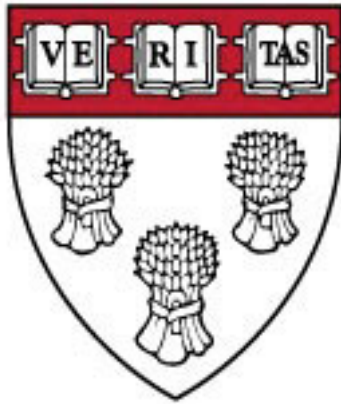


**HARVARD LAW SCHOOL**  
Center on the Legal Profession

Lawyers as Professionals and as Citizens:  
Key Roles and Responsibilities in the 21<sup>st</sup> Century

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## I. INTRODUCTION

This essay presents a practical vision of the responsibilities of lawyers as both professionals and as citizens at the beginning of the 21st century. Specifically, we seek to define and give content to four ethical responsibilities that we believe are of signal importance to lawyers in their fundamental roles as expert technicians, wise counselors, and effective leaders: responsibilities to their clients and stakeholders; responsibilities to the legal system; responsibilities to their institutions; and responsibilities to society at large. Our fundamental point is that the ethical dimensions of lawyering for this era must be given equal attention to—and must be highlighted and integrated with—the significant economic, political, and cultural changes affecting major legal institutions and the people and institutions lawyers serve.

We have chosen to write this essay as a joint statement from a former general counsel of a global corporation, a former managing partner of an international law firm, and a professor of the legal profession at a major law school. We therefore focus our discussion on the four ethical duties in the institutions we know best—corporate legal departments, large law firms, and leading law schools—and on the important connections among them. But we also hope that both the ethical framework we propose and our commitment to a shared responsibility for giving it practical effect will have resonance in the many other important settings in which lawyers work. The four duties are, we believe, central to what it means to be a lawyer, even as the practical expression of these responsibilities will undoubtedly vary by context and will require new and greater collaboration that reaches across many of the profession's traditional divides.

In the pages that follow, we are mindful of the dramatic changes in both the legal profession and in society that make the realization of our—or any other—ethical vision of lawyering especially difficult today. *There is widespread agreement that the legal profession is in a period of stress and transition; its economic models are under duress; the concepts of its professional uniqueness are narrow and outdated; and, as a result, its ethical imperatives are weakened and their sources ill-defined.* We are also mindful that some will resist the invitation to review and address the broad array of ethical issues we raise in a time in which so many of the profession's traditional economic assumptions are in question. Nevertheless, we reject the idea that there is an inherent and irresolvable conflict between “business” and “service.” To the contrary, we believe that, while tradeoffs about resource allocation will certainly be required, the proper recognition of each of the four ethical duties we explore is ultimately essential to the sustainability of “business”—whether that is the “business” of companies, law firms, or law schools, or more broadly, the health of our economic and political system as a whole. We therefore hope that this essay will stimulate an integrated discussion among the broad range of actors with a stake in the future of the legal profession not just about the pressing economic issues in major legal institutions but also about the equally pressing concerns relating to ethical responsibilities.

The rest of this essay proceeds in six parts.

Part II sets out our basic framework. It explicates lawyers' three fundamental roles as expert technicians, wise counselors, and effective leaders. It describes the sources and broad definitions of lawyers' four responsibilities: duties to clients and stakeholders; duties to the legal system; duties to one's own institution; and duties to the broader society. To effectively discharge these responsibilities, it argues that lawyers must not only have “core” legal competencies but also “complementary” competencies

involving broad vision, knowledge, and organizational skills that, while not unique to lawyers, are essential to the counseling and leadership roles. This Part thus describes how our framework goes beyond the limits of the bar's formal ethical rules and challenges lawyers as both professionals and as citizens.

Part III describes the context for our analysis. While recognizing the profound importance of other entities, we explain that we have chosen leading companies, law firms, and law schools as the focus of our analysis because of their influence in setting norms for lawyers, their role in providing counselors and leaders across society, and their standing in public perception of the law. It outlines our assumptions about the large-scale forces transforming the economics of these institutions. These include accelerating competition, costs, technology development, and transparency—and, in the case of companies and firms, undue focus on short-term profit maximization and profits per partner. All these factors gain greater force from globalization. A final contextual dimension is the cost and paradox of regulation of the legal profession: increasing the cost of becoming a lawyer while reducing the competition from other more effective and efficient providers of legal or legally related services. And, while noting that efforts to discharge the four responsibilities will entail allocation of resources and trade-offs, we maintain that forging a new, contemporary partnership between “service” and “business” is essential to the success, sustainability, and durability of these institutions.

Part IV discusses corporate law departments. Due to major trends in recent decades—the General Counsel becoming the senior counselor to boards and CEOs and the shift of power over money and matters from outside law firms to inside law departments—the General Counsel and inside lawyers have a special obligation to give practical meaning to the four responsibilities in leading corporations. The overarching theme of this Part is that the purpose of corporations, especially transnational ones, is the fusion of high performance with high integrity. Integrity is defined as ensuring robust adherence to formal rules, establishing binding ethical standards, advocating balanced public policy and fair political processes, and instilling the values of honesty, candor, fairness, reliability, and trustworthiness in employees. The General Counsel should also have a broad scope beyond law to include ethics, reputation, and geopolitical risk and should function as expert, counselor, and leader to assist the board and the business leaders in establishing an integrity culture in the institution. The General Counsel and all inside lawyers should aspire to be “lawyer-statespersons” who ask first “is it legal” but ask last “is it right,” and who can resolve the central tension of being both a partner to the business leader and the ultimate guardian of the corporation’s integrity. Inside lawyers have a special calling to surface, analyze, and recommend actions relating both to the corporation’s employees and to other stakeholders that go beyond what the formal legal and accounting rules require and that address the many ethical issues facing global business in challenging environments. Finally, inside lawyers must recognize that they have a shared responsibility—and the obligation to share costs—with firms to provide challenging experiences and training for young lawyers. They must also use their influence (through, for example, new supplier guidelines) to encourage law firms to join with companies in addressing vital issues like provision of pro bono services, diversity, and needed reforms in the legal system both at home and abroad by making these issues important considerations in firm retention.

Part V addresses law firms and the imbalance between “service” and “business” that has resulted from a myopic focus on short-term economics. To be sure, there have been benefits to the profession from increased transparency concerning operation of firms and the resulting increased competition among firms. But the relentless focus on short-term economic success has adversely affected the culture and institutional integrity of firms; the training, mentoring, and development of young lawyers; the ability of firms and their lawyers to service the poor and underprivileged; and the ability of firms and their lawyers to devote time to the profession and the broader needs of society. We urge a rebalancing of the sometimes competing goals of “economic” and “professional” success. This rebalancing will require leadership and vision which will (1) affirm the priority of excellence and quality over mere hours generation; (2) articulate a vision for and create a culture which revives and restores the institutional fabric of firms; (3) affirm the commitment to meaningful mentoring and development of young lawyers; (4) affirm the commitment to the profession, including pro bono services and the “Rule of Law”; and (5) affirm the role of lawyers as the architects of a well-functioning constitutional democracy. This rebalancing will not be easy and will require commitment to long-term goals and values, even at the expense of short-term economics.

In Part VI, we turn our attention to the implications of our framework for “leading” law schools. We begin from the premise that law schools play a critical—but not exclusive—role both in teaching students to become expert technicians, wise counselors, and astute leaders, and in generating knowledge about law and legal institutions (including about the legal profession itself), and about the relationship between these institutions and the health and welfare of the broader society. To achieve these twin goals—and to find a proper balance between the two—law schools should reexamine how they are preparing students for the challenges that they will face throughout their increasingly diverse careers, and how faculty members understand their obligations to the legal framework and society, and to the law school as an institution. With respect to educating students, we urge law schools to create courses that focus directly on teaching lawyering roles and responsibilities in specific contexts and that explore key complementary competencies. We also advocate breaking down the artificial barriers that currently exist between “theory” and “practice,” and between “law” and other disciplines, by developing new teaching materials (for example “business school” style case studies), new faculty (for example, Professors of Practice with significant experience outside of the academy, and team teaching with faculty from other disciplines), and a new integration between the placement function and the core educational objectives of the school. To achieve these goals, we put forward a number of specific reforms designed to restructure and refocus the third year of law school, while rejecting calls to eliminate it altogether. Finally, we underscore the critical need for deans and faculty to rededicate themselves to articulating a broad but nevertheless common understanding of the purposes of legal education and legal scholarship that gives appropriate recognition to the role that law schools—and law professors—play as part of the legal profession in addition to their role as an important part of the academy. Faculty and administrators should then use this purpose to guide the difficult tradeoffs around hiring, promotion, curricula, research, funding, and the allocation of other scarce resources that will inevitably be required to begin to achieve these common goals.

Part VII briefly discusses ways in which leading corporate law departments, law firms, and law schools can collaborate jointly to address the needs of young lawyers, to act on the needs of the legal system and society, to bridge the divide between the profession and the professoriate, and to develop better information on lawyers and the legal profession both here and abroad. It sets out next steps which include seeking short, written comments from leading thinkers which will be published early next year and holding a conference to discuss the issues raised both in this essay and in the comments at Harvard Law School in the first half of 2015.

A final introductory note. Our attempt here is to raise a wide variety of issues, not to discuss any single one exhaustively. Moreover, because this is a personal vision, we have chosen not to adorn the text with footnotes. But we owe a great debt to many friends and colleagues<sup>1</sup> and to the many who have written about law, lawyers, and professionalism as reflected in a Select Bibliography appended to the end of this essay.

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<sup>1</sup>*The authors thank, with the deepest gratitude, Felicia Ellsworth for her guidance, counsel, and perseverance in preparing this essay. Felicia not only served as editor and drafter, but provided the critical perspective of the younger generation of lawyers who will be most directly affected by the manner in which the challenges identified in this essay are addressed. We could not have brought this essay to completion without her, and she surely has made it better than it would have been if we had been left to our own devices.*



## II. THE FRAMEWORK

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This essay is built on the key proposition that lawyers do—or should—play three distinct, although often overlapping, roles. First, lawyers are “technical experts” who give their clients and others access to the complex machinery of the law. Second, lawyers act as “wise counselors” who help their clients understand not only what is legal, but also what is right. Finally, lawyers are called upon to be “effective leaders” who are the final decision makers on important matters which involve complex considerations beyond the law. In Part A, we briefly examine these three roles. Part B then defines the ethical responsibilities to clients, institutions, the legal system, and the public that we believe lawyers must take into consideration when performing their roles as experts, counselors, and leaders. Finally, Part C argues that if lawyers are to discharge these responsibilities effectively they must be equipped with a broad range of “complementary competencies” that supplement and expand the “core” competencies of legal reasoning and analysis that have been traditionally taught in law school and emphasized in legal practice.

#### A. Technical Expert, Wise Counselor, and Effective Leader

When most people think of lawyers, they think of them as technical experts on law. In this role, lawyers help clients solve fundamental legal problems by applying existing law to particular facts using their legal analysis skills and their knowledge of the legal system and legal subject matter. Solving these legal problems requires traditional attributes of fine lawyers—e.g., issue spotting, analytic power, ability to draft, negotiate, and advocate—but also an increasing degree of a highly sophisticated substantive and procedural expertise.

Importantly, a great deal of judgment may also be involved in the expert’s role. The law may be ambiguous. Its real rationale may be hidden under doctrine. As a result, in helping the client make decisions about legal action, the good lawyer will, of course, exercise judgment in advising the client about the probabilities of different outcomes regarding “what is the law” and “what are the relevant facts.” But in the end, the lawyer will defer to the client to decide which course to follow (assuming that it is legal). This application of technical expertise, both legal and factual, is at the center of many lawyer’s increasingly specialized careers.

In addition to being technical experts, lawyers are also often called upon to be wise counselors to their clients. In this role, the first question the lawyers ask about a particular course of action is “is it legal?” but the last questions are: “is it right?” and “what should we do?”

There are two different ideas behind the phrase “is it right?” First, even on technical legal matters, counseling—the provision of sound judgment to the client about the “right” course of action—is, of course, often necessary, either when requested by the client or volunteered by the lawyer. This counseling of the “right” course “under existing law and circumstances” can, of course, be quite complex and challenging. The wise counselor may put the particular decision in context, by describing the range of legal and non-legal factors relevant to the decision. Included in this concept of wise counselor is the role of lawyer as facilitator—not just advising on what is right in terms of making a challenging legal decision but also what is the right course of implementing that decision (through, for example, choosing among a variety of approaches to consummating a transaction or implementing a dispute resolution strategy).

Complicated as that type of counseling is, however, there is a different, broader, conception. Under this second view of counseling, the ultimate question is not what should be the “right” legal course of action under current law and circumstances, but rather what is “right” in the sense of what a law or policy or private norm ought to be in the future. For example: Should a client seek to overturn a regulation or propose a new one? Should a corporation adopt global standards—e.g., labor standards in global sourcing—that are not mandated by law? When a senior leader violates an institution’s core ethical standards, should that violation be weighed against past performance in deciding whether to terminate—or is the fact of violation itself a sufficient cause by itself for firing? This kind of counseling about “what ought to be” requires lawyers to consider a wide variety of factors beyond what is the “right” course of action under the existing facts, law, and circumstances. They may look at institutional, political, economic, policy, reputational, ethical, geopolitical, or media factors—to name some of the more salient. They will need access to other disciplines to describe complex present and future institutional, social, or economic realities. Such counseling requires an understanding of the client’s deeper explicit or implicit goals—or it may require suggesting alternative goals to the client rather than just devising or recommending a purely legal solution. Again, the ultimate question is what is “right” for the client, not just “what is legal.” And the issue of what is right in the “ought to be” sense may turn on prudential grounds—what is in the client’s enlightened self-interest—or it may be some combination of prudential considerations and moral concepts such as loyalty or transparency or fiduciary duty or respect for individual dignity. It will surely involve finding some appropriate course between what is feasible and what is desirable.

The broad factors which shape the analysis and recommendations on “what is right”—in the sense of “what ought to be”—show that lawyers, while they may often play the “wise counselor” role, do not have a monopoly of expertise on those key factors. People with other core professional training—e.g., economics, political science, communications, relevant scientific, or technical expertise—may also bring different, important perspectives to bear in counseling people or institutions on what ought to be the “right” norm, rule, or policy (even if they may need lawyers to translate into operative technical language). Wise lawyers have a responsibility to seek out—and incorporate—these important, complementary perspectives.

Finally, lawyers are leaders who often have ultimate positions of responsibility and accountability, who do not just advise but who decide. Interestingly, although many lawyers have assumed important leadership positions throughout our history, the paradigm of the “profession” is a lawyer serving clients, not lawyers as leaders.

Certain positions for lawyers as leaders are, of course, those that only people with legal training may occupy (e.g., judges, attorneys general, and heads of law firms or bar associations, general counsel, and deans of law schools). But, even in these “legal” leadership jobs, ultimate decisions are often based on broad factors similar to those considered by a wise counselor—institutional, political, economic, ethical, reputational, etc.—beyond those factors relating solely to law as it exists or as it will evolve. And, even these “legal” leadership positions require organizational skills—vision, planning, budgeting, management, personnel—which require general managerial, not uniquely legal, skills.

But lawyers, including those leaders of legal institutions, have also occupied leadership positions in a wide array of other public, private, and non-profit institutions and organizations. They can be heads of countries, universities, companies, foundations, cabinet departments, legislative committees, and

regulatory agencies of all shapes and sizes. They can create the architecture of our society in these positions as they have, indeed, done during critical historical epochs: the founding, the civil war, the progressive era, the New Deal, the rights revolution of the sixties or the conservative renaissance in the 1980s and thereafter. They can be leaders in thought, as well as action. The legal leaders we discuss here need to understand the other broad leadership roles lawyers assume in society.

But the concept of lawyer as leader that we define is not limited to those lawyers who find themselves in formal leadership positions. As every lawyer knows, in some circumstances lawyers are required to go beyond simply providing expert legal analysis or even wise counseling about what is right. Sometimes lawyers have to make the decision themselves, either because that is what their client wants or because time demands it. Certainly, this is true of lawyers who work in large law firms and in-house legal departments, who are often charged with making decisions on a range of issues from tactical decisions about how to deal with opposing parties in litigation to setting up “private ordering” regimes that will govern the company’s activities in areas where there is little or no relevant law. Moreover, in addition to being “producers” who are sometimes called upon to make important decisions for their clients or their organization, lawyers in these institutions are also “managers” of increasingly large and diverse teams. As such, even lawyers with no formal leadership responsibilities will exercise important decision-making authority in the course of their jobs. And one would be hard pressed to find a group of professionals that have more autonomy to lead and make important decisions for themselves, for their institutions, and for their constituents than law professors.

As with lawyers as wise counselors, it is worth emphasizing that law is just one of many occupations from which leaders across all facets of society are drawn. A law degree guarantees nothing but an opportunity to compete for leadership positions. Yet leadership is a station to which many lawyers may aspire—and in which many will find themselves whether they aspire to be there or not. No discipline or professional degree fully equips individuals with leadership abilities and capacity. A broad-gauged lawyer, however, with broad competencies informed by wide experience, is surely as qualified for leadership as others. And, just as surely, positions of leadership require lawyers to consider the four fundamental ethical responsibilities to which we now turn.

#### B. The Four Ethical Responsibilities

Given the breadth of the roles of expert, counselor, and leader, it is imperative that lawyers understand that their ethical responsibilities are correspondingly broad as well. The sources for ethical responsibilities, which arise both from the lawyer as a trained professional and from their status as highly educated citizens, include: the spirit and letter of the Model Rules of Professional Conduct; an implied social contract between state-licensed professionals and the rest of society; the enlightened self-interest of the institutions in which lawyers serve; the role of law, regulation, and norms as the foundation and expression of public policy and private ordering; and lessons about lawyers’ roles in the history of our constitutional democracy and political economy.

At least since the founding of the republic, there have been important and spirited debates about just how broad the ethical responsibilities of lawyers should be. Some have argued for a relatively narrow ethical view, which places paramount importance on the lawyer’s duty to advance the private interests

of clients. Others have argued for a much more expansive view that celebrates lawyers as “high priests of law” with broad duties to the rule of law and the public interest, and who are capable of mediating between the powerful and the people. Still other theorists have argued that the whole idea of legal ethics is largely a sham, operating principally as a shield for lawyer self-interest.

Although we write in the shadow of these broad sources and great debates, and frequently borrow from them, it is not our intention either to reprise or resolve them here. Instead, we wish to call on what we believe to be a broad—although certainly not universal—consensus that in return for their privileged status as “licensed professionals,” lawyers have explicit and implicit obligations to protect the interests of clients, to promote the rule of law, and to generally provide services in the public interest. And that in addition to these direct professional commitments, that lawyers have also—although certainly not always—played a critical role as exemplary “citizens” throughout our history, by helping to design the public and private institutions (including great companies, law firms, and law schools) that have helped our country prosper.

Given this consensus, we believe that lawyers and legal academics should understand themselves as having four interrelated sets of obligations, however open-textured, each of which are of signal importance, as they consider how to act in particular contexts across the full spectrum of their careers:

1. Responsibilities to the people and organizations that their own institution serves (such as corporate stakeholders, law firm clients, and law students and faculty).
2. Responsibilities to the legal system and rule of law that are the foundation of our political economy and constitutional democracy, including contributing to access to justice, strengthening the rule of law and legal institutions in the United States and around the world, and supporting efforts by other lawyers to uphold their own professional responsibilities.
3. Responsibilities to the institution in which lawyers work—e.g., corporations, law firms, and law schools—and to the people employed by such institutions, such as a corporation’s global workforce or a law firm’s or law school’s diverse employees.
4. Responsibilities to secure other broad public goods and enhance sound private ordering—complementary to the rule of law—in order to create a safe, fair, and just society in which individuals and institutions (including major corporations, major law firms, and major law schools) can thrive over the long-term.

We do not mean to suggest that any lawyer can—or should—honor all four of these responsibilities equally in every setting. Although in many circumstances the four ethical responsibilities will be complementary, in others they may be in tension or even conflict. As a result, we recognize that lawyers will sometimes be in the difficult position of choosing which of these responsibilities will take precedence in guiding specific courses of action. Criminal defense lawyers, for example, generally believe that they have, in particular matters, far greater obligations to protect the interests of their clients—and far fewer obligations to protect the rule of law or the public interest—than lawyers who are advising companies on prospective regulatory compliance, where the substantive and procedural context is very different. Even in the criminal defense context, however, we believe that lawyers should consider whether their actions are within a fair interpretation of “the bounds of the law,” and that those lawyers in any event have an obligation to participate in efforts to reform the legal framework, or society more generally, to better serve the goal of

protecting the rights of criminal defendants and the public interest in the fair and efficient administration of justice.

