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### Beyond Gilson: The Art of Business Lawyering

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## BEYOND GILSON: THE ART OF BUSINESS LAWYERING

by  
*Praveen Kosuri\**

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## I. INTRODUCTION

Thirty years ago, Ronald Gilson asked the question “[w]hat do business lawyers *really* do?”<sup>1</sup> That question sparked an ongoing effort by transactional scholars to describe what skills transactional business lawyers employ to provide value to their clients. Gilson described those skills as “transaction cost engineering.”<sup>2</sup> Unsatisfied with that answer, 10 years later, Karl Okamoto focused on the role of business lawyers as reputational intermediaries. Most recently, Steven Schwarcz attempted to isolate the unique role that business lawyers play in transactions and found it to be in navigating and managing regulatory costs. These scholars provided the canonical views of what business lawyers do and informed law schools how to teach it. Though differing in their conclusions, Gilson, Okamoto, and Schwarcz each focused on the narrow role of business lawyers in large public mergers and acquisitions (M&A) deals, and mostly execution work at that. The deal lawyer became the iconic transactional lawyer. Law schools responded with courses in M&A transactions, international business transactions, and deals that highlighted regulatory rules, technical lawyering, and execution.<sup>3</sup>

Today, the conception of business lawyers has evolved from that of Gilson, Okamoto, and Schwarcz. Even within the deal-execution world of big M&A, it has expanded to include deal-making and post-closing advising. Business lawyers are also recognized for their role in private mergers and acquisitions; start-up ventures; real-estate transactions; attracting, retaining, and firing employees; protecting intellectual property; counseling nonprofit, hybrid, and social enterprises; financing; restructuring; and tax. Rather than focusing exclusively on technical lawyering skills, the best business lawyers embrace the role of full-fledged advisors to their clients and employ a robust skillset for problem solving that goes beyond

<sup>1</sup> Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 241 (1984).

<sup>2</sup> *Id.* at 302.

<sup>3</sup> Daniel D. Bradlow & Jay Gary Finkelstein, *Training Law Students to Be International Transactional Lawyers—Using an Extended Simulation to Educate Law Students About Business Transactions*, 1 J. BUS., ENTREPRENEURSHIP & L. 67, 68, 71 (2007); Victor Fleischer, Essay, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, 478 (describing the Deals course at Columbia Law School started by Ronald Gilson, Victor Goldberg, and David Schizer); see also Kenneth N. Klee, *Teaching Transactional Law*, 27 CAL. BANKR. J. 295, 295, 299–302 (2004) (describing survey results of what types of transactional courses law schools teach; the most popular courses were real estate transactions, general business transactions, and international business transactions).

what is typically taught in law schools. In many ways, what exceptional business lawyers practice is much more art than science.

The conversation started by Ronald Gilson thirty years ago continues today as evidenced by this symposium, “Educating the Transactional Business Lawyer,” which explores how law schools and legal educators have transformed the development of business lawyers.<sup>4</sup> Over the past 30 years law schools have moved from transactional law courses focused on large, public deals to a broader, more expansive view of business lawyering. At this symposium we have learned about advances in representing social enterprises<sup>5</sup> and educating students in transactional intellectual property law.<sup>6</sup> We heard how international transactions have been brought into clinics.<sup>7</sup> We have also learned how massive open online courses are being used to teach large numbers of people about the legal aspects of entrepreneurship.<sup>8</sup> All of these developments are extremely positive in the education of future business lawyers.

The question remains, though, whether law schools can design and implement cohesive, coherent, and robust curricula that develop great business lawyers. I believe they can. The analysis starts with understanding what great business lawyers look like and ends with whether we can teach law students not only the technical lawyering skills required but also the art of business lawyering.

In Part II of this Article, I examine Ronald Gilson’s description of what business lawyers do and the related work of Karl Okamoto and Steven Schwarcz. I assert that though they each describe a function of business lawyering, their descriptions are too narrow and fail to fully describe what business lawyers do or, more importantly, how they add value to clients.

In Part III, I examine additional descriptions of business lawyering by transactional scholars to uncover a richer picture of what business lawyers

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<sup>4</sup> The Symposium used the term “transactional business lawyer.” Much of the literature on this subject uses the term “business lawyer” or “deal lawyer” to refer to the same type of person. I use terms “transactional business lawyer” and “business lawyer” synonymously to refer to lawyers who serve business clients in full range of transactional matters. I use “deal lawyer” to refer to M&A lawyers.

<sup>5</sup> Patience A. Crowder, *Design Principles for Transactional Law Clinics*, 19 LEWIS & CLARK L. REV. 413 (2015); Jay A. Mitchell and Michelle Sonu, *Food Banks and Investment Banks: Clinic Design for Corporate Practice*, 19 LEWIS & CLARK L. REV. 267 (2015); Alicia E. Plerhoples, *Risks, Goals, and Pictographs: Lawyering to the Social Entrepreneur*, 19 LEWIS & CLARK L. REV. 301 (2015).

<sup>6</sup> Cynthia L. Dahl, *Teaching Would-Be IP Lawyers to “Speak Engineer”: An Interdisciplinary Module to Teach New Intellectual Property Attorneys to Work Across Disciplines*, 19 LEWIS & CLARK L. REV. 361 (2015); Jennifer S. Fan, *Institutionalizing the USPTO Law School Clinic Certification Pilot Program for Transactional Law Clinics*, 19 LEWIS & CLARK L. REV. 327 (2015).

<sup>7</sup> Deborah Burand, *Crossing Borders to Create Value: Integrating International LL.Ms into a Transactional Clinic*, 19 LEWIS & CLARK L. REV. 441 (2015).

<sup>8</sup> Esther Barron & Stephen F. Reed, *A Closer Look at Distance Learning: The Law and the Entrepreneur MOOC*, 19 LEWIS & CLARK L. REV. 395 (2015).

do and how they add value. I build on that more complete picture to highlight a set of characteristics that differentiate great business lawyers from the rest. These seven characteristics—understanding business, allegiance to their client, understanding people, becoming part of the team, creativity, problem solving, and adding value—go beyond technical skills to define the art of lawyering.

In Part IV, I discuss how law schools can better educate and develop transactional business lawyers with a coherent, integrated, and progressive curriculum that resembles that of the litigation curriculum. I lay out a framework that classifies different business lawyering skills into three logically progressing tiers—foundational, transitional, and optimal. Foundational skills are rooted in fundamental analysis, statutory knowledge, and technical lawyering, all of which can be taught across the entire law school curriculum starting in the first year. Transitional skills add a level of judgment and applied theory which are best taught in simulation courses or practically oriented courses taught by practitioners using problem based learning to develop these skills. Optimal skills are those lawyering skills that set the great business lawyer apart from the good and are best learned and practiced in clinical settings.

I conclude by asserting that law schools have come a long way in educating law students who desire to be business lawyers, but they can do better. Though technical lawyering skills are essential, they are merely foundational and, without more, limit the value that a business lawyer can provide to a client. Law schools should do more to demonstrate and teach the art of business lawyering—something they are unlikely to get in practice. Creating a deliberately designed curriculum to logically and progressively take students through the different tranches of business-lawyering skills will provide them with the greatest opportunity to engage in the art of business lawyering wherein lies the highest value lawyering for clients.

## II. WHAT DO BUSINESS LAWYERS REALLY DO?

Over the past thirty years scholars have examined what business lawyers do and how they add value to clients. Ronald Gilson famously began the enterprise with his theory of deal lawyers as “transaction cost engineers.”<sup>9</sup> Ten years later, Karl Okamoto revisited Gilson’s question looking for greater depth in the answer and suggested that transactional lawyers added value by acting as reputational intermediaries.<sup>10</sup> Most recently, Steven Schwarcz attempted to isolate the particular role of business lawyers in deals and concluded that lawyers contributed most to transactions by

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<sup>9</sup> Gilson, *supra* note 1, at 243, 255.

<sup>10</sup> Karl S. Okamoto, *Reputation and the Value of Lawyers*, 74 OR. L. REV. 15, 15, 17–19 (1995).

reducing regulatory costs.<sup>11</sup> Gilson, Okamoto, and Schwarcz all examined business lawyering through the lens of mergers and acquisitions. All were attempting to help business lawyers defend their role in business transactions by ascertaining what functions were defensible from other transactional advisors. All of their conclusions are accurate in some form. None of them, however, provide a complete picture of what great business lawyers actually do and how they do it.

A. *Business Lawyer as Transaction Cost Engineer*

Thirty years ago, Ronald Gilson began his seminal article with the question, “what do business lawyers *really* do?” His goal was to answer another question, which was why do clients pay business lawyers large fees for the things they do? To Gilson, justification for that compensation must be rooted in rational economic theory. Gilson’s fundamental hypothesis was “[i]f what a business lawyer does has value, a transaction must be worth more, net of legal fees, as a result of the lawyer’s participation.”<sup>12</sup>

Ultimately, Gilson concluded that a business lawyer does not add value simply by securing a bigger piece of the pie for his client than he would have otherwise had without the lawyer, but, rather, the lawyer adds value by growing the pie so that there is more to be had by all.<sup>13</sup> How do lawyers do this? For Gilson, the answer lay in economic theory. Applying Capital Asset Pricing Model (CAPM) theory, Gilson assumed that “capital assets will be priced correctly as a result of market forces, [and, therefore] business lawyers *cannot* increase the value of a transaction.”<sup>14</sup> However, CAPM only worked in the hypothetical world of perfect information. Business lawyers, in fact, had a role to play in the real world. That role was to reduce inefficiencies in transactions which brought the real-world transaction closer to the hypothetical value suggested by CAPM. Gilson labeled this process “transaction cost engineer[ing].”<sup>15</sup> Lawyers engineered transactions by creating structures that minimized leakage due to inefficiencies. The inefficiencies were most often regulatory—tax, antitrust, labor law, products liability, ERISA, securities, or corporate, among others.<sup>16</sup> Gilson tested his theory by examining one of the most

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<sup>11</sup> Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 487–88, 506 (2007).

