Originally published in the NJSBA Business Law Section Newsletter Vol. 39, No. 2 - February 2016

Professionalism Guidelines for Transactional Attorneys

by Jennifer Saal, H. Glenn Tucker and Robert F. Ripley

In April 2014, the members of the Professionalism Committee (identified at the end of this article) of the Business Law Section developed a set of professionalism guidelines for transactional attorneys. The guidelines were not intended to establish any best practices or to raise any ethical issues. The goal was simply to develop guidelines that could be used for training purposes. While the guidelines could be particularly useful to younger transactional lawyers, they also provide more seasoned transactional attorneys with an opportunity to step back and think about how they handle their transactional practice and interact with other parties. As you will see when you read the guidelines (recited in full following this article), there are three distinct constituencies—your client, your adversary, and your team (which may include your own employees, accountants, insurance advisors, environmental consultants, title officers, and the like).

Why is how you interact with these people important? The answer is simple: The practice of law is a service. The quality of work is important, but so are the intangibles. Dealing with others in a professional manner builds relationships, which can lead to a diverse referral network; simply getting the job done using a scorched earth policy does not. Take a few minutes now and flip through the guidelines. Do any of them apply to you, either in a positive or negative manner?

The main purpose of this article is to put the guidelines to work. You should have already perused them, and you already may have made a few mental notes to do some things a little differently, but the guidelines could be much more useful than that. For instance, the guidelines can be used in an interactive setting, such as at a luncheon for newly hired transactional attorneys. Along those lines, we have developed three separate fact patterns based upon actual experiences of the committee members.

Fact Pattern 1

A longtime client of your firm, a big company with national reach (BigCo), decides to buy a small customer with a hugely successful retail store in a superb location. Caryn, the customer, has a long and excellent relationship with BigCo, but Caryn also wants to retire, although she is willing to work for a short time after the sale to help with the transition. Unfortunately for you, Caryn, eying the size of her retirement nest egg, is reluctant to incur large legal fees. Rather than retain a firm with experience in mergers and acquisitions (M&A), Caryn engages her neighbor, Ned, a nice guy who has a busy trusts and estates practice. Not surprisingly, Ned does not really know what he's doing when it comes to buying and selling a business, and he also does not have time to educate himself. As a result, he assigns the transaction to an associate, Joan. Meanwhile, BigCo and you develop a due diligence list and forward it to Joan.

Joan, knowing she is in way over her head, does what people do when faced with a difficult task—she pushes it to the bottom of her to-do list. No due diligence appears. BigCo grows impatient and complains to Caryn. Caryn nudges Ned. Ned yells at Joan, who blames you for being unreasonable. Weeks pass. Due diligence trickles in, slowly and incompletely. When you finally receive the lease for Caryn's store, you immediately see that it cannot be assigned

without the landlord's consent. You tell BigCo that negotiating with the landlord may take time, and then you prepare an assignment, which you present to Joan to forward to Caryn's landlord. The landlord forwards the assignment to *his* lawyer. The landlord's lawyer, however, is about to depart for a two-week vacation, and in that pre-departure rush, a request for a consent to an assignment of a lease is the lowest of low priorities. You have to wait two weeks before you even hear from the landlord's lawyer, and when you do, he, sensing your urgency and thus his leverage, drafts changes to the assignment, which are deeply one-sided, favoring his client.

Back at your office, BigCo complains about the delays and your increasing fees. Caryn is complaining that the lawyers are making this way too complicated. When you finally get the revised assignment from the landlord's attorney, you see that it is disadvantageous for BigCo, but by this time BigCo is suffering from deal fatigue and directs you to concede. You are concerned, but what can you do? You cross your fingers and the transaction closes.

What's the aftermath? BigCo and Caryn are barely talking to each other. Caryn's transitional assistance at the store is begrudging at best. The landlord can evict BigCo without cause at any time, placing one of the key benefits of the acquisition (remember that superb location) at risk. BigCo is annoyed with you for everything. Everyone is bruised, and when Caryn needs to have a will written to address her newly acquired wealth, she definitely does not choose Ned. Nor does she refrain from saying bad things about Ned (and you) when people ask.

What went wrong here? You may say that Caryn made a mistake in choosing Ned, and that would probably be true. But in the end, Caryn *did* get what she wanted—she sold her business *and* she saved on legal fees. It was everyone else—Joan, Ned, you and your client—who bore the burden of her poor choice. Could this have been avoided? Maybe not, but here are some things to think about:

First, do not be a Ned. Know your limits and don't accept matters you know you cannot handle, either due to lack of time or lack of expertise. You may fear that *this very client* is the last one who will *ever* walk through your door, but take a deep breath. Do you really want a client who is going to get a mediocre result if you are lucky, or potentially be a plaintiff in a legal malpractice lawsuit if you are not so lucky? You may have taken contracts in law school, but there is a whole lot more to 'doing a deal' than understanding *Williston on Contracts*. Know when to walk away, politely but firmly. Do not let your client talk you into doing something you know you cannot do (or should not do). This rule applies equally to situations where your client asks you to do something inappropriate.

