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Why Can't We Be Friends? A Business Finance Lawyer's Plaintive Plea to Entrepreneurs

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WHY CAN'T WE BE FRIENDS? A BUSINESS FINANCE LAWYER'S PLAINTIVE PLEA TO ENTREPRENEURS*

JOAN MACLEOD HEMINWAY**

Entrepreneurs have the capacity to add value to the economy and the community. Business lawyers—including business finance lawyers—want to help entrepreneurs achieve their objectives. Despite incentives to a symbiotic relationship, however, entrepreneurs and business finance lawyers are not always the best of friends. This Article offers several approaches to bridging this gap between entrepreneurs and business finance lawyers.

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INTRODUCTION

As a song about social and economic inclusion, the band War's 1975 hit rhythm and blues release "Why Can't We Be Friends?"¹ has a lot of salience in current discourse—including conversations about entrepreneurial finance. Without taking away from the song's broader

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1. WAR, *Why Can't We Be Friends?*, on WHY CAN'T WE BE FRIENDS? (Far Out Productions, Inc. 1975). For information about the band, the song, and the album, see WAR, ALLMUSIC, <http://www.allmusic.com/artist/war-mn0000191947> [<https://perma.cc/UV5D-EY4Q>].

social inclusion message, the repeated words in its chorus, together with a few additional lyrics, also present well the thesis of this Article. In pertinent part, the chorus (like the song's title) asks: "Why can't we be friends?"² And one of the interspersed verses admits, with some ostensible frustration: "Sometimes I don't speak right/But yet I know what I'm talking about."³ Apropos of those song lyrics, this Article asks entrepreneurs, on behalf of the business finance lawyers who desire to serve them, why we cannot be friends and work together to optimize our skills and knowledge to promote our joint objectives.

Truth be told, these familiar lyrics from my youth—this iconic song—kept running through my head as I researched and wrote. They summarize well, albeit at a general level, a common problem in the entrepreneur-lawyer relationship that impacts entrepreneurial success. Lawyers steeped in finance know a lot of things that are important to the avoidance of failure in start-ups and small businesses, including those organized for entrepreneurial ventures. They "know what [they're] talking about" in this space.⁴ Yet, sometimes they "don't speak right"⁵—or act right—or at least are perceived as not communicating or acting in a way that fosters and supports, rather than discourages and obstructs, entrepreneurs and entrepreneurship.

As a result of these miscues and other factors (including entrepreneur priorities and cost-benefit assessments), relationships between entrepreneurs and business lawyers—including those working on business financing transactions—vary significantly. Some are healthy, vibrant, productive relationships in which the lawyer is engaged in business formation and development activities from a venture's inception. Others are dysfunctional or even nonexistent.

With the foregoing in mind, this Article endeavors to illuminate and resolve—or at least minimize—disjunctions in the relationship between entrepreneurs and their business finance lawyers. To achieve its purpose, the Article proceeds in three principal parts before concluding. Part I describes the current relationship environment for entrepreneurs and their business lawyers, focusing most in the end closely on business finance specialists.⁶ Part II illustrates with examples some of the

2. WAR, *supra* note 1.

3. *Id.* For a transcription of the song's lyrics, see *Lyrics: Why Can't We Be Friends? (Live)*, WAR, GOOGLE PLAY MUSIC, <https://play.google.com/music/preview/Tneqvsrbak23ynowfj6jqaun4mi> [<https://perma.cc/6ZAN-SMAF>].

4. WAR, *supra* note 1.

5. *Id.*

6. This Article uses the broad term "business finance" to describe the funding of business firms—rather than the narrower, but more traditional and widely used, term

significant legal pitfalls entrepreneurs face in financing their businesses or projects and asserts that competent business finance lawyers can help entrepreneurs avoid these pitfalls. Part III seeks to encourage more productive relationships between entrepreneurs and business finance lawyers by proposing an approach to business finance lawyering that involves and more consciously engages the participants in entrepreneurial business finance.

I. ENTREPRENEUR RELATIONSHIPS WITH BUSINESS LAWYERS

Entrepreneurs and entrepreneurship get a lot of attention in business circles. Yet the term “entrepreneur” is used to label a number of different things. For some, entrepreneurship may be synonymous with the founding or promotion of new businesses generally.⁷ For others, the meaning of entrepreneurship is more focused. One recent article defines an entrepreneur as “an individual with specific high-growth, scalable, and often high-risk business objectives and ideas, who, through the launching of a business venture, seeks capital to monetize the business objectives and ideas.”⁸ Others explore entrepreneurship as a function of the identification, examination, and exploitation of new or innovative business opportunities.⁹ Other definitions similarly combine aspects of business innovation, commitment, confidence, risk taking, and rapid growth. Professor Luz Herrera captures these concepts well in describing entrepreneurs, working from a definition offered by ActionCOACH, a business coaching firm:

“corporate finance”—to emphasize the fact that not all entrepreneurial business ventures are legally organized as corporations.

7. See, e.g., D. Gordon Smith & Darian M. Ibrahim, *Law and Entrepreneurial Opportunities*, 98 CORNELL L. REV. 1533, 1542 (2013) (“The typical small business owner is often described as an entrepreneur, and some scholars have argued that opportunities exploited by small business owners count as entrepreneurial opportunities.”); Thomas S. Ulen, *Why Do Entrepreneurs Appear and Flourish?*, 28 COMP. LAB. L. & POL’Y J. 775, 776 (2007) (“Whatever else it is that entrepreneurs do, it is certain that they try new things—that they start new business enterprises that provide new products and services, that they provide new sources of employment, and that they frequently incorporate new technology into the production process or in the search for new or improved output.”).

8. Matthew D. Kaufman, *If You Build It, Will They Come?: A Critical Look at the Policy Approach to Encouraging Entrepreneurship in Wyoming*, 13 WYO. L. REV. 615, 618 (2013) (citation omitted).

9. See Smith & Ibrahim, *supra* note 7, at 1540–42 (recounting scholarly definitions that equate entrepreneurship with the pursuit of novel, new, or innovative business opportunities); Jack Wroldsen, *Creative Destructive Legal Conflict: Lawyers as Disruption Framers in Entrepreneurship*, 18 U. PA. J. BUS. L. 733, 736 (2016) (“The leading descriptions of entrepreneurship, both in theory and in practice, involve disruptive innovation and creative destruction, where entrepreneurs introduce new products or new business models that threaten existing market leaders.”).

ActionCoach . . . defines an entrepreneur as a “businessperson who not only conceives and organizes ventures but also frequently takes risks in doing so.” It claims that successful entrepreneurs share the following twelve common traits: confidence, a sense of ownership, good communicators, perpetual students, team players, dedicated, optimistic, grateful, gregarious, system-oriented, lead by example, love learning, and are not afraid of success or failure. Entrepreneurs have a strong sense of self-esteem and belief in their own abilities to meet challenges. They take responsibility for finding solutions to problems. Entrepreneurs are effective communicators. They develop a keen ear to hear what others say and learn to communicate to take advantage of available opportunities. Entrepreneurs love learning. They conduct their own research, they ask questions, and they learn from their errors and failures. Entrepreneurs work in teams and automate processes to replicate consistent results. They commit to meet specific goals and objectives and rise to meet challenges. Entrepreneurs are appreciative of their own and others’ accomplishments. They do not let shortcomings or disappointments create obstacles for future advancement. They exhibit enthusiasm for their projects and can motivate themselves and others. Finally, entrepreneurs allow themselves the opportunity to fail and more importantly, to succeed.¹⁰

This Article defines entrepreneurship in this more narrowly tailored sense. It is, in part, the additional details in the more pointed definition that may explain why a more productive relationship between entrepreneurs and their business finance lawyers is difficult to achieve.

