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# A Conceptual Approach to Negotiating Relational Contracts for the Small Business Client

Gary H. Doberstyn

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## A CONCEPTUAL APPROACH TO NEGOTIATING RELATIONAL CONTRACTS FOR THE SMALL BUSINESS CLIENT

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### I. INTRODUCTION

Negotiating relational contracts, those requiring executory obligations and on-going relationships, can be very complex.<sup>1</sup> Business lawyers must be aware of a variety of factors if they are to successfully negotiate relational contracts. That, in turn, requires familiarity with the many perspectives of relational agreements into which businesses enter.

Such an endeavor can become quite formidable when the lawyer is unfamiliar with the client's circumstances, the nature of the client's business, performance and risk issues, applicable areas of law, and the manner in which "change" may impact upon the relationship of the parties to the agreement. A lawyer in such a position may wish to employ a systematic approach to this multi-faceted task. The systematic approach, by necessity, requires treating the many aspects involved as discrete areas of inquiry and analysis. In fact, those aspects converge into

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<sup>1</sup> This work is not intended to comprehensively cover any individual aspect discussed herein. These aspects have been the subjects of many detailed books, most notably those pertaining to effective negotiation. See generally G. NIERENBERG, *THE COMPLETE NEGOTIATOR* (1986) [hereinafter *COMPLETE NEGOTIATOR*]; P. SPERBER, *THE SCIENCE OF BUSINESS NEGOTIATION* (1979) [hereinafter *SCIENCE OF BUSINESS NEGOTIATION*]; X. FRASCOGNA H. HETHERINGTON, *NEGOTIATION STRATEGY FOR LAWYERS* (1984) [hereinafter *NEGOTIATION STRATEGY*]; G. WILLIAMS, *A LAWYER'S HANDBOOK FOR EFFECTIVE NEGOTIATION AND SETTLEMENT* (1981); G. BELLOW & MOULTOON, *LAWYERING PROCESS: NEGOTIATION* (1981); R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (1981).

an “integrated consciousness” that is characteristic of successful business lawyers.

The purpose of this Article is to present a conceptual framework within which one may develop a comprehensive approach to negotiating relational business agreements. The framework identifies and integrates various considerations in a very broad manner to make it applicable to the various business contexts in which negotiations may occur.

Diagram 1 sets forth the conceptual organization of this Article. The reader will note that each general topic discussed herein should be integrated with the considerations presented in subsequent topics.

The framework will be useful in identifying those considerations which may require exploration, analysis and assessment by the business lawyer and/or the client. That systematic process directly impacts upon the basic lawyering skills of interviewing, counseling, negotiation and drafting because it brings into focus the way in which those skills must be utilized in order to create successful contractual business relationships.

### Conceptual Organization of Article

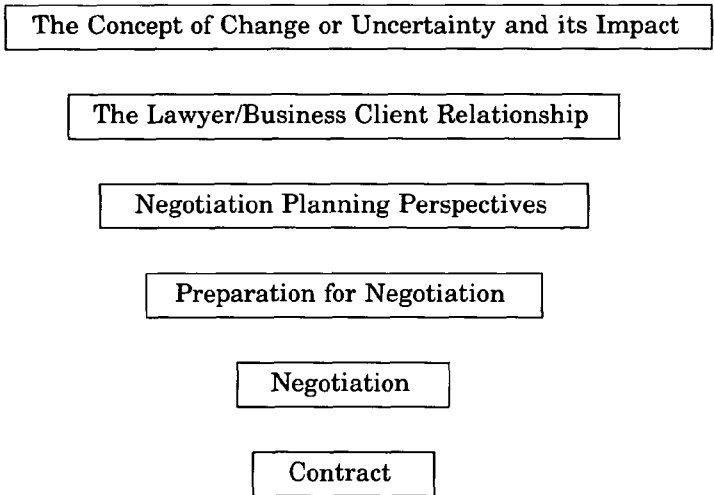


Diagram 1

## II. SCOPE OF ARTICLE

This discussion is limited to the exploration of relational contracts in which executory obligations and on-going relationships are created. A contract is relational to the extent that the parties are incapable of

reducing all of the terms of the arrangement to well defined obligations.<sup>2</sup> This often occurs because future contingencies are peculiarly intricate or uncertain. Therefore, practical difficulties arise that impede the contracting parties' efforts to allocate all risks at the time of contracting.<sup>3</sup> Such contracts are to be distinguished from transactional agreements which often are performed in a short time frame and which may not require significant future interaction between the parties.<sup>4</sup>

Business enterprises frequently enter into these continuing, highly interactive contracts.<sup>5</sup> They include franchise agreements, labor agreements, manufacturing and or distribution agreements, joint ventures, output and or supply agreements and personal service contracts.

