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Attorneys and Entrepreneurs: Creating Value for Small Business Startups

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ATTORNEYS AND ENTREPRENEURS: CREATING VALUE FOR SMALL BUSINESS STARTUPS

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TABLE OF CONTENTS

I. INTRODUCTION

In the wake of one of the worst recessions in U.S. history, there is a renewed focus on entrepreneurship, innovation, and creativity as a way to reinvigorate the U.S. economy and create jobs. Law schools have been increasing their offerings of interdisciplinary courses focusing on entrepreneurship and law intent on educating "entrepreneurial attorneys."[1] The vast majority of American law schools offer joint

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1. 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, 154 (2007) (discussing the various developments to law school curriculum "designed to provide students with tools necessary to become successful entrepreneurial or 'can do' lawyers"). *But cf.* Benjamin Means, *Foreword: A Lens for Law and Entrepreneurship*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 1, 7 (2011) (arguing that law and entrepreneurship "appears to lack the distinctiveness that would merit recognition as a field" (citing Darian M. Ibrahim & D. Gordon Smith, *Entrepreneurs on Horseback: Reflections on the Organization of Law*, 50 ARIZ. L. REV. 71, 76 (2008))). Means, in a very thoughtful article, argues "that the better approach would be to treat entrepreneurship as a critical perspective." *Id.* at 13. This Article avoids that canonical debate and attempts to adopt such an entrepreneurial perspective focusing on the goal of identifying for the attorney the stages of small business growth with suggestions on how a heightened understanding of these stages can be used to

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JD/MBA degree programs.[2] The *American Business Law Journal*, the flagship journal for the Academy of Legal Studies in Business, also devoted a 2010 issue to exploring how the intersections between law and business strategy can help create strategic and competitive advantage for a business organization.[3] Business and law schools without an entrepreneurship center, or at least an association with one, now appear behind the curve as business-plan competitions nationwide offer college students and entrepreneurs access to significant amounts of capital for start-ups.[4]

These cultural and institutional changes offer potential opportunities to those attorneys who understand and can effectively anticipate the needs of the entrepreneurial organization.[5] Many entrepreneurs lack the knowledge, time, and incentive required to effectively manage the legal environment of their business, especially at the business's inception or early stages of small-business growth.[6] Additionally, many entrepreneurs view contact with attorneys as a "necessary evil"[7] to be endured only in times of crisis within the organization[8] or when absolutely unavoidable to accomplish a task.

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help the entrepreneur manage risk and create value. Encouraging attorneys to think more like entrepreneurs, of course, is not a new idea. *See* Steven H. Hobbs, *Foreward: Entrepreneurship and Law: Accessing the Power of the Creative Impulse*, 4 ENTREPRENEURIAL. BUS. L.J. 1, 19 (2009) ("Lawyers should both assist and serve entrepreneurs animated by a creative impulse and, concurrently, become entrepreneurial in the manner and methods in which we practice law.").

2. Luppino, *supra* note 1, at 177 (noting that over 75% of ABA-accredited law schools offer the JD/MBA joint degree option).

3. *See, e.g.*, Daniel R. Cahoy, *Editor's Corner: Assembling a Special Issue on Law as a Source of Strategic Advantage*, 47 AM. BUS. L.J. v, v (2010) (discussing the motivation behind the attempt "to bridge law and business scholarship").

4. *See A Guide to Business Plan Competitions*, N.Y. TIMES.COM (Nov. 11, 2009), http://www.nytimes.com/interactive/2009/11/11/business/smallbusiness/Competitions-table.html (providing a list of business plan competitions with some offering first place prizes up to $100,000); *cf.* Emily Maltby, *And the Prize Goes to . . . a Different Company56 —Business-Plan Competitions Can Yield Much-Needed Cash for Start-Ups as Others Walk Away with Only Leads, Ideas*, WALL ST. J., June 10, 2010, at B4 (questioning whether the odds of winning are worth the effort).

5. *See generally* Constance E. Bagley, *What's Law Got to Do with It?: Integrating Law and Strategy*, 47 AM. BUS. L.J. 587, 588 (2010) (highlighting the intersections between law and strategy and arguing that "legal astuteness" for business people matters).