However the relevant terms may be defined, the public spotlight on entrepreneurs and entrepreneurship is well deserved. Entrepreneurship has been linked to job creation and, more broadly, economic growth (through, for example, entrepreneurs’ interactions with other businesses and the competition their ventures provide to existing businesses).¹¹ Entrepreneurs have also been credited with generating other public

10. Luz E. Herrera, *Training Lawyer-Entrepreneurs*, 89 DENV. U. L. REV. 887, 914 (2012) (footnotes omitted) (quoting *12 Essential Characteristics of an Entrepreneur*, ACTIONCOACH, http://www.actioncoach.com/_downloads/whitepaper-FranchiseRep5.pdf [<https://perma.cc/2EQ8-2B63>]).

11. See, e.g., James F. Freeley, III, *The Troubling Problem of Income Inequality: A Few Thoughts*, 11 U. MASS. L. REV. 6, 18 (2016) (“Jobs are created when entrepreneurs and existing companies innovate or expand the products or services that they offer.”); Stuart J.H. Graham et al., *High Technology Entrepreneurs and the Patent System: Results of the 2008 Berkeley Patent Survey*, 24 BERKELEY TECH. L.J. 1255, 1258 (2009) (“Entrepreneurs contribute significantly to economic growth in the U.S. and global economy. They create new organizations, products, services, jobs, and opportunities for complementary economic activities.” (footnotes omitted)).

benefits, such as philanthropy, community service including nonprofit activity and social enterprise, and the like.¹² Accordingly, there are many cheerleaders for entrepreneurs and entrepreneurship in the general public.

Lawyers are among these supporters of entrepreneurship. And lawyers see value for themselves in representing entrepreneurs, too. A subspecialty in business law has developed around representing new and young ventures:

The emerging company practice realm is a world unto itself. It is an area that is hard to simply dabble in as an attorney, and perhaps dangerous to try to dabble in. While it is important to become very conversant in the legal issues and legal norms in any field, it is especially important to be in tune with the business norms and the changing business landscape in each sector in which one works. People are trying to get really big things done quickly on low budgets, and everyone hopes to grow into the next Google. It is incumbent upon lawyers who want to practice in this realm to stay current on the issues—read industry news sources and blogs and talk frequently with investor and business people. It is a very friendly, relationship oriented domain, and clients are looking for trusted advisors who are knowledgeable about what they do, very pragmatic, and easy to work with.¹³

Conceptually, the client-lawyer relationship between entrepreneurs and the business counsel described above sounds ideal—an engaged, mutually beneficial arrangement between smart and creative people

12. See, e.g., Alyssa A. DiRusso, *Supporting the Supporting Organization: The Potential and Exploitation of 509(a)(3) Charities*, 39 IND. L. REV. 207, 233 (2006) (“The flexible nature of supporting organizations appeals to successful entrepreneurs who seek to address charitable needs through their talents as well as their funds, and this may be a ‘boon to the future framework of the charitable world.’” (quoting *The Supporting Organization: The Next Charitable Scapegoat?*, PLANNED GIVING DESIGN CTR. (Mar. 17, 1999), <http://www.pgdc.com/pgdc/supporting-organization-next-charitable-scapegoat> [https://perma.cc/EU32-8TYJ])); Nancy J. Knauer, *How Charitable Organizations Influence Federal Tax Policy: “Rent-Seeking” Charities or Virtuous Politicians?*, 1996 WIS. L. REV. 971, 1057 (“[E]conomic models of the charitable community endeavor to explain why entrepreneurs choose the charitable form for certain activities over the for-profit form.”); Dana Brakman Reiser & Steven A. Dean, *SE(c)(3): A Catalyst for Social Enterprise Crowdfunding*, 90 IND. L.J. 1091, 1104 (2015) (“An entrepreneur sets up a social enterprise with dual goals in mind—earning a financial return and providing some social good like environmental conservation, poverty reduction, or education.”).

13. Jeff Seul, *Current Business and Legal Trends in the Organization, Funding, and Operation of Emerging Technology Companies*, in REPRESENTING EMERGING TECHNOLOGY COMPANIES: LEADING LAWYERS ON GUIDING BUSINESSES AND INVESTORS THROUGH THE TECH START-UP PROCESS 7, 22 (2014).

who speak the same language and collaborate to achieve a common goal. This conceptual ideal is not, however, always achieved in practice.

Given a public focus on entrepreneurs and entrepreneurial ventures,¹⁴ the desire among many to see them succeed,¹⁵ and the availability of experts to do the work,¹⁶ most business lawyers believe the need for their services should be well understood. For example, business lawyers appreciate that entrepreneurs should engage lawyers before entrepreneurial activities involve interactions with others—including for organizational, personnel, or financing matters—or a need for intellectual property or other legal protection. Specifically, it is obvious to business lawyers that entrepreneurs would benefit from the opportunity to discuss and strategize about the legal bases for and implications of their decision making. For start-ups, these early stage determinations may include the choice of a legal entity, staffing, the sources of and methods for initial funding, or establishing branding for the entrepreneur's business. New businesses, business lawyers may note, are well served to have someone on hand who can sift through complex bodies of legal rules—including business entity law, tax law, contract law, intellectual property law, and securities law. A lawyer with that kind of knowledge and experience can help entrepreneurs join financial capital objectives with social and human capital forces to create synergies and otherwise optimize business formation, funding, operations, and restructurings (including business combination transactions).

Yet, it is often hard to convince an entrepreneur that a lawyer is needed—or even wanted—on the entrepreneur's business organization

14. See, e.g., Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J.L. & PUB. POL'Y 111, 127 (2005) (“[I]f what I see in the popular press reflects public opinion, popular admiration for entrepreneurs and commerce seems high.”).

15. See generally, e.g., ALBERT N. LINK, PUBLIC SUPPORT OF INNOVATION IN ENTREPRENEURIAL FIRMS (2013) (synthesizing a decade of the author's scholarship on public support for entrepreneurs); *Start-up and Entrepreneurship*, OECD, <https://www.oecd.org/sti/outlook/e-outlook/stipolicyprofiles/competencestoinnovate/start-upandentrepreneurship.htm> [<https://perma.cc/J9CV-N4HU>] (“Public support of entrepreneurship is often justified by perceived market failures that affect business creation and by the positive impact of business dynamics on economic growth and job creation. Public policies for entrepreneurship are often motivated by evidence demonstrating the impact of young innovative firms on economic growth and job creation.”).

