To Make or to Buy: In-House Lawyering and Value Creation

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Abstract: In recent years, companies have been shifting much of their transactional legal work from outside law firms to in-house lawyers, and some large companies now staff transactions almost exclusively in-house. Although this transformation redefines the very nature of the business lawyer, scholars have largely ignored it. This article seeks to remedy that omission, using empirical evidence as well as economic theory to help explain why in-house lawyers are taking over, and whether they are likely to continue to take over, these functions and roles of outside lawyers. The findings are surprising, suggesting that in-house lawyers may now be performing as high quality work as outside lawyers and that the reputational value of outside lawyers may be significantly diminishing.

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INTRODUCTION

Improvements in reputation and skill of in-house lawyers and the recent growth of in-house legal departments mark a watershed in legal demographics. Although a need remains for outside law firms, especially in litigation, the relative distribution of work has changed. There has been a substantial shift towards more in-house lawyer transactional work in the past decade, with one survey showing approximately 69% of transactions currently lawyered in-house.

Some large companies now rely almost exclusively on in-house counsel for their transactional legal work. Sears, for example, began building up its in-house legal department in the late 1990s, adding lawyers in areas like securities, tax, and real estate. In real estate, its goal was to handle transactions from the beginning to the end. Many other companies have legal departments numbering in the hundreds, providing internally many of the same skills available from large outside law firms.

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3 In-house lawyers work as employees of the company they represent, in contrast to outside lawyers or law firms who are retained by companies as independent contractors.

4 Appendix A, at H.1 (average percentage of transactions reported to be lawyered in-house). See also Appendix A, at H.3 (42% of general counsel respondents reporting a much higher percentage of in-house lawyered transactional work than 10 years ago, and 30% reporting a slightly higher percentage); LARRY SMITH, INSIDE/OUTSIDE: HOW BUSINESSES BUY LEGAL SERVICES 227 (2001) (General Electric’s General Counsel Heineman estimating that in 1990 sixty percent of GE’s legal work was performed by outside counsel and forty percent by in-house counsel, but that by 2000 those numbers had reversed); Robert Eli Rosen, The Inside Counsel Movement, Professional Judgment and Organizational Representation, 64 Ind. L.J. 479, 482 (1989).

5 SMITH, supra note 4, at 275.

6 Id. (though local zoning matters often are given to outside counsel in the locality, who can handle them more efficiently).

This article examines the shift from outside to in-house “transactional lawyering”—meaning the structuring, negotiating, contract drafting, advisory, and opinion giving process leading to “closing” a commercial, financing, or other business transaction. The shift appears to reflect a transformation in the relative value provided by in-house and outside transactional lawyers. This article uses empirical research and economic theory to attempt to understand that transformation, analyzing why in-house lawyers are taking over, and whether they are likely to continue to take over, the functions and roles of outside transactional lawyers. The findings suggest, among other things, that in-house lawyers may now be performing as high quality work as outside lawyers and that the reputational value of outside lawyers may be significantly diminishing.

Because this article focuses on transactional lawyering, subsequent references to “lawyer,” “counsel,” “lawyering,” and the like refer to lawyering in a transactional context. This article does not address such non-transactional lawyering roles as litigation, lobbying, or compliance work because those roles do not normally involve, as does transactional lawyering, head-to-head competition between outside and in-house counsel. Also, this article assumes that lawyers generally provide value in business transactions, and thus does not address such issues as whether lawyers add value

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8 A “closing” is the final stage of a business transaction when the documents and agreements are signed (and, as appropriate, filed with requisite government agencies) and the transaction is then funded or otherwise effectuated.

9 This article also interchangeably uses the terms “counsel” and “lawyers.”

10 This is not to say that non-transactional lawyering roles never involve head-to-head competition. Some law firms, for example, may be marketing their Sarbanes-Oxley expertise to clients, thereby potentially competing with in-house compliance lawyers. E-mail from Gabe Shawn Varges, Chief Compliance Officer, Zurich Financial Services, to the author (Oct. 8, 2006) (observing that “a growth area for law firms is targeting those internal company processes carried out largely internally [such as Sarbanes-Oxley compliance] where the law firm can find a value-adding way of inserting itself”). In-house and outside lawyers also occasionally may compete for litigation and lobbying work. [cite]
compared to having no lawyers involved in such transactions. Recent research confirms that lawyers do indeed add value.\textsuperscript{11}

**METHODOLOGY**

The article first utilizes quantitative data, derived from the results of surveys,\textsuperscript{12} to test a range of hypotheses about the value or relative value provided by in-house and outside lawyers and to assess any transformation therein.\textsuperscript{13} The article then compares the resulting findings with the predictions of economic theory, using the insight that a decision whether to bring legal work in-house is a subset of the broader question of vertical integration: whether a company should make needed products in-house, or whether it should buy them (the classic “make-or-buy” decision).\textsuperscript{14}

The recipient of value provided by in-house and outside lawyers is always primarily the client-company. The article therefore focuses on value from the company’s standpoint.\textsuperscript{15} The company’s general counsel (or other chief legal officer), as manager of the legal department, typically is responsible for assigning legal work, including the


\textsuperscript{12} Cf. Lee Epstein & Gary King, *The Rules of Inference*, 69 U. Chi. L. Rev. 1, 3 (2002) (observing that empirical data “may be … the results of interviews or surveys”).

\textsuperscript{13} By “value,” this article essentially means monetary value. Gilson, *supra* note 11, at 243 (arguing that if a lawyer adds value, the transaction must be worth more, net of legal fees, as a result of the lawyer’s participation). Cf. Richard Posner, *Economic Analysis of Law* 10 (2d ed. 1977) (defining value as “human satisfaction as measured by aggregate consumer willingness to pay for goods and services”). This would include not only lowering direct costs but also indirectly saving costs, such as reducing the time and effort that parties need to devote to a business transaction. Gilson, *supra* note 11, at 254 (equating “cost-saving” with “value creation”). Value also may include less tangible (and thus less quantifiable) factors, such as quality of the work performed.

\textsuperscript{14} See infra notes 191-203 and accompanying text (examining the make-or-buy decision).

\textsuperscript{15} The article does not, however, focus on value creation from the standpoint of any single client. Even if a clever lawyer is able to negotiate a better deal for her client than a
decision whether to handle a matter in-house or to retain the services of outside counsel.\textsuperscript{16}

For survey purposes, the article thus treats the general counsel—or, where applicable, a person to whom the general counsel forwards the survey to respond—as a proxy for the client-company.

Treating the general counsel as a proxy for the client-company raises potential biases. Where (as often occurs) general counsel also are responsible for hiring in-house attorneys, general counsel may respond to the survey in ways that justify their hiring decisions. That, in turn, may slant some responses towards in-house lawyer value. There also may be a self-reporting bias insofar as general counsel, being in-house lawyers, view the role of in-house lawyers as more important and indispensable than it actually is.\textsuperscript{17} To mitigate these biases, as well as to serve as a reality check, this article additionally surveys a representative sample of outside lawyers.\textsuperscript{18}


\textsuperscript{17} See, e.g., Robert E. Rosen, “\textit{We’re All Consultants Now}”: How Change in Client Organizational Strategies Influences Change in the Organization of Corporate Legal Services, 44 ARIZ. L. REV. 637, 638 (2002) (“The self-reports of elite actors, like lawyers, are especially suspect, for often they are speeches to an audience (other than the interviewer).”); Robert K. Rasmussen, \textit{Lawyers, Law and Contract Formation}, 98 MICH. L. REV. 2748, 2749-50 (2000) (discussing this tendency from the standpoint of lawyer self-reporting).

\textsuperscript{18} The Outside Counsel Questionnaire was sent to all outside lawyer respondents to a questionnaire recently distributed in connection with \textit{Explaining the Value of Transactional Lawyering}, supra note 11. Those respondents, in turn, were originally part of a group of 500 lawyers in New York City, 211 lawyers in Philadelphia, and 270 lawyers in Chicago randomly selected using a random number generator from a list of lawyers generated from the LexisNexis® Martindale-Hubbell® Lawyer Locator. See Leslie C. Levin, \textit{Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others}, 47 Rutgers L. REV. 81, 107-11 (1994) (using a similar sampling method). To qualify to receive a survey, the lawyer must concentrate the majority of his or her practice in corporate transactional work (including mergers and acquisitions (M&A), securities law, corporate finance, project finance, or structured
The surveys were conducted using a ten-page questionnaire for general counsel as proxies for client-companies and a slightly modified, shorter questionnaire for outside lawyers. The forms of general counsel and outside lawyer questionnaires are attached to this article as Annexes 1 and 2, respectively.

Survey methodology is potentially subject to flaws. Although they constitute “a primary source of data in . . . the social sciences,” surveys are dependent on the precise wording, format, and context of the survey questions. Survey data also indicate what respondents (in this case, lawyers) say they do, which may be different from what they actually do. [Also discuss response rates to the questionnaires once all questionnaires are in.] Additionally as mentioned, treating the general counsel as a proxy for the client-company may bias some survey responses. To help discover flaws or biases as well as to provide a contrasting perspective, the article finally compares its empirical findings with the predictions of economic theory. Significant differences might suggest methodological errors. The results, however, turn out to be remarkably complementary.

HYPOTHESES

In accordance with the foregoing methodology, this article first empirically tests the following hypotheses: 1. Disintermediation; 2. Reducing Agency Costs; 3.
Economies of Scale\textsuperscript{25}; 4. Economies of Scope\textsuperscript{26}; 5. Responsiveness and Ease of Communications\textsuperscript{27}; 6. Reputational Intermediary\textsuperscript{28}; 7. Client Privilege and Confidentiality\textsuperscript{29}; 8. Dynamic Equilibrium.\textsuperscript{30} These hypotheses—representing what appears to be the universe of plausible hypotheses about the value or relative value provided by in-house and outside counsel—were compiled from scholarly literature,\textsuperscript{31} practitioner literature, feedback on draft questionnaires, and the author’s experience as a transactional lawyer.\textsuperscript{32} As the discussion below shows, there is some overlap among certain of these hypotheses.

Each of these hypotheses is further explained below.

1. \textit{Disintermediation}. This hypothesis predicts that in-house counsel are, other factors being equal, less costly than outside counsel because, by bringing lawyers in-house, companies can achieve a disintermediation of legal services—removing the need for outside lawyers and therefore avoiding the profit component charged for their services.\textsuperscript{33} This profit component represents the higher average incomes of outside

\textsuperscript{25} This hypothesis is discussed \textit{infra} notes 57-69 and accompanying text.
\textsuperscript{26} This hypothesis is discussed \textit{infra} notes 70-74 and accompanying text.
\textsuperscript{27} This hypothesis is discussed \textit{infra} notes 75-81 and accompanying text.
\textsuperscript{28} This hypothesis is discussed \textit{infra} notes 81-97 and accompanying text.
\textsuperscript{29} This hypothesis is discussed \textit{infra} notes 98-104 and accompanying text.
\textsuperscript{30} This hypothesis is discussed \textit{infra} notes 104-108 and accompanying text.
\textsuperscript{31} Including the economic theory literature discussed \textit{infra} notes 189-228 and accompanying text.
\textsuperscript{32} The author represented clients in transactions involving corporate finance, structured finance, and securities law from 1974 through 1989 as an associate and then partner at the law firm of Shearman & Sterling and from 1989 through 1996 as partner and chairman of the Structured Finance Practice Group at the Kaye Scholer law firm.
\textsuperscript{33} Although the cost of outside counsel is high for at least two other reasons—law firms compete with investment banks for top transactional people, and the pool of “top tier” law students is artificially constrained by low law-school class size whereas hiring demand has risen dramatically (see Ellen Rosen, \textit{Street Scene, For New Lawyers, The Going Rate Has Gone Up}, N.Y. TIMES, Sept. 1, 2006, at C7)—disintermediation cannot reduce these costs because companies themselves, when they hire lawyers to work as in-house counsel, face the same market constraints.
lawyers at comparable experience levels, including—even in non-partner billing—a contribution towards partnership profits.

Disintermediation also may be able to reduce costs by eliminating “the learning curve for outside counsel [as well as] the myriad small costs of doing business, such as visits to the client, talking through the issues, etc., that add up significantly from start to finish.” There is little question that learning curve costs are real. In the 1980s, companies sent almost all of their legal work to multiple outside law firms, believing that would lead to more competitive pricing. The results, however, were disappointing; companies repeatedly had to educate new firms about their operations. The more

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34 See, e.g., Press Release, National Association for Law Placement, Salaries Up at Largest Firms for First Time Since 2000 (Aug. 01, 2006) (on file with author & available at http://www.nalp.org/press/details.php?id=62) (observing median starting income of first year law firm associates of $105,000 compared to corresponding median salary for corporate staff attorneys of only $96,000). This article uses the term “income” when referring to outside lawyer compensation because outside lawyers are independent contractors of their clients, and the term “salary” when referring to in-house lawyer compensation because in-house lawyers are employees of their clients. See supra note 3.  
35 See, e.g., Douglas R. Richmond, Professional Responsibility and the Bottom Line: The Ethics of Billing, 20 S. ILL. U. L.J. 261, 262 (1996) (noting that “firms have increased attorneys’ billable hour requirements in the pursuit of greater partnership profits”). Cf. James E. Karlovich, Profitability: Improving the Bottom Line, 560 PLI/COMM 307, 313-314 (1990) (noting correlation between law firm billing rates and partner income). Compensation, however, is market driven, and this article later questions whether outside lawyer incomes will always be higher than in-house lawyer salaries. See infra notes 104-108 and accompanying text (discussing the “Dynamic Equilibrium” hypothesis) (discussing why in-house lawyer salaries are lower, and whether they are likely to remain lower).  
36 SMITH, supra note 4, at 245. This article discusses learning curves in the context of the disintermediation and other hypotheses. Disintermediation also can reduce costs to the extent outside counsel billing practices are rife with over-billing and other inefficiencies. In-house counsel monitoring of outside counsel billing, however, can mitigate any such inefficiencies. See infra notes 50-53 and accompanying text.  
37 SMITH, supra note 4, at 175. See also id. at 223 (observing that “Richard Cotton [the general counsel of GE’s subsidiary, NBC] told OF COUNSEL magazine that he foresaw increasingly less use of law firms, and he, for one, looked forward to 'no longer having to finance the education of outside counsel.’”).
complex the company’s regulatory, organizational, and operational structures, the greater the cost of this education.\textsuperscript{38}

At least partly in response to economic and competitive pressures to cut these costs, many companies have increased the size and responsibilities of their in-house legal departments.\textsuperscript{39} Disintermediation alone, however, cannot fully explain the cost saving because companies pay the full salaries of in-house counsel whereas they only pay the portion of outside lawyer income allocated to the company’s legal work. Therefore, any downtime in the use of in-house counsel would reduce the cost saving, except to the extent that such counsel can be redirected to other useful activities.\textsuperscript{40} Furthermore, the cost saving of using in-house counsel may be exaggerated because, unlike outside lawyers who actually bill for their legal services, in-house lawyer charges are usually internally imputed to the business units that use their services.\textsuperscript{41} Therefore, the price of using outside counsel may be perceived as higher or more tangible than the price of using in-house counsel.\textsuperscript{42}

2. Reducing Agency Costs. This hypothesis predicts that in-house counsel can more effectively reduce agency costs than outside counsel.

\textsuperscript{38} Cf. E-mail from Gray McCalley, \textit{infra} note 63
\textsuperscript{39} Peter J. Gardner, \textit{A Role for the Business Attorney in the Twenty-First Century: Adding Value to the Client’s Enterprise in the Knowledge Economy}, \textit{7 Marq. Intell. Prop. L. Rev.} \textit{17}, 32-33 (2003) (arguing that companies have found that a great deal of their legal work can be done in-house for significantly lower cost than what outside law firms would charge). \textit{See also} Robert L. Nelson, \textit{Partners with Power: The Social Transformation of the Large Law Firms} 57 (1988) (arguing that the increased cost of legal services, driven by increased regulation and expanded business operations, helps explain the shift to in-house counsel); Milton C. Regan, Jr., \textit{Law Firms, Competition Penalties, and the Values of Professionalism}, \textit{13 Geo. J. Legal Ethics} 1, 30 (1999) (observing that “as legal services have become a more significant component of its budget, the corporation has begun to internalize more of the provision of legal services by greatly expanding the size and role of its in-house legal department.”).
\textsuperscript{40} Cf. \textit{infra} note 61 and accompanying text.
\textsuperscript{41} [cite]
\textsuperscript{42} Of course, changes in the way companies allocate in-house counsel costs could change these perceptions.
There are two types of agency costs at issue. The first is the well-known agency costs resulting from the conflict between a company’s ownership and management. In-house counsel are in a better position than outside counsel, according to this hypothesis, to observe any misbehavior by company managers.\(^{43}\) In-house counsel’s informal day to day interactions with other corporate employees give them access to information through back channels that would rarely, if ever, be available to outside counsel.\(^{44}\) In-house counsel also may be in a better position than outside counsel to bring “client” misbehavior to the attention of senior management,\(^{45}\) though some in-house counsel may fail to investigate or to report suspected corporate wrongdoing due to fear of retaliatory action by management or a desire to be considered a team player.\(^{46}\)

The second type of agency cost can result from the conflict between the company and its outside law firm. For example, outside counsel who bill by the hour may have less motivation than in-house counsel to close a transaction quickly.\(^{47}\) Outside counsel also may be motivated to assign more senior attorneys than needed in order to bill at a higher rate.\(^{48}\)

\(^{43}\) Demott, supra note 16, at 966 (“Somewhat paradoxically, [in-house] counsel’s embedded position within a corporation, which underlies counsel’s ability to function proactively, also places counsel in an environment rich with information that may require uncomfortable choices.”).

\(^{44}\) Sung Hui Kim, The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper, 74 FORDHAM L. REV. 983, 999 (2005).

\(^{45}\) Cf. [proposed reporting requirements of Sarbanes-Oxley and MRPC].

\(^{46}\) See generally Kim, supra note 44. If in-house counsel more effectively monitor managers to reduce these agency costs, one might think that, at least on margin, some managers (i.e., those wanting the freedom to act in their personal best interests) would prefer hiring outside counsel. The company’s general counsel, however—not the managers actually working on transactions—usually decides in the first instance which counsel to use. See supra note 16 and accompanying text.

\(^{47}\) Joel F. Henning, Law Firms and Legal Department: Can’t We All Get Along?, 7 BUS. L. TODAY 24, 28 (Aug. 1998) (observing that “In a recent survey, more than one-third of outside counsel admitted that the prospect of billing additional hours at least sometimes influences their decisions to undertake work that they wouldn’t otherwise have performed”).

