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Lawyers as Exchange Engineers in Commerce: An Empirical Overview

I

THE LAW AND CONTEMPORARY COMMERCE

PUBLIC interest and debate recently have focused on the density of federal, state, and local legislation and regulation governing commerce in America and beyond its borders. Balanced budget amendments and line item vetoes will not significantly alter this density since budget constraints normally prompt enterprising legislators to substitute self-interest enforcement of entitlements for government implemented ones. Consequently, increased lawyer involvement in the commercial milieu is inevitable.

Apart from legislatively instigated mandates for greater lawyer involvement, contemporary evolution of commerce necessitates escalated lawyer participation. Globalization of commerce engages the inherent complexities of complying with both the laws and regulations of multiple cultures. The decreasing duration of products, employment relationships, enterprise capitalization structures and interbusiness agreements also fuel exponential growth in the volume and density of transactional arrangements. As a result of competition, innovation and information handling technologies, the need to execute these arrangements efficiently and effectively has increased, making lawyers critical participants in these transactions.

Given current public perceptions about the marginal costs and

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benefits of extensive attorney participation, it seems appropriate to explore strategies of deploying specific legal resources to specialized transactional tasks where they have comparative advantage. This should enhance the structuring and execution of essential exchanges among the principals in commerce.

Traditionally, experience has been the lighthouse for such deployment, especially when the algorithms of commercial exchange were dominated by somewhat repetitive activity patterns shaped by economic cycles and levels of political stability, among other factors. Unfortunately, the past is decreasingly the prologue of future events. Thus, enlightened deployment frequently must flow from theory verified by perceptive empirical sampling. Currently, most of the legal community's study of such matters falls into three categories. Descriptive studies chronicle the work of lawyers and firms in diverse contexts without significant measures of effectiveness.¹ Economists and lawyers use various economic perspectives like transaction cost theory to assess the effectiveness of legal techniques and strategies underlying an array of commercial transactions.² Finally, multidisciplinary efforts now seek to map more broadly the components and dynamics of exchange relationships that are central features of commerce in America.³

In furtherance of multidisciplinary research, this article empirically explores the exchange relationship between lawyers and their clients with particular attention on the variables of experience and practice specialty. The lawyers' perceptions of client relationships are preliminarily analyzed in terms of their discrete or relational properties and their distribution within experience segments within the firm. Enriched understanding of these matters can assist both lawyers and their clients in crafting more efficient and effective exchange relationships here viewed as critical to commercial activities.

II

THE ESSENCE OF COMMERCE IS EXCHANGE

Contemporary commerce is increasingly global and short cy-

¹ See, e.g., ROBERT L. NELSON, *PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM* (1988).

² See, e.g., Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297 (1978).

³ See, e.g., Jan B. Heide, *Interorganizational Governance in Marketing Channels*, J. MARKETING, Jan. 1994, at 71.

cluded. Technology and politics are largely shaping these dimensions, but the efficiencies of market dynamics have provided much of the underlying organizational structure. The pervasive dependence upon these "markets" to organize commercial activity, subject to government mediation, has many implications for lawyers and the practice of law. Markets imply exchanges among institutional and individual entities with differing cultural, political and economic perspectives. In turn, exchanges within the context of these differences require translation services by persons with special vocabularies, knowledge and perspectives. Lawyers and the institutions and processes of the law are critical features of this translation infrastructure, which has been examined from a variety of perspectives.⁴ In fact, whole legal movements have emerged from these analytical perspectives.⁵

However, such movements and their byproducts are of second order importance compared to the dynamics of the exchanges between the institutions and entities that are the principals. The contemporary, first order importance of exchange dynamics is signalled by the exponential increase in business scholarship during the last five years on all aspects of the exchange process. This scholarship also extends to new business forms such as interorganizational networks,⁶ dynamic networks,⁷ alliances,⁸ virtual corporations,⁹ competitor partnerships¹⁰ and coalitions.¹¹ The richness of this scholarship and its salience since the 1960s reflect the enduring importance of the exchange process in commerce.¹²

⁴ For sample analyses of the process as regards corporate and administrative law, see generally Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984); Sandra M. Huszagh & Fredrick W. Huszagh, *Production and Consumption of Informal Law: A Model for Identifying Information Loss*, 13 GA. L. REV. 515 (1979); Sandra M. Huszagh & Fredrick W. Huszagh, *A Model for the Law Communication Process: Formal and Free Law*, 13 GA. L. REV. 193 (1978); Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 538-43 (1994).

⁵ See, e.g., *Pedagogy of Narrative: A Symposium*, 40 J. LEGAL EDUC. 1 (1990).

⁶ Hans B. Thorelli, *Networks: Between Markets and Hierarchies*, 7 STRATEGIC MGMT. J. 37 (1986).

⁷ Raymond E. Miles & Charles C. Snow, *Organizations: New Concepts for New Forms*, CAL. MGMT. REV., Spring 1986, at 62.

⁸ Kenichi Ohmae, *The Global Logic of Strategic Alliances*, HARV. BUS. REV., Mar.-Apr. 1989, at 143.

⁹ John Byrne et al., *The Virtual Corporation*, BUS. WK., Feb. 8, 1993, at 98.

¹⁰ Rashi Glazer, *Marketing in an Information-Intensive Environment: Strategic Implications of Knowledge as an Asset*, J. MARKETING, Oct. 1991, at 1.

¹¹ Ravi S. Achrol, *Evolution of the Marketing Organization: New Forms for Turbulent Environments*, J. MARKETING, Oct. 1991, at 77.

¹² For excellent coverage of this literature see F. Robert Dwyer et al., *Developing*

III

MULTI-DISCIPLINARY ORIGINS OF EXCHANGE THEORY

Pioneering researchers on interpersonal relations and group behaviors, conflict as a strategy, power dependence in social relations and exchange and bargaining in courtship defined the intellectual foundations of exchange theory.¹³ The advantages of using the exchange construct as the crux of research efforts are fourfold: first, for two or more parties it centers on a "focal event"; second, the exchange itself is a reference point for tracing participating entities and individuals; third, concentrating upon the exchange reveals the nature of the value transferred; and finally, as an organizing construct, it provides a window into conditions which precede and processes which accompany the event.¹⁴

Legal statutes, cases and documents memorialize the exchange process. In contrast, business literature defines the dynamics of the process, especially those associated with manufacturer-distributor and franchisor-franchisee type relationships. These accounts rely heavily upon the social sciences such as economics and social psychology to construct multiple topologies regarding content, evolution and consequences. Currently, the topologies of content and consequences enjoy greatest consensus. They are derived from both microeconomic and the behavioral paradigms.¹⁵

The microeconomic paradigm posits the exchange process as driven by economic efficiency maximized by perceptive choices between internal and external organization, although economists differ as to the types of costs shaping the organizational decision.¹⁶ While widely used, the paradigm's "black box" approach to human behavior obscures the processes that characterize exchange partner interaction. The behavioral paradigms that focus on matters such as the deployment of power accord these ex-

Buyer-Seller Relationships, J. MARKETING, Apr. 1987, at 11; Shelby D. Hunt, *General Theories and the Fundamental Explanada of Marketing*, J. MARKETING, Fall 1983, at 9.

¹³ THOMAS C. SCHELLING, *THE STRATEGY OF CONFLICT* (1963); JOHN W. THIBAUT & HAROLD H. KELLY, *THE SOCIAL PSYCHOLOGY OF GROUPS* (1959); Richard M. Emerson, *Power Dependence Relations*, 27 AM. SOC. REV. 31 (1962); Michal M. McCall, *Courtship as Social Exchange: Some Historical Comparisons*, in KINSHIP AND FAMILY ORGANIZATION 190 (Bernard Farber ed., 1966).

¹⁴ See Dwyer et al., *supra* note 12, at 11.

¹⁵ Heide, *supra* note 3, at 72.

¹⁶ See generally OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975).

change processes great salience, but give scant attention to the processes' antecedent conditions, outcomes and the contextual variables that legal scholars now view as highly important.¹⁷

Within the shared milieu of these separate paradigms reside discrete theories dealing specifically with the exchange process. Resource dependency theory asserts that few individuals or organizations are truly self-sufficient, which prompts individuals and entities to establish exchange relationships that enhance resource predictability as to timing and availability.¹⁸ While this theory is not insensitive to key antecedent conditions that stimulate and shape exchange relationships, or to contextual variables influencing the effectiveness of particular organizational arrangements, it ignores efficiencies associated with alternative dependency structures.

More familiar to legal scholars is transaction cost theory which focuses on issues such as transaction-specific investments and uncertainty to assess the efficiency of alternative exchange governance systems. The efficiencies of alternative systems are often gauged by their capabilities for safeguarding, adaptation and evaluation. The evaluation issue is especially important to exchanges encompassing legal services where information asymmetry and the resulting performance ambiguity pose a significant problem. Each component of this theory has been analyzed by scholars who have long been associated with business law contexts, and thus their work is most easily assimilated by lawyers wishing to understand the intricacies of exchange relationships.¹⁹

The main deficiencies of the transaction cost theoretical approach to understanding exchange relationships are two implicit assumptions. First, the approach maintains the superiority of internal organization as regards the above-noted issues of safeguarding, adaptation and evaluation, even though these benefits

¹⁷ For example, many recently published legal ethics casebooks devote considerable attention to the differing ethical obligations of lawyers associated with different contextual environments of domestic relations, criminal, or class action practice areas. See GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 747-854 (2d ed. 1994); ANDREW L. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 283-346 (3d ed. 1989); DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY-ETHICS BY THE PERVASIVE METHOD* 463-864 (1994).

¹⁸ The origins of this theoretical approach can be traced back to organizational research classics like RICHARD M. CYERT & JAMES G. MARCH, *A BEHAVIORAL THEORY OF THE FIRM* (1963).

¹⁹ Two seminal works illustrative of this form of scholarship are: Klein et al., *supra* note 2; Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 *YALE L.J.* 698 (1982).

of bureaucratic organization are obtainable with contractual strategies. The second major deficiency is its insensitivity to the social structures surrounding the hosts of the exchange.²⁰

The most fully articulated exchange theory with regard to lawyer facilitated exchanges is relational contract theory pioneered somewhat independently by two law professors.²¹ By classifying exchanges within a continuum bounded by the characteristics of discreteness and relationality, the foremost legal scholar on relational exchange has crafted an exchange construct that gives remarkable prominence to the historical and social context in which nondiscrete exchanges take place.²² Moreover, the classification anchors many of its core premises within the context of both resource dependency and transaction cost theories.

Despite its richness with respect to exchanges implicating legal services, where performance ambiguity presents major challenges, relational contracting theory provides few indicators of the contours of its effectiveness in diverse operating contexts. This gap raises a significant concern for business lawyers serving corporate client's varied range of relationships with an array of capital, material and labor suppliers as well as downstream customers. Conversely, its implicit and explicit deployment of ephemeral concepts like trust and ethics²³ makes it the construct of choice for understanding the deep structure of legal services delivery in dynamic, multicultural settings.

IV

REVIEW OF CONTINUUM AND ASSOCIATED RESEARCH

Building upon this plethora of theories about various aspects of the exchange process in diverse business settings such as manufacturer-supplier, manufacturer-distributor, manufacturer-retailer and franchisor-franchisee, several business scholars have delineated and documented detailed topologies of the exchange process. In 1987, Dwyer, Schurr and Oh, using primarily Mac-

²⁰ See Heide, *supra* note 3, at 73-74.

²¹ Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978).

²² IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483.

²³ See Gregory T. Gundlach & Patrick E. Murphy, *Ethical and Legal Foundations of Relational Marketing Exchanges*, J. MARKETING, Oct. 1993, at 35, 41-42.

neil's dichotomy of discrete and relational exchange, catalogued their respective situational and process characteristics and then proposed the evolutionary phases associated with relational exchanges.²⁴ They identified five phases: awareness,²⁵ exploration,²⁶ expansion,²⁷ commitment²⁸ and dissolution,²⁹ and pointed

²⁴ See Dwyer et al., *supra* note 12. In this seminal work, conceived as a "framework for relationship development," *id.* at 20, we note that while the authors' model is introduced by their distillation of Macneil's dichotomy of discrete and relational exchange, the model's articulation does not reflect progress toward Macneil's solidarity ideal. Instead, the model might be seen as a "blowup" of a vertical point at a prototypic relational intersect along the horizontal continuum. As indicated by the model phases, lateral movement will occur as the parties either digress or progress toward more discrete or more relational endpoints of the continuum.

