

Handling Legal Matters

Chapter 13

When a Handshake Isn't Enough

The Web site designer offered to create an Internet identity for the radio station. He and the station manager reviewed similar Web sites, outlined key information for the new site, decided to launch the site as soon as possible, and shook hands.

Final agreement, right?

Not exactly. Their discussion overlooked important issues such as what exactly is the business owner paying for? Design? Input of artwork? Audio and video links? And what does “as soon as possible” really mean? It is an old-fashioned concept: a business deal sealed with a handshake. But handshakes do not always hold up well in court.

Here are a few sound but simple steps to protect yourself in negotiating a contract.

- First, prepare an outline of all items to be covered in the agreement. Discuss each item with someone else in the organization; two heads are better than one.
- Avoid “do-it-yourself” contracts. Instead, talk with a lawyer—before you enter into the agreement, not afterwards.
- Get signatures. No agreement is final until both people agree to the terms and conditions and confirm it with their signatures. A court is more likely to dismiss claims that a verbal estimate or quote is a contract. Sometimes it is not. Only a piece of paper that has signatures, a date, and specific details of the arrangement can be considered a reliable contract.
- Be specific. What do I have to do? What do I get in return? How much will be paid and when? Are the deadlines realistic? If the contract doesn't spell out these details, a court will decide later what the contract “says” and this may not be what is intended.
- Clearly state the business terms. Clarify the definitions and put them in writing. This will avoid confusion and/or misunderstanding.
- Seek the advice of others as needed. For example, your insurance agent can guide you through liability/exposure issues, your accountant can calculate tax implications, and most importantly, fellow employees can ensure that you deliver on your promises—on time and on budget.
- A signed contract is a binding agreement. Keep an original, fully signed copy for your files. And shake hands—after the ink dries.

—by Neil W. Gurney, a partner in the business group of Ulmer & Berne, LLP, Cleveland.

When The Emperor Has No Clothes...

Remember the fairy tale where the emperor was hoodwinked by some con artists saying his new fabulous suit was spun with gold thread so fine that only the smartest subjects could see it? Remember how the emperor commented on how beautiful the suit was because he wanted to appear intelligent? Remember that everyone around the emperor told him how great it looked because they did not want to lose his favor? Remember how the emperor walked *completely* naked among his subjects until a young child yelled, “But the emperor has no clothes on!”

Unfortunately, family businesses sometimes resemble small kingdoms where the family members may be afraid to tell the founders the truth about a delicate subject for fear of being fired—or worse—cut out of the will!

As the family business’s legal advisor and counselor, the lawyer often will be in the position of telling the founder information he or she NEEDS to know, but may well not WANT to know. In fact, the attorney may be the *only* person objective or brave enough to tell the truth—such as, “Your son has a drug problem and may not be the proper choice for your successor,” or, “The amount you believe is right for the valuation of your family business is way too high.”

When advising a client, the law charges a lawyer with informing the client about what the law says, helping with decisions about future conduct and relationships, and being truthful.

Few attorneys enjoy being the bearer of bad news and few business owners enjoy discussing disagreeable matters. However, a business should depend on its attorney to be a counselor, a trusted adviser—the person who will always speak the truth—even if the information is unwanted or unpopular.

—*Beatrice E. Wolper, president of the Columbus firm, Emens & Wolper Law, LPA.*

What Is ADR and Why Use It?

Q: *What is ADR?*

A: ADR is the common abbreviation for Alternative Dispute Resolution, which refers to any method of resolving disputes without a customary courtroom trial. ADR can be as simple as a mutual friend helping to resolve a conflict between two other friends, or as complex as a private judge hearing an intricate patent lawsuit.

Q: *I've heard of mediation and arbitration. What do they have to do with ADR?*

A: Mediation and arbitration are two types of ADR. Others include mini-trials, summary trials, and private judging.

Q: *How does mediation differ from arbitration?*

A: Mediation is an informal process whereby a neutral mediator helps the parties negotiate a resolution to their dispute in a non-adversarial manner. Mediation is non-binding, and all decision-making authority remains solely with the parties.

During arbitration, a neutral decision-maker or panel considers the facts and evidence of a dispute and renders a decision. This decision may or may not be binding, and may or may not be appealed. Although arbitration is considered “adversarial” since the parties do not attempt to resolve the dispute themselves, it is generally conducted with relaxed rules of procedure and evidence.

Q: *What are the other types of ADR?*

A: Other types of ADR include mini-trials, summary trials, and private judging.

In a mini-trial, each party presents a short form of its case to the opponent in order to negotiate a settlement. A neutral advisor may preside and give advice when asked.

Summary trials are similar to mini-trials, except each party’s brief (summary) case is presented to an advisory jury. After the jury gives an advisory verdict, the presiding judge may help the parties to reach a negotiated settlement.

Private judges, who may be former judges or similarly trained individuals, are sometimes hired by the parties to hear a dispute. The private judge may use the same procedures and rules of evidence that would apply to a regular court trial, or may alter these rules. The judge renders a binding decision which may or may not be appealed, and the judge’s costs and expenses are paid entirely by the parties.

Q: *What are the benefits of using ADR (Alternative Dispute Resolution)?*

A: The benefits of ADR include speed, cost, and results.

Q: *Why is ADR quicker than a regular court trial?*

A: Because ADR (occasionally known as Accelerated Dispute Resolution) procedures generally are conducted in an expedited fashion, disputes often are resolved much sooner than if settled through a court trial. Preparation for a court trial often takes many months or even years, and the court trial itself can take weeks to complete. By contrast, ADR procedures usually are scheduled at the parties’ convenience, and generally are resolved in less than one day.

Q: How can I save money by using ADR?

A: Some of the expenses of regular court trials include filing fees and court costs, the cost of depositions, records and discovery, the cost of experts and attorney time, and the cost to the parties for loss of work, time, and inconvenience. While some of these costs still will be necessary with ADR, they almost always are minimized.

