

ADVOCACY IN THE COURT OF PUBLIC OPINION PART I: BROADENING THE ROLE OF CORPORATE ATTORNEYS
[Forthcoming __ GEO. J. LEGAL ETHICS __ 2009]

*Michele DeStefano Beardslee**

Abstract:

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

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

The preliminary findings from this study will appear in two installments to be published in the same issue of the Georgetown Journal of Legal Ethics. In the first installment, I focus on how the court of public opinion can shape legal controversies and how corporate attorneys actually manage legal PR for their corporate clients. I argue that the “court” of public opinion is a real part of our justice system and that managing “legal public relations” is a legitimate and fundamental component of corporate legal services. I contend that the role corporate attorneys play in managing legal PR for corporate clients is at odds with the conventional view and that it is time to broaden our view of the corporate attorneys’ role in this venue.

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

* Climenko Fellow and Lecturer on Law, Harvard Law School. I thank Alberto Bernabe-Riefkohl, Michael Cassidy, Elizabeth Chambliss, John C. Coates, Tamar Frankel, Jim Greiner, Tara Grove, Ronald Mann, Peter Joy, Peter Margulies, Andrew D. Martin, Nancy Moore, Amanda Pustilnik, Milton Regan, Robert E. Rosen, Gregory Sisk, John Steele, Elizabeth Warren, and David B. Wilkins for comments on drafts. Thanks also to the participants in the Climenko Fellowship workshop and the Program on the Legal Profession Fellowship workshop and to Young-Kyu Kim, Mehran Ebadolahi and Mitchell Griffith for help with data coding. I am grateful to the lawyers and public relations executives who shared their experiences and opinions with me. Lastly, I extend a special thanks to everyone at Harvard Law School’s Program on the Legal Profession who was instrumental in recruiting the participants and administering the survey.

awareness of the importance of managing legal PR for corporate clients and to provide better guidance to lawyers as to how to advocate ethically within the court of public opinion.

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INTRODUCTION

The traditional view is that law is a separate discipline from public relations and that corporate legal services do not and should not incorporate public relations concerns or advice.¹ Many scholars, lawyers, and judges still believe that considering potential media spin or managing “legal PR”² is not or should not be part of legal services and that attempting to influence prosecutors, regulators, or trials in the media is inappropriate.³ However, as almost any general counsel of a large, publicly traded, consumer-oriented company will tell you, legal controversies today are tried in the court of public opinion at least as much as in any court of law. Large publicly traded corporations have much to gain (or lose) by the way a legal controversy is positioned in the media.⁴ Because the value of a company’s reputation is immeasurable and perhaps its “largest uninsured asset,”⁵ a corporation loses when the brand image is tarnished even if the corporation technically wins at trial. Further, since most legal controversies are settled prior to trial, the court of public opinion has arguably become the most

¹ See *infra* notes 95-100, 105 and accompanying text; cf. Kevin Cole and Fred Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1637 (1996) (“Many courts and bar associations started from a pristine view that litigation should be decided exclusively in court.”); *id.* at 1640 (explaining that lawyers historically were discouraged from making extrajudicial statements); cf. 18 GEO. J. LEGAL ETHICS 365, 366-368; GEOFFREY C. HAZARD JR. & WILLIAM HODES, *THE LAW OF LAWYERING, A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 397 § 48.2, at 48.4 (Aspen 3d ed. 2005) (1985) (“In the traditional view of lawyering, lawyers provided legal services (and nothing else) to clients, while any professional services provided by non-lawyers are by definition not legal services.”).

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

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

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

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

important battleground affecting not only good will and market share but legal bargaining power, settlement negotiations, and future liability.⁶ Managing this battleground, therefore, has become integral to many corporations' legal strategies.⁷

Although many scholars have highlighted the importance of the court of public opinion – especially for individual criminal defendants⁸ – few scholars have conducted empirical research on the role corporate attorneys play in developing messages around legal controversies.⁹ Instead, they focus on lawyers as spokespeople,¹⁰ the risks of legal PR spin,¹¹ journalism ethics¹² or the application of the corporate attorney-client privilege to legal PR services.¹³ This literature

⁶ *Press releases instigate investigations by SEC* (Westinghouse 951 F.2d 1414, 1418 in 1978).

⁷ J. W. Ehrlich, *American Jurisprudence Trials*, 1 Am. Ju. Trials 303, § 1; *see also* Gardner, *supra* note 4, at 39

⁸ *See, e.g.*, Elizabeth Semel and Charles M. Sevilla, *Talk to the Media About Your Client? Think Again*, 21-NOV. CHAMPION 10, 14 (1997) (focusing on criminal defendant lawyers as spokespeople); Watson, *supra* note 2, at 77 (discussing criminal defense attorneys' behavior in the in the court of public opinion); Roschwalb *et al*, *supra* note 2 (focusing on high profile criminal defendants). However, corporations are defendants in more than a majority of cases. Marc D. Galanter, *Planet of the APs: Reflections on the scale of law and its Users*, 53 BUFFALO LAW REVIEW 1369 (2005) (noting that in 2000, organization defendants made up 83% of cases in state courts of general jurisdiction of the 75 most populous counties of the United States).

⁹ *Cf.* Jonathon M. Moses, *Legal Spin Control: Ethics And Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, n. 106 (1995) (explaining that “there are no hard numbers to compare how frequently lawyers speak to the press on behalf of clients today, as opposed to at some prior time” and that “much of the evidence therefore must be anecdotal”). In Roschwalb *et al*, *supra* note 2, at vii-vix, the editors mention interviews of lawyers, judges, and journalist but fail to explain any details, interview methodology, or the number of interviews). *Id.* *See also infra* notes 101-102 and accompanying text.

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

¹¹ *See, e.g.*, Peter A. Joy and Kevin C. McMunigal, *The Role of Lawyers in Client Media Campaigns*, CRIMINAL JUSTICE, at 48 Fall 2004 (explaining that client statements can be construed as admissions, false exculpatory statements, or prior inconsistent statements). Alberto Bernabe-Riefkohl, *Prior Restraints on the Media and the Right to a Fair Trial: A Proposal for a New Standard*, 84 KY. L. J. 259 (1995); Kevin C. McMunigal, *Client Media Campaigns in Criminal Cases*, at 3 (draft on file with author).

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

¹³ Ann M. Murphy, *Spin Control and the High Profile Client – Should The Attorney-Client Privilege Extend to Communications With Public Relations Consultants*, 55 SYRACUSE L. REV. 545, 585 (2005); Deniza Gertsberg, *Should Public Relations Experts Ever Be Privileged Persons?*, 31 FORDHAM URB. L.J. 1443, 1476 (2004) (analyzing whether the attorney-client privilege should protect PR consultants in the criminal context); Jonathon M. Linas, *Make Me Well-Liked: In re Grand Jury and the Extension of the Attorney-Client Privilege to Public Relations Consultants in High Profile Criminal Cases*, 19 WASH. U. J.L. & POL'Y 397, 424 (2005); Michael Jay Hartman, *Yes, Martha Stewart Can Even Teach Us About the Constitution: Why Constitutional Considerations Warrant an Extension of the Attorney-Client Privilege in High-Profile Criminal Cases*, 10 U. PA. J. CONST. L. 867 (Comment) (arguing that attorneys should advocate in the court of public opinion for very high-profile individual criminal defendants and that the constitution justifies extending the attorney-client privilege in this context); Steven B.

generally does not address the main inquiries of this project: 1) How do corporate attorneys advocate in the court of public opinion behind the scenes (outside of the limelight); and 2) How far are corporate attorneys currently going in the court of public opinion for their clients – and how far is too far?¹⁴

In this project, I investigate the emerging trend of general counsels acting as legal PR managers for legal issues facing large publicly traded corporations and the potential impact that the eroding distinction between legal advice and PR management could have on the legal profession. My analysis is informed by: 1) a questionnaire sent to all general counsels working at S&P 500 companies (eliciting a 28% response rate); and 2) 58 qualitative interviews of

Hantler, Victor E. Schwartz, Phil S. Goldberg, *Extending the Privilege to Litigation Communications Specialists in the Age of Trial by Media*, 13 COMMLAW. CONCEPTUS 7 (2004).

¹⁴ Some scholars have written about the importance of legal PR for corporate clients. See, e.g., Moses, *supra* note 9, at 1833 (“Corporations also may need lawyers with press savvy, especially during corporate crisis.”); David M. Sudbury, *The Role of Corporate Counsel in the Criminal Environmental Case: Advice to Quench the Fire*, 3 VILL. ENVTL. L.J. 95, 110 (1992); Kathleen F. Brickey, *From Boardroom to Courtroom to Newsroom: The Media and the Corporate Governance Scandals*, 33 J. CORP. L. 625, 636 (2008) (exploring the use of media by high profile individual and corporate criminal defendants); Kathleen F. Brickey, *Andersen’s Fall From Grace*, 81 WASH. U. L. Q. 917 (2003); see also *infra* note 32. Indeed, Harlan A. Loeb, a lawyer who now works at Hill & Knowlton (a PR agency) presented a paper at the 2004 Spring Meeting Association of General Counsel that discussed the importance of media on corporate litigation and urged corporate counsel to “work very closely with corporate communications in the aftermath of” publicity around litigation. Harlan A. Loeb, *Managing Corporate Crisis and Litigation While Everybody is Watching: The Expanding Role of the General Counsel*, presented at the 2004 Spring Meeting of the Association of General Counsel, April 30, 2004, [on file with author]. However, scholars generally do not attempt to determine what level of advocacy should be provided in this arena by corporate attorneys who do not act as spokespeople and how the regulations should be revised to better define ethical advocacy. For example, Jonathon M. Moses, a public relations specialist, wrote an article examining the ethical rules ability to “control extrajudicial advocacy by attorneys.” Moses, *supra* note 9. Although he points out issues with the ethical rules, he does not provide a recommendation on how to fix them. Instead, he states that when making extrajudicial statements lawyers have a “duty not to mislead the public about the law” and that the “greatest control of advocacy in the court of public opinion may come from an ideal of traditional lawyer ethics . . . [I]f lawyers are uncomfortable with a client’s position they may be less likely to speak out in the court of public opinion or at least to engage in the most brazen forms of legal spin control.” See, generally Moses, *supra* note 9; see also, Cole and Zacharias, *supra* note 1, at 1627-28 (analyzing the speech by attorneys involved in OJ Simpson’s trial and arguing that “not everything that is legal and beneficial to the client is appropriate in the context of make public statements” but declining to propose any regulations because of first amendment and other practical issues). One scholar wrote an article concerned with extrajudicial speech by criminal defense attorneys and prosecuting attorneys. Lonnie T. Brown, “*May it Please the Camera, . . . I mean the Court*” – *An Intrajudicial Solution to an Extrajudicial Problem*, 39 GA. L. REV. 83 (2004). He recommends a rule to curb attorneys’ extrajudicial speech and argues that it might also apply to non-lawyer speech for which attorneys are responsible. For a detailed description and analysis of his recommendation see the second installment of this project. Michele DeStefano Beardslee, *Advocacy in the Court of Public Opinion Part II: How Far Should Corporate Lawyers Go?*, __ GEO. J. L. ETHICS __, __-__ (2009) [*hereinafter* Beardslee, *Advocacy Part II*]

general counsels of the S&P 500, law firm partners, and PR executives [hereinafter the PR Study].¹⁵ I conducted this research to help enlighten exploratory analysis of three questions:¹⁶ First, how does the “court” of public opinion affect legal controversies of large, publicly traded corporations? Second, how do general counsels manage the intersection of PR and legal issues? Finally, what ought to be their ethical obligations, if any, in this court?

The preliminary findings from the PR Study will appear in two installments to be published in the same issue of the Georgetown Journal of Legal Ethics. In the first installment, I attempt to determine how the court of public opinion can influence legal controversies and how corporate attorneys actually manage legal PR for their corporate clients. Surprisingly, the findings from the PR study paint a picture that is inconsistent with the conventional depiction of the lawyers’ role in this area. In the second installment, I highlight some examples of wrongdoing by corporate attorneys in managing legal PR. I analyze and identify the deficiencies in existing guidelines that regulate lawyers’ behavior in the court of public opinion and

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

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

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

recommend what ought to be the ethical obligations of lawyers in that court. My main theoretical point in the second installment is that attorneys should exercise restraint. Attorneys should help their clients manage PR around legal controversies but they should not make or aid misleading statements around legal controversies.

The first part of the current installment provides an overview, based in part on preliminary data from the PR study, of how the court of public opinion can shape legal controversies. The second part describes, through the voices of PR Study participants, the way some corporate attorneys think about and handle legal PR for corporations. The third part explores the possible implications of the PR Study on the question of whether corporate attorneys should be managing legal PR for corporate clients and advocating in the court of public opinion.¹⁷ In that part, I argue that the court of public opinion acts as an extra-legal decision-maker and, therefore, influences the fair administration of justice. I contend, therefore, that managing legal PR is a legitimate and fundamental component of corporate legal service. Ultimately, in the last part, I recommend that corporations and the profession attempt to support and enhance lawyers' ability to manage this role effectively.

I acknowledge that my analysis is based on self-reports by executives and not a random sample of *all* large, publicly traded companies that have high demand for legal services. However, the primary goals of this Article are to evaluate how general counsels of certain large, publicly traded, consumer-oriented corporations manage legal PR and highlight the potential importance of this new trend. To that end, my research provides a rich depiction of the perceived impact of the court of public opinion and how some corporate lawyers advocate in this venue. It informs my ultimate conclusion (addressed in the second installment) that the

¹⁷ Moses, *supra* note 9, at 1848 (“There has been little attention paid to whether legal spin control even is proper lawyers’ work”). *See also infra* note 204 and accompanying text.

profession’s current approach to managing and regulating “legal PR” for corporate clients could be enhanced to benefit professionalism and the public at large. Moreover, by studying these professionals and the roles they play, I hope to contribute to their effectiveness in ethically managing legal PR for their corporate clients.

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

Much of the literature on the court of public opinion highlights its importance with respect to high profile individual criminal defendants like OJ Simpson and Martha Stewart.¹⁸ More recently, scholars have begun to address the impact of media spin on corporate litigation.¹⁹ Neither camp, however, has conducted empirical research like that in the PR Study to gain a better understanding of how the court of public opinion is perceived to affect the outcomes of corporate legal controversies and the role corporate lawyers play in managing legal PR for corporate clients.²⁰

A. Overview

For large, publicly traded, consumer-oriented corporations, the court of public opinion is an especially important venue.²¹ Ninety-eight percent of Survey Respondents in the PR Study stated that in the past three years they have had to deal with a potentially high profile legal controversy one or more times.²² Sixty percent claimed they had to do so many times.²³ Unlike

¹⁸ See *supra* note 8.

¹⁹ See *supra* note 14.

²⁰ See *supra* note 9.

²¹ Harlan A. Loeb, *Public Opinion Counts: Companies Must Aim for a Clear and Timely Expression of the Truth*, 7/19/2004 Legal Times 41 (volume 27, No. 29) (last visited on 5/13/2008) <http://web2.westlaw.com/print/printstream.aspx?sv=Split&prft+HTML&mt=LawSchool>. (“Dominant industries that for decades seemed impervious to the pressures of public opinion have paid the price for failing to deal successfully with this phenomenon.”).

²² See Chart

²³ See Chart detailing use of external consultants by matter type in appendix B. Likely the impact of the media on legal issues may be of more concern to large, publicly traded consumer-product companies, especially those that are highly regulated, than it is for smaller companies that are not public and that do not sell products to the average consumer. One of the interviewees worked at a company that was not part of the S&P 500 and did not sell consumer products. He explained that if the corporation has a very limited outside audience and does not do a lot of

twenty years ago, when newspapers, radio and network television were the only media outlets, today there is media coverage 24 hours a day on television, cable, the web, faxes, cell phones, and other emerging media.²⁴ And journalists do not always present an accurate, objective or complete picture of current events.²⁵ As such, the court of public opinion affects reputation and profits²⁶ and can have severe legal consequences. As one General Counsel Interviewee

institutional advertising and if investors are primarily institutions, the corporation “probably do[esn’t] have the kinds of public relations challenges that [a corporation] would have if it were Merck or Procter and Gamble.” GC-NA-L-1*NotS&P at 35; 25. Other interviewees thought this was true as well. The more public the organization is, the “more you need a PR strategy”. LP-NA-L-2 at 12; GC-NA-L-1*NotS&P at 23. However, even companies that do not sell consumer products, are not in the S&P 500 or publicly traded face situations when PR issues affect legal advice. For example, when the company plans to shut down a facility, the lawyers must talk with the PR people about the potential impact on the community and employees to gauge the possibility of suits over termination packages. GC-NA-L-1*NotS&P at 30. Further, the one non-S&P 500 interviewee expressed remorse for times he did not pay more attention to the PR aspects of the legal issue. See *infra* notes 141-145 and accompanying text.

²⁴ Robert Hardaway & Douglas B. Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety; Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 38, 41 (1996) (discussing the “instantaneous dissemination of information”); GC-I-L-5 (S-2) at 4 (“We live in a world where the news is on 24 hours a day and things are happening very quickly and it’s not just CNN, it is blogs and everything that’s on the internet. There are people who sit on the internet every 30 minutes to see what’s happened in the world.”). Sarah Kellogg, *The Art and Power of the Apology*, WASHINGTON LAWYER at 22 (June 2007); Brickey, *Boardroom to Courtroom*, *supra* note 19, at 636 (commenting on all the media outlets).

²⁵ Semel and Sevilla, *supra* note 8, (“[T]hey will hunt you on the beaches, on the streets, in your home, office, or car, they will call you on your phones, they will send you faxes, and most assuredly, they will find you on the courthouse steps. They will never give up.”). Brickey, *Boardroom to Courtroom*, *supra* note 19, at 628 (explaining that the “media reports without judgment and restraint”). There are many possible reasons why this is true. First, unlike the legal profession, journalist ethics codes are completely voluntary. See generally Alberto Bernabe-Riefkohl, *The First Amendment and the Business of Journalism: Some Thoughts on Media Ethics* (tracing the history of journalism ethics and reviewing common journalism ethical dilemmas) (on file with author); Tamar Frankel, *Court of Law and Court of Public Opinion: Symbiotic Regulation of the Corporate Management Duty of Care*, 3 NYU J. OF LAW & BUSINESS 353, 371 (2007) (recognizing that reporters have “strong incentives to discover scoops” but lack meaningful ethical restraints). Second, the press has always been a business; it prints what sells. Bernabe-Riefkohl, *Prior Restraints*, *supra* note 13, at n. 8; “The fact is that the public has an insatiable curiosity to know everything, except what is worth knowing.”); Peter Margulies, *The Detainees’ Dilemma: The Virtues and Vices of Mobilization Strategies For Human Rights in the War on Terror* (working paper) <http://ssrn.com/abstract=1263442>, 38 (2008) (“[J]ournalists give more play to the perspectives of players who talk to them.”) at 37 (“Outlets for journalism typically must survive in an increasingly competitive marketplace, where novelty attracts eyeballs and advertising.”). Third, the press is not and has historically not been independent. Many of the large newspapers or news stations are owned by corporations that may have a stake in the current publicized issues. Bernabe, *Some Thoughts*, *supra* at 22-25 (detailing examples where press coverage was directly affected by the fact that the news outlet was owned by a corporation with an interest in the issue). Lastly, as discussed, journalists are not trained in the law and they often report inaccuracies. See *supra* notes 111-116 and accompanying text.

²⁶ The impact Martha Stewart’s lawsuit had on profits of Martha Stewart Omnimedia exemplifies this effect. See Wade Moriarty, *Winning in the Court of Public Opinion*, 45-DECEMBER HOUS. LAW. 26, 27 (2007) (reporting that after resigning from the board of her company, earnings fell 42%). Another example is the effect the Tylenol cyanide poisonings had on Tylenol’s share in the painkiller market in 1982. *Tylenol’s ‘Miracle’ Comeback*, Time Magazine, October 17, 1983 (explaining that Tylenol’s share of the painkiller market fell from 35% to 7%). Similarly, in 1994, Intel Corporation was lambasted in the press for a flaw in a microprocessor which affected only a

explained, “If I’m painted as a bad company . . . and the stock prices drop precipitously, I’m gonna be in a lawsuit.”²⁷ In turn, negative publicity around legal issues can have severe business consequences.²⁸ As another General Counsel Interviewee explained:

If there is accurate or [an] inaccurate perception. . . then customers cannot trust you, which could result in a loss of business and /or investors could not trust you, and that translates into a hit to your stock price or it hits the company’s value, which might not be warranted.²⁹

The intensified media scrutiny of the 24-hour news cycle is a growing concern for companies and their general counsels. The interviewees in the PR Study often commented that the number of instantaneous media outlets with which to broadcast information create public interest in corporate legal events overnight.³⁰ One participant in the PR Study aptly observed: “The house could be burned down before you even smell smoke.”³¹ Thus, the nonstop media culture of today does not only affect a corporation’s bottom line or individual criminal cases but also civil and criminal corporate legal controversies.³²

very small subset of computer users but it took a big hit overall and lost \$475 million. A.S. GROVE, ONLY THE PARANOID SURVIVE: HOW TO EXPLOIT THE CRISIS POINTS THAT CHALLENGE EVERY COMPANY AND CAREER 12-14 (Doubleday 1st ed. 1996).

²⁷ GC-I-L-5 (S-2) at 31 (explaining that this is the argument he would make to the judge to show it was in anticipation of litigation but that “the judge would likely never buy that”).