\(^{48}\) [cite]
This second type of agency cost, however, may be manageable through monitoring and convergence.\(^49\) Being part of the client organization, in-house counsel can monitor outside counsel,\(^50\) “question[ing] fees, deny[ing] disbursements, and insist[ing] on strict case management procedures.”\(^51\) Some in-house counsel, such as GE’s legal department, have established clear procedures to be followed by outside law firms in certain areas (e.g., patent application) to ensure quality and efficiency.\(^52\) In-house counsel also may request and review budgets prepared by outside counsel. This, and negotiating “blended rates” (billing rate for a team of lawyers based on rough average of the rates for each individual), can help eliminate perverse incentives for outside counsel to be inefficient.\(^53\)

The second type of agency cost also may be able to be managed through “convergence,” or reducing “the number of law firms on [the company’s] approved list.”\(^54\) Although the stated goal of convergence is to foster stronger relationships between the company and the chosen firms, it can help to reduce the learning-curve costs of outside law firms.\(^55\) Convergence also may be able to make it easier for in-house counsel to perform their role of monitoring outside counsel because there are not as many firms to track.\(^56\)

3. Economies of Scale. An economy of scale is the savings resulting from the greater efficiency of large-scale processes.\(^57\) This hypothesis predicts that in-house

\(^{49}\) “Convergence” is defined and discussed infra notes 54-56 and accompanying text.
\(^{50}\) Rosen, supra note 4, at 487. Although non-legal managers could likewise monitor outside counsel, such managers, not being lawyers, would not speak the same language or understand the issues as well as outside counsel.
\(^{51}\) SMITH, supra note 4, at 154.
\(^{52}\) Id. at 230.
\(^{53}\) Id. at 16.
\(^{54}\) SMITH, supra note 4, at 173.
\(^{55}\) Id.
\(^{56}\) SMITH, supra note 4, at 173. See also id. at 167-69 (discussing a matrix system that ties payment to outside counsel to compliance with cost projections as a form of management by in-house counsel).
counsel sometimes can achieve better economies of scale than outside counsel, and vice versa.

In-house counsel may be able to achieve better economies of scale than outside counsel, for example, when handling large numbers of repetitive transactions. Even complex repetitive transactions sometimes may be able to be performed more efficiently by in-house counsel. Thus,

the ‘vast majority’ of Oracle’s legal matters involve customer ‘out-licensing’ when other companies use Oracle systems. These matters are not simple, but involve ‘tricky issues’ with challenging variations from one national venue to another. No outside law firm can possibly do this work better, or with more intimate familiarity of the specific facts relevant to specific Oracle products, than Oracle’s own lawyers.

As companies expand in size, they therefore may find it efficient to hire full-time in-house counsel to address these types of transactions. Even absent large numbers of repetitive transactions, companies still may find it efficient to hire in-house counsel so long as “staff can be redirected to handle a variety of other client matters as well.” To the extent in-house staff cannot be redirected, however, hiring outside counsel can help to smooth out a fluctuating transactional workload which, if addressed by hiring in-house counsel, would result in future excess capacity.

58 SMITH, supra note 4, at 245 (identifying Jeff Kindler, then General Counsel of McDonald’s, as “one example of a whole generation of in-house counsel that have concluded . . . that repetitive, non-litigation legal work will usually be handled more cost effectively in-house”). See also id. at 70 (discussing that the fairly common assumption “that large law firms are by definition the most expensive source of legal work” often proves to be true).

59 SMITH, supra note 4, at 67 (referencing conversation with Daniel Cooperman, General Counsel of Oracle Corporation).

60 [Try to get critical mass data.]

61 SMITH, supra note 4, at 245 (discussing interview with Jeff Kindler, General Counsel of McDonald’s).

62 Cf. supra note 40 and accompanying text (observing that any downtime in the use of in-house counsel could reduce the cost saving from disintermediation). See also Carl D. Liggio, Sr., A Look at the Role of Corporate Counsel: Back to the Future—Or is it the Past?, 44 ARIZ. L. REV. 621, 629 (2002) (observing that “judicious use of outside counsel
For transactions that a company does not engage in repetitively, economies of scale may favor outside counsel who frequently engage in that type of transaction and therefore are able to apportion to more than one client the cost of gaining experience and expertise. Because the cost of gaining experience and expertise is even higher for complex transactions, economies of scale would favor outside counsel even more. For example, “in its representation of J.P. Morgan and Société Générale in connection with the joint acquisition of Seagrams Wine and Spirits from Vivendi by Group Pernod Ricard and Diageo PLC, the Jones, Day law firm counseled its clients on governing law in eight jurisdictions, including the United States, Australia, France, Japan, and Spain. In-house buyers cannot now rely on their own legal staffs, or on smaller firms or law firm networks, for such comprehensive advice in such a recondite area. Chances are they never will.”

Economies of scale also may favor outside counsel in large deals, where legal fees are relatively small compared to overall transaction costs and benefits. Thus, although Caterpillar “does most of its major transactions in-house, . . . it has used some M&A [law firm] powerhouses . . . for billion dollar deals.”

The discussion above focuses on economies of scale that are a function of lawyer expertise and experience. The relative value provided by in-house and outside counsel also may depend on logistical economies of scale. For example, some law firms may achieve savings and help facilitate timely closings through large back-office service

will be made in those areas where the inside lawyers have not developed the expertise to provide the needed legal services or where the workload does not permit it”).

63 SMITH, supra note 4, at 78. Cf. E-mail to the author from Gray McCalley, Jr., Vice President & General Counsel, Printpack, Inc. (July 26, 2006) (observing that “many in house counsel may never get more than one opportunity to do a complicated transaction which, on the other hand, may be the daily bread of the outside lawyer. . . . As an in house lawyer with competing priorities, if I am faced with a choice of doing a one-off transaction or doing a transaction that I will likely see again, and assuming that they both provide me with a first-time learning opportunity, it makes more sense for me to do the deal that is going to repeat because I can assure future cost avoidance that way . . . ”).

64 SMITH, supra note 4, at 255.
departments—such as proofreading, photocopying, word processing, and other support staff, including paralegals—that could only be cost-justified by a large volume of transactions.65

Law libraries also can provide logistical economies of scale. Because most companies cannot afford to maintain extensive law libraries for their in-house counsel,66 they have been almost completely dependent until recently on large law firms as the keepers of legal knowledge.67 With the introduction of Lexis and the Internet in the late 1970s, however, law firms appear to have lost much of this powerful economy of scale:

The advent of the internet with its access to vast amounts of information, including a considerable number of legal resources, has changed the door from being slight ajar [as a result of Lexis] to being almost wide open. This, coupled with the increasing number of computer literate lawyers joining corporate law departments, is materially altering the balance of power. The outside law firm’s once almost monopolistic control of that gateway to legal knowledge is broken.68

For large companies, moreover, the increasing size of in-house legal departments—some rivaling the size of the largest law firms and thus being able to afford large law libraries and back office services69—may be reducing the advantage that these logistical economies of scale give to outside law firms.

65 See, e.g., e-mail from Karl S. Okamoto, Senior Managing Director, Atticus Capital LLC, to the author (April 24, 2006) (observing that “[s]imple manpower (i.e., willingness to work at all hours while keeping proofreading quality high, meals served and cabs available) is often the explanation” for an outside transactional law firm’s value). Okamoto’s observation also may help to explain the failure of in-house counsel to replace outside litigation counsel, litigation being even more manpower and process intensive than transactional lawyering.

66 Liggio, supra note 62, at 625.

67 Id. at 625, 633.

68 Id. (although noting that, in its early days, Lexis was rather expensive and required computer skills that many lawyers did not have). The Internet also helps in-house counsel gain access to forms and templates that previously were more exclusively the province of outside lawyers. See infra note 124.

69 [cite]
4. *Economies of Scope.* An economy of scope represents the savings resulting from having the same investment support multiple profitable activities less expensively in combination than separately. This hypothesis predicts that in-house counsel who are already familiar with their company’s regulation and its organizational and operational structure may be able to achieve economies of scope by avoiding the learning curve of having to become educated about these matters. The learning curve also may be able to be reduced through convergence of outside law firms. When a company reduces the number of law firms it uses to a relatively small number, those firms may have more incentive—and through deal concentration naturally may tend—to develop in-firm expertise about the company.

Aside from the learning-curve economy of scope, this hypothesis also predicts that an outside law firm may be able to achieve economies of scope by offering the client a range of legal expertise that the client does not have in-house.

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70 Harvey, *supra* note 57.
71 The distinction between economy of scope and economy of scale tends to blur in this context, however. This article treats avoiding the learning curve as an economy of scope in the sense that the same investment—teaching in-house counsel about the company—supports multiple legal transactions by such counsel. But avoiding the learning curve also could be viewed as an economy of scale in the sense that in-house counsel, by counseling multiple transactions for a company, apportion the costs of learning about the company. Outside counsel unfamiliar with the company may have to incur this cost even for a one-off transaction.
72 Cf. E-mail from Gray McCalley, *supra* note 63 (observing that in-house counsel also save costs by understanding the company’s culture, since “any transaction, both the substance and the conduct thereof, will reflect a company’s culture and values. In house is much better positioned to ‘apply’ this. In house lawyers can also better manage (or at least are better positioned to manage) the client during the transaction, e.g. by defining success and using that as a management process as the transaction proceeds, thus managing expectations and assisting in identifying areas for compromise or concession.”).
73 See *supra* note 54 and accompanying text (defining convergence as reducing the number of law firms used by the company).
74 [cite; mention also SLS experience at S&S re Citibank/Citicorp]
5. Responsiveness and Ease of Communications. This hypothesis predicts that in-house counsel are generally more responsive to and can better communicate with the “client” than outside counsel.\(^{75}\)

It has been reported that “[o]fficials of corporations maintaining corporate counsel generally stress convenience, rapid service, and better understanding of their problems as the principal advantages of having their own law department rather than using outside counsel.”\(^{76}\) These advantages in part may result from the physical proximity of a company’s in-house counsel and management, often having offices in the same building if not on the same floor.\(^{77}\) At least at the outset of a transaction, management also may find it easier to communicate with in-house counsel, who presumably are more familiar with the company’s business than outside counsel and with whom management may have regular contact.\(^{78}\) Perhaps for this reason, in-house counsel seem to get involved at earlier stages of transactions than outside counsel, often helping (more than outside counsel) to actually structure transactions.\(^{79}\) Indeed, “[t]he very existence of a properly established inside counsel pushes back the involvement of lawyers to an earlier phase of a transaction and shifts the mode from reactive to proactive.”\(^{80}\)

In-house counsel who are more familiar with the client than outside counsel may also be more comfortable rendering informal legal advice. Although risky, this

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\(^{75}\) [Discuss IFLR or EuroMoney survey on importance of responsiveness. cite]
\(^{77}\) For these same reasons, in-house counsel of a regulated company would be expected to be able to work more efficiently with in-house regulatory counsel than would outside counsel.
\(^{78}\) Liggio, supra note 62, at 634.
\(^{79}\) See Appendix A, at E.4 (77% of general counsel respondents report that in-house counsel are typically more involved in structuring a client’s business transactions than outside lawyers). [Compare SLS Enron deposition testimony on V&E’s involvement: like a typical outside lawyer, only getting involved when outside lawyers receive a term sheet. Also, expand on perceptions of managers sensing outside counsel’s “meter running.”]
\(^{80}\) Chayes & Chayes, supra note 7, at 281.
sometimes could be valuable for business managers who need to make time sensitive business decisions.\(^{81}\)

6. **Reputational Intermediary.** This hypothesis predicts that outside counsel are better reputational intermediaries than in-house counsel.

Particularly for complex transactions, law firms historically have tended to have better reputations than in-house counsel.\(^{82}\) The reputations of outside counsel may be enhanced by their independence and, at least heretofor, by their firms’ ability to hire the best lawyers—or at least the best students from the most prestigious law schools.\(^{83}\)

The reputations of in-house legal departments are rapidly growing, however, and some in-house legal departments have very good reputations indeed.\(^{84}\) In-house counsel are increasingly viewed as competent to handle complex legal matters.\(^{85}\) In the late 1980s, in-house legal departments began attracting higher caliber practitioners and, by the late 1990s, partners from firms all over the country were leaving for in-house positions.\(^{86}\) Legal work posing significant risk is no longer always automatically sent to outside counsel.\(^{87}\) Furthermore, in-house legal departments are beginning to specialize more. For example, the number of specialty areas practiced by GE in-house attorneys has

\(^{81}\) See SMITH, *supra* note 4, at 247 (“After a while on the job, inside lawyers ‘get it.’ They recognize that their duty is to give the best possible answer they can, but also that an answer is more valuable at a 50% level of certainty today than a week from today at 90%.”).

\(^{82}\) [cite]

\(^{83}\) [cite]

\(^{84}\) [cite and give examples] Cf. Schwarcz, *supra* note 11, Appendix A at B.1 (finding that outside lawyers have a somewhat higher opinion than clients of the extent to which a highly reputed law firm contributes to the success of a transaction, perhaps indicating that general counsel with confidence in their own staff do not see as much of a need to hire outside law firms).

\(^{85}\) Rosen, *supra* note 4, at 483.

\(^{86}\) SMITH, *supra* note 4, at 216.

\(^{87}\) Rosen, *supra* note 4, at 483.
grown from “about 10 to approximately 17,” and recently added specialty areas include commercial transactions and e-commerce.

There may still be a significant reputational gap between in-house and outside counsel, however, in the giving of third-party legal opinions. These are legal opinions, spanning the entire range of business and financial undertakings, issued by counsel for one party but addressed to third parties such as financiers of credit or investors. Requiring outside counsel to issue these opinions helps assure the independence—and hence, the integrity—of the opinions. The reputational gap in part may result from perceptions (if not reality) that outside counsel have greater expertise than in-house counsel as well as a stronger culture of legal opinion giving. Furthermore, where outside counsel give legal opinions, there is an additional “deep pocket” besides the company to sue if the opinion is wrong—the law firm rendering the opinion. For these reasons, third-party legal opinions rendered by in-house counsel may still not be considered as credible as those rendered by outside counsel for the company.

Although reputational value has been viewed as the most agreed upon scholarly theory of the value added by transactional lawyers, some are beginning to question its

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88 SMITH, supra note 4, at 224.
89 Id. [May want to try and do informal interview with GC at GE] There are, nonetheless, concerns about specialization. In-house lawyer specialists may not develop the business skills and understanding that have traditionally been such an important part of the in-house lawyer’s role. SMITH, supra note 4, at 222. Furthermore, specialization could lead to myopia—a tendency to view the world too much from the perspective of the specialties. Id.
91 Id. at 9-10.
92 Compare e-mail from Gabe Shawn Varges, supra note 10 (observing that outside law firm legal “opinions—backed by their malpractice insurance—is something that internal lawyers often look for,” and later in that e-mail describing such a legal opinion as a “risk-shifting mechanism”), with Karl S. Okamoto, Reputation and the Value of Lawyers, 74 OR. L. REV. 15, 32 (1995) (finding that, at least in a securities offering context, an in-house counsel legal opinion on “legality” suffices for “the most platinum-plated of issuers”).
93 See, e.g., Gardner, supra note 39, at 46-48; Okamoto, supra note 92, at 43.
importance. Furthermore, any reputational gap would diminish if outside-law-firm reputation falls. This could occur for at least two reasons. Larger size may make it more expensive and less practical for a law firm to monitor the quality of its lawyers. (Perhaps for this reason, companies now say that they hire outside legal expertise based more on individual lawyers than the law firm per se.) Also, the increasing shift of outside law firm organization from traditional partnerships to limited liability partnerships may signal that law firm partners are no longer as willing to stand behind their firm’s good name.

7. Client Privilege and Confidentiality. This hypothesis predicts that outside counsel afford clients greater privilege and confidentiality than in-house counsel.

Although in-house counsel are theoretically afforded the same privilege as outside counsel, the privilege only applies to communications that constitute “legal” rather than “business” advice made to someone who qualifies as a client. It is often difficult to distinguish in-house counsel “legal” advice from “business” advice because the former must not only be “primarily legal in nature” but also must be “made in the attorney’s professional legal capacity.” That is a difficult determination “[s]ince every conversation that in-house counsel has with his company likely relates in some way to the

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94 See Schwarcz, supra note 11 (finding only weak support for the proposition that transactional lawyers add value by acting as reputational intermediaries). Cf. Rosen, supra note 4, at 494: “The emergence of corporate legal departments simply reflects decreasing corporate need for the legitimation afforded by independent lawyering.”
95 E-mail from Victor Fleischer, Acting Professor of Law, UCLA Law School, to the author (April 19, 2006) (arguing that “it becomes awfully costly to monitor other partners, and thereby protect the value of the firm’s reputational capital, as firms grow in size. . . . [P]artners may monitor each other to make sure that no one is slacking off. But monitoring is costly and imperfect, [and] many aspects of, say, due diligence, are not easy to monitor without duplication of effort.”).
96 E-mail from Gray McCalley, supra note 63.
97 [cite to that shift, and also to its impact on reputational value]
99 Id. at 346.
company’s business.”100 Additionally, there may be ambiguity as to whether the advice is given to a “client,” a determination that is subject to conflicting tests.101 A “control group” test limits clients to company employees “in a position to control or to take a substantial part in directing the company’s response to legal advice.”102 Federal courts, however, apply a “subject matter” test, which only requires that “the communication [is] made at the direction of corporate superiors and the subject matter of the communication is within the scope of the employee’s corporate duties.”103

To complicate matters further, in foreign jurisdictions outside counsel are often afforded a greater privilege than in-house counsel.104

8. Dynamic Equilibrium. This hypothesis—in truth more of a “meta”-hypothesis because it does not explain relative value as much as it explains how relative value changes—predicts that the relative value provided by in-house and outside lawyers fluctuates over time, although at certain times it may appear to be in equilibrium. Thus, although “theoretically, all corporate legal functions can be outsourced to law firms,” there has been “an almost three-decade peristalsis [sic] of work going inside one day and outside the next, of in-house staff being reduced one year and increased the next.”105

The first seven hypotheses may help to explain the dynamic equilibrium. For example, if disintermediation is causing a shift to in-house lawyering, the shift could reverse if in-house lawyer costs rise relative to outside lawyer fees. That might occur if in-house lawyers were no longer to receive the quality-of-life benefits that originally

100 Id. (arguing that, for this reason, the distinction between “legal” and “business” advice is “about as clear as mud”).
101 Id. at 347.
102 Id.
103 Id. (federal courts apply the subject matter test following Upjohn Co. v. U.S., 449 U.S. 383 (1981), rejecting the control group test).
105 SMITH, supra note 4, at 216.
attracted them to their relatively lower paying jobs, a scenario not entirely far-fetched: “There may have been some truth to... claims [that in-house lawyers do not work as hard as law-firm lawyers] ten years ago, but now working in-house can be just as demanding as firm jobs.” Similarly, to the extent economies of scale are causing a shift to in-house lawyering, the shift likewise could reverse if, for example, repetitive transactions were to decrease or complex transactions and average deal size were to increase.

