

OUTSIDE COUNSEL GUIDELINES: POWER, IDEOLOGY, AND THE EVOLUTION OF THE CORPORATE BAR

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Outside Counsel Guidelines (“OCGs”), terms of the lawyer–client relationship imposed by corporations, are a significant development in the practice of law by large corporate law firms (“BigLaw”). Among the most controversial OCGs are those that expand on law firms’ fiduciary obligations, thereby restricting their future clientele. The organized bar maintains that rules of professional conduct should restrict lawyers’ acquiescence to these OCGs because they limit clients’ access to legal services and undermine lawyers’ independence without advancing corporate clients’ legitimate interests.

This Article shows why the bar’s effort has (very recently) deservedly failed: corporate clients have a legitimate interest in demanding greater loyalty than the rules provide as well as in expanding on other fiduciary protections, and the bar’s avowed concerns about clients’ choice of counsel and lawyers’ autonomy are not significantly implicated in this context.

At the same time, the Article shows that the bar has other good cause for concern. It argues that by treating BigLaw firms as service providers rather than trusted professionals, OCGs contribute to corporate lawyers’ loss of influence and standing as wise counselors, and to the corresponding decline of their traditional commitment to promoting the public good through their legal work. This analysis contradicts the conventional understanding of how corporate law practice is evolving. The traditional pendulum account states that power and standing swing internally within the corporate hemisphere, historically from general counsel to BigLaw and now back to in-house counsel. Our revisionist account shows that power has shifted from the corporate bar to corporate clients.

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The account we develop explains for the first time seemingly contradictory contemporary-practice realities in the corporate hemisphere of the legal profession that others have struggled to understand. If BigLaw firms have lost power, how have they remained so profitable? And if they have not lost power, why have many firms capitulated to the Trump Administration?

We show that in response to their loss of power in the twenty-first century, BigLaw firms have restructured. This restructuring has successfully mitigated BigLaw's loss of power and allowed the firms to remain profitable. But law firms' restructuring further weakened their commitment to practicing corporate law as a public calling and promoting the public spirit of the law and the rule of law. This helps explain why, at the start of the second Trump Administration, highly profitable law firms declined to oppose Executive Orders targeting the legal profession.

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INTRODUCTION

Early in his second presidential term, Donald Trump began attacking national institutions that he perceived to be left leaning,¹ including not only the federal administrative bureaucracy and Ivy League universities but also BigLaw, the group of top-earning large corporate law firms.² President Trump issued a series of Executive Orders threatening to impose ruinous consequences on leading law firms for alleged misdeeds, including employment discrimination favoring lawyers of color and discrimination in the selection of clients—especially pro bono clients—in favor of liberal and antigovernment causes.³ While four law firms opposed the Administration by filing constitutional challenges to the Executive Orders, more than twice as many acquiesced by reaching agreements, often proactively.⁴ Among other things, law firms agreed to comply with civil-rights law and to donate millions of dollars in uncompensated legal services to causes that President Trump favors.⁵ Other law firms, to avoid becoming targets, scrubbed references to Diversity, Equity, and Inclusion (“DEI”) from their websites⁶ and declined to join amicus briefs supporting the firms that stood up to President Trump in court.⁷

Various explanations might be offered for why seemingly powerful law firms decided to reach accommodations rather than fight. The firms’ defenders and the firms themselves say that opposing the Executive Orders would have grievously

1. See Neetu Arnold, *Trump Is Right to Target Colleges. He’s Doing It the Completely Wrong Way*, POLITICO (May 19, 2025, at 05:00 ET), <https://www.politico.com/news/magazine/2025/05/19/trump-higher-ed-elite-universities-reform-00355256> [https://perma.cc/EHD9-Y6A3]; Andrea Shalal & Matt Spetalnick, *Trump Accelerates Campaign to Remake Federal Bureaucracy*, REUTERS (Jan. 23, 2025, at 16:28 MT), <https://www.reuters.com/world/us/trumps-attack-diversity-programs-bureaucracy-sends-us-agencies-scrumbling-2025-01-23/> [https://perma.cc/6KHB-9WSD]; Jeffrey Toobin, *Trump’s Next Move After the Law Firms Surrender*, N.Y. TIMES (May 19, 2025), <https://www.nytimes.com/2025/05/19/opinion/trump-law-firms.html> [https://perma.cc/UD8G-4D73].

2. See Bruce A. Green & Carole Silver, *Technocapital@Biglaw.com*, 18 NW. J. TECH. & INTELL. PROP. 265, 267 n.6 (2021) (“‘BigLaw’ has no fixed definition but generally connotes the largest, most profitable law firms.”).

3. See, e.g., Exec. Order No. 14,230, 90 Fed. Reg. 11781, 11781–83 (Mar. 6, 2025).

4. See Nancy B. Rapoport, *Scrappy or Strategic? Law Firm Decision-Making in Light of Executive Orders*, 13 EMORY CORP. GOV. & ACCOUNTABILITY REV. (forthcoming 2026) (manuscript at 3) (on file with authors).

5. See *id.* at 52.

6. See Debra Cassens Weiss, *Diversity References Scrubbed from BigLaw Websites Amid DEI Probes; Informal Guidance Issued*, ABA JOURNAL (Mar. 20, 2025, at 11:57 CT), <https://www.abajournal.com/news/article/diversity-references-scrubbed-from-biglaw-websites-amid-dei-probes-informal-guidance-issued> [https://perma.cc/NQ52-LF5M].

7. See Ben Protess, *In Trump’s Fight with Perkins Coie, the Richest Firms Are Staying Quiet*, N.Y. TIMES (Apr. 2, 2025), <https://www.nytimes.com/2025/04/02/business/trump-perkins-coie-amicus-brief.html> [https://perma.cc/P2WT-LBDU].

harmed the firms' clients and personnel, whereas their deals were virtually cost-free, since the firms simply agreed to abide by antidiscrimination laws, as they would do anyway, and to perform pro bono services, which they already did in abundance, for mutually agreeable causes.⁸ Less sympathetic explanations might include that the law firms that reached accommodations were dominated by greedy corporate partners who wanted to maintain their high compensation and by managing partners who feared that in the absence of a deal, their corporate superstars would have taken their books of business to other law firms.⁹

This Article offers a different explanation. Our story is about how BigLaw firms lost their power and status—that is, how over time, and certainly by the early twenty-first century, the law firms comprising BigLaw lost power and influence relative to the powerful corporations that were their most important clientele. And along with the loss of power came the loss of prestige and a shift in lawyers' professional identity and values, including the erosion of BigLaw firms' traditional, vaunted commitment to the public interest, and especially their commitment to the rule of law. These changes made BigLaw less likely to stand up to clients, powerful partners, and other actors, eventually including the President. Our description of the movement of power from corporate lawyers to corporate clients and of declining professional values differs markedly from academics' conventional account of how the corporate legal hemisphere has evolved, which is a story about the movement in power from in-house lawyers to outside counsel and back to in-house counsel along with the continued elevated status of corporate lawyers.

At the heart of our account are Outside Counsel Guidelines (“OCGs”)—the terms that many powerful corporations insist on as a condition of retaining a particular law firm. The incorporation of OCGs into BigLaw's engagement agreements is an expression of BigLaw's declining power. Previously, BigLaw firms leveraged their power to persuade corporate clients to waive the protections of conflict-of-interest rules.¹⁰ But now, relenting to particularly desirable clients, law firms expanded on the fiduciary protections of the rules of professional conduct, and in doing so, restricted their ability to represent clients' business rivals and other disfavored parties. By the time President Trump made deals with law firms, BigLaw firms were accustomed to acquiescing to powerful entities that sought to dictate how

8. See Stephen Gillers, *Paul Weiss Cut a Deal with Trump—That Doesn't Mean It Caved*, BLOOMBERG L. (Mar. 24, 2025, at 08:29 MT), <https://news.bloomberglaw.com/us-law-week/paul-weiss-cut-a-deal-with-trump-that-doesnt-mean-it-caved> [<https://perma.cc/8NWJ-LZ7F>]; Lauren Irwin, *Paul Weiss Chair: Trump Order 'Could Easily Have Destroyed Our Firm'*, THE HILL (Mar. 24, 2025, at 15:53 ET), <https://thehill.com/homenews/5211222-paul-weiss-chair-trump-order/> [<https://perma.cc/3B9C-C8HA>].

9. David McGowan, *Fealty Oaths* 58–63 (San Diego Legal Stud., Working Paper No. 25-033, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5433934 [<https://perma.cc/5X4T-FQF2>]; Rebecca Aviel, *All the King's Lawyers*, 94 FORDHAM L. REV. 1261, 1264–65 (2026); Nora Freeman Engstrom, Jonah B. Gelbach & David Marcus, *How a Rule 23(b)(2) Class Action Could Save Law Firms From Trump*, 78 STAN. L. REV. ONLINE 40, 44 (2025); Bruce A. Green & Eli Wald, *Lawyers, the Rule of Law, and the Executive Orders Targeting Law Firms*, 78 OKLA. L. REV. (forthcoming 2026) (manuscript at 29–30) (on file with authors).

10. See, e.g., John K. Villa, *An Advanced Class on Advance Waivers for the Sophisticated Client*, 23 ACC DOCKET, Sep. 2005, at 164, 164.

they operated and whom they represented, and their commitments to the public interest and the rule of law in their everyday practices had diminished.

Our Article begins in Part I with a discussion of the advent of OCGs and the organized bar's response to them, especially the D.C. Bar's opposition to the terms that limited law firms' future clients. Because law firms were not standing up to corporate clients on their own, influential representatives of the bar tried invoking professional conduct rules to influence law firms to resist the most noxious OCGs.¹¹ When law firms ignored the bar's interpretation of the rules, the D.C. Bar initiated an unsuccessful multiyear effort to persuade the judiciary to amend the rules to expressly forbid lawyers from acquiescing.¹² The D.C. Bar's premise was that corporations had no legitimate interest in OCGs that expanded on law firms' fiduciary protections, and that these OCGs significantly undermined other corporate clients' access to legal representation and lawyers' own professional independence.

Part II examines the D.C. Bar's stated rationale for the proposed restrictions. The D.C. Bar argued that existing conflict-of-interest and confidentiality rules are broad enough to address all reasonable client interests and that any expanded protections would not only be unreasonable and unnecessary but also unduly restrict future clients' access to legal services.¹³ We show that corporate clients often have legitimate reasons to seek greater fiduciary protections, including greater loyalty, than existing rules afford. We also challenge the claim that OCGs significantly undermine other important interests, demonstrating that these agreements are unlikely to affect access to legal services and diminish lawyers' exercise of professional judgment.

Part III suggests that the organized bar has a different, largely unspoken, reason to oppose OCGs. Toward this end, we offer a revisionist history of BigLaw in which OCGs play a significant role. The conventional story is that, over time, power shifted internally within the legal profession from in-house lawyers to outside law firms and back to in-house lawyers. We argue, on the contrary, that the corporate bar, comprised of both outside and in-house corporate counsel, has collectively lost power to corporate clients, and that OCGs express and fuel that power shift. Furthermore, we show that although BigLaw firms successfully mitigated their power loss by restructuring, resulting in unprecedented profits, OCGs reflect the firms' loss of influence over corporate clients and the accompanying decline in prestige, erosion of traditional professional values, and weakened professional identity as guardians of the public interest and the rule of law. Finally, we establish that BigLaw's very own successful restructuring contributed to corporate lawyers' diminished self-conception as lawyer-statespeople or wise counselors who encourage corporate clients not only to comply with the law but to act fairly and consistently with the spirit of the law. We suggest that the organized bar opposes OCGs in order to resist this development.

Part IV explores the implications of corporate lawyers' declining power relative to corporate clients, including the erosion of lawyers' role as wise

11. See *infra* notes 15–80 and accompanying text.
12. See *infra* notes 81–108 and accompanying text.
13. See *infra* notes 109–68 and accompanying text.

counselors who practice law as a public calling. On the one hand, we question the lawyer-centric conventional academic wisdom, apparently shared by the organized bar, that corporate lawyers' (d)evolution from wise counselors to high-end service providers significantly harms corporate clients, BigLaw firms, and the public because lawyers have a reduced role in influencing corporations to serve the public good.¹⁴ We show that lawyers acting as wise counselors have been replaced by increasingly sophisticated and professionalized corporate actors and new professional advisors. Although corporate lawyers may have lost power and professional prestige, they are not entirely "lost." BigLaw still allows lawyers to do useful, challenging work, as well as to do good—for example, by greasing the wheels of the economy and offering pro bono legal services—while doing exceedingly well financially. Finally, rhetoric aside, corporate lawyers may not have actually protected the public interest in the past, and other mechanisms, like evolving corporate governance policies, may protect the public from corporate misdeeds. On the other hand, we identify new harms to the public good, contending that BigLaw's evolution made it easier for leading corporate law firms to make deals with President Trump rather than battle him in court in defense of the rule of law. Large law firms' responses to the Executive Orders show that the public interest is disserved because BigLaw's inclination and ability to stand up for the rule of law have eroded in a time when they are most needed.

I. EXPANSION OF CLIENT PROTECTIONS BY CORPORATE OCGS AND THE ORGANIZED BAR'S PUSHBACK

BigLaw firms are prestigious and powerful,¹⁵ but their large corporate clients are also powerful actors accustomed to negotiating with sophisticated counterparties. At one time, law firms could dictate the terms of their financial relationship with corporate clients, but eventually, corporate clients began using their bargaining power to reduce law firms' fees both at the outset of the representation and thereafter.¹⁶

Corporate clients eventually grew more ambitious in negotiating the terms of the lawyer-client relationship. Many now ask law firms to accept OCGs mirroring requirements initially designed for vendors and contractors.¹⁷ OCGs range from

14. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 1–7, 283–91 (1993); MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 274–79 (1994); SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* 227–45 (1994).

15. See *supra* note 2 and accompanying text.

16. See Nancy B. Rapoport & Joseph R. Tiano, Jr., *Legal Analytics, Social Science, and Legal Fees: Reimagining "Legal Spend" Decisions in an Evolving Industry*, 35 GA. ST. U. L. REV. 1269, 1273 (2019) (noting that clients used to pay the amounts their lawyers billed, but large institutional clients now use their leverage to negotiate bills); David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2101–03 (2010).

17. See D.C. BAR RULES OF PRO. CONDUCT REV. COMM., REPORT TO THE BD. OF GOVERNORS PROPOSING CHANGES TO THE D.C. RULES OF PRO. CONDUCT RELATING TO CLIENT-GENERATED ENGAGEMENT LETTERS AND OUTSIDE COUNS. GUIDELINES 1 (Jan. 2022) [hereinafter D.C. BAR REPORT] ("In some cases, . . . OCGs reflect nothing more than clients

relatively simple instructions to detailed provisions controlling virtually every aspect of the engagement: staffing, billing rates, billing processes, travel expenses, insurance, confidentiality, publicity, conflicts, conflict waivers, litigation procedures, experts, third-party vendors, data security, AI use, disaster recovery, file retention, diversity requirements, and even law firm flex-time arrangements.¹⁸

OCGs' objectives include controlling legal costs, aligning lawyers' business practices with corporate clients' administrative practices, and promoting corporations' values.¹⁹ They are often incorporated as an addendum to lawyer-drafted engagement agreements and are occasionally included in corporations' requests for proposals seeking law firms' bids to offer legal assistance.²⁰ Law firms may negotiate to eliminate or revise the most onerous provisions, but they risk losing business to more compliant competitors if they resist too hard, especially if competitor firms can render the requested legal work just as proficiently. Once accepted, the OCGs become contract terms binding on the law firms that undertake corporate legal work.²¹

While some OCGs advance values or promote practices to which corporations might believe their law firms are not otherwise fully committed,²² the most controversial ones advance values to which the legal profession has been committed for centuries: loyalty, confidentiality, candor, and competence.²³ These

using the same processes to procure legal services that they use for such other procurements as office furniture and catering services.”); Anthony E. Davis & Noah Fiedler, *Indemnity Provisions in Outside Counsel Guidelines: A Tale of Unintended Consequences*, 23 PRO. LAW., no. 4, 2016, at 4 (“Even the largest, most powerful, and most profitable law firms often find themselves in the position of having to accede to some or all of a client’s OCGs in order to receive coveted legal work.”).

18. Davis & Fiedler, *supra* note 17, at 3 (noting that typical OCGs address such activities as conflicts of interest, billing, staffing, and data protection).

19. See Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers’ Ethics*, 80 FORDHAM L. REV. 2577, 2586–87 (2012).

20. See *id.* at 2586.

21. See, e.g., *Dr. Falk Pharma GmbH v. GeneriCo, LLC*, 916 F.3d 975, 982–84 (Fed. Cir. 2019).

22. See, e.g., O’Kelly E. McWilliams III & Jennifer Budoff, *When and How to Link ESG Metrics with Exec Compensation*, LAW360 (July 1, 2021, at 13:32 ET), <https://www.law360.com/articles/1398378/why-and-how-to-link-esg-metrics-with-exec-compensation> [<https://perma.cc/MP5M-ZDP4>] (“The Coca-Cola Co. recently made headlines when it updated its outside counsel guidelines to require that the U.S. law firms it uses take concrete steps toward promoting diversity internally.”); Christopher J. Whelan & Neta Ziv, *Law Firm Ethics in the Shadow of Corporate Social Responsibility*, 26 GEO. J. LEGAL ETHICS 153, 155 (2013) (analyzing OCGs “regarding diversity and flex time employment requirements, ethics and the justice system, ADR, and reporting and gate keeping”).

23. See, e.g., A.B.A. Comm. on Pro. Ethics, Formal Op. 512 (2024) (some OCGs require law firms to disclose use of AI); N.Y.C. Bar, Comm. on Pro. & Jud. Ethics, Formal Op. 2024-3 (2024) (some OCGs require disclosure of cybersecurity incidents and/or data breaches); Orange Cnty. Bar Ass’n Pro. & Ethics Comm., Formal Op. 2022-01 (2022) (some OCGs forbid law firms from publicly referring in marketing materials to information not covered by the confidentiality rules); Ryan Davis, *How Firms Can Avoid Conflicts Involving Corporate Affiliates*, LAW360 (Mar. 1, 2019, at 22:09 ET), <https://www.law360.com/articles/1134392/how-firms-can-avoid-conflicts-involving-corporate-affiliates>

are bedrock principles of the lawyer–client fiduciary relationship, embodied in the common law of agency and codified in the American Bar Association (“ABA”) Model Rules of Professional Conduct (“Model Rules”).²⁴ OCGs expand lawyers’ fiduciary obligations, especially the duty of loyalty, beyond what agency law and professional conduct rules require.²⁵ Such OCGs include those forbidding firms from representing the corporate client’s competitors, advocating on other clients’ behalf in favor of certain disfavored legal positions, and advocating adversely against any of the corporate client’s dozens or hundreds of affiliates.²⁶

These provisions vex corporate law firms and the organized bar because they limit the matters that the firms can undertake on other clients’ behalf. At various times, ethics committees of two leading bar associations as well as the American Law Institute asserted that lawyers may not properly assent to terms of an engagement agreement that compromise future clients’ access to counsel of choice and lawyers’ freedom to undertake other matters.²⁷ Regulatory authorities did not enforce this understanding, however, and corporate law firms did not cease agreeing to OCGs that restrict future legal work for other clients.

More recently, bolstered by the prior writings, the D.C. Bar urged the D.C. judiciary to amend its rules of professional conduct to establish conflict-of-interest rules as a ceiling on law firms’ fiduciary obligations.²⁸ The D.C. Bar’s principal premise was that existing conflict-of-interest rules provide as much protection as corporate clients legitimately need. The proposed amendment would have forbidden law firms from agreeing to terms of an engagement agreement that, by expanding fiduciary obligations to corporate clients, restricted firms’ ability to represent certain future clients or undertake certain future matters.²⁹ However, the D.C. judiciary

[<https://perma.cc/K4FM-M3A4>] (some OCGs stipulate that for purposes of conflict-of-interest rules, law firms represent all of the corporate client’s affiliates).

24. See *infra* notes 37–43 and accompanying text.

25. See Anthony E. Davis & Noah Fiedler, *The New Battle Over Conflicts of Interest: Should Professional Regulators—or Clients—Decide What Is a Conflict?*, 24 PRO. LAW., no. 2, 2017, at 44–47 [hereinafter Davis & Fiedler, *The New Battle Over Conflicts of Interest*]. This Article does not address a different type of provision of OCGs that law firms and the bar have found particularly troubling: provisions requiring law firms to indemnify corporate clients for losses or damages attributable to lawyers’ negligent acts or omissions. See Davis & Fiedler, *supra* note 17, at 4–5. Corporate clients might argue that these provisions reinforce lawyers’ fiduciary duty of competence by encouraging law firms to be more careful; whereas critics argue that these provisions might lead lawyers to act “based not on which [course] is best for the client, but on which is less likely to result in some loss to a third party for which the client might seek indemnification.” *Id.* at 6.

26. See Davis & Fiedler, *The New Battle Over Conflicts of Interest*, *supra* note 25, at 41–43. Corporations are not the only entities to employ OCGs such as these. Some public entities also do so. See, e.g., *Mauer v. State*, 333 A.3d 636, 642 (N.J. Super. Ct. App. Div. 2025) (citing New Jersey Attorney General’s OCGs restricting outside counsel retained by the State from representing private clients asserting positions inconsistent with the State’s interests).

27. See *infra* notes 81–93 and accompanying text.

28. See D.C. BAR REPORT, *supra* note 17 and accompanying text. For an earlier critique of the D.C. Bar’s proposals, see Mikki Weinstein, Note, *How Notions of Professional Independence Constrain Lawyers*, 35 GEO. J. LEGAL ETHICS 1183, 1184–85 (2022).

29. See *infra* note 96 and accompanying text.

rejected the Bar's proposed rule based on our argument (elaborated in Part II) that corporations sometimes have legitimate reasons to seek protections that conflict-of-interest rules do not provide.³⁰

A. The Baseline: Fiduciary Obligations in the Representation of Individual Clients

Traditionally, most lawyer–client relationships involved solo or small-firm practitioners serving individuals seeking assistance with business transactions, criminal defense, matrimonial cases, personal injury matters, or other legal matters.³¹ These clients typically lacked the power and sophistication to negotiate the terms of the representation beyond identifying the service to be provided and perhaps, seeking a reduction in the lawyer's standard fee.³² If the retention agreement was in writing, which it need not have been,³³ it was typically drafted by the lawyer without input from the client. Clients may have vaguely understood that their lawyers would function in accordance with a set of professional norms, but clients did not ordinarily ask for protections to be made explicit.

Even today, most individual clients accept the terms of standard form retainer agreements rather than negotiate the substantive protections of the lawyer–client relationship.³⁴ Many individuals are unaware of their rights in the relationship and are certainly less knowledgeable than the lawyers they consult.³⁵ Many rightly

30. D.C. Court of Appeals, Order No. M287-24, at 3 (May 14, 2025) (“[T]he court is not persuaded that the RPC should broadly make unethical any engagement or similar agreement that restricts the lawyer’s right to practice beyond the limitations imposed by the conflict rules. First, the comment from the law professors persuasively indicates that such agreements can sometimes be reasonable.”).

