

IT'S YOUR BUSINESS

What you need to know!

Organization . . .

Maintenance . . .

Employees . . .

Informal Board of Advisors . . .

Planning for the Future . . .

Buying ~ Selling . . .

Attorney Barry W. Szymanski

Representing Clients Throughout Wisconsin
262.797.8560

Organization . . .

SOLE PROPRIETORSHIPS. This is the most basic and most common form of business organization. An individual holds title to all assets of the business which are owned and the individual is also responsible for all the debts and obligations of the business.

ADVANTAGES: 1. Costs and formalities in creating and maintaining business format are minimal. 2. Management and control of business is completely in the hands of the individual owner. 3. Free transferability of ownership of the business.

DISADVANTAGES: 1. Individual is personally liable for all debts and obligations of the business. 2. No continuity of ownership since when the owner ceases to exist so does business.

CORPORATIONS. This is an 'artificial person' created under the laws of a state.

ADVANTAGES: 1. Liability of shareholders is limited to their investment. 2. Can exist in perpetuity. 3. Absent restrictions on the shares of stock, ownership is freely transferable. Placing restrictions on the transfer of shares can also act as an advantage in small closely-held corporations where continuity of ownership is important.

DISADVANTAGES: 1. Possible "Double Taxation" if a C Corporation, but not if an "S" Corporation [which are taxed as partnerships]. 2. Corporations require initial formation fees. When incorporating consider the filing fees, annual fees, drafting of Articles of Incorporation, Annual Reports, By-Laws, Shareholder Agreements [as necessary], and Stock Certificates.

PROFESSIONAL SERVICE CORPORATIONS. These corporations are unique to engineers, architects, accountants, physicians, veterinarians, lawyers, and other licensed professionals. The key is that the professional remains liable for individual acts of negligence.

STATUTORY CLOSE CORPORATIONS. The close corporation law simplifies the legal requirements of Wisconsin's corporation law.

The shareholders have a statutory legal restriction on the right to transfer stock. A statutory close corporation need not have a Board of Directors. The shareholders may also enter agreements regarding management. A statutory close corporation is the only corporate form in Wisconsin which allows only one corporate officer. Arbitration may be elected by the corporation in its Articles as a remedy instead of court.

LIMITED LIABILITY COMPANIES [LLC's]. Limited liability companies require that Articles of Organization be filed with the Wisconsin Department of Financial Institutions.

The LLC statutes provide limited liability for the LLC's members and managers. Operation of the limited liability company is usually controlled by a formal "Operating

Agreement. LLC's may provide for various classes of members with differing rights and duties. Limited liability companies are taxed in the same manner as a partnership allowing members to take losses on their personal tax filings – like an 'S' corporation.

LIMITED LIABILITY PARTNERSHIPS [LLP's]. The LLP provides that a partner is generally not personally liable.

This extends to a debt, obligation or liability of the partnership, including any debt, obligation or liability arising from omissions, negligence, wrongful acts, misconduct or malpractice that arises while the partnership is a registered LLP. This narrows the liability of partners substantially. It allows partners to insulate their personal assets from liability. Creditors would only be permitted to attach business assets -- unlike general partnerships where the partner can be held personally liable for debts [unless a partner signed a personal guarantee]. A partner remains liable for the following: [a] the partner's own omissions, negligence, wrongful acts, misconduct or malpractice; [b] the omissions, negligence, wrongful acts, misconduct or malpractice of any person acting under the partner's actual supervision and control in the specific activity in which the omissions, negligence, wrongful acts, misconduct or malpractice occurred; and [c] any debts, obligations and liabilities resulting from the partner's acts or conduct incurred while a partner.

Maintenance . . .

LLC'S AND CORPORATIONS SHOULD HAVE ANNUAL MINUTES AND SPECIAL RESOLUTIONS IN ORDER TO MAINTAIN THEIR INDEPENDENT STATUS.

