
EXECUTIVE'S GUIDE TO BUSINESS LAW

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EXECUTIVE'S GUIDE TO BUSINESS LAW

PREFACE

Executive's Guide to Business Law was written to help business executives make more effective use of legal counsel in today's highly regulated business climate. The book contains a modern discussion of the laws which concern business executives today. These laws are generally the new federal laws dealing with employee health and safety, consumer product safety, employee discrimination, product liability, warranties, environment, toxic substances, freedom of access to government information, current practices in antitrust enforcement, foreign corrupt practices, and international boycotts. In the past, books on business law have dealt not with these subjects but rather with commercial laws, including those covering the law of agency, contract, and corporations. These commercial laws are not dealt with extensively in this book because they are adequately covered elsewhere. *Executive's Guide to Business Law* also contains understandable explanations of some of the major and frequently encountered problems in the fields of securities law and federal income tax law.

Most lawyers feel that these laws are too complex and difficult to explain to business people in understandable terms and further, that they change so frequently that any such explanation would be out of date before it was published. To some extent this is true, but there is a certain baseline of information which has remained essentially unchanged in all these areas. While the details change, this baseline of information should prove useful to business executives trying to communicate effectively with their lawyers.

The book should help the reader identify situations where specific legal advice should be sought; it should facilitate communications between lawyer and business executives in talking about these problems and taking constructive actions. It is not intended to encourage business people to make their own legal decisions but instead to help them and their lawyers to communicate about these problems and to reach realistic and workable solutions.

Section 1 advocates a program of preventative legal advice—I call it posi-

tive legal help for management. The guiding thought in preparing the book is not to help you get out of trouble but to keep you from getting into trouble. Analogies can be drawn to medicine. Major responsibility for an individual's medical health rests with the individual—not with the doctor. Doctors can and should provide advice on how people can prevent illness and stay healthy. However, they cannot do it without the patient's full cooperation—indeed, the initiative almost always has to come from that individual. Certainly, doctors must treat specific illnesses as they appear, but this is not their sole function.

The same is true in business. Lawyers must deal with specific legal problems as they appear, but that should not be their sole role. They can and should provide advice on how to keep the business legally healthy, but substantial initiative on this front must come from management. Similarly, much of what is advocated herein cannot be done entirely by lawyers. To pursue the medical analogy, your doctor may advocate a program of physical exercise for you, but you are the one who must actually do the exercises.

The portion of the book which advocates this program of positive legal help for management charts a long course. Keep in mind however, that the longest journey begins with the first step, and it is neither necessary nor appropriate to do everything at once.

This book covers much, but not all, of the law relating to business. Those areas which it does cover represent the areas which are developing the most rapidly. The book is an excellent starting point for helping you and your lawyer keep your business healthy, and many lawyers will find it useful. However, it is not a substitute for specific legal advice nor for the more detailed publications which will be available to your lawyers. The book should be used to obtain a general understanding of the basic framework of the law on the subjects covered, and most of it should remain accurate for a number of years because I have tried to avoid specific discussions of fine points which might change.

The book is not intended to be critical of lawyers or of managers who use (or don't use) lawyers. However, in my judgment, the relationship between lawyers and their business clients has almost never developed into the close, constructive relationship which has developed between members of other professions. I have not attempted to assign any blame for this, but I do feel a problem is present and have therefore identified it. I hope this book contributes to the development of the lawyer/business relationship so that lawyers can continue to fulfill their obligation to be independent counselors as well as their obligation to provide positive, preventative legal advice.

An obvious question that will arise during the course of examining this book is the cost/benefit ratio of the kinds of preventative legal programs which are suggested. Almost everyone would agree in principle that all the programs I have suggested are desirable, but like many things that may be desirable, they may cost more than they are worth. This is a very important observation. It is the rare company that can justify full scale prevention/education programs in each of the areas of law discussed in this book. However, most companies will benefit from *some* of these programs, executed in varying degrees of detail and cost. Management and its counsel should work together to achieve a program that falls somewhere between the extremes of no preventative legal advice at all and burdensome and costly preventative programs that aren't justified by the company's risks. I hope this book helps the reader make these judgments.

A note about language in this book: The generic "he" is generally used but only for the sake of simplicity, and it is always intended to refer to both sexes.

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I would like to acknowledge the assistance of my mother, Mrs. Leona F. Hancock, in the typing of this entire manuscript through several drafts and in the preparation of the index.

