



LAMSON, DUGAN AND MURRAY, LLP
ATTORNEYS AT LAW

BUSINESS COUNSELING

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ANDREW T. CHAPEAU, EDITOR

BUSINESS START-UP CHECKLIST

Both heart and mind must be working well if the owners of a new small business are to experience success. While it is only human nature, not to mention fun, to indulge one's imagination about what a new business started from scratch could be like, would-be entrepreneurs need to engage in some cold, hard thinking and planning before taking the plunge. At the risk of pouring cold water on some of the anticipation and excitement, what follows is a guide for how to plan for and think through the many decisions that must be made well before you have that "Grand Opening" sign made.

Why?

This may seem obvious, but you should know just what your reasons are for wanting to start a new business. If the motivations are weak, odds are the business will be a bust, but



well-founded reasons can help a business persevere through good times and bad. Some common reasons for starting a new business include escaping the whole 9-to-5 routine (though it may be replaced by an 8-to-8 routine), answering to no one else, upgrading your standard of living and being convinced that you can provide a needed product or service.

Why Me?

Let's face it, not everyone is cut out to be a captain of industry, or even the captain of a small business. Maybe you need not subject yourself to an intensive psychological and life-experiences evaluation, but be honest with yourself about whether you have the necessary characteristics, skills, and experience. A few examples give you the idea:

- Can you make yourself pull the trigger on an important decision?
- Do you see competition as exciting or just stress-inducing?
- Are you willing and able to plan ahead?
- Do you like interacting with people you don't know?
- Do you have the perseverance, not to mention the physical stamina and health, to put in long hours if that's what is needed to make the business succeed?

- Are you, and anyone else financially dependent on you, prepared to risk your savings in pursuit of the business dream if that's what it takes?
- Unless you are planning a one-man band of a business, are you comfortable with hiring, supervising, and possibly firing other people?
- Are you reasonably well organized?
- Do you know anything about the paperwork and legal side of running a business, such as payroll and accounting, the permits or licenses you will need, or the regulations and laws that may apply to the business?

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Why This Business?

You may have the best motives and a skill set that would be the envy of any MBA graduate, but if there is no niche for your planned business, or, simply put, if not enough people will want to buy what you are selling, the new business will fail. The variables here include timing, location and simply whether your business is feasible or practicable, so that you can be the one to fill that niche that you have first identified. Don't make your business the equivalent of carrying coals to Newcastle.

In economic terms, you want to do some investigation to determine if there is some currently unmet demand for the product or service you want to supply. Then you want to meet that demand with a product or service that is competitive in quality, selection, price and/or location. In short, learn as much as you can about the market you will be in. Learn who your customers will be and try to understand their needs and desires. Anticipate how your fledgling business will compare with any established competitors. What can you do in setting up and running the business to make sure you get your share of whatever market there is for your product or service?

How?

Turning the idea into bricks and mortar (literally or figuratively) involves a lot of decisions, some of which are best made only after getting professional advice. Still, you should acquire at least a layperson's understanding of the pros, cons and consequences of each decision.

Choose a name for the business that you find appealing, but also one that is informative for someone hearing

it for the first time. Select the most appropriate business form, such as a sole proprietorship, a limited liability company, an "S" corporation or a "C" corporation. An attorney can help you with this decision. An attorney can also assist you in investigating which local, state and federal laws and regulations will apply to the business. This will run the gamut from laws of universal application (e.g., taxes) to laws specific to your business.

Make an unflinching and detailed examination of your financial picture. How much do you have now, how much will you need to start the business, and how much will you need to stay in business? Projecting cash flow into the future means taking into account such variables as seasonal trends in sales, the amount of cash taken out of the business for personal expenses, whether and when to expand the business, and the rate at which customers will pay off accounts if credit is extended to them.

Find a location for the business that is convenient for customers, appropriate in size and configuration and zoned so as to allow your type of business. When you have settled on the product or service you will sell, calculate the inventory you should create and maintain and locate reliable suppliers.

