

## CHIEF LEGAL OFFICER 5.0

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### INTRODUCTION

The contemporary business environment requires an enhanced chief legal officer (CLO) role. Since the Great Recession of 2008, the demands placed on CLOs have increased.<sup>1</sup> Today's business environment is characterized by technological disruption, increased activism by shareholders and other stakeholders, a regulatory environment emphasizing internal controls, and private ordering instead of prescriptive regulation. At the same time, delivery methods in the legal services industry are undergoing a massive transformation,<sup>2</sup> driven in part by technological innovation. If handled ineffectively, these complex demands threaten corporate value.

The enhanced CLO role is an element of a corporate immune system, which "is a collection of internal processes and mechanisms that have been developed to protect corporations by identifying and eradicating threats to their economic value," such as managerial shirking and opportunism.<sup>3</sup> Other elements of the corporate immune system often include, inter alia, board oversight, compliance and risk management systems, and remuneration.<sup>4</sup> In a sense, modern CLOs perform "an embedded internal regulatory function,"<sup>5</sup> which includes "monitoring, formulating company procedures and policies,

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1. See ASS'N OF CORP. COUNSEL, 2019 ACC CHIEF LEGAL OFFICERS SURVEY 2–7 (2019), <https://www.acc.com/sites/default/files/resources/upload/2019-ACC-Chief-Legal-Officers-Survey.pdf> [https://perma.cc/5PEY-QFCQ].

2. See George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. REV. 1635, 1637 (2006).

3. Omari Scott Simmons, *The Corporate Immune System: Governance from the Inside out*, 2013 ILL. L. REV. 1131, 1136.

4. *Id.*

5. *Id.* at 1144.

and enforcement.”<sup>6</sup> As another advantage, “[t]his internal regulatory function [arguably] lowers the monitoring costs for government actors.”<sup>7</sup>

The CLO role falls within the monitoring model of corporate governance that has become the favored policy response to economic turmoil and contemporary scandals.<sup>8</sup> The monitoring model emphasizes procedures, internal controls, compliance, and risk management “as tools to address agency costs [i.e., transaction costs], particularly problems of asymmetric information and managerial opportunism.”<sup>9</sup> The modern CLO role is best expressed in terms of value creation,<sup>10</sup> a “dynamic concept involving the interaction of multiple parties and activities in the employment of corporate resources.”<sup>11</sup> In-house counsel value is not simply limited to individual value-producing activities. “[I]t also encompasses the networked and embedded nature of the role, which contributes to the enhancement of corporate value and competitive advantage in unique ways that outside counsel cannot easily replicate.”<sup>12</sup>

The CLO role is inherently strategic rather than tactical.<sup>13</sup> It involves consistent interaction with corporate operations and a multiplicity of actors, enabling the corporation to significantly enhance its creation and preservation of value.<sup>14</sup> Generally, CLOs’ fiduciary obligations and

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6. Omari Scott Simmons & James D. Dinnage, *Innkeepers: A Unifying Theory of the In-House Role*, 41 SETON HALL L. REV. 77, 138 (2011).

7. *Id.*; see also Miriam Hechler Baer, *Corporate Policing and Corporate Governance: What Can We Learn from Hewlett-Packard’s Pretexting Scandal*, 77 U. CIN. L. REV. 523, 547–48 (2008) (explaining that the government, through policies and regulations, has encouraged companies to have higher ethical standards as well as effective compliance programs).

8. Simmons, *supra* note 3, at 1144.

9. *Id.* at 1145.

10. There are numerous formulations of the value-creation concept in the business literature. See, e.g., TIM HINDLE, GUIDE TO MANAGEMENT IDEAS AND GURUS 201–02 (2008). These issues elicit considerable debate on what metrics are the best proxies for corporate value (e.g., stock price, accounting or book value, net present value of future cash flows). *Id.* For example, financial experts may focus on metrics such as share price or book value as a proxies for value, whereas marketers may rely on more intangible measures, such as perceived customer value above cost. *Id.* Legal observers such as Ronald Gilson have also applied the value-creation concept to business lawyers. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 243 (1985); see also Steven L. Schwarcz, *To Make or to Buy: In-House Lawyering and Value Creation*, 33 J. CORP. L. 497, 498 (2008).

11. Simmons & Dinnage, *supra* note 6, at 84.

12. *Id.* Most definitions of business lawyer value creation in the legal literature, although useful, are descriptively too narrow because (1) they are limited to transactional sources of value; (2) they are fragmented; or (3) they fail to capture the unique value that stems from in-house counsel linkages, networks, and integration with other firm activities. *Id.* at 110 (“By contrast, our theory is not limited to transactions as traditionally envisioned, but also encompasses intangible and non-transactional sources of value, such as corporate compliance, which help directors and officers fulfill their oversight duties.”).

13. *Id.* at 84–85 (“When completed by competent professionals with well-honed ethical sensibilities, the strategic tasks that in-house counsel undertake add value because they are fundamentally different from the largely tactical outside law firm role.”).

14. *Id.* at 83 (“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

representation serve, in the following order: (1) the corporation, (2) the chief executive officer (CEO), and (3) everyone else.<sup>15</sup> This order of priority is especially important where conflict arises. CLOs are both leaders and lawyers, and must continuously navigate the tension between these responsibilities. Simply being a highly proficient tactical lawyer is insufficient.<sup>16</sup> CLOs, leading an entire legal department and sometimes having other corporate functions, are charged with ensuring that corporate clients receive quality advice on an ongoing basis.

Given the fast pace and growing complexity of the financially focused business environment, the CLO must creatively and intelligently engage internal clients and a range of third parties, which requires a diverse and deeper set of competencies. The CLO of the future should have a skill set that resembles a T shape.<sup>17</sup> Here, the vertical line represents acute legal acumen and the horizontal line represents additional competencies that allow the CLO to bridge multiple constituencies. Specifically, these additional competencies include, inter alia, (1) sophisticated procurement capabilities, (2) an enhanced financial focus, and (3) a global enterprise risk-management

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value. Prudent corporate managers cannot wait until such threats materialize; they require a type of consistent and strategic guidance that in-house counsel are uniquely positioned to provide.”). CLOs mitigate threats to corporate value as well as proactively capture opportunities. *Id.* Value can be both tangible and intangible and the particular metric for value may vary depending on the context or particular vantage point. *Id.*

15. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.13 (AM. BAR ASS’N 2018); E. Norman Veasey & Christine T. Di Guglielmo, *The Tensions, Stresses, and Professional Responsibilities of the Lawyer for the Corporation*, 62 BUS. LAW. 1, 8–13 (2006) (explaining that tensions may arise because of in-house counsel’s relationship with corporate management and in spite of these tensions in-house counsel “must exercise independent judgment on behalf of the corporate client when advising directors, officers, and employees of the client”); see also Gillian Tett, *Does Capitalism Need Saving from Itself?*, FIN. TIMES (Sept. 6, 2019), <https://www.ft.com/content/b35342fe-cda4-11e9-99a4-b5ded7a7fe3f> [https://perma.cc/4WZ2-EGNN]; *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans,’* BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [https://perma.cc/X992-XPE3] [hereinafter *Business Roundtable*].

16. A CLO has to create an environment of collaboration, support, and teamwork as opposed to an insecure environment caused when the CLO’s words do not parallel action. Interview with Thomas L. Sager, Former Exec. Vice President & Gen. Counsel of DuPont (Aug. 14, 2019). Additionally, a CLO who overemphasizes CEO- and board-oriented activities at the expense of other corporate constituencies may prove ineffective. *Id.*; see also Ben G. Pender II, Note, *Invigorating the Role of the In-House Legal Advisor as Steward in Ethical Culture and Governance at Client-Business Organizations: From 21st Century Failures to True Calling*, 12 DUQ. BUS. L.J. 91, 96 (2009) (“Although many business organizations frame and articulate corporate conscience through written policies, ethics codes, and compliance management programs, policies, codes, and compliance programs alone are inadequate to operationalize an ethical corporate conscience.”).

17. See R. Amani Smathers, *The 21st-Century T-shaped Lawyer*, LAW PRAC., July/Aug. 2014, at 32; see also Scott F. Norberg, *Summary of the Proceedings*, 13 FLA. INT’L U. L. REV. 313, 332 (2019) (summarizing the remarks of Fernando Garcia, general counsel and government affairs and corporate secretary of Nissan Canada). See generally ELAINE MAK, *THE T-SHAPED LAWYER AND BEYOND: RETHINKING LEGAL PROFESSIONALISM AND LEGAL EDUCATION FOR CONTEMPORARY SOCIETIES* (2017).

orientation.<sup>18</sup> Performing this enhanced role, however, may be subject to challenges and limitations.