6. *See* Tanya M. Marcum & Eden S. Blair, *Entrepreneurial Decisions and Legal Issues in Early Venture Stages: Advice That Shouldn't Be Ignored*, 54 BUS. HORIZONS 143, 144 (2011) (discussing the effect of constraints in time and knowledge that entrepreneurs often face).

7. *E.g.*, Luppino, *supra* note 1, at 151.

8. *See, e.g.*, Mel Scott & Richard Bruce, *Five Stages of Growth in Small Business*, 20 LONG RANGE PLAN. 45, 45 (1987). Scott and Bruce's model expands on the model used in this Article, but they argue that small business growth is generally precipitated by an internal or external crisis. *Id.* Scott and Bruce argue that such "crisis points," which they elaborate by stage of growth, may lead to the failure of the business and understanding when and how they may occur therefore is important to long-term planning and success. *Id.* at 47.

Attorneys who have a basic understanding of the stages of small-business growth, however, may be able to help create value for the business by offering strategic legal and business advice to the entrepreneur.[9] Most of the risks that small businesses face can be handled contractually or with a basic understanding of the regulatory environment,[10] but the extraordinary challenges created by the Internet and social media have created a new legal landscape for small businesses. The attorney who understands an entrepreneurial organization at different stages of growth may be better able to anticipate the problems the organization may face over the long term. Legal issues for small businesses, for example, generally include the appropriate choice of business structure, protection and management of intellectual property, and effective management of human resources, which have all been affected by the technologies that are reshaping American society and its workforce. The attorney who understands the stages of small-business growth, even in a general sense, may have a more effective lens[11] for providing legal assistance to a small business. This understanding also may help attorneys to more effectively market their legal expertise to an entrepreneur based on the unique needs of the entrepreneurial organization.

II. Understanding the Stages of Small Business Growth

While there are many models for understanding how business organizations evolve, this Article uses the five-stage model initially offered

9. *See, e.g.*, Hobbs, *supra* note 1, at 20 (noting that those "entrepreneurial lawyers" who are capable of thinking creatively will enjoy "an edge in the global marketplace for legal services"); David Orozco, *Legal Knowledge as an Intellectual Property Management Resource*, 47 Am. Bus. L.J. 687, 711–18 (2010) (arguing that managers who can share with lawyers their often disparate "mental models" may enjoy a competitive advantage in areas where legal knowledge is "valuable, rare, difficult to imitate and difficult to substitute"). Orozco provides various examples of what he views as competitive advantage based on legal knowledge, like waivers of the corporate opportunity doctrine, which after being legally "tested" by attorneys, were eventually recognized legislatively by the state of Delaware. *Id.* at 708–11. He also notes that, for larger organizations, in-house counsel may be in the best position to provide competitive advantage to the business, since outside counsel are not constrained in the disclosure of this type of information or legal strategy. *Id.* at 711.

10. Some have argued that for most small businesses, this has been true for a long time. Means, *supra* note 1, at 9 ("It is doubtful, for instance, that individuals planning to open a neighborhood pub would confront questions very different than those faced by their predecessors in previous decades and even centuries."). Even a pub, however, has intellectual property and likely will face issues related to the internet and social media. *See also* Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 Am. Bus. L.J. 727, 729 ("Although contracts pervade most of what we do at a consumer or commercial level, this article's main purpose is to provide a survey of only those areas in which contract law is used to obtain a strategic advantage.").

11. *See supra* note 1 and accompanying text.

by Churchill and Lewis.[12] The first three stages of Churchill and Lewis's model have been empirically tested, and evidence based on managers' perceptions was found for "an association between [an organization's] life cycle and competitive strategy."[13] The model used in that study incorporated only three of the five stages in the Churchill and Lewis model since the authors of the study argued that Churchill and Lewis's model was designed to understand only small businesses.[14]

