

# Survival Tips for Corporate Lawyers

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This month we explore miscellaneous horror stories and lessons to be learned from the corporate front.

## **1. Beware of individuals who are unrepresented by counsel.**

Attorney was retained by Smith to represent him in the purchase of Jones' stock interest in XYZ Corporation. Jones, who was unrepresented by counsel, agreed to sell her stock to Smith for \$500,000. At the closing, Jones asked Attorney about the documents she was signing. Attorney felt there was no harm in briefly explaining the legal effect of the documents to Jones. The deal was closed.

Jones subsequently developed "seller's remorse." Rather than admit that she made a poor business decision, Jones decided to blame Attorney and filed a legal malpractice action against him. In her complaint, Jones alleged that Attorney should have advised Jones to retain independent counsel and to obtain an appraisal of the value of her stock. Jones also alleged that Attorney was in fact Jones' counsel based on the brief remarks made by Attorney to Jones at the closing, and that Attorney had conspired with Smith to defraud Jones.

Our claim files are replete with variations on this theme. Corporate attorneys who deal with smaller businesses are often involved in transactions in which one or more players are not represented by counsel. These unrepresented parties typically argue that they don't need to pay another lawyer for advice concerning a "friendly transaction." Unfortunately, that reasoning goes out the window when the deal falls apart or the unrepresented party regrets the business decision.

To reduce your risk in these situations, we suggest the following: First, promptly write the unrepresented



## **Avoid problems by communicating clearly to clients and documenting your communication.**

party, stating that you do not represent the individual, that the interests of your client are or may be adverse to that individual, and that he or she should seek legal counsel immediately. Second, watch what you say to the unrepresented individual in writing and otherwise. Exchanging pleasantries is okay. Summarizing the contents or describing the purpose of a document is not. Now, repeat after me 20 times: "I'm sorry, I don't represent you and can't give you legal advice."

**2. Fill in those blanks.** Attorney represents Client in the sale of its business to Buyer. Buyer's attorney sends Attorney a draft of the buy-sell agreement for review. The draft contains a blank paragraph to be filled in later with a formula for reducing the sales price based upon Client's gross sales during a specified period. Attorney assumes that Client is negotiating with Buyer about this provision and doesn't men-

tion it to Client. At the closing, Attorney does not point out the final version of the provision to Client. A few weeks after the sale, Client is notified that the purchase price will be reduced by \$100,000 based upon the formula set forth in the agreement. Client sues Attorney, claiming Attorney should have explained the implications of this provision to Client.

How many times have you reviewed a document with missing exhibits or blank spaces for such items as interest rates, sales

prices, and critical dates? We often assume that the corporate client is negotiating with the other side about these terms. But this assumption may be dead wrong. Make it a practice to point out these missing exhibits and unresolved provisions to your client. Then, when the final version is prepared, verify that your client understands and agrees.

**3. Who's responsible for the cleanup work?** A common theme running through legal malpractice claims against transactional attorneys is the alleged failure to perform one final task, such as filing a subchapter S election or perfecting a security interest. The attorney often assumes that the client or a third party is handling these matters, or may simply forget to do it.

That's why you should maintain standard checklists for the transactions you routinely handle. (Law libraries are loaded with checklists on every topic imaginable.) Each checklist should include all steps necessary to complete the transaction in question. They should also have columns listing the party responsible for each item.

Next, review the checklist with your client and determine which party will complete each item, whether you, the client, the opposing party, an accountant or a tax specialist, or someone else.

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Then use the list to guide you through the transaction.

If you are *not* responsible for the cleanup work, a well-drafted closure letter at the end of the representation can reduce the risk of misunderstandings. This letter, which can accompany the final bill, should simply state that your work on the transaction is now complete and remind the client of any loose ends that must be tied up. For example, "To get the tax benefits you expect, you must file the subchapter S election with the IRS without delay. If you would like our assistance on this matter, please give me a call." Estate planning attorneys have used closure letters for years to document "post-closing" items left to the client, such as transferring assets into the names of newly created trusts. It's an idea worth copying.

**4. Retain copies of those drafts.** Attorney drafts a software development agreement to be entered into between her client Corporation and Software Consultant. Attorney's first draft contains rigorous warranties and remedies to protect Corporation if the software fails to perform. Software Consultant objects to these provisions. Vice President Anderson of Corporation tells Attorney that the disputed language is a "deal breaker" and instructs Attorney to soften the warranty and remedy provisions as requested by Software Consultant's counsel.

The project does not go smoothly. After it is more than \$500,000 over budget and six months late, Corporation decides to sue Software Consultant. Since the project was initiated, Vice President Anderson has been replaced by Vice President Johnson. Johnson calls Attorney and instructs her to go after Software Consultant. Attorney reviews the executed contract and informs Johnson that Corporation has little if any redress under the terms of the agreement. Johnson is furious and blames Attorney for her failure to draft stronger warranty and remedy provisions into the agreement. Unfortunately, Attorney has discarded all drafts except the final version. The moral of this story is self-evident.

**5. Watch out for "quickie" projects.** First thing on Friday morning, Client calls Attorney and asks her to "quickly" review an agreement that Client is faxing to her. Client explains that he needs to sign and send back the agreement by day's end. Finally, Client instructs Attorney not to write a long memo detailing Attorney's comments. "Just call and tell me if I can sign it."

Attorney reviews the contract and notes several unfavorable provisions, including a mandatory arbitration clause that requires arbitration in California. Attorney calls Client and verbally relays her concerns. Client says it's the third party's standard agreement and they'll never agree to the suggest-

ed changes. Client signs agreement and subsequently has a dispute with third party. He is horrified to discover that he must arbitrate the dispute in California rather than seek redress in a local court. He doesn't remember his five-minute conversation with Attorney several months ago and blames Attorney. After all, Attorney was paid to review the agreement and Client has the bill to prove it.

The request for quickie advice leaves every attorney between a rock and a hard place. On the one hand, the attorney knew she should document her advice to the client in writing. On the other, she knows that clients don't want to pay for written responses. We suggest the following alternative. On the copy provided by your client, handwrite your concerns and highlight the undesirable provisions. Fax your handwritten comments to the client and call to explain them. Then retain a copy of your comments in the file. You've given the client verbal and written advice while keeping your bill to a minimum.

The common theme in these examples is communication and documentation. As attorneys, we must ensure that the scope of our representation, along with the advice itself, is communicated clearly and fully. And then we need to document.