This discussion is focused on small businesses. However, its applicability is very broad. There is no universally recognized definition of a "small business," but the Small Business Administration, using a benchmark of five-hundred employees or more to distinguish small from large businesses, has estimated that approximately ninety-seven percent or more of all businesses qualify as "small businesses."<sup>6</sup>

The line between small and large business enterprises is not distinct. Any quantifiable means of distinguishing a small business from a large one, such as the number of shareholders, amount of assets or annual sales, is not entirely adequate.<sup>7</sup> The basic difference is the distinction between large publicly held corporations and closely held enterprises which have certain common characteristics that shape their legal needs.<sup>8</sup> Closely held enterprises usually consist of individual proprietors or a limited number of participants in ownership that reside in the same geographic area, actively participate in the business, seek to guarantee such involvement and derive most of their income from such activity. They seek to provide for the continuation of their business, the purchase of their interest upon death, disability or retirement and desire to insulate their personal assets from the risks of doing business. In fact

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<sup>2</sup> Goetz and Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089, 1091 (1981) [hereinafter *Principles*].

<sup>3</sup> *Id.* at 1090.

<sup>4</sup> I. MACNEIL, *CONTRACTS, EXCHANGE TRANSACTIONS AND RELATIONS* 12 (2d ed. 1978) [hereinafter *CONTRACTS, EXCHANGE TRANSACTIONS*]. Often this interaction consists of fulfilling payment terms over time. It may also arise from remedial contractual measures that one party may seek to invoke. For a more detailed distinction between relational and transactional contracts, see *Id.* at 14-16.

<sup>5</sup> *Principles*, *supra* note 2, at 1090.

<sup>6</sup> H. HAYNSWORTH, *THE PROFESSIONAL SKILLS OF THE SMALL BUSINESS LAWYER*, (A Joint Project of the Section of Corporation, Banking and Business Law of the American Bar Association and the American Law Institute—American Bar Association Committee on Continuing Professional Education) Vol. 1 at 1 (1984) [hereinafter *PROFESSIONAL SKILLS*].

<sup>7</sup> *Id.* at 2, 3.

<sup>8</sup> *Id.*

most such enterprises tend to be relatively small in terms of receipts and assets.<sup>9</sup>

While these characteristics have a profound effect upon the manner in which such entities are organized, managed, and operated, they also greatly affect the nature of contractual arrangements that such small businesses enter. Characteristics of small businesses manifest themselves in the manner in which such enterprises operate on a day to day basis, in the way policies are determined and in the nature and extent of business planning. For instance there are usually fewer individuals involved in decision making. The personalities of these individuals have a greater impact upon the personality of the corporation. Major decisions may not be subjected to the scrutiny that accompanies such decisions of large publicly held corporations. Plans, policies and goals of the smaller enterprise may be determined with less forethought and may change more readily. In addition, the potential impact of many types of change may be quite severe. Competitive environments and limited resources may impose larger operational risks requiring swift decisions in order to maintain or achieve profitability. These characteristics, in turn, have a significant impact upon planning for the negotiation and drafting of relational contracts.

### III. THE CONCEPT OF CHANGE

The concept of change and its resulting impact is an overriding consideration that a lawyer cannot afford to overlook in representing clients. It is an important factor in counseling the business client. The process of identifying issues, exploring alternatives, assessing the consequences of such alternatives and ultimate decision making respecting proposed contractual relations must be approached with an appreciation of the likelihood of changing circumstances. The concept of change is even more significant in the context of relational contracts where performance cannot be completely planned,<sup>10</sup> problems are expected to arise and unexpected contingencies may occur.<sup>11</sup>

Lawyers must develop strategies to cope with change.<sup>12</sup> These strategies include developing (i) an awareness of the process by which a specific change occurs; (ii) a sense of the substantive issues arising from those types of change and (iii) an insight into the way change impacts upon business clients.

Strategies for planning in atmospheres of change or uncertainty

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<sup>9</sup> *Id.*

<sup>10</sup> CONTRACTS, EXCHANGE TRANSACTIONS, *supra* note 4, at 21.

<sup>11</sup> *Id.* at 16.

<sup>12</sup> W. Sogg, Private Corporation Seminar Lecture, Cleveland-Marshall College of Law, Aug. 25, 1987.

depend not only upon the nature of the specific change, but also upon the client's posture regarding such change. A business entity may adopt one of four basic positions with respect to any potential change. It may resist the change, adapt to the change, anticipate the change, or take an innovative posture by helping to shape the change.<sup>13</sup> The client may also decide not to take a position at all by ignoring change.<sup>14</sup>

Strategies for planning contractual relations in atmospheres of change include developing a sensitivity to indicators of change which may originate from legislative, judicial, industry, market, economic or technological developments. Once the likelihood of any given change becomes more certain, strategies shift to techniques and mechanisms, contractual or otherwise, that either mitigate any adverse consequences or assure the benefits of such change.<sup>15</sup>

Appropriate techniques to deal with change include interaction with other professionals, awareness and employment of legal and non-legal resources, such as trade articles, and on-going educational activities. The business lawyer should also assess the client's appetite for assuming any risks associated with such change.<sup>16</sup>

Those considerations enable lawyers and their business clients to determine where and to what degree flexibility planning, performance planning, risk planning, and even nonplanning are required in structuring contractual relations. Appropriate mechanisms, contractual or non-contractual, can then be identified in order to give effect to such planning.<sup>17</sup>

It may be helpful to treat the subject of change as a discrete area of evaluation in planning for contractual relations. The following discussion presents an organizational concept of change in order to aid in this evaluation. One can divide the concept of change into four hierarchical levels which increase in the degrees of specific applicability to an individual business client.

