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Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys

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Advocacy in the Court of Public Opinion, Installment One: Broadening the Role of Corporate Attorneys

MICHELE DESTEFANO BEARDSLEE*

Today legal controversies are tried in the “court” of public opinion as much as in any court of law. Corporate lawyers’ traditional tendency, however, has been to attempt to compartmentalize legal activities from public relations activities. Accordingly, they have viewed media considerations as separate from those involved in providing legal advice, and corporate lawyers’ typical media strategy often has consisted of no more than “no comment.” Given today’s saturated media culture, this is no longer a viable strategy. Indeed, there are indications that some corporate lawyers are adapting to the new media environment and attempting to help their clients manage the public relations impact of legal controversies. To date, however, there has been little systematic evidence gathered on the role corporate lawyers are playing in the court of public opinion for their clients’ legal controversies and little sustained examination of the implications of these trends.

The purpose of this project is to analyze: (1) how the court of public opinion affects legal controversies of large publicly traded corporations that have high demand for legal services; (2) how the intersection of public relations and law is managed by general counsels of these corporations; and (3) what ought to be lawyers’ ethical obligations, if any, in this extra-judicial court. To investigate these questions, the author sent a questionnaire to all general counsels of the S&P 500 and conducted fifty-seven interviews with general counsels of S&P 500 corporations, law firm partners, and public relations consultants.

The preliminary findings from this study will appear in two installments to be published in *The Georgetown Journal of Legal Ethics*. In the first installment, the author focuses on how the court of public opinion can shape legal controversies

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and how general counsels actually manage legal PR for their corporate clients. The author argues that the “court” of public opinion is a real part of our justice system and that managing “legal public relations” is a legitimate and fundamental component of corporate legal services. She contends that the role general counsels play in managing legal PR for corporate clients is at odds with the conventional view and that it is time to broaden our view of the corporate attorneys’ role in this venue.

In the second installment, the author highlights some examples of wrongdoing by corporate attorneys. She contends that there is little oversight of lawyers’ typical management of legal PR “behind the scenes.” Because professional guidelines focus on lawyers’ extrajudicial statements regarding matters that are adjudicated in a court of law, they put the spotlight in the wrong place and on the wrong subjects and are not relevant to corporate practice as it relates to public relations. Moreover, they risk a race to the bottom—where lawyers’ ability to spin is valued over their ability to provide effective legal advice that accounts for PR concerns and the corporation’s long term interests. Given that the court of public opinion is an extra-legal decision-maker, an alternate forum for administering justice, the author contends that corporate lawyers should behave socially responsibly when advocating there and promote socially responsible behavior on the part of their corporate clients. Ultimately, the author recommends different education methods and disciplinary rules to raise awareness of the importance of managing legal PR for corporate clients and to provide better guidance to lawyers as to how to advocate ethically within the court of public opinion.

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INTRODUCTION

The traditional view is that law is a separate discipline from public relations and that corporate legal services do not and should not incorporate public relations concerns or advice.¹ Many scholars, lawyers, and judges still believe

1. See *infra* notes 104-9, 114 and accompanying text; see also Part III.A.; cf. Kevin Cole & Fred Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1637 (1996) (“Many courts and bar associations started from a pristine view that litigation should be decided exclusively in court.”); *id.* at 1640 (explaining that lawyers historically were discouraged from making extrajudicial statements); cf. Larry O. Natt Gantt, II, *More than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 366-368 (2005); GEOFFREY C. HAZARD JR. & WILLIAM HODES,

that considering potential media spin or managing “legal PR”² is not or should not be part of legal services and that attempting to influence prosecutors, regulators, or trials in the media is inappropriate.³ However, as almost any general counsel of a large, publicly traded, consumer-oriented company will tell you, legal controversies today are tried in the court of public opinion at least as much as in any court of law. Large publicly traded corporations have much to gain (or lose) by the way a legal controversy is positioned in the media.⁴ Because the value of a company’s reputation is immeasurable and perhaps its “largest uninsured asset,”⁵ a corporation loses when the brand image is tarnished even if the corporation technically wins at trial. Further, since most legal controversies are settled prior to trial, the court of public opinion has arguably become the most important battleground affecting not only good will and market share but legal bargaining power, settlement negotiations, and future liability.⁶ Managing this battleground, therefore, has become integral to many corporations’ legal strategies.⁷

Although many scholars have highlighted the importance of the court of public opinion—especially for individual criminal defendants⁸—few scholars have conducted empirical research on the role corporate attorneys play in developing

THE LAW OF LAWYERING, A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 397 (Aspen 3d ed. 2005) (1985) (“In the traditional view of lawyering, lawyers provided legal services (and nothing else) to clients, while any professional services provided by non-lawyers are by definition not legal services.”).

2. This term includes all PR efforts around legal controversies including those that have not yet reached litigation. Others have used the term “litigation PR” which is a bit narrower in scope. *See, e.g.*, John C. Watson, *Litigation Public Relations: The Lawyers’ Duty to Balance News Coverage of Their Clients*, 7 COMM. L. & POL’Y 77 (2002); Susanne A. Roschwalb & Richard A. Stack, *Introduction to LITIGATION PUBLIC RELATIONS: COURTING PUBLIC OPINION* at vii, xii (Susanne A. Roschwalb & Richard A. Stack eds., Rothman & Co. 1995) (describing “litigation public relations” as “behind the scenes activities that support an attorney at trial and in the court of public opinion”).

3. *See, e.g.*, Ann M. Murphy, *Spin Control and the High Profile Client—Should the Attorney-Client Privilege Extend to Communications with Public Relations Consultants*, 55 SYRACUSE L. REV. 545, 585 (2005) (arguing that attempting to influence prosecutors, regulators, and the public “goes far beyond a fair reply”); Michael Dore & Rosemary Ramsy, *Dealing with Public Relations Concerns in Products Liability and Toxic Tort Litigation*, 213 N.J. LAW. 52, 52 (2002) (explaining that some courts are hostile to litigants’ PR concerns); Judith L. Maute, “*In Pursuit of Justice*” in *High Profile Criminal Matters*, 70 FORDHAM L. REV. 1745, 1756 (2002) (“Criminal cases should be tried in court, not in the media. Period.”).

4. Peter J. Gardner, *Media at the Gates: Panic! Stress! Ethics?*, 27 VT. B. J. 39, 39 (2001) (“Because an organization’s public response to a crisis may determine whether the company will survive, . . . [and] effective crisis management [is] essential in preserving shareholder value, a company may be as concerned with press coverage as with eventual legal action.”).

5. David S. Marguiles, *Media Relations for Litigation*, 1 Ann. 2005 ATLA-CLE 759 (2005).

6. *See infra* Part I.

7. 1 AM. JUR. TRIALS § 1; *see also* Gardner, *supra* note 4, at 39.

8. *See, e.g.*, Elizabeth Semel & Charles M. Sevilla, *Talk to the Media About Your Client? Think Again*, 21 CHAMPION 10, 14 (1997) (focusing on criminal defendant lawyers as spokespeople); Watson, *supra* note 2, at 77 (discussing criminal defense attorneys’ behavior in the court of public opinion); Roschwalb & Stack, *supra* note 2 (focusing on high profile criminal defendants). However, corporations are defendants in more than a majority of cases; Gillian Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57

messages around legal controversies.⁹ Instead, they focus on lawyers as spokespeople,¹⁰ the risks of legal PR spin,¹¹ journalism ethics¹² or the application of the corporate attorney-client privilege to legal PR services.¹³ This literature generally does not address the main inquiries of this project: 1) How do corporate attorneys advocate in the court of public opinion behind the scenes (outside of the limelight); and 2) How far are corporate attorneys currently going in the court of public opinion for their clients—and how far is too far?¹⁴

STAN. L. REV. 1275, 1298, 1304 (2005) (reporting that in 2000, organizations were defendants in 83% of all federal civil cases).

9. Cf. Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, n.106 (1995) (explaining that “there are no hard numbers to compare how frequently lawyers speak to the press on behalf of clients today, as opposed to at some prior time” and that “much of the evidence therefore must be anecdotal”). In Roschwalb & Stack, *supra* note 2, at vii-vix, the editors mention interviews of lawyers, judges, and journalists but fail to explain any details, interview methodology, or the number of interviews. *Id.*; see also *infra* notes 110-111 and accompanying text. Bryan H. Reber conducted empirical research via the Q methodology and depth interviews “to provide insight into how public relations and legal professionals view themselves and their colleagues in the other profession.” Bryan H. Reber, *The Lawyer-Public Relations Counselor Dynamic* (Feb. 4, 2000) (unpublished, on file with author, submitted to Institute for Public Relations for the 1999 Walter K. Lindenmann Scholarship), available at http://www.instituteforpr.org/files/uploads/1999_Reber_LawyerPR.pdf. His final sample involved 16 PR professionals and 14 lawyers. *Id.* at 9-10. He identified two types of PR professionals and two types of lawyers. *Id.* at 3. These types varied by their desire for collaboration and control of public statements. *Id.*

10. See, e.g., Moses, *supra* note 9 (recognizing that there are other types of advocacy in the court of public opinion but focusing on the lawyer as spokesperson).

11. See, e.g., Peter A. Joy & Kevin C. McMunigal, *The Role of Lawyers in Client Media Campaigns*, CRIM. JUST., Fall 2004, at 48 (explaining that client statements can be construed as admissions, false exculpatory statements, or prior inconsistent statements) [hereinafter Joy & McMunigal, *Role of Lawyers*]. Alberto Bernabe-Riefkohl, *Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard*, 84 KY. L. J. 259 (1995) [hereinafter Bernabe-Reifkohl, *Prior Restraints*]; Kevin C. McMunigal, *The Risks, Rewards, and Ethics of Client Media Campaigns in Criminal Cases*, 34 OHIO N.U. L. REV. 687 (2008) (identifying and focusing on the risks and ethical issues of client media campaigns).

12. Alberto Bernabe-Riefkohl, *The First Amendment and the Business of Journalism: Some Thoughts on Media Ethics* (tracing history of journalism ethics) (unpublished, on file with author).

13. Murphy, *supra* note 3, at 585; Deniza Gertsberg, *Should Public Relations Experts Ever Be Privileged Persons?*, 31 FORDHAM URB. L.J. 1443, 1476 (2004) (analyzing whether the attorney-client privilege should protect PR consultants in the criminal context); Jonathan M. Linas, *Make Me Well-Liked: In re Grand Jury and the Extension of the Attorney-Client Privilege to Public Relations Consultants in High Profile Criminal Cases*, 19 WASH. U. J.L. & POL’Y 397, 424 (2005); Michael Jay Hartman, Comment, *Yes, Martha Stewart Can Even Teach Us About the Constitution: Why Constitutional Considerations Warrant an Extension of the Attorney-Client Privilege in High-Profile Criminal Cases*, 10 U. PA. J. CONST. L. 867 (arguing that attorneys should advocate in the court of public opinion for very high-profile individual criminal defendants and that the constitution justifies extending the attorney-client privilege in this context); Steven B. Handler, Victor E. Schwartz, Phil S. Goldberg, *Extending the Privilege to Litigation Communications Specialists in the Age of Trial by Media*, 13 COMM.LAW. CONSPLECTUS 7 (2004).

14. Some scholars have written about the importance of legal PR for corporate clients. See, e.g., Moses, *supra* note 9, at 1833 (“Corporations also may need lawyers with press savvy, especially during corporate crisis.”); David M. Sudbury, *The Role of Corporate Counsel in the Criminal Environmental Case: Advice to Quench the Fire*, 3 VILL. ENVTL. L.J. 95, 110 (1992); Kathleen F. Brickey, *From Boardroom to Courtroom to Newsroom: The Media and the Corporate Governance Scandals*, 33 J. CORP. L. 625, 636 (2008) (exploring the use of media by high profile individual and corporate criminal defendants) [hereinafter Brickey, *Boardroom to Courtroom*]; Kathleen F. Brickey, *Andersen’s Fall From Grace*, 81 WASH. U. L. Q. 917 (2003) [hereinafter

This project investigates the emerging trend of general counsels acting as legal PR managers for legal issues facing large publicly traded corporations and the potential impact that the eroding distinction between legal advice and PR management could have on the legal profession. The analysis is informed by: 1) a questionnaire sent to all general counsels working at S&P 500 companies (eliciting a 28% response rate); and 2) 57 qualitative interviews of general counsels of the S&P 500, law firm partners, and PR executives [hereinafter the PR Study].¹⁵ This research was conducted to help enlighten exploratory analysis

Brickey, *Andersen's Fall*]; see also *infra* note 41. Indeed, Harlan A. Loeb, a lawyer who now works at Hill & Knowlton (a PR agency) presented a paper at the 2004 Spring Meeting of the Association for General Counsel that discussed the importance of media on corporate litigation and urged corporate counsel to “work very closely with corporate communications in the aftermath of” publicity around litigation. Harlan A. Loeb, *Managing Corporate Crisis and Litigation While Everybody is Watching: The Expanding Role of the General Counsel*, presented at the 2004 Spring Meeting of the Association of General Counsel (Apr. 30, 2004) (on file with author). However, scholars generally do not attempt to determine what level of advocacy should be provided in this arena by corporate attorneys who do not act as spokespeople and how the regulations should be revised to better define ethical advocacy. For example, Jonathan M. Moses, a public relations specialist, wrote an article examining the ethical rules ability to “control extrajudicial advocacy by attorneys.” Moses, *supra* note 9. Although he points out issues with the ethical rules, he does not provide a recommendation on how to fix them. Instead, he states that when making extrajudicial statements lawyers have a “duty not to mislead the public about the law” and that the “greatest control of advocacy in the court of public opinion may come from an ideal of traditional lawyer ethics . . . [I]f lawyers are uncomfortable with a client’s position they may be less likely to speak out in the court of public opinion or at least to engage in the most brazen forms of legal spin control.” See generally Moses, *supra* note 9; see also Cole & Zacharias, *supra* note 1, at 1627-28 (analyzing the speech by attorneys involved in OJ Simpson’s trial and arguing that “not everything that is legal and beneficial to the client is appropriate in the context of making public statements,” but declining to propose any regulations because of First Amendment and other practical issues). In an article concerned with extrajudicial speech by criminal defense attorneys and prosecuting attorneys, Lonnie T. Brown recommends a rule to curb attorneys’ extrajudicial speech and argues that it might also apply to non-lawyer speech for which attorneys are responsible. Lonnie T. Brown, “*May it Please the Camera, . . . I mean the Court*”—An Intrajudicial Solution to an Extrajudicial Problem, 39 GA. L. REV. 83 (2004). For a detailed description and analysis of his recommendation see the second installment of this project. Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Lawyers Go?*, 23 GEO. J. LEGAL ETHICS (forthcoming 2010) (on file with author) [hereinafter Beardslee, *Advocacy Installment II*].

15. The PR Study focused on general counsels working at S&P 500 companies that had high demand for legal services. Both the survey and interviews sought information about the legal and PR departments reporting structure, recent legal controversies that had publicity, use of and information sharing with internal and external PR consultants, and the role of outside lawyers in managing legal PR. The interviews provided more employment history and more detail. Each interviewee was asked to share vignettes describing recent times that the lawyer has confronted a legal issue that had potential legal PR spin and for the lawyers’ opinion regarding the impact PR spin can have on the process and outcomes of legal controversies. All of the General Counsel Interviewees except one worked at S&P 500 corporations in the banking, pharmaceutical, or petroleum industries. The Law Firm Partner Interviewees serviced the General Counsel Interviewees. The PR Executive Interviewees worked internally at an S&P 500 corporation or at an external PR agency hired by the general counsels. For a more detailed explanation of the sample and methodology, see the Appendix.

All of this research will be referred to as the PR Study. However, the survey and some of the original interviews were conducted as part of a larger research project funded by Harvard Law School’s Center for Lawyers and Professional Services, a subsidiary of Harvard’s Program on the Legal Profession. At that time, the author was the Associate Research Director of the Center and the lead researcher on the project. The Harvard Law School faculty directors of the project were John Coates, David Wilkins, and Ashish Nanda. Robert L. Nelson, Director of the American Bar Foundation, was also a key collaborator. For more information about the

of three questions:¹⁶ First, how does the “court” of public opinion affect legal controversies surrounding large, publicly traded corporations? Second, how do general counsels manage the intersection of PR and legal issues? Finally, what ought to be their ethical obligations, if any, in this court?

The preliminary findings from the PR Study will appear in two installments to be published in the *Georgetown Journal of Legal Ethics*. This first installment attempts to determine how the court of public opinion can influence legal controversies and how general counsels actually manage legal PR for their corporate clients. Surprisingly, the findings from the PR Study paint a picture that is inconsistent with the conventional depiction of the lawyers’ role in this area which is much narrower. The conventional picture is of separate legal and public relations functions that work together only when a media sensitive matter arises that has a legal dimension.¹⁷ In this view, corporate lawyers focus on the technical legal work and report limited information to the PR executives while the PR executives decide how best to spin the facts and manage the publicity,¹⁸ and corporate lawyers are not relied on to help deal directly with the news media.¹⁹ The findings from the PR Study contradict this view and the first installment explores the new landscape.

The second installment highlights some examples of wrongdoing by corporate attorneys in managing legal PR. It analyzes and identifies the deficiencies in existing guidelines that regulate lawyers’ behavior in the court of public opinion and recommends what ought to be the ethical obligations of lawyers in that court.²⁰ The main theoretical point in the second installment is that attorneys should exercise restraint.²¹ Corporate attorneys should help their clients manage PR around legal controversies but they should not make or aid misleading statements around legal controversies.²²

The first part of the current installment provides an overview, based in part on preliminary data from the PR Study, of how the court of public opinion can shape

larger research project see Michele DeStefano Beardslee, John C. Coates IV, Ashish Nanda, and David B. Wilkins, *Hiring Teams from Rivals: Theory and Evidence on the Evolving Relationships in the Corporate Legal Market*, available at <http://ssrn.com/abstract=1442066>.

16. Many scholars have utilized qualitative interviews and/or a mixed methodology of qualitative and quantitative interviews to aid similar investigations and analysis. See, e.g., Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559 (2002); Howell Jackson & Eric Pan, *Regulatory Competition in International Securities Markets: Evidence From Europe in 1999—Part I*, 56 BUS. LAW. 653 (2001); Ronald Mann, *Strategy and Force in the Liquidation of Secured Debt*, 96 MICH. L. REV. 163 (1997) (employing case study technique); Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631 (2004).

17. See *infra* Part III.A. Note: I thank Milton C. Regan for his helpful comments and suggestions on comparing the conventional view with the current picture.

18. *Id.*

19. *Id.*

20. Beardslee, *Advocacy Installment II*, *supra* note 14.

21. *Id.*

22. *Id.*

legal controversies.²³ The second part describes, through the voices of PR Study participants, the way some corporate attorneys think about and handle legal PR for corporations.²⁴ The third part explores the possible implications of the PR Study on the question of whether corporate attorneys should be managing legal PR for corporate clients and advocating in the court of public opinion.²⁵ That part argues that the court of public opinion acts as an extra-legal decision-maker and, therefore, influences the fair administration of justice. It contends, therefore, that managing legal PR is a legitimate and fundamental component of corporate legal service. Ultimately, in the last part, the Article recommends that corporations and the profession should attempt to support and enhance corporate lawyers' ability to manage this role effectively.

Admittedly, this analysis is based on self-reports by executives and not a random sample of *all* large, publicly traded companies that have high demand for legal services. However, the primary goals of this Article are to evaluate how general counsels of certain large, publicly traded, consumer-oriented corporations manage legal PR and highlight the potential importance of this new trend. To that end, this research provides a rich depiction of the perceived impact of the court of public opinion and how some corporate lawyers advocate in this venue. It informs the Article's ultimate conclusion (addressed in the second installment) that the profession's current approach to managing and regulating "legal PR" for corporate clients could be enhanced to benefit professionalism and the public at large. Moreover, by studying these professionals and the roles they play, this Article aims to contribute to their effectiveness in ethically managing legal PR for their corporate clients.

I. THE IMPACT OF THE COURT OF PUBLIC OPINION ON CORPORATE LEGAL CONTROVERSIES

Much of the literature on the court of public opinion highlights its importance with respect to high profile individual criminal defendants like OJ Simpson and Martha Stewart.²⁶ More recently, scholars have begun to address the impact of media spin on corporate litigation.²⁷ Neither camp, however, has conducted empirical research like that in the PR Study to gain a better understanding of how the court of public opinion is perceived to affect the outcomes of corporate legal controversies and the role corporate lawyers play in managing legal PR for

23. This part is also supported by the existing literature on this topic. Often, the findings from the PR Study lend credence to contentions made by other scholars on this topic.

24. Thus, the first two parts are largely descriptive in nature.

25. Moses, *supra* note 9, at 1848 ("There has been little attention paid to whether legal spin control even is proper lawyers' work."). See also *infra* note 213 and accompanying text.

26. See *supra* note 8.

27. See *supra* notes 14 and 41.

corporate clients.²⁸

A. OVERVIEW

For large, publicly traded, consumer-oriented corporations, the court of public opinion is an especially important venue.²⁹ 98% of Survey Respondents in the PR Study stated that in the past three years they have had to deal with a potentially high profile legal controversy one or more times.³⁰ 60% claimed they had to do so many times.³¹ Unlike twenty years ago, when newspapers, radio and network television were the only media outlets, today there is media coverage 24 hours a day on television, cable, the web, faxes, cell phones, and other emerging media.³² And journalists do not always present an accurate, objective or complete picture of current events.³³ As such, the court of public opinion affects reputation and

28. See *supra* note 9.

29. Harlan A. Loeb, *Public Opinion Counts: Companies Must Aim for a Clear and Timely Expression of the Truth*, LEGAL TIMES, July 19, 2004, at 41 (“Dominant industries that for decades seemed impervious to the pressures of public opinion have paid the price for failing to deal successfully with this phenomenon.”).

30. See *infra* Appendix V.B.4.

31. See *id.* (detailing use of external consultants by matter type). Likely the impact of the media on legal issues may be of more concern to large, publicly traded consumer-product companies, especially those that are highly regulated, than it is for smaller companies that are not public and that do not sell products to the average consumer. For this reason, the author also interviewed a general counsel that worked at a manufacturing company that was not part of the S&P 500 and did not sell consumer products. See *infra* note 314. This interviewee explained that if the corporation has a very limited outside audience and does not do a lot of institutional advertising and if investors are primarily institutions, the corporation “probably do[esn’t] have the kinds of public relations challenges that [a corporation] would have if it were Merck or Procter and Gamble.” Long Interview with #60, Chief Legal Officer, Global Manufacturing. (July 23, 2007), at 35; *id.* at 23-25. Other interviewees thought this was true as well. The more public the organization is, the “more you need a PR strategy.” Long Interview with #40, Partner and Chairman, Law Firm (Aug. 22, 2007), at 12.. However, even companies that do not sell consumer products, are not in the S&P 500 or publicly traded face situations when PR issues affect legal advice. For example, when the company plans to shut down a facility, the lawyers must talk with the PR people about the potential impact on the community and employees to gauge the possibility of suits over termination packages. Long Interview with #60, Chief Legal Officer, Global Manufacturing (July 23, 2007), at 30. Further, the one non-S&P 500 interviewee expressed remorse for times he did not pay more attention to the PR aspects of the legal issue. See *infra* notes 150-154 and accompanying text.

32. Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 38, 41 (1996) (discussing the “instantaneous dissemination of information”); Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 4 (“We live in a world where the news is on 24 hours a day and things are happening very quickly and it’s not just CNN, it is blogs and everything that’s on the internet. There are people who sit on the internet every 30 minutes to see what’s happened in the world.”). Sarah Kellogg, *The Art and Power of the Apology*, WASH. LAWYER, June 2007, at 22 (June 2007); Brickey, *Boardroom to Courtroom*, *supra* note 14, at 636 (commenting on all the media outlets).

33. Semel & Sevilla, *supra* note 8 (“[T]hey will hunt you on the beaches, on the streets, in your home, office, or car, they will call you on your phones, they will send you faxes, and most assuredly, they will find you on the courthouse steps. They will never give up.”); Brickey, *Boardroom to Courtroom*, *supra* note 14, at 628 (explaining that the “media reports without judgment and restraint”); Deborah L. Rhode, *A Bad Press on Bad Lawyers: The Media Sees Research, Research Sees the Media*, in SOCIAL SCIENCE SOCIAL POLICY AND THE LAW 143, 146 (Patricia Ewick, Robert A. Kagan, Austin Sarat eds. Russell Sage Foundation) (explaining that the media presents “highly selective factual accounts” and uses anecdotes instead of analysis); *id.* at 151 (describing

profits³⁴ and can have severe legal consequences. As one General Counsel Interviewee explained, “If I’m painted as a bad company . . . and the stock prices drop precipitously, I’m gonna be in a lawsuit.”³⁵ In turn, negative publicity around legal issues can have severe business consequences.³⁶ Moreover, the public often believes that what is said or even just alleged in the news media is

journalism’s “gaps in analysis”). There are many possible reasons why this is true. First, unlike the legal profession, journalist ethics codes are completely voluntary. See generally Bernabe-Riefkohl, *The First Amendment and the Business of Journalism*, *supra* note 12 (on file with author) (tracing the history of journalism ethics and reviewing common journalism ethical dilemmas); Tamar Frankel, *Court of Law and Court of Public Opinion: Symbiotic Regulation of the Corporate Management Duty of Care*, 3 N.Y.U. J. L. & Bus. 353, 371 (2007) (recognizing that reporters have “strong incentives to discover scoops” but lack meaningful ethical restraints). Second, the press has always been a business; it prints what sells. Bernabe-Riefkohl, *Prior Restraints*, *supra* note 11, at n.8 (“The fact is that the public has an insatiable curiosity to know everything, except what is worth knowing.”); Peter Margulies, *The Detainees’ Dilemma: The Virtues and Vices of Mobilization Strategies For Human Rights in the War on Terror* 38 (2008) (working paper available at <http://ssrn.com/abstract=1263442>) (“[J]ournalists give more play to the perspectives of players who talk to them.”); *id.* at 37 (“Outlets for journalism typically must survive in an increasingly competitive marketplace, where novelty attracts eyeballs and advertising.”); Rhode, *supra* note 33, at 140-141 (“[C]oncerns about profitability, convenience, and ‘fairness’ systematically bias media coverage . . . [and] tend to skew stories in favor of spectacle.”). Third, the press is not and has historically not been independent. Many of the large newspapers or news stations are owned by corporations that may have a stake in the current publicized issues. Bernabe, *Some Thoughts*, *supra* at 22-25 (detailing examples where press coverage was directly affected by the fact that the news outlet was owned by a corporation with an interest in the issue). Fourth, as discussed, journalists are not trained in the law and they often report inaccuracies. See *infra* notes 120-125 and accompanying text; Rhode, *supra* note 33, at 152 (“The typical generalist reporter is often not prepared to assess partisan claims on law-related issues.”). Lastly, another contributing factor may be that the public is willing to accept inaccurate, uncritical, unbalanced reporting. Rhode, *supra* note 33, at 154.

