CONTENTS

Acknowledgments xi
About the Author xiii
Preface xv

Chapter 1 Representing the Small Business 1

1.1 What Should You Know About Representing Small Businesses? 1
1.2 Who Is Your Client, and How Can You Avoid Conflicts of Interest? 2
1.3 How Can You Provide Value to Your Clients? 3
1.4 How Can You Attract and Retain Small Business Clients? 5
1.5 Sample Documents and Checklists 8
   Form 1 A: Terms and Conditions for Fee Agreements 9
   Form 1 B: Credit Card Acceptance Language 12
   Form 1 C: Letter to Client Considering Other Counsel 13
   Form 1 D: Sample Fee Deferral and Investment Provision for Fee Agreement 15
   Form 1 E: Sample Contract Provision to Acknowledge the Company as the Client 16
   Form 1 F: Sample Disclosure for Taking an Interest in a Client 16

Chapter 2 Protecting Intellectual Property 19

2.1 Should Your Client Be Using a Nondisclosure Agreement? 19
2.2 Does Your Client Have an Idea that May Be Patentable? 19
2.3 What Is a Provisional Patent? 20
2.4 In What Other Ways Can a Small Business Protect Its IP? 21
2.5 How Should Your Client Work with Designers and Developers? 24
2.6 How Can Your Client Protect Its Trademarks and Domain Names? 25
2.7 What Can Your Client Do If a Desired Domain Name or Trademark Is Not Available? 26
2.8 Will Domain Registries Block Use of a Conflicting Domain Name? 27
2.9 Sample Documents and Checklists 27
   Form 2 A: Checklist for Protecting Trade Secrets 29
   Form 2 B: One-Way Nondisclosure Agreement (NDA) 30
   Form 2 C: Mutual Confidentiality Agreement 33
   Form 2 D: Trade Secrets Agreement 36
   Form 2 E: Technical Consulting Agreement 40
   Form 2 F: Trademark Assignment 47
   Form 2 G: Cease and Desist Letter to Trademark Infringer 48
Chapter 3 Business Plans

3.1 Does Your Client Need a Business Plan and/or Executive Summary? 49
3.2 What Should Be in a Business Plan or Executive Summary? 50
3.3 What Turns Investors Off in a Business Plan? 53
3.4 Sample Documents and Checklists 53
  Form 3 A: Template for a One-Page Executive Summary 54
  Form 3 B: Template for a Longer Executive Summary 55
  Form 3 C: Business Plan Outline for Retail Business 60
  Form 3 D: Business Plan Outline for Technology Business 62

Chapter 4 Contracts for Small Businesses

4.1 How Can You Help Your Client Make Good Contracts? 65
4.2 When Is It Important for a Small Business to Have a Written Agreement? 67
4.3 What If Your Client Has Contracts That Don’t Work? 68
4.4 What Should Be in Your Client’s Boilerplate? 68
4.5 Sample Documents and Checklists 69
  Form 4 A: Discussion Points for a Joint Venture or Strategic Partnership 70
  Form 4 B: Mediation Followed by Arbitration 71
  Form 4 C: AAA Arbitration with Ceiling for Specific Type of Dispute 72
  Form 4 D: Arbitration of a Specific Issue Only 73
  Form 4 E: International Arbitration 74
  Form 4 F: Exception to Arbitration for Disputes Concerning Intellectual Property Rights 75
  Form 4 G: Jury Trial Waiver with Judicial Reference Alternative 76
  Form 4 H: Choice of Law and Jurisdiction Based on Defendant 77
  Form 4 I: Terms and Conditions of Sale 78
  Form 4 J: Website Terms of Use 84

