not only to interpret but more fundamentally to (14) *shape international law*, by interpreting precedents and guiding the creation of new state practices. That role was reinforced in 1973, when the *U.S. Digest of International Law* became an annual publication.

During the Carter Administration, two Legal Advisers affirmed yet another distinctive feature of the Office: (15) *L as action officer*. Through his work on the Middle East peace process at Camp David, Herb Hansell became far more than a reactive dispenser of advice. He became a *negotiator of treaties*. His successor Roberts ("Bob") Owen went further, when during the Iranian Hostage Crisis, Owen became both a *litigator* and an *architect* of a new legal institution. Owen played the litigator's role when Iran attacked the established international legal order by holding American diplomats hostage; Owen led the U.S. government team that went to the ICJ seeking a declaration of illegality and a request to restore the status quo ante. Then, in the Algiers Accords that ended the Hostage Crisis, Owen and Deputy Secretary of State Warren Christopher created a refuge of relative peace from the storms of our bilateral relationship, the Iran–United States Claims Tribunal, to resolve claims of the two countries and

25. John R. Stevenson, *Statement of the Legal Adviser*, 64 AM. J. INT'L L. 933 (1970).

26. *Id.* at 935.

27. As Legal Adviser, I have tried to fulfill this duty in a number of ways, including presentations at the annual meeting of ASIL and now even blog posts when certain particularly important international law events occur. *See infra* note 45.

those of our nationals through the application of law. Yet another side of L's work, that of (16) *counsel to diplomatic law and litigation*, took on new meaning in the Carter Administration's brief in the landmark human rights case of *Filártiga v. Peña-Irala*.[28] Bob Owen, his Deputy Bill Lake, and his Counselor Stefan Riesenfeld worked with Assistant Attorney General for the Civil Rights Division (and later Yale Law School Professor) Drew S. Days III to bring human rights sensitivities to the U.S. government's approach to the Alien Tort Claims Act, a tradition that Clinton Administration Legal Adviser Conrad Harper carried forward with the brief he and then-Solicitor General Drew Days filed in the *Karadžić* case.[29]

During the 1980s, Legal Adviser Davis Robinson continued L's tradition as litigator by appearing before the ICJ in the *Gulf of Maine* and *Nicaragua* cases and by overseeing the formation of a new L office to deal specifically with Iranian claims.[30] Developments in the latter part of that decade drew an unusual degree of critical attention to the work of the Legal Adviser. During those years, a series of controversies arose around such issues as the U.S. military operation in Grenada, the mining of Nicaraguan harbors, the rejection of the ICJ's compulsory jurisdiction, the assertion of the right to seize fugitives abroad, and the controversial reinterpretation of the Anti-Ballistic Missile (ABM) Treaty. All of these challenges led to a probing 1991 report by the Joint Committee of ASIL and the American Branch of the International Law Association on "The Role of the Legal Adviser of the Department of State," which noted that "since foreign policy decisions are often highly political, and policy makers are often skeptical concerning the relevance of international law, pressures on the Legal Adviser to 'bend' or ignore international law in order to support policy decisions may be intense."[31] It is therefore critical, the report stressed, that the Legal Adviser recognize and develop tools to carry out "the responsibility of resisting such pressures."[32]

Throughout the Clinton years, Legal Advisers Conrad Harper and David

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28. 630 F.2d 876 (2d Cir. 1980).

29. Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995). The evolution and importance of these two human rights briefs is described in Harold Hongju Koh, Filártiga v. Peña-Irala*: Judicial Internalization into Domestic Law of the Customary International Law Norm Against Torture*, *in* INTERNATIONAL LAW STORIES 45 (John E. Noyes, Laura A. Dickinson & Mark W. Janis eds., 2007). For the most recent U.S. government court filing in this line, submitted after this speech was delivered, see Brief for the United States as Amicus Curiae Supporting Petitioners, Kiobel v. Royal Dutch Petroleum Co., No. 10-1491 (U.S. Dec. 21, 2011).

30. *See* Davis R. Robinson, *The Reagan Administration*, *in* SCHARF & WILLIAMS, *supra* note 2, at 55, 55–56, 60–63 (discussing these developments). Ironically, it was through the overwork of the office in this period that I, as a young Justice Department attorney at the Office of Legal Counsel, had my first experience with L, when I was detailed to L in 1984 on temporary duty to help fill in for lawyers who had been dispatched to The Hague to work on these cases.

31. *The Role of the Legal Adviser of the Department of State: A Report of the Joint Committee Established by the American Society of International Law and the American Branch of the International Law Association*, 85 AM. J. INT'L L. 358, 361 (1991).

32. *Id.*

Andrews worked to address these concerns while confronting an ever-larger suite of legal issues. Perhaps most notably, Harper and Andrews strengthened the tradition of "L as architect" by assisting in the creation of the International Criminal Tribunals for Yugoslavia and Rwanda; and they strengthened the tradition of "L as negotiator" through Andrews' work to resolve the dispute arising out of the Chinese embassy bombing in Belgrade. Significantly, the Clinton Administration also called Bob Owen back into service, when then-Secretary of State Warren Christopher asked Owen to serve as a legal adviser to Richard Holbrooke at the Dayton Peace Conference in December 1995 and later as presiding arbitrator at Brčko.

For any Legal Adviser, the most intense moments arise when policymakers desire to use force out of a sense of external urgency. Ed Williamson worked extensively and productively on use of force and related issues as Legal Adviser during Operation Desert Storm in the early 1990s. In the difficult years immediately following 9/11, Will Taft and John Bellinger strove to uphold the rule of law and to maintain a strong dialogue with their counterpart legal advisers, even in the face of tremendous controversy about the Bush Administration's legal views. Legal Advisers can also find themselves in controversy when they seek to change prior legal positions or resist emerging positions. George H.W. Bush's Legal Adviser Abraham Sofaer became embroiled in public controversy over his efforts to reinterpret the ABM Treaty,[33] while George W. Bush's first Legal Adviser Will Taft became engaged in a heated interagency dispute when he attempted to resist and then to roll back the Justice Department's reinterpretation of the Geneva Conventions after 9/11.[34] Some of Taft's valiant efforts on these sorts of sensitive matters have since come to light.[35] Other such efforts by him, and by every Legal Adviser and by many L attorneys before and after him, may remain largely hidden from public view.

Thus, to review, L's institutional history has set the core canons of the office, which may be summarized as follows: Ideally, the Legal Adviser should act as an independent, nonpartisan expert on and scholar of international law, with a wide-ranging remit across the Department's entire workload, always giving

33. *See, e.g.*, Abram Chayes & Antonia Handler Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956 (1986).

34. *See* William H. Taft IV, *The Bush (43rd) Administration*, *in* SCHARF & WILLIAMS, *supra* note 2, at 127, 129–30.

35. Perhaps the best known example is Will Taft's detailed January 11, 2002 memorandum responding to the January 9, 2002 memorandum by John Yoo, then-Deputy Assistant Attorney General of the Office of Legal Counsel at the Department of Justice. In arguing that Yoo's analysis was "seriously flawed," Taft wrote: "In previous conflicts, the United States has dealt with tens of thousands of detainees without repudiating its obligations under the [Geneva] Conventions. I have no doubt we can do so here, where a relative handful of persons is involved." Memorandum from William H. Taft, IV, Legal Adviser, U.S. Dep't of State, to John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice 1, 2 (Jan. 11, 2002), *available at* http://www.torturingdemocracy.org/documents/20020111.pdf. Taft ended on this memorable and poignant note: "Your draft acknowledges that several of its conclusions are close questions. The attached draft comments will, I expect, show you that they are actually incorrect as well as incomplete. We should talk." *Id.* at 2.

legal advice that is sensitive to the clients' policy objectives, takes the long view, and seeks to advance the best long-term interests of the State Department as an institution rather than the interests of any particular individual or administration. These competing commitments require the Legal Adviser to balance the concerns of politics and the law, to report directly to the Secretary (with career lawyers in turn reporting directly to the Legal Adviser), and to run an office of professional international lawyers that is kept in the loop with regard to all departmental matters. L must be in at the takeoff of a new foreign policy episode to help establish the legal and political legitimacy of the actions that follow. At the same time, L must also stay connected to the outside world, including the legal academy, which both reinforces the Legal Adviser's Duty to Explain and underscores the capacity of U.S. Executive Branch lawyers not just to interpret but more fundamentally to shape international law. In all of this work, L plays many roles, not only as a desk-bound interpreter but also as an action officer, negotiator, litigator, counsel to diplomatic litigation, architect of new legal institutions, and at times arbiter of international legal disputes.

II. "L PRESENT": OFFICE ROLES

Obviously, this breathless history cannot do our 163 years justice, but one point at least emerges clearly: As Professors Scharf and Williams explain in their book, "[j]ust as the Solicitor General is the government's point [person] for constitutional questions, the Legal Adviser is the government's principal expert in international legal affairs."[36] L continues to be the Executive Branch's primary agent, authority, and focal point for international law—the institution charged with figuring out how to formulate and implement the foreign policies of the United States in accordance with international law and the responsible development of international institutions. L helps determine how international agreements should be worded, how international organizations should be structured, and how customary international law rules should be articulated.

The core traditions of the office have all been evident throughout L's history: our wide-ranging portfolio, our independence from yet connection to the political apparatus, our close ties to the Secretary and her team on the State Department's Seventh Floor, the institutional predominance and personal dedication of the career staff, the multilayered mix of the scholarly and the worldly, and the stunning diversity of roles our lawyers must play. There are some great government offices in which the lawyers become expert at arguing in a particular court or giving advice to a particular client. But the lawyers in L must negotiate the roles of litigator, counselor, action officer, diplomat, arbitrator, negotiator, scholar, and opinion-giver, all at one time. One way to describe our role is as "togglers." We toggle constantly among domestic, international, and foreign legal sources, between public and private law, between our specific

36. SCHARF & WILLIAMS, *supra* note 2, at xix.

advice-giving duties and our broader normative and strategic responsibilities.

Thinking in functional terms, as I have previously explained, L plays four basic roles.[37] First, L serves as a *counselor*. Like any public or private general counsel's office, we give formal and informal legal advice to help our clients achieve their policy objectives, but in our case the law we apply includes U.S. constitutional provisions, statutes, regulations, judicial decisions, treaty commitments, and customary international law. Second, L serves as a *conscience*: both in the sense of an ethical conscience giving prescriptive advice[38] and as a group of individuals who understand how government bureaucracy works and thus can place issues in a broader normative perspective, especially in the complex, delicate, and contentious realm of international law, where legal issues may bleed into moral and policy issues. In this role, it is L's duty and its tradition not just to try to guide difficult policy choices into lawful channels but also to suggest when choices may be "lawful but awful." Third, L serves as a *defender* of U.S. interests in a variety of contexts. We represent the United States in treaty negotiations, diplomatic discussions, and international litigation before all manner of international tribunals, and we coordinate daily with the Department of Justice on litigation before domestic courts that implicates U.S. foreign policy interests. Fourth and finally, L acts as a *spokesperson* for the U.S. government regarding the meaning and importance of international law. Thus, speeches like this are, in an important sense, not distractions, but a critical part of my job as the Legal Adviser.

Another part of my job is to recruit the best and the brightest to come work at L, and here, the facts largely speak for themselves. Today, the lawyers in L—spread across twenty-four offices, nineteen functional and five regional—wear a mindboggling number of hats in many different fascinating and demanding settings. We currently have positions in New York; Charleston, South Carolina; Brussels; The Hague; Geneva; Kabul; and Baghdad, and at any given moment some percentage of our lawyers are on temporary duty assignments all over the world. The attorneys at these locations are not just observers who file the occasional field report. They are action officers and diplomats who actually get out there and solve problems, whether it is brokering peace treaties, supporting arms export control inspections, or helping American citizens in difficult circumstances. One reason young lawyers seek temporary duty at these locations abroad is that they know that, on these postings, they will be responsible for the entire range of issues confronting their institutional clients. By virtually any metric, L has become one of the most diverse international "law firms" in the world. Over the last eighty years, we have experienced tremendous growth, expanding from fewer than twenty-five employees at our birth to over 175 lawyers and over 260 total personnel in the office today, including many

37. *See* Koh, *supra* note 1.

38. Our L/Ethics office, for example, advises all political appointees on their ethical duties and reviews particular issues of potential ethical conflict.

non-lawyers who are essential to the work we do. At the same time, we have worked hard to maintain an informal collegial culture, to avoid becoming rigidly hierarchical, and to maintain a collective spirit of intellectual curiosity and inquiry.

By way of international comparison, we are significantly larger than virtually any other country's legal adviser's office.[39] We are more of a lawyer's shop, in that we have much less of a tradition than many of our foreign counterparts of diplomats (as opposed to lawyers) running the office. Generally speaking, our Legal Advisers do not go on to become ambassadors.[40] And, not infrequently, we are lawyers who counsel other lawyers. At this time, for example, L has a range of brilliant lawyers as clients, including the current President, Secretary of State, Deputy Secretary of State, National Security Adviser, and Director of the Department's Policy Planning Staff.

While we have gradually accreted functions over time, so that we now handle nuclear nonproliferation just as surely as we handle claims disputes, in the twenty-first century the pace of change has quickened. We must add to the list whole new fields, such as the law of the Internet, the law of the Arctic, the law of climate change, and the law of 9/11. As the worlds of international law, policy, and diplomacy grow ever more complex and interconnected, so does the work of L. Increasingly, we must address "old wine in new bottles," timeless concerns in new factual settings. I am thinking, for example, of the problems of piracy in the Gulf of Aden, the application of international human rights and humanitarian law to cyberspace, and international legal problems of discrimination as applied to previously unprotected minority groups. More broadly, over the course of the history I have recounted, L has developed a substantive institutional expertise and structural position within the U.S. government that allows it to be the government's leading authority on a variety of recurring international legal issues, ranging from diplomatic and consular privileges and immunities; to the negotiation of international instruments on counterterrorism, investment, and everything in between; to international environmental law; to private international law, particularly through the Hague Conference; to specific statutes and issue areas such as the Iran Sanctions Act and presidential proclamations imposing visa sanctions.

As my listing of roles above suggests, we also fulfill a variety of functions that are not exclusively legal in nature. L provides stability and continuity over the course of changing administrations and foreign policy visions, informing our clients about the broader context in which they operate and bridging bureaucratic chasms to lay the groundwork for interbureau and interagency solutions. In addition to counseling clients on what is legal, we may provide

39. *See* SCHARF & WILLIAMS, *supra* note 2, at 158 (remarks of Conrad Harper).

40. Our career deputies, however, not infrequently do become ambassadors. For example, longtime Deputy Legal Adviser Jim Michel became Ambassador to Guatemala in 1987, Mike Kozak became Chief of the U.S. Interests Section in Cuba in 1996 and Ambassador to Belarus in 2000, and Jim Thessin recently became Ambassador to Paraguay.

them with our assessment of the wisdom of lawful actions they seek to undertake. The client always remains free to disagree with such an assessment, but history shows that L's advice is ignored at the policymaker's peril.[41] L attorneys also do significant work outside the confines of the State Department's walls. We help manage strained relations and chronic tensions with foreign states in the context of international law—for instance, helping to negotiate agreements with Cuba to promote safe, legal, and orderly migration. We help resolve specific international disputes that bubble up. And we help design international mechanisms for dispute resolution. Increasingly, we are being asked to operate in conflict and post-conflict zones. All of which makes life at L endlessly fascinating and highly challenging. I have enjoyed every job I have had, but I have enjoyed serving as Legal Adviser the most, and nearly every lawyer who has worked in the office says the same.

III. "L PRESENT": TIMELESS CONCERNS, NEW CONTEXTS

Against this background, let me address in more detail three areas in which we have had to adapt old expertise to new situations: the law of armed conflict, the law of official immunities, and the law of international dispute resolution.

A. LAW OF ARMED CONFLICT

Cicero famously said that in times of war, the law falls silent. But I prefer the words of President Obama, who noted in his 2009 Nobel Lecture that even when a state is engaged in conflict with the most ruthless and lawless of adversaries, "adhering to standards, international standards, strengthens those who do, and isolates and weakens those who don't."[42] Historically, L lawyers have been passionately committed to this principle, particularly in the Office of Political-Military Affairs, or "L/PM." And in working every day to uphold it, these lawyers are conscious that they stand on the shoulders of a group of giants in the field, all of whom are members of what I have called Career L.

As many of you know, the history of the law of armed conflict in the post-World War II period is one of peaks and valleys. The Geneva Conventions

41. Davis Robinson provides a vivid example of this point in recalling the mining of the harbors of Nicaragua during the Reagan Administration, which was undertaken by the CIA without input from the Legal Adviser's Office:

> I would argue strongly that if L had been involved in the take-off in the case of the mining of the harbors of Managua, we could have provided constructive legal advice . . . . The input of L would, I believe, have added a significant dimension to the decision-making process and also improved the implementation of the President's ultimate decision. However, as it transpired, instead of being ready for the fire storm that followed the public disclosure of the mining of the harbors, the Administration was legally caught off-guard. Thus, all that the lawyers could contribute was assistance in after-the-fact containment of a train wreck.

Robinson, *supra* note 30, at 60.

42. President Barack H. Obama, Nobel Lecture: A Just and Lasting Peace (Dec. 10, 2009), *available at* http://www.nobelprize.org/nobel_prizes/peace/laureates/2009/obama-lecture_en.html.

of 1949 were a towering achievement in the development of humanitarian safeguards for vulnerable populations. They created for the first time in treaty law a baseline of protections, reflected in Common Article Three, that states must afford their enemies even in the context of civil wars and other conflicts of a non-international character.

Over the next three decades, our engagements in Korea and Vietnam demonstrated the need for further development of the laws of war. So during the 1970s, there was an initiative to devise protocols to the Geneva Conventions, elaborating additional rules applicable to international as well as non-international armed conflicts. Around that same time, many states also initiated a process—formally launched by the United Nations Conference on Certain Conventional Weapons (CCW) in 1979 and 1980—to regulate the use of specific weapons to protect civilians against certain indiscriminate effects.

L attorneys were at the very the center of this work. In 1973, George Aldrich, now known to many as a longtime arbitrator on the Iran–United States Claims Tribunal, was the State Department's Principal Deputy Legal Adviser and one of the Department's leading experts in the laws of war. He was assigned to head the U.S. delegation that from 1974 to 1977 negotiated the first and second Additional Protocols to the Geneva Conventions.

The negotiations were not smooth. There were a number of contentious issues, and the United States did not become a party to Additional Protocol I. But while serving from 1975 to 1977 as the Special Rapporteur to the Third Committee of the Diplomatic Conference (an extraordinary position for an American), Aldrich shared responsibility for drafting and negotiating some of the most important provisions of both protocols. These included the core rules that articulate what can be considered legitimate military objectives, when civilians lose their immunity from being the object of attack, and when attacks cross the line into indiscriminate or disproportionate conduct. Although the United States may not agree with every element of all of these rules, it agrees with a great deal of them, and it is for this reason that when President Reagan communicated to Congress in 1987 that the United States would not seek to become a party to Additional Protocol I, he nevertheless committed the United States to work with allies on incorporating the positive provisions of the Protocol into the rules that govern our military operations and into the customary international law that governs international armed conflicts.[43]

The task of taking forward the President's commitment fell to another lawyer in L: Mike Matheson, one of our longest-serving Principal Deputies and to this day a leading figure in the field of international humanitarian law. Like Aldrich, Matheson had served before joining L at the Department of Defense, where he developed an expertise in the laws of war, and in due course he rose to a position in the L Front Office. Working with attorneys from the Defense

43. *See* Letter of Transmittal from President Ronald Reagan to the Senate of the United States (Jan. 29, 1987), *reprinted in* 81 AM. J. INT'L L. 910, 911–12 (1987).

Department like Jack McNeill and with JAGs like Hays Parks, Matheson took on the important project of identifying those elements of Additional Protocol I that might be supported as customary international law. In 1987, he gave a landmark speech at American University in which he painstakingly worked through the elements of Additional Protocol I that the United States might consider to be customary international law.[44]

As mentioned previously, another major initiative in the laws of war during the post-Vietnam era concerned the development of a regulatory scheme for certain conventional weapons in the so-called "CCW" forum. Here again, Matheson is widely acknowledged for his leadership in concluding the Amended Mines Protocol in 1996. That protocol helped pave the way for further amendment and strengthening of the CCW framework itself, an achievement that owes a great deal to the late Ed Cummings, Matheson's successor as U.S. head of delegation to the CCW.

I first met Ed Cummings when I was a young U.S. government lawyer, and it is hard to identify another person in the law of war community who was as universally loved and admired for the combination of skill, expertise, and personal grace that he brought to his work. In addition to shaping efforts to broaden the scope of the CCW, Cummings was the driving force behind other signal achievements in the field and a consummate mentor to young lawyers. His work on Additional Protocol 3 to the Geneva Conventions, for example, was instrumental in forging a path for the Israeli society, Magen David Adom, to join the International Red Cross/Red Crescent movement. And he is credited for his important role in pressing the CCW group toward successful resolution in the 2005 Protocol on Explosive Remnants of War.