²⁸ Robert Eli Rosen, *We’re All Consultants Now: How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services*, 44 ARIZ. L. REV. 637, 659 (2002) (“Legal risks not only must be assessed, but also processed because legal risks often are not detached risks.”); see also Michele DeStefano Beardslee, *The Corporate Attorney-Client Privilege: Third Rate Doctrine for Third Party Consultants*, 62 S.M.U. L. REV. __, 15-16 (forthcoming 2009) (on file with author) ; Frankel, *supra* note 25, at 369 (“Reputation is crucial to most businesses and to their management”); Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate-Defendants*, 44 AM CRIM. L. REV. 53, 73 (2007) (explaining that indictment can ruin a company long before a case is tried).

²⁹ GC-I-L-5 (S-2) at 4.

³⁰ Indeed, Oscar Wilde remarked back in 1891 “We are dominated by Journalism. In America, the President reigns for four years, and Journalism governs for ever and ever.” OSCAR WILDE, THE SOUL OF MAN UNDER SOCIALISM (1891). See, e.g., ROBERT A. FERGUSON, THE TRIAL IN AMERICAN LIFE (University Chicago Press 2007) (discussing how immediate reports attained from real-time-reporting via telegraph inflamed public interest and affected the conduct of John Brown’s trial in 1859).

³¹ LP/PRE-NA-L-3 at 11.

³² Dore and Ramsy, *supra* note 3, at 52 (highlighting the importance of the court of public opinion on matters other than celebrity defendants such as “other industries including the pharmaceutical, chemical, automobile, petroleum, computer/electronics, construction, tire, tobacco and firearm industries”). Loeb, *Public Opinion*, *supra* note 21 (“[T]he impact of public opinion on lawsuits has dramatically reshaped corporate litigation over the last two decades”); see also Harlan A. Loeb, *Managing Corporate Crisis and Litigation While Everybody is Watching: The*

Importantly, preliminary findings from the PR Study suggest that the impact of the court of public opinion is not limited to the big issues. Given the complex regulatory landscape, there are more opportunities for corporations to make mistakes,³³ more avenues to broadcast those mistakes,³⁴ and more stakeholders.³⁵ Thus, even small mistakes can attract media attention. As one General Counsel put it, “[i]t’s freaky. I mean we’re a high profile enough company that *everything, every filing, gets picked up.*”³⁶

B. Impact Before a Case is Filed or Tried

Preliminary findings from the PR Study indicate that media spin plays a role before a case is filed or charges are brought.³⁷ General Counsel Interviewees believe that it affects whether a case will be filed, the nature of the charges, and, therefore, the legal strategies they pursue.³⁸ An interviewee that was a former U.S. Attorney explained that he “regularly s[aw] things in the paper that lead to investigations” and to charges by the government or shareholder suits.³⁹ Indeed, “the stuff that is in the Wall Street Journal or is in Podunk Financial News that you didn’t even pay attention to can capture [a regulator’s] attention.”⁴⁰ Further, it appears that prosecutors or regulators will pursue a target in order to appease the public and/or send a

Expanding Role of the General Counsel, presented at the 2004 Spring Meeting of the Association of General Counsel, April 30, 2004, [on file with author] (explaining that media attention has been given to criminal corporate misconduct but also civil litigation e.g., tobacco litigation, 911 tort litigation, and obesity litigation).

³³ Kellogg, *supra* note 24, at 22.

³⁴ See *supra* note 24 and accompanying text.

³⁵ Loeb, *Public Opinion*, *supra* note 21 (“Corporate litigation affects customers, employees, regulators, shareholders, opinion leaders, elected officials, and a variety of others, all of whom rely heavily on the media for their information.”).

³⁶ GC-I-S- 2 (L-5) at 40; GC-I-L-5 (S-2) at 37 (“We are increasingly in a world where everything is a PR issue.”).

³⁷ Cf. Moses, *supra* note 9 at 1839 (“[M]ost public relations work starts well in advance of indictment, let alone a possible trial.”).

³⁸ Thus, if true or not, it may be a self-fulfilling prophesy.

³⁹ LP-NA-L-2 at 17. For example, press accounts of the director of a local organization driving expensive cars and airplanes raised one interviewee’s suspicions and led him to investigate and then prosecute the director. *Id.*

⁴⁰ GC-I-L-5 (S-2) at 5.

message.⁴¹ Indeed, a federal judge in the recent Martha Stewart case protected communications between the lawyers and PR consultants because they were hired to counteract negative publicity that might pressure prosecutors and regulators to bring charges against Stewart.⁴² Similarly, other scholars have contended that certain tactics (such as apologizing, or conducting an internal investigation, or “demonizing prosecutors” in the press)⁴³ can influence prosecutors not to prosecute or to do so with less severity.⁴⁴

My research suggests that what is said in the media can limit legal options such as the defenses a corporation will be able to raise.⁴⁵ For example, if consumers are experiencing unanticipated side effects from a drug marketed by a pharmaceutical company, before

⁴¹ Mike Nifong and Eliot Spitzer are two examples. *See also* LP-NA-L-2 at 13 (explaining that they had to be careful how they managed a consent decree in the press because “there were more potential legal consequences that they would have to face having a prosecutor with his nose bent out of shape over the fact that [they] appear to be undercutting him in the public and his message.”); *but see* Linas, *supra* note 13, at 424 (2005) (arguing that media influence on prosecutorial discretion is “unsubstantiated, speculative, and hardly a valid reason to extend the privilege to public relations experts”).

⁴² In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321, 326 (S.D.N.Y. 2003) (reasoning that “the advocacy of a client’s case in the public forum will be important to the client’s ability to achieve a fair and just result in pending or threatened litigation.”); *Cf.* Schmuhl, *Government Accountability and External Watchdogs*, <http://usinfo.state.gov/journals/itdhr/0800/ijde/schmuhl.htm> (last visited on Feb. 13, 2008) (describing “the new informational environment” as it relates to the government and press).

⁴³ Brickey, *Boardroom to Courtroom*, *supra* note 19, at 637-639 (describing Arthur Andersen’s legal and PR strategy as an attempt “to bring public pressure to bear on the decision whether to prosecute” and to “taint the jury pool”); *See generally* Brickey, *Andersen’s Fall*, *supra* note 19; Kellogg, *supra* note 24, at 21 (explaining that tactics like these can help a corporation to avoid a lawsuit or shorten litigation time). McMunigal, *Client Media Campaigns*, *supra* note 13, at 3 (explaining that publicity can impact whether a prosecutor seeks a charge or the severity of a charge and “might influence the prosecutor to be more generous in guilty plea negotiations”); Moses, *supra* note 9, at 1833 (explaining that prosecutors have wide discretion to determine whether a corporate matter is a criminal or civil violation and that the right strategic PR can “limit public pressure on government officials in order to limit the escalation of charges”).

⁴⁴ Consider Jet Blue’s scandal in 2006. Immediately after a snow-storm trapped passengers on airplanes on runways for up to 11 hours without food or a way to empty the overflowing bathrooms, the CEO apologized publicly, offered \$50 retroactive “mea culpa” coupons and promised to change the customer bill of rights to better handle similar situations in the future. Such action may have prevented some consumers from filing suit. Some plaintiffs actually desire public apologies in lieu of or in addition to a damage remedy. News reports after the 2003 Air Midwest plane crash in North Carolina stated that a “primary focus” of one victim’s family “had been to require accountability by the defendants, either by trial or by public apology, for the operation, maintenance and design deficiencies that caused the air crash.” http://www.baumhedlundlaw.com/bhl2_press/midwest_apology.php (last visited 11/12/2008). Indeed, they claimed that “[a] trial was avoided as a result of [the] public apology by Air Midwest and Vertex.” *Id.*

⁴⁵ Margulies, *supra* note 25, at 39 (“Statements made in advance of trial . . . can lock defense counsel into a strategy that seems less than optimal as the trial proceeds.”). Also, an apology or expression of sympathy can be used as proof of liability. *Cf. see e.g.*, Kellogg, *supra* note 24, at 25 (noting that 29 states have passed laws excluding expression of sympathy as proof of liability in medical malpractice suits and 5 states have passed laws that require hospitals to notify patients of adverse medical outcomes); *see supra* note 140.

recommending a course of action (whether to pull the drug, admit to liability, run more tests, disclose prior drug test results, attempt to pre-empt claims by offering compensation), lawyers consider first the health and safety of users and secondarily how each option may be spun by media outlets and therefore perceived by potential injured consumers, stockholders and regulators.⁴⁶ And the way something is spun, limits future options.

The PR Study findings overwhelmingly support the argument that the potential PR ramifications are part of the cost-benefit analysis conducted in determining how best to handle a legal controversy. Sometimes the lawyers come to the conclusion that a full-fledged PR campaign that creates positive messages about the corporation in general (as opposed to the legal controversy specifically) is the best route.⁴⁷ Other times, the lawyer will conclude that it is better to try to stay out of the court of public opinion and hire external PR specialists to do just that.⁴⁸ All of these responses are calculated – designed to affect the legal outcome.⁴⁹ With respect to the last option, however, avoiding the PR altogether does not remain an option.⁵⁰ Once the media picks up something, the traditional “no comment” response is rarely viable

⁴⁶ GC-C-L-13 (S-28) at 5. Results from the interviews suggest that general counsels often do this with the help of a PR consultant.

⁴⁷ Larry Smith, *Merck's Powerful Tactical Advantage in the Court of Public Opinion*, 25 NO. 11 OF COUNSEL 12 (Nov. 2006) at 2 (explaining that “a white noise of positive messages about the defendant [] can be as ultimately decisive as any evidentiary material”). For example Merck “saturated” the city in which a Vioxx trial was going to be held with a full blown PR campaign to enhance its image. *id.* (reporting that “from January through June 2005 – just a few weeks before one Vioxx trial began in Texas – Merck spent \$8.9 million on ‘image’ ads alone, up from \$4.6 million during all of 2004); *id.* (reporting that the year that Merck found out “there was legal trouble ahead” it “outspent Budweiser and Pepsi . . . spending more than \$150 million, the most ever for a prescription drug” and that the “advertising paid off for Merck as retail sales quadrupled).

⁴⁸ PRI-I-L-19 at 3 (“We hate people writing about us. We’d much rather pay them to go away.”) (meaning settle); *see also* PRE-C-L-23.

⁴⁹ *See, e.g.,* Smith, *supra* note 47, at 3 (contending that the Merck ads that “don’t argue a legal position” “are no less designed to effect a legal result”).

⁵⁰ Richard Grasso, former CEO of the New York Stock Exchange explained there was a “I had the good judgment of [my PR consultant] saying there's no way in the current environment that you're going to effectively counterpunch. There [was] no need to try and parry in the press.” *Exclusive interview: Grasso Bullish on PR's Worth*, PR WEEK, JULY 16, 2008, C:\Documents and Settings\Michele D. Beardslee\Local Settings\Temporary Internet Files\OLK145\Exclusive Interview Grasso bullish on PR's worth - PRWeek US.mht (Last visited on 7/18/08). Grasso’s PR representative explained: “Had [Grasso] given media interviews, the Op-Ed wouldn't have had the same value or impact. . . . If he had given interviews and all his positions were known, the impact would have been severely diminished and the Journal may not have even wanted it.” *Id.*

today. “There is very much a need for lawyers to be practical about . . . allowing the company to take out some sort of media strategy and response” to a legal controversy even before a case is filed.⁵¹ This is because the public may assume silence means the publicity is true.⁵² Also, the media often gives more press coverage to those sources that talk than those that do not.⁵³

My research also supports the contention that media spin is used to manipulate negotiation power before trial.⁵⁴ As the General Counsel of a petroleum company remarked about the recent Venezuelan expropriation scandal, “the negotiation is in the newspaper.”⁵⁵ According to another interviewee, plaintiffs’ lawyers initiate negative press to pressure companies involved in potentially high profile cases, like racial discrimination, to settle.⁵⁶ Media spin also affects how quickly parties settle.⁵⁷ As one General Counsel Interviewee explained: “It could force you to come to the table faster. It certainly would. I mean, god knows that even the threat of media could sometimes make you come faster, particularly if it was something that . . . could affect my customers.”⁵⁸ For that reason, lawyers sometimes ask the PR consultants what they can do to make the other side settle faster.⁵⁹ Similarly, PR executives approach the lawyers

⁵¹ GC-I-L-5 (S-2) at 4; Frankel, *supra* note 25, at 369 (“The Advocacy of lawyers in the Court of Public Opinion is now a fixture on the legal scene.”); GC-P-S-27(L-8) at 28 (“No comment doesn’t work very well. . . .at least you got to give them an answer that is the effect of no comment, but it sounds like you gave them an answer.”).

⁵² Joy and McMunigal, *The Role of Lawyers*, *supra* note 13, at 111 (“Silence in the midst of the crisis may cause the client to lose the war before the battle has even begun.”).

⁵³ Margulies, *supra* note 25, at 38 (“[J]ournalists give more play to the perspectives of players who talk to them.”).

⁵⁴ Carole Gorney, *Litigation Journalism is a Scourge*, N.Y. TIMES, Feb. 15, 1993, at A15 (“Litigation blackmail is being committed in the United States every day, aided and abetted by journalists, lawyers, and public relations consultants.”); *Id.* (explaining that lawyers and clients are featured in the media for the purpose of “forcing out-of-court settlements and upping the ante in return for squashing the adverse publicity”). See Moses, *supra* note 9, at 1840 (“For the plaintiff’s lawyer, publicity is arguably a way to generate more clients which in turn may pressure companies to settle. On the other side a defendant has a lot to gain by an active PR approach. It may deter plaintiff’s lawyers from investing in a class action fight, and it may discourage additional plaintiffs from suing.”).

⁵⁵ GC-P-S-22 (Long) at 65. In order to pressure petroleum companies, Venezuelan officials issued a press release stating, inaccurately, that other petroleum companies had signed on to the new terms. *Id.*

⁵⁶ LP/PRE-NA-L-3 at 10.

⁵⁷ GC-I-L-5 (S-2) at 28.

⁵⁸ GC-I-L-5 (S-2) at 30; GC-I-L-5 (S-2) at 19 (“[T]he public relations theme that got going on this brought the other party to the settlement tables.”).

⁵⁹ GC-I-L-5 (S-2) at 19.

with ideas on how they can make the other side “fold fast.”⁶⁰ As one General Counsel Interviewee explained, “I think if you are facing a firestorm of negative public opinion, even if you think you could win the case on the merits in a courtroom two years or three years down the road, there is a very substantial incentive to resolve the matter quickly, in order to stop the negative reputation impact.”⁶¹ Decisions to settle are “nuanced” ones that take account of PR:

We settle things all the time . . . when you are in a highly regulated industry, it is hard to be in litigation with a regulator because if they don’t get you one way they get you another. We care about our reputation. For example, on scale of 1-10 with flimsy evidence at 0 and 10 the worst, let’s say we’ve done something wrong on a scale of 2 or 1. If they file a case, they may allege it’s a 9 even though it’s not. The damage from a case being filed like that to your franchise might be great enough to make you settle at a 3 level. . . . There is some interplay between how people perceive your problems and what you are willing to do.⁶²

C. Impact After a Case is Filed

My research also supports the popular notion that the court of public opinion shapes the process and outcome of litigation.⁶³ All of the General Counsel Interviewees believe in what one described as the “the power of public relations.”⁶⁴ This is not news. The public’s interests – the views and perceptions of the community– have been shaping the outcomes of trials since at least the 1800s.⁶⁵ As the Supreme Court counseled in *Sheppard v. Maxwell*⁶⁶ in 1966, modern

⁶⁰ GC-I-L-5 (S-2) at 29.

⁶¹ GC-C-L-17 (S-11) long at 8.

⁶² GC-I-L-6 (S-1) notes on file with author at 3.

⁶³ Bernabe-Riefkohl, *Prior Restraints*, *supra* note 13, at n. 5 (1995) (explaining that Bar-media committees exist to “establish mechanisms which alleviate the tensions that media coverage creates on the judicial system.”); Loeb, *Public Opinion*, *supra* note 21 (explaining that it was “the media’s ability to arouse the interest of the American public,” regulators, and state attorney generals that “toppled” the tobacco industry).

⁶⁴ GC-P-S-25 at 32-33. Both PR and Legal professionals “recognize the impact the other can have, reputation being something you can not get back easily.” GC-P-S-27 (L-8) at 26; GC-C-S-17 (There are “business connections between what happens from a legal risk perspective and brand damage, and PR and company reputation.”).

⁶⁵ *Cf.* Ferguson, *supra* note 30; *see also* James Srodes, Book Review (Reviewing ROBERT A. FERGUSON, *THE TRIAL IN AMERICAN LIFE* (University Chicago Press 2007)), *THE WASHINGTON LAWYER*, June 2007, at 42 (characterizing Ferguson’s book as “a case study of various high-profile trials of American history in which the intent and process of the law come into conflict with the views of the community and how the latter shapes the outcome of the trial”); Roschwalb *et al*, *supra* note 2 xiv. (“It seems new, but in actuality, the use of media relations techniques in high-profile legal cases goes back at least two hundred years.”); Margulies, *supra* note 25, at 14-15 (describing examples

communication is pervasive and it is “difficult[.]” to “effac[e] prejudicial publicity from the minds of the jurors.”⁶⁷ This is the justification for the fair reply provision in Model Rule of Professional Conduct 3.6 which allows lawyers to make extrajudicial statements to alleviate adverse publicity.⁶⁸

Interviewees in the PR Study also claim that PR affects judges. A common point was: “Judges read newspapers; appellate judges read newspapers too,”⁶⁹ not to mention legal blogs.⁷⁰ If what is in the news creates the impression that an unfavorable verdict or action might have negative public consequences, this may influence a judge’s decisions because judges care about their reputation.⁷¹ The Supreme Court has recognized this⁷² and admitted that public perception

of use of media to influence legal outcomes dating back to the late 1880s through today); *id.* at 24 (“Stories of innocence have long been a central element in advocacy for individuals and groups detained by the state.”).

⁶⁶ 384 U.S. 333, 362-363 (1966) (releasing a man from prison due to effect of adverse publicity before/during trial).

⁶⁷ *Id.*; Brickey, *Boardroom to Courtroom*, *supra* note 26, at 629 (“[O]verly aggressive media tactics can skew the balance between the public’s right to know and the parties’ interest in receiving a fair trial.”); Roschwalb et al, *supra* note 2 at xiv “jurors are influenced by what they see and read.”); *but see* Bernabe-Riefkohl, *Prior Restraints*, *supra* note 13, at 300 (“[T]he evidence on the effect of pretrial publicity on potential jurors is, at best, inconclusive.”); Amy L. Otto et al., *The Biasing Impact of Pretrial Publicity on Juror Judgments*, 18 LAW & HUM. BEHAV. 453, 455 (1994) (critiquing the survey methodology); John Kaplan, *Of Babies and Bathwater*, 29 STAN. L. REV. 621, 623 (1977) (contending that pretrial publicity has “virtually no impact” on jurors.”); Watson, *supra* note 6, at 85 (“[S]tudies have not proved conclusively that news coverage . . . determines a litigation outcome” or affects jurors).

⁶⁸ MODEL RULES OF PROF’L CONDUCT R. 3.6(C) (2002). *See also* Murphy, *supra* note 3, at 584; *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043, 1051-52 (1991) (explaining that “petitioner sought only to stop a wave of publicity he perceived as prejudicing potential jurors . . . and injuring his client’s reputation.”).

⁶⁹ LP/PRE-NA-L-3 at 6; *see also* GC-C-L-17 (S-11) at 8 (“[J]udges and juries read newspapers and watch the news. . . either consciously or unconsciously, [it] influences the way fact finders evaluate cases.”).

⁷⁰ For example, bloggers speculate that their “early and often” criticism of New York’s advertising rules helped pressure the judge to strike down parts. *New York Advertising Laws Held Unconstitutional*, LEGAL BLOG WATCH [www. http://legalblogwatch.typepad.com/legal_blog_watch/2006/09/bloggers_keep_o.html](http://legalblogwatch.typepad.com/legal_blog_watch/2006/09/bloggers_keep_o.html) (last visited July 25, 2007) (On file with author); Case 5:07-cv-00117-FJS-GHL Filed 7/23/2007. Moses, *supra* note 9, at 1836 (explaining that judges may not be immune to media influence and litigators utilize a public litigation strategy in an attempt to make sure that judges hear their arguments in as many places as possible.”).

⁷¹ Roschwalb et al, *supra* note 2, at xiv; Lynn M. LoPucki and Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1457 (2000) (“Because judges care what members of the profession and the public think of them, they are vulnerable to media spin regarding the cases that come before them.”); *id.* (explaining that “manufacturers and insurers have been campaigning in the mass media against high jury verdicts and expanded remedies” for the past 20 years but that these efforts have affected judges); *id.* (“Recent studies show astonishingly high rates of verdict reductions or reversals by both trial and appellate courts.”); McMunigal, *Client Media Campaigns*, *supra* note 13, at 3 (on file with author) (explaining that public sympathy generated by media “might help convince a preliminary hearing judge not to bind the client over for trial” or “influence the trial judge to be more favorable to the client in rulings made prior to, during, and after the trial as well as more lenient at sentencing”).

⁷² Sheppard v. Maxwell, 384 U.S. 333, 358 (1966) (chastising judge for “view[ing] the news media as his target.”).

of judicial decisions matters.⁷³ Even if this were not the case, even if juries and judges are able to remain objective, the belief that they cannot affects negotiations and settlements.⁷⁴

Moreover, as one commentator aptly pointed out “[i]n more than 90% of all cases filed in the United States, discovery is the only trial anybody gets.”⁷⁵ Because discovery is directed by lawyers, often lawyers are the only “jury” that parties get. Lawyers are not immune to the influence of the media⁷⁶ and the impact it has on their reputation. Almost all parties, even the government, have something to gain or lose in how a trial is spun. One author makes this point: “Those who conduct a trial are always on trial themselves.”⁷⁷

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

If you are litigating [a matter] in a courtroom . . . you are also essentially litigating the matter in the court of public opinion. What strategy you might adapt in the litigation can be influenced by what you think is going to happen in the court of public opinion. . . . It doesn't do my client any good if we win in the courtroom, but we have been pummeled in the press.⁷⁸

Additionally, publicity can affect the severity of the punishment. Attorneys have used clips from pretrial television interviews in court as evidence for aggravation at sentencing hearings.⁷⁹

⁷³ Ammon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, And the Role of the Scholar*, 95 CAL. L. REV. 1619, 1626-1627, 1674 (citing cases in which the Supreme Court has considered the role of public perception and public confidence in its decision making process but pointing out that “the notion of public confidence is more complex than the ordinary or conventional notion of the opinion of the general public on a given issue”); *id.* at 1637-1658 (denoting the media as one of the five systems that affect the Court’s decision-making).

