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# The Law Firm Operations Team: Collaborative Agent of Change in a Changing Profession

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## THE LAW FIRM OPERATIONS TEAM: COLLABORATIVE AGENT OF CHANGE IN A CHANGING PROFESSION

By James Keuning<sup>†</sup> and Ann Rainhart<sup>††</sup>

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## I. INTRODUCTION

Thompson Reuters and Georgetown Law's collaborative publication, *The Report on the State of the Legal Market 2016* ("2016 Report"), opens with a brief case study of the Kodak company.<sup>1</sup> The report describes Kodak as the camera and film market-maker during the 1970s and 1980s.<sup>2</sup> During those decades, Kodak controlled "80 percent of the market for the chemicals and paper used to develop and print photos."<sup>3</sup> But when the market switched to digital, Kodak failed to respond. Futurist and innovation advisor Chunka Mui categorized this missed opportunity as one of history's most staggering corporate blunders.<sup>4</sup> Law firms need to heed the warning from the 2016 Report that Kodak was one of many "well-established companies being blindsided by technological developments that oust[ed] them from their positions of market leadership."<sup>5</sup> Kodak even invented the very technology that led to its downfall.<sup>6</sup> Kodak's problem, according to author Richard Randall, is the same problem that plagued Borders bookstore and Blockbuster video rental—namely, wanting to take on the competition while maintaining traditional business.<sup>7</sup> While Kodak's competitors were establishing footholds in digital photography, Kodak was distracted by its continued focus on the film market.<sup>8</sup>

The Kodak story is a cautionary tale for law firms. The 2016 Report warns that law firms' adjustments to significant and permanent market changes are largely passive and reactive.<sup>9</sup> The 2016 Report finds that "very few firms have been willing to engage

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1. See GEO. L. & THOMSON REUTERS, PEER MONITOR, 2016 REPORT ON THE STATE OF THE LEGAL MARKET 1 (2016), [https://www.law.georgetown.edu/news/upload/2016\\_PM\\_GT\\_Final-Report.pdf](https://www.law.georgetown.edu/news/upload/2016_PM_GT_Final-Report.pdf) [hereinafter 2016 REPORT].

2. *Id.*

3. *Id.*

4. See Chunka Mui, *How Kodak Failed*, FORBES (Jan. 18, 2012), <https://www.forbes.com/sites/chunkamui/2012/01/18/how-kodak-failed/>.

5. 2016 REPORT, *supra* note 1.

6. Mui, *supra* note 4. Steve Sasson, an engineer at Kodak, invented the first digital camera in 1975. *Id.* He says Kodak's response was, "that's cute—but don't tell anyone about it." *Id.*

7. See generally Richard Randall, *Kodak's Failure to Exploit its Digital Edge is a Lesson on Complacency*, CENT. PENN. BUS. J. (Oct. 14, 2011), <http://www.cpbj.com/article/20111014/CPBJ01/111019870/the-whiteboard-kodaks-failure-to-exploit-its-digital-edge-is-a-lesson-on-complacency>.

8. *Id.*

9. 2016 REPORT, *supra* note 1, at 2.

proactively in the consideration or implementation of the kinds of operational changes that would be required to respond effectively to the changed expectations of their clients.”<sup>10</sup> Law firms who fail to react to the indisputable legal market changes are choosing to ignore reality.<sup>11</sup> Instead of attempting to convince readers to act, the authors of this article provide suggestions for readers about how to act. The 2016 Report’s finding that law firm partners are reluctant to move away from “an economic model that has served them very well over the years and that continues to produce good results today” is a harsh analog to Borders’ and Blockbuster’s addiction to physical stores and Kodak’s commitment to film.<sup>12</sup> Such reluctance “could result in law firms failing to respond to trends that over time could well challenge their traditional market positions.”<sup>13</sup>

Importantly, failing to respond does not always look like inactivity. In fact, organizations can be very active while failing to respond to market changes. Donald Sull calls this “active inertia.”<sup>14</sup> This occurs when, “stuck in the modes of thinking and working that brought success in the past, market leaders simply accelerate all of their tried-and-true activities.”<sup>15</sup> If the industry is at “an inflection point, old ways of measuring success can lead to a sharp decline—or failure.”<sup>16</sup> Sull challenges leaders to avoid assuming that paralysis is the only enemy, and to recognize that action can be just as dangerous. “Instead of rushing to ask, ‘What should we do?’ managers should pause to ask, ‘what hinders us?’”<sup>17</sup>

To survive, law firms must not rely on their old ways of conducting business. As Marshall Goldsmith wrote, “What got you

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10. *Id.*

11. *Id.* (“The current challenge in the legal market is not that firms are unaware of the threat posed to their current business model by the dramatic shift in the demands and expectations of their clients. Instead, as in the case of Kodak, the challenge is that firms are *choosing* not to act in response to the threat, even though they are fully aware of its ramifications.”).

12. *Id.*; see also RICHARD SUSSKIND, *TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* 62 (Oxford U. Press 2d ed. 2017) (“[I]t will be hard to convince a room full of millionaires that they have their business model wrong.”).

13. 2016 REPORT, *supra* note 1, at 2.

14. Donald N. Sull, *Why Good Companies Go Bad*, HARV. BUS. REV. 43 (Aug. 1999), <https://hbr.org/1999/07/why-good-companies-go-bad>.

15. *Id.*

16. Bertolini Duncan & Waldeck, *Knowing When To Reinvent*, HARV. BUS. REV. 93 (Dec. 2015), <https://hbr.org/2015/12/knowning-when-to-reinvent>; see also Wald, *infra* note 230, at 93 (stating the legal market’s inflection point was back in 2008).

17. Sull, *supra* note 14, at 50.

here won't get you there."<sup>18</sup> But the lesson learned from active inertia is that paralysis is not your worst enemy. The solution is for an organization to break the pattern of management-by-reaction, and begin to "reposition[] the core business while actively investing in the new growth business."<sup>19</sup> There are two questions for law firms—How is the market changing, and how do we change our law firm?

The authors will answer this question in four parts. First, the authors provide an overview of some current key market changes.<sup>20</sup> Second, the authors describe the prevailing leadership structure in law firms and challenge the preference for promoting a successful partner to the most senior management seat.<sup>21</sup> The authors propose an alternative that does not eliminate senior lawyer leadership, but adds a successful professional manager in the chief operating officer role, leading a team of operations directors and collaborating with lawyer-leaders. Third, the authors describe the characteristics of the operations team and the qualities of the leader.<sup>22</sup> Lastly, the article explains how organizations change.<sup>23</sup> The purpose of this section is not only to acknowledge difficulties associated with change, but to demonstrate that leadership and management can work together. Accordingly, existing models provide guideposts for law firms to follow.

## II. CHANGES IN THE LEGAL MARKETPLACE

The legal market is changing, and reasonable minds disagree about the many ways to describe the nature of phenomena identified as market change. A technical innovation on its own is not a market change; it is the application of the innovation by market participants that makes the market change. It is important to note that the language used to describe markets is not always clear. This is

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18. MARSHALL GOLDSMITH & MARK REITER, WHAT GOT YOU HERE WON'T GET YOU THERE: HOW SUCCESSFUL PEOPLE BECOME EVEN MORE SUCCESSFUL! (Hyperion 2007).

19. Scott Anthony & Evan I. Schwartz, *What the Best Transformational Leaders Do*, HARV. BUS. REV. (May 8, 2017), <https://hbr.org/2017/05/what-the-best-transformational-leaders-do>.

20. *Infra* Part II.

21. *Infra* Part III.

22. *Infra* Part IV.

23. *Infra* Part V.

especially true when discussing a market distinguished by the rapid introduction and uptake of innovative influences.

Consider the example of Online Dispute Resolution (“ODR”): the American Bar Association (“ABA”) Task Force on E-Commerce defines the technical innovation ODR as “a broad term that encompasses many forms of alternative dispute resolution (“ADR”) that incorporate the use of the internet, websites, email communications, streaming media, and other information technology as part of the dispute resolution process.”<sup>24</sup> Although ODR is not new, it is a force impacting contemporary legal practice.<sup>25</sup> While ODR has its critics, the criticism is aimed at its practice, not at its potential.<sup>26</sup> While ODR is a bona fide innovation that will impact law firms, it is not clear that ODR is a market force. It is not the goal of this section to sort out ODR’s position on the ambiguous continuum of trends, disruptions, innovations, or market characteristics. The goal of this section is only to identify some examples of law firms’ experiences in the present market. The following sections outline current legal market changes.

#### *A. Decreasing Demand for Lawyers Within Law Firms*

Decreasing demand is an umbrella topic that could include all that is ominous in the future for law firms. The decrease is specific to the demand for services provided by lawyers within law firms. The legal market is not shrinking; there is not a society-wide decrease in legal problems. People and organizations still encounter problems that require legal solutions, and they still need practitioners with expertise in achieving legal solutions. But those practitioners are no longer strictly lawyers and they are no longer found strictly in law

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24. American Bar Ass’n Task Force on E-Commerce and ADR, *Addressing Disputes in Electronic Commerce*, 1 (Aug. 2002), [www.abanet.org/dispute/documents/FinalReport102802.pdf](http://www.abanet.org/dispute/documents/FinalReport102802.pdf).

25. SUSSKIND, *supra* note 12, at 121 (“ODR will prove to be a disruptive technology that fundamentally changes the work of traditional litigators and judges.”); see Victor Li, *Is Online Dispute Resolution the Wave of the Future?*, A.B.A. J. (Mar. 18, 2016, 1:00 PM), [http://www.abajournal.com/news/article/is\\_online\\_dispute\\_resolution\\_the\\_wave\\_of\\_the\\_future](http://www.abajournal.com/news/article/is_online_dispute_resolution_the_wave_of_the_future).

26. See Pietro Ortolani, *Self-Enforcing Online Dispute Resolution: Lessons from Bitcoin*, 35 OXFORD J. LEGAL STUD., 595, 600–02 (“[N]ational ODR schemes are unlikely to affirm themselves as a comprehensive vehicle for the resolution of e-commerce disputes. [However,] ODR schemes can establish themselves as appropriate venues for the resolution of online disputes if the goal of self-enforcement is attained.”).

firms.<sup>27</sup> This means that law firms are getting a smaller share of the legal work.

In the second edition of his book, *Tomorrow's Lawyers*, Richard Susskind identifies three phenomena that are driving change in the legal market.<sup>28</sup> These three drivers all have the same result: less work for lawyers in law firms. The first driver is that corporate legal departments are being asked to do more with less.<sup>29</sup> The “less” part of this equation is that clients are reducing headcount while spending more on outside counsel.<sup>30</sup> The “more” part is more work for lawyers.<sup>31</sup> Opportunities exist for law firms that can deliver more for less through efficiency, rather than lowering the billable rate or providing arbitrary discounts.<sup>32</sup>

The second driver is liberalization, which describes a loosening of restrictions on law firm ownership eligibility, specifically the general prohibition against non-lawyers owning (or holding any ownership interest in) a law firm.<sup>33</sup> As liberalization takes root, non-lawyers find opportunities to provide legal services (such as Limited License Legal Technicians in Washington state).<sup>34</sup> The people who use these opportunities and take market share from lawyers in law firms are not lawyers first; they are entrepreneurs and business

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27. See, e.g., *Legal Technicians: A New Option for Affordable Legal Services*, WASH. STATE BAR ASS'N, <http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians> (last visited Oct. 2, 2017).

28. SUSSKIND, *supra* note 12, at 3.

29. *Id.* at 4.

30. *Cf. id.*

31. *Cf. id.*

32. See A.B.A., *Billing for Professional Fees, Disbursements and Other Expenses*, 1–6 (Dec. 6, 1993), [https://www.americanbar.org/content/dam/aba/migrated/Genpractice/resources/costrecovery/ABA\\_CommEthics\\_Opinion.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/migrated/Genpractice/resources/costrecovery/ABA_CommEthics_Opinion.authcheckdam.pdf). The elephant in the room, and the topic which would betray intellectual honesty if avoided, is (at best) inefficiency and (at worst) churning. *Id.* (defining the term “churn” to describe overbilling: “. . . continuous toil on or overstaffing a project for the purpose of churning out hours is also not properly considered ‘earning’ one’s fees.”). To the extent that firms operate inefficiently or intentionally overbill, that practice is going to stop. The gray train of the 1980s and 1990s has long stopped rolling, but plenty of firms still pass along various forms of waste to their clients. That waste needs to stop and be reversed—the processes which took too long and which make the bills go up, are going give way to processes that take less time. [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/formal\\_opinion\\_11\\_461\\_nm.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_11_461_nm.authcheckdam.pdf)

33. SUSSKIND, *supra* note 12, at 5.

34. *Legal Technicians*, *supra* note 27.

people first.<sup>35</sup> They are better at running a business than lawyers and provide an affordable alternative to traditional legal services.<sup>36</sup>

Susskind's third driver is technology. Technology does not just increase efficiency, it also enables innovation—allowing “us to perform tasks that previously were not possible (or even imaginable).”<sup>37</sup> This cannot be overstated. The business of delivering legal services is going to change in ways that no one sees coming. Even if law firms are prepared for every technical innovation that has been featured in industry publications, that would not be enough because technology will bring change that no one thought was possible.

Susskind provides the example of Google artificial intelligence (AlphaGo), which unexpectedly beat one of the world's best Go players.<sup>38</sup> Go is a board game which is vastly more complex than chess; in fact the number of possible moves in Go is “beyond imagination and renders any thought of exhaustively evaluating all possible moves utterly and completely unrealistic.”<sup>39</sup> AlphaGo was “trained on 30 million board positions from 160,000 real-life games taken from a go database.”<sup>40</sup> It then played games against itself, testing how likely a particular move might lead to a win.<sup>41</sup> It repeatedly played these games against itself, learning from each decision.<sup>42</sup> This allowed the machine to execute self-created moves against a human adversary; these moves were not programmed by a human.<sup>43</sup> The machine innovated so that no human could have predicted how it would act.<sup>44</sup> This is the level of technical innovation that Susskind writes will “disrupt and radically transform the way lawyers and courts operate.”<sup>45</sup>

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35. See Michael W. Unger, *The Only Thing We Have to Fear . . .*, BENCH & BAR OF MINN. (Nov. 6, 2015), <http://mnbenchbar.com/2015/11/the-only-thing-we-have-to-fear/>.

36. *Id.*

37. SUSSKIND, *supra* note 12, at 15.

38. *Id.*

39. Christof Koch, *How the Computer Beat the Go Master*, SCI. AM. (Mar. 19, 2016), <https://www.scientificamerican.com/article/how-the-computer-beat-the-gomaster/>.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. SUSSKIND, *supra* note 12, at 15.



*B. Disaggregated Legal Services*

The disaggregation of legal services refers to the process of breaking down legal work into its component parts. “Clients are . . . more prepared than ever before to disaggregate matters, to retain work in-house, and to bring in additional (even non-traditional) service providers—all in an effort to reduce costs and improve efficiency.”<sup>46</sup> “Legal services traditionally have been regarded as relatively ‘bundled,’ in the sense that they consist of tightly linked elements that cannot be easily separated.”<sup>47</sup> But Richard Susskind writes, “for any deal or dispute, no matter how small or large, it is possible to break it down, to ‘decompose’ the work, into a set of constituent tasks.”<sup>48</sup> Breaking work down is a fundamental component of project management that creates a key project deliverable, called a Work Breakdown Structure (“WBS”). The WBS is a hierarchical decomposition of the total scope of the project team’s work to accomplish the project objectives and create the required deliverables.<sup>49</sup> The WBS organizes and defines the total scope of the project, and represents the work specified in the current approved project scope statement.<sup>50</sup> One of the tools and techniques used in creating WBS is decomposition, which is “a technique used for dividing and subdividing the project scope and project deliverables into smaller, more manageable parts.”<sup>51</sup>

Disaggregated legal services impact law firms in two ways. First, “[c]lients can unbundle litigation work and ‘right source’ to the firm such projects as large-scale document and data review at a dramatically lower cost.”<sup>52</sup> The unbundled services are processed by a legal process outsourcer (“LPO”).<sup>53</sup> Once a project is referred, the

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46. 2016 REPORT, *supra* note 1, at 16.

47. Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137, 2148 (2010).

48. SUSSKIND, *supra* note 12, at 32.

49. *Work Breakdown Structure*, WORK BREAKDOWN STRUCTURE, <http://www.workbreakdownstructure.com/> (last visited Nov. 15, 2017).

50. PROJECT MANAGEMENT INSTITUTE, A GUIDE TO THE PROJECT MANAGEMENT BODY OF KNOWLEDGE 125 (5th ed. 2013).

51. *Id.* at 128.

52. Clayton M. Christensen, Dina Wang & Derek van Bever, *Consulting on the Cusp of Disruption: The Industry that has Long Helped Others Sidestep Strategic Threats is Itself Being Upended*, 91 HARV. BUS. REV. 106, 109 (Oct. 2013), <https://hbr.org/2013/10/consulting-on-the-cusp-of-disruption>.

53. *Id.*

LPO then “coordinates this discovery work with the higher-value services of lead counsel, who focus on the less routine aspects of litigation.”<sup>54</sup> In this way, the work is never touched by a traditional law firm.

The second way that disaggregation impacts a law firm occurs when other firms are unbundling legal services and down-streaming lower-value work to lower-cost resources (either inside or outside the firm).<sup>55</sup> This creates a cost-advantage, which in turn, provides a competitive advantage.<sup>56</sup> Traditional law firms are developing these practices, as are new firms which are forming with disaggregation as a business model.<sup>57</sup> These firms can include their disaggregation capabilities in marketing pitches, and some clients may even ask for examples of such efficiencies in their requests for proposals.

Of course, simply unbundling legal services does not make the aggregated deliverable more efficient. There is a certain amount of administrative overhead involved with coordinating service providers. “The absence of such coordination can make production more expensive and prone to error than if the company had retained the fixed overhead costs associated with remaining more vertically integrated.”<sup>58</sup> Law firms have an opportunity to solve this problem by acting as the coordinators of these various service providers. Additionally, to sensibly design or adopt a disaggregated solution, the economics must make sense, the costs must be evaluated, and the processes must be measured. This leads to the next change, which underpins many of the other changes: data analysis.

