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Author: Frederick Lambert
Source: Oregon Law Review
Citation: 74 Or. L. Rev. 121 (1995).
Title: A Preliminary Inquiry into the Transcendence of Value Creation

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A Preliminary Inquiry into the Transcendence of Value Creation

THE Symposium focuses analysis on what lawyers create when they advise, document and negotiate in the context of the business transaction.¹ Specifically, we are to "explore how the work of business transaction lawyers contributes economic value to clients."² Creation of value for the business client constitutes the heart of the lawyer-client relationship. But the transaction also serves as the focal point from which reciprocal economic forces radiate into and influence the organization of the law firms dependent for survival on the corporate client. As law firm organization is altered, the lawyer participants experience a change in relation to the organization; traditional noneconomic values thus undergo change driven by forces originating from value creation in the business transaction. In

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In some respects the thesis of the transcendence of value is an extension of earlier work done at the University of Michigan Law School and Duke University Law School where the author was a Visiting Professor from 1990-1993. See Frederick W. Lambert, An Academic Visit to the Modern Law Firm: Considering a Theory of Promotion-Driven Growth, 90 MICH. L. REV. 1719 (1992).

¹ The creation of value for clients invariably connotes economic value and the direct or indirect maximization of wealth. Since the thesis of the paper seeks to explore whether a connection exists between the creation of economic value by lawyers and a resultant influence on noneconomic values of lawyers, it may be important to consider initially the relationship of wealth and the concept of value. The abstract notion of wealth as a value has been analyzed in other contexts. See, e.g., Ronald M. Dworkin, Is Wealth a Value? 9 J. LEGAL STUD. 191 (1980); Anthony T. Kronman, Wealth Maximization as a Normative Principle, 9 J. LEGAL STUD. 227 (1980); Richard A. Posner, The Value of Wealth: A Comment on Dworkin and Kronman, 9 J. LEGAL STUD. 243 (1980).

this sense, I define value creation as a transcendent force in the lawyer-client interface; what follows constitutes a preliminary inquiry into how value creation influences law firm organization and, ultimately, the noneconomic values of lawyers who serve the business client. The modest goal of this paper is to lay a foundation for further study that would result in a theory of value creation incorporating, in part, sociological scholarship on the theory of organizations.

A consideration of value creation as it influences lawyer and client conduct beyond the confines of the business transaction may be a digression from the stated purpose of the Symposium. But considering the outlying and less immediate and observable consequences of what lawyers do for business clients will illuminate how value is added or subtracted in the business transaction by the sometimes conflicting institutional forces bearing on lawyers in business practice, particularly those in large firms. The preliminary thesis advanced by this essay is as follows: value creation constitutes a medium connecting the economic activity of lawyers with the structure of their organizations, and ultimately influences noneconomic values such as collegiality, solidarity, professionalism and independence—each apparently in decline.

The inquiry that follows rests upon at least one premise not addressed directly by other commentators on current law practice. The business acquisition transaction that Ron Gilson analyzed a decade ago using the insight of the capital asset pricing

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3 One caveat is necessary regarding value creation in the business transaction as a determinant of law firm structure and an influence on noneconomic values of lawyers—the focus of the preliminary inquiry suggested, supra note 1. Any theory of organizational structure must include the effects of value creation in dispute resolution, presumably the segment of work in law firms providing the largest segment of dollar revenue to the entity. Nevertheless, much of what governs the environmental medium between the lawyer and client permeates both transactional and dispute resolution law practice. Accordingly, while the importance of dispute resolution to the revenue base of the law firm raises some distinct organizational issues, it should not diminish the relevance of the questions with which this paper is concerned. Indeed, much of what appears in the literature of organizational theory, particularly the importance of belief systems and rational myths, would seem to have general application across the full range of legal services offered. Thus, the business transaction, as part of the larger matrix of legal services, seems an appropriate focal point for some preliminary observations on the value lawyers are perceived to create and how it shapes their organizational world.

4 The growing literature of the law and the profession has been the subject of several symposia. See Symposium, The Growth of Large Law Firms and Its Effects on the Legal Profession and Legal Education, 64 Ind. L.J. 423 (1988-1989); Symposium, The Corporate Law Firm, 37 Stan. L. Rev. 271 (1985). None, however, seem
model\(^5\) represents only one obvious nexus of value creation in a much broader matrix of transactions and transactors. Surrounding the stage on which the actors negotiate and consummate the business transaction exists a hidden array of institutional and economic forces which must be understood to fully explain value creation. Competition within the law firm and with the corporate legal department is one such force. How do the demands of the law firm on its lawyer and the rise of the full-service in-house legal department influence value created in the business transaction?

We know corporations have increasingly fulfilled their demands for legal services by internalizing them in the form of law departments\(^6\) with hierarchies typical of divisions of corporations.\(^7\) The outside provider of law services, the law firm, has
to have connected value creation as a concept with organizational development of law firms or as an influence on noneconomic values.


\(^6\) Robert Rosen argues that corporations, in allocating work between inside and outside counsel, make choices based on the comparative functionality of providing legal services from an internal vertically integrated unit (the law department) or purchasing them from an external organization (the law firm). Robert E. Rosen, \textit{The Inside Counsel Movement, Professional Judgment and Organizational Representation}, 64 Ind. L.J. 479, 505 (1989). He explains the rise of in-house corporate legal resources as a means of imposing controls on the law firm. \textit{Id.} Corporations thus have established governance structures for the purchase of corporate legal services. \textit{Id.} This, of course, leads to the conclusion that law firms do not efficiently supply all of the service their corporate clients require. \textit{Id.} According to Rosen:

Corporate allocation of work between inside and outside counsel . . . is determined according to a governance structure that responds to the presence of three contractual problems. First, under current market conditions, corporations have found it necessary to control the fees incurred for legal services. Inside counsel substitute for outside counsel because elite firms are not able or willing to renegotiate their fee structures. Second, corporations have found it necessary to control outside counsel's work to insure that it furthers corporate goals. . . . [E]lite law practitioners do not adequately and efficiently determine the client's objectives for the representation. Third, corporations have found it necessary to control outside counsel because their work assumes levels of legal compliance at variance with the commitments of client organizations. Inside counsel practice preventative law because elite firm practitioners do not adequately or efficiently alter the services they provide to comport with corporate interests in legal compliance.