This Essay builds upon the business-lawyer value-creation literature by analyzing the contemporary CLO and argues for an enhanced CLO role.<sup>19</sup> It emphasizes the sometimes ignored and underemphasized demand-side considerations involved in the provision of legal services. These demand-side considerations will help to predict the competencies and expanded skill sets CLOs will need to navigate the challenging contemporary business environment. Part I of this Essay discusses CLOs' sophisticated purchasing competencies. It explores how CLOs have revolutionized legal service provision by addressing problems stemming from information asymmetries between the client corporation and external legal service providers. Part II examines how the contemporary CLO role is more financially focused, placing greater demands on legal departments to articulate their value to corporate managers. Part III explores the importance of global enterprise risk management and the impact CLOs can have in capturing and preserving economic value. Part IV addresses potential challenges and concerns related to the proposed enhanced CLO role. The Essay concludes that the contemporary business environment facing global companies requires an enhanced CLO role reflecting a broader range of competencies. As a matter of prediction and aspiration, it maps out key competencies contemporary CLOs should possess.

#### I. SOPHISTICATED PURCHASING COMPETENCIES

CLOs function as sophisticated purchasers who help companies make a key decision: whether to make or buy legal services.<sup>20</sup> If they opt for the latter, questions arise as to which external service provider(s) to use and for which types of matters.

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18. Jena McGregor, *Group of Top CEOs Says Maximizing Shareholder Profits No Longer Can Be the Primary Goal of Corporations*, WASH. POST (Aug. 19, 2019, 6:18 PM), <https://www.washingtonpost.com/business/2019/08/19/lobbying-group-powerful-ceos-is-rethinking-how-it-defines-corporations-purpose/> [https://perma.cc/RA3S-LFG7].

19. This Essay often uses "CLO" as a proxy for the entire corporate legal department. See generally Gilson, *supra* note 10, at 243 ("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." (emphasis omitted)); Schwarcz, *supra* note 10, at 498.

20. See generally R. H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937) (asserting that, in order to minimize transaction costs, it may be optimal to bring various labor functions within the firm to prevent costly "spot" labor market transactions); Oliver E. Williamson, *The Vertical Integration of Production: Market Failure Considerations*, 61 *AM. ECON. REV.* 112 (1971) (analyzing the benefits of internalization versus external procurement); *Corporations Are Adding to Their In-House Legal Departments, Cutting Outside Expenditures*, A.B.A. J. (Dec. 1, 2014, 5:00 PM), [http://www.abajournal.com/magazine/article/corporations\\_are\\_adding\\_to\\_their\\_in\\_house\\_legal\\_departments\\_cutting\\_outside](http://www.abajournal.com/magazine/article/corporations_are_adding_to_their_in_house_legal_departments_cutting_outside) [https://perma.cc/9L2T-ACDU] ("Large corporations worldwide switched their 2013 legal spending from outside law firms to in-house law departments.").

*A. Nature of Legal Services: Experience and Credence Characteristics*

The value of legal services is a function of cost and quality.<sup>21</sup> Whereas cost is relatively transparent from service provider invoices, quality is often more difficult to discern. Economists identify three types of goods: (1) search goods, (2) experience goods, and (3) credence goods.<sup>22</sup> In the search goods context, the search process prior to consumption readily reveals the quality of the goods.<sup>23</sup> Search goods have “low pre-buying costs of quality detection.”<sup>24</sup> On the other hand, the quality of experience goods cannot be discerned during the search process but only during or after consumption.<sup>25</sup> These goods have “high pre-buying costs of quality detection” but low post-buying costs of quality detection.<sup>26</sup> Examples include many jobs, movies, newspapers, wine, and food.<sup>27</sup> The quality of credence services—such as certain medical services, automobile repairs, and education—cannot fully be determined after the search process and even following a significant period after consumption.<sup>28</sup> They have “high pre-buying costs and high post-buying costs of quality detection.”<sup>29</sup>

Legal services most closely reflect experience and credence services, making the client corporation vulnerable to the opportunistic behavior of service providers seeking to extract higher profits or rents.<sup>30</sup> If the services are experience services, their quality can be detected earlier than that of credence services; that is, during or immediately after use.<sup>31</sup> Nonetheless, the client company may still fall prey to opportunistic behavior; for example, if the service provider is not interested in repeat business and tries to extract a hefty “one-off” premium. However, the risk of losing future business may constrain and discipline the conduct of many service providers.<sup>32</sup>

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21. See Simmons & Dinnage, *supra* note 6, at 106–07.

22. Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1600 (2006) (listing the three types of goods); see also Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68–69 (1973); Philip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311, 311 (1970).

23. Fleischer, *supra* note 22, at 1600. The quality of search goods, such as clothing, footwear, and jewelry, can readily be discerned during the search process prior to consumption. *Id.*

24. MEN-ANDRI BENZ, STRATEGIES IN MARKETS FOR EXPERIENCE AND CREDENCE GOODS 2 (2007); see also Nelson, *supra* note 22, at 311 (analyzing consumer behavior with respect to search and experience goods).

25. See Darby & Karni, *supra* note 22, at 68.

26. BENZ, *supra* note 24, at 2.

27. *Id.*

28. See Darby & Karni, *supra* note 22, at 68–69 (“Credence qualities are those which, although worthwhile, cannot be evaluated in normal use.”).

29. BENZ, *supra* note 24, at 2.

30. *Id.*; see also Nelson, *supra* note 22, at 311 (analyzing consumer behavior with respect to search and experience goods). On the other hand, the quality of experience goods is not discernable during the search process but rather after consumption. See Darby & Karni, *supra* note 22, at 80.

31. Fleischer, *supra* note 22, at 1600.

32. See Darby & Karni, *supra* note 22, at 68 (explaining that the profits of many businesses depend on client relationships, which are “implicit understanding[s] that the

Credence services expose an even greater asymmetry between buyers and sellers concerning knowledge about quality.<sup>33</sup> In the legal services context, quality will be difficult to determine or require costly information and other circumstances;<sup>34</sup> for example, a considerable time lapse.<sup>35</sup> Credence characteristics create two types of asymmetry based on customers' inability to determine their needs or accurately diagnose a problem and the level of service necessary.<sup>36</sup> By controlling the interplay between diagnosis and service provision, the service provider can exacerbate the customer's dilemma because "consumer ignorance and [the] additional cost of separate diagnosis and repair provide motivation [or incentives] for a service firm to defraud its customers."<sup>37</sup> The veracity risk is higher when "information may be filtered and possibly distorted to the advantage of the [service] firm that has assumed the information collection responsibility."<sup>38</sup> A broader range of overreaching service provider conduct falling short of fraud is still problematic; for example, inferior work product and lack of punctuality may still work to the detriment of the corporate client.

In the legal services context, CLOs can disrupt service provider overreach and opportunism in several ways. As sophisticated purchasers within the corporation, they can help to mitigate information gaps associated with experience and credence services.<sup>39</sup> Their embedded legal acumen enables them to help diagnose problems and, equipped with data-driven tools, they can collect and analyze reliable information about the proposed service, thereby creating more value for their companies.<sup>40</sup> For example, a data analysis of contracts might reveal costly errors and gaps for which the service provider bears responsibility. Similarly, data analytics might reveal that a law firm's recommended litigation strategy has not generated desirable results commensurate with its costs. CLOs' guidance is not simply *ex post*; they can provide valuable predictive guidance to assist *ex ante* decision-making.<sup>41</sup>

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customer will return for future services so long as he does not detect fraud or low quality services.").

33. *Id.*

34. *Id.*

35. *See id.* at 69.

36. *See* Brian Roe & Ian Sheldon, *Credence Good Labeling: The Efficiency and Distributional Implications of Several Policy Approaches*, 89 AM. J. AGRIC. ECON. 1020, 1020 n.1 (2007) ("[O]nly an expert can diagnose the consumer's true needs, e.g., does the car need a minor or major repair? . . . [O]nly the seller may know the level of service actually provided, e.g., was the car given the appropriate level of service?").

37. Darby & Karni, *supra* note 22, at 77.

38. Williamson, *supra* note 20, at 120.

39. Simmons & Dinnage, *supra* note 6, at 108–09.

40. Rebecca M. Lamberth et al., *Alternative Fee Arrangements: Who's Responsible for Making Them Work?*, 22 CAL. LITIG., no. 2, 2009, at 11, 14–15.

