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## Nobody has a "Corner on the Market": The Collaborative Use of Both In-House Counsel and Outside Counsel

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## NOBODY HAS A "CORNER ON THE MARKET": THE COLLABORATIVE USE OF BOTH IN-HOUSE COUNSEL AND OUTSIDE COUNSEL

### I. INTRODUCTION

In business lawyering, there is no single prescription for when to use in-house counsel or outside counsel. Many companies employ both types of counsel. Each brings different advantages to the client and the transaction in issue. Notwithstanding historical resistance in the legal industry about the propriety of deeming in-house counsel as veritable counselors at law, the legal industry has come to accept the importance, power, and contributions of the in-house counsel role.<sup>1</sup> What has resulted is a symbiotic relationship between in-house counsel and outside counsel.<sup>2</sup>

In the context of the evolving and rising history of in-house counsel, this article explores the complex relationship<sup>3</sup> that has existed (and may still exist) between outside counsel and in-house counsel. This article argues in favor of the symbiosis<sup>4</sup> of all counsel and addresses business lawyering, fungibility, and different theories on what is an "Effective Counselor."<sup>5</sup> Further, this article treats the requirements for proper corporate contextual knowledge (what the article calls "tribal knowledge"), teamwork, and a "can-do" paradigm for successful business lawyering.

This article also reviews the cost factors in business lawyering. First, this article will compare outside counsel bill rates with in-house counsel salaries and balance the need for additional statistically significant studies to vet the comparison more. This article will review qualitative factors that impact the cost analysis between in-house and outside counsel. This article submits that there will be times where it is more efficient to use in-house counsel and, times where it is more efficient to use outside counsel, but generally, it will not matter.

While acknowledging there are exceptional subject-matter specializations, neither counsel has a "corner on the market" of providing effective business legal services.<sup>6</sup> The beauty of the symbiotic relationship is that clients can choose to optimize their legal support for facts and circumstances. Ideally, in-house counsel and outside counsel work collaboratively as "Effective Counselors" for a blended legal support to meet their clients' objectives.

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<sup>1</sup> See David B. Wilkins, *The In-House Counsel Movement*, 2(4) THE PRACTICE (May/June 2016), <https://thepractice.law.harvard.edu/article/in-house-counsel-movement/>.

<sup>2</sup> See Eli Wald, *Getting in and out of the House: The Worlds of In-House Counsel, Big Law, and Emerging Career Trajectories of In-House Lawyers*, 88 FORDHAM L. REV., 1765, 1766, 1774, 1782-1785, 1796, and 1797 (2020). The author is grateful to Professor Wald of the University of Denver - Sturm College of Law for his contribution to this article.

<sup>3</sup> *Id.*

<sup>4</sup> See Steven Lovett, *The Employee-Lawyer: A Candid Reflection on the True Roles and Responsibilities of In-house Counsel*, 34 J.L. & COM. 148-149 (2015). As to "inferior legal providers"; see also Mary C. Daly, *The Cultural, Ethical, and Legal Challenges in Lawyering for a Global Organization: The Role of the General Counsel*, 46 EMORY L.J. 1100 (1997); see also Wald, *supra* note 2, at 1767.

<sup>5</sup> See John Herbert Roth, *The Effective Counselor*, 77 ALA. LAW. 190-191 (2016).

<sup>6</sup> See 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, 468 (2000).

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**II. HISTORICAL REVIEW: ASCENDANCY OF IN-HOUSE COUNSEL,  
FUNGIBILITY, AND LEADING THEORIES**

**A. Ascendancy of In-House Counsel to Symbiosis and Collaboration between In-house  
Counsel and Outside Counsel: Nobody Has a Corner on the Market**

This article focuses on and supports the interdependence and symbiosis between in-house counsel and outside counsel. This cooperative paradigm has not always been illustrative of the dynamics between counsel within the legal industry.<sup>7</sup> In the spirit of objectively celebrating the progress of such cooperation, this article provides a brief review of the transformational phases of in-house counsel, as well as the prior, less collaborative attitudes about in-house counsel and its progress towards the contemporaneous symbiosis among counsel.

The coming of age of in-house counsel through four developmental stages<sup>8</sup> threatened the traditional elite<sup>9</sup> legal monopoly of outside counsel. These four developmental stages are:

(1) from the post-Civil-War era to the 1930s (featuring respected business and legal advisers);<sup>10</sup>

(2) from the 1940s to the 1970s (characterized by a decline of the status of “house counsel” vis-à-vis the elite attorneys trained through the Cravath system as one-stop-shop legal solutions);<sup>11</sup>

(3) the 1970s to the 2000s (when in-house counsel made a comeback in power and respect, especially within increasingly complex large corporations);<sup>12</sup> and

(4) the 2000s to present (continuing expansion and transformation of in-house counsels’ prestige and roles within large and small corporations, as well as its selection and supervision of outside counsel).<sup>13</sup>

As in-house counsel ascended in the ranks through the third and fourth stages above, some legal scholars described the relationship between in-house and outside counsel as a struggle over power, pride, reputation, and control (complete with name-calling and

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<sup>7</sup> See Wald, *supra* note 2, at 1767.

<sup>8</sup> *Id.* at 1767-81.

<sup>9</sup> See Robert Eli Rosen, *The Inside Counsel Movement, Professional Judgment and Organizational Representation*, 64 IND. L.J. 479 (1989). Rosen uses the descriptor of “elite” counsel to distinguish outside counsel from in-house counsel 65 times in his landmark article.

<sup>10</sup> Wald, *supra* note 1, at 1767-68.

<sup>11</sup> *Id.* at 1769-71.

<sup>12</sup> *Id.* at 1771-75.

<sup>13</sup> *Id.* at 1776-79.

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questioning the appropriateness of letting in-house counsel practice law).<sup>14</sup> The relationship is characterized as follows: "Although inside and outside lawyers are not quite Hatfields and McCoys, these two parts of what is purportedly a common profession have become increasingly distant and antagonistic, often communicating through dueling pronouncements from their respective bar organizations."<sup>15</sup>

Discouraging this unproductive dialogue and encouraging symbiosis:

Much has been made of the traditional friction and competition between in-house counsel and outside counsel, but to a large extent, the competitive acrimony has done little to make either group a better value, or a better sell, to corporations. Mudslinging detracts credibility from both factions. Cynicism and negativity do not yield positive opinions, and corporate clients do not favor their outside counsel or their in-house counsel as a result of one slinging enough mud at the other. An objective observer would acknowledge that outside counsel and in-house counsel now reside in a much more symbiotic, rather than antagonistic, state. They are, and should be, complementary to each other's function and purpose, although there may still be some quibbling over just how to get the job done.<sup>16</sup>

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<sup>14</sup> See Rosen, *supra* note 9, at 495, 497. For example, in Rosen's landmark article on the rise of in-house counsel repeatedly questions the propriety in calling in-house counsel "counsel." Accordingly, Rosen used expressions such as the following: "[inside counsels'] claims to increased professional standing ought to be challenged", and "What is needed are grounds against which to assess the claims of inside counsel's enlightenment, while recognizing that these grounds are contested terrain", and "the notion of in-house counsel 'as an influential and independent counselor ... is a 'radical' one.'" Other references in Rosen's article to his view of the impropriety or difficulty in deeming in-house counsel as veritable legal counselors are found in these pages: 480, 486, 491, 498, 500, 501, 502, 503-04, 509, 514-15, 520, 526-27, 531-32, 534, 536, 538-39, 544, 546, and 552. Rosen even goes further to question whether in-house counsel can ethically render professional judgment in these pages: 490, 494-95, 501, 519, 524-25, 536, and 541. Some legal scholars, representing big law, reduced itself to pejorative name-calling by referring to in-house counsel as anything but "counsel" or "attorney", including law managers (without high professional status), translators, quirks finder, runners, generalists, counselors of amateurs, purchasing agents, policemen, staff consultants, second-class citizens, non-lawyer legal consultant inferior legal service providers, "failures who did not make it to partner", "lawyers 'who had not quite made the grade as partner[s],'" and "cast-offs of the legal profession."; see also Rosen, *supra* note 9, "law managers" at 534, "translators" at 515, "quirks finder" at 515, "runners" at 515, "generalists" at 515, "counselors of amateurs" at 546, "purchasing agents" at 552, "policemen" at 520 and 526, "staff consultants" at 539, "second-class citizens" (implying in-house counsel was once a "second-class citizen") at 486, "non-lawyer legal consultant" at 531, and "staff" at 544; see also Daly, *supra* note 4, at 1063: "the second-class status ... traditionally stigmatized salaried lawyers." See also Wald, *supra* note 1, at 1767; see also Carl D. Liggio, Sr., *A Look at the Role of Corporate Counsel: Back to the Future-or is it the Past?*, 44 ARIZ. L. REV. 621, 622 (2002). Generally, according to Wald, "in-house lawyers never sought to strip outside counsel of their power and control" and "in-house lawyers were not seeking to replace Big Law as part of a professionalism project or a battle for status or standing." He continues arguing that there is no threat to outside counsel because "in-house lawyers had no reason, no interest, and little ability to bring Big Law down."; see also Wald, *supra* note 1, at 1766-67, 1775, and 1783.

<sup>15</sup> See David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney-Client Relationship*, 78 FORDHAM L. REV. 2067, 2123 (2010).

<sup>16</sup> See Lovett, *supra* note 3, at 148-49; See also Wald, *supra* note 1, at 1767.

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This article wholly supports the positive celebration of the symbiosis between in-house and outside counsel. Even while recognizing that there are exceptions for subject-matter specializations, in general, neither counsel has a categorical "corner on the market" in providing business lawyering.

**B. THE FUNGIBILITY OF BUSINESS LAWYERING**

While in-house counsel rose in importance in the legal industry,<sup>17</sup> a conversation ensued about reasons to seek in-house employment.<sup>18</sup> In parallel, in some respects the value of in-house versus outside counsel converged.<sup>19</sup> "Legal services are more fungible than outside legal service providers may care to admit. The reputational and expertise gaps between in-house and outside lawyers are becoming smaller and, in certain areas, nonexistent."<sup>20</sup> This article submits that, in many matters but certainly not all, there is fungibility between the services proffered by both in-house counsel and outside counsel. Admittedly, there are gaps in each counsels' expertise. Some counsels have unique and profound expertise in certain specializations.<sup>21</sup> This article acknowledges such irreplaceable and non-substitutable value contribution while simultaneously positing that much of business lawyering can be performed well by both outside and in-house counsel. This article highlights key and transferable characteristics that enhance such fungibility of business lawyering. Within such

<sup>17</sup> See Wald, *supra* note 1, at 1767.

<sup>18</sup> The Association of Corporate Counsel itemizes the following reasons to be in-house counsel: hands-on law experience, quality of life, and opportunity for growth. See BECOMING IN-HOUSE COUNSEL: A GUIDE FOR LAW STUDENTS AND RECENT GRADUATES, ASSOCIATION OF CORPORATE COUNSEL, December 2013, 10-11, [https://www.acc.com/sites/default/files/resources/vl/membersonly/InfoPAK/19654\\_2.pdf](https://www.acc.com/sites/default/files/resources/vl/membersonly/InfoPAK/19654_2.pdf). (last visited January 31, 2022). Further, Adecco itemizes the following reasons to be in-house counsel: no billable hours, work-life balance, predictability of schedule, working closely with the business team and interfacing with upper-level management and executives, career track, focusing on practical law versus business development, working on deals from start to finish, focusing on one client, sophisticated work, and overseas assignments; *Top Ten Reasons Go In-House*, ADECCO INC., <https://www.lhh.com/us/en/individuals/resources/top-10-reasons-attorneys-go-in-house> (last visited Jan. 18, 2022).