<sup>12</sup> Gilson, *supra* note 1, at 243 (emphasis omitted).

<sup>13</sup> *Id.* at 239–313; see also William J. Carney, Ronald J. Gilson & George W. Dent, Jr., Keynote Discussion, *Just Exactly What Does a Transactional Lawyer Do?*, 12 TRANSACTIONS: TENN. J. BUS. L. (SPECIAL REPORT) 175, 176–77 (2011) (characterizing Gilson as describing that the distributive negotiation between parties is still present even while simultaneously working to grow the size of the pie for all parties).

<sup>14</sup> Gilson, *supra* note 1, at 251.

<sup>15</sup> *Id.* at 244.

<sup>16</sup> *Id.* at 296–97.

essential things lawyers produce in the M&A context: an asset-purchase agreement. Through negotiating and drafting the asset-purchase agreement, Gilson held that business lawyers reduce market inefficiencies and thereby create value.<sup>17</sup>

Gilson concluded that business lawyers earn their keep by engineering deals to increase overall value by decreasing inefficiencies. He correctly pointed out that there is nothing unique about lawyers in performing that role and that it would likely be encroached upon by other professions, namely accountants and investment bankers. In fact, we have seen that trend over the past 30 years with an increase in multidisciplinary practice.<sup>18</sup> Gilson's view of the future was simple. Either lawyers must defend their position as chief transaction cost engineers or devolve into mere draftsmen for a different architect and give up the premiums charged to clients.

#### B. *Business Lawyer as Reputational Intermediary*

Ten years after Gilson's seminal piece, Karl Okamoto took a more empirical approach to understanding how business lawyers add value, but fundamentally, he too was asking why do clients pay business lawyers large sums of money for their services?<sup>19</sup> Okamoto's conclusion was that business lawyers operate as reputational intermediaries to facilitate transactions and reduce information asymmetries.<sup>20</sup>

For Okamoto, lawyers perform this function primarily through the production of legal opinions. Legal opinions are essentially insurance policies issued by law firms to participants in a transaction to give comfort about some piece of information that is difficult for the client to independently verify and necessary for the deal to close.<sup>21</sup> The law firm takes responsibility for performing the diligence necessary to verify the piece of information. The firm's reputation as an honest, arm's length third party with no incentive to lie or mislead facilitates the transaction, even more so because the firm risks direct economic loss if the information it is validating proves to be untrue. Clients are willing to pay for this service because it shifts risk to the law firm and preserves the relationship between the transacting parties.

Okamoto based his theory of lawyer as reputational intermediary on five tenets. First, that in-house lawyers cannot serve the same function as outside lawyers because they are in fact insiders. Second, law firms are al-

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<sup>17</sup> *Id.* at 257–58, 262.

<sup>18</sup> John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 *FORDHAM L. REV.* 83, 84–89 (2000); see also Larry E. Ribstein, *The Death of Big Law*, 2010 *WIS. L. REV.* 749, 798–99.

<sup>19</sup> Okamoto, *supra* note 10, at 16.

<sup>20</sup> *Id.* at 18.

<sup>21</sup> *Id.*; see also Darrel A. Rice & Marc I. Steinberg, *Legal Opinions in Securities Transactions*, 16 *J. CORP. L.* 375, 377–78, 381 (1991).

ready ordered along a reputational spectrum that allows clients to differentiate among them and pay accordingly. Third, the function of law firms as reputational intermediaries is declining. Fourth, decreased information asymmetry has decreased the demand for legal opinions. And fifth, with the decreased demand for lawyers as reputational intermediaries, there is an opportunity for lawyers to reassert themselves as experts in essential areas where clients actually need counsel.<sup>22</sup>

Though Okamoto focused on the legal opinion as the primary way lawyers lend their reputations to clients and transactions, his focus moved away from what business lawyers do to the value law firms provide. Okamoto posited that the amount a lawyer or law firm can charge for their reputation is directly correlated to the normative value society has bestowed on a firm, and is achieved through longevity, pedigree, and brand. In fact, Okamoto's fifth tenet acknowledged this focus on firm rather than the lawyer as reputational intermediary and suggested that with decreased demand for legal opinions, individual lawyers may reassert their functionality based on merit achieved in areas where clients need their expertise.<sup>23</sup>

### C. *Business Lawyer as Controller of Regulatory Costs*

Twelve years after Okamoto, Steven Schwarcz remained unsatisfied with previous explanations about how transactional lawyers add value.<sup>24</sup> Where both Gilson and Okamoto found functions lawyers perform that added value to transactions, they acknowledged that one need not be a lawyer to perform them. Schwarcz looked to empirically answer the question, "what value transactional lawyers actually provide?" by attempting to isolate the lawyer functions.<sup>25</sup>

Schwarcz began with a basic conception of transactional lawyering, similar to that set forward by Gilson and Okamoto—negotiation, contract drafting, and opinion giving.<sup>26</sup> In attempting to isolate the true lawyer functions—those that no other advisor can do—he narrowed the definition even further.

Schwarcz tested six theories for how business lawyers might add value to clients: (1) by minimizing potential for litigation; (2) by reducing transactional costs (Gilson's theory); (3) by reducing regulatory costs; (4) as a reputational intermediary (Okamoto's theory); (5) via enhanced communication because of attorney-client privilege and confidentiality; and (6) by creating economies of scope.<sup>27</sup> Schwarcz tested all six hypothe-

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<sup>22</sup> Okamoto, *supra* note 10, at 18–19.

<sup>23</sup> *Id.* at 45–46.

<sup>24</sup> Schwarcz, *supra* note 11, at 486–87.

<sup>25</sup> *Id.* at 487–88.

<sup>26</sup> *Id.* at 486.

<sup>27</sup> *Id.* at 491.



ses by surveying practicing attorneys and clients.<sup>28</sup> His conclusion was that only the third hypothesis, reducing regulatory costs, is unique to the lawyer's role and is how transactional lawyers actually provide value.

The regulatory costs that Schwarcz identified as the focus of lawyer cost-minimization efforts are not client industry regulations but rather transactional regulations. In other words, lawyers focus on rules governing the deal, not rules governing the client's underlying business. These are the same regulatory issues that Gilson identified. Schwarcz described them as:

[E]nsuring that desired legal priorities are achieved, that security interests are properly perfected, and that subordination agreements are enforceable; that indenture covenants are not violated and that covenant protections adequately balance debtor and creditor needs; that commercial-law remedies made available upon insolvency or default work in harmony with debtor-creditor law protections; that legal entities are established in the form . . . and with the governance characteristics most effective for the task. . . ; that guaranties and other credit supports are legally enforceable; that any special-purpose entities achieve the applicable legal requirements of rating agencies and investors . . . ; that cross-border legal demands are complied with; and that any securities law requirements are met.<sup>29</sup>

Everything in Schwarcz's description is technical lawyering, and for Schwarcz, the means by which business lawyers affect value.

#### *D. The Answer to the Question Is Still Incomplete*

Gilson, Okamoto, and Schwarcz take a very narrow view of what it is that lawyers do. They each exclusively look at deal execution as the province of business lawyering. They exclude any role the lawyer might play before there is a deal to execute or after the deal has transpired. They also focus on measurable, economic value. Gilson provided an incomplete answer to his opening question of "what do business lawyers *really* do?" Gilson dismissed as irrelevant much of what business lawyers do under the belief that those things do not add value in quantifiable economic

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<sup>28</sup> Schwarcz's study was conducted by sending a questionnaire to both clients and lawyers. His conclusions are based on 75 lawyer responses and 17 client responses. *Id.* at 489 n.16. Some of the client responses came from the companies' general counsel. *Id.* at 488 n.15. Asking lawyers how they provide value is like asking a carpenter what the most important tradesperson is in building a house. Clients are the most important actors in answering the questions about how lawyers add value. They are the consumers of the services and the payers of the bill. If they consume legal services that do not add value, presumably they would not retain that lawyer again or would not pay the bill. This implies that lawyers must provide value to clients in multiple ways since clients continue to hire lawyers and pay for their services. An interesting study would be to evaluate the different rates clients pay for differing legal services. Presumably, the higher rates are attached to higher value service.

<sup>29</sup> Schwarcz, *supra* note 11, at 501-02.

terms. Instead, he limited the work of business lawyers to structuring transactions to minimize leakage or drafting purchase agreements to eliminate inefficiencies. Gilson stressed that by focusing on how they add value, business lawyers would be better able to sustain themselves in the future. However, his future depicts business lawyers who are mere technicians. In fact, technology is already replacing technical lawyer functions like creating the most optimal terms in contracts.<sup>30</sup>

Though Okamoto sought to revisit Gilson's question of "what do business lawyers *really* do?" he also focused on the M&A deal, and provided an even more limited response by focusing on the law firm's reputational value when providing legal opinions.<sup>31</sup> Unfortunately, this does very little to inform law schools how to better educate future business lawyers.

While Schwarcz also focused on deal execution, he acknowledged that there may be other ways beyond reducing regulatory costs that business lawyers can add value to clients by testing his other five hypotheses. Two of those are additional theories to Gilson's and Okamoto's—that lawyers play a preventive role by minimizing future liability risk and that the attorney–client relationship facilitates communication and trust due to confidentiality and attorney–client privilege.<sup>32</sup> Based on his research, he concluded by dismissing these theories as reasons why clients hire lawyers.<sup>33</sup> Instead, Schwarcz provided a litany of technical tasks a lawyer performs.<sup>34</sup> Schwarcz, however, took issue with the conclusion of Gilson and Okamoto that these functions could be performed by any other sophisticated actor.<sup>35</sup> To Schwarcz, reducing regulatory costs is the proprietary domain of the business lawyer. If it seems like the Schwarcz transactional lawyer is also a technocrat, that is in fact what he envisions—an increase in lawyer technocrats in an increasingly regulated world.<sup>36</sup> More recently, other scholars have broadened the description of business lawyer adding additional contexts, roles, and functions to provide a richer tapestry.