41. *See* Simmons & Dinnage, *supra* note 6, at 108. With access to internal control mechanisms as well as ongoing internal relationships, in-house counsel can gather information more efficiently and at a lower cost, allowing them to conduct more precise *ex ante* and *ex post* evaluations of corporate legal performance. Otherwise, the external acquisition of this information could be costly and increase veracity risks, where "information may be filtered

### B. Bundling

CLOs must also be attuned to the issue of service provider bundling. Bundling involves a single service provider performing a range of differentiated tasks for a single client.<sup>42</sup> At first, bundling services can seem to be a win-win proposition for both customer and service provider.<sup>43</sup> For the corporate customer, purchasing bundled services can save money. Bundling, in essence, offers a volume discount, where the corporate customer gets more product or services at a lower per-unit cost.<sup>44</sup> For the seller or service provider, bundling is a way to generate additional revenue.<sup>45</sup> The efficacy of the standard “Costco” volume discount, involving a single product, hinges on buyers’ actual need for more product or service.<sup>46</sup> Similarly, cable television customers may continually pay for access to hundreds of channels they do not watch.<sup>47</sup>

When service providers offer corporate clients a bundle of differentiated professional services rather than a standard volume discount—that is, various products versus more of the same product—the potential for information asymmetries and service provider overreach increase.<sup>48</sup> Thus, bundling, involving differentiated services, requires greater sophistication and monitoring prowess. Beyond the primary service offering, ancillary bundled services must provide additional value to the customer; otherwise, they are as superfluous and wasteful as surplus services provided at a standard volume discount. However, in the bundled context, monitoring and discerning value across a range of differentiated services can be more complex and burdensome, and bundling can also significantly increase the corporate customer’s switching costs.<sup>49</sup>

As sophisticated purchasers of legal services, CLOs are crucial in diagnosing the legal issues; determining what type, level, and mix of services

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and possibly distorted to the advantage of the [third party service] firm that has assumed the information collection responsibility.” *Id.*

42. Lamberth et al., *supra* note 40, at 14–15.

43. *Id.*

44. Vanessa Page, *How Costco Makes Money*, INVESTOPEDIA (Dec. 13, 2018), <https://www.investopedia.com/articles/investing/070715/costcos-business-model-smarter-you-think.asp> [<https://perma.cc/KSG9-3BAD>].

45. Lamberth et al., *supra* note 40, at 14–15.

46. Brad Tuttle, *Costco Is Facing a Looming, Bulk-Sized Problem*, TIME (Mar. 10, 2014), <https://time.com/18671/costco-is-facing-a-looming-bulk-sized-problem/> [<https://perma.cc/6CQT-CU4H>].

47. Jonathan Berr, *Why Americans Are Watching Fewer TV Channels*, FORBES (July 31, 2019, 10:00 PM), <https://www.forbes.com/sites/jonathanberr/2019/07/31/why-americans-are-watching-fewer-tv-channels> [<https://perma.cc/S2K3-BUUE>] (describing how “the average TV household had access to nearly 200 channels” in 2018, but only watched an average of 12.7 channels).

48. Toby Brown, *Pricing Legal Services: Alternative Fee Arrangements*, ADVOCATE, Winter 2017, at 31, 32–33 (explaining that true cost savings, as opposed to a discount, require general counsels to “engage in planning, scoping, and budgeting”).

49. Patrick Greenlee et al., *An Antitrust Analysis of Bundled Loyalty Discounts*, 26 INT’L J. INDUS. ORG. 1132, 1134 (2008) (“Employing a bundled loyalty discount imposes switching costs on customers because a customer that shifts some purchases to a rival seller pays a higher unit price for the quantity still purchased from the incumbent.”).

are needed; deciding whether to provide them in-house or procure them from an external provider; and analyzing their value.<sup>50</sup> Technological advancements in data collection have made in-house analysis and measurement of service provision more effective.<sup>51</sup> Consequently, the power dynamic between the corporate client and external legal service provider can be significantly altered to the client's benefit.<sup>52</sup>

### C. Disintermediation

Today, companies are eschewing intermediaries and external service providers in a number of areas. Disintermediation<sup>53</sup>—that is, eliminating middlemen—may be desirable where in-house counsel can perform work previously provided by external law and other service firms.<sup>54</sup> Technological advances, particularly in the artificial intelligence (AI) arena (e.g., machine learning), are displacing lawyers and changing legal service delivery

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50. Simmons & Dinnage, *supra* note 6, at 107–10.

51. Reena SenGupta, *Tech, Data, and Compliance Are Converging to Transform Business*, FIN. TIMES (Nov. 15, 2018), <https://www.ft.com/content/d3cba350-d845-11e8-a854-33d6f82e62f8> [<https://perma.cc/RfV9-MVBX>] (“[L]egal and compliance data touch so many parts of a business that collecting, harmonising and analysing it yields useful insights about vendors, customers and staff.”).

52. Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 902–03 (1990) (explaining how a corporation can generally save money by internalizing legal services instead of hiring outside counsel). Gilson comments on the shift in power between the client corporation and external legal providers. *Id.* (“As Robert Mnookin and I stated four years ago, ‘[g]eneral counsel for major corporations are creating a revolution and are the primary agents of change.’ Increasingly, general counsel are former partners in large corporate firms who are capable of internalizing both the diagnostic and referral functions they previously performed on behalf of clients as outside counsel. The critical difference is that internalizing these functions eliminates the information asymmetry between client and lawyer, so that no relationship specific assets are created and no lock-in effect results. The consequence is a dramatic reduction in the switching costs facing clients and an elimination of lawyers’ market power.”).

53. See MCKINSEY GLOB. INST., *THE FUTURE OF WORK IN AMERICA: PEOPLE AND PLACES, TODAY AND TOMORROW* 99 (2019), <https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Future%20of%20Organizations/The%20future%20of%20work%20in%20America%20People%20and%20places%20today%20and%20tomorrow/The-Future-of-Work-in-America-Full-Report.ashx> [<https://perma.cc/2QFU-N5CX>] (predicting that automation and AI could replace 23 percent of all lawyers); Andrew L. Shapiro, *Digital Middlemen and the Architecture of Electronic Commerce*, 24 OHIO N.U. L. REV. 795, 798 n.8 (1998) (predicting disintermediation’s effect on the legal profession, where lawyers are middlemen between information and the clients); *cf.* Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 200 (2008) (explaining disintermediation’s role in “enabling companies to access the ultimate source of funds, the capital markets, without going through banks or other financial intermediaries”). See generally Tom C. W. Lin, *Infinite Financial Disintermediation*, 50 WAKE FOREST L. REV. 643 (2015) (discussing disintermediation in the financial industry).

54. Sarah Kellogg, *The Uncertain Future: Turbulence and Change in the Legal Profession*, 30 WASH. LAW. 18, 21 (2016) (explaining that 67 percent of law firms surveyed in 2016 stated they were “currently losing business to corporate law departments that are in-sourcing legal work”).

methods.<sup>55</sup> Just as the law firm convergence movement employed strategies to reduce the number of external service providers and thus reduce costs and improve the quality of service,<sup>56</sup> the implementation of AI technology foreshadows another major shift in service delivery.<sup>57</sup> This shift inevitably will impact the number of external as well as in-house lawyers needed to serve corporate client needs. But most importantly, AI frees lawyers up to spend more time on productive, value-producing activities. Instead of routine tasks, the modern CLO can spend more time collaborating with business partners on strategic issues than their historical counterparts could.<sup>58</sup> Equipped with useful data and a more strategic orientation, the modern CLO can better engage the board and C-suite executives, bridging historical silos.<sup>59</sup>

#### D. Expansive View of Legal Services

In the contemporary context, CLOs should adopt a more expansive view of corporate service needs and acquisition options, rather than a narrow traditional focus on legal services alone. From a company's demand-side perspective, legal services are quite similar to other types of professional services. Today's legal service providers are not limited to law firms but include the "Big Four" accounting firms—PricewaterhouseCoopers (PwC), Deloitte, Ernst & Young (EY), and KPMG—and legal tech companies.<sup>60</sup> The alternative legal service provider (ALSP) market represented an estimated \$10.7 billion in 2017 revenue and is increasing at an annual rate of nearly 13 percent.<sup>61</sup> The ALSP industry can be divided into five segments:

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55. Jane Croft, *The Relentless Advance of the Super-Intelligent Attorney*, FIN. TIMES (Dec. 5, 2016), <https://www.ft.com/content/af3e2a64-a069-11e6-891e-abe238dee8e2> [<https://perma.cc/MW69-VJ6P>].

56. See generally THE NEW REALITY: TURNING RISK INTO OPPORTUNITY THROUGH THE DUPONT LEGAL MODEL 2 (Silvio J. Decarli & Andrew L. Schaeffer eds., 5th ed. 2009) [hereinafter NEW REALITY].

57. Croft, *supra* note 55.

58. Richard Susskind, the world's most cited author on the future of legal services, provides a clear illustration of the changing legal landscape. See Bloomberg Law, *How A.I. Will Excel at Legal Work*, YOUTUBE (May 24, 2016), <https://www.youtube.com/watch?v=-Qec14tbNVg> [<https://perma.cc/F7WX-5S5J>]; see also Julie Sobowale, *How Artificial Intelligence Is Transforming the Legal Profession*, A.B.A. J. (Apr. 1, 2016), [http://www.abajournal.com/magazine/article/how\\_artificial\\_intelligence\\_is\\_transforming\\_the\\_legal\\_profession](http://www.abajournal.com/magazine/article/how_artificial_intelligence_is_transforming_the_legal_profession) [<https://perma.cc/K2NM-9FYL>] (discussing how technology automates tedious, low-value tasks and allows lawyers to devote more time to high-value, analytical tasks).

