12. ETHICAL CONSIDERATIONS FOR BUSINESS AND TRANSACTIONAL LAWYERS

ETHICAL CONSIDERATIONS FOR THE BUSINESS AND TRANSACTION LAWYER: A PRACTICAL APPROACH

Clifford R. Ennico, Esq.
2490 Black Rock Turnpike, # 354
Fairfield, Connecticut 06825-2400
Phone: (203) 254-1727
Fax: (203) 254-8195
E-Mail: crennico@gmail.com
Internet: www.cliffennico.com

TABLE OF CONTENTS

1. **PowerPoint Slide Presentation, "Ethical Considerations for the Business and Transaction Lawyer: A Practical Approach"**

2. **Some Essential Web Links Relating to the New York Model Rules of Professional Conduct**

3. **"Some Ethical Aspects of the Business Lawyer's Job" [reprinted with permission from "Business Lawyers Handbook: What Business Lawyers Do" by Clifford R. Ennico (Biennix 1991-2013)]**

4. **Form of Retainer Letter – Multiple Clients Forming Corporation or LLC**

5. **Waiver of Conflict of Interest – Multiple Clients Forming Corporation or LLC**

6. **Form of Retainer Letter – Hourly Rate**

7. **Form of Retainer Letter – Flat Fee**

8. **Form of Retainer Letter – Combination of Flat Fee and Hourly Rate**

9. **Form of Retainer Letter – Percentage Fee**

10. **Form of Nonrepresentation Letter – Where Retainer Letter Exists**

11. Form of Nonrepresentation Letter – Where Retainer Letter Does Not Exist

12. "Marketing the Solo or Small Office Law Practice: Some Real World Tips and Practices" by Cliff Ennico

Ethical Considerations for the Business and Transactional Lawyer: A Practical Approach

Law Offices of Clifford R. Ennico
2490 Black Rock Turnpike, # 354
Fairfield, Connecticut 06825-2400, U.S.A.
Tel.: (203) 254 1727
Fax: (203) 254 8195
e-Mail: cennico@legalcareer.com
Web: www.cliffennico.com

What Business Lawyers Do

- Keep the Client Out of Court!
- What I Spend Most of My Professional Time Doing:
  - Forming business entities (corporations, LLCs);
  - Giving legal advice (and sometimes getting paid for it);
  - Drafting and negotiating contracts;
  - Drafting and negotiating "deals" (er, transactions) for my clients;
  - Communicating with government agencies and regulators
  - Billing clients (my FAAAVORITE activity ☺)
  - Marketing the Heck out of my practice

The Ethical Challenges [Part 1]

- Forming Business Entities
  - "Everybody wants to be my client" [Model Rule 1.13]
  - "You've been representing our business for years now, but I've got this little thing on the side I need your help with" [Model Rule 1.13(d), 1.7]
  - "Would you consider a barter deal, or perhaps debt or equity in our company?" [Model Rule 1.5]
  - "We're setting up a subsidiary in Idaho. Can you help us with that?" [Model Rule 5.5, comment 13]

The Ethical Challenges [Part 2]

- Advising clients
  - "Now, this isn't really legal advice, but . . . " [Model Rules 2.1, 5.7]
  - "I've never really done this before, but a lot of clients are asking for it . . . " [Model Rule 1.1]
  - "The law says X, but nobody really enforces it so don't worry about it" [Model Rule 2.1]
  - "I can't help you, but my good friend Joe can" [Model Rule 1.1, 1.5]
  - "I'm thinking about hiring you, but could you answer a couple of quick questions for me first?" [Model Rule 1.18]

The Ethical Challenges [Part 3]

- Drafting and Negotiating Contracts
  - "I want you to protect my interests, but for Heaven's sake don't kill the deal! I really need this job . . . " [Model Rule 1.2(a), 1.3 Comment 1]
    - **Be sure to document your client's concessions (one of the few really good things about e-mail)**
  - "I'm buying a franchise. There's some stuff in the franchise agreement I don't like, but the franchise says it won't change anything. What can I do about that?" [Model Rule 1.3]
  - "Hey, the other guy made a mistake in my client's favor . . . " [Model Rule 4.1]

The Ethical Challenges [Part 4]

- Drafting and Negotiating "Deals"
  - "I understand you did a great job representing my good friend Joe. I want you to get me the same deal you got him!" [Model Rule 1.6]
  - "I'm not a confrontational person. Can you handle all the negotiations for me?" [Model Rule 5.7]
  - "This other attorney is an idiot; he'll believe anything I tell him" [Model Rule 4.1]

The Ethical Challenges [Part 5]

- Interfacing with Government Agencies
  - "I just found out I was supposed to register my company with State X years ago. What do I do?" [Model Rule 1.2(d), 2.1[6]]
  - "The form asks for my home address but I don't want my home address to be made public . . ." [Model Rule 4.1]
  - "But you TOLD me X wasn't the case. Now you tell me it is?" [Model Rule 1.3, 1.16]

Billing Clients

Clients HATE surprise invoices:

- Get retainer letters with ALL clients, on EVERY important matter
- Post your fees on your Website (and stick to them)
- Bill promptly, and often ☺
- Do a detailed "narrative" bill on all matters
- Never charge for discussing a bill

Your Retainer Letter

- Your "front line" of defense against ethics claims
- Common provisions
  - What services are (and are not) to be performed
  - Your fee and when payable
  - Interest due on overdue bills
  - Fee estimates, and how you will handle changes in the "scope of work"
  - Upfront retainer, and if/when refundable
  - "Fee not based on success"/no guarantee of satisfaction/result
  - Look to client personally for payment (no reliance on legal entity)
  - When you/client can terminate relationship, and what happens on termination
- If client won't sign, send a "nonrepresentation letter"

Marketing Your Practice [Part 1]

- "Hey, while working for another client, I just learned you can do X. Why don't you consider it as well?" [Model Rule 2.1, Comment 5]
- "Could you please give me references to one or two of your other clients for whom you've done similar work?" [Model Rule 1.6, Comment 4]
- Your client newsletter [Model Rule 7.3]
- Your Website [Model Rule 7.1]
- Speaking to local business groups [Model Rule 7.1, Comment 7]
  - **"Legal information is not legal advice."**
  - **Watch Out for the Q&A at the end of your program**

Marketing Your Practice [Part 2]

- Can you use social networking sites such as LinkedIn to market your practice? Yes, as long as:
  - Your clients' confidential information (including their identities as clients) is not disclosed (Model Rule 1.6);
  - You do not directly solicit business on your profile page (Model Rule 7.3); and
  - Your page complies with all provisions of Model Rule 7.1 that apply to your law practice website

Some Tips for the In-House Lawyer

- Don't become one . . . ☺
  - The businesspeople don't like you because you're not "one of them"
  - The outside lawyers don't like you because you're not "one of them"
- What in-house lawyers do
  - Deal with "mixed law/business" situations
  - Do the things that are too small/routine to be outsourced to outside counsel
  - Act as "modem" between outside counsel and the company's executives/manage outside counsel costs
- Read Model Rule 1.13(b) and Comment 3 and pray that you are never in this situation

Dealing with Ethics in the "Real World"

- Know the rules, and know them cold
  - Read the Model Rules and Comments
  - Read the ethics opinions in the *NYSBA Journal*
- Get a detailed retainer letter with EVERY client and EVERY new matter – don't rely on "form" documents (not even mine ☺)
- Build a support network of other (more experienced or retired) attorneys
- When in doubt, "yield not to temptation" . . . there's plenty of other business out there, even in these difficult times.

One Last Point

"Whenever I have had sleepless nights over my law practice, got myself into an ethical "grey area", or took an unnecessary risk, it was without exception because I gave in to the temptation to do something 'nice' for someone. Being ethical is essential to success in any profession. But being nice can get you killed. The trick is to know the difference, and remember, no one expects lawyers to be nice."

-- Cliff Ennico
October 2, 2013

One More Last Point

Never let a lack of knowledge, experience or talent get in the way of your success!

GOOD LUCK !!!!

Thank You!

SOME ESSENTIAL WEB LINKS RE
NEW YORK MODEL RULES OF PROFESSIONAL CONDUCT

1. The text of the Model Rules, along with the Official Comments as amended through July 1, 2012, can be found at http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/RulesofProfessionalConductasamended070112.pdf

2. A chart comparing the Model Rules with New York's former Code of Professional Responsibility (CPR) can be found at http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/CorrelationtableofnewNYrules.pdf.

3. The text of New York's former Code of Professional Responsibility (effective through March 31, 2009), can be found at http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/LawyersCodeDec2807.pdf.

4. A "cumulative index" of the Opinions of the New York State Bar Association Committee on Professional Ethics from 1964 to the present can be found at http://www.nysba.org/AM/Template.cfm?Section=For_Attorneys&ContentID=21454&template=/CM/ContentDisplay.cfm.

Please note:

Opinions 1-123 (November 1964-December 1969) were decided under the Canons of Professional Ethics.

Opinions 124-828 (January 1970-March 2009) were decided under the Code of Professional Responsibility.

Opinions 829 and higher (issued on or after April 1, 2009) were decided under the Rules of Professional Conduct.

CHAPTER 8

Some Ethical Aspects of the Business Lawyer's Job

§ 8.01 Introduction: Legal Limits on What Business Lawyers May Do

This book is not a treatise on the ethical obligations of business lawyers. In describing what business lawyers do, however, it is important to recognize the limitations on what they can do. The most important of these rules are imposed not by State or Federal law but rather by the legal profession itself which, through the American Bar Association, has drafted codes of conduct which the states have adopted. This chapter summarizes some of the more important ethical rules that govern the business lawyer's professional life; for a more comprehensive discussion of this important topic, the reader is referred to the books reviewed in the Bibliography.