31. An influential study of the Chicago Bar distinguished between the corporate and individual hemispheres of the legal profession. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319–20 (1982). See Eli Wald, *Formation Without Identity: Avoiding a Wrong Turn in the Professionalism Movement*, 89 UMKC L. REV. 685, 693 (2021) (noting that the corporate hemisphere is largely comprised of graduates of elite law schools “practicing at in-house legal departments and in large law firms . . . primarily specializing in business law areas and serving large entity clients”; whereas the individual hemisphere “typically features lawyers educated in non-elite law schools, practicing in solo and relatively small-size law firms,” representing mostly individuals “in areas such as criminal law, torts, and family law”).

32. See David B. Wilkins, *Everyday Practice Is the Troubling Case: Confronting Context in Legal Ethics*, in EVERYDAY PRACTICES AND TROUBLE CASES 68, 70–79 (Austin Sarat et al. eds., 1998).

33. Even today, professional conduct rules do not generally require the client’s retention of counsel to be memorialized in writing. See MODEL RULES OF PRO. CONDUCT r. 1.5(b) (A.B.A. 2023) (requiring that a lawyer communicate the scope of the representation and the lawyer’s fee “preferably in writing”). The rules require contingent fee agreements to be in writing, however. *Id.* r. 1.5(c).

34. See, e.g., Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 201 (2010).

35. Cf. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 18 cmt. e (A.L.I. 2000) (“A client might hesitate to resist or even to suggest changes in new terms proposed by the lawyer, fearing the lawyer’s resentment or believing that the proposals are meant to promote the client’s good.”).

perceive that their lawyers hold the power in the relationship, given the prospective clients' dependence on a skilled practitioner to protect their liberty, property, or other important interests.³⁶ They may also assume that as licensed and regulated professionals, lawyers can be trusted to treat them fairly.

It was in the context of lawyers' work for individuals that lawyers' fiduciary obligations under the common law of agency were initially elaborated. The principal fiduciary obligations, and the ones that corporate clients would later seek to expand, are the duties of loyalty (which includes a duty to avoid conflicts of interest), competence, confidentiality, and candor.³⁷ These agency-law understandings have had a central place in the contemporary professional conduct codes—the 1969 Model Code of Professional Responsibility³⁸ and the 1983 Model Rules.³⁹

From an agency-law perspective, individual clients' deference, dependence, and trust are not misplaced because, as agents of clients, lawyers assume fiduciary duties.⁴⁰ In the absence of negotiation where permitted, these duties become terms of the lawyer–client relationship for the protection of clients, who are the principals in the agency relationship.⁴¹ The fiduciary duties to represent clients competently, to preserve clients' confidences, to communicate candidly, and to avoid conflicts of interest govern lawyers' obligations to clients even—indeed, especially—if there are no discussions other than about what the lawyer will do and for what fee.⁴² Disciplinary enforcement of state professional conduct rules codifying lawyers' fiduciary duties gives teeth to lawyers' contractual and agency obligations. The risk of discipline encourages adherence by lawyers whose clients

36. Various rules and laws governing the lawyer–client relationship are premised on the imbalance of power between lawyers and their clients. *See, e.g.*, *Stender v. Blessum*, 897 N.W.2d 491, 518 (Iowa 2017) (Hecht, J., dissenting) (“A power imbalance between lawyers and their clients—often arising from clients' vulnerable personal and financial positions—tends to significantly undermine the consensual aspects of sexual relationships between them.”).

37. For discussions of lawyers' fiduciary duties to clients under agency law, see, for example, Bruce A. Green, *The Lawyer as Lover: Are Courts Romanticizing the Lawyer-Client Relationship*, 32 *TOURO L. REV.* 139, 143–45 (2016).

38. *See, e.g.*, MODEL CODE OF PRO. RESP. DR 1-101, 4-101, 5-101, 5-105 (A.B.A. 1980).

39. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.1, 1.4, 1.6, 1.7 (A.B.A. 2023).

40. *See, e.g.*, *Delaney v. Dickey*, 242 A.3d 257, 268 (N.J. 2020) (“The foundation of the attorney-client relationship, like any fiduciary relationship, is trust and confidence. The client places trust and confidence in the attorney, expecting that the attorney will use his or her superior expertise, knowledge, training, and judgment for the client's benefit.” (citations omitted)).

41. *Cf.* Deborah A. DeMott, *The Lawyer as Agent*, 67 *FORDHAM L. REV.* 301, 317 (1998) (observing that as compared with other agency relationships, “the relationship between the lawyer and the client is less susceptible to an agreement that varies the lawyer's duty of loyalty to the client.”).

42. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 16 (A.L.I. 2000).

may lack the wherewithal to enforce lawyers' obligations through civil lawsuits for breach of contract, breach of fiduciary duty, or professional negligence.⁴³

With respect to conflicts of interest, early law and rules were most concerned with three situations: first, where the lawyer jointly represented two or more clients in the same matter;⁴⁴ second, where the lawyer advocating against a former client was in a position to exploit the former client's confidential information;⁴⁵ and third, where the representation implicated the lawyer's own financial interests.⁴⁶ The concept of loyalty in these conflict-of-interest situations is closely tied to competence and candor. It would be disloyal to pursue the interests of another because doing so creates a risk that as a result, the lawyer will represent the client inadequately or prejudice the client. And it would be a breach of candor to withhold the circumstances establishing a conflict of interest or to fail to explain their significance, thereby denying the client the opportunity to object or to assume the risk and making it likely that the client will feel betrayed when the facts later emerge.⁴⁷

This original understanding of loyalty was thus relatively thin. Lawyers were not closely bound to, or identified with, the client. They could act adversely to the client (such as by representing an opposing litigant) once the representation was over, unless the client's confidential information would thereby be exploited or jeopardized, or the lawyer would be undermining the work originally performed for the client. As Daniel Bussel has shown, even while the representation was ongoing, lawyers could generally represent opposing parties in other, unrelated matters.⁴⁸ In other words, a lawyer owed loyalty to the client only within the narrow confines of the matter in which the lawyer was engaged.

Although professional conduct rules have never expressly codified or defined the duty of loyalty,⁴⁹ gradually, conflict-of-interest rules have expanded agency law's conception of loyalty. Based on a smattering of judicial decisions and

43. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 879–81 (1992) (showing that corporate clients have greater access than individual clients to mechanisms other than the disciplinary process to control lawyers' conduct).

44. See, e.g., *Arrington v. Arrington*, 21 S.E. 181, 185 (N.C. 1895) (“[T]he rule which forbids the same attorney from representing both parties in adversary proceedings rests upon the broad principle of public policy, which precludes persons occupying these fiduciary relations from representing conflicting interests that may tempt them to disregard duty and lead to injury on one side or the other.” (quoting *Gooch v. Peebles*, 11 S.E. 415, 421 (N.C. 1890))).

45. See, e.g., *Weidekind v. Tuolumne Cnty. Water Co.*, 19 P. 173, 173–74 (Cal. 1887) (finding that the trial judge properly forbade a lawyer from switching sides to use the former client's confidences to benefit the new client).

46. See, e.g., *Hughes v. Willson*, 26 N.E. 50, 51 (Ind. 1890) (“It is a well-known rule that the attorney shall not, in any way whatever, in respect of any professional transaction between him and his client, make gain or profit for himself at the expense of his client, beyond the amount of his just and fair professional compensation.”).

47. See, e.g., *In re Boivin*, 538 P.2d 171, 174–75 (Or. 1975).

48. Daniel J. Bussel, *No Conflict*, 25 GEO. J. LEGAL ETHICS 207, 210 (2012).

49. Robert P. Lawry, *The Meaning of Loyalty*, 19 CAPITAL U. L. REV. 1089, 1089 (1990) (“[T]he concept [of loyalty] is not defined or explicated in any of the various codes of ethics . . .”).

bar association opinions, the ABA adopted a model rule, later incorporated into most states' professional conduct rules, to forbid lawyers from undertaking other, unrelated representations directly adverse to current clients.⁵⁰ Initially, this meant that a lawyer or law firm could not litigate against a current client, but eventually the restriction was broadly interpreted to forbid lawyers from negotiating for a party in a transaction against a current client.⁵¹ The rule's premise is only partly predicated on loyalty, that is, on the recognition that clients may justifiably feel betrayed if their lawyers advocate or negotiate against them.⁵² The principal concern is with the impact on the lawyer's ability to achieve the client's objectives: the lawyer's apparent disloyalty will lead clients to be mistrustful, and therefore hesitant to confide in the lawyer or accept the lawyer's advice, to the ultimate detriment of the representation.⁵³

B. Modifying Fiduciary Protections

Because the lawyer–client relationship is established by contract, the parties are generally free to negotiate the terms of the relationship. Agency law establishes terms in the absence of contrary agreement, but fiduciary duties established by agency law are default rules.⁵⁴ In other words, these duties set the terms in the absence of contrary agreements, and the parties may freely agree to alter them or dispense with them.

Professional conduct rules, which both augment and shape the common law as applied to lawyers, limit the role of fiduciary duties as default rules.⁵⁵ But they explicitly do so in only one direction. Because the rules assume that individual

50. Bussel, *supra* note 48, at 217–21. The relevant rule provides that except with the client's informed consent, "a lawyer shall not represent a client if the representation involves a concurrent conflict [which includes where] the representation of one client will be directly adverse to another client." MODEL RULES OF PRO. CONDUCT r. 1.7(a)(1). The restriction generally applies equally to other lawyers in the law firm. *Id.* r. 1.10(a).

51. See MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 7 (A.B.A. 2023) ("Directly adverse conflicts can also arise in transactional matters.").

52. *Id.* r. 1.7 cmt. 6 ("The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively.").

53. *Id.*

54. See, e.g., RESTATEMENT (SECOND) OF AGENCY § 390 (A.L.I. 1958) (providing that the principal may consent to an agent's acting as an adverse party). On the role of professional conduct rules as default rules, see generally Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665 (2001) (discussing a trend toward replacing immutable rules with default rules). On the role of conflict rules in particular as default rules, see Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 IOWA L. REV. 965, 965–67 (1997); Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 292–95 (2000).

55. See, e.g., MODEL RULES OF PRO. CONDUCT r. 1.7(b)(1) (A.B.A. 2023) (noting that a lawyer with a concurrent conflict of interest may not accept the client's consent to the representation unless "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation"); *id.* r. 1.8(c) (noting that even with the client's consent, a lawyer may not prepare an instrument on behalf of the client giving the lawyer a substantial gift, unless the client is related to the lawyer).

clients are weak vis-à-vis their powerful lawyers and vulnerable to abuse,⁵⁶ the conflict rules restrict lawyers from negotiating to give clients less fiduciary protection than afforded by agency law and the rules themselves. For example, the rules allow a lawyer to accept the client's decision to forgo conflict-of-interest protection but only if the risk that the lawyer will give substandard representation is not significant and the client gives "informed consent."⁵⁷

The limitation on the parties' freedom to contract away the conflict protections recognizes that it may be unreasonable for clients to forgo the rules' protection because the risk to the quality of the representation may be too high or because the client's decision is likely ill-informed or coerced.⁵⁸ The legal profession has an interest in protecting clients from improvident agreements about the terms of the representation. But conflict protections are not entirely nonnegotiable because clients may benefit from sacrificing some of their protection. Sometimes a client might reasonably accept the risk created by joint representation to benefit from sharing legal fees or to receive the strategic benefit of a united front in litigation. Or a client might reasonably forgo measures protecting the confidentiality of the client's information.⁵⁹ Likewise, although the rules do not permit clients to agree to accept incompetent representation, they often allow a client to make an informed decision to limit the scope of the representation, accepting legal services that might otherwise be regarded as incomplete and therefore incompetent.⁶⁰ These provisions largely give priority to the parties' freedom to contract regarding the extent of fiduciary protections, but they protect clients from entirely bargaining away protections that are essential to ensure that they receive the service they seek—namely, the lawyer's competent completion of a defined legal task. If the client accepts too great a risk, or forgoes competent representation altogether, it will be presumed that the lawyer has taken unfair advantage of a vulnerable, unsophisticated client or that the client made an irrational decision.

Not surprisingly, clients may negotiate for *greater* fiduciary protections, since the fiduciary protections of agency law and professional conduct rules are intended to benefit clients, not lawyers.⁶¹ Historically, there was no reason for the rules to protect lawyers from overreaching clients. The professional conduct rules

56. Wilkins, *supra* note 32.

57. MODEL RULES OF PRO. CONDUCT r. 1.7(b)(1), (4) (A.B.A. 2023) (providing that notwithstanding a concurrent conflict of interest, "a lawyer may represent a client if . . . the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client . . . [and] each affected client gives informed consent, confirmed in writing.").

58. See RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 122 cmt. g(iv) (A.L.I. 2000) ("Concern for client autonomy generally warrants respecting a client's informed consent. In some situations, however, joint representation would be objectively inadequate despite a client's voluntary and informed consent.").

59. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 18 (A.B.A. 2023).

60. *Id.* r. 1.2(c); see, e.g., Donald R. Lundberg & Caitlin S. Schroeder, *The Ethics of Serving as Local Counsel*, RES GESTAE, May 2019, at 7 ("Limiting the role of local counsel when the client has primary counsel is certainly a reasonable limitation.").

61. *Udall v. Littell*, 366 F.2d 668, 676 (D.C. Cir. 1966) ("[A] formal long-term contract, superimposed on the normal attorney-client relationship, alters the relationship only by adding new dimensions of duties and obligations on the attorney.").

set minimum standards for lawyers' conduct—the floor beneath which lawyers may not sink without being sanctioned.⁶² They generally allow lawyers to be more protective of clients. For example, lawyers may provide more than the minimally competent representation that the rules demand and may agree in advance to provide more skilled representation.⁶³

Further, the rules acknowledge some ways in which lawyers may agree to expand or build on the minimal protections embodied by agency law and related rules. For example, although the confidentiality rule requires a lawyer only to “make reasonable efforts to prevent the inadvertent or unauthorized disclosure of” confidential information,⁶⁴ a client may “require the lawyer to implement special security measures not required by this Rule.”⁶⁵ Similarly, while the confidentiality rule generally permits lawyers to share confidential client information with other lawyers in their firm on the theory that the client has impliedly authorized them to do so, a client may demand greater protection by “instruct[ing] that particular information be confined to specified lawyers.”⁶⁶

Likewise, decisional law presupposes that the lawyer may agree to offer greater protections than default rules might require. For example, the ordinary standard of competence for purposes of professional negligence is the standard of care of an ordinary practitioner in the community.⁶⁷ But lawyers may agree to provide a higher quality of work. Indeed, they do so impliedly when they hold themselves out as experts or specialists, in which case they are tacitly agreeing to provide at least the quality of service that an expert or specialist would provide.⁶⁸

Of course, the professional conduct rules set some limits on expanding fiduciary protections. A lawyer may not agree to provide fiduciary protections to one client that violate obligations to another client or that violate rules designed to protect third parties or the public. For example, a law firm may not agree to expand its candor obligations to one client in a way that violates confidentiality duties to other clients or former clients.⁶⁹ Likewise, a lawyer may not agree to expand confidentiality protections by promising never to rectify the client's false

62. Neil Hamilton, Madeleine Coulter & Marie Coulter, *Professional Formation/Professionalism's Foundation: Engaging Each Student's and Lawyer's Tradition on the Question "What Are My Responsibilities to Others?"*, 12 U. ST. THOMAS L.J. 271, 274 (2016) (“The legal profession has created a ‘floor’ of rules regarding responsibilities to the client and to the legal system. A ‘floor’ defines conduct below which the profession will discipline a lawyer. . .”).

63. See, e.g., *Selene Fin., LP v. Malcolm & Cisneros*, No. 23-CV-01124-DJC-CKD, 2025 WL 2402823, at *9 (E.D. Cal. Aug. 19, 2025) (“When a lawyer holds himself out as a specialist in an area of law, then he [is] bound by the skill and diligence other specialists would exercise.”).

64. MODEL RULES OF PRO. CONDUCT r. 1.6(c) (A.B.A. 2023).

65. *Id.* r. 1.6 cmt. 18.

66. *Id.* r. 1.6 cmt. 5.

67. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 52 (A.L.I. 2000).

68. See *Udall v. Littell*, 366 F.2d 668, 676 (D.C. Cir. 1966).

69. Recognizing this, the D.C. Bar's ethics committee condemned OCGs that would require lawyers to disclose impending conflicts of interest when doing so would betray another client's confidences. D.C. Bar Legal Ethics Comm., Op. 383 (2022).

testimony.⁷⁰ Other limitations may be implicit. For example, a lawyer probably could not commit never to disclose confidential information to prevent a third party's death or to prevent or rectify a client's fraud in which the client engaged the lawyer.⁷¹

C. OCGs: Corporate Clients' Expansion of Fiduciary Protections

OCGs reverse the trend in individual representations in which the lawyer drafts the retainer agreement and the client either accepts it or raises minor questions. Many corporate clients now dictate various terms of the attorney–client relationship. One objective of OCGs is to establish standards of conduct for outside counsel by expanding lawyers' fiduciary duties beyond what is required under agency law and the rules of professional conduct.⁷² Some expand on law firms' loyalty obligations by limiting the law firms' ability to represent other clients where other representations might be regarded as disloyal, while others expand on law firms' confidentiality and disclosure obligations where other representations might put the client's confidential information or accomplishing the client's objectives at risk.⁷³

These OCGs function like the converse of the “advance waiver” provisions that powerful law firms pioneered several decades ago.⁷⁴ At that time, law firms with leverage over prospective clients began exploiting the provisions of conflict-of-interest rules that allow clients, within limits, to forego the rules' protection. Law firms began asking clients to agree before the representation commenced that the firms could represent adverse parties in the future, including parties that were not yet clients in matters that had not yet eventuated.⁷⁵ Law firms incorporated advance or future waiver provisions into their engagement letters or as addendums. When conflicts later arose, firms initially used the provisions to try to persuade corporate clients not to object. When corporate clients did object, firms could often be expected to relent to avoid disqualification motions, both because there were

70. See MODEL RULES OF PRO. CONDUCT r. 3.3(a)(3) (A.B.A. 2023) (requiring “reasonable remedial measures” when the lawyer's client testifies falsely).

71. See Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 285 (2006) (“It would thus be improper for a lawyer to treat the future harm exception as a default rule and to bargain at the outset of the representation never to reveal client wrongdoing, or to decide categorically never to disclose client wrongdoing as permitted by the rule, because doing so would derogate third-party interests that the rule protects.”); see also N.Y.C. Bar Comm. on Pro. Ethics, Formal Op. 2025-4 (2025) (“Even if attorneys sometimes enter into agreements that contractually limit their discretion, they must still exercise independent professional judgment where the Rules explicitly give them such discretion.”).

72. See Amy E. Richardson, Hilary P. Gerzhoy & Lauren E. Snyder, *Ethical Implications of Outside Counsel Guidelines*, BLOOMBERG L.: PRAC. GUIDANCE (Oct. 2019), <https://www.bloomberglaw.com/external/document/X69VE094000000/litigation-professional-perspective-ethical-implications-of-outs> [<https://perma.cc/V5SA-VTRZ>].

73. See Davis & Fiedler, *The New Battle Over Conflicts of Interest*, *supra* note 25.

74. See Michael J. DiLernia, *Advance Waivers of Conflicts of Interest in Large Law Firm Practice*, 22 GEO. J. LEGAL ETHICS 97, 97–102 (2009); Jonathan J. Lerner, *Honoring Choice by Consenting Adults: Prospective Conflict Waivers as a Mature Solution to Ethical Gamesmanship—A Response to Mr. Fox*, 29 HOFSTRA L. REV. 971, 988–92 (2001).

75. See sources cited *supra* note 74.

business reasons not to antagonize the corporate client and because courts might not regard the earlier consent as adequately informed.

The use of advance waivers increased, however, after they were endorsed by the D.C. Bar, the New York City Bar, and the ABA⁷⁶—three of the most influential bar associations—along with the American Law Institute in its Restatement.⁷⁷ Although the rules frown on open-ended advanced waivers—except in the case of sophisticated corporate clients⁷⁸—and some courts remain skeptical of them even when employed with sophisticated clients,⁷⁹ elite law firms have selectively used them in their engagement agreements and later relied on them in opposition to disqualification motions.⁸⁰

Increasingly, however, it is the corporate client that has the leverage, which is why OCGs are becoming as prevalent as advance waivers. When the corporation is offering lucrative legal business or the promise of lucrative business down the road and has abundant choices where to take its business, the law firm may be put to the hard decision of whether to resist an OCG provision that will limit its freedom to accept future clients to a greater extent than the law otherwise contemplates.

D. The Bar's Failed Attempt to Forbid Agreements that Limit Future Representations

Around three decades ago, some bar associations began worrying that prospective corporate clients took their negotiating power too far. These were the same bar associations that most strongly endorsed advance waivers, which contract away fiduciary protections based on a charitable conception of informed consent. The bar sought a way to push back. Professional conduct rules could not forbid clients from presenting OCGs, but rules could forbid lawyers from accepting them.

In 1994, the ABA's ethics committee, which publishes opinions interpreting the Model Rules, considered "whether a corporation's in-house counsel may offer or an outside lawyer may accept an agreement making the representation in a specific matter contingent upon an agreement by the outside lawyer never to represent anyone against the corporation in the future."⁸¹ The agreement would expand on the protection that Rule 1.9(a) affords to a former client's confidential

76. See D.C. Bar Legal Ethics Comm., Op. 309 (2001); N.Y.C. Bar Comm. on Pro. Ethics, Op. 2006-1 (2006); MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 22 (A.B.A. 2002).

77. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 122 cmt. d (A.L.I. 2000).

78. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 22 (A.B.A. 2023) (noting that "general and open-ended . . . consent ordinarily will be ineffective," but consent is more likely to be effective "if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise.").

79. See, e.g., *McKesson Info. Solutions, Inc. v. Duane Morris, LLP*, No. 2006CV121110, 2006 WL 6627812, at *11 (Ga. Super. Ct. Nov. 8, 2006) (finding that an advance waiver inadequate "because it is not a knowing waiver that identifies the specific adverse clients and details of adverse representation.").

80. See, e.g., *Macy's Inc. v. J.C. Penny Corp.*, 107 A.D.3d 616, 616 (N.Y. App. Div. 2013).

81. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 94-381 (1994) [hereinafter A.B.A. Opinion 94-381].

information. Under this rule, a lawyer may not accept a representation adverse to a former client if the matter is “substantially related” to the former representation.⁸² Codifying a restriction that courts developed in cases where lawyers litigated against former clients,⁸³ Rule 1.9(a) reduces the risk that the lawyer will use the former client’s confidential information for the new client’s benefit.⁸⁴ The agreement considered by ABA Opinion 94-381 expanded Rule 1.9(a) by “prohibiting the lawyers involved from representing others in any matter adverse to the corporation, even if that matter were unrelated to any representation of the corporation in which the lawyers had been involved.”⁸⁵

Opinion 94-381 concluded that “[a] lawyer may not ethically ask for nor may a lawyer agree to any further restriction unnecessarily compromising the strong policy in favor of providing the public with a free choice of counsel.”⁸⁶ It reasoned, in part, that the client has no legitimate interest in the further restriction: “While a current client’s interests should assume a certain priority for the lawyer, the extent of those interests that continue to have a claim on the lawyer after the lawyer–client relationship is terminated is defined by the scope of the restriction contained in Model Rule 1.9.”⁸⁷ The opinion also reasoned that the agreement would encroach on the lawyer’s “professional autonomy” and “the freedom of clients to choose a lawyer.”⁸⁸ These are the interests underlying Rule 5.6, titled “Restrictions on Right to Practice,” which generally forbids a lawyer from making “a partnership . . . or other similar type of agreement” that restricts the right of a lawyer to practice after termination of the relationship.⁸⁹ According to the ethics opinion, the agreed-on restriction would be “an overbroad and impermissible restriction on the right to practice.”⁹⁰

In 2000, the American Law Institute’s Restatement of the Law Governing Lawyers endorsed and expanded on the ABA ethics committee’s opinion, which had focused on protection of the client’s confidential information. A Comment to the Restatement suggested that lawyers may not agree to *any* conflict-of-interest protections that further restrict lawyers’ future practices.⁹¹ In other words, according

82. MODEL RULES OF PRO. CONDUCT r. 1.9(a) (A.B.A. 2023).

83. Charles W. Wolfram, *Former-Client Conflicts*, 10 GEO. J. LEGAL ETHICS 677, 677–78 (1997).

84. *Id.* at 685–91.