Similarly, we do not believe that there is any single path that every lawyer should follow to achieve these goals. There is not now, nor has there ever been, “one true faith” for ethical lawyering. To the contrary, great lawyers throughout history have grounded their ethical responsibilities in traditions that are both “progressive” and “conservative”—and every permutation in between. But regardless of their political preferences, these great lawyers have also insisted that the legal profession has normative obligations along the lines of the four duties outlined above. It is to this broad consensus that we appeal.

Indeed, the legal profession’s historic commitment to these four responsibilities has always been one of its principle appeals for new entrants—and one of the keys to the profession’s success. Research consistently demonstrates that many of the most talented women and men applying to law school have a strong desire to devote an important part of their professional lives to work of public or private sector importance—to feel a strong connection between “who they are” and “what they do.” Yet it is widely believed that it is increasingly difficult for many lawyers to feel this connection, particularly in the context of companies and law firms. By helping lawyers to focus on the broad ethical dimensions of their roles in these institutions, we hope to restore at least some of this critical connection. Whether working as lawyers in a particular setting, or on projects outside of their core institutions, lawyers must understand and navigate sometimes conflicting duties to clients, the legal framework, their own institutions, and the wider public. Although this process will often be challenging, it is also what makes the lawyers’ role so potentially rewarding. As former Harvard Law School Dean Robert Clark eloquently stated, the lawyers’ fundamental role is not “law” per se, but “normative ordering.” And in the context of lawyering, normative ordering requires attention to all four of the responsibilities outlined above.

### C. “Complementary” Competencies: Beyond the “Core”

To discharge the diverse roles of technical expert, wise counselor, and effective leader, lawyers in this era, even more than in the past, need broad knowledge and skills. But these necessary skills are more capacious than the “core competencies” taught in law schools and required to pass the bar.

The “core competencies” of lawyering are primarily communicated in the basic training on legal concepts, subjects, and methods in the first year of law school. It is no accident that more than 100 years after Christopher Columbus Langdell and more than 50 years after the Realists, the first-year curriculum at most law schools is still built on the “case method” applied to traditional subjects such as torts, contracts, civil procedure, criminal law, property, and constitutional law. Focusing primarily on appellate opinions, these courses are used to transmit knowledge about the legal system. They illustrate important traits of skepticism, critical thinking, balance, and judiciousness. Further, they develop and train the critical qualities of traditional legal method and analysis: issue spotting, basic legal concepts, close textual analysis, legal reasoning, legal ambiguity, and the importance and elusiveness of “facts.” These skills and habits of mind have served lawyers well over the years, and should continue to be at the core of legal education, as well as of any plausible professional licensing regime.



The question has always been what other qualities of mind—modes of thinking—do we want in our lawyers so that they can be outstanding technical experts, wise counselors, and effective leaders? Beginning with the progressive and realist movements in the first half of the 20th century, and continuing through the rise of clinical education and the “Law and” movements in that century’s latter half, we have developed a set of partial—albeit contested—answers to this question. Thus, in today’s law schools students now learn to varying degrees about statutory and regulatory law, the policy frameworks and value choices underlying legal policies and decision making, a basic introduction to various lawyering skills, and set of social science tools with which to make and evaluate legal rules.

Nevertheless, we believe that a full recognition of the roles lawyers will increasingly play in the 21st century will require an even more expansive and systematic view of the competencies that are required of astute technicians, wise counselors, and effective leaders. Thus in addition to the expanded set of “core competencies” described above, lawyers will also need to acquire a broader set of “complementary competencies”—first in law school, but then reinforced during the continuum of their careers—that will allow them to operate effectively across the broad sweep of roles that they will play throughout their legal careers.

To underscore their importance, we offer here an exemplary (not exhaustive) list of the complementary competencies which are central to the roles of expert, counselor, and leader. This brief description of complementary competencies is intended to encourage an energized discussion about the broad qualities of mind that lawyers will need to discharge their responsibilities as experts, counselors, and leaders, and most importantly, about where and how those with legal training should develop such competencies, and how they can be nurtured and supported. Obviously, each lawyer cannot have every complementary competency listed below—and in a world of scarce resources there will be a need for critical discussions within institutions about which of these competencies is most important in any given context. Nevertheless, we believe that education and training of lawyers should move towards making acquisition of these competencies—and others deemed vital—possible in a systematic, sustained way during their education and careers.

Most generally, we need lawyers who have a creative and constructive, not just a critical, cast of mind. Lawyers should be trained and encouraged to build an argument in a brief, a regulation, a complex piece of legislation, or a business plan that paints a persuasive vision about what “ought” to be, as opposed to simply delineating what already “is.”

We need lawyers who, in asking “ought” questions, base that inquiry on a relentless and fair-minded empirical quest for a broad set of facts which, to the greatest extent possible, reflect the complex reality of the world they would seek to change—cultural, systemic, and structural—by drawing on a diverse set of empirical disciplines outside of law.

We need lawyers who, in asking these “ought” questions, can articulate a set of systematic and constructive options that expose and explore the value tensions inherent in most decisions. In the context of business decision making, for example, when issues often come clothed in shades of gray, what

are the alternatives for accomplishing a legitimate business goal with different degrees of legal, ethical, and reputational risk and with varying direct and indirect costs?

We need lawyers who, in addition to exposing value tensions, can find a fair balance, in the ultimate course taken, between legitimate competing values. This may entail a balance between the policy or cost-benefit choices just mentioned, or, on a grander scale, a balance between the values that underlie so much of American history, legal and otherwise; for example, between freedom and equality or order and liberty, individualism and community.

We need lawyers who think about the ethical, reputational, and enlightened self-interest of their client or the institution they are leading, not just about what is strictly legal or advantageous in the short-term. Exposing and analyzing these extra-legal issues is a critical function for lawyers.

We need lawyers who, in making recommendations or decisions, are capable of assessing all dimensions of risk but who are not risk-averse. Taking well-considered chances is not a quality of mind customarily associated with lawyers but is often vital to innovation and change in the public and private sectors.

We need lawyers who have the ability to get things done, to understand how to make rules realities, particularly in the hurly-burly world of politics, media, and power. This includes not just the ability to understand and work within large institutions to achieve meaningful progress in implementing high-level rules, but also the role of lawyer as “facilitator”—to drive a transaction or negotiation to successful conclusion, often characterized as “getting to yes.” It involves, on public issues in a democratic society, skill at fusing policy and politics.

We need lawyers who are not just strong individual contributors but who have the ability to work cooperatively and constructively in groups or on teams that are increasingly diverse and multidisciplinary—and who can lead these teams effectively. Teams are ubiquitous in the working lives of lawyers. Yet very little attention has been focused on what makes individuals effective team players. Moreover, working on teams and leading them are increasingly interconnected: much of leadership today is not command and control of the troops but persuasion, motivation, and empowerment of teams around a shared vision. All of these skills must now be practiced on teams that are increasingly diverse in every way, and where lawyers must work collaboratively with professionals from a broad range of other disciplines to get the job done.

We need lawyers who, when working on teams or developing arguments or positions, have the ability to understand the validity, value, and limits of related disciplines. This is particularly true with respect to the closely related disciplines of business and public policy, which are inseparable from law, particularly in the world of large companies and law firms that is our primary focus. But lawyers must also be familiar with the basic tenants of a broad array of other disciplines. Needless to say, lawyers cannot all have joint degrees, and choosing which disciplines to teach—and where and how—is a complex task. But lawyers must nevertheless have the aptitude and capacity to envision the relevance of a broad range of disciplines, and then, through the expertise of others, mine these other fields of knowledge to understand their strengths and the limitations inherent in their assumptions and their methods, and to separate what is established from what is hotly contested.

We need lawyers who can define problems properly in all of their increasingly complex global dimensions, and who can recognize the critical role of private ordering in addressing these problems. Particularly as they advance in their careers, lawyers will need to develop the vision, breadth, and inclination to be outstanding generalist-leaders. We recognize that there is a tension between the demands of super-specialization early in a career and the demands of a great generalist later in a career as one assumes broader types of responsibility and accountability. Nevertheless, it is critical that we develop lawyers who have the quintessential quality of the great generalist of envisioning and understanding the multiple dimensions of issues and the ability to comprehensively integrate those dimensions into the decision.

And, finally, with respect to all competencies, core and complementary, we need lawyers who can communicate effectively and concisely in a wide variety of formats and venues. Lawyers have always prided themselves on their ability to communicate. But as the range of problems they confront as experts, counselors, and leaders expands—and the modes of communication multiply—lawyers must explicitly work on developing competency in the full range of mediums and disciplines required to communicate effectively in today’s information society.

In Parts IV—VI we will explain why we believe these and other similar complementary competencies are particularly important in the context of in-house legal departments, law firms, and law schools, and offer some preliminary ideas about how these institutions can create systems that will support lawyers in developing and exercising these critical skills. Before doing so, however, it is first important to explore the implications of focusing on these particular institutions for our analysis, as well as to briefly explore the economic and regulatory context in which lawyers working in these institutions currently operate.



### III. THE CONTEXT

We believe that the framework set out in Part II has important implications for lawyers across a broad range of positions and functions, whether they are in the public, private, or non-profit sectors—and regardless of whether their primary job is “practicing law.” But, as noted, the central purpose of this essay is to explore our ideas in the context of three major legal institutions: multinational corporations, large law firms, and the law schools that send an important number of graduates into these two institutions.

#### A. The Importance of Multinational Companies, Large Law Firms, and Leading Law Schools

We focus on the ethical responsibilities of lawyers in these three institutions mindful of both the continuing importance of this particular lawyering context, and the continuing danger of treating it as if it were representative of the entire profession. Legal departments, law firms, and leading law schools that send many of their graduates into these and other similar institutions continue to play an important role in defining professional norms—and the profession’s and public’s perceptions about these norms. Many of the leaders of the bar who have defined its ethical standards have come from these three institutions, and precisely because of the attention they receive in the legal and popular press, these institutions also play a key role in shaping how lawyers, law students, and the general public perceive these ethical standards. Moreover, companies, law firms, and law schools are a training ground and way station for lawyers who will spend significant time in other sectors of the profession, including government, and non-profits—a trend that is likely to accelerate as young lawyers change jobs with increasing frequency. Finally, and perhaps most importantly, precisely because of their connection to the most powerful economic actors in society, lawyers in the in-house legal departments of multinational companies, in large law firms, and in the selective law schools that send a lawyers into these institutions are, as the sociologist Robert Nelson described, “partners with power.” As a result, they are in a position to exercise influence over how these important institutions understand and carry out their own ethical responsibilities. Providing a framework for the lawyers working in these institutions, and the law schools that train those lawyers, to understand and evaluate their broader public responsibility is therefore of critical importance to society even if one believes, as we emphatically do, that there are other lawyers whose contribution to the public good are equally or more important.

It is also critically important, however, not to lose sight of the differences between this setting and the one in which most lawyers continue to work and study. Notwithstanding all of the attention paid to “BigLaw,” the majority of lawyers in the United States continue to practice alone or in very small firms, and a significant number work in the public and non-profit sectors. The work that these lawyers do to provide legal services to individuals and small businesses, and to articulate and enforce the public purposes of our legal system, is at least as important to core issues of access to justice and the rule of law as the work done by lawyers working in companies and law firms. It is precisely because of this segmentation, however, that we believe it is important to ground our analysis in a particular lawyering context. Even concepts as general as the four ethical duties we explore in this essay cannot be applied uniformly in all lawyering contexts. By focusing on a specific context, we hope to move beyond the abstract generalities about “the lawyer’s role” or “legal ethics” that have failed to drive concrete change.

Of course, even accepting the importance of context, defining what constitutes the universe of “multinational” companies, “large” law firms, and “leading” law schools we are addressing is itself a question of context. There is a great deal of variation in the size and operation of the legal departments of even the subset of “multinational” companies, and the definition of what constitutes a “large” law firm is likely to vary by time and context. Defining which law schools to include as a part of this sector is even more difficult and controversial, because traditional metrics such as size, revenue, and even rankings provide a highly imperfect measure of a law school’s quality or influence. Moreover, although legal education—like the rest of the legal profession—has traditionally been both segmented and hierarchical, with different law schools sending graduates into different parts of the legal market, these traditional patterns have blurred in recent years as lawyers have become more mobile across jobs and even sectors.

Given this variation, it will inevitably be up to individual law departments, law firms, and law schools to determine for themselves how much of our analysis about the particular operation of “multinational” companies, “large” law firms, and “leading” law schools applies to their own particular institution. This task, in turn, will inevitably take place against the backdrop of recent changes that have created an environment that is very different from the one contemplated by the traditional model of legal ethics.

#### B. The Challenges of the Marketplace

In little more than a generation, law has gone from being one of the most insulated and least competitive markets to one of the most competitive, in which lawyers and even law schools feel pressure to aggressively compete in an increasingly global marketplace. There are undoubtedly many causes for this fundamental change. Some, like the rapid expansion in the size of the bar from fewer than 250,000 in 1960 to well over a million today, are internal to the legal profession itself. But the most important causes are the same ones that are reshaping virtually every aspect of our political, economic, and social lives. Thus, globalization—and the significant expansion of economic activity from the north and west to the south and east—is putting pressure on a wide array of existing national and international institutions and practices, presenting complex challenges that require new ways of thinking about everything from addressing the needs of multi-cultural employees to doing business with integrity in challenging environments to addressing corporate citizenship and public policy issues in multiple political economies. Similarly, the increasing speed and sophistication of information technology has created an explosion of new data—and an equal number of challenges in understanding, analyzing, and protecting it—that is continuing to reshape the way we communicate with each other and live our lives. All of this has, in turn, accelerated the blurring of traditional boundaries such as those separating the “public” from the “private,” or the “global” from the “local,” and creating new ways of thinking and being. It is only natural that these same forces are reshaping law and the legal profession as well.

The pressure of this new global, more transparent, more competitive environment is being felt throughout the profession. Solo and small firm practitioners, and lawyers working in the public sector, have arguably been hit the hardest, but the legal departments, law firms, and law schools that we are examining have been dramatically affected as well. These changes, in turn, have made it difficult for lawyers and law professors working inside these institutions to focus attention and resources on the broad ethical duties we advocate here.

Law Departments. In-house legal departments are both a major cause of the transformation of the corporate legal market, and are increasingly being reshaped by it. Beginning in the 1980s, companies responded to the growing competitiveness of their own business markets and the rapidly escalating cost of legal service by building internal legal departments capable of taking legal work inside and breaking apart the long-term and near exclusive relationships that they had with their principle outside law firms. In the new millennium, as globalization increased pressure to cut margins and boost productivity even further, these increasingly sophisticated consumers began harnessing the power of information technology and the 24-hour global work day to take legal work that lawyers traditionally sold as an integrated whole—e.g., “class action litigation,” or “a \$500 million acquisition”—and “unbundle” it into its component parts and then spread those different aspects of the work across an increasingly global supply chain of legal producers, many of which (ranging from legal process outsourcing organizations to the Big 4 and other multidisciplinary professional service organizations) were not law firms. Since the economic downturn in 2008, this drive for efficiency and disaggregation is now increasingly being felt inside legal departments as well. Some companies have frozen or even reduced the number of in-house lawyers, putting pressure on these lawyers to work even harder and to demand even more from their outside counsel, while simultaneously paying for less, including by refusing to pay for junior lawyers to work on the company’s matters. Similarly, these lawyers are under even more pressure to demonstrate their “value to the business” by contributing to the short-term economic returns of business leaders, who are themselves under increasing pressure to produce more. Collectively, all of these developments put pressure on general counsels to focus on achieving bottom line results for their companies, and to reduce or eliminate activities that focus on developing and supporting the broad ethical responsibilities of their in-house lawyers—let alone those that are focused on developing and supporting the ethical responsibilities of outside law firms.

Law Firms. These changed practices of in-house law departments are in turn putting significant pressure on the traditional business model of large law firms. Law firms have for years relied on a steady increase in the hourly rates that they charge clients, and an equally steady increase in leverage (the percentage of associates, who do not have an equity interest in the firm, to partners who do) to drive profitability. But as corporate consumers have become more sophisticated about their legal needs, and have greater access to a global network of firms willing and able to provide these services, law firms have had a more difficult time utilizing either of these strategies. These changes have in turn put pressure on traditional hiring and promotion practices. Until the 1970s, law firms hired virtually all of their lawyers directly from law school and observed strong informal norms against “poaching” lawyers from other law firms. As even the most casual observer knows, these norms have almost entirely broken down. Virtually all United States law firms now hire associates and even partners “laterally” from other law firms (and to a lesser extent, government agencies, and in-house legal departments), with many lawyers (particularly partners with significant “books of business”) moving frequently from firm to firm in response to the highest bidder. This growing free agent market is spurred on by a vibrant legal press that reports incessantly on salaries and profits-per-partner, and an industry of “head hunters” whose job it is to move lawyers from one firm to another. Once again, the economic downturn has only intensified these trends with many law firms increasing their lateral hiring of “rainmakers” as a way of bolstering profitability, while at the same time attempting to shed “less productive” partners and associates to reduce costs. And as with in-house counsel, these changes in the client and employment markets have put tremendous pressure on law firm leaders to focus intently on driving profitability, to the detriment of activities that focus on developing and supporting the broad ethical responsibilities of their partners and associates.

Law Schools. It is now clear that law schools—even the selective ones we are considering—are not immune from these pressures. Even before the economic downturn, the rapidly escalating cost of legal education was a major issue for law students, legal educators, and policymakers, with many students graduating with \$100,000 or more in law school debt on top of their undergraduate loans. The causes of the rapid escalation in law school tuition are undoubtedly multiple and complex, including pressure to recruit and retain “star” faculty, the push to create new and expensive educational opportunities ranging from legal clinics to global campuses and exchange programs, greater emphasis on faculty research and the creation of new academic research programs, and the perceived need to build better facilities and programs for students from dormitories and gyms to loan forgiveness and financial aid. The result has been growing pressure on deans to keep their school “competitive” for all of their constituencies, and even more importantly, in the United States News rankings that play an outsized role in whether a law school can attract everything from students to employers to alumni donors. Since the downturn, the confrontation over both the cost of law school—and what students receive in exchange for their tuition dollars—has developed into a full-blown crisis. The job prospects for many law school graduates have plummeted, with barely half now finding full-time employment for which a J.D. is required within nine months of graduation. Not surprisingly, applications to law school have fallen dramatically, off by as much as 40 percent from their prerecession high at many schools. Although these changes are being felt most severely by law schools that do not have the traditional prestige and market position of the ones we are primarily addressing, no law school has been immune from the effect of the tightening job market and the demand that they prepare their students to “hit the ground running” in the jobs that they are able to secure. Similarly, just as technology is allowing companies to unbundle traditional legal services, a host of new providers are seeking to use online learning to restructure law schools—and law-related education generally—in a way that threatens to destabilize the existing economic model of legal education even further. Once again, all of these changes have put tremendous pressure on law school deans to focus their energy on ensuring that their schools remain viable, making it difficult for them to devote increasingly scarce resources to educating students beyond the “core” competencies demanded by employers.

The Hidden Cost of Regulation. Finally, many of the pressures faced by companies, law firms, and law schools are being made even more complex by the shifting parameters of the regulatory system governing legal practice and legal education. Traditionally, the formal requirements of the regulatory system have been simultaneously both broad and narrow in a manner that has tended to reduce innovation and increase costs. On the one hand, the formal licensing regime in the United States is among the most capacious in the world at restricting anything and everything that falls within the notoriously vague and open-ended definition of the “practice of law” to “lawyers” who have graduated from a three year post-graduate law school and have passed a state sanctioned bar examination and character and fitness review. Moreover to receive ABA accreditation, which in most states is a requirement for graduates to sit for the bar examination, all law schools must meet a number of rigid and uniform requirements, ranging from the number of in-class credit hours, to the ratio of faculty to students, to the number of books in the library (although thankfully this latter requirement was recently amended to require only “access” to legal materials, which can now be provided through an online subscription service). Not surprisingly, as countless commentators have argued, the combination of these formal requirements has dramatically increased the cost of becoming a lawyer while reducing the competition that those with law degrees face from other professionals or para-professionals who might be able to provide legal or legally related services more effectively or efficiently. It is precisely for this reason that

the United Kingdom has partially deregulated its legal market, and why both companies and law firms are searching for substitutes—from “outsourced” lawyers in India, to “contract specialists” and “patent agents” without law degrees, to artificial intelligence—to replace more highly paid law school graduates.

