PLAYING TO WIN

Olaide A. Banks

This is an abridged version of the book entitled "Playing To Win" by Olaide A. Banks.

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A Note From The Author

This excerpt is packed with what I believe is the most important information that every business owner needs to know about protecting their assets. Many business owners are strapped for time and have difficulty committing to read a book of several hundred pages. This e-book is only twenty-five pages.

I challenge you to read this book! When you read this book, you will be confronted by certain aspects of your business that you have ignored. Please push through. Don't stop reading when it becomes uncomfortable. Growth is uncomfortable.

I challenge you to treat your business like a business. It is too easy to treat your business like a job – a place you go every day and put in the time. When you treat your business like the money-making machine that it is, your business will flourish.

I challenge you to keep growing! Don't settle for less, don't settle for the ordinary. If you have a question or comment, please feel free to call me at (832) 582-8289 or email me at obanks@banks-attorneys.com.

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INTRODUCTION – PLAYING TO WIN

Each year, about 627,000 businesses startup, and each year about 600,000 businesses fail. They either die a slow painful death taking the owners' dreams and fortunes with them, or they take the quicker and slightly less-painful route of dissolving in bankruptcy.[i] In both scenarios businesses are dying as fast as they are being born.

Whatever happened to small business being the backbone of the American economy? The apparent negative growth rate of American business is not caused by a lack of ingenuity or desire.

My experience tells me that the cause is a lack of balance.

This book is designed to help you - the business owner - achieve the critical balance necessary in their business. It is easy for you to get caught in trap where you view their business through the eyes of an employee – where the business becomes just a job and you never have the time to step back from the day-to-day and focus on what makes your business work.

I have fallen into that trap myself on more than one occasion. As a business owner, you will need to find the right balance of:

1. Being involved in your day-to-day business activity,

2. Being a strategist – one level removed from the every day activity of your business, and

3. Being a visionary – seeing beyond the horizon of your current business situation to the future you envision for your business and personal wealth.

The right balance varies for each business and for each individual. Some of us in business naturally prefer to focus on the day-to-day, some focus on dreams at the expense of the operations of their business, and some of us live in the strategic realm – constantly analyzing this and that until we get nothing accomplished.

When you achieve the right balance for your situation your business will flourish! You will lose that feeling of spinning your wheels in the mud. You will overcome the doubts and uncertainties that cause you to become unproductive. You will have the alertness and awareness to catch blind spots that threatened your business in the past.

The critical balance that we want to achieve is between the day-to-day revenue producing activities of the business, and some of the other financial, legal and strategic aspects of our business that are less glamorous and often overlooked.

There are hundreds of books on the market dedicated to castigating the legal profession, and explaining why lawyers and lawsuits are killing American business. This is not one of those books.

Litigation is a business reality.

If you do not maintain the appropriate balance of strategic and operational involvement in your business, litigation will "creep up" on you. When you maintain the right balance, you will have the ability to anticipate and plan for litigation events and take the appropriate steps to mitigate your risk.

Very little is accomplished by complaining about litigation so we will leave the complaining to others.

My approach will be to focus on the strategies and behaviors that will help you to succeed in your business, avoid the common conflicts that lead to litigation, and position yourself to succeed if you encounter litigation.

Businesses that achieve long-term sustained success are those that master the topics covered in this book, along with the day-to-day management and revenue producing activities.

If the business model for your business does not work, there is very little that this book or any other resource can do for your business. If your business model is broken you need to either fix the model or get a new one. For a great resource on evaluating your business model read *Business Model Generation* by Alexander Osterwalder and Yves Pigneur.

According to a recent research study commissioned by the SBA Office of Advocacy, and conducted by the Klemm Analysis Group, legal disputes can have a devastating impact on small businesses.[ii] The cost of litigation for most small business disputes can range from $15,000 for smaller disputes to over $150,000 for larger disputes.

The study found that:

1. Litigation is costly to business owners – costing both time and money,

2. Litigation negatively alters the way that small businesses do business,

3. Litigation causes emotional hardship within small firms,

4. Litigation can kill the momentum of a business,

5. Litigation diverts funds that could be used for investment and growth, and directs them to activities that may offer little or no value to the future of the business.

The Klemm study also found that the above outcomes held true whether the small business was the plaintiff (the party filing the lawsuit) or defendant (the party being sued) in a lawsuit.

While not all instances of litigation will cost $100 thousand, the impact of business disputes can still devastate your business' bottom line.

SCORE[iii] compiled a list of the top ten reasons why businesses fail, and they can be reduced to one of three general problems:

1. Unfocused or distracted management,

2. Inadequate financing, or

3. Failing to utilize professionals.[iv]

Throughout this book I will help you to focus on the right things, identify the right professionals to get the job done, and position your business to obtain the right financing to capitalize on transactions.

