GAINER LAW

Making Agreements or Forming A Business

When "Do-It-Yourself" Can Be "Do-IN-Yourself"

by Stephen R. Gainer

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I don't think a year of my law practice has gone by without my meeting a new client who planned to avoid "unnecessary legal fees" by either getting a "free version" or a "cheaper version" of a needed document from someone other than a full time experienced lawyer, or by just ignoring the need for such a document and "winging it" with verbal promises between that client and his or her business counterpart. And now that new client is in my office hoping I can "repair the damage" created by the original document, usually requiring a time

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The examples arise in all areas of my work.

A

A new client comes in presenting me with a corporation he had formed years ago, using a Las Vegas, Nevada "document factory" which sold him corporation formation documents without first getting the background of his situation (including determining whether he even needed a corporation) and then providing elevant advice. My client wanted to form the corporation with himself as sole owner ("shareholder") based on my client's view (again with no advice from the "document factory") that he could then perform his services for his clients as an employee of his corporation and if he were sued for any mistakes in his work his clients could only get money from his corporation (in which little money was to be placed) and not from my client.

The "document factory" sent a form of "steps-to-take" instructions which my new client overlooked, and one of the steps was to file a corporate report document annually with the California Secretary of State, or face a $250 penalty for each year of late or non-filing.

My client had never filed the annual corporate report document and so the California Secretary of State "suspended" the corporation (taking away the right of the corporation to sue anyone or even defend itself if it was sued) and the client owed years of annual $250 penalties to that government agency.

Also, my client had never taken either the initial formal steps or year-by-year follow-up steps which are critical to making a corporation an effective "shield" against exposure of an individual to suits for that individual's errors, and which can be critical in upholding the income tax status my client took, through his tax advisor, as a corporation instead of as an individual in business for himself.

My client then paid me for cure work resulting in fees over three times what my original fees to form the corporation AND give the client "corporate ongoing care and maintenance" advice would have cost PLUS my client had to pay the $250 per year penalty fees.

Moreover, my original fee would not have been higher than the fee charged by the "document factory".

And even worse news yet for my client, had the client come to me for an initial consultation of an hour or so I most likely would have advised the client NOT to do his work through a corporation since he could be sued directly by his unhappy customer for any claimed errors made by my client whether my client made the errors as an individual contractor or as the employee of his corporation. So one hour spent by my client with me at my hourly rate would have saved my client thousands of dollars and a lot of headaches.

B

Another client came to me in a dispute with his business partner, a fellow doctor, involving their business relationship with respect to a commercial office condominium they owned together. They had used an attorney to prepare documents for a sale of the other doctor's medical practice to my client with the other doctor retiring, and these documents provided that both doctors would continue to own the commercial office condo together, with my client paying what would be 'half rent' to the other doctor since the other doctor owned one half of the condo (but in what is called in law an "undivided interest" since no physical boundaries had been set for the "half" the other doctor owned). The buyout documents stated simply that the doctors would have the 'half rent' leasing arrangement, and that a more thorough document covering the leasing arrangement would be prepared at some point.

Undoubtedly to "save money on attorney fees" the two doctors never got around to having a laywer prepare the tourough written lease covering topics such as a rent increase formula in future years, how the retired doctor could end the lease of his one-half "undivided" condo interest, steps to take if either doctor wanted to sell his "undivided" half interest in the condo office suite, payment of repairs to the condo since my client was the co-owner putting 'wear and tear' on it, etc. When my client came to me the two doctors were having a dispute over what would be a fair current rental figure for the retired doctor's one-half interest in the condo, and since neither doctor could agree the retired doctor was now beginning a lawsuit to evict my client from the retired doctor's one-half interest which (again) under the law had no physical boundaries but was a formless onehalf interest in the entire condo office suite.

Both the retired doctor and my client began lawsuits against each other, with attorney fees amounting to well over $100,000 for each party, and the lawsuits were finally dropped or "settled" by the doctors entering into a lease for the retired doctor's one-half condo interest which they could have prepared years earlier.

C

A family came to me because they were now facing a lawsuit by a man whom the family had committed to selling their deceased father's store building to. The family had been told to come to me much earlier so I could prepare a sale agreement, but the family wanted to "save on attorney fees" by taking up their real estate broker's offer to give them a "free" sale agreement.

Unfortunately this broker was unaware of California probate laws which would have permitted the family to approve the sale by a mere vote of the family members without the need to get probate court approval after a time-drawn-out court hearing, so the broker provided an agreement giving the building buyer time to get purchase financing within a deadline of 60 days after such a hearing. The family quickly agreed to sell to the buyer and the broker notified the astonished buyer who then begged for more time because, relying on the loose wording of the broker's sale agreement, the buyer expected "breathing time" until a court hearing approving the sale (maybe 90 days or so) and then the 60 more days to get needed financing. So the family members, having agreed to the sale with

needed financing. So the family members, having agreed to the sale with no requirement for court approval, now threatened to seek another buyer, and the current prospective buyer was about to sue because he felt the family just wanted to try to get a higher sale price.