\textit{Id.} at 505-06.

\(^7\) Anthony Kronman in \textit{The Lost Lawyer} notes the reallocation of legal work between the law firm and the law department:

The historical reasons for this transfer of routine legal business from outside firm to inside staff remain a subject of debate. . . . Whatever its
also structurally changed and now more closely resembles the vertical organizational form of its corporate clients. What exactly is this new "business of the law" and is it "new" in any real sense?

Historically, professional legal service activities were differentiated from activities of typical service businesses by virtue of state licensing and regulation and the self-imposed ethical restraints of professional organizations such as bar associations. Increasingly, however, we observe both anecdotal and scholarly comment that law practice, particularly in large firms serving corporations, has evolved into a business virtually indistinguishable from the profit-seeking activities of the clients it serves. In this new environment, the law firm takes on the attributes of vertical hierarchy and central management. Is this a form of organizational isomorphism, a mimicry of its corporate clients, and, if it is, does it influence value creation? What is implied by the disappearance of the association of professionals collaborating in the partnership form with dispersed control through more or less equal votes over firm policy?

A related question asks whether the increased business orientation of law practice, with its primary emphasis on economic goals, brings with it other less verifiable changes in attitudes and values of a noneconomic nature. We hear of the decline of collegiality, solidarity, professionalism and independence, values associated with the traditional law partnership. How are the economic goals of the law business entity connected with the noneconomic values of the lawyers who inhabit the law firm?

Two parallel lines of recent academic commentary connect the relationship between economic and noneconomic values. The explanation, the simple fact is that many corporations today do more of their own routine legal work than they did before, and increasingly rely on outside firms only for those unusual matters requiring special intellectual or other resources that it would be uneconomical for these companies to acquire on their own.

So clear has this shift in the division of legal labor been that many strategists now claim large firms can survive only by adapting to it, by cultivating the specialties their clients cannot afford to develop for themselves, and leaving to their clients' own internal law departments all legal tasks of a less exotic sort. Large firms that fail to reorganize along these lines are likely, it is said, to fall behind in the competition for corporate clients and eventually to disappear, relics from an older age ill-adapted to the new one. Anthony T. Kronman, The Lost Lawyer—Failing Ideals of the Legal Profession 284 (1993) (footnote omitted).

Law practice and lawyers have been analyzed in terms of both economic and
The Transcendence of Value Creation

first is represented by Ron Gilson’s decade-old article on lawyers as transaction cost engineers, which creatively applied the capital asset pricing model to speculate about how the lawyer creates value for clients in the business acquisition transaction.\(^9\) In a subsequent article, he and Bob Mnookin applied economic principles to describe internal law firm relationships in terms of capital-sharing and risk aversion.\(^{10}\) The second line of inquiry, focusing on noneconomic values of lawyers, is exemplified by Bob Gordon’s article analyzing lawyer independence.\(^{11}\) I propose to connect in a very preliminary way these two parallel strands of literature by suggesting that value creation in the broadly conceived context of the business transaction transcends the discrete exchanges of money for services, and radiates outward not only to shape the law service entity, but also the noneconomic values of its inhabitants.

Part I first classifies business transactions performed by law firms versus in-house law departments. I then argue that the direct services rendered by lawyers in the discrete business transaction reveal only a small component of a much more complex transactional matrix involving the creation of value by the lawyer for the law firm, in the form of fee income, and the perception by the management of the firm of the value of the lawyer’s ability to attract repeat business. The less visible component of the business transaction now conceived of as including the lawyer’s business relationship with the law firm thus constitutes an important manifestation of the transcendent aspect of value creation be-

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\(^9\) Gilson, supra note 5.

\(^{10}\) Gilson & Mnookin, Sharing Among Capitalists, supra note 8.

\(^{11}\) Gordon, supra note 8.
yond the interface of the lawyer and business client. This lays the basis for a later discussion of how value creation radiates through the law organization to influence noneconomic values.

In Part II, I examine commentary from organizational theory that creates a consistent, if not conclusive, explanation of the tendency of law firms to mimic the organizational traits of the clients they serve. In Part III, I connect the economic forces noted in Part I with changes in noneconomic values of lawyers. Value creation drives the current organizational mode of law practice. In the new organizational environment, the constant and frequently conflicting pressures to create value for the business client and for the law firm erode noneconomic values of the law firm such as collegiality, solidarity, professionalism and independence. In the Conclusion I emphasize the preliminary nature of the inquiry connecting value creation by business lawyers in the more broadly conceived definition of the business transaction, and suggest the need for additional empirical study emphasizing sociological and psychological disciplines.