⁷⁴ GC-C-L-13 (S-28) at 10 (explaining that court of public opinion matters even if juries are not affected because all the parties believe they are and it makes it a war in the press).

⁷⁵ James W. McElhaney, *Discovery is Trial*, ABA JOURNAL, August 2007, at 26. This is because fewer than 5% of cases ever make it to trial U.S. SENT’G COMM’N, 2006 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS TBL.11 (2006), available at <http://www.ussc.gov/ANNRPT/2006/table11.pdf> (reporting that 95.7% of criminal defendants pleaded guilty).

⁷⁶ *But see* Murphy, *supra* note 3, at 585 (arguing that attempting to influence prosecutors, regulators and the public “goes far beyond a fair reply”).

⁷⁷ Ferguson, *supra* note 30; It is likely for this reason that the Supreme Court submitted the video of the car chase for public review. *Will You Tube Decide the Next President?* <http://thetubeblog.com/2007/05/01/> last visited 11/5/07 (using Supreme Court’s publication of police chase video as support for hypothesis that You Tube will decide who becomes the next president).

⁷⁸ GC-C-L-17 (S-11) at 5.

⁷⁹ Semel and Sevilla, *supra* note 8, at 14 (describing situation).

D. Impact After a Case or Legal Issue is Concluded

My research supports the contention that “[t]he court of law and the court of public opinion have a symbiotic relationship. . . . [E]ach affects the other.”⁸⁰ Both courts render verdicts and lawyers must consider the consequences of those verdicts when recommending a legal strategy.⁸¹ The decisions to file, defend, admit, try, apologize – all undeniably legal advice – are wrapped up with public relations implications.⁸² One interviewee explained: “PR and the law go hand in hand and anybody who thinks that just keep your head down, don’t talk to the press, just doesn’t understand in today’s world how interrelated they are.”⁸³

Although the two courts can operate simultaneously, the court of public opinion is often not just the first⁸⁴ but also the only or the last court.⁸⁵ It can be used in lieu of a traditional court.⁸⁶ It can reinforce the judgment of a court of law and add an extra layer of punishment.⁸⁷ It can thwart the judgment of a court of law and deliver its own version of justice. “A lawyer can prove a client is innocent within the legal system, and yet that same client appears guilty when it

⁸⁰ Frankel, *supra* note 25, at 379. See, e.g., Joseph G. Wojtecki, Jr., *The Intersection between Legal and Public Relations Counsel*, Center for Risk Communication, <http://www.centerforriskcommunication.org/staff.htm#JW> (document on file with author) (claiming that “controversial public issues will be tried simultaneously” in both courts); Roschwalb *et al*, *supra* note 2, at xiii (explaining that it was clear back in 1807 during Aaron Burr’s trial that both the court of law and the court of public opinion “were operating simultaneously”).

⁸¹ Wojtecki, *supra* note 80.

⁸² Arthur Andersen attempted to humanize its story and discredit prosecutors by waging a PR campaign in 1) the traditional media outlets and 2) lawyer’s documents and court filings. Brickey, *Boardroom to Courtroom*, *supra* note 19, at 637-638 (explaining that Andersen’s legal and PR strategies were “so closely intertwined it was hard to tell one from the other”).

⁸³ LP-NA-L-2 at 17.

⁸⁴ Brickey, *Boardroom to Courtroom*, *supra* note 19, at 625 (“The first trial is always in the court of public opinion.”).

⁸⁵ Roschwalb *et al*, *supra* note 2, at xiii (explaining that Washington D.C. Mayor Marion Barry’s defense strategy against indictment for drug use “included mounting a PR campaign concurrently with court proceedings with the aim of achieving a major future benefit – salvaging his political career”).

⁸⁶ Margulies, *supra* note 25, at 16 (“Publicity and mobilization have been important because when public interest and civil liberties strategies have relied too much on courts, they have often fallen short.”); *id* at 28 (explaining that “crossover advocacy,” like advocacy in the court of public opinion “can maximize client voice, enhance clients’ negotiation posture, and gain time when traditional advocacy has lead to a dead end.”).

⁸⁷ Elizabeth Dale, *A Different Sort of Justice: The Informal Courts of Public Opinion in Antebellum South Carolina*, 54 S.C. L. Rev. 627, 633 (2003) (detailing examples in history where “[p]ublicity was, then, both a means of proclaiming the judgment of the court and a form of punishment.”).

comes to the public's perception."⁸⁸ Material disseminated publicly can have a lasting effect.⁸⁹

As the Supreme Court reminded "reversals are but palliatives"; they are not a real cure.⁹⁰

Negative publicity can even taint future juries. One General Counsel explained: PR is "a big issue for the energy companies right now because jurors that pay three dollars for gasoline are not particularly good jurors for us on *any* issue, because they walk in to the courtroom...mad."⁹¹

Because the press has historically been viewed as a protector of justice,⁹² advocates and courts sometimes rely on the court of public opinion *ex post* to discipline moral lapses not punishable by the legal system.⁹³ Some commentators contend that the media court is *better* for

⁸⁸ Tripp Frohlichstein, *Communication Consultant's Perspective*, in Roschwalb *et al*, *supra* note 2, at 19. Dirk C. Gibson & Mariposa E. Padilla, ("Verdicts rendered by public opinion may have greater historical significance than judicial outcomes."). A great example is Aaron Burr, the third vice president of the United States, who was acquitted four times for treason. Nevertheless, he was lambasted in the press and eventually ostracized from society. Ferguson, *supra* note 30; Srodes review at 43. OJ Simpson received tremendous negative publicity after he was acquitted of murder and many claim that the jury convicted him in the robbery case, in part, because they were still resentful of his acquittal. *See, e.g., Simpson's conviction evokes emotion* <http://www.msnbc.msn.com/id/27023534/> (last visited 11/12/2008) ("[F]or many observers, the line connecting the former NFL star's murder acquittal last decade and his new conviction for robbing memorabilia peddlers couldn't have been clearer.").

⁸⁹ *Cf.* Cass R. Sunstein, "She Said What?" "He Did That" Believing False Rumors, SSRN Harvard Public Law Working Paper No. 08-56 (12/20/2008) ("And because material on the Internet tends to have considerable longevity, and may even be permanent (for all practical purposes), a false rumor can have an enduring effect.").

⁹⁰ Sheppard v. Maxwell, 384 U.S. 333, 362-363 (1966); Susan Hanley Duncan, *Pretrial Publicity in High Profile Trials: An integrated Approach to Protection the Right to a Fair Trial and the Right to Privacy*, 34 OHIO N. U. L. REV. 755, 761-762 (2008) ("Although never convicted or even tried for rape, many people still harbor suspicion about the [Duke players] . . . because of the media coverage. . . . Years after the incident people may read about the Duke players and not know the charges were dismissed.").

⁹¹ GC-P-S-22(Long) at 66; In a recent survey of Fortune 1000 corporate counsel sponsored by Hill & Knowlton, 76% of respondents believed that negative publicity around alleged corporate wrongdoing impairs the ability to attain a fair, impartial jury and over half believed that public opinion directly affects the size of legal awards. On file with author. Whether this is true may not matter since the perception affects negotiations and settlements.

⁹² Ralph Waldo Emerson wrote in 1860 "as gas-light is found to be the best nocturnal police, so the universe protects itself by pitiless publicity." *The Conduct of Life "Worship"* (1860); Sheppard v. Maxwell, 384 U.S. 333, 350 (1966) ("The press guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.") For example, scholarly literature gives credit to the media (not lawyers) for uncovering the fact that tobacco companies knew nicotine was addictive and for mobilizing elected officials to take action. *See, e.g., Loeb, Public Opinion, supra* note 21.

⁹³ Tamar Frankel posits that this is what the court did in the Micheal Ovitz Disney decision. Frankel, *supra* note 25, at 355-368 (explaining that the court damned the defendants in dicta and thereby gave the corporate governance issue "to the market assisted by the media"). The rationale is that the community can correct an outcome with which it disagrees. Kellogg, *supra* note 24, at 24 (explaining that Exxon did not apologize quickly nor take responsibility for the damage from the 1989 oil spill in Alaska and that customers cut up Exxon credit cards in protest). *See* Ferguson, *supra* note 30 ("Public justice develops into a serious matter when a discrepancy exists between official findings and communal perception."); Watson, *supra* note 6, at 87 ("The right spin on a criminal prosecution . . . that appears in the news media can make a conviction seem like a miscarriage of justice, just as no spin or a

managing corporate governance and deterring corporate executive misconduct than is a court of law.⁹⁴

II. PRELIMINARY FINDINGS: HOW GENERAL COUNSELS MANAGE LEGAL PR

Given the importance of the court of public opinion, scholars often urge lawyers – especially criminal defense attorneys – to “develop[] litigation strategies that take public opinion into account.”⁹⁵ They call on lawyers to get more involved in the court of public opinion for their clients. They disparage lawyers for not “consider[ing] themselves principal contributors to litigation communications strategy.”⁹⁶ They claim that “most lawyers advise their clients not to talk to the press and most clients heed that advice.”⁹⁷ They give practical advice on how to respond to press inquires and navigate client risks that are associated with legal PR spin.⁹⁸ A major sentiment is that lawyers are behind the eight ball when it comes to legal PR.⁹⁹ As one of

prosecution-oriented frame can undermine the cleansing of suspicion that an acquittal is supposed to provide.”). Margulies, *supra* note 25, at 31 (“Crossover advocacy can also enhance the integrity and transparency of legal processes”).

⁹⁴ Frankel, *supra* note 25, at 375 (suggesting situations where it might be better if courts let the court of public opinion decide).

⁹⁵ See, e.g., Loeb, *Public Opinion*, *supra* note 21; Robert L. Shapiro, *Using the Media to Your Advantage*, 17 THE CHAMPION 6 (Jan./Feb. 1993) reprinted as adapted, *Secrets of a Celebrity Lawyer*, COLUM. JOURNALISM REV. SEPT./OCT. 1994, at 25; Robert L. Shapiro, *Harnessing the Power of the Press*, LEGAL TIMES, JUNE 27, 1994, at 22; Dore and Ramsy, *supra* note 3, at 55 (arguing that lawyers involved in products liability and toxic torts should “take the lead in ensuring that the nature, timing, scope, and content of public disclosures assist or at a minimum do not detract from the litigation effort.”).

⁹⁶ Loeb, *Public Opinion*, *supra* note 21 (basing this comment on a survey finding corporate counsel are more than twice as concerned about industry analysts and nonparty regulators or government bodies than they are the media – even though 90% claimed that a legal PR strategy was a priority during high-stakes or high-profile litigation).

⁹⁷ Joy and McMunigal, *The Role of Lawyers*, *supra* note 13, at 48; *id.* at 49 (explaining that this is conventional wisdom for criminal defendants including corporate criminal defendants); Haggerty et al, *supra* note 98 (explaining that some lawyers first tendency is say “no comment” in response to media inquiries”); see also Moriarty, *supra* note 26, at 26 (“Many attorneys are not comfortable in the media arena. They simply declare that they will not try their client’s case in the media and hope that statement will satisfy their critics.”).

⁹⁸ See, e.g., Joy and McMunigal, *The Role of Lawyers*, *supra* note 13; James F. Haggerty and John Wily & Sons, Inc., IN THE COURT OF PUBLIC OPINION WINNING YOUR CASE WITH PUBLIC RELATIONS.

⁹⁹ Cf. Roschwalb et al, *supra* note 2 (“Close working relations between public relations practitioners and lawyers are rare”); Haggerty et al, *supra* note 98 (contending that litigators fail to comprehend the impact the court of public opinion can have on litigation and the importance of managing litigation PR messages).

the General Counsels in the PR Study explained the “more traditional approach is that PR is just PR and legal is legal, and PR really shouldn’t be involved in legal.”¹⁰⁰

However, more recently, there is some literature contending that lawyers are increasingly developing sophisticated, integrated legal PR strategies.¹⁰¹ Unsurprisingly, external PR agencies sponsor some of this literature. For example, in a 2004 survey of Fortune 1000 corporate counsel funded by Hill & Knowlton, 90% of the 78 respondents stated that a PR strategy was a priority when embroiled in high stakes or high profile litigation.¹⁰² These contentions, albeit less prevalent, are consistent with my findings. The General Counsels in the PR Study claimed they were actively managing legal PR for their clients – not as the spokespeople but more typically as advocates behind the scenes.¹⁰³ The outside lawyer and external PR interviews shored up these claims.

A. *General Counsels and Internal PR Executives*

1. Regular interaction

Because they believe the court of public opinion shapes corporate legal controversies big and small, almost all of the General Counsel Interviewees report having strong, daily relationships with internal PR professionals.¹⁰⁴ As one General Counsel Interviewee explained

¹⁰⁰ GC-I-L-5 (S-2) at 41.

¹⁰¹ Loeb, *Public Opinion*, *supra* note 21 (discussing legal PR strategy of Bayer AG in response to the alleged injuries from Baycol); Moses, *supra* note 9, at 1843 (“Lawyers work closely with public relations professionals to get out their client’s messages.”).

¹⁰² On file with Author. Hill & Knowlton is a popular public relations and public affairs agency.

¹⁰³ Likely, this is partly due to the types of companies and industries in which the interviewees worked.

¹⁰⁴ Internal PR professionals were commonly referred to as PR executives or PR directors by the interviewees. However, formally the titles vary. Some are called PR executives or communication specialists and the internal PR department at a publicly traded corporation can be referred to as the PR department, Communications, Corporate Communications, Corporate Affairs, or Public Affairs. Often, however, the PR department is a subset of Marketing, Communications, or Public Affairs. (Along with PR, Human Relations and Government Relations are often part of these overarching corporate functions.) After marketing professionals devise the optimum positioning and message strategy to lead the creative team in developing the appropriate messages, they create a communication plan consisting of, for example, TV advertising, website management, direct mail, events, and public relations. Thus, PR is a very specific function within Marketing Communications. Although PR is a specific tactical component to a marketing communication plan, for large, publicly traded corporations, this can be complicated. PR is an attempt to influence end users and influencers (primarily editors and analysts) through targeted messages

“[t]he traditional teaching of the lawyer is that you don’t comment, which is not the way one can operate in today’s environment. So I have learned to work very, very closely with [the PR group].”¹⁰⁵ Most made statements like the following: “Well, [the relationship is] very close and we’re in touch with them all the time, daily, not just on cases.”¹⁰⁶ Indeed, only two General Counsel Interviewees stated that they did not work with the internal PR executives very often.¹⁰⁷

Typical interactions with PR counterparts involve drafting press releases around legal issues or disclosure obligations, developing talking points around a case or legal issue, and dealing with trademark protection issues and SEC filings.¹⁰⁸ The following is a representative description: “The lawyers are always involved in important disclosures to markets because [a] lawyer’s job is to make sure the statement is clear and as accurate and balanced for the investors as it possibly can be.”¹⁰⁹ To be clear, General Counsel Interviewees do not claim to be involved only in formal disclosures. They claim to be involved whenever any legal issues may be discussed with journalists. Legal issues are often complicated and consumers often lack

around a specific product, service, or legal issue – or around a corporation’s brand, culture, governance, and citizenship. As one General Counsel Interviewee explained, PR is “about promoting brands, creating sense of corporate personalities, interfacing with the community at large on the products and services [the company] offers.” GC-C-L-17 (S-11) at 14. They handle press releases on product releases, commercial developments and investment projects. They arrange town hall meetings across the country at which the CEO can speak to the public. They are generally also in charge of internal corporation communications e.g., developing the company newspaper and employee relations website, organizing internal dialogues with the CEO and senior executives. In short, PR directors manage the overall reputation of their corporate clients. This article addresses a small slice of what PR executives are concerned about: the intersection of PR and corporate legal controversies. How does the court of public opinion impact the trajectory and outcome of a legal issue? And how do lawyers and public relations executives manage this venue? In this Article, I will refer to executives that manage PR as PR communication executives or specialists and I will refer to the department that specifically manages PR (as opposed to other types of corporate communication) as the PR department.

¹⁰⁵ GC-I-L-5 (S-2) at 40; Roschwalb *et al*, *supra* note 2, at xii (explaining that lawyers and PR executives often provide advice that is contradictory).

¹⁰⁶ GC-P-S-22 (Long) at 65

¹⁰⁷ Based on preliminary findings. GC-I-S-7 at 27; GC-NA-L-1*NotS&P at 24-25 (explaining that PR was not as important because they were not a consumer product company and most of its investors were institutional. Therefore, the relationship between legal and PR is not as close. Instead, they tell PR when there is a problem, how they are going to deal with it and just ask PR to “shine up [the facts] to make them look rosy”).

¹⁰⁸ GC-C-S-4; GC-NA-L-1*NotS&P at 25; GC-F-L-4 at 13.

¹⁰⁹ GC-F-L-4 at 13; GC-P-S-22 (Long) at 65 (“[O]ur disclosure obligation is the biggest driver to that close relationship.”).

knowledge about the industry and law.¹¹⁰ Journalists, who are not trained in the law, must cater to non-lawyer consumers that have many media choices and expect information that is newsworthy, timely, and easy to digest.¹¹¹ Therefore, there is a risk of inaccuracies. The following account by one interviewee was echoed by Lawyer and PR interviewees alike:

[The media] will hop on anything. And the people who are assigned are . . . not financial journalists. So many of them don't have a background and don't really frankly know what it is they're writing about. They don't really frankly understand those stories that they are writing, and they get things wrong very frequently; like very, *very* frequently . . . and maybe not wrong enough that it has to be retracted, but wrong enough that it creates a misleading impression, sometimes on purpose and sometimes by accident.¹¹²

Therefore, many interviewees complained that the media “tends to oversimplify complex issues and get the facts and details wrong.”¹¹³ One interviewee observed, “if you try to explain [a legal issue] in 30 seconds, you’re gonna get it wrong. And so there’s a lot of talent to come up with the right words.”¹¹⁴ General Counsel Interviewees, therefore, work with PR executives to come up with those right words.

We actually wanted the story to be correct and accurate. And so the first thing we wanted to do was have a long conversation with the PR executives so that they understood the technical aspects of what had actually happened here. And then their job was to figure out how to communicate all this and, frankly, how to communicate it in a sound bite.¹¹⁵

¹¹⁰ GC-P-S-22 (Long) at 68 (explaining that consumers are not aware that the gas station they just frequented is owned by a country that is expropriating all U.S. companies there).

¹¹¹ Reichman, *supra* note 73, at 1631 (“Since the target audience of the general media includes non-lawyers, there are limits to the degree of technical analysis that the media can convey. . . . the electronic media often has to reduce a decision to several sound bites”). There are multiple reasons why speed is essential. First, news sells and if another paper has published it, it is not news. *Cf. supra* note 25. Second, to keep brand loyalty, news outlets need to be able to credibly claim they bring the most recent news to their clients. Third, “[t]he press must be allowed to publish news quickly enough for it to effectively check abuses of governmental power.” Bernabe-Riefkohl, *Prior Restraints*, *supra* note 13, at 262-264; *A Quantity of Copies of Books v. Kansas*, 378 U.S.205, 224 (1964) (Harlan, J., dissenting) (“It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances.”).

¹¹² GC-I-L-5 (S-2) at 13; LP/PRE-NA-L-3 at 10 (“We did . . . a quick study of 10 or 20 newspapers about corrections the largest body group were spelling. . . the second largest were it happened to be legal matters where papers got things wrong. As you know this other stuff is not self-evident to reporters or lay people.”).

¹¹³ *See, e.g.*, LP-NA-L-31 at 21.

¹¹⁴ GC-I-L-5 (S-2) at 45.

¹¹⁵ GC-I-L-5 (S-2) at 8-9.

And, according to participants, they have to aid PR executives in this task because this can be “really hard. It is really hard. [The media] want for me to get down to the sound bite, and I wanna push back and say, ‘It’s not a sound bite’”.¹¹⁶

Managing legal PR is an iterative process. The legal department informs the public relations group about the matter, the issues at stake, what needs to be communicated (and what should not be communicated).¹¹⁷ The PR professionals and lawyers together craft the spin.¹¹⁸ The following quote was a typical description: “We work together a lot up front on the communication, about what is going on and what press releases we will need. We write and then they re-write. It’s collaborative.”¹¹⁹ Once a press release is approved, the PR people handle “the technique of getting it out and how to get it out.”¹²⁰ PR executives develop personal relationships with the reporters that cover the industry so that “they have a rolodex of people they can call in and a bank of goodwill that [can] temper the tone of what an article was”¹²¹ or help attain more than the typical 35 second sound-bite.¹²² However, it is not only the PR people that develop rapport with reporters. Inside (and outside) lawyers sometimes also create relationships with the media.¹²³

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

¹¹⁶ GC-I-L-5 (S-2) at 45; GC-F-L-4; GC-NA-L-1*NotS&P; Moses, *supra* note 9, (“[N]ot all lawyers are comfortable with the new world of advocacy that demands that they be as quick with a sound bite as with a legal argument”).

¹¹⁷ GC-C-S-24; GC-P-L-15 (S-29) at 23.

¹¹⁸ GC-NA-L-1*NotS&P at 13, 17; GC-P-L-15 (S-29) at 23.

