

BIG LAW'S SIXTH AMENDMENT: THE RISE OF CORPORATE WHITE-COLLAR PRACTICES IN LARGE U.S. LAW FIRMS

Charles D. Weisselberg* and Su Li**

Over the last three decades, corporate white-collar criminal defense and investigations practices have become established within the nation's largest law firms. It was not always this way. White-collar work was not considered a legal specialty. And, historically, lawyers in the leading civil firms avoided criminal matters. But several developments occurred at once: firms grew dramatically, the norms within the firms changed, and new federal crimes and prosecution policies created enormous business opportunities for the large firms. Using a unique data set, this Article profiles the Big Law partners now in the white-collar practice area, most of whom are male former federal prosecutors. With additional data and a case study, the Article explores the movement of partners from government and from other firms, the profitability of corporate white-collar work, and the prosecution policies that facilitate and are in turn affected by the growth of this lucrative practice within Big Law. These developments have important implications for the prosecution function, the wider criminal defense bar, the law firms, and women in public and private white-collar practices.

* Shannon Cecil Turner Professor of Law, University of California, Berkeley.

** Statistician, Center for the Study of Law and Society, University of California, Berkeley.

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INTRODUCTION

On July 16, 2007, U.S. District Court Judge Lewis A. Kaplan entered a remarkable order.¹ Federal prosecutors had investigated the giant accounting firm KPMG LLP (“KPMG”) for allegedly marketing fraudulent tax shelters.² The firm managed to avoid criminal charges, but 16 former partners and employees did not.³ In *United States v. Stein*, Judge Kaplan dismissed the indictment against 13 of the 16 individuals, finding that federal prosecutors had unconstitutionally induced KPMG to stop funding their individual defenses.⁴ As a result, although these defendants generally had substantial personal assets, they either lost their counsel of first choice (including lawyers from major law firms) or were financially unable to defend their cases as they would have had their legal expenses been entirely advanced or underwritten by KPMG.⁵ The court was incensed, calling this “intolerable in a society that holds itself out to the world as a paragon of justice.”⁶ The Department of Justice (“DOJ”) challenged the ruling. The defendants and their amici were represented in a closely watched appeal by some of the finest lawyers of the day, including counsel from the nation’s largest law firms. On August 28, 2008, the U.S. Court of Appeals for the Second Circuit affirmed, finding that the government had violated the defendants’ Sixth Amendment right to counsel.⁷

Doctrinally, these rulings are defensible. But to people steeped in ordinary criminal cases, *Stein* is downright odd, if not otherworldly. The contrasts are so easy to draw that it almost seems trite to do so. A fee cap of \$1000 for appointed trial counsel’s out-of-court work does not violate the U.S. Constitution, even in a death penalty case.⁸ The Sixth Amendment is not violated when one court-appointed counsel replaces another, even when the client is unable to form a “meaningful relationship” with her new lawyer.⁹ There is no per se Sixth Amendment violation in appointing an attorney in a capital case who is a raging alcoholic, drinks heavily during the trial, and is arrested on his way to court for jury selection with a .27 blood alcohol level.¹⁰ Of course, a critical difference between *Stein* and these indigent defense cases is that in *Stein* the government interfered with funding arrangements for already-retained counsel.¹¹ Yet in another case, the U.S. Supreme Court held that the forfeiture of a drug defendant’s assets

1. *United States v. Stein (Stein IV)*, 495 F. Supp. 2d 390, 427 (S.D.N.Y. 2007).

2. *Id.* at 394.

3. The *Stein* prosecution produced a series of decisions in addition to the July 16 holding. *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006); *United States v. Stein (Stein II)*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006); *United States v. Stein (Stein III)*, 452 F. Supp. 2d 230 (S.D.N.Y. 2006), *vacated sub nom.* *Stein v. KPMG, LLP*, 486 F.3d 753 (2d Cir. 2007); *United States v. Stein (Stein V)*, 541 F.3d 130 (2d Cir. 2008).

4. *Stein IV*, 495 F. Supp. 2d at 427.

5. *See id.* at 415–23.

6. *Id.* at 427–28.

7. *Stein V*, 541 F.3d at 157–58.

8. *Ex parte Smith*, 698 So. 2d 219, 223–24 (Ala. 1997).

9. *Morris v. Slappy*, 461 U.S. 1, 12–14 (1983).

10. *People v. Garrison*, 765 P.2d 419, 440–41 (Cal. 1989).

11. *See Stein IV*, 495 F. Supp. 2d at 394.

that were intended to pay for already-retained counsel does not violate the Sixth Amendment.¹² So why was it “intolerable” for the wealthy KPMG defendants to lose company funding and their counsel of choice? And when did the large civil firms start handling criminal cases?

We think that much more underlies *Stein* than a distinction between defendants who have already retained counsel and those who have not, or even a simple distinction between rich and poor. Judicial decisions reflect and reinforce legal, professional, and cultural norms. We would like to suggest that *Stein* reflects a developing norm that corporate officers and employees ought to be represented in white-collar criminal cases not just by accomplished defense counsel, but by a certain type of counsel—those at the nation’s leading corporate law firms, most of whom are former federal prosecutors.

It was not always this way. Historically, a majority of the nation’s largest law firms maintained civil practices; criminal matters (even those we would now call “white-collar”) were generally referred to small regional boutique law firms or reputable solo practitioners. As large corporate firms expanded rapidly and developed national practices, many also established white-collar and corporate investigation departments. Sometimes the national firms acquired smaller, regional firms and sometimes they hired former prosecutors or other skilled counsel. Dramatic changes in law firm culture and the economics of practice, coupled with an increased federal law enforcement focus on corporate crime, encouraged the lateral movement of government and private counsel and made white-collar practices within the nation’s largest firms quite lucrative. To any current observer of the large firms, it comes as no surprise that they take on criminal as well as civil work. But, as we demonstrate, their corporate, white-collar criminal practices have become remarkably extensive and profitable.

This Article explores the development of these practices at the nation’s leading law firms and some of the implications for firms and the criminal justice system. The *Stein* case bookends our project. In addition to introducing the topic, the ruling from the Second Circuit Court of Appeals is singularly important, for it reinforces what may be a norm of representation by these particular counsel, and makes it quite risky for the government to suggest that a company not fully underwrite or advance the costs of the personal defense of its officers or employees. *Stein* protects a funding stream, allowing individual officers and employees to draw on corporate dollars to pay the stratospheric hourly rates and fees that these lawyers and their firms command. *Stein* may amount to a full-employment act for this very select cadre of attorneys. Perhaps it would not be unfair to call the result “Big Law’s Sixth Amendment.”

Part I of the Article describes the growth of corporate law firms and white-collar practices, and certain aspects of modern, large law firms. Part II reviews the evolution of modern, federal white-collar investigations and prosecutions—legal developments that have encouraged the creation of corporate compliance and internal investigations practices within the major law firms. Part

12. Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 626–28 (1989).

III presents an empirical analysis of white-collar lawyers and practices within the “Am Law 200,” the 200 U.S. law firms with the highest gross revenues. Our analysis is based on data we initially collected about 4837 firm lawyers, although we focus on 1626 partners with substantial white-collar and internal investigations practices. We detail these lawyers’ prior work experiences, particularly in federal prosecution settings. We also note some significant gender differences in the career paths of the partners. Using a second data set, we then examine the lateral movement of law firm partners in white-collar practices, especially the movement of lawyers from government to the Am Law 200. With both sets of data, we explore the profitability of these practices. We believe that these practices are so lucrative because they are largely immune from the cost controls that apply to other types of law firm work. Part IV presents the KPMG investigation and the *Stein* litigation as a case study. While *Stein* is not representative of internal corporate investigations and white-collar prosecutions, it provides interesting insights into prosecution and defense practices, as well as the structure of the defense bar. Part V explores some of the implications for the prosecution function, the defense bar, the firms, and women in public and private white-collar practices.

I. THE “OLD WORLDS” OF LARGE CORPORATE LAW FIRMS AND WHITE-COLLAR PRACTICES

The “old worlds” of large corporate law firms and white-collar practices—by which we mean 40-or-so years ago—were almost entirely separate. The large firms generally evolved from transactional practices; they came to include litigation, but that litigation was overwhelmingly civil. What we now think of as white-collar criminal defense practices emerged later and not as part of the large law firm culture or tradition. Changes in firm structure and culture facilitated the migration of corporate white-collar work to the nation’s largest law firms.

A. *The Development of the Large Corporate Law Firm*

The traditional account begins with firms in New York City, generally considered the largest private legal market in the United States.¹³ In their important 1991 work, Marc Galanter and Thomas Palay describe the factors characteristic of big firms that emerged in New York during the first part of the 20th century: The

13. For example, in 1980, the New York Standard Metropolitan Statistical Area (“SMSA”) was ranked first in lawyer population, private practitioner population, and total law firms. See BARBARA A. CURRAN ET AL., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S, at 572 tbl.III.4 (1985). The Washington, D.C. SMSA was ranked first by population per lawyer (and private practitioner), but fourth by numbers of private practitioners and law firms. See *id.* at 573; see also AM. BAR FOUND., THE 1971 LAWYER STATISTICAL REPORT 68 tbl.19 (Bette H. Sikes et al. eds., 1972) (discussing that, as of 1970, New York City had professional listings for 30,180 private sector lawyers, and Washington, D.C. was the second-ranked city with 15,501 private lawyer listings); JAMES V. MARTINDALE ET AL., SURVEY OF THE LEGAL PROFESSION: THE SECOND STATISTICAL REPORT ON THE LAWYERS OF THE UNITED STATES 20, 119, 166 (1952) (stating that Manhattan and the Bronx had professional listings for 18,956 lawyers in private practice, Chicago had 9470, and Washington, D.C. had 4393). All of these publications draw from Martindale–Hubbell Law Directory data.

firms were comprised of partners and associates; they served primarily large corporate entities or organizations, clients with the need for continuous or recurrent legal services; the work required specialization in the problems of these particular clients, as well as teamwork among lawyers (partly to share the partners' surplus human capital); and there was a strong preference for "office" practices—transactional work—as opposed to litigation.¹⁴ Another feature was what came to be called the "Cravath system," meaning hiring law school graduates right out of school, providing training, and holding out a possible promotion to partnership after an extended apprenticeship.¹⁵

Several characteristics of large firms at that point in time are important for our account. One is the emphasis on in-house advancement; lateral movement was decidedly not the norm. The relatively few lateral partners were mostly well-known individuals from the world of politics or business, or occasional specialists with unique training.¹⁶ Another characteristic was that "all business in the office must be firm business," meaning that business did not belong to any individual partner or associate.¹⁷ As a practical matter, this would discourage lateral movement because work was not readily portable.

And then there was the focus on civil business practice. Firms preferred large commercial clients, not the problems of the average person. Although they might have assisted a corporate officer with a "personal indiscretion" or taken an occasional white-collar case, large firms did not specialize in criminal work.¹⁸ Elite lawyers may have found handling criminal cases distasteful.¹⁹ At least as important, the economic incentives favored practices with continuous or recurring clients; recidivists aside, criminal defendants tend to need one-time representation.

14. See MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 4–6 (1991). Milton Regan also provides an exceptional account of the corporate firm at that time. MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* 16–33 (2004).

15. See GALANTER & PALAY, *supra* note 14, at 9–10. The system was attributed to Paul Cravath by Cravath's partner, Robert Swaine. Swaine writes that the basic philosophy had been developed by others, but Cravath developed it more systematically. See 1 ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS: 1819–1947*, at 3 (1946). For a discussion of the spread of the Cravath system, see ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* 72–73 (1988).

16. See ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 42 (Ind. Univ. Press 1969) (1964) (describing occasional partner recruitment); see also *id.* at 57 ("Competition for lawyers among the large firms in New York City is limited in two major ways: the firms will not pirate an employee from another law office, and they maintain a gentleman's agreement to pay the same beginning salary . . ."). Although the Cravath firm may have been an extreme, Swaine writes: "With but one exception during the 1928–1944 period, [the firm] grew through promotion of men trained within the office." 2 ROBERT T. SWAINE, *THE CRAVATH FIRM AND ITS PREDECESSORS: 1819–1948*, at 462 (1946).

17. REGAN, *supra* note 14, at 22.

18. See SMIGEL, *supra* note 16, at 150, 163–66.

19. See *id.* at 271 ("Large law firms usually will not handle divorce cases or defend professional criminals or accept negligence work.").

In their study of lawyers in Chicago in 1975, John Heinz and Edward Laumann famously described two hemispheres of the profession: lawyers who represent large organizations—including corporations, unions, and government—and those who represent individuals.²⁰ Most lawyers “seldom, if ever, cross the equator.”²¹

If the “golden age” of the firm was the late 1950s and early 1960s,²² the model was not stable and enormous growth was just on the horizon. In 1957, there were 20 corporate law firms in New York City with 50 or more lawyers.²³ Firms began to grow at an exponential rate, “with an acceleration or ‘kink’ in the rate around 1970.”²⁴ In 1978, when the *National Law Journal* published its first annual survey of the nation’s largest law firms, it found 77 firms with 100 or more lawyers; the 200th-ranked had 53.²⁵ By 1988, the nation’s 250 biggest firms *all* had more than 100 lawyers.²⁶ As we next explain, the white-collar criminal defense bar began, at least in New York, as the large firms entered these periods of dramatic growth.

B. The Start of the Corporate White-Collar Defense Bar

The term “white-collar crime” is not self-defining. Sociologist Edwin Sutherland, who coined the phrase in 1939, intended to capture “crime committed by a person of respectability and high social status in the course of his occupation”; Sutherland would exclude offenses unrelated to the occupational structure, such as murder or adultery.²⁷ The term now has a broader meaning.

20. JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319 (1982).

21. *Id.* Heinz and Laumann, among others, have recognized that the “two-hemispheres” metaphor is somewhat crude and simplistic, but it does capture basic features of the structure of the profession. See JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 7 (2005).

22. See GALANTER & PALAY, *supra* note 14, at 20. And the “golden age” firms may have been regional. “Among Chicago lawyers, Golden Age careers were always a rarity.” HEINZ ET AL., *supra* note 21, at 148.

23. See SMIGEL, *supra* note 16, at 39 (relying upon data from the 1957 Martindale–Hubbell Law Directory).

24. George Rutherglen & Kevin A. Kordana, *A Farewell to Tournaments? The Need for an Alternative Explanation of Law Firm Structure and Growth*, 84 VA. L. REV. 1695, 1695 (1998).

25. *National Law Firm Survey*, NAT’L L.J., Sept. 18, 1978, at 14–17 [hereinafter *National Law Firm Survey (Sept. 18, 1978)*]; *National Law Firm Survey*, NAT’L L.J., Sept. 25, 1978, at 14–17. The data include lawyers in all offices, including outside of the United States. The top two firms had 434 and 272 attorneys, respectively. See *National Law Firm Survey (Sept. 18, 1978)*, *supra*, at 14.

26. *The NLJ 250*, NAT’L L.J., Sept. 26, 1988, at S-4 to S-24 [hereinafter *The NLJ 250 (Sept. 26, 1988)*]. The two largest firms reported 1179 and 962 attorneys. See *id.* By 1991, 23% of all private law firm practitioners (i.e., private lawyers other than solo practitioners) were working in firms that had over 100 attorneys. BARBARA A. CURRAN & CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S, at 8 tbl.6 (1994).

27. EDWIN H. SUTHERLAND, WHITE COLLAR CRIME: THE UN-CUT VERSION 7 (1983). Sutherland also provided a more straightforward definition of a white-collar criminal: “[A] person with high socioeconomic status who violates the laws designed to

Decades ago, the DOJ defined white-collar offenses as nonviolent activities that “principally involve traditional notions of deceit, deception, concealment, manipulation, breach of trust, subterfuge, or illegal circumvention”; the definitions used by the DOJ and the Federal Bureau of Investigation (“FBI”) focus on the crime, not the status or position of the offender.²⁸

The most important insights about white-collar practice in the late 1970s and 1980s come from the remarkable scholarship produced in affiliation with the Yale White-Collar Crime Project, directed by Stanton Wheeler. Kenneth Mann’s *Defending White-Collar Crime: A Portrait of Attorneys at Work*,²⁹ and the larger doctoral dissertation on which it is based,³⁰ together provide a rich account of white-collar defense practices in New York City. Mann’s research included interviews with experienced lawyers and surveys of counsel who defended white-collar cases in the Southern District of New York from 1974 to 1978.³¹ While Mann’s account may not necessarily capture the development of the white-collar bar nationwide, the story of the white-collar bar in 1970s New York is essential to understand the movement of white-collar work into the nation’s large law firms, given New York City’s prominence as the hub of corporate legal practice in the United States.

In the late 1970s, there was not a consensus as to whether white-collar practice could even be considered a legal specialty. Mann discerned a division in attitude. Younger lawyers, those who started practice in the 1960s and 1970s,

regulate his occupational activities.” Gilbert Geis, *White-Collar Crime: What Is It?*, in WHITE-COLLAR CRIME RECONSIDERED 31, 34 (Kip Schlegel & David Weisburd eds., 1992) (quoting Sutherland’s definition of white-collar crime in ENCYCLOPEDIA OF CRIMINOLOGY 511 (Vernon C. Branham & Samuel B. Kutash eds., 1949)).

28. J. TOMPKINS, JR., U.S. DEP’T OF JUSTICE, OFFICE OF POLICY & MGMT. ANALYSIS, CRIMINAL DIV., NATIONAL PRIORITIES FOR THE INVESTIGATION AND PROSECUTION OF WHITE COLLAR CRIME: REPORT OF THE ATTORNEY GENERAL 5 (1980). The 1977 DOJ definition “is also consistent with the FBI’s working definition of white collar crime.” *Id.* Even more recently, “[w]ithin the FBI definition, there is no mention of the type of occupation or the socioeconomic position of the ‘white-collar’ offender.” CYNTHIA BARNETT, U.S. DEP’T OF JUSTICE, FED. BUREAU OF INVESTIGATION, THE MEASUREMENT OF WHITE-COLLAR CRIME USING UNIFORM CRIME REPORTING (UCR) DATA 1 (2000). One reason may be that “it is impossible to measure white-collar crime with [Uniform Crime Reporting] data if the working definition revolves around the type of offender.” *Id.* For a discussion of various meanings of white-collar crime, see David T. Johnson & Richard A. Leo, *The Yale White-Collar Crime Project: A Review and Critique*, 18 LAW & SOC. INQUIRY 63, 65–69 (1993).

29. KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985).

30. Kenneth Mann, *Defending White-Collar Crime: A Field Study of Defense Attorneys at Work* (Dec. 1980) [hereinafter Mann Dissertation] (unpublished Ph.D. dissertation, Yale University) (on file with author). We cite to the published volume where possible but draw on the unpublished dissertation for details that are not included in the book.

31. Mann interviewed 44 lawyers and obtained survey results from 249 counsel. MANN, *supra* note 29, at 30–34. He also worked in a white-collar defense firm for 18 months. *Id.* at 34.

viewed themselves as white-collar specialists. Older attorneys tended to think of themselves simply as trial attorneys or litigators.³²

Mann described a “new movement of attorneys into white-collar crime defense practice” beginning in the mid-1960s in New York City, when some graduates of the U.S. Attorney’s Office “went into small law offices where they might have an opportunity to specialize in criminal work or started their own offices.”³³ This new specialty provided something of an upgrade to the traditionally low image and status of criminal defense practitioners.³⁴

Only a modest number of the leading white-collar defense specialists in New York practiced with large corporate firms.³⁵ The white-collar specialist in a large corporate firm did not have a diverse white-collar practice. That lawyer would handle “mainly corporate matters and individuals in relation to their actions in a corporate setting. . . . This attorney puts a smaller percentage of total work hours into criminal cases.”³⁶ Survey responses revealed that none of the white-collar practitioners who devoted 50% or more of their practice to criminal law were in firms of more than 50 lawyers. Furthermore, all of the white-collar practitioners in large firms (those with more than 75 attorneys) described themselves as doing less than 50% criminal work, of which more than half was white-collar.³⁷

It was not easy for white-collar defense specialists to integrate into large law firms at the time. A number of former prosecutors found themselves dependent on decisions of senior partners as to the work the firm would do. They risked losing valuable contacts and expertise while handling only one or two criminal matters per year. Several other lawyers managed to negotiate agreements that criminal work “will be sought or at least not rejected” or they joined one of the

32. See *id.* at 23–25.

33. *Id.* at 21.

34. See *id.* at 21–22.

35. From his survey responses, Mann identified two groups of white-collar lawyers. The first and most prominent group was comprised of 20 attorneys who were named as white-collar specialists by ten or more survey respondents. Of the group of 20, only two (10%) were from large law firms and the remainder were solo practitioners or from firms with 20 or fewer lawyers. *Id.* at 30–31; Mann Dissertation, *supra* note 30, at 321 tbl.13. One was from a firm with 76 to 100 attorneys, and one was from a firm with over 100 attorneys. Mann Dissertation, *supra* note 30, at 321 tbl.13. According to the *National Law Journal’s* 1978 survey, a firm with 76 attorneys would be ranked number 119, and the 200 largest firms all had more than 50 lawyers. See *National Law Firm Survey (Sept. 18, 1978)*, *supra* note 25, at 14–17.

Using a snowball reference procedure, Mann also identified a larger group of 60 specialists (which included 19 of the first group of 20). MANN, *supra* note 29, at 30–32, 252 app. 2, 255 app. 4. Of the larger group of 60 specialists, 12 were in firms with more than 76 attorneys (20%), 8 were in firms with 21–50 lawyers (13.3%), and the rest were solo practitioners or from smaller firms. Mann Dissertation, *supra* note 30, at 321 tbl.13.

36. MANN, *supra* note 29, at 28–29.

37. Mann Dissertation, *supra* note 30, at 319 tbl.12. Perhaps just as significantly, these lawyers “did not claim to be specialists in criminal law. All of them stated that their own specialization was litigation, a minor percentage of which included criminal cases.” *Id.* at 318.

few large firms “traditionally open to this kind of work.”³⁸ But change was coming. A former prosecutor told Mann:

In the last ten years [since the mid-to-late 1960s], some of the most talented people who have come out of the U.S. Attorney’s office in Manhattan have stayed in the white-collar area. . . . Some of the big firms are now also beginning to allow . . . [t]hat practice in their door. Some are going into small defense oriented firms.³⁹

Prior to the last ten years, the interviewee explained, there was

[m]ore of a stigma . . . [T]here was a perception before that gentlemen don’t practice this kind of law, and that is breaking down. Even so, there are some people who practice this kind of law out of big firms and the grapevine says that some of the other partners are alarmed at some of the characters walking in and out [of the office]. . . . There is a clientele image problem.⁴⁰

He added, presciently: “Ultimately, law firms will tolerate most, not all, but most legitimate practices of law, if they turn out to be lucrative to the firm.”⁴¹

White-collar specialists sacrificed larger incomes if they chose to practice in small firms. These small firm lawyers would “never have the consistent high income of a partner in a major Wall Street or midtown firm” and they would be “unlikely to approach, even in . . . good years, the income of a senior partner in a major firm.”⁴² They had “cases, not clients”—to the extent the clients had business or personal legal needs, other lawyers would handle them.⁴³ Certainly, these white-collar defense specialists did not have the sort of long-term repeat-business clients treasured by the large corporate firms.

Although the focus of this Article is the structure of the bar retained to represent corporations and their officers and employees in investigations and prosecutions—which is closer to Sutherland’s original meaning—these comprise only a subset of white-collar matters. Given the DOJ’s definition of “white-collar crime” as generally encompassing offenses involving deceit, subterfuge, and the like regardless of the status or position of the offender,⁴⁴ a “white-collar defense lawyer” conceivably could have quite a diverse range of cases and clients, including many defendants too poor to retain counsel. In another study from the Yale Project, David Weisburd and colleagues examined a sample of white-collar cases drawn from seven federal districts in fiscal years 1976–1978.⁴⁵ They found that counsel was appointed in 43% of the cases as compared with 84% of

38. MANN, *supra* note 29, at 29. Two such firms were Paul, Weiss, Rifkind, Wharton & Garrison LLP, and Curtis, Mallet-Prevost, Colt & Mosle LLP. *Id.*

39. Mann Dissertation, *supra* note 30, at 330–31.

40. *Id.* at 331–32.

41. *Id.* at 332.

42. MANN, *supra* note 29, at 23.

43. *Id.* (quoting a white-collar defense specialist).

44. TOMPKINS, *supra* note 28, at 5.

45. DAVID WEISBURD ET AL., CRIMES OF THE MIDDLE CLASSES: WHITE-COLLAR OFFENDERS IN THE FEDERAL COURTS 15–16, 196 *tbl.A-1* (1991).

“common crimes.”⁴⁶ Defendants were most able to retain counsel in antitrust, securities fraud, and bribery matters, and least able in bank-embezzlement and mail-fraud cases.⁴⁷ Thus, even a white-collar practice could be quite varied, and Mann also reported that most attorneys handling white-collar cases also represented defendants in other criminal matters.⁴⁸

C. The Last Two Decades of Firm Growth and Breakdown of Longstanding Norms

Until at least the middle of the last decade, the nation’s largest law firms continued their remarkable growth. In 1988 the nation’s 250 largest firms all had more than 100 lawyers,⁴⁹ but by 2008, before the recession fully impacted the national firms, the 100th-ranked reported 458 attorneys, and the 250th-largest firm had 174 lawyers.⁵⁰ The data also reflect the evolution of national and international law firms.⁵¹ As firms expanded in size and scope, firm culture changed and barriers to the development of white-collar practices also fell.

When Marc Galanter and Thomas Palay published their landmark study of law firms in 1991, firms were in the middle of this period of growth and transformation.⁵² Galanter and Palay noted an increasingly competitive environment and more frequent lateral movement of lawyers, as well as the development of in-house corporate law departments that retained more routine work and were more sophisticated consumers of law firms’ services.⁵³ On this shifting landscape, Galanter and Palay argued that the central feature of the big

46. *Id.* at 101 tbl.5.2 (reporting cases where counsel was retained; counsel would necessarily be appointed in the remaining cases). The “common crimes” studied were postal theft and forgery, as they were (at least then) fairly common offenses in the federal system. *Id.* at 17.

47. *Id.* at 101 tbl.5.2. By offense type, the percentages of defendants with retained counsel were: antitrust (100%); securities fraud (81.3%); bribery (78.3%); tax fraud (61.3%); false claims (57.9%); credit fraud (54.6%); mail fraud (51.4%); bank embezzlement (33.9%). *Id.* The data for antitrust and securities fraud cases included prosecutions outside of the seven select districts. *See id.* at 101, 197 tbl.A-2; *see also* CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES 3 tbl.3 (2000) (reporting that in fiscal year 1998, 42.8% of federal fraud defendants and 63.0% of those charged with federal regulatory offenses had retained counsel, as compared with 19.3% of those charged with violent federal offenses and 35.8% of federal drug defendants).

48. *See* Mann Dissertation, *supra* note 30, at 302, 303 tbl.6.

49. *The NLJ 250* (Sept. 26, 1988), *supra* note 26, at S-4 to S-24.

50. *The NLJ 250*, NAT’L L.J., Nov. 10, 2008, at S-18 to S-34 [hereinafter *The NLJ 250* (Nov. 10, 2008)]. The two largest firms reported 3785 and 3627 attorneys. *Id.* at S-18.

51. In 1980, only 47% of the largest law firms—the 287 firms with more than 50 lawyers—operated in more than one state. CURRAN ET AL., *supra* note 13, at 54 tbl.1.8.6. By 2008, 92% of the 250 largest firms were in more than one state or country. *See The NLJ 250* (Nov. 10, 2008), *supra* note 50, at S-35 to S-42.

