

# DOING BUSINESS: THE MANAGEMENT OF UNCERTAINTY IN LAWYERS' WORK

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Apparently naive, but in fact not, is the question: What do lawyers do? Many scholars assume the central role of the lawyer is that of the advocate, but among lawyers working in law firms advocacy consumes little of their time. Similarly, the term *lawyer* provides hardly any meaning in itself. The research presented here is based on a participant-observation study of a corporate law firm. The central thesis proposed, in the light of case studies of the selling of shopping mall and the arranging of a bank loan, is that business lawyers are engaged in managing uncertainty for both their clients and themselves. Managing uncertainty is accomplished through interaction rather than appeals to the law.

## I. INTRODUCTION

"I'm a litigator."

"I do ERISA."<sup>1</sup>

"I'm a labor lawyer—management."

If one were to ask a lawyer what he or she does, these might be some of the answers elicited. In themselves they are hardly informative. An insider would understand the terminology, but there are degrees of "insiderness" and understanding would not be uniform across all degrees. Heinz and Laumann (1982) have suggested that a criminal defense lawyer, for example, would fail to comprehend the arcana of the corporate lawyer's interest-rate swaps, and similarly the corporate lawyer would have difficulty understanding the intricacies of a plea bargain or a death penalty appeal. At the general rhetorical level, the problem poses an issue basic to much work on the legal profession, namely, *the problem of what lawyers do* (cf. Llewellyn and Hoebel 1941; Abel 1980; Abel and Lewis 1989). Why does the noun *lawyer* not take a verb that

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<sup>1</sup> ERISA is the Employee Retirement Income Security Act, a complex statute governing the funding and administration of pension plans.

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connotes a set of cognate activities to the same degree as other naming nouns? It is intuitively simple to understand painters painting, auditors auditing, doctors doctoring, nurses nursing, and ministers ministering—the dictionaries carry them all—but lawyers lawyering carries no or little semantic sense compared to the others. Indeed, the verb “to lawyer” is a neologism; both the *Oxford English Dictionary* and *Webster's Third New International Dictionary* carry no entries for this word as a verb, but they do for every one of the others.<sup>2</sup> One solution is to examine lawyers' actual work practices in a systematic and closely textured way (Maynard 1984). Because few studies of lawyers have been carried out from within the firm setting, the current stock of knowledge about lawyers' work and their relationships with clients is at best partial (Mann 1985; Sarat and Felstiner 1986; but cf. Danet et al. 1980). Furthermore, the difficulty of the enterprise is compounded because the authority of lawyers depends on factors other than their knowledge base (cf. Jamous and Peloille 1970; Schon 1983; Horobin 1983; Parsons 1954). Their work, as I shall show, covers areas of advising that are intuitively more within the boundaries of business practice than law (Dezalay 1990).<sup>3</sup>

Ultimately, these theoretical concerns about professional work—what people do—are dependent on the nature of the interactions that form the infrastructure of the relationship between professional and client (Hughes 1958). Hughes (1971:304) put it thus:

The division of labor, in its turn, implies interaction; for it consists not in the sheer difference of one man's kind of work from that of another, but in the fact that the different tasks and accomplishments are parts of a whole whose product all, in some degree, contribute to. And wholes, in the human social realm as in the rest of the biological and the physical realm, have their essence in interaction. Work as social interaction is the central theme of sociological and social psychological study of work.

Schon (1983) argues an analogous position that the conventional model of professionals as “technically rational” problem solvers is insufficient to describe and explain the methods professionals use. For him “doing-in-action” and “knowledge-in-action” are far more powerful explanatory concepts. That is, to understand professionals' work, we must describe and analyze what they do, that is, concentrate on the interactions in their work.

In this article I will argue that the central role business lawyers play is in *managing uncertainty* both for themselves and for

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<sup>2</sup> Interestingly, one finds the idea of *practice* entering as a descriptor for professionals, e.g., she practices law. The term carries the connotation of improvement through doing. *The Oxford Dictionary of Concise English* defines the verb to practice as “do repeatedly as exercise to improve skill.”

<sup>3</sup> This raises the further question of what exactly it is that distinguishes lawyers from other professionals (Abbott 1988).

their clients. By business lawyers, I mean those who classify themselves as office lawyers rather than as litigators and who generally work in large law firms.<sup>4</sup>

I derive my notion of uncertainty management from the ethnography of Renee Fox, the medical sociologist (1957, 1959; see also Parsons 1952), and Donald Schon (1983). Fox articulates two types of uncertainty: that of incomplete grasp of knowledge and that based on the limits of current knowledge. From them, she derives a third type, that caused by inability of actors to distinguish between the first two (1957:208–9). Her presentation of the uncertainty variable arises in the context of doctors' training and the ways they begin to recognize and acknowledge its existence. Fox intertwines uncertainty into the training trajectory: "With the growth of [the student's] knowledge and skill . . . and the widening and deepening of his experience, a student's perspective on his own uncertainty changes" (ibid., p. 219). Describing the student's awe at the amount of knowledge that must be absorbed early in the training, Fox says that by the student's third year a change in manner occurs. "He . . . adopts a *manner* of certitude, for he has come to realize that it may be important for him to 'act like a servant' even when he does not actually feel sure" (ibid., p. 227). This manner is, however, short-lived because in the fourth year the student is given sole responsibility for patients; uncertainty intrudes sharply. One of Fox's student-subjects summarizes his feelings this way: "Experience makes you less sure of yourself . . . Instead of looking for the day when all the knowledge you need will be in your possession, you learn that such a day will never come" (ibid., p. 228). And so the doctors-to-be realize that feelings of uncertainty will never depart, but at least they are made aware of this phenomenon.

Like Fox's tyro doctors, would-be lawyers are introduced to the notions of uncertainty during their professional school training. Their texts are no longer comprehensive and inclusive, designed to facilitate the student's acquisition of knowledge step by step as most college texts do, but rather apparently random and chaotic collections of disjointed materials with little or no connective narrative (cf. D'Amato 1987; Schlegel 1989). This does not mean, however, that lawyers are necessarily fully imbued with the values of uncertainty in law school. Nevertheless, uncertainty is controlled, for the approach of law school is basically theoretical,<sup>5</sup> more concerned with appellate judicial decisionmaking, than the

<sup>4</sup> For those unfamiliar with the structure of the U.S. legal profession, lawyers are admitted by their individual states as attorneys which allows them to practice as both advocates and office lawyers. The basic requirements for admission by a state are the possession of undergraduate and law school degrees.

<sup>5</sup> By theoretical I do not necessarily mean that law is a body of scientific theory, but rather that it is a discipline based on book knowledge as opposed to craft skills.

situations students face after graduation when the real world of practice pitches them into the maw of uncertainty where the court is rarely invoked, and where solutions are not always found but often created. Indeed, the tension between the search for a "right answer" which seems implicit in such law teaching and the notions of indeterminacy which are easily inferred from the substance of the cases infuses much of the law school experience with a kind of ambivalence about uncertainty. One could argue that medicine, by virtue of its continuing ties to the hospital—during training and afterwards in practice—smooths the entry of its students into practice. The training commingles theory and practice. Doctors never sever the connection between their training institutions and their places of work because they are often the same. Law schools entirely lack this capacity: they are not functional equivalents of the hospital and they are not conspicuously successful in mixing elements of theory and practice (Stevens 1983). Whereas they raise the issues of uncertainty for their students, this is not a theme that recurs in the law school experience. It is the move into practice which prompts the thought that "experience makes you less certain of yourself."

The uncertainty of *practice* functions at more than one level. Each type of uncertainty is contingent on the situation. For my purposes there are three main types of uncertainty ranging in degree from high to low risk, plus a fourth kind of uncertainty that is ancillary to the other three:

1. Where the lawyer is not handling law per se or tightly specified sets of facts. Instead, the situation is fluid, open and constantly changing. The lawyer must rely on experiential skills rather than "book learning." A typical example is a business negotiation,<sup>6</sup> as will be discussed in the first two cases below.
2. Where the lawyer is ignorant of the law on the topic. The second example in the section on "snow jobs" is an instance of this type: Faking knowledge is necessary to reassure the client and to preserve the lawyer from exposure.
3. Where the lawyer needs to buy time in order to arrive at a satisfactory answer, e.g., the partner wanting to check the law on polygraph tests in the first example of snow jobs or the partner trying to discover what a letter of guarantee is.
4. Where the lawyer is subject to the politics of the law firm.

If the first two types of uncertainty were exposed to clients, they would cause embarrassment to the lawyer, raising the question of what the lawyer is supposed to be doing for clients. The amount of uncertainty felt is also a function of the status of the

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<sup>6</sup> Of course, elements of negotiation can be taught and learned, but not every lawyer acquires such skills either in law school or afterwards (see Fisher and Ury 1981).

lawyer. It is potentially more embarrassing for a partner than for a first-year associate to display ignorance. Articulating the third type of uncertainty to the client brings a positive benefit, as it displays the lawyer's concern for the client's welfare and justifies research and billing. Instead of possessing negative features, this type of uncertainty could be positively displayed to the client, but it has to be done with care. It connotes an insurance policy by the lawyer against future risk.<sup>7</sup> Another way of putting this is to view the first two types as ways of preserving the state of the lawyer's ego and the third type as focused on the client. The lawyer preserves harmony within her immediate community and herself and does not alarm the client.