34. The impact Martha Stewart’s lawsuit had on profits of Martha Stewart Omnimedia exemplifies this effect. See Wade Moriarty, *Winning in the Court of Public Opinion*, Hous. Law., Nov.-Dec. 2007, at 26, 27 (2007) (reporting that after resigning from the board of her company, earnings fell 42%). Another example is the effect the Tylenol cyanide poisonings had on Tylenol’s share in the painkiller market in 1982. *Tylenol’s ‘Miracle’ Comeback*, TIME, Oct. 17, 1983 (explaining that Tylenol’s share of the painkiller market fell from 35% to 7%). Similarly, in 1994, Intel Corporation was lambasted in the press for a flaw in a microprocessor which affected only a very small subset of computer users but it took a big hit overall and lost \$475 million. A.S. GROVE, *ONLY THE PARANOID SURVIVE: HOW TO EXPLOIT THE CRISIS POINTS THAT CHALLENGE EVERY COMPANY AND CAREER* 12-14 (Doubleday 1st ed. 1996).

35. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 31 (explaining that this is the argument he would make to the judge to show it was in anticipation of litigation but that “the judge would likely never buy that”).

36. Robert Eli Rosen, *We’re All Consultants Now: How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 ARIZ. L. REV. 637, 659 (2002) (“Legal risks not only must be assessed, but also processed because legal risks often are not detached risks.”); see also Michele DeStefano Beardslee, *The Corporate Attorney-Client Privilege: Third Rate Doctrine for Third Party Consultants*, 62 SMU L. REV. 727 (forthcoming Spring 2009) (on file with author) [hereinafter Beardslee, *Third Party Consultants*], available at <http://ssrn.com/abstract=1374624>; Frankel, *supra* note 33, at 369 (“Reputation is crucial to most businesses and to their management.”); Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate-Defendants*, 44 AM. CRIM. L. REV. 53, 73 (2007) (explaining that indictment can ruin a company long before a case is tried); KATHLEEN FEARN-BANKS, *CRISIS COMMUNICATIONS, A CASEBOOK APPROACH* 32 (3d Ed.2007 Lawrence Erlbaum Associates Inc., Publishers) (“When your company loses in the court of public opinion, it also loses its reputation, good name, and positive image—the very qualities that make for its success.”).

the “truth” even when that might not be the case.³⁷ As another General Counsel Interviewee explained:

If there is accurate or [an] inaccurate perception . . . then customers cannot trust you, which could result in a loss of business and/or investors could not trust you, and that translates into a hit to your stock price or it hits the company’s value, which might not be warranted.³⁸

The intensified media scrutiny of the 24-hour news cycle is a growing concern for companies and their general counsels. The interviewees in the PR Study often commented that the number of instantaneous media outlets with which to broadcast information create public interest in corporate legal events overnight.³⁹ One participant in the PR Study aptly observed: “The house could be burned down before you even smell smoke.”⁴⁰ Thus, the nonstop media culture of today not only affects a corporation’s bottom line or individual criminal cases but also civil and criminal corporate legal controversies.⁴¹

Importantly, preliminary findings from the PR Study suggest that the impact of the court of public opinion is not limited to the big issues. Given the complex regulatory landscape, there are more opportunities for corporations to make mistakes,⁴² more avenues to broadcast those mistakes,⁴³ and more stakeholders.⁴⁴ Thus, even small mistakes can attract media attention. As one General Counsel put it, “[i]t’s freaky. I mean we’re a high profile enough company that *everything, every filing, gets picked up.*”⁴⁵

37. FEARN-BANKS, *supra* note 36, at 15; Reber, *supra* note 9, at 7 (claiming that “[r]ecent studies have shown that when told a large company is accused of wrongdoing in a lawsuit, more than one-third of the population believes that company is probably guilty”) (internal citations and quotations omitted).

38. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 4.

39. *See, e.g.*, ROBERT A. FERGUSON, *THE TRIAL IN AMERICAN LIFE* (Univ. Chi. Press 2007) (discussing how immediate reports attained from real-time-reporting via telegraph inflamed public interest and affected the conduct of John Brown’s trial in 1859).

40. Long Interview with #41, PR Specialist (and Lawyer), Ancillary PR Firm of a Law Firm (Aug. 22, 2007), at 11.

41. Dore & Ramsy, *supra* note 3, at 52 (highlighting the importance of the court of public opinion on matters other than celebrity defendants such as “other industries including the pharmaceutical, chemical, automobile, petroleum, computer/electronics, construction, tire, tobacco, and firearm industries”). Loeb, *supra* note 29 (“[T]he impact of public opinion on lawsuits has dramatically reshaped corporate litigation over the last two decades.”); *see also* Harlan A. Loeb, *Managing Corporate Crisis and Litigation While Everybody is Watching: The Expanding Role of the General Counsel*, Presentation to 2004 Spring Meeting of the Association of General Counsel (April 30, 2004) (on file with author) [hereinafter Loeb, *Managing Corporate Crisis*] (explaining that media attention has been given to criminal corporate misconduct but also civil litigation, e.g., tobacco litigation, 911 tort litigation, and obesity litigation).

42. Kellogg, *supra* note 32, at 22.

43. *See supra* note 32 and accompanying text.

44. Loeb, *supra* note 29 (“Corporate litigation affects customers, employees, regulators, shareholders, opinion leaders, elected officials, and a variety of others, all of whom rely heavily on the media for their information.”).

45. Short Interview with #2, General Counsel, Investment Bank (Oct. 4, 2006), at 40; Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 37 (“We are increasingly in a world where everything is a PR issue.”).

B. IMPACT BEFORE A CASE IS FILED OR TRIED

Preliminary findings from the PR Study indicate that media spin plays a role before a case is filed or charges are brought.⁴⁶ General Counsel Interviewees believe that it affects whether a case will be filed, the nature of the charges, and, therefore, the legal strategies they pursue.⁴⁷ An interviewee that was a former U.S. Attorney explained that he “regularly s[aw] things in the paper that lead to investigations” and to charges by the government or shareholder suits.⁴⁸ He exclaimed, “the stuff that is in the Wall Street Journal or is in Podunk Financial News that you didn’t even pay attention to can capture [a regulator’s] attention.”⁴⁹ Further, it appears that prosecutors or regulators will pursue a target in order to appease the public and/or send a message.⁵⁰ Indeed, a federal judge in the recent Martha Stewart case protected communications between the lawyers and PR consultants because the PR executives were hired to counteract negative publicity that might pressure prosecutors and regulators to bring charges against Stewart and the attorneys “were not skilled at public relations” and “needed outside help” to provide legal advice.⁵¹ Similarly, other scholars have contended that certain tactics (such as apologizing, or conducting an internal investigation, or “demonizing prosecutors” in the press)⁵² can influence prosecutors not to

46. Cf. Moses, *supra* note 9, at 1839 (“[M]ost public relations work starts well in advance of indictment, let alone a possible trial.”).

47. Thus, if true or not, it may be a self-fulfilling prophecy.

48. Long Interview with #40, Partner and Chairman, Law Firm (Aug. 22, 2007), at 17. For example, press accounts of the director of a local organization driving expensive cars and airplanes raised this interviewee’s suspicions and led him to investigate and then prosecute the director. *Id.*; see also Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1418 (3rd Cir. 1991) (intimating in the fact section that the SEC began investigations into a company because newspaper articles alleged that the company had been involved in bribery).

49. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 5.

50. Mike Nifong and Eliot Spitzer are two examples. See also Long Interview with #40, Partner and Chairman, Law Firm (Aug. 22, 2007), at 13 (explaining that his corporate client had to be careful how it managed a consent decree in the press because “there were more potential legal consequences that they would have to face having a prosecutor with his nose bent out of shape over the fact that [it] appeared to be undercutting him in the public and his message”). But see Linas, *supra* note 13, at 424 (arguing that media influence on prosecutorial discretion is “unsubstantiated, speculative, and hardly a valid reason to extend the privilege to public relations experts”).

51. *In re Grand Jury Subpoenas Dated Mar. 24, 2003*, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003) (reasoning that “the advocacy of a client’s case in the public forum will be important to the client’s ability to achieve a fair and just result in pending or threatened litigation”); cf. Robert Schmuhl, *Government Accountability and External Watchdogs*, 5 ISSUES OF DEMOCRACY 21, 24 (Aug. 2000), <http://www.italy.usembassy.gov/pdf/ej/ijde0800.pdf> (last visited Apr. 9, 2009) (describing “the new information environment” as it relates to the government and press).

52. Brickey, *Boardroom to Courtroom*, *supra* note 14, at 637-39 (describing Arthur Andersen’s legal and PR strategy as an attempt “to bring public pressure to bear on the decision whether to prosecute” and to “taint the jury pool”); see generally Brickey, *Andersen’s Fall*, *supra* note 14; Kellogg, *supra* note 32, at 21 (explaining that tactics like these can help a corporation to avoid a lawsuit or shorten litigation time). Joy & McMunigal, *Role of Lawyers*, *supra* note 11, at 689 (explaining that publicity can impact whether a prosecutor seeks a charge or the severity of a charge and “might influence the prosecutor to be more generous in guilty plea negotiations”);

prosecute or to do so with less severity.⁵³

Findings from the PR Study suggest that what is said in the media can limit legal options such as the defenses a corporation will be able to raise.⁵⁴ For example, if consumers are experiencing unanticipated side effects from a drug marketed by a pharmaceutical company, there are many possible courses of action such as pulling the drug, admitting to liability, running more tests, disclosing prior drug test results, or attempting to pre-empt claims by offering compensation. Before making a recommendation, lawyers consider first the health and safety of users and secondarily how each option may be spun by media outlets and, therefore, perceived by potential injured consumers, stockholders and regulators.⁵⁵ And the way something is spun, limits future options.

The PR Study findings overwhelmingly support the argument that the potential PR ramifications are part of the cost-benefit analysis conducted in determining how best to handle a legal controversy. Sometimes the lawyers come to the conclusion that a full-fledged PR campaign that creates positive messages about the corporation in general (as opposed to the legal controversy specifically) is the best route.⁵⁶ Other times, the lawyer will conclude that it is better to try to stay

Moses, *supra* note 9, at 1833 (explaining that prosecutors have wide discretion to determine whether a corporate matter is a criminal or civil violation and that the right strategic PR can “limit public pressure on government officials in order to limit the escalation of charges”).

53. Consider Jet Blue’s scandal in 2006. Immediately after a snow-storm trapped passengers on airplanes on runways for up to 11 hours without food or a way to empty the overflowing bathrooms, the CEO apologized publicly, offered \$50 retroactive “mea culpa” coupons and promised to change the customer bill of rights to better handle similar situations in the future. Such action may have prevented some consumers from filing suit. See FEARN-BANKS, *supra* note 36, at 33 (claiming that after Delta Airlines “public relations effort[s],” such as sending flowers and show[ing] great concern for survivors and families of victims,” “was so impressive that many lawsuits were avoided as a result”). Some plaintiffs actually desire public apologies in lieu of or in addition to a damage remedy. News reports after the 2003 Air Midwest plane crash in North Carolina stated that a “primary focus” of one victim’s family “had been to require accountability by the defendants, either by trial or by public apology, for the operation, maintenance and design deficiencies that caused the air crash.” Press Release, Baum Hedlund, Companies Accept Responsibility and Publicly Apologize to the Families of the January 8, 2003 Air Midwest Flight 5481 Crash in Charlotte, North Carolina (Mar. 5, 2005), http://www.baumhedlundlaw.com/bhl2_press/midwest_apology.php (last visited Apr. 9, 2009). Indeed, they claimed that “[a] trial was avoided as a result of [the] public apology by Air Midwest and Vertex.” *Id.*

54. Margulies, *supra* note 33 (manuscript at 39) (“Statements made in advance of trial . . . can lock defense counsel into a strategy that seems less than optimal as the trial proceeds.”). Also, an apology or expression of sympathy can be used as proof of liability. See, e.g., Kellogg, *supra* note 32, at 25 (noting that twenty-nine states have passed laws excluding expression of sympathy as proof of liability in medical malpractice suits and five states have passed laws that require hospitals to notify patients of adverse medical outcomes); see *infra* note 149.

55. Long Interview with #27, General Counsel, Commercial Bank (Feb. 26, 2008), at 5. Results from the interviews suggest that general counsels often make this assessment with the help of a PR consultant.

56. Larry Smith, *Merck’s Powerful Tactical Advantage in the Court of Public Opinion*, 25 NO. 11 OF COUNS. 12, 13 (2006) (explaining that “a white noise of positive messages about the defendant . . . can be as ultimately decisive as any evidentiary material”). For example Merck “saturated” the city in which a Vioxx trial was going to be held with a full blown PR campaign to enhance its image. *Id.* (reporting that “from January through June 2005—just a few weeks before one Vioxx trial began in Texas—Merck spent \$8.9 million on ‘image’ ads alone, up from \$4.6 million during all of 2004 . . .”); *id.* (reporting that the year that Merck found out “there was legal

out of the court of public opinion and hire external PR specialists to do just that.⁵⁷ All of these responses are calculated—designed to affect the legal outcome.⁵⁸ Avoiding the publicity altogether is generally not a sustainable tactic.⁵⁹ Once the media picks up something, the traditional “no comment” response is rarely viable today. As one General Counsel interviewee explained, “There is very much a need for lawyers to be practical about . . . allowing the company to take out some sort of media strategy and response” to a legal controversy even before a case is filed.⁶⁰ This is because the public may assume silence means the publicity is true.⁶¹ Also, the media often gives more press coverage to those sources that talk than those that do not.⁶²

The research findings also support the contention that media spin is used to manipulate negotiation power before trial.⁶³ As the General Counsel of a petroleum company remarked about the recent Venezuelan expropriation scan-

trouble ahead” it “outspent Budweiser and Pepsi . . . spending more than \$160 million, the most ever for a prescription drug” and that the “advertising paid off for Merck as retail sales quadrupled . . .”).

57. Long Interview with #47, Global Head of Corporate Communications (PR), Investment Bank (Apr. 3, 2008), at 3 (“We hate people writing about us. We’d much rather pay them to go away.”) (meaning settle); *see also* Long Interview with #51, Principal (PR), Commercial Bank (Apr. 8, 2008). Richard Grasso, former CEO of the New York Stock Exchange explained that “[he] had the good judgment of [his PR consultant] saying there’s no way in the current environment that [he was] going to effectively counterpunch. There [was] no need to try and parry in the press.” Tonya Garcia, *Exclusive interview: Grasso Bullish on PR’s Worth*, PR WEEK, July 16, 2008, <http://www.prweekus.com/Exclusive-Interview-Grasso-bullish-on-PRs-worth/article/112494/>. Grasso’s PR representative explained: “Had [Grasso] given media interviews, the Op-Ed wouldn’t have had the same value or impact If he had given interviews and all his positions were known, the impact would have been severely diminished and the Journal may not have even wanted it.” *Id.*

58. *See, e.g.*, Smith, *supra* note 56, at 3 (contending that the Merck ads that “don’t argue a legal position . . . are no less designed to effect a legal result”).

59. *See supra* notes 32 and 39 and accompanying text..

60. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 4; Frankel, *supra* note 33, at 369 (“The Advocacy of lawyers in the Court of Public Opinion is now a fixture on the legal scene.”); Short Interview with #26, General Counsel, Petroleum (May 25, 2007), at 28 (“No comment doesn’t work very well at least you got to give them an answer that is the effect of no comment, but it sounds like you gave them an answer.”).

61. Joy & McMunigal, *Role of Lawyers*, *supra* note 11, at 111 (“Silence in the midst of the crisis may cause the client to lose the war before the battle has even begun.”); Reber, *supra* note 9, at 7 (claiming that “[r]ecent studies have shown that . . . 58% of the public believe that a large company is guilty when its spokesperson responds “no comment” to charge of wrongdoing”) (internal quotations and citations omitted).

62. Margulies, *supra* note 33 (manuscript at 38) (“[J]ournalists give more play to the perspectives of players who talk to them.”).

63. Carole Gorney, *Litigation Journalism is a Scourge*, N.Y. TIMES, Feb. 15, 1993, at A15 (“Litigation blackmail is being committed in the United States every day, aided and abetted by journalists, lawyers, and public relations consultants.”); *id.* (explaining that lawyers and clients are featured in the media for the purpose of “forcing out-of-court settlements and upping the ante in return for squashing the adverse publicity”); *see* Moses, *supra* note 9, at 1840 (“For the plaintiff’s lawyer, publicity is arguably a way to generate more clients which in turn may pressure companies to settle. On the other side a defendant has a lot to gain by an active PR approach. It may deter plaintiff’s lawyers from investing in a class action fight, and it may discourage additional plaintiffs from suing.”).

dal, “the negotiation is in the newspaper.”⁶⁴ According to another interviewee, plaintiffs’ lawyers initiate negative press to pressure companies involved in potentially high profile cases, like racial discrimination, to settle.⁶⁵ Media spin also affects how quickly parties settle.⁶⁶ As one General Counsel Interviewee explained: “It could force you to come to the table faster. It certainly would. I mean, god knows that even the threat of media could sometimes make you come faster, particularly if it was something that . . . could affect my customers.”⁶⁷ For that reason, lawyers sometimes ask the PR consultants what they can do to make the other side settle faster.⁶⁸ Similarly, PR executives approach the lawyers with ideas on how they can make the other side “fold fast.”⁶⁹ As one General Counsel Interviewee commented, “I think if you are facing a firestorm of negative public opinion, even if you think you could win the case on the merits in a courtroom two years or three years down the road, there is a very substantial incentive to resolve the matter quickly, in order to stop the negative reputation impact.”⁷⁰ Decisions to settle are “nuanced” ones that take account of PR:

We settle things all the time . . . when you are in a highly regulated industry, it is hard to be in litigation with a regulator because if they don’t get you one way they get you another. We care about our reputation. For example, on scale of 1-10 with flimsy evidence at 0 and 10 the worst, let’s say we’ve done something wrong on a scale of 2 or 1. If they file a case, they may allege it’s a 9 even though it’s not. The damage from a case being filed like that to your franchise might be great enough to make you settle at a 3 level . . . There is some interplay between how people perceive your problems and what you are willing to do.⁷¹

C. IMPACT AFTER A CASE IS FILED

Findings from the PR Study also support the popular notion that the court of public opinion shapes the process and outcome of litigation.⁷² All of the General

64. Long Interview with #39, General Counsel, Petroleum (Apr. 26, 2007), at 65. In order to pressure petroleum companies, Venezuelan officials issued a press release stating, inaccurately, that other petroleum companies had signed on to the new terms. *Id.*

65. Long Interview with #41, PR Specialist (and Lawyer), Ancillary PR Firm of a Law Firm (Aug. 22, 2007), at 10.

66. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 28.

67. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 30; Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 19 (“[T]he public relations theme that got going on this brought the other party to the settlement tables.”).

68. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 19.

69. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 29.

70. Long Interview with #11, General Counsel, Commercial Bank (Mar. 26, 2008), at 8.

71. Long Interview with #1, General Counsel, Investment Bank (Feb. 7, 2008), at 3 (notes on file with author).

72. Bernabe-Riefkohl, *Prior Restraints*, *supra* note 11, at n.5 (explaining that Bar-media committees exist to “establish mechanisms which alleviate the tensions that media coverage creates on the judicial system”); Loeb,

Counsel interviewees believe in what one described as the “the power of public relations.”⁷³ This is not news. The public’s interests—the views and perceptions of the community—have been shaping the outcomes of trials since at least the 1800s.⁷⁴ As the Supreme Court counseled in *Sheppard v. Maxwell*⁷⁵ in 1966, modern communication is pervasive and it is “difficult[.]” to “effac[e] prejudicial publicity from the minds of the jurors.”⁷⁶ This is the justification for the fair reply provision in Model Rule of Professional Conduct 3.6 which allows lawyers to make extrajudicial statements to alleviate adverse publicity.⁷⁷

Interviewees in the PR Study also claim that PR affects judges. A common point was: “Judges read newspapers; appellate judges read newspapers too,”⁷⁸ not to mention legal blogs.⁷⁹ If what is in the news creates the impression that an

supra note 29 (explaining that it was “the media’s ability to arouse the interest of the American public,” regulators, and state attorney generals that “toppled” the tobacco industry).

73. Short Interview with #24, General Counsel, Petroleum (May 23, 2007), at 32-33. Both PR and Legal professionals “recognize the impact the other can have, reputation being something you can not get back easily.” Short Interview with #26, General Counsel, Petroleum (May 25, 2007), at 26; Short Interview with #17, General Counsel, Commercial Bank (Feb. 6, 2007) (There are “business connections between what happens from a legal risk perspective and brand damage, and PR and company reputation.”).

74. *Cf.* FERGUSON, *supra* note 39; *see also* James Srodes, Book Review, WASH. LAW., June 2007, at 42 (reviewing ROBERT A. FERGUSON, *THE TRIAL IN AMERICAN LIFE* (University of Chicago Press 2007)) (characterizing Ferguson’s book as “a case study of various high-profile trials of American history in which the intent and process of the law come into conflict with the views of the community and how the latter shapes the outcome of the trial”); Roschwalb & Stack, *supra* note 2, at xiv (“It seems new, but in actuality, the use of media relations techniques in high-profile legal cases goes back at least two hundred years.”); Margulies, *supra* note 33 (manuscript at 14-15) (describing examples of use of media to influence legal outcomes dating back to the late 1880s through today); *id.* at 24 (“Stories of innocence have long been a central element in advocacy for individuals and groups detained by the state.”).

75. *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966) (releasing a man from prison due to effect of adverse publicity before/during trial).

76. *Id.* at 362; Brickey, *Boardroom to Courtroom*, *supra* note 14, at 629 (“[O]verly aggressive media tactics can skew the balance between the public’s right to know and the parties’ interest in receiving a fair trial.”); Roschwalb & Stack, *supra* note 2, at xiv (“Jurors are influenced by what they see and read.”); Rhode, *supra* note 33, at 159 (reporting findings from a study that concluded that “plaintiffs’ awards were four to five times larger in cases profiled in the media than in actual trials”). *But see* Bernabe-Riefkohl, *Prior Restraints*, *supra* note 11, at 300 (“[T]he evidence on the effect of pretrial publicity on potential jurors is, at best, inconclusive.”); Amy L. Otto et al., *The Biasing Impact of Pretrial Publicity on Juror Judgments*, 18 LAW & HUM. BEHAV. 453, 455 (1994) (critiquing the survey methodology); John Kaplan, *Of Babies and Bathwater*, 29 STAN. L. REV. 621, 623 (1977) (contending that pretrial publicity has “virtually no impact” on jurors); Watson, *supra* note 2, at 85 (“[S]tudies have not proved conclusively that news coverage . . . determines a litigation outcome” or affects jurors).

77. MODEL RULES OF PROF’L CONDUCT R. 3.6(c) (2002) [hereinafter MODEL RULES]; *see also* Murphy, *supra* note 3, at 584; *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043, 1051-52 (1991) (explaining that “petitioner sought only to stop a wave of publicity he perceived as prejudicing potential jurors . . . and injuring his client’s reputation”).

78. Long Interview with #41, PR Specialist (and Lawyer), Ancillary PR Firm of a Law Firm (Aug. 22, 2007), at 6; *see also* Long Interview with #11, General Counsel, Commercial Bank (Mar. 26, 2008), at 8 (“[J]udges and juries read newspapers and watch the news . . . either consciously or unconsciously, [it] influences the way fact finders evaluate cases.”).

79. For example, bloggers speculate that their “early and often” criticism of New York’s advertising rules helped pressure the judge to strike down parts of the rule. Legal Blog Watch, New York Advertising Laws Held

unfavorable verdict or action might have negative public consequences, this may influence a judge's decisions because judges care about their reputation.⁸⁰ The Supreme Court has recognized this⁸¹ and admitted that public perception of judicial decisions matters.⁸² Even if juries and judges are able to remain objective, the belief that they cannot affects negotiations and settlements.⁸³

Moreover, as one commentator aptly pointed out “[i]n more than 90% of all cases filed in the United States, discovery is the only trial anybody gets.”⁸⁴ Because discovery is directed by lawyers, often lawyers are the only “jury” that parties get. Lawyers are not immune to the influence of the media⁸⁵ and the impact it has on their reputation. Almost all parties, even the government, have something to gain or lose in how a trial is spun. One author makes this point: “Those who conduct a trial are always on trial themselves.”⁸⁶

Unconstitutional, http://legalblogwatch.typepad.com/legal_blog_watch/2006/09/bloggers_keep_o.html (Sep. 18, 2006 5:36pm EST) (On file with author); Case 5:07-cv-00117-FJS-GHL Filed 7/23/2007. Moses, *supra* note 9, at 1836 (explaining that judges may not be immune to media influence and litigators “utilize a public litigation strategy in an attempt to make sure that judges hear their arguments in as many places as possible”).

80. Roschwalb & Stack, *supra* note 2, at xiv; Lynn M. LoPucki and Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1457 (2000) (“Because judges care what members of the profession and the public think of them, they are vulnerable to media spin regarding the cases that come before them.”); *id.* (explaining that “manufacturers and insurers have been campaigning in the mass media against high jury verdicts and expanded remedies” for the past 20 years but that these efforts have affected judges); *id.* (“Recent studies show astonishingly high rates of verdict reductions or reversals by both trial and appellate courts.”); Joy & McMunigal, *Role of Lawyers*, *supra* note 11, at 689 (explaining that public sympathy generated by media “might help convince a preliminary hearing judge not to bind the client over for trial” or “influence the trial judge to be more favorable to the client in rulings made prior to, during, and after the trial as well as more lenient at sentencing”); FEARN-BANKS, *supra* note 36, at 34 (“[J]udges grant new trials in anticipation of public reaction.”).

81. Sheppard v. Maxwell, 384 U.S. 333, 358 (1966) (chastising judge for “view[ing] the news media as his target”).

82. Ammon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, And the Role of the Scholar*, 95 CAL. L. REV. 1619, 1626-27, 1674 (citing cases in which the Supreme Court has considered the role of public perception and public confidence in its decision making process but pointing out that “the notion of public confidence is more complex than the ordinary or conventional notion of the opinion of the general public on a given issue”); *id.* at 1637-58 (denoting the media as one of the five systems that affect the Court’s decision-making).

83. Long Interview with #27, General Counsel, Commercial Bank (Feb. 26, 2008), at 10 (explaining that court of public opinion matters even if juries are not affected because all the parties believe juries are influenced and it makes it a war in the press).

84. James W. McElhaney, *Discovery is the Trial*, ABA J., August 2007, at 26. This is because fewer than 5% of cases ever make it to trial. U.S. SENT’G COMM’N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS TBL.11 (2006), available at <http://www.ussc.gov/ANNRPT/2006/table11.pdf> (reporting that 95.7% of criminal defendants pleaded guilty).

85. *But see* Murphy, *supra* note 3, at 585 (arguing that attempting to influence prosecutors, regulators and the public “goes far beyond a fair reply”).