§ 8.02 The Sources of Ethical Rules Governing the Business Lawyer's Conduct

When a business lawyer is admitted to practice in a particular state, he is expected to become familiar with that state's ethical rules and regulations. Ordinarily these are set out in the state's statute books; the rules governing lawyers admitted to practice in New York, for example, appear scattered in sections of the Judiciary Law, particularly in the Appendix thereto.[1] A majority

[1] N.Y. Judiciary Law App. (McKinney 1989).

of states require the aspiring business lawyer to take a special examination on these ethical rules as part of the bar admission process.

There are two sets of rules which govern the conduct of American lawyers: the American Bar Association Code of Professional Responsibility (the "CPR"), and the Model Rules of Professional Conduct (the "Model Rules"). The CPR was adopted by the ABA in 1968 and has been adopted, with or without some modification, by virtually all of the states. The Model Rules were proposed in 1983 and have met with some resistance from the bar; as a result, the Model Rules have been adopted in only about half of the states. Even in the states that have not adopted the Model Rules, however, judges and bar association ethics committees may use the Model Rules as guides.

Finally, most state bar associations have ethics committees that issue formal written opinions and telephone advice on ethical issues raised by practitioners in that state, in much the same way as an administrative agency will issue formal and informal advice on compliance with its regulations. Most business lawyers will subscribe to the formal opinions of their state bar association, which are usually published on an irregular basis. This chapter will summarize only the most important rules contained in the CPR and the Model Rules.

§ 8.03 The Lawyer's Basic Duties to the Client

The ethical rules to which business lawyers are subject are often not easy to find; the drafters of the CPR and the Model Rules had litigators primarily in mind, and most of their rules apply only in the context of adversarial proceedings. A few of the rules, however, can be applied by analogy to the tasks of client monitoring, client counseling and transaction management.

Both the CPR and the Model Rules impose a number of duties on the business lawyer in his dealings with clients, regardless of the type of work involved. The most important of these are the duty of competence, the duty of diligence, the duty to keep the client informed of developments, and the duty of confidentiality.

First, a business lawyer is required to represent his clients competently.[2] This means the lawyer cannot neglect his client's matters, must be thoroughly prepared to handle the matters he takes on, and cannot take on work he is

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[2] Model Rules of Professional Conduct, Rule 1.1; ABA Code of Professional Responsibility DR 6-101.

unable to do, either because he lacks knowledge or because he has insufficient time to handle the matter. Business lawyers have the obligation to stay abreast of current developments in their areas of practice, and in some states must yearly attend a certain number of "continuing legal education" courses and seminars.[3]

Second, a business lawyer must act on behalf of his client with reasonable diligence and promptness.[4] One of the most common client complaints about their lawyers is procrastination—the lawyer does not respond in a timely fashion to letters and telephone calls, or takes weeks to perform a task that the client needs done in days. Often a client will have unreasonable expectations about the time necessary to research a particular question or draft a particular legal document. In such cases it is the business lawyer's ethical responsibility to discuss the necessary time frame with the client up front and, if possible, reach an agreement with the client as to the lawyer's deadline for rendering the advice or drafting the document.

Closely related to the duty of diligence is the duty to keep the client informed of developments.[5] Because it is the client, not the lawyer, who must make the ultimate business decisions in a particular matter, the lawyer has a duty to furnish the client all of the information necessary for the latter to make informed decisions, even if this information is adverse to the lawyer's interest or results in inconvenience to the lawyer.[6] Part of the reason for the businessperson's traditionally negative view of the business lawyer probably arises from the simple fact that business lawyers are frequently called upon to be the bearers of bad tidings: "shooting the messenger" is a natural human response to bad news of any kind.

Finally, the business lawyer owes his client a duty of confidentiality.[7] Simply put, he is not allowed to gossip about his client's affairs at any time whatsoever, in any place whatsoever, under any circumstances whatsoever, unless the client has expressly authorized him to disclose to specific people

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[3] ABA Code of Professional Responsibility, EC 6-2.

[4] Model Rules of Professional Conduct, Rule 1.3; ABA Code of Professional Responsibility DR 6-101(A)(3).

[5] Model Rules of Professional Conduct, Rule 1.4; ABA Code of Professional Responsibility DR 6-101(A)(3), EC 7-8 and 9-2.

[6] Model Rules of Professional Conduct, Official Comment to Rule 1.4.

[7] Model Rules of Professional Conduct, Rule 1.6; ABA Code of Professional Responsibility, DR 4-101(B).

certain aspects of the matter. This is true even though the lawyer came upon information about his client outside of the attorney-client relationship, or the information does not relate to any matter upon which the lawyer is then working.[8] Some law firms even impose upon their lawyers a rule never to reveal that someone is a client of the firm!

The business lawyer cannot use confidential information for his own benefit even if the client is not harmed. This duty may explain why business lawyers are not the most favored guests at cocktail parties or backyard barbecues; a number of lawyers I know make it a rule never to "talk shop" with anyone outside their law offices at any time.

These basic ethical duties apply regardless of the type of activity in which the business lawyer is engaged.

§ 8.04 Conflicts of Interest Within the Client Organization

[1] Who Is the Business Lawyer's Client?

The lawyer who represents a corporation or other type of business organization is always on the alert for possible conflicts of interest, because of the peculiar nature of organization clients. Although the organization is a recognized legal entity with powers and rights of its own, it can only act through individual human beings—shareholders, directors, partners, employees, owners, officers, and so forth. As a practical matter, the business lawyer deals only with individuals, and yet, in theory, he is counsel to the organization itself. Who exactly is the business lawyer's client, and what happens when the interests of the organization and one or more of the individuals who make up the organization are in conflict?

When the business lawyer's client is an organization, both the CPR and the Model Rules require that he be loyal to the organization itself, not the human beings who make it up. If the lawyer learns that an individual within the organization has acted, or is going to act, in a way that violates the law or a duty the individual owes to the organization, the lawyer has an ethical obligation to protect the interests of the organization, not the individual.[9]

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[8] Model Rules of Professional Conduct, Rule 1.6.

[9] *Id.* § 1.13.

[2] The Organization vs. the Human Beings That Make Up the Organization

Ordinarily, the interests of the organization and the human beings who make it up are not in conflict. On the occasions when they are in conflict, the business lawyer's challenge is to perform his ethical obligations to the organization without alienating the individual, who may after all be one of the lawyer's regular contacts at the organization. At times, it will be impossible to walk this ethical tightrope; in such cases the lawyer will be required to come down unequivocally on the side of the organization (as he is required to "resolve all doubts against the propriety of the representation"),[10] disqualify himself from representing either the individual or the organization (a difficult thing to do in practice, since he forgoes a fee and risks losing both the individual and the organization as clients), or proceed after disclosing to both parties the nature of the conflict and obtaining the consent of each (preferably in writing) to the joint representation.[11]

Perhaps the most common instance of such a conflict occurs when a senior officer's employment contract with a corporate employer comes up for renewal. The corporation's general counsel will be required to represent the employer, and yet the person asking him to represent the organization in this matter may well be the senior officer whose contract is up for renewal! In such a case the general counsel probably would advise the senior officer to obtain other counsel, for whose services the corporation most likely would pay.

Another common instance of a conflict of interest between the organization and its individual constituents occurs when a new corporation is being formed. At such a time, the individuals who will run the corporation enter into a shareholders' agreement, which will determine such matters as the amount of control each shareholder will have over the corporation's activities, how much stock each shareholder will receive, what each shareholder will contribute to the corporation in return for his shares, and so forth. It is also common for such agreements to require the corporation to buy the shares of any shareholder upon his death, retirement, or termination of employment by the corporation. The potential for conflicts in such an agreement are obvious; yet it is often not economically possible for each of the individuals *and* the corporation to retain separate counsel. In such a case, the business lawyer will point out the possible

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10 *Id.* § 1.13(c).

11 *Id.* § 1.13(e).

conflicts, obtain the written consent of each shareholder (and the corporation, by a letter signed by an authorized officer) to the joint representation, and agree to withdraw if the going gets too rough during the negotiations.

[3] When the Human Beings Fail to Follow the Business Lawyer's Instructions

A special case involving a conflict of interest between an organization and one of its individual constituents occurs when the corporate officer or employee has engaged, or proposes to engage, in conduct that is contrary to the corporation's interests. Generally, under both the CPR and the Model Rules, a lawyer may withdraw in certain instances where the client refuses to follow the lawyer's recommendations or instructions, but is not required to withdraw unless continuing the representation would result in a course of action either fraudulent or criminal in nature.[12]

What if the lawyer is not required to resign, but is uncomfortable with the conduct proposed by the individual officer or employee? Here the CPR and the Model Rules part company, and the approach taken by the Model Rules is one of the reasons many states have refused to adopt them. The CPR leaves it up to the lawyer's discretion whether to withdraw (if he is an in-house counsel, this would mean resigning from the company), taking into account his ability to render independent advice to the organization in the future and the extent to which the individual's behavior has undermined the lawyer's trust and confidence in him.[13] In addition, the Model Rules require the business lawyer to decide whether he must go over the individual's head to a superior officer, the board of directors, or even the shareholders of the corporation.[14] Model Rule 1.13 requires a lawyer for an organization to take such action as is "reasonably necessary in the best interests of the organization" when the individual "is engaged in an action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization."[15] In such a case the lawyer, after using all the arts of persuasion at his disposal to

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12 *Id.* § 1.13(b).