## II. DATA AND METHODS

My data are drawn from an ethnographic study of an elite corporate law firm in Chicago, which I call Tischmann Weinstock and Levine.<sup>8</sup> I will first present a brief picture of the social structure and work of the firm and then explain how the research was done.

The firm is composed of about eighty lawyers who practice in several fields, among them, tax, real estate, business, estate planning, and litigation. Tischmann considers itself a general practice firm. Within Tischmann the largest practice areas are real estate, litigation, and corporate, all of comparable size. The next largest practice group is estate planning.

The lawyers are evenly divided in number between partners and associates. Tischmann has a policy of maintaining a one-to-one partner-to-associate ratio, an inducement it uses to counteract the lure of the megafirms to potential associates. Using the ranking system of law schools devised by Heinz and Laumann (1982), I found that 50 percent of the firm's lawyers graduated from elite law schools (Harvard, Yale, Chicago, Michigan), about one-quarter from prestige law schools (Northwestern, Duke), and about 10 percent each from regional schools (Illinois, Iowa, Notre Dame, Wisconsin) and from local schools (Chicago-Kent, Loyola, De Paul). The range of the billing rates, at the time of the research, was from \$70 to \$225 with a median of \$115.

The firm's clients ranged from large multimillion-dollar companies to wealthy individuals with large estate planning and corporate needs. The majority of the corporate clients were controlled by five of the partners. By controlling the major clients, these five partners were thus able to exercise considerable authority in the firm.<sup>9</sup>

<sup>7</sup> Kagan and Rosen (1985:404) refer to one of the images of the corporate lawyer's role as the "Insurer."

<sup>8</sup> The law firm's name is a pseudonym. I have changed a few details in my description of the firm to make it harder to identify, but these changes do not affect the analysis.

<sup>9</sup> For further on the structure and work of Tischmann see Flood (1987).

I observed, interviewed, and participated in the firm over a period of about twelve months. This bland statement hides an elaborate set of negotiations between a number of law firms and myself as to how I would observe lawyers at work.<sup>10</sup> One of my advisers, a notable in the Chicago legal community, put me in contact with a partner at Tischmann. I discussed my plans with him for observing lawyers' working and the everyday routines of the law firm. Because I am English, a comparative element was often introduced into these discussions (e.g., "What are law firms like in England? What is the difference between barristers and solicitors?") This element, in my opinion, helped the negotiations and certainly provided a basis for my perceived ignorance of U.S. law practice (cf. Danet et al. 1980). I was granted access by the Tischmann partnership to enter the firm for one year as a part-time associate. In making me an associate the partners were protecting the firm from any charges of breaching the lawyer-client privilege of confidentiality (cf. Felstiner and Sarat 1984). Their primary concern was for their clients; the partner with whom I negotiated my entry was not overly concerned if I identified the law firm. Nevertheless, I have been careful to hide its identity.

I began my period at Tischmann by working on two cases handled by the partner who negotiated my entry. This method had the benefit of plugging me into the lawyers' information network in the firm. I attended in-house seminars on litigation and other topics and gradually came to know what matters other lawyers were working on. My aim was to gain experience of all the fields of practice either directly, by working on cases, or indirectly, by observing matters. I did not apply systematic criteria for selecting cases; that is, I did not specify the *types* of cases I would observe. Rather, as I heard of matters through the informal information networks, I would ask to participate in some way. At other times lawyers would come to me and say they had an interesting case that I might like to see. One basic distinction I came to make was between cases involving some form of dispute resolution and those that were facilitative in nature (i.e., putting deals together).

Because of the way a law firm such as Tischmann operates, the social scientist is unable to plan precisely how to approach the functioning of the organization. I was committed, taking my lead from Hughes, to observing the firm in its *natural* day-to-day routines and perceiving how the members of the firm organized these routines as a set of accomplishments (Schegloff 1986). Thus, as Sarat and Felstiner (1986) also note, my cases were not randomly selected. Nor did I necessarily cover cases from start to finish; given that a lawyer's work generally involves dealing with several cases simultaneously, extensive gaps in cases' developments are in-

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<sup>10</sup> For complete details of the biography of the research project see Flood (1987).

evitable. A lawyer may draft an agreement, but the other party's lawyer may not respond for several weeks. I too therefore was forced to dip in and out of cases. I observed and participated in cases from all practice fields in Tischmann. Over the course of the twelve months I collected data on just over a hundred cases. But I should add here that cases were not the sole form of data I was interested in; much of my time was also taken up with observing the interactions of the lawyers among themselves, which provided me with insight into how the firm held together. The context within which they functioned was as important as what they actually did (Goffman 1964; Flood 1987). The form of the interactions was highly varied: formal meetings between lawyers and clients; formal meetings between groups of lawyers; court and other quasi-judicial hearings; informal discussions among lawyers from the firm and among lawyers from different firms; informal discussions between lawyers and clients; and, on occasion, discussions among clients about their lawyers. One important source of information was the telephone calls the lawyers made and received. If I happened to be sitting in a lawyer's office when the telephone rang and it was not a personal call, I usually remained. Fortunately for me lawyers like to make notes when they are talking on the phone, which means that they need to keep their hands free, so often they would use the "squawk box," the loudspeaker attached to the phone. In this way I could hear both sides of the conversation. And since everyone was taking notes on their yellow legal pads, so did I.<sup>11</sup>

I was given free access to the file room, and I also examined case files. The files varied in quality. Some were haphazard collections of paper with no easily recognizable form; others were highly organized and intensively indexed. Transactions of the type described below—selling a shopping mall—occupied the latter category. They told the story of detailed planning, the coping with "blue sky laws," etc. The less detailed files often reflected a particular lawyer's degree of interest in a case. I used the files as a contextual device to inform the content of the interactions I observed. Similarly, I used my own discussions with lawyers as a means of supplementing my observations. Most of these "interviews" were of an informal nature (cf. Flood 1983).

I was, however, excluded from certain situations. I did not attend the partnership meetings, although their contents rarely stayed private long: in such a relatively small environment it was difficult to keep information in closed circuits. Gossip was inevitable (cf. March and Sevon 1988:432). Another situation of exclusion was the occasion when a partner in another law firm came to con-

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<sup>11</sup> Unlike Sarat and Felstiner (1986) I never used a tape recorder, considering it inappropriate in the context of my work. Instead I took very detailed notes, often taking down virtually entire conversations.

sult the lawyer with whom I happened to be working at that time. The lawyer-client adamantly refused to have me present. I was never told that I could not attend any other meetings, but I am unable to specify the extent to which I was excluded by omission, by simply not being informed of such and such a meeting taking place. Of course, if meetings were held in another city or country, it was unlikely I would be invited to attend.

The main resource used in this article is lawyers' talk. Corporate lawyers spend roughly 55 percent of their *chargeable* time in some form of talk with others (Flood 1987). Those others are a mixture of other lawyers, clients, colleagues, and helpers. Unlike "L.A. Law," real elite lawyers do not spend much time in court. Their time is taken up in the office or conference rooms where they counsel clients, negotiate with other lawyers, cut deals, draft letters, review documents, and fill in time sheets describing their billable work. Talk, then, is vital to lawyers: It is through recurring talk that they constitute their worlds, organizations, and create their identities. Talk is their business (Boden, forthcoming).

In the following sections, I consider some examples of putting deals together and giving advice. I selected these particular examples because they show the ways work is done by lawyers, either collectively or individually. The substance of the examples is typical of the sorts of matters handled by corporate lawyers.

### III. DOING BUSINESS: THE ROLE OF BUSINESS LAWYERS

Business lawyers carry out a large range of tasks: arranging loan agreements with banks, engaging in international business, incorporating companies, preparing securities' issues, negotiating the purchase of shopping malls. All these can be boiled down to essentially three tasks: *advising*, *negotiating*, and *drafting documents*. These three tasks are not necessarily neatly sequentially ordered. They are interactive. As the client begins to make various objectives clearer to the lawyer, the lawyer can begin to frame them in the appropriate language (Cain 1983). But then as the framing takes place, the objectives may begin to shift and further advice and negotiation is required. For example, a client may need capital to expand a business. If he needs advice, then one of the array of advisers a businessman may turn to is a corporate lawyer. Depending on the degree of expertise of the client and the degree of intimacy with the lawyer, a client may ask for advice on whether to borrow, how to go about it, the best means of raising money or which bank to use. Such questions are not always simple, however, as the means of raising money is closely related to the uses to which it will be put.