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<sup>30</sup> See Lawrence A. Cunningham, *Language, Deals, and Standards: The Future of XML Contracts*, 84 WASH. U. L. REV. 313, 315–16 (2006) ("XML pioneers envision structuring narrative contract texts into modules that would make the contracting process swifter and yield more efficient terms by purging excess complexity without oversimplifying."); see also John O. McGinnis, *Machines v. Lawyers*, CITY J., Spring 2014, at 12.

<sup>31</sup> Okamoto posits a potential role for lawyers as repeat players in certain types of transactions where clients will want to rent the lawyers' reputations—dealing with regulatory authorities, in a takeover battle, internal investigations, or championing social values. See Okamoto, *supra* note 10, at 45.

<sup>32</sup> Schwarcz, *supra* note 11, at 492–94.

<sup>33</sup> *Id.* at 496–97, 504–06.

<sup>34</sup> *Id.* at 501–02.

<sup>35</sup> See *id.* at 502 & n.101.

<sup>36</sup> *Id.* at 507.

### III. A MORE FULLY DEVELOPED CONCEPTION OF THE BUSINESS LAWYER

Transactional scholars have begun to recognize a more expansive and holistic view of what business lawyers do. James Freund, for example, paints a more complete picture that recognizes fundamentals like structuring, drafting, and negotiating as key tools that business lawyers use to service clients.<sup>37</sup> Though he retains the more narrow conception of business lawyer as deal lawyer, he notes: “The skillful *structural* lawyer never stops at the point where he has spotted the legal problem, but rather goes on to solve it in a creative fashion. . . . [T]his subject often boils down simply to a matter of ‘feel’ . . . .”<sup>38</sup> Freund also points to problem solving as a defining characteristic of a business lawyer.<sup>39</sup> Other transactional scholars have also recognized that business lawyers engage in practice beyond merely M&A and are called upon to employ more than just technical lawyering skills. The cumulative result is a richer, deeper picture of what business lawyers do and what skills they employ to add value to clients.

#### A. *Beyond Big Deal Lawyers*

Where Gilson, Okamoto, and Schwarcz looked at what business lawyers do through the lens of big M&A deals, George Dent, Jr. added to the description by looking outside the scope of an acquisition.<sup>40</sup> Dent introduced additional transactions such as debt financings, relational contracts, strategic alliances, and internal transactions to the universe of the business lawyer. He introduced the business lawyer earlier in the transaction process than Gilson, Okamoto, and Schwarcz. He described the lawyer’s role as “enterprise design,” and recognized the role of lawyers in providing advice including on compliance and governance issues. Dent’s business lawyer proactively “help[s] fix the scope of the enterprise, including its time frame, geographic scope, and range of business.”<sup>41</sup> Embedded in Dent’s paradigm is a lawyer who understands business. This is antithetical to Schwarcz’s conclusion that business lawyers do not care much about a client’s industry or regulation.<sup>42</sup> Still, however, Dent highlighted the technical lawyering skills that a business lawyer would provide in these areas.

Where Dent added new practice areas to the universe of the business lawyer, another transactional scholar, Mark Suchman, added new con-

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<sup>37</sup> JAMES C. FREUND, *ANATOMY OF A MERGER* 2, 6 (1975).

<sup>38</sup> *Id.* at 2.

<sup>39</sup> James C. Freund, *Teaching Problem Solving: New Business Lawyers Need to Know How to Find the Deal: A Lawyer’s Perspective*, *BUS. L. TODAY*, July/Aug. 1999, at 32, 32, 36.

<sup>40</sup> George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 *BUS. LAW.* 279, 296–99 (2009).

<sup>41</sup> *Id.* at 300.

<sup>42</sup> See Schwarcz, *supra* note 11, at 500–01.

stituents that demanded new skills from business lawyers. In representing early stage companies and start-ups, for example, business lawyers exercise additional skills in order to provide value to their clients. Suchman categorized some of these as counseling, dealmaking, matchmaking, gatekeeping, proselytizing, and conciliating.<sup>43</sup> In describing how Silicon Valley attorneys service emerging company clients, Suchman described the business lawyer's role beginning at the idea stage with the lawyer counseling the entrepreneur in developing her business plan and then connecting the entrepreneur to potential investors. The lawyer would negotiate deal terms with an interested investor or steer the entrepreneur to another potential investor who may be more suited for a potential transaction. Unlike Gilson's transaction cost engineer who is ultimately seeking to maximize value for his client, Suchman's Silicon Valley lawyer is seeking to establish long-term resources for his client.<sup>44</sup> Transactions in this context are more conciliatory and standardized, according to Suchman, because the value is in the lasting relationship more than in the economics of a given deal. In this context, lawyers embrace non-legal roles more readily—"business lawyers . . . tend to be counselors in the broader sense. . . . Larry Sonsini . . . he's gone beyond just being a lawyer into being something of a business advisor."<sup>45</sup> Suchman recognized that "[g]ood lawyers in this practice have to provide more than simply legal advice. They are a wonderful resource for *business* advice . . . . [T]he business lawyer is a repository of experience . . . ."<sup>46</sup> These traits are not unique to Silicon Valley lawyers. In fact, they are supported by clients' expectations of their lawyers.<sup>47</sup>

<sup>43</sup> Mark Charles Suchman, *On Advice of Counsel: Law Firms and Venture Capital Funds as Information Intermediaries in the Structuration of Silicon Valley* (Feb. 1994) (unpublished Ph.D. dissertation, Stanford University); see Lisa Bernstein, *The Silicon Valley Lawyer as Transaction Cost Engineer?*, 74 OR. L. REV. 239, 240 & nn.7–11 (1995) (citing Suchman, *supra*).

<sup>44</sup> Suchman, *supra* note 43, at 94–126.

<sup>45</sup> Bernstein, *supra* note 43, at 252 (alterations in original) (quoting Suchman, *supra* note 43, at 95) (internal quotation marks omitted). For a profile of Larry Sonsini, partner at Wilson, Sonsini, Goodrich & Rosati, see Roger Parloff, *The Man to See in the Valley*, *FORTUNE*, Nov. 27, 2006, at 150.

<sup>46</sup> Suchman, *supra* note 43, at 101; see also Bernstein, *supra* note 43, at 252 (quoting Suchman, *supra* note 43, at 101).

<sup>47</sup> Todd Taylor, *What Clients Want in a Lawyer*, *BIOMASS MAG.*, <http://biomassmagazine.com/articles/2595/what-clients-want-in-a-lawyer> (Scott Hughes, COO at Visiam LLC, a renewable energy company, stating in response to an interview: "[Y]ou hire an attorney to be an advisor and counselor, not just someone to draft contracts. If you find the right attorney, you will save your company in the long run, and create opportunities that add value, more than any squabbling over a bill or a cheap lawyer will ever get you. . . . [T]here is nothing better than a good attorney, one who takes the time to understand the business and how . . . [to] help the business succeed."); see also Jill Schachner Chanen, *The Strategic Lawyer: Companies Are Placing Premiums on Advisers Who Understand Both Business and the Big Picture*, *A.B.A.J.*, July 2005, at 43, 43.

Jeff Lipshaw went a step further than Suchman and introduced leadership into the suite of assets business lawyers use to add value to clients. Lipshaw, again focusing on M&A transactions, highlighted the role of lawyer as deal manager or quarterback.<sup>48</sup> Lipshaw pointed to the leadership skills necessary to run a deal—“what they do to give the parties the courage to overcome fear, panic, seller’s remorse, buyer’s remorse, and risk averseness.”<sup>49</sup> Leadership is a less tangible quality than those that other transactional scholars have described. It may in fact draw from social science training more than from legal education; however, implicit in the characteristic lays a host of functions the business lawyer must do to lead well. Put another way, a leader knows how to get things done, and getting things done is a primary function of a business lawyer.<sup>50</sup>

Therese Maynard highlighted a final characteristic that makes for a “damn good business lawyer” by introducing the element of judgment.<sup>51</sup> She described judgment as being about more than technical expertise and often best employed early in the deal process.<sup>52</sup> Judgment is clearly something that clients value and will pay for when the lawyer has more experience and expertise than they do.<sup>53</sup> The business lawyer, having seen multiple scenarios play out to conclusion, has the ability to better predict outcomes and advise the client accordingly.

Dent, Suchman, Lipshaw, and Maynard all add to the description of what business lawyers do and how they add value to clients. By expanding the universe of transactions beyond big M&A, introducing different types of clients other than big corporations, and highlighting characteristics like leadership and judgment that move beyond technical lawyering, they begin to create a fuller, more accurate description of a transactional business lawyer. However, no one articulates a complete picture of what skills great business lawyers display to differentiate themselves.

#### *B. Great Business Lawyers Look Like This . . .*

Karl Okamoto, almost 15 years after his assertion that lawyers add value as reputational intermediaries, was still grappling with the question

<sup>48</sup> Jeffrey M. Lipshaw, *Beetles, Frogs, and Lawyers: The Scientific Demarcation Problem in the Gilson Theory of Value Creation*, 46 WILLAMETTE L. REV. 139, 143 (2009).

<sup>49</sup> *Id.* at 144.

<sup>50</sup> See Lawrence Lederman & Jay Levenson, Essay, *Dealing with the Limits of Vision: The Planning Process and the Education of Lawyers*, 62 N.Y.U. L. REV. 404, 404 (1987) (“[I]f [lawyers] saw themselves as troubleshooters and forward planners with skills for sizing up situations and getting things done . . . there would be good work to do.”).

<sup>51</sup> Therese Maynard, *Teaching Professionalism: The Lawyer as a Professional*, 34 GA. L. REV. 895, 918 (2000) (internal quotation marks omitted).