13 *Id.*

14 *Id.*

15 *Id.*

try to talk the individual out of the harmful conduct, is required to go over the individual's head, and if the senior policymaking body in the organization backs the individual up, the lawyer in such a case may resign (indeed, if the individual is a senior officer, he almost will be required to do so).[16] Needless to say, many lawyers are reluctant to play the role of whistle blower in an organization, and as a result many state bar associations are reluctant to recommend to their state legislatures that Model Rule 1.13 be adopted without some modification that would not put the business lawyer in such a difficult position.

§ 8.05 Conflicts of Interest Between the Business Lawyer and the Organization Client

In addition to the conflicts that often occur between an organization client and the client's personnel, it is possible for conflicts to occur between the business lawyer's interests and those of its organization client. This situation usually occurs when the lawyer has other ties to the organization as a shareholder, director or employee.

[1] The Lawyer-Director and the Lawyer-Executive

The general counsel of a privately held corporation is often asked to serve on the board of directors. It is often believed that, by doing so, counsel will be in a better position to practice preventive corporate law, since he will be a part of the decisionmaking process rather than an outsider who merely reacts to management's proposals. It is also believed that having a lawyer on the board reduces the overall cost and delay of making management decisions, since executives will not have to consult with counsel separately and then report counsel's advice back to the full board. Generally, neither the CPR nor the Model Rules prevents a lawyer from serving on the board of directors.[17]

The practical wisdom of doing so is another matter. The business lawyer who serves as a corporate director is subject to individual liability for his actions as a director; since he is a lawyer, there is the risk he will be held to a higher degree of diligence and due care than a nonlawyer would. Moreover, in the event of a dispute among factions of directors on the board, the business lawyer

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16 *Id.*

17 H. Haynsworth, The Professional Skills of the Small Business Lawyer § 2.03 (1984).

will be placed in an awkward position, as he will invariably have to take sides in the matter and risk alienating one faction. He may even find himself in the awkward position of casting the tie-breaking vote on a particular matter.

The best approach for the business lawyer who is asked to serve on a board of directors is not to "just say no," and risk antagonizing an otherwise friendly and profitable client. Instead, if the business lawyer is squeamish about assuming a director's responsibilities, he may suggest he be present at board meetings in a nonvoting capacity. This will accomplish the businesspeople's objective of having the lawyer ready at hand to render on-the-spot legal advice and discover legal issues before management commits itself to a course of action, while also accomplishing the lawyer's objective of avoiding responsibility for business decisions. If the lawyer does indeed wish to serve as a director, believing himself competent to do so, he is well advised to take out (or have the corporation take out) a policy of directors' and officers' liability insurance.

Traditionally, the business lawyer who also serves as a corporate executive runs little risk of a conflict of interest with his client, since he will be either: (1) the corporation's general counsel, in which case he is not, strictly speaking, performing a management function, but rather is acting solely in a legal capacity; (2) the corporation's secretary whose role [as was seen in Chapter 6] is well defined; or (3) a nonlegal executive, in which case he is not engaged in the practice of law. The business lawyer who serves as both general counsel and corporate secretary (a common combination), however, will be concerned that, in preparing minutes of meetings of the corporation's board of directors or shareholders, he will not be called upon to falsify or invent from his own imagination official records, documents or evidence.

[2] Investing in Stock or Securities of a Client Organization

Generally, a business lawyer is careful when he is called upon either: (1) to accept stock or other securities of an organization client in lieu of a fee, (2) to invest in a client organization's stock or securities, or (3) to perform legal work for an organization in which the lawyer is already a significant stockholder or owner. Most law firms have detailed policies requiring their lawyers to disclose any personal holdings of stock or securities in corporations, whether or not they are clients of the firm, and prevent the fees from any one client from being greater than a certain percentage of the firm's total fees.[18]

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[18] *Id.* § 2.04.

In the case of smaller corporations, which are normally strapped for cash, there may be no practical alternative to accepting stock or other securities in lieu of cash as payment for legal services. Since there is no ready market for the stock or securities and most new business start-ups in the United States fail in the first five years of operation,[19] the lawyer who accepts client securities as payment may find to his dismay that the securities are worthless in later years. It should also be pointed out that accepting corporate stock for services rendered to the newly formed corporation could cause the incorporation to lose its tax exempt status under Section 351 of the Internal Revenue Code.[20]

§ 8.06 Ethical Aspects of the Client Monitoring Function

[1] The Ethical Duties of Diligence and Keeping the Client Informed Do Not Apply

To avoid confusing the reader, it is necessary to point out that the general ethical duties of diligence and "keeping the client informed," discussed earlier in this chapter, do not apply in the context of the business lawyer's client monitoring function. These general rules apply only *after* a client has brought a legal matter to the attention of an attorney and has retained the attorney's services. The client monitoring function, it will be recalled from Chapter 2, occurs before the client has become aware of a legal problem or risk and has approached an attorney for assistance.

Generally, while a business lawyer has no ethical obligation to render legal advice until asked to do so, he may volunteer legal advice without being asked.[21]

[2] The Prohibition on Soliciting Legal Business

Traditionally, there have been strict rules prohibiting lawyers from soliciting legal business from a potential client who has not sought the lawyer's services. The term "solicitation" has not, however, been construed to mean the volunteering of legal advice to a relative, close friend, or present client, or the

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[19] A. Lipper III, Venture's Guide to Investing in Private Companies vii (1984).

[20] I.R.C. § 351 (1989).

[21] Model Rules of Professional Conduct, Rule 2.1; ABA Code of Professional Responsibility DR 2-104(A)(1).

volunteering of legal advice to a former client if the advice concerns the subject of a former representation of that client.[22]

The rules prohibiting solicitation have been relaxed somewhat in recent years, as courts and bar associations have grown generally more comfortable with the idea that lawyering is a service business and should not be treated differently than other service businesses. The United States Supreme Court, for example, issued a ruling in 1988 that lawyers may send truthful, non-deceptive letters to potential clients known to face particular legal problems.[23] The Model Rules, however, prohibit lawyers from engaging in any person-to-person contact where a significant motive for the lawyer's conduct is pecuniary gain; this rule will, of course, have to be modified at least somewhat in light of the Supreme Court's 1988 decision on direct mail solicitation.[24] Even under the Model Rules, however, a lawyer may send out letters, brochures or other printed materials to a group of people who "are not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful."[25] Until these rules have been clarified, most business lawyers will take a conservative position and have their direct mail brochures approved by the ethics committee of their state bar association before sending any brochures to potential clients.

§ 8.07 Ethical Aspects of the Client Counseling Function

[1] The Business Lawyer as Advisor

When acting as advisor to a client, a lawyer must exercise independent judgment and render candid advice, no matter how unpleasant that task may be. A lawyer may give a client not only legal advice, but also moral, economic, social, or political advice where it is relevant to the client's situation.[26]

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[22] Model Rules of Professional Conduct, Rule 7.3; ABA Code of Professional Responsibility DR 2-104(A)(1).

[23] Shapero v. Kentucky Bar Ass'n, 108 S.Ct. 1916 (1988).

[24] Model Rules of Professional Conduct, Rule 7.3.

[25] *Id.*

[26] Model Rules of Professional Conduct, Rule 2.1; ABA Code of Professional Responsibility, EC 7-3, 7-8 and 7-9.

[2] The Business Lawyer's Evaluation of a Client for Use by Third Parties

Often a business lawyer is called upon to analyze or evaluate the client's affairs from a legal standpoint and then present a report or opinion letter summarizing his findings to a third party. Under Model Rule 2.3 (there is no corresponding provision in the CPR), a lawyer may evaluate a client's affairs for the use of a third person if both: (1) the lawyer reasonably believes making the evaluation is compatible with the lawyer's other responsibilities to the client, and (2) the client consents after consultation with the lawyer.[27]

[3] The Business Lawyer's Association with Specialists

Often a business lawyer is presented with a matter or question beyond his ability to handle effectively, or that requires knowledge of the law of a jurisdiction in which he is not admitted to practice. In either situation, a business lawyer has an ethical obligation to associate with a specialist or with a lawyer or law firm qualified to render an opinion on the law of the other jurisdiction.[28] Obviously, business lawyers will be concerned about the possibility their clients will be stolen by the attorney or law firm to whom the matter is referred, but most law firms limit this risk by establishing long-term working relationships with firms in other cities specializing in certain legal areas (such as patent or admiralty law), and publish periodic "lists of recommended counsel" for distribution to all lawyers in the firm to make sure that only those "friendly" firms are used.

A lawyer who is forced to relinquish control of a matter to another lawyer or law firm usually will not be able to charge a referral fee for this service, with the lawyer or law firm to whom the matter is referred entitled to retain the entire fee.[29]

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27 Model Rules of Professional Conduct, Rule 2.3.