I

Understanding and Defining the Business Transaction in the Context of the Law Business of the 1990's

A. Functions of the Law Firm and the Law Department: Classifying the Business Transaction

Historically, law firms provided value to clients in business transactions by forging an ongoing relationship encompassing virtually all of the client's legal work, from the routine to the complex. Today, however, law firms are typically retained on a transaction-by-transaction basis. The corporate internalization of the law service function, reflected in the emergence of the law department of the large corporation, has forced law firms to market specialized legal services. Transactional value that is superior to that deliverable within the client entity must be created by the law firm in competition with other firms. This new competitive element along with the decline of ongoing client relationships causes changes within the law firm. The following classification of transactions performed by the law department and the law firm assists in developing the thesis that value creation in the current

12 Kronman, supra note 7, at 283-85.
The Transcendence of Value Creation

competitive climate affects the structure of law firms and the relationships of lawyers in them.\footnote{The lawyer's function in the transaction may also be important to classify since specialization of function is related to the ability to compete with the internal capability of the client and other law firms. Functions of lawyers may be described as follows: (1) facilitative work: a pure task-based function that may be accomplished without specialized knowledge or training. This function is associated with the mechanical-repetitive transaction described in the text. It is typical of the function now performed in the legal department; (2) creative work: a novel application of legal principles to attain client objectives. Creative transactional structuring by lawyers in law firms remains one of the most marketable of functions. It is not work intensive, but may justify billing premiums and attract repeat business; (3) facultative work: the securing of the approval or authority to consummate a transaction, as by gaining a governmental approval. Except in the largest of corporations, the law firm with extensive regulatory capability generally competes well in marketing this function; (4) negotiative work: bargaining for the best legal protections with opposing attorneys. This function is difficult to identify, but the reputation of a lawyer as a negotiator may be deemed a specialty in labor and insolvency matters.} It serves to introduce the discussion in Part I-B of the broader value creation environment in which value creation to the law firm is considered.

Mechanical and repetitive: These transactions do not involve novel applications of the law; they typically are work intensive and time consuming. By definition they are repetitive and thus may consist of utilizing form documents such as employment agreements, indentures, supply contracts or regulatory filings to effectuate client goals in predictable chronological sequences. Because of the comparative cost structure of the law department and the law firm, these transactions are the most likely candidates for delegation to in-house counsel or paralegals.\footnote{The corporate client will seek to avoid paying hourly fees to outside counsel when it may undertake the legal function internally and avoid the hourly billing associated with the fixed costs of law firms.} This shift in mechanical and repetitive work away from the law firm deprives it of a means to train newer lawyers. It will increase the likelihood that an associate in a law firm will be assigned to a small part of a larger more unique transaction as described below. Two consequences of the economics of value creation on the junior lawyers of the law firm thus are demonstrated. First, the younger lawyer in the law firm will not gain experience and judgment that comes from individual responsibility for minor matters. Second, the lawyer is deployed to the lower level of a hierarchy commanded within the law firm in the context of a large transaction. This, in turn, accentuates the transactional bond between young lawyers and the law firm; at an early stage
they will view the law firm as the relevant client rather than the business entity for which services are rendered.

**Mechanical, nonrepetitive:** These transactions exist at a slightly higher level of complexity because they may not be undertaken by the law department simply by reference to prior transactions and documents. However, frequently they may be completed with reference to business treatises, computerized sources of similar transactions for which there is publicly available information. Examples include incorporation and merger of subsidiary companies, corporate recordkeeping, standard real estate transactions and loan documentation. Formerly the work of a mid-level associate in the law firm, these transactions may be executed by in-house lawyers hired from law firms laterally or trained within the corporate law department. A smaller corporate client may not, of course, find it economical to maintain a legal department of sufficient size to handle these transactions, but it may also be disinclined to retain the large law firm at high billing rates. Accordingly, it may retain a small law firm.

The effect on the structure of the large law firm is similar to that seen from the absorption of mechanical, repetitive transactions by the law department. The mid-level associate is deprived of client contact and an important source of professional development. This also has implications for the lower level partner. She has less opportunity to supervise younger associates. She is driven toward developing a specialized practice or becoming part of the mid-level of a large firm engagement. The result is the same: the law firm lawyer, driven by value creation demands of the firm, becomes part of an internal law firm hierarchy where performance frequently is judged in terms of aggregate billable hours. As the billable hours requirement increases, she has less time to develop an independent client base outside of the firm. But even given time to develop clients, she finds herself burdened by a high billing rate that does not compete well with the small law firm or the legal department of the corporation. Accordingly, she must rely on the firm as her principal client.

**Complex, homogeneous:** These transactions require considerable experience in terms of lawyerly skills. They will tend to involve large dollar amounts and have considerable importance to the corporation. They are not repetitive in the same sense as the mechanical, work-intensive transactions described above, but they exhibit some common elements. For example, an entity may
be engaged in an acquisition program where a number of smaller companies are absorbed through the medium of stock acquisition, purchase of assets or merger. If the corporation is in a unique line of business, the transactions may be complex, but the legal and business issues may be similar. The practice habits and locale of the opposing lawyers may be the only significant distinguishing features among a series of these transactions.

A large corporation with developed in-house capability will seek to apply its own legal resources to consummate an acquisition program, relying on outside law firms solely for tax matters, regulatory counsel and opinion matters. This causes the law firm and its lawyers to specialize individually and institutionally. The individual lawyer who has not specialized sufficiently so as to be retained by clients outside the firm often enough to meet law firm value creation requirements will be driven to participate in work-intensive large projects for which the firm has been retained because of its institutional capability for heterogeneous and unique transactions, the next category to be described.\(^\text{15}\)

*Large, heterogeneous and unique:* These transactions reflect extraordinary business initiatives such as the undertaking of or defending against a hostile acquisition, an offering of hybrid securities or a complex international financing. In this environment, the large law firm brings to bear its considerable resources of unique experience and numbers of lawyers. The importance of the transaction to the corporation and the amount of money involved are perceived to justify a high billing rate and deployment of many lawyers. In the context of the large, heterogeneous transaction, we see most clearly the changing relationship of the lawyer to the firm driven by value creation for the corporate client.