16. See, e.g., Kevin Davis, *Law Firms Are Sponsoring Incubators, Cozying Up with Young Entrepreneurs*, ABA J. (June 1, 2014, 10:20 AM), http://www.abajournal.com/magazine/article/law_firms_are_sponsoring_incubators_cozying_up_with_young_entrepreneurs [<https://perma.cc/4L3H-REAR>] (“Reaching out to potential clients in the startup sector is something law firms across the country are doing with vigor.”).

team at all.¹⁷ Along these lines, one commentator offers that “[m]ost small businesses put off hiring a lawyer until the sheriff is standing at the door serving them with a summons.”¹⁸ Under these conditions, some entrepreneurs resort to using online templates to generate common agreements and instruments without using legal counsel.¹⁹

Why do many entrepreneurs avoid retaining legal counsel at an early stage in their business planning? A number of dominant reasons emerge in the academic and public commentary. First, entrepreneurs are focused on their innovation—the ideas that drive their business venture—and the means of bringing that innovation to relevant markets.²⁰ The concerns of, and communications with, business lawyers and others distract them from their central entrepreneurial objectives.²¹

17. Last year, I interviewed a local entrepreneur about how he financed his denim business during a class meeting as part of my Corporate Finance course. The students were shocked to learn that he had legally organized his firm as a limited liability company (“LLC”), sold equity in the firm (in the form of LLC interests) to an unrelated third-party investor, and bought the LLC interests back from that investor, in each case without the assistance or advice of legal counsel. Earlier this year, I conducted an in-class interview for my Advanced Business Associations course of a former student who started his own business. In that interview, the former student (a licensed lawyer) admitted to incorporating and handling the financing of his business himself as a new lawyer—without having sought the advice of specialized legal counsel. He did, however, seek expert advice from an intellectual property lawyer to ensure appropriate protection for the venture’s trademarks.

18. Cliff Ennico, *How to Hire an Attorney*, ENTREPRENEUR, <https://www.entrepreneur.com/article/58326> [<https://perma.cc/R2PZ-3D2H>]; see also Charles R. Schaefer, *You and Your Eager Entrepreneur: When Someone Wants to Buy a Business*, BUS. L. TODAY, Nov.–Dec. 1995, at 43, 44 (“Many times . . . the entrepreneurs first decide how things ought to be done and then call the lawyers to ‘just write it up.’”).

19. Alice Armitage et al., *Startups and Unmet Legal Needs*, 2016 UTAH L. REV. 575, 584 (“[M]any young companies without access to incubators that provide customized legal services or programs like the Startup Legal Garage told us that they turn to online legal service companies such as LegalZoom and Rocket Lawyer to obtain forms and complete essential legal tasks such as incorporation and employment contracts.”); see also Alison R. Weinberg & Jamie A. Heine, *Counseling the Startup: How Attorneys Can Add Value to Startup Clients’ Businesses*, 15 J. BUS. & SEC. L. 39, 40 (2014) (“Lawyers are often viewed as expensive obstacles to deal-making, notorious for saying ‘no’ to every slightly risky business endeavor.”).

20. See, e.g., Manuel A. Utset, *Reciprocal Fairness, Strategic Behavior & Venture Survival: A Theory of Venture Capital-Financed Firms*, 2002 WIS. L. REV. 45, 140 (2002) (“One can assume that during the early part of the venture, an entrepreneur will principally focus on the innovation process, aiming to improve and finish the innovation.”).

21. These concerns and communications span many areas of law important to entrepreneurial venture, including taxation, employment, and business governance. See, e.g., Victor Fleischer, *Taxing Founders’ Stock*, 59 UCLAL. REV. 60, 92 (2011) (“[M]ost entrepreneurs keep a steely focus on questions of technology, customers, and business models—not tax.”); Robert W. Gomulkiewicz, *Reasons for Counseling Reasonableness in Deploying Covenants-Not-to-Compete in Technology Firms*, 20 LEWIS & CLARK L. REV. 477, 485 (2016) (“First and foremost, technology entrepreneurs focus on developing their technology and, after that, how to get their technology into the marketplace. Given this focus, new entrepreneurs seldom think about noncompetes as they begin to assemble their team of

Second, business lawyers have a reputation among elements of the public, including some entrepreneurs, for adding complexity to business organization and maintenance; they are viewed as putting up, rather than clearing, obstacles to launching new ventures.²² In their interactions with entrepreneurs, business lawyers may be perceived to be advancing their own, rather than the entrepreneur's, interests.²³ Third, there is concern about the financial cost of engaging business counsel.²⁴ Business lawyering does not come cheap, as many are wont to observe, and hourly billing rates may combine with conservative legal judgments that are perceived as impediments to entrepreneurial enterprise to convey the impression that an entrepreneur's engagement of legal counsel comprises buying an expensive service and getting little for it (other than obstruction).²⁵ These and other factors likely conspire to keep entrepreneurs and business lawyers apart during critical stages of entrepreneurial business development.

Until recently, however, there has been little in the way of experimental data to substantiate the acquired (and, perhaps, accepted) wisdom regarding the likely causes for the underutilization of business lawyers by entrepreneurs at early stages in their business development. Empirical work has begun to provide additional information regarding the challenges in the entrepreneur-attorney relationship, however. For

employees."); Dana Thompson, *Accelerating the Growth of the Next Generation of Innovators*, 8 OHIO ST. ENTREPRENEURIAL BUS. L.J. 379, 388 (2013) ("Many . . . entrepreneurs . . . do not focus on governance issues because they are focused on developing their technology, product, or service, engaging in customer discovery and working on other aspects of their ventures.").

22. See, e.g., Weinberg & Heine, *supra* note 19, at 40 ("Lawyers are traditionally known for deploying complex 'legalese' and designing dense, lengthy contracts aimed at the impossible task of preempting every conceivable risk related to a transaction."). Undoubtedly, some of this perception is rooted in the pervasiveness and complexity of the laws governing business enterprises. See William H. Mellor & Patricia H. Lee, *Institute for Justice Clinic on Entrepreneurship: A Real World Model in Stimulating Private Enterprise in the Inner City*, 5 J. SMALL & EMERGING BUS. L. 71, 74 (2001) ("The bewildering array of laws and regulations prevents and stifles honest enterprise to the detriment of aspiring entrepreneurs.").

23. See, e.g., Abraham J.B. Cable, *Startup Lawyers at the Outskirts*, 50 WILLAMETTE L. REV. 163, 171 (2014) ("[A]t a high level, it can appear that an individual startup client takes a back seat to the lawyer's relationship with financing sources, reputation within the community, and fidelity to the Silicon Valley system of entrepreneurship."). See generally Demetrios Dimitriou, *The Individual Practitioner and Commercialism in the Profession: How Can the Individual Survive?*, 45 S.C. L. REV. 965, 973 (1994) ("The failure to focus on the client, forgetting that the value of the services rendered is measured by the client and not the lawyer, has resulted in clients' perceiving lawyers as being interested only in making money, not meeting client needs.").

24. See Weinberg & Heine, *supra* note 19, at 40 (noting the perception of lawyers as "overly expensive" and as "transaction costs").

25. See *id.* at 43-44 ("[L]awyers can be seen by the entrepreneur as more of a money-drain and an obstacle to getting things done quickly, a view that is hard to reconcile with the thought of employing attorneys strategically to add value to the startup enterprise.").

example, a study published in 2014 identifies three factors that may add tension to this relationship: “(1) entrepreneurs’ lack of experience with attorneys, (2) financial tensions, and (3) fast pace and time-sensitive demands.”²⁶

Notwithstanding these barriers, some entrepreneurs do turn to business counsel for advice in the foundational stages of their businesses or projects. Yet, even these entrepreneurs often focus narrowly on finding and retaining lawyers in one or two practice areas. For example, an entrepreneur may seek out legal counsel who can advise on choice of entity questions (regarding personal liability, income taxation, and governance considerations) or intellectual property rights and protections or employment law considerations, but may fail to secure the services of a lawyer with securities regulation or broader business finance expertise.²⁷ Legal counsel offering advice on choice of entity, intellectual property, or employment law matters may expressly restrict the scope of their engagement to exclude the provision of legal services involving business finance (including especially advice under federal and state securities law). Lawyers with independent expertise in business finance may not be consulted until existing legal counsel or prospective investors suggest or demand that the entrepreneur engage business finance counsel for a specific transaction or dispute. The absence of business finance lawyers at an early stage in an entrepreneurial venture’s existence may impede or thwart the success of the venture.