### C. Data Analysis

Peter Drucker famously said (or perhaps famously *didn't say*, although the famous adage is often attributed to him), “What gets measured gets managed.”<sup>59</sup> While there is nothing new about

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54. *Id.* at 110.

55. *Id.* at 111.

56. *See id.*

57. For example, some large firms will create lower-paid staff attorney positions within a practice group to make certain services cheaper. *See, e.g.*, FREDRIKSON & BYRON IMMIGRATION TEAM, [https://www.fredlaw.com/practices\\_industries/immigration/#group\\_3\\_65784](https://www.fredlaw.com/practices_industries/immigration/#group_3_65784) (last visited Nov. 5, 2017).

58. Regan & Heenan, *supra* note 47, at 2160.

59. Paul Barnett, *If What Gets Measured Gets Managed, Measuring the Wrong Thing Matters*, CORP. FINANCE REV. 1, 1 (2015).

generating and evaluating business metrics, law firms are characteristically slow in adopting data analysis. It is true that most law firms track a number of metrics such as utilization<sup>60</sup> and realization,<sup>61</sup> and compare those numbers across years, practice areas, and individual lawyers. But the data analysis we refer to is beyond traditional law firm metrics, and, dare we say, amounts to big data.<sup>62</sup> In a 2016 survey, only “34% of [responding law firms] indicated they would utilize business intelligence and analytics-type technologies to address firm management, new business and client challenges.”<sup>63</sup> In the 2015 version of that same survey, “49% of all respondents said they had no plans to use big data technologies.”<sup>64</sup>

Big data is characterized by two qualities: size and complexity. “Big data is the collection of data sets so large and complex that it becomes difficult to process using standard databases and data processing tools/techniques.”<sup>65</sup> In other words, a program such as Microsoft Excel cannot process such large data. As data analytics methods and resources have become more accessible, clients have adopted the techniques to measure and manage their businesses. Clients are using analytics to understand their legal expenditures, both internal and external, and to understand the services and outcomes that their dollars are buying.<sup>66</sup> This analysis enables clients to identify the sources of the best work at the best price. As clients demand specific services and lower fees from outside counsel, law firms may be tempted to react by lowering their price, often by applying an arbitrary percentage or flat-rate discount. Without appropriate data analytics to support these pricing decisions, firms may base their prices on whatever the client asks for, whatever the

60. The percentage of worked hours which are billed.

61. The percentage of billed hours that are paid.

62. See Sharon D. Nelson & John W. Simek, *Big Data: Big Pain or Big Gain for Lawyers?*, 39 No.4 L. PRAC. 24, 24 (2013) (“Those in the e-discovery world have begun to grasp the implications of big data, but most other lawyers have not.”).

63. 2016 *ILTA/InsideLegal Technology Purchasing Survey*, INT’L LEGAL TECH. ASS’N, 5 (2017), [https://insidelegal.typepad.com/files/2016\\_ILTA\\_InsideLegal\\_Technology\\_Purchasing\\_Survey.pdf](https://insidelegal.typepad.com/files/2016_ILTA_InsideLegal_Technology_Purchasing_Survey.pdf).

64. *Id.* at 3.

65. Jobst Elster, *Big Data for Law Firms*, LEGAL MGMT. 36 (2013), <http://insidelegal.typepad.com/files/2013/10/Big-Data-for-Law-Firms-Jobst-Elster-ALA-Legal-Management.pdf>.

66. See Nelson, *supra* note 62, at 25 (predicting that “clients will begin to use data analytics to evaluate law firms in a far more precise fashion . . .” and that “comparisons between law firms will be much easier to make”).

competition is charging, or guesswork. None of these are good pricing strategies for a law firm. The firm that leads with analytics can appropriately price work, even (or especially) disaggregated work. While such firms may choose to price their offerings as loss-leaders, the decisions are based on sound analysis, rather than guesses or price-matching discounts.

Not only does data analysis help with sound pricing calculations, it can be used, like disaggregation, in a marketing pitch. As Justin Ergler, Director of Alternative Fee Intelligence and Analytics in GlaxoSmithKline PLC's legal department, said, "in order to survive the new marketplace, law firms must differentiate themselves with something other than the excellent lawyering mantra. Leveraging big data is a way to do that."<sup>67</sup>

Proving big data capabilities can help demonstrate three things to clients. First, regarding the client's billing and services received, the firm can show it knows more about what the client spent and what the client bought than the client does. Second, regarding management of bundled services for the client, the firm shows it understands the costs and benefits of the options and chooses the most efficient deliverables management methods. And third, regarding the client's legal issues, the firm has the means to understand and explain the complex data-driven facts that underlie many of today's legal problems.

#### *D. Commoditized Legal Work*

A commodity is a commercial good that is interchangeable with goods of the same type from other sources.<sup>68</sup> The quality difference among the goods is slight, and the goods meet some minimum standard.<sup>69</sup> Commoditized legal work is work for which there is no significant value to add; the quality of the product among various providers is reasonably interchangeable.<sup>70</sup> When work is

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67. Jobst Elster, *The Billable Hour's Grip on Legal: Changing Times have Made the Gold Standard in Legal Billing Less Viable—but it's not Entirely Obsolete*, LEGAL MGMT. 24 (2017), [http://insidelegal.typepad.com/files/2017/Editorial/ALA%20Legal%20Management\\_Feature\\_The%20Billable%20Hours%20Grip%20on%20Legal\\_2017-02.pdf](http://insidelegal.typepad.com/files/2017/Editorial/ALA%20Legal%20Management_Feature_The%20Billable%20Hours%20Grip%20on%20Legal_2017-02.pdf).

68. Commodity, INVESTOPEDIA, <https://www.investopedia.com/terms/c/commodity.asp> (last visited Nov. 16, 2017).

69. *Id.*

70. See Raymond H. Brescia, *White Paper: What we Know and Need to Know About Disruptive Innovation*, 67 S. C. L. REV., 203, 211 (2016) ("Commoditization is the

commoditized, clients can seek out the lowest price available because the quality of the deliverable does not decrease with price.<sup>71</sup> Firms that can standardize and systematize certain components of legal services are able to develop workflows which relocate timekeepers' efforts, by reassigning the commoditized components to either lower-priced timekeepers or workers whose time is not billed hourly. The result is usually some combination of these two outcomes, meaning that the firm must have both the ability to develop systems and to employ effective workers whose time can be billed at lower rates or at a flat rate. While these two resources sometimes appear accidentally in a law firm, they may only come about intentionally as the result of strategic planning.

Some of the commoditized work will be performed by clients themselves; this work will never make it to a law firm.<sup>72</sup> Some of the work will be performed by a legal services provider which may never make it to a law firm. And finally, some of the work will be moved from one firm to a more efficient (i.e. cheaper) firm.<sup>73</sup> The danger, of course, is for a firm that has not developed efficiencies to attempt to compete on price with a firm that has developed such efficiencies. The opportunity is found in the alternative; firms can develop efficiencies and compete on price to win work and to upsell customizable work. The authors are not under any illusions when it comes to the feasibility of and the effort required to develop efficiencies. "[F]irms will need human, brand, technological, and financial resources to deploy against new and increasingly complex problems and to develop new intellectual property."<sup>74</sup> Developing capabilities to provide commoditized legal services may have an

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process by which a product or service becomes so commonplace that it can be obtained from a variety of suppliers with virtually no easily determined difference between those suppliers' product, as with the case of milk, sugar, or gasoline.").

71. One characteristic of commodities is fungibility—the individual units are interchangeable. As Karl Marx wrote, "From the taste of wheat, it is not possible to tell who produced it, a Russian serf, a French peasant or an English capitalist." Cori Hayden, *Distinctively Similar: A Generic Problem*, 47 U.C. DAVIS L. REV., 601, 601 (2013).

72. Susskind calls this in-sourcing: "[w]hen lawyers undertake legal work themselves, using their own internal resources. This could be, for example, when an in-house legal department decides to conduct all of its negotiation and drafting internally, without any external advice or assistance." Susskind, *supra* note 12, at 37.

73. See, e.g., Ahmed Murad, *Virtual Legal Teams are Giving Clients a Cheaper, More Efficient Option*, FIN. TIMES (Oct. 8, 2014), <https://www.ft.com/content/8bb682fe-39f9-11e4-83c4-00144feabdc0>.

74. Christensen, Wang & van Bever, *supra* note 52, at 112.

unexpected impact, and even strain, on a law partnership.<sup>75</sup> As services become commoditized, the knowledge and competencies required to deliver those services becomes less proprietary to individual lawyers.<sup>76</sup> According to Laura Empson, “there is less need to secure their cooperation by offering them a share of ownership and a say in the management of the firm. In this context, the limitations of a partnership start to outweigh its benefits.”<sup>77</sup> This is a pretty dramatic thing to say about partnerships, and while this declaration is not a prediction of the demise of the law firm partnership model, partnerships must adapt to commoditized work.

*E. A Move Away from the Billable Hour*

The move away from the billable hour should be no surprise. You certainly did not read it here first. Yet the *2017 Report on the State of the Legal Market* (“*2017 Report*”) reports that this is “[o]ne of the most potentially significant, though rarely acknowledged, changes of the past decade . . . .”<sup>78</sup> Clients who want efficiency and predictability do not want to pay by the hour. Richard Susskind writes that “[h]ourly billing is an institutionalized disincentive to efficiency. It rewards lawyers who take longer to complete tasks than more organized colleagues, and it penalizes legal advisers who operate swiftly and efficiently.”<sup>79</sup> Yet the billable hour is indisputably the prevalent method for calculating legal fees. In fact, the billable hour is so ubiquitous that any billing arrangement that does not rely on billable hours falls into the category of alternative fee arrangement (“AFA”).<sup>80</sup> The *2017 Report* argues that one popular approach, the

75. Laura Empson, *Your Partnership: Surviving and Thriving in a Changing World: The Special Nature of Partnership*, in *MANAGING THE MODERN LAW FIRM: NEW CHALLENGES, NEW PERSPECTIVES* 17 (Laura Empson ed., Oxford U. Press 2007).

76. *Id.*

77. *Id.* This prediction is based on agency theory. “The partnership form of governance emphasizes informal practices of mutual- and self-monitoring, which are backed up by unlimited personal liability. These will be more effective than formalized managerial controls at minimizing free-riding and shirking.” *Id.* Agency theory is discussed in the Leadership Section below, in the context of lawyers preferring leaders who are partners. See *infra* Part III: Leadership.

78. GEO. L. & THOMSON REUTERS LEGAL EXEC. INST., *PEER MONITOR, 2017 REPORT ON THE STATE OF THE LEGAL MARKET* 9 (2017), <http://static.legalsolutions.thomsonreuters.com/static/pdf/peer-monitor/S042201-Final.pdf> [hereinafter 2017 REPORT].

79. SUSSKIND, *supra* note 12, at 17.

80. Jerome Crawford & Erika L. Davis, *Show Me The Bill*, 96 MICH. B.J. 40, 40

“budget with cap” model, is worse than an AFA (which the 2017 Report defines as fixed-cost or cost-plus) because firms have to work their way up to the fixed price through already heavily discounted billable hours.<sup>81</sup> Even when calculating fees with no reference to hours, law firms often use a proxy, by estimating how many billable hours the work requires, and then proposing an alternative method for collecting that amount of money.<sup>82</sup>

The ability to successfully move away from the billable hour depends on a firm’s ability to disaggregate legal work to find the lowest-rate biller (including identifying, and appropriately outsourcing, commoditized legal work and other services);<sup>83</sup> using analytics to determine the costs of the various unbundled components (requiring a historic practice of collecting critical data);<sup>84</sup> and re-aggregating the work to set a price for the client. In this way, hours matter, but not *billable* hours. The hours that matter are the hours used in the cost equation, which are the “actual hourly costs (not billing rates) for all lawyers and other staff required to deliver the anticipated services.”<sup>85</sup> When combined with an allocation of overhead, these costs can provide the basis for pricing work and for evaluating past projects to compare estimated costs to actual costs.

The billable hour is so pervasive in firm culture that, even when evaluating compensation models for attorneys and determining how to reward non-billable work, firms often assign a billable-hour-equivalent to certain efforts.<sup>86</sup> For example, when accounting for work such as client relations or professional development, firms can provide billable hour credits or “firm investment time” to incentivize lawyer participation.<sup>87</sup> Most lawyers think of their value in terms of how many hours they billed last year and the size of their book of

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(2017) (“Alternative fee arrangements are a way for lawyers to receive compensation without relying on hourly billing.”).

81. See 2017 REPORT, *supra* note 78, at 9–10.

82. See *id.*

83. See *supra* section II.B, D.

84. See *supra* section II.C.

85. 2016 REPORT, *supra* note 1, at 13.

86. David C. Baca, *The Managing Partner’s Perspective – Incentivizing the Right Behavior*, in COMPENSATION (RE)DESIGN FOR LAW FIRMS 53, 54 (Soo Darcy ed., 2016) (discussing using billable hour as mode of “right behavior” measure).

87. Cf. *id.*

business.<sup>88</sup> Associates earn bonuses based on their billable hours.<sup>89</sup> Firms persist in relying on the billable hour because it is an easy form of measurement to understand. Yet, we know that lawyer practices and expectations are complex and therefore law firms should change compensation systems to address and reward a range of behaviors.<sup>90</sup>

The opportunity to move beyond the billable hour is twofold. First, by understanding the costs associated with work—either by proactively developing cost-based models or by ex-post analysis of a flat-fee billing arrangement—law firms will understand their own business better.<sup>91</sup> Second, by pricing work based on value, not on hours, firms can create efficiencies that translate in to more profits.<sup>92</sup> These opportunities solve what one commentator called the *technology paradox* or *billing dilemma*.<sup>93</sup> Ani Krikorian writes that technologies such as online research and electronic discovery databases enable “attorneys to work more efficiently, i.e., spending less time on matters that used to take more hours to complete.”<sup>94</sup> She then echoes Susskind’s observation when she writes that these technologies “should result in a smaller bill, yet the practice of time-based billing seems to encourage and reward inefficiency.”<sup>95</sup> Thus, value-based billing enables an attorney to capture the value

88. See, e.g., *Do you Measure Success by Inputs or Outputs?*, BOREALE L. (Oct. 16, 2013), <http://www.borealelaw.com/do-you-measure-success-by-inputs-or-outputs/>.

89. See, e.g., FREDRIKSON & BYRON SALARY OVERVIEW, [https://www.fredlaw.com/careers/attorneys\\_\\_law\\_students/salary\\_overview/](https://www.fredlaw.com/careers/attorneys__law_students/salary_overview/) (last visited Nov. 5, 2017) (“For example, a beginning associate who earns a base salary of \$120,000 will earn approximately \$131,953 if the associate hits 1,900 creditable hours.”).

90. See *supra* note 88.

91. David Lat, *Beyond The Billable Hour: 6 Key Insights*, ABOVE THE L. (April 30, 2015), <https://abovethelaw.com/2015/04/beyond-the-billable-hour-6-keyinsights/> (“[N]ot all clients and matters are worth pursuing. Firms must give careful thought to the type of work they want and how to get that work.”).

92. *Id.* (“Stacey Kielbasa of Chapman and Cutler focused her remarks on the implications that the move away from the billable hour has for attorney recruitment and training. Chapman has reduced its focus on the billable hour and shifted its focus to efficiency. The firm wants to track and reward behaviors that drive client value, not just the racking up of hours.”).

93. Ani Krikorian, *Billing Outside the Box*, 27 GEO. J. L. ETHICS 27 655, 663 (2014).

94. *Id.*

95. *Id.*; see also SUSSKIND, *supra* note 12, at 17.



generated by technical innovation.<sup>96</sup> This “strategy of ‘market-valued pricing’ [applies] traditional business product pricing tools” and is a “profit-, not revenue-, based business model.”<sup>97</sup>

*F. Nonlawyers are Getting Into the Business of Providing Legal Services*

Rule 5.4 of the Model Rules of Professional Conduct prohibits nonlawyer ownership of law firms.<sup>98</sup> The ABA refers to “business models through which legal services are delivered in ways that are currently prohibited by Model Rule 5.4” as alternative business structures (“ABS”).<sup>99</sup> In addition to ABS, the discussion of nonlawyer ownership also refers to Multidisciplinary Practice (MDP), which describes a scenario where lawyers “share their fees with nonlawyers, and practice law in institutions that are partially or wholly owned by nonlawyers.”<sup>100</sup> The vast majority of states follow Rule 5.4 or have a similar rule.

A case from the Southern District of New York challenging such a rule provides a good introduction to why states regulate attorney behavior in this way.<sup>101</sup> The law firm of Jacoby & Meyers challenged New York state’s Rule 5.4 of Professional Conduct and a dozen state laws prohibiting lawyers from partnering or sharing legal fees with nonlawyers.<sup>102</sup> The challenge was based on allegations of First Amendment violations (both free speech and freedom of association), Fourteenth Amendment violations (both substantive due process and equal protection), and violations of the dormant

96. Peggy K. Hall, *I’ve Looked at Fees from Both Sides Now: A Perspective on Market-Valued Pricing for Legal Services*, 39 WM. MITCHELL L. REV. 154, 157 (2012) (suggesting that law firms reframe what they are selling: “It may be semantics, but focusing on market pricing conceptually allows the notion that a market price might not necessarily be lower than a price derived by hourly billing models. Rather than a firm’s ‘inventory’ only being the hours it has to sell, a firm should think of its inventory as the ‘value’ it has to sell, which should be priced at the market rate for that value.”).

97. *Id.* at 157–58.

98. MODEL RULES OF PROF’L CONDUCT r. 5.4 (A.B.A. 1983).

99. A.B.A. Comm’n on The Future of Legal Serv., *For Comment: Issue Paper Regarding Alternative Business Structures* (2016).