L also played a key role in the 1990s in developing the more robust use of Chapter VII authorities under the United Nations Charter to restore international peace and stability and to provide the basis for elaborate peacekeeping operations in East Timor and Kosovo. By the end of that period, I was serving in the Clinton Administration as Assistant Secretary for the Bureau of Democracy, Human Rights and Labor under then-Secretary of State Madeleine Albright. During the Kosovo episode, I admit, I felt uncomfortable about whether L had fully met its Duty to Explain. It seems to me that particularly when we use force, we have a duty to explain why we believe that use of force to be lawful. That is one reason why in various statements and speeches during my tenure, I have made a special effort to address some of these questions to the extent I can in a public forum.[45]

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44. Michael J. Matheson, Remarks, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419 (1987).

45. *See, e.g.*, *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2011) (statement of Harold Hongju Koh) [hereinafter Koh Libya Testimony], *available at* http://foreign.senate.gov/imo/media/doc/Koh_Testimony.pdf; Koh, *supra* note 1; Harold Hongju Koh, Statement Regarding Use of Force in Libya (Mar. 26, 2011), *available at* http://www.state.gov/s/l/releases/

I have spoken of the post-World War II history of the law of war as being one of peaks and valleys. As many know, the past years have been trying times, and it was the Legal Adviser's Office that pushed back at numerous critical junctures, including during Will Taft's tenure from 2001 to 2005. Senator Lindsey Graham memorably remarked in 2005 that "the lawyers in the Secretary of State's office, while I may disagree with them, and while I may disagree with Secretary Powell, were advocating the best sense of who we are as people."[46] I also admired Taft for writing in 2003 that "[w]hile the United States has major objections to parts of Additional Protocol I, it does regard the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled."[47] The Supreme Court went on to quote Taft's words in *Hamdan v. Rumsfeld*, when it underscored that "[a]lthough the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government 'regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled.'"[48] Although in his reminiscences today, Will described himself as having been embattled in this period, over time, by adhering to principle, L can sometimes win even when losing.[49]

When Will Taft left, he was replaced by John Bellinger, who deserves great credit for opening up channels of communication with our legal counterparts in allied and partner governments all around the world. Bellinger helped draw the U.S. government into a posture of engagement on a whole host of sensitive issues relating to the law of armed conflict, creating bilateral and multilateral channels for communication that helped rebuild some of the trust that had been lost in the years following the September 11 attacks. Some of the foreign government participants in this conference, including Legal Advisers Peter Taksoe-Jensen of Denmark, Alan Kessel of Canada, and Sir Daniel Bethlehem of the United Kingdom, played an important role in this effort.

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remarks/159201.htm; Harold Hongju Koh, *The Lawfulness of the U.S. Operation Against Osama bin Laden*, OPINIO JURIS, May 19, 2011, http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/; *cf.* Harold Hongju Koh, Statement Regarding Syria (Mar. 30, 2012), *available at* http://www.state.gov/s/l/releases/remarks/187163.htm.

46. *Confirmation Hearing on the Nomination of Alberto R. Gonzales to Be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 80 (2005) (statement of Sen. Lindsey Graham).

47. William H. Taft IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319, 322 (2003).

48. Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006) (alteration in original) (quoting Taft, *supra* note 47).

49. On March 7, 2011, just a few days after these remarks were delivered, the Obama Administration announced that the "[t]he U.S. Government will . . . choose out of a sense of legal obligation to treat the principles set forth in Article 75 [of Additional Protocol I] as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well." Press Release, White House, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011), http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy. The Administration further urged the Senate "to act as soon as practicable" to provide its advice and consent to ratification of Additional Protocol II. *Id.*

Finally, I cannot complete this review without mentioning my former Principal Deputy Joan Donoghue, who recently left L to become a judge on the ICJ. Brilliant, principled, and composed, she was the perfect steward for a delicate transition from the Bush to the Obama Administrations. During my confirmation process, Judge Donoghue served as Acting Legal Adviser for a protracted period and spent much of her time guiding senior officials in the new Administration through the thicket of issues they were inheriting in this area, including by helping with the implementation of the President's three detention- and interrogation-related executive orders of January 2009.

In short, these select L/PM highlights reveal the continuing critical role of what I have called Career L: career attorneys, supported by the Legal Adviser, who are deeply committed to America's tradition of abiding by international humanitarian law. On a day-to-day basis they continue that tradition—always working closely with our colleagues at the Department of Defense Office of General Counsel and the Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff, with whom we have forged an extraordinary partnership over decades of collaboration on armed conflict issues. Recently, a team of L lawyers returned from Geneva, where the U.S. delegation (led by an L attorney) has been continuing the work of their L predecessors by trying to reach agreement on a new CCW protocol that would govern cluster munitions; meanwhile, another team of L lawyers returned from the UN, where they had been engaged in negotiations regarding the arms trade issue. I myself have continued to engage with counterpart legal advisers to continue in the intergovernmental dialogue on political-military affairs that John Bellinger helped establish. The precise subject matter may change over the years, but in this time of armed conflict, like all others before it, we at L constantly engage in these sorts of conversations and negotiations to ensure that the law is not silent, but rather, loudly and proudly incorporated into the practice of modern warfare.

B. OFFICIAL IMMUNITY: FROM THE TATE LETTER TO *SAMANTAR*

Another area in which L has played a recurring, if changing, role over time has been in the area of foreign sovereign and official immunity.[50] Historically, the Executive Branch was considered the appropriate branch to determine immunity, by providing courts with so-called suggestions of immunity. Courts adopted a two-track process that looked to the State Department to decide whether immunity was appropriate. If the State Department offered a suggestion of immunity, the court would dismiss the suit. If the State Department was silent, the court would decide on its own "'whether all the requisites for such

50. For a fuller description of current State Department practice, see Harold Hongju Koh, *Foreign Official Immunity After* Samantar*: A United States Government Perspective*, 44 VAND. J. TRANSNAT'L L. 1141 (2011), from which the following discussion directly derives.

immunity existed,'"[51] considering "'whether the ground of immunity is one which it is the established policy of the [the State Department] to recognize.'"[52]

The State Department practice of suggestions of immunity evolved over time. Before 1952, there was absolute sovereign immunity for friendly foreign sovereigns. In 1952, Acting Legal Adviser Jack Tate wrote the "Tate Letter" that adopted a more restrictive theory of sovereign immunity.[53] In 1976, Congress passed the Foreign Sovereign Immunities Act (FSIA),[54] which codified the standards for foreign sovereign immunity and transferred primary decision-making responsibility for determinations of foreign sovereign immunity from the State Department to the federal courts. The Executive Branch saw the FSIA as applying only to foreign states, however, not to foreign officials, and therefore continued the practice of providing suggestions of foreign official immunity. The circuits were split on this issue. In 2010, the Supreme Court held in *Samantar v. Yousuf* that the Executive Branch was correct: The FSIA does not govern immunity for foreign officials.[55]

In lieu of the FSIA, the Court's *Samantar* decision makes clear that the immunity of individual foreign officials derives from common law standards and from international law.[56] Accordingly, Samantar's own case was remanded so that the trial court could consider common law immunities potentially available to him.[57] The Supreme Court did not consider the precise nature and scope of those immunities. Just as they did historically, courts must now look to the Executive Branch—principally the State Department—to suggest principles governing official immunity. Before the FSIA was enacted, when the State Department suggested that a foreign sovereign defendant was immune from suit, district courts "surrendered [their] jurisdiction" over the case.[58] As the Second Circuit put it, "once the State Department has ruled in a matter of this nature, the judiciary will not interfere."[59] The *Samantar* Court expressly found "no reason to believe that Congress saw as a problem, or wanted to eliminate, the State Department's role in determinations regarding individual official

51. Samantar v. Yousuf, 130 S. Ct. 2278, 2284 (2010) (quoting *Ex parte* Peru, 318 U.S. 578, 587 (1943)).

52. *Id.* (quoting Republic of Mexico v. Hoffman, 324 U.S. 30, 36 (1945) (alteration in original)).

53. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen., U.S. Dep't of Justice (May 19, 1952), *reprinted in* 26 DEP'T OF STATE BULLETIN 984 (1952). Forgive me if I note with pride my own fleeting personal connection with Jack Tate. Born in Bolivar, Tennessee, in 1902, Tate graduated from the University of Tennessee at Knoxville in 1924, and after his historic service as Acting Legal Adviser moved to my hometown, New Haven, Connecticut, where he served for many years as the beloved Deputy Dean of Yale Law School. In that role, Tate showed great kindness to my family, and his wife Elizabeth became my older sister's revered and favorite high school English teacher.

54. Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

55. 130 S. Ct. at 2282, 2292.

56. *Id.* at 2284–85, 2292–93.

57. *Id.* at 2292–93.

58. *Id.* at 2284.

59. Isbrandtsen Tankers v. President of India, 446 F.2d 1198, 1201 (2d Cir. 1971).

immunity."[60] The U.S. government's amicus brief in *Samantar* explained why a rigid statutory framework is not appropriate for these determinations; instead we need flexibility to consider complex issues relying on a nonexhaustive range of factors.[61]

As a result, building on pre-FSIA practice, we are now establishing a new process for making these official immunity determinations. We believe that, as the Court recognized, the State Department, in consultation with others in the Executive Branch, is best positioned to consider the policy, remedial, substantive, and prudential concerns raised by suits against officials. Four basic reasons underlie this belief. First, the Department has a unique and critical expertise in international law and practice; there are nearly 200 lawyers in L whose specialty is the determination of rules of international law, both positive and customary. Second, the State Department daily grapples with the impact of litigation on foreign states. Third, the State Department has expertise regarding the federal common law of immunity for individual foreign officials and can best distinguish true "*Samantar*" issues from "non-*Samantar*" procedural issues regarding status and parties. Fourth, the State Department has a special capacity and responsibility to evaluate foreign policy and reciprocal consequences of official immunity decisions. Moreover, the Department is better equipped to do all of these things today than it was in the era before the FSIA, when it lacked the resources to make recommendations in certain cases.

In our recent filing before the Eastern District of Virginia, we determined that Samantar was not immune from suit, based on a number of factors relating to the facts of the case in conjunction with "the applicable principles of customary international law."[62] We noted, among other things, that the defendant was a U.S. resident sued by a U.S. citizen, and that he was a former official of a state with no currently recognized government who would normally enjoy only residual immunity for acts taken in an official capacity.[63] We also considered "the overall impact of this matter on the foreign policy of the United States,"[64] and ultimately determined that Samantar was not immune from suit. The district court duly followed this determination.[65]

So that is what happens when the Executive Branch makes an official immunity determination—but what if the State Department stays silent? Will the State Department really be forced to make an immunity determination in every single case where that issue might arise? The Supreme Court in *Samantar*

60. *Samantar*, 130 S. Ct. at 2291.

61. Brief for the United States as Amicus Curiae Supporting Affirmance, Samantar v. Yousuf, 130 S. Ct. 2278 (2010) (No. 08-1555).

62. Statement of Interest of the United States of America at 7, Yousuf v. Samantar, No. 1:04 Civ. 1360 (E.D. Va. Feb. 14, 2011) [hereinafter *Samantar* Statement of Interest]; *see also* Brief for the United States as Amicus Curiae Supporting Appellees at 5, Yousuf v. Samantar, No. 11-1479 (4th Cir. Oct. 24, 2011).

63. *Samantar* Statement of Interest, supra note 62, at 7–9.

64. *Id.* Ex. 1, at 2.

65. Order, Yousuf v. Samantar, No. 1:04 CV 1360 (E.D. Va. Feb. 15, 2011).

explained that under the traditional practice which the FSIA did not displace, if the Executive Branch chooses *not* to participate in the litigation, district courts must consider whether a defendant is entitled to immunity under "the established policy of the State Department."[66] Once again, the Supreme Court is looking to the Executive Branch to suggest broader principles of decision to govern individual immunities of foreign officials. And the more we say now to set forth an official immunity policy that can guide the courts in these cases, the less we will have to say in future cases. Thus, just as L works hard to ensure that during war, the law is never silent, in the area of official immunity, the most meaningful sound coming from the Executive Branch may ultimately turn out to be the sound of silence.

C. INTERNATIONAL DISPUTE RESOLUTION

Finally, we should not forget that, as befits an office originally known as the Examiner of Claims, the resolution of international disputes remains a critical piece of L's portfolio. At the time of L's founding in 1931, the world had just passed through its first tentative stages of building the architecture for the resolution of disputes through the use of international tribunals, and we continue to participate actively in such efforts before the ICJ, international claims bodies, and the various international criminal tribunals. Significantly, notwithstanding the establishment of world courts following the two world wars, this is a body of law that largely did not even exist at L's 50th birthday.

1. International Court of Justice

All of us are aware that, from early on, the U.S. relationship with international dispute resolution has encountered significant rough spots, reflecting in varying degrees a broader undercurrent within the U.S. body politic of ambivalence toward international institutions generally. Thus, for all the energies expended by statespersons like Elihu Root dating back at least to the beginning of the last century, the United States never became party to the Statute of the Permanent Court of International Justice, just as we famously declined to ratify the Covenant of the League of Nations. And while the United States provided true luminaries to serve as judges of the Permanent Court—for example, John Bassett Moore and Manley Hudson, not to mention former Secretaries of State like Charles Evan Hughes and Frank Kellogg—it is also true that the United States never participated in litigation before the Court.

After the horrors of World War II, however, the United States did become a party to the Charter of the United Nations and to the Statute of the ICJ. Throughout the postwar period, L has led an active U.S. participation before the ICJ. The United States has participated in more contentious ICJ cases than any other country, and L lawyers have played a pivotal role in many of the Court's

66. *Samantar*, 130 S. Ct. at 2284 (internal quotation marks and brackets omitted).

most significant cases. The same has been true in the Court's advisory cases, in which the United States has again participated in more cases than any other country, including the remarkable efforts led by Mike Matheson, the late Jack McNeill, and others in the *Nuclear Weapons* cases in the 1990s and, more recently, the efforts during my own time as Legal Adviser in the *Kosovo* case in The Hague.

Although our views do not always prevail, our contributions to these cases can nevertheless shape international law in profound ways. U.S. participation in advisory cases reads like a list of some of the most important questions in international law: Kosovo independence, nuclear weapons, Israel's construction of a security barrier in occupied territory, expenses of the United Nations, the Genocide Convention, and the list goes on. I consider myself fortunate to have represented the United States before the ICJ in the *Kosovo* case in December 2009. I was deeply moved both to have worked on human rights for Kosovo in the late 1990s while Assistant Secretary of State for Democracy, Human Rights and Labor, and then to be arguing a decade later as the United States' lawyer urging the international lawfulness of Kosovo's declaration of independence. U.S. participation in contentious cases has been equally important, with L representing the United States in disputes regarding consular notification, NATO's use of force in the Balkans, the inviolability of diplomatic premises and personnel, oil platforms, the Lockerbie bombing—in all, twenty-two contentious cases to which the United States has been party.[67]

2. International Claims Resolution

At the same time, L has continued its historic role in handling disputes over property and other economic claims. That role, too, has developed and continues to expand. For instance, L took the lead in achieving compensation for U.S. property losses resulting from World War II and the spread of communist governments in Europe. This was accomplished not through quasi-judicial commissions of the type that had been used in the 1920s and 1930s, but largely through bilateral negotiations and lump-sum settlements.

Three decades ago, in 1981, we saw the advent of the Iran–United States Claims Tribunal. By providing compensation to many American claimants and giving the world a weighty and important body of judicial decisions, the Tribunal has provided a forum for Iran and the United States, acting through their Legal Advisers, to settle a number of difficult claims. Some of these settlements have gone beyond the four corners of the Algiers Accords, including the settlement concerning the tragic shoot-down of the Iran Air passenger plane

67. At this time, we also continue to work vigorously to secure enactment of consular notification legislation that would implement the United States' obligations under the ICJ's outstanding judgment in *Case Concerning Avena and Other Mexican Nationals (Mexico. v. United States)*, 2004 I.C.J. 12 (Mar. 31). *See, e.g.*, *Fulfilling Our Treaty Obligations and Protecting Americans Abroad: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of Patrick Kennedy, Under Sec'y for Mgmt., U.S. Dep't of State), *available at* http://www.state.gov/m/rls/remarks/2011/169182.htm.

over the Persian Gulf in 1988. Remarkably, the Tribunal has continued to function to this day as a place where L lawyers and their Iranian counterparts regularly have bilateral interaction.[68] While the path has not always been smooth and remains far from perfect, the Tribunal has been the only forum in which such bilateral interaction has happened for thirty years without significant interruption. L lawyers were also instrumental in erecting the architecture of the United Nations Compensation Commission (UNCC), established to compensate individuals, companies, and states suffering losses from Iraq's 1990 unlawful invasion and occupation of Kuwait. Virtually without fanfare, over 1.5 million claimants have been compensated nearly $30 billion dollars by the UNCC.

Arbitration has taken firm hold in another area: international investment. Here too, L has played a significant role in shaping the way that the North American Free Trade Agreement (NAFTA) tribunals consider key international legal issues. The entry into force of NAFTA in 1994 ushered in for the United States, Canada, and Mexico a period of unprecedented growth in the resort to binding international arbitration to resolve investment claims under the Agreement's Chapter 11. L has led the defense of more than a dozen challenges to U.S. laws, and I had the privilege of arguing the *Grand River* case, in which the United States recently prevailed.[69] These tribunals render important decisions both for our investors venturing abroad with their capital and for law- and policymakers around the world who have agreed to a set of enforceable rules in NAFTA and in our broader suite of bilateral investment and free trade agreements.

3. *Ad Hoc* International Criminal Tribunals

When war raged in the Balkans in the early 1990s, L stood at the forefront of negotiations to establish the first international criminal tribunal since the Nuremburg trials. Created through a binding resolution adopted by the UN Security Council, the International Criminal Tribunal for the former Yugoslavia (ICTY) has served as a haven of justice for some of the worst atrocities perpetrated in the region, and its work continues to this day. L lawyers have been deeply involved in shaping every step of the process, from playing a lead role in drafting the founding statute for the ICTY, to managing U.S. cooperation with the Tribunal through our team at the Embassy in The Hague, to negotiating the terms of a resolution for an orderly transition to a successor institution that will handle so-called "residual issues" for both the Yugoslav and Rwanda Tribunals, seeking to ensure that any fugitives remaining cannot escape justice simply by outrunning the clock.

Over the course of nearly twenty years, the ICTY has indicted some 161

68. As this article goes to press, a group of L attorneys, including myself, are preparing to present the U.S. case to the Tribunal in Case No. A(15)(IV).

69. Grand River Enterprises Six Nations, Ltd. v. United States, Award (ICSID Jan. 12, 2011), *available at* http://www.state.gov/documents/organization/156820.pdf.

individuals and concluded proceedings for 125 accused, in the process creating a wealth of jurisprudence that elaborates and explains applicable international law on war crimes, crimes against humanity, and genocide. The ICTY has also served as a model for a number of other "*ad hoc*" and "hybrid" international criminal tribunals that have been created to address cries for justice in Rwanda, Sierra Leone, Cambodia, and Lebanon. Together, these tribunals have not only served as an endless source of novel and challenging legal issues for L to grapple with, but they have also proven to be an excellent training ground for new L attorneys, many of whom come to us after spending time as interns or employees at the tribunals engaged in the practice of international criminal law. The success of these tribunals has strengthened and entrenched the basic principle—for which support is now virtually universal—that perpetrators of gross atrocities must be held to account.

4. International Criminal Court

Although we sometimes forget, the United States was also an early supporter of an international criminal court. It will not surprise that this, too, has been a bumpy ride—with the United States first declining to sign the Statute of the International Criminal Court (ICC) at the conclusion of negotiations in Rome in 1998, subsequently deciding to sign on the last possible day during the final month of the Clinton Administration, and then in 2002 submitting a letter in which Under Secretary John Bolton purported to "un-sign" the Statute. Our rocky relationship with the ICC reflects a deep national tension between on the one hand, the longstanding bipartisan support for accountability in the face of atrocities, and on the other, a fear of international institutions that might sit in judgment of the United States, particularly in the form of criminal prosecutions against young Americans who serve in our Armed Forces.

While the exact path forward may not yet be known, it is clear that we have finally been able to swing the pendulum away from unsustainable U.S. positions of the past decade. That movement began at least as far back as the decision of the United States in the spring of 2005 to allow the UN Security Council to refer the situation in Darfur to the ICC, a decision that was followed by commendably steadfast efforts in the final years of the Bush Administration to oppose those who would interfere with the Court's work there. In the fall of 2009, the Obama Administration reengaged with the Assembly of States Parties, and in the summer of 2010, I co-headed a large observer delegation to the ICC Review Conference in Kampala. Thus, with little fanfare, in just three years we have shifted the default of our relationship with the ICC from hostility to positive engagement.[70] In a sign of how far we have come, the Security Council

70. *See generally* The U.S. and the International Criminal Court: Report from the Kampala Review Conference (June 16, 2010) (remarks of Harold Hongju Koh and Stephen J. Rapp), *available at* http://www.asil.org/files/Transcript_ICC_Koh_Rapp_Bellinger.pdf. As an academic, I had discussed some of the challenges of addressing the United States' relationship with the ICC and other interna-

recently made a historic, unanimous referral of the Libyan situation to the ICC. The United States proudly, and without controversy, cast its first vote in favor of an ICC referral. The ICC's Prosecutor announced that he will open an investigation into those who are most responsible for the most serious crimes committed in Libya, and stressed that there will be no impunity.