The five-stage model effectively captures the realities of small-business growth as it does not presume a linear or inexorable progression from one stage of the model to the next: retrenchment or failure is possible and considered at each stage of development.[15] The five-stage framework also provides a more rigorous analysis of each stage of small-business growth since the model focuses on more than a business's size or annual revenues. The model does consider size but also considers the following: (1) the owners' management style; (2) the organization's structure; (3) the presence or absence of formal systems in the organization; (4) the organization's strategic goals; and (5) the extent of the owners' involvement in the business.[16] These factors can then be considered at each stage of the organization's development while recognizing that many organizations may never progress from one stage to the next.[17] The five stages include the organization's existence, survival, success—which also considers disengagement by the owners and growth—take off, and resource maturity.[18]

A. *Stage 1—Existence*

Every business organization, of course, begins with issues ranging from whether it will have a significant customer base for its product or service to whether it can deliver that product or service efficiently. Key questions regarding cash flow at the startup phase are perennial for the owners of the business.[19] Organizations at this stage generally

12. *See generally* Neil C. Churchill & Virginia L. Lewis, *The Five Stages of Small Business Growth*, HARV. BUS. REV., May–June 1983.

13. Donald L. Lester et al., *Organizational Life Cycle: A Five-Stage Empirical Scale*, 11 INT'L J. ORGANIZATIONAL ANALYSIS 339, 341 (2003).

14. *But cf.* Churchill & Lewis, *supra* note 12, at 2 (asserting that their "framework . . . increases our understanding of the nature, characteristics, and problems of businesses ranging from a corner dry cleaning establishment with two or three minimum wage employees to a $20-million-a-year computer software company experiencing a 40% annual rate of growth"). Of course, a business with a $20-million-a-year revenue stream may still be "small" when the characterization is based on the number of employees and not revenue. *See infra* notes 42–44 and accompanying text.

15. *See* Churchill & Lewis, *supra* note 12, at 3.

16. *Id.* at 3, 9. For consistency, this Article will refer to "owners" in the plural, although many small businesses are sole proprietorships. *See also infra* note 45 (discussing non-employer firms or the self employed).

17. Churchill & Lewis, *supra* note 12, at 3.

18. *Id.* at 5 (including Exhibit 4, which outlines all stages of the model).

19. *Id.* at 3, 10.

lack formal planning, and there is likely little delegation or management structure.[20] Even high-tech organizations must pass through this stage, particularly if they do not have stable production facilities or quality controls in place, which may be contingent on the ability to first secure customer orders and therefore a consistent revenue stream.[21] At this point, the organization is inseparable from the owners, and the owners' particular skill set usually drives the business given that the organization will have few, if any, employees.[22] For the business to be successful, the owners must be committed to the organization with all the sacrifices such commitment entails.

B. *Stage 2—Survival*

Once the organization is able to secure a customer base, the focus generally shifts from the question of existence to questions about the organization's ability to replace capital assets and grow within its market segment.[23] Rather than assuming that movement from the survival stage to another stage of development is inevitable, Churchill and Lewis note that an organization may remain indefinitely in stage two earning a marginal rate of return but never developing "economic viability."[24] They place the typical "mom and pop" store in this category.[25]

At stage two, the organization is still largely inseparable from the owners, although employees may be hired at this stage and some systems development will occur.[26] Movement to stage three requires that the organization's economic health be at a stage where expansion is possible, which may allow the owners to begin to either disengage from the organization or expand the existing management structure.[27]

C. *Stage 3—Success*

As noted, at stage three the owners have an organization that is profitable and stable and therefore allows the owners the option of disengaging from the organization.[28] Stage three organizations generally have functional managers in place, and the organization also may

20. *Id.* at 3–4.

21. *Id.* at 4, 11. Of course, the inclusion of venture capitalists in these types of firms may allow the firm to rapidly progress through stage one and two of the model into stage three. *Id.* at 11. Churchill and Lewis note that the same phenomenon—rapid movement through stages one and two—also may occur with franchising, since the franchise relationship already provides sophisticated marketing and operational systems that would be unavailable to the franchisee who lacked sufficient start-up capital to purchase the franchise. *Id.*

22. *Id.* at 10.

23. *Id.* at 4.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 4–5.

