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# Startup Lawyering 2.0

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## STARTUP LAWYERING 2.0\*

JOHN F. COYLE\*\* & JOSEPH M. GREEN\*\*\*

*This Article describes the day-to-day work of lawyers who advise startup companies. Drawing upon interviews with practicing attorneys in New York City and the Research Triangle of North Carolina, it distinguishes the practice of startup lawyers from the practice of other types of corporate lawyers. In so doing, the Article aspires to update and expand upon a sociological study published in 1996 that described the distinctive character of the work performed by startup lawyers in Silicon Valley. This earlier study provides an account of what we call “Startup Lawyering 1.0.” In this Article, we describe the work of startup lawyers outside of Silicon Valley circa 2016. In so doing, we provide an account of what we call “Startup Lawyering 2.0.”*

*We first describe how startup lawyers serve as transaction cost engineers by preparing prepackaged documents, by utilizing standard forms, and by providing nonlegal advice to their clients. We then show that startup lawyers serve as reputational intermediaries by screening clients and by vouching for them with investors. We also show that startup lawyers serve as regulatory compliance experts, transmitters of norms, and designers of innovative billing schemes.*

*We further argue that West Coast norms of startup lawyering have migrated to other startup ecosystems in the United States. The key distinction for lawyering practice in the startup space today, we argue, relies less on geography and more on whether a lawyer is what we call a “startup law aficionado.” Startup law aficionados can be found in any geographical region, though they tend to be clustered in technology hubs. Silicon Valley is still such a center of gravity in the startup world that startup law aficionados outside the Bay Area will inevitably come into contact with Silicon Valley startup lawyers and venture investors. As this occurs, the lawyering*

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\*\*\* Senior Legal Editor (Startups & Venture Capital), Thomson Reuters Practical Law. We would like to thank Elisabeth de Fontenay, Rebecca Morrow, Andrew Verstein, and our fellow symposium participants for their comments on an earlier draft of this paper. We would also like to thank our many interviewees for their willingness to share their time. All mistakes are our own.

*practices of startup law aficionados outside of Silicon Valley increasingly reflect those of their counterparts in Silicon Valley—and repeated exposure only increases the effect.*

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## INTRODUCTION

Startup lawyers are lawyers who represent early-stage companies as these startups seek to raise capital and grow their businesses.<sup>1</sup> In many respects, the work performed by startup lawyers resembles the work of a traditional corporate lawyer. They draft contracts, negotiate with opposing counsel, and generally seek to facilitate transactions that their clients wish to pursue. In a number of other respects, however, the work

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1. In this Article, we use the term “startup” to refer to an early-stage technology company with the potential for rapid and scalable growth that might plausibly seek to raise money from a venture capital fund and return the fund’s investment in connection with a liquidity event, such as a sale of the company to a strategic acquirer or an initial public offering. The term does not encompass businesses that would be unlikely to attract institutional venture capital investment, such as so-called “cash-flow” or “lifestyle” companies. See Joseph M. Green & John F. Coyle, Essay, *Crowdfunding and the Not-So-Safe-SAFE*, 102 VA. L. REV. ONLINE 168, 175–76 (2016). Whereas the primary goal of a startup is to provide an outsized return to its investors, the primary goal of a lifestyle company is to provide a good income to its founders. See *id.* Facebook, in its early days, is a good example of what we mean by startup. A restaurant or a graphic design firm is a good example of what we consider cash-flow or lifestyle companies.

performed by these attorneys is quite different from the work of traditional corporate lawyers. Startup lawyers often represent founders who have little to no experience running a business. They must sometimes wait for months—or even years—to be paid. And they are often asked to introduce their clients to potential investors, a task that typically falls to investment bankers in more traditional corporate deal making.

In this Article, we paint a portrait of startup lawyering circa 2016. In so doing, we update and expand upon the work of Mark Suchman and Mia Cahill, the authors of a leading sociological account of startup lawyering published in 1996.<sup>2</sup> We refer to this descriptive account by Suchman and Cahill as “Startup Lawyering 1.0.” This account of startup lawyering has cast a long shadow over the academic literature. It was and still remains the seminal work in the field.<sup>3</sup> To date, however, scholars have not sought to determine whether the work of startup lawyers has changed in the years since the study was first published. Nor have scholars sought to determine whether this account of startup lawyering accurately describes the work performed by lawyers who represent early-stage companies outside of Silicon Valley.<sup>4</sup>

This Article updates and expands upon this prevailing account of startup lawyering. In so doing, it offers an account of what we call

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2. Mark C. Suchman & Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC. INQUIRY 679 (1996). Drawing upon interviews with Silicon Valley lawyers, Suchman and Cahill observed that startup lawyers facilitated venture capital transactions in three ways. First, the lawyers did not insist that their startup clients pay for services when rendered. *Id.* at 691–92. Instead, they would defer fees for unfunded companies or take equity in lieu of cash. *Id.* at 692. Second, these attorneys enforced a normative order that increased the stability of the local venture capital market. *Id.* at 697. They refused to take clients who might challenge the community’s assumptions, indoctrinated their clients into the routines of the local business community, and steered startups to appropriate investors. *Id.* at 698–702. Third, these attorneys developed local norms that created a shared frame of reference for attorneys practicing in Silicon Valley. *Id.* at 703. They then sought to export these norms to other jurisdictions. *Id.* at 703, 705–08.

3. See, e.g., Ian Ayres, *Never Confuse Efficiency with a Liver Complaint*, 1997 WIS. L. REV. 503, 513 (describing Suchman and Cahill’s article as “incredibly rich, both in detail and interpretation”); Jeffrey M. Lipshaw, *Why the Law of Entrepreneurship Barely Matters*, 31 W. NEW ENG. L. REV. 701, 701 n.1 (2009) (listing Suchman and Cahill’s article as one of the few that addresses “the intersection of law and entrepreneurship”). Occasionally, scholars will cite an earlier (and much shorter) article that reaches some of the same conclusions. See generally Lawrence M. Friedman et al., *Law, Lawyers, and Legal Practice in Silicon Valley: A Preliminary Report*, 64 IND. L.J. 555 (1989) (discussing the relationship between Silicon Valley lawyers and the growth of the tech industry).

4. The sole exception would appear to be a 2014 article by Abe Cable in which he noted that the model of startup lawyering pioneered by firms in Silicon Valley had spread to other jurisdictions, such as Seattle and Boston. Abraham J.B. Cable, *Startup Lawyers at the Outskirts*, 50 WILLAMETTE L. REV. 163, 165 (2014).

“Startup Lawyering 2.0.” The Article first assesses whether the lawyering style described by Suchman and Cahill has evolved over time. Is the practice of startup lawyers today meaningfully different from the practice of startup lawyers in the early 1990s? Or is contemporary practice broadly similar? It then seeks to determine whether the model they describe varies by geographical location. Do lawyers who represent startups in other parts of the country behave in ways that are broadly similar to their Silicon Valley counterparts? Or are there regional variations in the ways that startup lawyers behave?

To answer these questions, we conducted interviews with startup lawyers in two regions—New York City and the Research Triangle in North Carolina—in the late summer and early fall of 2016.<sup>5</sup> Overall, we conducted sixteen interviews. We interviewed nine attorneys in North Carolina and seven attorneys in New York. Each attorney interviewed was a law firm partner or senior lawyer who has worked extensively with entrepreneurial clients over a period of many years.<sup>6</sup> The insights gleaned from these interviews suggest that the descriptive account of startup lawyering developed by Suchman and Cahill twenty years ago remains broadly accurate. In several respects, however, we uncovered evidence that the portrait of startup lawyering painted by Suchman and Cahill does not fully capture the nuances of contemporary startup lawyering outside of Silicon Valley circa 2016.

The Article proceeds as follows. Part I offers a brief overview of venture capital in the United States. Part II then describes the various roles that startup lawyers play in contemporary practice and reviews the

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5. We chose to focus our research on New York City and the Research Triangle as representative examples of large and small East Coast tech hubs, respectively. New York has grown to be the second-largest tech hub in the United States, second only to the San Francisco Bay Area (which includes Silicon Valley and San Jose). See PITCHBOOK DATA, INC., US VENTURE ECOSYSTEM: FACTBOOK 5 (2016), [https://files.pitchbook.com/pdf/PitchBook\\_2016\\_US\\_Venture\\_Ecosystem\\_FactBook.pdf](https://files.pitchbook.com/pdf/PitchBook_2016_US_Venture_Ecosystem_FactBook.pdf) [<https://perma.cc/TY6L-VDXS>]. The Research Triangle, including the cities of Raleigh, Durham, and Chapel Hill in North Carolina, has long been a hub for life sciences companies and technology startups, but unlike New York, remains a small and somewhat isolated startup ecosystem. See *Region's Vibrant Entrepreneurial Environment Boosts Jobs and Investment*, RES. TRIANGLE REGION, <http://www.researchtriangle.org/news-and-events/regions-vibrant-entrepreneurial-environment-boosts-jobs-and-investment> [<https://perma.cc/FW75-SX9V>]; see also Renee Morad, *10 Biotech Firms Rapidly Expanding in North Carolina*, BIOSPACE (July 21, 2015, 5:01:57 AM), <http://www.biospace.com/News/10-biotech-firms-rapidly-expanding-in-north/384976> [<https://perma.cc/B533-HMVS>]. We also chose these hubs because one of us is based in New York and the other in Chapel Hill, so our networks yielded the greatest number of experienced startup lawyers for us to interview in these locations.