Q: What results can I expect from ADR?

A: Parties using ADR have a direct input into the process, and therefore, the results. This is particularly true with the non-binding forms of ADR. Even with the binding types, the parties themselves often have direct interaction with the individual who decides the case. ADR allows each party to tell his or her side of the dispute, and also to hear the other party's point of view.

—by Keith L. Faber, an attorney and mediator in Celina, and a member of the Ohio Senate.

Mediation Can Resolve Business Disputes

Q: What is mediation?

A: Mediation is a process of guided negotiations. A neutral individual, called a mediator, discusses a dispute or pending case with disputing parties and/or their attorneys in an effort to resolve it by mutual agreement. The mediator has no decision-making authority. Rather, the mediator serves as a discussion leader to help the participants negotiate more efficiently, and, hopefully, reach an agreement sooner than they could on their own.

Q: What is a mediator?

A: A mediator is an independent, trained neutral who works as a diplomat to help people settle disputes. A mediator may be a court employee, a volunteer lawyer helping a court, or a lawyer or other professional in private practice. Although many mediators are also lawyers, that credential is not required.

Q: What kinds of cases or disputes can go to mediation?

A: Just about any kind of case can be mediated. Courts use mediation for business contracts, intellectual property, real estate and land use disputes, employment matters, for collecting accounts, and for many other types of cases. Outside of court, neighborhood disputes, consumer complaints, land use, environmental, and many other types of disputes can be successfully mediated.

Q: Will the mediator issue a decision in my case?

A: No. The mediator can only help the parties and attorneys look at the case more objectively, discuss various options, review strong and weak points of each side's position, listen to each side privately, and help the participants find a mutually acceptable solution.

Q: What does the mediator tell the judge?

A: Next to nothing. The mediator will only tell the court whether or not the case settled. Also, mediation discussions cannot be admitted at trial.

Q: Should I bring witnesses and exhibits to the mediation?

A: No. A mediation is not like a trial or arbitration. While the attorneys, parties, and the mediator will discuss the evidence, there are no witnesses, no testimony, no exhibits, no objections, no cross examination, and no arguments. You may, however, bring documents that further explain, clarify or update the factual situation.

Q: Will I be expected to testify?

A: No. Mediation is a focused negotiation process. You will be expected to listen, participate in the discussions as appropriate, and make decisions for your business about how to negotiate and whether or not to settle.

Q: Can the mediator tell me what my case is worth?

A: No. The mediator is not there as a judge, jury, or arbitrator of the case. You and your attorney should evaluate your case and weigh the benefits of settling. The mediator, the attorneys, and the parties will, however, discuss the costs of going forward with litigation as compared to the benefits of settlement.

Q: Will the other side be there?

A: Generally yes. In a business case, the other party or a company representative should be present to give his/her view of the facts and make decisions about settling. If your case involves insurance, the insurance adjustor will be there representing the carrier. It is often important for parties to listen to and learn about each other's point of view on the way to a resolution. The mediator usually will meet separately with each side for private, more candid discussions.

Q: I want my day in court. Why should I settle?

A: You have every right as a citizen to seek a fair trial in court, but a trial is not the only legal choice available. More than 95 percent of all U.S. cases filed never go to trial. Some cases need a trial because of an unusual legal question, a factual dispute, or a serious disagreement about a fair settlement value. Before going to trial, you should consider factors such as time, expense, distraction from your business, disclosure of private business information like customer lists or trade secrets, court delays, possible appeal, the risk of a bad result, the facts of the case becoming part of a public record, and stress.

Q: What happens if we can't settle?

A: If the parties cannot settle at the mediation, several things might happen. The attorneys may agree to negotiate further later on, either with or without formal discovery. The mediator can schedule a follow-up mediation. Certain legal questions may need to be resolved by the judge through motions before further negotiations occur. Or the case could ultimately go to trial. There is no penalty or extra cost for using mediation, beyond the mediator's fee, if any. One of the strengths of mediation is that parties neither gain nor lose any rights or access to other means of dispute resolution if they try mediation first.

—by Harold D. Paddock, Esq., Columbus mediator and arbitrator.

Uniform Mediation Act Affects Business Dispute Resolution

Q: *What is the Uniform Mediation Act?*

A: Ohio's Uniform Mediation Act (UMA), which became effective in 2005, affects many types of mediation and is designed to provide for a uniform set of legal rules regarding mediation practices from state to state. The UMA can be found in chapter 2710 of the *Ohio Revised Code*, sections 2701.01 to 2710.10.

Q: *Why should I be concerned about the UMA?*

A: Mediation is being used more and more, both in and out of Ohio's courts, to resolve business disputes, and it is likely that even more disputes and cases will be mediated in the future. Knowing how the UMA affects mediation will be increasingly important for those companies that are participating in mediation.

Q: *What types of mediation are covered by the UMA?*

A: The UMA defines mediation broadly as any process where a third party neutral helps the disputing parties negotiate better. What is *not* covered by the UMA are collective bargaining in the labor field, school peer mediations, labor dispute mediations, court settlement conferences conducted by a judicial officer (judge or magistrate) who might make a ruling in the case, or mediations in a correctional institution for youths.

Q: *Who can be a mediator under the UMA?*

A: As defined in the UMA, a mediator is anyone who conducts a mediation. A mediator does not have to have special credentials or a license, but a mediator must be impartial. In certain situations, the parties to a business dispute can pick a mediator with a special background, like accounting, technology or finance.

Q: *In essence, what does the UMA do?*

A: The primary purpose of the UMA is to protect the private and confidential nature of discussions before, during, and after a mediation. This is important because, when people do not talk openly with the mediator and each other, the chances of a successful settlement drop. The UMA protects the privacy of the mediation discussions, and thus helps everyone reach a mutually beneficial resolution.