In Section I of this Book, we look at the basic mind set of a winning business owner. I draw from my experience in dealing with some very successful people over the course of my career as a CFO and an attorney. I also provide some actionable negotiation strategies that lay the foundation for some of the discussion later in the book.

In Section II, I explain eight of the most prominent mistakes that business owners make, and provide you with actionable steps to avoid these mistakes.

Below are eight deadly sins that many business owners commit:

1. Not using professionals to negotiate commercial leases,

2. Entering one-sided subcontracting agreements,

3. Forming partnerships and LLCs without detailed agreements,

4. Making and receiving poorly documented loans and investments,

5. Not having the right amount and types of business insurance,

6. Failing to be proactive in dealing with the IRS and state agencies,

7. Passively responding to legal threats, and

8. Overlooking the need for a defined exit strategy.

This book will help new business owners to avoid many of the mistakes that will ultimately sink many of their competitors. This book will also help experienced business owners to re-focus and re-sharpen their approach.

If you are ready to change the game, then read on.

Let's play to win!

THE WINNING MINDSET

"*It is the mind that maketh good or ill, that maketh wretch or happy, rich or poor.*" [v]

A 2010 article in U.S. News and World Report revealed that 71% of "C-suite" executives in Fortune 100 companies had held some senior level position overseas prior to holding their current position. That number was up from 48% just ten years earlier. The article went on to explain that large corporations now see international experience, and in particular, success in working in a culturally diverse environment as a major asset. Contrast the current professional expectations with prevailing wisdom from the 1980s. In the 1980s an international assignment was often considered career limiting for a rising executive.[vi]

Today, all major companies understand that basic survival, market share growth, and many of the new ideas and technologies will come from outside the U.S. or through cross border collaboration. Successful businesses today understand, like the merchants of old, that success at home will involve expansion and trading abroad.

To get to this point, these companies have had to study and focus on where the opportunities for growth lie in their business and industry. They had to develop a plan for entering and being successful in international markets. They have to develop and keep people who understand the social, cultural and legal intricacies of each of the markets that they will enter. And they have to ensure that their leaders demonstrate sensitivity and respect for employees and stakeholders of the company both at home and abroad. There are also many companies and industries that have taken the denial approach, and are failing or have failed.

As a small business owner, you have to make the same commitments that successful CEOs in large corporations make. The four commitments that make up the winning mindset are:

1. Commitment to studying and focusing on the actions and skills that will make your business successful,

2. Commitment to developing, refining and executing a strategy and plan for your business' success,

3. Commitment to building the right team, and

4. Commitment to creating and fostering an attitude and culture of success within your company.

In his book *The Power of Focus*[vii], author Jack Canfield outlined ten strategies to help business people gain the focus and perspective that they need to achieve excellent results in their personal and professional lives. Canfield is also a co-author of the *Chicken Soup For the Soul* series of books. In "*The Power Of Focus,*" he drives home the first commitment that business owners must make for their businesses to thrive and sustain success - the commitment to focus on the success of their business. According to Canfield, our habits are the best evidence of what we are focusing on. And it is what we do consistently that determines the outcomes we achieve.

So many business people just seem to let business happen to them. They attribute the success of others to luck or privilege, and attribute their own difficulties to the economy, bad employees, government regulations and a whole host of other external factors.

During the past 15 years we have had two major global economic crises. The first major crisis was largely driven by a collapse in the residential mortgage and real estate market between 2007 and 2011. The COVID 19 pandemic gave rise to the economic crisis that began in March 2020. The scope and scale of the COVID 19 economic crisis has been unprecedented, effectively bringing a wide range of industries to a grinding halt.

With each economic crisis there tends to be a set of lessons learned, and a shift in thinking based on the fundamental causes of the crisis. The 2007 mortgage crisis caused banks and regulatory agencies to more closely scrutinize loan documentation and validation practices. The Federal Government responded with increased regulation in the lending sector and consumer protections. In many of the economic crises and collapses that we have endured over the past 100 years, beginning with the Great Depression in the early 1930s through the 2007 mortgage and real estate collapse, the major shifts hat we have made as a society have been to increase regulation and oversight.

The COVID 19 economic crisis has been different. The major takeaway, thus far, has not been the need for more government regulation and oversight, but instead a major realization has been the need to build more predictive and resilient businesses.

True, some traditionally "brick and mortar" and production businesses did not have the option of taking their workforces remote or virtual. But many businesses had been doggedly resistant to the integration of technology that might have allowed them to begin take advantage of the cost-savings, improved efficiency, and even greater accountability associated with remote work, telecommuting and broader adoption of communication technology.

Resilience and forecasting are the themes of the moment and they will become even more important in the years to come. How you think about your business, and what you focus on in your business, is as important as how much you know. In other words, focusing on the right things at the right time is much more important to your success in business than knowing a lot about things unrelated to your business.

