

# COUNSELING THE STARTUP: HOW ATTORNEYS CAN ADD VALUE TO STARTUP CLIENTS’ BUSINESSES

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## I. INTRODUCTION

As the world grows more interconnected and begins to operate at a faster pace, “business” problems take on legal dimensions and “legal” problems are never purely legal. In the twenty-first century economy, technology means business decisions can have an almost instant impact and the business environment changes rapidly and constantly.<sup>1</sup> To be valuable in this highly interconnected world, lawyers must be more than legal advisers; they must be able to identify clients’ business needs and incorporate strategies to meet those needs into legal solutions. Lawyers must not think

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<sup>1</sup> See, e.g., Gillian K. Hadfield, *Legal Infrastructure and the New Economy*, 8 ISJLP 1, 1 (2012) (noting “new economy” is driven by the dual trends of globalization and Internet-driven technology); Peter J. Gardner, *A Role for the Business Attorney in the Twenty-First Century: Adding Value to the Client’s Enterprise in the Knowledge Economy*, 7 MARQ. INTELL. PROP. L. REV. 17, 18 (2003) (arguing the same position).

simply in terms of the law, but in terms of their clients' business operations, which inevitably have legal dimensions.

Yet, the role lawyers must fill in the twenty-first century economy conflicts with their common perception as “transaction costs”<sup>2</sup>—part of the cost of participating in a business transaction or market. Lawyers are often viewed as expensive obstacles to deal-making, notorious for saying “no” to every slightly risky business endeavor. Lawyers are traditionally known for deploying complex “legalese” and designing dense, lengthy contracts aimed at the impossible task of preempting every conceivable risk related to a transaction. Lawyers are perceived as being overly expensive and ill-equipped to craft integrated business solutions for their clients. These problems have been documented in past interviews of general counsels in Silicon Valley, who lodged a variety of complaints, including that: lawyers focus too intently on the details of a contract, but overlook the bigger picture of deal value; lawyers shy away from risk at the expense of business opportunity; and lawyers fail to integrate other disciplines, such as finance or public relations, into their legal strategies.<sup>3</sup>

Despite this reputation, lawyers serve an integral role in the startup world. Lawyers are regularly employed by startups at all growth stages. In the startup phase, businesses require basic advice about tax, financing, and business structure. As companies grow, they require more involved advice about managing financing relations with often very experienced venture capitalists and, later, advice about acquisition or public offerings. In the interim, businesses require advice on myriad legal issues, from intellectual property to employment relationships.<sup>4</sup> The sheer size of the legal market in Silicon Valley also suggests lawyers play a regular role in the startup industry; there are over four hundred law firms and nearly three thousand

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<sup>2</sup> See, e.g., Royce de R. Barondes, *The Business Lawyer as Terrorist Transaction Cost Engineer*, 69 *FORDHAM L. REV.* 31, 31 n.1 (2000) (citing ROBERT A WENKE, *THE ART OF NEGOTIATION FOR LAWYERS* 86 (1985); Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 *COLUM. L. REV.* 509, 510-11 (1994); G. Pascal Zachary, *As Asian Assets Dive, The Bargain Hunters Move in for the Killing*, *WALL ST. J.*, June 22, 1998, at A1)). See also David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 *ARIZ. L. REV.* 61, 62 & nn.1-2 (2005) (noting conventional view of lawyer as a transaction cost) (citing as examples of such literature Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 *YALE L.J.* 239, 244 (1984) (discussing transactional lawyers as “transaction cost engineers”); Pierre Schlag, *The Problem of Transaction Costs*, 62 *S. CAL. L. REV.* 1661, 1685 (1989) (noting attorneys are transaction costs); STEPHEN P. MAGEE ET AL., *BLACK HOLE TARIFFS AND ENDOGENOUS POLICY THEORY: POLITICAL ECONOMY IN GENERAL EQUILIBRIUM* 118-21 (1989) (finding negative correlation between economic growth and number of lawyers per capita)).

<sup>3</sup> Hadfield, *supra* note 1, at 35-37.

<sup>4</sup> Lawrence M. Friedman, et al., *Law, Lawyers, and Legal Practice in Silicon Valley: A Preliminary Report*, 64 *IND. L.J.* 555, 557-58 (1989).

attorneys in Palo Alto alone.<sup>5</sup> That amounts to roughly 4.5 lawyers per one hundred people in Palo Alto -- more than four times the number of lawyers per one hundred people in Los Angeles and roughly twice the number of lawyers per one hundred people in San Francisco.<sup>6</sup> The need for lawyers at various stages in the startup business as well as the relative size of the legal market in areas known for their startup culture, such as Palo Alto, gnaw at the popular perception of lawyers as transaction costs and suggests instead a vital role for lawyers in business transactions. This raises the question, is the use of lawyers a necessary evil of conducting business or can lawyers add value to the transactions and businesses they advise and, if so, how?

A few inquiries into this and related questions have been made over the last several decades. Not surprisingly, legal academia has generally concluded lawyers can be value-enhancing. Ronald Gilson, in what has become the major work on the subject, pegged lawyers as “transaction cost engineers” capable of adding value by reducing frictions that raise the cost of transacting.<sup>7</sup> Mark C. Suchman has concluded Silicon Valley lawyers’ value arises in part from their central position in the deal-flow network, controlling resources and acting as information intermediaries.<sup>8</sup> Peter J. Gardner has suggested lawyers can be valuable in an increasingly globalized and high-tech economy by learning to manage and employ knowledge.<sup>9</sup> In an empirical analysis, Steven L. Schwarcz has suggested that, rather than being “transaction cost engineers,” transactional attorneys add value by reducing regulatory costs.<sup>10</sup> This essay does not attempt to

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<sup>5</sup> *People Search Results: Lawyers, in Palo Alto, California, United States of America*, MARTINDALE HUBBLE <http://perma.cc/R4Y46-VDFV> (last visited Nov. 5, 2014); *Law Firm Search Results: Law Firms in Palo Alto, California, United States of America*, MARTINDALE HUBBLE, <http://perma.cc/ZFM2-C5FM> (last visited Nov. 5, 2014).

<sup>6</sup> *People Search Results: Lawyers, in Los Angeles, California, United States of America*, MARTINDALE HUBBLE, <http://perma.cc/T2K6-W468> (last visited Nov. 5, 2014); *People Search Results: Lawyers, in San Francisco, California, United States of America*, MARTINDALE HUBBLE, <http://perma.cc/MWH4-7W7Q> (last visited Nov. 5, 2014). See Friedman, et al., *supra* note 4, at 556 (finding similar trend and noting lawyers per capita greater in Palo Alto than any other U.S. city except Manhattan and Washington, D.C. in 1989; also noting the sharp growth in number of lawyers in Palo Alto, which stood at 50 in the 1950’s).

<sup>7</sup> Gilson, *supra* note 2, at 255. However, Gilson also recognizes that other types of advisers could be effective in reducing transaction costs. *Id.* at 254, 298-99. See also Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 498 (2007) (noting that transactional lawyers actually add little value by reducing transaction costs, partly because transaction costs can effectively be reduced by non-lawyer advisers such as investment bankers and others).