Q: *How does the UMA protect the privacy of talks in a mediation?*

A: The UMA creates a legal privilege for *mediation communication* (any statement made before, during, or after a mediation). A *privilege* is the legal ability of one person to block another person's testimony from being introduced in a later court proceeding. The mediator, all parties, and any other people present at the mediation (such as attorneys) have a privilege in varying degrees under the UMA to stop other people from revealing what was said at a mediation.

Q: *Can a person give up the protection of the UMA?*

A: Yes, a person can waive or give up his or her mediation privilege. It is important to remember, however, that all parties to a mediation are protected by the UMA. Even if all but one party involved in the mediation have given up the privilege, that one party still may choose to use the privilege to block certain testimony.

Q: Is everything said in a mediation protected by the legal privilege in the UMA?

A: No, certain topics or types of statements are legally excluded. For example, discussion regarding abuse of children or the elderly, crimes or threats of violence, and materials subject to public records laws, and signed settlement agreements are not protected from disclosure by the legal privilege provided under the UMA.

Also, the UMA does not stop or limit communications outside of court to third parties. If someone is concerned about protecting proprietary business information or trade secrets, for instance, the parties can enter into a confidentiality agreement before a mediation starts.

Q: What can a mediator tell a judge if the case is in court?

A: A mediator cannot tell a judge much at all. The UMA limits a mediator to telling a judge the following: whether or not the mediation occurred, who attended, and whether or not the case was settled. Beyond those points, a mediator cannot report, analyze, evaluate, or make findings or recommendations to a court or judge.

Q: Does a mediator have any obligations under the UMA?

A: Yes. A mediator must look into and reveal any potential conflicts of interest that might affect his or her impartiality, and, if asked, must disclose his or her qualifications as a mediator.

Q: Where can I learn more about the UMA?

A: The Internet has many resources on the UMA in Ohio. You can read the full text of the UMA at <http://codes.ohio.gov/orc/2710>. The Ohio Commission on Dispute Resolution and Conflict Management also has material on the UMA at <http://disputeresolution.ohio.gov/cc/confidentialitystatute.htm>. The Supreme Court of Ohio has information on the UMA at www.supremecourt.ohio.gov (type “UMA” in the search box).

–by Harold D. Paddock, Esq., Columbus mediator and arbitrator.

Can Foreclosure Mediation Help Me?

Q: *What is foreclosure mediation?*

A: Mediation is a process of guided negotiations. A neutral individual (*mediator*) works with the parties to a mortgage, with or without attorneys, to resolve the mortgage problem by mutual agreement before it reaches court, default judgment, or foreclosure sale. The mediator (even a mediator who is also an attorney) cannot give legal or financial advice to either side and has no authority to decide the case.

Q: *We bought a building for our business, but are now having trouble making payments. Why should our business mediate its mortgage problem?*

A: Mediation allows you to make decisions on what solution is best for your business. Many mortgage problems, whether caused by a sudden change in the terms of the mortgage, like a rate adjustment, or a change in your financial situation, can be resolved through good communication. An experienced mediator can help you create solutions. Right now, lenders are generally willing to discuss reasonable solutions, and mediation provides a more controlled, diplomatic environment in which to have discussions that, without a mediator, might be tense or difficult.

Q: *How does using foreclosure mediation differ from using a “debt relief” service?*

A: While some mediators volunteer their time and others charge limited fees for hours actually worked, there are no hidden or ongoing fees or costs associated with mediation and, in most cases, it only takes a few hours of time. “Debt relief” services, however, may charge excessive fees for modest results, and some are actual scams.

Q: *What is pre-suit mediation?*

A: Pre-suit mediation is a conference that is held before a lawsuit is filed. Once a suit is filed, it becomes a public record and anyone can get information about the parties. Credit reporting services monitor court records and note the filing of a foreclosure as a black mark on a person’s or corporation’s credit rating. Pre-suit mediation avoids a public record, saves expenses, and solves a problem (like non-payment) before it becomes worse.

Q: *Will the mediator make a recommendation to the court about our case?*

A: No. A mediator makes no decision or recommendation to the court. In fact, the mediator can only tell the court (if a case is already pending) whether or not the case settled. Mediation discussions in Ohio cannot be used at trial.

Q: *Should we bring witnesses and exhibits to the mediation?*

A: No. A mediation is not a trial. There are no witnesses, no exhibits, no objections, no cross examination, and no arguments. You may, however, bring documents related to your mortgage and financial circumstances.

Q: *Will the business owners be asked to testify?*

A: No. In mediation, everyone sits at the table as equals in a discussion. You are there to listen, participate, negotiate, and decide whether or not to settle.

Q: *Can the mediator help us with our case?*

A: No. The mediator may objectively identify certain problems for each side, and discuss the drawbacks of foreclosure versus the benefits of settlement. The mediator is

not there as a judge, jury, or arbitrator of the case, nor as an advocate or advisor for either side. You must evaluate your finances, cash flow, and the benefits of possible new mortgage terms.

Q: Will the other side be there?

A: Generally, yes. A lender representative with authority to settle and the current property owner(s) should be present and prepared to negotiate. The mediator usually will meet separately with each side for private, more candid discussions.

Q: Can we bring our attorney?

A: Yes. Under Ohio law, a party can bring an attorney or another support person to the mediation.

Q: What if we decide to give up our building and walk away?

A: If, after careful consideration, you decide to give up your place of business, you can return your mortgaged property to the lender through a *deed in lieu of foreclosure*. You can still mediate such issues as the date of turn over, when to move out, and any other obligations you may have.

Q: Can't we go to trial rather than settle?

A: You have the right to a fair court hearing, but foreclosure cases hardly ever go to trial. The judge usually decides foreclosures based on motions the lender files with the court. Each side should thoroughly discuss every factor before choosing to settle with new terms or go forward with foreclosure. Mediation allows you to explore settlement without risk, and with a trained mediator's help.