52. *See* Marc Galanter & Thomas Palay, *A Little Jousting About the Big Law Firm Tournament*, 84 VA. L. REV. 1683, 1683 (1998).

53. GALANTER & PALAY, *supra* note 14, at 48–55.

firm was the “promotion to partner tournament,” their parlance for a contest in which a limited number of junior lawyers became members of the firm.⁵⁴

More recently, although pre-dating the recession, Galanter and William Henderson have argued that law firms have been transformed again, and that the firms’ current structures reflect a very different world than in the heyday of the classic, “Cravath system” firm.⁵⁵ Competition has increased among and within firms, at least for those who aspire to equity partnership. Among the most important changes are: “[l]iberalization of the traditional up-or-out principle”; appointment of nonequity partners, counsel, staff lawyers, contract lawyers, and attorneys at outsourced locations; “[s]oftening of the commitment of partnership as a permanent achieved status”; differentials in compensation not based on seniority; and lateral partner movement.⁵⁶

For our account, the most important development is the new norm of lawyer mobility. Had law firms retained the model of overwhelmingly choosing partners from the ranks of the firms’ own associates and discouraging lateral movement, it would have been very difficult for the law firms to hire a large number of experienced former prosecutors and other lawyers to build white-collar practices.

Lateral movement of partners and other lawyers represents a sea change for the traditional firm.⁵⁷ No longer are firms’ futures secured by ties with established corporate clients who generate legal work for decades, and no longer does all the work belong to the firm. John Coffee writes that the public corporation “now has acquired a professional manager of legal services in the in-house general counsel, who can expertly play the market. Monogamy has thus given way to polygamy, as the corporation flirts with many outside counsel.”⁵⁸ As Milton Regan notes:

54. *Id.* at 10–11. The tournament theory has drawn significant criticism. *See, e.g.*, David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the International Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1606–27 (1998) (challenging a number of aspects of the Galanter and Palay model, including that all associates are competing for partnership, that partnership is actually a reward for production as an associate, and that the rules of the tournament and its results are transparent for associates); Kevin A. Kordana, Note, *Law Firms and Associate Careers: Tournament Theory Versus the Production-Imperative Model*, 104 YALE L.J. 1907, 1918–21 (1995) (arguing that the tournament model does not apply to firms for a number of reasons, including lack of full participation and outside economic forces).

55. Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1875–77 (2008).

56. *Id.* at 1875–76.

57. *See id.* at 1894 (“The age of lawyer mobility is the antithesis of the so-called ‘Golden Era’ of big law firms (circa 1960).”). However, it may also be that lawyers in large firms outside of New York had fewer “golden age” careers. A follow-up study of Chicago lawyers, conducted in 1995, noted that “[a]mong Chicago lawyers, Golden Age careers were always a rarity.” HEINZ ET AL., *supra* note 21, at 148.

58. JOHN C. COFFEE JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* 230 (2006); *see also id.* at 223–32 (describing, in general, the rise of in-house

Most major corporations now look to outside firms only for discrete large-scale transactions or major litigation that can't be fully staffed in-house. Rather than rely on the same firm for all their outside work, in-house counsel now tend to act as savvy consumers who shop around for representation on each matter

Furthermore, many companies are more concerned with retaining individual lawyers than specific firms [T]he emphasis is on obtaining lawyers with the most expertise regardless of what firms they may call home.⁵⁹

John Conley reinforces the point, adding that “in-house counsel believe that they call the shots, using outside lawyers on an as-needed basis, forcing firms to compete for individual pieces of business, and taking an assertive role in monitoring fees.”⁶⁰ David Wilkins has reported that many companies are now reducing the number of outside firms they use, primarily for cost reasons, although this reduction has not diminished the role of in-house counsel, and it in no way signals a return to the old model.⁶¹

Moreover, the market has become far more transparent for buyers (e.g., in-house counsel and other clients) and sellers (e.g., individual lawyers and law firms).⁶² For partners who are no longer tied to their first employers—or for government counsel looking to move to the private sector—there is much greater information to guide potential moves. *The American Lawyer*, for example, began publishing firms' profits per partner in the mid-1980s.⁶³ “[W]ithin a few short

counsel and the changing relationship with outside law firms); Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313, 380–83 (1985) (discussing in-house counsel as an agent for change).

59. See REGAN, *supra* note 14, at 33.

60. John M. Conley, *How Bad Is It Out There?: Teaching and Learning About the State of the Legal Profession in North Carolina*, 82 N.C. L. REV. 1943, 1997 (2004). Conley based his article on interviews of private lawyers that he and his students conducted in North Carolina. *Id.* at 1947–48; see also Joyce S. Sterling & Nancy Reichman, *So, You Want to Be a Lawyer? The Quest for Professional Status in a Changing Legal World*, 78 FORDHAM L. REV. 2289, 2296 (2010) (discussing shift in nature of relationships between firms and corporate clients).

61. Wilkins describes a reduction in use of outside firms among a growing number of companies; DuPont, for example, reduced the number of its outside U.S. firms from 350 to 35. David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney–Client Relationship*, 78 FORDHAM L. REV. 2067, 2085–89 (2010). At least for the more routine matters, and not the high-value work, “cost is a significant factor. By concentrating their legal work in a smaller number of firms, companies hope to leverage their status as a ‘trophy client’ to exact deeper discounts and package rates.” *Id.* at 2087. Notably, Wilkins’s account of this trend still includes a dominant role for inside counsel, see *id.* at 2084, although he also has discerned that some companies “have begun to rethink whether a spot-contracting model that simultaneously ruthlessly applies the agency model to outside firms while leaving all gatekeeping duties to in-house counsel is the most effective way to meet their legal needs,” *id.* at 2085.

62. See Galanter & Henderson, *supra* note 55, at 1894.

63. *Id.* at 1896 & n.110; Kimberly Kirkland, *Ethics in Large Law Firms: The Principle of Pragmatism*, 35 U. MEM. L. REV. 631, 676 n.202 (2005).

years, lawyers gained the ability to evaluate the adequacy of their own pay by comparing it to crosstown rivals.”⁶⁴ Keeping profits high “can lure lawyers with profitable clients from other firms, as well as protect the firm from defections by its own lawyers.”⁶⁵

Another change has been extremely important in facilitating the development of white-collar practices within large corporate law firms. We have already noted the increased geographical diversity of large firms and the establishment of branch offices.⁶⁶ This may have fueled the movement of white-collar work into the firms in at least two ways. First, the practice of referring matters to smaller, regional firms—which would include white-collar shops—has declined, as firms seek to retain more and more of the profitable work that they previously farmed out. Although Galanter and Henderson do not focus specifically on white-collar practices, they write:

In earlier years, large corporate law firms competed primarily on a regional basis and relied upon friendly networks of out-of-town firms to oversee their clients’ legal needs in other markets. With the proliferation of branch offices, a large number of national and international law firms are capable of competing for work that originates in a specific regional market. In other words, there is more work for corporate lawyers, but the anticompetitive benefits of a localized guild have, in the process, been destroyed.⁶⁷

Second, for a national firm looking to establish a presence in a new region, small white-collar firms are tempting acquisition targets. The lawyers in these firms are skilled practitioners, with established reputations in the federal and state courts. Wholly apart from their specialized knowledge of complex criminal investigations and prosecutions, these lawyers also bring jury trial experience to the law firms—experience that civil litigation partners brought up through the firms’ ranks cannot easily acquire.

Finally, we recognize that the recession of the past several years has led to (or perhaps accelerated) layoffs, firm consolidations, and other dramatic changes in legal markets and Big Law.⁶⁸ But the recession has not reduced the significance of in-house counsel or the new norm of lateral movement. The economic downturn has increased the pressure on law firms to contain costs, at

64. Galanter & Henderson, *supra* note 55, at 1896.

65. REGAN, *supra* note 14, at 34.

66. See *supra* notes 50–51 and accompanying text.

67. Galanter & Henderson, *supra* note 55, at 1882–83.

68. See William D. Henderson & Rachel M. Zahorsky, *Paradigm Shift*, A.B.A. J., July 2011, at 40 (noting that the financial crisis beginning in late 2007 was “a game-changer, prompting drastic measures as firms laid off thousands of associates, de-equitized partners, and slashed budgets and new hires,” but ultimately arguing that law firm employment was in decline prior to the recession); see also Sterling & Reichman, *supra* note 60, at 2296–2312 (describing impact of the recent financial crisis on younger lawyers); Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 *FORDHAM L. REV.* 2245, 2260–62 (2010) (discussing the slow response of firms to the changing realities of practice, until the economic downturn of 2008–2009).

least in routine matters.⁶⁹ Layoffs and de-equitization of partners can only lead to greater lateral movement. As we explain later in this Article, we believe that the recession has, if anything, intensified the firms' desires to establish white-collar practices, because they are relatively resistant to cost controls and downward pressure on billing.

II. CORPORATE CRIMINAL PROSECUTIONS AND DEFENSE PRACTICES PRIOR TO *STEIN*

The corporate criminal defense bar has developed along with and in response to changes in federal prosecution priorities and practices. Section A of this Part provides a brief overview of federal white-collar prosecutions and laws that have led to an increased focus on corporate crime. Section B examines the basics of corporate criminal liability and internal investigations, including practices relating to information control and privileges. We then review a series of DOJ corporate criminal prosecution policies and discuss their relation to law firm practices in Section C. The threads that run through all of these Sections are government efforts to shift the burden of oversight and investigation to the business entity itself, a battle over the control of internal information, and—importantly—the business opportunities that these create.

A. *White-Collar Prosecutions and Corporate Compliance Programs*

Over the last several decades, the federal government has regularly investigated and prosecuted white-collar crime. Efforts wax and wane and, to be sure, there are white-collar crimes *du jour*, such as today's focus on mortgage fraud.⁷⁰ There are also other prosecution goals that can command a higher priority, most notably national security and anti-terrorism cases after 9/11.⁷¹ Nevertheless, white-collar criminal defense lawyers are in demand, and changes in federal law have encouraged the development of corporate compliance and internal investigations practices. While these are not what criminal defense lawyers would consider part of a traditional white-collar criminal defense practice, the areas are related and, as a practical matter, many law firms structure their practice groups to do both.

69. See Neil J. Dilloff, *The Changing Cultures and Economics of Large Law Firm Practice and Their Impact on Legal Education*, 70 MD. L. REV. 341, 351–54 (2011) (describing increased competition and pressures to change fee arrangements and billing practices).

70. “From foreclosure frauds to subprime shenanigans, mortgage fraud is a growing crime threat that is hurting homeowners, businesses, and the national economy.” *Mortgage Fraud*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/investigate/white_collar/mortgage-fraud (last visited Sept. 13, 2011). Mortgage fraud schemes typically “employ some type of material misstatement, misrepresentation, or omission relating to the property or potential borrower which is relied on by an underwriter or lender to fund, purchase, or insure a loan.” *2009 Financial Crimes Report*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/stats-services/publications/financial-crimes-report-2009/financial-crimes-report-2009#mortgage> (last visited Sept. 13, 2011). The FBI has “continued to add investigative resources to combat the mortgage fraud problem.” *Id.*

71. See *What We Investigate*, FED. BUREAU OF INVESTIGATION, http://www.fbi.gov/about-us/investigate/what_we_investigate (last visited Sept. 13, 2011).

For many years, the federal government has prosecuted a range of white-collar cases, such as antitrust, securities fraud, embezzlement, and other types of fraud.⁷² Its lens has widened; the DOJ has taken an increasingly global approach to corporate criminal prosecutions.⁷³ In addition, over the last several decades, Congress has enacted a variety of laws that criminalize a broad range of conduct associated with business organizations and provide greater criminal penalties. These statutes are often passed in the wake of the scandal of the day, with highly publicized business sector meltdowns drawing the most attention from federal investigators and prosecutors.

Prominent among the new laws are the Foreign Corrupt Practices Act of 1977⁷⁴ and the Sarbanes–Oxley Act of 2002.⁷⁵ Sarbanes–Oxley also substantially increased funding for the Securities and Exchange Commission (“SEC”),⁷⁶ and in July 2002, the same month that Sarbanes–Oxley was passed, President George W. Bush created an interagency Corporate Fraud Task Force.⁷⁷ The Task Force’s April 2008 report claims that since July 2002, the DOJ obtained nearly 1300 corporate fraud convictions, including those of “more than 200 chief executive officers and corporate presidents, more than 120 corporate vice presidents, and more than 50 chief financial officers.”⁷⁸ In November 2009, President Obama established a successor task force to combat financial crime.⁷⁹ Phalanxes of firm

72. See, e.g., ADMIN. OFFICE OF THE U.S. COURTS, 1993 REPORT OF THE DIRECTOR AI-123 to AI-125 tbl.D-2 (1993) (reporting that filings for the year ending September 30, 1993 included 71 antitrust, 40 securities fraud, 1857 embezzlement, and 7535 prosecutions for other types of fraud); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1979, at 553 tbl.5.27 (1980) (reporting that filings in U.S. district courts in fiscal year 1977 included 26 antitrust, 79 securities fraud, 143 embezzlement, and 2757 fraud against the government cases).

73. See generally Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. (forthcoming Dec. 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871033.

74. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 to -3 (2006)).

75. Sarbanes–Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.). Besides making many significant regulatory changes in financial accounting and oversight, Sarbanes–Oxley added a number of new federal crimes and penalties. 18 U.S.C. §§ 1348–1350, 1519–1520 (2006).

76. 15 U.S.C. § 78kk (2003) (appropriating at least \$776 million for the SEC for fiscal year 2003 for purposes including adding at least 200 professionals to the agency).

77. Exec. Order No. 13271, 67 Fed. Reg. 46091 (July 9, 2002) (order establishing task force).

78. CORPORATE FRAUD TASK FORCE, REPORT TO THE PRESIDENT, at iii (2008), available at <http://www.justice.gov/archive/dag/cftf/corporate-fraud2008.pdf>; see also Kathleen F. Brickey, *Enron’s Legacy*, 8 BUFF. CRIM. L. REV. 221, 247 tbl.1, 252 tbl.2, 253 tbl.3 (2004) (tracking federal cases); Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 424–25 (2007) (stating that post-Enron, “substantially increased prosecutorial and FBI agent resources were allocated nationwide to white-collar investigations of corporations and their executives”).

79. *President Obama Establishes Interagency Financial Fraud Enforcement Task Force*, U.S. SEC. & EXCH. COMM’N (Nov. 17, 2009), <http://www.sec.gov/news/press/2009/2009-249.htm>.

lawyers have undoubtedly been kept occupied in these cases, which tend to involve corporate officers and employees (in contrast to ordinary fraud and embezzlement prosecutions).

Yet an account based solely upon the number of “prosecutions” vastly underreports those matters in which the corporate white-collar bar is engaged. Even in the late 1970s, when Mann did his fieldwork, there was a substantial difference between the approach of white-collar practitioners and those who represent ordinary defendants. White-collar specialists usually are called in before the government has finished its investigation; the goal is to prevent an indictment, rather than simply to try to achieve the best outcome for a defendant who has already been charged.⁸⁰ The strategy is the same today. Samuel Buell has commented: “The lawyer of traditional criminal procedure—the accused’s lawyer—is not absent in the firm case. But she arrives much earlier.”⁸¹ Investigation subjects often learn quite early about the existence of an investigation from government actions, such as subpoenas for documents and requests for statements. Counsel have important roles to play at these early stages.⁸²

Apart from the legal work directly generated by investigations initiated by the DOJ, SEC, and various agencies, other changes in federal law have encouraged the development of specialized practices aimed at deflecting prosecutions in the first instance or at reducing sentences in the unlikely event an organization is indicted and convicted. The corporate compliance and internal investigations practice areas are particularly suited to the large law firms and to former prosecutors who are partners at those firms.

In 1991, the U.S. Sentencing Commission promulgated sentencing guidelines for organizations in federal criminal prosecutions. Under the new guidelines, the fine ranges for organizations are calculated using a base-fine amount multiplied by a “culpability score.”⁸³ The culpability score “is determined primarily by ‘the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organization’s actions after an offense has been committed.’”⁸⁴ The Sentencing Commission did not invent the concept of

80. See MANN, *supra* note 29, at 4–13, 183–200; Mann Dissertation, *supra* note 30, at 322 tbl.14 (comparing the percentage of matters received prior to indictment among white-collar specialists who do primarily white-collar crime, and those who do more ordinary criminal cases).

81. Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1630 (2007).

82. *Id.* at 1630–31.

83. See U.S. SENTENCING GUIDELINES MANUAL §§ 8C2.5–.7 (1991) [hereinafter 1991 SENTENCING GUIDELINES MANUAL].

84. U.S. SENTENCING COMM’N, SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS 5–6 (Aug. 30, 1991), available at http://www.ussc.gov/Guidelines/Organizational_Guidelines/Historical_Development/OrgGL83091.pdf (quoting 1991 SENTENCING GUIDELINES MANUAL, *supra* note 83, ch. 8, introductory cmt.). For example, the 1991 guidelines describe various factors to assess whether a compliance program is effective. 1991 SENTENCING GUIDELINES MANUAL, *supra* note 83, § 8C2.5(f)

corporate codes of conduct or compliance programs,⁸⁵ but by assessing culpability with reference to steps taken to prevent and detect crime, the guidelines gave formal recognition and value to them, furthering their development. In 1996, the Delaware Court of Chancery noted that the guidelines “offer powerful incentives for corporations today to have in place compliance programs to detect violations of law, promptly to report violations to appropriate public officials when discovered, and to take prompt, voluntary remedial efforts.”⁸⁶ By situating these incentives within the law of criminal sanctions, the guidelines encouraged the development of white-collar practices relating to corporate compliance and conduct.⁸⁷

Sarbanes–Oxley has also had a substantial influence on the development of law firm practice areas. The Act requires public companies’ audit committees to be independent and to have the authority to retain independent counsel.⁸⁸ The Act strengthened internal controls and compliance programs by obligating the SEC to issue rules requiring attorneys to report evidence of a violation of securities law or breach of a fiduciary duty “up the ladder” to the chief legal counsel or CEO and, in some circumstances, to the board of directors.⁸⁹ Another part of Sarbanes–Oxley asked the Sentencing Commission to review aspects of its organizational

(stating that the culpability score is reduced by three points “[i]f the offense occurred despite an effective program to prevent and detect violations of law” (citing *id.* § 8A1.2 cmt. n.3(k))).

85. For an overview of the development of corporate codes of conduct and compliance programs, see Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23, 32–39 (2010), and Karl A. Groskaufmanis, *Corporate Compliance Programs as a Mitigating Factor*, in CORPORATE SENTENCING GUIDELINES: COMPLIANCE AND MITIGATION 5-1, 5-5 to 5-28 (Jed S. Rakoff et al. eds., 1993). For other discussions of this topic, see Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 87 IOWA L. REV. 697, 707 n.44 (2002) (noting efforts prior to the organizational guidelines), and U.S. SENTENCING COMM’N, PROCEEDINGS OF THE SECOND SYMPOSIUM ON CRIME AND PUNISHMENT IN THE UNITED STATES, CORPORATE CRIME IN AMERICA: STRENGTHENING THE “GOOD CITIZEN” CORPORATION 83–87 (Sept. 7–8, 1995) (statements of Alan Yuspah) (describing the Defense Industry Initiative on Business Ethics and Conduct).

86. *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 969 (Del. Ch. 1996). The court went on to hold that:

[A] director’s obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards.

Id. at 970 (footnote omitted); see also *Stone v. Ritter*, 911 A.2d 362, 365 (Del. 2006) (“*Caremark* articulates the necessary conditions for assessing director oversight liability.” (citing *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27 (Del. 2006))).

87. See Richard S. Gruner, *Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform*, 36 ARIZ. L. REV. 407, 432 (1994) (“Law compliance programs are enjoying a resurgence of interest in large firms because of the draconian fines and penalties threatened under the corporate sentencing guidelines.”).

88. Sarbanes–Oxley Act of 2002 § 301, 15 U.S.C. § 78j-1(m)(3), (5) (2006).

89. *Id.* § 307, 15 U.S.C. § 7245 (2006). The SEC later issued the rules mandated by Sarbanes–Oxley. 17 C.F.R. §§ 205.1–7 (2011).

guidelines.⁹⁰ Acting on the recommendations of an advisory group, the Sentencing Commission amended its organizational guidelines to define further what it would mean to have an effective compliance and ethics program.⁹¹ All of these developments have increased the demand for the legal services of corporate compliance, internal investigations, and white-collar specialists.

B. Corporate Criminal Liability, Leverage, and Internal Investigations

To begin, government agents who are investigating potential crimes by actors within a business organization wield substantial power. Corporate criminal liability in the United States has historically been quite broad.⁹² Generally, a corporation may be held criminally liable if an agent or employee committed a criminal act or omission while in the scope of his employment and the purpose of the act or omission was to benefit the corporation in some way (even if the act or omission was contrary to corporate policy or was unknown to corporate officers).⁹³ At the same time, federal prosecutors have virtually unfettered discretion in deciding whether to institute criminal charges or not; they may decline to prosecute even when there is strong evidence on which to proceed. This broad basis for corporate criminal liability, coupled with the DOJ's wide discretion, provides prosecutors with enormous leverage against companies in corporate criminal investigations.

For companies facing investigation, the nightmare scenario is that of Arthur Andersen LLP. At the time of its indictment for obstruction of justice, Arthur Andersen was one of the "Big Five" accounting firms, with an estimated 85,000 employees worldwide, 28,000 of them in the United States.⁹⁴ Following its conviction in June 2002, the firm was sentenced to five years' probation and a fine

90. Sarbanes-Oxley Act of 2002 §§ 805, 905, 1104, 28 U.S.C. § 994 (2006).

91. See U.S. SENTENCING COMM'N, REPORT OF THE AD HOC ADVISORY GROUP ON THE ORGANIZATIONAL SENTENCING GUIDELINES 47-49 (Oct. 7, 2003), available at http://www.uscc.gov/Guidelines/Organizational_Guidelines/advgrprpt/AG_FINAL.pdf; see also U.S. SENTENCING COMM'N, REASON FOR 2004 AMENDMENTS TO CHAPTER EIGHT (AMENDMENT 673 FROM THE SUPPLEMENT TO APPENDIX C, GUIDELINES MANUAL) introductory cmt. (Nov. 1, 2004), available at http://www.uscc.gov/Education_and_Training/Guidelines_Educational_Materials/Amend-673.pdf.

92. A century ago, the Supreme Court found that a corporation could be held criminally liable "because of the knowledge and intent of its agents to whom it ha[d] [e]ntrusted authority to act in the subject-matter . . . and whose knowledge and purposes may well be attributed to the corporation." *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 495 (1909). The former U.S. Attorney for the Southern District of New York has noted: "On the federal level especially, the sweep of corporate criminal liability could hardly be broader." Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong*, in 237TH ANNUAL INSTITUTE ON SECURITIES REGULATION 815, 817 (2005).

93. See, e.g., *United States v. Sun-Diamond Growers*, 138 F.3d 961, 970 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999); *United States v. Auto. Med. Labs., Inc.*, 770 F.2d 399, 406 (4th Cir. 1985); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000, 1004 (9th Cir. 1972).

94. See Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 108-09 (2006).

of \$500,000.⁹⁵ Yet the partnership was forced to close its doors and employees lost their jobs.⁹⁶ What killed Arthur Andersen was not the sentence but the indictment and the very fact of conviction. Under the SEC's regulations, a person (or entity) convicted of a felony or misdemeanor involving moral turpitude is suspended from practicing before the SEC.⁹⁷ The term "practicing" includes preparing any statement, opinion, or other paper by an attorney, accountant, or other professional for filing with the SEC.⁹⁸ Arthur Andersen became a public accounting firm that was unable to conduct audits and prepare opinions for publicly held corporations. Although the U.S. Supreme Court reversed the company's conviction in 2005,⁹⁹ the company had already effectively ceased to exist.¹⁰⁰

While some have described the conviction, or even the indictment, of a business entity as an automatic "death sentence" for a company,¹⁰¹ that description substantially overstates the case. The actual consequences vary depending on a number of factors, including the type of business the company engages in, the share of business that the company may lose upon indictment or conviction, and whether the company is considered too valuable to the government for it to destroy. The threat of a criminal prosecution against an accounting or securities firm—or an entity, such as a law firm, that depends upon its professional reputation—may be extraordinarily powerful because a conviction will likely lead to (or will certainly be perceived as leading to) the end of the entity.¹⁰² The threat is also substantial in the pharmaceutical and health care industries because companies that are convicted of fraud relating to health care will be suspended

95. *Id.* at 107.

96. *Id.* at 108.

97. 17 C.F.R. § 201.102(e)(2) (2011). Although this and related regulations expressly apply to "persons," they have been applied to entities, including Arthur Andersen pre-Enron. See *In re Arthur Andersen LLP*, Order Instituting Public Administrative Proceedings, Making Findings and Imposing Remedial Sanctions Pursuant to Rule 102(e) of the Commission's Rules of Practice, Exchange Act Release No. 44,444, 75 SEC Docket 501 (June 19, 2001), available at http://www.sec.gov/litigation/admin/34-44444.htm#P46_877.

98. 17 C.F.R. § 201.102(f)(2) (2011).

99. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 702, 708 (2005).

100. See Cassell Bryan-Low, *Andersen Staff Works to Tie Up Loose Ends—Some Offices to Close; Others Are Acquired by Rival Companies*, WALL ST. J., June 17, 2002, at C1 (describing loss of business following indictment).

101. Editorial, *Corporate Injustice*, WALL ST. J., Apr. 6, 2006, at A14 (stating that "as a practical matter, only a rare CEO will risk the death sentence that a corporate indictment represents" and "bankruptcy nearly always follows a corporate indictment, whether the firm is later convicted or not"); see also Brief for Amici Curiae Ass'n of Corp. Counsel and Chamber of Commerce of the United States of America in Support of Defendants-Appellees at 19–20, *Stein V.*, 541 F.3d 130 (2d Cir. 2008) (No. 07-3042-cr) ("[T]he government's threat of indictment is nothing less than a loaded and cocked gun pointed at the head of a company. Few if any responsible businesses could ignore the threat that the government would pull the trigger, and few if any could survive the shot.").

102. See Michael L. Seigel, *Corporate America Fights Back: The Battle over Waiver of the Attorney-Client Privilege*, 49 B.C. L. REV. 1, 18 (2008).

from participation in government health care programs, such as Medicare.¹⁰³ On the other hand, the threat of a prosecution might not be very coercive if the part of the business involving government contracts or services is small in relation to the overall enterprise, or if the government depends on the company to provide essential products or services that it cannot otherwise obtain—a variant of the current “too big to fail” trend. The point is simply that the power of the threat varies, although it can be enormously significant.¹⁰⁴ And, debarment or suspension aside, companies want to escape prosecution to avoid a drop in stock price and damage to reputation (among other collateral consequences), not to mention escaping the criminal penalties themselves.

The goal of an organization under investigation is to end the matter without a criminal conviction or, better yet, without being charged at all. An entity may persuade the government not to file charges, possibly through a non-prosecution agreement (“NPA”); as a second-best alternative, a company might reach a deferred prosecution agreement (“DPA”) with the government, under which charges are generally filed but there is no further prosecution.¹⁰⁵ Under both types of agreements, the company avoids the consequences of a conviction “by voluntarily entering [into] a probationary period during which it will (1) enact substantial internal reforms and (2) cooperate with the government.”¹⁰⁶ The agreements may also include monetary settlements, waiver of attorney–client and work-product privileges, disclosure of information to the DOJ and other agencies,

103. See, e.g., 42 U.S.C. § 1320a-7(a) (2006). This statute requires the Secretary of Health and Human Services to exclude from participation in any federal healthcare program any “individual or entity . . . convicted of a criminal offense related to the delivery of an item or service” under the Medicare program or under any state health care program. *Id.* § 1320a-7(a)(1). Moreover, restrictions are placed on any individual or entity convicted of “a felony relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct” involving a government healthcare program. *Id.* § 1320a-7(a)(3); see also Marc R. Greenberg et al., *Beware: Debarment Can Prove to Be More Damaging than the Criminal Penalty*, in AM. BAR ASS’N CTR. FOR CONTINUING LEGAL EDUC. NAT’L INST., WHITE COLLAR CRIME V-17, V-17 (2011) (noting the costly nature of debarment and suspension from federal grants and contracts for violations of certain federal environmental laws).