²⁵ The model's awareness phase involves no interaction between parties, but reflects one party's recognition that another party is a plausible exchange partner. While physical proximity or prior exposure may trigger awareness, and "positioning" to increase each party's attractiveness may occur, all actions in this phase are unilateral and precede the actual exchange process. *Id.* at 15-16.

²⁶ Within the second phase of relationship development, namely exploration, bilateral interactions between the parties may result in increasing commitment as the various subphases transpire. However, the fragile nature of the exploration phase can terminate the relationship should commitment not be accompanied by the parties' mutual investments whose outcomes may then contribute to increasing interdependence. Mutual investments are evidenced through communication of and accommodation to changing "wants, issues, inputs, and priorities." *Id.* at 17. Interdependence increases when the parties to such investments perceive the just exercise of power and the ascendance of mutual rather than strictly individual interests. *Id.* As this phase matures, the parties set forth norms to guide future interactions and, most importantly, form assessments about the trustworthiness of each other through direct experience. *Id.* at 17-18. For example, assessment may be made based on whether promised obligations are fulfilled. In sum, the exploration phase enables "each party to gauge and test the goal compatibility, integrity, and performance of the other." *Id.* at 18.

²⁷ The third phase, expansion, involves a widening of the relation's benefits and deepening of the parties' interdependence achieved in the expansion phase. *Id.* Differentiating this phase from expansion, however, is the penchant for risk taking, accompanied by commitment to relationship maintenance, particularly since performance results may limit the number of substitute partners. *Id.* In addition, the parties' "perceptions of goal congruence and cooperativeness lead to interactions beyond those strictly required at the outset." *Id.*

²⁸ As the fourth and "most advanced phase of buyer-seller interdependence," commitment is marked by the parties' satisfaction and an underlying promise of continuity in the relationship. *Id.* at 19. While parties are still aware of optional partners, even those substitute partners who could bring to the relationship equal benefits are most often precluded. In sum, "[c]ustomer (seller) loyalty is achieved." *Id.* The strong mutual dependence between exchange partners is effectively reinforced by "value structures and contractual mechanisms that ensure its durability." *Id.* at 20. Proposing their own indicators of commitment, Dwyer et al. criticize the concepts of solidarity and cohesion for their vagueness and lack of susceptibility to measurement. *Id.* at 19. Although they reference Macneil's conception of organic solidarity as consisting "of a common belief in effectiveness of future exchange," the

to research literature supporting each phase and its associated subphases. The exploration, commitment and dissolution phases all have enormous implications for both the service relationship between lawyer and client and the lawyer's role in facilitating the exchange relationship between client entities and third parties. Subsequently, Gundlach and Murphy further articulated the continuum of exchange classes looking at their temporal utilities, strategic qualities and major outcomes.³⁰ More importantly, the authors linked elements of the continuum with major law system developments,³¹ especially those associated with ethically based

authors propose inputs, durability and consistency as criteria which can measure the commitment phase. *Id.* (quoting MACNEIL, *supra* note 22, at 95). We briefly recapitulate each measure: Inputs exchanged are substantial and diverse ranging from economic to emotional in content; durability presages investment by the parties over time in the relationship within an environment conducive to relationship maintenance; and consistency applies to the dedication of inputs to maintain the relationship. *See id.*

²⁹ In the final phase, dissolution, the authors present a four-stage model which describes the underlying processes accompanying this phase. *Id.* at 20. Triggered by one party's dissatisfaction, the first stage is a unilateral cost/benefit analysis; the second, interactive stage involves bilateral negotiation of disengagement; in the third, the dissolved relationship is announced publicly; and finally, "social and psychological recovery from the breakup" ends the process. *Id.*

³⁰ *See* Gundlach & Murphy, *supra* note 23. The Gundlach and Murphy continuum classifies exchange into the two poles of transactional and relational, with contractual as an intermediate form. *Id.* at 36. Elements of each exchange form are presented comparatively and include: duration of the relation and linkage of transactions; situational and strategic aspects such as investments required, costs of switching to alternative exchange partners, intent and substance of exchange; and outcomes which range from extent of interdependence to sharing of benefits and burdens. *Id.* A major contribution of this work is the further articulation of contractual exchange forms within the continuum. *Id.* at 37. Simple contractual exchange is positioned at the transactional pole of the continuum with autonomously created interfirm/interparty entities at the relational end. *Id.* Between these two polar forms are traditional business-to-business and business-to-consumer exchanges such as contracts between franchisor and franchisee or legal services provided to consumers and the less conventional interfunctional coalitions such as strategic partnerships among business entities by business function and, in the consumer domain, child care services. *Id.*

³¹ The authors profile the three exchange forms and examine "the increasing impact and importance of ethics and the declining significance of contract law as one moves toward relational exchange." *Id.* at 40. First, with transactional exchange, classical contract law principles are predominant given this form's elements of short duration, infrequency, simplicity and directness. *Id.* at 40-41. These elements place transactional exchanges into the context of "contract law's 'offer,' 'acceptance,' and 'performance' criteria." *Id.* at 41. The second form, contractual exchange, unites both contract law and ethical principles since the inherently complex duties call for "more than just principles of modern contract law." *Id.* Ethical principles provide guidance when there are gaps in contract provisions. With the third form, relational exchanges, "[t]heir long-term, complex nature requires administrative mechanisms

precepts of trust, equity, responsibility, and commitment.³² Such precepts are of pivotal importance in sustaining highly relational exchanges which Macneil characterizes as imbued with reciprocity and solidarity.

The continuum from discrete transactional exchanges to highly relational exchanges, characterized by the highest level of fiduciary commitment among exchange partners, has most recently been conceptualized as arranged around three morphologies.³³ Each form shares three basic phases; the differences among the three are elucidated by comparing governance processes during the phases of relationship initiation,³⁴ maintenance³⁵ and

not found in contract law." *Id.* While a contract is in place, the parties' reliance on ethical principles permits the relation to be responsive to change and to evolve. The context for such relations is highly competitive market conditions, which have led firms to forge closer links with customers, suppliers and even competitors. Such cooperative endeavors have contributed to "an increasing emphasis on highly ethical relationships." *Id.*

³² *Id.* These ethical constructs are cited by the authors as critical to relational exchange and as requisites to "fair and open exchanges." *Id.* At the core of human exchange is the first construct, that of trust, which reflects belief by the parties that each will fulfill commitments embodied in and coordinated through an exchange arrangement. *Id.* Essentially a prerequisite for relational exchange, trust can also assist parties when interests conflict. As the second construct, equity or fairness can be tied to the concept of distributive justice. *Id.* at 42. Lawsuits by exchange partners can result when there are perceptions of inequity about "the value and relevance of participants' inputs and outcomes." *Id.* The third construct, responsibility, is linked to the individual parties' duties to lead, delegate, communicate and motivate when serving in a managerial/leadership role. *Id.* Ethical practices in each of these duties are necessary in relational exchange. For the fourth construct of commitment to be credible, there must be trust, equity and responsibility existing between the parties. *Id.* Commitment must also entail willingness to work out differences, which moves the parties "beyond a strictly utilitarian evaluation of the situation's costs and benefits." *Id.* Indicative of the parties' pledges to continue the relation, commitment increases when accompanied by communication and risk-taking on a bilateral basis. *Id.*

³³ See Heide, *supra* note 3. Heide first distinguishes among three governance forms based on whether they represent market governance, here viewed as analogous to discrete exchange, or nonmarket governance. *Id.* at 74. Next, he breaks with tradition, and posits that nonmarket governance can operate in a bilateral or a unilateral fashion. Drawing on an extensive literature review, Heide asserts "nonmarket governance is a heterogeneous syndrome" with the bilateral relation governance being one "in which the parties jointly develop policies directed toward the achievement of certain goals." *Id.* Organization in the unilateral relation, on the other hand, is "by means of an authority structure that provides one exchange partner with the ability to develop rules, give instructions, and in effect impose decisions on the other." *Id.*

³⁴ Under market governance, there is no required initiation process; the assumption is that exchange parties' identities are immaterial. *Id.* at 76. In contrast, for hierarchical and bilateral governance forms, the entry processes are selective. The bilateral form is, however, more exacting "in that the initial evaluation could involve

termination.³⁶

This latest iteration of the exchange continuum and its predecessors highlights the importance of the termination process by giving it equal stature with the initiation and maintenance of the

assessments of not only skills or qualifications but also certain attitudes or values." *Id.* This requires substantial investments at the outset directed "to eliminate goal divergence" which over time may translate into reduced costs in maintaining relations. *Id.* Selectivity in initiating relationships and the associated investments in screening also apparently increase when "performance ambiguity and transaction-specific assets" are in place. *Id.*

³⁵ Contrasts among the six governance subprocesses of the relationship maintenance phase will be drawn from hierarchical and bilateral governance forms given their fit with our research context. First, *role specification* in the hierarchical context involves the specification and assignment of roles to exchange parties by authority. *Id.* In the bilateral form, there is increased complexity, multidimensionality and integration of exchange parties' roles. *Id.* Second, *planning* in the hierarchical form is concentrated in the hands of one of the parties and characterized by "formalized contingency plans." *Id.* With the bilateral form, planning is decentralized and viewed as "frames of reference rather than strict specifications of duties." *Id.* at 77. Bilateral conceptions of planning appear to be activated by the presence of transaction-specific assets. Thomas M. Palay, *Comparative Institutional Economics: The Governance of Rail Freight Contracting*, 13 J. LEGAL STUD. 265, 285 (1984). Third, *adjustment processes* in hierarchical governance are built in explicitly while with bilateral governance, the parties turn to negotiation and implementation of changes as environmental shifts occur. Heide, *supra* note 3, at 77. Fourth, under hierarchical governance *monitoring procedures* to determine compliance are focused on external behavior at the time of task completion. *Id.* This is in contrast to bilateral governance, under which the socialization process and agreed upon internal controls serve to monitor compliance. *Id.* However, in both forms, difficulties either in monitoring or measurement may require supplements or teaming of monitoring procedures. *Id.* Fifth, the *incentive system* in the hierarchical form rewards performance outcomes and actual observations of behavior. *Id.* at 76. In bilateral governance, incentives are less tied to performance outcomes, since attitudes reflecting commitment to the system are also critical to the reward system. "In practice, this implies that incentive systems become inherently long term in nature, and parties could forego present rewards on the basis of expectations of long-run equity." *Id.* at 77. Sixth, and finally, while both hierarchical and bilateral forms rely on *enforcement mechanisms* internal to the relationship, there are distinct differences between the two governance forms. *Id.* at 78. With the hierarchical form, the basis of enforcement is direct controls with authority legitimated through contract. *Id.* In comparison, with bilateral governance the relationship itself provides the enforcement mechanisms. *Id.* However, the processes for enforcement in the bilateral form can differ depending on the contours of the relationship itself. To illustrate, the need for explicit enforcement could be relatively low when common values are in place. Furthermore, when the parties expect and value future relations, there may be incentives for flexible enforcement of contract terms. *Id.*

³⁶ In Heide's topology "bilateral governance is based on entirely open-ended relationships, with no finite or foreseeable termination points." *Id.* The hierarchical form can range from open-ended, such as in the context of total vertical integration, to explicit statements, as in the context of various interfirm contracts where timing of start-up and termination is defined. *Id.*

exchange relationship. It also magnifies the essential elements for exchange relationship maintenance and signals the lawyer's emerging importance in maintaining exchanges in addition to creating and destroying exchanges. These responsibilities have assumed increasing importance and include governing client exchanges with other parties through optimizing role specification, planning, adjustment, monitoring, incentive mechanisms and enforcement.