28 ABA Code of Professional Responsibility DR 6-101(A)(1) and EC 6-3.

29 Model Rules of Professional Conduct, Rule 1.5(e); ABA Code of Professional Responsibility DR 2-107.

§ 8.08 Ethical Aspects of the Transaction Management Process

[1] The Duty of Fairness to Opposing Parties and Their Counsel

While the CPR and Model Rules provisions regarding the lawyer's duty of fairness to opposing parties and their counsel apply primarily in litigation, the business lawyer will find these provisions applicable as well when negotiating or drafting legal documents for a client's business transaction. Generally, when dealing on behalf of a client with a third person, a lawyer must not knowingly make a false statement of law or material fact.[30] While a lawyer has no duty to inform a third person of relevant facts, he must not misrepresent the facts.[31] In some cases, the lawyer's failure to speak or act—usually the failure to correct the opposing party's mistaken statement or assumption of fact—may constitute a misrepresentation that will run afoul of this rule.[32]

Certain types of exaggerated statements which are ordinarily made during negotiations, such as an initial bargaining position that everyone at the table knows is unrealistic, do not come under the heading "misrepresentation" but are instead called "puffery," and are permissible.[33] The line separating permitted puffery from prohibited misrepresentation, however, can sometimes be quite thin.

Finally, while these rules can easily be applied to a negotiation setting, the business lawyer must be aware that these rules may also come into play when drafting transaction documents. The lawyer who sees a provision in a term sheet that he does not like and who willfully omits the offensive provision from the first draft in the hopes the other party's counsel won't notice its absence, is as much at fault as the negotiating business lawyer who tells an outright lie to the other side. Similarly, when the businesspeople agree to a point during negotiations, it is the drafting lawyer's responsibility to be sure the language accurately reflects the agreement of the parties and is not twisted to favor his client's side in a way the parties did not anticipate. Of course, if in reaching the agreement the parties failed to discuss a particular detail of their agreed-upon point, there is nothing wrong with drafting language resolving the detail in favor of one's client.

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30 Model Rules of Professional Conduct, Rule 4.1; ABA Code of Professional Responsibility 7-102(A)(5).

31 *Id.*

32 *Id.*

33 Model Rules of Professional Conduct, Comment to Rule 4.1.

[2] Communication with Persons Represented by Counsel; Dealing with Unrepresented Persons

Simply stated, a business lawyer never, ever, ever talks to a businessperson on the opposite side of the table unless the opposing party's lawyer is present (in person or on the telephone), or the opposing party's lawyer has consented to his party's communication.[34] Where an organization is the opposing party, the business lawyer cannot contact [any] of the organization's executives or employees without first contacting the organization's counsel and seeking permission to communicate directly.[35] The reader should note that this rule applies only to business lawyers; it does not prevent businesspeople on opposite sides of the table from meeting or talking separately without their lawyers present or without their lawyers' permission.[36]

[3] Dealing with Other Professionals; Preventing the Unauthorized Practice of Law

In negotiating a complicated business transaction, an organization client will be served not only by business lawyers but by accountants, investment bankers, underwriters, insurance agents and management consultants as well, and it behooves the lawyer to work together, and not at cross-purposes, with these other professionals who may, after all, be useful contacts for future business. Often though, a lawyer and another professional will give a client conflicting advice, and it is the lawyer's task to persuade the client to accept his (the lawyer's) point of view in a way that does not cast the other professional in a negative light. If the client's decision is one that ultimately does not have a legal component (such as the amount of life insurance each shareholder of a closely held corporation should buy to fund the mutual buyout provisions in their shareholders' agreement, a point as to which lawyers and insurance agents are likely to disagree), most business lawyers will accept their professional limitations and decline comment on the matter even if they disagree with the other professional's advice.

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[34] Model Rules of Professional Conduct, Rule 4.2; ABA Code of Professional Responsibility DR 7-104(A).

[35] Model Rules of Professional Conduct, Comment to Rule 4.2.

[36] *Id.*

In most states it is a criminal misdemeanor, if not a felony, to practice law without being admitted to the bar of that state. Accordingly, the business lawyer has an ethical obligation to make sure that other professionals, in performing their customary tasks in a business transaction, do not engage in the unauthorized practice of law.[37] Thus, if an accountant, for example, attempts to persuade an entrepreneur to form his new enterprise as a partnership rather than a corporation, and begins discussing the legal consequences of this course of action, the business lawyer, if present, should blow the whistle and make sure his view of the matter is heard, (although it is rare in practice for a nonlawyer to be prosecuted for unauthorized practice if he does not charge a fee for the purely legal advice).

§ 8.09 Cross-Border Problems

The reader will recall that a business lawyer admitted to practice in State X who is called upon to render advice on the law of State Y normally will associate himself with a lawyer or law firm in State Y who will render the advice and, if requested, an opinion letter on the application of State Y's law to the matter. What if the business lawyer does not do this? What if the business lawyer plows ahead, thoroughly researches the law of State Y, and renders the advice on State Y law himself to the client?

Technically, he has done nothing wrong; a lawyer in one state can give advice on the law of another state (or country) if he is diligent and thorough in his work.[38] Customarily in business transactions most New York law firms will render opinions on Delaware's corporate law, even though neither they nor anyone else in their firm is admitted in Delaware. It is also customary for any lawyer in a law firm to sign an opinion letter discussing the law of another state if at least one other lawyer in the firm is admitted to the bar in that other state (it is preferable of course, although not necessary, for the attorney admitted in that state to sign the opinion letter, or at least review it prior to signing).

The lawyer who renders such an opinion, however, will often be held to the same standard of competence and due care as a lawyer admitted to practice in the other state.[39] If the opinion is rendered (*i.e.*, the transaction

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[37] Model Rules of Professional Conduct, Rule 5.5(a); ABA Code of Professional Responsibility, DR 3-101(B).

[38] H. Haynsworth, *supra* note 17, § 2.09.

[39] *Id.*

closes) in the other state, moreover, he may be subject to liability for the unauthorized practice of law in that state.

§ 8.10 Some Ethical Aspects of In-House Lawyering

The proliferation of corporate legal departments and in-house counsel, which will be discussed in greater detail in Chapter 9, has spawned new and difficult ethical issues for business lawyers which are only now beginning to be sorted out in the courts. Most of these issues stem from the in-house counsel's dual role as independent professional and corporate employee.

For example, what if an in-house counsel discovers impropriety in his employer's conduct? Under the Model Rules of Professional Conduct, he is obligated to alert senior management to the problem, and if they fail to take action he may under some circumstances go to the board of directors. Obviously, by doing so he puts his career at risk, but what if the company still fails to take action? Most states have adopted "whistleblowing" statutes which allow employees to sue their employers if they are fired for making public disclosure of alleged violations of law. Clearly the in-house counsel's status as a corporate employee with perhaps the best access to the sort of internal information that will uncover improprieties and illegal conduct within the organization supports the argument that he should be entitled to release information to the public. The in-house counsel, however, is also under a professional duty to keep his client's matters strictly confidential. If that duty of confidentiality is overriden by the employee's duty to "blow the whistle" on illegal conduct, there is a real risk that businesspeople will fear to entrust their in-house counsel with sensitive information, and thereby render them second-rate attorneys. How to reconcile these conflicting duties?

The few cases involving whistle-blowing in-house attorneys are in conflict.[40] Two recent cases illustrate the conflict. In *Balla v. Gambro Inc.*,[41] an in-house attorney learned that his employer, a distributor of dialysis machines,

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40 *Compare Parker v. M&T Chemical Inc.*, 566 A.2d 215 (New Jersey,1989) (an in-house attorney who refused to photocopy a business competitor's confidential documents could sue the employer for retaliatory discharge) *with Willy v. Coastal Corp.*, 647 F.Supp. 116 (S.D. Texas 1986) (an in-house counsel who was fired for telling his employer to comply with environmental laws had no action to sue for wrongful discharge).

41 Ill. App. Ct. 1st Dist. No. 1-88-2955, Sept. 10, 1990, *summarized in* 59 U.S.L.W. 2187 (Oct. 2, 1990).

would shortly be receiving a shipment of defective machines from an overseas manufacturer. The attorney notified the company president that the sale would have to be reported to the Food and Drug Administration (FDA), but the machines were sold to customers anyway and the attorney fired. Shortly after his firing, the attorney reported the sale to the FDA, which confiscated the defective machines. The court, holding for the fired attorney, found it necessary to determine whether the firing resulted from information learned in a non-legal capacity or as a lawyer; whether the information was privileged; and whether the privilege was waived. Even if the privilege exists and is not waived, the court added, the court is obliged to balance the public policy of the privilege against the competing policy of protecting individuals (users of the defective dialysis machines) from serious bodily harm or death.[42] The fact that the sale of the defective machines posed serious risk to bodily harm or death seems to have weighed heavily in the court's decision.

In contrast, the court in *IBM v. Murray*[43] found for the employer. In this case the in-house attorney warned company officers that an IBM regional office was treating black workers engaged in threatening behavior significantly harsher than white employees accused of similar actions. Although the in-house attorney availed himself of an internal company policy favoring such disclosures, he was promptly transferred to a location thousands of miles away that he described as "disciplinary barracks for attorneys."[44] IBM put the attorney on a paid leave of absence, offering him the opportunity to return if he promised in writing not to disclose confidential IBM documents to the public. The attorney refused, and was promptly dismissed. The attorney sued IBM for wrongful termination, and IBM moved to seal all IBM documents in the attorney's possession, winning a temporary restraining order from the court preventing the attorney from disclosing IBM documents to anyone except his attorney. Both before and after the temporary restraining order was issued, the attorney released copies of the lawsuit to two local newspapers. IBM has since filed motions for the adjudication of civil contempt, and a criminal contempt motion is pending.[45]

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42 *Id.* at 2187.