<sup>19</sup> See Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the In-house Counsel Role*, 41 SETON HALL L. REV. 77, 106 (2011).

<sup>20</sup> See *id.*; Note also how Gilson expands that concept of fungibility of certain legal services (especially as transaction cost engineers) into other professions such as accounting and investment banking where the focus is less on who is providing the service: "Why lawyers? And this question, in turn, decomposes into two different lines of inquiry. From an academic perspective, it is important to understand why lawyers seem to have dominated the transaction cost engineer role over the years. And if this is the legal role, what roles remain for other professionals - such as accountants and investment bankers - and how do the roles of the various professions mesh? From the perspective of the legal profession, a different kind of inquiry assumes importance. How does the profession remain competitive in a world where traditional distinctions between professions, largely formal, have begun, and are likely to continue, to break down?"; see Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 295 (1984).

<sup>21</sup> See *Pros and Cons of In-House Counsel*, THE HARTFORD: BUSINESS OWNER'S PLAYBOOK, <https://www.thehartford.com/business-insurance/strategy/in-house-counsel/pros-cons> (last visited Oct. 3, 2022).

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interchangeable context, the value of business lawyering depends less on who provides it, but rather the quality and effectiveness of the legal service.<sup>22</sup>

Importantly, the fungibility of legal services does not equate to a zero-sum game tradeoff between in-house counsel and outside counsel. A zero-sum game or fixed-pie model presumes that where one party wins, the other necessarily loses in a fixed system of opportunities.<sup>23</sup> It is “a false or exaggerated assumption that mutually beneficial solutions are unavailable.”<sup>24</sup> Not only is such a fixed-pie gaming model inconsistent with the interdependent nature of in-house and outside counsel, but it also fails to allow for parallel growth and interchange within both groups.<sup>25</sup>

For example, if in-house counsel triumphed over Big Law in a zero-sum game, why have in-house lawyers gain only limited control over outside counsel and core legal functions of the corporation? Why are some large law firms prospering when they should be declining? Moreover, if in-house counsel won, why are some in-house lawyers moving back to Big Law?<sup>26</sup>

Thus, as the lawyering content converged into fungible services, the professional opportunities for counsels have become merged into a collaboration of both in-house and outside counsel, all while expanding the overall size of the “pie” of opportunities.<sup>27</sup> Beyond expanding employment opportunities for counsel, the size of the pie represents a significant win-win model for all parties (versus the win-lose model of the zero-sum game).<sup>28</sup> The “increase must be in the overall value of the transaction, not merely in the distributive share of one of the parties. That is, a business lawyer must show the potential to enlarge the entire pie, not just to increase the size of one piece at the expense of another.”<sup>29</sup>

The historical reference and win-win invitation to all attorneys highlights the successful journey of convergence and collaboration as business lawyering expands, benefiting both in-house and outside counsel as well as their clients.<sup>30</sup> In the symbiotic spirit of collaboration, this article rejects categorically any tension between all types of attorneys, instead supporting an open-armed inclusive philosophy among: in-house and outside; specialized and generalist; in big, medium-sized, and small firms; in industry, government, and education. Along these lines one may append to this list business lawyers for “private mergers and acquisitions; start-up ventures; real-estate transactions; attracting, retaining, and firing employees; protecting intellectual property; counseling nonprofit, hybrid, and social

<sup>22</sup> See Mark A. Cohen, *How Does The Legal Function Demonstrate Value To Business?*, FORBES (Feb. 2, 2021, 6:28 AM), <https://www.forbes.com/sites/markcohen/2021/02/02/how-does-the-legal-function-demonstrate-value-to-business/?sh=2eca4026138c>.

<sup>23</sup> See Thomas Hills, *The Zero-Sum Fallacy in Negotiation and How to Overcome It*, PSYCHOLOGY TODAY: STATISTICAL LIFE (Apr. 13, 2018), <https://www.psychologytoday.com/us/blog/statistical-life/201804/the-zero-sum-fallacy-in-negotiation-and-how-overcome-it>.

<sup>24</sup> See Douglas N. Frenkel & James H. Stark, *Improving Lawyers' Judgment: Is Mediation Training De-Biasing?* 21 HARV. NEGOT. L. REV. 1, 16 (2015).

<sup>25</sup> See Wald, *supra* note 2, at 1765.

<sup>26</sup> See *id.* at 1765-66.

<sup>27</sup> See *id.* at 1786.

<sup>28</sup> See *id.*

<sup>29</sup> See Gilson, *supra* note 20, at 246.

<sup>30</sup> See Wald, *supra* note 2, at 1789.

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enterprises; financing; restructuring; and tax.”<sup>31</sup> No law firm, corporation, nor individual is an expert in all of the wide ranging aspects of business lawyering for the applicable business client.<sup>32</sup> Consequently, attorneys are symbiotically dependent on each other.<sup>33</sup> Similarly, and most importantly, businesses also need both in-house and outside counsel. There are many roles to perform and there is no need to deem one type of counsel as more superior than another.<sup>34</sup> Neither has a wholesale “corner on the market” of providing effective legal services.<sup>35</sup> Each should work together, symbiotically and collaboratively, to create value for the business client.<sup>36</sup>

### C. BUSINESS LAWYERING

To create value in business lawyering, all attorneys, whether in-house or outside counsel, must strive to contemplate the legal and business issues surrounding a transaction.<sup>37</sup> Superior business lawyers are intimately aware of their clients’ issues at the macro and micro levels.<sup>38</sup> Such issues include strengths and weaknesses of position, opportunities to leverage,

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<sup>31</sup> See Praveen Kosuri, *Beyond Gilson: The Art of Business Lawyering*, 19 LEWIS & CLARK L. REV. 464 (2015).

<sup>32</sup> See Wald, *supra* note 2, at 1778-79.

<sup>33</sup> See *id.* at 1770; see also note 41.

<sup>34</sup> See Wald, *supra* note 2, at 1778-79 (“It is not uncommon in some industries to observe a hierarchal structure in which several associate and assistant general counsel, in particular specialty areas such as intellectual property and labor and employment law, report to the general counsel, as well as the proliferation of more specialized in-house positions under such associate general counsel”).

<sup>35</sup> See *id.*

<sup>36</sup> See Virginia Smith & Paul Tyler, *How to Develop and Maintain Good Lasting Client Relationships with In-house Corporate Counsel*, 25 UTAH B. J. 30, 33 (2012) (“Recognize that in-house lawyers often have extensive experience in various practice areas and are uniquely positioned to collaborate with outside counsel. Partner with in-house counsel. Do not be afraid to call on that knowledge and expertise or the knowledge that in-house counsel has of other departments as you do work for the company. Be flexible and creative in the degree of in-house counsel involvement. This collaboration can range from litigation management of outside counsel, to attorney work share, to in-house counsel doing the majority of the work on the case with outside counsel acting in an advisory role. Let in-house counsel help to develop strategy and budget. In-house counsel will determine what level of involvement they want to have. Copies of all letters, pleadings, motions, briefs, and memoranda should be sent to the responsible in-house attorney. Do not be offended if in-house counsel edits your work. Hopefully, together the work product will be improved. Send all such documentation in a format that can be edited within a reasonable time to allow a meaningful review. If time does not permit this, the outside attorney should orally outline the strategies and objectives prior to filing. In any matter that may eventually be litigated, work with in-house counsel as early as possible to determine whether a litigation hold is needed and, if so, to put one in place. Use in-house counsel to assist with litigation holds, the collection of documents, and interviewing of company employees.”).

<sup>37</sup> See Wald, *supra* note 2, at 1773.

<sup>38</sup> See *id.* (Explaining there are three prominent roles found to be played by general counsel under varying circumstances, including “‘Cops,’ whose role was primarily a gatekeeping one, in which they relied on their legal expertise to give rule-based legal advice assessing legal risks. Second, ‘counsel’ who engaged in gatekeeping but relied on both legal and institutional knowledge to give legal and business advice. And third, ‘entrepreneurs’ who understood their role to encompass a lot more than mere law avoidance and compliance and relied on legal, managerial, and economic knowledge to give law and business advice.”)

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and threats against which to ward.<sup>39</sup> Below, this article summarizes four descriptive accounts of how lawyers create value.

**i. Rational Economic Theory**

Gilson inquired, “What do business lawyers really do?”<sup>40</sup> and “Why do clients pay business lawyers large fees for the things they do?”<sup>41</sup> Focusing on distributive bargaining in “transaction cost engineering” and using the economic theory of the Capital Asset Pricing Model,<sup>42</sup> Gilson employed rational economic theory to suggest that “If what a business lawyer does has value, a transaction must be worth more, net of legal fees, as a result of the lawyer’s participation.”<sup>43</sup> Resisting the zero-sum game theory of acquiring a larger piece of the pie, business lawyers ideally expand the size of the pie for all, thereby facilitating the clients’ access to a larger piece of a larger pie.<sup>44</sup> Per this theoretical model, “The increase must be in the overall value of the transaction, not merely in the distributive share of one of the parties. That is, a business lawyer must show the potential to enlarge the entire pie, not just to increase the size of one piece at the expense of another.”<sup>45</sup> In significant part, business lawyers do so by decreasing inefficiencies.<sup>46</sup>

**ii. Reputational Intermediaries**

Ten years after Gilson, Okamoto reviewed the value added by transactional attorneys as they serve as reputational intermediaries.<sup>47</sup> Okamoto begins with the question, “Why do companies with corporate counsel continue to pay outside law firms for legal work?”<sup>48</sup> This

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<sup>39</sup> *See id.*

<sup>40</sup> *See* Gilson, *supra* note 20, at 241.

<sup>41</sup> *See* Kosuri, *supra* note 31, at 367.

<sup>42</sup> *See* David W. Mullins, Jr. *Does the Capital Asset Pricing Model Work?*, HARV. BUS. REV. (Jan. 1982), [https://hbr.org/1982/01/does-the-capital-asset-pricing-modelwork#:~:text=The%20capital%20asset%20pricing%20model%20\(CAPM\)%20is%20an%20idealized%20portrayal,of%20expected%20return%20on%20equity](https://hbr.org/1982/01/does-the-capital-asset-pricing-modelwork#:~:text=The%20capital%20asset%20pricing%20model%20(CAPM)%20is%20an%20idealized%20portrayal,of%20expected%20return%20on%20equity) (last visited Mar. 14, 2022) (offering interesting commentary of the Capital Asset Pricing Model that is contemporaneous with Gilson).

<sup>43</sup> *See* Gilson, *supra* note 20, at 243.

<sup>44</sup> *See id.* at 246, 308, 312-13.

<sup>45</sup> *Id.* at 246. Gilson also acknowledged the impossibility of empirically measuring with statistical significance the actual value of business lawyers’ participation. “How can we tell whether a transaction would have been more valuable if a lawyer had participated? A truly empirical approach to measuring the impact of a business lawyer’s participation seems impossible for a number of reasons. It is unlikely that we could find data covering both a sample of transactions in which a business lawyer did participate and a control group of transactions which were accomplished without a lawyer. Even if the data-collection problem could somehow be solved, serious methodological problems would nonetheless remain. While we might know the dollar value attached to particular transactions by the participants, we would still face overwhelming problems in determining whether the transactions were really so comparable that any difference in value could be ascribed to the business lawyer’s participation.”; *see id.* at 247–48.