At the same time, the substantive requirements for what actually must be taught in law school, and ultimately demonstrated on the bar examination, are relatively narrow, concentrating almost exclusively on what we have described above as the “core” legal competencies. Thus, the only required courses in law school are the core first year subjects and the mandatory course in legal ethics, which in many (but certainly not all schools) concentrates on the formal requirements of the Model Rules of Professional Conduct. As a result, the broad duties and complementary competencies that we explore in this essay—the roles and responsibilities of lawyers as professionals and lawyers as citizens—go far beyond the formal rules required to obtain a license to practice law.

Short-term Costs and Long-term Interests. We do not mean in any way to diminish the difficulties posed by the economic and cultural challenges faced by those leading today’s law departments, law firms, and law schools. There are far too many examples of institutions that have ignored these changes at their peril.

Nevertheless, we do not believe that these market conditions render futile any serious discussion of the normative duties we propose. To the contrary, we believe that they make such a discussion even more important. Ethics are imperative. We reject the argument that there is a stark dichotomy between “business” and “service.” Transparency and competition generally improve service, by giving both consumers and producers better choices. This has clearly been the case in the market for corporate legal services. We believe that competition can also help to promote the normative vision of service to clients, the legal system, institutions, and the public that we argue for here. In essence, we argue that each of the three institutions we address will be more sustainable, will engender more long-term trust, will play an appropriate role in creating a society in which they can flourish long-term, if they find a way to inculcate and support the ethical values we elaborate. But, there is little doubt, this will mean allocation of resources to the four responsibilities of lawyers we advocate. That is a fundamental choice raised by this essay.

The next three sections attempt lay out a broad array of issues facing companies, law firms, and law schools that wish to address their four responsibilities. But we also recognize that if these efforts are to be successful, it is essential that all relevant stakeholders work together to define and support practices that are in the long-term interest of all three institutions, but which are likely to appear risky without support. We return in the conclusion to ways to encourage such collaboration.



### IV. THOUGHTS ON CORPORATE LAW DEPARTMENTS

In the past 25 years, general counsel and inside law departments in major corporations have become far more sophisticated and powerful, transforming an important part of the legal profession. Inside lawyers, not firm partners, are now often the first-line counselors to the CEO and the board, with broad responsibilities beyond legal expertise and with leadership responsibilities which in many instances make them the final decision maker in a corporation. So, too, power has shifted from outside law firms to inside counsel who have asserted their authority to choose law firms, manage costs, and provide real strategic direction on important matters. This growth in power and prestige of law departments in major corporations has significant implications for the four ethical responsibilities those inside lawyers face as professionals and as citizens.

As a framing idea, we maintain that the ultimate goal of corporations—especially global companies—should be the fusion of high performance with high integrity, with the general counsel and inside lawyers playing key roles in achieving both. High performance means strong sustained economic growth through provision of superior goods and services, which in turn provide durable benefits for shareholders and other stakeholders upon whom the company's health depends. Such commercial performance entails an essential balance between risk-taking and economic risk management.

High integrity means robust adherence to the letter and spirit of formal rules, both legal and financial; voluntary adoption of binding global ethical standards that go beyond existing rules, including balanced proposals on future public policy; and employee commitment to core values of honesty, candor, fairness, trustworthiness, and reliability. It involves understanding, and mitigating, other types of risk—beyond direct economic risk—that can cause a company catastrophic harm: legal, ethical, reputational, communications, public policy, and country-geopolitical. The core values of employees are essential to strong relationships inside and outside the company—and these values, in turn, can only exist when the company adheres to the formal rules and adopts appropriate global stands. For lawyers, these integrity issues go far beyond the strictures of mandatory legal professionalism.

But the fusion of high performance with high integrity is not just about risk mitigation. It is about creating affirmative benefits in the company, in the marketplace, and in the broader global society. Ultimately, high performance with high integrity creates fundamental trust among shareholders, creditors, employees, recruits, customers, suppliers, regulators, communities, the media, and the general public. This trust is essential to sustaining the corporate power and freedom that drives the economy—trust which in the past 10 years has dramatically eroded due to stark corporate scandals and unthinkable business failures. Increasingly, over the past 25 years, major corporations, especially transnational ones, have accepted these broad goals of high performance with high integrity, although each company might formulate those goals in different terms and although these broad goals do not command assent at the top of all major, global companies. But, as we note at the end of this section, incessant cost pressures from global competition and desire for margin expansion make choices about the types and scope of integrity initiatives challenging for the inside lawyers—and, ultimately, for the corporation.

## A. Responsibilities Inside the Corporation

The core task of CEOs, and top senior executives like the General Counsel, is to build a performance with integrity culture that permeates the corporation and is uniform across the globe. Such a culture entails shared principles (values, policies, and attitudes) and shared practices (norms, systems, and processes). Although this culture must include elements of deterrence and sanctions against legal, financial, and ethical wrongdoing, it must, at the end of the day, be affirmative. An underlying tenet of this culture should be that people want to do the right thing because leaders make it a company imperative and because the leaders live it themselves.

Although the CEO, with explicit support from the board of directors, is ultimately accountable for fusing high performance with high integrity, the General Counsel—and the inside legal department—also have a critical role in supporting that general effort as technical experts, wise counselors, and leaders. The essence of the role is to move beyond the first question—“is it legal?”—to the ultimate question—“is it right?” Such a role involves leadership, or shared responsibility, not just for the corporation’s legal matters but for its positions on ethics, compliance reputation, public policy, communications, country, and geopolitical trends and, ultimately encompassing all those issues, corporate citizenship.

The General Counsel and inside lawyers should aspire to a lawyer-statesman ideal. This role involves not just dealing with past problems, but charting future courses; not just playing defense, but playing offense; not just providing legal advice, but also offering business advice. Even more broadly, it involves the wise counseling and leadership roles which stem from practical wisdom, not just technical mastery; requiring broad judgment based on knowledge of history, culture, human nature, and institutions, not just a sharp tactical sense; which flows from the ability to understand long-term implications, not just achieve short-term advantage; and which is founded on a deep concern for the public interest, not just the private good.

### 1. Supporting the CEO’s creation of an integrity culture

A critical role for the General Counsel and the inside lawyers is to provide strong support to the CEO and other business leaders in creating essential systems and processes so that “tone at the top” is matched by operational disciplines that affect all employees. The following key principles are fundamental to creation of an integrity culture, and require the support and leadership of the General Counsel and the other inside lawyers to implement.

- CEO and business leader demonstration of committed and consistent leadership through aspirations expressed to the whole corporation, the choice of respected people to carry out integrity functions, and the allocation of significant resources to integrity systems and processes.
- Managing performance with integrity as a business process, so that, ensuring compliance with the spirit and letter of formal legal and accounting rules—through prevention, detection, and remediation—are the responsibility of all business leaders and integrated with commercial practices through systematic process mapping, risk assessment, and risk mitigation.
- Adopting and implementing global ethical standards, beyond what the formal rules require, which bind the corporation and its employees.

- Establishing and following early warning systems in order to stay ahead of global trends and expectations relating to formal rules, ethical standards, and public policy.
- Fostering employee awareness, knowledge, and commitment through creative education and training in order to instill understanding of law and ethics—and to inculcate the values of honesty, candor, fairness, trustworthiness, and reliability.
- Giving employees voice so that they may lodge concerns about possible commercial, legal, or ethical risks with senior decision makers who can promptly investigate and remediate as appropriate—such systems counter the deadly culture of silence by detecting and deterring and must not countenance retaliation against whistleblowers.
- Designing systems that pay for performance with integrity so that legal and ethical conduct is rewarded just as commercial achievement—regular compensation for action that is expected and special compensation for action that exceeds expectations.

Embedding these principles in the commercial activities of the corporation is a complex, systematic task that requires the highest level of leadership from the board, the CEO, business leaders, and key staff officers like the CFO and GC.

## 2. Resolving the partner-guardian tension

The greatest challenge for the General Counsel, and other inside lawyers, is to reconcile the dual—and at times contradictory—roles of being partners to business leaders and guardians of the company's integrity and reputation. Resolving this tension is at the core of the lawyer-statesman role in helping the company perform with integrity. General Counsel must function as business partners to the CEO and top business leaders; acting as lawyer to achieve business goals but also, at times, as a business person in giving broad, non-legal views on complex and difficult commercial issues.

But the General Counsel's fundamental role is to act as the guardian of the company, his or her ultimate client. The guardian role involves first and foremost the difficult task of explaining to the CEO and other business leaders that the inside lawyers represent the company, not them. It may involve being the final decision maker on a variety of legal, ethical, reputational, and public policy issues. When serving as wise counselor to the CEO or business leaders, the guardian role often can involve slowing decisions down until crucial facts are gathered and multi-faceted analysis completed. It involves presenting to the CEO or the board (or other top business leaders) a range of options with varying degrees of legal, ethical, reputational, and other risk. It involves making a recommendation after explaining the options. And it must involve saying “no” strongly if proposed actions are clearly illegal or highly unethical.

All lawyers inside the organization have a broad obligation to report serious “concerns” about commercial, legal, or ethical risk to the General Counsel or other top lawyers in the company. And the senior lawyers have a correlative obligation, after at least preliminary factual inquiry, to report such concerns to the top business leadership or the board. This broad reporting duty goes far beyond duties under the Model Rules of Professional Conduct or other formal reporting regimes such as Sarbanes-Oxley, it deals with “concerns” about a broad range of activities not the more stringent reporting standards of



“knowledge” or “reasonable certainty” of discrete types of wrongdoing. But inside lawyers must be trained carefully on exceptions to the duty of confidentiality and the duties under law to report up and out when the company leadership does not respond to warnings on certain core real or potential illegalities.

The General Counsel—and inside lawyers—must be prepared to resign if asked to condone or do something clearly illegal or highly unethical or if excluded from major decisions.

### 3. Duties to employee lawyers’ professional and personal needs

The leaders of inside legal organizations also have strong ethical obligations to the people who work for and with them, beyond the bureaucracy of corporate HR systems.

- To attract outstanding inside lawyers, General Counsels should generally delegate on a broad range of issues and judge lawyers by results. In doing so, it is critical that they defend the lawyers when profit-and-loss leaders lower in the organization seek to compromise integrity to make the numbers or ignore or abuse lawyers who raise issues. No act is more important to the esprit and culture of the legal organization than this shield that General Counsels provide to field lawyers so those front-line lawyers can wield the sword of integrity.
- General Counsels owe an obligation to lawyers to provide tailored training about business and finance generally and about the business and finance of the corporation in particular.
- In a global company, it is essential to create a strong, uniform culture in the legal organization because it will always be under constant pressure in its pursuit of corporate integrity. This can occur through a variety of mechanisms: division meetings, specialist meetings, meetings of all lawyers in a particular country or region, global senior lawyer meetings, robust use of IT.
- General Counsels must have real personnel evaluations processes in place that honestly speak about strengths and weaknesses on an annual (or per matter) basis. They must give lawyers a sense of possible career paths and opportunities either as generalists or specialists—or to cross over into business jobs within the company. Inside lawyers need to have a true understanding of where they stand, but this requires hard work and specificity, not a brief adjective-laden meeting. Leaders must devote significant attention to creating company-wide opportunities, evidenced, importantly, by filling important positions with non-United States lawyers outside their home nations.
- Lawyer leaders inside corporations have a special obligation to hire, retain, and promote qualified women and minorities. Although corporate legal departments may, on the whole, have a significant number of women lawyers and some representation of minorities, the process of promoting them into leadership positions is far from complete. For example, in recent years, only 106 top legal officers in the Fortune 500 were women (21 percent) and 29 were men of color (6 percent). Internal leadership diversity is a subject which must be addressed by virtually all Fortune 500 companies. This includes providing meaningful jobs for lawyers who may have left for a period of time (beyond regular new child leave) to raise families but then wish to return to practice—for example, giving them preference for open positions.

- Although corporations have numerous levels of hierarchy and a profusion of titles, the leader of the legal department should, to the greatest extent possible, seek to create a “partnership” of inside lawyers where teamwork is a high value, information is widely shared, common purposes are underscored, and leadership respects individuals through engagement and participation of all. Because leaders have significant power over the lives of subordinates, corporations can tend towards a command and control culture. This tendency can be rejected in the legal organization, even when holding people to high standards of performance.
- Pro bono activities of inside legal departments are not as well established as in private law firms. But they are important, doable, and should be done, for example, by forming legal clinics with other corporations in underserved areas, forming alliances to provide pro bono services to 501(c)(3) entities in the community, or creating partnerships for overseas legal service provision.
- General Counsels need to keep work load under control to the greatest extent possible so that lawyers may have time for family, pro bono, community, church, or other activities outside the workplace. Inside lawyers may work incredibly hard—facing huge projects, front page crises, immediate demands of business leaders. General Counsels and other law department leaders can work hard to increase law department productivity, effect efficiencies and pay close attention to lawyers’ workload so that their colleagues can have a life—including fighting against mindless headcount reductions in a function that is usually a fraction of one percent of company costs.

#### B. Ethical Decision Making about Stakeholder Issues

Corporations often make ethical decisions which bind the company and its employees and which go beyond what the formal legal and financial rules require. Some company-imposed norms apply internally to employees such as non-discrimination in all nations across the globe; designing compensation systems that reward/incentivize integrity activities; actively promoting internal whistleblowing to give employees voice about business, legal, and ethical risks; and determining what kinds of company formal or ethical principles are so fundamental that when violated require separation of the offending employee (e.g., falsification of financial data) without balancing prior work history.

Other ethical precepts can apply to stakeholders or settings outside the corporation: no bribery (even when not clearly prohibited by law); building new facilities to global, not local, environmental, health, and safety standards; engaging in ethical sourcing so that third-party suppliers avoid child or prison labor and provide safe and healthy working conditions; ethical lending standards; reducing pollutants or eliminating greenhouse gases above regulatory standards; deciding that global company standards should have greater weight than injurious national law (e.g., Google’s decision to give up its Chinese browser due to China’s legal imposition of censorship); deciding not to do business in a particular nation prior to formal national sanctions (e.g., not doing business in Iran); or forming industry associations to create a floor on best practices to address serious problems (electrical standards or nuclear safety).

The General Counsel and other lead lawyers are not the sole decision makers on decisions adopting corporate ethical positions or, to use a more neutral phrase, global standards. But, without question, the lawyers should have a lead role in defining the issues and refining the options and the analysis. This is so because these decisions often have reference to broad norms with which lawyers may (should!) be familiar

including: fiduciary concepts such as diligence and loyalty; reliability in keeping promises and commitments even if not enshrined in formal contract; transparency including such ideas as avoiding deception or adequate disclosure and candor; respecting the dignity of all stakeholders, for example, in the workplace, in health and safety or in protecting privacy; fair dealing and fair treatment; responsiveness in learning about and addressing stakeholder concerns. Decisions in these areas create “operational norms” with the full force of company compliance and with sanctions for violations, even if they are not technically law.

But such decisions may have multiple rationales that are contextual and multi-factorial and change with the problem being addressed. The ultimate standard is the “enlightened self-interest” of the company—a prudential standard that is dependent on context, but may have reference to broad normative ideas (fiduciary duty, transparency) and may also include the value of being a “moral” actor in the eyes of various stakeholders. For example, a decision to have ethical sourcing for third-party suppliers (requiring such suppliers meet company imposed standards regarding working conditions and health/safety) may have multiple rationales: avoid supply chain interruptions; answer critics of globalization (who accuse multi-nationals of exporting bad practices); and not appearing hypocritical to company employees, especially those in the same emerging market and who may question sub-standard practices at suppliers. But critical details in implementation (second and third tier suppliers too?) may turn on administrative complexity and cost. A different decision, prohibiting both public and private bribery even when not clearly prohibited by United States or national law, turns on the variety of harms corruption causes in emerging markets that affect sound business as well as making an unequivocal statement to employees about the centrality of integrity in all business activities.

In identifying issues for decision, a company—often led by its lawyers—should have a robust process for canvassing the demands made on the company by internal and external constituencies: issues raised in commentary; the ethics of other multi-nationals; guidelines from multilateral organizations; demands from NGOs; and practices being adopted by other companies. The lawyers must help determine, first, if the issue is of such moment for the company that research, analysis, and development of options is appropriate. In making such decisions after analysis, it is important to view expenditures in implementing the decision as an investment, not just as a cost; to understand that the “benefit” of such an investment may require common sense and judgment not just financial analysis (e.g., not just discounted rates of return); and the “accounting period” during which the benefit will occur may be years, not just the next quarter.

Also, although the General Counsel and inside lawyers may have an important role in defining and debating global standards, the CEO and/or the board of directors will often make the ultimate decision taking into account perspectives offered by other corporate staff and other operational leaders, not just inside counsel. This is so because top leadership should, in most cases, determine what is the enlightened self-interest of the company and create a binding norm with strong operational effects.

In this critical corporate function, lawyers are acting both as professionals because of expertise about norms and institutions but also as citizens because they have no monopoly on the multiple factors and considerations which go into the ultimate judgment about what is in the best interest of the company in relation to its stakeholders and society—and, more broadly, about what, for a particular enterprise, should constitute corporate citizenship.

### C. Relations With, and Responsibilities To, Law Firms

The rise of inside legal departments in power and prestige is due, in important part, to the increase in the quality of in-house lawyers, both broad-gauged generalists and highly skilled specialists. Increasingly, inside lawyers are close business associates and ethical advisors to profit and loss leaders throughout corporations, as well as the front line experts/advisors on cross-functional teams for a vast array of corporate activities from acquisition to operations. Put simply, as the breadth and depth of inside law departments have increased, there has been a shift of power from outside to inside on matters and on money. On matters, inside lawyers are often active managers of major issues facing the corporation. With the rise of inside “specialists” lawyers (e.g., tax, mergers and acquisitions, labor and employment, antitrust, intellectual property, and litigation), expert inside counsel may well “run” the matter, utilizing lawyers from an outside firm or number of firms.

On money, inside law departments started more than a quarter of a century ago to break up monopolies or oligopolies that specific firms enjoyed with specific corporations, injecting serious competition into the purchasing of legal services and using a wide array of techniques to control and reduce the outside legal spend (front-end budget, back-end audits, increasing use of fixed fees, and strategic alliances). Money is, however, still a source of great discontent and tension between many clients and firms, as law departments try to reduce costs for the corporation under constant productivity pressure from management and outside lawyers try to increase revenues for the law firm in order to compete for star partner talent under the free agency system through profits per partner.

Although corporations have legitimate claims about firms not getting on the same page about money, corporations must acknowledge that this transformation of the inside-outside relationship is a cause of some of the problems facing major law firms, and that corporations and law firms have congruent interests in discharging the four ethical responsibilities. Indeed, many of those problems will require cooperative approaches on both side of the inside-outside divide. The General Counsel, and other lead in-house lawyers, must find a new balance between the corporation and the firm, and must understand that they have an obligation to work with firms on the four responsibilities, and may use their influence over both matters and money to encourage responsible, cooperative law department-law firm interactions. (This complements a potential rebalancing in law firms, discussed in the next section, between their role as business organizations and their role as associations of professionals.)

#### 1. Young associates

Corporations have some responsibility for solving the numerous problems facing young associates in major firms: clarifying what rates are reasonable for young lawyers (as opposed to just saying no to high rates); letting young lawyers have responsibility on company matters; supporting mentoring, competency training, and balancing specialist and generalist skills; and, at bottom, sharing the cost of training young lawyers. Taking such responsibility may include:

- Major law firms and major corporations could agree on developmental programs for young associates in the law firm: a complete range of mentoring, competency training, blending specialization and generalist skills, and phased responsibility on client matters. Major

corporations could seek out and agree to use talented associates on their matters as they went through these early developmental phases, and agree to pay full or partial cost with no or little margin for the firm in the early phases, and to slowly increase margin as associates gain more experience.

- As associates gained experience, they could be “seconded” to corporations in their third or fourth years. Again, the law department could pay the firm the cost plus a negotiated margin of such an associate. It is in the firm’s interest for the young lawyer to work, for a time, “in the belly of the beast” and to learn corporate problems in general and the client in particular, including the many ethical and judgment calls which inside lawyers must make.
- It is critically important that leaders of law departments should work with firms (and heads of firm practice groups) to support rotation of young lawyers during the early years of their career in order to create a foundation for young lawyers to become either generalists (in a broad area of the law like litigation or mergers and acquisitions) or specialists (in more technical areas like tax or intellectual property). A generalist perspective is critical both for law department and law firm specialists.
- Major corporations could also have a guideline that gives preferences to firms which have a general policy and practice of setting expected average associate hours at a reasonable level (e.g., 1,900-2,000 billable client hours per year). But such a guideline must be accompanied by law department self-restraint—refraining from demanding late hour or weekend work on young law firm lawyers in the name of phony deadlines, or from giving unnecessary “cover the posterior” assignments untethered from good judgment.
- Inside law departments could reverse their general practice and begin hiring students right out of law school. Some legal departments are starting to do this. Such hiring should only be undertaken, however, if the law departments are prepared to provide real competency training, development, mentoring, and growth opportunities, and to give meaningful work and appropriate responsibility.