Next, consider how Ned treated Joan. He placed her in an untenable position and then blamed her when events played out in the only way possible. Thrashed by Ned, Joan lashed out at you and your client. Lesson? Pick your team based on skills and experience, not on the presence of a pulse. If the matter is large enough, have a mix of experienced and neophyte, so that young lawyers can learn. Mentor junior attorneys. Yes, it is time consuming, and yes, time may need to be written off, but it is the only way to develop the talent your firm needs and get the results your clients want.

In addition, be sure to give credit to junior members where credit is due. Everyone on the team has a contribution to make; recognize that. This goes for the bad as well as the good; do not point fingers at others and do own your own mistakes. Acknowledge your errors and enlist your team's help in fixing them. Imagine how this transaction might have proceeded if, at some point, Ned had apologized to Joan for asking her to handle this transaction on her own and had started helping her figure out how to proceed.

Junior lawyers, let yourselves be mentored. Most law schools still only teach theory, not practice. Let yourself learn, even if the lesson is what *not* to do. When Joan leaves Ned's practice and starts her own, she only takes matters she knows she can handle, and as her firm grows, she never throws her junior attorneys under the proverbial bus.

Remember that third parties are also members of your team, even if you do not get to choose them. These third parties may include accountants, financial advisors, landlords, franchisors and environmental consultants. Even the government is a third-party player in a transaction where there is a regulatory approval or similar gating step. So be sure to involve these parties as early as possible, when you are first identifying who you need to get the deal done. Not only will it help save time down the road, it also will build team spirit. Instead of being late-in-the-game roadblocks, these parties can be cheerleaders if they are invested in the success of the transaction early on. The key is to make sure they are invested.

Accountants, in particular, are key players in any transaction. They know as much about your client as you do, just from a different angle. You proceed to a closing without their input at your peril.

Even unrelated third parties like a landlord or a government clerk can be made a part of the team. If you have a question about how to complete a regulatory form, call the agency and ask. If you know that you will need a landlord's signature in the future, ask about his availability well before your deadline. Get your third-party players involved as early as possible. Under fact pattern 1, you could not reach out to the landlord's lawyer early, because you did not even know his name. Imagine, however, if you had been able to address the assignment question a month before the two-week vacation. The resulting document might have been very different.

Finally, you are not blameless in this debacle. The first rule of the practice of law is to communicate with your client. Violate this at your peril. By failing to explain to BigCo that Ned and Joan are not experienced M&A lawyers, you permitted BigCo to expect a standard transaction, rather than the rough ride it experienced. Keeping your client informed of the bad news as well as the good is critical because no one likes nasty surprises, least of all the people who will end up having to pay for them. Communicate early and often.

There is nothing novel about this advice, but you would be amazed at the number of ethics complaints made against lawyers for failing to communicate with their clients.

You also failed to explain the necessity of obtaining third-party consents. Again, if BigCo had known at the beginning that you would need to go to the landlord for its consent, BigCo would have been better prepared for the delays. Sure, BigCo is an experienced buyer, but you still need to talk to them, even if the conversation is short. Your client may have lived it before, but he or she still needs to hear it again.

Fact Pattern 2

A family-owned business has an opportunity to sell its business to a company with which it has pre-existing relations. The owners are two brothers, one sister, and two ex-employees (who own only a couple of shares each). One of the brothers (Owen) is actively involved in the business, but none of the other owners has any involvement. No members of the next generation are interested in working at the company, so the owners are eager to sell.

The company's lawyer is a solo practitioner (Sally), but when informed of the sale by Owen she, unlike Ned, tells Owen she is not comfortable handling a transaction of this size and importance. Owen asks Sally (as well as his accountant) to provide him with the name of a lawyer who can handle his transaction. Your name is provided by the accountant, with whom

you have worked in the past and who believes your personality would mesh well with Owen's. Sally also suggests an attorney. Owen schedules introductory meetings with both prospective lawyers during the first week of November.

At your first meeting with Owen, he tells you the sale transaction should be pretty simple because he and the buyer have been doing business together for decades and the owner of the buyer is a 'stand-up' guy. He also says the buyer is going to consolidate operations out-of-state, and will only be retaining a few hand-picked employees. All other employees will lose their jobs when the sale is consummated. He acknowledges he might have some difficulty with certain post-closing matters (primarily dealing with office and warehouse space the buyer does not want), but those will be mostly business issues he will handle. Owen starts describing the transaction, and you learn the value of his business is primarily in the company's license agreements, of which there are 100 (although three of them could be considered the company's crown jewels). You also learn the sale must be structured as an asset sale for tax purposes. At this point in time, he tells you he would like to close by year end, and asks if you would handle the transaction for a $50,000 fixed fee.

