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BUSINESS PLANNING  
Financing the Start-Up Business  
and Venture Capital Financing



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# BUSINESS PLANNING: FINANCING THE START-UP BUSINESS AND VENTURE CAPITAL FINANCING

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For Philip, with love.

— TM

To my wife, Linnea McPherson Warren, my partner in all endeavors.  
If these words do not succinctly and clearly express my love, appreciation,  
and wonder at her willingness and desire to tirelessly rework  
and improve every sentence I wrote for this book, it is simply  
because this is the only part she didn't see first.

— DW

# PREFACE

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This casebook was inspired by the legions of law school graduates who sought to practice law as first-year corporate law associates, but who had no idea what it is that corporate lawyers *actually do*. We wrote this casebook for these students in order to bridge the gap between law school and practice as a transactional lawyer, much in the same way that the well-established Trial Advocacy course offered at our law school (as well as at most law schools today) prepares our graduates to “hit the ground running” as first-year litigation associates.

This casebook does not bear any resemblance to the traditional form of law school casebook typically used in upper-division law school courses. Indeed, in helping us finalize our manuscript for publication, one of our research assistants pointed out that our casebook does not include very many cases at all! This was done deliberately because our goal was to write a casebook that educates students regarding what is expected of them as first-year corporate law associates — whether they practice as a transactional lawyer on Wall Street or Main Street.

In order to expose law students to the expectations of senior lawyers supervising the work of first-year corporate law associates, this casebook adopts a simulated deal format that is designed to teach law students exactly what it is that transactional lawyers *actually do* in the context of planning a capital raising transaction. While transactional lawyers represent business clients in a wide variety of transactions, this casebook focuses on one type of business transaction that occurs on a daily basis out there in the real world: organizing and financing a new business. Since literally hundreds of thousands of new businesses are formed annually in this country, this type of transaction is likely to be a regular part of the professional life of those law students who plan to practice law in a transactional setting.

By using a simulated deal format, our casebook integrates (i) the teaching of new substantive knowledge about financing a start-up business venture with (ii) the development of the skills that are required for today’s law student to be prepared to hit the ground running in a transactional practice. In this way, law students will gain a real world perspective on the life cycle of a deal, as well as exposure to the kind of problems that typically arise over the course of a deal and frequently jeopardize its successful completion. In addition, use of the simulated deal format provides law students with a meaningful opportunity to identify and reflect on the ethical considerations that face the modern transactional lawyer, a particularly important concern in our post-Enron world.

This book is organized in a straightforward way. Chapter 1 introduces the client, a new technology business that is seeking start-up funding. The primary focus of the materials in this chapter is to describe the role of the lawyer and the lawyer’s relationship with the client in connection with representing an entrepreneurial business of any size — ranging from a small family-owned business to a large high-tech, start-up business.

The remaining chapters of our casebook are organized in a manner that tracks the evolution of our client's capital raising transaction. Thus, Chapters 2 and 3 discuss the issues that typically arise when entrepreneurs consider entering into a strategic joint venture with a larger well-established business that will contribute the necessary capital to launch the new business venture. The remaining chapters analyze the issues that typically arise in the course of planning and consummating a venture capital financing transaction.

We have tried to organize the casebook so that relevant topics are presented in a sequence that has later materials building on earlier chapters. By this sequencing and by including a fair amount of explanatory material, our casebook is organized on the fundamental precept that the law student who takes this course is curious about this subject, but has limited familiarity with the business world in general and with the life cycle of a venture capital financing transaction in particular. By introducing the topics traditionally covered in a course on Business Planning in terms that are accessible to the uninitiated law student, we hope to stimulate the law student's curiosity in this subject and to demystify what is often an intimidating and overwhelmingly jargon-laden body of law. Accordingly, the objective is to treat the topics covered in each chapter in a comprehensive, understandable, and yet intellectually challenging manner that combines both the theoretical and practical aspects of the subject matter area. In this way, our casebook combines theory and practice in order to prepare law students for the types of projects and challenges that they will confront in the first year of a transactional law practice. In addition, by using a simulated deal format, we hope to instill in the law student a sense of the inherent dynamics and fluidity of a capital raising transaction, thus allowing the law student to become an effective junior member of a law firm that represents start-up businesses.