28. *Id.* at 5.

have retained professional staff.[29] Organizations at stage three can be managed and maintained indefinitely—as long as they are in a position to stave off external threats and have adequate management in place—since they should be generating adequate profits.[30]

Conversely, the owners may decide to use the organization's economic success as a platform for growth, necessitating an increased need for financing.[31] Rapid expansion, or "overtrading,"[32] is a key risk at this point, although the organization may avoid failure from overtrading or adverse externalities through retrenchment to an earlier stage of business growth.[33] If a growth strategy in stage three is successful, the organization may move to stage four.

D. *Stage 4—Take-off*

At stage four, securing additional financing is critical. As the organization grows, formal systems also are required, and the owners must be able to effectively delegate and decentralize.[34] The organization will now require fairly complex operational and strategic planning, which requires that the owners be prepared (and willing) to detach from the organization. Entrepreneurs who are unwilling or unable to compensate for their own managerial limitations through the addition of professional staff may contribute to the organization's failure or retrenchment to an earlier stage.[35] If the owners can effectively meet these adverse internal and potential external factors, however, the organization may develop into a "big business."[36]

E. *Stage 5—Resource Maturity*

When the organization reaches resource maturity, the key challenges are controlling growth and maintaining the "entrepreneurial spirit" of the organization.[37] This is difficult, as the organization is

29. *Id.*
30. *Id.*
31. *Id.* at 7.
32. *See, e.g.*, Scott & Bruce, *supra* note 8, at 49–50. Scott and Bruce consider "overtrading" or "uncontrolled growth" as an "ever present threat" from the survival stage and forward. *Id.* at 49. They identify overtrading as one of the crises most likely at all stages, particularly if the organization lacks resources to maintain growth, which can then precipitate transition to the next phase of growth, retrenchment or failure. *Id.* at 50. Their point is in accord with Churchill and Lewis's focus on the need for increasing revenue sources when an owner wants to grow the business at stage three and more urgently at the take-off stage described in stage four of their model. *See* Churchill & Lewis, *supra* note 12, at 6–7.
33. Churchill & Lewis, *supra* note 12, at 7.
34. *Id.*
35. *Id.* at 7, 9. Churchill and Lewis note that venture capitalists generally have access to the types of resources a small business would need to move rapidly to stage three or stage four, frequently leading to "a mismatch of the founders' problem-solving skills and the demands that 'forced evolution' brings to the company." *Id.* at 11.
36. *Id.* at 7.
37. *Id.* at 9.

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now largely separate from the owners and can be quite complex, requiring sophisticated systems management and talent who may not be as committed to the organization as the original owners.[38] Churchill and Lewis argue that the failure to maintain the entrepreneurial spirit of the organization also may lead to "ossification," which they define as "a lack of innovative decision making and an avoidance of risks."[39]

III. Focusing on the Early Stages of Business Growth

The media and many entrepreneurship programs tend to focus on high-tech startups. High-tech startups can grow quickly and their attractiveness to sophisticated investors may provide some impetus for the organization to rapidly advance to stage three or even stage four of the model.[40] A recent study by Hurst and Pugsley, however, indicates that most small business owners are not interested in becoming big business owners.[41]

Hurst and Pugsley note that most small businesses are concentrated in relatively few industry sectors,[42] many of which have low fixed production costs (usually tied to the owners' particular skill set) relative to variable costs, making a smaller-sized business optimal.[43] Most of these businesses, for example, are in industries that already have an established customer base for existing goods and services; and although there are obviously large businesses within these industries, small businesses generate most of the economic activity.[44] Hurst and Pugsley also report that small business owners most often cited "nonpecuniary benefits" as "the primary driver" of their decision to start a business, like the desire to work for oneself or have flexibility over

38. *Id.*

39. *Id.*

40. *Id.* at 11.

41. *See* Erik Hurst & Benjamin Wild Pugsley, *What Do Small Businesses Do?* 1, 1 (Nat'l Bureau of Econ. Research, Working Paper No. 17041), *available at* http://www.nber.org/tmp/2932-w17041.pdf.

42. The authors' data indicate that more than two-thirds of small businesses fall within "just 40 narrow 4-digit NAICS industries [294 NAICS industries in total]." *Id.* Hurst and Pugsley define "small business" as organizations with 1 to 19 employees, although they state that their data "only changes slightly" when organizations with between 1 and 100 employees are included. *Id.* at 6, 8.

