

25 Legal Tips in 50 Minutes: An Experiment in Brevity

presented by

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TIP #1: Asset Protection From Costs of Skilled Nursing Care



TIP #1: Asset Protection

From the Cost of Skilled Nursing Care (i.e. nursing home costs)

Preplan

- Reduce assets
- Maintain control and benefit of assets.
 - Continued use of real property
 - Receipt of income
 - Power to control who receives their assets and when.
- ONLY gives up the unilateral ability to put the transferred asset back in their name.

Crisis Plan

- Reduce Countable Resources
- Use MA annuity
 - Eliminate excess resources
 - Cover ineligibility period

3



TIP #2: FINRA Arbitration and Expungement



4



TIP #2: FINRA Arbitration and Expungement

- FINRA = Financial Industry Regulatory Authority
 - Private not-for-profit corporation
 - Authorized by Congress
 - Oversight by the Securities and Exchange Commission (“SEC”)
- FINRA’s Mission: “Protecting investors and safeguarding market integrity that facilitates vibrant capital markets.”
- What does FINRA do?
 - Regulates Exchange Markets and the New York Stock Exchange.
 - Regulates, tests, registers, and certifies securities firms and professionals individuals that sell, market, or broker securities.
 - Maintains and operates the Central Registration Depository and “BrokerCheck”—public database that shows customers and potential customers individual and firm qualifications, experience, and customer disputes.
 - ✓ BrokerCheck access is required to be included on members’ websites.
 - Serves as efficient arbitration or mediation forum for claims involving FINRA members.

5



TIP #3: Labor Shortage



TIP #3: Demographic Drought



- In February 2020 (pre-pandemic), a record 70% of U.S. businesses reported a talent shortage.
- This was more than double the figure reported in 2015.
- Recent press coverage blames COVID. Is that accurate?



- COVID and COVID-related policies did not create the problem, but merely accelerated its impact.
- According to “Demographic Drought,” the United States is suffering the beginning phases of what it terms a “great sansdemic” or “without people.”

7

TIP #3: Causes of Demographic Drought

- *Demographic Drought*, article by Emsi:
<https://www.economicmodeling.com/>
- Causes
 - Mass exodus of baby boomers (workforce past)
 - Record-low labor force participation rate (workforce present)
 - Lowest birth rates in U.S. history (workforce future)

8

TIP #4: KNOW YOUR CONTRACT???



9

TIP #4: KNOW YOUR CONTRACT???

- **Acceptance of a contract**
 - Acceptance can be accomplished by either an agreement or an act.
 - The document may or may not reflect additional terms which form a part of the agreement.
- **Prior and subsequent writings to a contract**
 - All documents/terms which were part of the contract negotiations need to be referenced or incorporated in the agreement itself.
 - To the extent they are not, a party may not be bound to performance.
 - Subsequent writings, while evidence of intent, may not be legally enforceable without additional consideration.
 - Parties also need to ensure that the modification or amendment language in the agreement is followed when changing or altering an agreement.

10

TIP #5: Alternative Chapters for Bankruptcy Relief



TIP #5: Alternative Chapters for Relief in Bankruptcy

- Chapter 7 - Liquidation
- Chapter 9 - Municipalities
- Chapter 11 - Reorganization
 - Subchapter V - Small Business Reorganization
- Chapter 12 - Farmers and Fisherman
- Chapter 13 - Debt Adjustment for Individuals
- Chapter 15 - International Protocols

TIP #6: Asset Protection From Taxes

- Estate
- GST
- Income
- State



13

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TIP #7: ITEMS, SPECIFICITY & TAXES



14

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TIP #7: ITEMS, SPECIFICITY & TAXES

Purchase

- Parties need to identify what is being purchased, in sufficient detail so as to be enforceable.
- Is there any requirement regarding the quality of goods? Do all parts have to be new?
- The quantity of the item or service needs to be sufficiently identified.
- If there is a deadline for performance it must be sufficiently identified, and to the extent necessary, called out so the other party cannot claim ignorance. Care should be taken to identify, if needed, what remedies there are for failing to perform on a timely basis.