As the *ad hoc* tribunals move to complete their work, it is to the ICC that eyes around the world will increasingly turn to provide accountability and legality in the face of unspeakable atrocities. And while there were and remain considerable questions about the Court and the Rome Statute, we have supported the Court's ongoing prosecutions; we now participate actively and constructively in the meetings of the Assembly of States Parties, as we did also in the Review Conference held last summer in Kampala; and we meet regularly with the Prosecutor to determine the kinds of tangible assistance needed to bring successful prosecutions. Within the framework of domestic legal and political constraints, L has thus helped the United States make significant headway in building a more productive and sustainable relationship with the ICC that will serve the interests of the United States as well as the cause of international criminal justice.

IV. "L FUTURE": NEW CHALLENGES, ENDURING PRINCIPLES

What this review of past and present should make clear is that the more L has changed, the more its basic roles have stayed the same. As Mike Matheson has succinctly summarized, the Legal Adviser "gives legal advice before decisions are made; he gives the best possible legal defense for the decision once it has been made; he contributes to solving practical problems with his lawyering skills; and he needs to be able to use the personnel available to accomplish these objectives."[71]

Even still, to stay the same, L will have to change. New factual challenges will constantly arise, and those challenges will force us to adapt our legal paradigms to new scenarios—at times providing old wine in new bottles, at other times providing an entirely new legal analysis to meet rapid technological change. Issues that could be described as old wine in new bottles have recently included such well-worn topics as piracy, immunity of foreign officials, and international dispute resolution, which increasingly raises not just questions about adjudicatory fora but also complex issues of compliance and implementation.

Most significantly, this recent period has also witnessed the emergence of technologies—digital, biological, chemical, genetic—that may require more profound adaptations by L. The Internet alone has generated major new debates about the nature of human freedom and expression, cyber war, cybersecurity, online privacy, and much else Hugo Grotius could never have imagined. When I

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tional tribunals in Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1503–09 (2003).

71. SCHARF & WILLIAMS, *supra* note 2, at 156–57 (remarks of Michael J. Matheson).

became Legal Adviser, I said we would concentrate on the law of globalization, an area that will increasingly grip our attention as we live in an age not divided by a Berlin Wall but linked by a World Wide Web. The defining players will not be blocs of countries, necessarily; they may be networks of actors connected in countless tangible and intangible ways that challenge our traditional understandings of international relations and international law.

Increasingly, we find ourselves addressing twenty-first-century challenges with twentieth-century laws. It is no secret that our polarized political environment has made it increasingly difficult to ratify treaties or to enact legislation. But rather than simply dismissing the extant law as quaint and outmoded, we find ourselves increasingly trying to translate the directive and spirit of these laws to unanticipated situations. On a daily basis, we seek to answer questions never contemplated by the framers of legal instruments, questions like: How should the War Powers Resolution apply to a limited, NATO-led, UN-authorized operation that implicates the international community's responsibility to protect innocent civilians?[72] How do the Geneva Conventions apply to an armed conflict with a transnational non-state terrorist organization like Al Qaeda, or to the efforts of a computer programmer to attack a government system by changing the number zero to the letter *o*?[73] What will the consequences be if global warming leads the Arctic ice cap to shrink and the United States cannot bring about a workable global climate change convention or accession to the UN Convention on the Law of the Sea?[74] How does the FSIA's language regarding "foreign states" apply to the emerging institutions of the European Union?[75] Does the FSIA permit execution of judgments against China upon giant pandas or their embryos?[76]

And in negotiating these myriad new challenges, how will we know if we are succeeding? By what metric can we judge our influence in advancing U.S. interests while promoting respect for, and compliance with, international law? I have no complete answer to this question. But surely, we cannot fairly measure L's influence by such crude metrics as counting how many treaties have been ratified or cases won. We cannot fall prey to the trap that when you cannot measure what is important, you make important that which you can measure.

One short measure of our worth is that we are only as good as our principals,

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72. *See* Koh Libya Testimony, *supra* note 45.

73. For a partial answer, see Koh, *supra* note 1.

74. *Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2012) (written testimony of Hillary Rodham Clinton, Sec'y of State, U.S. Dep't of State), *available at* http://www.foreign.senate.gov/imo/media/doc/REVISED_Secretary_Clinton_Testimony.pdf.

75. *See* Brief for the United States as Amicus Curiae in Support of Neither Party, European Community v. RJR Nabisco, Inc., No. 11-2475 (2d Cir. Oct. 4, 2011).

76. *See* Walters v. Indus. & Commercial Bank of China, Ltd., 651 F.3d 280, 284 (2d Cir. 2011) (discussing effort to execute default judgment upon two Chinese giant pandas on loan to the National Zoo in Washington).

and we are only as good as our principles. We are only as good as the principals for whom we serve as agents: President Barack Obama, Secretary Hillary Clinton, and the many other clients for whom we work. And we are only as good as our principles: the values that we live by and that we seek to uphold every day. On these qualitative dimensions, I am confident that L will continue to thrive.

More generally, I retain the utmost confidence in L's ability to meet new challenges because of three of the office's core, established strengths, already alluded to earlier. The first is *L's unique perspective*: its ability to place issues in broader geographic, historic, and legal context. This ability is nurtured by our system of attorney rotation, which keeps lawyers in L for long tenures while allowing them to work on an ever-expanding set of issues, thus avoiding intellectual calcification while maintaining institutional continuity and knowledge. It is nurtured by the structure of the State Department, which is effectively a microcosm of the U.S. government in the way it must balance all U.S. foreign policy interests—from trade to counterterrorism to tourism to human rights—and which is uniquely plugged in to foreign governments and events, international bodies, and emerging global trends and norms. It is nurtured by L's role as the U.S. government's primary interface with the international legal community, which allows our attorneys to bring other countries' views and experiences back to our interagency colleagues, and to share our views and experiences with allies. It is nurtured by L's role in helping to set the U.S. government's international law agenda and to coordinate its position on international law questions, which keeps us on the cutting edge of novel legal issues. And it is nurtured by L's reputation as a repository of information and insight on U.S. foreign policy, which gives us an unparalleled background in the legal precedents of diplomacy, crisis management, and the like.

Second, I take confidence in the strength and significance of *L's unique relationships*. This conference, and the participation of eminent foreign colleagues, has helped to showcase why the office will perpetually benefit from the multilateralism that is woven into the fabric of our daily work. What L understands, as Sir Daniel Bethlehem likes to say, is that you may not be able to herd cats, but you can move their food. And so we work daily with foreign colleagues to change incentives and restructure situations. Beyond our relationships with foreign colleagues, we are engaged in multiple other dialogues, mirroring the subjects of the panels today: our interagency conversations about international law with colleagues across the U.S. government; our conversations with groups such as ASIL and with the legal academy; and our conversations with ourselves, through our repeated examination of the office's precedents and practices. Only by maintaining such close ties with colleagues inside and outside the United States and inside and outside government, and by maintaining respect for and continuity with our predecessors, can L strike its trademark balance of independence, expertise, and creativity in solving problems and promoting the rule of law.

Third, and most important, I draw confidence from *L's unique dynamism*. The "ism" that best characterizes the lawyers in our office is neither conservativism nor liberalism, but "metabolism." We are a notably energetic bunch. We are not potted plants. Our job is to identify legal channels within which policy decisions can flow and to shape legal instruments through which policy goals can be pursued. That task can seem monumental, and the work ceaseless. But we engage daily in a remarkable exercise, an interactive process between lawyers and policymakers through which legal doctrine moves from abstraction to reality. Law influences policy, policy makes law, and that perpetual feedback loop is a key to understanding why lawyering in L has historically been such a dynamic enterprise and to determining why nations obey international law. In my academic work, I have observed and described this phenomenon, which I have called "transnational legal process."[77] For the past few years, I have been lucky enough to live within this process at L and, from that vantage point, to help shape it.

CONCLUSION

Across 163 years (eighty as a statutory entity), L's decades have been full of lessons learned in the crucible. Those experiences cast important light on what it means to be government lawyers committed to the rule of law in international affairs. For if international relations are to be more than just power politics, true international lawyers must fuse their training and skill with moral fortitude and guide the evolution of legal process with the application of reasoned and respect-worthy legal norms. Our foreign policy decisions most fully conform with international law when the international lawyers are at the table while important decisions are being made. By having the courage to argue with our clients; to invoke illegality when appropriate; to offer creative legal solutions, fearless advice, and loyal implementation; and to defend our country when challenged, we serve the highest values of our office. While much else may change, my time inside L has given me deep faith that future L attorneys will continue to uphold these proud traditions over the next eight decades and beyond.

77. *See generally* Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

HARVARD LAW SCHOOL
PROGRAM ON THE LEGAL PROFESSION

THE GENERAL COUNSEL AS LAWYER-STATESMAN

A Blue Paper

By Ben W. Heineman, Jr.

The Fundamental Mission of the Corporation

The foundational goals of the modern corporation should be the fusion of high performance with high integrity. The ideal of the modern general counsel is a lawyer-statesman who is an acute lawyer, a wise counselor and company leader and who has a major role assisting the corporation achieve that fundamental fusion which should, indeed, be the foundation of global capitalism.

I believe that this concept of General Counsel as lawyer-statesman has strong roots in major American companies, is growing in the UK and has adherents in some companies elsewhere in the world. Trends over the past 25 years have made possible a powerful, affirmative leadership role for General Counsels, at least in large transnational enterprises. But to understand the role, it is necessary, first, to understand in some detail what (in my view) should be the mission of the contemporary global corporation.

High performance means strong sustained economic growth through provision of superior goods and services which in turn provide durable benefits for shareholders and other stakeholders upon whom the company's health depends. Such performance entails an essential balance between risk-taking (the creativity and innovation so essential to economic growth) and economic risk-management (the financial, commercial and operational disciplines so essential to the soundness and durability of business institutions).

High integrity means robust adherence to the letter and spirit of formal rules, both legal and financial; voluntary adoption of global ethical standards that bind the company and its employees; and an employee commitment to core values of honesty, candor, fairness, trustworthiness and reliability. It involves understanding, and mitigating, other types of risk—beyond directly economic risk—which can cause a company catastrophic harm: legal, ethical, reputational, communications, public policy and country-geopolitical.

But the fusion of high performance with high integrity is not just about risk mitigation. It is about creating affirmative benefits in the company, in the marketplace and in the broader global society. Ultimately high performance with high integrity creates the fundamental trust among shareholders, creditors, employees, recruits, customers, suppliers, regulators, communities, the media and the general public. This trust is essential to sustaining corporate power and freedom which drives the economy with widespread economic and social benefits—trust which in the past 10

years has dramatically eroded due to stark corporate scandals and unthinkable business failures.

The core task of CEOs, and top senior executives like the General Counsel, is to build a performance with integrity culture that permeates the corporation. Such a culture entails shared principles (values, policies and attitudes) and shared practices (norms, systems and processes). Although this culture must include elements of deterrence against legal, financial and ethical wrong-doing, it must, at the end of the day, be affirmative. An underlying tenet of this culture should be that people want to do the right thing because leaders make it a company imperative and live it themselves. Clear expectations must be driven down into the company, and this must be a uniform global culture that applies in every nation and cannot be bent by corrupt local practices, regardless of short-term business costs.

The Role of a General Counsel—and Inside Lawyers—In a High Performance with High Integrity Corporation

Given this view of the global corporation's fundamental mission, the role of the General Counsel, and other inside lawyers, is extremely broad, involving three distinct functions: acute technical lawyer, wise counselor and lawyer as leader. The essence of being a lawyer-statesman is to move beyond the first question—"is it legal?"—to the ultimate question—"is it right?" Such a role involves leadership, or shared responsibility, not just for the corporation's legal matters but for its positions on ethics, reputation, public policy, communications, corporate citizenship, country and geopolitical trends.

The lawyer-statesman role involves not just dealing with past problems, but charting future courses; not just playing defense, but playing offense; not just providing legal advice, broadly defined, but being part of the business team and offering business advice. It means being both a partner to business leadership but ultimately the guardian of the company. Even more broadly, it involves the wise counseling and leadership roles which stem from practical wisdom, not just technical mastery; which requires broad judgment based on knowledge of history, culture, human nature and institutions, not just a sharp tactical sense; which flows from the ability to understand long-term implications, not just achieve short-term advantage; and which is founded on a deep concern for the public interest, not just the private good.

In aspiring to be a lawyer-statesman, the General Counsel, and inside lawyers, must be skilled in asking "what ought to be" questions; in articulating systematic and constructive options that expose and explore the value tensions inherent in most decisions; in assessing risk, but not being paralyzed by its existence; in understanding how to make rules realities and develop strategies for meaningful implementation of policies; in understanding the hurly burly world of politics, media and power outside the corporation and how to navigate with principle and purpose in that domain; in leading and building organizations, creating the vision, the values, the priorities, the strategies, the people, the systems, the resources and the motivation; in having understanding, intuition, perspective and respect relating to different cultures around the globe; in, ultimately, having the quintessential quality of the great generalist to envision and understand the multiple dimensions of issues—to define the problem properly—and the ability to comprehensively integrate those dimensions in decision-making.

Given this definition of fundamental corporate purpose, this delineation of the general counsel's broad responsibilities and this description of essential qualities of mind a lawyer leader must possess, let me very briefly highlight ten essential tasks of the General Counsel as lawyer-statesman. Each task could, in and of itself, be the subject of an article (and most apply to all senior inside lawyers as well).

The General Counsel must build a world class legal organization…

…hiring the best possible global talent which includes both top-flight generalists (to head legal teams at profit and loss centers) and world class specialists. These lawyers must be capable of handling the most difficult matters facing the company on their own, and, as necessary, in forging strategic partnerships with outside counsel. The General Counsel must lead in creating an inside-outside relationship which minimizes conflicts over money and is instead characterized by a powerful value proposition of providing high quality services with alignment of economic incentives (through, for example, fixed fee arrangements). The inside legal team must be integrated with other staff (Finance/HR) and business teams. And the General Counsel must effect world-wide integration (one legal culture) through specialist global practice groups, cross-company lawyer councils at national and regional levels (e.g. China or Europe) and close partnering at the senior lawyer level.

The General Counsel and the legal team must be creative, affirmative partners to business leaders in using their broad skills to accomplish the corporation's high performance objectives.

The General Counsel should be at the table with the CEO on the broad array of performance issues: key operational initiatives, economic risk assessment and mitigation, major transactions, new strategic directions (new products, new markets, new geographies), important template contracts, resolution of major disputes (through mediation or arbitration if possible), and major accounting decisions that have a forensic dimension (as many do today). The fundamental task is to establish critical facts, define applicable legal principles, identify areas of risk and generate options for accomplishing performance goals while minimizing legal, ethical or reputation risk.

The General Counsel must also provide perspective and advice as a business person, not a lawyer.

Others at the table with business leaders come, like counsel, from specialist backgrounds: finance, marketing, engineering, IT, HR. Beyond providing advice as members of different disciplines, they all need to generate energy as intelligent persons with a broad understanding of the products, technology, competition and other dimensions of business decisions. The General Counsel, as curious, broad-gauged business partner, must help define, debate and develop business positions on broad company issues.

The General Counsel must be a leader in building an integrity infrastructure that embeds formal requirement (law and finance) and the company's ethical rules into business operations.

This task requires an understanding of the enormously complex web of law and regulation of both general (competition law) and specific (health care law) application at national, state and local level in nations all across the globe. Each business process (finance, sales, marketing, engi-

neering) in each business unit in each country must be mapped to understand where requirements intersect—then those points of intersection must be risk-assessed with appropriate risk mitigation systems integrated into the business processes. The broad purposes of the integrity infrastructure are to prevent legal and ethical misses, to detect misses as soon as possible and then to respond quickly and effectively. This merger of integrity and business process requires business leader commitment with the General Counsel (and other inside lawyers) providing expertise and advice on such key leadership issues as resource allocation and in-depth management reviews which demonstrate commitment from the top down.

The General Counsel must play a lead role in defining and adopting ethical standards—beyond what the formal rules require—which bind the corporation across the globe.

Great corporations often impose rules upon themselves: no bribery (even when not prohibited), building new facilities to world, not local law, standards; engaging in ethical sourcing so that third parties avoid child or prison labor and provide safe and healthy working conditions. The General Counsel has a key role in these decisions which, as noted above, go beyond asking "is it legal" to asking "is it right." The chief lawyer helps generate issues (by, for example, systematically reviewing claims on the corporation by various stakeholders); determining which ones require in depth analysis; conducting that analysis under an "enlightened self-interest" standard which understands that "costs" are also "investments," that "benefits" may be expressed in strictly financial terms but may also require judgment, and that the proper "accounting period" may be years, not just the next quarter. The General Counsel will be at the center of resolving conflicts between national laws (which transnational companies must follow) and global ethical standards, a vexing problem illustrated by Google's recent decision to stop complying with Chinese censorship laws because of global ethical standards against suppression of information.

The General Counsel must help develop early warning systems which allow the corporation to stay ahead of emerging global trends and expectations relating to formal rules, ethical standards, public policy and important country and geopolitical risk.

The integrity infrastructure and adoption of global ethical standards focus on immediate issues, but looking into the future and anticipating changes is one of the characteristics of a lawyer-statesman. These early warning systems are systematic: careful compilation of information from a variety of sources (cases, legislative proposals, commentary, NGO agendas); regular meetings to determine which issues require analysis; and then decisions about whether pro-actively to change policies and practices far in advance of when the company might be forced to do so.

The General Counsel must play a lead role in fostering employee awareness, knowledge and commitment to a high performance with high integrity culture.

Employees must understand their basic obligations; must do the right thing under those duties; must live the core company values; and must understand enough about the technical rules to seek advice when in "gray areas." It is the task of the General Counsel, working with other key corporate staff, to create education and training materials on business and society issues which are as engaging as the education in business disciplines. This involves tracking, training and test-

ing employees in high risk jobs; creating meaningful case-based learning; being candid about company failures; and integrating integrity training with business training. It also means confronting cultural differences head on (explaining why conflicts of interest involving family members may be the norm in Chinese society but why they are not tolerated in a global corporation).

The General Counsel must develop systems which give employees at all levels "voice" to express concerns about the corporation's adherence to law, ethics and values.

Based on nearly 20 years in one of the world's most complex business enterprises, I believe that integrity is greatly advanced when employees are encouraged (indeed required) to report concerns without fear of retaliation. The General Counsel has a vital role in developing different forums for "voice" to be heard: through bottoms-up compliance reviews that start on the shop-floor; through a powerful independent, internal audit staff doing compliance reviews; through candid communications from lawyers in the businesses to the General Counsel; and, most importantly, through a company "ombuds" system. Such a system allows employees to report in many languages in many forms (email, phone, letter) to many recipients (in the division or at headquarters) either anonymously or not. The General Counsel (and the CFO) must treat all concerns promptly with dignity and respect and follow the facts wherever they lead—up, down or sideways. Employee trust in the integrity of the processes is key to a successful ombuds system that detects and deters (and avoids back-biting because cheap shots won't work).

The General Counsel should have either the lead role, or a strong supporting role, in the development and implementation of the company's positions on public policy…

…in capitals all across the globe, from Brussels to Beijing, from Washington to Moscow. Policy development requires marrying substantive expertise with the corporation's business strategy and should be done with business teams at headquarters. Many of the substantive experts on public policy which cuts across the company will work for the General Counsel: antitrust, environment, IP, securities law, labor and employment law, tax, trade etc. These corporate legal specialists should have broad knowledge and experience in public policy and its processes. The General Counsel should also help the individual business units find industry specific policy experts (e.g. communications, energy, healthcare). Once policies are developed and prioritized then the government relations staff (whose customers are executive and legislative branch officials) should work with the business people and the policy experts on political implementation. One of the most challenging tasks for the General Counsel is defining policy positions based on credible facts that advance public interests not just the corporation's narrow private interest and thus can command assent, rather than just being viewed as a business land-grab.

The General Counsel will also be a core member of crisis management teams responding to investigations, law suits, product problems, personnel emergencies and threats to company people, facilities, information or supply chain from terrorism, natural disaster or war.

Working with the CEO, the General Counsel must seize the issue the moment top management learns about it; develop a crisis management team with clear responsibilities; meet continuously

to adapt to changing developments; and, ultimately determine an appropriate response. A key related role, one for which the General Counsel is well suited, is to develop the facts both expeditiously and carefully. And the General Counsel must be closely integrated in all communications stemming from the crisis to assure accuracy and credibility. Crisis management is often a stress test for the corporation's integrity—and for the General Counsel.