100. Va. St. B. & Va. St. B. Ass’n Joint Comm’n on Multidisciplinary Prac., *Understanding the Debate Over Multidisciplinary Practice (MDP)*, VA. LAW. MAG., 35, 35 (2001), <http://www.vsb.org/docs/valawyer magazine/dec01mdp.pdf>.

101. *See Jacoby & Meyers v. Presiding Justices of the First, Second, Third & Fourth Dep’ts*, 118 F. Supp. 3d 554 (S.D.N.Y. 2015).

102. *Id.* at 554.

Commerce Clause.<sup>103</sup> There was also an underlying non-legal argument related to access-to-justice issues; namely, that capital investment from nonlawyers would help firms provide legal services to underrepresented groups.<sup>104</sup>

The Court of Appeals for the Second Circuit ultimately affirmed the district court's grant of the defendant's motion to dismiss.<sup>105</sup> The district court found that no violation of any constitutional right existed because the regulations satisfied the strict scrutiny requirement for a legitimate state interest.<sup>106</sup> The Second Circuit found that the regulations and laws "serve New York State's well-established interest in regulating attorney conduct and in maintaining ethical behavior and independence among the members of the legal profession" by precluding "the creation of incentives for attorneys to violate ethical norms, such as those requiring attorneys to put their clients' interests foremost."<sup>107</sup> The district court provided additional reasons for the restrictions, such as protecting the public by "preventing nonlawyers from controlling how lawyers practice law and . . . attempt[ing] to minimize the number of situations in which lawyers will be motivated by economic incentives rather than by their client's best interests."<sup>108</sup> Because other international jurisdictions have moved forwards, is there something special about lawyers in the United States that makes them especially vulnerable to outside influence?

There are two jurisdictions that deviate from the general prohibition against ABSs in the United States: the District of Columbia and Washington state. District of Columbia Rule 5.4(b) permits ABSs "in which a financial interest is held or managerial authority is exercised by an individual non-lawyer who performs professional services which assist the organization in providing legal services to clients," subject to certain conditions and restrictions.<sup>109</sup> As mentioned above, Washington state permits nonlawyers to provide legal advice in the role of a Limited License Legal

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103. *Id.* at 560.

104. *Id.* at 575–76.

105. *Jacoby & Meyers v. Presiding Justices of the First, Second, Third & Fourth Dep'ts*, N.Y. App. Div., 852 F.3d 178, 182 (2d Cir. 2017).

106. *Id.* at 178.

107. *Id.* at 191.

108. *Jacoby & Meyers*, 118 F. Supp. 3d at 574 (quoting *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1385 (7th Cir. 1992) (internal quotations omitted)).

109. D.C. RULES OF PROF'L CONDUCT r. 5.4(b) (D.C. BAR ASS'N, amended 2007).

Technician (“LLLT”).<sup>110</sup> In early 2015, the Washington Supreme Court added a rule to the Washington Rules of Professional Conduct that permits ABSs involving, inter alia, ownership and fee-sharing among lawyers and LLLTs.<sup>111</sup> Additionally, the ABA Commission on the Future of Legal Services took note of a New York State Bar Association Committee on Professional Ethics’ opinion that allowed a New York attorney to “enter into a partnership with a Japanese *benrishi*—a professional licensed to practice intellectual property law in Japan who need not have a law school degree.”<sup>112</sup> Outside of the United States, a number of jurisdictions allow for ABSs in some form. For example, Australia, England, Wales, Scotland, Italy, Denmark, Germany, the Netherlands, Poland, Spain, Belgium, Canada (Quebec and British Columbia), Singapore, and New Zealand all permit some form of nonlawyer ownership.<sup>113</sup>

The ABA has recently moved from its previous position of resistance to its current position of considering, even encouraging, the possibility of ABSs. In 2011, the ABA Commission on Ethics 20/20 (“20/20 Commission”) “publicly rejected certain forms of nonlawyer ownership that some other countries currently permit, including multidisciplinary practices, publicly traded law firms, and passive, outside nonlawyer investment or ownership in law firms.”<sup>114</sup> In 2012, the 20/20 Commission released a statement summarizing further research and consultation into ABS, declaring that “there does not appear to be a sufficient basis for recommending a change to ABA policy on non-lawyer ownership of law firms.”<sup>115</sup> But in August 2014, the ABA formed the Commission on the Future of Legal Services (“Future Commission”) to take up the issue again with the charge to “improve the delivery of, and access to, legal services in the United States.”<sup>116</sup> The Future Commission proposed, and in February 2016, the ABA House of Delegates approved, Resolution 105, which provided guidance to state supreme courts and bar

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110. *Legal Technicians*, *supra* note 27.

111. WASH. RULES OF PROF’L CONDUCT r. 5.9 (WASH. BAR ASS’N, adopted 2015).

112. A.B.A. Comm’n on the Future of Legal Servs., *Report on the Future of Legal Servs. in the United States* 4 (2016).

113. *Id.* at 5–6.

114. A.B.A. Comm’n on Ethics 20/20, *Will Not Propose Changes to ABA Policy Prohibiting Nonlawyer Ownership of Law Firms*, (April 16, 2012).

115. *Id.*

116. A.B.A. Comm’n on the Future of Legal Servs., *supra* note 112, at 5–6, <https://www.americanbar.org/content/dam/aba/images/abanews/2016mymres/105.pdf>.

associations as they examine their regulatory framework concerning non-legal service providers.<sup>117</sup> Before the vote, the opposing sides debated two amendments that summarized the sentiments of the two sides. The first amendment passed, adding this language to the resolution: “[N]othing contained in this Resolution abrogates in any manner existing ABA policy prohibiting non lawyer ownership of law firms or the core values adopted by the House of Delegates.”<sup>118</sup> The second amendment failed; it tried to “require lawyer supervision of non-lawyers providing legal services; require that such practitioners be subject to rules of professional conduct; and require that such practitioners accurately state the scope of services provided.”<sup>119</sup>

The ABA has stopped short of encouraging states to authorize ABSs, but also has resisted pressure to recommend additional regulation of nonlawyer practitioners. Sam Glover of the *Lawyerist* summarized the state of affairs as thus: “[A]ll the controversial provision does is acknowledge reality. But if any state regulators were waiting for a cautious go-ahead from the ABA, now they have it.”<sup>120</sup> In April 2016, the Future Commission issued a paper calling for comments regarding ABSs.<sup>121</sup> In August 2016, the Future Commission published its report, finding, inter alia, that “[n]ew providers of legal services are proliferating and creating additional choices for consumers and lawyers,”<sup>122</sup> and that “[t]he traditional law practice business model constrains innovations that would provide greater access to, and enhance the delivery of, legal services.”<sup>123</sup> The Future Commission recommended that courts “consider regulatory innovations in the area of legal services delivery,” specifically through “continued exploration” of ABSs and by developing and

117. A.B.A., Resolution 105 Revised & Amended (Feb. 2016), <https://www.Americanbar.org/content/dam/aba/images/abanews/2016mymres/105.pdf>).

118. Lorelei Laird, *ABA House Approves Model Regulatory Objectives for Nontraditional Legal Services*, A.B.A.J. (Feb. 8, 2016, 5:55 PM), [http://www.abajournal.com/news/article/house\\_approves\\_proposed\\_model\\_regulatory\\_objectives\\_for\\_nontraditional\\_legal](http://www.abajournal.com/news/article/house_approves_proposed_model_regulatory_objectives_for_nontraditional_legal).

119. *Id.*

120. Sam Glover, *ABA Opens the Door to “Non-Traditional Legal Service Providers,”* LAWYERIST (Feb. 9, 2016), <https://lawyerist.com/aba-opens-the-door-to-Nontraditional-legal-service-providers/>.

121. A.B.A. Comm’n on the Future of Legal Servs., *supra* note 112, at 5–6.

122. *Id.* at 5.

123. *Id.* at 16. Recall that access to justice was one of Jacoby and Meyers’ arguments, *supra* note 101.

assessing evidence and data regarding the risks and benefits associated with ABSs in jurisdictions where ABSs are allowed.<sup>124</sup>

A few opportunities exist here for law firms, along with a few warnings. The first opportunity is to take a stand. Law firms can figure out how they want to react when these changes come to their jurisdictions. They can plan to be on the side of liberalization and encourage ABSs, or they can hunker down with the opposition. Another opportunity is preparation. Law firms that wish to seek outside investment can start to make changes now to position themselves as attractive investments. Consider the following warning from *The Economist*, answering the question, “Should you buy shares in a law firm?”:

Another concern for potential investors is that lawyers are not proven business leaders. Clients frustrated with private-practice lawyers often accuse them of lacking commercial nous. Because most lawyers spend much of their time peering at small print, big-picture concerns can go unnoticed. Few managing partners know their firm’s profit per billable hour, even though that is the main product law firms sell. Cost control is often an afterthought, trailing far behind revenue generation.<sup>125</sup>

The author continues by advising law firms that, to be attractive to investors, the firm’s managers must be able to run the firm like a public company. Specifically, outside investors will “be less sentimental and more critical” than equity partners when analyzing performance.<sup>126</sup> As discussed below, law firms have an opportunity to place professional nonlawyer directors in key managerial positions.<sup>127</sup>

### G. *Changing Demographics of the Workforce*

Current research and writing about demographics of law firms use classes such as age and generation (e.g., baby boomer and generation X) to categorize lawyers’ roles, goals, beliefs, and attitudes within law firms.<sup>128</sup> While the categories neatly describe the

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124. *Id.* at 37–42.

125. *Legal Advice: Should You Buy Shares in a Law Firm?*, THE ECONOMIST (Aug. 21, 2008), <http://www.economist.com/node/11967043>.

126. *Id.*

127. *Infra* Part IV.

128. *See, e.g.*, MP McQueen, *Here Come the Big Law Millennials*, THE AM. LAW. (Feb. 29, 2016), <https://www.law.com/americanlawyer/almID/1202749825654>.

lawyer workforce, age is merely a proxy for understanding that older lawyers have been in the profession longer, have been with the firm longer, are closer to retirement, are more likely to be in positions of leadership, and own more client relationships than younger lawyers. While these statements are truisms for many lawyers, we present them here in black and white to contrast them with most of the corporate world.<sup>129</sup> Understanding how the nonlawyer world works is important because, as we have attempted to show above, nonlawyers will soon compete with law firms.<sup>130</sup> The current ownership, pay, and business structures of most law firms are not well-suited to compete with corporations. It is not the older lawyers' fault that they rose through the ranks and succeeded in the prevailing law firm structure. Additionally, it is not their fault that changes loom on the eve of their retirement. However, the reality is that many older lawyers are practicing on the cusp of disaster.

Millennials have taken over as the largest generation in the United States,<sup>131</sup> and they think and act differently than previous generations. Gallup recently published a report summarizing these differences, noting that millennials are more concerned with their "purpose" and their "life" than they are with their "paycheck" and their "job" (respectively).<sup>132</sup> The majority of millennials are not engaged in their work, meaning that their "employers are not giving them compelling reasons to stay."<sup>133</sup> In fact, lack of loyalty to employers is a recurring hallmark of the millennial generation.<sup>134</sup> But it has been noted that if employers can keep their millennials

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129. See Elizabeth Olson, *Graying Firms Wrestle With Making Room for Younger Lawyers*, N.Y. TIMES (Nov. 4, 2015), <https://www.nytimes.com/2015/11/05/Business/dealbook/graying-firms-wrestle-with-making-room-for-younger-lawyers.html?mcubz=3> ("Less than 5 percent of managing partners or their equivalents in the top 100 firms were born [in] . . . the Generation X period. In comparison, almost 20 percent of Fortune 100 corporations and 30 percent of companies traded on the Nasdaq stock market have leaders in that generation . . .").

130. See *supra* Part II(f): Non-Lawyers are Getting into the Business of Providing Legal Services; see Glover, *supra* note 120.

131. See Richard Fry, *Millennials Overtake Baby Boomers as America's Largest Generation*, PEW RES. CTR. (Apr. 25, 2016), <http://www.pewresearch.org/fact-tank/2016/04/25/millennials-overtake-baby-boomers/>.

132. *How Millennials Want to Work and Live*, GALLUP NEWS (2016), <http://news.gallup.com/reports/189830/e.aspx#aspnetForm>.

133. *Id.* at 6.

134. See James Weber, *Discovering the Millennials' Personal Values Orientation: A Comparison to Two Managerial Populations*, 143 JOURNAL OF BUSINESS ETHICS, 517, 519 (2017).

engaged, “they will be happy to overachieve for you.”<sup>135</sup> These millennials are the next generation, and law firms must accommodate their different personal value orientation into future-planning.<sup>136</sup>

William Henderson, a professor at the Indiana University Maurer School of Law, has warned that “[s]ome law firms could crumble” if they do not figure out how to shift ownership and power to a younger generation.<sup>137</sup> Others have written that failure to design succession plans creates the perilous situation involving anxious clients that, wary of counsel’s lack of transition plans, choose to work with another firm, rather than risk the unexpected retirement of current counsel.<sup>138</sup> This article is not intended to serve as a flag-waving, flare-launching warning of a looming disaster, but some commentators warn of firms losing clients when partners retire.<sup>139</sup> The authors hope that this article establishes that partner retirement is just one of many vectors for losing clients. In other words, if a firm is concerned that a client will leave when a partner retires, that firm is already not doing enough to retain that client.

The problem with aging lawyer leadership is the prevalence of short-term thinking among decision makers. If forty percent of practicing lawyers are approaching retirement, it is hard to expect them to be motivated by long-term profits.<sup>140</sup> Accordingly, not only are these lawyers with the big clients a concern for law firms in this changing market, older lawyers are also more likely to impede the changes that law firms must make to survive. In the majority of law firms, lawyers sixty years old or older control more than twenty-five

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135. *Id.*

136. *See id.* at 524–28 (discussing values orientation, the Rokeach Value Survey, and their implications for managing millennials).

137. *Id.*

138. Bill Donahue, *Firms Ignore Aging Partners at Their Own Peril*, LAW360 (June 28, 2013), <https://www.law360.com/articles/447809/firms-ignore-aging-partners-at-their-own-peril>.

139. *Id.*

140. *See* ALAN R. OLSON, LAW FIRM SUCCESSION PLANNING: DO ONE SIMPLE THING 1 (Altman Weil, Inc., 2012), [http://www.de-lap.org/pdfs/2c2d6f51-66c8-4c2d-b420-2da0a8003b17\\_document.pdf](http://www.de-lap.org/pdfs/2c2d6f51-66c8-4c2d-b420-2da0a8003b17_document.pdf) (“30%-40% of actively practicing lawyers are at an age and stage where they are beginning to retire, phase down, or contemplate phasing down.”); *see also* Eric A. Seeger & Thomas S. Clay, *2016 Law Firms in Transition*, ALTMAN WEIL FLASH SURVEY 20 (2016), [http://www.altmanweil.com/dir\\_docs/resource/95e9df8e-9551-49da-9e25-2cd868319447\\_document.pdf](http://www.altmanweil.com/dir_docs/resource/95e9df8e-9551-49da-9e25-2cd868319447_document.pdf) (showing willingness to make long-term investments inversely proportional to proximity to retirement).

percent of the revenue.<sup>141</sup> This alone buys a lot of influence. Additionally, many of these lawyers are in positions of top leadership, as lawyers born between 1946 and 1955 make up almost half of the managing partner seats in the top 100 law firms.<sup>142</sup>

#### H. *Third-party Financing*

Third-party financing refers to someone other than the party or the party's lawyer paying the costs of litigation.<sup>143</sup> This financing is different from recourse loans to lawyers, which are loans that must be paid regardless of successful outcomes.<sup>144</sup> Third-party financiers usually only get paid if the litigation is successful; if the litigation is unsuccessful, the party and the lawyers typically owe the financier nothing.<sup>145</sup> But the party and the lawyers do not get a free ride, as most funders require the lawyer and the party to maintain enough interest in the action to remain motivated in pursuing a positive outcome for the investor.<sup>146</sup>

Third-party financing is a result of, and is facilitated by, the changes discussed in this article. First, for law firms unwilling (or unable because of cash flow) to take on the risks associated with alternative fees, the third-party provides the financing to both mitigate the risk and pay the bills.<sup>147</sup> However, the law firm must be very good at budgeting because investors require detailed cost

141. See Seeger & Clay, *supra* note 140, at 34.

142. Cf. ALAN OLSON, *supra* note 140 (stating that less than 5% of managing partners were born between 1960 and 1980). The actual statistic is 3% of managing partners were born between 1965 and 1982, the so-called generation X. *Id.*

143. Radek Goral, *Skin in the Game: Why Business Lawsuits Get Third-party Funded*, 30 NOTRE DAME J. OF L., ETHICS & PUB. POL'Y 247, 248 (2016) (providing the following examples: "buying a stake in a patent asserted against an infringer, lending against expected proceeds from a pending suit, or paying the costs of litigation in exchange for a portion of anything recovered").

144. See Radek Goral, *The Law of Interest Versus the Interest of Law, or on Lending to Law Firms*, 29 GEO. J. OF LEGAL ETHICS 253, 303 (2016) (discussing specialized law-firm financiers who are "paid from the cash flow of a borrowing litigator").

145. See A.B.A. Comm'n on Ethics 20/20, Informational Report to the House of Delegates 4-7 (2012), [https://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20111212\\_ethics\\_20\\_20\\_alf\\_white\\_paper\\_final\\_hod\\_informational\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf).

146. See Goral, *supra* note 143, at 272 n.55 ("The skin-in-the-game motive is probably the single, most prominent theme present in all interviews where incentives in litigation funding arrangements were discussed. The expression itself was used by interviewees surprisingly often and without being prompted.").

