



BAKER DONELSON EMERGING COMPANY BOOT CAMP



Baker Donelson Emerging Company Boot Camp

Nashville Entrepreneur Center
Nashville, Tennessee
Wednesday, November 16, 2011

AGENDA

- | | |
|------------------|--|
| 8:30-9:00 a.m. | Breakfast and Registration |
| 9:00-9:15 a.m. | Welcome and Opening Remarks
<i>Chris Sloan, Baker Donelson</i> |
| 9:15-9:45 a.m. | Choice of Entity and Corporate Formation
<i>Chris Sloan, Baker Donelson</i> |
| 9:45-10:15 a.m. | Intellectual Property (Patent, Copyright and Trademark)
<i>Edward Ramage, Baker Donelson</i> |
| 10:15-10:30 a.m. | Talking Tech with the Nashville Technology Council
<i>Liza Massey, Nashville Technology Council</i> |
| 10:30-10:45 a.m. | Break |
| 10:45-11:15 a.m. | Outside General Counsel Relationship
<i>Jason Epstein, Baker Donelson</i> |
| 11:15-11:45 a.m. | Accounting, Finance and HR Basics
<i>Mike Cain, LBMC</i> |
| 11:45-12:15 p.m. | Contract Basics
<i>Steve Wood, Baker Donelson</i> |
| 12:15-1:15 p.m. | Lunch and Networking |
| 1:15-1:45 p.m. | Things to Know When Starting Your First Company
<i>Michael Burcham, Entrepreneur Center</i> |
| 1:45-2:15 p.m. | Labor and Employment Basics
<i>Kim Vance, Baker Donelson</i> |
| 2:15-2:45 p.m. | Tax Basics for Emerging Companies
<i>Scott Smith, Baker Donelson</i> |
| 2:45-3:15 p.m. | Venture Capital Basics
<i>Stuart McWhorter, Clayton Associates</i> |
| 3:15-4:30 p.m. | Open Questions and Networking
<i>All presenters</i> |

Choice of Entity and Corporate Formation

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Why Establish an Entity?

- Divide the pie
- Allow for transfer of ownership
- Agree on governance rules
- Achieve immortality (sort of)
- Limit personal liability

Choice of Entity - Considerations

- Nature of business (active or passive; tax-sensitivity)
- Governance
- Number of owners
- Role of owners (active or passive)
- Allocation of profits, losses, and cash flow
- Ability to attract outside capital
- Incentive equity
- Taxation
 - Entity vs. flow-through
 - Payroll taxes

The Choices

- Sole Proprietorship (aka “d/b/a”)
- Corporation
 - An S-corporation is a tax election, not a different type of entity
- Limited Liability Company

Ignore:

- General Partnership
- Limited Partnership

Sole Proprietorship

- Simplest form of business – not an entity at all
 - Alter ego (“d/b/a”) of owner
- Single owner has complete control, but also full personal liability
- Generally requires nothing more than filing a certificate of assumed name and obtaining a business license
- All income and losses flow through
- When owner dies, business dies

- Limited liability entity is usually a better option

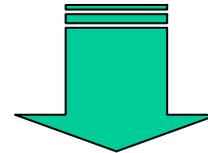
Corporation vs. LLC

- Corporation
 - State statute
 - Charter (or Certificate of Incorporation in DE)
 - Bylaws
 - Board of directors
 - Officers
 - Double tax (except S corp)



RIGID

- LLC
 - State statute (lite)
 - Articles of Organization (or Certificate of Formation in DE)
 - Operating Agreement
 - Board or not
 - Officers or not
 - Pass through tax



FLEXIBLE

Recommendations

- For likely VC-backed, DE C-corp is “gold standard”
 - Pass-through entities create problems for institutional funds
 - Delaware is the most familiar and well-respected body of corporate law
- LLC better if unsure of VC path, or not necessarily growing to exit
 - Relatively easy to convert to a corporation later
- No real advantage (any more) to using S-corp over an LLC

Entity Formation

- File with secretary of state
 - For LLC: Articles of Organization (TN) or Certificate of Formation (DE)
 - For corporation: Charter (TN) or Certificate of Incorporation (DE)
- In TN, record with county of business
- Adopt organizational minutes and bylaws
- Subscription or contribution agreements for founder equity
- Business license and sales/use tax permit (county clerk's office)

Keeping Your House in Order

- A COMMON, AVOIDABLE PROBLEM – if you don't know who owns what, how do you expect an investor to know??
- Cap Table
 - Keep accurate, current info on equity ownership
 - Both issued and fully-diluted
 - Vesting and forfeiture restrictions
- Transfer Ledger
 - Track each individual stock certificate and equity transaction
 - Keep the paperwork documenting each one
- Minute Book
 - Minutes of all meetings (including actions on written consent)
 - Copies of relevant corporate documents (e.g. certificate of incorporation, bylaws, shareholders agreement, option plan, etc.)

Who Is Your Business Partner?

- Each owner typically relies heavily on the others
- Consider these scenarios:
 - An owner dies, leaving stock to the spouse, a complete jackass who is now your business partner
 - An owner pledges his LLC interest for a loan, then defaults; now the bank is your partner and wants to liquidate the business
 - An owner leaves the company to work for a competitor; he still is entitled to financial and other information about the company
 - An owner gets divorced and his stock is awarded to his ex-wife; now he works for her
 - An owner quits the business; he still owns a significant chunk of the company

Preventative Measures

- Founder Vesting - reciprocal vesting restrictions on co-founders
 - Ownership vests over time
 - Unvested shares are forfeited if owner quits
 - Acceleration on change of control
 - Acceleration if terminated without cause?
- Shareholders Agreement or Operating Agreement
 - aka Buy-Sell Agreement
 - Founder vesting could be addressed in this document

Shareholders or Operating Agreement

- Rules for decision-making
 - Supermajority voting for some matters
 - Rights to appoint board members or officers
- Dispute resolution
 - Toughest with 50-50 because of deadlock potential
 - “Hand Grenade” aka “Texas Shootout”
 - Voting trust (e.g. someone to break the tie)
 - Creative options
- Drag-along rights, tag-along rights
- Restrictions on voluntary transfers
 - No pledging or assignment
 - ROFR on other transfers
- Repurchase on involuntary transfers

Involuntary Transfers

- Transfers on death, divorce, bankruptcy, or other transfer by operation of law
- Company and/or other owners have right of repurchase
 - Suspend voting rights
- Valuation mechanism:
 - Board can set
 - Book value
 - Agreed value updated periodically
 - Financial formula (e.g. multiple of TTM revenue or profits)
 - Expert appraisal (many variations)
- Valuation standard = “fair market value”
 - Usually based on enterprise value as a going concern
 - Discounts allowed?

Other Issues

- Confidentiality & IP (if not addressed elsewhere)
- Tax distributions (if a pass-through entity)
- LLC owners usually treated as self-employed
 - “guaranteed payments” can roughly imitate salary but no withholdings
- Capital accounting provisions (if an LLC)
 - “substantial economic effect”

Equity Incentives

- Restricted Stock vs. Options
 - 409A
 - 83(b)
- ISOs vs. NQSOs (vs. Profits Interests in an LLC)
- Vesting Considerations
 - Standard = 4 years with first year cliff then quarterly/monthly

Securities Law Basics

- “Security” includes stock, options, LLC membership interests, promissory notes, bonds, investment contracts, etc.
- General Framework – registration is required unless an exemption applies
 - Must have both state and federal exemption
 - Fortunately, there are lots of exemptions
- Private Placements
 - Generally, an offer and sale not involving a public offering
 - Reg D – certain offerings to “accredited investors” are exempt from both state and federal registration
- Unlicensed Broker/Dealers

Contact Us

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IP Basics: The Bare Minimum

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EXPAND YOUR EXPECTATIONSSM

IP BASICS

The Big 3:

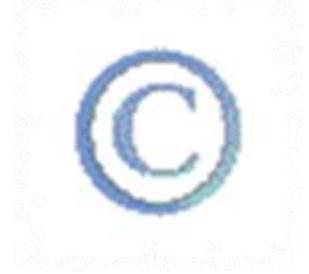
- Copyright
- Trademark
- Patent

*Not going to discuss
trade secrets*



Copyrights

What is a copyright?