85. A.B.A. Opinion 94-381, *supra* note 81.

86. *Id.*

87. *Id.*

88. *Id.*

89. MODEL RULES OF PRO. CONDUCT r. 5.6(a) (A.B.A. 2023). Although this provision addresses agreements among and between lawyers, not between lawyers and clients, an accompanying Comment explains in relevant part: “An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer.” *Id.* r. 5.6 cmt. 1.

90. A.B.A. Opinion 94-381, *supra* note 81.

91. RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 19 cmt. e (A.L.I. 2000) (“Nor could the contract [calling for more onerous obligations on the lawyer’s part] contravene public policy, for example by forbidding a lawyer ever to represent a category of plaintiffs even were there no valid conflict-of-interest bar . . . or by forbidding the lawyer to

to the Restatement, existing conflict rules—including those establishing loyalty and competence protections—establish the limits on fiduciary protections that restrict lawyers’ future clientele, and any additional contractual restriction contravenes public policy.

The same policy concerns were invoked by the New York City Bar’s ethics committee in 2007.⁹² Opinion 2007-3 acknowledged that a lawyer and client may expand fiduciary protections by specifying which affiliates will be regarded as clients, but it cautioned that

“[A] lawyer may not ask for nor may a lawyer agree to any . . . restriction unnecessarily compromising the strong policy in favor of providing the public with a free choice of counsel.” Thus, the law firm and client should be mindful of entering into an agreement which places excessive restrictions on the lawyer’s right to practice, for example, by restricting the law firm from any representation adverse to hundreds of corporate affiliates, both here and abroad.⁹³

These writings did not discourage law firms from agreeing to OCGs. Concerned that the practice continued unabated, a D.C. Bar committee sought to employ the rulemaking process to forbid lawyers from agreeing to restrictive OCGs under penalty of professional discipline. After soliciting comments in May 2019 and circulating a draft report in 2020,⁹⁴ the committee published a final report in 2022,⁹⁵ which the D.C. Bar adopted and forwarded to the D.C. Court of Appeals asking it to amend the D.C. Rules of Professional Conduct. A proposed addition to Rule 5.6 would bar lawyers from entering into “[a]n engagement agreement or other agreement addressing terms of a representation in which a restriction on the lawyer’s right to practice is broader in scope than required by the conflict of interest elements of these rules or by other law.”⁹⁶ Additionally, the report proposed deleting an existing Comment that not only permitted lawyers to agree to restrictions broader than the conflict rules but subjected lawyers to discipline for violating these agreements.⁹⁷ In its place, a new Comment would explain that “[i]n light of the

speak on matters of public concern whenever the client disapproves.”); *id.* § 19 cmt. e, reporter’s note (citing A.B.A. Opinion 94-381, *supra* note 81).

92. N.Y.C. Bar Comm. on Pro. & Jud. Ethics, Formal Op. 2007-3 (2007).

93. *Id.* (quoting A.B.A. Opinion 94-381, *supra* note 81).

94. D.C. BAR RULES OF PRO. CONDUCT REV. COMM., DRAFT REP. PROPOSING CHANGES TO THE D.C. RULES OF PRO. CONDUCT RELATING TO CLIENT-GENERATED ENGAGEMENT LETTERS AND OUTSIDE COUNS. GUIDELINES 3–5 (Nov. 2020) [hereinafter DRAFT REPORT], <https://www.dcbar.org/getmedia/47f95789-27ca-4369-bbf4-3cab2097c32e/Draft-Report-on-OCGs-for-comment-11-12-2020-FN> [https://perma.cc/8LNS-SCX7].

95. D.C. BAR REPORT, *supra* note 17.

96. *Id.* at 24.

97. The then-existing Comment 25 to D.C. Rule 1.7 provided that conflict rules are subject to any contrary agreement or other understanding between the client and the lawyer. In particular, the client has the right by means of the original engagement letter or otherwise to restrict the lawyer from engaging in representations otherwise permissible under the foregoing guidelines. If the lawyer agrees to such restrictions in order to obtain or keep the client’s business, any such agreement between client and lawyer will take precedence over these guidelines.

strong policy in favor of providing a free choice of counsel,” the conflict rules “establish the maximum scope of conflicts in the context of a lawyer’s representation of an organization client.”⁹⁸

The D.C. Bar justified its proposal in two principal ways. First, it drew on lawyers’ comments to the effect that clients had no legitimate reasons for expanding on the protections of the conflict rules.⁹⁹ Evidently, the D.C. Bar committee had not elicited comments from corporations themselves,¹⁰⁰ and corporations’ outside counsel made little effort to defend clients’ OCGs.¹⁰¹ Second, the D.C. Bar’s report asserted that OCGs upset the careful balancing between clients’ interests in fiduciary protections of loyalty and confidentiality and in “allowing clients and lawyers latitude to contract with one another as they see fit,” and the countervailing interests in clients’ “access to legal services” and in “the independence of lawyers.”¹⁰²

In May 2025, after inviting comment on the D.C. Bar’s report, the D.C. Court of Appeals issued an order addressing these and other proposed amendments to the professional conduct rules.¹⁰³ Although it accepted some proposals, the court rejected the D.C. Bar’s proposal to “make it ethically impermissible for a lawyer to enter into an engagement or similar agreement that restricts the lawyer’s right to practice beyond the limitations imposed by the conflict rules.”¹⁰⁴ The court stated that it had received only two comments on the proposal, one from the Law Firm General Counsel Roundtable favoring it, and the other from two legal ethics professors (the co-authors of this Article) “arguing that (1) clients can have legitimate reasons for asking lawyers to agree to such restrictions; (2) such agreements have not been shown to actually interfere with the ability of clients to obtain legal representation; and (3) the proposed amendments are overbroad.”¹⁰⁵ Finding our comment persuasive, the court declined to adopt the D.C. Bar’s proposed rule on conflicts of interest.¹⁰⁶ However, the court amended the Comment to Rule 1.7 to provide that lawyers are not subject to discipline for violating an agreement that expands on the conflict rule.¹⁰⁷ Additionally, it added a precatory Comment to Rule 5.6 acknowledging that some agreements could go too far in expanding on the conflict rules.¹⁰⁸

Id.

98. *Id.* at 25.

99. *Id.* at 9–10.

100. DRAFT REPORT, *supra* note 94, at 3.

101. *Id.* at 3–4.

102. D.C. BAR REPORT, *supra* note 17, at 1.

103. D.C. Court of Appeals, Order No. M287-24 (May 14, 2025).

104. *Id.* at 1, 8.

105. *Id.* at 1–2.

106. *Id.* at 2–3.

107. The Court replaced the existing Comment 25 with one providing the following: “Agreements between a lawyer and a client precluding representation of other clients in circumstances that do not preclude representation under R. 1.7 through 1.12 will not expand the scope of those rules.” *Id.* at 2, 8.

108. The new Comment 4 provides that other than when a lawyer agrees to work exclusively for a single client,

II. WHY CONFLICT RULES DO NOT, AND SHOULD NOT, SET THE LIMIT ON LAWYERS' FIDUCIARY DUTIES

Underlying the D.C. Bar's rejected proposal were claims about the conflict-of-interest rules: that the conflict rules fully protect clients' legitimate interests and that the extent of their protection is limited by important countervailing interests in lawyers' autonomy and in future clients' choice of counsel. When other bar associations had previously made these assertions, they were not interrogated.

Elaborating on our submission to the D.C. Court of Appeals, this Part interrogates the D.C. Bar's premises with several objectives in mind. The analysis underscores unique aspects of the corporate attorney–client relationship and of corporate clients' expectations regarding the relationship. The analysis also provides a better understanding of the conflict rules and of their potential limitations from corporate clients' perspective.

Our examination shows the inadequacy of the D.C. Bar's justifications for the proposed rule. Section A shows that corporate clients may have legitimate reasons to expand on the rules' fiduciary protections, while Section B shows that the asserted countervailing interests are unconvincing. These insights raise a further question to which we devote the next Part of the Article: if the D.C. Bar's opposition to OCGs is not adequately explained by its stated reasons, is there a better explanation for it?

A. Corporate Clients' Interests in Expanding Fiduciary Protections

Conflict-of-interest rules capture situations where lawyers might subordinate clients' interests to other interests. For example, the conflict rules cover a lawyer's representation of two or more clients in the same matter because of the risk that the lawyer will favor one client's interests over those of another.¹⁰⁹ The rules also address situations where lawyers may favor their own personal interests over those of their clients.¹¹⁰ But these are not the situations where corporate clients are most likely to consider the rules to be underprotective and try to bargain for more. Clients with desirable legal business seek to exploit their leverage to expand on two other rules: Rule 1.9(a), which protects former clients' confidentiality interests by precluding lawyers from accepting representations where they would have the ability, opportunity, and incentive to use or disclose the former client's

a lawyer should not agree to restrictions a client seeks to place on the lawyer's ability to represent other individuals or entities whose representation is not otherwise precluded by these rules if those restrictions would unduly interfere with the general ability of clients to obtain lawyers or lawyers' ability to engage in public service or would undermine the integrity of the profession.

Id. at 3, 9.

109. See MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2) (A.B.A. 2023). A body of Sixth Amendment caselaw addresses this situation in the criminal defense context. See, e.g., *Cuyler v. Sullivan*, 446 U.S. 335, 345–50 (1980).

110. See, e.g., MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2), 1.8(a) (A.B.A. 2023).

confidential information;¹¹¹ and Rule 1.7(a)(1), which forbids a lawyer or law firm from representing the current client's direct adversary.¹¹²

Both rules are expressly subject to negotiation—at least in one direction—because they are potentially overprotective. With the informed consent of the former or current client, a lawyer may sometimes undertake an otherwise-forbidden representation.¹¹³ The client's consent, or “conflict waiver,”¹¹⁴ is not ordinarily meant to permit or condone breaches of loyalty or confidentiality but reflects a recognition that the rules are sometimes more protective than necessary to assuage a client's concerns. For example, a current litigation client may not perceive that its law firm is being disloyal when the firm's lawyers represent an opposing party in an unrelated matter, particularly a transactional matter. Or a former client may acknowledge that with adequate screening of the lawyers who previously represented the client, a law firm can represent the former client's opponent without misusing confidential information. Of course, when the law firm is especially well-qualified in a highly specialized field or when there are other advantages to retaining a particular firm, a client may sacrifice the conflicts rules' protections and tolerate some perceived disloyalty or accept some risk to confidential information to secure the desired law firm's services.

Conversely, it may sometimes be reasonable for clients to regard the conflict rules as underprotective. Clients may have a more expansive conception of loyalty or confidentiality than that of the conflict rules and therefore seek further limits on their lawyers' future clientele.¹¹⁵ We focus first on three agreements that opponents of OCGs argue have no legitimacy, namely, agreements by law firms to not (1) represent the client's business rival, (2) oppose the legal position they are advocating for the client, and (3) oppose the client's affiliates. We then briefly offer examples of restrictions that promote corporate clients' legitimate interests in confidentiality and competence. Together, these show that corporate clients' interests are not fully protected by existing rules. These rules are derived from the nineteenth-century paradigm in which the typical client was an individual represented on a one-off or episodic basis by an outside counsel serving multiple

111. See *supra* notes 81–88 and accompanying text.

112. See *supra* notes 50–53 and accompanying text.

113. In the case of a representation that is directly adverse to a current client, the lawyer needs both clients' informed consent. See MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 6 (A.B.A. 2023).

114. See *id.* r. 1.7 cmt. 22. The Rules primarily refer to clients' consent, while lawyers colloquially refer to waivers. Increasingly, secondary authority, including bar associations' ethics opinions, refer to waivers.

115. Agreements expanding on the rules' protection do not necessarily require lawyers to decline certain future representations. For example, professional conduct rules require lawyers to “make reasonable efforts” to prevent others from obtaining unauthorized access to the client's confidential information, but a client might negotiate for greater than ordinary protective measures. See *id.* r. 1.6 cmts. 18, 19; see, e.g., Complaint ¶¶ 24–32, *Hiscox Ins. Co. v. Warden Grier, LLP*, 474 F. Supp. 3d 1004 (W.D. Mo. 2020) (No. 20-cv-00237) (explaining that an insurance company alleged that its law firm breached its agreement to take particular care in protecting the insurer's highly sensitive confidential information).

clients in the community. They do not invariably satisfy contemporary corporations' expectations.

1. Representing Business Rivals

Rule 1.7 recognizes that conceptions of loyalty vary among clients and that clients that do not perceive their lawyers' direct adversity to them to be an act of betrayal may give informed consent to it.¹¹⁶ But the converse is also true: some clients may think the rule fails to adequately protect their expectations of loyalty. They may therefore try to negotiate for more.¹¹⁷ An obvious example is where a corporate client asks its lawyers not to represent its business rival, such as where a major national company that sends millions of dollars in legal business to its regular outside counsel asks the law firm to agree not to represent the company's chief competitors in any matter. For example, Coke might wish to secure its outside counsel's promise not to represent Pepsi while the firm is still employed by Coke. This restriction is not primarily designed to protect the client's confidence, since it would extend to matters that do not implicate the client company's confidential information. And it demands more than Rule 1.7(a)(1) because it extends to situations where the two rivals are not directly opposed. Under the agreement, for example, Coke's outside counsel could not assist Pepsi in purchasing property in which Coke has no interest, even though this real estate work would not prejudice Coke except perhaps in the sense that assisting Pepsi, however marginally, enhances Pepsi's ability to compete with Coke.

Such a restriction can be explained by a conception of loyalty that is genuine but that the conflict rules simply do not acknowledge and protect. Existing rules reflect a narrow and perhaps overly simplistic conception of loyalty. Their focus is on ensuring that the lawyer acts to achieve, not undermine, the client's objectives in the representation.¹¹⁸ For more than three decades, scholars have debated whether, even when there is no threat to the quality of the representation, conflict rules should protect the client's perception that the lawyer is providing "undivided loyalty," or conversely, whether these rules should prevent the client's perception that the lawyer is engaged in betrayal.¹¹⁹ In this conception, conflict rules preserve not only the lawyer's competence but the client's trust in an agent on whom the client relies but who the client cannot control.

Under existing rules, representing corporate rivals in different and unrelated matters is ordinarily not a conflict of interest because the lawyer can

116. See MODEL RULES OF PRO. CONDUCT r. 1.7 (A.B.A. 2023).

117. See Davis & Fiedler, *The New Battle Over Conflicts of Interest*, *supra* note 25, at 3 (providing examples of OCGs that restrict law firms from representing clients' competitors).

118. See, e.g., Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L.J. 243, 251 (1985) ("Defining disloyalty is simple. A lawyer is disloyal when she opposes the client's interests.").

119. Compare Nancy J. Moore, *Conflicts of Interest in the Simultaneous Representation of Multiple Clients: A Proposed Solution to the Current Confusion and Controversy*, 61 TEX. L. REV. 211, 217–18 (1982) (advocating idea that "the essence of loyalty is emotional commitment"), with Lawry, *supra* note 49, at 1094–99 (arguing that "[t]he focus cannot simply be on the client's subjective feelings").

adequately achieve the objectives of the various representations. Rule 1.7(a)(1) allows a lawyer to represent a current client's competitors except when the competitors are direct adversaries, such as opposing parties in a lawsuit or business transaction or competitors for a particular business opportunity.¹²⁰ Presumably, the rule's limited reach accords with ordinary expectations of loyalty held by most individuals as well as by most small businesses, given the nature of their competition. For example, restaurant owners presumably would not feel betrayed if their lawyers represented other restaurant owners competing for local diners' patronage in the same locale.¹²¹

But not all businesses, business competitions, and client relationships are alike. In situations of head-to-head competitors, as in the Coke–Pepsi example, their rivalry may be unusually intense and unfriendly, and it will not be mutually beneficial to the competitors for a firm to represent both. When a company invests in and cultivates a brand loyalty—one either drinks Coke or Pepsi products, one is either an Apple or a Samsung user—it may be counterproductive for the company's general outside counsel to be seen trafficking with the competitor, especially when the lawyer–client relationship is closer than in a one-off or occasional representation: the client–company may identify its regular outside counsel in public filings, and the law firm in turn may identify this major client in promotional materials.¹²² In these circumstances, the client's management might naturally, and reasonably, regard it as a betrayal of loyalty for its regular outside counsel to assist its long-time business rival.

Expectations of loyalty are not fixed, and besides differing with the context, as this example shows, they are in part socially constructed. Over time, clients' expectations can evolve. Once, most clients may have been unconcerned when their lawyers concurrently represented their adversaries in unrelated matters.¹²³ That may have changed, and Rule 1.7(a)(1) may codify what it regards as individual clients' and small business clients' usual expectations.¹²⁴ In turn, the rule drafters may hope that the rules influence, and minimize, clients' expectations. But this possibility does not negate the legitimacy of different loyalty expectations that the rules overlook. Some competitors may expect everyone in the community, including the lawyers, to choose a side. Or clients may develop distinctive cultural conceptions of loyalty; for example, the corporate client's management may be situated in a jurisdiction outside the United States that has more demanding expectations. Or its management may develop a conception of loyalty from interacting with employees and agents who are

120. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 6 (A.B.A. 2023).

121. On the contrary, the restaurants might benefit from each other's success in drawing diners to the locale and benefit from the lawyer's general knowledge of the local businesses and their legal issues.

122. See Green & Silver, *supra* note 2, at 268 (“To enhance their reputations, firms promote . . . their lawyers' individual and collective experience working on complex, high-stakes matters for prestigious clientele . . .”).

123. Bussel, *supra* note 48, at 214–16.

124. *But see id.* at 235–36 (asserting that although clients should be allowed to bargain for a lawyer's agreement not to represent the opposing party in unrelated matters, the conflict rules should not require it).

not lawyers. If the company has come to expect exclusive loyalty from nonlawyer employees and agents, it may expect the same from its outside counsel.

To the extent that the client is advancing a genuine expectation of loyalty, its interest is reasonable and compelling because an actual, subjective expectation of loyalty is precisely the interest that Rule 1.7(a)(1) seeks to protect. Rule 1.7(a)(1) presupposes that the average client who is directly opposed by its own lawyer “is likely to feel betrayed,” and the lawyer–client relationship will suffer.¹²⁵ A client has a compelling interest in protection from professional conduct that genuinely makes it “feel betrayed,” regardless of whether its perception is widely shared or idiosyncratic.

Admittedly, the concept of “feel[ing] betrayed” does not fit well with corporate clients, which are incorporeal legal entities.¹²⁶ One might argue that loyalty should have a different, and more limited, meaning for corporate clients—for example, one that focuses on whether the lawyer competently carries out the objectives of the representation rather than “betraying” the client by subverting its objectives outside the representation. In this conception, disloyalty would exclude certain conduct that might make an individual client feel bad, such as litigating an unrelated case against the corporation, because corporations have no feelings. But decisions interpreting conflict-of-interest rules have assumed that the rules, including those protecting loyalty, apply to corporations in ways analogous to how they apply to individuals.¹²⁷ One might explain that the corporation acts through individuals who will have comparable feelings of betrayal if the lawyer opposes the corporation. Or one might explain that even if an entity does not have human feelings, it may have other legitimate conceptions of loyalty and betrayal not applicable to individual clients, such as brand loyalty.

For large-entity clients seeking brand loyalty, it will be regarded as an act of betrayal for their lawyers to represent their rivals. For these clients, Rule 1.7(a)(1) falls short in that it is premised on a generalization about clients’ “feelings” or

125. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 6 (A.B.A. 2023); *see* Mun. Revenue Servs., Inc. v. Xspand, Inc., 537 F. Supp. 2d 740, 746 (M.D. Pa. 2008) (applying r. 1.7 cmt. 6 to disqualification of attorney); *accord* Jeffrey v. Pounds, 136 Cal. Rptr. 3d 6, 11 (Cal. Ct. App. 1977) (“A lay client is likely to doubt the loyalty of a lawyer who undertakes to oppose him in an unrelated matter. Hence the decisions condemn acceptance of employment adverse to a client even though the employment is unrelated to the existing representation.”); RESTATEMENT (THIRD) OF THE L. GOVERNING LAWS. § 128 cmt. e (A.L.I. 2000); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 350 (1986). It is because of this concern that absent client consent, the rule forbids *any* representation directly adverse to a current client rather than only adverse representations related to the subject of the earlier representation, as would be true if the representation were adverse to a *former* client. *Cf.* MODEL RULES OF PRO. CONDUCT r. 1.9(a) (A.B.A. 2023) (addressing adversity to *former* clients).

126. *See* Lawry, *supra* note 49, at 1110 (“[W]ith huge and sophisticated business enterprises, the ‘feeling’ of disloyalty is diffuse or nonexistent.”).

127. For example, Rule 1.7(a)(1), which forbids a lawyer from advocating directly against a current client without that client’s consent, applies the same to corporate clients as to individual clients, even though it might be argued that corporations are less likely to perceive the lawyer’s adversity as disloyal. *See, e.g.*, A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 95-390 (1995).

expectations that differ from these clients' actual expectations.¹²⁸ An OCGs' agreement that outside counsel will not represent rival companies compensates for the rule's overgeneralization. In the Coke–Pepsi example, the agreement would probably accord with one's ordinary intuition about what a company would expect from its general outside counsel in this situation. But even if not, it is legitimate for a corporate client to negotiate ground rules to preserve trust in its lawyers. If the corporation genuinely believes that it would be a betrayal for its lawyers to represent its rival, then its lawyers' agreement not to do so is a legitimate, if not essential, way to preserve trust in the lawyer–client relationship and thereby ensure that the relationship functions effectively. In other words, even if the corporation's genuine “feeling” might seem to be anomalous, an agreement to accommodate that genuine feeling serves a legitimate, indeed important, end.