Chapter 5 Legal Structures for Small Businesses

5.1 What Is a “Corporate Shield”? 89
5.2 When Should Your Client Form a Separate Legal Entity for Its Business? 90
5.3 What Form of Entity Should Your Client Choose? 90
5.4 Where Should Your Client’s Company Be Organized? 97
5.5 What If Your Client Does Business in More than One State? 98
5.6 What If Your Client Is Operating in an Inappropriate Legal Structure? 98
5.7 What Legal Requirements Apply to All Businesses? 99
5.8 How Can Your Client’s Owners Avoid Personal Liability? 99
5.9 Should My Client Get D&O Insurance? 101
5.10 What If My Client Wants to Form a Subsidiary? 102
5.11 Sample Documents and Checklists 103
  Form 5 A: Discussion Items for Determining Form of Entity 104
  Form 5 B: Top Ten List for Avoiding Personal Liability 105
Chapter 6 Organizing or Cleaning Up a Corporation

6.1 What Is the Basic Structure of a Corporation? 107
6.2 What Is Authorized Stock? 107
6.3 How Many Shares Should Be Authorized? 107
6.4 What Is Issued and Outstanding Stock? 108
6.5 What Is Issued and Outstanding Stock on an “As If Converted Basis”? 108
6.6 What Is the Role of a Shareholder? 108
6.7 What Are the Roles of the Officers? 108
6.8 What Are the Duties of the Directors? 109
6.9 What Corporate Formalities Must Be Observed? 110
6.10 What Should Be in the Client’s Corporate Minutes? 111
6.11 What Are the Tax and Regulatory Obligations of a Corporation? 112
6.12 Sample Documents and Checklists 113
   Form 6 A: First Correspondence to Newly Formed Corporation 115
   Form 6 B: Second Correspondence to Newly Formed Corporation 122
   Form 6 C: Articles of Incorporation—California 123
   Form 6 D: Certificate of Incorporation—Delaware 125
   Form 6 E: Statement of Incorporator 127
   Form 6 F: Bylaws—California 128
   Form 6 G: Bylaws—Delaware 148
   Form 6 H: Initial Written Consent of Board of Directors 159
   Form 6 I: Rules for Shareholders’ Meetings 163
   Form 6 J: Time and Responsibility Schedule for Annual Shareholder Meeting 166
   Form 6 K: Directors’ Written Consent 169
   Form 6 L: Shareholders’ Written Consent 171
   Form 6 M: Stock Assignment Separate from Certificate 172
   Form 6 N: Lost Securities Indemnity Agreement 173
   Form 6 O: Foreign Corporation Certificate—Delaware 175
   Form 6 P: Certificate of Amendment—Delaware 176
   Form 6 Q: Resignation of Officer/Director 177
   Form 6 R: Agreement for Inspector of Election 178
   Form 6 S: Report of Inspector of Election 180
   Form 6 T: Agreement to Terminate Voting Trust 182
   Form 6 U: Sample Timeline to Identify Issues for Clean-Up 183

Chapter 7 Organizing or Cleaning Up an LLC

7.1 What Is the Basic Structure of a Limited Liability Company? 187
7.2 What Are Membership Interests? 188
7.3 What Are Economic Interests? 188
7.4 Should a Specific Number of Membership Interests Be Authorized? 188
7.5 What Is the Role of a Member? 188
7.6 What Is the Role of a Manager? 189
7.7 What Formalities Must Be Observed? 190
7.8 What Are the Tax and Regulatory Obligations of an LLC? 193
7.9 Sample Documents and Checklists 195
Form 7 A: First Correspondence to a Newly Formed LLC 196
Form 7 B: Limited Liability Company Certificate of Formation 204
Form 7 C: Limited Liability Company Certificate of Formation—Series 205
Form 7 D: Limited Liability Company Certificate Face 206
Form 7 E: Limited Liability Company Certificate Legend 208
Form 7 F: Managers’ Written Consent for Limited Liability Company 210
Form 7 G: Written Consent of LLC Members 212
Form 7 H: Operating Agreement—California Short Form 213
Form 7 I: Operating Agreement—California Corporate Format 217
Form 7 J: Operating Agreement—Delaware Series 243
Form 7 K: Operating Agreement—Nevada Manager-Managed 289
Form 7 L: Power of Attorney 313
Form 7 M: Proxy 314