<sup>8</sup> Mark C. Suchman, *On Advice of Counsel: Law Firms and Venture Capital Funds as Information Intermediaries in the Structuration of Silicon Valley* (Feb. 1994) (unpublished Ph.D. dissertation, Stanford University) (on file with Madison Law Library, University of Wisconsin).

<sup>9</sup> Gardner, *supra* note 1, at 18.

<sup>10</sup> Schwarcz, *supra* note 7, at 501 (noting that lawyers add value “by providing expertise in the law and regulations that generally govern the transaction and by understanding the rationale for the contractual provisions in the transaction documents.”).

reevaluate the work others have done on the ways in which lawyers contribute value to their clients' businesses. Nor do we attempt to provide a framework for measuring or evaluating the value lawyers add. Instead, we examine practical aspects of the attorney-startup relationship, with a primary focus on communication. Our inquiry concerns what skills and mechanisms lawyers can employ to maximize value for their clients and respond to common client complaints. This paper serves to inform both individual lawyers seeking to establish themselves professionally and the legal industry seeking to combat a growing perception of obsolescence. Additionally, this inquiry is relevant to entrepreneurs who wish to identify basic criteria useful to selecting advisers. Our analysis is based on interviews Weinberg conducted with Silicon Valley in-house counsel, outside counsel, and entrepreneurs, all of whom have experience advising or running startup companies. While anecdotal, these surveys provide on-the-ground evidence from which we extrapolate and analyze how attorneys can effectively counsel startup companies.

Our limited evidence suggests some dissatisfaction with the current state of legal services. Common complaints include: attorneys not understanding the businesses they counsel, poor communication between attorneys and clients, and the high cost of legal services. We then identify how lawyers can add value to their clients' businesses, focusing on how lawyers can structure their relationship with clients, maintain strong channels of communication, and provide practical business advice. We hope our recommendations help guide lawyers seeking to evolve their practices and, perhaps optimistically, hope to help resuscitate the reputation of business lawyers.

## II. SURVEY RESULTS: HOW LAWYERS CAN ADD VALUE TO STARTUP COMPANIES THEY COUNSEL

We now turn to the results of our interviews. We begin with a brief discussion of our interview methodology. Next, we set out what we have identified as strains on attorney-startup communication. We then present the results of the interviews. We draw out and discuss how attorneys can add value to their clients' businesses based on the strains and problems identified. From our interviews, we have synthesized a list of best practices:

1. Communicate your role.
2. Be willing to take the time to explain – the founders do not know what they do not know.
3. Ask probing questions to find out objectives.
4. Provide context and informal advice.
5. Listen carefully.
6. Invite the client to continue communications.
7. Explain how billing works and communicate through the bill the value of your advice.

8. Make the business case, quantify it, use their language, and provide actionable choices.
9. Communicate early and often.
10. Be transparent and upfront with your client.

#### A. Survey Methodology

Roughly fifty percent of venture-backed firms in the United States are based in the Bay Area.<sup>11</sup> Thus, we limit our focus to Northern California markets. The interviews took place in 2012 and 2013 mostly by phone, were recorded and transcribed or were transcribed at the time of the interview. In two cases, the interviews were in person. In all cases, we spoke with high-level individuals in their respective organizations: partners and proprietors in law firms, general counsels, and startup founders. We spoke with: seven outside counsel attorneys (ranging from sole practitioners to members of international law firms), seven in-house counsel attorneys (ranging from venture capital-backed companies to startups that have grown into public companies), and seven entrepreneurs (ranging from first time entrepreneurs to successful serial entrepreneurs). Respondents are quoted herein anonymously, identified only by their role (*i.e.*, “entrepreneur,” “in-house counsel,” “outside counsel”) and have been assigned a number. Our interviews dealt largely with addressing communication issues between attorneys and startup clients.

#### B. Identifying Inherent Strains on the Attorney-Startup Relationship

Companies at the startup stage face significant uncertainties. Many of these uncertainties have legal aspects, for which entrepreneurs turn to attorneys for advice. While entrepreneurs simply want results from their startups, they often lack the experience and know-how to get the value they need from their attorneys. Startups are cash-poor and time-strapped, with a mean of 18 months between founding and closing the first round of funding.<sup>12</sup> Entrepreneurs are action-oriented and usually play many roles (CEO, CFO, CTO, COO, marketing coordinator, etc.), given the few people typically involved at the startup stage. Startups also need to make sure everything gets done quickly.<sup>13</sup> As such, lawyers can be seen by the entrepreneur as more of a money-drain and an obstacle to getting things

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<sup>11</sup> Junfu Zhang, *The Advantage of Experienced Start-up Founders in Venture Capital Acquisition: Evidence from Serial Entrepreneurs*, INST. STUDY OF LAB., 14 (July 2007), <http://perma.cc/ZFM2-C5FM> (firms examined in this study focused on firms located in the Bay Area).

<sup>12</sup> *Id.* at 35.

<sup>13</sup> *Generalists Succeed as Entrepreneurs*, STAN. GRADUATE SCH. OF BUS., (Feb. 1, 2005), <http://perma.cc/464Q-JAQR>.

done quickly, a view that is hard to reconcile with the thought of employing attorneys strategically to add value to the startup enterprise.

Based on both previous researchers' observations and the observations of our interviewees, we identify three constraints on the startup that strain the attorney-startup relationship: (1) entrepreneurs' lack of experience with attorneys, (2) financial tensions, and (3) fast pace and time-sensitive demands.

1. *Entrepreneurs Tend to Lack Experience Working with Attorneys*

When working with startups, attorneys are frequently dealing with clients who have never had to interact with attorneys before and who are unaware of many legal and even business issues. In fact, about seventy-three percent of founders are novice entrepreneurs.<sup>14</sup> While it would be "ideal" for clients to be "particular about [what they want]," "[m]ost entrepreneurs aren't focused on the legal issues."<sup>15</sup> The entrepreneurs do not engage with the attorneys about what they want and need often because they are unaware of what to disclose to the attorneys or what explanations to seek.

Not only can entrepreneurs be unfamiliar with how to approach attorneys, they can also be unaware of the value attorneys can provide. Entrepreneurs who lack experience dealing with attorneys are unsure "how to question the recommendations being provided" or "how to see flaws in the [attorneys'] proposals."<sup>16</sup> Further, entrepreneurs may not be aware of business and legal risks and, consequently, may undervalue the role of attorneys and simply see them as a cost. Additionally, entrepreneurs may compartmentalize their legal issues and, in doing so, fail to communicate the necessary business context to their attorneys.

Outside Counsel 7 stated:

Many times, with a newer client, they will just send over contracts and say to us - review it. Reviewing a document is meaningless without a business context. We then need to lay out for our client, here is what we expect of our clients and in exchange here is what you can expect us to do.<sup>17</sup>

Entrepreneurs tend to believe attorneys serve a particular function—providing legal advice—that is separate from the entrepreneurs' more business-oriented efforts. In reality, as Outside Counsel 7's comment implies, attorneys cannot provide sound legal advice without foundational knowledge of the business context in which that advice is to be used. In

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<sup>14</sup> Zhang, *supra* note 11, at 15.