For my Clients, my services include:

Notification of Annual Meeting

Update of Persons Interested Records

Preparation of Annual Stockholder Minutes with Waiver of Notice, Election of Directors, Resolutions, and Ratification of the Acts of the Directors

Preparation of Annual Board of Directors' Minutes with Waiver of Notice, Election of Officers, Resolutions, and Ratification of the Acts of the Officers

Draft of Special Minutes for Pension or Profit Sharing Minutes, Stock Ownership Changes, Name Changes, Leases, major corporate changes, major resolutions, and other specific legal problems

Index of Documents into the Corporate Record Book with copy to Client

Review or preparation of the Department of Financial Institutions Annual Report [when supplied by Client], and inclusion into Client's Corporate Record Book

Employees . . .

Representing you in the area of Employment Law includes:

Employment at Will / Employment Contracts / Personnel Records

Defamation / Privacy / Libel and Slander

Drug Testing / Honesty Testing / HIV Laws

Unions - National Labor Relations Board / Plant Closing Laws

Employment Torts

Wisconsin Fair Employment Laws / Federal Civil Rights Act

Equal Pay Act / Discrimination in Employment Act

Americans with Disability Act [Impairment / Reasonable Accommodation]

Occupational Safety and Health Act

Federal and Wisconsin Family and Medical Leave Act

Unemployment Law / Worker's Compensation Law

Wisconsin Trade Secrets Law

Informal Board of Advisors . . .

As a business owner, operator and entrepreneur you deserve success. Yet, operating a business in this economy is too complex for one person. And the staggering statistics of the failure of new enterprises confirms this! Business owners must recognize that their strengths are in their business field [whether professional, retail, computer service, mechanic, restaurant, engineering, shoe, or construction business] and they must continue to grow in both the knowledge required to remain experts in their field – and to work to promote their business. The statistics on business failure are dismal. Over three-fourths of new enterprises do not survive three years. Numerous reasons are suggested for failure, including lack of capital, lack of planning, lack of support, and government mandates.

Successful Businesses. However, one key reason for success, based upon my experience in working with businesses since 1973, is that when business owners work closely with their advisors. Your advisory group ideally should consist of an accountant, marketer, advertiser, insurance agents, banker, and [dare I say it?] your business lawyer. Each member of your informal board should possess business knowledge and experience vital to you. These are some ways that each board member may be able to assist you:

ACCOUNTANT. Bookkeepers or CPA's render advice on the financial operational systems, and taxation.

MARKETER. Assist you in your initial and subsequent marketing studies, including pricing, packaging, and location of your product or services.

ADVERTISER. Provide assistance in dealing with telemarketing, sales representatives, radio, newspaper, direct mail, and/or television advertising.

INSURANCE AGENTS: BUSINESS AND LIABILITY. Assist in funding for estate and business succession. Provide protection in the event of liability issues [fire, theft, casualty, vehicle, bonding, product liability, error and omission].

BANKER. You and your banker should review your cash flow needs and identify your credit needs well in advance of problems.

LAWYER. As your legal consultant and advisor, I offer business options and the legal and practical effects of your decisions.

Some legal considerations: How do I best handle this employee problem? Can I fire this person? Should I have this contract reviewed? Is incorporation, or an LLC, or an LLP a solution? How can I best word this agreement to forestall expensive and time-consuming litigation? Does this lease protect me personally? Have I considered alternate dispute resolution procedures in the event I and my business partners/investors have disagreements? How have I considered planning in my business in the event of an untimely death of myself or a key staff member? Is this the right policy for this business entity?

Disagreements within your Advisory Board. At times members of your Board will seemingly disagree with each other – yet no one will be wrong. Their dissents are the result of each director viewing a peculiar problem from his or her specialized discipline. After receiving various options, and then weighing the risks and benefits, you can make an Informed Decision.

Your Business Plan. Your Business Plan is your key to a successful enterprise. It is also a good self-test. Its value, because of the information you have gathered and examined, is to provide a basis for working with your Advisors to hone your plan – all in order to achieve your objectives – a profitable business. And, as you desire to improve your business, your well thought out Plan will serve as excellent evidence of your Resolve.

