



LEGAL NOTES

Blustein, Shapiro, Rich & Barone, LLP

BURT J. BLUSTEIN
MICHAEL S. BLUSTEIN
RICHARD J. SHAPIRO
GARDINER S. BARONE
RITA G. RICH
JAY R. MYROW

ARTHUR SHAPIRO,
of Counsel
DAVID S. RITTER,
of Counsel

10 MATTHEWS STREET
GOSHEN, NEW YORK 10924

PHONE: (845) 291-0011
TOLL FREE (866) 692-0011
WWW.MID-HUDSONLAW.COM

CAROL C. PIERCE
AUSTIN F. DUBOIS
JAMIE T. FERRARA

July 2011
Vol. 3 – No. 7

PRACTICAL CONSIDERATIONS FOR ESTABLISHING A JOINT BUSINESS VENTURE

By Burt J. Blustein, J.D., Senior Partner

bblustein@mid-hudsonlaw.com

With the recent recession and the lingering economic difficulties, business failure rates have increased dramatically. When economic times are good and businesses are doing well, the differences and annoyances that may arise between business partners tend to be tolerated. When a business downturn occurs, however, those differences and annoyances often become magnified, resulting in conflicts that contribute to business failure.

There are some similarities between marriages and business partnerships. Both are entered into with the best intentions featuring high levels of trust and a belief that a unified effort working for the common goal will overcome all obstacles. In the context of a business venture, this initial euphoric period often causes the various participants to ignore the need for a written agreement among them because of the high level of trust, and initial desire for the achievement of success. However, this often proves to be a false hope. Whether the business

is highly successful or on the verge of failure, resentments among the principals can and usually do build. Absent a roadmap in the form of a business agreement that clearly outlines the obligations, duties and responsibilities among the parties, the almost inevitable conflict between the principals can result in an expensive and seemingly endless litigation which very rarely results in a clear winner.

This article discusses initial choice of the appropriate business entity and the need for clarity in a written agreement that defines the rights, duties and obligations among the parties.

In a business joint venture, there are essentially three types of entities to be used as a vehicle for a business: a partnership, corporation or limited liability company. A *general partnership* is the simplest legal form of a business entity with more than one principal owner. It is the least expensive to form and requires only the filing of a Doing Business Certificate under an assumed name with your County Clerk. The general partnership is required to obtain from the Internal Revenue Service an Employer Identification Number (“EIN”). While the primary attraction of a general partnership is the ease of formation, a significant drawback of that structure is that it does not provide a shield against personal liability for acts of the business, and each partner is responsible for the acts of

the partnership as well as the other partners acting in his or her capacity as a partner. Another type of partnership, the *limited partnership*, is rarely used for operating businesses and will not be discussed here.

For hundreds of years, the only form of business that provided its owners with any type of liability protection was the *corporation*. The corporation still remains an effective tool for limiting the liability of shareholders. The formation of a corporation requires the filing of a Certificate of Incorporation with the Secretary of the State of New York. The corporate structure requires the issuance of stock. From a tax perspective, when a corporation is taxed on its income directly, it is known as a “C” corporation. To avoid a corporate tax, a specific election may be made by the shareholders to have the corporation treated for tax purposes in essentially the same manner as a partnership. This special election is called a Subchapter “S” election. When an “S” election is made, the corporation’s profits and losses are passed through to the shareholders, who then report their profits and losses on their individual income tax returns. The primary appeal of a corporation is its limited liability feature, which shields the shareholders, officers and directors from direct liability for the obligations of the corporation -- provided that the corporate structure is properly maintained.

The corporation was the only practical alternative for business owners seeking liability protection until the 1994 when New York State adopted a *limited liability company* law (LLC). The LLC combines the best features of a corporation -- limited liability for its members -- and the flexibility, simplicity of management, and tax treatment offered by the general partnership. The LLC has the added advantage of allowing its members to elect to be taxed as either a C or S corporation. Since the adoption of the limited liability company laws in New York, the LLC has by far become the dominant form of small business entity.

