



Daniel H. Coultoff, Esq.



Patricia R. McConnell, Esq.

Michael G. Candiotti, Esq.

Small Business Guide to Addressing Key Formation Issues

Many small businesses are founded with high hopes, and some are fortunate enough to enjoy a matching level of success for many years. The failure to draft thoughtful operating and succession provisions during business formation, however, can result in unnecessarily painful and expensive litigation or, in a worst case scenario, even destroy the business altogether.

New owners of limited liability companies or corporations often overlook important concerns such as how to ensure continuity of the business, how to deal with dissenting members or shareholders, and how to provide for loved ones after events such as retirement, disability, incapacity, and death. While most small business owners today have the wherewithal to organize their business through a legal entity that limits their personal liability, a large number do not take this extra step up front. Commonly, we hear that the business relied on an accountant to select the best entity for tax purposes and the discussion stopped there. This could, and oftentimes does, lead to issues as the business progresses and its founders begin to age and plan for the future.

Planning for contingencies may seem difficult in a business' early stages. It requires owners to contemplate management, disputes, disability, death, and other topics that may inspire differences in opinion or cause discomfort. However, by asking the right questions and providing proper counseling up front, attorneys can help business clients avoid common pitfalls and the costly consequences of Florida's statutory default rules.

For instance, what happens when one founder wishes to take advantage of a successful product launch by entering into a licensing agreement with a larger company or a competitor, but the other founder disagrees? An example of unsuccessful planning for this situation would be for the two founders to have equal ownership interests but have no method for resolving deadlocks. The statutory defaults are Section 605.0702, *Florida Statutes*, (LLC judicial dissolution) and Section 607.1430, *Florida Statutes*, (corporate judicial dissolution).

Common Key Topics to Consider

Different businesses may require individual adjustments, but most should endeavor to develop written procedures that address, at a minimum:

- **Business Description**—What is the business' purpose—what will it do or not do in its ordinary course?

- **Management/Governance**—Who manages the business' day-to-day affairs, and how will the business replace this individual upon retirement, disability, incapacity, or death?
- **Voting Rights**—How do members or shareholders vote on items outside the ordinary course of business? How are voting rights managed in the event of disability, incapacity, or death?
- **Deadlock**—Which procedure will the business follow if there is a tie vote—mediation, arbitration, or forced buy-sell? Too many businesses fall victim to a "50-50" ownership structure that works well only when there is agreement yet is useless in the face of disagreement. Unresolved deadlock can result in judicial dissolution.
- **Economic Interest**—How will the business manage distributions during normal course of business, when the business is sold, or when a key individual retires, becomes disabled or incapacitated, or dies? How are membership interests or shares bought out when an owner retires, becomes incapacitated or disabled, or dies?
- **Intellectual Property**—If the business licenses valuable IP from a member or shareholder, then how will the business manage this licensing relationship if that member or shareholder dies or becomes disabled or incapacitated?

For these and other recurring topics, a thorough in-take checklist is an invaluable resource for an attorney advising small business owners.

Launching a new business is understandably exciting for clients, but for those who set time aside to discuss less-exciting operating and succession issues at formation, the benefits can prove far-reaching. With a general understanding of the client's business goals, an attorney can add significant value to a small business in the entity formation stage by identifying and addressing potential issues up front and setting the client on a course for success.

Daniel H. Coultoff, Esq., is a partner at Latham, Shuker, Eden & Beaudine, LLP and chair of the Business Law Committee of the Orange County Bar Association. He has been a member of the OCBA since 1999. **Patricia R. McConnell, Esq.**, is an associate attorney in the litigation department, and **Michael G. Candiotti, Esq.**, is an associate attorney in the corporate and real estate department at Latham, Shuker, Eden & Beaudine, LLP. McConnell has been a member of the OCBA since 2017, and Candiotti has been a member since 2014.