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INTRODUCTION

This book is dedicated to the proposition that business executives who are affected by the law should know something about it and about the lawyers they rely on to interpret and apply it. It is based on the belief that business executives who know the fundamentals of the laws which govern the operation of their businesses will be better able to use their lawyers, will get better performance from them, and will move ahead of those who fail to do so.

The business world is already highly legalistic and becoming more so. Federal legislators are more inclined each year to tell business executives how to run their businesses, and state legislators are following suit.

While business executives need not and should not attempt to do their own legal work, those business executives who simply abandon the whole area to their lawyers are making a sad mistake. Nothing can take a bigger chunk out of company profits than a mistake in some of these legal areas. Nothing can sap the energies of management more than a serious legal entanglement.

For this reason, this book will be devoted almost entirely to "preventive medicine." It will show the business executive how to take maximum advantage of all the competitive flexibility the law allows while complying with the necessary rules and avoiding costly and energy-draining legal confrontations. It will also show the executive how to fit lawyers into his operation in the most efficient and economical manner.

Why is it necessary for the business executive to pay more than passing attention to these laws? After all, that's what the lawyers are for. Why not let them worry about it?

The answers are simple, yet overlooked by many business executives.

These laws present both problems and opportunities. Lawyers are trained to solve problems and not to take advantage of the opportunities the law allows. Indeed, law students in any good law school are given a copy of the *Canons of Professional Ethics* at the beginning of their education, and one of the most important of these canons is the one preventing the lawyer from soliciting business. Any lawyer who violates this canon is branded an "ambulance chaser" and scorned by his professional colleagues. Recent Supreme Court rulings allowing advertising by lawyers for some routine services will not change this basic attitude in the near future. Is it any wonder that lawyers usually render advice only when problems are presented to them? To go out and find the problems and turn them into opportunities goes against their training from their very first exposure to the law. To be sure, there are many lawyers who frequently render constructive advice to their clients without requiring the client to come after it. However, the executive who depends upon this and fails to exercise his prerogative to insist upon full and complete legal advice in all appropriate areas of business is not using all the tools he has available to help him do his job and to make his business more successful.

There is another fundamental problem—the communications gap. In far too many cases, there is a tremendous communications gap between lawyers and their business clients. Business executives sometimes do not realize that they have legal problems or that their lawyers might help them solve a problem or take advantage of an opportunity. They therefore go their own ways without legal advice and, far too frequently, either get into a legal situation which is difficult, costly, or embarrassing to get out of or fail to take advantage of a business opportunity because of their own belief that there are legal problems when, in fact, competent counsel could show them how to accomplish the desired objective with little or no legal risk. Lawyers are frequently guilty of contributing to this gap. Too many times, the corporate counsel will sit in his office and write memos which will not be read and could not be followed even if they were read. Often, what he should be doing is talking to the business executives who are actually dealing with the problem and finding out the business requirements so that a practical and constructive legal contribution can be made. In short, frequently the lawyer is guilty of an overly academic approach to business problems and sometimes gives advice which is of no value to the business executive who receives it.

Whose fault is this? Does it matter? Is your physical health your responsibility or that of your doctor? If you have had regular checkups for a number of years and then find out that you have developed a serious problem which, had it been discovered sooner, could have been remedied much more easily, can you blame your doctor? The answer may depend upon your communications with the physician. If you requested complete physicals periodically and fully disclosed any abnormalities you had noticed yourself, perhaps you can and should blame the doctor. But if you went to him simply for specific problems and asked him for specific help with those problems, can you blame him if you developed an unrelated problem and he didn't discover it? To pursue the analogy further, if you asked for a "complete physical" because you had been experiencing digestive discomfort but did not tell the doctor the precise nature of your concern or the theory that he was the doctor and he would find it in the "complete" physical you requested, would you be justified in blaming your problems on anyone but yourself?

The relationship between a business executive and his lawyer is not unlike that between doctor and patient. The patient himself lives with his body constantly and knows more about it than does the doctor—at least about when

and how it experiences problems. Lawyers, even business lawyers, are not business executives, and it is the rare lawyer who knows very much about the day-to-day operations of the business. It is therefore incumbent upon the business executive to make sure this information is provided if he expects the lawyer to render good service. If the executive fails to provide the necessary information, is it the lawyer's duty to pry it out of him? This is an unrealistic and unproductive argument. Communication is a two-way street, and when the one-way sign goes up there is going to be a problem.