<sup>15</sup> In-House Counsel 6.

<sup>16</sup> Entrepreneur 6.

<sup>17</sup> Outside Counsel 7.

short, attorneys cannot add value to their clients' businesses without effective communication from their clients.

With greater experience, entrepreneurs can resolve many of these communication issues because they have a better sense of the role of an attorney in their business and what they need from their attorneys. Experienced clients can ask for exactly what they want and can demand the attorney follow through because their experience permits them to constantly evaluate the attorney's performance.

However, as Outside Counsel 7's comment also indicates, this communication problem is a two-way street. Attorneys also bear the burden of communicating to startup clients just what information and guidance they need to advise effectively. While the startup client may not always understand the role of the attorney, the attorney can minimize the client's skepticism by keeping the client informed about the purpose and effect of the attorney's work. In fact, entrepreneurs often have "no idea if the attorney is doing the right thing early on" and fail to "appreciate the value of the attorney" "until after a deal is closed." Thus, attorneys should "explain what is going to happen [and] why things are important."<sup>18</sup> Inexperienced attorneys, like inexperienced clients, can fail to appreciate the client's need for regular explanations. One strategy for overcoming this communication problem is to be direct and clear about the exchange of information that needs to occur:

In general, first-time entrepreneurs can be inexperienced and require more handholding as a result. I find it puts a premium on communicating clearly and in a down to earth way. I try to be up-front in the way the client needs to be candid with me to give them great service.<sup>19</sup>

It is important for attorneys to be cognizant of this barrier, especially with new entrepreneurs. The need to establish an effective and regular method of communication is particularly strong in today's economy, given the fast pace of business in a technologically-connected world. Additionally, the need is also particularly strong in the startup world, in which immediate financial tensions can cloud an entrepreneur's view of longer-term considerations. It is to these financial tensions that we now turn.

## 2. *Financial Tensions*

Entrepreneurs generally have limited financial resources; their companies likely have only a few key employees (who may be overstretched) and the companies have limited budgets, concerns attorneys may not fully appreciate. Entrepreneurs "are trying to make everything work" with limited funding and view attorneys as wanting "to get as much

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<sup>18</sup> Entrepreneur 6.

<sup>19</sup> Outside Counsel 6.

of our funding as possible.”<sup>20</sup> Further, a startup’s limited financial resources are devoted to immediate growth, not to paying attorneys for long term protections. Without short-term success, there is no long term; and it is difficult to convince an entrepreneur to spend money on protecting themselves from future issues when the short term is life or death. “Startups are generally cash starved. They are not funded, or not well-funded, and there are tremendous stresses and tensions in the organization.”<sup>21</sup>

Given the constraints on the client, there is also tremendous pressure on the attorney. A lawyer’s time is valuable and they are not generally doing startup work as a free service. Demands of startup clients may not be realistic from an attorney’s perspective; startup clients may need more explanation and hand-holding than experienced clients, and may also be asking for concessions on fees or deferrals. With clients that cannot pay, the incentive is for the lawyer not to spend much time on the client and not to develop robust communications with their startup clients. This incentive is in part driven by the hourly billing model most law firms employ.<sup>22</sup> Lawyers face immense “pressure not to bill too much to startup clients who we all know do not have very big bank accounts and cannot allocate significant resources to professional services.”<sup>23</sup> The hourly billing model also disincentivizes the client from offering important information to the attorney and seeking the attorney’s advice, forcing the client “to balance the cost of picking up the phone to ask, with the value we might receive from the certainty of knowing the answer.”<sup>24</sup>

Thus, there is a significant interplay between the communications tension identified in Section 1 above and the financial tensions that both lawyers and clients face. On the one hand, clients are reluctant to share information because they do not understand the attorney’s need for information, and they are focused on short-term business operations. On the other hand, the attorney does not have a monetary incentive to probe the client for information. The impact of the intersection between the financial and communication tensions is significant:

In my experience it is often the case that the client wants broader and more practical advice; the lawyer oftentimes wants to provide broader and more practical advice and to have more background, and to understand the client better, and to understand the business better but the constraints of the [lawyer’s] business model do not incentivize them to do what frankly should be done.<sup>25</sup>

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<sup>20</sup> Entrepreneur 7.

<sup>21</sup> Outside Counsel 4.

<sup>22</sup> Alex Vorro, *Law Firm Billing Rates Steadily Climbing Despite Down Economy*, INSIDE COUNS. (Apr. 17, 2012), <http://perma.cc/G36V-DTBA>.

<sup>23</sup> In-House Counsel 2.

<sup>24</sup> Entrepreneur 7.

<sup>25</sup> In-House Counsel 2.

As a result, entrepreneurs enter the relationship skeptical of the value of the attorney in their business and the enormous cost of receiving legal advice. This can lead to entrepreneurs looking for ways to cut corners with legal services to conserve resources for growth. Rather than hiring an attorney, entrepreneurs may instead turn to online services, forms, or simply ignore legal issues.<sup>26</sup> Ignoring legal issues can be particularly troublesome for startup clients as small problems can often cascade into larger ones that could have been prevented with simple, upfront advice. By the time they do seek legal help, the severity or number of legal issues may have grown. The billable hour system “incentivizes [startup clients] to wait until . . . the problem can no longer resolve itself and then go to the lawyer.”<sup>27</sup> Additionally, when entrepreneurs do seek an attorney’s advice for their legal problems, the hourly billing model incentivizes clients to do so at the last minute so that attorneys have less time to craft a solution, in the hopes that “the lawyer will spend less time and the bill will be smaller.”<sup>28</sup> These incentives lead to far from ideal results for entrepreneurs, and this tension can be damaging on the attorney-startup relationship.

The anecdotal evidence of the perverse incentives created by the hourly billing model our interviewees noted is confirmed by an American Bar Association (“ABA”) study on the effect of the hourly billing model on the value of an attorney’s services. The study noted that the hourly billing model discourages communication between lawyer and client, puts the client’s interests in conflict with the lawyer’s interests, and results in itemized bills that tend to report mechanical functions, not value or progress.<sup>29</sup> As the ABA commission pointed out, one of the major problems with the billable hour system is that it is “fundamentally about quantity over quality, repetition over creativity, with no gauge for intangibles such as productivity, creativity, knowledge or technological advancements; it is a counter-intuitive measure of value.”<sup>30</sup>

Given these constraints, entrepreneurs have expectations about what work they should be billed for, and what work they should not. The entrepreneurs want the attorneys to know and understand their business without having to explain it to them. The entrepreneurs do not want to pay an attorney to get up to speed. They do not want to take the time to explain and communicate with the attorney because it costs them money. “The

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<sup>26</sup> Diana Ransom, *Seven Money Mistakes Young Entrepreneurs Make*, ENTREPRENEUR (Aug. 4, 2011), <http://perma.cc/KF57-M92R>.

