

# **“WE’RE ALL CONSULTANTS NOW”: HOW CHANGE IN CLIENT ORGANIZATIONAL STRATEGIES INFLUENCES CHANGE IN THE ORGANIZATION OF CORPORATE LEGAL SERVICES**

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## *Table of Contents*

I. INTRODUCTION: ADOPTING A DEMAND-SIDE PERSPECTIVE .....	638
II. ORGANIZATIONAL STRATEGIES.....	641
A. Downsizing and Self-Managing Teams .....	641
1. Teams Should Be “Project Teams” .....	643
2. Some Teams Should Be Multidisciplinary Teams .....	644
3. Teams Should Be Self-Managing.....	644
4. Team Members Should Be Ensnared in Ian MacNeil’s “Entangling Strings” of Interdependence, Friendship, and Reputation .....	646
5. Teams Should Have the Choice To Use Either Internal or External Experts.....	646
B. Outsourcing and Companies’ Porous Borders.....	647
III. DEMAND FOR LEGAL SERVICES IN THE REDESIGNED COMPANY.....	650
A. An Example: M&A Practice .....	651
B. Using Lawyers as Consultants.....	656
IV. EFFECTS OF CHANGES IN CLIENT ORGANIZATIONS ON THE CORPORATE BAR .....	660
A. Corporate Legal Department Effects.....	660
1. Re-Engineering Legal Departments .....	660
2. Purchasing Agents but not Gatekeepers .....	668
B. Relations Between Inside and Outside Counsel: Partnering.....	670
C. Outside Law Firm Effects.....	671
1. The Age of the Minders.....	672
2. Selling Added Value: Services and Products .....	675
V. CONCLUSION.....	679

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## I. INTRODUCTION: ADOPTING A DEMAND-SIDE PERSPECTIVE

Articles describing change in the legal profession normally use lawyer self-reports as evidence. In fact, when voices outside the profession are heard, descriptions of the profession are transformed.<sup>1</sup> Self-reports, of course, are suspect evidence.<sup>2</sup> The self-reports of elite actors, like lawyers, are especially suspect, for often they are speeches to an audience (other than the interviewer).<sup>3</sup> If lawyers are not always selling themselves, at least some always speak for the record to promote their interests.

Another method for evidencing change in the legal profession tests lawyer self-reports by other evidence.<sup>4</sup> This Article interprets lawyer self-reports and summaries of lawyer self-reports by utilizing information about how companies organize themselves to use legal services. Not the incidence of, but the structure of, client demand is used to analyze reports of changes in the organization of corporate legal services.<sup>5</sup>

In approximately the last twenty-five years, the corporate bar has changed dramatically in response to changes in how companies use lawyers. For example, changes in corporate organization of legal departments transformed both what work outside counsel performed and the organization of outside law firms.<sup>6</sup> The

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1. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988) (listening to third parties); Lucie E. White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (listening to clients). See generally Anthony V. Alfieri, *Impoverished Practices*, 81 GEO. L.J. 2567 (1993) (describing the transformative practice of hearing silenced and marginalized voices).

2. Cf. FED. R. EVID. 803(6) (self-serving statements).

3. See CHRIS ARGYRIS, *UNDERSTANDING ORGANIZATIONAL BEHAVIOR* 40 (1960); Daniel Lerner, *Interviewing Frenchman*, 62 AM. J. SOC. 187 (1956).

4. For example, to understand the changing roles of inside counsel, in addition to interviewing inside counsel, one also may speak to managers and outside counsel who have had a course of dealing with the interviewed inside counsel. Such interviews, placing the inside counsel within a causal chain, permit examination (and sometimes corroboration) of inside counsel's self-reports, for example, about how they served the corporate client's interests and exercised increased responsibilities. I followed this approach in previous works. See Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L. J. 479 (1989) [hereinafter Rosen, *Inside Counsel Movement*]; Robert Eli Rosen, *Problem-Setting and Serving the Organizational Client: Legal Diagnosis and Professional Independence*, 56 U. MIAMI L. REV. 179 (2001) [hereinafter Rosen, *Legal Diagnosis*]; Robert Eli Rosen, *The Responsible Organization of Corporate Legal Services* (1984) (unpublished Ph. D. dissertation, University of California, Berkeley, on file with author and also available from University of Michigan Dissertation Services, 300 North Zeeb Road, Ann Arbor, Michigan 48106) [hereinafter Rosen, *Responsible Organization*].

5. Cf. Carl Landauer, *Beyond the Law and Economics Style: Advancing Corporate Law in an Era of Downsizing and Corporate Reengineering*, 84 CAL. L. REV. 1693 (1996) (book review) (criticizing corporate law academics for ignoring consequences of corporate redesign).

6. ROBERT L. NELSON, *PARTNERS WITH POWER: SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* (1988); Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Law Firm Practice*, 37 STAN. L. REV. 399 (1985); Jeffrey S. Slovak,

recent past suggests that a demand-side perspective best explains the market for corporate legal services.<sup>7</sup> Hence, to predict the future of corporate legal practice, a good place to begin is to examine the direction of change in how company clients use lawyers.<sup>8</sup>

The changing use of lawyers by clients is understudied.<sup>9</sup> To advance such studies, in addition to anecdotal evidence,<sup>10</sup> this Article presents an interpretive reconstruction of management rhetoric. This Article analyzes some recent organizational development literature authored by both consultants (who are carriers of change) and academics (who are sometimes just observers of change).<sup>11</sup>

Admittedly, this literature, even when it claims to describe instances of actual change, is not the best evidence of how companies are changing.<sup>12</sup> In

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*Working for Corporate Actors: Social Change and Elite Attorneys in Chicago*, 1979 AM. B. FOUND. RES. J. 465.

7. Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869 (1990).

8. This Article is largely restricted to considering client demand for transactional work. I follow the old law firm divide between corporate and litigation work. Litigation work for companies is only incidentally described in this Article. *But see infra* text accompanying notes 153, 262–63. By adopting a demand-side approach, I deny neither the explanatory importance of other bases for legal professionalism, see, for example, W. Wesley Pue, “*Trajectories of Professionalism?*”: *Legal Professionalism after Abel*, 19 NO. 3 MAN. L.J. 384 (1990), nor the ability of agency (self-determination) to respond to context, rather than be determined by it.

9. There are important exceptions, however. *See generally* YVES DEZALAY ET AL., *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996); *LAW AND TECHNOLOGY IN THE PACIFIC COMMUNITY* (Philip S.C. Lewis ed., 1994); AUSTIN SARAT & WILLIAM FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* (1995); John Flood, *Doing Business: The Management of Uncertainty in Lawyers’ Work*, 25 LAW & SOC’Y REV. 41 (1991); Robert L. Nelson & Laura Beth Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 LAW & SOC’Y REV. 457 (2000); and economic explorations that use client demand as an independent variable.

10. In 1994, while a visitor at Stanford Law School, I revisited five of the six corporations studied in Rosen, *Responsible Organization*, *supra* note 4. (One had relocated from the Bay area). I’d like to thank the Stanford Law School, and, among others, Dean Brest, Deborah Rhode, William Simon and particularly Robert Gordon. In 1994, I did not receive the cooperation from the legal departments that I had received in the early 1980s. Due to this lack of cooperation, I did not speak with enough individuals to find anything but anecdotes. Like the cited articles from legal newspapers, the interviews conducted in 1994 present instances from which trends are inferred [hereinafter 1994 Interview].

11. This Article seeks to correct for my not having spoken to the managers with whom the lawyers worked in 1994. Inside counsel were much more protective of their relationships with managers than they had been in the early 1980s. In 1994, I knew that inside counsel was talking a different game, in which corporate social responsibility was not a move. Like Nelson & Nielsen, I concluded that “there has been a historical shift in the ideology and practices of inside counsel that maps onto historical changes in the ideology and practices of corporate management.” Nelson & Nielsen, *supra* note 9, at 490.

12. The relationships between rhetoric and reality are complex. The decentralizing management rhetoric reviewed in this Article can be used to increase

particular, this literature over-samples large and “hot” companies, especially ones from the “information industry.” Assuredly, some companies have and are changing in ways this literature seeks to describe and advance. The extent of these changes, however, is not documented here. This Article assumes that companies re-organize to conform to what are conceived to be the best managerial practices. Rhetoric has power!<sup>13</sup>

The aim of this Article is to map out a possible future for corporate legal services. This future appears to be emerging, but is still nascent. The future described in this Article need not be our future. Social change is not deterministic. This Article is not an argument for this future; indeed, it is an argument against it. I do not explore the positive gains, especially economic ones, made possible by this imagined future. My concerns are the impediments this future presents to legal professionalism and its regulation. This Article aims to be hypothesis generating, not hypothesis validating. If it succeeds, it will stimulate further work to explore the issues that this possible future raises.<sup>14</sup>

“We’re All Consultants Now” means that corporate legal services are changing because corporate clients are organized to use lawyers as they use any consultant. Lawyers may continue to supply specialized technical services, but that work will be integrated into the company’s decision-making as a consulting service. To the company, the legal department becomes just one internal consulting group among others and outside law firms become just one type of professional service firm. “We’re All Consultants Now” also means that legal departments and law firms are re-organizing themselves to supply what corporations seek from consultants. For the largest law departments and firms, this means imitating the consulting divisions that have been attached to the large accounting firms. Smaller law departments and firms will organize themselves on the model of other consulting firms.

To explain why “We’re All Consultants Now,” Part II analyzes four current organizational strategies: downsizing, outsourcing, self-managing teams, and porous borders. Part III, using M&A practice as an example, describes how companies redesigned by these organizational strategies use lawyers as consultants. Part IV(A) discusses how legal departments are re-organizing to serve company teams and how outsourcing leads to legal departments losing their role as gatekeepers of outside legal services. Part IV(B) examines how inside and outside counsel relations are developing by a “partnering” model as companies re-organize to have porous borders and utilize outsourcing strategies. Part IV(C) discusses how corporate law firms are re-organizing themselves to serve company teams, creating

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bureaucratic controls. See Joan E. Manley, *Negotiating Quality: Total Quality Management and the Complexities of Transforming Professional Organizations*, 15 Soc. F. 457 (2000).

13. JEFFREY PFEFFER, NEW DIRECTIONS FOR ORGANIZATION THEORY 64–79 (1997). See generally CRITICAL CONSULTING: NEW PERSPECTIVES ON THE MANAGEMENT ADVICE INDUSTRY (Timothy Clark & Robin Fincham eds., 2002) [hereinafter CRITICAL CONSULTING]. As lawyers and those who are denied privileges know, language matters.

14. Cf. Walter W. Powell, *The Capitalist Firm in the Twenty-First Century: Emerging Patterns in Western Enterprise*, in THE TWENTY-FIRST-CENTURY FIRM: CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPECTIVE 33, 36 (Paul DiMaggio ed., 2001).

"The Age of the Minders," and responding to outsourcing by selling both services and products. This Article concludes with questions for future research.

## II. ORGANIZATIONAL STRATEGIES

"Throughout much of the economy, and especially among new firms, hierarchies are flatter, headquarters staff smaller . . . and people's careers increasingly span business units and firms."<sup>15</sup> Employees experience "less secure internal labor markets, more fluid job definitions, and more ambiguous reporting relationships" instead of "the rules of clarity and commitment" of bureaucratic organizations.<sup>16</sup> These changes result from companies implementing four strategies of organizational development. In organization literature, these strategies are differently named and differ in their details, as each consulting guru seeks to corner a market. In this Article, the strategies are named "downsizing," "outsourcing," "self-managing teams," and "porous borders."

### A. Downsizing and Self-Managing Teams

The term "downsizing" refers to organization-wide firings, otherwise known as reductions in force. Corporate downsizing supposedly reduces bloated bureaucracies and eliminates deadwood bureaucrats, that is, middle managers and headquarters' staff.<sup>17</sup> As one lawyer in 1994 told me, the goal of downsizing was to "get rid of the military chain of command thing, the vertical silos" of different departments.<sup>18</sup> Downsizing supporters disparage specialization, the self-sufficiency of technical competence, uniform policies, and standardized procedures. They also target a hierarchical accountability structure, where "coordination" is "done from a level or more above the work being coordinated."<sup>19</sup> Employees have to be downsized (i.e., fired), we are told, so that the remaining employees can become "empowered" by dismantling the organization's bureaucracy.<sup>20</sup>

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15. Paul DiMaggio, *Introduction: Making Sense of the Contemporary Firm and Prefiguring Its Future*, in *THE TWENTY-FIRST-CENTURY FIRM: CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPECTIVE* 3, 26 (Paul DiMaggio ed., 2001).

16. *Id.* at 5.

17. Downsizing can be understood as part of a larger movement, which includes privatizing government, that might be named the "Critique of Bureaucracy Movement." Robert Eli Rosen, *Breaking Through Bureaucracy and Democratic Participation* (April 1993) (presented at University of Illinois Conference on "Community Empowerment and Economic Development," April 1993) (unpublished paper, on file with author).

18. Cf. PETER F. DRUCKER, *MANAGEMENT CHALLENGES FOR THE 21ST CENTURY* 30-34 (1999); R. Whitley, *Firms, Institutions and Management Control: The Comparative Analysis of Coordination and Control Systems*, *ACCT. ORG. & SOC'Y*, July 1, 1999, at 507.

19. GIFFORD PINCHOT & ELIZABETH PINCHOT, *THE END OF BUREAUCRACY AND THE RISE OF THE INTELLIGENT ORGANIZATION* 23 (1994).

20. "[T]he iron fist of intensification and job insecurity is softened as well as strengthened by the velvet rhetoric of 'self-actualization' and the opportunity to work for 'meaning as well as money' . . . cement[ed] together . . . [by] the ideology of entrepreneurialism." David Knights & Hugh Willmott, *The Reengineering Revolution? An*

There are pathologies of bureaucracy, such as when bureaucracy's formal structure is used to evade responsibility or employees work according to the bureaucracy's rules rather than the task to be accomplished.<sup>21</sup> In fact, the changing role of corporate legal departments in the 1980s was accompanied by arguments that powerful inside lawyers were needed to respond to bureaucratic pathologies.<sup>22</sup> Consequently, corporate legal departments that had been re-organized in the 1980s, I hypothesized, would be less affected than untransformed departments by downsizing's attack on bureaucracy.<sup>23</sup>

Nonetheless, the legal departments I re-examined in the mid-1990s all had experienced at least one wave of downsizing. Legal department downsizings appeared to have no relation to whether they had been redesigned in the 1980s. Many downsizing cuts were corporate "across the board" ones. For example, at one company, all departments (including legal) were first cut ten percent, then another five percent. As this company's legal department had been re-organized in the 1980s, I asked why the General Counsel did not argue that the legal department had already attacked bureaucracy. The answer I received was that internal politics made it necessary for all departments to "share the pain equally."<sup>24</sup> Inside counsel expressed the hope that re-hiring would not be across-the-board, because their department had already been re-organized. In the redesigned company, however, re-staffing after downsizing depends on responding not to the defects of bureaucracy, but to the needs of self-managing teams.

Organization downsizing was accompanied by implementation of the organizational strategy of managing transactions by self-managing project teams.<sup>25</sup> Bureaucratic pathologies were understood to require organizing project teams, in

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*Introduction, in THE REENGINEERING REVOLUTION? CRITICAL STUDIES OF CORPORATE CHANGE 1, 7* (David Knights & Hugh Willmott eds., 2000) (internal citation omitted).

21. See GUY BENVENISTE, *PROFESSIONALIZING THE ORGANIZATION: REDUCING BUREAUCRACY TO ENHANCE EFFECTIVENESS* (1987); Rosen, *Legal Diagnosis*, *supra* note 4, at 186–91.

22. Rosen, *Inside Counsel Movement*, *supra* note 4, at 510–25.

23. Judging by the corporate legal departments I studied in the early 1980s, downsizing attacks straw-bureaucracies. *Contra* PINCHOT & PINCHOT, *supra* note 19, at 184 ("[t]he law department had come to represent some of the worst traits of bureaucracy"). Pinchot & Pinchot describe the re-organization of a law department unaffected by the Inside Counsel Movement. Their law department is re-organized by the four strategies described in this Article. The improvements of the re-organization they describe, however are ones that were also claimed in the 1980s. *Compare id.* at 186 ("Trivial repetitive tasks were turned over to clerks with boilerplate contacts. 'Cover your ass' requests for opinions declined 70 percent . . . Lawyers began appreciating delivering value.") with Rosen, *Inside Counsel Movement*, *supra* note 4, at 508–09, 522 n.168, 516.

24. Inside counsel's acceptance of across-the-board cuts also reflected and advanced the view that law is just one information technology among others and legal risks are just one set of risks among others. See *infra* Part III(B).

