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# COMPETENT COUNSEL

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**" A gold mine of helpful suggestions  
on how to choose, work with, and  
even fire your lawyer."**

**--Arthur R. Miller  
Harvard Law School**

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**ERWIN CHEROVSKY**

**Author of The Guide to New York Law Firms**

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# **Competent Counsel**

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**ERWIN CHEROVSKY**

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## *Prologue*

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If the seemingly endless jokes about lawyers are to be believed—or given their due—there is in the land vast resentment toward lawyers and unhappiness over the services they perform, the fees they charge, and the attitudes they adopt.

As a lawyer I repeat many of these same jokes in apparent good humor, but they often leave a bittersweet taste in my mouth in the retelling. The bad news about lawyer-client relations seems to overwhelm the many long, happy, trusting, and mutually beneficial relationships I have witnessed and know exist.

It cannot be denied that lawyers are responsible for much of the criticism through failing to communicate meaningful developments, using confusing language riddled with technical jargon, and charging substantial fees without any real explanation. But you, as the client, can help make your relationship with a lawyer more rewarding and meaningful by learning how to choose the right lawyer in the first place and understanding what you have a right to expect from that lawyer.

It is a shame—indeed, a perversion—when a client and a lawyer develop an adversarial relationship with one another. While this state of affairs cannot be avoided in all instances, it can at least be kept to a minimum if you, the client, have done your best job of selecting, retaining, and overseeing your lawyer. If

you do not expend some effort in selecting and monitoring your lawyer, chances are that one or more of the following problems will arise and fester:

1. There may be an improper fit between you and your lawyer; the lawyer is not competent to do the specific work required or is not particularly good at it.
2. The fee arrangement may not be fair, clear, or suitable for the specific work or it may be unfairly applied to the circumstances of the matter.
3. Your lawyer may not develop clearly defined objectives with you at the outset of a matter and as it proceeds; he may fail to inform you of developments in a meaningful way or may give spotty or incomprehensible reports, including invoices that do not adequately inform you of the type or the extent of the services performed.

Because so much of our personal and business activity is enmeshed in legal considerations, it is self-defeating for you to select incompetent counsel, to pay excessive fees, or to feel in the dark about what is being done on your behalf. While much of what lawyers do may appear mysterious or unintelligible, this book will show you how to obtain better and more responsible legal services by helping you to understand more clearly how to select, retain, and oversee your lawyer. There is no need to view your legal problems with the same fear and foreboding you have when you go to a periodontist for root canal work. The relationship can be satisfying and even enjoyable if

you are aware of what you are getting into and do not adopt a passive attitude.

To demonstrate the most common problems that tend to crop up in lawyer-client relations, I have created a unique group of clients, each with different types of problems. While many similar problems exist in the higher reaches of corporate America, I have focused my attention on the needs of middle- and upper-middle-class Americans and small and medium-sized businesses. The legal problems of the poor and very poor—who by definition cannot pay for these services—are not directly addressed in this book; they require a substantially different methodology and approach.

Each hypothetical client discussed in Chapter 1 represents a variation on the lawyer-client theme. While all the clients taken together, of course, do not nearly exhaust the various possibilities, they should help you to determine where you fit into the spectrum and what your own particular problems and solutions are. They should also give you an idea of just how complex a seemingly straightforward matter can turn out to be.

We will first consider the nature of legal problems and the ways in which they are addressed in the real world by looking at our hypothetical clients as examples.



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## Chapter 1

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# *An Overview: Legal Problems and Lawyers*

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When our children were young, my wife and I would talk—out of earshot of the children, we thought—about problems with our laundry, grocer, or mechanic. Invariably, one or both children would say, “You should sue them” or “Tell them you’re going to sue them.” I never intended to convey this bellicose attitude to my children, but I guess it is difficult to be a lawyer and not give others, especially impressionable children, the idea that lawyers are put on this earth either to sue people or to threaten suit. In reality, the great majority of lawyers do neither. Even those who specialize in lawsuits, called *litigators*, rarely see the inside of a courtroom.

