12-19-2018

# An Excerpt from Chapter 3 of *Legal Upheaval: A Guide to Creativity, Collaboration, and Innovation in Law*

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## THE INNOVATION DISCONNECT

If clients are asking for collaboration with lawyers and, specifically, for innovation with lawyers and, as discussed in the next chapter, they are rewarding lawyers for both, then why does innovation remain a four–letter word? The answer lies in part from an Innovation Disconnect that stems from three gaps:

1. The ask for innovation has been too vague;
2. There is a skills and behavior deficiency;
3. The leap from a culture of collegiality to one of collaboration has not been made.

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[†] Michele DeStefano, *Legal Upheaval: A Guide to Creativity, Collaboration, and Innovation in Law*, 44–55 (Ch. 3, *The Lawyer Skills Delta*) (2018). Reprinted with permission. 

These gaps in turn represent a huge opportunity for differentiation by the lawyers who fill them. Let's explore each of them in greater detail.

### *Gap 1: A Vague Ask for Innovation*

> *"All the evolution we know of proceeds from the vague to the definite."*
>
> —Charles Sanders Peirce[1]

Let's face it: One of the reasons everyone is sick of the word *innovation* is because too many people are batting the term around without having a clear understanding of its meaning. Clients do not know exactly what they want when they ask for innovation. Yet they know when they are *not* getting what they want, and they know when they are getting what they want, sort of like the old definition of pornography: They know it when they see it but remain confused and vague in defining it.[2]

> *"I think the challenge right now is that GCs need to understand how to consume a new type of services and the law firms need to understand what that type of services is and how to sell it. So I don't necessarily see it as the law firm is to blame or the GC is to blame. I think there is a fundamental disconnect going on and the GC, as the buyer of legal services, should start driving that conversation. And the conversation should not just be: how can you trim your rack rates or how can you deliver innovation for me which is another classic but frankly not particularly constructive request. To me the question GCs should ask is: if I am going to invest in you for the next two to three years' worth of fees, how can you invest back in me? What's your technology roadmap—and your POV on technology strategy—how are you going to help me*

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1 Charles Sanders Peirce, Collected Papers (1931–1958), Vol. VI, par. 191, accessed December 10, 2017, https://en.wikiquote.org/wiki/Charles_Sanders_Peirce.

2 *Jacobellis v. Ohio*, 378 U.S. 184 (1964) (holding that the Constitution protected all obscenity except "hard]core pornography"); in his concurrence, Justice Potter Stewart wrote: "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." Id. Lawyers remain confused about what is and is not "obscene" pornography, and the doctrine remains vague in defining it. *See, e.g., Movie Day at the Supreme Court or "I Know It When I See It": A History of the Definition of Obscenity*, FINDLAW, accessed July 16, 2017, http:// corporate.findlaw.com/litigation-disputes/movie-day-at-the-supreme-court-or-i-know-it-when-i-see-it-a.html.

> *unbundle, co–source, multi-source—what are you doing in legal management legal services space, how can you prime for me with a whole number of other vendors delivering better value . . . to me? Those are the types of questions that are interesting."* —VP and associate GC, American multinational enterprise information technology company[3]

Unfortunately, the right set of questions isn't being asked as often as it should be. GCs aren't asking the fire–lighting questions such as how can you help me manage my array of service providers, how can you help me predict my resources needs, and how can you help me quarterback my multiple legal service providers. Instead, they take the easy way out and simply ask their firms to *be more innovative*.

> *"It is easy for big corporates to say law firms 'you need to be more innovative.' They don't know as much as their law firms know what they are asking for."* —Lead counsel, large global bank headquartered in the United Kingdom[4]

> *"We see a few but relatively few in house who push for change or for innovation or for different ways of doing things. Most of them have a tepid gentle push."* —Former CEO, professional services firm located in the United States.[5]

As of right now, some (but not all) clients are asking law firms to demonstrate that they have been innovative in RFPs but not checking to see if what they claim is true. Furthermore, some clients are asking law firms to pledge that they will be innovative but not following up to see if what they promised was done. And clients and lawyers alike are claiming that they are innovative or that they are innovating—but are they?