THE QUALITY OF YOUR LAWYER

There are no two lawyers of precisely equal ability, and there are as many kinds of lawyers as there are kinds of people. Unfortunately, these include dumb ones, arrogant ones, those who are more concerned with making a buck than helping a client, and those who lack the fundamental human skills to make effective use of their legal abilities. There are also overworked lawyers who just don't have time to do the proper job for their clients. There are also an astounding number of lawyers who don't know the law. Fortunately, however, most corporate lawyers are bright, conscientious, ethical people who diligently try to do the best possible job for their clients and who maintain the highest professional standards regarding their own personal education and professional development.

There is a reason for this, and it is very simple. Most corporate law firms hire only students who have graduated very high in their classes from the best law schools and who, as the interviewers sometimes say, "have their heads screwed on right." The reason for this is, in turn, very simple. Corporate law firms need these kinds of people and can afford them. They need them because of the tremendous complexity of today's business world and because they must deal with business executives who are themselves very bright and able. They can afford them because they charge fees which will enable them to pay high salaries. Clients pay these fees because they know they need this high-quality help. Almost all corporate legal departments hire their lawyers out of these corporate law firms, and those who don't either hire the most able government lawyers they can find or use the same high recruiting standards used by the large corporate law firms. Thus, whether the corporation gets its advice from its in-house legal staff or from independent counsel, it is very likely to be getting advice from the cream of the crop and to be paying accordingly. This places a premium on using this high-priced resource efficiently.

It is true that there is a great deal of routine legal work which must be done and that it is not necessary to have the highest-paid Wall Street lawyer or the brightest Harvard Law School graduate do it. This, however, is not the kind of legal advice we are talking about at this point. We are talking about "corporate counsel," not about law clerks, and we will be talking about legal advice and not about routine legal work. This is another reason why business executives must appreciate the fundamental principles of law governing their businesses. If they do not know the difference between corporate counsel and law clerks, or between legal counsel and routine legal work, they run a high risk of either getting bad advice or wasting a great deal of money. Thus, we have a chapter titled "How to Use Your Lawyer," which will give some guidance on how business executives can get top-quality legal advice and, at the same time, not overpay for routine legal work.

THE ORGANIZATION OF THE BOOK

Chapter 1, "Positive Legal Help for Management," lists two approaches which the executive can use to get better and more cost-effective legal advice. The first approach is to list a series of sample "problems" which may be presented by today's legal climate. Each problem is then followed by a short paragraph which describes a possible "solution." Naturally, each of these problem/solution scenarios is considerably oversimplified, and in some cases the "solution" is simply to watch out for the problem. The remainder of the book will be devoted to a more detailed discussion of these and other problems and solutions.

Another approach which the executive can use to "audit" his legal function is to do it by statute. In other words, the executive simply asks his lawyers what exposure the company has under the various statutes which affect its business and what the lawyer is doing to minimize the risks and take maximum advantage of the opportunities.

Throughout this book, we will use the terms "legal counsel" or "lawyer" to refer to the company's in-house or outside counsel. However, the choice of whether to receive one's legal advice wholesale or retail is very important, and so the pros and cons of each system are discussed in Chapter 2, "Methods of Obtaining Legal Services."

A WORD ABOUT "LEGAL COMPLEXITY"

"Legal complexity" can mean a number of things:

1. It can refer to the drafting of the laws itself. The classic example is the Internal Revenue Code. The plain and simple truth, however, is that a detailed law is sometimes easier to understand and apply than is a simply worded one. Let's take two examples.

The complexity of the Internal Revenue Code is legendary. However, the overwhelming majority of day-to-day tax problems can be solved by consulting only the Internal Revenue Code and the Internal Revenue Service regulations thereunder. These are contained in three volumes. To be sure, the print is fine and the paper is thin, but the volumes are fairly well indexed, only a relatively small number of the sections are applicable to any one problem, and most tax lawyers know which ones they are.

Consider, on the other extreme, section 10(b)(5) of the Securities Exchange Act and section 1 of the Sherman Act. These are very simple statutes which can be quoted in a few words:

Section 10(b) It shall be unlawful for any person, directly or indirectly . . . to use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device. . . .

Section 1 Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is hereby declared to be illegal. . . .

However, it is submitted that the complexity of these two statutes is actually greater than that of the Internal Revenue Code. The reason is this: The Internal Revenue Code statutes and regulations—while sometimes difficult to read—usually contain an answer to the question. On the other hand, in the 10(b)(5) and Sherman Act, there simply is no *sure* answer except in the clearest of cases. Thus your lawyer may have to give you a less than certain answer, and this will involve the ultimate complexity—uncertainty. The true complexity of the law should not be measured by the wording of the statute.