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## DOES YOUR BUSINESS NEED A BUY/SELL AGREEMENT?

**A** buy/sell agreement is a contract between the owners of a closely-held business, designed to provide for continuity of ownership in the event that one of the owners dies, becomes disabled, gets divorced, voluntarily or involuntarily leaves the business or declares bankruptcy; or the business itself declares bankruptcy; or one of the owners desires to sell his interest.

A buy/sell agreement focuses on each owner's rights to transfer ownership to others – either within or outside the company. The purpose of the agreement is to describe the events that might happen and establish a method for handling each event if and when it occurs.

### Why Have A Buy/Sell Agreement?

Every closely held business that has more than one owner should consider having a buy/sell agreement, for these reasons:

- To assure that there will be continued stability without the uncertainty of transfers to unknown third parties or the pledging of the business interest as collateral for personal loans.
- To provide a purchase price formula if one owner departs.
- To provide for owners who become disabled or retire and the families of deceased owners.
- To enable the remaining owners to continue running the business without interference by former owners and their families.

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- To benefit key employees by assuring them that a business succession plan is in place if one owner departs.
- To provide an opportunity for key employees to buy into ownership.

#### **When Should Buy/Sell Agreements Be Entered Into?**

The best time to enter into a buy/sell agreement is now, before problems arise. Unfortunately parties starting a business often tend to postpone preparation of such an agreement because it seems unimportant or they do not want to devote the time and expense for such an effort. The earlier these issues are considered, the more likely objective approaches will be available to reach an agreement among owners.

#### **What Should the Buy/Sell Agreement Include?**

Some important factors to consider for inclusion in any buy/sell agreement are:

- Include all owners of the business entity as parties to the agreement.
- Address as many potential triggering events as possible.
- Identify the purchase price, approaching the valuation question from the standpoint that any one of the owners in the future could be on either side of the issue – either a remaining or a departing owner.
- Determine the date of the business valuation, such as the period of time after a principal's death, the period of time after termination of full-time employment or the period of time after disability.
- Provide how long after the triggering event the transaction will conclude.
- Outline payment terms of the purchase price, including maturity dates and interest rates for installment payments.

- Provide for funding, including references to life insurance and disability insurance. Such proceeds may impact the payment terms and amount of the purchase price.
- If the purchase price is paid in installments over a period of time, reference the type of security to the seller in the event of a default.

Buy/sell agreements are usually structured either as a redemption agreement or as a cross-purchase agreement. Under a redemption agreement, the business entity has the obligation to buy back the shares or interest of the departing owner. Under a cross-purchase agreement, the remaining equity owners are obligated to purchase the interest of the departing owner. Each structure has its own advantages and disadvantages.

Owners in a closely-held business will always have to address the problem of which is more important, the survival of the business or obtaining the maximum dollar value for the family of the departing owner. The best results usually occur when owners address that consideration from the viewpoint of what they would consider fair and reasonable, not knowing which side of that issue they might be on.

#### **What Should the Business Do Now?**

Business owners who are aware of the need to plan for business continuity and stability should do as follows: If the business has an existing buy/sell agreement, review it with your professional consultant to update the document. If the business does not have a buy/sell, contact your professional consultant to get an agreement in place as soon as possible.

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## **DOCTORS MUST SECURE THEIR PATIENTS' INFORMED CONSENT.**

Before a doctor treats or operates on a patient, he must obtain the patient's consent to the procedure. If the patient is a child or is incompetent, the consent must come from someone legally authorized to give consent on the patient's behalf. The consent must always be an informed consent, no matter who gives the consent.

The law requiring informed consent is based on the principle that every patient has the right to exercise control over his own body by deciding whether or not to undergo a proposed therapy. The choice is the patient's, not the doctor's. If the doctor does not obtain informed consent before proceeding, the doctor commits a battery on the patient.

A consent is an informed consent – and therefore legally valid – only if the patient is told of: material risks; unexpected risks; possible complications expected; reasonable alternatives; risks and comparative benefits of the alternatives; effects of non-treatment; and the doctor's training and experience.