43. *Id.* at 32. These industries include the following:

> restaurants (full service, limited service, or bars), skilled professionals (doctors, dentists, lawyers, accountants, architects, and consultants), skilled craftsmen (general contractors, plumbers, electricians, mason workers, painters, and roofers), professional service providers (clergy, insurance agents, real estate agents, and travel agents), general service providers (auto repair, building services such as landscaping, and barbers/beauticians), or small retailers (grocery stores, gas stations, pharmacies, and clothing stores).

Id. at 7–8.

44. *Id.* at 11.

one's time,[45] which suggests that the lack of growth in most small business is purposeful.[46] In fact, Hurst and Pugsley's data indicate that few small businesses will hire more than ten employees during the organization's life cycle.[47]

In addition to challenging the notion that most small business owners want to grow their businesses, Hurst and Pugsley's study also challenges the notion that most small business owners are interested in innovation, which provides further insights for attorneys seeking to understand ways to provide relevant services to such businesses. Data cited by Hurst and Pugsley indicate that only about 10% of business owners express any intent to engage in technological innovation.[48] Even four years into the formation of a small business, almost 85% of small businesses had yet to "innovate," as measured by ownership of patents, trademarks, or copyrights.[49] The data also indicated that at five years into the life of the business, 80% of small businesses reported no development of "proprietary technology, process, or procedure."[50]

In sum, recent data indicate that there is support for the proposition that most, although certainly not all, small businesses are found in stages one, two, or possibly three of development. Key factors for these businesses include generating a revenue stream, expanding their foothold in an already existing market for goods and services, and managing a low number of employees. How can an attorney help these businesses create value or gain a competitive or strategic advantage?

45. *Id.* at 27 ("[O]ver half of all respondents in all samples stated that non pecuniary [sic] benefits were an important component of their start up decision."). The second most common cited motivation was based on having a good idea or a desire to generate income. *Id.* Unemployment or being a "reluctant entrepreneur" was cited by fewer than 4% of respondents. *Id.* at 36. *Cf.* Robert B. Reich, *Entrepreneur or Unemployed?*, N.Y. TIMES, June 2, 2010, at A25 ("Another term for 'entrepreneur' is 'self-employed.'"). Reich's article discusses 2009 data, which indicated that 2009 was a record year for business startups, while Hurst and Pugsley's data were primarily from 2003 to 2007, although they indicated they had "nearly identical" results using data in "any year between 1998 and 2008." Hurst & Pugsley, *supra* note 41, at 5. Hurst and Pugsley also note that their findings "carry through to non-employer" firms, which "represent roughly 78% of all firms . . . [but] collectively represent less than 4 percent of all sales or receipts within the U.S. during a given year." *Id.* at 10.

46. Hurst & Pugsley, *supra* note 41, at 25.

47. *Id.* at 18–19. Again, the authors of the study are careful to note that there are still large firms within these industry sectors. *Id* at 19.

48. *Id.* at 25.

49. *Id.* at 21. The authors indicate that they understand that this focus is an "imperfect" way to measure innovation, since businesses may innovate yet not apply for a patent and all businesses have a business name even if the owners do not seek trademark protection. *Id.* at 22–23.

50. *Id.* at 23.

IV. Managing Risk and Creating Value

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. Attorneys who understand where the business is in the present can more effectively help the owners plan for the future.

A. *Choosing a Business Structure*

As noted, at stage one or two of a business's growth, the owners' time and consideration about how to structure their business may be severely limited. Business owners instead may rely on simplistic heuristics, like cost, when making important decisions, which may negatively affect the long-term opportunities for their business.[51] Some owners may not be aware of the benefits of a limited liability structure.[52]

Sound advice from an attorney at this stage seems critical, though it is often overlooked.[53] The owners may not even be thinking in these terms, particularly when their energies must be focused on the survival of the organization. Legal assistance at this stage can help the business achieve effective risk management, which alone may provide the business with a market advantage. Even helping the owners draft a partnership agreement, an operating agreement for a limited liability company, or corporate bylaws can help focus the owners' attention on the organization's long-term needs. Knowing whether the owners want to move the organization beyond stage two or three can help the attorney provide effective strategies and advice about the appropriate business structure for that organization.