104. As an added wrinkle, multinational corporations may be concerned about mandatory debarment from public procurement under directives adopted by the European Parliament and the Council of the European Union. See Peter B. Clark & Jennifer A. Suprenant, *Siemens—Potential Interplay of FCPA Charges and Mandatory Debarment Under the Public Procurement Directive of the European Union*, in AM. BAR ASS’N CTR. FOR CONTINUING LEGAL EDUC. NAT’L INST., WHITE COLLAR CRIME B-71, B-74 to B-76 (2009) [hereinafter WHITE COLLAR CRIME 2009].

105. See generally Peter Spivack & Sujit Raman, *Regulating the ‘New Regulators’: Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 160–67 (2008) (describing the development of NPAs and DPAs).

106. *Id.* at 160; see also Joshua R. Hochberg & David M. Irvine, *Deferred Prosecution Agreements: Corporate Criminal Liability Redefined*, in AM. BAR ASS’N CTR. FOR CONTINUING LEGAL EDUC. NAT’L INST., WHITE COLLAR CRIME D-1, D-3 (2008) (“Certain terms of DPAs and NPAs appear in almost all of the agreements. Cooperation with both DOJ and its designees is almost always mandated.”).

acknowledgment of wrongdoing, ongoing monitoring, and other terms.¹⁰⁷ The use of such agreements has markedly increased in the last decade.¹⁰⁸

When a company believes that an officer or employee may have committed a crime, or when the DOJ or another agency approaches a company and indicates that it is investigating possible criminal conduct by officers or employees, there will generally be an internal investigation. A company's in-house or outside counsel may be detailed to investigate. The lawyer may interview officers and employees. However, the lawyer is counsel for the entity, not the individual officers and employees. These individuals may choose to retain their own lawyers (often at company expense), but the company's counsel does not represent them. The communications from the officers and employees to the lawyer are generally shielded from disclosure under the attorney-client privilege, and the work-product rule provides additional important protections.¹⁰⁹ Critically, because the lawyer works for the entity, the attorney-client privilege belongs to the company. It is the entity's to waive or assert.¹¹⁰

The decision to assign a lawyer to oversee the internal investigation—as opposed to relying upon company managers or different types of professionals such as accountants or private investigators—is strategic. Corporations do not have

107. See Hochberg & Irvine, *supra* note 106, at D-4 to D-5; see also Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 893–902 (2007). Brandon Garrett maintains an electronic library of DPAs and NPAs. Brandon L. Garrett & Jon Ashley, *Federal Organizational Prosecution Agreements*, U. VA. SCH. OF L., http://lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp (last visited July 25, 2011).

108. Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 1 (2006) (collecting corporate DPAs and NPAs, and reporting that from 2002–2005 companies entered into twice as many agreements as they had during the entire decade from 1992 to 2001); Spivak & Raman, *supra* note 105, at 159 (same); see also Lawrence D. Finder et al., *Betting the Corporation: Compliance or Defiance? Compliance Programs in the Context of Deferred and Non-Prosecution Agreements: Corporate Pre-Trial Agreement Update—2008*, 28 CORP. COUNS. REV. 1, 12 (2009) (reporting 112 agreements from 1993–2008, 40 in 2007, and 16 in 2008).

109. *Upjohn Co. v. United States*, 449 U.S. 383, 394–402 (1981).

110. See *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348, 351–53 (1985) (explaining that for a solvent corporation, the power to waive the attorney-client privilege rests with management, but finding in this case that the power passed to the bankruptcy trustee); *United States v. Ruehle*, 583 F.3d 600, 607–13 (9th Cir. 2009) (holding that once company waived the privilege, former CFO could not prevent prosecutors from calling the company's outside counsel to testify about communications); *In re Grand Jury Subpoena*, 274 F.3d 563, 573 (1st Cir. 2001) (“[A] corporation may unilaterally waive the attorney-client privilege with respect to any communications made by a corporate officer in his corporate capacity, notwithstanding the existence of an individual attorney-client relationship between him and the corporation's counsel.”); see also Cristina C. Arguedas & Raphael M. Goldman, *The Attorney-Client Privilege and Attorney Ethics During Internal Investigations: The Lessons of United States v. Ruehle*, in AM. BAR ASS'N CTR. FOR CONTINUING LEGAL EDUC. NAT'L INST., WHITE COLLAR CRIME F-15, F-16 to F-19 (2010) [hereinafter WHITE COLLAR CRIME 2010]; Jan Nielsen Little, *The Attorney-Client Privilege and the Corporate Executive*, in WHITE COLLAR CRIME 2009, *supra* note 104, at E-5, E-8.

a Fifth Amendment privilege against compelled self-incrimination.¹¹¹ As Julie O’Sullivan explains, the attorney–client privilege and work-product rule are essentially surrogates for an unavailable Fifth Amendment privilege.¹¹² One of Kenneth Mann’s major findings 30 years ago was that white-collar lawyers, who arrive on the scene early, strive to get information under their control and keep it out of the hands of potential adversaries, including the government.¹¹³ The choice of an attorney to conduct an internal investigation is consistent with that strategy. It allows the company to protect at least some communications and to establish initial control over the disclosure of information.¹¹⁴ What has changed since Mann’s study is the extent to which the government has succeeded in persuading—some would say coercing—business entities to relinquish that control after it is initially acquired.

C. Prosecution Policies and the Defense Function

Over the last decade, the U.S. Sentencing Commission, the DOJ, and other agencies have increasingly used their leverage to incentivize companies to conduct internal investigations and then to cooperate with regulators and law enforcement officials. This has altered the dynamic during investigations in highly significant ways. The DOJ has often sought waivers of companies’ attorney–client privilege (and the company attorneys’ work-product protection) in order to investigate corporate officers and employees and gain information that the individuals might be willing to reveal to company investigators but not to the government.¹¹⁵ Agreements to end the investigations or prosecutions of the companies require cooperation and, frequently, waivers of privilege.¹¹⁶ DPAs and NPAs may “create an agency relationship between the government and the corporation, under which the corporation assumes certain continuing efforts on behalf of the prosecution.”¹¹⁷ *Stein* reveals a different gambit—the use of leverage to cut off company funds for separate private counsel for individual defendants.

111. *Hale v. Henkel*, 201 U.S. 43, 69–70 (1906); *see also* *United States v. Kordel*, 397 U.S. 1, 7 n.9 (1970).

112. Julie R. O’Sullivan, *Does DOJ’s Privilege Waiver Policy Threaten the Rationales Underlying the Attorney–Client Privilege and Work Product Doctrine? A Preliminary “No,”* 45 AM. CRIM. L. REV. 1237, 1292–94 (2008).

113. *See generally* MANN, *supra* note 29, at 6–8, 103–80.

114. *See* STUART H. DEMING, THE FOREIGN CORRUPT PRACTICES ACT AND THE NEW INTERNATIONAL NORMS 364 (1st ed. 2005) (“Internal investigations . . . can enable an entity to gain control of a situation and make informed decisions,” including “whether disclosure is required.”); *id.* at 365 (“Typically, it is preferable that an internal investigation be conducted at the direction of an attorney. Accountants, consultants, and [others] can work at the attorney’s direction. But without an attorney’s direction and control, the protections of the attorney–client privilege . . . [and the] work-product doctrine may not apply.”).

115. *See* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 321–40 (2007) (describing leverage and use of DPAs that may include privilege waivers).

116. Garrett, *supra* note 107, at 900 (reporting that privilege waivers were in 57% of agreements from January 2003 to January 2007); *see also supra* notes 105–07 and accompanying text.

117. First, *supra* note 85, at 47.

Both tactics are part of an overall strategy to shift to companies the burden of ensuring compliance with the law and to use company resources to investigate corporate officers and employees.¹¹⁸ This is a government counter to the “information control” defense.

In 1999, then-Deputy Attorney General (and now U.S. Attorney General) Eric H. Holder, Jr. issued a memorandum to all components of the DOJ. In the “Holder Memorandum,” the DOJ sought for the first time to provide guidance “as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case.”¹¹⁹ The list included illustrative and nonbinding factors such as the nature and seriousness of the offense, the pervasiveness of wrongdoing within the corporation, the collateral consequences to shareholders and non-culpable employees, and the adequacy of civil or regulatory enforcement actions.¹²⁰ But other items went to the company’s internal investigations and its “willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney–client and work product privileges.”¹²¹ The Holder Memorandum also noted that prosecutors could look at whether the corporation appeared to be protecting its culpable employees and agents, such as by retaining them in their jobs without sanctions, providing information to them pursuant to joint defense agreements, or advancing attorneys’ fees to them for their own separate counsel.¹²² Two years later, the SEC issued the “Seaboard Report,” setting forth factors that it would consider in taking action against a public company due to the misconduct of an officer.¹²³

In 2003, the Deputy Attorney General in the next administration, Larry D. Thompson, revised the Holder Memorandum. The “Thompson Memorandum” reiterated many of the principles set forth by Holder. While “the actual changes in

118. The strategy has its supporters and detractors. *See, e.g.*, Buell, *supra* note 81, at 1622–61 (generally defending this strategy given the distinct nature of the firm); First, *supra* note 85, at 60–64, 81–88 (discussing rewards to corporations as mechanisms to deal with the problem of agency cost, and arguing that corporations should be targets as well as instruments of prosecution); Griffin, *supra* note 115, at 340–78 (addressing practical and constitutional concerns in deputizing corporate actors to perform prosecutorial tasks).

119. Memorandum from Eric H. Holder, Jr., Deputy Attorney Gen., to the Heads of Dep’t Components, U.S. Attorneys 1 (June 16, 1999), *reprinted in* 66 CRIM. L. REP. (BNA) 189 (1999). We refer to the documents collectively as the Holder Memorandum.

120. *Id.* § II.A.

121. *Id.* § VI.A. Prosecutors could also consider the adequacy of the corporation’s internal compliance program. *See id.* § VII.A.

122. *Id.* § VI.B.

123. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969, 76 SEC Docket 220 (Oct. 23, 2001), *available at* <http://www.sec.gov/litigation/investreport/34-44969.htm>. A number of factors focused on the steps taken by the company upon discovering the misconduct, including whether the company adopted new and more effective internal controls and whether a thorough review was performed by persons inside or outside the company. *Id.*

the Thompson Memorandum were rather slight,”¹²⁴ the “focus of the revisions [was] increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation.”¹²⁵ As a practical matter, the Thompson Memorandum reinforced the notion that it was legitimate or even ordinary for the government to expect privilege waivers by corporations in the course of DOJ investigations. The Sentencing Commission’s 2004 amendments to the organizational guidelines further legitimized the practice of seeking privilege waivers.¹²⁶

Several of these prosecution practices, notably those surrounding privilege waivers—and to a lesser extent, payment of attorneys’ fees—were unpopular among corporate in-house counsel and the white-collar defense bar. An April 2005 survey by the Association of Corporate Counsel flagged a growing perception that the attorney–client privilege was being eroded in the corporate context.¹²⁷ In 2006, a consortium of business and legal organizations—including the Association of Corporate Counsel, Business Roundtable, U.S. Chamber of Commerce, National Association of Criminal Defense Lawyers, and the American Civil Liberties Union—surveyed in-house and outside counsel. The survey has been appropriately criticized, but the consortium reported evidence that “a ‘culture of waiver’ ha[d] evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney–client privilege or work product protections.”¹²⁸ The organizations also found some evidence that prosecutors may have “certain expectations with regard

124. First, *supra* note 85, at 44.

125. Memorandum from Larry D. Thompson, Deputy Attorney Gen., to the Heads of Dep’t Components, U.S. Attorneys 1 (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm. As before, we refer to the documents collectively as the Thompson Memorandum.

126. The organizational guidelines’ culpability score could be reduced if a company “fully cooperated in the [government’s] investigation.” U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) & cmt. n.12 (2004). The 2004 amendment “provided an independent formal source of considerable pressure for corporations to waive the attorney–client privilege and attorney work product doctrine.” Gideon Mark & Thomas C. Pearson, *Corporate Cooperation During Investigations and Audits*, 13 STAN. J.L. BUS. & FIN. 1, 67 (2007).

127. See *Association of Corporate Counsel Survey: Is the Attorney–Client Privilege Under Attack?*, ASS’N OF CORPORATE COUNSEL, 2 (Apr. 6, 2005), <http://www.acc.com/vl/public/Surveys/loader.cfm?csModule=security/getfile&pageid=16315>.

128. Am. Chemistry Council et al., *The Decline of the Attorney–Client Privilege in the Corporate Context: Survey Results*, ASS’N OF CORPORATE COUNSEL, 3 (Mar. 2006), <http://www.acc.com/vl/public/Surveys/loader.cfm?csModule=security/getfile&pageid=16306> (reporting that almost 75% of surveyed in-house and outside counsel agreed with that proposition, while only 1% of inside counsel and 2.5% of outside counsel disagreed). We offer the survey as only some indication of the issue; we do not claim it to be representative of the views or experiences of counsel. While there were 676 responses to the in-house counsel survey and 538 responses to the outside counsel survey, both instruments were web-based and the respondents were self-selected. See *id.* at 2–3 n.7; see also Buell, *supra* note 81, at 1619 n.12 (describing one of the surveys as “methodologically unsound”); O’Sullivan, *supra* note 112, at 1247 (“[T]he surveys were not conducted with even minimal rigor, at least tested by the standards required in academic circles.”).

to employees” during an investigation, such as that the company will not advance legal fees or agree to reimburse the expenses of an employee.¹²⁹ These politically astute and influential groups, dubbing themselves the “Coalition to Preserve the Attorney–Client Privilege,” pushed back against the DOJ’s policies and lobbied Congress to enact legislation to protect the privilege.¹³⁰ One measure passed the House in 2007, and former Senator Arlen Specter repeatedly introduced bills in the Senate.¹³¹

There has been some retrenchment by the DOJ and the Sentencing Commission, although it remains to be seen how these new policies will play out. In 2006, the Sentencing Commission removed language about privilege from the guidelines commentary.¹³² Shortly thereafter, Deputy Attorney General Paul McNulty introduced a more finely regulated approach and required high-level DOJ approval for certain requests for privilege waivers.¹³³ The “McNulty Memorandum” also provided that prosecutors “generally should not take into account” whether the corporation was advancing attorneys’ fees to employees or agents under investigation or indictment, although the McNulty Memorandum did not prohibit prosecutors from using this as a factor for consideration.¹³⁴ In the wake of the *Stein* litigation, the DOJ again revised the McNulty Memorandum, as we discuss later in this Article.

129. Am. Chemistry Council et al., *supra* note 128, at 12. Approximately 60% of outside counsel indicated that they had experienced these expectations. *Id.* Of these counsel, 26% said that they had experienced an expectation that the company not advance or reimburse legal fees; 24% reported an expectation that the company not enter into, or breach, a joint defense agreement; 21% said that the government expected them not to share documents with a targeted employee; and 16% reported that the company was expected to discharge an employee who refused to be interviewed by the government. *Id.*

130. See Coal. to Preserve the Attorney–Client Privilege, *Why Congress Should Act to Protect the Attorney–Client Privilege*, ASS’N OF CORPORATE COUNSEL, <http://www.acc.com/vl/public/PolicyStatement/loader.cfm?csModule=security/getfile&pageid=16210> (last visited Sept. 13, 2011); see also Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 918 (2009) (noting the “orchestrated campaigning by big business interests”); Buell, *supra* note 81, at 1619 (describing the “uproar among corporate actors and the corporate bar”); O’Sullivan, *supra* note 112, at 1241 (recounting lobbying by groups with “an impressive array of political muscle”).

131. In December 2006, Senator Specter introduced the Attorney–Client Privilege Protection Act, which would prohibit federal agents or attorneys from requesting privilege waivers and from conditioning charging decisions on privilege waivers. S. 30, 109th Cong. § 3 (2006). The bill never made it to the floor of the Senate. In November 2007, the House passed a revised version, which would prohibit the DOJ from seeking privilege waivers and from considering a corporation’s advancement of legal fees to officers and employees or the entry into a joint defense agreement. H.R. 3013, 110th Cong. § 3 (2007). Senator Specter continued to introduce versions of the legislation in 2008 and 2009. S. 3217, 110th Cong. (2008); S. 445, 111th Cong. (2009).

132. See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) cmt. n.12 (2006).

133. See Memorandum from Paul J. McNulty, Deputy Attorney Gen., to the Heads of Dep’t Components, U.S. Attorneys § VIIB (Dec. 12, 2006), available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

134. *Id.*

Before examining law firms today and the *Stein* case, we might compare some aspects of corporate compliance and internal investigations practice with the more traditional white-collar work of defending corporate actors or other individuals who are under investigation or indictment. There is, of course, a relationship between the two. But the corporate compliance and internal investigations practice is far more akin to the work done by prosecutors than that traditionally performed by the criminal defense bar. One law firm partner, a former DOJ attorney, urges companies to consider whether corporate security officials or internal auditors have the background and experience to conduct an internal investigation.¹³⁵ He suggests that former prosecutors “often represent a combination substantive knowledge of . . . relevant law and experience directing and supervising the work of investigators, accountants and other forensic professionals.”¹³⁶ However, there are occasional claims that some lawyers in the compliance and investigations field—the majority of whom are former prosecutors—have such difficulty separating their responsibilities on behalf of their current clients from their prior work as prosecutors that they lack both independence from the government and a sincere interest in fighting it. One practitioner, another former prosecutor, criticizes the government for “outsourcing” criminal investigations to company counsel, who “are essentially deputized as junior [Assistant U.S. Attorneys] for an investigation that . . . is more or less directed from the Department of Justice.”¹³⁷ Harry First has commented: “In essence, the public corporation [conducting an internal investigation] has now become a branch office of the prosecutor.”¹³⁸

An example will help make the point clear. Computer Associates International, Inc. and its senior executives were under investigation by the DOJ. In September 2004, the company entered into a deferred prosecution agreement,

135. George J. Terwilliger III, *Botched Internal Investigations Can Be Avoided: The Keys to a Successful Investigation Include Understanding When, Where, Why and By Whom It Will Be Conducted*, NAT'L L.J., Apr. 4, 2011, at 24.

136. *Id.*

137. Aitan D. Goelman, *A New Way Forward in Internal Investigations*, in AM. BAR ASS'N SECTION OF BUS. LAW ET AL., NATIONAL INSTITUTE ON INTERNAL CORPORATE INVESTIGATIONS AND IN-HOUSE COUNSEL G-1, G-8 (2009) [hereinafter NATIONAL INSTITUTE ON INTERNAL CORPORATE INVESTIGATIONS AND IN-HOUSE COUNSEL]. Goelman was one of the lawyers involved in the *Stein* case. See *infra* note 260.

138. First, *supra* note 85, at 28. First notes that “[t]he SEC even set up a computer tracking system to follow the efforts of the various law firms performing . . . internal investigations” into stock option backdating. *Id.* at 29. “The idea is to let government investigators share information with each other about how responsive, independent and thorough they believe private lawyers have been . . .” James Bandler & Kara Scannell, *Legal Aid: In Options Probes, Private Law Firms Play Crucial Role*, WALL ST. J., Oct. 28, 2006, at A1. The lack of independence from the government is clear from this “practice tip” for companies choosing a lawyer to conduct an internal investigation into possible violations of the Foreign Corrupt Practices Act: “The government wants to know it has a *surrogate* upon which it can rely,” such as a former prosecutor. Lee Stein, *Maintaining Credibility in FCPA Investigations*, CRIM. JUST. SEC. NEWSL. (Am. Bar Ass'n Criminal Justice Section, Washington, D.C.), Winter 2008, at 7 (emphasis added).

although federal prosecutors indicted several company officials.¹³⁹ The company's former General Counsel agreed to plead guilty to conspiracy and obstruction of justice for failing to provide truthful or complete information *to the law firm hired by the company* to conduct an internal investigation. According to the DOJ, the defendant knew that the law firm would later present the false evidence to prosecutors.¹⁴⁰ Prosecuting obstruction of justice on this theory requires a particular conception of the role of an investigating law firm hired by the company.

There have also been claims that the corporate bar has built quite lucrative practices that leverage the DOJ's prosecution policies. Another former prosecutor and experienced (small-firm) white-collar defense lawyer puts it in harsh terms:

[T]here are many law firms and lawyers who have viewed this culture of waiver as an enormous business opportunity. . . . [L]ook at some of the big law firms, go to their web sites and you'll see . . . what they call 'internal investigations practice.' You know you can read that to mean 'we are really good at being deputized to act on behalf of the federal government.' And it's a great practice if you think about it. . . . They don't have to worry about actually defending a case—that's not their job. Indeed, if they were going about it to try to defend the case, the government would say 'hey, you are impeding our investigation.' Their job is to come in, parachute in with all sorts of lawyers at considerable expense to the client, investigate up one side and down the other, extract as much information as they can, then go back to the government, waive the attorney-client privilege, provide them all the information and give them whatever the employees have said on the silver platter.¹⁴¹

He also commented:

[A]t the end of the day, they get paid very handsomely by the company, and go back to the company and say 'I've got good news for you. You know, we're only going to have to pay a \$500 million fine, but we're not going to be prosecuted and we're able to limit the damage to 10 or 12 employees.' . . . [T]hat, in their view, is a successful representation. So don't tell me that lawyers don't share some responsibility for that because I think they have helped to create an environment in which that kind of practice is very lucrative and, as a result, . . . have actually become partners with the Department of Justice in this sort of practice.¹⁴²

139. Press Release, U.S. Dep't of Justice, Former Computer Associates Executives Indicted on Securities Fraud, Obstruction Charges (Sept. 22, 2004), *available at* http://www.usdoj.gov/opa/pr/2004/September/04_crm_642.htm.

140. *Id.*; *see also* Information at 8–11, *United States v. Woghin*, No. 04 CR 00847 (E.D.N.Y. Dec. 1, 2004).

141. Symposium, *Corporate Compliance: The Role of Company Counsel*, 21 *GEO. J. LEGAL ETHICS* 491, 510–11 (2008) (remarks of Richard Janis).

142. *Id.* at 511. Janis calls this "the neutron bombing of the company." *Id.*

A criminal defense attorney and commentator says that federal prosecutors and the corporate white-collar bar have built “a synergistic system . . . where the former creates the opportunity for the latter to thrive, and the latter creates the opportunity for the former to prevail, both believing that they’ve done their job well. This has proven to be a huge fee generator”¹⁴³

III. LAWYERS, GUNS, AND MONEY—BY THE NUMBERS

During the spring of 2010, we collected data on individual lawyers from the websites of law firms in the “Am Law 200,” the 200 U.S. law firms with the highest gross revenues as ranked by *The American Lawyer* and its publisher, ALM Media, Inc. Our data allow us to present a profile of lawyers at these firms, primarily partners, who have white-collar and investigations practices (for convenience, we will refer to both practices generically as “white-collar”). As we show in Section A, virtually all of the leading firms have lawyers in these practices. Some work primarily as white-collar lawyers. Others have different dominant specialties—such as securities or antitrust, where criminal and civil issues often intertwine, or where there may be parallel proceedings—but these attorneys nevertheless still have substantial ongoing white-collar practices. The majority are former prosecutors. They are overwhelmingly male. And they tend to be concentrated in select legal markets. In Section B, we look specifically at lateral movement from a variety of practice settings into or among the Am Law 200 firms. This portion of the Article, which relies upon a different data set obtained from the Law Firms Working Group and ALM Media, Inc., shows that—consistent with our other findings—there is substantial movement from government service into the Am Law 200 for these lawyers, and it is concentrated in a few legal markets. In Section C, we use both sets of data to examine the profitability of white-collar and internal investigations work. We think that, for structural reasons, this area of practice is not susceptible to the same types of cost controls that in-house counsel typically seek to implement in other litigation. Thus, it can be enormously lucrative.

Before turning to the data, a note about nomenclature: When we refer to “white-collar” practice in the Am Law 200, we mean the representation of companies and individuals in criminal investigations and prosecutions related to their business—essentially Sutherland’s original definition.¹⁴⁴ This reflects the reality of Big Law practice, rather than a theoretical rejection of a broader meaning of the term. As a practical matter, given the high hourly rates these large firm partners command, very few individual defendants can afford to retain them if their fees are not advanced by their corporate employers.¹⁴⁵ We also include

143. E-mail from Scott H. Greenfield to Charles D. Weisselberg (Dec. 20, 2010, 12:12 EST) (on file with author). Greenfield practices in New York and publishes the *Simple Justice* blog. SIMPLE JUSTICE: A N.Y. CRIMINAL DEF. BLOG, <http://blog.simplejustice.us> (last visited Oct. 29, 2011).

144. See *supra* note 27 and accompanying text.

145. While a number of firm partners may take other criminal cases—some, for example, mention in their biographies that they accept appointments from the federal courts under the Criminal Justice Act—we believe that even these paid cases are viewed largely as “pro bono” matters by the firms.

internal corporate investigations even though it is not what one traditionally considers criminal defense work. The same practice groups at many firms do both, and it is difficult to separate the two.

A. Lawyers: White-Collar Practices and Partners Within the Am Law 200

Using the websites of all law firms in the Am Law 200, we collected information about all lawyers in practice groups that included white-collar crime and internal investigations matters,¹⁴⁶ as well as a weighted stratified random sample of non-white-collar litigation attorneys in the same firms.¹⁴⁷ After determining which partners had at least a *substantial* white-collar and investigations practice, we examined the partners' prior government service, practice location, and gender (we were unable to identify the lawyers' race and ethnicity). The law firms' websites generally promote their attorneys' prior government practice, so we are confident that we accurately captured the lawyers' previous government work, at least among the partners.¹⁴⁸ We consider partners and shareholders generically; we were unable to distinguish between equity and nonequity partners.

1. Lawyers, Practices, and Firms

Our data set contains 4837 attorneys *initially* identified as within white-collar or internal investigations practices, including 2809 partners, 1501 associates,

146. We initially used the 2008 Am Law 200 rankings to identify the firms. We collected individual lawyer data during spring 2010. The 2009 Am Law 200 rankings were released on June 1, 2010, after our first round of coding, and we then collected additional data for lawyers in firms that had recently made the rankings. For some firms, we supplemented our lists of lawyers through keyword searches.

147. We set out to sample approximately 1000 non-white-collar litigators, using the relative size of the firms (the number of lawyers in each firm divided by the total number of lawyers across all 200 firms) to determine the sample size for each firm. Then we used the ratio of the total number of lawyers in each firm over the number of sampled lawyers at each firm to create the weight values for the larger firms with sample sizes greater than six. We oversampled the smaller firms to ensure that each small firm had at least six lawyers drawn into the sample. We took the oversampling into account in creating the weight variable. After oversampling, we had 1409 lawyers to be selected into the non-white-collar sample. We then made a complete list of all non-white-collar litigators for each firm, and determined the relative size of lawyers of each position (partner, counsel, associate, other attorney) in the sample. After we determined how many lawyers in each position to draw from each firm, we randomly drew the lawyers of each status from the complete list of non-white-collar litigators at each firm.