The most important impact of the above developments is the emerging consensus on both the end points and key points of the exchange continuum and the intellectual heritage of these points in theory and empirical research. This consensus, in turn, exposes the evolutionary complexities of the exchange process which lawyers must confront daily to enhance both client interests and the ultimate social utility of client actions.

V

TAXONOMY OF EXCHANGES IN CORPORATE CONTEXT

The above theoretical literature on exchange, with illustrative empirical efforts, has its chronological counterpart in macro-level analysis. This macro analysis is derived primarily from observation of the exchange process in action. Porter's "Five Forces Model" established the broadest, business specific framework which is both industrially and culturally sensitive.³⁷ Research focused on the legal facets of the business domain was mainly pursued through the lens of economics and sociology. Typical of the former was the work of Klein, Crawford and Alchian, which concentrated on the maintenance of long-term relationships without resort to hierarchical or bureaucratic structure.³⁸ Additionally, selective works specifically analyzed the lawyer's role in business exchanges from a transaction cost perspective.³⁹ Investigations of the lawyer's role in such relationships, emanating from the sociological end of the social science continuum, often examined business relationships in their broader social context.⁴⁰ In recent

³⁷ MICHAEL E. PORTER, *COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS* (1983).

³⁸ See Klein et al., *supra* note 2.

³⁹ See Gilson, *supra* note 4.

⁴⁰ See generally, ROGER COTTERELL, *THE SOCIOLOGY OF LAW* (2d ed. 1992); Marc Galanter, *Mega-Law and Mega-Lawyering in the Contemporary United States*, in *THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS, AND OTHERS* 152 (Robert Dingwall & Philip Lewis eds., 1983); JOEL F. HANDLER, *THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED CITY* (1967); JOHN P.

years, study of the lawyer's role in such exchanges has been increasing, with considerable emphasis on the mediating influence of ethical constraints unique to the profession.⁴¹ Collaterally, theoretical research in the business domain has sought to explore the significance of ethically based legal variables in various business exchange environments.⁴²

Systematic study of diverse business exchanges involving lawyers is arguably best premised on a model that is contextually sensitive and salient to both central parties in business exchanges and the lawyers that service such parties. The Porter construct, augmented by the insights of marketing and legal scholars like Gundlach and Murphy, Kaufmann and Stern, and Painter,⁴³ provides just such a model.

VI

SPATIAL MODEL OF EXCHANGE RELATIONSHIPS

Deployment of exchange theory to understand the lawyer's role in diverse business contexts requires cognizance that such theory focuses solely on dyadic relationships between principal parties, and their respective resources, skills and values. This raises two immediate challenges. First, the disparate resources, skills and values of parties involved in the myriad of normal business relationships must be classified in terms of the operative variables of exchange theory such as contingency planning, monitoring and enforcement.⁴⁴ Second, relationships among operative variables posited by exchange theory must be modified to account for the lawyer's "independent" role in "servicing" these relationships. Significant progress in resolving both problems

HEINZ & EDWARD O. LAUMAN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982); John P. Heinz & Edward O. Lauman, *The Organization of Lawyers' Work: Size, Intensity, and the Co-Practice of the Fields of Law*, 1979 AM. B. FOUND. RES. J. 217.

⁴¹ See generally, Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988); Painter, *supra* note 4, at 538-43.

⁴² See Gundlach & Murphy, *supra* note 23, at 39-44.

⁴³ See Gundlach & Murphy, *supra* note 23; Patrick J. Kaufmann & Louis W. Stern, *Relational Exchange Norms, Perceptions of Unfairness, and Retained Hostility in Commercial Litigation*, 32 J. CONFLICT RESOL. 534 (1988); Painter, *supra* note 4, at 538-43.

⁴⁴ Even existing theory is deficient since it fails to distinguish precisely between entities and their implementing agents in the relationship. See generally, Dwyer et al., *supra* note 12; Heide, *supra* note 3, at 81-82. Our work raises this question in a more pressing manner by showing the extensive involvement of "independent" third parties, lawyers, who are intermediaries within traditional dyadic relationships in business contexts.

can be achieved by categorizing these myriad relationships and their accompanying lawyer impactedness regarding the critical dimensions of exchange theory. Porter's Five Forces Model⁴⁵ and the theory of firm literature⁴⁶ provide considerable insights for organizing this task by major participants in each dyad. Select legal scholarship can then be employed to capture the extent of lawyer impactedness in specific dyadic interactions.

Porter characterizes a business enterprise's critical operating environment as composed of suppliers, buyers, the firm and its competitors, new entrants and substitutes.⁴⁷ Using basic theory of the firm literature to spatially organize this environment, the following three dimensional model was synthesized.⁴⁸ The next step is to annotate this model with the laws, regulations, structure and processes crafted and maintained by lawyers. The annotated model then provides a framework for defining basic dyadic relationships in the general business environment where lawyers play critical roles in the initiation, maintenance and termination of business exchanges.⁴⁹

⁴⁵ See PORTER, *supra* note 37, at 3-33.

⁴⁶ See generally, RICHARD A. POSNER & KENNETH E. SCOTT, *ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION* 2-66 (1980); W. DUNCAN REEKIE, *INDUSTRIAL ECONOMICS: A CRITICAL INTRODUCTION TO CORPORATE ENTERPRISE IN EUROPE AND AMERICA* 153-71 (1989). For an exemplary specific application see Paul H. Rubin, *The Theory of the Firm and the Structure of the Franchise Contract*, 21 *J.L. & ECONOMICS* 223 (1978).

⁴⁷ See PORTER, *supra* note 37, at 3-33.

⁴⁸ This model is a summary of a more fully annotated model used as an instructional aid in University of Georgia Law School courses on Law Firm Economics and Capital Utilization offered since 1984.

⁴⁹ Relevant here, for example, is Easterbrook's discussion of "off-the-rack" rules to govern relationships that are not susceptible to treatment as "discrete relationships." See Easterbrook & Fischel, *supra* note 19, at 700-03.

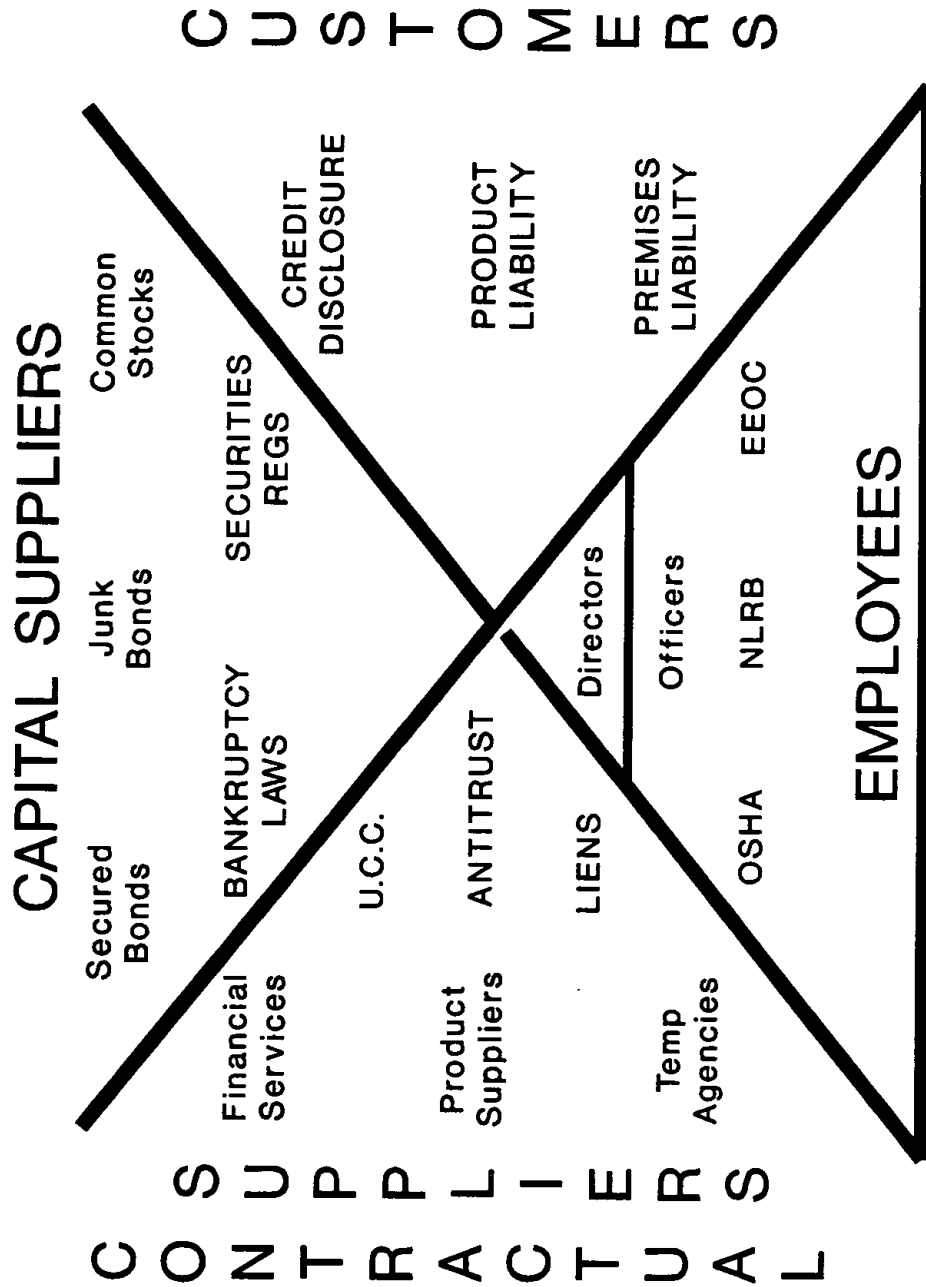


Figure 1

Annotating this model may prove enlightening. For example, Gilson articulates the merger and acquisition (M&A) lawyers' roles in serving both dyadic principals of the M&A process and those of competing intermediaries in the information business, such as accountants and investment bankers.⁵⁰ Similarly, Gordon and Painter survey lawyers' involvements in diverse areas of the model, such as relations with various classes of employees and capital providers.⁵¹ These works are especially useful in understanding the impact of professional ethics and mores upon faithful representation of the two principals' interests in a particular discrete or relational exchange. In fact, the latter two works have special value, since they provide proxy measures of the extent to which the use of lawyers as agents can distort the normal functioning of the exchange relationship between two principals. In sum, sources such as these contribute rich qualitative data on important elements of particular classes of exchange relationships. Further, since the relationships are examined in their substantive contexts, uniquely valuable information is provided about lawyers as professional facilitators of exchange.

VII

SPECIAL PROBLEMS AND ADVANTAGES OF LAWYERS IN THE EXCHANGE PROCESS

As noted earlier, contemporary scholars present the traditional exchange continuum as bounded by two types of exchanges. At one end are "discrete exchanges" involving no relationship beyond an exchange of finite amounts of money and a commodity at a finite moment in time, as in a stand-up auction.⁵² At the other end are "relational exchanges," which in their most advanced form are ethically defined, value exchanges of indefinite duration characterized by high levels of future interdependence.⁵³ In such exchanges, satisfaction measures focus as much on the quality of the relationship as the anticipated exchanges of material value. Ideally, relational exchange types and hybrids within the continuum are consummated by principals for their own accounts without aid from agents or intermediaries.

The operating constructs of the continuum extremes are equally diverse. The discrete exchange relies on pure market

⁵⁰ See Gilson, *supra* note 4.

⁵¹ See Gordon, *supra* note 41; Painter, *supra* note 4.

⁵² See Dwyer et al., *supra* note 12, at 12.

⁵³ See *id.* at 12-13.

principles while the relational exchange, and to varying extents the hybrids, substitute a rich mix of ethical and value synchronizing operating principles representative of nonmarket governance. There are bilateral variations of nonmarket governance "in which the parties jointly develop policies directed toward the achievement of certain goals" and hierarchical variations in which the relation is governed unilaterally "by means of an authority structure."⁵⁴ Lawyers service both bilateral and hierarchical exchange systems.