25. The combination of downsizing and team strategies produced resistance by workers to self-managing teams, who initially saw them as a means for further layoffs. Debra L. Shapiro & Bradely L. Kirkman, *Employees' Reaction to the Change to Work Teams: The Influence of 'Anticipatory' Injustice*, 12 J. ORGANIZATIONAL CHANGE MGMT. 51 (1999).

which technical specialists work not as part of their disciplinary group, but as members of a team; standardized procedures and policies are replaced by a commitment to innovation and employee rights; and coordination by the hierarchy is constrained by a commitment to the teams being self-managing.<sup>26</sup>

Instead of bureaucratic controls, the supervision of project teams is done by the teams themselves and by hierarchical review of risk-management reports, which the project team writes, at least, in part. By shifting from bureaucratic organization to one based on self-managing project teams, the company shifts away from a "transmission belt" delegation of powers from principal to agent towards one that emphasizes "network coordination." In network coordination, *hierarchical* authority is exercised through the management of risks and the pronouncement of abstracted (flexible) visions and values and *horizontal* authority is informal, emphasizing personal responsibility and team cohesion.<sup>27</sup> Company workers are not to be reduced to mere followers of instructions, but rather treated as "professionals," directed by desired results and esoteric symbolic structures.<sup>28</sup> "[F]ired up, highly cohesive" teams regulate professional work.<sup>29</sup>

Best team practices have emerged, further specifying the team model of organizational design. The promoted best practices for team development include:

#### *1. Teams Should Be "Project Teams"*

"Projects replace 'jobs' as the basic unit of work."<sup>30</sup> In organizational terms, the move is "[f]rom function to process" in which units are "organized around delivering customer oriented outputs."<sup>31</sup> Narrow job descriptions are rejected.<sup>32</sup> Contributing to a team requires "role flexibility."<sup>33</sup> The lawyer's kiss-

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26. Thomas A. Stewart, *Planning a Career in a World without Managers*, FORTUNE, Mar. 20, 1995, at 72.

27. PINCHOT & PINCHOT, *supra* note 19, at 37.

28. See generally BENVENISTE, *supra* note 21. To understand being directed by "esoteric symbolic structures" consider that lawyers are directed not only by client objectives but also by something that might be called "the law." Because the law is both esoteric and symbolic, it is open to multiple interpretations and contains multiple voices.

29. Richard W. Woodman & William A. Pasmore, *The Heart of It All: Group- and Team-Based Interventions in Organization Development*, in ORGANIZATION DEVELOPMENT: A DATA-DRIVEN APPROACH TO ORGANIZATIONAL CHANGE 164, 166 (Janine Waclawski & Allan H. Church eds., 2002). "[T]eams . . . are typically . . . collections of individuals whose working relationships require close coordination, higher levels of cooperation, greater cohesiveness, and the like." *Id.* at 176 n.1. Cf. David Hechler, *Enron's Legal Staff Battered, Confused*, NAT'L L.J., Feb. 4, 2002, at A1, A11 ("There was a real esprit de corps" and "You just walked into the lobby and you felt electrified).

30. DiMaggio, *supra* note 15, at 26.

31. Knights & Willmott, *supra* note 20, at 3.

32. Paul DiMaggio, *Conclusion: The Futures of Business Organization and Paradoxes of Change*, in THE TWENTY-FIRST-CENTURY FIRM: CHANGING ECONOMIC ORGANIZATION IN INTERNATIONAL PERSPECTIVE 210, 210-11 (Paul DiMaggio ed., 2001); see DAVID H. MAISTER, TRUE PROFESSIONALISM: THE COURAGE TO CARE ABOUT YOUR PEOPLE, YOUR CLIENTS, AND YOUR CAREER (1997).

33. GORDON LIPPITT & RONALD LIPPITT, THE CONSULTING PROCESS IN ACTION 37 (1978).

off, "that's not my job,"<sup>34</sup> is what team members should not say.<sup>35</sup> All team members are expected to have "responsibilities with bottom-line implications." To meet these, "they become partners in designing their own roles and expanding the nature of their contributions."<sup>36</sup>

### 2. Some Teams Should Be Multidisciplinary Teams

Those assigned to project teams "develop[] a network of relationships that reach across functions," "plan[] and implement ideas that transcend their functions," and "practic[e] strategic thinking."<sup>37</sup> In the sphere of production, multidisciplinary teams break bureaucracy's sharp distinction between conception and execution. Teams "de-couple" functional specialists, like lawyers, from their specialization, thus reducing bases for conflict.<sup>38</sup> Lawyers on multidisciplinary teams no longer have the privilege to say, "This is the legal department's (or my law firm's) position on this issue."<sup>39</sup>

Before redesign, companies affirmed the "bureaucratic 'art of separation.'"<sup>40</sup> The bureaucratic divisions of office and hierarchy enable role-differentiation; this is my office in this place in the hierarchy. Role-differentiation creates role moralities, where different norms emerge for different roles, creating role conflict.<sup>41</sup> On teams, role conflicts are suppressed.

### 3. Teams Should Be Self-Managing

Teams "want to be able to do the problem solving themselves." They want to be able to "change the assumptions and see how [different solutions to the problem] play out."<sup>42</sup> With teams, "supervision, responsibility, and even discipline, is . . . shifted from managers to peers."<sup>43</sup> In the redesigned company, "[e]mployee accountability shifts from hierarchy to collegiality. . . ."<sup>44</sup> "Team

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34. William H. Simon, *Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 74 n.100.

35. "Turf battles get eliminated" as one lawyer told me in 1994. Or, as another said, "there's no buck-passing" on teams. See 1994 Interview, *supra* note 10.

36. Raymond E. Miles & W.E. Douglas Creed, *Organizational Forms and Managerial Philosophies: A Descriptive and Analytical Review*, 17 RES. IN ORG. BEHAV. 333, 362 (1995).

37. RAM CHARAN ET AL., *THE LEADERSHIP PIPELINE: HOW TO BUILD THE LEADERSHIP-POWERED COMPANY* 67 (2001).

38. Henry Mintzberg, *Covert Leadership, Notes on Managing Professionals*, in *MANAGING IN THE NEW ECONOMY* 133, 137-43 (Joan Magretta ed., 1999).

39. See *supra* text accompanying note 37; *infra* text accompanying note 211.

40. Paul du Gay, *Making up Managers: Enterprise and the Ethos of Bureaucracy*, in *THE POLITICS OF MANAGEMENT KNOWLEDGE* 19, 31 (Stewart R. Clegg & Gill Palmer eds., 1996).

41. LUBAN, *supra* note 1, at 107-11.

42. JAMES O'SHEA & CHARLES MADIGAN, *DANGEROUS COMPANY: THE CONSULTING POWERHOUSES AND THE BUSINESSES THEY SAVE AND RUIN* 293 (1997)

43. Powell, *supra* note 14, at 58.

44. Knights & Willmott, *supra* note 20, at 5. The redesigned organization is premised on there being an inverse relation between risk-taking, innovative behavior and



leaders tend to be much younger than the previous supervisors, and work with the staff, rather than simply supervising or directing them; they do not have a management title or the trappings of prestige that go with it.”<sup>45</sup>

Teams are their own bosses, they both direct their work and decide how bonuses are to be distributed. Teams change the individuals with whom team members interact and those by whom they are evaluated.<sup>46</sup> “Team members must agree on who will do particular jobs, how schedules will be set and adhered to, what skills need to be developed, *how continuing membership in the team is to be earned, and how the group will make and modify decisions.*”<sup>47</sup>

Supervisors only covertly manage teams:

Managers cannot bring out the intelligence of everyone in the organization if they pretend they can do better thinking in a few hours than a project team that has wrestled with the problem for months. Instead of issuing arbitrary orders, they need to raise concerns and trust the project team to find a way of handling them that integrates with all the other issues guiding the design.<sup>48</sup>

Executives also are disconnected from project teams.<sup>49</sup> In the redesigned company, executives let teams plan the transactions themselves.<sup>50</sup> The task for

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formal conflict resolution, coordination procedures. Henry W. Chesbrough & David J. Teece, *When is Virtual Virtuous? Organizing for Innovation*, HARV BUS. REV., Jan.–Feb. 1996, at 65.

45. Darren McCabe & David Knights, ‘*Such Stuff as Dreams are Made On*’: *BPR Up Against the Wall of Functionalism, Hierarchy and Specialization*, in *THE REENGINEERING REVOLUTION? CRITICAL STUDIES OF CORPORATE CHANGE* 63, 77 (David Knights & Hugh Willmott eds., 2000). Nonetheless, in some team redesigns, “team leaders have disciplinary powers.” *Id.* When they do, team leaders fulfill many of the functions once performed by bureaucratic controls, “[t]o a considerable extent the role of team leader embodies that of assistant manager, chief clerk, and supervisor; it reproduces rather than removes these roles.” *Id.*

46. Self-management often is linked to claims about the “empowerment of workers.” I do not consider this here because I think it is a deceptive concept, especially when applied to lawyers. This empowerment discourse assumes that the worker lacks any “distinctive personal [or professional] values.” Knights & Willmott, *supra* note 20, at 12. Some literature distinguishes “empowered teams” from “self-managing teams,” for example, by emphasizing that empowerment means the “team’s experiencing its tasks as important, valuable, and worthwhile.” Bradley L. Kirkman & Benson Rosen, *Beyond Self-Management: Antecedents and Consequences of Team Empowerment*, 42 *ACADEMY MGMT. J.* 58, 59 (1999). I assume that the best practices for self-managing teams include such dimensions of empowerment.

47. PINCHOT & PINCHOT, *supra* note 19, at 205 (source omitted) (emphasis added).

48. *Id.* at 34.

49. SUSAN ALBERS MOHRMAN & SUSAN G. COHEN, *When People Get Out of the Box*, in *THE CHANGING NATURE OF WORK* 365, 372 (Ann Howard ed., 1995).

50. Thomas M. Hout & John C. Carter, *Getting it Done: New Roles for Senior Executives*, HARV. BUS. REV., Nov.–Dec. 1995, at 133 (“The traditional hands-on role of the senior manager is disappearing. The message seems to be: Get the processes right, and the company will manage itself.”) *See also id.* at 133 (criticizing this message because it

corporate management is to “manage[] an economy.”<sup>51</sup> Corporate executives review risk-management reports for each team’s project and select which projects will be implemented.<sup>52</sup> If a team’s project is selected, executives turn implementation back to the team.

*4. Team Members Should Be Ensnared in Ian MacNeil’s “Entangling Strings” of Interdependence, Friendship, and Reputation*<sup>53</sup>

Team members should “feel and act as if they have ownership of the project.”<sup>54</sup> Team members should “buy into” the project, developing and protecting the project as if it were their own property.<sup>55</sup> On the dark side, the entangling strings may mean that assertions of professional ethics are treated as “*ethiscuity*,” the “taking of refuge in ethics in order to protect oneself from potentially threatening and anxiety-producing relationships.”<sup>56</sup> According to the proponents of redesign, the team’s operating principle should be “team above personal interests.”<sup>57</sup> For professionals, including lawyers, teams “promote[] loyalty to the project group with which the professional is associated . . . subject the professional to greater scrutiny by the project manager [and other team members]. . . [and] as potential consumers of functional services,” the team has the power to influence the professional’s rewards from this project as well as future work assignments.<sup>58</sup>

*5. Teams Should Have the Choice To Use Either Internal or External Experts*

For example, outside counsel “may function as integral members of the team, in addition to performing specific professional services as outsiders.”<sup>59</sup>

Redesigning work for self-managing teams did not protect law departments from further downsizings.<sup>60</sup> Some further downsizings of staff are

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ignores the need to manage political conflicts); Kurt Eichenwald, *Another Quality of the Corporate Titan: Ignorance at the Top*, N.Y. TIMES, March 3, 2002, § 4, at 3.

51. Miles & Creed, *supra* note 36, at 356.

52. See *infra* text accompanying notes 124–29. Corporate executives also manage the corporate economy by managing corporate finance, such as M&A work, and choosing organization designs. J.C. Spender & P.H. Grinyer, *Organizational Renewal: Top Management’s Role in a Loosely Coupled System*, 48 HUM. REL. 909 (1995).

53. Ian R. MacNeil, *Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and de Vos*, 143 J. INSTITUTIONAL & THEORETICAL ECON. 271, 275 (1987).

54. ROSS DAWSON, DEVELOPING KNOWLEDGE-BASED CLIENT RELATIONSHIPS: THE FUTURE OF PROFESSIONAL SERVICES 149 (2000).

55. DAVE ULRICH ET AL., RESULTS-BASED LEADERSHIP 102 (1999).

56. LIPPITT & LIPPITT, *supra* note 33, at 74 (citation omitted).

57. *Id.* at 68–74.

58. JOSEPH A. RAE LIN, THE CLASH OF CULTURES: MANAGERS AND PROFESSIONAL 231 (1986).

59. Joseph M. Morris, *Mergers and Acquisitions*, in THE ACCOUNTANT AS BUSINESS ADVISOR 299, 303 (William K. Grollman ed., 1986).

60. PINCHOT & PINCHOT, *supra* note 19, at 190.

caused by the fifth best practice of teams, their ability to utilize and even bring external workers onto the teams. This best practice exemplifies the organizational strategies of outsourcing and treating the company as having porous borders, the subjects of the next part.

### ***B. Outsourcing and Companies' Porous Borders***

Having downsized, outsourcing recommends that companies use non-employee workers on a project basis.<sup>61</sup> Today, "many basic organizational functions are either outsourced or done collaboratively with outsiders."<sup>62</sup>

When you think of downsizing, think of workers re-hired on a contingent basis, with fewer benefits, especially health insurance. But think also of outside counsel. In the redesigned company, "outside counsel" are "outsourced counsel." Outside counsel gain work through the downsized numbers of inside lawyers.<sup>63</sup> Outside counsel also gain work when the company implements an outsourcing strategy. More generally, the organizational strategies of downsizing and outsourcing link corporate demand and the supply offered by consulting firms.<sup>64</sup>

The proponents of outsourcing advance the arguments outside counsel proposed, unsuccessfully, in the face of the Inside Counsel Movement.<sup>65</sup> The proponents argue that outsourcing makes economic sense because the outsourced work is done by firms that have heavily invested in R&D, are experienced in a variety of approaches, and can deliver, in short time frames, the highest quality work. Like many outside law firms, consulting firms hold themselves out as meeting each of these characteristics. It is difficult to ignore, therefore, the self-interest organizational development experts who work for multidisciplinary consulting firms have in companies adopting outsourcing strategies. Nonetheless, the consulting firms are successfully convincing clients to implement outsourcing

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61. DiMaggio, *supra* note 15, at 26.

62. Powell, *supra* note 14, at 64.

63. Outsourced legal work came from not only downsizing the legal department, but also downsizing legally trained corporate employees working elsewhere in the company.

64. "At the moment, the glue that keeps the client-consulting relationship together is the fact that both parties 'buy into' the same business model." FIONA CZERNIAWSKA, *MANAGEMENT CONSULTANCY IN THE 21ST CENTURY* 16 (1999).

65. Compare Emily Barker, *Greener Pastures*, AM. LAW., Oct. 1998, at 64 ("catalyst of transactions," "helping a CEO think about the direction of the company," not "brought in after the decisions were made," and "data gathering") with Rosen, *Inside Counsel Movement*, *supra* note 4, at 484-90.

strategies.<sup>66</sup> This is the age of consultants. The management consultant business is booming and consultants have “increasing influence.”<sup>67</sup>

Unlike the arguments against the Inside Counsel Movement, the arguments for outsourcing include two accounts of the importance of inside staff. First, outsourced consultants leave inside staff an important place at the table,<sup>68</sup> never denigrate inside staff, and insist that outside consultants are only needed “to supplement in-house skills.”<sup>69</sup> Second, outsourced consultants, as part of their commitment to serve (by adding value to) the client, promise to educate internal staff.<sup>70</sup> The proponents of these organizational strategies argue that inside and outside consultants should be partners.<sup>71</sup>

Outsourcing proponents speak a great deal of “cosmopolitan professional judgment” (state-of-the-art service, worldwide access to information, etc.).<sup>72</sup> They do not emphasize “independent [from the client] professional judgment,” as did outside counsel in response to the Inside Counsel Movement. In the literature

66. CZERNIAWSKA, *supra* note 64, at 5 (explaining outsourcing as a cause of the expansion of consulting in the 1990s). In the 1980s, consulting expanded by broadening the services offered, increasing the use of information technology and globalizing. *Id.*; see also ELAINE BIECH, *THE BUSINESS OF CONSULTING: THE BASICS AND BEYOND* 4 (1999).

Given their clear self-interest, consultants’ successes have been explained in ways familiar to the legal post-modern literature, with emphases on rhetoric, drama and the persuasive power of narrative. See generally CRITICAL CONSULTING, *supra* note 13.

67. Robin Fincham & Timothy Clark, *Introduction: The Emergence of Critical Perspectives on Consulting*, in CRITICAL CONSULTING, *supra* note 13, at 1, 1–4 (industry-wide revenues of \$3 billion in 1980 and \$60 billion in 1999); see also DENIS SAINT-MARTIN, *BUILDING THE NEW MANAGERIALIST STATE: CONSULTANTS AND THE POLITICS OF PUBLIC SECTOR REFORM IN COMPARATIVE PERSPECTIVE* 41–47, 57 (2000); Timothy Clark & Graeme Salaman, *Telling Tales: Management Consultancy as the Art of Story Telling*, in *METAPHOR AND ORGANIZATIONS* 166 (David Grant & Cliff Oswick eds., 1996).