<sup>27</sup> In-House Counsel 2.

<sup>28</sup> *Id.*

<sup>29</sup> Jim Hassett, *Alternative Fees (Part 1): What’s Wrong with Billing by the Hour?*, LEGALBIZDEV BLOG (Jan. 7, 2009), <http://perma.cc/R2JN-EZTG>.

<sup>30</sup> Robert Pack, *The Tyranny of the Billable Hour*, WASH. LAW., Jan. 2005, at 20, 25, available at <http://perma.cc/M5SX-KNN5>.

lawyers don't have the expertise the entrepreneur does and the entrepreneur doesn't want to teach them when they're billing by the hour."<sup>31</sup>

Thus, a difficult tension for the attorney-startup relationship is that the incentives due to the billable hour fee structure and the monetary pressures on the startup are not designed to facilitate strong communication and instead lead the entrepreneur to provide limited information and the attorney to spend limited time on clients that can scarcely afford to pay the bill. There does not seem to be a convincing reason why the attorney should take all of the risk and not be paid the prevailing rate for their time, but it may mean that the billable hour structure is unworkable for the client.

### 3. *Fast Pace and Time-Sensitive Demands*

Startups move at a fast pace and face time-sensitive demands. Much of the need to move quickly arises from various pressures that a startup faces. First, the broader business environment demands that startups move quickly. The business environment is a competitive, "survival of the fittest" marketplace.<sup>32</sup> This is especially true in tech-based businesses, given the speed of technological evolution. Additionally, this is increasingly true as technological developments expedite the pace of transacting. Second, time is money and the financial pressures startups face require them to work quickly or risk squandering their limited financial resources. Finally, entrepreneurs have high aspirations for their startups and want to see results achieved quickly. Entrepreneurs are under constant time pressures and do not think they can afford to spend time communicating with attorneys.<sup>33</sup> Entrepreneurs instead prefer to spend their time on the product, service, or idea.

A challenge for lawyers is helping business people understand the value of taking time to provide information; business people in a high pressure startup are pulled in 100 different directions and deal with whatever fire they need to put out at that moment, nonetheless sharing of information enables lawyers to do a good job for the company.<sup>34</sup>

Because startups face constant time pressures, business decisions need to be made quickly and without full information. This means that attorneys, who typically aim to minimize risk, need to be able to advise on business decisions in the face of uncertainty by providing advice in a timeframe that matters and moves the business forward. Pace impacts the ways in which the entrepreneur chooses to and is able to communicate with

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<sup>31</sup> Entrepreneur 5.

<sup>32</sup> David Roth, *Latest Trait of Successful Start-Ups: Speed & Iteration of Learning*, FORBES (July 18, 2012, 5:45 PM), <http://perma.cc/QJQ9-8VPJ>.

<sup>33</sup> Martin Zwilling, *Entrepreneurs Have to Move Fast or Get Run Over*, BUS. INSIDER (Apr. 14, 2012, 8:00 AM), <http://perma.cc/YU9P-A9KV>.

<sup>34</sup> In-House Counsel 5.

the attorney. The entrepreneur is again incentivized not to provide the attorney with much information. The attorney is limited considerably in the ability to render good advice given both information and time constraints.

Despite time pressures, lawyers must be cognizant of when their advice simply should not be rushed and must insist on more time where it ultimately serves the startup's interests. "Lawyers must be consciously aware that they are being tugged in a direction and understand that even though the client wants it in 10 minutes, they may need to say, I need a day on this issue and it is worth spending the \$2.5K on."<sup>35</sup> Startups that are successful can take off rapidly, magnifying the impact of legal issues that are ignored early on. Some startups can reach the IPO stage and still face major legal issues, which can pose a serious obstacle to a successful IPO. For instance, Square, the startup that permits mobile credit card processing using a square dongle, was sued in early 2014 for patent infringement and fraud by a professor who claims he invented the product. Square had been readying itself for an IPO in 2014, but has since postponed the IPO indefinitely.<sup>36</sup> Attorneys must understand that the fast pace of business does not justify ignoring potential legal problems and must take the time to address important legal problems upfront, such as patent ownership and infringement issues, rather than dealing with such problems after the startup has succeeded.

The three constraints we have identified in this section notably revolve around a similar theme of communication, which was a theme our interviews targeted. While the pressures and constraints on communication are diverse, that these pressures combine to disincentivize communication indicates that implementing effective communication patterns can go a long way to easing many different constraints on the attorney-startup relationship.

### C. How Attorneys Can Add Value to Startups They Advise

The three inherent strains on the attorney-startup relationship discussed above provide a broad sense of the roadblocks attorneys face in attempting to add value to their startup clients' businesses. This section examines what attorneys can do to minimize these roadblocks and otherwise add value to their clients' businesses. Based on conversations with our interviewees, we explore five ways in which attorneys can add value: (1) engage in effective communication; (2) understand the client's business; (3) provide actionable advice; (4) provide solutions, not just risk-management; and (5) offer flexible billing practices.

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<sup>35</sup> Entrepreneur 4.

<sup>36</sup> Katie Roof, *Square IPO Postponed Indefinitely*, FOX BUS. (Feb. 28, 2014), <http://perma.cc/R8FE-R9R4>.

The foregoing analysis speaks to communication between the attorney and startup client as a major source of potential breakdowns in the attorney-startup relationship. Solving or avoiding communication problems is one important step attorneys can take to be less of a “transaction cost” and more of a “transaction cost engineer.”<sup>37</sup> In fact, as this section argues, the attorney is in the better position to lay the foundations for strong communication. Common roadblocks to communication emerged in our interviews. Based on these common complaints, the most important steps attorneys can take to establish patterns of effective communication are to communicate their role to and request necessary information from the client.

Respondents expressed concerns that attorneys do not communicate their role well and do not explain to the client what information about the client’s business they need to provide quality service. An experienced attorney now working in-house at a startup stated: “Attorneys do not communicate their role; they assume that the client knows their role or the attorney has assumed the role and then [believe] that it would be obvious to the client what the attorney’s role is.”<sup>38</sup> The attorney must explain their role to the startup client. Given the multiple roles founders tend to play and the general lack of experience entrepreneurs have with attorneys, it is important to define the relationship. While the nature of the relationship can vary depending on the circumstances and scope of the attorney’s representation, at the outset “[t]he attorney should be the authority and should present the lay of the land.”<sup>39</sup> Confusion about the role of the attorney can cripple business decisions; the attorney’s role should not be to make business decisions for their clients, but rather to examine the consequences of each course of action for them and engineer solutions to complicated legal problems. One respondent recounted an instance in which uncertainty surrounding an attorney’s role impeded a startup’s operations;

I saw a company we were involved with spend a year identifying and weighing alternatives because the attorneys identified the risks associated with the preferred course of action, only [for the company] to end up doing what we [had] advised at the very beginning. In my opinion, the attorneys did not do a good job of communicating the extent of their role, and the business people interpreted the highlighting of risk as business advice, advising them not to proceed.<sup>40</sup>

The attorney’s role can vary from client to client and can evolve over time throughout the representation of a single client. In the beginning,

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<sup>37</sup> Gilson, *supra* note 7.

