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Winter 2007



"We Make Business and Estate Planning Simple."

# ICS LAW BRIEF

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## Is Your Business Plan Complete?

By Gweyn Colaberdino

Business owners make huge investments in their businesses to try to create a viable and profitable going concern. Many times the financial investment has meant draining personal savings accounts, obtaining second mortgages, or taking out loans with personal assets as collateral. For most, the sacrifice is made with the intent of providing a source of income and financial security for the owner and the owner's family, and ultimately, wealth to share with future generations.

Unfortunately, a critical element in providing for financial security is often forgotten by overworked business owners. While most business owners would say that they intend to have their family retain the business they have created, many have not put that plan into action.

As you expend all of your time and energy establishing and maintaining a successful business, have you thought about what will happen to the fruits of your labor after you're gone?

Consider this. Would you draft a Will with the following provisions?

*I, TESTATOR, of Nashville, Tennessee, hereby declare this to be my Last Will.*

*I give my spouse one-third of my assets, and I give my minor children the remaining two-thirds. This includes my interest in my business.*

*I name my spouse to hold my children's money, but I require my spouse to obtain the court's permission before the money can be spent.*

*When my children reach age eighteen (18), each of them shall have the absolute freedom to use their money to buy a Ferrari and a \$25,000 stereo system.*

*Should my spouse remarry, I encourage her new spouse to help spend everything he can get his hands on.*

*Should my spouse predecease me, I direct the Probate Court to select a guardian for my children. If the court wants to appoint a stranger, that's OK by me.*

*Finally, since I love the state and federal governments as much as I love my wife and children, I direct that no effort be made to lower taxes.*



Guest Column:

### Great clients/customers are made, not born.

By George Sepetys

Each issue, we invite trusted business colleagues to write a short article on a relevant topic. This issue's guest is George Sepetys.

How many times have you heard a business owner complain, "This would be a great business, if it weren't for customers." Generally followed by, "If I had customers like XYZ Company, I could have a great company too."

The simple fact is that great customers are made, not born. They don't fall out of the sky, you don't win them in the Great Client Lottery. If through some great intervention, you would end up with all the clients of the most successful company you know and admire, how long could you hold on to them? What would it take? If you can answer the last question, you are on your way to having great clients.

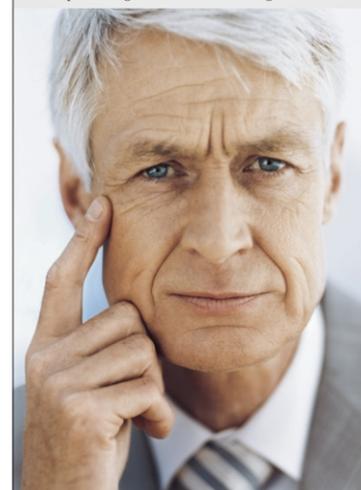
Do you know what it is that your market dislikes the most about dealing in your industry? Do you know what the three major reasons are that your customers buy from you and not someone else? What is

your point of difference? If your customers could improve 2 things about you, what would they be and how would you change them? If you don't know, then it is critically important that you find out. A simple survey, asking these four and other questions will give you the answer to building a great company.

Learn to understand the intimate needs and wants of your customers, anticipate their needs. What will delight them, what will make them return over and over again? Create a personal relationship that lasts and creates loyalty. When you do, you will have customers that are raving fans. They will be your best ambassadors and your most credible sales people.

*George Sepetys is a Certified Business Coach in the Nashville area. He helps business owners grow their profits, develop better systems, improve their team, and work fewer hours. For a free assessment of your potential, he can be reached at (615) 969-7047, or georgeseptys@action-international.com*

Note: The information contained in this newsletter is for general technical guidance and is not intended for specific application. This newsletter is not intended to be legal advice and should not be used as a substitute for legal consultation. If legal advice is needed, independent legal counsel should be sought.



Our firm aids those who are considering starting a business and assists existing business owners with their continuing legal needs, such as contract review, contract drafting, franchising agreements, and consultation. In addition, our firm specializes in estate planning and management. For additional information or to set up an appointment, please call our office at (615) 224-1290.

# Is Your Business Plan Complete?

(Continued From Page 1)

If you die without having a written Will in Tennessee, you could get the default Will above. Given everything that you have devoted to creating what you have, don't you want more control over its ultimate distribution? Regardless of where you are on your path to successful entrepreneurship, an individually tailored estate plan is a key element in the big picture of your long term business planning.

Most people think of Wills when they think of estate planning. Your Will governs how property in your name alone, without any beneficiary designation, will be distributed. If you don't have a Will, the state intestacy laws will determine who gets what at your death. In most circumstances, the intestacy laws are not in line with what an individual desires.

A Will is a crucial part of the estate plan, and, when well drafted, can do more than just determine who gets what. A well drafted Last Will and Testament will appoint a guardian for any minor children, set up trusts that control the when and how of the distribution of assets, and provide for the special needs of someone who the drafter may be financially responsible for, without losing any government benefits to which that individual may be entitled. Each state has rules about what makes a Will valid, and there are some formalities that need to be observed when signing a Will. Any subsequent changes to the Will need to observe the same legal requirements. It is therefore wise to have an attorney assist in the preparation of this document.

Good estate plans are not just limited to Wills, however. Any good estate plan will also include a Powers of Attorney for financial and medical decisions. These documents appoint an agent to make decisions and perform certain listed duties on your behalf if you are unable to do so. The documents may be drafted to grant the agent the authority to act on your behalf in not just personal matters, but business matters as well. These documents are important in ensuring that the right individuals are making decisions.