Your experience tells you that Owen's time line is almost impossible to meet, and that the proposed fixed fee will be inadequate. Without even reading one of the license agreements, you realize that because the transaction is structured as an asset sale, consent is going to be required from a large number of licensors. As you know from the first fact pattern, obtaining third-party consent is not easy, especially within a short period of time. To further complicate matters, you do not have any institutional knowledge of the company, and know the matter will require you to conduct due diligence on the company at the same time as the buyer. You also are thinking that your firm is currently light on M&A matters, and that you could really use a fourth-quarter deal and this transaction would certainly fill that void.

Resisting the temptation to simply say yes, you are honest, and tell Owen your reservations. He looks at you like you have three eyes and says: "But just yesterday I met with the lawyer referred to me by Sally and he told me that he just closed a pretty complicated transaction and that he didn't see any problem with the timing or the fixed fee. Perhaps you know him, his name is Ned."

After you regain your composure, you decide you are not going to bad-mouth Ned. Instead, you educate Owen. You explain to Owen why you believe his timeline and fixed fee arrangement are not reasonable. You explain to him that consents will probably have to be obtained and that they might not be easily obtained in a short period of time. Owen responds by saying: "You're probably right. I can't get them to change anything in short order." You also explain the due diligence process and how it is important to do things the right way, with great care and thoroughness. You emphasize that if you cut corners you would probably have to return a portion of the purchase price. "I didn't realize that could happen," he says. "I'm glad you explained it. Maybe Ned was just yessing me to death."

Owen retains you, and you get started. Owen was right about one thing—the owner of the buyer is a stand-up guy, and his lawyer (Tom) is even better. Tom works for a large international firm, is experienced in these matters, and is a perfect gentleman. He gives you a due diligence checklist and you review it with Owen. The purchase agreement arrives a couple of weeks later. Owen provides you with copies of all 100 license agreements. You notice they are governed by the laws of not only different states, but different countries. Virtually all of them contain anti-assignment provisions, but only about half of them contain change in control provisions. Owen is concerned about seeking certain consents because it could delay or even derail the entire deal.

You explain to him that it might be possible to restructure the deal, but you would have to conduct a lot of research and retain counsel in foreign jurisdictions to determine if a change in control is deemed to be an assignment under the laws of those jurisdictions. If so, the restructuring will not provide much relief. You explain to Owen that this will take time and cost money, but Owen understands how important the issue is, and authorizes you to proceed. In the meantime, you are reviewing the purchase agreement with Owen and point out to him that Tom made an obvious drafting error that would put an extra million dollars into the pockets of the owners. You want to point out the mistake to Tom, but Owen instructs you to the contrary. You explain to Owen that by pointing out the error you will increase the trust factor between you and Tom, which could be useful in the future. You also explain that it is likely Tom will realize he made a mistake and correct it before the purchase agreement is signed, in which case you will have lost the opportunity to earn the 'goodwill' with Tom. Even if the purchase agreement is signed, at some point in time the error will surface and the buyer could seek to recoup his loss post-closing. For example, he could fight earn-outs or file claims for indemnification that he otherwise would not bring. Owen reluctantly agrees to permit you to advise Tom of his mistake, which turns out to be advantageous to Owen because the results of the research on the consent issue favors the restructuring of the transaction into a stock deal.

As it turns out, the buyer is amenable to restructuring the transaction and the number of consents that have to be obtained is significantly reduced. However, because the transaction morphed into a stock deal, you now have to tell Owen that each of the owners has to obtain his or her own counsel, but by this time nothing really surprises Owen. You supply those lawyers with copies of all documents in a timely manner, and incorporate any changes they may have into the transaction documents. Relations are good all around, the transaction closes without incident and Owen turns to the task of dealing with those thorny post-closing issues.

Fact Pattern 3

Now let us consider a much more pleasant scenario. Larry, a lawyer at another firm, calls you with the news that his client (Clarence) wants to sell his business. Unfortunately, Larry cannot represent Clarence due to a conflict of interest. Larry refers Clarence to you. You explain to Clarence how sale transactions usually develop; that they tend to take a lot of time and effort, which will be reflected in your billing; and then you start work. Almost immediately, you realize the buyer is not behaving properly. He's not conducting due diligence, he's keeping his own lawyer out of the loop, and in general, he is acting strangely. Concerned about developments, you warn Clarence that something with this proposed transaction is 'off,' but Clarence is desperate to sell. You press on, but it's like slogging through mud, uphill. You tell Clarence this, but he urges you to keep on trying, so you do. Then, at some point, Clarence's bizarre buyer vanishes into the night and the sale is never completed. Clarence, however, is left with your substantial bill for the work you did. Fortunately, Clarence appreciates your efforts and pays your fee.