Index. Based upon the disciplines of your informal board of advisors, the index and tabs of your Business Plan should be [and not in any order]:

- Vision and Mission Statement
- Business Owners and Key Employees
- Accounting
- Marketing

Advertising
Insurance
Banking
Law

Your Business Plan should therefore include:

- A complete description of your proposed or existing business and your business objectives.
- A working resume of each owner, director, key employee describing not only what jobs and positions are held but what responsibilities each person has, and the results achieved by, and expected of, each person. This segment may also include key investors and support staff, as well as the training undertaken by each person.
- Marketing objectives and feasibility studies in each area of your business.
- Advertising goals and the varied means you are using to achieve those goals.
- The capital requirements of your business.
- An Income Expense Analysis with a two year cash flow projection. This can be set forth in three scenarios: The Normal Expectation, If Everything Goes Better Than Expected, and The Worst Possible Scenario.
- A statement of your legal organization and compliance.
- A listing of your insurance policies and how insurance is protecting your business.
- Each area should include the CV of each of your informal board of directors by discipline.

Formulation of your Business Plan requires personal discipline because you have to analyze your objectives and outline the means to those objectives. Critical examination is crucial. The results will be worth it. Remember: **Success is not equivalent to luck.** Businesses may appear to grow haphazardly. Successful entrepreneurs

- plan carefully;
- understand and accept the complexity of business;
- surround themselves with good business information sources;
- accept advice from a variety of sources.

This is the foundation for their success!

Review your Plan annually and test it with your "Board of Directors". Be prepared to modify it because your Plan must be a dynamic tool for you and your company.

Options. When you approach a problem it is important to learn all of the available options. This is the only way to facilitate appropriate decision making. Since profit is the goal of all businesses, it is critical that you know, measure, and decide upon the appropriate options.

Your consultations with your board members should give you meaningful business counsel allowing you to:

- [1] Clarify your business objectives for your business;
- [2] Grow in your particular expertise and contacts;
- [3] Expand your total knowledge of various disciplines, allowing you to focus on your business; and
- [4] Start and stay in the successful one-fourth of businesses!

Planning for the Future . . .

The goal of your business continuity plan is to minimize disruption to your business upon your disability, or death, or retirement. It also includes what happens if there is a fire, tornado, or flood. Because you want to protect your family and yourself, the benefit of planning both for the future, and for catastrophe is essential.

Questions to Ask. In working with business Clients I ask these questions:

- Who are the key successors to your business?
Are they family members?
What is the training and experience of these key successors?
Can they be relied upon to take over when the time comes for succession?
- If there are no successors in the business operation, how saleable is the business?
- If the business cannot be easily sold, can the assets be sold at profit?
- When your death occurs, does your family want to continue to own the stock of the business while business successors operate it?
- What type of Business Buy/Sell Agreements should be entered into?
What type of funding [insurance or otherwise] should be employed for the Buy/Sell Agreement?
Should the stock be placed into two classes?
Should the non-involved family members have a place on the Board of Directors?
- If the stock is sold, what are the best methods to do so?

And you may find that your examination of asset ownership, asset valuation, and debt may produce current cash savings!

Integration of Your Estate Plan with Your Business. As your Attorney I can work with you in drafting your Will and, if you wish, your Trust, to coordinate your estate plan with your business continuity plan. I can also work with you to draft a Business Power of Attorney and other documentation in business disaster and continuity planning.

Buying ~ Selling . . .

There is no "usual" sale; each business sale is unique. For example, [1] the sale of a free standing restaurant with many years of owner dedication to customers, is very different from [2] the sale of a company whose owner is a broker/dealer who wishes to retire and sell the customer list.

There is an exchange of relevant information whether you are considering purchasing or selling a business. Basic information must be divulged before the parties sign a Letter of Intent or an Offer to Purchase. Buyers often want additional information and Sellers are unsure as to what information should be divulged to the prospective Buyer. A major fear of Sellers is that prospective Buyers are front people for a competitor exploring what the competition is doing. Sellers are reluctant to show their customer lists which can be stolen.