- A bundle of rights protecting an original work of authorship fixed in any tangible medium of expression

U.S. Constitution, Art. 1, Sec. 8, Cl. 8
17 U.S.C. § 101 *et seq.*

Copyrights

- To be protected by copyright, a work must contain at least a certain minimum amount of authorship in the form of original literary, musical, pictorial, or graphic expression.



Copyrights

What is copyrightable?

- Literary works
- Musical works (incl. words)
- Dramatic works (incl. music)
- Sound recordings
- Architectural works
- Computer software
- Pantomimes and choreographic works
- Pictorial, graphics and sculptural works
- Motion pictures and audiovisual works



Copyrights

Computer Program

- Set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result
- Protects that particular expression of the set of statements or instructions, not what the program does



Copyrights

What is in the bundle of rights?

- Reproduce the work in copies or phonorecords
- Prepare derivative works
- Distribute copies or phonorecords
- Perform the work publicly
- Display the work publicly

Copyrights

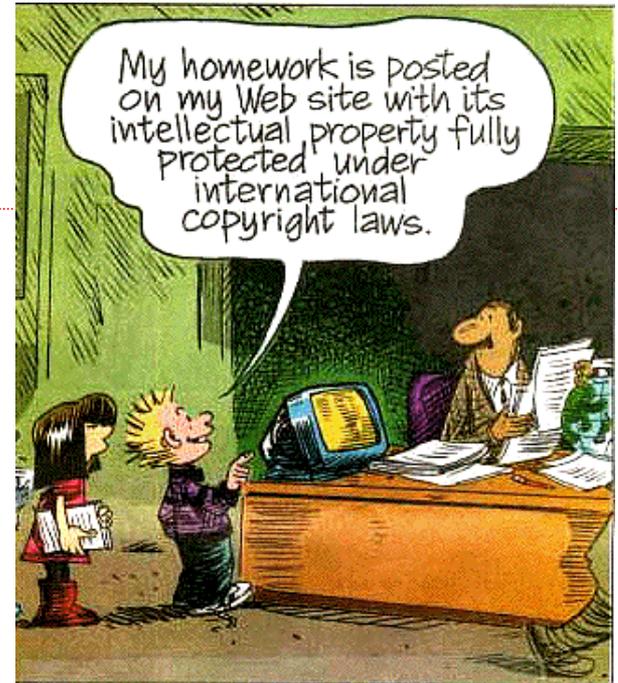
Work For Hire

- Work prepared by an employee within scope of employment
- Work specially ordered or commissioned, *expressly agreed in written instrument*, for one of following:
 - Contribution to collective work
 - Part of motion picture or other AV work
 - Translation
 - Supplementary work
 - Compilation
 - Instructional text
 - Test
 - Answer material for a text
 - Atlas

Copyrights

Creation

- Copyright automatically exists as soon as work is created in "fixed form"
- Registration with U.S. Copyright Office is not required, but brings benefits:
 - Ability to bring infringement action
 - Timely registration allows recovery of statutory damages and attorneys fees
 - Prima facie evidence of validity of copyright



Trademark

What is a trademark or service mark?

- Any word, name, symbol, device, or combination thereof either used or intended to be used by a person to identify and distinguish goods or services from those of others and to indicate their source of origin



Trademark

Levels of Distinctiveness

- Fanciful or Coined
- Arbitrary
- Suggestive
- Descriptive
- Generic

Trademark

Fanciful or Coined

- Letters that form a word without meaning, has no relation to the product
- Strongest type of mark
- E.g., KODAK, EXXON

Problem: Can become generic



Trademark

Arbitrary

- One or more words whose common meaning has nothing to do with the goods or services being labeled
- Strong mark
- E.g., PARLIAMENT, CAMEL, used for cigarettes



Trademark

Suggestive

- One or more words that hint at or suggest the nature of a product without actually describing it
- Requires a mental step before association between mark and product is understood
- E.g., **HOMEMAKER** vacuum cleaner; **MORNING FRESH** aerosol room freshener



Trademark

Descriptive

- Words that merely describe the product or its components or ingredients
- Very weak; protectible as trademark only if can establish that term has acquired “secondary meaning”
- E.g., **HOMEMAKER** home care services

Trademark

Generic

- Words that designate the “genus” of the product or what the product is
- Cannot trademark
- E.g., THERMOS, ASPIRIN, CELLOPHANE



Trademarks

Creation

- Trademark rights conferred by use in commerce
- Registration with U.S. Patent and Trademark Office is not required, but brings benefits:
 - Nationwide notice
 - Can achieve incontestable status



JCW Investments v. Novelty, Inc.
482 F.3d 910 (9th Cir. 2007)

Copyright and Trademark Infringement

“Pull My Finger Fred”

Pull My Finger Fred

Plush doll

White, middle-aged, overweight man with black hair, receding hairline, sitting in an armchair with white tank top and blue pants



Pull My Finger Fred

- “Did somebody step on a duck?”
- “Silent but deadly”
- “Mmmmmm.....fruity!”



Pull My Finger Fred

- Copyright registration (Feb. 5, 2001)
- Trademark registration (Reg. 2532263)
 - "Pull My Finger"
 - "Plush Toy with electronic action"

“Pull My Finger”

- Other trademark registrations
 - Compact Discs featuring the sounds of intestinal gas expelling from the body
 - Bowl, Soup Bowls, Sugar Bowls
 - Beans, peas
 - Entertainment services, motion picture film
 - Beer
 - Cosmetics, skin and hair care products

Pull My Finger Family

"Pull My Finger Frankie"



Pull My Finger Family

"Pull My Finger Gascar Driver"

- *"Ooooh...a backfire!"*
- *"Aaaaah...I blew a tire!"*



Pull My Finger Family

“Pull My Finger Fat Bastard”

- *“Get In My Belly!”*



Pull My Finger Family

“Pull My Finger President”

- *“Hey Sadaam...here's a weapon of mass destruction!”*



Not in the Pull My Finger Family

“Fartman”

“...could be Fred’s twin.
Fartman, also a plush doll, is a white, middle-aged, overweight man with black hair and a receding hairline, sitting in an armchair wearing a white tank top and blue pants.”



JCW Investmt. v. Novelty, Inc.

- JCW sues for copyright and trademark infringement
- Wins summary judgment on liability
- Jury awards damages

JCW Investmt. v. Novelty, Inc.

- \$116K for copyright infringement
- \$125K for trademark infringement
- \$50K in punitive damages
- \$575K in attorneys fees

Patents

What Is A Patent?

- *Set of exclusive rights granted to an inventor for a fixed period of time in exchange for the regulated, public disclosure of the invention*

U.S. Const. Article I, Section 8, Cl. 8

17 U.S.C. § 101 *et seq.*

Exclusive Rights

- Right to *exclude* others from making, using, selling, offering to sell the invention within the U.S., or importing into the U.S.
- Does not give inventor the right to make, use, sell, offer to sell



What Can I Patent?