II. ENTREPRENEURIAL SUCCESS AND THE BUSINESS FINANCE LAWYER

The story told in Part I comprises a narrative in which (in the view of some entrepreneurs) business finance lawyers may be marginal, at best, to successful business planning, formation, and existence. One might ask, then, whether and why we might care about promoting the engagement of business finance lawyers by entrepreneurs. A recent paper raises this question in broad terms: “[I]s the use of lawyers a necessary evil of conducting business or can lawyers add value to the

26. *Id.* at 44.

27. *See, e.g.*, Armitage et al., *supra* note 19, at 577, 580–81 (noting that most legal issues addressed in the Tech Module of the Startup Legal Garage during the 2014–2015 academic year “can be sorted under one of three general categories: general corporate formation, contracts, or nonpatent intellectual property issues.”); Carl A. Pierce, *Representing One Client at a Time in Connection with the Formation and Organization of a Corporation*, 8 *TRANSACTIONS: TENN. J. BUS. L.* 327, 327 (2007) (“When entrepreneurs first contact lawyers, the entrepreneurs have a business venture in mind but no legal entity through which to conduct the business. If all goes well, the end product of the collaboration between the lawyers and the entrepreneurs will be a legally-recognized entity . . .”).

transactions and businesses they advise and, if so, how?”²⁸ This Part is designed to briefly highlight circumstances in which the advice of a business finance lawyer may add value to entrepreneurial business ventures.

There are many risks attendant to advancing an entrepreneurial venture without the advice of legal counsel, and there are corresponding benefits of proceeding with the counsel of business law advisors. Competent business lawyers are able to do the following: ensure that entrepreneurs enjoy limited liability for the obligations of the enterprise; define who can bind the venture to transactions; clarify the nature and extent of duties and other obligations owed by the entrepreneurs and their coventurers to each other and to the firm; and fashion smooth and equitable withdrawal rights and responsibilities for entrepreneurs and other business constituents.²⁹ They also can assist the business in securing and retaining the usage rights it needs in intellectual property owned or controlled by others; suggest means of protecting intellectual property owned by the business; help entrepreneurs plan for orderly leadership succession for the business enterprise; provide advice to entrepreneurs and the firm on federal and state tax planning; counsel entrepreneurs on appropriate employment practices (including the use of noncompetes, nondisclosure agreements, and the like); and facilitate compliance with regulatory requirements in various areas.³⁰ Most importantly for purposes of this Article, lawyers with experience in business finance can advise entrepreneurs on the possible elements of a long-term capital raising strategy, compliance with federal and state securities regulation principles, and other legal matters concerning the

28. Weinberg & Heine, *supra* note 19, at 41.

29. See generally Richard A. Mann et al., *Starting from Scratch: A Lawyer's Guide to Representing a Start-Up Company*, 56 ARK. L. REV. 773 (2004) (noting limited liability, control mechanisms, and exit strategies among other matters as to which lawyers provide choice-of-entity advice to entrepreneurs).

30. See, e.g., *id.* at 775–90, 792–93, 801–05, 815–17 (noting intellectual property protection and tax implications of business entity selection as important matters in advising entrepreneurs); Laurie A. Lucas & Griffin T. Pivateau, *Attorneys and Entrepreneurs: Creating Value for Small Business Startups*, 18 TEX. WESLEYAN L. REV. 717, 725 (2012) (“Attorneys who understand the structure of a business in stage one, two, and three may be better able to help that business with a choice of business structure, the development and protection of intellectual property, and the management of human resources.”); Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 501 (2007) (concluding through empirical findings that “transactional counsel reduce regulatory costs”); Scott S. Hoffmann, *Top Five Employment Law Pitfalls Entrepreneurs Should Avoid*, NEV. LAW., June 2015, at 22, 22 (“While welcoming like-minded, passionate people into an organization can be a source of immense pride for entrepreneurs, it also presents employment law challenges that, if ignored, can prove detrimental to the business.”).

funding of the business, whether through the offer and sale of securities or otherwise.³¹

Recent changes in federal and state securities law, the continuous evolution of financial investment instruments, and relatively high levels of entrepreneurial activity—all of which are fueled to some extent by consistent and persistent technological innovations—have brought increased attention to business finance generally and the need for related legal services more specifically. In particular, the advent of crowdfunding, including securities crowdfunding under the Capital Raising Online While Deterring Fraud and Unethical Non-Disclosure Act of 2012 (the “CROWDFUND Act”)—Title III of the Jumpstart Our Business Startups Act (the “JOBS Act”)³²—has heightened public awareness of issues in entrepreneurial finance and brought pressure on related business finance law and regulation.³³ Among other things, federal securities laws governing capital raising somewhat lagged behind organic growth in the practice of entrepreneurial business finance conducted over the Internet—business finance fueled in part by the omnipresence of ecommerce and social media.³⁴ Entrepreneurial ventures engaged in funding activities that tested or ignored the boundaries established by then-existing securities regulation.³⁵

Specifically, in the months leading up to the enactment of the JOBS Act, crowdfunding websites (now commonly known as crowdfunding platforms) and the businesses using them for financing were violating federal and state securities laws relating to the offer and sale of securities and the brokering of securities transactions.³⁶ These violations

31. See Cable, *supra* note 23, at 168–70, 178–79 (describing ways in which Silicon Valley and other start-up lawyers provide entrepreneurs with legal advice and related support concerning business finance matters); Mann et al., *supra* note 29, at 817–39 (noting financing and securities regulation as two key areas in which legal counsel should be prepared to advise entrepreneurs).

32. Jumpstart Our Business Startups (JOBS) Act, Pub. L. No. 112-106, §§ 301–05, 126 Stat. 306, 315–23 (2012) (codified as amended in scattered sections of 15 U.S.C.).

33. See Richard A. Epstein, *The Political Economy of Crowdsourcing: Markets for Labor, Rewards, and Securities*, 82 U. CHI. L. REV. DIALOGUE 35, 47–51 (2015) (describing regulatory pressures on crowdfunding prior to and after adoption of the CROWDFUND Act); Wroldsen, *supra* note 9, at 775–77 (characterizing equity crowdfunding as “creative destructive legal conflict” rooted in “disruptive innovation” and describing the role of early crowdfunding innovators in changing regulatory frameworks).

34. See, e.g., Joan MacLeod Heminway, *Business Lawyering in the Crowdfunding Era*, 3 AM. U. BUS. L. REV. 149, 150 (2014).

35. See Wroldsen, *supra* note 9, at 775 (noting that “equity crowdfunding sites that flaunted securities laws were shut down through federal and state cease-and-desist orders” and setting forth several examples (footnotes omitted)); *infra* notes 39–44 and accompanying text.

