

**LAW OFFICES OF
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"The Business of our Firm is Business"

**Doing the Deal
What You Need to Know Going In**

Persons new to business or who have not done a major transaction in a while often make the same basic mistakes. Here are my “One Minute Lectures” to address some of them.¹

1. *The Candy Jar Speech.* The buyer in a business transaction is naturally focused on getting the benefit of the bargain. With a business purchase this typically includes the customers and contracts, location, the furniture, fixtures and equipment (aka “FF&E”) and the intellectual property, including the trademark(s), URL, domain name, website, phone numbers, emails and other brand and contact information. Often, the business is very attractive. It may be a little like looking at the crystal candy jar we have in our office. But, exaggerating to make a point, I tell my clients: “Don’t (just) look at the business like the crystal candy jar filled with the multi-colored chocolate bars. Look at what the purchase contract says about the business because that is what you are buying.” The *contract* determines whether you get what you pay for and a fair deal. For example, is the candy jar real crystal? Is the candy as labeled and edible? There are two sides to this: one is due diligence, i.e. doing your “homework” and making a reasonable investigation, and two, having the other party represent and warrant (i.e. guarantee) that the product, service, business or property is as it appears and presented to be.

In short, “Look at the deal, not the property.” Some investors I know, including me, will not even look at the property unless the numbers work. This is the financial analysis equivalent of my Candy Jar Speech. Bottom line, remember: It is not furniture, fixtures and equipment (aka FF&E) and other assets *that you see* that you are buying (i.e. getting); it is *what the contract says* about the FF&E and other aspects of the business that you are buying. Remember: The contract doesn’t just facilitate the deal; *it is the deal.*”

2. *The Document Looks OK to me Fallacy.* Often the client focuses on the language *in* the draft document, but does not realize what *is not in it*. For example, I had a self-made millionaire client who was negotiating the purchase of a new business. He asked me to look at the contract late in the afternoon on the day before the Closing. I quickly realized the contract contained none of the seller representations and warranties essential

¹ This is an excerpt from my longer article of about 30 One Minute Lectures.

to a business buyer. The client had gone through nine drafts and revised the language *in* the document but did not realize what language was *not* in the document. It takes years of law school and considerable knowledge and experience to know *what the business contract is missing*, e.g. strong indemnification language; precise and favorable definitions of terms; and as in this case representations and warranties about the accuracy and completeness of financial and other information disclosed, taxes paid, condition of equipment, the absence of liens and litigation, etc. The list goes on.

A corollary to this point is “Stick with what you know and hire others to do what they know.”

3. ***The You Don’t Want a Lawyer; You Want a Priest Confusion.*** Another problem with the above transaction is that the client came to me at the very last minute. When this happens, often the client is looking for the attorney to in effect “bless” the documents. The lawyer is supposed to do the legal equivalent of the sign of the cross, thereby making the client feel good about the transaction. But, in a case like this the attorney has been outside the loop of the deal, does not know the parties’ needs and objectives, has not had sufficient time to give the documents a competent review, and has not previously met with the client to review the documents and discuss the transaction. Because of this, the attorney cannot provide competent advice – at least not the best, most complete and valuable advice -- due to the lack of notice, input and time. It is beneficial to hire an attorney; it is better to use one wisely and get your money’s worth.

4. ***The “How Much is It for a _____” Approach.*** Particularly with the availability of internet forms and research, it is not uncommon for the client to call and say: “I need _____. How much do you charge for this?” Price comparison is of course good business. The error here is assuming that you know what is needed. Things are always simpler and more definite when one is working outside of one’s knowledge base. Hence, the witticism: “I can speak with confidence because I know nothing about it.”

Most of us would not take our car to the repair shop and tell the mechanic how to fix it. Rather, we would describe the problem and ask the mechanic to diagnose the problem and suggest ways to fix it. Law (and medicine) are no different. It is OK to ask about _____, but the underlying approach should be consultation and advice.

5. ***The “Landmines” Speech.*** Landmines occur in the context of contract drafting and review. “Landmines” are terms that are unidentified, misunderstood or missing from an agreement. Even worse, Landmines often arise from the lack of any agreement at all. Landmines may not be obvious to the lay reader, even when one is trying to be diligent and prudent. Just as it takes a doctor of medicine or one with medical training

or experience to recognize and know, in advance, the difference between heartburn and a heart attack, it takes a doctor of law² or someone with legal training and experience to recognize legal Landmines. Landmines can be destructive to the success of the transaction, the business as a whole, and your life. Consider, for example, the effect on the business and life of the business owner whose General Manager left his company with impunity due to the lack of a well-drafted Key Employment Agreement. The fact that “Landmines” can be so business and life-altering is a major reason that I strongly recommend legal consultation and advice regarding any important contract or business relationship or contract.

Commercial Leases are filled with legal and practical “landmines.” There is what I call a “New York Lease Review.” Such a review is more thorough and detailed than a typical Phoenix lease review. An example of the reason for this is that, while always important, CAM definitions become more important when rent is, say, \$300 a square foot (in New York city) instead of, say, \$30 per square foot. But, such a review in Phoenix tends to create issues not addressed in most Phoenix lease negotiations, so local landlords are not used to them. And, in any case, most of my clients lack the bargaining power to “rewrite the lease.” So, we focus on the “landmines.” Our goal is to achieve and ameliorate the, typically four or five, terms most critical to the client and inform and advise regarding the rest. We may not be able to negotiate away or in our favor all of the problematic terms of the agreement, i.e., the “Landmines.” But, because of legal representation, we will know where the landmines are.

² Lawyers receive their Juris Doctorate (J.D.) upon graduation from law school and have nearly the same number of years of training as a medical doctor, excluding time spent by medical doctors in “residency.”