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**Values and Value Creation by Lawyers
in Public-Private Transactions**

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Introduction

Nearly twenty-five years ago, Ronald Gilson famously asked “What do business lawyers *really* do?”¹ After dismissing a variety of primarily mechanical explanations, Gilson’s answer was that business lawyers increase the overall value of deals by structuring transactions to minimize information asymmetries, find mutual gain in responding to parties’ differential expectations, and likewise engineer a variety of other transaction costs.² Scholars have developed a substantial literature to refine this model,³ particularly for environments where regulatory constraints drive deal structure, but Gilson’s essential insight remains influential—transactional lawyers at their best have unique potential to “make the pie grow larger rather than merely to help to carve it up.”⁴

This paper extends Gilson’s inquiry into a new realm, asking whether lawyers involved in what are commonly known as public-private partnerships—the increasingly important realm where the government engages the private sector to provide goods or services to the public—do something *different* than their purely private-sector counterparts. The short answer is yes. What is fundamentally different about deal lawyers in this context is that the “value” they create cannot be divorced from public policy goals that the private sector has been engaged to advance.⁵ Unlike in garden-variety transactions between private

¹ Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 Yale L.J. 239, 241 (1984).

² *Id.* at 255. Gilson framed this conclusion in terms of capital asset pricing theory, which assumes that the price of an asset will costless reflect future income.

³ See, e.g., *Symposium on Business Lawyering and Value Creation for Clients*, 74 Or. L. Rev. 1 et seq. (1995).

⁴ Gilson, *supra* note 1, at 308.

⁵ The government is often represented in public-private partnerships and government attorneys can be intimately involved in some kinds of public-private transactions. This paper is focused, however, on private rather than public attorneys, given that the paradigm transaction contemplated is not one between the government and the private sector, but rather in the private sector pursuant to some government program.

parties, in other words, the end-product of public-private partnerships cannot be captured simply in economic terms, although the underlying economics can be as important as the policy goals that drive the partnership.

For deal lawyers in public-private transactions, then, the programmatic and transactional context, as well as their clients' own mission-driven goals, necessitate a broader perspective on the concept of value. Such lawyers must contend with a challenging double layering, structuring deals to balance economic value creation with essentially non-economic (indeed, often counter-market) purposes. In addition to structuring for transaction costs and regulatory constraints, deal lawyers in public-private partnerships must also anticipate the challenges of engaging the private sector in solving difficult social problems. In short, these lawyers do create value in much the same way that Gilson and his successors have highlighted, but they do so in no small part by translating their clients' and the government's policy goals into the practical mechanisms of private ordering—helping to bake a very different pie.⁶

The goal of this paper is to add a new theoretical category to the well-developed, but still incomplete, literature on transactional lawyering, bringing the descriptive and normative insights of that literature to the discourse on public-private partnerships, particularly in the realm of social services. Accordingly, this paper first reviews the literature on value creation

⁶ The kinds of transactions on which this paper focuses are generally handled by private attorneys, not acting pro bono. Many firms have developed elaborate pro bono transactional practices, *see* Scott R. Cummings, *The Politics of Pro Bono*, 52 UCLA L. Rev. 1, 123-125 (2004), but this paper focuses on fee-paying transactional work.

Moreover, scholars have recognized the role of transactional lawyers in serving both individual clients in communities in need and also causes on behalf of those clients. *See, e.g.*, Ann Southworth, *Business Planning for the Destitute? Lawyers as Facilitators in Civil Rights and Poverty Practices*, 1996 Wis. L. Rev. 1121. Public-interest-oriented lawyering is certainly an important aspect of transactional lawyering in public-private partnerships, particularly in certain areas of social welfare policy, but represents only a portion of the larger mosaic of lawyer involvement with clients involved in public programs.

in transactional law, and particularly the emerging emphasis in that literature on the role of lawyers in managing regulatory constraints. It then discusses the nature of transactions in public-private partnerships, using affordable housing as a paradigm example. Finally, it argues that transactional lawyers in public-private partnerships have a unique role to play in translating public-policy goals into the hard work of real-world deal-making.

I. Value Creation in Transactional Lawyering

Lawyers stand at the heart of commercial transactions of any significant value, serving a wide range of practical roles—business and legal negotiator, document drafter, information gatherer, coordinator, as well, of course, as *lawyer*. In all of these capacities, it is fair to ask whether—and how—lawyers benefit the transaction and why other professionals (or clients themselves) couldn't as easily or more efficiently perform the same, often quite costly, tasks.⁷

In attempting to answer these questions, Ronald Gilson set out a useful framework.⁸ Gilson began with the proposition that in the absence of transaction costs, parties would reach agreement—would price the asset that is the subject of a deal and, by extension, the other material terms of the transaction—with perfect information.⁹ In this transactional

⁷ Gilson, in approaching these questions, argued that whatever value might be added by lawyers must be assessed from the perspective of the transaction as a whole, not from the gains that any one client might achieve by gaining their clients some distributional benefit. *See* Gilson, *supra* note 1, at 245.