<sup>52</sup> *Id.*

<sup>53</sup> Taylor, *supra* note 47; see also Matthew D. Kaufman & Lucas Buckley, *The Next Generation Lawyer: Embracing Change, Creating Value*, WYO. LAW., June 2013, at 36, 37.

of what separates great business lawyers from average ones.<sup>54</sup> Though he did not articulate what components make someone great, he concluded that those components are not teachable. I disagree. Okamoto says, “[t]he best way to learn to be a better deal lawyer is to watch really good deal lawyers work.”<sup>55</sup> That implies that lawyers learn it on the job. But what are they learning? Joe Flom, Marty Lipton, and Larry Sonsini are iconic business lawyers.<sup>56</sup> They are likely the few transactional business lawyers that students have ever heard of before they entered law school. If you were lucky enough to watch them work, would you become a better technical lawyer? Unlikely. Each was or is a master strategist and problem solver who creatively sought to solve problems without limitations.<sup>57</sup>

What if law schools could bring that approach—being a strategist and problem solver—to law students? That training begins by articulating for law students, and even practicing lawyers, what characteristics and attributes separate great business lawyers from ordinary ones.

### 1. *Great Business Lawyers Understand Business*

It seems self-evident that a business lawyer should understand business; however, it is far from the norm. In fact, that is why it is a differentiating characteristic of great business lawyers.<sup>58</sup> There is a saying on Wall Street that deal lawyers do weddings, not marriages. The suggestion is that lawyers focus on the transaction and not the long-term impact of the transaction on the businesses involved. Businesses prefer it when their lawyers not only understand their business and strategy but also are interested in their long-term success.<sup>59</sup> It seems self-evident that in order to do that well, a lawyer must know certain things: What does the client do? How does it make money? Who are its main competitors? What economic

<sup>54</sup> Karl Okamoto, *Teaching Transactional Lawyering*, 1 DREXEL L. REV. 69 (2009); see also Robert C. Illig, *A Business Lawyer's Bibliography: Books Every Dealmaker Should Read*, 61 J. LEGAL EDUC. 585, 585 (2012) (“The best business lawyers provide not only legal analysis and deal execution. We offer wisdom and counsel. . . . When we master context, we can rise to the level of counselors—purveyors of judgment, caution and insight.”).

<sup>55</sup> Okamoto, *supra* note 54, at 71.

<sup>56</sup> See Emma Brown, *Aggressive Corporate Lawyer Changed Business World with Mergers and Hostile Takeovers*, WASH. POST, Feb. 24, 2011, at B7; Landon Thomas Jr., *Counselor for All Reasons: Martin Lipton Wears Many Hats (Some Say Too Many at Once)*, N.Y. TIMES, July 28, 2005, at C1; Parloff, *supra* note 45. It is also important to note that there are far more great business lawyers that most people have never heard of. I do not intend to imply fame and quality of lawyering are linked together.

<sup>57</sup> Brown, *supra* note 56; Thomas, *supra* note 56; Parloff, *supra* note 45.

<sup>58</sup> Once upon a time, I was an investment banker. As a banker, my team would routinely work with company counsel on deals—sometimes asset dispositions, sometimes securities offerings. In numerous instances, I was shocked at how few of those lawyers could actually describe their clients’ businesses or explain how their clients made money. Too often the task of writing a company overview section in a securities offering would fall to the bankers after the lawyers’ failed attempt.

<sup>59</sup> Chanen, *supra* note 47, at 43; Kaufman & Buckley, *supra* note 53, at 38; Taylor, *supra* note 47.

factors is it most sensitive to? Understanding what one's client does, how it does it, and how it makes money are fundamental to problem solving. Without knowing a client's goals (both short- and long-term) and strategy, it is virtually impossible to give relevant or meaningful advice. A great business lawyer is unafraid to ask his client questions about its business and industry. Understanding the drivers of the business will help the lawyer better assess the parameters of available solutions.

Additionally, being able to see problems through the lens of business is one of the most important features of a great business lawyer.<sup>60</sup> Problems manifest in the context of a business and understanding that context means understanding the client's business. Relatedly, a business lawyer should speak his client's language. If there are industry terms or terms of art used by a client, a great business lawyer will learn and understand them. By the same token, great business lawyers can read and understand financial statements. Accounting is the language of business. The ability to engage with basic financial documents is essential for any business lawyer. A great business lawyer uses the information to better understand his client's business. Understanding business arms the transactional lawyer with the ability to provide better and more valuable advice to his client. It also makes it more likely that the client will not switch lawyers simply based on cost. In other words, business lawyers that plan marriages are more likely to be around for future events.

## 2. *Great Business Lawyers Are Loyal to Their Client*

Though most businesses are entities and most business lawyers represent the entity, determining who the lawyer truly represents is not always straight forward, particularly when the lawyer has relationships with executives, directors, and in-house lawyers. Great business lawyers know how to navigate this web of personalities and competing interests without sacrificing their client. In fact, great business lawyers will use their relationships with other constituencies to further his client's interests.<sup>61</sup>

In the famous Getty Oil acquisition of the mid-1980s Marty Lipton represented a key minority shareholder, the Getty Museum Trust.<sup>62</sup> Through various iterations of deals, Lipton altered his support from party to party always keeping in mind the best interests of his client, which wanted independence from Getty Oil and long-term financial security.<sup>63</sup> Though some may argue that Lipton exceeded his authority and overreached in his role by authoring documents for other parties, not his client, he did so to ultimately achieve the best outcome for his client, the Trust.

The decision on whose interest to prioritize is not always so clear for business lawyers. In today's competitive legal market, clients hire lawyers,

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<sup>60</sup> Dent, *supra* note 40, at 310.

<sup>61</sup> See Thomas, *supra* note 56.

<sup>62</sup> JAMES SHANNON, TEXACO AND THE \$10 BILLION JURY 14 (1988).

<sup>63</sup> *Id.* at 15–21.

not firms. As such, the person(s) making the hiring decision is competing for the lawyer's allegiance. If it is a general counsel, she may be at a different company next year. A lawyer might be tempted to preference the general counsel over the company in certain scenarios hoping to continue to get work from her. The great business lawyer will navigate the potential conflicts, pick a client, and advocate for that person or entity whole heartedly. Usually the result is respect and enhanced reputation which may lead to additional business in the future.

### 3. *Great Business Lawyers Understand People*

In addition to understanding the business, a lawyer must understand just as much about the people in the business: Who owns the company? Who runs the company? What motivates them? What are their short and long term goals? What is their risk tolerance? Regardless of the size of the business, these are questions that every lawyer representing a business client should know the answers to. They are the same questions that other business advisors ask in order to do their jobs well. Though business lawyers often represent entities, no business acts without people. What Lipton displayed as complete allegiance to his client started with a complete understanding of the people and personalities involved in any transaction. If problem solving is the ultimate goal of the great business lawyer, diagnosing the problem is primarily derived from hearing the client's story. That story is delivered through people.<sup>64</sup> The first set of people for the great business lawyer to understand are the principals in the business. If a lawyer is representing a start-up venture, these may be the founders. What is their story? Why did they start this business over all the others they could have started? What have been the biggest challenges and successes? What are they good at? Conversely, what are they less good at? If the client is an established company the business lawyer must know and understand the executives and board members. There may be in-house counsel, other outside advisors, investors, or bankers. The goal is for the business lawyer to get to know the person(s) with whom they are interacting and ultimately to whom they need to deliver advice. In addition to providing the great business lawyer with a much richer appreciation of his client, it allows him to deliver better advice.

The client's principals and advisors are two sets of people but there are many others. In a transaction there is often a counterparty. Who are they? What motivates them? What other information can a business lawyer learn about the other side? Over time, a great business lawyer may have encountered certain actors before and stored knowledge about them. Learning to pay attention to the traits and predilections of all the people one encounters in any transaction is a valuable trait for the great

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<sup>64</sup> JEROME GROOPMAN, *HOW DOCTORS THINK* 11–27 (2007) (describing how medical doctors diagnose most ailments by learning the patient's story, not by conducting tests—in the story lies the information a doctor needs to make a diagnosis).



business lawyer. Business is transacted by people and great business lawyers understand how to utilize psychology and manage personalities. This is true whether one is engaged in an M&A deal for a Fortune 500 company or negotiating with a city agency to get a necessary approval. Great business lawyers know how to get people to do things that ultimately further their clients' interests.

#### 4. *Great Business Lawyers Become Part of Their Client's Team*

Clients that are engaged in a transaction or some other form of business often act through teams. Usually the composition of the team is a selection of internal employees. Outside advisors such as consultants, bankers, accountants, or lawyers are rarely viewed as part of the team. That creates a barrier between the client and the advisor. Getting a client to treat the business lawyer like an actual team member facilitates communication which leads to better and more-candid advice. The lawyer's role is to be an advisor. When the lawyer is viewed as an outside party, clients do not treat him with the same trust and familiarity as one of their own. Great business lawyers integrate themselves into the client team and break down that barrier.<sup>65</sup> Fully integrating into the team also better aligns incentives which allows the business lawyer to fully prioritize his client's success.

#### 5. *Great Business Lawyers Are Creative*

Though grounded in technical expertise, great business lawyers are incredibly creative. Strict interpretation of the law and an adherence to organization and process sometimes make clients think their lawyers are rigid and narrow minded. Many lawyers are. Great business lawyers, however, do not let their lawyerly training confine their thinking. They resist practice by template, seek to understand the problem and all of its parameters, and propose creative solutions.<sup>66</sup> They draw on their entire experience, not merely their legal experience.

Examples of creative business lawyering are present in all kinds of transactions. Lawyers create unique structures for all types of transactions and deals. Maximizing liability protection, minimizing tax leakage, ensuring sound governance, and accommodating efficient exit options may all be features in a corporate structure designed by a great business lawyer.