36. See Wroldsen, *supra* note 9, at 775.

continued even after the JOBS Act was signed into law and before the CROWDFUND Act was effective.³⁷ The succeeding paragraphs offer examples—from the era that preceded effectiveness of the CROWDFUND Act and from current corporate finance practice—of ways in which entrepreneurial business ventures may take undesirable legal risks in financing their businesses or participating in financing the businesses of others. These risks, which are largely the function of the complex system of securities regulation in the United States, can be eliminated or mitigated through the retention of experienced business finance lawyers and compliance with their counsel. As a result, these examples highlight important advisory opportunities for business finance lawyers—ways in which business finance lawyering can add value to entrepreneurial business ventures.

In an early academic article on securities crowdfunding, coauthored with a former student and published in 2011 before passage of the JOBS Act,³⁸ I described how a crowdfunding platform named “33needs” was apparently operating in violation of federal securities laws.³⁹ The analysis in the article provided support for the view that 33needs was offering and selling securities without federal registration under the Securities Act of 1933, as amended (the “1933 Act”),⁴⁰ or an available exemption from registration.⁴¹ The article’s coverage was limited to an analysis of possible legal violations under section 5 of the 1933 Act (“Section 5”); however, it bears noting that 33needs likely also was both

37. See, e.g., Eureeca Capital SPC, Securities Act Release No. 9678, Exchange Act Release No. 73,569, 2014 WL 10679646 (Nov. 10, 2014) (finding, among other things, that “Eureeca violated Sections 5(a) and 5(c) of the Securities Act as a result of the unregistered offer and sale of securities to three U.S. investors because, after generally soliciting, it did not take reasonable steps to verify that the purchasers of the securities were accredited investors, as required under Rule 506(c) of Regulation D under the Securities Act”); see Joan MacLeod Heminway, *How Congress Killed Investment Crowdfunding: A Tale of Political Pressure, Hasty Decisions, and Inexpert Judgments that Begs for a Happy Ending*, 102 KY. L.J. 865, 877–78 (2014) (summarizing the U.S. history of unregistered public offerings of crowdfunded securities).

38. Joan MacLeod Heminway & Shelden Ryan Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 TENN. L. REV. 879 (2011).

39. See *id.* at 892–906, 892 n.60. Other articles have taken similar aim at the Internet-based business finance practices occurring at that time. See, e.g., Thomas Lee Hazen, *Crowdfunding or Fraudfunding? Social Networks and the Securities Laws—Why the Specially Tailored Exemption Must Be Conditioned on Meaningful Disclosure*, 90 N.C. L. REV. 1735, 1762 n.169 (2012) (noting the California consent order involving ProFounder’s activities); Wroldsen, *supra* note 9, at 775 (mentioning early securities crowdfunding sites violating securities law prohibitions); John S. (Jack) Wroldsen, *The Social Network and the Crowdfund Act: Zuckerberg, Saverin, and Venture Capitalists’ Dilution of the Crowd*, 15 VAND. J. ENT. & TECH. L. 583, 595–97 (2013) (describing the same).

40. 15 U.S.C. §§ 77a–77aa (2012).

41. See Heminway & Hoffman, *supra* note 38, at 890–904.

offering and selling securities in violation of state securities requirements and brokering securities transactions (or perhaps even acting as a securities exchange) without having complied with applicable registration requirements.⁴²

That same article made similar observations about a pre-CROWDFUND Act crowdfunding platform called ProFounder. Specifically, I noted that ProFounder had become the subject of a “cease and desist order from the California Department of Corporations regarding [its] status as an unlicensed broker dealer in the state.”⁴³ A subsequent article, *Business Lawyering in the Crowdfunding Era*, republished a dialog between a principal of ProFounder and a lawyer that describes in some detail the facts relating to ProFounder’s probable failure to comply with the registration requirements of Section 5 as well as applicable broker-dealer registration requirements.⁴⁴

Both 33needs and ProFounder were offering, through their respective platforms, innovative short-term financial interests I have termed “unequity.”⁴⁵ These financial interests were designed to serve the financing needs of particular types of entrepreneurial ventures.⁴⁶ Their creation and use is part of a larger phenomenon that raises offering registration issues under Section 5: the continuous search for better-tailored financial instruments, which has persisted for decades.⁴⁷ This

42. § 77e; see Heminway & Hoffman, *supra* note 38, at 882 n.7.

43. See Heminway & Hoffman, *supra* note 38, at 919 n.205.

44. §§ 77e, 78o(a)(1); see Heminway, *supra* note 34, at 158–64 (setting forth a dialogue in which a lawyer notes these probable violations).

45. See Heminway, *supra* note 37, at 878; Joan MacLeod Heminway, *To Be or Not to Be (a Security): Funding For-Profit Social Enterprises*, 25 REGENT U. L. REV. 299, 312, 324–25 (2013); Joan MacLeod Heminway, *What Is a Security in the Crowdfunding Era?*, 7 OHIO ST. ENTREPRENEURIAL BUS. L.J. 335, 360–61 (2012) [hereinafter Heminway, *What Is a Security?*].

46. See Heminway, *What Is a Security?*, *supra* note 45, at 360 (“Entrepreneurs were creatively innovating new funding models that were designed to operate in a business finance ‘sweet spot’ that leverages social-network-like tools to raise capital while avoiding the significant strictures of securities regulation (or so they hoped.)”); see also Andrew A. Schwartz, *The Digital Shareholder*, 100 MINN. L. REV. 609, 678–79 (2015) (noting that “there is good reason to expect that many crowdfunding companies will sell a variety of other types of securities, including unusual variants that will be unfamiliar to potential investors, such as ‘unequity’ or ‘safe.’” (quoting Heminway, *What Is a Security?*, *supra* note 45, at 360–61) (footnote omitted)).

47. See Erik F. Gerding, *Code, Crash, and Open Source: The Outsourcing of Financial Regulation to Risk Models and the Global Financial Crisis*, 84 WASH. L. REV. 127, 188 (2009) (“[T]he private sector continues to generate technical innovations in financial instruments and modeling.”); Avnita Lakhani, *Imposing Company Ownership Transparency Requirements: Opportunities for Effective Governance of Equity Capital Markets or Constraints on Corporate Performance*, 16 CHI.-KENT J. INT’L & COMP. L. 122, 162 (2016) (referring to “the deafening pace of innovation in financial instruments”); Frank Partnoy, *Financial Innovation in Corporate Law*, 31 J. CORP. L. 799, 800 (2006) (“[F]inancial innovation is pervasive . . .

quest implicates and adds to the complexity already present in the U.S. securities regulatory regime. As a result, the advent of the JOBS Act (which, through the CROWDFUND Act, provides a registration exemption for possible use in offerings of unequity) did not—and does not—decrease the opportunities for business finance lawyers to add value to entrepreneurial business finance.⁴⁸

New instruments for business finance are introduced regularly. Most are labeled with acronyms or other cutesy names that attract interest in the blogosphere and in entrepreneurial communities. For example, in the past few years, business finance lawyers have grappled with unequity, SAFEs (Simple Agreements for Future Equity),⁴⁹ KISSes (Keep It Simple Securities),⁵⁰ and “Slicing Pie.”⁵¹ Despite the relative simplicity of these financing instruments, unequity, SAFEs, KISSes, and Slicing Pie are all investment interests in businesses that constitute securities under federal or state law, based on generally available information.⁵² Yet, when the use of these financing instruments is

Capital structures are unfathomably complex, and a booming venture capital industry has reengineered how private companies use preferred stock to raise funds. Hybrid securities have proliferated so that the right-hand sides of many public company balance sheets contain many more slices than merely equity and debt.”); Reiser & Dean, *supra* note 12, at 1093 (noting the use of “specialized financial instruments” in certain investment contexts).