<sup>38</sup> In-House Counsel 2.

<sup>39</sup> Entrepreneur 6.

<sup>40</sup> Entrepreneur 2.

attorneys should make clear their initial role “is to provide basic legal support” such as “setting up the corporate structure, setting up employee agreements, and drafting contracts and other legal documents.”<sup>41</sup> As the startup progresses, attorneys should communicate the changing nature of their role, which should evolve to legal advising, including “identifying various courses of action, the advantages, disadvantages, and potential risks associated with each one.”<sup>42</sup> Finally, attorneys can begin to “provide business advice,” which “may go beyond identifying the various courses of action, and into the realm of helping the business people make the business decisions and choose among multiple alternatives.”<sup>43</sup> The attorney can establish themselves as a proactive tool and driver of business success if they are able to communicate effectively. Eventually, a lawyer may become “viewed as an integral part of the business team” rather than someone who performs a discrete “function called on when [the business team] needs it.”<sup>44</sup> When lawyers are integrated into the business team, the business team can fully realize “the huge value of using legal [services] strategically for planning purposes and to help drive success as opposed to only dealing with problems.”<sup>45</sup>

No matter what role the attorney plays, the attorney must also inform the client of the need to stay involved by providing necessary information and feedback. “Business people tend to view the legal affairs department as dry cleaning. . . . [The business people] want to just be able to hand [work] to [the attorneys] and when they come back everything is going to be fine.”<sup>46</sup> When the attorney fails to acquire necessary information about the client’s business, goals, and expectations, the attorney will struggle to fulfill the various roles they have undertaken. In turn, the entrepreneur may view an uninformed attorney as a poor or untrustworthy business adviser. This lack of communication clouds the relationship with uncertainty and undermines the attorney’s ability to serve their client’s needs effectively, and can prevent an attorney-client relationship from progressing from the provision of legal support to the provision of business advice. For instance:

A client may go to an attorney with a trade dispute and say, we got overcharged-what can we do here? If the lawyer asks probing questions, the lawyer might understand it isn’t the trade dispute the client is worried about; the supplier is constantly late with deliveries and they are worried because they have an exclusivity clause with the supplier so they assume they can’t replace him. They go over the minor gripe of being overcharged, but the bigger issue is: can I get

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> In-House Counsel 5.

<sup>45</sup> *Id.*

<sup>46</sup> In-House Counsel 7.

out of the exclusivity because I am really unhappy with the supplier? A lawyer, who doesn't ask the probing questions, doesn't get to the real issue and they just provide the advice – take them to small claims court for \$X,XXX, or you need to go to arbitration because there is an arbitration clause in the contract. You can imagine that the advice would be completely different if the lawyer knew that the client was generally upset or unhappy with the supplier.<sup>47</sup>

Additionally, while the attorney should communicate with the client about their role, the attorney should also establish that they “are not trying to control the client.”<sup>48</sup> The client needs to “understand you're on their side, that the attorney doesn't have an agenda of his or her own.”<sup>49</sup> “Regular communication minimizes the need for status requests from the client and contributes to the client's overall confidence in advice and recommended solutions. Keeping a client informed will help keep client expectations reasonable. Timely communication is essential to client well-being.”<sup>50</sup>

Successful attorneys must also gauge the needs and knowledge of their clients and tailor their advice to the client's level of understanding. Attorneys can build trust by going through basics to help clients understand the attorney's advice and role. When communicating with a business person, attorneys should “use [the former's] language, make the business case, describe the business value, quantify it, as that's how business people think and make their decisions.”<sup>51</sup>

## 2. *Understand the Client's Business*

Strong communication is only the underpinning that permits attorneys to add value to their clients' services -- the attorney can do much more to be value-adding. The attorney needs to make sure they understand the client's objectives because advice may change based on what the client is trying to accomplish. The attorney must draw out information from the client in order to truly understand the client's business. The client may not recognize what information is important and may inadvertently leave out useful information. Thus, the attorney must constantly “probe more and get the information [the client is] not providing” in order to truly understand the client's business.<sup>52</sup> Clients will “get the best level of service” when they

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<sup>47</sup> In-House Counsel 2.

<sup>48</sup> Outside Counsel 3.

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

<sup>50</sup> Betty Adams, *Client Communication and Contact*, GPSOLO, Jan./Feb. 2008, at 18, 19, available at <http://perma.cc/N8CZ-XW4M>.

<sup>51</sup> In-House Counsel 5.

<sup>52</sup> Entrepreneur 6.

“provide context” about their business so attorneys can ensure their advice matches the client’s “business intentions.”<sup>53</sup>

Without business input, legal advice is of little value. Attorney-startup communication should facilitate strategic thinking and not just be task-oriented. The attorney must learn not only to respond to explicitly communicated needs of the startup, but also to anticipate uncommunicated or yet-unknown needs. Additionally, the attorney must use what they learn about a client’s business to provide the big picture advice that may not be directly sought. Startup clients often need broader advice than the lawyer assumes. Due to lack of communication, this broader advice often is not sought or delivered. Lawyers should use their knowledge and experience to provide broader “guidance and wisdom” rather than just a “service.”<sup>54</sup> This can even include “informal advice” about the market, such as “what is normal, what is typical, what is weird for a company of our size.”<sup>55</sup>

In many situations, what the client needs is for the attorney to advise using a practical business approach. They need the attorney to take a step back and use their understanding of the context within which the client is working to offer a broader perspective than the black letter law. To acquire an understanding of the context in which the attorney’s advice is to be used, the attorney must ask questions.

Further, the attorney must be able to guide the entrepreneur by communicating an understanding of the long term consequences of a contemplated course of action. Attorneys are often “conditioned to be intensely practical” about the advice they provide and be inclined to “not offer an opinion” unless directly asked, but startup clients need attorneys “to help [the former] weigh the options.”<sup>56</sup> The way to implement this communication is to explain long-term consequences and slow the client down. The balance is in communicating enough so that the client is well-informed, but not so much that the client is overloaded with potentially unimportant information. The attorney needs to draw out key pieces of information and incorporate this information into useful advice for the client. Additionally, the entrepreneur deserves and needs information that they might not necessarily know to ask for. One respondent offered a particularly sound strategy for communicating consequences:

I try to make sure to give my client examples of downsides because they may not fully appreciate the issues. I tell them, here are the pros and cons of going down this path and here are examples that I have seen in practice. To get across the consequences, I may also put the client in touch with an entrepreneur who was in a similar situation.<sup>57</sup>

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<sup>53</sup> Outside Counsel 7.

<sup>54</sup> Entrepreneur 6.

<sup>55</sup> Entrepreneur 1.

<sup>56</sup> Entrepreneur 6.

<sup>57</sup> Outside Counsel 3.