## 2. Request for firm views on “What is Right”

Law firm lawyers have their own form of the “partner-guardian” tension. To keep business, they may simply address narrow questions of legality, without providing the perspective and advice that can protect the corporation on a wide variety of ethical, reputational, and public policy issues. The client must ask them for such advice or listen when it is offered—and corporations should be willing to compensate outside lawyers who undertake this broader task. The lack of broad outside counseling may occur more at the middle levels of corporations and law firms—when inside lawyers are trying to manage their budgets tightly and young firm lawyers, anxious to keep business, hew strictly to what they are asked to do. General Counsels and heads of firms need jointly to encourage law firm lawyers to provide broader view of the problem at hand and inside lawyers to be open to using additional resources when the broader analysis is warranted.

### 3. Promoting diversity in law firms

In making decisions about whether to retain firms, General Counsels and inside lawyers can, at a minimum, ask for the overall diversity profile of the firm (associates, partners, leaders), trends in that firmwide profile, and a similar diversity profile of those in the firm actually working for the company during particular time periods. Corporate law departments can also ask for data on pay differentials, and for firm policies and implementation practices relating to diversity. They can ask further about how diverse candidates fare in promotion to partnership and firm leadership. The inside lawyers can make clear that this information will be relevant to a decision to hire the firm and may be decisive when the choice of firms is otherwise a close call. But, unless General Counsel—and division and specialty heads—make this initiative an important part of the law department culture that inside lawyers regard with the utmost seriousness, it will simply be a paper exercise with no impact on firms.

### 4. Improving the justice system

So, too, General Counsels can ask that firms provide information about their pro bono programs when making retention decisions between otherwise well-qualified firms, including pro bono activities and responsibilities of young lawyers. And major law firms and large corporations, working with local bar associations, public defenders, and civil justice groups, should consider a systematic legal needs assessment for their local communities relating to underserved populations. This could be followed by a more comprehensive action plan—with real resource allocation—to close the gap. More broadly, General Counsels should consider alliances with other companies and with law firms to address broader issues in the administration of justice at the federal, state, and local level.

Many businesses advance corporate citizenship initiatives from both corporate foundations and the corporate treasury. Inside lawyers must press to have these “justice” issues be part of the company’s citizenship agenda to obtain necessary funding whatever the corporate financial source. Corporations and law firms should also support rule of law initiatives, not just in the developed world, but in emerging markets to promote the signal importance of doing business with integrity in societies today marked by corruption and a deeply flawed legal system (although making these initiatives have impact, not just sound good, is a great challenge).

### 5. Competition or cooperation: strategic alliance

The relationship of major companies and major law firms with respect to shared definition and implementation of the four fundamental ethical responsibilities will take place in the context of changing strategic economic relationships between them, often involving one of the following three types of matters, tied, increasingly, to alternative fee arrangements:

- A repeating, routine book of business, which involves expertise and judgment, but not much risk, such as filing certain types of patent or trademark applications, monitoring compliance with environmental permits, and handling routine labor matters in arbitration (as opposed to court).



- A repeating, but more complex book of business that involves judgment, expertise, and risk, such as annual securities reporting, a line of product liability cases, a series of venture capital financings, more complex multi-party contracts for capital equipment sales or merger/joint venture agreements in a particular market (e.g., China).
- A one-off, highly complex, high-risk matter, where the firm is on the corporation's selective list of potential providers for such issues. Examples include: bet-the-company litigation; a company-wide bribery scandal being pursued by enforcers in multiple jurisdictions; a transaction to double the company's size with a target in similar lines of business in many different nations.

From the corporate point of view, the choice of firms will turn, of course, on business dimensions: cost, quality, experience, and service. Especially in this era of constrained resources, law departments will scrutinize carefully a law firm's ability to provide real productivity as defined by businesses (doing more with less), not by law firms (more resources per matter) and ultimately will assess real comparative value (how do firms compare on the ultimate metric: value divided by cost). But corporate law departments can decide that, other things being equal, they will choose to work with outside law firms that have parallel views on the roles and responsibilities of lawyers as professionals and as citizens, to use their power and influence to work jointly on the "service" dimensions of being a lawyer.

Some may scoff at this idea as naïve and too idealistic. But with respect to the first two types of strategic alliance, there are a sizeable number of major law firms that could handle those types of matters in virtually the same way and at about the same negotiated cost. If General Counsels and other inside lawyers care about redefining the role of lawyers, then these non-commercial considerations can come into play in retention choices and formation of strategic alliances. (On the third category of strategic matters—the difficult "one-off, highly complex, high risk matter"—companies are, of course, focused on the best and less likely to look at a broader set of factors in making the retention choice, although it is surely conceivable that, even here, several firms could be comparable and non-commercial factors could influence the retention decision.) At a minimum, adding the issues relating to the four ethical responsibilities to determinants of law department-law firm relationships is worthy of serious debate, perhaps through new supplier guidelines.

#### 6. Broader outside counsel/supplier guidelines

The ideas discussed here about the role of corporations in incentivizing law firms to address the four responsibilities as part of a new, broader type of strategic relationship could be clearly set out in a more expansive set of outside counsel/supplier guidelines. Corporations could consider explicitly including in these law firm guidelines requests for information on some of the human resources and ethical issues that are contained in their guidelines for third-party vendors in global supply chains. These guidelines could ask for law firm information, if they wish to provide it, on such issues as diversity (employment, utilization, pay, and promotion); associate hours; associate evaluation, mentoring, and development; the balance between specialization and generalist training; efforts on pro bono service and other administration of justice issues; and, more broadly, law firm citizenship.

Thus, corporate law departments could take four steps. First, they could formulate this broader set of outside law firm guidelines that covers topics relating to roles and responsibilities and seek information from the firms on these subjects. Second, law departments could, unlike third party global supply chain information which is used in a “hard” sense to qualify third parties, use this information in a “soft” sense when deciding whether to hire the firm, especially in various types of repeating books of business where there is robust competition and much similarity between firms. Third, they could train law department lawyers on the importance and proper use of these guidelines, driving home to them that this is not just a paper exercise but also one guided by flexibility and sensitivity. Finally, in forging strategic economic relationships, General Counsels and heads of law firms could also reach agreements on the suggested joint ethical responsibilities described above as an explicit part of these new arrangements, building off the information provided pursuant to the outside counsel/supplier guidelines. This could include such salient matters as: a) a joint law department/law firm approach to associate training, and development; b) law firm participation in hard ethical decisions facing the corporation about what is right, especially at the middle levels of both organizations; and c) addressing jointly deep-seated (and deeply troubling) issues in the legal system.

#### D. Responsibilities to Society: Corporate Citizenship and Public Policy

Following from the fundamental goals of high performance with high integrity, corporate citizenship has four elements: strong sustained economic growth in the service of customers; robust adherence to the spirit and letter of formal legal/financial rules; adoption of global ethical standards which bind the company and its employees; and adoption of public policy positions which fairly balance private concerns and the public interest. Action on public policy should be a fundamental role—as expert, counselor, or leader—of the broad-gauged lawyers we envision. We believe that corporate “citizenship” is a preferable term to corporate social responsibility because the latter phrase often ignores the benefits to society of a corporation’s core commercial activities and focuses on a company’s individual ethical acts beyond what the formal rules require.

A company’s position advancing “public goods” through public policy—through joint efforts with other businesses and other groups—is, in our view, a fundamental part of its ethical duties. The Clean Air and Clean Water Acts are good examples of laws which made major and necessary changes in American society (compare the United States’ environmental status with China’s) because, due to cost, actions by individual companies would not have been taken or have been effective. Indeed, mandatory laws level the playing field for all economic actors (voluntary action by a civic minded company could be prohibitively costly), and allow companies to “outcompete” other corporations by more effectively and efficiently complying. Voluntary group actions (if consistent with competition laws), such as certain manufacturers’ codes of supply chain conduct so much in the news today, can also be very important if they can overcome the problems of private verification and enforcement.

The General Counsel, and specialist lawyers (trade, tax, environmental, antitrust, labor), may lead the public policy effort inside corporations, coordinating with other company units and using outside specialists (sometimes lawyers but often others with relevant expertise). The public policy function has two basic dimensions. Consistent with future business strategy, it requires substantive policy experts to help define a corporation’s public policy priorities (offensive and defensive) with business leaders at headquarters



both in the United States and abroad. But it also requires corporate political and communications experts in the national or regional capitols to influence the decision makers in the legislature, the executive, and the regulatory agencies. If they have the skills, the inside lawyers should lead or be an important part of the critical step of fusing policy and politics—being the bridge between policy and political experts in determining what is desirable but also what is feasible—and how to achieve it.

Major corporations will have a broad portfolio of public policy issues which directly affect their business and society. These can be cross-cutting issues which affect the whole corporation (e.g., taxes or trade or competition law) or more discrete issues which impact specific divisions within the broader company (e.g., telecommunications or food safety or healthcare or aerospace or energy/environment). Corporations also have a potential role in addressing a host of broader societal issues which indirectly affect their business and more directly affect society, which create the conditions under which freedom and capitalism can flourish. These macro-issues include such topics as fiscal policy; broad tax reform; government support for education, research, and development; infrastructure; anticorruption; state capitalism; terror; cybersecurity; etc.

The impact of business on society and of society on business is an enduring theme of our history and a matter of great moment for contemporary corporations, not just in the United States but across the globe in both the developed world and in emerging markets. The purpose of this essay is not to advance our individual views on the proper balance in a mixed economy—either at home or abroad—between public policy and private ordering, or to take a position on current debates about what are the precise dimensions of public goods that require government action (in such areas as national security, an appropriate social safety net, enhancing global competition). But corporations must consider this range of direct and indirect issues, with the General Counsel and other inside lawyers being a leading or strong supporting actor. It is imperative that corporations—and their lawyers—have the capacity to select and evaluate substantive positions on a priority list of key public policy issues. Helping define substantive public policy priorities is a great challenge for—and should be a central task of—the General Counsel and the inside legal department. But too often, even in major corporations, the General Counsel and other inside lawyers do not view public policy as a core part of their writ.

We also believe that general counsel and other inside lawyers in major corporations have a special skill set and a special responsibility to address problems in the process of developing public policy. This is so because trust is so low with respect to business in general due, in important part, to low trust regarding their participation in politics and policy. There are four fundamental process questions of great moment requiring in-depth involvement by counsel: providing real and comprehensive (not narrow, technical) transparency on corporate policy positions and on corporate spending both for elections and lobbying; making special effort to develop fair “legislative” or “regulatory” facts that are not distorted by buying experts; seeking balanced policy solutions that recognize competing values (not just corporate interests) and try to articulate fair resolution of those tensions; and seeking bipartisanship and not exacerbating the divisive, partisan wars which are degrading our political culture.

We are not naïve. We recognize that frequently companies will use any lawful tactic to advance their short-term public policy interests, even if such tactics involve gobs of money, slanting of facts, one-sided proposals, and extreme partisanship. The ultimate question that major corporations need to ask is whether, in seeking to advance their interests, they can do so in a way which helps to heal, rather than exacerbate, the ills in our political system and political processes. We submit that it is an issue major corporations—

with important contributions from wise counsel—should evaluate given their ultimate interest in the maintenance of a healthy constitutional democracy and mixed economy which depends on a functional political system to strike the right balance between sound public policy and sound private ordering. These issues of political process—in addition to select substantive positions—should be central to a company's future debates about what constitutes, for each entity, being a “good corporate citizen.” Finally, as part of their broad program of corporate citizenship, corporations should provide a detailed, audited citizenship report, analogous to the annual financial report, on efforts, resources, and results in discharging the legal and ethical responsibilities to constituents, the legal system, the corporation itself, and the broader society pursuant to the Global Reporting Initiative or other robust template. The inside law department will be intensely involved in its preparation.

#### E. Obstacles

Fusing high performance with high integrity—and, in so doing, advancing a robust view of corporate citizenship that encompasses the four ethical responsibilities emphasized here—is essential to achieving the broad trust and respect for a major corporation that is the foundation of sustainability. We have emphasized that the role of the General Counsel and the inside lawyers is an essential (but hardly sole) element of this effort. There are, however, clear obstacles to effecting this practical vision, and we fully recognize that many choices and judgment calls must be made in addressing all the issues described above.

- CEOs and boards of directors must believe in the fundamental goal of fusing performance with integrity as a means of creating the corporate trust so necessary to sustainability. Similarly, company leaders must believe in the value of broad-gauged lawyers who have skills beyond law, from ethics to country risk to corporate citizenship. Yet not all CEOs have the education, training, ethics, or culture to accept those precepts. Overcoming this obstacle raises profound questions of company culture and what specifications the board sets for CEO selection. One trend is that CEOs and boards may be looking for highly skilled General Counsels to build legal teams that are focused more narrowly on legal and regulatory risk—and do not have broad skills or aptitude relating to what we consider the proper scope of the position. If that is so, the inside lawyers need to seek to broaden the vision or help the company find internal champions for that broader set of issues.
- Even if CEOs and boards do have this view, they may be under short-term pressures to reduce costs and pump up stock price, especially in the wake of the Great Recession. General Counsels must be effective in making the case that the legal and compliance staffs should be subject to productivity goals, but that, with increasing legal enforcement around the world and concomitant brand and reputation a risk, unthinking cuts may increase risks. Moreover, General Counsels must be skilled at justifying not just the cost for headcount but for the broader costs of complying with the spirit and letter of formal rules, adopting global ethical standards, and integrity actions that have an impact on business (e.g., no bribery or no business in Iran). Most importantly, there is the fundamental and difficult problem of quantifying precisely the potentially catastrophic costs avoided by resources devoted to prevention. To be effective, counsel must often make arguments from analogy to the company's own past problems or to the huge costs of other corporate failures, for example, from towering bribery scandals, multiple financial illegalities, or environmental catastrophe.

- A problem worth emphasizing is that these kinds of arguments can be especially hard when business leaders are pursuing their endless quest for productivity and competitiveness by company-wide measures to achieve cost reduction. CEOs often don't want to hear differentiated arguments for avoiding the across the board cuts because they fear being nibbled to death. But legal, compliance, ethical, and public policy costs are a tiny percentage of overall corporate costs. To be credible, General Counsels must review discrete areas of budget carefully and find cost savings. But they must be adept at avoiding the brute, across the board company cuts—being able to make an effective argument that it makes little sense to subject these areas to reductions at a time when legal, regulatory, and ethical/reputational risk are increasing exponential across the globe. Often such justifications must be a candid appeal to common sense and good judgment because, especially with prevention, they cannot be reduced to pro forma financials.
- After a quarter of century of back and forth between major law firms and major corporations, we do not underestimate the difficulty in finding that elusive new *modus vivendi* on such contentious issues as productivity, associate education/rotation, strategic alliances, and, in general, true cooperation between corporate law departments and law firms on discharging the four responsibilities. These difficulties are partly questions of different cultures of client and vendor; partly the analytic complexity of defining and finding common ground and delineating "quality"; and partly the inexorable cost pressures (often short-term) which challenge investments—especially joint investments—in discharging the four responsibilities. But corporations must honestly acknowledge that they are part of the problem as an important premise for forging or creating a new way forward with law firms.

At the end of the day, the catch-22 is that companies must hire talented, broad-gauged lawyers to be General Counsels who can work within the business demands of the corporation to sustain high performance while also forcefully advancing an operational vision of high integrity, but such General Counsels will not exist if the board and the CEO do not share that vision.

### V. THOUGHTS ON MAJOR LAW FIRMS

#### A. The Historic Balance between “Service” and “Business”

In 1919, Reginald Heber Smith, Managing Partner of then Hale and Dorr, authored the seminal publication *Justice and the Poor*. Smith articulated in the clearest terms possible the duty and responsibility of the profession to serve the legal and social needs of the poor and disadvantaged, stating “No society can flourish in the face of... indifference” of the bar to the poor and under-represented. For his pioneering work, the National Legal Aid Association established the Reginald Heber Smith Award, recognizing his extraordinary commitment to “equal justice under the law.”

In 1940, Smith, still Managing Partner, published “*Law Office Organization*,” still today one of the most widely disseminated pamphlets of the American Bar Association. As Smith said, the goals of a firm “are much more likely to be produced by a well-organized office than by one in which there is no real system and where the organization is haphazard.” Smith described in detail the need for disciplined business execution and economic success in a law firm and the organization and compensation structures required to ensure that success. Smith was, many say, the creator of the timesheet and billing in tenths of an hour.

Smith was not a paradox. Instead, he was a leader who recognized that law firms are both service and economic institutions with responsibilities to multiple constituencies, and, as such, have both ethical (professional) and business (economic) goals. Smith recognized and honored the four duties or obligations of firms and their lawyers in addition to maintaining a healthy business organization: duties to clients and other stakeholders, duties to the legal profession and system, duties to the firm itself (including the partners, associates, and staff employed), and duties to society as a whole. In many instances, the service and economic goals and duties of a firm are coincident (for example, achieving outstanding results for clients or hiring exceptionally talented lawyers). But, in other circumstances, the goals in fact conflict (for example, dedicating resources to the representation of the poor on a pro bono basis that might otherwise be employed to generate revenues). Each firm defines its own unique balance of ethical and economic success, and that balance contributes greatly to defining the culture of the firm and to its success with different constituencies.

Smith, of course, defined this balance in a time before law practice became national and then global in nature, *The American Lawyer*, the concept of “profits per partner,” and *Above the Law*. Law firms today increasingly operate on a national or international level, in a time of unprecedented and rapid information transparency, and compete for national and international clients in a way never contemplated when law (and business) were more local pursuits. Technology, information, interconnectedness, and globalization have commoditized many legal services, fundamentally changing the nature of the legal market, and in the process exerting economic pressures on firms in a way that never existed before. To be sure, increased transparency, better market information, and enhanced competition have benefitted the profession and clients, and in many cases eliminated the monopolies or oligopolies firms had for decades with corporate clients that often resulted in inefficiencies and ineffectiveness.

But short-term economic goals seem to have overwhelmed the ethical imperatives and duties, resulting in widespread public mistrust of lawyers as a profession. This is a sad state of affairs for a profession that should be populated by the architects of and advocates for a system that ensures a society governed by the Rule of Law.

We believe that the balance between creating a successful law firm business and honoring our professional duties must be reevaluated and reset. To do so, we must try to answer these questions: What has caused the balance to swing markedly to economic—and we would suggest, short-term economic—considerations? What have been the consequences of this imbalance for law firms, their employees, their clients, and the legal system? What can be done to strike a better and more meaningful balance? Private law firms have become an enormous economic enterprise. In 1987, *The American Lawyer* reported profits per partner for the first time. The total revenue for *The Am Law 100* was \$7.2 billion. The total revenue of *The Am Law 100* for 2012 was \$72.4 billion. For a market of this magnitude, the forces defining and driving the market are multiple and complicated. There is, of course, the undeniable fact that some lawyers are motivated primarily by economic incentives. But few firms are so imbalanced—and no firm should be. We suggest that there are several “causes” that contribute substantially to the emphasis on short-term finances by the profession.

The first and most obvious cause is (for many firms) the myopic and insidious focus on short-term economic success, usually defined by profits per partner. This is neither new nor a revelation. But over time, has become for too many a singular definition of success. Profits per partner also have become increasingly less meaningful as firms manipulate their numbers to reduce the number of “partners” sharing in the profits for reporting purposes to improve their results. The now-defunct Dewey & LeBoeuf was reported to have intentionally reported inflated results to *The American Lawyer*, purportedly as a “marketing effort” that many other firms similarly undertook. If even half true, this would be a sad commentary on a profession purportedly devoted to truth and openness. *The American Lawyer* itself has recognized the limitations of profits per partner—for its A List, it considers measures beyond economics (pro bono commitment, diversity, and associate satisfaction), and measures economic success by revenue per number of lawyers—a number less susceptible to manipulation. But, still, for too many firms, increasing reported profits per partner has become the primary goal.

The effect of published profits per partner has been exacerbated by the aggressive recruitment and movement of laterals. The “free agency” of lawyers has resulted in a cohort of lawyers driven by maximizing compensation with much less loyalty to the firm. This has led firms to attempt to lure lateral hires with compensation guarantees that create resentment within the firm and financial stress on its commercial health. Lateral hires also often insist on maintaining or increasing their compensation year over year, creating a “star system” that imbalances the cultural and financial health of a firm even more.