147. See *id.*



estimates.<sup>148</sup> After all, this is the price the firm pays for the investment. These fee estimates often are not based on hourly billing, but instead, on flat fees.<sup>149</sup> And once a firm agrees to deliver services for a fixed price, it is in the firm's interest to provide those services as efficiently as possible. Second, ethics rules and various state regulations currently prohibit the expansion of third-party investment. We have seen how Model Rule 5.4 prohibits fee-splitting with nonlawyers.<sup>150</sup> But as states loosen these rules, firms will be able to enter into fee-splitting arrangements with nonlawyers. Third, law firms that want their matters backed by third-party financing will need to excel at selling themselves as viable investment candidates. A firm will benefit from having data analytics capabilities, not only to crunch the numbers, but to visualize the results in a way that is attractive to investors.<sup>151</sup> Naturally, marketing and presentation skills will help. Firms should create marketing and presentation deliverables quickly, because their creation is not billable work. Last, an investor may agree to pay the firm for some legal services, but not for others. For example, the investor may mandate that document review is handled by a certain company, perhaps one in which the investor has a stake. Because the investor is now forcing the firm to

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148. *Guide to Litigation Financing*, WESTFLEET ADVISORS 10 (2015), [https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015\\_spring\\_leadership\\_meeting/guide\\_to\\_litigation\\_financing\\_may\\_2014\\_charles\\_agee\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2015_spring_leadership_meeting/guide_to_litigation_financing_may_2014_charles_agee_authcheckdam.pdf) ("To consummate a litigation financing transaction, a company needs to prepare the appropriate documents, develop a targeted list of financing providers, schedule meetings with providers, and negotiate term sheets and financing documents. Companies should begin the process by assembling a synopsis of the financing opportunity it intends to offer. This synopsis should include a detailed memorandum discussing the legal claim (including strengths of the opposing party's position and how these will be refuted), financial projections for the budget and probable outcome(s), and a due diligence package (including legal and factual analyses, material documents and pleadings, expert reports, CVs and relevant experience of litigation counsel, parameters of engagement with counsel, et cetera).").

149. See Roy Strom, *A New Game of Risk*, CHICAGO LAW. (Aug. 2014), <http://chicagolawyer magazine.com/Archives/2014/08/Longford-Capital> (explaining how Longford Capital, a litigation funding firm, does not pay lawyers using only the billable hour).

150. MODEL RULES OF PROF'L CONDUCT r. 5.4 (A.B.A. 1983).

151. For example, big data companies like Juristat offer tools to law firms that allows firms to compare their performance metrics with those of other firms to highlight where they excel to investors. See JURISTAT, <https://www.juristat.com/#businessintelligence> (last visited Nov. 7, 2017).

disaggregate, a firm accustomed to managing (or mismanaging, which is too often the case) the entire matter may encounter a lot of waste and administrative friction. These inefficiencies may cost money which cannot be recovered because of the aforementioned agreed-upon budgets.

It is one thing for the investment firm to exert pressure on the law firm's operation and *how* legal services are delivered, but what about the investor that wants to influence the actual legal strategy? It may be that an investor, unhappy with a law firm hired to deliver the return on the investment (e.g., through legal victory), starts its own law firm to handle the representation. One New York based third-party investor has come full-circle and formed its own law firm, Burford Law, in the United Kingdom.<sup>152</sup> The ABS is headed by a London-based solicitor with the purported goal of allowing "its judgement enforcement team a new level of efficiency and ease with which to fulfill client needs."<sup>153</sup> Said bluntly, a third-party financier started its own law firm.<sup>154</sup>

It is not just obstacles such as Rule 5.4's prohibition against fee sharing and state champerty<sup>155</sup> laws that will govern the success of third-party funding in the United States.<sup>156</sup> Michael McDonald, assistant professor of finance at Fairfield University in Connecticut, stated that the litigation funding industry needs to attract more institutional interest. He writes:

Lawyers and financial analysts are both smart groups of folks who have value, but they think about the world in completely different ways. And most major institutional

152. Kali Hays, *Burford Capital Launches Legal Arm To Enforce Judgments*, LAW360 (Oct. 6, 2016, 1:22 PM), <https://www.law360.com/articles/848469/burford-capital-launches-legal-arm-to-enforce-judgments>.

153. *Id.*

154. See Victoria Shannon Sahani, *Reshaping Third-Party Funding*, 91 TUL. L. REV. 405, 409 (2017) ("Chris Bogart, CEO of Buford, . . . 'Buford has added the ability to be a law firm . . . .'").

155. "An agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds; specif. [sic], an agreement to divide litigation proceeds between the owner of the litigated claim and a party unrelated to the lawsuit who supports or helps enforce the claim." *Champerty*, BLACK'S LAW DICTIONARY (10th ed. 2014).

156. See Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1286–1301 (Apr. 2011) (discussing champerty and proposing a regulatory framework designed to enable the benefits of benefits of third-party financing while minimizing the harms).

investors are dominated by finance people, not attorneys. Corporate finance verticals are the same way, of course. This dichotomy – attorneys asking finance people for investments and asset sales – explains why the litigation funding industry has not attracted more institutional interest yet.<sup>157</sup>

McDonald concludes that “finance and accounting people speak a different language than attorneys, and until litigation finance firms learn to operate in both worlds, they [attorneys in charge of third-party funders] will be missing out on the true level of growth potential in the field.”<sup>158</sup> If these attorneys, who are in the business of third-party finance, cannot speak the language of investors, lawyers who have not considered any of the concepts are much further behind.

These changes are to the legal industry what digital cameras were to the film market. They are to law firms what the internet was to the retail book industry. Law firms need to decide if they want to be Kodak and Borders, or if they want to follow better examples. These changes are not threats; they are opportunities. Law firms need to reposition while continuing to serve clients using their current services model. Apple is an example of a company that repositioned its core business while actively investing in the new growth business. Apple rethought how computers were used in the internet age while developing portable devices and product lines with the iPad and iTunes.<sup>159</sup> Amazon is another example, as it expanded its product offering to include things like streaming media and groceries while also building the world’s largest cloud services platform.<sup>160</sup> Of course, both of these examples sell products, while law firms are professional service providers. Accordingly, the dynamic of change for law firms is even more complicated than developing a new product for the market. Perhaps the biggest takeaway from these stories of thriving-through-adapting is not

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157. Michael McDonald, *Lessons From the Burford-Gerchen Keller Deal: What Might Have Motivated This Major Deal in the Litigation Financing Space?*, ABOVE THE L. (Dec. 20, 2016, 6:28 PM), <http://abovethelaw.com/2016/12/lessons-from-the-burford-gerchen-keller-deal/?rf=1>.

158. *Id.* McDonald writes that “(i)nstitutions want to talk about laddered durations in case portfolios, cross-case outcome correlations, and quantitative methods of case selection. These are the kinds of concepts that [are] completely outside the wheelhouse of attorneys.” *Id.*

159. Anthony & Schwartz, *supra* note 18.

160. *Id.*

ultimately about the product, but rather about the leadership needed to adapt to a changing marketplace. If you know the Amazon and Apple stories, you know about Jeff Bezos and Steve Jobs.<sup>161</sup> Both leaders drove change and disrupted their respective markets. True change requires leadership and vision, but it also requires doers willing to work together, while trying new things.

### III. LEADERSHIP

The purpose of this article is to detail an approach to managing change in response to market dynamics; namely, that law firms' lawyer leaders should partner with an operations team to execute law firm strategies. Law firm leaders should also expect the operations team to offer creative and new ways of doing business. This begs the question: who develops the strategies? There are numerous ways to structure leadership and management in a law firm. It is worth taking some space to set the stage by discussing leadership and how to run a law firm that is future-ready. In recent decades, many large law firms have moved away from having an active, practicing attorney managing the entire firm, and have started to move to various models where leaders "resemble public-company CEOs, focused on managing others at the firm,"<sup>162</sup> particularly the partnership itself. Ten years ago, one study found that:

During the last decade, larger law firms have begun migrating to a more centralized corporate model for managing certain business functions, such as accounting, marketing, human resources, training and development—freeing lawyers to focus on what they do best in the interest of the client and the profession. Many midsized and smaller firms are now following suit.<sup>163</sup>

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161. See Tyler Durden, *The Extraordinary Size of Amazon in One Chart*, ZEROHEDGE (Jan. 10, 2017, 1:51 PM), <http://www.zerohedge.com/news/2017-01-09/Extraordinary-size-amazon-one-chart> (stating Jeff Bezos is the founder and CEO of Amazon, the largest retailer in the United States (measured by market capitalization)); see also Walter Isaacson, *The Real Leadership Lessons of Steve Jobs*, HARV. BUS. REV. (Apr. 2012), <http://www.harvardbusiness.org/real-leadership-lessons-steve-jobs> (stating Steve Jobs was the founder and CEO of Apple, who "cofounded Apple in his parents' garage in 1976, was ousted in 1985, returned to rescue it from near bankruptcy in 1997, and by the time he died, in October 2011, had built it into the world's most valuable company").

162. Nathan Koppel, *Theory & Practice: Law Firms Try New Idea: Manager-Focused CEO*, WALL ST. J. B3 (Jan. 22, 2007).

163. See Roland B. Smith & Paul Bennett Marrow, *The Changing Nature of*

This model is different from the “traditional management model for U.S. law firms, [which] includes an ever-narrowing group of partners managing high-level firm administration.”<sup>164</sup>

Alternative management models can be structured in many ways, but one typical approach is to have a managing partner and a chief operating officer (COO)<sup>165</sup> work together to lead the firm. The managing partner provides leadership and direction to the legal practice and overall firm strategy, serving as a sounding board and guide for the partnership.<sup>166</sup> The managing partner must set direction, build commitment, and ensure execution while constantly exhibiting a personal example for all to see.<sup>167</sup> The COO is often someone with a business background, law firm operational background, or a lawyer with significant law firm operational experience.<sup>168</sup> Operational experience and the requisite skillset requires capabilities very different than those required for practicing law or leading as a practitioner. “Giving direction at the operational

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*Leadership in Law Firms*, 80 N.Y. St. B.J. 33, 34 (Sept. 2008), <http://myccl.ccl.org/Leadership/pdf/landing/ChangingNatureLeadershipLawFirms.pdf>; see also Elizabeth Chambliss, *New Sources of Managerial Authority in Large Law Firms*, 22 GEO. J. LEGAL ETHICS 63, 67 (2009). This change has been observed for twenty years and supports Elizabeth Chambliss’ finding that “(m)uch of the academic literature about the basis of managerial authority in large law firms is grounded in market and regulatory conditions circa 1980, such as relative firm stability, passive liability insurers, and the absence of competing organizational forms. Likewise, much of the ideological resistance to dedicated, professional management comes from a generation of partners who are about to retire. Conditions have changed, with profound effects on the structure, if not yet the culture, of law firm management.” *Id.*

164. Lauren Moak & Nicholas Gaffney, *Managing Partner or Executive Director?: A New Model for Law Firm Management*, L. PRAC. TODAY (June 2011), [https://www.americanbar.org/content/dam/aba/publications/law\\_practice\\_today/managing\\_partner\\_or\\_executive\\_director.pdf](https://www.americanbar.org/content/dam/aba/publications/law_practice_today/managing_partner_or_executive_director.pdf).

165. “Executive Director” and “COO” can be used interchangeably, as the role is the same.

166. THOMAS J. DELONG, JOHN J. GABARRO, & ROBERT J. LEES, *WHEN PROFESSIONALS HAVE TO LEAD* 17 (Harv. Bus. Sch. Press 2007) (identifying the integrated leader model).

167. *Id.* at 17.

168. In such situations, the title might be Chief Operating Partner (COP). A firm should consider whether the COP has requisite leadership and operations experience. Some firms may also divvy up some of the managing partner responsibilities among more than one partner, in the form of an executive committee, or a Strategic Chair. All of these partners require leadership skills. See *supra* notes 114–15 and accompanying text.

level involves setting expectations and providing direction on a day-to-day, project-by-project basis. It consists of translating what the firm's or the practice's strategy means in terms of choices, decisions, and actions that are made in serving clients."<sup>169</sup> The success ingredients to this managing partner/COO leadership partnership are:

- (1) The managing partner has credibility with her partners and exhibits strong "integrated" leadership skills;<sup>170</sup>
- (2) The COO has strong operational and people leadership skills;<sup>171</sup>
- (3) Both leaders have influence with lawyers and operations team members and work to create collaboration among all within the firm;<sup>172</sup> and
- (4) Both leaders have a deep understanding of the ways to influence and drive change in a law firm setting and work together to do so.<sup>173</sup>

"The goal is to free managing partners to focus on revenue-generating work," be it through their own practice, or through driving revenue-generating strategies and behaviors within the firm.<sup>174</sup> The managing partner must have a leadership skillset as it is her job to "create a vision for the future, design a competitive strategy, build an agile, flexible and inclusive culture, and attract, retain and develop a top-flight, committed talent pool."<sup>175</sup> The result is a "Managing Partner [who] provides the strategic leadership and direction for the firm" and an "Executive Director or [COO] [who] implements a multitude of tactics and coordinates the administrative functions required to ensure the smooth day-to-day operation of the firm."<sup>176</sup>

169. DELONG ET AL., *supra* note 166, at 18.

170. See generally David Edelman, et al., *The CMO and COO: Partners on a Customer Journey*, MCKINSEY & COMPANY MARKETING & SALES (2015), <http://www.mckinsey.com/business-functions/marketing-and-sales/ourinsights/the-cmo-and-coo-partners-on-a-customer-journey>.

171. *Id.*

172. *Id.*

173. *Id.*

174. Lauren Moak & Nicholas Gaffney, *supra* note 164.

175. Smith & Marrow, *supra* note 163, at 34 ("Unlike administrative operations such as finance and human resources, these core leadership responsibilities simply cannot be delegated to non-attorney staff members.")

176. *Id.* at 1 (quoting Glen Callison, Chairman and Chief Executive Officer of

This article presents the view that a managing partner paired with a COO create the ideal leadership partnership to prepare for and lead through market changes, since operations professionals are the management agents of change. However, lawyers in law firms may push back on the idea. For many lawyer-leaders, their “credibility [as a leader] depends on [their] credibility as a practitioner.”<sup>177</sup> David Wilkins, Faculty Director of the Center on the Legal Profession at Harvard Law School, says that “lawyer-managers ‘do have more authority because their partners see them as true participants,’” but adds that “most big firms need a full-time manager.”<sup>178</sup>

One structural problem that is characteristic of law firms and has impeded moving to a COO model is the tension that exists between the dominant rainmakers<sup>179</sup> and full-time management:

Despite the tremendous potential for gain . . . the current arrangement of power in large American law firms poses a significant barrier preventing an extensive, dramatic, and immediate shift in the management structure of the legal profession. More specifically, a structural conflict exists between the interests of the firm and those of the rainmaking partners, at least in part because the dominant rainmakers are both mobile and the most powerful actors within law firms, and for the new model to be successful, these partners must surrender a significant amount of control. Further, the new model requires that power shift from rainmaking partners to a centralized leader, making this shift unlikely to occur because dominant partners will not easily relinquish the authority and influence they currently possess. Consequently, those attempting to modify a firm’s management structure and the distribution of power have the arduous task of garnering the approval of the firm’s rainmakers since those lawyers are in a position to thwart any proposed transformation.<sup>180</sup>

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Munsch Hardt Kopf & Harr, P.C. from 2006–2013 (internal quotations omitted)).

177. Koppel, *supra* note 162, at 2 (quoting Evan Chesler, Chairman of Cravath, Swaine & Moore LLP).

178. *Id.*

179. “[A] person (such as a partner in a law firm) who brings in new business.” *Rainmaker*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/Dictionary/rainmaker>.

180. Matthew S. Winings, *The Power of Law Firm Partnership: Why Dominant Rainmakers Will Impede the Immediate, Widespread Implementation of an Autocratic Management Structure*, 55 *DRAKE L. REV.* 165, 166 (2006).

Said differently, “the traditional law firm hierarchy often stands in the way of new ideas. Partners who wield the most power within their firm are often the least likely to see any reason to change a system that has benefited them.”<sup>181</sup>

One problem with resistance to full-time managers is that lawyers are often bad managers; accordingly, moving a successful lawyer into a leadership role is not always a good idea.<sup>182</sup> This isn’t a knock against lawyers; many professionals are bad managers because the key success behaviors in the professional field do not always align with strong people management. For example, Peter Sherer, a professor at the Haskayne School of Business in Calgary, Canada, says that “[t]he best engineer isn’t necessarily the best manager or team leader.’ As these professionals climb the ladder, they have to rely more on other people to help them and ‘that’s a different set of skills.’”<sup>183</sup> Lawyers and law firms especially experience this skill deficit because the legal education system does not often provide ample management and leadership training.<sup>184</sup> But some law schools are beginning to adapt their curriculum to address the clear need for more leaders and managers in the profession.<sup>185</sup>

181. Roy Strom, *Barnes & Thornburg’s Efficiency Push: A Change Management Story*, THE AM. L. DAILY (June 17, 2017).

182. See generally Deena Shanker, *Why are Lawyers Such Terrible Managers?*, FORTUNE (Jan. 11, 2013), <http://fortune.com/2013/01/11/why-are-lawyers-such-terrible-managers/> (quoting Peter Sherer, professor).

183. *Id.*; see also Alice M. Sapienza, *From the Inside: Scientists’ Own Experience of Good (and Bad) Management*, 35 R&D MGMT. 473, 473–82 (Nov. 2005) (“[S]cientists admit that they are not ready for one of the most difficult and consequential aspects of their work—leading a group of people.”).

184. See David G. Delaney, *The Leadership Opportunity for Law Schools*, A.B.A. J. (Sept. 29, 2016, 8:00 AM), [http://www.abajournal.com/legalrebels/article/the\\_leadership\\_opportunity\\_for\\_law\\_schools](http://www.abajournal.com/legalrebels/article/the_leadership_opportunity_for_law_schools).

