Dallas Association of Young Lawyers

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Meadows Conference Center

2900 Live Oak Street

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Co-sponsored By

Preface

Small businesses play a significant role in Dallas' local economy. Nearly 80% of businesses in Dallas are classified as small businesses, employing nearly 40% of Dallas' workforce. Small businesses are fundamental to workforce development — especially in minority and immigrant communities. Starting a business helps those most marginalized to accumulate assets and gain a stake in society. On an individual level, owning a business helps people exit poverty and build wealth. On a community level, small businesses anchor communities, providing job opportunities as well as diverse goods and services responsive to local needs.[1]

Unfortunately, many small businesses struggle for survival and tend to have a high failure rate. Many cannot afford legal services that would assist them in maintaining their business. In an effort to have a greater impact on the local community and to help ensure the future success of Dallas' small business owners, the Dallas Association of Young Lawyers (DAYL) partnered with its sister bar organizations on June 20, 2016 to host a free legal symposium focused on the needs of minority and women business owners.

This informative booklet contains articles submitted by presenters at the DAYL Small Business Symposium for participants to use as a resource in starting and developing their business. This booklet includes articles on: real estate, social media and privacy law, debt collection, intellectual property, employment law, and many other topics vital to a business owner's success.

The DAYL Small Business Symposium is excited to provide this general legal information to business owners through this booklet. Please note, this information is not legal advice, and the articles contained in this booklet do not necessarily reflect the views of the DAYL. We highly encourage all readers to hire a lawyer if legal assistance is needed. In the event you retain the services of one of the authors, this is independent of the DAYL or any co-sponsoring organization or contributor.

We hope that you find this booklet useful and we wish you continued success.

Stephanie K. Gause
DAYL President, 2016

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[1]Information provided by the City of Dallas Office of Economic Development [www.dallasecodev.org) and the not-for-profit Start Small Think Big [http://startsmallthinkbig.org/)

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I Want to Start a Business: Now What?

Emeka Anyanwu and Crystal Mitchell

Congratulations on taking the first step! Starting a business can be compared to being on a roller coaster, with the thrill and excitement of new beginnings and unknown experiences. However, the excitement is also accompanied by daunting climbs to the peak and terrifying dips. This quick reference should help to provide some initial guidance and explanation regarding first steps. As always for detailed advice, you should seek the counsel of a competent attorney. Hopefully after reading this quick reference guide you should be able to raise your hands and enjoy the ride!

Registering Your Business with the State

1) Determine Name Availability – An entity cannot have a name that is the same or deceptively similar to a filing entity, name reservation or name registration filed with the Texas Secretary of State. The first step is to do a search and determine if the name that you would like to use is taken. This search can be completed on the Texas Secretary of State website, listed below. If you find the name is used, first determine if the name has been abandoned. Second consider contacting the existing entity. A filing entity can use an existing entity's name, if the filing entity receives the consent from the existing entity.

2) Registering the Entity with the Texas Secretary of State—There are two options that are available when filing the required documentation with the Texas Secretary of State:

    A. File online on SOSDirect (www.sos.state.tx.us); or

    B. Complete the appropriate form for your entity type, and mail, fax, or deliver the form to the Texas Secretary of State.

3) Filing an Assumed Name with the State—The following entity types must file an assumed name certificate in the county of the entity's principal place of business:

    A. Sole Proprietorship; and

    B. General Partnership

4) An assumed name certificate must be filed with both the Texas Secretary of State and the county where the entity's principal place of business is located for the following entity types:

    A. Corporation;

    B. Limited Liability Company;

    C. Limited Partnership; and

    D. Professional Associations.

5) Registering the Entity's Assumed Name - In order to register your assumed name with the Texas Secretary of State, you must file Form 503. Individuals can also receive preliminary name clearance by calling 512-463-5555 or email corpinfo@sos.texas.gov.

Registering Your Business with the Internal Revenue Services

Employer Identification Numbers (EIN) are used by businesses for tax purposes, in the same way individuals use their social security number when filing taxes. It is used to identify the business entity and can be received from the Internal Revenue Service by completing and submitting a free application online or via fax, mail, or telephone. Most business entities are required to have an EIN, though sole proprietorships may be able to utilize the owner's social security number for tax purposes. EINs are required for business entities that have employees; operate as a corporation or a partnership; file any of the following tax returns: employment, excise, or alcohol, tobacco and firearms; withhold taxes on income, other than wages, paid to a non-resident alien; have a Keogh plan (self-employed individual retirement account); or are involved with certain types of organizations (trusts, except certain grantor-owned revocable trusts; IRAs; exempt organization business income tax returns; estates; real estate mortgage investment conduits; non-profit organizations; farmers' cooperatives; or plan administrators).

Entity Types

Sole Proprietorships

Sole proprietorships are entities formed by one individual. These are the easiest entities to form, as they are unincorporated and do not require working with other individuals to make business decisions for the entity. The entity may complete "Doing Business as" paperwork with the state to establish a business name. Also, depending on the type of business the entity will be in, there may be a need to acquire a license or permit from the state, such as a cosmetology license. It is important to note that sole proprietorships are not considered to be le-

gally separate from the individual owner. This has implications for both the individual's taxes and liability. The tax return for the business will be included in the owner's individual tax return. Further, any liabilities of the business, whether debt or any other obligation such as losing a lawsuit, will be the full responsibility of the owner. In other words, personal assets of the owner, though not necessarily business assets, could be taken to pay off any liabilities acquired by the business.

Partnerships

Partnerships are entities formed by two or more individuals. Though not required, a legal partnership agreement can be very useful for dictating how profits will be shared among the owners, what happens if the business is dissolved or there is a change in ownership, and how disputes among the owners are to be resolved. Similar to sole proprietorships, licenses or permits may be required, depending on the type of business the entity is involved in. The owners may choose to complete "Doing Business as" paperwork to establish the name of the business. Also, like sole proprietorships, income taxes and losses from the business will be filed on the individual owners' personal tax returns. Each partner will be responsible for the income taxes that are proportionate to their share in the business. Partners will have joint and individual liability, meaning they share any liabilities of the business. Like sole proprietorships, personal assets belonging to partners may be used to pay off liabilities of the business.

Corporation

A corporation is essentially a legal person, which means it may buy, sell, or own property, enter into contracts, initiate and defend litigation, and can exist indefinitely. This unique entity type gives the organization separate legal standing, and allows the owners or "shareholders" the ability to avoid personal liability, if the organization is sued, unlike a sole proprietorship or partnership. This concept is known as limited liability. The corporation is responsible for paying its' own taxes. Additionally, the shareholders are also responsible for paying taxes on the "dividends" or income they receive from the corporation. This concept is called "double taxation," and some individuals view this aspect as a disadvantage to forming a corporation. A corporation can be managed by individuals referred to as "directors," or it can be managed by its shareholders.

Limited Liability Company

A limited liability company (LLC) is not a partnership or a corporation, but rather a hybrid of both, which essentially provides the benefits of both entity types. Like a corporation the owners of a LLC benefit from limited liability; in other words, their liability is limited to their investment in the entity. Additionally, owners of an LLC receive pass-through tax treatment afforded to partners in a partnership. Any gains, losses, credits or deductions flow through the entity to the owners, and are reported as income or losses on their personal tax return. The owners are called members, and their roles and functions can be compared to the shareholders of a corporation. This entity type is often preferred for small businesses, but if you are considering publically listing the company this may not be a suitable option.

Non-Profit Corporation

A Non-profit corporation is a corporation where no part of its income is distributed to its members, directors, or officers. If there is any profit after the entity has paid its bills, this money must be placed back in the organization. This is very different than a LLC or corporation, where the profit can be distributed to its owners. It is usually organized with a mission to engage in activities for the good of the public; for example, charitable, educational, religious, literary, or scientific purposes. Creating or registering a non-profit corporation with the Texas Secretary of State will not automatically ensure that the entity is given tax exemption. Once filed with the state, the entity must still obtain a designation as a charitable organization from the Internal Revenue Service (IRS). Once the entity is given tax exemption status by the Internal Revenue Service, it is prohibited from participating in certain activities to keep its exemption status, such as participating in political campaigns.■

Protecting Your Business:
The Role of Insurance

Sarah Rogers and Stephen Richman

Small businesses face numerous challenges throughout their existence. These include the development of a marketable product or service, financing, logistics, advertising, operations, and long-term strategy. The world of insurance, and in particular, the nuances of insurance coverage, can present additional, and sometimes over-looked, challenges. This article offers tips and information from attorneys who interact with insurance on a daily basis.