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<sup>65</sup> Richard J. Phillips, Sr., famous (or infamous) for his representation of the Major League Baseball Umpires union in 1999, was outside general counsel to a struggling freight forwarding company. The company, Pilot Air Freight, was made up of a number of franchisees. As it emerged from bankruptcy, the franchisees rallied behind Phillips to be their next CEO even though he was outside counsel. He turned a \$3 million annual loss into a \$4 million profit in his first year. See Douglas Martin, *Richie Phillips, Union Leader Who Helped and Hurt Umpires, Dies at 72*, N.Y. TIMES, June 6, 2013, at B18; Mark B. Solomon, *Richie Phillips Dies; Took Controversial Stand for Baseball Umpires, Then Became Transport Success*, DC VELOCITY (June 7, 2013), <http://www.dcvLOCITY.com/articles/20130607-richie-phillips-dies/>.

<sup>66</sup> Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 97-98 (2001).

Understanding the features of different business entities, their underlying infrastructure, and how they can be manipulated provides the great business lawyer with a toolkit to be creative. One of the most famous creative-lawyering solutions was Martin Lipton's creation of the poison pill. In the face of increased hostile takeover activity in the early 1980s, Lipton sought a defensive strategy that would empower target companies. Drawing from his knowledge and understanding of securities laws, corporate governance, and the process of unsolicited offers, Lipton devised a solution called "the Warrant Dividend Plan" that would allow target companies to issue a security before or after an unsolicited offer that would buy the board of the target more time to respond to the offer while maintaining control over the process.<sup>67</sup> It would later become known as the "poison pill" and be used by countless business lawyers as a takeover defense strategy.<sup>68</sup> The best business lawyers are in fact strategists.<sup>69</sup> Their objective is to help the client get from point *A* to point *B*. The journey may be wrought with obstacles and land mines, but the great business lawyer is able to chart a path forward and ultimately deliver the client to its destination.

#### 6. *Great Business Lawyers Solve Problems*

Though scholars have parsed different aspects of being a business lawyer and tried to empirically prove the value that lawyers provide, almost all transactional scholars agree that being a business lawyer is fundamentally about helping business clients solve problems and make decisions.<sup>70</sup> In many ways, problem solving is embedded in each of the characteristics that differentiate great business lawyers from average ones. Problem solving is what the best business lawyers get paid to do.<sup>71</sup> Too often lawyers, even really good lawyers, abdicate their advisory role when it comes to "business decisions." The false dichotomy between "legal" and business decisions (presented as problems) has permeated the dialogue between lawyers and clients to such an extent that they presume it is valid. To a client, every problem is a business problem requiring a business decision. Clients look to their advisors to provide the best solutions to make those problems go away. The best solution may or may not be rooted in the law; the business lawyer's job, at the end of the day, is to provide the best solution to his client's problem. Lawyers who only present problems without solutions are quick to be labeled "deal killers" or "ob-

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<sup>67</sup> Martin Lipton, *Pills, Polls, and Professors Redux*, 69 U. CHI. L. REV. 1037, 1043–44 (2002).

<sup>68</sup> *Id.* at 1044.

<sup>69</sup> Chanen, *supra* note 47, at 43.

<sup>70</sup> See, e.g., Dent, *supra* note 40, at 309–10; Freund, *supra* note 39, at 32; Gilson, *supra* note 1, at 305 n.182; Maynard, *supra* note 51, at 906; Schwarcz, *supra* note 11, at 507; see also Peter J. Gardner, *A Role for the Business Attorney in the Twenty-First Century: Adding Value to the Client's Enterprise in the Knowledge Economy*, 7 MARQ. INTELL. PROP. L. REV. 17, 39 (2003) (highlighting the business lawyer's role as problem solver).

<sup>71</sup> FREUND, *supra* note 37, at 2.

structionists” or “speed bumps.” They are also likely to be out a client unless they present solutions to the problems they identify.

Part of effective problem solving is figuring out what the problem is and its constraints. Clients often come to lawyers with ill-structured problems. For example, in a start-up context a young company may call its lawyer stating that it wants to grant equity to a new employee in lieu of cash compensation. The great business lawyer will continue to ask questions to better define the problem. Is their desire to issue equity to the employee about attracting long-term talent to the company, managing cash flow, meeting a competing offer from another company, or compensating the new employee for a major contribution to the business that could affect its trajectory? Does the company want the employee to share in the unlimited upside of a liquidity event or governance of the company? This first series of questions is meant to help the lawyer diagnose the problem. The lawyer must then establish the parameters of the universe of solutions. When does the company anticipate earning revenue, how much, what is the expected growth rate of revenues, how many employees does the company currently have and anticipate having, does the employee have the ability to pay taxes if incurred, and does the company plan on paying taxes for the employee?<sup>72</sup>

Once the business lawyer defines and constrains the problem he can finally begin to create potential solutions.<sup>73</sup> As part of problem definition, a business lawyer may have to educate himself about new areas of law or other subject matter in order to come up with the best solution. Great business lawyers are great at teaching themselves new material all the time. They learn what they need to learn in order to solve a client’s problem.<sup>74</sup> It is not unlike a patient going to the doctor and stating that his foot hurts and he wants the doctor to amputate it. No doctor would let patients diagnose themselves. Doctors would conduct their own interviews and make their own diagnoses before researching and deciding on potential treatments. It is no different for business lawyers, yet many business lawyers will rely on the client to present its own solution to an ill-structured problem and simply execute that solution.

#### 7. *Great Business Lawyers Add Value to Their Clients*

Gilson was correct in his notion that lawyers must add value to clients.<sup>75</sup> Whether a lawyer represents Fortune 500 companies, privately owned family businesses, or start-up ventures, he must always be thinking about how he will add value to that client. Technical lawyering is foundational for business lawyers and expected by clients.<sup>76</sup> It is a commoditized

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<sup>72</sup> The list of questions is merely for demonstration. The inquiry could go much further and be more complex.

<sup>73</sup> Susan D. Bennett, *Embracing the Ill-Structured Problem in a Community Economic Development Clinic*, 9 CLINICAL L. REV. 45, 49–57 (2002).

<sup>74</sup> Lederman & Levenson, *supra* note 50, at 425.

<sup>75</sup> Gilson, *supra* note 1, at 244.

<sup>76</sup> Kaufman & Buckley, *supra* note 53, at 36–38.

service. Premium service lies in being a trusted advisor to a client in the fullest sense of the word. That advice, like the advice from any other business advisor, needs to add value to the client's business. Too often lawyers are viewed by clients merely as cost centers. Instead, lawyers should work to get clients to view them as assets that will pay a return based on the investment. Lawyers should seek to provide a positive return on assets. This can be done in many ways—helping the client make a decision, preventing the client from making a bad decision, or offering unique solutions to difficult problems. Fundamentally, it's about getting things done and advancing the client toward its goals. There is a notion that other advisors are better equipped to deal with problems outside of the lawyer's sphere. Yet lawyers fear those same advisors encroaching on their turf.

When one thinks about a lawyer's training, it is at its core about critical and analytical thought. That thought need not be relegated to applying securities law or drafting the best indemnity clause. It is equally valuable in helping clients solve problems that confront their business whether that problem has a solution rooted in the law or elsewhere. But the universe of value-added functions goes well beyond transaction cost engineering and minimizing regulatory costs.<sup>77</sup> Valuation of companies is not a science. There are different methods that one can use to determine the value of an enterprise;<sup>78</sup> however, at the end of the day a business is worth what someone is willing to pay for it. It is no different for legal services. Gilson, Okamoto, and Schwarcz may crave a rational explanation for why clients pay lawyers, but it is not something that can be reduced to an economic formula. Clients pay for what they perceive as value. Great business lawyers provide it.

#### IV. TEACHING THE ART OF BUSINESS LAWYERING

Law schools spend much of their curricula teaching students how to "think like a lawyer." Unfortunately that endeavor has been monolithic for too long. The traditional law school curriculum is built around producing litigators, not transactional business lawyers.<sup>79</sup> For nearly 150 years, law schools have been employing Christopher Columbus Langdell's model of pedagogy to train students to think like lawyers.<sup>80</sup> By reading and dissecting hundreds of appellate court opinions about past disputes, law students learn to think critically about facts, word choice,

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<sup>77</sup> Stephen T. Furnari, *Start-Ups: Providing Value with Non-Legal Advice*, GPSOLO MAG., Jan./Feb. 2008, at 30, 31–32.

<sup>78</sup> See generally ASWATH DAMODARAN, DAMODARAN ON VALUATION (2d ed. 2006).

<sup>79</sup> Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASS'N LEGAL WRITING DIRECTORS 118, 120–21 (2008).

<sup>80</sup> Todd D. Rakoff & Martha Minow, *A Case for Another Case Method*, 60 VAND. L. REV. 597, 597 (2007).

logical arguments, legal rules, and interpretation.<sup>81</sup> Through this experience, law students begin to develop intuition for predicting outcomes in litigation. This experience-based intuition serves as the basis for why clients pay lawyers and how lawyers help resolve disputes. After the first year, students can participate in moot court competitions and take pre-trial and trial courses.<sup>82</sup> Over the past 40 years, law schools have added clinical experiences that provide a forum for students to apply their total library of learning in live-client, real-life contexts. The analogous curriculum for producing transactional business lawyers does not currently exist in most law schools.