185. See, e.g., Donald J. Polden, *Symposium on Leadership Education for Lawyers and Law Students*, 52 SANTA CLARA L. REV. 685, 685 (2012) (describing the symposium as a “national conference for law schools, law firms, and professional educators developing methods and programs to provide not only more, but improved leadership education for law students and lawyers”); George T. Lewis & Douglas A. Blaze, *Training Leaders the Very Best Way We Can*, 83 TENN. L. REV. 771, 771–95 (2016) (describing leadership courses at various schools, e.g. “Leadership for Lawyers” at Santa Clara, “Leadership for Lawyers” at Columbia, “Law, Leadership, and Social Change” at Stanford, “Leadership and Team Management” at University of Virginia, “Leadership and Law” at University of Minnesota, and “Leadership Effectiveness and Development” at University of Chicago); Michael J. Madison, *Leading New Lawyers: Leadership and Legal Education*, 83 TENN. L. REV. 751, 751–69 n.3 (2016) (describing the leadership course he developed at the University of Pittsburgh and



Additionally, even after practicing for years or decades, “[t]he qualities that are valuable in building a successful law practice are not necessarily those that make for an effective manager.”<sup>186</sup> Traditionally, “[l]arge law firms...are run by individuals who generally have had no management training, and whose skills as lawyers do not necessarily meet the demands of leadership.”<sup>187</sup> In their book, *Learning from Law Firm Leaders*, Susan G. Manch and Michelle C. Nash articulate the core competencies needed for all leadership if they want to gain followers.<sup>188</sup> These competencies are (1) knowledge and skill mastery, (2) openness to learning, (3) effective communication/interpersonal style, (4) mentorship, and (5) vision.<sup>189</sup> This leadership model clearly articulates how the professional expert (lawyer) can also exhibit the needed competencies to lead. Developing competencies two through four listed above is the key to leading.

Despite evidence that professional managers are capable of managing their businesses, lawyers do not often choose that option. An example can be found in a recent article for *The American Lawyer* that observes the changing legal markets and proposes that “today’s leaders [need] to bring more younger partners into leadership roles.”<sup>190</sup> The reasoning is that law firms “should change the composition of their leadership teams to include many more younger partners,” because they “need to have people with skin in the game to tackle appropriately a firm’s long-term challenges.”<sup>191</sup> The idea of “skin in the game” (in other words, an ownership interest) is important to lawyers. For example, it was cited as the reason that Baker & Hostetler dropped their non-equity partner tier.<sup>192</sup> Skin in the game is a method chosen by law firms to avoid the

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also providing a summary list of practitioners and scholars who are calling for leadership training for lawyers).

186. Regan & Heenan, *supra* note 47, at 2163.

187. Deborah L. Rhode, *Lawyers and Leadership*, 20 PROF. LAW. 1, no. 3, 13 (2010).

188. SUSAN G. MANCH & MICHELLE C. NASH, *LEARNING FROM LAW FIRM LEADERS* 64–65 (A.B.A. Book Pub. 2012).

189. *Id.*

190. Hugh A. Simons, *Are Law Firms Too Sophisticated for Their Own Good?*, AM. LAW. (July 12, 2017), <http://www.americanlawyer.com/id=1202792832469/Are-Law-Firms-Too-Sophisticated-for-Their-Own-Good>.

191. *Id.*

192. 2016 REPORT, *supra* note 1 (quoting Susan Beck, *Baker & Hostetler Votes to Nix Nonequity Partner Tier*, AM. LAW. (Sept. 11, 2015), <http://www.americanlawyer.com>).

principal-agent problem. The principal-agent problem describes the differences in motivation and behavior between principals (law firm partners) and their agents (operations directors).<sup>193</sup> The so-called “principal-agency” problem is summarized in the proposition that “if not sufficiently monitored or . . . [incentivized], agents will be lazy or irresponsible—or at least not entirely selfless in their motivations.”<sup>194</sup> In other words, lawyers want their leaders to be fellow partners because partners can be trusted to act selflessly, to put the firm’s needs first.

While the previous sentence was written with straight faces, the authors hope readers recognize the absurdity of the argument that skin in the game creates altruistic motivation.<sup>195</sup> The authors also hope that readers recognize that thousands of companies are successfully run by agents (managers) who act in the best interest of the business owners (public companies generally follow this model). Companies are successful despite being led by non-owners because agents’ propensity for opportunistic behavior can be mitigated by implementing agency controls (mechanisms whereby the goals of principals and agents are aligned). “[A]gency controls play a critical role in reducing their opportunistic behaviors.”<sup>196</sup> The two most common agency controls are monitoring and bonding.<sup>197</sup> “Monitoring involves observing the behaviour and/or the performance of agents. Bonding refers to arrangements that penalize agents for acting in ways that violate the interests of

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com/id=1202737020721/Baker—Hostetler-Votes-to-Drop-Nonequity-Partner-Tier).

193. See generally 2 MARC J. HOLLEY, *ENCYCLOPEDIA OF EDUCATION, ECONOMICS, & FINANCE* 544–45 (Dominic J. Brewer & Lawrence O. Picus eds., 2014) (presenting four assumptions of the principal-agent model: “both principals and agents are rational actors seeking to maximize their own utility,” “there is information asymmetry between the principal and the agent when the agent has specialized skill or knowledge that the principal lacks,” there is a “potential misalignment of goals between principals and agents,” and “that principals can set contractual provisions unilaterally”).

194. Eric W. Orts, *Shirking and Sharking: A Legal Theory of the Firm*, 16 *YALE L. & POL’Y REV.* 266, 277 (1998).

195. See Winings, *supra* note 180; see also Strom, *Barnes & Thornburg’s Efficiency Push*, *supra* note 181 (showing examples where partners act selfishly and not in the firm’s interest).

196. Eric A. Fong & Henry L. Tosi Jr., *Effort, Performance, and Conscientiousness: An Agency Theory Perspective*, 33 *J. OF MGMT.* 161, 162 (2007).

197. *THE SAGE HANDBOOK OF ORGANIZATION STUDIES* 16 (Stewart R. Clegg et al. eds., 2006).

principals or reward them for achieving principals' goals."<sup>198</sup> One prevalent example of bonding is an incentive in the form of a salary that is tied to organizational goals.<sup>199</sup>

In addition to the agency controls of monitoring and incentivizing, the personality of the agent also impacts the individual manager's levels of effort and performance. For individual managers, possessing the personality trait of conscientiousness from among the five commonly accepted personality factors<sup>200</sup> "exerts the greatest empirical impact on individual performance."<sup>201</sup> "Conscientiousness refers to the extent to which someone is achievement-oriented, dependable, persevering, hardworking, and deliberate."<sup>202</sup> Conscientiousness stands out among the personality traits "because the positive relationship between conscientiousness and individual performance has been found across all job criteria and across all occupational groups studied."<sup>203</sup> Thus, despite lawyer ownership, operations leaders are often as invested in the outcome of the business due to personality traits, as well as structural dynamics. The lack of individual personal financial gain available to operations team members based on their inability to control a book of business may create an enterprise-driven motivation. Conversely, a personal gain mindset sets the stage for strong leadership benefiting the whole law firm. Said differently, employees want to do a good job because they want to get a better job, and doing a good job at their current job is one of the best ways to advance their careers.

It is worthwhile to note that leadership and management are not the same thing. Annemarie Neal and Karen Conway, the authors of the book *Leading From the Edge: Global Executives Share Strategies for Success*, quote Mark Zuckerberg, the founder of Facebook, as saying: "There are people who are really good managers, people who can manage a big organization . . . And then there are people who are

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198. *Id.*

199. *See id.*

200. 5 ROBERT R. MCCRAE ET AL., *PERSONALITY AND SOCIAL PSYCHOLOGY* 66 (Howard A. Tennen et al. eds., 2d ed. 2013) (stating the five personality traits are neuroticism, extraversion, openness to experience, agreeableness, and conscientiousness).

201. Fong & Tosi, *supra* note 196, at 165.

202. *Id.*

203. *Id.* (citing Michael K. Mount & Murray R. Barrick, *Five Reasons Why the "Big Five" Article Has Been Frequently Cited*, 51 *PERSONNEL PSYCHOLOGY* 849 (1998)).

very analytical or focused on strategy. Those two types don't usually tend to be in the same person."<sup>204</sup> Neal asserts that in order for law firms to manage change, they must "understand there's a discipline called management, and it's valuable, and you can't just be chaotic."<sup>205</sup>

Change is already here and more is coming; law firms need to change the way they traditionally operate. "The traditional partnership model was designed for the practice of law, not the delivery of legal services," let alone the adaptation to a radically changing marketplace.<sup>206</sup> Firms that do not anticipate and proactively address the market changes (firms where "operations professionals are accorded second-class status")<sup>207</sup> are not going to be ready, and will cease to exist. Firms where COOs feel "that their position is not vested with sufficient influence of authority to implement the methodologies that they have been hired to develop" will struggle.<sup>208</sup> What is required of firm leadership and management is "not merely an organizational change but a fundamental shift in methods, approach, alignment with clients, reward system, and division of labor."<sup>209</sup>

Traditional law firm management will likely initially resist non-partner leadership. But traditional law firm management and the pool of available leadership candidates exhibiting the requisite competencies among partners are not sufficient for the requirements of rigorous change management needed in today's law firm.<sup>210</sup> We have detailed the changes happening in the profession.<sup>211</sup> However, it is one thing to articulate outside market pressures. It is another thing entirely to help an organization to successfully change, let alone a law firm. While other factors are

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204. ANNAMARIE NEAL WITH KAREN CONWAY, *LEADING FROM THE EDGE: GLOBAL EXECUTIVES SHARE STRATEGIES FOR SUCCESS* 57 (ASTD Press 2013).

205. Dorie Clark, *Why Great Leaders Make Bad Managers - and That's OK*, FORBES, (Jan. 10, 2013, 10:34 AM), <https://www.forbes.com/sites/dorieclark/2013/01/10/why-great-leaders-make-bad-managers-and-thats-ok/> (quoting Annemarie Neal, author).

206. Mark Cohen, *Are Law Firms Becoming Obsolete?*, FORBES, (June 12, 2017, 5:36 AM), <https://www.forbes.com/sites/markcohen1/2017/06/12/are-law-firms-becoming-obsolete>.

207. *Id.*

208. Lauren Moak & Nicholas Gaffney, *supra* note 164.

209. Cohen, *supra* note 206.

210. *See id.*

211. *Supra* Part II.

involved, creating change within a law firm requires, at the very core, acceptance and trust by a significant number of lawyers.<sup>212</sup> This is not something that can happen on day one when a COO walks into a firm. The COO must gain the trust and acceptance of lawyers well before the change is needed. In particular, the COO must have a strong and trusting work relationship with the managing partner.

Patrick McKenna notes that he has “witnessed numerous instances where the leadership transition [to a new managing partner] has either caused the firm’s chief operating officer (COO) to seek alternative employment or to be forced out because of a conflict of working styles.”<sup>213</sup> McKenna notes that this “magnif[ies] the sensitive nature of how closely these two, the firm leader and their COO, must work together.”<sup>214</sup> In addition, the COO must gain the acceptance and trust of the operations team to also lead successful change. One might naively state that this should be easy, as the COO is the “boss” of the operations team. But the retention of law firm operations professionals is historically high. Because many such professionals are well-regarded or protected by influential lawyers, leading the team may be challenging. Rarely does it occur that a COO arrives and cleans house immediately upon joining the firm, which is a dynamic often seen in corporations.<sup>215</sup>

With all the political nuance required, some might argue that an operations team could self-lead, without a COO. Before reaching this conclusion, the managing partner should consider whether the team can provide both management and leadership to itself. “[M]anagement involves those activities focused on getting things organized to accomplish a particular job or mission in the near term, while leadership involves setting the long-term strategic direction for an organization and inspiring people to move in that direction.”<sup>216</sup> It is highly unusual for an operations team to do these well, especially for themselves.

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212. See Winings, *supra* note 180, at 188–89 (2006) (discussing skepticism held by lawyers for firm management).

213. Patrick J. McKenna, *When a New Firm Leader Takes the Reins*, in *RISE OF THE LEGAL COO* 31 (Laura Slater ed., 2017).

214. *Id.*

215. See Robert W. Denney, *The Evolution of the Professional Administrator*, A.B.A.: LAW PRAC. (April/May 2008), [https://www.americanbar.org/publications/law\\_Practice\\_home/law\\_practice\\_archive/lpm\\_magazine\\_articles\\_v34\\_is3\\_pg35.html](https://www.americanbar.org/publications/law_Practice_home/law_practice_archive/lpm_magazine_articles_v34_is3_pg35.html).

216. Larry R. Richard & James W. Jones, *The Scholarship on Leadership*, in *HILDEBRANDT HANDBOOK OF LAW FIRM MANAGEMENT* 352 (2010).

Trust is at the epicenter of leading change in a law firm. “Trust can be built one hundred and one ways, through both small and large actions.”<sup>217</sup> Most significantly, “professionals must see alignment between what leaders say and what they do.”<sup>218</sup> This trust building is central to the success of the COO. In many ways, trust is more easily built with a COO than with a practicing lawyer because the COO is not vying for clients, resources, or a portion of the partnership net revenue. The team may see the COO as an outsider to the practice, but may recognize the COO as an insider to the business. Many factors add to the complex law firm change dynamic, including the influence of the law firm rainmakers, the lawyer leader’s vision and strategy, the lawyer’s personality, the fear of destabilizing a firm due to too much change at any given moment, the differences among practice groups, the differences across offices and countries, long held lack of trust between some lawyers, and true alliances between other lawyers. It sounds like a season of *Game of Thrones*,<sup>219</sup> and at times, it is.

As the authors will address in detail later in the article, a strong leader is needed to skillfully, and with finesse, lead this group of people through change. Successful law firms will see this complex dynamic and understand they need help navigating the choppy waters ahead. Successful law firms will choose to work side-by-side with other professionals and will look to the leadership of a COO and an operations team for the change needed within the organization. Successful law firms will have high expectations for the COO and operations team; therefore, the COO and team must be up to the task.

#### IV. MEET THE OPERATIONS TEAM

The law firm operational model is not historically viewed as an influential team, a change agent, or a partner in the business.<sup>220</sup> The traditional law firm business model often separates the individuals and teams who keep the law firm business humming (Marketing and

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217. DE LONG ET AL., *supra* note 166, at 26.

218. *Id.* at 27.

219. *Game of Thrones* (HBO) (television show developed by David Benioff and D.B. Weiss).

220. See William Josten & Ian Turvill, *Reinventing the Law Firm Business Model*, WIS. LAW. 42, 43 (2016); Toby Brown, *Accounting 101 for Lawyers or Too Late, You Lose?*, UTAH B.J. 8 (1999).

Business Development, IT, Human Resources, Finance, Facilities, Recruiting, Diversity & Inclusion, and eDiscovery) from the legal teams. This model labels the former group of professionals “nonlawyers,” even when some of these professionals have law degrees and are licensed lawyers. It happens through workspace separation (sometimes by floor, sometimes in different office locations) and it happens through a general lack of understanding and appreciation for the important roles everyone plays. The physical, linguistic, and behavioral separations hinder these professionals from optimizing their full potential and ultimately impact a firm’s ability to proactively address the changing legal market.

Many of the individuals leading these functional areas are people with tenure in the firm, promotions from remaining with the firm for many years, influence with key lawyers, and the ability to continually learn and adapt on the job.<sup>221</sup> This tenure allowed law firms to keep overhead in check versus recruiting in the expensive marketplace.<sup>222</sup> These roles were often focused on the core required services within the firm.<sup>223</sup> It is not hard to argue that you need a human resources staff to focus on the hiring and evaluation of the firm’s employees, a finance team to handle your billing and collections, a facilities person to ensure your space is welcoming and impressive to clients (and equally welcoming and impressive to lawyer talent), and an IT department to ensure your technology needs are met. Additionally, many of these roles have evolved significantly in the last decade. However, it is a much newer dynamic to hire subject matter experts with leadership competencies from other professional service environments, corporations, or competitive law firms to lead these functions.

Due to firms’ compensation, retirement plan structure, and the revenue growth seen in the 1990s–2007 timeframe, key operations professionals often stayed in their firms and were promoted to ever-increasing responsibility.<sup>224</sup> These professionals stayed because their roles, responsibilities, and work evolved.<sup>225</sup> Many stayed because they

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221. See generally Marc Galanter, “Old and in the Way”: *The Coming Demographic Transformation of the Legal Profession and Its Implications for the Provision of Legal Services*, WIS. L. REV. 1081, 1092 (1999).

222. *Id.*

223. *Id.*

224. *Id.*

225. See *id.* at 1094.

developed autonomy due to the divide between legal practices and operations.<sup>226</sup> It also became part of some firms' retention strategies to pay these individuals well to retain them.<sup>227</sup> This practice is commonly referred to in the industry as "combat pay" for people willing and able to successfully work with lawyers. During this timeframe, the legal profession also saw the emergence of the law firm recruiter and law firm professional development manager as the war for associate talent escalated, associate salaries dramatically increased, and the time needed to lead successful recruiting and retention efforts also increased.<sup>228</sup> These market dynamics led lawyer leadership to conclude that the daily operations of these functions were better served by a subject matter professional instead of a billing timekeeper.<sup>229</sup> However, just as the marketing professional worked with the marketing partner, the legal recruiting professional worked closely with the firm's hiring partner.<sup>230</sup> These roles quickly grew in influence as these professionals often worked closely with law firm leadership and held the key to working with the talent most needed in a law firm: associates.<sup>231</sup> Recruiters and professional development managers quickly became directors and ultimately, operating chiefs, as associate talent required additional management, leadership, and skills, and the need for lateral lawyers grew.<sup>232</sup> The pressure exerted on law firms from in-house counsel to recruit, retain, and grow diverse talent also increased dramatically during this time.<sup>233</sup>

In fact, we have observed that the post 2009 great-recession decade saw the emergence of competency models, levels models, modified career paths, alternative lawyer roles, a key focus on lawyer satisfaction, and a greater retention of women lawyers, lawyers of

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226. *See id.* at 1107.

227. *See id.* at 1100.

228. NALP FOUNDATION FOR RESEARCH & EDUCATION, KEEPING THE KEEPERS STRATEGIES FOR ASSOCIATE RETENTION IN TIMES OF ATTRITION 23 (1998).

229. *Cf. id.*

230. *Cf. id.*

231. One can also argue that finance professionals grew in influence during this time as well. However, recruiting and professional development professionals were in front of hiring partners, group leaders, board members, management team members, and associate evaluation committees, allowing them broader visibility in the firm.