What is Insurance?

Insurance is a mechanism by which a company or an individual can obtain financial protection from various risks. These risks can include property damage (by hail, flood, or windstorm), personal injury (to customers or employees), professional malpractice, and business interruption. A person can insure everything from a service, to motor vehicles, to body parts (Heidi Klum has insured each of her legs; Troy Polamalu has insurance for his hair). A company can similarly obtain various types of insurance to protect it from losses. Knowing your business and understanding the risks it faces can help you obtain the appropriate insurance for if, and when, accidents or other mishaps occur. The decision not to purchase insurance, or purchasing insurance that may not afford your business proper coverage, can have devastating consequences.

Common Insurance Coverage and Limits of Liability

While businesses can purchase a number of different insurance policies, the following are some of the more common ones: General liability; Property; Worker's compensation; Automobile; Business interruption; Errors & omissions; Director & officer; and Excess/ umbrella.

Each of these coverages can be purchased at various monetary levels. For example, a trucking company may purchase a $1 million automobile policy. An accounting firm may purchase a $10 million errors & omissions policy. The limit of liability in the insurance contract states the amount of the policy and the carrier's financial obligation to the policyholder. So, in the example above, the trucking company is limited to $1 million in coverage, while the accounting firm enjoys $10 million in coverage. Generally speaking, policies that provide more coverage are more expensive, and require a higher premium and deductible.

General liability insurance typically protects a business against personal injuries to customers of the business, or other non-employee guests, that occur on the premises of the business, such as a "slip and fall."

Property insurance typically protects a business from damage to the business's building or other business-related property, such as damage to the roof, walls, or foundation caused by hail, flood, and/or windstorm.

Worker's compensation insurance typically protects employees of the business from personal injuries sustained while working in the course and scope of the business.

Automobile insurance typically protects a business, and company vehicles, against personal injuries and property damage occurring as a result of automobile accident.

Business interruption insurance typically protects a business from conditions that prevent the owners from operating the business.

Errors & omissions insurance typically protects professionals such as doctors, lawyers, real estate agents, insurance agents, accountants, engineers, and architects from claims of malpractice, e.g. a breach of the professional's standard of care.

Director & officer insurance typically protects a business's directors and officers from claims by investors and/or shareholders relating to the management of the company.

Excess insurance is a separate policy that provides coverage over and above the limits of a business's primary insurance policy. In other words, if the business has a $1 million commercial automobile insurance policy, but wants to obtain additional coverage be-

cause the business engages in interstate trucking, the business can purchase a separate policy to provide coverage above the $1 million limit of the primary policy.

Umbrella insurance is a separate policy that provides coverage over and above the limits of more than one of the business's primary insurance policies. For example, a $10 million umbrella policy can provide coverage over an above the limits of the business's general liability and property insurance policies.

Each of these types of insurance offers specific protection for various risks. They also include a number of "exclusions" – meaning that the insurance company has no obligation to provide coverage for certain, specified events, or under certain factual situations. For example, a typical general liability policy will have an exclusion for an injury to a company employee. So, if an employee is injured on the job, the general liability policy will not provide coverage. Similarly, most errors & omissions policies do not cover fraud.

A small business likely does not need all of these coverages. But, understanding what each covers, and what each does not cover, is critical to protecting your business. If your business is leasing office space, your landlord may require certain coverage. Under some circumstances, a failure to obtain the coverage required in the lease could be a beach of the lease agreement.

Insurance Agents: Duties in Texas

As would be expected, insurance companies sell insurance polices through insurance agents. Some companies have their own agents, like Allstate and State Farm. These agents can only sell policies from that specific insurance company. These agents are referred to as "captive agents." Other companies enter into agreements with independent insurance agents, who can sell policies from a number of different insurance companies.

In Texas, an insurance agent owes a client a duty to use reasonable diligence to attempt to place the *requested insurance*, and inform the client promptly if the agent is unable to do so. *May v. United Services Ass'n of America*, 884 S.W.2d 666, 669 (Tex. 1992). An insurance agent does not breach his duty of procuring the requested coverage where the client does not specifically request a particular type of coverage.

When discussing your insurance needs with your agent, it is important to understand the risks that may affect your business, and to explain those risks, in detail, to your agent. If you do not, your agent may not know to obtain the appropriate insurance and your business may have no coverage in the event of an uncovered accident or mishap. These discussions may also help you avoid buying insurance that your business does not need.

Tips to Protect Your Business in the Event of a Loss/Claim

Should your business suffer a mishap, it is critical that you inform your insurance agent and insurance carrier as soon as is reasonably practical. Under some circumstances, an insurance company can deny a claim if they are not made aware of the loss in a timely manner.

In the event of a personal injury or property damage, you should create an incident report, documenting what occurred. This can include taking photographs of the scene and obtaining statements from customers/employees affected by the incident. If the matter were to proceed to litigation, this information can prove extremely valuable in protecting the business from a "he said, she said" contest.

Conclusion

As discussed herein, the world of insurance, and the nuances of insurance coverage, can present challenges for the small business owner – particularly when he or she is focused on making the business profitable. Knowing your business and understanding the risks it faces, as well as conveying this information, in detail to your agent, can help you obtain the appropriate insurance for if, and when, accidents or other mishaps occur.■

Top 10 Things to Ask When Signing a Lease

Fawaz Bham and Rocío Cristina García

How much will I pay in rent? In a gross lease, tenants pay a flat monthly amount and the landlord is responsible for all other costs, including taxes, insurance, and common area repairs. On the other end of the spectrum, you may be asked to pay for base rent, taxes, operating expenses, and insurance.
Solution: Discuss with your landlord what costs you are responsible for covering and make sure those terms are reflected in the lease.

Will the rent go up? If you are signing a multi-year lease, it will be important to decide up front with your landlord whether the base rent will escalate from year to year. Landlords may want to escalate the base rent on a year to year basis, such that the base rent moves up incrementally. If you are paying for operating expenses, you may consider locking in operating expenses at a certain level (called a base year concept).
Solution: Discuss with your landlord how leasing costs may change from year to year. If you are liable for operating expenses, consider using the base year concept or capping expenses to limit year-to-year fluctuations.

What if the premises aren't delivered on time? A common problem is the failure of a lease to state what happens if the previous tenant does not vacate on time or if there are so many construction delays that you cannot move your business in within your desired timeframe.
Solution: Make sure that your lease states what will happen if your premises has not been delivered within "X" days; a termination right for the tenant is typical if the landlord can't deliver the premises by a certain date.

Can you sublease the premises or assign the lease? Subleasing and assignment clauses are great exit strategies in case your business is not doing well. Does your lease allow you to sublease so that you can have a subtenant to share the costs? If you need to close down completely, does your lease allow you to assign the lease to a third party?
Solution: Make sure that your lease includes a sublease and assignment provision. Please note that although you may be able to assign or sublease, you will likely remain on the hook in case the third party does not fulfill their obligations under your lease. In case you are able to assign or sublease, it is also likely that you will have to obtain the landlord's consent in writing and potentially pay an administrative fee.

What happens at the end of the lease? Once your initial lease term expires, where will your business go? If you found premises that you like at a cost that works for your business, you might want to consider adding a renewal option to your lease before your sign it. However, the costs for the renewal term should be spelled out or else future problems could arise.
Solution: The renewal provision should be clear on the base rent and other costs for the renewal period. Base rent should be specified, and if not, a formula to determine it should be agreed upon. Try to stay away from agreeing to agree on the base rent for the renewal term in the future; this arrangement typically does not work out and prices tenants out of their premises.

What happens if your landlord no longer is your landlord? A landlord can be removed by foreclosure. When a landlord finances the property that is leased out to tenants, the lender gains the right to foreclose and remove tenants on the property. A foreclosing lender may want the tenants removed, for instance, if the lender wishes to market the property as a redevelopment project or lease it out to other tenants.
Solution: Obtain a recognition or non-disturbance clause, which gives tenants the right to stay in and continue to lease their premises even if the landlord is foreclosed upon because the tenant is directed to pay the lender directly instead of the landlord.

