

BREAKING UP ISN'T ALWAYS HARD TO DO: BUSINESS DIVORCE WITHOUT THE DRAMA

By Kevin J. O'Connor*

As a commercial litigation trial attorney with over twenty years' of experience helping business people divorce each other, I often wish I could have met and spoken with a client months before they first contacted me, at a time when they were first contemplating a break from their business relationship. It is often the case that partners, co-members or fellow shareholders forego legal advice and instead try to "make a break" on their own, engaging legal counsel only when things get ugly. The purpose of this article is to outline the duties commonly owed as between business partners and to provide some "do's and don'ts" when contemplating a business divorce.

A business divorce should be carefully thought out and planned. First, a word or two about the types of organizations that might exist in any given business relationship:

- A ***common law partnership*** is a type of business organization in which two or more individuals pool money, skills, and other resources, and share profit and loss in accordance with terms of the partnership agreement (written or oral). In absence of such agreement, a partnership is assumed to exist where the participants in an enterprise agree to share the associated risks and rewards proportionately. Many people are surprised to learn that they have been operating as partners with someone with whom they've had an informal business relationship that turned into a genuine opportunity, making the rights and duties as between them of paramount importance.
- A ***business corporation*** is a firm that meets certain legal requirements to be recognized as having a legal existence, as an entity separate and distinct from its owners. Corporations are owned by their stockholders (shareholders) who share in profits and losses generated through the firm's operations.
- A ***limited liability company ("LLC")*** is a business organization that allows one or more persons to organize in such a way that their liability is limited to their investment in the company, and the members are able to enjoy the single taxation feature of a partnership or sole-proprietorship firm. Its profits and tax benefits are split any way the members (whether individuals or other firms) choose.

In each case outlined above, partners/shareholders/members owe duties to one another while the relationship is ongoing and during any wind down of the business. The nature and types of duties are far too broad to outline here. Broadly stated, while in business in any of these forms, you can create liability for yourself if you are not very careful in how you treat your fellow partner/shareholder/co-member. For example, New Jersey has a comprehensive set of laws applicable to partnerships, corporations and LLCs alike, which protect partners, shareholders or LLC members from oppression or other illegal activity by other shareholders or members. Many people are surprised to learn that, even where a business has been operating for years without a formal partnership/shareholder/LLC operating agreement, the law will impute certain legal obligations to the participants of that business.

I could write a book about all the crazy situations I have seen over the years, and that experience has given me a short list of "do's and don'ts" to strongly consider if you are contemplating a run for the exit. So, if you are contemplating a business divorce, consider this:

Do's	Don'ts
Hire competent counsel with experience in this practice area.	Go without representation, or hire a general practitioner who only "dabbles" in this area. You will end up paying more in the end. When hiring counsel, ask for the attorney's actual experience litigating these cases.
Organize your files, particularly any agreements you have as well as any files demonstrating the value of your interest and client base. Preserve all evidence.	Download massive quantities of information in a surreptitious way that could be turned against you, or delete data. Bad move.
Begin to think about your next phase, but don't act to form a new (competing) company until you meet with counsel.	Form a competitor with a name that sounds eerily familiar to the existing entity, email all of the company's clients about your new venture, and begin diverting customers and

business opportunities to your new business.

Continue to honor any written agreement(s) you have, and don't act precipitously to fire a co-member or lock them out of the business without the advice of counsel.

Take unilateral action to stop payment of salary to a long-standing business partner, lock them out of accounts, or other drastic measures, without clearing it with competent legal counsel.

In short, breaking up is hard to do, but it can be achieved in a quick and economic fashion if planned properly. The ugliest business divorces tend to be the ones where one or more of the business people took matters into their own hands without the benefit of legal counsel.

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