The first and most general type of potential changes are those that affect every sector of private enterprise.<sup>18</sup> The second level of potential changes encompasses those that impact upon a business enterprise due to the nature of its industry (manufacturing, retailing, distribution, publishing, construction, etc.) or the nature of its product or service within a

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<sup>13</sup> J. McCarter, Private Corporation Seminar Lecture, Cleveland-Marshall College of Law, September 22, 1987.

<sup>14</sup> W. Sogg, Private Corporation Seminar Lecture, Cleveland-Marshall College of Law, September 22, 1987.

<sup>15</sup> See *infra* text accompanying notes 84-88.

<sup>16</sup> Private Corporation Seminar Lectures, Cleveland-Marshall College of Law, Aug. 24 to Sept. 25, 1987.

<sup>17</sup> See *infra* text accompanying notes 84-85.

<sup>18</sup> Perhaps the best examples of such changes are amendments to the Internal Revenue Code.

specific branch of such industry.<sup>19</sup> A third level of potential change can arise from changing circumstances in contractual relations.<sup>20</sup> Finally change can arise internally from management decisions regarding goals, philosophies, values, priorities, strategies, and methods of day to day operation of the enterprise.

It is important to note that in each of the foregoing strata the "change factor" may be legal, economic, technological, demographic, sociographic, psychographic, objective, or subjective.<sup>21</sup> Furthermore, a change that occurs in a stratum that is more generally applicable to the client may cause a change in a more specifically applicable stratum. Thus, as in any other type of counseling, the business lawyer and/or the client must assess the potential impact of such change and develop strategies to decrease the uncertainty and risk involved in creating business relations and in obtaining contractual performance. This is particularly significant in the case of relational contracts where the term of the agreement is often of a significant duration.<sup>22</sup>

The potential for change and its resulting impact permeates the entire environment within which the business attorney and the business client operate and should be an ever present consideration in their interaction with one another. This organizational concept of change should assist in identifying the ramifications of any business activity and in the case of creating contractual relations, must be integrated with every step of planning for negotiations and contractual drafting.

#### IV. THE LAWYER/SMALL BUSINESS CLIENT RELATIONSHIP

As a general rule, most business lawyers spend a considerable amount of time counseling and advising their business clients.<sup>23</sup> Some pertinent remarks must be made regarding counseling in this context.<sup>24</sup> Business issues, legal issues, and ethical issues represent overriding consider-

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<sup>19</sup> Business activities may be subject to discrete areas of federal or state laws or regulatory requirements such as environmental, banking or intellectual property law. Even the on-going development of common law doctrines such as agent liability may affect the activities of an enterprise. Furthermore, non-legal factors such as technology, competition, or the economy may have an impact upon the way in which specific types of products or services are created and marketed to customers.

<sup>20</sup> For a discussion of potential for change in the relationships of parties to relational contracts, see text accompanying footnotes 79-93.

<sup>21</sup> Subjective factors include perceptions of contracting parties, whether accurate or inaccurate.

<sup>22</sup> CONTRACTS, EXCHANGE TRANSACTIONS, *supra* note 4, at 13.

<sup>23</sup> PROFESSIONAL SKILLS, *supra* note 6, at 3.

<sup>24</sup> See generally H. FREEMAN & H. WEIHOFEN, CLINICAL LAW TRAINING 8-55 (1972) (hereinafter CLINICAL LAW TRAINING); BINDER & PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT CENTERED APPROACH 1-29 (1977).

ations which the business lawyer must always be cognizant of in representing any business client.

First, drawing the line between legal, ethical, and business problems is an impossible task.<sup>25</sup> Nevertheless, some important observations can be made.

The extent to which a business lawyer should engage in business counseling rather than legal counseling is another important consideration when representing a small business.<sup>26</sup> Perhaps the proper line to draw involves the distinction between imaginative and inventive business planning and final business decisions which must be made by management. In creative business planning, the lawyer helps the client think through the situation, foresee dangers, identify undesirable consequences, and devise acceptable alternatives.<sup>27</sup>

Before offering business advice, a lawyer should possess a sophisticated understanding of the client's circumstances and an awareness of the practical ramifications of such recommendations.<sup>28</sup> Even so, this advice should be given with utmost caution. Business clients usually know more about the nature of their business than their lawyers. Such a client, because of prior experiences, may even be more educated about esoteric areas of the law than the lawyer.<sup>29</sup> Moreover, businessmen are experienced decision makers. Therefore, a lawyer may expect to exert less control over the contractual affairs of the business client than in other areas of representation such as litigation and tax matters.<sup>30</sup> This is appropriate because any client decision must take into account non-legal consequences as well as legal consequences. Recommendations that do not take into account the needs, objectives, and other relevant circumstances of the business, as well as the psychological and emotional needs of its principals, can lead to disastrous results.<sup>31</sup> Furthermore, a lawyer who renders mere legal advice without considering the various aspects of his client's circumstances may be perceived to be meddling in his client's affairs.<sup>32</sup> It is most critical to the lawyer-client relationship that business advice given by a lawyer is cogent, relevant, practical and well considered so as to reinforce the business client's confidence in the capabilities of the attorney. In turn this confidence will encourage the client to disclose

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<sup>25</sup> PROFESSIONAL SKILLS, *supra* note 6, at 6.