6. On a number of occasions, the interviewee had previously practiced in Silicon Valley and therefore was well positioned to explain the difference in practice between Silicon Valley and the jurisdiction where he or she currently practices.

similarities and differences found in these practices in different geographical locations. Part III discusses the migration of Silicon Valley startup lawyering norms to East Coast startup ecosystems and introduces the concept of the “startup law aficionado.”

#### I. THE GEOGRAPHY OF VENTURE CAPITAL IN THE UNITED STATES

In the decades after the Second World War, there emerged two primary technology startup hubs in the United States: Silicon Valley in Northern California and the Route 128 Corridor near Boston, Massachusetts.<sup>7</sup> Both of these tech clusters produced large quantities of venture-backed startups in a variety of technology sectors but predominantly in three areas: (1) hardware, (2) software/internet, and (3) life sciences.<sup>8</sup> During the dot-com boom in the late 1990s, other metropolitan areas developed nascent tech hubs. Cities such as Seattle, Washington (home of Microsoft); Austin, Texas (home of Dell); and New York City (which became known at the time as Silicon Alley) had fast-growing tech ecosystems until the bursting of the dot-com bubble in 2001.<sup>9</sup>

Coming out of the Great Recession into the Web 2.0 era, many of these secondary startup ecosystems experienced a resurgence in startup and venture capital activity. By 2016, New York City had largely overtaken Boston as the second-largest tech hub in the country.<sup>10</sup> Metropolises such as Los Angeles, Chicago, and Washington, D.C., joined Austin and Seattle as significant tech hubs.<sup>11</sup> During this latest startup boom, many Silicon Valley startups and larger technology companies began migrating from Silicon Valley to San Francisco,<sup>12</sup> creating a massive technology hub encompassing the San Francisco Bay Area, which now constitutes the largest technology cluster in the world by a significant margin.<sup>13</sup>

7. See ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128, at 11 (1994); Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 588–89 (1999).

8. See Mary J. Dent, *A Rose By Any Other Name: How Labels Get in the Way of U.S. Innovation Policy*, 8 BERKELEY BUS. L.J., no. 2, 2011, at 128, 128, 134.

9. See Victor Fleischer, *The Rational Exuberance of Structuring Venture Capital Startups*, 57 TAX L. REV. 137, 177 n.161 (2003).

10. See PITCHBOOK DATA, INC., *supra* note 5, at 5.

11. See *id.*

12. Jenny Belotserkovsky, *Why San Francisco Is the New Tech Titan, Not Silicon Valley*, GEEKTIME (June 8, 2016), <http://www.geektime.com/2016/06/08/why-san-francisco-is-the-new-tech-titan-not-silicon-valley/> [https://perma.cc/3V7A-EX6D].

13. See PITCHBOOK DATA, INC., *supra* note 5, at 5.

Smaller hubs that have long had local startup ecosystems also expanded during this period. Examples of these smaller hubs include places such as Boulder, Colorado; Raleigh, Durham, and Chapel Hill, North Carolina (known collectively as the Research Triangle); and San Diego, California.<sup>14</sup> While the Bay Area still has startups representing every imaginable sector of the technology industry, many other ecosystems tend to be more densely populated by startups from particular tech sectors. For example, Boston, San Diego, and the Research Triangle have significant clusters of life sciences companies.<sup>15</sup> New York, in contrast, has fewer life sciences startups, but a large number of startups melding technology (software, in particular) with the industries that have long dominated New York City's economy: finance, advertising, media, and professional services.<sup>16</sup>

These hubs vary across a number of different dimensions beyond the sectors in which their startups compete. More mature hubs, such as the Bay Area and Boston, have a greater number of startups that have grown into large, prosperous public companies.<sup>17</sup> They also have far more institutional venture capital firms ("VCs") headquartered within the vicinity than the other hubs.<sup>18</sup> Furthermore, a number of the entrepreneurs and early employees of the more mature ecosystems have become serial entrepreneurs and/or angel investors.<sup>19</sup> That kind of virtuous cycle is present to a lesser extent in less mature startup ecosystems, even those that have grown tremendously of late, such as New York.

Just as these various geographical clusters differ in size, presence of local capital for early-stage ventures, maturity of companies, and sectors

14. Victor Fleischer, *Taxing Founders' Stock*, 59 UCLA L. REV. 60, 95–96 (2011).

15. See JONES LANG LASALLE IP, INC., LIFE SCIENCES OUTLOOK 3 (2015), <http://www.us.jll.com/united-states/en-us/Documents/Life-Sciences/JLL-US-Life-Science-Outlook-2015.pdf> [<https://perma.cc/RW7M-2G8B>].

16. Christina Parajon Skinner, *Whistleblowers and Financial Innovation*, 94 N.C. L. REV. 861, 874 (2016).

17. See SAXENIAN, *supra* note 7, at 12–27 (describing the growth and development of Boston and Silicon Valley and some of their respective companies).

18. See Tanya Benedicto Klich, *VC 100: The Top Investors in Early-Stage Startups*, ENTREPRENEUR (Feb. 19, 2015), <https://www.entrepreneur.com/article/242702> [<https://perma.cc/8YB6-UV8H>]; see also Andrew A. Schwartz, *Rural Crowdfunding*, 13 U.C. DAVIS BUS. L.J. 283, 283–84 (2013).

19. John F. Coyle & Gregg D. Polsky, *Acqui-hiring*, 63 DUKE L.J. 281, 292 n.35 (2013) (citing Ari Levy, *'PayPal Mafia' Gets Richer*, BLOOMBERG (Feb. 21, 2012, 12:01 AM), <https://www.bloomberg.com/news/articles/2012-02-21/paypal-mafia-gets-richer> [<https://perma.cc/2H76-UWC3>]). Angel investors are "wealthy individuals who personally finance the same high-risk, high-growth start-ups as venture capitalists but at an earlier stage." Darian M. Ibrahim, *The (Not So) Puzzling Behavior of Angel Investors*, 61 VAND. L. REV. 1405, 1406 (2008).

represented, so too are there differences in the types of startup lawyering found in these technology hubs. A startup lawyer representing a life sciences company founded by a professor at North Carolina State University will face a different set of challenges than a startup lawyer representing a software company founded by a college student at New York University. To date, most accounts of startup lawyering have generally treated it as monolithic.<sup>20</sup> In the next Part, we show that while there are broad similarities in startup lawyering practice in the United States, there are also some noteworthy differences in practice based on geographical location.

## II. COMMON THREADS IN STARTUP LAWYERING

In theory, a company could draft and negotiate all of its contracts without the assistance of outside counsel. In practice, it is common for companies to hire corporate attorneys to assist with both contract drafting and contract negotiation. In performing these services, corporate attorneys do not prepare legal briefs, appear in court, or engage in the practice of law as it is commonly understood.<sup>21</sup> Instead, they perform a variety of tasks that could be performed by someone who lacks a law degree.<sup>22</sup> A question that has long preoccupied legal scholars, therefore, is what value do corporate lawyers add to the transaction so as to justify their hefty billing rates?<sup>23</sup> Or, to put it another way, why do companies continue to hire corporate lawyers to perform tasks for which no law license is required?

Legal scholars have developed three paradigms that seek to answer this question.<sup>24</sup> The first paradigm suggests that corporate lawyers serve as “transaction cost engineers.”<sup>25</sup> On this account, corporate lawyers minimize transaction costs by drafting contracts that assign specific legal risks to the party that is best positioned to bear them.<sup>26</sup> A commonly

20. See *supra* note 4 and accompanying text.

21. See Elisabeth de Fontenay, *Law Firm Selection and the Value of Transactional Lawyering*, 41 J. CORP. L. 393, 399 (2015) (“Unlike the litigation context, in which the lawyer’s role *qua* lawyer is clear in the public imagination, transactional lawyers are often accused of—or congratulated for—not being lawyers at all.”).

22. See *id.* (noting that some firms label their corporate attorneys as “advisers, deal-makers, or business planners”).

23. See Martha Neil, *Top Partner Billing Rates at BigLaw Firms Approach \$1,500 Per Hour*, ABA J. (Feb 8, 2016, 4:00 PM), [http://www.abajournal.com/news/article/top\\_partner\\_billing\\_rates\\_at\\_biglaw\\_firms\\_nudge\\_1500\\_per\\_hour/](http://www.abajournal.com/news/article/top_partner_billing_rates_at_biglaw_firms_nudge_1500_per_hour/) [<https://perma.cc/VQ65-98BT>] (noting the steady rise of hourly rates at some of the nation’s biggest law firms).