<sup>46</sup> *See* Eli Wald, *Getting in and out of the House: The Worlds of In-House Counsel, Big Law, and Emerging Career Trajectories of In-House Lawyers*, 88 FORDHAM L. REV., 1765 (2020).

<sup>47</sup> Karl S. Okamoto, *Reputation and the Value of Lawyers* (Symposium on Business Lawyering and Value Creation for Clients), 74 OR. L. REV. 15, 55 (1995).

<sup>48</sup> *Id.* at 19.



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question arises from the potential of the fungible or substitutable services of outside counsel services being replaced by in-house counsel. The study found that such substitutability is not as likely in the case of public mergers and acquisitions (the narrow context of his analysis).<sup>49</sup> Okamoto then asks a follow-up inquiry, "Is there some kind of legal work that prestige law firms will not undertake?"<sup>50</sup> Different from the answer to the former inquiry, the study finds more substitutability arising from outside counsel's denial of representation in certain cases in "that high-end firms generally shun the representation of all but the most elite of companies in the public sale of securities. These observations are consistent with the conclusion that a defining feature of the business lawyer's work is service as a reputational intermediary for her clients."<sup>51</sup>

Furthermore, Okamoto asserts that outside counsel, as reputational intermediaries, permit the use of their name and reputation as a validation of their clients' objectives in this applicable transaction.<sup>52</sup>

These reputational intermediaries will lease their reputation to the client by offering various forms of third-party verification to the other party to the transaction. By joining in the client's assurances, these intermediaries stake their reputations on behalf of the client. The client in turn pays for this service in the form of premium billing rates or commissions charged by the higher reputation firms.<sup>53</sup>

Only in the narrow context of the above analysis (public mergers and acquisitions), the study finds less fungibility of business lawyering.<sup>54</sup> However, Okamoto does not posit any theory against fungibility generally or a lack of collaboration between business lawyers.<sup>55</sup>

### iii. The Economic Costs of Business Lawyering

Schwarcz's approach to survey dozens of general counsel about a host of questions intended to differentiate the strengths and weaknesses of outside and in-house counsel.<sup>56</sup> To do so, Schwarcz inquired about and analyzed six theories that business lawyers can use to add value for clients: "(1) by minimizing potential for litigation; (2) by reducing transactional costs (Gilson's theory); (3) by reducing regulatory costs; (4) as a reputational intermediary (Okamoto's theory); (5) via enhanced communication because of attorney-client privilege and confidentiality; and (6) by creating economies of scope."<sup>57</sup> The study concluded that business lawyers' primary contribution relates to adding value by reducing costs of transactional

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<sup>49</sup> *Id.* at 33.

<sup>50</sup> *Id.* at 20.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 34.

<sup>53</sup> *Id.* at 23.

<sup>54</sup> *Id.* at 23, 24.

<sup>55</sup> *Id.* at 24.

<sup>56</sup> See Steven J. Schwarcz, *To Make or to Buy: In-house Lawyering and Value Creation*, 33 IOWA J. CORP. L. 527-530 (2008).

<sup>57</sup> Kosuri, *supra* note 31, at 469-70.

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lawyering.<sup>58</sup> Further, the study explored various factors that can cause the positive transformation of the in-house counsel role to accelerate or decelerate, as well as factors that attract talented counsel to in-house and outside counsel roles, respectively.<sup>59</sup> This article later cites instructive findings from the study.<sup>60</sup>

**iv. The Seven Characteristics of Great Business Lawyers**

In a complementary critique of Gilson, Okamoto, and Schwarcz, the article written by Kosuri appends seven characteristics shared by great business lawyers.<sup>61</sup>

1. Great Business Lawyers Understand Business<sup>62</sup>
2. Great Business Lawyers Are Loyal to Their Client<sup>63</sup>
3. Great Business Lawyers Understand People<sup>64</sup>
4. Great Business Lawyers Become Part of Their Client's Team<sup>65</sup>
5. Great Business Lawyers Are Creative<sup>66</sup>
6. Great Business Lawyers Solve Problems<sup>67</sup>
7. Great Business Lawyers Add Value to Their Clients<sup>68</sup>

In light of this article's assertion that neither outside nor in-house counsel can have an absolute "corner on the market" of ideal business lawyering,<sup>69</sup> it discusses each of these seven desirable characteristics, save the second and third ones.

The ascendancy of in-house counsel invited to business lawyering the paradigm-shift, moving from a perceived steep gradient between outside and in-house counsel to one of a more level playing field.<sup>70</sup> Leveling can and should promote a movement away from a territorial zero-sum-game mentality to one of finding value for the client through business lawyering.<sup>71</sup> Within their respective analytical limitations and assumptions, the above four descriptive accounts attempt to explain distinctions between in-house and outside counsel.<sup>72</sup> Drawing from the

<sup>58</sup> Simmons & Dinnage, *supra* note 20, at 115.

<sup>59</sup> *Id.* at 147.

<sup>60</sup> Schwarcz, *supra* note 56, at 537-30.

<sup>61</sup> Kosuri, *supra* note 31 at 466.

<sup>62</sup> *Id.* at 475-476.

<sup>63</sup> *Id.* at 476-477.

<sup>64</sup> *Id.* at 477-478.

<sup>65</sup> *Id.* at 478.

<sup>66</sup> *Id.* at 478-479.

<sup>67</sup> Kosuri, *supra* note 31, at 479-480.

<sup>68</sup> *Id.* at 480-481.

<sup>69</sup> *Id.* at 477.

<sup>70</sup> See David B. Wilkins, *The In-House Counsel Movement*, THE PRACTICE (May, 2016), <https://thepractice.law.harvard.edu/article/in-house-counsel-movement/>.

<sup>71</sup> See generally *Becoming In-House Counsel: A Guide for Law Students and Recent Graduates*, Association of Corporate Counsel (Dec. 5, 2013), [https://www.acc.com/sites/default/files/resources/vl/membersonly/InfoPAK/19654\\_2.pdf](https://www.acc.com/sites/default/files/resources/vl/membersonly/InfoPAK/19654_2.pdf).

<sup>72</sup> See generally Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 295 (1984); Karl S. Okamoto, *Reputation and the Value of Lawyers*, 74 OR. L. REV. 15 (1995); Praveen Kosuri, *Beyond Gilson: The Art of Business Lawyering*, 19 LEWIS & CLARK L. REV. 464 (2015); David W. Mullins, Jr., *Does the Capital Asset Pricing Model Work?*, HARVARD BUSINESS REVIEW (Jan., 1982), <https://hbr.org/1982/01/does-the-capital-asset-pricing-model-work#:~:text=>

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helpful foundation provided by above mentioned four articles, this article furthers the conversation through a collaborative paradigm between in-house and outside counsel while also providing recommendations on how any business lawyer can be more effective. The first recommendation is to garner "tribal knowledge."

### III. TRIBAL KNOWLEDGE

Businesses have sought "lawyers who were well versed in all aspects of their clients' business operations and therefore equipped to advise clients on a daily basis with respect to compliance issues."<sup>73</sup> All business counsel should garner "an up-close, fine-grained knowledge of the corporate enterprise. It calls for instantaneous response, day-to-day in-depth continuity, and on-the-ground presence."<sup>74</sup> This article refers to "up-close," "fine-grained," day-to-day knowledge as "tribal knowledge."<sup>75</sup>

Along these lines Katherine Compton asserts:

You should learn all you can about your client's business, strategies, policies, and corporate culture. The better you understand what the company does and how it operates, the better you will represent the company and the more comfortable the company will be to seek your counsel. You need to understand the difficulties and risks the company is facing. You should understand that there has been a shift in the regulatory environment for many companies. Show the company that you 'get' what it is dealing with.<sup>76</sup>

With a host of risks in providing businesses with legal services, lawyers add value in helping reveal clients' blind spots or seeing around corners.<sup>77</sup>

When my question - what does a business lawyer *really* do - is put to business lawyers, the familiar response is that they 'protect' their clients,

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The%20capital%20asset%20pricing%20model%20(CAPM)%20is%20an%20idealized%20portrayal,of%20expected%20return%20on%20equity.

<sup>73</sup> Daly, *supra* note 4, at 1061.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Smith & Tyler, *supra* note 36, at 32.

<sup>77</sup> See Katherine Compton, *Attorneys' Fees: What In-house Counsel Wish Outside Counsel Knew about Legal Fees*, 75 TEX. B. J. 711 (Oct. 2012). The author calls this "seeing with l'eagle eyes." This tribal knowledge can provide an opportunity for value-added contributions by business lawyers that were otherwise in the companies' blind spots. "If an attorney knows an in-house client's business and industry, that attorney may be able to identify potential lawsuits in which the client could possibly win large damages." Compton continues with a practical example, "An attorney may learn that a client's former employees have gone to a competitor, taking the client's trade secrets with them. In talking to the client, the attorney learns that the former employees are under non-compete agreements. Suggesting that the client bring a lawsuit seeking money damages from the competitor and departing employees, where appropriate, can bring revenues in the form of money damages to the client." To garner this level of tribal knowledge, business lawyers must listen, know the relevant law, know the industry, know the competition, and know the company.

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that they get their clients the 'best' deal. In the back of their minds is a sense that their clients do not appreciate them, that clients neither perceive nor understand the risks that lawyers raise, and that[,] as a result[,] clients do not recognize that it is in their best interest when lawyers identify the myriad of subtle problems unavoidably present in a typical transaction.<sup>78</sup>

One survey of general counsel by BTI Consulting Group evinced "overwhelmingly" that what they most value in outside counsel is "client focus" which meant the respondents' "understand[d] our business."<sup>79</sup>

Further, the leading in-house counsel organization, Association of Corporate Counsel, suggests similar advice to in-house counsel that is applicable to business lawyering generally as follows:

It is imperative that in-house counsel fully understands the complexities of a company's business as well as the respective industry to best serve their client. ... In-house counsel can utilize their unique position within the organization's structure to play an integral role in the strategic planning of the company's business. Counsel can provide legal insight that might otherwise never be addressed from more business-oriented directors.<sup>80</sup>

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<sup>78</sup> See Gilson, *supra* note 20, at 242; see also Lovett, *supra* note 4, at 144-45.

1. LISTEN: Many in-house lawyers' intelligence inhibits their ability to listen. They hear only the first half of the question, or they so quickly jump to a stock legal rule, practice, or position that they forget to listen to the entire question, weighing the goal of their client against the backdrop of the law. 2. KNOW THE LAW: Staying current on the laws, regulations, and litigation that affect a company's industry is vital to providing good advice. Set up electronic devices and information streams so there is a steady diet of current and relevant legal information. Daily (or weekly) canvassing of a few key web sites and legal newswires is an excellent technique for keeping up with the curve. 3. KNOW THE INDUSTRY: As important as the law is to a client-company, how the law fits (usually reactively) with a company's core business activities is the knife edge of where an in-house lawyer sits. Most industries have their own trade journals (many times online) and news outlets or resources. If an in-house lawyer fails to keep pace with market trends, supply-side issues, delivery systems, demand-side issues, customer demographics and trends, and the myriad of other topics that may affect a corporation's operations, he or she will fall woefully short of meeting a corporation's needs, as would even the best-prepared legal mind. 4. KNOW THE COMPETITION: As part of staying current on industry matters, an in-house lawyer's capacity to keep a client-company's competition "on the radar" is essential. Not only will the actions, news releases, employment issues, public-image issues, acquisitions or divestments, success, and failure of the competition give an in-house counsel a wealth of contextual information, it might also prove valuable when there is the need to attack or join its efforts. 5. KNOW YOUR COMPANY: An in-house lawyer must keep your finger on the pulse of his or her employer-corporation. Watch what is going on at every level (or on as many as can be managed). Drop by different departments, ask to sit in on meetings, attend company functions, participate in committees outside the legal department, and let everyone know the legal department is there to help (not interfere) and to support their jobs and operations.