Who needs to plan for a rainy day or insurance? Insurance can be confusing because, in some cases, tenants contribute to a landlord's insurance costs and may wrongfully believe a landlord's insurance covers tenants for losses they are exposed to the most. For instance, if tenants' customers slip and fall in the common areas or an employee accidentally starts a fire in the premises, which insurance policy covers?
Solution: Review insurance provisions carefully, which usually have the landlord responsible for procuring liability insurance for the common areas and property insurance for the building of the property while the tenants will be responsible for liability insurance in the premises and property insurance for the contents in the premises. Insurance agents are happy to review leases for gaps as well.

My business is protected from competitors and disturbing neighbors, right? Most business owners realize their success is due in part to the location of their business. The business may be one of a kind in a shopping center or may be proximately close to a high demand area. Also not all neighbors are created equal; for example, a kickboxing gym next to a massage and spa business is not a match made in heaven.
Solution: Secure a promise from the landlord that tenant's business will be the only one of its kind allowed on the property (pay attention to the wording in the lease). Also the lease should include protection of a tenant's business from noise, odors, construction, etc. from neighbors and a mechanism for tenants to complain to landlord and for landlord to take action.

I pay rent for the premises, but what else do I get? There are several services (with limitations) that a landlord provides to tenants that can help make the most of the rent the tenants do pay. Some examples of services landlords provide: electricity, HVAC, heating, ventilation and cleaning services.
Solution: Pay attention to the times electricity, HVAC, and heating services are provided without an extra charge and if there are any wattage limitations. A landlord may be willing to negotiate the timing of such services and the extra fees charged in the event tenants require extended hours of services. Landlords also contract with janitorial services, and tenants should negotiate to obtain those services for their premises.

Who and how much can be built? Depending on the term of the lease, space leased and a landlord's marketing strategy, landlords can offer allowances for tenant improvements. Allowances can usually be used for new carpet, lighting, remodeling, etc. Landlords want improvements to the premises that enhance the property's overall value.
Solution: Confirm the "work letter" accurately reflects the understanding between the landlord and tenant on how much and when the allowance is available (e.g. reimbursement versus upfront or lien releases) and whether the description of the work to be performed is clear and sufficiently broad (e.g. detailed plans versus generic statements). In a few leases, the landlord may elect to "finish out" or "turnkey" the premises because the landlord believes it can do so cheaper than the tenant may be able to do. In those circumstances, tenants should secure a warranty from the landlord for the work it conducts.■

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Protect Your Revenue Stream:
Develop an AR Process

Ross A. Williams, Esq., Partner and David G. Webster, Esq.

A successful accounts receivable (AR) process is truly the lifeblood of every business. Without a consistent revenue stream, a business will fail. A common misconception is that the AR process is about placing accounts with a collection agency or with an attorney.

In reality, the best collection results flow from a credit department that has a well-organized, carefully-documented credit and AR process. Proper documentation on the frontend can help minimize or prevent collection problems from arising later. The process of collecting receivables begins before credit is extended.

From the initial decision to extend credit to the ultimate collection of the receivable, credit managers must develop an effective and efficient AR process to protect a business's revenue stream.

Have a Written Credit Policy and Follow It.

Many companies have no written credit policy. That is, in part, a function of the belief that creating a written policy is either not worth the effort or that, once in place, the policy will go unobserved.

Not so. When a business develops and adheres to a written credit policy, it gains the advantages of consistency, continuity, and predictability in both the sales and credit departments. A written credit policy can also be an extremely effective tool to determine credit limits and decide when to impose credit holds.

A written credit policy that establishes parameters for when to place accounts with agencies and attorneys helps improve a company's collection rates. Ultimately, a written credit policy, when followed, fosters the detailed and thorough recordkeeping that makes collection more efficient.

Each business is unique. Likewise, each credit policy should be unique. So it is critical for a credit manager to evaluate his or her company's individual requirements for the extension of credit, and then tailor and follow a written credit policy to meet these requirements. Doing so can help protect the front, middle, and back end of the credit process. That is time well spent.

Develop a Strong Credit Application, Use It to Vet Credit Risks, and Always Get It Signed.

The easiest way to avoid problem accounts is to never open them. Credit professionals should carefully review and analyze the creditworthiness of every new customer seeking to purchase products or services on account. A credit application is a valuable tool in that process, and can help a business identify common red flags such as excessive business debt, increased use of credit to pay basic business expenses, unbalanced asset-to-liability proportions, and high debt-to-income ratios.

A business should develop a well-written credit application that will gather important information for the credit evaluation process. Developing the application is just the first step. The reliability of the credit analysis depends on the quantity and quality of the information gathered.

Robust credit applications include requests for at least one year of business tax returns, year-to-date profit and loss report, business debt schedules, balance sheets, and an accounts receivable aging report. A strong credit application will also appropriately request authorizations to check credit. And knowledge of whom the applicant has done business with previously in your industry, and what their opinion is of the applicant's creditworthiness, can also be highly informative.

The credit manager must follow through by confirming that all of the important information requested on the application is accurate. It can be useful to include a declaration wherein the person signing the credit application swears that all information provided is true and correct under penalty of perjury. But credit managers should still do their homework and vet the information provided.

Once the applicant signs the credit application, the applicant becomes a debtor. The signed credit application constitutes a contract that establishes the terms and conditions between the parties for the purchase of goods or services "on account." This written contract is highly valuable. It establishes and waives rights and duties for the business and the applicant to put the business in the most advantageous position possible, should an account need to be placed for collection.

Always Get a Personal Guaranty, If Possible.

In addition, the credit application may include a signed "personal guaranty," which will reduce the risk of nonpayment where the debtor is a corporate entity. A guaranty is an agreement in which one party agrees to act as a surety for another and provides the creditor with another source of recovery in the event the debtor fails to make his or her payments.

In other words, a guaranty lets you collect against the corporate debtor and the individual that signed the guaranty at the same time. This can protect a business from the inability to collect against a defunct corporate debtor. A credit manager can incorporate the guaranty into the credit application or leave it as a stand-alone document.

Obtain Security Agreements Cautiously.

Credit managers should also consider using security agreements. In a secured transaction, the debtor promises to pay the creditor and agrees that if the debtor defaults in making payment, the creditor may take possession of certain designated property of the debtor, sell that property, and use the proceeds to satisfy the debt.

Before relying too heavily on a security agreement, it is important that the credit manager determines what, if any, superior security interests exist on the property. Fourth in line is usually not a great spot to be in when a debtor becomes distressed.

Coordinate the Sales and Credit Departments.

The sales and credit departments should be united regarding decisions to approve or deny an order request. Remember, the credit department's primary function is to assess the customer's risk factors, while also finding various ways to safely make the sale when possible and prudent.

The most effective order approval process occurs when the sales department assists the credit department to gather as much information about the potential customer as possible. Once the account is open, the credit department can work with sales to follow up if any delinquency arises on an account and to head off small problems before they become big ones.

Send Demand Letters.

Once an invoice is sent, most businesses follow an internal procedure with delinquent customers. The first step typically includes sending a past due or "reminder" notice, reflecting that an invoice remains unpaid.

After the credit department sends a past due notice and perhaps makes a follow-up call, the next step is to send a letter demanding payment. Some businesses prefer to send this letter on company letterhead. Other businesses prefer to hire a third party to assist with this process.

Place Accounts Appropriately.

There are many types of collection agencies and legal counsel available to make demands and prosecute claims in court. Collection agencies handle debt collection, including filing suit by engaging counsel for the creditor. Collection agencies typically operate through a contingency-driven economic model, meaning they seek to receive a percentage of the debt as compensation for their services.

For disputes with larger amounts in controversy, creditors may consider directly hiring an attorney on an hourly basis. A classic cost-benefit analysis drives the decision to hire an hourly attorney versus a collection agency.

You can and should also hire legal counsel to review your credit application before problems arise. Many a litigation dollar could have been saved by spending a few transactional dollars on this step.

Monitor Placed Accounts.