2. *Advocating Opposing Legal Positions*

Another illustration involves so-called positional conflicts: a company seeks its law firm's agreement not to advance a legal position in another jurisdiction contrary to the position the firm is advancing for the company in a lawsuit or as a lobbyist.¹²⁹ For example, an insurance company seeking to establish a cap on punitive damages in a Texas state court asks its lawyers not to advocate in Minnesota—by representing plaintiffs or by lobbying—for unlimited punitive damages. In part, the company's concern may be that the law firm will develop compelling arguments in Minnesota that can be used effectively by the opposing party in Texas; that the firm's advocacy in Texas will seem less sincere and therefore be less effective if the court learns that the firm is making contrary arguments in Minnesota; or that the firm's lawyers will advocate less aggressively in Texas out of sympathy for the Minnesota client's position. But wholly apart from whether the law firm's representation in the Texas lawsuit will be impaired, the corporate client's management may sincerely believe that arguing the contrary position in Minnesota is disloyal.

The conflict rules, however, do not regard it as disloyal for a law firm to advance opposing legal positions on clients' behalf in different jurisdictions.¹³⁰ These positional conflicts are not regarded as instances of “direct adversity” and for the most part, they are not covered by any other conflict rule.¹³¹ In part, this recognizes that at least in litigation, many clients, and most individual clients, do not ordinarily retain lawyers to make law but simply to achieve a favorable outcome in a particular case. The assumption that lawyers can advocate effectively on opposite sides of a legal question in two different cases also reflects a particular

128. See MODEL RULES OF PRO. CONDUCT r. 1.7(a)(1) (A.B.A. 2023).

129. See Davis & Fiedler, *The New Battle Over Conflicts of Interest*, *supra* note 25, at 42–43 (providing examples of OCGs that impose restrictions on “positional or interest conflicts”). A far more restrictive, and therefore more problematic, scenario is where OCGs would be the ones forbidding the corporation's law firm from arguing legal positions identified by the corporate client that the law firm is not advancing on its behalf.

130. See Lawry, *supra* note 49, at 1097 (citing Cal. State Bar, Comm. on Pro. Resp. & Conduct, Formal Op. 1989-108 (1989)).

131. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 24 (A.B.A. 2023).

conception of advocacy.¹³² The profession's conventional understanding is that although trial lawyers are not allowed to make frivolous arguments,¹³³ their advocacy does not require or convey a personal belief in the justness of the client's cause, and that good lawyers can publicly argue with conviction even when they privately believe their client will and should lose.¹³⁴ Consequently, advancing contrary legal positions with equal fervor in Texas and Minnesota is not only permitted by the rules but is a testament to the lawyer's advocacy skills.

Some corporate clients may be less than admiring, however. They may genuinely regard it as an act of betrayal for their law firm to oppose the company's legal position.¹³⁵ The client, doing business nationally or even globally, may be one that encounters a recurring legal question and is seeking to make law.¹³⁶ In the insurance company's case, the company may be less interested in limiting its damages in any one case than in achieving a legal victory in Texas as part of a long-term strategy to limit punitive damages there and in every other jurisdiction where it does business. The law firm's work in Minnesota would undermine the insurer's overarching objective. Or the company may simply have a visceral reaction that its lawyers should not try to establish adverse precedent in other jurisdictions, or that in public the lawyers should consistently adhere to the company's fundamental view of the law until the legal issue is resolved. One cannot say this reaction would be feigned or irrational, because as noted, the concept of loyalty is, in large part, subjective, turning on clients' perceptions and business circumstances.¹³⁷

Moreover, one might question whether the client's perception of disloyalty in this example would be especially unusual. Rule drafters have never polled corporate clients, or undertaken other empirical work, to gauge clients' perception of when their lawyers' work for others is disloyal.¹³⁸ Nor have rule drafters polled

132. The exception is where the two cases are in the same jurisdiction, so that adverse legal precedent achieved in one case will control the other case. *See id.*

133. *See id.* r. 3.1.

134. *See, e.g.,* Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 507–09 (1994) (discussing the bar's traditional view that lawyers can advocate for causes that they do not personally believe). "Cause lawyering" reflects a contrary conception of lawyers' role, however. *See* STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING 3 (2004).

135. *See* Susan P. Shapiro, *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87, 105–06 (2003) (finding that many lawyers regard positional conflicts as "business conflicts," because clients "have clear conceptions and expectations of loyalty" and advocating an adverse position for a different client in a different forum "violate[s] their sense of loyalty").

136. *See generally* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (explaining how sophisticated repeat legal players come ahead using the legal system by playing for the rules as opposed to particular outcomes).

137. *See supra* note 119 and accompanying text.

138. For critiques of rule drafters' general failure to employ empirical evidence, see generally Elizabeth Chambliss, *Evidence-Based Lawyer Regulation*, 97 WASH. U. L. REV. 297 (2019) (arguing that the law governing lawyers ought to be informed by clients' actual objectives and concerns).

law firms to ask what they think their clients expect by way of loyalty.¹³⁹ But we know that wholly apart from the use of OCGs, corporate clients expect greater protection than conflict rules afford, and law firms often accommodate clients' expectations. There is an expansive literature on so-called business conflicts, meaning situations where conflict rules do not require law firms to decline a particular legal representation, but a law firm will do so anyway to avoid offending a valuable client.¹⁴⁰

Positional conflicts are a recurring example of business conflicts that lead law firms to self-restrict their choice of clients, including in some cases to a greater extent than would OCGs. Many law firms decline certain pro bono matters to avoid opposing the legal positions or preferences of their paying clients; for example, some law firms decline pro bono consumer representations out of deference to the banks and credit card companies they represent.¹⁴¹ And of course, many law firms serve clients on only one side of an industry—for example, unions but not management, or personal-injury plaintiffs but not defendants—even though the lawyers' expertise might be equally useful to the other side.¹⁴² Law firms identify positional conflicts as business conflicts because they recognize how clients perceive this situation.¹⁴³ One might argue that the existing conflict rules do not fully respect clients' reasonable perceptions. OCGs would therefore fill the gap. Freedom of contract would allow a corporate client to seek a law firm that will agree to meet its expectations of loyalty, and it would allow law firms to choose between avoiding positional conflicts or declining a client who insists on this restriction.

3. Adversity to a Client's Affiliate

Yet another common provision of OCGs involves adversity to members of a corporate client's "family."¹⁴⁴ A large corporation with one or more corporate affiliates requires its outside law firm to agree during the representation not to oppose its affiliates; in other words, the firm must treat the corporate client and its affiliates as a single client for purposes of the direct-adversity rule.¹⁴⁵ This expands

139. See generally *id.* (arguing that the law governing lawyers ought to also reflect lawyers' conduct and practice realities).

140. See, e.g., Helen A. Anderson, *Legal Doubletalk and the Concern with Positional Conflicts: A "Foolish Consistency"?*, 111 PENN. ST. L. REV. 1, 3–4 (2006); Esther F. Lardent, *Positional Conflicts in the Pro Bono Context: Ethical Considerations and Market Forces*, 67 FORDHAM L. REV. 2279, 2279–86 (1999).

141. See Atinuke O. Adediran, *Solving the Pro Bono Mismatch*, 91 U. COLO. L. REV. 1035, 1053–54 (2020) (explaining that large firms decline pro bono work that would conflict with clients' interests, characterizing these situations as "business conflicts").

142. See Edward Malone, *Conflicts of Interest Are Like the Weather*, 51 LITIG. 24, 28 (2024) ("My firm regularly represents auto manufacturers in their relationships with their dealers. Because of the nature and breadth of our work for manufacturers, we likely would never represent a dealer, even one for a car company that we do not represent, in *any* type of matter." (emphasis added)).

143. Many law firms structure their practices to accommodate clients' expectation that the firms will take only one side—for example, that labor lawyers will represent either labor or management.

144. See Davis & Fiedler, *The New Battle Over Conflicts of Interest*, *supra* note 25.

145. See, e.g., *Dr. Falk Pharma GmbH v. GeneriCo, LLC*, 916 F.3d 975, 980 (Fed. Cir. 2019) (noting that pharmaceutical company's OCGs required law firms with over

on Rule 1.7(a)(1)'s protection,¹⁴⁶ which includes a Comment recognizing that “[a] lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary,” and therefore, ordinarily, “the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter.”¹⁴⁷ The Comment derives from courts’ decisions on disqualification motions, which recognize that in general, when a law firm agrees to represent a particular corporation, and proceeds to provide legal assistance only to the corporation, the client is only that individual corporation.¹⁴⁸ Courts recognize exceptions, such as when the affiliated companies effectively operate as one company—e.g., with a single board, set of officers, and headquarters¹⁴⁹—and the Comment to Rule 1.7 likewise acknowledges that “circumstances [may be] such that the affiliate should also be considered a client of the lawyer.”¹⁵⁰

Opponents of OCGs argue that an agreement expanding on the judicial standard is per se unreasonable,¹⁵¹ citing decisions saying “that the bar to concurrent representation applies [only] if a firm’s representation adverse to a client’s corporate affiliate ‘reasonably’ diminishes the level of confidence and trust in counsel held by [the client].”¹⁵² Arguably, a more restrictive lawyer–client agreement is necessarily *unreasonable*. The argument is unpersuasive. The cited cases, where courts determined whether an expectation of loyalty was reasonable, and therefore enforceable, did not involve a prior agreement by the lawyer to refrain from advocating against the client’s affiliate. Rather, the question in those cases was what a corporate client would reasonably expect in the absence of a prior agreement, not whether it would be reasonable for a client to expect, and negotiate, for more. It would be unfair to expect lawyers to comply with clients’ unusual expectations that were not expressed before the lawyer accepted the matter. But the courts were not asked to enforce lawyers’ promises to respect corporate clients’ atypical expectations of loyalty as incorporated in an engagement agreement. Where clients’

\$1 million in annual billings to refrain from representing clients adversely to the company’s subsidiaries).

146. For discussions of so-called corporate family conflicts, see generally Michael Sacksteder, Note, *Formal Opinion 95-390 of the ABA’s Ethics Committee: Corporate Clients, Conflicts of Interest, and Keeping the Lid on Pandora’s Box*, 91 NW. U. L. REV. 741 (1997); John Steele, *Corporate Affiliate Conflicts: A Reasonable Expectations Test*, 29 W. ST. U. L. REV. 283 (2002).

147. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 34 (A.B.A. 2023).

148. See, e.g., *GSI Com. Sols., Inc. v. BabyCenter, LLC*, 618 F.3d 204, 210 (2d Cir. 2010) (“[A] ‘lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary.’” (quoting MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 34 (A.B.A. 2023))); *Reuben H. Donnelly Corp. v. Sprint Publ’g & Advt’g, Inc.*, No. 95 C 5825, 1996 WL 99902, at *2–3 (N.D. Ill. Feb. 29, 1996).

149. See, e.g., *GSI Com. Sols., Inc.*, 618 F.3d at 210–11.

150. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 34 (A.B.A. 2023).

151. Davis & Fiedler, *The New Battle Over Conflicts of Interest*, *supra* note 25, at 40–41 (quoting *GSI Com. Sols., Inc.*, 618 F.3d at 210).

152. *GSI Com. Sols., Inc.*, 618 F.3d at 210 (quoting *Certain Underwriters at Lloyd’s, London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 914, 922 (N.D. Cal. 2003)).

genuine expectations of loyalty are the subject of an agreement, they deserve respect, even if they are “unreasonable” in the sense that the average corporation would not share them.

Not only is it reasonable for a corporate client to seek to expand on the Rule’s protection for the benefit of its affiliates but the Comment accompanying Rule 1.7 invites corporate clients to do just that. It declares that a corporation’s lawyers may not advocate against the client’s affiliates if “there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client’s affiliates.”¹⁵³ ABA Ethics Opinion 95-390 likewise recognized that corporate clients may contract with their lawyers in this manner.¹⁵⁴

4. Expansions of Other Fiduciary Protections

Although we have focused on whether corporate clients have a legitimate interest in expanding on the loyalty rules, corporate clients can also have a legitimate interest in expanding confidentiality and competence protections or in restricting counsel’s clientele for other reasons.

With respect to confidentiality, Rule 1.9(a) forbids certain representations that are adverse to a former client to prevent the misuse of confidential information, but sometimes a corporate client might reasonably worry that Rule 1.9(a) will not fully protect its confidentiality interests once the representation ends.¹⁵⁵ A corporation might ask its in-house lawyers to agree that for two years after leaving, they will not represent clients in any litigation against the corporation. This restriction would go beyond Rule 1.9(a) because it would apply to all adverse representations, not just to representations in matters that are substantially related to its former lawyers’ prior work. The entity may bargain for this restriction to protect against the misuse of confidential information in adverse representations that do not involve “substantially related matters,” but where the lawyer nonetheless possesses confidential information that may be useful. A two-year bar, while confidential information is most likely to be fresh in the lawyer’s mind and useful to other matters, would also serve an administrative and financial interest: it would reduce the need for collateral litigation over whether a new matter is substantially related to an earlier one on that the lawyer worked when that question is debatable.

153. MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 34 (A.B.A. 2023). It is hard to see why corporate clients may secure their lawyers’ agreement to enhance loyalty in this respect but not others. The bar might argue that an agreement to treat an affiliate as a client differs because the objective is simply to achieve clarity and certainty, rather than leaving it to future litigation to determine whether a client corporation and its affiliate will be treated as a single client under a vague judicial standard. But the Comment allows the protections of Rule 1.7(a)(1) to be extended regardless of whether the lawyer works for the affiliates or whether the affiliates might otherwise be regarded as clients under the applicable law. Moreover, corporate clients’ desire to achieve clarity and certainty, and to minimize the likelihood of disputes and the costs of resolving them, is a legitimate interest.

154. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 95-390 (1995) (“Clearly, a corporate affiliate must be treated as a client . . . if the lawyer has agreed so to treat it, regardless of whether any actual work has been or is to be performed for the affiliate.”).

155. See MODEL RULES OF PRO. CONDUCT r. 1.9(a) (A.B.A. 2023).

A corporation might also seek to expand on Rule 1.9(a) to protect internal information that courts do not necessarily regard as confidential. For example, many courts decline to disqualify a party's former lawyer to protect against the use of so-called playbook information—that is, information about the entity's internal workings and general approach to litigation and transactions.¹⁵⁶ A corporation that is sensitive about this information might seek its lawyers' agreement to refrain from future representations where this information might be used.

Or a corporate client may seek to preserve the confidentiality of a unique business or tax strategy.¹⁵⁷ For example, a corporation that generously compensates its outside counsel to develop the agreements and other documents necessary to implement its proprietary strategy might seek the lawyers' agreement not to implement the strategy for other clients' benefit until it becomes generally known in the relevant business community. Even though abstract legal knowledge is ordinarily not protected as confidential information under the professional conduct rules,¹⁵⁸ a corporation might reasonably try to protect this knowledge so that having devised the strategy and invested in developing it, the corporation, rather than its counsel, obtains the financial benefit.

A corporation might also pursue an agreement that gives greater protection to lawyer competence than existing rules. The conflict rules cover multiple representations where “there is a significant risk that” one representation will “materially limit” another,¹⁵⁹ but needless to say, the rules do not require lawyers to represent only one client at a time. However, a large entity with an in-house legal department might restrict its in-house lawyers from representing *any* other clients, even on their own time, without the entity's approval.¹⁶⁰ The objective would be to ensure that in-house lawyers avoid commitments to other clients that might detract from their work for the corporation. The corporation might also seek to avoid embarrassment when, on their own time, its lawyers accept unpopular clients. Such an employment agreement would not be unprecedented: the U.S. Department of Justice forbids its lawyers from undertaking most outside legal work¹⁶¹ and requires its lawyers to obtain permission before undertaking legal work that is not categorically forbidden.¹⁶²

156. See, e.g., *Watkins v. Trans Union, LLC*, 869 F.3d 514, 529 (7th Cir. 2017).

157. See, e.g., *Diversified Grp., Inc. v. Daugerdas*, 139 F. Supp. 2d 445, 452 (S.D.N.Y. 2001) (exploring whether a lawyer breached his fiduciary duty by exploiting a client's tax strategy for other clients' benefit).

158. See N.Y. RULES OF PRO. CONDUCT r. 1.6(a) (2025) (explaining that confidential information does not ordinarily include “a lawyer's legal knowledge or legal research or . . . information that is generally known in the local community or in the trade, field or profession to which the information relates.”).

159. MODEL RULES OF PRO. CONDUCT r. 1.7(a)(2) (A.B.A. 2023).

160. See, e.g., *Cunningham v. Sommerville*, 388 S.E.2d 301, 302 (W. Va. 1989) (explaining that company's general counsel was prohibited from having outside employment and therefore could not be required to accept court assignments to represent indigent criminal defendants).

161. 5 C.F.R. § 3801.106 (1997).

162. *Outside Employment and Activities*, U.S. DEP'T OF JUST. (Dec. 9, 2025), <https://www.justice.gov/jmd/outside-employment-and-activities> [<https://perma.cc/4LA5-C6DK>].

A corporation might also seek to restrict its lawyers' current or future work to promote objectives other than to prevent the lawyers from breaching their duty of loyalty, confidentiality, or competence. For example, some government agencies bar all their former employees, including their former lawyers, from interacting with the agency for a specified period.¹⁶³ The purpose is to prevent current employees from favoring their former colleagues, or appearing to do so. A private corporation might adopt a similar restriction on work by its former lawyers, not to prevent them from breaching a fiduciary duty to the corporation but to ensure the integrity of its internal workings.

5. *The Distinctiveness of Corporate Representations*

We have identified various ways in which corporate clients might advance genuine, lawful, legitimate, and in some cases, compelling interests by securing an agreement restricting their lawyers' current or future work for other clients.¹⁶⁴ This suggests that if existing conflict rules are well-designed to protect individual clients who lack the sophistication and bargaining power to negotiate over fiduciary protections, they are not equally well-designed for corporate clients. That is because some of the things that make corporations different from individuals are relevant to the nature of fiduciary protections. These include that corporations may have different conceptions of loyalty, such as the idea of brand loyalty. As repeat players in litigation, they may have different objectives from those of individual litigants who simply want to prevail in their lawsuits, including the aim of establishing favorable law. They may have a different regard for corporate affiliates than individuals' relationship with relatives. They may have long-term relationships with lawyers and law firms, not one-off or occasional relationships, including a full-time employment relationship.

Perhaps OCGs are sometimes poorly thought out or arbitrary, or corporate clients' purported concerns about loyalty or other fiduciary protections are pretextual. There is still no reason to assume that corporations' interests are never legitimate and genuine. The presumption should be otherwise, at least when corporate clients turn down their preferred lawyers in favor of others who will agree to greater fiduciary protections. It is a sign of corporations' sincerity if they decline to retain first-choice law firms that will not accept OCGs.

This is not to say that lawyers should agree to everything or anything that clients want. Some agreements would be impermissible because they would require lawyers to violate duties to other clients.¹⁶⁵ Opponents of OCGs have described provisions that would be difficult to administer or overly demanding, and to which

163. See, e.g., N.Y. PUB. OFF. LAW § 73(8)(a)(i) ("No person who has served as a state officer or employee shall within a period of two years after the termination of such service or employment appear or practice before such state agency. . . .").

164. One can envision other examples. For example, a corporation might seek to forbid its law firm from taking on certain representations in which the firm would develop work product that could be used against the client corporation, or certain representations that would disadvantage the corporate client but were not "directly adverse" to it (such as an action against the corporate client's important supplier).

165. See *supra* note 69 and accompanying text.

law firms presumably should not agree.¹⁶⁶ For example, it would be unwise for a firm to agree not to represent any of the client's competitors, named or unnamed, rather than just a single identifiable rival. Likewise, while a firm could feasibly implement an agreement not to advocate a specific legal position adverse to one that the firm is trying to establish for the client, it might be impossible to ensure compliance with an agreement not to advocate any legal position adverse to the company's interests. And it might be a bad business decision for a firm to agree not to advocate against a corporate client's "hundreds of corporate affiliates, here and abroad."¹⁶⁷ But we have shown that tailored agreements adding to the conflict rules' restrictions may be reasonable and well-motivated, compensating for the conflict rules' limitations.¹⁶⁸

B. The Primacy of Corporate Clients' Interests

The D.C. Bar's position was that whatever interest corporate clients may have in adding to the conflict rules' protections is outweighed by other corporations' interest in access to their preferred lawyers and by lawyers' "autonomy" interest, meaning their business interest in access to clients.¹⁶⁹ But these interests, in the context of corporations' OCGs, are not as compelling and as strongly implicated as the D.C. Bar suggests.

1. Corporate Clients' Interest in Access to Counsel

The D.C. Bar's concern for clients' interest in access to counsel might be misread as a reference to the interest of low- and middle-income parties who cannot afford lawyers or secure free legal assistance. That is a much-discussed national problem,¹⁷⁰ but it is not the problem that concerned the D.C. Bar. Its concern was with corporations' choice among counsel, not individuals' access to any counsel. The latter is essentially the interest underlying Rule 5.6,¹⁷¹ which forbids lawyers

166. See Davis & Fiedler, *The New Battle Over Conflicts of Interest*, *supra* note 25, at 39–42.

167. N.Y. City Bar Comm. on Pro. & Jud. Ethics, Formal Op. 2007-3 (2007).

168. Corporate entities' interest in conceptions of loyalty broader than the Rules' avoidance of conflicts of interest is not only consistent with past iterations of thicker loyalty but also with emerging contemporary understandings of loyalty in corporate law. See generally Andrew S. Gold, *The New Concept of Loyalty in Corporate Law*, 43 U.C. DAVIS L. REV. 457 (2009) (exploring the evolution of a new conception of loyalty in corporate law pursuant to which directors may be disloyal to their entity when acting in bad faith even when they have no conflict of interest and when they intend to benefit the corporation); Andrew S. Gold, *Purposive Loyalty*, 74 WASH. & LEE L. REV. 881 (2017) (studying evolving multiple strands of loyalty in directors' duties to corporations).

169. See D.C. BAR REPORT, *supra* note 17, at 8 (“[T]he problem of overbreadth in identifying the ‘client’ for conflicts purposes is a substantial one that threatens two central tenets of the D.C. Rules—the ability of a would-be client to engage her choice of competent counsel and the professional autonomy of practicing lawyers.”).

170. See, e.g., Ralph Baxter, *Dereliction of Duty: State-Bar Inaction in Response to America's Access-to-Justice Crisis*, 132 YALE L.J.F. 228, 229–30 (2022); Kathryn M. Young, *What the Access to Justice Crisis Means for Legal Education*, 11 U.C. IRVINE L. REV. 811, 812–23 (2021).

171. See *supra* note 89 and accompanying text.

from entering into (or even offering) restrictive covenants as part of partnership and settlement agreements.

The D.C. Bar's ostensible concern is that OCGs restrict corporations' access to their preferred law firms. But this is not a weighty problem. There are 100 law firms in the AmLaw 100 and twice that many in the AmLaw 200, and other firms compete to join their ranks. Moreover, global firms now routinely compete with their American counterparts,¹⁷² and technological advances, AI included, have allowed smaller firms to compete for the work of corporate clients.¹⁷³ It seems unlikely that OCGs, while sometimes reducing some corporations' options, would impede a corporation from retaining a qualified law firm in the highly competitive market for corporate legal services. This is particularly true because the services of law firms, even BigLaw firms, increasingly seem interchangeable, which is precisely why corporations have leverage to negotiate for OCGs.