Fast-forward six months. Another buyer surfaces to buy Clarence's business. Clarence, remembering your good work, calls you and asks you to handle the transaction. What do you do?

First, ask yourself, why did Clarence call you back or, more accurately, why, in the face of such a disastrous outcome, did Clarence *still* call *you*? It is probably because of the way you handled yourself during the disaster, leading Clarence to trust you and have confidence in your abilities. That trust and confidence were built on your honest and straightforward communication with Clarence throughout the transaction. You explained to Clarence how things were supposed

to play out, and you explained to Clarence exactly when things began to go wrong. This communication helped him set realistic expectations, so that when the deal did go south he was deeply disappointed but not surprised and, more importantly, he did not blame you.

In addition, you did not forget that communication includes communication about billing. Some people are shy when it comes to talking about money. Do not be one of them. At the beginning of your relationship with your client, be clear about how you are going to bill. Do not just explain about rates; be sure to explain how the matter will be staffed and how often you will be sending out invoices. Again, this is a matter of ensuring your client has realistic expectations. If a particular step within a transaction is proving more difficult and time consuming than you anticipated, pick up the phone and warn your client, because it's probably fair to say that an unexpectedly huge invoice qualifies as a nasty surprise. Remember—Clarence paid his bill in full, even though he got nothing for it.

But back to the original question: What do you do when Clarence asks you to handle the new transaction? The correct answer is not to say yes without hesitation. The correct answer is: "I am honored that would ask me to handle this transaction, but in all fairness, I only stepped in to cover for Larry because his law firm had a conflict. Because Larry's firm may not have a conflict with the new transaction, I would not feel comfortable handling the new matter unless you first discussed it with Larry."

So, when dealing with adversaries…wait, you say, Larry isn't an adversary! After all, he made the initial referral! But in the legal profession every lawyer is a potential adversary. You never know who will be on the other side of the table, on the other end of the phone. So rule number one for dealing with your adversaries, past, current, and future, wherever they may be sitting, is to be fair. Respect existing relationships, and always remember the golden rule—do unto others as you would have them do unto you. This involves more than just not abusing referral relationships. This means everyday practical niceness.

Try to be timely; let your adversary know when you will be sending materials, and try to not send them at 4:59 p.m. on a Friday afternoon before a long holiday weekend. Always send documents in word processing format so they can be easily marked with changes and comments, and remember to send redlines. If you do not, you are still going to get comments, only now they will be coming from an aggravated adversary rather than a friendly one. There is no benefit gained for you or your client by being gratuitously difficult. Save leverage for when it matters—when you need to achieve something for your client. So do not be aggressive when you do not have to be; do not ask for an opinion if one is not warranted; do not waste time moving commas unless they actually help the document; and if a draft comes from your adversary with an obvious mistake, tell him or her. It is probably going to come out eventually anyway, so get credit for being honest.

The happy postscript to this vignette is that Larry continues to make referrals to you and your firm when his office cannot handle matters due to conflicts or any other reason.

Finally, the most important rule of all when dealing with anybody—client, adversary, or team member—is to listen. Listen to your client, listen to your adversary, listen to the team members. Listen means more than just signals along your auditory nerve. Close your mouth, open your mind, and listen. Do you have to agree with everything you hear? No. But do you need to know how everyone is feeling about a particular issue? Yes, because you can't solve problems unless you know they exist. So listen, and if you really listen well what you will hear is the sweet sound of an excellent result for your client.

H. Glenn Tucker *is the chair of the corporate department of Greenberg Dauber Epstein and Tucker in Newark.* ***Robert F. Ripley*** *is a partner in Greenberg Dauber Epstein & Tucker's corporate department.* ***Jennifer S. Saal*** *is a partner in Greenberg Dauber Epstein & Tucker's corporate department.* *The authors would like to thank the members of the Professionalism Committee of the NJSBA Business Law Section for their contributions in developing the guidelines. Committee members included: John Aiello (Giordano Halleran & Cesla), Maria Cestone (Cestone & Thompson), Bruce I. Goldstein (McCusker, Anselmi, Rosen, & Carvelli), Roger M. Iorio (Cole Schotz Meisel Forman & Leonard), Stuart L. Pachman (Brach Eichler), Gianfranco A. Pietrafesa (Archer & Greiner), Allen M. Silk (Start & Stark), and Seth E. Zuckerman (Greenberg & Traurig).*