In Illinois, the extent of the duty to disclose is measured by a medical community standard. That means what is customarily disclosed by physicians, or, what a reasonable physician would disclose under similar circumstances. In some other states, but not Illinois, the duty to disclose is dependent on the patient's need for material information.

If a physician fails to obtain the patient's informed consent before the procedure, he can be sued for malpractice. The question then becomes: Did the lack of informed consent result in an injury to the patient? In other words, would the patient have gone ahead and had the procedure even if the proper informed consent had been given, or would he have declined the procedure? To answer this questions, courts ask: What would a prudent person in this patient's position have decided if he had been adequately informed?

If disclosure would not have changed the decision of a reasonable person in the position of the patient, there is no legal connection between nondisclosure and treatment. If, however, disclosure would have caused a reasonable person in the position of the patient to refuse the procedure, a connection exists.

Based on a physician's general duty to disclose material risks to the patient, physicians are well advised to discuss the following with every patient – in clear and understandable language – as part of the normal and customary informed consent procedure:

- Explain the patient's diagnosis, in terms that the patient can understand. Explain to the patient what the condition is and how it affects the patient's well being. Make use of instructional aids such as models, illustrations and videos.
- Discuss the general nature of the contemplated procedure. Explain to the patient what takes place during the procedure and where on the patient's body the procedure is to be performed and what devices will be used.
- Discuss the risks involved in the procedure. Explain to the patient any material risks associated with the procedure and the possibility of the risk occurring. General risks to discuss are infection, failure to relieve symptoms, need for further surgery or follow up and failure to correct the problem.
- Discuss the prospects of success. Explain how successful the procedure is expected to be. Explain if the procedure will give permanent or temporary relief, and explain if additional surgeries may be needed for a complete success.
- Discuss the prognosis if the recommended procedure is not performed. The discussion should include an analysis of whether the patient's condition could get worse over time if the procedure is not performed and an explanation of how the patient's condition can affect the patient's lifestyle if the procedure is not performed.
- Discuss alternative treatments. The doctor should explain any non-surgical treatments which could relieve the patient's problem and should explain risks of alternative surgical treatments and other procedures so the patient can decide which procedure would be best for him.

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## DO YOU NEED A LEGAL AUDIT OF YOUR INTERNET WEBSITE?

Every business should consider conducting a legal audit of its internet site to ensure compliance with regulatory requirements. Cyberspace is becoming increasingly regulated by the federal government, and the regulatory environment is ever changing.

### Statutes regulating the internet include:

- **The Anticybersquatting Consumer Protection Act.**  
This law provides trademark owners with a civil remedy against cybersquatting – the registering of other entities'

trademarks as domain names and profiting from the sale of those names or traffic through the site.

- **The Children's Online Privacy Protection Act.**  
This law regulates operators of commercial or online service directed to children under 13 that collect personal information from children or that operate a general audience website and have actual knowledge that children are visitors.

- **The Digital Millennium Copyright Act.** This law creates safe harbors for online service providers against copyright liability if they adhere to and qualify for certain prescribed guidelines and promptly block access to allegedly infringing material or remove such material from their systems if they received notification claiming infringement from a copyright holder.

The internet is also regulated by a myriad of federal laws regulating advertising in general, state laws relating to sales and use tax, laws restricting unsolicited commercial e-mail advertising, and laws of foreign jurisdictions relating to the internet.

In view of all this, adoption of a systematic website legal audit can be critical to avoiding costly and preventable litigation. A website audit should concentrate on:

- **Name use:** Is the complete legal name used consistently throughout the website? Legal entities must consistently present themselves to the public as the legal entity they are organized or incorporated as. Unless the business presents itself under a properly registered assumed name or its complete legal name, it risks losing the protection afforded it by the statute under which it was organized.
- **Copyright:** If the website was created by an independent contractor, who owns the intellectual property, including all original source code, associated with the website? There should be a written agreement transferring all necessary rights from the web designer to the site owner. Appropriate consents, licenses and agreements should be obtained from third-party authors or owners of materials that are published on the website. Attribution to the author or owner should be consistent with those consents, licenses and agreements. Any original content should be registered with the U.S. Copyright Office. Though not required by law, that is an important part of protecting a very significant financial investment. Copyright notices should be used on the website that are appropriate and consistent.
- **Copyright Infringement:** If the website allows for the exchange of ideas through forums or other similar electronic communities, it should comply with the Digital Millennium Copyright Act mentioned above. This helps reduce the risk of copyright infringement caused by content uploaded by the site's users. Compliance includes notifying users of the name, email and mailing address of the agent authorized to accept notices of alleged copyright infringement, designating a copyright agent with the U. S. Copyright Office, and providing takedown notices and procedures.
- **Trademarks and Domain Names:** All domain names should be reviewed to ensure that they do not conflict with registered trademarks. Failure to do so may lead to costly claims of trademark infringement or claims under the Anticybersquatting Consumer Protection Act. Appropriate consents, licenses and agreements should be obtained from third-party owners of the trademarks or domain names that are used on the website. Proprietary trademarks should be registered with the Illinois Secretary of State and the U.S. Patent & Trademark Office.
- **Legal Notices and Terms of Use:** The website's terms of use should be legally enforceable. They cover issues such as how content can be used, limitations of liability, rights to submissions or ideas and compliance with applicable laws. Appropriate language should be stated to disclaim liability for the accuracy of information contained on the website or on websites for which links have been provided. The disclaimers should be at a website location that is easily found. The company might want to require website users to acknowledge and accept the terms of use.
- **Sweepstakes, Promotions, Contests and Advertising:** If a website promotes the sale of products, it should contain terms and conditions of sale, including warranties, disclaimer of warranties, limitations of liability, return policies, shipping and delivery arrangements, payment terms and collection policies. If the website promotes a sweepstake, the sweepstakes should have adequate rules, affidavit of eligibility, liability and public release posted on the website. The site should be in compliance with advertising laws and guidelines such as the Federal Trade Commission's rules applicable to children's advertising, comparative ads, contests and sweepstakes, bait and switch, catalogs, credit, disclosures and disclaimers, endorsements and testimonials, franchises and business opportunities, free claims, guarantees, internet advertising, mail order advertising, pricing and rain checks.
- **Sales Tax Issues:** If the website sells products nationally, it should collect state sales taxes for sales in jurisdictions in which it has a nexus (generally, meaning a physical presence in the buyer's home state). If the business has a nexus to a state, then it must collect and remit that state's sales tax. If the company has no nexus, then the buyer himself may be required to remit the sales tax. Not terribly surprising, buyers generally do not comply with that requirement. One study showed that the

states are yearly losing as much as \$1.7 billion in sales tax revenue from this source. As a result, states are looking for ways to expand the definition of nexus and obligate internet vendors to remit the appropriate sales tax.

- **Privacy Policy:** The business' privacy policy must comply fully with the Children's Online Privacy Protection Act. The privacy policy must specify what personal information is collected, how it is maintained, what the information is used for, whether it is sold or shared with others, whether the user can opt out, whether the user can access incorrect data associated with his own

account, and what steps are taken to maintain security of the information. The privacy policy must contain a clear explanation of the use of "cookies." If you still think cookies are those delicious things that grandma baked for you, you need to get more technology-updated.

- **Insurance:** Every business should carry the proper insurance for its online activities covering invasion of privacy, other types of privacy liabilities, defamation, and intellectual property infringement.

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## THE NEW ILLINOIS EMINENT DOMAIN LAW – THEY CAN STILL TAKE YOUR HOUSE.

In most countries, the government has the absolute right to take private property – often without any compensation, or with bare minimum compensation to the owner whose property was taken. The United States stands almost unique in the world in having a provision in its Constitution mandating that although private property may indeed be taken by the government, it may be taken only for public use and the owner must be paid just compensation. Essentially, just compensation means fair market value.

Every state in the Union, including Illinois, has a similar law. Illinois has delegated the right to take private property (for just compensation) to many of the State's more than 1,000 local governmental units.

This power of the United States, the 50 states and various local governments to take private property for public use – but pay fair market value – is known as the power of eminent domain or the right of condemnation.