86. FERGUSON, *supra* note 39; It is likely for this reason that the Supreme Court submitted the video of the car chase involved in *Scott v. Harris* for public review. *Scott v. Harris*, 550 U.S. 372 (2007) (holding that Scott’s attempt to end the chase by forcefully bumping the respondent’s car off the road was reasonable and did not violate the 4th Amendment given that the car chase itself posed serious danger to bystanders); *Will You Tube Decide the Next President?* <http://theutubeblog.com/2007/05/01/> (last visited Nov. 5, 2007) (using Supreme

The potential media spin also influences the way an attorney litigates a case—which defenses and tactics he/she pursues in court. According to one General Counsel Interviewee:

If you are litigating [a matter] in a courtroom . . . you are also essentially litigating the matter in the court of public opinion. What strategy you might adapt in the litigation can be influenced by what you think is going to happen in the court of public opinion It doesn't do my client any good if we win in the courtroom, but we have been pummeled in the press.⁸⁷

Additionally, publicity can affect the severity of the punishment. Attorneys have used clips from pretrial television interviews in court as evidence for aggravation at sentencing hearings.⁸⁸

D. IMPACT AFTER A CASE OR LEGAL ISSUE IS CONCLUDED

Findings from the PR Study support the contention that “[t]he court of law and the court of public opinion have a symbiotic relationship [E]ach affects the other.”⁸⁹ Both courts render verdicts and lawyers must consider the consequences of those verdicts when recommending a legal strategy.⁹⁰ The decisions to file, defend, admit, try, apologize—all undeniably legal advice—are wrapped up with public relations implications.⁹¹ One Lawyer Interviewee explained: “PR and the law go hand in hand and anybody who thinks that just keep your head down, don't talk to the press, just doesn't understand in today's world how interrelated they are.”⁹²

Although the two courts can operate simultaneously, the court of public opinion is often not just the first⁹³ but also the only or the last court.⁹⁴ It can be

Court's publication of police chase video as support for hypothesis that You Tube will decide who becomes the next president).

87. Long Interview with #11, General Counsel, Commercial Bank (Mar. 26, 2008), at 5.

88. Semel and Sevilla, *supra* note 8, at 14 (describing situation).

89. Frankel, *supra* note 33, at 379. *See, e.g.*, Joseph G. Wojtecki, Jr., *The Intersection between Legal and Public Relations Counsel*, Center for Risk Communication, <http://www.centerforriskcommunication.org/staff.htm#JW> (document on file with author) (claiming that “controversial public issues will be tried simultaneously” in both courts); Roschwalb & Stack, *supra* note 2, at xiii (explaining that it was clear back in 1807 during Aaron Burr's trial that both the court of law and the court of public opinion “were operating simultaneously”).

90. Wojtecki, *supra* note 89.

91. According to other scholars, Arthur Andersen's legal and PR strategies were “so closely intertwined it was hard to tell one from the other.” Brickey, *Boardroom to Courtroom*, *supra* note 14, at 637-638. For example, Andersen attempted to humanize its story and discredit prosecutors by waging a PR campaign in 1) the traditional media outlets and 2) lawyers' documents and court filings. *Id.*

92. Long Interview with #40, Partner and Chairman, Law Firm (Aug. 22, 2007), at 17.

93. Brickey, *Boardroom to Courtroom*, *supra* note 14, at 625 (“The first trial is always in the court of public opinion.”).

94. Indeed, in 1891 Oscar Wilde remarked, “We are dominated by Journalism. In America, the President reigns for four years, and Journalism governs for ever and ever.” OSCAR WILDE, *THE SOUL OF MAN UNDER SOCIALISM* (1891). Roschwalb & Stack, *supra* note 2, at xiii (explaining that Washington D.C. Mayor Marion

used in lieu of a traditional court.⁹⁵ It can reinforce the judgment of a court of law and add an extra layer of punishment.⁹⁶ It can thwart the judgment of a court of law and deliver its own version of justice. “A lawyer can prove a client is innocent within the legal system, and yet that same client appears guilty when it comes to the public’s perception.”⁹⁷ Material disseminated publicly can have a lasting effect.⁹⁸ As the Supreme Court reminded “reversals are but palliatives”; they are not a real cure.⁹⁹ Negative publicity can even taint future juries. One General Counsel Interviewee explained: PR is “a big issue for the energy companies right now because jurors that pay three dollars for gasoline are not particularly good jurors for us on *any* issue, because they walk in to the courtroom . . . mad.”¹⁰⁰

Because the press has historically been viewed as a protector of justice,¹⁰¹

Barry’s defense strategy against indictment for drug use “included mounting a PR campaign concurrently with court proceedings with the aim of achieving a major future benefit—salvaging his political career”).

95. Margulies, *supra* note 33, at 16 (“Publicity and mobilization have been important because when public interest and civil liberties strategies have relied too much on courts, they have often fallen short.”); *id.* at 28 (explaining that “crossover advocacy,” like advocacy in the court of public opinion “can maximize client voice, enhance clients’ negotiation posture, and gain time when traditional advocacy has led to a dead end”).

96. Elizabeth Dale, *A Different Sort of Justice: The Informal Courts of Public Opinion in Antebellum South Carolina*, 54 S.C. L. REV. 627, 633 (2003) (detailing examples in history where “[p]ublicity was, then, both a means of proclaiming the judgment of the court and a form of punishment”).

97. Tripp Frohlichstein, *Communication Consultant’s Perspective*, in Roschwalb & Stack, *supra* note 2, at 19. Dirk C. Gibson & Mariposa E. Padilla, *Litigation Public Relations Problems and Limits*, PUB. REL. REV. 215, 219 (Jun. 22 1999) (“[V]erdicts rendered by public opinion may have greater historical significance than judicial outcomes.”). A great example is Aaron Burr, the third vice president of the United States, who was acquitted four times for treason. Nevertheless, he was lambasted in the press and eventually ostracized from society. FERGUSON, *supra* note 39; Srodes, *supra* note 74, at 43. Also, O.J. Simpson received tremendous negative publicity after he was acquitted of murder and many claim that the jury convicted him in the robbery case, in part, because they were still resentful of his acquittal. *See, e.g., Simpson’s Conviction Evokes Emotion*, MSNBC, Oct. 4, 2008, <http://www.msnbc.msn.com/id/27023534/> (last visited Nov. 12, 2008) (“[F]or many observers, the line connecting the former NFL star’s murder acquittal last decade and his new conviction for robbing memorabilia peddlers couldn’t have been clearer.”). The opposite is also true. FEARN-BANKS, *supra* note 36, at 34 (explaining that Mayor Marion Barry of Washington D.C. was re-elected after being convicted of a drug charge and serving time because the public believed he had been “setup”).

98. *Cf.* Cass R. Sunstein, “*She Said What? “He Did That” Believing False Rumors* (SSRN Harvard Public Law Working Paper No. 08-56, 2008) (“And because material on the Internet tends to have considerable longevity, and may even be permanent (for all practical purposes), a false rumor can have an enduring effect.”).

99. Sheppard v. Maxwell, 384 U.S. 333, 362-63 (1966); Susan Hanley Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 34 OHIO N.U. L. REV. 755, 761-62 (2008) (“Although never convicted or even tried for rape, many people still harbor suspicion about the [Duke players] . . . because of the media coverage Years after the incident people may read about the Duke players and not know the charges were dismissed.”).

100. Long Interview with #39, General Counsel, Petroleum (Apr. 26, 2007), at 66. In a recent survey of Fortune 1000 corporate counsel sponsored by Hill & Knowlton, a public relations and public affairs agency, 76% of respondents believed that negative publicity around alleged corporate wrongdoing impairs the ability to attain a fair, impartial jury and over half believed that public opinion directly affects the size of legal awards. Hill & Knowlton, General Counsel Survey (2004) (unpublished survey on file with author). Whether this is true may not matter since the perception affects negotiations and settlements.

101. Ralph Waldo Emerson wrote in 1860, “as gas-light is found to be the best nocturnal police, so the universe protects itself by pitiless publicity.” RALPH WALDO EMERSON, *Worship*, in *THE CONDUCT OF LIFE*

advocates and courts sometimes rely on the court of public opinion *ex post* to discipline moral lapses not punishable by the legal system.¹⁰² Some commentators contend that the media court is *better* for managing corporate governance and deterring corporate executive misconduct than is a court of law.¹⁰³

II. PRELIMINARY FINDINGS: HOW GENERAL COUNSELS MANAGE LEGAL PR

Given the importance of the court of public opinion, scholars often urge attorneys—especially criminal defense attorneys—to “develop[] litigation strategies that take public opinion into account.”¹⁰⁴ They call on lawyers to get more involved in the court of public opinion for their clients. They disparage lawyers for not “consider[ing] themselves principal contributors to litigation communications strategy.”¹⁰⁵ They claim that “most lawyers advise their clients not to talk to the press and most clients heed that advice.”¹⁰⁶ They give practical advice on how to respond to press inquires and navigate client risks that are associated with

(1860); *Sheppard*, 384 U.S. at 350 (“The press guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.”). For example, scholarly literature gives credit to the media (not lawyers) for uncovering the fact that tobacco companies knew nicotine was addictive and for mobilizing elected officials to take action. *See, e.g.,* Loeb, *supra* note 29.

102. Tamar Frankel posits that this is what the court did in the Micheal Ovitz Disney decision. Frankel, *supra* note 33, at 355-68 (explaining that the court damned the defendants in dicta and thereby gave the corporate governance issue “to the market assisted by the media”). The rationale is that the community can correct an outcome with which it disagrees. Kellogg, *supra* note 32, at 24 (explaining that Exxon did not apologize quickly nor take responsibility for the damage from the 1989 oil spill in Alaska and that customers cut up Exxon credit cards in protest); *see* FERGUSON, *supra* note 39 (“Public justice develops into a serious matter when a discrepancy exists between official findings and communal perception.”); Watson, *supra* note 2, at 87 (“The right spin on a criminal prosecution . . . that appears in the news media can make a conviction seem like a miscarriage of justice, just as no spin or a prosecution-oriented frame can undermine the cleansing of suspicion that an acquittal is supposed to provide.”). Margulies, *supra* note 33, at 31 (“Crossover advocacy can also enhance the integrity and transparency of legal processes.”).

103. Frankel, *supra* note 33, at 375 (suggesting situations where it might be better if courts let the court of public opinion decide).

104. *See, e.g.,* Loeb, *supra* note 29; Robert L. Shapiro, *Using the Media to Your Advantage*, CHAMPION, Jan.-Feb. 1993, at 6, *reprinted as adapted in Secrets of a Celebrity Lawyer*, COLUM. JOURNALISM REV., Sept.-Oct. 1994, at 25; Robert L. Shapiro, *Harnessing the Power of the Press*, LEGAL TIMES, JUNE 27, 1994, at 22; Dore & Ramsy, *supra* note 3, at 55 (arguing that lawyers involved in products liability and toxic torts should “take the lead in ensuring that the nature, timing, scope, and content of public disclosures assist or at a minimum do not detract from the litigation effort”).

105. Loeb, *supra* note 29 (basing this comment on a survey finding corporate counsel are more than twice as concerned about industry analysts and nonparty regulators or government bodies than they are the media—even though 90% claimed that a legal PR strategy was a priority during high-stakes or high-profile litigation).

106. Joy & McMunigal, *Role of Lawyers*, *supra* note 11, at 48; Loeb, *supra* note 29, at 49 (explaining that this is conventional wisdom for criminal defendants including corporate criminal defendants); JAMES F. HAGGERTY AND JOHN WILY & SONS, INC., *IN THE COURT OF PUBLIC OPINION WINNING YOUR CASE WITH PUBLIC RELATIONS* (2003) (explaining that some lawyers first tendency is say “no comment” in response to media inquiries”); *see also* Moriarty, *supra* note 34, at 26 (“Many attorneys are not comfortable in the media arena. They simply declare that they will not try their client’s case in the media and hope that statement will satisfy their critics.”).

legal PR spin.¹⁰⁷ A major sentiment is that lawyers are behind the eight ball when it comes to legal PR.¹⁰⁸ As one of the General Counsels in the PR Study explained the “more traditional approach is that PR is just PR and legal is legal, and PR really shouldn’t be involved in legal.”¹⁰⁹

However, more recently, there is some literature contending that lawyers are increasingly developing sophisticated, integrated legal PR strategies.¹¹⁰ Unsurprisingly, external PR agencies sponsor some of this literature. For example, in a 2004 survey of Fortune 1000 corporate counsel funded by Hill & Knowlton, 90% of the 78 respondents stated that a PR strategy was a priority when embroiled in high stakes or high profile litigation.¹¹¹ The contentions that lawyers are avidly and ably managing legal PR, albeit less prevalent, are consistent with the findings of the PR Study. The General Counsels in the PR Study claimed they were actively managing legal PR for their clients—not as the spokespeople but more typically as advocates behind the scenes.¹¹² The outside lawyer and external PR interviews shored up these claims.

A. GENERAL COUNSELS AND INTERNAL PR EXECUTIVES

1. REGULAR INTERACTION

Because they believe the court of public opinion shapes corporate legal controversies big and small, almost all of the General Counsel Interviewees report having strong, daily relationships with internal PR professionals.¹¹³ As one General Counsel Interviewee explained “[t]he traditional teaching of the lawyer is that you don’t comment, which is not the way one can operate in today’s environment. So I have learned to work very, very closely with [the PR

107. See, e.g., Joy & McMunigal, *Role of Lawyers*, *supra* note 11; HAGGERTY ET AL., *supra* note 106.

108. Cf. Roschwalb & Stack, *supra* note 2 (“Close working relations between public relations practitioners and lawyers are rare”); HAGGERTY ET AL., *supra* note 6 (contending that litigators fail to comprehend the impact the court of public opinion can have on litigation and the importance of managing litigation PR messages); FEARN-BANKS, *supra* note 36, at 34-35 (urging lawyers “who have not adapted to public relations procedures” to do so and to work with PR professionals “to put clients in the best light in both courts”).

109. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 41.

110. Loeb, *supra* note 29 (discussing legal PR strategy of Bayer AG in response to the alleged injuries from Baycol); Moses, *supra* note 9, at 1843 (“Lawyers work closely with public relations professionals to get out their client’s messages.”); see also *infra* note 213.

111. Hill & Knowlton, General Counsel Survey (2004) (unpublished survey on file with author).

112. Likely, this is partly due to the types of companies and industries in which the interviewees worked.

113. Internal PR professionals were commonly referred to as PR executives or PR directors by the interviewees. Yet formally the titles vary. Some are called PR executives or communication specialists and the internal PR department at a publicly traded corporation can be referred to as the PR department, Communications, Corporate Communications, Corporate Affairs, or Public Affairs. Often, however, the PR department is a subset of Marketing, Communications, or Public Affairs. (Along with PR, Human Relations and Government Relations are often part of these overarching corporate functions.) In this Article, executives that manage PR will be referred to as PR communication executives or specialists, and the department that specifically manages PR (as opposed to other types of corporate communication) will be referred to as the PR department.

group].”¹¹⁴ Most made statements like the following: “Well, [the relationship is] very close and we’re in touch with them all the time, daily, not just on cases.”¹¹⁵ Indeed, only two General Counsel Interviewees stated that they did not work with the internal PR executives very often.¹¹⁶

Typical interactions with PR counterparts involve drafting press releases around legal issues or disclosure obligations, developing talking points around a case or legal issue, and dealing with trademark protection issues and SEC filings.¹¹⁷ The following is a representative description: “The lawyers are always involved in important disclosures to markets because [a] lawyer’s job is to make sure the statement is clear and as accurate and balanced for the investors as it possibly can be.”¹¹⁸ To be clear, General Counsel Interviewees do not claim to be involved only in formal disclosures. They claim to be involved whenever any legal issues may be discussed with journalists. Legal issues are often complicated and consumers often lack knowledge about the industry and law.¹¹⁹ Journalists, who are not trained in the law, must cater to non-lawyer consumers that have many media choices and expect information that is newsworthy, timely, and easy to digest.¹²⁰ Therefore, there is a risk of inaccuracies. The following account by

114. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 40; Roschwalb & Stack, *supra* note 2, at xii (explaining that lawyers and PR executives often provide advice that is contradictory).

115. Long Interview with #39, General Counsel, Petroleum (Apr. 26, 2007), at 65.

116. Based on preliminary findings. Short Interview with #7, General Counsel, Investment Bank (Nov. 2, 2006), at 27; Long Interview with #60, Chief Legal Officer, Global Manufacturing (July 23, 2007), at 24-25 (explaining that PR was not as important because the company was not a consumer product company and most of its investors were institutional. Therefore, the relationship between legal and PR is not as close. Instead, they tell PR when there is a problem, how they are going to deal with it and just ask PR to “shine up [the facts] to make them look rosy.”).

117. Short Interview with #4, General Counsel, Commercial Bank (Oct. 20, 2006); Long Interview with #60, Chief Legal Officer, Global Manufacturing (July 23, 2007), at 25; Long Interview with #42, General Counsel, Pharmaceutical (Oct. 1, 2007), at 13. This article addresses a small slice of PR and what PR executives are concerned about: the intersection of PR and corporate legal controversies. Generally, PR is an attempt to influence end users and influencers (primarily editors and analysts) through targeted messages around a specific product, service, or legal issue—or around a corporation’s brand, culture, governance, and citizenship. As one General Counsel Interviewee explained, PR is “about promoting brands, creating sense of corporate personalities, interfacing with the community at large on the products and services [the company] offers.” Long Interview with #11, General Counsel, Commercial Bank (Mar. 26, 2008), at 14. PR executives, therefore, handle press releases on product releases, commercial developments and investment projects. They arrange town hall meetings across the country at which the CEO can speak to the public. They are generally also in charge of internal corporation communications, e.g., developing the company newspaper and employee relations website, organizing internal dialogues with the CEO and senior executives. In short, PR directors help manage the overall reputation of their corporate clients.

118. Long Interview with #42, General Counsel, Pharmaceutical (Oct. 1, 2007), at 13; Long Interview with #39, General Counsel, Petroleum (Apr. 26, 2007), at 65 (“[O]ur disclosure obligation is the biggest driver to that close relationship.”).

119. Long Interview with #39, General Counsel, Petroleum (Apr. 26, 2007), at 68 (explaining that consumers are not aware that the gas station they just frequented is owned by a country that is expropriating all U.S. companies there).

120. Reichman, *supra* note 82, at 1631 (“Since the target audience of the general media includes non-lawyers, there are limits to the degree of technical analysis that the media can convey . . . the electronic

one interviewee was echoed by Lawyer and PR Interviewees alike:

[The media] will hop on anything. And the people who are assigned are . . . not financial journalists. So many of them don't have a background and don't really frankly know what it is they're writing about. They don't really frankly understand those stories that they are writing, and they get things wrong very frequently; like very, *very* frequently . . . and maybe not wrong enough that it has to be retracted, but wrong enough that it creates a misleading impression, sometimes on purpose and sometimes by accident.¹²¹

Therefore, many Lawyer Interviewees complained that the media “tends to oversimplify complex issues and get the facts and details wrong.”¹²² One interviewee observed, “if you try to explain [a legal issue] in 30 seconds, you're gonna get it wrong. And so there's a lot of talent to come up with the right words.”¹²³ General Counsel Interviewees, therefore, work with PR executives to come up with those right words.

We actually wanted the story to be correct and accurate. And so the first thing we wanted to do was have a long conversation with the PR executives so that they understood the technical aspects of what had actually happened here. And then their job was to figure out how to communicate all this and, frankly, how to communicate it in a sound bite.¹²⁴

And, according to participants, they have to aid PR executives in this task because this can be “really hard. It is really hard. [The media] want for me to get down to the sound bite, and I wanna push back and say, ‘It's not a sound bite.’”¹²⁵

Managing legal PR is an iterative process. The legal department informs the

media often has to reduce a decision to several sound bites”); *see supra* note 33 and accompanying text. There are multiple reasons why speed is essential. First, news sells and if another paper has published it, it is not news. *Cf. supra* note 33. Second, to keep brand loyalty, news outlets need to be able to credibly claim they bring the most recent news to their clients. Third, “[t]he press must be allowed to publish news quickly enough for it to effectively check abuses of governmental power.” Bernabe-Riefkohl, *Prior Restraints*, *supra* note 11, at 262-64; *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 224 (1964) (Harlan, J., dissenting) (“It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances.”).

121. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 13; Long Interview with #41, PR Specialist (and Lawyer), Ancillary PR Firm of a Law Firm (Aug. 22, 2007), at 10 (“We did . . . a quick study of 10 or 20 newspapers about corrections . . . the largest body group were spelling . . . the second largest were it happened to be legal matters where papers got things wrong. As you know this other stuff is not self-evident to reporters or lay people.”).

122. *See, e.g.*, Long Interview with #59, Managing Partner, Law Firm (Apr. 29, 2008), at 21.

123. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 45.

124. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 8-9; Rhode, *supra* note 33, at 147; *id.* at 151 (commenting on “the public's short attention span”).

125. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 45; Long Interview with #42, General Counsel, Pharmaceutical (Oct. 1, 2007); Long Interview with #60, Chief Legal Officer, Global Manufacturing. (July 23, 2007); Moses, *supra* note 9, at 1856 (“[N]ot all lawyers are comfortable with the new world of advocacy that demands that they be as quick with a sound bite as with a legal argument.”).

public relations group about the matter, the issues at stake, what needs to be communicated (and what should not be communicated).¹²⁶ The PR professionals and lawyers together craft the spin.¹²⁷ The following quote is a typical description:

We work together a lot up front on the communication, about what is going on and what press releases we will need. We write and then they re-write. It's collaborative.¹²⁸

Once a press release is approved, the PR people handle "the technique of getting it out and how to get it out."¹²⁹ PR executives develop personal relationships with the reporters that cover the industry so that "they have a rolodex of people they can call in and a bank of goodwill that [can] temper the tone of what an article was"¹³⁰ or help attain more than the typical 35 second sound-bite.¹³¹ However, it is not only the PR people that develop rapport with reporters. Inside (and outside) lawyers sometimes also create relationships with the media.¹³²

In addition to the daily interaction around the more routine issues, general counsels meet PR executives a number of times over the course of the year to construct more developed legal PR strategies regarding high-profile legal issues. One quote aptly describes this practice:

I would say that it's undoubtedly not a week [goes by] that the legal department isn't talking to the communications team about some legal matter. Everyday there are stories written about [our company] and typically every week there is a story being written about something that's legally related that affects us. But in terms of a concerted effort to sit down and really focus on a media strategy in a substantial way, I'd say probably four or five times a year.¹³³

2. OPEN COMMUNICATION AND A TEAM APPROACH

Most of the General Counsel Interviewees take a candid, team oriented approach to relationships with internal (and often external) PR counter-

126. Short Interview with #23, General Counsel, Commercial Bank (May 3, 2007); Long Interview with #28, General Counsel, Petroleum (Mar. 3, 2008), at 23.

127. Long Interview with #60, Chief Legal Officer, Global Manufacturing. (July 23, 2007), at 13, 17; Long Interview with #28, General Counsel, Petroleum (Mar. 3, 2008), at 23.

128. Short Interview with #31, General Counsel, Pharmaceutical (Sep. 24, 2007), at 9.

129. Long Interview with #60, Chief Legal Officer, Global Manufacturing. (July 23, 2007), at 13, 17; Long Interview with #28, General Counsel, Petroleum (Mar. 3, 2008), at 23.

130. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 41-42.

131. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 45.

132. Ken Frazier of Merck is a good example. *See* Moriarty, *supra* note 34, at 29 (quoting Lynne Liberator as saying that "[m]ost lawyers who deal in high profile cases have already established relationships with reporters"). Some of the interviewees intimated that this relationship can make a difference in how the corporation is ultimately portrayed in the press.

133. Long Interview with #11, General Counsel, Commercial Bank (Mar. 26, 2008), at 9.

parts:¹³⁴ “You get together with your CEO, CFO, your general counsel, your outside counsel, and your [internal] PR guy and you go through everything and get everyone’s input on the documents and strategy and you get your outside PR firm too.”¹³⁵ This depiction is consistent with Robert E. Rosen’s portrayal of how large corporations conduct business. They organize around self-managing project teams (consisting of internal employee professionals and external consultants) that work collaboratively.¹³⁶

General Counsel Interviewees claim they sometimes need to share confidential information in order to receive the best advice from the PR executive,¹³⁷ provide solid legal advice to their corporate client;¹³⁸ and avoid problems.¹³⁹

You have to share information that is confidential so that [the PR people] fully understand what it is they’re going to be talking about if they’re the ones having the interface with the reporter or media I don’t think it’s fair to give them only a part of the story. They can’t contribute, I don’t think, as well if they are limited.¹⁴⁰

For example, the lawyers must ensure that the right information is disclosed in the proper manner¹⁴¹ and PR executives help the lawyer determine what a consumer or stockholder might consider “material” and therefore necessary to disclose. PR executives help the lawyer determine the way potential legal

134. Loeb, *Managing Corporate Crisis*, *supra* note 41, at 10 (explaining need for “a multidisciplinary approach”). Only two General Counsel Interviewees claimed that they were not as team oriented. One was the GC of a non-S&P 500 corporation.

135. Short Interview with #31, General Counsel, Pharmaceutical (Sep. 24, 2007), at 16; Long Interview with #39, General Counsel, Petroleum (Apr. 26, 2007), at 65 (“Our press person, communications person, is part of our team, meets with us at every meeting including when we meet with the external law firm.”).

136. Rosen, *supra* note 36, at 642-48 (2002) (explaining that corporations have porous borders and that outsourcing includes not only hiring workers “on a contingent basis with fewer benefits” but also hiring external specialists like engineers, accountants, and even outside counsel); *id.* at 642-648 (“The organizational strategies of downsizing and outsourcing link corporate demand and the supply offered by consulting firms.”). For further discussion of this topic, see Beardslee, *Third Party Consultants*, *supra* note 36, at Part I.

137. For example, if the PR executive knows beforehand that the CEO was having an affair with the employee of the target company being sued for embezzlement, he/she might make different recommendations regarding media spin.

138. Long Interview with #11, General Counsel, Commercial Bank (Mar. 26, 2008), at 6 (“There nonetheless are situations where you, in order to be fair to them and for them to give you good advice about what they think the media’s perspective on things might be, you are going to have to share some with them.”). *But see* Short Interview with #38, General Counsel, Pharmaceutical (Nov. 1, 2008) (notes on file with author) (“There is no need to share confidential info with PR people. In litigation, all the relevant information is public knowledge.”).

139. Long Interview with #42, General Counsel, Pharmaceutical (Oct. 1, 2007); Long Interview with #28, General Counsel, Petroleum (Mar. 3, 2008), at 22; Long Interview with #39, General Counsel, Petroleum (Apr. 26, 2007), at 68 (“If you keep [the PR] people in the dark, they end up being mismanaged.”); Short Interview with #26, General Counsel, Petroleum (May 25, 2007), at 27. The PR Interviewees confirmed this. The amount of confidential information shared may be limited because media stories often do not get written with intense detail.