For most of us in business, we haven't yet achieved the right balance. We tend to look ***"without"*** when we should be looking ***"within"*** and vice versa. When our business seems to be going well, we tend to give ourselves too much credit, and when our business is not doing well we tend to cast too much blame on external factors.

The winning mindset is much more than positive thinking. It involves diligent planning, thorough preparation, definite action, precise execution, and consistent monitoring of results. The winning mindset is a about committing to do what we know we should be doing. We prove our commitment by making the right moves consistently, even when we don't see the immediate results.

According to Drs. Thomas J. Stanley and William D. Danko, in their book, *The Millionaire Next Door*, approximately 20% of the American workforce is self-employed (business owners), yet they make up about two thirds of American millionaires. Sounds great right? There is more. The American workforce consists of about 154 million workers. So there are approximately 30 million business owners in America.

There are about 3.5 million households with a net worth of at least $1 million. Working under the assumption that two thirds of millionaires are business owners, we can estimate that there are about 2.3 million millionaire-business owners. We have already stated that there are about 30 million business owners, so about 8% of business owners are millionaires. While being a millionaire is not the only measure of success in business, it is a quantifiable measure of business success.

The question is: what is going on with the other 92%?
There could be several factors or reasons why 92% of business owners have not achieved a very high level of financial success in business. Below are some of the potential reasons:

1. They haven't been in business long enough,

2. Their business or industry is not highly profitable,

3. They're really not highly motivated by profits,

4. The economy is always up and down,

5. Taxes are too high, or

6. Foreign competitors are undercutting American businesses.

I tried my best to come up with some plausible factors or reasons why people who are in business might not achieve their highest potential level of financial success.

Reason number one makes some sense. Rome wasn't built in a day, and neither are profitable and sustainable businesses. Yet, every business owner should have a plan and a business model that will allow them to achieve defined, financial results in a specified period of time. The fact that things rarely ever go according to plan is not a good reason not to make a plan.

Reason number two is a little shaky, but the reality is that some industries are less profitable than others. Diamond miners and oil and gas companies probably have better profit margins than neighborhood convenience stores. Yet there are some convenience store owners that do make large profits.

It is up to the convenience store owner to develop a business model that drives profit. How closely have the convenience store owners studied the key metrics in their business to help them make the best decisions?

In just about every sector, you can find some businesses that are just getting by and others that are succeeding on the highest level. There are people cutting lawns and making $200 per week, and there are landscaping companies grossing $50 million per year in revenue. There are contractors making $2,000 per month cleaning office buildings, and there are janitorial companies grossing $30 million per year in revenue.

Reason number three is where we really start to wobble. In the past, I chaired a business roundtable, where I inevitably got the uncomfortable look of disbelief when I reminded the members that a business is supposed to be a money-making machine. You can use your business as a vehicle for social good, to provide employment opportunities for people, and to teach life lessons to your children. But ultimately your business is about making money. If it were not about making money, you could teach your children important life lessons in another way. You could volunteer in other organizations and be socially responsible in that way. You could get a job as a guidance counselor or as a recruiter and help people find jobs in that way.

Unless you embrace as a core belief that your business should be a money-making machine, it is almost impossible that you will run a profitable business. Your business can and arguable should be all of those other things, but it must primarily be a money-making machine.

Reason number four is where the house of cards falls flat and we begin to encroach on the territory of politicians, pundits and other empty vessels. In every down economy, there are millions of people who continue to succeed on a very high level. In 2010, when the airline sector was being crippled by fuel prices, Southwest Airlines was able to thrive and remain profitable when fuel prices were up and the economy was down. While big name carriers that fly internationally bragged about “only” losing $90 million in the fourth quarter of 2010, Southwest reported substantial profits. That is because Southwest Airlines is designed to succeed and be profitable in any market.

While other airlines could only brag about decreased losses, and were only able to do so increasing baggage fees, Southwest continued to let "***bags fly free,***" not charge ticket change fees, and still made healthy profits.

Southwest has a business model that is designed to be profitable. They don't just hope to be profitable. They operate in a way that will almost ensure their profitability.

Every business' business model should take external factors into consideration. Those external factors might include: government regulations; advances in technology; fuel cost; shifting demographics; or any other of a long list of factors. Whatever the external factors, if they are likely to impact your business, they should be considered as you refine your business model.

In 2012, as the volume of foreclosures remains steady and the housing market is flooded with an additional supply foreclosed homes, it has become more difficult and time consuming to sell a house. The supply has increased and the demand has either decreased or remained flat. Many real estate agents have already fallen out of the industry, yet there are others who continue to make money. In 2005, you basically need little more than a pulse and a business card to do very well at selling new homes in Texas. A lot has changed since then. My opinion is that the people who were professionals in 2005 and had a well thought out plan for their business are either still out-performing their peers in the real estate market today, or are succeeding in another industry. Yet in my law practice I encounter many former real estate agents and mortgage brokers who have no discernable skills, but complain about how the terrible market has put them out of business.