The collection process does not end by placing the account with either a collection agency or a law firm. It is important to monitor these accounts as follows:

1. Obtain written periodic status reports;
2. Review the status reports; and
3. Evaluate recovery results.

Conclusion

By maintaining a well-organized AR process, the credit manager can effectively ensure a consistent revenue stream for the business.■

Why All Small Business Owners Need an Estate Plan and a Succession Plan

Kenneth E. Walker and Terry James

INTRODUCTION

Every business owner needs both an estate plan and a succession plan to protect and preserve the wealth that he has created. The following case study illustrates some pitfalls from lack of planning and some legal tools to avoid these problems.

CASE STUDY

Background Facts:

Ten years ago, I was sitting in my office when my receptionist informed me that a young man was in the lobby. He introduced himself as Sam Miller, the son of Carl Miller.

Carl was one of my business clients. I had not heard from him since he repurchased the stock of his former business partner, Harry Brown. Carl and Harry formed Miller Construction Company, Inc. ("Miller Inc.") several years earlier. Carl owned 51%, and Harry owned 49%. Carl was an African American, and Harry was Caucasian. Miller Inc. was certified with the U. S. Department of Transportation as a Disadvantaged Business Enterprise (a "DBE"), because Carl owned and controlled 51%. When Harry received a better job opportunity, he resigned, and Miller, Inc. repurchased his stock.

Afterwards, Carl added his wife, his sister, and two friends as board members. Miller, Inc. was taxed as an S corporation.

Sam informed me that Carl had died. Carl was only 40 years old. Sam was 18 years old and just starting college. Tonya, Carl's third wife, was a board member but had never been active in the business. None of the other board members were active in the business either. Sam had worked part-time in the business since he was in high school. However, Sam had no management experience.

Carl left behind his third wife, Tonya, his oldest son, Sam, his middle son, Brian, and his youngest son, Joe. Sam and Brian had the same mother, Lucy, Carl's first wife. There was some question as to whether Sam was Carl's biological son. However, Carl had always treated Sam as such. Joe had a different mother, Nancy, Carl's second wife. Carl's third wife, Tonya, also had two children, Eddie and Betty, before she married Carl. Carl and Tonya had raised Sam, Brian, Eddie, and Betty together as their own children.

Carl did not leave a will. Shortly before his death, Carl signed a document with Fred and Mack. In that document, they agreed to "invest" $100,000 into Miller Inc., which they did, and all the funds were used for business operations. The document was too ambiguous to determine whether it was equity or debt.

Problems Encountered:

1. Business Bank Account

The first problem was accessing the business bank account. Carl was the only signatory, and payroll was due. The board signed a unanimous consent electing Tonya as chairman and giving her signing authority.

2. Managing Business Operations

The next issue was how to run the day-to-day operations. Fortunately, the company had experienced employees, and Sam could supervise them while Tonya controlled the finances. Sam was elected as president.

3. Stock Ownership and Intestacy Laws

Without a will, stock ownership would be determined by the probate court under the Texas intestacy laws. The case was complicated by the "investment" made by Fred and Mack. Also, without a will, the estate was subject to a time consuming and expensive dependent administration.

4. Equity v. Debt

Mack and Fred wanted repayment of their $100,000 with interest. Without their "investment" being clearly structured as debt, Mack and Fred could not demand immediate repayment.

5. S Corporation Stock Restrictions

Carl's common stock was the only outstanding stock of Miller Inc. Mack and Fred wanted preferred stock, but because Miller Inc. was

an S corporation, it could only have one class of stock.

6. DBE Ownership Restrictions

If Mack and Fred were given $100,000 worth of common stock, they would have owned and controlled more than 51% of the company. Because Mack and Fred were Caucasians, Miller Inc. would have lost its DBE certification. This certification was an essential element of Miller Inc.'s success in competing for minority set asides with governmental entities.

Improvised Solutions:

1. Restructuring Agreement

To keep the company going pending the outcome of the probate case, we negotiated the following restructuring agreement. The voting common stock would be split amongst Tonya (50%), Brian (25%), and Joe (25%). Tonya would buy out Brian and Joe. Mack and Fred (experienced business managers) would be given non-voting common stock and provide management consulting services for a fee to train Sam as president. Sam would be elected to the board. Miller Inc. would have the option to repurchase Mack's and Fred's non-voting common stock at an agreed price.

2. Probate Court's Approval

The restructuring agreement was subject to probate court approval. Everything worked well until Carl's second wife decided to bring a challenge on behalf of her minor son, Joe, because Tonya had refinanced the mortgage on the homestead without court approval. This resulted in a court-appointed administrator. Nevertheless, we eventually obtained court approval of the agreement.

3. Fate of Miller Inc.

Sam was trained to manage the day-to-day operations by Mack and Fred. Tonya and the board oversaw the finances. Miller Inc. thrived, and Mack and Fred were bought out. Tonya bought out the other two sons. She eventually turned over 51% of the company to Sam and retained 49%.

ELEMENTS OF A GOOD ESTATE PLAN AND SUCCESSION PLAN

Estate Planning Documents:

If a business owner wants to save his family from problems similar to the Miller Family's, then he should put in place an estate plan with the following elements:

1. a pour over Will,
2. a Living Trust (which in the Miller Family's case would have to satisfy S corporation eligibility requirements and DBE requirements),
3. a Statutory Durable Power of Attorney,
4. a Medical Power of Attorney,
5. a HIPAA Release,
6. a Declaration of Guardian in the Event of Later Incapacity (Person and Property)
7. a Directive to Physician,
8. a Declaration for Mental Health Treatment, and
9. an Agent to Control Disposition of Remains.

Succession Planning Documents:

The above estate planning documents need to be coordinated with the following succession planning documents:

1. Business Organizational Documents:
    - A. in the case of a corporation, a certificate of formation, **well drafted** bylaws, various unanimous consents, stock certificates, a minute book, and (if more than one owner) a shareholder agreement;
    - B. in the case of a limited liability company, a certificate of formation, a **well drafted** company agreement, various unanimous consents, membership certificates, and a minute book;
    - C. in the case of a general partnership, a **well drafted** partnership agreement, and various unanimous consents;
    - D. in the case of a limited partnership, a certificate of formation, a **well drafted** partnership agreement, and various unanimous consents;
2. Buy-sell Agreement; and
3. Key Man Life Insurance.■

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Divorce-Proofing *Your* Business:

4 Effective Steps to Help Ensure Your Business Survives In The Event of Divorce

Alia L. Derrick

If you (or a business partner) are married, are making plans to marry, or would like to be married one day, you need to divorce-proof your business. The occurrence of any number of events could threaten the success, profitability, creditworthiness, and survival of a business. Few business owners, however, consider the devastating impact of divorce from a spouse, a business partner, an investor, a key employee, or even an adult child's soon-to-be ex-spouse can have on businesses large or small, profitable or not. And although most don't have the substantial amount of cash it typically takes to pay off an ex-spouse in a divorce settlement (*e.g.*, at least half of your company's value), many fail to take the affirmative steps needed to protect their company in the event of divorce. If you (or a business partner) are married, are making plans to marry, or would like to be married one day, but do not have a plan in place to ensure your business survives in the event of divorce, you better get one.

The Odds Against Your Company. Given the divorce rates, the odds are that many businesses are likely to be impacted by divorce. According to some studies, the *spousal* divorce rates for first time marriages are 50-52%, while the divorce rates for second and third marriages are 70-73% respectively[1]. Consequently, ignoring the possibility that your (or your business partner's) fairy-tale marriage will end in divorce can wreak havoc on more than just emotions. For the unprepared, it can result in the soon-to-be ex-spouse being named your business partner, you being ordered/pushed out of *your* business completely, or tanking your business' creditworthiness and stability. Even worse, it can result in you being forced to sell part or all of the business to pay off the divorce settlement. The reason is simple: business owners who fail to divorce-proof their companies are subject to prevailing state laws.

What's at Stake in Texas. Every business owner in Texas needs to divorce-proof their business because Texas is a community property state. This basically means that regardless of which spouse *owns* the property or how it is titled, certain qualifying income, assets, and property that are acquired, developed, worked on, or expanded during the marriage are deemed marital property that is typically owned equally by both spouses (*e.g.*, 50-50 split). Not surprisingly then, businesses started, worked on, invested in, or expanded during the marriage are often one of the biggest marital property assets up for division in a divorce. Absent the right plan, your business—or at least the cash that can be generated from its sale—will be an attractive target for your soon-to-be ex-spouse.