232. *See* NALP, *supra* note 228.

233. *See, e.g.*, TWIN CITIES DIVERSITY IN PRACTICE, <http://diversityinpractice.org/> (last visited Oct. 1, 2017).



color, and LGBT lawyers.<sup>234</sup> Additionally, these years brought the need for more careful articulation of compensation, particularly on parental leave, reduced hours, and bonus potential for strong performance. Moreover, these change dynamics and the influence of the general counsel gave rise to the emergence of the diversity and inclusion professional.<sup>235</sup> All of these talented professionals became key change agents in law firms and helped pave the way for further influence on the part of operational professionals within the firm. Business development and marketing professionals also became a significant change agent, as this person's key circle of influence included the firm rainmakers.<sup>236</sup> The marketing function first emerged as a coordinator-type individual who stood at the ready to help prepare lawyers for a golf outing, update the firm brochure, and coordinate the few events the firm hosted in a given year.<sup>237</sup>

234. See, e.g., Aisling Maki, *Law Firms Implement Initiatives, Mentoring to Retain Women Attorneys*, MEM. DAILY NEWS, Oct. 14, 2017, <https://www.memphisdailynews.com/news/2017/oct/14/law-firms-implement-initiatives-mentoring-to-retain-women-attorneys/>.

235. See Rick Palmore, *A Call to Action: Diversity in the Legal Profession*, LEADERSHIP COUNCIL ON LEGAL DIVERSITY (2004), <http://www.lclldnet.org/resources/2004-call-to-action/>. *A Call to Action: Diversity in the Legal Profession*, authored by Rick Palmore, is

a legal industry manifesto urging general counsel to drive diversity by demanding results in the law firms with which they work as well as in their departments. The initiative later grew into the Leadership Council on Legal Diversity (LCLD), a collaboration between general counsel and managing partners, which was formed in May 2009 and now includes more than 225 corporate chief legal officers and law firm managing partners. Rick was the founding chair of the LCLD's board of directors and continues to serve on its executive committee

Rick Palmore, DENTONS, <https://www.dentons.com/en/rick-palmore> (last visited Oct. 5, 2017).

236. *Investing in Rainmakers: Do Business Development Training Programs Yield ROI?*, THE ACKERT ADVISORY, <https://www.ackertadvisory.com/investing-in-rainmakers-do-business-development-training-programs-yield-roi/> (last visited Nov. 16, 2017) ("For example, an associate trainee may only bring in one small matter over the course of a given BD training program, but her increased rainmaking potential will yield a far more meaningful gain to the firm in the years to come.").

237. Amanda Brady, *The Evolution of Law Firm Marketing and Business Development*, L. J. NEWSL. (Dec. 2015), <http://www.lawjournalnewsletters.com/sites/lawjournalnewsletters/2015/12/31/the-evolution-of-law-firm-marketing-and-business-development/?slreturn=20171007215236> ("In the early days of law firm marketing, the Associate Recruiting Manager was often also responsible for marketing, and the function centered on events, typically associate recruiting events as well as tickets to social and sports events.").

Often, that individual worked with a lawyer who was designated as the “marketing partner” in the firm, even though the lawyer lacked any marketing training or education. As the internet grew in influence, the marketing professional began to oversee the firm’s website.<sup>238</sup> As client pressures grew, marketing began to include business development efforts.<sup>239</sup> During the last decade, we have seen the business and development function grow in department size and expertise, adding graphic designers, communication experts, brand specialists, business development coaches, and business development managers—all lead by a C-Level professional with deep subject matter expertise.<sup>240</sup>

The director of finance or the chief financial officer (CFO) is seen in some firms as the de facto COO. Chris Bull, founding director of Kingsmead Square, notes in his chapter “Horses for courses – The spectrum of chief operating officer roles in law firms” in *Rise of the Legal COO*, that it is common for the COO role to evolve out of the CFO role because “as a firm grows, [and as] a managing partner becomes stretched[,] . . . the CFO demonstrates a capability to understand and manage other support areas with substantial financial significance.”<sup>241</sup> Bull also states that “this evolution usually stops some way short of the complete business responsibility.”<sup>242</sup> Whether the CFO has responsibilities beyond the finance department or not, this role is increasingly influential, as managing partners and COOs increasingly rely on metrics and modeling.<sup>243</sup> Firm leadership also expects the CFO to raise flags of warning should an issue arise in the finances of the firm, as the CFO and her team are likely to spot the early signs of problems.<sup>244</sup>

Additional key roles in law firm operations include the chief information officer (CIO), the real estate and facilities

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238. *Id.*

239. *See id.* (“In 2010, law firms began rehiring marketing leaders and rebuilding their departments. However, there was a new focus on the need for targeted business development that emphasized client relationships and actively generating leads for new work ‘not just on sponsoring events, advertising and responding to RFPs.’”).

240. LEGAL MARKETING ASSOCIATION, <https://www.legalmarketing.com> (last visited Dec. 26, 2017).

241. Chris Bull, *Horses for Courses – The Spectrum of Chief Operating Officer Roles in Law Firms*, in *RISE OF THE LEGAL COO* 3, 9 (Laura Slater ed., 2017).

242. *Id.*

243. *Id.*

244. *Id.*

professional,<sup>245</sup> the strategy officer,<sup>246</sup> the pricing expert,<sup>247</sup> the eDiscovery leader, and project managers.<sup>248</sup> The CIO is now expected to provide a holistic and future-looking strategic plan for the firm's technology needs. This includes hardware, software, bring-your-office device programs, application development, co-locations, protecting the firm from cyber-security threats, and addressing the ever-changing client technology needs. We should expect IT to continue to grow as AI<sup>249</sup> becomes more prevalent, client technology demands increase, and the drive for efficiencies becomes a part of every legal practice. The background and experience needed to lead the IT function in a law firm makes finding these professionals

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245. As law firms seek to maintain or reduce overhead, space efficiencies are of key importance. Many firms are moving to one-size offices for lawyers, benching models for operational teams, and at times office space dedicated to the operational professional in cost saving mindset. See Cushman & Wakefield, *Bright Insight: The 2017 National Legal Sector Benchmark Survey Results*, June 6, 2017, <http://www.cushmanwakefield.us/en/research-and-insight/2017/lsg-bright-insight/>; see also Michal Ptacek, *A Tour of Fish & Richardson's New Minneapolis Office*, OFFICELOVIN', <https://www.officelovin.com/2017/05/25/tour-fish-richardsons-new-minneapolis-office/>.

246. At times this role is played by a practicing lawyer, but increasingly is an operation professional focused on bringing the methodology behind careful strategy articulation with deliverables. See, e.g., *Enabling Business Transformation Via the Facilitation of Strategy Development and Execution*, ARK GRP. (May 11, 2017), <http://usa.ark-group.com/upload/event/agenda/b368cd49-01f0-4950-aae8bc1597db4fa0.pdf>.

247. As clients demand changes to law firm pricing through different fee arrangements such as flat fees, blended rates, success fees, carefully articulated budgets, project management updates and commoditized packaged legal work, expertise is required with both data and experience in working on legal work as well as the ability to explain the options to a client and communicate continually with the client. Cf. Catherine Ho, *At Law Firms, Pricing Managers are in Demand*, WASH. POST (May 25, 2014), [https://www.washingtonpost.com/business/capitalbusiness/at-law-firms-pricing-managers-are-in-demand/2014/05/25/f6e880b2-e130-11e3-8dcc-d6b7fede081a\\_story.html?utm\\_term=.b2018a5f2310](https://www.washingtonpost.com/business/capitalbusiness/at-law-firms-pricing-managers-are-in-demand/2014/05/25/f6e880b2-e130-11e3-8dcc-d6b7fede081a_story.html?utm_term=.b2018a5f2310); Marg. Bruineman, *What is a Pricing Officer and Does Your Firm Need One?*, CAN. L. (Jan. 5, 2015), <http://www.canadianlawyermag.com/author/sandra-shutt/what-is-a-pricing-officer-and-does-your-firm-need-one-2729/>.

248. See Mark A. Cohen, *The Reluctant Rise of Project Management in Law*, LEGAL MOSAIC (Mar. 24, 2015) <https://legalmosaic.com/2015/03/24/reliant-rise-project-management-law/#> ("Project Management is the application of knowledge, skills and techniques to execute projects effectively and efficiently . . . Project Management has many applications to the delivery of law firm services.").

249. Artificial intelligence is the development of computer systems to provide tasks typically performed by humans.

somewhat like finding a unicorn. They need to have the technology background, but more importantly, they need to translate the “techie” ideas into a well-executed strategy that meets the needs of the legal practice, the clients, and the operations colleagues.<sup>250</sup> Simultaneously, the IT individual must collaborate across the firm, then effectively communicate the strategy and implementation to these same people.<sup>251</sup> Hence, this role has a unique unicorn aspect.

The same can be said for the other key roles. The experience and subject matter expertise is important for each of these professionals, as it provides the price-of-entry credibility to the lawyers: Do you know your stuff? Can you fix my problem? However, the other portions of the success formula matter equally. The professional must not only know her stuff, but must also be able to develop a strategy, gain the lawyers’ acceptance of the strategy, collaborate across the operations leadership, lead a team of individuals in the execution of the strategy, effectively communicate the work involved, and then, actually deliver the desired outcome.

While individual professional leaders with subject matter expertise are important to a law firm operational model, it is really the power of their collective experience and collaboration where the rubber hits the road. This collaborative team approach is not something that typically occurs on its own in law firms,<sup>252</sup> but is rather something that requires purposeful building and leading.

#### A. *Building an Operations Team*

Building a performing operations team in a law firm can take years. As previously noted, many operations areas in law firms fall under a loosely defined “team.” These individuals may lead only their own functional areas, communicate only when necessary, collaborate only occasionally, and in the worst cases, have open warfare with each other. A key question to ask when considering whether to build a true team of operations professionals is—do you really need a team for the task at hand?<sup>253</sup> In the book *Senior*

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250. See Stephen P. Gallagher, *Staffing for Law Firm Technology*, A. B. A., [https://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/gallagr.html](https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/gallagr.html) (last visited Nov. 16, 2017).

251. See *id.*

252. Departments working as silos, or interacting with each other on a need-to-know basis, are more common in law firms.

253. RUTH WAGEMAN, DEBRA A. NUNES, JAMES A. BURRUSS, & J. RICHARD HACKMAN, SENIOR LEADERSHIP TEAMS: WHAT IT TAKES TO MAKE THEM GREAT 30 (Harv. Bus. Sch.

*Leadership Teams*, the authors provide a roadmap for considering whether to build a team.<sup>254</sup> The key questions to ask are: Is there a vital business need that is better met with a team versus a loose collective of individuals focusing on their own accountabilities? Is the organization in rapid growth? Are there areas of the business to integrate, or are there new areas to upstream, downstream,<sup>255</sup> or both? Do you anticipate major capital expenditures? Is your firm moving into a new stage of its life cycle?<sup>256</sup> Most law firms can answer “yes” to the majority of these questions right now.

When considering whether to create a team for a particular group, it is worth questioning whether a team is really needed. Patrick Lencioni notes in his book, *Silos, Politics, and Turf Wars*, that he “strongly believe[s] that building a cohesive leadership team is the first critical step that an organization must take if it is to have the best chance of success.”<sup>257</sup> Lencioni defines “team” as “a small number of people with *complementary skills* who are committed to a *common purpose, performance goals*, and an *approach* for which they hold themselves *mutually accountable*.”<sup>258</sup>

Understanding team dynamics is important to leading a team to successful outcomes. In 1965, Dr. Bruce Tuckman published the well-known “stages of group development,” in which he detailed the four necessary stages through which small groups must pass to truly function at peak performance. These stages are forming, storming, norming, and performing.<sup>259</sup> In 1977, Dr. Tuckman added a fifth stage, adjourning.<sup>260</sup> When any member changes on the team, the team must go through the previous stages to reestablish itself.

A leader of a team must understand these phases and know how to support the team through them. The forming phase is the phase in which the team comes together, as people are polite, and the role

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Press 2008).

254. *Id.*

255. Upstream and downstream refers to where a business sits in the supply chain. In a law firm, the terms refer to higher cost value work (upstream) versus commoditized work (downstream). Many firms handle both.

256. *Id.*

257. PATRICK LENCIONI, *SILOS, POLITICS AND TURF WARS* 175 (Jossey-Bass 2006).

258. Jon R. Katzenbach, *The Myth of the Top Management Team*, 75 HARV. BUS. REV. 83, 84 n.6 (1997).

259. Bruce W. Tuckman, *Developmental Sequence in Small Groups*, 63 PSYCHOL. BULL. 384, 387 (1965).

260. Bruce W. Tuckman & Mary Ann. C. Jensen, *Stages of Small-Group Development Revisited*, 2 GROUP & ORG. STUD., 419, 419 (1977).

of the leader is important to guiding the team.<sup>261</sup> The storming phase then occurs when team members start formulating opinions of each other and start voicing those opinions.<sup>262</sup> At times, there can be very visible conflict and during this phase the team can also begin to have conflict with the leader.<sup>263</sup> Tuckman's theory is that, although some teams avoid the storming phase, the phase is important to forming a fully functioning team.<sup>264</sup> The role of the leader is to help the team move through storming effectively.<sup>265</sup> The authors note that many law firm legal and operational teams bounce frequently between forming and storming phases and need more leadership to help move them to the norming stage. The norming phase occurs when conflict and difference result in increased intimacy and trust within the team, and cooperation among the team members emerges.<sup>266</sup> Many teams remain in the norming phase, as the final leap to fully performing can take significant leadership skills.<sup>267</sup> The performing phase occurs when team members feel confident in their roles and responsibilities, trust one another, and are focused on achieving common goals.<sup>268</sup> Focusing on common goals based on a shared vision allows an operations team to have significant impact.

Individual subject matter experts working in silos, or even loosely connected groups, can have some daily impact. However, a collective of operational professionals working together, providing different perspectives, and collaborating with one another for a common goal, can deliver the biggest results for a law firm. For example, consider an IT rollout of a new piece of software. Working in isolation, the IT team can purchase the software and work with the software company to rollout the program to all users. However, an IT team working within a collaborative performing operations team can leverage the perspectives of the other operations team members for the benefit of the firm. The finance team is involved in the negotiation and budgeting of the purchase, the HR team addresses the impact on the firm's employees, the marketing and

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261. *Id.* at 396.

262. *Id.*

263. *Id.*

264. *Id.*

265. *See id.*

266. *Id.*

267. *See id.*

268. *Id.*

business development team provides perspectives and expertise in communicating the software change to the firm, and the COO acts as the project sponsor and team guide for each step of the plan execution.

While it would be nice to conclude that most teams function at a very high level, we observe that the reality is that most legal teams exhibit some dysfunction and certainly do not function at their peak. Many functional teams rarely achieve consistent and sustainable maximum efficiency.<sup>269</sup> Patrick Lencioni's *The Five Dysfunctions of a Team* details the ways teams exhibit dysfunction, and provides the recipe for building a functioning team.<sup>270</sup> Lencioni's articulated dysfunctions are: absence of trust, fear of conflict, lack of commitment, avoidance of accountability, and inattention to results.<sup>271</sup> A team can succeed or fail if "even a single dysfunction is allowed to flourish."<sup>272</sup> Lencioni notes that a strong team is one in which team members trust each other, engage in unfiltered conflict around ideas, commit to decisions and plans of action, hold each other accountable, and focus on the achievement of collective results.<sup>273</sup> This framework provides a good roadmap for the COO to guide his team through development. The dysfunctions framework provides key opportunities along the way to set the tone for the team and to work through situations and dynamics as they arise. The role of the COO leader cannot be understated here, as he can easily add to the dysfunction, or help the team successfully move to functioning. A functioning operations team is a key element in law firms' successful change.

## V. HOW ORGANIZATIONS CHANGE

The following discussion on organizational change is framed in terms of Kurt Lewin's unfreeze, move, refreeze model.<sup>274</sup> A number

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269. See PATRICK LENCIONI, *THE FIVE DYSFUNCTIONS OF A TEAM* 188–90 (Jossey-Bass 2002).

270. *Id.*

271. *Id.*

272. *Id.* at 189.

273. *Id.* at 189–90.

274. See generally Kurt Lewin, *Frontiers in Group Dynamics: Concept, Method and Reality in Social Science; Social Equilibria and Social Change*, 1 *HUM. REL.*, 5, 5–41 (1947). But see Todd Bridgman, Kenneth G. Brown & Stephen Cummings, *Unfreezing Change as Three Steps: Rethinking Kurt Lewin's Legacy for Change Management*, 69 *HUM. REL.* 33, 37 (2016) (stating the proposition that Lewin did not develop the three-step model,

of change theories exist, but the simplicity and accessibility of Lewin's three-step model serves the purposes of this article.<sup>275</sup> Lewin is seen as the "founding father of change management," and "academics claim that all theories of change are reducible to [his] one idea."<sup>276</sup> Many believe that, more than any other person, "his thinking has had a more pervasive impact on organization development, both directly and indirectly."<sup>277</sup> His unfreeze, move, refreeze model is regarded as the fundamental approach to thinking about change management.<sup>278</sup>

Lewin started writing about change in 1947.<sup>279</sup> In those earliest years of studying organizational change, researchers were observing the characteristically human quality that is currently associated with lawyers and law firms—people are resistant to change.<sup>280</sup> The attitudes and beliefs of workers sewing pajamas in 1948 (the subject of Lester Coch and John French's earliest studies of Lewin's

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and that it formed after his death).

