

LEGAL EVENTS AND LEGAL DOCUMENTS

Over the years in my legal practice I have noticed that, much as I would wish, advise, and preach to the contrary, most of my business law clients come to the firm, not because they have recognized a need and seek to avoid or prevent some problem or event from happening, but in response to that problem or event after it has occurred. In other words, the demand for our legal services is reactive, not preventative.

This response-based, as opposed to prevention-based, approach to legal services has several consequences to and for the firm and the client:

1. Legal matters are handled at the dispute level rather than the transaction level.
2. The cause of the dispute is often due to the lack, or legal inadequacy of, the underlying business formational or transactional documents. And now that the event has occurred the client has at least three problems.
 - A. The loss of merits, advantage, even remedy, caused by bad documentation,
 - B. The exponentially greater cost of “cure” versus “prevention,” and
 - C. Fixing the bad documentation so the problem will not arise again.

Loss of Merits, Advantage or Remedy.

Just a few of many examples of the loss of merits, advantage or remedy are:

A. The failure to have a well drafted key person employee confidentiality and non-competition agreement (in states like Arizona which allow same). The consequences or benefits of having same can be huge, e.g. my printing company client who weathered the Great Recession only to have his six year star sales person leave and do \$1,116,000.00 in business in six months with the business clients because the company had an expired, do-in-yourself confidentiality agreement (only).¹

¹ Clients appear to think that because law is in English that they know what they are doing. They almost never do and lose great benefits, both proactive and protective.

B. Potential liability under a defective software program for lost profits of \$1.5 million when by law the consequential damages remedy could have been limited to the cost of the software, \$139.95.

C. Business owner termination and separation disputes, known in the trade as “partnership disputes” (although the owners may be in fact corporate shareholders or LLC members) which can last a year and cost, say, \$50-100,000.00 to litigate *whether a buy out* of the existing “partner” *will occur* at all and another six months to a year, and \$50-\$100,000.00 more to hire experts and litigate the *price*. And this agony can be easily and cheaply avoided by having a “shareholders agreement” (for corporations) or “buy-sell agreement (in general) that deals with dissociation issues (typical causes for buy-out would be divorce (purchase from ex-spouse), disability, death, and sometimes termination of employment). Our firm typically charges \$1250-\$1500 base fee for such documents. Many law firms with bigger clients may charge \$5,000 and up, but at anywhere near these prices the documentation is a much better bargain than the event.

Litigation versus Prevention.

As noted in the above examples, the cost of bad documentation can be extreme, especially if the cost of litigation is added to the loss. For example, in the case of the expired confidentiality agreement, we tried to “bootstrap” that agreement into a non-competition agreement by focusing on the statutorily as well as contract protected customer list and proprietary information, but this argument failed at the trial level – after the client spent more than \$100,000.00 in attorneys’ fees, and to my knowledge the client lost on appeal by an appellate firm. The point here is that some problems just cannot be fixed after the fact and the cost to attempt to do so can be astronomical.

This is not to say that good documentation prevents or eliminates bad events or “misconduct.” An employee or partner or other contract party who is going to “act out” may do so regardless of what the contract says. However, this firm reviews and advises employees, business owners and contract parties before they leave or take a certain action under a contract so they can know what to expect. Sometimes this changes the outcome. In any case, good documentation creates or adds to clarity and certainty which can bring the matter to a close more quickly at less cost. So, good documentation may not only prevent the harm but reduce the cost of dealing with the harm.

Fixing the Organizational or Contract Problem.

As we have been discussing, it is a much better idea “to close the barn door before the cows get out.” This is such common sense that it is difficult, frustrating and “saddening” to me as a business lawyer to see the great harm and costs that could have been prevented. But, in the event a negative incident occurs the client should not stop or limit the law firm representation to just the matter at hand, but also should have the firm fix the underlying documentation problem; that is deal with both the event and the documents –put yet another way to fix the problem and its cause.

“Overstating and oversimplifying...” (if you meet with me you will hear me say that a lot) most small business, and many national business documents are crap, either in general or under Arizona law. Clients often go Online to obtain legal advice and legal forms, or just as often use their old employers’ or someone else’s form. (but “Who says the document is good just because they use it?”) Overstating and oversimplifying again, they typically get neither advice nor a good documents. They do not get “advice” because advice must be tailored to specific client facts and needs (one fact can change everything) and they do not get a good contract because, among other things, the law varies from state to state. In the attempt to make one size fit all, it may not fit any client well.²

Conclusion.

You can save your business and yourself time, money and aggravation by thinking proactively. Now, when you don’t have legal problems is the time to have your legal “audit,” “check-up,” or “review” – whatever you want to call it. Planning for security and growth is fun; dealing with problems aggravated by poor planning is not. This is particularly important in the predatory world we live in today, where competitors, contract parties, and customers may want you to make mistakes so that they can capitalize on your errors and omissions.

So, call us. Let’s get your legal house in order.

² I have written on this topic in my article on “Dos and Don’t’s on Using Google for Legal Matters.