Effective Steps to Divorce-Proofing Your Business. The good news is no matter what you (or your partner's) Facebook status (single, married, or it's complicated), if your company's survival is truly a priority, below are several steps you should take now to divorce-proof your business or at least minimize the potential damage of divorce.

Revamp [or Prepare] Company Agreements. One effective way to divorce-proof your company is to include "in the event of divorce" and/or "community property" provisions in all company agreements that deal with the business' ownership —*e.g.*, an LLC Operating Agreement, a partnership agreement, or a shareholders' agreement. The specific terms of these provisions will vary based on a number of factors including the services or goods your company offers, your company's preferences, and state law. Accordingly, the list of possible terms that follows is not exhaustive and may not apply to every company. Business owners should consult legal counsel to identify any special legal requirements or needs and what terms work best for their company.

At a minimum, the provision(s) should address the interest, if any, non-owner spouses have in the company and what happens to stock or ownership interests in the event of divorce. Ownership interests might include the right to vote, the ability to run the company, or sell stock or interest in the company. If, for example, the provision makes it clear that, upon divorce, the divorcing owner's stock automatically becomes nonvoting, then even if the ex-spouse is awarded part or all of that owner's stock, he or she will have no say in how the business is run. Your company may want to, or may be legally obligated to, take it a step further to prevent a former spouse from having any ownership in the company[2]. In this instance, business owners should consider including a buy-sell provision that requires the company be given the right to buy back all stock, shares, or interest owned by (or awarded by a judge to) the non-owner ex-spouse. If this option is chosen, it is important that the agreement also address whether the ex-spouse must sell it back for the fair market value or some other predetermined specified price. If the former, the agreement needs to describe how fair market value will be determined. Finally, the agreement should always clearly state when and how payment will be made. For example, the amount will be paid out over a certain period of time (*e.g.*, 24, 36, or 48 months), the first payment must be made by a certain date,

how frequently payments will be made thereafter, and for how much. If written properly, the buy-sell provision's prolonged payment schedule should help prevent business owners from being forced to sell the business to gain the lump sum of cash needed to pay the divorce settlement.

The company agreement should, if feasible, also require that all owners obtain their non-owner spouses' written agreement to be bound by the divorce-proof provisions of the company agreement. The inclusion of such a provision gives business owners a bona-fide reason and excuse to ask their spouse for a business-focused pre- or postnuptial agreement.

Prenuptial Agreement. Before you say "I Do," discuss, negotiate, and sign a written prenuptial agreement ("Prenup") with your future spouse that addresses your business, including, but not limited to, which spouse owns it, his or her percentage of ownership, and the non-owner spouse's right to a divorce settlement pay out. A good time to introduce this potentially awkward subject is early on when the two of you are discussing how personal bank accounts will be held (jointly or separately) and how finances will be handled during the marriage. Do not wait until the night before the wedding to ask your future spouse, for the first time, to agree to and sign a Pre-nup. The reason is simple: courts are likely to view your last minute request, no matter how innocent, as coercion and grounds to invalidate and render the Prenup unenforceable.

Postnuptial Agreement. If you already "did" and are married, you should (or at least attempt to) take the following precautions: (1) sign a postnuptial agreement with similar terms as the Prenup; (2) keep business assets and liabilities separate from personal family property, assets, and liabilities; and (3) pay yourself a good salary from the business to help avoid (or defend against) a claim that you deprived the marital property and assets of the benefit of the company by reinvesting all the money back into the business.

Mediate Divorce Settlement. If you are currently in the throes of divorce, there are still a few strategies you can attempt to do to protect your business. Instead of allowing the judge to decide your business' fate, negotiate a workable settlement at mediation. Be ready to sacrifice other assets in exchange for being able to keep the business and arrange to make payments over time.

A Final Word of Caution: Plan Ahead. As shown above, there are a number of effective ways to "divorce-proof" your company. It is a smart idea for you to seek legal help to put the necessary agreements in place that will ensure your company's post-divorce survival. Whatever the pre-divorce preventative legal cost —*e.g.*, as low as $500-$1,000 for standard, non-elaborate contract preparation or modifications and added costs for more complicated and detailed versions—it is likely to pale in comparison to the lump sum amount you could be ordered to shell out in the event of divorce. Ultimately, then, it *is* in you and your company's best interest to plan ahead and develop a business *divorce* plan ASAP.■

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[1]The divorce rate varies based on the source, study, or scholar on which you rely. Although such variance exists, one thing is certain: divorce rates are high enough for business owners to seriously consider a business contingency plan and for married couples to at least consider how assets will be split should divorce befall them.

Litigation Best Practices:
Avoiding and Navigating Lawsuits

Jason Shyung and Andrew Spaniol

Aside from bankruptcy, litigation may be one of the scariest prospects a business-owner may face. Lawsuits, however, are not inevitable nor are they the end of the world. With the right foresight, you can avoid litigation or manage it towards an acceptable resolution. Much of the fear of lawsuits stems from not knowing what litigation involves and how to handle those situations. This section is intended to allay some of those fears by showing you ways you can avoid lawsuits and guiding you through what happens if a lawsuit is ever brought against you.

Avoiding Litigation

If it is important, put it in writing. Lawsuits generally stem from conflicts over broken promises, unmet expectations, or simple misunderstandings. The reason why these conflicts turn into lawsuits is because there is a significant disagreement over what the promise, expectation, or understanding was – and the only way to clear up that disagreement is through a lawsuit, which is an expensive way to achieve clarity. To avoid this, you should seek to achieve such clarity up-front and in writing. For example, when dealing with a customer, you should clearly communicate about what you are going to provide, what they are going to pay, and most importantly, put that down in a signed document, which you have read and understood. Clearly documenting your expectations and agreements can avoid a lot of conflicts that give rise to lawsuits.

Attack problems early, communicate well, and follow the Golden Rule. Inaction, poor communication, and regrettable responses often exacerbate problems and cause them to mushroom into expensive lawsuits. Before that happens, you should do all that you can to address anything that goes wrong early on, regardless of whether you are the wronged party or the alleged wrongdoer. Do not sit on a problem. Putting your head in the sand will not make the problem go away. When you address the problem, you should establish clear lines of communication where you and the other party understand the issue. Finally, you should apply the Golden Rule – do unto others, as you would have them do unto you. If you take that mindset into the problem, you will increase the odds of finding a mutually acceptable resolution that will allow you to nip the conflict in the bud before it blossoms into an expensive lawsuit.

Do a risk analysis. All businesses should do a risk analysis. While that may sound difficult, it can be as simple as asking yourself these two questions: (1) what can go wrong in my business? And (2) what are the consequences if those things happen? Once you have answered those questions, take the situations with the biggest consequences and do what you can to eliminate or reduce the likelihood of those events occurring. For example, you may own a car wash, and property damage to vehicles might be the biggest risk you face. To eliminate that risk, you may want to invest in better cleaning materials or training for your employees. Such simple steps can help you avoid the problems that give rise to lawsuits in the first place.

Talk to a lawyer before anything goes wrong. People often have the misconception that lawyers are only needed when things go wrong. That is the furthest thing from the truth. In fact, lawyers are often most helpful before anything goes wrong. If you run into an important issue or are negotiating an important agreement, you should consider consulting a lawyer with experience with your particular issue or agreement at the outset. Experienced lawyers have a broad base of knowledge and can often predict how things can go wrong, and they can provide you with great advice on proactive steps you can take to mitigate or avoid problems from occurring.

Navigating Litigation

Find the right lawyer. Avoidance strategies are not always successful, and if you find yourself in litigation, you should contact your lawyer as soon as you become aware of the potential litigation. Although the attorney who helps in setting up the business is unlikely to be the attorney who would handle litigation, that same attorney likely knows a litigator with experience in the relevant area or can help to find the right attorney for your case. Your most critical decision in litigation may be selecting the lawyer who will represent your business. That lawyer should understand how your business works, what the standards in your industry are, and, most importantly, what is at stake for you. Your lawyer should work with you to achieve the best resolution (which may not necessarily be "winning" at trial).