The limitation on all takings that they must be for public use means in theory that the government may not take private property to be used for private purposes. However, two years ago in a case called *Kelo vs. City of New London*, the U.S. Supreme Court surprised legal observers by ruling that the U.S. Constitution does not prohibit a governmental entity from taking private homes so that the government could build offices, a hotel and a river walk to complement a nearby research facility. The Supreme Court said that each local government could define public use it sees fit.

*Kelo* sparked fierce public debate and outrage over the use of eminent domain. Private homeowners had visions of the government appearing one night and taking their homes and evicting them to benefit a rich private developer. In Illinois, worried citizens successfully lobbied the legislature to completely rewrite Illinois' eminent domain law. The new law took effect January 1st of this year.

The new Illinois eminent domain law does not prevent the government from taking your house. Instead, it divides all taking of private property into five categories and establishes different requirements for each. The burden on the governmental entity increases as the nature of the taking becomes more private. Here are the five categories:

- **Public Ownership or Control.** If the government is taking the property with the intent that it will be publicly owned and controlled, the governmental authority need show only that the acquisition is necessary for a public purpose. In this category, for example, would be a taking of land on which to build a road or a public school.
- **Private Ownership or Control.** If the property will be privately owned or controlled, the governmental authority must prove by clear and convincing evidence that the acquisition is necessary and is primarily for the benefit, use or enjoyment of the public. Examples are takings for railroads, pipelines and utilities.
- **Elimination of Blight.** If the property is being taken because is it blighted, the governmental entity must prove by a preponderance of evidence that the property is indeed blighted; that the taking is necessary and that either (a) the government has made an agreement with

a private entity that will develop the property, or (b) the exercise of eminent domain is consistent with a regional plan or certain codes, or (c) the taking is consistent with a proper comprehensive development plan, and a deed restriction is recorded against the property assuring that the use of the property will remain consistent for at least 40 years.

- **Private Ownership or Control, Public Use.** If the property is being taken for private ownership or control, but for public use, the governmental authority may take the property and then give the property to the private entity, but it must prove the necessity of doing so, and there must be a 40 year deed restriction assuring such use. Examples are public housing, airports, roads, mass transit facilities, utilities, railroads, water supply, waste disposal facilities, parking spaces, libraries, museums, charter schools and landmarks.

- **Public Ownership and Private Control.** If there will be public ownership and private control, the governmental entity must show that the taking is necessary, that the acquired property will be publicly owned but not controlled, and that the property will serve one of the enumerated functions listed in the statute. Examples are airport concessions and hotels for convention centers.

The new law also grants additional benefits to the property owners that did not exist under the old Illinois eminent domain law, such as relocation costs. To ensure that the governmental authority cannot quickly sell the property to a private entity at an unreasonably low price, restrictions are imposed on when the property that is taken may subsequently be sold, and at what price.

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*Fact or Fiction?* The courtroom bailiff pounding a gavel and saying something like, "All rise. Hear ye, hear ye. This honorable branch of the Circuit Court is now in session. Come to order. Be seated. No talking."

*A: Fact.* Nearly every American courtroom is opened each morning with a deputy sheriff, bailiff, marshal or clerk banging a gavel and intoning these or similar words. That's the only time you'll ever hear a gavel used in a courtroom. In some courtrooms they have added one more sentence: "And turn off your cell phones."

## RECENT ANNOUNCEMENTS

**All the news you can use...**

ACHIEVEMENTS OF NOTE

**Tracy Stevenson** spoke before the National Insurance Crime Bureau on the subject of insurance fraud.

**Tracey Salinski** and **Nat Pomrenze** spoke before Loyola Medical Center's Department of Pediatrics on physician employment agreements.

**Jeffrey Randall** and **Richard Fimoff** authored a chapter on representation of a home rule municipality for the Illinois Institute on Continuing Legal Education's textbook on municipal law.

**Tracey Salinski** was a guest lecturer at John Marshall Law School on the topic of structuring health care entities.

**Michael Hriljac** gave a presentation on financial ethics in health care at the Midwest Podiatry Conference.

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