Buyers should ask the type of information the Seller would divulge to a college student who had spent a one month internship at the Seller's business. If the customer list would not be divulged to the student, then a prospective Buyer should not be shown a customer list.

In example at the beginning of this section, in # [2] above, the broker/dealer may wish to discuss his operations, but would not want to release his customer list. On the other hand, in example [1] above, if the restaurant has a long standing and excellent reputation, it may be justifiably proud of it's extensive list of epicures; however the restaurant would not divulge the recipes for it's sauces or desserts.

When, and should the Seller disclose tax records, profit/loss statements, and balance sheets? The answer may revolve on how the Seller perceives a particular prospective Buyer. The Seller may wish to have either an Offer or an Intent to Purchase in hand before releasing certain information. The Seller may wish to reveal only the most recent of these reports simply to show the prospective Buyer that the time and expense in drafting and presenting an Offer to Purchase is justified and that the asking price is reasonable.

Confidentiality Agreements. Any Seller thinking of giving information to a Buyer should require a Confidentiality Agreement. Without that agreement the possessor of the information may do whatever he or she wishes. Even though there will be expense in seeking court protection if there is a Confidentiality Agreement breach, there is, at least, the opportunity to seek judicial relief.

Intents to Purchase. The danger to both parties is that a 'simple' Intent to Purchase will lock either of the parties out of key provisions in a later anticipated Offer to Purchase – and lead to litigation to enforce the Intent to Purchase. Therefore many Buyers and Sellers prefer to embark upon the transaction with an Offer to Purchase. With the Offer to Purchase all of the provisions deemed necessary are set out in detail which either eliminates or minimizes disputes between the Buyer and the Seller.

What Should Be Disclosed Before a Sale. Minimally and typical of the items requested to be disclosed before a sale are:

- A. An inventory of all furniture, fixtures and equipment included in this transaction.
- B. Copies of all Leases affecting equipment, real estate or signs; and all copies of other Leases pertaining to the business.
- C. Estimated principal balance of accounts receivable.
- D. Estimated principal balance of accounts payable.
- E. Copy of profit and loss statements, balance sheets, business books and records, and income tax returns for the prior years, which Buyer may have examined by Buyer's agents or Attorneys.
- F. Copies of latest real estate and personal property tax bills.
- G. Copies of Franchise Agreements, if any.
- H. Copy of Corporate Minutes approving or authorizing the sale, if Seller is a corporation or an LLC.
- I. Copies of all licenses used in operating the business.
- J. An agreement regarding a restriction on Seller competing with Buyer after the closing of this transaction.

Critical Trade Secrets. Disclosure of any Trade Secrets should be reserved until near or at the time of closing when the Buyer produces the certified checks and places them on the table or in the hands of an escrow agent. If a prospective Buyer wishes to review trade secrets earlier, then some creative use can be made of escrow agents, and innovative liquidated damage clauses for breaches of trade secrets. Sellers may also feel comfortable in allowing some information short of "Trade Secrets" to be presented to the prospective Buyer after financing contingencies have been removed. By this time the Sellers have certain indication that the prospective Buyer has done their 'due diligence' and shown good faith and is "ready, willing and able" to purchase the business.

Pre-Qualifying Buyers. Sellers may wish to pre-qualify a Buyer. Sellers are well within their rights to exercise good financial business practices to seek qualification

information from the Buyer. Sellers may desire a Letter of Credit to prove that the Buyer has the necessary financial backing to consummate the transaction.

How I Can Help You . . .