¹¹⁹ GC-F-S-32 at 9.

¹²⁰ GC-NA-L-1*NotS&P at 13, 17; GC-P-L-15(S-29) at 23.

¹²¹ GC-I-L-5 (S-2) at 41-42.

¹²² GC-I-L-5 (S-2) at 45.

¹²³ Ken Frazier of Merck is a good example. *See also*, Moriarty *supra* note 26, at 29 (quoting Lynne Liberator as saying that “[m]ost lawyers who deal in high profile cases have already established relationships with reporters”). Some of the interviewees intimated that this relationship can make a difference in how the corporation is ultimately portrayed in the press.

I would say that it's undoubtedly not a week [goes by] that the legal department isn't talking to the communications team about some legal matter. Everyday there are stories written about [our company] and typically every week there is a story being written about something that's legally related that affects us. But in terms of a concerted effort to sit down and really focus on a media strategy in a substantial way, I'd say probably four or five times a year.¹²⁴

2. Open Communication and a Team Approach

Most of the General Counsel Interviewees take a candid, team oriented approach to relationships with internal (and often external) PR counterparts:¹²⁵ “You get together with your CEO, CFO, your GC, your outside counsel, and your [internal] PR guy and you go through everything and get everyone's input on the documents and strategy and you get your outside PR firm too.”¹²⁶ This depiction is consistent with Robert E. Rosen's portrayal of how large corporations conduct business. They organize around self-managing project teams (consisting of internal employee professionals and external consultants) that work collaboratively.¹²⁷

General Counsel Interviewees claim they sometimes need to share confidential information in order to receive the best advice from the PR executive,¹²⁸ provide solid legal advice to their corporate client;¹²⁹ and avoid problems.¹³⁰

¹²⁴ GC-C-L-17 (S-11) at 9.

¹²⁵ Loeb, *Managing Corporate Crisis*, *supra* note 32, at 10 (explaining need for “a multidisciplinary approach.”). Only two interviewees claimed that they were not as team oriented. One was the GC of a non-S&P 500 corporation.

¹²⁶ GC-F-S-32 at 16; GC-P-S-22 (Long) at 65 (“Our press person, communications person, is part of our team, meets with us at every meeting including when we meet with the external law firm”).

¹²⁷ Rosen, *We're All Consultants*, *supra* note 28, at 642-48 (2002) (explaining that corporations have porous borders and that outsourcing is not only hiring workers “on a contingent basis with fewer benefits” but also includes hiring external specialists like engineers, accountants, and even outside counsel). *Id.* at 642-648. *Id.* at 647 (“The organizational strategies of downsizing and outsourcing link corporate demand and the supply offered by consulting firms.”). For further discussion of this topic see Beardslee, *Third Party Consultants*, *supra* note 28, at Part I.

¹²⁸ For example, if the PR executive knows beforehand that the CEO was having an affair with the employee of the target company being sued for embezzlement, he/she might make different recommendations regarding media spin.

¹²⁹ GC-C-L-17 (S-11) at 6 (“There nonetheless are situations where you, in order to be fair to them and for them to give you good advice about what they think the media's perspective on things might be, you are going to have to share some” with them.”); *but see* GC-F-S-39 (“There is no need to share confidential info with PR people. In litigation, all the relevant information is public knowledge.”).

¹³⁰ GC-F-L-4; GC-P-L-15(S-29) at 22; GC-P-S-22(Long) at 68 (“If you keep [the PR] people in the dark, they end up being mismanaged.”); GC-P-S-27(L-8) at 27; the PR interviewees confirmed this. The amount of confidential information shared may be limited because media stories often do not get written with intense detail.

You have to share information that is confidential so that [the PR people] fully understand what it is they're going to be talking about if they're the ones having the interface with the reporter or media. . . . I don't think it's fair to give them only a part of the story. They can't contribute, I don't think, as well if they are limited.¹³¹

For example, the lawyers must ensure that the right information is disclosed in the proper manner¹³² and PR executives help the lawyer determine what a consumer or stockholder might consider “material” and therefore necessary to disclose. PR executives help the lawyer determine the way potential legal strategies might be spun and therefore how governmental agency regulators, stockholders, judges, and potential juries, might react.¹³³ This understanding, in turn, informs the lawyers’ legal choices. As one General Counsel Interviewee explained: After a dialogue with the PR executive, a lawyer might recommend that “it’s not worth it to confront a regulator publicly even when [he] think[s] [the regulator] is wrong” and he “was right on the narrow issue” because “it might be detrimental to [the] company’s long-term dealings with them.”¹³⁴ To that end, lawyers utilize the reputational consequences (as explained in part by the PR executives) to convince clients not to take legally risky actions that might technically comport with the law.¹³⁵ Perhaps for all of these reasons, 74% of Survey Respondents were comfortable sharing *all* information about a legal issue with internal PR staff.¹³⁶

¹³¹ GC-P-L-8 (S-27) at 27.

¹³² GC-P-S-27(L-8) at 27.

¹³³ *Calvin Klein Trademark Trust v. Wachner*, 198 F.R.D. 53, 55 (S.D.N.Y. 2000) [hereinafter *Calvin Klein I*] (explaining that PR consultants need to understand legal strategies to provide PR advice and PR advice influences attorneys’ strategic and tactical legal decisions). As explained in another article, “[t]his is not to imply that lawyers build legal strategies around the media strategy but simply that media impact is a consideration when providing legal advice. For example, a lawyer might want to meet with an external PR consultant if representing a private bank facing significant regulatory sanctions for money laundering. The company has to appear appropriately chastened before the regulators but also reassure the customers. A PR consultant can help the attorneys understand how certain statements might be construed and how to reach the right balance to prevent additional charges or cases against the company.” Beardslee, *Third Party Consultants*, *supra* note 28, at note 34 (citing GC-I-L-12 (S-3) at 6).

¹³⁴ GC-I-L-9 (S-23) at 5. *But see*, Part II.A.4 (indicating that this reliance only occurs if the lawyer believes the PR executive is savvy and has experience in managing high-profile litigation).

¹³⁵ Beardslee, *Third Party Consultants*, *supra* note 28, at notes 210-213 and accompanying text.

¹³⁶ *See* chart in Appendix. Although General Counsels “try when it’s appropriate to set things up so as to be able to demonstrate that it’s protected by the attorney-client privilege and you know I think that’s helpful, but . . . We’re pretty candid and . . . as I said, it’s a partnership that’s easy, works well, very smooth.” GC-C-S-17 at 40; GC-C-L-

It is the PR department’s responsibility to ensure that reporters understand the legal arguments made in court. Knowing beforehand what arguments the lawyer is going to make, the basis of the case, and potential rebuttal, helps the PR executives inform the reporters in a way that does not weaken the client’s legal position and devise the right communication plan from a tactical standpoint.¹³⁷ Messages in the court of public opinion need to be consistent with messages in a court of law. First, what is said publicly can constrict the legal strategies a lawyer can pursue persuasively in court.¹³⁸ Second, inconsistency breeds mistrust.¹³⁹

If a reporter decides that they do not believe your defense or that you are not being candid with the media, or you look like you are hiding something or you are not willing to take on the hard issues, it creates even more of a story in and of itself. [Media spin] does impact the way you approach things – not because you don’t raise the defenses, but . . . the manner in which you are going to assert them. When you say it, how you say it and to whom you say it becomes critical and consistency becomes really important.”¹⁴⁰

Even the two General Counsel Interviewees that reported a more distant relationship with the internal PR executives felt there were times where they needed to share confidential information with them¹⁴¹ and have regretted not sharing information.¹⁴² The law firm partner of one of those General Counsels explained that the failure to share information had negative consequences. The PR executives were not on board with the direction that the lawyers wanted

13 (S-28) at 9 (It’s difficult to speak in generalities, but I would say that although it’s important to protect the privilege, that’s not always the driving factor in terms of how you go about things. There are other considerations that you have.”). It appears that General Counsels are less comfortable sharing information with external PR consultants because of attorney-client privilege issues. For further discussion of the risks associated with sharing confidential information with external consultants *see* generally Beardslee, *Third Party Consultants*, *supra* note 28.¹³⁷ PRI-I-L-19 at 10-11. As discussed briefly *infra* and in my prior article, however, this type of divulgence might not be protected by the corporate attorney-client privilege.

¹³⁸ *See supra* note 38.

¹³⁹ Beardslee, *Third Party Consultants*, *supra* note 28, at 13 (citing Dore and Ramsy, *supra* note 3, at 56). For example, if a client is being sued for violation of antitrust laws, the lawyer will likely try to demonstrate that the client is not a monopolist. The PR strategy, however, would likely be to emphasize that the client is the dominant market participant. Christopher P. Bogart and Robert D. Joffe, HIGH-PROFILE LITIGATION, OBJECTIVES CONCERNS AND PRELIMINARY CONSIDERATIONS (discussing the “strong need to coordinate the client’s litigation strategy and the client’s on-going business strategies, shareholder/investor relations, and public relations”).

¹⁴⁰ LP-NA-L-31 at 5. This also breeds mistrust by the judge. Margulies, *supra* note 25, at 41 (explaining that a judge will notice if one theory is propounded in the press and not in the court).

¹⁴¹ GC-I-S-7 (explaining that it is a reactive relationship except when it involves high stakes matter, then “inform them of everything going on” and what can and cannot be leaked to the press”).

¹⁴² GC-NA-L-1*NotS&P at 25.

them to take publicly, were unprepared and left scrambling.¹⁴³ If information had been shared, the PR specialists could have “conditioned the press and their sources instead of the media finding out when everyone did.”¹⁴⁴ This would have resulted in guided, better press coverage.¹⁴⁵

Other General Counsel Interviewees, who now believe in collaborating, described similar stories of regret for times when they had not: “There were times when there might have been something that had a PR issue that I didn’t bring the PR people in and even tried to keep them out of, and I was sorry about it sort of because of the ancillary effects that go along with it.”¹⁴⁶ Thus, the traditional segregation between law and PR is no longer workable. As one interviewee explained, “with the expansion of financial news coverage . . . I don’t think you really have a choice but to have a pretty active, strong relationship between PR and Legal. . . . If you are encountering PR for the first time in either a crisis situation or a litigation situation or an unpleasant situation. . . you’ve already lost the battle.”¹⁴⁷

3. Healthy Tension

Despite the close relationship, many interviewees claim there is a “healthy dynamic tension” between the legal and public relations departments.¹⁴⁸ Indeed, the two have, what one interviewee called, “spirited debates” about what to disclose.¹⁴⁹ “There are times when you butt

¹⁴³ LP-NA-L-2 at 10 (“I think the company could have done a better job preparing its PR people for how bad it was going to be in the first day after this [crisis] was announced.”); *id.* at 9 (“It would have been better [if they had been brought in earlier] because they would have been living through it with [them] and [the PR people] would have seen what was coming and they would have drawn their own conclusions.”).

¹⁴⁴ LP-NA-L-2 at 11.

¹⁴⁵ *Id.*

¹⁴⁶ GC-I-L-5 (S-2) at 37 (“PR people should be brought in right away, as much to be defensive so that they are up to speed when the phone rings and they get the call about that.”).

¹⁴⁷ GC-I-L-5 (S-2) at 41.

¹⁴⁸ GC-F-L-4 at 11; GC-NA-L-1*NotS&P (referring to this tension); GC-I-L-5 (S-2) at 40-42 (same); GC-F-S-32at 16 (same).

¹⁴⁹ GC-I-S-2 (L-5) at 40.

heads. Like in a high stakes legal matter, PR wants to put the best spin on it and I would say this is not something you could spin. You have to call just the facts and no spins.”¹⁵⁰

Interviewees claimed that lawyers and PR executives are often at opposite ends of timing issues. PR executives often want the corporation to quickly state it has not done anything wrong.¹⁵¹ But, the lawyers want to conduct an internal investigation.¹⁵²

The real challenge in these cases very often is the legal process is much slower and much more deliberate, than the public relations process, and so public relations people always have a need to or desire to be out there and just staking out a position relatively early on, whereas the legal process including the fact gathering process often takes much longer than the news cycle.¹⁵³

Even when there is a valid defense, sometimes it may not be something the public and media can understand. One General Counsel painted the picture: “If we got out there with ‘our’ side of the story, I think the lawyers felt it would sound like we were saying ‘we haven’t seen our wives in ages and by the way, when we were beating our wives, we were doing it with rolled 8 ½ X 11 inches of paper. It wasn’t metal bars.”¹⁵⁴

On the other hand, when it is clear that the corporation has done something wrong, the PR professionals want the corporation to confess to garner the public’s trust. Although most interviewees recognized that there is the risk that the corporation looks like it is hiding something,¹⁵⁵ many explained that “confessing has lots of other implications, for example, civil, criminal liability.”¹⁵⁶ Additionally, findings from the PR Study indicate that PR executives

¹⁵⁰ GC-F-S-32 at 16.

¹⁵¹ According to a 2002 Hill & Knowlton poll, 81% of the respondents said they would keep an open mind if a corporation provides clear, timely explanations. Loeb, *Public Opinion*, *supra* note 21. (“The unguided imagination of the public may be far more damaging to corporate interests than a clear and timely expression of the truth.”).

¹⁵² LP-NA-L-2 at 14 (“How do you know nobody has done anything wrong?”); McMunigal, *Client Media Campaigns*, *supra* note 13 (explaining that the media infers guilt if not publicly denied). GC-F-L-4 (“All the PR people say it is better to get all the bad news at one time and if you confess, people will trust you.”).

¹⁵³ GC-C-L-17(S-11) at 3.

¹⁵⁴ GC-NA-L-1*NotS&P at 12.

¹⁵⁵ LP-NA-L-2 at 12.

¹⁵⁶ GC-F-L-4 at 11.

prefer settlement to avoid negative publicity¹⁵⁷ whereas lawyers, although not insensitive to the benefits of settlement, believe that a particular course of action should be pursued because it is legally appropriate.¹⁵⁸ Thus, although they work closely, General Counsels and PR executives are often on opposite camps on legal PR matters.

4. Legal drives the PR strategy for Media Sensitive Legal Matters

Although it is a dynamic process and “everybody usually has a voice,”¹⁵⁹ most interviewees claimed that the lawyers drive the PR strategy for potentially high profile legal matters. In fact, 12% of the Survey Respondents reported that the Legal Department directly oversees the PR department.¹⁶⁰ The literature supports this finding that some companies integrate the two departments in this fashion.¹⁶¹ Moreover, even when the general counsel does not directly oversee PR, the general counsel is often in an elevated position relative to the director of PR. For example, 92.3% of survey respondents (general counsels) report to the CEO while only 25.4% of the PR directors report to the CEO.¹⁶² In other words, in 67.8% of respondent companies, the GC reports to the CEO but the PR director does not.¹⁶³

Whether it is a formal reporting relationship or not, the General Counsel Interviewees claim that “the law department ultimately calls the shots.”¹⁶⁴ This is because there is a need for consistent messages and General Counsel Interviewees believe that PR executives do not appreciate the impact the media can have on a company’s ability to successfully manage legal

¹⁵⁷ PRI-I-L-19 at 13. Ironically, the general counsel of this same investment bank said in his interview with me: “I can’t say I spend a lot of time having someone in PR saying you should settle this because it’s pretty obvious.” GC-I-L-6 (S-1) notes on file with author at 3.

¹⁵⁸ PRI-I-L-19 at 5.

¹⁵⁹ LP-NA-L-2 at 14

¹⁶⁰ See Chart in Appendix.

¹⁶¹ Loeb, *Public Opinion*, *supra* note 21 (citing two companies where the PR department reported to legal department).

¹⁶² This is based on 118 respondents. See chart in appendix.

¹⁶³ Only one respondent claimed that the PR director reported to the CEO but the GC did not. See chart in appendix.

¹⁶⁴ GC-F-S-39 (explaining that “[t]his was a problem at first, but now it’s well understood at our company”).

controversies.¹⁶⁵ As one General Counsel explained, “legal usually wins out because if you spin stuff there is always legal risk associated with that.”¹⁶⁶ As another expounded, “None of [the PR executives] really appreciate the legal risks of certain PR courses of action. They can’t. They are just not equipped to evaluate the impact of certain things they would do in the public relations arena on the outcome of the litigation.”¹⁶⁷ For example, “lawyers understand that sometimes the message sent to the prosecutors is more important than trying to convince the public that what is being said about you is not *exactly* correct. In those situations, it is better to let the prosecutor have his day and save the sophisticated technical arguments for the people that need to understand it.”¹⁶⁸ But this is a judgment call only the lawyers can make. “Knowing what should be disclosed is only half the battle. You also need to know what you shouldn’t disclose. If you’re not savvy there you’re in trouble.”¹⁶⁹ PR interviewees admitted as much: “just like [y]ou don’t want to have the general counsel who’s actually never been involved in litigating a case,” you don’t want “a PR guy who’s never handled a major disaster.”¹⁷⁰ Thus, the more important or high-profile the matter, the more lawyers are in the driver seat.¹⁷¹ As one General Counsel Interviewee explained: “This was a problem at first, but now it’s well understood at our company.”¹⁷² In keeping with that, it appears that general counsels ultimately decide when to hire an external PR firm for very important matters.

¹⁶⁵ Cf. GC-P-S-22(Long) at 66 (explaining situation that was so sensitive that the CEO was leading the PR strategy).

¹⁶⁶ GC-F-S-32 at 16; LP-NA-L-2 at 14

¹⁶⁷ GC-C-S-8; GC-P-L-8 (S-27) (“When it comes to legal matters, we’ll drive the final result but certainly want their input and it’s collaborative. Outside of the law, [the pr people] drive.”).

¹⁶⁸ GC-NA-L-1*NotS&P 15-16.

¹⁶⁹ GC-C-S-14.

¹⁷⁰ PRI-I-L-19 at 17. This PR interviewee was formerly a banker and external PR consultant on M&A crises.

¹⁷¹ GC-C-S-31 (describing it as a collaborative relationship but prioritizing); *see also* GC-C-S-10 (explaining that the environment in which they operate is very heavily regulated and questioning “so who’s better able to explain that? People who are in with that and really immersed in it or someone who just happens to write press releases?); GC-NA-L-1*NotS&P at 18 (“If there was an issue that were not so sensitive from the legal perspective, my guess, is maybe we would rely more on what the . . . public relations executives had to say.”).

¹⁷² GC-F-S-39 (notes on file with author). This may suggest that the “healthy” tension the interviewees claimed existed is not well balanced. *See infra* discussion at Part III.D.1.

B. General Counsels and External PR Consultants

Large publicly traded corporations, such as those in my sample, often have internal PR resources to manage run-of-the-mill PR issues internally.¹⁷³ Therefore, most General Counsel Interviewees stated that external PR firms are only hired for very important, high profile matters.¹⁷⁴ Consistent with that, 98% of Survey Respondents claimed they dealt with a high profile legal issue one or more times in the past three years and 53% hired an external PR agency.¹⁷⁵ The percentage was even higher among the interviewees. X% of General Counsel Interviewees had recently worked with an external PR agency on a legal controversy.

Although outside PR firms do the same tasks as internal public relations consultants (draft press releases and positioning statements, act as spokespeople etc.), they are often selected for their special expertise in legal crisis management for high profile legal matters.¹⁷⁶ General Counsel Interviewees do not appear to work as closely with the external PR executives as they do with internal executives. Nevertheless, for the same reasons that they share confidential client legal information with internal PR executives, the interviewees claim they also share with external PR executives.¹⁷⁷ Most, however, reported that they were not as comfortable doing so

¹⁷³ GC-I-L-9 (S-23); GC-C-S-9; GC-C-S-13 (explaining that her company “hasn’t had enough nutsy stuff that requires an outside firm” but that they “do have one on retainer”).

¹⁷⁴ GC-C-L-13 (S-28) at 7; Kellogg, *supra* note 24, at 23; CLO-C-S-20.

¹⁷⁵ Sixty percent of survey respondents said they had to deal with a high profile legal matter many times in the past three years. Twenty-seven percent said a few times. Eleven percent said once or twice. Two percent said never. See chart in appendix. Roschwalb *et al*, *supra* note 2, at xi (noting that since the “mid-1980s, legal teams in high-profile proceedings have been increasingly employing public relations practitioners as part of the effort”); *id.* (“Public relations specialists increasingly are being brought in along with jury analysts and other forensic experts to affect the outcome of a trial. Lawyers engage publicists to handle media relations, jury selection, communication advice, and overall case strategy.”).

¹⁷⁶ CLO-C-S-21 at 23 (explaining it had “experience in those types of crisis communications” and could predict the storyline that would be picked up and how the community would respond). Many PR firms claim to be crisis management firms such as Bork & Associates in Washington, Kekst in New York, Sitrick and Company. LP/PRE-NA-L-3 at 9, 13, 21; GC-NA-L-1*NotS&P at 11. Many crisis management firms are led by ex-lawyers e.g., Jayne Thompson Associates and Rotenberg Associates.

¹⁷⁷ See *supra* Part II.A.2. Gertsberg, *supra* note 13, at 1476 (“There is simply no practical way for meaningful discussions to occur if the lawyer is unable to inform the public relations expert of nonpublic facts, as well as the lawyer’s defense strategies and tactics.”); Hantler *et al*, *supra* note 13 at 23. *But see* Murphy, *supra* note 3, at 587 (claiming that “[a] client need not divulge incriminating information in order to receive effective media advice.”).

given privilege issues.¹⁷⁸ Interestingly, 53.6% of Survey Respondents claimed they were comfortable sharing *all* information with external PR executives.¹⁷⁹

C. General Counsels and Outside Lawyers

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

Very often we will just do it internally. But sometimes in a particularly larger or complex or sensitive matter, . . . we may develop what our strategy is and then run it by our outside lawyers to see whether they have any objection or concerns about it. But more typically we are dealing with these issues internally.¹⁸⁰

In keeping with this sentiment, 43% of the Survey Respondents claimed the outside law firm did not play a substantial role in developing the PR strategy despite having dealt with a high profile legal issue in the past three years. In fact, 42% of the Survey Respondents claimed that the outside lawyer only provided advice and did not collaborate or “work with” the internal lawyers and PR staff on the PR strategy as it related to the legal controversy.¹⁸¹ The interviews with the external lawyers echoed this arrangement.