Within the corporate business environment modeled earlier, both bilateral and hierarchical governance systems are engaged, despite significantly different requirements for making operative relationship initiation, maintenance and termination. Moreover, a single law firm is often responsible for implementing critical elements of each type of governance system for a particular principal. This research empirically explores the characteristics of law firm personnel who effectively service these two significantly different exchange systems simultaneously.⁵⁵

VIII

RELATIONSHIP DYNAMICS BETWEEN BUSINESSES AND OUTSIDE COUNSEL

Business enterprise dependence upon lawyers in outside law firms, apart from the substantive content of particular professional engagements, is typified by two problems endemic to professional services in general.⁵⁶ Knowledge asymmetry masks the quality of service provided, especially during the engagement process, creating severe disadvantages for one-shot legal transactions confronting the layperson, such as complicated divorce or personal injury transactions.⁵⁷ Conversely, repeat players and business enterprises with in-house lawyers are less disadvan-

⁵⁴ See Heide, *supra* note 3, at 74.

⁵⁵ In contrast, in-house counsel only infrequently undertake the diverse range of responsibilities regarding both classes of governance systems. Of course, there are many other areas involving legal services, such as taxation, environmental compliance and oversight of routine Securities and Exchange Commission filings, where such incompatibility of ethical standards is not prevalent and thus in-house staff would be highly functional.

⁵⁶ See David E. Bowen & Gareth R. Jones, *Transaction Cost Analysis of Service Organization-Customer Exchange*, 11 ACAD. MGMT. REV. 428 (1986).

⁵⁷ For elaboration on the plight of the "one-shot" client, see Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

taged, if at all.⁵⁸ Obviously, escalating malpractice litigation, competition among legal service providers, law practice technology and performance based billing are combating this problem, along with invigorated enforcement of professional standards by bar associations and the courts. However, competition equipped with contemporary “work flow” technologies should prevent inadequate performance abetted by such asymmetry.

A more obvious problem, highlighted by hourly billing practices, is goal incongruity. Simply put, the lawyer often seeks fee maximization while the client covets the opposite result. Similarly, the lawyer seeks to reuse knowledge derived from a specific engagement, but the client may be directly or indirectly disadvantaged by such use. Traditionally, legal ethics regarding conflicts of interests, loyalty and confidentiality have been mechanisms for containing this problem and still continue to be highly important in this regard. In the business environment, various forms of cost-of-service based billing and technology designed to track information flows will also measurably constrain the adverse impacts of such incongruity.

The impacts of knowledge asymmetry, also called “performance ambiguity,” and goal incongruity upon the lawyer’s involvement in exchanges among business principals are mediated by the degree to which such involvement embodies professional services and their ethical overlays. Thus, the extent to which the lawyer must be viewed as operating somewhat independently of agency principles in representing client interests depends on whether the services are informational or representational. If only informational, then the principal receiving the information could be viewed as acting on his/her/its own account in the exchange relationship with another principal.

Representational services, however, encumber both hierarchical and bilateral exchanges with an independent relationship between principal and agent controlled by forces beyond the principal. In the case of the legal profession, with its well developed and increasingly enforced ethical structures, this intervening factor can only have a significant confounding impact upon the exchange relationship. As has been noted earlier,⁵⁹ existing

⁵⁸ For detailed economic analysis of the consequences of such information asymmetry for corporations with in-house counsel, see Jack Carr & Frank Mathewson, *The Economics of Law Firms: A Study in the Legal Organization of the Firm*, 33 J.L. & ECON. 307, 328-29 (1990).

⁵⁹ See *supra* note 44.

literature has not contemplated this factor which represents a "relationship within a relationship" dilemma. Material distortions in traditional exchange theory are posed by this dilemma, especially in the application of such theory to exchanges which are bilateral as opposed to hierarchical.

Unfortunately, the intervening impacts upon exchanges of these nested relationships are not only a function of the representational nature of the lawyer's involvement. Demographic differences among lawyers themselves can result in significant variations in how such representation creates dynamics not reflective of the principal's resources and interests. Two differences likely to result in the greatest variations are: the lawyer's level of maturation from law school to law firm defined practice and ethical standards, and the variants of those standards dictated by peculiarities of specific legal specialties. Such level of maturation is likely to be associated with years of practice and the extent of alignment between firm and practice area values and those of the individual lawyer. Some managing partners of firms over fifty lawyers have observed that generally this maturation from law school educational standards to firm and practice area standards occurs within the first four years of the associate's apprenticeship.⁶⁰

IX

TWO FIRMS IN PERSPECTIVE

From 1989 to 1991, lawyer-assisted relationship creation, maintenance and termination was empirically explored by the authors. Extensive interviews were conducted with four southeastern firms of fifty to one hundred lawyers with predominantly business oriented practices. The data collection instrument was pretested with a major regional, general corporate practice firm. The data presented herein was collected from two firms with highly similar practice demographics as regards size, number and geographic diversity of branch offices and corporate practice area specialties concerning the clients' hierarchical and

⁶⁰ Conversations with managing partners of select firms of over fifty lawyers suggest three stages in the evolution from associate to partner. The first stage involves acculturation to the firm's standards, practices and procedures. In the second stage, the attorney is immersed in gaining the appropriate knowledge and experience for discrete representation functions inherent in the practice area. The third stage is comprised of apprenticing and partner-type responsibilities without extensive partner oversight.

bilateral relationships. Moreover, the two firms often serviced similar clients and viewed many of the same firms as their reference competitors on a regional and national basis. The firms were dissimilar, however, in the state and economic milieu of their home offices, core practice development styles and internal practice management organization.

All members of the eighty plus firm and all but four of the nearly seventy lawyer firm participated in one-on-one interviews that were identically structured and averaged an hour in duration. Questionnaires deemed incomplete due to nonresponse to critical questions are excluded from the following data sets. The actual response pool comprised eighty-six percent of the total lawyer populations of both firms.

X

EMPIRICAL ANALYSIS

The nine page interview instrument embodied forty-nine basic questions, some containing up to thirty-three subparts separated into thirteen sections. The questions on practice development activities, practice attitudes and client relationships were highly detailed. Billing practices, technology use and basic demographic information were addressed in a structured but less detailed fashion. Although the resulting data was subjected to a wide variety of statistical analyses, this article reports on only those analyses that relate directly to the exchange relationship issues noted earlier.

A. *The Lawyer Within the Firm*

Figures 2-14 depict the diversity and commonality of lawyer perceptions about lawyer-client relationships within each firm on the thirteen elements of the exchange process, set forth in the Appendix, extrapolated by Dwyer et al., from Macneil's comparison of discrete transactions and relational exchanges.⁶¹ The high scale numbers reflect perceptions associated with the "relational version" of the various measures⁶² while the low numbers characterize lawyer-client relationships that are transactionally discrete and focus on objective, arms-length-type performance standards. The mean and standard deviation for each firm on each element, as presented in Tables 1 and 2, suggest the relative

⁶¹ See Dwyer et al., *supra* note 12, at 13.

⁶² See Kaufmann & Stern, *supra* note 43, at 545.

level of cohesion or diversity within the firm on these important matters and firm attorneys' "average" conception of client relations. Such diversity, or the lack thereof, may reflect one or more of many variables. Although each firm services corporate clients almost exclusively, such services embrace a wide range of relationships within the clients' operating environments. Thus, practice area idiosyncracies and their associated ethical requirements might be significant intervening variables along with individual maturation of lawyers from law school derived lawyer-client relationship perceptions to firm or practice area defined standards.

Perceptions about client relationships of lawyers who practice in specialty areas also indirectly reflect the underlying transaction between the client and the other principal in the primary exchange relationship.⁶³ Therefore, diverse perceptions among practice area specialists allow a firm to provide the client with a form of "portfolio" protection in facilitating various types of exchanges appropriate to the practice area and relationship phase (creation, maintenance or termination). Conversely, if a lawyer is assigned to service a phase of a relationship or a particular type of exchange where such perceptions might be dysfunctional, the primary exchange relationship between client and principal would be impaired. The actual statistical measures of these two firms are consistent with these observations.

A rough approximation of cohesion or diversity within each firm on specific relationship items is depicted by the standard deviation scores presented in Tables 1 and 2 and illustrated graphically by the percentage of attorney responses distributed across the scale from discrete to relational (Figures 2-14). For example, in Firm 1, perceptions about the extent of customization are the most diverse (Table 1). Nearly one-third of firm attorneys perceived their client relationships as conforming with traditional conceptions of arms-length transactions, while the majority of attorneys indicated that they tailored the relationship in response to client needs. Such diversity may in part reflect ethical tensions between the lawyers' concepts of their roles as independent professionals judged by peers according to professionally defined performance standards and as dependent profes-

⁶³ For example, if a lawyer is servicing a "permanent" commercial client whose business is highly dependent upon strategic alliances with other enterprises, then there would be a parallel in experience and perception regarding both relationships with the client and the client's exchange partners.

sionals judged by client satisfaction.⁶⁴ This explanation is compatible with the high standard deviations on three associated relationship items: the discreteness of the representation's duration; the applicability of attorney ethics and peer expectations of standards; and the extent to which case results are the sole determinants of performance evaluation.

The diversity of response may also flow, as noted earlier, from the idiosyncrasies of the lawyers' practice specializations and their individual maturation with regard to the specialization's ethical requirements and value training. For example, in the employee relations area, EEOC compliance plan representation would likely be evaluated from an independent professional perspective while union representation litigation would more likely be evaluated in terms of client satisfaction with the end result. As might be expected of a firm serving diverse needs of clients desiring repeated firm representation, perceptions about lawyer-client interdependence have the lowest standard deviation with approximately eighty percent scoring this item at five or above on the seven point scale (Table 1, Figure 5).

While the level of diversity on specific perceptions of lawyers in Firm 2 does not completely parallel those of Firm 1, the general patterns of low and high diversity among specific categories of perceptions are similar. Furthermore, on the subject of reliance on informal communication during the representation process, the lawyers of both firms showed the highest and almost identical levels of relationality (Tables 1 and 2). The relatively low standard deviations within each firm increases confidence in these results.

Clearly the sample size does not support observations more specific nor profound than those noted above, but in the aggregate these relationship perceptions reflect a relatively uniform and high level of relationality in both firms. While this is not compatible with the image of the "independent" lawyer, it is consistent with current scholarship on how such independence is inversely related to both practice area and the level of financial and value interdependence between lawyer and "repeat" client representations.

⁶⁴ See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1277-80 (1991).

B. *The Firm*

While the individual items probe attorney perceptions for specific facets of client exchanges, the firm's ability to service clients' relational exchanges depends on its collective competence regarding all phases of its clients' exchanges with others as to both substantive process skills and styles. Ideally, each lawyer's perceptions as measured by the thirteen items should collectively reflect compatibility among the lawyer's usual terms of engagement, substantive discharge of those terms and styles of lawyering. This compatibility should be most apparent in firms structured to achieve optimal results in all transaction phases of each practice area rather than in firms attempting to optimize overall results for a client across practice areas.

An exploratory factor analysis on each of the thirteen items for both firms exposed four significant dimensions accounting for fifty-six percent of the variance (Table 3). The first factor to surface relates to the lawyers' expectations about the basic terms of the engagement, and is styled "Engagement Terms." Items loading highly on this factor include low versus high interdependence, formal/informal communications, and focus of planning and evaluation. All four items fit generally in the initiation and/or termination phases of bilateral governance. In corporate practice these terms are typically set forth by the client at the outset of the engagement of outside counsel and may even be "codified" into formal guidelines.⁶⁵

The second factor reflects the lawyers' perceptions about the dynamics between parties during the work process itself. The three items which load highly on this factor, labeled the "Representation Process," are extent of customization, exercise of power and division of benefits/burdens. Such items together are descriptive of the relationship maintenance phase in the bilateral form of governance.