In Tischmann Weinstock and Levine, great emphasis was placed on establishing and maintaining strong ties, and hence trust (e.g., Shapiro 1988), with clients. Some of the senior partners had



almost avuncular relationships with their clients, and clients would call for advice on all sorts of matters. For example, one of the senior rainmakers frequently gave advice to clients on how to act in the stock market. A client called asking if he should sell his block of 24,000 shares in General Foods to Philip Morris during a takeover war, even though the price was still rising. The lawyer told him to sell now, at \$118 per share, rather than wait for \$120 "because the deal is going through and any increments [on the share price] would be small. If you sell now, you will only lose \$48,000; cheap insurance for getting a good price." The client preferred his lawyer's advice to that of a stockbroker, even though stereotypically investment advice is not a central part of lawyer's work.

In the next two sections I take two typical transactions that corporate lawyers would consider among their normal duties, namely, the selling of a \$30 million shopping mall by a real estate partnership (the client) to a national bank, and arranging \$5 million loan from a bank to a client company. The transactions highlight the contingent nature of routine activities for lawyers, the uncertainty of dealmaking. They show in a finely grained way what the actual, instead of textbook, processes of lawyering and hence contingency management are. They show that much of the work, while routine and mundane, nonetheless necessitates methodical accomplishment (Schegloff 1986). They show how lawyers interact with each other and their clients when constructing a complex deal.

#### A. Selling a Shopping Mall

In this example, the Tischmann Weinstock partner, Michael Shapiro, a middle-ranking partner who graduated from the University of Chicago law school, was only nominally in charge of his client, Segal Partners, a real estate company, which was actually the "property" of another senior partner. Shapiro was thus placed in the position of having to satisfy two constituencies, the client and his senior partner. In a large or medium-sized firm this is a normal situation for lawyers below the level of senior partner. All partners are expected to win and nurture their own clients, but power and control flow to those who hold the largest, and hence potentially the most productive, clients. Michael Shapiro practiced predominantly in the real estate area and worked mainly for Segal Partners. His mentor in Tischmann was Robert Levi, who brought Segal Partners to the firm. As this client was one of the firm's largest, Levi exercised considerable authority in the firm and indeed headed the firm's policy committee which managed the firm's internal affairs, including distribution of partners' annual draws.<sup>12</sup> Segal Partners's principals dealt primarily with Levi, but in indi-

<sup>12</sup> Since Tischmann Weinstock is a partnership, the partners are the own-

vidual matters the work was assigned to a middle-ranking partner, such as Shapiro, who would shepherd the deal through the various intermediate stages. As much as a partner like Shapiro was in charge of a matter, he could never forget that he was at best only a second in command: the client could never be his, at least while Levi was in the firm. His relationship with the client, therefore, would always contain an irresolvable tension for him. That is, if the professional is granted the mantle of expert, how is that expertise to be exercised authoritatively when the professional is placed in an ambiguous position vis-à-vis the client?

Andrew Segal was a successful and wealthy property developer.<sup>13</sup> In this particular transaction there were problems which he tried to overcome by force of his personality. As most property transactions—especially commercial property—involve legal considerations, Segal was continually dealing with lawyers and was used to them; he was not awed by them. His two associates at the meeting played very minor roles to his central one.

The bankers and lawyers who were involved in the buying of Strawberry Fields were less ambiguously situated in their relationships to each other. Both represented large institutions, both institutions having maintained a long-term relationship with each other. Similarly, both sets were of equivalent status. The lawyers were middle-range partners in their firm, and the bankers were middle management.

Those involved in the negotiation were as follows:

DICK PARSONS	Meganational banker (B=banker)
ROY PORTER	Meganational banker (B)
HAL POSNER	Meganational outside counsel (BL=bank lawyer)
SEYMOUR PERRY	Meganational outside counsel (BL)
ANDREW SEGAL	Segal partners senior partner (D=developer)
JOHN SIMMONDS	Segal Partners associate (D)
BILL STANLEY	Segal Partners associate (D)
MICHAEL SHAPIRO	Tischmann Weinstock partner (TL=Tischmann lawyer)
PAUL STRAUSS	Tischmann Weinstock associate (TL)

The buying and selling of shopping malls are extremely complex events. In part this is because there are so many parties involved in the transaction—lawyers, accountants, bankers, insurance companies, government agencies, and developers. In one such acquisition of a mall, a transaction involving a sales price of \$43 million, the file had seventeen *expandable* folders and 116 sub-

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ers of the firm and thus do not receive a salary but share a draw from the firm's profits.

<sup>13</sup> Segal had had no legal training.

folders in it. Thus, these are protracted, complicated deals entailing many labor-hours from the parties and their associates. What is interesting about the following example is that although the development company was selling the Strawberry Fields shopping mall to Meganational Bank for \$30 million, it wanted to retain control of it for a few years. Such an arrangement was unusual inasmuch as a transfer of property from one party to another generally entailed the transfer of the property itself and the rights to do whatever the new owner wished (subject to some covenants and easements, etc.). So in this example some of the rights that would usually move to the purchaser were to stay with the seller. The retention of these rights had a significant influence on the subsequent negotiations.

I focus here on an all-day meeting scheduled to settle on a final draft of the sales agreement. Prior to the meeting, Segal Partners and Meganational had met a few times to discuss price and modes of payment. In addition, Segal had two other issues to settle before the deal could be completed; namely, the matter of the guarantee and delinquent tenants. The original development was undertaken with a guarantee from Equity Insurance Company. If the development failed to reach certain profit goals, then Equity could be in a position to exert control over Strawberry Fields against Segal Partners's wishes. Segal had been trying to persuade Equity to give up its rights under the guarantee now the sale was taking place. Equity was, however, reluctant to do this. Segal had also met with his lawyers several times to discuss the problem of tenants who defaulted. He was under an obligation to deliver Strawberry Fields as a profitable going concern. If the tenants were escaping their leases and obligations, the profits of the mall would suffer and consequently the transaction with Meganational. Neither of these issues had been fully disposed of by the time this meeting was held. In addition to the normal pressures operating at the end of a long negotiation process, there was less than a month to complete the deal before the year's end. If the deal collapsed, Segal Partners would lose certain tax benefits.

The meeting started early in the day in a disjointed way—the lawyers had laid down no tight agenda—but the real issue of who was to control the mall and in what ways soon emerged:

HAL POSNER (BL): Who wants to get this thing off the ground?

SEYMOUR PERRY (BL): Why don't we go through the purchase agreement?

DICK PARSONS (B): Which copy are we using?

MICHAEL SHAPIRO (TL): I'm using the September 13 copy.

DICK PARSONS (B): Well, I have the latest. Let's have some copies made.

MICHAEL SHAPIRO (TL): Should we be doing assignment of benefit interest?

DICK PARSONS (B): Isn't there a statute?

MICHAEL SHAPIRO (TL): Next point: parcel 3 isn't part of the transaction.

SEYMOUR PERRY (BL): That'll be part of a separate REA [Reciprocal Easement Agreement].

MICHAEL SHAPIRO (TL): about the recitals on 1A, you're not buying the entire marketplace.

DICK PARSONS (B): That's right.

MICHAEL SHAPIRO (TL): We get to see how much square footage there is at Strawberry Fields? We may be selling X plus agreements to build others, i.e., a cinema and Taco Bell. On Taco Bell, if they default and don't build, we won't put anything there.

JOHN SIMMONDS (D): We're covered through a holdback.

BILL STANLEY (D): We'd find someone else.

MICHAEL SHAPIRO (TL): The parking spaces number isn't correct. There's more to be done yet. Our site is actually constructed, but Alpine's [another developer] site isn't.

BILL STANLEY (D): Size depends on how you measure it: inside, middle, or outside of the wall. When you're the landlord, it's outside; when you're the tenant, it's inside.

Although this was to be the crucial meeting to discuss major issues systematically, the participants meander into the discussion in a random, almost haphazard way with no indication of clear direction. It was surprising that the lawyers had developed no clear agenda. Points were brought up and dismissed quite rapidly. For example, the "assignment of benefit interest" question (asked by a lawyer) was dealt with and dismissed by the reply, "Isn't there a statute?" (asked by a banker). Other points were started, dropped, and picked up again in a quasi-abstract manner. When Michael Shapiro (TL) asked the question about the square footage at Strawberry Fields, no one replied until four utterances later when the property company representative, Bill Stanley (D), discoursed on how measurements were interpreted by different people. After a few more exchanges along these lines, the participants began to go through the documents more systematically and tackled larger issues. One striking feature of this piece of talk is that the protagonists were the lawyers. The bankers and real estate representatives hardly said anything. Yet the talk was disorganized. For example, there was doubt over which was the correct copy of the purchase agreement. It was almost as though the lawyers were using this as a preamble to the serious business, a way of warming up.

In the next set of exchanges, the real core of the transaction, *how to define control*, surfaced vividly. And with it who was to control development of the deal in the meeting.