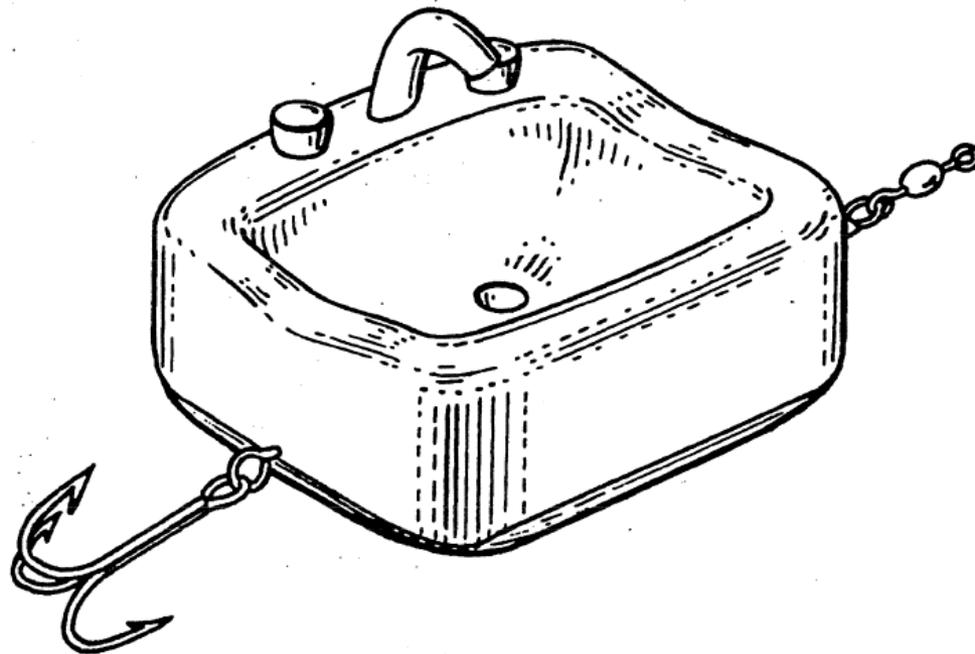
- **Plant** – protects certain types of plants
- **Design** – protects the ornamental (non-functional) appearance of an article; the way it looks
- **Utility** – protects a useful article; the way it works or is used



Design Patents

FISHING LURE

US D274,350 (1984)

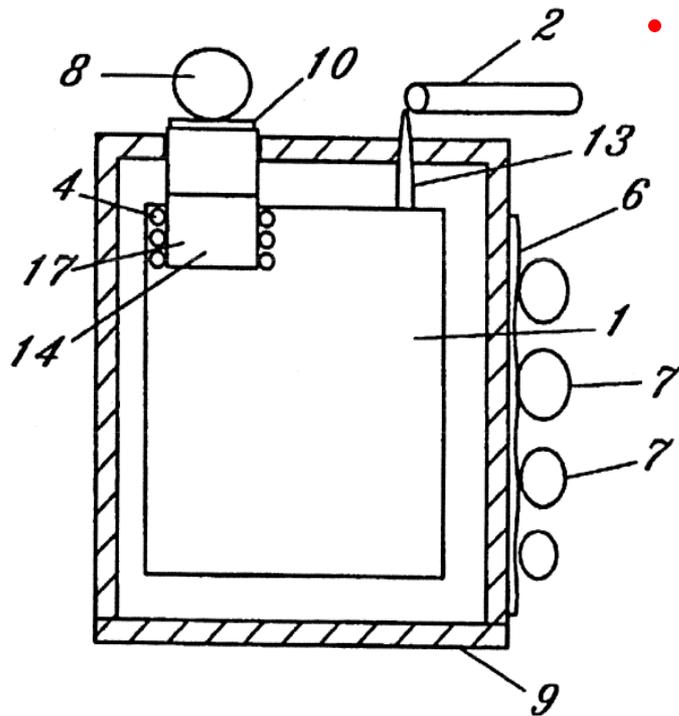


The ornamental design for a fishing lure, as shown.

Utility Patents

SMOKING CESSATION LIGHTER AND METHOD

US 5,871,518 (Feb. 16, 1999)



• *It delivers a shock to the user's hand when the lighter is extinguished.... The anticipation of the shock will negate the anticipation of the relief the drugs in the smoke provide. In yet another embodiment... a pin pricks the user at the time of activation of the lighter.*

Utility – *Requirements*

- Patentable Subject Matter
- Utility (i.e., useful)
- Novelty (i.e., new)
- Not obvious



Utility-*Subject Matter*



- Machine
- Manufacture (Article of Manufacture)
- Composition of Matter
- Process (Method)

Patentable Subject Matter

- **CANNOT patent:**
 - *scientific truths, laws of nature*
 - *mathematical expressions*
 - *algorithms*
 - *abstract ideas*
 - *physical phenomena*



Novelty

- **Inventor Can Destroy Novelty**
 - public use or disclosure of invention
 - prior sales or offers for sale

U.S. – > 1 year prior to filing

Foreign – absolute novelty bar

Unlike copyrights and trademarks, you must timely file with the U.S. PTO in order to have patent rights!

Starting the Time Bomb

- Journal article
- Newspaper article
- Emails
- Submission of proposal
- Report to research sponsor
- Poster presentation
- Oral presentation with handouts or slides
- Thesis catalogued and placed on shelf



Ownership

- In U.S., only individuals can apply for a patent (not corporations, entities)
- Inventors can assign the patent to any entity
- Each inventor owns full rights to invention without an obligation to the other inventors
- ***Get obligation to assign IP rights in employment agreement!***



Provisional Patent

- Lower cost, quick alternative
- No claims required
- No particular format
- Provides earlier effective filing date, permits use of “patent pending” status
- Not examined, does not issue into a patent
- Must file full utility application within one year



10 THINGS YOU NEED TO KNOW ABOUT PATENT REFORM

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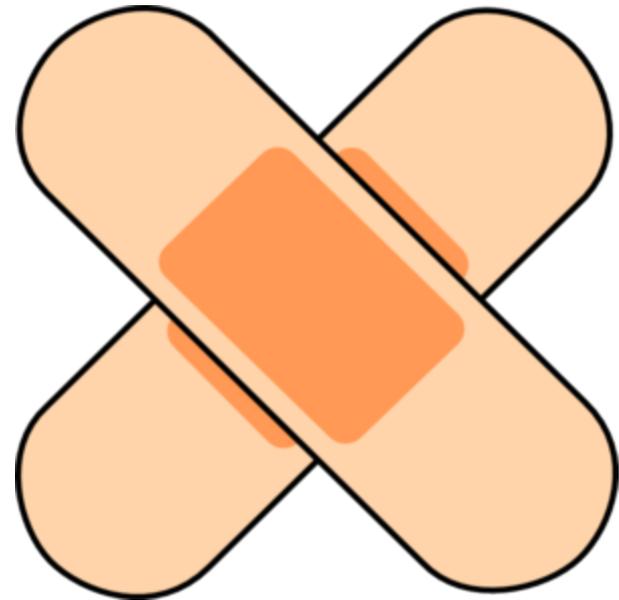
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EXPAND YOUR EXPECTATIONSSM

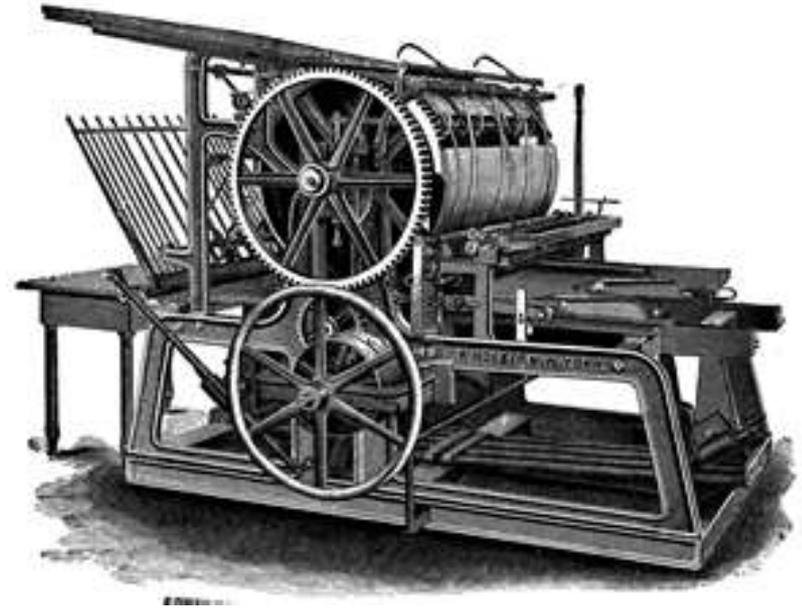
Patent Reform

- Signed by President Obama on Sept. 16th
- Melange of changes (major and minor)