To be sure, in some highly specialized areas of practice, or in some highly significant matters such as “bet the company” litigation, the number of qualified, trusted law firms will be substantially smaller. The D.C. Bar speculates that some companies will use OCGs strategically to limit competitors' access to lawyers when the pool is limited.¹⁷⁴ But it is precisely the firms that are highly sought after, because they have special expertise, that will have the wherewithal and bargaining power to reject OCGs and conversely, may even be able to continue to negotiate for advance waivers. On the other hand, firms that principally undertake ordinary commercial litigation or ordinary transactions in a competent manner will not have leverage, but their unavailability will not be a matter of concern because many other law firms can do what they do equally well.

In the most sympathetic case, perhaps by happenstance, the effect of an OCG will be to preclude a corporate client from retaining a lawyer with which it has an established relationship. This sometimes happens apart from OCGs because of the existing conflict rules—for example, a law firm with an established relationship with two corporations will be precluded, at least without client consent, from representing one against the other in a litigation or transaction. OCGs will increase the frequency of this problem. But one should not exaggerate the challenge. Few corporations of any significant size employ just one law firm. Corporations frequently employ different law firms for different types of matters or for matters in different locales.¹⁷⁵ Often, they conduct so-called beauty contests among different

172. See generally James R. Faulconbridge et al., *Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work*, 28 NW. J. INT'L L. & BUS. 455 (2008) (describing the emergence, growth, and work of non-American global law firms).

173. See Albert H. Yoon, *The Post-Modern Lawyer: Technology and the Democratization of Legal Education*, 66 U. TORO. L.J. 456, 457 (2016) (“Production under these technologies are [sic] less reliant on law firm economies of scale, empowering solo practitioners and small-firm lawyers as much as their counterparts in large firms.”).

174. D.C. BAR REPORT, *supra* note 17, at 1 (“A leading participant in a particular economic sector may want to make it more difficult for newer, smaller companies to gain a competitive foothold there. Conflicting out lawyers who are knowledgeable about the sector can be part of this strategy.”).

175. Stephen V. Arbogast, *Commentary on Legal and Managerial “Cultures” in Corporate Representation*, 46 HOU. L. REV. 33, 35 (2009) (“Corporate clients . . . retain

firms before selecting one for a significant matter. From a contemporary corporation's perspective, it may not be much of a hardship to be denied one's preferred law firm, even if it is a firm with which one has a prior or current relationship.

2. *Corporate Lawyers' Interest in Autonomy*

The other countervailing interest said to justify the D.C. Bar's proposal was lawyers' interest in professional autonomy and the exercise of independent professional judgment. But OCGs generally do not impede lawyers' independence in representing corporate clients because lawyers are valued for their exercise of judgment. What the D.C. Bar calls "autonomy" is a cover for lawyers' business interests in representing the clients of their choosing, free of OCGs restrictions.

Lawyers' business interests are important because the legal profession cannot serve the public if lawyers cannot make a living, and therefore lawyers' business interests sometimes justify limits on the reach of professional conduct rules. For example, the rules governing conflicts of interest when lawyers move between law firms take account of lawyers' interest in mobility, so as not to unnecessarily restrict lawyers' ability to accept new positions.¹⁷⁶ But OCGs do not strongly implicate lawyers' business interests. The loss of business because of OCGs will be borne by a corporation's law firm, not by an individual lawyer, and will follow from the reciprocal benefit of having received business from the corporate party to the OCGs. A law firm may sometimes regret its business decision, but sophisticated corporate law firms can judge whether the tradeoff is economically worthwhile. More importantly, OCGs do not impact lawyers' self-interest collectively because the work lost by one large law firm will be gained by another, and even the loss of particular business by a law firm because of OCGs may be balanced out by gaining business other firms had to forgo.

The contrast with existing provisions of Rule 5.6, to which the D.C. Bar refers, is instructive. Current Rule 5.6(a) principally addresses a lawyer's agreement not to represent firm clients after leaving the firm.¹⁷⁷ The impact of such an agreement would be on identifiable clients with whom the lawyer already has a lawyer-client relationship, including those whom the lawyer is currently representing. The impact would be substantial on both the identifiable clients, some of whom are individuals who would lose their current counsel mid-representation and may find them hard to replace, and on the lawyer, whose livelihood would be significantly handicapped. Rule 5.6(b) principally addresses a plaintiff's lawyer's agreement, as part of a settlement, not to bring lawsuits on behalf of similarly

multiple law firms eager to provide services and willing to compete on the basis of being more accommodating to the clients' wishes."); see Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455, 487 (2006) ("Some rules [of professional conduct] . . . encourage companies to spread the work among multiple firms that engage in spot work.").

176. See MODEL RULES OF PRO. CONDUCT r. 1.9, 1.10(a)(2), 1.11(b) (A.B.A. 2023).

177. See *supra* note 89 and accompanying text; A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 93-371 (1993) ("Restrictions on the Right to Represent Clients in the Future").

situated plaintiffs against the same defendant.¹⁷⁸ Here, specific parties would lose access to a uniquely qualified lawyer who succeeded in a prior related representation, and the lawyer would lose access to the specific clientele that the lawyer may be best qualified to serve. In contrast, the impact of OCGs is on unidentifiable clients with unidentifiable future matters for which the law firm may not be uniquely suited.

III. OCGS, POWER, AND IDEOLOGY IN THE CORPORATE BAR: A REVISIONIST ACCOUNT

If, as we have shown, the organized bar's rationale for opposing OCGs is unpersuasive, one might consider whether the organized bar has a different motivation. We argue that the organized bar's genuine concern is that OCGs signal corporate lawyers' loss of power and standing and the demise of traditional professional values and ideology. In the D.C. Bar's own words: "OCGs reflect nothing more than clients using the same processes to procure legal services that they use for such other procurements as office furniture and catering services."¹⁷⁹ OCGs treat corporate lawyers as vendors, like furniture salespersons and caterers, rather than as powerful professionals, as corporate lawyers in BigLaw would wish to be portrayed.

Although the D.C. Bar's proposed amendment to the professional conduct rules is unjustified,¹⁸⁰ the Bar's underlying concern about what OCGs represent is well-founded. This Part shows this by examining OCGs in the context of the evolution of the corporate bar. After summarizing the traditional account in Section A, we show in Section B that it misdescribes how power in the corporate bar has evolved, and we offer a revisionist history. OCGs illustrate that power in the corporate lawyer–client relationship has not shifted back and forth between outside counsel and in-house counsel, as the traditional account assumes. Rather, power has shifted from both outside and in-house counsel to corporate management, which is why OCGs often supplant advanced waivers.

Section C shows why the organized bar rightly worries about this development, even if corporate law firms themselves do not. When BigLaw firms had greater power in the attorney–client relationship, besides dictating the terms of the representation, their equity partners had the influence and standing to serve as wise counselors to their corporate clients, interjecting public-interest considerations that were not necessarily compelled by law. Although law firms remain immensely profitable, the shift in power has eroded corporate lawyers' influence and self-image as lawyer–statespeople. The bar objects to OCGs because they reinforce that top equity partners might be viewed as high-end service providers, making it hard for them to practice, and model, their traditional, vaunted professional public role.

178. MODEL RULES OF PRO. CONDUCT r. 5.6(b) (A.B.A. 2023) (forbidding lawyers from agreeing to "a restriction on the lawyer's right to practice [as] part of the settlement of a client controversy"); see A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 95-394 (1995) ("Settlement Agreement Restricting Lawyer's Right to Undertake Other Representations Against a Government Agency").

179. DRAFT REPORT, *supra* note 94, at 3.

180. See *supra* Section II.B.

A. The Traditional Story of the Evolution of Corporate Law Practice

The traditional story of the evolution of the corporate hemisphere of the legal profession is one of a power pendulum: power was first held by in-house lawyers, then it shifted to outside counsel, and it finally swung back to in-house lawyers.¹⁸¹ The story goes something like the following.

Between the mid- to the late nineteenth century, following the Industrial Revolution and the Civil War, emerging corporate legal needs were served by first-generation in-house general counsel, drawn from the ranks of retired judges.¹⁸² These general counsels emerged not as mere legal experts, advising corporate clients about compliance with new laws and regulations, but as venerable wise counselors who provided guidance about the entities' strategic decisions and did not shy away from opining on the right thing to do.¹⁸³ General counsels' power and standing stemmed from a confluence of circumstances, including their judicial experience and professional status; prevailing conceptions of the law, which mixed legal reasoning, ethics, and morality and made lawyers more likely to opine on and clients more likely to listen to advice about the public interest; and nascent corporate governance structures, which rendered corporate clients more receptive to lawyers' sage advice.¹⁸⁴ These circumstances allowed general counsels to establish themselves as trusted advisors to their corporate clients—employers.¹⁸⁵

The wise counselor role was essential to corporate lawyers' self-conception. Oliver Wendell Holmes, for example, opined in 1897 that “happiness . . . cannot be won simply by being counsel for great corporations and having an income of fifty thousand dollars.”¹⁸⁶ Rather,

“[a]n intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch . . . a hint of the universal law.”¹⁸⁷

181. See Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 277–78 (1985); Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479, 479 (1989); Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1057, 1058–59 (1997).

182. See Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 FORDHAM L. REV. 955, 958–59 (2005).

183. See JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 297 (1950).

184. See Carl D. Liggio, Sr., *A Look at the Role of Corporate Counsel: Back to the Future—or Is It the Past?*, 44 ARIZ. L. REV. 621, 634–35 (2002); Robert W. Gordon, *The Return of the Lawyer-Statesman?*, 69 STAN. L. REV. 1731, 1736–41 (2017).

185. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 490 (3d ed. 2005).

186. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

187. *Id.*; see also Robert W. Gordon, *Law as a Vocation: Holmes and the Lawyer's Path*, in *THE PATH OF THE LAW AND ITS INFLUENCE* 7, 7–32 (Steven J. Burton ed., Cambridge

Expanding on the calling of corporate lawyers, Louis Brandeis, a leading corporate lawyer before his appointment to the U.S. Supreme Court, noted that business lawyers are needed “not only because of the legal questions involved, but because the particular mental attributes and attainments which the legal profession develops are demanded in the proper handling of these large financial or industrial affairs.”¹⁸⁸ He added that “[t]he questions which arise are more nearly questions of statesmanship,” which “call in many instances for the exercise of the highest diplomacy. The magnitude, difficulty and importance of the problems involved are often as great as in the matters of state with which lawyers were formerly frequently associated.”¹⁸⁹ The great opportunity in the law, concluded Brandeis, was to practice as a wise counselor, mitigating the interests of corporate clients and the people, the “contest between those who have and those who have not.”¹⁹⁰

In the late nineteenth century, in-house lawyers began to face competition from large law firms,¹⁹¹ which featured a new breed of attorneys: elite corporate lawyers, as opposed to former judges and experienced generalists. The firms represented multiple corporate clients and offered a one-stop shop for all of the entities’ corporate legal needs.¹⁹² The law firms’ founders touted prudent corporate legal planning as the height of professional excellence and litigation as evidence of poor corporate practice.¹⁹³

The new firms could service all of the clients’ needs because they hired junior lawyers directly out of elite law schools dubbed associates.¹⁹⁴ Associates were supervised by senior firm lawyers—partners—employing a model that came to be known as the tournament of lawyers.¹⁹⁵ Associates at the bottom of the firm’s pyramid structure were trained and mentored by the partners at the top. Associates

Univ. Press 2000) (exploring Holmes’s view that a lawyer must practice law as a public calling, advancing clients’ interests subject to the public interest).

188. Louis D. Brandeis, *The Opportunity in the Law*, Address to the Harvard Ethical Society (May 4, 1905), <https://law.louisville.edu/lawlibrary/special-collections/louis-d-brandeis-collection/writings-louis-d-brandeis/business-profession-16> [<https://perma.cc/QUH4-3VSN>].

189. *Id.*

190. *Id.*

191. PAUL HOFFMAN, *LIONS IN THE STREET: THE INSIDE STORY OF THE GREAT WALL STREET LAW FIRMS 6–7* (1973).

192. 1 ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS: 1819-1947* 575 (1947) (“[Paul Drennan Cravath’s] first great object was so to organize his firm and its staff as to make it competent to do, as nearly perfectly as it could be done, any acceptable work which might be offered Prior to the time when Cravath took control as the active head of the firm there had been little attempt at scientific organization in the office.” (quoting Cravath partner Carl August de Gersdorff)); John P. Heinz, *When Law Firms Fail*, 43 SUFFOLK U. L. REV. 67, 75 (2009).

193. See SWAINE, *supra* note 192, at 573–74 (“Cravath had no instinct for litigation. On its merits he thought it was something to be avoided at any reasonable price; and he had neither liking nor capacity for courtroom forensics. Cravath’s forum was the conference room.”).

194. See JEROLD S. AUERBACH, *UNEQUAL JUSTICE* 22–27 (1976).

195. Marc S. Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747, 780–84 (1990).

competed for a partnership position, with only the best attaining promotion. To ensure the elite quality of the representation, firms avoided lateral hiring and promoted only associates whom they trained.¹⁹⁶ As clients' needs grew, firms grew as well by promoting new partners to the top of the pyramid and recruiting even more associates to the bottom of it.¹⁹⁷

First-generation in-house lawyers gradually lost out to these new large firms with their elite, superior people-power and specialized expertise. Large firms' senior partners took over as entity clients' trusted advisors and outside general counsels.¹⁹⁸ The shift in power was internal to the corporate bar: influence and elevated professional status shifted from in-house counsel to large law firms' partners.

In the first half of the twentieth century, corporate clients and corporate law firms had stable, long-term relationships characterized by thick reciprocal loyalty: clients offered a steady and growing diet of work with little scrutiny of law firms' fees, staffing, and terms of engagement; law firms, in return, avoided representing clients' business competitors or advancing legal positions contrary to their clients' interests.¹⁹⁹ These arrangements served the interests of both corporate clients, who lacked legal sophistication, and their lawyers, who faced little competition in the market for legal services.²⁰⁰ These longstanding, long-term relationships cemented senior partners' position as wise counselors who exercised practical wisdom and provided clients with influential, strategic advice.²⁰¹

These stable relationships helped establish senior partners' independence, an essential ingredient of practical wisdom and the exercise of professional judgment. Serving as a wise counselor to several clients not only exposed partners to a variety of legal and business challenges, which allowed them to develop judgment, but it also secured their independence because they were not beholden to one particular client and were not especially concerned with losing the client's business were they to give unwelcome advice.²⁰² Put differently, whereas first-generation in-house counsels' exercise of judgment was informed by their years of experience on the bench, senior partners brought to the table judgment informed

196. See HOFFMAN, *supra* note 191 at 60–61 (noting the rarity of lateral movement by individual lawyers and that there were no “open breaks” between firms).

197. See generally MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991) (explaining that large law firms' growth engine included an effective partner to associate ratio such that when firms elected new partners they recruited many more associates to support the partners' work).

198. See Eli Wald, *Getting in and out of the House: The Worlds of In-House Counsel, Big Law, and Emerging Career Trajectories of In-House Lawyers*, 88 *FORDHAM L. REV.* 1765, 1769–71 (2020).

199. Wilkins, *supra* note 16, at 2080–84.

200. See Chayes & Chayes, *supra* note 181, at 290–91, 294.

201. KRONMAN, *supra* note 14, at 282–91; Wilkins, *supra* note 16, at 2078.

202. Robert W. Gordon, *The Independence of Lawyers*, 68 *B.U. L. REV.* 1, 36 (1988).

by years of experience giving independent advice to a stable group of large-entity clients.²⁰³

Practicing corporate law as wise counselors was as essential to large law firms' partners as it was to first-generation in-house counsel. When large law firms emerged in the late nineteenth century, their claim to elite professional status was weak.²⁰⁴ The new firms abandoned the longstanding model of apprenticeship and began recruiting lawyers directly out of law schools newly established by elite universities. Firms' professional standing could not yet derive from their influence over clients' strategic decision-making and from firms' control over work and pay because they did not yet possess these powers, which had been exercised by first-generation in-house counsel. Law firms' early campaign for elite professional status built on their lawyers' elite ethnoreligious and cultural status.²⁰⁵ Large firms exclusively recruited and promoted white men who shared the same religious and European background as elite corporate executives.²⁰⁶

As large law firms established their elite professional status, dethroned first-generation in-house counsel, and secured a stable flow of corporate work from growing corporate clients, they shed their ethnoreligious and cultural identity in favor of merit as the cornerstone of corporate practice.²⁰⁷ The growing reputation of elite law schools helped support large law firms' claim to be recruiting the best lawyers.²⁰⁸ Representing large corporate entities allowed firms to credibly assert that they were working on complex and challenging matters.

What was initially missing was a meritorious professional ideology. The standard conception of the zealous advocate was a poor fit²⁰⁹ because large law firms' bread and butter was transactional work, advising clients in a conference room away from courts and the adversary system. To secure, maintain, and build

203. Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 270 (1990).

204. See Eli Wald, *The Rise and Fall of the WASP and Jewish Law Firms*, 60 STAN. L. REV. 1803, 1805–25 (2008).

205. *Id.* at 1814–15.

206. *Id.* at 1811–12; see also AUERBACH, *supra* note 194 (documenting the early hiring and promotion practices of large law firms). See generally Eli Wald, *The Rise of the Jewish Law Firm or Is the Jewish Law Firm Generic?*, 76 UMKC L. REV. 885 (2008) (studying the rise of large Jewish law firms as a response to prevailing discriminatory practices at elite white-shoe firms).

207. See generally Wald, *supra* note 204 (exploring the rise and evolution of large law firms on Wall Street throughout the twentieth century).

208. See Jerold S. Auerbach & Eugene Bardach, "Born to an Era of Insecurity": *Career Patterns of Law Review Editors, 1918-1941*, 17 AM. J. LEGAL HIST. 3, 5 (1973). See generally ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983) (examining the symbiotic relationship between elite law schools and elite large law firms).

209. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 11 (1975); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 30.

their professional standing, corporate lawyers advanced the lawyer–statesperson ideal centered upon the role of lawyers as wise counselors.²¹⁰

Elihu Root, a founding member of Root & Clark,²¹¹ famously captured the ideal of the lawyer–statesperson when he opined that: “About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.”²¹² Root conveyed that when corporate interests diverged from the public interest, the corporate lawyer’s responsibility as a professional and a lawyer was to advise the client to consider the public interest.²¹³

The affinity between elite corporate interests and their rising large law firms provided these law firms’ partners the platform from which they fulfilled another facet of the lawyer–statesperson role, repeatedly and seamlessly moving back and forth between elite private corporate practice and public service.²¹⁴ Elihu Root is again exemplary, having left private practice multiple times to serve as the United States Attorney for the Southern District of New York, Secretary of War under President McKinley, Secretary of State under President Roosevelt, and United States senator from New York, a position he held when he received the Nobel Peace Prize.²¹⁵ Regardless of whether, in retrospect, Root and his professional colleagues genuinely advanced the public good, they embodied the meaning of professionalism, and in particular, the ideal of lawyer–statespersons in their day.²¹⁶

210. See Robert W. Gordon, *Lawyers as the “American Aristocracy”: A Nineteenth-Century Ideal that May Still Be Relevant*, STAN. LAW., Fall 1985, at 4–7. See generally Robert W. Gordon, *The Citizen Lawyer—A Brief Informal History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169 (2009) [hereinafter Gordon, *The Citizen Lawyer*] (exploring the historical roots of the lawyer–statesperson ideal and its application to large law firm lawyers); KRONMAN, *supra* note 14 (describing the exercise of practical wisdom by wise corporate counsel giving holistic advice to clients informed by the public interest as the lawyer–statesmen ideal).

211. Predecessor firm to Winthrop & Stimson, then Winthrop, Stimson, Putnam & Roberts, and today’s Pillsbury Winthrop Shaw Pittman. See *About Us*, PILLSBURY WINTHROP SHAW PITTMAN LLP, <https://www.pillsburylaw.com/en/about-us.html> [<https://perma.cc/X7NW-NT4D>] (last visited Apr. 17, 2026).

212. 1 PHILIP C. JESSUP, ELIHU ROOT 133 (1938) (describing Root’s belief that it was a lawyer’s role to tell clients when appropriate that “they are damned fools and should stop”).

213. See Gordon, *The Citizen Lawyer*, *supra* note 210, at 1183–84.

214. *Id.* at 1184.

215. Nathan Porceng, *The Shameful Imperialist Legacy of Elihu Root, Godfather of Corporate Law*, BALLS & STRIKES (Mar. 8, 2023), <https://ballsandstrikes.org/legal-culture/elihu-root-imperialist-legacy/> [<https://perma.cc/67NA-AQGZ>].

216. Indeed, it was these very elite law firms and their partners who advocated not only for their particular brand of lawyer–statespersons but also for the very notion of lawyers as professionals, to be distinguished from riffraff plaintiffs’ lawyers, the so-called ambulance chasers, the sons of immigrants, who graduated from low-ranked and part-time law schools and flooded the ranks of the bar. Thus, the foundation of professionalism and professional status were marred by exclusion, discrimination, and anticompetitive motivations. See generally AUERBACH, *supra* note 194 (studying the American legal profession, including its prevalent discriminatory practices through the 1970s).

Practicing corporate law as wise counselors was important to all large law firms' lawyers, not just to senior partners. Through most of the twentieth century, BigLaw featured only two classes of lawyers: associates and partners.²¹⁷ Associates vied to become partners in the tournament-of-lawyers model, and partners, through the lock-step system, were destined to become senior partners and serve as wise counselors.²¹⁸ Pursuing the lawyer-statesperson ideal thus captured the professional aspirations of most, if not all, corporate lawyers.²¹⁹ To borrow from Holmes, exercising practical wisdom as a wise counselor was corporate lawyers' grand prize.²²⁰

By the second half of the twentieth century, however, change was in the air. On the demand side, corporate clients grew much faster than BigLaw, and their legal needs multiplied. Regulations swelled, forcing increased legal specialization, which strained partners' ability to give holistic advice and serve as wise counselors.²²¹ The growing professionalization and sophistication of corporate management gradually decreased entity clients' deference to law firms' billing and staffing policies.²²² The tournament of lawyers may have helped establish the elite status of corporate firms, but it was inefficient from the perspective of clients who were focusing on profitability and increasingly less willing to pay for the training and mentoring of associates.²²³ On the supply side, while elite large law firms grew, they began to face increased competition, initially from Jewish and Catholic firms on Wall Street, and later nationally and globally.²²⁴ The increasingly competitive practice realities led to a gradual change in corporate lawyers' conception of their role. Into the early 1960s, according to Erwin Smigel, large law firm partners still regarded themselves primarily as wise counselors and guardians of the law who advised clients on both the law and the public good.²²⁵ But by the 1980s, many

217. Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205, 220 (1999) ("Once all the lawyers were either associates or partners.").

218. See generally GALANTER & PALAY, *supra* note 197 (studying the organizational structure of large law firms, including their hiring and promotion policies).

219. For a subsequent critique of the tournament's assumptions, see generally David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998).

220. See generally Holmes, *supra* note 186 (arguing that in addition to representing the interests of clients and securing handsome compensation, lawyers must serve the public interest by exercising practical wisdom and guiding clients' conduct consistent with the public good).

221. See Wald, *supra* note 198, at 1771–75.

222. *Id.* at 1772.

223. See Eli Wald, *BigLaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509, 2539–41 (2015); see also Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 281–82 (2000) (lamenting the decline of mentoring and training at large law firms).