<sup>79</sup> Wilkins, *supra* note 15, at 2088.

<sup>80</sup> See *Becoming In-House Counsel: A Guide for Law Students and Recent Graduates*, *supra* note 71 ("In-house counsel have the luxury of being able to approach business problems without having ultimate responsibility for resolving the matters. This objectivity enables counsel to contribute meaningful suggestions to be used in resolving complicated business questions.").

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To better understand the nuances of their clients' businesses, business lawyers should express a genuine and detailed interest by asking a plethora of questions to better understand the drivers, means, resources, competitive environment, problems, and objectives of the client.<sup>81</sup> Addressing from a business angle these concerns, management and economics guru Michael Porter created a model of the five competitive forces upon all businesses.<sup>82</sup> These forces are supplier power, buyer power, threat of a new entrant, competitive rivalry, and threat of substitution.<sup>83</sup> Each of these forces impacts the value creation, success, longevity, and financial stability of businesses.<sup>84</sup> Importantly, each has a legal component. With respect to in-house counsel, "corporations require legal support as an indispensable [*sic*] aid to manage these ongoing threats, which often involve a legal component. Examples such as failure to comply with a federal regulation, a poorly written supply contract, or a mishandled product lawsuit, all constitute a threat to corporate value."<sup>85</sup> While agreeing with the above comment directed to in-house counsel, this article asserts that outside counsel should also provide good legal support to manage these forces.<sup>86</sup> As to business lawyers, "his or her mental resources are charged with addressing and/or being responsible for the full spectrum of employer-company's liabilities, business operations, and current projects-past, present, and future."<sup>87</sup> Both in-house counsel and outside counsel must equally provide competent representation in using a company's tribal knowledge to deal with such market forces.<sup>88</sup>

While in-house and outside counsel justifiably strive to have such tribal knowledge, there may well be room for improvement for both in-house counsel and outside counsel. Neither has an unqualified "corner on the market" of tribal knowledge.<sup>89</sup> Practically, any gap in performance between in-house counsel and outside counsel emphasizes the need for symbiosis between them to optimize the legal services for the client.<sup>90</sup>

### A. Respective Advantages of Tribal Knowledge

In-house counsel have the advantage of accessing and practicing tribal knowledge because they are, by definition, insiders.<sup>91</sup> "In-house lawyers would be a better source of institutional memory about the company's history and practices than outside firms."<sup>92</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> See MICHAEL E. PORTER, *COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS* 35 (1980).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Simmons & Dinnage, *supra* note 20, at 83.

<sup>86</sup> Kosuri, *supra* note 31, at 476.

<sup>87</sup> Lovett, *supra* note 4, at 119.

<sup>88</sup> See Neil J. Wertlieb, *The Rules of Professional Conduct Apply to In-House Lawyers*, ABA (Dec. 20, 2021), <https://www.americanbar.org/groups/litigation/committees/corporate-counsel/articles/2021/fall2021-rules-professional-conduct-apply-in-house-lawyers/>.

<sup>89</sup> Kosuri, *supra* note 31, at 477.

<sup>90</sup> See Howard J. Aibel, *Successful Teaming of Inside and Outside Counsel to Serve the Corporate Client*, 38 BUS. LAW 1587, 1594 (1983).

<sup>91</sup> Kosuri, *supra* note 31, at 468.

<sup>92</sup> Wilkins, *supra* note 15, at 2095.

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Frequently, business clients' internal discussions precede the inclusion of outside counsel in the conversation as the matter is not sufficiently developed or ripe; it is still in the planning or development stage.<sup>93</sup> However, from the business clients' earliest discussions, in-house counsels are more likely to participate.<sup>94</sup> A non-exhaustive, exemplary depiction of such discussions includes:

- ☐ planning and strategy meetings for supplier selection;
- ☐ product go-to-market tactics;
- ☐ the development of new contractual templates for latest products and services;
- ☐ the creation of a contract clause library inclusive of alternative provisions tied to a concession plan therefor;
- ☐ for with the creation of delegation of authority for the approval of non-standard contractual terms for settlements, net payment terms, interest payments, indemnity coverage, limitation of liability of type and amount, warranty limits, audit restrictions, technical service level support;
- ☐ patent monetization in light of forecast product obsolescence;
- ☐ pricing models through multi-layered distribution channels in light of anti-trust concerns;
- ☐ licensure, certifications, and registrations for product expansions into markets in new foreign jurisdictions; and
- ☐ training worldwide employees on company-specific codes of conduct, harassment reporting protocols, confidentiality policies, data marking requirements, invention harvesting programs, and business gift policies.<sup>95</sup>

Outside counsel may not be able to force themselves into all such activities and conversations. But outside counsel can seek to learn of all such activities, policies, programs, protocols, and procedures, and then propose additional guidance and improvements thereto drawn from their experiences with other clients who face similar issues.<sup>96</sup> Outside counsel may have best-in-class insights to aid the in-house counsel in avoiding unseen "landmines" and may even have proverbial scars to prove it.<sup>97</sup> Outside counsel tend to have clients that transcend

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<sup>93</sup> Aibel, *supra* note 90, at 1589.

<sup>94</sup> *Id.* at 1588.

<sup>95</sup> Kosuri, *supra* note 31, at 473, 480.

<sup>96</sup> Simmons & Dinnage, *supra* note 20, at 114.

<sup>97</sup> Aibel, *supra* note 90, at 1588-89.

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multiple industries and are of different sizes and risk profiles.<sup>98</sup> This amplified view of the overall market provides valuable insights to business clients who generally want a broader risk profile perspective. In contrast, in-house counsel tend to have a narrower focus on their respective companies and their strategies, plans, problems, and issues.<sup>99</sup> Outside counsels' demonstration of such value added to the business clients' internal strategies, plans, problems, and issues will engender a cycle of increased inclusion of outside counsel and thereby enhance their tribal knowledge of the business client. Ideally, "outside corporate counsel is just as driven by the goal of value contribution as" in-house counsel.<sup>100</sup> As a result, the business client receives superior business lawyering from the combined and collaborative input of both in-house and outside counsel.

This combined, synergistic benefit between counsel is ideal, especially in a world without economic constraints. However, every business faces the reality of limited resources for business lawyering.<sup>101</sup> In some circumstances, the fungible nature of business lawyering manifests itself in having outside counsel handling the matter and, at other times, vice versa.<sup>102</sup> Hence, there remains the question of when to use in-house counsel and when to use outside counsel.

One leading study surveyed dozens of general counsel in an effort to distinguish when to use in-house counsel or hire out the legal service to outside counsel.<sup>103</sup> The majority of general counsel surveyed evinced that outside counsel brings the particular benefits of domain expertise, increased issue-spotting from independent objectivity, and more resources to immediately attend to the business transaction.<sup>104</sup> This is not to say that in-house counsel does not exhibit these strengths. As all these characteristics are laudable, in-house counsel should also strive to bring them to bear in their business lawyering.<sup>105</sup>

In contrast, one hundred percent of the general counsel evinced in the above study that in-house counsel has an advantage with their intimate company knowledge to help them spot issues faster than outside counsel.<sup>106</sup> Other advantages the significant majority of general counsel attributed to in-house counsel are understanding the company culture and more proactivity, availability, and timeliness.<sup>107</sup> Their inherent proximity to and daily interactions with their peers drive the natural advantage for in-house counsel.<sup>108</sup> "[I]n-house counsel who are already familiar with their company's regulation and its organizational and operational structure may be able to achieve economies of scope by avoiding the learning curve of having to become educated about these matters."<sup>109</sup> As a result, outside counsel can consciously strive

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<sup>98</sup> *Id.*

<sup>99</sup> See Simmons & Dinnage, *supra* note 20, at 113.

<sup>100</sup> See Lovett, *supra* note 4, at 149.

<sup>101</sup> See Schwarcz, *supra* note 60, at 43.

<sup>102</sup> See Simmons & Dinnage, *supra* note 20, at 148.

<sup>103</sup> See Schwarcz, *supra* note 60, at 514.

<sup>104</sup> *Id.* at 554.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 553.

<sup>107</sup> *Id.* at 512-14.

<sup>108</sup> *Id.* at 553.

<sup>109</sup> *Id.* at 508-09.

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to gain an intimate knowledge of the company and its culture (tribal knowledge) and enhance their responsiveness to the clients in an effort to adopt advantages of their in-house colleagues.

As asserted above, there are certain advantages to in-house counsel and others to outside counsel in the application of tribal knowledge in business lawyering.<sup>110</sup> Neither counsel has a “corner on the market” in all circumstances. The common lesson for both counsels, however, is that to garner the advantages of tribal knowledge, business lawyers must be present to ask a lot of questions and listen to learn and apply what they learn.

#### IV. TEAMWORK

Being a recognized, trusted, and integrated member of the team is important for business lawyers.<sup>111</sup> Both in-house counsel and outside counsel share this challenge.

In-house counsel has an initial advantage of position being an employee of the client.<sup>112</sup> However, proximity does not necessarily determine integration and trust. In-house counsel needs to become a full team member by showing competence with business lawyering using tribal knowledge with a “can-do” frame.

Although it may be difficult, outside counsel can also successfully and even intimately integrate themselves within their business clients’ inner circles, including both their legal and business representatives. That is the inherent challenge for outside counsel as they are, by definition, “outside.”<sup>113</sup> Kosuri explains the outsider barrier as follows:

Clients that are engaged in a transaction or some other form of business often act through teams. Usually[,] the composition of the team is a selection of internal employees. Outside advisors such as consultants, bankers, accountants, or lawyers are rarely viewed as part of the team. That creates a barrier between the client and the advisor.<sup>114</sup>

To overcome this barrier, all business lawyers (including outside counsel) have the challenge to become an integrated member of the team.<sup>115</sup> The outside lawyer’s role is further presented:

Getting a client to treat the business lawyer like an actual team member facilitates communication which leads to better and more-candid advice. The lawyer’s role is to be an advisor. When the lawyer is viewed as an outside party, clients do not treat him with the same trust and familiarity as one of their own. Great business lawyers integrate themselves into the client team and break down that barrier. Fully integrating into the team also better

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<sup>110</sup> See Schwarcz, *supra* note 60.

<sup>111</sup> See Kosuri, *supra* note 31, at 478.

<sup>112</sup> *Id.* at 468.