Reason number five is another favorite. It always amazes me when business owners who are running unprofitable businesses complain about the IRS and the tax burden.

I say this with all due respect, in America if you're running an unprofitable business then you're not paying a whole heck of a lot in taxes.

That's just the truth. There are payroll taxes and unemployment taxes that businesses pay, and some states have aggressive tax structures, but most of the anger is directed toward the IRS - and as much as it pains me to say this - the IRS' tax structure is not bad if you're not making that much money. If you're running a highly profitable business, then you may have a legitimate gripe with the IRS and the tax code. But if you're not profitable, you might be best served channeling your energy into creating a profitable business model so that you have something to complain about. If you lose money, not only do you not have to pay Federal Income Taxes, but you also get to carry your losses forward to get a tax credit.

I am reminded of "Joe The Plumber". During the 2008 presidential election cycle, Joe emerged at a political rally and captured the imagination of many Americans. Joe portrayed himself as a small business owner suffering under an oppressive tax code. It caught the nation's attention because many of us accept the narrative that excessive regulation is a significant factor holding back small businesses. It turns out that not only did Joe not own a business, but he wasn't even a licensed plumber. The key is this as business owners we can't allow ourselves to get caught up in the emotion or sensationalism on any side of the political spectrum. Our charge is to create a good business, perfect the plan for the business, and implement it.

If I haven't lost you yet, then I think we're well on our way to getting some real value for you in your business. We are still working on the mindset.

Reason number six is another interesting and politically charged possibility.

If your business is one that is being impacted by low prices from foreign competitors, then the question is what are your options? The American people have already voted with their wallets and have said that they will buy the lower cost products that meet their needs, pretty much regardless of where the goods are made. Some people pay a premium for extra perceived quality. Some will pay a premium for luxury brands. Some will pay a premium for convenience. Some people will pay a premium for the "*Made in the USA*" logo.

The reality is that if the competitive pressure you face is based on low prices in the market, for products of about the same perceived quality, then you've got a problem. The odds are that the problem won't be solved for your business by tariffs or government intervention. Either because the government regulation won't work, or it will take too long to work. Again, what you are facing is a either a business model issue, or a marketing and sales issue, or both. You have to decide whether you will change your business model, change your pricing, or change the perceived value of your product through your sales and marketing effort. Complaining about price pressure is about as effective as complaining about the weather.

The winning mindset in business can be summed up like this:

1. A winner acknowledges external factors,
2. A winner identifies which external factors they can influence,
3. A winner understands the profit model of their business,
4. A winner sets specific and measurable goals,
5. A winner develops a business model to achieve their goals,
6. A winner consistently manages the things within their control,
7. A winner understands that their business is a money making machine, and
8. A winner focuses on doing what they can excel at.

If all this talk about business models has you a bit bored, then I suggest you snap out of it!

A business model is simply a structure or set of rules for your business that will help you to succeed and be profitable. In other words, combining the right business model and the right business mindset is an essential step to running a highly profitable business.

Each business has a unique success model. You can try to copy someone else's model, but that may not work for you. SCORE is a great program and you can get connected with a SCORE counselor who may be able to help you. SCORE counselors are often available for intensive coaching and training.

For more information and tools to help you evaluate and refine your business model, please visit the companion webpage for this book at www.banks-attorneys.com.

In business, you will need to activate this successful mindset in each and every transaction that you undertake. One of the ways you put this mindset into action is through successful negotiation.

NEGOTIATING TO WIN

"*You must never try to make all the money that's in a deal. Let the other fellow make some money too, because if you have a reputation for always making all the money, you won't have many deals.*"[viii]

Many business people are either fearful or have negative feelings and perceptions associated with negotiating. Mastering five basic rules will help you to dramatically improve your success in negotiating and in business in general. These five principles are:

1. Be prepared,
2. Know your value,
3. Be organized,
4. Know what's important to you, and
5. Know what's important to the other side.

Early in my legal practice, I recorded a brief video for YouTube that touched on these five basic areas. I was younger and had much more hair back then. Still, 15 years later I am reminded that to this day many business owners are facing the same issues and wrestling with the same challenges. Technology changes. Laws and regulations change. The fundamentals of successful business negotiations don't change.

For the purpose of this discussion, a negotiation is any process by which parties resolve a disputed matter, or the means by which a business deal or transaction is closed. In most cases, a negotiation is about exercising free will - giving up something of value to get something else of value.

For example, when a business signs a lease for its office space or warehouse, a negotiation is necessarily involved. In our society, no business is required or forced to sign any specific lease with any specific landlord. If you sign a contract with a vendor to provide materials for the product that you manufacture, negotiation is again necessarily involved. If you sign on as a subcontractor to provide services under a prime contract, a negotiation is also involved. When you hire a new employee you negotiate the compensation, the benefits, the work schedule and so many other things. When you decide to open a bank account for your business or apply for credit, negotiation is involved.

