

Tip for Avoiding Costly Business Litigation: Tip#1 - Always Have a Strong Written Agreement to Govern Your Business

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Phil Kirchner

As a career commercial litigation attorney, I have been asked by several people why I would write a column advising business people on how to *avoid* needing my services. That's a good question for which I do not have a good answer, other than to say I believe, in our ever-more complex commercial world, there will be plenty of commercial litigation to keep me busy. At the same time, I hope my clients will benefit from using an ounce of prevention to avoid paying a pound for a cure involving litigation.

Litigation is expensive, time-consuming, a distraction from running a successful business, and unpredictable. It is NEVER a good thing for a business to be involved in litigation; it generally means you owe someone money or someone owes you money. Either way, you are not happy, but you will be even less happy if you end up in litigation, regardless whether you are the plaintiff or defendant.

I plan to post one litigation avoidance tip per week for the next several weeks. I hope you find these tips helpful, and if you have questions or want to discuss any of them with me, I am happy to oblige. So, here is my first tip for avoiding litigation:

Tip #1: Always Have a Strong Written Agreement to Govern Your Business.

No matter what type of business you have, be it a pizza parlor or a high tech company, and regardless how your business is organized, as a corporation, partnership, LLC, or whatever, you should start your business with a well-drafted operating agreement. This is the document that governs all the important decisions and activities in the life of your business, such as ownership structure, voting rights, management responsibilities, resolution of disputes between owners, death or disability of an owner, adding new members, transfers of ownership interests, and, ultimately, dissolution of the business. For example, the death of one of the owners of the company need not automatically lead to the death of the business. A well-drafted agreement will spell out exactly how the deceased owner's interest in the company will be distributed and valued and how the company will be managed going forward. Without such an agreement, however, an owner's death could lead to a power struggle among the remaining owners, expensive litigation, and, eventually, dissolution of the company.

Business operating agreements are generally ignored until there is a significant event in the life of the business. When such an event occurs, however, you will be happy you have one. For example, many businesses with multiple owners reach a stage in their development where the owners develop different visions for the future of the business and how the business should be managed. They might disagree about whether to expand the company into a new line of business, take on additional debt, hire a new employee, or any number of other critical business decisions. Without a strong agreement that specifies how such

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disputes are to be resolved, the company could find itself in a stalemate position, requiring resort to a court to break the deadlock. The cost of a court battle alone (payment of attorney's fees and costs of suit, plus the expenses associated with the possible appointment of a receiver to run the business while the owners and the court sort things out) is reason enough to avoid litigation. The other detriments inherent in business litigation, such as the business opportunities the company is unable to pursue, and the time spent by the business's owners and key employees on the litigation that should be devoted to the business, reinforce the conclusion that litigation is not a desirable outcome. Finally, the litigation might very well produce a result that neither of the owners wants.

In short, every business should avoid litigation if possible, and one of the best ways to do that is to have a well-drafted, comprehensive operating agreement. Be sure to entrust this most important task in the life of your business to an experienced and able business attorney who has drafted many agreements of this kind.

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