Factor three taps the construct of "Professional Independence" so critical to the ethics of lawyering. Items loading on this factor include: personal relations, with end points labeled "minimal personal relationships with client" and "strong personal relations with client"; conduct standards, whose discrete descriptor is "lawyer conduct guided mainly by attorney ethics and expectations of law practice colleagues," and whose relational descriptor

⁶⁵ See, e.g., Marjorie W. Doyle, *Corporate Clients: A Recipe for Successfully Keeping and Working with Them*, 10 CORP. COUNS. Q. 64, 68-71 (1994).

is “conduct dictated by ethics and conduct standards specifically applicable to client interests”; and transferability with contrasts between “it does not matter who does the work” and “relationship is heavily dependent on the identity of the lawyer doing the work” (Appendix).

Reflective of “Practice Area,” the fourth factor is comprised of only one item, number of people. The end points are labeled “only one lawyer and one person from client firm involved” and “often have more than one lawyer and one person from client entity involved” (Appendix). Although only one item loaded on this factor, the functional fit with practice area led to its retention.

C. Practice Area Coverage

Within the relationality continuum posited by Macneil, parties not opting to achieve more relational objectives through hierarchical approaches implicit in the firm may embrace a reciprocity orientation for the duration of the relationship. Another option is to begin with a reciprocity orientation and to gradually evolve the relationship into one imbued with trust and solidarity. The items embraced within Factor 1, discussed above, roughly measure the presence of a solidarity perspective⁶⁶ while Factor 2 items probe the reciprocity perspective⁶⁷ on client relationships. More specifically, the questions on contingency planning by the lawyer and how interdependency dictates judicious use of power in the representation relationship are the most direct indicators of lawyer perceptions on the extent to which one or both of these orientations characterizes their lawyer-client relationship. This assessment is consistent with how each item’s score for a particular factor contrasts with its scores for the other factors. Also im-

⁶⁶ Ian R. Macneil, *Exchange Revisited: Individual Utility and Social Solidarity*, 96 ETHICS 567 (1986). According to Macneil, “[s]olidarity or social solidarity is a state of mind or, rather, a state of minds. It is a belief not only in future peace among those involved but also in future harmonious affirmative cooperation. (An equally good word for solidarity is ‘trust.’)” *Id.* at 572. Macneil further elaborates on what sustains solidarity: “At root the answer is expectations of continued interdependence. Those expectations lead each to trust that the self-interest of the other will lead to adequate future concern for the interests of the one trusting.” *Id.* at 585.

⁶⁷ Macneil states that “reciprocity is always a ‘between’ relation . . . [that] can only perpetuate the separate economic identities of those who so exchange.” *Id.* at 584 (quoting MARSHALL SAHLINS, *STONE AGE ECONOMICS* 94 (1974)). However, the division of labor it implies generates interdependence that, in turn, leads to “active cooperation,” and “[w]orkable ways of sharing the large exchange-surplus. . . .” *Id.* at 585.

plicit in these distinctions is the judgment that a solidarity type relationship is best characterized by the parties' expectations of the basic terms of the engagement, while a reciprocity-oriented relationship is hallmarked by critical process features of the engagement.

While many elements may shape these relationship perceptions, Macneil asserts that solidarity evolves from reciprocity in a specialized exchange relationship.⁶⁸ Thus, experience could be expected to correlate positively with both reciprocity and the presence of solidarity type perceptions of lawyer-client relationships. Figures 15 and 16 map how firm attorneys have evolved by using the attorney's experience as a significant independent variable. These figures chart the distributions of these two relationship orientations among the individual lawyers in each firm and distinguish such individuals by experience as lawyers.

Apart from depicting relational maturation, relationship perceptions may reflect practice area or firm structure variables. Practice area influence has already been noted. The impact of firm structure is less obvious but could be as important. Firm 1's highly defined departments and deployment of leverage could be viewed as reflected in high relationality of most junior associates and apparent "pairing" with partner interests and perspectives. In contrast, the deliberate lack of such departmentalization in Firm 2 could result in the adoption by associates of more utilitarian relationship perspectives that have functionality in diverse practice areas and disparate client preference settings.

These figures are bounded by four orientation categories. The first, regarding simple, discrete legal transactions requiring minimal client interaction, presumably characteristic of a lawyer who represents solely "one-shotters" in the legal system, does not display affinity for the relational orientations of either reciprocity or solidarity (Reciprocity: 1; Solidarity: 1). An example of this category of transaction is the processing of a traffic ticket issued to a traveling salesman on an interstate highway. The converse category of high orientation for both reciprocity and solidarity (Reciprocity: 7; Solidarity: 7) would likely describe a lawyer drafting a complicated compensation agreement for an owner-executive of a family corporation which envisions many sensitive administrative decisions and actions in its execution over time. With the third orientation category, high reciprocity/low solidarity (Reci-

⁶⁸ *Id.* at 588.

procuity: 7; Solidarity: 1), lawyers could be expected to be involved in traditional routine transactions work while in the fourth, low reciprocity/high solidarity (Reciprocity: 1; Solidarity: 7), lawyers would likely be trusted advisors of clients regarding relationships with other individuals or enterprises where trust and character judgments are critical.

XI

OBSERVATIONS

Figure 1 spatially displays the range of exchange relationships a corporate enterprise is likely to embrace during its operating life. Initiation, maintenance and termination of most relationships will involve lawyers whose operating platform is either a law firm, corporate counsel's office or corporate operating division, such as procurement. Obviously, the content and dynamics of these multitudinous exchange relationships are highly diverse, and the effectiveness of each is dependent upon the perceptions, values, experience and resources of those who implement them.

Contemporary research posits that each relationship ought to be shaped by the parties' expectations of associated costs and benefits. These relationships can be characterized by the three vector continuum illustrated in Figure 17.

The requisite concerns regarding the initiation, maintenance and termination of each relationship are largely dictated by where the relationship's principals assess it should be located on the continuum given competitive realities. Unexpected circumstances encountered during its duration may cause some repositioning on this continuum and thus the allocation of human capital and other enterprise resources will require modification as illustrated in Figure 18.

This, in turn, may require redeployment of lawyers assigned to help craft and implement the relationship, including redistribution of responsibilities within the principal's enterprise, between the enterprise and outside counsel, or within the outside counsel firm.

Redeployment as well as initial deployment of required personnel invariably will be dictated largely by their attitudes and experience, however, the preliminary question is the criteria for selecting the appropriate operating perceptions. The research reviewed in this Article and the empirical data presented should facilitate such "perceptual" screening. Heide's topologies re-