24. See de Fontenay, *supra* note 21, at 399–401 (describing the three paradigms).

25. See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 243, 255 (1984).

26. See *id.*



cited example of such engineering is the representations and warranties section that is typically found in merger agreements.<sup>27</sup> The second paradigm holds that corporate lawyers add value to transactions by serving as “reputational intermediaries.”<sup>28</sup> On this account, the law firm effectively “rents” its good name to clients about which little information is available.<sup>29</sup> Thereafter, potential counterparties are more willing to deal with the client—or to offer the client better terms—because these counterparties trust the law firm that is representing it.<sup>30</sup> The third paradigm posits that corporate lawyers add value to transactions by acting as “regulatory compliance experts.”<sup>31</sup> On this account, transactional lawyers add value by “providing expertise in the law and regulations that generally govern the transaction and by understanding the rationale for the contractual provisions in the transaction documents.”<sup>32</sup> In contrast to the first two paradigms, which suggest that lawyers add value by performing services that could—in theory—be performed by any sophisticated actor in the marketplace, this paradigm suggests that the value added by lawyers is attributable principally to their skills as lawyers.<sup>33</sup>

It should be emphasized that these three paradigms are not mutually exclusive. A corporate lawyer may add value by working as a transaction cost engineer *and* by serving as a reputational intermediary *and* by acting as a regulatory compliance expert. Indeed, a review of the existing literature suggests that startup lawyers in Silicon Valley are often described as adding value in each of these ways.<sup>34</sup> While corporate

27. *See id.* at 259–60. The purpose of these representations and warranties, Gilson argues, is to “remedy conditions of asymmetrical information in the least-cost manner.” *Id.* at 269. By requiring the seller to represent that certain facts are true, and by requiring the seller to indemnify the buyer if these facts turn out not to be true, these provisions incentivize the seller—the party who can acquire this information at the lowest cost—to disclose any and all relevant facts to the buyer. Once these disclosures are made, Gilson argues, the buyer is more likely to proceed to closing because it is no longer worried that it is overpaying for the assets. *See id.* at 270–71. Gilson also identifies an “earnout” provision as a contractual device that facilitates the consummation of a transaction when the parties disagree as to the future prospects of the business. *See id.* at 263–64.

28. *See de Fontenay, supra* note 21, at 400.

29. *Id.*

30. *See id.* at 400–01.

31. *See de Fontenay, supra* note 21, at 401.

32. Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 501 (2007).

33. *See id.* at 501–02.

34. *See* Lisa Bernstein, *The Silicon Valley Lawyer as Transaction Costs Engineer?*, 74 OR. L. REV. 239, 245–51 (1995) (describing the various means—both contractual and relational—by which Silicon Valley lawyers may reduce transaction costs in venture capital financings); Cable, *supra* note 4, at 168–70 (arguing that Silicon Valley lawyers play an important role as reputational intermediaries); *see also* D.E. Wilson, Jr. & Andrew E. Bigart, *AML*

lawyers may also provide value in a manner that is not fully captured by any of these paradigms, they provide a useful framework to evaluate the value added by the particular species of corporate lawyers—startup lawyers—that is our focus in this Article.

#### A. *Startup Lawyers as Transaction Cost Engineers*

In its most narrow and formalistic sense, the transaction cost engineer paradigm emphasizes the role of contractual innovations pioneered by lawyers that help their clients close value-enhancing deals that would not have occurred if not for the attorney’s involvement.<sup>35</sup> The paradigm is, however, broad enough to encompass other lawyering activities that reduce costs in the context of venture capital transactions. In particular, contemporary startup lawyers serve as transaction cost engineers by (1) developing sets of prepackaged documents that cover formation and basic financing, (2) promulgating standard forms for financing transactions, and (3) explaining the mechanics and dynamics of financing transactions to their clients.

##### 1. Prepackaged Documents

Increasingly, law firms that regularly represent startups offer a “prepackaged” set of documents that allow their clients to incorporate, secure funding from friends and family, and hire employees and incentivize them with stock options.<sup>36</sup> In some markets—including New York, Boston, and Silicon Valley—some law firms are now giving the forms away for free.<sup>37</sup> In other markets, the cost of these packages is nonzero but still generally affordable for early-stage companies.<sup>38</sup> The increased availability of these documents reduces the legal costs that are often associated with launching a startup. In this respect, this

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*Considerations for the Fintech Industry*, VENABLE LLP (Dec. 10, 2015), <https://www.venable.com/aml-considerations-for-the-fintech-industry-12-10-2015> [<https://perma.cc/94TQ-95PT> (staff-uploaded archive)] (explaining the importance of regulatory compliance in regards to anti-money laundering risks for Silicon Valley industries).

35. See de Fontenay, *supra* note 21, at 400.

36. See Interview with Attorney II, North Carolina Law Firm II, in Raleigh, N.C. (Aug. 22, 2016) (“Our legal docs are prepackaged. We have form articles, bylaws, and the works. The only case where this isn’t true relates to licenses.”) (notes on file with authors); Interview with Attorney I, North Carolina Law Firm IV, in Raleigh, N.C. (Aug. 24, 2016) (“There has been such a commodification of startup work here. We were the leaders in 2006 in developing a prepackaged set of startup documents. Now, everyone does it.”) (notes on file with authors).

37. Daniel Doktori, *What It Means When Law Firms and Startups Give Away Legal Documents*, TECHCRUNCH (Jan. 10, 2015), <https://techcrunch.com/2015/01/10/documents-just-want-to-be-free> [<https://perma.cc/9ERR-FWQH>].

38. See Interview with Attorney III, North Carolina Law Firm II, in Raleigh, N.C. (Aug. 24, 2016) (notes on file with authors).

development represents a classic example of transaction cost engineering.

The creation of such documents is a service that could be performed by nonlawyers. Indeed, nonlaw firm legal tech startups such as Clerky and Shake (among others) provide prepackaged sets of incorporation documents that are not all that different from the documents offered by law firms.<sup>39</sup> To date, however, law firms do not appear to be too worried about these competitors displacing them. As one attorney explained, “You *can* get that document somewhere else cheaper. You’re coming to me for my judgment.”<sup>40</sup> At the end of the day, therefore, law firms hope that startups that use the firm’s prepackaged forms at the launch of their business ventures will someday hire the firm to advise them in later, more substantial (and, therefore, more lucrative) transactional work.

## 2. Standard Forms

In 2003, the National Venture Capital Association (“NVCA”) published a set of “model” documents for venture finance transactions.<sup>41</sup> In the intervening years, these documents have reshaped startup lawyering in the United States. Prior to 2003, it was common for law firms to have their own semiproprietary set of venture financing forms. When two different firms had substantially different forms, contract negotiations could be frustratingly slow, as each lawyer sought to conform the proposed agreement to “his firm’s” set of forms. The NVCA documents sought to address this problem by providing a common frame of reference. Once everyone was working off of the same basic template, so the argument went, deals could be concluded more quickly, and the average legal costs incurred to complete such transactions could be substantially reduced.<sup>42</sup>

All of the North Carolina lawyers we interviewed believed that the NVCA forms had wrought a significant change in market practice—for

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39. See *Automatic Legal Paperwork for Startups*, CLERKY, <https://www.clerky.com> [<https://perma.cc/787R-3KX5>]; *Create, Sign and Send Legally Binding Agreements in Seconds*, SHAKE BY LEGALSHIELD, <http://www.shakelaw.com> [<https://perma.cc/M7AB-N28Z>].

40. Doktor, *supra* note 37.

41. See *Model Legal Documents*, NAT’L VENTURE CAP. ASS’N, <http://nvca.org/resources/model-legal-documents/> [<https://perma.cc/F76N-JRKV>]. This set of model documents now includes (1) a term sheet; (2) a restated certificate of incorporation; (3) an investor rights agreement; (4) a stock purchase agreement; (5) a right of first refusal and co-sale agreement; (6) a voting agreement; (7) a director indemnification agreement; (8) a management rights letter; and (9) a model legal opinion. See *id.*

42. See *id.*

them, the release of model documents was a watershed moment. As one lawyer observed,

The NVCA model documents are widely used here [in North Carolina]. The largest firms are too proud to use them, but the smaller firms use them in their entirety. The model docs have led to more standardized terms, which is wonderful service. They eliminate a lot of unnecessary negotiation. They create a sense of market terms, which is one of the most powerful concepts in transactions generally. Fenwick's surveys and the [American Bar Association] Deal Points also help with this. These resources allow schleps like me to push back and tell opposing counsel that what they're proposing isn't "market." Clients are never happy when they're the schleps. The NVCA forms, by establishing a market norm, steer things in certain directions.<sup>43</sup>

Another North Carolina attorney emphasized the fact that the NVCA forms help to establish "market" norms and discussed their ability to reduce transaction costs:

The NVCA forms have changed our practice. They are really helpful. Not everyone has adopted them. I'm not sure why. Some firms use their "own" forms. We're migrating over to NVCA. It makes sense for companies. Some say that they are too "pro-investor." I disagree. How many companies have a lot of bargaining power? These forms help with efficiency at the venture rounds.<sup>44</sup>

Still, another North Carolina attorney commented that the widespread use of the NVCA forms, along with other standardized deal documents, had helped to standardize the terms in the venture capital space more broadly:

The biggest difference [in practice over the past twenty years] relates to the standardization of legal documents nationally. Series Seed. The SAFE. The NVCA docs. Just about every deal starts from one of those places. The docs are much more standardized. I think that Wilson Sonsini still uses "their" docs, and I've heard that Cooley does also. Generally speaking, though, no client wants

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43. Interview with Attorney I, North Carolina Law Firm III, in Raleigh, N.C. (Aug. 24, 2016) (notes on file with authors).