The transactional lawyer who by reputation attracts a continuing flow of unique transactional work escapes the necessity to create value for the firm or the client corporation measured by billed hours. She is an entrepreneur. Her personal hours become virtually irrelevant because of her apparent ability to attract the transaction that generates a high volume of work by other lawyers in the firm that generates profitable revenue. The lawyer develops her own hierarchy within the firm, which may be deployed to service unique transactions attracted to the firm by

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\(^{15}\) For a more detailed discussion of how the economic forces of value creation influence the noneconomic values of the lawyers in the firm, see infra part III.
her reputation. Value creation in the form of a continuous flow of specialized work connects directly to the law firm organization. By virtue of her power to attract and assign work, the lawyer resembles her executive counterpart in the corporate client, an issue addressed in greater detail in Part II. Her importance to the firm as a source of work also translates into greater power relating to overall firm policy.

As the foregoing classification of transactions demonstrates, what lawyers do to create value in the business transaction inevitably defines their relation to the law firm. The ongoing transactional relationship of the lawyer to the firm exhibits certain tensions described in what follows; it constitutes the connecting link between economic value creation and noneconomic values discussed in Part III.

B. Lawyers as Value Creators to Dual Clients—Value to the Business Organization and Value to the Law Firm

The business transaction at a typical closing reflects exchanges of assets and contractual undertakings between business clients designed to advance and protect their financial objectives. Less apparent at the closing are the underlying or secondary business transactions of a continuing nature occurring between the lawyer and its own organization, whether the law firm or the law department. The following hypothetical transaction exhibits the multiple value-creation tensions arising, on the one hand, among the lawyers in the law firm, and between the lawyers and the client retaining the firm, on the other. The secondary transaction arising from the relationship of the lawyer to the law firm may assume primary importance because the firm is the lawyer’s direct source of compensation.

Let us look critically at the process of value creation from its inception. A corporate client places a call to a law firm for legal services, beginning a sequence of events that highlights the dual relationship of the lawyer to the client and to the firm. Initially, the lawyer contacted by the corporate client must make a judgment about whether to perform the work personally, delegate it to someone junior, perhaps an associate, or assemble a team of lawyers. On its face, this decision would seem to involve a calculation of how to serve the client most efficiently by providing the highest quality of service at lowest cost.

Indeed, the nature of the service requested may make the
staffing decision unambiguous. For example, a complex corporate transaction may require the immediate assembling of a large specialized team that is experienced in effectuating the client objective. There will be many hours of work for associates and partners and perhaps a good result will justify premium billing beyond the hourly rate. Alternately, verbal advice rendered by the lawyer on the spot may be sufficient.

But between these poles of simplicity and complexity the manner of performing work for a client may pose alternative staffing possibilities involving different combinations of work performed by the lawyer contacted by the corporate client and other partners and associates. Here, the multiple transactional and tensional nature of value creation in the business becomes more apparent. Because the lawyer is compensated directly by the law firm based upon the perceived value of the lawyer to the firm, a conflict may arise between the lawyer's objective in satisfying the firm's internally set goals of billable hours and the immediate needs of the client. Specifically, the lawyer may sacrifice the client's interest in receiving the lowest cost service by performing it personally at higher rates, thus deferring to internal firm goals. The conflict between the client and the firm and how it is resolved by the lawyer responsible for assigning the work is as difficult to analyze as the value the lawyer adds to the transaction: there simply does not exist a setting to control and compare variables in equivalent transactions.

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16 Work performed by the associate is also complicated because associates are required to bill high numbers of billable hours for partnership consideration. See Edward A. Adams, Large Firm Partnerships Now an Even Longer Shot—Survey of City's 30 Largest Shows Odds Drop Further, N.Y. L.J., July 8, 1991, at 1, 2. Accordingly, the associate may be inclined to see the law firm as the "real" client for purposes of creating value.

17 Economic value is exceedingly hard to quantify in any business transaction because it is virtually impossible to control variables across a representative sample of transactions and lawyers so that meaningful cost-benefit comparisons may be made. We do know that clients make ex ante selections of law firms and individual lawyers based entirely or in part on perceptions of value. They may, of course, make the choice on criteria related to personal relationships, perceived reputation of a firm or lawyer or the possibility that the lawyer will direct business of its other clients as a quid pro quo for the lawyer's retention. These criteria, however subjective, usually are not entirely noneconomic; they may simply foster business objectives distinct from value creation in the specific transaction for which the lawyer is retained. The point is this: the services lawyers perform and the reasons they are selected create significant problems of measurement for those of us interested in quantifying how much lawyers add or detract from net value derived from the business transaction. See Gilson, supra note 5, at 247-48.
There are, however, strong countervailing incentives to favor the client’s interest in performing the work in a manner that the client will believe is most economical. The lawyer is aware that the client in most cases is attentive to how matters are staffed in the law firm. If the client perceives that alternate means may be more efficient, it may in the future assign work to its internal law department or to another law firm. Accordingly, the lawyer will have a strong incentive to perform the work in a manner that will encourage return business. This goal is perhaps deemed higher in importance to the law firm than annual hours per lawyer, though it is considerably more difficult to evaluate in terms of lawyer compensation.

In developing a preliminary thesis of the transcendence of value creation, it is sufficient simply to connect a classification of business transactions with the dual relationship of the lawyer to the corporate client and the law firm. In short, value must be created outward to the fee paying client and inward to the firm compensating the lawyer. But is there anything new in this observation?

C. Value Creation: Is There a "New" Business of Law?

The staffing of a project only begins the value creation process with its inherent tensions and multiple transactional dimensions. Throughout the transaction the lawyer with responsibility for overall decisionmaking constantly balances the application of personnel to the objectives of the client with the necessity of being aware of the firm’s internal goals. Some law firms and lawyers possess a specialized capability that minimizes or eliminates this tension because the services they provide are always in demand at comparatively high hourly or premium rates. But they are the exception rather than the rule; hostile takeover work stands as an example of the exception as does some esoteric regulatory work. The billing process ends the project; the lawyer must then explain the charges for services and subtract for useless or duplicated work.