This appears to be, in part, because the General Counsel Interviewees believe that their corporation’s PR capabilities are as strong if not stronger than that of an outside law firm: “If

¹⁷⁸ Many lawyer interviewees are careful about sharing information that could destroy their case, e.g., opinion on chance of winning; but when it comes to less major confidential information, they will take their chances. *See, e.g.*, Law Firm Partner interviewee, LP-NA-L-27 at 18 (“It’s all a balance of the risks:”); *Id.* at 8

¹⁷⁹ This is high given that the doctrine is very unpredictable. *See Generally* Beardslee, *Third Party Consultants*, *supra* note 28.

¹⁸⁰ GC-C-L-17(S-11) at 8.

¹⁸¹ There is no way to know whether Survey Respondents felt that their outside attorneys did not collaborate in legal PR specifically or in management of legal issues in general. Regardless, such behavior, if accurate, is detrimental to clients and to the reputation of the legal profession. *See* Appendix.

[the law firm] ha[s] a particular capability we may ask them to play a more front and center role but, in general, our own PR capability is as good as any lawyer’s and we tend to prefer to handle things on a centralized basis.”¹⁸² Although legal PR capability is considered “a bonus,”¹⁸³ the interviewees suggested that “[t]here is a bias against going [to an] outside [firm] unless there is a determination that value will be added.”¹⁸⁴ Thus, external lawyers might be consulted “if they have the expertise,” but most General Counsel Interviewees “ha[d]n’t seen that yet.”¹⁸⁵ Instead, many believe “a law firm is really for the aftermath, that is, if [the company] get[s] expropriated, how [will it] get compensated?”¹⁸⁶

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

One of the reasons why we don’t rely on our outside counsel as much is because the outside lawyers tend to be very focused on winning the case in court and they are typically quite good at that, but for a major company that’s subject to a lot of public criticism, winning in court, two or three years down the road isn’t the most important thing, it’s a necessary thing, but it’s also a very important thing to be able to deal with the media and reputation issue.¹⁸⁷

Law firms, the interviewees explained, are “are about on-offs” and “next cases,” “not long term reputation” of the client.¹⁸⁸ Further, they are worried about their *own* reputations, and, therefore, might not provide objective legal PR advice.¹⁸⁹ Indeed, one General Counsel Interviewee

¹⁸² CLO-C-S-20.

¹⁸³ GC-F-S-32 at 16 (“Depending on what the issue is and who the counsel is sometimes we rely on [outside counsel] - some are very savvy on PR issues and can help review your Qs and As. But outside counsel having this expertise is very secondary – it’s always a bonus when you have an outside counsel who is PR savvy but I would not select solely on this criterion.”).

¹⁸⁴ GC-C-L-13 (S-28).

¹⁸⁵ GC-I-L-9 (S-23) (explaining that outside lawyer expertise in this area would be especially viable for less sophisticated clients).

¹⁸⁶ GC-P-S-22(Long) at 65.

¹⁸⁷ GC-C-L-17 (S-11) at 9.

¹⁸⁸ GC-I-L-9 (S-23); PRI-I-L-19 at 14-15 (explaining that outside lawyers “are not particularly concerned with external perception.”).

¹⁸⁹ GC-I-L-7(S-5) (“When talking about the media, you don’t want someone that is worried about their own [or their law firm’s] reputation.”).

mentioned that he had to remind a litigator, who liked to promote himself, that he represented the company and not himself.¹⁹⁰ These complaints are substantiated in the literature.¹⁹¹

This is not to say that General Counsels Interviewees do not include their law firm partners in discussions related to managing legal PR. When it comes to high stakes, high profile legal controversies, many believe that “two heads are better than one.”¹⁹² According to General Counsel Interviewees, senior managers “get real team oriented real fast” when faced with a major legal controversy. The outside lawyers are definitely part of the team and participate in some meetings with the external and internal PR executives.¹⁹³ Outside attorneys are used as a vetting source for accuracy of press releases, SEC disclosures, response statements, and the like and to ensure all parties are on the same page.¹⁹⁴ Further, many of the General Counsel Interviewees rely on their outside law firm to provide a recommendation for an outside PR firm when needed.¹⁹⁵ “What better place to look for a [recommendation for a] crisis type of a media firm than a law firm that does a lot of big, big deals that are sometimes controversial, sometimes

¹⁹⁰ GC-C-L-13(S-28) at 6 (providing outside lawyers with strict instructions not to speak to the media unless specifically given approval by the corporation). *See also* McMunigal, *Client Media Campaigns*, *supra* note 13 (explaining that outside lawyers have economic motivations for desiring publicity) (on file with author).

¹⁹¹ *See, e.g.*, Cole and Zacharias, *supra* note 1, at 1660 (“Self-promotion, though common, is a problematic justification for speaking to the press . . . raising a potential conflict between lawyer’s and client’s interests . . . the lawyer will wish to show that the case is difficult and that only the lawyer could win while the client will wish to show that the client is obviously right. Moreover, the client’s best interest may lie in minimizing publicity; to the lawyer, all publicity is beneficial.”). *See also*, Joy and McMunigal, *The Role of Lawyers*, *supra* note 13, at 49 (“The defense lawyer is likely to place a very high value on minimizing risk of conviction and a relatively low value on a client’s future business interests. This is so in part because the lawyers’ professional training and competitive instincts lead the lawyer to focus almost exclusively on winning the case, and in part because the outcome of the case influences the lawyer’s reputation and future business interests.”); Semel and Sevilla, *supra* note 8, at 14. *See also* Cole and Zacharias, *supra* note 1, at 1660 (“Lawyers have economic incentives to make themselves appear important and to publicize their potential usefulness to others.”); Brown, *May it Please the Camera*, *supra* note 12, at 124 (explaining that lawyers “exploit media exposure for strategic as well as personal gain.”).

¹⁹² GC-NA-L-1*NotS&P at 18

¹⁹³ GC-C-L-17 (S-11); GC-C-S-10; GC-C-L-13 (S-28); GC-C-S-24.

¹⁹⁴ GC-P-S-30 (“It’s very important to have your PR strategy in line with your litigation strategy. Otherwise it can be disaster.”).

¹⁹⁵ *See, e.g.*, GC-I-L-5(S-2). In an effort garner attorney-client privilege protection, outside law firms often formally hire the PR firm once the selection decision has been made.

cutting edge . . . they understand exactly the type of issues that we would be confronted with.”¹⁹⁶

The outside law firm is also sometimes used as a messenger between the corporation and the prosecutors or regulators.¹⁹⁷ The law firm lawyers, as opposed to the corporation’s lawyers, can ask the U.S. Attorney for his or her opinion on potential media statements a corporation might make on a sensitive subject.¹⁹⁸

III. IMPLICATIONS AND ANALYSIS

A. The Court of Public Opinion: An Integral Component to the Adversary System and Extra-Legal Decision-Maker

Based on my analysis in Part I and preliminary findings from the PR Study, I contend that the court of public opinion is at once both an integral component of our adversary system and an extra-legal decision-making venue. It affects both the process and outcome of legal controversies.¹⁹⁹ Like other pretrial procedures in litigation (e.g., discovery), it is one stage in the process of resolving legal controversies that must be negotiated. It affects what charges are brought, what causes of action are ultimately pursued and settlement negotiations. For example, inflammatory or misleading commentary may force a party to settle rather than litigate a matter because of the potential impact on future jurors or judges and the immediate impact on business prospects. However, the court of public opinion is often more than just one step in the procedural process. At times, the court of opinion supplants a court of law especially in the corporate context.²⁰⁰ Like a court of law, it renders binding judgments that directly affect the

¹⁹⁶ CLO-C-S-21 at 23. Interestingly, although the general counsel interviewees appeared to believe that outside law firms are exposed to high profile issues with other clients and take their advice on which external PR consultant to hire, they still do not collaborate with them in large part on the PR strategy.

¹⁹⁷ See, e.g., GC-F-S-39 (“We have in house PR people, and we use outside PR people, and often use one of our outside counsels as our main spokesperson (but that’s their only role in PR.”).

¹⁹⁸ GC-NA-L-1*NotS&P at 13-14. As mentioned, in some instances, a corporation must be careful about what message it sends to the prosecutors – sometimes this is even more important than trying to convince the public that what is being said about it is not accurate. *Id.*

¹⁹⁹ See *supra* Part I.A.

²⁰⁰ Cf. Dale, *supra* note 87 at 634 (using historical examples to show that the court of public opinion “acts in place of” or “as a complement or supplement to the formal law”).

parties’ interests in a legal matter. It influences the perceptions of judges, juries, consumers, regulators, and stockholders. Thus, although it does not render “legal” judgments, the judgment rendered by the court of public opinion can be just as important and have the effect *defacto*.²⁰¹ Further, the court of public opinion is relied upon to enforce the law and mete out punishment. Tamar Frankl suggests that this ability to “take over the punishment and enforcement” from the courts actually reduces the pressure to find legal solutions and seek legal decisions.²⁰² Thus, the court of public opinion not only influences the fair administration of justice by a court of law, it is arguably an extra-legal decision-making system that itself administers a version of justice.²⁰³

B. The Role of the Corporate Attorney is at Odds with the Conventional View

Corporate attorneys are assisting their clients in managing legal controversies in the court of public opinion behind the scenes.²⁰⁴ They are collaborating with internal and external PR executives to help clients react to and proactively engage PR around legal issues so that the media spin positively affects the corporations’ image and resolution of the legal controversy.

What is most surprising about this picture is how deeply involved corporate counsel are in managing legal PR. The conventional picture of the lawyers’ role is much narrower than that depicted by the interviewees. The conventional view is as follows: A discrete, high-profile legal issue confronts the corporation. The lawyers meet with the internal PR executives to explain the company’s legal position – often after the press has called the PR executive to inquire about the

²⁰¹ Brown, *May it Please the Camera*, *supra* note 12, at 85 (“The public’s perception of a given case may be as important, if not more important, than legal vindication before an actual judge or jury.”).

²⁰² Frankel, *supra* note 25, at 367; *Id.* at 380 (“The Courts of Law and the Courts of Public Opinion may complement each other to produce greater, more flexible, and more effective ways to ensure the accountability of those who control very large and powerful public corporations.”).

²⁰³ Frankel, *supra* note 25, at 367 (intimating as much by asking whether it is a “flawed decision-maker”); Dale, *supra* note 87 at 647 (arguing that historically “informal courts of public opinion existed as a site of extralegal justice in antebellum South Carolina”).

²⁰⁴ As pointed out in Part I.A, there are risks associated with attorneys’ lack of involvement in legal PR for their clients. *Cf.* Brown, *May it Please the Camera*, *supra* note 12, at 138 (explaining that extrajudicial commentary is at times necessary and appropriate).

issue. They share just enough information to ensure the PR executives can write a press release but they do not share information regarding legal strategies or chances of success. (And they certainly do not ask the PR executives for advice on how various legal options might be spun and the affect the messages might have on regulators, consumers, and stockholders before determining their legal strategy). The PR executives then (sometimes with the help of external PR experts that *they* hire) determine the spin and make statements to the public directly or issue press releases. The lawyers concentrate on dealing with potential legal proceedings and generally abstain from commenting in the press. Once the crisis is resolved, the PR experts issue press releases to enhance the corporation's image. In sum, the conventional picture is of separate legal and public relations functions that work together only when crises arise that have a legal dimension, of lawyers focusing on the technical legal work and reporting limited information back to the PR people, and of the PR people deciding how best to spin the facts and manage the publicity. Any more expansive involvement of lawyers in the process is discouraged by ethics rules that limit lawyer's extrajudicial statements, and by a general attitude that it is unseemly for lawyers to try to influence public opinion in order to enhance the company's legal position.²⁰⁵ Any more collaboration between lawyers and PR executives is discouraged by the existence of unclear attorney-client privilege rules and the traditional view that law is a separate discipline from public relations.

The portrait painted by the PR study, however, is at odds with this depiction. Given the 24/7 news cycle of the modern era, the corporation constantly is engaged in activity that could have legal implications, and thus is engaged in a continuous proactive process of trying to affect public opinion long before any legal problems or proceedings are on the horizon. Therefore, lawyers interact regularly with PR people on an ongoing basis in order to enhance the company's

²⁰⁵ See *supra* note 3; see also Beardslee, *Advocacy Part II*, *supra* note 14 at X.

reputation, not simply when a high-profile legal issue erupts.²⁰⁶ The interaction is iterative, not simply one in which lawyers provide information to the PR people who then use their expertise to spin it. The lawyers help craft the spin. The interaction is open and collaborative. The lawyers openly share thoughts about potential legal strategies with internal and external PR executives and account for PR concerns when selecting legal strategies.²⁰⁷

Ironically, lawyers are often criticized for their inability to market themselves or their law firms. However, these findings suggest that in order to be effective, lawyers must be effective marketers – at least when it comes to marketing their clients’ legal controversies. Marketers utilize an understanding of human behavior (decision making and motivations) to predict future behavior and influence purchasing attitudes and decisions. They develop communication in many forms (including advertisements, press releases, and websites) to convince the target audience to believe something about its product so that the target will purchase it. Similarly, when managing legal PR for corporate clients, lawyers utilize an understanding of human decision making behavior and motivations to predict how the target audience (a judge or jury, another party, a regulator, and the public) will react to certain statements. They develop communications for public dissemination to convince the target audience to believe something

²⁰⁶ They try to get ahead of the news cycle. However, as discussed *supra*, sometimes the press picks something up before lawyers can do so. Sometimes, it is hard to predict what will become high-profile, but the attorneys in the sample seem to be prepared that any thing could. *See supra* Part II.A.1. That said, the role they play and the level of interaction differs depending on the immediacy and the stakes. *See supra* note 124 and accompanying text.

²⁰⁷ As Rob Rosen points out, corporations are now often run by teams and “legal work requires obtaining input from the whole teams.” Rosen, *We’re All Consultants*, *supra* note 28 at 654. Just as “[i]t is better for the project team to work with the lawyer to draft the proposed [legal] document, rather than for the lawyer to draft the agreement and then seek input from the project team,” it is better for the project team to work together to draft the PR documents. *Id.* Even when the lawyers are drafting legal documents that may not appear to be high profile, they draft them with internal public relations executives in mind. *Id.* (“[T]he outputs of the process may have external audiences, but, from the company’s perspective, they also have important internal audiences, especially the implementation, human resources, liaison, and public relations sub-teams of the project team.”).

about the client so that consumers continue to purchase the product and so that it prevails in the legal controversy.²⁰⁸

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

C. Corporate Attorneys Should Proactively Manage Legal PR for Corporate Clients

Some scholars may question whether corporate attorneys should manage legal PR for corporate clients and advocate in the court of public opinion.²⁰⁹ I, however, contend that “legal spin control” should be managed by lawyers.²¹⁰ Findings from the PR Study confirm what the

²⁰⁸ Although this may seem unconventional, the reality is that lawyers practice marketing all the time. When lawyers write briefs, file cases, conduct oral arguments and negotiate, they are doing what marketers do but for a different audience.

²⁰⁹ See *supra* notes 1-3.

²¹⁰ The contention that lawyers should oversee legal PR may not be novel for attorneys that represent individual criminal defendants or even high-profile corporate litigators. See, e.g., Cole and Zacharias, *supra* note 5 (describing the media tactics of both prosecution and defense attorneys in OJ Simpson trial); see also *supra* notes 8-13. However, I contend that *corporate* attorneys should proactively manage legal PR for all legal issues (not just those in litigation). Only a few other scholars have made similar contentions. See, e.g., Moses, *supra* note 9, at 1848 (concluding that attorneys should advocate in the court of public opinion but “as the aims of such advocacy become removed from a legal goal, the attorney’s responsibility should diminish”); Sudbury, *supra* note 13, at 111 (explaining in environmental investigation “[c]ounsel’s participation in [the media circus] can and should be one of the most critical services provided to the client”); Dore and Ramsy, *supra* note 3, at 55 (arguing that lawyers involved in products liability and toxic torts cannot just be “adept litigators” but should “take the lead in ensuring that the nature, timing, scope and content of public disclosures assists or at a minimum do not detract from the litigation effort”). Roschwalb *et al*, *supra* note 2, at xvii (addressing both lawyers representing individual and corporate clients and explaining that “the news media must become part of an attorney’s responsibilities, both on behalf of the client and the law firm.”); *id.* (“It is increasingly part of the practice of law to understand how the media work and how to communicate to the public through media’s channels.”). Some judges have shown their support for this role by awarding attorneys’ fees for PR work related to the case in support of the client. See, e.g., *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1545 (9th Cir. 1992) (“Where the giving of press

Supreme Court stated in *Gentile*: “An attorney’s duties do not begin inside the courtroom door.”²¹¹ Instead, they often begin in the court of public opinion. I contend that managing legal PR in a holistic, interactive manner is an essential component of competent corporate legal services.²¹² Preliminary results from the PR study indicate that many general counsels are already managing legal PR for corporate clients this manner. However, outside corporate attorneys should be doing it too – and more avidly than the preliminary results from the PR Study indicate they are now.²¹³

To be clear, I am not arguing that lawyers should act as spokespeople. Although some lawyers may be adept in this role, this is not true of all.²¹⁴ Moreover, there are risks associated with lawyers acting as spokespeople.²¹⁵ First, their statements may be given either too much weight or too little.²¹⁶ Second, as indicated by the findings from the PR study, this role can augment conflict of interests that can jeopardize the lawyer’s effectiveness and loyalty to the

conferences and performance of other lobbying and public relations work is directly and intimately related to the successful representation of a client, private attorneys do such work and bill their clients. Prevailing civil rights plaintiffs may do the same.”). *See supra* note 17. In Part II of this project, however, I argue for additional constraints on the way that attorneys manage legal PR for corporate clients

²¹¹ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991).

²¹² There are other examples of the expansion of services offered by today’s lawyers. *Sisk et al, supra* note X, at 8. (providing examples from “four fields of practice—family law, corporate law, environmental law, and elder law—to illustrate the general and wide-reaching evolution of professional services provided by lawyers today”).

²¹³ I am not advocating that outside law firms offer PR services as an ancillary business. First, most of the General Counsel Interviewees emphatically stated that they would not be interested in such services. *See, e.g., GC-I-L-5 (S-2)* at 35 (“If a law firm has PR capability internally it would be a black mark like the law firm is trying to make double profits off of me ‘You must not think your legal services are all that great, so you need to make money someplace else”). Second, I do not think this service should be considered “ancillary” or separate from the regular services attorneys provide to clients. Although more research would need to be done to determine if general counsels would accept more help from outside attorneys in this area, the PR Study suggests that outside attorneys are currently missing a business opportunity. *See, e.g., GC-C-L-13(S-28)* (“If I were a law firm, one of the ways I would market my background is among other things, I’d be good at helping you navigate the PR side, the interface of PR and legal b/c you can’t just leave it up to the PR people.”).

²¹⁴ *Frohlichstein, supra* note 88, at 21.

²¹⁵ *Semel and Sevilla, supra* note 8, at 10 (explaining that a “trial attorney as commentator on his or her own case” can be “embarrassing to the attorney, harmful to the client, and damaging to the legal profession” because lawyers “Lose sight of their core responsibilities” to their client); *But see Watson, supra* note 2, at 80 (suggesting that its better for the attorney, as opposed to the PR person, to be the spokesperson “because spin control may be counterproductive when it s recognized as such”). There are other risks involved as well e.g., the lawyer who speaks publicly outside of the judicial context, such as in the media, can be sued for defamation.

²¹⁶ *Id.* (reporting findings from National Law Journal study that more than 30% of Respondents believed lawyers were dishonest).

client.²¹⁷ Instead of focusing on the best interests of the corporate client when advocating in the court of public opinion, the lawyer may be concerned with his or her own reputation or (if the lawyer is external) the law firm’s reputation.²¹⁸ This tendency is likely only enhanced when the lawyer is acting as a spokesperson. Third, as will be discussed in the second installment, lawyers are under great pressure to manipulate information about legal controversies in a way that misleads – to put the right face on a corporate legal controversy in the press. This is unethical whether done as the spokesperson or behind the scenes. However, when the lawyer speaks directly to the public and misleads them, it not only undermines the lawyers’ credibility²¹⁹ but also the reputation of the legal profession. In sum, legal PR services should be something corporate attorneys provide to corporate clients.²²⁰

Some may purport that this contention turns lawyers into business advisors. However, according to Model Rule 2.1, attorneys “may” consider PR ramifications in rendering advice to corporate clients.²²¹ Indeed, it is not clear that a lawyer’s job was ever supposed to be limited to

²¹⁷ Cf. Peter Margulies, *supra* note 25, at 51 (explaining that conflicts of interests exist in crossover forums such as the media and can impede the effectiveness of cross over advocacy); MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(2) (2002) (defining conflicts of interest “materially limit[ing]” the lawyer’s ability to represent a client).

²¹⁸ See *supra* section II.C. See also Maute, *supra* note 3, at 1758 (explaining that “[l]awyers’ self-interest in garnering favorable publicity for themselves may color their judgment as to whether comments serve the clients’ interests more than their own” and arguing that “[a] personal default rule of remaining silent should trigger a degree of conscious self-reflection before the lawyer begins to speak.”).

²¹⁹ Peter Margulies, *supra* note 25, at 11 (“Crossover advocacy that uncritically pitches stories of innocence or detainee abuse can undermine the credibility of the advocate.”).