140. Long Interview with #26, General Counsel, Petroleum (Feb. 11, 2008), at 27.

141. Short Interview with #26, General Counsel, Petroleum (May 25, 2007), at 27.

strategies might be spun and, therefore, how governmental agency regulators, stockholders, judges, and potential juries, might react.¹⁴² This understanding, in turn, informs the lawyers' legal choices. As one General Counsel Interviewee explained: After a dialogue with the PR executive, a lawyer might recommend that "it's not worth it to confront a regulator publicly even when [he] think[s] [the regulator] is wrong" and he "was right on the narrow issue" because "it might be detrimental to [the] company's long-term dealings with them."¹⁴³ To that end, lawyers utilize the reputational consequences (as defined, in part, by the PR executives) to convince clients not to take legally risky actions that might technically comport with the law.¹⁴⁴ Perhaps for all of these reasons, 74% of Survey Respondents were comfortable sharing *all* information about a legal issue with internal PR staff.¹⁴⁵

It is the PR department's responsibility to ensure that reporters understand the legal arguments made in court. Knowing beforehand what arguments the lawyer is going to make, the basis of the case, and potential rebuttal, helps the PR executives inform the reporters in a way that does not weaken the client's legal position and devise the right communication plan from a tactical standpoint.¹⁴⁶

142. *Calvin Klein Trademark Trust v. Wachner (Calvin Klein I)*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000) (explaining that PR consultants need to understand legal strategies to provide PR advice and PR advice influences attorneys' strategic and tactical legal decisions). As explained in another article,

This is not to imply that lawyers build legal strategies around the media strategy but simply that media impact is a consideration when providing legal advice. For example, a lawyer might want to meet with an external PR consultant if representing a private bank facing significant regulatory sanctions for money laundering. The company has to appear appropriately chastened before the regulators but also reassure the customers. A PR consultant can help the attorneys understand how certain statements might be construed and how to reach the right balance to prevent additional charges or cases against the company.

Beardslee, *Third Party Consultants*, *supra* note 36, at n.34 (citing Long Interview with #3, General Counsel, Investment Bank (Feb. 25, 2008), at 6).

143. Long Interview with #22, Associate General Counsel, Investment Bank (Feb. 11, 2008), at 5. *But see* Part II.A.4 (indicating that this reliance only occurs if the lawyer believes the PR executive is savvy and has experience in managing high-profile litigation).

144. Beardslee, *Third Party Consultants*, *supra* note 36, at nn. 210-213 and accompanying text.

145. *See* Appendix V.B.5.b. As one General Counsel Interviewee explained, although general counsels "try when it's appropriate to set things up so as to be able to demonstrate that it's protected by the attorney-client privilege and you know I think that's helpful, but . . . We're pretty candid and . . . as I said, it's a partnership that's easy, works well, very smooth." Short Interview with #17, General Counsel, Commercial Bank (Feb. 6, 2007), at 40; Long Interview with #27, General Counsel, Commercial Bank (Feb. 26, 2008), at 9 ("It's difficult to speak in generalities, but I would say that although it's important to protect the privilege, that's not always the driving factor in terms of how you go about things. There are other considerations that you have."). It appears that General Counsels are less comfortable sharing information with external PR consultants because of attorney-client privilege issues. For further discussion of the risks associated with sharing confidential information with external consultants, *see generally* Beardslee, *Third Party Consultants*, *supra* note 36.

146. Long Interview with #47, Global Head of Corporate Communications (PR), Investment Bank (Apr. 3, 2008), at 10-11. As discussed briefly *infra*, however, this type of divulgence might not be protected by the corporate attorney-client privilege. For further explanation *see generally* Beardslee, *Third Party Consultants*, *supra* note 36.

Messages in the court of public opinion need to be consistent with messages in a court of law. First, what is said publicly can constrict the legal strategies a lawyer can pursue persuasively in court.¹⁴⁷ Second, inconsistency breeds mistrust.¹⁴⁸

If a reporter decides that they do not believe your defense or that you are not being candid with the media, or you look like you are hiding something or you are not willing to take on the hard issues, it creates even more of a story in and of itself. [Media spin] does impact the way you approach things—not because you don't raise the defenses, but . . . the manner in which you are going to assert them. When you say it, how you say it and to whom you say it becomes critical and consistency becomes really important.¹⁴⁹

Even the two General Counsel Interviewees that reported a more distant relationship with the internal PR executives felt there were times when they needed to share confidential information with them¹⁵⁰ and have regretted not sharing information.¹⁵¹ The Law Firm Partner Interviewee hired by one of those General Counsels explained that the failure to share information had negative consequences. The PR executives were not on board with the direction that the lawyers wanted them to take publicly, were unprepared and left scrambling.¹⁵² If information had been shared, the PR specialists could have “conditioned the press and their sources instead of the media finding out when everyone did.”¹⁵³ This would have resulted in guided, better press coverage.¹⁵⁴

Other General Counsel Interviewees, who now believe in collaborating, described similar stories of regret for times when they had not collaborated: “There were times when there might have been something that had a PR issue that I didn't bring the PR people in and even tried to keep them out of, and I was

147. See *supra* note 47.

148. Beardslee, *Third Party Consultants*, *supra* note 36, at 13 (citing Dore & Ramsy, *supra* note 3, at 56). For example, if a client is being sued for violation of antitrust laws, the lawyer will likely try to demonstrate that the client is not a monopolist. The PR strategy, however, would likely be to emphasize that the client is the dominant market participant. CHRISTOPHER P. BOGART AND ROBERT D. JOFFE, HIGH-PROFILE LITIGATION, OBJECTIVES CONCERNS AND PRELIMINARY CONSIDERATIONS (discussing the “strong need to coordinate the client’s litigation strategy and the client’s on-going business strategies, shareholder/investor relations, and public relations”).

149. Long Interview with #59, Managing Partner, Law Firm (Apr. 29, 2008), at 5. This also breeds mistrust by the judge. Margulies, *supra* note 33, at 41 (explaining that a judge will notice if one theory is propounded in the press and not in the court).

150. Short Interview with #7, General Counsel, Investment Bank (Nov. 2, 2006) (explaining that it is a reactive relationship but when it involves a high stakes matter, they “inform them of everything going on” and “what can and cannot be leaked to the press”).

151. Long Interview with #60, Chief Legal Officer, Global Manufacturing (July 23, 2007), at 25.

152. Long Interview with #40, Partner and Chairman, Law Firm (Aug. 22, 2007), at 10 (“I think the company could have done a better job preparing its PR people for how bad it was going to be in the first day after this [crisis] was announced.”); *id.* at 9 (“It would have been better [if they had been brought in earlier] because they would have been living through it with [them] and [the PR people] would have seen what was coming and they would have drawn their own conclusions.”).

153. Long Interview with #40, Partner and Chairman, Law Firm (Aug. 22, 2007), at 11.

154. *Id.*

sorry about it sort of because of the ancillary effects that go along with it.”¹⁵⁵ Thus, the traditional segregation between law and PR is no longer workable. As one General Counsel Interviewee explained:

[W]ith the expansion of financial news coverage . . . I don’t think you really have a choice but to have a pretty active, strong relationship between PR and Legal If you are encountering PR for the first time in either a crisis situation or a litigation situation or an unpleasant situation . . . you’ve already lost the battle.¹⁵⁶

3. HEALTHY TENSION

Despite the close relationship, many Lawyer and PR Interviewees claim there is a “healthy dynamic tension” between the legal and public relations departments.¹⁵⁷ Indeed, the two have, what one General Counsel Interviewee called, “spirited debates” about what to disclose.¹⁵⁸ Another General Counsel Interviewee described the tension as follows: “There are times when you butt heads. Like in a high stakes legal matter, PR wants to put the best spin on it and I would say this is not something you could spin. You have to call just the facts and no spins.”¹⁵⁹

Lawyer and PR Interviewees claimed that lawyers and PR executives are often at opposite ends of timing issues. PR executives often want the corporation to quickly state it has not done anything wrong.¹⁶⁰ But, the lawyers want to conduct an internal investigation.¹⁶¹

The real challenge in these cases very often is the legal process is much slower and much more deliberate, than the public relations process, and so public relations people always have a need to or desire to be out there and just staking out a position relatively early on, whereas the legal process including the fact gathering process often takes much longer than the news cycle.¹⁶²

155. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 37 (“PR people should be brought in right away, as much to be defensive so that they are up to speed when the phone rings and they get the call about that.”).

156. Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 41.

157. Long Interview with #42, General Counsel, Pharmaceutical (Oct. 1, 2007), at 11; Long Interview with #60, Chief Legal Officer, Global Manufacturing. (July 23, 2007) (referring to this tension); Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 40-42 (same); Short Interview with #31, General Counsel, Pharmaceutical (Sep. 24, 2007), at 16 (same).

158. Short Interview with #2, General Counsel, Investment Bank (Oct. 4, 2006), at 40.

159. Short Interview with #31, General Counsel, Pharmaceutical (Sep. 24, 2007), at 16.

160. According to a 2002 Hill & Knowlton poll, 81% of the respondents said they would keep an open mind if a corporation provides clear, timely explanations. Loeb, *supra* note 29 (“The unguided imagination of the public may be far more damaging to corporate interests than a clear and timely expression of the truth.”).

161. Long Interview with #40, Partner and Chairman, Law Firm (Aug. 22, 2007), at 14 (“How do you know nobody has done anything wrong?”); McMunigal, *supra* note 11, at 688 (explaining that the media infers guilt if not publicly denied). Long Interview with #42, General Counsel, Pharmaceutical (Oct. 1, 2007) (“All the PR people say it is better to get all the bad news at one time and if you confess, people will trust you.”).

162. Long Interview with #11, General Counsel, Commercial Bank (Mar. 26, 2008) at 3.

Even when there is a valid defense, sometimes it may not be something the public and media can understand. One General Counsel painted the picture:

If we got out there with 'our' side of the story, I think the lawyers felt it would sound like we were saying 'we haven't seen our wives in ages and by the way, when we were beating our wives, we were doing it with rolled 8½ X 11 inches of paper. It wasn't metal bars.'¹⁶³

On the other hand, when it is clear that the corporation has done something wrong, the PR professionals want the corporation to confess to garner the public's trust.¹⁶⁴ Although many Lawyer Interviewees recognized that there is the risk that the corporation looks like it is hiding something,¹⁶⁵ they explained that "confessing has lots of other implications, for example, civil, criminal liability."¹⁶⁶ Additionally, findings from the PR Study indicate that PR executives prefer settlement to avoid negative publicity¹⁶⁷ whereas lawyers, although not insensitive to the benefits of settlement, believe that a particular course of action should be pursued because it is legally appropriate.¹⁶⁸ Thus, although they work closely, General Counsels and PR executives are often on opposite camps on legal PR matters.

4. LEGAL DRIVES THE PR STRATEGY FOR MEDIA SENSITIVE LEGAL MATTERS

Although it is a dynamic process and "everybody usually has a voice,"¹⁶⁹ most General Counsel Interviewees claimed that the lawyers drive the PR strategy for potentially high profile legal matters. In fact, 12% of the Survey Respondents reported that the Legal Department directly oversees the PR department.¹⁷⁰ The literature supports this finding that some companies integrate the two departments in this fashion.¹⁷¹ Moreover, even when the general counsel does not directly oversee PR, the general counsel is often in an elevated position relative to the director of PR. For example, 92.3% of survey respondents (general counsels) report to the CEO while only 25.4% of the PR directors report to the CEO.¹⁷² In other words, in 67.8% of respondent companies, the GC reports to the CEO but

163. Long Interview with #60, Chief Legal Officer, Global Manufacturing (July 23, 2007), at 12.

164. See *supra* notes 52-53 and accompanying text.

165. Long Interview with #40, Partner and Chairman, Law Firm (Aug. 22, 2007), at 12.

166. Long Interview with #42, General Counsel, Pharmaceutical (Oct. 1, 2007), at 11.

167. Long Interview with #47, Global Head of Corporate Communications (PR), Investment Bank (Apr. 3, 2008), at 13. Ironically, the general counsel of this same investment bank said in his interview with me: "I can't say I spend a lot of time having someone in PR saying you should settle this because it's pretty obvious." Long Interview with #1, General Counsel, Investment Bank (Feb. 7, 2008), at 3 (notes on file with author).

168. Long Interview with #47, Global Head of Corporate Communications (PR), Investment Bank (Apr. 3, 2008), at 5.

169. Long Interview with #40, Partner and Chairman, Law Firm (Aug. 22, 2007), at 14.

170. See *infra* Appendix V.B.3.b.

171. Loeb, *supra* note 29 (citing two companies where the PR department reported to legal department).

172. This is based on 118 respondents. See *infra* chart in Appendix.

the PR director does not.¹⁷³

Whether it is a formal reporting relationship or not, the General Counsel Interviewees claim that “the law department ultimately calls the shots.”¹⁷⁴ This is because there is a need for consistent messages and General Counsel Interviewees believe that PR executives do not appreciate the impact the media can have on a company’s ability to successfully manage legal controversies.¹⁷⁵ As one General Counsel explained, “legal usually wins out because if you spin stuff there is always legal risk associated with that.”¹⁷⁶ As another expounded, “None of [the PR executives] really appreciate the legal risks of certain PR courses of action. They can’t. They are just not equipped to evaluate the impact of certain things they would do in the public relations arena on the outcome of the litigation.”¹⁷⁷ For example, “lawyers understand that sometimes the message sent to the prosecutors is more important than trying to convince the public that what is being said about you is not *exactly* correct. In those situations, it is better to let the prosecutor have his day and save the sophisticated technical arguments for the people that need to understand it.”¹⁷⁸ But this is a judgment call only the lawyers can make. One General Counsel Interviewee made the following comment: “Knowing what should be disclosed is only half the battle. You also need to know what you shouldn’t disclose. If you’re not savvy there you’re in trouble.”¹⁷⁹ PR Interviewees admitted as much: “just like [y]ou don’t want to have the general counsel who’s actually never been involved in litigating a case,” you don’t want “a PR guy who’s never handled a major disaster.”¹⁸⁰ Thus, the more important or high-profile the matter, the more lawyers are in the driver seat.¹⁸¹ As one General Counsel Interviewee explained: “This was a problem at first, but now it’s well

173. Only one respondent claimed that the PR director reported to the CEO but the GC did not. *See infra* chart in Appendix.

174. Short Interview with #38, General Counsel, Pharmaceutical (Nov. 1, 2008) (notes on file with author).

175. *Cf.* Long Interview with #39, General Counsel, Petroleum (Apr. 26, 2007), at 66 (explaining situation that was so sensitive that the CEO was leading the PR strategy).

176. Short Interview with #31, General Counsel, Pharmaceutical (Sep. 24, 2007), at 16; Long Interview with #40, Partner and Chairman, Law Firm (Aug. 22, 2007), at 14.

177. Short Interview with #8, General Counsel, Commercial Bank (Nov. 17, 2006); Long Interview with #26, General Counsel, Petroleum (Feb. 11, 2008) (“When it comes to legal matters, we’ll drive the final result but certainly want their input and it’s collaborative. Outside of the law, [the PR people] drive.”).

178. Long Interview with #60, Chief Legal Officer, Global Manufacturing (July 23, 2007), at 15-16.

179. Short Interview with #14, General Counsel, Commercial Bank (Dec. 19, 2006).

180. Long Interview with #47, Global Head of Corporate Communications (PR), Investment Bank (Apr. 3, 2008), at 17. This PR Interviewee was formerly a banker and external PR consultant on M&A crises.

181. Short Interview with #30, General Counsel, Commercial Bank (Jul. 10, 2007) (describing it as a collaborative relationship but prioritizing); *see also* Short Interview with #10, Deputy General Counsel, Commercial Bank (Dec. 1, 2006) (explaining that the environment in which the company operates is very heavily regulated and questioning “who’s better able to explain that? People who are in with that and really immersed in it or someone who just happens to write press releases?”); Long Interview with #60, Chief Legal Officer, Global Manufacturing (July 23, 2007), at 18 (“If there was an issue that was not so sensitive from the legal perspective, my guess, is maybe we would rely more on what the . . . public relations executives had to say.”).

understood at our company.”¹⁸² In keeping with that, it appears that general counsels ultimately decide when to hire an external PR firm for very important matters.

B. GENERAL COUNSELS AND EXTERNAL PR CONSULTANTS

Large publicly traded corporations, such as those in this study’s sample, often have internal PR resources to manage run-of-the-mill PR issues internally.¹⁸³ Therefore, most General Counsel Interviewees stated that external PR firms are only hired for very important, high profile matters.¹⁸⁴ Consistent with that, 98% of Survey Respondents claimed they dealt with a high profile legal issue one or more times in the past three years and 53% hired an external PR agency.¹⁸⁵

Although outside PR firms perform the same tasks as internal public relations consultants (draft press releases and positioning statements, act as spokespeople etc.), they are often selected for their special expertise in legal crisis management for high profile legal matters.¹⁸⁶ General Counsel Interviewees do not appear to work as closely with the external PR executives as they do with internal executives. Nevertheless, for the same reasons that they share confidential client legal information with internal PR executives, the interviewees claim they also share with external PR executives.¹⁸⁷ Most, however, reported that they were not

182. Short Interview with #38, General Counsel, Pharmaceutical (Nov. 1, 2008) (notes on file with author). This may suggest that the “healthy” tension the interviewees claimed existed is not well balanced. *See infra* discussion at Part IV.A..

183. Long Interview with #22, Associate General Counsel, Investment Bank (Feb. 11, 2008); Short Interview with #9, General Counsel, Commercial Bank (Nov. 27, 2006); Short Interview with #13, General Counsel, Commercial Bank (Dec. 19, 2006) (explaining that her company “hasn’t had enough nutsy stuff that requires an outside [PR] firm,” but that they “do have one on retainer”).

184. Long Interview with #27, General Counsel, Commercial Bank (Feb. 26, 2008), at 7; Kellogg, *supra* note 32, at 23; Short Interview with #20, Chief Legal Officer, Investment Bank (Apr. 10, 2007).

185. 60% of survey respondents said they had to deal with a high profile legal matter many times in the past three years. 27% said a few times. 11% said once or twice. 2% said never. *See infra* Appendix V.B.4. Roschwalb & Stack, *supra* note 2, at xi (noting that since the “mid-1980s, legal teams in high-profile proceedings have been increasingly employing public relations practitioners as part of the effort”); *id.* (“Public relations specialists increasingly are being brought in along with jury analysts and other forensic experts to affect the outcome of a trial. Lawyers engage publicists to handle media relations, jury selection, communication advice, and overall case strategy.”).

186. Short Interview with #21, Executive Vice President and Chief Legal Officer, Commercial Bank (Apr. 13, 2007), at 23 (explaining it had “experience in those types of crisis communications” and could predict the storyline that would be picked up and how the community would respond). Many PR firms claim to be crisis management firms, such as Bork & Associates in Washington, Kekst in New York, and Sitrick and Company. Long Interview with #41, PR Specialist (and Lawyer), Ancillary PR Firm of a Law Firm (Aug. 22, 2007), at 9, 13, 21; Long Interview with #60, Chief Legal Officer, Global Manufacturing (July 23, 2007), at 11. Many crisis management firms are led by ex-lawyers, e.g., Jayne Thompson Associates and Rotenberg Associates.

187. *See supra* Part II.A.2. Gertsberg, *supra* note 13, at 1476 (“There is simply no practical way for meaningful discussions to occur if the lawyer is unable to inform the public relations expert of nonpublic facts, as well as the lawyer’s defense strategies and tactics.”); Hantler et al., *supra* note 13, at 23. *But see* Murphy, *supra* note 3, at 587 (claiming that “[a] client need not divulge incriminating information in order to receive effective media advice”).

as comfortable doing so given privilege issues.¹⁸⁸ Interestingly, 53.6% of Survey Respondents claimed they were comfortable sharing *all* information with external PR executives.¹⁸⁹

C. GENERAL COUNSELS AND OUTSIDE LAWYERS

Because General Counsel Interviewees claimed they were avidly managing legal PR for their clients, it was surprising that this was not the case for outside attorneys. The survey and the interviews with the general counsels, PR executives and the outside attorneys suggest that unless outside lawyers have some special expertise in managing legal public relations or an exceptionally close relationship with the general counsel, they are not actively helping the general counsels develop legal PR strategies. A typical description of the relationship was:

Very often we will just do it internally. But sometimes in a particularly larger or complex or sensitive matter, . . . we may develop what our strategy is and then run it by our outside lawyers to see whether they have any objection or concerns about it. But more typically we are dealing with these issues internally.¹⁹⁰

In keeping with this sentiment, 85% of the Survey Respondents claimed that the outside lawyers' played a minor, advisory role in developing the PR strategy despite having dealt with a high profile legal issue in the past three years. Specifically, 43% of the Survey Respondents claimed the outside law firm did not play a substantial role and another 42% claimed that the outside lawyer only provided advice and did not collaborate or "work with" the internal lawyers and PR staff on the PR strategy as it related to the legal controversy. Indeed, 64% of the Respondents claimed that outside lawyers did not work with or provide advice to any PR executives.¹⁹¹ The interviews with the external lawyers echoed this arrangement.

This appears to be, in part, because the General Counsel Interviewees believe that their corporation's PR capabilities are as strong if not stronger than that of an outside law firm: "If [the law firm] ha[s] a particular capability we may ask them to play a more front and center role but, in general, our own PR capability is as

188. Many Lawyer Interviewees are careful about sharing information that could destroy their case, e.g., opinion on chance of winning; but when it comes to less major confidential information, they will take their chances. See, e.g., Long Interview with #55, Partner, Law Firm (Apr. 17, 2008), at 18 ("It's all a balance of the risks"); *id.* at 8.

189. See *infra* Appendix V.B.5.b. This is high given that the doctrine is very unpredictable. See generally Beardslee, *Third Party Consultants*, *supra* note 36.

190. Long Interview with #11, General Counsel, Commercial Bank (Mar. 26, 2008) at 8.

191. See *infra* Appendix V.B.6. There is no way to know whether Survey Respondents felt that their outside attorneys did not collaborate in legal PR specifically or in management of legal issues in general. Regardless, such behavior, if accurate, is detrimental to clients and to the reputation of the legal profession.

good as any lawyer's and we tend to prefer to handle things on a centralized basis."¹⁹² Although legal PR capability is considered "a bonus,"¹⁹³ the General Counsel Interviewees suggested that "[t]here is a bias against going [to an] outside [firm] unless there is a determination that value will be added."¹⁹⁴ Thus, external lawyers might be consulted "if they have the expertise," but most General Counsel Interviewees "ha[d]n't seen that yet."¹⁹⁵ Instead, many believe "a law firm is really for the aftermath, that is, if [the company] get[s] expropriated, how [will it] get compensated?"¹⁹⁶

Additionally, General Counsel Interviewees appeared skeptical that outside attorneys *would* add value even if they had the expertise. The following is a typical account:

One of the reasons why we don't rely on our outside counsel as much is because the outside lawyers tend to be very focused on winning the case in court and they are typically quite good at that, but for a major company that's subject to a lot of public criticism, winning in court, two or three years down the road isn't the most important thing, it's a necessary thing, but it's also a very important thing to be able to deal with the media and reputation issue.¹⁹⁷

Law firms, the General Counsel and PR Interviewees explained, are "are about on-offs" and "next cases," "not long term reputation" of the client.¹⁹⁸ Further, they are worried about their *own* reputations, and, therefore, might not provide objective legal PR advice.¹⁹⁹ Indeed, one General Counsel Interviewee mentioned that he had to remind a litigator, who liked to promote himself, that he represented the company and not himself.²⁰⁰ These complaints are substantiated in the literature.²⁰¹

192. Short Interview with #20, Chief Legal Officer, Investment Bank (Apr. 10, 2007).

193. Short Interview with #31, General Counsel, Pharmaceutical (Sep. 24, 2007), at 16 ("Depending on what the issue is and who the counsel is sometimes we rely on [outside counsel]—some are very savvy on PR issues and can help review your Qs and As. But outside counsel having this expertise is very secondary—it's always a bonus when you have an outside counsel who is PR savvy but I would not select solely on this criterion.").

194. Long Interview with #27, General Counsel, Commercial Bank (Feb. 26, 2008).

195. Long Interview with #22, Associate General Counsel, Investment Bank (Feb. 11, 2008) (explaining that outside lawyer expertise in this area would be especially viable for less sophisticated clients).

196. Long Interview with #39, General Counsel, Petroleum (Apr. 26, 2007), at 65.

197. Long Interview with #11, General Counsel, Commercial Bank (Mar. 26, 2008), at 9.

198. Long Interview with #22, Associate General Counsel, Investment Bank (Feb. 11, 2008); Long Interview with #47, Global Head of Corporate Communications (PR), Investment Bank (Apr. 3, 2008), at 14-15 (explaining that outside lawyers "are not particularly concerned with external perception").

199. Long Interview with #5, General Counsel, Investment Bank (Feb. 8, 2008) ("When talking about the media, you don't want someone that is worried about their own [or their law firm's] reputation.").

200. Long Interview with #27, General Counsel, Commercial Bank (Feb. 26, 2008), at 6 (providing outside lawyers with strict instructions not to speak to the media unless specifically given approval by the corporation); *see also* McMunigal, *supra* note 11 at 697-98 (explaining that outside lawyers have economic motivations for desiring publicity).

201. *See, e.g.,* Cole & Zacharias, *supra* note 1, at 1660 ("Self-promotion, though common, is a problematic justification for speaking to the press . . . raising a potential conflict between lawyer's and client's interests . . .

This is not to say that General Counsel Interviewees do not include their law firm partners in discussions related to managing legal PR. When it comes to high stakes, high profile legal controversies, many believe that “two heads are better than one.”²⁰² According to General Counsel Interviewees, senior managers “get real team oriented real fast” when faced with a major legal controversy. The outside lawyers are definitely part of the team and participate in some meetings with the external and internal PR executives.²⁰³ Outside attorneys are used as a vetting source for accuracy of press releases, SEC disclosures, response statements, and the like and to ensure all parties are on the same page.²⁰⁴ Further, many of the General Counsel Interviewees rely on their outside law firm to provide a recommendation for an outside PR firm when needed.²⁰⁵ “What better place to look for a [recommendation for a] crisis type of a media firm than a law firm that does a lot of big, big deals that are sometimes controversial, sometimes cutting edge . . . they understand exactly the type of issues that we would be confronted with.”²⁰⁶ The outside law firm is also sometimes used as a spokesperson or messenger between the corporation and the prosecutors or regulators.²⁰⁷ The law firm lawyers, as opposed to the corporation’s lawyers, can ask the U.S. Attorney for his or her opinion on potential media statements a

the lawyer will wish to show that the case is difficult and that only the lawyer could win while the client will wish to show that the client is obviously right. Moreover, the client’s best interest may lie in minimizing publicity; to the lawyer, all publicity is beneficial.”). See also Joy & McMunigal, *Role of Lawyers*, *supra* note 11, at 49 (“The defense lawyer is likely to place a very high value on minimizing risk of conviction and a relatively low value on a client’s future business interests. This is so in part because the lawyers’ professional training and competitive instincts lead the lawyer to focus almost exclusively on winning the case, and in part because the outcome of the case influences the lawyer’s reputation and future business interests.”); Semel & Sevilla, *supra* note 8, at 14; see also Cole & Zacharias, *supra* note 1, at 1660 (“Lawyers have economic incentives to make themselves appear important and to publicize their potential usefulness to others.”); Brown, *supra* note 14, at 124 (explaining that lawyers “exploit media exposure for strategic as well as personal gain”); see also FERN-BANKS, *supra* note 36, at 33 (explaining that after Delta Airlines had initiated a successful PR campaign in response to a recent crash, the lawyers’ behaved “vicious[ly]” during litigation in order to win. This incongruity created an onslaught of negative publicity about “the airline’s ‘Jekyll-Hyde’ behavior”).