ANDREW SEGAL (D): Next one, E,<sup>14</sup> I have a big problem with. I don't give a *damn* what a guy's net worth is. Let me give you an example of a guy who got a Vie de France franchise. He did very well though he has limited net worth. Then on another development we wanted restaurants, so we went to him and told him we wanted him to run one. We'd finance, but he'd own it. A good tenant is best.

ROY PORTER (B): Yeah, that's venture capital.

ANDREW SEGAL (D): If you're in real estate that's *venture capital*. If it's in then you're worried about it.

ROY PORTER (B): I guess that's our only way of isolating it.

ANDREW SEGAL (D): We get financial statements.

HAL POSNER (BL): When do we get to look at the tenants?

ANDREW SEGAL (D): You want to approve every lease?

SEYMOUR PERRY (BL): Is there another economic test we could use?

ANDREW SEGAL (D): We're not gambling. We put a tenant in, he improves the place. The worst that can happen is that he's in and out in a year. You could make on turnover, lease it.

ROY PORTER (B): That's not our tenant.

ANDREW SEGAL (D): Why don't we isolate it? Under 3,500 square feet we don't bother, over that you approve the lease.

SEYMOUR PERRY (BL): We could have a security deposit.

ANDREW SEGAL (D): Not being demanded any more.

SEYMOUR PERRY (BL): Why not restrict it to a three-year lease with a three-year option?

ANDREW SEGAL (D): That's good.

ROY PORTER (B): Andrew's right; it creates a bit of turnover.

MICHAEL SHAPIRO (TL): OK.

The two sides started the true substance of the meeting by arguing over who should examine prospective tenants.<sup>15</sup> Andrew Segal (D) opened in a very aggressive manner by disparaging the bank's need to examine the financial creditworthiness of every prospective tenant. He backed up his demand with a success story, which the bank representative immediately identified as venture capital, that is, a high-risk investment. Segal then attempted to reinforce his story by saying his organization obtained reliable financial statements. Here he was implying that he did not give away tenancies without scrutinizing prospective tenants, so the bank should not need to inspect every lease.

The two sides were trying to determine the point at which the authority of the manager, Segal Partners, ceded to the owner, Meganational Bank. The arrangement was that while Meganational was buying the mall, Segal Partners would manage it for the

<sup>14</sup> This clause required that potential tenants' assets be examined.

<sup>15</sup> See MacCullum (1967) for an interesting discussion of social control in the American shopping mall.

bank. Segal Partners, because, in part, of the guarantee from Equity Insurance, wanted to extend their control over the leasing arrangements as far as they could. The problem concerned the real estate company's guarantee of \$14 million with Equity Insurance, which appeared intractable. The guarantee was tied to specific profit projections that the property company had to meet within a certain time or else lose control of the mall. The issue was whether it could meet the projections, since having sold the mall to the bank, Segal Partners would have no control over how the guarantee was paid off. This particular problem had already consumed considerable amounts of the Tischmann lawyers' time. It was in the choice of tenant that the future of the mall lay—high-risk, potentially profitable tenants versus low-risk, low-profit ones. The bank was essentially arguing that conservatism should rule choices, with the implied possibility that the profits from such a tenant would be relatively low but secure. Segal Partners wanted to pursue a riskier, more aggressive approach by putting in less financially stable tenants, who nonetheless might generate larger profits. This difference reflected the difference in organizational ethos between an established bank and a risk-taking property developer.

Roy Porter (B) suggested "isolating the economic test," put forward by the bank lawyer, Seymour Perry, which Segal said should not be applied below 3,500 square feet. The bank's lawyers were unable to accept this initial suggestion and offered their alternatives of taking security deposits on anything more than a three-year lease with a three-year option. Both sides wanted the deal to go through, but it was the task of Posner and Perry to anticipate the problems and uncertainty that would arise as the deal was formulated. Here both Porter and Perry moved Segal towards the formulation of a test that would clarify when a tenant became the responsibility of the other.

The protagonist in this scene was the property company representative, Andrew Segal. The antagonists were the bankers and their lawyers. Interestingly, the Tischmann Weinstock partner played a quite modest, passive role, that of summarizing and concluding the proceedings with the statement "OK." Part of the conventional wisdom of lawyering is the picture of the lawyer exercising control, dominating the scene. James Stewart's *The Partners* (1983) speaks of lawyers as virtual cowboys proving who is fastest with the writ or interrogatory; everyone else is cast as inferior to the lawyers.<sup>16</sup> Sarat and Felstiner (1986), in their study of divorce lawyers, also depicted lawyers as controlling and manipulating their clients. But here we see more of a dialogue between lawyer

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<sup>16</sup> In his description of the IBM antitrust suit, Stewart (1983:53-113) not only depicts the IBM helpers as inferior to the Cravath lawyers, but distinguishes between the superiority of private counsel, Cravath lawyers, and the mediocrity of the government lawyer.

and client and between lawyer and opposite principal. The dialogue can become heated, however, as the next exchange shows. The issue of trust and its limits was brought to the fore by Meganational's lawyers.

HAL POSNER (BL): We're still thinking about this. These partners are giving up their rights to review things.

ANDREW SEGAL (D): They're not. They're putting their trust in us.

HAL POSNER (BL): For every one that succeeds, a few will bomb out.

ANDREW SEGAL (D): No, doesn't happen. You've got to know the marketplace.

Here we see the counterpoint of "rights" versus "trust and knowledge of the marketplace." Segal was trading on the ignorance of the bank in this type of venture. The bank was not a frequent party to real estate deals *involving management*. Its lawyers, aware of this, tried to depict the issue as one of rights and their abandonment. Segal placed his, and the market's, integrity at stake. As we see in the next part of the meeting, his gambit failed to draw the bank's agreement.

HAL POSNER (BL): We want the space small—2,500 square feet.

ANDREW SEGAL (D): OK, let's say 3,000 and a three plus three.<sup>17</sup>

HAL POSNER (BL): OK.

ROY PORTER (B): Twenty-five hundred only applies to two tenants.

HAL POSNER (BL): I think 2,500 is appropriate.

ANDREW SEGAL (D): Let's just do three plus three.

HAL POSNER (BL): No, we want square footage too. We want to participate in the review process. It's reasonable.

ANDREW SEGAL (D): Yeah, *reasonable*. It's what the courts want it to be.

HAL POSNER (BL): Look, it's different in California.

ANDREW SEGAL (D): Yeah, it only takes ten years to get a building permit there. Do you want to knock out the three plus three to 3,000?

SEYMOUR PERRY (BL): Knock out the three and three and go to 2,800.

ANDREW SEGAL (D): I don't like it.

BILL STANLEY (D): I don't like it either.

Meganational's lawyers were afraid of granting Segal the amount of discretion he was demanding. As a means of communicating to Segal the strength of their concern, Posner invoked the concept of "reasonableness," a commonsense approach to what was appropriate (Geertz 1983), a way of saying that the situation entails risk for all but there are ways we can come to agreement over what the quantum should be. In his response Segal was dismissive

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<sup>17</sup> A three-year lease with an option to renew for a further three.

of what he saw as a ploy,<sup>18</sup> that instead of being a commonsense notion, reasonableness was in fact a way of pulling in a legal definition. The extent to which the claim to reasonableness was successful is summed up in Posner's statement: "Look, it's different in California."

The final step in the discussion was how to cope with the problem presented by the insurance company's guarantee. Failure to pay off the guarantee would affect both parties, so both wanted to see it resolved. And here the Meganational lawyers were determined to reduce their potential for risk.

MICHAEL SHAPIRO (TL): We have a problem with the insurance company where if we don't reach limit within fifteen months, we're on the guarantee for the full term of the loan—ten years.

HAL POSNER (BL): I hope you can change it with the insurance company. We've had one like this where we couldn't get rid of the management group. So if you're still on the guarantee, then it's because you're not doing a good job. But we'd want a new manager. We could let you approve a new manager.

ANDREW SEGAL (D): We don't like it. Our company is a good developer with a good reputation.

HAL POSNER (BL): Once you've been burned once, you're leery about doing it again.

At this state in the negotiations, both sides—and especially the lawyers—were aware of the risks and uncertainties if the insurance guarantee could not be satisfied. This was one element that was essentially outside their control, and consequently Meganational's lawyers were reluctant to rely on Segal's promises to overcome any difficulties: he could not provide substantial evidence for them to overcome the effects of "being burned."

Finally, what occurred *after* the meeting was interesting in the context of what had been said there. Members of the Segal group were talking among themselves when Strauss, Shapiro's associate, came into the room and announced:

PAUL STRAUSS (TL): I've worse news. Our third tenant from Strawberry Fields has just walked, after six weeks. A franchise. I told [another associate] to start a suit, but the tenant said he'll go bankrupt if we do.

MICHAEL SHAPIRO (TL): How big?

PAUL STRAUSS (TL): Two thousand feet.