When the question is asked whether law practice has really become a “business” and, if so, whether anything is fundamentally different between the business of law now and in the past, we must consult the sources of analysis of law practice of a few decades ago. In doing so, the competitive environment of today in law practice compares as a virtual inversion of the manner in
which staffing decisions were made only a few decades ago. Erwin Smigel, a pioneer in the study of law firms, described the manner of staffing law projects in his study of law firm recruitment practices as follows:

This expansion of legal work is generally attributed to the continuing growth of big business and to the multiplication of laws affecting commerce. [David] Riesman also suggests [in a letter to Smigel dated September 8, 1958] that "it takes more people to do the same amount of work and that ever higher standards of conspicuous production go into the definition of the standard of work—Parkinson's law, in other words." Personal observation suggests that while Wall Street lawyers work very hard today, they probably do not work as hard (as indicated by historical sources) as their predecessors did in the past—another reason why more lawyers are needed to do the job now.19

Observing the climate of the business of law practice and thus underscoring the change in the intervening period, Abram and Antonia Chayes observed the following at a 1985 Symposium:

It is not beyond belief that [the law department] could replicate the range of skills and potential economies available in the largest outside law firms.

Therefore, the status, organization, and business of the traditional elite law firm may be substantially altered in both substantive emphasis and in the nature of client base by the new prominence of corporate counsel. Indeed, it is the authors' view that the rise of corporate counsel is, if not the cause, then a powerful [factor] that, in recent years, [has] altered the 'traditional' firm beyond recognition . . . .20

The Chayes, of course, only address the impact of the internalization of the legal function by the corporation, but the observation confirms that the legal business world Erwin Smigel and David Riesman viewed in 1958 has largely disappeared.

Again, for the purposes of this paper in developing a preliminary thesis of value creation, it is sufficient to describe an environment where value creation radiates beyond the business transaction to influence the structure of law firms and the noneconomic values of their inhabitants. It seems beyond ques-

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19 Smigel, supra note 18, at 58 (emphasis added) (footnote omitted).


21 See Smigel, supra note 18.
tion that, at least in economic terms, the intensely competitive environment of law firms and law departments constitutes a "new" business of law.\textsuperscript{22}

II

VALUE CREATION AND ORGANIZATIONAL ISOMORPHISM

Thus, institutional environments are notoriously invasive. To paraphrase Pogo, We have met the environment and it is us!\textsuperscript{23}

Much of the preceding discussion relies upon a description of competitive forces to confirm that there is at least a changed business context of law practice. It is not surprising to observe that the organization of law firms has increasingly taken on the structural attributes of the law firm client, the corporation. What are these attributes of organizational isomorphism?\textsuperscript{24} Law firms exhibit vertical hierarchies governed by managing partners; partners and associates are terminated like corporate officers and employees when economic or other conditions cause them to be unproductive; partners move laterally much like executives; and firms merge, fail and enter new product markets. Does value creation constitute a cultural and sociological phenomenon that explains organizational structure and noneconomic values of lawyers apart from the exchange of money for services and the related division of law firm profits and power?\textsuperscript{25}

Little has been written about how the current interchange of services between the client and the law firm alters its shape and the relationships of the people in it as a sociological phenomenon. However, if one views the relationship of the law firm to

\textsuperscript{22} This, of course, does not address the question of why changes in the business of law did not occur until recently.


\textsuperscript{24} See infra text accompanying notes 25-27.

\textsuperscript{25} Scholars of professional institutionalization do not greatly refine these observations by framing them in terms of supply and demand. For example, Eliot Freidson makes the following observation:

When one's goods or services are so valuable on the market as to make consumers supplicants, then one can exercise considerable control over the terms, conditions, content, and goals of one's work. But when one's goods or services are not in heavy demand, then one can only be a desperate supplicant of indifferent consumers or employers.

the corporate client as involving a medium connecting an external environment, then the work of sociologists studying organizational structure becomes helpful in explaining why law firms increasingly look and act like their corporate clients. This is because organizational theory increasingly connects organizational structure to environmental and relational phenomenon rather than to the technical nature of the work performed. W. Richard Scott has written of the shift in organizational theory as follows:

A few years ago it was common to discuss the structures of formal organizations on the assumption that they reflected the technical requirements of work activities going on in these organizations, and on the further assumption that variations in the way organizations are structured were likely to have substantial consequences for the way work was done. That is, organizational structure was seen as linked closely to external technical requirements and to internal work activities.

During the 1970's, dominant perspectives in organization theory changed to emphasize environment over technology as the central determinant of organizational structure. Organizations were variously viewed as structured in ways that copied the environment . . . or warded off the environment. There also developed the idea that managing the actual work of the organization might be less critical than managing the way in which the work was depicted to the environment.

[W]e emphasize the role played by institutional environments in determining organizational structure and behavior. Institutional environments are broadly defined as including the rules and belief systems as well as the relational networks that arise in the broad societal context. We suggest that in modern societies an important category of the rules and belief systems that arise are sets of 'rational myths.' The beliefs are rational in the sense that they identify specific social purposes and then specify in a rule-like manner what activities are to be carried out (or what types of actors must be employed) to achieve them. However, these beliefs are myths in the sense that they depend for their efficacy, for their reality, on the fact that they are widely shared, or are promulgated by individuals or groups that have been granted the right to determine such matters. We argue that the elaboration of these rules provides a normative climate within which formal organizations are expected to flourish.26

John Meyer and Brian Rowan elaborate on this general observation by equating environmental influences with isomorphic

26 Scott, supra note 23, at 13-14 (emphasis added).
tendencies of organizations and a correlative diffusion of organizational boundaries.

The observation is not new that organizations are structured by phenomena in their environments and tend to become isomorphic with them. One explanation of such isomorphism is that formal organizations become matched with their environments by technical and exchange interdependencies. . . . This explanation asserts that structural elements diffuse because environments create boundary spanning exigencies for organizations, and that organizations which incorporate structural elements isomorphic with the environment are able to manage such interdependencies.

