# DELAWYERING THE CORPORATION

LARRY E. RIBSTEIN*

This Article shows how in-house lawyers' role has evolved to address the high cost of legal services and the traditional information asymmetry between lawyers and clients. The first stage of this evolution involved the expanding role of in-house counsel from intermediary between corporate executives and the corporation's outside law firm to the corporation's purchasing agent in a broader market for legal services. The second stage could see legal work distributed among employees with and without legal expertise throughout the corporation. The Article also shows how evolving legal information technology could facilitate corporations' full-fledged integration of legal information into business decisions. These developments have potential implications for the corporate and general markets for legal services and for legal education.



* Mildred van Voorhis Jones Chair, University of Illinois College of Law. I am indebted for comments by some of the people who are driving the developments discussed in this paper: Mark Chandler, Mark Hermann, Bill Henderson, Ken Friedmann, Dan Katz, Paul Lippe, Jonathan Lipson, and participants in the Nov. 18–19, 2011, symposium at the University of Wisconsin for valuable comments.

## INTRODUCTION

The common image of a lawyer, which the U.S. bar has vigorously promoted for over a century, is that of an independent advisor who tempers loyalty to the client with adherence to professional norms. Yet this image long has been challenged by corporate in-house lawyers who serve one client. In-house lawyers have struggled to reconcile their positions as corporate employees with their professional identities as members of the bar.[1]

The resolution of in-house lawyers' identity crisis has potentially significant consequences for how corporations engage with the law. Professional norms will tend to matter more for in-house lawyers who self-identify as lawyers than for law-trained employees who see themselves as business people. The in-house lawyer may become entirely the corporation's agent rather than partly an emissary from the legal system.

The evolution of law-trained corporate employees also could profoundly affect the legal profession. Corporations' substantial resources could increase demand for alternatives to high-priced customized legal services and erode regulatory barriers to new legal information products.[2] This, in turn, could reduce the price of law for individual clients.[3]

These changes are being shaped by the general market for legal services that determines corporations' alternatives to in-house lawyers. For much of the twentieth century, in-house counsel shared power with the corporation's main outside law firm. The in-house counsel, in addition to providing day-to-day legal advice, served as the main intermediary between top corporate executives and the outside firm. Corporations and their in-house lawyers relied on big law firms to ensure the competence, diligence, and integrity of the individual lawyers who worked on the client's matters. Law firms have been important institutions for their corporate clients, and these clients in turn have ensured the growth and stability of their outside firms.

---

1. *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, 474–78 (2000).

2. Larry E. Ribstein, *Lawyers as Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 321–24 (2004) (discussing these regulatory barriers).

3. *See* Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 1003–04 (2000) (discussing the effect of the corporate market for legal services on the overall price of law and suggesting unbundling this market from the justice system which protects individual rights).

This equilibrium broke down as outside law firms' power declined while in-house lawyers' power increased. Corporations began to buy legal services from multiple law firms and individual lawyers rather than from a single outside law firm. This was due partly to outside firms' decline—what I have called "the death of big law"[4]—and partly to increasing corporate regulation, which changed corporations' demand for legal services. More recently, corporations, led by their in-house lawyers, have turned to many different types of providers of legal services.

This Article focuses on particular factors influencing the evolving role of in-house counsel—the emerging technology of corporate legal services and its move from individualized legal advice to legal information products that do not necessarily involve the participation of conventional lawyers.[5] The structure of the market for legal services has reflected corporations' costs of being informed about the quality of these services. Increased costs first induced in-house counsel to contract across the legal information market. This initially expanded in-house counsel's power as the corporation's main connection with the multifaceted market for legal services and technology. Yet many compliance and transactional tasks that initially expanded inside lawyers' jobs are being replaced by new technologies. These developments could lead to the redistribution of the traditional functions of in-house counsel's office to lawyers or other law-trained people in departments throughout the corporation. Even more drastically, new technology and markets might enable non-law-trained business people to perform functions traditionally performed only by lawyers. In-house lawyers' future role, if any, will depend on their ability to compete successfully with other methods of obtaining legal information.

Part I of this Article discusses the first stage of the evolution of corporate legal services in which power shifts to in-house lawyers from non-lawyer corporate executives (because of increased regulation) and outside law firms (because of the death of big law). Both developments are at least partly functions of increased regulation and the rising cost of legal services, both of which spurred a search for lower-cost alternatives.

Part II focuses on the implications of the rise of the legal information market for the evolution of the corporate lawyer. It discusses new information products' important corporate applications and shows how they can reduce the role of specialized legal expertise. In the process, work may flow from the legal professionals in the in-

---

4. *See* Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749.

5. *See* Bruce H. Kobayashi & Larry E. Ribstein, *Law's Information Revolution*, 53 ARIZ. L. REV. 1169 (2011).

house counsel's office to employees embedded throughout the organization.

Part III discusses the potentially far-ranging implications of the evolution of in-house lawyers for corporations' interaction with the law, as well as for the legal profession and legal education.

## I. THE TRANSFORMATION OF THE CORPORATE LAWYER

This Part discusses the emergence of in-house counsel as the corporation's most important legal advisor. Increased corporate regulation fueled corporate demand for legal expertise. Corporations responded both by "making" the expertise in-house through their in-house lawyers, and "buying" it from outside counsel. This, in turn, increased both the prominence of in-house lawyers and the size and influence of large law firms. Big firms' internal weakness and the growth of alternative sources of supply have helped bring about the death of big law. This Part ends with in-house lawyers taking charge of the corporate market for legal expertise.

### *A. The Demand for Corporate Legal Expertise and the Rise of Big Law*

Corporations have long relied on both large multi-departmental firms and in-house counsel. Corporate demand helped shape the firms that supplied this legal expertise.[6] The late 1960s saw a significant rise in the regulation of business and therefore in the corporate demand for legal services. Congress enacted new laws regulating, among other things, employment (ERISA, employment discrimination, OSHA), the environment (Environmental Protection Act, Endangered Species Act, Superfund), disclosure (Foreign Corrupt Practices Act), and consumer protection (Fair Credit Reporting Act). Congress later added such significant regulation as the Gramm-Leach-Bliley financial regulation overhaul and Sarbanes-Oxley. These laws plus new judicial remedies spurred increases in litigation for matters such as product defects and securities law violations.

Corporations allocated their increased demand for legal services between in-house lawyers and outside counsel. Pervasive regulation forced corporations to have on call legal experts who were intimately familiar with the company's business. But corporations had to balance the substantial costs of hiring and depending on outside lawyers against those of adding significant in-house legal resources that are outside the

6. For a prescient analysis of the significance of the evolving corporate demand for legal services, see Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869 (1990).

firm's core business. Inside counsel initially relied on the corporation's main outside law firm, serving as the intermediary between corporate executives and the firm's lead client partner, who in turn enlisted others in the firm to perform specific services.