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Integrating all these foundational roles, the General Counsel should develop the corporation's essential position on corporate citizenship for review by top business leaders, the CEO and the board of directors. Consistent with my emphasis on high performance with high integrity, I believe that corporate citizenship (a much better concept that corporate responsibility for assessing business' role on society) consists of three elements:

- Sustained economic performance which provides benefits to stakeholders across the society;
- Robust adherence to the spirit and the letter of the laws and regulations designed to advance social goods; and
- Adherence to global ethical standards and public policy positions that are in the enlightened self-interest of the company but fairly balance private concerns with the public interest.

General Counsel Trends

The greatly enhanced role of the General Counsel in large transnational companies—whether headquartered in the US, the UK, Europe or elsewhere in the world—is due a number of trends which have occurred over the past 25 years. The future growth of the General Counsel role in major global corporations—and its spread to smaller and medium sized companies—will depend on the continuation of those trends.

- General Counsel have increasingly been hired from the upper reaches of government and private practice. A former U.S. Attorney General, a former Deputy Attorney General, distinguished former federal appeals court and district court judges, and a former White House counsel now all serve as chief legal officers of major American companies. Similarly, law firm partners in their forties and fifties are being recruited away from their firms to General Counsel positions.

- This remarkable upgrade in the quality of General Counsel has increased the status and prestige of inside lawyers and has made it possible to hire superb lawyers from outside the company to serve as heads of large business divisions or as heads of specialty functions (tax, environment, trade, antitrust, mergers and acquisitions, labor and employment, intellectual property). Indeed, larger companies are developing specialty practice groups, headed by a nationally renowned practitioners, which rival law firm practice groups.

- As a result of this increase in inside talent, the General Counsel has become, in many cases, the chief legal advisor to the CEO and to the board of directors, replacing the venerable senior partner from the great law firm. The General Counsel is a member of the core management team—and, as business and society issues have become of ever greater importance to corporations, has come to have comparable status to the Chief Financial Officer in some major companies.

- To attract this talent, corporations have been willing, at least for the General Counsel and division and lead specialist lawyers, to meet market pay, although some of that compensation may be in the form of deferred equity which may lose (or increase) its value. *Corporate Counsel*, an American magazine for inside lawyers, each year publishes a table of highly paid General Counsels in US companies—and it can only get this information because many GCs are among the companies' five most highly compensated executives whose pay packages must be disclosed, per government regulation, in the annual Proxy Statements.

- The new inside lawyers—who now have skills equal to their peers in outside law firms—have begun to manage actively major issues staffed by joint inside/outside teams. Not only has power over control of matters shifted in a number of instances, but inside lawyers have also sought to break up old monopolies (when single firms represented companies on a broad range of matters) and introduce competition among firms. Thus, the new inside lawyers forged new cooperation on *matters* with outside firms and fostered new competition on *money.* As noted above, today both corporations and law firms are trying to develop new strategic alliances in which financial incentives are aligned and value and quality, rather than sheer hours billed, are emphasized.

In sum, in the course of a generation, General Counsels' prestige, status, compensation, power and position at the core of major transnational corporations have been transformed. But, this enhanced role will only continue, and be expanded at other companies, if boards of directors and CEOs see the value of a strong inside team working closely with business leaders. They must be willing both to pay for talent and to carry the legal headcount.

I believe that a strong inside legal team—that is part of the company culture, understands its rhythms and personality, is in the daily flow of business—is far more effective, and far more cost-effective, than outside counsel can possibly be in helping the company achieve both high performance and high integrity. In difficult economic times, there is always the call to cut costs by cutting headcount. While the legal function can never be immune from a relentless quest for productivity, it is very short-sighted of business leaders to use the traditional meat-axe ("10 percent down") and either push costs (which will be higher) outside or degrade the core goals of performance with integrity which can lead to far greater, even catastrophic, costs down the road.

The Partner-Guardian Tension and the Lawyer-Statesman Role

Although the role of General Counsel has been transformed in recent years, one dimension remains the same: the reliance on a good relationship with the CEO. And, at the core of that relationship, is what I term "the partner-guardian" tension. Indeed, in many recent scandals (from Enron-like accounting fraud to improper options back-dating to the credit crisis), General Counsel have failed as guardians. They were either excluded from decisions or failed to ask broad, probing questions about dubious actions.

Although the General Counsel must be a strong business partner for the CEO and other business leaders (to help the company but also to grain credibility), he or she must, at the same time, be guardian of the company (whom the General Counsel actually represents). This guardian role can involve slowing decisions down until facts are gathered and analysis completed—and, on occasion, it can involve saying "no" if no legitimate actions are possible. I do not believe that the choice for General Counsel (and inside lawyers generally) is to go native as a "yes person" for business leaders and be legally and ethically compromised or to be conservative, inveterate "naysayer" ultimately excluded from core corporate activity and decisions. Being at the table to assess facts, law, ethics, risk and options—to help find an appropriate way to accomplish business goals—is essential.

Resolution of this tension is key to a company's high performance with high integrity and to the ability of the General Counsel to play to the kind of lawyer-statesman role I have outlined above. But, this requires a strong degree of independence. Yet critics have questioned whether such independence can exist when candid General Counsels run the risk of being fired and losing unvested economic benefits (like stock options, restricted stock or deferred compensation).

Certain conditions inside the company must be met before a General Counsel can resolve the tension and aspire to be a lawyer statesman. Most importantly, the board of directors and the CEO must understand and approve the broad role for General Counsel I have outlined here. They can demonstrate that by hiring a General Counsel with deep experience (hopefully in both public and private sectors), with superlative legal skills but also broad vision, with both credibility and courage. The CEO must also support the General Counsel in hiring the outstanding, independent lawyers for key inside positions. This is not to say lawyers make critical decisions for the company: their primary job is to give the business leaders a range of legitimate options with different

degrees of risk and explain pros and cons. Only after acute analysis, integrating all relevant perspectives, should they make recommendations. And, unless the action is unlawful, General Counsels, having spoken their piece, should defer to the CEO's discretion.

Certain processes can help assure that the proper conditions exist. General Counsel candidates should do extensive due diligence on the CEO, the company culture, the attitudes of top staff and business leaders. They should clarify the conception of the chief legal officer held by those executives. They should meet with one or two board members before accepting the job. Once in place, the General Counsel should meet alone with the board (or the Audit Committee) on a regular basis.

But the General Counsel must go into the position prepared to resign if asked to condone or do something clearly illegal or highly unethical or if excluded from major decisions. With a good CEO and a good Board, this will not happen, although there can be friction as hard decisions may yield tough conversations. With a bad CEO and a good Board, the General Counsel may be able to negotiate an honorable withdrawal. With a bad CEO and a bad board, the General Counsel obviously may simply have to quit—but with proper diligence before accepting the job this risk should be minimized.

At the end of the day, the rise of the General Counsel to a broad lawyer-statesman role, and an increase in status to be a true peer of the Chief Financial Officer, turns on intense commitment of board of directors and CEOs to high performance with high integrity.

Bloomberg BNA

Corporate Law & Accountability Report™

OFFICER LIABILITY

SEC Broadens Corporate Officer Liability Exposure By Adding Teeth to Internal Controls Certification and Disclosure Requirements



BY DANIEL O'CONNOR, MARKO S. ZATYLNY AND KAIT MICHAUD

The Securities and Exchange Commission's increased focus on identifying and penalizing misstatements in public company financials is no secret. In April of this year, Chairman Mary Jo White highlighted in prepared testimony before the U.S. House Financial Services Committee the SEC's new Financial Fraud Task Force and the strides it was taking to identify ''both traditional and emerging financial fraud issues.''[1] Likewise, at the March 2014 ''SEC Speaks'' conference, an annual event where the agency provides an overview of recent initiatives, SEC representatives explained that they would be analyzing patterns of internal control problems even absent a restatement and holding ''gatekeepers''—such as auditors and corporate officers—accountable for corporate misstatements.[2]

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The SEC's disclosure on July 30 of an enforcement action against two corporate executives of a small, Florida-based computer equipment company exemplifies the type of emerging theory the SEC staff is apt to pursue.[3] In a departure from past practice, the SEC pursued theories of fraud against both the chief executive officer and chief financial officer of Quality Services Group Inc. solely for alleged misrepresentations in public disclosures about the company's internal controls environment, which are required by the Sarbanes-Oxley Act of 2002.

What makes QSGI a unique case is that it did not arise from a restatement of the company's prior financial statements; indeed, there does not appear to have

[1] Mary Jo White, Chairman, U.S. SEC. & EXCH. COMM'N, Testimony before U.S. House Fin. Servs. Comm. (Apr. 29, 2014), *available at* http://www.sec.gov/News/Testimony/Detail/Testimony/1370541674457#_ftn1.

[2] *See generally* http://www.sec.gov/News/Page/List/Page/1356125649549 (speeches dated Mar. 12, 2014).

[3] (12 CARE 887, 8/1/14).

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been any material mistakes in the company's reported financials. Here the SEC hinged its fraud claims on alleged unreported deficiencies in QSGI's internal controls over its accounting function.

Taking the SEC's theory to its furthest extension, this case may sound an end to the days where corporate officers may simply adopt a ''no harm, no foul'' approach to disclosure when a company identifies an immaterial accounting issue or otherwise fails to follow its accounting policies and practices.

The SEC's theory in the QSGI matter also appears to reflect a continuation of the SEC's ''Broken Windows'' strategy, a reference to a New York Police Department strategy that pursued small infractions on the theory that chasing minor violations may lead to preventing larger ones. This theory was originally adopted by a former director of the SEC Enforcement Division, Robert Khuzami, and rearticulated by Chairman White.

As Chairman White explained in her October 2013 remarks at the Securities Enforcement Forum: ''The [Broken Windows] theory can be applied to our securities markets—minor violations that are overlooked or ignored can feed bigger ones, and, perhaps more importantly, can foster a culture where laws are increasingly treated as toothless guidelines. And so, I believe it is important to pursue even the smallest infractions.''[4]

The SEC's focus on ''small'' internal controls misstatements that are unaccompanied by restatements of public company financials should serve as a reminder to corporate officers that Sarbanes-Oxley certifications can form the basis of personal liability for minor, known problems. While it may be debatable whether the SEC's resources are best spent pursing such cases, the environment today at the agency is such that we may see more of these types of cases. Commissioner Aguilar's August 28, 2014 Dissenting Statement In the Matter of Lynn R. Blodgett and Kevin R. Kyser reinforces that certain voices within the SEC are committed to deter fraud with the imposition of suspensions for individuals involved regardless of whether those individuals acted with any intent.[5] Commissioner Aguilar emphatically noted that ''the Commission *must* be willing to charge fraud and *must* not hesitate to suspend [individuals] from appearing or practicing before the Commission. This is true regardless of whether the fraudulent misconduct involves *scienter*'' (emphasis in original).

Therefore, companies that identify internal control problems, large or small, should quickly address the issues and consider the need to report such issues to their auditors and, after evaluating the potential risks posed by the issue, the investing public.

The SEC's Allegations Against QSGI's Corporate Officers

The SEC alleged that QSGI's CEO (Marc Sherman) and former CFO (Edward Cummings) knew of significant internal controls issues in the company's inventory practices that they failed to disclose to auditors and investors. Central to the SEC's theory of fraud is that Sherman and Cummings (1) signed Form 10-Ks with management reports on internal controls (required by Sarbanes-Oxley Act § 404) that falsely omitted issues; and (2) signed certifications (required by Sarbanes-Oxley Act § 302) in which they falsely represented that they had evaluated the management report on internal controls and disclosed all significant deficiencies to auditors.

At bottom, the SEC's theory is reducible to two internal controls ''deficiencies.'' First, the SEC viewed inventory controls at one of QSGI's facilities as insufficient, principally because inaccurate inventory counts occurred when product was routinely moved into and out of the facility without appropriate entries in the company's books and records. The SEC explained that the inaccurate inventory counts were a product of multiple issues at the facility, including (1) a general practice of removing component parts from products in inventory without documenting it, (2) belated and insufficient efforts to introduce new controls, and (3) failure to hire experienced accounting personnel and granting autonomy to unqualified individuals.

Second, the SEC asserted that QSGI took advantage of the internal control weaknesses to accelerate revenue recognition by a matter of days, up to approximately a week, to maximize QSGI's borrowing potential based on the terms of a private working capital loan agreement.

The SEC's enforcement action did not allege, however, that the revenue acceleration materially altered QSGI's financial statements. (One has to wonder if this ''early recognition'' issue is what first drew the attention of the SEC enforcement staff.)

The company's internal controls ''deficiencies'' translated to misstatements in public disclosures in two ways. First, QSGI's management reports on internal controls over financial reporting were ''false'' because they stated that Sherman had evaluated QSGI's management controls using the criteria set forth by the Committee of Sponsoring Organizations of the Treadway Commission in Internal Control. In the SEC's view, however, Sherman did not participate in any such evaluation and, in fact, was unaware of the referenced evaluation framework.

Likewise, QSGI's § 302 certifications were ''false'' because they certified that the signatories (Sherman and Cummings) had evaluated the management report on internal controls and disclosed all significant deficiencies to auditors when, in the SEC's view, both men were aware of and failed to disclose to auditors the aforementioned inventory and revenue recognition controls issues when they signed the certifications.

The SEC's Fraud Theory

Rather than pursue a theory of negligence on the basis of this fact pattern, the SEC has advanced fraud charges against Sherman and Cummings under § 10(b) of the Securities and Exchange Act of 1934. In addition, the SEC has asserted claims against both for violating § 13(b)(5) of the Exchange Act, which prohibits knowingly falsifying books and records and circumventing a company's internal controls, and causing QSGI to violate § 13(b)(2) of the Exchange Act, which requires

[4] Speech, Mary Jo White, Chair, U.S. Sec. & Exch. Comm'n (Oct. 9, 2013), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370539872100#.U_31GXPD-Uk.

[5] Luis A. Aguilar, Comm'r, U.S. Sec. & Exch. Comm'n, *Dissenting Statement In the Matter of Lynn R. Blodgett and Kevin R. Kyser, CPA, Respondents* (Aug. 28, 2014), *available at* http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370542787855.

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companies to ''make and keep accurate books and to devise and maintain effective internal accounting controls.'' The SEC also charged them with making false statements to the company's auditors under Exchange Act Rule 13(b)(2), by omitting to disclose the internal controls significant deficiency and the inventory recognition scheme.

The § 10(b) fraud claim carries a high burden of proof with respect to intent. Section 10(b) prohibits the ''a) use of any device, scheme, or artifice to defraud; b) the making of material misrepresentations or omissions; and c) any act, practice or course of business which operates or would operate as a fraud or deceit upon any person'' in connection with the purchase or sale of a security. Section 13(b)(5) forbids ''knowing falsification'' of a public company's books and records or ''knowing circumvention'' of a public company's internal controls. In the § 10(b) context, the SEC must establish that the defendant acted with scienter, ''a mental state embracing intent to deceive, manipulate, or defraud.''[6] This requires ''proof that the defendant acted knowingly or recklessly,''[7] where ''[r]eckless conduct . . . represents an extreme departure from the standards of ordinary care such that the defendant must have been aware of it.''[8]

The weight of the SEC's evidence may yet be tested. At the time the SEC announced its theory of liability, it disclosed that Cummings entered into a settlement without admitting or denying the SEC's claims.[9] Cummings' settlement carried with it a $23,000 civil monetary penalty, a minimum five year bar from appearing in front of the SEC as an accountant, and a five year bar from acting as an officer or director of a public company. Unlike Cummings, however, Sherman has not settled his claims and will be required to appear at an evidentiary hearing before an Administrative Law Judge to contest the SEC's allegations.[10]

Corporate Officers' Obligations to Attest To a Corporation's Internal Controls

Congress' enactment of Sarbanes-Oxley in 2002 is well acknowledged as a bellwether moment in the general movement to heighten corporate executive accountability. Specifically, §§ 302 and 404 were intended to place more responsibility on corporate officers to establish and monitor internal control systems. Some have argued that these certification requirements were born of former Enron CEO Jeffrey Skilling's testimony in front of the U.S. Senate Banking and Commerce Committee in 2002, in which he claimed ignorance of and denied responsibility for the details of Enron's accounting. Regardless, the congressional record regarding Sarbanes-Oxley acknowledged a dual purpose to the executive certification requirements: prevention of fraud and accountability. Specifically, representatives in favor of the bill noted it would ''improve the ethical standards of top corporate officers'' and ensure they would be liable in the event of fraud.[11]

Taken together, §§ 302 and 404 require corporate officers to (1) certify that they have evaluated and maintained internal controls, (2) identify the framework used to make such an evaluation, and (3) certify that they have reported significant deficiencies in the design of internal controls to auditors. Section 302 and 404 certifications are formalized, requiring the following elements:

- Section 302's certification asserts:
  - that the financial statements and related disclosures fairly present the company's operations and financial condition in all material respects;
  - that the CEO and CFO have designed disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under their supervision, to provide reasonable assurance regarding the reliability of financial reporting;
  - that the CEO and CFO have evaluated the effectiveness of the company's internal controls in a management statement on internal controls over financial reporting; and
  - that the CEO and CFO have disclosed to the auditor and audit committee all significant deficiencies or material weaknesses in the design or operation of internal controls and any fraud, whether or not material, that involved management or other employees with a significant role in internal controls.
- Section 404's report on internal controls requires:
  - a statement asserting management's responsibility for establishing and maintaining adequate internal control over financial reporting;
  - a statement identifying the framework used by management to evaluate the company's internal controls; and
  - management's assessment of the effectiveness of the company's internal controls and disclosure of any material weaknesses in the internal controls.

Prior to the QSGI decision, perhaps given the ambiguity inherent in determining whether internal controls are adequate or effective, SEC enforcement actions premised on ''false'' §§ 302 and 404 certifications were almost always accompanied by other alleged misstatements, such as an accounting misstatement. Even in the civil securities fraud arena, courts routinely held that false certifications are insufficient on their own to enable a securities fraud action to survive a motion to dismiss.

This principle was affirmed as recently as this year by the U.S. District Court for the Southern District of New York in its analysis of *In re Magnum Hunter Resources Corp. Sec. Litig.*, 2014 BL 173951 (S.D.N.Y. June 23, 2014). In granting a motion to dismiss a § 10(b) fraud action, Judge Forrest stated that '' 'failure [of corporate executives] to identify problems with the defendant-company's internal controls and accounting practices does not constitute reckless conduct sufficient for Sec-

[6] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976).

[7] Hollinger v. Titan Capital Corp., 914 F.2d 1564, 1568-69 (9th Cir. 1990) (en banc).

[8] SEC v. Rubera, 350 F.3d 1084, 1094 (9th Cir. 2003).

[9] U.S. SEC. & EXCH. COMM'N, Release No. 2014-152, *SEC Charges Company CEO and Former CFO with Hiding Internal Controls Deficiencies and Violating Sarbanes-Oxley Requirements* (July 30, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542561150#.U_34N6MXOA0.

[10] *Id.*

[11] House Consideration and Agreement to the Conference Report to Accompany H.R. 3763, Sarbanes-Oxley Act of 2002 (July 25, 2002).

tion 10(b) liability.' '' Therefore, even though the court found that there may have been misstatements in the company's public statements, and that as a result management certifications may have been false, such allegations did not sufficiently plead the scienter requirement of § 10(b).

Now, however, the SEC is signaling an intent to enforce §§ 302 and 404 certification requirements even absent material misstatements in a company's financial statements.

Key Takeaways

In its press release announcing the charges, the SEC took the opportunity to state that corporate executives have ''an obligation to take the Sarbanes-Oxley disclosure and certification requirements very seriously.''[12] Corporate officers should remember three key takeaways:

1. Where appropriate, be open with the company's external auditors about perceived internal controls setbacks. Transparency with the company's audit committee and with external auditors regarding evaluations of the company's internal controls will protect the company, its investors and its officers. Possible steps to achieve this end may include: taking additional ownership over the internal audit function, hiring adequate personnel with accounting background to place in appropriate management positions and ensuring that accounting practices are consistent throughout the company. Although it is no silver bullet, it is much more difficult for the SEC's enforcement staff to bring a fraud case against an officer when an issue has been fully vetted with the company's auditor.

2. It may be appropriate for officers to revisit their company's internal controls review framework, as well as their individual involvement in the same. The Sarbanes-Oxley § 404 certification places ultimate responsibility for an operational and effective internal controls environment at officers' feet. Accurate descriptions of the scope of each corporate officer's involvement in internal controls development and monitoring will head off a theory of fraud premised on over-selling an officer's involvement in internal controls.

3. The SEC's ''Broken Windows'' strategy might extend to issues that many consider to be immaterial. Although the SEC has shown with recent cases that it will pursue non-restatement accounting issues against companies (for example, PACCAR's $225,000 payment to the SEC in 2013 to settle charges that the company misinformed investors through ''various accounting deficiencies that clouded their financial reporting''), it appears to be extending this approach to individuals. The SEC may take the view that a corporate officer's obligations extend beyond responding to problems as they develop, and encapsulate ''rooting out'' systemic issues before they turn into larger problems and keeping auditors informed as the company identifies and addresses problems.