Many firm leaders believe that higher profits per partner are necessary to recruit the best laterals. Prospective laterals, in turn, often judge the financial health of firms based upon reported profits per partner. Even when two firms can offer comparable compensation (because their revenues per lawyer are comparable), laterals will often assume that a differential in profits per partner signals something significant.

The constant emphasis on short-term economic success (profits per partner) as a measure of law firm success also has adversely affected the relationships between large law firms and clients, judges, public sector lawyers, and legal service providers—as well as the professional reputation of lawyers who practice

at large firms. Although it is not always correct, lawyers who work in large law firms may well be perceived within the profession—and the general public—as people who, by definition, care more about money than their obligation to discharge their professional duties to clients, the rule of law, their employees, and society.

The focus on short-term economic goals has been exacerbated by the shift in bargaining power and economic leverage to large clients (primarily corporations) from firms, an evolution we described earlier. Faced with pressures from business leaders and boards to cut costs and increase productivity, inside law departments today can and do extract discounts, fee caps, and substantial non-monetary concessions from law firms. One of the most obvious negative effects of this evolution is the shift from “relational” to “transactional” engagements, which has impaired development of strategic relations based on sustained quality, and has increased competition among major firms both for business from a static or shrinking universe of clients and for keeping “at risk” partners with clients happy. This fundamental change in the relationships between firms and clients may well become exacerbated by the looming demographic crisis facing the profession with the recent and/or impending retirement of the Baby Boom generation lawyers. Many of the “stars” whose books of business led to the increase in profits per partner across the board are a part of this generation, and the effects of popping this bubble on individual law firms and the profession as a whole remains to be seen.

The economic recession of 2008 only compounded these problems. The effect of the economic downturn on large law firms could not be clearer. The drop in demand for legal services since 2008 has been estimated at approximately 5%, with spending on outside counsel dropping approximately 11%. All firms no matter how prominent were affected. This has resulted in a decreased demand for services, still greater fee pressure, and excess capacity. Again, the result was predictable: in addition to necessary controlling of expenses, the economic downturn led to an even greater focus on how to maintain or increase short-term profits and profits per partner, the continued talisman of success for so many firms.

#### B. The Problems from Over-Emphasis on Short-term Profits

To be sure, the focus on the business aspect of law firms has, from a purely business perspective, had positive effects and results. Most prominently, this has led to extraordinary economic success at larger law firms, leading to financial rewards that have been significant for lawyers at all levels. By way of illustration, in 1985, average profits per partner for The Am Law 50 (the forerunner to today’s Am Law 200) was \$309,000 (\$623,000 in today’s dollars); today, the comparable profits per partner for The Am Law 200’s 50 highest grossing firms is around \$1.5 million.

But, there have also been substantial costs, including:

- A focus on law firms’ definition of increased productivity (more hours generating revenue) rather than the traditional business definition of increased productivity (more output with less resources); uninteresting work for younger lawyers, which generates revenue but offers little or no professional development;
- Minimal investment in the core responsibilities of training, mentoring, and sponsoring new lawyers;



- Reliance on the false precision of certain quantitative performance measures (paying client hours billed, billings to clients) which do not recognize the many ways lawyers contribute to firms and the abilities of firms and their lawyers to perform the broader set of responsibilities we advocate;
- Fewer resources devoted to pro bono services, and in particular, services for the truly poor and underrepresented;
- Less time devoted to the profession, including but not limited to participation in bar associations; and
- Less time devoted to broader service activities at various levels of society.

The reason these costs have been incurred is obvious. Each of these activities requires investment. It requires investment to ensure quality and excellence for clients; to train, develop, and mentor new lawyers; to treat older lawyers with dignity; to represent the underrepresented; to advocate for the advancement of our profession; and to serve broader goals in broader communities. That investment requires using short-term dollars to make long-term investments in the lawyers in the firm, in the profession, in the legal system, and in society more broadly. Too many firms elevate short-term profits over these long-term goals.

Let us give one example: leverage. After profits per partner, “leverage” is the most often invoked indication of economic success in a large law firm. The mathematics are manifest. The greater the leverage, the greater the number of lawyers per equity partner (e.g., five lawyers for each equity partner), the greater the profits per partner. Equally evident is the adverse impact. Greater leverage means fewer partners to engage in supervising, training, and mentoring young lawyers. Greater leverage means more young lawyers practicing and developing without guidance and sponsorship—or even understanding the overall strategy of a large matter. There are, of course, some highly leveraged firms that produce excellent services and train and develop the next generation of lawyers well. But there are others—and more—that do not. The recent economic downturn has, of course, resulted in decreased associate hiring and decreased leverage at some firms which can lead to greater pressure and focus on profits per partner.

The result has been greater disillusionment and unhappiness in firms at all levels. Most students who enter law school do not do so to maximize their economic future. Most, instead, seek a profession that promises intellectual challenge and the prospect for doing some social good as well as one that will also provide a good living. Today, too many young lawyers—and even partners—leave firms discouraged and disillusioned, forgetting why they became a lawyers.

What then should be done?

C. Finding a New Balance: The Role of Firm Leadership in Furthering the Service Dimension of the Legal Profession

The solution is to reset the balance. The economic success of firms neither can nor should be ignored. It is clearly one of the driving reasons for their existence. But we believe substantial economic success is fully compatible with substantial commitment to the service dimension of being a lawyer-professional and a lawyer-citizen.

We also are not suggesting a nostalgic return to the past. While in the past, the balance between the economic and professional imperatives was better set, there were significant issues on which the profession has made much progress. Law firms and the profession have made progress in ethnic, racial, and gender diversity—even though there is still a great distance to go. In addition, in the past, the lack of transparency in law firm fees and expenses led to a degree of freedom from client oversight that could lead to unsavory and at times unethical behavior on billing and actual hours worked. Law firms have made progress in being more responsive working in partnership on matters with clients (even if there are often still divergent views and conflicts about economics). The real question is how we move forward and establish the right balance for the future.

The key to resetting the balance is leadership in the context of a strong firm culture. Firm leadership can and must acknowledge the obligations of firms to multiple constituencies: partners, other lawyers, employees, clients' economic and ethical concerns, the profession, the underrepresented and disadvantaged, and society in general. Firm leadership must acknowledge the tension between competing demands for resources. Firm leadership must articulate a balance between economic and professional success that is right for their firms. And firm leadership must acknowledge and embrace the fact that some decisions furthering the long-term economic and professional interests of the firms may well result in lower short-term profits.

We recognize that law firms are and should be organized differently than corporations. While the move to address business imperatives has led firms to appropriately adopt many practices and disciplines of corporations, law firms remain different in critical respects (many of which arise from the broader responsibilities we discuss here), and they should. Law firm leaders consequently have less opportunity to direct and dictate and, instead, must lead by encouraging, empowering, and trusting partners, and building momentum and consensus for the pursuit of a shared vision. Most importantly, firms must have a strong, loyal culture that shares the vision of balance—which leaders can help create but which depends on the values and vision of the individual lawyers, especially the largest business generators, coming together as a community, not just as solo contributors. But these differences are not an insurmountable barrier. Firm leadership can begin by re-evaluating or re-shaping the fundamental strategic principle of many firms that bigger is better. The globalization of law practice has led many to assume that firms must be bigger and more extensive to survive. While that principle may have operated well for the past 25 years, is it the correct principle for next 25 years? The legal profession may well be witnessing the effects of the disruptions in different segments of the market (for example, routine transactions, less complicated litigation, and electronic discovery) so well described by Clay Christiansen of the Harvard Business School.

Certainly, the increased commoditization of work and fierce price competition would suggest that the Christiansen disruption phenomenon is occurring in our profession. If it is, then the future of firms actually may be best served by smaller institutions with the highest quality lawyers consistently and predictably performing work at the highest level in the most demanding areas of the law. These would include areas for which in house lawyers need outside partners and which, by its "bespoke" nature, cannot in the foreseeable future be commoditized. This could mean a smaller number of deeply involved lawyers on matters (perhaps resulting in higher individual charges, but lower total cost), which would create real productivity for clients and a strong economic profile for the firm. Alternatively, it could mean focusing on



mobilizing resources and technology to capture substantial “commodity” work profitably and using that work as the entry point to higher end work. The question of which model will be best for a particular firm will have different answers at different firms. But it is a question which requires a thoughtful and deliberate answer.

To reset the balance, firm leadership must also ask these questions: What would be the right decision if profits per partner were not reported? Would we have multi-tiered partnerships? Would partnership runways be extended beyond a decade? Would we be asking the partner of 35 years to leave a year or two before retirement? Would we adopt leverage models that may compromise quality, training, and development? The answer may be different in a world without reported profits per partner. Making the right decision in a “no profits no partner world” but implementing it in a “profits per partner” world is a challenge. The task requires leadership and communication on both vision and values—but also a strong sense of loyalty and community among all or most members of the firm.

By openly and actively resetting the balance with the active participation of the firm’s lawyers, leadership can:

- Affirm the priority of excellence and quality over hours and revenue generation;
- Affirm the commitment to the profession, the legal system and society, including true pro bono and real effort at legal system reform;
- Affirm the commitment to meaningful training, mentoring, and sponsorship of younger lawyers; and
- Affirm the historic role of lawyers in addressing the needs of the time in a constitutional democracy.

We are not suggesting that mere pronouncements by firm leadership will reset the balance. We are not suggesting that mere directives by firm leadership will be enough. We are not suggesting that truly resetting the balance will be easy. Resetting the balance will require innovation and creativity. It will also involve experimentation and some risk of failure—although as we have seen, so too does staying the present course. In the end, it will require articulating a vision that embraces a broader set of long-term goals and duties, building support for that vision within the firm, then empowering the firm’s lawyers to achieve it, and preparing the firm for both innovation and some painful but in the end necessary setbacks along the way toward a firm that resets the balance in this critical area.

#### 1. Rededication of law firms’ duties to partners

Leaders must work to reestablish within firms and among partners a common sense of community with shared values and aspirations. And there may be a latent desire for change on the part of many lawyers in the firm. Too many partners find themselves in balkanized practice groups and offices, judged by the profitability in the near term of their group or individually. Few partners went to law school to become

a piece worker in a silo, even if that leads to incremental financial rewards. Even within large firms, it is possible, and we would suggest required, that common cultures based upon values of service, quality, collegiality, loyalty, and teamwork be pursued. Business enterprises with tens of thousands of employees have been successful in developing and sustaining cultures of shared values and purpose. If a global corporation with tens of thousands of employees can do so, so too can (much smaller) law firms.

Firms and partners must have a sense of common community, with shared values and aspirations, instead of existing as balkanized practitioners, practice groups, or geographies intent on their own narrow self-advancement. Creating a common culture based on sound business performance but also on professional values of service, collegiality, loyalty, quality, integration, and cooperation is probably the greatest challenge for today's leading law firms. It requires a vision, a strategy to achieve that vision, and relentless and open communication in the service of developing shared values.

The partnership must also be more explicit in recognizing the different ways in which partners and other lawyers can add value: bringing in business, being expert in client relations, being adept at project management (as firms move to alternative fee arrangements), being a mentor and leader for associates, or contributing to community or society. Firms must reevaluate the role of the older partner. Treating older, still productive, partners with grace is a challenge but also the right thing to do. Firms could develop a category designated "Senior Partner," a title given to long-standing partners who want to have a different balance between firm and other activities in their lives, begin the transition to new ventures, or simply begin a transition to retirement. For partners in this category, the firm and the partner have open and candid communications about how much the partner will commit to the firm and how much the firm should expect—committing to working half time while teaching at a local law school, committing to less time while transitioning to a legal services position. These flexible arrangements recognize that long-standing partners are often interested in new challenges and that transitions can be accomplished in a sensitive and appropriate way.

The partnership must reinforce, through its compensation system, these collaborative and differentiated values and move away from the mechanistic compensation that proceeds from an "eat-what-you-kill" mentality, and excessively rewards only the top business getters. The compensation system must evaluate and measure the "whole partner" on the many competencies we describe. The system must be both qualitative and quantitative and include business generation productivity, quality of work, training and mentoring, pro bono and public service contribution, and firm citizenship. And the practice leaders must lead by example; in many great firms both past and present the top lawyers have taken out less money than they could have in order to set an example. Again, we are not naïve about this aspiration. Some will ignore it. But it is a subject which affects most of major law firms—and is one source of the profession's ills.

## 2. Young lawyers

Many of the issues and solutions we just discussed for partners apply to all firm lawyers. But there is another set of problems which specifically afflicts many firms in connection with young lawyers: the striking discontent of many young associates, which often leads to a dramatic, voluntary exodus after only a few years of practice. This exodus is due to many factors including the heavy load of uninteresting work; the

infrequent connection with partners for whom mentoring is at the bottom of the “to do” list; the limited view of many complex matters from their vantage point; and the lack of individual responsibility when buried in large teams. Unsatisfying experiences in the first years of employment harm associates’ view of the law and of its ethical and policy possibilities.

The solution is not more feel-good programs designed to suggest to associates that they should be happier. Instead, it requires programs designed to develop the real skills a lawyer needs and to provide real opportunities for young lawyers to use those skills in the real world, even if that does not maximize short-term profits for the firms. These programs must include both training in the broader set of complementary competencies but also real world opportunities to employ them. Law firms are, importantly, educational institutions with a duty to train outstanding young people for a broad-gauged career in the law, even if not a lifetime in the firm—training in the critical roles of technical expert, wise counselor, and lawyer as leader should complement legal training both in specialties and in being a general lawyer. Firms have an obligation to treat associates as respected colleagues critical to the advancement of the profession, not as line items in the annual budget.

In our view, nurturing associate development also requires merit-based compensation, but not simply for the purpose of providing economic incentives for performance. Most if not all firms have moved away from lockstep compensation systems for partners, and if partners are not evaluated and compensated on a lockstep basis, it makes little sense to retain evaluation and compensation systems for associates that are not merit-based. Merit-based compensation systems that work—and there are some that do and some that do not—require candid and direct feedback on performance and development. Systems that work are those that develop meaningful competencies against which associate performance is evaluated, provide associates practical opportunities to develop and demonstrate those competencies, and require explanations for compensation decisions and the communication of steps that can be taken to perform better. To be effective, merit-based compensation systems require time, effort, and commitment from partners and law firm leaders to implement and maintain. Most young lawyers do not want to be told things are going well when they are not. Instead, most want to know how they really are doing and what they can do to improve. Critical to such a compensation system is real mentoring, counseling, and commitment from partners who actually care about the development of young professionals, and who are willing to spend real time evaluating work and addressing strengths and areas for improvement. This effort and commitment is necessary to advance long-term professional and economic goals, even if once again that does not maximize short-term profits for the firms.

In addition, firms must address super-specialization. Forcing young lawyers into specialties at the beginning of their career creates narrow technicians who are less capable of pursuing a broad career dealing with a variety of legal, ethical, and policy issues. A litigation associate, for example, needs exposure to and training in the craft of being a litigator (to write the persuasive brief, to make the effective argument, to ask the compelling question) as well as exposure to substantive areas of the law that drive litigation results. A transaction associate needs to understand areas like labor, environment, pensions, and executive compensation that often are critical deal issues.

Firms must also use technology to innovate and create new ways to train their associates. Firms could, for example, use the online Harvard course, Copyright X, to provide additional substantive training to associates. The use of online courses such as this or the Harvard Business School course on business

fundamentals provide new and immense opportunities for better and more meaningful training.

Reevaluating the compact with younger lawyers must proceed as well with a reevaluation of the manner in which law students are evaluated and hired. All major firms interview and hire after one year of law school, basing hiring decisions on one set of grades and an interview process that is often more an exercise in the law firm selling itself than a real evaluation of the fit between the student and firm. Those hired become summer associates, most summer associates receive offers and, then, two or three years after they were first interviewed, they arrive at the firms. There must be a better way, a way that allows firms to better align current demand for services with hiring (rather than hiring three years in advance), that allows consideration of how well the student is progressing measured by all of the roles a practicing lawyer should perform. The best consulting firms hire in a substantially different way, by asking candidates to analyze and react to case studies that approximate business situations likely to be encountered by consultants in practice. Indeed, one leading consulting firm now requires every candidate to go through a final set of interviews in a team comprised of other candidates interviewing that day to see and assess the interviewees' team work and team building skills. Once again, to change this paradigm requires leadership—in this era of transparency and competition, no single firm can switch to a case-based interview process alone and hope to find success: because major law firms across the country are seen as fungible by students (the same way they are increasingly seen by clients), no individual firm can hire outside the on-campus interview system or demand case preparation from interviewing students without losing out. But, if one or a small number of firms take the lead, others will quickly recognize the benefits of this new paradigm.

### 3. Compliance

Law firms advise clients on compliance and risk management. Yet, some may justifiably question whether all firms themselves follow their own advice with respect to their own operations. Many law firms have appointed internal general counsels to ensure compliance with the firm's own operations and guard against abuse. Firms need to have robust systems and processes for preventing, detecting, and remedying violations of legal and financial rules and the firm's own ethical standards just as many firms urge clients to do. Issues like billing fraud, massaging profits per partner numbers, or failing to keep promises to associates (e.g., about competency training or rotation or number of hours) are real. The firm must govern itself just as it would have its corporate clients govern themselves. We acknowledge that most of the challenges described in this paper cannot be solved by mere compliance with existing ethical rules. In a partnership, however, dedication to the highest ethical standards needs to be a stated and shared value, and at a minimum, robust internal compliance policies are an important step towards fostering this value.

### 4. Rededication of law firm's duties to clients/stakeholders

Law firm leaders also must lead their partners to reevaluate the relationship with clients. For too many years, the relationship between firms and clients has been defined by the party having the greatest real world leverage—in the past, the firm, but today, the client. As a result, too many relationships are adversarial to some extent and, more importantly, characterized by incentives that are not aligned. As many have described, the hourly billing structure is the best example: firms want more hours to generate more revenue; clients want fewer hours and lower fees.

Resetting the expectations between firms and clients requires not only realigning the firms'

economic incentives with the incentives of their clients (most commonly through alternatives to the traditional billable hour fee arrangement), but also realigning the clients' incentives to view firms as trusted, strategic advisors. Firms should, at the outset of important engagements, seek a related and reciprocal commitment from the client that the job of the firm is not just to provide astute lawyering (what is the law), but also wise counseling (what is right). A new relationship between firms and clients would benefit from redefining the value the firms will deliver and clients expect. Michael Porter of the Harvard Business School has written extensively on this subject of "value" in a variety of contexts. For lawyers and clients, value includes the value delivered in the form of an end result (a transaction closed, a litigation resolved) as well as the value provided by the manner in which the services are delivered (responsiveness, communication, predictability). If clients and firms can reach some agreement on the value expected to be delivered, significant progress can be made. Fee arrangements can then be reached which will compensate firms for this "value" and align the economic incentives of the firms and clients to deliver this "value" efficiently and effectively. Equally important, but more qualitatively, the relationship and communication between firm and client will improve immeasurably.

An example of such a mutually beneficial relationship between law firms and clients is the model established by Intel Corporation with its preferred law firms. Intel identifies three groups of attorneys at these firms—(1) leaders, who are the trusted advisors with whom Intel entrusts the "bet the company" cases; (2) the next generation of partner-leaders, identified by the firms and Intel, the lawyers who will lead the major matters of the future; and (3) promising and talented non-partner attorneys and staff working on Intel matters. For each major matter, Intel and its preferred providers identify a team that has members from each of the three categories. Intel also assigns an Intel team leader and an Intel team that works closely with the firm leader. Critically, the relationship is predicated on frequent, frank discussions about goals and how value will be measured on a given case or matter, resulting in fee arrangements that vary depending on the needs of both Intel and the law firm—sometimes fixed fee arrangements, sometimes fees marked by performance incentives for the law firms, and sometimes straightforward hourly billing.

Consistent with the insistence on specific planning and execution that has made Intel a successful business, Intel has established procedures and protocols for its law firm model to ensure the combined team is effective and efficient. For example, the firm and Intel team leaders set goals and objectives at the outset of every major matter and those goals and objectives are reviewed quarterly. To ensure the quality of the work product being done, firms establish "writing committees" to review any major written submission before it is filed with the Intel name on it. And at the conclusion of every case or matter, Intel and the law firm conduct a "lessons learned" session in which they discuss what went well—and not so well, and identify how to do better in the future.