43 Stamford, Conn. Superior Court No. DN CV 90-0107445 S, *summarized in* National L.J., Nov. 5, 1990 at §1 and §12.

44 *Id.*

45 *Id.* at §12.

The facts in the *Murray* case can be distinguished from those in *Gambro* in two ways: unlike the *Gambro* case, there is no serious risk of bodily injury or death which would arise from IBM's alleged illegal conduct even it was ultimately proven; and in *Murray* the conduct of the attorney at issue is not the bringing of a wrongful termination suit against IBM, but rather the attorney's unauthorized disclosure of (possibly) sensitive confidential information to the news media. Still, the facts of these two cases are not broad enough to cover all of the possible fact situations in this complicated area, and more litigation can be expected.

Another ethical problem for in-house attorneys involves the unauthorized practice of law. Like all corporate employees, in-house attorneys are subject to transfer from one corporate location to another on little or no notice. If the attorney is not admitted in the state of his new corporate location, what can he do, and what must he not do, without engaging in the unauthorized practice of law in that state? Clearly he cannot represent his employer in a court of that state, or issue a written opinion on the law of that state. Arguably he should not give verbal advice on the law of that state. As will be seen in Chapter 10, however, the in-house attorney's work involves a lot of "grey areas" that only partially entail the practice of law as traditionally viewed. Situations may well arise where an in-house attorney, in the heat of getting a deal done or getting a rush question answered, may engage in conduct that a court or state bar association may look upon as the practice of law.

§ 8.11 Summary of Important Points

- When a business lawyer is admitted to practice in a particular state, he is expected to become familiar with that state's ethical rules and regulations.
- There are three sets of rules which govern the conduct of American lawyers: The American Bar Association's Code of Professional Responsibility (or the "CPR"), the Model Rules of Professional Conduct (or the "Model Rules"), and those state statutes that amend, overrule or add to the CPR or the Model Rules (such as the Appendix to New York's Judiciary Law).
- The ethical rules of a particular state are usually interpreted by that state's bar association, in the form of written opinions which are published irregularly. .The drafters of the CPR and the Model Rules had litigators, not business lawyers, in mind.

- A business lawyer is required (1) to represent his clients competently, (2) to act on behalf of his client with reasonable diligence and promptness, (3) to keep the client informed of developments, and (4) to keep the client's affairs and information relating to the representation confidential (this may include even the fact that someone is a client of the firm).
- When the business lawyer's client is an organization, both the CPR and the Model Rules require that he be loyal to the organization itself, not the human beings who make it up.
- When the interests of an organization and one or more of its principals is in conflict, the business lawyer's challenge is to perform his ethical duties to the organization without alienating the principal.
- Under both the CPR and the Model Rules, a lawyer may withdraw in certain instances where the client refuses to follow the lawyer's recommendations or instructions, but is not required to withdraw unless continuing the representation would result in a course of action either fraudulent or criminal in nature.
- Under the Model Rules (not the CPR) a business lawyer may be required to "blow the whistle" within his organization if he discovers illegal or harmful conduct.
- The best approach for the business lawyer who is asked to serve on a board of directors is not to "just say no," and risk antagonizing an otherwise friendly and profitable client, but to suggest his presence at board meetings in a non-voting capacity.
- Most law firms have detailed policies requiring their lawyers to disclose any personal holdings of stock or securities in corporations, whether or not they are clients of the firm, and prevent the fees from any one client from being greater than a certain percentage of the firm's total fees.
- While a business lawyer has no ethical obligation to render legal advice until asked to do so, he may volunteer legal advice without being asked.
- The rules prohibiting lawyers from soliciting clients have been relaxed somewhat in recent years, as courts and bar associations

have grown generally more comfortable with the idea that lawyering is a service business and should not be treated differently than other service businesses.

- A lawyer may give a client not only legal advice, but also moral, economic, social, or political advice where it is relevant to the client's legal situation.
- When dealing on behalf of a client with a third person, a lawyer must not knowingly make a false statement of law or material fact.
- While a lawyer has no duty to inform a third person of relevant facts, he must not misrepresent the facts.
- A business lawyer never, ever, ever talks to a businessperson on the opposite side of the table unless the opposing party's lawyer is present (in person or on the telephone), or the opposing party's lawyer has consented to his client's communicating directly with the lawyer.
- In most states it is a criminal misdemeanor, if not a felony, to practice law without being admitted to the bar of that state.
- A lawyer in one state can give advice on the law of another state (or country) if he is diligent and thorough in his work; he will, however, be held to the same standard of competence and due care as a lawyer admitted to practice in the other state (or country).
- In-house lawyers have special ethical problems, some of which have not been settled in the courts; a current issue is whether in-house counsel may sue his employer for wrongful termination using information that his employer deems confidential and part of the attorney-client relationship.

ENGAGEMENT LETTER – NEW BUSINESS FORMATION

Reprinted with permission from "Forms for Small Business Entities"

By Clifford R. Ennico (ThomsonWest 1996-2013)

[Date]

PERSONAL AND CONFIDENTIAL

____

____

____

Re: *Engagement Letter*

Dear Mr./Ms. *[name]*:

Just a few lines to let you know how excited I am to be working with you again. I was honored by your request to form a *[corporation/partnership/limited liability company]* for *[name of business]*, and the following sets forth the terms that we would propose to govern our working relationship on this transaction:

1. Our engagement is to represent you in drafting and negotiating the documents necessary to organize a *[corporation/partnership/limited liability company]* under the laws of the State of *[state]* (including the preparation of *[a partnership agreement, an operating agreement, a shareholders' agreement]*). Our representation will not include applications for federal and state tax identification numbers, which you have indicated will be obtained by your certified public accountant. *[Describe any other aspects of the matter for which you are disclaiming representation]*

2. We will bill you for its work on a time-devoted basis. We will bill at our normal hourly rates as in effect from time-to-time for any lawyer or other person working on this matter. My hourly rate is ________ dollars ($________) per hour, and the rate of other lawyers working on this transaction will range from ________ dollars ($________) to ________ dollars ($________). You will, in addition, reimburse us for out-of-pocket disbursements and costs such as photocopying, long distance telephone charges, express deliveries and related matters.

3. We will bill you on a monthly basis for our work in this matter, and all bills will contain a detailed statement of the services rendered by our firm.

4. Because this is the first time our firm has had the opportunity to work with you, we acknowledge receipt of a retainer of ________ dollars ($________) as a condition to representing you in this transaction. If our fees and expenses in this transaction total less than ________ dollars ($________), we will refund the unused portion of your retainer promptly upon your request. You agree to pay all bills within *[number]* days of receipt. In the event our bills are not paid within the *[number]*-day period following receipt, you agree

to reaffirm your commitment to pay within *[number]* days and provide a retainer upon our request, which retainer will be held as security for future payments.

5. Our firm reserves the right to charge interest at ________ percent (________ %) per annum on unpaid balances and to decline to continue to represent you if payment is not received within *[number]* days of a statement date. Our fee represents a charge for my services rendered and is not contingent upon successful completion of the services described in this letter or the results achieved by you. Our agreement is to perform services for the person or persons signing this agreement in their individual capacities, and we will look to them personally for the payment of my fees and expenses. While we may accept payment from a corporation, limited liability company, or other legal or business entity that is related to you, we will not be obligated to rely on such entity for the payment of my fees and expenses unless we expressly agree in writing to do so.

6. Our engagement is to provide legal services to you personally and we will not provide services to any other person or entity or look to any other person or entity for payment unless we specifically agree to do so in writing. Please note also that we would represent you in this matter, and would not represent the interests of any other person, including your business partner Mr./Ms. *[name]*; each such person will be encouraged to obtain separate counsel.

If the above is acceptable to you, I would appreciate your indicating your agreement to the terms and conditions contained in this letter by executing this letter in the space below and faxing the signed letter back to me. The original should be sent to me via regular or certified mail, and you should make a copy for your files.

We look forward to working with you on this exciting project.

Very truly yours,

[Name of Firm]

By: *[Name of Partner]*

Signature: *[signature]*

Agreed to this *[date]*

Name of Client: *[name]*

Signature: *[signature]*

WAIVER OF CONFLICT – FORMATION OF NEW BUSINESS ENTITY

**[Reprinted from "Forms for Small Business Entities" by
Clifford R. Ennico, ThomsonWest 1996-2013]**

[to be sent to each member/shareholder of company being formed]

[Date of letter]

________________________ *[Name and address of member/shareholder]*
____
____

[VIA CERTIFIED MAIL, RETURN RECEIPT REQUESTED]

Dear *[name of member/shareholder]*,

I am very pleased to have the opportunity to form and advise your new *[corporation/limited liability company]*, to be organized under the laws of the State of New York, that will engage in the business of *[name of business]* (the "Company"). You have informed me that there will be *[number of members/shareholders]* of the Company, who will also act as officers and employees of the Company and otherwise assist the Company in the management of its business and affairs, and that as part of my duties I will be preparing and discussing with you and your partners a *[Operating Agreement/Shareholders' Agreement]* and other similar documents for the Company.

In a situation like this one, under the Rules of Professional Conduct that all New York lawyers are subject to when practicing law, my client in this matter will be the Company itself and not any of its *[members/shareholders]*, including you. While I will make every effort to ensure that the *[Operating Agreement/Shareholders' Agreement]* and all other documents and agreements relating to the Company will be prepared in a fair and equitable manner, you are advised to have them reviewed by legal counsel of your choice prior to signing any of them. I would be happy to refer you to a local attorney if you request, and to speak to him or her directly about any matter relating to the Company. In the event you choose not to retain your own legal counsel, you acknowledge that I have recommended you do so in order to protect your interests.

