

LEGAL MATTERS AFFECTING BUSINESS OWNERS

Every business needs legal counsel and hiring a proven business attorney to advocate for and protect the interests of your company saves money and brings peace of mind. There are an unlimited number of situations in South Florida's commercial environment that involve business and legal procedures, but the panorama can be broken down into traditional categories.

Business Contracts

Whether the subject matter involves services or goods, agreements are an indispensable component to business transactions. In fact, it is no exaggeration to say that the art of drafting and interpreting contracts is the foundation of all business law.

One of the major functions of the business law practitioner is to provide comprehensive and accurate review of the provisions to an agreement and ensure that the parties understand the terms of the transaction into which they are entering. Similarly, a trained business attorney is skilled at listening to the parties and writing contractual clauses that clearly and precisely reflect their intentions. The attorney's ability to accomplish these tasks directly bears on both the likelihood of disputes arising between the parties down the road and the possibility of incurring penalties as a result of non-compliance with rules and regulations.

Bear in mind that parties to an agreement will always have at least some adverse interests. Accordingly, in most instances contracts should be reviewed, negotiated, and/or drafted by separate counsel representing each party individually. The reality is that the party with the more skilled business lawyer is likely to come away with certain advantages.

Another real-life consideration is the business attorney's demeanor. Business negotiations are a very delicate matter. One of the fears business professionals have is that after they have laid the groundwork for a business relationship with another party, their attorney will show up and wreck the deal by aggressively seeking more favorable terms and/or by bringing up issues that lead to conflict. To be fair to the attorney, he or she is only trying to look out for the client in this situation. However, the bottom line for the client in such a case is that the deal is gone. It requires a certain amount of wisdom and grace on the part of business counsel to ascertain the situation, weigh the consequences of making certain statements against not making them, and choose the appropriate comportment in order to walk the fine line that leads to true advocacy of the client.

Business Litigation

The subject of litigation is one that must be fully and frankly considered since business ventures and business relationships often do not work out as planned. Some business attorneys focus their practice on litigation and dispute resolution. Such practitioners are business litigators, and they have a different skill set from the transactional lawyers that draft and negotiate contracts.

First, the steps involved in litigation are complex, and failure to following proper procedures invariably leads to delay, expense, and/or defeat. To further complicate matters, there are several different codes of civil procedure that apply depending upon the issue, amount in

controversy, and the county. Many times you may need a business attorney just to determine in which courthouse to file the lawsuit.

A business litigator knows the correct legal forms to use and the proper procedures for each courthouse. Also, the litigator is adept at presenting the facts of the case and the legal support for the client's claim both on paper, in the form of a pleading, and before a judge, in the form of oral arguments. Each of these can be daunting tasks for a business professional without legal training and experience. Where the amount of money in question is relatively small (under \$5,000 in Florida's Tri-County), the business professional may bring the matter in Small Claims Court *pro se*,¹ where some judges may have more patience with non-lawyers. Many times, however, it is a bad idea to go into even a small claims matter without a qualified business attorney. Some judges dislike non-lawyers representing themselves or their companies because they invariably make mistakes and end up wasting the court's time. Once the amount in controversy gets over a certain limit (over \$15,000 in Florida's Tri-County), the court will require that business entities be represented by legal counsel and failure to do so will mean losing the case.

Another important consideration is when to pull the plug. The conscientious litigator weighs the costs and benefits of litigation and advises his client accordingly. When the amount in controversy is comparatively small, the expenses involved might make it impractical to initiate or continue a lawsuit. Also, the skillful litigator will consider the facts and applicable law and give the client an honest appraisal of the chances of winning or forcing a favorable settlement. Sometimes the wisest thing to do is walk away or settle for less than the client would like. Even in that situation, however, the matter might be so emotionally charged that the client is willing to incur the expenses and take the risk anyway. Ultimately, whether or not to proceed is the client's decision. A good business attorney gives the client the counsel needed to make an informed decision and then takes appropriate measures to carry out the client's wishes.