. . . According to the institutional conception as developed here, organizations tend to disappear as distinct and bounded units. Quite beyond the environmental interrelations suggested in open-systems theories, institutional theories in their extreme forms define organizations as dramatic enactments of the rationalized myths pervading modern societies, rather than as units involved in exchange—no matter how complex—with their environments.

The two explanations of environmental isomorphism are not entirely inconsistent. Organizations both deal with their environments at their boundaries and imitate environmental elements in their structures.27

If value creation constitutes a dominant element in the external environment of the law firm and the corporate client, it may be useful to investigate it as a sociological phenomenon apart from its financial attributes. One could suggest an inquiry of value creation as follows: Organizationally, lawyers, among themselves and with respect to the clients they represent, will respond to exchange interdependencies. It may thus be less important to quantify value in the actual exchange than to determine which entity defines the environment that is external to both the corporate client and the law firm. Accordingly, if value creation between the lawyer and client inculcates rational beliefs (or rational myths) of organizational mode associated with the corporation, will the law firm, as the dependent entity, necessarily adopt corporate attributes and attitudes? Does the theory of organizations explain why the law firm takes on the organizational attributes of its clients? Meyer and Rowan's theoretical observations appear to suggest that the law firm may tend to do so be-

cause it thus will best be able to manage its exchange interdependencies.\textsuperscript{28} In other words by being an entity dependent on the corporate client, the law firm takes on the organization attributes of the corporation.

It is not entirely clear, however, why the management by one entity of exchanges of value necessarily causes it to become isomorphic with other entities constituting the external environment of its exchange partners. It does seem that as a group of similar entities (for example, law firms) becomes more dependent on other entities with which they engage in exchanges they will react to competitive forces by seeking to become more efficient. But this simply restates observations based upon economic analysis and does not confirm the applicability or explanatory power of organizational theory.

There is some anecdotal evidence, however, that lawyers and law firms mimic client attributes for reasons not explainable by efficiency. It is commonly believed that the manner in which business is conducted in the motion picture production industry differs significantly from the manner in which it is conducted in mature industrial enterprises. Management of artistic talent tends to be freer of lines of reporting, contractual relations are conducted with less technical reliance on the written word, and personal styles tend to be more colorful. The same appears to be true for lawyers and law firms serving the motion picture industry. Even mature entertainment law firms exhibit much less of the recent tendency toward centralized management and departmental specialization.\textsuperscript{29} In contrast, law firms doing public finance work of utilities and municipalities reflect organizational attributes not dissimilar to the entities they represent. But much

\textsuperscript{28} Id.

\textsuperscript{29} See D.M. Osborne, The Players, Am. Law., Dec. 1994, at 60. Osborne's article contains an in-depth description of one of the prominent entertainment firms in the country. He describes fee payment on the basis of commissions rather than hourly time, the lack of a detailed written partnership agreement and rather casual attention to client conflicts of interest, along with other stylistic attributes of law practice much more akin to the entertainment milieu than the traditional law firm. Osborne states:

Unlike full-service firms, [the law firm described in the article] does no litigation or any of the traditional corporate legal work on the big transactions in which it is involved. In fact, talent clients, such as film star Eddie Murphy and television writer-producer Stephen Cannell, remain the firm's core business—paying their legal fees as a percentage of their earnings and accounting for roughly 50 percent of revenue. . . .

\textit{Id.}
of this was true many years before the relatively recent changes in law firm structure and behavior. What explains the apparent increase in law firm isomorphism with corporate client structure?

Part of the answer may be found in Professor Scott's observation that "[i]nstitutional environments are broadly defined as including the rules and belief systems as well as the relational networks that arise in the broader societal context."\(^{30}\) As the lawyer becomes more dependent on the client and seeks to develop specialized legal skills that are not deliverable by the law department, she perhaps incorporates the rules and belief systems of the client. This seems consistent with the diffusion of organizational boundaries in the environment surrounding the law firm and the corporate law consumer. Accordingly, one can speculate that the rise of in-house law departments has been one factor in diffusing the boundaries between the law firm and the corporation. Diffusion of organizational boundaries would likely amplify the tendency toward common belief systems in the form of rational myths of structure, compensation and reporting relationships. Thus the law firm comes to resemble the structural appearance of the corporate client independent of concerns for efficient provision of legal services.

In summary, one can argue that organizational theory assists in describing the increasingly centralized, vertical organization of the law firm. "Law is a business" is the common refrain heard in the competitive climate of law firms. Yet all businesses are not the same; the style and structure of entertainment production companies and municipal entities differ as greatly as the style and structure of the law firms that serve them. In each case the law firm takes on some of the client's organizational and stylistic qualities. Empirical study will be necessary to confirm whether the observed isomorphic tendency of law firms in the last decade is traceable principally to economic forces or, rather, involves a diffusion of organizational boundaries and resultant homogenization of belief systems that are exhibited in organizational form. What lawyers must create in the form of perceived value is likely an important force behind either explanation.