148. See, e.g., *White Collar Defense and Investigations*, JENNER & BLOCK, http://www.jenner.com/practice/practice_detail.asp?ID=59 (last visited Oct. 29, 2011) ("The Practice includes 16 former federal prosecutors" and "several former SEC enforcement attorneys, including the former Associate Director of the Division of Enforcement."); *Attorneys*, QUINN EMANUEL URQUHART & SULLIVAN, LLP, <http://www.quinnemanuel.com/attorneys.aspx> (last visited Oct. 29, 2011) (allowing a search of all firm lawyers who were former prosecutors). The firms' web pages did not consistently contain detailed biographies of associates, counsel, and other lawyers, so we are not presenting data on their prior government work, if any.

and other lawyers.¹⁴⁹ We additionally sampled 1303 non-white-collar litigators, including 563 partners, 593 associates, and others. Figures 1a and 1b show the lawyers in each set, respectively.

Figure 1a: Initial Pool of Lawyers in White-Collar Practice Groups, By Position

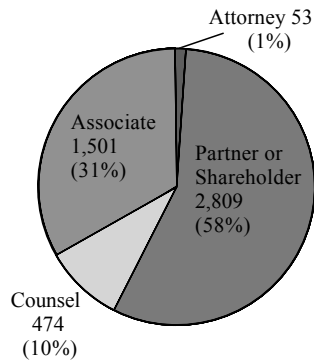
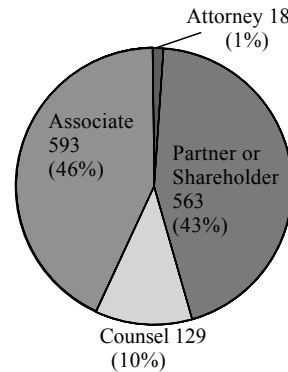


Figure 1b: Weighted Sample of Non-White-Collar Litigation Lawyers, By Position



What is most notable is that in the white-collar practice groups, partners comprise a much higher percentage of all lawyers (58%) than the partners in the non-white-collar weighted sample (43%), and this is statistically significant.¹⁵⁰ There are several possible reasons for the difference. The firms' websites might list fewer associates in the white-collar area for signaling or marketing purposes, or the white-collar practice groups themselves might not be highly leveraged—the nature of this work may require greater partner involvement, with associates pulled in from general litigation or other practice groups on a per-project basis.

We then studied the white-collar partners more closely. Many firms list lawyers within white-collar practice groups when, in fact, the attorneys handle criminal matters or internal investigations rarely, if at all. And firms define their practice groups differently. Thus, one of the authors reviewed the web biographies of all 2809 partners to determine whether the description of each partner's work, including representative matters, affirmatively indicates that the lawyer has *at least a substantial* ongoing white-collar or internal investigations private practice.¹⁵¹ Of the 2809 white-collar partners in our data set, we identified 1626 with *at least a*

149. We originally had a population of 4859 white-collar lawyers, but dropped 22 because of missing data.

150. Two-sample t-test, $p < .05$.

151. We looked at descriptions of each partner's representative matters for affirmative evidence that white-collar work was more than a trivial or incidental part of his or her practice. It was not enough for a partner to be listed in a white-collar practice group. We excluded partners if their biographies did not affirmatively indicate that white-collar work or investigations were at least a substantial part of their current practice. We excluded, for example, a number of partners who had previously served in senior DOJ posts because their biographies described only their government experience and did not detail their current work for their firms.

substantial white-collar and investigations practice.¹⁵² Next, we sorted these partners into two subgroups: (1) those who appear to work *primarily* in the white-collar or investigations area; and (2) those with a *substantial* white-collar practice *but with one or more other dominant specialties*. Of the 1626 partners with at least a substantial white-collar practice, we identified 700 (43%) who work primarily in the white-collar field, while 926 (57%) have other practice areas that are dominant. (The law firms do not consistently provide details about associates, counsel, or staff attorneys, and so we were only able to determine whether the partners have substantial white-collar and investigations practices.)

We were unable to specify a single “other” practice area for the majority of the 926 partners who are predominantly in other fields; many handle a mix of civil or regulatory matters or are in multiple practice groups. For those with an identifiable single “other” dominant practice area, a few coordinate practices stand out, including: securities (204 partners; 22%); antitrust (68 partners; 7%); healthcare, pharmaceuticals, and life sciences (43 partners; 5%); environmental and energy (23 partners; 2%); financial, accounting, and banking institutions (15 partners; 2%); and tax (16 partners; 2%). These 926 lawyers’ practices are akin to those of the large firm white-collar specialists Mann studied in New York 30 years ago, *none* of whom described themselves as doing more than 50% criminal work.¹⁵³ Mann found highly skilled lawyers, including many former prosecutors, who handled mainly corporate and commercial matters. But, most notably, what has emerged from our analysis is an identifiable cadre of attorneys in the large firms, whose primary practice is representing companies and corporate officers and employees in criminal investigations and prosecutions. This group did not exist 30 years ago.

White-collar partners have become firmly established in the Am Law 200. We initially note that the white-collar partners are similar to the sample of non-white-collar litigation partners in terms of time in practice, as measured by years from law school graduation.¹⁵⁴ But the headline here is that the white-collar partners have deeply penetrated the firms. Figure 2 shows the penetration of partners with at least a substantial white-collar practice in firms grouped by rankings of gross revenue. In the Am Law 100—the top 100 firms by gross revenue¹⁵⁵—all but three had one or more partners with a substantial white-collar

152. We initially identified 1654 partners, but excluded 28 because we lacked sufficient information for further analyses.

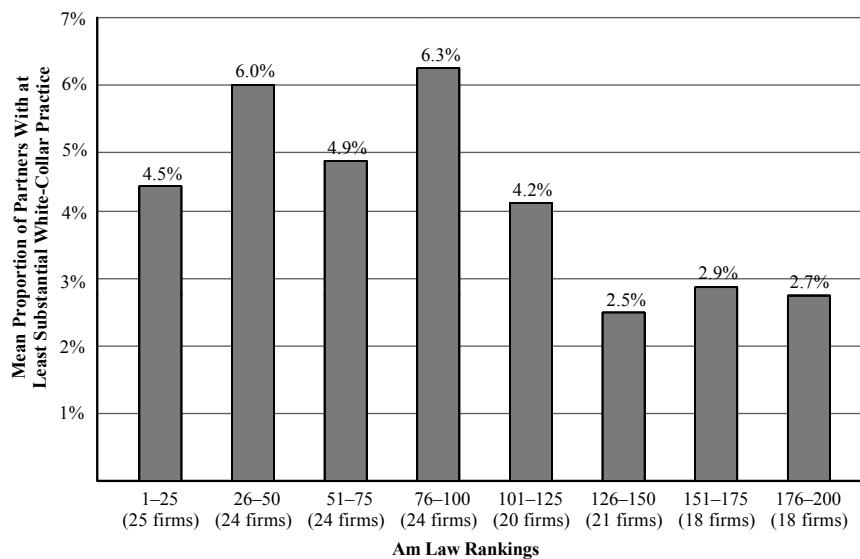
153. See *supra* note 37 and accompanying text.

154. We ascertained the year of law school graduation for 1500 of the white-collar lawyers and 471 of the non-white-collar litigation partners. We calculated years in practice as of spring 2010, excluding those lawyers for whom the year of graduation was unavailable. The frequency distributions of years of practice for the white-collar partners and the non-white-collar litigation partners are very similar. Both are roughly normally distributed around 23 to 24 years with standard deviations around nine years. There is no statistically significant relationship between number of years since graduation and partner group.

155. The source for all of the financial data in these and other tables, as well as data on the numbers of firm partners, is ALM Media, Inc., which publishes *The American Lawyer*. According to this publication:

practice; there is a decline in the bottom half of the Am Law 200.¹⁵⁶ For each firm, we calculated the partners with substantial white-collar practices as a percentage of all equity and nonequity partners in the firm. The columns in Figure 2 represent the average proportion of these white-collar partners among groups of ranked firms. (Table 2, printed in the Appendix, shows the substantial range in size of these practice groups.) There is a statistically significant correlation between average proportion of white-collar partners and Am Law ranking by gross revenue.¹⁵⁷

Figure 2: Firms with at Least One Partner with Substantial White-Collar Practice, and Mean Proportion of Partners With at Least Substantial White-Collar Practice, in Firms Grouped by Am Law Rankings (Gross Revenue)



Most law firms provide their financials voluntarily for this report. Some choose not to cooperate, so we make estimates based on our reporting. But all data is investigated by our reporters. In the event that an error in reporting in a previous year is discovered, we will correct the numbers and base the percentage changes in future years on restated numbers.

A Guide to Our Methodology, AM. LAW., May 2010, at 105 [hereinafter *A Guide to Our Methodology*].

156. We excluded firms if they had no partners with substantial white-collar practices (or if we could not affirmatively determine that any partners had at least substantial practices or that the lawyers doing this work were partners). We excluded a total of 26 firms in the Am Law 200.

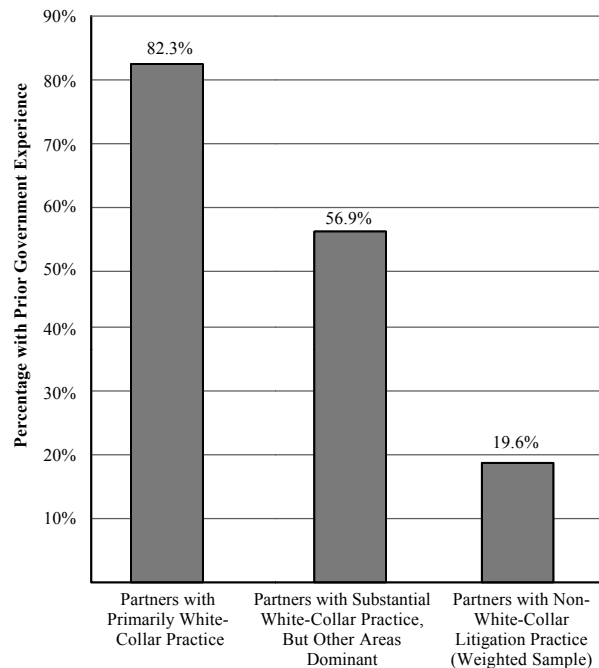
157. Pearson's correlation = .2588, $p < .05$. The positive correlation here indicates that the larger the firm (by gross revenue), the higher the mean percentage of white-collar partners.

2. Prior Government Service

Our data also confirm what we have understood anecdotally: most white-collar and internal investigation partners at large law firms are former government lawyers, especially federal prosecutors.

Figure 3 reports the percentages of partners with prior government experience in our two subgroups of white-collar lawyers and in the weighted sample of non-white-collar litigators.¹⁵⁸ The differences are striking and significant.¹⁵⁹

Figure 3: White-Collar and Non-White-Collar Litigation Partners with Prior Government Experience



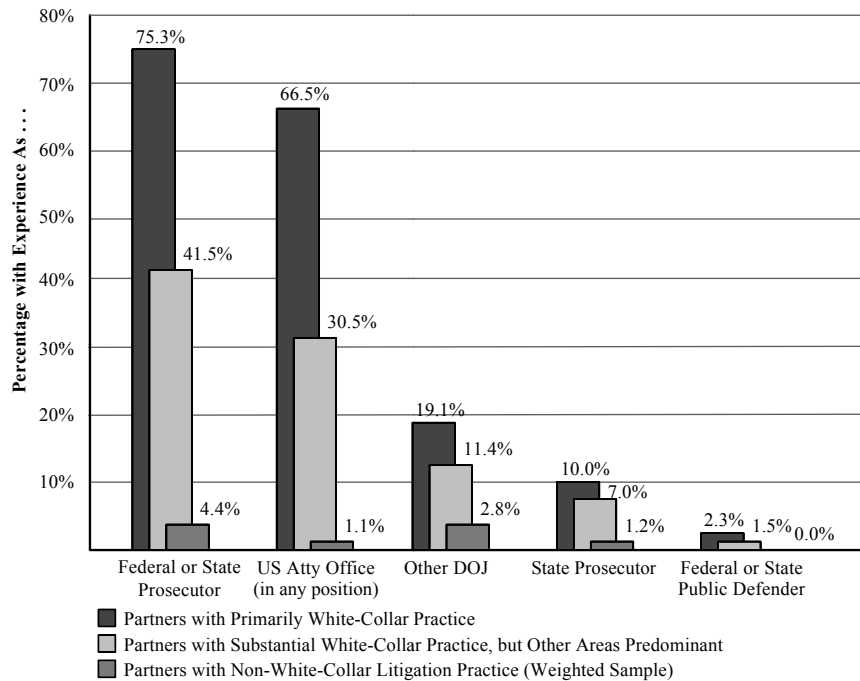
158. Figure 3 and subsequent tables and figures do not include the 1185 partners whom we *initially* identified as in white-collar groups, but who do not affirmatively appear to have substantial white-collar or internal investigations practices. For these excluded partners, 31% had prior government experience, including 8% who had served as Assistant U.S. Attorneys.

159. The relationship between the categories of white-collar partners and prior government experience is significant at the .001 level (Pearson's chi square = 117.6, $p < .001$). When we combine the two groups of white-collar partners and compare the prior government experience of all partners with at least substantial white-collar practice and non-white-collar litigation partners, the difference is significant at the .001 level (two-sample z-test, $p < .001$).

Notably, over 80% of the partners who are primarily engaged in white-collar practice have prior government experience. Among all partners with at least a substantial white-collar practice (the first two columns combined), 68% previously worked for the government.

Figure 4 shows the most prevalent types of prior government service for our partner groups. (Table 3, printed in the Appendix, reports additional categories of government service.) Because many partners have held multiple government positions, the figure reflects the numbers of lawyers who have served in each type of position. It is common, for example, for someone to be an Assistant U.S. Attorney and then later assume a leadership position in that office or move to “Main Justice,” meaning one of the DOJ’s divisions or offices in Washington, D.C.

Figure 4: Prior Prosecution and Public Defender Experience of White-Collar and Non-White-Collar Litigation Partners



Among the partners whose primary practice is white-collar and internal investigations, fully three-fourths are former federal or state prosecutors. There are many more partners with federal than state prosecution experience (as one might expect given the federal focus of the white-collar work); two-thirds of the partners primarily in white-collar practice served in a U.S. Attorney’s Office. By comparison, for those partners who have a substantial white-collar practice but work primarily in other substantive fields, 41% are former federal and state

prosecutors and 30% served in a U.S. Attorney's Office.¹⁶⁰ Former public defenders barely made the list. For partners who primarily practice in the field, the ratio of former prosecutors to public defenders is 33:1, and for white-collar attorneys in predominantly other fields, the ratio is 28:1. As further detailed in Table 3, many white-collar partners were leaders in the U.S. Attorneys' Offices (such as chief of a division or unit). For white-collar lawyers primarily ensconced in another field, 9% once served in the Securities and Exchange Commission. No other single government agency or branch was as prominent.¹⁶¹

When we contrasted all partners with at least substantial white-collar practices (our two subgroups of white-collar partners, combined) with our sample of non-white-collar partners, we found obvious and statistically significant differences for most types of prior government service.¹⁶² Fifty-six percent of the white-collar partners are former prosecutors, compared with 4% of the non-white-collar litigation partners.

Finally, out of the 1626 partners with substantial white-collar practices, we identified 240 partners who are listed on the firms' websites as practice group leaders or contacts. Of these 240 partners, 84% have prior government experience, 77% are former prosecutors, and 69% served in some position in a U.S. Attorney's Office.

The high proportion of former prosecutors in white-collar practices raises issues about the work of (mostly) federal prosecutors and the delivery of defense services. We explore these points in Part V of this Article, but we may also note just how different are the career paths of white-collar partners and those who practice other areas of litigation. A few firms may still seek to develop most of their white-collar expertise in-house.¹⁶³ Nevertheless, for Big Law white-collar partners, government service is the norm, particularly for practice group leaders. Barriers to lateral movement appear to have vanished. If traditional litigators still participate in a "promotion to partnership tournament," as Galanter and others have written, the white-collar practitioners are in a different tournament altogether.¹⁶⁴

3. Gender

Women are dramatically underrepresented in the partnership ranks of major U.S. law firms. A 2009 survey of U.S. offices of large firms found that

160. These differences are statistically significant. *See infra* Table 3.

161. The "other federal" category in Table 3 includes former White House and congressional officials, as well as employees from the Environmental Protection Agency, Department of the Treasury, Federal Trade Commission, judiciary, and Defense Department.

162. Two-sample z-test, $p < .01$. The pairwise differences are significant for all types of positions except for public defenders, SEC attorneys, and foreign government service.

163. From our review of partners' biographies on the law firms' websites, Cravath, Swaine & Moore LLP and Williams & Connolly LLP may be some of the most notable firms in this category.

164. *See supra* notes 52–57 and accompanying text.

women comprise only 19% of the partners.¹⁶⁵ Our weighted sample of non-white-collar litigators mirrors the 2009 survey: 19% of the partners in the weighted sample are women. However, among the 1626 white-collar partners in our data set, only 247 (15%) are women. We found the same proportion of women, 15%, in our two subgroups of partners with substantial white-collar practices (those primarily in white-collar work and those predominantly in other fields). The gender difference between the white-collar and non-white-collar partners is statistically significant.¹⁶⁶ Interestingly, we note that in both our initial pool of white-collar lawyers and the weighted sample of non-white-collar litigators, women comprise 43% of associates who are recent law school graduates.¹⁶⁷ Inasmuch as women appear to enter these practice areas as new associates at the same rate, it is especially discouraging that women are even more poorly represented among the white-collar partners than among the non-white-collar litigation partners.

We found something else that is striking: Women and men have different paths to partnership in white-collar practices. Women who achieve partnership in white-collar practices are significantly less likely than men to have prior government experience. Among the 1626 white-collar partners, 53% of the women have worked in government as compared with 69% of the men.¹⁶⁸ Only 44% of the female white-collar partners are former federal or state prosecutors, and 33% served in U.S. Attorneys' Offices. By contrast, 58% of the male white-collar partners were federal or state prosecutors, 48% in U.S. Attorneys' Offices.¹⁶⁹ As we discuss later in this Article, these different career paths may help explain the especially low number of women white-collar partners. It turns out that within U.S. Attorneys' Offices in key districts, women are significantly less likely to serve in Criminal than in Civil Divisions. This results in a smaller pool of women who are most likely to be considered for lateral moves to law firms in white-collar practices.

165. Emily Barker, *Stuck in the Middle*, AM. LAW., June 2009, at 74, 76 (reporting results from *Women in Law Firms Study*). While we were unable to identify equity and nonequity partners in our collected data, a 2010 survey of Am Law 200 firms reported that women occupy 16% of equity partner and 27% of nonequity partner positions. STEPHANIE A. SCHARF & BARBARA M. FLOM, REPORT OF THE 2010 NAWL SURVEY ON THE RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 9 (Oct. 2010).

166. Two-sample z-test, $p < .05$. We note that among the 1185 partners we excluded as *not* having a substantial white-collar practice, 975 (82%) are male and 210 (18%) are female.

167. We define recent graduates as associates who graduated from law school in 2008 and 2009. We collected our data in early 2010, so these lawyers would be in practice for less than two years. Looking only at the recent graduates, women are 65 of these 152 associates (42.7%) in our initial pool of white-collar lawyers and 42 of the 98 associates (42.6%) in the weighted sample of non-white-collar litigators. Notably, if we look at gender among *all* associates, not just the recent graduates, women are *better* represented in white-collar practices. They comprise 704 of the 1501 associates (46.9%) in the initial pool of white-collar lawyers and 252 of the 593 associates (42.5%) in the weighted sample of non-white-collar litigators.

168. Two-sample t-test, $p < .01$.

169. These differences are statistically significant at the .001 level. There are no statistically significant gender differences among partners who served in Main Justice or as public defenders.

The lower rate of prior government service for women also raises questions about the professional opportunities afforded even those who manage to reach partnership. Women are further underrepresented among the 240 white-collar partners who are practice group leaders or contacts; only 27 (11%) are women. However, in terms of prior government experience, these women look more like their male counterparts, although there are still statistically significant differences. For example, 70% of the women practice group leaders or contacts have prior government experience—a much higher proportion than women white-collar partners in general—but still less than the male practice group leaders or contacts, 86% of whom previously worked for the government.¹⁷⁰ Looking more closely at their types of government experience, 67% of the women leaders are former federal or state prosecutors, and 60% served in a U.S. Attorney's Office, compared with 78% and 70% of the men, respectively, although these differences are not statistically significant.

Finally, there are interesting gender differences among the partners with substantial white-collar practices with respect to years since law school graduation. The mean number of years since graduation is 21 for women partners and 25 for men, a difference that is statistically significant.¹⁷¹ The distributions are also dissimilar. For women partners, the distribution of years appears to be bimodal, with a peak at approximately 16 years and a second, smaller peak at approximately 28 years. For male partners, the distribution of years appears roughly normal, but is slightly skewed to the right side, with a long tail that includes partners in as much as their sixth decade of practice.¹⁷²

We explore some of the implications of these findings in Part V. There we also present data about gender in U.S. Attorneys' Offices in leading districts.

170. Pearson's chi square = 4.3452, $p < .05$.

171. Two sample t-test, $p < .05$. We were able to calculate years since graduation for 226 female and 1274 male white-collar partners; we excluded 126 partners for whom data were not available.

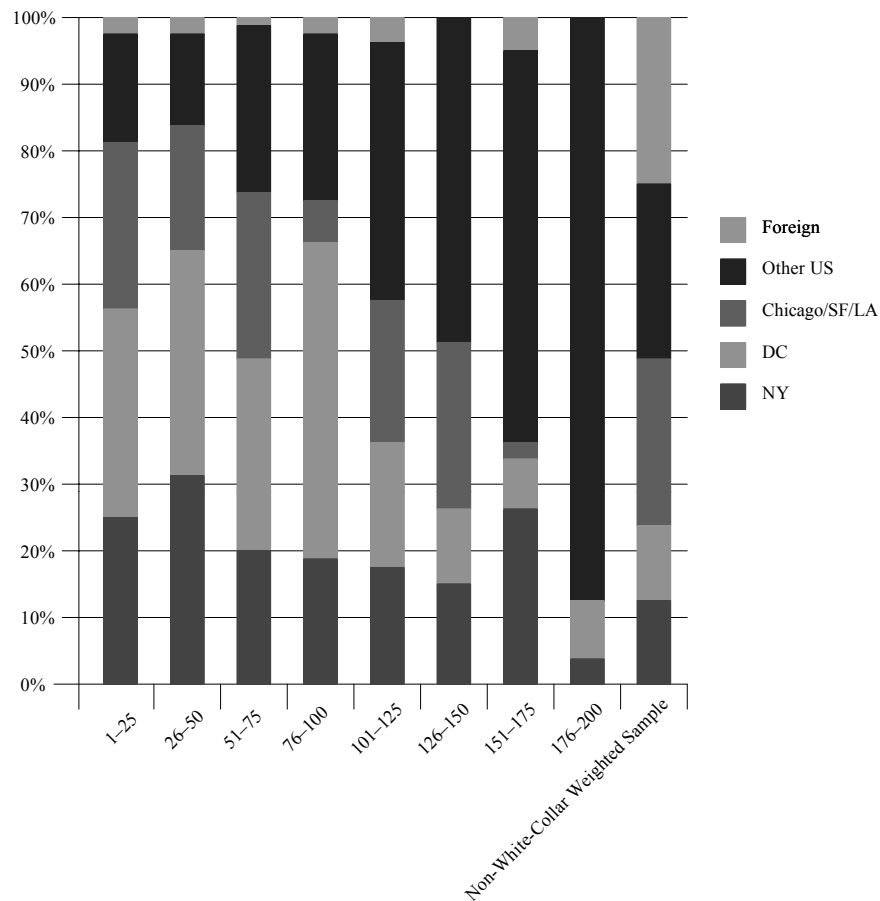
172. Some of the differences in the two distributions are evident from the years after graduation at various percentiles, as follows:

| Percentile | Female Partners | Male Partners |
|------------|-----------------|---------------|
| 5% | 11 | 12 |
| 10% | 11 | 14 |
| 25% | 15 | 18 |
| 50% | 20 | 24 |
| 75% | 27 | 32 |
| 95% | 35 | 42 |
| Mean | 20.79 | 25.09 |
| SD | 7.68 | 9.23 |
| Max | 42 | 58 |

4. Markets

An important attribute of white-collar practice is its concentration in a few key legal markets, particularly among Am Law 100 firms. Figure 5 displays the geographic distribution of the 1626 partners with substantial white-collar practices, grouped by the firms' Am Law rankings (based on gross revenue), in leading legal markets. Table 4, printed in the Appendix, provides details about these and other legal centers. Five markets—Metropolitan New York, Washington, D.C., Chicago, San Francisco, and Los Angeles/Orange County—collectively account for 70% of all white-collar partners. Other significant legal markets for white-collar lawyers in the Am Law 200 include Boston, Philadelphia, Dallas/Ft. Worth, Atlanta, and Houston.¹⁷³

Figure 5: Location of Partners with Substantial White-Collar Practices, Grouped by Am Law Rankings (Gross Revenue), and Non-White-Collar Weighted Sample



173. See *infra* Table 4.

For Big Law white-collar partners, two markets—New York and Washington, D.C.—are dominant, with 22% and 29% of partners, respectively. Figure 5 shows that these concentrations are particularly strong in the 100 highest-grossing firms. And the top-five markets (New York, Washington, D.C., Chicago, San Francisco, and Los Angeles) together have over half of the corporate white-collar bar through the top 150 firms. We can see the emergence of regional firms in the bottom quarter of the Am Law 200, the firms with gross revenues ranked 151–200.¹⁷⁴ By contrast, fewer partners in the non-white-collar weighted sample are in Washington, D.C. and New York (12% in each city), and more are in foreign locations (24%).¹⁷⁵

The concentration of white-collar partners in a handful of markets also suggests that only a few government offices may be important feeders for the major law firms. It may be far easier to move to a partnership at an Am Law 100 firm from Main Justice or the U.S. Attorneys' Offices in New York, Washington, D.C., Chicago, San Francisco, and Los Angeles than from a prosecution position in another location.

B. Guns: Lateral Partner Movement

ALM Media, Inc.—the media conglomerate that publishes *The American Lawyer* and the *National Law Journal*—has tracked the lateral movements of partners since 2000. These data have been made available to us through the Law Firm Working Group.¹⁷⁶ The lateral partner data complement our profile of white-collar lawyers and practices and permit additional insights about how these practices are growing.

In their 2008 article, Galanter and Henderson took a first cut at the ALM data; the data set then included 14,338 lateral movements into, out of, or among Am Law 200 firms from January 2000 through December 2005.¹⁷⁷ More recently, Henderson and a new co-author, Leonard Bierman, analyzed an expanded data set with movements through 2007.¹⁷⁸

The data set we obtained has 24,670 partner movements from 2000 through 2009. While the data set contains a text field with descriptions of the partners' practice areas, the descriptions come from a variety of sources (such as

174. We also looked at the distribution of partners with predominantly white-collar and other practices, and the results are not much different. However, the white-collar lawyers with predominantly other practices are somewhat more clustered in Washington, D.C. (30% in Washington, D.C. and 21% in New York) compared with the partners who focus primarily on white-collar work (28% in Washington, D.C. and 24% in New York).

175. The group rankings (by gross revenue) of the firms are significantly related to legal markets (Pearson's chi square = 511, $p < .05$).

176. The Law Firms Working Group is a network of scholars sponsored by the American Bar Foundation and Indiana University, among others. For a description of the group and ongoing projects, see *Our Purpose*, THE LAW FIRMS WORKING GRP., <http://firms.law.indiana.edu/about/index.shtml> (last visited Sept. 13, 2011).

