

No Business is too Small to Need Corporate Counsel

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By: Brad J. Boyd

All businesses, big or small, should have “corporate counsel”. This isn’t to suggest that all businesses will need an in-house attorney, or that you have to have an extraordinary budget for legal counsel, but this article will address the wisdom of having an attorney that the business identifies as its business counsel.

This attorney can play an invaluable role in assisting with start-up and organizational matters business owners sometimes mistakenly assume to be “routine” and perform on their own. Many times those owners fail to realize what they had missed until it is too late. Additionally, the attorney is an ongoing resource in a consulting capacity much like someone may draw upon an accountant, advertising/PR firm, or other professional.

Too many times businesses (particularly small businesses), think that utilizing an attorney is a “luxury” that they can’t afford, or that an attorney isn’t needed until a problem arises. Both assumptions are misplaced.

This author has recently encountered several scenarios in which a client has had an extraordinarily expensive and contentious business dissolution or fight regarding management and control, in entities in which the client had not utilized an attorney until the problem arose. In those cases, the cost of resolving the problem was likely considerably higher than had the entity had internal agreements addressing such issues.

Similarly, several clients (and prospective clients) have filed Articles of Incorporation (for a corporate entity) or Articles of Organization (for an LLC), and they believe they have successfully avoided the need for an attorney. In some scenarios, the risk and cost of such a misunderstanding is drastically larger than the cost that would have been incurred in using an attorney proactively.

What could happen?

Failing to follow some of the basics of corporate or LLC/company entity formation can result in tens of thousands of dollars (or more) of liability, should the corporation or LLC be sued. In the event of a suit, if the plaintiff is able to “pierce the corporate veil”, proving that the entity is a mere alter-ego of the owner and has not met the corporate formalities, the owner may be personally liable for the actions or inactions of the entity. In the worst case scenario, this may mean the owner’s personal assets could be pursued in a judgment that results from an action against the entity.

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Why do I need an attorney; can't I handle this on my own?

Filing Articles and assuming the job is complete is short-sighted (at best). People tend to have insurance to protect themselves from somewhat remote and reasonably unlikely scenarios. You don't anticipate having your home destroyed by fire or tornado, but if that occurs you will be happy to have paid your insurance premiums to protect you in such an event.

Business owners and individuals should utilize an attorney in the same way – hire and pay an attorney for advice and counsel before a dispute arises, to reduce risk and limit damages. Too many individuals utilize an attorney like a firefighter, rather than like a smoke detector.

Short-changing or failing to recognize the value of utilizing an attorney for proactive advising can compound the liability and create extraordinary cost if a problem does arise.

In what areas can an attorney reduce risk?

Whether you have filed your own Articles, or are considering doing so, seek representation. Not only is it wise to create a relationship with an attorney who your business can draw upon to review contracts, help with leases or real estate acquisition, and advise you through matters involving legal strategy, but an attorney familiar with business and corporate law can help you address issues you may miss on your own.

1) Setting up proper formation and governing documents.

Corporate law and LLC law in Minnesota require an entity to name certain officers (such as a President and Treasurer). While these roles can be assumed by conduct, this can create confusion and conflict. This exceedingly simple step is sometimes missed in a self-help entity formation. You have to maintain certain records, both in an LLC and in a corporation. Failing to maintain appropriate lists of owners, the articles, and various other records at the entity's principal place of business may run afoul of requirements imposed by state law.

2) Establishing rights, responsibilities and role.

Who owns an entity, what role they play, and how they participate in decision-making, management and the like should not be left to chance. Similarly, whether you can have multiple classes of shares or separate financial rights from governance (voting) rights will vary depending upon what type of entity you structure.

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In this author's experience, internal business disputes and controversies regularly arise when the owners of an entity disagree on strategy, decisions to be made, or the allocation of profits and losses. Some businesses implode when the owners evaluate whether additional capital contributions or loans are necessary, or whether one of the owners can sell or transfer his or her ownership. Although these disputes can never be eliminated altogether, the risks and uncertainties can be significantly reduced and directly managed by clearly establishing the rights, responsibilities and roles of each shareholder/member, director/governor, and officer/manager.

3) **Planning for the unexpected.**

What happens to the ownership and management if an owner dies? Does his or her spouse assume the role of the former owner, with the same voting and financial rights? This is a common result, unless such issues have been addressed in a Buy-Sell or Member Control Agreement. While these agreements can sometimes be complex, challenging, and time-intensive to structure, they are similar to any good contract in that taking proper time and effort to consider and address potential issues comprehensively reduces the chance that such issues are left to chance. Issues left to chance often create the most dramatic and costly lawsuits and disputes. Separately, business owners need to be cognizant about succession planning, estate planning, and how assets such as their stock/ownership interests are handled in the event of the death of an owner.

4) **Memorializing and confirming corporate or LLC decisions in writing.**

Certain corporate decisions require the appropriate vote of the Board or shareholders, which can be determined by your Bylaws, but would otherwise be left to what the statutes set as a default. Consequently, actions you take as a corporation may not have proper authority, depending upon how many owners or board members you have, whether there was proper notice and vote, etc. Separately, potential investors, lenders and others will want to identify whether the entity has maintained records and/or resolutions.

5) **Ongoing advising and counsel.**

While many business owners are smart, capable, and have a wide field of vision, decision-making and judgment can sometimes be limited to one's own experience. Attorneys can bring a broad-based perspective, based on similar or relevant scenarios that the attorney or his or her other clients have experienced, which may help to shape or guide strategic decisions and risk management for the entity they advise.

Ultimately, this author recognizes that many consumers and business owners prefer “self-help” to engaging (and paying for) outside assistance. While many individuals recognize the importance of utilizing a doctor, dentist or other professional proactively, they sometimes fail to realize the value of utilizing an attorney in the same way.

The adage “penny wise and pound foolish” is cliché because it is often true, and it couldn’t be more so here. Short-changing a business by drawing upon an attorney only when a dispute arises will quite often be a more expensive and difficult proposition than using an attorney proactively.