202. Long Interview with #60, Chief Legal Officer, Global Manufacturing (July 23, 2007), at 18.

203. Long Interview with #11, General Counsel, Commercial Bank (Mar. 26, 2008); Short Interview with #10, Deputy General Counsel, Commercial Bank (Dec. 1, 2006); Long Interview with #27, General Counsel, Commercial Bank (Feb. 26, 2008); Short Interview with #23, General Counsel, Commercial Bank (May 3, 2007).

204. Short Interview with #29, General Counsel, Petroleum (Jun. 7, 2007) (“It’s very important to have your PR strategy in line with your litigation strategy. Otherwise it can be disaster.”).

205. See, e.g., Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008). In an effort to garner attorney-client privilege protection, outside law firms often formally hire the PR firm once the selection decision has been made.

206. Short Interview with #21, Executive Vice President and Chief Legal Officer, Commercial Bank (Apr. 13, 2007), at 23. Interestingly, although the General Counsel Interviewees appeared to believe that outside law firms are exposed to high profile issues with other clients and take their advice on which external PR consultant to hire, they still do not collaborate with them in large part on the PR strategy.

207. See, e.g., Short Interview with #38, General Counsel, Pharmaceutical (Nov. 1, 2008) (notes on file with author) (“We have in house PR people, and we use outside PR people, and often use one of our outside counsels as our main spokesperson (but that’s their only role in PR.”).

corporation might make on a sensitive subject.²⁰⁸

III. IMPLICATIONS AND ANALYSIS

The first two parts of this Article, mainly descriptive in nature, provide a rich depiction of the way the court of public opinion is viewed and managed by corporate attorneys representing large, consumer-oriented corporations. This next part, on the other hand, attempts to highlight the significance of the findings, how these findings differ from prior accounts and how they might influence the way attorneys view and approach their role in managing legal PR for corporate clients.

A. THE ROLE OF THE GENERAL COUNSEL IS AT ODDS WITH THE CONVENTIONAL VIEW

What is most surprising about the picture depicted by the PR Study is how deeply involved corporate counsel are in managing legal PR in conjunction with PR professionals. The conventional picture of the lawyers' role is much narrower. The conventional view is as follows:

*A discrete, high-profile legal issue confronts the corporation. The lawyers meet with the internal PR executives to explain the company's legal position—often after the press has called the PR executive to inquire about the issue. They share just enough information to ensure the PR executives can write a press release but they do not share information regarding legal strategies or chances of success. (And they certainly do not ask the PR executives for advice on how various legal options might be spun and the affect the messages might have on regulators, consumers, and stockholders before determining their legal strategy or making legal decisions that might have a tremendous potential for publicity). The PR executives then (sometimes with the help of external PR experts that they hire) determine the spin and make statements to the public directly or issue press releases. The lawyers concentrate on dealing with potential legal proceedings and generally abstain from commenting in the press and advise their clients to refrain from making public statements. The PR executives work to manage any damage and once the crisis is resolved, the PR experts issue press releases to enhance the corporation's image.*²⁰⁹

208. Long Interview with #60, Chief Legal Officer, Global Manufacturing (July 23, 2007), at 13-14. As mentioned, in some instances, a corporation must be careful about what message it sends to the prosecutors—sometimes this is even more important than trying to convince the public that what is being said about it is not accurate. *Id.*

209. Although working relationships vary, other scholars have described the “conventional” working relationship between lawyers and PR professionals in a way that is similar to this depiction. For example, Susanne A. Roschwalb's account of the way that attorneys worked with the PR consultant in the Anita Hill case tracks the conventional view described above. Susanne A. Roschwalb, *The Role of Public Communication in the Judicial Proceedings of Anita Hill and Clarence Thomas*, in Roschwalb & Stack, *supra* note 2, at 177 Ch. 9. The PR professional was hired late in the process and did not even meet Anita Hill until the day prior to the hearings.

In sum, the conventional picture is of separate legal and public relations functions²¹⁰ that work together only when crises arise that have a legal dimension, of lawyers focusing on the technical legal work and reporting limited information back to the PR people, and of the PR people deciding how best to spin the facts and manage the publicity.²¹¹ Any more expansive involvement of lawyers in the process is discouraged by ethics rules that limit lawyer's extrajudicial statements,²¹² and by a general attitude that lawyers are not adept at dealing with news media issues²¹³ or that it is unseemly for lawyers to try to influence public opinion in order to enhance the company's legal position.²¹⁴ Any more collaboration between lawyers and PR executives is discouraged by the existence of unclear attorney-client privilege rules²¹⁵ and the traditional view that law is a separate discipline from public relations.²¹⁶

The portrait painted by the PR Study, however, is at odds with this depiction.

Id. at 178. The lawyers considered the PR professional's role to be very limited, e.g., to field media calls. *Id.* at 178-79 (explaining that the lawyers and the PR professional "did not have time to consider a media strategy," let alone work together on one). The lawyers made decisions about the case without including the PR professional. For example, they decided that Hill should take a lie detector test and that the results would be made public during one of the Judiciary Committee's breaks. *Id.* at 180-81. The night of the vote, the lawyers only allowed Hill to make a public statement but no commentary. *Id.* at 181. "The legal team representing Anita Hill never acknowledged 'the power of the media' or understood that the real audience was outside the hearing room." *Id.* at 181. In sum, Roschwalb's description is of lawyers focusing on the legal aspects and the PR professionals dealing with the resultant PR externalities.

210. Reber, *supra* note 9, at 4 (explaining that many people believe that the rift that existed between lawyers and PR professionals back in the 1950s and 1960s still exists today).

211. Roschwalb & Stack, *supra* note 2, at xii (explaining that lawyers and PR professionals do not collaborate, have a "close working relationship," or understand the "other's expertise"); cf. *Advice for Mattel, Courtesy of Shook Hardy's Victor Schwartz*, WALL STREET J., Aug. 14, 2007 (explaining that "problems need to be looked at in three dimensions: the litigation dimension, the public-relations point of view and from a governmental regulations point of view" but that "often you've got these three departments within a company working in three different silos when something like this happens. They're not even talking to each other").

212. See, e.g., MODEL RULES R. 3.6.

213. FEARN-BANKS, *supra* note 36, at 32-33 (explaining that although "some lawyers are becoming more adept at public relations" some still "advise clients in a crisis" to "be silent" or "say as little as possible" and "think public relations is publicity, getting somebody's name in the newspaper"). Clarence Jones, *Winning the News Media, Lawyers & Lawsuits, In a Media Crisis Your Lawyer Will Be Wrong*, <http://www.winning-newsmedia.com/lawyers.htm> (last visited 3/25/2009) ("Most lawyers do not understand the news media game. This is a different arena. A lawyer's training and experience—the instincts developed in the courtroom—will often lead to disaster in the media. By following the attorney's advice, you will probably lose the media battle.").

214. FEARN-BANKS, *supra* note 36, at 32-33 ("Some lawyers truly believe it is unethical to talk to the news media."). See *supra* note 3; see also Beardslee, *Advocacy Installment II*, *supra* note 14, at Part I (highlighting some recent examples of attorneys' unethical management of legal PR).

215. See *Generally*, Beardslee, *Third Party Consultants*, *supra* note 36 (discussing the effect that unclear attorney-client privilege rules may have on communications between attorneys and external consultants including external PR executives).

216. See *supra* notes 1 and 104-109 and accompanying text. The conventional belief is that "the relationship between the legal and public relations personnel deteriorates in time of crisis, just when the client/organization most needs a unified team." Reber, *supra* note 9, at 5 (reporting survey results that show that "Air Force public affairs officers and . . . lawyers believed there was more conflict between the groups during times of crisis").

Given the 24/7 news cycle of the modern era, the corporation constantly is engaged in activity that could have legal implications, and thus is engaged in a continuous proactive process of trying to affect public opinion long before any legal problems or proceedings are on the horizon. Therefore, General Counsel Interviewees interact regularly with PR people in order to identify risks and to enhance the company's reputation, not simply after a high-profile legal issue erupts.²¹⁷ The interaction is iterative, not simply one in which lawyers provide information to the PR people who then use their expertise to spin it. The lawyers help craft the spin. The interaction is open and collaborative.²¹⁸ The lawyers openly share thoughts about potential legal strategies with internal and external PR executives and account for PR concerns when selecting legal strategies.²¹⁹ They collaborate with internal and external PR executives to help clients react to and proactively engage PR around legal issues so that the media spin positively affects the corporations' image *and* resolution of the legal controversy. Corporate attorneys are not just assisting their clients in managing legal controversies in the court of public opinion. They are leading the process (most often behind the scenes).²²⁰

Ironically, lawyers are often criticized for their inability to market themselves or their law firms.²²¹ However, these findings suggest that in order to be effective lawyers, lawyers must be effective marketers—at least when it comes to mar-

217. General Counsels try to get ahead of the news cycle. However, as discussed *supra*, sometimes the press picks something up before lawyers can do so. Although it is hard to predict what will become high-profile, the attorneys in the PR Study seem to work under the assumption that any thing could become news-worthy. *See supra* Part II.A.1. That said, the role they play and the level of interaction differs depending on the immediacy and the stakes. *See supra* note 133 and accompanying text.

218. Reber, *supra* note 9, at 37-39 (presenting research findings indicating that the “disastrous relationship between lawyers and public relations practitioners may be changing” for the better and that both lawyers and PR professionals “noted the importance of collaborative relationships,” but “the lawyer/public relations practitioner world isn’t completely rosy”).

219. As Rob Rosen points out, corporations are now often run by teams and “legal work requires obtaining input from the whole team.” Rosen, *supra* note 36, at 654. Just as “[i]t is better for the project team to work with the lawyer to draft the proposed [legal] document, rather than for the lawyer to draft the agreement and then seek input from the project team,” it is better for the project team to work together to draft the PR documents. *Id.* Even when the lawyers are drafting legal documents that may not appear to be high profile, they draft them with internal public relations executives in mind. *Id.* (“[T]he outputs of the process may have external audiences, but, from the company’s perspective, they also have important internal audiences, especially the implementation, human resources, liaison, and public relations sub-teams of the project team.”).

220. As pointed out in Part I.A, there are risks associated with attorneys’ lack of involvement in legal PR for their clients. *Cf.* Brown, *supra* note 14, at 138 (explaining that extrajudicial commentary is at times necessary and appropriate).

221. Many of the General Counsel Interviewees claimed that the marketing materials produced by law firms was not effective and, in fact, annoying. Other general counsels (not part of this study) have echoed this sentiment and even claimed that outside lawyers’ attempt at marketing can have a negative impact. *See, e.g.*, Posting of Micah Buchdahl to The Marketing Attorney Blog, In-house Counsel Seek Value from Law Firm Marketing Dollars, <http://www.marketingattorney.com/archives/000047.htm> (Mar. 22, 2008 12:25pm EST) (explaining that the 10 general counsels with which the blogger spoke did not see value in lawyers’ marketing attempts including community and pro bono endeavors).

keting their clients' legal controversies. Marketers utilize an understanding of human behavior (decision making and motivations) to predict future behavior and influence purchasing attitudes and decisions. They develop communication in many forms (including advertisements, press releases, and websites) to convince target audiences to believe something about its brand or product so that the target will purchase products from the corporation.²²² Similarly, when managing legal PR for corporate clients, lawyers utilize an understanding of human decision making behavior and motivations to predict how the target audience (a judge or jury, another party, a regulator, and the public) will react to certain statements. They develop communications for public dissemination to convince the target audience to believe something about the client so that consumers continue to purchase the product and so that it prevails in the legal controversy.²²³

Thus, the PR Study provides a distinctive account of the relationship between lawyers and the communications function in publicly-traded corporations and the role corporate attorneys are expected to play. The research paints a picture of law and PR intertwined.²²⁴ The findings also suggest an aggrandized role of the corporate attorney in managing legal PR for corporations. In sum, the findings uncover different behavior of lawyers representing large, publicly-traded corporations. As will be addressed in the second installment, the findings suggest that the ethical rules governing lawyers' role in media relations are not relevant to corporate practice. They do not adequately guide lawyers' involvement in publicity because they are based on a very narrow view of both the corporate lawyer's role and the impact of the court of public opinion.

222. Marketing has been defined in many different ways; this definition was created by the author of this article who worked as a marketer for seven years prior to becoming a lawyer. See, e.g., Allen Weiss, What is Marketing, <http://www.marketingprofs.com/2/whatismarketing.asp?part=2> (last visited Mar. 25, 2009) ("Marketing is, in fact, the analysis of customers, competitors, and a company, combining this understanding into an overall understanding of what segments exist, deciding on targeting the most profitable segments, positioning your products, and then doing what's necessary to deliver on that positioning."); Wikipedia, Marketing, <http://en.wikipedia.org/wiki/Marketing> (last visited Apr. 26, 2009) ("Marketing is defined by the American Marketing Association as the activity, set of institutions, and processes for creating, communicating, delivering, and exchanging offerings that have value for customers, clients, partners, and society at large"); *id.* ("Marketing practice tends to be seen as a creative industry, which includes advertising, distribution and selling. It is also concerned with anticipating the customers' future needs and wants, which are often discovered through market research.").

223. The reality is that lawyers practice marketing all the time. When lawyers write briefs, file cases, conduct oral arguments, and negotiate, they are doing what marketers do but for a different audience.

224. To a degree, the story painted by this research could be read more generally as another story of the decline of law as an autonomous discipline similar to the story told by law and economics scholars. NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW: FROM POSNER TO POST MODERNISM*, 172 Ch. 7 (Princeton University Press 1998) (arguing that law and economics "viewed as a body of thought that recognizes and probes the interrelations between law and economy" among other things, "is now an entrenched part of the legal landscape," and, therefore, "law is no longer an autonomous discipline").

B. CORPORATE ATTORNEYS SHOULD PROACTIVELY MANAGE LEGAL PR FOR CORPORATE CLIENTS

Preliminary results from the PR Study and other literature indicate that some corporate attorneys are already managing legal PR for corporate clients. That they are doing so, however, does not necessarily mean that they should be. To that end, as mentioned earlier, some scholars question whether lawyers should be playing the role the PR Study suggests they are playing. They contend that lawyers, for various reasons, are ineffective in managing PR around legal issues or that doing so is outside the scope of what it means to be a lawyer or creates externalities that pose risks to clients and lawyers.²²⁵ This Article contends, however, that attorneys—as opposed to other executives—*should* be in charge of managing legal PR for corporate clients for all legal controversies, not just those in litigation or those that are easily identified as media sensitive.²²⁶ Findings from the PR Study support what the Supreme Court stated in *Gentile*: “An attorney’s duties do not begin inside the courtroom door.”²²⁷ Instead, they often begin in the court of public opinion. Therefore, this Article contends that managing legal PR in a holistic, interactive manner is an essential component of competent corporate legal services.

First, findings from the PR Study support contentions made by other scholars that the court of public opinion is an important venue for various types of clients. They demonstrate that many corporate lawyers believe the way something is spun in the press can greatly impact the process and outcome of a legal

225. See *supra* notes 1-3, 11, 14, and *infra* note 213.

226. The contention that lawyers should oversee legal PR may not be novel for attorneys that represent individual criminal defendants or even high-profile corporate litigators. See, e.g., Cole & Zacharias, *supra* note 1 (describing the media tactics of both prosecution and defense attorneys in O.J. Simpson trial); *supra* notes 8-13. However, the author contends that *corporate* attorneys should proactively manage legal PR for all legal issues (not just those in litigation). Only a few other scholars have made similar contentions. See, e.g., Moses, *supra* note 9, at 1848 (concluding that attorneys should advocate in the court of public opinion but “as the aims of such advocacy become removed from a legal goal, the attorney’s responsibility should diminish”); Sudbury, *supra* note 14, at 111 (explaining that in an environmental investigation “[c]ounsel’s participation in [the media circus] can and should be one of the most critical services provided to the client”); Dore & Ramsy, *supra* note 3, at 55 (arguing that lawyers involved in products liability and toxic torts cannot just be “adept litigators” but should “take the lead in ensuring that the nature, timing, scope and content of public disclosures assists or at a minimum do not detract from the litigation effort”); Roschwalb & Stack, *supra* note 2, at xvii (addressing both lawyers representing individual and corporate clients and explaining that “the news media must become part of an attorney’s responsibilities, both on behalf of the client and the law firm.”); *id.* (“It is increasingly part of the practice of law to understand how the media work and how to communicate to the public through media’s channels.”). Some judges have shown their support for this role by awarding attorneys’ fees for PR work performed in support of the client related to the case. See, e.g., *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992) (“Where the giving of press conferences and performance of other lobbying and public relations work is directly and intimately related to the successful representation of a client, private attorneys do such work and bill their clients. Prevailing civil rights plaintiffs may do the same.”); *supra* note 25. In the second installment of this project, however, the author argues for additional constraints on the way that attorneys manage legal PR for corporate clients. See Beardslee, *Advocacy Installment II*, *supra* note 14.

227. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991).

controversy.²²⁸ They suggest that like other pretrial procedures in litigation (e.g., discovery), the court of public opinion is one step, one stage in the process of resolving legal controversies that must be addressed. More than that, however, the findings from the PR Study suggest the court of public opinion can play an even larger role in corporate controversies. At times, the court of opinion supplants a court of law especially in the corporate context.²²⁹ Like a court of law, it renders binding judgments that directly affect the parties' interests in a legal matter. It influences the perceptions of judges, juries, consumers, regulators, and stockholders. As discussed in Part I of this Article, it affects what charges are brought, what causes of action are ultimately pursued and settlement negotiations. For example, inflammatory or misleading commentary may force a party to settle rather than litigate a matter because of the potential impact on future jurors or judges and the immediate impact on business prospects. Thus, although it does not render "legal" judgments, the court of public opinion renders judgments that can be just as important and have legal effect *defacto*.²³⁰ Further, the court of public opinion is relied upon to enforce the law and mete out punishment. Tamar Frankl suggests that this ability to "take over the punishment and enforcement" from the courts actually reduces the pressure to find legal solutions and seek legal decisions.²³¹ Thus, the court of public opinion not only influences the fair administration of justice by a court of law, it is arguably an extra-legal decision-making system that itself administers a version of justice.²³²

Second, it is in the public's and clients' interests that lawyers, as opposed to non-lawyers, navigate this space. Some may purport that this contention turns lawyers into business advisors. However, according to Model Rule 2.1, attorneys "may" consider PR ramifications in rendering advice to corporate clients.²³³

228. See *supra* Part I.

229. *Id.* Cf. Dale, *supra* note 96, at 634 (using historical examples to show that the court of public opinion "acts in place of" or "as a complement or supplement to the formal law").

230. Brown, *supra* note 14, at 85 ("The public's perception of a given case may be as important, if not more important, than legal vindication before an actual judge or jury."). See *supra* Part I.D.

231. Frankel, *supra* note 33, at 367; *id.* at 380 ("The Courts of Law and the Courts of Public Opinion may complement each other to produce greater, more flexible, and more effective ways to ensure the accountability of those who control very large and powerful public corporations."). See *supra* Part I.D.

232. *Id.*, at 367 (intimating as much by asking whether it is a "flawed decision-maker"); Dale, *supra* note 96 at 647 (arguing that historically "informal courts of public opinion existed as a site of extralegal justice in antebellum South Carolina").

233. MODEL RULES R. 2.1 ("[A] lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."). Further, the decision to engage in a media campaign around a legal issue is likely, under Rule 1.2, a tactical one and thus one for which the lawyer should assume responsibility or, at least, jointly undertake with clients. MODEL RULES 1.2 cmts. 1 and 2. Joy & McMunigal, *Role of Lawyers*, *supra* note 11 (arguing that even if it is the client's decision, most clients will likely defer the decision to the lawyer); McMunigal, *supra* note 11, at 16 ("A media campaign is certainly a means that may advance the objectives of limiting damage to the client's representation, shielding the defendant from criminal punishment, or minimizing the punishment imposed on the defendant."); Semel and Sevilla, *supra* note 8, at 14 (explaining that a media campaign is a tactical choice and that there is a "potential conflict of interest when defense counsel pursues a strategy of trial by jury while the client favors a trial by press").

Indeed, it is not clear that a lawyer's job was ever supposed to be limited to legal theory and legal consequences alone. As courts have recognized, since 1950, unmixed opinions of law are hard to come by;²³⁴ legal advice includes "in addition to legal points some economic or policy or public relations aspect."²³⁵ One interviewee explained, "It's good public policy to enable a company . . . to get the best advice that lawyers and our legal team can give to a client."²³⁶ Further, if lawyers do not fill this void, non-practicing lawyers might.²³⁷ This would be detrimental: clients' needs can best be served by someone who understands *both* the legal and business aspects.²³⁸ As will be developed further in the second installment of this project, corporate attorneys are uniquely positioned to help corporations balance their immediate business and image concerns against future legal and long-term reputational and public interests.²³⁹ They understand the interrelation between law, their client's business, and the immediate legal controversy better than any lay person. Further, attorneys of today understand the risks involved in legal PR spin.²⁴⁰ Moreover, with their involvement, information can be crafted for the press in a way that benefits clients and the public: attorneys can help ensure the messages to the public are

234. *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 359 (D. Mass 1950).

235. *Id.*

236. Long Interview with #40, Partner and Chairman, Law Firm (Aug. 22, 2007), at 15-16.

237. *See generally* Tanina Rostain, *The Emergence of 'Law Consultants'*, 75 *FORDHAM L. REV.* 1397, 1399 (2006) (considering "the effects that law consulting might have on the interests and values that professional regulation is intended to protect").

238. A recent survey of 149 senior corporate executives of corporations that employ 100 or more people found that corporations want lawyers to play non-legal roles and incorporate non-legal concerns into advice. Association of Corporation Counsel, *In-House Counsel for the 21st Century* (2001), <http://www.acc.com/Surveys/CEO/> (last visited Apr. 11, 2009); Ben W. Heineman, Jr., *Imagination at Work*, 28 *AM. LAW.* 73 (2006) ("[I]nside lawyers should strive to be full members of the business team. Yes, the lawyers must, first and foremost, bring their legal skills, experience, and analysis to business problems. But they also have (or should have) the intelligence and breadth to learn and understand the products, technology, competition, and, most importantly, the public dimensions of the markets in which the business operates."). As will be discussed *infra*, this would also be detrimental because non-lawyers do not generally play a gatekeeping role.

239. *Cf.* Gregory Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, at 46 (working paper, on file with author) (2008) ("Lawyers are uniquely well-positioned to play an integral role in cultivating an ethically-sensitive organizational culture."). As will be explored more in the second installment of this project, there is some debate about whether internal or external lawyers are better situated to play a gate-keeping role. *See generally* Sung Hui Kim, *Gatekeepers Inside Out*, 21 *GEO. J. LEGAL ETHICS* 411, 429 (2007); Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 *STAN. L. REV.* 399, 435 (1985).

240. Part of a general counsel's job is detecting and managing risks. Chad R. Brown, *In-House Counsel Responsibilities in the Post-Enron Environment*, 21 *No. 5 ACCA DOCKET* 92, 93 (2003) (explaining that corporations are more often hiring in house counsel and one of the most important benefits is that these lawyers can better manage risks); Robert L. Nelson & Laura Beth Nielson, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *LAW & SOC'Y REV.* 457, 487 (2000) ("Inside counsel have not abandoned their roles as monitors of corporate legality and analysts of legal risk, but they have adopted the current idiom of corporate management as they play those roles."). Managing risks is a crucial component to managing legal PR. FEARN-BANKS, *supra* note 36, at 11 (explaining the importance of early detection "to avoid an impending crisis or at least have time prepare to address the media or other publics").

accurate,²⁴¹ understandable, and informative.²⁴² More than that, by explaining the effect that adverse publicity might have on the corporation, lawyers may be able to convince senior management not to take a legally risky (but technically legal) action.²⁴³ Thus, the lawyers' increased role in managing legal PR and increased concern with reputation serves to incorporate social norms beyond law into the company's deliberations. In this sense, concern for reputation serves an informal regulatory function.

This Article is not necessarily claiming that corporate lawyers should have an unstated obligation to conduct legal PR for their clients in all circumstances.²⁴⁴ However, at times, a lawyer may not be able to provide competent legal advice without taking into account the media ramifications. Corporate clients have

241. *Id.* at 28 (“In these days, when news is disseminated instantly, it is even more important than ever to make sure the information is accurate.”); *id.* at 29 (explaining that news reporters ask “[t]rick [q]uestions” and, therefore, it is important to be savvy); *id.* at 31 (explaining that “[r]eporters are frequently not knowledgeable about, or interested in, the issues they cover”).

242. In the second installment, the author argues that attorneys should abstain from manipulating the truth and attempt to convince corporate clients to behave socially responsibly in their public messages. See Beardslee, *Advocacy Installment II*, *supra* note 14.

243. See *supra* note 144 and accompanying text. Some scholars and lawyers believe that corporate attorneys can and do play this role. See, e.g., Peter J. Gardner, *A Role for the Business Attorney in the 21st Century: Adding Value to the Client's Enterprise in the Knowledge Economy*, 7 MARQ. INTELL. PROP. L. REV. 17, 37 (explaining that business “lawyers are called upon actively to encourage and promote measures designed to protect corporate interests” and that they often have to counsel clients about non-legal concerns even if the client's intended actions are within the bounds of the law); Tanina Rostain, *General Counsel in the Age of Compliance*, 21 GEO. J. LEGAL ETHICS 465, 473 (2008) (reporting that the ten general counsel interviewees in her study described their gatekeeping function in “very strong terms”); Brown, *supra* note 240 at 97. (reporting that 57% of an ACCA survey of 1216 members believed that “in-house counsel should play a role as important as that of the CEO, COO, or CFO in preventing financial and accounting fraud, as well as other illegal and unethical behavior”). However, others have suggested that inside and/or outside corporate attorneys do not often play this role and do not even “aspir[e] to serve as molders of corporate and public policy.” See, e.g., Kagan & Rosen, *supra* note 239, at 435; *id.* at 423-434 (arguing that the law firm “lawyer-as-influential-and-independent-counselor role is likely to be extraordinary rather than ordinary”). See *infra* note 251.