Corporations had two main reasons for relying on outside law firms rather than individual lawyers. First, corporate managers lacked sophisticated information concerning the types of legal services the firm needs and the quality of the advice it is receiving. Legal services are "credence" goods, whose quality the client cannot evaluate on sight but must take on faith in the seller.[7] The client may not be able to assess the quality of advice it receives until many years later when a dispute arises and the document or advice is tested in court or an administrative agency. Corporations therefore could not shop in the market for legal services the way they shopped for other supplies and services. Even experienced in-house lawyers could not fully analyze the capabilities of all of the available lawyers and monitor their performance over time. Corporations, however, could trust large law firms to render high-quality service. A big law firm earns its clients' trust by developing a reputation for high-quality work and posting this reputation as a "bond" to secure future performance.[8] The firm maintains its reputation by monitoring, mentoring, and screening its lawyers. These actions assure a client that the lawyers the firm assigns to work on its matters are high quality even if the client cannot directly judge their work and may not even know who they are.

The second reason for the importance of big law firms is that regulation's complexity requires the law firm to acquire significant knowledge about the client's business. Law firms' need to invest in client-specific information and the limited number of large, highly reputable law firms motivated long-term relationships between clients and large multi-departmental firms.[9]

### *B. The Death of Big Law and the Rise of In-house Lawyers*

Although big law firms once were corporations' main response to their increased need for legal services, several factors ultimately led to their decline. The most important factor was the inherent fragility of

---

7. *See* Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68–69 (1973) (discussing the general nature of credence goods); Ellen R. Jordan & Paul H. Rubin, *An Economic Analysis of the Law of False Advertising*, 8 J. LEGAL STUD. 527, 530–31 (1979) (describing credence qualities as requiring the non-expert to rely on the seller).

8. *See* Larry E. Ribstein, *Ethical Rules, Agency Costs and Law Firm Structure*, 84 VA. L. REV. 1707, 1714–18 (1998).

9. *See* Gilson, *supra* note 6, at 893–94.

Big Law's business model.[10] Big firm lawyers had to be induced to contribute to preserving the firm's reputation that was critical in binding the firm's implicit promise to monitor, mentor, and screen its lawyers. Big Law's lawyers have an incentive to maintain the value of their individual human capital by building and protecting their own books of business. They therefore need to be encouraged to invest their limited time and energy in the firm rather than exclusively in their own human capital. This involves a collective action problem: unless most of the firm's lawyers invest in building the future income stream from the firm's reputation, none will have an incentive to make this investment. Big firms motivated their lawyers to contribute to building the firm through mechanisms such as the up-or-out promotion tournament, lock-step seniority compensation, and vicarious liability.

The death of Big Law was hastened by the erosion of firm-building incentives. Vicarious liability became untenable when law firms became subject to huge regulatory liabilities in the late-1980s savings and loan crisis fallout. Demand for legal expertise and publicity about lawyer compensation increased demand for star lawyers. Compensating these lawyers forced firms to hire more associates per partner. Firms' increasing demand for new associates forced them to abandon the "out" part of the up-or-out associate promotion tournament. These changes, in turn, made it harder for firms to deliver on their implicit promise to screen, mentor, and monitor associates. As Big Law's reputational "bond" declined, clients had to find other ways to bridge the information asymmetry between them and their lawyers.

Market forces increased the pressures on Big Law. Rising legal fees, global competition, and financial restructuring motivated corporate clients to cut costs by building their in-house legal departments. Clients' increased legal expertise increased their leverage in shopping for lawyers. Competition both globally and from alternatives to traditional legal services reduced Big Law's ability to profit from its armies of associates.

The rise of in-house counsel and decline of Big Law combined to undermine clients' loyalty to single large firms. Rather than being bound to a single large law firm, corporations enlisted networks of outside firms that had to compete for shares of the firm's business.[11] These "preferred provider" networks ensured corporations continued

10. *See* Ribstein, *supra* note 4, at 759–60.

11. Michele DeStefano Beardslee et al., Hiring Teams from Rivals: Theory and Evidence on the Evolving Relationships in the Corporate Legal Market 42 (Feb. 21, 2010) (unpublished manuscript), *available at* http://ssrn.com/abstract=1442066 (discussing evidence supporting the prevalence of preferred providers as of the end of 2007).

access to substantial legal resources on short notice to meet their rapidly changing legal needs.[12]

As emphasized throughout this paper, the need for and costs of information shape the structure of the corporate legal market. Corporate clients needed networks of large outside firms because of clients' costs of continually evaluating firms and individual lawyers and of sharing information about themselves on short notice with new lawyers. The importance of information costs also means that as in-house lawyers become more sophisticated and informed about legal services, and as technological barriers to information-sharing drop, corporations have become less bound to preferred provider networks.

## II. THE CORPORATE LAWYER AND THE LEGAL INFORMATION MARKET

This Part discusses technological and market developments that could reshape the market for legal services. The first step has been the increase of in-house lawyers' power as they become the purchasing agents in an expanded market for legal information. But in-house lawyers ultimately may find their own power eroded by products and services that replace customized legal advice with standardized technology. This could lead to replacement of in-house legal departments by law-trained people dispersed throughout the organization.

Those who are skeptical of the power of technology and related markets to reshape the legal services industry should consider what has happened recently in other industries. Over a relatively short time, technology enabled, among others, Amazon to kill bookstores, Netflix to supplant Blockbuster, Apple and Pandora to dominate the music industry, Pixar to beat Disney in animation, Google and Groupon to take over direct marketing, Skype to become a leading telecom company, LinkedIn to become a leading recruiter, and Wal-Mart and FedEx to become leaders in retail distribution.[13] It is realistic to expect that similar changes will come to the legal services industry.

Large corporations are particularly ripe for change. First, the legal information revolution enables firms to harness data and computing power to make legal judgments. Large firms produce data as a byproduct of their activities and have scale economies in purchasing computing power. For example, Cisco has been able to use its size and

---

12. *Id.* at 23, 49.

13. *See* Marc Andreessen, *Why Software Is Eating the World*, WALL ST. J., Aug. 20, 2011, at C2.

data in a variety of ways to reduce legal costs through technology.[14] Law firms lack equivalent scale and access to data.[15] Constraints on law firm finance hamper law firms' ability to expand into these areas. The ethical rule against non-lawyer equity financing[16] and law firms' impermanence means partners need to finance technology out of current earnings and with bank loans.

Second, because large corporations exercise concentrated control over significant resources their purchasing decisions can shape the entire demand side of the market.[17] By contrast, the law firm market is segmented and dispersed.

Third, large corporations with in-house legal departments can overcome the incentive problems that impede adoption of legal technologies throughout the legal profession. The move to technology inherently threatens lawyers' basic business model, which relies on customized advice to individual clients. As lawyer-managed organizations, law firms are unlikely to take transformative steps toward technologies that will reduce lawyers' comparative advantage. By contrast, corporate in-house lawyers' strong incentives to minimize costs temper their guild-preservation mentality. Thus, the new methods are likely to face less resistance in corporations than in the general market for legal services. Even if in-house lawyers would want to protect lawyers' role, their desire for success and compensation within the corporation may drive them to embrace new technology.[18]

A fourth reason why corporations can lead a move toward the legal information market is that corporate users of legal services do not confront regulatory impediments to these new technologies. Sale of sophisticated programs for making legal decisions to individuals could risk penalties for unauthorized practice of law.[19] Corporations do not

---

14. *See* William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373, 382–84 (2011); Steve Harmon, *Legal OnRamp Interview: The Impact of Technology on Legal Services*, LEGALONRAMP (Aug. 1, 2011, 2:16 PM), http://legalonramp.com/index.php/LegalOnRamp-Interview-The-Impact-of-Technology-on-Legal-Services.html.