Q: What happens if we can't settle?

A: Everyone may agree to negotiate further, the mediator can schedule a follow-up mediation, or the case could ultimately go forward in court. There is no penalty or extra cost for using mediation.

Q: What are Ohio courts doing about foreclosure mediation?

A: The Supreme Court of Ohio, under the leadership of Chief Justice Thomas Moyer, has created a model program to help local courts start their own foreclosure mediation programs. Information about this model is available on the Web at: www.supremecourt.ohio.gov (type "dispute resolution - foreclosure" in search box). To see if the common pleas court in your county has adopted such a program, please contact the court administrator, the local bar association, or the clerk of courts. Please remember that asking for mediation of a foreclosure case pending against you does not automatically prevent a default judgment. You should contact an attorney to make sure you file an answer to the foreclosure complaint.

—by Harold D. Paddock, Esq., Columbus mediator and arbitrator.

Arbitrating Business Disputes: Plan Ahead

Litigators love going to court. But sometimes business people feel the courts do not give their case the attention it deserves. Arbitration can be an effective alternative in resolving commercial disputes. It is a private, confidential process that can be tailored to handle a particular controversy. The parties, not the courts, have virtually complete control over the process because the arbitration procedures are agreed upon when the business contract is drafted—*before* any dispute arises. Addressing the following issues up front can eliminate the need to litigate over them later.

Arbitrator(s)

Specify the number of arbitrators, identify them by name, or make sure they have particular qualifications. For instance, contracting parties might choose to have panels of three arbitrators hear disputes over a certain dollar amount, and to require that the arbitration panel include either lawyers or non-lawyers with a certain amount of construction industry experience.

Place of arbitration

Select a city roughly in-between the principal locales of the businesses. Or, to deter claims with little merit, the parties can agree that any arbitration demand must be heard on the other party's home turf.

Governing law

Specify which law will govern the merits of the dispute. The law of the state where the contract will be principally performed makes good sense. The parties should also specify the arbitration law that will apply.

Administration

Decide whether it is worthwhile to specify an administrator for the arbitration proceeding. While not without problems, an administrator *can* serve as a valuable buffer between potentially hostile parties and may be able to rein in an overzealous arbitrator.

Remedies

Set some limits on the arbitrators' powers, particularly with respect to the remedies available, such as curtailing the power to award punitive or consequential damages.

Arbitration can be effective in resolving business disputes when the contracting parties can agree on the basic rules that will govern the procedure. The key is to exercise the ability to control the proceedings before there is any dispute, since it may be much harder to come to terms after a controversy has arisen.

—by Anthony J. LaCerva, a partner in the litigation group in the Cleveland office of McDonald Hopkins LLC.

Three Keys To Dealing with Litigation

As a small business attorney, I often have clients who face litigation for the first time. Sometimes they choose to go to court and sometimes it is an unpleasant surprise. Either way, it is often a frustrating and tense time for a business owner unfamiliar with the process. Armed with a little information, however, a lot of stress can be eliminated.

The law may aspire to be fair and just, but it doesn't even try to be fast.

Recognizing the limits of the litigation process will go a long way to alleviating stress and preventing misunderstandings. Filing a complaint, obtaining service of process (delivery of your Complaint to the other party, a.k.a., the *defendant*) and receiving an answer from the defendant may take two months and much more if problems with service of process arise.

Once service is obtained, the other side has 28 days to respond to the complaint you filed. Do not get your hopes up. Extensions to this deadline are frequently requested and provided. You can reasonably expect to wait two or three months from the complaint-filing date to obtain service and receive the defendant's answer. Do not fret; there is more waiting ahead, and you will get used to it.

The answer is anything but...

You should understand that an answer is a very specific type of legal document. It generally contains denials of virtually every paragraph in your complaint and a laundry list of defenses that must be asserted so they will not be waived. This is just how answers are prepared; it is nothing personal. When you answer a complaint, you will do it the same way. If you know that an answer will be a flat-out denial of what you know is true, it may be easier to accept.

CMC, discovery, pre-trials, hearings, oh my!

Shortly after the answer is filed, the court generally holds a case management conference (CMC). This is a quick meeting (sometimes by phone) to select dates for the rest of the case. Your attorney will likely provide you with some or all of those dates, which will include dates for trial and discovery cut-off.

You should know that these are "best-case scenario" dates that likely will change depending on circumstances. For example, if the trial is scheduled for ten months from now, you can expect that it will be held a *minimum* of ten months from now and maybe significantly later. While you should calendar these dates, always contact your attorney before going to court to confirm that nothing has changed.

The *discovery* process (during which both sides learn information about the case) can take anywhere from a few months to years depending on the complexity of the case. Discovery, however, is the heart of the case and you, as a business owner, must give prompt attention to discovery requests from your attorney and from the opposing side. Cases are often won or lost based on discovery.

It is essential to provide your attorney with blemishes as well as trophies. Clients often believe that keeping a negative item from their attorney will benefit their case. Often, however, what you view as bad may not be that harmful to the case (and sometimes is not even relevant), and can easily be addressed if your attorney knows about it in advance.

Relatively small problems, however, can derail the entire case if your attorney was unaware of them and built the case on a foundation that was not firm. If the opposing party learns about the issue, it inevitably gets exposed at the most inopportune moment. Knowing of problems ahead of time, your attorney can present the strongest possible arguments and prepare for the other side's counter-arguments. Additionally, a business owner who lies during testimony or becomes evasive about a small, simply embarrassing matter can damage the business's credibility and change the outcome of the case in a way that is disproportionate to the embarrassing item's actual importance.

Be patient, be responsive, be upfront.

