

INSIDE THE LAW

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I'VE GOT A GREAT IDEA FOR A BUSINESS! NOW WHAT?

By *Samantha P. McDonald, Esq.*

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You've developed an idea for a business, created a twist on a product or developed a niche. Congratulations! That's the hard part. Many people put off implementing their business idea because the next stage, the "now what am I supposed to do?" part, can be daunting. It is important to "do it" right, though, as you will save time, trouble and often money down the road if your business is structured properly.

There are several steps on the path to a successful business venture. The first is to outline the concept — the product or service you will offer — and what differentiates your concept from what is already available, your "value proposition." The next step is to develop a business plan. A written plan provides at least two advantages: accountability and marketability. Marketing, financing, sales, operations and staffing are all part of a good plan, and each should have concrete, measurable objectives. This gives you a way to evaluate the company's progress, guides your actions and provides accountability. A good business plan can be a tool for recruiting potential employees and is necessary to secure capital from outside funding sources. Finally, it provides you with an opportunity to take a bird's-eye view of your venture and ensure that all the pieces fit together without gaps, particularly in terms of timing and cash flow.

As part of your business plan, you will need to determine where the business will be located. Will you work out of your home? Rent a location? Purchase a building? Purchase vacant land and build the facility you need? The costs of each need to be built into your plan and the necessity of financing considered. You will also need to ensure the location is properly zoned for the activity. Also, how many employees will you need? What licenses or permits are required?

After you've developed your business plan, you will have a better idea of expected revenue and expenses, along with potential liability risks. Working with your accountant, we can help you select the proper business entity to provide the appropriate protection to you, both personally and financially. One of the most flexible entities is the limited liability company or "LLC." There are other options, such as corporations and partnerships, and there are many different types of corporations and partnerships, such as professional corporations, general or

limited partnerships, and the relatively new beneficial corporations for socially responsible companies. Tailoring the type of business entity and its controlling documents to your needs and circumstances is crucial.

A sole proprietorship is often known as a DBA, which stands for “doing business as.” For example, Joe Smith bakes pies and markets them as “Uncle Joe’s Pies,” but he has not formed a business entity; Joe is doing business as “Uncle Joe’s Pies.” However, Uncle Joe’s Pies does not have a separate existence from Joe Smith: its debts, liabilities, assets and profits all really belong to Joe Smith. If a pie makes a customer ill, that customer could look to Joe’s assets, such as Joe’s bank accounts and home, to pay for any damages.



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A corporation is a legal entity that is separate from the individuals involved in the company. When documents are properly executed and the formalities of a corporation are observed, the debts of the corporation belong to the corporation, as do its assets. Contracts of the corporation generally will not bind the individual signing the document. Incorporation also provides certain protections against personal liability: if a widget malfunctions and someone files a lawsuit and gets damages, usually the damaged party cannot expect to recover money from the president of the widget manufacturing corporation, individually, but only against the assets of the widget company. A variety of actions and circumstances can erode the liability protection, however. A corporation can be taxed as a stand-alone entity, with the corporation paying federal income tax and then the individual shareholder paying income tax on the profits distributed to each shareholder. For obvious reasons, this is known as double taxation. In certain cases, the corporation can elect to be treated as an “S corporation,” which eliminates the double taxation by making the corporation a pass-through entity,

meaning the profits distributed or passed through to each shareholder are the sole point of federal income taxation.

A partnership is two or more individuals working together to create a business. Responsibility for the partnership's debts or losses is shared between the individuals involved, as are the profits. In general, partnerships provide little protection from liability.

A limited liability company can provide the most flexibility: it can choose to be taxed as a corporation or a partnership, or if there is a single member, as a pass-through entity such as an S corporation. It can be managed by its members or the members can appoint a manager. It can provide a greater degree of liability protection than a partnership. However, it is often more difficult for an LLC to raise capital than it is for a corporation, and there are some potential taxation issues, particularly if the LLC does business in more than one state and is taxed as a partnership.

After the proper business entity has been selected and created, we can assist you with the details of setting up your business by drafting leases or real estate purchase agreements; contracts with vendors or purchasers, and agreements to prohibit partners, co-owners or employees who leave the business from poaching your other employees or taking confidential information and using it to start their own business; helping you obtain permits; and ensuring your location's zoning allows your business operations or obtaining zoning relief, among others. We can help you set up your business to succeed! **FT**

Marketing, financing, sales, operations and staffing are all part of a good plan, and each should have concrete, measurable objectives.



TIPS FOR AVOIDING BUSINESS LITIGATION

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In the movie *WarGames*, the American military’s supercomputer, Joshua, repeatedly simulates global thermonuclear warfare until discovering the futility of it all, observing, “A strange game. The only winning move is not to play.” The same can almost always be said of litigation. For a multitude of reasons, the best way to win a lawsuit is to avoid it from the beginning.