Finally, if you go to all the trouble and expense involved in creating a small business, don't forget to think about protecting against losing the business from such threats as fire, theft, robbery, vandalism and liability for an accident. This means taking measures to provide security, but also arranging for the appropriate types and levels of insurance.

WEBSITE TERMS OF USE

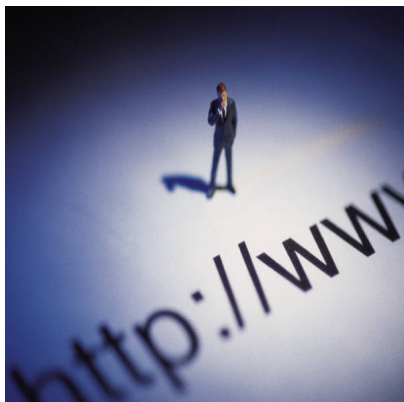
The terms for using websites, often taking the form of legalese to which many users pay little attention, are more important than they are interesting to read. The terms restrict how the public can use a website to obtain information, purchase goods and services, or take part in web-based social networking. Largely because of the federal Computer Fraud and Abuse Act (CFAA), the terms of use can now be used offensively either by prosecutors charging individuals with wrongdoing emanating from a violation of the terms, or by website owners themselves seeking civil remedies for legal injuries to them from what amounts to a breach of contract.

The growing and evolving body of court decisions concerning terms of use and the CFAA should prompt owners of websites to adopt and regularly review the terms for using their sites, giving special attention to the following considerations:

- Instead of using just any boilerplate legal language, the terms of use should be tailored to fit the particular risks posed to the business and users of the site;
- The terms of use must be easily seen and understood to have their intended effect. This means that they should be conspicuous on the site and written so as to clearly indicate conduct that is and is not authorized. There may be no one fail-safe approach, but one court has said that there is adequate communication of the terms of use if the terms can be accessed from all pages on the site;
- Website owners may want to

make explicit the agreement to abide by the terms of use by including “clickwrap” or “browsewrap” agreements that make consent to the terms a condition of using the site. If the user clicks on “I accept,” but then violates the terms of use, this essentially nails down the fact, which may be pivotal in later criminal or civil court cases, that the user lacked the necessary authorization for his actions. For example, in a recent criminal case in which a university student secured access to a university computer site and stole Social Security numbers and other confidential data, the prosecution was aided by the fact that the student had signed an “acceptable use” computer policy that prohibited the very actions which led to the criminal charges;

- Putting the terms of use in place is one thing, but then monitoring compliance and notifying users of suspected or confirmed violations result in enhanced protection. In the case of the university student who was improperly gathering sensitive personal information, the university had on three occasions detected that the student’s computer was performing unauthorized and



suspicious functions, and had informed him of its discoveries. When the student nonetheless continued to scan and infiltrate computers without authorization, adding to his database of stolen information, his fate in the ensuing criminal case was sealed.

GENERATION-SKIPPING TRUSTS

If you have heard of generation-skipping trusts (GSTs) at all, you probably think of them as a way for wealthy families to shield their fortune from estate taxes. That is true as far as it goes, but GSTs can also have benefits for the less well off by protecting assets from ex-spouses and creditors and by serving as a place for appreciable assets to grow outside of taxable estates.

Although the phrase “generation skipping” sounds like an arrangement which leaves out children altogether in favor of the grandchildren, in fact what a GST “skips” is the taxation of assets put into children’s estates by their parents. In a typical scenario, grandparents who are satisfied that their children are financially secure may decide to set up a GST in favor of all of their descendants as possible beneficiaries. Successive generations eventually receive the assets without the repeated imposition of estate taxes when each preceding generation dies. The assets are taxed only once, at the time of the initial transfer to the trust.

The first generation of children can be made to benefit as well. Although they technically won’t own the assets in the trust, they can be given a right to distributions for their reasonable needs, meaning not only their

support and maintenance, but also “comforts, conveniences, pleasures, and happiness.” However, discretion over whether trust funds may be used for the benefit of the child must be exercised not by the child, but by a “disinterested trustee,” that is, someone who is not a related or subordinated person as defined in the Internal Revenue Code.

