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## INTRODUCTION

WHEN AN EMPLOYMENT relationship is going well, no one wants to think that it may end. Unfortunately, we know that once-perfect relationships sometimes end, and when this happens, someone often suffers. To ensure that your executive and entrepreneur clients are not the ones harmed, you must understand how to protect them before, during, and at the end of their employment relationships.

Multiple knowledge, skill, and style sets are required to effectively represent executives and entrepreneurs in their personal negotiations with the companies they love, hope to love, or previously loved. Picayune attention to technical detail is required. Negotiating the definitions of “Cause” and “Good Reason” down to the last sub-clause does matter, especially if things later go wrong.

An educator’s touch is required. The entrepreneur may be smarter than you and have invented the next great product. The executive may be shrewder than you and run a 10,000-person company that you could not possibly run. But none of this means the executive or entrepreneur knows much about protecting himself if things go wrong. Some of the worst personal negotiators are vice presidents of worldwide sales who have no problem negotiating tens of millions of dollars in deals for their employers but cannot negotiate basic protective clauses for themselves. Your executive or entrepreneur client may be a quick study and make clear, expeditious decisions. He often needs you, however, to enable him to make these decisions.

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Effectively representing the executive or entrepreneur requires knowing your field. Knowing your field certainly means knowing the applicable laws. And there are many: Employment, securities, contract, intellectual property, and tax law, among other areas of the law, may all be implicated in complex ways during a single representation.

But knowing your field means much more. It means knowing the typical documents that comprise a deal, knowing how to apply relevant facts to the law, knowing the market for executive and entrepreneur compensation, and knowing what typically matters and what does not. A knowledgeable practitioner understands that some clauses need to be in those employer-generated contracts, but the power of many pro-company provisions can often be negated with the proper language.

Knowing your field also means recognizing nonlegal issues and themes that regularly arise—such as when an executive assures you that his first-draft employment agreement will appear by day’s end, when you can be relatively certain that it will not. (And knowing the field as you do, you understand the delay usually has little to do with the level of the employer’s desire to hire and much to do with the slow pace of the employer’s outside counsel or human resources (HR) department.)

Dynamism and speed are required. The executive-entrepreneur archetype usually wants everything done yesterday, even when he assures you otherwise. Once serious negotiations begin, your client—and the other side—often demand immediate attention, late-night telephone conferences, long and detailed explanations, and much more.

You must be a lay psychologist to be the best at what you do. As the executive’s or entrepreneur’s lawyer, you must do your best to understand your client’s psychology. Sometimes, hand-holding is required. Sometimes tough talk is necessary. Sometimes, simply listening is important. Sometimes, delayed decision making is critical. And sometimes your client’s personality and capacity to hear what you are saying requires a detailed letter with the frank opening paragraph:

This is the cover-your-ass letter I said I would write to confirm our prior conversation. As we discussed, you are the client and this is America, and thus, you are free to make whatever decision you want to make. However, in my professional opinion. . . .

Recognizing and responding to the psychology of the other side is also imperative. The corporation, the board, and the venture capital funds are all run by humans. And humans are emotional, even when they appear otherwise. They love, hate, and make good decisions as well as bad ones. They can be rational or completely economically irrational.

As the executive’s and entrepreneur’s counsel, you must also endeavor to identify the politics driving the other side. The other side may simply be the employer. But this is not always the case. The other side may include investors, attorneys, other executives, and board members, all of whom may be calling the shots and many (or all) of whom may have competing personal, financial, and emotional interests.

The ability to push and recalibrate your client—the ability to tell the executive or entrepreneur things no one else will—is required. Doing a good job may mean bluntly informing your client that he will not receive x, y, and z because no matter how superb his record, the request is more than three standard deviations beyond reasonable. On the other hand, the executive may so desperately want the “premier” job or the entrepreneur may so badly want the investment that without your advice and prodding, he may give up the store.

Representing executives and entrepreneurs requires you to have (or learn) negotiation skills. Negotiating for the executive or entrepreneur is, in many respects, similar to any other negotiation. Stripped of everything, you are negotiating for a widget. In this case, the widget is the value of the executive’s or entrepreneur’s labor.

Is it possible to represent the executive or entrepreneur purely on instinct? Perhaps top practitioners will do a good job on intuition alone. Diligent practitioners without the intuition gene, however, should easily be able to learn what they need to know to be outstanding representatives for executives and entrepreneurs. And with this knowledge, the conscientious attorney can out-negotiate and out-advise the lawyer relying primarily on intuition.

To effectively represent the executive or entrepreneur also requires experience. Experience in dealing with the high-powered, would-be high-powered, and the delusionally high-powered. Experience with applicable laws. Experience with typical documents. Experience with competing dynamics. Experience with many things.

That representing the executive or entrepreneur requires experience means this book cannot teach you everything you need to know. Experience is achieved by doing. This book, however, will start you off in the right direction and allow you to identify and learn from important experiences when they occur.

The goal of this book is not to present every law, nor every model, nor to describe every document applicable to every possible executive or entrepreneur employment situation. Rather, the goal of this book is to explain the fundamentals of representing executives and entrepreneurs, and by extension, management teams and employees, so that when you are done reading this book, you will realize that you, too, can be a first-class lawyer for these individuals.