These recommendations necessitate some words of caution. The attorney must strike a balance between anticipating the client's needs and providing the necessary, though unrequested, advice while not providing unnecessary advice that does not benefit the client. "If I ask for A, I want A not A+B."<sup>58</sup> Attorneys can end up "just freaking the business person out" with unnecessary advice or going "way off on tangents" if they don't take time to "ask questions beforehand."<sup>59</sup>

In choosing to do something extra, the attorney may need to communicate the importance of the additional work and understand that the client may not appreciate additional costs without an understanding of the associated value. Unilateral decisions are only going to be helpful if the client understands the underlying reasons. The key is for the attorney to truly understand the client's business needs and provide advice necessary to respond to and meet those needs. The attorney must be careful not to provide superfluous advice that does not address a client's needs or ultimately add value to their business.

### 3. *Provide Actionable Advice*

The fast pace of the startup requires that information be conveyed in an actionable and comprehensible manner for business people. This requires the attorney to: (1) provide advice in a format the startup can immediately implement and (2) communicate that advice efficiently. Attorneys may throw work back over the fence without communicating in an efficient and useful way, which may slow a process down and impede growth.

Actionable advice is advice that does not require further synthesis by the client. This means the advice cannot simply consist of information. Rather, the advice must consist of information broken down into legal-business strategies the startup can implement. To accomplish this, attorneys must be able to view matters from their clients' perspectives and communicate advice usefully.

You need to use their language and make a pitch. Everything with business people who are in the startup world revolves around the next pitch they are going to make, so you need to think about it in that context and frame your request or analysis in the format and language that they use; align what you're trying to accomplish in their strategic vision of the company and express how it supports their business plan.<sup>60</sup>

Additionally, the advice must be communicated in understandable terms. Lengthy memos or contracts full of legalese, while traditional, may

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<sup>58</sup> In-House Counsel 1.

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

<sup>60</sup> In-House Counsel 5.

not be the most effective tools. Communicating information to a client in a simple way, without complex legal language, “will serve the needs of both the attorney and the client.”<sup>61</sup> “What frustrates clients the most is when you don’t answer their questions or you answer it in a way that is very nice, but requires them to read a 49 page book.”<sup>62</sup> Due to general lack of experience startup entrepreneurs have with attorneys, the attorney must be willing to step back from the legal terminology and explain concepts to their client in terms and ways that the client can understand. Communicating with the client from the client’s perspective is a useful approach. Speak to the client in ways that they understand and appreciate, and respond to them in a similar manner. “Clients really appreciate if you try to explain complicated legal concepts in plain terms and with analogies.”<sup>63</sup> Further, attorneys must be cognizant of their clients’ time and provide advice quickly and in an informative manner, focusing in on what is truly important:

The startup needs things turned around quickly. There is a premium on being a good communicator. It is imperative that the lawyer puts their thoughts together before putting them on paper for the client. Make the communication very concise, very informative, but with no more background than is necessary.<sup>64</sup>

The entrepreneur appreciates being told what is to come and what to expect. The attorney must communicate what matters and why to the client. Not everything is necessary for the client to read and to be part of; if the client understands that the attorney can handle certain areas and will raise issues that are important for them to look at, they will appreciate that the attorney has taken the time to do so (assuming it is appropriate in the context). The attorney should also articulate to the client what is normal in the market for that type of business; for instance, what venture capital investors demand in their contracts and expect, matters that clients unfamiliar with the investment process might not yet understand. One outside counsel provided a good example:

In many situations, the entrepreneur doesn’t know which parts of the contract are important to them. In a stock purchase agreement that is say 25 pages – maybe only 2 pages are important. What I say is, here are the pieces you need to read and understand, the rest, from experience will never come into play or are not negotiable, and so are not worth your time; I will explain what they mean and the risks they might entail, but there are some things in venture

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<sup>61</sup> Outside Counsel 1.

<sup>62</sup> Outside Counsel 4.

<sup>63</sup> In-House Counsel 2.

<sup>64</sup> In-House Counsel 1.

capital documents that no one argues over and they are critical to investors, so we don't touch them.<sup>65</sup>

In providing advice, attorneys should focus on the question the client asked the attorney to answer so there is no confusion over the significance and impact of the attorney's advice. "An answer needs to be completely and utterly focused on the question [the client] asked you."<sup>66</sup> It is critical for the attorney to be "precise about what advice they are providing based on what they thought the question was."<sup>67</sup> However, this does not mean that an attorney should not anticipate a client's needs and communicate with the client about what questions a client should be asking and what additional advice the attorney is capable of providing. Rather, the attorney should be clear about what question of the client's they are answering and inform the client where their advice exceeds the bounds of the client's question.

#### 4. *Provide Solutions, Not Just Risk Management*

The attorney may view their role as simply to identify risks. Lawyers are trained to do so and some academic literature points to risk management as the value of legal advice.<sup>68</sup> Because the entrepreneur may need help in deciding what to do, risk identification is helpful only to a degree, and clients can find it very frustrating. Business clients "want you to synthesize the issues and find a solution. . . . It is infuriating if someone is presenting you with a problem because what you really need and want is at least one or two solutions."<sup>69</sup>

One major complaint our respondents identified is the belief that risk identification by the attorney translates into advising a client against a deal. In reality, risk is inherent in any deal and the attorney's job is to attempt to provide ways to get the deal done at a risk level tolerable to their client. As one in-house counsel wisely recognized;

While we need to advise our clients of the risks, all clients realize there is risk and what they really want is a path to accomplish their goal. The attorney's job is often finding the path to help them be able to do what they want to do. It is easy to tell them why they shouldn't do something, but that's usually not what they're asking. They want to know how to do it and what the risks involved are. Everything is

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<sup>65</sup> Outside Counsel 7.

<sup>66</sup> In-House Counsel 5.

<sup>67</sup> In-House Counsel 3.

<sup>68</sup> See, e.g., Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814, 823 (2006) (explaining the primary goal of contracting is minimizing the risk of litigation over a contract); Jeffrey M. Lipshaw, *Contingency and Contracts: A Philosophy of Complex Business Transactions*, 54 DEPAUL L. REV. 1077 (2005) (noting lawyers should anticipate and address in contracts possible problems).

<sup>69</sup> In-House Counsel 7.

grey. Find the grey if it is possible and advise them as to the risk of the grey.<sup>70</sup>

Attorneys tend to see risks and not in the context of opportunities. The attorney may view their role as protecting the client from risks, but entrepreneurs cannot succeed or get anything done without taking risks. What is often frustrating for the business people is that the attorney fails to give them actionable choices and business people get frustrated by lawyers presenting the problem and not the solution. There is more to giving advice than simply knowing where things might go wrong. As we have emphasized above, the attorney needs to be a strategic business partner. For instance, in designing a contract, an attorney is more likely to add value by constructing an agreement that reflects a business purpose rather than attempting to minimize all potential risks associated with the deal.<sup>71</sup>

To appeal to a business person, a lawyer must assess acceptable legal risks in the context of a client's business objectives and communicate those risks to the client; "a good lawyer facilitates a transaction by communicating to the client what legal risks are worth taking in the context of achieving the client's business objectives."<sup>72</sup> As one entrepreneur put it;

Our sales team used to call our lawyers the revenue prevention department. It is the mindset of lawyers to 'CYA,' there is a lot of finger pointing and liability concerns and they don't view things in terms of the opportunity but in terms of the potential liability. The entrepreneur can't afford to think like that.<sup>73</sup>

Attorneys must fully explain the consequences of potential business decisions to their clients, especially where the client tends to be focused on immediate effects but may not be in a position to predict long term effects. Attorneys must tailor their advice to enable clients to make better business decisions.<sup>74</sup>

While the client is intensely deal focused, they don't just need to understand that terms are [standard in the] market. Flat statements aren't doing the client justice. Sometimes you need to slow your client down so they don't end up resenting you; explain what the decision means for running the business or exiting the business five years down the line.<sup>75</sup>

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<sup>70</sup> In-House Counsel 2.