When approaching litigation, remember to: *be patient*, because the legal system moves at its own pace; *be responsive*, because dragging your feet on discovery requests and inquiries from your attorney needlessly delays your case and can work against you; and *be upfront* in your communications with your attorney about both the strengths and the weaknesses in your case. By understanding these principles and cooperating with your attorney, you will greatly reduce the stress and frustration that can come from litigation.

—by Jeffrey J. Fanger, the managing member of the Cleveland law firm of Fanger & Adelman LLC.

Divorce Victim: Family Business?

Divorce is the end of a marriage. But the divorce process and the divorce itself has fallout, including the family's business, the enterprise that provides the family's financial support.

Often the family's business is one of the largest marital assets. Generally, most of the family's wealth, net worth and support is tied to the family's business. At least one and often both of the partners in a marriage are owners, employees or participants in the family business.

When both spouses are working in the family's business, the personal and financial effect of divorce can be more severe than if only one spouse participates. If both partners are active in the family's business and working together, the divorce process itself can lead to many destructive forces invading the business from personal recriminations to financial feuding. Moreover, family businesses are not easily divided, so it is difficult for divorcing spouses to take a piece and "go their separate ways." Generally one partner gets to keep the business and pays the other for his or her share. Perhaps divorcing spouses' need for money and liquidity explains why, according to an October 31, 2005, *Business Week* article ("Good Divorce, Good Business" by Michelle Conlin), 10 percent of divorced spouses continue working together after the divorce.

Is it ever possible to prevent divorce from harming the family business? Perhaps not, but divorcing spouses can take certain steps to protect the business as much as possible so that it can continue to generate income for the newly separated family.

Preuptial agreements can also protect a family's business in some instances. Children who are in line to receive stock in the family's business should be urged to have a prenuptial agreement before they marry. While enforceability may be challenged and the judge may compensate divorcing spouses in other ways, setting a valuation procedure and dealing with later acquired stock and appreciation in stock owned at the time of marriage, can help to minimize disruption of the business if a divorce occurs.

Even with a prenuptial agreement, a necessary objective is to find ways to divide the business's wealth without actually dividing the business. For example, when adult children are working in the business and are the designated successors, this division sometimes can be achieved by giving part or all of the family's business to the next generation. In this way, both spouses find some assurance that the family's business wealth (or at least much of it) will not end up benefiting a new spouse. Moreover, assuming there are enough other assets, the divorcing spouses feel they have split the business by giving it to their children yet leaving the business intact.

Agreements among business owners can provide for mandatory buyback of ownership in the event of a divorce using a discounted valuation and/or extended payment terms in order to preserve the business and protect its assets. While a buyout may not work with a majority shareholder involved in a divorce, because it would shift control, it can be effective to protect the business when minority shareholders are involved in the divorce and can protect against having to sell assets or borrow heavily to pay off one of the divorcing spouses.

—by Charles R. Schaefer, an attorney with the Cleveland firm of Walter & Haverfield LLP.

Attorney Fees: What You Should Know

Q: I'm thinking about hiring an attorney to do some legal work for me, but I'm worried about the expense. Can I find out ahead of time how much it will cost?

A: Yes. You should ask your attorney about fees before asking him or her to represent you. In most instances, a written fee agreement spelling out information about payment of fees and expenses as well as billing procedures should be signed by both you and your attorney. This is especially important where the matter is complex or the representation is for an ongoing matter. Such an agreement should set forth the specific legal services to be provided by the attorney and the amount of legal fees to be paid by you, the client, for those services. The fee agreement should also set forth how expenses, such as court filing fees, photocopying, telephone calls, investigators, etc., are to be paid. Before signing a fee agreement, you should read it carefully and ask questions about any provision you do not understand. You also should ask for an estimate of the total charges that will be billed, and ask for monthly billing statements and written receipts for all amounts paid to the attorney.

Q: How do attorneys charge for their services?

A: Attorneys may charge for their services in one of several ways. Most legal work is billed at an hourly rate. Attorneys generally keep daily billing logs to record the time they spend working on behalf of their clients.

Sometimes, attorneys may charge a flat fee for a particular service. This method of billing is generally chosen for short-term legal matters such as a real estate closing or a matter involving a specific service, such as preparation of a will.

In certain types of cases, a lawyer may work on a *contingent* fee. In this type of arrangement, the lawyer gets paid for his or her time only if the client is successful in recovering money from a lawsuit. The payment, in this case, would be a percentage of the recovery. Your attorney would tell you ahead of time what that percentage would be. Contingent fee arrangements are made most often in cases where the client brings suit to recover for damages, such as personal injury caused by a negligent driver in a traffic accident. If the client is not successful in recovering any money, then the lawyer agrees not to take a fee for his or her services. However, the client may nonetheless be responsible for costs and expenses associated with prosecuting a case regardless of whether or not any money is recovered. Payment of costs and expenses also may be made contingent upon the recovery of money from the suit. This is, as noted before, a matter that should be discussed with the attorney beforehand and clearly set forth in the fee agreement.

Q: I called an attorney, who said she was unable to tell me exactly what it would cost for her services. Why couldn't she?

A: Often, lawyers are able to estimate how much time a particular legal matter will take to complete and, thus, are able to provide relatively accurate fee estimates. However, because each person's legal situation is unique, what appears on the surface to be a simple legal matter may prove more complex and time-consuming once the work has begun. Therefore, often it may be difficult for an attorney who charges an hourly rate to tell you exactly how much the work will cost.

—by the staff of the Ohio State Bar Association.

How To Get the Most from an Attorney-Client Relationship

Q: *How is an attorney-client relationship created?*

A: Generally, persons may consult with and be represented by an attorney whenever they choose. The client is usually responsible for the fees associated with the service. When a person hires or retains a particular attorney, and the attorney agrees to represent that individual, an attorney-client relationship is created.