224. Wald, *supra* note 198, at 1784–86.

225. See ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 8–10 (1964); Russell G. Pearce, *Lawyers as America's Governing*

BigLaw partners understood their primary role as clients' representatives who zealously advanced their corporate clients' interests subject only to the law, having abandoned the lawyer-statesperson ideal.²²⁶ As John Dzienkowski convincingly argues, contemporary corporate lawyers assimilated trial lawyers' hired-gun ideology stripped of its adversary-system context.²²⁷

Beginning in the 1970s, clients recruited senior BigLaw partners to serve as their general counsel, lead their in-house legal departments, and claim seats at the corporate decision-making table.²²⁸ These second-generation in-house lawyers gradually supplanted large law firms' partners as corporate clients' wise counselors for various reasons, including the growth of corporations and the professionalization of their business decision-making processes; the increased complexity, specialization, and fragmentation of the law; the growth of large law firms; a growing emphasis on profits per partner and the financial bottom line; a decline in commitment to traditional professional values; and lawyers' ongoing specialization.²²⁹

The traditional account of the evolution of corporate law practice treated the return of in-house lawyers and the corresponding demise of partners as trusted advisors as a zero-sum game, like the competition won by senior partners a century before: this time, partners lost power to the new general counsel.²³⁰ Although BigLaw firms facially lost power to corporate clients, that power was gained by in-house lawyers, who exercised control on behalf of corporate clients. In this sense, the power shift in the corporate hemisphere was once again *internal* to the legal

Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role, 8 U. CHI. ROUNDTABLE 381, 399–407 (2001).

226. See Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399, 442–43 (1985); Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 504 (1985).

227. See John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 75 (2013); see also John S. Dzienkowski, *Lawyering in a Hybrid Adversary System*, 38 WM. & MARY L. REV. 45, 49–50 (1996) (exploring the influence of the adversarial model on corporate lawyering).

228. Carl D. Liggio, *The Changing Role of Corporate Counsel*, 46 EMORY L.J. 1201, 1203 (1997); Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011, 1011 (1997).

229. See generally KRONMAN, *supra* note 14 (arguing that changing practice realities no longer afford large law firm partners the opportunity to serve as lawyer-statespersons who exercise practical wisdom to help clients pursue their interests in the public spirit); THOMAS D. MORGAN, *THE VANISHING AMERICAN LAWYER* (2010) (asserting that increased competition within and outside the profession and increased specialization erode the traditional role of lawyers as trusted advisors).

230. See generally Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749 (arguing that the rise of in-house counsel and legal departments would come at the expense of large law firms); Rosen, *supra* note 181 (detailing the rise and growth of in-house counsels' roles and responsibilities as replacing and detracting from the work previously done by outside counsel).

profession, from BigLaw partners to in-house lawyers who were well-positioned to return to the role of wise counselors.²³¹

A quarter century ago, based on this shift in power, scholars predicted that in-house legal departments would become the locus of corporate law practice, leading to the decline of BigLaw.²³² This prediction derived in part from in-house general counsel's mandate to cut "legal spend," meaning the corporations' financial outlay for legal activities. Corporations' legal budgets were escalating in part because of BigLaw's inefficient tournament structure, which included staffing matters to allow for the training and mentoring of associates in both routine and more complicated tasks. Commentators assumed that general counsel would cut costs by bringing routine legal work in-house and by monitoring outside counsel's work.²³³ As the number of large law firms grew and specialization increased, corporations' loyalty to a single law firm as its one-stop shop diminished, and stable relationships were replaced by shorter, ad hoc relationships with multiple outside-counsel law firms.²³⁴ Commentators predicted that in-house lawyers would take advantage of these competitive practice realities to push back against BigLaw's hefty bills, demanding fee discounts and lower blended rates.²³⁵ All of this was supposed to result in decreased legal spend and the decline of BigLaw.²³⁶

Scholars acknowledged that their predictions presupposed that lateral transplants from large law firms would integrate into the corporate environment.²³⁷ Doubts were raised about whether in-house lawyers working exclusively for one corporate employer would retain their professional independence, provide persuasive advice, and discourage risky corporate conduct rather than being discounted as naysayers who are not part of the team.²³⁸ But these were regarded as transitional concerns. Commentators assumed that once in-house lawyers established their competence and demonstrated their loyalty to the corporate entity,

231. See generally PRASHANT DUBEY & EVA KRIPALANI, *THE GENERALIST COUNSEL: HOW LEADING GENERAL COUNSEL ARE SHAPING TOMORROW'S COMPANIES* (2013) (studying the emerging roles of general counsel); BEN W. HEINEMAN, JR., WILLIAM F. LEE & DAVID B. WILKINS, *LAWYERS AS PROFESSIONALS AND AS CITIZENS: KEY ROLES AND RESPONSIBILITIES IN THE 21ST CENTURY* (2014) (exploring the opportunities general counsel of large entity clients have to act as public citizens); BEN W. HEINEMAN, JR., *THE INSIDE COUNSEL REVOLUTION: RESOLVING THE PARTNER-GUARDIAN TENSION* (2016) (arguing that general counsel of large corporations can and should act as lawyer-statespersons, advising client about how to pursue their interests consistent with the public interest).

232. See Ribstein, *supra* note 230, at 772.

233. See *id.* at 760; Steven L. Schwarcz, *To Make or to Buy: In-House Lawyering and Value Creation*, 33 J. CORP. L. 497, 503–13 (2008); Zachary Atherton-Ely, *Demonstrating Value to a Corporation as In-House Counsel*, 43 MITCHELL HAMLINE L. REV. 1003, 1003–04 (2017).

234. Wilkins, *supra* note 16, at 2083.

235. See Ribstein, *supra* note 230, at 768; Schwarcz, *supra* note 233, at 505.

236. David B. Wilkins, *The In-House Counsel Movement, Metrics of Change*, THE PRACTICE, May/June 2016, <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/the-changing-role-of-the-global-general-counsel/the-in-house-counsel-movement/> [<https://perma.cc/4U9Q-APBS>].

237. Eli Wald, *In-House Myths*, 2012 WIS. L. REV. 407, 424–39.

238. *Id.*; Hazard, *supra* note 228.

they would emerge as powerful professionals, commanding attention, respect, and deference, and exercising the full gamut of powers previously exercised by BigLaw partners.²³⁹ Pursuing the interests of corporate management without losing power, in-house lawyers would reduce spending on legal matters and align outside counsel with corporate values and policies. As a result, in-house legal departments would grow, some large law firms would collapse, and others would shrink, offering high-end services closely supervised and monitored by in-house lawyers.²⁴⁰

OCGs were not yet prevalent when this account of the corporate bar developed, but in-house lawyers at that time exercised power over their BigLaw counterparts toward similar ends, such as by freezing fee increases, imposing discounts, and limiting staffing.²⁴¹ One might therefore conceptualize OCGs as the apotheosis of the hypothesized shift in power from BigLaw lawyers to in-house counsel. But that would be a misconception, because as we have discussed, OCGs did not originate with in-house counsel. Rather, as corporations expanded and employed increasing numbers of vendors, corporations developed form contracts to manage the procurement of goods and services, not initially to manage legal services.²⁴² Corporate clients' business constituents subsequently transmitted the OCGs to in-house legal departments as part of a streamlined corporate policy, often denying in-house lawyers authority to negotiate the terms of OCGs and constraining in-house lawyers to present the OCGs to outside counsel as a *fait accompli*.²⁴³ In this respect, corporations' use of OCGs is inconsistent with the assumption that in-house law departments gained the power BigLaw lost. Rather, the use of OCGs developed by management in place of in-house lawyers' ad hoc negotiation of engagement agreements with outside counsel suggests that power shifted from the corporate bar to corporate management—a concept developed in the following Section.

B. OCGs and the Decline of Corporate Lawyers' Power

To explore the power dynamics in corporate lawyers' relationships with corporate clients, it helps to unpack the concept of power. Power in the attorney–client relationship encompasses three related variables: influence over decision-making, control over work conditions, and pay. Nominally, clients as principals have sole authority over the representation's objectives. In consultation with clients, lawyers as agents determine how the objectives are to be pursued, including making decisions related to the nature of the work, its quality, quantity, timing, and staffing.²⁴⁴ In practice, however, unsophisticated individual clients often defer to lawyers' advice regarding their objectives.²⁴⁵ In such circumstances, lawyers, in

239. Rosen, *supra* note 181; Ribstein, *supra* note 230, at 760–71; HEINEMAN, LEE & WILKINS, *supra* note 231.

240. See Ribstein, *supra* note 230, at 760–71.

241. Wilkins, *supra* note 236.

242. See *supra* note 17 and accompanying text.

243. Christopher J. Whelan & Neta Ziv, *Privatizing Professionalism: Client Control of Lawyers' Ethics*, 80 FORDHAM L. REV. 2577, 2580 (2012).

244. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (A.B.A. 2023).

245. See generally William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones's Case*, 50 MD. L. REV. 213 (1991) (explaining how well-intending lawyers often usurp the autonomy of clients by imputing their objectives and telling them what to do).

turn, exercise de facto control over the objectives, means, and their work conditions, and are able to set their fees with little pushback from clients.²⁴⁶

Historically, BigLaw firms exercised ample power in the attorney–client relationship in all three respects. As wise counselors, senior relationship partners exercised practical wisdom and gave holistic advice to clients, influencing corporations’ key strategic decisions. Law firms controlled their work conditions. The growing business needs of clients generated ample legal work, which large law firms serviced via the tournament model. Ranks of junior associates handled routine corporate tasks, trained and supervised by senior associates, freeing partners to concentrate on high-level work and at times even engage in big-picture holistic strategic advising. BigLaw firms had nearly exclusive control over staffing, which meant that partners controlled their own and their teams’ schedules. Determining both the hourly rate of their lawyers and the number of hours they worked on matters, large law firms were able to translate their influence and control over work conditions into control over their compensation and de facto control over clients’ legal spend.²⁴⁷

The traditional account of the corporate bar’s evolution accurately documented senior partners’ loss of influence over C-suite-level corporate decision-making, and in-house general counsels’ assumption of that role. However, commentators wrongly predicted that law firm partners’ declining influence would lead to declining compensation. They also wrongly predicted that control over work conditions in the corporate hemisphere would shift to in-house legal departments.²⁴⁸ We explain here why commentators’ predictions did not materialize.

1. BigLaw Lost Less Power than Anticipated

At the highest levels of corporate law practice, in-house positions gradually grew in prestige and power. General counsels displaced senior BigLaw partners as holistic, big-picture advisors to corporate boards and C-suite executives. As senior outside counsels lost the ear of senior management and with it the ability to act as wise counselors dispensing practical wisdom, they gradually became high-end specialized service providers as opposed to trusted advisors. Although senior partners primarily lost influence, they also lost some control over work conditions. Because they increasingly provided specialized legal services, not big picture advice, senior partners received less and later notice of matters to be handled and tighter deadlines in which to complete them, reducing control over their own schedules.²⁴⁹ Moreover, vendor-like OCGs required leaner staffing, requiring partners to do more of the work for clients, resulting in longer hours.

One might have expected law firm partners’ loss of influence and reduced control over their work conditions to lead to diminished compensation. Corporate clients might have extracted lower fees for senior partners’ time insofar as their

246. Wilkins, *supra* note 32, at 73, 78–79.

247. GALANTER & PALAY, *supra* note 197, at 37–45; KRONMAN, *supra* note 14, at 282.

248. Ribstein, *supra* note 230, at 760.

249. Jonathan T. Molot, *What’s Wrong with Law Firms? A Corporate Finance Solution to Law Firm Short-Termism*, 88 S. CAL. L. REV. 1, 18–20 (2014).

services were devalued or more easily replaceable, and in-house lawyers might have more strictly policed BigLaw firms' fees. But BigLaw preserved senior partners' high compensation by restructuring.²⁵⁰ They shifted work from associates at the bottom of the pyramid whose time and assignments were now curtailed by OCGs to paralegals, temporary lawyers, and staff attorneys whose time was billed at significantly lower rates.²⁵¹ This enabled BigLaw to maintain, and even increase, the hourly rates charged for associates' time for work that could not be assigned to a cheaper workforce. At around the same time, BigLaw firms replaced the traditional partner rank with two-tiered partnerships, consisting of salaried or income partners and equity partners.²⁵² Firms positioned income partners as lower-ranked subject-matter experts—for example, tax, intellectual property, and regulatory law team members—while treating equity partners as higher-status deal makers.²⁵³

The seeds of this creative restructuring were grounded in BigLaw's own practice realities. Historically, BigLaw partners occupied the roles of finders, minders, and grinders.²⁵⁴ Finders were the rainmakers who established client relationships, finding work for themselves and others at the firm. Minders managed client relationships, as did finders at times when they did not wish to cede control of the relationship to another partner, and the legal work was in their area of expertise. Grinders performed the bulk of the work for clients, both themselves and by supervising associates.²⁵⁵ Traditionally, finders, minders, and grinders were all partners, with lock-step compensation as the norm.²⁵⁶ BigLaw restructuring conferred elevated equity-partner status on finders (even as clients began to insist that finders do some of the minding and the grinding) and relegated grinders to

250. Lerman, *supra* note 217, at 220 (“Now there are equity partners, income partners, junior partners, senior partners, of counsels, permanent associates, and part-time associates and partners.”).

251. Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 *BUFF. L. REV.* 1155, 1188–89 (2008); Eli Wald, *In-House Pay: Are Salaries, Stock Options, and Health Benefits a “Fee” Subject to a Reasonableness Requirement and Why the Answer Constitutes the Opening Shot in a Class War Between Lawyer-Employees and Lawyer-Professionals*, 20 *NEV. L.J.* 243, 282–89 (2019).

252. William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, 84 *N.C. L. REV.* 1691, 1694 (2006); William D. Henderson & Marc Galanter, *The Elastic Tournament: The Second Transformation of the Big Law Firm*, 60 *STAN. L. REV.* 1867, 1891 fig. 7 (2008).

253. Henderson & Galanter, *supra* note 252, at 1894–1906; Bernard A. Burk, *What's New About the New Normal: The Evolving Market for New Lawyers in the 21st Century*, 41 *FLA. ST. U. L. REV.* 541, 588–90 (2014); Moray McLaren, *The Salaried Partner Dilemma: Part II*, *HARV. L. SCH. CTR. ON THE LEGAL PRO.* (July 20, 2025), <https://clp.law.harvard.edu/knowledge-hub/insights/the-salaried-partner-dilemma-part-ii/> [<https://perma.cc/T3Y9-F29M>].

254. ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 9 (1988).

255. MITT REGAN & LISA H. ROHRER, *BIGLAW: MONEY AND MEANING IN THE MODERN LAW FIRM* 128 (2021).

256. See MILTON C. REGAN, JR., *EAT WHAT YOU KILL* 33 (2010); Larry E. Ribstein, *Delayering the Corporation*, 2012 *WIS. L. REV.* 305, 309–11.

income-partner status.²⁵⁷ Equity partners' new elevated status allowed BigLaw firms to charge their time at a high premium, notwithstanding pressure to lower outside-counsel fees.²⁵⁸

This revisionist account significantly diverges from prior discussions of the corporate bar's evolution. Others have devoted attention to studying restructuring within BigLaw, including the creation of new subclasses of lawyer-employees,²⁵⁹ and the underrepresentation of women and lawyers of color in the equity-partner rank.²⁶⁰ But they have overlooked how, by restructuring, BigLaw avoided reducing equity partners' compensation, which was expected to result from the shift in power away from BigLaw. Furthermore, other commentators have envisioned BigLaw's restructuring as an internal affair, designed to favor the interests of powerful partners at the expense of other firm actors.²⁶¹ We suggest, however, that firms were motivated in part by the need to protect equity partners' power and standing vis-à-vis corporate clients.

Restructuring has not fully preserved BigLaw's control over work conditions. OCGs routinely impose fee caps and staffing restrictions,²⁶² requiring minders and grinders to perform more work themselves rather than through associates. But restructuring has been a financial success.²⁶³ BigLaw firms provide services that are too important and complex to be performed in-house. While ceding the practical wisdom and holistic advice-giving role to general counsels and chief legal officers ("CLOs"),²⁶⁴ BigLaw firms remain the primary providers of high-end, complex legal services, a position yielding significant revenue. Profits per equity partner and equity partners' compensation have soared.²⁶⁵

257. REGAN & ROHRER, *supra* note 255, at 135.

258. *Id.*; see also Henderson, *supra* note 252, at 1694 (describing the competitive practice realities that informed large law firms' decision to abandon their traditional model and adopt a two-tier partnership structure, as well as the consequences of this transformation); Henderson & Galanter, *supra* note 252, at 1911 (exploring the impact of two-tier partnership status on the ability of law firms to charge varying fees).

259. Jewel, *supra* note 251, at 1156.

260. David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 496–97, 502 (1996); Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1043–45 (2011); Eli Wald, *A Primer on Diversity, Discrimination and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1107, 1119 (2011).

261. Jewel, *supra* note 251, at 1156.

262. See, e.g., Daniel B. Mahoney, *When Pruning Is in Order*, BUS. L. TODAY, July–Aug. 1996, at 48, 50.

263. See REGAN & ROHRER, *supra* note 255, at 121–45.

264. Constance E. Bagley, Mark Roellig & Gianmarco Massameno, *Who Let the Lawyers Out?: Reconstructing the Role of the Chief Legal Officer and the Corporate Client in a Globalizing World*, 18 U. PA. J. BUS. L. 419, 432 (2016); E. NORMAN VEASEY & CHRISTINE T. DI GUGLIELMO, *INDISPENSABLE COUNSEL: THE CHIEF LEGAL OFFICER IN THE NEW REALITY* 39–40 (2012); Omari Scott Simmons, *Chief Legal Officer 5.0*, 88 FORDHAM L. REV. 1741, 1743 (2020).

265. Kathryn Rubino, *Biglaw Is Having a Fantastically Profitable 2024*, ABOVE THE LAW (Nov. 20, 2024, at 15:30 MT), <https://abovethelaw.com/2024/11/biglaw-is-having->

Although BigLaw firms' work is increasingly fungible and is sometimes moved from one outside counsel to another, or assigned following a price-only bidding war,²⁶⁶ the transaction costs of switching law firms limit the frequency of such moves. And precisely because the work is fungible, so that "better" legal services are unavailable elsewhere, corporate clients often have little incentive to switch. The nature and complexity of BigLaw's high-end services, now overseen by a smaller equity-partner rank, explain their record-setting revenues and profits per equity partner and the failure of in-house legal departments to emerge as elite legal institutions displacing large law firms.²⁶⁷

Restructuring has also allowed BigLaw to preserve associates' roles. By shifting routine legal work to paralegals, temporary lawyers, and staff attorneys; recruiting smaller classes of entry-level associates;²⁶⁸ and taking advantage of technological advances—for example, using AI tools to handle the bulk of e-discovery—BigLaw firms freed associates to concentrate on more challenging, higher-end work.²⁶⁹ Even while claiming to reduce associates' billable-hour expectations,²⁷⁰ firms protected associates' compensation, which has risen along with that of equity partners.²⁷¹

In sum, the traditional account of the corporate bar, which predicted the erosion of BigLaw's power, proved wrong in significant respects. Yes, senior partners lost the ability to act as wise counselors and to almost wholly control the terms of the representation. Significantly, this loss included, in some

a-fantastically-profitable-2024/ [https://perma.cc/RLE8-V62M]; Andrew Maloney, *Profits Surge Across Big Law Tiers; Am Law 50 Segmentation Accelerates*, LAW.COM (Jan. 29, 2025, at 18:42 MT), <https://www.law.com/international-edition/2025/01/29/profits-surge-across-big-law-tiers-am-law-50-segmentation-accelerates/?slreturn=20250622113821> [https://perma.cc/9MQQ-HN2Y].

266. Sung Hui Kim, *The Profit Principle: Tracing the Moral Decline of Corporate Law Firms*, 122 MICH. L. REV. 1321, 1333 (2024); David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 884 (1998).

267. Wilkins, *supra* note 236.

268. Robert Graff, *Where Have All the Biglaw Associates Gone?*, MAJOR, LINDSEY & AFRICA (Mar. 23, 2017), <https://www.mlaglobal.com/en/insights/articles/where-have-all-the-big-law-associates-gone?byconsultantauthor=robert-graff> [https://perma.cc/N5FP-3REX].

269. Bernard A. Burk & David McGowan, *Big But Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 96–97; William D. Henderson & David Zaring, *Young Associates in Trouble*, 105 MICH. L. REV. 1087, 1096–102 (2007); Robert J. Couture, *The Impact of Artificial Intelligence on Law Firms' Business Models*, HARV. L. SCH. CTR. ON THE LEGAL PRO. (Feb. 24, 2025), <https://clp.law.harvard.edu/knowledge-hub/insights/the-impact-of-artificial-intelligence-on-law-law-firms-business-models/> [https://perma.cc/7NHL-D8B5].

270. See, e.g., Debra Cassens Weiss, *Billable Hours at Larger Law Firms "Did Not Quite Live Up to Expectations" in First Quarter*, ABA J. (May 1, 2025, at 09:25 CT), <https://www.abajournal.com/news/article/billable-hours-at-larger-law-firms-did-not-quite-live-up-to-expectations-in-first-quarter> [https://perma.cc/MS4T-4JTT].

271. See Joshua Holt, *Biglaw Salary Scale*, BIGLAW INVESTOR, <https://www.biglawinvestor.com/biglaw-salary-scale/> [https://perma.cc/YNX7-GYNS] (last visited Mar. 23, 2026).

representations, agreeing to OCGs restricting the law firms' clientele, in marked contrast to advanced waivers of conflicts of interest given by corporate clients seeking nonfungible legal services. But by restructuring, large law firms were able to mitigate some of their power loss, especially with regard to their fees and their equity partners and associates' compensation.

2. *BigLaw's Loss Was Not Entirely In-House Law Departments' Gain*

In the traditional account, routine legal work would gradually shift from BigLaw firms to corporations' in-house legal departments. Over time, in-house lawyers who were initially perceived as naysayers and outsiders would prove to be trusted corporate team players, earn corporate constituents' trust, and become powerful actors in corporations while reducing legal costs.²⁷² Building on their elevated and trusted professional role, some in-house lawyers would eventually move to senior corporate positions.²⁷³ Restrictions on outside counsel, which OCGs later came to represent, would play a role. For example, capping BigLaw firms' fees and requiring leaner staffing would shift more legal work in-house.²⁷⁴

The prediction that in-house lawyers would gain power at outside counsels' expense presupposed that corporate clients needed wise counsel from someone—if not from equity partners, then from in-house general counsels. But the role turned out to have become less essential. The top in-house lawyers, CLOs, and general counsels, who often had been equity partners at BigLaw, did establish themselves as powerful advisors to the C-suite,²⁷⁵ sometimes even serving as wise counselors.²⁷⁶ But for the most part, the wise counselor role became obsolete for at least two reasons. First, corporate governance evolved significantly over the course of the twentieth century, increasingly relying on professionalized C-suite decision-making overseen by boards staffed in part by independent board members.²⁷⁷ Second, general counsels became, by the demands of their jobs, business professionals with deep legal training, rather than legal professionals who strongly identified first and foremost as lawyers.²⁷⁸ These general counsels served effectively as corporate team members within the C-suite, over time becoming CLOs, but not as independent wise counselors.