[12] U.S. Sec. & Exch. Comm'n, Release No. 2014-152, *SEC Charges Company CEO and Former CFO with Hiding Internal Controls Deficiencies and Violating Sarbanes-Oxley Requirements* (July 30, 2014), *available at* http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542561150#.U_34N6MXOA0.

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Diversity in the Legal Profession: Perspectives from Managing Partners and General Counsel

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DIVERSITY IN THE LEGAL PROFESSION: PERSPECTIVES FROM MANAGING PARTNERS AND GENERAL COUNSEL

Deborah L. Rhode & Lucy Buford Ricca***

INTRODUCTION

Within the American legal profession, diversity is widely embraced in principle but seldom realized in practice. Women and minorities are grossly underrepresented at the top and overrepresented at the bottom. What accounts for this disparity and what can be done to address it are the subjects of this Article. It provides the first comprehensive portrait of the problem from the vantage of leaders of the nation's largest legal organizations. Through their perspectives, this Article seeks to identify best practices for diversity in law firms and in-house legal departments, as well as the obstacles standing in the way.

Part I begins with an analysis of the challenges confronting the American bar with respect to diversity and the gap between the profession's aspirations and achievements. Part II sets forth the methodology of the survey of law firm leaders and general counsel. Part III explores the survey's findings, and Part IV concludes with a summary of best practices. "We can and should do better"[1] was how one participant in the study described his firm's progress, and that view is the premise of this Article.

I. CHALLENGES[2]

According to the American Bar Association (ABA), only two professions (the natural sciences and dentistry) have less diversity than law; medicine, accounting, academia, and others do considerably better.[3] Women

* Ernest W. McFarland Professor of Law and Director of the Center on the Legal Profession, Stanford University. This Article is part of a larger colloquium entitled *The Challenge of Equity and Inclusion in the Legal Profession: An International and Comparative Perspective* held at Fordham University School of Law. For an overview of the colloquium, see Deborah L. Rhode, *Foreword: Diversity in the Legal Profession: A Comparative Perspective*, 83 FORDHAM L. REV. 2241 (2015).

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1. Telephone Interview with Ahmed Davis, Nat'l Chair of the Diversity Initiative, Fish & Richardson P.C. (May 6, 2014).

2. Analysis in this part draws on DEBORAH L. RHODE, THE TROUBLE WITH LAWYERS (forthcoming 2015).

3. ELIZABETH CHAMBLISS, ABA COMM'N ON RACIAL & ETHNIC DIVERSITY IN THE LEGAL PROFESSION, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 6–7 (2005). For example, minorities account for about 25 percent of doctors and 21 percent of

constitute over one-third of the profession but only about one-fifth of law firm partners, general counsel of Fortune 500 corporations, and law school deans.[4] Women are less likely to make partner even controlling for other factors, including law school grades and time spent out of the work force or on part-time schedules.[5] Studies find that men are two to five times more likely to make partner than women.[6] Even women who never take time away from the labor force and who work long hours have a lower chance of partnership than similarly situated men.[7] The situation is bleakest at the highest levels. Women constitute only 17 percent of equity partners.[8] Women are also underrepresented in leadership positions, such as firm chairs and members of management and compensation committees.[9] Only seven of the nation's one hundred largest firms have a woman as chair or

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accountants but only about 12 percent of lawyers. Sara Eckel, *Seed Money*, AM. LAW., Sept. 2008, at 20; *Lawyer Demographics Table*, ABA, http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer_demographics_2013.authcheckdam.pdf (last visited Mar. 25, 2015) (estimate of minority lawyers drawn from 2010 U.S. Census data).

4. *See generally* ABA COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN LAW (2014), *available at* http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_july2014.authcheckdam.pdf; *MCCA Survey: Women General Counsel at Fortune 500 Companies Reaches New High*, MINORITY CORP. COUNSEL ASS'N (Aug. 3, 2012), http://www.mcca.com/index.cfm?fuseaction=Feature.showFeature&FeatureID=350&noheader=1; *Women in Law in Canada and the U.S: Quick Take*, CATALYST (Dec. 10, 2014), http://www.catalyst.org/knowledge/women-law-us.

5. Theresa M. Beiner, *Not All Lawyers Are Equal: Difficulties That Plague Women and Women of Color*, 58 SYRACUSE L. REV. 317, 328 (2008); Mary C. Noonan et al., *Is the Partnership Gap Closing for Women? Cohort Differences in the Sex Gap in Partnership Chances*, 37 SOC. SCI. RES. 156, 174 (2008).

6. A study of young lawyers by the American Bar Foundation (ABF) found that women attained equity partner status at about half the rate of men. *See* RONIT DINOVITZER ET AL., NAT'L ASS'N FOR LAW PLACEMENT FOUND. FOR CAREER RESEARCH & EDUC. & THE ABF, AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 63 (2009), *available at* http://law.du.edu/documents/directory/publications/sterling/AJD2.pdf. A study by the Equal Employment Opportunity Commission (EEOC) found that male lawyers were five times as likely to become partners as their female counterparts. *See* EEOC, DIVERSITY IN LAW FIRMS 29 (2003), *available at* http://www.eeoc.gov/eeoc/statistics/reports/diversitylaw/lawfirms.pdf.

7. Mary C. Noonan & Mary E. Corcoran, *The Mommy Track and Partnership: Temporary Delay or Dead End?*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 142 (2004); *see also* Kenneth Day Schmidt, *Men and Women of the Bar, the Impact of Gender on Legal Careers*, 16 MICH. J. GENDER & L. 49, 100–02 (2009) (comparing the respective likelihoods that men and women become partner).

8. NAT'L ASS'N OF WOMEN LAWYERS (NAWL) AND THE NAWL FOUND., REPORT OF THE EIGHTH ANNUAL NAWL NAT'L SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 7 (2014); *see also* Vivia Chen, *Female Equity Partnership Rate Is Up! (Just Kidding)*, CAREERIST (Feb. 25, 2014), http://thecareerist.typepad.com/thecareerist/2014/02/nalp-report-2014.html.

9. Jake Simpson, *Firms Eyeing Gender Equality Should Adopt a Corporate Culture*, LAW360 (Apr. 22, 2014), http://www.law360.com/articles/530686/firms-eyeing-gender-equality-should-adopt-corporate-culture (subscription required); *see* Maria Pabón López, *The Future of Women in the Legal Profession: Recognizing the Challenges Ahead by Reviewing Current Trends*, 19 HASTINGS WOMEN'S L.J. 53, 71 (2008); *see also* JOAN C. WILLIAMS & VETA T. RICHARDSON, PROJECT FOR ATT'Y RETENTION & MINORITY CORP. COUNSEL ASS'N, NEW MILLENNIUM, SAME GLASS CEILING? THE IMPACT OF LAW FIRM COMPENSATION SYSTEMS ON WOMEN 14 (2010).

managing partner.[10] Gender disparities are similarly apparent in compensation.[11] Those differences persist even after controlling for factors such as productivity and differences in equity/non-equity status.[12]

Although blacks, Latinos, Asian Americans, and Native Americans now constitute about one-third of the population and one-fifth of law school graduates, they still only account for fewer than 7 percent of law firm partners.[13] The situation is particularly bleak for African Americans, who constitute only 3 percent of associates and 1.9 percent of partners.[14] In major law firms, about half of lawyers of color leave within three years.[15] Attrition is highest for women of color; about 75 percent depart by their fifth year and 85 percent before their seventh.[16] Compensation in law firms is lower for lawyers of color, with minority women at the bottom of the financial pecking order.[17]

The situation is somewhat better for women in-house. Women hold the top legal job at 21 percent of Fortune 500 companies.[18] That number increased from 17 percent in 2009.[19] Interestingly, women seem to be doing best at the nation's largest companies: four women are general counsel at the seventeen largest companies.[20] But only 17 percent of general counsels in the Fortune 501–1000 are female.[21] Minority representation in the general counsel ranks of the Fortune 500 is 10

10. Kathleen J. Wu, *"Bossy" is "Bitch" on Training Wheels*, TEX. LAW. (Apr. 29, 2014), http://www.texaslawyer.com/id=1202653144141/Bossy-Is-Bitch-on-Training-Wheels?slreturn=20150202171343 (subscription required) (referring to Law360 survey).

11. BARBARA M. FLOM, NAWL & NAWL FOUND., REPORT OF THE SEVENTH ANNUAL NAT'L SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 15–16 (2012); Karen Sloan, *ABA Issues Toolkit, Aiming to Eliminate Gender Pay Gap*, NAT'L L.J. (Mar. 18, 2013), http://www.nationallawjournal.com/id=1202592488273/ABA-issues-toolkit-aiming-to-eliminate-gender-pay-gap-?slreturn=20150203201645 (subscription required) (noting that women law firm partners earn about $66,000 less than male partners). Women also have lower billing rates than their male counterparts. *See* Jennifer Smith, *Female Lawyers Still Battle Gender Bias*, WALL ST. J. (May 4, 2014), *available at* http://www.wsj.com/articles/SB10001424052702303948104579537814028747376.

12. Marina Angel et al., *Statistical Evidence on the Gender Gap in Law Firm Partner Compensation* 2–3 (Temple Univ., Legal Studies Research Paper No. 2010-24, 2010); Ronit Dinovitzer, Nancy Reichman & Joyce Sterling, *Differential Valuation of Women's Work: A New Look at the Gender Gap in Lawyer's Incomes*, 88 SOC. FORCES 819, 835–37 (2009).

13. *Women and Minorities in Law Firms by Race and Ethnicity—An Update*, NALP (Apr. 2013), http://www.nalp.org/0413research.

14. Julie Triedman, *The Diversity Crisis: Big Firms' Continuing Failure*, AM. LAW. (May 29, 2014), http://www.americanlawyer.com/id=1202656372552/The-Diversity-Crisis-Big-Firms-Continuing-Failure?slreturn=20140825135949 (subscription required).

15. NANCY LEVIT & DOUGLAS O. LINDER, THE HAPPY LAWYER 14 n.55 (2010).

16. DEEPALI BAGATI, WOMEN OF COLOR IN U.S. LAW FIRMS 1–2 (2009).

17. ABA COMM'N ON WOMEN IN THE PROFESSION, VISIBLE INVISIBILITY 28 (2006).

18. Sue Reisinger, *Top Women Lawyers in the Fortune 500*, CORP. COUNS. (Mar. 18, 2014), http://www.corpcounsel.com/id=1202647358761/Top-Women-Lawyers-in-the-Fortune-500?slreturn=20150110161812 (subscription required).

19. *Id.*

20. *Id.*

21. *Id.*

percent.[22] Five percent of Fortune 500 general counsel are African American, 2 percent are Asian, and 2 percent are Hispanic.[23]

II. METHODOLOGY

Between May and June 2014, a request to participate in this survey was sent to the managing partner or chair of the nation's one hundred largest firms[24] and the general counsel of Fortune 100 corporations. Telephone interviews were scheduled with all of those who indicated a willingness to be surveyed. In some instances, the organization's managing partner or general counsel identified someone else in charge of diversity initiatives to be contacted, and interviews were conducted with that person instead of, or in addition to, the managing partner or general counsel. Thirty firms and twenty-three corporations agreed to participate. Thirty spoke on the record; eleven requested anonymity; eleven requested that any quotations be cleared; and one did not indicate any preference. To gain additional perspectives, the authors interviewed members of a national search firm and a consultant on diversity, as well as in-house counsel of some smaller corporations. A list of survey participants appears as Appendix A.

By definition, those who were willing to take the time to participate in the study had a strong commitment to diversity. Moreover, they came from the sectors of the profession with the most resources available to invest in the issue. The findings therefore do not represent a cross section of the profession. Rather, they reflect the experience of those with the greatest willingness and ability to advance diversity in the profession. These participants' insights can help illumine the most effective drivers of change.

III. Findings

A. Diversity As a Priority

For the vast majority of survey participants, diversity was a high priority. Although this comes as no surprise, given the self-selected composition of the study, the strength of that commitment was striking.

Among firms, several members spoke of diversity as one of their core values or as part of the firm's identity.[25] A number of individuals stressed

22. AMENA ROSS, EXECUTIVE SUMMARY OF 2014 FORTUNE 500 GENERAL COUNSEL DIVERSITY (n.d.), *available at* http://www.lcldnet.org/media/uploads/resource/Executive_Summary_of_Amena_Ross_Fortune_500_General_Counsel_Diversity.pdf.

23. *Id.*

24. Based on *The American Lawyer*'s ranking.

25. For core values, see Telephone Interview with Nicholas Cheffings, Chair, Hogan Lovells (July 2, 2014); Telephone Interview with Robert Giles, Managing Partner, Perkins Coie LLP (July 18, 2014); Telephone Interview with Thomas Milch, Chair, Arnold & Porter LLP (June 25, 2014); *accord* Telephone Interview with Carter Phillips, Chair of Exec. Comm., Sidley Austin LLP (June 13, 2014) (one of firm's top three or four priorities). For firms' identity, see Telephone Interview with Joseph Andrew, Global Chairman, & Jay Connolly, Global Chief Talent Officer, Dentons (July 30, 2014); Telephone Interview with Maya Hazell, Dir. of Diversity & Inclusion, White & Case LLP (June 24, 2014); Telephone Interview with Larry Sonsini, Chairman, Wilson Sonsini Goodrich & Rosati (July 21, 2014).

that it was not just the "right thing to do," but also critical to firms' economic success.[26] In elaborating on the business case for diversity, many firm leaders indicated that diversity was central to providing quality service to clients:

- "A diverse team is a more effective team; it has a broader base of experience . . . and the client gets a better product."[27]
- "You can't get the best work without the best talent."[28]
- "This is a talent business. You need to cast the net broadly."[29]
- "The client base is changing and if we don't change with it, our bottom line will be impaired as a result."[30]
- "We're in the human capital business. [Diversity is a way to get] the best people and the best decision making."[31]

Some leaders also spoke of matching the clients and communities they served.[32] One noted, "a diverse profile is important to our clients."[33] Larry Sonsini, Chair of Wilson Sonsini, noted that sixty different languages were spoken in Silicon Valley.[34] Diversity, he said, is "inherent in what we do and who we represent. . . . Diversity is not a 'check the box' issue in this firm."[35] Joseph Andrew, the Global Chair of Dentons, made a similar point. Because the firm did not have a single nationality, its clients were diverse and the firm needed to follow suit.[36]

Whether leaders' views of diversity were fully shared within firm partnerships was, however, less clear. As the chair of one firm's diversity initiative noted, "It is apparent to me that there are people in the firm who if they had their druthers, there would be less focus on diversity. They keep that view to themselves."[37]

Firm leaders communicated their commitment in multiple ways. Many gave periodic updates to leadership and the partnership and included it in their state of the firm speeches and speeches to summer associates.[38] One

26. *See* Telephone Interview with Nicholas Cheffings, *supra* note 25; Telephone Interview with Brad Malt, Chair, Ropes & Gray LLP (May 8, 2014); Telephone Interview with Wally Martinez, Managing Partner, Hunton & Williams LLP (July 22, 2014); Telephone Interview with Thomas Reid, Managing Partner, Davis Polk & Wardwell LLP (July 31, 2014).

27. Telephone Interview with Guy Halgren, Chair of Exec. Comm., Sheppard, Mullin, Richter & Hampton LLP (July 23, 2014).

28. Telephone Interview with Greg Nitzkowski, Global Managing Partner, Paul Hastings LLP (June 3, 2014).

29. Telephone Interview with Wally Martinez, *supra* note 26.

30. Telephone Interview with Thomas Reid, *supra* note 26.

31. Interview by Deborah L. Rhode with participant (July 21, 2014) (on file with author).

32. Telephone Interview with Nicholas Cheffings, *supra* note 25.

33. Telephone Interview with Ahmed Davis, *supra* note 1.

34. Telephone Interview with Larry Sonsini, *supra* note 25.

35. *Id.*

36. Telephone Interview with Joseph Andrew & Jay Connolly, *supra* note 25.

37. Telephone Interview with Ahmed Davis, *supra* note 1.

38. *See* Telephone Interview with Guy Halgren, *supra* note 27; Telephone Interview with Lee Miller, Global Co-Chairman, DLA Piper (June 23, 2014); Telephone Interview

made sure that every presentation to partners discussed diversity.[39] Some included an update or a "come to Jesus" presentation at firm retreats.[40] Many had a formal statement on their website and some put diversity information in their newsletters or annual reports.[41] Diversity often figured in a firm's strategic plan.[42] One chair mentioned it in every major speech in an effort to keep it at the "forefront of peoples' attention."[43] One had a partners' meeting focused on the topic; another had a conclave on the issue for firm leadership, practice group leaders, office managing partners and other key people; and a third held diversity retreats annually.[44] Some emphasized it in required training for firm leadership or new partners.[45]

General counsel also stressed the importance of diversity, although some were slightly more reluctant to rank it among priorities.[46] As one noted, "I don't want to give you pablum. Every company says it's a high priority. The issue is whether you are doing something about it."[47] Most emphasized the same reasons as law firm leaders. Diverse teams provided a more diverse perspective; they avoided "group think."[48] Corporations wanted to "reflect and represent the communities in which we operate."[49] It is the "right thing to do and smart business."[50] It was not just a "check the

with Larren Nashelsky, Chair & Chief Exec. Officer, Morrison & Foerster LLP (June 24, 2014); Telephone Interview with Thomas Reid, *supra* note 26; Telephone Interview with Nadia Sager, Global Chair of Diversity Leadership Comm., Latham & Watkins LLP (May 7, 2014). Some leaders, including several who spoke off the record, had the diversity officer make a presentation at partner meetings. *See, e.g.*, Telephone Interview with John Soroko, Chairman and Chief Exec. Officer, Duane Morris LLP (July 24, 2014).

39. Telephone Interview with Carter Phillips, *supra* note 25.

40. Telephone Interview with Ahmed Davis, *supra* note 1 ("come to Jesus" talk); Telephone Interview with Robert Giles, *supra* note 25; Telephone Interview with Guy Halgren, *supra* note 27; Telephone Interview with Tyree Jones, Dir. of Global Diversity & Inclusion, Reed Smith LLP (July 2, 2014).

41. *See* Telephone Interview with Maya Hazell, *supra* note 25 (website and annual report); Telephone Interview with Lee Miller, *supra* note 38 (newsletter).

42. *See, e.g.*, Telephone Interview with Bob Couture, Exec. Dir., McGuireWoods LLP (June 30, 2014).

43. Interview by Deborah L. Rhode with participant (June 26, 2014) (on file with author).

44. For the conclave, see Telephone Interview with Lee Miller, *supra* note 38. For the diversity retreats, see Telephone Interview with John Soroko, *supra* note 38. The information about the partners' meeting came from an interview not for attribution.

45. Telephone Interview with Robert Giles, *supra* note 25 (leadership); Telephone Interview with Nadia Sager, *supra* note 38 (new hires).

46. These general counsel did not speak for attribution.

47. Telephone Interview with Stephen Cutler, Exec. Vice President & Gen. Counsel, JPMorgan Chase & Co. (Aug. 7, 2014).

48. Telephone Interview with Stephanie Corey, Chief of Staff for Gen. Counsel, Flextronics Int'l Ltd. (July 17, 2014); Telephone Interview with Charles Parrish, Exec. Vice President, Gen. Counsel & Sec'y, Tesoro Corp. (July 25, 2014).

49. Telephone Interview with Teri McClure, Chief Legal Commc'ns & Compliance Officer & Gen. Counsel, United Parcel Serv., Inc. (July 17, 2014); *accord* Telephone Interview with Tara Rosnell, Assoc. Gen. Counsel, Procter & Gamble Co. (June 6, 2014).

50. Interview by Deborah L. Rhode with participant (June 12, 2014) (on file with author).

box" program.[51] One mentioned being sued as a reason for focusing attention on the issue.

In terms of communication, corporations relied on more informal or indirect methods than law firms. The commitment could be conveyed through the leadership's involvement with minority bar associations or the Leadership Council on Legal Diversity.[52] Others stressed their diversity programming.[53] One noted leaders' emphasis on diversity to the people making hiring decisions.[54] Another pointed to its inclusion in performance evaluations.[55] Whatever the method of communication, it mattered that leaders were "personally and professionally committed."[56]

B. Diversity Initiatives

Diversity initiatives varied. Among law firms, some involved formal plans or goals.[57] Rarely did these specify numerical targets.[58] As the chair of one major Wall Street firm explained, "we don't want to be limited" or to "set up unrealistic expectations."[59] Most firms had a committee, council, or task force charged with coordinating diversity efforts.[60] For example, Wilmer Hale has a diversity committee with six partners representing the firm's six offices, each of whom is responsible for heading a separate committee on diversity in each office.[61] Orrick has an Inclusion Leadership Council, comprised of the heads of women's and diversity initiatives, two rising star partners, and two former members of the firm's board of directors.[62] In addition to sponsoring training, speakers' programs, and retreats, firms often had formalized mentorship or sponsorship initiatives. These sought to ensure that associates and junior partners of

51. Telephone Interview with Charles Parrish, *supra* note 48.

52. Telephone Interview with Gretchen Bellamy, Assistant Gen. Counsel, Wal-Mart Stores, Inc. (July 16, 2014); Telephone Interview with Debra Berns, Chief Compliance, Ethics & Privacy Officer & Senior Deputy Gen. Counsel, UnitedHealth Grp., Inc. (July 25, 2014); *see also* LEADERSHIP COUNCIL ON LEGAL DIVERSITY, http://www.lcldnet.org/ (last visited Mar. 25, 2015).