<sup>113</sup> *Id.* at 478.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*



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aligns incentives which allows the business lawyer to fully prioritize his client's success.<sup>116</sup>

Being a fully integrated member of the team can bring along expectations of superior legal support.<sup>117</sup> Business clients see beyond the glamorized reputation and promises of performance. As legal services may be perceived as commoditized or fungible, some business clients look to be given priority in responsiveness as legal services, whether solely by in-house counsel or outside counsel, or from a combination of them.<sup>118</sup> Simmons and Dinnage state:

[C]orporations are becoming more savvy and sophisticated purchasers of legal services. Within this context, corporations are seeking value added beyond law firm reputation. Corporations and in-house legal departments often possess a more instrumental demand-side view of legal services and do not differentiate between legal services and other procured services. Depending on the type of legal work involved, multiple firms may adequately perform the task. Other components of value, such as responsiveness and cost, can make a less reputable firm more attractive to the client corporation. Thus, a five-star law firm may not be necessary where a three-star firm will suffice.<sup>119</sup>

Accordingly, there is not only a competition amongst outside counsel firms to win the legal business of companies; in-house counsel can also differentiate themselves to provide alternative solutions to "fungible" business lawyering.<sup>120</sup>

Outside and in-house counsel can drive out inefficiencies in quality and cost to increase the overall value for their clients.<sup>121</sup> In fact, one leading study found that general counsel were overwhelmingly indifferent as to who was more efficient, in-house counsel or outside counsel.<sup>122</sup> When asked, "Who handles repetitive transactions more efficiently, taking into account quality and cost?" and "Who handles non-repetitive transactions more efficiently, taking into account quality and cost?", almost two-thirds responded equally with the answer, "It depends on the nature of the transaction."<sup>123</sup> Again, this finding speaks to the general, but not absolute, fungibility of efficient business lawyering.

Increased efficiencies in quality and cost are fomented by enhanced "relations between in-house and outside counsel" which "may be summarized in one word ... 'partnering.'"<sup>124</sup> This interaction moves away from the "strong boundaries that once separated firms", and makes relations between in-house and outside counsel "more intimate."<sup>125</sup> With the

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<sup>116</sup> *Id.* at 464.

<sup>117</sup> *Id.* at 478.

<sup>118</sup> See Simmons and Dinnage, *supra* note 20, at 106-107.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Kosuri, *supra* note 31, at 468.

<sup>122</sup> Schwarcz, *supra* note 60, at 557.

<sup>123</sup> *Id.* at 553.

<sup>124</sup> Wilkins, *supra* note 15, at 2094.

<sup>125</sup> *Id.* at 2094.

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use, consolidation, and use of “preferred firms” coupled with the “knowledge transfer between companies and firms”, business clients can “blur the boundaries between the in-house and outside, and ... are spurring the creation of a new working partnership between companies and their primary outside firms.”<sup>126</sup> Although in-house counsel and outside counsel experience inherent competition between them, the modern trend is for “coopetition,” an acknowledged paradoxical blend of cooperation with such backdrop of competition that characterizes the new species of long-term and strategic collaboration between counsel “in order to achieve common objectives” for the business client.<sup>127</sup> “It is evident that the relationship between large companies and their private outside law firms is increasingly being defined by the kind of cooperative/competitive relationships...”<sup>128</sup> The intercompany teambuilding that arises from these relationships “makes it increasingly difficult for either side to walk away.”<sup>129</sup>

A novel approach some companies and firms take to enhance such collaboration is to place employees of outside counsel “full-time in the legal departments of their best clients for limited periods of time” and vice versa.<sup>130</sup> This practice further enhances the fungibility of business lawyering between in-house and outside counsel. Not only does the client and firm benefit by shared tribal knowledge and teambuilding, but also because the business client “becomes far more inclined to choose that law firm over others it knows less well.”<sup>131</sup> As to being a team member generally, a business lawyer “is presented ..., most strikingly, even as a friend.”<sup>132</sup> Such steeped and intimate collaboration between counsel moves away from the historical model of “delegation of powers from principal to agent towards one that emphasizes ‘network coordination’ among various constituencies.”<sup>133</sup>

Although it may be initially harder for those on the outside trying to get in, becoming part of the team (or the “tribe”) remains the invitation and opportunity for all business lawyers. Doing so requires continued, superior responsiveness and efficiency in business lawyering as there is competitive pressure on both in-house and outside counsel.<sup>134</sup> A key advantage goes to the business lawyer that integrates as a full member of the team.<sup>135</sup> To do so may also require specially designed programs to foster enhanced cooperation and integration between counsel, all designed to provide the optimal business lawyering to the client.<sup>136</sup> Working with such teamwork as business lawyers, Roth contends:

You will increase your capacity to make wise decisions. This means that you must vigorously keep up with new developments-and the possibility of developments-in the applicable bodies of law and the business of the firm itself, and embrace the fluidity of both. Otherwise, you will find yourself on

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<sup>126</sup> *Id.* at 2096.

<sup>127</sup> *Id.* at 2097.

<sup>128</sup> *Id.* at 2104.

<sup>129</sup> *Id.* at 2103.

<sup>130</sup> *Id.* at 2092.

<sup>131</sup> *Id.* at 2093.

<sup>132</sup> Gilson, *supra* note 20, at 242.

<sup>133</sup> Wilkons, *supra* note 15, at 2093.

<sup>134</sup> *See generally id.*

<sup>135</sup> Wilkins, *supra* note 15, at 2094-97.

<sup>136</sup> *See* Bill Henderson, *Lawyers and Teamwork, Part II: Training (190)*, LEGAL EVOLUTION (Aug. 9, 2020), <https://www.legalevolution.org/2020/08/lawyers-and-teamwork-part-ii-training-190/>.

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a rudderless ship, never certain where you are going and hardly capable of  
leading.<sup>137</sup>

With the perspective of a team member, the business lawyer will help the business  
client get to where it is going if the business lawyer has a "can-do" attitude and paradigm.

**V. A "CAN-DO" FRAME FOR BEING THE EFFECTIVE COUNSELOR**

Armed with such expertise, tribal knowledge, responsiveness, and team membership,  
business lawyers will avoid being deal killers from the so-called "sales prevention  
department."<sup>138</sup> They will promote, encourage, facilitate, and execute business matters with  
balanced expertise of a combined legal counselor and business consultant with a "can-do"  
frame.<sup>139</sup>

**A. The Effective Counselor**

This balance is well described by Roth as he distinguishes in-house counsel among  
the spectrum bounded by a "Yes Man" and a "Never Man", where an "Effective Counselor" is  
in the middle.<sup>140</sup> Roth submits that business lawyers, both in-house and outside counsel, fill the  
spectrum. The essential invitation is for all business lawyers to be what he calls "Effective  
Lawyers." A "Yes Man" is "a paper tiger who cowers to the" business pressure to get a deal  
done while overlooking excessive risk.<sup>141</sup> This "Yes Man" provides a rubber-stamp approval  
without the profound critical analysis incumbent on a fiduciary.<sup>142</sup> Sometimes the "Yes Man"  
eclipses his duties of competence and avoiding conflicts of interest to the client by focusing  
more on his personal gain or convenience over what is best for his client.<sup>143</sup>

On the other end of the continuum is the "Never Man." This counselor is the  
quintessential barrier to signing a deal, or, as otherwise commonly described as "the sales  
prevention department."<sup>144</sup> He is "a draconian figure who takes a chastity belt approach and  
would be most comfortable with a gate that resembles the Berlin Wall."<sup>145</sup> Different from the  
"Yes Man," the "Never Man" is so risk-averse that he thwarts the business' progress and  
assumption of reasonable and wise risks.<sup>146</sup> The "Never Man's" excess of caution causes good

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<sup>137</sup> Roth, *supra* note 5, at 190-91.

<sup>138</sup> *See generally id.*

<sup>139</sup> It may be that sales teams are expropriating the in-house regulators' work for sales, but that does not undercut  
the point. If revenue-generating units perceive in-house regulators as valuable, they will continue to support  
internal regulatory efforts. Indeed, the more symbiotic the relationship becomes, the more sales goals may change  
how the in-house regulators operate and shift the sales teams dialogue with clients around how in-house regulators  
are a value-driver for clients. Kirby M. Smith, *In-house Regulators: Documenting the Impact of Regulation on  
Internal Firm Structure*, 36 YALE J. ON REG. BULLETIN 43 (Nov. 8, 2019).

<sup>140</sup> Roth, *supra* note 5, at 189-90.

<sup>141</sup> *Id.* at 190.

<sup>142</sup> *See* Roth, *supra* note 5, at 190.

<sup>143</sup> *See id.*

<sup>144</sup> *See id.*

<sup>145</sup> *Id.*

<sup>146</sup> *See id.* at 190.

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deals slip through the business' fingers. "[L]egal fees represent a tax on business transactions to provide an income maintenance program for lawyers. At worst, lawyers are seen as deal killers whose continual raising of obstacles, without commensurate effort at finding solutions, ultimately causes transactions to collapse under their own weight."<sup>147</sup>

The ideal counselor is the "Effective Counselor." The "Effective Counselor" is an approachable, full team member that values the good in opportunities while sifting out unacceptable risk.<sup>148</sup> Contrasting with the "Yes Man" and the "No Man," respectively, Roth describes the Effective Counselor:

An Effective Counselor is one who is not viewed as a speedbump to be run over or a roadblock to be rammed, but rather an asset to help navigate the firm toward optimal solutions. In sum, the Effective Counselor is regarded as critical and necessary to the pursuit of smart profit.<sup>149</sup>

Business lawyers can say "no" without being a "Never Man." Business lawyers can say "yes" without being a proverbial rubber stamp. Business lawyers can be "Effective Lawyers" by having a "can-do" attitude to problem-solve creatively. "Can-do," proactive business lawyering "is characterized by a 'can-do' attitude that focuses on problem-solving and mixes business and legal counseling with little concern for the boundaries between them."<sup>150</sup> Further, this "can-do" attitude in the pro-business context is as follows:

The business world is vastly more complicated than it was five years ago. And in defining what is quality legal service what corporations do not want is an attorney who views a particular situation or proposal and says 'you cannot do that because it is illegal, period.' We want attorneys that start by saying 'Maybe,' followed by, 'Have you looked at a different approach?' The attorney who works with you and suggests alternatives so you can still get your end result is the one who is providing quality legal services.<sup>151</sup>

### B. A "Can-do" Mission Orientation

Both in-house and outside counsel, acting as business lawyers, must have "mission orientation" and promote with positivity solution-thinking versus naysaying.

A compromise of objectivity can certainly occur if an in-house lawyer fails to deliver advice in a balanced and thorough manner. It can also be true of outside counsel, who may pound his or her fist on the table with righteous

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<sup>147</sup> Gilson, *supra* note 20, at 242–43.

<sup>148</sup> See Roth, *supra* note 5, at 190–91.

<sup>149</sup> *Id.* at 189–190.

<sup>150</sup> Daly, *supra* note 4, at 1068.

<sup>151</sup> *Id.* at 1062–1063. See also note 21 on page 1062 for a practical example from ConAgra's chairman. "Mr. Fletcher, ConAgra's chairman, says that the first time he dealt with Mr. Rohde, back in 1982, he had a sticky sales-related problem. Mr. Rohde didn't say, 'no you can't do this or no you can't do that,' as lawyers Mr. Fletcher had previously encountered. Instead, he asked, 'What are you trying to do? I'll show you how to do that.' Says Mr. Rohde: 'We've had a great relationship ever since.'"