The purpose of this letter is to disclose to you the possibility, that the Company and/or your two colleagues could at some point have an adversarial relation with you, and to seek your consent to my continuing to represent the Company should such an adversarial situation arise. I believe this disclosure and consent is necessary and appropriate in light of my prior representation of you, and the fact that my representation of the Company at some future time could place me in the position of representing persons or entities adverse to you.

You hereby consent to my representation of the Company and to my continued representation of the Company under the circumstances described above. You further understand, after consultation and disclosure, that if my representation of the Company results in my being in the position of representing a client directly adverse to you, I am permitted but may not be required under the Rules of Professional Conduct to withdraw from representing the Company.

If the above is acceptable to you, I would appreciate your so indicating in the space below. If you have any questions, please feel free to call at your convenience. Thanks again for your kind cooperation on this matter.

Sincerely,

____
[Name of sender]

Agreed and consented to this on *[date of agreement]*:

____
[Name of member/shareholder]

RETAINER LETTER – HOURLY RATE

Reprinted with permission from "Forms for Small Business Entities"

By Clifford R. Ennico (ThomsonWest 1996-2013)

[Date]

PERSONAL AND CONFIDENTIAL

____

____

____

Re: *Engagement Letter*

Dear ____________:

It was a pleasure to speak with you earlier this week, and learn about your plans to *[describe matter in reasonable detail]* (the "Transaction").

Since the New York Rules of Professional Conduct require that a written statement be prepared setting forth the terms of any lawyer-client relationship, this letter sets forth our agreement in that regard. I will work with you and your tax advisor(s) in preparing, reviewing and/or negotiating any and all documents relating to the Transaction, and any other matters you may require me to perform from time to time.

My fee for the services described above and any other services that would be required would be an hourly rate of $____ plus reimbursement of my out-of-pocket expenses and disbursements, which would be billed to you at cost. I would not be responsible for providing litigation support at any time, or furnish you with advice or counsel at any time regarding intellectual property matters such as patents, trademarks and copyrights.

You agree to pay to me promptly a retainer of $______, at which time my service will commence. This retainer is based upon committing myself, the value of services, the reservation of time, the nature of the matters, the issues involved and other factors affecting an overall fee. Time spent on services (computed in units of 6 minutes), which includes telephone calls and correspondence, will be charged against the retainer at the rate of $____ per hour. Out-of-pocket expenses such as overnight deliveries and filing fees will be billed to you at actual cost without markup. An itemized statement of charges will be sent to you not less often than every 30 days. No time will be charged for discussing any statement or bill. If the retainer is depleted in full, then additional charges will be billed to you on a monthly basis. If you fail to pay any invoice promptly when due, I reserve the right to request an additional retainer against future anticipated charges.

I reserve the right to charge interest at eighteen percent (18%) per annum, or the highest interest rate allowed by Connecticut law if less, on unpaid balances and to decline to continue to represent you if payment is not received within 30 days of a statement date. My fee represents a

charge for my services rendered and is not contingent upon successful completion of the services described in this letter or the results achieved by you. My agreement is to perform services for the person or persons signing this agreement in their individual capacities, and I will look to them personally for the payment of my fees and expenses. While I may accept payment from a corporation, limited liability company, or other legal or business entity that is related to you, I will not be obligated to rely on such entity for the payment of my fees and expenses unless I expressly agree in writing to do so.

You have the right in your sole discretion to terminate my representation at any time, in which event you shall be liable for the time spent providing services as computed above, and any unused portion of the retainer will be refunded to you. I also have the right to withdraw from representing you if you fail to co-operate or to provide on a timely basis accurate and complete information and documents relating to the services, if I should die, retire or otherwise discontinue the practice of law generally, or if you engage in any conduct which would make it inappropriate for me to continue representation.

I appreciate the opportunity to assist you on this matter, and look forward to working with you in an attempt to build your business. Please indicate your acceptance by printing out two (2) copies of this letter, signing and returning both copies to me along with the $_______ retainer check payable to "_______________". When I have received both copies of this letter I will countersign one of the copies and return it to you for your records.

Very truly yours,

/s/_________________________

ACCEPTED AND APPROVED:

[Name of Client]

By: ________________________________
Print Name and Title: ___________________

RETAINER LETTER – FLAT FEE

Reprinted with permission from "Forms for Small Business Entities"

By Clifford R. Ennico (ThomsonWest 1996-2013)

Date: ________ , 20__

PERSONAL AND CONFIDENTIAL

Mr./Ms. _______________

____

____

Re: Purchase of Franchise

Dear ________ :

It was a pleasure to speak to you again this morning, and learn about your plans to acquire a ________ *[name of franchise]* franchise with a territory to be to be designated in ________ .

Since the Rules of Professional Conduct of the State of ________ require that a written statement be prepared setting forth the terms of any lawyer-client relationship, this letter sets forth our agreement in that regard. I will work with you and your tax advisor(s) in (i) negotiating the terms of a Franchise Agreement and other documents between you and ________ *[name of franchisor]* relating to this franchised business (the "Franchise Documents"), and (ii) preparing the documents necessary to form either a subchapter "C" or "S" corporation under the laws of the State of ________ to operate the franchised business and act as the franchisee under the Franchise Documents (the "Incorporation").

My fees for the services described above would be as follows:

- for the Franchise Documents, a flat fee of $________ , including all out-of-pocket expenses and disbursements; and

- for the Incorporation, a flat fee of $________ for a subchapter "S" or "C" corporation, including all out-of-pocket expenses and disbursements.

Any additional services you may require will be billed at my hourly rate of $________ and invoiced monthly, with payment due on a "net 30" basis, unless we agree otherwise in writing.

You agree to pay to me promptly a retainer of $________ , at which time my service will commence. The retainer is based upon committing myself, the value of services, the reservation of time, the nature of the matters, the issues involved and other factors affecting an overall fee. Time spent on services (computed in units of ________ minutes), which includes telephone calls and correspondence, will be charged against the retainer at the rate of

$________ per hour. Out-of-pocket expenses such as overnight deliveries and filing fees will be charged against the retainer at actual cost without markup.

The balance of $________ will be invoiced on the last day of ________ and will be payable in full on or before ________ , 20__ . I reserve the right to charge interest at ________ % per annum, or the highest interest rate allowed by applicable law if less, on unpaid balances and to decline to continue to represent you if payment is not received when due. . My fee represents a charge for my services rendered and is not contingent upon successful completion of the services described in this letter or the results achieved by you. My agreement is to perform services for the person or persons signing this agreement in their individual capacities, and I will look to them personally for the payment of my fees and expenses. While I may accept payment from a corporation, limited liability company, or other legal or business entity that is related to you, I will not be obligated to rely on such entity for the payment of my fees and expenses unless I expressly agree in writing to do so.

You have the right in your sole discretion to terminate my representation at any time, in which event you shall be liable for the time spent providing services as computed above, and any unused portion of the $________ retainer will be refunded to you. I also have the right to withdraw from representing you if you fail to co-operate or to provide on a timely basis accurate and complete information and documents relating to the services, if I should die, retire or otherwise discontinue the practice of law generally, or if you engage in any conduct which would make it inappropriate for me to continue representation.

I appreciate the opportunity to assist you on this matter, and look forward to working with you in an attempt to bring the above matters to a swift and orderly conclusion. Please indicate your acceptance by printing out two (2) copies of this letter, signing and returning both copies to me along with the $________ retainer check payable to "________ ". When I have received both copies of this letter I will countersign one of the copies and return it to you for your records.

Very truly yours,

____

ACCEPTED AND APPROVED:

Signature of Client: _______________

Print Name of Client: _______________

Date: _______________

RETAINER LETTER – COMBINED FLAT FEE AND HOURLY RATE

Reprinted with permission from "Forms for Small Business Entities"

By Clifford R. Ennico (ThomsonWest 1996-2013)

Date: ________ , 20__

PERSONAL AND CONFIDENTIAL

Mr./Ms. _______________

____

____

Re: Acquisition of Franchise

Dear ________ :

It was a pleasure to speak to you last week, and learn about your plans to acquire the ________ *[name of franchisor]* franchise currently owned by ________ (the "Seller") and located at ________ (the "Premises").

Since the Rules of Professional Conduct in the State of ________ require that a written statement be prepared setting forth the terms of any lawyer-client relationship, this letter sets forth our agreement in that regard. I will work with you and your tax advisor(s) in (i) negotiating the terms and documents (including but not limited to a letter of intent) under which you will purchase the assets of Seller's ________ *[name of franchisor]* franchised business (the "Asset Acquisition"), (ii) negotiating the terms of a new Franchise Agreement and other documents between you and *[name of franchisor]* relating to this franchised business (the "Franchise Documents"), (iii) preparing the documents necessary to form a limited liability company under the laws of the State of ________ to operate the franchised business and act as the franchisee under the Franchise Documents (the "LLC"), and (iv) negotiating the terms of the existing or a new lease with the landlord of the Premises (the "Lease").

My fees for the services described above would be as follows:

- for the Asset Acquisition, an hourly rate of $________ plus reimbursement of my out-of-pocket expenses and disbursements, which would be billed to you at cost;

- for the Franchise Documents, a flat fee of $________ , including all out-of-pocket expenses and disbursements;

- for the formation of the LLC, a flat fee of $________ , including all out-of-pocket expenses and disbursements; and

- for the negotiation of the Lease, a flat fee of $________ , including all out-of-pocket expenses and disbursements.