First, litigation is costly, both in dollars spent and time wasted. Unsurprisingly, in a 2015 survey of chief legal officers, costs rank as management’s number one concern.¹ The cost of defending (and ultimately resolving) a lawsuit, even one with dubious merit, can be prohibitive. Nationwide, small and midsize businesses faced with employment lawsuits spend an average of \$125,000 – and 275 days – to settle them.² Those costs can vary considerably, of course, depending on the nature of the lawsuit and the forum in which it is brought. In Massachusetts, the average cost of settling a complaint filed with the Massachusetts Commission Against Discrimination was a little more than \$32,000 in 2014.³ MCAD cases are notorious for their longevity, however, with many complaints hanging over an employer’s head for three or even four years before reaching a final outcome, causing significant distractions and lost productivity to the business.

Second, litigation is risky and often brings with it the possibility of catastrophic loss. One MCAD case from 2014 resulted in damages for the plaintiff/employee in excess of \$350,000 and an award of attorney fees just short of \$420,000 – on top of the employer’s costs for defending the suit, almost certainly also a six-figure number.⁴ A business’s potential liability in defective product cases routinely exceeds \$1 million, with one recent plaintiff’s verdict in Massachusetts reaching as high as \$130 million.⁵ A botched merger and acquisition can create still greater exposure, as illustrated by Boston Scientific’s agreement to settle litigation brought by Johnson & Johnson for the sum of \$600 million.⁶ Even that figure pales in comparison with the potential liability that can arise when an employee blows the whistle on unlawful business practices. Vanguard, the largest mutual fund company in the United States, is currently grappling with numerous federal and state actions alleging that it owes a staggering \$35 billion in taxes, interest, and penalties.⁷

Third, litigation is unpredictable and the outcome is always uncertain. In order to adapt to future market conditions and continue meeting customer demands, businesses must plan carefully. Litigation can be extremely disruptive to a five- or ten-year plan, however, leaving serious doubts about the company's financial health and even its survival as a going concern. "Bet the company" litigation is common, and not every company will come out on the winning side.

Fourth, litigation can generate bad publicity. Many documents filed in connection with lawsuits become a matter of public record, and news outlets routinely scour court dockets in search of scandalous stories. Even a company that has strong arguments on the merits may find its reputation destroyed in the "court of public opinion." For businesses whose value is largely a function of intangible assets such as brand equity, name recognition, and customer goodwill, getting tangled up in a high-profile lawsuit can create a no-win situation.

For those reasons, among others, the most prudent business strategy is to avoid litigation whenever possible and to minimize the costs and risks whenever it is not. The following tips can help a business reduce its exposure to potential claims.

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1. HAVE A LAWYER REVIEW YOUR CONTRACTS.

This may seem obvious, but as seasoned litigators will attest, it is not unusual for businesses to operate on the basis of self-drafted or form contracts that they signed without involving corporate counsel. Do-it-yourself contracts tend to create more problems than they solve by inaccurately identifying the parties, relying on vague and undefined terms, neglecting to capture important aspects of the agreement between the parties, and failing to provide remedies in the event of a failure to perform. Obtaining legal advice when drafting a contract will help minimize disputes down the road.

2. UTILIZE ALTERNATIVE DISPUTE RESOLUTION.

Litigating claims in court, where an adverse party can avail itself of robust discovery techniques, abundant opportunities for motion practice, and ultimately appeal rights, is typically the most expensive and slowest method of resolving a dispute. It is also the most public way for that dispute to play out. To mitigate those risks, businesses should seek legal advice on the best way to incorporate alternative dispute resolution into their contracts. Contracts should contain clauses requiring the parties to mediate their claims before seeking relief in court – and limiting the remedies available to them if they do end up in litigation. These clauses can provide both the means and the motivation to reach out-of-court settlements that are swift, cost-effective, and private. Likewise, binding arbitration clauses can expedite a final outcome by limiting discovery and appeal rights.

3. BE PROACTIVE BY TRAINING YOUR STAFF.

Two of the most common sources of litigation against employers are discrimination/harassment claims and wage-and-hour actions that allege the employee was not paid minimum wage or worked unpaid overtime. Employment-based claims are particularly hazardous for employers because the applicable statutes make certain corporate officers personally liable and allow aggrieved employees to recover multiple damages and attorney fees. Many businesses attempt to avoid such claims by setting clear written policies regarding appropriate workplace conduct and timekeeping practices. That makes good sense, but having policies is not enough; the employees tasked with carrying out those policies must be trained in the best practices for doing so. Businesses should make a habit of training their staff on an annual basis to ensure that their conduct policies and compensation models comply with the current state of the law and are implemented consistently. Investing company resources in training programs will help protect against potentially ruinous employment claims. An ounce of prevention truly is worth a pound of cure.