Q: *How do I go about hiring an attorney?*

A: If you need an attorney and you do not know one you would like to hire, ask for a recommendation from friends, neighbors, or others whose opinions you respect. You may also contact one of the lawyer referral services operated by county and city bar associations across the state. To locate a list of lawyer referral services in Ohio, visit www.supremecourt.ohio.gov/attysvcs/lawyerreferral/default.asp. In selecting an attorney, you should take the same careful steps you would take when selecting another professional, such as a doctor or dentist.

Q: *How can I check an attorney's qualifications?*

A: Before hiring an attorney, you have the right to know that person's training and experience in dealing with cases similar to yours. Be sure to ask the attorney questions about his or her education, experience and qualifications. You may also ask for references from other clients and lawyers.

Q: *How can I be sure that the attorney I plan to hire is legally licensed to practice law in Ohio, and has not had any client complaints?*

A: You can find out if an attorney is licensed to practice law in Ohio by contacting the Supreme Court of Ohio's Attorney Registration Office at 65 South Front St., 5th Floor, Columbus, Ohio 43215-3431; phone: (614)387-9320; or by visiting the court's Web site at www.supremecourt.ohio.gov (select "Attorney Information" and then "Attorney Directory"). You can also find out if the attorney has been disciplined. To find out if there are any pending disciplinary cases against an attorney, you will need to contact that office. You cannot, however, find out if there are any *pending* complaints against the attorney *unless* there has been a *probable cause* finding by the Board of Commissioners on Grievances and Discipline. Only the Supreme Court of Ohio has the authority to restrict or end an attorney's right to practice law in Ohio.

Q: *What is a "consultation"?*

A: The first meeting with an attorney is frequently called a *consultation*. The attorney uses this meeting to evaluate the client's case, to assess whether the attorney is qualified to handle the particular case, and to determine whether the attorney can represent the client or whether some factor exists (such as a conflict of interest) that would prevent the attorney from taking the client's case. The client should use the initial consultation as an opportunity to get acquainted with the attorney; to discuss the attorney's background and training, how the attorney is to be paid, what expenses may be involved in the case, how and when the client can communicate with the attorney (*e.g.*, personally in the office, by phone, by e-mail or in writing); and to find out the names of all those persons who will be working on the case (*e.g.*, paralegals, associates, etc.).

Q: What is a fee agreement?

A: A fee agreement is basically the payment contract between the attorney and the client. Fee agreements should always be requested, and should always be in writing and signed by the client and the lawyer at the time the lawyer is hired. Such an agreement should, at a minimum, set forth the specific legal services to be provided by the attorney, the amount of legal fees to be paid by the client for those services, and when payment is due. The fee agreement should also set forth how other expenses, such as court filing fees, photocopying, telephone calls, investigators, etc., are to be paid. Before signing a fee agreement, the client should read it carefully and ask questions about any provision the client doesn't understand. The client also should ask for an estimate of the total charges that will be billed, and ask for monthly billing statements and written receipts for all amounts paid to the attorney.

Q: What are the attorney's responsibilities in an attorney-client relationship?

A: The attorney's primary task is to protect the client's legal rights. Attorneys must use their best efforts on behalf of their clients, but they cannot guarantee particular results in cases. Attorneys also must observe the ethical standards set forth in Ohio's Rules of Professional Conduct.

The attorney should keep his or her client informed of the status of the client's legal problem, and should provide copies of all correspondence and documents prepared on the client's behalf or received from another party. An attorney may not settle the client's case without the prior approval of the client.

Q: What are the client's responsibilities in an attorney-client relationship?

A: For the attorney-client relationship to work effectively, the client must be truthful in all discussions with his or her attorney. The client must give the attorney both the favorable and unfavorable facts pertaining to the legal matter, and must provide copies of all relevant information and documents to the attorney. The attorney must be informed of any changes in the client's situation. Clients must pay in a timely manner all legal fees earned by the attorney, and any other expenses or items agreed to in the retainer or fee agreement.

Q: How is the attorney-client relationship terminated?

A: In most cases, the attorney-client relationship is ended when the legal matter is concluded. However, with certain limitations, either the client or the attorney may terminate the attorney-client relationship at any time. This should be done in writing, and in accordance with any provisions contained in the retainer or fee agreement and, for the attorney, with the Rules of Professional Conduct. The attorney is entitled to be paid for the work completed before termination. The client is entitled to a refund of any unused or unearned fees paid in advance.

—by Janet L. Green Marbley, administrator of the Clients' Security Fund of Ohio. Updated by Gene Whetzel, general counsel for the Ohio State Bar Association.

Payback Time

Supreme Court of Ohio agency reimburses clients of dishonest lawyers

The person trusted with business secrets and personal information is your legal advisor. But every profession has its bad apples and, as with clergy, police, doctors, and teachers, there are a few unethical and dishonest lawyers.

That's no consolation to their victims, however, so the Supreme Court of Ohio has established a fund to compensate clients who have lost money or property as a result of the dishonest conduct of a licensed Ohio attorney. The Clients' Security Fund receives all of its funding from attorney registration fees.

Q: What types of losses are covered?

A: The Clients' Security Fund compensates losses resulting from the "dishonest conduct" of a licensed Ohio attorney. Dishonest conduct includes theft, misappropriation, or embezzlement of client funds or property. It does not include negligence or malpractice by an attorney or loans made to an attorney.

Q: Can I receive reimbursement of legal fees paid to my attorney?

A: Legal fees will be reimbursed only when the attorney fails to provide the services for which he or she was paid. Legal fees are not reimbursable simply because the client is dissatisfied with the services provided or with the results obtained.

Q: Who can apply for compensation from the Clients' Security Fund?

A: Almost any law client who has lost money or property as a result of a theft, embezzlement or misappropriation by his or her attorney may file an application for reimbursement with the fund. An attorney-client relationship must exist between the applicant and the attorney. A guardian or other representative of a claimant may file a claim on behalf of the client.