Because it is difficult for me to anticipate the form the Asset Acquisition will take, the amount of time I will require to draft or review the necessary transaction documents, and the amount of time it will require to conclude an agreement with the Seller, I expect that my fees and disbursements could be in the $________ to $________ range for that portion of the services described above as the "Asset Acquisition". Per our telephone conversation last week, however, if you execute and deliver a letter of intent with the Seller in the next few days for the Asset Acquisition, I am willing to cap my fees for the Asset Acquisition at $________ . In the event that fee estimates must be revised, I will inform you as early as possible of my revised estimate. This estimate applies only to the services described above, and would not include litigation or intellectual property matters at any time.

You agree to pay to me promptly a retainer of $________ , at which time my service will commence. This retainer is based upon committing myself, the value of services, the reservation of time, the nature of the matters, the issues involved and other factors affecting an overall fee. Time spent on services (computed in units of ________ minutes), which includes telephone calls and correspondence, will be charged against the retainer at the rate of $________ per hour. Except as set forth above, out-of-pocket expenses such as overnight deliveries and filing fees will be billed to you at actual cost without markup. An itemized statement of charges will be sent to you not less often than every ________ days. No time will be charged for discussing any statement or bill. If the retainer is depleted in full, then additional charges will be billed to you on a monthly basis. If you fail to pay any invoice promptly when due, I reserve the right to request an additional retainer against future anticipated charges.

I reserve the right to charge interest at ________ % per annum, or the highest interest rate allowed by applicable law if less, on unpaid balances and to decline to continue to represent you if payment is not received within ________ days of a statement date. My fee represents a charge for my services rendered and is not contingent upon successful completion of the services described in this letter or the results achieved by you. My agreement is to perform services for the person or persons signing this agreement in their individual capacities, and I will look to them personally for the payment of my fees and expenses. While I may accept payment from a corporation, limited liability company, or other legal or business entity that is related to you, I will not be obligated to rely on such entity for the payment of my fees and expenses unless I expressly agree in writing to do so.

You have the right in your sole discretion to terminate my representation at any time, in which event you shall be liable for the time spent providing services as computed above, and any unused portion of the retainer will be refunded to you. I also have the right to withdraw from representing you if you fail to co-operate or to provide on a timely basis accurate and complete information and documents relating to the services, if I should die, retire or otherwise discontinue the practice of law generally, or if you engage in any conduct which would make it inappropriate for me to continue representation.

I appreciate the opportunity to assist you on this matter, and look forward to working with you in an attempt to bring the above matters to a swift and orderly conclusion. Please indicate your acceptance by printing out two (2) copies of this letter, signing and returning both copies to me along with the $________ retainer check payable to "________ ", along with copies of the letter of intent with the Seller and any draft documents you have received from ________ *[name of franchisor]* in this matter. When I have received both copies of this letter I will countersign one of the copies and return it to you for your records.

Very truly yours,

____

ACCEPTED AND APPROVED:

Signature of Client: _______________

Print Name of Client: _______________

Date: _______________

RETAINER LETTER – PERCENTAGE FEE

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By Clifford R. Ennico (ThomsonWest 1996-2013)

Date: ________ , 20__

PERSONAL AND CONFIDENTIAL

Mr./Ms. _______________

____

____

Re: Retainer Agreement

Dear ________ :

When signed by you, this letter shall constitute the written retainer agreement with the undersigned for the performance of certain legal services for a percentage fee (the "Agreement"). The term of this Agreement shall commence as of the date first written above and shall continue until either party terminates this Agreement by written notice to the other party (the "Term").

During the Term, the undersigned will perform all customary legal services in connection with the entertainment and related industries (e.g., the negotiation or Substantial Negotiation (as defined below) of agreements for the performance of services or the transfer of rights for you.

In consideration of the above services, you shall be responsible to pay us an amount equal to ________ % percent of ________ % percent of your Gross Income (as defined below) directly received by you or payable to you but held by the payor at your request or direction for tax or other reasons, during or after the Term with respect to any and all entertainment related services and/or properties (the "Percentage Fee"). "Gross income" shall be defined as ________ % percent of all consideration without any deductions whatsoever (whether fixed, contingent, residual, required by collective bargaining agreements, percentage, on a royalty basis, or otherwise) derived from any and all agreements entered into or Substantially Negotiated during the Term (and any options in and/or modifications, extensions, additions, supplements, substitutions, and renewals of such agreements), as well as any services performed during or after the Term and any properties, materials, or projects written, created, or acquired by or for you before, during, or after the Term, and any projects based upon or derived from any proprietary materials or projects written, created, or acquired by you or for you before, during, or after the Term (e.g., spin-offs, generic, planted character, sequels, remakes and all other related or derivative projects). Gross Income shall not include reimbursements received and used by you for your actual travel, lodging, and/or meal expenses (whether on an accountable or non-accountable basis) but shall include amounts withheld pursuant to tax laws.

We have advised you, and you acknowledge, that the Percentage Fee is not set by law but has been determined by good faith negotiation between us.

The term "Substantially Negotiated" shall mean that negotiations have proceeded to a point where substantially all material terms of the agreement have been discussed in detail, it being understood that such negotiations will be more than a mere solicitation of interest, but need not have proceeded to the point where the parties have entered into an agreement.

If you so request, we will continue to perform our services in connection with any agreement on which we continue to receive the Percentage Fee after the Term; provided, however, that your failure to make such request shall not affect your obligation to pay us the Percentage Fee.

If we make any disbursements or incur any costs on your behalf, you agree to advance us, or to reimburse us upon receipt of invoice for, all such disbursements and costs within a reasonable time period after receiving such invoice from us. Such disbursements and costs may include, without limitation, photocopying costs, facsimile and messenger costs; and if we are asked to incur any such cost in excess of $________ Dollars in any one instance, we will ordinarily expect you to pay directly such fees and expenses of any third parties, such as consultants, appraisers, expert witnesses and court reporters, engaged with respect to your matter(s), where such fees and expenses exceed $________ Dollars in any one instance.

The Percentage Fee does not cover any of the following services. If you should request such services, we will bill you monthly on an hourly basis for all of our fees and costs:

1. Extraordinary services, such as motion picture, television or video production legal services if you produce a motion picture, television program or video;

2. Tax, corporate or estate matters (including, without limitation, the formation and maintenance of a corporation to furnish your services) and a trust to receive income;

3. Non-entertainment legal services, such as real estate matters and labor matters; and/or

4. Arbitration, litigation or other formal proceedings before any court, tribunal, guild, or other hearing body.

The undersigned shall have the right to conduct, upon reasonable written notice to you, an inspection of books and records with respect to verifying the accuracy of your payments pursuant to this Agreement. Subject only to the express terms and condition of this Agreement, your obligation to account to us and pay the Percentage Fee and hourly fees (if any) to us shall continue after the expiration of the Term.

If you ever have any concerns about our work, please feel free to contact us. You acknowledge that you are free to seek the advice of independent legal counsel other than the undersigned with respect to this document before deciding whether to countersign and return it to us. If you agree with the foregoing, please sign below and return it to my attention.

We are looking forward to working with and to a long and mutually rewarding relationship.

Very truly yours,

____

AGREED TO AND ACCEPTED:

Signature of Client: _______________

Print Name of Client: _______________

Date: _______________

NONREPRESENTATION LETTER – WHERE RETAINER LETTER EXISTS

Reprinted with permission from "Forms for Small Business Entities"

By Clifford R. Ennico (ThomsonWest 1996-2013)

[Date]

[VIA CERTIFIED MAIL]

____

____

____

RE: Your Request for Legal Representation in Connection with a Possible Transaction with *[name]*

Dear *[name]*:

This letter confirms that on *[date]* we sent you a retainer letter describing the terms and conditions under which this firm would be willing to represent you in the above matter. We requested that you indicate your agreement to the terms and conditions set forth in the letter by signing the letter and returning an original signed counterpart to the undersigned's attention.

Despite repeated requests, we have not received the signed counterpart of our letter. Accordingly, we assume that either you no longer wish to pursue this matter or have sought legal counsel from another firm or attorney. By this letter we withdraw our offer to represent you in this matter set forth in our retainer letter of *[date]*, which is of no further force or effect.

Please be advised that this firm does not, and has not at any time, represented you in connection with this matter or any other matter. You are not to identify our firm as your legal counsel in this matter, or as your attorneys generally, in discussions with third parties. If we are contacted by third parties or their attorneys in connection with this matter or any other matter in which you have identified us as your counsel, we will deny any attorney-client relationship with you.

As required by the American Bar Association's Code of Professional Responsibility and the Model Rules of Professional Conduct, all discussions which we have had with you concerning this matter shall be kept strictly confidential, and we will avoid any relationship with any other party to this transaction which would create a conflict of interest.

Should you wish to pursue this transaction, or if you are currently doing so, we advise you of the necessity of retaining competent legal counsel to represent your interests at your earliest convenience.

Very truly yours,

[Name of Firm]

By: *[Name of Signatory]*

Signature: *[signature]*

NONREPRESENTATION LETTER – WHERE RETAINER LETTER DOES NOT EXIST

Reprinted with permission from "Forms for Small Business Entities"

By Clifford R. Ennico (ThomsonWest 1996-2013)

[Date]

[VIA CERTIFIED MAIL]

____

____

____

RE: Your Request for Legal Representation in Connection with a Possible Transaction with *[name]*.