It goes without saying that not all executives are entrepreneurs, and not all entrepreneurs are executive material. Executives manage companies, and while an entrepreneurial skill set may sometimes be required, this is not necessarily (or generally) the case. For their part, entrepreneurs invent, create, and take risks. They may make great executives but not necessarily.

Whether or not an executive is an entrepreneur or an entrepreneur an executive, many of the issues discussed in this book (e.g., protection during the employment relationship) apply equally to both. For this reason, I frequently refer to “executives” and “entrepreneurs” interchangeably in this book. Furthermore, when I refer to the executive or entrepreneur as “he,” I mean “he” or “she.”

The organization of this book reflects the phases of an executive’s or entrepreneur’s relationship with an employer. Chapter 1 is this Introduction. Chapter 2 addresses the

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“negotiating playing field” that the executive or entrepreneur faces. It includes a discussion of the life cycle of a negotiation and the relationship between business and legal issues in executive and entrepreneur employment matters. Chapter 3 focuses on the players that the executive or entrepreneur may find on the negotiating playing field.

Chapter 4 introduces the myriad documents and contracts that may affect the executive or entrepreneur in his employment relationship. Chapter 5 addresses the executive’s and entrepreneur’s relationship with you, his attorney. Chapter 6 discusses general negotiation considerations for executives and entrepreneurs. It explains when executives and entrepreneurs should negotiate directly with the other side, as well as your role, as the executive’s or entrepreneur’s attorney, in an employment-related negotiation.

Chapter 7 focuses on negotiating the executive employment agreement. Chapter 8 discusses both executive-employer contract negotiations that may occur during employment as well as issues that may arise during the employment relationship. Chapter 9 focuses on the termination of the employment relationship, including negotiating the separation agreement.

Chapter 10 addresses the ability of the executive or entrepreneur to compete against his former employer. The chapter includes a discussion of non-compete agreements, the unenforceability of most non-compete agreements in California, and what happens when an executive or entrepreneur with a non-compete agreement signed outside of California moves there to compete against his former employer. Chapter 11 concludes with a brief discussion of international issues that may affect both the U.S.-based and foreign-based American executive.

“Real-life stories” are included as examples of situations that may occur when you are doing the lawyering. Because personalities and emotions often have huge effects on the ultimate agreement (or dispute), I hope the stories will increase your understanding of what may, and sometimes does, happen. As you practice, you will discover that “genres” of stories—of typical problems, of relevant facts, and of negotiations that follow a relatively predictable pattern—repeat themselves. Some of the real-life stories in this book are examples of “genres” that occur repeatedly, while others are atypical or even unique, intended to trigger the questions: “Do I know everything I need to know? Have I anticipated everything that may occur?” The stories have been modified to mask the identifying details of the executives and entrepreneurs and their particular companies, conversations, and situations. All executives and entrepreneurs, no matter how masked, consented to the use of the stories they inspired.

I have deliberately written this book from the perspective of counsel for the executive and entrepreneur (and, by extension, counsel for the management team and employee). There are many books describing how to represent the employer but few, if any, other than this one, devoted to the executive’s and entrepreneur’s side of the aisle.

Writing a book from the executive’s and entrepreneur’s attorney’s perspective does not mean I believe the executive or entrepreneur should (or will) receive everything he wants in a negotiation. The fact is that some executives and entrepreneurs are fantastic at what they do, some are mediocre, and some are downright horrid, and any one of these types might ask for more than he should reasonably expect to receive.

A curmudgeon of an excellent attorney once told me after his executive client's former employer paid millions to settle a hard-fought wrongful termination case: "I would have fired him too." As the executive's or entrepreneur's attorney, your job is to zealously advocate for your client—no matter how good, or bad, an inventor or manager he is.

If understanding how to zealously advocate for an executive or entrepreneur is your goal, then this book is for you.

This book is also for you if you are company, board, in-house, or investor counsel because it will give you a thorough understanding of what the "other side" may be thinking. This, in turn, has at least two distinct benefits. First, the ability to anticipate the executive's potential concerns, and likely courses of action, before or during a negotiation will make you more informed and effective.

Second, to the extent you find yourself advising executives and entrepreneurs, this book may help you "fill in the blanks." As it turns out, many (although surely not all) corporate attorneys do not do the best job representing their entrepreneur and executive clients even when they are laboring hard to do so. The reason may be that these attorneys spend most of their professional lives inculcating the employer's perspective, understanding everything about their corporate or investor or board clients but not understanding, at the same level, their executive or entrepreneur clients' concerns. When it comes time to advise them about the best contract possible, these corporate attorneys come up short. Consequently, the perspective of this book will benefit company, in-house, investor, and board counsel as much as the entrepreneur or executive and his attorney.

This book is also for you if you are an entrepreneur or executive, or a would-be entrepreneur or executive. Although I have written this book from the perspective of the attorney representing executives and entrepreneurs, this book is as much about you the executive and you the entrepreneur as it is about the attorneys representing you. Change the phrase, "your executive client" to "you," or to "you the executive," or to "you the entrepreneur," and this book becomes a "how to" book written for you the entrepreneur and you the executive. But retain an experienced lawyer. You will almost certainly need one.