244. To date, no court, statute, or rule of professional responsibility has affirmatively established such an obligation. Watson, *supra* note 2, at 99. However, some lawyers and clients might feel that they have such an obligation. *Id.* at 78; Moses, *supra* note 9, at 1831 (“[A] growing number of lawyers and clients believe a public relations strategy can get results in certain kinds of cases. If so, the lawyers reason, they have a duty to pursue such a strategy on behalf of their clients.”). Moreover, some scholars have suggested that there might be a “theoretical legal basis” for a malpractice or negligence claim against lawyers who do not conduct legal PR on behalf of their clients. *Id.* (finding “a basis in contract and malpractice law for requiring [criminal] attorneys to tend to their client's interest in the court of public opinion as zealously as they do in courts of law”); see also Joseph W. Martini & Charles F. Willson, *Defending Your Client in the Court of Public Opinion*, 28 CHAMPION 20 (2004) (“[I]n [high-profile criminal or civil] cases, it may now be that a lawyer's obligation is not only to pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, but in the first instance, also to attempt to demonstrate in the court of public opinion that the client does not deserve to be tried.”) (internal quotations omitted). If the customary standard of care is to handle legal PR for clients under the circumstances, then there could also be an implied contract for services. *Id.* at 99-101. Although proving that handling legal PR is customary and expected is outside the scope of this article, the author's research and the literature suggest that it may be for some corporate attorneys. Watson, *supra* note 2, at 99 (suggesting that “[i]n communities that are large metropolises, such as Los Angeles, New York, Chicago or Boston, a credible argument could be made that it is customary for attorneys handling high-profile cases to make media appeals”).

complex goals with multiple stakeholders. The business goals are not detachable from the legal goals and a lawyer who advises on only the legal ramifications is not fulfilling the client's needs or his/her obligation to serve the client.²⁴⁵ The comments to Model Rule 2.1 explain that "purely technical legal advice" may be "inadequate" because "advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people are predominant."²⁴⁶ Consistent with that, the PR Study suggests that general counsels representing large, consumer-oriented, publicly traded corporations must understand and consider PR concerns to provide valuable advice. This is also true of outside lawyers.²⁴⁷ The portrait painted by the PR Study depicts *outside* lawyers' involvement in legal PR consistent with the conventional view.²⁴⁸ It suggests that outside lawyers sometimes fail to provide valuable advice to corporate clients because they do not account for the PR ramifications or the clients' diffuse goals²⁴⁹ and instead pursue the legally infused goals that support their own interests.²⁵⁰ It is important for these lawyers to adapt

245. Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 501 (1989) ("It may be that a lawyer can claim to be 'just a law lawyer.' But the Inside Counsel Movement suggests that such a lawyer does not satisfy corporate demands for legal service."); Mary C. Daly, *What the MDP Debate Can Teach Us About Law Practice in the New Millennium and the Need for Curricular Reform*, 50 J. LEGAL EDUC. 521, 525 (2000) [hereinafter Daly, *The MDP Debate*] ("[L]egal advice is rarely just that. The complexity of modern society increasingly creates a superabundance of problems in which it is virtually impossible to separate the legal component from components more traditionally associated with other disciplines, such as accounting, financial planning, psychology, and social work."); see generally Beardslee, *Third Party Consultants*, *supra* note 36. Long Interview with #42, General Counsel, Pharmaceutical (Oct. 1, 2007), at 23 ("[I]n the world there is now a convergence of discipline, not just legal and public affairs. People who are actually able to manage complicated situations have to be able to look at it from multiple perspectives. There are no more pure finance questions. There are no more pure marketing questions. There are no more pure policy questions or legal questions or HR questions. They are all multidisciplinary."); Gardner, *supra* note 243, at 42 ("An attorney who is a valuable sounding board, a repository of experience, a legal analyst, a business strategist, and talented in creative problem solving is especially valuable.").

246. MODEL RULES R. 2.1 cmt. 2. Some scholars argue that Model Rule 2.1 obligates attorneys to advise clients on non-legal, related issues especially moral considerations. See, e.g., Larry O. Natt Gantt, II, *More than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 366-368; HAZARD & HODES, *supra* note 1, at 23-41 (Aspen 3d ed. 2004 Supp.) (1985) ("The Comment to Rule 2.1 points out that in some cases the right to give more extensive advice can turn into a duty to do so."). *Id.* ("Purely technical legal advice can sometimes be inadequate, for many legal problems arise in contexts that are so charged with nonlegal considerations that no 'pure' legal choice exists."). For a more detailed discussion see Beardslee, *Third Party Consultants*, *supra* note 36, at Part I.

247. Gardner, *supra* note 243, at 42 ("In a world in which business crises played out in public are becoming more frequent, an attorney will increasingly be called on to assist business clients as preoccupied with press coverage as with eventual legal action.").

248. See Kagan & Rosen, *supra* note 239, at 412 (depicting one popular image of large firm lawyers as "primarily client-directed technicians who merely implement the plans, agreements, and defenses conceived by corporate officers and directors" and hypothesizing why law firm lawyers do not more often play the "influential-and-independent counselor role").

249. Rosen, *Inside Counsel Movement*, *supra* note 245, at 506 ("Inside counsel have become purchasing agents because elite law practitioners do not adequately and efficiently determine the client's objectives.").

250. Another reason why outside counsel may not vie for more control over legal PR could be that they "fear . . . biting the hand that feeds them" or believe that their ethical duty is "to provide the service the client

to the changing needs of corporate clients.²⁵¹

Corporate lawyers are not expected to provide legal PR advice alone. The ABA and the Supreme Court have both repeatedly stated that in today's modern, complex, regulated marketplace, providing adequate legal representation is not a solitary task. For this very reason, the work product doctrine was created²⁵² and communications between attorneys and third party consultants are sometimes protected by the attorney-client privilege.²⁵³ Thus, attorneys can and should, in certain circumstances, consult more with internal and external PR specialists when deciding which legal strategies to pursue.

To be clear, the author is not arguing that lawyers should act as spokespeople. Although some lawyers may be adept in this role, this is not true of all.²⁵⁴ Moreover, there are risks associated with lawyers acting as spokespeople.²⁵⁵ First, a lawyer's statements may be given either too much weight or too little. On the one hand, a lawyer's words may be given more weight because a lawyer is

requests." *Id.* at 485-86. Or in-house attorneys may not be clearly communicating the client's needs and objectives. *Id.* at 515-516 (explaining the role in-house lawyers play in translating, defining, and determining legal needs and objectives).

251. See Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 281 (2000) [hereinafter *Daly, Choosing Wise Men*] ("The needs of clients are increasingly difficult to pigeonhole as 'legal,' 'accounting,' 'financial planning,' 'environmental planning,' etc. And the boundaries between law and other disciplines are blurring."). Admittedly, some scholars argue that clients do not want or need such service from lawyers, especially outside lawyers and that outside lawyers servicing large corporation are not in a position to play and seek to avoid playing an "independent and influential counselor role." See, e.g., Kagan & Rosen, *supra* note 239, at 422-430). However, even these scholars do not contend that the status quo is "socially desirable or inevitable." *Id.* at 440; see also Daly, *The MDP Debate*, *supra* note 245, at 538 (admitting that the "profound changes in the marketplace for legal services, especially in large law firms, have devalued the traditional rhetoric of the lawyer's role as 'a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice,' but explaining that "[n]onetheless, . . . the complete banishment of this rhetoric and supporting ideology from the lawyer-consultant's identity [is] highly disturbing").

252. *Hickman v. Taylor*, 329 U.S. 495 (1947).

253. See generally Beardslee, *Third Party Consultants*, *supra* note 36; *United States v. Kovel*, 296 F.2d 918, 921 (2d Cir. 1961) (privileging communications between lawyer, accountant, and client). This is also why communications that mix business and law that are "made primarily for the purpose of generating legal advice" are protected. *McCaugherty v. Siffermann*, 132 F.R.D. 234, 240 (N.D. Cal. 1990); *U.S. v. United Shoe Machinery Corporation*, 89 F. Supp. 357, 359 (D.C. Mass. 1950) ("The privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.").

254. Frohlichstein, *supra* note 97, at 21.

255. Semel & Sevilla, *supra* note 8, at 10 (explaining that a "trial attorney as commentator on his or her own case" can be "embarrassing to the attorney, harmful to the client, and damaging to the legal profession" because lawyers "[l]ose sight of their core responsibilities" to their client). *But see* Watson, *supra* note 2, at 80 (suggesting that its better for the attorney, as opposed to the PR person, to be the spokesperson "because spin control may be counterproductive when it is recognized as such"). There are other risks involved, as well. For example, the lawyer who speaks publicly outside of the judicial context, such as in the media, can be sued for defamation. Additionally, having a certain public face may create business conflicts with future clients.

viewed as an “officer of the court.”²⁵⁶ On the other, hand, however, a lawyer may be seen as a “hired gun”²⁵⁷ willing to say anything to help his/her client prevail.²⁵⁸ Second, as indicated by the findings from the PR Study, playing the role of legal PR manager can augment conflict of interests that may jeopardize the lawyer’s effectiveness and loyalty to the client.²⁵⁹ Instead of focusing on the best interests of the corporate client when advocating in the court of public opinion, the lawyer may be concerned with his or her own reputation; or, if the lawyer is external, the law firm’s reputation.²⁶⁰ This tendency is likely only enhanced when the lawyer is acting as a spokesperson. Third, as will be discussed in the second installment, lawyers are under great pressure to manipulate information about legal controversies in a way that misleads—to put the right face on a corporate legal controversy in the press. This is unethical whether done as the spokesperson or behind the scenes. However, when the lawyer speaks directly to the public in a misleading manner, it not only undermines the lawyers’ credibility²⁶¹ but also the reputation of the legal profession. The point is, therefore, that legal PR services should be something corporate attorneys provide

256. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975); *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074 (1991) (“Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers’ statements are likely to be received as especially authoritative.”); MODEL CODE OF PROF’L RESPONSIBILITY pmbl. (1983). (“Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.”); *Watson*, *supra* note 2, at 85 (quoting a public relations specialist as recommending the use of attorneys as spokespeople because “though low on the public opinion pole, attorneys are considered credible sources and they can intimidate and thereby be on a more equal emotional and professional footing with reporters”) (internal citations and quotations omitted). *But see* Alberto Bernabe, *Silence is Golden, the New Illinois Rules on Attorney Extrajudicial Speech*, 33 LOY. U. OF CHI. L.J. 323, 359 (2002) (arguing that the Supreme Court in *Gentile* provided “no actual proof that the public finds lawyers more credible than other sources”).

257. *See, e.g., Abram Chayes & Antonia H. Chayes, Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 294 (1985).

258. Bruce A. Green, *Thoughts About Corporate Lawyers After Reading the Cigarette Papers: Has the “Wise Counselor” Given Way to the “Hired Gun”?*, 51 DEPAUL L. REV. 407, 407-408 (2001) (explaining that recently corporate lawyers, not just courtroom advocates, are viewed as functioning as “hired guns”); Kagan & Rosen, *supra* note 239, at 419 (“The attorney acts as a cynical manipulator of the tools made available by a complex legal system. He takes advantage of the forms and the letter of the law rather than the spirit or intent, to maximize his client’s narrowly defined and essentially asocial goals.”); *Watson*, *supra* note 2, at 80 (reporting findings from *National Law Journal* study that more than 30% of Respondents believed lawyers were dishonest).

259. *Cf. Margulies, supra* note 33, at 51 (explaining that conflicts of interests exist in crossover forums such as the media and can impede the effectiveness of cross over advocacy); MODEL RULES R. 1.7(a)(2) (defining conflicts of interest “materially limit[ing]” the lawyer’s ability to represent a client).

260. *See supra* Part II.C; *see also Maute, supra* note 3, at 1758 (explaining that “[l]awyers’ self-interest in garnering favorable publicity for themselves may color their judgment as to whether comments serve the clients’ interests more than their own” and arguing that “[a] personal default rule of remaining silent should trigger a degree of conscious self-reflection before the lawyer begins to speak”).

261. *Margulies, supra* note 33, at 11 (“Crossover advocacy that uncritically pitches stories of innocence or detainee abuse can undermine the credibility of the advocate.”).

to corporate clients but *behind the scenes*.²⁶²

The legal profession is, as Professor Lawrence Friedman describes, a “nimble” one.²⁶³ Lawyers have risen to the changing marketplace and redefined what services lawyers provide many times.²⁶⁴ By managing legal PR outside of the limelight, lawyers like most of the general counsels in the PR Study, are doing just that. However, outside corporate attorneys should be doing it too—and more avidly than the preliminary results from the PR Study indicate they are now.²⁶⁵ In sum, it is time to do that which Supreme Court urged in *Gentile*: to “view the lawyer’s role more broadly.”²⁶⁶

C. OTHER POSSIBLE IMPLICATIONS

Findings from the PR Study have other possible implications that for various reasons cannot be fully developed in this Article. First, the findings may affect how lawyers market their skills and services to corporate clients. The ability to manage legal PR for corporate clients could be leveraged differently than it is today by both outside and inside counsel.

262. That being said, these services need not necessarily be considered *legal* as opposed to *business* services. If they are, it will make determining when the attorney-client privilege and work product doctrine apply much simpler. Dore & Ramsy, *supra* note 3, at 55 (“If courts ultimately view PR concerns as a legitimate and essential aspect of the provision of legal services, communications by and with pr professionals will be afforded a/c privilege and work product protections.”). If they are not, it merely means that attorneys have to be careful when sharing confidential information with PR consultants. For further discussion, see Beardslee, *Third Party Consultants*, *supra* note 36.

263. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 391-411, 439-66, 606-54 (2d ed. 1985).

264. Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession, in LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL SYSTEM* 1 (Robert L. Nelson et al. eds., 1992) (“[A] hallmark of American lawyers has been their protean entrepreneurial spirit . . . the zeal with which they have developed new organizational forms for capturing particular segments of the market for legal services.”); cf. Daly, *Choosing Wise Men*, *supra* note 251, at 282 (“The naysayers predicted doom when the office lawyer replaced the trial lawyer as the icon of the legal profession, when general counsel assumed positions of power and prestige within corporate organizations and in-house legal departments expanded . . . Each time, the naysayers were proved wrong.”). See Sisk & Abbate, *supra* note 239, at 8 (providing examples from “four fields of practice—family law, corporate law, environmental law, and elder law—to illustrate the general and wide-reaching evolution of professional services provided by lawyers today”).

265. This author is not advocating that outside law firms offer PR services as an ancillary business. First, most of the General Counsel Interviewees emphatically stated that they would not be interested in such services. See, e.g., Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 35 (“If a law firm has PR capability internally it would be a black mark like the law firm is trying to make double profits off of me. ‘You must not think your legal services are all that great, so you need to make money someplace else.’”). Second, this service should not necessarily be considered “ancillary” or separate from the regular services attorneys provide to clients. Although more research would need to be done to determine if general counsels would accept more help from outside attorneys in this area, the PR Study suggests that outside attorneys are currently missing a business opportunity. See, e.g., Long Interview with #27, General Counsel, Commercial Bank (Feb. 26, 2008), (“If I were a law firm, one of the ways I would market my background is among other things, I’d be good at helping you navigate the PR side, the interface of PR and legal because you can’t just leave it up to the PR people.”).

266. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991).

Second, the findings that suggest that lawyers share confidential information with internal and external consultants have important implications for how the profession thinks about the corporate attorney-client privilege. The primary justifications for the corporate attorney-client privilege are that it increases the flow of information and candor between the lawyer and client and thereby increases the chance that the lawyer will be able to lead the client to compliance.²⁶⁷ Although the privilege either does not apply or is considered waived when communications are shared with third parties, there are a couple exceptions that enable protection. These exceptions were originally created because, in modern society, attorneys sometimes need help from third parties to provide competent, fully informed legal advice.²⁶⁸ Critics of extending the corporate attorney-client privilege to communications between clients, attorneys and third party consultants claim that there is no need for the attorney-client privilege in this situation because lawyers will share information and consult with third party specialists out of necessity and, therefore, any benefit from the privilege will flow regardless.²⁶⁹ Supporters claim that without the privilege in these circumstances, lawyers will fail to get the necessary input from external consultants and fail to provide competent, holistic legal advice.²⁷⁰ The PR Study

267. *NXIVM Corp. v. O'Hara*, 241 F.R.D. 109, 125 (N.D.N.Y. 2007) ("The free flow of information and the twin tributary of advice are the hallmarks of the privilege. For all of this to occur, there must be a zone of safety for each to participate without apprehension that such sensitive information and advice would be shared with others without consent."); *Hercules v. Exxon*, 434 F. Supp. 136, 144 (D. Del. 1977) ("In a society as complicated in structure as ours and governed by laws as complex and detailed as those imposed upon us, expert legal advice is essential. To the furnishing of such advice the fullest freedom and honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity."); Tanina Rostain, *The Emergence of Law Consultants*, 75 *FORDHAM L. REV.* 1397, 1426 (2008) ("The importance of the attorney-client privilege is premised on its capacity to further social values . . . not only . . . to assist counsel in formulating legal advice . . . [but] to create a zone of privacy . . . to convince corporate clients to abide by the law.").

268. *U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1961) (holding attorney-client privilege may apply to employee/agent of lawyer under some circumstances); see also Beardslee, *Third Party Consultants*, *supra* note 36 at 21.

269. The rationale is that if clients are willing to divulge information to third parties, they would likely divulge it to their attorneys even if no privilege applies. Thus, a primary justification for the privilege—to promote the free flow of information between client and attorney—disappears. See *Westinghouse II*, 951 F.2d 1414, 1424 (3d Cir. 1991) (making similar point); cf. *Murphy*, *supra* note 3, at 586-87 ("The privilege protects the free exchange of information that otherwise would not take place in its absence. In order for the attorneys to provide the best legal advice, all of the facts, both favorable and unfavorable, must be made known to him or her. This is not true of a public relations consultant. A client need not divulge incriminating information in order to receive effective media advice."). Indeed these are the same arguments that critics of the corporate attorney privilege make generally. See, e.g., Vincent Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 *ST. JOHN'S L. REV.* 191, 222-226 (1989) (explaining this view and outlining the debate generally); Paul R. Rice, *The Corporate Attorney-Client Privilege, Loss of Predictability Does Not Justify Crying Wolfenbarger*, 55 *BUS. LAW.* 735, 739-42 (2000); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 177-205 (1988) (providing this reason along with other reasons why the privilege should not be applied to corporations).

270. Edward J. Imwinkelried, *The Applicability of the Attorney-Client Privilege to Non-Testifying Experts: Reestablishing the Boundaries Between the Attorney-Client Privilege and the Work Product Protection*, 68 *WASH. U. L. Q.* 19, 27 (1990) (explaining that denying all protection to experts used for pretrial preparation

findings suggest that neither camp may be correct. Attorney Interviewees claim that the complete absence of privilege protection would discourage lawyers from seeking advice from third party consultants but the possibility of coverage may be enough.²⁷¹ Because attorneys work in an actuarial universe that predicts risks, a certain level of possibility (that is much lower than certainty) may be sufficient to enable open consultation between attorneys, clients and third party consultants when necessary.²⁷² Therefore, although predictability is valuable, it may be that absolute predictability is not necessary. As long as there is a respectable chance that the communications with the third party consultants will be privileged and the attorney understands the standards by which the communication will be judged, open communication may occur when necessary.²⁷³

Third, findings from the PR Study suggest that lawyers are crafting communications to non-lawyers' legal consciousness and that this affects the way corporate executives and other lay-people experience and define the law.²⁷⁴ Thus, there are many other possible implications of these findings that will likely yield more scholarship.

“deters thorough pretrial investigation”); Kim J. Gruetzmacher, Comment, *Privileged Communications with Accountants: The Demise of United States v. Kovel*, 86 MARQ. L. REV. 977, 977 (2003) (“No competent attorney would engage in confidential communications with a . . . representative of a client unless he were certain the privilege would apply.”). The same point is often made by supporters of the corporate attorney-client privilege in general. John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 465 (1982) (explaining that “even if” “the modern corporation has no choice but to communicate with attorneys, a corporate privilege still might serve to make those communications that do occur more candid and truthful, as well as to prevent corporate employees from simply refraining from supplying information”) (internal quotations omitted); Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 NOTRE DAME L. REV. 1721, 1755 (2004) (“[M]ost lawyers and corporate officials believe that the privilege does in fact promote candor in attorney client communications especially as to potential litigation another sensitive matters.”). Interviewees expressed a similar sentiment believing that the privilege enables them to provide valuable advice. See, e.g., Long Interview with #42, General Counsel, Pharmaceutical (Oct. 1, 2007), at 21 (“I am a big believer in the privilege. You know when you read some of these opinions on the privilege and they say the privilege prevents people from finding out what’s really going on inside the world. I think they have it completely backwards. The privilege is what allows my clients to come to me in the worst times and tell me honestly, that they have done something that they are worried about.”). The General Counsel of Johnson and Johnson is reported as stating that “without the privilege, you discourage the necessary level of trust and open communication between business people and lawyers that is necessary for good decision making.” The Metropolitan Corporate Counsel, Global Corporations—Global Citizens Johnson & Johnson—True To Its Credo (2008) <http://www.metrocorp counsel.com/current.php?artType=view&artMonth=January&artYear=2008&EntryNo=6130>.

271. See Beardslee, *Third Party Consultants*, *supra* note 36 at 41.

272. See Beardslee, *Third Party Consultants*, *supra* note 36 at 81.

273. For this reason, among others, the author concludes in a separate article that application of the corporate attorney-client privilege to communications between lawyers, clients, and third party consultants should be assessed by a multi-factored nexus test in lieu of a bright line rule. *Id.* at Part IV.A. (recommending that the attorney-client privilege protect exchanges between lawyers, clients, and third-party consultants when there is a strong nexus between the consultant’s service and the legal advice provided to the client and other factors are taken into account).

274. The author intends to explore this finding in a future paper. Other scholars have addressed this subject, as well. See, e.g., Patricia Ewick & Susan Silbey, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (Chicago, University of Chicago Press, 1988); Rhode, *supra* note 33.

IV. SOME PRELIMINARY RECOMMENDATIONS

The second installment of this project addresses the normative implications associated with corporate lawyers' enlarged role in the court of public opinion and makes more detailed recommendations on the *ethical* management of legal PR. However, this first installment is concerned with corporate lawyers' *effective* management of legal PR. The following section, therefore, identifies a few steps that corporations and the profession can and should take to support and promote corporate lawyers' broadened role in managing legal PR.

A. SAFEGUARD A HEALTHY TENSION BETWEEN LAWYERS AND PR EXECUTIVES

As indicated earlier, Lawyer and PR Executive Interviewees alike value the "healthy tension" that exists between them. This tension raises awareness among the lawyers that they must be attuned to the ordinary moral judgments reflected in public opinion in order to avoid becoming confined to a technocratic legal worldview that is divorced from grounded human concerns. In turn, it attunes the PR executives to the need to be sensitive to the law's constraints in the court of public opinion. This tension, therefore, serves as a check against an imbalance. It can lead to better management of legal controversies in the court of public opinion.

However, preliminary findings from the PR Study indicate that the lead internal communication specialists are not at the same reporting level as General Counsels and that some internal communication specialists may be perceived as being inferior corporate managers.²⁷⁵ This is further supported by the findings that the General Counsel Interviewees sometimes view themselves as the final decision-makers with respect not just to the legality of press releases but the legal PR strategy and whether an external PR executive should be hired.²⁷⁶ It is possible, therefore, that the tension that so many General Counsel Interviewees

275. In addition to the survey data on reporting structure, the findings from the interviews suggest that some internal PR people may be perceived as second-class citizens. Long Interview with #42, General Counsel, Pharmaceutical (Oct. 1, 2007), at 11-12 ("Sometimes [the PR department is] low down inside the company and that's a big problem that public affairs professionals fight against because they always say they have 'public affairs professionals' that we deserve to see at the table, and a lot of companies don't agree with that, they don't provide that kind of access to senior management for public affairs."). Even one of the PR Interviewees admitted this perception exists. He explained that "the general staff of people in public relations is pretty low . . . we come across people at agencies and in-house and it is rare indeed that you meet someone you think wow, that stuff was really fantastic." Long Interview with #47, Global Head of Corporate Communications (PR), Investment Bank (Apr. 3, 2008), at 16; *see also* Reber, *supra* note 9, at 4 (describing anecdotal evidence that although one group might be viewed as "inept or ill-intentioned" and the other "more like the cavalry riding to the rescue", [t]he truth is likely somewhere in between").

276. *See supra* Part II.A.4. Jones, *supra* note 213 ("Most CEOs have a lot more experience with lawyers than with reporters . . . that past experience can lead the CEO to quickly accept the lawyer's advice, and dismiss the counsel of the public relations expert.").

referred to as “healthy” may not actually be that healthy.

Thus, a corporation might consider revising its organizational structure to foster an equivalent relationship between the general counsel and the Director of PR and provide the Director of PR a seat at the management table.²⁷⁷ For some companies, this may mean having the Director of PR report to the same person as the general counsel. For others, it may simply mean restructuring so that the PR department does not report to the legal department. Even the one General Counsel Interviewee that oversaw the PR department claimed that it was likely important in most situations to separate the functions. “I think the separation is probably optimal, because I think they both have important voices that ought to be heard because the decision in the end most likely is a business decision that has elements of the public affairs advice and elements in the legal advice.”²⁷⁸

These structural changes will help ensure that there truly does exist a healthy tension between the legal and PR departments—one in which the lawyer’s and the PR executive’s views are heard equally. Further, it will signal the importance of PR to other members of the corporation. It may also help address a PR department’s fear of being outsourced. Lastly, such a change may decrease some of the costs associated with litigation and reputational damage. If that is the case, it may outweigh the other business considerations that drive the current organizational structure.²⁷⁹

B. RAISE AWARENESS OF THE CORPORATE LAWYERS’ BROADENED ROLE

The second installment of this project recommends revising the *Model Rules of Professional Conduct* and educating law students about ethical accountability in the court of public opinion. In this installment, however, the focus is on the expanding and essential role of corporate attorneys in the court of public opinion. Therefore, the following recommendations are geared toward raising awareness of the importance of managing legal PR for corporate clients. Although findings from the PR Study indicate that many General Counsels are already well aware of the need to do this, it appears that outside counsel may not be as clued-in. The PR Study indicates that general counsels of large, public corporations believe that

277. It goes without saying that it is important that corporations ensure that the internal PR department includes senior executives that have experience dealing with high profile legal controversies.

278. Long Interview with #42, General Counsel, Pharmaceutical (Oct. 1, 2007), at 11. This general counsel felt he was unique because he was a lawyer and had previously acted as a director of PR in a non-legal capacity. Indeed, most of the interviewees felt strongly that the PR department should not report to the legal department.

279. Costs associated with trying a case in the court of public opinion can be very high. See *supra* note 34. Costs associated with trying a case in a court of law can also be very high. See, e.g., JOHN B. HENRY, METROPOLITAN CORPORATE COUNSEL FORTUNE 500: THE TOTAL COST OF LITIGATION ESTIMATED AT ONE-THIRD PROFITS (Feb. 2008) (reporting findings “based on litigation data compiled by eLawForum over the last eight years” and contending that corporations “spend an average of three years to resolve litigation,” and that there are incentives to delay and delay increases costs). Working together, the PR Director and General Counsel may be better able to avoid some of those costs.

outside counsel do not understand the corporations' goals or needs and, therefore, that they pursue a misinterpretation of clients' goals i.e., winning in a court of law.²⁸⁰ But, as discussed, the legal goals are inextricably tied to the corporations' other goals. Just as a lawyer must understand the client's tax position to provide advice on what corporate form to assume, lawyers must engage the PR issues to serve clients effectively. The profession needs to embrace this point.²⁸¹ Raising awareness of it promotes the desired behavior. Moreover, raising awareness that lawyers can and should proactively manage legal PR for corporate clients helps legitimize this new role.²⁸² Therefore, this Article makes two preliminary recommendations.