Thinking like a transactional lawyer is different from thinking like a litigator.<sup>83</sup> Whereas litigators look backwards in time to reconstruct past events in order to resolve a dispute in the present, transactional lawyers are looking forward to anticipate events and avoid disputes in the future. Litigators operate in fixed forums with proscribed rules and deadlines, whereas transactional lawyers operate in the dynamic world with more liberal constraints and the ability of a party to simply walk away. Most litigation is adversarial, whereas most business deals are collaborative. Yet for nearly 150 years, law schools have been using the same mode of education for both types of lawyers<sup>84</sup> even though more than half of law graduates practice some form of transactional law.<sup>85</sup> It makes no sense. Law schools should expand their training to create the full breadth of experiences for students who may want to pursue transactional careers. Law schools should deliberately design curricula that logically and methodically help students develop increasingly sophisticated business lawyering skills.<sup>86</sup>

I propose a curriculum that recognizes three increasingly sophisticated categories of skills—foundational, transitional, and optimal—with each level adding new dimensions to the lawyer that allow her to differentiate herself from other business lawyers and add greater value to her clients. Each set of skills may be taught through different components of the curriculum that build upon each other. In the end, the theory is that a law student emerging from this type of curriculum would be more fully aware of what business lawyers do at every level, more skilled emerging

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<sup>81</sup> C. C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS* v–vii (Boston, Little, Brown & Co. 1871); Rakoff & Minow, *supra* note 80, at 597–99, 602.

<sup>82</sup> I appreciate that many legal-writing programs have expanded beyond merely litigation-oriented training to include transactional writing as well, and I applaud such efforts. Those efforts are relatively new, however, and far from universally replicated.

<sup>83</sup> See Lederman & Levenson, *supra* note 50, at 408.

<sup>84</sup> LANGDELL, *supra* note 81, at v–vii.

<sup>85</sup> Penland, *supra* note 79, at 118.

<sup>86</sup> Fleischer, *supra* note 3, at 478; Illig, *supra* note 54, at 585–86; Okamoto, *supra* note 54, at 71; Penland, *supra* note 79, at 130.

from law school, and ultimately better able to add greater value to clients.<sup>87</sup>

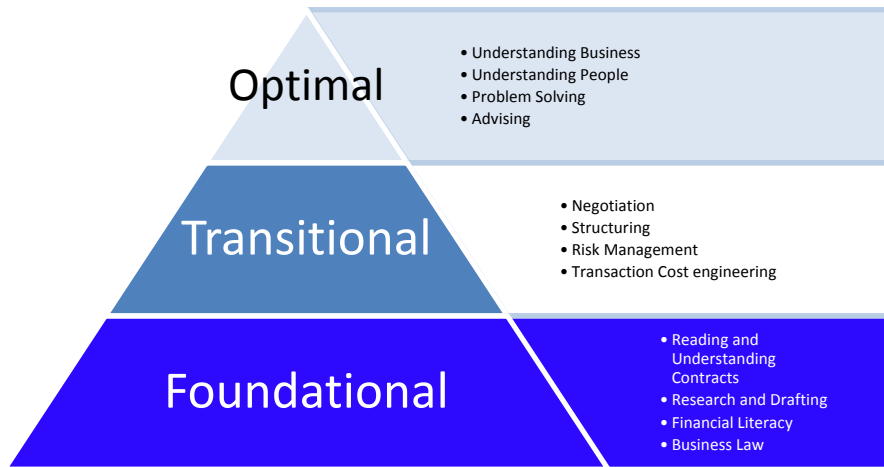


Fig. 1: Transactional Business Lawyer Skills Pyramid

#### A. *Foundational Skills*

Foundational business lawyering skills are already being taught in many law schools. The foundational category is comprised of the basic knowledge and tools that business lawyers use in servicing their clients' needs—reading and understanding contracts, research and drafting agreements and memoranda, financial literacy, and knowledge of core business-law subjects. These topics can be taught across the curriculum, starting in the first year, and can serve as the basis upon which advanced skills can be built.

##### 1. *Reading and Understanding Contracts*

Just as learning how to read and analyze appellate-court opinions serves as foundational to developing students' skills as future litigators, knowing how to read and understand contracts is fundamental to what transactional lawyers do. Contracts are the primary medium through which transactional lawyers operate. Understanding how they are constructed, what function they serve, and their limitations is elementary to being a transactional lawyer. Critical reading of a contract leads to better precision in contract drafting.<sup>88</sup> Understanding that every word has

<sup>87</sup> Though the legal profession is designed such that any person who passes a bar exam may practice law, I do not presume that having taken any set of classes in law school means that a law graduate would be competent to practice at the highest levels. But being aware of what skills are necessary to rise to the highest level equips law graduates with a greater ability to develop those skills over time.

<sup>88</sup> Jay A. Mitchell, *Reading (in the Clinic) Is Fundamental*, 19 CLINICAL L. REV. 297 (2012).

meaning and learning what terms are most contentious is invaluable for a business lawyer. In reading numerous agreements, students also begin to learn how lawyers anticipate and avoid problems through contract language. It begins the process of building the experience-based intuition that allows students to then preemptively craft solutions before problems arise. The prospective nature of contracts is very different from the retrospective approach of court opinions. In seeing that first hand, students are more likely to internalize the paradigm.

Though virtually every law school mandates a contracts course in its first-year curriculum, few of those courses spend much time showing students an actual contract.<sup>89</sup> While some appellate-court opinions may include specific language from a disputed contract, that is usually done in isolation. Missing from the analysis is the context for the agreement in the first place. Understanding context is the most important consideration for a great business lawyer.

## 2. *Researching and Drafting*

Many forms of research and writing, such as case law research, the corresponding research memorandum, and the drafting of correspondence to clients, are universal to all lawyers whether operating in the litigation or transactional sphere. Other forms of research and drafting, however, are unique to business lawyers.

Business lawyers must research beyond the law. Often, they must learn about industries, companies, and people in order to service their client. This entails looking at secondary sources, business intelligence reports, and business profiles. It may also include looking at equity research reports prepared by investment analysts. Additionally, business lawyers do not spend much time looking up case law precedents, but rather document precedents, which are previously crafted agreements that serve as starting points for drafting new agreements for clients.

Just as the research business lawyers perform is often unique to the practice of business law, so too is much of the drafting. For example, the goal of using precedent documents is to produce a new document. The primary document that business lawyers produce is the contract. Understanding contract construction and form are fundamental building blocks to drafting agreements. Those building blocks are used to translate business terms into contract language that everyone can understand.<sup>90</sup>

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<sup>89</sup> See Jennifer S. Taub, *Unpopular Contracts and Why They Matter: Burying Langdell and Enlivening Students*, 88 WASH. L. REV. 1427, 1427–31 (2013) (asserting that the traditional contracts course found in most law schools is arcane, that contract disputes are adjudicated but not about contracts, and then describing several alternative approaches that would provide students with greater exposure to how contracts appear and are used in our society).

<sup>90</sup> See generally TINA L. STARK, DRAFTING CONTRACTS: HOW AND WHY LAWYERS DO WHAT THEY DO (2007).

Legal research and writing programs have begun integrating transactional drafting into their syllabi; however, it is not equal to the time devoted to litigation writing. The primary reasons for this are likely lack of time and expertise. I am sympathetic to the constraint of time in any course. One solution might be to create secondary level courses that follow onto the basic legal research and writing course and can specialize in transactional research and drafting. Another idea would be to create parallel tracks of different writing courses concentrated on litigation or transactional practice and allow students to choose. Though not all students may know what career path they wish to pursue in their first year of law school, the bifurcated system is no worse than the current system of pushing all students down one specialized path. The point is that transactional research and writing is just as time consuming and valuable to law students who wish to be business lawyers as the traditional research and writing course is to litigation minded students. In implementing any type of transactional writing course, law schools must seek instructors who come from transactional backgrounds and who are versed in the craft.

### 3. *Financial Literacy*

Understanding business is essential for any great business lawyer, and the foundational skill to understanding business is financial literacy. Too often lawyers eschew numbers and rely too heavily on accountants, bankers, and their clients for any topic where numbers are involved. Business, however, is often communicated in numbers. Basic knowledge of financial accounting is a must for almost every lawyer. Being able to read and understand basic financial statements like a balance sheet, income statement, and cash-flow statement are essential. This is true whether one is representing large, multinational corporations that file quarterly earnings statements with the SEC, start-up companies with only projected financial statements, or nonprofit organizations that generate most of their revenue from government grants and private donations.

As far back as 10 years ago, law schools were beginning to see the need for educating law students about business.<sup>91</sup> Law schools have begun implementing courses that teach financial literacy to their entire student bodies.<sup>92</sup> These courses should begin in the first year alongside research and writing and should concentrate on basic financial accounting including financial statement analysis. Advanced courses could cover analytical methods (covering basic business and economic concepts and quantita-

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<sup>91</sup> *Mixing It Up: Law Schools Turn to Business School Techniques in Admissions, Teaching, but Not Without Controversy*, MIAMI DAILY BUS. REV., Apr. 30, 2004, at 10.

<sup>92</sup> See Sarah Mui, *Around the Blawgosphere: 'Financial Literacy' at NYU Law; A 10th Law School in Illinois?*, ABA JOURNAL (Oct. 26, 2012), [http://www.abajournal.com/news/article/around\\_the\\_blawgosphere\\_curriculum\\_reform\\_peoria\\_il\\_blue\\_ivy\\_amazon\\_crash](http://www.abajournal.com/news/article/around_the_blawgosphere_curriculum_reform_peoria_il_blue_ivy_amazon_crash); Press Release, Fordham University, New Course Aims to Teach Students Financial Literacy (Aug. 18, 2014), available at <http://law.fordham.edu/newsroom/33916.htm>; *Wharton Certificate in Management*, UNIV. OF PA. LAW SCH., <https://www.law.upenn.edu/live/files/1866-certificate-in-management>.



tive methods for addressing them),<sup>93</sup> corporate finance, and behavioral finance. Though one might argue that these types of courses do not belong in law schools, the reality is that law is far more interdisciplinary today, and lawyers need to draw from more settings and subject matter to understand, define, and solve problems.<sup>94</sup> Offering law students sequenced course offerings to build their body of knowledge and insight of business topics and issues will allow them to ultimately engage in the higher level skills that comprise the art of business lawyering.