<sup>71</sup> See, e.g., Schwarcz, *supra* note 10, at 497 (concluding from survey results of general counsels that "contracts may have less to do with avoiding litigation per se and more to do with setting forth a basic business understanding").

<sup>72</sup> See Peter Wilkniss, *What Does it Take to Become a Successful Corporate Attorney?*, BCG ATT'Y SEARCH, <http://perma.cc/V2GV-M3FY> (last visited Nov. 4, 2014).

<sup>73</sup> Entrepreneur 4.

<sup>74</sup> Gardner, *supra* note 1, at 18.

<sup>75</sup> Entrepreneur 4.

When an attorney does reject a course of action, the attorney needs to explain what that means and how they came to that result. The goal should be to engage the client in a conversation about other possible solutions rather than shutting things down entirely.

Simply saying no may mean that you have failed in your obligation to keep a deal alive. “No, that will have consequences because we are a Nevada LLC, we have no tax basis in any of our assets and reallocating them into a Delaware corporate entity as opposed to a Delaware LLC will cause X, Y and Z negative effects.” That is different than simply saying “no” and doesn’t end a conversation.<sup>76</sup>

### 5. *Be Flexible on Billing Models*

The Great Recession put tremendous pressure on companies to minimize costs. Companies have responded by reducing the amount of legal services they consume. From 2008 to 2012, demand for legal services dropped an average of 0.4 percent, a major shift from the average increase of 3.7 percent in the preceding four years.<sup>77</sup> The reduction in demand for legal services makes it more difficult to justify high hourly rates and means lawyers should find ways to offer services at more competitive prices or face declining business.<sup>78</sup> Average hours billed per lawyer fell from an average of 1,742 a year from 2001–2007 to 1,641 in 2011.<sup>79</sup> As a result, the need for more flexible billing models has increased.<sup>80</sup> Lawyers now have the opportunity (really, the imperative) to explore innovative ways to price their legal services.

Some entrepreneurs appreciate having an invoice that explains the services rendered from the attorney. The invoice is an opportunity to

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<sup>76</sup> Outside Counsel 1.

<sup>77</sup> Sara Randazzo, *Report: The Boom Years Are Not Coming Back, Get Used to It*, THE AM LAW DAILY, Jan. 13, 2013, <http://perma.cc/W9SF-DVMU>.

<sup>78</sup> However, others have predicted the changing nature of the twenty-first century economy will increase the demand for legal services. See Gardner, *supra* note 1, at 20 (predicting globalization will stimulate demand for legal services as businesses must pay increasing attention to international and foreign laws). However, Gardner also notes lawyers face an increasingly competitive environment, both because clients themselves are capable of providing their own legal services and because other types of firms such as banking, consulting, and accounting firms are sharing in the work historically performed by lawyers. *Id.* at 21-22.

<sup>79</sup> Randazzo, *supra* note 77.

<sup>80</sup> See, e.g., Larry E. Ribstein, *The Death of Big Law*, 2010 WISC. L.REV. 749, 770 (2010) (noting the financial downturn has increased pressure on law firms to offer alternative billing arrangements, such as flat fee billing). See also Nathan Koppel & Ashby Jones, ‘Billable Hour’ Under Attack--In Recession, Companies Push Law Firms for Flat-Fee Contracts, WALL ST. J. (Aug. 24, 2009, 11:59 PM), <http://perma.cc/75EV-PVW3> (noting survey results of Fortune 1000 companies indicating amount spent on alternative billing arrangements rose to \$13.1 billion in 2009 from \$8.6 billion in 2008).

demonstrate value and yet another way to communicate with the client in a practical way. “In taking the time to write the entries to explain what you do, you give the client more gratification that there was value.”<sup>81</sup>

While all companies care about their bills and want to see accurate billing, startups are particularly sensitive to costs. One area where the attorney can convey a message to the client of the quality of their services is in their billing. The attorney can use the bill as an opportunity to reaffirm the value of the services provided, rather than showing the client every minute spent working on a matter.<sup>82</sup>

Writing detailed bills, breaking down entries, having something that is in plain writing, not something simply saying telephone conference, fax or intra-office conference regarding ‘sames’ and ‘therefores’. You don’t want to include legalese and complex terms because that doesn’t matter to the client. Tell them in simple words what you’re doing for them, why it is that you did what you did and they will feel like this is a relationship that works.<sup>83</sup>

To satisfy communication objectives the attorney may need to come up with alternatives to the billable hour, especially for cash-strapped startup clients. One way to “engineer . . . around the startup phase” is to offer “discounts and deferred fee arrangements” until the startup is funded.<sup>84</sup> A deferred fee can be “enough to get [the startup] started,” especially if attorneys “concurrently discount or structure billing rates to fit the client.”<sup>85</sup> However, attorneys that use alternative fee arrangements must understand the value of the tasks they include on bills, both to ensure clients are billed fairly and to ensure the attorneys are adequately compensated for their work.<sup>86</sup> Additionally, while alternative fee arrangements can help contain costs and make costs more predictable, they ought to be structured based on “risk analysis and a one-on-one negotiation” between the attorney and client.<sup>87</sup> In wagering on the startup client and making clear the attorney is sharing in the risk of the client’s success, the client is more motivated to work with the attorney because the client and attorney’s incentives are better aligned.

Other arrangements, such as a fixed fee, can also facilitate the relationship. Working with the client to provide services on a fixed fee may mean that the client is more inclined to call the attorney and ask questions,

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<sup>81</sup> Outside Counsel 2.

<sup>82</sup> See Matt Marshall, *Don’t Trust your Lawyer’s Billing? Try Viewabill*, VENTURE BEAT (April 13, 2013, 11:08AM), <http://perma.cc/6H3L-CL3E>.

<sup>83</sup> Outside Counsel 2.

<sup>84</sup> Outside Counsel 4.

<sup>85</sup> Outside Counsel 5.

<sup>86</sup> See Tolis Dimopoulos, *Why Alternative Fee Arrangements Work*, SOPHOS LAW BLOG (March 22, 2010), <http://perma.cc/K5HH-8NDM>.