<sup>26</sup> CLINICAL LAW TRAINING, *supra* note 24, at 302.

<sup>27</sup> *Id.* at 301.

<sup>28</sup> *Id.* at 309.

<sup>29</sup> Although a client may not be able to articulate legal principles, past experiences may have enabled a business client to intimately understand the practical impact that such areas of the law have on his affairs.

<sup>30</sup> W. Sogg, Private Corporation Seminar Lecture, Cleveland-Marshall College of Law, Aug. 25, 1987.

<sup>31</sup> PROFESSIONAL SKILLS, *supra* note 6, at 7.

<sup>32</sup> M. McCORMACK, THE TERRIBLE TRUTH ABOUT LAWYERS 83 (1987) [hereinafter TERRIBLE TRUTH].



more sensitive information and thereby increase the effectiveness of the business lawyer's representation.

Second, lawyers must be sensitive to issues arising under the Code of Professional Responsibility as enacted in their jurisdiction.<sup>33</sup> Certainly a business lawyer has an obligation to give competent legal advice.<sup>34</sup> In addition, the lawyer must always be aware of exactly who the client is. Clearly a lawyer retained by a business entity owes allegiance to the entity and not to shareholders, directors, employees, representatives or others connected with the enterprise.<sup>35</sup> The business lawyer must also be aware of limitations on multiple representation of business entities and individuals connected with them.<sup>36</sup>

Finally, business people are usually upbeat and positive people. Lawyers are trained to proceed slowly, cautiously and only upon careful deliberation. This creates natural tension between being perceived as an impediment to progress and as a safety net for overly aggressive clients.<sup>37</sup> In addition, business lawyers must use considerable counseling skill to maintain their ethical standards without antagonizing a client who wishes to embark upon a questionable course of conduct.<sup>38</sup>

## V. PLANNING AND PREPARING FOR NEGOTIATIONS

### A. *In General*

To be a successful business lawyer one must have a superior ability to negotiate.<sup>39</sup> In the context of business, negotiation is ideally a cooperative process with the objective of reaching an agreement which provides for mutual gain.<sup>40</sup> The success of the lawyer-negotiator is therefore measured both by the ability to strike a deal and by the quality of the agreement.<sup>41</sup>

Business negotiations share certain similarities that distinguish them from other types of negotiation. First, each party to the agreement has

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<sup>33</sup> For the ethical considerations involved in negotiations, see *infra* note 56 and accompanying text.

<sup>34</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101 [hereinafter "CPR"] (1981). For an excellent discussion of the Code of Professional Responsibility and the business lawyer, the reader may refer to H. HAYNSWORTH, *THE PROFESSIONAL SKILLS OF THE SMALL BUSINESS LAWYER* (1984).

<sup>35</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (1981).

<sup>36</sup> MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-101, DR 5-104, DR 5-105 and DR 5-107 (1981).

<sup>37</sup> TERRIBLE TRUTH, *supra* note 32, at 124.

<sup>38</sup> CLINICAL LAW TRAINING, *supra* note 24, at 310.

<sup>39</sup> NEGOTIATION STRATEGY, *supra* note 1, at 185.

<sup>40</sup> COMPLETE NEGOTIATOR *supra* note 1, at 34 [hereinafter COMPLETE NEGOTIATOR].

<sup>41</sup> NEGOTIATION STRATEGY, *supra* note 39, at 185.

something to gain. Therefore, such negotiations are often less adversarial.<sup>42</sup>

The negotiations are often characterized by optimism and an upbeat tenor. Although it is true that each party has the opportunity to walk away from the deal, and sometimes this is the wisest choice, failure to reach an agreement often signifies a lost opportunity.<sup>43</sup> Therefore, a collaborative "win/win" negotiation strategy is often very effective.<sup>44</sup> Additionally, it is important to strive to enhance the personal relationships of the parties to the agreement.<sup>45</sup> This is considerably more important where the agreement is to be a relational one. Finally, good faith and good communication are essential for mutually advantageous business dealings.<sup>46</sup>

### B. Negotiation Planning Perspectives

Planning for the effective negotiation of relational contracts involves an understanding and balancing of various perspectives, including, but not limited to: (i) sensitivity to the nature and procedural aspects of the impending negotiation (the negotiation perspective); (ii) an awareness of the kinds of relationships that will be created (the relational perspective); (iii) an understanding of the applicable legal doctrines, statutes, and ethical considerations impacting upon the negotiations (the legal perspective); (iv) an appreciation of the inherent industry risks and common industry practices (the industry perspective) and (v) an understanding of the client's circumstances, objectives, policies and specific business practices (the client's business perspective). Once again the materials previously presented regarding change and its potential impact must be integrated with these perspectives.