44. Interview with Attorney I, North Carolina Law Firm II, in Raleigh, N.C. (Aug. 22, 2016) (notes on file with authors).

to start with docs that are not “market” and that means the standard terms.<sup>45</sup>

Overall, the North Carolina lawyers viewed the NVCA documents as a positive development in the market.

A number of the New York attorneys took a markedly different view of the NVCA forms. Several of these lawyers questioned whether the terms set forth in those forms could fairly be characterized as “market.” In the words of one New York lawyer,

Most lawyers outside of a major tech hub need some education on startup lawyering forms. They take the NVCA forms and think that it’s the gospel. They don’t understand that [the forms] take a kitchen sink approach and don’t represent market (particularly for companies represented by West Coast or West Coast-style startup law firms).<sup>46</sup>

Another New York lawyer commented on the benefits of the NVCA forms when they were first introduced but was less enthusiastic about their current incarnation and how they are being used by many startup lawyers today:

The proliferation of forms has led people to rely on them as gospel and allowed them not to really think about what’s actually happening in the market. But you have to have the deal flow to really be able to do that. We’re fortunate to be able to do that. The NVCA forms used to be quite helpful. They weren’t over-the-top or over-lawyered. They didn’t have every investor bell and whistle ever thought of jammed in there. Now they’re really a detriment.<sup>47</sup>

A different New York attorney noted that, despite the forms being (in his view) “investor friendly,” many of his clients were forced to use them because many of the term sheets his clients received from investors explicitly required using the NVCA’s model financing documents.<sup>48</sup>

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45. Interview with Attorney, North Carolina Law Firm I, in Raleigh, N.C. (Aug. 19, 2016) (notes on file with authors).

46. Interview with Attorney I, New York Law Firm I, in New York, N.Y. (Aug. 25, 2016) (notes on file with authors).

47. Interview with Attorney V, New York Law Firm I, in New York, N.Y. (Sept. 14, 2016) (notes on file with authors).

48. See Interview with Attorney I, New York Law Firm III, in New York, N.Y. (Sept. 22, 2016) (“The NVCA has an investor friendly set of documents, but term sheets include it as a mandatory starting point, and that sets the tone.”) (notes on file with authors). The New York attorneys who expressed these views generally came from firms that also have a strong presence in Silicon Valley. Many of the Silicon Valley law firms still prefer to use their own forms. These forms now largely track the language from the NVCA forms but tend to contain

These contrasting perspectives notwithstanding, the development and subsequent adoption of the NVCA model documents—along with other standard forms—constitutes an example of startup lawyers acting as transaction cost engineers. Nearly every attorney we spoke with mentioned the relevance of the NVCA documents in their practices, highlighting the influence of these forms in shaping the negotiations of venture investments irrespective of geography. By attempting to establish a baseline of “standard” language for the various terms commonly used in these deals, these documents serve as a *lingua franca* that facilitates venture-financing transactions across the United States.

### 3. Nonlegal Advice

Founders come in many different varieties. In some cases, the founder is a serial entrepreneur who already has multiple exits under his belt. In other cases, the founder has a brilliant idea and technical chops but lacks experience raising venture capital or running a business. In the latter case, the startup lawyer will often be called upon to provide nonlegal advice to the founder. As one North Carolina lawyer explained, “I try to help my clients understand how to negotiate and understand the entire financing process. The highest value advice I provide is in explaining the dynamics of the transaction.”<sup>49</sup> In other cases, the startup lawyer will advise founders on timelines and the relative merits of prospective investors. In the words of another North Carolina lawyer,

Clients often have unrealistic expectations about how long things will take. . . . It’s typically a months-long process, though angels can go faster. Entrepreneurs also tend to underestimate the variety of VCs when it comes to value add. Some are going to give you money and not much else. Others are going to give advice and make introductions. It’s important to set expectations up front. Sometimes it’s better to take worse terms if the VC in question is going to give you a lot of value add.<sup>50</sup>

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fewer investor-favorable provisions. The North Carolina lawyers, in contrast, have found it beneficial to have a single repository of forms that all startup lawyers can utilize. *See supra* notes 43–45 and accompanying text. The main difference in outlook appears to be driven mainly by the expectations around what constitutes “market” terms, which for each of them—depending on how much negotiating leverage their company clients have, on average—is in the eye of the beholder.

49. Interview with Attorney III, North Carolina Law Firm II, *supra* note 38.

50. Interview with Attorney, North Carolina Law Firm I, *supra* note 45.

Startup lawyers in New York also routinely provide nonlegal advice to startups. One New York lawyer likened the relationship to eventually becoming a de facto co-founder of the company:

You're not viewed as just a lawyer with startups. Large companies have an expert for everything. With startups, you're their partner. Unless they're a serial entrepreneur, they don't know anything. You have to advise them on absolutely everything. Once they trust you, they look at you like a cofounder.<sup>51</sup>

Another New York attorney commented,

Startups have something coming up every day that they're not sure about and want to check in with you on. It's a consigliere type of role, a trusted advisor. That includes business issues, especially for founders who are engineers or otherwise have no business background. They want to know what is "market" on business terms. It comes into play with startups much more than if you're representing a Fortune 500 company.<sup>52</sup>

On this issue, then, the practice of startup lawyers in North Carolina and New York are broadly similar.

The provision of nonlegal advice to founders and startups helps to reduce transaction costs across a range of different matters. By explaining the dynamics of the financing transaction, or by explaining the relative merits of two different VCs, a startup lawyer reduces the information asymmetry between the founder and the investor.<sup>53</sup> In this respect, the practice of a startup lawyer is again fairly characterized as that of a transaction cost engineer who adds value to the transaction by reducing these costs.

### *B. Startup Lawyers as Reputational Intermediaries*

In addition to their work as transaction cost engineers, startup lawyers often serve as reputational intermediaries on behalf of their clients. This means that startup lawyers will sometimes "vouch" for particularly promising clients by introducing them to potential investors. It also means that startup lawyers will occasionally decline to take on

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51. Interview with Attorney I, New York Law Firm III, *supra* note 48.

52. Interview with Attorney II, New York Law Firm I, in New York, N.Y. (Aug. 25, 2016) (notes on file with authors).

53. See, e.g., Telephone Interview with Attorney I, North Carolina Law Firm V (Sept. 16, 2016) ("For new founders (75% of my clients), they need some coaching, tutorial, realistic expectation talks. I tell them: 'Understand when you are negotiating a term sheet with a VC, you're fighting a gunslinger, and you're totally unarmed. They have way more experience at this than you.'") (notes on file with authors).

clients who may reflect poorly upon them. Each of these two forms of reputational intermediation is explored below.

### 1. Screening Clients

In their seminal article on startup lawyering in Silicon Valley, Suchman and Cahill argue that Silicon Valley lawyers routinely decline to take on certain clients.<sup>54</sup> While there are many reasons why a firm may decide to take on a client, Suchman and Cahill note that one common motivation for doing so in Silicon Valley is to “screen out entities that challenge the community’s taken-for-granted assumptions or that threaten the community’s social cohesion.”<sup>55</sup> These firms often refuse to take on a potential client out of a concern that the client would reflect poorly on the firm in the client’s dealings with investors.<sup>56</sup> Through this screening process, Suchman and Cahill contend, Silicon Valley lawyers establish “normative boundaries” around the venture capital community and maintain their status as reliable reputational intermediaries.<sup>57</sup>

When we asked our interviewees about their client screening practice, we received starkly different answers from the attorneys in North Carolina and the attorneys in New York. The North Carolina lawyers reported that they rarely, if ever, screened their clients in the manner described by Suchman and Cahill. One attorney reported that he had never turned away a client.<sup>58</sup> Several others remarked that they would refuse to take on a client if they had serious concerns about management’s ethics or character.<sup>59</sup> Three attorneys reported that they would turn a potential client away if (1) the company lacked the resources to pay up front and (2) the business plan was so unimpressive that they doubted the company would ever be able to raise capital.<sup>60</sup> As one explained,

In choosing clients, you have to think like an investor and ask yourself whether this is a quality company and if there is a quality

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54. See Suchman & Cahill, *supra* note 2, at 698–99.