Regardless of the business entity selected, to avoid the germination of the seeds of conflict present in every relationship, it is important that joint venturers recognize that things can and do go wrong in relationships. In order to avoid potential disasters, a well drafted and comprehensive agreement among participants is critical, whether it takes the form of a partnership agreement, a corporation’s shareholder’s agreement, or an LLC’s operating agreement. While they all have different titles, these agreements achieve the same purpose; namely, to memorialize the understandings and relationships among the principals. Without a clear delineation of the responsibilities of each of the members, it is not uncommon for one or more members to be saddled with the burden of operating the company business, while other members sit back and do nothing – all the while stating that they have no specific duties assigned to them, but that they remain entitled to their full share of the profits.

The list of areas that could be covered in an operating agreement can be lengthy, but some of the more common issues that should be addressed are:

- What are the ownership percentages?
- What are the initial investment requirements?
- If the company is in need of additional capital after the initial investment, what are the obligations of the members, if any, to contribute when there is an additional capital call required or loan in order for the company to survive economically?
- What are the specific duties and responsibilities of the various members, and are they required to devote their time and attention to the business and can they engage in competing businesses?
- Who, and how many members, are responsible for making the

day-to-day business decisions without approval of the entire membership?

- For those decisions that require shareholders', directors' or members' approval (such as buying or selling property or taking out business loans), is a decision to be made by a supermajority or a bare majority?
- How is a deadlock to be resolved?
- Do you bring in a third party to resolve a deadlock or does the deadlock result in a "no decision"?
- Will a "no decision" create a paralysis in the ability to run the business?

In addition to the governance and operational matters, there are other important issues that must be considered. Among them is the potential death or disability of a member. Often, a joint venture brings together several people with different skill sets, each of which is critical to the success of the business. If a member is disabled and unable to continue to contribute to the business, or if a member dies, do the remaining members want that member's interest to pass to the beneficiaries of his estate, none of who is likely to provide the skills that the departing member possessed? In the case of disability, how long should the disability continue before it triggers a buyout? When death or disability triggers a buyout, the remaining members are required to purchase the interest of the departed member. If so, how is the value for the interest to be determined and how is it to be paid? Similar issues arise when a member decides that he or she wishes to exit the business and sell his or her interest. Is the exiting member free to sell their interest to a non-involved third party? Are the remaining members obligated to buy that interest? Or, can the interest be marketed to a third party subject to a right of first refusal of the remaining members?

Without answering these and a multitude of other questions, a successful business can slide into chaos, with the inevitable result being the messy dissolution of a formerly profitable venture.

CAN AN ODOR GET YOU CONVICTED OF MURDER?

By Jamie T. Ferrara, J.D.

Jferrara@mid-hudsonlaw.com

Can a defendant be convicted of murder based on an odor? The simple answer is yes and no. One of this year's highest profile criminal cases is the trial of Casey Anthony, mother and accused murderer of her 2-year-old daughter, Caylee Anthony. Little Caylee disappeared in June of 2008 from her Florida home and the media quickly pounced on this case, sparking a national fervor. Approximately five months after her disappearance and after an intense search, a little body was discovered not too far from the Anthony residence wrapped in duct tape and enclosed in a plastic garbage bag. A battery of forensic tests ultimately identified the body to be that of young Caylee Anthony. Shortly thereafter, Casey Anthony was arrested and charged with Murder in the First-Degree, among other charges, under the laws of the State of Florida.

This case is nothing if not interesting when viewed through the eyes of trial attorney who is concerned with the rules of evidence. But before considering the Anthony trial, one must understand some basic rules of evidence. Under New York law, all evidence is relevant unless prohibited by some other rule or statute. And with that, all evidence can be classified as either "direct" or "circumstantial"; neither better, neither worse, just different in its name; remember, "a rose by any other name..." To understand the difference between direct and

circumstantial evidence, a good analogy can provide an illustration.