48. See, e.g., Gregory K. Bader, *The JOBS Act: New Rules for Raising Money and Going Public*, in UNDERSTANDING THE JUMPSTART OUR BUSINESS STARTUPS ACT: AN IN-DEPTH LOOK AT THE POTENTIAL IMPACT OF THE JOBS ACT ON ATTORNEYS AND THEIR CLIENTS, 5, 16 (2012) (“[T]he JOBS Act will inevitably lead to more work for lawyers, whether it is helping clients comply with the capital raising requirements, assisting more companies in going public, helping brokers or funding portals comply with the new requirements or any of a number of other legal assignments that result when new legislation comes out.”); Thomas V. Powers, *SEC Regulation of Crowdfunding Intermediaries Under Title III of the JOBS Act*, BANKING & FIN. SERVS. POL’Y REP., Oct. 2012, at 1, 4 (“Certain issuer disclosures would require particularly rigorous review by Crowdfunding Intermediaries and may even require the assistance of legal counsel, including the ownership and capital structure of the issuer, preemptive rights of existing shareholders and rights associated with the securities sold in the crowdfunding transaction.”).

49. See *Startup Documents*, Y COMBINATOR (Feb. 2016), [https://www.ycombinator.com/documents/\[https://perma.cc/7HZU-L6GF\]](https://www.ycombinator.com/documents/[https://perma.cc/7HZU-L6GF]); see also John F. Coyle & Joseph M. Green, *Contractual Innovation in Venture Capital*, 66 HASTINGS L.J. 133, 168–70 (2014).

50. See *500 Startups Kiss Convertible Debt & Equity Financing Documents*, COOLEYGO, [https://www.cooleygo.com/documents/kiss-convertible-debt-equity-agreements/\[https://perma.cc/BXE4-Q7E8\]](https://www.cooleygo.com/documents/kiss-convertible-debt-equity-agreements/[https://perma.cc/BXE4-Q7E8]).

51. See SLICING PIE, <http://slicingpie.com/learn-slicing-pie-model/> [https://perma.cc/DMK3-R6PS].

52. Unequity, SAFEs, and KISSes are generally acknowledged to be securities subject to the federal and state registration requirements (absent an exemption). Although I can find no admission of the federal or state security status of Slicing Pie on the promotional website, I have determined based on information made available to me that Slicing Pie investment interests (“pie slices”) are securities, at least under federal law. Unequity, SAFEs, and pie slices may be classified as forms of investment contract as that term is used in section 2(a)(1)

suggested, entrepreneurs may not be aware that, like equity and traditional debt instruments, unequity, SAFEs, KISSes, and Slicing Pie are securities. Moreover, even if entrepreneurs are told or otherwise recognize that these instruments are securities, they may not understand the legal or practical significance of that classification without the aid of a business finance lawyer. As a result, entrepreneurs who do not seek legal counsel from business finance lawyers run the risk of, among other things, violating Section 5.⁵³

The potential outcomes of a Section 5 violation are harsh for an entrepreneur seeking to finance a new business or project. The remedy for violations of Section 5 is rescission—the reversal of the securities sale, with the investment funds being returned by the issuer to the investor or investors.⁵⁴ Rescission also may be available for securities transactions made through an unregistered broker.⁵⁵ Moreover, to the extent an issuer of securities is determined to be a control person of a crowdfunding platform, a financial penalty may be assessed against an issuer of securities for transactions conducted through an unregistered

of the 1933 Act, 15 U.S.C. § 77b(a)(1) (2012), and defined under *SEC v. W. J. Howey Co.*, 328 U.S. 293, 298–99 (1946). See also Joseph M. Green & John F. Coyle, *Crowdfunding and the Not-So-Safe SAFE*, 102 VA. L. REV. ONLINE 168, 172 (2016) (“The SAFE is, in essence, a contractual derivative instrument.”). Each of these investment instruments is “a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits . . . from the efforts of the promoter or a third party.” *Howey*, 328 U.S. at 298–99. KISSes may be structured as debt or equity securities. See Gregory Raiten, *500 Startups Announces ‘KISS’*, 500 STARTUPS (July 3, 2014), <https://500.co/kiss/> [<https://perma.cc/4EXW-FKK4>].

53. Other law-related business finance risks may result from offerings of these new, seemingly simple financial interests designed for use in entrepreneurial ventures. A practitioner recently informed me about a financing in which the issuer issued a SAFE to an accelerator fund with a fairly low valuation cap on conversion. This resulted in a low conversion price on its stock under the SAFE as compared to the stock price for a seed financing involving new investors conducted a few months later. The disparate valuations were a stumbling block for the new investment. The lesson learned? Some of these financial instruments that seem so issuer friendly early in an entrepreneurial venture’s existence can present risks to future financings that a business finance lawyer can identify for and address with the entrepreneur. SAFEs also may generate investor discontent that creates litigation risk for entrepreneurial ventures. See Green & Coyle, *supra* note 52, at 169 (“[W]e believe that the forms of . . . the simple agreement for future equity (“SAFE”), . . . contain terms that are likely to frustrate the ability of investors to share in the upside of successful crowdfunding companies. . . . [C]rowdfunding investors who purchase SAFEs may discover that these instruments are anything but.”).

54. 15 U.S.C. § 77l(a)(2) (2012).

55. See *id.* § 78cc(b); Virginia K. Kapner, *When Finders Bring Trouble: Avoiding Pitfalls of Working with Unlicensed Broker-Dealers*, BOSTON BAR J., Jan./Feb. 2003, at 14, 15 (“Section 29(b) has been interpreted to allow rescission of transactions in securities with unregistered broker-dealers.”).

broker.⁵⁶ Planning a venture financing with the advice of legal counsel experienced in business finance should prevent or minimize the likelihood of a rescission remedy or financial penalty payment being ordered by a court or a voluntary rescission offer having to be made to investors.

The general prospect of securities law violations can present a significant legal enforcement risk for entrepreneurs—in some cases, a risk that undercuts the viability of the business. Along these lines, it may be important to note that both 33needs and ProFounder ceased operations in the wake of revelations that their business models raised questions about compliance with federal securities laws.⁵⁷ Overall, the risk of securities fraud litigation—including legal actions alleging a misstatement of material fact or a misleading omission to state material fact—looms large.⁵⁸ Once a financing involves a security, unhappy investors are likely to scrutinize the firm’s disclosures for misstatements and omissions that may be actionable. The key liability provision—Rule 10b-5,⁵⁹ adopted by the SEC under section 10(b) of the Securities Exchange Act of 1934⁶⁰—is relatively broad and deep, providing ample avenues for both criminal and civil enforcement actions.⁶¹ This type of litigation risk, like the rescission and financial penalty risks described in

56. See § 78t(a); Kapner, *supra* note 55, at 15 (“A company issuing securities could be subject to liability as a controlling person if it uses a finder who is acting as an unregistered broker-dealer.”).

57. See Heminway, *supra* note 34, at 176 & n.75.

58. See generally, e.g., Sec. & Exch. Comm’n v. Carriba Air, Inc., 681 F.2d 1318 (11th Cir. 1982) (affirming a trial court judgment finding a start-up in violation of federal securities laws for material misstatements and omissions in a public offering prospectus). The playing field for private securities fraud litigation arguably is tipped away from entrepreneurs and in favor of investors, at least in some cases. Two commentators explain:

Investors in new ventures who are unhappy with the state of their investment may wish to regain control of the venture or exit the venture through liquidation. When either of those strategies becomes extremely difficult, investors may resort to retaliation by threatening to file a securities fraud lawsuit against the entrepreneur. The securities legislation passed in 1933 and 1934 favored the naïve investor over the sophisticated issuer, a situation that could be detrimental to an entrepreneur—a relative naïve issuer selling to a sophisticated investor.