The negotiation perspective involves an understanding of the nature of the negotiations. The business lawyer must be aware of timing considerations. Negotiations may be complex and, therefore, lengthy. There may be a need to reach an agreement swiftly to preserve bargaining positions or market opportunities. Additionally, the lawyer must understand the culture in which such negotiations take place. Customary procedures or protocol for negotiating particular types of agreements may need to be considered.<sup>47</sup>

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<sup>42</sup> Certainly such negotiations can become quite adversarial. However, negotiating business agreements is to be distinguished from negotiating settlements where one party benefits solely at the expense of another and there is little, if any, mutual gain.

<sup>43</sup> NEGOTIATION STRATEGY, *supra* note 39, at 186.

<sup>44</sup> *Id.* at 187.

<sup>45</sup> *Id.*

<sup>46</sup> TERRIBLE TRUTH, *supra* note 32, at 188.

<sup>47</sup> See Snowdon, *The Impact of Protocol on Business Negotiations* 194 *N. Y. L. J.*, Aug. 24, 1985, at 5, col. 4.

The lawyer must also have a sense of the various stages or ritualistic aspects of negotiation. Three specific stages may be identified. Stage one involves orientation and positioning in which working relationships are established and can be characterized by posturing and positioning. Stage two involves argumentation, compromise and discussion of alternatives. Stage three is the crisis stage which is immediately followed by either wrap-up or deadlock. Knowledge of what stage any given negotiation is in is important because it: (i) explains the present dynamics of the negotiation; (ii) facilitates planning; (ii) allows for the proper coordination of activities and (iv) prevents mistakes in timing, such as premature concessions or unnecessary feelings of pressure.<sup>48</sup>

Furthermore, strategic decisions must be made: when to negotiate, where to negotiate, what to negotiate. The roles to be played by the lawyer and the small business client in the negotiation as well as appropriate opening positions must be established.

The relational perspective is important because participants in a relational contract may never intend or expect to see the whole future of the relation negotiated<sup>49</sup> at any single time. Rather, they may view the relation as an ongoing integration of behavior that grows and varies with events in a largely unforeseeable future.<sup>50</sup>

Relational contracts typically have certain distinguishing characteristics:

The relations are of significant duration (for example franchising). Close, whole person relations form an integral part of the relation (employment). The object of exchange typically includes both easily measured quantities [payment] and quantities not easily measured [prestige]. Many individuals with individual and collective poles of interests are involved in the relation (industrial relations). Future cooperative behavior is anticipated [as between the players and management of a professional sports team]. The benefits and burdens of the relation are to be shared rather than entirely divided and allocated [mutual investment]. The entangling strings of friendship, reputation, interdependence, morality and altruistic desires are integral parts of the relation [a management firm and its artistic clients]. Trouble is expected as a matter of course (a collective bargaining agreement).<sup>51</sup>

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<sup>48</sup> G. WILLIAMS, A LAWYER'S HANDBOOK FOR EFFECTIVE NEGOTIATION AND SETTLEMENT 33-41 (1981) [hereinafter *LAWYER'S HANDBOOK*].

<sup>49</sup> *CONTRACTS, EXCHANGE TRANSACTIONS*, *supra* note 4, at 3.

<sup>50</sup> *Id.* at 13.

<sup>51</sup> *Id.*

It is extremely important to identify the existence of those characteristics and assess their impact in planning for contractual relationships. Therefore, a business lawyer must consider the nature of the relationships to be created by the contract. The definition and development of those relationships are necessary to a successful agreement. Failure to employ mechanisms, contractual or otherwise, that define, strengthen, and preserve those relationships, while at the same time providing for flexibility, may jeopardize the success of the agreement. A lawyer should not simply seek to negotiate an agreement; he should endeavor to create contractual business relationships that will maximize successful performance, preserve good faith, and encourage cooperation.<sup>52</sup>

Furthermore, many of the foregoing characteristics point to the expectation of change in contractual relationships. The business lawyer must realize that "change" in general does not merely affect the parties to an agreement. Changing circumstances of the parties often change their contractual relationships with one another.

Since contractual performance cannot be completely planned and problems are expected to arise,<sup>53</sup> it is important to mitigate the effect of any future disagreements of parties to the contract.<sup>54</sup> Thus, dispute resolution mechanisms, contractual, legal and otherwise, are an important aspect of relational agreements.<sup>55</sup>

The lawyer must be thoroughly familiar with the legal ramifications and requirements of executing the specific agreement. Aside from the application of conventional contract doctrines, it is necessary to consider discrete areas of federal and state law that govern the subject matter, activities contemplated and status of the parties to the agreement. Compliance with the regulations of administrative agencies and the ordinances of local government may be required. Common law doctrines such as those governing principal and agent liability may apply as well. A lawyer must also be wary of the few, but important, ethical and liability issues to be confronted in representing clients in any kind of negotiation.<sup>56</sup>

A lawyer cannot plan for negotiation wisely without an intimate knowledge of the legal framework or milieu in which the contract takes place. Intelligent applications of legal knowledge, therefore, become critical aspects of planning for negotiation.<sup>57</sup>

The nature of the relevant industry must also be considered. Every

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<sup>52</sup> See *supra* note 91.