15



TIP #7: ITEMS, SPECIFICITY & TAXES, cont.

Prices

- Is the price firm, or is it an estimate?
- Do changes need prior approval?
- What is the means/manner of approval?
- Are there any “best price” provisions in the agreement?
- If the price is a quote, how long must the quote be honored?
- What are the payment terms? Is there any discount given for accelerated payment?
- If timely payment does not occur, is there a late payment fee or interest to be added?
- In the case of multiple agreements between the same parties, is there an ability to set off claims of one agreement against another? Is there an ability for a default of one agreement to constitute a default of another?

16



TIP #7: ITEMS, SPECIFICITY & TAXES, cont.

Taxes

- In general, a party is obligated to pay the taxes assessed to them by law.
- Did the price in the quote/agreement include or exclude sales tax?

17



TIP #8: Labor Shortage – The Perfect Storm



- Pre-pandemic: U.S. workforce already hit by major talent drought and is forecasting for a continuing drop off in available workforce.
- Pandemic Hits: COVID and COVID-related policies accelerate U.S. workforce drought. Tables turned on Employers.
- Enter Biden: President Biden's big pro-union push.
- These events have all come together to form the "Perfect Storm" for employers and HR professionals.

18



TIP #8: How to Survive the Perfect Storm

- Value your employees
- Employee surveys
- Supervisor Training
- Develop a culture that stresses open communication, encourages employee participation and engagement, and demonstrates the values of fair treatment, respect for the individual, and personal and professional integrity.
- Training on avoiding third party interference in your Company's operations

19



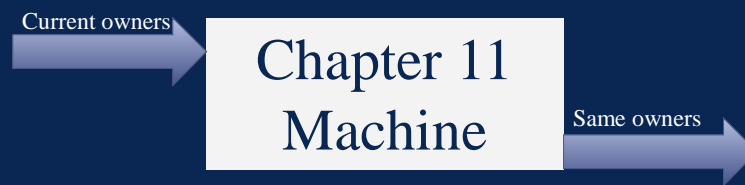
TIP #8: Labor Shortage – Conclusion

- The labor shortage has impacted most employers.
- Although accelerated by COVID and government response to the pandemic, the labor shortage was well on its way and likely will not be a short-term issue.
- Labor shortage has allowed employees or those seeking work to “turn the tables” on employers.
- Labor shortage + COVID + Biden Administration's pro-union push = The “Perfect Storm.”
- Employer should consider taking pre-emptive measures to deal with the “Perfect Storm.”

20



TIP #9: Importance of Financial Projections in a Successful Reorganization



TIP #9: Importance of Financial Projections:

- Goal of Chapter 11 Reorganizations
- 3 types of pleadings that require financial projections:
 - Cash Collateral Motions
 - Monthly Operating Reports
 - Disclosure Statement
- Legitimacy with the Court
- Feasibility of the Plan

TIP #10: FINRA Arbitration – What is Covered?

- **Eligibility for arbitration:** Any type of dispute, claim, or controversy arising out of business dealings with any FINRA brokerage firm or registered individuals.
- **Two ways of securing jurisdiction for disputes:**
 1. Voluntary consent of both parties to the dispute.
 2. Mandatory arbitration provision in contractual agreement—e.g., customer agreement or employment agreement.
- **Two general categories of arbitration cases:**

Customer Disputes	Employment Disputes
<ul style="list-style-type: none">• Fraud• Misappropriation• Misleading advertising• Breach of Fiduciary Duty• Violation of permitted sales practices	<ul style="list-style-type: none">• Claims by <i>Employees</i>: Wrongful termination, discrimination, harassment, etc.• Claims by <i>Employers</i>: Fraud, conversion, breach of employee contract:<ul style="list-style-type: none">• Breach of non-solicitation, non-disclosure, or non-compete provisions