Read the pleadings. Oftentimes, you only learn about litigation when you are served with a copy of the *complaint* or *petition*. This is

the initial filing in a lawsuit, and it should contain factual allegations describing the basis of the lawsuit (essentially, what you allegedly did wrong) and the causes of action (the bases for the plaintiff's recovery of damages). Read the complaint carefully to find out what the plaintiff is accusing you of having done or failed to do. This will help you in your search for the right lawyer to defend your case. Generally, defendants must file and serve an *answer*, a legal response to the complaint, within 21 days, so you should begin your search for an attorney as soon as possible. Your attorney may also be able to suggest *counterclaims* (causes of action against the plaintiff), *cross-claims* (actions against another defendant), or *third-party claims* (actions against someone not yet named in the lawsuit).

Ask questions, listen to the answers, and be honest. Your attorney should be able to explain your case and his strategy in terms you can understand. If you don't understand terms or tactics, ask about them and listen to the answers. Your attorney should also explain what you and your employees may have to do during the litigation. For instance, you may need to issue a "litigation hold" to preserve documents and communications, and you and your employees may need to give interviews, sign affidavits, or collect documents. Remember, though, that information is a two-way street. When your attorney asks you for information or documents, be responsive and be honest. Avoid the temptation to provide only the "good facts" that support your side of the story. Your attorney can only protect from, and advise you about, the things he knows. In other words, if your attorney doesn't know about "bad facts," he can't prepare for them.

Evaluate the case. You and your attorney should have frank, serious discussions about the overall risks, exposure, and costs of litigation. You need to understand the severity of the plaintiff's claims, and you should be wary of attorneys who offer rosy-eyed perspectives on potential outcomes ("We've got this one in the bag."). Be sure to address two primary concerns: (1) the cost of litigation and (2) the risk of exposure. Litigation is an expensive process, and you should be prepared for that. Even meritless claims can require many hours to resolve, and you should ask your attorney pointed questions about cost vs. exposure. For instance, early in the litigation, you could try to have the plaintiff's complaint dismissed for failure to state an actionable claim. However, if that attempt is unsuccessful, you may have to pay the plaintiff's attorneys' fees related to that motion. Your attorney should inform you about the risks involved in your legal strategy and help you to weigh those risks against the likelihood of success. You might also consider performing a "risk-weighted exposure" ("*RWE*"), comparing the highest possible damage award to the likelihood those damages would be awarded. While this evaluation provides only a rough estimate, it can help the client and attorney in developing both a strategy and a budget. For instance, if the case has a low RWE compared to likely discovery costs (especially in cases that are document-intensive or may require multiple depositions), those costs could equal or exceed the RWE.

Consider the long term. In formulating a strategy, you and your attorney should also consider factors such as the likelihood of similar cases arising, the hostility/friendliness of the venue, and the financial situation of the opposing party. For instance, a slip-and-fall claim may quickly settle for $5,000.00, but news of the quick settlement may encourage other would-be plaintiffs to file similar suits. Meanwhile, the cost to defend the lawsuit would likely exceed the settlement-value, but might discourage potential plaintiffs (and attorneys) from filing suit.■

Building, Branding, and Bonding:
Social Media for Small Businesses

Tiffany Kamuche

In the digital age, most people begin their search for everything online. Whether they are looking for a housekeeper, a dog walker, or a dentist, the first place consulted is the internet. Building a strong social media presence allows you to control how the world views your business and helps you to connect you with your ideal client.

ESTABLISHING YOUR PRESENCE

Creating your social media presence occurs in three steps:

1. Building your company's infrastructure
2. Branding your company's services
3. Bonding your company to the community

Building

When creating an online presence, the first step is to identify who you are as a business owner, what services you seek to provide, and what group of individuals you expect to patron those services. In other words, answer this question: "Whose needs do I meet?" Until your business can stand on its own, you are the business and the business is you. You are the face of your company in the early years and how you feel about you affects how people will feel about your business.

In most cases, your company may be one of many —find your niche and determine how to make your company standout. Your company's infrastructure is the solid foundation on which it stands, make it formidable and fierce. Your company's identity should be equally recognizable to people who know you personally and people who do not know you at all. It should be engrained into the framework of your company's mission statement and tagline.

People should be able to know what you stand for without asking. This is only achieved when you know exactly what kind of company you want, what you expect to get out of your company, and how your company will make the lives of others better.

Branding

Branding is creating a specific image in the minds of consumers for a product or service. When people see your logo, your name, your tagline or slogan, the perception they have will strongly influence your bottom line. People hire perception before they employ skill. Before someone contacts your business, they must believe that you can actually assist them in their needs. The perception begins to form before they have even spoken to you. What the prospective client sees on the internet is often all they have to go on when deciding whether to contact your office. Make the view something people want to know more about.

If I handed you a red and white can, Coca Cola immediately comes to mind. You did not have to read the can and I did not have to announce what type of drink was in the can. You just knew. If I said name some soda drink companies, Coca Cola is one of the top 3 people will say aloud. This is the exact effect or experience that should take place when someone sees your logo or tagline. An easier way to describe branding is if your potential customers were playing Family Fued and the question was anything related to your services, your business name should be on the board.

Tip: Be the brand you are on social media in real life. If your tagline says, "trusted partner when it matters the most", be a trustworthy person in your community. People are smart and will fact check every post. Do not let a community fact check fall short of your social media presence.

Bonding

Bonding occurs when clients feel a connection to your business that outlasts your representation. You should always be first in their mind when they have a need that falls in your list of services. If you provide a service that is a one-time service such as a wedding planner or estate plan attorney, the "boomerang" effect should morph to a new client via a past client referral.

REVIEWS MATTER! How a client feels about your representation affects your social media presence. Either the client will become someone who boosts your branding efforts or someone who denounces them. Good press is free advertising and your bottom line will appreciate a good bond.

Bonding also occurs when you interact with the community and the community feels connected to you. Attorneys are known for coming into a person's life at a bad time. Creating a connection with the community before you are needed makes a person in need more comfortable coming to you when he or she really does need you. Once you identify your desired clientele, become the best friend of that population. Make sure that you appear to be the leading authority on all things related to your services to anyone you would determine to be a potential client.

Beatitudes of Social Media

- Be Consistent – If you start out posting twice a day, continue to do so. People like to believe that you are the same person today, tomorrow, and every day after.
- Be Creative – Everyone is posting on social media, find ways to be set apart.
- Be Approachable – People need to feel like they can reach you. If they feel like they cannot, they may also feel as though you will be the lawyer who is never available to talk while their case is pending.
- Be Courteous – Kindness is free, give it graciously.
- Be Articulate – People should believe you are competent; do not disappoint.
- Be Relevant – Find ways to compare your business to pop culture. Everyone does not speak your industry's language and you want to make sure that you adjust to the language people are speaking. Current events and pop culture are things that everyone can relate to.

CONCLUSION

Social media is a huge component in new business development. It can give your business an edge on the competition and allow you control the market. Additionally, employing platforms like Hootsuite and Facebook allow you to plan your posts in advance and distribute them at peak hours without you having to be in front of the computer for each post. You get the privilege of appearing to always be working even when you are not. We are in the microwave generation; people like quick results. It should appear that even when you cannot deliver quick, you can deliver diligence.

An effective and persistent social media presence is the difference between those who sit and wait for the phone to ring and those who give people something to call about. Always make sure that people know who you are, who you serve, and how to reach you when they need you. Your social media platforms are electronic business cards that provide these answers to prospective clients at any given moment.■

Social media posts are like toothpaste. Once they are out of the tube, you can never get them back.

Tiffany Kamuche is the principal and managing attorney of Kamuche Law Firm, PLLC. She graduated from Texas Tech University with a B.A. in Mathematics and Sociology and a Masters of Public Administration. She graduated from Texas Tech School of Law. Prior to launching Kamuche Law Firm, PLLC, she worked as a personal injury attorney and family law consultant.

Screenshots and Privilege:

The Evolution and Demise of the Reasonable Expectation of Privacy

Tiffany Kamuche

The notion of the reasonable expectation of privacy has become a wavering concept. At one point, the Supreme Court questioned law enforcement's ability to fly over your backyard without permission. Today, law enforcement and anyone in the world is entitled to walk through any area of your life via the world wide web and social media without permission from any governing body if you voluntarily post it or it is a matter of public record.

For purposes of this article, we are only considering what is a reasonable expectation of privacy in the digital age. This paper is to evaluate how technology has changed what level of expectation of privacy should be considered reasonable and what should not.