<sup>53</sup> See *supra* notes 10 and 11.

<sup>54</sup> CONTRACTS, EXCHANGE TRANSACTIONS, *supra* note 4, at 253.

<sup>55</sup> See *infra* text accompanying notes 82-89.

<sup>56</sup> For an excellent discussion of these considerations, see: Wolfram, *Modern Legal Ethics*, Sec. 13.5; Negotiation (1986).

<sup>57</sup> CONTRACTS, EXCHANGE TRANSACTIONS, *supra* note 4, at 43.

industry has unique inherent risks which must be mitigated in order to maximize the potential success of the agreement. These risks are often manifested by the positions that parties take to protect their interests. If such risks are understood, the business lawyer will have a basis for evaluating the appropriateness and reasonableness of those positions.<sup>58</sup>

In addition, the business lawyer must understand the practical business considerations of his client. It is important to be familiar with certain terminology, industry standards, operational logistics and other practical considerations involved in conducting business within a given industry.

Finally, a business lawyer should have an understanding of the individual client's circumstances, objectives, policies, and specific business practices. Each business in a given industry conducts its affairs in a slightly different manner. These differences may be external or internal and may arise from managerial attitudes, market position, availability of resources, competition, past experiences or other factors. It is important to understand the manner in which considerations unique to the client impact upon proposed contractual relations. Such considerations may dictate the positions that must be taken regarding specific contractual issues.

All of these perspectives are invaluable in establishing objectives, identifying and understanding issues, evaluating positions and ultimately creating a successful business relationship.<sup>59</sup>

### C. *Preparing for Negotiation*

Preparation is the essential ingredient for successful negotiation.<sup>60</sup> It may be helpful to divide preparation into both long range and short range activities.

Long range activities are those that an attorney engages in to acquire the skills necessary to be an effective negotiator. It is obvious that such skills need to be developed by all lawyers. These skills include the knowledge of human behavior<sup>61</sup> (including a mature knowledge of one's self), abilities of perception that allow the negotiator to recognize and react to the needs of his opponent<sup>62</sup>, the ability to effectively

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<sup>58</sup> There is a great difference between identifying issues and understanding why issues exist. The former can be accomplished by a simple review of relevant contract forms. The latter can only be understood if one understands why a contractual term is given a particular treatment.

<sup>59</sup> For a very detailed treatment of pre-negotiation planning and preparation, see W. MORRISON, *THE PRE-NEGOTIATION PLANNING BOOK* (1985).

<sup>60</sup> *NEGOTIATION STRATEGY*, *supra* note 1, at 45.

<sup>61</sup> *COMPLETE NEGOTIATOR*, *supra* note 1, at 23, 43-54.

<sup>62</sup> *NEGOTIATION STRATEGY*, *supra* note 1, at 47.

communicate<sup>63</sup> (including the ability to actively listen), and the ability to utilize different techniques in adapting to various situations.

The business lawyer must constantly work to develop and improve effective negotiation styles and strategies. The optimum general strategy in business negotiations is to employ a selective combination of negotiation styles, such as cooperative, aggressive, etc., with the overall objective of being cooperative, trustworthy and tough.<sup>64</sup> In addition, it is important to focus on interests rather than positions, separate people from the problem, insist on objective criteria, and to be creative enough to invent options for mutual gain.<sup>65</sup>

The short range activities involve those preparations that are necessary to effectively negotiate a specific agreement. The following discussion identifies specific aspects of this vital activity. The reader should note that the previous section regarding an organizational concept to effectively consider the impact of change is particularly applicable here.

It is important to understand and analyze the business reasons for initiating any negotiations. The client's true objectives and priorities, whether disclosed or not, should be thoroughly explored. A comprehensive evaluation of alternatives, their consequences, and their ability to meet business objectives allows for flexibility and creativity in negotiations.<sup>66</sup>

In like manner, it is critical to thoroughly research the opposing party as well as the individuals who will be conducting the negotiations. The objectives, circumstances, personality, strengths and weaknesses of the other contracting party must be identified and analyzed.<sup>67</sup> This information may be obtained directly from the client, from trade articles and house organs and/or from business publications such as *The Wall Street Journal*, *Barron's*, *Forbes*, or *Fortune*. Information may also be released by the opponent in the form of budgets and financial plans, press releases, publications, reports, institutional advertising and officers' speeches. Other sources of information include knowledgeable third parties, industry experts, competitors, other contractees of the opponent, business reference sources such as *Dunn & Bradstreet*, *Standard & Poors*, and *Moody's*, the opponents past history, prior deals and government publications.<sup>68</sup>

The opponent's true objectives, priorities and possible alternatives

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<sup>63</sup> *Id.* at 50.

