BECOME A VICE PRESIDENT OF KNOW:
EFFECTIVE MARKETING MESSAGES FOR BUSINESS CLIENTS

By Gideon Grunfeld

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"Put all of your contracts in writing."

This is among the most common pieces of advice attorneys give to businesses.

A recent conversation with a partner at a large firm highlighted the shortcomings of this message. She drafts contracts and handles litigation for participants in a specific industry in which most of the transactions involve the sale of goods. When we were discussing her marketing message to this industry, she noted with some consternation that most of the buy/sell agreements were consummated without a written contract. She felt that her marketing materials should focus on the risks associated with relying on oral agreements. Essentially, she wanted to tell her clients and prospects, "Put all of your contracts in writing."

But as we discussed this industry, we realized that business owners had legitimate reasons not to put every contract in writing. The industry has few participants, and the barriers to entry are relatively high. The value of individual transactions ranges from three thousand to half a million dollars. And the number of transactions in a given year is sufficiently high that business owners expect that they will interact with each other on a regular basis. They have little incentive to cheat each other.

In these circumstances, echoing the usual orthodoxy about written contracts would be a dubious way to market a law practice. Why? Because such advice fails to consider transaction costs and the different ways in which business owners and attorneys often think about risk. With respect to transaction costs, it doesn't make sense for the business owner to pay the lawyer $5,000 to draft a contract to sell a good that is worth less than that. And it is often short-sighted for attorneys to lower their fees and the value of the work they provide to draft written contracts for such low-level transactions.

Moreover, the business owner, unlike many attorneys, isn't trying to minimize the risks of every transaction. Even if the rare oral agreement does become disputed, that doesn't necessarily justify the time and expense of reducing every buy/sell agreement to writing.

A marketing message that reflexively advocates putting every contract in writing may run counter to the risk tolerances of many business executives.

Furthermore, the different ways in which attorneys and business clients assess risk impacts a wide array of legal services unrelated to drafting contracts. For example, I recently listened to an interview with an intellectual property attorney that was featured on a business channel of an in-flight audio program. The attorney's presentation was smooth, and not overly rehearsed; the production values were high, and the overall marketing approach was fairly sophisticated. The in-flight magazine featured an advertisement that identified a dozen attorneys whose interviews could be heard during the flight or online.

From a marketing perspective, the interview was impressive on several fronts, but the message conveyed by the attorney could have been much better. She expressed her heartfelt belief that clients should adopt "a scorched earth" litigation policy to protect their intellectual property rights. I don't exactly know what "scorched earth" means in this context, but it sounds expensive and self-serving. It's

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the equivalent of telling a client that the very best thing they can do is to use your services. A lot.

But why should the client adopt such an expensive and labor intensive strategy? I am not an IP attorney, and believe that the lawyer's answer would probably relate to the risks associated with intellectual property becoming part of the public domain. For many lawyers this justifies an aggressive litigation and IP protection strategy. But this message would be more effectively marketed if it considered the business owner's understanding of risk, and explained rather than presupposed the value of the attorney's work.

THE MORE BUSINESS CLIENTS PERCEIVE THAT THEIR LEGAL ADVSIORS UNDERSTAND AND ARE SYMPATHETIC TO THE BUSINESS GOALS THEY ARE TRYING TO ACHIEVE, THE MORE LIKELY THEY WILL BE TO LISTEN TO US WHEN WE TELL THEM THAT A CERTAIN COURSE OF ACTION IS UNETHICAL OR CLEARLY UNADVISABLE.

For the lawyer, securing patents and aggressively enforcing a client's intellectual property seems self-evident. But that is not how business owners and executives necessarily see it. For example, in August 2006, *Inc. Magazine* published an article entitled, "Relax. Let Your Guard Down". [1] The article's author, David H. Freedman, argued that most efforts to protect intellectual property are a waste of time and money:

> [C]ompanies rarely succeed because they succeed in protecting intellectual property, or fail because they do not. Ninety-five percent of patents end up being of absolutely no commercial value. Even in high-tech, where IP is king, the best rule of thumb for protection is: Don't bother.

The Freedman article is admittedly controversial, but even the people who wrote in to *Inc. Magazine* to challenge his argument, including one letter from a California-based lawyer, acknowledged that most patents are worthless. I am not qualified to assess the wisdom of Freedman's position or the argument, also advanced by the Freedman, that long periods of patent protection aren't generally useful because technology changes so rapidly for most companies.