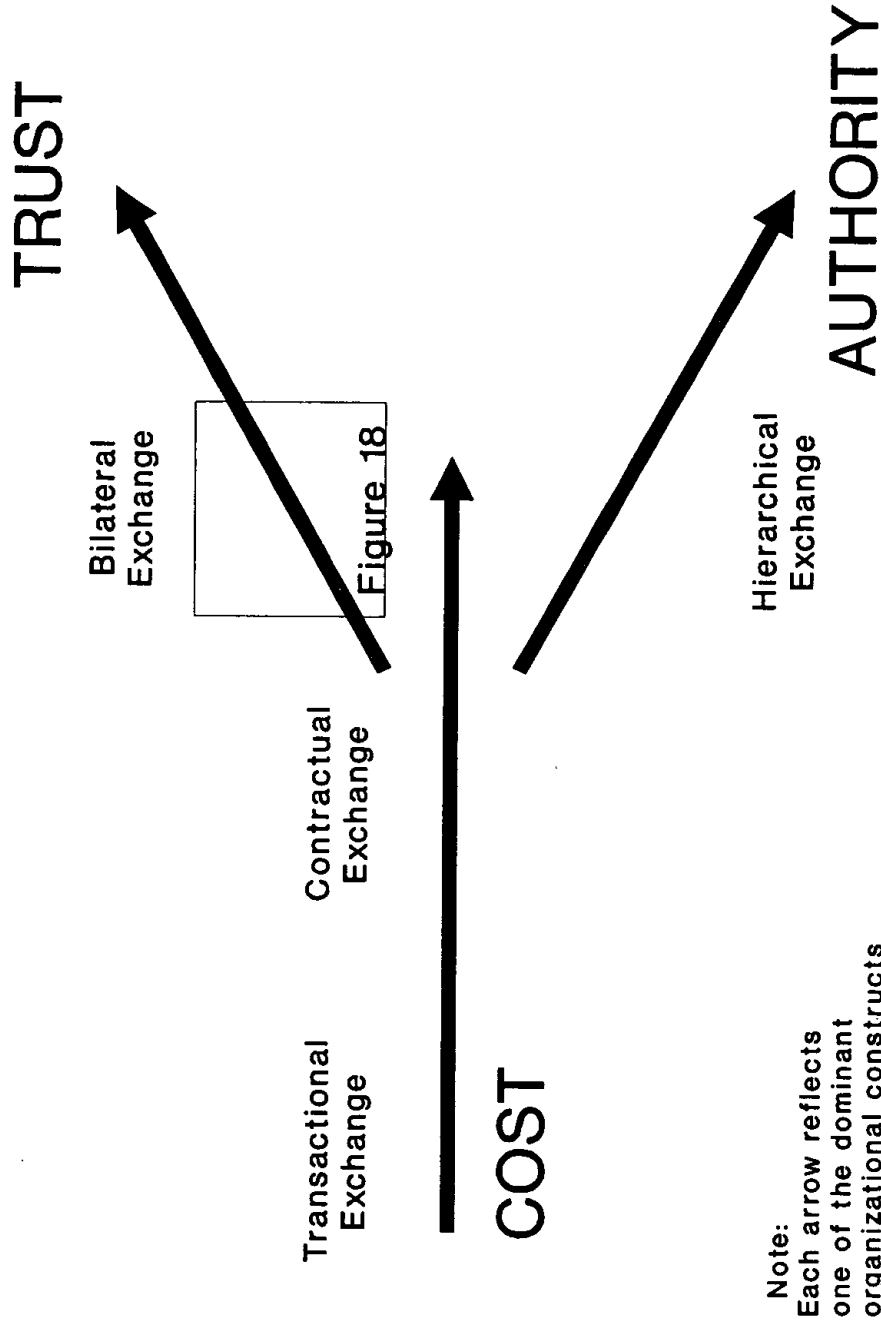


Figure 17

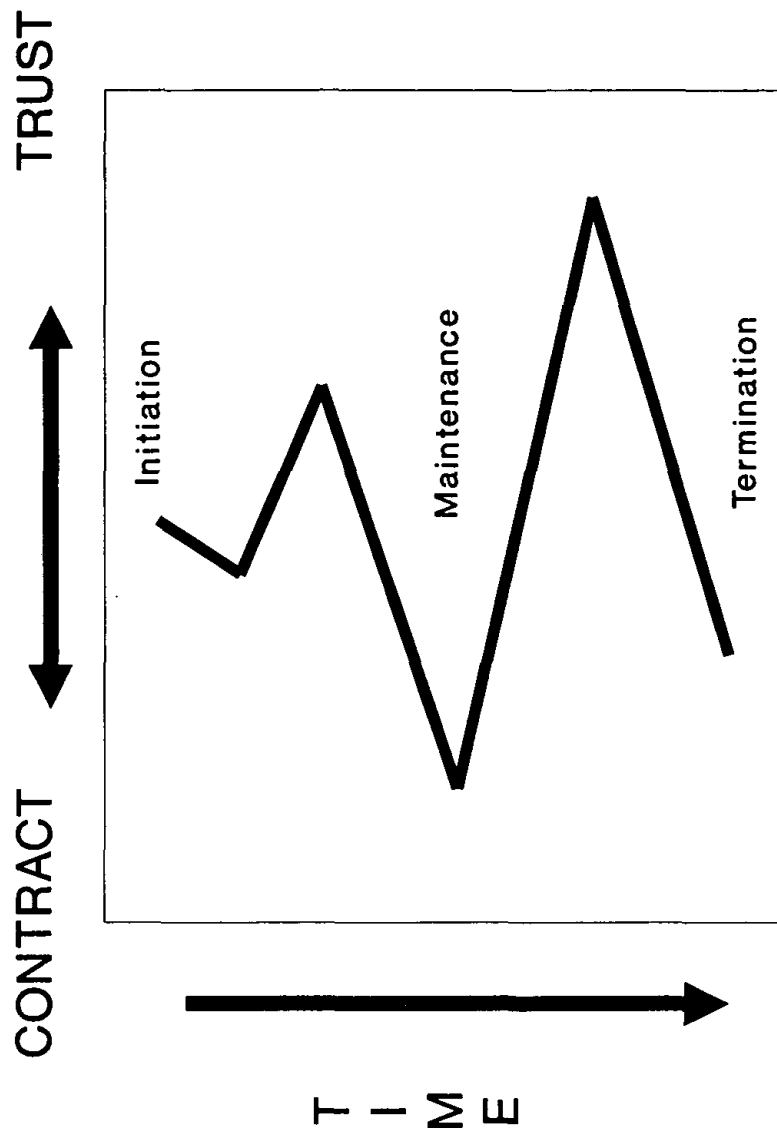


Figure 18

garding the dimensions and forms of relationship governance set forth basic criteria for relationship maintenance such as role specification, planning, adjustment, monitoring, incentives and enforcement.⁶⁹ The lawyering skills associated with each are frequently different if the principals' substantive objectives are to be achieved in a traditional market governance versus a bilateral form of nonmarket governance. Specifically, monitoring procedures for the former are normally external and reactive with reliance upon output measurements, while monitoring in the latter are normally internal and proactive with primary reliance on self control.⁷⁰ The criticality of legal experience and perception with respect to executing the basic elements of different exchange forms explain why large long-term "outsourcing" contracts among major companies undergoing significant "re-engineering" are normally handled by an extremely small group of lawyers. Recent coverage of the outsourcing phenomenon suggests that nearly fifty percent of the global contracts are concentrated in one Washington, D.C. law firm.⁷¹ The client and its existing and/or prospective law firms will covet both resources and processes that can accommodate undefined yet not unexpected discontinuities in the multitude of exchange relations underlying particular industries with which they are involved. Such resources and processes will also serve to insure the presence of appropriate perspectives and experience within a firm servicing a corporate client's diverse exchange relationships with suppliers and customers.

This Article's empirical research suggests and explores some information gathering and analysis tools that provide both quantitative and qualitative measures of these resources and processes. More specifically, the factor analysis suggests four major aspects of lawyering activities which are perhaps distinctive measures of a lawyer's experience and perceptions regarding particular types of exchange relationships or phases within such relationships. In addition, the cross-correlated relationality measures provide a rough assessment of a firm's manpower depth, experience and organization concerning diverse forms of

⁶⁹ See Heide, *supra* note 3, at 76-78.

⁷⁰ See *id.* at 77.

⁷¹ Bruce Caldwell, *Special Report: Outsourcing Special Counsel: Outsourcing Lawyers Can Help Corporate Clients Avoid Nasty Pitfalls When Signing Billion-Dollar Deals*, INFO. WK., Oct. 31, 1994, at 40.

exchange relationships that are premised on distinctive principles of relationship initiation, maintenance and termination.

CONCLUSION

Descriptive analysis of lawyer and law firm relationships with client environments and commentary on the consequences of unique, independent variables such as professional ethics illustrate the complex texture and substance of lawyer-client relationships and the consequences on consumers and investors. Without empirical analysis, however, current practice cannot be efficiently reshaped to respond to the legal profession's changing societal responsibilities. The empirical results presented herein are a crude first step. The structure for data collection and the breadth of data collected are not commensurate with the magnitude of policy issues implicated. Conversely, the importance of exchange theory to our profession's conduct and responsibilities is clear, as are the confounding variables inherent in the structure and content of our unique ethical constraints on enlightened self interest.

The social and behavioral sciences may clarify the trade-offs between in-house and law firm representation of enterprise interests in terms of the quality added to the client's value chain as opposed to more temporal economic measures. More importantly, through greater understanding of these relationships we can enhance our profession's contributions to the vast array of exchange processes which are the essence of our country's unique governance system.

TABLE 1
FIRM 1

	Mean	Standard Deviation
Timing of Transactions	4.94	1.67
Number of People	5.27	1.52
Extent of Customization	4.69	1.76
Low v. High Interdependence	5.40	1.11
Personal Relations	5.24	1.47
Formal/Informal Communications	5.87	1.35
Conduct Standards	5.24	1.70
Transferability	5.28	1.26
Extent of Cooperation	5.26	1.21
Focus of Planning	4.92	1.52
Focus of Evaluation	4.41	1.61
Exercise of Power	4.76	1.36
Division of Benefits/Burdens	4.60	1.43

TABLE 2
FIRM 2

	Mean	Standard Deviation
Timing of Transactions	4.59	1.76
Number of People	4.84	1.51
Extent of Customization	5.03	1.55
Low v. High Interdependence	5.70	1.11
Personal Relations	5.18	1.58
Formal/Informal Communications	5.93	1.17
Conduct Standards	4.98	1.67
Transferability	4.95	1.21
Extent of Cooperation	5.39	1.31
Focus of Planning	5.20	1.34
Focus of Evaluation	4.93	1.50
Exercise of Power	4.92	1.39
Division of Benefits/Burdens	4.75	1.47

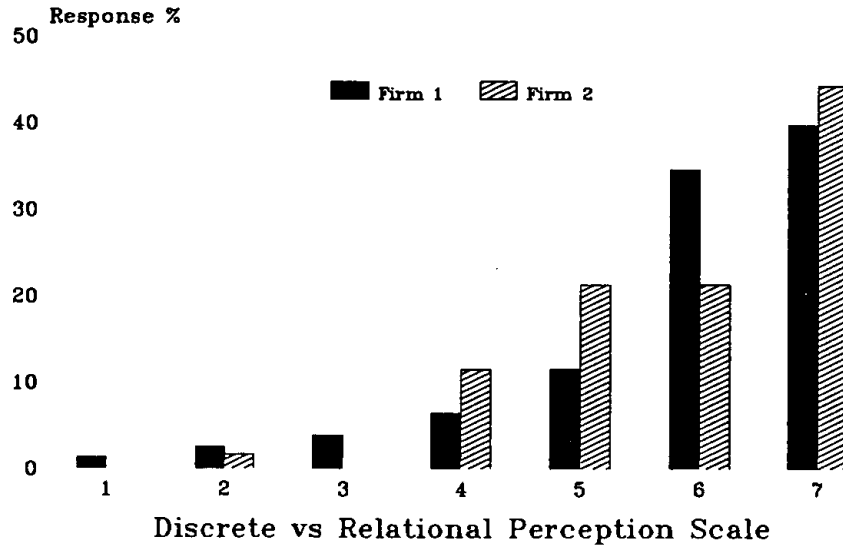
TABLE 3*
FACTOR LOADINGS FOR FIRMS 1 & 2

Item Descriptor	Factor			
	Engagement Terms	Representation Process	Professional Independence	Practice Area
Low v. High Interdependence	0.51			
Formal/Informal Communications	0.62			
Focus of Planning	0.80			
Focus of Evaluation	0.67			
Extent of Customization		0.61		
Exercise of Power		0.77		
Division of Benefits/Burdens		0.63		
Personal Relations			0.52	
Conduct Standards			0.67	
Transferability			0.74	
Number				0.86
Timing of Transactions				
Extent of Cooperation				
% Variance Explained	33	31	20	16

* An initial run of the factor analysis program elicited four significant dimensions that accounted for 56 percent of the variance. A re-run of the data eliminated those attributes that did not contribute significantly to the four dimensions. This table therefore reflects 100 percent of the variance explained by the remaining (significant) attributes.