Hobbs suggests reading the organization's business plan to better understand the direction the owners may want to take the business.[54] This is good advice *if* the organization has drafted one, particularly since entrepreneurship is "dynamic" and many people may choose to

51. *See* Eden S. Blair, Tanya M. Marcum & Fred F. Fry, *The Disproportionate Costs of Forming LLCs vs Corporations: The Impact on Small Firm Liability Protection*, 20 J. Small Bus. Strategy 23, 37 (2009) (reporting findings that many small business owners rely on cost as a primary decision factor in choosing between the LLC and corporate structures without regard to other critical factors).

52. *See, e.g.*, Marcum & Blair, *supra* note 6, at 145 (discussing why a yoga instructor believed there was little risk in remaining a sole proprietor and why the risks embedded in that belief might be greater than the cost of incorporation or formation as an LLC).

53. *Id.* at 148–49 (noting this "under-reliance on professionals" among entrepreneurs and speculating that this short-sighted decision may also be based on cost).

54. *See* Hobbs, *supra* note 1, at 15 ("It [the business plan] offers insight into that client's hopes and dreams.").

become an entrepreneur quite late in life.[55] This factor also highlights the need for an effective business structure because many late-in-life entrepreneurs may have accumulated significant personal assets, which could be protected using a limited liability structure. Additionally, the correct choice of business structure has obvious tax implications and also can affect the organization's ability to obtain short and long-term financing.[56]

B. *Protection of Intellectual Property*

Small business owners also need to consider the value of "branding" the organization—establishing a company name and trademarks for its products, as well as developing a cohesive organizational identity—during growth stages one and two.[57] Ideally, the organization will begin planning this branding process before the organization enters stage one.[58] A cohesive branding strategy needs to be consistently communicated to internal and external stakeholders by stage two with strategies for effective maintenance of these strategies firmly in place by stage three.[59] Small businesses may tend to overlook the value of their brand, since as Hurst and Pugsley report, many do not engage in innovation or even the development of business processes that might help create a strategic advantage.[60] This is another area where attorneys can help small business owners recognize valuable intellectual property and develop a cohesive strategy of protection in the early stages of business growth.[61]

The Internet also poses significant challenges for maintaining control over the business's brand or trademarks; thus, the business needs a coherent policy detailing permissible use of the company's brand through internal and external communications on the Internet in addi-

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55. *See* Michael Harvey & Rodney Evans, *Strategic Windows in the Entrepreneurial Process*, 10 J. BUS. VENTURING 331, 333 (1995) (noting that the "choice of being an entrepreneur [only] at the time of [college] graduation" is shortsighted, "[since] becoming an entrepreneur is not an event," but a "process"); *see also* Reich, *supra* note 45 (noting that 2009 was a record year for startups, with "most of the growth in startups propelled by 35- to 44-year-olds, followed by people 55 to 64 . . . Forget Internet whiz kids in their 20's").

56. *See* Marcum & Blair, *supra* note 6, at 145–46 (discussing the tax and liability issues pertaining to choice of business structure, as well as the type of business structures most attractive to venture capitalists). *See also infra* note 61.

57. *See* Mari Juntunen et al., *Corporate Brand Building in Different Stages of Small Business Growth*, 18 BRAND MGMT. 115, 116, 123 (2010).

58. *Id.* at 117 ("Several studies suggest that corporate branding starts even before a company is established.") (citations omitted).

59. *Id.* at 123–27.

60. *See supra* notes 48–50 and accompanying text.