Litigation aside, there are many problems in both life and business that are either not legal in nature or are too minor to involve the expense of a lawyer. Many of our problems have nothing to do with lawyers or legal redress: a lover’s spurned advances, the patronizing tone of a superior, the cutting remarks of a peer, rejection for office by voters. There are legal problems which, although real, are not worth engag-

ing counsel: the laundry burns a hole in your shirt, the grocer fails to deliver a package, the VCR breaks down two weeks after you purchase it.

Sometimes a matter is borderline, and it may be advantageous to have a lawyer draft a demand letter on your behalf or for your signature (e.g., protesting the purchase of a car that is a lemon and demanding repayment of the purchase price) or give you some guidance (e.g., the state or city agency with which to register a complaint and the procedure to follow).

Our hypothetical clients have substantial legal problems by any standard. How these people see their problems or articulate their needs would require guesswork, but their basic needs are clear.

**Tim Warden**, age 20, a junior at Big East College, is a 6'8" power forward who is also a strong defensive player. His teammates and fans refer to him as "Jordan Warden." He wants to leave school at the end of his junior year and be drafted and signed by a National Basketball Association team. Top Pro Group (TPG), a sports agency that provides legal, negotiating, promotional marketing, and insurance services, seeks to represent Warden and has asked him to enter into a six-month contract with a five-year renewal option.

Warden needs a basic understanding of the NBA rules relative to leaving college before the graduation of his class, the advantages and disadvantages of entering into a contract with TPG at the outset, advice on how best to modify its standard contract, and the parameters of negotiating an agreement directly with the club that drafts him.

**Iris LaBelle**, age 36, is executive vice president of Worldwide Investment Corp. (WIC), where she started 12 years ago. While with WIC, Ms. La Belle met and is about to be married to Larry Drive, age 24, the company's marketing director. She has learned that WIC's policy prohibits executives from being employed by the company if they are married to one another. In addition, she has learned that recently, Brian Eager, age 34, and Orrin Move, age 32, both of whom joined WIC two years ago as junior executives, have been appointed president and senior vice president, respectively.

LaBelle needs advice about the enforceability of the company's policy against married couples and whether Larry Drive can be considered an executive. She also needs to know whether she has a sexual discrimination claim against the company as a result of the recently hired executives being appointed to positions above her.

**Harry Lease**, age 68, is senior vice president and 50 percent shareholder of Victory-Line Corp. (VLC), an established and highly profitable real estate leasing company. He and Bill Victor, age 66, co-founded VLC 35 years ago. At that time they entered into a shareholders' agreement, which provides that members of the board of directors be appointed equally by both men. The agreement has been honored in the breach as much as it has been followed. Over the years Lease has made gifts that total 15 percent of the outstanding shares to Bob and Helene, his son and daughter, the maximum permitted by the agreement. For some time Lease and

*Victor have not seen eye-to-eye on managing VLC's affairs. Lease believes that Victor's use of the executive committee (Victor has been able to appoint a majority of the committee) is an effort to oust him from management of the company and violates the letter and spirit of their shareholders' agreement. Lease would consider retirement if he could give Bob, now executive vice president of the company, more stock and an equal say in the management of VLC.*

*Lease needs to know whether he has a claim for breach of his shareholders' agreement and whether he can prevent Victor from managing the company basically by himself.*

**Mike Paperone**, age 48, is president and owner of *Futuredesign, Inc. (FI)*, located in the South Bronx, which designs, manufactures, and distributes fancy wallpaper. FI regularly copies the designs of other companies. Recently Paperone received a letter from one of the companies whose designs FI had copied, charging FI with copyright infringement and unfair competition. FI intends to buy land in an industrial park located in a nearby dried-up swamp to construct a manufacturing facility. Over the years FI's policy has been to hire staff composed almost exclusively of black, Hispanic, and other minority groups.