Dear *[name]*:

This letter confirms that we have had several discussions with you regarding the above matter and the possibility that our firm may be retained as your legal counsel in this matter. [We have received letters and telephone calls from *[name]* indicating that you have identified us as your legal counsel in the above matter, of which we have had no prior knowledge.] To date, however, you have not retained this firm to act as your legal counsel in this matter, nor have we reached agreement on our fees and charges to represent you in this matter. Accordingly, we assume that either you no longer wish to pursue this matter or have sought legal counsel from another firm or attorney.

Please be advised that this firm does not, and has not at any time, represented you in connection with this matter or any other matter. You are not to identify our firm as your legal counsel in this matter, or as your attorneys generally, in discussions with third parties. If we are contacted by third parties or their attorneys in connection with this matter or any other matter in which you have identified us as your counsel, we will deny any attorney-client relationship with you.

As required by the American Bar Association's Code of Professional Responsibility and the Model Rules of Professional Conduct, all discussions which we have had with you concerning this matter shall be kept strictly confidential, and we will avoid any relationship with any other party to this transaction which would create a conflict of interest.

Should you wish to pursue this transaction, or if you are currently doing so, we advise you of the necessity of retaining competent legal counsel to represent your interests at your earliest convenience.

Very truly yours,

[Name of Firm]

By: *[Name of Partner]*

Signature: *[signature]*

MARKETING A SOLO OR SMALL OFFICE LAW PRACTICE:
SOME REAL WORLD TIPS AND STRATEGIES

Clifford R. Ennico, Esq.
2490 Black Rock Turnpike, # 354
Fairfield, Connecticut 06825-2400
Phone: (203) 254-1727
Fax: (203) 254-8195
E-Mail: crennico@gmail.com
Web: .cliffennico., www.legalcareer.com

I. THE IMPORTANCE OF MARKETING YOUR PRACTICE

A. You are a professional, but you are also a small business.
B. The key to success in any small business is marketing yourself and the services you offer.
C. If you do not learn how to market yourself and your services, you will fail – it's as simple as that.
D. If you are not spending at least 20% to 25% of your total working hours on marketing activities, you are not giving your marketing program the attention it deserves.
E. Never stop marketing – even when you have more clients than you can handle ☺.
F. If you are an associate in a law firm, there are only two ways you will ever make partner:
   1. Develop an unusual practice specialty that your firm's clients need but that isn't done by any of the other lawyers in the firm.
   2. Build a "book" of clients that look to you – not your firm – as their lawyer, and that account for more than 5% of your firm's total billings each year.
   3. For more information, see my new book *Partner Track: How to Go from Associate to Partner in Any Law Firm* (Kaplan Publishing, $12.95).

II. WHAT YOUR CLIENTS LOOK FOR IN A LAWYER

A. People don't hire lawyers, they hire people who can help them with certain types of problems.
B. Your personality and ability to empathize with a client's situation are your two biggest marketing tools.
C. People do not want your legal services – they want YOU. If they don't buy you, it doesn't matter how great your credentials are.
D. People are frightened of lawyers, and (sometimes) a little ashamed that they're in a situation where they have to hire one – after all, people don't call their lawyers when they're having a nice day ☺.

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E. Anything you can do to humanize yourself and demonstrate that clients can trust you and communicate with you with help you attract and keep clients over the long term.

F. Don't overlook your ethnic background, sex, and other personal characteristics – people feel comfortable working with people whom they perceive as being "like them". I don't think of myself as Italian-American, and wasn't brought up in that culture, but I sure have lots of clients with vowels at the end of their names . . . know what I'm sayin'? ☺

III. THE FOUR PILLARS OF YOUR LAW FIRM MARKETING PROGRAM

A. Your involvement in organizations and community activities.

B. Your personal interaction with potential clients and referral sources and your "elevator pitch".

C. Your public speaking strategy.

D. Your law firm Website

IV. PILLAR # 1: YOUR INVOLVEMENT IN ORGANIZATIONS

A. Bar associations and other professional groups are great, but you rarely get business from them unless other lawyers are a major referral source for your type of practice (e.g. specialized litigation, patent and trademark law, international trade).

B. It is better to join and get involved in organizations where lots of potential clients and referral sources are hanging out.

C. Some rules for choosing the right organizations and community activities:

1. Make sure there are lots of potential clients and referral sources in the membership.
2. Make sure there are as few other lawyers as possible in the membership who are going after the same markets you are targeting (for example, I join organizations of franchisors because while the other lawyers are looking to represent them, I'm looking to represent their franchisees).
3. Make sure you believe in the organization's mission – nonprofits, especially, can be "time vampires" and you don't want to spend lots of time working on projects that don't mean anything to you. Also, if people see that you are only interested in getting business from the membership, they will isolate you sooner or later.
4. Look for organizations that have a low "flake ratio" – number of flaky people as a percentage of the total population ☺.
5. If you join an organization, roll up your sleeves and get involved.
6. Look for organizations that will help get your name and/or photo in local newspapers or otherwise generate positive publicity for you and your practice.

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V. PILLAR # 2: YOUR PERSONAL NETWORKING AND "ELEVATOR PITCH"

A. Be sure to sell "benefits," not "features" – don't tell people what you do, tell them how you can solve particular problems or otherwise improve their quality of life.

B. Get people talking about their "fears" – the things that keep them awake at night – and their "passions" – the things that turn them on or get them excited. People love to talk about these two things more than anything else in the World, and showing a sincere interest in people's fears and passions make them much more likely to like you.

C. When giving an "elevator pitch," here's what you should say:

1. Describe the customers or clients you "serve" in your practice.
2. Describe the problems you solve, or otherwise say how you make your clients' lives better by what you do for them.
3. Describe what distinguishes you from your competition.
4. Tell a story, a humorous anecdote, or a weird fact that will stick in the person's head and make them remember you weeks and months from today (for example, the fact that I once wrote a book that, according to yearly surveys, is the book "most frequently stolen from law libraries around the country".

VI. PILLAR # 3: YOUR PUBLIC SPEAKING STRATEGY

A. Probably the best way to market your practice is to get up on some podiums and start giving talks, teaching classes, or hosting webinars on your law firm's Website (you do have one, don't you?)

B. Get hold of lists and schedules of local organization meetings – call the "program director" of each organization and volunteer to speak for free at an upcoming meeting. Most "program directors" are always on the lookout for interesting, free speakers, and you will rarely be turned down. You will also eat extremely well at least once a week without paying ☺.

C. Do not talk about what you do – talk about problems and issues members of the organization are facing and how they can be solved. Be sure to use lots of stories, illustrations and examples, as people tend to remember these longer than they will your information points. The more colorful, the better (but avoid off-color or politically incorrect stuff that may alienate your audience).

D. If you have a sense of humor, don't be afraid to use it – people cannot dislike someone who makes them laugh.

E. Remember that you are in "show business" whenever you speak – people today have shorter attention spans than they used to, and expect to be entertained as well as informed. As a mentor of mine once put it, "if you can't keep them awake, you can't teach them nothing".

F. Whenever you speak on a legal or law-related topic, be sure to include a disclaimer that "this is legal information only, not legal advice."

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VII. PILLAR #4: YOUR LAW FIRM WEBSITE

A. What should be on your Website:
1. What you do – in layperson's terms
2. How much you charge
3. Free information

B. What should not be on your Website:
1. Your photo
2. Your biography
3. Any other information your clients don't care about

C. "Attorneys are reminded that pursuant to Practice Book §2-28A(a)(3), a list of website domain names used by the attorney must be filed with the Statewide Grievance Committee quarterly on the first business day of January, April, July and October."

D. A further warning: this applies to Facebook pages, LinkedIn profiles, and any other Web page that relates specifically to your law practice.

VIII. SOME ETHICAL CONSIDERATIONS

A. Familiarize yourself with Rules 7.1 through 7.4 of the Model Rules of Professional Conduct (note that the New York and Connecticut versions of these are slightly different, if you practice in both states).

B. If you have a page on LinkedIn, Facebook or another social networking website that is focused on your law practice, note that the State Grievance Committee in CT may view that as a "website" that you must register and update quarterly with them.

C. Never make claims about your practice that cannot be backed up by hard facts or data. For example, I never say I am a "leading authority on small business law". Instead, I say "I am the author of 14 books on small business law, management and marketing" – that gets the message across just as well and can easily be supported by fact if anyone ever questions it (I will gladly send the Statewide Grievance Committee copies of each of my books if they request to see them, and will even autograph them without charge ☺).

VIII. THE BOTTOM LINE ON MARKETING YOUR LAW PRACTICE

A. Whether you like it or not, "ya gotta do it".

B. Do it ethically and professionally, but do it.

C. Yes, it takes up valuable time that you cannot bill, but do it.

D. Find a way to market your practice that fits your personality, the amount of time you have available, and your practice specialty . . . but do it.

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E. Set aside an hour or two each day that you devote exclusively to marketing related activities . . . and do it.

CLIFF ENNICO, best known as the host of the PBS television series "MoneyHunt", is the author of the nationally syndicated newspaper column "Succeeding in Your Business"(www.succeedinginyourbusiness.com) and the legal editor of the Small Business Television Network at www.sbtv.com. His latest books are "Small Business Survival Guide" (Adams, $12.95) and "The eBay Seller's Tax and Legal Answer Book" (AMACOM, $19.95).

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