But Intel's commitment to its firms extends far beyond specific cases. For example, Intel brings its outside and inside lawyers together each year to meet with business executives at Intel, to give the law firm attorneys the opportunity to learn about and understand Intel's business plan and how Intel's legal work fits into that business plan. Intel also commits to the "next generation" attorneys giving them mid-size cases to lead, and to both the "next generation" attorneys and the identified non-partner attorneys and paralegals a steady stream of Intel cases on which to work—instilling loyalty and commitment to Intel on the part of the law firm attorneys and a law firm institutional knowledge about Intel. Intel also hosts periodic "fireside chats" with a selected younger attorney at a firm—during which the identified attorney presents and discusses a long-term business or legal issue Intel may confront with the leaders of Intel's legal department. Indeed, Intel's commitment to building a meaningful partnership with its principle outside firms goes



beyond their mutual engagement with Intel's legal work. Intel's lawyers and its outside firms work together on specific pro bono matters and bar association activities. Intel's inside and outside lawyers also work together to identify issues of importance to the profession at large and to determine how Intel and they can address them. This arrangement represents a true partnership between the client and the law firm. A key component of this relationship is the commitment of both client and law firm that it represents. Each quarter, Intel inside lawyers sit down with the leaders of its law firms to discuss and review each attorney working on Intel cases, and provide the inside lawyers' perspective and individual feedback on those attorneys. This in turn allows the firm to provide better and meaningful feedback and mentoring to its younger lawyers. Likewise, Intel seeks and receives feedback on its inside lawyers from the law firms, to understand how the relationship is viewed from the law firms' perspective. All of these commitments ensure that Intel can help the firm identify and train a group of lawyers that will deliver the best services possible over the short and long-term. This Intel model underscores an approach towards addressing the central problem with the relationship between law firms and clients these days: the press of immediate profits (for both firms and clients) has caused both to stop investing in the relationship for the long-term. Intel's relationship with its preferred law firms is strong because both Intel and its law firms are willing to forego short-term profits for the longer-term goals. And, although Intel has pioneered its program, law firms can and should be the initiators of similar programs with their clients.

#### 5. Rededication of law firms' duties to the legal system

Law firms must undertake a rededication of the firm to the profession and to the Rule of Law, and to the development of a legal system that is fair and just for all, and not just economically beneficially to a few. This requires a new generation of leaders in the mold of Bob Fiske and Lloyd Cutler, firm lawyers and leaders who led by example and demonstrated that a lawyer and law firm could perform the multiple roles of great lawyers while advancing the interests of their clients, their firms, and the Rule of Law. Firms and lawyers who dedicate themselves to public engagement and public service not only provide a substantial public benefit but also are better able to serve all clients.

Firm leaders should also work to establish new and innovative relationships with legal services providers and strengthen pro bono engagement. The economic disparity between the poor and the rich is one of the most pressing issues of our time. At a time when the needs of the poor and unrepresented are growing and manifest, we are, as a society, reducing the resources available to legal aid and those committed to servicing these needs. Recently, the Legal Services Corporation's Pro Bono Task Force reported that nearly one in five Americans now qualify for civil legal assistance. Yet, LSC-funded organizations reduced their staffs by 661 employees last year and expect to lose another 724 employees this year.

Law firms need to step into the breach but not simply by doing more of what they have done before. This is a time for innovation, creativity, and the development of new partnerships and models. Recent examples of such creative collaboration include pro bono partnerships between in-house lawyers and firm lawyers, harnessing often untapped in-house talents to serve pro bono clients in need, and new initiatives such as the one spearheaded by the Association of Pro Bono Counsel in which a group of law firms committed to long-term collaboration with one another and legal services organizations to develop impact projects in eight cities involving more than forty law firms around the country. These innovations should extend beyond simply new ways to address the needs of individual clients but to broader efforts to pursue fundamental reforms that ensure the existing disparity in access to our legal system is, at least, diminished. These innovations again are required, even if it requires the investment of what otherwise would be short-



term profits.

6. Rededication of law firms' broader duties to society

This resetting of the balance will also contribute to the fourth ethical dimension, law firms' duties to society as a whole. A resetting of the balance includes changes to the expectations law firms place on their attorneys, allowing attorneys at large law firms to have the time, energy, and commitment to be involved in a wide variety of broader societal problems at local, state, or national level. This means not just participating in the traditional pro bono efforts undertaken by large law firm attorneys, but a commitment to true community service efforts, including participation in charitable organizations, religious groups, and local and state civic groups and organizations, among others.

But it is not just the individual attorneys employed by law firms who must rededicate themselves to their duties as lawyer-citizens. As with the corporations that comprise the bulk of large law firms' clients, law firms can and should redouble their efforts in the area of "law firm citizenship," with the goal of advancing pertinent social goods. This might include public policy efforts in areas that directly affect law firms' business and professional interests (e.g., tax reform or legislation aimed at litigation and professional conduct), as well as public policy efforts in areas that affect the business interests of a given law firm's core client base—so long as in each case the firm is careful to advocate for policies that further the broad public interest and not just the firm's or its client's parochial ones. Firms can adopt a focused philanthropy model, concentrating resources and time on a specific group of organizations, with an eye toward long-term relationship and capacity building. This includes financial support, pro bono legal representation, volunteer service, and in-kind donations. A firm could commit to a financial contribution over time to each selected organization, but also promise and commit the time and energy of lawyers and staff to the organization. This long-term commitment of money and manpower not only benefits the selected organizations but also allows the firm to act as an institutional citizen in a different and meaningful way.

Firms also can and should embrace a role in addressing broader societal issues, for example education, scientific research and development, or cybersecurity and privacy. Firms must recognize and reward those engaged in these efforts both in compensation and with other recognition. We also acknowledge that these issues are potentially controversial or may pose conflicts of interest—and that, in increasingly large and diverse partnerships, have the potential to increase the polarization and fragmentation of already diffuse firm cultures. We submit that it is important for law firms to spend real time and effort evaluating and participating in such issues, however, in a manner that maintains law firms' economic and cultural health, in order to, consistent with their duties to other constituencies, serve as "good corporate citizens."

D. Obstacles

There is, of course, no turning back: law firms must be run in a businesslike manner. Competition is here to stay. But firms need not be run for only the greatest possible economic return. Law firm leaders should emphasize other values as they set forth a vision for their firms with respect to their associates, their partners, their clients, the legal system, and the society as a whole.

There are, of course, many obstacles to a changed law firm paradigm which firms and leaders must address—if, we must emphasize, they wish to do so. And we, of course, recognize that some may not. We thus do not underestimate the difficulty of modifying profits per partner relative to other firms as a driving ethos. We do not underestimate the lunar pull of extraordinary absolute compensation. We do not underestimate the difficulty of asking a star partner to forgo the free agent draft and give loyalty and community effort to the firm which provides significant compensation but not necessarily absolute top dollar. We do not underestimate the difficulties in unwinding uneconomic mergers or global empire-building that, in the harsh light of day, don't work for outside or inside lawyers. We do not underestimate the complex decision making structure in firms, with its tension between partner autonomy over important aspects of their practice/professional life and the need for collective leadership to make binding decisions for a large institution with hundreds of employees and complex assets, revenues, and costs.

Many firms are already undergoing significant changes—for example the dramatic end to unceasing and uncritical growth in associate hiring, leverage, revenues, and reliance on the billable hour—and a new or modified law firm model is necessary, or certainly worthy of the most serious consideration. The multiple issues stemming from absolute profit maximization at law firms have been starkly highlighted in the downturn and have a profound impact on law schools and law students. Many practicing lawyers wish to see those issues directly and candidly addressed.

The ultimate question is whether there can be a new model for major law firms. Can firms focus on long-term economics (sometimes at the expense of short-term profits), find true partnerships with clients, and create a true culture of legal challenge and development for attorneys? Can partners both collectively and individually make a renewed commitment to the ethical and policy issues that can inspire lawyers and benefit society?

A new paradigm for law firms—and a new balance between ethical values and business returns—can only happen, of course, if firm leaders, in connection with firm partners, explicitly address the issue of money. But raising this issue is the beginning, not the end, of the discussion, because firm decision structure—and a new consensus and an altered culture—ultimately rests on the will of the partnership. And some partners will certainly view the ideas expressed here as quaint, or worse. But for others, it is a welcome, and long-overdue, rebalancing.

We do not believe that a fundamental resetting will be easy. It will require vision, innovation and execution, as well as experimentation and the willingness to accept failure. The philosopher Albert Hirschman said that true advances are often the result of “stumbling rather than...careful planning.” In order to make significant progress, law firms must be willing to stumble a bit along the way.

### VI. THOUGHTS ON “LEADING” LAW SCHOOLS

In this last section, we turn our attention to legal education. As indicated at the outset, we focus our remarks on those law schools whose graduates have traditionally spent significant parts of their careers in large law firms, in-house legal departments, and other practice settings that deal with the kind of complex, multidisciplinary, and increasingly global issues that we have argued are the daily fare of lawyers working in these two institutions.

We do so mindful of the fact that, given the current economic conditions, some argue that we should completely overhaul our system for educating lawyers to prepare graduates who are ready to practice “on day one.” Against this backdrop we are aware that it may seem quixotic—as not confronting a central problem—to put forward a set of reform proposals which address law schools that have been less affected by the downturn and which emphasize teaching additional “complementary” competencies beyond core legal skills. Although we are mindful of this danger, we believe that precisely because this is a critical time for reexamining the fundamental purposes of legal education as a whole, a careful examination of the ethical responsibilities of those law schools that have traditionally played an important role in defining and exemplifying these purposes is especially warranted. Moreover, while we certainly agree that all law schools have a responsibility to prepare students to enter legal practice, we reject the often unstated assumption that this requires turning law schools into trade schools focused on a narrow set of core competencies and practical skills. Instead, we believe that the “practice” that will engage students’ potential as experts, counselors, and leaders will be both broad and diverse, and will require these new graduates to have learned a correspondingly broad understanding of the key complementary competencies and ethical responsibilities we seek to define in this essay.

We also believe that the objective of preparing students for practice is both under and overinclusive of the role that law schools properly occupy in our legal system. The emphasis on preparing students for practice is underinclusive because it sleights the critical role that law schools play in the development and teaching of knowledge and ideas about law and the legal system (including, of course, the legal profession), and about the relationship between these legal practices and institutions and the rest of society. At the same time, this focus is overinclusive because it fails to acknowledge that formal legal education is only one part of a life-long learning process in which law schools, important employers such as law firms and in-house legal departments, and the profession itself must collaborate to inculcate and reinforce the core and complementary competencies that lawyers need to build successful and satisfying careers.

By focusing on the core ethical responsibilities that deans and law professors not only owe to their students, but to the legal system, their own institutions, and the public at large, we believe that our framework can play a useful role in helping law schools reexamine their full range of responsibilities in these turbulent times.

## A. Preparing Students for Their Ethical Responsibilities as Technicians, Counselors, and Leaders

Even if preparing law students to be lawyers is not the only mission of legal education, it nevertheless must be its most important one. Unlike in many other parts of the world, the United States does not have a formal “articling” system or a separate post-law school legal training institution to prepare law school graduates for practice. As a result, even the most research-focused law professors have an obligation to teach law students, the overwhelming majority of whom will practice law, at least initially, while also building careers that will often move beyond law in a variety of complex settings. Preparing these students to become lawyers, in the broad sense we advocate, is therefore, not to put too fine a point on it, a primary reason why law professors have their jobs.

Deciding how law schools should prepare students for legal careers, however, is not a single decision. Instead, it is at least four separate, albeit interlocking, ones: deciding what to teach, how to teach it, how long students should be taught in law school, and who should be doing the teaching.

Finally, in addition to teaching students to become astute technicians, wise counselor, and effective leaders, law schools also play a central role in helping graduates to secure the kind of good jobs that will give them an opportunity to begin to put their knowledge about these roles into practice. In our system law schools act as the primary bridge between law students and the world of employment. Helping both students and employers to make sound decisions in this process is therefore also an important way that law schools prepare students for their future roles as lawyers and as citizens.

### 1. Teaching directly about lawyers’ roles, institutions, and competencies

The most straightforward application of our thesis is that in addition to teaching students to be expert technicians by introducing them to the core competencies of being a lawyer, law schools must also prepare graduates to be wise counselors and astute leaders who are capable of acknowledging and grappling with their obligations to clients, to the legal system, to the institutions in which they work, and to the broader goals of society. As we have indicated, in order to equip students for these critical roles and duties, law schools must also introduce students to the array of “complementary competencies” outlined in Part II, as well as to the varying institutional contexts in which they will have to marshal these skills.

Specifically, we urge law schools to expand their course offerings in three areas that we believe are currently underemphasized in law school curricula: courses on specific lawyering roles and institutions; courses that devote significant and sustained attention to integrating core legal skills with key complementary competencies to address complex problems; and courses that combine the first two types but focus specifically on the process and effects of globalization.

First, law schools could make a much stronger commitment to teach courses about particular lawyering roles and institutions. Such courses should seek to introduce students to the demands and institutional complexities of particular lawyering contexts, and how lawyers in these roles grapple with their broad and often conflicting duties to their clients, the legal system, their own institutions, and society.

Most law schools offer a handful of courses of this kind—e.g., “Challenges of a General Counsel,” taught by two of us at Harvard, or “Going Global: Advising Clients in a Global Economy” at Stanford—and we are happy to see that the number is growing. The goal of these and other similar courses should not be to teach students how to be a general counsel or global advisor (or government lawyer or public defender). Instead, they should introduce students to what it really means to be lawyer in one or more of the broad variety of vibrant, diverse, and fraught institutional settings in which lawyers work, where the legal framework is one—but only one—of the important factors to be considered.

Second, law schools should make a greater effort to develop courses that introduce students in a sustained, systematic way to the key complementary competencies that graduates will need to operate as wise counselors and effective leaders in law firms, companies, and other similar contexts. Once again, most law schools—and all of the leading ones—have made important progress in integrating knowledge and techniques from other disciplines into the curriculum. Indeed, this has been the principle accomplishment of the “law and” movement of the last several decades. But more can and should be done to assure that all students leave law school with at least a basic introduction to these critical skills. Although we believe that all of the exemplary areas we identified in Part II are important, we also realize that schools will have to make difficult choices about which of these competencies will be given particular importance. Although each school will ultimately have to decide for itself which competencies to emphasize, in the interest of focusing the debate we offer the following six as a first take on those that are especially critical to preparing lawyers for the settings we are considering.

- *Business Literacy.* No law student—and particularly no student who is going to spend at least some of his or her career in a law firm or in-house legal department—should graduate without having a basic understanding of the tools that managers use to understand and evaluate business opportunity and risk. Among the competencies that should be emphasized in such a course are financial literacy (including accounting), firm economics, market definition, competitive strategy, supply chains, and risk assessment.
- *New Technology.* The increasing speed and sophistication of information technology is reshaping virtually every aspect of our world—and by every account, the rate of change will increase exponentially in the coming years. Lawyers who expect to operate in this new environment must understand how technology is reshaping the markets in which their clients compete, as well as the practice of law itself, including the use of “big data,” artificial intelligence, and process management to analyze, structure, and produce legal outcomes.
- *Decision Making.* As we have emphasized throughout this essay, lawyers both assist clients and other constituents in reaching sound decisions and are frequently important decision makers themselves. It is therefore critical that law students receive at least an introduction to the processes and metrics of sound decision making in a variety of legal and non-legal settings where lawyers will work, including decision theory, behavioral economics, and the uses—and abuses—of statistics, economics, and other social and natural sciences.
- *Institutional Design.* The majority of lawyers in the United States now work in some kind of institutional setting—institutions, with respect to the lawyers in law firms and in-house legal departments, which are of increasing size and complexity. As we have argued, understanding

lawyers' responsibilities within these organizations is one of the profession's core ethical duties. Moreover, virtually all of the work that these lawyers perform is also done in the context of public and private institutions—e.g., courts, legislatures, administrative agencies, business, NGOs, international organizations—that have themselves become increasingly large, complex and, at times, dysfunctional. Finally, lawyers are often called upon to create new institutions of private or public ordering. All of this places a premium on law students gaining at least an introductory knowledge of institutional incentives and design.

- *Teamwork Across Difference.* In virtually every sector of legal practice—and particularly in large law firms and in-house legal departments—lawyers work primarily in teams. Moreover, these teams are increasingly diverse in every way, including demographic characteristics such as gender, race, nationality, and culture, and disciplinary characteristics, since issues lawyers confront often require collaboration with professionals from a wide range of disciplines. Research in a variety of settings demonstrates that these diverse teams are likely to produce superior outcomes provided that team members know how to work effectively across difference. Law schools therefore need to devote significantly greater attention to teaching students how to understand and evaluate team dynamics and to work in—and lead—diverse teams effectively.
- *The Ethical Dimension.* As we have repeatedly emphasized, lawyers will often be called upon to make decisions about how they or the institutions they advise should act in situations that go far beyond what the law and other formal rules require. Teaching students how to be sensitive to such concerns, how to identify the way they should be framed in different institutional settings and the variety of methods for generating choices about what “ought to be” is therefore vital to their ability to act as wise counselors and effective leaders.

Finally, we urge law schools to continue to focus attention on how every aspect of the lawyers' role and competencies is being reshaped by globalization. Once again, we recognize that many—if not all—of the law schools that we are addressing have taken important steps in this direction, with some requiring every student to take at least one course in international or comparative law. We applaud these requirements, and urge law schools to consider what more that they can do to integrate knowledge about different legal systems and the operation of the public and private institutions of global governance into the curriculum. There are a variety of ways that law schools can accomplish this objective, ranging from incorporating a comparative dimension into the core curriculum to teaching advanced courses on key issues produced by globalization such as frameworks for achieving global security or managing the global economy. The key point is for American law schools to take even more seriously than they have to date the reality that their graduates will increasingly live and work in a multipolar world in which the United States—and its law and legal institutions—will be only one of the frameworks that they will need to understand to operate as astute technicians, wise counselors, and effective leaders.

## 2. From the case method to real cases

For more than 150 years, law schools have taught primarily by the “case method” invented by Christopher Columbus Langdell. As we indicated in Part III, this method of teaching “core” competencies has served us well. As many have argued, however, notwithstanding its many strengths, the traditional law



school case method needs to be expanded far beyond the narrow focus on appellate cases if it is to prepare law students for the increasing complexities of the modern world. In addition to teaching appellate cases, law schools should develop complex, interdisciplinary, and factually rich case studies, similar to those used in business and public policy schools, to illuminate the multiple dimensions of problems individuals or institutions face, and the multiple dimensions of the different roles that lawyers occupy as professionals and as citizens in addressing those problems. The subject matter choices for such case studies are infinite—e.g., How should the managing partner of a law firm try to define the firm’s duty to its community? What are the issues confronting a General Counsel trying to guide his company on how to do business with integrity in China?—but the need to produce such concrete and context-specific learning has never been more immediate or compelling. To be clear, we do not suggest that cases of this kind should replace the traditional law school case method, or the other methods of instruction that are now common in most law schools. But we do believe that law schools should make it a priority to encourage and support faculty in producing more “real world” cases like this (which will often have the additional benefit of promoting collaboration between faculty and practitioners) and to help them to integrate such cases into their courses.

To be successful, however, law schools will have to promote a far greater integration of both theoretical and practical teaching—and the faculty who tend to focus their teaching primarily around one of these two poles—than even the best law schools have been able to accomplish to date. At present, there is a sharp divide between “classroom” courses that largely focus on teaching students to understand the theory underlying law and legal institutions, and “experiential” course, which are primarily focused on teaching students particular lawyering skills through clinical practice or simulations. This curricular divide mimics a deeper division between “theory” and “practice” that pervades much of the way that both students and faculty think about law. Indeed, in the current debate over legal education these two domains are often portrayed as a zero-sum game, in which law schools must chose to have more of one (typically practice) and less of the other (typically theory). But if law schools are to prepare students to meet the demands of their roles as astute technicians, wise counselors, and effective leaders they will have to give students more theory and practice—and, more importantly, more integration between the two. The kind of rich case studies we advocate (and the empirical research upon which these case studies are based) provide one important avenue for accomplishing this goal by giving students an opportunity to explore how theoretical debates actually play out in practice—which in turn will help them to develop new theoretical insights that push beyond existing practices.

Law schools should also work to increase the number of courses that directly combine experiential and theoretical learning. The LawWithoutWalls program (LWOW) pioneered by the University of Miami School of Law is a model of what can be achieved when faculty, students, and practitioners from a wide range of disciplines collaborate to combine experiential learning with cutting edge insights from both theory and practice. In this program 55 to 60 students from 26 different law and business schools around the world work both in person (including an introductory meeting outside of the United States) and virtually (in teams selected to promote demographic, geographic, and disciplinary diversity) to create a “project of worth” that provides a concrete solution to an important problem in legal practice or legal education. In developing their proposals, students are assisted by “faculty mentors,” drawn from leading academics who study similar issues from a broad range of disciplines, “lawyer mentors,” who practice in related areas, and “entrepreneur mentors,” including consultants and venture capitalists who help students to formulate real business plans and develop strategies for putting their ideas into practice. Over the three

months of the course, students also attend weekly virtual classes conducted by academics, practitioners, business leaders, and policymakers (often collaboratively) on a wide range of topics related to innovation in legal practice and legal education, and are introduced to a number of new technologies that will allow them to work across borders and time zones. Since the program's inception five years ago, hundreds of students from around the world have participated in LWOW, producing projects such as Judgment Pay, an online portal that harnesses the powers of crowdsourcing to help those who have obtained a favorable civil judgment collect the money they are owed; Nirubi, an innovative application that provides a secure way for NGOs to gather, record, and share witness testimony; and Traffick Junction, an NGO featuring a social-network-like website specifically designed to unite and connect legal, political, and community advocates around the world who fight against human trafficking.