1. It's Not Really "First-to-File"

- "First-to-Publish" can beat "First-to-File"
- Interaction of new Sections 102(a), (b)



Section 102(a): First-to-File



- Entitled to patent unless:
 - (1) patented, described in printed publication, in public use, on sale, or otherwise available to public before effective filing date (subject to one-year grace period), or
 - (2) described in patent or patent application by another effectively filed before effective filing date

Section 102(b)(1): 1-Year Grace Period

- Disclosure made < 1 year before filing is not prior art under 102(a)(1) if:
 - (1) disclosure was made by inventor, or another who obtained subject matter from inventor, or
 - (2) inventor or another who obtained from inventor had publicly disclosed the subject matter before the disclosure in question

Section 102(b)(2): Prior Art Disclosure

- Disclosure in patent or application is not prior art under 102(a)(2) if:
 - (1) subject matter disclosed obtained from inventor, or
 - (2) inventor or another who obtained from inventor had publicly disclosed the subject matter earlier, or
 - (3) both owned or under obligation to assign to same person

“First-to-File”

- INVENTOR A
 - Jan: invents
 - July: file patent app.
- INVENTOR B
 - Feb: invents
 - Dec: file patent app.



**Same result
even if B
invents first**

“First-to-Publish”

- INVENTOR A
 - Jan: invents
 - June: publishes article
 - July: file patent app.

- INVENTOR B
 - Feb: invents
 - April: publishes article
 - Dec: file patent app.



2. Don't Count on Publishing

- “Absolute Novelty” bar
- Will lose foreign filing rights

File Early, File Often!

Defensive Publication: not seeking patent protection, but protection from patenting



3. Prior Art Hurdles Are Higher

- “On sale” removed from grace period
- Public use no longer limited to U.S.
- Foreign patent applications will count for priority dates (i.e., for “effective filing date”)



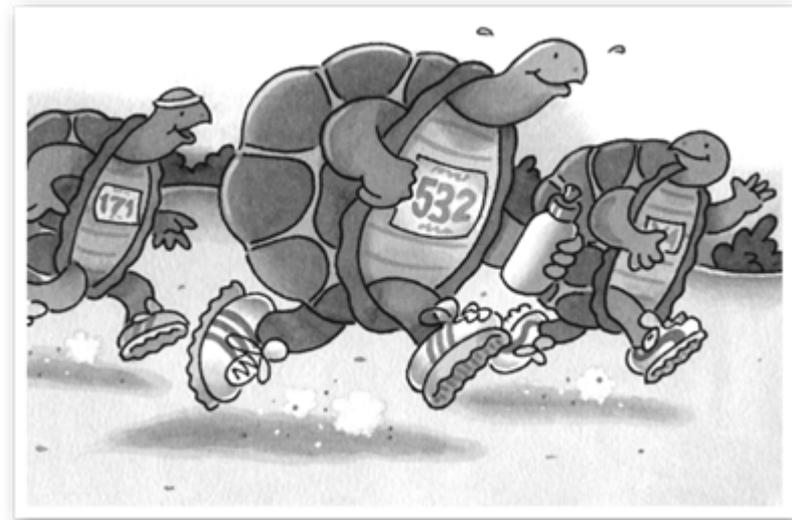
4. Don't Wait on FTF

- FTF applies to applications filed on or after Mar. 16, 2013
BUT....
 - can be affected by third-party publications on or after Mar. 16, 2012
 - changes in grace period



5. File New Apps Before FTF

- File before Mar. 16, 2013
 - new apps & CIPs
- Avoid broader definition of prior art
- Can still swear behind third party prior art
- Avoid post grant review



6. New Avenues for Attack

- Post Grant Review (“opposition”)
 - 9-mo. window
 - broader than re-exam
- Inter Partes Review
 - amended IP Re-exam
 - new standard (reasonable likelihood)
- Pre-Issuance Submissions



7. Supplemental Examination

- Similar to *Ex Parte* Re-exam, but not limited to patents and publications
- Patent owner can address any validity issues uncovered after patent is granted
- Patent owner can purge inequitable conduct
 - must be done before any attempt is made to enforce patent, or before owner receives a notice of invalidity
 - excludes substantial fraud



8. Derivation Is The New Interference

- PTO or civil action
- Resolves whether earlier inventor derived claimed invention from an inventor in later-filed application
- Good reason to keep inventor's notebooks and other documents establishing independent research and development of claimed subject matter

9. Mixed Bag re Litigation

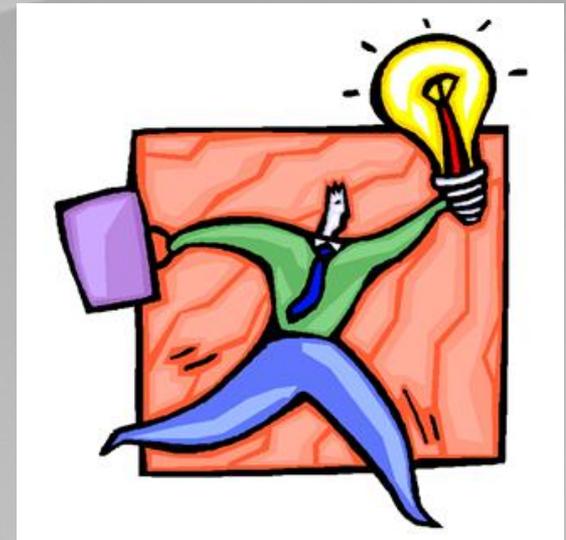
- False Marking Cases
- Prior Commercial Use Defense
- Best Mode
- Attorney Opinions
- Joinder of Multiple Defendants
- Jurisdiction
- Venue
- Removal

10. Patents Not Easier or Cheaper

- Lots of uncertainty with disclosure, derivation and first-to-publish
- Narrower one-year grace period
- Broader prior art
- Post Grant Review



They Patented That??