There is a limit on the amount that can be transferred into a GST. Currently, the limit is \$3.5 million for each person setting up the trust. In other words, a married couple could place up to \$7 million in a GST. Any amount that is transferred in excess of the limit is subject to gift or estate tax when the older generation passes along the assets, and an additional “generation-skipping tax” is imposed when the children die and the property is transferred to the grandchildren. The potential estate tax benefits of a GST are easy to see when it is considered that each dollar over the limit is taxed at the highest estate tax rate, which currently is 45%. If there are downsides to a GST for some people, they may be found in the fact that someone outside the family (the trustee) will become intimately involved in the family’s money matters, and that it will be necessary to file an income tax return for the trust each year. Still, under the right circumstances and with proper planning under the guidance of an estate planning professional, these and any other drawbacks for a GST could pale next to the bottom-line advantages realized as assets are passed from generation to generation without Uncle Sam taking his cut.

REAL ESTATE ROUNDUP

Religious Icon Removed from Condo

A condominium association adopted a rule forbidding the placement of any signs or symbols on doors or in hallways outside condominium units. When a Jewish resident placed a religious symbol on the doorpost of her unit, the association had it removed without her consent. The resident sued the association under the federal Fair Housing Act (FHA), claiming religious discrimination, since she maintained that her religion required that she place the symbol outside the entrance to her residence.

The tenant's claim under the FHA failed. That statute does prohibit discrimination based on religion, but, in contrast to disability discrimination, it does not require a "reasonable accommodation" of religious beliefs and practices. The challenged association rule did not target any particular religion, but instead was a religiously neutral, exception-free regulation adopted for reasons unrelated to religion. Under pertinent precedents of the United States Supreme Court, that neutrality made the rule valid as nondiscriminatory and consistent with preserving the constitutional right to exercise one's religion freely. Under similar reasoning, the rule also withstood the challenge brought under the FHA.

EMPLOYERS AND JOB REFERENCES

Whether an employer-employee relationship ends on good terms or with acrimony, a common final act—the employee's request for a reference for a new job—is increasingly leading to litigation.

From the former employer's standpoint, it can be a case of damned if you do and damned if you don't. A candid, negative response to the request can invite a suit by the former employee. A glowing recommendation that omits some serious shortcomings in the employee's performance, or that declines to say anything about the employee except perhaps dates of employment, could result in litigation brought by the new employer, who would have preferred to be warned about a subpar employee. The prevalence of such disputes only figures to increase in the current economic downturn.

The growing dilemma is such that some employers are telling their employees from the outset that they will get no job reference—good, bad or indifferent—when they leave. Under such a policy, inquiring prospective employers would get only the employment equivalent of "name, rank and serial number." Other employers are willing to give a reference, but only

after they have in their files documents in which an employee consents to having prospective employers find out all there is to know, and waiving their right to sue over anything that is said in the reference.

Although other states have enacted statutes generally providing immunity to the givers of references, so long as their actions were not motivated by malice, Nebraska has enacted no such statute. Therefore, it is important for Nebraska employers to talk with an employment professional regarding the adoption of a referral policy which provides the best insulation from potential litigation.

BUSINESS DEPARTMENT

Frank J. Barrett
Matthew J. Bock
Andrew T. Chapeau
Donald L. Erftmier, Jr.
Lawrence F. Harr
C.E. Heaney, Jr.
Brian J. McGrath
Robert J. Murray
Jon S. Reid
Frank M. Schepers
Daniel J. Waters

Sara B. Christianson, Advanced
Certified Paralegal
Anna C. Palmer, Paralegal



LAMSON, DUGAN AND MURRAY, LLP ATTORNEYS AT LAW

LAMSON, DUGAN AND MURRAY BUILDING
10306 REGENCY PARKWAY DRIVE
OMAHA, NEBRASKA, USA 68114-3743