15. *See* Beardslee et al., *supra* note 11; Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137 (2010).

16. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2009).

17. *See* Mark Harris, *Seize the Day: General Counsel, You Hold the Purse Strings. Go for It*, CORP. COUNS., Oct. 2011, at 55.

18. *See* Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the In-House Counsel Role*, 41 SETON HALL L. REV. 77, 106–07 (2011) (noting that in-house departments have an "instrumental demand-side view of legal services and do not differentiate between legal services and other procured services").

19. *See Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1069–70 (W.D. Mo. 2011) (partially denying summary judgment for defendant on class action

face these problems because their in-house lawyers purchase the technology for the firm. Also, corporations can develop general business technology with legal applications for their own use. For example, knowledge management software that, as discussed below, could reduce corporations' discovery costs, is not subject to lawyer regulation.

The following Sections discuss some particular areas where in-house lawyers are increasingly using legal technology that ultimately could take over their jobs. These technologies affect corporate demand for legal services in various ways, from e-discovery, which mainly affects routine tasks, to software that helps lawyers make legal judgments, and sophisticated processing of large databases of case law, which ultimately may replace legal judgments.

### *A. Transactional Work*

In-house lawyers work on many routine transactions that lend themselves to standardization, including purchase of sales and services, real estate transactions, setting up and supervising strategic alliances, employment agreements and internal governance arrangements.[20] Thus,

---

claims for damages arising out of LegalZoom's alleged unauthorized practice of law in Missouri). The case settled before trial by LegalZoom's agreement to modify its business. Press Release, LegalZoom Reaches Agreement in Principle for Proposed Settlement of Missouri Class Action (Aug. 22, 2011), *available at* http://www.globenewswire.com/newsroom/news.html?d=230108; *see also Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. 3:97-CV-2859-H, 1999 U.S. Dist. LEXIS 813, at *18 (N.D. Tex. Jan. 22, 1999) (holding that a CD-ROM which enabled consumers to prepare their own wills and other legal documents violated the Texas unauthorized practice law because it "purports to select" the appropriate legal document, "customizes the documents," and "creates an air of reliability about the documents"), *vacated by* 179 F.3d 956, 956 (5th Cir. 1999) (vacating and remanding after Texas legislature amended the law to provide "that 'the "practice of law" does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney'" (quoting TEX. GOV'T CODE ANN. § 81.101 (West 1999))); William H. Brown, Comment, *Legal Software and the Unauthorized Practice of Law: Protection or Protectionism*, 36 CAL. W. L. REV. 157, 165–67 (1999); Steve French, Note, *When Public Policies Collide . . . Legal "Self-Help" Software and the Unauthorized Practice of Law*, 27 RUTGERS COMPUTER & TECH. L.J. 93, 114–19 (2001); Marie A. Vida, Comment, *Legality of Will-Creating Software: Is the Sale of Computer Software to Assist in Drafting Will Documents Considered the Unauthorized Practice of Law?*, 41 SANTA CLARA L. REV. 231, 249–51 (2000).

20. *See* Simmons & Dinnage, *supra* note 18, at 15–16.

one former in-house lawyer highlights the in-house counsel's role as what she calls a "transactions facilitator."[21]

A problem with this work from an efficiency standpoint is that lawyers may not properly exploit potential economies of learning from past transactions. They sometimes may reinvent the wheel when clients will pay them to do so, while at other times excessively relying on past forms in order to profit from scale economies.[22] Technology facilitates combining past experience with customization and learning. Firms have developed software that revises a basic template based on the client's responses to a questionnaire. For example, ContractExpress DealBuilder uses web-based templates, questionnaires, and other materials.[23] Kiiac can analyze a database of contracts and create a "Reference Standard" that firms can use to create new agreements.[24]

Developing and selling these tools to consumers currently confronts problems under unauthorized practice laws.[25] One problem arises where the technology is sophisticated enough to be considered rendering legal advice. This issue arose in a class action in Missouri involving LegalZoom's sale of document assembly software to consumers despite the relatively unsophisticated nature of this technology.[26] Regulation also complicates combining the software with human legal advice to fill gaps in current technology. Although the consumer can hire her own lawyer, the software firm cannot provide

---

21. Sarah Helene Duggin, *The Pivotal Role of the General Counsel in Promoting Corporate Integrity and Professional Responsibility*, 51 ST. LOUIS U. L.J. 989, 1006–07 (2007).

22. *See* G. Mitu Gulati & Robert E. Scott, *The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design* (Columbia Law & Econ. Working Paper No. 407, 2011) (discussing example of problems of reusing part forms); Larry E. Ribstein, *Sticky Forms, Property Rights and Law*, HOFSTRA L. REV. (forthcoming 2011) (discussing potential ways around excessive use of past forms).

23. *See ContractExpress DealBuilder—Document Assembly Software*, BUSINESS-INTEGRITY.COM, http://www.business-integrity.com/products/contractexpressdealbuilder/default.html (last visited Feb. 11, 2012); *see also* Ron Friedmann, *Contract Drafting for the 21st Century: A Conversation between Ken Adams and Ron Friedmann*, PRISM LEGAL (Apr. 12, 2009, 2:19 PM), http://www.prismlegal.com/wordpress/index.php?p=940&c=1; *The Document-Assembly System*, KONCISION, http://www.koncision.com/how-it-works/system/ (last visited Feb. 11, 2012).

24. *See Welcome to Kiiac.com*, KIIAC, http://www.kiiac.com (last visited Feb. 11, 2012).

25. *See supra* note 19 and accompanying text.

26. *See supra* note 19. One provider reasons that its contract-creation software does not involve the unauthorized practice of law because, among other things, it does not constitute advice to a specific person, and its personnel only give technical support. *See Frequently Asked Questions*, KONCISION, http://www.koncision.com/resources/faq/#upl (last visited Feb. 11, 2012).

one for the consumer because of rules against lawyers working for non-lawyer-owned corporations.[27] Regulation restricts legal software from doing more than helping users tinker with a specific type of contract, leaving them on their own in making more complex choices such as which types of documents to use. For example, the software might help the user write an operating agreement for a limited liability company, but cannot advise on whether an LLC is the appropriate business form for the user.

Large corporations, however, may be able to overcome many of these problems. As discussed above, they are not subject to unauthorized practice or ethical issues in using these products for their own contracts. They also do enough transactions and litigation to stock a database for constructing sophisticated transactional software. In-house lawyers have profit-making incentives to overcome professional resistance to these innovations.

Corporate adoption of transactional software will affect in-house lawyers' routine corporate work. Rather than starting each contract from scratch, the contracting process increasingly will be automated. Although there will still be a role for individual judgments, particularly in large deals or deals calling for new types of structures, corporations may be able to automate enough of their contracting to trim their dedicated legal staffs. Firms could assign the work to law-trained people embedded in firms' operational departments, such as human resources or purchasing, rather than in a "legal" department. These employees could make basically business judgments about deal terms, using their legal skills to choose and use the appropriate template; then they could refer out to lawyers for quality control. They also could collaborate with non-law-trained technicians to develop new templates for recurring situations.