²²⁰ That being said, these services need not necessarily be considered *legal* as opposed to *business* services. If they are, it will make determining when the attorney-client privilege and work product doctrine apply much simpler. Dore and Ramsy, *supra* note 3, at 55 (“If courts ultimately view PR concerns as a legitimate and essential aspect of the provision of legal services, communications by and with pr professionals will be afforded a/c privilege and work product protections.”). If they are not, it merely means that attorneys have to be careful when sharing confidential information with PR consultants. For further discussion, see Beardslee, *Third Party Consultants*, *supra* note 28.

²²¹ MODEL RULES OF PROF’L CONDUCT R. 2.1 (2002) (“[A] lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client’s situation.” Further, the decision to engage in a media campaign around a legal issue is likely, under Rule 1.2, a tactical one and thus one for which the lawyer should assume responsibility or, at least, jointly undertake with clients. MODEL RULES OF PROF’L CONDUCT 1.2 cmts. 1 and 2 (2002). Joy and McMunigal, *The Role of Lawyers*, *supra* note 13 (arguing that even if it is the client’s decision, most clients will likely defer the decision to the lawyer); McMunigal, *Client Media Campaigns*, *supra* note 13, at 16 (“A media campaign is certainly a means that may advance the objectives of limiting damage to the client’s representation, shielding the defendant from criminal punishment, or

legal theory and legal consequences alone. As courts have recognized, since 1950, unmixed opinions of law are hard to come by;²²² legal advice includes “in addition to legal points some economic or policy or public relations aspect.”²²³ As one interviewee explained, “It’s good public policy to enable a company . . . to get the best advice that lawyers and our legal team can give to a client.”²²⁴ Further, if lawyers do not fill this void, non-practicing lawyers might.²²⁵ This would be detrimental: clients’ needs can best be served by someone who understands *both* the legal and business aspects.²²⁶ As will be developed further in the second installment of this project, corporate attorneys are uniquely positioned to help corporations balance their immediate business and image concerns against future legal and long-term reputational and public interests.²²⁷ They understand the interrelation between law, their client’s business, and the immediate legal controversy better than any lay person. Further, attorneys of today understand the risks involved in legal PR spin. Moreover, with their involvement, information can be crafted for the press in a way that benefits clients and the public: attorneys can help ensure the

minimizing the punishment imposed on the defendant.”); Semel and Sevilla, *supra* note 8, at 14 (1997) (explaining that a media campaign is a tactical choice and that there is a “potential conflict of interest when defense counsel pursues a strategy of trial by jury while the client favors a trial by press”).

²²² U.S. v. United Shoe Machinery Corporation, 89 F. Supp. 357, 359 (D.C. Mass 1950).

²²³ United Shoe, 89 F. Supp. at 359.

²²⁴ LP-NA-L-2 at 15-16.

²²⁵ Tanina Rostain, *The Emergence of ‘Law Consultants,’* 75 FORDHAM L. REV. 1399.

²²⁶ A recent survey of 149 senior corporate executives of corporations that employ 100 or more people found that corporations want lawyers to play non-legal roles and incorporate non-legal concerns into advice. Am. Corp. Counsel Ass’n In-House Counsel for the 21st Century (2001), <http://www.acc.com/Surveys/CEO/>; Ben W. Heineman, Jr., *Imagination at Work*, 4/2006 Am. Law. 73 (Vol. 28 #4) “[I]nside lawyers should strive to be full members of the business team. Yes, the lawyers must, first and foremost, bring their legal skills, experience, and analysis to business problems. But they also have (or should have) the intelligence and breadth to learn and understand the products, technology, competition, and, most importantly, the public dimensions of the markets in which the business operates.”). As will be discussed *infra*, this would also be detrimental because non-lawyers do not generally play a gatekeeping role.

²²⁷ Cf. Sisk et al, *supra* note 251 at 46 (“Lawyers are uniquely well-positioned to play an integral role in cultivating an ethically-sensitive organizational culture.”). As will be explored more in Part II of this project, there is some debate about whether internal or external lawyers are better situated to play a gate-keeping role. See generally, Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEORGETOWN J. L. ETHICS 411, 429 (2007); Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 435 (1985).

messages to the public are accurate, understandable, and informative.²²⁸ More than that, by explaining the effect that adverse publicity might have on the corporation, lawyers may be able to convince senior management not to take a legally risky (but technically legal) action.²²⁹ Thus, the lawyers' increased role in managing legal PR and increased concern with reputation serves to incorporate social norms beyond law into the company's deliberations. In this sense, concern for reputation serves an informal regulatory function.

I am not necessarily claiming that corporate lawyers should have an unstated obligation to conduct legal PR for their clients in all circumstances.²³⁰ However, at times, a lawyer may not be able to provide competent legal advice without taking into account the media ramifications. Corporate clients have complex goals with multiple stakeholders. The business goals are not

²²⁸ In the second installment, I argue that attorneys should abstain from manipulating the truth and attempt to convince corporate clients to behave socially responsibly in their public messages.

²²⁹ See *supra* note 135 and accompanying text. Some scholars believe that corporate attorneys can and do play this role. See, e.g., Peter J. Gardner, *A Role for the Business Attorney in the 21st century: Adding Value to the Client's Enterprise in the Knowledge Economy*, 7 MARQ INTELL. PROP. L. REV. 17, 37 (explaining that business "lawyers are called upon actively to encourage and promote measures designed to protect corporate interests" and that they often have to counsel clients about non-legal concerns even if the client's intended actions are within the bounds of the law); However, others have suggested that outside corporate attorneys do not often play this role and do not even "aspir[e] to serve as molders of corporate and public policy." See, e.g., Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 435 (1985); *id.* at 423-434 (arguing that the law firm "lawyer-as-influential-and-independent-counselor role is likely to be extraordinary rather than ordinary"). See *infra* 237.

²³⁰ To date, no court, statute, or rule of professional responsibility has affirmatively established such an obligation. Watson, *supra* note 6, at 99. However, some lawyers and clients might feel that they have such an obligation. *Id.* at 78; Moses, *supra* note 9 at 1831 ("[A] growing number of lawyers and clients believe a public relations strategy can get results in certain kinds of cases. If so, the lawyers reason, they have a duty to pursue such a strategy on behalf of their clients."). Moreover, some scholars have suggested that there might be a "theoretical legal basis" for a malpractice or negligence claim against lawyers who do not conduct legal PR on behalf of their clients. *Id.* (finding "a basis in contract and malpractice law for requiring [criminal] attorneys to tend to their client's interest in the court of public opinion as zealously as they do in courts of law."); see also Joseph W. Martini and Charles F. Willson, *Defending Your Client in the Court of Public Opinion*, 28-APR CHAMPION 20 (2004) ("[I]n [high-profile criminal or civil] cases, it may now be that a lawyer's obligation is not only to pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, but in the first instance, also to attempt to demonstrate in the court of public opinion that the client does not deserve to be tried) (internal quotations omitted).. If the customary standard of care is to handle legal PR for clients under the circumstances, then there could also be an implied contract for services. *Id.* at 99-101. Although proving that handling legal PR is customary and expected is outside the scope of this article, my research along with the literature suggests that it may be for some corporate attorneys. Watson, *supra* note 2, at 99 (suggesting that "[i]n communities that are large metropolises, such as Los Angeles, New York, Chicago or Boston, a credible argument could be made that it is customary for attorneys handling high-profile cases to make media appeals.").

detachable from the legal goals and a lawyer who advises on only the legal ramifications is not fulfilling the client’s needs or his/her obligation to serve the client.²³¹ The comments to Model Rule 2.1 explain that “purely technical legal advice” may be “inadequate” because “advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people are predominant.”²³² Consistent with that, the PR Study suggests that general counsels representing large, consumer-oriented, publicly traded corporations must understand and consider PR concerns to provide valuable advice. This is also true of outside lawyers.²³³ The portrait painted by the PR Study depicts outside lawyers’ involvement in legal PR consistent with the conventional view.²³⁴ It suggests that outside lawyers sometimes fail to provide valuable advice to corporate clients because they do not

²³¹ Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 501 (1989) (“It may be that a lawyer can claim to be ‘just a law lawyer.’ But the Inside Counsel Movement suggests that such a lawyer does not satisfy corporate demands for legal service.”); Mary C. Daly, *What the MDP debate Can Teach Us About Law Practice in the New Millennium and the Need for Curricular Reform*, 50 J. Legal. Educ. 521, 525 (2000) (“[L]egal advice is rarely just that. The complexity of modern society increasingly creates a superabundance of problems in which it is virtually impossible to separate the legal component from components more traditionally associated with other disciplines, such as accounting, financial planning, psychology, and social work.”); See generally Beardslee, *Third Party Consultants*, *supra* note 28. General Counsel Interviewee, GC-F-L-4 at 23 (“[I]n the world there is now a convergence of discipline, not just legal and public affairs. People who are actually able to manage complicated situations have to be able to look at it from multiple perspectives. There are no more pure finance questions. There are no more pure marketing questions. There are no more pure policy questions or legal questions or HR questions. They are all multidisciplinary.”); Gardner, *supra* note 229 at 42 (“An attorney who is a valuable sounding board, a repository of experience, a legal analyst, a business strategist, and talented in creative problem solving is especially valuable”).

²³² MODEL RULES OF PROF’L CONDUCT 2.1 cmt. 2 (2002). Some scholars argue that Model Rule 2.1 obligates attorneys to advise clients on non-legal, related issues especially moral considerations. See, e.g., Larry O. Natt Gantt, II, *More than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEO. J. LEGAL ETHICS 365, 366-368; GEOFFREY C. HAZARD JR. & WILLIAM HODES, *THE LAW OF LAWYERING, A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 397 § 23.3, at 23-4.1 (Aspen 3d ed. 2004-2 Supp.) (1985) (“The Comment to Rule 2.1 points out that in some cases the right to give more extensive advice can turn into a duty to do so”). *Id.* (“Purely technical legal advice can sometimes be inadequate, for many legal problems arise in contexts that are so charged with nonlegal considerations that no ‘pure’ legal choice exists.”) For a more detailed discussion see Beardslee, *Third Party Consultants*, *supra* note 28, at Part I.

²³³ Gardner, *supra* note 229 at 42 (“In a world in which business crises played out in public are becoming more frequent, an attorney will increasingly be called on to assist business clients as preoccupied with press coverage as with eventual legal action.”).

²³⁴ See Kagan and Rosen, *supra* note X, at 412 (depicting one popular image of large firm lawyers as “primarily client-directed technicians who merely implement the plans, agreements, and defenses conceived by corporate officers and directors” and hypothesizing why law firm lawyers do not more often play the influential and independent counselor role”).

account for the PR ramifications or the clients’ diffuse goals²³⁵ and instead pursue the legally infused goals that support their own interests.²³⁶ It is important for these lawyers to adapt to the changing needs of corporate clients.²³⁷

Corporate lawyers are not expected to provide legal PR advice alone. The ABA and the Supreme Court have both repeatedly stated that in today’s modern, complex, regulated marketplace, providing adequate legal representation is not a solitary task. For this very reason, the work product doctrine was created²³⁸ and communications between attorneys and third party consultants are sometimes protected by the attorney-client privilege.²³⁹ Thus, attorneys should consult with internal and external PR specialists when deciding which legal strategies to pursue.

The legal profession is, as Professor Lawrence Friedman describes, a “nimble” one.²⁴⁰ Lawyers have risen to the changing marketplace and redefined what services lawyers provide

²³⁵ Rosen, *Inside Counsel Movement*, *supra* note 231, at 506 (“Inside counsel have become purchasing agents because elite law practitioners do not adequately and efficiently determine the client's objectives.”).

²³⁶ Another reason why outside counsel may not vie for more control over legal PR could be that they “fear . . . biting the hand that feeds them” or believe that their ethical duty is “to provide the service the client requests.” *Id.* at 485-86. Or inhouse attorneys may not be clearly communicating the client’s needs and objectives. *Id.* at 515-516 (explaining the role in-house lawyers play in translating, defining, and determining legal needs and objectives).

²³⁷ See Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 281 (2000). (“The needs of clients are increasingly difficult to pigeonhole as ‘legal,’ ‘accounting,’ ‘financial planning,’ ‘environmental planning,’ etc. And the boundaries between law and other disciplines are blurring.”). Admittedly, some scholars argue that clients do not want or need such service from lawyers, especially outside lawyers and that outside lawyers servicing large corporation are not in a position to play and seek to avoid playing an “independent and influential counselor role” See, e.g., Kagan and Rosen, *supra* note X, at 422-430). However, even these scholars do not contend that the status quo is “socially desirable or inevitable.” *Id.* at 440; see also Daly, *the MDP Debate*, *supra* note X, at 538 (admitting that the “profound changes in the marketplace for legal services, especially in large law firms, have devalued the traditional rhetoric of the lawyer’s role as ‘a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice’ but explaining that “[n]onetheless, . . . the complete banishment of this rhetoric and supporting ideology from the lawyer-consultant’s identity [is] highly disturbing.”).

²³⁸ *Hickman v. Taylor*, 329 U.S. 495 (1947).

²³⁹ See generally Beardslee, *Third Party Consultants*, *supra* note 28; *United States v. Kovel*, 296 F. 2d 918, 921 (2d Cir. 1961) (privileging communications between lawyer, accountant, and client). This is also why communications that mix business and law that are “made primarily for the purpose of generating legal advice” are protected. *McCaugherty v. Siffermann*, 132 F.R.D. 234, 240 (N.D. Cal. 1990); *U.S. v. United Shoe Machinery Corporation*, 89 F. Supp. 357, 359 (D.C. Mass 1950) (“The privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.”).

²⁴⁰ Lawrence M. Friedman, *A HISTORY OF AMERICAN LAW* (2d ed. 1985), at 391-411, 439-66, 606-54.

many times.²⁴¹ By managing legal PR they are doing just that.²⁴² Thus, it is time to do that which Supreme Court urged in *Gentile*: to “view the lawyer’s role more broadly.”²⁴³

D. Other Possible Implications

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

Second, the findings that suggest that lawyers share confidential information with internal and external consultants have important implications for how the profession thinks about the corporate attorney-client privilege. Critics of extending the corporate attorney-client privilege to communications between clients, attorneys and third party consultants claim that there is no need for the attorney client privilege because lawyers will share information and consult with third party specialists out of necessity. Supporters claim that without the privilege in these circumstances, lawyers will fail to get the necessary input from external consultants and fail to provide competent, holistic legal advice. The PR Study findings suggest that neither camp may be correct. As is further developed in another article, attorney interviewees claim that the complete absence of privilege protection would discourage lawyers from seeking advice from third party consultants but the possibility of coverage may be enough. Because attorneys work in

²⁴¹ Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession, LAWYERS’ IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL SYSTEM 1* (Robert L. Nelson et al. eds., 1992) (“[A] hallmark of American lawyers has been their protean entrepreneurial spirit . . . the zeal with which they have developed new organizational forms for capturing particular segments of the market for legal services.”). Cf. Mary C. Daly, *Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership*, 13 GEO. J. LEGAL ETHICS 217, 282 (2000) (“The naysayers predicted doom when the office lawyer replaced the trial lawyer as the icon of the legal profession, when general counsel assumed positions of power and prestige within corporate organizations and in-house legal departments expanded . . . Each time, the naysayers were proved wrong.”).

²⁴² See *supra* note 220.

²⁴³ *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1043 (1991).

an actuarial universe that predicts risks, a certain level of possibility (that is much lower than certainty) may be sufficient to enable open consultation between attorneys, clients and third party consultants when necessary.²⁴⁴

Third, findings from the PR study suggest that lawyers are crafting communications to non-lawyers' legal consciousness and that this affects the way lay-people experience and define law.²⁴⁵ Thus, there are many other possible implications of these findings that will likely yield more scholarship.

IV. SOME PRELIMINARY RECOMMENDATIONS

The second installment of this project addresses the normative implications associated with the corporate lawyer's enlarged role in the court of public opinion and makes more detailed recommendations on the *ethical* management of legal PR. However, first, there are a few steps corporations and the profession can and should take to promote corporate lawyers' *effective* management of legal PR.

A. *Safeguard a Healthy Tension between Lawyers and PR Executives*

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

²⁴⁴ See Beardslee, *Third Party Consultants*, *supra* note 28, at X.

²⁴⁵ I intend to explore this finding in a future paper. Other scholars have addressed this subject as well. See, e.g., Patricia Ewick and Susan Silbey, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE*, (Chicago, University of Chicago Press, 1988).

However, preliminary findings from the PR study indicate that the lead internal communication specialists are not at the same reporting level as General Counsels and that some internal communication specialists may be perceived as being inferior corporate managers.²⁴⁶ This is further supported by the findings that the in-house lawyer interviewees sometimes view themselves as the final decision-makers with respect not just to the legality of press releases but the legal PR strategy and whether an external PR executive should be hired.²⁴⁷ It is possible, therefore, that the tension that so many General Counsel Interviewees referred to as “healthy” may not actually be that healthy.

Therefore, a corporation might consider revising its organizational structure to foster an equivalent relationship between the General Counsel and the Director of Public Relations and provide the Director of PR a seat at the management table.²⁴⁸ For some companies, this may mean having the Director of PR report to the same person as the General Counsel. For others, it may simply mean restructuring so that the PR department does not report to the legal department. Even the one General Counsel interviewee that oversaw the PR department claimed that it was likely important in most situations to separate the functions. “I think the separation is probably optimal, because I think they both have important voices that ought to be heard because the

²⁴⁶ In addition to the survey data on reporting structure, the interviewees suggested that some internal PR people may be perceived as second-class citizens. GC-F-L-4 at 11-12 (“Sometimes [the PR department is] low down inside the company and that’s a big problem that public affairs professionals fight against because they always say they have “public affairs professionals” that we deserve to see at the table, and a lot of companies don’t agree with that, they don’t provide that kind of access to senior management for public affairs.”). Even one of the PR Interviewees admitted this is true. He explained that “the general staff of people in public relations is pretty low . . . we come across people at agencies and in-house and it is rare indeed that you meet someone you think wow, that stuff was really fantastic.” PRI-I-L-19 at 16.

²⁴⁷ See *supra* Part II.A.4.

²⁴⁸ It goes without saying that it is important that corporations ensure that the internal PR department includes senior executives that have experience dealing with high profile legal controversies.

decision in the end most likely is a business decision that has elements of the public affairs advice and elements in the legal advice.”²⁴⁹

These structural changes will help ensure that there truly does exist a healthy tension between the legal and PR departments – one in which the lawyer’s and the PR executive’s views are heard equally. Further, it will signal the importance of PR to other members of the corporation. It may also help address a PR department’s fear of being outsourced.

B. Raise Awareness of the Corporate Lawyers’ Broadened Role

In the second installment, I recommend revising the Model Rules of Professional Conduct and increased education at the law school level to enhance ethical accountability in the court of public opinion. In this installment, however, my focus is on the expanding and essential role of corporate attorneys in the court of public opinion. Therefore, these recommendations are geared toward raising awareness of the importance of managing legal PR for corporate clients. Although the PR Study indicates that many General Counsels are already well aware of the need to do this, it appears that outside counsel may not be as clued-in. The PR Study indicates that General Counsels of large, public corporations believe that outside counsel do not understand the corporations’ goals or needs and therefore, that they pursue a misinterpretation of clients’ goals i.e., winning in a court of law. But, as discussed, the legal goals are inextricably tied to the corporations’ other goals. Just as a lawyer must understand the client’s tax position to provide advice on what corporate form to assume, lawyers must engage the PR issues to serve clients effectively. The profession needs to embrace this point.²⁵⁰ Raising awareness of it promotes the

²⁴⁹ GC-F-L-4 at at 11. This general counsel felt he was unique because he was a lawyer and had previously acted as a director of PR in a non-legal capacity. Indeed, most of the interviewees felt strongly that the PR department should not report to the legal department

²⁵⁰ To a certain extent, then, I sound like many of the scholars that urge lawyers to get more involved. See *supra* note 95-100. The difference is one of degree. The PR Study shows that both inside and outside corporate attorneys are involved in legal PR. I am urging increased awareness of the new, *enhanced* role that many corporate attorneys can and should play.

desired behavior. Moreover, raising awareness that lawyers can and should proactively manage legal PR for corporate clients helps legitimize this new role.²⁵¹ Therefore, I make two preliminary recommendations.

First, I recommend revising Model Rule 2.1 to include *reputation* as one of the factors lawyers can take into account along with “moral, economic, social and political factors.” According to other scholars, Model Rule 2.1 “active[ly] encourag[es] lawyers to provide more broadly based and richer professional advice.”²⁵² Similarly, I recommend that the comments to Rule 5.7 should specifically name PR services as a potential law-related service.²⁵³ Model Rule 5.7 recognizes the expansion in services offered by today’s lawyers. Just as environmental consulting is highlighted as a “law-related service” so should legal PR.²⁵⁴ These tweaks are baby steps but they communicate that lawyers are obligated to follow the model rules when conducting legal PR for clients. And they close one of the loops between the rules and the reality of corporate practice²⁵⁵ and work to nurture norms.

Second, law schools should educate law students about the needs of corporate clients in today’s 24/7 news marketplace and the importance of managing legal PR for clients and the

²⁵¹ It may also help garner attorney-client privilege protection in the appropriate circumstances. *See generally* Beardslee, *Third Party Consultants*, *supra* note 28. *See also* Gregory Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, Working Paper (on file with author) (2008) 28 (“By focusing upon the ‘law-related’ nature of these additional services and their integration within a law practice, the applicability of professional responsibilities and the appropriate protection of the attorney-client privilege are brought into sharper relief.”).

²⁵² Sisk et al, *supra* note 251 at 45 (citing Hazard & Hodes, *supra* note X, § 23.4, at 23-6).