⁸ The economic orientation of much of the value-creation literature has its limits, as Mark Suchman has argued. *See* Mark C. Suchman, *Translation Costs: A Comment on Sociology and Economics*, 74 *Or. L. Rev.* 257 (1995) (discussing cultural norms, power relations, and developmental dynamics as alternative explanatory inputs into business lawyering absent from economic accounts). To draw on the framework that Gilson and his successors have laid out is not to suggest that it provides the only or even necessarily a complete description of the work of transactional attorneys.

⁹ Gilson derived this transaction-cost free baseline from the financing concept of the Capital Asset Pricing Model, which presumes that capital assets will be priced based on market forces, a world that would make the cost of any third-party intermediary a loss to the transacting parties. *See id.* at 251.

environment, there would be no need for lawyers or any other third-party intermediaries. In the real world, of course, transaction costs are pervasive, with parties having different time horizons and expectations about the future, as well as significantly different information about all of the inputs to the transaction and ability and incentives to gather that information. To these barriers, Robert Mnookin and others have added the reality that parties can behave irrationally in negotiating and tend to bring incentives to any transaction to act strategically, undermining the potential for mutual gain.¹⁰

It is in the gap between the unreal assumption of perfect transacting by rationally acting parties and the transaction-cost-filled world of imperfect information and strategic behavior that lawyers have the potential to add value. Business lawyers, in Gilson's term, serve as "transaction-cost engineers," devising mechanisms through which market imperfections—primarily heterogeneous expectations and information costs—can be unearthed and structured around.¹¹ Lawyer-facilitated cooperative bargaining can thus create more valuable transactions by recognizing that solving transactional failures saves deals that would otherwise collapse, lowers the overall cost of a deal, and shifts the focus of negotiations away from potentially destructive distributional bargaining that engenders mistrust and opportunism.¹²

¹⁰ See ROBERT H. MNOOKIN, SCOTT R. PEPPET, AND ANDREW S. TULUMELLO, BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 127-155 (2000); Ronald J. Gilson & Robert H. Mnookin, *Foreward: Business Lawyers and Value Creation for Clients*, 74 Or. L. Rev. 1, 10-13 (1995) (reviewing strategic-behavior and psychological barriers to transacting).

¹¹ Gilson, *supra* note 1, at 255.

¹² There is an important empirical question that suggests a note of caution in taking too rosy a view of Gilson's description of value creation, namely the *relative* value to a client of the gains from value-creating lawyering versus the distributional consequences to that client from participating in the kind of cooperative behavior that Gilson highlights. Cf. Edward A. Bernstein, *Law & Economics and the Structure of Value Adding Contracts: A Contract Lawyer's View of the Law & Economics Literature*, 74 Or. L. Rev. 189, 195 (1995) (practicing lawyers "who are properly concerned only with the well being of their clients, frequently fail to understand that a reduction in joint costs can benefit their client perhaps because, in practice, many actions that increase the value of a transaction as a whole decrease

Recently, scholars have begun to add a new dimension to this picture of lawyers as transaction-cost engineers. Gilson dismissed the potential for value creation from what he described as “manipulation of a regulatory system,”¹³ arguing that most business lawyers operate “in a world in which regulation has made few inroads,” and thus where the “critical rule of law is that a court will enforce whatever the lawyer writes.”¹⁴ In the modern transactional world, however, managing regulatory constraints may be as important, if not more important, to the value lawyers can create than non-regulatory transaction-costs.¹⁵ The paradigm of the private client largely indifferent to regulation is now more of the exception than the rule, if it ever was predominant. And in that regulatory world, even the most seemingly mundane private transaction takes place under regulatory constraints with potential regulatory consequences.

David Schizer, for example, has identified what he describes in the tax-planning context as “frictions,” constraints on transactional structure that derive from accounting rules, securities regulation, and other legal regimes.¹⁶ Schizer argues that tax planners are more or less successful in working around targeted tax laws, depending in no small measure

the value of a transaction to one of the parties.”). In other words, if the increase in the size of the pie yields less than the benefits to keeping a larger slice of a smaller pie, then a client has every incentive to act strategically or otherwise add to total costs—short of killing a deal—to capture that relative advantage.

¹³ Gilson, *supra* note 1, at 244.

¹⁴ *See id.* at 247. Edward Bernstein has challenged the assumption of costless enforcement, *see* Bernstein, *supra* note 12, noting that “legal system” costs are themselves pervasive. For recent debate about the extent to which contract drafters can and should take into account litigation risks, *compare* Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 *Yale L.J.* 814 (2006), *with* Steven Schwarz, *Explaining the Value of Transactional Lawyering*, 12 *Stan. J. of L., Bus., & Fin.* ___ (2007) [at 16 in SSRN version].