68. Usually at a team table.

69. Fincham and Clark, *supra* note 67, at 4. Consultants are called in because the client “has a personnel shortage,” “lacks the expertise to do the job” and “has a deadline to meet.” GREGORY F. KISHEL & PATRICIA GUNTER KISHEL, *CASHING IN ON THE CONSULTING BOOM* 405 (1985).

70. O’SHEA & MADIGAN, *supra* note 42 (“involve the client’s employees in the engagement”). Outsourcing is accompanied by the motto: “The Intelligent Corporation is The Learning Corporation.” In the learning corporation:

Clients are finding increasingly that knowledge transfer from their professional suppliers is the primary differentiating factor in the value they receive, and they are switching from suppliers that insist on the black-box model of services to those that add greater value by increasing transparency or focusing specifically on knowledge transfer.

DAWSON, *supra* note 54, at 23. Cf. CZERNIAWSKA, *supra* note 64, at 14 (stating that consultants “are accused of not working effectively with client staff.”).

71. See *infra* Part IV(B). The outsourcing literature, however, also stresses the benefits of flexible and contingent external relations. Larry Rittenberg & Mark A. Covalleski, *Internalization Versus Externalization of the Internal Audit Function: An Examination of Professional and Organizational Imperatives*, 26 ACCT. ORG. AND SOC’Y 617, 621–23 (2001) (summarizing the literature).

72. Cf. Alvin W. Gouldner, *Cosmopolitans and Locals: Toward an Analysis of Latent Social Roles I*, 2 ADMIN. SCI. Q. 281 (1957).

reviewed, when independent professional judgment is discussed, “independence” usually means “independence from other clients” and its value derives from outside consultants being permitted to engage in relationships that a lawyer would regard as at least a potential conflict-of-interest. Thereby, value is added to the client through the consultants’ knowledge of the activities of competitors, usually called consultants’ knowledge of the best practices.<sup>73</sup> Otherwise, only in the context of political battles within the company, is the fact of independence from the client marketed.<sup>74</sup> Sometimes, it is only the appearance of “independence” that is said to add value to the client.<sup>75</sup>

The concept of independence also is transformed by adopting the organizational strategy of viewing the company as having porous borders, sometimes called the “boundary-less” corporation. From the corporate perspective, “[T]he strong boundaries that once separated firms have become less distinct, while . . . market transactions have become more intimate.”<sup>76</sup> The distinction between inside and outside blurs with outsiders being part of the decision-making team.<sup>77</sup> Some proponents of the porous border strategy go further and suggest including suppliers, customers, and even competitors on the decision-making team (sometimes only by proxy).<sup>78</sup> “The boundaries of many firms have become so porous that to focus on boundaries means only to see trees in a forest of interorganizational relations.”<sup>79</sup> Today, the most conspicuous examples of the porous border strategy are companies using one accounting firm as both their internal and external auditor.<sup>80</sup>

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73. ROBERT R. BLAKE & JANE SRYGLEY MOUTON, CONSULTATION: A HANDBOOK FOR INDIVIDUAL AND ORGANIZATION DEVELOPMENT 563 (2d ed. 1983). Consultants sell “Keeping Up with the Companies You Think are Hot.” See *id.* at 4 (“Keeping up with the Joneses”).

74. When the client “wants to avoid a[n internal] conflict,” “is experiencing a crisis,” “wants to avoid going through channels,” or “needs an objective viewpoint” because internal processes are not trusted. KISHEL & KISHEL, *supra* note 69, at 5–7.

75. Such as when “the client doesn’t want to do the job” or “wants to capitalize on the consultant’s credibility.” *Id.* at 7, 5; see also Robert Eli Rosen, *Feasting on Leftovers . . . and More: Strategies for Outside Corporate Counsel*, 10(2) LEGAL OFF. ECON. NEWSL. (FLA.) 6, 8 (1987).

76. DiMaggio, *supra* note 15, at 4.

77. See Raymond J. Beninato, *Employee and Executive Benefits*, in THE ACCOUNTANT AS BUSINESS ADVISOR 373, 400 (William K. Grollman, ed., 1986); see also Morris, *supra* note 59, at 303.

78. DRUCKER, *supra* note 18, at 115.

79. Powell, *supra* note 14, at 35.

80. See, e.g., Jonathan Glater, *Enron’s Many Strands; Accounting; Ernst & Young Latest Auditor Moving to Alter Some Practices*, N.Y. TIMES, Feb. 5, 2002, at C1; see also Rittenberg & Covaleski, *supra* note 71. Another example may be Enron’s General Counsel’s hiring Vinson & Elkins to conduct an investigation of deals in which Vinson & Elkins had been involved. Hechler, *supra* note 29, at A10–A11. As Anderson’s external auditors could monitor the numbers generated by Anderson’s internal auditors, Vinson & Elkins could monitor deals which some of its partners advised. With porous borders, companies include suppliers as “part” of the company and conflicts of interest supposedly are managed.

At the transactional level, seeing the company as having porous borders means recognizing that transactions with outsiders are not, and need not be, arms-length deals. The strategy requires company employees to manage not only what occurs inside the company, but also that which occurs outside it. Managers are told to control outsiders principally by fostering the outsiders' dependence on the company and particular individuals and teams within the company.<sup>81</sup>

A checklist entitled, "How boundaryless is your company?" has been presented as an action-oriented test of the implementation of the porous borders strategy. Among other questions, the checklist asks whether:

Decision-making is pushed down to the lowest possible level at which competent decisions can be made. . . . Cross-functional decisions are made through teams, horizontal organizations. . . . Decision-making includes members of the value chain . . . (including suppliers and customers). . . . Talent moves from one unit to another in the organization, as needed. . . . Rewards (financial and non-financial) . . . encourage cross-functional work and collaboration. . . . Rewards focus on meeting the goals set by those in the value chain.<sup>82</sup>

Like outsourcing, the porous border strategy is promoted by consulting firms who have an interest in the outsourcing of internal functions.<sup>83</sup> Professional service firms have an interest in being included within the company's "borders."

The introduction of these four organizational philosophies is not uniform across companies. The results, at any organization, of introducing these techniques will depend on the organization's "unique history, power players, and power games."<sup>84</sup> Nonetheless, the next two sections generalize about how the introduction of these organizational strategies influences the future of corporate legal practice.

### III. DEMAND FOR LEGAL SERVICES IN THE REDESIGNED COMPANY

This Part considers how client adoption of these organizational strategies structures client demand for legal services. It reviews what advice this literature provides for clients about how to manage their relations with lawyers. Although lawyers serve the company client "as an entity,"<sup>85</sup> how the company is organized affects how lawyers act.<sup>86</sup> The redesigned company challenges lawyers to respond

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81. DRUCKER, *supra* note 18, at 33.

82. ULRICH ET AL., *supra* note 55, at 100-01.

83. Rittenberg & Covalski, *supra* note 71, at 624-57.

84. Denis Collins, *A Socio-Political Theory of Workplace Democracy: Class Conflict, Constituent Reactions and Organizational Outcomes at a Gainsharing Facility* 6 ORG. SCI. 628, 641 (1995). Consultants protect themselves against such uncertainties by preparing clients for the need for further consulting. See, e.g., PETER M. SENGE, *THE FIFTH DISCIPLINE* 146 (1990) ("To empower people in an unaligned organization can be counterproductive.") (emphasis omitted).

85. MODEL CODE OF PROF'L RESPONSIBILITY EC 5-8 (1969).

86. MODEL RULES OF PROF'L CONDUCT R. 1.13 (1984) [hereinafter MODEL RULES].

in different ways to the ethical dilemmas of serving organizations as clients.<sup>87</sup> As a first step in understanding these dilemmas in the redesigned company, this part analyzes the changed context in which corporate lawyers act.

The first section of this part describes M&A (Mergers & Acquisitions) practice, legal work in which the lawyer is thought to function as an independent and influential counselor, possessing highly specialized expertise.<sup>88</sup> It is an area in which lawyers may think that their work is immune to internal corporate change below the level of top management and the board. If changing organizational strategies change what lawyers do in M&A work, *a fortiori*, changing organizational strategies change much of corporate legal work.

The second section of this part generalizes about how redesigned companies use lawyers. It describes how companies are being advised to manage lawyers. It uses the redesigned company's management of legal risks as its example. As this part shows, companies are being advised to use lawyers just like they use any other consultant.

#### A. An Example: M&A Practice

If the self-report of two lawyers could be trusted,<sup>89</sup> an account of current company use of M&A lawyers might be as follows:<sup>90</sup>

An impetuous CEO of a NYSE listed corporation calls up another CEO to broach a merger. They schedule a meeting three days later to which the other CEO brings his outside lawyer. Not having brought her own outside lawyer along, the proposing CEO fails to finesse an issue, causing her company significant and precipitous expenses.<sup>91</sup> Like the CEO, her GC (General Counsel) fumbles the ball.<sup>92</sup>

On the other hand, there are wise CEOs who, when troubled, first call their outside counsel.<sup>93</sup> It is wise for them to do so, for law provides critical contingencies.<sup>94</sup> The wise CEO ensures that outside counsel is present at all negotiations.<sup>95</sup>

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87. Rosen, *Inside Counsel Movement*, *supra* note 4, at 536–41 (analyzing the bureaucratic perspective of Model Rule 1.13).

88. Flood, *supra* note 9. For a discussion of the independent and influential counsel image, see Kagan & Rosen, *supra* note 6, at 405–11.

89. See *supra* text accompanying notes 1–3.

90. See Barry S. Alberts & Samuel Thompson, Jr., *Ethics Issues Faced by Lawyers and Investment Bankers in Mergers and Acquisitions: A Problem Approach and Report of Panel Discussion*, 54 U. MIA MI L. REV. 697 (1999).

91. See *id.* at 700–01.

92. *Id.* at 701 (The General Counsel inadvertently faxes to the target's outside counsel the strategy memo).

93. *Id.* at 706–07.

94. *Id.* at 706.

95. *Id.* at 706–07.

In short, the whiggish tradition of lawyers displaying influential good judgment<sup>96</sup> survives in self-reports by M&A outside counsel. Like whiggish lawyers, M&A outside counsel are vitally concerned with ethics. But, as compared to whiggish lawyers, M&A outside counsel's ethical concerns have a narrow scope. Instead of the whiggish concern about corporate social responsibility, today's M&A lawyers' ethical concerns are about conflicts of interest and other law-of-lawyering problems, including problems in law firm management, such as how to minimize associates' stealing corporate opportunities.<sup>97</sup>

Such lawyer self-reports are suspect evidence, at least because the legal profession has a history of whiggish self-reports that only loosely fit lawyers' actual behaviors.<sup>98</sup> For present purposes, I suspect this account because, in it, the client's organization is irrelevant. In this account, changes in client demand affect how many calls are made for legal services, but not the work of outside counsel.

The plausibility of this account depends on important decisions about legal work being made by the CEO or the Board of Directors. Perhaps some clients treat their M&A activity as "bet your company" deals, in which CEOs are intimately involved. And some CEOs may use outside counsel as their trusted advisors. As this account presumes, lawyers can ignore clients' organizations when lawyers are the right arms of CEOs who make the decisions. This account of M&A work does not describe company legal work whose key decisions are not made by the CEO. In the redesigned company, remember, top executives don't manage most transactions.<sup>99</sup>

In the redesigned company, even M&A is not the CEO's baby. M&A lawyers receive assignments from project teams, not CEOs. Companies are advised by proponents of organizational redesign that M&A lawyers ought to be used quite differently than lawyer self-report.

In the redesigned company, the company's outsourcing strategy shapes demand for outside counsel services. In establishing porous borders, companies take into account the economic interests of those to whom companies outsource work. Consequently, the best practice for M&A work avoids contacting outside counsel early in the deal as law firms' financial interests favor the M&A work proceeding.<sup>100</sup>

In M&A ventures, the first step taken by CEOs of redesigned companies is not to call outside counsel. The CEO's first step is to form a project team.

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96. Robert W. Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870-1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 61 (Gerard W. Gawalt ed., 1984).

97. Alberts & Thompson, *supra* note 90, at 706-07.

98. See Gordon, *supra* note 96.

99. See *supra* text accompanying notes 49-52.

100. JOHN E. TRIANTIS, *CREATING SUCCESSFUL ACQUISITION AND JOINT VENTURE PROJECTS: A PROCESS AND TEAM APPROACH* 18 (1999). The same jaundiced scrutiny also might be applied against law firms' responses to this exclusion, developing products for sale (merger prospects, for example). See *infra* Part IV(C)(2).



Knowing that most M&A ventures fail,<sup>101</sup> the project team evaluates the project, including the expenses of legal service, before calling outside counsel.

In the redesigned company, outside counsel should not to be involved in initial negotiations, such as the lunch meeting between the CEOs described above.<sup>102</sup> In fact, best practices caution against using outside counsel in any negotiation,<sup>103</sup> except near the end, when it is time to “squeeze the best possible deal from the other side.”<sup>104</sup>

On the other hand, porous company borders allow outside counsel to become members of the project team when outside counsel demonstrates mastery of the “complete picture of the strategic and operational gaps of the company.”<sup>105</sup> For outsourced providers to meet this requirement, they must mind the company. Today, best practices favors the use of inside, rather than outside, counsel on M&A project teams because outside counsel “tak[e] over [negotiations without an] . . . intimate knowledge of every issue that the project team has.”<sup>106</sup>

The M&A project team is a multidisciplinary group whose “core team” is composed of the team leader, “a financial analyst, a lawyer, and an operational manager.”<sup>107</sup> The team does not include senior managers.<sup>108</sup> The team decides on the goals and objectives to be sought<sup>109</sup> and the strategy to be used.<sup>110</sup>

101. TRIANTIS, *supra* note 100, at 4.

102. *See supra* text accompanying note 91.

103. TRIANTIS, *supra* note 100, at 199. *See also id.* at 196 (resisting “[o]utside [f]orces” on negotiating team). “Do not let external consultants conduct face-to-face negotiations on your behalf but, if necessary, use them sparingly in that capacity. Also, have the negotiation subteam monitor [any such] discussions.” *Id.* at 387–88.

104. *Id.* at 199. Outside counsel may be brought into negotiations at an earlier time “to bring balance in negotiations dynamics when the other side brings in” their outside counsel “to influence the direction of discussions.” *Id.*

105. *Id.* at 18; *cf.* 1994 Interview, *supra* note 10 (“In a lean and focused company, lawyers [inside counsel] understand the company’s business and its problems.”).

106. TRIANTIS, *supra* note 100, at 20. Using inside counsel also maximizes the transfer to the corporation of knowledge gained about the target and from outsource providers to the team. *Id.* at 20, 201.

107. *Id.* at 39, 52. As a core team member, especially, the lawyer “participates in identification of business needs to be addressed and covered through legal documents.” *Id.* at 296.

108.

Project team members are drawn from different functional areas including finance, operations, legal, technical support, marketing, corporate planning and strategy, human resources, and public relations. Senior managers are usually excluded from the acquisition project team because their presence does not allow for open team communication and interaction and their involvement results in decisions being made simply to satisfy senior manager wishes.

*Id.* at 130; *cf.* McCabe & Knights, *supra* note 45.

109. TRIANTIS, *supra* note 100, at 20. Teamwork requires commitment to the team and “it is essential that team members share common goals and objectives and maintain continuity of purpose throughout the project.” *Id.* at 130.

110. *Id.* at 56.

The team decides on how and when to obtain assistance from internal and external experts.<sup>111</sup> Proponents of organizational redesign advise teams to manage outside counsel.<sup>112</sup> “In every case, the role of external advisors must be well defined and their activities and involvement controlled.”<sup>113</sup>

The core team (and, in particular, the project leader) directs the use of outsource providers.<sup>114</sup> But the entire team is involved in the work. Legal work, for example, requires obtaining “input from the [whole] team.”<sup>115</sup> Lawyers on the team or working for the team do not own any of the legal documents of the M&A process. Each member of the team owns responsibility for the legal documents.<sup>116</sup> Any legal document’s “essence is developed by the project team.”<sup>117</sup> “It is better for the project team to work with the lawyer to draft the proposal document, rather than for the lawyer to draft the agreement and then seek input from the project team.”<sup>118</sup> “The business development representative on the project team also helps to create and reviews legal documents and agreements drafted to affect the completion of the transaction and ensure that the project objectives are met and that the legal documents reflect the desired terms.”<sup>119</sup>

The legal documents that are the outputs of the process may have external audiences, but, from the company’s perspective, they also have important internal audiences, especially the implementation, human resources, liaison, and public relations sub-teams of the project team. Consequently, “project teams play an important role in shaping and drafting the agreements to make them easier to negotiate, manage, and monitor throughout their lives.”<sup>120</sup> And, “the project team should ensure that legal documents contain clear language because if the project team does not understand the language of the agreement, chances are the implementation subteam [among others] cannot manage that agreement.”<sup>121</sup>

Furthermore, “[n]egotiation subteams are . . . advised to simplify the language of legal documents to the maximum extent” to prevent lawyers from

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111. *Id.* at 85. “The project workplan shows key activities involved in completing the project, the subteam *owning* each activity and individual members *responsible*, deliverables of each subteam, timelines associated with each activity, and estimated costs in performing each activity.” *Id.* at 133 (emphasis added).