Meanwhile, in-house lawyers at the middle and junior ranks could not establish themselves as powerful corporate insiders. This is partly attributable to the growth of in-house legal departments, which drew from the ranks of mid-level associates, not equity partners who earned corporate insiders' trust and confidence before moving in-house.²⁷⁹ Besides lacking the experience and credentials to compel

272. Ribstein, *supra* note 230, at 768; Wald, *supra* note 237, at 437. *But see* Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 *LAW & SOC'Y REV.* 457, 457 (2000).

273. *See, e.g.*, Brandeis, *supra* note 188 (listing general counsels who became leaders of their entity clients).

274. *See* Wilkins, *supra* note 236.

275. *See* Rosen, *supra* note 181, at 525.

276. HEINEMAN, LEE & WILKINS, *supra* note 231, at 23.

277. Gordon, *supra* note 184, at 1744.

278. Wald, *supra* note 251, at 295–300.

279. Wald, *supra* note 198, at 1779.

corporate actors' deference, these in-house lawyers were put in the awkward position of "supervising" outside counsel, who were often BigLaw equity partners, while lacking the subject-matter expertise, knowledge, and professional standing to do so effectively.²⁸⁰

The development of two-track career trajectories, opening the door for some in-house lawyers to go back to BigLaw firms, as well as the development of lateral in-house tracks, also weakened in-house lawyers' standing within corporations.²⁸¹ These opportunities shortened lawyers' tenure in in-house departments and reduced in-house lawyers' incentive to negotiate strenuously with BigLaw counterparts. Lawyers who took "terminal" or "dead-end" specialized positions within corporations with limited opportunities for growth or promotion, such as those specializing in intellectual property or employment law, also had less opportunity to become influential actors within the corporate environment.²⁸²

Moreover, the role of mid-level in-house lawyers as intermediaries between the corporation and outside counsel, with a responsibility to "manage" outside counsel and "cut" legal costs, made it a challenge to gain management's trust.²⁸³ Insofar as in-house lawyers endorsed concessions such as advance conflict waivers or watered-down OCGs, they reinforced management's suspicion of them as outsiders with greater fidelity to fellow lawyers than to the corporate client.

In-house legal positions are still quite attractive. They relieve lawyers of having to develop and maintain a profitable book of business, of having to track time in six-minute intervals, and of having to meet billable-hour quotas and mile markers for professional advancement.²⁸⁴ But these positions also entail diminished power and professional status, and a corresponding reduced position of power and influence within corporations. Consequently, in-house legal departments have not generally replaced BigLaw as powerful leading institutions within the legal profession, and in-house lawyers aside from CLOs and general counsels of Fortune 500 companies have not replaced BigLaw lawyers as powerful legal actors.²⁸⁵

In sum, in-house law departments have not seized whatever power has been lost by BigLaw. Rather, to the extent that power has not simply dissipated, it has shifted to corporate clients, as represented by corporate executives. OCGs that expand on outside counsels' fiduciary obligations illustrate the point. When the corporation has leverage, corporate management can employ these OCGs to secure the sort of loyalty that law firms provided decades earlier when firms voluntarily refrained from representing business competitors, from advocating against clients' affiliates, or from taking legal positions for others that were anathema to important

280. *Id.* at 1774.

281. *See id.* at 1791.

282. Wald, *supra* note 237, at 432–34; Wald, *supra* note 198, at 1786–94.

283. Ben W. Heineman, Jr., *The Rise of the General Counsel*, HARV. BUS. REV. (Sep. 27, 2012), http://blogs.hbr.org/cs/2012/09/the_rise_of_the_general_counsel.html [<https://perma.cc/44C3-WMD3>]; Ribstein, *supra* note 256, at 318.

284. Wald, *supra* note 237, at 416.

285. *See, e.g.*, William D. Henderson, *From Big Law to Lean Law*, 38 INT'L REV. L. & ECON. 5, 8 (2014).

clients. But corporate clients no longer reciprocate by reestablishing long-term stable relationships with large law firms that handle most of the client's substantial legal needs.²⁸⁶ Nor do corporations accept their lawyers' fee structures and bills without question but subject law firms to beauty pageants and fixed-price auctions.²⁸⁷ Our revisionist account shows that the power dynamics in the corporate hemisphere were not a pendulum that swung from in-house lawyers to outside corporate counsel and back, but rather a shift from first-generation general counsel to BigLaw and then from BigLaw to corporate clients.

C. OCGs and the Decline of Professional Values, Ideology, and Status

The most significant development in the evolution of the corporate bar in the twenty-first century has been corporate lawyers' loss of professional standing and the corresponding erosion of traditional professional values and ideology. In the traditional account, which regards lawyers as having monolithic power, BigLaw partners' power, including their elevated professional status, would shift to in-house lawyers along with their control over legal spending and work conditions.²⁸⁸ The corporate bar would retain high professional standing because BigLaw's lost prestige would be gained by in-house lawyers. But our revisionist account shows something significantly different. BigLaw equity partners retained financial power but lost their status, which in-house lawyers failed to gain. The erosion of BigLaw partners' professional standing matters because it has been accompanied by the decline of professional values and traditional ideologies. On this point, the D.C. Bar report on OCGs hit the mark when it bemoaned not only that "OCGs may reflect a shift in the economic balance between corporate clients and private practitioners,"²⁸⁹ but also that BigLaw has experienced significant loss of prestige, reduced to being treated as little more than furniture vendors. This, we suggest, better explains the D.C. Bar's opposition to OCGs than its claim, which we addressed in Part II, that OCGs serve no legitimate interests and undermine countervailing interests.

OCGs diminish BigLaw lawyers' professional status in several ways. They reverse the traditional depiction of lawyers' relationships with corporate clients, in which the lawyer is a trusted professional who advises clients in their time of need,²⁹⁰ and to whom clients generally defer.²⁹¹ OCGs treat lawyers like other service providers who are subject to form contracts drafted by corporations. Their services are assumed to be interchangeable with those of other lawyers, so that if

286. See Wilkins, *supra* note 16, at 2096.

287. See *supra* note 175 and accompanying text.

288. KRONMAN, *supra* note 14, at 309.

289. D.C. BAR REPORT, *supra* note 17, at 3.

290. Wilkins, *supra* note 32, at 70.

291. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 2 (A.B.A. 2023) ("[Trust] is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that *almost all clients follow the advice given, and the law is upheld.*" (emphasis added)).

law firms do not accept the corporate client's form agreement, thereby acceding to the corporation's power, they can be as easily replaced as other service providers and vendors. To an extent, the treatment of large law firms' services as fungible and interchangeable is not new as some of BigLaw firms' work has always been relatively straightforward, a form of paperwork,²⁹² consistent with standardized forms of law practice in other legal arenas.²⁹³ But this treatment has been reserved for the work of associates,²⁹⁴ not of partners. Whereas associates perform a mix of necessary paperwork and "royal jelly"—the most challenging, prestigious, intellectual, rewarding work lawyers can perform²⁹⁵—partners' time was supposed to be predominantly dedicated to high-end work. BigLaw's traditional organizational structure—its tournament of lawyers—presupposed that powerful relationship partners concentrated their efforts on this challenging and important work, relying on team members to handle the paperwork.²⁹⁶ BigLaw's restructuring in the twenty-first century was thought to free even associates to focus on more challenging legal work. Importantly, however, OCGs' very existence undermines the prestige of corporate lawyers' work, and consequently the status of the lawyers performing this work, by regarding their work as fungible.²⁹⁷

Of course, OCGs cannot take the full blame for eroding corporate lawyers' professional standing; more accurately they simply deliver the final blow. Increased competitive pressures in the corporate hemisphere toward the end of the twentieth century had already weakened corporate lawyers' commitment to the ideal of corporate law as a public calling.²⁹⁸ The inability to influence corporate decision-making as wise counselors further diminished corporate lawyers' ideological commitment to the public interest. BigLaw's restructuring—designed to shore up equity partners' status, power, and compensation—made things worse. Unlike associates in BigLaw's earlier tournaments, lawyers who are now at the bottom of the law firm hierarchy—temporary lawyers, staff attorneys, of counsel, and income partners—cannot now aspire to become equity partners practicing as wise counselors. Because practicing corporate law as a public calling is beyond their reach, they have no reason to assimilate and communicate this ideal.

292. In the corporate sphere, Wilkins & Gulati note that “[e]xamples of paperwork range from writing, answering, and supervising discovery requests, to proofreading and making slight modifications to pre-existing corporate documents, to writing legal memos to the file or for review by senior associates, to faxing important documents to the client.” Wilkins & Gulati, *supra* note 219, at 1609–10; Wilkins & Gulati, *supra* note 260, at 550.

293. For a helpful summary and examples of the evolving definition of the practice of law, see Shane L. Goudey, Comment, *Too Many Hands in the Cookie Jar: The Unauthorized Practice of Law by Real Estate Brokers*, 75 OR. L. REV. 889, 893–96 (1996).

294. Wilkins & Gulati, *supra* note 260, at 565–67 (exploring the types of work performed by large law firm associates).

295. Wilkins & Gulati, *supra* note 219, at 1610–11.

296. GALANTER & PALAY, *supra* note 197, at 65, 109.

297. See generally Andrew Perlman, *The Implications of ChatGPT for Legal Services and Society*, 30 MICH. TECH. L. REV. 1 (2024) (arguing that the perception of legal work as straightforward and routine undercuts the status of lawyers as professionals who perform challenging and complex tasks).

298. See *supra* notes 225–26 and accompanying text.

Specific OCGs undermine corporate lawyers' status in other ways. Some OCGs require law firms, among other service providers and vendors, to adhere to certain public values, such as racial or gender diversity or environmental protection.²⁹⁹ In the traditional attorney–client relationship, the lawyer, as a trusted professional, was the one who provided advice and guidance that, while grounded in the law, was informed by public spirited values—Holmes's prize.³⁰⁰ OCGs reverse the roles, assigning corporate clients and corporate executives, not BigLaw's equity partners, responsibility for identifying values and wisdom about how to serve the public interest.³⁰¹

Finally, the prevalence of OCGs makes the loss of corporate lawyers' professional standing undeniable. Although the shifting role from trusted professional advisor to service provider is a phenomenon about which Brandeis, Smigel, Kronman, and others cautioned over the years,³⁰² OCGs visibly confirm the demise of the lawyer–statesperson ideal. Although corporate lawyers' practice as wise counselors was never empirically verifiable, the idea of doing good while doing well was important to the profession.³⁰³ A BigLaw partnership held the promise of elite professional status derived from performing complex work that advanced not only corporations' interests but the public's interest.³⁰⁴ By relegating elite lawyers to the role of service providers, the bar likely fears, OCGs not only diminish lawyers' status but discourage lawyers' commitment to the public that sustained their status.

299. Whelan & Ziv, *supra* note 22, at 159–71; *see, e.g., JPMorgan Holds Law Firms' Feet to the Fire on Diversity*, LAW.COM (Feb. 2, 2018), https://finance.yahoo.com/news/jpmorgan-holds-law-firms-apos-111540613.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xllmNvbS8&guce_referrer_sig=AQAAADQEISisHyw- eaAaPgmYc_Ii4_5h1HcNWPQb7HB7kn6eB7RBV0_V-JD1QBbhsXKwe0Ev3u8qUo43kuLS8ZoeRE3EU42GBwjfcqCVDKsJFcCgmODJ64XW1NT9m00CcJ6PdfCeWcABE88JrnSKdZ3R7Um9G7E9jj4-Mj5-X7Ui0I1- [https://perma.cc/CS62-PP9H] (reporting on new OCGs from JPMorgan that require outside counsel to staff any litigation matters with at least 50% female and diverse lawyers in leadership positions).

300. MODEL RULES OF PRO. CONDUCT Preamble cmt. 9 (A.B.A. 2023) (“Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.”).

301. *See supra* note 17 and accompanying text.

302. Brandeis, *supra* note 188; SMIGEL, *supra* note 225, at 12; KRONMAN, *supra* note 14; *see also* GLENDON, *supra* note 14 (detailing changes in lawyers' work in the twentieth century and their corresponding diminished professional status); LINOWITZ & MAYER, *supra* note 14 (arguing that lawyers have come to understand their role as service providers for paying clients as opposed to public citizens).

303. Robert W. Gordon, “*The Ideal and the Actual in the Law*”: *Fantasies of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51, 53 (Gerald W. Gawalt ed., 1984).

304. *See* NELSON, *supra* note 254.

IV. THE IMPLICATIONS OF CORPORATE LAWYERS' NEW NORMAL FOR CLIENTS, THE PROFESSION, AND THE PUBLIC

Needless to say, adopting the D.C. Bar's proposed amendment to the Rules of Professional Conduct would not have revived corporate lawyers' role as wise counselors to corporate clients. Nor would the new provisions have enhanced corporate lawyers' professional status insofar as it derives from their self-conception as lawyer-statespeople. Nor would the proposal have reinforced corporate lawyers' ideological commitment to serving the public good through their rendition of legal services. But that said, the question remains whether the bar should be deeply concerned either about OCGs themselves or about what they represent and if so, whether the bar should pursue other measures to redress corporate lawyers' lost influence, diminished status, and eroding ideology.

The traditional account of the corporate bar's evolution, and of the virtual extinction of the role of equity partners as wise counselors, would reinforce the bar's concern and encourage it to respond. In the 1990s, well before the return of in-house lawyers was complete and before OCGs became prevalent, several commentators explored BigLaw firms' partners' diminished capacity to influence strategic corporate decision-making, asserting that their inability to serve as wise counselors was a public crisis.³⁰⁵ The argument was that lawyer-statespersons played an important public role as intermediaries between large corporate entities and the public, a check on the former in the interest of the latter.³⁰⁶ Large law firms' partners, to be sure, first and foremost served the interests of their clients. But as professionals who took seriously their commitments to the public and the public good, they also served as a constraint on egregious corporate conduct. Accordingly, their decline as powerful professional actors who had the ear of C-suite executives was bad news for the public.³⁰⁷

The pushback from both the left and right was swift, however.³⁰⁸ Critics on the left argued that corporate lawyers have not actually practiced as lawyer-statespersons in the public interest to constrain corporate conduct; that these lawyers' presence and power foreclosed and prevented the development of other possible checks on egregious corporate conduct; and that celebrating the so-called golden era of BigLaw's lawyer-statesperson stewardship ignored and disturbingly belittled the discriminatory realities during which BigLaw flourished.³⁰⁹ Katharina

305. KRONMAN, *supra* note 14, at 3.

306. *Id.* at 362.

307. *Id.* at 39; GLENDON, *supra* note 14, at 349; LINOWITZ & MAYER, *supra* note 14, at 239.

308. See generally MAGALI S. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977) (questioning the public calling commitments of the professions and arguing that they emerged instead as monopolistic projects designed to secure economic benefits and elite status for their members); RICHARD L. ABEL, *AMERICAN LAWYERS* (1989) (studying the practice realities of American lawyers and arguing that the profession is driven by self-interest as much as it is by obligations to the public and the public interest).

309. See, e.g., Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 TEX. L. REV. 1139, 1178–79 (1995); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* 22–24 (1998).

Pistor, for example, criticized large law firm partners for assisting in the wealth transfer from employees and consumers to corporate entities and their officers and directors, resulting in growing inequality.³¹⁰ Critics on the right added that corporate lawyers' claim to be wise counselors who safeguard the public interest was professional posturing designed to protect the profession's monopoly over the provision of legal services.³¹¹

Some who defended the wise counselor idea hoped that in-house lawyers would return to power and replace outside corporate counsels as lawyer-statespersons.³¹² As we have shown, however, that never happened, both because in-house lawyers did not generally emerge as powerful actors within corporations and because even powerful general counsels and CLOs understand their role as corporate team players, not wise counselors. As corporate lawyers' self-image came to mirror their corporate clients' perception of them as high-end service providers, they became increasingly unlikely to practice corporate law as a public calling.

There is little reason to think that corporate lawyers could regain the opportunity to influence corporate clients in the public good, or that the organized bar could wrest it back for them by amending rules of professional conduct. And as we have shown, even if the opportunity to serve as wise counselors reemerged, corporate lawyers might not take advantage of it, since they no longer regard their role in representing corporate clients as encompassing public responsibilities.

Should the bar care? In this Part, the Article completes its revisionist account of the corporate bar's evolution by suggesting that although all is not well, in some ways it is not as bad as the contemporary bar and an earlier generation of commentators have believed. Neither corporate clients nor the profession have been left so badly off by the virtual extinction of the wise counselor role. Advances in corporate governance and the rise of new actors can help constrain undesirable corporate conduct. And BigLaw firms retain a general commitment to the public good in their work outside corporate representations. Therefore, the bar should have an easier time reinforcing that commitment than it would have resurrecting the role of wise counselor. In other ways, however, our account reveals that BigLaw's loss of influence and shifting professional values may have worse consequences than previously assumed. Law firms' declining ideological commitment to the public good is principally a problem for the public insofar as it affects law firms' inclination and ability to stand up for the rule of law in the face of powerful government actors, as some firms' responses to President Trump's Executive Orders might suggest.

A. The Implications for Corporate Clients

We can quickly dispense with whatever concerns one might have about whether corporate counsels' evolving role undermines corporate clients' well-being.

310. KATHARINA PISTOR, *THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY* 158–67, 176–82 (2019); *see also* Richard L. Abel, *Are There Causes and Clients Lawyers Should Not Represent?*, 27 *LEGAL ETHICS* 99, 101 (2024) (“Corporate lawyers draft legislation, litigate, negotiate, propagandise and establish judicial precedents on behalf of their wealthy clients, increasing their wealth.”).

311. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 185–211 (1999).

312. *See* HEINEMAN, LEE & WILKINS, *supra* note 231, at 23.

Elite law partners' role as wise counselors declined not because corporations became more or less indifferent to the public good, but largely because corporations could look to others aside from lawyers both to restrain them and to advise them about the public good. With the rise of sophisticated and professionalized corporate governance mechanisms, wise legal advisors became less necessary.³¹³ What corporate management needed from lawyers was advice about how to comply with increasingly detailed regulatory law and how to minimize transactional and litigation risks.³¹⁴ At an earlier time, first-generation in-house lawyers and outside counsel had more say over corporate social responsibility, but in a law-thick regime, avoiding entanglement with the law still goes a long way toward serving the public interest. And when more is needed, corporations can now rely on sophisticated management and consultants.

Nothing suggests that because corporate lawyers are no longer at the table to give wise counsel, BigLaw firms' corporate clients are generally less faithful to the spirit of the law or less socially responsible—or for that matter, less legally compliant. On the contrary, many corporations, if only for appearances' sake, devote considerable resources to complying with unenforceable human rights norms and serving the public good in other ways, and lawyers often provide technical legal advice about how to do so as well as advice about relevant nonlegal considerations.³¹⁵ Insofar as further checks and balances on excessive corporate power are needed, it is doubtful that wise counselors should be the ones to provide them when corporations can expand relevant governance mechanisms or utilize other professional actors such as gatekeepers.³¹⁶

To be clear, we are not suggesting all is well with corporate governance, compensation, objectives, treatment of affected constituents, and conduct. Nor are we questioning the importance of the recent shift in corporations' stance on DEI and Environmental, Social, and Governance (“ESG”) commitments.³¹⁷ Rather, our point is that whatever challenges face corporate America, the solutions may not entail lawyers acting as wise counselors, and the decline of this role and the inclination of corporate lawyers to perform it does not make corporations worse off.

313. See Gordon, *supra* note 184, at 1736–41.

314. See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L.J.* 239, 246–47 (1984).

315. See, e.g., Elizabeth Pollman, *The Making and Meaning of ESG*, 14 *HARV. BUS. L. REV.* 403, 405, 409–10 (2024); Rachel Brewster, *Enabling ESG Accountability: Focusing on the Corporate Enterprise*, 2022 *WIS. L. REV.* 1367, 1371–73; Emma O'Connor, Note, *Toward a Global Consensus on the “S” in ESG: Strengthening Human Rights and Corporate Accountability Through Global Governance*, 37 *PACE INT'L L. REV.* 157, 160 (2025).

316. JOHN C. COFFEE, JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* 1–5, 8 (2006).

317. Issues of diversity and inclusion, human rights, employee welfare, and climate change are now being discussed as financial risks, rather than value commitments. See Atinuke O. Adediran, *Risky Business*, 106 *B.U. L. REV.* (forthcoming 2026) (studying corporate public filings in 2024 and 2025 and showing that hundreds of corporations have reframed DEI and ESG issues and initiatives as risk factors in their annual reports).

B. The Implications for the Profession: Loss but Not Lost

Having lost the ability to act as wise counselors, corporate law firms were supposed to be weak, lost, and in decline.³¹⁸ Our revisionist account shows why they are not.

The short-term consequences of corporate lawyers' loss of power to entity clients appear to be limited. While BigLaw partners have lost the ability to influence strategic corporate decision-making, BigLaw firms retain considerable power. By restructuring, they protected equity partners' high earnings and preserved much of their control over work conditions. Although equity partners frequently complain that they now have less control over their time because clients increasingly expect them to do more of the work as opposed to delegating it to team members, because they are burdened by administrative tasks managing clients' work, often imposed by OCGs, and because they receive less notice from clients and are brought in later in the game to assist,³¹⁹ equity partners have always worked hard,³²⁰ and they can take comfort in being compensated at unprecedentedly high levels.³²¹ BigLaw firms' high earnings also enable them to recruit associates by offering entry-level salaries well above the rest of the profession and to generously compensate senior associates and income partners.³²² Likewise, the corporate bar's declining influence has not posed an immediate threat to in-house law departments. Lawyers have infrequently been attracted to this work by the opportunity to wield power within the corporation but instead by release from the tyranny of the billable hour and the demand to develop a book of business.³²³

Perhaps in the long-term, BigLaw firms will suffer from their lost influence, diminished status, and declining ideology, given the importance of all of these to their historic success. Elite lawyers traditionally pursued an elevated place

318. KRONMAN, *supra* note 14, at 2.

319. Wilkins, *supra* note 16, at 2080–104; Debra Cassens Weiss, *Denial and Partner Morale Problems Proliferate at Law Firms*, ABA J. (Feb. 6, 2013, at 11:30 CT), https://www.abajournal.com/news/article/denial_and_partner_morale_problems_proliferate_at_law_firms_report_says [<https://perma.cc/D3F4-ZU6E>]; James G. Leipold, *Honing the Hybrid Life*, NAT'L ASS'N FOR L. PLACEMENT (Oct. 2022), <https://www.nalp.org/pdq-hybrid-life> [<https://perma.cc/5599-UHL8>].

320. Wald, *supra* note 204, at 1831 (noting that elite WASP firms were known as “sweat-shops” in light of the long billable hours recorded by the attorneys).

321. See, e.g., Casey Sullivan et al., *Big Law Partners Are Getting Paid Like Star Athletes, with Top Earners Now Making \$10 Million or More. Call It the Kirkland Effect*, BUS. INSIDER (Mar. 30, 2022, at 08:54 MT), <https://www.businessinsider.com/big-law-partner-pay-gibson-dunn-10-million-kirkland-effect-2022-3> [<https://perma.cc/7HPT-KXQM>]; Debra Cassens Weiss, *BigLaw Firm Will Pay Up to \$20M to Top Partners, an Amount Needed “To Be at the Big Table,”* ABA J. (May 20, 2024, at 15:32 CT), <https://www.abajournal.com/news/article/biglaw-firm-to-pay-up-to-20m-to-top-partners-an-amount-needed-to-be-at-the-big-table> [<https://perma.cc/S88H-T4U8>].