4. DO YOUR HOMEWORK.

It was recently reported that the Boston Red Sox quietly ended their pursuit of a Cincinnati Reds pitcher after their background research revealed his involvement in a violent domestic dispute. The Los Angeles Dodgers, by contrast, reached an agreement in principle to trade for the pitcher before news of the alleged episode broke, sending the organization scrambling to unwind the deal and control the damage. Contrary to what common sense would suggest, businesses often proceed with care and caution where the stakes are comparatively low, while

Before embarking on a bold new course of action, engage legal counsel to evaluate the potential pitfalls and craft a strategy for navigating them successfully.



rushing headlong into decisions that involve significant company resources. Whether your business is considering a joint venture, structuring an incentive plan for key employees, or preparing to launch a new product, it is vitally important to carry out due diligence that is commensurate with the risk. There are always traps lurking for the unwary business that leaps before it looks. Before embarking on a bold new course of action, engage legal counsel to evaluate the potential pitfalls and craft a strategy for navigating them successfully. **FT**

¹ http://www.altmanweil.com/dir_docs/resource/e377d935-7263-4031-b25d-57dbc4d9d16d_document.pdf.

² <http://www.hiscox.com/shared-documents/The-2015-Hiscox-Guide-to-Employee-Lawsuits-Employee-charge-trends-across-the-United-States.pdf>.

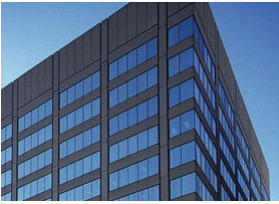
³ <http://www.mass.gov/mcad/docs/annual-reports/2014-annual-report.pdf>.

⁴ *MCAD and Lulu Sun v. University of Massachusetts, Dartmouth*, 36 MDLR 85 (2014).

⁵ *Reckis v. Johnson & Johnson*, 471 Mass. 272 (2015).

⁶ <http://www.bizjournals.com/boston/blog/bioflash/2015/02/boston-scientific-settles-7-2b-lawsuit-by-johnson.html>. Although one might think that litigation at least paid off for the plaintiff in this case, consider that Johnson & Johnson is the same company that was hit with the \$130 million judgment.

⁷ <http://www.newsweek.com/vanguard-whistleblower-tax-dodge-complaint-400901>.



FIRM NEWS



CONGRATULATIONS TO ATTORNEY ADAM PONTE ON HIS RECENT CASE

Adam C. Ponte, an associate at the firm, recently and successfully completed an 8 day trial in the Superior Court. Atty. Ponte obtained a judgment for the defense in a case in which an income beneficiary of a trust both sought to remove the trustee and to compel the trust to invade principal to fund a lavish lifestyle. The court rejected the claims, exonerated the trustee and preserved the principal for the benefit of the trust and the other beneficiaries. *Nobile v. Ring, et al, No. 1381-CV-04679, Middlesex Sup. Ct. Dec. 29, 2015.*

AN ODYSSEY THROUGH STATE AND FEDERAL APPELLATE COURTS

In the context of a single case, FT litigation Attorney **Adam C. Ponte** has shepherded Fletcher Tilton's client from the federal U.S. Bankruptcy Court up to the federal U.S. First Circuit Court of Appeals, across to the state of Massachusetts Supreme Judicial Court and soon back to the federal First Circuit Court of Appeals.

It started with a foreclosure issue that surfaced in the U.S. Bankruptcy Court. Following that court's decision, a party appealed to the federal Court of Appeals. Following oral argument before that august body, the Court of Appeals requested a ruling from the Massachusetts Supreme Judicial Court with the comment, "The outcome of this federal bankruptcy case turns on interpretations of two different state statutes, each of which concerns defects in real estate titles. In time, those

interpretations may affect considerable numbers of Massachusetts foreclosure procedures.” Attorney Ponte then argued the case before the Supreme Judicial Court on February 11, 2016 at the John Adams Courthouse, Boston.



Fletcher Tilton attorney Adam Ponte presents oral argument in front of the Massachusetts Supreme Judicial Court.

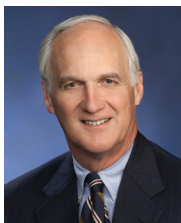
The Supreme Judicial Court is the highest court in Massachusetts. The First Circuit Court of Appeals stands only one level below the U.S. Supreme Court. Navigating a case between the state and federal appellate courts is an unusual scenario and accomplishment, especially in such a short span of time on a single case.

SIGNIFICANT TAX ABATEMENTS SECURED FOR FT CLIENT

FT attorneys **Peter Barbieri, Phillips Davis** and **Patrick Tinsley** negotiated a very client-friendly resolution via arbitration with the Appellate Tax Board. Based on the firm’s



Peter Barbieri



Phillips Davis



Patrick Tinsley

argument of improper income and expense assessment by the Worcester Board of Assessors, the client was awarded \$380,000 in tax abatements for the period of 2012 through 2014 for the client’s office building located in downtown Worcester, MA.



March 2nd, Massachusetts Bar Association Young Lawyers gather for a night at the Celtics.

Adam Ponte and **Amanda Risch**, associates with the firm, recently organized an event with the Massachusetts Bar Association's Young Lawyers Division. Approximately 40 young lawyers from New England gathered at the TD Garden in Boston to enjoy a Boston Celtics game and to network and exchange their views on their current practices. **FT**