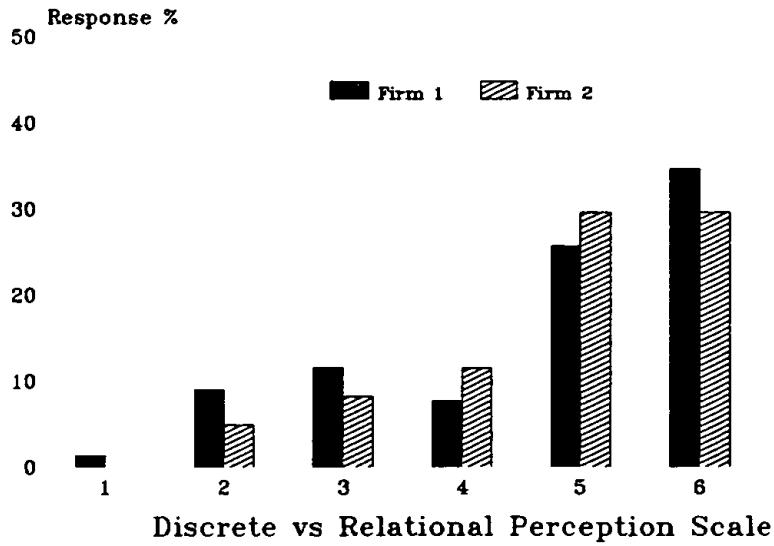
ENGAGEMENT TERMS FORMAL/INFORMAL COMMUNICATION

Figure 2



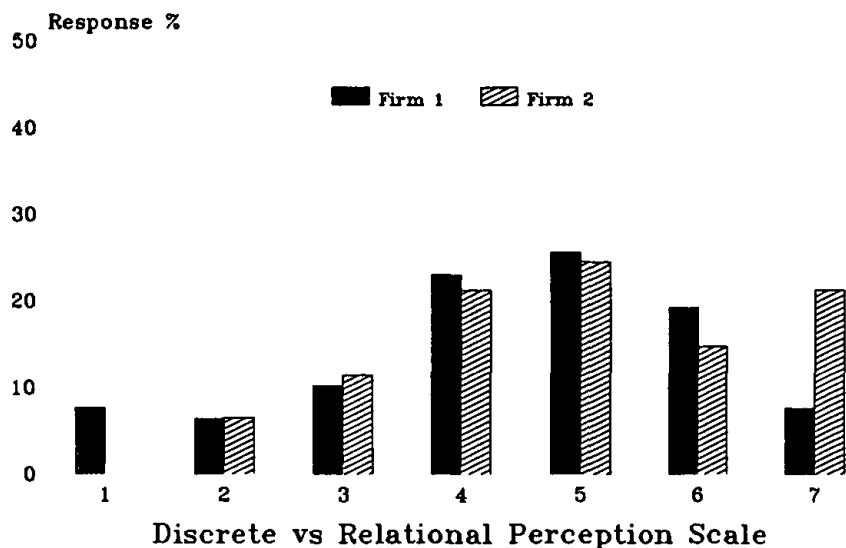
FOCUS OF PLANNING

Figure 3



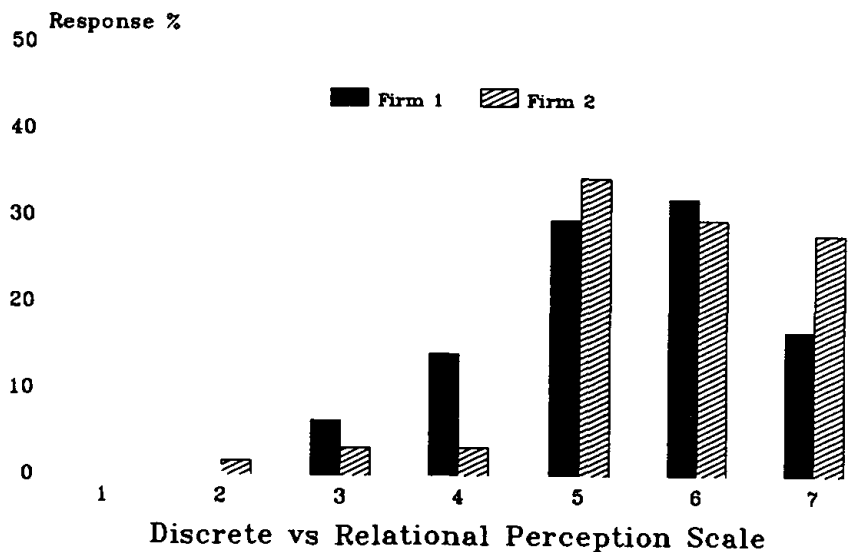
ENGAGEMENT TERMS FOCUS OF EVALUATION

Figure 4



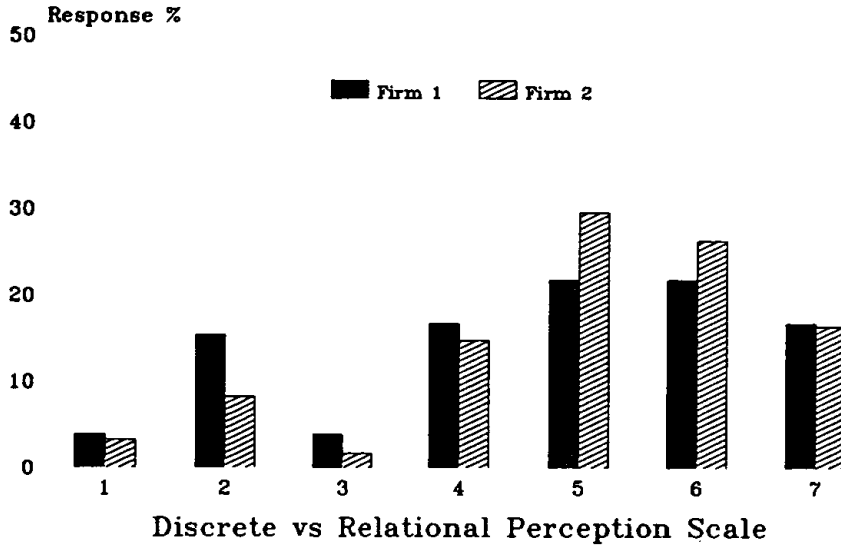
LOW V. HIGH INTERDEPENDENCE

Figure 5



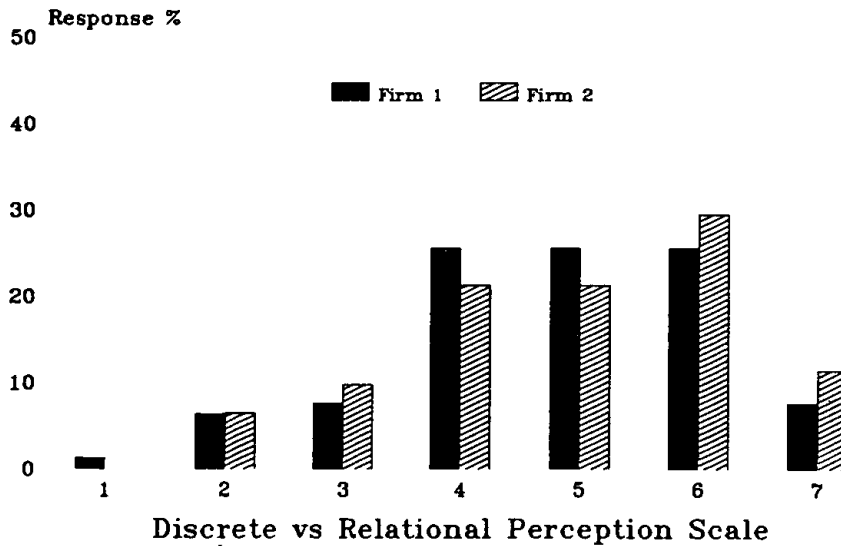
REPRESENTATION PROCESS EXTENT OF CUSTOMIZATION

Figure 6

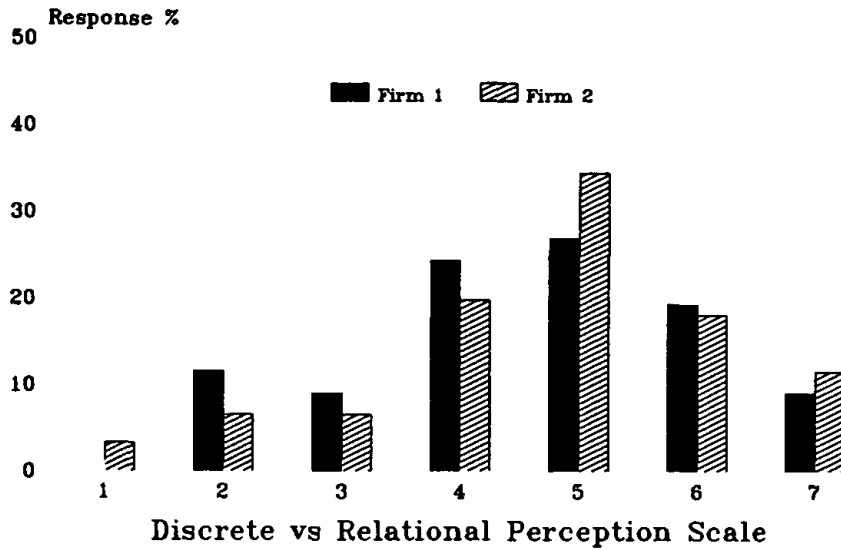


EXERCISE OF POWER

Figure 7

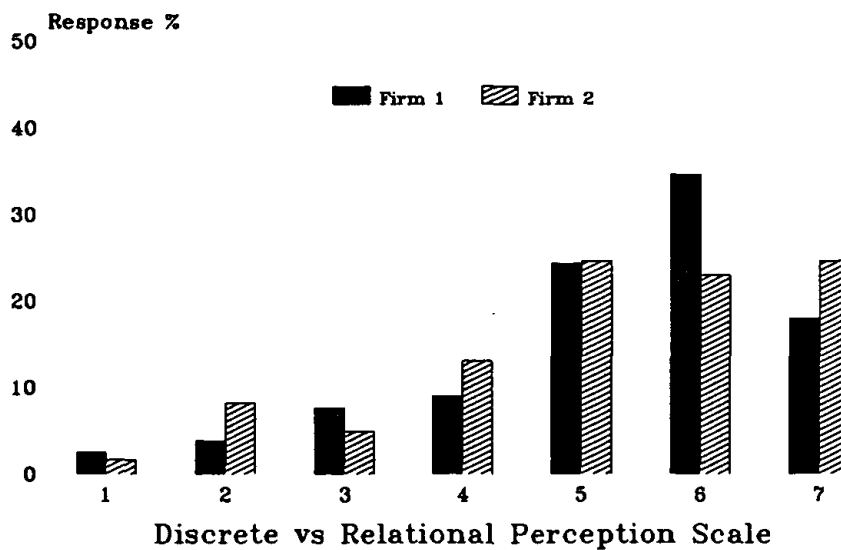


REPRESENTATION PROCESS
BENEFIT/BURDEN DIVISION
Figure 8



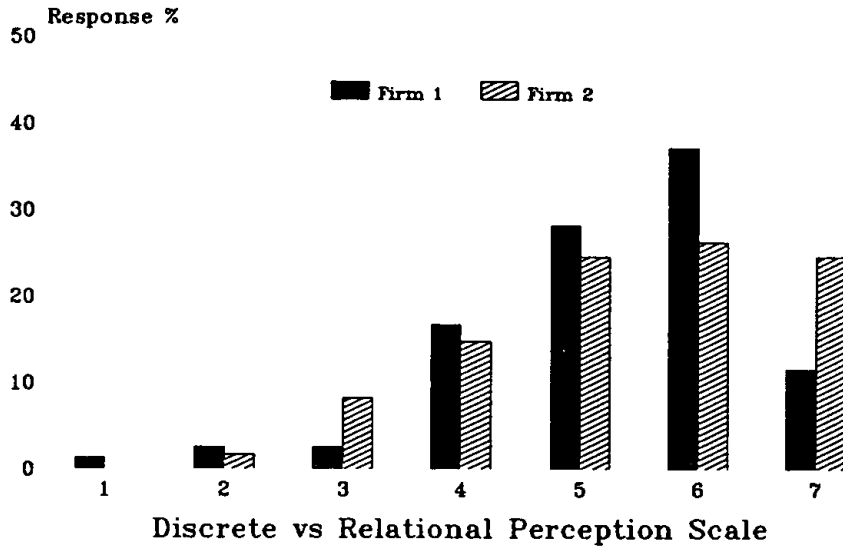
PROFESSIONAL INDEPENDENCE

PERSONAL RELATIONS
Figure 9



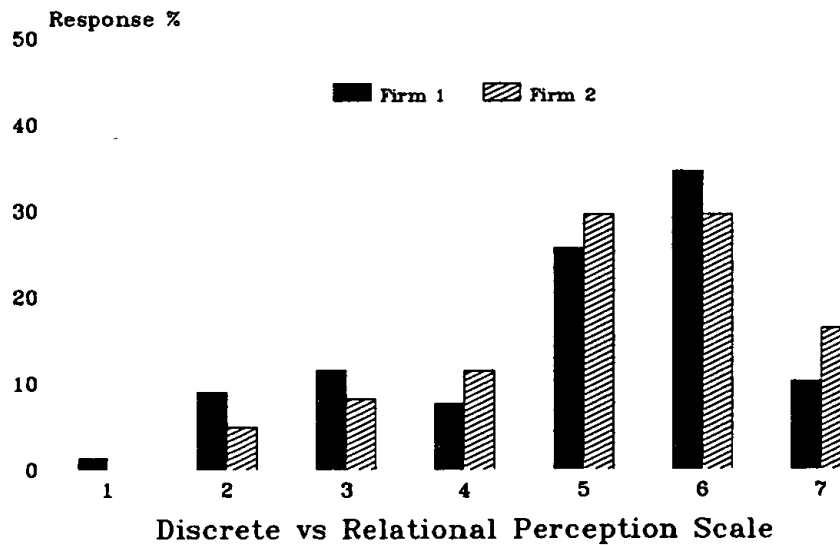
PROFESSIONAL INDEPENDENCE EXTENT OF COOPERATION

Figure 10

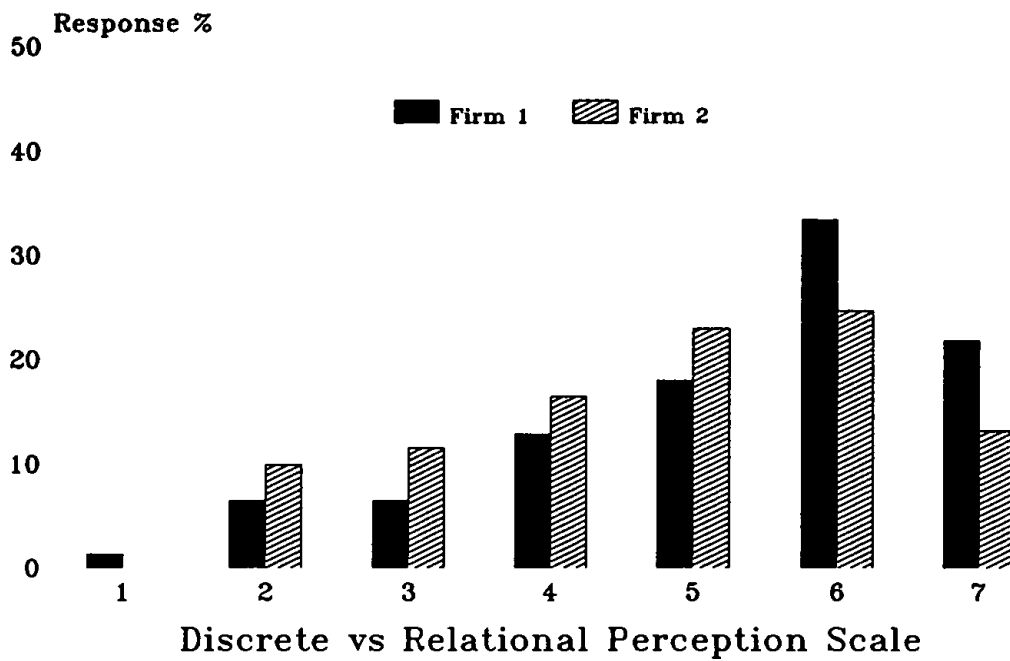


FOCUS OF PLANNING

Figure 11

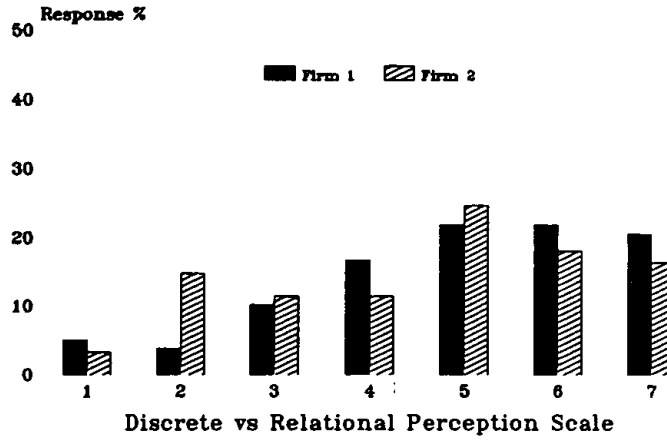


PRACTICE AREA FOCUS
NUMBER OF PEOPLE INVOLVED
Figure 12

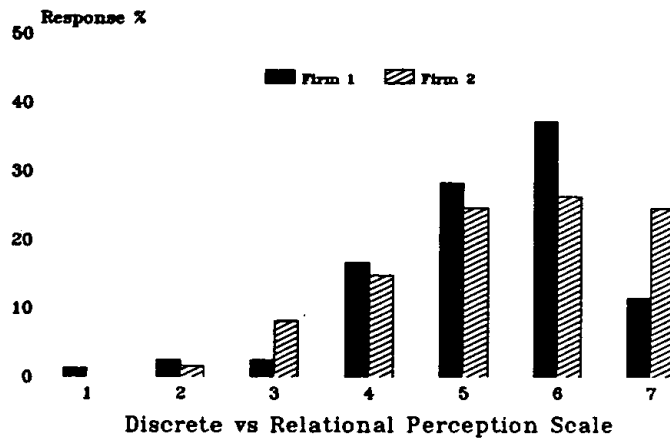


NOTE: Figures 13 & 14 are related to Practice Area focus but were not significant in the factor analysis.

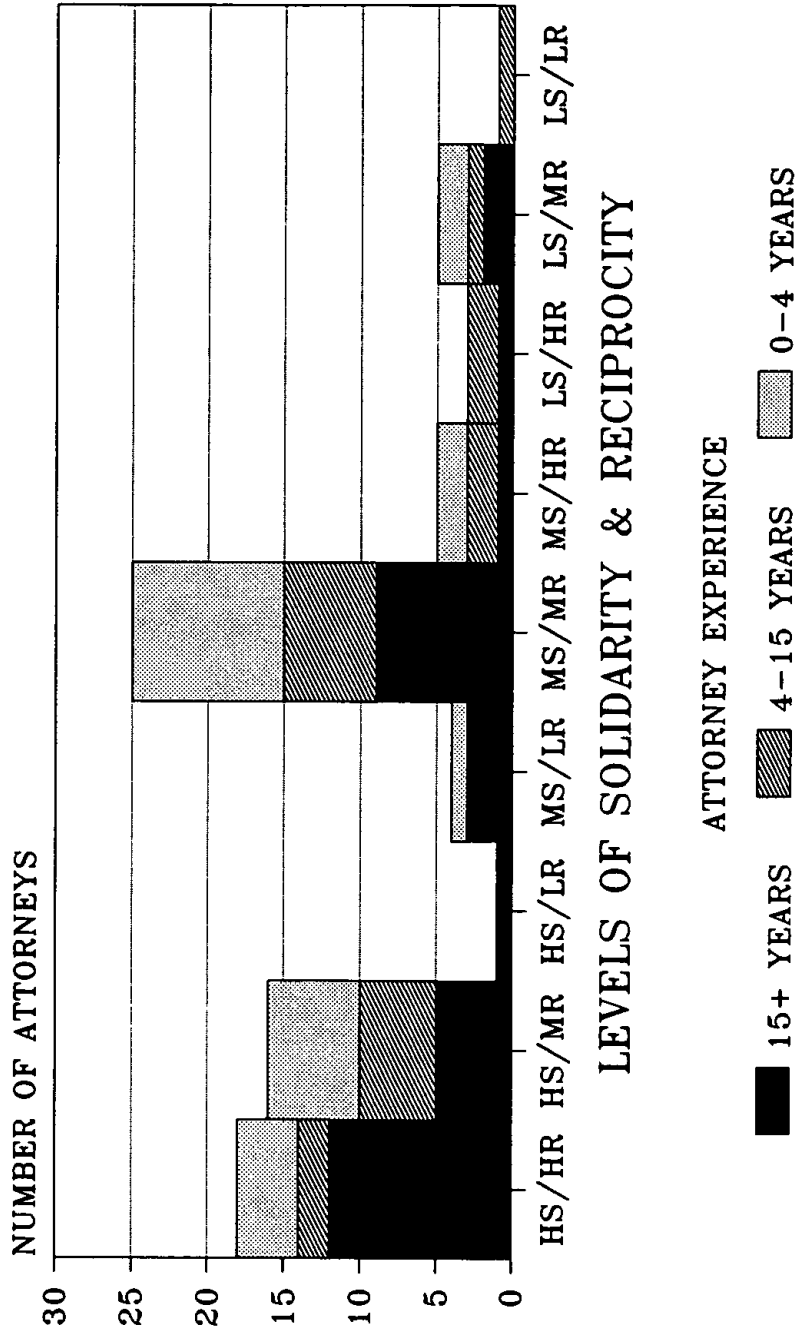
PRACTICE AREA FOCUS TIMING OF TRANSACTION Figure 13



EXTENT OF COOPERATION Figure 14

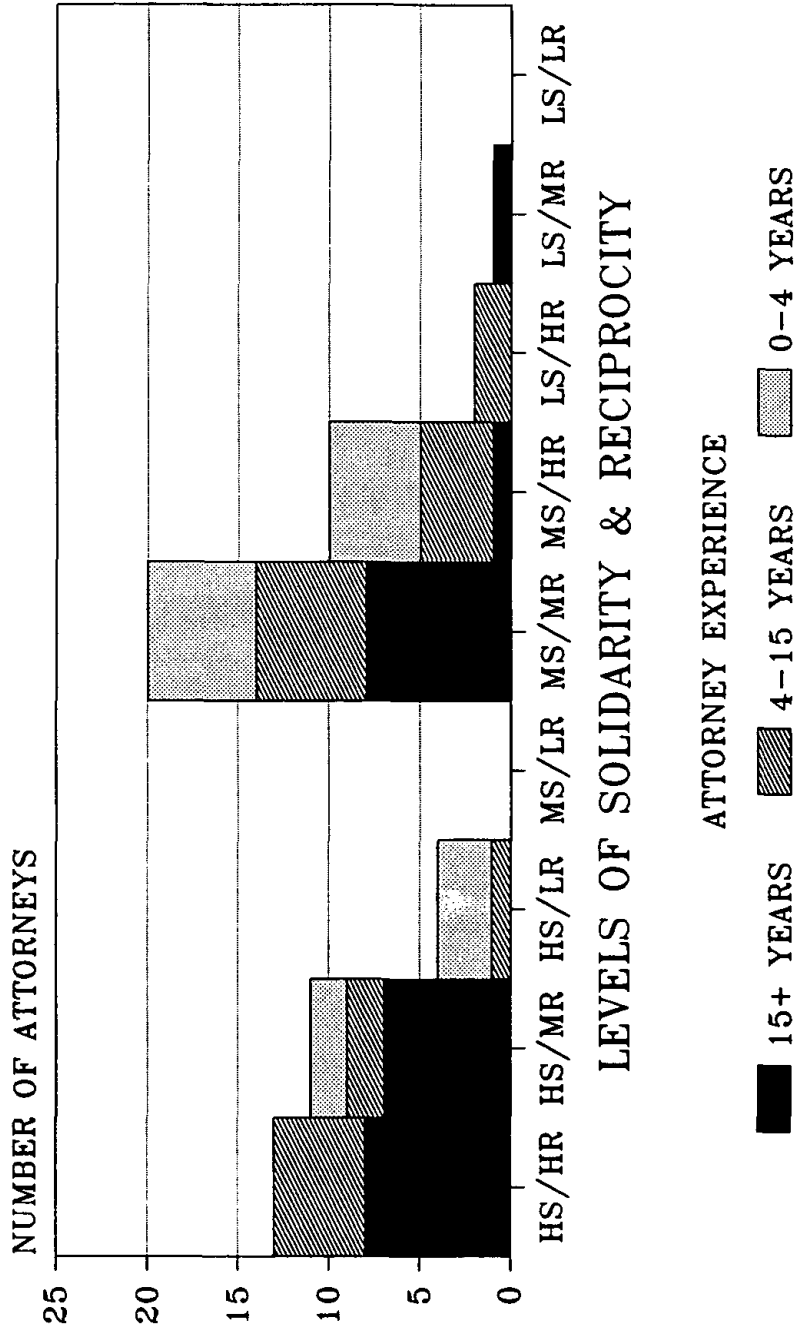


RECIPROCIY — SOLIDARITY PROFILE
FIRM #1 — FIGURE 15



High/Med/Low=H/M/L & Sol./Rec.=S/R

RECIPROCIY — SOLIDARITY PROFILE
FIRM #2 — FIGURE 16



LEVELS OF SOLIDARITY & RECIPROCIY

ATTORNEY EXPERIENCE

15+ YEARS
 4-15 YEARS
 0-4 YEARS

High/Med/Low=H/M/L & Sol./Rec.=S/R

APPENDIX

	TIMING OF TRANSACTIONS	
Work has a distinct beginning and end	<hr/> 1 2 3 4 5 6 7	Work is an ongoing process
	NUMBER OF PEOPLE	
Only one lawyer and one person from client firm involved	<hr/> 1 2 3 4 5 6 7	Often have more than one lawyer and one person from client firm involved
	EXTENT OF CUSTOMIZATION	