23



TIP #11: Negotiating with Taxing Bodies in Bankruptcy Proceedings



TIP #11: Taxing Bodies

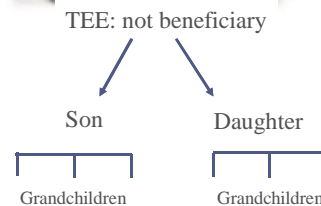
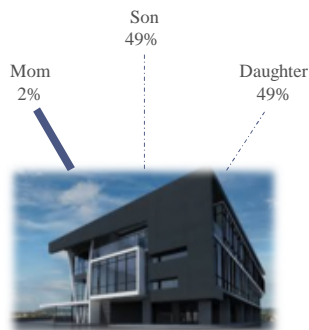
- Required compliance
- Automatic Stay
- Secured or Priority Claims
- Popular Payout schedules
- Objections to proof of claim

25



TIP #12: Asset Protection From Your Kids

- Asset Protection Entities
- Trusts



26



TIP #13: DISPUTES & COSTS



27

"That's your best advice? Play nice!"



TIP #13: DISPUTES & COSTS

Dispute Resolution / Venue

- Most agreements will specify a specific state law which applies to any dispute between the parties.
- Most agreements will specify a specific jurisdiction to resolve any dispute between the parties.
- Parties should be cognizant that choice of state law and jurisdictions for a dispute are enforceable to the extent these have a rational connection to the transaction (corporate headquarters, place of performance, etc.).
- Mediation is a requirement which requires parties to submit to discussions, before going to litigation, in a hope to resolve the disagreement amicably.
- Arbitration constitutes private court, which may or may not include the ability to appeal to an actual court.
- Attorney's Fees for one party, for the prevailing party, for the substantially prevailing party, or silent.

28



TIP #14: FINRA Arbitration – Arbitration Process

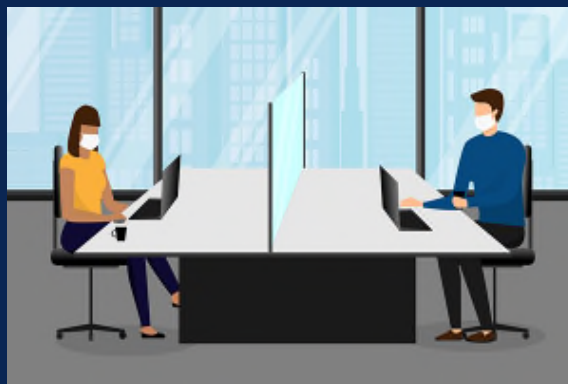
Faster, less expensive, more efficient, and more confidentiality than typical litigation.

- Panel of Arbitrators
- Pleadings
- Motion Practice – Disfavored
- Limited Discovery:
 - Exchange of documents and information = YES
 - Depositions = STRONGLY DISFAVORED
- Hearing
- Decision - Must be confirmed by a Court
- Fees: Depends on amount in controversy. Filing fee, plus hearing session fees. Less expensive than standard litigation or other arbitration forums (AAA, JAMS, etc.)

29



TIP #15: COVID-19 & THE WORKPLACE



TIP #15: COVID-19 & THE WORKPLACE

- On September 9, 2021, President Joe Biden announced a new “Path Out of the Pandemic Action Plan.”
- Biden broke his plan down into six main points:
 1. Vaccinating the unvaccinated;
 2. Further protecting the vaccinated;
 3. Keeping schools safely open;
 4. Increasing testing and requiring masking;
 5. Protecting the country’s economic recovery; and
 6. Improving care for those with COVID-19.

31



TIP #15: COVID-19 & THE WORKPLACE

- Initiatives announced on September 9th include:
 - Executive Order 14043 – “Executive Order on Requiring Coronavirus Disease 2019 Vaccination for **Federal Employees**.”
 - Executive Order 14042 – “Ensuring Adequate COVID Safety Protocols for **Federal Contractors**.”
 - Upcoming HHS Rule requiring all **Head Start** and **Early Head Start** employees to be fully vaccinated.
 - Upcoming OSHA Rule requiring all **private employers with 100 or more employees**, that together employ over 80 million workers, to ensure their workforces are **fully vaccinated** or show a **negative test at least once a week**.”

32



TIP #15: Biden's COVID-19 Action Plan, cont.