177. Galanter & Henderson, *supra* note 55, at 1899.

178. William D. Henderson & Leonard Bierman, *An Empirical Analysis of Lateral Lawyer Trends from 2000 to 2007: The Emerging Equilibrium for Corporate Law Firms*, 22 GEO. J. LEGAL ETHICS 1395, 1401 (2009).

press releases) and vary in detail and consistency. We found it difficult to identify white-collar lawyers accurately with these descriptions. Therefore, we searched the lateral database for partners whom we had previously identified as having at least a substantial white-collar practice through our own review of the Am Law 200 firms. We then created a comparison set of lateral movements of partners in any type of litigation practice, but excluded those partners whom we had identified as having at least a substantial white-collar practice.¹⁷⁹ Our main interest is movement to or among Am Law 200 firms (rather than movement out of the large firms), so we excluded lawyers who left the Am Law 200, joined foreign offices, or remained in the same firm. Our data set has 20,421 lawyers moving to (or among) Am Law 200 firms. We identified 444 of these movements for partners with substantial white-collar practices and 3890 movements for non-white-collar litigation partners.¹⁸⁰ Table 5, printed in the Appendix, summarizes movements to (or among) Am Law 200 firms by partner category and year.

We examined the white-collar partners and non-white-collar litigation partners by the settings the lawyers left,¹⁸¹ and the results are represented in Figures 6a and 6b.

179. The lateral partner data set contains a text field describing the practice areas of the lawyers, obtained from press releases and other sources. Because the field was not coded using consistent criteria, we counted partners as “white-collar” only if they were in our own set of collected data. We are somewhat more comfortable in using the text field to identify the non-white-collar litigation partners in the lateral partner data set as we looked for more general indicators of a litigation practice. We included partners if “litigation” appeared in the text description in any way. We understand that this omitted partners with specialized practices that are litigation-based, such as antitrust or securities, if the word “litigation” was not in the text field. But we note that our set includes 126 partners with practices described as litigation and antitrust; 658 with litigation and IP; 362 with litigation and securities; and 30 with litigation, securities, and antitrust.

In addition, our litigation set includes other partners whose practices are described as litigation of the following types, among others: commercial; environmental; bankruptcy; financial services; insurance coverage; employee benefits; entertainment; business; broker-dealer; class action; civil; diversity counseling; toxic or mass tort; contract; global; and products liability.

180. While this allows us to identify lateral moves of white-collar partners with accuracy, we believe that a certain number of white-collar partners remain in the comparison set of litigation partners. Our collected data only tell who was at an Am Law 200 firm in spring 2010. Thus, we did not capture white-collar partners who moved laterally between 2000 and 2009, but who were not in Am Law 200 firms in spring 2010. These partners are likely included in our lateral partner comparison set of non-white-collar litigators. However, to the extent this methodology may bias our results, it should lead us to *underestimate* the differences between white-collar and non-white-collar partners.

181. We used the same categories as prior researchers, but we independently coded the data. See Henderson & Bierman, *supra* note 178, at 1401 tbl.2.

Figure 6a: White-Collar Partners by Setting Left

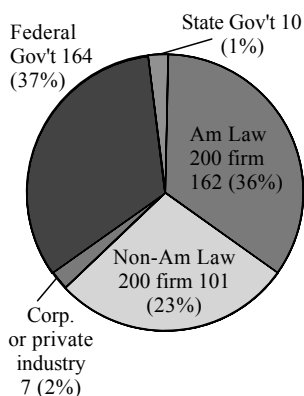
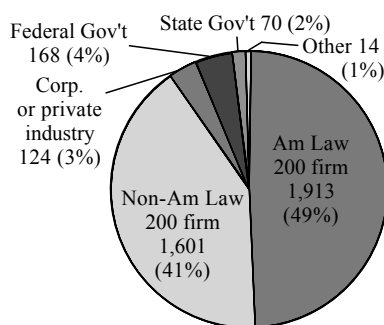


Figure 6b: Non-White-Collar Litigation Partners by Setting Left



There is a statistically significant relationship between the groups of partners and the settings they left.¹⁸² We note the much greater proportion of partners who joined white-collar practices from the federal government (37%) than who joined non-white-collar litigation practices from the federal government (4%). Further, the percentages of white-collar lawyers who left Am Law 200 firms and non-Am Law 200 firms (36% and 23%) are quite different from the non-white-collar litigators (49% and 41%). We earlier showed that a majority of white-collar partners have prior government experience. The lateral partner data are consistent with many lawyers moving from government directly to the Am Law 200 and others leaving government for smaller firms or another Am Law 200 firm, and then subsequently moving up to or within the Am Law 200. This is also not inconsistent with what we understand anecdotally—that a number of national law firms have established white-collar practices by absorbing smaller white-collar boutiques.

We examined those partners who joined Big Law from federal government service more closely. The largest cohort of lawyers departing the federal government were prosecutors within the Department of Justice, either in U.S. Attorneys' Offices (41%) or at Main Justice (22%). As one might expect, white-collar practices have a significantly higher proportion of former DOJ attorneys.¹⁸³ Eighty percent of partners joining white-collar practices directly from federal government came from the DOJ (56% from U.S. Attorneys' Offices). Of those partners joining non-white-collar litigation practices directly from federal service, 47% came from the DOJ (25% from U.S. Attorneys' Offices), although the data may not fully capture the differences if the non-white-collar litigation

182. Pearson's chi square = 606.75, $p < .001$.

183. Pearson's chi square = 58.31, $p < .001$.

group in fact contains some white-collar lawyers who are no longer practicing in the Am Law 200.¹⁸⁴

In our earlier discussion of white-collar partners in the Am Law 200, we noted a concentration of lawyers in New York and Washington, D.C. Figures 7a and 7b reflect a similar geographic distribution in partner movement to leading legal markets.

Figure 7a: White-Collar Partners by U.S. Markets

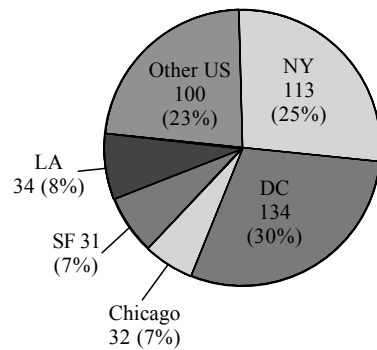
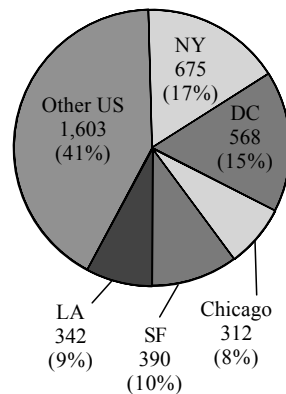


Figure 7b: Non-White-Collar Litigation Partners by U.S. Markets



Of the white-collar lawyers in the lateral partner database, 56% moved to Am Law 200 firms in those two cities compared with just 32% of the non-white-collar litigation partners, a statistically significant difference.¹⁸⁵ Non-white-collar litigators are much more likely than white-collar litigators to move to a location outside of the five major legal markets (41% compared with 23%), a finding that is also statistically significant.¹⁸⁶

C. Money: Practices and Profitability

Without question, certain white-collar practices can be quite lucrative.¹⁸⁷ But are they more profitable than other work in the Am Law 200?

1. Partners and Profits

We have shown that white-collar practices are well established in the Am Law 200. Figure 2 displayed the average proportion of firm partners with substantial white-collar practices (as a percentage of all partners at the firm), with

184. See *supra* note 180.

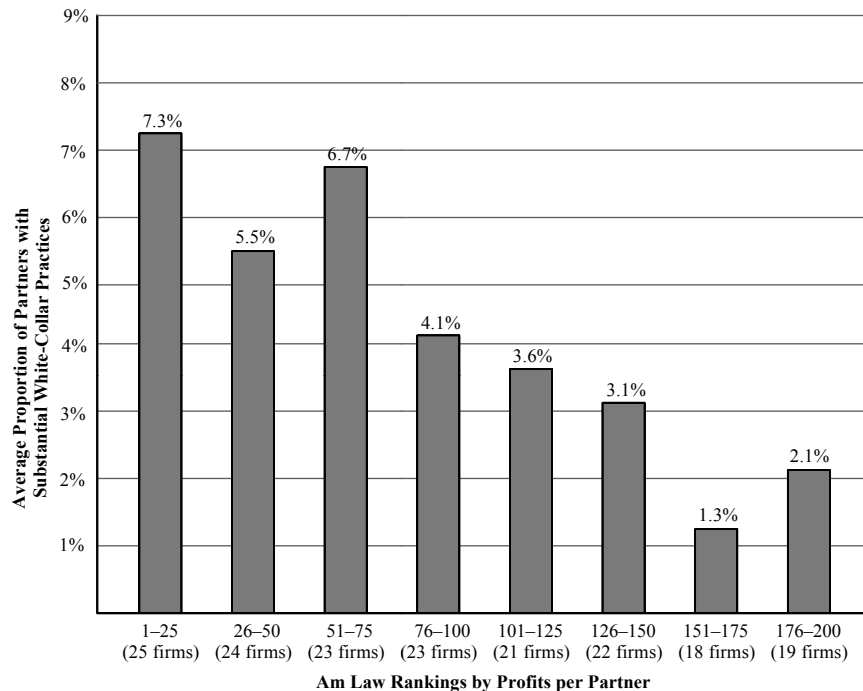
185. The differences between litigation and non-litigation partners joining firms in New York and in Washington, D.C. are each significant (two-sample t-test, $p < .001$).

186. Two-sample t-test, $p < .001$.

187. This is of course an outlier, but it has been reported that Siemens AG paid a leading law firm \$275 million for an internal investigation. Firm lawyers are said to have logged 354,000 hours. Michael D. Goldhaber, *Cheap at the Price*, AM. LAW., May 2009, at 86.

firms grouped by Am Law 200 gross revenue rankings. However, gross revenue may be driven more by firm size than profits. Figures 8a and 8b show the average proportion of partners with substantial white-collar practices, this time with firms grouped by rankings of profits per partner (“PPP”) and revenue per lawyer (“RPL”). ALM Media calculates PPP by dividing net operating income by the number of equity partners. RPL is calculated by dividing the firm’s total gross revenue by the number of lawyers.¹⁸⁸ Tables 6 and 7, printed in the Appendix, show the range in the size of these practice groups.

Figure 8a: Average Proportion of Partners with Substantial White-Collar Practices, With Firms Grouped By Ranking of Profits Per Partner



These figures suggest a positive relationship between substantial white-collar practices and PPP and RPL (correlations .4997 and .5372, respectively), and these correlations are stronger than with respect to gross revenue (Table 2).¹⁸⁹ Regression analyses show that for each point increase in the percentage of white-collar partners over the total number of partners, PPP and RPL would substantially increase.¹⁹⁰ However, we do not have sufficient other firm-level data to control for the other factors that may be correlated with profitability, such as concentration of firm partners in top legal markets or the mix of practices at the various firms. The lateral partner data provide further insight if one infers that movement by lawyers

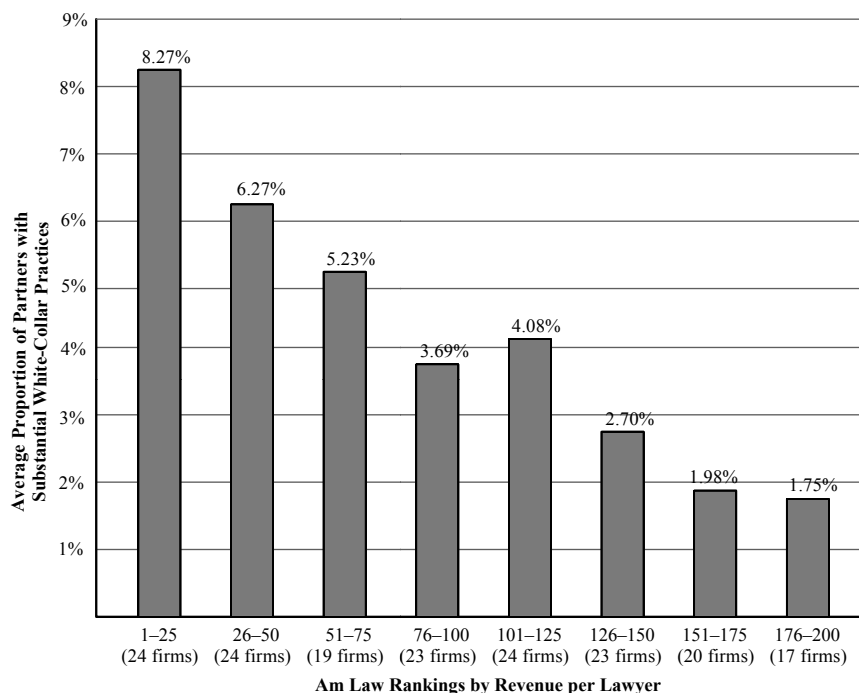
188. See *A Guide to Our Methodology*, *supra* note 155, at 105.

189. For Table 6 (PPP), Pearson’s $r = 0.4997$, $p < .05$. For Table 7 (RPL), Pearson’s $r = 0.5372$, $p < .05$. For Table 2 (gross revenue), the correlation is .2588, $p < .05$.

190. The regression coefficients are \$77,549 and \$34,146, respectively; $p < .05$.

with substantial white-collar practices to the more profitable firms reflects the profitability of these practices.

Figure 8b: Average Proportion of Partners with White-Collar Practices, With Firms Grouped By Ranking of Revenue Per Lawyer



In their analysis of lateral partner moves, Galanter and Henderson coded lawyers by one of 13 mutually exclusive primary practice areas.¹⁹¹ They found that for lawyers who moved *between* Am Law 200 firms, those who practiced in the white-collar or securities enforcement area moved *upstream* to firms with the highest mean PPP compared with every other practice specialty (such as mergers and acquisitions, intellectual property, antitrust, labor and employment, bankruptcy, corporate securities, litigation, and others).¹⁹² Henderson and Bierman subsequently confirmed this hierarchy, reporting that for lawyers moving *between* Am Law 200 firms, white-collar or securities enforcement specialists moved to firms with the highest mean PPP (\$1,046,507, as compared with \$819,540 for litigators and \$862,194 for all practitioners).¹⁹³ They also studied movement in and out of government service and noted a substantial premium for lawyers who left the DOJ and U.S. Attorneys' Offices to join Am Law 200 firms in "top-five" legal

191. Galanter & Henderson, *supra* note 55, at 1901. If multiple practice areas were listed, the researchers assumed that the first-listed area was primary. *See id.*

192. *See id.* at 1901 tbl.2, 1903 tbl.4.

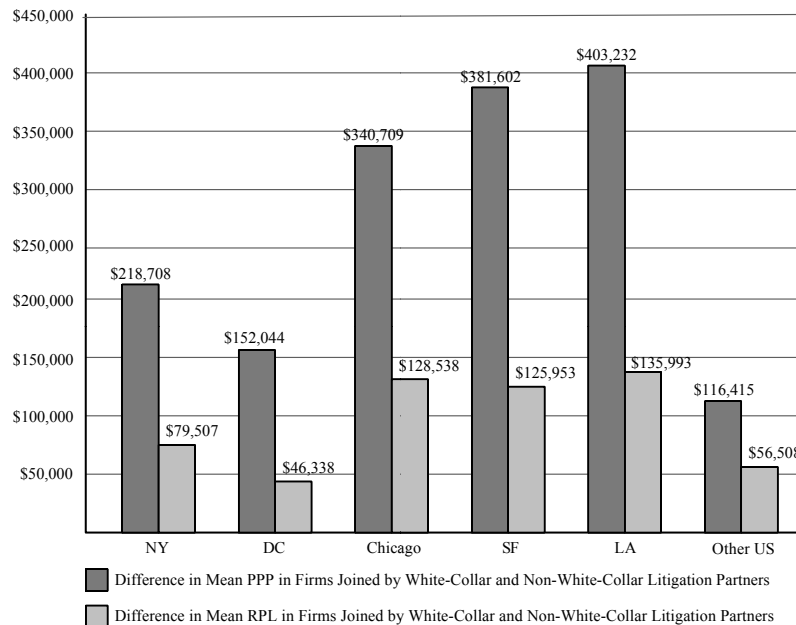
193. *See* Henderson & Bierman, *supra* note 178, at 1413 tbl.8.

markets.¹⁹⁴ We undertook a similar analysis with the lateral movement of the white-collar and non-white-collar litigation partners whom we earlier identified.

We first compared our two partner groups by the average PPP and RPL of the firms joined in each year from 2000–2009. White-collar partners went to firms with higher average PPP and RPL than non-white-collar partners, and the differences are statistically significant for every year after 2000.¹⁹⁵

Henderson and Bierman also reported movement to firms with higher average PPP and RPL in the top-five markets—New York, San Francisco, Los Angeles, Washington, D.C., and Chicago, in that order—compared to the rest of the United States.¹⁹⁶ Figure 9, below, and Tables 8a and 8b, printed in the Appendix, show differences within discrete legal markets for our sets of white-collar and non-white-collar litigation partners. Tables 8a and 8b report average PPP and RPL at firms joined by the two partner groups by market. Figure 9 displays the *differences* for the two partner groups in average PPP and RPL at the firms they joined. In each of the top-five U.S. markets, as well as in other U.S. locations, the average PPP and RPL of the firms joined are significantly higher for white-collar partners than for non-white-collar litigation partners.¹⁹⁷

Figure 9: Differences in Average Profits Per Partner and Revenue Per Lawyer in Firms Joined by White-Collar Partners and Non-White-Collar Litigation Partners, by U.S. Markets



194. See *id.* at 1419 tbl.11.

195. $P < .05$ for differences in PPP and RPL for 2003, and for differences in PPP in 2004. Otherwise, $p < .001$ for differences in PPP and RPL in every year after 2000.

196. See Henderson & Bierman, *supra* note 178, at 1405 tbl.5.

197. For significance levels, see *infra* Tables 8a and 8b.

Although Figure 9 and Table 8a appear to demonstrate quite substantial differences in PPP for white-collar partners compared with other litigation partners in certain markets (e.g., over \$400,000 for lawyers in Los Angeles and close to that in San Francisco), the figures for PPP and RPL represent the mean. The lateral partner data set includes a disproportionate number of lateral moves for white-collar lawyers in three of the last four years, when PPP and RPL were higher than in the early 2000s, and this may inflate the mean PPP and RPL compared with non-white-collar litigators.¹⁹⁸ On the other hand, the increased proportion of white-collar lawyers who joined Am Law 200 law firms (compared with other litigators) toward the end of our study period could represent an acceleration in the development of this practice.

Finally, Table 1 reports the results of a multiple regression analysis with PPP as the dependent variable.

Table 1: Marginal Effect of White-Collar Practice, Setting Left, Legal Market and Year on Profits Per Partner of Firm Joined

| PPP of Firm Joined | Coefficient | Std. Err. | t | P>t | Standardized Beta |
|-----------------------------------|---------------|---------------------------|-------|--------|-------------------|
| White Collar | \$149,906 | 20,247 | 7.4 | < .001 | 0.10 |
| Left Government | \$184,772 | 24,123 | 7.66 | < .001 | 0.11 |
| Left Am Law 200 Firm | \$126,860 | 12,509 | 10.14 | < .001 | 0.15 |
| Left Corp/Private Setting | \$114,119 | 33,794 | 3.38 | 0.001 | 0.04 |
| Top-Five U.S. Legal Market | \$235,200 | 11,916 | 19.74 | < .001 | 0.26 |
| 2001 | \$29,055 | 73,102 | 0.4 | 0.691 | 0.02 |
| 2002 | \$65,233 | 73,060 | 0.89 | 0.372 | 0.04 |
| 2003 | \$146,798 | 72,715 | 2.02 | 0.044 | 0.10 |
| 2004 | \$251,425 | 72,872 | 3.45 | 0.001 | 0.17 |
| 2005 | \$306,761 | 72,877 | 4.2 | < .001 | 0.21 |
| 2006 | \$396,968 | 73,807 | 5.38 | < .001 | 0.23 |
| 2007 | \$408,558 | 72,480 | 5.64 | < .001 | 0.30 |
| 2008 | \$409,187 | 71,974 | 5.69 | < .001 | 0.35 |
| 2009 | \$404,987 | 71,835 | 5.64 | < .001 | 0.35 |
| Constant | \$329,215 | 71,024 | 4.64 | < .001 | |
| N | 4334 | Adjusted R-squared | | | 0.26 |
| F (14, 4319) | 112.28 | Prob > F | | | 0 |

The regression analysis indicates that the average PPP of firms joined is almost \$150,000 greater for white-collar than non-white-collar litigation partners holding other covariates in the model constant. This is somewhat outweighed by location: moving to a top-five legal market increases average PPP by \$235,000. With respect to setting left—which reflects the partners' immediate past

198. See *infra* Table 5.

employment—the premium for joining a firm directly from government is quite substantial (almost \$185,000), larger than the premiums for lawyers leaving another Am Law 200 firm (approximately \$127,000) or a corporate or private setting (almost \$115,000). These “setting left” premiums are in comparison to lawyers moving from non-Am Law 200 firms into the Am Law 200 (the omitted variable). All of these coefficients are significant, as are the dummy variables for years 2004–2009.¹⁹⁹ We obtained similar results with a regression analysis with revenue per lawyer as the dependent variable, although leaving a government setting or an Am Law 200 firm carried a somewhat higher premium.²⁰⁰

Galanter and Henderson and, later, Henderson and Bierman, put white-collar and securities enforcement partners at the top of the heap in terms of profits per partner of firms joined, compared with partners in all other practice areas.²⁰¹ Our findings are not inconsistent; we compared partners with at least a substantial white-collar practice to other litigation partners, many of whom have the same basic legal skills. White-collar partners received a premium for their practice area. Moreover, because white-collar work is concentrated geographically and many white-collar lawyers also came from government, many lateral white-collar partners received additional premiums for joining firms in top-five markets and for leaving government service.

2. *Conflicts, Coverage, and Cost Controls*

The data do not tell us whether white-collar partners have such lucrative opportunities because corporate criminal work is itself so profitable, or for other reasons. It may be that one increasingly needs both civil and criminal skill sets to work at the highest levels in a variety of traditional large-firm practice areas (such as antitrust and securities), and so these lawyers are in heavy demand compared with civil-only specialists. Further research, perhaps with surveys and interviews, may be necessary to answer this question. But we have another reason to believe that white-collar criminal practice is enormously profitable, and the reason is structural: the white-collar and investigations practice area is largely insulated from the cost controls that are implemented by in-house counsel in ordinary

199. We could not ascertain whether partners whose primary work is in the field are more able to enjoy the white-collar premium. We ran an additional regression with a dummy variable for those who practiced predominantly in other fields. It was not significant. On the other hand, it also did not affect the regression coefficients of the other predictors.

200. The RPL of the firm joined is \$45,828 higher for white-collar lawyers, \$82,473 for former government lawyers, \$54,207 for those leaving Am Law 200 firms, \$44,061 for partners leaving corporate/private settings, and \$91,081 for those who joined firms in top-five markets. Each of these coefficients is significant at < .001 levels.

The differences in coefficients from the regression model with PPP as the dependent variable may reflect a number of factors. PPP represents profits per equity partner, so PPP is influenced by the partnership structure at the various firms. And firms reporting the same PPP may have lower RPL depending on leverage between equity partners and other lawyers. But, for our purposes, we are most interested in PPP as it reflects the potential earnings of partners who move to or between Am Law 200.

201. Galanter & Henderson, *supra* note 55, at 1901 tbl.2, 1903 tbl.4; Henderson & Bierman, *supra* note 178, at 1413 tbl.8.

litigation. These are not the sorts of cases in which in-house counsel can expertly play the legal market or tightly control legal fees. In addition, much of the individual representation is covered by insurance.

An internal investigation of alleged corporate wrongdoing is a high-stakes matter and possibly a “bet the company” case. Among the factors considered by the DOJ in deciding whether to charge a company with a crime is the quality of the corporation’s remedial actions.²⁰² If the company is to argue later for non-prosecution or a deferred prosecution, it will need to show government agents and prosecutors that it took the problem quite seriously. One way to do that is to give those conducting the internal investigation a free hand. Also, as O’Sullivan points out, if the investigation has been announced publicly, the company will want to reassure investors, regulators, and employees by making clear that the investigation will be conducted independently.²⁰³ This “often translates into hiring an outside firm.”²⁰⁴ Another benefit of having an outside firm conduct the investigation, as opposed to in-house counsel, is that it may be clearer to a reviewing court that communications to the investigating lawyers are privileged, because it would be less likely that the communications would relate to other business matters.²⁰⁵ A 2010 survey of 275 in-house counsel in the United States reports that 43% of the responding companies retained outside counsel for assistance in a government or regulatory investigation within the last year.²⁰⁶

Practitioner publications emphasize that counsel conducting the investigation “must have the authority sufficient to conduct an investigation that is objectively thorough,” which means making sure that the results of the investigation “are not predetermined by a scope that is defined too narrowly.”²⁰⁷ The task of retaining counsel and overseeing the investigation is often taken away from in-house counsel, the lawyer who—in Coffee’s words—is the “professional

202. See U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-28.300(A)(6) (2008), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrn.htm; see also *id.* § 9-28.900(B) cmt. (“In determining whether or not to prosecute a corporation, the government may consider whether the corporation has taken meaningful remedial measures. A corporation’s response to misconduct says much about its willingness to ensure that such misconduct does not recur.”).

203. O’Sullivan, *supra* note 112, at 1260; see also Robert W. Tarun, *Tarun’s Ten Commandments for Conducting Internal Investigations*, in WHITE COLLAR CRIME 2010, *supra* note 110, at A-12, A-15 (“Today, . . . the ultimate audience [for an internal investigation]—whoever the client is—has grown to include shareholders, lenders, auditors, competitors, regulators, the media, citizen groups, and even potential civil litigants.”).

204. O’Sullivan, *supra* note 112, at 1260.

205. See *id.* at 1259.

206. See *Fulbright Litigation Trends: Fulbright’s 7th Annual Litigation Trends Survey Report*, FULBRIGHT & JAWORSKI L.L.P., 31 (Nov. 2, 2010), <http://www.fulbright.com/images/publications/7thLitigationTrendsReport.pdf>. The Survey does not indicate how the respondents were selected, although it states that an independent research firm conducted the survey. See *id.* at 2. The survey also reports a decline in the use of outside counsel among the largest companies from the previous year. See *id.* at 32.

207. Thomas J. Curran, *Mistakes in Investigations: Avoiding Questions About How the Investigation Was Conducted*, in NATIONAL INSTITUTE ON INTERNAL CORPORATE INVESTIGATIONS AND IN-HOUSE COUNSEL, *supra* note 137, at E-1, E-3.

manager of legal services”²⁰⁸ regularly exercising cost controls on behalf of the company. The company’s board of directors may delegate that responsibility to the audit committee or other special committee.²⁰⁹ The American College of Trial Lawyers cautions:

Where the alleged or suspected conduct involves senior officers or serious employee misconduct, or where the corporate entity is the focal point of a government inquiry, it is important that management, including usually the General Counsel’s office, not be, and not be perceived to be, in charge of the internal investigation. An investigation carried out by management, or a corporate department (such as an internal audit department), likely will not be afforded credibility.²¹⁰

While some warn that the general counsel or other company lawyer must monitor the progress of the investigation because “[l]awyers left alone will spend wildly and unnecessarily,”²¹¹ that may be difficult to accomplish as a practical matter. One national publication advises that lawyers’ “bills should be submitted in redacted form. There should be an appropriate certification as to the necessity and propriety of all charges, so as not to provide the company with a roadmap of the findings or progress of the investigation.”²¹² These are not circumstances in which the entity may shop around for a low-cost legal provider or aggressively monitor fees, even if it were inclined to do so.