53. Telephone Interview with Susan Blount, Exec. Vice President & Gen. Counsel, Prudential Fin., Inc. (n.d.); Telephone Interview with Tara Rosnell, *supra* note 49.

54. Telephone Interview with Jonathan Hoak, Exec. Vice President & Gen. Counsel, Flextronics Int'l Ltd. (n.d.).

55. Telephone Interview with Mary Francis, Chief Corp. Counsel, Chevron Corp. (Apr. 29, 2014).

56. Telephone Interview with Debra Berns, *supra* note 52.

57. Telephone Interview with Brad Malt, *supra* note 26.

58. Telephone Interview with Lee Miller, *supra* note 38 (goals and objectives, not quotas for recruitment, retention, and promotion). *But see* Telephone Interview with Nicholas Cheffings, *supra* note 25 (global diversity plan that aspires to having women be 25 percent of partners in 2017 and 30 percent in 2022).

59. Interview by Deborah L. Rhode with participant (June 26, 2014) (on file with author).

60. Some had a committee and a smaller steering council. *See* Telephone Interview with Guy Halgren, *supra* note 27.

61. Telephone Interview with Peggy Giunta, Chief Legal Pers. & Dev. Officer, & Kenneth Imo, Dir. of Diversity, Wilmer Cutler Pickering Hale & Dorr LLP (July 28, 2014).

62. Telephone Interview with Mitch Zuklie, Global Chairman & Chief Exec. Officer, Orrick, Herrington & Sutcliffe LLP (May 9, 2014).

underrepresented groups had the professional development opportunities and assistance necessary to ensure retention and promotion.[63] McGuireWoods is piloting a reverse mentoring program in which diverse associates mentor department chairs; the firm also gives a diversity and inclusion award at its annual partnership retreat.[64] Some firms have adopted policies that conformed to best practices developed by outside groups, such as the Project for Attorney Retention.[65] One firm required a slate that included at least one diverse candidate for every open lateral position.[66] That practice is modeled on the Rooney Rule, which the National Football League established to ensure that minority candidates were considered for coaching positions.[67]

Most firms had a dedicated budget for diversity; others financed their efforts with funds allocated for other purposes, such as business development or recruiting. Thomas Reid, managing partner at Davis Polk, explained his firm's preference for an integrated approach: "I don't want people thinking of this as just a cost. Diversity is part of business development efforts. If it's seen as something we just have to do, it will not be sustainable."[68]

General counsel reported similar initiatives. Some have also adopted a modified Rooney Rule to guarantee diverse slates of candidates. One large technology company has a numerical goal for female hiring and promotion because the company found it challenging to achieve diversity in the technology industry. Most general counsel, however, did not focus on numerical goals. Many corporations had mentorship and sponsorship programs as well as speaker programs and training on unconscious bias.[69] Also common were minority summer internships and other pipeline initiatives such as street law for high school students.[70] J.P. Morgan has recently established a legal reentry program targeting lawyers—generally women—who have been out of the workforce for at least a year.[71] After an

63. Telephone Interview with Carter Phillips, *supra* note 25.

64. Telephone Interview with Bob Couture, *supra* note 42.

65. Telephone Interview with Lee Miller, *supra* note 38.

66. Telephone Interview with Bob Couture, *supra* note 42.

67. Brian N. Collins, *Tackling Unconscious Bias in Hiring Practices: The Plight of the Rooney Rule*, 82 N.Y.U. L. REV. 870, 871 (2007); Greg Garber, *Thanks to Rooney Rule, Doors Opened*, ESPN (Feb. 9, 2007, 3:03 PM), http://sports.espn.go.com/nfl/playoffs06/news/story?id=2750645.

68. Telephone Interview with Thomas Reid, *supra* note 26.

69. Telephone Interview with Susan Blount, *supra* note 53; Telephone Interview with Stephen Cutler, *supra* note 47; Telephone Interview with Bruce Kuhlik, Exec. Vice President & Gen. Counsel, Merck & Co., Inc. (July 18, 2014); Telephone Interview with Maryanne Lavan, Senior Vice President, Gen. Counsel & Corp. Sec'y, Lockheed Martin Corp. (July 17, 2014).

70. Telephone Interview with Debra Berns, *supra* note 52; Telephone Interview with Susan Blount, *supra* note 53; Telephone Interview with Maryanne Lavan, *supra* note 69; Telephone Interview with Teri McClure, *supra* note 49; Telephone Interview with Mary O'Connell, Head of Legal Operations, Google Inc. (June 5, 2014); Telephone Interview with Ashley Watson, Senior Vice President & Chief Ethics & Compliance Officer, Hewlett-Packard Co. (May 16, 2014).

71. Telephone Interview with Stephen Cutler, *supra* note 47.

eight-week internship, the company hopes to place them in permanent positions in the legal department.[72]

Evaluations of the success of diversity initiatives were mixed. Virtually all managing partners and general counsel were proud of their efforts but varied in their assessments of results. Those who spoke for attribution had particular reasons to put their best foot forward, and some were confident that their workplace was an inclusive meritocracy.[73] A number mentioned awards from clients and minority or women's organizations, as well as positive ratings from Working Mother Magazine or Yale Law Women.[74] Most felt that their numbers were better than their peers, and most general counsel felt that their offices were often more successful than their companies as a whole. Many firm leaders and general counsel cited progress for women at leadership levels as an example of success. Although women are still underrepresented at the top, a common perception was that this was on the path to being fixed. Some general counsel were also proud of their records in channeling increased business to women- and minority-owned firms, although it could be a challenge finding them in areas where the corporation had the greatest needs. On the whole, participants mentioned more success in recruiting than in promotion and retention. Many mentioned the lack of progress concerning African American partners as a continuing challenge. Some were particularly careful not to be complacent. Comments included:

- "We could be better."[75]
- "I don't think anyone is satisfied with the profession overall. And despite all the efforts, it's hard to see meaningful success in outside counsel."[76]
- "We do pretty good with hiring but we struggle with retention. It's a constant effort."[77]
- "With minorities, we are hiring but not keeping them."[78]

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72. *Id.*

73. For example, one participant felt confident that diversity efforts were successful because "there isn't any perception that people are here for any reason other than that they are doing a great job." Interview by Deborah L. Rhode with participant (July 30, 2014) (on file with author). Another noted, "I really do perceive a color-blind and gender-blind environment." Interview by Deborah L. Rhode with participant (June 30, 2014) (on file with author). One firm chair reported that "in terms of culture and inclusiv[ity], our feedback suggests we are very successful." Telephone Interview with Mitch Zuklie, *supra* note 62.

74. Telephone Interview with Tyree Jones, *supra* note 40; Telephone Interview with Brad Malt, *supra* note 26; Telephone Interview with Wally Martinez, *supra* note 26; Telephone Interview with Lee Miller, *supra* note 38; Telephone Interview with Jim Rishwain, Chair, Pillsbury Winthrop Shaw Pittman LLP (Aug. 2, 2014); Telephone Interview with Tara Rosnell, *supra* note 49; *see also* YALE LAW WOMEN, http://yalelawwomen.org/ (last visited Mar. 25, 2015).

75. Telephone Interview with Maryanne Lavan, *supra* note 69.

76. Telephone Interview with Susan Blount, *supra* note 53.

77. Telephone Interview with Robert Giles, *supra* note 25.

78. Interview by Lucy Buford Ricca with participant (July 21, 2014) (on file with author).

- "You look at the numbers and it's pretty depressing, but it's better than it would have been without initiatives."[79]
- "It's hard for us to walk away and say that we've moved the needle even though we've been trying. . . . It's not a lack of trying, it's a lack of impact."[80]
- "There's always room for improvement."[81]
- "The numbers [concerning African American partners] are pathetic."[82]
- "Not nearly successful enough, no question about it."[83]

C. Challenges and Responses

When asked about the challenges they faced in pursuing their diversity objectives, participants stressed common themes. With respect to minorities, the greatest obstacle was the limited pool of candidates with diverse backgrounds and the fierce competition for talented lawyers.[84] As one firm leader put it, "We hire many young diverse lawyers and then they often leave to go in-house, and then the clients come back and want diverse teams. That makes it difficult."[85] A director of diversity lamented that "[o]ur firm is a place where others come to poach."[86] Others complained about the difficulties of achieving diversity in lateral hiring, because "if firms have diverse lawyers, they work hard to keep them."[87] Corporate counsel noted that they often could not pay as much as large law firms. Carter Phillips, chair of the executive committee of Sidley Austin, expressed a common frustration: "It's tough even when you succeed in getting them in the door and giving them the best work, and they leave."[88]

A related frustration was that leaders were depending on a pipeline controlled by others. For example, across the technology industry, legal departments find it difficult to have a certain percentage of lawyers that meet their diversity goals because the entire pool of attorneys available to fulfill those goals is below that percentage.[89] Some put the blame squarely

79. Interview by Deborah L. Rhode with participant (June 30, 2014) (on file with author).

80. Interview by Lucy Buford Ricca with participant (July 21, 2014) (on file with author).

81. Telephone Interview with Teri McClure, *supra* note 49.

82. Telephone Interview with Thomas Reid, *supra* note 26.

83. Interview by Deborah L. Rhode with participant (July 18, 2014) (on file with author).

84. Telephone Interview with Joseph Andrew & Jay Connolly, *supra* note 25; Telephone Interview with Susan Blount, *supra* note 53; Telephone Interview with David Braff, Partner & Co-Chair of Diversity Comm., Sullivan & Cromwell LLP (July 31, 2014); Telephone Interview with John Soroko, *supra* note 38.

85. Telephone Interview with Bob Couture, *supra* note 42.

86. Telephone Interview with Kenneth Imo, *supra* note 61.

87. Telephone Interview with Robert Giles, *supra* note 25.

88. Telephone Interview with Carter Phillips, *supra* note 25.

89. Telephone Interview with Mark Chandler, Gen. Counsel, Cisco Sys., Inc. (July 24, 2014).

on law schools.[90] One law firm chair declined to participate in the study, explaining, "I simply believe that the academy is the principal problem and should be the focus of your inquiry. You're losing the war at the intake, and we are dependent upon you. . . . Fill our pipeline with diverse talent, and through sponsorship and other initiatives we'll know what to do with it."[91] Other participants put some of the responsibility on society: "A law firm alone can't make overnight changes; some of where we would like to be depends on [the] broader society."[92] To one managing partner, the situation regarding African American lawyers was "hopeless" given issues with the pipeline.[93]

With respect to women, the principle problem mentioned was a "culture that focuses heavily on hours as a metric of contribution."[94] According to one general counsel:

> Until law firms make certain fundamental changes in their business model, it's going to be hard to make meaningful statistical change. . . . When you look at women after forty years [of being in the pipeline] and look at leadership levels, law firms don't seem to be the right stewards on these issues. . . . To get beyond [current levels] firms will have to look at how people coach and invest in talent.[95]

A further challenge was "getting everybody to buy into the issue. Not all men see that there is a need to address women's issues. They see women partners and don't see inhibitions."[96]

Some firms identified broader attitudinal problems. They specified implicit bias, "diversity fatigue,"[97] and the difficulty of having an "honest conversation" on the issue.[98] "Keeping the dialogue fresh and avoiding platitudes" was a continuing challenge.[99] At Lockheed Martin, "the struggle is to avoid backlash and people just checking the box."[100] United Parcel Service worked hard to keep diversity as a "consistent focus . . . incorporat[ed] in the ways we do business, as opposed to . . . the next flavor of the month."[101] For one smaller company, not part of the study's sample, the biggest challenge was "pushback from white males. . . . We need to reassure [them that they] aren't being displaced, [and] get [them] engaged in the process."[102]

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90. Telephone Interview with Tyree Jones, *supra* note 40 (noting drop in diverse attorneys attending law schools).

91. Email from Peter Kalis, Chairman & Global Managing Partner, K&L Gates LLP, to Deborah Rhode, Professor of Law, Stanford Law School (June 13, 2014, 14:06 PST) (on file with author).

92. Telephone Interview with Nicholas Cheffings, *supra* note 25.

93. Interview by Deborah L. Rhode with participant (June 3, 2014) (on file with author).

94. Telephone Interview with Maya Hazell, *supra* note 25.

95. Telephone Interview with Susan Blount, *supra* note 53.

96. Telephone Interview with Nicholas Cheffings, *supra* note 25.

97. Telephone Interview with Kenneth Imo, *supra* note 61.

98. Telephone Interview with Ahmed Davis, *supra* note 1.

99. Telephone Interview with Mary Francis, *supra* note 55.

100. Telephone Interview with Maryanne Lavan, *supra* note 69.

101. Telephone Interview with Teri McClure, *supra* note 49.

102. Telephone Interview with Jonathan Hoak, *supra* note 54.

For some participants the biggest challenge was the location or nature of their organization. A few had their principal offices in Midwestern cities that "don't have a critical mass of racially diverse professionals."[103] Aetna has its corporate headquarters in Hartford, Connecticut, a city not all that "attractive to diverse groups."[104] Boston was reportedly less attractive to African American lawyers than other cities.[105] Some companies were in an industry not seen as "sexy" to "diverse lawyers [who] have a lot of options."[106] The general counsel of an oil and gas company noted that "[it's n]ot easy to recruit. You can't get any more old industry than us."[107]

Other participants expressed frustration with the pace of progress. Those in organizations where attrition was low had to realize that "change is very slow."[108] Pipeline programs took a long time to have immediate impact. "It's a marathon, not a sprint," said the Global Co-Chairman of DLA Piper.[109] The Chair of Morrison & Foerster agreed: "There's no magic bullet or overnight fix. . . . You never get a boulder up the hill."[110] The long-term nature of the struggle required a consistency in focus that was challenging to maintain. As one general counsel put it, "[W]hen [your] day job is putting out fires, [diversity] doesn't always make it to [the] priority of the day. Then six months out, you realize [you] haven't made much progress."[111]

Responses to these challenges took a variety of forms. Many firms invested in mentorship and sponsorship programs. Some took special steps to support their rising stars, such as pairing them with a partner mentor or sending them to outside leadership programs.[112] One placed "a thumb on the scale" for qualified diversity candidates for leadership positions.[113] Often the diversity officer sat in on evaluations and/or hiring decisions, or was notified when a diverse candidate received adverse performance ratings. One firm established a diversity challenge, which asked all attorneys to devote forty hours a year to diversity-related efforts, including recruiting, mentoring, participating in various events, and so forth. Some firms and clients partnered on diversity programs, which often increased their appeal. Some companies also offered internships or secondments for

103. Telephone Interview with Andrew Humphrey, Managing Partner, Faegre Baker Daniels LLP (July 18, 2014).

104. Telephone Interview with William Casazza, Executive Vice President & Gen. Counsel, Aetna, Inc. (June 30, 2014).

105. Telephone Interview with Brad Malt, *supra* note 26.

106. Interview by Lucy Buford Ricca with participant (July 21, 2014) (on file with author).

107. Telephone Interview with Charles Parrish, *supra* note 48.

108. Interview by Lucy Buford Ricca with participant (July 30, 2014) (on file with author).

109. Telephone Interview with Lee Miller, *supra* note 38.

110. Telephone Interview with Larren Nashelsky, *supra* note 38.

111. Telephone Interview with Mary O'Connell, *supra* note 70.

112. Telephone Interview with Diane Patrick, Co-Managing Partner & Chair of Diversity Comm., Ropes & Gray LLP (May 9, 2014).

113. Telephone Interview with Robert Giles, *supra* note 25.

minority law firm attorneys that could enhance their skills and build personal relationships.

Diversity training, particularly around unconscious bias, was common. One firm had lawyers take the implicit bias test or a refresher course before making promotion decisions.[114] Others required it for new hires or anyone involved in recruitment. Evaluations of its effectiveness were mixed. Some felt the programs were "not solving a problem that we had."[115] In one firm, the training had created a "bad tone around the subject. . . . It made people feel nervous."[116] In another firm, "people felt preached to and imposed upon."[117] The same program provoked disagreement in one firm. The firm's leader did not see the "value" of it; the firm's head of human relations disagreed.[118] According to the Chair of Hogan Lovells, "[M]ost people don't think they need it, but most take from the training the need for understanding the possibility of unconscious bias."[119] Another agreed: "[People] don't know what they don't know."[120] Lawyers were sometimes "pleasantly surprised" at the usefulness of the programs. A few leaders felt that it helped if programs were billed as something other than "diversity" initiatives, and many believed that the experience "helped with opening dialogue and making people aware."[121] No one had a concrete basis for his or her perception. As one chair of a diversity initiative acknowledged, "[I w]ould like to . . . know whether participants are taking away anything which affects practice. [I d]on't have any data."[122]

Another strategy involved affinity groups, variously named, which almost all firms and corporations sponsored.[123] Some groups included not just traditional categories based on race, ethnicity, sexual orientation, and gender, but also religion, disability, parent, and veteran status. Many of these groups were actively involved in recruiting, mentoring, and providing business development skills and opportunities. Some held retreats. Many had sponsors from the senior ranks of the organization. Their formality and usefulness varied.[124] One concern was that white men felt excluded or threatened, or that certain groups were better than others in getting their issues addressed. "I've always believed [that] separating people rather than

114. Telephone Interview with Joseph Andrew & Jay Connolly, *supra* note 25.

115. Telephone Interview with Brad Malt, *supra* note 26.

116. Interview by Deborah L. Rhode with participant (July 21, 2014) (on file with author).

117. Telephone Interview with Diane Patrick, *supra* note 112.

118. Interview by Lucy Buford Ricca with participant (June 30, 2014) (on file with author).

119. Telephone Interview with Nicholas Cheffings, *supra* note 25.

120. Telephone Interview with Larren Nashelsky, *supra* note 38.

121. Interview by Deborah L. Rhode with participant (July 1, 2014) (on file with author).

122. Telephone Interview with Ahmed Davis, *supra* note 1; *accord* Telephone Interview with Carter Phillips, *supra* note 25 ("[It's] hard to tell how successful they have been.").

123. At most companies, the affinity groups were company-wide, not specific to the legal department.

124. At several law firms, the only formal group was the women's initiative/group.

bringing them together is not the way to go," said one firm chair.[125] One general counsel felt that the groups were "not as effective as people hoped they would be. . . . I don't think they've made a difference."[126] Others had received feedback that they were "incredibly" important. One company had had senior executives come out in LGBT forums.[127] At the very least, most participants believed that these groups provided a sense of community and an opportunity for raising concerns that should be communicated to management. They helped ensure that diversity was "front and center" in the workplace.

D. Accountability

Participants were asked a number of questions about the structures used to achieve accountability on diversity-related issues. The first was whether they did anything to monitor the experience of employees concerning diversity. Eleven firms and sixteen companies reported relying on surveys to assess experiences related to diversity.[128] "We survey ourselves up the wazoo," reported one general counsel.[129] Most included diversity-related questions as part of a general quality of life survey; some had conducted surveys just on diversity. Some organizations held focus groups as a supplement or substitute for surveys. However, many leaders appeared to see no necessity for formal assessments; they believed that the organization's "culture and open door policy" made people feel that they could raise concerns. One firm worried that the issues could be "somewhat uncomfortable, so we have left it to informal dialogue."[130] But it is precisely because of the discomfort connected with raising such issues openly that some organizations found anonymous surveys useful. Many firms also collected information from exit interviews and 360 performance reviews. One conducted "stay" interviews with minority attorneys to find out what factors were most important to their retention.[131]

Participants were also asked what, if any, measures were in place to hold employees accountable for progress on diversity issues. "Nothing that has teeth," said one general counsel.[132] "I wish there were some," responded another, "That's a good idea."[133] It is, in fact, an idea that many companies

125. Interview by Deborah L. Rhode with participant (June 24, 2014) (on file with author).

126. Interview by Deborah L. Rhode with participant (July 30, 2014) (on file with author).

127. Telephone Interview with Maryanne Lavan, *supra* note 69.

128. Some law firms did not conduct their own survey but relied on the responses of their attorneys to Vault or Am Law surveys. These were included in the survey number.