MICHAEL SHAPIRO (TL): A small tenant. It's going to show on the list [of defaults].<sup>19</sup>

ANDREW SEGAL (D): I haven't told about the others.

MICHAEL SHAPIRO (TL): You mean on the list? They're down. Andrew, we've just told them there are no de-

<sup>18</sup> The way Segal used the stretched form, "Yeah," accentuated his attitude towards Meganational's lawyer's suggestions.

<sup>19</sup> A list of defaults was promised in the course of this type of transaction.



faults, except [X and Y]. You gotta tell them, you gotta tell them.

Shapiro was faced with a situation where he lacked complete knowledge of the information his client held. This is a common problem for lawyers: for a variety of reasons clients may withhold information. In writing about the relationship between clients and white-collar defense attorneys Mann (1985:38) says: "Client withholding of information may be consistent with the best defense strategy. Defense attorneys sometimes facilitate withholding of information . . . . The defense attorney is thus always concerned with the question of whether his client is giving him all the information he needs to know."

In one sense this is uncertainty at its most elemental. True, the lawyer may resist hearing information as Mann suggests, but when the lawyer is trying to obtain information and finds it withheld, he or she faces the abyss. Incorrect information could mean the destruction of the case. Shapiro is clear as to what Segal must do: he must tell Meganational about the defaults, but, given Segal's status as a major client, Shapiro cannot force him to tell. There are both objective and normative dimensions to Shapiro's position. What would be the result of not informing Meganational? Similarly, is Shapiro under an ethical obligation to do anything? Shapiro's recourse in this case was to pass on the facts to Levi, who had the authority to spell out the consequences of various actions to Segal. Here the ambiguous position of the middle-range partner operates to his advantage, for he shares responsibility and resources with his more senior colleague. Segal eventually talked to the insurance company and was able to persuade them to accept the bank as a substitute for the guarantee and ultimately the deal with Meganational was concluded.

## **B. Negotiating a Bank Loan**

Lawyers will often simply modify an existing document rather than draft a new one. The uncertainty of putting deals together is reduced by relying on something that has proved successful before. Loan agreements are a prime example of a repeated document. They are often framed by the lender (a bank) as preparation for negotiating a final form of the agreement. This example shows how such a document is transformed from a unilaterally conceived agreement into a consensual one. The document's final form is as much a result of the interaction between the two senior lawyers on either side of the transaction—Peter Black and Marvin Broad—as it is a quest for the most profitable and efficient solution to lending for maximum profit and minimal risk. These two lawyers, who had been in practice for many years, had attended elite law schools and knew each other well. Broad had been a partner in two firms, both of which he helped build. He specialized in corpo-

rate work, acting mainly as a counselor for his clients. He generally saw himself as a *paterfamilias* figure for his clients and colleagues. Black, too, was a corporate lawyer, spending much of his time on banking affairs. Both were prominent in the community. It is their personalities which dominate the proceedings. As they thrust and parry, we will see how a legal instrument—a contract—is cut up, then eventually stitched together and given new life.<sup>20</sup> Brian Ochre, although not a lawyer, is an accountant who has spent his entire career with First Bank and was also intensively involved in the discussions.

This example will show that lawyers engage in practical reasoning (Garfinkel 1967; cf. Levi 1949). That is, the process of formulating a document recognizably acceptable to all the actors is an unfolding and contingent process, which is not—as one might expect from a traditional reading of law as a “principled discipline”—merely an explication and application of some fundamental axioms. The process takes place in specific places, at specific times, with particular people.

In this example, a large, private company (Company Ltd.) wanted to borrow \$5 million from a medium-sized bank (First Bank).<sup>21</sup> The negotiations extended over three meetings: in the first two, the clients—the president, Clive Small; the senior vice-president, Earl Long; and the chief financial officer, Frank Short—were present; the final meeting was held between the lawyers without their clients. These clients had retained Tischmann Weinstock for corporate, tax and litigation matters for more than ten years, and the senior partner, Marvin Broad, had also been the lawyer for the previous owners of the company. In one respect, he was almost a godfather to the present company, having assisted Small and Long in taking over the company from the previous owners in a management buyout.

Broad was annoyed by what he considered to be the unnecessary complexity and prolixity of the proposed agreement, which had been drafted by First Bank's lawyers. The loan agreement opened with a two-paragraph statement describing who the parties were and the amount to be borrowed. This opening statement was then followed by thirty-eight single-spaced pages of terms and conditions. Several pages of schedules followed the main document. According to Broad, the other major bank he had dealt with, Second Bank, used much shorter and simpler agreements, but he was unable to use Second Bank for this loan.<sup>22</sup> Though Broad pre-

<sup>20</sup> This example will show that legal documents are not immutable objects, but are open to change and reconstruction. It will also suggest that those who engage in business find their efforts and goals mediated in a peculiarly esoteric way by law and lawyers.

<sup>21</sup> For obvious reasons of confidentiality, the name of the company and its products have been kept anonymous.

<sup>22</sup> From my examination of other loan agreements in Tischmann Weinstock files, this was not, *contra* Broad, an extravagantly long document.

ferred shorter agreements, he knew his chances of achieving that in this case were slim. Broad believed a long document, whereas it might appear to cover contingencies, would in fact create them: it would be a local form of hyperlexis. He had discussed with his clients what they could expect from the discussions and they had agreed to rely on whatever Broad could change for them. Ultimately, they needed the loan.

A number of issues arose in the meetings that both lawyers and clients had to resolve: Who or what was the bank lending its money to? What were the time periods involved? How would trademarks and jury trial waivers be determined? The resolution of these issues was necessary for the loan to be made. One point should be noted about the extracts of talk that follow. The action is accomplished with an appearance of rapidity; the degree of haggling is apparently low. But, as Maynard (1984:104-5) indicates, the appearance of rapid resolution may obscure much in the way of detailed work being done by the participants. The routine does require work to be accomplished (Schegloff 1986).

The first meeting, held at Tischmann Weinstock's offices, was between First Bank's representatives: an accountant from the bank, three outside lawyers from a firm that traditionally handled First Bank's legal work; and two lawyers from Tischmann Weinstock: Broad, a senior partner, and Narrow, a middle-level partner who often worked with him on corporate matters; and the clients. The two teams of lawyers knew each other well, having negotiated similar matters before.

The cast is as follows:

PETER BLACK	First Bank outside senior counsel (BL=bank lawyer)
MARGARET TAUPE	First Bank outside counsel (BL)
DAVID GREEN	First Bank outside counsel (BL)
BRIAN OCHRE	First Bank accountant (BA=bank accountant)
CLIVE SMALL	Company Ltd. president (CP)
EARL LONG	Company Ltd. senior vice-president (CVP)
FRANK SHORT	Company Ltd. chief financial officer (CFO)
MARVIN BROAD	Tischmann Weinstock senior partner (TL)
RAY NARROW	Tischmann Weinstock partner (TL)

The meeting started, in a low key fashion, with a discussion about who owned the company and about similar provisions found in the loan agreements of other banks. Although Marvin Broad did most of the talking for his clients, he had relied on Ray Narrow, his junior partner, to analyze the document and brief him on what to say. This, of course, had been done outside the purview

of the participants in this meeting. As one of Tischmann Weinstock's key business-getters ("rainmaker"), Broad spent most of his time talking with clients: to do otherwise would have adversely affected his profitability for the firm (Nelson 1988). Even though Broad and Black had negotiated with each other before, prior relationships, whatever they bring to current interactions, will rarely provide the constitutive force for the achievement of the business at hand (cf. Garfinkel 1967:94-96).

During the meeting two central issues emerged: trademarks and waiver of jury trial. One of Company Ltd.'s most valuable assets was its collection of trademarks, which had achieved national recognition. Because they identified the company in the public mind, they were of great importance to First Bank as well as Company Ltd. But even more important to Company Ltd., as will come out in the stretch of talk following the next, was the possibility of losing the right of trial by jury. Broad was concerned to keep the latter. In order to do so, he set up an elaborate but effective procedural decoy. The importance of the trademarks is established and then is weighed against the effect of losing the trial by jury. Broad had also worked closely with Small in setting up the form of the discussion over these issues. The meeting began with the following discussion.

MARVIN BROAD (TL): Clive, you indicated you didn't like filing trademarks as collateral.

CLIVE SMALL (CP): But if the business fails don't they get our trademarks?

MARVIN BROAD (TL): They need an assignment if they want to sell it. The other way is to give a negative covenant that you won't sell it to anyone else.

CLIVE SMALL (CP): Yes, this company is worth more as an entity than its pieces.

MARVIN BROAD (TL): I personally question the assignment of the trademarks.

CLIVE SMALL (CP): But you're giving them the ability to cut out the trademarks. I would rather they sell the business.

BRIAN OCHRE (BA): But what do we do if we don't have them?

MARVIN BROAD (TL): People do a trademark search and they find you have done a collateral assignment that might impugn your credibility.

