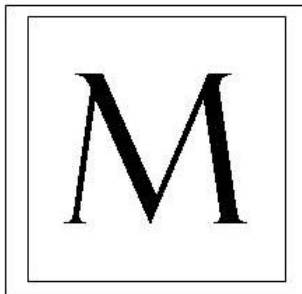


“BUSINESS LAWYERS SERVING BUSINESS”



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Welcome

Dear Friends,

We appreciate the opportunity that we have to work with you and the friends that you have so thoughtfully referred to us. We are mindful of the trust that is involved in the lawyer-client relationship and look forward to our continuing association with you.

The mission of the McCarrey Law Group is to provide sound legal advice tempered by the realities of the business world. Our lawyers operate in the real world and

understand the challenges that business faces. The purpose of "Business Lawyers Serving Business" is to highlight both issues and solutions to problems facing you and the rest of our diverse group of clients.

The McCarrey Law Group is a boutique firm that provides legal services to real estate professionals, financial institutions, entrepreneurs and businesses operating among the NAFTA countries. We are worldwide in our view, but never forget that our business is our clients. We desire to provide you with the best legal service possible and hope that you will find "Business Lawyers Serving Business" helpful and informative.

If there are issues that you would like to see addressed in our Newsletter, please contact us. We prize our relationship with you and look forward to continuing our association.

THE MCCARREY LAW GROUP

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Ten Mistakes Commonly Made by Entrepreneurs

Recently, a *Harvard Business Review* article focused on mistakes commonly made by entrepreneurs in new business ventures. Over the next several newsletters, we will address many of these issues as well as ways to avoid the problems that may arise through neglect of vital legal issues.

In no particular order, Constance Bagley, a Harvard Business School professor, listed the following ten mistakes that often find their way into new ventures:

1. Failure to incorporate early enough.
2. The issuance of founder's stock without a vesting requirement. In other words, Founders are often given stock without a requirement that certain benchmarks be met before the shares permanently vest in that individual. The effect is that a founder might leave early in the venture's cycle without having any obligation to return stock or provide further services to the new company.
3. Hiring a lawyer who has no experience with either entrepreneurs or venture capitalists.
4. Failure to make the proper election under Section 83(b) of the Internal Revenue Code. In a successful venture, this failure can result in a significant tax bill to those receiving company stock options that legitimately and legally could have been avoided.
5. Negotiating a financing arrangement with a venture capitalist based solely on valuation. The successful entrepreneur needs to recognize that there are other considerations that need to be taken into account, including the past success of the venture capitalist, its reputation and whether or not the chosen financing group has a reputation of standing behind its new companies if an entrepreneur happens to stumble.
6. Failure to take into account foreign patent and other international intellectual property concerns.
7. Disclosing proprietary information to individuals and financing companies without first obtaining executed non-disclosure agreements.

8. Starting a new business while employed without first checking any existing employment agreements to see the rights that a current employer might have in a new venture or new technology.
9. Promising more in the business plan than can reasonably be delivered. A corollary to this is the failure to take into account state and federal security laws.
10. Thinking legal problems can be solved later. While this is often true, there is generally a cost associated with the deferral that can be significant.

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Eleven Key Issues a Tenant Should Consider Before Executing a Real Estate Lease

While leasing space might seem like a straightforward process, particularly if it is an occasional undertaking, there are many complex legal issues that need to be considered before a lease is executed. This is especially true when the lease is one that has been prepared by a prospective landlord. As a general rule, leases are heavily slanted in favor of the landlord and without careful consideration, a tenant is likely to miss key and important concerns. Without technical expertise, a tenant is left with the choice of signing what is often a convoluted and contradictory document as originally written by the landlord, turning the process over to a lawyer or real estate agent who does not understand the business of the tenant or attempting to read, understand and negotiate the lease without the aid of expert help.

The process of negotiating and executing a lease can be made less difficult if prior its execution key issues are considered, including the following:

1. The side that drafts the lease in a negotiation has a great advantage in making sure that key items are included and that the lease is properly slanted. Unfortunately, unless the tenant is a *Fortune 100* company or has equal bargaining power with the landlord, the landlord will draft the lease. This means that the landlord often presents a prospective tenant with the toughest possible lease and negotiations must begin from there.
2. There is no such thing as a form lease that is perfect for every situation and every lease must be negotiated to address the specific issues of the particular transaction. Most problems with leases arise from items that are omitted or have not been considered prior to the time the lease is executed. Generally, issues are easily addressed and if the tenant approaches the leasing process as if it were acquiring the property in a purchase transaction, chances that a key item will be omitted from the final document are greatly minimized.
3. Key issues must be addressed and the property must be susceptible to being used as needed by the tenant. Representations made by the landlord during the negotiation process with respect to the leasehold property must be detailed in the lease and if the landlord has promised the tenant critical items that have not yet been completed, these must be described in the lease in detail. Most, if not all leases will contain a provision that provides that all of the representations made by the landlord have been included in the lease. This means that anything that a tenant has been promised during the negotiations that is not described in the lease most likely will not happen.
4. An incoming tenant should take all steps necessary to insure that the property is satisfactory for its intended purposes. Among other things, a

