

Larry:

There are substantial problems with your drafts of the Transition and Release Agreement and the Severance, Waiver and Release Agreement. Because the provisions of the Severance Agreement are needlessly duplicative of and nearly identical to the provisions of the Transition Agreement, I will focus on the more egregious problems with the Transition Agreement.

1. The Transition Agreement is drafted so that the Company is entering into the Agreement on behalf Bill and Melinda and the Company's managers. This makes absolutely no sense whatsoever. A limited liability company can't bind individuals. To even suggest that Boris would not require a release and non-disparagement agreement signed by Melinda, herself, for example, is simply ridiculous.

2. The Transition Agreement is absurdly one-sided. Boris is required to make endless representations, warranties and covenants which are not similarly required of Bill, Melinda, and the Foundation, who are not signatories to the Agreement, or even of the Company, which is. Even in the limited cases where some minimal reciprocal undertaking is provided by the Company, the Company's obligations under the Agreement are minimal and provide no meaningful protection to Boris, especially when compared to the impossibly draconian undertakings required of him. Given that both the limited release granted to Boris and Boris's so called "severance benefits" are made subject to his compliance with the Transition Agreement's multitude of overly expansive representations and warranties and impossible covenants, with virtually no protections in return, it is preposterous to expect that Boris would be willing to enter into this Agreement in its present form.

3. As woefully inadequate "consideration" for the one-sided and oppressive burdens to be imposed on Boris under the current draft of the Transition Agreement, the few "benefits" that the Transition Agreement confers on Boris are illusory at best:

- Section 1 of the Transition Agreement claims to change the nature of Boris's employment from "at-will" employment to employment for a term ending on July 1, 2014. However, Section 1 also provides that the Company "may choose (or decide) to have Dr. Nikolic stop performing services prior to July 1, 2014," and provides no limitation whatsoever on the Company's ability to do so. Clearly, despite Section 1's stated changes, the nature of Boris's employment effectively remains "at-will".
- The limited release granted to Boris under Section 2.1b and the non-disparagement benefits under Section 4.3b are meaningless, as the Company has no ability whatsoever to release claims or make non-disparagement agreements on behalf of Bill, Melinda or the Company's managers.

- Moreover, Section 2.1b of the Transition Agreement will permit the Company to avoid the release altogether pursuant to the express exclusion from the release for any “affirmative misconduct” (whatever that means) by Boris of which the Company was unaware at signing. Thus, the Company would have the ability at any time to vitiate Boris’s release simply by asserting some claim of misconduct by Boris. It is laughable to think that anyone could derive any comfort from or be satisfied with such an aggressively lopsided mutual release.
- Boris’s entitlement to the severance benefits provided in Section 6 of the Transition Agreement, which benefits still remain largely undefined and tentative as a result of the missing terms and bracketed language in your drafts, is subject to the express condition that “Dr. Nikolic performs his duties **in a manner satisfactory to the Company** through the Separation Date.” This clause is entirely open-ended, giving the Company complete and unfettered discretion to avoid any severance obligations whenever it chooses to do so.

4. Just to give a few additional examples of the ill-considered and outrageous provisions in your drafts:

- Throughout the Transition Agreement the defined term “Released Party” is used in a number of important contexts, including Boris’s grant of a general release in favor of the Released Parties in Section 2.1, Boris’s obligation not to disparage a Released Party in Section 4.3 and Boris’s obligation in Section 3 to return or destroy property received or taken from or given access to by a Released Party. Despite its obvious importance in the Transition Agreement, the term “Released Party” is carelessly defined to include “present, former and future affiliates, related entities (including without limitation any other entities owned or controlled by William H. Gates III), predecessors, successors and assigns,” which has created a number of obvious and frankly silly interpretative consequences. For example, what is meant by a “former predecessor”? Additionally, how is it even possible to apply these obligations to “future affiliates” or “future related entities”? How can Boris be expected to release or to refrain from disparaging an unnamed person or entity whose affiliation or relationship with Bill is not yet established and will not be established until some undefined time in the future? In addition, by virtue of this overreaching and silly definition, Boris has an obligation to return or destroy property or information that Boris might receive from some now unnamed person or entity without any current relationship to Bill, but who may become affiliated with Bill at some future time, well after Boris received the property or information. Obviously, there are a multitude of ludicrous interpretative permutations in attempting apply these obligations to “future” persons and entities, all of which could and should have been avoided with a more thoughtful and reasonable approach.
- In Section 3 of the Transition Agreement, Boris is required on demand and at the end of his employment to return or destroy any property or information

acquired during the course of his employment, without any thought whatsoever given in Section 3 to any record keeping requirements that Boris may have. Does it may any sense that Boris would have to delete emails and records that he may require for his taxes? To give a sense of how absurd these provisions really are, as drafted, Section 3 would even require Boris to destroy his own W-2s or return them to the Company.