59. See Sterling Miller, *Artificial Intelligence and Its Impact on Legal Technology: To Boldly Go Where No Legal Department Has Gone Before*, THOMSON REUTERS ("As CEOs and CFOs become more accustomed to using AI, they will expect the other members of the C-Suite—including the general counsel and legal department—to follow suit. In-house lawyers that embrace AI, will become more valuable to the next generation of CEOs and CFOs.") (last visited Mar. 17, 2020).

60. David B. Wilkins & Maria J. Esteban Ferrer, *The Integration of Law into Global Business Solutions: The Rise, Transformation, and Potential Future of the Big Four Accountancy Networks in the Global Legal Services Market*, 43 LAW & SOC. INQUIRY 981, 982 (2018).

61. THOMSON REUTERS, ALTERNATIVE LEGAL SERVICE PROVIDERS 2019: FAST GROWTH, EXPANDING USE AND INCREASING OPPORTUNITY 3 (2019), <https://legal.thomsonreuters.com/>

the Big Four (\$1.2 billion), captive legal process outsourcers (LPOs) (\$300 million), independent LPOs (\$7.4 billion), managed services (\$700 million), and contract and staffing services (\$1.1 billion).<sup>62</sup>

The Big Four accounting firms, subject to ethics and local bar rules, are already supplanting law firms in the tax advisory space and beyond.<sup>63</sup> Typically, they have strong, and sometimes “cozy,” C-suite connections with chief financial officers (CFOs) and corporate finance departments as well as relationships with fraud and investigative units.<sup>64</sup> They generally categorize their practices as audit and non-audit.<sup>65</sup> The obvious driver of this division is the risk of conflicts, as well as the perception of conflicts.<sup>66</sup> Despite a modest legal presence in the United States, they are arguably the world’s largest law firms,<sup>67</sup> employing armies of lawyers in Latin America, Europe, the Middle East, Asia, and Africa.<sup>68</sup>

The work of the Big Four and traditional law firms is generally distinguished as lower-cost, high-volume work versus more strategic, higher-cost, low-volume work.<sup>69</sup> Examples of the former include compliance, data privacy, and labor law work.<sup>70</sup> The latter might include high-level board advice; for example, defending a shareholder fiduciary duty lawsuit. Notably, the Big Four often have direct control over a team of full-time lawyers who are not outsourced or contract talent.<sup>71</sup> Their vertical integration allows them to provide one-stop solutions for major corporate

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content/dam/ewp-m/documents/legal/en/pdf/reports/alsp-report-final.pdf [https://perma.cc/7J2T-Y2XN] [hereinafter ALSP REPORT].

62. *Id.*

63. Wilkins & Ferrer, *supra* note 60, at 982.

64. *Id.*; see also ALSP REPORT, *supra* note 61, at 4; Interview with Big Four Accounting Principal (Aug. 27, 2019).

65. Wilkins & Ferrer, *supra* note 60, at 997 (“[T]he real growth in the development of each of the Big Four’s legal networks has come from their ability to sell legal services to the vast majority of companies around the world that are not their audit clients.”).

66. *Id.* at 997–98.

67. John Fitzgerald, *The Big 4: An Existential Threat to Law Firms?*, LAW.COM (Mar. 18, 2019, 12:00 PM), <https://www.law.com/mid-market-report/2019/03/18/the-big-4-an-existential-threat-to-law-firms/> [https://perma.cc/4XT6-UAVR] (“PwC Legal had already become the world’s sixth largest legal services provider, by headcount, in 2017. Indeed, between them, the Big 4 average well over 2,200 lawyers in 72 countries.”).

68. Jonathan Derbyshire, *Big Four Circle the Legal Profession*, FIN. TIMES (Nov. 15, 2018), <https://www.ft.com/content/9b1fdab2-cd3c-11e8-8d0b-a6539b949662> [https://perma.cc/X4N9-DVBP] (“PwC employs 3,600 lawyers in 98 countries; EY has 2,200 lawyers in 81 countries; KPMG about 1,800 lawyers in 75 jurisdictions; and Deloitte has more than 2,400 lawyers on its books.”).

69. Dan Packel, *Big Law’s Trojan Horse: Are the Big Four Preparing an Invasion?*, LAW.COM (Nov. 29, 2018, 5:00 PM), <https://www.law.com/americanlawyer/2018/11/29/big-laws-trojan-horse-are-the-big-four-preparing-an-invasion/> [https://perma.cc/NMM3-JLDT].

70. See Interview with Big Four Accounting Principal, *supra* note 64.

71. *Id.*

clients.<sup>72</sup> Insiders estimate that their fees are roughly 30 percent lower than those of major law firms.<sup>73</sup>

Outside the United States, CLOs are more likely to encounter direct, robust competition for legal and advisory work among a wide range of professional service providers: law firms, large accounting firms, legal tech companies, and management consultancies.<sup>74</sup> A CLO seeking legal due diligence in India, for example, may forgo hiring a traditional law firm and engage an ALSP.<sup>75</sup> The shift to ALSPs abroad is not without critics. In the United Kingdom, the potential conflicts created by bundled service offerings have prompted proposals to spin off the Big Four's audit functions from their other services (e.g., legal).<sup>76</sup> More law firms would be supplanted in the United States if not for jurisdictional rules affecting the ownership of legal service providers.<sup>77</sup> Abroad, ownership requirements are less restrictive.<sup>78</sup> Some observers contend that the present U.S. regulatory structure impedes innovations that might benefit American companies and their stakeholders, and some jurisdictions are lowering ownership barriers,<sup>79</sup> but the patchwork of rules continues to inhibit experimentation.<sup>80</sup> Such restrictions are often justified as protecting the quality of professional representation.<sup>81</sup> Critics contend that they are actually rooted in efforts to eliminate competition for traditional legal service providers—law firms.<sup>82</sup> To the extent that quality and professionalism concerns are eliminated, the justifications for restricting ALSPs do not outweigh demand-side, value-based concerns. Notably, even law firms employ ALSPs in serving their own corporate clients, and this indirect use is growing in popularity.<sup>83</sup> For example, “[m]ore than half of large law firms use ALSPs for five or more functions, with the most common being e-discovery, legal research, litigation and investigation support,

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72. Derbyshire, *supra* note 68 (“Over the past decade, the accounting firms have sought not to replicate the large law firm model but rather to refine an integrated services model that operates at the intersection of tax, finance, consulting, strategy, information technology and project management.”).

73. See Interview with Big Four Accounting Principal, *supra* note 64.

74. Wilkins & Ferrer, *supra* note 60, at 998–1000.

75. See Interview with Big Four Accounting Principal, *supra* note 64.

76. Derbyshire, *supra* note 68.

77. Wilkins & Ferrer, *supra* note 60, at 1006.

78. *Id.* at 998–1000.

79. See generally Andrew M. Perlman, *Toward the Law of Legal Services*, 37 CARDOZO L. REV. 49 (2015).

80. See generally Wilkins & Ferrer, *supra* note 60, at 997–1000 (describing how the Big Four have experimented more with alternative business structures in global jurisdictions that are less strict about legal service provision than the United States).

81. Sam Skolnik & Amanda Iacone, *Big Four May Gain Legal Market Foothold with State Rule Change*, BLOOMBERG L.: BIG L. BUS. (Apr. 11, 2019), <https://biglawbusiness.com/big-four-may-gain-legal-market-foothold-with-state-rule-change> [https://perma.cc/V58K-P58L] (explaining that some lawmakers have considered these restrictions “necessary to protect the public, by defending legal professionalism and the ability of lawyers to maintain independence of judgment”).

82. See *id.*

83. ALSP REPORT, *supra* note 61, at 5–6.

document review/coding, and non-legal/factual research.”<sup>84</sup> Survey results underscore this trend:

Around 65 percent of large law firms are using ALSPs for e-discovery purposes, compared to 42 percent just two years ago. Half of large law firms are currently using ALSPs for legal research, compared to just 21 percent two years ago. Non-legal and factual research was cited as a use by 54 percent of large law firms in 2018, up from 32 percent. Litigation and investigation support jumped to 52 percent from 33 percent, and document review/coding is now used by 52 percent of large law firms, up from 38 percent.<sup>85</sup>

In some instances, client corporations are pressuring law firms to make greater use of ALSPs.<sup>86</sup>

Ironically, ALSPs can both collaborate and compete with traditional law firms.<sup>87</sup> The fact that corporate legal departments have significantly increased their use of ALSPs is not surprising, but, according to a recent survey, cost is cited as only a tertiary factor.<sup>88</sup> According to the survey, the primary reasons that companies use ALSPs are to access expertise they lack in-house and to use their own resources (e.g., in-house lawyers) more strategically and efficiently.<sup>89</sup> Corporate legal departments are highly unlikely to completely outsource legal functions. For cost and other reasons, CLOs may decide to bring or keep certain functions in-house. Although ALSPs offer an appealing option, they do not eliminate CLOs’ key make-versus-buy decisions or their professional, legal, and ethical obligations.<sup>90</sup> Despite inroads by ALSPs, CLOs must still remain attentive to jurisdictional restrictions and professional ethics rules.