This article next turns to the empirical findings.

FINDINGS AND ANALYSIS

This part sets forth and analyzes the results of the surveys that were used to test the foregoing hypotheses about the value of in-house and outside counsel. The article thereafter compares these findings and the analysis with economic theory. References below to general counsel respondents mean respondents to the Company’s General Counsel Questionnaire; references below to outside lawyer respondents mean respondents to the Outside Counsel Questionnaire.

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106 Cf. infra notes 168-169 and accompanying text (finding that even though in-house counsel salaries are presently less than outside counsel incomes, companies are able to compete in hiring by offering in-house counsel a better lifestyle). See also supra notes 34-35 and accompanying text (discussing that salaries of in-house counsel tend to be lower than the incomes earned by outside lawyers at comparable levels).

107 SMITH, supra note 4, at 283. See also id. at 275-76 (discussing why in-house counsel salaries may increase relative to law firm compensation).

108 See supra notes 58-64 and accompanying text (discussing the relationship between these factors and economies of scale).

109 A possible additional hypothesis is that in-house counsel are more likely than outside counsel to include alternative dispute resolution (ADR) provisions in contracts. Because ADR clauses are now standard in most agreements, this hypothesis no longer appears to be significant.

110 See Comparing the Findings with Economic Theory, infra.

111 See Annex 1 (Company’s General Counsel Questionnaire).

112 See Annex 2 (Outside Counsel Questionnaire).
Remarkably, there are only a handful of significant differences in the data reported by general counsel respondents and outside lawyer respondents. The high degree of congruence suggests a corresponding reliability of the data. The few significant differences suggest perception gaps that, if bridged, can help inform outside counsel who wish to make themselves more competitive.

**Disintermediation Hypothesis Compared with Empirical Findings.** General counsel respondents almost universally regard in-house counsel as the lower cost option. Two primary reasons appear to explain this cost differential: the learning curve of having to educate outside lawyers about the company’s organization and operations, and the lower effective hourly rate of in-house counsel.

Although outside lawyer respondents recognize the second reason for the cost differential—the lower effective hourly rate of in-house counsel—they seem to have myopia regarding the importance attached by general counsel to the learning curve.

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113 These differences are in assessing the importance of the learning curve to hiring decisions (infra note 118 and accompanying text); in assessing who is more likely to report management misbehavior (infra note 129 and accompanying text; but cf. infra notes 127-128 and accompanying text (observing that this difference has little practical importance)); in assessing who is more responsive to the client (infra note 155 and accompanying text); and in assessing whether the need for quality work is a relevant factor in the hiring decision (infra note 166 and accompanying text).

114 See supra note 18 and accompanying text.

115 Appendix A, at A.3 (86% of general counsel respondents citing this as a factor helping to explain the cost differential).

116 Appendix A, at A.3 (79% of general counsel respondents citing this as a factor helping to explain the cost differential).

117 See Appendix A, at A.5. The lower effective hourly rate of in-house counsel is indeed important and may well become more important if, as 91% of general counsel respondents believe, law firm billing rates are increasing more rapidly than in-house counsel costs. This is notwithstanding the efforts by many law firms to reduce costs by switching from all-equity partnerships to two-tier partnerships that include non-equity partners. Cf. William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the AM LAW 200*, 84 N.C. L. REV. 1691 (2006). But cf. Appendix A, at A.5 (indicating that only a third of outside lawyer respondents believe that law firm billing rates are increasing more rapidly than in-house counsel costs).
Indeed, relatively few outside lawyer respondents recognize learning curves as an important factor in the hiring decision.118

This suggests an opportunity for outside counsel to try to increase efficiency and maintain their competitiveness. Law firms may be able to reduce learning curve costs, for example, by developing institutional knowledge about the client and teaching that knowledge to new lawyers. Admittedly, though, institutional knowledge is not the same as individual lawyer knowledge. Although a law firm could attempt to translate institutional knowledge into individual lawyer knowledge through in-firm educational programs, those programs would be costly and their cost would be exacerbated by the high turnover rate within law firms.119 A law firm also might attempt to minimize the knowledge differential by assigning lawyers to work more closely with particular clients. From an individual’s standpoint, however, a lawyer so assigned might not receive as broad training, and therefore may not be as valuable, as one who works with a range of clients. And, from the law firm’s standpoint, a lawyer so assigned is more likely to be hired away by the client.

The findings also confirm the possibility that cost differentials are artificially magnified,120 in that in-house counsel costs are generally viewed as less transparent to senior management than outside lawyer fees.121 If and when these costs become equally transparent, the shift towards in-house lawyering may slow down or even reverse.122

118 Appendix A, at A.3 (only 42% of outside lawyer respondents, compared to 86% of general counsel respondents, citing this as a factor helping to explain the cost differential).

119 [cite as to high turnover rate]

120 See supra notes 41-42 and accompanying text.

121 Thirty-five percent of general counsel respondents believe in-house counsel costs are less transparent than outside counsel costs compared to only 14% who believe those costs are equally transparent. Appendix A, at A.8.

122 But cf. e-mail from Gabe Shawn Varges, supra note 10 (suggesting that part of the lack of transparency of the cost of using in-house counsel is “the Club Med phenomenon: people may perceive costs to be lower when they pay once and all services are included
In that context, there are several reasons why outside lawyers are sometimes lower-cost providers of legal services. They may, for example, have more extensive knowledge of the relevant transactional law than in-house counsel, although outside lawyers offer more of an advantage here for clients with small in-house legal departments. The findings also confirm the value of hiring outside counsel to help smooth out fluctuating transactional workloads that, if addressed by hiring in-house counsel, would result in future excess capacity. Finally, outside lawyers sometimes have an artificial cost advantage where a third party pays their client’s legal fees, because it is more common for outside lawyer than in-house lawyer fees to be paid.

Reducing Agency Costs Hypothesis Compared with Empirical Findings. The first type of agency costs, constraining management, is generally viewed as relatively in that fee, than if they are individually billed for each service”). If true, some lack of transparency may be inherent in the cost of in-house counsel.

123 See Appendix A, at A.4 (47% of general counsel respondents indicate that such knowledge could make outside counsel a lower-cost provider of legal services). This highlights the importance of law firm internal educational programs.

124 Fifty-seven percent of general counsel respondents from one-to-two lawyer in-house legal departments believe that outside counsel have a more extensive knowledge of transactional law, compared to 46% of respondents from three-to-nine lawyer in-house departments and only 25% of respondents from in-house departments of ten or more lawyers. Appendix B, at A.4. Cf. e-mail from Gabe Shawn Varges, supra note 10 (observing that outside law firms are also more likely to have “a broader supply of templates and other pre-fabricated components to apply than in-house, particularly smaller, in-house legal departments,” and that “smaller [legal] departments sometimes seek to overcome this through use of external professional associations, like the American Corporate Counsel Association that offers a library of templates, precedents, etc.”).

125 Appendix A, at A.4 (38% of general counsel respondents indicate that smoothing out fluctuating transactional workloads could make outside counsel a lower-cost provider of legal services). Interestingly, this was by far the dominant factor that outside lawyer respondents saw as explaining why outside counsel may be lower-cost providers of legal services. See id. (92% of outside lawyer respondents so indicating).

126 Appendix A, at A.4 (26% of general counsel respondents indicate this factor as a reason why outside counsel may be lower-cost providers of legal services). See also Appendix A, at C.7 (79% of general counsel respondents indicate it is unlikely that third parties will pay for in-house lawyer imputed fees). This may result in a “moral hazard” problem insofar as otherwise more expensive outside lawyers sometimes may be hired only because the other side to a transaction will reimburse for outside lawyer fees.
Although the ability to observe and report management misbehavior does not generally factor into the decision to hire counsel, there is clear consensus that in-house counsel are better able to observe such misbehavior. Survey respondents disagree, however, about who is more likely to report misbehavior.

In theory, the second type of agency cost, potentially resulting from the conflict between a company and its outside law firm, can be mitigated through monitoring and convergence. The findings indeed confirm that in-house counsel closely monitor in-house counsel, paying attention to progress of the transaction, billing, and client protection. Convergence, in contrast, appears to be only partially effective in reducing these agency costs.

**Economies of Scale Hypothesis Compared with Empirical Findings.** The findings confirm that at least part of the shift to in-house lawyering is attributable to the standardization of many transactions, which enables in-house counsel to more cost

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127 Fifty-three percent of general counsel respondents reported that the ability to observe management misbehavior is either a small factor or not a factor at all in selecting counsel. Appendix A, at B.2.
128 Thus, 95% of general counsel respondents and 75% of outside lawyer respondents believe that in-house counsel are better able to observe management misbehavior. Appendix A, at B.2. One in-house counsel made the following analogy: “Who can more quickly and accurately identify a family member’s drug problem? The priest who visits twice a year, or the older brother who shares a bedroom? As long as the in-house lawyer doesn’t have his own ‘drug problem’ I believe he or she will always have a better observation point than an outside lawyer.” Appendix C, at B.2.
129 Appendix A, at B.4 (88% of general counsel respondents indicate that in-house lawyers are more likely to report management misbehavior, whereas 58% of outside lawyer respondents say they are more likely to report it).
130 Appendix A, at B.6 (49% of general counsel respondents indicate that they monitor outside counsel to a “great extent,” and another 40% indicate that they monitor such counsel to a “significant extent”).
131 Appendix A, at B.7 (98% of general counsel respondents indicate that they monitor progress of the transaction, 91% indicate that they monitor billing, and 79% indicate that they monitor client protection).
132 Appendix A, at B.8 (only 16% of general counsel respondents indicate that convergence (at least) significantly reduces the need for in-house monitoring of outside counsel, whereas 37% indicate that convergence has little or no impact on the need for such monitoring).
effectively perform the legal work. The findings also confirm that at least some of this cost-effectiveness results from logistical economies of scale in the form of in-house counsel’s ability to use technology to routinize in-house transactional work.

The findings additionally confirm the utility of hiring outside counsel to help smooth out fluctuating workloads. The shift to in-house lawyering would be even greater but for difficulty in matching the fluctuating volume of work with the number of in-house lawyers. Furthermore, outside lawyers can help to maximize economies of scale where companies have difficulty in matching complex or unusual transactions with in-house lawyer expertise.

The findings support the view that where companies do not engage in repeat transactions of a given type, economies of scale may favor outside counsel who engage in multiple transactions of that type, especially where the transactions are complex. In deciding whether to hire outside counsel, 93% of general counsel respondents consider complexity of the transaction and 58% regard it as the most important factor. This suggests that outside lawyers, to remain competitive, should concentrate their practices in the most complex forms of transactional work. It also may help to explain the dramatic growth of in-house legal departments: most of a company’s transactions may not be very complex.

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133 Appendix C, at H.4 (19 of 43 general counsel respondents appear to agree that increased costs of outside counsel and increased standardization of transactions have facilitated a shift to in-house lawyering).
134 One general counsel respondent observed, for example, that “technology has made it easier for in-house lawyers to do repetitive agreements as they can search earlier documents and memos to refresh their memory on a less frequent issue to determine how it was treated in the past.” Appendix C, at H.5.
135 Cf. supra note 61-62 and accompanying text (discussing why this might be important).
136 Appendix A, at H.2 (33% of general counsel respondents reporting this difficulty in matching).
137 Appendix A, at H.2.
138 Appendix A, at A.1 & A.2. Outside lawyers appear to recognize the importance of complexity to the hiring decision. See id. at A.1 & A.2 (100% of outside lawyer respondents citing complexity as a relevant factor, and 67% of such respondents citing complexity as the most important factor, in the hiring decision).
Interestingly, although one would predict that companies that expand in size may gain economies of scale by hiring relatively more full-time in-house counsel with a greater range of expertise, the findings suggest that most companies, irrespective of size, have approximately the same proportion of transactions lawyered in-house.\textsuperscript{139} [Perhaps there are offsetting factors, or perhaps transactional work is so small a percentage of legal department numbers that the correlation gets lost, or perhaps we have insufficient data?]

On the other hand, the findings reveal that particular costs and benefits of using in-house or outside counsel can vary significantly as a function of legal department size. For example, the benefits of outside lawyer knowledge and of outside lawyer support staff are inversely proportional to the size of the in-house legal department.\textsuperscript{140} Monitoring of outside lawyer work is directly proportional to size of the in-house legal department.\textsuperscript{141} The degree of a company’s outside lawyer convergence also is directly proportional to size of the in-house legal department (in that the bigger the legal department, the greater the convergence),\textsuperscript{142} perhaps reflecting that larger legal departments either have less need to rely on outside law firms or are large because management has already decided to reduce reliance on outside law firms.\textsuperscript{143}

\textsuperscript{139} When the survey data for each are examined in the aggregate (and assuming that company size correlates closely with legal department size), it appears that large, medium and small in-house legal departments handle approximately the same proportion of company transactions in house. See Appendix B, at H.1 (reporting that companies with one or two in-house lawyers handle 65\% on average of transactions in-house, companies with three to nine in-house lawyers handle 72\% on average of transactions in-house, and companies with ten or more in-house lawyers handle 70\% on average of transactions in-house). Although regression analysis shows a slight positive correlation between the size of in-house legal departments and the percentage of transactions handled in-house, the correlation is limited and inconclusive.

\textsuperscript{140} Appendix B, at A.4 & A.7.

\textsuperscript{141} Appendix B, at B.6.

\textsuperscript{142} Appendix B, at D.9 (larger in-house legal departments are more likely to have already reduced the number of outside law firms with which the company works).

\textsuperscript{143} If the latter is true, one should expect average law department size to grow as companies become less reliant on outside law firms.
Economies of Scope Hypothesis Compared with Empirical Findings. The findings confirm that in-house counsel, by avoiding the learning curve of having to be educated about the client’s regulation and organizational and operational structure, have an advantage over outside counsel. The findings only partly support the view that learning curves can be improved through convergence of outside law firms, creating more incentive for outside firms to develop in-firm expertise about their client. Although most respondents believe that convergence would reduce learning curves to some degree, few believe that reduction would be significant. Perhaps for this reason, there appears to be no clear trend toward convergence.

The findings suggest, but do not prove, that outside law firms can achieve economies of scope by offering clients a range of legal expertise.

Responsiveness and Ease of Communications Hypothesis Compared with Empirical Findings. The findings confirm that in-house counsel communicate better with

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144 Appendix A, at A.6 (all general counsel respondents report that in-house lawyers’ familiarity with the company, and 86% of general counsel respondents report that understanding of the company’s culture, explain why in-house counsel provide greater benefits). See also Appendix A, at A.3 (86% of general counsel respondents citing avoiding the learning curve as a factor helping to explain the cost differential between in-house and outside counsel).

145 See supra notes 73-74 and accompanying text.

146 See Appendix A at D.8 (93% of general counsel respondents believe that reducing the number of outside law firms would achieve some degree of parity in in-house and outside lawyer familiarity with client’s regulatory, organizational and operational issues, although only 2.3% believed that parity could be achieved to any great extent). See also id. at D.9 (51% of general counsel respondents report already reducing the number of outside law firms used for transactional work).

147 Liggio, supra note 62, at 632 (observing that “[t]here is considerably more spreading of the work among [law] firms and the use of boutique shops for specialized projects”).

148 Cf. Appendix A, at A.4 (47% of outside lawyer respondents indicate that outside counsel may be a lower cost provider because they have a more extensive knowledge of transactional law); id. at A.7 (54% of outside lawyer respondents, many of whom specifically cite their firms’ specialty practices, believe that outside law firms may provide greater benefits through access to more and/or better resources).
Some general counsel respondents even see in-house counsel as more of an ally and team member than outside counsel.

Timely availability and responsiveness appear to be important to the lawyer hiring decision. A majority of general counsel respondents perceive in-house lawyers to be marginally more responsive to the client than outside lawyers. Although a significant minority of those respondents believe that in-house and outside lawyers are equally responsive, few regard outside lawyers as more responsive. This is in marked contrast to the views of outside lawyers, who generally regard themselves as more responsive to the client than in-house counsel.

149 Appendix A, at E.2 (67% of general counsel respondents indicate that in-house counsel are better able to communicate with company management, whereas only 28% of general counsel respondents and half of outside lawyer respondents believe that in-house and outside counsel are equally able to communicate with company management).

150 Thus, one such respondent observed that “businesses are seeing in-house legal as more of an ally and engaging in-house legal as part of the ‘normal term’ on more transactions.” Another emphasized “the ability of in-house lawyers to become an integral part of the transaction team [who will have to] live with their deal for as long as they are with the same company.” Appendix C, at H.4. Closeness between in-house counsel and management can become a liability, however, to the extent it deters such counsel from exercising proper independence or from reporting management misbehavior. E-mail from Gabe Shawn Varges, supra note 10.

151 Cf. Appendix A, at A.6 (54% of general counsel respondents identify timely availability and responsiveness as reasons why in-house lawyers may provide greater benefits than outside lawyers). Only 9% of general counsel respondents identify those reasons as explaining why outside lawyers may provide greater benefits (see Appendix A, at A.7), but in-house counsel make the hiring decision.

152 Appendix A, at E.1 (51% of general counsel respondents believe that in-house lawyers are more responsive).

153 See id. (44% of general counsel respondents stating that in-house and outside lawyers are equally responsive).

154 Id. (only 5% of general counsel respondents regard outside lawyers as more responsive).

155 Appendix A, at A.7 (67% of outside lawyer respondents identifying timely availability and responsiveness as reasons why they may provide greater benefits than in-house counsel). See also id. at E.1 (42% of outside lawyer respondents believe they are more responsive, whereas no such respondents believe that in-house counsel are more responsive, to companies’ timing requirements).
To some extent, the very location of in-house counsel—typically at corporate headquarters, where they have regular formal or informal contact with senior management—may explain why in-house counsel are, or at least appear to be, more responsive to the client. Furthermore, that proximity makes it easier for management to consult in-house counsel at early stages of transactions, making in-house counsel appear even more beneficial.