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conviction over a legal issue while forgetting the corporate client needs advice that assists in promoting, expanding, and strengthening its core business. Risks may have to be taken or endured. For those in doubt, Willie Miller, deputy general counsel of Kraft Foods, Inc., made this remark about Jeanne Gills, a partner at Foley & Lardner and outside counsel for Kraft: 'She listens to the conversations, to the discussions we're having, and then she responds in a manner that helps us to get to where we want to go.' All counsel, both in-house and outside, are best fulfilling their roles when they understand and look to help implement the overarching mission of the corporate client.<sup>152</sup>

While pointing his finger at in-house counsels' naysaying, one scholar renders valuable advice to all business lawyers. Lovett illustrates this below:

The popular perception, certainly held within the business world for a long time, is that lawyers are doomsayers. We warn of disaster, predict devastation, and use the word 'no' far too often. Admittedly, the naysayer task is an indispensable part of good lawyering. A mild obsession over possible pitfalls is proactive risk management, and a corporate employer will always need its legal counsel to shine a light in dark corners and say, 'I wouldn't do that if I were you.' Of course, words of caution need balance. Constant refrains of 'no' and 'be careful' will eventually erode the perception of an in-house counsel's objectivity or adaptability, and the impact of his or her advice might be lessened at times when it is needed the most. To deal with this situation, decide to take an active part in finding a good or positive remedy to whatever might be the problem or issue. Too often, an in-house lawyer's analytically risk- or loss-averse mind rushes only to defend against, or to warn away from, possible hazards. Like an unmoving sentinel, the oft-naysaying in-house lawyer can become so intent on protectionism that he or she forgets to help pursue a remedy. Neither function, though, is mutually exclusive from the other. A supportive in-house lawyer must be able to identify risks, threats, and liabilities, as well as generate or collaborate on curative resolutions. A corporate client needs its hawks to also be its doves (or at least its creative thinkers). An in-house lawyer can bring to bear the invaluable asset of his or her trained and battle-ready mind on a corporation's question of 'how do we get this done?' instead of stopping at 'don't do it.'<sup>153</sup>

It is not only outside counsel that say "no" and then face losing a client. Scholars Marks and Rapoport expound on this issue:

Inside counsel face their own particular pressures. Depending on to whom an inside lawyer reports, he or she is likely to face substantial push back

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<sup>152</sup> See Lovett, *supra* note 4, at 143-44.

<sup>153</sup> *Id.* at 148-49.

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from the management in the business unit for any naysaying of potential business deals. Many within the corporation believe that it's not the lawyer's job to tell them 'no,' but to help them make a deal happen, no matter how questionable the deal may be. Unlike outside counsel, who have the chance to diversify their client base, inside counsel have but one client. Therefore, strong push back and alienation from the client means, at best, a miserable work environment and, at worst, withdrawal (or firing) and unemployment.<sup>154</sup>

Both in-house and outside counsel must master the art of redirecting from an excessively risky position to a positive, less risky strategy.<sup>155</sup> Quality legal services involve not only the art of substantive law (the "what"), but also the art of the format, or the delivery (the "how") of the counsel.<sup>156</sup> Instead of focusing on "technical lawyering skills," Kosuri states, "the best business lawyers embrace the role of full-fledged advisors to their clients and employ a robust skillset for problem solving that goes beyond what is typically taught in law schools. In many ways, what exceptional business lawyers practice is much more art than science."<sup>157</sup> Mastering these transferable skillsets by both outside counsel and in-house counsel militates in favor of more fungible business lawyering.

### C. Shades of Gray in Risks and Rewards

Providing quality legal services involves sifting through the shades of gray, seeing around corners, and taking confident steps in the dark backed by thorough investigation.<sup>158</sup> A business lawyer's success is neither reckless nor accidental. It is wisdom in action. Roth expands on this concept:

One must be aware of not only the black, white and otherwise well-defined boundaries, but understand the gray and blurry lines as well. After all, business profit is often awarded to those who can successfully navigate uncharted waters, whether by avoiding uncertainty when necessary or taking advantage of it where appropriate. ... The Never Man may be unwilling to wade into the previously off-limit waters, or the Yes Man may dive in with reckless abandon. In each case, the reaction is a result of an inability or unwillingness to see the new frontier for what it is (or is not). On the other hand, an Effective Counselor is aware of the change, identifies the possible

<sup>154</sup> See Colin Marks & Nancy B. Rapoport, *The Corporate Lawyer's Role in a Contemporary Democracy*, 77 FORDHAM L. REV. 1288 (2009).

<sup>155</sup> See Amber Lee Williams et. al., *Lawyers on the Front Lines: Identifying Risk and Managing Internal Investigations*, 35 NO. 10 ACC DOCKET 26, 28-29 (2017).

<sup>156</sup> See John H. McGuckin Jr., *Corporate Law Departments, the Ethical Dilemma of the In-house Counsel*, 35-MAR L.A. LAW. 31 (2002).

<sup>157</sup> Kosuri, *supra* note 31, at 464-65.

<sup>158</sup> See Roth, *supra* note 5, at 191.

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risks and rewards, studies its internal and external ramifications and advises the firm how to wisely (if it can) dip its toes.<sup>159</sup>

Investigating the risks and rewards of an issue is not enough.<sup>160</sup> The wise business lawyers must also frame their presentation “to encourage the most balanced consideration possible. The reason is that framing can, for better or worse, impact outcomes.”<sup>161</sup> Framing the conversation in a positive fashion invites honesty, creativity and solution-thinking. It can also invite conversations around why the reward outweighs the risk.<sup>162</sup> In the alternative, framing the conversation with proscription can put the business client on the defensive.<sup>163</sup> “If the businessperson’s perception is that the counselor always says ‘no,’ putting the burden of proof on that person may reinforce this perception by making him believe that the issue has already been decided even before he has been given the opportunity to present his side.”<sup>164</sup> Often the very idea under consideration is a pet project or “brain child” of the one seeking advice.

This process of investigation and presenting is an art. Not only does the business lawyer have to dance through the black and white, the risks and benefits, framing opinions in the right way and not the wrong way; the business lawyer does it all in the context of the corporate culture and the tribal knowledge.<sup>165</sup> But the business lawyer does not stop “at the point where he has spotted the legal problem, but rather goes on to solve it in a creative fashion... This subject often boils down simply to a matter of ‘feel’.”<sup>166</sup> Often, this “feel” guides creative, customized solutions for the facts and circumstances of the business client.

#### D. Examples and Advantages of “Can-do” Creativity

As to such creativity:

Though grounded in technical expertise, great business lawyers are incredibly creative. ... Great business lawyers, however, do not let their lawyerly training confine their thinking. They resist practice by template, seek to understand the problem and all of its parameters, and propose creative solutions. They draw on their entire experience, not merely their legal experience.<sup>167</sup>

Examples of creativity in “great” business lawyering include “[m]aximizing liability protection, minimizing tax leakage, ensuring sound governance, and accommodating efficient exit options.”<sup>168</sup> Other creative customized solutions are innumerable and include:

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<sup>159</sup> Roth, *supra* note 5, at 189-191.

<sup>160</sup> *Id.* at 194.

<sup>161</sup> *Id.* at 192.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 191-92.

<sup>166</sup> Kosuri, *supra* note 31, at 472.

<sup>167</sup> *Id.* at 478-79.

<sup>168</sup> *Id.*

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- ☐ bartering intellectual property rights to settle disputes;
- ☐ reverse triangular mergers;
- ☐ sub-leasing unused real estate with options to purchase;
- ☐ cutting-edge software-as-a-service and storage-as-a-service offerings within the context of expansive data privacy strictures;
- ☐ compliance training that employs interactive and engaging stories and modern technology;
- ☐ creating dynamic clause libraries that automatically update all relevant templates in the catalog;
- ☐ monetizing a stagnant but valuable intellectual property portfolio;
- ☐ minimum purchase commitments for manufacturing operations that allow for decreasing modifications over time; and
- ☐ joint technology development agreements with customized license and ownership provisions for background and foreground intellectual property rights.

Outside counsel may have an advantage at exercising the “can-do” frame in situations when they have increased informational asymmetry, drawn from their exposure to a broader set of clients, issues, and industries.<sup>169</sup> A corollary to this point is that “there is an opportunity for lawyers to reassert themselves as experts in essential areas where clients actually need counsel.”<sup>170</sup> One area of such assertion for outside counsel is by taking the lead in litigation strategy, tactics, and research.<sup>171</sup> Having litigated scores of cases before in the same industry and dealing with similar issues will give outside counsel a valuable advantage in predicting outcomes and developing the optimal litigation approach for the business client.<sup>172</sup>

On the other hand, in-house counsel has advantages of contemplating the entire vista of the litigation while interfacing with the outside counsel in all litigation matters, from managing the litigation to serving as an intermediary between the client and outside counsel.<sup>173</sup> Also, utilizing the insider’s tribal knowledge and coupling it with the professional incentive to facilitate their employers’ success, in-house counsel are able to balance the internal enthusiasm for the business plan with the skill of successfully managing the attendant legal risks and

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<sup>169</sup> *Id.* at 468-69.

<sup>170</sup> *Id.* at 469; *see also* Okamoto, *supra* note 48, at 3.

<sup>171</sup> Nancy Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging from the Expanding Role of the Attorney-Employee*, 39 S. TEX. L. REV. 497, 506 (1998).

<sup>172</sup> *Id.* at 505.

<sup>173</sup> *Id.*



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challenges.<sup>174</sup> The opportunity to do just this has increased with the enhanced prestige of in-house counsel (as discussed above) and the corresponding decline of outside counsel as reputational intermediaries.<sup>175</sup> Thus, this dynamic environment facilitates in-house counsels' opportunity to take advantage to demonstrate their solution-thinking frame and their value to the business client.

Some argue that outside counsel used to be better trained, in general.<sup>176</sup> However, over the fourth developmental phase, companies have attracted, through appealing lifestyles and benefits packages, very talented outside counsel to migrate to in-house counsel positions.<sup>177</sup> This migration reduced in-house counsel training and development expenses for the hiring companies.<sup>178</sup> Therein lies a personal opportunity for outside counsel and a potential disadvantage for in-house counsel of being replaced. All else equal, business clients will prefer a lawyer that demonstrates a solution-thinking frame that exhibits superior training and experience. And such preference may result in replacing its less "can-do" counsel.<sup>179</sup>

In-house counsel has the advantage of serving as the incumbent counsel to be the first to handle the legal issue. But the fixed capacity of in-house counsel provides an inherent opportunity for outside counsel to serve as flex capacity for the business client.<sup>180</sup> Rather than employing an "all or nothing" demand on the business lawyering for a client, the outside counsel can happily take whatever business lawyering comes their way from a client with a "can-do" attitude.<sup>181</sup> Not doing so will certainly sour the next opportunities for more work. Further, outside counsel "might even try to get involved at earlier stages of client transactions, perhaps by offering to charge lower rates during a transaction's structuring phase."<sup>182</sup> This sacrifice by outside counsel evinces to the client the counsel's desire to learn more about the opportunity to provide superior and lower cost counsel.<sup>183</sup> This tactic helps to balance out the head-start advantage in-house counsel typically has.<sup>184</sup>

Armed with a "can-do," solution-thinking, flexible, creative frame, both in-house counsel and outside counsel can and should successfully navigate their clients' challenging, fact-specific circumstances and lead them to their objectives while balancing the lawyers' roles as legal counselors and business advisors. As shown above, each of in-house counsel and outside counsel has advantages in exhibiting a "can-do" frame.<sup>185</sup> Each has disadvantages as well. Neither has a total "corner on the market" at business lawyering with a "can-do" frame. Nevertheless, a "can-do" frame is essential for superior business lawyering and the professional success of the counsel exhibiting it.<sup>186</sup>

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<sup>174</sup> See William D. Henderson, *Innovation Diffusion in the Legal Industry*, 122 DICK. L. REV. 395, 419 (2018).

