

Do I Really Need a Lawyer for This?

A Common Sense Approach to Using Attorneys for Your Home Business

By Gary M. Heller, Hodgson Russ LLP



The assistance of competent legal counsel (as well as a good accountant) will go a long way toward ensuring that all filings reflect the business goals of each participant in the venture.

Having represented clients in commercial disputes for more than fifteen years, I am still struck by the frequency in which the following scenario occurs — a small business owner claims that she has been wronged in a transaction, that considerable monies are owed and, most important, that proof of wrongdoing is embodied in a single document. Although the client is angry about the situation, her excitement about having the proverbial “smoking gun” is palpable.

When asked who prepared the document and whether a lawyer was consulted, the client responds, “That wasn’t necessary, this was a simple transaction so we prepared the agreement ourselves and, look, it proves that he owes me money.” I am then faced with the unenviable task of deflating the client’s confidence, informing her that the document does not quite say what she thinks it says, or mean what she thinks it means. On some occasions, a lawyer must also be the bearer of bad news, informing the client that, even though her claim may be legitimate and compensable, the document she believed would prove her case does nothing of the sort and may, in fact, expose her to potential exposure.

The foregoing problem is one that likely would have been avoided had the agreement been prepared by an attorney. It begs questions that should be asked by any prospective or established home business owner — “When should I seek legal advice?” and “What kind of lawyer should I consult?” Speaking with an attorney can be intimidating, and hiring one can become expensive. It is understandable, therefore, that seeking counsel typically is not on the list of important priorities, as creating revenue and meeting expenses is always your primary concern. Many of the problems you face appear to be simple, the kinds that you reasonably believe you can handle

yourself. In a world where information is widely available online and without cost, this is understandable. However, even with the ease of access to information, much is unreliable or incomplete. Moreover, there are many questions that non-lawyers simply do not consider when seeking answers on their own.

Although many legal issues are unanticipated, one can prepare for potential problems before they occur. The balance of this article offers a snapshot into the circumstances where it is advisable to seek the assistance of an experienced attorney.

1. Corporate Formation

Forming your corporation, partnership, or LLC may appear to be a matter of completing online forms provided by your state’s Division of Corporations. Similarly, if you are interested in reserving a particular name for your business, many states provide web-based resources that identify entity names that are currently in use. However, even though finding and completing the correct forms may appear to be uncomplicated, you should seek advice from an attorney before jumping in. Most important at the outset is determining the type of entity you should form. The manner in which you proceed will be based

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on, among other things, the complexity of the anticipated business, the number of individuals involved, and the financial contribution of each. There are advantages and disadvantages to choosing one type of entity over another. Often, the decision involves a consideration of tax benefits and consequences as well as potential personal liability or exposure. The assistance of competent legal counsel (as well as a good accountant) will go a long way toward ensuring that all filings reflect the business goals of each participant in the venture.

When a home business involves multiple owners and/or contributions of capital, the parties should seek advice geared toward fostering the resolution of potential problems before they occur. An attorney can assist in the formulation of exit strategies at the start of the venture via the memorialization of business “prenuptial” agreements, including buy-sell, buy-back, or buy-out agreements. In planning ahead, the goal is to prevent future legal entanglements or financial issues, regardless of the circumstances surrounding the departure of a partner or shareholder.

2. Contracts

Home businesses are often engaged in the buying and/or selling of products or services, each of which creates a contractual relationship. For many transactions, particularly if you provide specialized services, it is of utmost importance that you properly document all elements of the agreement to ensure that the parties involved have a complete understanding of their respective rights, obligations, and responsibilities. Seemingly straight-forward transactions carry a degree of risk, even when the parties believe that they have accounted for potential contingencies. Written agreements prepared under an

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attorney's guidance serve to clearly express each party's intent, while also accounting for matters that the lay business person might not consider. The goal is always to minimize the unexpected and create protections in the event that the relationship breaks down.

3. Employment Procedures, Policies and Agreements

Your home business has become successful and you realize that you need help, so you put out the word that you are hiring. However, what seems like a simple undertaking must be done in accordance with applicable law. You can undertake the actual interviewing and hiring of employees on your own, but you must be keenly aware of the questions you are permitted to ask as well as the kinds of inquiries that can subject your company to liability. An attorney's advice on these matters can provide you with an understanding of all of the "dos and don'ts" in hiring, including relevant anti-discrimination statutes.

Any business that takes on employees is also subject to state and federal labor, employment, and tax laws. Issues can arise regarding whether a worker should be categorized as an employee or as an

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independent contractor, and whether you are required to provide that person with overtime compensation or benefits. At some point, you may also be faced with internal claims of improper treatment, including, but not limited to, sexual harassment or discrimination. And, if your business has processes, procedures, intellectual property, or a roster of clients that you want to protect, it might make sense to have an attorney prepare an employment contract that contains, among other things, confidentiality agreements and nonsolicitation agreements.

Needless to say, you must retain counsel in the event you are forced to prosecute or defend any legal action involving a current or former employee.

4. Intellectual Property

Intellectual property is original work created by or for you or your business. These assets include ideas, inventions, writings, artwork, and software as well as brand names, logos, designs, and new products or processes intended for sale into the marketplace. Copyright, trademark, and patent laws offer protection to the creators or owners of intellectual property. Where this is important to your business, you should retain a specialist to secure all available rights (or to ensure that you are not violating the intellectual property rights of another). Even the look and content of your web site should be scrutinized to ensure that it does not violate a copyright or trademark held by another.

5. Selecting a Lawyer

Lawyers do not come in one size. Personalities and areas of concentration differ, as do the capabilities of law firms of all sizes. When starting out, the people whom you know and trust are the best sources for a recommendation. Also helpful are local bar associations and lawyer referral

services. It is advisable to meet with multiple attorneys and to review their web sites and written materials to ascertain whether their capabilities fit your needs. Be clear about your financial situation, and make sure that you understand any lawyer's fee structure (e.g., hourly rate, contingency, etc.). An attorney and client must always be on the same page, and this should be reflected in the letter of engagement. Also, it is advisable to choose a professional who possesses the humility to refer you to another lawyer when your problem falls outside her practice area. Finally, and perhaps most important, select someone with whom you feel comfortable, but who is also willing to provide honest and candid counsel.

6. Conclusion

It is not always clear when one should seek advice of an attorney. Although you are capable of handling many important functions on your own, when thinking about the continued success of your home business, it is always important to pay heed to Benjamin Franklin's adage that "An ounce of prevention is worth a pound of cure." **HBM**

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Owners Face Risks without Insurance

"Most home-based businesspeople don't know they need insurance like other businesses," says Janet Scott-Buckley, an agent with Harrington Insurance Agency in North Andover, Mass.

A homeowners (or renters or condo) policy gives little or no protection for the business, she says. Someone getting hurt is also a risk, she adds. "If a customer, or even a deliveryman, slips on your doorstep and gets hurt, you could get hit with a big lawsuit," Buckley says. "Your homeowners policy won't cover you, so you'd have to hire a lawyer and pay the settlement out of your own pocket."

It's usually best to buy a separate policy for the home-based business, Buckley says. It covers business equipment, inventory and supplies at home and offsite — for instance, your laptop. And the policy also covers your business general liability, for slips and falls —

at home and possibly elsewhere. If you have employees, you'll also need workers' compensation insurance. **HBM**

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