Reputational Intermediary Hypothesis Compared with Empirical Findings. The findings suggest that outside counsel no longer add greatly to reputational value in transactions. Reputation reflects quality, and most general counsel respondents view in-house lawyers as performing as high quality work as outside lawyers. A majority of outside lawyer respondents agree that they are no more qualified than in-house counsel. And, to the extent outside counsel might be more qualified for a type of transactional work, both general counsel respondents and outside lawyer respondents

156 See Appendix A, at E.3 (95% of general counsel respondents reporting that they are located in the corporate headquarters).
157 See id. (95% of general counsel respondents reporting that they have regular (formal or informal) contact with senior management).
158 Regular formal or informal contact also can foster trust between senior management and in-house counsel, which itself can make in-house counsel appear more responsive. Cf. e-mail from Gabe Shawn Varges, supra note 10 (observing that regular contact increases trust between senior management and in-house counsel).
159 See Appendix A, at A.6 (91% of general counsel respondents and 67% of outside lawyer respondents reporting that in-house lawyer involvement at a much earlier stage in transactions than outside law firms helps to explain why in-house lawyers may provide greater benefits than outside lawyers).
160 Appendix A, at F.1 (63% of general counsel respondents believe that outside counsel enhance reputational value to some extent but only 5% believe it enhances such value to a great extent). These findings confirm a “tentative assertion” made in 1995 that reputational “value in law practice is, except for the very few ‘super elite’ firms, on the decline.” Okamoto, supra note 92, at 43-44.
161 See Appendix A, at A.7 (only 5% of general counsel respondents believe that lawyers at outside firms perform higher quality work). Cf. id. at F.2 (only 9% of general counsel respondents believe that outside counsel are more qualified than in-house counsel).
162 Appendix A, at F.2 (58% of outside lawyer respondents so agreeing). Incongruously, though, two-thirds of outside lawyer respondents tended to view themselves, on average, as more qualified than in-house counsel—perhaps the “Lake Wobegon” effect. Appendix A, at F.2 (67% of outside lawyer respondents so viewing themselves).
agree it would be because outside counsel see that type of work more often. Still, most respondents concede that reputation still favors outside counsel because reputational perceptions change slowly.

This disconnect between quality and reputation helps explain a result that may be surprising to many outside lawyers. Only 33% of general counsel respondents take into account the need for quality work in deciding whether or not to hire outside counsel. In contrast, two-thirds of outside lawyer respondents believe the need for quality work is a relevant factor in the hiring decision.

The findings also suggest why, other things being equal, outside counsel might be no more qualified than in-house counsel. Most general counsel respondents report that their companies are able to compete at least to some extent with outside law firms in hiring lawyers to work as in-house counsel. Although these respondents universally believe their companies cannot compete based on monetary compensation, they report that they are able to compete based on the better lifestyle of in-house lawyers.

This suggests that if the lifestyle of in-house lawyers were to deteriorate, the quality of in-house lawyers might diminish. It also suggests that outside law firms could attempt to compete more effectively by increasing the quality of life of their legal

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163 Appendix A, at F.3 (81% of general counsel respondents, and 92% of outside lawyer respondents, agreeing that outside counsel might, on average, be more qualified for transactional work because they see the type of transaction more often). Few survey respondents (only 2% of general counsel and 8% of outside lawyers) felt that outside lawyers might be more qualified because of higher intellect or better legal education. Id.
164 Appendix A, at F.2 (65% of general counsel respondents, and 58% of outside lawyer respondents, believe that outside counsel are no more qualified than in-house counsel but reputational perceptions change slowly).
165 Appendix A, at A.1.
166 Appendix A, at A.1. But cf. id. at A.2 (indicating that no outside lawyer respondents regarded the need for quality work as the most important factor).
167 Appendix A, at F.4 (81% of general counsel respondents so reporting).
168 Appendix A, at F.5.
personnel. In the latter context, outside lawyer respondents report that their ability to compete with in-house legal departments in hiring the best lawyers is dependent on paying higher monetary compensation, engaging in more interesting and diverse transactions, and having greater prestige associated with their law firms. The competition will become tougher, however, if in-house counsel salaries begin to rival outside counsel incomes, the range of outside lawyer transactions (or at least the range of such transactions worked on by any given lawyer) narrows, or the reputational gap between outside and in-house counsel continues to shrink.

Finally, the findings confirm the existence of a significant reputational gap between in-house and outside counsel in the giving of third-party legal opinions. Sixty percent of general counsel respondents report that a third party requesting a legal opinion on matters other than corporate housekeeping will accept an in-house opinion only occasionally or rarely. Nonetheless, only 21% of general counsel respondents hire outside lawyers to any significant extent simply because third parties request outside legal opinions. The disparity between these numbers might be explained by the fact that legal opinions are not always required on matters whose analysis would be independent of the transaction’s fact pattern. Thus, in at least some transactions where non-housekeeping legal opinions are required, outside counsel already may be involved because of the complexity or novelty of the fact pattern or issues.

169 Appendix A, at F.5 (49% of general counsel respondents citing a low-stress, better lifestyle as a competitive advantage over outside law firms). Fourteen percent of general counsel respondents also cited the more flexible hours available to in-house lawyers. Id. [Consider discussing my recent observations of Quinn Emmanuel’s attempt to do this.]
170 Appendix A, at F.5 (75%, 83%, and 58%, respectively, of outside lawyer respondents so agreeing).
171 Appendix A, at F.5 (75%, 83%, and 58%, respectively, of outside lawyer respondents so agreeing).
172 See supra notes 90-92 and accompanying text.
173 Appendix A, at F.7. Cf. e-mail from Gabe Shawn Varges, supra note 10 (suggesting that “the comparative advantage of [outside] law firms lies primarily in” their issuance of legal opinions).
175 See Schwarcz, supra note 90, at 11 n. 53.
176 See supra notes 137-138 and accompanying text.
The findings may not be precise enough, however, to measure the reputational gap between in-house counsel and the very finest of outside law firms. At least one recent study suggests, for example, that a significant reputational gap may still exist between in-house counsel and the nation’s few dozen most prestigious firms.\textsuperscript{177} That study discovers that those law firms are maintaining single-tiered equity partnerships, whereas less prestigious law firms are switching to two-tiered partnerships consisting of both equity partners and lower paid non-equity partners.\textsuperscript{178} This article suggests an explanation for this dichotomy: the most prestigious law firms are performing work that is especially complex or novel, whereas lower prestige firms may be competing with in-house lawyers for much of the same work and so must lower billing rates by employing non-equity partners.\textsuperscript{179}

\textit{Client Privilege and Confidentiality Hypothesis Compared with Empirical Findings}. General counsel respondents view the attorney-client privilege as weaker for in-house than for outside lawyers.\textsuperscript{180} As a result, a majority of such respondents would at least consider hiring (and presumably in the past sometimes may have hired) outside counsel solely to take advantage of this privilege.\textsuperscript{181} To the extent outside lawyers have been hired for this reason, future hiring of outside counsel may diminish to the extent

\textsuperscript{177} Henderson, \textit{supra} note 117. \textit{Compare} note 160, \textit{supra} (predicting in 1995 that reputational value in law practice is, “except for the very few ‘super elite’ [law] firms,” on the decline).

\textsuperscript{178} Henderson, \textit{supra} note 117, at 1695, 1725-26, 1730 (finding that, according to data published in \textit{The American Lawyer}, only 42 of the top 200 largest (based on gross revenue) American law firms still maintain a single-tier equity partnership structure; and also finding that, according to proxies for prestige derived from the Vault 100 prestige score and the 2004 Mid-Level Survey, the law firms that switched to two-tier partnerships are “less prestigious than the firms that remained single-tier”).

\textsuperscript{179} Cf. Henderson, \textit{supra} note 117, at 1749 (concluding that at least one explanation for his findings is that “a highly prestigious [law] firm enjoys high client demand for high-end noncommodity legal services”).

\textsuperscript{180} Appendix A, at G.2 (58% responding the privilege is somewhat weaker for in-house counsel and another 16% responding it is much weaker).

\textsuperscript{181} \textit{Id.} at G.3.
differences narrow—and may increase to the extent differences expand—between this privilege for in-house and outside counsel.182

*Dynamic Equilibrium Hypothesis Compared with Empirical Findings.* The findings suggest that the radical shift of the past few decades to in-house lawyering may be slowing or approaching an equilibrium state. Although many general counsel respondents would like to shift additional work in-house, they face institutional realities of staffing.183 Furthermore, even as the quality of in-house transactional work approaches or matches that provided by outside lawyers, lingering concerns about reputational advantages of law firms may prevent companies from effectively and efficiently transitioning work to in-house lawyers.184

Indeed, the equilibrium might even reverse if in-house lawyering becomes a less attractive profession or if in-house costs increase. The former could occur if in-house lawyers stop receiving the quality-of-life benefits that have been attracting them to relatively low paying jobs.185 The latter could occur if in-house salaries rise, a real possibility insofar as those salaries may still be artificially low because of a path dependence. The argument for this path dependence is that, at least in the latter half of the twentieth century,186 the best law graduates—who could command the highest incomes—desired to work at firms.187 This desire resulted from various factors, including that firms

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182 But cf. Schwarcz, *supra* note 11 (finding it doubtful that transactional lawyers add net overall value through privilege and confidentiality).

183 See *supra* notes 134-137 and accompanying text. See also Appendix A, at H.2 (33% of general counsel respondents cite difficulty in matching the number of in-house lawyers with fluctuating workload, and 30% cite an inability to find the in-house expertise necessary for complex or unusual transaction, as reasons why the percentage of company business transactions currently lawyered in-house is less than what those respondents would prefer to have lawyered in-house).

184 Cf. Appendix A, at F.2 (65% of general counsel respondents believe that outside lawyers may be no more qualified than in-house lawyers, but reputational perceptions change slowly).

185 See *supra* notes 106-107 and accompanying text.

186 Cf. Liggio, *supra* note 62, at 621 (observing that the “golden age” of in-house counsel “lasted from the early part of the 20th century through the late 1930s”).

187 [cite]
offered more prestige and possibly professional independence than in-house work.\textsuperscript{188} Companies only were able to hire second-rate applicants, reinforcing the low prestige of in-house legal jobs. The increasing prestige of in-house jobs, however, has been attracting more qualified applicants, who in turn are demanding higher salaries.\textsuperscript{189}

\textbf{COMPARING THE FINDINGS WITH ECONOMIC THEORY}

This article does not claim that these findings are conclusive. As discussed, the use of survey methodology has both inherent limitations and, in this article’s context, other specific limitations.\textsuperscript{190} The findings therefore may be biased or otherwise flawed. To help test for bias or flaws, this part compares the findings with the predictions of economic theory. Significant differences might raise questions as to the reliability of the findings.

A decision whether to bring legal work in-house is a subset of the broader question of vertical integration: whether a company should make needed products in-house, or whether it should buy them.\textsuperscript{191} Applied to legal services, this “make-or-buy decision” would be similarly couched: When should a company “make” an in-house legal staff to provide legal services, and when should it buy those services from outside lawyers?\textsuperscript{192}

\textsuperscript{188} Cf. Liggio, \textit{supra} note 62, at 622 (observing that “[d]uring the 1960s and 1970s [in-house] corporate counsel were looked on with disdain by the outside bar. The corporate counsel role was deemed a parking place for those associates who couldn’t make partner.”).

\textsuperscript{189} Liggio, \textit{supra} note 62, at 627-28 (observing that “in the early 1980s[,] [t]he compensation of in-house lawyers was going up. The pay of inside counsel was not only catching up with outside lawyers but outside metropolitan areas the inside pay was better than what associates and partners were earning in law firms.”).

\textsuperscript{190} See \textit{supra} notes 19-22 and accompanying text.

\textsuperscript{191} Cf. Regan, \textit{supra} note 39, at 27-28 (suggesting that legal services can be viewed “as a factor of production whose efficiency might be enhanced through vertical integration”).

\textsuperscript{192} This assumes those legal services are adequate substitutes (although the hypotheses and empirical findings go beyond this by examining why those services may not be adequate substitutes). Also, although “the literature on vertical integration tends to focus on a simple dichotomy between the decision to ‘make’ internally or ‘buy’ through the market, . . . there are a wide array of market-based governance arrangements that represent alternatives to both simple anonymous repeated spot market transactions and
Professor Ronald Coase laid the groundwork for examining vertical integration, asking “Why does the entrepreneur not organize one less transaction or one more?”\(^{193}\)

Following Coase, economists have fashioned a systematic theoretical framework for this examination. Sometimes referred to as transaction cost economics, or “TCE,” the framework builds on the insight that “all complex contracts are unavoidably incomplete.”\(^{194}\) Thus, companies are unable to contractually bind third parties to all circumstances,\(^ {195}\) and circumstances may arise where one or more parties may engage in ex post opportunistic or otherwise conflicting behavior.\(^ {196}\) Internalizing the work can minimize the conflicts\(^ {197}\) because a company’s managers “(arguably) will pursue a common objective to maximize the [company’s] value” and “are not expected to engage in the kinds of opportunistic behavior” engaged in by third parties.\(^ {198}\)

vertical integration.” Paul L. Joskow, *Vertical Integration, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS* 319, 320 (Claude Menard & Mary M. Shirley, eds., 2005). Thus, in-house and outside lawyers sometimes act in concert together, such as where a company hires outside counsel to assist in-house counsel’s work on a transaction. E-mail from Gabe Shawn Varges, *supra* note 10. Companies also could “rent” attorneys from law firms, or law firms could lend attorneys to clients for periods of time. This article, like the literature on vertical integration, focuses on the simple (and essential) dichotomy and not on possible alternatives.

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\(^{195}\) Contracts may be incomplete for various reasons, including the difficulty of trying to anticipate all possible contingencies (“bounded rationality”), the costs of trying to address such contingencies, and the costs of monitoring, verification, and enforcement (e.g., litigation costs, delays, and uncertainties). Joskow, *supra* note 192, at 322. Attempting to draft for all possible contingencies can backfire by introducing “costly rigidities and . . . poor adaptive properties.” *Id.* at 332.

\(^{196}\) Joskow, *supra* note 192, at 321 & 326. This is sometimes referred to as the “hold up” problem. *Id.* at 322.

\(^{197}\) *Id.* at 321.

\(^{198}\) *Id.* at 333.
In a labor context—the context of this article—^199—the potential for conflicts arises out of human “asset specificity,” that workers accumulate relationship-specific information and expertise that make them efficient in the particular relationship but that would lose value in other relationships. This creates a bilateral dependency: “workers who acquire firm-specific skills will lose value if prematurely terminated (and firms will incur added training costs if such employees quit).”^201 This dependency invites a “governance” response. “Because continuity has value to both firm and worker, governance features that deter termination (severance pay) and quits (nonvested benefits) and which address and settle disputes in an orderly way (grievance systems) to which the parties ascribe confidence have a lot to recommend them.”^203

Bilateral dependency can help to explain a rapid rise in in-house lawyering. Several decades ago, for example, no truly “deep” market for in-house counsel existed. Lawyers who went in-house and acquired in-house-specific skills therefore could lose value if prematurely terminated. By the same token, the companies for which they worked would incur added training costs if those lawyers quit. Companies therefore provided incentives, such as quality of life benefits and perhaps certain measures of job protection, to deter in-house lawyers from quitting. That, in turn, attracted more lawyers to work in-house, deepening the market and potentially creating a feedback loop: the deeper the market, the more lawyers would want to work in-house (since, if prematurely terminated, they could more easily find other jobs), in turn creating an even deeper market, etc.

^199 Hiring lawyers is, of course, hiring labor, albeit highly skilled labor.
^200 Joskow, supra note 192, at 328 (giving the example of design engineers who develop special skills designing a particular company-specific product).
^201 Williamson, supra note 194, at 55.
^202 The TCE literature often refers to vertical integration as an alternative “governance” response to outside contracting. Joskow, supra note 192, at 333.
^203 Williamson, supra note 194, at 55.
^204 [cite]
^205 [cite. Is there any support for the job protection supposition?]
Economic theory also may help to explain why the radical shift of the past few decades to in-house lawyering may be slowing or approaching an equilibrium state. Except for situations where there are “significant market imperfections” justifying vertical integration, “market mediation is generally to be preferred over internal supply.”206 Indeed, Professor Joskow maintains that “[v]irtually all theories of vertical integration turn in one way or another on the presence of market imperfections of some type.”207 In the context of transactional lawyering, what might those imperfections be?

The central imperfection identified by TCE theory is ex post opportunistic behavior—meaning, in this article’s context, that outside counsel may try to take advantage of the client after being retained but before the transaction closes.208 It is unlikely, however, that outside counsel would be motivated to behave opportunistically where—as is typically the case—multiple other law firms with the necessary transactional capabilities are available for hire.209 A law firm that engages in such behavior would probably be replaced, and may well suffer reputational cost.210

Other previously discussed market imperfections of using outside counsel do, however, appear to justify a degree of vertical integration. These primarily consist of the information asymmetry in which outside counsel do not understand the company as well as in-house counsel and therefore have a higher learning curve211; agency costs insofar as outside counsel are less likely to be loyal to the company from the standpoint of billing and fees, and also insofar as outside counsel are less able than in-house counsel to

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206 Joskow, supra note 192, at 320 (quoting Oliver Williamson, The Vertical Integration of Production: Market Failure Considerations, 61 AM. ECON. REV. 112, 113 (1971)).
207 Joskow, supra note 192, at 320.
208 See supra note 196 and accompanying text.
209 See, e.g., Sandra Prufer, In-House Counsel Axing Law Firms, ABA JOURNAL REP. 2 (Sept. 8, 2006) (based on a survey discussed therein, observing that “[f]or those [law] firms that don’t rise to the challenge, the number of secondary law firms waiting to capture the lost business is only growing”).
210 Cf. Joskow, supra note 192, at 333 (noting that “the presence of reputational capital and the potential erosion of its value by opportunistic behavior may operate to mitigate such behavior”).
211 See supra note 115 and accompanying text.
monitor and report on management misbehavior\textsuperscript{212}; and outside counsel’s lower availability and less timely responsiveness than in-house counsel.\textsuperscript{213} Some vertical integration also appears to be justified by the profit charged by outside counsel, although charging a profit is not technically a market imperfection.\textsuperscript{214}

The existence of market imperfections does not, however, militate for complete vertical integration. This article has shown, for example, that most of the agency costs can be mitigated through monitoring and convergence\textsuperscript{215} and that there may well be uncertainty whether outside counsel are in fact less responsive than in-house counsel.\textsuperscript{216} Furthermore, vertical integration itself creates costs that must be balanced against the imperfections.\textsuperscript{217} In that context, although TCE theory talks almost entirely of “costs,” its application implicitly (and sensibly) takes benefits into account in the balance.\textsuperscript{218} Balancing of costs and benefits, however, has been precisely this article’s approach, revealing that outside counsel sometimes can add more value than in-house counsel.\textsuperscript{219}

Economic theory also helps to explain why relatively few companies rely exclusively on in-house legal staff. A company engaging in such exclusivity “is likely to lose some of the benefits associated with continually examining and accessing outside opportunities through repeated contracting.”\textsuperscript{220} For example, a company using only in-house counsel may be unable to keep up with developments as well as a company that

\textsuperscript{212} \textit{See supra} notes 127-131 and accompanying text.