In July 2014, the ABA Council on Legal Education took a small step toward mandating the kind of integration we are calling for when it voted that every law student must receive at least 6 credits of "experiential learning"—rejecting an even stronger proposal that would have required 15 credits. According to the new standard, these credits must be in a "simulation course, law clinic, or field placement" and must "integrate doctrine, theory, skills, and legal ethics." We applaud the idea that experiential learning combining theory and practice ought to be a part of every law students' education, although we urge the ABA and law schools to ensure that students can choose from a broad array of options in fulfilling this requirement, and to relax some of the regulatory restrictions on online instruction and other methodologies that make achieving the integration the new regulation seeks to promote (and innovation in legal education generally) more difficult to achieve. As we indicate below, this has important implications for how law schools should treat the third year. It also draws renewed attention on long-simmering debates about the composition of the faculty.

### 3. Between the profession and the professoriate

For several years there has been a growing consensus among many observers—including many in the legal academy—that the gap between the academy and the profession has widened to a degree that is harmful to the core mission of legal education. Yet closing this gap has proven notoriously difficult. Although there are many reasons why law schools have found it difficult to better connect legal education to the broad realities of legal practice that we have outlined here, there can be little doubt that one important barrier has been that few current faculty members have either the interest or experience to build such bridges. As a result, if law schools are going to make progress on the agenda we propose, these institutions will have to think critically about how to increase the number of faculty members who, either on their own or in collaboration with others, have a serious interest in connecting their teaching and scholarship to the central issues facing lawyers operating in their broad and diverse roles as astute experts, wise counselors, and leaders.

The idea that law professors should have experience and interest in the broad variety of institutions inhabited by lawyers is, of course, not new either. Indeed, it was not so long ago that having this kind of interest and engagement was virtually a requirement for getting hired at a leading law school, and for succeeding once there. In the last several decades, however, this approach to law school hiring has given way to an emphasis on faculty who have deep academic training, often in disciplines other than law, and who have already demonstrated the capacity to produce scholarship (again often interdisciplinary) of high

quality. This intellectual orientation has brought an important critical perspective to the study of law and legal institutions, as well as focused attention on some of the complementary competencies that are so important for lawyers in the broad roles we have articulated here. But even many of the most academically minded professors would concede that the pendulum has swung too far in this direction and that there is a need for more faculty with experience in the institutions and organizations, beyond the academy, which play important roles in our society—and the ability to use that experience to inform their teaching and scholarship.

We will return to the obligations of current faculty to participate in helping to find—and to mentor and develop—tenured and tenure track faculty who can bridge the theory-practice divide below. But changing the composition of the tenured faculty is only one way that law schools can try to close this critical gap. We urge law schools to continue to create “Professor of Practice” and other similar positions that will allow lawyers with deep experience to teach courses either independently or in collaboration with other faculty, and to engage on a sustained basis with students and faculty. Harvard Law School, for example, has a number of outstanding faculty members with the titles of Professor of Practice or Lecturer in Law or Senior Fellow, teaching rigorous, intellectually sophisticated courses at the intersection of theory and practice in areas such as law firm leadership, sentencing policy and judicial discretion, the international criminal court, and internet regulation, as well as a number of distinguished practitioners serving as long-time and deeply engaged lecturers, including two of the authors here. As the full-time academic in the group can attest, the presence even on a part-time basis, of these leading practitioners, with a commitment to intellectual rigor complexity and depth, has made a tremendous impact on the Harvard Law School community, helping to foster a deeper integration of theory and practice in teaching and scholarship. Law schools could do much more to incorporate the many talented practitioners who would be interested in this kind of serious intellectual engagement—often at little or no cost to the school.

Indeed, if law schools are to educate students in the complementary competencies, they will have to get even more serious about encouraging team teaching of all kinds. Once again, law schools have talked for years about the importance of interdisciplinary teaching, particularly at the intersection of law, business, and public policy. But most would concede that results have fallen far short of the ideal. To move beyond this current impasse, deans will have to facilitate this kind of collaborative exchange by being more flexible about teaching requirements, scheduling, time to develop new integrated courses, tenure requirements, and a host of other bureaucratic obstacles that frequently stymie team teaching and scholarship across disciplinary frontiers. Professors who teach and research collaboratively will not only often produce better knowledge, they will also serve as better role models for students who will increasingly work in environments in which collaboration across difference is required. And, as LWOW demonstrates, beyond team teaching is the great value of having students from different disciplines in the same classroom working in teams—as they will often do in their careers—to deal with complex course problems. Recognizing the value of this kind of collaboration at all levels leads us to the thorny issue of the duration of legal education.

#### 4. The third year

Arguably no aspect of the current debate over the future of legal education has been more heatedly discussed than the question of what to do with the third year of law school. Many advocate eliminating the third year altogether as a way of reducing the cost of legal education. But even those who support retaining

law school at its current length frequently argue that the third year should be dramatically restructured to allow for more experiential learning, externships, or intensive study in or out of the law school. We applaud this debate, and add our voices to the growing consensus calling for a serious reevaluation of the third year. We therefore disagree with Justice Scalia's argument in his recent graduation address at William & Mary Law School that the reason for keeping the third year is to allow students to take more courses that are substantially the same as the ones that they have taken in their first and second year. Instead, we advocate refocusing the third year to illuminate the broad roles, complementary competencies, and ethical duties that today's law school graduates will need throughout their long and increasingly diverse careers.

Given what we have said about the importance of collaboration and interdisciplinary learning, we strongly support programs—currently adopted by an increasing number of law schools—that offer joint JD/MBA degrees in three years as opposed to four. We similarly urge schools to create or expand programs that will allow students to receive three-year joint JD and Master's degrees in a broad array of fields, including traditional programs that combine law with public policy, and perhaps even more importantly, ones that combine law with disciplines such as computer science, engineering, or environmental science that will equip graduates to confront the growing number of legal and policy issues that call for a sophisticated understanding of these and other similar domains. To the extent possible, we urge that these programs be simultaneous and integrated, as opposed to sequential and independent, with students having the opportunity to take courses that combine ideas, instruction, and classmates from both disciplines for at least the third year of the program.

We also urge law schools to institute other structured programs that will allow students to use their third year to achieve the broader purposes of legal education we advocate. Such programs could include:

- Going abroad for a year and receive a special diploma or certificate from an international law school;
- “Concentrating” (and receiving a special diploma) in a particular discipline of the law (for example, intellectual property or human rights), or in an area related to law (for example, organizational behavior or renewable energy), including preferred access to law school courses in the area as well as courses in the university relevant to the student's concentration (e.g., environmental science for environmental lawyers or finance for tax lawyers);
- Participating in an externship or work-study program with academic supervision. This would involve defining an important subject of research and analysis with a professor but carrying out the work in a real world setting that will also assist a private or public sector institution. As a committee of the ABA has recently proposed, in addition to receiving academic credit, students could be paid for this work. Alternatively, these externships could be non-paying, in which case students choosing this option would receive a significant reduction in tuition;
- Writing the equivalent of a master's thesis under the tutelage of a professor with the goal of producing a publishable piece of work that will help the student pursue an academic career.

Our commitment to preparing students for the complex challenges that they will face in their roles as expert technicians, wise counselors, and astute leaders, however, leads us to reject proposals that law schools such as those we are considering should eliminate the third year altogether. We are acutely aware of why many have made such proposals. The cost of legal education has skyrocketed, leaving far too many students mired in debt. Many hope that if these costs can be reduced, that more graduates might be able to pursue careers in public service, or delivering legal assistance to individuals of low or moderate means, who notwithstanding claims of “too many lawyers” remain chronically underserved. But unless the regulatory barriers outlined in Part III are dramatically altered, even reducing law school to two years would not significantly improve access to justice, and would only create a partial, albeit important, reduction (1/7th of the combined college and law school debt) in the cost of legal education—assuming that law schools actually reduced tuition by one-third if the third year is dropped, which has not necessarily been the case to date. More importantly, even if the United States was to significantly reduce the boundaries of the unauthorized practice of law to allow practitioners with various levels of legal training (including two, or even one, year of post-graduate legal education—or new paraprofessional certification programs at the college or junior college level), large law firms, corporate legal departments, and other similar employers are likely to continue to hire a significant number of lawyers who have gone through more traditional legal training. The question that the law schools that seek to supply this talent will have to answer, therefore, is whether the value to students of pursuing what will inevitably be an expensive educational credential is worth the cost.

For all of the reasons set out above, we believe that introducing students to the fundamentals of their roles as expert technicians, wise counselors, and astute leaders, and giving them the complementary competencies that they will need to operate in these roles, will make graduates more marketable to those entry level employers who need lawyers who are capable of functioning in today’s increasingly complex, globalized, and multidisciplinary world, and will make these graduates better able to succeed throughout their careers. Yet these are precisely the kind of learning experiences that are likely to be cut (or at least dramatically reduced) in a two-year legal education, where both educators and students would inevitably feel great pressure to concentrate on the “core” legal courses and competencies. A third year focused specifically on providing this kind of education is, therefore, a reasonable requirement to impose for those schools that seek to prepare their students for these kind of demanding—and rewarding—careers.

The current debate over eliminating the fourth year of medical school reinforces this conclusion. As reported in a recent article in *The New York Times*, about 30 percent of medical schools are considering granting three-year medical degrees, with several, including NYU, already offering such a program. The reasons given by proponents—reducing student debt, replacing classroom learning with practical experience, and getting doctors out into the field more quickly—mirror those that are made for eliminating the third year of law school. But proponents of three-year medical degrees are also candid about the tradeoffs that eliminating the fourth year of medical school would entail—and the corresponding structures that would be required for this initiative to succeed. At NYU, for example, students applying to the three-year program must already know what kind of medicine that they want to practice (since they will not have sufficient time in three years to explore alternatives while gaining appropriate depth in their chosen field), and are also guaranteed places in NYU’s own internship program, thus eliminating the need for interviewing for internships while providing continuity between what these students have—and have not—learned during medical school and their post-graduate education.



Neither this front-end commitment nor the back-end support structure is applicable in the law school context. By the time students apply to medical school, they have been through a comprehensive “pre-med” curriculum specifically designed to give them at least a preliminary introduction to what they might want to do as doctors. There is no comparable “pre-law” process. Therefore most law school applicants have little knowledge about legal careers—and much of what they think they know is probably wrong. Nor, as indicated above, is there currently any systematic post-graduate education in law to pick up the slack for what students do not learn in law school. Indeed, this is precisely why we need greater collaboration among law schools, law firms, and companies to ensure that young lawyers receive the training that they need throughout their careers.

Finally, in medicine as in law, those seeking to engage with the most difficult problems recognize that they need more education, not less. Even at NYU, 15 percent of graduates actually stay on for a fifth year to obtain a master’s degree in public health or business administration—a percentage 50 percent greater than those seeking to graduate in three years. And the best medical schools are moving to expand opportunities for students to learn key complementary competencies like collaboration and cross-cultural fluency through experiential learning and international exchange. Law schools seeking to train students for the complex, global careers we have been describing need to do the same.

Once again, we recognize that our support for retaining—and restructuring—the third year of law school will be controversial. Individual schools—and regulators—will, and should, continue to debate whether other models of professional education, ranging from the undergraduate model prevalent in many European countries, to the certification model used in public accounting, should be incorporated in whole or in part to the system of training United States lawyers and other legal service providers. Our goal is only to insist that these debates take into account the need to ensure that those who will enter into the kind of complex institutions and careers that we have been describing will have sufficient exposure during their education to the broad core and complementary competencies that they will need to exercise their roles as expert technicians, wise counselors, and astute leaders.

## 5. The placement process

Our framework also has important implications for how law schools exercise their critical role as intermediaries in the employment process. Although every law school has a formal placement process that gives employers access to students, and provides students with information about employers and the employment process, there is much more that law schools can and should do to connect this process to the core academic mission of the institution.

First, law schools should work to give students better information about particular employment options and careers generally, rather than leaving students to learn about these issues anecdotally or from employers or the legal press. There are number of ways that law schools could help to close this information gap, including courses specifically on careers and career development; hiring faculty who can serve as role models for students interested in careers outside of the academy, or who can give students access (either on their own or in connection with the law school’s alumni association) to practitioner networks and counseling programs designed to give students an independent perspective on career choices; and conducting

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<sup>2</sup>Ben Heineman would emphasize that, if law schools of all types are not willing or able to restructure the third year, then the option of graduation after two years, combined with enhanced continuing or executive education later in careers, deserves the most serious consideration.



systematic empirical research on the lawyers and careers, including longitudinal career studies of graduates that can help to give current students an indication of what their career might look like 5, 10, or 20 years after graduation.

Second, law schools should do more to even the playing field between public service and private sector employers. The loan forgiveness and deferral programs instituted by many law schools are critical to achieving this objective. Law schools must do everything in their power to preserve—and hopefully strengthen—these initiatives. But the simple (albeit contested) act of moving law firm recruiting into the spring semester would also go a long way toward placing law firms and other private sector employers on a more equal footing with public sector employers who interview later in the year. Indeed, as we indicated in Part V, after the economic downturn even many law firms recognize the need to delay recruiting until they have a better sense of their employment needs.

Finally, law schools should seek to create a meaningful dialogue with employers about what both parties can do to improve the coordination between the central goals of legal education and the legitimate needs of employers. Particularly in the wake of the economic downturn, many law schools have begun to engage employers in a discussion about how schools can better prepare graduates for legal practice. We applaud these discussions, but urge schools to also ensure that this dialogue is a two-way street. In addition to asking employers about their current preferences, law schools should be working to help to shape preferences in the direction of valuing the broad ideas about lawyering roles and duties for which we have argued in this essay. For example, law schools should press employers about whether grades and the other traditional indicia of merit that play such an outsized role in hiring decisions—particularly for law firms—in fact correlate strongly with career success or satisfaction. Available evidence from the study of Michigan Law School’s graduates—the most rigorous to date—suggests that this is not the case. Law schools should use studies of this kind to challenge themselves and employers to create additional measures that more accurately reflect the full range of qualities and competencies that contribute to success and satisfaction as a lawyer.

## B. Obligations to the Rule of Law and to the Connection between Law and Society

It is common to speak of lawyers as being both “advocates” with ethical obligations to their clients and “officers of the court” with corresponding obligations to the legal system. As we have indicated above, giving real content to this latter duty in the context of contemporary in-house legal departments and large law firms is a complex task. It is even more complex to understand what a similar obligation means for leading contemporary law schools—and the legal academics working inside these institutions. Of course, law schools have an obligation to prepare students to become competent and ethical practitioners who understand their own obligations to the legal system and to the political, social, and economic institutions that give this system purpose and meaning. But law schools also perform a critical (although far from exclusive) role in producing independent knowledge about our legal framework and its connection to broader issues of public policy or private ordering that can be used to improve the legal system and society as a whole. Debates about whether law schools adequately prepare students for legal practice often undervalue this crucial role.

Admittedly, the role of legal scholarship in producing this kind of knowledge was easier to see in the past. Until recently, legal scholarship consisted largely of casebooks, treatises, restatements, and other

similar work that was specifically designed to help practitioners, judges, and lawmakers understand and improve legal doctrine and policy. Today law schools are much more connected to the rich intellectual life of the rest of the academy. This “law and” movement has brought an invaluable outside perspective to scholarship about law and its relationships to social, economic, and political institutions and processes. But it is also critical that those pursuing this work understand themselves as having an obligation to engage with those working from a perspective inside legal and other societal institutions to demonstrate how insights gleaned from this interdisciplinary perspective, especially when tested by experience, can help improve those institutions and the people they serve, and to better connect appropriate norms to society’s broader goals and purposes.

Notwithstanding all of their important connections to the rest of the academy, law professors are first and foremost members of the legal profession, with distinct obligations to the legal system broadly understood—including the obligation to critique this system from the perspective of society’s broader goals and purposes. This enterprise involves both sophisticated descriptive studies about how institutions work and normative scholarship about how society’s systems, processes, and institutions can be improved.

This does not mean that law professors should be advocates who seek to justify either current practices or their own beliefs. But law schools are not simply graduate schools for the study of law. They are part of an interconnected set of institutions that maintain the critical public good of the rule of law, not just by having the exclusive right to train those who will become lawyers, but also by producing the knowledge about law and legal institutions—including critically about the legal profession itself—and the relationship between these institutions and society, that lawyers and policymakers need to understand and improve both law and society. This link between law schools and the legal profession (and the broader connection between lawyers and society) confers important benefits on all law professors—including those who are not themselves lawyers. Anyone doubting this need only observe the significant difference in compensation between law professors and professors doing similar work in other parts of the academy that do not have a formal connection to the legal profession. Our point simply is that with these benefits also come important responsibilities to participate in the legal academy’s core obligation to improve normative frameworks and their benefit to society.

Law schools, however, have public responsibilities that extend even beyond their critical role in training lawyers, and producing descriptive and normative scholarship that addresses the vast array of societal issues in which law plays a role. In addition, law schools have an obligation to be a resource to the public about the deeper relationship between law and the public interest.

There are many ways that law schools could help facilitate a much-needed public dialogue about law and its relationship to society. For example, law schools could make an institutional commitment to examine one or more issues of great public importance, with the goal of producing a tangible intervention that will assist policymakers and the public at large in reaching a fair resolution of the matter in question. In addition to attempting to develop concrete solutions, these projects would also build trust among groups that must learn to work together if we are to move beyond the finger pointing and blame games that continues to stymie progress in so many areas.

Law schools can also develop new ways of extending themselves into the broader community.

For example, some law schools have begun developing “executive education” courses designed to give practitioners access to new ideas developed in the academy—and to give academics access to knowledge about legal practice. At present, these courses are directed primarily at lawyers, but this need not be the case. Law schools could develop courses specifically designed to help those who are not lawyers better understand and utilize law and legal institutions. The “street law” programs run by some law schools are an excellent example, and could be expanded to include “introduction to law” courses for business leaders, trust officers, hospital administrators, political appointees, and the myriad of other individuals and groups who would benefit from greater knowledge about particular areas of law and the legal framework generally. Indeed, law schools could work to develop even more proactive means of making information about law, legal institutions, and legal education generally accessible to the public. Harvard Law School, for example, has instituted a program to digitize large amounts of legal content and to make it freely available to the public. Similarly, several law schools now offer online courses that are open to the public, as well as blogs, podcasts, and YouTube channels that are all designed to give those outside the law school access to the content that is produced within the legal academy.

Needless to say, there are many other ways in which law schools can become a more important public resource for disseminating information about law and its relationship to society. Giving real content to what all of these obligations mean in the context of an educational institution committed to academic freedom and the highest standards of teaching and scholarship will require building a consensus among the current faculty about the fundamental purposes of legal education. This brings us to the crucial, but rarely acknowledged, issue of the responsibility of law professors and deans to support the purposes of the law school as an institution.

### C. Obligations to the Law School

Few faculty members would deny that they owe a broad range of duties to the law schools that employ them to competently and diligently carry out their commitments as teachers and scholars, including showing up and being prepared for class, producing scholarship, and doing their fair share of committee work and other ministerial jobs necessary for the school to run efficiently. What is likely to be considerably more controversial is whether faculty members owe anything more to the school than just doing their jobs—and, even more controversially, how whatever institutional responsibilities that do exist should be balanced against the individual autonomy that remains—one of the central features of academic life. Although we do not pretend to offer anything like a definitive resolution of this debate here, we do insist that faculty have core ethical obligations to the law school as an institution and to its institutional mission that should both be expressly acknowledged and balanced against their autonomy as teachers and scholars. At a minimum, this means that faculty have an obligation to participate collaboratively in efforts to advance a broad yet common purpose for legal education, and then to respectfully use this vision to guide the critical decisions around hiring, promotion, curricular development, and resource allocation that in the end determine whether these aspirations will be achieved.