One of my favorite quotes about innovation sums up the current state of the marketplace as it relates to innovation in law: "Innovation is like teenage sex; everyone talks about it, nobody really knows how to do it, everyone thinks everyone else is doing it, so everyone claims they are doing it."[6]

But if Charles Sanders Peirce is correct about evolution, the demands for innovation will, over time, proceed "from the vague to the definite."

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3 Client Interviewee 29.
4 Client Interviewee 22.
5 PSF Interviewee 10.
6 Cris Bewick, https://crisbeswick.com/.

We have seen this trajectory happen before in the legal marketplace e.g., in GCs' call for diversity. The accredited original call for diversity happened in 1999 when former BellSouth general counsel Charles Morgan, in a white paper petition entitled "Diversity in the Workplace: A Statement of Principle," gathered the signatures of approximately 500 chief legal officers of major corporations to affirm their commitment to diversity in the legal profession and to promote diversity in law firms. That original call (like the current call for innovation) was vague. It didn't specify exactly what was meant by diversity or exactly how GCs would draw the line when it came to hiring law firms.

As the call for diversity went further in 2004 with then GC of Sara Lee, it attempted to translate the general principles of the original call to support diversity into a real action plan. It called for GCs to request diversity performance statistics and make hiring decisions based, at least in part, on those stats.[7] Companies signed on and responded by surveying their law firms to determine their stance on diversity principles and to gather diversity statistics. This led to companies setting diversity benchmarks and monitoring their law firms' progress in meeting the goals. They set quotas, at first very vague ones. For example, they might have said that we expect a certain percentage of all employees of the law firm to be female. This then lead to in–house lawyers setting more *exact* parameters for diversity. For example, they then said that they expect a certain percentage of all *partners* of the law firm to be female. Over time, the call for diversity matured. GCs began setting diversity benchmarks not only for law firms as a whole but also for internal teams working on their business at the firms. Today the requisite proof of a commitment to diversity isn't only in the concrete numbers or the faces around the table. Forward–thinking clients are looking for proof that the law firm provides meaningful opportunities for development to diverse lawyers, and they are looking at the law firm's flextime policies as a proxy for a firm's commitment to diversity. The thinking is that robust flextime policies enable a diverse workforce to work at a firm.[8] Almost 20 years later, clients are rewarding and punishing law firms based on their diversity efforts or lack thereof.[9]

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7 Melanie Lasoff Levs, *Call to Action: Sara Lee's General Counsel: Making Diversity a Priority*, MINORITY CORPORATE COUNSEL ASSOCIATION, DIVERSITY & THE BAR, accessed December 8, 2017, archive.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=803.

8 Erin Geiger Smith, *Wal-Mart Will Slash Firms That Don't Have Flex-Time Policies*, BUSINESS INSIDER, October 27, 2009, accessed December 5, 2017, www.businessinsider.com/wal-mart-will-slash-firms-that-dont-have-flex-time-policies-2009-10.

9 Lisa Kirby and Caren Ulrich Stacy, *Client Call for Greater Diversity at Fever Pitch*, LAW.COM, July 25, 2017, accessed July 17, 2107, https://www.law.com/sites/almstaff/2017/07/17/client-call-for-greater-diversity-at-fever-pitch/.

True, not all clients are asking for innovation. In some cases, those that are asking for innovation are the early adopters; in other cases, they are being pushed to innovate and/or find more affordable solutions than law firms have traditionally provided. This relieves law firm lawyers from any sense of urgency. Regardless, the future likely holds more consistent calls for innovation by clients and more stringent benchmarking, evaluation, and measuring of innovation along the same trajectory as the call for diversity. And firms that do not measure up will not be hired.

> *"If the law firms don't do it, then new entrants will. And then the law firms will become less significant and less relevant. And the conversation will be less about demanding law firms to innovate and more about the opportunity that law firms continue to miss out on and their ever–decreasing pie because they are not being proactive in helping us in areas that they had not traditionally helped us in past."* —GC, large media and telecommunications company in Australia[10]

Who will lead this trajectory? Who will fill this gap and define what is meant by innovation—clients or legal service providers? If the former, will the clients forge together to create a more unified and influential voice? And if the latter, which types of legal service providers will set the pace (ALSPs? big law? PSFs?) And as questioned in the innovation trajectory chart in one of the reflection points of Chapter 2, will innovation come from outside law (via entrepreneurial alt–legal service providers or from within via intrapreneurs at firms)? The most innovation results will likely be co–created by lawyers and clients, sharing the risks and rewards, as they define, measure, and implement innovation.