In order to completely understand the evolution of privacy, it is important to review the history of the "reasonable expectation of privacy" standard and how it became enmeshed in our privacy framework. The standard lies in a Fourth Amendment, search and seizure analysis developed by the United States Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967). In *Katz*, the petitioner had been convicted of transmitting wagering information by telephone across state lines. Federal agents obtained incriminating evidence listening and recording his phone calls by attaching an electronic listening and recording device to the outside of the telephone booth from which the calls were made. The Court of Appeals affirmed the conviction, finding that there was no Fourth Amendment violation, since there was "no physical entrance into the area occupied by" the petitioner.

The Supreme Court overturned the conviction and held the following:

The Government's eavesdropping activities violated the privacy upon which petitioner **justifiably relied** while using the telephone booth, and thus constituted a "search and seizure" within the meaning of the Fourth Amendment. Even in a public place, a person may have a **reasonable expectation of privacy** in his person. Although the petitioner did not seek to hide his self from public view when he entered the telephone booth, he did seek to keep out the uninvited ear. He did not relinquish his right to do so simply because he went to a place where he could be seen. A person who enters into a telephone booth may expect the protection of the Fourth Amendment of the Constitution as he assumes that the words he utters into the telephone will not be broadcast to the world.

The key phrase to focus on in this ruling is "justifiably relied." It was reasonable to believe that a phone conversation was private in 1967. It is not reasonable to think that information you voluntarily publish online is private in 2016. Stolen information (leaked credit card info) is waived. Privacy settings usually come with small print terms and conditions that only further the notion that it is unreasonable to expect privacy through social media and internet. It does show your intent to limit access to the information, but it does not keep the information from becoming public and fair game.

You may never need to evaluate the lawfulness of a search for purposes of a criminal conviction. However, as a business owner, what your clients can Google affects your bottom line. For purposes of this discussion, we will use this standard to evaluate online exposure and how much faith you should place in privacy settings. Your reasonableness regarding privacy will determine how you protect your online presence and overall brand.

Consider the fact that most cell phones automatically save our frequent locations and searches on our phone. The number of steps that we take, calories we burned, and even our heart rate and the number of hours slept can be tracked on devices we sync with our social media accounts. Posts from other people related to you or your business are usually requested from sites like Google, Yelp, Facebook, Twitter, and online phone book companies. None of this information is private and all of this information affects our ability to attract new business and maintain current business. The "digital age" could be better described as the "overexposed age." These are just examples of things we do *willingly*. This leads one to question what degree of privacy should now be reasonably expected.

There is a notion that engaging in activity online is safeguarded by privacy settings. This is a flawed belief since enhanced privacy settings do not protect you from:

1) Screen Shots – Your post may have been only shared with friends on your Facebook page, but a quick screen shot of the post allows a friend to re-post with no privacy setting at all.

2) Tagging – You can be tagged in a public post and your location in the photo is disclosed to anyone with access to the internet to find that post.

3) Cloud Based Platforms – If you are not careful, you could allow access to a public cloud when you use the internet in public places or willingly allow your computer to be "discoverable."

These are a few examples of how the reasonableness of your expectation of privacy is removed, and therefore the information found can and will be used against you and your business. Your potential clients can review your entire life and what they find may not be something that reflects positively on your business.

Your social media and online presence may be the first thing your customers see. Assume nothing is private and everything is discoverable. It is imperative that you mind your matters and mind your mouth whenever you engage in any internet use. I would also caution one to be careful about allowing others to indulge in posting your likeness and paraphrased versions of your comments. Always ask yourself if your post can be misconstrued to mean something that does not represent who you are. If you cannot answer a definite "no", do not post it. ***Ex***. Taking pictures using hand signs. An innocent hand gesture in a photo can be easily manipulated to carry a derogatory meaning.

Post like you expect to run for political office in the future. If there is a chance of your post being played on the news cycle would hurt your campaign, do not post it. If there is a chance your post will offend a group of constituents that you intend to be elected to serve, do not post it. If you want to reserve the right to change your mind later regarding your position on an issue, do not post it. Social media posts are like toothpaste: once they are out of the tube, you can never get them back.

Social media screenshots and posts are just one of the many ways that the reasonableness standard for privacy is slowing dissolving and very soon we will need another standard all together.■

Tax Basics for Small Business

Mark Melton and Caitlin Sawyer

Tax issues for Texas small businesses fall generally into three categories: federal income taxes; employment taxes; and state taxes. Below is a general summary of those three categories, but the application of tax laws is complex and variable from business to business, based on the specific circumstances. Every small business owner should hire a qualified tax advisor to guide them.

Federal Income Taxes

The mechanics of federal income taxation are largely dependent upon how a buseinss is structured. Typically, a small business will be structured as either a limited liability company (an "LLC") or a corporation (and occasionally as a limited partnership (an "LP")). Some may even be operating as a sole proprietor without any liability shielding entity (they should probably go talk to a lawyer about that). Based on the structure, a business will be taxed for federal tax purposes as either a corporation, a partnership or a sole proprietorship. All tax return due dates described below assume that a business operates on a calendar year.

If a business is a corporation for federal income tax purposes, and note that any of the above-referenced entities can elect corporate status, tax advisors will almost certainly recommend that the business elect to be treated as an S corporation if all of the S corporation eligibility requirements are satisfied. As an S corporation, a business using a calendar fiscal year will need to file IRS Form 1120-S no later than April 15th each year to report its annual taxable income.

The owners of an S corporation will generally also be employees that are paid a salary. Each owner will pay tax on his or her salary just like any other employee. In addition, to the extent there are profits in the business, each owner will pay tax on his or her allocable share, whether or not those profits are distributed. The business itself does not pay any corporate federal income tax.

Businesses structured as an LLC or LP that have not elected corporate status will be taxed as partnerships if they have more than one owner. If such a business has only one owner, however, the entity will be disregarded for federal income tax purposes and the single owner will be taxed as a sole proprietor as if no entity existed. A business treated as a partnership using a calendar fiscal year should report its annual taxable income on IRS Form 1065 no later than March 15th each year. An owner operating through a disregarded entity should simply report his or her taxable income from the business on Schedule C of their personal IRS Form 1040.

Neither partnerships nor disregarded entities pay federal corporate income tax. All income flows through to the owner(s) of the entity. Each owner reports their share of the business's income on their personal IRS Form 1040. Note that owners of a partnership or disregarded entity are not treated as employees of the business, and the business is not required to withhold any taxes on payments to domestic owners. Accordingly, each owner is required to personally pay quarterly estimated income taxes to the IRS on April 15th, June 15th, September 15th and January 15th.

Employment Taxes

To the extent a business has employees, including when owners are treated as employees in business structured as S corporations, the business must comply with several reporting and withholding regimes. On the federal level, an employer must generally withhold FICA and Medicare taxes from its employees' pay at a combined rate of 7.65%, and the employer must make a matching contribution of the same amount. In addition, the employer must also withhold federal income tax for each employee at various rates based on the amount they earn and the number of allowances they claim on Form W-4. Tables describing the amount to be withheld can be found in IRS Publication 15 (Circular E).

As the employer, the business must pay federal and state unemployment insurance premiums ("FUTA" and "SUTA," respectively). An employer must file IRS Form 941 quarterly to report federal tax withholding from employees (and the matching employment taxes paid by the employer), and must file IRS Form 940 no later than January 31st each year to report FUTA. In most cases, an employer must also file Form C-3 quarterly to report payroll details and SUTA to the Texas Workforce Commission. Failing to remit amounts

withheld from employee payroll can subject certain individuals in the business to personal liability for 100% of the amount not remitted.

For non-corporate businesses, where the owners are not also employees, each owner must pay self-employment tax at a rate of 15.3%, which represents both the employee and employer portions of the FICA and Medicare tax. Self-employment taxes are reported on each owner's personal Form 1040 on Schedule SE. Because such amounts are not withheld by the business, each owner should make quarterly estimated payments of their self-employment taxes along with their quarterly income tax payments.

State Taxes

Businesses operating in Texas within an entity that provides some amount of limited liability (*e.g*. Corporation, LLC, LP, etc.) must report their Texas Margin Tax liability each year. For entities that owe margin tax, Form 05-158 must be filed with the Texas Comptroller by May 15th each year. Entities that do not owe any tax should instead file a "no tax due" report on Form 05-163. Additional public information reports may also be required. If the business operates in any state other than Texas, additional state tax and reporting liabilities may arise.

