

Negotiating with Well Established Entities : What to Expect When You are a Start-Up

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Introduction

As an attorney who represents a start-up company, you await the day when your client's email arrives on your laptop announcing the fact that General, Inc. wants to enter into a deal. Obtaining the parties' actual signatures on the written contract, as well as the elusive initial payment, can prove to be a challenge, however. Drafting the paperwork memorializing the deal yourself, being persistent and being prepared to address the well-established company's concerns can help the process along.

However desperate your client may seem, the fact that General Inc. has sought out your client should be regarded as almost conclusive evidence that a deal is there to be had. Understand that, in spite of its levels of bureaucracy, lack of guidance from the top and apparent *non-chalant* attitude, General Inc. must grow, must develop new products and services and must turn a profit for its shareholders. If the products or services are not developed in-house, its only remaining alternative is to enter into deals with innovative new suppliers, which oft times, are start-up companies. The same "guarantee" often applies to a great extent if the start-up company is the party which sought out its well established counterpart. As a result, probability favors the fact that if the topic of an agreement has been broached by General Inc. or even, sometimes by Mom and Pop, that an agreement will eventually conclude, thereby, it is hoped, enriching both your client and your practice. However, in such case, it is obtaining the parties' actual signatures on the written contract, along with that elusive initial payment, that provides the greatest challenge to the attorney and his start-up company client.

Obtaining What Your Start-up Company Deserves

While you and your client may be ready to close a deal "yesterday," you may have to endure endless meetings, phone calls and months of delay owing to the many levels of personnel working at General Inc., all of which must sign off on any meaningful expenditure or concession.

As the attorney for the start-up, you should be prepared to be "in the face" of whomever it is you think can help you close the deal. Deals, like cars, need to be "driven" if they are to go anywhere. It is completely unreasonable to think that, as the attorney for the start-up company, you are able to sit back and wait for a written contract to arrive by FedEx or, for that matter, any other expedited method. Unless you, yourself help to drive the deal forward, it is not unusual for thirty, sixty or even ninety days to elapse before even the most primitive draft proposal appears in written form or the most basic deal points can be established and agreed upon.

By way of example, once your client emails you that a deal is in the wind, *immediately* ask your client for the other party's contact information. Start your clock (if you haven't already), pick up the telephone and introduce yourself to that party. Tell them that you represent Mom and Pop. Tell them how glad you are that someone at General Inc. was astute enough to figure out what you have known all along, namely that Mom and Pop is the most innovative, ethical and fundamentally sound company you have ever had the pleasure to represent in the entire history of your practice. Tell them how available you are to facilitate a deal, *e.g.*, give them your office, home and mobile telephone numbers, your email and snail mail addresses and the dates you will be away from the office. Finally, ask them if they would be willing to entertain your written proposal outlining the basic terms of what you believe your client will be willing to agree upon.

More often than not, the overworked attorneys at General Inc. and/or the creative executive who provided the impetus for the deal will welcome the opportunity to see someone else do the work and/or to see "their own ideas" on paper. Chances are that your proposed written

memorandum of agreement will not serve as the final statement of the parties' intentions. However, what such an outline *will* serve to accomplish will be to provide a starting point for discussions, an opportunity to highlight any areas which have not as yet been well thought-out, as well as offering a chance for you to prove your own value by pointing out potential revenue streams and profit centers that were not initially contemplated, even by your own client. In any event, the effort will be well worth the expenditure of time and the fees involved.

Once your proposal has been completed, phone General Inc. to let them know you intend to fax it over. Once faxed, phone them again to make sure that it has been properly received. Phone them the next day to ask if has been read.

Do not, *I repeat*, do not harbor any hesitation to appear anxious to enter into a deal. Your client's natural desire to price itself right out of the market, coupled with the creaky bureaucracy of the well established company, provides enough of an impediment to closing any deal. Rather, open the way for clear and frequent communication, and by all means, communicate!