### *Gap 2: Skills, Mindset, and Behaviors*

> *"The truth won't set us free—until we develop the skills and the habit and the talent and the moral courage to use it."*
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> —Margaret Heffernan[11]

As mentioned above, the focus is changing from what lawyers "do" to *how* they work—*how* they provide their service. In other words, the focus

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[10] Client Interviewee 25.

[11] *The Main Themes from Dare to Disagree—A Ted Talk from Margaret Heffernan*, NVMS, October 12, 2016, accessed December 9, 2017, https://nvms.us/2016/10/12/the-main-themes-of-dare-to-disagree-a-ted-talk-from-margaret-heffernan/.

is on the C.O.S.T skills and collaborative, creative problem–solving skills in the Lawyer Skills Delta. In the past, what mattered is whether lawyers had the skills for private practice, the legal expertise, and that they provided high–quality work (the base of the Lawyer Skills Delta). Today what is desired is full–service client service that requires a whole set of competencies that lawyers today often lack. The reality is that lawyers today are ill–equipped in all three levels of the Lawyer Skills Delta: Level 1: The C.O.S.T skills; Level 2: Collaborative, Creative Problem Finding and Solving; and Level 3: Innovation.

> *"My team is frustrated with law firms.They send us something and it seems so divorced. Over time, they are becoming less and less relevant."* —GC, Australian division of a worldwide healthcare group based in the United Kingdom[12]

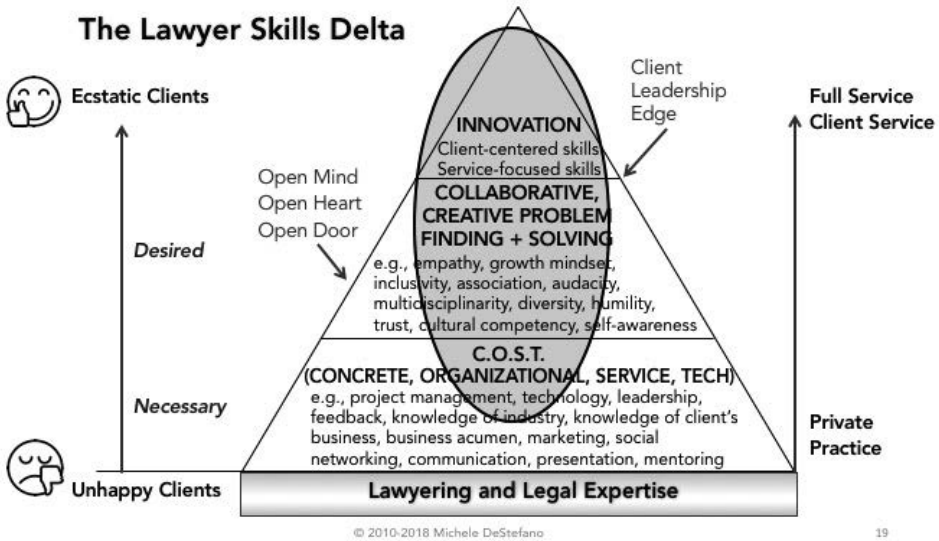


**FIG. 3.6.** The Lawyer Skills Delta detailing the skills, mindset, and behavior gap.[13]

Starting with Level 1, C.O.S.T skills, there was a series of common complaints of deficiencies in these skills. Client interviewees often complained that the work product provided was unhelpful, un–actionable,

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12 Client Interviewee 11.

13 "Thumbs-up smiley face" and "Thumbs-down smiley fact" icons are by iconsmind.com, GB from the Noun Project, accessed April 25, 2018, https://thenounproject.com/search/?q=thumbs%20up%20face&i=68448.

and divorced from the clients' industry concerns and actual business needs. Clients have been complaining for years about the need for lawyers to up their skills about the industries within which the client works. And so there appears to have been some progress with respect to that competency. But one of the most repeated complaints by clients was a lack of understanding of business in general. Time and time again clients expressed dismay with a lack of business acumen and client service. They complained about the consistent lack of cost certainty and transparency and about projects that were not managed to meet deliverables on time. Clients want lawyers to learn how to communicate better and check in more often and provide and embrace feedback. It's a different level of client service than was required in the past, and lawyers are not providing it. Indeed, I had the opportunity to do some video interviews of a law firm's clients. These clients knew that they were being recorded and that the videos would be shown to the partners of the firm at their annual retreat. And they were forthcoming with these types of complaints with respect to skills gaps at the bottom of the pyramid. In addition to a lack of business acumen, there appears to be a lack of understanding of the clients' specific business. It is one of the reasons the client interviewees touted the benefits of secondments. They want their outside lawyers to work seamlessly with them, and that can only be done if they understand how their specific law department functions within their specific company business and culture.