Robert Sprague & Karen L. Page, *The Private Securities Litigation Reform Act and the Entrepreneur: Protecting Naïve Issuers from Sophisticated Investors*, 8 WYO. L. REV. 167, 190 (2008).

59. 17 C.F.R. § 240.10b-5 (2016).

60. 15 U.S.C. § 78j.

61. See A.C. Pritchard, Halliburton II: *A Loser’s History*, 10 DUKE J. CONST. L. & PUB. POL’Y 27, 28 (2015) (“Since the private cause of action under Rule 10b-5 was first discovered by the courts, the Supreme Court has at various times expanded and contracted its scope. In general, however, the § 10(b) private right of action has grown from what then-Justice William Rehnquist called a ‘legislative acorn’ into a ‘judicial oak.’ ” (footnotes omitted)).

the preceding paragraph, can be appropriately calibrated and addressed with the advice of competent business finance counsel.

III. TOWARD MORE CONSTRUCTIVE ENTREPRENEUR RELATIONSHIPS WITH BUSINESS FINANCE LAWYERS

Given the potential for missteps that create substantial threats to the success of entrepreneurial activity and the likelihood that competent business finance lawyers can provide valuable assistance, an entrepreneur should have a business finance lawyer as part of the working team from the start. Having said that, the lack of enthusiasm on the part of entrepreneurs to reach out to business finance lawyers presents a challenge. How can the legal community help entrepreneurs overcome impediments to the identification and engagement of appropriate business finance counsel at the early stages of their entrepreneurial activity?

As a general matter, entrepreneurs could be better-educated consumers of legal services. Some nonlaw academic programs that focus on entrepreneurship (typically offered in business and engineering programs) include information about or access to lawyers and legal services, potentially including the need for business finance lawyers.⁶² Others do not include much, if any, exposure to lawyers or legal services.⁶³ Incubators, accelerators, local entrepreneur centers, and other

62. See Thompson, *supra* note 21, at 382–83 (“The University of Michigan Law School’s Entrepreneurship Clinic . . . is one of the first legal clinics of its kind created to provide legal representation and general legal education solely to student-led ventures at the University of Michigan, including those ventures involved in the University’s student venture accelerator, TechArb.”); *id.* at 391 (“Well-structured campus incubators connect student ventures with mentors, funding, workspace and access to a number of other valuable resources such as legal assistance.”).

63. See Anthony J. Luppino, *Minding More Than Our Own Business: Educating Entrepreneurial Lawyers Through Law School-Business School Collaborations*, 30 W. NEW ENG. L. REV. 151, 156 (2007) (“[L]aw schools are often merely fringe players in campus-wide interdisciplinary endeavors in entrepreneurship education—brought into projects only if and when someone in another unit identifies a legal issue that may need attention. Many of the entrepreneurship programs discussed originated in business schools.”); see also *id.* at 167 (“Business school faculty members sometimes share the tendency of businesspersons to view lawyers as essentially obstructionists, and, in turn, pass that perception on to their students. This may, at least in part, account for the relatively low level of participation by law schools in interdisciplinary entrepreneurship programs.”). Community-based programs also may lack engagement with legal issues. See Dorcas R. Gilmore, *Expanding Opportunities for Low-Income Youth: Making Space for Youth Entrepreneurship Legal Services*, J. AFFORDABLE HOUSING & COMMUNITY DEV. L., Spring 2009, at 321, 325–26 (observing that, while a “local government-funded program won awards for government innovation and had many of the attributes of a successful community-based entrepreneurship education program[,] . . . one crucial element was missing, i.e., legal education for business ownership and legal assistance to advise youth in developing viable small businesses.” (footnotes omitted)).

repeat players in business finance generally do realize the need, however, and have policies or programs that provide salient information about legal services to entrepreneurs.⁶⁴ Yet exposing entrepreneurs to the general need for and value of business finance—as well as other—legal services in the early stages of their business development efforts, taken alone, has been and will continue to be insufficient to meet the challenge.

Several additional ideas seem promising. First, to help entrepreneurs understand more clearly the value of a business finance lawyer on the entrepreneurial team, lawyers providing business finance services to entrepreneurs should get focused legal training.⁶⁵ That training can and should start in law school (including in the growing number of entrepreneurial law clinics⁶⁶ and in extracurricular activities,⁶⁷ as well as in traditional law classrooms⁶⁸) and extend into continuing legal education programs for practicing lawyers. Many, if not most, law schools focus their business law curricula around core, generalized

64. See, e.g., Armitage et al., *supra* note 19, at 585 (“In addition to online tools, some incubators, accelerators, and coworking spaces offer informational lectures from local attorneys or ‘office hours’ in which companies can ask brief questions from attorneys who agree to sit in for a few hours.”); Laura Dym Cohen, Luz E. Herrera & William T. Tanner, *Launching the Los Angeles Incubator Consortium*, 83 UMKC L. REV. 861, 863 (2015) (“[M]any of the law firm incubator programs have partnerships with legal services providers and others who advocate for increased access to legal services.”).

65. Accord Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 CAP. U. L. REV. 241, 245 (1997) (“[L]awyers need special knowledge, skills and tools to effectively service clients who own small businesses and pursue entrepreneurial opportunity.”); *id.* at 298 (“Gaining a fuller understanding of entrepreneurship and the client who is an entrepreneur will allow practioners [sic] to better serve this special agent of change in a society undergoing tremendous social and economic change.”).

66. See, e.g., Stephanie Dangel & Michael J. Madison, *Innovators, Esq.: Training the Next Generation of Lawyer Social Entrepreneurs*, 83 UMKC L. REV. 967, 969–70 (2015) (mentioning four entrepreneurial law clinics); Mellor & Lee, *supra* note 22, at 72–83 (describing the Institute for Justice Clinic on Entrepreneurship at the University of Chicago Law School); Alicia E. Plerhoples, *Risks, Goals, and Pictographs: Lawyering to the Social Entrepreneur*, 19 LEWIS & CLARK L. REV. 301, 302–04 (2015) (describing the Social Enterprise & Nonprofit Law Clinic at Georgetown University Law Center); Thompson, *supra* note 21, at 386–88 (describing the University of Michigan Law School’s Entrepreneurship Clinic). See generally Susan R. Jones, Jacqueline Lainez & Debbie Lovinsky, *Viewing Value Creation by Business Lawyers Through the Lens of Transactional Legal Clinics*, 15 U.C. DAVIS BUS. L.J. 49 (2014) (analyzing transactional legal clinics).

67. See Dangel & Madison, *supra* note 66, at 971, 973 (mentioning extracurricular activities at the University of Pittsburgh School of Law centered on entrepreneurship).