112. *Id.* at 41.

113. *Id.* at 199. “[I]t is important to specify the functions expected to be performed by these experts so that costs can be controlled, while maximum services are obtained from them.” *Id.* at 85.

114. *Id.* at 181.

115. *Id.* at 142.

116. *Id.* at 144.

117. *Id.* at 303. The team “creates the intent and business objectives, but the lawyers are responsible for drafting appropriate language that reflects those objectives.” *Id.* at 41.

118. *Id.* at 198.

119. *Id.* at 40–41.

120. *Id.* at 303.

121. *Id.* at 304.

managing the project.<sup>122</sup> The team, sometimes in consultation with its sponsors, decides on negotiation commitments.<sup>123</sup>

The redesigned company accepts that project teams may lose their objectivity. Owning the project, teams may not make “a sound evaluation of [the] assumptions underlying” their forecasts,<sup>124</sup> thus preventing proper analysis of risks. To an extent, companies rely on outside experts to manage this risk. Companies are advised that they may need to use outside experts who understand “that [the] company has expectations that through external advisors, an independent assessment and objective view of the project can be obtained.”<sup>125</sup> In such situations, the company relies on outside counsel to be not only a *haruspex*,<sup>126</sup> a predictor of known risks, but also an insurance investigator, searching for hidden risks.<sup>127</sup>

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122. *Id.*

123. The negotiation subteam reports to the core subteam, the project sponsor and the business development group. *Id.* at 56. By contrast, the due diligence sub-team reports to the financial analyst. *Id.* at 57. For a discussion of the role of legal due diligence in this process see *id.* at 282–85. For a discussion of reporting to the financial analysts, see *id.* at 56, 136–38.

124. *Id.* at 137. Triantis gives the following account of why objectivity might be lost:

1. It is possible that the project team information, assessment and analysis are erroneous or incomplete. Issues can go unchecked and basic elements escape the project team’s attention because of tight schedules and operating under pressure.
2. Interpretation of facts may not be entirely consistent or correct. This occurs because project team members often take definitions for granted and these definitions are not the same across all participants.
3. Recommended processes may not have been followed. This can happen for a number of reasons, but is mostly traced to shortcuts and pressures to meet deadlines.
4. Information and facts may have been omitted from the analysis. This occurs either because of ignorance on the part of the project team or because they were not considered important in the broader scheme of things.
5. *Personal biases and subjective judgments. They are occasionally introduced in the assessment process, but an independent assessment identifies such biases and requires explanations that satisfy impartial observers.*

*Id.* at 148 (emphasis added)

125. *Id.* at 56. On the other hand, the best practice for responding to “team think” is not only to rely on outside experts, but also to create a shadow team that, with no contact with the project team, replicates the team’s work. *Id.* at 148.

126. Detlev Vagts, *Legal Opinions in Quantitative Terms: The Lawyer as Haruspex or Bookie*, 34 BUS. LAW. 421 (1979).

127. “Evaluation of project risks . . . by outside advisors . . . [could] identify new risks, generate discussion, and result in more accurate quantification of risks.” TRIANTIS, *supra* note 100, at 271. To perform this service, like other outside experts, outside counsel must understand that they have to examine the problems as set for them by the team,

In redesigned companies, the risk that project teams will not accurately identify project risks is generally managed internally through the company's risk management process. Teams develop "[r]isk management plans . . . to deal with unresolved issues and project risks, negotiate their allocation and sharing, and create ways to deal with them so as to mitigate the impact or eliminate the risks completely."<sup>128</sup> Senior executives decide whether to go forward with the M&A deal by assessing these risk management plans, sometimes requiring that independent assessments be made of certain risks.<sup>129</sup>

### *B. Using Lawyers as Consultants*

In the redesigned company, as in M&A work, lawyers may work with project teams whenever "familiarity with basic legal skills"<sup>130</sup> needs to be supplemented. Lawyers become members of the team by developing knowledge of the company's business. Lawyers get legal work from the team, which has the responsibility to define and control it. Companies for a long time have been advised that, when using consultants, "[t]he best results seem to come when management knows what the problem is, and sets down clear boundaries and objectives in advance."<sup>131</sup> Lawyers for a long time have been advised that lawyers need to advise management about what actually are their problems and question the work boundaries set for them by non-lawyers.<sup>132</sup> This conflict between the advice that has been given to companies and their lawyers often poses only a potential rather than an actual conflict. The conflict does not emerge when companies strongly trust their lawyers or do not closely monitor legal work. Project teams, like those for M&A work, attempt to institute what companies long have been advised. The team allocates work and monitors it closely. A multidisciplinary decision is made that sets the problem, objectives, and scope of the legal work to be performed.

This is not to say that lawyers will not sometimes challenge team decisions. Law is esoteric and sometimes unyielding. Expertise makes moral

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investigating its overt and implicit assumptions. For an approach to this task, see Rosen, *Legal Diagnosis*, *supra* note 4.

128. TRIANTIS, *supra* note 100, at 137.

Risk management in acquisition projects takes several forms, the most common being pushing the risk back to the seller or the target through the use of agreements, negotiating the risk away to third parties, and allocating risk according to ability to handle. Other approaches to risk management include purchasing commercial insurance to cover certain risks and sharing the risk with the seller or other entities according to potential benefits received.

*Id.* at 138. See also *id.* at 267–80.

129. *Id.* at 148–49.

130. *Id.* at 36.

131. GERALD L. MOORE, *THE POLITICS OF MANAGEMENT CONSULTING* 238 (1984) (quoting Walter Guzzardi, Jr., *Consultants: The Men Who Came to Dinner*, *FORTUNE*, Feb. 1965, at 238); see also *supra* text accompanying notes 112–13.

132. See, e.g., ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 121–46, 283–91 (1993); Rosen, *Legal Diagnosis*, *supra* note 4, at 208–15.

demands on its carriers. In redesigned companies, much of consulting work continues to be "selling and telling," because "the client purchases . . . some information or an expert service that she is unable to provide herself."<sup>133</sup> Like consulting work, much of legal work also will be "selling and telling" to teams.

In other ways, too, companies using lawyers as consultants will not change the work of corporate lawyers. Consultants describe themselves in terms compatible with lawyer self-definitions, especially in the large law firms.<sup>134</sup> Like lawyers, consultants customize expertise for their clients. Consultants apply their cosmopolitan knowledge to local information. In the language of organizational theory, lawyers as consultants are still "boundary-spanning professionals."<sup>135</sup> But as companies develop porous borders, lawyers as consultants are better described as "cutpoint[s] . . . in a flow of communication," receiving information from the client and then scanning the legal community "for information and opportunities relevant to the firm's objectives."<sup>136</sup> Lawyers on teams still are "buffers," transforming expert knowledge to meet the team's goals and they are "brokers," selling appropriations of expert knowledge.<sup>137</sup>

What may be different is that consultants approach problems from the client's business perspective.<sup>138</sup> Lawyers working on and for teams need to develop the skills that once were associated with managers' jobs. Like managers, such lawyers are involved in developing business strategies, enabling their company "to do something better than the competition."<sup>139</sup> Like managers, lawyers playing on teams have to learn to take other team members' "concerns and needs into consideration," as they compete with them for resources and power.<sup>140</sup> In so doing, these lawyers, like managers, learn "that their function exists to support overall business objectives."<sup>141</sup> They learn to think like a businessperson,

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133. EDGAR H. SCHEIN, *PROCESS CONSULTATION REVISITED: BUILDING THE HELPING RELATIONSHIP* 7 (1999).

134. One definition of management consultants, formulated by "several US consulting associations in the mid-1980s" is "[m]anagement consultancy is an independent and objective advisory service provided by qualified persons to clients in order to help them identify and analyze management problems or opportunities. Management consultancies also recommend solutions or suggested actions with respect to these issues, and help, when requested, in their implementation." CZERNIAWSKA, *supra* note 64, at 8 (citation omitted).

135. J. Stacey Adams, *Interorganizational Process and Organization Boundary Activities*, 2 RES. IN ORG. BEHAV. 321 (1980).

136. Stacia E. Zabusky & Stephen R. Barley, "You Can't be a Stone if You're Cement": *Reevaluating the Emic Identities of Scientists in Organizations*, 19 RES. IN ORG. BEHAV. 361, 365 (1997); *see also infra* text accompanying note 179.

137. Stephen R. Barley, *Technicians in the Workplace: Ethnographic Evidence for Bringing Work into Organization Studies*, 41 ADMIN. SCI. Q. 404 (1996).

138. Cf. Nelson & Nielsen, *supra* note 9, at 473-77. They report that eighty-three percent of their inside counsel described acting as counsel or entrepreneur, both of whom prioritize business objectives. *Id.* at 468.

139. CHARAN ET AL., *supra* note 37, at 21.

140. *Id.* at 20. Like managers, lawyers on teams must learn to "value the success of others." *Id.* at 24. "Having to work effectively with people who are different is a growth experience." *Id.* at 78.

141. *Id.* at 66.

not a functional specialist.<sup>142</sup> They “must make the shift from ‘can we do this?’ to ‘will we make money if we do this?’”<sup>143</sup> They have to learn that “adding value” is the basis of concern. When lawyers act like consultants, their applications of legal skills are done in the managerial frame. For the redesigned company, the opposite of a consultant is a mere technician, not a carrier of independent professional judgment.<sup>144</sup>

The problems, which may result when lawyers approach their work with a business perspective, can be illuminated by considering legal work from the perspective of risk management. The redesign of companies is linked to the acceptance both of risk and of capabilities to manage risk. Teams supposedly facilitate risk taking: “Under conditions of fear-based hierarchical authority, risky behavior . . . is discouraged. Teams, by contrast, provide safety from the power structure to take risks and do new things.”<sup>145</sup> Team risk taking is monitored by risk management reports.<sup>146</sup> Risk managers emerge to help executives manage the corporate economy, the executives’ redesigned task.<sup>147</sup>

From a risk management perspective, the company has four types of demand for legal services:<sup>148</sup>

First, some legal work is risk-transformative.<sup>149</sup> Most of this work is captured in the “lawyer as insurer” image.<sup>150</sup> Creating contractual distributions of responsibility over time and interests—the insurance policy writ large—is a classic lawyerly response to risk. Like insurance agents, lawyers adopt the boy-scout motto, “be prepared.” Whether applying bankruptcy considerations into financial instruments or opt-out clauses into relational contracts, much of legal service adds value by transforming the nature of the risks facing management. Risk transformation products, for example insurance policies and M&A documentation, differ in their customization, but are viewed by companies as standard products. From a risk management perspective, the risks to be managed in buying legal risk-transformation services are “limited to issues such as assessing transactional suitability and reviewing documentation.”<sup>151</sup> Companies minimize suitability risks by providing lawyers with specific objectives, desired results, and team

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142. *Id.* at 67.

143. *Id.* at 198.

144. *Cf.* MAISTER, *supra* note 32, at 16.

145. PINCHOT & PINCHOT, *supra* note 19, at 198.

146. *See supra* text accompanying notes 52, 124–29.

147. *See supra* text accompanying notes 49–52.

148. These distinctions interpret CHRISTOPHER L. CULP, *THE RISK MANAGEMENT PROCESS: BUSINESS STRATEGY AND TACTICS* 238 (2001). Culp later suggests that “[l]egal risk has so many different dimensions that it is difficult even to categorize.” *Id.* at 440 (emphasis omitted).

149. *See also* TRIANTIS, *supra* note 100, at 138.

150. Kagan & Rosen, *supra* note 6, at 415–22.

151. CULP, *supra* note 148, at 238. Culp emphasizes that these risks emerge for business reasons, for example, “that the counterparty has a different understanding of the deal than the [corporate] firm” or risks arising from insolvency. *Id.* at 442, 444.

monitoring. Using standard forms minimizes documentation risks.<sup>152</sup> For this type of demand for legal services, companies seek lawyers who mind their business and sell them products.

Second, companies demand legal work that informs them of and resolves risk. Some legal work informs clients of risks in the legal environment.<sup>153</sup> Other legal work informs clients of legal risks generated by the companies themselves.<sup>154</sup> Sometimes lawyers are needed to work with the risk management team to perform "prudential oversight" of corporate operations.<sup>155</sup> Sometimes lawyers respond when liabilities are realized. Litigators are involved in liability "work-outs." Companies see these activities as species of information technology (IT). As with other information technologies, like computing services, companies select firms to do this type of work who are the most effective/efficient providers. Sometimes consulting firms, not law firms, are chosen by the company to do this work.<sup>156</sup>

Third, some legal work is risk assessment. Lawyers are expected to provide real-world risk assessments, such as the probability of a regulatory audit. Liability assessment useful for the risk management process also requires that lawyers employ basic information technology, such as a decision-analysis tree, with probabilities assigned to concatenating events.<sup>157</sup> Lawyers who can apply the company's risk assessment procedures are sought for this type of work.<sup>158</sup>

Fourth, some legal work is risk management. Risk-assessing legal work is data for risk managers, as legal risks are just one set of risks among many considered in their decisions. Legal risks not only must be assessed, but also processed because legal risks often are not detached risks. Consider understanding a company's insolvency risks without understanding the business risks to which it is subject, not to mention the need to work with accounting and finance staffs. As Professor Theodore Eisenberg concludes, the insolvency risk issue shows "the need for a multidisciplinary approach to risk research in business life."<sup>159</sup> Because

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152. Products emerge to minimize "documentation risk," for example, a clause being "either unenforceable or enforceable in a different manner than the firm had in mind." *Id.* at 440. "To moderate uncertainty surrounding enforceability, as well as to lower transaction costs for participants . . . standardized forms of documentation . . . began to evolve." *Id.* at 441.

153. Culp provides an example of understanding the system of multiple, jurisdictionally limited regulatory authorities. *Id.* at 449.

154. Even "the risk management process at a [corporate] firm . . . can inadvertently create liability—"The board knew the risk was \$1 million, retained the risk anyway, and lost \$1 million!" Statements like that may fly in the face of the goals of putting stakeholder risk tolerances first, but they are nevertheless sometimes made." *Id.* at 238.

155. *Id.* at 450.

156. See, e.g., Richard L. Abel, *Transnational Law Practice*, 44 CASE W. RES. L. REV. 737, 747 (1994).

157. See, e.g., GLENN KOLLER, *RISK ASSESSMENT AND DECISION MAKING IN BUSINESS AND INDUSTRY: A PRACTICAL GUIDE* 198–205 (1995).

158. See *infra* notes 212–13 and accompanying text.

159. Theodore Eisenberg, *Introduction, in Risk Behavior and Risk Management in Business Life* 257 (Bo Green ed., 2000).

legal risks must be processed, and this may require more than a basic knowledge of the law,<sup>160</sup> lawyers can find a place on the risk management team.

The risk management team's task is complicated by the fact that most corporate legal risks are managed, not eliminated.<sup>161</sup> Managing legal risks often involves "choosing to retain rather than hedge them."<sup>162</sup> Some legal work informs clients of how the law requires risks to be managed, such as when courts have required risks to be hedged.<sup>163</sup> But managing legal risks requires assessing all the risks of "policy compliance"/non-compliance and "liability."<sup>164</sup> Approaching problems from the client's business perspective, lawyers on risk management teams approach managing legal risks with non-compliance as a viable option.

It is beyond the scope of this Article to determine if corporations using lawyers as consultants changes the corporations' or lawyers' decisions about what is legally proper. Further research is needed to explore this issue. The principal change described here is an organizational one. The problems set for lawyers differ in the redesigned company and lawyers use different skills. The effects of these changes on lawyer organizations are described in the next part. This Article, however, offers no conclusions about whether, within the type of service for which they have been hired, lawyers behave differently in the redesigned company. Further research is needed to address that question.

#### IV. EFFECTS OF CHANGES IN CLIENT ORGANIZATIONS ON THE CORPORATE BAR

##### A. Corporate Legal Department Effects

###### 1. Re-Engineering Legal Departments

The transformation of legal departments in the 1980s was advanced by their political movement and assisted by corporate imposed controls over outside law firms.<sup>165</sup> Today, legal departments hire law firm partners, as well as associates.<sup>166</sup> The Inside Counsel Movement, however, is far from over. For example, in many companies, inside counsel are not trusted advisors.<sup>167</sup>

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160. Cf. TRIANTIS, *supra* note 100, at 36.

161. Companies have and do accept different risk levels for different legal risks. "For example, although the steel industry has had a rocky history with regard to fair employment practices, its safety record is a model compared with that of the coal industry." RAELEN, *supra* note 58, at 249.

162. CULP, *supra* note 148, at 238.

163. *Id.* at 447.

164. *Id.* at 238.