Q: How much can I receive as compensation from the Clients' Security Fund?

A: The fund can reimburse the full amount of the loss up to the maximum of \$75,000.

Q: How can I file an application for reimbursement with the Clients' Security Fund?

A: Application forms may be obtained by calling the following toll-free number: (800)231-1680 (in Ohio only). Applications may also be obtained online at www.supremecourt.ohio.gov/boards/clientsecurity/default.asp. The application must be filed within one year of the occurrence or the discovery of the attorney's dishonest act.

—by Janet L. Green Marbley, the administrator of the Clients' Security Fund of the Supreme Court of Ohio.

Lawyers Keep Clients' Confidences

Q: *Are lawyers required to keep secret the information learned during the attorney-client relationship?*

A: Generally, yes. The Supreme Court of Ohio recently stated: “A fundamental principle in the attorney-client relationship is that the attorney shall maintain the confidentiality of any information learned during the attorney-client relationship.” Three separate, but overlapping, rules protect information that clients give to their lawyers within the lawyer-client relationship.

- 1) *Confidentiality* – Under the rules of legal ethics, lawyers generally cannot *voluntarily* reveal information relating to the representation of their clients without their clients’ express or implied consent.
- 2) *Attorney-client privilege* – Under the rules governing the introduction of evidence in court, lawyers generally cannot be *compelled* to reveal communications with their clients. However, the attorney-client-privilege applies *only* when clients communicate confidentially with their lawyers in order to obtain legal service.
- 3) *Work product* – Under the rules of civil and criminal procedure, lawyers generally cannot be *compelled* to reveal written material that was created while working on their clients’ behalf to prepare a case for trial. When lawyers do legal research, take notes of witness interviews, or meet with other lawyers to develop strategies, the written material is called *work-product* and it is protected from disclosure by rules of both criminal and civil procedure.

The rules of legal ethics prevent lawyers from volunteering what they know; the rules on introducing evidence in court prevent lawyers from being compelled to tell what was discussed with their clients, and the rules of court procedure prevent lawyers from being compelled to reveal written information created for litigation.

Q: *Why are lawyers required to keep secret information relating to the representation of their clients?*

A: The primary reason is to encourage clients to provide their lawyers with all possible pertinent information—including possibly embarrassing or damaging information—that may be relevant to their legal problem. Full communication allows lawyers to determine what is or is not relevant to their clients’ case. The confidentiality rule protects clients from being penalized for consulting with lawyers and telling their lawyers as much as possible about the matter.

Q: *Is information transmitted by electronic means protected by these secrecy rules?*

A: Yes. Lawyers and clients may exchange confidential information by e-mail, fax transmissions, cellular phones, cordless phones, text messaging, video conferencing, and other electronic means. Generally, lawyers may communicate with clients by e-mail without encryption or other safety measures, but enhanced security measures may be required for any form of electronic communication transmitting exceptionally sensitive information.

Q: Can a business organization, as well as a natural person, be a client?

A: Yes. The rules requiring lawyers to maintain confidentiality of their clients' information apply to both natural persons and to entity clients such as corporations, partnerships, and unincorporated associations.

Q: When lawyers represent business organizations, do the organizations' constituents—the owners, officers, directors, trustees and employees—also become the lawyers' clients?

A: No. Organizational clients are legal entities, but they can act only through their constituents. Lawyers, who are employed or retained by organizations, represent the organizations acting through their constituents. Lawyers employed or retained by an organization owe allegiance to the organization, rather than to any constituent or other person connected with the organization. Constituents of business organizations do not automatically become clients of the organizations' lawyers. When a business entity's constituents, acting in their organizational capacity, communicate with their organization's lawyers, they cannot expect the entity's lawyers to keep these communications secret from their client (the business entity). However, lawyers must keep those communications confidential within the business entity, subject to the permitted and required disclosures of confidential information set out below.

Q: Who holds the attorney-client privilege when business organizations that are represented by lawyers are dissolved?

A: When a business organization is a client entitled to invoke the attorney-client privilege and the organization has been dissolved, the attorney-client privilege extends to the last board of directors or their successors in interest, or to the trustees or their successors in interest.

Q: Can clients keep facts secret by telling these facts to their lawyers and then relying on the attorney-client privilege to prevent discovery of the facts?

A: No. The attorney-client privilege protects only *communications*, not facts. Clients cannot hide facts by telling them to their lawyers. What is privileged is the content of the communications between the clients and their lawyers. What clients say or write to their lawyers is privileged. The facts about what clients knew, did, or failed to do are *not* privileged.

Q: Are there exceptions to the three "secrecy rules"?

A: Yes, and the exceptions are detailed and complex. Here is a summary of some of the most important exceptions.

- **Confidentiality**

Ohio lawyers **may** *volunteer* information relating to the representation of their clients when the clients give "informed" consent or when it is implied that the disclosure is authorized in order to carry out the representation. In addition, lawyers **may** *volunteer* information relating to the representation of their clients if the lawyers reasonably believe it necessary to: 1) prevent reasonably certain death or substantial bodily harm; 2) prevent their clients or others from committing a crime; 3) mitigate substantial injury to financial or property interests resulting from their clients' commission of illegal or fraudulent acts for which their clients have used their lawyers' services; 4) obtain legal advice about their own compliance with the lawyer disciplinary rules; 5) claim or defend in controversies between lawyers and their clients, defend against criminal or civil claims based on conduct in which their clients were involved, or respond to

allegations in proceedings concerning the lawyers' representation of their clients; and 6) comply with other law or court orders.

- **Attorney-client privilege**

In Ohio, there are three basic *exceptions* to the attorney-client privilege that *permit* lawyers to disclose information when it is compelled by judicial process.