#### 4. *Business Law*

Business law is a large umbrella under which sit many relevant subject-matter areas of law that make up the pool of knowledge from which business lawyers operate. Among the core subjects that business lawyers need familiarity with are business associations, contracts, securities, employment, intellectual property, and tax. It is unlikely that any student will master all of these topics in law school nor do they need to, but a familiarity with them and comfort in navigating them when the need arises in practice is foundational to a business lawyer. Understanding the principles that gird business relationships and transactions equips business lawyers with foundational knowledge upon which more advanced counseling is based.

#### B. *Transitional Skills*

Foundational skills equip students with the basic tools to be business lawyers. However these skills are merely the ante to enter the game. Clients expect these skills regardless of whether they are paying \$200 an hour or \$1000 an hour. If all a law graduate possesses are these foundational skills, the risk is that their services will be viewed as a commodity by clients seeking the low cost provider.<sup>95</sup> Transitional skills employ an added element of creativity and judgment that is often missing in the foundational category and allow a lawyer to begin to add value to clients. Some of these skills include negotiation, structuring, risk management, and counseling.

Law schools often teach these skills in simulation or lawyer-taught practical courses. Negotiation courses have proliferated in law schools across the country and often include business negotiations. Specialized courses in particular types of transactions are also in this category—international business transactions, real estate, executive compensation, venture capital, or private equity deals. Sitting on top of the building

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<sup>93</sup> See *Analytical Methods for Lawyers*, HARVARD LAW SCH., <http://hls.harvard.edu/academics/curriculum/catalog/index.html?o=64299>.

<sup>94</sup> Rakoff & Minow, *supra* note 80, at 600–01.

<sup>95</sup> See William D. Henderson, *Three Generations of U.S. Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373–74, 380–85, 388–89 (2011) (describing the oversupply of specialized, technical lawyers and corporations' refusal to pay a premium for their services).

block of the foundational courses, these types of practical courses introduce students to the mechanics of specific types of business law and allow students to develop skills and substantive expertise in safe settings. Through these courses, students develop more nuanced lawyering skills and a more complete picture of what business lawyers do.

Professors teaching practice-oriented courses may consider introducing business case studies as a vehicle to present problems to students in simulated settings.<sup>96</sup> Gilson and Schwarcz, even with their narrow view of business lawyering, both advocated for a problem based approach to educating law students about transactional law.<sup>97</sup> The problem based approach allows law students to grapple with an issue as it may manifest in real life. It provides greater context and engages students with the complexity of real life practice. The business case study is a higher form of problem based teaching and forces students to engage in more active thinking than mere lectures do. While hypotheticals may be used to present problems a business may confront, the typical business case study is based on a real event enmeshed in the complex content in which it arose. It inputs the student into the scene at a critical decision point where the objective is to help the client solve the problem or make a decision. Students must conform their analysis to provide advice to the client.

The business case method has much promise for the training of business lawyers. In addition to inserting the student into an active problem, it also allows them to check their approach and solution against what really happened. This has the potential to help students develop confidence in their own abilities as well as learn from an epilogue which is rarely present in law school hypotheticals. The business case study can be the transactional practice analog to Langdell's case method. Just as Langdell's method of reading hundreds of appellate court opinions about the adjudication of disputes allows students to develop heuristics to predict outcomes in future disputes that a court might see, the business case study will allow business lawyering students to begin to develop similar heuristics for anticipating, avoiding, and solving problems in business contexts. The more students confront and immerse in these case studies, the more insight they will develop about how businesses operate, how decisions are made, and the impacts of those decisions. The opportunity to acquire this kind of knowledge and insight is sorely lacking in law schools and highly essential to developing great business lawyers.

### *1. Negotiation*

Negotiation courses are ubiquitous in law schools, however few are exclusively tailored to business lawyering scenarios. Case studies are often

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<sup>96</sup> See Rakoff & Minow, *supra* note 80, at 603–04. See generally D. GORDON SMITH & CYNTHIA A. WILLIAMS, BUSINESS ORGANIZATIONS: CASES, PROBLEMS, AND CASE STUDIES (3d ed. 2012).

<sup>97</sup> Gilson, *supra* note 1, at 303–05 & n.182; Schwarcz, *supra* note 11, at 507.

used, placing students in the role of advocate for one party against a counterparty. Through simulated negotiations and subsequent debriefs with the professors and peers, students learn common negotiating techniques and approaches. Negotiating in a simulated setting allows students to try new things or experiment where they may be too risk averse to do so in a real-life setting. Learning lessons through this method allows students to gain confidence as well as greater ability.

Though law students can learn much through a traditional negotiation course, in the transactional setting negotiation often occurs through exchanging drafts of a contract. Being fundamentally sound in drafting is essential in knowing how to manipulate a draft to negotiate better terms for one's client. Mastery of language, knowledge of market terms, and understanding who has the leverage are all necessary to be a good transactional negotiator. In addition, lawyers must exercise judgment to be good negotiators. In order to advocate for the best interests of one's client, lawyers must understand what clients really care about. This might mean sacrificing a desired term in exchange for a different term that secures the client's true goal. Creating more such courses would allow professors to go in depth into strategies and common techniques in common business scenarios. Law students could build heuristics and schema upon which they could draw when encountering similar issues in practice.

### 2. *Structuring*

Good business lawyers employ creativity in structuring companies. For example, a client might come to a lawyer for help structuring a joint venture with another company but want to retain management control over the entire project.<sup>98</sup> The lawyer's job is to design the most efficient and appropriate structure to meet the client's needs. A complete understanding of business associations and their nuances including the tax implications of choices is essential to creatively designing structures that meet clients' goals. Rarely is structuring taught in the current portfolio of courses that most law schools offer. Business association courses cover the differences between entities, but do not often cover how the selected entity can be assembled to achieve particular objectives. An M&A course might touch upon structuring by requiring students to use securities laws to merge two companies together, but will rarely ask students to design a structure from scratch. An alternative course could use case studies to present students with open-ended scenarios requiring them to synthesize the clients' goals with their knowledge of entity forms and law to create optimal structures.

### 3. *Risk Management*

Risks are present and therefore require managing in almost every business transaction. Learning how to help clients identify and manage

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<sup>98</sup> There would likely be many more parameters, but for simplicity and brevity, I choose not to elaborate.

risks is an essential function of business lawyers. The value, however, is not in identifying all possible risks present, but rather in helping identify the most significant and relevant risks and advising the client how to manage them. Risk management could be taught across the curriculum starting in a contract-drafting course or via case study in any course dealing with transactional law. Since businesses price risk, business lawyers must use judgment to help clients decide how to manage risk. Advising clients about the probabilities associated with a particular risk and the consequences associated with a risk allows clients to better price the risk and make a decision about whether to bear it. Lawyers who think practically about how likely risks are to manifest under a particular business plan or set of operations are better risk managers than those who lawyer by template.<sup>99</sup>

#### 4. *Transaction Cost Engineering*

Ronald Gilson coined the term “transaction cost engineering” as the primary way that business lawyers add value to clients.<sup>100</sup> It builds on structuring but can utilize other skills to eliminate inefficiencies in a transaction. Transaction cost engineers must understand the process of a deal to engineer out waste. The engineering may occur in the structure a lawyer creates or the clauses she drafts in a contract to address particular issues. Again, the skill requires judgment and creativity to do well. Gilson, with Victor Goldberg and David Schizer, created such a course at Columbia Law School entitled Deals.<sup>101</sup> The Deals course showcases recurring problems in business transactions and asks students to solve them by looking at precedential deals and applying their own analysis.<sup>102</sup> In many ways, the Deals course is an attempt to provide law students with the ability to develop intuition about solving business problems much like the proposed integration of business case studies into the transactional curriculum would do.

Law schools that employ both the foundational and transitional skills described above will provide law students with a formidable start to becoming good business lawyers. Fundamentally sound technical business-law skills and higher-level skills that require creativity and judgment allow law students to enter practice with the ability to provide business clients with unique and tailored service centered around their strategy and goals. It also enables students to continue to develop their skills through post-graduate experience. That development will be deeper and more consistent than a law graduate who must learn how to be a business lawyer by finding a good mentor and role model. There are many good

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<sup>99</sup> Many business lawyers learn to lawyer by template. Meaning that they use a precedent from a prior transaction as a guide to execute the current transaction. When they encounter an issue that deviates from the template, some of these lawyers do not know what to do.

<sup>100</sup> Gilson, *supra* note 1, at 243, 255, 302.

<sup>101</sup> Fleischer, *supra* note 3, at 478.

<sup>102</sup> *Id.* at 482–83.

mentors and role models among business lawyers, to be sure, but the randomness of a graduate finding one of them is not a sustainable or pervasive strategy.

### C. *Optimal Skills*

The complement of skills that set great business lawyers apart from average ones are what I have labeled optimal skills. Four primary ones are understanding business, understanding people, creative problem solving, and advising clients. These skills transcend any specific type of business lawyering and allow lawyers who master them to provide the greatest value to clients. Unlike most of the skills in the foundational and transitional sets, optimal skills are not unique to lawyers. In fact, any business advisor who wants to excel at counseling business clients should develop these optimal skills.

The best place to teach optimal skills in the law school setting is in clinics. Live-client representations present the only forum in law schools that allow students to engage with clients confronting problems that are not neatly structured or constrained. The added pressure of clients relying on a student counselor's advice adds to the development of higher level lawyering skills such as being creative and practical. Though it may appear that I am jettisoning the foundational and transitional skills by stressing optimal skills, it is in fact the opposite. Law students in a clinic cannot fully engage in optimal skills if they have not yet mastered foundational and transitional skills. The first two levels of the pyramid provide students with the tools to execute on their advice. The optimal skills allow them to devise a plan and strategy to solve a client's problem.<sup>103</sup>

I teach a live-client transactional clinic at the University of Pennsylvania Law School, the Entrepreneurship Legal Clinic (ELC).<sup>104</sup> Students in the ELC represent business clients ranging from established nonprofit organizations engaged in transactions to start-up ventures with preformation issues to established for-profit entities planning for growth. Though Penn has not yet employed the full Transactional Business Lawyer Skills Pyramid, I have worked intentionally to integrate the optimal skills into the ELC. As a result, the ELC provides a rich platform from which its students learn the art of business lawyering in addition to the fundamentals of transactional law.