165. Rosen, *Inside Counsel*, *supra* note 4, at 490-502.

166. Nelson & Nielsen, *supra* note 9, at 457 n.1. The Inside Counsel Movement appears to be making progress. At the company I called "Drafter," based on their primary activity being that of drafting contracts, Rosen, Responsible Organization, *supra* note 4 at 192, law firm cast-offs were no longer being hired and members of the legal department had been on the teams of two outside acquisitions, that outside counsel reportedly only advised on highly specific issues, such as Mexican employment law. Nonetheless, another acquisition, one especially critical to the company, used outside counsel on the team,



On the other hand, some corporate legal departments, including those that had been transformed in the 1980s and whose inside counsel were management's trusted advisors, have been re-engineered.<sup>168</sup> The redesign of legal departments in the 1990s came about by imitation, assisted by organizational development consultants who sold not only the described organizational strategies, but also organizational processes, including benchmarking. "[B]enchmarking is the continuous process of measuring products, services, and practices against the toughest competitors," whose "high performing business units" exemplify best practices.<sup>169</sup>

Benchmarking is presented as an audit procedure.<sup>170</sup> Benchmarking is a process through which accounting multidisciplinary practices, among other consulting firms, advise on the re-organization of corporate legal departments at the same time as they are hiring lawyers. Unsurprisingly, the "best practices" for legal departments mirror those of multidisciplinary practice firms.<sup>171</sup> Despite this self-interest, company clients appear to be heeding their advice. The benchmarked legal department is said to be one that continuously asks itself, "[W]hat needs to be improved within [our] operation in order to obtain optimum value for [our] customers?"<sup>172</sup> It is one that offers the services of internal consultants.<sup>173</sup> As this part describes, benchmarked legal departments redesign their operations to improve relations with project teams and de-emphasize their lawyers' corporate service. This results in changed relations between the General Counsel and inside counsel and the loss of "corporate policy" work.

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reportedly because "we [the legal department] were too busy at that point." 1994 Interview, *supra* note 10.

167. The American Corporate Counsel Association (ACCA) continues to advance the same arguments advanced at its founding in 1986. Larry Smith, *A Fresh Eye on Partnering . . . The Client/Law Firm Threads Draw Tighter*, OF COUNSEL, Oct. 5, 1998, at 2 [hereinafter Smith, *Fresh Eye*]; see generally THE AMERICAN CORPORATE COUNSEL ASSOCIATION, at <http://www.acca.com>.

168. Frederick J. Krebs, *In-House Legal Counsel Adapt in Shifting Times*, NAT'L L.J., Nov. 13, 1995, at C41 ("As clients' operations change, . . . law departments must change as well."). All the corporations that I revisited in 1994 had been partly transformed. 1994 Interview, *supra* note 10. Even at Drafter, team-management was an issue affecting the legal department. See Rosen, *Responsible Organization*, *supra* note 4, at 192.

169. JAC FITZ-ENZ, *BENCHMARKING STAFF PERFORMANCE: HOW STAFF DEPARTMENTS CAN ENHANCE THEIR VALUE TO THE CUSTOMER* 26 (1993).

170. See *id.* at 26-54.

171. Some of this redesign has been beneficial to legal departments. As a result of benchmarking, at one company at least, the intellectual property group (including patent agents) began to report to the General Counsel. Given the technical background (degrees in science and engineering, for example) of the members of the intellectual property group, they proved an important entry for the legal department into team involvement. Managers felt comfortable with them, as they may do with intellectual property lawyers who have technical backgrounds.

172. FITZ-ENZ, *supra* note 169, at 13 ("customers," not "the client").

173. Peter Turner, *In-House Lawyers Versus Consultants: May the Best Adviser Win*, 26 INT'L BUS. LAW. 247 (1998) "[T]oday's corporate lawyers are indeed in direct competition with consultants. Consequently, I believe that we need to rapidly learn how to play the consultant's game according to their rules." *Id.* at 248.

Company redesign poses a significant threat to legal departments. "When a process is re-engineered . . . [f]unctional departments lose their reason for being."<sup>174</sup> In 1995 interviews, Nelson & Nielson found that "[m]any respondents indicated that there is a danger that the Legal Department may come to be viewed as expendable."<sup>175</sup> If legal departments are only hiring-halls for an internal lawyer labor market, lawyers can be moved to other hiring-halls.<sup>176</sup>

Legal departments responded by using the team concept in three distinct ways.

First, they developed "intrapreneurial"<sup>177</sup> teams within the legal department, demonstrating how the department could be a profit center. Second, they divided into competing teams. Third, they promoted company use of lawyers on project teams, thereby creating and maintaining work for inside counsel.

In addition to being a hiring-hall for the company, the legal department can add value to the company by forming its own project teams. "Intraprises" (entrepreneurial teams) can be built within corporate legal departments.<sup>178</sup> Recognizing that "law can itself be a source of profits, an instrument to be used aggressively in the marketplace," the legal department can form project teams, for example, "to use the law to generate new sources of revenue for the corporation."<sup>179</sup> Legal departments also can generate revenues for their companies by selling its lawyers' work in external markets.<sup>180</sup> Sometimes they find a market, and sometimes not. Legal departments also can form teams, task forces, and groups to examine issues that "cut across many people's plates," such as

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174. Knights & Willmott, *supra* note 20, at 8 (source omitted). In the early 1990s, various companies totally outsourced their legal work, eliminating their law departments. Michael France, *Firing the Legal Department*, 15 CAL. LAW. 35 (1994); Michael France, *Corporations Question Need for In-House Counsel*, NAT'L L.J., Oct. 17, 1994, at C3. Others redesigned their legal departments so that outsourcing was "the base against which to measure internal staffing arrangements." David B. Garten, *A Receptive Attitude Makes Change Possible*, NAT'L L.J., Oct. 17, 1994, at C21.

175. Nelson & Nielsen, *supra* note 9, at 477.

176. Larry Smith, *The Shared Services Specter . . . Mobil's Strategy to "Break Down Fiefdoms" Generates Mixed Reactions*, OF COUNSEL, Jan. 5, 1998, at 1 (company adopting "shared services" approach in which inside counsel "report to the same nonlawyer manager as staff from human resources, information technology, purchasing, public affairs, etc.") [hereinafter Smith, *Shared Services*].

177. This popular neologism refers to teams within a company who engage in externally-oriented entrepreneurship.

178. PINCHOT & PINCHOT, *supra* note 19, at 189.

179. Nelson & Nielsen, *supra* note 9, at 466, 487 (providing examples of teams generating revenues "by taking advantage of loopholes in regulations to enter new fields of business by creating new forms of intellectual property, by creating new business entities." *Id.* at 487.

180. PINCHOT & PINCHOT, *supra* note 19, at 190. Sometimes legal departments entering the market of outside legal services can be troubling. Consider, for example, members of an insurance company's corporate legal department who form a private law firm engaging in insurance defense, in part to prevent jurors from characterizing them as company mouthpieces. Julie Kay, *Counterfeit Law Firms?*, FLA. LAW., Oct. 2001, at 6.

"ethics."<sup>181</sup> "Lawyers don't run these" teams, inside counsel emphasize, but they show that the legal department can be more than a hiring-hall and bring inside counsel into contact with "senior operations and staff people."<sup>182</sup>

Second, legal departments responded by dividing themselves into competing hiring-halls. Emphasizing that increasing choice and competitiveness are the ideological underpinnings of team and outsourcing redesigns,<sup>183</sup> some legal departments formed competing teams of inside counsel, which bid against each other for work from project teams.<sup>184</sup>

Third, legal departments promoted their lawyers' inclusion on multidisciplinary teams.<sup>185</sup> Legal departments can market the legal function by advertising "the pervasiveness of legal issues in corporate operations" and by making their "advice more palatable to businesspeople," in part by advertising that they are "part of the company, rather than . . . obstacles to getting things done."<sup>186</sup> Legal departments can accept that, in the redesigned company, legal departments largely function as hiring-halls for teams and promote inside counsel having a place, wherever possible, on teams.

Teams' abilities to outsource their legal work made this marketing role essential to legal departments. Companies are advised that using outsourcing on a project "means that only its outcome matters, and the [legal] knowledge behind it is nonessential" to the company.<sup>187</sup> To persuade project teams to choose them over outside lawyers, inside counsel must demonstrate either that they have the abilities to provide quality, efficient output or that process matters. To do the second, they have to sell themselves as consultants. Best practices for the redesigned company favors inside over outside consultants when "[e]ffectively performing the role of knowledge customization requires in-depth knowledge of the client, including what information and knowledge adds the greatest value, the

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181. 1994 Interview, *supra* note 10. One legal department I visited had made its generation of company-wide teams the department's goal for that year. Although his company was trying to cut down on as many meetings as possible, the General Counsel reported success in organizing retreats, task forces and then teams on company-wide issues, such as the creation of the office of the ombudsman. He emphasized that all these efforts had to be sold as the minimal organizational structures necessary to deal with the issue. *Id.*

182. *Id.* (interviewing a different respondent).

183. PINCHOT & PINCHOT, *supra* note 19, at 121; *see also id.* at 197 ("To create an effective free intraprise system, we must make sure internal customers have free choice among alternatives and that an honest system empowers intrapreneurs to keep and spend, without bureaucratic interference, what they earn for the purposes of the intraprise.").

184. *Id.* at 186-87. The project team would choose which bid, if any, to accept. *Id.* at 187.

185. *Id.* at 194-211; *cf.* Martin A. Levine & Herbert J. Lerner, *Outsourcing: Opportunities and Challenges for the Corporate Tax Executive*, TAX EXECUTIVE, Sept. 1, 1993, at 375, 378 (stating that tax departments are seeking positions on corporate teams).

186. Nelson & Nielsen, *supra* note 9, at 459, 477.

187. DAWSON, *supra* note 54, at 10 (nonessential to the company's "core competencies").

client's decision-making processes and capabilities, and the cognitive preferences of key individuals in the client group."<sup>188</sup>

The team-based redesign of legal departments is sometimes evident in the very architecture of their offices. I have seen headquarter legal department offices where the lawyers have been moved out of the offices they obtained during the Inside Counsel Movement (arguing for their need to protect confidences) to non-floor-to-ceiling modules. Small, enclosed conference rooms are provided and used when there is a need to protect team confidences.<sup>189</sup>

Lawyers may find places on teams, but team management nonetheless threatens the legal department with becoming a mere hiring-hall because "the self-managing team takes on personnel selection, discipline, and compensation."<sup>190</sup> The slogan is that lawyers are functioning not in "Expert-Dependent" but "Communication-Intensive" organizations.<sup>191</sup> The reality is that inside counsel's use and rewards are not determined only by the legal department.<sup>192</sup> As a consequence, although the members of the legal department "may still be in a reporting relationship to headquarters, the real power influencing their destiny stems from the choices made by" the project team.<sup>193</sup>

Because the "quality of the interaction process" guides teams' "selecting between alternative" providers,<sup>194</sup> project teams influence authority relations within the legal department. In some redesigned companies, "[i]ncreasingly some lawyers found themselves with unbillable time. Their plight was made more annoying by the fact that others were turning work away."<sup>195</sup> The result was to increase pay disparity within legal departments.<sup>196</sup> In many cases, seasoned inside specialist lawyers depended on a younger generalist inside counsel, who was a team member, to assign work projects.<sup>197</sup> Judged by billings, in legal departments

188. *Id.* at 154.

189. In one company, next to the conference rooms was a small room with recording equipment and telephones, presumably because paranoia is sometimes justified.

190. Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 891 (1994) ("as well as budgeting, purchasing, and customer-relations tasks").

191. Frank Blackler, *Knowledge, Knowledge Work and Organizations: An Overview and Interpretation*, 16 ORGANIZATION STUD. 1021 (1995).

192. RAELEN, *supra* note 58, at 174-78. Company managers always played a role in determining inside counsel's fate. In the legal departments of the 1980s, lawyer compensation was dependent on "legal skills, interpersonal and team skills." Donald S. Brooks, *Training and Development in a Corporate Law Department*, LEGAL ECON., Nov.-Dec. 1985, at 31, 36. Managers evaluated inside counsel on these skills, Dan A. Bruce, *Performance Appraisal in a Corporate Law Department*, LEGAL ECON., Mar.-Apr. 1985, at 51, but then the legal department had final say in determining compensation. With teams, corporate managers directly exercise control.

193. PINCHOT & PINCHOT, *supra* note 19, at 122.

194. Clark & Salaman, *supra* note 67, at 174.

195. PINCHOT & PINCHOT, *supra* note 19, at 187.

196. Mark Curriden, *It's Lonely at the Bottom . . . Survey Shows Slow Pay Growth Among In-House for Non-Managers*, OF COUNSEL, Jan. 2001, at 24.

197. PINCHOT & PINCHOT, *supra* note 19, at 189-90.

"older lawyers without clients found themselves at the bottom . . . while younger lawyers with excess business found themselves in positions of power."<sup>198</sup>

In redesigned legal departments, inside counsel also may be subject to work intensifications and speed-ups. Although legal departments once were advanced as a place for women with family responsibilities to work,<sup>199</sup> at least one survey of female inside counsel reports that only nine percent believe that flexible schedules will not hurt their chances of advancement and sixty-six percent report having difficulty balancing work and personal life.<sup>200</sup> Other lawyers lured inside return to their old firms, finding no increase in work hours and higher wages outside.<sup>201</sup> Nelson & Nielsen conclude that inside counsel now "attempt to be lean and mean."<sup>202</sup>

Inside counsel always had two reporting relationships, one to the General Counsel and another to the supervisors of the employees with whom they work. Inside counsel's inter-organizational power with supervisors, in part, derived from the strength of their superior's (the General Counsel's) access to the executive suites. Inside counsel's claims to increased respect and dignity within the legal profession depended on the General Counsel attaining power within the company and using this power when the independence of inside counsel was somehow threatened; for example, when they might "have to go along to get along."<sup>203</sup>

In the redesigned company, a General Counsel may have the power in the organization envisioned by the Inside Counsel Movement, but she "may relinquish substantial oversight over the day-to-day operations of in-house counsel and spend more time directly advising and participating in strategy meetings with the CEO and Board of Directors."<sup>204</sup> With self-managing teams and the flattening of the chain of command, the General Counsel has no place to support inside counsel at

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198. *Id.* at 189. If they are like other professionals, older lawyers are more likely to accept the client's definition of the problem and are less likely to engage in conflict on the basis of their professionalism. *See* RAELIN, *supra* note 58, at 18-19. This makes specialist lawyers doubly unlikely to contest the team's requirements, as relayed to them by the more junior attorneys on the teams who employ them. In some legal departments, inside counsel resisted these changes, asserting the requirements of their professional independence. Pinchot & Pinchot describe a lawyer saying that the positive aspects of teams:

must not blind us to a real danger, the danger that some of us, driven by the urge to increase our billings, will bend over too far to help clients pursue ideas that are inherently full of legal risk. In this new [manager's] free choice [of lawyer] system[,] the corporation is increasingly at risk.

PINCHOT & PINCHOT, *supra* note 19, at 188.

199. *See* Grace M. Giesel, *The Business Client Is A Woman: The Effect of Women As In-House Counsel On Women in Law Firms and the Legal Profession*, 72 NEB. L. REV. 760 (1993).

200. *Is Life Really Better In-House?*, AM. LAW., Mar. 2001, at 19; *but see supra* text accompanying note 3 (discussing the unreliability of lawyer surveys).

201. Curriden, *supra* note 196, at 24. It also shows that the pay gap between inside and outside lawyers is increasing. *Id.*

202. Nelson & Nielsen, *supra* note 9, at 487.

203. Rosen, *Inside Counsel Movement*, *supra* note 4, at 552-53.

204. Smith, *Shared Services*, *supra* note 176, at 1.

the team level or at the level immediately above the team.<sup>205</sup> If the General Counsel wishes to exercise her power, she must exercise it at the executive level, in the presence of the VP's of the other functional specialists on the team. Furthermore, the changing role of the General Counsel is accompanied by redesign's attack on intra-organizational bureaucracy. Consequently, even though led by non-monitoring General Counsels, "few if any law departments have formal ethics committees or lawyers designated as ethics consiglieres to advise either the legal staff or the GC."<sup>206</sup>

Redesigning companies also changes the types of work that inside counsel perform. In so doing, it changes inside counsel's abilities to resist irresponsible company actions.

Part of the work of legal departments has been to help draft and enforce uniform rules and standards throughout the company. In the company decision-process, inside counsel have argued for results based on their organizational memory, the corporate culture, the "internal law of the organization," and company policies.<sup>207</sup> Lawyers can "get people to understand and become comfortable with what the company expects and they don't expect."<sup>208</sup> In the redesigned company, however, "Guaranteed Rights" replace uniform rules and standards are constantly changed, due to the company's emphasis on innovation and imitating customers and competitors.<sup>209</sup>

The shift from company-wide rules and policies to "Guaranteed Rights" shifts work from legal departments in three ways. First, there are the direct effects of the lost work. Second, as the "Guaranteed Rights" of the redesigned company, by and large, are employment rights, disputes increasingly involve HR (Human Resources) departments. The legal department, wanting to maintain good relations

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205. Nelson & Nielsen, *supra* note 9, at 473 ("The clear impression for the interviews, however, is that not all questions go up the legal chain of command."). The lack of importance of the General Counsel's professional support in the redesigned company is demonstrated by Nelson & Nielsen's including lawyers who do not report to the General Counsel as inside counsel (for example., lawyers who report to the CFO or VP of Human Resources). *Id.* at 471, 475. Such lawyers were not traditionally thought to be inside counsel. *Counsel, In-house*, 4 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 2851 (Neil J. Smelser and Paul B. Baltes eds., 2001). Enron's General Counsel, James Derrick, is praised by his legal staff for his "honesty, intelligence and affability," but is criticized for being "a hands-off manager" who "doesn't even know the names of his lawyers." What did he do? Derrick was "involved" in Enron board decisions. Hechler, *supra* note 29, at A1, A11. Pinchot & Pinchot recommend the creation of "a tiny corporate legal inspection team with the power to discipline lawyers who failed to look after the safety of the corporation and its officers." PINCHOT & PINCHOT, *supra* note 19, at 189.