## Employment Agreements – Protect Your Business

By Gaylord Gardner

In Tennessee, a business is allowed to terminate its employees for almost any reason. There are a few exceptions. For example, federal law prohibits firing an employee based on race, gender, or national

origin. Tennessee law prevents firing an employee in cases where an employee has a contract stating otherwise. (article continued on next page)

Depending on your financial situation, it may be advisable to incorporate tax management provisions in your documents to minimize estate tax liability. Because a business owner's estate consists of business property, business decisions regarding the purchase and titling of business property can have significant estate tax implications. It is important, therefore, that estate and business planning be done hand in hand, and that any estate plan be specifically designed to meet your financial circumstances.

More sophisticated estate planning tools may also be beneficial. These include establishing a Revocable, or Living Trust, and/or a Life Insurance Trust. Again, whether or not the inclusion of these tools would be desirable for your estate plan will depend in large part on your overall business plan.

Some business owners may have very specific ideas about how ownership and management of the business should be passed on, and who has a right to the income from the business. The situation becomes more complex when the business is owned by multiple owners, rather than by just a sole proprietor. What happens if one of the individuals gets divorced? Will the ex-spouse be awarded any ownership interest in the property settlement? Do the remaining owners really want to be in business with the ex-spouse? What happens when one of the owners dies? Do the remaining owners find themselves in business with the surviving spouse and minor children? The rules for types of "what ifs" can be addressed in a Buy-Sell agreement. While these agreements are typically thought of as business agreements, they have tremendous estate planning implications.

Each business owner has unique estate planning issues. Planning well today ensures that your wishes with respect to your business and assets are carried out after you are gone. Your estate plan is an integral part of your overall business plan. It is smart business to have your attorney assist you in addressing all of your specific estate planning needs.

Each business owner has unique estate planning issues. Planning well today ensures that your wishes with respect to your business and assets are carried out after you are gone. Your estate plan is an integral part of your overall business plan. It is smart business to have your attorney assist you in addressing all of your specific estate planning needs.

Why would a Tennessee business ever bother to have an at-will employee sign an employment agreement?

- (a) to ensure that the employee understands that his/her employment is at-will; and
- (b) to set forth the employee's compensation.

These issues alone are enough to justify having an employment agreement! However, there are other important concerns that affect the integrity of the business itself.

### Competition and Solicitation

A major concern for businesses is the loss of valuable employees. Imagine hiring a new employee, training that employee in the many aspects of the business, and watching that employee become a vital part of that business, only to have the employee jump ship and start his/her own competing business. Worse yet, is when that employee starts working for a rival competitor.

Businesses invest a substantial amount of time and expense developing a client base and training employees. It is important to take steps to protect that investment. One method of protection comes through the use of employment agreements.

Employment agreements allow a business to protect its client base and prevent a former employee from competing by containing non-competition and non-solicitation clauses. Non-competition clauses prevent an employee from competing with his/her former employer in a specified location for a specified period of time after an employee's termination. Non-solicitation clauses prevent a former employee from soliciting a former employer's clients or the employer's remaining employees.

Tennessee courts enforce non-competition and non-solicitation clauses only to the extent that the courts find the restrictions in the clauses reasonable. What is considered reasonable is often determined by the former employer's business itself. Therefore, any business looking to create an employment agreement with non-competition and non-solicitation clauses should seek the advice of an attorney when creating an employment agreement.

### Proprietary Information

In many businesses, the value of the business is not in the physical property owned by the business but in the intangible ideas or data collections of that business, commonly referred to as proprietary information. The

value of the business may be in a patent, trade secret, formula, business method, or marketing scheme, or the value of the business may be certain client, customer, or vendor lists created by the business. One single act of sabotage by an employee could drastically reduce the value of the business or even cripple the business.

While patents are given strong federal protection, other proprietary information is not given the same level of protection. The federal and state laws that do provide protection for non-patent proprietary information often require a business to take steps to protect that information. In order to meet these requirements, a business needs to integrate confidentiality clauses into its employment agreements. Furthermore, confidentiality clauses can provide additional safeguards beyond these laws.

Confidentiality clauses can be drafted broadly in order to protect proprietary information not covered by the law and by providing a business with additional remedies not found under the law. A business that wants to create employment agreements with confidentiality clauses should seek the advice of an attorney in order to develop employment agreements that provide the broadest protection to that business's proprietary information.

### Intellectual Property Developed by an Employee

Certain businesses hire employees for the purpose of developing inventions or artistic works, also known as intellectual property. For example, such businesses may be involved in software development, engineering, pharmaceuticals, or even music. For these types of businesses, there is a risk that an employee could claim ownership of that invention or artistic work. Therefore, it is vital for these types of businesses to develop an employment agreement containing intellectual property clauses that protect against such risks.

Intellectual property clauses specifically assign all rights an employee may have in any invention or artistic work developed by that employee to the business. In the case of inventions, it is usually not enough to limit the assignment to inventions developed during the employee's employment. Broadly written intellectual property clauses assign inventions developed by a terminated employee to the business if the terminated employee benefited from the business's research.

Well written employment agreements provide a method of protecting the business. They can prevent employees and former employees from stealing from the business. An attorney will be able to help a business owner determine what aspects of the business need protection and how best to draft an employment agreement.