> *"Some things I still find painful at times. No amount of feedback seems to address them. To be candid, stuff like over the top legal advice or un– commercial legal advice or lack of understanding of the issues as they relate to the business."* —CEO, a specialist real estate investment management company in Australia[14]

> *"There are a couple of firms that we use that kind of see the advice of the legal adviser as a little bit removed and their job is to provide the technically correct legal advice in relation to the question that is asked whether or not that is particularly helpful and whether or not that is what is wanted. And it is almost like a high moral ground. We are here to tell you what the law is and you can go away and deal with it . . . we have other firms who are much more attuned to what it is the client (not me but our business areas) wants to achieve and find a way to do that and delivering advice that while still accurate takes into*

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14 Client Interviewee 39.

> *account where the client wants to go—and the law is very rarely black and white. There are lots of greys and it's how you work with greys to find the way through. The firms that don't do that well, do at times very much frustrate me—because they are not really delivering the service we need."* —GC, government department of Australia[15]

Moving on to Level 2 of the Lawyer Skills Delta, client interviewees also made clear that their lawyers lacked the collaborative, creative problem finding and solving skills they needed. They want their lawyers to develop the skills that provide a collaborative mindset such as empathy, self–awareness, and humility because those skills are what turn a great lawyer into a great leader.

> *"I do think there is quite a number of things lawyers need to develop. Leadership starts with self, emotional intelligence and self–awareness. There is a huge difference between being a great lawyer versus a great leader. Do they actually lead people? Inspire, motivate, collaborate, and drive a team to high performance? There's a whole skill set required for lawyers around leadership and that requires a huge amount of investment."*—Senior corporate counsel, multinational insurance company head– quartered in Australia[16]

Clients want their law firm lawyers to invest more time in developing these skills, and they think they are ahead of their law firm lawyers in that respect.

> *"We are very keen on developing that broader set of soft skills. I don't know if we are kidding ourselves a little bit but I kinda get the sense that law firms are following us a bit not the other way around. They need human resources. People that think of their employees as an organism that needs nurturing."*—Head of knowledge and development, Compliance and Secretariat, a Big Four Australian bank and financial service provider[17]

And the #1 reason for the gap in skills and behaviors seems to boil down to one word: *investment*. The phrase "lack of investment" resonates

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15 Client Interviewee 31.
16 Client Interviewee 33.
17 Client Interviewee 9.

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with the clients—not only investment in mastering the skills in the Lawyer Skills Delta but also investment in more time spent problem finding (versus problem solving). As the senior legal counsel of a global management consulting and professional services company explained, the company wanted its lawyers to spend more time "getting to know them and understanding their paint points, what makes them tick."[18] They want more time talking and listening (and not being charged for that time).

> *"They want to have a one hour kickoff call but really just want to suck off info from you and they are sort of listening to you but also selling themselves and it's an hour and a half and then they bill you for it and you could have found it on my website and then asked five minutes of targeted questions and that would have showed your value."* —GC, global cybersecurity company based in the United States[19]

> *"What is important is: how do they then add value to make strategic decisions? We need more law firms to invest in the front add and provide a value add to go through the problem at an early stage and talk to us—and not charge us—and not jump to advice."*—Senior corporate counsel, multinational insurance company headquartered in Australia[20]

One GC told me about a law firm of theirs that keeps coming to him to tell him how the law firm is going to innovate *for* him—for his company. The firm even runs hackathons to solve his company's problems without inviting anyone from his company to join them. He was incredulous: "What I find hilarious, uh fascinating, is that they never asked us to do it . . . They *know* that I have been focusing efforts on creating an innovation forum. I find it *fascinating* that they think we would be excited about them trying to solve our problems without us in the room. It is really missing the mark with the best of intentions."[21] This story says it all. Today in their rush to solve the problems presented to them, lawyers often miss the mark, leaving clients unhappy and convinced that lawyers lack the ability to reach the top of the Lawyer Skills Delta: Innovation.