I managed to resolve the dispute on the brink of filing of a lawsuit by the frustrated buyer, and my fees were five times what they would have been had the selling family come to me to prepare the sale agreement which would have provided accurate time lines for the buyer to complete his purchase.

D

I am often visited by first-time clients who are in disputes with their business co-owners and my clients assure me that they and the co-owners "are not partners" because "to save on attorney fees" they never signed a written partnership agreement. The disputes involve one co-owner wanting to leave the business, or wanting to bring in others as co-owners, or wanting to change the allocation of work among co-owners or the share of business profits of co-owners.

Of course in California and probably every other State when two or more people go into business they are automatically partners if they haven't placed their business in the form of a corporation or other formal entity, with all required documents in place. And they do have a partnership agreement: it is given to them "free of charge" by the California legislature (labeled the "Revised Uniform Partnership Act") and it may have a lot of consequences which neither the client nor the client's business counterparts like and which they could have avoided had they had a knowledgeable lawyer write an agreement with provisions they both might prefer including provisions which would probably have headed off their dispute.

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What these clients and so many others did not realize is that almost no relationships which are meant to be understandable and supportable later on

— either by the participants in the relationship

— or by a judge or someone else asked to enforce the terms of the relationship

are best formed by a "one size fits all" or "cookie-cutter" approach, or are best formed without the supporting "advice or counseling services' of an experienced and wise lawyer.

There are several reasons for this.

- the use of "cookie-cutter" language often means that portions of a document are framed with needless and easily misunderstood "legalese" in an effort to cover all kinds of variations in circumstances among people, while a well-tailored document may be able to avoid this by just focusing on the variations likely to come up with these particular people.

- the low cost legal assembly line documents or the do-it-yourself documents are missing the follow up "actions to still take" checklists which can be a critical part of getting documents to achieve the intended goals.

- such documents are not supplied to users accompanied by an adequate investigation, through consultations or correspondence, of the user's particular needs for inclusion of special document language or exclusion of certain language, so the documents may fail to meet the special needs of the user or may provide for consequences not needed or desired by the user or his counterparts in the project.

- the provision of these documents without such adequate investigation deprives the user of the benefits of an experienced attorney's advice on the "what ifs" or "contingencies" that may come up and that ought to be examined now between the client and his or her counterpart. At this time such "what ifs" (what if one person dies or becomes disabled or wants to quit the joint activity or changes marital status; what if payments agreed now to be made to or by the client or counter-party appear some years from now to be unfair to either side when measured by general market or economic conditions) can be viewed calmly and evenhandedly because the "what ifs" have

not occurred and so are "context neutral" -- for example, it is not known who will become disabled so now is a good time to explore what would now seem to be fair treatment if any of the parties to a relationship become disabled or want to sever ties with the relationship. But later on when the "what if" becomes a "now its happened" great mutual bitterness can arise because of the different and never-expressed expectations of the parties (not earlier planned for at the "context neutral" time) regarding such events.

Morever, since such events were not dealt with in the documents governing the parties' relationship, the parties often can't at the later date agree on how to amicably deal with the event and so the parties push each other into a lawsuit in which lawyers have to spend a lot of time arguing what "ought to be" the answer to the "what if" that has happened, and a judge has to make a difficult decision with no guidelines from the signed documents.

- the provision of these documents without such adequate investigation deprives the user of the benefits of an experienced attorney's advice on related issues not directly covered by the documents but which come to the attorney's attention during the investigation. For example, a discussion between client and attorney on a business project calling for certain documents may trigger in an experienced attorney's mind questions about indirectly related "personal life" topics that ought to be taken into account either now or at a later date (marriage or other companionship relations, parent-child relations, etc.).

"An ounce of prevention is worth a pound of cure." It is better to face the "burden" of paying a wise, experienced, and practical lawyer "up front" for well-written documentation and guidance on a business relationship instead of paying many times more in attorney fees to undo or re-arrange that relationship, now turned hostile, later on. Such documentation and guidance provides:

- making sure a client and his or her counterparts understand the consequences of the "deal" they want to get into.

- making sure all aspects of a project such as formation of a business meet all needs of each participant and meet all government requirements;

- making sure there is continued follow-through in meeting government requi-

rements;

- considering possible "side topics" not directly tied to the project for which documents are needed, but which are significant and ought to be considered now or soon.

- putting a relationship on a strong footing likely to preserve cooperation and good feelings between participants, instead of paying multiple times more later on to resolve a bitter dispute arising from lack of foresight and lack of preparedness for eventualities.