129. Interview by Deborah L. Rhode with participant (June 12, 2014) (on file with author).

130. Interview by Deborah L. Rhode with participant (July 21, 2014) (on file with author).

131. Telephone Interview with Andrew Humphrey, *supra* note 103.

132. Interview by Deborah L. Rhode with participant (July 16, 2014) (on file with author).

133. Interview by Deborah L. Rhode with participant (June 30, 2014) (on file with author).

and law firms have embraced in some form. Seventy-seven percent of companies and 80 percent of firms surveyed make some effort to assess individual employees' performance on diversity. Some used the data from employee surveys to assess the performance of managers. Others used 360 performance reviews or information submitted as part of lawyers' self-evaluations. Some allocated specific dollar amounts to diversity contributions.[134]

Participants divided on the usefulness of tying compensation to performance on diversity. Twenty-nine percent of companies and 43 percent of firms surveyed acknowledged that an individual's diversity efforts could play a role in compensation decisions. According to one firm leader, financially rewarding diversity efforts gets people's attention and makes them realize that diversity is part of their job. Other leaders disagreed. Hogan Lovells had "taken the view that artificially incentivizing people to do the right thing is not the right way. We want it to be part of the culture of the firm. . . . [But] commitment to diversity above and beyond what we would normally expect is something we would take into account."[135] Other organizations similarly made it a matter for those who had "gone [the] extra mile" on diversity issues.[136] One company had gone "back and forth" and was still debating the issue.[137] The general counsel wanted it to be "part of [the] culture" but was unsure if incentives were the way to get there.[138]

Corporate clients also had opportunities to hold law firms accountable by requiring data on diversity and allocating their business on that basis. Most companies reported asking for general information on firms' composition as well as specific information about the staffing of their own matters.[139] Rarely did general counsel report terminating representation over the issue, although some seemed prepared to do so.[140] As the chief of legal operations at Google noted, "as much as we encourage it, there isn't a penalty or reward."[141] Only one firm reported losing business over the issue. Some companies gave awards and some had targeted expenditures

134. Associates as well as partners were rewarded.

135. Telephone Interview with Nicholas Cheffings, *supra* note 25.

136. Interview by Deborah L. Rhode with participant (June 26, 2014) (on file with author).

137. Telephone Interview with Teri McClure, *supra* note 49.

138. *Id.*

139. One general counsel did not ask because "we are hiring individual lawyers and not basing on social criteria." Telephone Interview by Deborah L. Rhode with participant (July 24, 2014) (on file with author).

140. One had "moved matters from firms that didn't have the same commitment as we have." Telephone Interview with Teri McClure, *supra* note 49. Another recalled letting a firm go about eight years ago because of its record on women. Another said she would terminate a firm if she didn't see a "diverse slate." Telephone Interview with Maryanne Lavan, *supra* note 69. One said he would not take an existing matter away but would "decrease business and channel it to firms doing the right thing." Interview by Deborah L. Rhode with participant (June 12, 2014) (on file with author). Another said, "[W]e have not dropped a firm but it is a factor in who we approve." Telephone Interview with Ashley Watson, *supra* note 70.

141. Telephone Interview with Mary O'Connell, *supra* note 70.

on minority or women-owned firms. One leader reported experience with a bonus program allocating additional business to firms that had a certain number of minorities and women working on their matters.[142] Most general counsel thought, "[T]he firms get it. This isn't a hard sell."[143] Evaluations of the effectiveness of these accountability efforts varied. A number of general counsel felt frustrated by the lack of progress made by outside firms. The senior vice president and chief ethics and compliance officer at Hewlett Packard expressed common views with uncommon candor. "We've always tracked it . . . but we're not that great at [getting results]."[144] According to one general counsel, "they want to send glossy documents describing their programs. It's not very productive."[145] Some faulted themselves for not "following through" on the reports. One felt frustrated with firms that "want me to goad them into doing the right thing."[146]

For their part, firms found it "frustrating . . . when clients take a hard stick on this and then don't do anything in response. People are doing cartwheels to comply and then don't get an increase in business . . . ."[147] Some corporations "say this is important but don't pay attention to it."[148] "A lot of it is half-hearted. . . . Even the most detailed response to questions never gets a follow-up."[149] One firm chair noted that clients' concern ran the gamut; some made diversity their top priority while others got questionnaire results year after year "and that's the last we heard of it."[150] "It ebbs and flows. If you get a [general counsel] who is passionate about the issue, it gets a lot of traction. If that person leaves or gets preoccupied, it fades."[151] Most of the interest came from large corporations; midsize companies and individual clients showed little interest. One firm chair thought that clients on the whole had gotten more serious about their inquiries. "[This] has moved over the last five years from 'we want to be [seen as] doing this' to 'we want to see that it's happening.'"[152]

When asked if pressure from clients had changed firm practices, many leaders said it had not.

- "We would be doing it anyway."[153]

142. Telephone Interview with Ahmed Davis, *supra* note 1 (describing Microsoft's approach).

143. *See, e.g.*, Telephone Interview with Mary Francis, *supra* note 55.

144. Telephone Interview with Ashley Watson, *supra* note 70.

145. Telephone Interview with participant (n.d.) (on file with author).

146. Interview by Deborah L. Rhode with participant (July 18, 2014) (on file with author).

147. *See, e.g.*, Interview by Deborah L. Rhode with participant (July 21, 2014) (on file with author).

148. Interview by Deborah L. Rhode with participant (June 23, 2014) (on file with author).

149. Interview by Deborah L. Rhode with participant (Aug. 6, 2014) (on file with author).

150. Telephone Interview with Guy Halgren, *supra* note 27.

151. Interview by Deborah L. Rhode with participant (July 21, 2014) (on file with author).

152. Telephone Interview with Nicholas Cheffings, *supra* note 25.

153. *Id.*

- "We expect as much from ourselves or more than our clients do."[154]
- "I'd like to believe [this] hasn't affected our commitment."[155]
- "We haven't been dragged to [the] conclusion" that diverse teams make for better lawyering.[156]

Other firm leaders registered a positive impact from the requirements. "Partners are responsive to anything clients highlight as a concern and follow up."[157] Some "wished there were more pressure. . . . It has helped to get people to see diversity as a bottom line issue. . . . It gets partners' attention."[158] Others similarly "welcomed" client interest because it "reinforces the importance of our own efforts."[159] At the very least, the "collective pressure from a lot of committed counsel has prevented things from being worse than they are."[160] According to Perkins Coie's managing partner, client pressure "really does help send the message home. . . . You get what you measure. It's a good thing to do, and if this [pressure] helps us achieve it, so be it."[161] Others agreed. Client inquiries had "raised awareness among partners—they were paying attention because they know clients care about it."[162] Senior lawyers who "may not have been all that committed listen when a client says we care about quality, cost, and diversity."[163]

E. Work/Family Issues

A final question asked leaders how they had addressed issues of work/life balance and how successful they had been. The vast majority claimed to have been successful. "If you don't want to lose good people, you have to be flexible."[164] A common view was that "we work hard but it's not a sweatshop."[165] Most organizations guaranteed fairly generous parental leaves, permitted flexible time and reduced hour schedules, and allowed telecommuting at least to some extent. A few had emergency childcare or on-site centers.[166] Law firms often were at pains to "demonstrate that you can be a successful partner with a balanced schedule—reduced hours or part time. This is important to attract the best talent: you don't need to be a

154. Telephone Interview with Jim Rishwain, *supra* note 74.
155. Telephone Interview with Andrew Humphrey, *supra* note 103.
156. Telephone Interview with John Soroko, *supra* note 38.
157. Telephone Interview with Maya Hazell, *supra* note 25.
158. Interview by Deborah L. Rhode with participant (July 1, 2014) (on file with author).
159. *Accord* Telephone Interview with Larren Nashelsky, *supra* note 38 ("Clients reinforce the message."); Telephone Interview with Diane Patrick, *supra* note 112 ("Some general counsel are active in pressing the issue. That's a good thing for us.").
160. Telephone Interview with Susan Blount, *supra* note 53.
161. Telephone Interview with Robert Giles, *supra* note 25.
162. Telephone Interview with Kenneth Imo, *supra* note 61.
163. Telephone Interview with Mitch Zuklie, *supra* note 62.
164. Telephone Interview with Lee Miller, *supra* note 38.
165. Telephone Interview with Guy Halgren, *supra* note 27.
166. Telephone Interview with David Braff, *supra* note 84 (emergency care); Telephone Interview with Thomas Milch, *supra* note 25 (on-site childcare).

staff attorney or [on a] different track."[167] Championing flexibility was also important in corporations. As one leader noted: "It's feasible for . . . caregivers to have a flexible work schedule; [they] really can do the work from anywhere."[168]

"But," she added, "there is the inherent obstacle in that in the legal profession [there is] a lot of work to do."[169] Many leaders made a similar point:

- "Everyone feels stressed. . . . It's the profession we've chosen. It's a client service profession and a demanding job."[170]
- "It's a tough environment to be part-time in."[171]
- "Clients expect availability twenty-four hours a day."[172]
- "We run a 24/7 business and it's international. We have a difficult and time-committed job."[173]
- "It's really difficult in the industry, especially for primary caretakers."[174]
- "It's a real tough [issue]. We do programs on the subject but I'm not sure people have time to attend. I don't think we've done anything really to address that issue."[175]
- "You have to be realistic. It's a demanding profession. . . . I don't claim we've figured it out."[176]

Although some leaders were sensitive to the problem of "schedule creep," and tried to avoid escalation of reduced hours, others saw the problem as inevitable. As one firm chair put it, "When you go on a reduced schedule, there are times when [you] have to work full-time to demonstrate [you] can do the job. [Lawyers] need a support system in place so that they can demonstrate the skills to be promoted. Sometimes people don't recognize that."[177]

Most general counsel felt that "corporations are easier places to combine work and family than law firms are."[178] As one general counsel put it, part of the reason "that lawyers move from firms to in-house is to achieve a

167. Telephone Interview with Joseph Andrew & Jay Connolly, *supra* note 25; *accord* Telephone Interview with Robert Giles, *supra* note 25 ("[We've] made a lot of people partner while [they were] on part-time status.").

168. Telephone Interview with Debra Berns, *supra* note 52.

169. *Id.*

170. Telephone Interview with Susan Blount, *supra* note 53.

171. Interview by Deborah L. Rhode with participant (July 1, 2014) (on file with author).

172. Interview by Deborah L. Rhode with participant (June 24, 2014) (on file with author).

173. Telephone Interview with Teri McClure, *supra* note 49.

174. Telephone Interview with Larren Nashelsky, *supra* note 38.

175. Telephone Interview with Stephanie Corey, *supra* note 48.

176. Telephone Interview with Andrew Humphrey, *supra* note 103.

177. Telephone Interview with Kenneth Imo, *supra* note 61.

178. Interview by Deborah L. Rhode with participant (July 30, 2014) (on file with author).

better work-life balance."[179] Another noted, "People could make more money in law firms. To counter that, we offer a better work/life balance as well as a competitive salary."[180] Because lawyers in-house do not bill by the hour, "no one is looking over your shoulder to make sure [you] are in [your] chair twelve hours a day. We just look to people to get their jobs done."[181] The general counsel of Cisco stated his belief that "the point is to measure output rather than input. We don't care how many hours are worked on a particular matter as long as the project gets done."[182] The general counsel of Aetna felt similarly: "We work pretty hard. But we let people do it at a time and place convenient to them."[183]

Leaders were of mixed views on whether to use their "family friendly" status in recruiting. Some were proud of their policies and their ranking by organizations like the Yale Law Women. Others opted for a lower profile. "I don't put it out there because I don't want to attract people who are coming for that reason," said one general counsel.[184] A firm chair similarly recalled that "we made the mistake of recruiting around work/life balance and got people who thought we weren't a 'type A' intense place."[185]

Whether organizations could do more to address the issue also evoked varied responses. Some leaders wished "we could stop talking about it because it raises the expectation that we can do something about it."[186] Others were less resigned. "The whole company, including the legal department, has room for improvement when it comes to work/life balance," said one general counsel.[187] Others similarly felt more change was inevitable, and desirable. "If we crack the code on work/life balance it will help women," said Mitch Zuklie, Chair of Orrick.[188]

IV. BEST PRACTICES

The findings from this study, together with other research and interviews with headhunters and a diversity consultant, suggest a number of best practices for advancing diversity in law firms and in-house legal departments.

179. Telephone Interview with Chan Lee, Vice President & Assistant Gen. Counsel, Pfizer, Inc. (July 29, 2014).

180. Telephone Interview with Gretchen Bellamy, *supra* note 52.

181. Interview by Lucy Buford Ricca with participant (July 30, 2014) (on file with author).

182. Telephone Interview with Mark Chandler, *supra* note 89.

183. Telephone Interview with William Casazza, *supra* note 104.

184. Interview by Deborah L. Rhode with participant (July 18, 2014) (on file with author).

185. Interview by Deborah L. Rhode with participant (June 12, 2014) (on file with author).

186. Interview by Lucy Buford Ricca with participant (July 21, 2014) (on file with author).

187. Telephone Interview with Charles Parrish, *supra* note 48.

188. Telephone Interview with Mitch Zuklie, *supra* note 62.

A. Commitment and Accountability

The first and most important step toward diversity and inclusion is to make that objective a core value that is institutionalized in organizational policies, practices, and culture. The commitment needs to come from the top. An organization's leadership must not only acknowledge the importance of diversity but also establish structures for promoting it and for holding individuals accountable. To that end, leaders need to take every available opportunity to communicate the importance of the issue, not just in words, but in recruiting, evaluation, and reward structures.

"What doesn't work is when leaders talk about the value of inclusion but fail to make it more than the seventh, eighth, or ninth priority," said Christie Smith, managing principal of Deloitte University Leadership Center for Inclusion.[189] So too, Miriam Frank, vice president of recruiters Major, Lindsey & Africa, saw "some companies purport to put it at the top of the list, but when push comes to shove, other qualities will creep up the ladder."[190] By contrast, true commitment from an organization's leadership can help stave off frustration or "diversity fatigue" that occurs when lawyers feel that programs are simply window dressing. What also does not work, according to Smith, are

> programs and initiatives around diversity without leadership expectations tied to [them]. . . . There are a lot of well-intentioned leaders who have abdicated responsibility to a few in the organization rather than making diversity and inclusion the responsibility of every leader in their organization. . . . [They] have stated values around inclusion but [they] don't live up to those values.[191]

To institutionalize diversity, a central priority should be developing effective systems of evaluation, rewards, and allocation of leadership and professional development opportunities. Women and minorities need to have a critical mass of representation in key positions such as management and compensation committees. Supervisors need to be held responsible for their performance on diversity-related issues, and that performance should be part of self-assessments and bottom-up evaluation structures.[192] Although survey participants were divided in their views about tying compensation to diversity, most research shows that such a linkage is

189. Telephone Interview with Christie Smith, Managing Principal, Deloitte Univ. Leadership Ctrs. for Inclusion & Cmty. Impact, Deloitte & Touche LLP (July 23, 2014).

190. Telephone Interview with Miriam Frank, Vice President, Major, Lindsey & Africa (June 9, 2014).

191. Telephone Interview with Christie Smith, *supra* note 189.

192. *See* BAGATI, *supra* note 16, at 49; Deborah L. Rhode & Barbara Kellerman, *Women and Leadership: The State of Play*, *in* WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE 1, 27–28 (Barbara Kellerman & Deborah L. Rhode eds., 2007); Cecilia L. Ridgeway & Paula England, *Sociological Approaches to Sex Discrimination in Employment*, *in* SEX DISCRIMINATION IN THE WORKPLACE 189, 202 (Faye J. Crosby et al. eds., 2007); Robin J. Ely, Herminia Ibarra & Deborah Kolb, *Taking Gender into Account: Theory and Design for Women's Leadership Development Programs*, 10 ACADEMY OF MGMT. LEARNING & EDUC. 474, 481 (2011); JOANNA BARSH & LAREINA YEE, UNLOCKING THE FULL POTENTIAL OF WOMEN AT WORK 11 (McKinsey & Co. 2012).

necessary to demonstrate that contributions in this area truly matter. Performance appraisals that include diversity but that have no significant rewards or sanctions are unlikely to affect behavior.[193]

Pressure from clients to hold firms accountable is also critical. Such initiatives need to include not just inquiries about diversity, which most clients make, but also follow-ups, which occur less often. Good performance needs to be rewarded; inadequate performance should carry real sanctions. This kind of pressure ensures that "regular partners have to think about it."[194]

B. Self-Assessment

As an ABA Presidential Commission on Diversity recognized, self-assessment should be a critical part of all diversity initiatives.[195] Leaders need to know how policies that affect inclusiveness play out in practice. That requires collecting both quantitative and qualitative data on matters such as advancement, retention, assignments, satisfaction, mentoring, and work/family conflicts. Periodic surveys, focus groups, interviews with former and departing employees, and bottom-up evaluations of supervisors can all cast light on problems disproportionately experienced by women and minorities. Monitoring can be important not only in identifying problems and responses, but also in making people aware that their actions are being assessed. Requiring individuals to justify their decisions can help reduce unconscious bias.[196]

C. Affinity Groups

Affinity groups for women and minorities are extremely common, but data on their effectiveness is mixed. Survey participants generally agreed with research suggesting that, at their best, such groups provide useful advice, role models, contacts, and development of informal mentoring relationships.[197] By bringing lawyers together around common interests, these networks can also forge coalitions on diversity-related issues and

193. Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 HARV. J.L. & GENDER 279, 293–94 (2007); Frank Dobbin, Alexandra Kalev & Erin Kelly, *Diversity Management in Corporate America*, CONTEXTS, Fall 2007, at 21, 23–24, *available at* http://scholar.harvard.edu/files/dobbin/files/2007_contexts_dobbin_kalev_kelly.pdf.

194. Telephone Interview with Thomas Reid, *supra* note 26.

195. PRESIDENTIAL INITIATIVE COMM'N ON DIVERSITY, ABA, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 23 (2010).

196. Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1381 (2008); Emilio J. Castilla, *Gender, Race, and Meritocracy in Organizational Careers*, 113 AM. J. SOC. 1479, 1485 (2008).

197. *See* Rhode & Kellerman, *supra* note 192, at 30; Alexandra Kalev, Frank Dobbin & Erin Kelley, *Best Practices or Best Guesses: Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 594 (2006); Cindy A. Schipani et al., *Pathways for Women to Obtain Positions of Organizational Leadership: The Significance of Mentoring and Networking*, 16 DUKE J. GENDER, L. & POL'Y, 89, 131 (2009).

generate useful reform proposals.[198] Yet their importance should not be overstated. As one senior vice president put it, "[There's] only so much progress you can make by talking to people just like you. [You are] preaching to the choir."[199] The only large-scale study on point found that networks had no significant positive impact on career development; they increased participants' sense of community but did not do enough to put individuals "in touch with what . . . or whom they [ought] to know."[200]

D. Mentoring and Sponsorship

One of the most effective interventions involves mentoring and sponsorship, which directly address the difficulties of women and minorities in obtaining the support necessary for career development. Many organizations have formal mentoring programs that match employees or allow individuals to select their own pairings. Research suggests that well-designed initiatives that evaluate and reward mentoring activities can improve participants' skills, satisfaction, and retention rates.[201] However, most programs do not require evaluation or specify the frequency of meetings and set goals for the relationship.[202] Instead, they permit a "call me if you need anything" approach, which leaves too many junior attorneys reluctant to become a burden.[203] Ineffective matching systems compound the problem; lawyers too often end up with mentors with whom they have little in common.[204] Formal programs also may have difficulty inspiring the kind of sponsorship that is most critical. Women and minorities need advocates, not simply advisors, and that kind of support cannot be mandated. The lesson for organizations is that they cannot simply rely on formal structures. They need to cultivate and reward sponsorship of women and minorities and monitor the effectiveness of mentoring programs.[205]

E. Work/Family Policies

Organizations need to ensure that their work/family policies are attuned to the needs of a diverse workplace, in which growing numbers of men as well as women want flexibility in structuring their professional careers. To

198. Bob Yates, *Women and Minorities: The Retention Challenge for Law Firms*, CHI. LAW., Feb. 2007.

199. Telephone Interview with Ashley Watson, *supra* note 70.

200. Dobbin, Kalev & Kelly, *supra* note 193, at 25.

201. Rhode & Kellerman, *supra* note 192, at 30; *see also* IDA O. ABBOTT, THE LAWYER'S GUIDE TO MENTORING 32–33 (2000); Kalev, Dobbin & Kelly, *supra* note 197, at 594; Schipani et al., *supra* note 197, at 100–01.

202. *See, e.g.*, MINN. STATE BAR ASS'N, DIVERSITY AND GENDER EQUITY IN THE LEGAL PROFESSION, BEST PRACTICES GUIDE 65–79 (2008).

203. *Id.* at 77.

204. IDA O. ABBOTT & RITA S. BOAGS, MINORITY CORP. COUNSEL ASS'N, MENTORING ACROSS DIFFERENCES: A GUIDE TO CROSS-GENDER AND CROSS-RACE MENTORING (n.d.), *available at* http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=666; Leigh Jones, *Mentoring Plans Failing Associates; High Attrition Rates Still Hit Firms Hard*, NAT'L L.J. (Sept. 15, 2006), http://www.nationallawjournal.com/id=900005462642/Mentoring-plans-failing-associates.