\textsuperscript{213} \textit{See supra} notes 149-159 and accompanying text.

\textsuperscript{214} \textit{See supra} notes 116-117 and accompanying text. TCE theory does not appear to regard profits charged by outside market suppliers of goods or services as market imperfections.

\textsuperscript{215} \textit{See supra} notes 130-132 and accompanying text.

\textsuperscript{216} \textit{See supra} note 155 and accompanying text.

\textsuperscript{217} Joskow, \textit{supra} note 192, at 325 & 334.

\textsuperscript{218} \textit{Cf. id.} at 337 (“The bottom line is that there are benefits and costs of internal organization.”).

\textsuperscript{219} \textit{See, e.g., supra} note 137 and accompanying text (indicating that outside lawyers can help to maximize economies of scale where companies have difficulty in matching complex or unusual transactions with in-house lawyer expertise).

\textsuperscript{220} Joskow, \textit{supra} note 192, at 325 & 336.
uses at least some outside lawyers. Also, in-house legal staff “may have strong incentives to hide or misrepresent outside [counsel] opportunities in order to protect itself from external competition.” Dual sourcing, or using outside counsel for at least a portion of a company’s legal work, can help mitigate these costs.

Finally, economic theory helps to explain why there is a “dynamic” equilibrium. Besides the feedback loop insight already discussed, economists observe that changes such as “[c]hanges in technology or government regulations may . . . change the relative attractiveness of” vertical integration. This is very much in line with the view that the advent of the Internet worked as a catalyst for the shift to in-house lawyering. The regulatory explosion of the 1960s and 1970s also may have created, decades later when the legal work became more routine, a critical mass of repetitive or at least standardizable transactional legal work which in-house counsel could perform at minimal cost. In

221 Cf. e-mail from Gabe Shawn Varges, supra note 10 (observing that “by doing work for several clients, the outside lawyer brings . . . more advance market-based knowledge” than in-house counsel could gather).
222 Joskow, supra note 192, at 325 & 336. Cf. id. at 325 (suggesting that in-house counsel, like any other employees, may be less willing to reveal information that “adversely affects their promotion possibilities or continuing employment”).
223 Id. at 325 & 336.
224 See supra note 205 and following text.
225 Joskow, supra note 192, at 337. See also id. at 345 (observing that “the ‘make or buy’ decision is not a once and for all decision. Firms may choose to vertically integrate and then decide that it is less costly to rely on market contracting.”).
226 See supra note 68 and accompanying text. See also infra note 229 (discussing outsourcing of legal work to foreign law providers, a recent development driven by the spread of high-speed Internet communications).
227 See Appendix A, at H.4 [synthesized answers to which may be inserted in a new Appendix C to this article]. Cf. Regan, supra note 39, at 27-28 (arguing that at least one factor that explains why companies only recently began shifting legal work in-house is that “[c]ompared to other steps in the production process, law was less amenable to standardization according to routine procedures. This meant that monitoring costs were higher than those required for supervision of many other aspects of production.”). Although Professor Regan advances several additional factors to help explain why vertical integration of legal services has been so late in coming, those factors do not persuasively help to explain why the shift is occurring now. See id. (arguing, as additional factors, that “many companies had strong ties to particular localities and relied on lawyers who practiced in and were familiar with the [geographical] areas in which they operated,” and that because some legal services “drew on attorneys’ legal and
turn, using in-house counsel to perform that work would have helped to break down information asymmetries between clients and outside counsel regarding the expertise needed to perform such transactions, enabling companies to better assess when outside lawyers can—and when they cannot—add more value than in-house lawyers.228

Economic theory therefore supplements and helps to confirm and place this article’s empirical findings into perspective.

CONCLUSIONS

Various factors have contributed to the in-house lawyering transformation of the past few decades. The shift may initially have been triggered by changes in technology, such as the advent of computers and the Internet, creating logistical economies of scale by helping to routinize in-house legal work and providing substitutes for law firm libraries. A portion of this shift also may have been triggered by disintermediation, the recognition that companies can avoid the profit component charged for outside legal services by bringing lawyers in-house.

Once begun, this transformation may have been accelerated through a feedback loop. At a time of relatively few in-house counsel, lawyers working in-house had a limited market for their skills, so the best lawyers tended to work at outside law firms. As more lawyers came in-house, however, their employers provided incentives—such as better quality of life and working conditions—to attract and keep the best of them, thereby minimizing training and replacement costs. Those incentives attracted even higher quality lawyers to in-house work, which in turn motivated companies to provide even greater incentives, and so on.

business contacts and their reputations,” “[l]awyers who practiced in separate firms for more than one client had the potential to provide corporations with important access to a broad segment of the business, political and legal community”).

228 Cf. Regan, supra note 39, at 30 (arguing that in-house lawyers “can serve as sophisticated consumers of outside legal services, reducing the asymmetry of information between the corporation and law firm attorneys. In-house counsel closely monitor the provision of these services, with lower switching costs giving them leverage in determining both how work is done and how much the company will pay for it.”).
The result is that, at present, companies generally regard in-house and outside lawyers as providing roughly the same quality of work. Companies also regard in-house lawyers to be slightly more responsive than outside lawyers. Furthermore, with large and sophisticated in-house legal staffs, companies are now better able to cut through the information asymmetries that previously existed between clients and outside counsel regarding the expertise needed to perform transactions, enabling companies to better assess when outside lawyers are worth hiring.

The transformation to in-house lawyering may well continue for some time, but outside law firms are assured of at least some future niche. They always will be needed to help smooth out fluctuating transactional workloads that, if addressed by hiring in-house counsel, would result in future excess capacity, as well as to provide complex or unusual expertise that a company may not have in-house. In the near term, outside firms enjoy some reputational advantages over in-house lawyers because perceptions change slowly. Companies also may want to employ outside counsel at least occasionally in order to retain the benefits associated with continually examining and accessing outside opportunities through repeated contracting, as well as to remove incentives from in-house counsel to protectively hide or misrepresent true outside counsel opportunities.

On the other hand, the transformation to in-house lawyering could reverse under various scenarios.229 For example, in-house lawyering would become less attractive, and

229 One such scenario not directly addressed by this article is the outsourcing of legal work to foreign law providers, such as sophisticated law firms in lower-cost countries like India. This recent development, driven by the spread of high-speed Internet communications (though ultimately restrained by differences in time zones and other logistical factors), does not involve competition between outside and in-house lawyers per se but, rather, between outside and in-house lawyers on the one hand and, on the other hand, the foreign law providers. See, e.g., e-mail from Gabe Shawn Varges, supra note 10 (observing that “[c]ertain types of legal services [such as routine contracts, contractual review work, due diligence, and the like] could be outsourced to providers in low cost jurisdictions, such as to move work away both from the in-house counsel and from the company’s normal [outside] law firms in the company’s home country”). At present, not only foreign companies and law firms but also U.S. companies (such as
in-house lawyer competence would correspondingly fall, if companies reduce the quality-of-life benefits that have been attracting lawyers to relatively low paying in-house jobs. To some extent, that may already be happening. The transformation also might reverse if in-house costs increase, a real possibility insofar as in-house salaries may be artificially low because of a path dependence. Similarly, the transformation may reverse or at least slow if the real costs of in-house counsel become more transparent to senior management; cost differentials between outside and in-house counsel are sometimes artificially magnified by lack of the latter’s transparency. It is even conceivable that the real costs of the transformation to in-house lawyering may sometimes exceed the costs of using outside counsel, and that part of the transformation might have resulted from such irrational factors as general counsel “empire building” or a herd mentality in building up legal departments. Some irrationality would not be surprising because the market

Lumen Legal, formerly called “Contract Counsel,” http://www.lumenlegal.com; Prism Legal Consulting, http://www.prismlegal.com; and OfficeTiger, http://www.officetiger.com) are beginning to sell legal outsourcing services. See, e.g., Manjeet Kripalani, India’s Office Tiger: Hear it Roar, BUSINESSWEEK ONLINE, July 11, 2005, http://www.businessweek.com/magazine/content/05_28/b3942429.htm (describing 1,500 employees “analyzing and processing U.S. Securities & Exchange Commission reports and other” legal and financial documents). Because legal outsourcing appears to have the most potential for work that is repetitive within a company, its impact is more likely to be felt by in-house rather than outside counsel.

230 Cf. supra note 107 and accompanying text (observing that working in-house can be now just as demanding as working at a law firm).

231 See supra notes 185-188 and accompanying text.

232 See supra notes 120-121 and accompanying text.

233 Human beings generally see what they already are inclined to believe. It is reported, for example, that King Croesus of Lydia wanted to make war on Cyrus but was wary of doing so without heavenly sanction. After singling out the Delphic Oracle as the most reliable, the King’s messengers “asked the practical question about the advisability of Croesus going to war, and received the famous [and famously ambiguous] response that ‘Croesus by crossing the Halys would destroy a mighty kingdom.’” THOMAS DEMPSEY, THE DELPHIC ORACLE: ITS EARLY HISTORY, INFLUENCE, AND FALL 70 (1918). Croesus interpreted this to mean what he wanted to hear—that Cyrus would fall—but in fact the empire that fell was his own. Id. at 71. See also id. at 71, 107 (discussing the historical method of the oracles as sheltering ignorance behind a “studied ambiguity” and vagueness). See also J. Barkley Rosser, Alternative Keynesian and Post Keynesian Perspectives on Uncertainty and Expectations, 23 J. POST KEYNESIAN ECON. 545 (June 22, 2001) (arguing that uncertainty leads to self-fulfilling mistakes).
imperfections of using outside counsel\textsuperscript{234} do not clearly appear to justify the degree of transformation that has taken place.\textsuperscript{235}

This article also reveals ways in which companies can improve their utilization of lawyers and in which outside counsel can improve their competitive positions vis-à-vis in-house counsel. Regarding the former, the decision to assign lawyers to work on a given transaction is customarily made by the company’s general counsel, who often is also responsible for hiring the in-house legal staff.\textsuperscript{236} This inherent conflict of interest can bias a general counsel in favor of assigning in-house lawyers even when an outside law firm could be more effectively utilized. How companies might mitigate this bias, such as by making different individuals responsible for the hiring and assigning decisions, is an interesting question for further inquiry.\textsuperscript{237}

Outside lawyers, on the other hand, dramatically disregard learning curve costs, which could be mitigated by developing institutional knowledge about the law firm’s clients and teaching that knowledge to new lawyers.\textsuperscript{238} Outside lawyers additionally may want to be more sensitive to the importance that clients attach to timely availability and responsiveness.\textsuperscript{239} In that context, they might even try to get involved at earlier stages of

\textsuperscript{234} Those market imperfections are summarized \textit{supra} notes 208-214 and accompanying text.
\textsuperscript{235} See \textit{supra} note 206 and accompanying text (observing that market mediation is generally to be preferred over internal supply except to overcome significant market imperfections).
\textsuperscript{236} See \textit{supra} notes 16-17 and accompanying text.
\textsuperscript{237} This question was originally posed by Professor Adam Feibelman, a colleague at University of North Carolina Law School. \textit{Cf.} e-mail from Gabe Shawn Varges, \textit{supra} note 10 (agreeing that this question “would be fascinating to explore,” and suggesting that, “in a legal model, since legal judgment would be needed to make the decision on in-house versus external [counsel], it would require setting up a separate legal function (independent from the General Counsel) to make such decisions and assign work”).
\textsuperscript{238} See \textit{supra} notes 118-119 and accompanying text.
\textsuperscript{239} See \textit{supra} notes 151-155 and accompanying text.
client transactions, perhaps by offering to charge lower rates during a transaction’s structuring phase.\footnote{See supra note 159 and accompanying text (reporting that involvement at early stages of transactions helps to explain why in-house lawyers may provide greater benefits than outside lawyers).}

Outside lawyers also may want to pay attention to the fact that companies cannot compete for high quality in-house counsel based on monetary compensation but can (and do) compete based on the better lifestyle of in-house lawyers. Law firms thus can advance their viability by improving the quality of life of their own lawyers.

Outside lawyers do seem to understand, however, the importance of matching their expertise to complex or unusual client transactions. Top law firms, for example, are beginning to concentrate their efforts in just a few categories of highly complex and usually non-recurrent deals, such as mergers and acquisitions, corporate finance, structured finance, and project finance.\footnote{See Schwarz, supra note 11, at __ (observing that concentration). Merger and acquisitions transactions involve the client acquiring, or being acquired by, another company, or buying or selling significant company assets; corporate finance transactions often involve the issuance of securities, which requires expertise in federal and sometimes also state securities laws; structured finance transactions utilize complicated special-purpose entities in complex bankruptcy-remote structures to obtain funding advantages; and project finance transactions utilize complex special-purpose entities to raise off-balance sheet financing for construction of major projects, such as powerplants.}

Finally, this article suggests a possible change in legal education. Traditionally, legal ethics classes are taught from the standpoint of outside lawyers working at law firms that are independent from their clients. In-house lawyers, however, work for the very companies that are their clients, arguably necessitating that ethics be revisited from that quite different perspective.\footnote{See supra note 159 and accompanying text (reporting that involvement at early stages of transactions helps to explain why in-house lawyers may provide greater benefits than outside lawyers).}
See, e.g., Jeffrey D. Bauman & Milton C. Regan, Jr., [cite to and briefly discuss their work regarding ethics for in-house lawyers].

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ANNEX 1

Company’s General Counsel Questionnaire

This questionnaire is intended to be filled out by the company’s general counsel, chief legal officer, or other legal department manager (or such person’s designee) responsible for assigning transactional legal work, including the decision whether to handle a matter in-house or to retain the services of outside lawyers. Information you provide will remain strictly confidential and only be disclosed as part of aggregate data reporting.

Position with Company:

Responsibility for Assigning Legal Work:

Years in Position(s) of Responsibility for Assigning Legal Work:

Approximate Number of Attorneys in Legal Department:

Nature of Company’s Business:

State or Country of Company’s Corporate Headquarters:

NOTICE: This questionnaire’s purpose is to test a range of hypotheses about the value or relative value provided by in-house and outside transactional lawyers and to assess any transformation therein. By “transactional lawyers,” this questionnaire means lawyers involved in the negotiating and contracting process leading to closing a commercial, financial, or other business transaction. Please assume that all questions below pertain to those types of business transactions.

A.
1. In deciding which to use—in-house lawyers, or an outside law firm—as the primary lawyers on a business transaction, what considerations do you take into account (check all that apply)?:
   (a) __ size of the transaction
   (b) __ complexity or novelty of the transaction
   (c) __ riskiness of the transaction
   (d) __ perceived importance to senior management of successfully closing the transaction
   (e) __ anticipated legal expenses of the lawyers used
   (f) __ need for quality work
   (g) __ timely availability and responsiveness
   (h) __ other (please specify): __________________________________________________________

2. Of the considerations you checked, how would you rank them in degree of importance (“A” being most important, “B” being next most important, and so on)?:

In-House Lawyering.doc
1. Which of the following factors help to explain why in-house lawyers may be a lower-cost provider, compared to an outside law firm, of transactional legal services (check all that apply)?:
   (a) __ using in-house lawyers reduces incidental costs (e.g., visits to the client, talking through issues)
   (b) __ using in-house lawyers eliminates the need to educate an outside law firm about your company’s organization and operations
   (c) __ in-house lawyers tend to close transactions more quickly than law firms
   (d) __ effective “hourly rate” of in-house lawyers is lower
   (e) __ in-house lawyer costs are less visible to senior management
   (f) __ other (please specify) ________________________________________________

2. Which of the following factors help to explain why an outside law firm may be a lower-cost provider, compared to in-house lawyers, of transactional legal services (check all that apply)?:
   (a) __ law firms tend to have more extensive knowledge of transactional law
   (b) __ when they must educate themselves on a point of transactional law, law firms can apportion the cost of this educational process among numerous clients
   (c) __ hiring a law firm can make it easier to match the number of in-house transactional lawyers on staff with the fluctuating volume of transactional work
   (d) __ law firms tend to close transactions more quickly than in-house lawyers
   (e) __ where the other side pays your legal fees, it is more common to pay outside lawyer fees than in-house lawyer imputed fees
   (f) __ other (please specify) ________________________________________________

3. How would you compare the trend in in-house transactional lawyer salaries with the trend in outside law firm billing rates for transactional work (check all that apply)?:
   (a) __ both are increasing at about the same rate
   (b) __ in-house transactional lawyer salaries are increasing more rapidly than law firm billing rates
   (c) __ law firm billing rates are increasing more rapidly than in-house transactional lawyer salaries
   (d) __ other (please specify) ________________________________________________

4. Which of the following factors help to explain why in-house lawyers may provide greater benefits, compared to an outside law firm, as the primary lawyers on a business transaction (check all that apply)?:
(a) in-house lawyers’ intimate familiarity with your company allows them to more quickly spot issues than outside lawyers
(b) in-house lawyers are usually involved at a much earlier stage in the transaction than outside law firms and therefore can take a more proactive approach
(c) in-house lawyers have a greater incentive to always ensure that your company is protected
(d) in-house lawyers have greater expertise in certain types of transactions (specify which: ___________________
(e) in-house lawyers better understand the company’s “culture”
(f) more timely availability and responsiveness of in-house lawyers
(g) in-house lawyers have access to more and/or better resources (if you check this factor, please specify what resources): ____________________________________________
(h) in-house lawyers perform higher quality transactional work
(i) other (please specify): ________________________________________________

7. Which of the following factors help to explain why an outside law firm may provide greater benefits, compared to in-house lawyers, as the primary lawyers on a business transaction (check all that apply)?:
(a) a law firm’s more extensive knowledge of transactional law may allow them to spot issues that could be overlooked by in-house lawyers
(b) law firms have access to more and/or better resources (if you check this factor, please specify what resources): ____________________________________________
(c) lawyers at outside firms are more independent, and thus more objective, than in-house lawyers
(d) lawyers at outside firms have greater expertise in certain types of transactions (specify which: ___________________
(e) law firms are specifically set up to get transactions done by having sufficient support staff (e.g., proofreading, photocopying, word processing, paralegals) to handle a large volume of transactions
(f) more timely availability and responsiveness of lawyers at outside firms
(g) lawyers at outside firms perform higher quality transactional work
(h) other (please specify) ____________________________________________

8. In-house transactional lawyer costs are (check all that apply):
(a) less transparent to senior management than outside lawyer costs
(b) as transparent to senior management as outside lawyer costs
(c) absorbed in, or obscured by, other company costs
(d) appropriately transparent to senior management

B.