Company Formation

Company formation starts with assessing the different factors in play and choosing the company structure that best suits the client's purposes. In Florida, there are a number of different options including the following:

- sole proprietorship
- partnership
- limited partnership (LP)
- limited liability company (LLC)
- professional limited liability company (PLLC)
- professional association (PA)
- corporation (Inc.)

Deciding on which business form is right for the endeavour requires consideration of such issues as liability protection, size and scope of the venture, desired level of formality, allocation of ownership interests, transferability of ownership interest, tax implications.

¹ That is, represent the company without a licensed lawyer.

The client can discuss goals and circumstances with the business attorney and receive a reliable recommendation regarding the best choice of business entity. Later, as the business grows and changes, the attorney will indicate when it would be advantageous to convert to a different business form.

The business attorney's job is not complete once the best type of entity is determined. Each business type requires certain documents, certificates, and permits. The following are a few examples:

- articles of incorporation or articles of organization
- operating agreement or corporate charter
- share certificates
- employer identification number
- registration with the state department
- registration of fictitious name
- occupational licenses

Failure to comply with any of the necessary steps can lead to problems among the owners and/or employees as well as compliance issues with city, county, state and federal governments. Some of the relevant tasks are fairly straightforward once you become aware of the requirement. However, tasks such as drafting an operating agreement or corporate charter are quite complex and really should be done by qualified corporate counsel.

Joint Ventures

A joint venture can be accomplished with or without forming a business entity.² Where the joint venturers choose not to form a company, the venture will be largely governed by the law of partnerships. There is no shortage of disputes that have arisen in South Florida over joint ventures, and the innocent party (or the one less at fault) is generally the one to suffer for not having consulted qualified business counsel ahead of time. Business attorneys know what kinds of issues are bound to arise between the parties and how best to prepare for the contingencies. Many of the considerations involved in a joint venture are the same as those for forming a new company. Additional considerations may involve escrow of capital, tax implications, foreign investors, etc. Savvy business professionals understand what can go wrong and they invariably consult with a business attorney before entering binding agreements.

In South Florida there is a great deal of foreign commerce and foreign investment, particularly involving South America, Central America, and the Caribbean. Joint ventures involving foreign parties and/or foreign countries have unique considerations such as enforceability issues, tax implications, and federal and state regulations. Before getting involved in any such venture, one would be very well advised to consult not only a business attorney but one with specialized knowledge of international business law.

² Trusts are sometimes used for joint ventures.

Employment and Labor

Employment and labor policies, regulations, and laws are among the most widely contested and stringently enforced. There are millions of people employed by thousands of companies in any given city, and the employment issues that affect them tend to be of particular significance to both the lives of the individuals and operations of the companies.

There are a few exceptions, but for the most part there is a clear line drawn between the interests of the employee and the interests of the employer. Any company with employees that does not consult a business attorney lives dangerously indeed.

Employment in Florida is “at-will,” which essentially means employment can be terminated by either party with or without cause. That policy sounds all-encompassing and, for the most part, it is. However, there is plenty of case law in South Florida indicating that while an employee can be terminated for no reason, an employee cannot be terminated for the *wrong* reason (*i.e.* certain types of discrimination, retaliation, etc.). Also, the manner in which the employee is let go should be carefully considered. Such issues are the battleground for claims of wrongful discharge.

Moreover, there are a plethora of state and federal laws governing employer responsibilities—such as workers compensation and employee taxes—and conditions of employment—such as safety of the work environment, harassment, and overtime compensation.

An experienced business attorney will protect its corporate client by, among other things, drafting an employee handbook, employee agreement, and termination agreements as well as by making recommendations regarding compliance with state and federal laws.

Collections

Collections are a reality of nearly all business enterprises. Often enough, whether or not a company survives depends upon the success or failure of its collection activities. Accordingly, there may be a lot on the line and companies should not delve into the realm of collections without first consulting a business attorney because there is a legal minefield surrounding such actions. That is, both state and federal laws outline requirements for collections activities, and failure to comply can result in (i) failed collection attempts, and (ii) penalties levied against the company-creditor.

On the other hand, the law does provide company-creditors with important and effective means of enforcing their rights, and a competent business attorney can assist in bringing to bear the full range of available legal mechanisms.

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