55. *Id.* at 698.

56. See *id.* at 698–99, 698 n.58.

57. *Id.* at 699.

58. See Interview with Attorney II, North Carolina Law Firm II, *supra* note 36.

59. Interview with Attorney I, North Carolina Law Firm II, *supra* note 44; Interview with Attorney I, North Carolina Law Firm III, *supra* note 43; Interview with Attorney II, North Carolina Law Firm IV, in Raleigh, N.C. (Aug. 26, 2016).

60. Interview with Attorney, North Carolina Law Firm I, *supra* note 45; Interview with Attorney I, North Carolina Law Firm IV, *supra* note 36; Interview with Attorney II, North Carolina Law Firm IV, *supra* note 59.



team that is going to have the means to raise funding. If the answer is no, then I might not take them on as a client.<sup>61</sup>

Significantly, none of the North Carolina lawyers interviewed stated—or even implied—that they had ever turned clients away because they threatened the community’s taken-for-granted assumptions.<sup>62</sup> Nor did any of them state that they regularly turned away clients who would reflect poorly on the firm in their dealings with investors. The overwhelming sentiment from these interviews was that startup lawyers in the Research Triangle will generally turn away only those clients who are unlikely to be able to pay. This is not to say that these lawyers will not try to be helpful. As one explained,

I will also refer people to more cost-effective service providers. . . . If someone needs help with residential real estate, for example, I’ll send them to a solo practitioner who is a friend of the firm. Or if someone is trying to open a restaurant or other type of lifestyle company, I may refer them elsewhere for help with company formation. In some cases involving solo entrepreneurs who don’t have investors, I’ll even present the option of . . . using Rocket Lawyer or Legal Zoom because an actual lawyer will charge so much more.<sup>63</sup>

In discussing their policies for screening clients, none of the North Carolina lawyers mentioned the policing of community norms or a desire to preserve relationships with investors.

A very different picture emerged from New York, where most of the attorneys we interviewed actively screened clients. One of them stated his reliance on his existing network of clients to perform the screening function: “We decline to take on clients without a referral

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61. Interview with Attorney, North Carolina Law Firm I, *supra* note 45; *see also* Interview with Attorney I, North Carolina Law Firm IV, *supra* note 36 (“If he is asking us to work for free, if he can’t pay us, and if his prospects are bad, then I’m going to say no.”); Interview with Attorney II, North Carolina Law Firm IV, *supra* note 59 (“Generally speaking, I may decline to take a client where they don’t have any money and don’t have the ability to raise it.”).

62. One North Carolina lawyer did say that he has, on occasion, refused to take on a client if he believed the client would not be coachable (particularly with regard to the valuation the client seeks when raising capital): “Yeah, if their expectations are unrealistic, I’ll refuse to take them on. Has to be really wildly unrealistic though. If they expect valuations that are wildly unrealistic, it’s a big red flag for me. If they seem like a person who can learn, I’ll work with them.” Telephone Interview with Attorney I, North Carolina Law Firm V, *supra* note 53. This type of refusal appears to have less to do with the client challenging the community’s taken-for-granted assumptions and more to do with the increased likelihood of the client’s unreasonable valuation expectations preventing them from being able to raise capital (and pay their legal fees).

63. Interview with Attorney III, North Carolina Law Firm II, *supra* note 38.

from someone we know and respect. We only take on clients who aren't referred if they have something really novel."<sup>64</sup> Another New York lawyer makes screening determinations based on a number of factors:

[I will decline representing a company] if it's not the right stage . . . where the idea may not be quite ready for our rates or getting institutional investment. Personality fit is also important, as it's a long-term relationship. Likelihood of getting funded also comes into play. We'll often refer companies to cheaper lawyers with the understanding that if they progress, and are able to move the idea along, that we can revisit representation as they grow. We want the environment to be right on both sides of the equation.<sup>65</sup>

Several New York lawyers focused on the company's business model and likelihood of successfully raising capital:

For us, there's a sweet spot of tech-oriented companies that will ultimately be financed by VC funds. If you're going to have a super successful cottage business that stays an LLC (i.e., a lifestyle business), then we're not the right firm. If we don't think you will be able to raise VC funds, by and large we won't represent you.<sup>66</sup>

Compared to the lawyers in North Carolina, the New York attorneys considered a much wider variety of factors—including personality fit and connections within the startup community network—when deciding whether to serve as a reputational intermediary on behalf of a prospective client.

## 2. Making Introductions

In their capacity as reputational intermediaries, startup lawyers regularly introduce their clients to potential investors.<sup>67</sup> At first glance,

64. Interview with Attorney IV, New York Law Firm I, in New York, N.Y. (Sept. 14, 2016) (notes on file with authors). A number of our interviewees in New York stated that they are first introduced to many of their company clients by the company's investors with whom they have long-standing relationships (and whom they have also often represented in other transactions). *See, e.g.*, Interview with Attorney I, New York Law Firm III, *supra* note 48 ("The best way I find clients is through my relationships with the funds.").

65. Interview with Attorney II, New York Law Firm I, *supra* note 52; *see also* Interview with Attorney I, New York Law Firm III, *supra* note 48 ("We don't necessarily decline to take a client, but sometimes we tell companies they might be a bit too early for us (not a lot of need at this point). . . . We may not decline, but we'll just not show them a lot of interest and they usually take the hint.").

66. Interview with Attorney I, New York Law Firm I, *supra* note 46. Another New York lawyer made a similar point: "Putting our MBA hats on and not our legal hats, we ask, 'Is this something that might be successful down the road?'" Interview with Attorney I, New York Law Firm III, *supra* note 48.

67. Suchman and Cahill argue that Silicon Valley lawyers also serve as reputational intermediaries by giving opinion letters in which they stand behind certain representations

this might seem somewhat unusual. Outside the venture capital context, it is rare for a corporate attorney to introduce clients to potential investors; it is a role more typically performed by investment bankers. Within the venture capital context, however, such introductions occur frequently. One North Carolina attorney explained that introducing clients to potential investors is “part and parcel of what it means to be a venture attorney.”<sup>68</sup> A New York lawyer responded that it “happens all the time; it’s the most valuable service that we can provide to a founder, I think.”<sup>69</sup> Other interviewees stated that “clients are buying access to my network”<sup>70</sup> and that “if you’re not introducing clients to investors, I’m not sure what you’re doing all day.”<sup>71</sup> It is common, in other words, for startup lawyers to set up meetings between clients and investors in the hopes that the latter will choose to invest in the former.

Although these meetings are frequently arranged, there is no guarantee that they will actually lead to investments being made in the startup. One North Carolina attorney observed: “Even though I make these introductions regularly, they do not happen regularly *with success*. Very few startups get funding.”<sup>72</sup> In some cases, clients will hire a particular lawyer primarily to obtain an introduction to a particular investor or group of investors. In these cases, the lawyer must set the client straight. As one North Carolina lawyer explained,

Some clients come to us expecting that this is our primary role. We disabuse them of that notion. No investor will invest in a startup because we introduce them. It’s not hard to find investors, and while there is probably some slight advantage to being referred to them by us, it’s the wrong reason to hire us.<sup>73</sup>

Another North Carolina lawyer remarked that he carefully considers which clients to introduce to particular investors: “I don’t want to send a

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and warranties made by their clients. Suchman & Cahill, *supra* note 2, at 694–95. We do not explore this topic at any length for three reasons. First, corporate lawyers of all stripes routinely give opinion letters in connection with financing transactions. This behavior is not unique to startup lawyers. Second, it has become less common in recent years for investors to ask firms to provide opinion letters in venture finance transactions. Third, and finally, the reputational backing provided by an opinion letter in the venture capital context is largely chimerical. It is highly unlikely that an investor would ever bring suit against a law firm that had given an opinion letter due to reputational constraints. See Coyle & Polsky, *supra* note 19, at 309–10.

68. Interview with Attorney I, North Carolina Law Firm IV, *supra* note 36.

69. Interview with Attorney V, New York Law Firm I, *supra* note 47.

70. Interview with Attorney II, North Carolina Law Firm III, in Raleigh, N.C. (Aug. 26, 2016) (notes on file with authors).