### *B. Regulatory Compliance*

Corporate compliance with regulation and litigation has increased corporate demand for legal services. Although commentators have opined that this work is appropriately done by in-house counsel,[28] and

---

27. MODEL RULES OF PROF'L CONDUCT R. 5.4 (2009).

28. *See* Abram Chayes & Antonia H. Chayes, *Corporate Counsel and the Elite Law Firm*, 37 STAN. L. REV. 277, 284 (1985) (commenting on Foreign Corrupt Practices Act in-house counsel role in "programmatic prevention," giving them opportunity to deter and discover wrongdoing); Duggin, *supra* note 21, at 1010–11 (in-house counsel can serve as a compliance officer); Simmons & Dinnage, *supra* note 18, at 102 (noting that in-house counsel can detect misbehavior); *id.* at 104–05 (commenting that Sarbanes-Oxley creates a need for "legal acumen of in-house counsel to control costs and manage legal threats"); *id* at 121 (in-house counsel functions

regulatory compliance is at the top of in-house counsel's task list, compliance is not necessarily a task for lawyers. Avoiding improper conduct that could hurt the firm's reputation and trigger significant legal fees is an important business function that does not necessarily require hands-on legal assistance. Instead, lawyers can articulate legal obligations for non-law-trained employees to apply in day-to-day operations.

Software can facilitate corporate compliance just as it can contract-drafting. For example, Neota Logic software offers an expert compliance engine that combines "decision trees, decision tables, if/then rules, calculations, weighted factors, spreadsheets, [and] case-based reasoning."[29] This technology helps embed legal determinations in mechanical tools that non-lawyers can use. It also can help corporations adjust to new regulations or the conditions in which they apply by quickly implementing operational changes throughout the business. Lawyers could provide the expertise necessary for developing these tools. Lawyers would function in this capacity as architects and engineers rather than as mechanics applying rules to particular facts. Law-trained people also could be dispersed throughout the organization to help other employees use the tools.

The important point for present purposes is that these tools would help firms make cost-benefit decisions about compliance. This contrasts with instilling legal norms of compliance in the organization, which some commentators have argued is an important function of in-house counsel.[30] To be sure, compliance norms could be useful to the firm in reducing long-run litigation and regulatory costs. The question is whether the norms will be shaped by businesspeople or, instead, by lawyers, who may have an interest in promoting compliance even if it does not make business sense.

Compliance tools and new technologies enabled by faster computers and new software could tip the scales toward removing compliance from the in-house counsel dispersing it throughout the organization. Consider two types of tasks that potential new compliance technologies could perform. The first is inferring the possibility of wrongful behavior from data about firms' activities. For example, one

---

include "routine monitoring"); *id.* at 123–25 (in-house counsel are in a good position to promote a "pragmatic approach to . . . compliance"); *id.* at 136–37 (in-house counsel can promote shareholder value by dealing with compliance, risk management, knowledge management); *id.* at 126–27 (in-house counsel can foster proactive, preventive approach to litigation).

29. *Reinventing Legal Services*, NEATO LOGIC, http://www.neotalogic.com/ (last visited Feb. 11, 2012).

30. *See* Duggin, *supra* note 21, at 1020–23, 1039; Simmons & Dinnage, *supra* note 18, at 105–06.

study determined the likelihood that particular investment managers will engage in fraud from their responses to SEC-mandated questionnaires.[31] The authors found that the best predictors of fraud included the firm's payment of referral fees for business, the manager's conflict of interest indicated by taking the opposite side of transactions from clients, whether the firm traded through an in-house broker (and therefore removed a level of outside supervision of suspect transactions), and the nature of the firm's clients (less fraud with larger investors who can monitor for fraud, more if the clients are agents for other investors who have less incentive to monitor). Companies could use similar types of data to decide how to reduce risks of misconduct. Firms could use knowledge management tools to mine their data gathered for various regulatory and other purposes to head off potential misconduct by changing monitoring, incentives, and employee training. For example, firms might use employment records to find signs of noncompliance with employment discrimination laws.[32] Government-mandated disclosure could enhance internal monitoring by eliciting relevant data. Academic researchers could test for correlations with actual misconduct and insurers might use these data to determine risk factors. For example, a patent has been granted for medical malpractice insurance where premia depend on the insureds' responses to questions bearing on malpractice risk.[33] Insurers can discipline misrepresentations by threatening denial of coverage.

Other compliance technology could elicit direct information about wrongful behavior from deep within the organization. For example, whistleblower laws such as those adopted under Dodd-Frank[34] reward reports of misconduct. These laws present the challenge of designing reporting incentives so that they are robust enough to encourage employees, customers, and suppliers to come forward with information without encouraging false or opportunistic reporting or rewarding useless information. Alternatives include authorizing insider trading on

---

31. Stephen G. Dimmock & William C. Gerken, *Predicting Fraud by Investment Managers* 1 (Networks Fin. Inst., Working Paper No. 9, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832770.

32. *See* Ron Friedmann, *Automating the Law Factory—UK May Lead the Way*, PRISM LEGAL (June 28, 2011, 5:45 AM), http://www.prismlegal.com/wordpress/index.php?p=1152&c=1.

33. *See* U.S. Patent No. 6,272,471 (filed Aug. 7, 2001).

34. *See* Implementation of the Whistleblower Provisions of Section 21F, Exchange Act Release No. 34-64545, 76 Fed. Reg. 34,300, 34,300 (Aug. 12, 2011), *available at* http://www.sec.gov/rules/final/2011/34-64545.pdf.

knowledge of fraud[35] and establishing prediction markets on questions relating to fraud or wrongdoing.[36]

The main importance of these ideas for present purposes is their bearing on the in-house counsel's role. Compliance software and systems that manage data and elicit information from corporate employees convert legal tasks into management tools that need not be part of the in-house counsel's portfolio.

### *C. Discovery and Other Litigation Practice*

Electronic discovery is one of the fastest rising new legal services technologies. It involves using software to cull large amounts of data, such as emails, in response to discovery requests in litigation. Finding the right technologies and firms to handle the rising burden of e-discovery has been an important part of in-house counsel's work. The risks and stakes of this work were highlighted by a client's lawsuit alleging that its lawyers negligently turned over privileged documents to the U.S. Attorney's office.[37] The law firm had relied on third-party outsourcing and e-discovery vendors to review the documents and separate out privileged documents.

Big law firms may not be doing this work much longer. As discussed in Part I, law firms are structured to reduce clients' costs of finding and monitoring lawyers doing complex legal work. It made sense for them to take charge of discovery when it was an integral part of high-stakes litigation and the work mostly involved judgment and litigation strategy. But discovery now includes review of millions of emails and other electronic documents by lower-paid employees subject to advanced quality control techniques and computer monitoring. Law firms handling this work likely will hire specialist third-party vendors.[38] The main basis for assigning document review to junior lawyers is the firm's interest in hanging onto the profits they once could earn by

---

35. Robert E. Wagner, *Gordon Gekko to the Rescue?: Insider Trading as a Tool to Combat Accounting Fraud*, 79 U. CIN. L. REV. 973, 1013 (2011); Larry E. Ribstein, *Let the Whistleblowers Trade*, FORBES (July 28, 2010, 2:53 PM), http://www.forbes.com/2010/07/28/whistleblower-insider-trading-fraud-opinions-columnists-larry-ribstein.html.