First, the model rules should be revised to incorporate and emphasize the importance of legal PR concerns. Specifically, Model Rule 2.1 should be amended to include *reputation* as one of the factors lawyers can take into account along with "moral, economic, social and political factors." According to other scholars, Model Rule 2.1 "active[ly] encourag[es] lawyers to provide more broadly based and richer professional advice."²⁸³ Similarly, the comments to Rule 5.7 should specifically name PR services as a potential law-related service.²⁸⁴ Model Rule 5.7 recognizes the expansion in services offered by today's lawyers. Just as environmental consulting is highlighted as a "law-related service" so should legal PR.²⁸⁵ These tweaks are baby steps but they communicate that lawyers are obligated to follow the model rules when conducting legal PR for clients. They close one of the loops between the rules and the reality of corporate practice²⁸⁶ and they work to nurture norms.

Second, law schools should educate law students about the needs of corporate

280. Interestingly, none of the General Counsel Interviewees mentioned trying to educate the outside lawyers' on the need for increased involvement in managing legal PR for their corporate client. Instead, they appeared to have somewhat of a defeatist attitude about the outside lawyers' role. See *supra* Part II.C.

281. To a certain extent, then, this contention sounds like those made by other scholars that urge lawyers to get involved in PR aspects. See *supra* note 104-109. The difference is one of degree. The PR Study shows that both inside and outside corporate attorneys are involved in legal PR. This article, however, urges increased awareness of the new, *enhanced* role that many corporate attorneys can and should play.

282. It may also help garner attorney-client privilege protection in the appropriate circumstances. See generally Beardslee, *Third Party Consultants*, *supra* note 36; see also Sisk & Abbate, *supra* note 239, at 28 ("By focusing upon the 'law-related' nature of these additional services and their integration within a law practice, the applicability of professional responsibilities and the appropriate protection of the attorney-client privilege are brought into sharper relief.").

283. Sisk & Abbate, *supra* note 239, at 45 (citing HAZARD & HODES, *supra* note 1, at § 23.4, at 23-6).

284. Comment 9 to Rule 5.7 currently lists the following as law-related services: "providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting." MODEL RULES R. 5.7 cmt. 9; cf. Daly, *The MDP Debate*, *supra* note 245, at 525 (reporting in 2000 that only five states had adopted it); *contra* Sisk & Abbate, *supra* note 239 (discussing the importance of Model Rule 5.7 and reporting in 2008 that it has been "adopted by most states").

285. MODEL RULES R. 5.7 cmt. 9.

286. For further analysis of the deficiencies of the ethics rules that address advocacy in the court of public opinion, see Beardslee, *Advocacy Installment II*, *supra* note 14 at Part II.

clients in today's 24/7 news marketplace and the importance of managing legal PR for clients and the ethical issues (and risks) around doing so.²⁸⁷ They might also consider teaching some of the necessary skills to adeptly handle legal PR.²⁸⁸

CONCLUSION

Little attention has been paid to the role that corporate attorneys play in managing legal PR for corporate clients. Most scholarship focuses on the criminal defense lawyer's advocacy in the court of public opinion and/or the lawyer as a spokesperson. Preliminary results from the PR Study indicate, however, that some corporate lawyers are avidly advocating in the court of public opinion not only as spokespeople but behind-the-scenes. As opposed to the conventional view, the picture painted by the PR Study indicates that legal and public relations functions are not separate. General Counsels included in the PR Study do not only work with PR executives when a legal crisis arises and they do not act as mere legal technicians. In today's 24/7 media climate, they interact and collaborate with PR executives daily and they are integral to determining the PR strategy and crafting the spin around legal controversies. This is because the court of public opinion is an alternate court that works in tandem and sometimes apart from a court of law.

The main point of this first installment is that managing legal PR for corporate clients is a legitimate and fundamental component of corporate legal services and that corporations and the legal profession should find ways to support corporate attorneys' broadened role in the court of public opinion. However, as will be addressed in the second installment of this project, with this new role come risks. Because there is currently little oversight over attorneys' management of legal PR behind the scenes, attorneys may succumb to the pressure to aid their clients in legal PR campaigns that mislead the public about the law and facts around legal controversies. Although this first installment raises awareness of the departure from the conventional view of the lawyers' role in PR and the importance of managing legal PR for corporate clients, the next installment seeks to define how far corporate attorneys should go in advocating for their corporate clients in the court of public opinion and to encourage lawyers to do so in a way that is socially desirable.

287. Roschwalb & Stack, *supra* note 2, at xvi (arguing that PR specialists and lawyers need to learn to work more collaboratively and that courses in law school can communicate legal restraints and appropriate codes of conduct).

288. See Rhode, *supra* note 33, at 164 (contending that one "strategy is to make lawyers and legal academics more sophisticated participants in media discussions").

V. APPENDICES

A. RESEARCH METHODOLOGY

This analysis is based on an ongoing study of general counsels, PR executives, and external law firm partners that work with S&P 500 corporations.²⁸⁹ The primary goal of the study was to explore the perspectives of general counsels servicing large, publicly traded corporations regarding the way the court of public opinion affects corporate legal controversies and is handled today.²⁹⁰ The study focused on general counsels because they establish the legal strategies and determine whether an internal or external PR agent should be consulted regarding a legal matter.²⁹¹ The general counsel interviews were complemented with interviews of PR executives and outside lawyers because they also play a role in managing corporate legal PR.

The study consists of: 1) detailed interviews with 39 general counsels of S&P 500 corporations,²⁹² 10 law firm partners of law firms servicing those corporations, and 8 public relations professionals,²⁹³ and 2) a survey sent to general counsels of all S&P 500 companies²⁹⁴ which elicited a 28% response rate.

289. The first stage of interviews and the survey were conducted as part of a larger research project funded by Harvard Law School's Center for Lawyers and Professional Services, a subsidiary of Harvard's Program on the Legal Profession. At that time, the author was the Associate Research Director of the Center and the lead researcher on the project. The Harvard Law School faculty directors of the project were John Coates, David Wilkins, and Ashish Nanda. Robert L. Nelson, Director of the American Bar Foundation was also a key collaborator.

290. Admittedly, most of this research stems from conversations with the corporate bar and, therefore, is subjective. However, as Professor Lonnie Brown pointed out in the compelled waiver context, whether beliefs are "real or imagined, [those] belief[s] alone could prove to be . . . self-fulfilling prophec[ies]." Lonnie T. Brown, *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Paradox*, 34 HOFSTRA L. REV. 897, 946 (2006).

291. This is not to say that there are not exceptions. There are likely times that an outside law firm recommends using external PR consultants. Yet, even in these situations, the general counsels (not the outside lawyers) make the ultimate call. Moreover, as discussed *infra*, this study's findings suggest that the outside lawyers are less involved with the external PR firm than are the general counsels. Thus, the major and constant constituent is the general counsels.

292. The title general counsel is used to refer to both chief legal officers, general counsels, and deputy general counsel. All but eight of the General Counsel Interviewees reported directly to the CEO. Of those that did not report to the CEO, two reported to the Chief Legal Officer, two reported to the Chief Administrative Officer, one reported to the Chief Financial Officer, and the other two reported to people who held titles that were not generic. All but three of the General Counsel Interviewees were the highest ranking legal officer at the company. It was appropriate in these circumstances to talk with these individuals as opposed to the general counsel given that the majority of outside spending was on litigation and these general counsels ran that department.

293. Thirty-one of the general counsel interviews were conducted by the author (sometimes with a colleague), while eight were conducted by Sean Williams, then Harvard Law School Research Fellow, now Assistant Professor of Law at University of Texas Law School. The interviews with law firm partners and public relations executives were conducted only by the author.

294. The author tabulated the data with the help of Young-Kyu Kim, a research fellow at Harvard Law School's Program on the Legal Profession.

Altogether, the combined sample includes 125 general counsels,²⁹⁵ eight external and internal PR executives, and ten law firm partners. The charts in section B of this part depict the characteristics of the respondents and corporations in the sample.

These samples were neither random nor meant to be statistically representative. The target of inference was publicly traded corporations in financial services and manufacturing industries.²⁹⁶ The study focused on three sectors: commercial and investment banks, petroleum companies, and pharmaceutical companies. Each has high demand for legal services and received significant media attention around legal issues in the past three years.²⁹⁷ Each sector offers substantively different consumer products and services, and therefore inferences about the court of public opinion may be able to be drawn about industries that share similar features.²⁹⁸ General Counsels were interviewed from 52% of the financial services companies,²⁹⁹ 75% of the petroleum companies, and 41% of the pharmaceutical companies in the 2006 S&P 500.³⁰⁰

Although the General Counsel Interviewees had diverse professional backgrounds in career trajectories, experience, and responsibilities, the interviews uncovered notable similarities in the way General Counsels think about and negotiate the space between PR and legal. Although this is not as true for the Outside Lawyer interviews, these interviews supported the General Counsel's characterization of the process. Further, how the General Counsel Interviewees described the role of outside lawyers comported with how Outside Lawyer Interviewees described their role.

Admittedly, there is likely some sample bias. A randomization analyses of the non-Respondents to the interviews and the survey was conducted. It showed that active participant corporations had larger legal departments than non-Respondents. Thus, the hypothesis that active participants companies have more

295. Although 139 general counsels filled out the survey, fourteen of them also participated in qualitative interviews. (One other general counsel also participated in the initial interviews but due to time constraints, this individual was not asked questions about PR topics and therefore, this interviewee is not counted in the overlaps).

296. Findings from this research also might shed light on publicly traded corporations with diverse, large demand for legal services for other industries including insurers and other types of manufacturers—two industries known for their use of mass media to overturn or prevent high jury verdicts. See LoPucki & Weyrauch, *supra* note 80 (propounding a legal theory that explains “how superior lawyers can determine outcomes, why local legal cultures exist, how resources confer advantages, and one of the means by which law evolves”).

297. For example, the banks have dealt with the sub-prime mortgage scandal. Pharmaceutical companies, like Merck, have dealt with drug recalls (e.g., Vioxx) and negative publicity around genetic pharmaceuticals. The petroleum companies have had to deal with publicity around expropriation and the escalating cost of gas.

298. To round out the sample, in the future, the author would also like to interview general counsels of retail manufacturing corporations and/or consumer goods.

299. General counsels were interviewed from 100% of the investment banks and 40.5% of the commercial banks in the 2006 S&P 500.

300. See chart in Appendix B.

revenue, more operating expenses, and more demand for legal service than non-active participants cannot be rejected. Additionally, interviewees were more likely to be working at companies that were mentioned in legal cases and articles than non-respondents.³⁰¹ Furthermore, one could argue that all of the interviewees have an invested interest in painting a sunny-side up picture—especially with respect to the corporate attorney-client privilege.³⁰² Indeed, this may be why the study did not uncover any examples of lawyer misconduct in the court of public opinion—when there have been many examples recently.³⁰³

1. QUALITATIVE INTERVIEWS

Interviews were conducted in two stages. Stage one consisted of short interviews at the end of longer interviews on a separate topic.³⁰⁴ Stage two consisted of longer interviews that concentrated on the intersection of law and PR.

a. Stage One: Interview Methodology

To elicit participation, all the General Counsels in the selected sectors were contacted by phone and/or by email on average three to four times. The General Counsels were told that the topic for the interview was the way in which general counsels purchase, assess, and monitor legal services. They were also told that they and their companies would remain anonymous.³⁰⁵ They were not informed that questions would be asked about the intersection of public relations and legal controversies. However, permission was requested to proceed with questions on this topic during the interview.

301. See Appendix Part V.B.7. That said, during the interviews the interviewers tried not to use the term “the court of public opinion” because arguably, answers to the interview and survey questions could have been biased by characterizing the legal PR as occurring in the court of public opinion.

302. One colleague accused the author of drinking the corporate Kool-Aid. To his credit, the author agrees that similar research could/should be done with attorneys of individual clients. Moreover, it would likely also be informative to talk to other decision-makers (e.g., corporate executives within the same firms) whose views might counteract the likely bias of the corporate lawyer’s perspective.

303. Beardslee, *Advocacy Installment II*, *supra* note 14 Part I (discussing examples of lawyer misconduct in the court of public opinion).

304. The purpose of Harvard Law School’s larger research project was to gain a better understanding of how general counsels within this target purchase, monitor, and assess legal services.

305. In these initial communications, we explained: 1) we are academics involved with Harvard Law School’s Center on Lawyers and the Professional Services Industry; 2) the primary objective of the center is to conduct empirical research on questions facing the legal industry and to foster closer ties between academics and professionals in the field; 3) we are conducting interviews with General Counsels from a select list of firms in the industry on considerations that go into, and best practices related to, the purchase of legal services; 4) we have conducted a certain number of interviews to date; and, 5) the interview length and format, and confidentiality. Additionally, we offered to share our research findings with the General Counsels in return for participation and we explained that the findings from the interviews would be used to develop one or more scholarly articles or papers.

From July 2006 to November 2007, thirty-eight interviews were conducted with General Counsels of S&P 500 companies across the three selected sectors.³⁰⁶ Fifteen of the interviews were conducted in person and the remaining by phone. No one participated in the interviews other than the respondents³⁰⁷ and one or two interviewers.³⁰⁸ The interviews averaged approximately 76 minutes in length, but the time spent on the topic of PR was between 5 and 30 minutes. The discrete goal of the PR part of these interviews was to gain a general understanding of how general counsels a) currently work with internal and external public relations executives and outside law firms on matters that were identified as potentially high profile and b) think about the attorney-client privilege in this context. This understanding was then used to develop a more comprehensive interview template for the more focused, longer interviews.

All but five of the interviews were recorded and transcribed.³⁰⁹ After each session, transcriptions were reviewed (or notes where transcriptions were not available). To ensure anonymity, a number was assigned to each interviewee and a labeling system developed revealing the title of the interviewee, the industry within which the interviewee works, and the date of the interview.³¹⁰

The interview approach was fairly systematic. Each interviewee was asked the same questions but the order and flow varied somewhat depending on the answers to the questions. Some answers covered or led to some of the outstanding questions. That said, each interview generally began with closed-ended questions around employment background, title, department size and legal spending. After questions concerning the larger research topic were asked, the open-ended questions around PR were introduced.³¹¹

306. Although some of the In-house Interviewees were Chief Legal Officers and two were Deputy General Counsels, this Article refers to all of the in-house lawyer Respondents as General Counsels.

307. In three instances, we interviewed more than one Respondent at a time. In one instance, two Respondents were interviewed because they were co-General Counsels (Short Interview with #1, General Counsel, Investment Bank (Oct. 3, 2006)). In another instance, we interviewed the General Counsel and the Chief Operating Officer of the Legal Department at the same time (Short Interview with #7, General Counsel, Investment Bank (Nov. 2, 2006)).

308. In addition to me, the researchers who conducted interviews were John Coates, Ashish Nanda, David Wilkins, or Sean Williams. During interviews in which there were two interviewers, one interviewer took the lead interviewing role.

309. Recordings were downloaded to our assistant's computer and emailed to Techsynergy in India for transcription. For the five interviews in which the interviewees would not allow a recording, the interviewer typed notes during the interview.

310. For the most part, the numbers reflect the sequential order in which the interview was conducted. Also, as is discussed in the next section, some General Counsel Interviewees participated in both a short and a long interview. These interviewees kept the same identifying number. Therefore, the word "long" or "short" is used to identify which interview is being sourced. For example, the following citation format reveals that the long interview was the source for the citation; Long Interview with #2, General Counsel, Investment Bank (Feb. 4, 2008), at 4.

311. In stage one, the open ended questions were much more limited and focused on attorney-client privilege issues. This approach is similar to what has been called a "hybrid technique" and is considered to be "an improvement on past empirical studies" as it elicits quantifiable and qualitative data and is "more receptive to

b. Stage Two: Interview Methodology

Stage two consisted of much longer, interviews, averaging 55 minutes in length, that were focused on the topic of this project. Those general counsels from stage one who said they would be willing to speak further were targeted. Ultimately, follow-up interviews were conducted with twelve of the original interviewees.³¹² One general counsel working at a pharmaceutical company in the S&P 500 that was not interviewed for the larger project was also interviewed at this stage. A “snowball sample” was used to reach law firm partners and PR executives.³¹³ The General Counsels referred the researchers to law firm partners and internal and external public relations executives with whom the General Counsels worked.

Between July 2007 and April 2008, thirteen long interviews were conducted with General Counsels of S&P 500 companies across the three selected sectors.³¹⁴ Additionally, ten interviews were conducted with law firm partners and eight with PR executives. All of the interviews were conducted by phone.³¹⁵

greater depth and breadth of responses.” Jackson & Pan, *supra* note 16 (employing this technique). Because preparation was not necessary for the interview, the PR questions were not provided to the interviewees before or during the interview.

312. One general counsel (#20) connected the author with a deputy GC in the department in lieu of being interviewed directly. Long Interview with #43, Chief Counsel for Risk Management, Investment Bank (Feb. 25, 2008). General Counsel Interviewee #39 participated in a long interview directly after the stage one interview.

313. Snowball sampling is “a standard technique for sampling populations that are difficult to reach through randomized methods.” Angela Littwin, *Beyond Usury: A Study of Credit Card Use and Preference Among Low-Income Consumers*, 86 TEX. L. REV. 451, 457 (2008). It is developed by starting with one or more people within the target population. *Id.* Those initial participants refer the researcher to other people who meet the study criteria. *Id.* For a more detailed description, see Leo A. Goodman, *Snowball Sampling*, 32 ANNALS OF MATHEMATICAL STAT. 148 (1961) (defining snowball sampling); Charles Kadushin, *Power, Influence, and Social Circles: A New Methodology for Studying Opinion Makers*, 33 AM. SOC. REV. 685, 694-96 (1968) (discussing the strengths and weaknesses of snowball sampling); *see also*, Jean Faugier & Mary Sargeant, *Sampling Hard to Reach Populations*, 26 J. ADVANCED NURSING 790 (1997); Sarah H. Ramsey & Robert F. Kelly, *Using Social Science Research in Family Law Analysis and Formation: Problems and Prospects*, 3 S. CAL. INTERDISCIPLINARY L. J. 631, 642 (1994). Legal scholars have used snowball samples to study legal issues. *See, e.g.*, Littwin, *supra* note 313, at 456 (using a snowball sample to study “the perspective of low-income consumers regarding the advantages and disadvantages of increased access to credit cards in the wake of deregulation”); Jose B. Ashford, *Comparing the Effects of Judicial Versus Child Protective Service Relationships on Parental Attitudes of Juvenile Dependency Process*, 16 RES. ON SOC. WORK PRAC., 582 (2006) (using a “convenience sample” of forty parents involved with child protective services to study the effect of judicial and case-worker relationships on perceptions of fairness); Chambliss & Wilkins, *The Emerging Role, supra* note 16 (using a snowball sample to study “the emerging role of compliance specialists in large law firms”); Kirkland, *supra* note 16 (utilizing a snowball sample of twenty-two lawyers practicing in ten large law firms to investigate “how bureaucratic legal workplaces shape lawyers’ ethical consciousness”).

314. In addition, the author interviewed one General Counsel from a slightly smaller global manufacturing company that was not publicly traded nor part of the S&P 500. *See supra* note 31. Long Interview with #60, Chief Legal Officer, Global Manufacturing (July 23, 2007). This general counsel is not included in the thirteen General Counsel interviews in stage two nor in the thirty-nine General Counsel interviews in total.

315. No one participated in the interviews other than the respondents and the author.

All but three of the interviews were recorded and transcribed by a professional service.³¹⁶ After each session, the author reread the transcriptions (or notes where transcriptions were not available). To ensure anonymity, the author utilized the same labeling system as mentioned above.³¹⁷

The author began the interviews by taking detailed employment histories. The author then asked a few closed-ended questions regarding the size of legal and PR departments and reporting structure. The author then moved on to ask some open-ended policy questions about the impact of PR on legal controversies and the roles of lawyers and PR executives. The final section consisted of a request for the participants to describe specific past experiences dealing with legal issues that had a potential media impact. During these vignettes, the author asked a few closed-ended questions around the use of external PR consultants.³¹⁸ The author stopped interviewing subjects when questions consistently elicited the same types of information.

c. Transcript Analysis

To the degree possible, the author attempted to analyze the transcripts using content analysis—a method of qualitative analysis frequently used to analyze political speeches, advertisements, judicial opinions,³¹⁹ and interview transcripts.³²⁰ The author started by reading all of the transcripts. The author then developed a codebook to analyze the transcripts. The codebook consisted of questions that could elicit specific answers, e.g., size of PR department. The author also coded for some of themes that emerged from the interviews. For example, the author coded the number of respondents that agreed with the following statement “media spin greatly affects the process and/or outcome of a legal controversy.”³²¹ Subsequently, the author trained two law-student research

316. Recordings were downloaded to our assistant's computer and emailed to Techsynergy in India for transcription. During the three interviews in which the interviewees would not allow a recording, the interviewer typed notes.

317. Interviewees that were involved in both stages kept the same identifying number. The interviews in stage one include the modifier “short” and the interviews in stage two include the modifier “long”. See *supra* note 310.

318. Although the interviewers covered substantially the same questions with each Respondent, often the interviews did not go in exactly this order. The flow changed based on the way the Respondent answered the question. Because no real preparation was needed for the interview, the PR questions were not provided to the interviewees before or during the interview.

319. See, e.g., KLAUS KRIPPENDORFF, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* 26-9 (Sage Publications 2004); Littwin, *supra* note 313, at Appendix.

320. See ROBERT PHILIP WEBER, *BASIC CONTENT ANALYSIS* 9 (Sage Publications 1990); Littwin, *supra* note 313, at Appendix.

321. The author gave each coder a list of words that were pertinent to the theme but that were not necessarily “high-frequency” words. See, e.g., Gery W. Ryan, *Measuring the Typicality of Text: Using Multiple Coders for More than Just Reliability and Validity Checks*, http://findarticles.com/p/articles/mi_qa3800/is_199910/ai_n8867279/print?tag=artBody;coll (last visited Jul. 14, 2008) (“Unlike classic content analysis that

assistants to code the data according to this procedure.³²² Their coding was meant to serve as a cross-check to the author's coding. The codebook was modified as necessary during the process. However, at the date of publication of this installment, all of the coding had not yet been completed.

2. S&P 500 SURVEY

In conjunction with the larger project described above, a survey was developed to investigate how large companies in the S&P 500 purchase services from law firms and manage their law firm relationships.

a. Survey Methodology

The survey was first pre-tested among twenty randomly selected General Counsels of the S&P 500. This pre-test elicited a 40% response rate. The survey was then tweaked and sent to general counsels of the entire S&P 500. The survey garnered a 28% response rate. The survey in its entirety contained 26 multi-part questions and was estimated to take approximately 15 minutes to fill out. The PR questions elicited information about 1) the reporting structure for PR departments; 2) the number of times the legal department has dealt with a legal controversy with potentially substantial publicity; 3) whether the lawyers met with internal PR executives and/or hired external PR executives; 4) the role of the outside attorney in developing the PR strategy; and 5) the comfort level lawyers have in disclosing confidential client information to internal and/or external PR executives given the parameters of the attorney-client privilege. A copy of the questions and a chart detailing the sample characteristics of the survey respondents is included in this Appendix.

associates high-frequency words with theme salience, this technique identifies words that are pertinent to a theme but that may have low frequencies.”).

322. Some scholars believe that using multiple coders enhances validity and reliability. *Id.* (“Investigators use agreement among multiple coders as proxies for the reliability and validity of the analysis process.”). *But see* Norman Denzin and Yvonna S. Lincoln, *Introduction: Entering the Field of Qualitative Research* to HANDBOOK OF QUALITATIVE RESEARCH 1, 1-18 (Norman Denzin & Yvonna S. Lincoln, eds., Sage Publications 1994) (contending that qualitative data cannot be assessed based on reliability and validity); HANDBOOK FOR TEAM BASED QUALITATIVE RESEARCH 215 (Greg Guest & Kathleen M. MacQueen eds.) (explaining that some scholars argue that multiple coders need not be used in qualitative research when analysis is done by the actual researcher).

b. Survey Questionnaire

HARVARD LAW SCHOOL

LEGAL PURCHASING SURVEY

CENTER ON LAWYERS AND THE PROFESSIONAL SERVICES INDUSTRY

This survey asks questions about how your company makes legal services purchasing decisions. ***No information secured from this survey will be presented in any way that will identify an individual or an organization.*** The survey should take approximately **15-20 minutes** to complete.

Please answer based on your experiences in the last **three years** at your current company. Where questions call for quantitative information, please give your best estimates—you do not need to research the answers. At the end is space for comments, if you wish to make them.

Purchase decisions may differ depending on the importance of matters. Some questions deal specifically with decisions to retain law firms for “***very significant***” matters, by which we mean matters of strategic importance to the company, such as litigation with very large liability exposure, high-risk regulatory matters, and large M&A transactions.

Outside Legal Services

- 1) What was your approximate legal budget in 2006 (*excluding* compliance)?
\$ _____ million
- 2) Approximately what percentage of that budget was spent on outside law firms in 2006? _____ %
- 3) Approximately how many law firms has your company used in 2006? _____ in 2003? _____
- 4) Approximately how many law firms accounted for 80% of your company's outside legal spend in 2006? _____ in 2003 _____?
- 5) Consider the last time you hired outside counsel for a **very significant** matter:

What type of matter was it? _____

Identify the importance you placed on each of the following factors in making this hiring decision:

FACTORS	Very important	Important	Somewhat important	Not very important	Not important at all
Prior Experience with Firm or Lawyer(s)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Reputation of Firm or Lawyers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rankings in legal periodicals or other	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Results in similar transactions or cases	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Size of firm	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Geographic scope of firm (e.g. branches)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Market share of firm in similar matters	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Recent growth history of law firm	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Leverage (ratio of Partners to Associates)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Turnover rates of Partners or Associates	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Partnership structure (i.e. single tier vs. two tier)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ancillary business or non-legal capacity	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Firm's Pro Bono practices	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Firm's commitment to diversity	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Profit per partner	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Partner compensation system (e.g., lock step, "eat what you kill")	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Associate system (e.g., salary rates, hourly billing targets, bonuses)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Quality control systems (e.g., peer review, audits / reviews of matters, feedback)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ethical infrastructure (e.g., ethics committees)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

6) What sources did you rely on in making the hiring decision? (check all that apply)

- _____ Personal Knowledge
- _____ Conversations with colleagues at your company
- _____ Conversations with lawyers at other law firms
- _____ Public sources of data, e.g., court records, Lexis, TFSD, American Lawyer

Termination of Law Firms

7) Since 2003, has your company terminated a relationship with a *law firm* because of their work on a **very significant** matter? (By "terminated" we mean that you have stopped hiring the firm for all types of matters and that you do not intend to work with them again.)

____ Yes, many times ____ Yes, a few times ____ Yes, once or twice ____ No

- 8) Consider the last time that you terminated a law firm because of their work on a **very significant** matter:
- Why did you terminate the law firm?

 - Had you or your company worked with the law firm before?
 Yes # of years _____ approximate % of outside legal spend in past 3 years
 No
- 9) Aside from terminating a law firm, have you purposely reduced the amount of work given to a law firm in reaction to poor quality or service on a **very significant** matter since 2003?
 Yes, many times Yes, a few times Yes, once or twice No
- 10) Consider the last time that you purposefully reduced the amount of work given to a law firm (aside from terminating them) in reaction to poor quality or service on a **very significant** matter:
- Why did you purposefully reduce their work?

