Caesars Palace
Las Vegas, NV
Friday, January 25, 2019
1:45 pm – 2:45 pm

Innovate Your Practice for Success CLE

Advising the Small Business:
Forms and Advice for the Legal Practitioner

Speaker: Jean L. Batman
Advising the Small Business: What You Need to Know

Friday, January 25, 2019 | 1:45 PM
Sponsored by the ABA GP Solo
Why Small Businesses?

• The Majority of the Economy
• 60-80% of All New Jobs
• Working with “C” Level Executives
• The Spark of Invention and Vision
• The Entrepreneurial Spirit – Optimism, Grit
• Front Row Seat to Cutting Edge Technologies, Products, and Markets
Top Ten Issues Every Start-Up Needs to Address

#1 Choice of Entity

• Sole Proprietors and General Partners
• Entity State of Formation
• Limited Liability Company
• Corporation – S Corp or C Corp
Top Ten Issues Every Start-Up Needs to Address

#1 Choice of Entity – Preliminary Considerations:

• When should an entity be formed?
• Do the principals want pass-through tax treatment?
• Who will the initial owners be and in what proportion?
• What level of corporate formality is possible or desired?
• How will the business be managed?
• Where will business be conducted?
• How much capital is needed and how will it be raised?
• What is the expected length of the investment/venture and what is the exit strategy?
#2 Creating the Plan and the Pitch

- Elevator Pitch
- Executive Summary
- Business Plan and Projections
#3 Getting it in Writing

Documenting the agreement at the beginning of each relationship, and sometimes at the end, too, is critical to avoiding future problems that can arise out of the 3 M’s:

- Misunderstanding
- Memory
- Mood
#3 Getting it in Writing - Founders Agreements:

Worth the time and effort to define:

• Relative duties and contributions;
• Relative benefits or returns;
• Intellectual property rights (competition, trade secrets);
• Rights of first refusal, drag-alongs, and tag-alongs;
• Buy-sell provisions – deadlock, retirement, disability, and/or death;
• Procedure or formula for valuation; and
• Dispute resolution.
Top Ten Issues Every Start-Up Needs to Address

#4 Protecting Intellectual Property

• Trademarks and domain names
• Inventions
• Copyrights
• Trade Secrets
#4 Protecting Intellectual Property - Trade Secrets:

- Use Confidential Info and Invention Assignment Agreements with all employees and contractors.
- Use NDAs wherever possible.
- Don’t disclose trade secrets if unprotected.
- Place confidentiality restrictions on Executive Summaries and Business Plans.
#5 Ongoing Compliance

- Annual Secretary of State filings;
- Local Business Licenses, Professional Licensing and Permits;
- Insurance – unemployment and workers’ compensation, liability, etc.
- Qualifying to do business in other states (and ongoing compliance).
#5 Ongoing Compliance – Corporate Records

- Shareholder Meeting Minutes, Written Consents:
  - Elect Directors Annually
  - Amendments to Articles or Bylaws
  - Asset Sale, Merger, Dissolution

- Board of Directors Meeting Minutes, Written Consents:
  - Appoint Officers, Set Salaries, Appoint Committees
  - Transactions Involving Stock, Options, Dividends
  - Amendments to Articles or Bylaws
  - Borrowing, Asset Sale, Merger, Dissolution, etc.
Top Ten Issues Every Start-Up Needs to Address

#6 Hiring Employees

- Federal, State, and Local Rules Apply;
- Develop a Good Basic Set of Paperwork;
- Post Required Information; and
- Use a Payroll Service.
#7 Providing Equity Incentives

For Directors, Advisors, and Key Employees –

• Stock Options and Restricted Stock Grants;
• Pursuant to a Plan;
• With Vesting and Buyback Provisions.
Top Ten Issues Every Start-Up Needs to Address

#8 Valuation

- Founders Stock
- Stock Options and Other Equity Incentives
- Buy-Sell Provisions
- Investors
#9 Raising Money – Stages of Financing:

• Seed/ Founders: Funding for proof of concept;
• Start-up/ Development: Funding for product development and marketing;
• First Round/ Series A: Funding to establish sales and manufacturing;
• Second Round/ Series B: Growth capital for companies producing revenue but not yet profitable;
• Third Round/ Mezzanine: Funding for newly profitable companies for growth;
• Fourth-Round/ Bridge: Funding for the exit process.
#9 Raising Money – Financing Stages Blurred By:

- Access to free/affordable software, technology, infrastructure, marketing resources, and information;
- Incubator arrangements that provide resources in exchange for equity;
- Venture Capitalists (VCs) investing at the seed level;
- Angels and Angel Groups providing larger, later-stage financing on VC-like terms; and
- Markets for privately-held stock.
#9 Raising Money - Staying Out of Trouble:

• State and Federal Securities Laws Apply;

• Most Common Securities Law Safe Harbor is Rule 506 under Reg D (Private Offering Limited to Accredited Investors);

• There Are a Lot of Misconceptions About What is Exempt and/or Permissible.
### #9 Raising Money - Staying Out of Trouble:

<table>
<thead>
<tr>
<th></th>
<th>Rule 506(b)</th>
<th>Rule 506(c)</th>
<th>Crowdfunding</th>
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<tr>
<td><strong>Marketing</strong></td>
<td>Non-Public, Private Placement</td>
<td>Advertising Permissible</td>
<td>Limited Advertising, Offering on Funding Portal, or using Broker-Dealer</td>
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<tr>
<td><strong>Eligible Investors</strong></td>
<td>Up to 35 Non-Accredited, Unlimited Accredited Investors</td>
<td>Only Verified Accredited Investors Permissible</td>
<td>Type of Investor Not Restricted, Dollar Amount per Investor Limited</td>
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<td><strong>Offering Size</strong></td>
<td>No $ Limit</td>
<td>No $ Limit</td>
<td>$1M Limit</td>
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<td><strong>Disclosures</strong></td>
<td>PPM for Non-Accredited Investors</td>
<td>Not Prescribed</td>
<td>Disclosures Mandated by Statute, Form C</td>
</tr>
</tbody>
</table>
Top Ten Issues Every Start-Up Needs to Address

#9 Raising Money - Staying Out of Trouble:

In general, an Accredited Investor is . . .

- A person with a net worth of $1 Million (excluding their residence), and/or annual income of $200,000 (or $300,000 with their spouse);
- Officers and directors of the issuer; and
- Various entities and institutions that have more than $5 Million in assets.
#10 Planning for an Exit

- Put your House in Order;
- Polish the Plan and the Pitch;
- Get the Meeting(s);
- Respond to Due Diligence;
- Negotiate a Term Sheet;
- Respond to (more) Due Diligence;
- Negotiate Definitive Documentation; and
- Close the Deal (signatures and $$).
Which of These Is Not a Typical Start-Up Issue?

Poll - choose the one that does not belong:

2. Creating the Plan and the Pitch.
3. Getting it in Writing.
5. Ongoing Compliance.
6. Hiring Employees.
7. Providing Equity Incentives.
8. Valuation.
Which of These Is Not a Typical Start-Up Issue?

Poll – the correct answer is:

2. Creating the Plan and the Pitch.
3. Getting it in Writing.
5. Ongoing Compliance.
6. Hiring Employees.
7. Providing Equity Incentives.
8. Valuation.

Most start-ups eventually fail, but entrepreneurs can survive financially to fight another day, and will return to you as serial entrepreneurs – if they have the protection of a corporate shield and follow ten tips (with your help, of course).
The Corporate Shield: a limitation on the liability of business owners for the debts and obligations of the business.

Corporate Shield? Yes No

Sole Proprietor X
General Partnership X
Limited Liability Company X
Corporation X
Make Sure Your Entrepreneur Client:

1. Forms an Entity.
Top Ten Tips to Keep Entrepreneurs Coming Back

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2. Provides Adequate Capitalization.
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5. Keeps Personal and Business Assets Separate.
Top Ten Tips to Keep Entrepreneurs Coming Back

Make Sure Your Entrepreneur Client:

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2. Provides Adequate Capitalization.
5. Keeps Personal and Business Assets Separate.
6. Observes Appropriate Corporate Formalities.
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8. Remits All Taxes Withheld or Collected.
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2. Provides Adequate Capitalization.
5. Keeps Personal and Business Assets Separate.
6. Observes Appropriate Corporate Formalities.
8. Remits All Taxes Withheld or Collected.
10. Does No Evil.
Which of These Keep Entrepreneurs Coming Back?

Poll – choose the correct answer(s):
1. Operate as a sole proprietor or general partnership.
2. Fail to adequately capitalize the business.
3. Sign contracts in an individual capacity.
4. Provide personal guarantees.
5. Comingle personal and business assets.
6. Ignore corporate formalities.
7. Ignore ongoing compliance matters.
8. Fail to remit taxes withheld or collected.
9. Go without insurance coverage.
10. None of the above.
Which of These Keep Entrepreneurs Coming Back?

Poll – the correct answer is:

1. Operate as a sole proprietor or general partnership.
2. Fail to adequately capitalize the business.
3. Sign contracts in an individual capacity.
4. Provide personal guarantees.
5. Comingle personal and business assets.
6. Ignore corporate formalities.
7. Ignore ongoing compliance matters.
8. Fail to remit taxes withheld or collected.
9. Go without insurance coverage.
10. None of the above.
Thank you for joining me today!