To the extent a business provides taxable services or sells taxable goods, it must collect sales tax from each customer and remit those amounts to the Texas Comptroller. Sales tax is reported on Form 01-114. Sales tax returns are typically filed monthly by the 20th day of the month following the month being reported.■

Traps for the Unwary:

What Every Small Business Owner Needs to Know to Protect Their Intellectual Property

Wei Wei Jean and Suzy Fulton

Introduction

Startups and small companies often do not allocate sufficient resources to pursue adequate intellectual property (IP) protection. There are often many seemingly higher priority demands like rent, salaries, and equipment costs that may lead to a misguided reliance on shortcuts and do-it-yourself efforts. This article addresses some common misconceptions about IP protection that will hopefully help these business owners to sidestep traps that may result in the loss of their most valuable assets or unknowingly incur liabilities.

The first question right out the gate is: what am I trying to protect? What kind of IP is at issue? Only after the type of IP is identified can we know how to proceed.

A utility patent is the proper mechanism to protect ideas related to useful things and methods. The U.S. Patent Statute states that processes, machines, articles of manufacture, and compositions of matter are patentable. Further, in order for an invention to be patentable, it must be new, unobvious, and useful as defined in the patent law. Another type of patent, a design patent, is used to protect the ornamental appearance of a thing. Utility and design are the two main types of patents.

A trademark is "any word, name, symbol, or device, or combinations thereof" that is used to indicate the source of the goods/services. Trademarks can be product names, brands, logos, slogans, tag lines, product packaging, décor and color scheme of the retail space, etc. Therefore, trademarks are closely associated with marketing efforts.

Many people have trouble distinguishing copyright and trademark. A common mistake is to adhere a copyright notice to a phrase or tag line that is used as a trademark. Copyright protection exists in "original works of authorship fixed in a tangible medium of expression." Recognized categories of copyright include: literary works, musical works, dramatic works, pantomimes and choreographic works, motion pictures and other audiovisual works, sound recordings, and architectural works. A business's website design, software app, marketing and advertising materials, and photographic images are copyrightable assets.

Having identified the type of intellectual property to be protected, common myths and misconceptions associated with each area of intellectual property are addressed in turn below.

Patent – Protecting Ideas

Q: Can I protect my idea by mailing myself a certified letter?

A: This method of "protection" is often called "the poor man's patent." However, it also falls into the category of if it's too good to be true then it must not be true. Sending yourself a letter does not afford you any protection whatsoever.
Q: I invented this awesome gadget, and I've been selling it since last April, can I patent it now?

A: If you have been selling it for more than a year, it's too late. If it's within the year, you may still pursue patent protection in the U.S., but you may not be able to secure foreign patent rights. Similar activities that may jeopardize your patent rights include posting a demonstration video on Facebook, publishing a website on the gadget, and showing off your gadget to your neighbors, friends, and family.

Q: My next-door neighbor is a real estate attorney, can he help me get a patent on my invention?

A: An inventor may act pro se and represent himself before the U.S. Patent and Trademark Office (USPTO), or he may hire a patent practitioner to prepare, file, and prosecute the patent application. Unless your neighbor is also registered with the USPTO as a patent attorney or patent agent, he/she is unauthorized to represent you before the USPTO.

Q: Do I need to make a working prototype before I can patent my invention?

A: No prototype is needed prior to applying for a patent. All that is needed is a summary that describes the invention and how the invention works, taking into account certain legal requirements. These requirements are intended to enable a teaching of the invention and the broader goal of exchanging the limited monopoly provided by the patent for public disclosure of the invention to advance the

state of the art.

Q: My gadget is "patented" since I filed a patent application, right?

A: It is a common mistake to claim an invention is "patented" when it is in fact only "patent pending." The patent application still needs to go through an examination procedure at the USPTO. If what you filed is a provisional patent application, then you would still need to follow up with the filing of a non-provisional patent application within one year of the provisional application filing date.

Q: I have a patent on my invention, they can't sue me for patent infringement!

A: A U.S. patent gives its owner "the right to exclude others from making, using or selling the invention throughout the United States or importing the invention into the United States." However, a patent does not give its owner the right to practice the invention. This is a concept that is confusing and not intuitive for many people.

Trademark – Protecting Commercial Identity

Q: My mark is perfect because it's a good description of my product/service.

A: One of the biggest headaches for trademark attorneys is the descriptive nature of their clients' marks. Descriptive marks that merely describe the services or goods cannot function as a trademark. An example is using the word "MILK" as a trademark for a dairy beverage.

Q: I searched the Internet using Google/Yahoo, so my name is available, right?

A: Not quite. An Internet search is not adequate to uncover state and federal trademark registrations, or common law databases.

Q: The USPTO TESS database search didn't turn up any hits, so my mark is available, right?

A: Also not quite. The USPTO TESS (Trademark Electronic Search System) database search would only give you access to the federal registration database, but not state registration, common law databases, the Internet, and other sources. Also, the USPTO TESS search engine is not very robust in terms of finding similar marks.

Q: I checked with the state and they said the name is available. It's ok for me to use it as my trademark, right?

A: Corporations, like limited liability companies, partnerships, etc., are simply forms of organizing a business and have nothing to do with the rights associated with a trademark. Just because a business name was successfully filed with the state does not mean that the name is available federally or in any other state.

Q: I own the domain name, so I'm protected, right?

A: Having ownership of a domain name does not grant any trademark rights. Further, if the domain name is confusingly similar to a company's trademark, they may sue you for infringement. However, the domain name may be eligible for trademark protection.

Q: I've used my mark for years so it's protected, right?

A: The use of a trademark over a long period of time may establish common law rights to the trademark. However, common law rights (versus federal registered trademark rights) are limited to the geographic area in which you do business and use the mark in connection with goods or services. Trademark is peculiar in that improper usage can lead to a loss of rights. A valid trademark can become generic if the consuming public misuses the mark such that it becomes the generic name for the product. Some examples of former trademarks that became the generic are ASPIRIN, CELLOPHANE, ZIPPER, THERMOS, KEROSENE, and ESCALATOR. Trademarks are used improperly when they are used as nouns or verbs, or are pluralized. Examples of improper usage include:

- I love Kindle;
- Would you xerox some copies of the presentation; and
- Band-Aids are great for boo-boos.

Q: How do I protect my trademark?

A: You should use superscript TM or SM with your trademark or service mark if it is not federally registered or if the federal registration is pending. You can use ® if you have a federally registered trademark or service mark. Try to set your trademark apart from the rest of the text by using all caps or a different color. You may also post this notice: XYZ is a [registered] trademark of ABC Company.

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Copyright – Protecting Expressions

Q: I hired Johnny to design and implement my company website. I own everything on the website, right?

A: Not necessarily. By law, if Johnny is your employee, then yes you do own the website and all IP embodied in the website. However, if Johnny is not an employee, then Johnny, not you, may own all of the IP in the website. The only way that you would own the website IP is if you have a written agreement signed by Johnny assigning all of his IP rights to you. Absent such an agreement, Johnny will likely be deemed to be the author of the work and the owner of the copyright.

Q: I downloaded some images from the Internet to use on my website. Is that ok?

A: Probably not. If there is not explicit permission for you to download and use those images, then you have violated copyright laws and you may be liable.

Q: But I made changes to those downloaded images. Am I still liable?

A: If you started with a copy of an original work that didn't belong to you, then it is still a violation of copyright law because you made an unauthorized copy. There are no clear rules on how much change would render the resultant work legal in view of copyright law.

Q: How do I protect my copyrightable work?

A: An original work of authorship is protected under U.S. copyright law the moment it is created and fixed in a tangible form of expression. Although not required, it is advisable to include a copyright notice to your work. The notice may include the symbol © or the word "copyright" with the year of first publication and the name of the owner. You may additionally register the copyright with the U.S. Copyright Office, which confers some additional advantages, including public record of copyright, statutory damages, and prima facie evidence of validity. Registration is also required prior to suing for copyright infringement.

Conclusion

Although entirely suitable for some home remodeling projects, reliance on DIY and shortcuts on IP issues will likely lead laypersons down the wrong path resulting in the irreversible loss of IP rights or inadvertently incurring liability for infringing IP rights of others. Consulting an IP attorney with the proper credentials and experience should be near the top of any company's checklist.■

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