322. See, e.g., Harrison Barnes, *2024-2025 Biglaw Bonuses and Salary Scale: A Comprehensive Guide to the Cravath System and Industry Trends*, LAW CROSSING (Jan. 19, 2025), <https://www.lawcrossing.com/employers/article/900055731/2024-2025-Biglaw-Bonuses-and-Salary-Scale-A-Comprehensive-Guide-to-the-Cravath-System-and-Industry-Trends/> [<https://perma.cc/R7CM-L5UB>].

323. Wald, *supra* note 237, at 416.

in society as the law's "high priests"³²⁴ and as a professional aristocracy.³²⁵ Sustaining the image of elite law practice as a public calling may be important to BigLaw's ability to maintain a stable work environment and culture, and to recruit and retain top talent. Doing well financially may not suffice, since other occupations pay even better; without the ability to do good, BigLaw's allure may dim.³²⁶

We would hesitate to sound the alarm, however. Even as high-end service providers, corporate lawyers perform important, socially meaningful work in helping corporate clients achieve their objectives within the bounds of the law.³²⁷ These lawyers' services, which drive commerce forward and grease the wheels of the economy,³²⁸ may be fungible in the sense that other BigLaw firms may perform them, but they are nonetheless complex and challenging. The intellectual quality of the services not only makes them gratifying, at least to the equity partners, but it also renders them professional work.³²⁹ And in some cases, corporate lawyers' work for corporate clients is explicitly intended to serve the public good, as when lawyers assist corporations in complying with international human rights norms, and in promoting DEI policies (until recently) and ESG values.³³⁰

Moreover, if BigLaw's commitment to the public good is no longer expressed by serving as corporate clients' wise counselors or by the frequency of corporate lawyers' movement in and out of government in the manner of Elihu Root, BigLaw can point to other expressions of this commitment, outside of the day-to-day practice of corporate lawyers—for example their pro bono work and representation of unpopular clients.³³¹ As BigLaw firms started to lose power to their corporate clients, they started to provide a lot more pro bono as an expression of their

324. See Gordon, *supra* note 303.

325. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 302–11 (Arthur Goldhammer trans., Library of Am. 2004) (1835) (discussing the status of lawyers as America's aristocracy).

326. David B. Wilkins, *Partner, Shmartner!* EEOC v. Sidley Austin Brown & Wood, 120 HARV. L. REV. 1264, 1275–77 (2007); see Ankush Khardori, *The Fallout Is Growing on Trump's Deals with Law Firms*, POLITICO (July 10, 2025, at 10:12 ET), <https://www.politico.com/news/magazine/2025/07/10/trump-law-firms-deals-mess-column-00445259> [<https://perma.cc/T9NG-S2R3>] (“For years, some prominent Big Law lawyers have tried to soften the industry’s image by positioning themselves as reliable allies of progressive initiatives like DEI policies and as principled litigators willing to oppose their own government. This has in large part been a marketing exercise — large law firms make their money by serving wealthy and powerful private interests and, to take just one example, racial and ethnic diversity among law firm equity partners remains truly abysmal — but Trump managed to blow up that image with the literal stroke of his pen.”).

327. See Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 FORDHAM L. REV. 275, 282 (1992).

328. See Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 954–57 (2000).

329. Wasserstrom, *supra* note 209, at 7–8 (describing the esoteric, intellectual nature of law practice as a characteristic of professionalism).

330. See Brewster, *supra* note 315, at 1394–99.

331. See Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 FORDHAM L. REV. 2357, 2376–78 (2010); Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 35–38 (2004) [hereinafter Cummings, *The Politics of Pro Bono*]; Green & Wald, *supra* note 9.

commitment to the public good.³³² Although some scholars have described this commitment to the public good as thin, at least in contrast to corporate lawyers' historical role as wise counselors,³³³ large law firms' pro bono contributions have become significant in terms of providing access to legal services to those unable to afford them and to unpopular clients.³³⁴ Importantly, however, the very same shift of power from BigLaw firms to their clients, which explains the demise of corporate lawyers' understanding of their role as inherently concerned with serving the public interest, also shaped and informed the rise of pro bono as a manifestation of these lawyers' secondary commitment to the public good. As BigLaw firms' pro bono commitments increased, corporations had significant influence over the content of pro bono programs, from integrating pro bono into corporate client values and priorities to nixing pro bono that raised "positional" or "business" conflicts that echo many of the OCGs provisions.³³⁵

Similarly, while large law firms can no longer credibly claim to advance the public good in their day-to-day practice of corporate law, they can point to efforts to make their workplaces more inclusive and welcoming as manifesting a commitment to the public good.³³⁶ Once again, it is important to concede that BigLaw's commitment to DEI has been influenced and informed by their corporate clients' expectations and interests.³³⁷ Still, as corporate lawyers lost the opportunity to contribute to the public interest directly in their day-to-day practice, they resorted to indirect means, outside of their core practices, to support the public good through the representation of unpopular clients, offering pro bono legal services, and implementing DEI policies.

Contemporary corporate lawyers may regret that they have less ability and opportunity than their predecessors to influence corporate clients to promote public values. But the influence that corporate lawyers once held over corporate clients was always an anomaly. Lawyers are the agents in the fiduciary relationship, not the principals. By necessity, principals give up some of their power and place their trust in fiduciaries who have specialized skills and knowledge. But the principal is still entitled, if not expected, to direct its agents. As corporate management has become increasingly sophisticated over time, there is no reason why it should not wield

332. See Rob Atkinson, *A Social-Democratic Critique of Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best*, 9 AM. U. J. GENDER SOC. POL'Y & L. 129, 141 (2001); Russell G. Pearce, *Lawyer and Public Service, The Historical Perspective on Pro Bono Lawyering*, 9 AM. U. J. GENDER SOC. POL'Y & L. 171, 175 (2001); Deborah L. Rhode & Scott L. Cummings, *Access to Justice: Looking Back, Thinking Ahead*, 30 GEO. J. LEGAL ETHICS 485, 492–94 (2017); Deborah L. Rhode, Lucy Ricca & Michael Winn, *Corporate Pro Bono*, 16 STAN. J. CIV. RTS. & C.L. 315, 317–19 (2020).

333. See Pearce, *supra* note 332.

334. Scott L. Cummings, *The Autocratic Legal Playbook*, UCLA L. REV. (forthcoming 2026) (on file with the authors).

335. Cummings, *The Politics of Pro Bono*, *supra* note 331, at 117–18.

336. Wald, *supra* note 260, at 1090.

337. David B. Wilkins, *From "Separate Is Inherently Unequal" to "Diversity Is Good for Business": The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1556 (2004).

greater power relative to both the outside counsel and in-house lawyers who serve the corporation.

C. *The Implications for the Public*

BigLaw firms' response to President Trump's Executive Orders—the fact that more than twice as many firms settled with President Trump as challenged the Executive Orders in court³³⁸—might legitimize the bar's concern about OCGs and what they represent. Early in his second term, President Trump launched a campaign against political adversaries and their lawyers. In a series of Executive Orders, he targeted large law firms that represented clients and causes he disfavored and sought to punish them by curtailing their access to federal facilities, their ability to represent the government, and their ability to represent clients interacting with the federal government.³³⁹ Commentators from across the political spectrum—including the ABA, many national and regional bar associations, law professors, and legal think tanks—decried the Executive Orders as an assault on the rule of law.³⁴⁰ Four targeted law firms challenged the Orders' legality, seeking injunctions preventing the Orders from taking effect.³⁴¹ As this Article goes to print, four district judges have issued permanent injunctions and summary judgments in favor of the targeted law firms, finding the pertinent Orders blatantly unconstitutional, which the Department of Justice is appealing.³⁴²

While four law firms challenged the Orders' legality, more than twice as many negotiated with the Administration, reaching deals to rescind or preempt orders targeting them. The settling law firms agreed to perform hundreds of millions

338. McGowan, *supra* note 9, at 65.

339. *See, e.g.*, Exec. Order No. 14,230, 90 Fed. Reg. 11781 (Mar. 6, 2025); Exec. Order No. 14,237, 90 Fed. Reg. 13039 (Mar. 14, 2025); Exec. Order No. 14,246, 90 Fed. Reg. 13997 (Mar. 25, 2025). *See generally* Kim Lane Scheppelle, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018) (explaining how democratically elected autocratic leaders use legal tools to dismantle the very constitutional systems designed to protect basic democratic rights, including the ability to peacefully vote leaders out of office).

340. *Bar Organizations' Statement in Support of the Rule of Law*, ABA (Mar. 26, 2025), <https://www.americanbar.org/news/abanews/aba-news-archives/2025/03/bar-organizations-statement-in-support-of-rule-of-law/> [<https://perma.cc/LQ3A-JSDW>].

341. *See* John W. Keeker, Robert A. Van Nest & Elliot R. Peters, *Our Law Firm Won't Cave to Trump. Who Will Join Us?*, N.Y. TIMES (Mar. 30, 2025), <https://www.nytimes.com/2025/03/30/opinion/perkins-coie-trump.html?searchResultPosition=2> [<https://perma.cc/AK8G-SRJK>].

342. *See Perkins Coie's Response to the Unlawful Executive Order Targeting the Firm*, PERKINS COIE, <https://www.perkinscoiefacts.com/> [<https://perma.cc/MCD8-DJL7>] (last visited Mar. 23, 2026); *Jenner Stands Firm*, JENNER & BLOCK, <https://www.jennerfirm.com/> [<https://perma.cc/6MTG-7BL5>] (last visited Mar. 23, 2026) (same). After filing an appeal in June 2025 with the United States Court of Appeals for the District of Columbia Circuit, the Department of Justice sought to dismiss it in early March 2026, only to reverse course again the next day. Michael S. Schmidt, Jonah E. Bromwich & Devlin Barrett, *Trump Administration, in Reversal, Tries to Continue Fight Against Law Firms*, N.Y. TIMES (Mar. 3, 2026), <https://www.nytimes.com/2026/03/03/us/politics/trump-law-firm-orders-reversal.html> [<https://perma.cc/N9L7-MMTU>].

of dollars' worth of pro bono legal services in mutually agreed upon matters.³⁴³ As some view it, while the Administration was in the midst of attacking the rule of law, these large law firms chose to visibly and publicly capitulate to the President. As Judge Howell observed, "If the founding history of this country is any guide, those who stood up in court to vindicate constitutional rights and, by so doing, served to promote the rule of law, will be the models lauded when this period of American history is written."³⁴⁴

Other BigLaw firms stood on the sidelines: when law firms challenging the Executive Orders asked their peers to join an amicus brief denouncing the Orders as an attack on the rule of law, most of the largest law firms declined to join the brief.³⁴⁵ Some critics suggested that BigLaw firms had abdicated their professional responsibility to defend the rule of law,³⁴⁶ while others wondered aloud whether law firms that capitulated to the President could be trusted to stand up to the government on behalf of clients in future representations.³⁴⁷

Our analysis suggests that BigLaw's response was, in part, a product of the corporate bar's evolving role.³⁴⁸ Regardless of whether BigLaw firms were ever likely to challenge governmental action, contemporary corporate lawyers were *less likely* to challenge the Executive Orders than their predecessors, who perceived that

343. Michael S. Schmidt et al., *Skadden, A Top Law Firm, Is in Talks to Avert an Executive Order*, N.Y. TIMES (Mar. 27, 2025), <https://www.nytimes.com/2025/03/27/business/trump-law-firms-skadden-arps.html> [<https://perma.cc/4KBC-ZFJR>].

344. *Perkins Coie LLP v. U.S. Dep't of Just.*, 783 F. Supp. 3d 105, 120 n.3 (D.D.C. 2025).

345. Sujeet Indap, *Top US Law Firms Balk at Backing Perkins' Challenge to Donald Trump Sanctions*, FIN. TIMES (Mar. 30, 2025), <https://www.ft.com/content/494a061a-dde5-43cd-a855-7ced75447cc2> [<https://perma.cc/UDH9-JBRC>].

346. See Deborah Pearlstein, *They Are America's Most Powerful Law Firms. Their Silence Is Deafening*, N.Y. TIMES (Mar. 25, 2025), <https://www.nytimes.com/2025/03/25/opinion/trump-law-firms.html> [<https://perma.cc/4ME4-9EUF>]; Ruth Marcus, *How Donald Trump Throttled Big Law*, NEW YORKER (Mar. 27, 2025), <https://www.newyorker.com/news/the-lede/how-donald-trump-throttled-big-law> [<https://perma.cc/VV23-E8ZA>]; Aviel, *supra* note 9, at 1263; see also Clay Risen, *At a Time When Lawyers Feared Defending Government Enemies, One Law Firm Stood Up*, POLITICO (Mar. 26, 2025, at 12:00 ET), <https://www.politico.com/news/magazine/2025/03/26/law-firm-resisted-government-intimidation-00248850> [<https://perma.cc/N2FY-SDXT>] (explaining that during the Red Scare of the 1950s, most large law firms did not stand up to the rule of law by defending individuals accused of disloyalty).

347. See, e.g., Erin Mulvaney et al., *The Law Firms that Appeased Trump—and Angered Their Clients*, WALL ST. J. (June 1, 2025, at 21:00 ET), <https://www.wsj.com/us-news/law/law-firms-trump-deals-clients-71b3616d?mod=Searchresults&pos=3&page=1> [<https://perma.cc/M4G7-RBXC>] (reporting that general counsels have expressed concerns that law firms that bent to the Trump Administration's demands could not be trusted to fight for them).

348. Other factors, to be sure, informed BigLaw's response, including the dominance of business and transactional partners in large law firms' decision-making and profitability over litigators. See Nora Freeman Engstrom, Jonah B. Gelbach & David Marcus, *How a Rule 23(b)(2) Class Action Could Save Law Firms from Trump*, 78 STAN. L. REV. ONLINE 40, 44 (2025). Of course, as we have shown, the very rise of large law firms was premised on the dominance of corporate law practice over litigation.

their role entailed explicit duties to the public. Focusing on their obligation to advance clients' best interests, the settling firms explained that they were doing what was best for their clients by preserving their own ability to represent clients effectively in dealings with the federal government.³⁴⁹ As deal makers, America's most powerful corporate lawyers did exactly what they advise clients to do: they swallowed their pride to buy peace. Their deals eerily recalled powerful corporate clients' OCGs and law firms' now-prevalent practice of agreeing to them in exchange for being retained to perform lucrative legal work.³⁵⁰ Indeed, some OCGs, just like the settlement agreements with President Trump, call for law firms to perform pro bono work for third parties.³⁵¹ And at least implicitly, the settlements do exactly what the most objectionable OCGs do: they impede lawyers' representation of disfavored clients and causes.³⁵²

Because commitment to the public interest is no longer central to BigLaw firms' self-conception, their response to the Executive Orders became largely a business decision for all the firms that decided to litigate as well as those who made deals. Although it is tempting to envision law firms' response as a measure of their commitment to the rule of law, and the public perception undoubtedly entered into firms' calculus, it seems unlikely that the differing decisions reflected law firms' contrasting values or principles. Rather, having become accustomed to deferring to power, BigLaw firms likely acted consistently with their powerful clients' expectations and interests: large law firms dominated by deal makers and transactional lawyers representing large-entity clients that transact big business with the government settled, while BigLaw firms with powerful litigation departments accustomed to litigating against the government representing entity clients more likely to expect their firm to fight challenged the Executive Orders.³⁵³

In sum, it is easy to perceive the settlements as a pernicious product of BigLaw's declining ideological commitment to the public good and to view the settlements as evidence that this declining commitment is terrible for the public, even if not for corporate clients or for the legal profession itself. But this overlooks the perspective that while forgoing an opportunity to serve the public by going to court to defend the Constitution, BigLaw negotiated settlement terms that reflected their commitment to the public good: they agreed to serve the public by providing millions of dollars in pro bono services, which they were already professionally

349. See, e.g., David Lat, *Brad Karp's Email to Paul Weiss About Its Deal with the Trump Administration*, ORIGINAL JURISDICTION (Mar. 25, 2025), <https://davidlat.substack.com/p/brad-karp-firmwide-email-to-paul-weiss-about-the-trump-administration-deal> [https://perma.cc/8TSK-2S8L].

350. The settlements, to be sure, are quite different than OCGs in at least one crucial respect. Whereas OCGs advance legitimate corporate clients' interests, the Executive Orders advance no legitimate public interests. Yet both seem to result in the same outcome—BigLaw firms' capitulation to powerful actors.

351. See Whelan & Ziv, *supra* note 19, at 2603–07; see also Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 150 (2002) (studying the evolution of pro bono practice, which has come to reflect the commitments of individual lawyers, law firms, and clients).

352. Green & Wald, *supra* note 9.

353. McGowan, *supra* note 9, at 57–65; Green & Wald, *supra* note 9.

committed to doing, on a nonpartisan basis for veterans and other mutually acceptable clients and causes.³⁵⁴ If the bar worries that corporate lawyers' professional influence, status, and public commitment are declining, the bar can encourage additional means to elevate the corporate bar that are likely to be more effective and more appropriate than amendments to the rules of professional conduct. The bar might encourage elite corporate lawyers to exploit their skills and leverage their high compensation and elevated socioeconomic status in ways that serve their local and professional communities. For example, the bar might encourage BigLaw firms' lawyers to run for public office, to join boards of nonprofit organizations, to serve as mentors, and to contribute financially to good causes.³⁵⁵ At the same time, the bar can promote the idea that serving corporate clients, even outside the role as wise counselors, is a significant public service insofar as lawyers promote compliance with the law and help corporate clients avoid and resolve disputes in an ever-more complex, volatile world.

But BigLaw firms' response to President Trump's Executive Orders shows at least one reason why the public should worry about BigLaw firms' loss of influence and status, and their eroding commitment to working for the public. BigLaw firms may be willing to act for the good of the public when they face no threat in doing so and certainly when, as in the case of rendering pro bono services, they are lauded for doing so. But BigLaw firms' declining status and public commitment have made it harder for them to stand up for the rule of law and less likely that they will be motivated to do so at risk to themselves. The Executive Orders, and BigLaw firms' response to them, are noteworthy exactly because the Orders targeted BigLaw's very commitments to the public good: the representation of unpopular clients, pro bono, and DEI policies. Yet as we explained, because these commitments have been shaped and informed by deference to powerful clients' preferences and interests, law firms, which were already willing to conform their pro bono practices to corporate interests, were then likely to conform them to President Trump's preferences, shutting down pro bono and DEI policies the Trump Administration disfavored.

Such capitulation, while consistent with and indeed predicted by our analysis, is nonetheless regrettable, because during a period of perceived democratic backsliding,³⁵⁶ institutions outside government are needed to defend democracy.

354. Although the settlements did not impose much financial cost, since the firms could simply reorient pro bono services that they already intended to provide, the settlements were not costless. Besides taking a reputational hit, firms lost lawyers and some clients who opposed the settlements. See, e.g., Sara Merken, *More Partners Leave Paul Weiss to Join New Law Firm*, REUTERS (June 9, 2025, at 11:06 MT), <https://www.reuters.com/legal/government/more-partners-leave-paul-weiss-join-new-law-firm-2025-06-09/> [<https://perma.cc/U3TK-QJW2>]; Brit Morse, *A Law Associate Making \$300,000 a Year at Skadden Arps Quit Over the Firm's Deal with Donald Trump*, FORTUNE (May 5, 2025, at 07:00 ET), <https://fortune.com/article/rachel-cohen-making-300k-year-law-associate-skadden-arps-quit-protest-firms-deal-trump/> [<https://perma.cc/49E3-Y4F6>].

355. See Eli Wald, *Serfdom Without Overlords: Lawyers and the Fight Against Class Inequality*, 54 U. LOUISVILLE L. REV. 269, 304–05 (2016).

356. See Scott L. Cummings, *Lawyers in Backsliding Democracy*, 112 CALIF. L. REV. 513, 622 (2024).

One would expect representatives of the organized bar to step up, as some have. But one would also expect large, profitable law firms, which historically were the most powerful and influential members of the bar, to take the lead within the profession. We have shown why that is harder for BigLaw firms than at an earlier time and harder than one might expect.

CONCLUSION

This Article challenges conventional wisdom about corporate law practice in several respects. The bar argues that corporate clients' OCGs, which expand on BigLaw's ordinary fiduciary obligations, serve no legitimate purpose. We show that these provisions, although restricting law firms' future clientele, often serve legitimate purposes, and that corporations' freedom to contract should be respected. Legal scholars argue that power in the corporate hemisphere swung like a pendulum from in-house lawyers to BigLaw and back to in-house lawyers, so that the corporate bar collectively retained its power and professional standing. We demonstrate that OCGs are contrary evidence: power has shifted from both in-house lawyers and outside counsels to corporate clients' management. As a result, corporate lawyers have lost the influence over corporate clients that came with the role of wise counselor, and corporate lawyers' professional standing, traditional values, and public-interested ideology have correspondingly eroded. Finally, commentators have envisioned corporate lawyers' declining influence as a significant loss for corporate clients, the bar, and the public. We challenge that assertion, showing that corporations can obtain necessary guidance and restraint elsewhere, that the corporate bar retains significant influence and respect, and that corporate lawyers can serve the public in many ways other than as wise counselors to corporate clients.

At the same time, our revisionist account of the evolution of the corporate hemisphere sheds new light on contemporary practice realities. Unpacking complex power and professional status dynamics, we explore for the first time BigLaw firms' restructuring not as an internal phenomenon designed to bolster equity partners' and associates' pay at the expense of income partners and staff attorneys, but as a calculated response to BigLaw's loss of power and standing to corporate clients. Our account also explains how BigLaw firms have been able to increase their revenue and profits notwithstanding their loss of influence. And it describes BigLaw's response to President Trump's Executive Orders not in simplistic terms of greed but as a reflection of the demise of traditional professional values and commitments.

Just as Odysseus asked his crew to tie him to the mast because he could not resist the Sirens' songs on his own, the D.C. Bar asked the judiciary to restrain law firms from signing on to corporate clients' OCGs because they could not resist clients' pressure on their own. Now that the judiciary has rejected the D.C. Bar's request to restrain its members, should law firms follow the guidance of ethics opinions and other professional writings arguing that law firms should resist on their own initiative? The D.C. Bar's explicit reason to reject these OCGs, which is that they contravene compelling public policies regarding client choice and lawyer autonomy, is unpersuasive. The D.C. Bar's largely unspoken concern about corporate lawyers' waning influence, status, and public-interested ideology is legitimate but will not be met by rejecting OCGs. In any event, the near extinction

of the wise counselor role does not mean that corporate lawyers are “lost.” They can still do good while doing well.

The harm to the public is not utilitarian but deontological. Our account shows that irrespective of the good that corporate lawyers may otherwise appear to do, the demise of their public commitment and influence will, for good reason, erode public confidence in BigLaw firms’ willingness to make sacrifices to defend the rule of law, as well as in their ability to wield the necessary authority. This concern does not justify the D.C. Bar’s efforts to disallow OCGs, but it certainly explains its anxiety and opposition to them.