

Closely-held Corporations (and other businesses): Avoiding Litigation and Other Unnecessary Business Ownership Catastrophes

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Everyone always (or almost always) understands that, at any and every given moment in time, he/she is thinking “clearly” and “reasonably”. Given such universal reality, it generally or otherwise often flows that the person who is not agreeing with your “clearly reasonable” thinking is thereby ‘thinking unreasonably’ or ‘not thinking clearly’ and/or ‘being unreasonable’ in such regard.

In essence, what [in the real world, as distinguished from the law school classroom or the Court room] does the word “reasonable” therefore and thereby generally or otherwise often actually (in reality) mean to almost every individual in such situations of cognitive dissonances regarding “reasonable”?

Answer: It means: “Do it my way!”

In closely-held businesses that are owned by more than one individual [including all partnerships of individuals and all corporations whose capital stock shares are owned by two or more individuals, etc.], the following three (3) elements play-out a triumvirate type of human dynamic that often requires mindful-attention and sensitive-calibration:

- A. Ownership
- B. Power
- C. Control

When such three elements are in-harmony with the expectations and satisfaction of all of the “owners”, then all-is-generally well. However, when such three elements are not in-harmony with the expectations and satisfaction of the owners, then there will generally be significant (including ultimately even catastrophic) disruption to the business-owner relationship dynamic, including possibly to the detriment of all of the owners.

In many cases, there is an owner/shareholder who is not involved (or, not nearly as involved as another owner/shareholder or other owners/shareholders) in the management, operation or high-level decision-making of the Business. In such circumstances, much of the Power and/or Control can rest with another or others of the owners/shareholders. However, unless such powerful individual or individuals is/are acting in a sufficiently bona fide manner (as perceived by the other owners/shareholders), there can and often will be latent or open issues that are best resolved both effectively and efficiently. Even the most powerful owner/shareholder who is exceedingly confident in the strength of his/her Power and Control regarding the Business can (and often does) end-up with the short-end-of-the-stick when and if such particular owner/shareholder both over-reaches and underestimates the lengths and extents that another individual will often be prepared to fight when feeling (even if actually mis-perceived) offensively aggrieved.

Fertile ground for catastrophic discord is particularly tricky in family-owned closely-held businesses where the mixtures of respect, ego, money, emotions and perceived entitlements can ignite the contemplation and activation of heightened elements of unhelpful measures. And none more devastating than when resort is made by anyone to lawyers and then litigation.

In litigation, the only individuals who can possibly win for-sure and who will also “always” win for-sure are the litigators who are involved in such litigation. Not ever so assured for any of the clients, though. Indeed, in many cases of litigation, both sides of the aisle of clients can and will often ‘lose’ in the litigation...and particularly so after all of the costs of the litigation (including large amounts of lost-time and wasted opportunity-cost and much distracting emotions) are calculated. Also, in all cases of litigation, not only are the financial costs of financing litigation very high, but litigation is almost always very risky, since forecasting the future outcome of almost any litigation is fraught with much uncertainty of outcome as well as the journey along-the-way. It is almost always better for all owners/shareholders to sort-out their issues definitively, quickly, thoroughly, and in a mutually-satisfactory manner and amongst themselves – without binding resort to someone else (such as an Arbitrator or a Judge) who has no meaningful history or any skin whatsoever in-the-game.

How many times has one been involved in or heard of or read about a situation such as the McCain brothers who, for decades, worked side-by-side beautifully, until one day the roof was blown off by an issue that could have/should have been fully solved quickly and with “cool heads”, but wasn’t...and the owners/shareholders resort to suing each other in Court?

Often, once viscerally divisive matters “escalate” (and especially so, if one party engages a litigator), such matters can and will often spin-out-of-control, to the massive detriment of most (if not all) owners/shareholders involved...but, of course, to the delighted glee of all of the litigators (as well as other paid advisors and consultants) involved.

The following five key steps are often helpful, when employed properly, to avoiding such catastrophes within closely-held businesses (and especially so when the Business is or will be very valuable):

1. The selection of the most-capable person for each and every important oversight position (e.g., CEO, President, CFO and Vice-Presidents).
2. The rational allocation of responsibilities through a protocol of meritocracy, including matching competencies with such responsibilities...for the best interests of the Business...and not allowing anyone to take-on any significant position through “ego” or “entitlement”. How can everyone be expected to act fairly if fairness in such regard has no valid objectivity?
3. Establish clear “process-protocols” for the timely raising of any issues that could possibly become confrontational or otherwise tricky and especially so as to avoid anything ever becoming existentially problematic. Is there actually any meaningful helpfulness in putting only a tiny bandage on a large, gaping wound?
4. Establish and maintain at all times (and particularly so when certain heads might be inclined to erupt) the bedrock foundational covenant that, in the event of any issue of large importance to any owner, then all owners will meet (face-to-face...Zoom-call would be fine if meeting in person is not practical or possible), in a timely manner, and discuss in a manner whereby everyone abides by mutual-respect and mutual-courtesy. How can individuals who don’t respect each other possibly be expected to work well together, let alone during stressful times or situations?
5. Establish clear process-protocols for the timely dealing with any issues that get beyond the pale of mutual-respect and mutual-courtesy. Trusted financial consultants and legal counsel who are highly sensitive to and will remain “objective” can often provide a calming, balancing, grounding and otherwise helpful effect, and particularly so if the consultant/counsel exudes unimpeachable honesty of objectivity, perspective and sensitivity to the-cause-of achieving the most sensible decision for the Business and its owners/shareholders, based upon the prevailing and otherwise existing facts and circumstances

A PDF version is available to download [here](#).

If you require any assistance, our **Business and Corporate Commercial Group** lawyers are available to assist you. Please contact **Richard Hoffman** at 416.865.6623.

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