I can not think of a legitimate business transaction where negotiation is not involved. In any business transaction, negotiation is taking place whether or not you choose to participate.

If every legitimate business transaction involves negotiation, then success in negotiation is necessary to success in business. Because this concept is so intuitive and so much like "common sense," many business people overlook it to their peril.

You could have the best business idea, the best product or service, the brightest employees and still fail in business if you are unwilling or unable to master the five principles of negotiating.

Be Prepared

Being prepared is partly a negotiation principle and partly a state of being. The old military adage that states: prior planning and preparation prevents poor performances, is no truer than in business negotiations.

Being prepared involves knowing the value you bring to the table, knowing what you expect to get out of the deal, knowing what your counterpart wants to get out of the negotiation, and having these assumptions and understandings documented.

For example, if you need a loan or line of credit for your business, it is important that you know and understand that banks and other lenders make their money by making loans. Banks have other revenue sources like overdraft fees and account maintenance fees, but ultimately the big bucks are going to come from making loans and charging interest. Knowing that banks need to make loans is an important piece of ammunition when going into a negotiation for a loan. More importantly, banks really need to make good loans. They need to lend to businesses that have the ability to repay. There is always risk involved, but they want to minimize their risk. Knowing what the banks are looking for in terms of past and future cash flow, profitability, contracts in hand, and several other areas will help you to put together a strong and persuasive package that will set the table for negotiation.

Sticking with the financing example, if your business is seeking financing from a non-bank lender, it is important to know how these lenders work, and what they are looking for. Many of these lenders are subject to less regulation and oversight than traditional banks. So having the background information on the potential lender and their principals is critical to completing a full background check as part of your due diligence. Being unprepared wastes time, reduces negotiating advantages and can cause otherwise good deals to die on the vine.

I had a new client who came to my office excited about a potential $5 million equity funder for his business. He had spent the past 10 years in his business developing an educational product for children that would have wide market appeal. While the product seemed well conceived and potentially profitable, the client was really unprepared in his marketing and sales approach. He didn't have a sense of how the process of obtaining financing worked. He would sent out his business plan to various online services and he got varied responses and offers. In reviewing the offers he had received, I could tell immediately that many were fraudulent and sent by international scam artists. The formatting on the documents was inconsistent, the names on the email addresses didn't match up with the names in the documents, and a Google search of the telephone numbers immediately provided scam alerts as the top responses.

The bottom line is that my client was prepared to send these "funders" his sensitive bank information for a funding wire and was also prepared to send off a significant "processing fee". Had we not met and slowed down the process to help the client properly prepare, he would have been just another victim of a scam artist.

Know Your Value

Too many business owners act like the main character Hans in the Grimm fairy tale *Hans In Luck*. As the story goes, Hans is given a lump of gold as large as his head by his employer as payment for his faithful service. As he heads home he sees a man on horseback and grumbles to himself about the weight of the gold he must carry. He then exchanges the huge lump of gold for the horse because it would make his journey a little easier. As Hans rode along the horse showed himself to be a rough ride and Hans soon traded the horse for a cow. Hans knew that he could use the cow for milk for many years to come. Further along his journey Hans tried to milk the cow and was frustrated as the cow gave no milk. Hans then traded the cow for a pig, and then traded the pig for a goose, and the goose for a grinding stone.

By the time Hans reached his home, he had only a small grinding stone. But was quite pleased with himself, because he didn't have the "burden" of being responsible for a pig, a cow, a horse or even a big lump of gold.

Hans started out with an extremely valuable lump of gold and ultimately ended with a worthless piece of rock. He had no clue that he had been taken advantage of all around, because he didn't know or appreciate the value of what he had.

Be Organized

It is hard to prove the value of your product or service if you can't find your paperwork. Especially in negotiating, perception and appearances matter. It might be your strategy to appear disheveled and out of sorts in order to throw your negotiating counterpart off their game. But it is more likely that if you come across as lacking organization, the person on the other side of the table will be put off or at the very least more closely scrutinize you. They will be more likely to question your professionalism and probably will not want to do business with you. I recall a situation where a salesperson came to my home to demonstrate a water filtration system. First, I took a big step by allowing a salesperson into my home and into my kitchen. This was a clear indication that I was inclined to buy. When the salesperson began their presentation they became continually flustered because they could not find this, that, or the other thing. After about fifteen minutes, I knew I needed a filtration system. I knew that I had the money to buy the filtration system, but I didn't buy the filtration system from this salesperson because they were just too disorganized and made me feel uncomfortable with their presentation. In my case it was a water filtration system, which was an important and sizeable invest for me at the time, in your business the stakes could be even higher. If your disorganization makes others feel uneasy or uncomfortable, you could end up on the wrong side of a negotiation.