¹⁵ Victor Fleischer pioneered the shift in the transactional-value literature towards understanding the increasing importance of regulatory constraints. *See, e.g.*, Victor Fleischer, *The MasterCard IPO: Protecting the Priceless Brand*, ___ *Harv. Neg. L. Rev.* ___ (2007); *see also* Schwarz, *supra* note 15, at 8 n.37 (discussing Fleischer’s conception of regulatory cost engineering).

¹⁶ *See* David M. Schizer, *Frictions as a Constraint on Tax Planning*, 101 *Colum. L. Rev.* 1312 (2001).

on the effect of these non-tax legal constraints. Victor Fleischer has argued more broadly that lawyers engage in what he calls “regulatory cost engineering,” where lawyers “driv[e] a wedge between the economics of a deal and its treatment for legal or regulatory purposes.”¹⁷ Fleischer acknowledges that this descriptive claim raises potentially significant normative implications, as regulatory cost engineering can potentially pit private benefit against social cost.¹⁸

Operating in regulation-influenced transactional contexts can create a tension, moreover, for lawyers between what David Dana has identified as a “client-service” model of lawyering versus a “public-service” model. The former model focuses on zealous advocacy of a client’s goals above all else, while the latter emphasizes the lawyer’s role as agent of a legal system whose ends may transcend—or conflict—with their client’s interests.¹⁹ Taking the realm of environmental compliance as an example, Dana argued that for lawyers drawn to the public service model, a number of forces conspire to give primacy to client service over the often vague and complex demands of any modern regulatory system.

This is a sobering cautionary note for lawyers serving the private sector, and a marker for what might be different when client interests and the public interest are more closely aligned, as we shall see. Despite this appropriate concern, however, transaction-cost and regulatory-cost engineering perspectives ultimately suggest a salutary role for

¹⁷ Fleischer, *supra* note 17, at [2 in SSRN version]. Fleischer gives the example of the MasterCard initial public offering, which was structured to include “reverse” dual-class voting that reduced formal voting control for member banks (while retaining an effective veto). This structure, Fleischer argues, flipped the usual pattern of insider control in dual-class voting, but did so to reduce the member banks’ antitrust exposure. *Id.* at [9-12.]

¹⁸ *Id.* at [16].

¹⁹ See David Dana, *Environmental Lawyers and the Public Service Model of Lawyering*, 74 Or. L. Rev. 57 (1995).

transactional attorneys, overcoming barriers that clients may not understand or appreciate to maximize the value of mutually beneficial exchange.

II. Public-Private Partnerships and the Example of Affordable Housing

Public-private partnerships are an increasingly important aspect of public policy. Although the term is notoriously expansive,²⁰ it generally refers to situations in which the government interacts with private parties not simply by setting the legal framework within in which transactions take place or providing regulatory oversight, but through directly engaging the private sector to advance public goals.

This kind of partnership has a long history in the provision of infrastructure, economic development, urban renewal, and for the delivery of a wide array of public services. Engaging the private sector to serve the public has also long been at the heart of social-service provision.²¹ In fields as diverse as health care, job training, welfare, and housing, both nonprofit and to a lesser (although growing) extent for-profit entities have often served as the primary vehicles for governments at all levels to serve communities and individuals in need. The use of public-private partnerships is taking on increasing importance as governments at all levels are caught between demand for public services and limited political will to expand the role of government in providing those services.

Public-private partnerships vary from traditional public contracting in that the ultimate recipient of the relevant good or service is not directly the government, but instead the public. They also vary from some more controversial examples of privatization in that

²⁰ See UNITED STATES GENERAL ACCOUNTING OFFICE, PUBLIC-PRIVATE PARTNERSHIPS: TERMS RELATING TO BUILDING AND FACILITY PARTNERSHIPS 1 (1999).

²¹ See LESTER M. SALAMON, PARTNERS IN PUBLIC SERVICE: GOVERNMENT-NONPROFIT RELATIONS IN THE MODERN WELFARE STATE (1995).

responsibility is not shifted entirely to the private sector, but rather the public and private sectors work together to achieve a public goal. It is important, however, to acknowledge a significant, and serious, debate about the engagement of the private sector in the provision of public services under any label. To oversimplify a rich discourse, on one side, skeptics of the involvement of the private sector in public programs point to concerns about accountability, the quality of the services provided, and the risk of “hollowing out” the government and ultimately undermining the rule of law. On the other side, proponents of such involvement tout its benefits for enhancing the efficiency of public services and its potential to draw on the experience of a more pluralistic array of service providers.²² Whatever the merits of the arguments on both sides of this debate, it is undeniable that the government is increasingly drawing upon the private sector to deliver public services and particularly in the arena of social services, that engagement is firmly entrenched. This is not to accept uncritically all aspects of public-private partnerships, but simply to place the debate in the context of making the best of what these partnerships may have to offer and specifically the role of transactional lawyering in maximizing their value.²³

²² See Nestor M. Davidson, *Relational Contracts in the Privatization of Social Welfare: The Case of Housing*, 24 *Yale L. & Pol’y Rev.* 263, 269-276 (2006).