275. See Alicia Kritsonis, *Comparison of Change Theories*, 8 INT'L J. SCHOLARLY ACAD. INTELL. DIVERSITY 1, 5–6 (2004) (comparing Lewin's Three-Step Change Theory, Lippitt's Phases of Change Theory ("a seven-step theory that focuses more on the role and responsibility of the change agent than on the evolution of the change itself"), Prochaska and DiClemente's Change Theory ("people pass through a series of stages when change occurs . . . precontemplation [sic], contemplation, preparation, action, and maintenance"), Social Cognitive Theory ("proposes that behavior change is affected by environmental influences, personal factors, and attributes of the behavior itself" (citation omitted)), and the Theory of Reasoned Action and Planned Behavior ("include[ing] the beliefs of . . . peers and . . . [the] motivation to comply with the opinions of their peers")); see also Tom Peters, *McKinsey 7-S Model*, 28 LEADERSHIP EXCELLENCE 7 (2011) ("[T]he 7-S framework offers a sound approach to combining all of the essential factors that sustain strong organizations: *strategy, systems, structure, skills, style, and staff*—united by *shared values*.").

276. See Bridgman et al., *supra* note 274, at 34.

277. ORGANIZATION DEVELOPMENT: A JOSSEY-BASS READER 25 (Joan V. Gallos ed., 2006).

278. We want to emphasize that we are using the model as a framework only. We do not hold it out as a linear formula that can be followed by a change agent. "Lewin never presented (the model) in a linear diagrammatic form and he did not list it as bullet points. Lewin was adamant that group dynamics must not be seen in simplistic or static terms and believed that groups were never in a steady state, seeing them instead as being in continuous movement, albeit having periods of relative stability . . ." Bridgman et al., *supra*, note 274, at 38.

279. See Lewin, *supra*, note 274.

280. See Lester Coch & John R. P. French, Jr., *Overcoming Resistance to Change*, 1 HUM. REL., 512, 512 (1948) (asking the questions: "Why do people resist change so strongly?" and "What can be done to overcome this resistance?").



theories) are relevant to what is encountered in law firms today, as the long history of change management theories have established principles that act as touchstones for contemporary understanding.<sup>281</sup> Lewin himself addressed the need for a framework for discussing change, saying that “there is nothing as practical as a good theory.”<sup>282</sup> As theories of change go, Lewin’s is simple, stable, and “still relevant to the modern world.”<sup>283</sup> As this article explores how operations teams can help manage change in law firms, it will refer to the unfreeze, change, refreeze theory to orient the reader within the change process.<sup>284</sup> In addition to Lewin’s model, this article will add information from two contemporary scholars: Edgar Schein (an organizational development scholar and MIT professor) and John Kotter (Harvard professor and author).

#### A. *Unfreeze*

The first step of the model is unfreezing, during which the inertia of the status quo is disrupted. Unfreezing “involves questioning the organization’s current state, and if a different state is desired, then equilibrium needs to be destabilized before old behavior is discarded.”<sup>285</sup> The status quo is described as a state of equilibrium held in balance by “driving and restraining forces.”<sup>286</sup> Change is “a profound psychological dynamic process that involve[s] painful unlearning . . . and difficult relearning as one . . . attempt[s] to restructure one’s thoughts, perceptions, feelings, and attitudes.”<sup>287</sup>

281. The earliest research was conducted at the Harwood Manufacturing Corporation, a pajama manufacturer in Marion, Virginia. *Id.* at 512.

282. Katherine W. McCain, “*Nothing as Practical as a Good Theory*” Does Lewin’s Maxim Still Have Salience in the Applied Social Sciences? ASIST 2015, <http://onlinelibrary.wiley.com/doi/10.1002/pr2.2015.145052010077/full>.

283. Bernard Burnes, *Kurt Lewin and the Planned Approach to Change: A Reappraisal*, 41 J. MGMT. STUD. 977, 977 (2004).

284. Another example of a three-step change process is provided by William Bridges: (1) letting go of the old ways and the old identity people had; (2) going through an in-between time when the old is gone but the new isn’t fully operational; and (3) coming out of the transition and making a new beginning. WILLIAM BRIDGES, *MANAGING TRANSITIONS* 4–5 (3d ed. 2009).

285. Matthew W. Ford & Bertie M. Greer, *Profiling Change: An Empirical Study of Change Process Patterns*, 42 J. APPLIED BEHAV. SCI. 420, 424 (2006).

286. Edgar H. Schein, *Kurt Lewin’s Change Theory in the Field and in the Classroom: Notes Toward a Model of Managed Learning*, 1 REFLECTIONS 59, 59 (1999).

287. *Id.*

Edgar Schein breaks the unfreezing step into three phases, which is helpful in understanding how to disrupt inertia. The first phase is disconfirmation, which is marked by “some form of dissatisfaction or frustration generated by data that disconfirm our expectations or hopes.”<sup>288</sup> For lawyers in law firms, this might come in the form of trade articles predicting market changes, dire warnings delivered at CLE courses, dwindling billable hours, or explicit actions by clients which demonstrate that the current business model is not sustainable. Schein stresses that mere information is not always enough because people have a variety of psychological manipulations which subconsciously reinforce the status quo.<sup>289</sup> Confirmation bias, for example, occurs when a person “selectively gathers, or gives undue weight to, evidence that supports one’s position while neglecting to gather, or discounting, evidence that would tell against it.”<sup>290</sup> Another psychological tendency is biased assimilation, which occurs when “individuals . . . dismiss and discount empirical evidence that contradicts their initial views but . . . derive support from evidence, of no greater probativeness [sic], that seems consistent with their views.”<sup>291</sup> These are just two examples of how one interprets the world so that “[i]nformation that is inconsistent with [our] expectations or beliefs is discounted and scrutinized more carefully than is expectation-congruent data.”<sup>292</sup> Consequently, merely telling lawyers that the legal market is changing is insufficient to disconfirm their belief that the status quo is sustainable.

In order to unfreeze and break loose of the status quo, lawyers must “accept the information and connect it to something [they] care about.”<sup>293</sup> You may ask yourself what lawyers care about. Perhaps money comes to mind, or perhaps jobs, careers, or the firm’s legacy.

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288. *Id.* at 60.

289. *Id.* (providing the following examples: “ignor[ing] the information, dismiss[ing] it as irrelevant, blam[ing] the undesired outcome on others or fate, or . . . simply deny[ing] its validity”).

290. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998).

291. Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2099 (1979).

292. Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. DISP. RESOL. 437, 454 (2008).

293. Schein, *supra* note 286, at 60.

Whatever the thing is, Schein writes that in order to unfreeze, the disconfirming information “must arouse what we can call ‘survival anxiety,’ or the feeling that if we do not change, we will fail to meet our needs or fail to achieve some goals or ideals that we have set for ourselves.”<sup>294</sup> So in order to unfreeze and start the change process, lawyers must be convinced that the thing they care about is going to go away unless they change.

Survival anxiety is Schein’s second phase of unfreezing. Survival anxiety is scary. It is scary to be told that your job is going to be taken over by a robot,<sup>295</sup> that your law firm partnership is doomed for failure,<sup>296</sup> or that nonlawyers are going to start taking your work.<sup>297</sup> When lawyers receive this type of information, they react defensively and often become determined to hold fast to their beliefs more than ever. This is natural. Schein calls it “‘learning anxiety,’ or the feeling that if we allow ourselves to enter a learning or change process, if we admit to ourselves and others that something is wrong or imperfect, we will lose our effectiveness, our self-esteem, and maybe even our identity.”<sup>298</sup> Schein writes that “[l]earning anxiety is the fundamental restraining force which can go up in direct proportion to the amount of disconfirmation, leading to the maintenance of the equilibrium by defensive avoidance of the disconfirming information.”<sup>299</sup>

Readers of this article may feel like the authors are getting into some psychological hypotheses which are too touchy-feely for the reality of the legal practice—that law firm leaders might not buy into all of this. This reaction is the reason that law firms need a professional manager leading change initiatives. “[E]motional intelligence is the differentiating factor for successful leadership,” and lawyers do not learn these competencies in law school.<sup>300</sup> One study has found that “self-awareness and self-management are

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294. *Id.*

295. See Steve Lohr, *A.I. Is Doing Legal Work. But It Won't Replace Lawyers, Yet.*, N.Y. TIMES (Mar. 19, 2017), <https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html>.

296. See Jordan Weissmann, *Why Law Firms Are Rigged to Fail*, THE ATLANTIC (May 31, 2012), <https://www.theatlantic.com/business/archive/2012/05/why-law-firms-are-rigged-to-fail/257843/>.

297. See *Legal Technicians*, *supra* note 27.

298. Schein, *supra* note 286, at 60.

299. *Id.*

300. See Smith & Marrow, *supra* note 163, at 36 (listing four competencies: self-awareness, self-management, social awareness, and relationship management).

significant predictors of change management skills.”<sup>301</sup> This is because “businesses, families, and governments do not change; people within these organizations do.”<sup>302</sup> By identifying the presence of learning anxiety and designing tactics to manage it, the COO can help calm it—particularly if the leader understands how to prepare the lawyer personality to adapt to change.<sup>303</sup>

This article primarily explored the use of the operations team in the law firm. Still, note that for true success, law firms should employ additional tactics, including collaboration with the managing partner and, ideally, with the partnership itself. Are lawyers afraid of artificial intelligence? There are IT professionals to help. Afraid of alternative fee arrangements? There are finance and pricing professionals for that. Afraid of Limited License Legal Technicians? There are human resources professionals. The COO leads this team of specialists and provides what Schein calls “psychological safety.”<sup>304</sup> Advanced use of this theory includes the managing partner and other lawyer leaders supporting and learning from these subject matter experts in the firm, rather than trying to learn the area on their own.

The last phase of unfreezing involves creating psychological safety.<sup>305</sup> The key to unfreezing, and ultimately change management, is the ability to balance the threat of disconfirming data with psychological safety in a way that allows survival anxiety to be felt and motivated by change.<sup>306</sup> Schein outlines several tactics that help in creating psychological safety.<sup>307</sup> Law firms will be interested in the

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301. Rekha Dhingra & Bijender K. Punia, *Relational Analysis of Emotional Intelligence and Change Management: A Suggestive Model for Enriching Change Management Skills*, 20 VISION: J. BUS. PERSP. 312, 318 (2016).

302. MARVIN WASHINGTON ET AL., SUCCESSFUL ORGANIZATIONAL TRANSFORMATION: THE FIVE CRITICAL ELEMENTS 15 (Bus. Expert Press, LLC 2011).

303. Larry Richard, *Herding Cats: The Lawyer Personality Revealed*, 29 REP. TO LEGAL MGMT. 1 (Aug. 2002) (finding that lawyers have consistent personality traits). By looking at extensive data of lawyer personality types using the Caliper instrument, Richard finds that lawyers typically have high skepticism, a high sense of urgency, lower sociability than the average person, low resilience, and a high need for autonomy. *Id.* at 4, 9.

304. Schein, *supra* note 286, at 60.

305. *Id.*

306. *Id.* at 61.

307. *See id.* According to Schein, “tactics that change agents [should] employ to create psychological safety” and reduce learning anxiety include: “working in groups, creating parallel systems that allow some relief from day-to-day work pressures, providing practice fields in which errors are embraced rather than

change-management model developed by Ann Rainhart and Melanie Green during the creation of Faegre Baker Daniels—when Faegre & Benson, LLP merged with Baker & Daniels, LLP in 2012. This model provides a twelve-step approach to unfreezing, while creating an evolution of change that minimizes skepticism and maximizes lawyer adoption.<sup>308</sup>

While Schein provides advice on managing the social and psychological dynamics during organizational change, a more contemporary author, John Kotter of Harvard Business School, has an eight-step model that provides specific guidance on certain actions that the change process should include.<sup>309</sup> Kotter's eight-step process indicates that unfreezing may be both the most complicated and most involved of Lewin's three phases. Lewin's unfreezing phase operates in parallel with the first four of Kotter's eight-step approach, specifically: establishing a sense of urgency, forming a powerful guiding coalition, creating a vision, and communicating the vision.<sup>310</sup>

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feared, providing positive visions to encourage the learner, breaking the learning process into manageable steps, and providing on-line coaching and help . . .” *Id.*

308. See Ann Rainhart & Melanie Green, *The Athrú Model for Law Firm Operational Management* (2012) (on file with author). *The Athrú Model for Law Firm Operational Management* by Rainhart-Green details twelve steps to move from conception, to unfreezing, to action, to acceptance. The twelve steps are identifying initiative, assessing impact to others, seeking reaction of others, road testing with operational team, seeking leadership buy-in, refining based on feedback, test marketing with pilot group, assessing reaction again, refining again based on feedback, empowering others, setting the stage for launch, and finally releasing initiative or change. *Id.*

309. Compare JOHN P. KOTTER, *LEADING CHANGE*, 20 (Harv. Bus. Sch. Press 1996), with Mark Hughes, *Leading Changes: Why Transformation Explanations Fail*, *LEADERSHIP* Vol. 12(4), 449–69 (2012) (acknowledging that Kotter's *Leading Change* is one of *Time* magazine's top 25 most influential business books and describing it as a landmark leadership study, but arguing that Kotter's formula “paradoxically discourage[s] change”).

310. Compare KOTTER, *supra* note 309, at 21 (indicating steps 1–4 include “examining the market and competitive realities, identifying and discussing crises, potential crises, or major opportunities, putting together a group with enough power to lead the change, getting the group to work together like a team, creating a vision to help direct the change effort and developing strategies for achieving that vision”), with Schein, *supra* note 286, at 59–60 (“For change to occur, this force field had to be altered under complex psychological conditions because, as was often noted, just adding a driving force toward change often produced an immediate counterforce to maintain the equilibrium.”).

Lewin's Three-Phase Model	Kotter's Eight-Step Model
Phase 1 - Unfreezing	Step 1 - Establishing a sense of urgency Step 2 - Creating a powerful guiding coalition Step 3 - Developing a vision and strategy Step 4 - Communicating the change vision
Phase 2 - Changing	Step 5 - Empowering employees for broad-based action Step 6 - Generating short-term wins
Phase 3 - Refreezing	Step 7 - Consolidating gains and producing more change Step 8 - Anchoring new approaches in the culture

The first step in Kotter's organizational change model, unfreezing, is establishing a sense of urgency.<sup>311</sup> Complacency, Kotter writes, is the opposite of urgency.<sup>312</sup> Change requires work, and "[w]ith complacency high, transformations usually go nowhere because few people are even interested in working on the change problem."<sup>313</sup> Kotter writes that urgency is not synonymous with anxiety, cautioning that driving up anxiety will "create even more resistance to change."<sup>314</sup> Without exploring anxiety and resistance at great length, Kotter's argument echoes Schein's survival anxiety and "defensive avoidance."<sup>315</sup> Kotter offers a stern warning that we cannot stress enough: "Never underestimate the magnitude of the forces that reinforce complacency and that help maintain the status quo."<sup>316</sup> This is Kodak inertia. You are warned. Ask yourself if this stunningly relevant observation by Kotter applies to your firm:

311. *Id.* KOTTER, *supra* note 309, at 35.

312. *Id.* at 36.

313. *Id.* at 36.

314. *Id.* at 5.

315. *Id.* at 60.

316. *Id.* at 42.

Much of the problem here is related to historical victories—for the firm as a whole, for departments, and for individuals. Past success provides too many resources, reduces our sense of urgency, and encourages us to turn inward. For individuals, it creates an ego problem; for firms, a cultural problem. Big egos and arrogant cultures reinforce . . . complacency, which, . . . can keep the urgency rate low even in an organization faced with major challenges and managed by perfectly intelligent and reasonable people.<sup>317</sup>

Creating urgency is a leadership challenge. Since law firms are notoriously slow to change, fostering a sense of urgency is perhaps *the* leadership challenge. As Dr. Larry Richard notes, the lawyer personality includes a high sense of urgency.<sup>318</sup> However, that sense of urgency is often tied to completing one's work for a client or for someone else to attend to the lawyer's needs versus a sense of urgency to adapt to change.<sup>319</sup> Likely, the key to creating a sense of urgency in a law firm is to garner the attention of lawyers by using clearly articulated facts which provide the detail needed to create anxiety.<sup>320</sup> After all, lawyers want evidence. It is not difficult to imagine what evidence may cause enough anxiety inflection to gain the attention of lawyers—data around large-scale litigation slowing within a firm, market information about changes in litigation, or a valued client discussing possible litigation changes. Dr. Richard further notes that a key component to creating urgency is having social proof from respected partners or experts that the anxiety is warranted.<sup>321</sup>

Kotter warns that creating urgency and reducing complacency are absolutely necessary. The next three steps, which make up the rest of Lewin's unfreezing phase, is extremely difficult without urgency.<sup>322</sup> Urgency is particularly important in a law firm where consensus among partners is expected, assumed, or maybe forced. It is important to listen to dissenting voices, solicit outside opinions, and have many conversations in order to avoid a false consensus. Failure to identify insincere unanimity may be realized a few years

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317. *Id.* at 41–42.

318. Larry Richard, *Herding Cats*, *supra* note 303, at 4.

319. *Id.*

320. *See id.*

321. *Id.*

322. *See generally* KOTTER, *supra* note 309, at 37–38.

later when the support for, and success of, change-efforts diminishes. Rainhart and Green's Athrú model focuses on this dynamic in multiple steps,<sup>323</sup> reinforcing that the need to hear various opinions and incorporate them into the change cannot be underestimated. Ignoring dissenting voices can endanger the entire unfreezing process.

Kotter's second step requires creating a powerful guiding coalition.<sup>324</sup> He acknowledges that "major change is so difficult to accomplish, [that] a powerful force is required to sustain the process."<sup>325</sup> Specifically, Kotter calls out lone leaders as lacking information necessary "to make good nonroutine decisions," and refers to weak committees as one of least effective means of "anchor[ing] new approaches deep [within] the organization's culture."<sup>326</sup> In a slow-moving world, like the pre-2008 legal market, unplanned and unhurried change was both an acceptable and feasible strategy.<sup>327</sup> But the current legal market is changing too fast for such delay. Kotter's suggestion for a powerful coalition is a team of influential people who are "truly informed and committed to key decisions," capable of maintaining urgency and moving the change process forward.<sup>328</sup> As noted earlier, the collaborative power of a team is required to execute change properly. Just as the law firm itself requires both leadership and management, the guiding change coalition needs to balance leadership and management.