#### 1. *Understanding Business*

The ELC begins with a business case study entitled Icedelights about three Harvard MBAs negotiating the rights to a gelato franchise in Florida.<sup>105</sup> Icedelights is the first reading for the first class. I do this for two primary reasons. First, Icedelights is a great case to introduce the multi-

<sup>103</sup> See Lederman & Levenson, *supra* note 50, at 424–25.

<sup>104</sup> See Praveen Kosuri, "Impact" in *3D—Maximizing Impact Through Transactional Clinics*, 18 CLINICAL L. REV. 1, 30–32 (2011) (describing how the ELC is designed).

<sup>105</sup> MICHAEL J. ROBERTS, ICEDELIGHTS (July 31, 2003).

tude of legal issues that touch a new business—founder issues, governance, financing, securities, contracts, intellectual property, structuring, tax, licensing and permitting, zoning, and exit options, among others. Second, it serves to reorient the students (mostly third years) to view these issues through the eyes of an entrepreneur. The problems are rooted in the context of making a decision. The students, who inhabit the role of lawyer, must help the client make a decision.

The way in which I engage students in the Icedelights case study serves as the template for how I want students to approach their actual clients. I want them to understand their clients' businesses first. Among other things, the students must be able to understand what their clients' businesses do, how they do it, how they plan to sustain themselves, what pressures exist on them, and who their competitors are. Much of the students' initial interviews center around learning this information. In advance of the interviews the students often do research on the companies and their industries. The pedagogical design is that students will be better able to diagnose clients' problems if they understand the complete context.

### 2. *Understanding People*

In addition to understanding the business, I want students to understand the people behind it. Icedelights is a great introduction to that concept as well: it features three business school friends and one of their fathers who are attempting to buy franchise rights from a franchisor with two principals. Each of the friends has a unique background with differing levels of risk tolerance and differing ideas about the future. The franchisors exhibit inconsistent behavior in the case as well. Students must grapple with these differences in determining how to solve the problem, what solutions to present, and to whom to present them.

In the clinical context getting the client's personal story is similar to getting the business story. Why did they start this business? What are their personal goals? What are their goals for the business? What are their personalities? If there are multiple people in the room, what is their dynamic? What are the client's expectations of the student and the ELC? All of this information makes its way into an initial meeting memorandum which serves as a guide to help students manage their clients for the rest of the semester.<sup>106</sup>

### 3. *Creative Problem Solving*

Understanding the business and its people often requires more than one interview and a little bit of time. This can be frustrating for students who want to jump immediately into problem solving. Unfortunately for them the frustration will continue a bit longer.

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<sup>106</sup> See generally DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977).

The first step of problem solving is defining the problem. Clients often come to the ELC with stated tasks: "I want you to create a limited liability company for me," or "I would like you to draft an employee contract for me to use with all of my employees." I counsel my students to never accept a client's to-do list without independently verifying that it, in fact, makes sense. In other words, I want the students to diagnose the clients' problems themselves. That means that the students must figure out what the problem is. This can sometimes take half a semester or more. Clients use words that they don't always understand. They might say S-corporation but mean limited liability company. They might say they want to be incorporated in Delaware because they heard that's what everyone does. They may assume that everyone has to have an employment contract to be employed. Students need to get behind the statements to the underlying issues giving rise to the statements. Once they do that, they can move into problem solving.

Even if a solution seems evident, I encourage my students to look at different alternatives. I want them to understand why a particular solution may be the best. In order to do that they need to understand something about the alternatives. In a clinical setting, we have the luxury of being inefficient to teach students longer-lasting lessons. I occasionally let students go down a less optimal path before guiding them back. The goal is to let them discover the process of creativity that will lead them to the best solution.

Often times, solutions are not evident. In these situations, I encourage my students to use their entire experience to solve their clients' problems, not just their legal experience. If the best solution to a problem is non-legal, the student should not be afraid to offer that solution to the client. By the same token, they should use their knowledge of the law to search for solutions to their clients' problems. Researching and understanding the law allows students to define the universe of potential solutions available to a client. Students must then develop their advising skills in order to effectively offer or communicate solutions to clients.

#### *4. Advising Clients*

The primary characteristic of any advice students give to clients is that it should add value to the client. Before delivering any advice, I ask students to ask themselves two questions: (1) is the client better off after receiving your advice than before? and (2) can the client easily implement your advice? If the answer to both questions is yes, the students have usually added value.

Pragmatism is an important consideration in any solution a lawyer presents to a client. Too often in law school the academically creative answer is given much credit only to have no real-world application. In the ELC, the universe of solutions are limited to those that are practical and executable by the client. Over-lawyering is a common critique of business

lawyers.<sup>107</sup> I try to teach students that just because something is possible does not mean that it is useful or necessary. In the ELC we try hard not to create problems where one does not already exist or turn a simple problem into a complicated one.

Notwithstanding this approach, rarely is there a black-and-white solution in business law. Often students search for “the” answer to a problem. After researching for many hours they are often no closer to finding “the” answer than they were before they began. However, they are educating themselves in the process and better equipped to craft a solution. The skill that they must employ in deciding when to stop researching and what advice to give is judgment. Learning this lesson is a difficult one for students and lawyers alike but one that separates great business lawyers from average ones.

By the time students understand a client’s business and its people, define the problem(s), and create solutions, it is near the end of the semester. Though limited counseling and advising may go on throughout the semester for most of my students, the majority of advising comes at the end. How students process all of the research and investigation they have done and translate and package it into advice for the client is a formidable task in which lies much of the art of lawyering.

Doing all of this—understanding business, understanding people, creatively solving problems, and adding value to clients—in a clinical setting is incomparable to any simulated setting that could be devised. Though simulations can help prepare a student to perform better in a live-client setting, interacting with a business owner or operator whose livelihood is tied up in his business and who is going to rely on the student’s advice adds a unique dimension to the entire experience. Not to be lost in the skills developed in the clinical setting is the underlying technical lawyering that is often done—reviewing or drafting a contract, forming an entity, drafting bylaws and governance documents, or ensuring compliance with regulations. All of these skills buttress the student’s ability to engage at a higher level as the great business lawyers do.

Finally, clinical pedagogy offers students the opportunity to reflect on their thoughts and actions. Great business lawyers are like elite athletes.<sup>108</sup> They set goals and learn from everything—successes and failures. Offering students the opportunity to do the same will allow them to perfect their skills over time. Law school is a short experience. It is inconceivable that a law school could produce the next Joe Flom in three years. However, it is conceivable that law schools could produce more Joe Floms or more really good business lawyers over time if their graduates know how to keep improving and know what skills to concentrate on.

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<sup>107</sup> Scott Edward Walker, *Top 10 Reasons Why Entrepreneurs Hate Lawyers* (Jan. 14, 2010), <http://venturehacks.com/articles/hate-lawyers>.

<sup>108</sup> Graham Jones, *Managing Yourself: How the Best of the Best Get Better and Better*, HARV. BUS. REV., June 2008, at 123.



## V. CONCLUSION AND RECOMMENDATIONS

Scholars have described to us what business lawyers do. They negotiate, draft, structure, give legal opinions, and help minimize regulatory costs. But they also counsel, advise, strategize, and problem solve. Their job is to help clients make decisions that push their organizations forward. Often, that results in a business transaction. Sometimes, however, it does not.

Whereas Gilson, Okamoto, and Schwarcz focused on identifiable and measurable economic value that could be traced back to the lawyer, the additional roles and functions described by other scholars are no less valuable. At the end of the day (even considering capital assets), valuing business lawyers is not a science. Nor is everything business lawyers do to provide that value.

Gilson, Okamoto, and Schwarcz described a world where non-lawyer advisors were increasingly capable of providing services once exclusively provided by lawyers. Instead of seeing the erosion of professional boundaries as an opportunity, they urge lawyers to retrench and defend their territory. I encourage lawyers to take a more proactive approach. Business lawyers have the capacity to be advisors to their clients in the fullest sense. It does not mean they are going to open up investment banks, but they can surely advise clients about strategic questions on whether to merge with another company or take on a particular investment. With different advisors merging the roles they play, it makes sense to introduce law students to the scenarios that their counterparts often see in business school.<sup>109</sup> Business lawyering risks being commoditized. Fundamentally sound, technical lawyering is expected of any business lawyer. Clients, however, do not place a premium on that service. Educating students about higher-value services like strategizing and problem solving may allow lawyers to retain a meaningful role as business advisors.

Okamoto says you cannot teach greatness.<sup>110</sup> That might be true after a certain point. But what law student has even witnessed a great lawyer. Most would have no idea what that is or what characteristics were different from the average business lawyer. Most of the time, adding value to clients is not about technical lawyering. Marty Lipton, Joe Flom, and Larry Sonsini all are or were fundamentally sound lawyers, but what set them apart was their creativity and problem-solving ability. And while Gilson and Schwarcz warned of non-lawyers encroaching on law practice, Lipton, Flom, and Sonsini embody the value lawyers can add, particularly when they are not afraid to give advice that goes beyond narrowly defined legal issues. If law schools can provide law students with a contextualized view into what those lawyers do, students stand a far greater chance

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<sup>109</sup> Undergraduate business programs also use case studies so even advisors who did not go to graduate business school would likely have been educated using business case studies.

<sup>110</sup> Okamoto, *supra* note 54, at 70.

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of becoming great themselves. But even if they do not become great, they know what skills they have to develop in order to become better, and they are better educated about what services clients value the most.