²³ It is certainly a well-founded critique of lawyering in the context of programs that ameliorate conditions that might generate demand for broader social change that the potential exists for such lawyering to undermine the very causes it seeks to serve. Cf. Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 *Stan. L. Rev.* 399 (2001). How one responds to this concern has much to do with how one evaluates the potential likelihood of fundamental social change and the advantages and disadvantages of serving communities in need regardless of the pace (or, in recent decades, direction) of that change. These are difficult questions, and beyond the scope of this paper. For now, it must suffice to recognize that governments at all levels are investing resources—inadequate by most lights, but hardly trivial—in engaging the private sector to serve those in need and that model of social welfare is likely to continue for the foreseeable future.

To move, then, from the general to the specific, affordable housing offers a fruitful paradigm to understand modern public-private partnerships.²⁴ On the supply side, governments at all levels have engaged the private sector to develop and operate housing that is affordable at below-market-rate rents or that is available for sale on an income-restricted basis.²⁵ Various public agencies at all levels of government dedicate approximately [\$20] billion in direct and indirect subsidies to the development and preservation of affordable housing every year,²⁶ and the stock of privately owned, publicly subsidized housing currently stands at roughly [two million] units.²⁷

Affordable housing transactions resemble traditional private real estate transactions in many basic respects, but the requirements that attach to public subsidies involved introduces some notable complications. Just as in traditional real estate, affordable housing deals generally involve the development of a new building or the acquisition of an existing asset, and the bulk of contemporary programs at least at the national level focus on multifamily rental projects.²⁸ The players are familiar as well—the owner of land or the

²⁴ Cf. Tim Iglesias, *Our Pluralist Housing Ethics and the Struggle for Affordability*, 42 Wake Forest L. Rev. 511, 589 (2007). Housing shares some characteristics with other areas of public-private partnership, including examples from urban renewal and infrastructure, as well as other areas of social welfare policy, but is an interest area on which to focus given the heavily transaction-oriented nature of the practice.

²⁵ Affordable housing is subsidized on the supply side, directly through grants and loans and other subsidies and indirectly through the tax code, and on the demand side, typically through vouchers. The kinds of affordable housing transactions this paper examines involve supply-side subsidies.

²⁶ [Rough (and likely low-ball) estimate per HUD enacted 2007 budget for housing plus NPV of LIHTC. Need to confirm and add state and local data.]

²⁷ [Millennial Housing Commission Report (2002) at 29 (only federal) – need more recent and complete statistic.]

²⁸ Single-family housing particularly on the for-sale side is also a part of affordable housing policy, but despite the veneration of this sector of the market by policymakers, homeownership is untenable for many of those served by core affordable housing programs, which accordingly focus more on rental housing.

existing project, the developer or acquirer, and the web of financial participants on the debt and equity sides.

It is in the category of financial participation that the public side of the public-private partnership enters most clearly. In housing partnerships, it is the private sector that develops, owns, and operates the housing, but at least some portion of the financing is public. Subsidies, then, can take the form of grants or loans, waivers of fee requirements and other soft subsidies, or, increasingly, of the indirect subsidy of tax credits for equity investors in Low Income Housing Tax Credit transactions.²⁹ It is more often the rule than the exception that affordable housing projects require multiple subsidies, and more subsidy streams are generally required the further down the income scale (and hence less able to support operating costs) the target population that is to be served. Each subsidy stream comes with its own particular goals—in terms of development structure, clientele to be served, time horizon, and other variables—and particular set of generally highly detailed regulations and related requirements. Add multiple subsidy streams and the complications and required coordination correspondingly multiply.

Just as the basic affordable housing transaction is more than a particularly complex real estate deal, the private entities—both for-profit and non-profit—that get involved in this sector of the housing market tend to have notably different characteristics than the hypothetical traditional business.³⁰ Even the most steely-eyed for-profit developer rarely

²⁹ For good overviews of various subsidy mechanisms at all levels of government, see *THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT* (Tim Iglesias & Rochelle E. Lento, eds. 2005), particularly Chapter 7 (Rochelle E. Lento, *Federal Sources of Financing*), Chapter 8 (Peter Salsich, *State Sources of Housing Finance*), and Chapter 9 (Rick Judd & Barbara E. Kautz, *Local Government Financing Powers and Sources of Funding*).