Ann Rainhart writes that creating a powerful guiding coalition within a law firm requires critical nuance "due to the partnership structure and the stratified leadership model within law firms."<sup>329</sup> The law firm partnership structure historically means that each partner views him or herself as the CEO of their own business unit.<sup>330</sup>

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323. Step 3, step 5, step 8 and step 10.

324. KOTTER *supra* note 309, at 51.

325. *Id.* at 55.

326. *Id.* at 52.

327. While it is impossible to point to a specific timeframe when the legal market changed, the 2008–2009 economic recession is a safe bet. See Eli Wald, *The Economic Downturn and the Legal Profession, Foreword: The Great Recession and the Legal Profession*, 78 *FORDHAM L. REV.* 2051, 2051 (2010) ("2008-2009 will be remembered . . . as an inflection point for . . . the legal profession."); *id.* at 2052, n.7–8 (supporting the argument that the recession will have lasting impact on the legal market).

328. KOTTER, *supra* note 309, at 55–56.

329. Ann Rainhart, *The Evolving Practice of Law: Competency Development in Law Firm Combinations*, 11 *U. ST. THOMAS L.J.* 87, 91 (2013).

330. See *id.*



“No one can tell me what to do. I know what is best for my client and my practice” is often the historically rallying cry from a successful lawyer. And historically, this has worked quite well. However, it is not feasible to have one hundred or more self-proclaimed “CEOs” making individual business decisions for the entire enterprise, nor is it possible to run a business without someone making key decisions during a time of significant market change. The complexity of a partnership model suggests that the answer is not at the end of these choices, but rather in the middle. Patrick J. McKenna states that “many law firms are populated with professionals that are so preoccupied with their particular area of specialty that they are remarkably out of touch with the wider world.”<sup>331</sup> McKenna concludes that it becomes increasingly important that “every member of firm management maintain[] a running dialogue on the meaning of significant events and trends, and that they use their understanding of those trends to develop consensus on refining the direction and strategy of the firm.”<sup>332</sup> The key here is for the group of lawyers and professionals in leadership positions within a firm to have a consistent and regular drumbeat around firm direction and strategy, and to speak from the same script.<sup>333</sup> Chaos ensues if the leadership team is not on the same page, or worse, if there is no script at all.

Kotter’s third step is developing a vision and strategy.<sup>334</sup> A good vision serves three purposes. First, the vision identifies the destination and provides general directions for getting to the destination. The law firm is still in the unfreezing phase, so they are getting a glimpse of what is next and seeing the step towards which they need to move.<sup>335</sup> Second, the vision motivates people to move.<sup>336</sup> Third, the vision “coordinates the actions of different people” by providing individuals with general directions so they can make

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331. Patrick J. McKenna, *Seeing the Future First—Analyzing Strategic Trends*, in 2020 VISION: THE FUTURE OF LEGAL SERVICES 2 (Laura Slater ed., 2d ed. 2016).

332. *Id.* at 3.

333. *Id.*

334. See KOTTER, *supra* note 309, at 68. Even though Kotter does not consistently use the phrase “vision statement” and he writes about vision as a thing that exists independent of a vision statement, this step is about developing a vision statement. *Id.* A vision statement should provide clear focus and direction for the business. A mission statement usually describes *how* the vision will be achieved. *Id.*

335. *Id.* at 68.

336. *Id.* at 68–69.

decisions without constantly consulting superiors.<sup>337</sup> Some writers describe vision as a picture of success,<sup>338</sup> while others have said it is the organization's "ultimate purpose—the reason for its existence."<sup>339</sup>

A hasty or hyperbolic vision statement can misguide or derail an organization, so this assignment should not be taken lightly.<sup>340</sup> Kotter calls the process of creating a vision a "messy, difficult, and sometimes emotionally charged exercise."<sup>341</sup> It is a time-consuming process. Kotter indicates that a vision could take six months to develop and require a few hundred hours of work.<sup>342</sup> Others have written that it could take years.<sup>343</sup> Because the vision must be completely developed, this step cannot be rushed or skipped, lest the organization find itself starting over and losing time and progress. An accurate vision, as a future goal, allows everyone to see the gap between the present and the future.<sup>344</sup> Analysis of the gap enables an organization to identify key results areas (KRA) that can be measured by key performance indicators (KPI).<sup>345</sup> From there, things can start to fall into place in terms of strategy to obtain the vision. The KRAs can be analyzed to establish the actual change effort based on three characteristics: "the magnitude of change, the urgency for change, and the stakeholder impact on change."<sup>346</sup> Additionally, the KPIs can be analyzed to measure progress.<sup>347</sup> In sum, vision matters—so do it right.

Developing a vision within a law firm is complex because law firms historically have distributed leadership as a collective of practices versus coordinated client services.<sup>348</sup> This style results in the

337. *Id.* at 69.

338. John P. Kotter, *Accelerate!*, 90 HARV. BUS. REV. 44, 52 (2012).

339. David Collis, *Lean Strategy*, 94 HARV. BUS. REV. 62, 66 (2016).

340. KOTTER, *supra* note 309, at 72 (writing that an effective vision must be: imaginable, desirable, feasible, focused, flexible, and communicable).

341. *Id.* at 79.

342. *Id.* at 83, 89 ("[T]he boss then drafted a second statement, which was discussed with his guiding coalition over a six-month period . . . [A] few hundred hours collecting information, digesting it, considering alternatives, and eventually making choices.").

343. *See* Bertolini, *supra* note 14, at 101 (giving the examples of Netflix, Nestle, Adobe, and Xerox).

344. *See* WASHINGTON, *supra* note 207, at 46.

345. *See id.*

346. *Id.* at 46–47.

347. *Id.*

348. *See, e.g., Dorsey & Whitney Industries and Practices*, DORSEY AND WHITNEY,

inability to see the reason for a vision at all, and leaves lawyer leaders without the necessary skills to develop a clearly articulated vision. An organization with these characteristics will struggle to satisfy a group of partners demanding consensus. But you cannot give up on vision just because it is difficult.

Kotter's fourth step, the last in unfreezing an organization, is communicating the change vision.<sup>349</sup> The goal is for people in the organization to accept the vision.<sup>350</sup> Without success at this fourth step, lawyers and operations may quietly rebel or explicitly mutiny, and the organization is going to stay frozen. As Patrick Stroh warns, "[i]f vision is unclear, execution will be unclear and goals will not be attained."<sup>351</sup> This is going to lead to wasted time and having to rework projects.

An effectively communicated vision motivates people to work and focuses their efforts toward the vision's goals. This communication is not accomplished by sending an email, or posting a vision statement on the firm's intranet. William Bridges, in his book *Managing Transitions*, warns that vision is:

[U]sed in an almost mystical way to refer to something that has the power—almost by itself—to revitalize an organization and to realign its people . . . Too many visions are pure fantasy that simply alienate leaders from their more down-to-earth followers. Just as relatively few people can be swept up and moved to action by an idea alone, so it is with only a vision to go on.<sup>352</sup>

Communicating vision requires a planned multi-faceted approach. Kotter identifies the following elements for effective communication of vision:

- Simplicity: All jargon and technobabble must be eliminated;
- Metaphor, analogy, and example: A verbal picture is worth a thousand words;
- Multiple forums: Big meetings and small, memos and newspapers, formal and informal interaction—all are effective for spreading the word;

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<https://www.dorsey.com/services> (last visited Nov. 7, 2017).

349. KOTTER, *supra* note 309, at 85.

350. *Id.*

351. PATRICK STROH, BUSINESS STRATEGY 110 (John Wiley & Sons, Inc. 2014).

352. WILLIAM BRIDGES, MANAGING TRANSITIONS 75 (Da Capo Press 2009).

- Repetition: Ideas sink in deeply only after they have been heard many times;
- Leadership by example: Behavior from important people that is inconsistent with the vision overwhelms other forms of communication;
- Explanation of seeming inconsistencies: Unaddressed inconsistencies undermine the credibility of all communication; and
- Give-and-take: Two-way communication is always more powerful than one-way communication.<sup>353</sup>

As with his initial three steps, Kotter warns that “[i]f people don’t accept a vision, the next two steps in the transformation process—empowering individuals for broad-based action and creating short-term wins—will fail.”<sup>354</sup>

#### B. *Move*

After completing the first four steps of Kotter’s eight-step model, an organization also has effectively accomplished the first phase of Lewin’s three-phase model; namely, the firm is technically unfrozen. Lawyers are then instilled with confidence and have the psychological safety required to start the move step. It is important to understand that the “move” phase is not where the heavy lifting actually takes place, nor where the “real change” happens.<sup>355</sup> The unfreezing process makes up half of Kotter’s eight steps and Rainhart and Green’s nine steps. Lewin’s moving phase coincides with the next two of Kotter’s steps: empowering others to act on the vision, and generating short term wins.<sup>356</sup> The Rainhart-Green Athrú model also details a final step toward movement as empowering voices. Lewin refers to this phase as “movement” because the forces of change “move the organization toward a new and improved state.”<sup>357</sup> In this phase “new values, behaviours and structures replace the old . . . and it is [an] action-oriented stage based upon the efficacy of the first phase.”<sup>358</sup>

353. See KOTTER, *supra* note 309, at 90.

354. *Id.* at 100.

355. See Hughes, *supra* note 214, at 455.

356. *Id.* at 453, 455.

357. Ford & Greer, *supra* note 190, at 428.

358. Dhingra & Punia, *supra* note 206, at 313–14.

During the unfreezing phase, the guiding coalition delivered the vision to everyone in the firm, and all of those people are now unfrozen and ready to move. A strong vision even has them ready to move in the right direction. Now, leadership will empower everyone to act on their own, and to move in the direction towards which leadership has previously guided them. Kotter's fifth step is empowering employees for broad based action. Kotter writes that most of empowerment is about removing "barriers to the implementation of the change vision."<sup>359</sup> He recommends four areas of concentration: removing structural barriers, providing training, applying systems to the vision, and dealing with troublesome supervisors.<sup>360</sup>

Leaders should include everyone in the firm in the empowerment step. All lawyers and all operations staff should participate in creating success. Front-line staff members may see things that lawyers and operation leaders never see. Ensure success by creating a structure for celebrating innovative ideas, particularly when a team is involved in driving new change forward. Law firms often have minimal bureaucracy, but there are often traditional processes that have developed over many years. Allow people to question why things are done the way they are. Reinforce an environment in which the "way it has always been done" is not the way it needs to be done anymore.

Kotter's sixth step, the one that ushers the organization out of Lewin's move phase and into the refreezing phase, is generating short-term wins.<sup>361</sup> Richard Susskind writes that "most lawyers are convinced by evidence and not argument."<sup>362</sup> Susskind recommends that leaders "need to generate evidence from within—from pilots, experiments, and testing ideas out on sympathetic clients."<sup>363</sup> When Kotter writes that wins need to be "generated" he does not mean that evidence needs to be planted; rather that it should be planned. Short-term wins are the evidence needed to provide the credibility that sustains change efforts in the long-term.<sup>364</sup> These wins should not be latent or ambiguous. They need to be visible so that many people can observe and believe in the success, and unambiguous so

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359. KOTTER, *supra* note 309, at 103.

360. *Id.* at 106–14.

361. *Id.* at 122–24 (describing the role of short-term wins).

362. SUSSKIND, *supra* note 12, at 70.

363. *Id.* at 70.

364. *Cf. id.* at 69.

that no one can argue that the win is something other than evidence of success. The wins also need to be “clearly related to the change effort” so they do not appear to be random or coincidental.<sup>365</sup> In other words, these wins are planned milestones that reinforce the vision is sound and that the short-term sacrifices are paying off. These wins not only provide leadership with encouragement, but they can also stand in opposition to naysayers and cynics. Additionally, the wins build momentum to carry the firm into the refreezing phase.<sup>366</sup>

### C. Refreeze

Change agents<sup>367</sup> must be careful to not stop too long while celebrating short-term wins. In order to press forward, leadership needs to maintain urgency. The refreezing phase, the third and final phase in the change process, “requires activities to institutionalize the new behaviors and attitudes and to stabilize the organization at a new equilibrium.”<sup>368</sup> These activities take place in Kotter’s seventh step: consolidating gains and producing more change. “Until change practices attain a new equilibrium and have been driven into the culture, they can be very fragile.”<sup>369</sup> It is important to understand the timeline here—“transformation can become a huge exercise that plays itself out over years, not months.”<sup>370</sup> William McComb, former CEO of Liz Claiborne, wrote that “transformation is an era, not an event.” He urges leaders to take the long-view, and that when we “expect transformation to define an era,” we “figure out how to sustain a vision.”<sup>371</sup>

Law firms do not have a reputation for creating sustainable change. As we have described, change requires planning, and

365. See KOTTER, *supra* note 309, at 122.

366. See *id.* at 129–30. Kotter makes three observations about why people do not plan and deliver short term wins: (1) people are too overwhelmed to find the time and attention to plan short terms wins, (2) people are accustomed to the binary decision of short-term vs. long-term goals and do not believe that they can deliver both, and (3) lack of skill or buy-in on the part of management. *Id.*

367. Change agents are guiding coalition members (lawyer leaders and operations professionals).

368. Ford & Greer, *supra* note 190, at 424.

369. KOTTER, *supra* note 309, at 139.

370. *Id.* at 150.

371. William L. McComb, *Transformation Is an Era, Not an Event*, 92 HARV. BUS. REV. 34, (2014).

lawyers are not typically experienced planners. A 2011 Altman Weil survey found that “on a scale of 0 to 10, firms rate the effectiveness of Practice Group planning at 6.0 and the effectiveness of plan implementation at a meager 5.6.”<sup>372</sup> Unfortunately, there is no magic formula that can be applied to ensure sustainable change. To some extent, change agents will rely on momentum built up from the previous six steps in order to carry through the times when change comes slower. Consider the following practical actions:

- Continue to communicate the vision and find new areas to apply it. Every meeting, announcement, portal page, award, etc., should be evaluated for how the vision can be incorporated.
- Plan for continued wins and celebrate success.
- Develop structure (software, workflow, training) to support new initiatives.
- Leaders need to be role models, confirming their dedication to change through their actions.
- Encourage and solicit feedback. Conduct 360 degree evaluations.<sup>373</sup>

Firm leadership and management should be ever mindful that they are leading a firm in transition. Their priority as the guiding coalition and change agents should be to look for every opportunity to influence the firm’s culture and spread the belief that successful change is happening. Leadership should pay heed to the management adage that culture eats strategy, because when the strategic leaders get sloppy or weary, that old culture will rapidly pull the firm back to the old status quo.<sup>374</sup>

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372. Thomas S. Clay & Eric A. Seeger, *2011 Practice Group Performance*, ALTMAN WEIL FLASH SURV. ii (2011).

373. A 360 degree evaluation provides feedback from the people who work around an individual (peer, manager, direct-reports). In many situations these evaluations are confidential, although in law firms confidentiality is often provided through direct-reports, versus the feedback from other lawyers. These evaluations are increasingly used in law firm management and leadership positions.

374. The quote, “culture eats strategy for breakfast,” is usually (though dubiously) attributed to Peter Drucker. Edgar Schein has been writing that “culture determines and limits strategy” since at least 1985, in the first edition of his book, *Organizational Culture and Leadership*. See EDGAR SCHEIN, ORGANIZATIONAL CULTURE AND LEADERSHIP 34 (Jossey-Bass ed., 1st ed. 1985).

The last step in Kotter's model is anchoring new approaches in the culture.<sup>375</sup> This step requires the firm's culture to change. This is a daunting prospect, as the persistent and enduring nature of law firm culture was the initial cause of stasis. Frankly, this stasis was successful for quite some time; over a hundred years for many American law firms.<sup>376</sup> But leadership has trod this road already. The guiding coalition has already unfrozen the firm and that key work can be recycled here. Recall and retell the stories which provided evidence about the threats to safety, and remind people of the tactics that will ensure survival—by adding new and improved facts.

As the market changes, the stakeholders in the firm may see the threats, but wins within the firm can shore up psychological safety. The result is a supported and evolving sustainability maintained by a careful balancing of threats and solutions, which the coalition can achieve by recasting the new or realized threats as opportunities. Leadership and management should support the sustainability by monitoring, intervening, and reminding the stakeholders of the vision.

## VI. CONCLUSION

The opportunity to embrace change and look for new ways to deliver exceptional legal services is at our collective doorsteps. Clients are expecting faster, cheaper, and better legal advice and business outcomes. Generations are expecting new things from their workplaces. Technology is changing the way we work and deliver results daily. New business entities are entering the marketplace looking to capture market-share from law firms. Professionals are emerging within law firms who are poised to help firms address the increasing complexity of the world in which we practice and operate our businesses. Law firms that strategically determine their leadership structures and partner collaboratively with subject matter operational professionals will lead in the changing market. Successful collaboration requires highly functioning teams aligned with a business strategy. However, collaboration is not enough. Additionally, teams must proactively lead their firms through change initiatives in ways that build, not destroy, culture.

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375. KOTTER, *supra* note 309, at 53.

376. See, e.g., William D. Henderson, *Rise and Fall*, THE AM. LAW. (May 31, 2012), <https://www.law.com/americanlawyer/almID/1202555054300/>.



Organizational change is difficult, and the characteristics of the lawyer personality make change in law firms uniquely challenging. The path of least resistance is to stay frozen and double down on the successes that got us this far. But the changes that are coming are not going to slow down. If anything, the changes are going to speed up, and we will encounter innovations that no one saw coming.<sup>377</sup> Law firm leadership needs to react with agility, by rapidly making decisions, and moving when inevitable opportunities arise. Lone leaders are incapable of absorbing, interpreting, and acting on the barrage of information in today's market. Teams of capable operations leaders are the agents for change. They are the people who have the depth of knowledge required to partner with law firm leadership to move their firms forward.

Perhaps a law firm will not be the next Apple or Amazon. But the legal market is going to change so drastically that soon, a firm will be “the Amazon or the Apple of legal services.” That sounds much better than “the Kodak of law firms.”

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377. See SUSSKIND, *supra* note 12, at 11 (explaining that AI has the potential to manifest phenomena that no one predicted—these are things that we do not even have a paradigm for developing based on our human understanding of the world).

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