36. MICHAEL ABRAMOWICZ, PREDICTOCRACY: MARKET MECHANISMS FOR PUBLIC AND PRIVATE DECISION MAKING 88–93, 97–98, 198–99, 194–226 (2007).

37. *See* Vanessa O'Connell, *Objection! Lawsuit Slams Temp Lawyers*, WALL ST. J., Aug. 3, 2011, at B4.

38. *See* Henderson, *supra* note 14, at 384–86 (discussing one such outsourcing firm, Novus Law); Mark Herrmann, *Inside Straight: Why Vendors Win the Document Review Work*, ABOVE THE LAW (Aug. 25, 2011, 11:27 AM), http://abovethelaw.com/2011/08/inside-straight-why-vendors-win-the-document-review-work/ (comparing e-discovery cost and quality of third-party vendors and outside law firms).

billing thousands of hours of associate time to clients. Given the new dynamics of the legal services market discussed in Part I, clients no longer will tolerate this expense. Indeed, in-house lawyers can be expected to push the firm's outside lawyers to use knowledge management systems rather continuing to provide customized advice on discovery. Nor would law firms be in a particularly good position to hire third-party vendors on the client's behalf. Corporations have to master supply chain management in order to thrive in a networked world. Law firms have not even learned how to be part of a supply-chain, much less how to manage it. Corporations may end up hiring e-discovery vendors directly and skipping the middleman.

E-discovery is still at a fairly early stage of development. It would be a mistake to assume that advances in computing power and storage cannot eventually eliminate the need for human document review. This would make it even more obvious that in-house counsel should hire e-discovery specialists rather than relying on the same law firms they hire for sophisticated legal advice.

Computerized document review in discovery is likely not the end game. As with compliance, corporations could embed e-discovery into their business operations. Specifically, firms could use the same types of knowledge management tools that they use in general monitoring and business decisions to collect and categorize emails and other documents as the corporation creates them. This information would then be instantaneously available for responding to discovery requests. Moreover, the same information and tools could be used to spot ongoing compliance problems, along the lines discussed in Part II.B, and to evaluate litigation in connection with management and settlement of claims, as discussed below in Part II.D.

Knowledge management could move discovery not only out of outside lawyer's hands, but also away from the centralized in-house counsel's office. This work would lose its "legal" character and become integrally related to management. It follows that these functions would be handled by departments such as information technology rather than in-house counsel's office. To be sure, legally trained people would be valuable in designing these multi-purpose knowledge management systems. But these employees would tend to self-identify more as business people than the lawyers who now work in specialized legal counsel's offices.

### *D. Litigation Management*

An important part of an in-house counsel's job is making decisions about whether to try or settle cases. Although this seems inherently to require a traditional lawyer's judgment, data and computer processing could lead to more accurate judgments by means other than legal reasoning. A lawyer traditionally would research past judicial opinions and make a jurisprudential analysis based on the holdings and reasoning of those cases. While this approach is critical to making legal arguments to a judge, it may not be the best way to make business decisions about allocating corporate litigation resources. Firms could use publicly available data to discern the factors that bear on case results, and then analyze their internal data to assess the firm's exposure in light of those factors.[39]

There is already academic literature on using data to determine the factors that bear on litigation results. For example, Christina Boyd and David Hoffman used federal PACER data to analyze the factors that mattered in deciding motions addressing veil-piercing and the outcomes of cases with veil-piercing claims.[40] They found that the trial judge's conservative ideology, having a large number of employees, the fact that a claim was brought by a voluntary creditor, and the presence of shell, façade, and undercapitalization grounds predicted a pro-veil-piercing outcome of veil-piercing motions. Digging deeper, they found that veil-piercing motions against companies with fewer than 300 employees had an eighty percent chance of success, but less than a twenty percent chance of success for firms with more than 2100 employees.[41] Also, motions against corporations owned by artificial shareholders were more likely to succeed than those for piercing LLCs owned by artificial shareholders. This type of data could enable more precise predictions than traditional legal reasoning. Similarly, data on results in various courts could help firms choose where to litigate and the prospects of success once they land in a particular forum.[42]

A third-party market could develop to produce data that are useful for litigation management. Corporations could combine these data with internal information to assess their likelihood of succeeding at various stages of particular litigation, and therefore whether and for how much

39. *See* Ron Friedmann, *Data, Data, Everywhere . . . Someday in Legal Too*, PRISM LEGAL (May 17, 2011, 4:09 PM), http://www.prismlegal.com/wordpress/index.php?p=1143&c=1 (suggesting making litigation based on decision-trees using "automated culling and assessing facts in public and proprietary databases").

40. *See* Christina L. Boyd & David A. Hoffman, *Disputing Limited Liability,* 104 NW. U. L. REV. 853, 856, 879–80 (2010); *see also* Pauline T. Kim, Margo Schlanger, Christina L. Boyd & Andrew D. Martin, *How Should We Study District Judge Decision-Making?*, 29 WASH. U. J.L. & POL'Y 83, 83–84 (2009) (discussing empirical analysis of judicial decision-making).

41. *See* Boyd & Hoffman, *supra* note 40, at 893.

42. *See* Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 402–04 (2010) (based on Stanford Intellectual Property Litigation Clearinghouse data, questioning the conventional wisdom of best plaintiff and defendant jurisdictions for intellectual property litigation).

to settle cases.[43] Using the veil-piercing example, as soon as the corporation is sued it could determine the correlation between facts relating to the firm and factors relevant to liability risk.

This sort of econometrics is only one way computers could help corporations manage litigation. Instead of relying on humans to develop algorithms, powerful new computers can teach themselves how to organize data.[44] Just as Pandora, Netflix, and Amazon have used these tools to identify consumers' preferences based on their past choices, so computers could help corporations predict results in their cases and decide litigation strategy based on these predictions.[45] A computer's ability to use human-type intuitions to win at Jeopardy suggests that this future is well within reach.[46]

Another alternative for data-driven litigation management is for firms to effectively sell their litigation exposure via insurance or the capital markets. A hedge fund or insurance company, subject to rules against champerty and maintenance,[47] could agree to undertake the defense of the case for a particular price or premium. This would resemble the existing litigation finance market,[48] except that in addition to plaintiffs' financing the buy or long side cases defendants would finance the sell or short side. It also resembles existing insurance where

43. *See* Farhad Manjoo, *Will Robots Steal Your Job?: Software Could Kill Lawyers. Why that's Good for Everyone Else*, SLATE (Sept. 29, 2011, 2:42 AM), http://www.slate.com/articles/technology/robot_invasion/2011/09/will_robots_steal_your_job_5.html (discussing how software and data could help firms to "pick . . . lawyers and to decide whether or not to settle").

44. *See* Chris Wilson, *Blogging the Stanford Machine Learning Class: Entry 8: Teaching a Computer How to Think on Its Own*, SLATE (Dec. 6, 2011, 1:45 PM), http://www.slate.com/articles/technology/future_tense/features/2011/learning_machine/stanford_s_machine_learning_class_teaching_a_computer_how_to_think_on_its_own_.html.