\(^{30}\) Scott, supra note 23, at 14.
III

NONECONOMIC VALUES IN THE LAW FIRM:
COLLEGIALITY, SOLIDARITY,
PROFESSIONALISM AND
INDEPENDENCE

Describing value creation as a multiple transactional phenomenon among corporations, lawyers and their law firms with consequent organizational isomorphism introduces a discussion of noneconomic values of lawyers. A theory of transcendence of value must connect what lawyers create for clients—whether they are defined as the corporation or the law firm from which lawyers are directly compensated—with the cultural elements of law practice, which I identify as collegiality, solidarity and professionalism. There has been at least one scholarly attempt to make the connection. Bob Gordon’s brilliant and comprehensive Independence of Lawyers31 describes the absence of lawyer autonomy in terms not inconsistent with organizational theory:

Of course, the problem might be that lawyers have no such point of view [of their own] to assert. A host of recent studies of autonomy suggest that the basic issue is lack of disagreement, not lack of spine to disagree. According to these studies, most corporate lawyers simply find nothing to challenge in the way their clients present their interest; because they have been thoroughly absorbed into the political ideologies and strategies of the clientele, they believe they have no role to play save that of executing their clients’ interests efficiently.32

If value creation constitutes the protection of interests for dual, isomorphic clienteles, that is, the nominal corporate client and the law firm, the explanation for declining autonomy seems even more compelling. Gordon’s observation of the declining engagement in politics and public service also portrays the erosion of loyalty and collegiality in the current organizational environment of corporate law practice:

Only firms that have managed to preserve strong collegial cultures supporting engagement in politics and public service have resisted the trend. Elsewhere, the new interfirm mobility of lawyers, the breakdown of ethics of loyalty and collegiality within firms, as well as the increasing competition of firms for clients, of partners for a share of the take, of associates for partnerships, and of firms for new associates, all conspire to dis-

31 See Gordon, supra note 8.
32 Id. at 56 (emphasis added) (footnote omitted).
courage the development of any values besides making money for the collective.\(^{33}\)

Gordon, of course, focuses on forces operating between the client and the firm and within the firm that minimize lawyers' historical public function of formulating public policy regardless of the impact on client interests. Instead, "money for the collective" is the preeminent goal. Presumably this means money for the law firm. But framing a comprehensive theory of value creation as a force or organizational environment requires that the "collective" be defined as more than just the law firm. To survive, the lawyer must create value in multiple directions, judged on different criteria. The outside client must perceive the lawyer as adding value to the discrete business transaction; within the firm she must become an entrepreneur representing repeat business or she will, whether a partner or not, forever be considered an employee and judged on hourly quotas. The demands for value creation create conflict among the different constituencies the lawyer serves and explain the decline of independence, collegiality, solidarity and professionalism in the lawyer's life.

To address the noneconomic values influenced by value creation and to frame some avenues for further study, I return to the hypothetical business transaction described in Part I-B. Let us further consider the status of a junior partner of a law firm. Having risen from associate to partner, she has bested the odds of selection by producing quality work and meeting quantitative hours-denominated standards, but she also has become more expensive to compensate. At some point above the $200,000 or $300,000 salary level (varying greatly from city to city) she cannot justify further advancement by hourly time alone. If she bills 2000 hours at $250 per hour (a high rate for a junior partner), she generates $500,000 in revenue. But if the firm's margin of profitability is between 30% to 40%, she may be barely useful to the firm as a creator of firm value beyond her draw of $150,000 to $200,000 unless she provides additional legal business. This, of course, pressures her to deploy her skills in the firm in order to increase her billing to 2300 or 2500 hours, where she will be considered a marginally valuable participant. This state of affairs has important implications for the noneconomic values of the lawyer.

Although the term collegiality eludes formal definition, I use it to describe interpersonal relationships arising from an environ-

\(^{33}\) Id. at 60 (emphasis added).
ment in which the collective application of techniques of learning and knowledge create cooperation, teamwork and mutual respect. This highly idealistic concept may never have initially existed in the context of law practice, but anecdotal evidence indicates that law firms exhibited some of the characteristics of collegiality not generally associated with businesses in general. As value creation, at least in the context of this preliminary inquiry, reverberates outward from the business transaction, how has collegiality been influenced in the law firm? What has happened to the personal relations of lawyers in law firms?

We need to study this in sociological and psychological terms. However, some preliminary observations, devoid of scientific confirmation, seem uncontrovertible. To the extent that one constantly needs to be perceived as creating additional value in hourly terms to the organizational environment, one's personal life changes from that of participant to survivor. Additional billable time comes from nights and weekends, from family and recreation. Perhaps more importantly, the new organizational environment amplifies a connection to the financial goals at the expense of collegiality. Competition and dissonance increase and thus detract from personal relationships in the firm. Moreover, the economic structure of the thinly-capitalized law service organization mandates short-term profit horizons that intensify and serve to redefine a strikingly uncollegial law firm organization. 34

But we should return to our hypothetical participant to conclude the discussion of collegiality. Presumably she knows that, even for those intensely involved with the largest transactions, business transaction law consists of finite periods of time. She realizes that, unlike the lawyer employed by the law department on a salaried basis, the law firm's capital resources do not

34 The unique economic attributes of the law firm as a thinly-capitalized entity with minimal retained earnings, short-term profit goals and increasingly transferable human assets cause it to be dependent on a steady flow of cash fee collections. Thus the dominant economic variables in the modern law firm are revenue generation and cash flow. The ease of transferability of lawyers among law firms creates pressure to compensate lawyers with ability to confer superior value for clients. The horizontal, lockstep, seniority-based system of control and compensation molded into a different economic entity. A vertical economic and power structure emerges where lawyers with client relationships are compensated at higher levels than those who simply perform the service tasks.

35 The law firm and the law department may be compared in the most general of terms as follows:
permit her to be even relatively idle for extended periods of time without compromising her relation to the firm, or the existence of the firm itself if there is firmwide lack of work. The new determinants of value creation compromise not only the relations among the members of the firm but also its stability and integrity.

"Solidarity" is defined by the dictionary as the "union of interests and responsibilities in a group[, a] community of interests, objectives, or standards." I use it less for its preciseness of definition of what may have been an historical but declining attribute of the large law firm, and more as a means for examining the relationship of the lawyer to law firm as a unit of common interests among lawyers. Thus, if "collegiality" defines the level of interpersonal cathexis among the members of the firm, "solidarity" denotes the noneconomic value of the members' relationship to the entire organization and its goals.