<sup>64</sup> LAWYER'S HANDBOOK, *supra* note 48, at 56.

<sup>65</sup> See R. FISHER AND W. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).

<sup>66</sup> P. SPERBER, THE SCIENCE OF BUSINESS NEGOTIATIONS (1979) 18 [hereinafter SCIENCE OF BUSINESS]; NEGOTIATION STRATEGY, *supra* note 1, at 52-59.

<sup>67</sup> NEGOTIATION STRATEGY, *supra* note 1, at 190-91.

<sup>68</sup> *Id.* See also. COMPLETE NEGOTIATOR, *supra* note 1, at 71-76.

must also be discerned.<sup>69</sup> In addition, it is important to have an understanding of the personality and psychological needs of both the other party and its negotiation representative(s). An awareness of how they think, react and any characteristic negotiation procedures, tactics and strategies is very important.<sup>70</sup> It must be noted that the goals, interests and positions of the opponent may be based on purely subjective criteria such as security, power or ego. Such factors must be uncovered because they are motivators.<sup>71</sup>

The concepts of leverage and bargaining power of both sides, as well as the importance of the agreement to each side, should be evaluated because they may be dominant factors in the negotiations and determine the proper negotiation strategies.<sup>72</sup> The time devoted to this type of research and preparation is well spent because this storehouse of information increases flexibility and creativity in negotiation.<sup>73</sup> It also allows the negotiator to take advantage of any new development in the negotiation, gain insight, and anticipate negotiation strategies of the other side.<sup>74</sup>

## VI. CONTRACTUAL PLANNING AND DRAFTING

Once an agreement is reached, the psychology of the moment is that of battle fatigue.<sup>75</sup> Nevertheless, there are still substantive details to work out. Once the basic terms of an agreement have been agreed upon, the contracting parties will have explicitly or implicitly committed themselves to make a good faith effort to negotiate subsidiary matters.<sup>76</sup> However, the process of reaching an agreement on subsidiary terms may be different than the negotiation of basic terms of the agreement. Often, the implications of basic terms will have a bearing on the treatment of subsidiary terms. Therefore, principled reasoning may be very effective in resolving subsidiary matters.<sup>77</sup> In other instances, the invocation of precedent may be employed. Past practices of the business client or customary treatment of such terms within a given industry may justify positions taken with respect to subsidiary matters.<sup>78</sup>

A business lawyer should, if possible, draft the agreement that has

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<sup>69</sup> NEGOTIATION STRATEGY, *supra* note 1, at 52-59.

<sup>70</sup> SCIENCE OF BUSINESS NEGOTIATION, *supra* note 1, at 20, 21, 69.

<sup>71</sup> NEGOTIATION STRATEGY, *supra* note 1, at 193.

<sup>72</sup> *Id.* at 192.

<sup>73</sup> *See supra* note 66.

<sup>74</sup> COMPLETE NEGOTIATOR, *supra* note 1, at 71-76.

<sup>75</sup> LAWYERS HANDBOOK, *supra* note 48, at 40.

<sup>76</sup> Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637, 669 (1976).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 671.

been negotiated. Contractual drafting involves reducing planning and negotiations to media of mutual communication.<sup>79</sup> Contracts should be drafted with careful attention to the audience that is likely to read them. This audience consists of the parties to the contract who need to understand their performance obligations and the performance they can expect to receive.<sup>80</sup> Moreover, the contract must reflect the considerations that have been previously discussed. Ian R. MacNeil has aptly referred to those considerations as the environmental circumstances of the contract.<sup>81</sup>

Subsidiary terms may create or otherwise affect benefits of the bargain that are received by the business client. Often they will not have been the subject of negotiations. Therefore, the business lawyer may, *if consistent with the spirit of the negotiations*, consider these provisions to be mechanisms which may mitigate risk, alleviate the impact of change, protect the client from various contingencies and maximize the likelihood that a client will receive the full benefits of the bargained for exchange. This is often possible because of the effect of fatigue, oversight, the invocation of precedent or the clients past practices and the desire to wrap up the deal.

In addition, contract drafting encompasses clauses relating to basic performance and risk issues. Performance planning identifies those issues which must be performed if the contract is to proceed to a successful conclusion as planned.<sup>82</sup> It also determines the manner in which contractual obligations are to be performed.

Risk planning pertains to those factors that have an adverse impact on the client. This involves any issues which would preclude the substantive bargained for exchange from being accomplished.<sup>83</sup> Risk planning often is evidenced in a contract by conventional clauses relating to warranties, representations, indemnity provisions, liquidated damage clauses and so on. However, business clients may prefer to take advantage of non-contractual risk avoidance techniques, such as insuring against certain losses or dealing with contractees of good repute.<sup>84</sup> Furthermore, businesses often adhere to two widely accepted norms which have a bearing on their reputation: commitments are to be honored, and products or services should be of a high quality.<sup>85</sup> Therefore, business contractees will

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<sup>79</sup> CONTRACTS, EXCHANGE TRANSACTIONS, *supra* note 4, at 39.