Imagine a homicide on a city street:

First scenario: Witness sees Bad Guy standing next to Victim. Witness watches Bad Guy fire a handgun, sees the gun smoking and watches Victim fall to the ground dead. The testimony of the Witness that Bad guy shot the Victim would be classified as “direct” evidence because he actually saw what transpired.

Second scenario: Imagine now that Witness is walking on a city street sidewalk approaching an intersection and hears what he recognizes to be a gunshot. Immediately thereafter, the Witness passes a building, turns the corner and sees Victim lying on the ground with what appears to be a gunshot wound, dead. Standing over Victim is Bad Guy holding a smoking gun. This time, this evidence is classified as “circumstantial” evidence because the Witness did not actually “see” the homicide take place. Under this scenario, it is rational for a fact-finder to believe that Bad Guy killed Victim based on the fact that the witness heard the gunshot, saw the Bad Guy holding the smoking gun while he stood over the Victim and saw the Victim dead on the ground.

The lesson of this analogy is that it does not matter if one’s evidence is “direct” or “circumstantial” since both pieces of evidence carry the exact same weight. Neither is better or worse and in both scenarios above, Bad Guy can easily be found guilty. In my experience,

however, most people consider circumstantial evidence to be of lesser value than direct evidence. I’d be a wealthy man if I had a penny for every time I’ve heard someone say, “well, the case is completely circumstantial,” implying that the case is weak. This is a common misconception that must be overcome.

How does this all relate to odors and the Anthony trial? Since no one seems to know what led to the demise of little Caylee, the Prosecution is attempting to paint the picture of what transpired. But since there isn’t the “smoking gun” evidence, as was discussed using the analogy earlier, the Prosecution is using substantial circumstantial evidence and by doing so, it is pushing the boundaries of traditional evidentiary law.

The most interesting piece of evidence admitted is the “smell” of defendant’s car. Shortly after Casey Anthony became a person of interest, detectives collected a “sample” of the air in the trunk of her car. The Prosecution has elicited the testimony of one Arpad Vass, a senior research scientist at the Oak Ridge National Laboratory in Tennessee. Mr. Vass was allowed to testify that he operates a “body farm” at the University of Tennessee in Knoxville, specifically studying the process of human decomposition. Mr. Vass later examined and tested that “air” for the presence of certain chemical compounds and odors he would expect to find if there was a decomposing human body in the trunk of that car. As expected and in sum and substance, Mr. Vass testified that based on his analysis, he detected the presence of certain chemicals and compounds that undeniably led him to believe that at one time there was a decomposing human body in the trunk of Casey Anthony’s car.

Since the trial is ongoing at the time of this article, we do not know how this testimony will affect the Anthony trial. Will this evidence have any relevance in the minds of the jury? Did the jury consider this as relevant? Did the jury completely disregard it? Was the “sample”

previously contaminated? Are there other explanations for the foul smell? We may never know.

The more important question to the reader is, “how does this affect you?” As previously stated, in New York, *all* evidence is relevant unless otherwise prohibited by some statute or rule. Fortunately for a New York criminal defendant, if you happen to be accused of a crime, there are many statutes and rules that prohibit otherwise relevant evidence from being admitted at trial. The most common reason for prohibition is the overwhelming prejudice the evidence may have against the defendant that outweighs its probative value. Since the “odor” evidence is a new legal theory and it is somewhat controversial, most New York judges will be hesitant to admit it. Therefore, it is easier for a judge to prohibit the admission of such evidence instead of being appealed on it later. Good news for defendants.

In sum, it is highly unlikely that “smell” evidence of the type in the Anthony Trial would be admitted in a New York criminal trial because there are too many “ifs” about the reliability of such evidence. For example, was the canister clean? Did the canister have some contaminant in it to create such a smell? Was the canister tampered with? Was the evidence planted? In my opinion, all of these questions and the many others I have not contemplated leave open the possibility that there is too much room for prejudice against a defendant.