### *E. Service Industry Disruption*

The legal services industry is experiencing structural change and, some observers might contend, a technological revolution—or, at a minimum, evolution.<sup>91</sup> AI has already displaced “Big Law” associates who once

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84. *Id.* at 5.

85. *Id.* at 5–6.

86. *Id.* at 11.

87. *Id.* at 10.

88. *Id.* at 7–8.

89. *Id.*

90. Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 760 (“[T]he alternative to buying outside is ‘making’ in-house—in this case by hiring in-house counsel to provide direct legal advice and information about outside lawyers. When clients have the technical expertise to dispense with specialists and can figure out on their own which individual lawyers are reliable and meet their specific needs, they will have less need to buy outside legal services based on personal relationships with individual lawyers or to rely on a stable of ‘preferred provider’ Big Law firms. The increased role of in-house counsel is therefore a significant threat to Big Law.”).

91. Croft, *supra* note 55. Such transformation is not limited to the legal services industry. Consider transformations in other contexts and domains such as investment banking. Today, “90 [percent] of the economic profit made in the capital-markets industry is now earned on the buy side—that is, by those who manage assets or investments—and just 10 [percent] from sell-side investment banking activities. A decade ago . . . that split was closer to 50-50.” A

dedicated time to routine document review and due diligence.<sup>92</sup> Machine learning, which enables qualitative analysis of legal documents, such as contracts and briefs, will have a profound impact on the legal services market.<sup>93</sup> Already, machines can draft briefs in a fraction of the time a law firm associate would need<sup>94</sup> and, as a consequence, the demand for Big Law associates is likely to continue to wither.<sup>95</sup> The greater availability of legal data will drive decision-making about legal services,<sup>96</sup> with ramifications for litigation and deal strategies, evaluating intellectual property, improving business processes, helping digital transformation, and delivering new business insights in such areas as multiterritory risk assessment and analysis.<sup>97</sup>

## II. ENHANCED FINANCIAL FOCUS

The CLO role is more financially driven in today's environment where data-informed decision-making looms large.<sup>98</sup> In-house legal departments are often viewed as cost centers or non-revenue-generating corporate functions as opposed to a revenue-generating business unit.<sup>99</sup> However, a broader, more accurate view recognizes the legal department's role in revenue generation.<sup>100</sup> An important facet of the CLO role is to communicate the value of the legal department to key internal and external stakeholders.<sup>101</sup>

In-house counsel provide value to shareholders by mitigating two primary types of transaction costs: (1) costs between management and ownership and (2) costs between the corporation and outside service providers.<sup>102</sup>

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*New Era at Goldman Sachs Starts in the Shadow of a Scandal*, *ECONOMIST* (Apr. 15, 2019), <https://www.economist.com/finance-and-economics/2019/04/15/a-new-era-at-goldman-sachs-starts-in-the-shadow-of-a-scandal> [<https://perma.cc/YF2S-48UG>].

92. Croft, *supra* note 55 (“[Artificial intelligence] automatically reads and extracts relevant information from the documents under review in a fraction of the time, and more consistently, than humans.”).

93. See Sarah Murray, *Algorithms Tame Ambiguities in Use of Legal Data*, *FIN. TIMES* (Nov. 15, 2018), <https://www.ft.com/content/50b0eba4-d063-11e8-9a3c-5d5eac8f1ab4> [<https://perma.cc/2GXQ-SQJF>] (“[T]he next step is to enable machines to make qualitative analyses of legal documents.”).

94. See Interview with Big Law Managing Partner (July 11, 2019).

95. *Id.*

96. *Id.*

97. *Id.*

98. See generally LEXISNEXIS MARTINDALE-HUBBELL, *THE PROFITABLE LEGAL DEPARTMENT: HOW LEGAL DEPARTMENTS CAN PROSPER BY GENERATING REVENUE FOR THEIR COMPANY* (2010), [http://www.europeangc.com/uploads/Profitable%20Legal%20Department%20Full%20report\\_A4\\_FINAL.pdf](http://www.europeangc.com/uploads/Profitable%20Legal%20Department%20Full%20report_A4_FINAL.pdf) [<https://perma.cc/L5GS-DZ6L>].

99. *Id.* at 5.

100. *Id.* (“It is a duty . . . for in-house legal teams to recuperate any monies due to the corporation, outside normal duties such as dealing with labour law matters, contracts, or regulation and compliance.”).

101. *Id.* at 23–24 (describing how the general counsel is responsible for convincing stakeholders to support a legal recovery program and then proving to stakeholders that the program is yielding positive results).

102. See Simmons & Dinnage, *supra* note 6, at 95–96.

*A. Transaction Costs Between Management and Ownership*

CLOs and their departments figure prominently in corporate managers satisfying their fiduciary duties (e.g., care and loyalty).<sup>103</sup> Here, their engagement coupled with financial acumen can help mitigate serious risks to corporate value. In assisting their client corporations, today's CLOs must be conversant and comfortable with their company's balance sheets, financial drivers, and risks. They must also sometimes be willing to serve as a check or counterweight to other C-suite executives such as the CEO and CFO, even if it results in dismissal. Litigation and government investigations can bring significant legal and financial risks. For example, in the public disclosure context, an overly aggressive CEO or CFO may advance statements in public securities filings (e.g., 10-K, 10-Q, etc.) that may lead to serious litigation and reputational risks.<sup>104</sup> Additionally, the CLO and the corporate legal function are often crucial to corporate managers satisfying their oversight duties—that is, implementing a system of internal controls that allows for information flow to managers.<sup>105</sup> The corporate compliance, sustainability, government affairs, and other functions often report to or frequently interact with the CLO and legal department. Thus, CLOs and corporate legal departments loom large in addressing agency costs between managers and shareholders in the contemporary business environment.

*B. Transaction Costs Between the Corporation and Outside Service Providers*

1. Less Dependence on Big Law

With respect to the latter category of transaction costs between the corporation and external service providers, CLOs and corporate legal departments create and preserve value in multiple ways. In the market for professional services, CLOs as sophisticated purchasers must consider cost, quality, and value. In a common formulation, value is a function of cost and quality.<sup>106</sup> Although a service provider's reputation can serve as a heuristic for quality, value is not a function of service provider cost and reputation

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103. See generally MODEL RULES OF PROF'L CONDUCT r. 1.13 & cmt. (AM. BAR ASS'N 2018) (describing the CLO's responsibility to learn of and report breaches of fiduciary duties).

104. See U.S. SEC. & EXCH. COMM'N, NO. 353, REPORT OF THE SECURITIES AND EXCHANGE COMMISSION ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES (1976) (on file with author). The Securities and Exchange Commission found in the mid-1970s that financial statements of companies making sensitive payments invariably were distorted to conceal or obscure those payments. *Id.* at 8. This falsification "cast[s] doubt upon [a company's] whole system of accounting" which is an "essential component of the disclosure system." *Id.* at 6–7; see also, e.g., Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc., 137 S. Ct. 2042 (2017) (discussing securities purchasers' right of action against the issuing company or individual for any material misstatements or omissions in disclosure statements).

105. See *Stone v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006) (explaining managers' oversight duties of implementing and monitoring internal company controls).

106. See *Simmons & Dinnage*, *supra* note 6, at 106–07.

alone.<sup>107</sup> CLOs cannot easily justify the arbitrary hiring of their former law firm colleagues where more valuable service provider options exist. Large, midsized, and smaller firms as well as ALSPs are all potentially valuable service options that CLOs must consider in their value-creation role.<sup>108</sup> Within the contemporary financially focused environment, corporate legal departments are arguably less dependent on traditional Big Law firms.

The reasons for giving ALSPs serious consideration are also pragmatic. Traditional large law firms may have conflicts in many areas, and the litigation landscape has changed dramatically over the past thirty years.<sup>109</sup> Rather than court-based litigation, today's corporations often prefer alternative dispute resolution (ADR) for business-to-business and consumer disputes,<sup>110</sup> especially in the international context.<sup>111</sup> These factors require a more nuanced approach to sourcing services from a mix of providers.

## 2. Financially Influenced Law Department Innovations

CLOs and corporate legal departments also limit transaction costs through such practices as convergence, recovery programs, alternative billing arrangements, and streamlining law department operations.

### *a. Convergence*

The law firm convergence movement began when major companies, such as DuPont and General Electric, significantly reduced the number of law firms they engaged in order to reduce skyrocketing legal costs. Overall, “[i]nnovations such as law firm partnering and convergence can be viewed as attempts to extract more value from outside firms via more ongoing,

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107. *Id.* (“[C]orporations are seeking value added beyond law firm reputation. . . . Other components of value, such as responsiveness and cost, can make a less reputable firm more attractive to the client corporation.”).