To that end, this book includes a lengthy appendix that consists of many different types of documents that are typically prepared as part of a financing transaction. These documents are an integral part of the book, as the chapters make specific references to these agreements and ask students to review these agreements in order to give advice to clients, in a manner similar to what real-world corporate lawyers must do in advising their business clients. Thus, it is hoped that the text will stimulate class discussion of *both* the business and legal considerations involved in planning a capital raising transaction and at the same time provide law students with the opportunity to engage in practical problem-solving skills of the type required to be an effective transactional lawyer.

We hope that you enjoy teaching out of our casebook as much as we do. We would be delighted to hear from you with any criticisms or suggestions. With any luck, we hope to publish a second edition of this casebook in a few years and we will do our best to make the second edition better for both students and their professors.

*Therese H. Maynard  
Dana M. Warren*

Loyola Law School, Los Angeles, California  
March 2010

# ACKNOWLEDGMENTS AND EDITORIAL NOTE

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In our editing of the cases, articles and other materials included in this casebook, we have omitted most footnotes and case and statutory citations without indication. As to the footnotes that remain, the footnote numbers appear as they do in the original text, with no renumbering to take account of footnotes that we deleted. In addition, the formatting of headings does not necessarily correspond to the text of the original, since we made every effort for consistency of format within our casebook.

We are indebted to many persons for providing the impetus and encouragement to pursue this unusual and innovative casebook. This project never would have been conceived without many generations of law students (taught by Therese Maynard) and young corporate law associates (who sought guidance from Dana Warren), all of whom impressed on us the need to develop a course that would facilitate the young lawyer's ability to understand the life cycle of a typical capital raising transaction for a new business. We owe a debt of gratitude to those many law students who suffered through various drafts of this casebook as we experimented with our innovative approach to teaching the traditional Business Planning course. We are both eternally grateful for your patience, understanding, and feedback. This project is truly the better for having the benefit of your suggestions and guidance. In particular, we wish to extend a special word of gratitude to our colleague, Professor William Fischer of the University of Richmond School of Law, who was brave enough to teach his Business Planning course using our materials while our casebook was still in draft form. We are grateful to Bill for his insightful comments on our draft manuscript.

This book was inspired not only by our students, but also by the many fine business lawyers who gave us the benefit of their sage counsel as we sought to develop a casebook that would prepare law students to be ready to "hit the ground running" as young corporate lawyers in a transactional practice. We are particularly grateful for the insightful comments and generous contributions of Josh Armstrong, Mark Bonenfant, Randy Churchill, Molly Coleman, Jeff DuRocher, Scott Miller, and Bob Schroeder. In addition, we appreciate the thoughtful review and comments from serial entrepreneur Mark Goodstein and accounting guru Don Rudkin. Further, Linnea Warren sat through the entire course several times, which led to invaluable advice based on how it all looked from the other side of the lectern. She also devoted uncounted hours to editing and re-editing the drafts.

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- Callcott, W. Hardy & Abigail C. Slonecker, *A Review of Recent Sec Actions Against Lawyers*, 42 REV. SEC. & COMM. REG. 71 (March 2009). Reprinted with permission.
- Chandler, Stephanie L., *A Practical Guide to Raising Capital* (Law firm memo, (2004-2009)).
- Cox, James D. & Thomas Lee Hazen, *CORPORATIONS* (2d ed. 2003).
- Dzienkowski, John S. & Robert J. Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients*, 81 TEX. L. REV. 405 (2002). Reprinted with permission.
- Fenwick & West, LLP, *Guide to Starting A Corporation* (Law firm memo, 2009).
- Gartenberg, Edward, *A Review of Fiduciary Duties in California and Delaware Corporations*, State Bar of California, Business Law News, Oct. 2006.
- Gazur, Wayne M., *The Limited Liability Company Experiment: Unlimited Flexibility, Uncertain Role*, 58 LAW & CONTEMP. PROBS. 135 (Spring 1995). Reprinted with permission of author. All rights reserved.
- Gosfield, Gregory, *It's a Question of What's Binding: A Look at Letters of Intent*, 13 BUS. L. TODAY 55, (July/August 2004). ©2004 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
- Greenberger, James J., *Top Ten Legal Mistakes of Early Stage Tech Companies*, 10 BUS. L. TODAY 3, (Jan./Feb. 2001). ©2001 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
- Greguras, Fred M. & Blake Stafford, *2007 Update: Raising the Initial Funding for High Technology Companies in the San Francisco Bay Area* (Fenwick & West LLP Law Firm Memo 2007).
- Hamilton, Robert W., *Corporate General Partners of Limited Partnerships*, 1 J. SMALL & EMERGING BUS. L. 73 (1997).
- Herr, Mitchell E. & Stephen P. Warren, *Lawyer Liability: Why the SEC Should Clarify Policy on Its Actions Against Attorneys for Advising Clients*, 21 CORP. COUNS. WEEKLY (BNA) 200 (June 28, 2006). Reprinted with permission from BNA. Copyright ©2006 by the Bureau of National Affairs, Inc.
- Hofstrand, Don, *What Is an Entrepreneur?*, <http://www.extension.iastate.edu/agdm/wholefarm/html/c5-07.html>. Reprinted with permission.
- Hynes, J. Dennis, *Civil Freedom of Contract, Fiduciary Duties, and Partnerships: the Bargain Principle and the Law of Agency*, 54 WASH. & LEE L. REV. 439 (1997).