68. See *id.* at 970–71 (describing courses available to law students at the University of Pittsburgh School of Law and the University of Pittsburgh outside the law school); Hobbs, *supra* note 65, at 247–52 (describing a law and entrepreneurship course, Small Business Theory, taught at Washington & Lee University School of Law); Mellor & Lee, *supra* note 22, at 83–85 (describing the Entrepreneurship and the Law course at the University of Chicago Law School).

business law offerings (e.g., business associations, corporate finance, mergers and acquisitions, securities regulation). Continuing legal education programs often do the same. These courses and programs offer strong, broad foundations in the necessary theory, policy, doctrine, and skills. But they are insufficient to complete the task of providing quality business finance law services to entrepreneurs. To best serve the objective of providing entrepreneurs with relevant, competent business finance law counsel, the program of legal instruction should illuminate the attributes of entrepreneurs and entrepreneurial activity⁶⁹ in an effort to more transparently align the communications and other activities of legal counsel and the needs and desires of entrepreneurs.⁷⁰ The lawyer's role in reducing and communicating complexity should be among the overall learning objectives.⁷¹

In addition, it would seem important to counter the perceptions that lawyers are impediments to entrepreneurship (rather than entrepreneurial facilitators) and cost centers (rather than coinvestors).⁷² One way to do this is by publicizing more widely among entrepreneurs targeted stories of entrepreneurial failures resulting from failures to engage business finance lawyers in early stage business development.⁷³ To date, most of these tales of woe have, in this author's experience, been told mostly among lawyers. The broad-based publication of entrepreneurial client testimonials also may be helpful.⁷⁴ Another way to change perceptions is by encouraging business finance lawyers to be among those who successfully link entrepreneurs with potential sources of funding.⁷⁵ Yet a third means of countering prevailing perceptions about business finance lawyers is by lowering the actual cost of legal services. Business finance lawyers can accomplish this by accepting reduced fees or alternative fee arrangements.⁷⁶ However, business

69. See Herrera, *supra* note 10, at 914; Kaufman, *supra* note 8, at 618; *supra* text accompanying notes 8, 10.

70. E.g., Dangel & Madison, *supra* note 66, at 973–76 (describing law school programs that could and do focus on entrepreneurship more generally—including in law-related and nonlegal fields).

71. See *id.* at 968–69 (noting the divide between lawyers and entrepreneurs and the need to prepare law students for a more constructive role).

72. See *supra* Part I.

73. See *supra* Part II (relating the business finance challenges of 33needs and ProFounder).

74. See, e.g., Ellen Rosen, *Step 1 in Starting a Small Business: Hire a Lawyer*, N.Y. TIMES (Nov. 16, 2006), <http://www.nytimes.com/2006/11/16/business/16sbiz.html> [<https://perma.cc/B9S9-L6RQ>].

75. See Cable, *supra* note 23, at 169–70 (noting that Silicon Valley startup lawyers may assume this role, serving as “reputational brokers”).

76. See *id.* at 168 (noting that startup lawyers “offer to defer fees, or work for stock in the company rather than cash, to absorb some of the risk of uncertain business ventures and

finance lawyers can also achieve cost savings for clients by being more efficient in their work. Although lawyers may prefer customized approaches to financing documents based on their own tested precedent transaction documents, the use of standardized form instruments as starting points for drafting (as is commonly done in transactions involving National Venture Capital Association or Series Seed standard form documents, as well as SAFEs and KISSes, for example⁷⁷) may both reduce fees and enable entrepreneurs to be educated about and familiar with the forms and key substantive issues likely to be addressed and negotiated.

Others have made overlapping and related suggestions of a broader nature—focusing on legal counsel to startups from a more general perspective. For example, a recently published study suggests and explores five ways to add value to the overall entrepreneur-business lawyer relationship: “(1) engage in effective communication; (2) understand the client’s business; (3) provide actionable advice; (4) provide solutions, not just risk-management; and (5) offer flexible billing practices.”⁷⁸ The coauthors also note the need to look at the effects of attorney regulation, especially in light of technological advances and globalization.⁷⁹ Each of these suggestions, like those offered here with respect to business finance lawyers more specifically, reveal a greater need for a mutual understanding between entrepreneurs and lawyers as well as attentiveness to the services provided and their cost.

conserve precious cash flow for investment in product development”); John F. Coyle & Joseph M. Green, *Startup Lawyering 2.0*, 95 N.C. L. REV. 1403, 1427–31 (2017); Weinberg & Heine, *supra* note 19, at 58–62 (offering suggestions on flexible billing models and cost containment more generally). I am aware that some business finance practitioners are offering flat fee arrangements (capped formally or informally at a percentage of the amount raised in the financing). A business finance practitioner I know notes that, for this to work, the entrepreneur has to also take the long view and be willing to budget for legal services as a recurring cost that provides continuous value. This practitioner avers that the entrepreneur must therefore understand that the business finance law services provided are valuable, timely, and efficient.

77. See Cable, *supra* note 23, at 168–69 (noting the collaboration of Silicon Valley startup lawyers on the National Venture Capital Association forms and the publication of other form transaction documents); Coyle & Green, *supra* note 49, at 168–70; *500 Startups Kiss Convertible Debt & Equity Financing Documents*, *supra* note 50; *Model Legal Documents*, NAT’L VENTURE CAP. ASS’N, <http://nvca.org/resources/model-legal-documents/> [<https://perma.cc/SWL8-UMB6>]; *Series Seed Financing Documents*, SERIES SEED, <http://www.seriesseed.com/posts/documents.html> [<https://perma.cc/MA8V-GD8Y>]; *Startup Documents*, *supra* note 49.

78. Weinberg & Heine, *supra* note 19, at 49.

79. See *id.* at 62.

CONCLUSION

Entrepreneurs have the capacity to add value to the economy and the community. Business lawyers—including business finance lawyers—want to help entrepreneurs achieve their objectives. These lawyers have the knowledge and experience to provide valuable assistance to entrepreneurs and entrepreneurial ventures in the form of practical and strategic advice on important corporate and securities law matters—legal prescriptions and proscriptions that can, if disregarded or violated, bring an entrepreneurial firm to its knees. In particular, the constantly evolving state of both the law governing securities offerings and the nature of financial instruments provides significant challenges to entrepreneurs. Despite incentives to a symbiotic relationship, however, entrepreneurs and business finance lawyers are not always the best of friends.

Entrepreneurs and business finance lawyers frequently come from different educational and occupational traditions and have different priorities and skill sets. Unfortunately, members of the business finance bar do not always know or take time to understand the entrepreneur's position. Moreover, the customized services that many business finance lawyers provide are viewed as impediments to entrepreneurship, too complex, and too costly. As a result, entrepreneurs do not immediately realize the value of having a business finance lawyer on their business formation and development team and may not retain one.

This Article suggests several approaches to bridging this gap between entrepreneurs and business finance lawyers—apart from the rather obvious need to continue to educate entrepreneurs about the need for and value of relevant legal services (including business finance law services) and lawyering. First, business finance lawyers need more specialized, ongoing training to be better able to recruit, serve, and retain entrepreneurial clients. Second, business finance lawyers and others need to pointedly illustrate, using real-life examples, the ways in which business finance lawyers add specific value to the entrepreneurial team. Third, business finance lawyers need to focus more rigorously and consistently on the relationship among the cost of their legal services, the services provided, and client risk preferences. Specifically, business finance lawyers should concentrate on reducing the overall cost of their services, realigning that cost with the client's ability to pay, and better tailoring their services to the client's risk preferences. These measures, together with those suggested by others for more generally promoting legal services to entrepreneurs, may generate more consistent productive relationships between entrepreneurs and business finance lawyers. Why *can't* they be friends? Of course, they can.