- tenant should affirm that parking is sufficient, elevators and HVAC are adequate and that the insurance provisions of the lease are appropriate.
5. When purchasing a property, the buyer always requires title insurance. A tenant to a commercial real estate lease should also consider doing so. It is critical that a tenant know the extent of any liens against the property, whether or not an option has been recorded that provides for the transfer of the property to someone else or whether there is ongoing litigation that might affect the prospective use of the property by the tenant.
 6. The lease should always state the total number of square feet being leased and the rental rate described on a per square foot basis. A statement of the rent amount for the premises without declaring the number of square feet being leased is insufficient. Since a landlord's interest dictates that the lease make reference to the most square feet possible, the lease should provide a mechanism for calculating the number of square feet being leased as well as a method for checking and correcting any mistakes in the initial calculation that might exist.
 7. If the lease has an option term, the lease should address the rights of the tenant upon the extension of the lease and whether or not the tenant will be treated at that point as if he were a new tenant coming into the space. This is important as it might mean entitlement to free rent, additional tenant improvements or other considerations at the time that the option is exercised. In addition, a tenant should always ask for an option to extend the lease at the end of its original term. Circumstances may change and a future cost may be avoided by negotiating an option to extend at the outset.
 8. Often, space that is being leased is currently in use by another party. The lease should state a date certain when the landlord will deliver the property so that the incoming tenant is not legally bound to wait an inordinate period of time to take possession of the premises.
 9. A tenant should obtain representations and warranties from the landlord that the building has been constructed in accordance with all relevant building ordinances and statutes. In addition a tenant should obtain a warranty from the landlord that there are no environmental or hazardous waste issues that are related in any way to the leased property.
 10. Inappropriate common area expenses should be excluded from the lease. Careful determination should be made as to which common area expenses, if any, will be added to the base rent of the premises. Common area expenses that should be eliminated from the lease include expenses for hazardous waste remediation, brokers' commissions, costs related to the landlord's breach of the lease and interest on any underlying mortgage.
 11. While it seems an obvious point, it is critical to make sure that the person signing the lease on behalf of the landlord has the authority to do so. Failing to ascertain authority might result in a lease that is void or voidable and often this problem is not discovered until much time and many dollars have been spent in getting space ready to be used.

While the process of executing and negotiating a lease can be time consuming and arduous, time spent focused on key issues will save time and expense over the life of the lease.

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NAFTA Update

Toll Roads. Mexican President Felipe Calderon has declared that the use of toll roads will be a major part of his transportation and infrastructure policy and has budgeted almost \$2.7 billion for highway construction and maintenance during the coming year. The problem is that this represents only half of the amount experts believe is needed to meet the needs of the Country. To solve this problem, Calderon intends to privatize as many as sixteen freeways and to construct some twenty-four new highways through the mechanism of private enterprise and tolls.

While Europe has seen a resurgence of this financing mechanism, Mexico's history has been less than stellar and its efforts during the late 1980's and early 1990's have often been seen as ways not to build toll roads. Experts see this as Mexico's opportunity to redeem itself. All experts tend to agree that the problems that Mexico experienced are not intrinsic with toll roads. The biggest mistake made at the time was the granting of concessions which were too short in duration. This had the effect of causing developers to cut corners in construction and to defer required maintenance since they knew that the Mexican government would be there to pick-up maintenance in a relatively short period of time. It is not likely that this mistake will be repeated.

This major effort will create opportunity for domestic and foreign construction and financing companies. The need is too high and the lack of financial resources too obvious for the next generation of toll roads to fail.

Mexico Trucks on U.S. Roads. According to Franklin L. Lavin, Undersecretary for International Trade, the pilot program for permitting Mexico trucks and drivers to enter the United States is on target for implementation in July 2007. The Bush administration is adamant that Mexico has lived up to its obligations and have met the benchmarks necessary to implement the plan. For a more complete description of the program see our March 2007 Newsletter or visit our website.

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