Knowing What’s Important

In any negotiation, it is absolutely imperative that you know what is important to you in a deal, and what is important to the other party in the deal. Some deals are derailed by ego-driven disagreements. As an example, I represented a commercial tenant in a disagreement with landlord, where the landlord wanted to evict the tenant over a personal disagreement. My client the tenant, did in fact violate the lease agreement by paying a few days late, but had been a good paying tenant. The landlord refused to accept the payment and brought eviction proceedings even though his building was about 50% occupied, and my client occupied about 10% of the building’s space. The landlord was willing to lose 20% of his revenue over a personal disagreement. No one benefits when people don’t focus on what’s important.

COMMERCIAL LEASES

A critical area that many business owners overlook to their peril is the need for well structured commercial leases.

Every business needs space to operate. For many small and medium-sized businesses, rent and occupancy expenses can be as much as 20% to 30% of non-labor costs. I struggle to understand how business owners can overlook such a significant aspect of their business.

Many small businesses are stuck in a commercial lease that was created by the landlord’s attorneys, for the benefit of the landlord, and includes terms that are mostly against the tenant’s interests.

Business owners often sign unlimited personal guaranties on commercial leases, without fully understanding the impact of the guaranty. In these same leases sometimes the landlord will have no real obligation other than provide a space, and tenants end up stuck in bad location, in a bad deal with a landlord who is not incentivized to negotiate on anything after the lease is signed.

Before beginning negotiations on a commercial real estate lease, a business tenant should have both a good attorney and an experienced commercial tenant's agent on their team. This is true even if the business owner has negotiated prior commercial leases, and even if they believe that leased space is relatively small. Some business leaders shy away from using professionals because they fear the cost. This approach is penny wise and pound foolish. Because most business owners are not skilled in these types of negotiations, they often pay significantly more over the course of the lease and get fewer concessions from the landlord for build-out and remodeling. The result is that they end up with unfavorable lease terms.

In business, every term is negotiable. The "standard contract" is the equivalent of a "sucker's bet". Business tenants that do not use a tenant's agent can leave as much as 15% on the table in rental rates and build-out costs. They also lose on the lease terms.

Years ago, I asked Joshua Brown, a commercial real estate professional with the firm Jackson Cooksey, who represented one of my business clients, to further explain the role of a tenant's agent in a commercial lease. My questions and his answers are below.

Q: What is the biggest misconception that people have about the work you do?

A: I think one misconception is that commercial real estate is similar to residential real estate. While there are some similarities between the two, commercial decisions tend to rely less on an individual's emotions and more on business decisions that impact a corporation's bottom line.

Q: Why would someone need to have a commercial broker like you representing them in a commercial real estate lease?

A: Commercial real estate brokers bring tremendous value to corporations during a lease negotiation on both an economic and non-economic basis. Landlords retain representatives whose responsibility is to maximize a landlord's occupancy and rental rates. Therefore, it is imperative that the tenant have an advocate who exclusively represents its interests to ensure maximum value is attained.

Q: How much do your services typically cost the client?

A: Our commission is usually a percentage of the gross lease value (e.g. 4%). There is no direct charge to a tenant; however, the commission is factored in the rental rates. The reality is that if a broker does his or her job effectively, the value to the client should far exceed any commissions that have already been built into the lease rates.

It will cost you significantly less to use a good attorney and a commercial tenant representative than to go it alone.

ONE-SIDED CONTRACTS

Subcontracting is one way that small businesses are able to enter the market and grow their business. Both government agencies and large corporations provide incentives for large businesses to use small business subcontractors. A broad spectrum of goods and services are subcontracted including construction services, professional services, and unfinished goods.

The Federal Government has a standard goal of procuring at least 23% of the goods and services it needs from small businesses. Many major corporations also have similar small business utilization goals.

One major mistake, made by many small businesses, is accepting the large business' "standard contract" as-is. Some of my clients are shocked when I explain that you should rarely, if ever, accept someone's standard contract. What they call a standard contract, I call a death sentence. In business, everything is negotiable. A contract by definition is "a meeting of the minds". It is an agreement reached not through force or duress, but with each party exercising its free will. However, some businesses employ a tactic of creating artificial time pressure to rush the small business into signing a contract, discouraging them from having an attorney review the contract to provide input.

If someone will not allow you adequate time to engage a lawyer to review the agreement and provide comments and feedback, then you are better off without the contract.

My client learned this lesson the hard way. He owned a commercial plumbing company and was asked by a prime contractor to submit a bid for some work with a local school district. The prime contractor said that my client needed to review the plans and provide a firm bid by the end of the next day. My client was told that his bid needed to come in as low as possible to win the contract. His low bid was accepted the next day and he was asked to begin working immediately, while they worked out the final details of the contract. A week later the prime contractor sent my client their standard contract and asked that it be signed and returned by fax. The price my client bid was included in the contract, but that was the only term that had been agreed upon. The standard contract included several new provisions, all of which benefitted the prime contractor.