<sup>87</sup> Outside Counsel 5.

to hypothesize and find out what a project would cost, and to gauge their needs rationally; employing a cost-benefit analysis while armed with an attorney's input could be a very effective process. Further, entrepreneurs are unaware of how things work in a law firm; to incentivize better communication, it is valuable for the attorney to explain to the client how things actually work, both in terms of how and why they bill. No matter what, flexibility is key:

Sometimes it is a misconception of the client that the advice is being provided on an hourly basis. Partners at law firms often adjust the bills sometimes upward, sometimes downward based on what they think the client can pay. In reality, oftentimes it is not an hourly bill, it is somewhat of a fixed fee, but the client doesn't realize that. Had they known that, I think they would have behaved differently. I think the resolution here is probably to have some kind of a more flexible billing arrangement especially for clients that rely on outside counsel as a quasi-general counsel so that there is less of a chilling effect of the looming huge bill and they can communicate more often and provide more information.<sup>88</sup>

Attorneys can also take equity stakes in their client's business in lieu of all or a portion of their fees. Wilson Sonsini, a law firm well-known for representing startups, began taking an equity stake in some of its startup clients in the 1990s.<sup>89</sup> Both Wilson Sonsini and Foley, another firm known for its representation of startups, now operate venture funds through which they invest in their startup clients.<sup>90</sup> Such arrangements can be enormously profitable for law firms, and much more affordable for startups at early stages, offering mutual advantages that other fee arrangements do not. For instance, Fenwick & West, a law firm based in Silicon Valley that represented Apple Computers when it was a startup, was offered \$50,000 in Apple stock in exchange for a commensurate reduction in attorneys' fees; that investment would have been worth \$12 million when Apple went public.<sup>91</sup> However, there are ethical issues lawyers must consider when

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<sup>88</sup> In-House Counsel 2.

<sup>89</sup> Therese Maynard, *Ethics for Business Lawyers Representing Start-Up Companies*, 11 WAKE FOREST J. BUS. & INTELL. PROP. L. 401, 403, 403 n.1 (2011). See also Kevin Miller, *Lawyers as Venture Capitalists: An Economic Analysis of Law Firms that Invest in Their Clients*, 13 HARV. J.L. & TECH. 435, 439 (2000) (noting that in the 1990s firms in Silicon Valley including Wilson Sonsini and Cooley had begun accepting equity ownership in high-tech companies as an alternative to traditional fee structures).

<sup>90</sup> Kevin Davis, *Venturing into Startup Territory*, A.B.A. J., June 2014, at 55, 57, available at <http://perma.cc/RP2K-YTPH>.

<sup>91</sup> Maynard, *supra* note 89, at 408 (quoting Bill Fenwick, Founder, Fenwick & West, Remarks at the American Lawyer Media Roundtable: Building a Technology Law Practice: Let's Make This Equitable---How Flexible Must Firms Be on Pricing? (Aug. 1999)).

entering into such arrangements, as they may create a conflict of interest.<sup>92</sup> Such a conflict of interest could incentivize lawyers to take advantage of clients or fail to exercise independent judgment in advising clients due to having an equity stake, a major downside of such arrangements for clients.<sup>93</sup> Nonetheless, these arrangements have the potential to meet the financial needs of both the attorneys and startups, while better aligning the incentives of both to ensure the startup succeeds. A financial incentive can motivate the attorney to take a more active role in managing the relationship, understanding the startup's business, and communicating with the startup more effectively.

In addition to providing flexibility on billing services, attorneys can also be more innovative in how they provide services, a technique which synthesizes the various recommendations we have made herein. As legal services become increasingly commoditized and unbundled,<sup>94</sup> lawyers who are willing to systematize some of the more universal and routine aspects of their services and provide those services at lower rates can be more responsive to clients and provide more competitively priced services. Additionally, those lawyers can then focus more intently on providing customized business advice tailored to clients' unique needs, where such specialized advice is necessary.<sup>95</sup> As the economy increasingly turns on information and relationships, attorneys can be of more value to clients by assisting clients' understanding and applying "the thinking that underlies legal advice" rather than simply providing a conclusion.<sup>96</sup> Attorneys who are able to do so, especially those attorneys who are able to apply their legal thinking to business strategy and decisions and assist the client in managing knowledge and information assets, will be more responsive to client needs and more useful as clients face difficult business decisions.<sup>97</sup> Further, attorneys can find innovative ways to connect with clients and help manage costs simultaneously. In addition to providing venture funds to invest in startup clients, both Wilson Sonsini and Foley provide spaces for their new startup clients to work.<sup>98</sup> Wilson Sonsini provides conference rooms and work spaces for clients in one of its offices, which not only is a resource for cash-strapped clients but encourages client and lawyer interaction from working in a shared space; Foley has a space in Chicago it rents to new

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<sup>92</sup> Maynard, *supra* note 89, at 408-17 (discussing restrictions on lawyers' investments in client-companies). See also MODEL RULES OF PROF'L CONDUCT R. 1.8 (2013) (establishing when it is permissible for lawyers to acquire an ownership interest in a client).

<sup>93</sup> Maynard, *supra* note 89, at 418.

<sup>94</sup> See generally RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES (Oxford Univ. Press rev. ed. 2010).

<sup>95</sup> *Id.*

<sup>96</sup> Gardner, *supra* note 1, at 31.

<sup>97</sup> See *id.* at 31-32.

<sup>98</sup> Davis, *supra* note 90, at 56-57.

clients at an affordable rate that includes access to wireless Internet, printing, and various work spaces.<sup>99</sup>

### III. CONCLUSION

This article has attempted to provide attorneys with tools to improve their representation of startup clients. Our five recommendations, while broad, should provide lawyers with a springboard from which to continually revise their approach to representing startups. When viewed in light of prior literature on this subject, our recommendations are not new. What our interviews suggest is that fundamental problems in the attorney-startup relationship have persisted over time and attorneys have yet to respond to clients' dissatisfaction.

While the advice we have provided can certainly help lawyers become more effective advisers to their startup clients and to respond to the changing pressures on the legal industry, there are of course other aspects to, pressures on, and dynamics of the relationship. Some of the problems this article has discussed may arise from the current state of regulation of the United States legal industry, which prohibits practice of law by anyone other than state-licensed lawyers. Others have pointed to such restrictions as contributing to the inability of legal services providers to adapt fully to the major economic changes induced by technology and globalization.<sup>100</sup> For instance, while startups are increasingly conducting business across multiple jurisdictions, often globally, lawyers are still only permitted to practice law in jurisdictions in which they are admitted to the bar. Similarly, non-lawyers are typically not permitted to provide legal advice, meaning it is often left to the client to synthesize advice provided from lawyers with advice provided by financial advisers, accountants, or other consultants. Nonetheless, despite the highly-regulated state of the legal industry, lawyers can still work within these regulations to improve the services they provide and have a more fulfilling relationship with their clients.

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<sup>99</sup> *Id.*

<sup>100</sup> Hadfield, *supra* note 1, at 36-37, 54-56; Gardner, *supra* note 1, at 24-27.