206. Smith, *Fresh Eye*, *supra* note 167, at 5; *but see* PINCHOT & PINCHOT, *supra* note 19, at 189.

207. Rosen, *Responsible Organization*, *supra* note 4, at 239-63.

208. 1994 Interview, *supra* note 10.

209. PINCHOT & PINCHOT, *supra* note 19, at 37; *see also* John R. Sutton & Frank Dobbin, *The Two Faces of Governance: Responses to Legal Uncertainty in U.S. Firms, 1955 to 1985*, 61 AM. SOC. REV. 794 (1996).

with managers, often tries to avoid human resources disputes.<sup>210</sup> In large companies, HR legal disputes normally are undertaken either by lawyers working for the VP of HR or by outside counsel. Third, at the same time as lost work drives inside counsel to focus on their acceptance by teams, inside counsel's range of arguments is reduced because inside counsel lose the ability to invoke company rules and standards to resist team pressures. Furthermore, in their self-designed, flexible roles, it is not appropriate for team members to say, "This is my department's position on this issue" or "in my function, we were taught to do it this way."<sup>211</sup>

Before redesign, inside counsel provided to individual managers the company's perspective on what risk levels are acceptable and how to balance risks.<sup>212</sup> In the redesigned company, inside counsel join with other team members to make a team decision on acceptable risks. The inside counsel-team member's only specifically legal task is to measure legal risks. For executives to choose which projects to pursue, they need consistent risk assessments. Risk assessment procedures are standardized in corporate redesign. New recruits into the corporate legal department are not introduced to what levels of legal risks the company finds acceptable, but to a consistent "terminology" to be used in measuring and presenting legal risks across all corporate projects.<sup>213</sup>

Preventive law work<sup>214</sup> continues to have a place in re-engineered companies. As in bureaucratic organizations, inside counsel add value by educating employees to do legal tasks by themselves.<sup>215</sup> But in keeping with the redesigned company's organizational philosophy, when nonlawyer employees do legal work by themselves, there is no monitoring except in particularly sensitive areas. As a General Counsel told me, "You have to treat them like adults."<sup>216</sup>

When pushed, inside counsel admit there are accountability problems with using self-managing teams. But, besides being aware of the problems, not much is being done to address them. For the most part, legal departments are trying to secure their own place in the redesigned company, for example, by developing proper management tools. Such tools include biannual reports on the legal department's performance, prepared according to best practices business models. Some legal departments are responding to the problems of teams

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210. See Rosen, *supra* note 75.

211. Mintzberg, *supra* note 38, at 137-43. See generally GIDEON KUNDA, *ENGINEERING CULTURE: CONTROL AND COMMITMENT IN A HIGH-TECH CORPORATION* (1992).

212. Rosen, *Responsible Organization*, *supra* note 4, at 164-217.

213. KOLLER, *supra* note 157, at 199. Company history in this process is reduced to data-retention. "A well-constructed risk model should provide for . . . downloading model input and output data to a database. Such archived information can be invaluable in solving future problems." *Id.* at 200.

214. Rosen, *Inside Counsel Movement*, *supra* note 4, at 519-25.

215. Preventive law work serves inside counsel as well, by enabling them to concentrate on being part of higher-level teams, "More you educate people, the less time you spend at lower levels," and the more time you spend with "managerial level issues." 1994 Interview, *supra* note 10.

216. Cf. Nelson & Nielsen, *supra* note 9, at 473 ("Inside counsel often noted the legal sophistication of higher levels of management").

indirectly, by trying to build greater department cohesiveness. Increased use of meetings, video-conferencing, retreats, and the like can respond to the breakdown of the department by team assignments. Although their purpose is to create cohesion among inside counsel, in the redesigned company they are justified as being required to enable inside counsel “to be proactive; to add value; to help the machine to do better; [and] shutdowns to do maintenance work.”<sup>217</sup>

In 1994, I learned inside counsel at corporate headquarters knew their heads were on a chopping block. As “headquarters staff,” they were particularly subject to the next wave of downsizings. They knew their careers depended not on their expertise, but on relationships that they feared losing. The inside counsel whom I re-interviewed were older and much more sober than they were in the early 1980s.

## 2. *Purchasing Agents but not Gatekeepers*

In the 1980s, inside counsel became “purchasing agents” for outside legal services. To minimize legal fees, among other reasons, only the legal department could authorize the employment of outside lawyers.<sup>218</sup> Outsourcing changed this. Not only were corporate users of legal services allowed to select whom in the legal department they wanted to engage for their project, but they also were allowed to choose lawyers who worked for outside firms. The proponents of outsourcing argue “users deep in the organization experience [in the legal department] what looks to them like a distant monopoly. If they do not like the service, there is nothing they can do about it except complain—which is unlikely to improve the service in the long run.”<sup>219</sup> In response, corporate redesign allowed end users to select the lawyers with whom they wanted to work. “The inside functions could bid, but the team was free to accept the offer with the best mix of timing, cost, and quality.”<sup>220</sup> In some redesigned companies, corporate legal departments continue to have roles in the purchase of outsourced legal services, but nonetheless they have lost the right to veto the purchase. They still are purchasing agents, but no longer are they gatekeepers.<sup>221</sup>

Outsourcing thus attacked legal department power. Pinchot & Pinchot report that they heard from many clients in many industries that:

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217. 1994 Interview, *supra* note 10.

218. Rosen, *Inside Counsel Movement*, *supra* note 4 at 503–25.

219. PINCHOT & PINCHOT, *supra* note 19, at 121.

220. *Id.* at 169. Raelin explains functional outsourcing as the return of managers’ “right” to go outside. Raelin, *supra* note 58, at 230. *See also* TRIANTIS, *supra* note 100, at 40 (business development group’s role in selection of outside experts).

221. For an instance in which the manager selects a lawyer, see Nelson & Nielsen, *supra* note 9, at 481. Compare the absence of a response by the legal profession or ACCA (inside counsel’s organization) to the loss of the gatekeeping role with that of the Tax Executives Institute (TEI). The TEI “has secured commitments from all of the Big 6 accounting firms that they will not bypass the tax department in seeking outsourcing engagements, and [the TEI] has followed up with the firms where it appears the commitment has not been honored.” *Outsourcing: The Debate Continues*, 47 TAX EXECUTIVE, Mar.–Apr. 1995, at 95, 96.



It is much harder for us to do business with another division of our own company than to deal with an outsider. Vendors have to do what we want or we find someone else. With our divisions, if we ask for something that they don't want to provide, we end up in a political battle that escalates to the highest levels and threatens all our careers. It is easier to put up with mediocrity, or go to the trouble of setting up relations with an outsider.<sup>222</sup>

In the redesigned company, not only are the arguments available to inside counsel restricted, as discussed in the previous part, but also their intra-corporate power is reduced.<sup>223</sup> Companies are advised that outsourcing makes functional departments "want to provide" the requested services and avoid "battles."<sup>224</sup>

With outsourcing, even the purchasing agent role of the legal department was attacked. Some legal departments that sought to remain purchasing agents imposed overhead costs on teams when legal services were outsourced as "an inspection fee to make sure the outsiders did not succumb to excess client pleasing."<sup>225</sup> Managers were quick to portray the overhead instead "as a tariff to encourage continued use of inside resources whenever the decision was a close one."<sup>226</sup> In response, some legal departments reduced their purchasing involvement to just reviewing outside consultants' contracts.<sup>227</sup> In the redesigned company, inside counsel may lose their role as purchasing agents unless they exercise that role as a team member. On many teams, inside counsel's arguments

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222. PINCHOT & PINCHOT, *supra* note 19, at 171. See *supra* note 166 for an inside counsel defense mechanism to teams going outside, "[W]e were too busy" to do the outsourced work. Partnering with outside law firms who will include inside counsel on the team is a more effective response.

223. To reduce legal department power, in my judgment, the threat of outsourcing would have been sufficient. The extent of current legal outsourcing suggests that cutting legal departments down to size cannot be its only justification. Furthermore, the loss of the gate-keeping role does not appear to be economically justified. The economic justifications for outsourcing are the efficiencies of using cosmopolitan providers, especially when the company does not need to capture the cosmopolitan knowledge for its own development. This is the argument of Harvard Business School Professor Quinn, see JAMES BRIAN QUINN, *INTELLIGENT ENTERPRISE* (1992). See summary in PINCHOT & PINCHOT, *supra* note 19, at 168–69. This justification for outsourcing, however, does not support legal departments losing their gate-keeping role, for in the 1980s inside counsel demonstrated that they were the cheapest finders of cosmopolitan legal knowledge. Antonia H. Chayes & Abram Chayes, *Corporate Counsel and the Elite Law Firm*, 37 *STAN. L. REV.* 277 (1985). That redesigned companies expend resources on inside counsel partnering with outside counsel, see *infra* Part IV(B), also suggests strong limitations on the efficiencies gained by not continuing with the legal department as the gate-keeping purchasing agent

224. See PINCHOT & PINCHOT, *supra* note 19, at 171.

225. *Id.* at 190.

226. *Id.*

227. Daryl Van Duch, *Auditors' Top Lawyer Does it All at KPMG*, NAT'L L.J., Apr. 12, 1999, at B1 (KPMG's legal department lawyers only "negotiate and review all consulting contracts"). Legal departments also may retain a role in the retention decision by designating an inside counsel to buffer initial relations between businesspeople and outside counsel. See, e.g., *General Electric Company Outside Counsel Policy*, OF COUNSEL, May 15, 2000, at 5.

for a particular outsourced law firm are respected and, in that sense, inside counsel are still purchasing agents. But teams can override these arguments, thus, inside counsel are no longer gatekeepers.

***B. Relations Between Inside and Outside Counsel: Partnering***

The relations between inside and outside counsel in the redesigned company may be summarized in one word: "partnering."

Outside counsel are quick to embrace outsourcing and porous borders because these organizational strategies can lead to more relational work, rather than one-shot transactions. Outside law firms pursue rotations and internships for their lawyers at their clients, at the same time as they continue to participate in bidding wars, called "beauty contests." "It is fairly common for law firms to temporarily post their lawyers at key clients."<sup>228</sup> This allows for a "rich two-way knowledge transfer and relationship development [as the proponents of outsourcing argue] . . . and [the client] becomes far more inclined to choose that law firm over others it knows less well."<sup>229</sup>

At the same time, outside counsel embrace inside counsel as partners as the outsourcing movement advises.<sup>230</sup> For law firms, when outside counsel have a "partner" inside counsel on teams, the law firm is more likely to maintain sustained relationships with the company.<sup>231</sup> Outside counsel also may support inside counsel winning a place on teams because it provides outside counsel advantages over lawyers who work in consulting firms. Teams are multidisciplinary, so the lawyers meet as equals with, for example, engineers and accountants.<sup>232</sup> Each of these equals has an interest in outsourcing to a different type of consulting firm, many of whom have legal capabilities; there are engineering and accounting firms with legal staffs. Having inside counsel as a partner on the team may help law firms be selected when outsourced legal expertise is sought.<sup>233</sup>

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228. DAWSON, *supra* note 54, at 52. Corporate-imposed controls on billing, including no billing for the time of associates in their first years, also stimulates this trend. Cf. Ann Davis, *Learning Before: Earning No Bill to Clients for Training*, NAT'L L.J., Sept. 30, 1996, at A4. Partnering's advantage for law firms may also be obtained by their hiring former inside counsel. Lisa Brennan, *Don't Bank On It: Thinking of Leaving Law for the Investment World? Learn from those who Switched and Returned*, NAT'L L.J., July 6, 1998, at A1.

229. DAWSON, *supra* note 54, at 162.

230. See *supra* text accompanying notes 68–71.

231. See Jill Schachner Chanen, *Constructing Team Spirit*, 83 A.B.A.J., Aug. 1997, at 58; Smith, *Fresh Look*, *supra* note 167; Larry Smith, *Lawyers as Managers and Managers as Lawyers . . . Steptoe's Shrewd New Client Consulting Strategy*, OF COUNSEL, Mar. 20, 1998, at 2.

232. For a discussion of lawyer difficulties in working as equals, see Chanen, *supra* note 231, at 59.

233. Larry Smith, *ACCA Report Defines a Market . . . Increased Vigilance in a Downsized Environment*, OF COUNSEL, Dec. 1–15, 1997, at 2. Tax departments and outsourced consultants forming an "alliance." Cf. Stephen A. Moore, *Outsourcing the Tax Function: A Survey*, TAX EXECUTIVE, May–June 1994, at 175, 177.

For inside counsel, partnering places them on teams when legal work is outsourced. Both inside and outside counsel will argue that inside counsel is needed to buffer outside counsel's work so that it best serves the corporation's interests.<sup>234</sup> Inside counsel also can argue that, through their presence on teams, they retain, in the company, knowledge transferred from outside lawyers, hence maximizing value to the company from outsourced work.<sup>235</sup>

For companies, partnering supposedly allows them "to impose lasting discipline" and "more sophisticated supervision" on both inside and outside counsel.<sup>236</sup>

### C. Outside Law Firm Effects

In the 1990s, "[m]any law firms have learned from the business world that it's smart to market themselves, strategically plan growth and use management consultants."<sup>237</sup> Law firm management consultants advised law firms to re-orient themselves to be client-focused, thereby selling added value.<sup>238</sup> And many law firms have tried to follow that advice.<sup>239</sup>

A typical account of such a re-orientation is provided by Stephan Haeckel's description of his work with a "mid-sized Midwestern legal firm led by an executive committee of six senior partners" he names the LaBarr Partnership.<sup>240</sup> At a law firm retreat, Haeckel asked the lawyers to describe the mission of the law firm. Each of their self-generated mission statements described the law firm as existing to serve its lawyers by producing high quality legal services.<sup>241</sup> Working with the management consultant, the partners came to see that their mission instead was to provide added value to their clients.<sup>242</sup> Consider these actual law

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234. Peter D. Zeughauser & Sara Holtz, *Partnering Nirvana*, AM. LAW., Nov. 1997, at 36.

235. This aspect of partnering may not be in accord with outside counsel's long-term interests. At two of the corporations I had studied, inside counsel were doing M&A work. At one, sufficient knowledge supposedly was transferred so that M&A deals were made with inside counsel using lawyers in investment banks and accounting firms, but not in law firms.

236. John E. Morris, *A Healthy Disbelief*, AM. LAW., Aug. 1997, at 5; see also Clive Allen, *Partnering: Developing Effective Working Relationships Between Inside and Outside Counsel*, 24 INT'L BUS. LAW. 516, 517 (1996) ("A firm must show commitment to a client and its business"); Daryl Van Duch, *supra* note 227 ("There are firms you have to watch like a hawk, and then there are firms that you can relax with. They're like part of the family.").

237. Jonathan Foreman, *Poor People Skills Can Collapse Firms*, NAT'L L.J., Nov. 29, 1996, at A1.

238. E.g., MAISTER, *supra* note 32.

239. See, e.g., Patrick J. McKenna, *The Next Frontier . . . How To Make Strategic Innovation Happen*, OF COUNSEL, Feb. 2002, at 5; Steven Alan Bennett, *Law Firms Mount Challenges to House Counsel*, NAT'L L.J., Nov. 13, 1995, at C42.

240. STEPHAN H. HAECKEL, *ADAPTIVE ENTERPRISE: CREATING AND LEADING SENSE-AND-RESPOND ORGANIZATIONS* 116-17 (1999).

241. *Id.* at 117-19.

242. *Id.* at 121. Peter Drucker puts it as follows:

firm slogans: “‘Clients First,’ ‘Committed to You and Your Achievements,’ ‘Legal Solutions Tailor Made,’ ‘Practical Lawyers Providing Practical Solutions,’ and [my favorite, depicting the law firm as the client’s best friend] ‘Global Guard Dogs.’”<sup>243</sup>

### *1. The Age of the Minders*

To be focused on clients, law firms think of themselves as client “delivery systems,”<sup>244</sup> whose key is client management. Designs for best practices in law firms are similar to those for their corporate clients, and both derive from templates modeled on consulting firms.<sup>245</sup> Take a trivial example, a change without much substance: Associates once were told they worked for a partner, now associates in many firms are told they work on a client team. Now consider a more significant change.