BRIAN OCHRE (BA): How do we look to the inventory without the trademarks?

MARGARET TAUPE (BL): You have the tangibles. We need a secured interest<sup>23</sup> by having a filing in the Patent and Trademark Office.

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<sup>23</sup> A secured interest is "a form of interest in property which provides that the property may be sold on default in order to satisfy the obligation for which the secured interest is given." *Black's Law Dictionary* (5th ed.).

MARVIN BROAD (TL): Once we're in default yes, but what does it do to the reputation of the company?

EARL LONG (CVP): Did it happen before?

FRANK SHORT (CFO): No, I don't know what effect it would have.

MARVIN BROAD (TL): For the bank it's a valuable asset.

PETER BLACK (BL): It's *the* asset.

EARL LONG (CVP): Would you do it if we're in default?

PETER BLACK (BL)/BRIAN OCHRE (BA) [*together*]: It's an option.

BRIAN OCHRE (BA): To go back: to sell it in toto would realize more.

MARVIN BROAD (TL): In bankruptcy, of course, the bank wouldn't have priority.<sup>24</sup> It's up to the court.

BRIAN OCHRE (BA): If we're in there selling the real estate, et cetera, and the trustee in bankruptcy is selling off the trademarks, I don't see how we're better off. I don't like it.

MARVIN BROAD (TL): Ray, let me see the previous agreement.

MARVIN BROAD (TL) [*to Brian Ochre*]: Did we discuss it before?

CLIVE SMALL (CP): Why don't we put it aside and go on?

Broad started the meeting by talking directly to Small, his client, rather than the other lawyers. It was in the nature of a side-show, since Broad could have discussed the matter directly with Black. But it had the effect of drawing in Ochre of First Bank, allowing Broad to direct the talk initially and effectively prescribe the agenda and so maintain control. Second, there was a tension here over the fate of the trademarks. Without them Broad claimed Company Ltd. was valueless: if another company were to acquire them, it would immediately gain the prestige, and potential market, of Company Ltd. First Bank's accountant and lawyer are convinced that the only asset worth rescuing from a dying company would be its trademarks, hence their insistence on making a filing with the Patent and Trademark Office. Broad offered, though not very strongly, a countermeasure, that of giving a negative covenant—a legally binding undertaking not to do something—not to sell the trademarks to any other business or person except First Bank. He was concerned that others in the business world would draw the wrong inferences from First Bank's filing, which could damage or mar Company Ltd.'s reputation as a creditworthy business. For all of Broad's apparent concerns about the possible loss of Company's trademarks, they were a decoy. His main concern was a clause that excluded trial by jury in the event of a default, which he wanted taken out. His method was to offer a trade—the trademarks for the jury trial waiver. The trademarks

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<sup>24</sup> In bankruptcy creditors are rank ordered according to which will receive before the others.

were seen as valuable in the eyes of First Bank and Company Ltd., and Broad worked to sustain and reinforce that view.

MARVIN BROAD (TL): We don't want this waiver [of trial by jury] in the agreement.

PETER BLACK (BL): Marvin, for this to operate, you would be in default. Then it's not the time to argue technicalities. If there's going to be a big fight, there'll be a fight. It's a standard provision.

MARVIN BROAD (TL): Waiving trial by jury is not standard.

PETER BLACK (BL): It is.

MARVIN BROAD (TL): It depends what side you're on as to whether you want a jury. In the agreement with Second Bank it wasn't there.

PETER BLACK (BL): We don't have that agreement. You show us that mystical agreement and let's see what they did.

BRIAN OCHRE (BA): We've asked several times to see that agreement.

MARVIN BROAD (TL): How many?

BRIAN OCHRE (BA): Several, and I suppose our sister bank must have some insecurity language in there.

MARVIN BROAD (TL): No, I would never let my client agree to such language.

BRIAN OCHRE (BA)/PETER BLACK (BL) [*together*]: Well, we think of it as standard.

PETER BLACK (BL): We have to also resolve the trademark issue.

MARVIN BROAD (TL): Two issues: trademarks and jury trial.

BRIAN OCHRE (BA): I don't see, Clive, what the problem is over the trademarks.

MARVIN BROAD (TL): The problem could come up because trademark collateral assignments aren't that common. Someone might do a search because they want a mark. So how much damage, which I can't totally evaluate, might occur?

CLIVE SMALL (CP): We'll give up the trademarks for the jury trial.

MARVIN BROAD (TL): No. They're not interchangeable like that.

CLIVE SMALL (CP): Which is important? Is the jury trial important?

MARVIN BROAD (TL): Not as important as the trademarks. It's not a legal question, it's a business one.

EARL LONG (CVP): We can give up the trademarks.

MARVIN BROAD (TL): That leaves us with the jury trial.

CLIVE SMALL (CP): I think it's a *quid pro quo*.

MARVIN BROAD (TL): If they're suing us for damages, we want that protection.

BRIAN OCHRE (BA): I need to talk to Peter about this.

MARVIN BROAD (TL): Use my office.

The First Bank group left the conference room. While they

were out, the Tischmann lawyers chatted among themselves in and with their clients in the conference room. At one point Clive Small said, "I don't mind giving up the trademarks." The others returned after about five minutes and Peter Black said, "We'll give you the jury trial waiver."

The final resolution was a trade giving up the trademark collateral assignment in order to keep the right to a trial by jury. Broad thought this a successful outcome, as did his clients. Although Broad and Small had defended their claim on the trademarks as sacred, their ultimate position was that they were exchangeable for the protection of a jury trial. If an extreme trouble case occurred (Llewellyn and Hoebel 1941), then with a jury trial, Small and Long were better situated arguing before a jury rather than a judge about the merits of their case. The possibility of retaining the trademarks was stronger with a jury trial than without. As I mentioned in the introduction, the task of uncertainty management has two directions for lawyers, to reduce it for themselves and for their clients. Broad was engaged in curtailing the prolixity of the loan agreement while attempting, and succeeding, to protect Small's and Long's interests in the event of a dispute with First Bank. Here, there were significant differences in the knowledge available to each side. The lawyers on both sides were knowledgeable about the legal issues in constructing the loan agreement document; the relevant issues were factual ones over which there is potentially less control.

### C. Answering Clients' Questions and "Snow Jobs"

Clients assume lawyers carry their knowledge in their heads. This is not an unreasonable assumption for clients to make, but lawyers are typically cautious and are hesitant about being put on the spot. They may, however, be unable to avoid the spot, especially when a senior partner puts them there. A middle-range partner specializing in labor law, Coyne, was called by a senior partner, Kossof, a real estate lawyer, who had a client who owned a plant and who wanted to know if he could compel his employees to take polygraph tests. Kossof told Coyne that he was putting him, himself, and the client on the same phone call at that moment so the question could be discussed by all three of them. Coyne detested being put on the spot without some preparation, but he could not refuse. He was in a potential double jeopardy: if he could not produce the right answer, it might make the client wonder why he was paying his expensive legal fees. Moreover, Kossof would have been annoyed at Coyne and let others know of it. As it turned out, Coyne was able to deliver a quick off-the-cuff answer, but he backed it up by insisting that he do some research. Kossof also reinforced the call for confirming research. Both lawyers knew it was beneficial to them. This example, as in the sell-

ing of the shopping mall, demonstrates the problem of the junior lawyer who is often placed in an awkward situation by the senior members of the firm. The solution is in the passage of time when the junior becomes senior or for the lawyer to become a rainmaker and so be in the position to make similar demands. Nevertheless, even good rainmaking skills are not a complete escape from the uncertainties of legal practice, as the next example illustrates.

Sometimes lawyers are reluctant to tell their clients, or potential clients, that they do not have the information to hand, so they "wing it" or do a "snow job" (cf. Goffman 1952). This ability to do snow jobs is widely admired among lawyers. its *raison d'être* is simple: Clients will never see or receive any intimation that their lawyer is fallible. Of course such a veil cannot be held up all the time, but it can hide errors and gaps in knowledge much of the time. Doing a snow job can lead a lawyer to considerable lengths, as in the example below.

The fear of losing clients is almost palpable among corporate lawyers. Up to the 1980s law firms could rely on their clients never to stray to another firm. Law firms, therefore, could be very self-indulgent and engage in extensive legal research at great cost to the client.<sup>25</sup> The intensification of commercial competition among clients and of the business philosophy among corporate lawyers in the 1980s led to a move away from longstanding lawyer-client relationships to shorter-term transactional contacts (MacDonald 1989). Thus uncertainty is piled upon uncertainty: Can the question be answered and will the client stay?