<sup>175</sup> Okamoto, *supra* note 48.

<sup>176</sup> Schwarcz, *supra* note 60, at 527.

<sup>177</sup> *Id.* at 528-29.

<sup>178</sup> *Id.* at 527, 530.

<sup>179</sup> *Id.* at 528.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 530.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 528.

<sup>186</sup> See Daly, *supra* note 4, at 1062, 1063.

## VI. THE ECONOMIC COST FACTORS OF BUSINESS LAWYERING

Economic factors play a key role in commercial decisions.<sup>187</sup> Most companies have a profit motive.<sup>188</sup> Virtually all companies are cost conscious. In the decision of whether to hire in-house or outside counsel to handle a business transaction, companies analyze the “make or buy” alternatives.<sup>189</sup>

All else equal, companies should select the business lawyer that costs less. But all else is not equal. As indicated throughout this article, there are a host of other factors in the determination of whether a business lawyer is an “Effective Counselor.”<sup>190</sup> Nonetheless, cost-effectiveness is an important factor because of the profit motive.<sup>191</sup>

During the ascendancy of in-house counsel referenced above, companies moved many legal activities in-house because of the perception that in-house counsel cost less.<sup>192</sup> Scholars Bruck and Canter expand on the motive behind shifting to a stronger reliance on in-house counsel:

The increasing demand [for business lawyering] affected both the companies that hired law firms and the firms themselves. Corporate executives expanded the power of their in-house counsel, hoping that their company lawyers could help navigate an increasingly litigious business environment and better control the high cost of hiring outside counsel. The newly influential general counsels soon shifted more work in-house, which was cheaper, and used the new competition between large firms to negotiate better rates for the remainder of their companies’ legal work.<sup>193</sup>

Other scholars resonate by adding:

For most businesses, legal issues come with the territory, and managers quickly realize that in-house staff attorneys can do much of the routine and specialized work cheaper and more efficiently than outside counsel. When legal needs exceed staff resources, in-house lawyers act as purchasing agents for the selection, hiring, managing, and directing of outside counsel.<sup>194</sup>

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<sup>187</sup> See Smith, *supra* note 139, at 36.

<sup>188</sup> *Id.* at 35.

<sup>189</sup> See Schwarcz, *supra* note 60, at 500.

<sup>190</sup> See Roth, *supra* note 5, at 190.

<sup>191</sup> See Smith, *supra* note 139, at 35.

<sup>192</sup> See Andrew Bruck & Andrew Canter, *Supply, Demand, and the Changing Economics of Large Law Firms*, 60 STAN. L. REV. 2094 (2008).

<sup>193</sup> *Id.*

<sup>194</sup> Smith and Tyler, *supra* note 36, at 30.

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**A. Comparing Salaries and Bill Rates**

One of the most direct ways to measure the cost of an employee is to compare salaries.<sup>195</sup> This review suggests that in-house counsel has, in general, lower salaries than their outside counsel counterparts:

On average, in-house attorneys earn less than their law-firm counterparts. ... A further drag on in-house counsel salaries is the fact that, unlike firm partners, corporate attorneys do not share in the profits of the corporation. While their salary and bonus structure may earn them significant compensation, their salaries will never rival those earned by top attorneys in private practice.<sup>196</sup>

For instance, first-year associate salaries increased from \$10,000 in 1968 to \$71,000 in 1988, a seven-fold jump, and then doubled in the subsequent two decades, rising to \$160,000 by 2008.<sup>197</sup>

Recently, Robert Half, a nationwide talent staffing agency, conducted a salary survey for attorneys.<sup>198</sup> Exhibit A summarizes the 50<sup>th</sup> percentile of salaries for both in-house counsel and private practice attorneys, categorized based on years of experience.<sup>199</sup> It is worthy to note that generally, private practice attorneys have personal earnings that are in the same general ballpark.<sup>200</sup> Initially, private practice attorneys make more but with more experience, the pay gap narrows until the in-house counsel makes more than the private practice attorney (generally, after gaining ten or more years of experience in the field).<sup>201</sup>

Even though salaries of in-house counsel may be lower than those of outside counsel, the pay gap is even larger from the hiring companies' perspective; this is because bill rates exceed salaries which include costs for overhead and profit for the firm.<sup>202</sup> Using national averages for bill rates as a rough comparison to the 50<sup>th</sup> percentile of salaries, the annual billing for private practice attorneys ranges from 200% to 400% of the salaries of in-house counsel.<sup>203</sup>

But simply comparing salaries and bill rates is too simple in the analysis of which is the less costly "Effective Counselor". They may only render a perception that in-house counsel are less costly. Schwartz points out:

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<sup>195</sup> See *infra* note 199.

<sup>196</sup> See *Becoming In-house Counsel: A Guide for Law Students and Recent Graduates*, *supra* note 18.

<sup>197</sup> See Bruck and Canter, *supra* note 192 at 2096-2097 and 2126. See also Bernard A. Burk & David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1 at 21, 34.

<sup>198</sup> See 2023 *Legal Salary Guide*, ROBERT HALF TALENT SOLUTIONS, <https://www.roberthalf.com/salary-guide/specialization/legal> (last visited Oct. 25, 2022).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Schwarcz, *supra* note 60, at 504-05.

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[C]ompanies pay the full salaries of in-house counsel whereas they pay only the portion of outside lawyer income allocated to the company's legal work. Therefore, any downtime in the use of in-house counsel would reduce the cost saving, except to the extent that such counsel can be redirected to other useful activities. Furthermore, the cost saving of using in-house counsel may be exaggerated because, unlike outside lawyers who actually bill for their legal services, in-house lawyer charges are usually internally imputed to the business units that use their services. Therefore, the price of using outside counsel may be perceived as higher or more tangible than the price of using in-house counsel.<sup>204</sup>

While outside counsel may bill when they are actively working on their clients' legal matters, in-house counsel typically receives a salary whether or not they are actively working on their employer's legal matters.<sup>205</sup> As an employee, in-house counsel will be "on the clock" (and therefore inherently billing its employer, the client) for time spent on collateral matters such as:

- ☐ attending staff meetings;
- ☐ attending continuing legal education courses;
- ☐ socializing around the water cooler;
- ☐ attending teambuilding events;
- ☐ exercising in the company gymnasium;
- ☐ taking very long lunch breaks;
- ☐ attending funerals of employees or their loved ones;
- ☐ performing administrative;
- ☐ e-mailing on personal or collateral business matters;
- ☐ participating in company picnics;
- ☐ signing up for annual open enrollment for healthcare benefits;

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

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- ☐ attending mandatory company training (e.g., emergency preparedness, code of conduct, anti-harassment, safety protocols, new employee orientation);
- ☐ donating blood for the local blood drive;
- ☐ receiving on-site vaccinations;
- ☐ helping colleagues with maneuvering within the company website;
- ☐ providing informal and spontaneous training to colleagues on Microsoft Office;
- ☐ traveling to work while running late;
- ☐ attending company-wide presentations (e.g., quarterly and annual reviews, new product announcements, and updates on new technology programs);
- ☐ filling out paperwork for the company's stock purchase plan and deferred compensation program; and
- ☐ consoling a coworker who is struggling with problems at home.<sup>206</sup>

The list goes on. More statistically significant time-work studies needs to be performed to get a more complete and accurate understanding of the true hourly rate of in-house counsel. Of course, the rate will vary widely by company and job level.<sup>207</sup> Admittedly, the lack of certainty around the true hourly rates militates against absolute economic fungibility between in-house counsel and outside counsel.<sup>208</sup> Without more significant studies, the accuracy of the information will continue to be questioned and the comparison of out-of-pocket costs for veritable business lawyering between in-house and outside counsel will continue to elude us and remain a conjecture.<sup>209</sup>

### B. Qualitative Measures of Costs

Converse to the quantitative estimates of the hourly rate of in-house versus outside counsel, one leading survey suggests more qualitative responses as to which counsel costs more.<sup>210</sup>

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> Schwarcz, *supra* note 60, at 514-15.

<sup>209</sup> *Id.* at 526-27.

<sup>210</sup> *Id.* at 552.

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For example, a slight majority of general counsel responded that they prefer to use outside counsel as a lower cost provider because “law firms tend to have more extensive knowledge of transaction law.”<sup>211</sup> The general counsel also selected other more prominent factors in favor of selecting outside are more structural in nature, namely, outside counsel can be flexed for overflow work and the ease of billing the out-of-pocket services when others are paying for the legal work.<sup>212</sup> From these additional responses, the take-away for in-house counsel is to enhance outside counsel’s knowledge of transactional law to drive up their efficiency in handling transactions and, consequently, drive down costs.<sup>213</sup> The other two leading responses are not as actionable for in-house counsel. Nonetheless, the survey demonstrates that there are times when outside counsel is viewed as costing less than in-house counsel.<sup>214</sup>

As to why in-house counsel is more economical for business transactions, the general counsel’s overwhelming response in the leading survey was that in-house counsel already knew the companies’ organization and operations.<sup>215</sup> In other words, tribal knowledge drives efficiency in business lawyering.<sup>216</sup> Companies found it disappointing that they “repeatedly had to educate new firms about their operations. The more complex the company’s regulatory, organizational, and operational structures, the greater the cost of this education.”<sup>217</sup> Further, in alignment with the salary comparisons above, a significant majority of general counsel saw the “effective hourly rate of an in-house lawyer to be lower.”<sup>218</sup> The survey also found other factors in favor of in-house counsel as a lower cost provider, including a reduction in incidental costs and faster transaction closings.<sup>219</sup> These findings align with his hypothesis:

Avoiding the profit component, or markup, charged for their services. This profit component represents the higher average incomes of outside lawyers at comparable experience levels, including - even in non-partner billing - a contribution towards partnership profits. Disintermediation also may be able to reduce costs by eliminating ‘the learning curve for outside counsel [as well as] the myriad small costs of doing business, such as visits to the client, talking through the issues, etc., that add up significantly from start to finish.’<sup>220</sup>

From these responses, the take-aways for outside counsel is that they are more efficient to close transactions and their effective costs are lowered when they leverage tribal knowledge of the client’s company.

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 553.

<sup>216</sup> Schwarcz, *supra* note 60, at 553.

<sup>217</sup> *Id.* at 504.

<sup>218</sup> *Id.* at 553.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 503-4.