*Paperone needs advice as to whether he is liable for copyright infringement. He also needs advice concerning the acquisition of real estate and compliance with environmental laws, negotiation of a*

*construction contract, and defenses against possible claims of discrimination in his hiring policy.*

**Ted Rock**, age 36, is seeking financing for his company *Rock Enterprises, Inc. (RE)*, which for three years has designed, manufactured, and distributed a "space age" sneaker called "*The Rock*." Sales have expanded from \$750,000 for the first year of operation to \$4.5 million for the third year with a current order backlog of \$7.5 million. Rock is seeking to obtain \$10 million either in venture capital or through an initial public offering of securities. A major purchaser/distributor of Rock sneakers has rejected a \$450,000 shipment because of its alleged totally defective quality and has obtained a temporary restraining order against RE's bank from honoring the purchaser's letter of credit. The slogan of the company: "*Durable as The Rock; High Flying as the Rockefellerers.*"

Rock needs advice concerning which financing route to follow, the enforceability of his customer's letter of credit, and defenses to possible infringing uses of his corporate slogan.

**Barbara Joint**, age 26, and **Mary Solo**, age 28, own a trendy and successful bar and restaurant on the Upper East Side called *The Sole Joint*. While they have been in business three years, Joint and Solo have no real shareholders' agreement between them except to split profits 50-50. Joint put up 85 percent of the initial capital. Recently, they received their third citation from the New York Liquor Authority for serving liquor to persons under age 21.

*The Authority is threatening to revoke their liquor license, which would eliminate substantially all the profits of the enterprise. For the last four months the restaurant has undergone a major renovation pursuant to an agreement with Sokum Contractors; several subcontractors have filed liens against the premises totaling \$130,000 for work allegedly performed but not paid for. Joint and Solo have rejected the construction work because they believed it was shoddy and not according to specification.*

*Joint and Solo need advice concerning formalization of their relationship and the legal status of their bar / restaurant. They also need advice about the risk of revocation of their liquor license and contesting and removing the liens entered against their business.*

It is part of American folklore that these matters could be turned over to an experienced and wise family counselor who would not only identify the legal problems involved but also would dig out the relevant facts, give prudent advice, and solve all the problems graciously and without too much difficulty, too much involvement on the part of the client, and too much cost. Alas, this is as uncommon today as the family doctor who is on duty 24 hours a day and who makes house calls for a modest charge and instantly cures all ailments. While sole practitioners still exist, the great majority of lawyers have declared (or undeclared) specialties or focus their talents on fairly narrow areas. Certainly, no single lawyer is equipped to deal effectively with the full range of problems besetting our hypothetical clients.



Each of our hypothetical clients needs at least one specialist and, for most matters, a team. There will have to be someone—either a specialist or a generalist—to coordinate and supervise the effort, if not conceptualize and inspire it, if there is to be a successful resolution of the problems. Identifying and analyzing problems, however, does not necessarily mean that they are resolved, particularly when there are people, companies, or regulatory agencies who oppose or contest our clients' goals.

Our clients will probably find that their interests are best served by selecting a small or medium-sized firm. Except for Warden, their problems appear too large for a single lawyer but not large enough for a big firm. It is also probable that entree to the firm will be through a lawyer with a significant, favorable reputation who is one of the firm's originators of business or "finders." Besides having lawyers with various specialties, these firms also have others involved in the process—"minders" (who supervise the matter and other lawyers) and "grinders" (the lawyers who grind out the papers and documents). Frequently, "finders" are generalists at the law. While there is no field called general law (unless the entire common law inherited from England could be called "general"), lawyers who map out appropriate strategy and direction and marshal the lawyers needed are considered generalists. Usually based on their experience and talent, their job is to see the big picture and identify and address the key issues involved in particular matters. The specialists, of course, provide a great deal of thought and give the finders their input on the matter. The goal—and obviously some lawyers