<sup>80</sup> *Id.* at 40.

<sup>81</sup> *Id.* at 41.

<sup>82</sup> *Id.* at 24.

<sup>83</sup> *Id.* at 25.

<sup>84</sup> Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 63 (1963).

<sup>85</sup> *Id.*



often avoid conduct which might interfere with continued successful business operations.<sup>86</sup>

Non-contractual sanctions and risk avoidance techniques exemplify an additional aspect of contractual planning. Decisions must be made concerning what to omit from the agreement. Every contract is necessarily partially unplanned.<sup>87</sup> These unplanned portions consist of an anticipation of future cooperation, or lack thereof, in taking actions necessary to the satisfactory performance of the agreement.<sup>88</sup>

The concept of change also applies to contractual drafting. Initial drafts of contracts are often subject to negotiation and therefore, change. The lawyer must carefully analyze the impact that a change in any clause may have on the other provisions of the agreement.<sup>89</sup> These basic contractual drafting considerations must be balanced carefully to avoid undue complexity, while at the same time ensuring that there is a sufficient amount of certainty present in the agreement.

Successful contractual planning and drafting contributes to the smooth and efficient accomplishment of the substantive bargained for exchange,<sup>90</sup> provides processes for resolving material disputes,<sup>91</sup> affords flexibility in the contractual relationships<sup>92</sup> and promotes cooperation and good faith.<sup>93</sup> The drafting aspect of negotiating relational contracts for small business clients may be the difference between a successful agreement and an unsuccessful one in the eyes of the client. Therefore, it is worthy of the same careful consideration that the business attorney must give to the other materials presented in this Article.

## VII. CONCLUSION

This Article has broadly discussed many considerations that a business lawyer must bring to bear upon the task of negotiating relational contracts for small business clients. The following outline represents a framework for managing such a complex endeavor.

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<sup>86</sup> *Id.*

<sup>87</sup> CONTRACTS, EXCHANGE TRANSACTIONS, *supra* note 4, at 39.

<sup>88</sup> *Id.* at 24.

<sup>89</sup> The author has had the memorable experience of discovering, upon such an analysis, that even the omission of a single word can drastically change the expected benefits of the contract.

<sup>90</sup> CONTRACTS, EXCHANGE TRANSACTIONS, *supra* note 4 at 24.

<sup>91</sup> *Id.* at 253.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

- I. THE CONCEPT OF CHANGE AND ITS IMPACT
  - [A] Strategies for Coping With Change
    - [1] Substantive Issues Arising From Potential Change
    - [2] Sensitivity to Indications of Change
    - [3] Insight into Impact of Change
  - [B] Techniques/Mechanisms for Coping with Change
    - [1] Interaction with other Professionals
    - [2] Legal and Non-Legal Resources
    - [3] Assess Client Appetite for Specific Risks
    - [4] Identify Client's Position Re: Change
      - a) Innovative—(creating change)
      - b) Anticipatory—(contingency planning)
      - c) Adaptive—(reacting to change)
      - d) Resistant—(opposing change)
      - e) No Position—(ignoring change)
    - [5] Impact on Planning for Contractual Relationships
      - a) Performance Planning
      - b) Risk Planning
      - c) Flexibility Planning
    - [6] Non-Legal Mechanisms
    - [7] Legal Mechanisms
      - a) Contractual
      - b) Non-Contractual
  - [C] Change as an Organizational Concept
    - [1] Broad Changes Affecting All Sectors of Business
    - [2] Change Arising from Business Activities
      - a) Nature of Activity
      - b) Nature of Product or Service
    - [3] Internal Change
    - [4] Change in Contractual Relations
- II. THE LAWYER/SMALL BUSINESS CLIENT RELATIONSHIP
  - [A] Relevant Characteristics of Small Businesses
  - [B] Business v. Legal Counselling
  - [C] Awareness of Client's Circumstances
    - [1] Needs
    - [2] Objectives
    - [3] Nature of Business Problems
  - [D] Ethical Considerations
- III. PLANNING FOR NEGOTIATION
  - [A] Negotiation Perspective
  - [B] Relational Perspective
  - [C] Legal Perspective
  - [D] Industry Perspective
  - [E] Client's Business Perspective
- IV. PREPARING FOR NEGOTIATION
  - [A] Long Range Activities

- [1] Effective Negotiation Styles
- [2] Effective Negotiation Strategies
- [B] Short Range Activities
  - [1] Client's Business Reasons for Contract
  - [2] Specific Objectives and Priorities
  - [3] Analyze Positions, Alternatives and Consequences
  - [4] Research Circumstances of Proposed Contractee
- V. CONTRACT PLANNING AND DRAFTING
  - [A] Subsidiary Terms
  - [B] Performance Planning
  - [C] Risk Planning
  - [D] Non-Planning
  - [E] Dispute Resolution

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