Providing Assurances to the Well-Established Entity

One central issue which appears commonly in agreements between well-established entities and their start-up counterparts is intended to address the former's desire to protect itself from the shaky financing which is often associated with the latter. Having, itself, been burned, or at least having observed the recent rash of Internet "Shut-Downs" (*i.e.*, the opposite of an Internet Start-Up,) a well-established company such as General Inc. may now be anticipated to take steps which appear both reasonable and unreasonable to make absolutely certain that your Mom and Pop client can and will deliver on its promises, regardless of whether it will still be in existence six months after the deal closes.

By way of illustration, it is normal for an agreement to contain an "indemnity" provision *e.g.*, where an indemnifying party agrees to "defend, indemnify and hold harmless an indemnified party from and against all claims, breaches, *et cetera.*" However, what benefit does an indemnity provision offer if the start-up company which is charged with the duty of providing such indemnity, has gone out of business or does not have the financial wherewithal to provide the indemnity when called upon to do so? Accordingly, a company such as General Inc. may routinely make it a point to require that the principals of the Mom and Pop company personally guarantee their start-up company's obligations.

In evaluating such a request, an attorney may initially discourage her client from providing such a guaranty, for she may question, "Which entrepreneurs in their right mind would wish to stake their personal fortunes (read: childrens' private school education and annual vacations to Hawaii) in providing a guarantee to a megalithic giant such as General Inc.?" The attorney may reason, "What does General Inc. need with the president of Mom and Pop's personal assets?" On the other hand, the well-established company, which has everything to gain *and everything to lose* cannot place itself at risk when dealing with a start-up company which has everything to gain *and nothing to lose* by dissolving, performing erratically or seeking the protection of the bankruptcy courts. Accordingly, General Inc.'s demand is not wholly unreasonable. On balance, while I have seen many companies go out of business, I have never seen a well-established company move against the personal assets of a start-up's corporate executive: usually some kind of accommodation is reached. In conclusion, what the personal guaranty does is to "keep everyone honest," providing a level playing field so that the well-established company can comfortably deal with the start-up without fear that it will be left holding an empty satchel. For this reason, when representing a start-up, I am not entirely uncomfortable when my start-up clients are asked to deliver the personal guaranties of their principals.

In lieu of a personal guaranty, a well-established entity may instead opt to require the start-up to provide a guaranty in the form of a surety bond. (The same is a certainty when the start-up company is dealing with the Federal government, especially in regard to construction contracts valued at more than \$100,000 owing to the *The Miller Act*, [40 U.S.C. §§§§ 270a-270f], which provides that all Federal construction contracts performed in the United States require the contractor to furnish a performance bond in an amount up to \$2.5 million, with the exact sum at the discretion of the government's contracting officer. *N.B.*, individual contracts of \$2 million or less are eligible for the SBA's bond guaranty.)

Surety bonds fall into several categories and are routinely available from insurance agents and many sources which promote their availability via the World Wide Web. Among the categories are "bid bonds," guaranteeing the owner of the bond that the contracting party will honor its bid and will sign all documents if awarded a contract; "performance bonds," whereunder the owner becomes an obligee who may sue the principal and the surety to enforce the bond if the principal does not complete the contract according to its terms, including price and time. The last, and often most useful variety are "payment bonds," which guarantee the well-established entity that the start-up will pay monies that they are due to be paid.

For example, in a recent situation, a start-up advertising company wished to take advantage of the favorable long-term advertising rates offered by a well-established television network to any advertiser willing to commit \$500,000+ during a one-year period. In this case, the television network was willing to overcome any reluctance it had in dealing with the start-up when the start-up agreed to procure a payment bond guaranteeing its financial obligation.

In conclusion, by being solicitous and ably anticipating a well-established entity's concerns, the attorney for a start-up company is able to do much in the way of establishing and cementing a profitable and long lasting relationship between the former and his or her client. The attorney for the start-up should be prepared to take the laboring oar in drafting and have available ready solutions to meet any skepticism which is encountered in dealing with the well-established entity.

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