Nor may the company easily control costs when a law firm is retained to represent an individual officer or employee under investigation. The entity, or its insurer, typically covers legal fees. Indemnification of fees is mandatory in some circumstances and permissive in others.²¹³ Virtually all of the states’ indemnification statutes “specifically allow corporations to advance funds to pay attorneys fees as those fees are incurred, rather than after judgment.”²¹⁴ “It has become common corporate practice [for companies] to adopt mandatory charter, bylaw, or other contractual provisions ensuring both indemnification and

208. COFFEE, *supra* note 58, at 230.

209. See Sarbanes–Oxley Act of 2002 § 301, 15 U.S.C. § 78j-1(m)(3), (5) (2006). (specifying that audit committees may retain independent counsel); O’Sullivan, *supra* note 112, at 1260.

210. AM. COLL. OF TRIAL ATTORNEYS, RECOMMENDED PRACTICES FOR COMPANIES AND THEIR COUNSEL IN CONDUCTING INTERNAL INVESTIGATIONS 8 (Feb. 2008).

211. Robert M. Stephenson, *The Duties and Responsibilities of General Counsel When Confronted with Allegations of Corporate Wrongdoing*, in NATIONAL INSTITUTE ON INTERNAL CORPORATE INVESTIGATIONS AND IN-HOUSE COUNSEL, *supra* note 137, at H-1, H-4.

212. Marc S. Raspanti & Divya Wallace, *Will an ‘Independent’ Internal Investigation Always Make a Difference to a Corporation?*, CHAMPION, Feb. 2009, at 33.

213. See, e.g., DEL. CODE ANN. tit. 8, § 145(a), (c) (2011) (addressing permissive and mandatory indemnification of reasonable fees actually incurred).

214. Pamela H. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal*, 24 IND. L. REV. 279, 286 (1991). For example, Delaware provides permissive advancement of fees and expenses in anticipation of indemnification. DEL. CODE ANN. tit. 8, § 145(e) (2011).

advancement of expenses.”²¹⁵ Under these circumstances, in-house counsel is not in a position to flyspeck the bills because of a structural barrier: there is a potential conflict of interest and the lawyer for the individual officer or employee must exercise independent judgment. The American Bar Association’s Model Rules provide that a “lawyer shall not accept compensation for representing a client from one other than the client unless” there is consent, confidential information is protected, and “there is no interference with the lawyer’s independence of professional judgment or with the client–lawyer relationship.”²¹⁶ The Rules further demand that a “lawyer shall not permit a person who . . . pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment.”²¹⁷ These or similar provisions have been adopted in leading jurisdictions.²¹⁸

This does not mean that there is never downward pressure on billing. Even when an individual is entitled to indemnification of fees and expenses, for example, those expenses must be actually and reasonably incurred.²¹⁹ And there may be other restraints (such as reputational) in a community of white-collar lawyers who regularly refer cases to each other. Nevertheless, there is significant insulation of these cases from the cost controls now employed by in-house counsel in ordinary commercial litigation.

Finally, the very existence of insurance makes the representation of many entities and individual corporate actors profitable in a way that is quite different from work on behalf of ordinary criminal defendants. Entities may seek recovery from insurers when they incur legal expenses in a criminal investigation or when they indemnify their officers, directors, and employees, and there are circumstances in which these individuals may seek payment directly from insurers if there is no indemnification. Although we do not have data on payouts with respect to criminal investigations, insurance coverage is an important aspect of white-collar practice.

Virtually all publicly traded corporations in the United States purchase directors’ and officers’ liability insurance (“D&O insurance”),²²⁰ which “protects corporate officers and directors and the corporation itself from liabilities arising as a result of the conduct of directors and officers in their official capacity.”²²¹ Most

215. Linda Imes & Sarah E. Paul, *A Defense Attorney’s Guide to Indemnification and Advancement*, in NATIONAL INSTITUTE ON INTERNAL CORPORATE INVESTIGATIONS AND IN-HOUSE COUNSEL, *supra* note 137, at F-13, F-19.

216. MODEL RULES OF PROF’L CONDUCT R. 1.8(f) (2009).

217. MODEL RULES OF PROF’L CONDUCT R. 5.4(c) (2009).

218. *See, e.g.*, CAL. RULES OF PROF’L CONDUCT R. 3-310(F); D.C. RULES OF PROF’L CONDUCT R. 1.8(e), 5.4(c); ILL. RULES OF PROF’L CONDUCT R. 1.8(f), 5.4(c); N.Y. RULES OF PROF’L CONDUCT R. 1.8(f), 5.4(c); TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 1.08(e), 5.04(c).

219. *See, e.g.*, DEL. CODE ANN. tit. 8, § 145(a), (c) (2011).

220. Tom Baker & Sean J. Griffith, *The Missing Monitor in Corporate Governance: The Directors’ & Officers’ Liability Insurer*, 95 GEO. L.J. 1795, 1797 (2007).

221. *Id.* at 1801. D&O policies typically include “Side A” coverage, which protects individual officers or directors against losses, and “Side B” coverage, which

D&O policies define what is a covered “‘claim,’ and—except for policies limiting coverage to criminal proceedings in which the policyholder [may be] subject to a binding adjudication of liability—courts generally hold that these definitions encompass corporate criminal investigations.”²²² While policies may contain exclusions for certain criminal or fraudulent acts,²²³ they cover the costs of defending criminal and regulatory matters, including when companies are obligated to indemnify individual actors.²²⁴ Critically, even though criminal acts may be excluded from coverage, the insurer typically has an obligation to pay defense costs until a final judgment or adjudication.²²⁵ As one practitioner publication emphasizes: “The key point here is that the insurance company is obligated to pay defense costs, even in *criminal cases*, for potentially covered claims unless and until there has been a final adjudication against the insured that finds that the policyholder acted in a deliberately fraudulent or dishonest manner.”²²⁶ Of course, if the individual or entity is eventually convicted and the exclusion applies, legal counsel has already been compensated. Whether or not an insurer is later able to claw back the costs of defense from an insured—or the company from an individual to whom it has advanced fees—is a different matter altogether.

* * *

Summarizing our findings, our data show that white-collar or investigations practices are well established within the Am Law 200, especially for

protects the company from losses that result from indemnifying individual directors and officers. *Id.* at 1802–03.

222. Patricia A. Bronte, *D&O Coverage for Corporate Criminal Investigations*, INS. COVERAGE L. BULL., Dec. 2008, at 3 (reviewing decisions). There has been litigation over whether an investigative subpoena, often the first signal of a government investigation, is sufficient to trigger coverage. *See, e.g.,* *Minuteman Int’l, Inc. v. Great Am. Ins. Co.*, No. 03 C 6067, 2004 WL 603482, at *5 (N.D. Ill. Mar. 22, 2004) (holding that a subpoena may trigger a claim, at least where the policy does not require that a “‘binding adjudication of liability’ be sought,” such as by the filing of an actual complaint). Even so, Bronte advises policyholders and insureds to pay particular attention to the policy language defining “claim” because “[t]he receipt of a grand jury subpoena is not the time for either the insurer or the policyholder to begin considering whether the D&O policy covers a criminal investigation.” Bronte, *supra*, at 5.

223. *See* Baker & Griffith, *supra* note 220, at 1820; Hartford Fin. Prods., *Directors, Officers and Company Liability Policy* §§ IV(O), V(B) (June 1996) [hereinafter *Hartford Specimen Policy*], <http://www.hfpinsurance.com/forms/nj85.pdf>.

224. *See* Baker & Griffith, *supra* note 220, at 1799; Hartford Specimen Policy, *supra* note 223, §§ I(B), IV(B).

225. David M. Gische, *Directors and Officers Liability Insurance*, FINDLAW (Jan. 1, 2000), <http://library.findlaw.com/2000/Jan/1/241472.html> (“[M]any dishonesty exclusions include an adjudication clause, which provides that the exclusion only applies if the fraud or dishonesty is established by a judgment or other final adjudication.”); *see also* Hartford Specimen Policy, *supra* note 223, § III(C) (stating that the insurer shall advance claims expenses prior to the disposition of claims, provided that “to the extent it is finally established” that a claim is not covered, there is a duty to repay the insurer).

226. Jerold Oshinsky et al., *Little Fish, Big Ponzi: Recouping Madoff Losses Through Insurance Proceeds*, GILBERT LLP, 4 (Feb. 2009), <http://www.gotofirm.com/assets/attachments/54.pdf>.

the top-125 firms ranked by gross revenue. Five legal markets dominate. For firms in the Am Law 100, the white-collar partners are concentrated in New York and Washington, D.C., and regional firms and locations outside of the five leading markets emerge in the bottom quarter of the Am Law 200. The white-collar partners are different than our weighted sample of non-white-collar litigation partners in several respects: they are more concentrated geographically, more likely to have served in government (and *much* more likely to have been federal prosecutors), and fewer of them are women. White-collar practice groups also seem less leveraged compared with other litigation practices. There are some significant differences in the career paths of white-collar lawyers by gender; notably, women partners are less likely than men to have served in government.

The practices appear to be quite profitable. There are positive correlations between the proportion of white-collar partners in the firms and the firms' Am Law rankings by profits per partner and revenue per lawyer. If one assumes that the lateral movement of partners to firms with higher profits per partner reflects higher earnings of lawyers, the white-collar partners do well compared with non-white-collar litigators, earning a premium for their practice area. Our regression analysis also shows additional premiums for government service and for joining a firm in a top-five market, premiums that the white-collar lawyers also may well earn. As we explain, if this area of practice is more lucrative than others, the reason may be structural. We believe that this work is not subject to the same types of cost controls that entities seek to impose on firms in other legal matters, and insurers regularly advance legal fees. Given the enormous pressures in today's legal market to contain costs and to offer alternative billing models, firms must especially value legal work that can be staffed and billed with pre-recession enthusiasm.

IV. A CASE STUDY—KPMG, THE GHOST OF ARTHUR ANDERSEN, AND *STEIN*

The investigation of accounting firm KPMG and the ensuing *Stein* litigation offer a fascinating case study and a bookend for our project. They tie together the prosecution policies and the development of profitable white-collar practices in the major law firms. We suggest that one can read the *Stein* story several different ways. It might be a tale about difficult negotiations and professional judgments that saved an accounting firm, or zealous advocacy on behalf of individual criminal defendants, or perhaps the importance of the Sixth Amendment right to counsel. The headline could be about reducing prosecutors' unfair leverage against companies under investigation or the government's difficulty in countering the "information control" defense. Still others may be forgiven for seeing *Stein* as a fight by predominantly Am Law 200 lawyers to preserve a funding stream for a lucrative and growing area of practice—in essence, protecting the ability of law firms to receive compensation through indemnification and advancement. Regardless of how one interprets the story, however, *Stein* has clear and important implications for federal investigations, white-collar practice, and the nation's large law firms.

A. The KPMG Investigation

In 2002, the Internal Revenue Service (“IRS”) began investigating certain tax shelters.²²⁷ It issued summonses to accounting giant KPMG and later filed a petition to enforce the summonses.²²⁸ That led to congressional hearings, and the chair of KPMG became concerned.²²⁹ He retained Robert S. Bennett and his firm, Skadden, Arps, Slate, Meagher & Flom (“Skadden”), and asked them “to come up with a new cooperative approach.”²³⁰ In 2002, Skadden was ranked first among the Am Law 200 firms by gross revenue and tenth by profits per partner and revenue per lawyer.²³¹

At the time, Bennett was a very prominent attorney with Skadden’s Washington, D.C. office.²³² A former federal prosecutor, Bennett was special counsel to a Senate Committee, and represented powerful politicians (among them President Bill Clinton) and major corporations.²³³ Bennett notes in his autobiography that in the 1970s and 1980s, most large law firms “shunned criminal work as being beneath them,” and white-collar defense work was therefore done by boutiques, such as Bennett’s former shop in Washington, D.C.²³⁴ Bennett joined Skadden in 1990, defecting from his boutique along with 14 other lawyers.²³⁵ He explained to Skadden partners “why it made sense for Skadden to have a large group of white-collar-criminal lawyers who would represent both companies and individual managers.”²³⁶ The government had stepped up its prosecution of white-collar crime in response to corporate excesses of the 1980s. Skadden then “decided criminal law was of real interest, and that they should be able to say, ‘We’ve got the best in the business.’”²³⁷ According to Bennett: “Now, most major firms have former federal prosecutors in their ranks, so they do not have to farm out this lucrative business. Fortunately, I had gotten in early, so the increased competition had no effect on my practice.”²³⁸

With Bennett and Skadden on board, KPMG decided to “clean house” as part of its new cooperative approach.²³⁹ That included asking three senior KPMG

227. *Stein I*, 435 F. Supp. 2d 330, 338 (S.D.N.Y. 2006).

228. *Id.*

229. *Id.* at 338–39.

230. *Id.* at 339 (citation omitted).

231. *The Am Law 100: The Charts*, AM. LAW., July 2003, at 127, 137, 147.

232. He has since moved to another firm. David Ingram, *Will Skadden Be Hurt by Bob Bennett’s Departure?*, NAT’L L.J., Sept. 7, 2009, at 23; see also *Robert S. Bennett*, HOGAN LOVELLS, <http://www.hoganlovells.com/robert-bennett> (last visited Oct. 30, 2010).

233. See generally ROBERT S. BENNETT, *IN THE RING: THE TRIALS OF A WASHINGTON LAWYER* (2008) (describing his life and major cases, with only the briefest mention of KPMG).

234. *Id.* at 324.

235. See *id.* at 152–53; LINCOLN CAPLAN, *SKADDEN: POWER, MONEY, AND THE RISE OF A LEGAL EMPIRE* 231–32 (1993).

236. CAPLAN, *supra* note 235, at 232.

237. *Id.* at 233 (quoting Robert S. Bennett).

238. BENNETT, *supra* note 233, at 325.

239. *Stein I*, 435 F. Supp. 2d 330, 339 (S.D.N.Y. 2006).

partners to leave their positions.²⁴⁰ Among them was Jeffrey Stein, who became the lead defendant in the criminal case. Despite these efforts to change senior management, the IRS referred the matter to the DOJ for criminal prosecution.²⁴¹

In February 2004, the U.S. Attorney's Office advised 20 to 30 of KPMG's partners and employees that they were subjects of a grand jury investigation.²⁴² Later that month, prosecutors met with Bennett and others. Bennett explained that the firm had already taken high-level personnel actions, that it would fully cooperate, and that the objective was to save KPMG rather than protect individuals.²⁴³ In what the district court would later call an "obvious reference to the fate of Arthur Andersen," Bennett acknowledged that an indictment of KPMG would put the firm out of business.²⁴⁴ KPMG's in-house counsel had also learned from Arthur Andersen's collapse and understood that KPMG was at risk of going out of business.²⁴⁵

Prior to February 2004, it was the long-standing practice of KPMG to indemnify partners and employees for their legal expenses and to advance those fees.²⁴⁶ At the February meeting, prosecutors referred to the Thompson Memorandum and even stated that they would look at payment of fees "under a microscope."²⁴⁷ Afterwards, KPMG decided to implement a new policy, limiting the total amount of advanced fees and conditioning their payment on the individual's full cooperation with the government and the company.²⁴⁸

240. *Id.*

241. *Id.*

242. *Id.* at 340–41.

243. *Id.*

244. *Id.*

245. KPMG's general counsel, Joseph Loonan, testified at a hearing on attorneys' fees:

Q. You knew that the Department of Justice was not unwilling to indict a top four accounting firm even if it meant the firm would go out of business?

A. As well what happened with Anderson [sic].

Q. You were aware that that could happen to KPMG?

A. The government had the power to do so.

Q. You were aware that if it did happen to KPMG, you'd be out of business?

A. That was my personal belief, yes.

Transcript of May 8, 2006 Hearing re Fees at 132, *Stein I*, 435 F. Supp. 2d 330 (No. S1 05 Crim. 0888(LAK)). Loonan was deputy general counsel in 2004 and became general counsel prior to the 2006 fees hearing. *Id.* at 127.

246. KPMG is a limited liability partnership governed by Delaware law. *Stein I*, 435 F. Supp. 2d at 355 n.117. Delaware partnership law gives a partnership the power to indemnify and hold harmless any partner or other person from any and all claims. *See id.* (citing DEL. CODE ANN. tit. 6, § 15-106 (West 2006)). The district court found that KPMG had an unbroken track record of paying the legal expenses of its partners and employees, and that they had "every reason to expect that KPMG would pay their legal expenses," including those incurred in defending them against any criminal charges. *Id.* at 356.

247. *Id.* at 352–53 (citation omitted).

248. *Id.* at 344–49.

In August 2005, the firm entered into a deferred prosecution agreement, admitting wrongdoing, paying a \$456 million fine, and committing itself to cooperate in future investigations and prosecutions.²⁴⁹ A number of individual firm partners and employees were indicted. Under its new fees policy, KPMG stopped advancing legal fees to those who were charged.²⁵⁰

B. Proceedings in the District Court

The *Stein* case was assigned to U.S. District Court Judge Lewis A. Kaplan. Judge Kaplan came to the federal bench in 1994 from the New York law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP (“Paul Weiss”), where he had spent his entire legal career after a federal clerkship.²⁵¹ Paul Weiss was one of the few New York firms that traditionally handled some criminal law cases,²⁵² although Kaplan has described his practice as “over 90 percent civil.”²⁵³ Notably, while at the firm, Kaplan filed an amicus curiae brief for the New York City Bar in *Upjohn Co. v. United States*, arguing against the “control group” test and for a broader application of the attorney–client privilege in the corporate context.²⁵⁴

The indicted KPMG personnel challenged the effect of the fees decision.²⁵⁵ In June 2006, Judge Kaplan declared that the portion of the Thompson Memorandum (and the conduct of federal prosecutors) that threatened to take into account payment of attorneys’ fees violated the substantive due process rights of firm partners and employees, as well as the Sixth Amendment.²⁵⁶ He initially declined to dismiss the indictment, reasoning that KPMG might decide to advance the defense costs or be ordered to do so in a civil action, but those efforts later failed.²⁵⁷

In July 2007, Kaplan reaffirmed his previous decision, but this time dismissed the indictments against 13 defendants who were former KPMG partners

249. *Id.* at 349.

250. *Id.* at 349–50. KPMG avoided indictment after Bennett personally made the partnership’s case to Deputy Attorney General James Comey. He emphasized KPMG’s cooperation, including its new policy of conditioning payment of attorneys’ fees on the individual employees’ full cooperation with the investigation. *Id.* at 348–49.

251. *Confirmation Hearings on Federal Appointments: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 10 (1994) [hereinafter *Confirmation Hearings*] (statement of Lewis A. Kaplan).

252. *See* MANN, *supra* note 29, at 29.

253. *Confirmation Hearings*, *supra* note 251, at 89 (questionnaire of Lewis A. Kaplan).

254. *See* Brief Amici Curiae for the Committee on Federal Courts and the Committee on Corp. Law Department of the Ass’n of the Bar of the City of New York at 2, *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (No. 79-886).

255. *Stein I*, 435 F. Supp. 2d at 350.

256. *Id.* at 356–73.

257. *Id.* at 374–80. Judge Kaplan initially ruled that he could exercise ancillary jurisdiction over a civil claim against KPMG by its former partners and employees. *Stein III*, 452 F. Supp. 2d 230, 242–46 (S.D.N.Y. 2006). However, the Second Circuit reversed. *Stein v. KPMG, LLP*, 486 F.3d 753, 759–64 (2d Cir. 2007).

and employees.²⁵⁸ The district court determined that four of them were deprived of counsel of their choice due to the government's actions.²⁵⁹ Two of the four had to replace large national law firms with small firms, and at least three of the teams of discharged lawyers were comprised of former prosecutors or high-ranking DOJ officials.²⁶⁰ Judge Kaplan also found that even those defendants who were able to

258. *Stein IV*, 495 F. Supp. 2d 390, 393–94 (S.D.N.Y. 2007). He allowed the charges to go forward against three former KPMG defendants—because he was not convinced that KPMG would have paid their fees absent government influence—as well as two additional defendants who had never been employed by KPMG. *See id.* at 394, 425–27.

259. *Id.* at 415–16.

260. Defendant Gregg Ritchie was initially represented by James Robinson and Michael Horowitz of Cadwalader, Wickersham & Taft LLP but was forced to terminate their representation. *See* Docket, *Stein IV*, 495 F. Supp. 2d 390 (No. S1 05 Crim. 0888(LAK)); *see also Stein IV*, 495 F. Supp. 2d at 415–16 (discussing the firm's involvement). In 2007, Cadwalader was ranked number 47 in the Am Law 200. *Two Firms Pass the \$2 Billion Mark*, AM. LAW., May 2008, at 175, 176 [hereinafter *Two Firms Pass the \$2 Billion Mark*]. Michael Horowitz, held high-level positions in DOJ and served as an appointed member of the U.S. Sentencing Commission. *See Michael Horowitz*, CADWALADER, http://www.cadwalader.com/Attorney/Michael_Horowitz/634 (last visited Oct. 13, 2011). James Robinson was a U.S. Attorney and head of DOJ's Criminal Division. *See* Jeff Jeffrey, *James Robinson, Former DOJ Criminal Division Head, Dies at 66*, LEGALTIMES BLOG (Aug. 09, 2010, 4:39 PM), <http://legaltimes.typepad.com/blt/2010/08/james-robinson-former-doj-criminal-division-head-dies-at-66.html>.

Defendant Mark Watson was represented prior to indictment by Roger Spaeder and Aitan Goelman of Zuckerman Spaeder, but he was financially unable to retain them for the criminal case. Transcript of Hearing re Dismissal 07-02-07 at 67–69, *Stein IV*, 495 F. Supp. 2d 390 (No. S1 05 Crim. 0888(LAK)) [hereinafter Transcript re Dismissal]; *see also* Supplemental Declaration of Mark T. Watson in Support of Dismissal at ¶¶ 2–8, *Stein IV*, 495 F. Supp. 2d 390 (No. S1 05 Crim. 0888(LAK)). Although Zuckerman Spaeder is not one of the Am Law 200, it was recently named a national finalists for “litigation boutique of the year.” *See* Drew Combs, *Shelter in a Story: The Washington, D.C., Firm Is a Haven for Clients in Trouble*, AM. LAW., Jan. 2009, at 94. Roger Spaeder is a former federal prosecutor and high-profile lawyer in Washington, D.C. *See Roger Spaeder*, ZUCKERMAN SPAEDER LLP, http://www.zuckerman.com/roger_spaeder (last visited Sept. 26, 2011). His partner, Aitan Goelman, served for nine years as a federal prosecutor. *See Aitan D. Goelman*, ZUCKERMAN SPAEDER LLP, http://www.zuckerman.com/aitan_goelman (last visited Oct. 30, 2011).

Defendant Carl Hasting was initially represented by Roger M. Olsen, but was unable to retain him when KPMG ceased paying legal fees. *See* Amended Declaration of Carl D. Hasting at 2–3, *Stein IV*, 495 F. Supp. 2d 390 (No. S1 05 Crim. 0888(LAK)). Olsen has his own firm in Washington, D.C. He previously served as Assistant Attorney General in charge of DOJ's Tax Division as well as Deputy Assistant Attorney General for the Criminal Division. *See Roger M. Olsen*, MARTINDALE.COM, <http://www.martindale.com/Roger-M-Olsen/142618-lawyer.htm> (last visited Oct. 30, 2011).

Defendant Steven Gremminger hired the Jones Day law firm while he was still at KPMG. He was fired when he became a target of the investigation and could no longer afford representation from Jones Day. *Stein IV*, 495 F. Supp. 2d at 415. Jones Day was ranked fourth in the Am Law 200 in 2007. *Two Firms Pass the \$2 Billion Mark*, *supra*, at 175. It is not clear from the public record which attorneys at Jones Day would have represented defendant Gremminger. However, a 1993 biography of the Jones Day firm describes “corporate criminal investigations” as one of the firm's new specialties, operating in an area where “smaller law ‘boutiques’ were formerly dominant.” ALBERT BOROWITZ,

continue with their original counsel were forced to alter the way they defended the case.²⁶¹ Although prosecutors denied that their conduct violated the defendants' constitutional rights, they did not contest the factual allegations in the defendants' various declarations as to their inability to retain counsel of choice or the effect of KPMG's fees decision on the actual conduct of their defense.²⁶²

Kaplan's sense of anger and outrage was palpable. His first opinion begins with a discussion of the right to a fundamentally fair trial. A poor defendant "is guaranteed competent counsel"²⁶³ while an accused with financial means "has the right to hire the best lawyers money can buy."²⁶⁴ Then Kaplan laid out what he considered another basic principle, not quite universal and not of constitutional dimension: an employer often must reimburse an employee for legal expenses and advance fees up front.²⁶⁵ In the first decision, the judge found that the Thompson Memorandum—and the use of fees to gauge a company's cooperation—unconstitutionally burdened the individual defendants' right to a fair trial.²⁶⁶ By the time the second decision was issued, the judge went so far as to find that the prosecutors' conduct shocked the conscience,²⁶⁷ which is extraordinarily rare for a court to hold. He also determined that the government's actions infringed the defendants' Sixth Amendment right to counsel of choice even though the majority of the condemned conduct occurred prior to indictment.²⁶⁸ Kaplan concluded that prosecutors "deliberately or callously prevented many of these defendants from obtaining funds for their defense that they lawfully would have had . . . This is intolerable in a society that holds itself out to the world as a paragon of justice."²⁶⁹

C. Appeal

The United States appealed to the Second Circuit Court of Appeals, arguing that KPMG's decision not to pay attorneys' fees did not amount to state action, that there were no violations of the Sixth Amendment or Due Process Clause, and that dismissal was not proper.²⁷⁰ The defendants were represented on appeal by some of the most skilled advocates of the day, including former Solicitor

JONES, DAY, REAVIS & POGUE: THE FIRST CENTURY 261 (1993). In describing the growth of the firm in the late 1980s, Borowitz notes: "With the growth of its criminal investigations practice, the Firm was able to attract eminent lawyers with experience as government prosecutors, and to develop related skills among its younger lawyers." *Id.* at 276.

261. *Stein IV*, 495 F. Supp. 2d at 416–19.

262. *See id.* at 393; Transcript re Dismissal, *supra* note 260, at 72. The United States conceded that if the trial court correctly found a constitutional violation, the only appropriate remedy was dismissal. Transcript re Dismissal, *supra* note 260, at 90.

263. *Stein I*, 435 F. Supp. 2d 330, 335 (S.D.N.Y. 2006) (citing *Gideon v. Wainwright*, 373 U.S. 335 (1963)).

264. *Id.*

265. *Id.* Judge Kaplan expands on this principle later in the opinion. *Id.* 353–55.

266. *Id.* at 362–65.

267. *Stein IV*, 495 F. Supp. 2d at 412–15.

268. *Id.* at 415–16; *Stein I*, 435 F. Supp. 2d at 365–73.

269. *Stein IV*, 495 F. Supp. 2d at 427–28.

270. *See generally* Brief for the United States of America, *Stein V*, 541 F.3d 130 (2d Cir. 2008) (No. 07-3042-cr).