To be focused on clients, law firms are advised to redesign intra-firm relations along the model of accounting consulting firms.<sup>246</sup> They should create “client relationship partner[s],” who learn about clients’ potential needs for legal services and form teams to service them.<sup>247</sup> They should organize themselves around industries rather than practice areas.<sup>248</sup>

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From a marketing point of view . . . all the questions were: How do we sell the law firm? Not one question: Who buys. . . . You say, “we know our product, we know our competence. Let’s go and find customers for them.” No. That is the way the professional does it, but that’s why the professional needs a marketing man or a marketing woman who can say, “These are our customers. This is what they need. This is how they buy. This is how they work. And this is the direction they’re going.”

Larry Smith, *Outward Bound . . . What Peter Drucker Has to Say to Lawyers and Law Firm Managers*, OF COUNSEL, Mar. 2, 1998, at 2, 3, 13; see also Larry Smith, *Three Soothsayers Assess Profession-Wide Trends for 1996*, OF COUNSEL, Jan. 1, 1996, at 1 [hereinafter Smith, *Three Soothsayers*].

243. Ashby Jones and Michael Ravnitzky, *Counselor at Law*, AM. LAW, Jan. 2001, at 47.

244. John P. Heinz et al., *The Changing Character of Lawyers’ Work: Chicago in 1975 and 1995*, 32 LAW & SOC’Y REV. 751, 770 (1998); see also Jonathan J. Asperger, *How Agile is Your Legal Department? As Corporations Change Operations, In-House Lawyers Better Be Ready to Adapt*, CORP. LEGAL TIMES, Aug. 1995, at 1.

245. See, e.g., CZERNIAWSKA, *supra* note 64, at 23–24.

246. Compare DAWSON, *supra* note 54, at 154, with Gerald Hanlon, *A Shifting Professionalism: An Examination of Accountancy*, in THE END OF PROFESSIONS? 123, 130–37 (Jane Broadbent et al. eds., 1996).

247. Peter D. Zeughauser, *Optimal Organization*, AM. LAW., Mar. 2001, at 63 (asserting that “[t]he wisdom of assigning client relationship partners has become self-evident to most forward looking law firms”). From the company’s perspective, a client relations partner is a “responsible partner” or an “account supervisor.” James M. Melville, *“Responsible Partner” Can Help Ease Conflicts*, NAT’L L.J., Oct. 17, 1994, at C16.

248. See Cindy Collins, *Client Service Strategies . . . A Few Firm Holdouts Resist Interdepartmental Specialty Groups*, OF COUNSEL, Jan. 1, 1996, at 6; Edwin H. Greenebaum, *Development of Law Firm Training Programs: Coping with a Turbulent Environment*, 3 INT’L J. LEGAL PROF. 315, 321 (1996) (describing United Kingdom firms);

Previously, finders, attorneys who brought in new clients, were considered more valuable to the firm than minders, those who maintained relationships with current clients, or grinders, those who did the research, drafted the contracts, and so forth. A client-centric approach implicitly placed a premium on minding talents.<sup>249</sup>

Minders are valuable to the firm because, even if they do not generate work from client chief executives, they generate new work through their contacts with client teams.<sup>250</sup> Law firms are advised that "the greatest untapped source of work is the firm's existing client base."<sup>251</sup> Having enough clients, but not enough work is a common complaint of corporate practitioners.<sup>252</sup> In redesigned companies, work starts from the team level and is managed at the team level.<sup>253</sup> Most communication is peer-to-peer. Finders talk to senior executives and minders talk to project managers and teams, sometimes through juniors when status appropriate.<sup>254</sup> In redesigned companies, work flows bottom-up, rather than top-down. As a result, law firm minders, rather than finders, are most likely to learn of new work that might be outsourced to their firm.<sup>255</sup> When work emerges from teams, many "outside counsel" may be better termed "outsourced counsel" to emphasize that outside counsel's perspective is to become as much a part of the team as the team allows. Instead, they are termed "client relations partners."

In order to be focused on clients, law firms are advised, they must change how work is valued. The most valued work should be tracking changes over time in client circumstances and the law.<sup>256</sup> To value this work, law firms should create

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Smith, *Three Soothsayers*, *supra* note 242, at 11; Lori Tripoli, *A Marketing Ploy That's Worked . . . Law Firm Commitments to Industry Niche Practices Reap Benefits*, OF COUNSEL, Jan. 18, 1999, at 1 ("industry niches facilitate cross selling"); Zeughauser, *supra* note 247 (discussing Freshfields and other firms adopting this form of organization).

249. HAECKEL, *supra* note 240, at 121 (emphasis omitted). On the anxieties of requiring all partners to be finders, see D.M. Osborne, *Awakening: What They Never Told You About Partnership*, AM. LAW., Mar. 1998, at 71. Rewarding the development of work from existing clients may reduce aspects of these anxieties.

250. *How Inside Counsel Are Shaping Firms*, NAT'L L.J., June 16, 1997, at A1, A16 (stating that business does not only come from "the golf course") (citing comments of Jane A. Boyle, Aetna, Inc. from a panelists' discussion).

251. David Temporal, *Beyond Client Care*, AM. LAW., July 2001, at 65 (asserting that "midsize and large firms derive a significant proportion of their income and profit from a small number of clients. . . . At many firms, it is typical to see the top 50 clients generate between 45 and 60 percent of the firm's income."); *see also* MAISTER, *supra* note 32, at 168.

252. As a percentage of all lawyer time, general corporate work decreased from eleven to six percent between 1975 and 1995. Heinz et al., *supra* note 244, at 766-67. Anecdotal evidence suggests that this complaint is a "common" one.

253. *See, e.g.*, TRIANTIS, *supra* note 100, at 181-83.

254. DAWSON, *supra* note 54, at 156-58; *see also* Rosen, Responsible Organization, *supra* note 4 at 36-41 (using the OPM scandal to illustrate the hazards of this relationship model).

255. MAISTER, *supra* note 32, at 178-80.

256. HAECKEL, *supra* note 240, at 121; *see also* Am. Bar Ass'n, *The New Frontiers of Business and Legal Advice, Transformations in Legal Careers and Practice Settings*, the ABF Fellows Seminar, RESEARCHING L.: AN ABF UPDATE, Summer 2001, at 1.

compensation schemes, which encourage increased billings from current clients.<sup>257</sup> In this compensation scheme, client relationship partners' tasks importantly include solicitation, ethically permissible soliciting of one's current clients. The client relationship partners' "role is often nominally a 'sales' function, which is largely consumed by customizing and packaging specialist knowledge to make it most useful to clients."<sup>258</sup>

Finders are castigated as inhibitors of clients developing into "firm clients" because finders see their "clients as the source of the partner's power and influence within the firm," tend to take a "proprietary view of their clients," and hesitate to turn their clients over to other partners.<sup>259</sup> "Rewards for rainmakers too often interfere with the work of client relationship partners. The magic is balancing . . . compensation between those responsible for landing the client and those responsible for nurturing the relationship with the client."<sup>260</sup> Minders and finders partners, who always competed for "firm profits," now also compete for "client profits."<sup>261</sup>

The growing role that minders play in law firms also is influenced by two other changes in corporate law firms. First, there is the demographic shift: Large firm partners are retiring in their fifties.<sup>262</sup> Many of these partners were the finders of companies who may have become "firm clients." With the finder's retirement, the partner who maintains relationship with the firm client becomes essential to maintaining the client as a stable firm client. Briefly stated, the retirements of finders mature minders. Second, there is the corporate litigation boom; in Chicago, the most pronounced growth (between 1975 and 1995) in law firm work was the increasing proportion of time spent on business litigation.<sup>263</sup> In many law firms, there has been a shift in power from the corporate side to the litigation side.<sup>264</sup>

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257. HAECKEL, *supra* note 240, at 122. Law firms are advised to follow the compensation patterns of "the upper-tier accounting and consulting firms." Larry Smith, *Compensating Practice Team Leaders . . . New Competition Requires Fundamental Readjustments*, OF COUNSEL, Mar. 16, 1998, at 2, 2.

258. DAWSON, *supra* note 54, at 154.

259. Temporal, *supra* note 251, at 67; *see also* David H. Maister, *A Matter of Trust*, AM. LAW., Jan.-Feb. 1998, at 34. Status also is involved, "[C]hances are, a partner who heads an entire litigation department won't go quietly into a new role as 'team leader' for litigation affecting segmented industries." Tripoli, *supra* note 248, at 7.

260. Zeughauser, *supra* note 247, at 64. He continues: "Generally, funding the additional compensation for nurturing the account requires phasing out the client-origination portion of partner's compensation after a period of time." *Id.* Are such changes confirmed by the Chicago Lawyers Project finding that law firms are re-organizing away from "dominant seniors"? *See* Heinz et al., *supra* note 244, at 769 (industry groups and client relations partners emerging within law firms are not noted).

261. Client revenues after deducting expenses can be divided between returns distributed within the firm and returns distributed by a determination of the source of the client revenues.

262. *See* Amy Singer, *Special Report: The Graying of the Bar*, AM. LAW., June 2000, at 87.

263. Heinz et al., *supra* note 244, at 766-67.

264. *See, e.g.*, Gail Diane Cox, *Litigators Manage?*, NAT'L L.J., Mar. 13, 1998, at A1.

Especially in established firms, litigation partners have their own battles with non-litigation client finders.

## 2. *Selling Added Value: Services and Products*

To sell client-focused legal services, two questions must be answered: "What do our customers, both present and potential, want? How can we best respond to their needs?"<sup>265</sup> The answers to these two questions focus on law firm contributions to either company processes or results.<sup>266</sup> Law firms can embed their knowledge in closer and deeper client relations and in products offered for sale.<sup>267</sup>

Selling added value through improving corporate processes, law firms market their client relationships. Like other process consultants, the law firm partner has "the chance to build up relationships at an individual level (because the client and consulting team work closely together). In time, these personal relationships grow, providing a bedrock of future client contacts."<sup>268</sup>

Consider this anecdote. With respect to at least one outside firm, a client demanded that the law firm eschew any, even unrelated, representation of economic competitors. For this client, outsourcing's relational contracting "does not dampen rivalry but instead shifts the playing field to sharp competition among rival networks."<sup>269</sup> This client required, as a condition of their outsourcing, that the law firm not serve rival networks in any way. When the subsidiary of an economic rival approached a tax partner in the firm's East Coast office, the tax partner did a conflicts check. As the work being done by his law firm's West Coast branch did not create a legal conflict, the tax partner proceeded with the representation. A few days later, a West Coast junior partner asked the East Coast tax partner to drop the subsidiary. The junior partner told the East Coast partner that this client's minder had told him that this client did not want the firm to assist any of its economic rivals in any way. The East Coast partner contacted the West Coast's client's finder who was surprised to learn of the promise not to assist the client's economic rivals. Eventually, a compromise was worked out (with the client's consent) that the tax partner could continue working on this matter, limiting it in ways that cost the tax partner billable hours, but no further work was to be taken from the rival (whom the tax partner was hoping would buy future services). In this incident, the minder's power was basically affirmed, as was a conception of conflicts responsive to the organizational changes discussed in this Article.<sup>270</sup> As important,

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265. HAECKEL, *supra* note 240, at 230.

266. DAWSON, *supra* note 54, at xvi. Dawson says he expects "lawyers . . . to see immediately the relevance and value of these ideas." *Id.* at xii.

267. *Id.* at 41.

268. CZERNIAWSKA, *supra* note 64, at 117. By contrast, in selling products, "the relationship is very much between the client and the consulting firm as a whole." *Id.* There is a sales transaction that may involve continuing relations, but the client is not buying a relationship. Rather, the client is satisfying needs and taking hostage the reputation of the law firm or other product seller. *Id.*

269. Powell, *supra* note 14, at 59; *see supra* text accompanying notes 76–78.

270. As there was no legal bar to the East Coast partner's work, the firm let a current client restrict the firm's commitment to clients' rights to the lawyer of their choice.

notice how the minder sold the client not only the law firm's legal expertise, but also its business assistance.<sup>271</sup>

Law firms also sell added value through improved corporate processes by selling training. They depict themselves as outsourcing for a learning team:

Professional service firms can either try to hold onto their knowledge, and perform 'black-box' services for their clients, or they can proactively share their knowledge working with their clients to create value. . . . The clients of professional service providers are demanding not only real added value, but also respect. . . . What is most valuable to clients is making them more knowledgeable, helping them to make better decisions, and enhancing their capabilities.<sup>272</sup>

"Empowered clients" is a poster carried by many corporate lawyers as well as legal services and cause lawyers.<sup>273</sup> Although outside "[l]awyers are usually very reluctant to enable their clients to take over any of their own functions. . . . [I]t is increasingly common for [inside] corporate counsel to specifically request knowledge transfer from their legal firms."<sup>274</sup>

Parallel to consulting firms designing for themselves (and their clients) "client relationship partners," consulting firms' market strategy shifted to include the sale of products.<sup>275</sup> Consultants began to promise results.<sup>276</sup> Selling products is a means of promoting outsourcing work. It implicitly tells the client that only results are important.<sup>277</sup>

Today, although "[p]roducts are still usually a small part of the client offering . . . [t]he legal industry is making a concerted effort to 'productize' its services."<sup>278</sup> That many law firms still shy away from marketing products may be the consequence, not only of professional traditions, but also temporary market conditions. Clients still repeatedly pay much of the production costs of the firm's standard forms and procedures. Furthermore, if clients focused on law firms using client work to develop standardized forms and procedures, through whose re-use the law firm "also receives substantial value . . . then the client may . . . try[] to

271. The Big 5 do not promise not to assist economic rivals. *See supra* text accompanying note 73. But, consulting firms' market positions vary and teams innovate taking advantage of various arbitrage possibilities.

272. Asperger, *supra* note 244, at 1; *see* DAWSON, *supra* note 54, at ch. 7.

273. On legal services lawyers, *see*, for example, Louise G. Trubek, *Poverty Lawyering in a New Millennium*, 17 YALE L. & POL'Y REV. 461 (1998). On cause lawyers, *see* Robert Eli Rosen, *On the Social Significance of Critical Lawyering*, 3 LEGAL ETHICS 169 (2001) (reviewing CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITY (Austin Sarat & Stuart Scheingold eds., 1998)).

274. DAWSON, *supra* note 54, at 53.

275. Czerniawski, *supra* note 64, at 25.

276. *Id.*

277. *See supra* text accompanying note 187.

278. DAWSON, *supra* note 54, at 52. The amount of products being sold by lawyers may be underestimated because historic professional regulation creates incentives for lawyers to deny that they are being compensated for their products.



renegotiate the relationship to more of an alliance-based approach" thereby seeking a share of the "product" created during the service.<sup>279</sup>

Today, the explicit push is not to develop products, but to increase the use of "value billing."<sup>280</sup> Like products, value billing makes compensation contingent on producing results. In response to consulting firms selling products, the AICPA (American Institute of Certified Public Accountants) ruled that when accountants act as consultants "results should not be explicitly or implicitly guaranteed."<sup>281</sup> Yet, consultants "all say that their clients are insisting on risk-sharing, . . . [t]hat's just a euphemism for contingency billing or contingency payments."<sup>282</sup> Similarly, while it is unprofessional for lawyers to promise results,<sup>283</sup> value-billing's advocates insist that through value billing, in response to client demand, lawyers are sharing in their client's risk that legal services will be of little benefit.<sup>284</sup> Value-billing's advocates usually do not discuss lawyer promises to corporate clients of potential spectacular results that make the contingency payments acceptable.

As marketing strategies, providing services differ from selling products. As organizational design strategies, they also differ. For example, product development teams may emerge in law firms, as they have in the "intelligent corporation" and consulting firms.<sup>285</sup> Law firms may offer to sell templates, tools, methodologies, and so on.<sup>286</sup> But in the redesigned company, the distinction between selling services and products also blurs; when companies serve customers

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279. *Id.* at 173.

280. Steven T. Taylor, *Billing Rate Survey . . . Is the Sky the Limit or is the Sky About to Fall?*, OF COUNSEL, Jan. 2001, at 1, 9; *see also* MAISTER, *supra* note 32, at 196–97.

281. AM. INST. OF CERTIFIED PUB. ACCOUNTANTS, AICPA PROFESSIONAL STANDARDS MS § 11.06 (2d vol. 1982) (Statement on Standards for Management Advisory Services (SSMAS) No. 1. "Client Benefit") (SSMAS was replaced by Statements of Standards for Consulting Services (CS) on Jan. 1, 1992). The Standard continues: "When estimates of quantifiable results are presented, they should be clearly identified as estimates and the support for such estimates should be disclosed." This qualification may swallow up the reach of the language quoted in the text.

282. O'SHEA & MADIGAN, *supra* note 42, at 296 (citations omitted) (giving an example of Anderson Consulting linking their fee to the number of jobs eliminated as a result of its consultation). Other examples are the tax products that investment banks, accounting firms and law firms have been selling to their clients in which they collect a percentage of the tax savings. Accounting firms argue these "value-based" fees are not within the legal meaning of "contingency fees." For a discussion, see Sheryl Stratton, *SEC Looks at the Sale of Aggressive Products to Audit Clients*, TAX NOTES, Apr. 3, 2000, at 13–16.

283. *See, e.g.*, MODEL RULES, *supra* note 86, at R. 1.13, 7.1(b).