My client had agreed orally with the prime contractor, before signing the standard contract that he would be paid half of the price of the job at the commencement of the job and the balance would be paid in six weeks when the work was completed. The partial advance payment was actually an explicit term included in my client's written bid. When the final contract finally came in, it did not include any of the previously-agreed payment terms.

One month later, when my client had completed more than 85% of the work, and had not received a penny for the work he had completed, the prime contractor kicked my client off the job and replaced him with another subcontractor. When my client demanded to be paid, the prime contractor filed suit against my client for breach of contract.

There is a misconception that has become conventional wisdom among small businesses leaders – it is that lawyers kill deals. I've heard that statement from several small business leaders, but I have never seen large successful businesses exclude lawyers from their transactions. It is likely that an experienced lawyer would advise a business leader against entering a one-sided deal to protect the client's interest. But it is unlikely that a reasonable attorney would kill an otherwise good deal.

As someone who has worn the entrepreneur's hat, I have experienced the emotion involved in feeling like a particular transaction is "make or break" or "the big one." As a long-time CFO, I've also experienced the pressure from a business owner to move quickly on the financial analysis and due diligence when the other side has set an aggressive or unreasonable timeline. As an attorney, I've had to struggle to convince a client that holding their ground in a negotiation won't cause a deal to go away. Knowing the value that you bring to a particular transaction or relationship is crucial to getting the best results out of a deal.

Many business owners are more optimistic and hopeful, and less strategic and skeptical. It is this optimism that allows business people to sleep at night when things aren't going great, because there is hope that things will get better. Optimism is an important characteristic and quality to possess as you lead people within an organization. That positive energy is essential to keep people motivated and to cast a compelling vision. However, a business leader should never optimistically enter into transactions with people they don't know well, and whose interests may conflict with the business leader's interests and those of their business.

A healthy sense of skepticism is required for most business transactions, as well as a critical legal eye.

My client in the above example entered the deal knowing that he could only hope break even - at best. He did so based on the implicit promise that there would be more business down the line. He viewed the deal as a "loss leader" - an opportunity to make a small or nonexistent margin on this transaction, and make up the difference on future deals.

The concept of a "loss leader" is a myth.

Any prime contractor or business client that would ask you to take a loss on a transaction has no interest in your business' well-being. If there is a guarantee that you will get future work, if you perform as promised, then the agreement is not a loss leader. The reality is that if you are asked to take loss the first time, you'll probably be asked to take a loss every other time and you'll be dumped when you become unwilling to absorb losses in the future.

If this first low-margin piece of business if part of a larger deal, then get it in writing.

Here are five critical subcontracting questions that business leaders must consider. Answering yes to any of these questions could indicate a dangerous one-sided subcontract agreement:

1. Are you being asked to submit an unprofitable bid?
2. Is the time to respond unreasonable and inadequate?
3. Is the prime contractor inflexible in drafting?
4. Are your concerns being dismissed?
5. Are you being asked to work without a final contract?

I had explained the need for a comprehensive risk assessment, and attorney reviewed contracts to this client on multiple occasions for over a year. He was always so busy with "work" that he could not dedicate one hour to sit with me to discuss his business. He was able to find three hours to sit in my office to explain this issue once he found himself "in the stew" and many hours thereafter, as we worked on his case.

LLC AND PARTNERSHIP AGREEMENTS

If you ask ten successful business people about their experience with business partners, you will probably hear ten different answers. For many people who have gone through the startup phase with a business partner, there are more horror stories than success stories.

In fact, the opening line of a recent small business magazine article was, "there should be warning label on business handbooks that reads, BEWARE OF BUSINESS PARTNERS." In the article, Stacey Krizan, CEO of The WOW Factory relayed her story of starting her business with two male partners. Stacey brought the creative strengths to the business, another partner brought the production background, and yet another brought the sales experience.

The sales partner delivered great results early on, but failed to modify his approach over time and his performance slumped. He blamed co-workers and subordinates for the slumping sales. To make matters worse he used derogatory language in the workplace to refer to women. When the situation became unbearable for the other partners and for the company, the partners couldn't reach an agreement on a buyout for the troublesome partner.

There are several issues here that are common to most partnerships, and unfortunately to most partnership failures. Because the example above is so common, many people attribute the problems to the nature of partnerships and draw the conclusion that partnerships are "hit or miss" or doomed to failure.

There are thousands of examples of successful business partnerships of all sizes, and in all industries. In fact, especially in government contracting, most large companies team with other large or small companies to get the work done. Most of those arrangements don't end in litigation.