1. In deciding whether to use in-house lawyers or an outside law firm as the primary lawyers on a business transaction, to what extent do you take into account the lawyer’s ability to observe and report potential misbehavior by company managers working on the transaction?:
(a) to a great extent
(b) to a significant extent
(c) __ to some extent  
(d) __ to a small extent or not at all

2. Who can better observe misbehavior by company managers working on business transactions?:  
(a) __ in-house lawyers  
(b) __ lawyers at an outside law firm (hereinafter, “outside lawyers”)

3. Please explain your answer to the foregoing question: __________________________
________________________________________________________________________

4. Who is more likely to report misbehavior by company managers working on business transactions?:  
(a) __ in-house lawyers  
(b) __ outside lawyers

5. Please explain your answer to the foregoing question: __________________________
________________________________________________________________________

6. When using outside lawyers as the primary lawyers on a business transaction, to what extent do you also use in-house lawyers to monitor their work?:  
(a) __ to a great extent  
(b) __ to a significant extent  
(c) __ to some extent  
(d) __ to a small extent or not at all

7. In the context of the prior question, which of the following do your in-house lawyers monitor (check all that apply)?:  
(a) __ outside lawyer billing  
(b) __ progression of the transaction  
(c) __ level of protection provided to the company  
(d) __ other (please specify): ________________________________________________.

8. To what extent does reducing the number of outside law firms used for transactional work (“convergence”) reduce the need for in-house lawyer monitoring of law firms used in business transactions?:  
(a) __ to a great extent  
(b) __ to a significant extent  
(c) __ to some extent  
(d) __ to a small extent or not at all

C.
1. Approximately how many (significant) business transactions on average does your company engage in annually?: ____.
2. Approximately what percentage of your company’s in-house lawyers spend all or substantially all of their time on transactional legal work: ____%.

3. Who handles repetitive transactions more efficiently, taking into account quality and cost?:
   (a) __ in-house lawyers
   (b) __ outside lawyers
   (c) __ it depends on the nature of the transaction

4. Please explain your answer to the foregoing question:__________________________________________________________.

5. Who handles non-repetitive transactions more efficiently, taking into account quality and cost?:
   (a) __ in-house lawyers
   (b) __ outside lawyers
   (c) __ it depends on the nature of the transaction

6. Please explain your answer to the foregoing question:__________________________________________________________.

7. Where a third party is expected to pay your company’s transactional legal fees, how likely is it that they would agree to pay your company’s in-house lawyer imputed fees (assuming in-house lawyers act as the primary transactional lawyers)?:
   (a) __ very likely
   (b) __ somewhat likely
   (c) __ unlikely

D.
1. How much government regulation is your company subject to (compared to companies generally)?:
   (a) __ much more than average
   (b) __ somewhat more than average
   (c) __ about average
   (d) __ less than average
   (e) __ little or none

2. To what extent, if any, are your in-house transactional lawyers more familiar than your outside lawyers with the regulatory issues that impact your company’s transactions?:
   (a) __ much more familiar
   (b) __ somewhat more familiar
   (c) __ equally familiar
   (d) __ less familiar
   (e) __ it depends (please explain): ________________________________.
3. If you answered (a) or (b) to the foregoing question, to what extent does that greater familiarity enable the in-house transactional lawyers to handle transactions more efficiently than outside lawyers, taking into account quality and cost?:
   (a) __ much more efficiently
   (b) __ somewhat more efficiently
   (c) __ not necessarily more efficiently
   (d) __ it depends (please explain): _________________________________.

4. How complex is your company’s organization and operational structure (compared to that of companies generally)?:
   (a) __ much more complex than average
   (b) __ somewhat more complex than average
   (c) __ about average complexity
   (d) __ less complex than average

5. To what extent, if any, are your in-house transactional lawyers more familiar than your outside lawyers with issues of your company’s organization and operational structure that impact your company’s transactions?:
   (a) __ much more familiar
   (b) __ somewhat more familiar
   (c) __ equally familiar
   (d) __ less familiar
   (e) __ it depends (please explain): _________________________________.

6. If you answered (a) or (b) to the foregoing question, to what extent does that greater familiarity enable the in-house transactional lawyers to handle transactions more efficiently than outside lawyers, taking into account quality and cost?:
   (a) __ much more efficiently
   (b) __ somewhat more efficiently
   (c) __ not necessarily more efficiently
   (d) __ it depends (please explain): _________________________________.

7. Approximately how many outside law firms, overall, does your company use for transactional work?: ______.

8. To what extent could your company, by reducing the number of outside law firms used for transactional work, achieve greater parity between in-house and outside lawyer familiarity with regulatory, organizational, and operational issues that impact the company’s transactions?:
   (a) __ to a great extent
   (b) __ to some extent
   (c) __ to a small extent or not at all
9. Has your company already reduced the number of outside law firms used for transactional work to try to achieve that parity?:
   (a) yes
   (b) no

E.
1. Who are more responsive to your company’s timing requirements in business transactions?:
   (a) in-house transactional lawyers
   (b) outside transactional lawyers
   (c) about the same

2. Who are better able to communicate with your company’s management in business transactions?:
   (a) in-house transactional lawyers
   (b) outside transactional lawyers
   (c) about the same
   (d) it depends (please explain): ____________________________________________.

3. Check all of the following that describes your company’s in-house transactional lawyers:
   (a) they are located in the corporate headquarters and have regular (formal or informal) contact with senior management
   (b) they are located in the corporate headquarters but have little contact with senior management
   (c) they are located in regional offices and have regular (formal or informal) contact with management at their locations
   (d) they are located in regional offices but have little contact with management at their locations

4. Are in-house transactional lawyers typically more involved in structuring your company’s business transactions than outside lawyers?:
   (a) yes
   (b) no
   (c) it depends (please explain): ____________________________________________.

F.
1. To what extent does using outside transactional lawyers enhance your company’s reputation in a transaction (“reputational value”) more than using in-house lawyers?:
   (a) to a great extent
   (b) to some extent
   (c) not at all
   (d) it depends on the transaction.

2. Why might outside transactional lawyers provide greater reputational value than in-house transactional lawyers (check all that apply)?:
(a) __ outside transactional lawyers are independent, whereas in-house transactional lawyers are employees of the company
(b) __ outside transactional lawyers are, on average, more qualified than in-house transactional lawyers for the work they do
(c) __ outside transactional lawyers may be no more qualified, but reputational perceptions change slowly
(d) __ other (please specify) ________________________________________________.

3. Why might outside transactional lawyers, on average, be more qualified than in-house transactional lawyers for transactional work (check all that apply)?:
   (a) __ outside transactional lawyers are, on average, smarter than in-house transactional lawyers
   (b) __ outside transactional lawyers are, on average, better legally educated than in-house transactional lawyers
   (c) __ outside transactional lawyers see the type of transaction more often
   (d) __ other (please explain): ________________________________________________.

4. To what extent are you able to compete with outside law firms in hiring the best lawyers for your in-house transactional staff?:
   (a) __ to a great extent
   (b) __ to a significant extent
   (c) __ to some extent
   (d) __ to a small extent or not at all

5. If you answered (a), (b), or (c) to the foregoing question, what may explain your ability to compete?:
   (a) __ higher compensation paid to lawyers on your in-house transactional staff
   (b) __ lower stress/better lifestyle of lawyers on your in-house transactional staff
   (c) __ more flexible hours available to lawyers on your in-house transactional staff
   (d) __ other (please explain): ________________________________________________.

6. To what extent do you hire outside transactional lawyers in business transactions simply because other parties request legal opinions of your independent outside lawyers?:
   (a) __ to a great extent
   (b) __ to a significant extent
   (c) __ to some extent
   (d) __ to a small extent or not at all

7. When a third party requests a legal opinion in a business transaction (on matters other than corporate housekeeping), how often will that party accept an opinion issued by your in-house transactional lawyers?:
   (a) __ almost always
   (b) __ often
   (c) __ occasionally
   (d) __ rarely
G. 1. To what extent does the attorney-client privilege help facilitate your company’s business transactions?:
(a) ___ to a great extent
(b) ___ to a significant extent
(c) ___ to some extent
(d) ___ to a small extent or not at all
(e) ___ the attorney-client privilege works against facilitating transactions (for example, by increasing information asymmetry among transaction parties)

2. How does the in-house attorney-client privilege compare to the attorney-client privilege created by using outside transactional lawyers?:
(a) ___ in-house privilege is much weaker
(b) ___ in-house privilege is somewhat weaker
(c) ___ in-house privilege is about the same
(d) ___ in-house privilege is somewhat stronger
(e) ___ in-house privilege is much stronger

3. All other things being equal, would you consider hiring an outside law firm to handle a “sensitive” transaction simply to take advantage of the stronger (or perceived stronger) attorney-client privilege?:
(a) ___ yes
(b) ___ no
(c) ___ possibly

H. 1. Approximately what percentage of your company’s business transactions are currently lawyered primarily in-house?: ___%.

2. If the current percentage is less than the percentage of your company’s business transactions that you would like to see lawyered in-house, what accounts for the discrepancy (check all that apply):
(a) ___ difficulty in matching number of in-house transactional lawyers on staff with fluctuating volume of transactional work
(b) ___ outside law firms have the expertise necessary for complex or unusual transactions
(c) ___ third parties sometimes insist that your company uses an outside law firm
(d) ___ other (please specify) ____________________________________________.

3. How does the percentage of business transactions currently lawyered in-house compare with the percentage lawyered in-house ten years ago?:
(a) ___ currently much lower
(b) ___ currently slightly lower
(c) ___ currently about the same
(d) ___ currently slightly higher
(e) ___ currently much higher
4. Please comment on the following proposition: “There has been no transformation in the inherent value provided by in-house and outside transactional lawyers. Rather, the shift from outside to in-house transactional lawyers has been occurring because burgeoning legal costs have made companies more sensitive to legal bills. At the same time, transactional legal work has matured and become more straightforward and companies have grown and engage in repetitive transactions, making it more feasible to bring legal work in-house and save costs.”

*Your comments:*

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

5. Are there any other factors, not mentioned in this questionnaire, that might explain the shift from outside to in-house transactional lawyering or a transformation in the value or relative value provided by in-house and outside transactional lawyers?:

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

6. To the best of your knowledge, would you answer any of the questions in Parts A-G of this questionnaire differently if you were responding 10 years ago? If so, please explain (ignore questions that ask for specific numbers):

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

7. Please try to answer the preceding question as if the reference to “10 years ago” read “20 years ago”:

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
ANNEX 2

Outside Counsel Questionnaire

Information you provide will remain strictly confidential and only be disclosed as part of aggregate data reporting.

Position with Law Firm:

Areas of Practice:

Years of Practice:

City in Which You Practice:

Approximate Number of Attorneys in Your Law Firm:

NOTICE: This questionnaire’s purpose is to test a range of hypotheses about the value or relative value provided by in-house and outside transactional lawyers and to assess any transformation therein. By “transactional lawyers,” this questionnaire means lawyers involved in the negotiating and contracting process leading to closing a commercial, financial, or other business transaction. Please assume that all questions below pertain to those types of business transactions.

A.
1. In deciding which to use—in-house lawyers, or an outside law firm—as the primary lawyers on a business transaction, what considerations do clients take into account (check all that apply)?:
   (a) __ size of the transaction
   (b) __ complexity or novelty of the transaction
   (c) __ riskiness of the transaction
   (d) __ perceived importance to senior management of successfully closing the transaction
   (e) __ anticipated legal expenses of the lawyers used
   (f) __ need for quality work
   (g) __ timely availability and responsiveness
   (h) __ other (please specify): ________________________________________________

2. Of the considerations you checked, how would you rank them in degree of importance (“A” being most important, “B” being next most important, and so on))?:
   ___ size of the transaction
   ___ complexity or novelty of the transaction
   ___ riskiness of the transaction
   ___ perceived importance to senior management of successfully closing the transaction
anticipated legal expenses of the lawyers used
need for quality work
timely availability and responsiveness
other (if you so specified)

3. Which of the following factors help to explain why in-house lawyers may be a lower-cost provider, compared to an outside law firm, of transactional legal services (check all that apply)?
(a) using in-house lawyers reduces incidental costs (e.g., visits to the client, talking through issues)
(b) using in-house lawyers eliminates the need to educate an outside law firm about the client’s organization and operations
(c) in-house lawyers tend to close transactions more quickly than law firms
(d) effective “hourly rate” of in-house lawyers is lower
(e) in-house lawyer costs are less visible to senior management
(f) other (please specify) ________________________________________________

4. Which of the following factors help to explain why an outside law firm may be a lower-cost provider, compared to in-house lawyers, of transactional legal services (check all that apply)?
(a) law firms tend to have more extensive knowledge of transactional law
(b) when they must educate themselves on a point of transactional law, law firms can apportion the cost of this educational process among numerous clients
(c) hiring a law firm can make it easier to match the number of in-house transactional lawyers on staff with the fluctuating volume of transactional work
(d) law firms tend to close transactions more quickly than in-house lawyers
(e) where the other side pays the client’s legal fees, it is more common to pay outside lawyer fees than in-house lawyer imputed fees
(f) other (please specify) ________________________________________________

5. How would you compare the trend in in-house transactional lawyer salaries with the trend in outside law firm billing rates for transactional work?:
(a) both are increasing at about the same rate
(b) in-house transactional lawyer salaries are increasing more rapidly than law firm billing rates
(c) law firm billing rates are increasing more rapidly than in-house transactional lawyer salaries
(d) do not know

6. Which of the following factors help to explain why in-house lawyers may provide greater benefits, compared to an outside law firm, as the primary lawyers on a business transaction (check all that apply)?
(a) in-house lawyers’ intimate familiarity with the client allows them to more quickly spot issues than outside lawyers
(b) in-house lawyers are usually involved at a much earlier stage in the transaction than outside law firms and therefore can take a more proactive approach
(c) __ in-house lawyers have a greater incentive to always ensure that the client is protected
(d) __ in-house lawyers have greater expertise in certain types of transactions (specify which: __________________)
(e) __ in-house lawyers better understand the client’s “culture”
(f) __ more timely availability and responsiveness of in-house lawyers
(g) __ in-house lawyers have access to more and/or better resources (if you check this factor, please specify what resources): ________________________________
(h) __ in-house lawyers perform higher quality transactional work
(i) __ other (please specify): ________________________________

7. Which of the following factors help to explain why an **outside law firm** may provide greater benefits, compared to in-house lawyers, as the primary lawyers on a business transaction (check all that apply)?:
   (a) __ a law firm’s more extensive knowledge of transactional law may allow them to spot issues that could be overlooked by in-house lawyers
   (b) __ law firms have access to more and/or better resources (if you check this factor, please specify what resources): ________________________________
   (c) __ lawyers at outside firms are more independent, and thus more objective, than in-house lawyers
   (d) __ lawyers at outside firms have greater expertise in certain types of transactions (specify which: __________________)
   (e) __ law firms are specifically set up to get transactions done by having sufficient support staff (e.g., proofreading, photocopying, word processing, paralegals) to handle a large volume of transactions
   (f) __ more timely availability and responsiveness of lawyers at outside firms
   (g) __ lawyers at outside firms perform higher quality transactional work
   (h) __ other (please specify) ________________________________

B.

1. [Intentionally deleted]

2. Who can better observe misbehavior by company managers working on business transactions?:
   (a) __ in-house lawyers
   (b) __ lawyers at an outside law firm (hereinafter, “outside lawyers”)

3. Please explain your answer to the foregoing question: ________________________________

4. Who is more likely to report misbehavior by company managers working on business transactions?:
   (a) __ in-house lawyers
   (b) __ outside lawyers
5. Please explain your answer to the foregoing question: __________________________
________________________________________________________________________

6. To what extent do clients use in-house lawyers to monitor outside-lawyer work on business transactions?:
(a) __ to a great extent
(b) __ to a significant extent
(c) __ to some extent
(d) __ to a small extent or not at all

7. In the context of the prior question, which of the following do in-house lawyers monitor (check all that apply)?:
(a) __ outside lawyer billing
(b) __ progression of the transaction
(c) __ level of protection provided to the company
(d) __ other (please specify): ________________________________________________.

C.
1. [Intentionally deleted]

2. [Intentionally deleted]

3. Who handles repetitive transactions more efficiently, taking into account quality and cost?:
(a) __ in-house lawyers
(b) __ outside lawyers
(c) __ it depends on the nature of the transaction

4. Please explain your answer to the foregoing question: __________________________
________________________________________________________________________

5. Who handles non-repetitive transactions more efficiently, taking into account quality and cost?:
(a) __ in-house lawyers
(b) __ outside lawyers
(c) __ it depends on the nature of the transaction

6. Please explain your answer to the foregoing question: __________________________
________________________________________________________________________

D.
1. The fees charged by outside transactional lawyers are as high as they are because (check all that apply):
(a) __ law firms have to compete with investment banks for top transactional people
(b) __ law firms pay a premium to hire and train the best entry-level associates
(c) __ law firms try to maintain a degree of income parity among lawyers at the same
level working in different areas of concentration even though some transactional areas are
less inherently lucrative than other areas
(d) __ other (please specify): ________________________________.

2. Why do law firms pay a premium to hire and train the best entry-level associates?: __
______________________________________________________________________.

E.
1. Who are more responsive to a client’s timing requirements in business transactions?:
(a) __ in-house transactional lawyers
(b) __ outside transactional lawyers
(c) __ about the same
(d) __ do not know

2. Who are better able to communicate with a client’s management in business
transactions?:
(a) __ in-house transactional lawyers
(b) __ outside transactional lawyers
(c) __ about the same
(d) __ it depends (please explain): ________________________________.

3. [Intentionally deleted]

F.
1. To what extent does using outside transactional lawyers enhance a client’s reputation
in a transaction (“reputational value”) more than using in-house lawyers?:
(a) __ to a great extent
(b) __ to some extent
(c) __ not at all
(d) __ it depends on the transaction

2. Why might outside transactional lawyers provide greater reputational value than in-
house transactional lawyers (check all that apply)?:
(a) __ outside transactional lawyers are independent, whereas in-house transactional
lawyers are employees of the client
(b) __ outside transactional lawyers are, on average, more qualified than in-house
transactional lawyers for the work they do
(c) __ outside transactional lawyers may be no more qualified, but reputational
perceptions change slowly
(d) __ other (please specify): ________________________________.
3. Why might outside transactional lawyers, on average, be more qualified than in-house transactional lawyers for transactional work (check all that apply)?
(a) __ outside transactional lawyers are, on average, smarter than in-house transactional lawyers
(b) __ outside transactional lawyers are, on average, better legally educated than in-house transactional lawyers
(c) __ outside transactional lawyers see the type of transaction more often
(d) __ other (please explain): ____________________________________________________.