284. Debra Baker, *Who Wants to be a Millionaire?*, 86 A.B.A.J., Feb. 2000, at 36, 40.

285. For an alternative design, see *infra* text accompanying note 295.

286. MAISTER, *supra* note 32, at 94–95.

by producing products that are particularly customized, the distinctions between service industries and product manufacturers collapses.<sup>287</sup>

To understand the blurring of law firms providing services and selling products, consider whether a tax “product” offered by a Big 5 consulting firm to a company, developed from a review of the audit of that company, is a product or a service. To call it a product, as the Big 5 prefer, primarily serves to disengage it from the purchased audit.<sup>288</sup> Similarly, consider a law firm that proposes a tax shelter and provides an opinion letter that the tax shelter is legally acceptable. Is this opinion letter a professional service, a sales document, or both?<sup>289</sup> Or consider an opinion letter that a law firm provides to an investment bank promoting a tax shelter that is to be furnished to customers of the investment bank to encourage them to participate in the shelter. Is this opinion letter, as the Tax Court and the Third Circuit have said, “legal advice” or is it product promotional literature?<sup>290</sup> Or consider the confusion about services and products of tax lawyers turned investment bankers: “When I started out, I was the tax adviser. . . . Then I realized my clients were getting their advice from the investment banks and accounting firms and shelter promoters. I thought, I’ve lost my role.”<sup>291</sup> What is this advisory role? “‘Executives now call us for product,’ says one investment banker.”<sup>292</sup>

Too much can be made of the service/product distinction. Nonetheless, some law firms have re-organized themselves to sell both products and services. Since at least the early 1980s, lawyers have been saying they need to develop the internal training activities of the Big 5.<sup>293</sup> Freshfields has taken steps in that direction by developing PSL’s (Professional Support Lawyers)<sup>294</sup> who support legal services by providing educational services, maintaining form files, and

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287. “This trend was made clear in 1993, when *Fortune* merged its traditionally separate Top 500 rankings of industrial and service companies into a single list, implicitly admitting it could not distinguish between the two groups.” DAWSON, *supra* note 54, at 8–9.

288. The alternative is:

co-creating knowledge with clients. The idea of co-creation epitomizes a true partnership . . . [i]nvolving the client in the actual process of knowledge creation means that it not only has the deepest possible understanding of the knowledge being created, but also develops its own abilities to create knowledge, as a very high level capability.

*Id.* at 171. In this sense, at least, selling products may derogate from client duties.

289. Paul J. Sax, *Shelters: Bringing Back Professionalism*, TAX NOTES, Apr. 3, 2000, at 145 (arguing it is the sale of a product, especially when firm fees are contingent on the tax savings).

290. Lee A. Sheppard, *Shelter Opinions: The Tax Equivalent of Pasties*, TAX NOTES, Apr. 3, 2000, at 17 (considering ACM, concluding that it is not legal advice).

291. Joseph Bankman, *The New Market in Corporate Tax Shelters*, TAX NOTES, June 12, 1999, at 1775, 1783.

292. *Id.* at 1784.

293. I was told this in the early 1980s by a few outside counsel, including a former President of the ABA.

294. Compare Freshfield with Ernst, which has a role it calls “knowledge steward,” who is “based at the client” selling and developing Ernst products and services as the steward becomes more knowledgeable about the company. DAWSON, *supra* note 54, at 154. Ernst’s model is more that of the client relationship partner.

finding new products. The PSL functions include “identify[ing] the latest market-driven developments that will affect legal products, such as new types of bonds and new project-financing methods” and contacting every Freshfields lawyer on a weekly basis and asking “the question, ‘What did you do this week that’s of use to somebody else?’”<sup>295</sup>

Changing demands for legal services in the redesigned company has influenced, and likely will continue to influence, both what lawyers do and how they are organized. Some inside and outside counsel have responded, and others are likely to respond, to changing company demands. Both legal departments and corporate law firms will be very different than they were in the 1980s. Some have modeled themselves, and others are likely to model themselves, on what management consultants prescribe as the best practices for departments and firms supplying professional services.

## V. CONCLUSION

“We’re All Consultants Now” is a poster for two different and co-existing claims. First, organizational redesign means companies use all lawyers as they use consultants. Companies treat inside counsel as inside consultants. Companies treat law firms as just one consulting firm among many. The poster for this movement is “Corporations Are Professional Service Firms.”<sup>296</sup> Second, many law organizations are engaged in organizational redesign, adopting the consulting firm as the model. Legal departments<sup>297</sup> are redesigned to provide substitutes for outsourced legal consultants and to provide consultants about whatever legal work is outsourced. Law firms are adopting a best practices model in which law firms redesign themselves to resemble other consulting firms. “Clients First, Adding Value” is the poster for legal department and law firm redesign.

“We’re All Consultants Now” is part of a larger imitative pattern:

Until recently, each of the professional service industries thought of itself as distinct from others, and so looked primarily to its direct peers and competitors in learning how to confront key business challenges. Law firms studied other law firms, advertising agencies tried to implement best practices in advertising, and engineering firms looked within their own field for ideas and innovation.

This pattern is rapidly changing as professional service firms realize not only that the fundamental nature of their businesses is the same as those in other professional industries; but also that they are facing essentially the same competitive pressures, and sometimes even the same competitors. Given their common foundation, each

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295. Ritchenia Shepherd, *Lawyers Who Don’t Bill Clients*, NAT’L L.J., Mar. 8, 1999, at A17. At one legal department, in 1994, weekly meetings were organized specifically for that purpose. 1994 Interview, *supra* note 10.

296. Inside counsel often stressed in my 1994 Interviews, as one put it, “lawyers are like everyone else in management.” Corporate employees, like a professional service firm, are a collection of professionals. See 1994 Interview, *supra* note 10; *supra* text accompanying note 28.

297. And other places where lawyers work inside companies.

professional service industry has a tremendous opportunity to learn from the methods of all other professional fields. From now on the greatest innovation in professional service firms will come from that cross-pollination.<sup>298</sup>

As one law firm partner admitted, "There's so much law firms have to do to catch up with the Big-5."<sup>299</sup> And some are trying, not only by trying to become multidisciplinary themselves, but also, among other things, by creating industry groups, client relationship partners, and products for sale. Not only do clients use lawyers as consultants, but also lawyers themselves are choosing to act like consultants.

[An] illustration is found in the arena of corporate finance and mergers and acquisitions (M&A). The roles of investment bankers, lawyers, and accountants in structuring and carrying out these transactions were once fairly distinct. However, each of these professional groups has endeavored to take larger roles in the overall transaction, frequently making them direct competitors in the same business.<sup>300</sup>

I once argued that lawyers had a professional obligation to their organizational clients to become "decision consultants."<sup>301</sup> By this I meant that lawyers for organizations sometimes need to assist clients to secure accountable internal decision processes.<sup>302</sup> Lawyers add value to their clients when they ask if the decision is being made at the proper level, with appropriate input, supervision, and so on. More generally, the internal constitutional structure of the company, not only its board structure, ought to be of concern to lawyers.

Instead of lawyers, management consultants have assumed this jurisdiction. They are teaching companies how to make decisions. Companies are implementing organizational strategies that result in, among other things, team transactional control and executive control relegated to managing the company "economy," including supervising risk-management reports. As this Article and perhaps current corporate scandals suggest, the redesigned corporate accountability structure is ridden with gaps.

Consultants are teaching companies how to use expert knowledge. Company implementation of these process controls may create the future I have described above. With consultants describing these best practices, it is of little surprise that best practices for inside and outside counsel mirror those for lawyers employed by consulting (professional service and multidisciplinary practice) firms.

All too often, "[t]alk of 'ethical dilemmas' diverts attention from the structural conditions that have produced the problem in the first place."<sup>303</sup> The

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298. DAWSON, *supra* note 54, at 32–33.

299. Tripoli, *supra* note 248, at 8.

300. DAWSON, *supra* note 54, at 35; *see also* MAISTER, *supra* note 32, at 150–52.

301. Rosen, Responsible Organization, *supra* note 4, at 217.

302. *See, e.g.,* Rosen, *Inside Counsel Movement*, *supra* note 4, at 525–26, 531–33, 538–50.

303. DANIEL F. CHAMBLISS, BEYOND CARING: HOSPITALS, NURSES AND THE SOCIAL ORGANIZATION OF ETHICS 92 (1996).

redesigned company's use of lawyers as consultants and lawyers modeling themselves and their organizations on those of consultants may generate changed lawyer behaviors. As David Luban has warned: "As lawyers come to occupy roles structurally similar to those of deal-makers and clients, it should not surprise us if the lawyers' approach to the law swings increasingly into alignment with this jaundiced view."<sup>304</sup> What can one expect from a future in which everyone connected to the redesigned company, inside or outside, knows that the operating rule is "you will be employed by us as long as you add value to the organization, and you are continuously responsible for finding ways to add value"?<sup>305</sup>

This need not be the future. Responses from law firms that immunize their liabilities, however, will not prevent this future. What needs to be changed is how companies use lawyers. If lawyers do not work to advance such change, perhaps their clients will be forced to. Scandals may result in redesigned organizations becoming "more centralized."<sup>306</sup> Redesigned companies may decide that their organizational strategies need to be modified to reinvigorate bureaucratic "command and control" systems. Such supplementation is not described in the literature that I reviewed.<sup>307</sup> What the consultants are offering de-emphasizes bureaucratic controls. They advocate using authority covertly, thus allowing management to attain plausible deniability of how teams have "added value."

This need not be our future. But development of the Team Production Model<sup>308</sup> of corporate law will not prevent it, as long as the Team Production Model remains focused on changes in the board of directors. This model, like many others,<sup>309</sup> focuses on the top of the company. All these corporate law reform agendas would be greatly strengthened if they paid more attention to empirical, not theoretical, knowledge of company decision-making.<sup>310</sup> Focusing on the board

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304. David Luban, *No Rules?: Considering Values Asking the Right Questions*, 72 TEMP. L. REV. 839, 841 (1999).

305. Powell, *supra* note 14, at 57 (citation omitted).

306. This is "the most drastic change" of Paul Volcker's report on Arthur Anderson. Floyd Norris, *Enron's Many Strands: The Accountants; Anderson Told to Split Audits and Accounting*, N.Y. TIMES, Mar. 12, 2002, at C1.

307. The literature does discuss using information technology as a control mechanism, through the increased use of record-keeping and the like. Cf. MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE* (1972).

308. This model was first articulated in Margaret M. Blair and Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); see also, Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as a Regulatory Tool*, 35 U.C. DAVIS L. REV. 581 (2002).

309. See, e.g., Ira M. Millstein, *Corporate Governance Symposium: Introduction to the Report and Recommendations of the Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees*, 54 BUS. LAW. 1067 (1999).

310. For example, a Team Production Model may argue that a progressive company has a more independent board. Peter C. Konstant, *Team Production and the Progressive Corporate Law Agenda*, 35 U.C. DAVIS L. REV. 667, 684-90 (2002). In convincing research, however, James D. Westphal has found that CEOs successfully respond to increased board independence. CEOs use Board independence to gain advantage on matters like business strategy and CEO compensation. James D. Westphal, *Board Games: How CEOs Adapt to Increases in Structural Board Independence from*

assumes some sort of transmission belt up and down the company. It assumes that, under the top, employees obey instructions and their compliance with instructions can be reviewed.

The preceding analysis suggests these assumptions are no longer accurate. At best, the top manages the economy, not the transactions that violate the law. Delegates exercise authority. At most, the top can say “innovate responsibly.” But norms of self-management create significant gaps in the transmission belt.

In the redesigned company, executives may announce ethics codes, generalized rules of conduct, directions of all sorts, but not instructions. Professionals, perhaps especially lawyers, as they are experienced in the gap between the law on the books and the law in action, “will be quick to point out that the firm’s social proclamations represent mere lip service” if “specific procedures and structures for implementing these goals *throughout* the enterprise” do not accompany the pronouncements.<sup>311</sup> Professionals know that even in their firms, which carry forward professional traditions, there exists large “uncertainty with respect to what management values, and [there is reliance] on personal values in lieu of organizational ethical culture.”<sup>312</sup>

This need not be our future, but recognizing that law firms sell products is likely to be insufficient to prevent it. The Wisconsin School<sup>313</sup> has argued that many contracts are products and product safety regulations for contracts need to be instituted. If the distinctions between legal services and products are increasingly blurring, applying product safety regulations to legal work becomes increasingly attractive. Such regulations even may be necessary, but the prospects for their implementation are slim.<sup>314</sup>

A supply-side response would protect intellectual property rights in legal services/products. As one lawyer ruefully told me, “A third-rate engineer is remembered by those plaques on bridges . . . but a lawyer’s life is hidden in old never-seen papers.” For the sake of the development of our “mysterious

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*Management*, 43 ADMIN. SCI. Q. 511 (1998); see also Jerilyn W. Coles et al., *An Examination of the Relationship of Governance Mechanisms to Performance*, 27 J. MGMT. 23 (2001) (finding little relation between governance mechanisms and performance); Donald C. Langevoort, *The Human Nature of Corporate Boards: Law, Norms and the Unintended Consequences of Independence and Accountability*, 89 GEO. L.J. 797 (2001).

311. RAEIN, *supra* note 58, at 252 (emphasis added).

312. Patricia Casey Douglas et al., *The Effect of Organizational Culture and Ethical Orientation on Accountants’ Ethical Judgments*, 34 J. BUS. ETHICS 101, 111 (2001) (study of two large international CPA firms) (concluding that accountants “will tend towards consistency with the views of those to whom they are accountable if those views are known.”); see also MAISTER, *supra* note 32, at ch. 8. As a General Counsel told me, “ethics handbooks don’t get into the fabric of the company.” 1994 Interview, *supra* note 10.

313. See, e.g., Stewart Macaulay, *Private Legislation and the Duty to Read-Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966).

314. Ted Schneyer, *Professional Discipline in 2050: A Look Back*, 60 FORDHAM L. REV. 125, 127 (1991).

science,”<sup>315</sup> these property rights need to be non-exclusive rights. They also need to be non-exclusive for client protection purposes; the sale by law and accounting firms of “Black Boxes”<sup>316</sup> is improper. There is a name for sellers of secret cures—quacks. The public needs protection from quacks. Intellectual property law (and product safety regulations) could shape the products lawyers sell. The ability to license products, for example, could induce lawyers to publicize the “innovations” they make in client service.

This need not be our future, but to prevent it we need to understand better how lawyers act in the redesigned company. What problems are caused by its structure for using legal services? How do lawyers play on company teams? In regard to legal work, how are authority and accountability exercised in the redesigned company?<sup>317</sup> In regard to legal work, what issues are neither addressed nor responded to by lawyers when they take assignments from the redesigned company? How are legal departments, outside law firms, and lawyers responding to the changes described above?

In this future, lawyers, legal departments, and outside law firms are similar organizationally to consultants and their organizations. We need to learn whether lawyers act like other consultants. We need to know whether authority and accountability are exercised within legal departments and law firms as they are in other professional service firms.

The lawyering process, to a great extent, is open and contingent.<sup>318</sup> Both the shape of lawyer discretion and how it is exercised are problematic. Especially in legal practice, ethical issues are presented “in situations of high ambiguity” where there is “a hell lot more gray than black and white.”<sup>319</sup> “Individuals and groups have to make decisions in a highly complex context where roles and norms, authority and power relationships, competitive pressures, profit motives, and organizational structures all come into play.”<sup>320</sup>

The goal of publishing in law reviews analyses of lawyer behavior and changes in the legal profession, I believe, is to give lawyers tools with which to be responsive to, not determined by, contexts.<sup>321</sup> This Article, unfortunately, does not

315. This is Blackstone’s phrase. See DANIEL J. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* (1941).

316. See Robert Eli Rosen, *As the Big 5 Become Multi-Disciplinary Practices, Opportunities Abound for Tax Executives*, TAX EXECUTIVE, Mar.–Apr. 1999, at 147.

317. See ROBERT ELI ROSEN, *TEAM MANAGEMENT AND CORPORATE LAWYERS: AUTHORITY AND ACCOUNTABILITY IN THE REDESIGNED COMPANY* (using the managerial literature as evidence) (draft on file with author).

318. See Robert Eli Rosen, *Devils, Lawyers and Salvation Lie in the Details: Deontological Legal Ethics, Issue Conflicts of Interest and Civic Education in Law Schools*, in *ETHICAL CHALLENGES TO LEGAL EDUCATION AND CONDUCT* 61 (Kim Economides ed., 1988); Rosen, *Legal Diagnosis*, *supra* note 4, at 182–84.

319. Gary N. McLean & Susan H. DeVogel, *Organization Development Ethics: Reconciling Tensions in OD Values in Organization Development*, in *ORGANIZATION DEVELOPMENT: A DATA-DRIVEN APPROACH TO ORGANIZATIONAL CHANGE* 302, 308 (Janine Wacławski & Allan H. Church eds., 2002).

320. *Id.* at 309 (citation omitted).

321. Rosen, *Legal Diagnosis*, *supra* note 4, at 182.

provide such tools.<sup>322</sup> This Article is a warning about the need to develop such tools. Further research needs to be done to reveal the tools lawyers can use to respond to these organizational changes.

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322. *But see, e.g., supra* text accompanying note 217.