- In Section 4.1 of the Transition Agreement, Boris is subject to all the restrictive covenants he made during his history with the organization, while neither the Company, the Foundation, nor Bill and Melinda are subject to any restrictive covenants.
- Boris is subject to impossibly expansive, overreaching and unworkable non-disclosure provisions in Sections 4.1a and 4.2 of the Transition Agreement, while neither the Company, the Foundation nor Bill and Melinda are subject to any.
- The non-disclosure obligations imposed on Boris are so expansive as to make it impossible for Boris to even perform his duties during the final term of his employment without risking a violation and the resulting forfeiture of his so called “severance rights.” For example, the provision in Section 4.2 designating as Confidential Information “(d) the subject matter of the communications between Dr. Nikolic or others and Company, the Bill & Melinda Gates Foundation or the Individuals,” literally encompasses absolutely anything that these people talked about, whether or not related to the Gates organization and whether or not related to anything that might be deemed confidential at all. The non-disclosure provisions lack even the basic standard carve-outs for non-confidential information, assuring that the Company has the ability to assert a violation by Boris, and avoid its obligations in the process, whenever it chooses to do so.
- Additionally, the provisions in Section 4.2 that “No Confidential Information or Confidential Materials shall be used by Dr. Nikolic except as expressly authorized by the Company” and that “Dr. Nikolic shall not disclose or permit the disclosure of any Confidential Information or Confidential Materials to any third party without Company’s explicit written approval in advance of any such disclosure” are simply unworkable and would as a practical matter require Boris to seek permission from the Company each and every time he engaged in any employment task. It would also prevent Boris from being able to confer with his own professional advisors, engage in or respond to discovery in any proceedings that may arise, respond to inquiries by Government authorities, or even to comply with applicable laws should it ever become necessary to do so.
- As yet another example of the overly aggressive and careless approach exhibited throughout the Transition Agreement, in Section 4.2 of the Transition Agreement, “Confidential Information” is defined to include “all information . . . in any way related to . . . friends, guests . . . or acquaintances” of Bill and Melinda. By virtue of this definition, Boris could be found to violate his obligations to Bill (and thereby forfeit his right to severance benefits), if, without the Company’s approval, Boris uses or makes any disclosure of any information relating to a person who turns out to be a one

time guest, or a friend or acquaintance of Bill or Melinda (whatever it means to be a “guest”, “friend” or “acquaintance”), even if Boris did not know of this relationship, even if the information was not learned by Boris in connection with Boris’s employment and even if the information has no relation whatsoever to Bill, Melinda, the Company or their affiliates. The absurdity of that proposition speaks for itself.

5. Also particularly outrageous are the “mutual releases” provided in Section 2.1 of the Transition Agreement. In Section 2.1a, Boris is required to waive all claims against and give a general release to all named and unnamed persons and entities now or hereafter affiliated with the Company, the Foundation and Bill and Melinda for anything whatsoever that may have occurred through the date of the Transition Agreement, whether or not even related to Boris’s work for Bill. On the other hand, the Company, purporting to act for its managers and Bill and Melinda (which, as discussed, is obviously impossible), is undertaking to grant to Boris only a very narrow limited release only for acts or omissions during the course of Boris’s employment. And, incredibly, as I previously stated, even that narrow release is subject to an ambiguous exclusion for any “affirmative misconduct” by Boris that the Company can claim it did not know about prior to signing. On the other hand, the far-reaching, all encompassing general release in favor of the Company, the Foundation, Bill and Melinda and their named and unnamed affiliates has no exclusion whatsoever, whether or not Boris subsequently learns of any “affirmative misconduct” by any of the persons Boris released.

These are but a few examples of the many problems created by your drafts. A complete mark-up can be provided once the major problems are resolved and a more reasonable and workable draft is presented.