> *"I ask them to be innovative . . . but they are going on an old model. I find this with my team as well—they are*

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18 Client Interviewee 32.
19 Client Interviewee 28.
20 Client Interviewee 33.
21 Client Interviewee 25.

> *getting frustrated with law firms. As time goes on, it's becoming less and less connected with what you need . . . Figure out what do I need? You could be providing training that I can't do because I'm too busy. You are selling me templates but I want to buy your judgement."* —GC, Australian division of a worldwide healthcare group based in the United Kingdom[22]

And it's a double bind: Clients are underserved, and lawyers are under– valued. Law firm lawyer interviews made the same complaints about other lawyers that the clients did.

> *"Lawyers are not very innovative, which is weird because the practice of law is a creative practice. Most don't appreciate the extent to which what they do is a really creative practice and that is a skill and talent that they do have. They see it as external to them and therefore are challenged by the concept. They ask: 'What does that mean to me? I'm not innovative. I'm not very creative. I just draft leases.' But I don't think that's true."* —Partner, midtier Australian law firm[23]

As a result, there is a misconception in the marketplace that lawyers cannot be creative, cannot be innovative, or cannot be team players. But in reality, they can. Furthermore, when tapped into in the right way, the value these lawyers add can be exponential.

### *Gap 3: A Culture of Collegiality Instead of Collaboration*

> *"Your elbow is close, yet you can't bite it."*[24]
>
> —Russian Proverb

We have been discussing each gap as if it existed in a vacuum, but the truth is the three gaps are closely interrelated. For example, the vague ask for innovation contributes to the lack of investment by lawyers in honing the skills and behaviors, and the gap in skills and behaviors leads to a gap

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22 Client Interviewee 11.

23 Law Firm Partner Interviewee 10.

24 This is a Russian proverb for the English saying "so near yet so far." *See, e.g., Top 40 Russian Idoms, Proverbs, & Sayings. Part 4*, LinguaJunkie.com, March 15, 2015, accessed April 18, 2018, https://www.linguajunkie.com/russian/top-russian-idioms-proverbs-sayings-part; SPEECH IMPROVEMENT NOW, December 26, 2016, last visited April 18, 2018, https://www.speechimprovementnow.com/russian-proverbs-idiomatic-expressions-english/.

in a culture of collaboration within law firms and legal departments alike.[25] However, even if lawyers master the first block, the C.O.S.T skills, and learn the second block, how to problem solve creatively, in places and at times, there still might be a gap in the collaborative culture in the departments or firms in which they work.

This is due partly to the structure of the law firm, a group of separate fiefdoms under one house despite the one–firm gloss managing partners try to evoke. The client interviewees complained that law firms are essentially multiple practice area groups (each led by a lead partner) sharing an office and some profits without any real central leadership that has power to influence change in behavior. The relationship between the key partners and firm management is not unlike that between tenured faculty and the dean. The dean can suggest that faculty collaborate and put people in charge of committees to enact change in culture, but s/he doesn't have any real power to make faculty do things differently. And if faculty members don't want to change (and many of them don't) and they are in charge, change won't happen. The "elbow is so close, yet you can't bite it." The same Catch–22 occurs in law firms. The partners run the firm. And in the law partner world, power and the ability to influence is associated with revenue. Unfortunately, in large part, law firm management has not yet tied compensation to work that does not immediately generate revenue. Law firm partner interviewees made it clear that regardless of the collaboration mantra, the reality is that a revenue–based, eat–what–you–kill compensation structure is going to put up barriers. Furthermore, even partners who want to create change are limited in large part to the lawyers and staff in their own practice area, which in turns limits the potential for real change given that the people within the same practice area (because they are from the same practice area) tend to lack the requisite diversity and be like–minded and similarly situated. For this reason, some firms have attempted to restructure by industry segment to create more natural opportunities for collaboration across practice area. The success of such moves (if not supported by some type of incentive structure) is dependent on the willingness of partners to share clients out of the goodness of their hearts in the hope that doing so will yield benefits to both practice areas.

