

## **CONTRACTS, AGREEMENTS AND PACTS...OH MY!**

By David A. Feldheim, Attorney At Law

About to construct or execute a contract? Be afraid, be very afraid. Or, seek counsel from an experienced contracts attorney. This is no time to learn from your mistakes.

Contract law is defined as that branch of jurisprudence that involves the rights and obligations of parties entering into contracts and agreements. All entrepreneurs and businesspersons encounter circumstances during their professional careers that involve the “entering into contracts and agreements.” They can’t be avoided; nor should they be, for they offer a clear definition and binding record of each party’s “rights and obligations.” The trick, and it can be tricky, is to make sure they work for you, not against you. There is no more appropriate time to procure the assistance of an experienced attorney than during the construction and execution of a business contract.

Today more than ever, it takes more than just a good product or service and some customers to make for a successful business. Those products and services need to be safeguarded, and there are a wide range of legal means available that will accomplish this.

Virtually every department or function within even the smallest business depends upon contracts and agreements, starting with the formation of the business. Often required are incorporation contracts, by-laws, and if the business is a partnership, a buy-sell agreement to prevent unnecessary future conflicts. There may also be a need for shareholder agreements, or registration rights. Once formed, there will be contracts for real estate, possibly contracts for mergers or acquisitions, spin-offs, stock purchase agreements, governance, indemnification and non-disclosure agreements.

Marketing may require sales and service contracts, customer and vendor agreements. Human Resources needs employment and compensation contracts which can include salary, benefits, stock options, and severance pay. The finance department will encounter contracts for credit, loans or leases. Operations often need software development, license, or maintenance agreements, and perhaps even source code escrow agreements. Or, any variety of professional services agreements including contracts for disaster recovery, Web site development, subscription or hosting agreements, and most likely an Internet service provider agreement. And then there are contracts that will protect the firm’s intellectual property, including copyrights and patents

Rather than *necessary evils*, contracts and agreements should be viewed as opportunities to explicitly define, assign and manage the rights, obligations, and expectations of all parties. In any business relationship, there will likely be at sometime or other, inequality in bargaining positions. Maybe an employer, customer or vendor presents a contract from a perceived position of strength, as “take it or leave it.” This is where experience in contract jurisprudence will assist in providing a full understanding of all risks and rewards and maximize the opportunity to identify common grounds for negotiation. It is

here where the learned art and skill of a contract lawyer can combine to identify creative ways in which all parties can experience a win-win outcome.

After all, we're all in business for the long haul, and repeat business and a good reputation, earned by performing in accordance with a clear contract, will help ensure that longevity. Most large corporations already know this, as indicated by the number of attorneys on staff with varying areas of discipline and expertise. But even with in-house attorneys, nearly all corporations will find it cost-effective to engage outside counsel on an as-needed basis to:

- review and update standard contracts
- negotiate and draft new contracts when staff attorneys are in a "crunch"
- assist staff attorneys when the subject matter of the transaction is outside the experience of the law department.

An independent business attorney versed in contract law can literally contribute to your bottom line. Remember, properly written contracts will help manage the expectations of those with whom you deal, and will offer maximum protection for your people, products and services. Go it alone, and we repeat... be afraid, be very afraid.

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