³⁰ It is open to question the extent to which any private entity, at least in the for-profit arena, is driven purely by economic considerations, but it is hard to deny that that is certainly the predominant if not overriding organizing principle for most for-profit entities.

engages in public-private partnerships, at least in the social welfare context, without some underlying understanding of the non-economic values involved in such projects.³¹ To use a phrase that is common in housing deals, the “brain damage” is simply too great and the margins often too thin to justify investment in this market niche without at least sympathy to the overriding policy goals the niche involves.

Private clients involved in public-private partnerships array along a spectrum from entities indifferent to the goals they are incentivized to support to “mission-driven” entities dedicated to those goals. An example at the former end of this spectrum can be found with a certain type of Low Income Housing Tax Credit investor that seeks the credits purely for the economic advantage (a one-for-one tax credit) that the program offers, entirely indifferent to the use of their equity funds, except from a compliance perspective. At the other end of the spectrum are the myriad non-profit housing providers whose mission is to provide affordable housing and often related services. These entities include everything from the smallest community-based church group with a few units to the kinds of sophisticated national non-profit entities managing portfolios in the tens of thousands of units that have emerged in the past two decades. For all of these entities—even largely indifferent investors—the “deal” involves more than simply the economics and the threshold decision to participate in any public-private partnership reflects at least some understanding of the public goals involved.

Another notable feature of public-private partnerships in general and particularly of affordable housing is the role of the public as the recipient of the particular good or service

³¹ One staple of the literature on privatization is a concern with the conflict of interest that arises when private companies provide public services. This potential conflict should not be minimized, but there are many contexts in which private parties’ own goals serve as a mitigating influence. Non-profit housing providers are a good example.

(in housing, something of a mix of goods and services that below-market rate renting represents). Although any market transaction takes place in the shadow of the consumer, in public-private partnerships the public nature of the final product brings stakeholders to the table and political considerations that can be more muted in purely private transactions. These stakeholders and considerations in turn shape the expectations and risk profiles of the participants.

From the government's perspective, what is distinctive about housing as a public-private transaction is the relatively durable nature of the asset involved. When a public subsidy incentivizes the private sector to generate affordable housing or to convert a housing asset that was serving market-rate tenants, the time-horizon of the public commitment is measured in decades, if not longer. This can be true of public-private partnerships in the infrastructure arena and other examples involving hard assets, but is generally less true compared to other areas of social welfare. This extended public commitment, which has proven controversial for private providers at times,³² creates incentives and practical problems that intertwine the government and the private sector into long-term, on-going interactions that have to be understood—and accounted for in deal structuring—from the outset.

³² A notable area of policy development and litigation involves the problem of time-limited affordability requirements. Many housing programs make an explicit bargain with the private sector: utilize public subsidies to develop housing that will be below market for a period of time—30 years, for example, in many Low Income Housing Tax Credit transactions—at which point you will be able to take that building to market-rate housing. Congress and HUD have attempted in a variety of ways to mitigate the impact of this initial bargain (with owners resisting some of these attempts), and ever-longer affordability periods are becoming common, but this remains a controversial aspect of contemporary housing policy.

III. Values and Value Creation

Given the complexity of transactions in the context of public-private partnerships and the unusual nature of the client, the task—and value-added—of the private transactional attorney is different in important ways from what is required of their pure private-sector counterparts. Lawyers in this setting add value not just by transaction-cost and regulatory-cost engineering, but also by serving as the critical bridge between the government and the private sector. The “value” a transactional lawyer can create in a public-private transaction thus goes beyond managing the kinds of primarily information-cost-related barriers that Gilson identified or responding to the kinds of regulatory constraints that Fleischer noted. Lawyers in this context are instead undertaking what can be called “regulatory translation” engineering.

Private lawyers have a variety of tools to translate policy goals—both abstract and concrete—into the terms of private contract: risk allocation, information management, and the basic structures of reciprocal obligation over time. These tools are all solutions on some level to a different kind of information-cost failure than found in the private sector, namely the inevitable informational challenges that the government engenders by engaging the private sector to advance public goals. If transaction-cost engineering is an exercise in moving a deal closer to hypothetical perfect market conditions then changing the predicate assumption from a perfect market benchmark to a benchmark that is shaped by the interaction of market forces and public policy correspondingly changes the role of the lawyer in adding value. The mechanics of the task may be similar, with lawyers identifying opportunities and challenges from the differential information and expectations of the parties, but those differences are endemic to the different sectors, public and private, from which the partners approach any transaction.

In translating public-policy goals into the ordinary, if important, matrix of contractual language, transactional lawyers in public-private deals have to capture values that may be non-commodifiable or that might run counter to what would otherwise inform the market price of the asset in question. In housing, for example, policy goals include not just providing safe and decent below-market-rate shelter, which would be challenging enough, but also giving residents voice and stability, providing a locus for other social services, creating economic opportunity, and mitigating the impacts of the concentration of poverty, among others.