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[25] The GC of a global music streaming service explained that it is common within legal departments to find "silo operations and teams that don't work together and people not used to measuring their own success to how they contribute to the success of others and, as a result, lawyers are doing their own thing and creating conflict within the legal department and with other divisions like finance and accounting." Client Interviewee 23.

> *"We did this to ourselves. This structure of the law firm, is at the crux."*—GC, online legal technology company that helps clients create legal documents[26]

> *"The problem with law firms as a source of innovation is that most are not really a cohesive whole. They are a group of small business owners that share an office and do some profit sharing. Each partner has his/ her own business and own clients. Law firms don't have a lot of central strategic control over what their people are doing, especially their most successful people . . . Some firms are talking about innovation and putting people in charge of it. But does the head of innovation at a law firm have the ability to influence and convince the individual partners and senior associates to do anything differently?"* —GC, American non–profit that designs public competitions for technological development[27]

> *"A great element in our firm is that revenue and revenue production on an individual basis still runs how people are remunerated, so there is a great deal of self–interest and fear, and fear breaks down collaboration. In its dumbest form, I'll collaborate with you if I can get something from you. It is not collaboration for collaboration's sake. I want a dollar number to come out of it . . . Our firm talks about it a lot. Nice words in a well–put together policy that doesn't translate into hard and fast rules on how to weight behaviors vs how much revenue you made."* —Chief executive partner, top–tier Australian law firm[28]

> *"I think it has to do with a culture and a fear. The firm values the 'friendly be nice' culture above all else. That word 'culture' comes out all the time. We say we have this innovation focus. But when they say culture they mean something totally different. It harkens back to a thick wet blanket over the whole place. It's a culture of non–confrontation because you have to be nice. Nice is everything. If you draw criticism from anyone, then people want to put you through a fire squad. You can not*

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26 Client Interviewee 27.
27 Client Interviewee 20.
28 Law Firm Partner Interviewee 19.

> *perform or you can have paper files and commit all these sins that are against 'our culture,' but if you are nice? all of that is absolutely fine. And that really frustrates me and it is holding the firm back, the fear of conflict."* —Partner, midtier Australian law firm[29]

And so what we end up with instead of a culture of collaboration is, at best, a culture dedicated to being nice, to being collegial. I often ask partners and other leaders of law firms to describe the culture of their firm in only three words. Besides proving to be a difficult request time and time again, one of the three words they choose is "collegial." This is true of lawyers at American firms, Australian firms, and firms in the United Kingdom.

> *"I chose the word collegial because people like working together and there is a good vibe and feel around the firm but they don't necessarily work through how they can use that vibe to sort of make it truly collaborative. I'd say we are friendly without being engaged for a purpose."*— Chief financial officer, top–tier Australian law firm[30]

But collegiality is not collaboration. Collegiality is not "good enough."[31]If the partners dominate the firm and its culture and they don't want to change, to move from collegiality to collaboration, the structure and incentives of the firm need to change.[32]

And this is the point clients make. Clients don't want "good enough"; they want what leading management consultant Subir Chowdhury calls "the difference."[33] What they care about is whether innovation and collaborative problem solving has infiltrated the culture of the firm in a way that is intrinsic and not just external, not just a few well–chosen words on the innovation page of a firm's website. Without this shift from collegiality to collaboration, law firms and lawyers within them cannot collaborate internally, and as a by product, they also cannot collaborate

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29 Law Firm Partner Interviewee 10.

30 PSF Interviewee 6.

31 Subir Chowdhury, *The Difference: When Good Enough Isn't Enough* (New York: Crown Business Publishing, 2017).

32 Henry N. Nassau, Collaboration as Superpower: Optimizing Value to Lead in the Future, New York L.J., April 24, 2017, accessed September 17, 2017, https://www.newyorklawjournal.com/id=1202784074939/Collaboration-as-Superpower-Optimizing-Value-to-Lead-in-the-Future?mcode=0&curindex=0& curpage=ALL.

33 Chowdhury, *supra* note 31; *id.* at 36–37 (describing the difference as "a caring mindset" made up of four "STAR principles": "Being Straightforward," "Being Thoughtful," "Being Accountable," and "Having Resolve.").

externally *with* clients in the way clients want them to and that adds the value that clients desire.