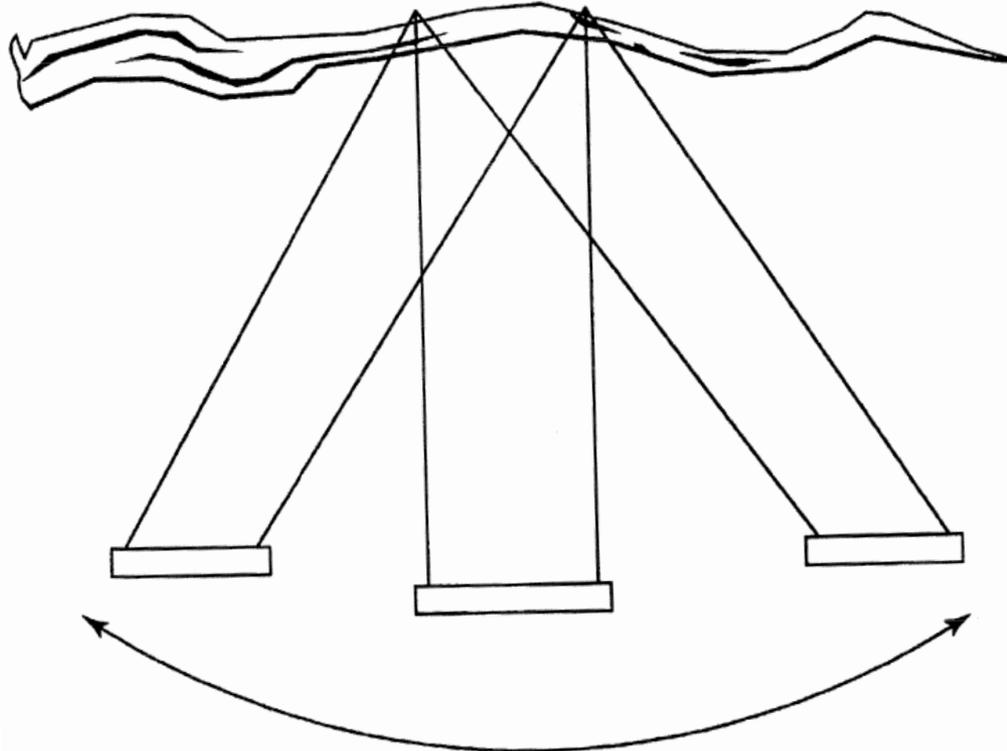


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EXPAND YOUR EXPECTATIONSSM

METHOD OF SWINGING ON A SWING

Olson, US 6,368,227 (Apr. 9, 2002)

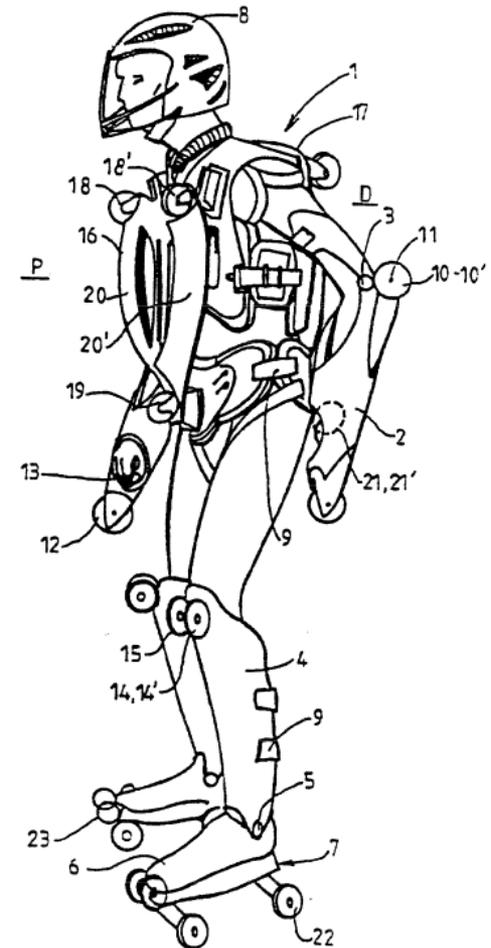


A method of swing[ing] on a swing is disclosed, in which a user positioned on a standard swing suspended by two chains from a substantially horizontal tree branch induces side to side motion by pulling alternately on one chain and then the other.

ARMOR WITH ROLLERS

Blondeau, US 5,926,857 (Jul. 27, 1999)

An armor with rollers is provided that enables a user to move in all positions by rolling on a hard and smooth surface while constantly varying his bearing points on the ground.



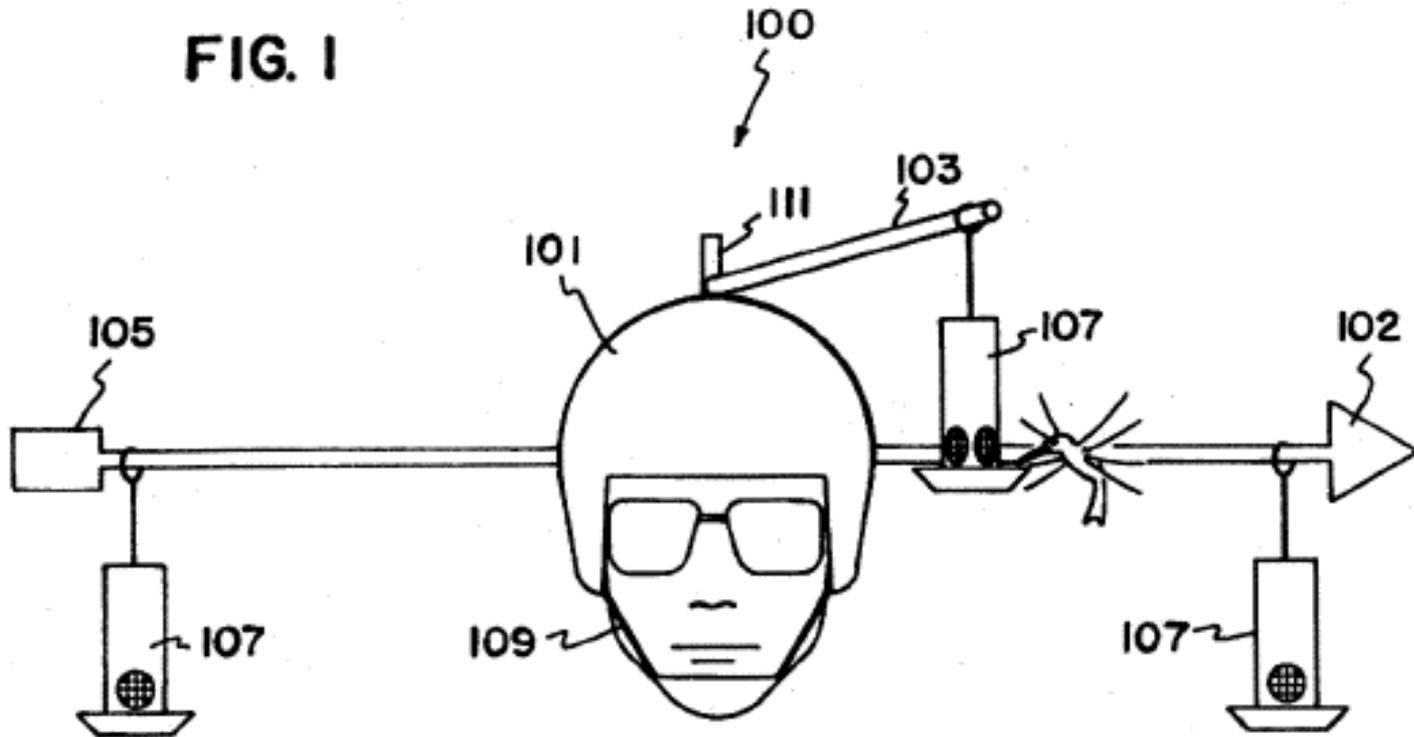
WEARABLE DEVICE FOR FEEDING AND OBSERVING BIRDS AND OTHER FLYING ANIMALS

Leslie, US 5,996,127 (Dec. 7, 1999)

The device may comprise a helmet with three poles mounted on it and extending outward from the helmet, and a feeder hanging from each of the poles.