One of Tischmann Weinstock's chief securities lawyers, Daniel Troha, was called by a lawyer in Phoenix, Jones, representing a group of cattle-feed investors from Arizona. Troha was renowned for his rainmaking skills. Even though he was only in his early thirties, he was one of the major businessgetters in the firm. He had had no warning Jones was going to call him. As the cattle-feed investors were in Jones's office, both lawyers turned on their squawk boxes so all the parties could speak. The investors had started an investment program in cattle, in which they would first solicit investors, then purchase the cattle and feed and ultimately sell them. They expected to purchase between \$1 million and \$2 million worth of cattle. They had drawn up the original cattle-feed agreement without a lawyer, however, and so the agreement was full of mistakes. On going to see Jones in Phoenix on an ancillary matter, Jones told them that in his view, a variety of problems might ensue because of the flawed agreement. Jones knew of Troha at Tischmann Weinstock because he had heard him

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<sup>25</sup> An amusing example of the lengths to which the maxim "research and more research" could be taken is found in John Jay Osborn's novel, *The Associates* (1979).



speak at a securities conference arranged by a national accounting firm.

Troha knew nothing about cattle-feed investment programs but was not going to admit it, so he said: "Let's assume, hypothetically, that I know nothing about this and you tell me all about it." The ploy was successful and as Troha listened he discovered that he could draw an analogy between cattle-feed investment programs and capital equipment investment so that he could make some intelligent extempore comments. The cattle-feed investors were unable to recognize how or why they had gone wrong. Troha explained that since the original agreement did not meet SEC requirements and the investors were not actively involved in the buying of the cattle (a consulting expert did the actual purchasing), those running the program were at risk. They had balked at the possible cost of writing as complex a document as they thought they would need to produce to satisfy SEC requirements. Troha explained that such a document need only run to twenty-two pages without exhibits. Their document should be revised—which he would do for them—and the revisions should be submitted to their investors, offering them the right to rescind their contracts.

The investors were still unsure whether to continue with their program now that they were in breach of the law. Troha told them to go ahead since, because they were already in violation, there was no reason why they should not continue. He could extract them, "with their asses," from any difficulty with the SEC; he had just handled a comparable case with much worse facts and brought out the clients "intact." Later Troha said that doing such retroactive repair work "was like seeing a box of lawnmower bits come into the office and being asked to put it back together again." Troha constructed his solution by the process of engaging his clients in a dialogue, a dialogue in which they educated him in the intricacies of cattle-feed investment. If he had been unable to achieve this connection with his clients, he would have been at a loss. Troha would have been forced to admit ignorance, which would have stripped him of the mantle of authoritative expert in the eyes of the clients.

In the next situation, a client bank, First State Local Bank, asked Davidson, a corporate partner, for help with a transaction they were conducting with an English bank involving a letter of guarantee. U.S. banks do not issue such letters of guarantee, relying instead on standby letters of credit. Davidson had had responsibility for this client—one that had been with the firm many years—for only a short time and was quite anxious to make a good impression on the bank. He had been a partner for about five years, and his ambition was to become head of the corporate department in Tischmann. Besides taking on responsibility for some large clients passed to him when another senior partner retired, Davidson had already managed to bring in a few steady clients.

Davidson knew nothing of letters of guarantee but wanted to hide his ignorance in this area from First State Local. He drafted two associates to research the issue and come up with a recognizable letter of guarantee which he could present to the bank officers. (The international lawyers in the firm had already been unable to supply any answers.) It had to be done very quickly, as Davidson did not want the bank to think that he lacked the knowledge of the issue. Cohen, one of the associates, learned that U.S. branches of English banks would, on notice of the issuance of a letter of guarantee, issue in its stead a standby letter of credit. Cohen believed this would be one way to resolve the problem. Davidson, however, refused to accept this solution, demanding to be told what a letter of guarantee really looked like. He was worried that the bank might ask him what the actual letter looked like.

After more than a day of research, the associates located some cases that had parts of such letters in them and patched together a near facsimile of a letter of guarantee. When Davidson told the bank what a letter of guarantee was and that it could be circumvented by using a branch of an English bank, First State Local decided to adopt the latter course. Thus Davidson was able to extend his knowledge base, impress the bank, and forestall any display of ignorance at the expense of the client bank.

This instance of a snow job exemplifies Goffman's (1959) distinction between frontstage and backstage performances. For a snow job to work, the two areas must be kept distinct; there must be no leakage from one to the other. Davidson's ignorance was never publicly displayed to the client and was carefully fended off by the claim of having to research the matter. Backstage, within the firm, ignorance is a private disability that is, on the whole, to be collectively overcome. Sometimes snow jobs require immediate improvisation without the respite of retreating backstage to find new props. The case of Troha counseling the Arizonan cattle-feed investors is one. Here he had to construct a role virtually within the purview of the audience, his clients, developing that character as he received cues and clues. He had no time to rehearse a script. Most lawyers avoid such roles because the potential for making mistakes is enormous.

#### IV. CONCLUSION

I have attempted to show what a certain group of lawyers—corporate lawyers—*do in their everyday activities as lawyers*. Their work is not an a priori given but is something that has to be constructed continually, in Schon's description, by doing-in-action with the aid of knowledge-in-action. In doing their work, corporate lawyers deal with other lawyers from within their own firms, lawyers from other firms, and of course their clients. Coping with the various constituencies of interests magnifies the contingent na-

ture of their work; the interaction of lawyers with lawyers and lawyers with clients are processes replete with uncertainty.

In my analysis of lawyers' work I have concentrated mainly on how lawyers put deals together, a quite separate category of work from litigation, with different expectations and motivations. The studies of divorce lawyers (Sarat and Felstiner 1986; Griffiths 1986), white-collar defense attorneys (Mann 1985), and personal injury lawyers (Rosenthal 1974) are significant within the context of dispute resolution—how to handle conflict already present. The Tischmann corporate lawyers hardly ever enter a courtroom: instead they think in terms of continuing negotiation. From the corporate lawyer's perspective the objectively knowable external world, referred to by Schon, is constantly shifting and unstable. It needs to be monitored, repaired, and reconstructed continuously. Everything is open ended. And it is for this reason that I characterize corporate lawyers' work as the management of uncertainty. The fundamental uncertainty is that the deal might collapse, which for the lawyer might possibly mean losing the client and the fees.<sup>26</sup> For lawyers working on matters more focused on resolution of discrete conflicts, a satisfactory custody order may be granted, a prosecution dismissed, or a settlement ratified. At this point the lawyer usually withdraws from the client's life. But in the case of the corporate lawyer, he or she often remains a constant feature in the client's daily business.

The lawyer realizes also that the client's or other party's expectations might change and matters will have to be renegotiated. Even though corporate lawyers seek certainty for their clients, they know it is really a chimera. This feature, too, distinguishes the management of uncertainty from problem solving. Inherent in the idea of problem solving is that there is a solution, some form of answer that closes the process. There may be answers of a sort, but they are at best merely short term. Salacuse (1988:347), for example, puts this way:

The challenge of international business negotiations is not just "getting to yes," but staying there. International business agreements, solemnly signed and sealed after hard bargaining, seem to break down frequently, bringing the parties back to the negotiating table. Indeed, many international business negotiations are in reality renegotiations of preexisting agreements.

The examples I have presented also illuminate the relationship between lawyer and client. The most basic question was that put by Rosenthal (1974): Who's in charge? In the general case of the personal plight lawyer, the question is an apposite one. The evidence from studies of these lawyers suggests strongly that lawyers expend considerable energy in maintaining control over their

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<sup>26</sup> Cf. Gilson (1984), who argues that business lawyers enhance the value of transactions.

clients (Hosticka 1979). Business lawyers, however, are more in the thrall of their clients, according to Heinz and Laumann (1982). In part this is correct: The example of Segal and Shapiro shows the client firmly taking command of the proceedings. In the examples of Broad and Small, Troha and the cattle-feed investors, and Davidson and the First State Local Bank, the division of authority is less clear. It might be more reasonable to speak of collaboration between lawyer and client towards ends that are open textured rather brought to natural closure. For example, both Broad and Small in the bank loan example work together in presenting the issues of the trademarks and the exclusion of trial by jury. Step by step, utterance by utterance, they construct their case. Troha, too, works with his potential clients to arrive at a range of possible answers. Again the motif of collaboration is present.

An element that complicates the lawyer-client relationship is when the lawyer doing the actual work is not the one who "owns" the client in the firm. This was very much the case with Shapiro, who could not influence a client like Segal in the same way his mentor Levi could. Once the lawyer-client relationship is placed in the context of the law firm as an organization, we cannot look at the relationship as a simple dyad. It is much more. Who does what and how becomes part of the politics of the firm. For example, within Tischmann Weinstock 41 percent of the firm's corporate clients were controlled by six lawyers, which means these six partners distribute a large amount of work throughout the firm. The potential, then, for patronage *within* the law firm is enormous, thus creating highly ambiguous situations for the lawyers working for their patrons. The "underlaborers" are pulled two ways simultaneously at least—to the client and to their patron. The problem for the underlaborer is that he or she has to satisfy both constituencies, which may not always be possible. For example, a client asked an associate to interrupt his senior partner during a series of questions because the partner had omitted something of importance. The partner responded as asked but afterwards berated the associate for his impertinence in interrupting him.