I do know, however, that patent attorneys would likely improve the effectiveness of their marketing messages if they recognized that businesses continually reassess the value of the legal services they receive. Attorneys act at their own peril when they presuppose the value of their services or assume that their business clients should adopt the approach that fits the attorney's evaluation of risk or utilizes the attorney's services most exhaustively.

This is a problem that transcends litigation and intellectual property practices. There is an increasing body of commentary in the business world criticizing how attorneys' perception of risk distorts the advice they provide to their business clients. In a 2004 Business Week article, addressing the role of attorney CEOs, Jeffrey A. Sonnenfeld, a professor at the Yale School of Management, noted that "business attorneys are often considered 'vice presidents of No.'"[2] Thus, they apparently delight in shooting down deals. The article recognizes that, while a compelling case can be made for attorney CEOs, attorneys view risk in a problematic way. The "main goal of business lawyers is not to maximize profits but to minimize risk."

Some executives have taken an even dimmer view of the influence and abilities of business lawyers. Billionaire Jon M. Huntsman is perhaps the most notable example. His recent book, *Winners Never Cheat,*[3] devotes an entire chapter to the proposition that executives should "corral the corporate lawyers." Huntsman, who founded one of the largest privately held corporations in the country, bemoans how corporate lawyers have watered down the importance of keeping one's words.

> One's word being one's bond has been replaced with one's word being subject to legal review. Concise, straightforward transactions carry no weight unless accompanied by 100 pages of exceptions and wherebys in fine-print legalese.

Hunstman advises executives to follow his lead and "lock the lawyers in the attic until you really need them." He excludes them from merger discussions unless their expertise in law or language is required. Huntsman doesn't think that attorneys are inherently bad or unethical. It's that they should play a more limited role in business dealings. According to Hunstman, it's the executive's responsibility to be the final arbiter of acceptable risk.

Whether or not you agree with Huntsman's view of attorneys, and their proper role in business transactions, attorneys need to pay attention to such arguments when we market ourselves to businesses. So how should attorneys market their services in such a seemingly hostile environment? Let's use the example of the attorney described at the beginning of this article to illustrate a three-step approach that identifies a more effective marketing message for business lawyers.

First: Understand how the business defines its business goals and acceptable risks to achieve those goals.

In the case of the goods market described above, the conduct of sellers and buyers revealed that an important business goal was to maximize a large volume of transactions. Conversely, they didn't perceive much risk associated with the failure of a particular transaction.

Second: Identify what benefits your work as an attorney provides that correlates most highly with the businesses' most important goals.

Here, the attorney concluded that her services were perceived to be the most beneficial when the value of the good being sold exceeded $100,000. At that price point, both the buyer and the seller had an economic incentive to seek relief if the good was alleged to be defective or the transaction was otherwise problematic. And, at that price point, the benefits of a written contract became more evident. Specifically, it made it harder for the other side to deny certain facts or statements.

In addition, it appeared to the attorney that business owners were reluctant to call her about a specific transaction because of her hourly rate. This reaction suggested that the business owners particularly valued having ready access to the attorney more than they valued having her review documents on an ongoing basis.

Third: Articulate the high-level benefits you provide, and place the risks and benefits in a context that is meaningful for the client.

In light of the answers to the first two questions, the attorney decided to market her services differently. Instead of telling business owners that every agreement should be memorialized in writing, she created a package deal that for a flat fee allowed clients to get basic contracts, and emphasized a benefit that the business owners valued highly—her availability to answer questions. By shifting the emphasis of her marketing message away from every contract, she should bridge the gap between how she and her clients perceived the risks of a particular transaction.

This revised marketing approach may also cause the business owner to take the lawyer's legal advice more seriously. Understanding a client's perception of risk does not mean that we should rubber stamp our client's decisions or meekly acquiesce to their wishes. To the contrary, the more business clients perceive that their legal advsiors understand and are sympathetic to the business goals they are trying to achieve, the more likely they will be to listen to us when we tell them that a certain course of action is unethical or clearly unadvisable.

The best way to counter a businessperson's perception that you are a "Vice President of No" is to demonstrate that, with respect to their business, you are a Vice President of Know.

Endnotes:

1. France, Mike and Lavelle, Louis, *A Compelling Case for Lawyer CEOs,* Business Week, December 13, 2004.

2. Freedman, David H., Relax. *Let Your Guard Down.* Inc. Magazine, August 2006, at 109-11.

3. Huntsman, Jon, M., *Winners Never Cheat*, Wharton School Publishing, 2005, at 71-80.

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