

Media Mention: Alex Dale on 'How to Find and Work with Attorneys' in Wilmington Business Journal

May 3, 2018



When faced with a legal problem, many people don't know where or how to begin looking for a lawyer. The latest "Insightful Discussions" article from the *Greater Wilmington Business Journal* would be a good place to start. The publication asked five legal professionals about hiring the right attorney, managing the cost, and what benefits counsel can provide.



Wilmington attorney Alex Dale was featured in this written Q&A format. Here's his best advice on finding and working with attorneys:

What questions should someone ask when looking for an attorney?

Experience is an obvious answer to this question, but a broad range of experience in various areas may prove particularly useful, depending on the needs of the business. Anyone can form a business; the question is whether the attorney can walk you through the strategic choices that come along with forming the business and getting it best positioned for growth and success. Another question to ask is whether the attorney or the attorney's law firm can meet all the needs of the business. For continuity and simplicity, a business may want to utilize one law firm for all its needs (corporate governance, intellectual property, tax, real estate, etc.). A full-service law firm can meet more needs. The prospective client also should look for any value-added information the attorney or the attorney's firm may provide. Some law firms offer news articles and informational blogs and seminars that can aid a business without the business incurring additional expense.

How can a client prepare for meeting with an attorney?

Preparation will vary based on the stage and needs of the business. I work with a number of start-ups, and they do not know what they need yet. That is okay. I can guide them on getting started, with entity formation and tax structure being an initial conversation. Getting it right on the front-end can be a tremendous cost savings. When a group of individuals is looking to form a new business, it is important to establish the attorney's role with that business. If the attorney represents the business, the attorney typically should not be representing one owner against another. Alternatively, if the attorney is representing one owner, this is fine, but the attorney will pursue that individual's wishes, not the wishes of all owners in the business. It is important to establish these parameters at the outset so no one is confused about the attorney's relationship with the business and the owners.

Participation by an accountant in the early stages of business formation also can be important. We encourage this type of collaboration to help owners make the right decisions from the start. For an existing business seeking advice on a specific issue, we will have a preliminary conversation about the need for legal assistance. If you want to register a trademark, you should show me the branding information you want protected. If you need to structure a buyout of an owner, we will want to see the corporate documents of the business. If the business needs Terms of Use or other website-deployed agreements, we will need to understand the structure of the platform and the goals for its use. As you can imagine, the information needed will vary dramatically based on the nature of the business.

What issues do you frequently see that could have been prevented through legal counsel?

Corporate recordkeeping mistakes and tax compliance failures are often spotted when we get involved with a new business client. The failure to treat the business appropriately for tax purposes can be a nightmare scenario for a company and for its owners. We also occasionally see companies that are excluding minority owners from participation, intentionally or unintentionally. Minority shareholders and members of limited liability companies with small membership interests have certain established rights at law and/or by agreement. Accidental or intentional disregard for those rights can cause headaches for company leadership and can result in litigation that is damaging to the company. Internal business disputes involving owners operating without a shareholder agreement or without an operating agreement are troubling, but we see these disputes entirely too often.

An ounce of prevention could prevent a pound of cure here, as operating documents for the business easily could include buy-sell provisions that allow for one owner to buy out the other, instead of having the owners engage in an endless internal struggle for control.

What legal advice do you have for married couples who enter into business together?

You need a buy-sell provision in your company documents, which will enable one owner (here, a spouse) to be bought out upon certain triggering events (divorce, bankruptcy, etc.) or upon request of the other owner. We can craft these provisions to make it compulsory, where if one owner requests to buy out the other for a certain price, the non-offering owner instead can take steps to buy out the offering owner, thus giving some protection against gamesmanship of one owner forcing out the other on unexpected terms.

However, these buy-sell provisions in a shareholders agreement for a corporation or an operating agreement for a limited liability company can avoid a situation in which the spouses are stuck with each other following a divorce. We regularly include these buy-sell provisions in company documents when a company has multiple owners, regardless of any marriage. Also, your estate planning documents should contemplate the continuation of the business if something happens in the marriage. Give consideration to how the business will move forward with just one spouse involved.

What can happen to a business jointly owned by a couple that did not create a prenuptial agreement?

Don't let personal strife negatively impact the performance of the business. Plan for that possibility on the front end and buy-sell mechanisms can be a solution. If a couple is going through a divorce, and the company documents have not prepared for some separation process among the owners of the company – married couple or otherwise – then litigation may ensue. A receiver could be put in place for the company in certain situations, and a receiver would run the company under the

oversight of a court. A dissolution action could be filed to dissolve the company, too.

How can an attorney help manage financial security?

Choosing the correct legal entity for a business can have a tremendous impact on personal asset protection. Maintaining the corporate formalities (recordkeeping, accounting, etc.) also can guard against an argument that the corporate veil should be pierced to get to an individual owner's assets. We regularly receive calls from clients who ask what can be done to protect them or their family because the client is involved in a business dispute, has just been sued for malpractice, or owns rental property where someone was injured. The best time to address these risks is in advance of a lawsuit or claim. In some cases, there are simple steps that can be taken in advance. Planning regarding the ownership of assets may offer protection.

For example, if North Carolina real property is owned by spouses as tenants by the entirety, there is protection from a creditor of just one spouse - but not from a creditor of both spouses. In some cases, a limited liability company can be created to hold certain assets. For estate planners, limited liability companies often serve to reduce estate taxes and transfer assets in an orderly manner to the next generation. In addition, assets in a limited liability company are often out of reach to creditors of an individual owner, as the creditor only can get a charging order to receive any distributions out of the company. And in some cases, more complicated asset protection strategies are employed, such as lifetime trusts for a spouse, domestic asset protection trusts and offshore trusts.

What is the best way to manage the cost of legal services?

Be candid about your goals for a project, and the attorney will be candid about the cost. Have these conversations. We seek to find alternative fee arrangements that work for both the client and the law firm. In some instances, the costs may be a flat fee based on the work being a project with a known cost. Some projects may be too open-ended to make any total cost projections, and you need to decide if you are comfortable with that uncertainty.

Attorneys can project the costs in certain situations, but it may be possible to move through a project in stages, so the client can see the cost in segments as the project advances. In other instances, the costs will be dependent on how the client handles the project, such as items requiring significant back-and-forth with the client. In those situations, clients can manage their costs by being strategic in structuring the exchanges with the attorney, such as limiting the line of communication to only one board representative or employee who gathers the comments or questions of a group. Conversations with your attorney about cost management and budgeting should be a part of the dialogue.

Who does a business's attorney represent?

A business's attorney represents the business, not the employees or owners.

The exception would be a sole proprietorship, where the business and the owner are the same. However, we immediately would recommend a different business structure for a variety of reasons.

The root of this question goes towards inquiring who the attorney will take direction from in giving legal advice. The business's attorney will take direction from the leader or leadership team of the business. In a limited liability company, it will be the manager(s) or the member(s) of the company,

depending on structure, and while these roles often are filled by the owners, they do not have to be the owners. In a corporation, the attorney will take direction from the board of directors, and the attorney usually will receive the board's direction from the president of the corporation or some other designee from the board. At all times, the company attorney's duties go to the company, not to any one individual. But the company's leaders direct the company and all persons affiliated with it, including giving direction to the attorney.

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