45. *See* Daniel Martin Katz, *Quantitative Legal Prediction—Updated Slides—2011 Midwest Law & Economics Association*, COMPUTATIONAL LEGAL STUD. (Sept. 18, 2011), http://computationallegalstudies.com/2011/09/18/quantitative-legal-prediction-updated-slides-2011-midwest-law-economics-association/ (arguing that "science of similarity" and artificial intelligence could spark innovations in legal services).

46. *See* Clive Thompson, *What is I.B.M.'s Watson?*, N.Y. TIMES, June 20, 2010, § MM (Magazine), at 36 (noting that the computer was able to pose the question "Who is Eddie Albert Camus?" for the answer "A 'Green Acres' star goes existential (& French) as the author of 'The Fall.'"); *see also* STEPHEN BAKER, FINAL JEOPARDY: MAN VS. MACHINE AND THE QUEST TO KNOW EVERYTHING 1–3 (2011).

47. *See* Stephen B. Presser, A Tale of Two Models: Third Party Litigation in Historical and Ideological Perspective 4 (Oct. 2009) (unpublished manuscript), *available at* http://www.law.northwestern.edu/searlecenter/papers/Presser_A_Tale_of_Two_Models.pdf.

48. *See generally* Kobayashi & Ribstein, *supra* note 5, at 1210–17 (discussing third party financing of litigation).

the insurer pays the claim and assumes the insured's defense or is subrogated to the insured's right of recovery against the tortfeasor. Litigation finance firms could hire lawyers or buy legal analysis from third parties. This moves any "legal" work outside the corporate defendant's legal department, leaving only a business decision similar to that regarding any other kind of asset.[49]

These technological developments could significantly affect lawyers' role with corporations. Litigation decisions could be made by non-lawyer business people with the help of computers rather than by lawyers based on their personal expertise. Lawyers would focus on designing the software or deciding the idiosyncratic cases the computers cannot handle.

### *E. Dispute Resolution*

The above approaches and technologies have the objective or likely effect of minimizing disputes. For example, clearer and more precise contract drafting may result in fewer disputes and compliance mechanisms may mean fewer torts and regulatory violations. This subpart shows how corporations could minimize the costs of resolving the remaining disputes by freeing themselves from the dispute-resolution mechanisms favored by lawyers.

Corporations have several strategies for avoiding conventional litigation. For example, they could use contractual provisions that opt out of open-ended fiduciary duty and good faith remedies requiring case-by-case adjudication by courts.[50] Firms could use the contracting technologies discussed in subpart A to refine these provisions to accommodate learning about avoidance mechanisms and the need for escape hatches. They could increase enforcement of the clauses by contracting for their preferred judicial forum, procedures,[51] state law, or alternative dispute resolution mechanism, assisted by data evaluating enforcement in each venue.

---

49. To be sure, moves in this area, like other technological inroads on former lawyer preserves, will have to breach the regulatory wall that currently protects lawyers from competition. In particular, lawyers can sell clients the significant advantages of the attorney-client privilege, which clients may sacrifice by going outside traditional attorney-client relationships. Firms would have to choose between retaining the privilege or making the kind of full disclosure litigation hedge funds would demand.

50. For analyses of such contracting in unincorporated firms, see Larry E. Ribstein, *Fiduciary Duties and Limited Partnership Agreements*, 37 SUFFOLK U. L. REV. 927 (2004); Larry E. Ribstein, *The Uncorporation and Corporate Indeterminacy*, 2009 U. ILL. L. REV. 131.

51. *See* Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507 (2011).

Where a corporation's disputes must be resolved through some type of hearing, the firm could contract for a procedure that reduces the involvement of lawyers. Routine litigation procedures such as collections could be embedded in software and integrated with the firms' management and data systems. Firms also have contracted with vendors for online "cybersettlement" processes to cheaply resolve small claims.[52] Even in court, document assembly tools and artificial intelligence could someday write briefs just as these devices are now writing contracts.[53]

Although current rules prohibit corporations from being represented by their employees in court, these rules assume traditional adversary litigation and therefore could be vulnerable if technology changes the fundamental nature of litigation. Thus, even some routine contract, personal injury, and regulatory litigation someday could be integrated into firms' ordinary business processes.

### *F. Hiring Lawyers*

The tools discussed above likely will not eliminate corporations' use of lawyers. But technology can enable corporations to manage the costs of traditional outside legal services. As with the products and services discussed above, these technologies can reduce the information costs that account for the structure of the traditional market for corporate legal services.

Some of these technologies involve data management. For example, TyMetrix provides various tools that enable clients to precisely track costs and outcomes across law firms.[54] As these tools become more sophisticated, corporations will be able to make decisions about hiring, firing, and compensating their lawyers in the same way that they decide on other business expenses.

Corporations also have new ways to buy legal services. For example, a "reverse auction" enables firms to let their suppliers compete for their business.[55] Software standardizes bids to facilitate

---

52. Vanessa O'Connell, *At GE, Robo-Lawyers: Oil-and-Gas Unit Tests Online Resolution to Control Costs*, WALL ST. J., Oct. 10, 2011, at B5, *available at* http://online.wsj.com/article/SB10001424052970203633104576620902874155940.html?mod=ITP_marketplace_2.

53. *See* Larry E. Ribstein, *Coding Legal Arguments*, TRUTH ON THE MARKET (Sept. 11, 2011), http://truthonthemarket.com/2011/09/11/coding-legal-arguments/.

54. *See* TYMETRIX, http://www.tymetrix.com/ (last visited Feb. 8, 2012).

55. *See* Patrick G. Lee, *Pricing Tactic Spooks Lawyers: Companies' Use of Reverse Auctions to Negotiate Legal Services Is Accelerating*, WALL ST. J., Aug. 2, 2011, at B5, *available at* http://online.wsj.com/article/SB10001424053111904292504576482243557793536.html?mod=ITP_marketplace_2.

comparisons. The auction may be hosted by the company or by third party providers such as Shpoonkle and Ariba.com.

These tools contrast with the traditional model of corporations relying on a network of large firms to screen and monitor lawyers. Corporate purchasers of legal services can find new ways to reduce the information asymmetry that traditionally has contributed to law firm profits and reputational capital. The key is enabling clients to understand enough about the service to be able to efficiently compare bids. One approach is developing metrics for evaluating attorney performance and then gathering performance data using these metrics.[56] Another tool is systems that aggregate performance data into standard ratings.[57] These tools can be made more useful by unbundling legal services into discrete tasks that can be separately priced and evaluated.

As with the other approaches discussed above, these pricing and evaluation mechanisms could remove tasks from the in-house counsel's portfolio and disperse them to non-lawyers or law-trained employees throughout the organization. More transparent purchases of legal services would reduce the need to involve a legal expert in each attorney hiring decision.

## III. Implications

Corporate legal work has become too expensive to leave it to lawyers. Corporations now have to make business decisions as to how they can most efficiently deal with their legal obligations. This involves integrating business and legal management. Part II showed how new technologies and information markets can reduce corporations' needs for legal experts to decide how to comply with the law, manage litigation, decide what to litigate, and choose outside lawyers. This Part discusses some potential implications of these developments.