An obvious reason to have a partner is that the more investors a business has, generally the easier it is to raise capital. Another valuable upside to having multiple partners is that they may bring diverse professional and social backgrounds which complement the other partners. A business partner may also bring complementary strengths to the organization, for example, you may be a visionary who lacks the ability to implement and execute that vision. You may be great at sales, but lack the patience and skill to create and implement a marketing plan.

A business partner can be a confidant, and a source of encouragement during the most challenging times in your business life.

A successful partnership typically has the same characteristics of a successful friendship. They include mutual respect, honesty, trust, loyalty and shared goals. The big difference is that partnerships, unlike most of our successful friendships, have money as the underlying connection.

Unlike friendships that don't have money attached, partnerships can't be allowed to grow and evolve organically. Partnerships must be planned. There should be no major implicit agreements and no business-related secrets between the partners.

One of the first questions that should be answered in any partnership or operating agreement is: how do we get out of this? Other equally important and pressing questions include:

(1) How will we make decisions?
(2) How large do we want to be?
(3) Who gets paid what, when and how?
(4) Who will fill what role?
(5) When will we meet?
(6) Who will be responsible for leading meetings?
(7) Who will sign checks?
(8) Who will authorize expenses?
(9) Who will make hiring and firing decisions?
(10) How will we resolve disputes between the partners?

The above list of questions is by no means exhaustive. In addition to the above questions, the partners should brainstorm and create a comprehensive list of questions early in the planning process, and then meet as often as necessary to reach a consensus on the answers to those questions before moving forward. An experienced attorney should be hired early on in the process to assist with documenting the answers to the above questions and to provide sound advice throughout the process.

INADEQUATE LEVELS OF BUSINESS INSURANCE

One uninsured event can destroy an entire life's work.

In the chapter on one-sided contracts, I introduced you to my client who signed the "standard contract" after he started work and performed 85% of the work before being terminated without pay. Making matters worse, the prime contractor sued my client for breach of contract, and claimed the work was defective. My client rolled two more deadly sins into one. He didn't have the appropriate business insurance, and he was passive in responding to their prime contractor's threat.

First, my client had only commercial and general liability insurance (CGL). For a commercial plumbing contractor having only CGL is like a racecar driver with no helmet and no seatbelt. A racecar driver can't get into his car hoping that he won't crash at 200 miles per hour. Even with all the skill in the world, a bad track or an absent-minded driver could spell doom for the racecar driver with no helmet and no seatbelt. A plumbing contractor may be highly skilled and well planned, but one error or omission could spell hundred of thousands of dollars in liability.

The client did not have errors and omissions insurance. Errors and omissions insurance would have paid if he indeed made a mistake. And if the error was in dispute, the insurance would have paid the legal fees associated with his defense. The cost of an average civil suit that goes to trial can start at about $35,000 on the law end. With no insurance in place to assist with his legal fees, the client could not muster the appropriate deposit to pay for his defense. Although I worked for more than ten months unpaid, in anticipation of the client raising the money, I eventually had to withdraw from the case. My client lost his business, and I lost ten months worth of revenue from the case. No one won.

Very few small and medium sized businesses have all of the insurance that they need. To be more accurate, too many small businesses are relying on insurance policies backed by companies that can never payout if they have a catastrophic claim. When a business chooses not to obtain insurance coverage from an insurance company, they are self-insuring – bearing the risk of a loss and wagering on the survival of their business.

Risk is an inevitable part of doing business. Every business should have a comprehensive risk assessment audit done, where the attorney and insurance professional for the business analyze the risk and identify the appropriate coverage. The cost of performing the risk analysis and putting together a comprehensive plan is infinitely less costly than one uninsured casualty.

Typical insurance policies that each business should have include:

- Commercial General Liability (CGL): This covers legal obligations to pay damages caused to others for: bodily injury, personal injury, advertising injury, or property damage.

- Business Personal Property: This protects the business assets and inventory in the event of a casualty.

- Business Interruption: Pays for the actual loss of business income due to necessary suspension of your operations.

- Errors and Omissions: Covers defects in the work performed by the business that not typically covered by a CGL policy.

- Key Man Life: These policies are life insurance policies that payout on the death of a key employee or partner.

RESPONDING PASSIVELY TO LEGAL THREATS

"Speak softly and carry a big stick; you will go far." [ix]

Deciding when to be conciliatory and when to strike is one of the tougher challenges that you will face as a businesses owner. Some business owners are conditioned to be either brash or passive in dealing with business conflicts. No one approach is right all the time. Evaluate every situation on its own merit.

You must be on guard for bullies! As I highlighted earlier, sometimes landlords are bullies. Sometimes prime contractors can be bullies. Even former business partners and clients can be bullies. What we learned about bullies in school is absolutely true. If you stand up to a bully they will likely back down and move on to the easier target. As in boxing, protect yourself at all times. If you are going to be in the game – Play To Win!

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