Chapter 8 Organizing or Cleaning Up a Partnership 315
8.1 What Are the Basic Partnership Types and Structures? 315
8.2 What Are the Roles of Partners? 316
8.3 What Formalities Must Be Observed? 316
8.4 What Are the Tax and Regulatory Obligations of a Partnership? 317
8.5 Sample Documents and Checklists 318
Form 8 A: Certificate of Limited Partnership—Delaware 319
Form 8 B: Limited Partnership Agreement—California 320
Form 8 C: Amendment to Limited Partnership Agreement 340
Form 8 D: One-Page General Partnership Agreement 343
Form 8 E: Partnership Agreement for a California LLP 344
Form 8 F: Mutual Release and Confidentiality Agreement 362

Chapter 9 Founders and Advisors 365
9.1 What Is a Founder? 365
9.2 When Should Founders Have a Written Agreement? 365
9.3 What Is Founders Stock? 366
9.4 How Many Shares Should Founders Receive? 366
9.5 How Should Equity Be Apportioned Among Founders? 367
9.6 Should Your Client Formalize Its Relationship with Its Advisors? 367
9.7 What Are Owners Agreements, and What Should They Cover? 368
9.8 Should a Small Business Impose Vesting Requirements? 369
9.9 What Is a Section 83(b) Election? 370
9.10 What Are Typical Vesting Requirements? 370
9.11 How Should Ownership Be Valued for Purposes of a Buyout? 372
9.12 Sample Documents and Checklists 372
Form 9 A: Founders Agreement 373
Form 9 B: Shareholder Agreement 375
Form 9 C: Offer Notice Pursuant to Right of First Refusal 384
Form 9 D: Provision to Deal with Phantom Income 385
Chapter 10 Introduction to Raising Capital 405

10.1 Which Laws Should a Small Business Be Aware of When Raising Capital? 405
10.2 What Is an Accredited Investor? 406
10.4 Does It Matter Where the Investors Reside, or What Are Blue Sky Laws? 409
10.5 What About Crowdfunding? 412
10.6 What If Investors Provide Goods and Services Rather than Cash? 414
10.7 Is It Okay to Put Fund-Raising Information on a Website? 414
10.8 What Is Restricted Stock? 416
10.9 What Is a Private Placement Memorandum? 416
10.10 Can My Client Pay Finder’s Fees? 419
10.11 Are There Any Recordkeeping Requirements? 420
10.12 What If Your Client Violates Securities Laws? 421
10.13 Where Can I Find the Referenced Forms? 421
10.14 Sample Documents and Checklists 422
  Form 10 A: Outline for Private Placement Memorandum 423
  Form 10 B: Directors’ and Officers’ Questionnaire 430
  Form 10 C: Subscription Agreement 442
  Form 10 D: Blue-Sky Law Requirements and Rule 506 of Regulation D 450

Chapter 11 Seed Financing and Angel Investors 455

11.1 Where Can a New Business Find Seed Financing? 455
11.2 How Is a Small Business Valued for Purposes of Seed-Round Financing? 456
11.3 What Is an “Angel” Investor? 457
11.4 What Do Angel Investors Typically Expect for Their Investment? 458
11.5 Is Preferred Stock Better Than a Convertible Debenture? 458
11.6 What Is Preferred Stock? 458
11.7 What Are the Basic Terms of a Convertible Debenture? 460
11.8 Sample Documents and Checklists 461
  Form 11 A: Term Sheet—Series A 462
  Form 11 B: Term Sheet—Series B 463
  Form 11 C: Term Sheet—Convertible Debenture 467
  Form 11 D: Placement Agent Agreement 468
  Form 11 E: Warrant for Placement Agent Agreement 482
  Form 11 F: Convertible Debenture 491
  Form 11 G: Purchase Agreement—Series A 497
Chapter 12 Venture Capital