4. To what extent is your law firm able to compete with in-house legal departments in hiring the best lawyers for transactional work?:
(a) __ to a great extent
(b) __ to a significant extent
(c) __ to some extent
(d) __ to a small extent or not at all

5. If you answered (a), (b), or (c) to the foregoing question, what may explain your ability to compete? (check all that apply)?:
(a) __ your law firm pays higher compensation
(b) __ your law firm engages in more interesting and diverse transactions
(c) __ there is greater prestige associated with your law firm
(d) __ other (please explain): ____________________________________________________.

G. 1. To what extent does the attorney-client privilege help facilitate business transactions?:
(a) __ to a great extent
(b) __ to a significant extent
(c) __ to some extent
(d) __ to a small extent or not at all
(e) __ the attorney-client privilege works against facilitating transactions (for example, by increasing information asymmetry among transaction parties)

2. How does the in-house attorney-client privilege compare to the attorney-client privilege created by using outside transactional lawyers?:
(a) __ in-house privilege is much weaker
(b) __ in-house privilege is somewhat weaker
(c) __ in-house privilege is about the same
(d) __ in-house privilege is somewhat stronger
(e) __ in-house privilege is much stronger

H. 1. Is there increasing in-house lawyer competition for outside lawyer transactional legal work? (check all that apply):
(a) __ yes
(b) ___ no
(c) ___ although in-house lawyers may be doing more transactional legal work, they are not doing the sophisticated or complex work done by outside lawyers
(d) ___ although in-house lawyers may be doing more transactional legal work, overall transactional legal work is expanding sufficiently to mitigate outside lawyer concerns about competition

2. How, if applicable, is your law firm attempting to adapt to in-house lawyering competition for transactional legal work?: ______________________________________________________________
   ______________________________________________________________________
   ______________________________________________________________________

3. How else might law firms attempt to adapt to in-house lawyering competition for transactional legal work?: ______________________________________________________________
   ______________________________________________________________________
   ______________________________________________________________________

4. Please comment on the following proposition: “There has been no transformation in the inherent value provided by in-house and outside transactional lawyers. Rather, the shift from outside to in-house transactional lawyering has been occurring because burgeoning legal costs have made companies more sensitive to legal bills. At the same time, transactional legal work has matured and become more straightforward and companies have grown and engage in repetitive transactions, making it more feasible to bring legal work in-house and save costs.”
   Your comments: __________________________________________________________
   ______________________________________________________________________
   ______________________________________________________________________

5. Are there any other factors, not mentioned in this questionnaire, that might explain the shift from outside to in-house transactional lawyering or a transformation in the value or relative value provided by in-house and outside transactional lawyers?: __________________
   ______________________________________________________________________
   ______________________________________________________________________
   ______________________________________________________________________

6. To the best of your knowledge, would you answer any of the questions in Parts A-G of this questionnaire differently if you were responding 10 years ago? If so, please explain (ignore questions that ask for specific numbers): __________________
   ______________________________________________________________________
   ______________________________________________________________________
   ______________________________________________________________________

7. Please try to answer the preceding question as if the reference to “10 years ago” read “20 years ago”: __________________
   ______________________________________________________________________
   ______________________________________________________________________
**APPENDIX A: DETAILED PRESENTATION OF THE DATA UNDERLYING THIS ARTICLE’S FINDINGS**

Notes:
(1) References below in each data box’s heading to “In-House Lawyers” means the general counsel, chief legal officer, or other legal department manager (or such person’s designee) responsible for assigning transactional legal work, including the decision whether to handle a matter in-house or to retain the services of outside lawyers.
(2) References below in each data box’s heading to “Outside Lawyers” means outside transactional lawyers.
(3) The wording of questions and possible answers set forth below is taken from ANNEX 1, the form of Company’s General Counsel Questionnaire. The wording of questions and possible answers in the form of Outside Counsel Questionnaire varied slightly. See ANNEX 2 (Form of Outside Counsel Questionnaire).

Where (n=43) and (n1=12)

A.

1. In deciding which to use—in-house lawyers, or an outside law firm—as the primary lawyers on a business transaction, what considerations do you take into account (check all that apply)?:

<table>
<thead>
<tr>
<th>Consideration</th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) size of the transaction</td>
<td>27 (62.8%)</td>
<td>11 (91.7%)</td>
</tr>
<tr>
<td>(b) complexity or novelty of the transaction</td>
<td>40 (93.0%)</td>
<td>12 (100.0%)</td>
</tr>
<tr>
<td>(c) riskiness of the transaction</td>
<td>29 (67.4%)</td>
<td>11 (91.7%)</td>
</tr>
<tr>
<td>(d) perceived importance to senior management of successfully closing the transaction</td>
<td>19 (44.2%)</td>
<td>10 (83.3%)</td>
</tr>
<tr>
<td>(e) anticipated legal expenses of the lawyers used</td>
<td>29 (67.4%)</td>
<td>9 (75.0%)</td>
</tr>
<tr>
<td>(f) need for quality work</td>
<td>14 (32.6%)</td>
<td>8 (66.7%)</td>
</tr>
<tr>
<td>(g) timely availability and responsiveness</td>
<td>32 (74.4%)</td>
<td>11 (91.7%)</td>
</tr>
<tr>
<td>(h) other</td>
<td>9 (20.9%)</td>
<td>4 (33.3%)</td>
</tr>
</tbody>
</table>
2. Of the considerations you checked, how would you rank them in degree of importance ("A" being most important, "B" being next most important, and so on)?:

<table>
<thead>
<tr>
<th>*Number that ranked A</th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity</td>
<td>Percent</td>
</tr>
<tr>
<td></td>
<td>(n=43)</td>
<td></td>
</tr>
<tr>
<td>(a) size of the transaction</td>
<td>1 2.3</td>
<td>2 16.7</td>
</tr>
<tr>
<td>(b) complexity or novelty of the transaction</td>
<td>25 58.1</td>
<td>8 66.7</td>
</tr>
<tr>
<td>(c) riskiness of the transaction</td>
<td>5 11.6</td>
<td>0 0.0</td>
</tr>
<tr>
<td>(d) perceived importance to senior management of successfully closing the transaction</td>
<td>2 4.7</td>
<td>1 8.3</td>
</tr>
<tr>
<td>(e) anticipated legal expenses of the lawyers used</td>
<td>3 7.0</td>
<td>0 0.0</td>
</tr>
<tr>
<td>(f) need for quality work</td>
<td>2 4.7</td>
<td>0 0.0</td>
</tr>
<tr>
<td>(g) timely availability and responsiveness</td>
<td>3 7.0</td>
<td>1 8.3</td>
</tr>
<tr>
<td>(h) other</td>
<td>5 11.6</td>
<td>0 0.0</td>
</tr>
</tbody>
</table>

3. Which of the following factors help to explain why **in-house lawyers** may be a lower-cost provider, compared to an outside law firm, of transactional legal services (check all that apply)?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity</td>
<td>Percent</td>
</tr>
<tr>
<td></td>
<td>(n=43)</td>
<td></td>
</tr>
<tr>
<td>(a) using in-house lawyers reduces incidental costs</td>
<td>28 65.1</td>
<td>3 25.0</td>
</tr>
<tr>
<td>(b) using in-house lawyers eliminates the need to educate an outside law firm about your company’s organization and operations</td>
<td>37 86.0</td>
<td>5 41.7</td>
</tr>
<tr>
<td>(c) in-house lawyers tend to close transactions more quickly than law firms</td>
<td>19 44.2</td>
<td>0 0.0</td>
</tr>
<tr>
<td>(d) effective “hourly rate” of in-house lawyers is lower</td>
<td>34 79.1</td>
<td>11 91.7</td>
</tr>
<tr>
<td>(e) in-house lawyer costs are less visible to senior management</td>
<td>16 37.2</td>
<td>7 58.3</td>
</tr>
<tr>
<td>(f) other</td>
<td>5 11.6</td>
<td>2 16.7</td>
</tr>
</tbody>
</table>
4. Which of the following factors help to explain why an outside law firm may be a lower-cost provider, compared to in-house lawyers, of transactional legal services (check all that apply):

<table>
<thead>
<tr>
<th>Factor</th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) law firms tend to have more extensive knowledge of transactional law</td>
<td>20 46.5</td>
<td>7 58.3</td>
</tr>
<tr>
<td>(b) when they must educate themselves on a point of transactional law, law firms can apportion the cost of this educational process among numerous clients</td>
<td>11 25.6</td>
<td>2 16.7</td>
</tr>
<tr>
<td>(c) hiring a law firm can make it easier to match the number of in-house transactional lawyers on staff with the fluctuating volume of transactional work</td>
<td>16 37.2</td>
<td>11 91.7</td>
</tr>
<tr>
<td>(d) law firms tend to close transactions more quickly than in-house lawyers</td>
<td>1 2.3</td>
<td>4 33.3</td>
</tr>
<tr>
<td>(e) where the other side pays your legal fees, it is more common to pay outside lawyer fees than in-house lawyer imputed fees</td>
<td>11 25.6</td>
<td>6 50.0</td>
</tr>
<tr>
<td>(f) other</td>
<td>10 23.3</td>
<td>1 8.3</td>
</tr>
</tbody>
</table>

5. How would you compare the trend in in-house transactional lawyer salaries with the trend in outside law firm billing rates for transactional work (check all that apply):

<table>
<thead>
<tr>
<th>Trend Comparison</th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) both are increasing at about the same rate</td>
<td>4 9.3</td>
<td>0 0.0</td>
</tr>
<tr>
<td>(b) in-house transactional lawyer salaries are increasing more rapidly than law firm billing rates</td>
<td>0 0.0</td>
<td>0 0.0</td>
</tr>
<tr>
<td>(c) law firm billing rates are increasing more rapidly than in-house transactional lawyer salaries</td>
<td>39 90.7</td>
<td>4 33.3</td>
</tr>
<tr>
<td>(d) other</td>
<td>1 2.3</td>
<td>8 66.7</td>
</tr>
</tbody>
</table>
6. Which of the following factors help to explain why **in-house lawyers** may provide greater benefits, compared to an outside law firm, as the primary lawyers on a business transaction (check all that apply)?:

<table>
<thead>
<tr>
<th>Factor</th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) in-house lawyers’ intimate familiarity with your company allows them to more quickly spot issues than outside lawyers</td>
<td>43 (100.0)</td>
<td>9 (75.0)</td>
</tr>
<tr>
<td>(b) in-house lawyers are usually involved at a much earlier stage in the transaction than outside law firms and therefore can take a more proactive approach</td>
<td>39 (90.7)</td>
<td>8 (66.7)</td>
</tr>
<tr>
<td>(c) in-house lawyers have a greater incentive to always ensure that your company is protected</td>
<td>11 (25.6)</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td>(d) in-house lawyers have greater expertise in certain types of transactions</td>
<td>10 (23.3)</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td>(e) in-house lawyers better understand the company’s “culture”</td>
<td>37 (86.0)</td>
<td>6 (50.0)</td>
</tr>
<tr>
<td>(f) more timely availability and responsiveness of in-house lawyers</td>
<td>23 (53.5)</td>
<td>1 (8.3)</td>
</tr>
<tr>
<td>(g) in-house lawyers have access to more and/or better resources</td>
<td>7 (16.3)</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td>(h) in-house lawyers perform higher quality transactional work</td>
<td>5 (11.6)</td>
<td>0 (0.0)</td>
</tr>
<tr>
<td>(i) other</td>
<td>3 (7.0)</td>
<td>1 (8.3)</td>
</tr>
</tbody>
</table>
7. Which of the following factors help to explain why an **outside law firm** may provide greater benefits, compared to in-house lawyers, as the primary lawyers on a business transaction (check all that apply)?:

<table>
<thead>
<tr>
<th>Factor</th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) a law firm’s more extensive knowledge of transactional law may allow them to spot issues that could be overlooked by in-house lawyers</td>
<td>26 60.5%</td>
<td>12 100.0%</td>
</tr>
<tr>
<td>(b) law firms have access to more and/or better resources</td>
<td>23 53.5%</td>
<td>9 75.0%</td>
</tr>
<tr>
<td>(c) lawyers at outside firms are more independent, and thus more objective, than in-house lawyers</td>
<td>10 23.3%</td>
<td>2 16.7%</td>
</tr>
<tr>
<td>(d) lawyers at outside firms have greater expertise in certain types of transactions</td>
<td>23 53.5%</td>
<td>7 58.3%</td>
</tr>
<tr>
<td>(e) law firms are specifically set up to get transactions done by having sufficient support staff (e.g., proofreading, photocopying, word processing, paralegals) to handle a large volume of transactions</td>
<td>26 60.5%</td>
<td>10 83.3%</td>
</tr>
<tr>
<td>(f) more timely availability and responsiveness of lawyers at outside firms</td>
<td>4 9.3%</td>
<td>8 66.7%</td>
</tr>
<tr>
<td>(g) lawyers at outside firms perform higher quality transactional work</td>
<td>2 4.7%</td>
<td>6 50.0%</td>
</tr>
<tr>
<td>(h) other</td>
<td>0 0.0%</td>
<td>0 0.0%</td>
</tr>
</tbody>
</table>

8. In-house transactional lawyer costs are (check all that apply):

<table>
<thead>
<tr>
<th>Cost Description</th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) less transparent to senior management than outside lawyer costs</td>
<td>15 34.9%</td>
<td>N/A</td>
</tr>
<tr>
<td>(b) as transparent to senior management as outside lawyer costs</td>
<td>6 14.0%</td>
<td>N/A</td>
</tr>
<tr>
<td>(c) absorbed in, or obscured by, other company costs</td>
<td>17 39.5%</td>
<td>N/A</td>
</tr>
<tr>
<td>(d) appropriately transparent to senior management</td>
<td>19 44.2%</td>
<td>N/A</td>
</tr>
</tbody>
</table>
B.

1. In deciding whether to use in-house lawyers or an outside law firm as the primary lawyers on a business transaction, to what extent do you take into account the lawyer’s ability to observe and report potential misbehavior by company managers working on the transaction?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) to a great extent</td>
<td>2</td>
<td>4.7</td>
</tr>
<tr>
<td>(b) to a significant extent</td>
<td>2</td>
<td>4.7</td>
</tr>
<tr>
<td>(c) to some extent</td>
<td>16</td>
<td>37.2</td>
</tr>
<tr>
<td>(d) to a small extent or not at all</td>
<td>23</td>
<td>53.5</td>
</tr>
</tbody>
</table>

2. Who can better observe misbehavior by company managers working on business transactions?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) in-house lawyers</td>
<td>41</td>
<td>95.3</td>
</tr>
<tr>
<td>(b) lawyers at an outside law firm (hereinafter, “outside lawyers”)</td>
<td>0</td>
<td>0.0</td>
</tr>
</tbody>
</table>

3. Please explain your answer to the foregoing question:

4. Who is more likely to report misbehavior by company managers working on business transactions?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) in-house lawyers</td>
<td>38</td>
<td>88.4</td>
</tr>
<tr>
<td>(b) outside lawyers</td>
<td>1</td>
<td>2.3</td>
</tr>
</tbody>
</table>

5. Please explain your answer to the foregoing question:
6. When using outside lawyers as the primary lawyers on a business transaction, to what extent do you also use in-house lawyers to monitor their work?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) to a great extent</td>
<td>21</td>
<td>48.8</td>
</tr>
<tr>
<td>(b) to a significant extent</td>
<td>17</td>
<td>39.5</td>
</tr>
<tr>
<td>(c) to some extent</td>
<td>4</td>
<td>9.3</td>
</tr>
<tr>
<td>(d) to a small extent or not at all</td>
<td>1</td>
<td>2.3</td>
</tr>
</tbody>
</table>

7. In the context of the prior question, which of the following do your in-house lawyers monitor (check all that apply)?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) outside lawyer billing</td>
<td>39</td>
<td>90.7</td>
</tr>
<tr>
<td>(b) progression of the transaction</td>
<td>42</td>
<td>97.7</td>
</tr>
<tr>
<td>(c) level of protection provided to the company</td>
<td>34</td>
<td>79.1</td>
</tr>
<tr>
<td>(d) other</td>
<td>14</td>
<td>32.6</td>
</tr>
</tbody>
</table>

8. To what extent does reducing the number of outside law firms used for transactional work ("convergence") reduce the need for in-house lawyer monitoring of law firms used in business transactions?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) to a great extent</td>
<td>2</td>
<td>4.7</td>
</tr>
<tr>
<td>(b) to a significant extent</td>
<td>5</td>
<td>11.6</td>
</tr>
<tr>
<td>(c) to some extent</td>
<td>19</td>
<td>44.2</td>
</tr>
<tr>
<td>(d) to a small extent or not at all</td>
<td>16</td>
<td>37.2</td>
</tr>
</tbody>
</table>

C.

1. Approximately how many (significant) business transactions on average does your company engage in annually?:

<table>
<thead>
<tr>
<th>General Counsel</th>
<th>Average (n=43)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>168</td>
</tr>
</tbody>
</table>
2. Approximately what percentage of your company’s in-house lawyers spend all or substantially all of their time on transactional legal work: ____%.

<table>
<thead>
<tr>
<th>General Counsel</th>
<th>Average (n=43)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>39</td>
</tr>
</tbody>
</table>

3. Who handles repetitive transactions more efficiently, taking into account quality and cost?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) in-house lawyers</td>
<td>9</td>
<td>20.9</td>
</tr>
<tr>
<td>(b) outside lawyers</td>
<td>5</td>
<td>11.6</td>
</tr>
<tr>
<td>(c) it depends on the nature of the transaction</td>
<td>29</td>
<td>67.4</td>
</tr>
</tbody>
</table>

4. Please explain your answer to the foregoing question:

5. Who handles non-repetitive transactions more efficiently, taking into account quality and cost?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) in-house lawyers</td>
<td>9</td>
<td>20.9</td>
</tr>
<tr>
<td>(b) outside lawyers</td>
<td>5</td>
<td>11.6</td>
</tr>
<tr>
<td>(c) it depends on the nature of the transaction</td>
<td>29</td>
<td>67.4</td>
</tr>
</tbody>
</table>

6. Please explain your answer to the foregoing question:

7. Where a third party is expected to pay your company’s transactional legal fees, how likely is it that they would agree to pay your company’s in-house lawyer imputed fees (assuming in-house lawyers act as the primary transactional lawyers)?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) very likely</td>
<td>1</td>
<td>2.3</td>
</tr>
<tr>
<td>(b) somewhat likely</td>
<td>8</td>
<td>18.6</td>
</tr>
<tr>
<td>(c) unlikely</td>
<td>34</td>
<td>79.1</td>
</tr>
</tbody>
</table>
D.