### *A. From Corporate Lawyer to Corporate Employee*

We have seen that one effect of technology could be to transfer many tasks from the corporation's lawyers in a special legal counsel's office to business people throughout the firm. Technology can convert

56. *See* Paul Lippe, *What Aspects of Legal Services Are Most Likely to Get Standardized?*, ABA (Aug. 1, 2011, 8:22 AM), http://www.abajournal.com/legalrebels/article/what_aspects_of_legal_services_are_most_likely_to_get_standardized/ (last visited Feb. 8, 2012).

57. Several services already provide such ratings. *See* Ron Friedmann, *If Lawyers Fear Accountability, Will It Be Imposed?*, PRISM LEGAL (Aug. 3, 2011, 6:16 AM), http://www.prismlegal.com/wordpress/index.php?p=1158&c=1.

tasks requiring special jurisprudential expertise into data-driven business decisions comparable to those regarding other corporate assets and strategies. For example, although lawyers need to be involved in negotiating deals if they are drafting the contract that will embody it, negotiation can be left to non-law-trained business people if they can feed the negotiated deal terms into a computer template. Compliance work would not involve legal advice, but instead converting legal requirements into systems for creating and analyzing corporate data bearing on potential violations. Discovery becomes knowledge management, litigation decisions become asset disposition decisions, and litigation becomes business negotiation. In other words, we should not assume that moving work inside corporations simply transfers it from outside to inside lawyers.

These developments may not completely replace the in-house counsel's office or the corporation's need for lawyers. Indeed, they can be seen as merely the evolution of existing practices. Law already pervades every aspect of firms, so that business managers constantly need to make "legal" decisions, if only when to seek legal advice. The developments discussed above might go no further than helping the in-house counsel's office cope with firms' increasing regulatory load by focusing their attention on the matters that most require a trained lawyer's help. But it seems more likely that fundamental changes in technology will lead to fundamental changes in corporate structure, including when and how legal services are brought in house.[58]

Although legal expertise would remain important to all of the activities discussed above, the nature of the services would change. Lawyers could be the "transaction cost engineers" Gilson envisioned,[59] but their engineering would contribute to the creation of software rather than the provision of one-to-one advice. Lawyers likely also would be involved in creating corporations' knowledge management programs, systems for evaluating litigation at various stages, and designing alternative dispute resolution mechanisms. This work could move from special resource centers devoted to "legal" activities to information technology or other departments. Legal experts would become part of and share metrics with firms' "other business-support function[s]."[60] As

---

58. This is an application of Coase's insight that technology can determine the size of the firm. *See* R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 397 n.4 (1937) (noting the effect of the development of factory machinery on the development of the firm).

59. *See* Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 243 (1984).

60. *See* Harmon, *supra* note 14.

discussed below in Part III.C, this could significantly change how corporations interact with the law.

As the nature of corporate legal work changes, so will the types of legally trained employees that corporations hire. Because in-house corporate lawyering traditionally has required specialized legal training, corporations have hired lawyers from large law firms. Corporations in effect outsourced lawyer training to Big Law. But Big Law is the last place corporations would want to train legal experts attuned to business needs and the types of cost-benefit decisions firms must make in deciding what to spend on legal work. Thus it is not surprising that corporations are starting to hire law-trained people directly out of law school.[61] These tasks also might be given to non-lawyer employees. This could have implications for lawyer licensing as the lines between legal and non-legal expertise blur.

### *B. Changing Professional Norms*

An important effect of the changing role and nature of the corporate lawyer corporate legal work could be a "change in consciousness" of the in-house lawyer[62] from one who self-identifies as a member of a distinct profession to one who is fully aligned with the entrepreneurial attitude of other corporate employees.[63] This new self-image of corporate lawyers could have significant economic consequences. As long as in-house counsel identify as lawyers, they derive utility from adhering to professional norms, or disutility in the form of shame or similar emotions from violating them.[64] In-house lawyers who leave the general counsel's office and become dispersed through and embedded in the organization may become more prone to making decisions and engaging in conduct that increases corporate profits at the expense of legal compliance. They would, accordingly, encourage corporations to engage in compliance only up to the point where expected benefits exceed expected costs, and not to engage in extra compliance beyond this point for the sake of good corporate

---

61. *See* Vanessa O'Connell, *Cut the Law Firms, Keep the Lawyers*, WALL. ST. J., Aug. 12, 2011, at B1.

62. Jerome Kowalski, *Outsourcing, Downsourcing and Insourcing: The Law Firm as General Contractor*, LEGALONRAMP (June 22, 2011), http://legalonramp.com/index.php/Outsourcing-Downsourcing-and-Insourcing-The-Law-Firm-as-General-Contractor.html (comments of FMC general counsel Jeff Carr in discussion thread).

63. *See* Nelson & Nielson, *supra* note 1 (discussing data on professional orientation of in-house lawyers).

64. *See* George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 Q.J. ECON. 715 (2000) (discussing a person's self-identity affects his or her behavior by altering his or her utility functions).

citizenship. Although competent law-trained employees' calculation of the benefits of compliance likely will include potential reputational costs of law violations, they may assign less value to legal compliance for its own sake than would traditional in-house counsel.

This insight contrasts with prior analyses of the implications of the enhanced role of in-house corporate counsel. Some commentators assert that in-house lawyers can play a significant role in corporate compliance.[65] But this assumes that corporate lawyers are inculcated with professional norms. The shift to law-trained employees could change the extent to which the compliance advice corporations receive reflects professional norms.

Business considerations rather than professional responsibility arguments are likely ultimately to determine the future of in-house counsel. Lawyers and others might resist a change in norms and insist that lawyers continue to supervise firms' legal decisions in the firm. Recommendations of an enhanced gatekeeper role for in-house counsel must contend with new technologies and markets that enable clients to choose whether and to what extent to use lawyers to make what are now legal decisions. For example, Darian Ibrahim's data presented at this conference suggest start-ups already are resisting employing in-house lawyers.[66] This may be due not only to the cost of hiring lawyers but also to the perceived business quality of guidance these firms are getting from their lawyers. Start-up firms' managers might prefer to have their lawyers serving as enablers rather than gatekeepers. Any effort to impose more duties on lawyers might only intensify these trends.

The social welfare implications of this potential shift away from in-house lawyers are unclear. More business-like advice may not reduce the level of compliance. As noted above, competent law-trained employees will take account of potential reputational costs of law violations when advising on compliance. Moreover, advice by legally trained people who think like business people may be accorded more weight in corporate decision-making than conventional "legal" advice. And these employees may be able to construct better compliance

---

65. *See* Duggin, *supra* note 21, 991–93; Simmons & Dinnage, *supra* note 18, at 83. Several papers in this Symposium touched on this issue. *See* Shaun Barnes, Kathleen G. Cully & Steven L. Schwarcz, *In-house Counsel's Role in the Structuring of Mortgage-Backed Securities*, 2012 WIS. L. REV. 519; Deborah A. DeMott, *The Stages of Scandal and the Roles of General Counsel*, 2012 WIS. L. REV. 461; Lawrence A. Hamermesh, *Who Let You into the House?*, 2012 WIS. L. REV. 359; Donald C. Langevoort, *Getting (Too) Comfortable: In-house Lawyers, Enterprise Risk and the Financial Crisis*, 2012 WIS. L. REV. 493.