205. CATALYST, THE PIPELINE'S BROKEN PROMISE 5 (2010).

that end, organizations should ensure that they have adequate policies and cultural norms regarding parental leave, reduced schedules, telecommuting, and emergency childcare. Most of the organizations surveyed had such formal policies. But existing research shows a substantial gap between policies and practices. One study found that although over 90 percent of law firms reported having part-time policies, only approximately 4 percent of lawyers actually use them.[206] Those who choose reduced schedules too often find that they aren't worth the price. Their hours creep up, the quality of their assignments goes down, their pay is not proportional, and they are stigmatized as "slackers."[207]

Surveying lawyers and collecting data on part-time policy utilization rates and promotion possibilities are critical in educating leaders about whether formal policies work in practice as well as in principle. Too many organizations appear resigned to the idea that law is a 24/7 profession.[208] Too few have truly engaged in the kind of self-scrutiny necessary to develop effective responses. As one survey participant noted, his firm's policies were "a work in progress." Other leaders need to take a similar view, and to subject their practices to ongoing self-assessment.

F. Outreach

Organizations can also support efforts to expand the pool of qualified minorities through scholarships, internships, and other educational initiatives, and to expand their own recruiting networks. The ABA's Pipeline Diversity Directory describes about 400 such initiatives throughout the country.[209] Many survey participants were undertaking such programs in recognition of their long-term payoffs. Some organizations had also cultivated contacts with organizations that support diverse talent. As one general counsel noted, "[I]f we are creative and think outside the box about the skills and experience needed to succeed in a position, we can find more qualified talent, including qualified diverse talent, for the pools from which we hire."[210]

CONCLUSION

Implementing these practices requires a sustained commitment and many leaders expressed understandable frustration at the slow pace of change. What is encouraging about this study, however, is that such a commitment

206. Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1056 (2011).

207. *Id.* at 1056–57.

208. *See* discussion *supra* Part III.E. (discussing work/family issues).

209. *See Search the Pipeline Diversity Directory*, ABA, http://apps.americanbar.org/abanet/op/pipelndir/search.cfm (last visited Mar. 25, 2015). For a discussion of such programs, see Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 294–99 (2014).

210. Email from Bevelyn A. Coleman, Exec. Vice President & Deputy Gen. Counsel, Wells Fargo & Co., to Deborah L. Rhode, Professor of Law, Stanford Law School (Aug. 14, 2014, 10:24 PST) (on file with author).

appears widely shared. That, in itself, is a sign of progress. As one chair noted, "Ten years ago, it wasn't uncomfortable to walk into a room with a non-diverse team. The temperature of the water has changed. It's hard to succeed without a commitment to diversity."[211] Leaders of the profession recognize that fact. The challenge now is to translate aspirational commitments into daily practices and priorities.

211. Telephone Interview with Greg Nitzkowski, *supra* note 28.

Appendix A: Participant List	
Fortune 100 Companies	***Am Law 100 Firms***
Aetna, Inc.	Arnold & Porter LLP
Am. Int'l Grp., Inc.	Davis Polk & Wardwell LLP
Chevron Corp.	Dentons
Cisco Systems, Inc.	DLA Piper
Comcast Corp.	Duane Morris LLP
ConocoPhillips Co.	Faegre Baker Daniels LLP
Google Inc.	Fish & Richardson P.C.
Hewlett-Packard Co.	Hogan Lovells
Intel Corp.	Hunton & Williams LLP
Johnson Controls, Inc.	Holland & Knight LLP
JPMorgan Chase & Co.	Kirkland & Ellis LLP
Lockheed Martin Corp.	Latham & Watkins LLP
Merck & Co., Inc.	McGuireWoods LLP
Pfizer, Inc.	Morgan, Lewis & Bockius LLP
Prudential Fin., Inc.	Morrison & Foerster LLP
Tesoro Corp.	Nixon Peabody LLP
The Coca-Cola Co.	O'Melveny & Myers LLP
Procter & Gamble Co.	Orrick, Herrington & Sutcliffe LLP
UnitedHealth Grp., Inc.	Paul Hastings LLP
United Parcel Serv., Inc.	Perkins Coie LLP
Verizon Commc'ns	Pillsbury Winthrop Shaw Pittman LLP
Wal-Mart Stores, Inc.	Proskauer Rose LLP
Wells Fargo & Co.	Reed Smith LLP
	Ropes & Gray LLP
	Sheppard, Mullin, Richter & Hampton LLP
	Sidley Austin LLP
	Sullivan & Cromwell LLP
	White & Case LLP
	Wilmer Cutler Pickering Hale & Dorr LLP
	Wilson Sonsini Goodrich & Rosati
Additional Participants	
Major, Lindsey & Africa	
Deloitte & Touche LLP	
Flextronics Int'l Ltd.	
NetApp	

Bigger Isn't Better

One-stop shopping at giant global firms has its limits, says GE's former top lawyer.

By Ben W. Heineman, Jr.

THE RISE OF LARGE, HIGH-QUALITY, global corporate law departments started more than 20 years ago. It was aimed, in part, at breaking up the "monopolies" that law firms had with corporations. Using a range of initiatives from requests for proposals to auctions, in-house counsel sought to end these cozy relationships and introduce a measure of competition into the law firm–client dynamic. The mantra of "lawyers, not law firms" was uttered so often that it became a cliché.

Because of these pressures—among others—law firms increasingly focused on becoming more effective business organizations. Some followed globalizing clients and looked to provide cross-specialty, cross-border service, either through acquisitions or organic growth, or both. This trend led to the rise of global megafirms—such as Clifford Chance, Linklaters, Jones Day, Freshfields, Allen & Overy, White & Case, Latham, and Skadden—with about 2,000 lawyers (plus or minus 10 percent), a significant proportion of whom practice outside their home country.

These firms have sought to regain monopoly positions with desirable multinational clients by aggressively asserting that they are a global "brand" in various types of practices (such as capital markets, transactions, litigation, or full service). Until this year's economic downturn, many of these firms had rising revenues and profits per partner. As a result, many have argued that bigger is better and that consolidation for global one-stop shopping is inevitable in the business of law.

As general counsel of General Electric Company's global law department for many years (with approximately 1,100 in-house lawyers), I have been skeptical that the global megafirms, in fact, provide the claimed superior service, quality, or price. Indeed, the relationship between the big law departments and big firms is often bedeviled by prickly issues relating to power, money, culture, and, ultimately, the foundational question of who controls the corporation's legal matters.

These questions have become more salient as the global economy turns down, but big firms' expenses and rates continue to rise. I recognize that GE may not be representative of in-house law departments, even big ones, and that global firms will point to paying clients as the best answer to doubts. I will return to these points at the end. But let me summarize the fundamental questions that potentially separate global law departments and large global law firms. (These questions may also apply to midsize firms.)

■ **DOES GLOBALIZATION CREATE HIGHER COSTS?** When firms expand, especially by acquisition, they are clearly taking on higher costs in people, space, and infrastructure. Yet, how many law firms have detailed, systematic integration policies, which identify "synergies" that can lead to cost reductions? How many have relentless, durable cost control programs? How often do we hear that many of the overseas offices or acquired firms are "loss leaders"? Indeed, global firms may often finance part of their expansion with debt, leading to even higher annual costs and greater risk.

■ **DO HIGHER COSTS (AND INCREASED RISKS)** put enormous pressure on firms to bill more per partner and per matter to cover the huge annual costs of a global firm—even before equity partners take home profits? My GE meetings with big-firm leaders usually began with a stark comparison of differing economic imperatives and worldviews. I had to operate the legal department

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within a budget; they had to bill and collect like crazy for almost two-thirds of the year to feed all the mouths before they made any profit. Billing targets are red flags for clients. For example, didn't these pressures lead to overstaffing, unwarranted markups for paralegals and young associates—work that an inside department could outsource far less expensively—and strong incentives for overbilling?

■ **WHY DO LAW FIRMS** take such a narrow view of "productivity"? In simplest terms, a total productivity increase in business is defined as more output with less input. To maintain margins in fierce global competition, the corporation has to lower costs along with price. But for law firms, "productivity increases" mean leverage—more lawyers per partner or per matter—or more hours billed per lawyer. Both of these measurements speak to increases in firm hours and revenues. But, with rising compensation and operating expenses, they do not, in and of themselves, remotely speak to more product for clients with less cost and less price. For the largest firms, with their cost problems and billing pressures, this "productivity disconnect" with clients can be acute. A truly productive law firm could get the same result with fewer lawyers and less total cost (and free up hours for other efficient work for other clients). Indeed, at GE I came to believe generally that small was beautiful, and big was wasteful. Until the big, global firms candidly address the ultimate issue of productivity on a "total cost" (single price) per-matter basis, they will have a hard time being on the same economic page as many corporate clients.

■ **HOW CAN THE VAST GLOBAL FIRMS** avoid a large "mediocre middle" and sustain a culture of high performance? Can they hire, teach, and retain the best in a firm with thousands of lawyers ["The Lost Generation?," March]? How can they evaluate and maintain quality control over the large numbers of more senior associates and nonequity partners? How, in fact, on large, international matters with huge staffing, do they have "project management" discipline to ensure quality and avoid billing for unnecessary work, poor work, and rework? Creating a unified culture across boundaries and nationalities, when the international lawyers are not homegrown, is perhaps an even more significant problem than quality control—especially when law firm acquisition and integration planning may be unsophisticated.

> If [cross-border] issues are complex and difficult, it is questionable whether one firm has the capacity to address them.

■ **WHY SHOULD GLOBAL CLIENTS** buy the specialty cross-sell from name-brand global firms? Acquiring in-house specialists has been an important element in the growth of corporate legal departments. It gives companies the capacity to evaluate and find the best outside specialists and not blindly accept a cross-sell from firms. Thus, for the global law legal department with a high level of specialization, the cross-sell by the global firm is no more compelling than before (and because of cost and quality issues may be even less so).

This is true even for the biggest firms, which seek to profit from a particular practice area, such as cross-border transactions for major clients. Broken up into pieces, transactions, of course, involve different legal issues beyond basic deal questions of price and control: antitrust, litigation, environmental health and safety, improper payments, and a host of other issues relating to myriad national and international laws. If those issues are complex and difficult, it is questionable whether one firm has the capacity to address them.

■ **SIMILARLY, WHY SHOULD GLOBAL CLIENTS** buy the cross-border cross-sell from the biggest firms? The global law department may have as much as 50 percent of its lawyers practicing in jurisdictions outside headquarters. These lawyers are often local nationals and are knowledgeable about outside lawyers in Shanghai or Mumbai or Berlin or Tokyo. Sophisticated purchasers of international legal services will not be persuaded by a cross-border cross-sell on the basis of a firm's brand. An antitrust issue under China's new competition laws, environmental due diligence when purchasing Russian assets, a target's improper payment problems in the Middle East, accounting issues in Japan, political issues in Poland—these may be critical to the cross-border transaction and require separate counsel with special expertise. Again, the task of putting together the right inside and outside teams on a major cross-border matter almost always, if properly done, involves far more than simply signing up with a big global firm. This may be especially so because some global firms, such as Linklaters, boast about charging higher rates on cross-border matters.

■ **UNDER NEW ACCOUNTING RULES,** won't the requirement that deal costs be "expensed," not "capitalized," increase the sensitivity to the megafirms' high legal costs on cross-border transactions? A Financial Accounting Standards Board rule (FAS 141(R))—and a similar International Accounting Standards Board rule—will take effect in 2009. These rules require that legal costs on transactions be treated as "expenses" in the year incurred, not as costs of the acquisition that can be

capitalized and amortized over many years (or deferred indefinitely as goodwill). If they weren't sensitive to deal costs already (because they were capitalized), in-house lawyers and business people will become much more so now because all annual legal costs will affect annual profitability.

■ **DO THE INEVITABLE CONFLICTS OF INTEREST** make retaining global firms problematic? For a large multinational corporation with many interests in many countries, it is hard to work through the technical conflicts posed by other clients of a big global firm. But the problem is even more complicated when the firm is on the other side of some general legislative, regulatory, litigation, or political issue, which is not a technical conflict, but is anathema to the corporation. These issues are true land mines, which big firms may not find until they've exploded.

Ultimately, the question for in-house law departments is: Do they want to manage their major global matters—or do they want to cede management to outside counsel? This question of control—who really is directing the specific legal matters of the corporation—affects the answers to many of the questions raised above. The sophisticated corporate purchaser of legal services, with high-quality in-house lawyers, will often choose to oversee the important cross-border matter—whether it's a deal, arbitration, litigation, investigation, public policy issue, etc. The corporation's general counsel may choose to work with smaller, more efficient firms—and piece together the necessary legal team through the smaller firms' few global offices, their ties with local firms, the corporation's own extensive law firm contacts and, importantly, its blue-chip in-house talent.

But some businesses may not have the desire or capacity to be so aggressive. And this doubtless accounts, in part, for the global firms' rising economic numbers prior to the current slowdown. Corporate law departments may not have a tradition of an independent and activist role. Until recently, this was especially so in the United Kingdom and Europe, where many of the big global firms are located. Midsize legal departments may not have the size, resources, and international reach to manage global matters actively. So, too, in the tradition of hiring "lawyers, not law firms," corporate law departments may be attracted to superstar senior partners, and then defer to them on staffing complementary matters that, in some cases, may be as effective and efficient as the alternatives.

At the end of the day, the continued rise of big global law firms will turn, in part, on a related trend. Are the CEOs in large and medium-size international companies (the big firms' targets) willing to invest in in-house legal departments? Are they willing to create global, specialized in-house groups to direct the legal work of the company and save total legal (and business) costs—and play a central role in ensuring high performance with high integrity? These high-caliber departments are a potent counterweight to the global firms, driving them to address hard questions about cost, quality, and productivity. The rise of such departments, in Europe and Asia, not just in the United States, is necessary to ensure meaningful competition among outstanding firms—small, medium, and large; national and international—which has been one of the enduring goals of the "inside counsel" movement, now more than a generation old.

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BY BEN W. HEINEMAN, JR.,
AND WILLIAM F. LEE

Getting Your Fix

Two veteran lawyers say that now is the time for fixed fees.

IN THESE TROUBLED ECONOMIC TIMES, fixed fees for particular legal matters have appeal both for law firms and their corporate clients. We—a former general counsel of a major company and a current co–managing partner of a major firm—strongly believe that this is an idea whose time has come. For in-house counsel facing tremendous budgetary pressures, the fixed fee addresses the problems caused by the hourly rate, such as unpredictability, high costs divorced from actual value and, most importantly, the maddening law firm definition of "productivity"—defined as more lawyers and more hours per matter.

For law firms facing reduced demand and cash flow problems (if not crises), the fixed fee addresses the issues of increasing overhead devoted to the billing process, clients flyspecking bills and demanding after-the-fact discounts, and delays in payments and falling realization rates.

Seen in its best light, fixed fees thus have significant benefits for both in-house and outside counsel: reduced billing hassles, more predictable cost to the client, more predictable and timely payments to the firm, and, ultimately, better alignment between the cost and the value of the legal service. The credit meltdown and the deep global recession may provide the impetus for real change in this corner of the economy, as in so many others.

Seen in the sweep of recent history, the fixed fee can also address a critical conflict at the center of the evolving inside counsel–outside counsel relationship. The 20-year rise in the talent, experience, and expertise of in-house lawyers has led to co-equal partnering on matters. But significant changes in both law firms and law departments have often led to ill will and conflict over money. As Am Law 200 firms have grown as businesses, they've faced relentless pressure for revenues, and the new breed of in-house lawyers (often alums of firms) face incessant business pressures for cost control.

During this period, there have been many attempts to find détente on hotly contested money issues: task-based budgeting and billing; RFPs; preferred providers; auctions; discounted, blended, or bulk hourly rates; or some combination of the above. But all have stumbled on the ultimate questions: how to set price with quality and achieve cost and value alignment.

SETTING A FIXED FEE

Historical data should provide the starting point for setting the fixed fee. Both firms and corporations have detailed information on the past cost of different kinds of matters. They can use data-mining techniques to determine reasonable ranges of cost for a wide variety of legal services. These services range, obviously, from the simple to the complex:

- A single project involving expertise and judgment, but not much risk, such as writing a handbook, creating form contracts, developing a compliance training program, and monitoring developments in evolving areas of law.
- A repeating, routine book of business, which involves expertise and judgment, but not much risk, such as filing a certain type of patent or trademark application, monitoring compliance with environmental permits, and handling routine labor matters in arbitration (as opposed to court).
- A repeating, but more complex book of business that involves judgment, expertise, and risk, such as annual securities reporting, a line of product liability cases, a series of venture capital financings, or more complex multiparty contracts for capital equipment sales.
- A one-off, highly complex, high-risk

ILLUSTRATION BY PETER HOEY


FIXED FEE
REVERSE
STOP
SLOW
HALF
FULL
EVERY 7.5 min.
EVERY 10 min.
EVERY 15 min.
LAW OFFICE BILLING

matter. Some may have historical antecedents: the bet-the-company litigation for the pharma company; the companywide bribery scandal being pursued by enforcers in multiple jurisdictions; the transaction to double the company's size with a target in similar lines of business. Other high-risk matters may arise on new frontiers: a patent-defense action in China; a novel product litigation; the huge acquisition of a company in a different line of business.

In complex, risky matters, the fixed fee can be split into segments. For example, one flat fee for a litigation evaluation period, and then a second fixed fee for completion—depending on joint expectations of the likely process (early settlement; reasonable discovery/settlement; full, contested discovery and trial). But whatever the type of matter, arriving at the fixed fee will depend on the motivation of both in-house and outside counsel to work toward a future result that is fair to both parties.

As in all business, a total price for a matter or a book of business is built up from costs (and, at times, also derived from the significance of the matter). One of the most important issues in setting fixed fees is distinguishing between a law firm's actual costs (which firms see), and the actual costs, plus profit margins for the partners (which is what clients see in a firm's bills). A second, related problem is that the history of costs to the company may be an imperfect guide. Past bills are an aggregation of hourly rates (plus out-of-pocket costs), which may reflect inefficiencies.

REDUCING COSTS AND REWARDING RESULTS

These two issues lead to a third in setting a fixed fee: How much can actual costs be reduced? To deal with this question, the law firm can decide that the fixed fee is just that: It will get the benefit of the savings if it is productive and does the work for less than the flat fee, and it will take the pain if the costs are higher than predicted. Alternatively, firms and companies can share the upside (the productivity gains) by splitting the difference between the flat fee and the lower actual cost. They can also share the downside (cost overruns above the flat fee). Such cost-sharing may be especially appropriate in novel, complex, and risky matters.

Sharing the cost-overrun risk drives both parties back into a review of hours and costs (what was the cause and how much was justified). However, such a review will likely occur at the end of the matter, not on a monthly or quarterly basis. The law firms, in any event, will be tracking costs continuously.

Most in-house counsel are concerned about the proper mix between cost and quality—not on getting the cheapest legal service available. From one perspective, quality is about process—close cooperation, coordination, and partnership between in-house and outside counsel. This entails a careful, continuing joint review of facts, law, policy, and politics—and critical strategy calls. Who "leads" the matter and how much in-house counsel contribute to the actual lawyering (e.g., fact-gathering and legal analysis) will depend on the size and specialization of the corporate law department.

Even with good processes, law firms under fixed-fee regimes will, of course, also be judged by the quality of their results. The fixed fee can make incentives or demerits easier to design and implement. For example, the monthly payment in a litigation could be 80 percent of the fixed fee. If a satisfactory settlement (defined at the outset) is reached, then the firm receives the withheld 20 percent. If the matter goes to trial with a positive result, the firm receives 125 percent of the fixed fee. If neither a good settlement nor a good trial outcome occurs, then the firm receives the original 80 percent of the fixed fee.

Similarly, some part of the fixed fee can be held back until after a deal is completed and acquisition integration occurs. Then the client can see if the due diligence done by the outside firm properly identified problems. A bonus could be possible if corporate performance is better than the pro forma projections. Moreover, if a law firm is managing a book of business, like labor arbitrations, as well as preventative measures inside the company, a bonus payment can be designed if the number of labor disputes declines year over year.

PROJECT MANAGEMENT

Communications between the law firms and the client on a continuing basis will be the key to fixed-fee success. Law firms must develop project management capacity that combines sensitivity to quality with sensitivity to productivity. The time invested in a project will be managed as the project proceeds, rather than discussed after the fact. It will require that firms, like corporations in fiercely competitive environments, learn to do more with less: the real definition of productivity. By the same token, in-house law departments must also develop project management capacity (and productivity measures for in-house lawyers) that mirrors the firms' efforts: focusing on working seamlessly with the outside firms to ensure efficiency on the merits. For both in-house and outside lawyers, connective technology (e.g., general and specific deal documents, databases, or general and specific litigation documents) and selective outsourcing to third parties can help drive real productivity.

CALCULATING BUDGETS AND COMPENSATION

In a fixed-fee world, law firms will build their budgets on whether fixed fees for matters (not just hours billed and received per lawyer) cover their projected costs. Under this approach, partners' compensation will turn not just on generating business but also on