1. How much government regulation is your company subject to (compared to companies generally)?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) much more than average</td>
<td>15 34.9</td>
<td>N/A N/A</td>
</tr>
<tr>
<td>(b) somewhat more than average</td>
<td>6 14.0</td>
<td>N/A N/A</td>
</tr>
<tr>
<td>(c) about average</td>
<td>10 23.3</td>
<td>N/A N/A</td>
</tr>
<tr>
<td>(d) less than average</td>
<td>10 23.3</td>
<td>N/A N/A</td>
</tr>
<tr>
<td>(e) little or none</td>
<td>2 4.7</td>
<td>N/A N/A</td>
</tr>
</tbody>
</table>

[Outside Counsel Only] 1. The fees charged by outside transactional lawyers are as high as they are because (check all that apply):

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) law firms have to compete with investment banks for top transactional people</td>
<td>N/A N/A</td>
<td>1 8.3</td>
</tr>
<tr>
<td>(b) law firms pay a premium to hire and train the best entry-level associates</td>
<td>N/A N/A</td>
<td>5 41.7</td>
</tr>
<tr>
<td>(c) law firms try to maintain a degree of income parity among lawyers at the same level working in different areas of concentration even though some transactional areas are less inherently lucrative than other areas</td>
<td>N/A N/A</td>
<td>2 16.7</td>
</tr>
<tr>
<td>(d) other (please specify):</td>
<td>N/A N/A</td>
<td>7 58.3</td>
</tr>
</tbody>
</table>

2. To what extent, if any, are your in-house transactional lawyers more familiar than your outside lawyers with the regulatory issues that impact your company’s transactions?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) much more familiar</td>
<td>11 25.6</td>
<td>N/A N/A</td>
</tr>
<tr>
<td>(b) somewhat more familiar</td>
<td>14 32.6</td>
<td>N/A N/A</td>
</tr>
<tr>
<td>(c) equally familiar</td>
<td>9 20.9</td>
<td>N/A N/A</td>
</tr>
<tr>
<td>(d) less familiar</td>
<td>6 14.0</td>
<td>N/A N/A</td>
</tr>
<tr>
<td>(e) it depends</td>
<td>3 7.0</td>
<td>N/A N/A</td>
</tr>
</tbody>
</table>
3. If you answered (a) or (b) to the foregoing question, to what extent does that greater familiarity enable the in-house transactional lawyers to handle transactions more efficiently than outside lawyers, taking into account quality and cost?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) much more efficiently</td>
<td>5</td>
<td>11.6</td>
</tr>
<tr>
<td>(b) somewhat more efficiently</td>
<td>14</td>
<td>32.6</td>
</tr>
<tr>
<td>(c) not necessarily more efficiently</td>
<td>5</td>
<td>11.6</td>
</tr>
<tr>
<td>(d) it depends</td>
<td>2</td>
<td>4.7</td>
</tr>
</tbody>
</table>

4. How complex is your company’s organization and operational structure (compared to that of companies generally)?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) much more complex than average</td>
<td>5</td>
<td>11.6</td>
</tr>
<tr>
<td>(b) somewhat more complex than average</td>
<td>8</td>
<td>18.6</td>
</tr>
<tr>
<td>(c) about average complexity</td>
<td>16</td>
<td>37.2</td>
</tr>
<tr>
<td>(d) less complex than average</td>
<td>14</td>
<td>32.6</td>
</tr>
</tbody>
</table>

5. To what extent, if any, are your in-house transactional lawyers more familiar than your outside lawyers with issues of your company’s organization and operational structure that impact your company’s transactions?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) much more familiar</td>
<td>23</td>
<td>53.5</td>
</tr>
<tr>
<td>(b) somewhat more familiar</td>
<td>11</td>
<td>25.6</td>
</tr>
<tr>
<td>(c) equally familiar</td>
<td>4</td>
<td>9.3</td>
</tr>
<tr>
<td>(d) less familiar</td>
<td>4</td>
<td>9.3</td>
</tr>
<tr>
<td>(e) it depends</td>
<td>1</td>
<td>2.3</td>
</tr>
</tbody>
</table>
6. If you answered (a) or (b) to the foregoing question, to what extent does that greater familiarity enable the in-house transactional lawyers to handle transactions more efficiently than outside lawyers, taking into account quality and cost?:

<table>
<thead>
<tr>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
</tr>
<tr>
<td>(a) much more efficiently</td>
<td>13</td>
</tr>
<tr>
<td>(b) somewhat more efficiently</td>
<td>18</td>
</tr>
<tr>
<td>(c) not necessarily more efficiently</td>
<td>3</td>
</tr>
<tr>
<td>(d) it depends</td>
<td>0</td>
</tr>
</tbody>
</table>

7. Approximately how many outside law firms, overall, does your company use for transactional work?:

<table>
<thead>
<tr>
<th>General Counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average (n=43)</td>
</tr>
<tr>
<td>6</td>
</tr>
</tbody>
</table>

8. To what extent could your company, by reducing the number of outside law firms used for transactional work, achieve greater parity between in-house and outside lawyer familiarity with regulatory, organizational, and operational issues that impact the company’s transactions?:

<table>
<thead>
<tr>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
</tr>
<tr>
<td>(a) to a great extent</td>
<td>1</td>
</tr>
<tr>
<td>(b) to some extent</td>
<td>40</td>
</tr>
<tr>
<td>(c) to a small extent or not at all</td>
<td>0</td>
</tr>
</tbody>
</table>

9. Has your company already reduced the number of outside law firms used for transactional work to try to achieve that parity?:

<table>
<thead>
<tr>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
</tr>
<tr>
<td>(a) yes</td>
<td>22</td>
</tr>
<tr>
<td>(b) no</td>
<td>21</td>
</tr>
</tbody>
</table>
E.

1. Who are more responsive to your company’s timing requirements in business transactions?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity</td>
<td>Percent</td>
</tr>
<tr>
<td></td>
<td>(n=43)</td>
<td>(n1=12)</td>
</tr>
<tr>
<td>(a) in-house transactional lawyers</td>
<td>22</td>
<td>51.2</td>
</tr>
<tr>
<td>(b) outside transactional lawyers</td>
<td>2</td>
<td>4.7</td>
</tr>
<tr>
<td>(c) about the same</td>
<td>19</td>
<td>44.2</td>
</tr>
</tbody>
</table>

2. Who are better able to communicate with your company’s management in business transactions?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity</td>
<td>Percent</td>
</tr>
<tr>
<td></td>
<td>(n=43)</td>
<td>(n1=12)</td>
</tr>
<tr>
<td>(a) in-house transactional lawyers</td>
<td>29</td>
<td>67.4</td>
</tr>
<tr>
<td>(b) outside transactional lawyers</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>(c) about the same</td>
<td>12</td>
<td>27.9</td>
</tr>
<tr>
<td>(d) it depends</td>
<td>3</td>
<td>7.0</td>
</tr>
</tbody>
</table>

3. Check all of the following that describes your company’s in-house transactional lawyers:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity</td>
<td>Percent</td>
</tr>
<tr>
<td></td>
<td>(n=43)</td>
<td>(n1=12)</td>
</tr>
<tr>
<td>(a) they are located in the corporate headquarters and have regular (formal or informal) contact with senior management</td>
<td>41</td>
<td>95.3</td>
</tr>
<tr>
<td>(b) they are located in the corporate headquarters but have little contact with senior management</td>
<td>2</td>
<td>4.7</td>
</tr>
<tr>
<td>(c) they are located in regional offices and have regular (formal or informal) contact with management at their locations</td>
<td>5</td>
<td>11.6</td>
</tr>
<tr>
<td>(d) they are located in regional offices but have little contact with management at their locations</td>
<td>0</td>
<td>0.0</td>
</tr>
</tbody>
</table>
4. Are in-house transactional lawyers typically more involved in structuring your company’s business transactions than outside lawyers?

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) yes</td>
<td>33</td>
<td>76.7</td>
</tr>
<tr>
<td>(b) no</td>
<td>2</td>
<td>4.7</td>
</tr>
<tr>
<td>(c) it depends</td>
<td>8</td>
<td>18.6</td>
</tr>
</tbody>
</table>

F.

1. To what extent does using outside transactional lawyers enhance your company’s reputation in a transaction (“reputational value”) more than using in-house lawyers?

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) to a great extent</td>
<td>2</td>
<td>4.7</td>
</tr>
<tr>
<td>(b) to some extent</td>
<td>27</td>
<td>62.8</td>
</tr>
<tr>
<td>(c) not at all</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>(d) it depends on the transaction</td>
<td>14</td>
<td>32.6</td>
</tr>
</tbody>
</table>

2. Why might outside transactional lawyers provide greater reputational value than in-house transactional lawyers (check all that apply)?

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>(a) outside transactional lawyers are independent, whereas in-house transactional lawyers are employees of the company</td>
<td>9</td>
<td>20.9</td>
</tr>
<tr>
<td>(b) outside transactional lawyers are, on average, more qualified than in-house transactional lawyers for the work they do</td>
<td>4</td>
<td>9.3</td>
</tr>
<tr>
<td>(c) outside transactional lawyers may be no more qualified, but reputational perceptions change slowly</td>
<td>28</td>
<td>65.1</td>
</tr>
<tr>
<td>(d) other</td>
<td>9</td>
<td>20.9</td>
</tr>
</tbody>
</table>
3. Why might outside transactional lawyers, on average, be more qualified than in-house transactional lawyers for transactional work (check all that apply):

<table>
<thead>
<tr>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quantity</td>
<td>Percent</td>
</tr>
<tr>
<td>(n=43)</td>
<td>(n1=12)</td>
</tr>
<tr>
<td>(a) outside transactional lawyers are, on average, smarter than in-house transactional lawyers</td>
<td>1</td>
</tr>
<tr>
<td>(b) outside transactional lawyers are, on average, better legally educated than in-house transactional lawyers</td>
<td>1</td>
</tr>
<tr>
<td>(c) outside transactional lawyers see the type of transaction more often</td>
<td>35</td>
</tr>
<tr>
<td>(d) other</td>
<td>7</td>
</tr>
</tbody>
</table>

4. To what extent are you able to compete with outside law firms in hiring the best lawyers for your in-house transactional staff:

<table>
<thead>
<tr>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quantity</td>
<td>Percent</td>
</tr>
<tr>
<td>(n=43)</td>
<td>(n1=12)</td>
</tr>
<tr>
<td>(a) to a great extent</td>
<td>7</td>
</tr>
<tr>
<td>(b) to a significant extent</td>
<td>9</td>
</tr>
<tr>
<td>(c) to some extent</td>
<td>19</td>
</tr>
<tr>
<td>(d) to a small extent or not at all</td>
<td>4</td>
</tr>
</tbody>
</table>

5. If you answered (a), (b), or (c) to the foregoing question, what may explain your ability to compete:

<table>
<thead>
<tr>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Quantity</td>
<td>Percent</td>
</tr>
<tr>
<td>(n=43)</td>
<td>(n1=12)</td>
</tr>
<tr>
<td>(a) higher compensation paid to lawyers on your in-house transactional staff</td>
<td>0</td>
</tr>
<tr>
<td>(b) lower stress/better lifestyle of lawyers on your in-house transactional staff</td>
<td>21</td>
</tr>
<tr>
<td>(c) more flexible hours available to lawyers on your in-house transactional staff</td>
<td>6</td>
</tr>
<tr>
<td>(d) other</td>
<td>9</td>
</tr>
</tbody>
</table>
[Outside Counsel Only] 4. To what extent is your law firm able to compete with in-house legal departments in hiring the best lawyers for transactional work?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) to a great extent</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>(b) to a significant extent</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>(c) to some extent</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>(d) to a small extent or not at all</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

[Outside Counsel Only] 5. If you answered (a), (b), or (c) to the foregoing question, what may explain your ability to compete? (check all that apply):

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) your law firm pays higher compensation</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>(b) your law firm engages in more interesting and diverse transactions</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>(c) there is greater prestige associated with your law firm</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>(d) other (please explain):</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>

6. To what extent do you hire outside transactional lawyers in business transactions simply because other parties request legal opinions of your independent outside lawyers?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) to a great extent</td>
<td>1</td>
<td>2.3</td>
</tr>
<tr>
<td>(b) to a significant extent</td>
<td>8</td>
<td>18.6</td>
</tr>
<tr>
<td>(c) to some extent</td>
<td>10</td>
<td>23.3</td>
</tr>
<tr>
<td>(d) to a small extent or not at all</td>
<td>24</td>
<td>55.8</td>
</tr>
</tbody>
</table>
7. When a third party requests a legal opinion in a business transaction (on matters other than corporate housekeeping), how often will that party accept an opinion issued by your in-house transactional lawyers?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity</td>
<td>Percent</td>
</tr>
<tr>
<td>(n=43)</td>
<td>(n1=12)</td>
<td></td>
</tr>
<tr>
<td>(a) almost always</td>
<td>6</td>
<td>14.0</td>
</tr>
<tr>
<td>(b) often</td>
<td>8</td>
<td>18.6</td>
</tr>
<tr>
<td>(c) occasionally</td>
<td>22</td>
<td>51.2</td>
</tr>
<tr>
<td>(d) rarely</td>
<td>4</td>
<td>9.3</td>
</tr>
</tbody>
</table>

G.

1. To what extent does the attorney-client privilege help facilitate your company’s business transactions?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity</td>
<td>Percent</td>
</tr>
<tr>
<td>(n=43)</td>
<td>(n1=12)</td>
<td></td>
</tr>
<tr>
<td>(a) to a great extent</td>
<td>10</td>
<td>23.3</td>
</tr>
<tr>
<td>(b) to a significant extent</td>
<td>6</td>
<td>14.0</td>
</tr>
<tr>
<td>(c) to some extent</td>
<td>15</td>
<td>34.9</td>
</tr>
<tr>
<td>(d) to a small extent or not at all</td>
<td>10</td>
<td>23.3</td>
</tr>
<tr>
<td>e) the attorney-client privilege works against facilitating transactions</td>
<td>2</td>
<td>4.7</td>
</tr>
</tbody>
</table>

2. How does the in-house attorney-client privilege compare to the attorney-client privilege created by using outside transactional lawyers?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity</td>
<td>Percent</td>
</tr>
<tr>
<td>(n=43)</td>
<td>(n1=12)</td>
<td></td>
</tr>
<tr>
<td>(a) in-house privilege is much weaker</td>
<td>7</td>
<td>16.3</td>
</tr>
<tr>
<td>(b) in-house privilege is somewhat weaker</td>
<td>25</td>
<td>58.1</td>
</tr>
<tr>
<td>(c) in-house privilege is about the same</td>
<td>10</td>
<td>23.3</td>
</tr>
<tr>
<td>(d) in-house privilege is somewhat stronger</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>e) in-house privilege is much stronger</td>
<td>1</td>
<td>2.3</td>
</tr>
</tbody>
</table>
3. All other things being equal, would you consider hiring an outside law firm to handle a “sensitive” transaction simply to take advantage of the stronger (or perceived stronger) attorney-client privilege?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) yes</td>
<td>22</td>
<td>51.2</td>
</tr>
<tr>
<td>(b) no</td>
<td>8</td>
<td>18.6</td>
</tr>
<tr>
<td>(c) possibly</td>
<td>13</td>
<td>30.2</td>
</tr>
</tbody>
</table>

H.

1. Approximately what percentage of your company’s business transactions are currently lawyered primarily in-house?: ___%.

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Average (n=43)</td>
</tr>
<tr>
<td></td>
<td>69</td>
</tr>
</tbody>
</table>

[Outside Counsel Only] 1. Is there increasing in-house lawyer competition for outside lawyer transactional legal work? (check all that apply):

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) yes</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>(b) no</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>(c) although in-house lawyers may be doing more transactional legal work, they are not doing the sophisticated or complex work done by outside lawyers</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>(d) although in-house lawyers may be doing more transactional legal work, overall transactional legal work is expanding sufficiently to mitigate outside lawyer concerns about competition</td>
<td>N/A</td>
<td>N/A</td>
</tr>
</tbody>
</table>
2. If the current percentage is less than the percentage of your company’s business transactions that you would like to see lawyered in-house, what accounts for the discrepancy (check all that apply):

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) difficulty in matching number of in-house transactional lawyers on staff with fluctuating volume of transactional work</td>
<td>14</td>
<td>32.6</td>
</tr>
<tr>
<td>(b) outside law firms have the expertise necessary for complex or unusual transactions</td>
<td>13</td>
<td>30.2</td>
</tr>
<tr>
<td>(c) third parties sometimes insist that your company uses an outside law firm</td>
<td>1</td>
<td>2.3</td>
</tr>
<tr>
<td>(d) other</td>
<td>10</td>
<td>23.3</td>
</tr>
</tbody>
</table>

3. How does the percentage of business transactions currently lawyered in-house compare with the percentage lawyered in-house ten years ago?:

<table>
<thead>
<tr>
<th></th>
<th>General Counsel</th>
<th>Outside Lawyers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Quantity (n=43)</td>
<td>Percent</td>
</tr>
<tr>
<td>(a) currently much lower</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>(b) currently slightly lower</td>
<td>4</td>
<td>9.3</td>
</tr>
<tr>
<td>(c) currently about the same</td>
<td>4</td>
<td>9.3</td>
</tr>
<tr>
<td>(d) currently slightly higher</td>
<td>13</td>
<td>30.2</td>
</tr>
<tr>
<td>(e) currently much higher</td>
<td>18</td>
<td>41.9</td>
</tr>
</tbody>
</table>

4. Please comment on the following proposition: “There has been no transformation in the inherent value provided by in-house and outside transactional lawyers. Rather, the shift from outside to in-house transactional lawyers has been occurring because burgeoning legal costs have made companies more sensitive to legal bills. At the same time, transactional legal work has matured and become more straightforward and companies have grown and engage in repetitive transactions, making it more feasible to bring legal work in-house and save costs.”

5. Are there any other factors, not mentioned in this questionnaire, that might explain the shift from outside to in-house transactional lawyering or a transformation in the value or relative value provided by in-house and outside transactional lawyers?:

6. To the best of your knowledge, would you answer any of the questions in Parts A-G of this questionnaire differently if you were responding 10 years ago? If so, please explain (ignore questions that ask for specific numbers):

7. Please try to answer the preceding question as if the reference to “10 years ago” read “20 years ago”: 