Conflicts between private incentives and public goals are inevitable, as in any transactional environment. However, just as lawyers can engineer private transactions to recognize such conflicts and create mechanisms to add value in solving them, transactional lawyers in public-private transactions can add value by clearly anticipating such conflicts and structuring the framework of the parties' interaction to emphasize the alignment of interests over points of conflict. Gilson called this cooperative bargaining, and the potential for similar structuring in public-private partnerships is even more pervasive.

The presence of public subsidies, moreover, alters private parties' risk profiles. Risk is inevitable in any deal, and will be factored into return in a well-structured transaction, but many elements of typical subsidy programs are designed to minimize the risk of failure and maximize the long-term stability of the public benefit. Unlike private-sector actors in market transactions, then, the public investment in this context means that certain risks become less acceptable or must be managed differently than in purely private transactions. Deal lawyers must accordingly translate that fact into mechanisms for ensuring the long-term viability of a project and, ideally, long-term commitment on the part of the government to support that viability.

Ultimately, because public-private partnerships are designed to benefit not the direct parties involved but rather those members of the public who will receive the goods or services, those interests become entwined in the latitude given to private providers. This has two primary consequences. Political considerations become unavoidable, although deals can be structured to moderate the impact that such considerations might have.³³ And more immediately, the interests of the members of the public to be served are appropriately a constant factor to be considered.

These challenges play out in the ordinary language of the deal documents that frame public-private transactions. It is difficult if not impossible, of course, to prove the value that transactional lawyers add in regulatory translation (or in any other kind of task undertaken by deal lawyers)—can you imagine the control group? Gilson, however, pointed out that evidence of value creation is discernable in deal documents. Gilson thus highlighted a number of examples in a typical asset-purchase agreement that demonstrated how lawyers in practice engineer transaction costs, citing earnout provisions, representations, warranties, and indemnifications, and legal opinions as tools to manage expectations and informational and other costs.³⁴

Similarly, one can see evidence of regulatory translation in some of the more common provisions of typical affordable housing transactions. For typical clients these provisions involve translating what can often be difficult, and in the context of multiple subsidy streams, conflicting regulatory requirements into obligations that are understandable

³³ This is not to argue that political considerations—a category of interests that are hard to define—are inherently illegitimate or inappropriate to factor into the implementation of public subsidy programs. There are positive and negative aspects to factoring in public participation and it is hard in many situations to separate beneficial involvement from naked rent seeking. The practical problem, however, is how to translate the potential for policy changes into a long-term set of mutual obligations. Conversely, accountability on the part of the provider is equally fundamental.

³⁴ See generally Gilson, *supra* note 1, at Part III.

and that can be framed in terms of the allocation of risks between the parties. Thus, to give one example, in Low Income Housing Tax Credit transactions, it is typical to see elaborate provisions for payments to investors in the case of “recapture” or similar adverse tax events (investors generally being subject to a fifteen-year window of tax-credit recapture risk). These provisions manage the differential horizon and incentives facing tax credit investors—often passive entities with little interest in actively intervening over the life of a project—and tax credit developers and owners.

For non-profit developers, moreover, the IRS has suggested constraints on their ability to offer strong indemnities of for-profit investors, even in the service of the accepted charitable mission of providing affordable housing. One common resulting structure caps the exposure to the non-profit developer to the economic value coming out of the deal. This gives investors some protection—and aligns the interests of the developer and investor over the period of risk—while protecting the on-going viability of the non-profit. This kind of creative structure bears a family resemblance to the kinds of structures that Gilson highlighted as solving heterogeneous-expectation problems in private transactions, but deal lawyers in the housing context must mold those solutions to the realities of the programs at issue.

Such transactional engineering in the face of programmatic and policy constraints is pervasive: thus one sees in housing transactions provisions that cover third-party rights, primarily for tenants; that require notification of the government and governmental approval at key turning points in the life of a project or reserve regulatory authority to the government; or that impose relatively open-ended “quality” standards on the housing.³⁵

³⁵ See Davidson, *supra* note 22, at 288-293 (discussing contractual provisions in affordable housing transactions).

Third-party rights can be understood as mechanisms to define the obligations of private owners and landlords in a way that balances their expectations with the need for tenant security. Oversight mechanisms similarly balance private flexibility with the need to protect the core public benefit at issue, both in terms of preserving affordability but also in terms of preserving the physical asset itself. And quality or similar open-ended obligations on the nature of management recognize the risk of opportunism at the same time as acknowledging the challenge of specifying with any level of detail the variety and complexity of obligations this can entail.

This by no means exhausts the universe of provisions unique to housing deals that set forth a framework and the terms of engagement for long-term public-private interactions, but does give a sampling of regulatory translation in action. Each of these typical provisions in the end represents a solution to a potential barrier to the various interests involved, public and private, reaching a mutually beneficial outcome. Because lawyers are capable of rendering these interests in the terms of agreement, even with provisions that are at times open ended, deals are created and made more “valuable” in the broadest sense of the word.