1) The *crime-fraud exception* applies when clients have used their lawyers' services to commit a crime or fraud. 2) The *testamentary exception* applies in Ohio when competing claimants are asserting claims through a deceased client and the dispute addresses their deceased client's competency, or whether their deceased client was the victim of fraud, undue influence or duress. 3) In Ohio, lawyers may testify by the *express consent* of their clients, or, if the client is deceased, by the expressed consent of the surviving spouse or the executor or administrator of the deceased client's estate. There is no requirement that the surviving spouse, executor or administrator must make the same decision about waiver that the decedent would have made.

Under the common law there are four major ways in which clients may be deemed to waive the attorney-client privilege: 1) *waiver by disclosure* – revealing privileged documents or privileged communications; 2) *waiver by failure to object* – when a lawyer fails to object to a question that calls for privileged information; 3) *waiver by attacking their lawyer's work* – clients who sue their lawyers or former lawyers for malpractice waive the attorney-client privilege for communications relevant to the malpractice action; 4) *waiver by putting the advice of counsel in issue* – lawyers may reveal their communications with their clients when their clients' defense against criminal charges is that they relied on their lawyers' advice that the conduct was lawful.

- **Work product**

Sometimes the opposing party may obtain parts of a lawyer's work-product if that party has *substantial need* of the materials and is unable to obtain the information in any other way.

Q: Are there instances when lawyers are required to reveal their clients' secrets?

A: Yes. In Ohio, there are two general rules and one rule specifically related to representing business organizations that *require* lawyers to disclose information relating to the representation of their clients.

- 1) Lawyers have duties of candor to the courts. If the lawyer, the client, or a witness for the client has offered false evidence and the lawyer later learns of its falsity, the lawyer must take "reasonable measures" to remedy the situation, including, if necessary, disclosure to the court. In addition, lawyers in adjudicative proceedings must take reasonable measures to remedy the situation, including, if necessary, disclosure to the court, when they know that their clients or other persons intend to engage, are engaging, or have engaged in criminal or fraudulent conduct relating to the proceeding.
- 2) Lawyers must be truthful in statements to others. When representing clients, lawyers must disclose material facts when disclosure is necessary for lawyers to avoid assisting their clients' illegal or fraudulent acts.

- 3) A recent Ohio rule provides that lawyers for organizations are to proceed as is necessary in the best interests of their client organizations when the lawyer knows or reasonably should know that an owner, officer, director, trustee, or employee of the organization is acting, intends to act, or refuses to act in a manner that is 1) a violation of a legal obligation to the organization, or 2) a violation of law that reasonably might be imputed to the organization and is likely to result in substantial injury to the organization. More specifically, if it is necessary to enable organizational clients to address the matter in a timely and appropriate manner, lawyers *must* refer the matter to higher authority within the organization, including the highest authority that can act on behalf of the organization.

This rule only requires lawyers to report within the organization, *i.e.*, *report up the ladder*. It does not require or permit lawyers to report outside the organization, *i.e.*, *report out*. Nevertheless, one of the two general rules requiring disclosure of information still may require lawyers to disclose information outside the organization.

—by Lance Tibbles, a professor of law at Capital University Law School in Columbus.

Paralegals Aid Attorneys and Clients

Q: What is a paralegal?

A: A paralegal is an individual who works under the supervision of an attorney, performing legal work which an attorney would ordinarily perform for a client. Paralegals work in law offices, in corporations and for government agencies. The number of paralegals in the United States has been increasing over the past 30 years, and is expected to continue to rise.

Q: What is the difference between a paralegal and a legal assistant?

A: There is no difference. The title is a matter of personal preference.

Q: What types of legal work can paralegals perform?

A: Paralegals can interview clients and witnesses; research facts and the law; and draft wills, trust agreements, contracts, pleadings and other legal documents. Paralegals are most extensively used in the litigation area where they take an active role in drafting motions, briefs and interrogatories. Paralegals also assist lawyers in the courtroom by organizing and tracking exhibits and preparing witnesses to testify during the trial.

Q: Can a paralegal perform legal work directly for clients?

A: Paralegals cannot engage in the practice of law. Paralegals may not give legal advice to clients or represent clients in most courts. Because paralegals are not licensed to practice law, performing legal work directly for clients would constitute the unauthorized practice of law in violation of state statute.

Q: Are communications with a paralegal covered by the attorney-client privilege?

A: Yes. As agents of the lawyer, paralegals are required to maintain client confidences. Information provided by a client to a paralegal during the course of representation by the attorney may not be shared with others.

Q: Can a paralegal appear in court on behalf of someone other than himself or herself?

A: A legal assistant cannot represent clients in contested matters in the courtroom. There are some administrative agencies that will allow paralegals to represent individuals at the administrative hearing stage. If the final order of the agency is appealed to a court, however, the individual would need to obtain a lawyer for representation.

Q: How can a person become a paralegal?

A: At the present time, no state licenses paralegals. The Ohio State Bar Association (OSBA) offers a voluntary credentialing program for paralegals. An individual who meets the eligibility requirements and passes a written examination will be designated as an "OSBA Certified Paralegal." The two national paralegal associations, the National Association of Legal Assistants and the National Federation of Paralegal Associations, also have a voluntary certification process for paralegals. Although there are no formal educational requirements for paralegals, numerous colleges, universities and proprietary schools throughout Ohio and the nation provide paralegal education programs leading to a paralegal degree or certificate. The American Bar Association (ABA) has an approval process for paralegal education programs whereby a program can gain the ABA's approval if it meets a strict set of quality standards.

Q: What do paralegals do to enhance the legal profession?

A: Attorneys enhance the legal profession's ability to provide legal services to clients at affordable rates when they use paralegals. By delegating work which would have been done by the attorney (whose cost to the client would have been billed at a higher rate), lawyers have made paralegals a vital part of the legal profession.

—by Laura C. Barnard, an attorney and Director of Paralegal Studies at Lakeland Community College in Kirtland.