- Authority
 - OSHA will issue the new rule as an Emergency Temporary Standard (ETS).
- When will the ETS be released?
 - No set timeline
- Covered employers
 - All employers covered by the Act with 100 or more employees
- Penalty
 - Although the new rule has not yet been finalized, it is anticipated that OSHA will announce fines of up to \$14,000 *per violation*.

33



TIP #16: FINRA Expungement – Part One



34



TIP #16: FINRA Expungement – Part One

- FINRA allows for the expungement of customer complaints from BrokerCheck/CRD...

BUT

- FINRA now considers it an extraordinary remedy
- SEC in the process of instituting new rules to make expungement more difficult
- **Standard for expungement – FINRA Rule 2080**
 - “The claim, allegation, or information is factually impossible or clearly erroneous.”
 - “The registered person was not involved in the alleged investment-related sales practice violation, forgery, theft, misappropriation, or conversion of funds.”
 - “The claim, allegation, or information is false.”

35



TIP #17: THE OSHA ETS



TIP #17: The OSHA ETS – Pressing Questions

- Will remote employees be covered?
- How will the 100-employee threshold be counted?
- Will employers have to provide paid time off for employees to receive and recover from the vaccine?
- Who pays for testing?

37



TIP #17: The OSHA ETS – More Pressing Questions

- What type of testing will be required?
- Will employers be required to collect proof of vaccination?
 - Maintenance of medical records
 - Privacy concerns
- Exemptions?

38



TIP #17: Legal Challenges to Vaccination Policies

■ Federal Vaccination Mandates

- On September 14, 2021, Arizona Attorney General Mark Brnovich announced that his office was suing President Biden’s administration over the vaccine mandates.
- Additional legal challenges have been filed and more are expected. Potential grounds for challenge include:
 - The President’s Powers under Article II of the Constitution.
 - The Equal Protection Clause.
 - The “emergency rulemaking” standard – which is to be used only to address a “bona fide safety emergency” in the workplace and when “necessary to protect workers from grave danger.”

TIP #18: SUCCESSION, AFFILIATION or SALE



TIP #18: SUCCESSION, AFFILIATION or SALE

Assignment / Changes in Ownership

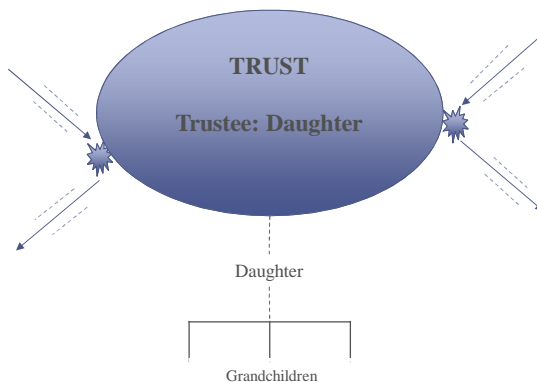
- Assignment governs the right to transfer the agreement in whole, or perhaps in part, to a third party.
- This can and many times does include delegation to subcontractors.
- If the agreement is silent, assignment can be made without any consent.
- Agreements many times call for a specific protocol to be undertaken before consent to an assignment may be given. In the most extreme cases, rights of first refusal are included in assignment provisions.
- Agreements can also restrict the ability of a company to change its ownership, or, alternatively, terminate an agreement if a change in ownership occurs with a party to an agreement.

41



TIP #19: Asset Protection From Your Kids' Creditors / Ex-Spouses

- Asset Protection Entity (with no vote)
- Trusts



42



TIP #20: Sale of Assets in Bankruptcy Proceedings



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TIP #20: Sale of Assets

- Possible scenarios:
 - Unprofitable division
 - Unsuccessful negotiations with creditors
- Free and clear of liens
- No transfer taxes
- Stalking horse bidder protection
- “Turn key” business opportunities

TIP #21: COVID-19, VACCINATION STATUS, AND THE EEOC



TIP #21: COVID-19 & the EEOC



U.S. Equal Employment
Opportunity Commission

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

- Vaccine Takeaways:
 - Asking about an employee's vaccination status and/or requesting proof of vaccination is not a disability-related inquiry under the ADA.
 - However, documentation or other confirmation of vaccination is medical information about the employee and must be kept confidential and in the employee's separate medical file.
 - Mandatory vaccination policies are permissible provided that religious and medical accommodations are considered.
 - Voluntary or incentivized vaccination programs are permissible so long as the incentive is not so substantial as to be "coercive."