US 5,996,127

FIG. 1

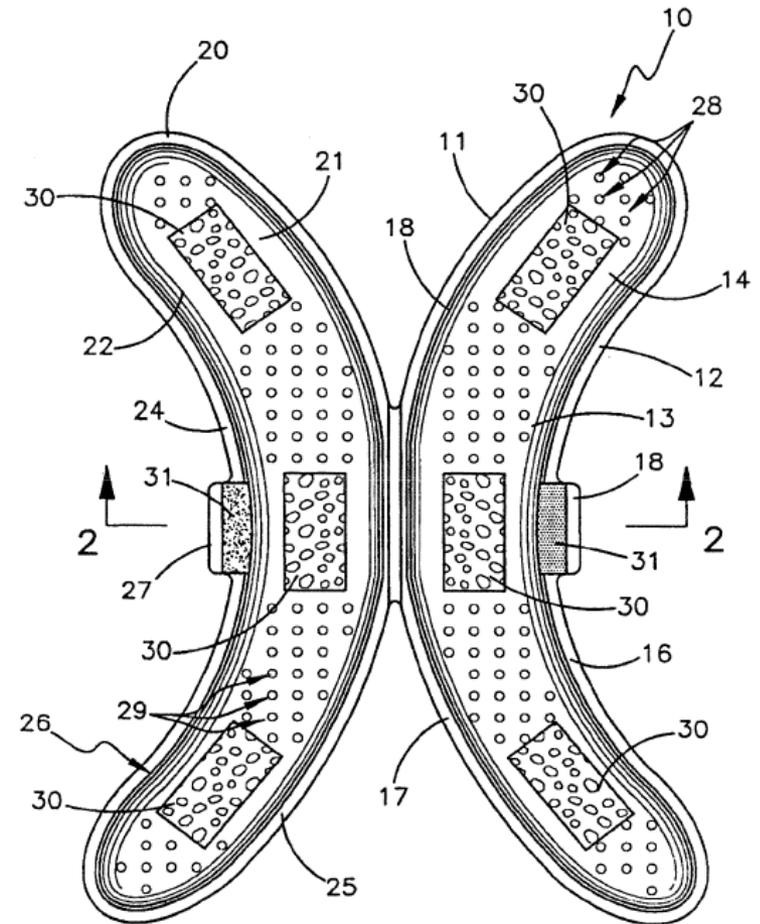


Optionally, a pole may enter the helmet from one side and exit on the other side, whereby a single pole will extend in two directions from the hat.

BANANA PROTECTIVE DEVICE

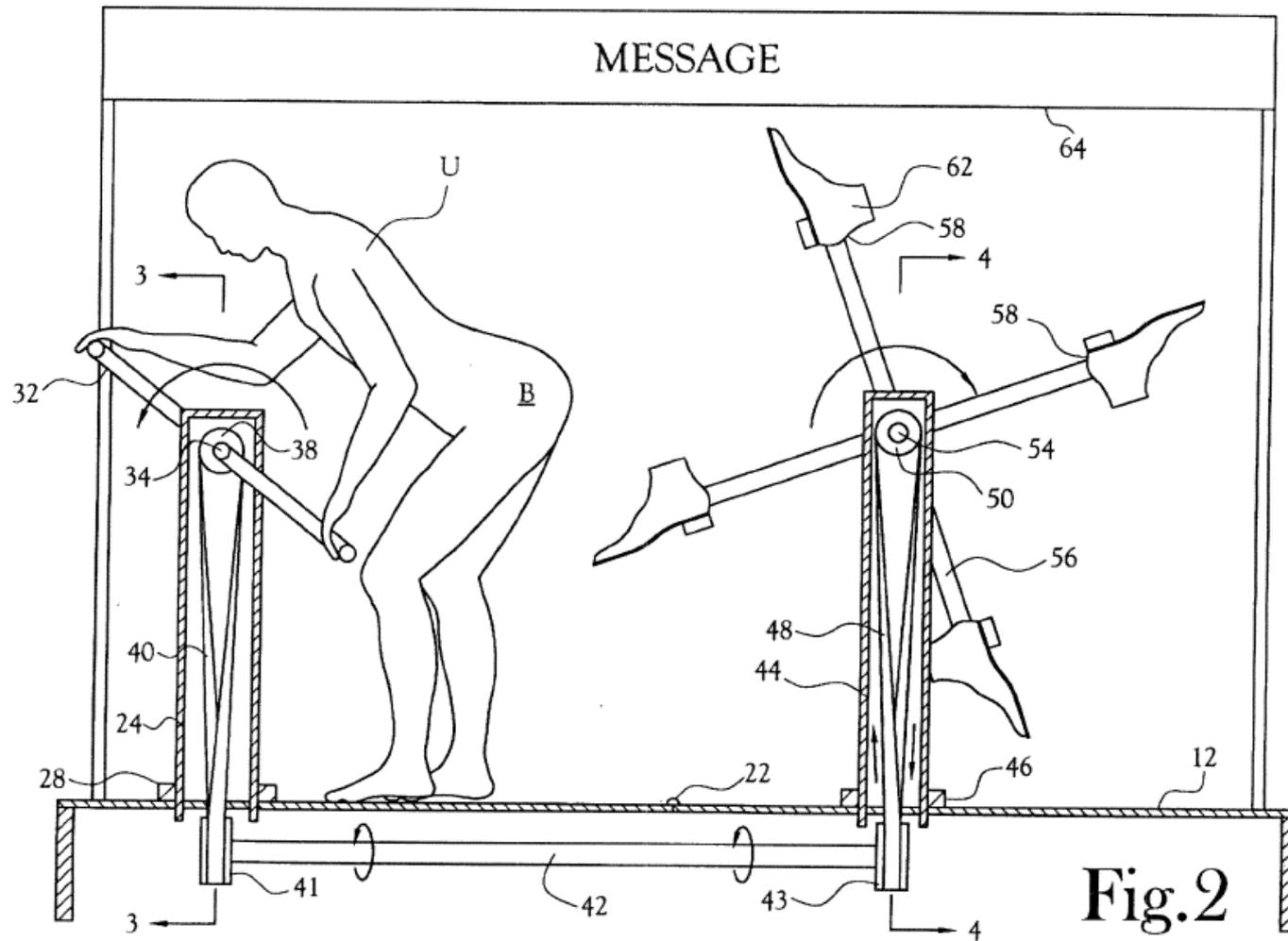
Agulnik, US 6,612,440 (Sept. 2, 2003)

The use of a banana guard is known in the prior art. More specifically, a banana guard heretofore devised and utilized are known to consist basically of familiar, expected and obvious structural configurations, notwithstanding the myriad of designs encompassed by the crowded prior art which have been developed for the fulfillment of countless objects and requirements.



USER-OPERATED AMUSEMENT APPARATUS FOR KICKING THE USER'S BUTTOCKS

Armstrong, US 6,293,874 (Sep. 25, 2001)



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EXPAND YOUR EXPECTATIONSSM

Baker Donelson
Entrepreneur Boot Camp



Nashville
Technology Council
feel the beat of technology

Liza Lowery Massey, President & CEO

1. Plan

- a. KISS
- b. Who is going to use it? Staff? Customers? Partners?
- c. What do you need? Now, near term, long term?
- d. Where will it be housed? Accessed?
- e. Why do you need it?
- f. When do you need it?
- g. How will it be maintained?

2. Look for 'ables

- a. Useable
- b. Sustainable
- c. Affordable
- d. Flexible
- e. Scalable
- f. Integratable

3. Consider Options

- a. Open Source
- b. Cloud – XaaS
- c. Single vendor vs. multi-vendor
- d. SME tools from traditional L/XL providers