12.1 Is Your Client Ready to Talk with Venture Capitalists? 535
12.2 How Is a Typical Venture Capital Deal Structured? 537
12.3 How Is a Business Valued for Purposes of Venture Capital Financing? 541
12.4 What Is the Employee Pool? 541
12.5 Sample Documents and Checklists
   Form 12 A: Investor Scorecard 543
   Form 12 B: Term Sheet for Venture Capital Investment—Series A 544
   Form 12 C: Preferred Stock Provisions for Venture Capital Investment 552
   Form 12 D: Stock Purchase Agreement 565
   Form 12 E: Shareholders Agreement 588
   Form 12 F: Investor Rights Agreement 597

Chapter 13 Hiring Employees

13.1 When Is an Independent Contractor Really an Employee? 611
13.2 What Are Some of the Most Common Hiring Mistakes? 612
13.3 Should a Small Business Have a Payroll Service? 615
13.4 Are Companies Required to Pay Unemployment Tax? 615
13.5 Should a Small Business Use Offer Letters? 615
13.6 Should a Small Business Have Formal Employment Agreements? 616
13.7 What Should a Small Business Know About Terminating an Employment Relationship? 616
13.8 Sample Documents and Checklists
   Form 13 A: Employment Application with Background Check 619
   Form 13 B: Employment Offer Letter 620
   Form 13 C: Confidential Information and Invention Assignment Agreement 622
   Form 13 D: Employment Agreement 630
   Form 13 E: Executive Employment Agreement 634
   Form 13 F: Sales Representative Agreement 641
   Form 13 G: Severance Agreement 647

Chapter 14 Providing Equity Incentives to Employees

14.1 Should Your Client Offer Employees Ownership in the Company? 651
14.2 What Kinds of Equity Incentives Are Used by Companies? 653
14.3 What Are Stock Options? 653
14.4 What Are Incentive Stock Options? 654
14.5 What Is a Nonqualified Stock Option? 657
14.6 How Much Equity Should Be Granted
to an Early Executive Hire? 659
14.7 How Should Stock Be Valued for Purposes of Equity Incentives? 660
14.8 Do Securities Laws Apply? 661
14.9 Sample Documents and Checklists 662
   Form 14 A: Stock Option Plan 663
   Form 14 B: Stock Option Grant and Stock Option Agreement 673
   Form 14 C: Directors’ Written Consent Adopting Stock Option Plan and Making Stock Option Grants 683
   Form 14 D: Shareholder Written Consent Approving Stock Option Plan 685

Chapter 15 Liquidity Events 687
15.1 What Type of Liquidity Event Might Your Client Experience? 687
15.2 How Can a Small Business Generate a Liquidity Event? 687
15.3 How Can a Small Business Prepare for a Successful Liquidity Event? 688
15.4 What About Secondary Markets for Privately-Held Securities? 688
15.5 Sample Documents and Checklists 689
   Form 15 A: Agreement to Engage Business Consultants 690
   Form 15 B: Due Diligence Checklist 701
   Form 15 C: Asset Purchase Agreement 706
   Form 15 D: Escrow Agreement for Asset Purchase 718
   Form 15 E: Bill of Sale and Assignment for Asset Purchase 722
   Form 15 F: Assignment and Assumption Agreement for Asset Purchase 724
   Form 15 G: License Agreement for Asset Purchase 726
   Form 15 H: Bulk Sale Notice for Asset Purchase 735
   Form 15 I: Time and Responsibility Schedule for IPO 737
   Form 15 J: Closing Checklist for Merger Transaction 750
   Form 15 K: Due Diligence Checklist for Opinion of Counsel 753
   Form 15 L: Officers’ Certificate 755

Index 757