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Outside counsel may do better: business development is among the most prominent roles that analytics have played in legal services thus far. When starting a new engagement or pitching to a potential client for new engagement, the legal team must have a complete picture of the client's litigation landscape. Finding that information independently is important: clients may have neither a complete and high-level picture of all their litigation nor the internal budget nor the manpower [*sic*] to prepare it. They may have unconsidered biases about long running and troublesome litigation, where an outside firm can more objectively assess their litigation landscape. Firms certainly have an incentive to match the range of a client's litigation with the range of the firm's service. For a potential engagement, a law firm may highlight a cohesive national or international litigation strategy. Pitching those broad ideas is hard because it is currently laborious and expensive to get a complete picture of a busy litigant."<sup>221</sup>

Different from the straight billing rates discussed above, switching costs are another economic factor businesses consider when using counsel, especially a single firm, which clients are particularly dependent.<sup>222</sup> Because high switching costs provide outside counsel with significant bargaining power, business clients "may have to endure a lack of responsiveness and inferior service from the outside firm."<sup>223</sup> But there comes a tipping point when businesses pull their legal support in-house, while outside counsel rest on their laurels and blind themselves with the entitlement of a business account.<sup>224</sup> "The aforementioned factors have led to the re-allocation of bargaining power between the corporate client and the outside law firm."<sup>225</sup> The prior citation is from the perspective of in-house counsel, but the economic principles equally apply in the reverse as well. If business clients can receive better legal support from outside counsel than in-house counsel for the same, or less, money (including the switching costs), the business clients will tend to move to outside counsel.<sup>226</sup> In the end, the objective business lawyer, whether in-house or outside counsel, will assure that they provide exceptional service so that the business client is not encouraged to assess the cost of switching to superior legal support elsewhere. Perhaps a motivator for any counsel is to provide such exceptional legal service that the client is never incentivized to analyze the cost of the lawyering itself. As put by one general counsel, "predictability is more important than the magnitude of the fee."<sup>227</sup>

While the question of whether in-house counsel or outside counsel costs the client more remains unresolved, perhaps the superior question is whether the client receives the optimal quality of business lawyering and less about whether or not the particular legal service

<sup>221</sup> See Patrick Flanagan & Michelle Hook Dewey, *Where Do We Go from Here? Transformation and Acceleration of Legal Analytics in Practice*, 35 GA. ST. U.L. REV. 1245, 1252-1253 (2019).

<sup>222</sup> Simmons, *supra* note 20, at 91-93.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> See *id.* at 98; see also Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 902-903 (1990).

<sup>226</sup> See generally David B. Wilkins, *The In-House Counsel Movement*, 2 THE PRACTICE: THE CHANGING ROLE OF THE GLOBAL GENERAL COUNSEL (May/Jun. 2006), <https://thepractice.law.harvard.edu/article/in-house-counsel-movement/>.

<sup>227</sup> See generally Wilkins, *supra* note 15, at 2087.

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is fungible. Each type of counsel can cooperatively learn from the other in their respective quests to become the cost-effective "Effective Counselor". Both can work together to provide a "blended" symbiotic solution for the common client. There should be no territoriality among counsel, even where the legal services are, in fact, fungible. There is no conclusive evidence that neither in-house counsel nor outside counsel has a complete "corner on the market" of being the most cost-effective lawyer.<sup>228</sup> When business counsel cannot provide cost-effective assistance on a matter, they may better serve their clients by recommending that other counsel handle the matter (such as when outside counsel refers the matter to in-house counsel).<sup>229</sup>

Ultimately, all counsel should focus on the zealous representation of the clients in a fashion which honors the clients' interests, including meeting or beating their cost expectations.<sup>230</sup>

## VI. CONCLUSION

Business lawyering involves many skills that both in-house counsel and outside counsel can learn and practice.<sup>231</sup> Some do so well, and, of course, others do not. The general business lawyering skillset is fungible, but fungibility does not require direct substitutability.<sup>232</sup> Admittedly, there are specialized skills, experiences, and knowledge that are notably esoteric, but are exactly what is needed for the facts and circumstances in issue.<sup>233</sup> The thrust of this article is the more generally applicable message that neither in-house counsel nor outside counsel has an absolute "corner on the market" of effective business lawyering. Accordingly, this article appeals to symbiosis and collaboration between in-house counsel and outside counsel. Such symbiosis and collaboration are intentionally intertwined to create the best business lawyering possible for the client.<sup>234</sup>

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<sup>228</sup> See Marilyn Odendahl, *Corporate costs: In-house legal departments spending more for outside counsel expertise*, THE IND. LAWYER (Apr. 26, 2022), <https://www.theindianlawyer.com/articles/corporate-costs-in-house-legal-departments-spending-more-for-outside-counsel-expertise>.

<sup>229</sup> See MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N, Discussion Draft 1983) (highlighting that business lawyers must be mindful of conflicts with their own interests, "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests.").

<sup>230</sup> See Cara O'Neill, *What You Should Expect From a Lawyer*, NOLO (last visited Sept. 30, 2022), <https://www.nolo.com/legal-encyclopedia/expectations-for-lawyer-attorney-29876.html>.

<sup>231</sup> *Strategic Voting in Proportional Representation Systems*, ALM MEDIA LLC (Sept. 20, 2021), <https://www.law.com/corpcounsel/2021/09/16/in-house-lawyers-are-taking-their-business-expertise-to-private-practice/>.

<sup>232</sup> See generally Peter Horvath, *Law Firms Need to Analyse Their Training Needs*, EVELAW (last visited Oct. 3, 2022), <https://www.evelaw.eu/blog/2017/11/23/strategic-thinking-about-training-necessitates-a-preliminary-analysis> (describing the skills that can be learned, practiced, perfected, and applied in many different contexts).

<sup>233</sup> See Carmine Cloak, *Necessary Skills For a Successful Law Career*, CARMINE CLOAK (Sept. 27, 2021), <https://www.carminecloak.com/lawyer-skills/> (detailing how research and writing skills are important prerequisites for achievement in the field of law).

<sup>234</sup> See Shawn Harpen, Alicia Still, Shannon Singleton & Neil J. Wertlieb, *Who Is the Client? The Ethics Rule Implications for In-House Counsel and Outside Counsel*, BUSINESS LAW TODAY (Mar. 22, 2022), <https://businesslawtoday.org/2022/03/ethics-rule-implications-in-house-counsel-outside-counsel/>.



## NOBODY HAS A "CORNER ON THE MARKET": THE COLLABORATIVE USE OF BOTH IN-HOUSE COUNSEL AND OUTSIDE COUNSEL

All business lawyers must garner a veritable “tribal knowledge” of their clients, their competitors, and their industries.<sup>235</sup> Business lawyers must also employ proven teamwork abilities and a “can-do” attitude to be an “Effective Counselor.”<sup>236</sup> Finally, while it is not profitable to squabble over the still-unresolved hourly rate comparison between in-house counsel and outside counsel, one can conclude that being an ineffective business lawyer is too costly, not only for the client, but for the counselor as well.<sup>237</sup>

Clients have a choice in business lawyers. This choice directly impacts both in-house counsel and outside counsel; neither is immune from losing a client or a job due to ineffectiveness or the appearance of the competition’s superiority.<sup>238</sup> While both can be effective counselors in their respective spheres, no business lawyer is ideally competent in every legal specialty.<sup>239</sup> As business clients settle in favor of a blended, contemporaneous use of both in-house and outside counsel for their complete legal services, symbiosis between the two becomes even more likely, important, and highlighted.<sup>240</sup> Ideally, all business lawyers will be “Effective Counselors” for their clients in their respective spheres of contribution, working collaboratively with their in-house and outside peers. With such symbiosis, outside counsel and in-house counsel jointly have a “corner on the market” of business lawyering for the client.

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<sup>235</sup> See Patrick J. McKenna & Michael Rynowecer, *Clients Want Firms That Know Their Industry*, LEGAL BUSINESS WORLD (Jun. 26, 2020), <https://www.legalbusinessworld.com/post/2020/06/26/clients-want-firms-that-know-their-industry>.

<sup>236</sup> *Id.*

<sup>237</sup> See generally Lee Norcross, *What is the Average Cost of Lawyer’s Malpractice Insurance?*, L SQUARED INSURANCE AGENCY (May 9, 2016), <https://www.l2insuranceagency.com/blog/what-is-the-average-cost-of-lawyers-malpractice-insurance.aspx> (explaining the costly nature of a lawyer’s poor performance).

<sup>238</sup> See Jonathan E. Hawkins, *In-house Counsel: Don’t Forget Who Your Client Is (and Is Not)*, DAILY REPORT ONLINE (Nov. 6, 2017), <https://www.law.com/dailyreportonline/2017/11/06/in-house-counsel-dont-forget-who-your-client-is-and-is-not/> (noting the importance of lawyers to work for their clients and the consequences of not doing so).

<sup>239</sup> See Roderick N. Petrey, *Professional Competence and Legal Specialization*, 50 ST. JOHN’S L. REV. 561, 568 (1976).

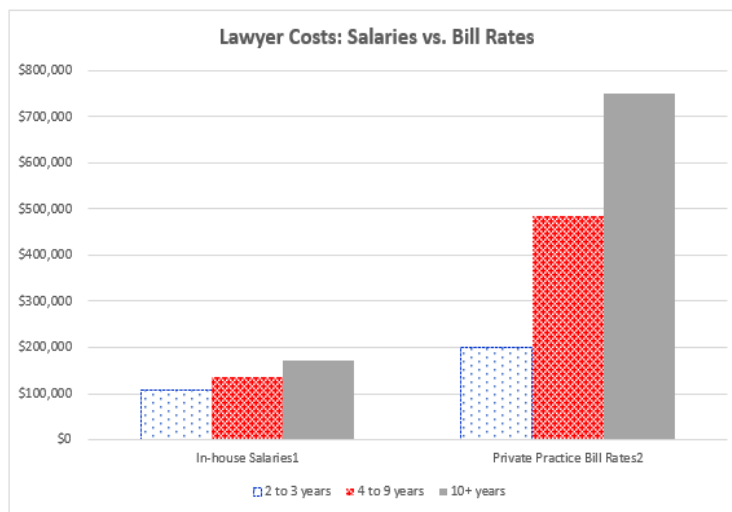
<sup>240</sup> See Scott Gaille, *The General Counsel’s Dilemma: In-House Counsel or Outside Counsel* [Gaille Energy Blog Issue 84], GAILLE PLLC (Apr. 21, 2020), <https://gaillelaw.com/2020/04/21/the-general-counsels-dilemma-in-house-counsel-or-outside-counsel-gaille-energy-blog-issue-84/>; see also Jennifer Daniels, *Perspectives from a General Counsel*, THE PRACTICE: TEAMWORK AND COLLABORATION (last visited Oct. 3, 2022), <https://thepractice.law.harvard.edu/article/perspectives-from-a-general-counsel/> (describing the ease with which in-house counsel and outside lawyers can work with another).

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Exhibit A

Annual Salaries of In-house vs. Private Practice Attorneys' Annualized Bill Rates

Experience	In-house Salaries <sup>1</sup>	Private Practice Bill Rates <sup>2</sup>
2 to 3 years	\$107,948	\$200,000
4 to 9 years	\$135,975	\$486,000
10+ years	\$172,328	\$750,000



Sources:

1- <https://www.roberthalf.com/salary-guide/specialization/legal>. Accessed on January 31, 2022.

2- <https://www.thumbtack.com/p/attorney-fees>. Assumes a 2,000-hour billing minimum per year. Accessed on January 31, 2022.

This exhibit compares the annual salaries for in-house counsel and outside counsel for three categories of time-based experience: 2-3 years, 4-9 years, and 10 or more years of experience, respectively. The in-house counsel figure represents that 50<sup>th</sup> percentile of the nationwide survey conducted by Robert Half. The outside counsel (or private practice)

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annualized bill rate uses the hourly rate multiplied by an assumed 2,000-hour annual billing amount. In all three categories from an annualized comparison, outside counsel is billed at much more than in-house counsel. The reader must note the lack of a more accurate analysis of actual bill rates for in-house counsel as set out more fully in the article.