71. Interview with Attorney, North Carolina Law Firm I, *supra* note 45.

72. Interview with Attorney I, North Carolina Law Firm III, *supra* note 43.

73. Interview with Attorney III, North Carolina Law Firm II, *supra* note 38.

startup to an investor when [its] business is well outside the investor's scope. I know one investor, for example, that relies on [business-to-business] software companies for deal flow, so I will only send companies to him that fit this model."<sup>74</sup>

New York lawyers had similar responses. One stated, "It happens frequently; we'll make introductions when it makes sense for both parties. We have clients on both sides of the table and try to add value where we can with the relationships we have."<sup>75</sup> Another New York attorney commented,

It's rare that something comes of it, but I'll make an introduction about once every couple months. I do it occasionally, but when startups ask about it, I tell them I only do it if it's a really good match. Sometimes the startup's not even a client and just wants my intro to a fund client of mine.<sup>76</sup>

One New York attorney told us about a special department of nonlawyer finance professionals at his firm that is dedicated to helping introduce the firm's startup clients to investors:

Oh yeah, [I make introductions] all the time. I view that as part of our role. Unless they're a serial founder, they may not have any connections. The intro means a lot more coming from me, when I can go to the right partner at the right fund. We even have bankers who do this full time in-house. All they do is make introductions for our company clients to venture funds (for which we don't take a fee). They're all MBA former I-bankers who now do this full time.<sup>77</sup>

One of the hallmarks of startup lawyering, in other words, is a willingness to introduce one's clients to the "right" investors. In so doing, startup lawyers serve as reputational intermediaries on behalf of their clients.

### C. *Startup Lawyers as Regulatory Compliance Experts*

Scholars have also hypothesized that corporate lawyers add value to transactions by serving as regulatory compliance experts.<sup>78</sup> On one hand, a corporate lawyer may provide valuable assistance by advising a client on a regulatory issue relating to a specific transaction (such as securities

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74. Interview with Attorney, North Carolina Law Firm I, *supra* note 45.

75. Interview with Attorney II, New York Law Firm I, *supra* note 52.

76. Interview with Attorney I, New York Law Firm II, in New York, N.Y. (Sept. 16, 2016) (notes on file with authors).

77. Interview with Attorney I, New York Law Firm III, *supra* note 48.

78. See, e.g., Schwarcz, *supra* note 32, at 492.

law compliance in connection with a venture financing round).<sup>79</sup> This sort of regulatory advice is *transaction specific*. On the other hand, a corporate lawyer may provide useful advice to clients that operate in highly regulated industries.<sup>80</sup> This sort of regulatory advice is *client specific*. In some cases, therefore, a lawyer may add value by virtue of the fact that she routinely advises on deals of a certain type. In other cases, a lawyer may provide value by virtue of the fact that he routinely advises clients that operate in a certain type of regulatory environment.

In the context of startup lawyering, our interviewees reported that they generally do not provide regulatory advice of any stripe to early-stage biotechnology companies. At first glance, this may seem somewhat surprising. Biotechnology companies seeking to produce drugs for market, after all, operate in a highly regulated industry. The startup lawyer's regulatory advice is, however, rarely needed because the founders in this space are typically quite familiar with the relevant regulatory issues. As one North Carolina lawyer explained,

Most early-stage entrepreneurs in the life sciences arena have experience in working through regulatory issues—experience gained either during tenure at universities or at former life science employers. Through these experiences, the entrepreneurs in many cases have extensive contacts in the regulatory arena—consultants who they have relationships or former employees who provide guidance. It would be rare for a life science entrepreneur to come in to the office and start a conversation with a request for advice on regulatory matters—if you are in life sciences, there is a significant probability that you have had direct contact with regulatory specialists. So with respect to life science companies, regulatory issues outside of securities matters are not major topics of conversation in the early stages of the startup.<sup>81</sup>

Another North Carolina lawyer echoed these sentiments:

Our clients rarely, if ever, ask us to provide advice on FDA regulatory issues. During development stage, the regulatory function is handled by consultants or employees trained in the areas, and legal issues rarely come up. Other clients may have need on particular issues in late-stage/pre-approval development and most often will use one of the DC-area FDA boutiques, given

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79. *Id.* at 492–93.

80. *Id.* at 492.

81. Interview with Attorney II, North Carolina Law Firm II, *supra* note 36.

their proximity/connection to the regulators. Bottom line is we have little or no demand for FDA regulatory advice.<sup>82</sup>

With respect to early-stage technology companies, by comparison, our interviewees reported that they do occasionally provide regulatory advice on privacy and security matters.<sup>83</sup> As one North Carolina lawyer explained,

[M]any information technology companies are being formed by entrepreneurs with little or no experience in regulatory matters, and we do in fact advise on regulatory matters—primarily privacy and security. I would also state that this experience would apply to young entrepreneurs as well as seasoned veterans—for the veterans, there is someone in IT, or legal or regulatory affairs that takes care of the security and privacy issues, but little interaction with the young or more mature entrepreneurs.<sup>84</sup>

In summary, startup lawyers may occasionally add value to certain types of early-stage companies by serving as regulatory compliance experts. The precise extent of the value added will, however, vary depending upon the company and the industry.

#### *D. Startup Lawyers in Other Roles*

In addition to their roles as transaction cost engineers, reputational intermediaries, and regulatory compliance experts, startup lawyers occasionally play two additional roles that distinguish them from the typical corporate lawyer. First, these attorneys sometimes transmit community norms to entrepreneurs. Second, these attorneys frequently utilize nontraditional billing schemes that account for the fact that their clients will often lack the funds to pay for lawyering services when rendered. Each of these two roles is discussed below.

##### 1. Transmitters of Norms

Startup lawyers in Silicon Valley play an important role in “educating” clients in community norms.<sup>85</sup> One of these norms is that venture capital transactions are essentially nonadversarial.<sup>86</sup> In this

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82. Interview with Attorney I, North Carolina Law Firm II, *supra* note 44.

83. For a discussion of contemporary issues in privacy, see generally Jules Polonetsky & Omer Tene, *Privacy and Big Data: Making Ends Meet*, 66 STAN. L. REV. ONLINE 25 (2013); Symposium, *Privacy and Technology*, 126 HARV. L. REV. 1880 (2013).

84. Interview with Attorney II, North Carolina Law Firm II, *supra* note 36.

85. See Suchman & Cahill, *supra* note 2, at 699–700.

86. *Id.* at 700.

respect, venture capital transactions are understood to be quite different from loan agreements. As one North Carolina lawyer explained,

Where an investment transaction is done right, it's a partnership. It's different from a loan transaction. The lender has to protect itself. An equity investor has less to protect. VC investors have no interest in middling returns. There is no reason to focus on negative covenants. The structure should be to focus the startup's energy on the returns. There are *some* zero sum pieces of the deal. But mostly the deal is about aligning interests.<sup>87</sup>

This perspective is not always shared by founders who have no prior experience dealing with venture capitalists. These founders are often wary of venture capitalists and are unlikely to view negotiations with them as nonadversarial without considerable coaching from their attorney. As the same North Carolina lawyer explained,

In the early 1990s, the predominant notion was that the VCs were sharks who want to take over our business. My experience in Silicon Valley was totally the opposite. That particular misconception seems to have gone away. Some entrepreneurs think they need protection, but really, there is a strong spirit of partnership. The "us vs. them" attitude is out of place.<sup>88</sup>

One New York lawyer who had previously practiced in Silicon Valley expressed a similar view, highlighting differences between those two tech hubs:

In California, raising from VCs is so ingrained in the culture that nobody questions it. Trying to scale a tech company without VC money is pretty hard. In New York, there are fewer funds headquartered here, so there's less of a virtuous cycle and relationship-driven culture like there is in the Valley. But I also haven't seen much antipathy towards VCs from our client base. That may be self-selecting, though, if we're representing them.<sup>89</sup>

When asked about educating founders about venture investors, one New York attorney focused on encouraging his clients to find the right balance:

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87. Interview with Attorney III, North Carolina Law Firm II, *supra* note 38.

88. *Id.* Another North Carolina lawyer expressed a somewhat different perspective on his clients' perceptions of venture capitalists: "People do walk in with some knowledge about angels or VCs and had some dealings with them. They've heard a lot about VCs, and what they've heard they don't like. I sometimes have to say not all VCs are assholes." Telephone Interview with Attorney I, North Carolina Law Firm V, *supra* note 53.

89. Interview with Attorney I, New York Law Firm I, *supra* note 46.

Some entrepreneurs think of the VCs as being all knowing and defer to them perhaps more than necessary. Others look at VCs as being not on the same team as them, as having interests not aligned. Neither approach is right for what a startup is in reality: a partnership after the investment occurs. The VCs have tons of market knowledge and relationships that can really help around the table, but at the end of the day, the entrepreneur is bringing a lot of value to the equation and shouldn't feel beholden to the VCs or like they're the executors of the VC's vision.<sup>90</sup>

Another New York attorney also found that sometimes his clients' initial attitude toward investors was too deferential: "Most clients come in thinking that it should be a collaborative process with investors, not especially antagonistic. In fact, some clients are too trusting of their VCs or unwilling to negotiate things they probably should."<sup>91</sup> However, other New York lawyers still found that they had to spend significant time disabusing their clients of preconceived notions about venture investors:

I have these conversations all the time. It happens more here in New York than in the Valley by a factor of ten or more. Founders come in suspicious of vulture capitalists and tell horror stories they've heard. You have to take them by the hand and explain that there are ne'er-do-wells in every industry, but you have to find the right people.<sup>92</sup>

Another hallmark of attorneys representing startups, therefore, is a predisposition to view venture capitalists as potential long-term partners rather than adversaries. These startup lawyers often actively work to instill these norms in their clients.

