



BUSINESS PRENUPS: WHO TAKES OUT THE COMPANY'S TRASH?

Couples getting married often enter into prenuptial agreements governing financial arrangements in the event of divorce. Sometimes, in an effort to reduce the likelihood of such development, these agreements will address day-to-day issues that often cause friction, such as domestic chores and location of residence.

Similarly, when starting a new business venture, the founders typically enter into a shareholders' agreement addressing topics such as initial capital contributions whether in cash or in kind (e.g. patents or other intellectual property, real estate or personal property), allocation of tax attributes, voting of interests, and procedures and payments/funding sources associated with a break-up of the firm. This is the case whether the document is called a shareholders' agreement, operating agreement, buy-sell agreement, partnership agreement or something else and whether the entity is a corporation or limited liability company.

These topics are important, and if properly handled at venture inception, will save time and money for all concerned in a variety of circumstances. However, for the most part, they deal with extraordinary circumstances, as opposed to day-to-day operations.

In order to enhance the likelihood of a happy "business marriage", we suggest that businesses founders do the same as many couples and include in their agreements not only 'divorce' provisions, but also agreements on how the business will be operated. In particular, the founders should agree in writing regarding the allocation of responsibility, or 'who does what' on an ongoing basis. We see a number of situations where disputes arise because responsibility is not clearly delineated and multiple venturers seek to become involved with or take control of a given functional area, whether sales, HR, accounting or other.

We feel that it is essential that when a business is formed and as it evolves, that there by a written agreement among the owners include allocation of responsibility for and authority over each functional area that they believe to be material to the business. This should include an enumeration of who (or which position(s)) has sole or shared authority to take important action such as signing of checks, borrowing of money under existing credit facilities or entering into new ones, signing of contracts for property or services, hiring or termination of staff, pricing bids for new business or anything else which is material **in the particular case.**



A formal agreement on such matters serves two purposes. First, its existence provides a framework for resolving questions or disputes that may arise without the likelihood of formal proceedings or break-up of the venture. Second, the process of developing the agreement serves to bring about agreement by identifying issues where it is helpful and promoting discussion at a time when the owners are on good terms.

This agreement should be updated as the business grows and as new owners are admitted and/or new financing is obtained. Often, investors such as VC's and angels who frequently act in such capacity will insist upon such process as a condition of their investments. Similarly, it is helpful to address the management roles and responsibilities when new senior level managers are hired. These issues can be resolved efficiently and well-short of litigation by promoting and requiring that the parties address their concerns in a collaborative environment prior to any dispute arising. Often, problems can be resolved or avoided simply and quickly before they escalate to a boiling point between founders.

Proper attention to business operations at business inception is just as important as financial and tax matters and may allow avoidance of the need to invoke break-up procedures.

Our corporate partners are happy to work with you to design an owners agreement that reflects the needs of your specific circumstances.

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