



We're Taking You To School

# Tips for a Smooth Start-Up

Avoiding Liability While  
Developing Your Business

**BANK OF  
COMMERCE**



# Class Outline

- Risk Management or Preventive Law?
- Defining Your Business Relationships
- Developing “Form” Contracts
- Dealing with Employment Matters
- Avoiding Personal Injury Liability
- Protecting Intellectual Property



# Risk Management vs. Preventive Law

- *Risk management*: “The function or process by which [an organization] identifies and manages the risks of liability that rise from its activities.”
- *Preventive law*: “The scope of preventive law provides the broader focus, to include environmental, political, economic, regulatory, institutional and cultural risks.”

— Definitions are from Prairie and Garfield, 2004



# Risk Identification: The Legal Audit

- Identify areas of possible liability during planning stages (business plan, etc.):
  - Regulatory issues
  - Contract law
  - Employment law
  - Personal injury concerns
  - Intellectual property law



# Risk Evaluation

- Evaluate risks in conjunction with organization's mission and importance of certain activities.
- Develop strategies to minimize risk of liability—or eliminate activities altogether.
- Consider your work in this regard - “brainstorming” for options.



# Risk Management and Business Realities

- Make sure the plan is congruent with the organization's core values.
- View the plan as a management tool for attaining a competitive advantage.
- Make sure that all members of the organization understand its importance.

# Risk Management Alternatives

- 1. Risk elimination – Most drastic measure; need good reason
- 2. Risk retention – Reward outweighs risk of elimination
- 3. Risk transfer – Insurance; indemnification; contractors
- 4. Risk control – Reduction of risk, either intrinsic or extrinsic



# Private Placements

- The term "private placement" refers to the offer and sale of any security not involving a public offering. Private offerings are not the subject of a registration statement filed with the SEC under the 1933 Act, but require preparation of a Private Placement Memorandum and adherence to investor requirements.
- Reference: [www.seclaw.gov](http://www.seclaw.gov)



# Accredited Investors

The principal categories of “accredited investors” are as follows:

- 1) Directors, executive officers, and general partners of the issuer.
- (2) Purchasers whose net worth either individually or jointly with their spouse equals or exceeds \$1 million.
- (3) Natural person purchasers who have "income" in excess of \$200,000 in each of the two most recent years and who reasonably expect an income in excess of \$200,000 in current year (or \$300,000, jointly with their spouse).
- (4) A business entity will be treated as a single accredited investor unless it was organized for the specific purpose of acquiring the securities offered, in which case each beneficial owner of the security is counted separately.



# Friends and Family

- Vast majority of new business developed by small groups who agree to invest time, money or intellectual property to venture without solicitation of private equity.
- No PPM is required.
- Parties should contractually agree on roles (financial and otherwise) before start of business.



# Entity Selection: LLC

- Limited Liability Company (LLC)
  - LLCs are popular because, similar to a corporation, owners have limited personal liability for the debts and actions of the LLC. Other features of LLCs are more like a partnership, providing management flexibility and the benefit of pass-through taxation.  
*Dummy proof?*
  - Reference: [www.irs.gov](http://www.irs.gov)



# Entity Selection: S Corp

- Subsection S Corporation (S Corp)
  - S Corps are corporations that elect to pass corporate income, losses, deductions and credit through to their shareholders for federal tax purposes. Shareholders of S Corps report the flow-through of income and losses on their personal tax returns and are assessed tax at their individual income tax rates. This allows S Corps to avoid double taxation on the corporate income.



# Entity Selection: Partnership

- Partnership

- A partnership is the relationship existing between two or more persons who join to carry on a trade or business. Each person contributes money, property, labor or skill, and expects to share in the profits and losses of the business. Does not offer same liability protection as LLC or S Corp.



# Resources

- NC Dept. of Commerce: [www.nccommerce.com](http://www.nccommerce.com)
- UNC Small Business & Tech. Development Center: [www.sbtcd.org/pdf/startup.pdf](http://www.sbtcd.org/pdf/startup.pdf)
- NC Secretary of State – Corporations Division: <http://www.secretary.state.nc.us/corporations/>
- U.S. Securities and Exchange Commission: [www.sec.gov](http://www.sec.gov)



# Form Contracts

- How courts interpret contract law:
  - As an integrated whole
  - In the event of an ambiguity, most strictly against the party that drafted the document
- Contracts should be written with the worst case scenario in mind
  - Develop hypotheticals while reviewing
  - If it doesn't make sense to you, change it



# Oral vs. Written Contracts

- Good managerial practice: Put every contract in writing.
- Some types of contracts *must* be in writing (Statute of Frauds)

*“Mr. Bray, an oral contract is worth the paper it’s written on.”*



# Statute of Frauds

- NCGS Section 22-2
  - All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them.....and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.



# Employment Contracts

- Duties and Responsibilities
- Compensation
- Term of employment
- Clauses related to termination
- Restrictive covenant/covenant not to compete



# Employment at Will

- Employer may fire an employee at any time, for any reason
- Employee can quit at any time, for any reason
- In practice, the rule favors employers more than employees



## NC Law

- An employee is presumed to be an employee-at-will absent a definite term of employment or a condition that the employee can be fired only “for cause.” An employee-at-will can be fired for an irrational reason, no reason, or any reason that does not violate public policy.



# Liability for Actions of Employees

- Vicarious liability: *Respondeat superior* (let the master respond):
  - Holds employer responsible for certain acts of employees
  - Predicated on employer's ability to control employees and to procure insurance covering employees' actions
  - Considered a cost of doing business
- Employee actions must be within "scope of employment"



# Duties to Customers

- ...the owner of the premises has a duty to exercise ordinary care to keep in a reasonably safe condition those portions of its premises that it may expect will be used by its customers during business hours and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision.



# Specific Duties

- Duty to design facility safely
- Duty to warn of hidden dangers
- Duty to inspect
  - Actual notice
  - Constructive notice
- Duty to repair damages
- Duty to provide emergency medical assistance

# Intellectual Property: Trademark

## ■ Trademarks

- protects words, names, symbols, sounds, or colors that distinguish goods and services from those manufactured or sold by others and to indicate the source of the goods. Trademarks, unlike patents, can be renewed forever as long as they are being used in commerce.
- Reference: [www.uspto.gov](http://www.uspto.gov)



# Intellectual Property: Patent

- Patents

- property right granted by the Government of the United States of America to an inventor “to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States” for a limited time in exchange for public disclosure of the invention when the patent is granted.



# Intellectual Property: Copyright

- Copyrights

- Copyright is a form of protection provided by the laws of the United States *to the authors of “original works of authorship,”* including literary, dramatic, musical, artistic, and certain other intellectual works. This protection is available to both published and unpublished works.
- Reference: [www.copyright.gov](http://www.copyright.gov)



# Intellectual Property: Trade Secrets

## ■ NC Trade Secrets Protection Act

- "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
  - a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
  - b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.



Thanks!

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