## 2. Designers of Innovative Billing Schemes

Startup lawyers represent founders and startups. In many cases, these clients have limited resources.<sup>93</sup> In an ideal world, they will—with the lawyer's assistance—raise money from investors. Unless and until this money is raised, however, many of these same clients will be unable to pay their lawyers.<sup>94</sup> Startup lawyers address this challenge in two

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90. Interview with Attorney II, New York Law Firm I, *supra* note 52.

91. Interview with Attorney III, New York Law Firm I, in New York, N.Y. (Aug. 25, 2016) (notes on file with authors).

92. Interview with Attorney IV, New York Law Firm I, *supra* note 64.

93. See Susan C. Morse, *Startup Ltd.: Tax Planning and Initial Incorporation Location*, 14 FLA. TAX REV. 319, 342 (2013).

94. *Id.* at 347 ("[I]f startups have 'no revenue,' and 'no product,' they have 'no future,' and cannot pay their legal bills." (footnote omitted) (citing Telephone Interview with Silicon Valley law firm partner (Feb. 16, 2013))).



ways. First, many firms will agree to defer the bills owed to them by their startup clients until funding is raised. Second, some firms will take equity in the startup client in lieu of cash.

*a. Deferred Billing*

In many cases, startup lawyers will agree to defer fees until their client raises capital from an investor. In some cases, the period of deferral can be lengthy. One North Carolina lawyer commented that he once deferred a client's fee for twenty years.<sup>95</sup> The practice of deferring fees is necessary, however, because the clients often lack the ability to pay for services when rendered. As one North Carolina attorney stated,

Normally we will bill startup clients monthly. They will rarely pay on time. They've got to raise money to pay you. You wind up writing off a lot of fees. The larger, more established companies pay the bills and make it possible to take on the startup clients, some (but not all) of whom will eventually pay.<sup>96</sup>

Another North Carolina lawyer observed that

[a] lot of the work we do puts us at risk of not ever getting paid. Sometimes we'll assume that risk knowingly, as when a serial entrepreneur has a really hot startup. We'll run a tab and count on the funding to come through at some point. Other times we'll just do it for pleasure and hope for the best.<sup>97</sup>

The New York attorneys told a similar story. One lawyer commented on the role of fee deferral in helping early-stage businesses grow: "We will defer fees, depending on the situation, up to a certain amount until funding or revenue comes in. It makes no sense for clients to spend their limited cash on us instead of building the business early on."<sup>98</sup> Another attorney remarked,

We defer billing with most clients, but many of those clients come to us with a deal on the table, so we're confident we'll get paid shortly. Otherwise, we can defer up to a certain amount and have a conversation about getting paid above that amount if the legal needs are outpacing collections by too much.<sup>99</sup>

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95. Interview with Attorney II, North Carolina Law Firm IV, *supra* note 59.

96. Interview with Attorney I, North Carolina Law Firm III, *supra* note 43.

97. Interview with Attorney I, North Carolina Law Firm IV, *supra* note 36.

98. Interview with Attorney II, New York Law Firm I, *supra* note 52; *see also* Interview with Attorney I, New York Law Firm III, *supra* note 48 ("We will defer fees until money is raised but not all the time.").

99. Interview with Attorney III, New York Law Firm I, *supra* note 91.

A third New York attorney highlighted the risks of deferral and the steps taken to minimize those risks:

We do end up writing off a significant amount of fees for clients where we've deferred, and they end up not raising money, but we try to limit that by selecting only clients we think will raise money, and it usually all comes out in the wash. The deferments are also limited in time and amount so that it doesn't become a substantial credit risk for us.<sup>100</sup>

The risk that a law firm will not be paid by its startup clients is real. This risk is much less salient when corporate lawyers represent more established business entities because these entities (by definition) have a reliable revenue stream. Startup lawyers are, therefore, unique among lawyers who represent for-profit corporations in that they face a material risk of nonpayment every time they take on a new client. In response, these attorneys have devised billing schemes that address this problem.

*b. Equity Compensation*

In order to address the risk of nonpayment, some law firms will take equity in their startup clients.<sup>101</sup> In so doing, these law firms are casting their lot with their client. If the startup is a success, the firm will participate in the upside. If the startup fails, the firm will likely receive nothing. This arrangement recasts the attorney in the role of venture capitalist. The attorney must decide whether the client's prospects are good enough to warrant giving up its status as a trade creditor and becoming a stockholder. The outcome of this assessment will vary depending on the client. As one North Carolina lawyer put it, "I have the worst business model in America. Almost no one can afford to pay me when they come in. Good teams are worth the risk, though. If I really like the deal, I'll take a small equity stake and defer fees."<sup>102</sup> Another North Carolina lawyer offered a somewhat more detailed explanation of his decision whether to take equity in a client:

We do take equity in some companies but not significant amounts. When and how much depends on the risk profile of the client. There is risk in money (fees accrued and written off) and risk in lost time. We may give the client a credit of \$20–25k for one year

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100. Interview with Attorney I, New York Law Firm I, *supra* note 46.

101. See generally Casey Perrino, Note, *Between a Rock and a Hard Place: What to Do When One Must Take Equity in a Client*, 28 GEO. J. LEGAL ETHICS 825 (2015) (discussing ethical issues that arise when law firms take equity in clients).

102. Interview with Attorney II, North Carolina Law Firm III, *supra* note 70.

in exchange for 1–2% up front. The way these things go, six or seven of these companies will be wallpaper. The other three to four will hit. We try to cover the fees for the \$20–25k we wrote off by getting a good return on the ones that hit.<sup>103</sup>

It is not, however, always so easy. Just as Groucho Marx once observed that he would never want to belong to a club that would admit him as a member,<sup>104</sup> one North Carolina lawyer pointed out that those clients who were willing to give their lawyers an equity stake were—as a general matter—not the ones in which the law firms wanted to invest. In his words,

We do take equity in our clients. . . . There is a deferral of initial fees, and we take equity in the company. That being said, the practice of taking equity in a client is less ingrained here than in some other places. *And the best companies don't want to do it.* So there's an adverse selection problem. . . . The clients in which you would most like to take equity won't agree to it.<sup>105</sup>

Another North Carolina attorney observed that the willingness of some startups to trade their equity for legal services varied by region:

Very occasionally, we will take equity in a client but usually not. This is a big difference between North Carolina and the Valley. If a North Carolina lawyer asks for equity, the client is offended. We deal with some companies in the Valley that *offer* equity. Their view is that they want us to have a stake in them and have us be part of the team. That practice just never took off in North Carolina.<sup>106</sup>

In North Carolina, therefore, some startup lawyers will agree to take equity in their startup clients. This practice is not, however, universally followed.<sup>107</sup>

103. Interview with Attorney I, North Carolina Law Firm IV, *supra* note 36.

104. *I Don't Want to Belong to Any Club That Will Accept Me as a Member*, QUOTE INVESTIGATOR, <http://quoteinvestigator.com/2011/04/18/groucho-resigns/> [<http://perma.cc/NLP5-PKZT>].

105. Interview with Attorney I, North Carolina Law Firm II, *supra* note 44.

106. Interview with Attorney I, North Carolina Law Firm I, *supra* note 45. Informal conversations the authors had with practitioners in Silicon Valley who had extensive knowledge of current and historic billing practices confirmed that the practice of taking equity in exchange for services has declined significantly since the dot-com era, particularly among the top-tier startup law firms in Silicon Valley.

107. See Interview with Attorney I, North Carolina Law Firm III, *supra* note 43 (“I’m just uncomfortable taking equity. I’ve done it but rarely.”). One North Carolina lawyer was prohibited from taking equity by his law firm. See Telephone Interview with Attorney I, North Carolina Law Firm V, *supra* note 53 (“We have a firm policy that taking equity is a conflict of interest, so we don’t do it.”)

The practices reported by the New York lawyers in this respect were very different. One of them expressly invoked the adverse selection problem to explain why he does not strike equity-for-services arrangements: “Generally the companies that want to pay me in equity, there’s a reason they’re cash strapped. The ones that don’t offer that are the ones whose equity you want.”<sup>108</sup> A second New York lawyer found that taking equity in a client made him less rational when deciding whether to continue the representation of a failing company: “We don’t take equity. It creates weird incentives to keep working for businesses that might not warrant it. We still occasionally see some companies out West that had previous law firms that took equity for services (with vesting).”<sup>109</sup> A third New York attorney believes the practice of investing cash in clients better aligns the attorney and client than does taking equity in exchange for legal services:

If we were good at picking the winners and losers, we’d be investors full-time. We’re better at following smart investors (by investing small amounts in those rounds). I also never want to negotiate with my clients. I never want them to feel like we’re opposite them.<sup>110</sup>

Still, another New York lawyer agreed that it was better for lawyers to pay cash for any equity they receive but for a different reason:

[W]e don’t think it’s appropriate to crowd out a startup’s cap table for no money. We advise clients not to freely give away their equity, and that should include giving it to us. We will invest in a client’s early-stage rounds at the same price and on the same terms as a VC, but in small amounts.<sup>111</sup>

There are, in short, divergent practices between startup lawyers in New York City and North Carolina when it comes to taking equity in startup clients in lieu of cash for legal services rendered.