Outside General Counsel Relationship

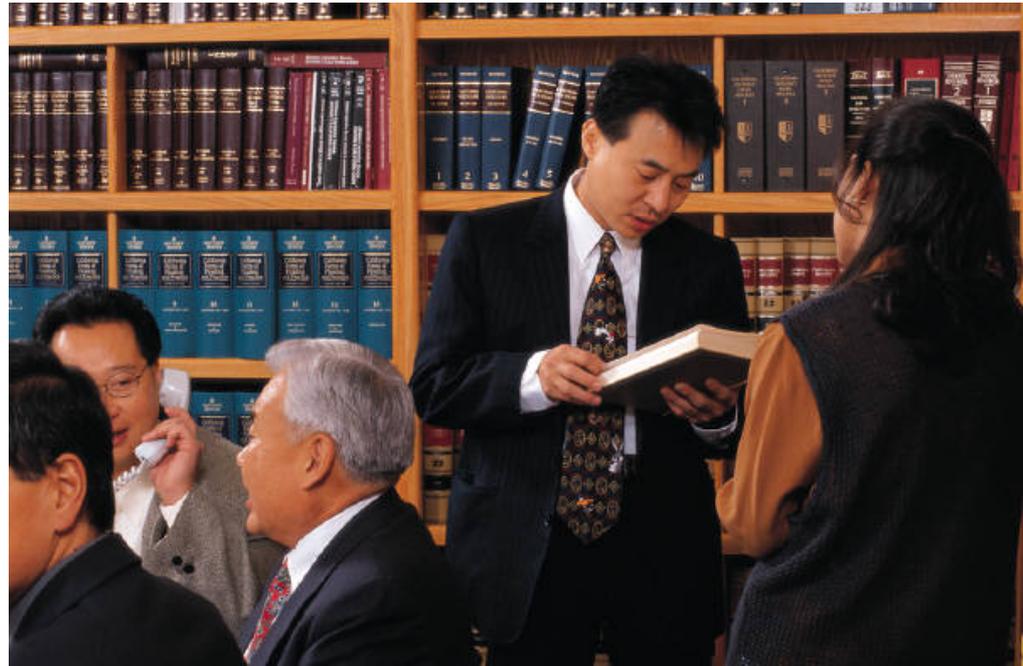
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Role of Outside General Counsel

- Understand the business.
- Attend senior management or board meetings.
- Spot issues in advance.
- Proactive suggestions based on experience (strategic planning).
- Reactive suggestions based on experience (lawsuits, investigations, etc.).



Role of Outside General Counsel

- Be part of the team to provide legal point of view.
- Understand the role is to serve the client, but that it's the client's business, not yours.
- Have access to all areas of legal specialty.
- Doing appropriate work while referring the rest.
- Be a trusted advisor.



Effective Use of Outside General Counsel

- Find somebody interested in you and your business.
- Arrive at appropriate compensation structure.
- “Train” yourself to include outside general counsel in strategic discussions as appropriate (like other professionals).
- Make sure you are on the same page with respect to whether something is billable or not.

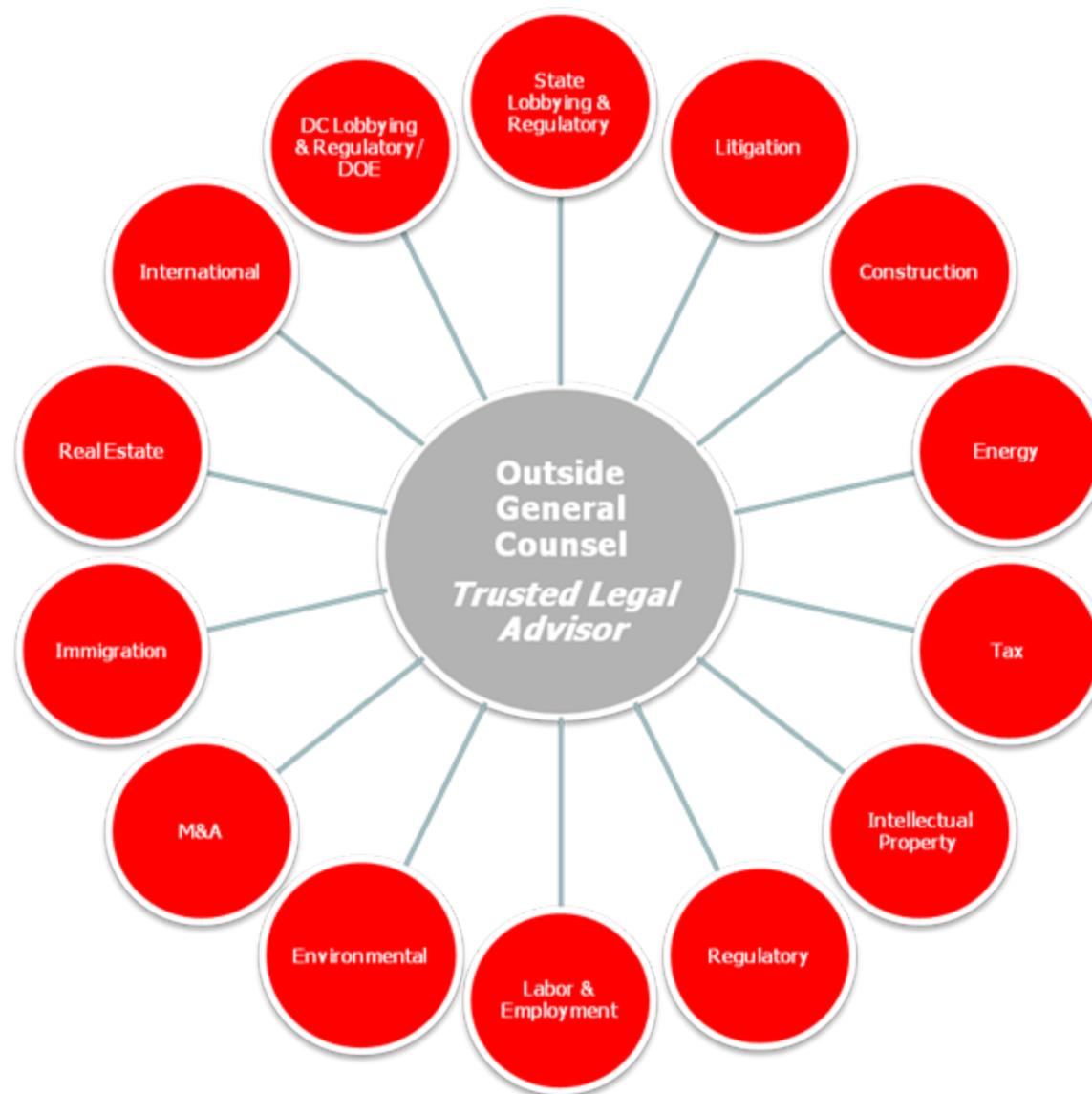


Effective Use of Outside General Counsel

- When something is “billable,” make sure scope is defined up front as well as proposed costs. This can often lead to strategic use of counsel, keeping work that can be done by others out of the scope.
- Create and keep tabs on a budget and have waypoints when “targets” are reached.
- Develop a trusted relationship that surpasses that of a mere technician. In fact, many outside General Counsel manage work they don’t do.



Outside General Counsel - Trusted Advisor



Contact Us

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LBMC...

Entrepreneurs Serving Entrepreneurs

- *Accounting*
- *Human Resources*
- *Technology*
- *Operations*



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Mr. Cain is co-managing partner and one of the founders of Lattimore Black Morgan & Cain, PC and affiliates (“LBMC”), the largest regional accounting and professional services firm in Tennessee. LBMC and its affiliates consist of seven operating companies providing professional services in a wide range of financial, human resources, technology, and operational areas. These companies include:

Lattimore Black Morgan & Cain, PC
LBMC Technologies, LLC
LBMC Employment Partners, LLC
LBMC Strategic Staffing, LLC

LBMC Investment Advisors, LLC
LBMC Planning Services, LLC
LBMC Managed Security Services, LLC

Mr. Cain has diversified experience with a range of industries including healthcare, manufacturing, distribution, services, restaurants, and many others. He frequently consults on business matters with closely held businesses and their owners. He often works with clients in connection with the acquisition and sale of businesses. His previous experience includes practicing with a national firm.

Mike serves on the Boards of the Nashville Entrepreneur Center, the Nashville Capital Network, and on the Lead Investor Council of Partnership 2020. He also has served as president of the Tennessee Society of CPAs and the Leading Edge Alliance, a worldwide association of large regional accounting and consulting firms.