General Seth Waxman, who argued for Stein.²⁷¹ There were amicus curiae briefs supporting the defendants from business and other organizations, former prosecutors, and bar groups. Lawyers associated with Am Law 200 firms were counsel of record on virtually all of these briefs.²⁷² One was submitted on behalf of 17 former leaders of U.S. Attorneys' Offices within the Second Circuit. While this is a small and non-random sample, we note that all seven amici on this brief who had served in the Southern and Eastern Districts of New York (i.e., metropolitan New York) were in practice with large national firms. The ten amici from outside of the New York metropolitan area were with small regional firms or in other settings.²⁷³

271. Waxman is chair of the Appellate and Supreme Court Litigation Practice Group at Wilmer Cutler Pickering Hale and Dorr LLP. *Seth P. Waxman*, WILMERHALE, http://www.wilmerhale.com/seth_waxman (last visited Oct. 30, 2011). In 2008, WilmerHale was ranked 21 in the Am Law 200. *Thirteen Firms Gross over \$1 Billion*, AM. LAW., May 2009, at 151 [hereinafter *Thirteen Firms Gross over \$1 Billion*].

272. See Brief for Amici Curiae Ass'n of Corp. Counsel and Chamber of Commerce of the United States of America in Support of Defendants–Appellees, *Stein V*, 541 F.3d 130 (No. 07-3042-cr) (Mark I. Levy of Kilpatrick Stockton LLP (2008 Am Law rank 100) was counsel of record); Brief of Amici Former Attorneys General and U.S. Attorneys in Support of Affirmance, *Stein V*, 541 F.3d 130 (No. 07-3042-cr) (Walter Dellinger and the Harvard Supreme Court Clinic were counsel of record, but that was through Dellinger's association with O'Melveny & Myers LLP (Am Law rank 24), which was also on the brief); Brief Amicus Curiae of Former United States Attorneys, First Assistants and Criminal Division Chiefs in Support of Defendants–Appellees, *Stein V*, 541 F.3d 130 (No. 07-3042-cr) (Ira M. Feinberg of Hogan & Hartson LLP (Am Law rank 22) was counsel of record); Brief of Amici Curiae the New York Council of Defense Lawyers, the New York State Bar Ass'n, and the National Ass'n of Criminal Defense Lawyers in Support of Affirmance of the District Court's Rulings in Favor of Defendants–Appellees, *Stein V*, 541 F.3d 130 (No. 07-3042-cr) (Lewis J. Liman of Cleary Gottlieb Steen & Hamilton LLP (Am Law rank 18) was counsel of record); Brief of Washington Legal Foundation as Amicus Curiae in Support of Defendants–Appellees Seeking Affirmance, *Stein V*, 541 F.3d 130 (No. 07-3042-cr) (Michael J. Gilbert of Dechert LLP (Am Law 200 rank 28) was counsel of record). For a listing of these firms' respective 2008 Am Law rankings, see *Thirteen Firms Gross over \$1 Billion*, *supra* note 271, at 151–52. The Brief of the Securities Industry & Financial Markets Ass'n as Amicus Curiae in Support of Defendants–Appellees, *Stein V*, 541 F.3d 130 (No. 07-3042-cr), was filed by Clifford Chance US LLP, a prominent international firm not on this list.

273. When the brief was filed, the seven amici who formerly practiced in the Southern and Eastern Districts were with: Kaye Scholer LLP (two amici) (2008 Am Law rank 65); Dorsey & Whitney LLP (Am Law rank 73); Hogan & Hartson (Am Law rank 22); Heller Ehrman LLP (two amici) (which would have made the American Lawyer list but is now defunct); and Jenner & Block LLP (Am Law rank 81). See *Thirteen Firms Gross over \$1 Billion*, *supra* note 271, at 151–52. The other ten amici—who formerly practiced with the U.S. Attorneys' Offices in the Northern and Western Districts of New York and the Districts of Connecticut and Vermont—were all with small firms or in other settings. See Brief Amicus Curiae of Former United States Attorneys, First Assistants and Criminal Division Chiefs in Support of Defendants–Appellees, *supra* note 272 (providing a list of amici in the Addendum).

The United States lost across the board; the panel affirmed the order dismissing the indictment.²⁷⁴ One of the most interesting aspects of the decision is the portion of the ruling finding that KPMG's actions may be attributed to the government. The Justice Department had argued that KPMG, which was under investigation and thus an adversary of the government, could not be considered its "partner" in the investigation of KPMG partners and employees.²⁷⁵ Rejecting that argument, the court of appeals found:

An adversarial relationship does not normally bespeak partnership. But KPMG faced ruin by indictment and reasonably believed it must do everything in its power to avoid it. The government's threat of indictment was easily sufficient to convert its adversary into its agent. KPMG was not in a position to consider coolly the risk of indictment, weigh the potential significance of the other enumerated factors in the Thompson Memorandum, and decide for itself how to proceed.²⁷⁶

In other words, the company became aligned with the government, so much so that its actions could be attributed to the prosecution. The court of appeals further held that the government unjustifiably interfered with the defendants' relationship with counsel and their ability to put forth a defense, in violation of the defendants' Sixth Amendment right to counsel.²⁷⁷ However, the court did not reach the due process argument.²⁷⁸ The United States declined to file a petition for writ of certiorari.

While the case was pending in the district court, the *Wall Street Journal* was harshly critical of the KPMG prosecution.²⁷⁹ When the appeal was handed down, the *Journal* sent its congratulations to Judge Kaplan, "whose withering critique of prosecutorial abuse in the KPMG tax-shelter case was vindicated yesterday by the Second Circuit Court of Appeals."²⁸⁰

D. Aftermath

The *Stein* litigation has had a substantial impact on white-collar criminal prosecutions. On the very same day that the Second Circuit Court of Appeals issued its decision, the DOJ once again revised its policies, which appears to be an unlikely coincidence. The "Filip Memorandum" now supersedes the McNulty Memorandum, and it provides that cooperation will be measured by the disclosure of facts and evidence (and not waivers of privilege), and that prosecutors will no longer consider advancements of attorneys' fees.²⁸¹ There has been some

274. *Stein V*, 541 F.3d at 158.

275. *Id.* at 151.

276. *Id.* (citation omitted).

277. *Id.* at 151–58.

278. *Id.*

279. See, e.g., Brian M. Carney, *Tax 'Fraud' Travesty*, WALL ST. J., July 19, 2007, at A14; Editorial, *KPMG Injustice*, WALL ST. J., June 25, 2007, at A14; Editorial, *The KPMG Fiasco*, WALL ST. J., July 10, 2007, at A20.

280. Editorial, *White-Collar Justice*, WALL ST. J., Aug. 29, 2008, at A16.

281. See Press Release, U.S. Dep't of Justice, Justice Dep't Revises Charging Guidelines for Prosecuting Corporate Fraud (Aug. 28, 2008), available at

skepticism expressed as to whether the Filip Memorandum has sufficiently changed practices within the DOJ.²⁸² Nevertheless, *Stein* sends a clear and powerful message. The court of appeals' decision surely communicates to federal agents and prosecutors that these behaviors are now quite risky; at the least, they invite close scrutiny, and a ruling dismissing an indictment will undo what might be years of investigative effort.²⁸³

V. IMPLICATIONS AND MORE QUESTIONS

Whether pushed by clients or pulled by profitable opportunities, white-collar and internal investigations practices—staffed largely by former prosecutors—have become well established within the nation's leading corporate law firms. We think that these developments, particularly viewed in light of the career paths of white-collar attorneys and the Second Circuit Court of Appeals' holding in *Stein*, have important implications for the prosecution and defense functions, for the law firms themselves, and for women in public and private practice. We explore some of these implications here. Others will require further study, perhaps through interviews, surveys, and other research methodologies.

A. The Prosecution Function

We began this Article with the *Stein* case and the question of whether it reflects or reinforces norms. We think the answer is a bit of both. Judge Kaplan's outrage is, to us, partly due to his sense that cutting off the source of fees for the KPMG defendants left them without the type of counsel to which these defendants are typically entitled. As we have pointed out, the *Stein* decision, vigorously

<http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html> (announcing the changes). The “Mark Filip Memorandum” is reflected in Title 9, Chapter 28 of the U.S. Attorneys' Manual. U.S. DEP'T OF JUSTICE, *supra* note 202, § 9-28.000. The U.S. Attorneys' Manual provides that “prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors,” nor may prosecutors request that a corporation refrain from doing so. *Id.* § 9-28.730. However, this does not “prevent a prosecutor from asking questions about an attorney's representation of a corporation or its employees, officers, or directors.” *Id.*; *see also id.* § 9-28.720 (“Eligibility for cooperation credit is not predicated upon the waiver of attorney–client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct.”).

282. *See, e.g.,* Peggy Aulino, *Defense Lawyers and Prosecutors Offer Views on How Attorneys Should Probe Misconduct*, 26 LAW. MAN. ON PROF. CONDUCT (ABA/BNA) 301 (May 12, 2010) (“I don't think culturally that change has fully come about.” (quoting attorney Steven Solow)); Charles W. Blau & Sarah Q. Wirsky, *Attorney–Client Privilege and Waiver*, in WHITE COLLAR CRIME 2009, *supra* note 104, at E-15, E-28 (“[T]here has been some speculation that the [Filip] policy could revert to the previous policy . . .”); John A. Nathanson, *Walking the Privilege Line*, N.Y. L.J., July 13, 2009, at S8 (“There is reason to doubt . . . that the Filip memorandum will significantly diminish the entrenched expectation of waiver.”).

283. *See, e.g.,* Sec. & Exch. Comm'n v. FTC Capital Mkts., Inc., No. 09 Civ. 4755(PGG), 2010 WL 2652405, at *4–8 (S.D.N.Y. June 30, 2010) (citing Judge Kaplan's ruling in *Stein*, and finding that a defendant had a Sixth Amendment claim to frozen funds as well as a valid expectation that her costs would be advanced).

defended on appeal by the cream of the corporate bar, reinforces this norm by protecting a funding stream for Am Law 200 representation. Without company funding or advancements, very few individuals—even those who earned a high net income prior to a government investigation or indictment—could afford the hourly rates that Big Law partners command. On this issue and the question of privilege waivers, an unusual assortment of business, public interest, and bar groups found common ground. They filed amicus briefs in *Stein* and lobbied Congress to restrict prosecutors from seeking waivers.

One question is whether the holding in *Stein* and the resulting Filip Memorandum have made it more difficult for the federal government to investigate and prosecute corporate crime. The investigation of a company and its employees is all about gathering and controlling information. If the federal government exercises leverage to incentivize companies to conduct internal investigations and turn information over to the government, does the provision of virtually unlimited funds for individual defendants' lawyers reduce that leverage and make it more difficult to investigate and prosecute? The issue is not whether white-collar lawyers in Am Law 200 firms *in fact* provide more skilled or vigorous representation than defense counsel who practice in smaller-firm settings (or are appointed counsel). Rather, if—prior to *Stein*—individuals under investigation or prosecution even *perceived* that they could not obtain first-rate representation without company funding, then *Stein* and its aftermath have reduced their incentive to cooperate. That may not be the wrong outcome, but it is an important effect to consider.

Apart from the impact of large firm white-collar practices upon Sixth Amendment law and the DOJ's procedures, there is also the question of whether the behavior of prosecutors is influenced by the possibility of a quite profitable Big Law partnership at the conclusion of government service. Movement between the public and private sectors is not a new story. But we have shown that both the numbers of prosecutors who have made the jump to the firms and the financial rewards are huge. Our regression analysis revealed premiums for leaving government service that are on top of the other rewards of private practice. This is an area for further study and future work,²⁸⁴ yet a few points are worth noting here.

First, there are a limited number of prosecution offices that are likely to provide a well-paved path to these partnerships, such as Main Justice and the U.S. Attorneys' Offices in the handful of jurisdictions where the practice is concentrated. This means that a potential study might focus on a few select locations.

284. For example, David Zaring has examined the careers of 151 prosecutors who were in the U.S. Attorney's Office for the Southern District of New York in 2001. David Zaring, *Does Future Employment Corrupt Government Lawyers?* 11 (June 27, 2011) (unpublished manuscript) (on file with author). He found no empirical support for the hypothesis that prosecutors who took a harder line towards defendants (as measured by trying more criminal cases on an annualized basis) were likely to be employed at less prestigious firms in 2010. *See id.* at 20. But there is room for more research into other aspects of prosecutors' behavior.

Second, a substantial number of white-collar partners in large firms have served in leadership positions in U.S. Attorneys' Offices or in important posts at Main Justice. Thus, many potential future partners are in positions of increased authority and oversight toward the end of their period of government service, which may be troubling. At least one researcher has examined potential links between performance of U.S. Attorneys and their subsequent careers.²⁸⁵ We have already described some of the claims that federal prosecutors and large firm white-collar lawyers have built a synergistic system. A prominent private attorney—who once headed DOJ's international fraud enforcement efforts—recently described Foreign Corrupt Practices Act investigations as “good business for law firms. . . . This is good business for accounting firms, it's good business for consulting firms, the media—and Justice Department lawyers who create the marketplace and then get [themselves] a job.”²⁸⁶

Third, relationships may be particularly important in this area of practice. The question whether to indict a company, for example, comes down to a judgment call by a prosecutor based on the factors set forth in the Filip Memorandum and other policies. The relationship between a former prosecutor, now representing a company, and the current government attorney may well affect this decision. “[W]hen hiring outside counsel, the organization will ‘want to find someone who has credibility with the office that will be torturing [it].’”²⁸⁷ At a recent ABA conference, a DOJ official emphasized that, among other things, “[l]awyers should ‘establish and maintain credibility’ with the DOJ” and “realize how much your credibility and candor can influence our decision’ on whether to be lenient.”²⁸⁸ With messages like this emanating from high places, clients might well perceive a substantial risk to retaining an attorney from outside of the community of large firm white-collar lawyers, most of whom are former prosecutors—even if some clients harbor concern that current prosecutors and Big Law partners have created a synergistic system that may work to their disadvantage.

The desire for lawyers with these relationships may be one reason why so few former public defenders are recruited to become law firm partners, although it seems odd that former prosecutors may become partners in white-collar practices without ever having defended a criminal case, while public defenders have represented many individual defendants. We have found that for Am Law 200 lawyers who predominantly practice in the white-collar field, the ratio of former

285. See generally Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV. 379 (2005).

286. Nathan Vardi, *The Bribery Racket*, FORBES MAG., May 24, 2010, at 70, 72 (quoting Joseph Covington).

287. *Compliance Pros Get Tips on Keeping Firms Out of Court*, 91 ANTITRUST & TRADE REG. REP. (BNA) No. 2261, at 14 (July 7, 2006) (quoting Adam B. Siegel, a former prosecutor who is now with a large firm); see also Stein, *supra* note 138, at 7 (“[T]he pedigree of a former federal prosecutor (i.e., former Assistant U.S. Attorney or DOJ Trial Attorney) usually provides comfort to the government sufficient to allow the internal investigation to proceed under the company’s direction.”).

288. Aulino, *supra* note 282 (quoting Denis McInerney, Chief of the Fraud Section of DOJ’s Criminal Division).

prosecutors to public defenders is 33:1. In the lateral partner data set, *none* of the 444 white-collar partners came from a federal public defender office. Of course, lawyers have different learning opportunities in different practice settings. While they are highly skilled in defending clients, including in complex fraud cases, public defenders and appointed defense counsel—who generally arrive on the scene after charges are filed—do not have the same grand jury and corporate investigation experience as former federal prosecutors. Moreover, law firm hiring may occur through established networks, with partners who are former prosecutors bringing in others with whom they have worked closely in the past.

The law firms promote their partners' prior government work, as we have noted, which provides some insight into the value that firms place upon the relationships between current and former prosecutors. Some firms may promote prior experience aggressively. Here is one quite direct statement that formerly appeared in a partner's web biography:

The practice group that he leads . . . includes 15 former federal or state prosecutors and enforcement officials, an ABA president, U.S. attorneys, state attorneys general, district attorneys, SEC enforcement chiefs, and other senior government regulators and investigators. These former government officials have extraordinary relationships, credibility and influence in business, legal and government circles nationwide.²⁸⁹

If the last sentence evokes Michael Clayton more than Clarence Darrow, it is surely true that such distinguished lawyers do have “extraordinary relationships, credibility and influence.” But one hopes that what firms market to potential clients is their lawyers' judgment, skill, and experience—not their raw influence.

B. The Defense Function

There are also implications for the structure and sustainability of the criminal defense bar and its ability to provide services to both indigent and nonindigent clients.

The movement of corporate defendant white-collar practice into the large firms may mean that fewer small firm or solo practitioners are able to share in this lucrative work, making it more difficult for these attorneys to maintain a profitable practice. For private lawyers who specialize in criminal defense, and who have traditionally taken a mix of retained and appointed cases, losing the high-end work may make the entire practice more difficult to sustain. This could account for some of the push, anecdotally reported,²⁹⁰ of some small criminal defense boutiques into the large law firms—although it appears from our regression results that these lawyers do not receive the same compensation premium as those joining Am Law 200 firms from government or other Am Law 200 firms. An important question, demanding further research, is whether lawyers in these small-firm settings handled a mix of retained and appointed non-white-collar criminal cases prior to

289. This source material is on file with the Author. However, the last sentence in the quotation no longer appears in the partner's biography.

290. See, e.g., *Roundtable: White Collar Defense*, CAL. LAWYER, Jan. 2010, at 45 (referencing panel discussion about shift from boutiques to large firms).

their jump to Big Law and whether they still handle such cases (as anything other than occasional pro bono matters or training for other firm lawyers who have not tried cases).

Another substantial question is whether the large firm structure is necessary to provide high-quality representation to companies and individual officers and employees under investigation or facing prosecution. Highly complex big-paper cases may be difficult for solo practitioners or some small firms. That is, depending upon the nature of the case, a certain depth of expertise and support may indeed be necessary. Yet there are many corporate white-collar matters in which excellent and effective representation can be provided by small firms or solo practitioners at a much lower cost. And in appropriate cases, joint defense agreements may make small firm representation more manageable.²⁹¹ Despite the potential cost savings in using lawyers from these smaller settings, however, there may be other reasons why this work gravitates to the large firms.

Corporations and their officers are accustomed to sending their legal work to large national law firms. It may be natural and comfortable for these clients to go to these same legal providers for white-collar cases—or at least that choice may seem less risky than retaining a distinguished criminal defense attorney previously unknown to the corporation's officers or its general counsel. No one will criticize a general counsel for sending a case to an Am Law 200 firm, and referrals to the large firms can only increase post-*Stein*.

Part of the clients' comfort may be rooted in status and class distinctions, which are also reflected in how the large firms label their practices. Big Law partners are generally in "white-collar" and "investigations" practice groups; very few call themselves "criminal defense" attorneys. Civil lawyers—who might not be comfortable having criminal defense attorneys as partners, or ordinary criminal defendants as firm clients—are less likely to object to a "white-collar" lawyer. "White-collar" connotes a higher class of clients and may appear to suggest lesser moral culpability and criminality. High-status investigation targets and defendants, who may not think of themselves as having anything in common with people charged with violent offenses or street crimes, may well prefer to be represented by someone who does not call himself a "criminal defense" attorney. What *Stein* may do, by assuring a stream of funding for individual corporate defendants, is to reinforce these behaviors and beliefs.

Further research should also examine whether the defense bar has become bifurcated in a way that diminishes the quality of representation in white-collar and other types of cases. It may be that the corporate white-collar bar and many former prosecutors belong to a separate community of lawyers with its own norms and referral networks, apart from the mainstream criminal defense bar. This insularity, if it exists, may adversely impact both white-collar and ordinary criminal cases. With respect to white-collar matters, if referrals regularly occur within a largely closed network with established patterns of behavior, an attorney may pay a heavy

291. See Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Agreement*, 65 *FORDHAM L. REV.* 871, 880–85 (1996) (discussing advantages of joint defense agreements).

price for a decision not to cooperate with the lawyers who represent the entity or the other individual targets of an investigation. And they may belong to different organizations—the ABA, for example, rather than the National Association of Criminal Defense Lawyers or state or local criminal defense groups—with their own continuing education and other programs. Surveys and interview research may help explore whether there is this separation and what it means for the white-collar bar, the defense bar as a whole, and the criminal justice system.

Finally, some have suggested that *Stein* may serve as direct precedent to assist indigent defendants in ordinary cases.²⁹² We are skeptical.

C. The Firms

White-collar practices in the Am Law 200 have been made possible because of the breakdown of long-standing norms, such as those against lateral movement of attorneys and the traditional reluctance among many of the firms to engage in criminal practice. Thirty years ago, one of Kenneth Mann's interviewees remarked that "[u]ltimately, law firms will tolerate most . . . legitimate practices of law, if they turn out to be lucrative to the firm."²⁹³ Much of white-collar practice, we believe, is not subject to the same sorts of cost controls implemented by in-house counsel in other matters. Particularly in today's legal market—with law firms restructuring and many clients pushing for discounts and alternative fee arrangements—white-collar work must be enormously attractive to the large firms, which can platoon the cases and bill by the hour.

Three-quarters of the partners who predominately practice in the white-collar field are former federal or state prosecutors, in stark contrast to our sample of non-white-collar litigators. Having such a substantial cadre of lawyers with formative professional experiences outside of the firm may have implications for firm structure and stability. If it turns out that these partners are less well integrated within their respective firms than in a community of former prosecutors and white-collar attorneys as a whole, these practice groups may be less stable than others within the firms. However, this may be counterbalanced by the large number of white-collar partners who predominately practice in other specialties. It may be that this subset of lawyers is better integrated within the firms.

The predominance of lawyers with prior government service also has an impact on the development of junior attorneys. Since the path to partnership in the white-collar area is generally not by rising through the ranks, for young lawyers looking to make a career at the firm, being an associate in a white-collar practice may be a risky career move unless the associate is able to go to the government for a few years and then lateral back to the firm.

However, our findings with respect to gender have interesting implications for women in large law firms and complicate the tale about government service and partner development.

292. See, e.g., Marc Sackin, Note, *Applying United States v. Stein to New York's Indigent Defense Crisis: Show the Poor Some Love Too*, 73 BROOK. L. REV. 299, 326–36 (2007).

293. Mann Dissertation, *supra* note 30, at 332.

D. Women in White-Collar Practices

Women are even more poorly represented among partners in white-collar practices than in non-white-collar litigation practices or the firms as a whole. Do women face even greater discrimination or more institutional barriers in white-collar than in non-white-collar practices, or are there other reasons for the even greater gender disparity? Our data also show that women and men take different paths to partnership; female white-collar partners are significantly less likely to have served in government than their male counterparts. Why the different path, and does the path help explain the especially low proportion of women white-collar partners? Identifying the mechanisms that lead to such disparate representation requires further study, although we can make some headway here. Some of the issues to explore include whether women and men in white-collar practice have the same work profiles and assignments, opportunity structures (including networking and mentoring), and mobility.²⁹⁴

Earlier in this Article, we reported that among relatively new law firm associates, women join white-collar and non-white-collar litigation practices at the same rate.²⁹⁵ Similar to the observation by Kathleen Hull and Robert Nelson following their study of Chicago lawyers, it appears that “the mechanisms that drive gender differences” in the trajectory of these firm lawyers is located “primarily in postentry processes.”²⁹⁶ We have shown that government service is a well-trod if not primary path to white-collar partnerships. Associates regularly leave law firms for prosecutors’ offices, many with an eye to moving back to firms after a number of years of experience. Do women seek work as criminal

294. See CYNTHIA FUCHS EPSTEIN ET AL., *THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIFE, FAMILY AND GENDER* 55–74 (1999) (discussing factors relating to mobility); Ronit Dinovitzer et al., *The Differential Valuation of Women’s Work: A New Look at the Gender Gap in Lawyers’ Incomes*, 88 SOC. FORCES 819, 820–25 (2009) (identifying some of these areas of inquiry as potential sources for gender wage gap). Other sources have described the importance of mentors to women, the difficulties that women face in actually finding mentors, and the gender differences implicated in patterns of networking. See, e.g., GITA Z. WILDER, *WOMEN IN THE PROFESSION: FINDINGS FROM THE FIRST WAVE OF THE AFTER THE JD STUDY* 18 (2007) (noting gender differences in patterns of networking among recent graduates); Monique R. Payne-Pikus et al., *Experiencing Discrimination: Race and Retention in America’s Largest Law Firms*, 44 LAW & SOC’Y REV. 553, 560–61 (2010) (discussing mentoring of women and minorities); Wald, *supra* note 68, at 2256 (describing the importance of mentors, and the difficulty that women experience in finding them); see also, e.g., CARROLL SERON, *THE BUSINESS OF PRACTICING LAW: THE WORK LIVES OF SOLO AND SMALL FIRM ATTORNEYS* 65–66 (1996) (explaining that the construction of social networks, which are sources for clients and legal work, is highly gendered).

295. See *supra* note 167 and accompanying text. We also noted there that women were represented at a higher rate among all associates in white-collar practice compared with non-white-collar litigation practice. There are several possible explanations for the higher percentage, including, perhaps, the departure of a disproportionate number of male white-collar associates for government service.

296. Kathleen E. Hull & Robert L. Nelson, *Assimilation, Choice, or Constraint? Testing Theories of Gender Differences in the Careers of Lawyers*, 79 SOC. FORCES 229, 253 (2000).

prosecutors at key feeder agencies—such as the U.S. Attorneys’ Offices in top-five markets—at the same rate as men, and are they hired at the same rate? It has long been said that women are disproportionately represented in government positions or are more inclined towards government or public interest careers.²⁹⁷ A recent study of lawyers entering the profession in 2000 shows that women are strongly represented in state and local government (53%), and less represented in federal government (42%) and private firms (43%).²⁹⁸ Women may also remain in federal government positions longer than men.²⁹⁹ However, these are aggregate data. There are no recently published data on gender and federal prosecutors, much less prosecutors in top-five markets.³⁰⁰ We therefore sought information directly from the DOJ under the Freedom of Information Act (“FOIA”).³⁰¹

297. See EPSTEIN ET AL., *supra* note 294, at 13 (“In contrast to private law firms, government practice has long offered a relatively safe haven for women . . . attorneys.”); Robert L. Nelson et al., *Observations from the After the JD Survey of the Bar Class of 2000*, 24 QUINNIPIAC L. REV. 539, 543 (2006) (summarizing employment of lawyers early in their careers, and noting that “many more women seem drawn to work involving public service, while men are much more interested in jobs offering money and power”).

298. WILDER, *supra* note 294, at 8 tbl.1. The After the JD study relies on survey responses from 3905 individuals admitted to the bar in 2000. The first survey was conducted in 2002. *Id.* at 5.

299. The second wave of the After the JD Study surveyed the same respondents in 2007 after seven years of practice. See RONIT DINOVTZER ET AL., AM. BAR FOUND. & NALP FOUND. FOR LAW CAREER RESEARCH & EDUC., AFTER THE JD II: SECOND RESULTS FROM A NATIONAL STUDY OF LEGAL CAREERS 24 (2009). Of the women lawyers working in federal government at the time of the first survey, 41% switched out of federal government by the time of the later survey, compared with 59% of the men who initially were in federal government. *Id.* at 66 tbl.8.2. Women also stayed longer in legal services or public defender positions—62% switched out, compared with 81% of the men. *See id.*; see also Hull & Nelson, *supra* note 296, at 239, 241 (noting that in a 1995 study of Chicago lawyers, women are better represented than men in government settings, and “men are less likely to leave large firms and more likely to leave government employment as their careers develop”).

300. In a recent manuscript, David Zaring reported that in 2001, two-thirds of the prosecutors in the U.S. Attorney’s Office in Manhattan were male. Zaring, *supra* note 284, at 12. Zaring also found that women tended to stay in that Office longer than men. In 2010, nine years later, only 56 of the 151 prosecutors (37%) remained in some type of government position. *Id.* at 11, 17. But the women who served as prosecutors in 2001 were evenly split between government and private practice in 2010. *Id.* at 21.