- Jacob, Valerie Ford, Stuart H. Gelfond, Michael A. Levitt & David A. Kanarek, *Key Considerations in Drafting a Registration Rights Agreement from the Company's Perspective*, 41 REV. SEC. & COMM. REG. 113 (May 21, 2008). Reprinted with permission.
- Jacobs, Jack B., *Entity Rationalization: A Judge's Perspective*, 58 BUS. LAW. 1043 (2003). ©2003 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
- Keller, Stanley, *Securities Enforcement: Searching Google for Meaning: Equity Compensation Pitfalls and a Changed Climate for Lawyer Responsibility*, 19 INSIGHTS 2 (August 2005).
- Kim, Young J. & Jeffrey L. Braker, *Taking Stock in Your Client: Strengthening The Client Relationship and Avoiding Pitfalls*, BUS. L. NEWS 1 (Issue 1, 2008).
- Klein, William H. & John C. Coffee, BUSINESS ORGANIZATION AND FINANCE 61-63 (4th ed. 1999). Reprinted with permission.
- Kleinberger, Daniel S., *Sorting Through the Soup: How Do LLCs, LLPs and LLLPs Fit Within the Regulations and Legal Doctrines?*, 13 BUS. L. TODAY 2 (Nov./Dec. 2003). ©2003 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
- Langevoort, Donald C., *When Lawyers and Law Firms Invest in Their Corporate Clients' Stock*, 80 WASH. U. L.Q. 569 (2002).
- Miller, Sandra K., *What Buy-Out Rights, Fiduciary Duties, and Dissolution Remedies Should Apply in the Case of the Minority Owner of a Limited Liability Company?*, 38 HARV. J. ON LEGIS. 413 (2001).
- Palmiter, Alan R., EXAMPLES AND EXPLANATIONS: SECURITIES REGULATION (4th ed. 2008).
- Palmiter, Alan R., EXAMPLES AND EXPLANATIONS: CORPORATIONS (5th ed. 2006).
- Pankey, David H., LaTisha O. Chatman, and Meredith Sanderlin Thrower, *Keeping Current: Securities – SEC Amends Rules 144 and 145*, 17 BUS. L. TODAY 28 (May/June, 2008). ©2008 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
- Peters, Philip, *The California Corporation: Legal Aspects of Organization and Operation*, vol. 31 CORPORATE PRACTICE SERIES (3rd ed. 2003). Reprinted with permission. Copyright ©2009 by the Bureau of National Affairs, Inc. (800-372-1033).
- Peterson, Victor & Alison N. Zim, *Corporate Directors, LLCs and Liability: It's Not Settled, But Caution Is Advised*, 12 BUS. L. TODAY 6 (July/August 2003). ©2003 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or

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- Robins, Martin B., *Recipe for an Overdue Change: Why Corporate Lawyers Sometimes Need to Give Business Advice*, 12 BUS. L. TODAY 6 ( July/August, 2003). ©2003 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
- Robins, Robert B., *The Fiduciary Duties of Directors of Corporate General Partners, Ten Years After USACafes*, 35 REV. SEC. & COMM. REG. 57 (March 27, 2002). Reprinted with permission.
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- Steele, Myron T., *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1 (2007).
- Wry, Charles A., Jr., *Choosing the Proper Form of Organization for a New Business Venture* (2009) (Morse, Barnes-Brown, Pendleton, PC, Law firm memo).

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