61. *See* Chris Rose, John Cronin & Rachael Schwartz, *Communicating the Value of Your Intellectual Property to Wall Street*, 50 RES. TECH. MGMT. 36, 36 (2007) ("Over the last three decades, intangible assets have ballooned to approximately 85 percent of the S&P 500's value, up from 38 percent in 1982.").

tion to traditional modes of communication with stakeholders.[62] Although not always considered outside of the employment relation, a social media policy can be an important part of the business's branding strategy. Employees will likely interact with outside stakeholders, and the brand image needs to be conveyed consistently.[63]

A social media policy also may help protect a business's trade secrets by heightening employee sensitivity to the issue—such a policy can be included as part of a comprehensive trade secret protection policy. An attorney can help the business owners understand the importance of having a comprehensive trade secret protection policy in relation to their employees and especially when dealing with independent contractors or vendors. Additionally, the attorney may be able to help the business owners recognize any untapped value of business processes or methods the business may have developed, which could benefit from inclusion in a trade secret protection policy.

The attorney also can determine the patentability of any business processes or methods. Recent changes in patent law, of course, have altered the landscape for patent protection in relation to business methods, among other changes like the modification of the first-to-invent rule to the first-to-file rule.[64] The attorney must inform small-business owners with a patentable product of these and other changes; for example, a cash-strapped entrepreneur may not be aware of the effects of disclosing an invention in a public forum like a business plan competition prior to filing a patent application.[65] Effective legal advice may help small business owners avoid costly mistakes related to patents.[66]

Attorneys also can support the small business at this stage by helping them understand the necessity of contracts that include things like work-for-hire clauses, licensing agreements for the use of the business's or others' intellectual property, and non-use and non-disclosure clauses, among other things. If the business engages in technological innovation, contractual clauses should be tailored to meet that business's specific needs. In stage one and two, the owners also may be tempted to control costs by outsourcing their information technology needs—which include their infrastructure requirements, data storage,

62. *See* Juntunen et al., *supra* note 57, at 118.

63. *See id.*

64. *See generally* Leahy-Smith America Invents Act, Pub. L. No. 112–29, 125 Stat. 284 (2011) (codified as amended in scattered sections of 35 U.S.C.); Bilski v. Kappos, 130 S. Ct. 3218, 3221 (2010) (explaining the requirement that the "process" transform an article into a different state or be tied to a machine to be patent eligible is no longer the sole test for patent eligibility).

65. *See generally* Leahy-Smith America Invents Act § 3.

66. The same kinds of issues may arise if the business is in need of copyright protection.

and various software applications. The small business can realize significant savings by doing so but may also incur significant risk.[67]

C. *Management of Human Resources*

Finally, in stage one and certainly by stage two of growth, many small businesses will need to hire employees. Generating revenue and controlling costs at this stage remains critical to the success of the business. Small business owners may benefit from outsourcing payroll functions and hiring independent contractors rather than hiring part- or full-time employees. Helping small business owners understand the differences between the two and the obligations and responsibilities that emerge with the hiring of employees is key. An attorney also can help small business owners comply with state and federal tax laws, state and federal civil rights statutes, and their state's workers' compensation program.

Internally, the attorney can help small business owners draft an effective employee handbook, non-compete, non-disclosure, and non-use agreements for employees. In a high-tech startup, of course, more specific clauses may be needed, like a no-moonlighting clause or an assignment-of-inventions clause. Contracts for use with vendors also are important and many small business owners may not recognize the need to use these clauses in contracts with them or other independent contractors.

V. CONCLUSIONS

This Article offers an interdisciplinary approach to understanding how an attorney can help entrepreneurs recognize and create value for their small businesses, particularly at the business's inception and early stages of growth. With this goal in mind, the relevant business literature is incorporated into a framework that attorneys may use to better understand and anticipate the needs of the entrepreneurial organization. The framework and discussion are general and can be applied to small-business development in several industry sectors. Some suggestions are offered within the framework in relation to the issues most important to small businesses, including choice of business structure, development and protection of intellectual property, and management of human resources. Attorneys who are able to view the law within this framework may be better able to meet the needs of their clients who manage a small business since many small business owners may lack the knowledge, experience, or time to adequately manage the legal environment.

67. *See, e.g.*, LuAnn Bean, *Cloud Computing: Retro Revival or the New Paradigm?*, 21 J. CORP. ACCT. & FIN. 9, 11–13 (2010); Stacy Collett, *Legal Risks in the Cloud*, 45 COMPUTERWORLD, Apr. 18, 2011, at 24 (providing an overview of these risks with suggestions on how to manage them).