RESIDENTIAL SUBDIVISIONS IN LIMBO

By Rita G. Rich, J.D.

rrich@mid-hudsonlaw.com

The purpose of this article is to give an overview of subdivision timing parameters that affect landowners who have begun or even completed subdivision procedures, but are

stymied by an economy that is not conducive to housing development.

A few years ago, many rural areas in Orange County were earmarked for development as residential subdivisions. Planning Boards were bustling with applicants who wanted to subdivide and lock in a number of buildable lots that would bring in sizable gains.

Realtors, planners, engineers, surveyors, title companies, attorneys and a host of related servicers were very busy.

Then suddenly, the bottom fell out of the housing market. There are tracts of land in Orange County with subdivision applications that are halted due to the economy, so that they remain undeveloped, vacant land at the stage of *preliminary approval*. That term means the layout of the subdivision has been approved, including details such as lot dimensions, topography, drainage and proposed facilities. The NYS Town Law language concerning preliminary approval is as follows: “Within six months of the approval of the preliminary plat, the owner must submit the plat in final form. If the final plat is not submitted within six months, approval of the preliminary plat may be revoked by the planning board.” The word, “may,” is important. Generally speaking, Planning Boards are hesitant to revoke an approval, provided that there are no zoning changes that would modify configuration of the subdivision, but it is incumbent upon owners to refrain from any substantial changes to the preliminary map and to maintain communication with the Town to avoid revocation.

Other potential subdivisions have *conditional final approval*, which means that the map coincides with all local regulations except that there are certain conditions required, typically, but not limited to, easements and maintenance agreements relating to the lots themselves, or easements required by the municipality. Those conditions have to be met before the map will

be final approved and signed by the Planning Board.

NYS Town Law concerning extensions of conditional final approval was recently amended. Extensions were previously limited to two 90-day periods following an initial 180-day automatic approval period. Currently, a 2010 statute provides for an unlimited number of extensions, although a municipality may have qualifying factors, such as evidence of hardship, that must be met. Thus, applicants with conditional final approval have been given some breathing room in a slow economy.

Once the conditions are met and *final approval* is granted, the map can be filed and building permits issued. Obtaining final approval and filing the approved map would seem to ensure that the developer may build homes on the lots depicted on the filed map no matter when actual development occurs. However, that is not always the case. Presently, (i) if an exemption or grandfathering is not provided under the municipality's zoning laws; (ii) substantial construction and/or expenditures have not been made constituting "vested rights;" or (iii) a lot is not held in "single and separate ownership" (the terms in quotes being frequently litigated), there is a time limit placed on the validity of the map with respect to areas and dimensions of the lots.

For instance, should the municipality change its zoning to require larger lots, the filed map with smaller lots is only valid and protected from zoning changes under NYS Town Law for a specified period of time. The longest exemption is three years from the filing of the map, applicable to municipalities with a zoning ordinance or local law, as well as a Planning Board.

In the last session of the New York State Legislature, a bill was introduced regarding a six-year period of "vested rights" for property owners who had filed an application for approval of a site plan, subdivision or other development plan. The bill affected Orange County and four other counties, but the session ended without passage.

Thus, there are risks related to subdivision approval. In today's economy, some subdivisions may indeed be in limbo because development has slowed down or halted, and landowners could be required to re-start the entire subdivision process as a result of the municipality's zoning changes.

EDUCATIONAL WORKSHOPS

Estate Plans That Work™

July 14, 2011 and August 23, 2011 (3:00 p.m. to 6:00 p.m.), 10 Matthews St. Goshen, New York

To register for a workshop, call Donna at 291-0011 x.242, or register online at www.mid-hudsonlaw.com by going to the "Event Calendar" link.

The information in this newsletter is for general information purposes only and is not, nor is it intended to be, legal advice, including legal advice for Internal Revenue Code purposes as described in IRS Circular 230.