Lawyers' knowledge is different in kind from that of natural scientists, who can appeal to the canons of scientific method and replication of experiments (Barnes 1985).<sup>27</sup> The results of lawyers' work depends on the interactions with others as much as, if not more than, the knowledge they find in texts. All the endeavors described and analyzed in this paper were ultimately social constructions—e.g., Broad worked with Small and Black; Troha

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<sup>27</sup> There is now evidence to show that even scientific work is dependent on an interactional infrastructure and that its objective methods cannot be taken for granted (Lynch 1985).

worked with his clients; Davidson collaborated with his associates. Norms, unlike objective phenomena (and this is highly contestable), are pure human constructs, out of which it is virtually impossible to derive general laws. The work of lawyers is founded on interaction. Negotiating, drafting, and advising all depend on an interactional context for their fulfillment, no matter how mundane the matter may be. Even the changing of the work "substantial" for "material" is not something that can occur in isolation. Within each of the spheres of negotiation, drafting, and advising lawyers have developed practices for their accomplishment. These practices are what Schon calls knowledge-in-action. That is, theoretical knowledge will only help partially; it is the knowledge that comes from the doing of the work which is crucial to normatively based professions. It is in the very activity of negotiating a deal that the deal comes to be.

### REFERENCES

- ABBOTT, Andrew (1988) *The System of Professions*. Chicago: University of Chicago Press.
- ABEL, Richard L. (1980) "Redirecting Social Studies of Law," 14 *Law & Society Review* 805.
- ABEL, Richard L., and Philip S. LEWIS (1989) "Putting Law Back into the Sociology of Lawyers," in R. Abel and P. Lewis (eds.), *Lawyers in Society: Comparative Theories*. Berkeley: University of California Press.
- BARNES, Barry (1985) *About Science*. Oxford: Basil Blackwell.
- BODEN, Deirdre (forthcoming) *The Business of Talk*. Oxford: Polity Press.
- CAIN, Maureen (1983) "The General Practice Lawyer and the Client: Towards a Radical Conception," in R. Dingwall and P. Lewis (eds.), *The Sociology of the Professions: Lawyers, Doctors and Others*. New York: St. Martin's Press.
- D'AMATO, Anthony (1987) "The Decline and Fall of Law Teaching in the Age of Student Consumerism," 37 *Journal of Legal Education* 461.
- DANET, Brenda et al. (1980) "Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure," 14 *Law & Society Review* 905.
- DEZALAY, Yves (1990) "The 'Big Bang' and the Law: The Internationalisation and Restructuration of the Legal Field," in M. Featherstone (ed.), *Global Culture: Nationalism, Globalization and Modernity*. Newbury Park, CA: Sage Publications.
- FELSTINER, William, and Austin SARAT (1984) "Access to Lawyer/Client Conferences," unpublished paper.
- FISHER, Roger, and William URY (1981) *Getting to Yes: Negotiating Agreement Without Giving In*. London: Hutchinson Business.
- FLOOD, John (1983) *Barristers' Clerks: The Law's Middlemen*. Manchester: Manchester University Press.
- (1987) "Anatomy of Lawyering: An Ethnography of a Corporate Law Firm," Unpublished Ph.D. diss., Northwestern University.
- FOX, Renee C. (1957) "Training for Uncertainty," in R. Merton et al. (eds.), *The Student-Physician: Introductory Studies in the Sociology of Medical Education*. Cambridge, MA: Harvard University Press.
- (1959) *Experiment Perilous: Physicians and Patients Facing the Unknown*. Glencoe, IL: Free Press.
- GARFINKEL, Harold (1967) *Studies in Ethnomethodology*. Englewood Cliffs, NJ: Prentice-Hall.
- GEERTZ, Clifford (1983) "Common Sense as a Cultural System," in C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology*. New York: Basic Books.

- GILSON, Ronald J. (1984) "Value Creation by Business Lawyers: Legal Skills and Asset Pricing," 94 *Yale Law Journal* 239.
- GOFFMAN, Erving (1952) "On Cooling the Mark Out," 25 *Journal of Personality and Social Psychology* 451.
- (1959) *The Presentation of Self in Everyday Life*. Harmondsworth, UK: Penguin.
- (1964) "The Neglected Situation," 66 *American Anthropologist* 133.
- GRIFFITHS, John (1986) "What Do Dutch Lawyers Actually Do in Divorce Cases?" 20 *Law & Society Review* 135.
- HEINZ, John P., and Edward O. LAUMANN (1982) *Chicago Lawyers: The Social Structure of the Bar*. New York: Russell Sage Foundation; Chicago: American Bar Foundation.
- HOROBIN, Gordon (1983) "Professional Mystery: The Maintenance of Charisma in General Medical Practice," in R. Dingwall and P. Lewis (eds.), *The Sociology of the Professions: Lawyers, Doctors and Others*. New York: St. Martin's Press.
- HOSTICKA, Carl J. (1979) "We Don't Care About What Happened, We Only Care About What Is Going To Happen: Lawyer-Client Negotiations of Reality," 26 *Social Problems* 599.
- HUGHES, Everett C. (1958) *Men and Their Work*. Glencoe, IL: Free Press.
- (1971) "Social Role and the Division of Labor," in E. Hughes, *The Sociological Eye: Selected Papers on Work, Self, and the Study of Society*. Chicago: Aldine Atherton.
- JAMOUS, H., and B. PELOILLE (1970) "Professions or Self-perpetuating Systems? Changes in the French University-Hospital System," in J. A. Jackson (ed.), *Professions and Professionalisation*. Cambridge: Cambridge University Press.
- KAGAN, Robert A., and Robert Eli ROSEN (1985) "On the Social Significance of Large Law Firm Practice," 37 *Stanford Law Review* 399.
- LEVI, Edward H. (1949) *An Introduction to Legal Reasoning*. Chicago: University of Chicago Press.
- LLEWELLYN, Karl, and E. Adamson HOEBEL (1941) *The Cheyenne Way*. Norman: University of Oklahoma Press.
- LYNCH, Michael (1985) *Art and Artifact in Laboratory Science: A Study of Shop Work and Shop Talk in a Research Laboratory*. London: Routledge Kegan Paul.
- MacCULLUM, Spencer (1967) "Dispute Settlement in an American Supermarket: A Preliminary View," in P. Bohannon (ed.), *Law and Warfare: Studies in the Anthropology of Conflict*. Garden City, NY: Natural History Press.
- MacDONALD, Duncan A. (1989) "Speculations by a Customer About the Future of Large Law Firms," 64 *Indiana Law Journal* 593.
- MANN, Kenneth (1985) *Defending White Collar Crime: A Portrait of Attorneys at Work*. New Haven, CT: Yale University Press.
- MARCH, James G., and Guje SEVON (1988) "Gossip, Information and Decision-Making," in J. March, *Decisions and Organizations*. Oxford: Basil Blackwell.
- MAYNARD, Douglas, W. (1984) *Inside Plea Bargaining: The Language of Negotiation*. New York: Plenum Press.
- NELSON, Robert (1988) *Partners with Power: The Social Transformation of the Large Law Firm*. Berkeley: University of California Press.
- OSBORN, John Jay (1979) *The Associates*. Boston: Houghton Mifflin.
- PARSONS, Talcott (1952) "Social Structure and Dynamic Process: The Case of Modern Medical Practice," in T. Parsons, *The Social System*. Glencoe, IL: Free Press.
- (1954) "A Sociologist Looks at the Legal Profession," in T. Parsons, *Essays in Sociological Theory*. Rev. ed. New York: Free Press.
- ROSENTHAL, Douglas E. (1974) *Lawyer and Client: Who's in Charge?* New York: Russell Sage Foundation.
- SALACUSE, Jeswald W. (1988) "Renegotiations in International Business," 4 *Negotiation Journal* 347.
- SARAT, Austin, and William L. F. FELSTINER (1986) "Law and Strategy in the Divorce Lawyer's Office," 20 *Law & Society Review* 93.

- SCHEGLOFF, Emmanuel A. (1986) "The Routine as Achievement," 9 *Human Studies* 111.
- SCHLEGEL, John H. (1989) "American Legal Theory and American Legal Education: A Snake Swallowing Its Tail," in C. Joerges and D. Trubeck (eds.), *Critical Legal Thought: An American-German Debate*. Baden-Baden: Nomos Verlagsgesellschaft.
- SCHON, Donald A. (1983) *The Reflective Practitioner: How Professionals Think in Action*. New York: Basic Books.
- SHAPIRO, Susan (1988) "The Social Control of Impersonal Trust," 93 *American Journal of Sociology* 623.
- STEVENS, Robert B. (1983) *Law School: Legal Education in America from the 1850s to the 1980s*. Chapel Hill: University of North Carolina Press.
- STEWART, James (1983) *The Partners: Inside America's Most Powerful Law Firms*. New York: Simon & Schuster.