²⁵³ Comment [9] to Rule 5.7 currently lists “providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.” MODEL RULES OF PROF’L CONDUCT R. 5.7 cmt. 9 (2002). *See generally* Sisk et al, *supra* note 251 (discussing the importance of Model Rule 5.7 and reporting in 2008 that it has been “adopted by most states”); *cf.* Mary C. Daly, *What the MDP Debate Can Teach Us About Law Practice in the New Millennium and the Need for Curricular Reform*, 50 J. Legal Educ. 521, 525 (2000) (reporting in 2000 that only 5 states had adopted it).

²⁵⁴ MODEL RULES R. 5.7 cmt. [9].

²⁵⁵ For further analysis of the deficiencies of the ethics rules that address advocacy in the court of public opinion see Beardslee, *Advocacy Part II*, *supra* note 14 at X.

ethical issues (and risks) around doing so.²⁵⁶ They might also consider teaching some of the necessary skills to adeptly handle legal PR.

CONCLUSION

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

[New Paragraph] The main point of this installment is that managing legal PR for corporate clients is a legitimate and fundamental component of corporate legal services and that corporations and the legal profession should find ways to support the corporate attorneys' broadened role in the court of public opinion. However, as will be addressed in the second installment of this project, with this new role come risks. Because there is currently little oversight over attorneys' management of legal PR behind the scenes, attorneys may succumb to the pressure to aid their clients in legal PR campaigns that mislead the public about the law and facts around legal controversies. Although this first installment raises awareness of the departure

²⁵⁶ Roschwalb *et al*, *supra* note 2, at xvi (arguing that PR specialists and lawyers need to learn to work more collaboratively and that courses in law school can communicate legal restraints and appropriate codes of conduct).

from the conventional view of the lawyers’ role in PR and the importance of managing legal PR for corporate clients, the next installment seeks to define how far corporate attorneys should go in advocating for their corporate clients in the court of public opinion and encourage lawyers to do so in a way that is socially desirable.

V. APPENDIXES

A. *Research Methodology*

My analysis is based on an ongoing study of general counsels, PR executives, and external law firm partners that work with S&P 500 corporations.²⁵⁷ The primary goal of the study was to explore the perspectives of general counsels servicing large, publicly traded corporations regarding the way the court of public opinion affects corporate legal controversies and is handled today.²⁵⁸ I focused on general counsels because they establish the legal strategies and determine whether an internal or external PR agent should be consulted regarding a legal matter.²⁵⁹ I complemented the general counsel interviews with interviews of PR executives and outside lawyers because they also play a role in managing corporate legal PR.

The study consists of: 1) detailed interviews with 39 general counsels of S&P 500 corporations,²⁶⁰ 10 law firm partners of law firms servicing those corporations, and 9 public

²⁵⁷ The first stage of interviews and the survey were conducted as part of a larger research project funded by Harvard Law School’s Center for Lawyer’s and Professional Services, a subsidiary of Harvard’s Program on the Legal Profession. At that time, I was the Associate Research Director of the Center and the lead researcher on the project. The Harvard Law School faculty directors of the project were John Coates, David Wilkins, and Ashish Nanda. Robert L. Nelson, Director of the American Bar Foundation was also a key collaborator.

²⁵⁸ Admittedly, most of my research stems from conversations with the corporate bar and, therefore, is subjective. However, as Professor Lonnie Brown pointed out in the compelled waiver context, whether beliefs are “real or imagined, [those] belief[s] alone could prove to be [] self-fulfilling prophec[ies].” Lonnie T. Brown, *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Paradox*, 34 HOFSTRA L. REV. 897, 946 (2006).

²⁵⁹ This is not to say that there are not exceptions. There are likely times that an outside law firm recommends using external PR consultants. Yet, even in these situations, the general counsels (not the outside lawyers) make the ultimate call. Moreover, as discussed *infra*, my findings suggest that the outside lawyers are less involved with the external PR firm than are the general counsels. Thus, the major and constant constituent is the general counsels.

²⁶⁰ I use the title general counsel to refer to both chief legal officers, general counsels, and deputy generally counsel. Most of the interviewees were the highest ranking legal officer at the company (X#) and reported to the CEO.²⁶⁰ X#, however, were the highest ranking legal officer reporting to the CLO, and X# were deputy GCs of their

relations professionals;²⁶¹ and 2) a survey sent to general counsels of all S&P500 companies²⁶² which elicited a 28% response rate. Altogether, the combined sample includes 125 general counsels,²⁶³ nine external and internal PR executives, and ten law firm partners. Tables one and two depict the characteristics of the respondents and corporations in the sample.

These samples were neither random nor meant to be statistically representative. My target of inference was publicly traded corporations in financial services and manufacturing industries.²⁶⁴ I focused on three sectors: commercial and investment banks, petroleum companies, and pharmaceutical companies. Each has high demand for legal services and received significant media attention around legal issues in the past three years.²⁶⁵ Each sector offers substantively different consumer products and services, and therefore inferences about the court of public opinion may be able to be drawn about industries that share similar features.²⁶⁶ I interviewed General Counsels from 52 percent of the financial services companies,²⁶⁷ 75 percent

companies reporting into the highest ranking legal officer. It was appropriate in these circumstances to talk with these individuals as opposed to the general counsel given that the majority of outside spend was on litigation and these general counsels ran that department.

²⁶¹ Thirty-one of the general counsel interviews were conducted by me (sometimes with a colleague) while eight were conducted by Sean Williams, then Harvard Law School Research Fellow, now Assistant Professor of Law at University of Texas Law School. The interviews with law firm partners and public relations executives were conducted only by me.

²⁶² I tabulated the data with the help of Young-Kyu Kim, a research fellow at Harvard Law School's Program on the Legal Profession.

²⁶³ Although 139 general counsels filled out the survey, fourteen of them were also interviewees. (One other general counsel also participated in the initial interviews but due to time constraints, I did not ask this individual about PR topics and therefore, this interviewee is not counted in the overlaps).

²⁶⁴ My research also might shed light on publicly traded corporations with diverse, large demand for legal services for other industries including insurers and other types of manufacturers – two industries known for their use of mass media to overturn or prevent high jury verdicts. See LoPucki and Weyrauch, *supra* note 71 (propounding a legal theory that explains “how superior lawyers can determine outcomes, why local legal cultures exist, how resources confer advantages, and one of the means by which law evolves”).

²⁶⁵ For example, the banks have dealt with the sub-prime mortgage scandal. Pharmaceutical companies, like Merck, have dealt with drug recall (e.g., Vioxx) and negative publicity around genetic pharmaceuticals. The petroleum companies have had to deal with publicity around expropriation and the escalating cost of gas.

²⁶⁶ To round out my sample, in the future, I would also like to talk with general counsels of retail manufacturing corporations and/or consumer goods.

²⁶⁷ I interviewed general counsels from 100% of the investment banks and 40.5% of the commercial banks in the 2006 S&P 500.

of the petroleum companies, and 41 percent of the pharmaceutical companies in the S&P 500.²⁶⁸

A randomization analyses of the non-Respondents to the interviews and the survey was conducted. It showed that active participant corporations had larger legal departments than non-Respondents. Thus, the hypothesis that active participants have more revenue and more operating expenses than non-active participants cannot be rejected.²⁶⁹

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

Admittedly, there is likely some sample bias. One could argue that all of my interviewees have an invested interest in painting a sunny-side up picture – especially with respect to the corporate attorney-client privilege.²⁷⁰ Indeed, this may be why I did not uncover any examples of lawyer misconduct in the court of public opinion – when there have been many examples recently.²⁷¹

²⁶⁸ See chart in Appendix B .

²⁶⁹ See Appendix, Table X, at X.

²⁷⁰ One colleague accused me of drinking the corporate cool-aid. To his credit, I agree that similar research could/should be done with attorneys of individual clients. Moreover, it would likely also be informative to talk to other decision makers (e.g., corporate executives within the same firms) whose views might counteract the likely bias of the corporate lawyer’s perspective.

²⁷¹ Beardslee, *Advocacy Part II*, *supra* note 14 at X.

1. Qualitative Interviews

I conducted the interviews in two stages. Stage one consisted of short interviews at the end of longer interviews on a separate topic.²⁷² To elicit participation, my colleagues and I contacted all the General Counsels in these sectors by phone and/or by email on average three to four times. We explained that the topic for the interview was the way in which they purchase, assess, and monitor legal services and that they and their companies would remain anonymous.²⁷³ We did not forewarn any of the General Counsels that we would also ask questions about the intersection of public relations and legal controversies. However, we asked permission to proceed with questions on this topic during the interview.

a) Interview Methodology

From July 2006 to November 2007, we conducted thirty-eight interviews with General Counsels²⁷⁴ of S&P 500 companies across the three selected sectors.²⁷⁵ Fifteen of the interviews were conducted in person and the remaining by phone. No one participated in the interviews other than the respondents²⁷⁶ and one or two interviewers.²⁷⁷ The interviews averaged approximately ninety(check) minutes in length, but the time spent on the topic of PR averaged

²⁷² The purpose of Harvard Law School's larger research project was to gain a better understanding of how general counsels within this target purchase, monitor, and assess legal services.

²⁷³ In these initial communications, we explained: 1) we are academics involved with Harvard Law School's Center on Lawyers and the Professional Services Industry; 2) the primary objective of the center is to conduct empirical research on questions facing the legal industry and to foster closer ties between academics and professionals in the field; 3) we are conducting interviews with General Counsels from a select list of firms in the industry on considerations that go into, and best practices related to, the purchase of legal services; 4) we have conducted a certain number of interviews to date; and, 5) the interview length and format, and confidentiality. Additionally, we offered to share our research findings with the General Counsels in return for participation and we explained that the findings from the interviews would be used to develop one or more scholarly articles or papers

²⁷⁴ Although some of the interviewees had different titles like Chief Legal Officer and two were deputy General Counsels, for the sake of ease, in this article, I refer to all of the Respondents as General Counsels.

²⁷⁵ Although some of the interviewees were Chief Legal Officers and two were deputy General Counsels, in this article, I refer to all of the in-house lawyers as General Counsels.

²⁷⁶ In three instances, we interviewed more than one Respondent at a time. In one instance, two Respondents were interviewed because they were co-General Counsels (GC-I-S-1(L-6)). In another instance, we interviewed the General Counsel and the Chief Operating Officer of the Legal Department at the same time (GC-I-S-7).

²⁷⁷ In addition to me, the interviewers were John Coates, Ashish Nanda, David Wilkins, or Sean Williams. During interviews in which there were two interviewers, one of us took the lead interviewing role.

approximately X minutes. The discrete goal of these interviews was to gain a general understanding of how general counsels currently work with the internal public relations departments, external public relations departments and outside agencies on matters that were identified as potentially high profile. This understanding was then used to develop a more comprehensive interview template for more in-depth interviews.

All but five of the interviews were recorded and transcribed.²⁷⁸ After each session, I reread the transcriptions (or my notes where transcriptions were not available). To ensure anonymity, I developed a labeling system revealing the title of the interviewee, the industry within which the interviewee works, and the sequential order of the interviews.²⁷⁹

My interview approach was fairly systematic. I asked the same questions of each interviewee but varied the order and flow somewhat. I began with closed-ended questions around employment background, title, department size and legal spending. After asking questions concerning the larger research topic, I segued into the open-ended questions around PR.²⁸⁰ A copy of the questions related to this topic is attached as Appendix C.²⁸¹

²⁷⁸ Recordings were downloaded to our assistant’s computer and emailed to Techsynergy in India for transcription. For the five that would not allow a recording, I typed notes during the interview.

²⁷⁹ The interview code consisted of four elements. The first element identified the title of the interviewee. CLO for Chief Legal Officer. GC for General Counsel. DGC for Deputy General Counsel, and AGC for Assistant or Associate General Counsel. LP for Law Firm Partner. PRI for internal PR executive. PRE for external PR executive. The second element identified the industry in which the interviewee worked. C for Commercial Banks. I for Investment Banks. P for Petroleum companies. F for Pharmaceutical. NA if the interviewee was not recommended by one of the GCs or was not associated directly with only one of these industries. For example, some of the PR executives I spoke with serviced clients more than one of these industries. The third element identified whether the interview was in the first round of interviews that were shorter (S) in length or the second round that were longer in length (L) of shorter interviews (S). The fifth element identified the order of the interviews numbered 1-X for the first round and 1-32 for the second round. Thus, interviewee GC-C-S-10 indicates that this interviewee had the title of General Counsel, works at a Commercial Bank, was part of the first round of interviews and was the 10th interview we conducted. For those GC that participated in both rounds, I included the third and fourth elements for additional round in parenthesis. Thus, GC-C-S-10 (L-2) indicates that this interviewee also participated in a long interview but that the page number is associated with the shorter interview. GC-C-L-2 (S-10) indicates the same information except that the page number is associated with the longer interview.

²⁸⁰ In stage one, the open ended questions were much more limited and focused on attorney-client privilege issues. This approach is similar to what has been called a “hybrid technique” and is considered to be “an improvement on past empirical studies” as it elicits quantifiable and qualitative data and is “more receptive to greater depth and breadth of responses.” Jackson and Pan, *supra* note 16 (employing this technique).

b) *Stage Two*

Stage two consisted of much longer, in-depth interviews, averaging X minutes in length, with thirteen general counsels,²⁸² ten law firm partners, and nine public relations executives.

(1) *Selection of Sample*

I targeted those general counsels from stage one who said they would be willing to speak further. I succeeded in interviewing eleven of the original interviewees.²⁸³ I also interviewed one general counsel in the pharmaceutical industry that we did not interview for the larger project. To reach law firm partners and PR executives, I developed what has been termed a snowball sample.²⁸⁴ The General Counsel Interviewees referred me to law firm partners and internal and external public relations executives with whom they worked.

(2) *Interview Methodology.*

²⁸¹ Since no real preparation was needed for the interview, the PR questions were not provided to the interviewees before or during the interview.

²⁸² Eleven of them were general counsels from stage one that mentioned they would be willing to speak with me in more depth.

²⁸³ One general counsel (CLO-C-S-20) connected me with a deputy GC in the department in lieu of interviewing with me directly. That interview is labeled DGC-C-L-11.

²⁸⁴ Snowball sampling is “a standard technique for sampling populations that are difficult to reach through randomized methods.” Angela Littwin, *Beyond Usury: A Study of Credit Card Use and Preference Among Low-Income Consumers*, 86 TEXAS L. REV. 451, 457 (2008). It is developed by starting with one or more people within the target population. *Id.* Those initial participants refer the researcher to other people who meet the study criteria. *Id.* For a more detailed description see Leo A. Goodman, *Snowball Sampling*, 32 ANNALS OF MATHEMATICAL STAT. 148 (1961) (defining snowball sampling); Charles Kadushin, *Power, Influence, and Social Circles: A New Methodology for Studying Opinion Makers*, 33 AM. SOC. REV. 685, 694-96 (1968) (discussing the strengths and weaknesses of snowball sampling). See also, Jean Faugier and Mary Sargeant, *Sampling Hard to Reach Populations*, 26 J. ADVANCED NURSING 790 (1997); Sarah H. Ramsey & Robert F. Kelly, *Using Social Science Research in Family Law Analysis and Formation: Problems and Prospects*, 3 S. CAL. INTERDISCIPLINARY L. J. 631, 642 (1994). Legal scholars have used snowball samples to study legal issues. See, e.g., Littwin, *supra*, at 284, at 456 (using a snowball sample to study “the perspective of low-income consumers regarding the advantages and disadvantages of increased access to credit cards in the wake of deregulation”); Jose B. Ashford, *Comparing the Effects of Judicial Versus Child Protective Service Relationships on Parental Attitudes of Juvenile Dependency Process*, 16 RES. ON SOC. WORK PRACTICE, 582 (2006) (using a “convenience sample” of 40 parents involved with child protective services to study the effect of judicial and case-worker relationships on perceptions of fairness); Chambliss and Wilkins, *The Emerging Role*, *supra* note 16 (using a snowball sample to study “the emerging role of compliance specialists in large law firms”); Kirkland, *supra* note 16 (utilizing a snowball sample of twenty-two lawyers practicing in ten large law firms to investigate “how bureaucratic legal workplaces shape lawyers’ ethical consciousness”).

Between July 2007 and April 2008, I conducted eleven in depth interviews with General Counsels of S&P 500 companies across the three selected sectors.²⁸⁵ Additionally, I conducted ten interviews with law firm partners and eight interviews with PR executives. All of the interviews were conducted by phone. No one participated in the interviews other than the respondents and me. The interviews averaged approximately sixty (check) minutes in length.

All but three of the interviews were recorded and transcribed by a professional service.²⁸⁶ After each session, I reread the transcriptions (or my notes where transcriptions were not available). To ensure anonymity, I utilized the same labeling system as mentioned above with some additions to identify those interviewees who were part of both stages.²⁸⁷

I began the interviews by taking detailed employment histories. I then asked a few closed-ended questions regarding the size of legal and PR departments and reporting structure. I moved on to ask some open-ended policy questions about the impact of PR on legal controversies and the roles of lawyers and PR executives. The final section consisted of a request for the participants to describe specific past experiences dealing with legal issues that had a potential media impact. During these vignettes, I asked a few closed-ended questions around use of external PR consultants.²⁸⁸ A copy of the questions related to this topic and the closed-ended questions included in Appendix B.²⁸⁹

I stopped interviewing subjects when I consistently elicited the same types of information.

²⁸⁵ In addition, I interviewed one General Counsel from a slightly smaller company that was not publicly traded.

²⁸⁶ Recordings were downloaded to our assistant's computer and emailed to Techsynergy in India for transcription. For the five that would not allow a recording, I typed notes during the interview.

²⁸⁷ See *infra* note 279.

²⁸⁸ Although I covered substantially the same questions with each Respondent, often the interviews did not go in exactly this order. The flow changed based on the way the Respondent answered the question.

²⁸⁹ Since no real preparation was needed for the interview, the PR questions were not provided to the interviewees before or during the interview.

2. Transcript Analysis

To the degree possible, I attempted to analyze the transcripts using content analysis – a method of qualitative analysis frequently used to analyze political speeches, advertisements, judicial opinions,²⁹⁰ and interview transcripts.²⁹¹ I started by reading all of the transcripts. I then developed a codebook to analyze the transcripts. The codebook consisted of questions that could elicit specific answers, e.g., size of PR department. I also coded for some of themes that emerged from the interviews. For example, I coded the number of respondents that agreed with the following statement “media spin greatly affects the process and/or outcome of a legal controversy.”²⁹² Subsequently, I trained two law-student research assistants to code the data according to this procedure.²⁹³ Their coding was meant to serve as a cross-check to mine. The codebook was modified as necessary during the process. However, at the date of publication of this installment, all of the coding had not yet been completed.

3. S&P 500 Survey

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

²⁹⁰ See Klaus Krippendorff, *CONTENT ANALYSIS: AN INTRODUCTION TO ITS METHODOLOGY* (2004); Littwin, *supra* note 284, at Appendix.

²⁹¹ See ROBERT PHILIP WEBER, *BASIC CONTENT ANALYSIS* 9 (1990); Littwin, *supra* note 284, at Appendix.

²⁹² I gave each coder a list of words that were pertinent to the theme but that were not necessarily “high-frequency” words. See, e.g., Gery W. Ryan, *Measuring the typicality of text: Using multiple coders for more than just reliability and validity checks* http://findarticles.com/p/articles/mi_qa3800/is_199910/ai_n8867279/print?tag=artBody:col1 (last visited 7/14/2008) (“Unlike classic content analysis that associates high-frequency words with theme salience, this technique identifies words that are pertinent to a theme but that may have low frequencies.”).

²⁹³ Some scholars believe that using multiple coders enhances validity and reliability. See, e.g., Gery W. Ryan, *Measuring the typicality of text: Using multiple coders for more than just reliability and validity checks* http://findarticles.com/p/articles/mi_qa3800/is_199910/ai_n8867279/print?tag=artBody:col1 (last visited 7/14/2008) (“Investigators use agreement among multiple coders as proxies for the reliability and validity of the analysis process.”); but see Norman Denzin and Yvonna S. Lincoln, *Introduction: Entering the Field of Qualitative Research* to *HANDBOOK OF QUALITATIVE RESEARCH* 1, 1-18 (Norman Denzin and Yvonna S. Lincoln, eds., Sage Publications 1994) (contending that qualitative data cannot be assessed based on reliability and validity); Janice M. Morse, *Designing Funded Qualitative Research* 1, 220-235, *HANDBOOK OF QUALITATIVE RESEARCH* 1, 1-18 (Norman Denzin and Yvonna S. Lincoln, eds., Sage Publications 1994) (arguing that multiple coders should not be used in qualitative research).



their law firm relationships. We first pre-tested the survey among twenty randomly selected General Counsels of the S&P 500. This pre-test elicited a 40% response rate. We then tweaked the survey and sent it to general counsels of the entire S&P500. The survey garnered a 28% response rate. The survey in its entirety contained 26 multi-part questions and was estimated to take approximately 15 minutes to fill out. The PR questions elicited information about 1) the reporting structure for PR departments; 2) the number of times the legal department has dealt with a legal controversy with potentially substantial publicity; 3) whether the lawyers met with internal PR executives and/or hired external PR executives; 4) the role of the outside attorney in developing the PR strategy; and 5) the comfort level lawyers have in disclosing confidential client information to internal and/or external PR executives given the parameters of the attorney-client privilege. This survey elicited a 28% response rate. A copy of the questions and a chart detailing the sample characteristics of the survey respondents is included in this Appendix.

B. Questionnaires

1. Questionnaire for Qualitative Interview
2. Questionnaire for Sample Characteristics

HARVARD LAW SCHOOL
LEGAL PURCHASING SURVEY

CENTER ON LAWYERS AND THE PROFESSIONAL SERVICES INDUSTRY

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

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

Purchase decisions may differ depending on the importance of matters. Some questions deal specifically with decisions to retain law firms for “**very significant**” matters, by which we mean matters of strategic

importance to the company, such as litigation with very large liability exposure, high-risk regulatory matters, and large M&A transactions.