 - When you reduced the amount of work, did you . . . (check all that apply)
 reduce the work given to the **individual** that underperformed
 reduce the work given to the **team** that underperformed
 reduce the work given to the **department** that underperformed
 reduce the work given **other departments** in the law firm

Movement of “Star” Lawyers

- 11) Over the past 3 years, approximately how many times have high profile (“star”) lawyers serving your company left their law firms for other law firms?
 _____ (fill in #) (If zero, proceed to question #18)
- 12) In how many of these instances was the only person moving the star lawyer (as opposed to a team)? _____ (fill in #)
- 13) In instances where the star lawyer moved as part of a team, what were the sizes of the teams that moved together?

Total number of attorneys in team that moved	Did the star (and their team) join an existing team in the new firm? (Yes, No, Don’t Know)	Did the star (and their team) replace departing lawyers in the new firm? (Yes, No, Don’t Know)	Did the star (and their team) establish a new practice or, office in the new firms? (Yes, No, Don’t Know)
Star Lawyer 1:			
Star Lawyer 2:			
Star Lawyer 3:			

- 14) How many times did you move work from the firm the star left to their new firm? _____
- After the most recent instance when you moved work, did the quality of service change?
 ___ Better at New Firm ___ Stayed the Same ___ Worse at New Firm
 - In the other instances where you moved work did the quality of service change?
 ___ Better at New Firm ___ Stayed the Same ___ Worse at New Firm
- 15) How many times did the star consult with you before joining another firm?

- How many times did you suggest firms to consider joining? _____
- 16) What kind of firms did the star lawyers join? (Fill in all blank spaces)
 ___ # who moved to law firm of equivalent size ___ # to firm with similar prestige
 ___ # who moved to a law firm of bigger size ___ # to firm with more prestige
 ___ # who moved to a law firm of smaller size ___ # to firm with less prestige
- 17) How many stars who moved over the past 3 years are still with their new law firms? _____
- 18) Over the past 3 years, how many times have you engaged in proactive “match-making”: suggesting to star lawyers to move to another firm and/or suggesting to law firms to bring on board specific lawyers and their teams?
 ___ # of times
- 19) Have the lawyers and firms heeded to your suggestion?
 ___ Yes, many times ___ Yes, a few times ___ Yes, once or twice
 ___ Never

Intersection of Public Relations and Legal Controversies

- 20) Do you or anyone in the Legal Department oversee Public or Government Relations?
 ___ Yes Public Relations ___ Yes Government Relations ___ No
- 21) Specifically, to whom do the directors of Public Relations and Gov’t Relations report?
 Public Relations reports to _____ (fill in title) _____ (department name)
 Government Relations reports to _____ (fill in title) _____ (department name)

22) In the past 3 years, have you or a lawyer in the Legal Department dealt with a legal controversy where there potentially was substantial publicity impacting the company?

Yes, many times Yes, a few times Yes, once or twice No
 _____ (fill in most recent type of matter)

- Did internal lawyers meet with internal PR staff about this legal matter?
 Yes No
- Was an outside Public Relations agency hired to help deal with the matter?
 Yes, an outside Public Relations agency was hired by our company
 Yes, an outside Public Relations agency was hired by our outside law firm
 No
- What role did an outside law firm play in developing the PR strategy? The law firm . . .
 did not play a substantial role
 provided advice to internal lawyers on managing the publicity
 provided advice to internal lawyers and PR staff on managing the publicity
 worked with internal lawyers and PR staff on publicity strategy
- Was there information you did not feel comfortable sharing with the internal or external PR staff for fear it would lose attorney-client privilege? (check all that apply)
 Yes, with the internal PR staff Yes, with the external PR agency No

Background Information

- 23) Your title: _____
- 24) Approximately how many attorneys do you oversee? _____
- 25) If you report to someone other than the CEO, what is this person's title, and what departments does this person oversee?

Comments

- 26) Please add any comments below that you think would be helpful to our understanding of how you purchase and manage outside legal or PR services. (Please add an additional page, if needed.)

Because we asked so few questions about your background, please send this survey **along with a copy of your resume or CV** in the enclosed self addressed stamped envelope to:

Harvard Law School
Center for Lawyers and the Professional Services Industry
23 Everett Street #G24
Cambridge MA 02138.

Please feel free to fax it to us at 617-496-8489 or email it to us if you prefer. Should you have any questions, please contact us at 617-496-6232 or nseaholm@law.harvard.edu.

Thank you.

B. SAMPLE CHARACTERISTICS

I. SIZE OF LEGAL BUDGET, LEGAL DEPARTMENT, AND BUDGETS

a. Survey Respondents

	N	Mean	Minimum	25th p-tile	Median	75th p-tile	Maximum
Approximate Legal Budget in 2006 (\$MM) (Q1)	131	65.42	3.5	15.00	37	76.00	606
Number of Attorneys Overseen (Q24)	134	68.85	0*	17.00	35	75	1250*
% of Budget spent on outside counsel (Q2)	130	59.64%	2%	20%	60%	70%	97%

Note: The following displays results if the two outliers for department size are taken out:

	N	Mean	Minimum	Median	Maximum
Number of Attorneys	132	60.87	4	35	600

b. Interview Participants*

	N	Mean	Minimum	25th p-tile	Median	75th p-tile	Maximum
Approximate Legal Budget in 2006 (\$MM) (Q1)	18	210.79	10.00	40.00	91.50	332.64	750.00
Number of Attorneys Overseen (Q24)	41	161.07	2	40	100	150	1480
% of Budget spent on outside counsel (Q2)	27	53%	20%	40%	50%	64%	90%

*This chart only reflects data from interviewees that participated in stage one or both stage one and stage two. Also, it includes data from two interviewees from pharmaceutical companies that participated in the larger research project but did not answer questions about public relations.

2. INDUSTRY TYPE

a. Survey and Interviews

Industry	SURVEY				INTERVIEWS	
	Report to CEO	Report to Vice Chairman/ CFO	Report to Other Exec.	TTL	# Interviewed of the total survey respondents	Remaining Interviewees (25)
Agriculture, Forestry, and Fishing	1	0	0	.1	0	0
Mining	4	0	0	4	0	0
Construction	2	0	0	2	0	0
Manufacturing						
- Petroleum*	4	0	0	4	3	3
- Pharmaceutical**	4	0	0	4	1	8
- Other manufacturing	39	0	3	42	0	0
Transportation, Communications, Electric, Gas, And Sanitary Services	23	0	1	24	0	0
Wholesale Trade	3	0	0	3	0	0
Retail Trade	10	1	0	11	0	0
Finance, Insurance, and Real Estate						
- Commercial Bank***	8	2	1	11	8	7
- Investment Bank****	3	0	1	4	2	7
- Other financials	9	0	4	13	0	0
Services	12	1	1	14	0	0
Public Administration and Others	2	0	0	2	0	0
TOTAL	124	4	11	139	14	25

* SIC 1311: Refining Petroleum

** SIC 2834: Pharmaceutical Preparations

*** SIC 6020 (Commercial Bank); 6099 (Functions Related to Depository Banking, Not Elsewhere Classified); SIC 6111 (Federal and Federally-sponsored Credit Agencies); SIC 616- (Mortgage Bankers and Brokers)

**** SIC 62 (Security And Commodity Brokers, Dealers, Exchanges, And Services)

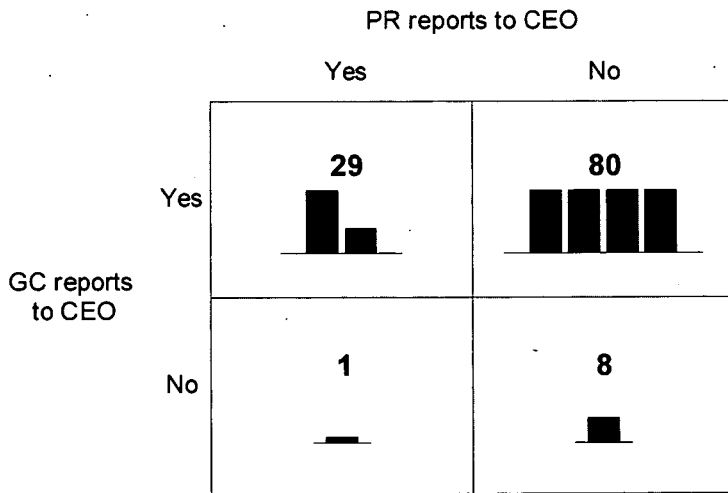
b. Interviews Only

Industry	TTL in industry in S&P 500*	Interviewed	% of Industry
Pharmaceutical	22	9	40.9%
Banks	46	24	52.2%
Investment banks	9	9	100.0%
Commercial banks	37	15	40.5%
Petroleum	8	6	75.0%
TOTAL		39	

* S&P500 (2006)

3. REPORTING STRUCTURE (Q20; Q21)

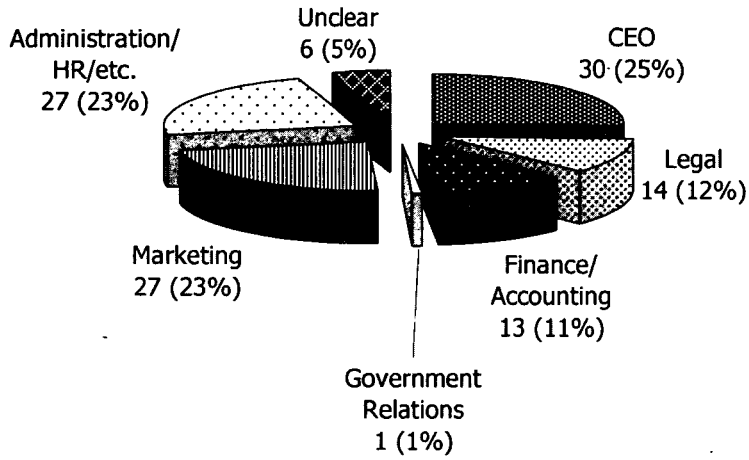
a. General Counsels and PR Directors



Note:

118 firms (of the 139 total respondents) answered to whom the director of PR reports. The GC reports to the CEO in 92.4% of these 118 firms. In 25% of these 118 firms (29 out of 118), both the director of PR and the GC reports to the CEO. In a majority of firms (80 out of 118 = 68%), the GC reports to CEO but the director of PR does not. And in 8 out of 118 firms (7%), neither the director of PR nor GC reports to CEO.

b. PR Department Reporting Structure

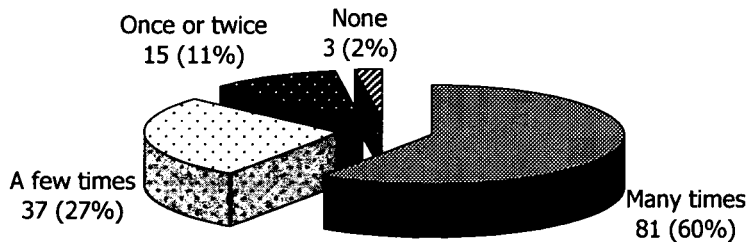


Note: This chart reflects the 118 respondents that answered to whom the director of PR reports.

4. EXPOSURE TO HIGH PROFILE LEGAL CONTROVERSIES (Q22)

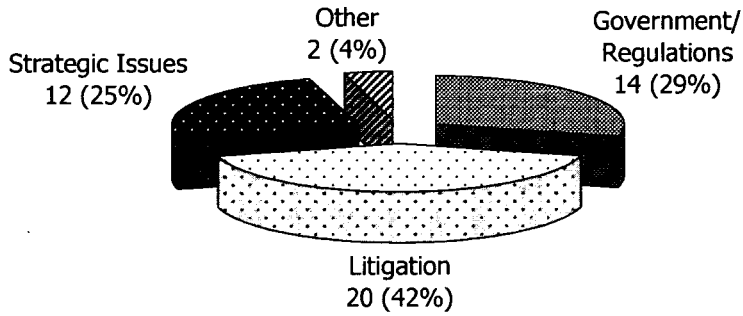
a. Percentage of Survey Respondents that Dealt with a High Profile Legal Controversy in the Last Three Years

98% of all firms have dealt with a legal controversy with potential substantial publicity in the last three years:



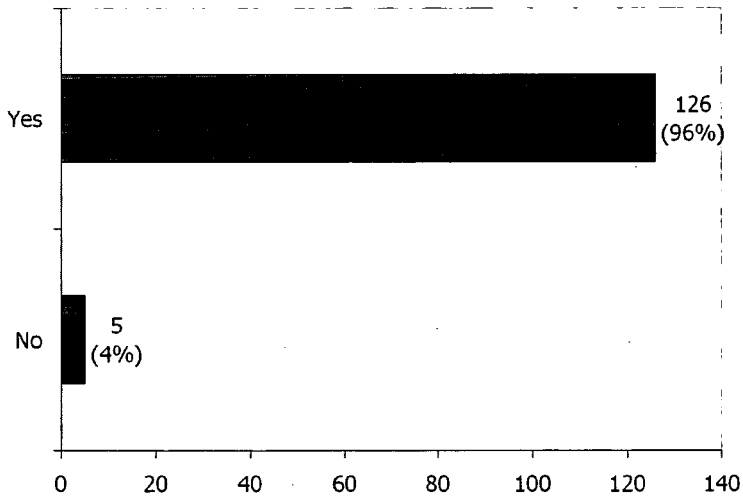
Note: This question was based on 136 responses. There is no statistical difference between firms whose legal departments oversee the PR department and firms whose legal departments do not oversee the PR department.

b. Most Recent Type of Legal Matter with Potential Substantial Publicity



Note: Only 48 GCs answered to this question.

c. The Percentage of Internal lawyers That Met with Internal PR Staff



Note: Among the 5 who answered that they did not meet with internal PR staff, one GC specified the most recent type of matter as “litigation”

d. The Percentage of Survey Respondents That Hired an External PR Agency to Help Deal with the Matter

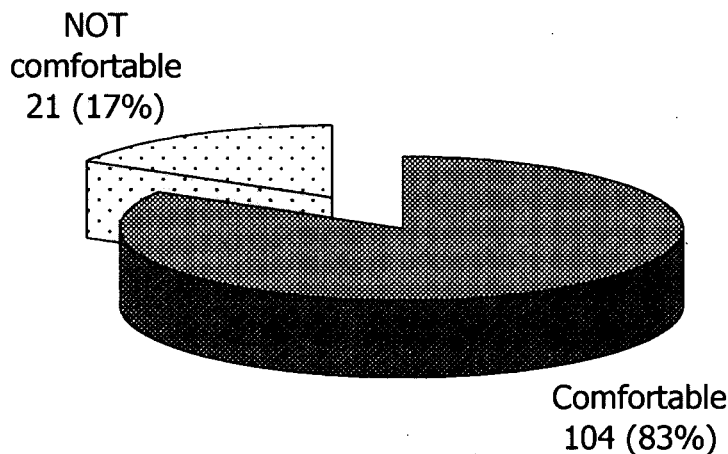
Note: 53% of companies hired an outside PR agency and in most cases (81% of the hiring cases), outside law firms were not involved in the hiring decision of the outside PR agency. (One survey respondent answered "sometimes Yes, sometimes No." This response was excluded from the analysis.)

e. The Percentage of Survey Respondents That Hired an External PR Agency and Type of Matter

Note: There was no significant difference across types of matters in terms of hiring an outside PR agency is found. However, it appears that companies are more likely to hire an outside PR agency if the matter involves strategic issues.

5. COMFORT LEVEL: SHARING INFORMATION WITH INTERNAL AND EXTERNAL PR EXECUTIVE (Q22)

a. The Percentage of Survey Respondents That Claimed They Were Not Comfortable Sharing Information with Either Internal or External PR Executives

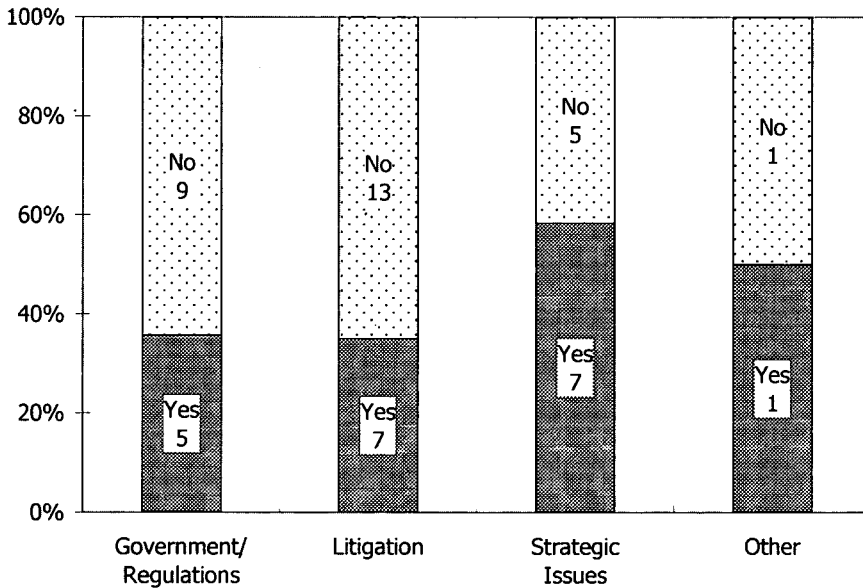
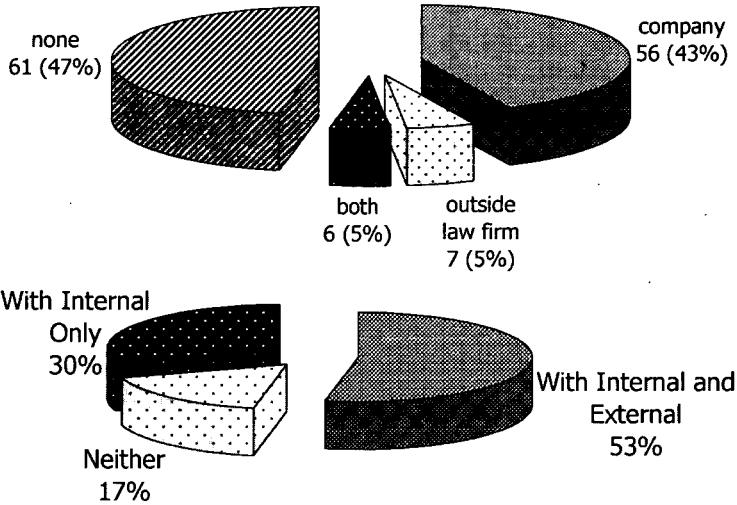


b. The Percentage of Survey Respondents That Were Comfortable Sharing Information with Both Internal and External PR Executives

Note: Of all 125 respondents:

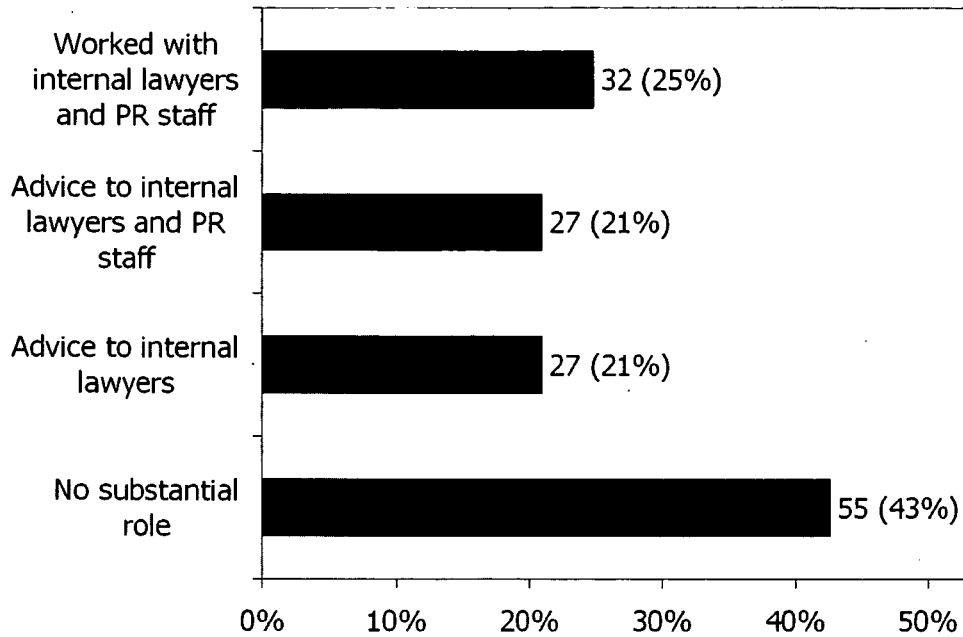
- 16.8% not comfortable
- 44.8% comfortable sharing with both
- 8.8% comfortable with external only
- 29.6% comfortable with internal only

6. ROLE OF OUTSIDE ATTORNEY (Q22)



Note: question asked: What role did an outside law firm play in developing the PR strategy? The law firm . . .

(A) did not play a substantial role



- (B) provided advice to internal lawyers on managing the publicity
- (C) provided advice to internal lawyers and PR staff on managing the publicity
- (D) worked with internal lawyers and PR staff on publicity strategy

7. MEAN-COMPARISON TESTS

a. Interview Participants vs. Non-Participants

Two-group mean-comparison test

Item	Significantly Different	Interview Participants				Non-Participants				p-value*		
		N	Mean	Standard Deviation	95% Confidence Interval	N	Mean	Standard Deviation	95% Confidence Interval			
Assets - Total	NO	42	286844.80	385024.6	166862.70	406826.90	28	117202.70	350243.1	-18607.39	253012.80	0.066
Long-Term Debt - Total	NO	42	55688.39	103594.8	23405.97	87970.81	28	16157.82	46891.1	-2024.65	34340.30	0.063
Earnings Before Interest and Taxes	YES	40	14866.66	17272.29	9342.71	20390.60	27	4940.26	12438.17	19.88	9860.64	0.013
Employees	NO	42	42.18	46.14	27.80	56.56	28	32.77	64.94	7.59	57.96	0.481
Net Income (Loss)	YES	42	5492.65	7650.57	3108.56	7876.73	28	2173.93	4398.18	468.49	3879.36	0.042
Revenue	YES	42	44386.05	64014.59	24437.70	64334.40	28	15345.63	28555.60	4272.93	26418.34	0.028
Settlement (Litigation/Insurance) After-tax	NO	9	-29.67	197.86	-18.76	122.42	10	-97.04	173.88	-221.43	27.35	0.440
Operating Expenses - Total	YES	42	28718.14	51462.49	12681.30	44754.98	28	9949.00	16612.90	3507.19	16390.81	0.067
The presence of GC in the ExecComp	NO	41	0.22	0.42	0.09	0.35	28	0.36	0.49	0.17	0.55	0.215
GC's annual salary in 2006	NO	8	526.63	117.93	428.04	625.22	10	489.13	146.39	384.41	593.85	0.565
Total Count of Legal Cases and Articles that Mentioned a Focal Firm's Name	YES	45	286.51	405.80	164.59	408.43	31	114.84	234.16	28.95	200.73	0.037
Top 200 Largest Legal Department 2004	YES	45	0.58	0.50	0.43	0.73	31	0.23	0.43	0.07	0.38	0.002
Title is Chief Legal Officer	NO	45	0.11	0.32	0.02	0.21	31	0.00	0.0	0.00	0.00	0.056
Firm is in the Banking Sector	NO						31	0.58	0.50	0.40	0.76	0.720
Survey Response	NO	42	0.36	0.48	0.21	0.51	28	0.18	0.39	0.03	0.33	0.108

Note: This analysis is based on the 76 S&P 500 firms within the petroleum, investment banking, commercial banking and pharmaceutical industries. These findings suggest that interview respondents are working at companies that a) have larger revenue, net income, and earnings before interest and taxes; b) are more likely to be mentioned in legal cases and published articles; c) and have larger legal departments.

b. General Counsels that Participated in Both the Interview and Survey vs. Non-Participants

Item	Significantly Different	Participated in the Interviews & Surveys						Non-Participants				p-value*
		N	Mean	Standard Deviation	95% Confidence Interval	N	Mean	Standard Deviation	95% Confidence Interval			
Revenue	marginally	15	41373.60	48879.51	14305.03	68442.18	21	16626.72	32309.15	1919.77	31333.67	0.076
Operating Expenses - Total	marginally	15	27393.54	39639.76	5441.78	49345.31	21	10291.54	3956.49	2038.44	18544.64	0.090
Top 200 Largest Legal Dept. 2004	YES	15	0.53	0.52	0.25	0.82	23	0.22	0.42	0.04	0.40	0.046

Note: The above reports only the significant difference between the two groups with the one-tail test. The hypotheses that participants have more revenue and more operating expenses than non-participants cannot be rejected. Moreover, active participants have larger legal departments than non-participants.

c. Survey Respondents vs. Non-Respondents

Two-group mean-comparison test

Item	Significantly Different?	Survey Participants				Non-Participants				p-value*		
		N	Mean	Standard Deviation	95% Confidence Interval	N	Mean	Standard Deviation	95% Confidence Interval			
Assets - Total	NO	135	61974.66	180699.7	31215.20	92734.11	351	51941.55	169172.5	34182.13	69700.96	0.57
Long-Term Debt - Total	NO	135	13687.40	49274.5	5299.69	22075.11	350	8261.64	32605.4	4833.87	11689.41	0.16
Earnings Before Interest and Taxes	NO	133	3742.48	7717.35	2418.78	5066.19	349	2980.62	7340.03	2207.86	3753.39	0.32
Employees	YES	135	66.41	170.42	37.40	95.43	347	41.00	60.45	34.62	47.39	0.02
Net Income (Loss)	NO	135	1748.85	3510.19	1151.33	2346.37	351	1551.66	3325.27	1202.58	1900.74	0.56
Revenue	YES	135	23448.51	42000.47	16299.01	30598.00	351	15510.22	27502.46	12623.06	18397.38	0.02
Settlement (Litigation/Insurance) After-tax	NO	45	-15.13	126.40	-53.11	22.84	103	-23.35	133.86	-49.51	2.81	0.73
Operating Expenses - Total	YES	135	18782.75	36704.79	12534.71	25030.79	351	11918.94	21615.44	9649.79	14188.09	0.01
The presence of GC in the ExecComp	NO	134	0.34	0.48	0.26	0.42	348	0.36	0.48	0.31	0.41	0.74
GC's annual salary in 2006	NO	46	468.66	205.63	407.59	529.72	125	469.91	179.05	438.22	501.61	0.97
Total Count of Legal Cases and Articles that Mentioned a Focal Firm's Name	NO	139	180.51	479.24	100.14	260.89	370	124.86	294.03	94.38	155.33	0.12

Note: In the highlighted terms, the null hypothesis that two groups have different means at 95% confidence level cannot be rejected. The major finding is that survey participants generally work at firms that have more employees, more revenue, and more expenses. Survey participants are also more likely to have a larger demand in legal services. Therefore, it is possible that rather than firm's size, firm's demand for legal service may have motivated survey participants.