Value creation has thus far been portrayed in terms of what the lawyer must do to satisfy the corporate client's requirements, on the one hand, and the less obvious but ever present law firm "client" demands, on the other. Value creation, in either direction, exacts a quid pro quo in terms of compensation to the firm and an allocation of profits or salary to the lawyer. If our hypothetical lawyer attains success by attracting clients, she ceases to merely perform technical legal services and instead becomes an executive who deploys and supervises the human resources of the law firm towards the goals of the corporate client. In the law firm she becomes an entrepreneur, a supplier of business and producer of revenue beyond her personal hourly capability. Not much distinguishes the present-day hypothetical lawyer from the previous model of the "rain-maker" who relied on other firm members to perform the work. The quid pro quo for this func-

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The Law Firm. It exhibits: (i) thin hard-asset capitalization and low retention of earnings; (ii) high reliance on human capital; (iii) intense demand for cash revenue; (iv) short-term cost/profit tension; and (v) competition for its human capital and risk of potential personnel and revenue-source (client) defection.

The Law Department. In contrast, this relatively small part of a larger organization exhibits: (i) reliance on diversified and usually greater overall firm capital resources and cash flow; (ii) reliance on nonlawyer management for ultimate policy direction; (iii) an undiversified client base; (iv) hierarchical compensation and reporting functions; (v) cost control and budgeting influenced by nonlegal business objectives; and (vi) internal value creation that does not usually produce revenue for the firm.

tion has, however, been altered in that the lawyer of today accumulates more political and economic power within the law firm based upon the perception that she controls the flow of legal business. How has this come about and what does it portend for the solidarity of law firms?

Beginning in the mid to late 1970s large law firms began to laterally hire associate attorneys from other law firms to staff large-case litigation and mega-transactional projects. Shortly thereafter, in conjunction with the rise of lawyer placement services and the creation of multiple branch offices, opportunities arose for partners with client followings (soon referred to as "books of business") to join other law firms. This system offered greater compensation than had been available under the historical profit division systems which emphasized years of service and gradual incremental raises. For those retaining the belief (or rational myth) that law practice was a profession rather than a business, the lawyer migration to other firms seemed crassly materialistic and traitorous to firm tradition and culture.

Two seemingly coincidental developments dramatically altered the sense of solidarity in law firms: some law firms failed financially and went out of business; and an active trade press devoted specifically to law practice reported firm profitability and partner compensation. One began to hear ponderings such as "I really don't want to be the first to look at law practice this way, but I can't afford to be the last." The events of the 1980s may best be described as intense organizational self-questioning and realignment to meet a new era of mobility. Of course, the rise of the corporate law department simply exacerbated competitive conditions.

The economic downturn in the early 1990s resulted in law firm failures and partner and associate layoffs and defections. Nevertheless a few firms managed to maintain historical tenure-related compensation schemes without loss of stability or financial prosperity. Of course, if a firm retains institutional clients through the firm's reputation rather than that of the members, it remains relatively resistant to the forces of lawyer mobility. By the same token, its reliance on institutional business would seem to accentuate the diffusion of organizational boundaries that is associated

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37 Karl Okamoto's Symposium article connects the reputational power of some of these firms to their retention of securities business. See Karl S. Okamoto, Reputation and the Value of Lawyers, 74 OR. L. REV. 15 (1995).
with structural isomorphism—the price of stability being a more corporate form of doing business.

Solidarity—the lawyer's noneconomic value to the common purpose of the firm—has been transformed by the value realized by the lawyer under new criteria of compensation driven by mobility and availability of information. Further study could shed light on several aspects of the relationship of the lawyer to the firm. Do firms and lawyers create value more efficiently for the corporate client by utilizing tenure-based compensation schemes, thus leaving lawyers less distracted by their separate transactional relationship with the firm? Or, in contrast, do law firms rewarding business generation create economic incentives that result in better client service by rewarding individual lawyer-client relationships? The impact of value creation on the noneconomic value of the lawyer's perception and commitment to the common purposes of the modern law firm could be better assessed if the answers to these questions were known.

Much has already been written of the functions, ethics and independence of lawyers as professionals; the literature comprehensively articulates the impact of the "new" business of the law on, for example, independence as one of the most important elements of professionalism. Accordingly, in this preliminary inquiry, I make only the most cursory observation about value creation and professionalism, and one dimension which I believe should be studied. The previous discussion describes what lawyers do for their various constituencies and what they get in return as a complex transactional and organizational environment. Obviously, a state license designating the holder as an officer of the court and conferring power to give legal advice carries with it civic responsibilities; Bob Gordon describes how modern law practice in the large law firm constrains even minimal lawyer participation in public policy. If from this work we better understand what may deter a lawyer from looking and reaching outward to society, I think we could benefit from a similar study looking inward, not inside the law firm, but rather to the lawyer's inner self and belief systems. If value creation exists as a form of energy that flows throughout the nervous system of law practice connecting the economic to noneconomic, then surely it reaches

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38 See supra note 32 and accompanying text.
39 See Gordon, supra note 8.
40 See id.
into the self-image of the lawyer as a professional and as a
human being. Are there common fears, compromises, satisfac-
tions, unhappinesses? Given the high rate of anecdotally re-
ported dissatisfaction, why do they continue to do what they do?
Who is harmed? What can and should be changed?

CONCLUSION

My goal in this paper has been to sketch out the broader trans-
actional environment of law practice as it reaches into and shapes
organizations and the lawyers in them. If value creation is con-
sidered as a form of currency constituting more than a medium of
monetary exchange, if it can be isolated as a force with substan-
tial noneconomic attributes, then perhaps we can undertake
studies to enhance our understanding of the social and psycho-
logical effects of law practice as they influence lawyer behavior as
individuals and groups. Perhaps there never was a true legal
"Golden Age"; it may exist simply as a nostalgie de la vierge.
There is, however, a new business of the law driven by value cre-
ation and we must understand its far-reaching effects.