Implications for Transactional Lawyers

Understanding the value that deal lawyers can create through regulatory translation engineering can give lawyers a new perspective to approach the task with better awareness of the comparative advantage they bring to a deal. One of Gilson’s goals in positing a theory of value creation for transactional lawyers was to highlight the competition that lawyers face from other potential market participants. As Gilson noted, there is nothing traditional or

inherently “legal” about the type of transaction-cost engineering that he identified, and other professions could as easily step in to add the same value.³⁶

This assumption, however, has much less force in the kind of regulatory environments in which public-private partnerships unfold. Because of the involvement of the government, involvement that is most often expressed through complex *legal* language, there is no escaping the centrality of lawyers to what in other contexts would tend to be non-legal aspects of a transaction. In this way, lawyers are not just leveraging their unique capability to understand and render comprehensible the mass of governmental requirements and constraints attached to most subsidies (as much as can be done) to take on additional tasks as drafters or negotiators or the like. Lawyers are instead adding unique value by operating simultaneously in the world of private transactional structures and public policies expressed through regulatory language.

Another aspect of the terms of economies of scope available for deal lawyers in public-private partnerships is that lawyers can add value for clients as they leverage the experience of working on one challenging regulation-driven transaction to other such transactions. It is hardly cost effective for most participants in the housing arena—an arena that often involves the long-term management of significant hard assets—to invest in the information necessary to understand evolving regulatory requirements that affect only a fraction of their portfolio or that represent only a marginal risk. Housing lawyers, by contrast, can and do develop expertise the costs of which can be spread across multiple clients.

³⁶ See Gilson, *supra* note 1 at 295. Gilson noted that economies of scope—the ability efficiently to apply the same investment to more than one outcome—“should give [lawyers] an advantage in performing the [non-legal] aspects of transaction structuring,” *id.* at 298, such as drafting, valuation, and due diligence. But this comparative advantage is not necessarily grounded in deal lawyers expertise as *lawyers*.

Recognizing this inevitable market niche, however, does not mean that lawyers should exploit that advantage to capture more value from a transaction than they add or than other potential participants might more efficiently provide. If a client or a less costly third-party professional can more efficiently play a role that deal lawyers now do, it is incumbent upon deal lawyers to cede that role—not out of some altruistic regard for their clients (although that should not be dismissed), but rather because the overall value to clients—and to the public—can be increased by more targeted specialization.

One curious cultural aspect that marks transactional lawyering in affordable housing is that attorneys seem open to sharing knowledge, document forms, and experience working with the various agencies that fund housing. The members of the American Bar Association’s listserv for affordable housing and community development law regularly engage in on-going discussions of arcane regulatory questions and an ethos seems to prevail that is hard to imagine in, say, the world of structured finance or mergers and acquisitions.³⁷ Deal lawyers in this context share insights and provide detailed feedback on regulatory interpretation (and the extent to which such interpretation has been accepted by agencies and market participants).

One can speculate that this is because attorneys see reciprocal advantage to be gained by this exchange of knowledge, but it is at least possible that this ethos has developed because of an awareness among housing deal lawyers that there is an important aspect of their work that is much closer to David Dana’s public service model than the kinds of conflicts Dana associated with the client service model in heavily regulated sectors of the

³⁷ This is an anecdotal impression, to be sure, and cannot be proven empirically without study of comparative contexts. There are certainly a number of contexts in legal practice where lawyers offer each other continuing legal education and regulatory and other legal knowledge is considered something of a common stock. Suffice it to say that deal lawyering in affordable housing does tend to foster a culture of mutual support.

economy. Dana argued that where regulatory constraints were clear and draconian, there would be no conflict between what client service and public service would demand of a lawyer. Dana rightly pointed out that this is rarely, if ever, the case.³⁸ But in public-private partnerships, the potential for an alignment of interest between private goals and public policy is much more achievable.

Implications for Clients in Public-Private Transactions

Lawyers are only worth their added value. Gilson noted that lawyers are often seen as more of a hindrance than a help to deals—at worst, “deal killers whose continual raising of obstacles . . . ultimately causes transactions to collapse under their own weight.”³⁹ If, as many clients assume, lawyers are true transaction costs, then their use cannot be justified and even more so in transactions that revolve around the deployment of scarce public resources. Anecdotally, critiques of transactional lawyering as adding unjustified costs ring as true, if not more so, for clients in public-private transactions than in traditional deal making, especially where transactions exist on narrow margins and subsidies are perennially limited.

Understanding the value that transactional lawyers add to public-private transactions thus has implications for clients. This perspective can lead clients to develop in-house expertise where that is appropriate, as many players in the housing arena have done, but also to be less reluctant to engage attorneys when the necessity for regulatory translation is most acute. And given the potential to develop expertise that transcends any given client, housing providers can understand the potential for cost saving that such leveraging might provide.