Outside Legal Services

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

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

FACTORS	Very important	Important	Somewhat important	Not very important	Not important at all
Prior Experience with Firm or Lawyer(s)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Reputation of Firm or Lawyers	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Rankings in legal periodicals or other	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Results in similar transactions or cases	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Size of firm	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Geographic scope of firm (e.g. branches)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Market share of firm in similar matters	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

5) Continued...

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

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

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

Termination of Law Firms

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

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

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

- Why did you terminate the law firm? _____

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

Movement of “Star” Lawyers

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

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

- 14) How many times did you move work from the firm the star left to their new firm? _____
- After the most recent instance when you moved work, did the quality of service change?
___ Better at New Firm ___ Stayed the Same ___ Worse at New Firm
 - In the other instances where you moved work did the quality of service change?
___ Better at New Firm ___ Stayed the Same ___ Worse at New Firm
- 15) How many times did the star consult with you before joining another firm? ___
- How many times did you suggest firms to consider joining? _____
- 16) What kind of firms did the star lawyers join? (Fill in all blank spaces)

_____ # who moved to law firm of equivalent size _____ # to firm with similar prestige

_____ # who moved to a law firm of bigger size _____ # to firm with more prestige

_____ # who moved to a law firm of smaller size _____ # to firm with less prestige

17) How many stars who moved over the past 3 years are still with their new law firms? _____

- 18) Over the past 3 years, how many times have you engaged in proactive “match-making”: suggesting to star lawyers to move to another firm and/ or suggesting to law firms to bring on board specific lawyers and their teams? ____ # of times
- 19) Have the lawyers and firms heeded to your suggestion?
____ Yes, many times ____ Yes, a few times ____ Yes, once or twice ____ Never

Intersection of Public Relations and Legal Controversies

- 20) Do you or anyone in the Legal Department oversee Public or Government Relations?
____ Yes Public Relations ____ Yes Government Relations
____ No
- 21) Specifically, to whom do the directors of Public Relations and Gov’t Relations report?
Public Relations reports to _____(fill in title)_____ (department name)
Government Relations reports to _____(fill in title)_____ (department name)
- 22) In the past **3 years**, have you or a lawyer in the Legal Department dealt with a legal controversy where there potentially was substantial publicity impacting the company?
____ Yes, many times ____ Yes, a few times ____ Yes, once or twice ____ No
_____ (fill in most recent type of matter)
- Did internal lawyers meet with internal PR staff about this legal matter?
____ Yes ____ No
 - Was an outside Public Relations agency hired to help deal with the matter?
____ Yes, an outside Public Relations agency was hired by our company
____ Yes, an outside Public Relations agency was hired by our outside law firm
____ No
 - What role did an outside law firm play in developing the PR strategy? The law firm...
____ did not play a substantial role
____ provided advice to internal lawyers on managing the publicity
____ provided advice to internal lawyers and PR staff on managing the publicity
____ worked with internal lawyers and PR staff on publicity strategy
 - Was there information you did not feel comfortable sharing with the internal or external PR staff for fear it would lose attorney-client privilege? (check all that apply)
____ Yes, with the internal PR staff ____ Yes, with the external PR agency
____ No

Background Information

- 23) Your title: _____
- 24) Approximately how many attorneys do you oversee? _____

25) If you report to someone other than the CEO, what is this person's title, and what departments does this person oversee? _____

Comments

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

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

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

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

Thank you.

C. *Sample Characteristics*

1. Size of Legal Budget, Legal Department, and Budgets

Survey

	N	Mean (\$M)	Standard Deviation	Minimum (\$M)	Median (\$M)	Maximum (\$M)
Approximate Legal Budget	131	65.42214	97.13093	3.5	37	606*
Number of Attorneys	134	68.85075	128.6073	0*	35	1250**
Budgets on outside counsels (%)	131	59.64275	19.84593	0	60	97*

- Size of legal budgets (Approximate Legal budget, Q1 of survey)
- Size of legal departments (Number of attorneys that GC supervises, Q24 of survey)
- % of outside spending (Budgets on outside counsels, Q2 of survey)

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

Number of Attorneys	132	60.8786	77.80706	4	35	600
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2. By Industry Type

Industry	SURVEY				INTERVIEWS	
	Report to CEO	Report to Vice Chairman/CFO	Report to Other Exec.	Total	# interviewed of the total survey respondents	Remaining interviewees (25)
Agriculture, Forestry, and Fishing	1	0	0	1	0	0
Mining	4	0	0	4	0	0
Construction	2	0	0	2	0	0
Manufacturing						
- Petroleum*	4	0	0	4	3	3
- Pharmaceutical **	4	0	0	4	1	8
- Other manufacturing	39	0	3	42	0	0
Transportation, Communications, Electric, Gas, And Sanitary Services	23	0	1	24	0	0
Wholesale Trade	3	0	0	3	0	0
Retail Trade	10	1	0	11	0	0

Finance, Insurance, and Real Estate								
- Commercial Bank***	8	2	1	11	8	7		
- Investment Bank****	3	0	1	4	2	7		
- Other financials	9	0	4	13	0	0		
Services	12	1	1	14	0	0		
Public Administration and Others	2	0	0	2	0	0		
Total	124	4	11	139	14	25		

* SIC 1311: Refining Petroleum

** SIC 2834: Pharmaceutical Preparations

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

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

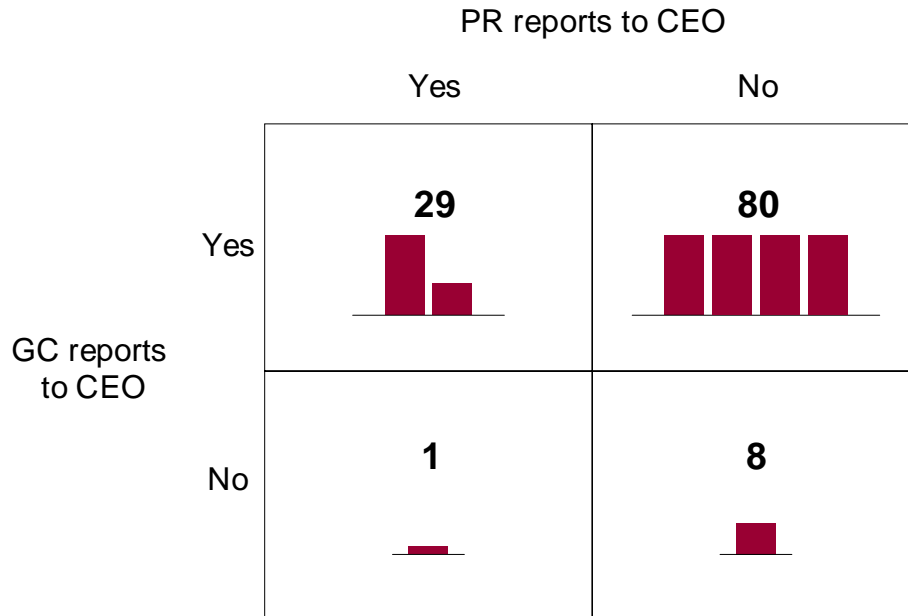
Interviews Only

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

*S&P500 (2006)

3. Reporting Structure

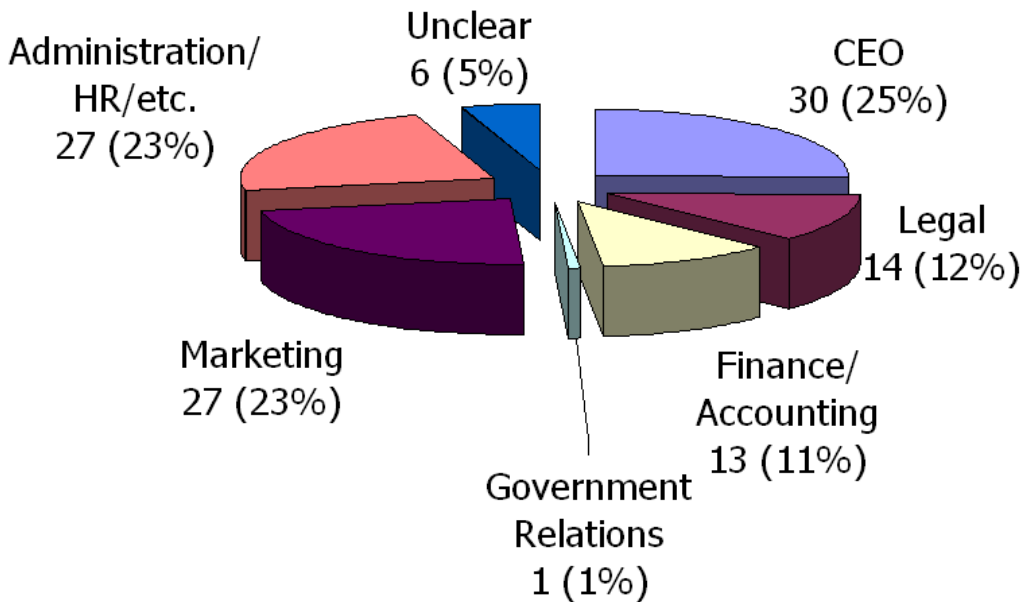
Survey Respondents



Note:

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

PR REPORTING STRUCTURE



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

Interviews

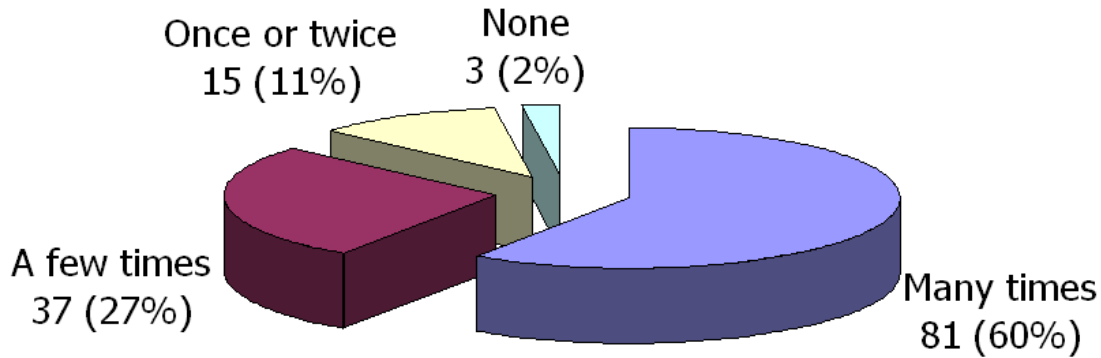
4. % Dealt With High Profile Legal Controversy in Past Three Years

Q22: In the past **3 years**, have you or a lawyer in the Legal Department dealt with a legal controversy where there potentially was substantial publicity impacting the company?

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

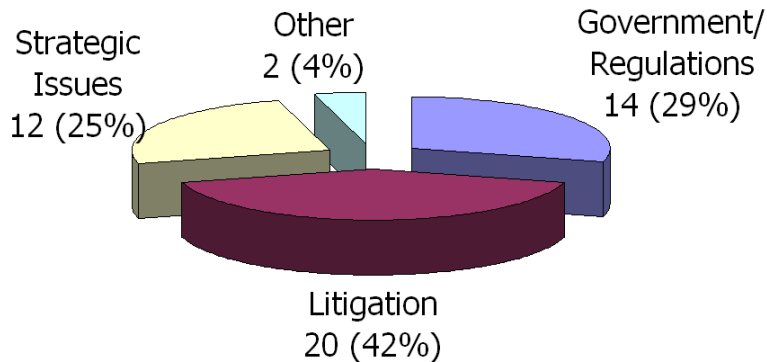
_____ (fill in most recent type of matter)

98% of all firms have dealt with a legal controversy with potential substantial publicity in the past 3 years.



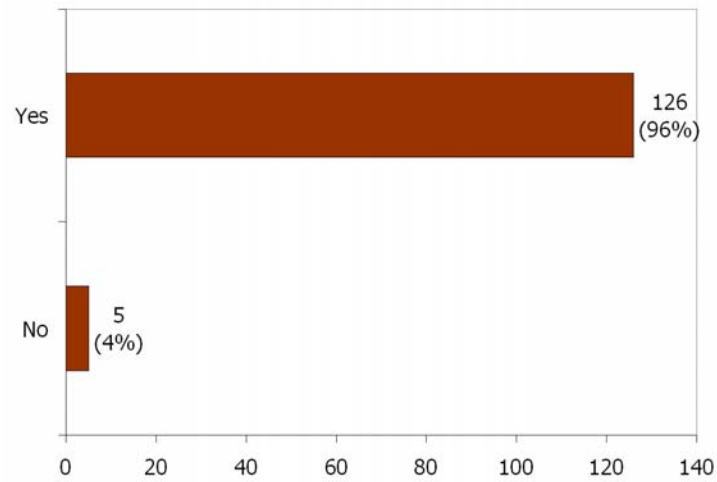
Note: This question was based on 136 responses. There is no statistical difference between firms whose legal departments oversee the PR department and firms whose legal departments do not oversee the PR department.

Most recent type of matters



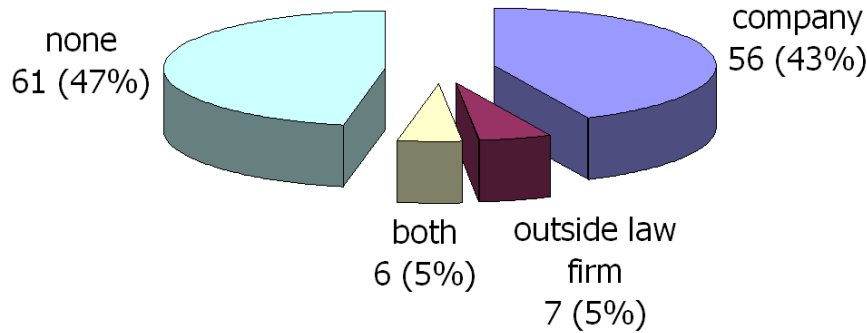
Note: Only 48 GCs answered to this question.

Did internal lawyers meet with internal PR staff about this legal matter?

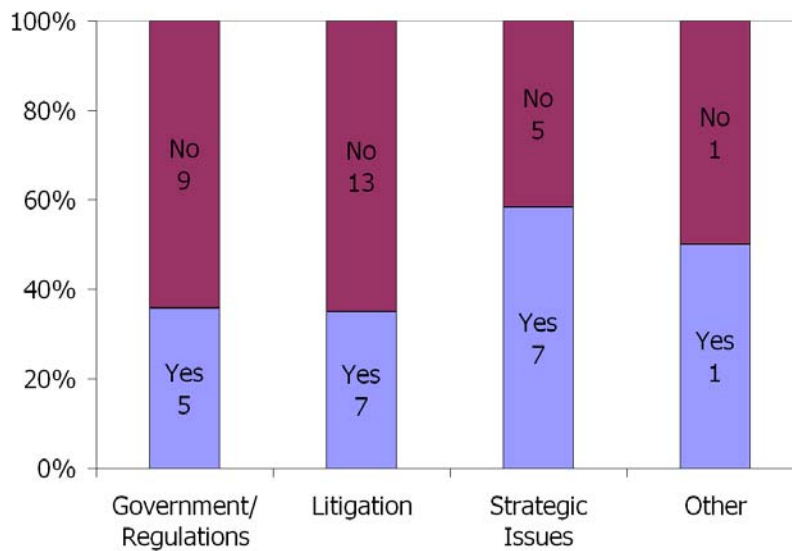


In most cases, internal lawyers met with internal PR staff. Among the 5 who answered “no,” one GC specified most recent type of matter (classified as “Litigation”)

Was an outside Public Relations agency hired to help deal with the matter?



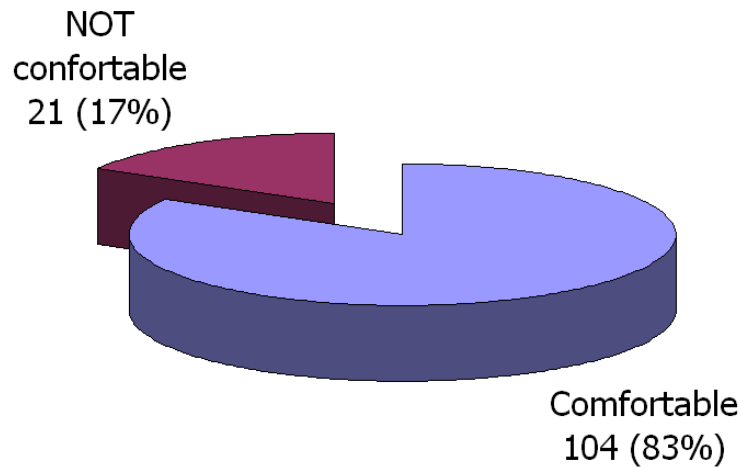
53 % of companies hired an outside PR agency and in most cases (81% of the hiring cases), outside law firms were not involved in the hiring decision of the outside PR agency. (One survey respondent answered “sometimes Yes, sometimes No.” This response was excluded from the analysis.)



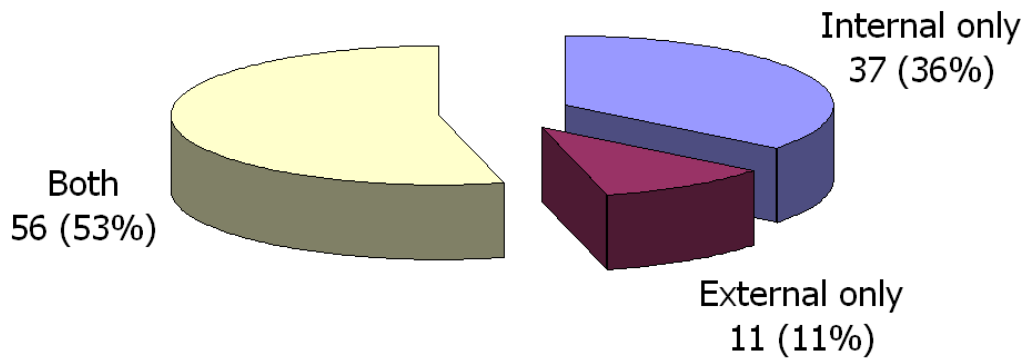
No significant difference across types of matters in terms of hiring an outside PR agency is found. However, it appears that companies are more likely to hire an outside PR agency if the matter involves strategic issues.

5. Comfort Level: Sharing Information with Internal and External PR Executives

17% of Survey Respondents claimed they were not comfortable sharing information with either internal or external PR executives.



Of the 83% that were comfortable sharing information, 53% were comfortable doing so with both internal and external PR executives.



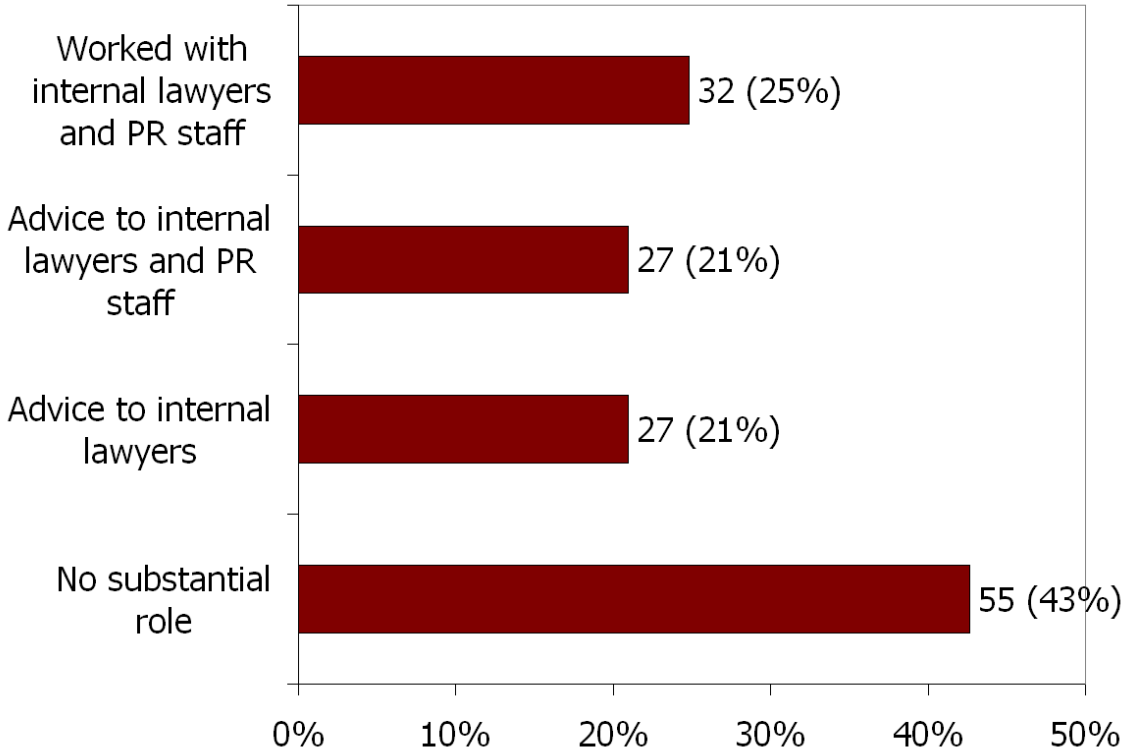
Note: Of all 125 respondents:

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

6. Role of Outside Attorney

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

- (A) did not play a substantial role
- (B) provided advice to internal lawyers on managing the publicity
- (C) provided advice to internal lawyers and PR staff on managing the publicity
- (D) worked with internal lawyers and PR staff on publicity strategy



7. Mean-Comparison Tests

Insert two-group mean-comparison tests: Contrast 1 and Contrast 2 Here (attached excel spreadsheet).