A Profitable Foundation for Your Business. As a Business Attorney my goal is to assist you in building a profitable foundation for your business. I can professionally assist you in the following legal areas:

- Limited Liability Companies
- Limited Liability Partnerships
- Corporate Transfers
 - Draft of Offer to Purchase
 - Purchase of Business
 - Sale of Business
- Contracts [Agreements]
 - General
 - Employment
 - Covenants Not To Compete
 - Stockholder
- Incorporation
 - Statutory Close
 - Regular
 - Non-Profit
 - Professional
 - Religious
 - Social - Clubs
- Partnerships
- Administrative Hearings
- Employer/Employee Issues
 - Discharge Assistance
 - Termination Litigation
 - Employee Handbooks
 - Unemployment
 - Compensation Law
 - Employee Issues
- Corporate Book Maintenance
 - Annual Stockholder and Director Minutes
 - Special Meeting Minutes
- Buy-Sell Agreements
 - Redemptive
 - Cross-Purchase
- Collections
- Intellectual Property
- Business Plan Draft and Consultation
- Business Owners Estate Planning
 - Wills and Trusts
 - Testamentary
 - Revocable
 - Integration with Business Plan
- Business Dissolution
- Real Estate-Review or Draft
 - Commercial Leases
 - Commercial Purchases

- License and Franchise Agreements

Options - Trades

- Arbitration & Mediation

- Negotiation

Alternate Dispute Resolution [ADR] Includes Arbitration and Mediation. Often there are other methods of solving a problem other than in litigation. I have experience in business arbitration as both business arbitrator and as counsel. I will use this experience on your behalf.

Our Mission . . .

I want to share our Mission Statement with you:

Our standard of operation and service is excellence. We believe in substantial ongoing professional education. We believe that proactive law can protect the majority of Clients, and that education of Clients by presenting and explaining options are part of well representing Clients. We believe that no Client should ever have a question or a concern as to how his or her matter is being handled. We believe that Clients should remain in control of the solution to their matter. We treat and care for a Client's problems as if they were our own and will loyally, honestly, and confidentially carry out our professional services.

Our Professional Business Relationship. Our professional business relationship is based upon trust which includes the willingness to discuss all relevant issues and, perhaps, painful in presenting the truth of a matter. When you retain us to advise and represent you, you and your business receive:

- [1] care and concern about each of your matters;
- [2] ethical standards affecting our relationship;
- [3] professional competence;
- [4] fair professional legal fees;
- [5] an efficient staff;
- [6] negotiating skills;
- [7] ability to anticipate additional causes of action; and
- [8] quality services.

Prior to our Conference. Prior to our initial conference you may wish to:

- Prepare a list of all persons involved in your matter including the full legal name, complete address, [and, if necessary, Social Security Numbers, dates of birth], e-mail address, and telephone numbers of each person or organization, LLC, or corporation involved, and their EIN numbers;
- Organize all your letters, documents, and papers in date order;

- Prepare a brief statement of the facts; and
- Bring all other relevant information regarding your matter.

How I can help you. I look forward to discussing your business matters with you toward the goal of helping you operate your business profitably. Because the principle of excellence has endured at our firm, we hope you will be well served by our relationship.

But – a business owner should also have success in life beyond profit. A business which is properly operated gives emotional comfort which translates to greater happiness in all other areas of life: family, hobbies, leisure time, as well as club, church, and other organizations.

Other Booklets which may be helpful to you. I have a number of other Booklets which may be of interest to you. They cover estate planning, professional practices, non-profit organizations, real estate, and more. Feel free to contact me for further information.

Affiliated with Schober Schober & Mitchell, S.C. to better serve you. I am an Of Counsel member with the law firm of Schober Schober & Mitchell, S.C. This association benefits you in many ways, because I continue to work and serve you, and all of the resources of Schober Schober & Mitchell, S.C. are available to you and to me. The Business Journal has ranked Schober Schober & Mitchell, S.C. in the top 30 Milwaukee-area law firms.

Sincerely, Barry W. Szymanski

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This booklet has been prepared to give a general overview of the legal issues in this area and is not intended to provide the type of legal advice that is given when an Attorney confers with a Client and is able to discover exactly the needs and requirements of the Client's matter and thereafter provide specific professional advice for the Client's benefit.

Attorney Barry W. Szymanski

www.BarryWSzymanski.com/Lawyer

Representing Clients Throughout Wisconsin

Secure Mailing Address: P.O. Box 13483, Milwaukee, WI 53213-0483

Telephone: 262.797.8560 / Fax 262.784.1051

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