³⁸ See Dana, *supra* note 19, at 59-60.

³⁹ Gilson, *supra* note 1 at 242. In a vivid example of the regard with which deal lawyers are sometimes held, Vic Fleischer relates a recent description of deal lawyers circulating widely on the Internet as “monkey f***-ing scribes.” Fleischer, *supra* note 17, at [2].

One aspect of client attitudes toward deal lawyers in public-private partnerships may stem from the connection between the need for regulatory translation and the concomitant provision of that service by lawyers. In other words, law creates complications that lawyers conveniently step in to solve,⁴⁰ and in working to translate regulatory requirements for private clients, lawyers could be seen as shifting value from the private sector to the government and undermining public incentives for transparency and consistency. This concern is appropriate, but somewhat misplaced. Regulatory complexity is an inevitable cost of involvement in public-private partnerships and the question is how best to manage that complexity.

Implications for the Government

If deal lawyers can structure to bring public goals in line with private incentives, as I have argued, the process can work the other way as well. Transactional lawyers can conversely structure deals to help the government achieve its goals through the language of private law in a way that can be hard for agencies steeped in policy to manage effectively. This is not to suggest that policy makers or government attorneys lack sophistication about their private counterparts—although that can be the case—but rather that there is value to be added for the public by transactional attorneys who operate in both worlds.

Given that governments at all levels have found it in the public interest to engage the private sector in serving the public, facilitating the regulatory translation function of deal lawyering can yield significant benefits. The Department of Housing and Urban Development, for example, has attempted in recent years to foster what former HUD General Counsel Keith Gottfried described as regulatory transparency in its dealings with the

⁴⁰ *Cf.* Gilson, *supra* note 1 at 246-47.

housing bar,⁴¹ but more can be done by all agencies involved in housing to make the implementation of public programs through the medium of private transactional law more efficient, whatever the content of the regulatory requirements the government finds necessary for the public interest.

Agencies in general can understand that public-private partnerships cannot simply involve the imposition of public goals on private participants, no matter how willing or enthusiastic those participants are. There are direct costs to regulatory complexity and those costs are not borne exclusively (or perhaps primarily) by the private entities that serve the public in these partnerships. Given the types of assets involved in the housing context, initial deal structures have long-term effects, which means that government entities no less than their private counterparts have to pay careful attention to asset management over time. It is through the obligations that lawyers craft to align long-term incentives and interests that the public interest is advanced.

In public-private partnerships, moreover, both sides have to recognize the consequences of interrelating between two cultures. The world of public subsidies is grounded in budget cycles, public scrutiny, political risk and changing policy priorities. Take the problem of appropriation risk. Often an important aspect of the financial viability of given development is a form of project-based rental subsidy. However, project-based Section 8 subsidies are typically limited by the proposition that Congress must appropriate funds for the subsidy on an annual basis. Congress has never failed to renew the subsidy, but the risk exists nonetheless that an important aspect of the financial viability of a project rests on political grounds. Lawyers manage this risk—again a question of heterogeneous

⁴¹ See, e.g., Remarks of Keith E. Gottfried, General Counsel, United States Department of Housing and Urban Development, at the National Settlement Services Summit (June 14, 2006) (discussing regulatory transparency).

information and expectation between public and private actors—by a variety of means, but the important point is that it does not in the end hold up transactions.

Finally, returning to the question of private deal-lawyer economies of scope, is it likely to be in the government’s interest to have to undertake the work of matching general regulatory goals to the vast array of specifically situated private entities who will be engaged in advancing those goals. Translation by lawyers in the context of specific transactions—information that can be taken to scale by those lawyers—seems an appropriate intermediate solution.

Conclusion

Understanding the role that transactional lawyers play in public-private partnerships has the potential to shed light on how best to harvest the fruits of this increasingly important aspect of public policy. This is not to endorse the engagement of the private sector without an appropriate awareness of the potential pitfalls that engagement may entail. Rather it is to recognize that if the threshold decision has been made to partner with the private sector, it is through the largely unheralded work of private deal lawyers translating policy goals into the mechanisms of private ordering that these partnerships take effect.

A “regulatory benefits engineering” perspective on the role of lawyers in public-private transactions can help lawyers, their clients, and the public sector gain value in the broadest sense of the word out of these partnerships. Just as lawyers in purely private transactions can recognize hidden barriers—and hidden opportunities for mutual gain—so lawyers in public-private transactions can craft deal structures and the relationships that flow from these deal structures in ways that enhance the overall benefits the transaction seeks. It is perhaps a modest role for lawyers to play on one level, but given how infused the basic

vocabulary of public-private partnerships is with the language of law, it is a role that private lawyers are uniquely suited to play.