### III. THE MIGRATION OF WEST COAST NORMS

There exist several noteworthy differences in the way that startup lawyers practice in different parts of the country. In North Carolina, startup lawyers rarely screen their clients on the basis of any criteria other than the ability to pay for services rendered. In New York and Silicon Valley, by contrast, startup lawyers routinely screen their clients

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108. Interview with Attorney I, New York Law Firm II, *supra* note 76.

109. Interview with Attorney IV, New York Law Firm I, *supra* note 64.

110. Interview with Attorney V, New York Law Firm I, *supra* note 47.

111. Interview with Attorney I, New York Law Firm I, *supra* note 46.

based on various criteria. In New York, and increasingly in Silicon Valley, startup lawyers are not taking equity in their clients in exchange for services, though many will invest cash in select clients in connection with financing rounds led by prominent venture investors. In North Carolina, by comparison, it is more common for startup lawyers to take equity in their clients when they agree to represent them. These differences suggest that significant regional variations in startup lawyering practice may still exist.

How can one explain these variations? For decades, scholars and industry observers found vastly different approaches to startup investing and lawyering based on geography, with significant variations in practice correlated with the locations of the startup, the VCs, and their respective lawyers.<sup>112</sup> They framed these differences in terms of a dichotomy: West Coast vs. East Coast—i.e., Silicon Valley vs. Boston, the two primary tech hubs for much of the history of venture capital.<sup>113</sup> As startup ecosystems across the country have continued to develop and mature, we believe that this dichotomy may no longer adequately describe the variations we observed in startup lawyering in different geographical regions.

To help explain why, it may be instructive to briefly consider the shifting landscape of venture capital contract terms. Scholars and practitioners alike have long maintained that geography and culture play an important role when it comes to shaping the terms of venture capital contracts.<sup>114</sup> The conventional wisdom explaining the East Coast/West Coast divide held that contracts on the West Coast were more favorable to the company because the Silicon Valley VCs viewed their relationship with portfolio companies as a “partnership[.]”<sup>115</sup> Contracts on the East

112. For a sampling of the literature, see Robert P. Bartlett, III, *Commentary*, 51 ARIZ. L. REV. 47, 53–54 (2009); Richard A. Booth, *Give Me Equity or Give Me Death—The Role of Competition and Compensation in Silicon Valley*, 1 ENTREPRENEURIAL BUS. L.J. 265, 277 (2006); Dana M. Warren, *Venture Capital Investment: Status and Trends*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 1, 12 (2012); Sarah Reed, *Will West Ever Meet East?*, BUS. L. TODAY, May–June 2002, at 24, 24; Anne Marie Borrego, *East vs. West: Location, Location, Location*, INC.COM (Dec. 1, 1999), <http://www.inc.com/articles/1999/12/15732.html> [https://perma.cc/9ZDV-UJ99].

113. See Bartlett, *supra* note 112, at 53–54; Booth, *supra* note 112, at 277–78; Warren, *supra* note 112, at 12; Reed, *supra* note 112, at 24; Borrego, *supra* note 112.

114. See, e.g., Reed, *supra* note 112 (discussing how the East Coast and West Coast differentiate in financing term sheets); Ola Bengtsson & S. Abraham Ravid, *The Geography of Venture Capital Contracts 1* (March 17, 2009) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1361827](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1361827) [https://perma.cc/FRH4-W5XW (staff-uploaded archive)] (analyzing the geographical and regional elements that influence contract terms) (on file with the North Carolina Law Review).

115. See Suchman & Cahill, *supra* note 2, at 700 (quoting a Silicon Valley attorney as stating that venture financing “is not an adversarial process” and that “[p]eople who view it

Coast, by contrast, were said to contain deal terms that were less favorable to the company because East Coast VCs took a more “banker-like” approach to their portfolio companies.<sup>116</sup>

There is evidence to suggest, however, that repeated exposure to companies in Silicon Valley resulted in East Coast VCs adopting more company-friendly deal terms in subsequent deals.<sup>117</sup> The more deals that East Coast VCs did in Silicon Valley, in other words, the more their deal terms came to resemble the terms used by their counterparts on the West Coast.

Our research indicates that a similar effect may occur when it comes to startup lawyering practices—that West Coast startup lawyering practices have increasingly migrated to other startup ecosystems, resulting in the decreasing relevance of the East Coast/West Coast dichotomy. The key distinction for lawyering practice in the startup space today relies less on geography and more on whether a lawyer is what we would call a “startup law aficionado”—someone who is in-the-know and steeped in startup community norms.<sup>118</sup> Startup law aficionados, in our view, are lawyers that are primarily in the business of representing venture-backed startups and who see significant startup deal flow, as opposed to lawyers that practice on the periphery of startup ecosystems, only occasionally representing early-stage businesses, angel

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properly . . . realize that they are creating a very long-term partnership between the venture capitalists on the one hand and the entrepreneurs on the other”).

116. See Bengtsson & Ravid, *supra* note 114, at 3. Specifically, Bengtsson and Ravid found that contracts involving East Coast VCs were more likely to grant the investors (1) cumulative dividends, (2) a right of redemption, and (3) participating preferred stock. *See id.* at 36 tbl.3B.

117. Bengtsson and Ravid hypothesize that the geographic disparities that they identify are attributable to three factors. First, they speculate that startups have more leverage to negotiate terms in markets, such as Silicon Valley, where there is a high concentration of high-quality VCs competing for access to promising startups. *Id.* at 22. Second, they note that the regional customs and norms of Silicon Valley may shape the way that companies and VCs in that region view the venture capital relationship. *Id.* Third, they surmise that the proximity of Silicon Valley VCs to companies in that region reduces monitoring costs. *Id.* Since monitoring costs are relatively low, they argue, Silicon Valley VCs rely less on contractual provisions to protect their interests in their portfolio companies. *See id.* at 20–21. Bengtsson and Ravid ultimately conclude that venture capital contracts are not influenced solely by determinants, such as agency costs. *See id.* at 21. Culture and geography also play a role in shaping the terms of these agreements. *Id.*

118. See, e.g., Interview with Attorney II, New York Law Firm I, *supra* note 52 (“Having firms who do this type of work regularly on the other side makes the process much easier than going up against a family-friend lawyer or generalist who doesn’t understand the startup practice.”); Interview with Attorney IV, New York Law Firm I, *supra* note 64 (“Lawyers who aren’t in this business make everything harder . . . I’d always rather see a venture lawyer I know on the other side because I don’t have to educate them on doing these deals and what’s important.”); Interview with Attorney I, New York Law Firm III, *supra* note 48 (“It matters whether the other lawyers know what they’re doing; it’s not a geography issue.”).

investors, or nontraditional VC investors. Startup law aficionados can be found in any geographical region, though they tend to be clustered in technology hubs. Silicon Valley is still such a center of gravity in the startup world that startup law aficionados outside the Bay Area will inevitably come into contact with Silicon Valley startup lawyers and venture investors. As this occurs, the lawyering practices of startup law aficionados outside of Silicon Valley increasingly reflect those of their counterparts in Silicon Valley—and we predict that repeated exposure will only increase the effect.

One possible explanation for the greater degree of convergence with Silicon Valley practices that we found in New York as compared with the Research Triangle, therefore, is that startup practice in New York is increasingly dominated by law firms with strong ties to Silicon Valley. Startup legal practice in North Carolina, by comparison, is more isolated from Silicon Valley, dominated by firms that are based in the Southeast. While these firms employ a number of lawyers who cut their teeth at firms in Silicon Valley, they also employ a great many lawyers who did not. This latter group of lawyers may, therefore, be less steeped in West Coast norms than those who began their practice on the West Coast or those who regularly interact with West Coast lawyers and investors. As a result, the startup lawyers in New York and the Research Triangle may simply be at different stages along the path of convergence with Silicon Valley startup lawyering practices and norms.

#### CONCLUSION

In the technology world, it is common to assign version numbers to software upgrades. These numbers generally correspond to new developments in the software and enable end users to identify the most up-to-date version of a particular program. In the realm of startup lawyering, there is no versioning equivalent, which means the evolution of attorney practice is more difficult to track. To the extent that trends are discernible, however, it would appear that the act of providing legal services to early-stage technology companies outside of Silicon Valley today is different in a number of respects from the act of providing similar services to companies within Silicon Valley in the early 1990s. At the same time, the work of a startup lawyer retains many of the core features that defined this earlier era. The advent of Startup Lawyering 2.0 thus represents a difference in degree—rather than a difference in kind—from the era that preceded it.