Other relevant data are hard to come by. Cynthia Fuchs Epstein has reported that in 1980, 17% of lawyers in the U.S. Attorneys’ Offices nationwide were women (including 194 lawyers in New York), and 31% of the lawyers hired in these offices were women. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 116 (2d ed. 1993); see also CLARA N. CARSON, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000, at 9 tbl.11 (2004) (reporting that women comprised 10,049 of 28,621 (35%) of lawyers employed by the federal government, other than in the judicial department).

301. 5 U.S.C. § 552 (2006); see Letter from Charles D. Weisselberg to Exec. Office for U.S. Attorneys (Apr. 12, 2011) (on file with author) (original FOIA request); E-mail from Charles D. Weisselberg to Vinay Jolly, Exec. Office for U.S. Attorneys (July 25, 2011, 13:56 PDT) (on file with author) (revised FOIA request).

We were able to obtain the numbers of women and men in the Criminal and Civil Divisions of the U.S. Attorneys' Offices in four of our top-five legal markets—New York, D.C., Chicago, and San Francisco—as of January 2005 and 2010.³⁰² At both time periods, women were significantly less likely to be employed in the Criminal than in the Civil Divisions of these offices. In 2010, women accounted for 47% of the attorneys in the Civil Divisions but only 36% of the lawyers in the Criminal Divisions.³⁰³ Table 9, which is printed in the Appendix, shows the gender of lawyers in the Civil and Criminal Divisions of individual U.S. Attorneys' Offices in these legal markets in 2010.

We believe that these data help tell an important part of the story. Both Civil and Criminal Division positions are highly-desirable, involve sophisticated work, and require outstanding credentials. But Criminal Division lawyers who conduct federal grand jury investigations and try federal criminal cases acquire a set of experiences markedly different from Civil Division attorneys who represent the government in administrative, civil rights, environmental, tort, and other matters. Firms that seek to build or expand their white-collar practices, perhaps with partners who have established relationships with prosecutors and agents, regularly look to hire Assistant U.S. Attorneys in the Criminal Divisions. The smaller numbers of women in these positions may help explain the lower proportion of women white-collar partners, even when compared with non-white-collar litigators. And our snapshots of men and women in the Criminal Divisions may not fully capture the inequality in the acquisition of human capital. If men tend to stay in government service for shorter periods of time than women, greater numbers of men may cycle through these positions.

While these findings are important, we do not mean to suggest that the problem is all on the supply side or that it is the product of a voluntary choice, unaffected by discrimination, institutional barriers, and other constraints.³⁰⁴ Further

302. We received data from the Executive Office for the United States Attorneys ("EOUSA") regarding five U.S. Attorneys' Offices (there are two offices in the N.Y. legal market—the U.S. Attorneys' Offices for the Southern and Eastern Districts of New York). We were unable to obtain usable data for Los Angeles (the Central District of California). We did not request data on the gender of lawyers in Main Justice. There were some differences in the way the U.S. Attorneys' Offices reported the data. For further information about the FOIA requests, the responses, and our methodology, see the notes following Table 9, which are printed in the Appendix.

303. In 2010, women comprised 210 of the 581 lawyers (36%) in the Criminal Divisions and 85 of the 179 lawyers (47%) in the Civil Divisions. The results from 2005 are similar: women comprised 212 of the 594 lawyers (36%) in the Criminal Divisions and 80 of the 166 lawyers (48%) in the Civil Divisions. For each of these years, these differences are significant (two-sample t-test, $p < .001$). For the most part, the differences are not statistically significant at the level of the individual Offices.

We were unable to discern from our data whether women are further underrepresented in the major frauds units or other sections within the Criminal Divisions of the various U.S. Attorneys' Offices that are more likely to handle white-collar cases.

304. See Hull & Nelson, *supra* note 296, at 252 (questioning whether we should characterize the exit of a woman from a firm, due to work-family tensions, "as an exercise of choice"). Hull and Nelson further note that gender relations "appear to be implicated in constructing different choice sets for men and women." *Id.*

research should explore the reasons why female white-collar lawyers move laterally (or not) in both junior and senior positions. It is important to examine job demands and structures and how women—who are much more likely than men to be the primary caretakers of children and other family members—navigate them. Women are more likely to work part-time or to be unemployed,³⁰⁵ which may inhibit lateral movement.³⁰⁶ Different family leave policies in private firms and government can shape or constrain career paths, including whether to leave a firm and seek government employment. Moreover, not all government practices are the same. Even within a U.S. Attorney's Office, civil and criminal government practices have different demands. Federal criminal practices are courtroom-focused, with heavy motion and trial calendars, and criminal cases move much more quickly than civil matters. Thus, in addition to other factors that may prevent women from seeking or being offered positions as Assistant U.S. Attorneys, lawyers in the Criminal Divisions may be less able to schedule their work than others. In some respects, federal criminal prosecutors may work under conditions that more closely resemble Big Law practice, with notoriously high time demands and little flexibility.

With respect to lateral movement of senior lawyers, Elisabeth Gorman and Julie Kmec recently studied the mobility of women partners at corporate law firms, noting an increasing disadvantage as women move to higher hierarchical levels.³⁰⁷ Further study may shed light on whether female white-collar partners are better able to move laterally between private firms—where positions are most comparable—than from government practice to private firms, although we were unable to discern any differences with our limited data.³⁰⁸

305. See DONOVITZER ET AL., *supra* note 299, at 62 (noting that “women [are] about seven times more likely than men to be working part time (14% versus 2.3%) and to report that they are unemployed (9.6% versus 1.4%)”).

306. See JOHN HAGAN & FIONA KAY, *GENDER IN PRACTICE: A STUDY OF LAWYERS' LIVES* 76 (1995) (“[I]n the aggregate, women’s occupational careers have been characterized as bimodal or M-shaped, with reduced participation in economic activity during childbearing years that are interposed between periods of higher employment activities. These discontinuities in employment may affect advancement through ‘foregone appreciation’ in experience and opportunities for promotion, as well as through discriminatory treatment . . .” (citations omitted)); see also EPSTEIN ET AL., *supra* note 294, at 63–73 (discussing work and advancement).

307. Gorman and Kmec contend that fundamental processes, which include gender stereotypes and use of gender as a proxy for competence, apply to selection decisions at all levels. But for high-level hiring, “the high status, work uncertainty, and traditional male domination of upper-level positions intensify these decision-maker gender biases,” and there is also a cumulative impact from earlier biased decisions. Elisabeth H. Gorman & Julie A. Kmec, *Hierarchical Rank and Women’s Organizational Mobility: Glass Ceilings in Corporate Law Firms*, 114 AM. J. SOC. 1428, 1465 (2009). They theorize that this effect should be diminished (or perhaps negated) for lateral partner hiring “if the external labor market is such that viable candidates for hiring into senior positions typically hold comparable positions in organizations of similar size and prominence.” *Id.* at 1439.

308. A firm considering hiring a partner from a prosecutor’s office may be required to assess a larger set of unknowns than for a partner already in private practice, such as the lawyer’s ability to transition from the prosecution function, to generate business, and to work in the large-firm setting.

And additional research may also address the differences in mean years of legal experience among men and women white-collar partners, and the apparent bimodal distribution of years of experience among the women. We did not study movement *out* of the law firms, but the differences could reflect a variety of factors, perhaps including decisions by women to leave law firms temporarily or permanently after making partner.³⁰⁹ The recent recession may also disproportionately affect women.³¹⁰

Finally, apart from the pipeline issues and barriers to lateral movement and partnership, it is also critical to consider how gender affects the work and opportunities of white-collar lawyers who have succeeded in becoming partners and who remain partners. For example, if large firm white-collar practice builds on relationships with current and former prosecutors and investigators, women—who are less likely to have served in government—may be less well networked with these key players and have fewer business opportunities. Perhaps this may help explain why only 11% of the white-collar partners in our data set who are practice group leaders and contacts are women.

CONCLUSION

The “old world” of corporate law firms has disappeared, along with barriers to the development of criminal practices—“white-collar” criminal practices, anyway—within the Am Law 200. Lawyers formerly had to make a financial sacrifice to practice criminal law. For criminal attorneys who can lateral to leading firms, financial sacrifices are no more. Just as mergers and acquisition practices were established in the large firms only after the lucrative nature of the practices overcame the partners’ initial reluctance,³¹¹ most law firms in the Am Law 200 (particularly in its upper reaches) now handle white-collar and internal investigations matters. Firms have not missed the business opportunities created by new prosecution priorities and policies and, as we have shown, these practices appear quite profitable. A large portion of the work may be covered by insurance, and *Stein* helps protect the ability of individuals to fund their defense through indemnification and advancement of fees.

We found no difference in the percentage of women (15%) in our two categories of partners with substantial white-collar practices—partners predominantly in the field and those predominantly in other fields—even though there are quite different rates of prior government service in the categories. *See supra* notes 166–70 and accompanying text. Also, for the 444 white-collar partners in our lateral partner data set, we found no significant relationship between gender and the work settings they left. *See supra* Figure 6a.

309. The higher mean for years of experience for male partners also likely reflects, at least in part, the lag in women’s entry into the legal profession. *See* BARBARA A. CURRAN, *WOMEN IN THE LAW: A LOOK AT THE NUMBERS* 6–10 (1995) (describing surge in women’s enrollment in law school and admission to the bar beginning in about 1971).

310. *See* Wald, *supra* note 68, at 2260–64 (arguing that the economic downturn has increased the hypercompetitive work ethic and “around-the-clock” service mentality in firms, which disadvantages women).

311. *See* MALCOLM GLADWELL, *OUTLIERS: THE STORY OF SUCCESS* 124–28 (2008) (discussing Joseph Flom at Skadden); Galanter & Henderson, *supra* note 55, at 1895–96 (discussing Skadden, and Wachtell, Lipton).

On the surface, there may be much here to cheer. Entities and individuals under investigation or actually charged with offenses *should* have adequate resources for their defense. To the extent that the private sector is able to cover the expenses for people charged with crimes, there is no need for appointed counsel and no demand on the public fisc.

But, looking deeper, our study raises other concerns that should be addressed. There are unexplored consequences for the prosecution function. We may now have two defense bars with different norms and networks, which may impact the delivery of defense services. Firms are affected beyond just their bottom lines. And women and men have different paths in this practice, and women may experience additional discrimination and constraints on the way to partnership.

We might also conclude by returning to the observation with which we began: whether or not the outcome in *Stein* is correct, and funding streams for individual corporate defendants should be protected, the contrast with ordinary criminal cases is stark and unavoidable. Perhaps the final question we should ask is why the right to adequate counsel in corporate white-collar cases demands a river of funds, but that right is satisfied in ordinary criminal cases with but a mere drop.

APPENDIX

Table 2: Firms With At Least One Partner With Substantial White-Collar Practice, and Average Proportion of White-Collar Partners, Grouped by Am Law Rankings (Gross Revenue)

| 2009 Am Law Rank (Gross Revenue) | # of Firms in This Ranking Group | Mean % of Partners With Substantial WC Practice | Std. Dev. | Min | Max |
|----------------------------------|----------------------------------|---|-----------|------|-------|
| 1-25 | 25 | 4.5% | 2.0% | 1.8% | 9.6% |
| 26-50 | 24 | 6.0% | 3.0% | 0.8% | 12.9% |
| 51-75 | 24 | 4.9% | 2.6% | 1.1% | 11.6% |
| 76-100 | 24 | 6.3% | 7.3% | 0.3% | 38.1% |
| 101-125 | 20 | 4.2% | 2.7% | 1.1% | 10.8% |
| 126-150 | 21 | 2.5% | 2.4% | 0.4% | 10.0% |
| 151-175 | 18 | 2.9% | 2.7% | 0.5% | 9.4% |
| 176-200 | 18 | 2.7% | 2.2% | 0.7% | 8.1% |

Pearson's correlation = .2588, $p < .05$.

Notes: Firms were excluded from ranking groups if there were no partners with substantial white-collar practices.

Table 3: Types of Prior Government Experience of Partners With White-Collar Practices, and in Non-White-Collar Weighted Sample

| | Partners with Primarily White- Collar Practice (1) | Partners with Substantial White-Collar Practice, but Other Areas Predominant (2) | All Partners with Substantial White-Collar Practice (1)+(2) | Non-White- Collar Litigation Partners (Weighted Sample) |
|---|---|--|--|--|
| Federal or State Prosecutor | 527 | 384 | 911 | 23 |
| | 75.3% | 41.5% | 56.0% | 4.4% |
| Federal Prosecutor | 506 | 340 | 846 | 17 |
| | 72.3% | 36.7% | 52.0% | 3.2% |
| U.S. Atty Office (in any position) | 466 | 282 | 746 | 6 |
| | 66.5% | 30.5% | 45.9% | 1.1% |
| U.S. Atty or Asst U.S. Atty in leadership role | 164 | 84 | 248 | 3 |
| | 23.4% | 9.1% | 15.3% | 0.6% |
| Other DOJ | 134 | 106 | 240 | 14 |
| | 19.1% | 11.4% | 14.8% | 2.8% |
| State Prosecutor | 70 | 65 | 135 | 6 |
| | 10% | 7.0% | 8.3% | 1.2% |
| Federal or State Public Defender | 16 | 14 | 30 | 0 |
| | 2.3% | 1.5% | 1.8% | 0% |
| SEC | 16 | 86 | 102 | 0 |
| | 2.3% | 9.3% | 6.3% | 0% |
| Other Federal | 46 | 57 | 103 | 11 |
| | 6.6% | 6.2% | 6.3% | 2.1% |
| Other State | 18 | 20 | 38 | 3 |
| | 2.6% | 2.2% | 2.3% | 0.6% |
| Foreign | 6 | 4 | 10 | 0 |
| | 0.9% | 0.4% | 0.6% | 0% |

Notes: For the two categories of white-collar partners, the different percentages were significant at the .001 level for service as “federal or state prosecutor” (Pearson’s chi square = 185, $p < .001$), “federal prosecutor” (Pearson’s chi square = 202, $p < .001$), “U.S. Attorneys’ Office (in any position)” (Pearson’s chi square = 209, $p < .001$), “U.S. Attorneys’ Office (leadership)” (Pearson’s chi square = 11.9, $p = .001$), “other DOJ” (Pearson’s chi square = 11.02, $p = .001$) and “SEC” (Pearson’s chi square = 33, $p < .001$). There were no significant relationships between the two categories and service as a “state prosecutor” (Pearson’s chi square = 4.7, $p = .03$), public defender (Pearson’s chi square = 1.3,

p = .25), or other federal, state or county employee (Pearson's chi square = .12, p = .7).

Table 4: Location of Partners with Substantial White-Collar Practices, Grouped by Am Law Rankings (Gross Revenue), and Non-White-Collar Weighted Sample

| LOCATION (COUNT/ PERCENTAGE) | 1-25 | 26-50 | 51-75 | 76-100 | 101-125 | 126-150 | 151-175 | 176-200 | Total | Non-WC weighted sample |
|---------------------------------|--------|--------|--------|--------|---------|---------|---------|---------|--------|------------------------|
| New York | 114 | 100 | 51 | 47 | 24 | 11 | 11 | 2 | 360 | 66 |
| | 24.00% | 29.20% | 19.70% | 18.70% | 18.90% | 15.10% | 21.20% | 4.30% | 22.10% | 12.40% |
| DC | 144 | 113 | 71 | 113 | 22 | 8 | 3 | 3 | 477 | 63 |
| | 30.30% | 33.00% | 27.40% | 45.00% | 17.30% | 11.00% | 5.80% | 6.40% | 29.30% | 11.90% |
| Chicago | 37 | 26 | 32 | 0 | 12 | 8 | 0 | 0 | 115 | 38 |
| | 7.80% | 7.60% | 12.40% | 0.00% | 9.50% | 11.00% | 0.00% | 0.00% | 7.10% | 7.20% |
| San Francisco | 31 | 14 | 19 | 4 | 3 | 1 | 0 | 0 | 72 | 42 |
| | 6.50% | 4.10% | 7.30% | 1.60% | 2.40% | 1.40% | 0.00% | 0.00% | 4.40% | 7.80% |
| Los Angeles | 46 | 19 | 13 | 10 | 12 | 9 | 1 | 0 | 110 | 43 |
| | 9.70% | 5.60% | 5.00% | 4.00% | 9.50% | 12.30% | 1.90% | 0.00% | 6.80% | 8.10% |
| Boston | 20 | 14 | 8 | 10 | 0 | 0 | 10 | 3 | 65 | 17 |
| | 4.20% | 4.10% | 3.10% | 4.00% | 0.00% | 0.00% | 19.20% | 6.40% | 4.00% | 3.20% |
| Philadelphia | 10 | 6 | 3 | 11 | 11 | 0 | 0 | 5 | 46 | 22 |
| | 2.10% | 1.80% | 1.20% | 4.40% | 8.70% | 0.00% | 0.00% | 10.60% | 2.80% | 4.10% |
| Dallas/Ft. Worth | 5 | 2 | 6 | 13 | 5 | 0 | 0 | 0 | 31 | 21 |
| | 1.10% | 0.60% | 2.30% | 5.20% | 3.90% | 0.00% | 0.00% | 0.00% | 1.90% | 4.00% |
| Houston | 1 | 6 | 8 | 4 | 4 | 2 | 0 | 0 | 25 | 13 |
| | 0.20% | 1.80% | 3.10% | 1.60% | 3.20% | 2.70% | 0.00% | 0.00% | 1.50% | 2.40% |
| Atlanta | 4 | 18 | 2 | 0 | 4 | 0 | 0 | 1 | 29 | 17 |
| | 0.80% | 5.30% | 0.80% | 0.00% | 3.20% | 0.00% | 0.00% | 2.10% | 1.80% | 3.20% |
| Other U.S. | 56 | 15 | 43 | 35 | 27 | 34 | 25 | 33 | 268 | 61 |
| | 11.80% | 4.40% | 16.60% | 13.90% | 21.30% | 46.60% | 48.10% | 70.20% | 16.50% | 11.40% |
| Foreign | 7 | 7 | 3 | 4 | 3 | 0 | 2 | 0 | 26 | 129 |
| | 1.50% | 2.10% | 1.20% | 1.60% | 2.40% | 0.00% | 3.90% | 0.00% | 1.60% | 24.30% |
| Total | 475 | 342 | 259 | 251 | 127 | 73 | 52 | 47 | 1,626 | 531 |
| | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% | 100% |

Pearson chi square (84) = 511 Pr = 0.000; for location and ranking group, p < .05.

**Table 5: Partners in Lateral Data Set Moving To Am Law 200 Firms,
By Comparison Sets, All Practices and Year**

| Year | White-Collar | Percent | Litigation, non-White-Collar | Percent | All Practices | Percent |
|--------------|--------------|---------|------------------------------|---------|---------------|---------|
| 2000 | 1 | 0.2% | 27 | 0.7% | 28 | 0.7% |
| 2001 | 28 | 6.3% | 357 | 9.2% | 385 | 8.9% |
| 2002 | 27 | 6.1% | 367 | 9.4% | 394 | 9.1% |
| 2003 | 28 | 6.3% | 424 | 10.9% | 452 | 10.4% |
| 2004 | 39 | 8.8% | 377 | 9.7% | 416 | 9.6% |
| 2005 | 58 | 13.1% | 356 | 9.2% | 414 | 9.6% |
| 2006 | 27 | 6.1% | 267 | 6.9% | 294 | 6.8% |
| 2007 | 62 | 14.0% | 441 | 11.3% | 503 | 11.6% |
| 2008 | 88 | 19.8% | 614 | 15.8% | 702 | 16.2% |
| 2009 | 86 | 19.4% | 660 | 17.0% | 746 | 17.2% |
| Total | 444 | 100% | 3890 | 100.0% | 4334 | 100% |

**Table 6: Average Proportion of Partners with White-Collar Practices, With
Firms Grouped By Ranking of Profits Per Partner**

| Rank of Profits per Partner | # of Firms in This Ranking Group | Mean % Partners With Substantial WC Practice | Std. Dev. | Min. | Max. |
|-----------------------------|----------------------------------|--|-----------|------|-------|
| 1-25 | 24 | 7.3% | 3.3% | 2.0% | 12.9% |
| 26-50 | 24 | 5.5% | 2.1% | 1.6% | 10.5% |
| 51-75 | 23 | 6.7% | 7.2% | 0.9% | 38.1% |
| 76-100 | 23 | 4.1% | 2.6% | 0.8% | 9.1% |
| 101-125 | 21 | 3.6% | 2.1% | 0.7% | 8.1% |
| 126-150 | 22 | 3.1% | 1.6% | 0.8% | 6.8% |
| 151-175 | 18 | 1.3% | 0.7% | 0.3% | 2.6% |
| 176-200 | 19 | 2.1% | 1.4% | 0.5% | 5.6% |

Notes: Firms were excluded from practice groups if there were no partners with substantial white-collar practices.

Table 7: Average Proportion of Partners with White-Collar Practices, With Firms Grouped By Ranking of Revenue Per Lawyer

| Rank of Revenue per Lawyer | # of Firms in This Ranking Group | Mean % Partners With Substantial WC Practice | Std. Dev. | Min. | Max. |
|----------------------------|----------------------------------|--|-----------|------|-------|
| 1-25 | 24 | 8.3% | 7.1% | 1.6% | 38.1% |
| 26-50 | 24 | 6.3% | 2.5% | 1.2% | 11.8% |
| 51-75 | 19 | 5.2% | 1.9% | 0.9% | 8.8% |
| 76-100 | 23 | 3.7% | 2.0% | 0.7% | 8.8% |
| 101-125 | 24 | 4.1% | 2.3% | 0.8% | 9.1% |
| 126-150 | 23 | 2.7% | 1.5% | 0.3% | 6.3% |
| 151-175 | 20 | 2.0% | 1.6% | 0.5% | 6.8% |
| 176-200 | 17 | 1.7% | 1.1% | 0.4% | 4.5% |

Notes: Firms were excluded from practice groups if there were no partners with substantial white-collar practices.

Table 8a: Average Profits Per Partner (PPP) in Firms Joined by White-Collar Partners and Non-White-Collar Litigation Partners, by U.S. Markets

| Market | White-Collar Partners | | Non-White-Collar Litigation Partners | Difference |
|------------|-----------------------|---------|--------------------------------------|------------|
| | Mean PPP | t- test | Mean PPP | |
| NY | 1,183,938 | *** | 965,230 | 218,708 |
| DC | 1,144,104 | ** | 992,060 | 152,044 |
| Chicago | 1,054,844 | *** | 714,135 | 340,709 |
| SF | 1,348,871 | *** | 967,269 | 381,602 |
| LA | 1,295,147 | *** | 891,915 | 403,232 |
| Other U.S. | 797,600 | *** | 681,185 | 116,415 |
| Total | 1,095,631 | *** | 825,717 | 269,914 |

p < .01; *p < .001

**Table 8b: Average Revenue Per Lawyer (RPL)
in Firms Joined by White-Collar Partners and
Non-White-Collar Litigation Partners, by U.S. Markets**

| Market | White-Collar Partners | | Non-White-Collar Litigation Partners | Difference |
|------------|-----------------------|---------|--------------------------------------|------------|
| | Mean RPL | t- test | Mean RPL | |
| NY | 749,204 | *** | 669,696 | 79,507 |
| DC | 746,716 | * | 700,379 | 46,338 |
| Chicago | 701,406 | *** | 572,869 | 128,538 |
| SF | 815,645 | *** | 689,692 | 125,953 |
| LA | 797,353 | *** | 661,360 | 135,993 |
| Other U.S. | 623,850 | *** | 567,343 | 56,508 |
| Total | 725,101 | *** | 625,504 | 99,598 |

*p < .05; **p < .01; ***p < .001

Table 9: Lawyers in the Criminal and Civil Divisions of U.S. Attorneys' Offices in Five Key Districts as of January 2010, By Gender

| District | Criminal Divisions | | | Civil Divisions | | |
|-------------------|--------------------|-------|---------|-----------------|-------|---------|
| | Lawyers | Women | % Women | Lawyers | Women | % Women |
| N.D. California | 95 | 39 | 41.1% | 21 | 10 | 47.6% |
| D.C. | 81 | 32 | 39.5% | 36 | 18 | 50.0% |
| N.D. Illinois | 125 | 36 | 28.8% | 23 | 9 | 39.1% |
| E.D. New York | 110 | 43 | 39.1% | 51 | 25 | 49.0% |
| S.D. New York | 170 | 60 | 35.3% | 48 | 23 | 47.9% |
| All Six Districts | 581 | 210 | 36.1%* | 179 | 85 | 47.4%* |

* Two-sample t-test, p < .001.

Notes: Each district prepared separate responses to the FOIA request, which were then provided by the EOUSA. There were variations in the form of the responses, and we employed some different methodologies.

The Northern District of California produced staff rosters with names, titles, and division assignments as of January 2005 and January 2010. Response to FOIA Request No. 11-1260 from Susan B. Gerson, Acting Assistant Dir., Freedom of Info. & Privacy Staff, Exec. Office for U.S. Attorneys (June 16, 2011) (on file with author). We excluded lawyers in the Tax Division and on executive staff. We then coded the Civil and Criminal division lawyers by gender. For 13 lawyers with androgynous or unfamiliar names, we obtained additional information from lawyers with deep knowledge of the office or through web searches. In two instances, we coded by gender based on whether the names were more frequently

given to girls or boys. *See, e.g.*, Gorman & Kmec, *supra* note 307, at 1443 n.12 (using frequency of names at the time of birth to code for gender). We also sought data from the U.S. Attorney's Office specifically on gender; the Office provided information on the Criminal Division only. The total numbers of lawyers were slightly different from our counts, but the percentages of women were consistent. *Compare, e.g.*, Table 9, *supra* (reporting that, in January 2010, 39 of 95 Criminal Division lawyers (41.1%) were women), *with* Supplemental Response to FOIA Request No. 11-1260 from Susan B. Gerson, Acting Assistant Dir., Freedom of Info. & Privacy Staff, Exec. Office for U.S. Attorneys (Aug. 19, 2011) (on file with author) (reporting that, in January 2010, 35 of 85 Criminal Division lawyers (41.2%) were women).

The District of Columbia reported the gender of individual lawyers in all divisions. Response to FOIA Request No. 11-1262 from Susan B. Gerson, Acting Assistant Dir., Freedom of Info. & Privacy Staff, Exec. Office for U.S. Attorneys (Aug. 19, 2011) (on file with author). We included only those lawyers specifically assigned to the District Court Criminal and Civil Divisions; we excluded lawyers assigned to the Superior Court, other divisions, and the office as a whole, as well as several who were on temporary assignment to unspecified divisions.

The Northern District of Illinois reported the total number of attorneys assigned to the Criminal and Civil Divisions by gender. Response to FOIA Request No. 11-1263 from Susan B. Gerson, Acting Assistant Dir., Freedom of Info. & Privacy Staff, Exec. Office for U.S. Attorneys (Aug. 19, 2011) (on file with author).

The Eastern District of New York reported the gender of individual Assistant U.S. Attorneys by assignment as of December 31, 2004 and December 31, 2009. Response to FOIA Request No. 11-1264 from Susan B. Gerson, Acting Assistant Dir., Freedom of Info. & Privacy Staff, Exec. Office for U.S. Attorneys (Aug. 19, 2011) (on file with author). We excluded lawyers assigned to the Appeals Division and those assigned to the office as a whole.

The Southern District of New York reported the gender of individual attorneys by division and, in many instances, unit. Response to FOIA Request No. 11-1265 from Susan B. Gerson, Acting Assistant Dir., Freedom of Info. & Privacy Staff, Exec. Office for U.S. Attorneys (Aug. 30, 2011) (on file with author). We excluded lawyers on the executive staff. We included lawyers in the appellate units within the Criminal and Civil Divisions because the units were contained within these specific Divisions.