In articulating this view of the ethical obligations of law professors to the law school, we recognize both the tremendous difficulty of reaching even a broad consensus about the goals and purposes of legal education and legal scholarship, given the wide diversity of views on most law school faculties, as well as the paramount importance of preserving academic freedom and scholarly integrity for individual faculty

members. But just because the process is likely to be difficult does not mean that it can be avoided. If law schools are to be more than a collection of isolated faculty members pursuing their own research objectives (as important as those objectives might be) then these institutions must begin a collective dialogue about the fundamental goals and purposes of legal education and legal scholarship.

With respect to teaching, if law schools are to make progress on the issues we have addressed, they will have to reach some consensus about the hard choices required to ensure that law students are in fact learning the broad ethical duties and complementary competencies that they will need to discharge their roles as expert technicians, wise counselors, and astute leaders throughout their careers. Which courses should be required? How can faculty coordinate their courses to make sure that particular competencies are adequately covered? We do not pretend that achieving this kind of consensus will be easy. Very little is required beyond the first year of law school, and law professors are used to having near complete control over their courses. But neither do we believe that attempting to achieve this kind of consensus and coordination is a restriction on academic freedom. In other parts of the academy from business school to undergraduate “core” courses, professors routinely work to coordinate their teaching to ensure that every student receives at least an introductory exposure to certain key foundational concepts. What is needed, therefore, is a robust and respectful debate about what those key foundational concepts ought to be for lawyers today. Our primary goal in writing this essay is to encourage just such—an open, honest, and constructive debate.

The same is true with respect to determining the standards of scholarship that should govern the appointment and promotion processes. Law schools have an obligation to produce scholarship that will improve the functioning of core legal institutions and the relationship between those institutions and broader societal goals. Legal academics have a corresponding obligation to the law school to develop standards for evaluating the scholarship of candidates for appointment to the faculty that take proper account of the law school’s central role in producing scholarship of this kind and to ensure that these standards are applied in a manner that will produce a critical mass of teachers and scholars with both the commitment and experience to engage with the broad and diverse array of problems that lawyers confront in their roles as expert technicians, wise counselors, and leaders. Once again, we recognize that many academics will react viscerally to any suggestion that there should be a “common” standard for evaluating scholarship, believing it to be the first step toward restricting their freedom of conscience—or worse, an attempt to enforce political orthodoxy. We share many of these concerns. One of the most important obligations that law professors owe to the law school as an institution is to ensure that those who join the faculty maintain the highest standards of scholarship, and that those with unpopular views are free to speak and have their voices heard. But academic freedom, and the tenure system that supports it, should also not be used as an excuse for refusing to engage in an honest, open, and respectful debate about the purposes of legal scholarship and the criteria by which it should be evaluated. In every hiring or tenure decision, law faculties make judgments about the quality and value of legal scholarship. All we are urging is that they make these decisions in the context of a much more explicit discussion about how the work in question relates to the broad purposes of legal education which we advocate for leading law schools.

#### D. Building Consensus—While Paying Up Front

As we have acknowledged in the prior two sections on in-house legal departments and law firms, driving institutional change is difficult. It is likely to be even more difficult in law schools—particularly in the kind of law schools to which this essay is primarily addressed. Given their history and prestige, these law schools have been affected less by the economic downturn. It is therefore more difficult for those who lead major law schools to demonstrate the need for change.

Moreover, law school leaders have even less power to drive change than their counterparts in legal departments and law firms. Although the leadership role of a law school dean is analogous to that of a managing partner in a law firm, deans have even fewer levers to influence the behavior of tenured faculty members than even the managing partner of the most collegial and egalitarian law firm. As a result, deans and other academic administrators must develop consensus by persuading their faculties of the importance of change—even when change will be difficult and expensive. We do not in any way underestimate the difficulty of this kind of leadership. This is particularly true since many of the changes we are proposing are likely to be expensive, in terms of both money and time. Even for law schools with relatively greater resources, instituting changes that increase the cost for either the institution or its students will not be easy.

Nevertheless, we do not believe that reform is impossible. As a preliminary matter, it is important to emphasize that some of the proposals that we make—for example, three year joint degrees and the opportunity for externships or study abroad programs in the third year—will, or should, reduce the cost of legal education for students, and at least a portion of the cost to law schools (as students take courses in other schools or departments). Others—such as creating new courses on lawyering roles and contexts, or ones that emphasize key complementary competencies—should in essence be revenue neutral for both students and law schools, although we do not underestimate the “cost” of building a consensus that courses of this kind ought to be an institutional priority. Similarly, hiring more tenured and tenure track faculty with practical experience beyond the academy, and bringing in additional Professors of Practice and Lecturers with a long-term commitment to participate in the intellectual life of the school, can also be revenue neutral—or even cost-reducing—provided again that schools can build a consensus for the need to shift the composition of the faculty in order to better prepare law students for their diverse roles as astute technicians, wise counselors, and effective leaders, and to produce more legal scholarship on the critical issues facing lawyers and society.

Of course, some of our proposals will require the expenditure of hard dollars. Case studies and empirical research are expensive. So too is creating courses that are jointly taught by faculty from a variety of disciplines. Law schools that want to embark on these reforms will have to find the funds to do so—without raising tuition or diverting funds from critical programs such as financial aid or experiential learning. This will require taking a hard look at ways both to reduce current expenditures and create new sources of revenue. Can some of what is currently taught in the classroom or the clinic be done more efficiently through various forms of online learning? Is there a way to expand on the model being used by LWOW and other similar initiatives to enlist professionals to volunteer their time or other resources to teach complementary competencies? Can law schools expand executive education for professionals (both in law



and other disciplines) to create new revenue streams that could be used to underwrite some of these new initiatives, while at the same time building better connections between the academy and practice? As we explain in the conclusion, we hope that this essay will stimulate innovative thinking of this kind about how law schools might collaborate with companies, law firms, and other important stakeholders to improve both the content and the cost of legal education.

Indeed, we believe that even those who disagree with our particular prescriptions for legal education will increasingly find themselves being called upon to produce innovative solutions of their own that address pressing issues of cost and quality. The forces that are currently disrupting the legal services market are slowly but surely making their way toward even the most prestigious institutions of higher education. While there will always be a place for academic institutions that claim to provide students with education at the highest level, both students and employers are likely to intensify their demands that institutions back up these claims with increasingly sophisticated metrics that demonstrate the value of the inevitably costly education that students receive. No law school—not even the most established and prestigious—can afford to ignore these pressures in a world in which major legal employers such as companies and law firms are being pressed to produce more for less. The fact that there is now a growing industry of “disruptive innovators,” who are working hard to develop metrics that evaluate lawyers on the basis of the quality of the “output” they produce, as opposed to traditional “inputs” such as where someone went to law school or how many hours it took him or her to do the work, will only intensify these pressures.

Undoubtedly, many law schools will attempt to respond to these pressures by increasing their focus on core legal competencies in an attempt to demonstrate that their graduates are “ready to work on day one.” But if law schools do nothing more than respond to the pressures of the marketplace without also insisting on the importance of the broader ethical values that have—however imperfectly—defined the lawyers’ role in the minds of many lawyers and law students, then it is difficult to see why law should exist as a profession at all, or why the best and the brightest should continue to have any interest in sinking their human capital into law as a career. Norms of independence, craft, and public service—and their partial realization in the lived experience of real lawyers as experts, counselors, and leaders—are central to the identity, prestige, and the power of the legal profession, and just as importantly, to the attractiveness of law as a career for the best and brightest students. The loss of these ideals threatens the recruitment of talent, and the fundamental trust upon which our shared economic, political, and social order is based. The forces that caused this transformation in other professions and occupations—skyrocketing costs, internal expertise developed by sophisticated clients, disaggregation along global supply chains, and disruptive innovation by alternative providers—are, as we have indicated above, now present in the legal profession.

If lawyers and law schools are to avoid this fate, then these institutions must both embrace and demonstrate the relevance of a set of professional ideals that recognizes, but ultimately transcends, the pressures of the marketplace. This essay represents our best effort to define what such ideals might look like in the context of in-house legal departments, large law firms, and leading law schools. We close with a set of questions that we hope will stimulate debate about how these three institutions might work together to make these ideals real in all three institutions.



### VII. CONCLUSION

This essay has raised a host of questions about the ethical responsibilities of lawyers in corporations, law firms, and law schools without attempting to provide detailed answers. This comports with our intention—and hope—that this array of issues will stimulate a robust debate that will be integrated with the existing discussion about the changing economics of all three major institutions.

#### A. Collaboration

Addressing the challenges confronting the legal profession will require clients, law firms, and law schools each to reevaluate their fundamental roles in carrying out the four fundamental ethical responsibilities we describe. But because the issues we discuss touch all three institutions (and have resonance for many others), we believe that collaborative efforts to address them will be essential, rather than continuing the cycle where corporations blame firms for cost, firms blame law schools for unprepared students, and law schools look down on law departments and law firms. Such collaboration could, for example, include the following.

- Leading corporations, law firms, and law schools should assess together whether our framework—the roles of lawyers as experts, counselors, and leaders; the four responsibilities to clients/stakeholders, to the law, to one’s own institution, and to society; the complementary competencies; and the distinction between lawyer as licensed professional and lawyers as citizen—is useful in thinking about how their relationships should be structured and about how they should discharge their duties.
- These three institutions should focus on the life-long learning of lawyers and delineate their respective roles on the continuum, especially with respect to young lawyers. In this era of constrained resources, when each is pointing fingers at the others to take on more of the responsibility (and cost) of providing the proper education and training for lawyers, these three institutions must recognize that it is their collective responsibility to train and mentor those who would discharge the four responsibilities. In this regard, they could collaborate on the design of robust executive education (beyond conventional CLE) in the mode of multi-week courses offered by business schools and public policy schools for those at mid-career transitions.
- The three institutions should explore together the broad question of the current relationship between the professoriate and the profession—from issues of teaching and curricula, including a restructured third year, to questions about research and writing, to the appropriate level and methods of involving those in “practice” to contribute to teaching, and to other aspects of the academic enterprise.
- Law schools should examine and help facilitate discussions of the fraught relationship between corporations and law firms on the core questions of direction of matters and aligning incentives on money—and on where and how they could collaborate on discharging the four responsibilities, especially in prioritizing critical areas of joint effort in promoting reform of the

administration of justice.

- Each of the institutions should explore among peers the fundamental questions raised in the essay. Corporations could convene sessions, for example, on the different meanings of performance with integrity; on how to reason about ethics; on how to deal with the problems of process in developing public policy; on how make the case for expenditures on prevention (where cost-benefit issues are complex); and on how, in general, to meet budget and cost pressures on discharging its citizenship responsibilities. Law firms could discuss different structures and styles of leadership and compensation; how to structure strategic alliances with clients; what kind of ethical precepts and internal compliance techniques they should adopt; and what are different approaches to law firm “citizenship.” And law school administrations and faculties can discuss whether the issues addressed here should affect the future of teaching, curriculum, placement, research, and faculty hiring and promotion—and what is the proper balance between faculty autonomy and law school community and the role of law school leadership in achieving that balance in a period of transition.
- Most broadly, all three institutions should discuss the value of research and analysis of the variety of questions raised here—and whether it is in the broad interest of each institution and the broad interest of the profession to define and finance studies about some of the most important but sensitive issues (such as the variety of ways that corporate counsel try to resolve the “partner-guardian” tension or the role that lawyers in companies and law firms can and should play in developing the rule of law in emerging economies).

## B. Next Steps

To help promote the discussion we envision, we will follow-up this essay with several next steps.

We will create a special website on the roles and responsibilities of lawyers as professionals and as citizens on the broad website of Harvard Law School’s Center on the Legal Profession. This essay will be the first entry.

- 10-15 leading lawyers and leading commentators on law, business, and ethics will be asked to submit comments on this essay—agreeing, disagreeing, modifying, expanding—of at least 1,500 words. We will publish these commentaries in a separate folder on the Roles and Responsibilities website. Among the topics we hope these commentators could address are situations where lawyers may have to make choices between the four responsibilities and the applicability of our framework to lawyers representing small business or individual clients.
- We will also invite comments from any interested party and publish all thoughtful responses—whatever the point of view—in a separate “public comments” folder on the website.
- The Center on the Legal Profession will host a conference in April 2015 at Harvard Law School with panels and speeches by those whom we have asked to write formal comments—as well as by other thought leaders—to address, inter alia, critical, collaborative issues, like those outlined

above, and specific action items which can continue this effort.

- We will also, by the time of the Conference, have a resource paper on the website listing other forums and venues where analogous discussions have in the recent past taken place and can occur in the immediate future.
- We will then decide whether the essay, comments, and conference proceedings should be collected in some form beyond the website (for example, an online book) to provide ease of access to the total effort to the broadest possible audience.

At the end of the day, we offer this essay with great humility. We are confident that the ethical issues we raise have been important historically and are ever more important today as debates about the economics threaten to displace or obscure them. But we also know that so many other concerned people have great wisdom, knowledge, and experience to take these vital issues far beyond what we have written here.



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Ben W. Heineman, Jr. was GE's Senior Vice President-General Counsel from 1987-2003, and then Senior Vice President for Law and Public Affairs from 2004 until his retirement at the end of 2005. He is currently Senior Fellow at Harvard Law School's Program on the Legal Profession and its Program on Corporate Governance, Senior Fellow at the Belfer Center for Science and International Affairs at Harvard's Kennedy School of Government, and Lecturer in Law at Yale Law School. A Rhodes Scholar, editor-in-chief of the Yale Law Journal, and law clerk to Supreme Court Justice Potter Stewart, Mr. Heineman was assistant secretary for policy at the Department of Health, Education and Welfare and practiced public interest law and constitutional law prior to his service at GE. His book, *High Performance with High Integrity*, was published in June 2008 by the Harvard Business Press. He writes and lectures frequently on business, law, public policy, and international affairs. He is also the author of books on British race relations and the American presidency.

He is a member of the American Philosophical Society, a fellow of the American Academy of Arts and Sciences, and a member of the National Academy of Science's Committee on Science, Technology and Law. He is recipient of the American Lawyer's Lifetime Achievement Award and the Lifetime Achievement Award of Board Member Magazine. He was named one of the top 50 Innovators in Law in the Past 50 Years by the American Lawyer, one of America's 100 most influential lawyers by the National Law Journal, one of the 100 most influential individuals on business ethics by Ethisphere magazine and one of the 100 most influential people in corporate governance by the National Association of Corporate Directors. He serves on the boards of Memorial Sloan Kettering Cancer Center (chair of patient care committee), the Center for Strategic and International Studies (chair of program committee), Transparency International-USA (chair of program committee), and the Committee For Economic Development. He is a member of the board of trustees of Central European University. He has served on an international panel advising the President of the World Bank on governance and anti-corruption, and given the Oliver Smithies Lectures at Oxford University. He is a graduate of Harvard College (BA-high honors in history), Oxford University (B.Litt-political sociology), and Yale Law School (JD).



### ABOUT WILLIAM F. LEE

William F. Lee is a partner at WilmerHale and is one of the country's foremost intellectual property and commercial trial and appellate lawyers. He has tried more than 100 patent cases, both jury and jury waived, to judgment and argued more than 75 appeals before the Court of Appeals. He has been selected as one of The National Law Journal's 100 Most Influential Lawyers in America; one of The American Lawyer's Litigators of the Year; the outstanding United States IP Practitioner by Managing IP; and one of the 50 most powerful people in Boston by Boston Business Journal. He became the fifth managing partner of Hale and Dorr in 2000 and, in 2004, became the co-managing partner of WilmerHale, the firm resulting from the merger of Wilmer Cutler and Pickering and Hale and Dorr. He continued to serve in that capacity until the end of 2011. In 2014, he received, together with his co-managing partner Bill Perlstein, the American Lawyer's Lifetime Achievement Award for law firm leadership.

He has acted as lead trial counsel for Apple in its worldwide litigation with Samsung, trying three cases to victory in 15 months. He was lead trial counsel for Broadcom in the highly publicized cases between Broadcom and Qualcomm and also litigated his client to victory three times in 15 months. And, in 2013 he represented Pfizer in a trial which, after seven days, resulted in a settlement of \$2.15 billion.

From July 1987 through June 1989, Mr. Lee served as associate counsel to Independent Counsel Lawrence E. Walsh in the Iran-Contra investigation, and he has also served as a special assistant to the Massachusetts Attorney General for the purpose of investigating alleged incidents of racial bias in the Commonwealth's courts. He has served on the Advisory Committee of the Court of Appeals for the Federal Circuit and on the Advisory Committee of the United States District Court of the District of Massachusetts. He is a Fellow of the American College of Trial Lawyers and has served as the John A. Reilly Visiting Professor and the Eli Goldston Lecturer at Harvard Law School. He is Senior Fellow of the Harvard Corporation and has served on the Harvard Board of Overseers.



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Professor Wilkins is the Lester Kissel Professor of Law, Vice Dean for Global Initiatives on the Legal Profession, and Faculty Director of the Center on the Legal Profession at Harvard Law School. He is also co-founder of Harvard Law School's Executive Education Program, where he teaches and helps to direct professional development courses such as Leadership in Corporate Counsel, Leadership in Law Firms, and Accelerated Leadership Development. Professor Wilkins is also a Senior Research Fellow of the American Bar Foundation and a Senior Faculty Associate and member of the Faculty Committee of the Harvard University Edmond J. Safra Foundation Center for Ethics.

Professor Wilkins has published extensively on a broad range of issues involving the legal profession in books, scholarly journals, and the popular press, and is a co-author of one of the leading textbooks in the field. His current scholarly projects include *Globalization, Lawyers, and Emerging Economies*; *After the JD*; *Disruptive Innovation in the Market for Legal Services*; *The Rise and Transformation of the Big 4 in the Market for Legal Services*; and over 200 in-depth interviews in connection with a forthcoming Oxford University Press book on the development of the black corporate bar. Professor Wilkins has delivered over 40 named lectures at leading law schools and universities, and is a frequent speaker at academic and professional meetings in the United States and around the world.

His recent professional honors include ESADE University's Aptissimi Scholar of the Year Award (Spain 2014); an Honorary Doctorate in Law from Stockholm University in Sweden (2012); the Distinguished Visiting Mentor Award from Australia National University (2012); the Genest Fellowship from Osgoode Hall Law School (2012); and the American Bar Foundation Scholar of the Year Award (2010). Professor Wilkins is a Member of the American Academy of Arts and Sciences (2012) and a Corresponding Member of the Spanish Royal Academy of Doctors (2014).





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Felicia Ellsworth is a partner at WilmerHale and a member of both the Appellate & Supreme Court Litigation Group and Business Trial Group. Her trial practice focuses on complex commercial litigation in both state and federal courts and her appellate practice spans both civil and criminal matters in the state and federal appeals courts, including the Supreme Court of the United States. Ms. Ellsworth has counseled numerous clients in commercial disputes on issues including patent infringement, trade secret misappropriation, contract law, civil procedure, real property disputes, tort law, administrative law, and procedure and constitutional law. She has also counseled and represented clients in both civil and criminal appeals involving patent infringement, contract law, constitutional law, and criminal law and procedure. Ms. Ellsworth has argued appeals in the First, Second, and Sixth Circuits and the Massachusetts Appeals Court.

Ms. Ellsworth has been deeply involved in numerous pro bono matters. She played a lead role in the Commonwealth of Massachusetts' challenge to the constitutionality of DOMA, leading to the historic Supreme Court ruling favoring marriage equality. Ms. Ellsworth remains involved in the fight for marriage equality nationwide, and is helping lead the firm's representation of Gay and Lesbian Advocates and Defenders in various federal courts of appeals considering marriage equality issues in the Fourth, Sixth, Seventh, and Tenth Circuits. Ms. Ellsworth is also a member of the First Circuit Court of Appeals Criminal Justice Act panel, through which she provides pro bono representation to indigent defendants on appeal.

Ms. Ellsworth served as a Special District Attorney in the Middlesex District Attorney's Office from November 2010 through April 2011, where she prosecuted cases involving violent crimes, financial fraud, and many other offenses. Previously, Ms. Ellsworth served as a law clerk to Chief Justice John G. Roberts, Jr. of the Supreme Court of the United States, and then-Chief Judge Michael Boudin of the United States Court of Appeals for the First Circuit. During law school, Ms. Ellsworth served as editor-in-chief of The University of Chicago Law Review.

This essay is based primarily on decades of experience we have collectively had in government, public interest lawyering, law firms, corporate law departments, and academia. It emerged from many conversations about changes in the profession, the nature and limits of formal professionalism, the broad role of lawyers and, most importantly, the ethical dimensions of being a lawyer which have attracted young people for more than two centuries to a life in the law.

Part of that experience, of course, is learning from others, both in person and in our reading. Although we intend this essay to be a co-authored statement of vision, not a scholarly treatise, we include here a select bibliography of background materials.

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