

# How to Prevent Business Divorces from Becoming Business Litigations

# Start with the operating documents

- Operating documents are:
  - Shareholder agreement for corporations
  - Operating agreement for LLCs

# Start with the operating documents

- What to look for:
  - Clear and plain definitions of responsibilities
  - Clear lines of authority – Who makes decisions? What are tiebreakers?

# Start with the operating documents

- What to look for:
  - How the assets of the company will be split up upon dissolution:
    - Intangible assets – cash
    - Tangible assets – real property & inventory
    - Intellectual property – trademarks, employees, etc.

# Start with operating agreements

- Who owns your intellectual property?
  - **General rule:** the employer owns the intellectual property the employee creates in the scope of his or her employment
  - **But be aware of:**
    - Independent contractors
    - The tinkering employee
    - Joint authorship

# Start with your operating agreements

- Work for hire agreements, including copyrights and trademarks:
  - Must be written and specially commission certain works
  - Things to look out for:
    - Employee-designed trademarks
    - Website design & hosting – “Who owns it when you’re done?”

# Start with operating agreements

- Invention assignment agreements, patents:
  - Can be done prior to invention
  - Power of attorney provisions
- Remember shop rights

# Be transparent

- Ensure all partners know how decisions are made and who makes them:
  - Improves communication – partners know who to complain to
  - Avoids distrust



# Be transparent

- Compensation should be roughly proportionate to responsibility:
  - Avoids resentment
  - Feeds sense of common purpose

# Be transparent

- Internal controls
  - Talk to an accountant
  - Basic steps:
    - Same person responsible for assets should not be responsible for records of those assets if possible
    - Split authority on major financial decisions – require two signatures, tiebreakers, etc.

# Be careful about partners you don't want

- Raising money – investors will likely want or be entitled to management rights
- Know whether you are selling securities – JOBS Act will make it easier to avoid a public offering
- Beware the accidental partnership

# Be careful about partners you don't want

- General partnerships can be implied:
  - Right to profits
  - Management rights
  - Liability for losses

# Be careful about partners you don't want

- Unincorporated associations can be implied:
  - Voluntary association under a common name for a lawful purpose
  - Can create joint liability

# Be careful about partners you don't want

- The untimely death of a partner
  - How to treat life insurance proceeds
  - Drag-along rights
  - Tag-along rights

# Do restrictive covenants apply?

- Types of restrictive covenants:
  - Non-competition agreements
  - Non-solicitation agreements
  - Non-disclosure agreements

# Do restrictive covenants apply?

- Non-competition and non-solicitation agreements typically provide for:
  - Injunctions
    - Customer stay-aways
    - Competitor stay-aways
  - Awards of attorneys' fees



# Look before you leap

- Mandatory arbitration provisions
- Forum selection and choice of law provisions
  - Different jurisdictions have different laws (MA vs. NH)

# Final Points

- Good operating agreements
- Transparency
- Only the partners you want
- Do any restrictive covenants apply?
- Where and how would dispute be litigated?