66. *See* Darian M. Ibrahim, *How Do Start-ups Obtain Their Legal Services?*, 2012 WIS. L. REV. 333.

systems than lawyers who have a self-interest in their clients needing more legal services.

The shift from legal advice by law-trained employees to embedding the law in software and compliance processes may have more profound implications. Non-law trained people are likely to treat legal advice not only as an input into their business decisions but also as directing the appropriate course of action. A non-law person may be reluctant to take the unknown risk of acting contrary to an expert's advice. Advice that comes from software may be less persuasive.

Even if firms advised by profit-maximizing law-trained employees or software have lower compliance than those advised by lawyers, this would not necessarily reduce social welfare. To be sure, government's costs of forcing compliance may increase. But more willing corporate compliance also makes it easier for interest groups to use regulation to transfer wealth. Among the beneficiaries of these wealth transfers are lawyers themselves, who may get a larger share of the legal costs of breaking the law than of more business-oriented compliance work.

### *C. Effect on the Non-corporate Market for Legal Information*

The technologies discussed in Part II could significantly affect the general legal services market as well as the corporate demand for legal services. Professional regulation and the lack of property rights in legal innovations currently impede the evolution of legal information products.[67] This impediment seems likely to persist as long as it is supported by politically powerful lawyers heavily invested in the status quo. The regulation itself prevents the emergence of a significant competing interest group of innovators with an incentive to press for stronger property rights and deregulation.

Corporate users of legal services and information could help change this equilibrium. As discussed above, large corporations can create their own systems without being constrained by regulation designed for legal representatives. Corporations also have the market leverage to demand that their outside lawyers use approaches and technologies that they otherwise would resist. Even demand by a single large client could be enough to move a law firm to action given the additional potential payoff the firm might reap from selling the service or technology to other clients.[68]

Once corporations spur the creation of a corporate market for legal technology, entrenched incumbents may find it hard to prevent this

67. *See generally* Kobayashi & Ribstein, *supra* note 5.
68. *See* Harmon, *supra* note 14.

market from spreading to the consumer sector. Products developed for the corporate market and services by non-lawyer employees will demonstrate the feasibility of reducing legal costs, and therefore the opportunity costs of regulation. This could motivate consumer groups and innovators to demand that regulators permit similar technologies and unlicensed providers in non-corporate markets. For example, as corporations employ increasingly sophisticated contract drafting programs, regulators will find it harder to maintain restrictions imposed by unauthorized practice laws on programs designed for non-corporate contracts and legal instruments such as wills.

### *D. Training the New In-house Lawyers*

The developments discussed in Part II may have two general types of effects on legal education. Although these developments directly affect only lawyers who work in and for corporations, this is a big enough part of the demand for legal services that it could generally affect how law schools train students to meet this demand.

First, the evolution from traditional in-house counsel to law-trained employees will increase students' demand for training as business people with legal skills rather than as lawyers who advise business people. Courses like accounting and finance are currently only niches in law school curricula and often outsourced to business schools. Standard law school courses like contracts and corporations focus on law, legal advice, and litigation distinct from how these areas affect business decisions. Law students mostly learn how to litigate disputes. To the extent they learn to give pre-litigation legal advice, they focus on strictly legal issues on the assumption that the business decisions will be made by others. Students educated in this way likely will be at a disadvantage in the new corporate legal environment against those who learn how to make legally informed business decisions. The new corporate lawyer must learn to interact with the legal information market and translate legal edicts into corporate processes.

To be sure, not all law students will seek corporate positions. Many will seek to be litigators, while others will want to represent individuals or specialize in regulatory or criminal law. Yet an important characteristic of the current model of legal education is that it is designed under uniform accreditation standards to produce general-purpose lawyers who will be litigating and giving "legal" advice.[69] The new corporate lawyer, by contrast, would have to be trained especially for the business environment. Legal education therefore may not be

---

69. *See* Larry E. Ribstein, *Practicing Theory: Legal Education for the Twenty-First Century*, 96 IOWA L. REV. 1649, 1652 (2011).

able to continue to adhere to a one-size-fits-all model. Corporate in-house legal expertise may become a new type of professional degree as well as a new type of lawyer. This may involve, for example, combining law and business training, leaving less time in law school.

The new technologies discussed in Part II may have additional effects on how lawyers think and must be trained.[70] While lawyers within corporations are becoming business people, other legally trained people will be creating new ways to automate contracts, learning to value litigation, developing new metrics for evaluating lawyers, and inventing new types of compliance mechanisms for anticipating and preventing problems that lead to litigation. As software takes over the mechanical tasks and leaves lawyers free to focus on business strategy, other law-trained people will evolve from mechanics to architects. These new tasks will force law schools to integrate certain types of theories with legal skills, thus eliminating the traditional dichotomy between theory and practice.[71] For example, Dan Katz's curriculum for his hypothetical "MIT School of Law" includes such courses as quantitative methods, legal information engineering, legal research and development, legal information technology, supply chain management clinic, and decision science.[72]

In general, the changes discussed in this paper are one more reason why law schools will be forced to fundamentally revise their model for training legal experts. This could include unbundling legal education and offering special degrees for in-house lawyers as are already offered in other countries.[73]

### *E. Effect on the Legal Services Market*

This Part has hinted at the possibility that the revolution in corporate legal services may profoundly affect the overall market for legal services. This may be a welcome development. Gillian Hadfield argues that corporations' demand for complex and therefore costly legal services has skewed the overall market for legal services.[74] The corporate demand for legal services is such a large part of the market that it drives up legal costs for everybody and impedes individuals'

70. *See* Harmon, *supra* note 14.

71. *See* Ribstein, *supra* note 69, at 1651–52.

72. *See* Daniel Martin Katz, *The MIT School of Law: A Perspective on Legal Education in the 21st Century*, SLIDESHARE (Oct. 14, 2011), http://www.slideshare.net/Danielkatz/the-mit-school-of-law-presentation-version-102-101411.

73. *See* David B. Wilkins, *Is the In-house Counsel Movement Going Global? Assessing the Role of Internal Counsel in Emerging Economies,* 2012 WIS. L. REV. 251 (discussing movements in various countries toward credentialing of in-house counsel).

74. *See* Hadfield, *supra* note 3, at 956–57.

access to justice. She therefore suggests bifurcating market law and justice law. The developments discussed in this paper may accomplish the bifurcation Hadfield advocates. Corporations may turn to employees who require less law training and more general business training than today's corporate lawyers. Meanwhile, more traditional training in the justice system may be aimed at people planning careers in such areas as consumer law, civil rights, and criminal law.

## CONCLUSION

The in-house counsel is becoming a central figure in corporations, aided by a sharp rise in litigation and regulation that makes controlling legal costs essential to corporate success. This Article focuses on two aspects of the evolving role of corporate counsel. First, it discusses a possible evolution of in-house corporate lawyers from lawyers who have been inculcated with traditional professional norms to business people with legal expertise. Second, the Article discusses legal information technology's role in this evolution that could lead to corporations' full-fledged integration of legal information into business decisions. More generally, this Article illustrates how dynamic market forces and rapidly evolving information technology can influence even markets as tightly regulated as the one for legal services. These developments may force lawyers to consider more deeply what is meant by the "practice of law."