TIP #21: Confidential Health Information

- Vaccination status is to be shared on a need-to-know basis and only with supervisors and management.
- Vaccination status cannot be disclosed to other employees.
- Vaccination status cannot be disclosed to clients or customers.



47

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TIP #21: COVID-19 & the EEOC



U.S. Equal Employment
Opportunity Commission

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

- Other Updates:
 - The EEOC recognizes “long COVID” as a disability under the ADA in certain circumstances.
 - An individualized assessment is necessary to determine whether a person’s long COVID condition or any of its symptoms substantially limits a major life activity.
 - Religious Accommodations.

48

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TIP #23: SHIPPING & DELAYS



51



TIP #23: SHIPPING & DELAYS

Shipping Terms

- Must identify who is paying for shipping costs, insurance and risk of loss in transit.
- Certain commercial shipping terms, or Incoterms, are included to govern risk of loss and payment for shipment.
- If there are any specific shipping requirements, they must be included.

52



TIP #23: SHIPPING & DELAYS, cont.

Delays / Holds / Changes / Insurance

- Is time of the essence? Should a grace period be included?
- Is there a force majeure provision in the agreement to govern acts of God? Does it only govern acts of God, or other items that are actually under the control of a party?
- Does a party have the ability to place a hold on performance, even after work has commenced? How long does this period last? Is there any financial consideration that must be given for the hold?
- Can changes to the work be made? At what time and place?
- Is the right to change unilateral or does a party have a right to refuse or increase the price?
- What is the method for confirming the change so that it becomes enforceable?

53



TIP #23: SHIPPING & DELAYS, cont.

Shipping Terms

- What does the indemnity cover?
- Is the indemnity solely for claims of third parties or as a proxy for any other breach of the agreement?
- Is there any trigger for the indemnity provisions to become applicable?
- What insurances are being required by the parties? What coverage amounts apply, and do the parties have them?
- Is there an additional insured, loss payee or other interest that must be granted to another party?
- Is there a waiver of subrogation for any long term arrangements?
- Is there a cap of liability for any indemnity claims, depending upon the nature of the indemnity?

54



TIP #24: Proof of Claims 101

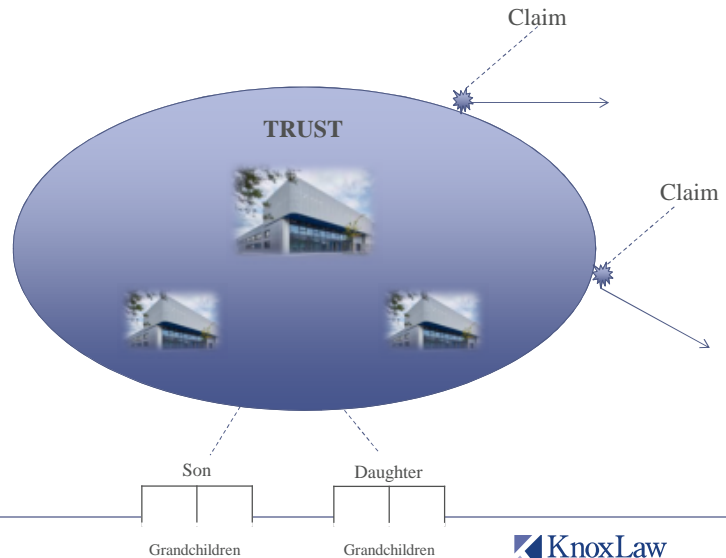


TIP #24: Proof of Claims 101

- File the proof of Claim!
- Submitting to jurisdiction of the Bankruptcy Court
- Preference Analysis
- Attend the Meeting of Creditors
- Documenting your Claim

TIP #25: Asset Protection From Your Creditors

- State Laws
- Federal Laws
- Asset Protection Entities
- Trusts
- Trusts and APEs



57

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Thank You!

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58

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