108. *See id.* at 107 (“Depending on the type of legal work involved, multiple firms may adequately perform the task. . . . Thus, a five-star law firm may not be necessary where a three-star firm will suffice.”).

109. *See* Interview with Thomas L. Sager, *supra* note 16.

110. *See* E. Norman Veasey & Grover C. Brown, *An Overview of the General Counsel’s Decision Making on Dispute-Resolution Strategies in Complex Business Transactions*, 70 *BUS. LAW.* 407, 415 (2015) (“A key advantage of international arbitration is the relative certainty (if all goes well in the process) of being able to enforce the award through the available international conventions . . .”).

111. *See generally id.* (providing an extensive discussion of the pros and cons of arbitration and situational factors influencing general counsels’ decisions to litigate in courts versus pursuing ADR). Confidentiality is one of the primary reasons arbitration is preferred over litigation. The benefits of confidentiality include: “recurring future business with the counterparty; secret commercial or scientific information; concerns about the company’s reputation; not revealing certain business or litigation strategies; not upsetting customers with a public display of problems, such as uncertain supply; and the like.” *Id.* at 416. The benefits of ADR, however, can be undermined by the following: (1) a retained litigation firm discourages ADR in pursuit of more lucrative fees; (2) executives such as the CEO and CFO may not wish to experience disruption or dedicate the time needed to actively participate in ADR; (3) parties’ perceived strength of their cases; (4) the risk to the CLO of obtaining an undesirable recovery; and (5) the strength of the parties’ relationship. *Id.* at 416–17.

mutually beneficial relationships that provide greater opportunities for law firms to develop more in-depth knowledge concerning the client's business."<sup>112</sup> Notably, the convergence movement targets both the quality and cost of legal services. It holds that, when law firms operate more as strategic partners en route to solving the client corporation's problems, the client receives greater value.

*b. Recovery Programs*

The goal of recovery programs is to inspire greater vigilance in the corporation's pursuit of its rights. This might entail pursuing contractual claims that sales personnel routinely disregard due to their perceived insignificance, yet when properly quantified, in the aggregate, account for serious losses. In essence, "the intent of a recoveries program is simply to ensure that the legal department identifies and pursues those legitimate claims that otherwise might be missed for various reasons."<sup>113</sup> Despite requiring intervention and possible disruption of established business relationships, recovery programs fall within the purview of the corporate legal department because, "[w]hether corporate legal departments like it or not, companies assert claims formally and informally every day, even without a recovery program."<sup>114</sup> They recognize that, in the business process, "things sometimes go wrong: services are not delivered on time, products are shipped in a defective condition, company property is negligently damaged by another party, warranties are breached, etc."<sup>115</sup> Revenue-conscious CLOs can proactively and systematically implement a recovery program to capture opportunities that are often overlooked across companies' entire business operations. Doing so, they can better articulate their value to management.

*c. Alternative Fee Arrangements*

Compensation functions as a mechanism to incentivize desired behavior. Alternative billing arrangements attempt to impose greater discipline and better incentives that ostensibly encourage service providers to deliver greater value to corporate clients.<sup>116</sup> Experimentation with varied fee arrangements (e.g., fixed, formula, and performance-based), rather than overemphasizing the billable hour, arguably discourages opportunism and better aligns service providers and corporate clients. CLOs can optimally

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112. Simmons & Dinnage, *supra* note 6, at 148. See generally NEW REALITY, *supra* note 56. DuPont was one of the first companies to take this direction and a large number of companies have followed.

113. LEXISNEXIS MARTINDALE-HUBBELL, *supra* note 98, at 6.

114. *Id.*

115. *Id.*

116. Brown, *supra* note 48, at 32–33 (explaining that true cost savings, as opposed to a discount, require general counsel to "engage in planning, scoping, and budgeting"); see also Lamberth et al., *supra* note 40, at 14–15.

employ a mixture of alternative fee arrangements customized to meet the needs of a particular business context.

*d. Streamlining Law Department Operations*

Operational changes can make corporate legal departments more nimble, efficient, and cost-effective. CLOs engage in a consistent process of streamlining law department operations in order to meet the needs of corporate clients. This requires, inter alia, attention to internal legal expertise, costs, technology, and efficient deployment of personnel. For example, corporate legal departments are developing greater process and project management capabilities. Process management often involves eliminating unnecessary work steps and costs,<sup>117</sup> whereas project management “is the application of knowledge, skills, tools, and techniques to project activities to meet the [specific] project requirements.”<sup>118</sup> Another example of streamlining law department operations involves large company law departments locating their employees in less expensive cities to control costs and attract top talent who might be reluctant to relocate to very expensive cities like Seattle or Palo Alto.<sup>119</sup> For example, Oracle and Cisco now have significant legal operations in the Research Triangle Park (RTP) of North Carolina.<sup>120</sup> For Cisco, RTP is its largest legal outpost outside of Silicon Valley.<sup>121</sup> These smaller cities bring multiple advantages: lower costs, highly educated talent, and multiple career opportunities.

### III. GLOBAL ENTERPRISE RISK-MANAGEMENT ORIENTATION

The modern CLO must have a panoramic view of business risks extending beyond the United States.<sup>122</sup> Lawyers are sometimes the primary interface with new geographies and essential to discerning how to set up a business or address ground-level regional concerns.<sup>123</sup> Accordingly, they must sensitize CEOs, other C-suite executives, and boards to a range of problems, legal and extralegal.

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117. See generally JEFFREY K. LIKER, *THE TOYOTA WAY: 14 MANAGEMENT PRINCIPLES FROM THE WORLD’S GREATEST MANUFACTURER* (2004).

118. *What Is Project Management?*, PROJECT MGMT. INST., <https://www.pmi.org/about/learn-about-pmi/what-is-project-management> [<https://perma.cc/P8XP-E6U7>] (last visited Mar. 17, 2020).

119. See Wake Forest Law Events, *Sager Speaker Series with Mark Chandler on Mar. 20, 2019*, YOUTUBE (Mar. 25, 2019), <https://www.youtube.com/watch?v=E6t0BjL5XYI> [<https://perma.cc/F59K-M9TD>].

120. See Interview with Thomas L. Sager, *supra* note 16.

121. See Wake Forest Law Events, *supra* note 119.

122. See Kellogg, *supra* note 54, at 22 (“Globalization of the legal profession is dramatic and dynamic and will continue. As time goes on, I expect that we’ll be dealing with other countries much the way we deal with other states.”).

123. See Yasmin Lambert, *Wanted: Lawyers at Full Throttle*, FIN. TIMES (May 2, 2019), <https://www.ft.com/content/c8ff241a-5f5e-11e9-b285-3acd5d43599e> [<https://perma.cc/L8A7-9C3J>].

Enterprise risk management (ERM) is an overarching theme that has added salience in today's business environment.<sup>124</sup> It "is an enterprise-wide attempt to ensure that corporations address risks in the business process" and often involves identifying, analyzing, and managing them via internal controls.<sup>125</sup> However, legal risks are only "one subset of risks that should be incorporated into business decisions."<sup>126</sup> Others may be financial, reputational, operational, or related to human resources and brand equity.<sup>127</sup> CLOs must recognize not only the various types of risk but how they interact. Here, CLOs, as insiders or "innkeepers" with intimate knowledge of business operations, are uniquely positioned to add value. Any sound risk-management strategy for large companies in the contemporary context requires a global perspective. CLOs can raise awareness and keep management apprised of regional and cultural risks to help protect corporate value. The following sections describe potential risks in more detail.

#### *A. Knowledge of Global Regulatory Architecture*

CLO competence includes a strong sense of the global regulatory framework across geographical boundaries.<sup>128</sup> From a regulatory standpoint, CLOs must be aware of international trade laws—including tariff regimes, sanctions, export controls, and restrictions on investment—that influence the

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124. For an overview of enterprise risk management's development, see Betty Simkins & Steven A. Ramirez, *Enterprise-Wide Risk Management and Corporate Governance*, 39 LOY. U. CHI. L.J. 571, 577–86 (2008). See also *In re Citigroup, Inc. S'holder Derivative Litig.*, 964 A.2d 106, 127–28 (Del. Ch. 2009) (shareholder suit alleging directors breached fiduciary duties pursuing excessively risky strategies); Stephen M. Bainbridge, *Caremark and Enterprise Risk Management*, 34 J. CORP. L. 967, 969 (2009); Kristin N. Johnson, *Addressing Gaps in the Dodd-Frank Act: Directors' Risk Management Oversight Obligations*, 45 U. MICH. J.L. REFORM 55, 59 (2011) ("In the absence of rigorous ERM obligations under state corporate law and in the wake of the recent financial crisis, Congress has taken steps to impose federal regulation on risk management oversight. In July of 2010, Congress adopted the [Dodd-Frank Act]."). See generally CAROLYN KAY BRANCATO ET AL., THE CONFERENCE BD., THE ROLE OF U.S. CORPORATE BOARDS IN ENTERPRISE RISK MANAGEMENT 10 (2006), <https://www.conference-board.org/pdfdownload.cfm?masterProductID=3840> [https://perma.cc/UNU7-G5BM]; MATTEO TONELLO, THE CONFERENCE BD., EMERGING GOVERNANCE PRACTICES IN ENTERPRISE RISK MANAGEMENT (2007), <https://www.conference-board.org/pdfdownload.cfm?masterProductID=1251> [https://perma.cc/46AM-M9EY] (outlining elements of ERM).