Traditional lawyer-client relationship	<hr/> 1 2 3 4 5 6 7	Relationship is customized to the needs of the client
	LOW V. HIGH INTERDEPENDENCE	
Low future interdependence is expected	<hr/> 1 2 3 4 5 6 7	High future interdependence is expected
	PERSONAL RELATIONS	
Minimal personal relationships with client	<hr/> 1 2 3 4 5 6 7	Strong personal relationships with client
	FORMAL/INFORMAL COMMUNICATIONS	
Formal communications predominate	<hr/> 1 2 3 4 5 6 7	Both formal and informal communications are used
	CONDUCT STANDARDS	
Lawyer conduct guided mainly by attorney ethics and expectations of law practice colleagues	<hr/> 1 2 3 4 5 6 7	Conduct dictated by ethics and conduct standards specifically applicable to the client interests
	TRANSFERABILITY	
It does not matter who does the work	<hr/> 1 2 3 4 5 6 7	Relationship is heavily dependent on the identity of the lawyer doing the work

<p>No joint efforts at performance and/or planning</p>	<p>EXTENT OF COOPERATION</p>							<p>Joint efforts related to both performance and planning over time</p>
	<hr/> <p>1 2 3 4 5 6 7</p>							
<p>Primary focus on the work requested by the client</p>	<p>FOCUS OF PLANNING</p>							<p>Focus beyond work requested; planning for contingencies</p>
	<hr/> <p>1 2 3 4 5 6 7</p>							
<p>Evaluation focuses on completion of work or outcome of case</p>	<p>FOCUS OF EVALUATION</p>							<p>Evaluation includes all aspects of performance including psychic and future benefits</p>
	<hr/> <p>1 2 3 4 5 6 7</p>							
<p>Either lawyer or client may choose to exercise power in the relationship</p>	<p>EXERCISE OF POWER</p>							<p>Interdependence increases the importance of judicious application of power</p>
	<hr/> <p>1 2 3 4 5 6 7</p>							
<p>Sharp division of benefits and burdens</p>	<p>DIVISION OF BENEFITS/BURDENS</p>							<p>Likely to include some sharing of benefits and burdens</p>
	<hr/> <p>1 2 3 4 5 6 7</p>							