125. Simmons, *supra* note 3, at 1146; see Bainbridge, *supra* note 124, at 981 ("[E]nterprise risk management can be understood as a form of agency cost control analogous to . . . law compliance programs, and internal controls.").

126. Simmons, *supra* note 3, at 1146.

127. See *id.*; see also Simkins & Ramirez, *supra* note 124, at 571 ("[Large public corporations] face a myriad of [global] risks . . . ranging from complex financial risk to quality control regarding material manufactured in China.").

128. ALM INTELLIGENCE & MORRISON & FOERSTER LLP, GENERAL COUNSEL UP-AT-NIGHT REPORT 5 (2018), <https://media2.mofo.com/documents/170622-gc-up-at-night-report.pdf> [https://perma.cc/VF58-UKK6] ("Now, GCs must not only think globally to maintain a culture of compliance regardless of geography, but also act locally in establishing policies and procedures to ensure corporate action meets the prevailing local regulatory standards.").

company's domestic and foreign operations.<sup>129</sup> For example, General Motors sells more Buicks in China than in the United States,<sup>130</sup> and ongoing trade disputes with China pose a significant risk to its business.<sup>131</sup> Even largely domestic firms may pivot toward a more global outlook as domestic markets mature and become saturated with their goods and services.<sup>132</sup> This dynamic may necessitate an expansion strategy targeting foreign markets and channels.

### B. Cultural Competence

The CLO's global competence must go beyond a mere sense of regulatory frameworks to encompass a keen cultural competence.<sup>133</sup> As business operations expand, and companies seek additional market outlets for their products and services, the need for global, regional, and cultural sensibilities becomes apparent.<sup>134</sup> CLOs are selected because of their legal acumen and because they speak the language and understand the culture of the business.<sup>135</sup> For example, Alexander Hamilton was DuPont's first corporate lawyer for these reasons; he spoke French and, most importantly, understood the business culture.<sup>136</sup> His effectiveness as a corporate lawyer is often overshadowed by his other contributions.<sup>137</sup> Hamilton's centuries-old example reflects the contemporary need for an expanded CLO skill set, which includes cultural competence. Culture is like the operating system of the corporation and, even if not readily visible to outsiders, it can have a significant impact on risk management, compliance, and other business outcomes.<sup>138</sup>

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129. See generally June Eichbaum, *Globalization and General Counsel*, MINORITY CORP. COUNS. ASS'N, <https://www.mcca.com/mcca-article/globalization-and-general-counsel/> [<https://perma.cc/3ZRZ-MRNE>] (last visited Mar. 17, 2020) (explaining that "hands-on experience with regulators in the European Union and in Asia" is a "must-have[]" for general counsel").

130. See Robert Ferris, *Your Grandfather's Buick Is Hot in China, but Maybe Not for Long*, CNBC (Feb. 8, 2019, 11:18 AM), <https://www.cnbc.com/2019/02/07/why-china-is-so-important-to-buicks-survival.html> [<https://perma.cc/5R2T-4FAX>]; Wake Forest Law Events, *Sager Speaker Series with Craig Glidden 2/6/2018*, YOUTUBE (Feb. 9, 2018), <https://www.youtube.com/watch?v=yP7TWJUBJf8&t=151s> [<https://perma.cc/425J-59DU>].

131. See Ferris, *supra* note 130.

132. Neil Kokemuller, *The Disadvantage of Market Saturation*, HOUS. CHRON., <https://smallbusiness.chron.com/disadvantage-market-saturation-69967.html> [<https://perma.cc/CMK5-VBLE>] (last visited Mar. 17, 2020) ("When an existing product market or industry is saturated, your business must look to new markets, products or services to grow.").

133. See Eichbaum, *supra* note 129 ("Ultimately, a global general counsel should know, for example, enough about Islamic banking so as not to offend a client in Dubai, enough about Indian culture so as not to ask for beef at a Mumbai restaurant, and enough about EU privacy laws so as not to disclose protected personal data in the UK.").

134. *Id.*

135. See generally TERRI MORRISON, *KISS, BOW, OR SHAKE HANDS: COURTROOMS TO CORPORATE COUNSELS* (2018).

136. Tom Sager, *Foreword* to MORRISON, *supra* note 135, at xiii, xiv.

137. See *id.*

138. See generally Jennifer G. Hill, *Legal Personhood and Liability for Flawed Corporate Cultures* (European Corp. Governance Inst. Working Paper Series in Law, Working Paper No.

From a legal procurement perspective, CLOs must rely on a diverse network of worldwide legal service providers, both traditional law firms and ALSPs, and form regional teams to address ground-level business concerns.<sup>139</sup> They must have sufficient cultural awareness to leverage these resources to serve corporate clients who desire cost-effective multijurisdictional solutions.

### C. *The New Normal of Shareholder and Stakeholder Activism*

Shareholder and stakeholder activism are the new normal.<sup>140</sup> Consequently, a growing number of large companies have proactive and reactive investor-engagement committees that usually report to the CEO or CFO.<sup>141</sup> They are often staffed with outside counsel, crisis management professionals, consultants, and securities experts.<sup>142</sup> While CLOs may not frequently sit on them, they can advise the board of directors and the CEO on how to respond to activist demands.<sup>143</sup> As a matter of strategy, the CLO might encourage the CEO to work through the formal investor-engagement process with these committees to handle requests, inquiries, and communication. The CLO's fidelity to process can help prevent unnecessary exploitation of executive decision-making.<sup>144</sup>

Recent statements by the Business Roundtable, the former chief justice of the Delaware Supreme Court, and other corporate influencers highlight the growing acceptance and consideration of broader stakeholder interests versus

413/2018, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3309697](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3309697) [https://perma.cc/YWL2-D6UB].

139. Kellogg, *supra* note 54, at 22–23 (“Big Law firms have established outposts and expanded their networks to better serve international clients . . . the ‘global legal market is becoming extremely competitive and, in some markets, over-crowded.’”).

140. *See generally* Lisa M. Fairfax, *From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm*, 99 B.U. L. REV. 1301, 1314 (2019).

141. Matteo Tonello & Matteo Gatti, *Board-Shareholder Engagement Practices*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 30, 2019), <https://corpgov.law.harvard.edu/2019/12/30/board-shareholder-engagement-practices/> [https://perma.cc/3TP3-X6NE] (“Sixty percent or more of the largest companies involve their general counsel in board exchanges with investors.”).

142. *See generally* Business Roundtable, *Principles of Corporate Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 8, 2016), <https://corpgov.law.harvard.edu/2016/09/08/principles-of-corporate-governance/> [https://perma.cc/3SY9-N5PS].

143. David Ruiz, *4 Tips for General Counsel Dealing with Shareholder Activists*, LAW.COM (Aug. 14, 2017, 12:00 AM), <https://www.law.com/insidecounsel/almID/59925767140ba0fd4186ad16/> [https://perma.cc/GP8F-739P] (explaining that general counsel should explain to the board how to appropriately communicate with shareholder activists); *see also* Interview with Thomas L. Sager, *supra* note 16.

144. Interview with Thomas L. Sager, *supra* note 16; *see* MATTEO TONELLO & MATTEO GATTI, BOARD-SHAREHOLDER ENGAGEMENT PRACTICES: FINDINGS FROM A SURVEY OF SEC-REGISTERED COMPANIES 42–43 (2019), <https://www.conference-board.org/pdfdownload.cfm?masterProductID=20347> [https://perma.cc/L35V-EAEP] (illustrating the positive correlation between a company's annual revenue and its expectation that the CLO meet with directors prior to the engagement with shareholders to discuss legal restraints of specific agenda items).

a narrow focus on shareholder primacy.<sup>145</sup> In this climate, corporations are assessing their environmental, social, and governance (ESG) profiles and considering the related risks alongside other traditional performance metrics.<sup>146</sup> CLOs must advise corporate managers to consider how ESG factors fit into the business strategy and help them respond to pleas to engage from impact investors and other stakeholders including the public.<sup>147</sup> In the ESG- and stakeholder-focused context, the role of the CLO is likely elevated. In the wake of the Sarbanes-Oxley and Dodd-Frank Acts, the CFO role rose in prominence. But the shift toward a stakeholder focus might signal a shift toward an enhanced CLO role because of the strong connection between ESG and corporate operations (e.g., supply chains).<sup>148</sup>

#### D. Succession as the CLO's Role and Legacy

Risks to corporate value are immediate, short term, and long term. And CLOs must be concerned with the continuity of quality legal support and advice for the client corporation during and after their tenure. This continuity extends to the entire legal department. CLOs need not view their immediate reports as successors but, ideally, facilitate and promote a talent development program throughout the legal organization.<sup>149</sup> Without such a program, corporations are assuming avoidable risks. A lack of succession planning for the legal department and other key corporate functions reflects suboptimal

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145. See *Business Roundtable*, *supra* note 15; see also Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism: A Comprehensive Proposal to Help American Workers, Restore Fair Gainsharing Between Employees and Shareholders, and Increase American Competitiveness by Reorienting Our Corporate Governance System Toward Sustainable Long-Term Growth and Encouraging Investments in America's Future* (Univ. of Pa. Law Sch. Inst. for Law & Econ., Research Paper No. 19-39, 2019), [https://www.law.nyu.edu/sites/default/files/Fair%20and%20Sustainable%20Capitalism%20Proposal%20-%20White%20Paper\\_09.26.19%20FINAL.pdf](https://www.law.nyu.edu/sites/default/files/Fair%20and%20Sustainable%20Capitalism%20Proposal%20-%20White%20Paper_09.26.19%20FINAL.pdf) [<https://perma.cc/HW6T-G5JT>]; Tett, *supra* note 15. In April 2019, the Conference Board rebranded its Governance Center as the ESG Center, recognizing the importance of strategic, integrated ESG practices. See TONELLO & GATTI, *supra* note 144.

146. TONELLO & GATTI, *supra* note 144, at 2 (“Once the sole purview of fringe, socially-responsible investors (SRI), issues of sustainability and corporate social responsibility have recently gone mainstream and found the endorsement of large mutual funds.”).

147. Veena Ramani, *Environmental, Social, and Governance (“ESG”) Issues Pose Risks to Companies. Can Chief Legal Officers Help Drive Solutions?*, ASS’N CORP. COUNS. (Nov. 6 2019), <https://www.acc.com/resource-library/environmental-social-and-governance-esg-issues-pose-risks-companies-can-chief-0> [<https://perma.cc/9JRK-W44W>].

148. *Id.* (“In 2018, investors filed nearly 400 shareholder resolutions on sustainability issues, many of them related to climate change.”). See generally PRINCIPLES FOR RESPONSIBLE INV., FINANCIAL PERFORMANCE OF ESG INTEGRATION IN US INVESTING (2018), <https://www.unpri.org/download?ac=4218> [<https://perma.cc/F3YM-DVXG>] (demonstrating how directing corporate attention to climate change and other social issues delivers higher stock returns and lower capital costs and volatility risks); Tamas Barko et al., *Shareholder Engagement on Environmental, Social, and Governance Performance* (European Corp. Governance Inst. Working Paper Series in Fin., Working Paper No. 509/2017, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2977219](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2977219) [<https://perma.cc/AFP7-XFTR>].

149. Neil Amato, *Poor Talent Management Hinders Companies' Growth, Innovation*, FIN. MGMT. (Sept. 18, 2012), <https://www.fm-magazine.com/news/2012/sep/20126410.html> [<https://perma.cc/4YCS-QKXW>].

risk management and, for some commentators, is an example of organizational failure.<sup>150</sup> Admittedly, short-term incentives may impede succession planning. CLOs may be overwhelmed by rigorous short-term demands, that is, “putting out fires.” But CLOs and the client corporation should aspire to address succession-related risks for the entire corporate legal department.

#### IV. CHALLENGES

There are multiple challenges to CLOs effectively executing their enhanced value-creating role. This effectiveness is impacted by multiple factors, especially: (1) a shared understanding between management and CLOs as to the latter’s role and (2) lawyer competence.<sup>151</sup>

##### *A. Shared Understanding Between Management and CLOs of the CLO Role*

Structure matters. It signals authority and limitations.<sup>152</sup> Corporate reporting structures should allow for CLOs’ strategic engagement with management and other constituencies. To achieve this, CLOs “must report to the board of directors or, at least, the CEO” because “[a]nything less than this will inhibit the functioning of the value-creation attributes that are vital to in-house counsel effectiveness.”<sup>153</sup> Ideally, the CLO should have dual reporting lines to the board of directors and the CEO. Alternative reporting structures where CLOs report to CFOs and other non-CEO C-suite members could constrain the ability of CLOs to address important risks.<sup>154</sup> There is an ongoing tension among C-suite executives. In recent years, CFOs have wielded significant power. Yet the emergence of the CLO in the contemporary environment could be perceived as a threat to other C-suite members who may harbor profoundly different views toward risk

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150. See Eben Harrell, *Succession Planning: What the Research Says*, HARV. BUS. REV. (Dec. 2016), <https://hbr.org/2016/12/succession-planning-what-the-research-says> [<https://perma.cc/K3PC-KGZM>].

151. Simmons & Dinnage, *supra* note 6, at 146.

152. See Veta T. Richardson & Liesbeth De Ridder, *Including General Counsel Could Prevent Scandal*, ASS’N CORP. COUNS., <https://www2.acc.com/governance/ridder/> [<https://perma.cc/U7QZ-UBZQ>] (last visited Mar. 17, 2020).

153. Simmons & Dinnage, *supra* note 6, at 146; see Sue Reisinger, *Talk to Me: Bank of America GC Now Reports to CEO as Part of Shake-Up*, LAW.COM (Jan. 14, 2010, 12:00 AM), [http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202437913504&Talk\\_to\\_Me\\_Bank\\_of\\_America\\_GC\\_Now\\_Reports\\_to\\_CEO\\_as\\_Part\\_of\\_ShakeUp](http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202437913504&Talk_to_Me_Bank_of_America_GC_Now_Reports_to_CEO_as_Part_of_ShakeUp) [<https://perma.cc/D3DV-VLAB>] (describing a situation where it was important for the general counsel to report to the CEO).

154. See Richardson & De Ridder, *supra* note 152; see also Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2082 n.12 (2016) (noting that the five most commonly listed compliance responsibilities are “compliance training,” “code of conduct,” “whistleblower programs,” “compliance with domestic regulations,” and “compliance strategy & process,” and the five least commonly listed compliance officer responsibilities are “regulatory filings,” “regulatory relationship management,” “records management,” “culture assessment,” and “business continuity”).

management, compliance, and professional ethics.<sup>155</sup> Understandably, the enhanced strategic CLO role demands greater C-suite prominence and management endorsement.

*B. CLO Competence: The T-shaped Lawyer*

CLO competence matters. The CLO of the future should have a skill set that resembles a T.<sup>156</sup> Here, the vertical line represents acute legal acumen and the horizontal line represents additional competencies (e.g., procurement, finance, global enterprise risk management, technology, cultural savvy) that allow a lawyer to bridge multiple constituencies.<sup>157</sup> CLOs must behave and be “perceived to behave in ways that justify their presence.”<sup>158</sup> Their professional competence extends beyond legal knowledge and technical skills: it includes a fidelity to ethics and professional responsibility.

Despite a heightened business focus, the enhanced CLO role advanced in this Essay remains consistent with legal ethics and lawyer professional identity. CLOs provide unique value to the corporation due in significant part to their legal identity and commitments to the profession. Thus, CLOs should remain lawyers, not professionals simply performing legal tasks. Ronald Gilson once asserted, “For those concerned about the future of the professional project, the growing prominence of inside counsel within the profession, reflecting their market power, is not a threat but an opportunity, perhaps our only one.”<sup>159</sup> The emergence of CLOs in the contemporary environment, if approached properly, has the potential to elevate both corporations and the legal profession.

CONCLUSION

The dynamic and rapidly shifting contemporary global business environment requires an enhanced CLO role with a deeper set of competencies. They include, inter alia, (1) sophisticated procurement capabilities, (2) an enhanced financial focus, and (3) a global enterprise risk-management orientation. Given their expanded skill set, contemporary CLOs can be more potent corporate officers creating value for the corporation and fulfilling an internal quasi-regulatory function benefiting multiple stakeholders.

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155. See Harrell, *supra* note 150.

156. Smathers, *supra* note 17.

157. See George W. Dent, Jr., *Business Lawyers as Enterprise Architects*, 64 *BUS. LAW.* 279, 281 (2009); Gilson, *supra* note 10, at 255; Mark C. Suchman, *Dealmakers and Counselors: Law Firms as Intermediaries in the Development of Silicon Valley*, in *UNDERSTANDING SILICON VALLEY: THE ANATOMY OF AN ENTREPRENEURIAL REGION* 71 (M. Kenney ed., 2000); Mark C. Suchman, *The Contracting Universe: Law Firms and the Evolution of Venture Capital Financing in Silicon Valley* (Jan. 2006) (unpublished manuscript) (on file with author).

158. Simmons & Dinnage, *supra* note 6, at 146.

159. Gilson, *supra* note 52, at 916.