Today's session

- Overview
- Financial Considerations
- Human Resource Considerations
- Questions

LBMC Overview

- Largest regional Accounting and Business Advisory firm in Tennessee
 - 4th largest in Southeast
 - 50th largest in U.S.
- 3 offices - Nashville, Knoxville, Chattanooga
- 400 employees
- 5,000+ clients
- Family of Companies
 - Lattimore Black Morgan & Cain, PC
 - LBMC Technologies, LLC
 - LBMC Employment Partners, LLC
 - LBMC Strategic Staffing, LLC
 - LBMC Investment Advisors, LLC
 - LBMC Planning Services, LLC
 - LBMC Managed Security Services, LLC



Received the NEXT AWARDS 2011
Entrepreneur Partner award by
Nashville Entrepreneur Center.



What's important in building a business?

- Identifying a need in the marketplace
- Assembling the resources needed to fill the need
- Getting customers
- Serving customers

But - It takes a strong back office infrastructure to sustain a business.



Two big mistakes entrepreneurs make:

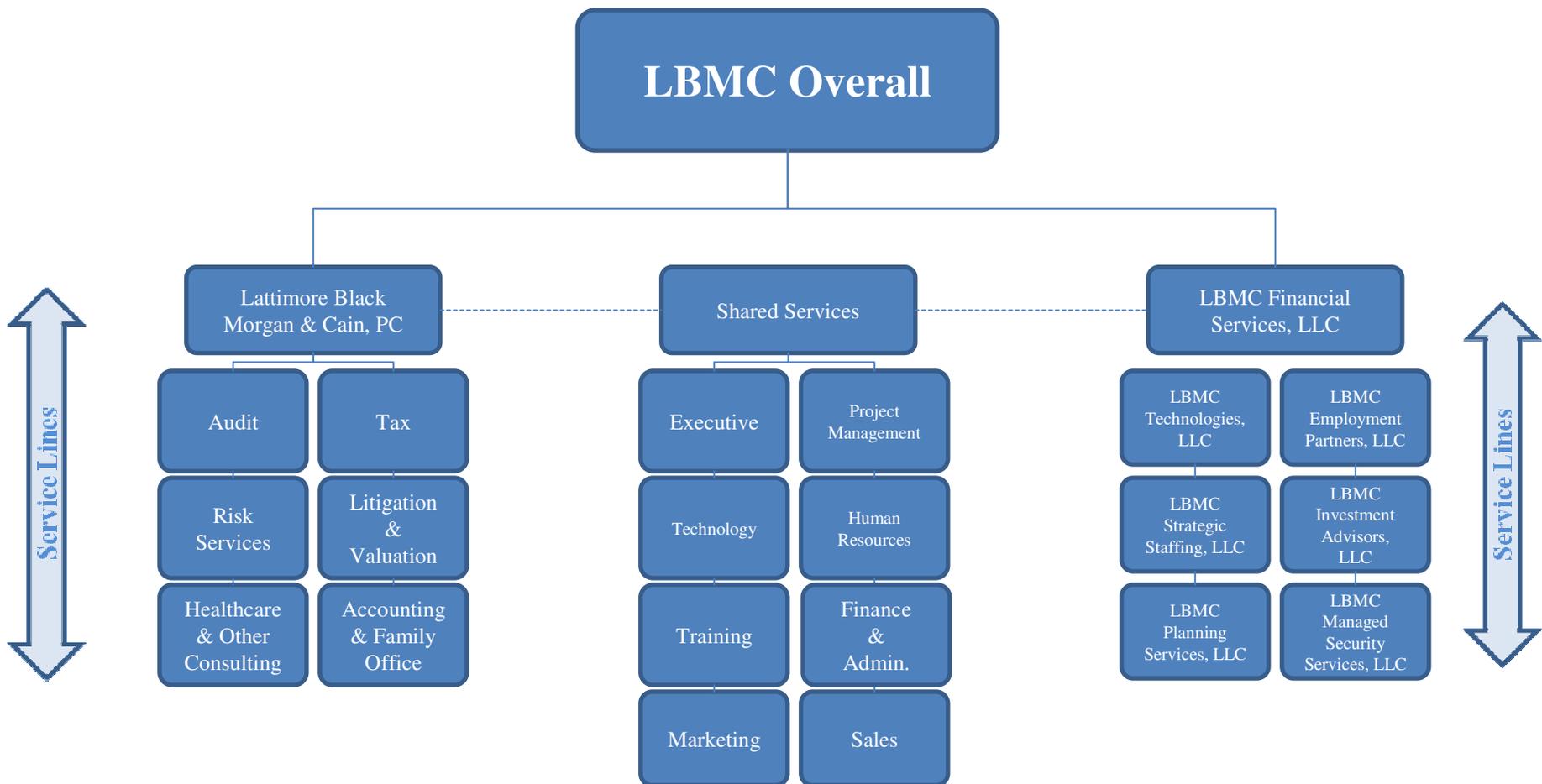
1. Ignoring the need for a strong back office, no matter what stage of business you are in.
2. Trying to do it all yourself to “save” money.



What we know...(because we've been there!)

- **Three back office areas will zap your time**
 - Accounting/Financial
 - People/Human Resources
 - Technology
- **What you need to focus on most**
 - Getting Customers
 - Serving Customers





What keeps a small business up at night?



In the back office, what are you trying to accomplish?

- Get the information you need to efficiently and effectively support and manage your business.
- Comply with legal and regulatory requirements.



Financial

Financial considerations touch everything.

•Forecast

- Start with a business plan. What are you trying to do?
- Use a “buildup” approach.
- What will it take to be in this business?
 - Costs
 - People
 - Facilities
 - Equipment
 - Sales
 - Service/Production
 - Outside professionals
 - Revenues
 - Research – Market need / Market size / Competitors / etc.
 - Expectations on timing and needs for ramp-up
 - Timeframe for cash conversion
- Know your “nut” and your “burn rate”.
- “It always takes longer and costs more.”
- Resources:
 - CPAs
 - Entrepreneur Center
 - Friends/Investors



Financial (continued)

- Funding – You'll need to get some money.
 - Equity:
 - Personal savings
 - Friends and family
 - Angel investors
 - Venture capital/Private equity
 - Debt:
 - Banks
 - Leases
 - Vendor terms



Financial (continued)

- Annual Budget
- Financial Reporting
 - Monthly and Annual Financial Statements
 - Needs will Vary depending on the Users
 - Management Team
 - Investors
 - Lenders
 - Tax authorities
 - Needs to Consider Entire Picture
 - Balance Sheet
 - Income Statement
 - Cash Flow
 - Your specific KPIs
 - Compare to budget and to prior year



Human Resources

With Human Resources, you're dealing with a myriad of issues and objectives:

- Compliance with all legal requirements:

- Wage & Hour
- Payroll taxes
- COBRA
- Unemployment
- FMLA

- Risk Management:

- Employment Handbook
- Employment Practices Liability Insurance (EPLI)
- Workers' Compensation

- Attracting and retaining people:

- Recruiting
- Employee Relations
- Employee Benefits

•**“You don't know what you don't know.”**



Total Human Resources Solution



Human Resources (continued)

What is a PEO?

- PEO stands for Professional Employer Organization.
 - A PEO involves a co-employment relationship.
 - The Company still stays the “worksite” employer.
 - The PEO becomes the administrative co-employer of a business, taking the responsibility for all human resource functions of the business.
- This model is all-inclusive all for one monthly, per-person fee.
- “Using a PEO is like having an HR department. You have a team of HR people, but only pay a portion of the expenses.” -PEO client



Human Resources (continued)

PEO Services

- Administrative Services – Payroll and Payroll Tax filings, Unemployment Cost Control, 401(k) Retirement Plan, COBRA Administration, Section 125 Plan Administration, FMLA Administration
- Human Resource Services – HR Audit, Employee Handbook, Handling Employee Relations issues and Regulatory Compliance, HR Toolkit, Employment Practices Liability Insurance, dedicated HR Account Manager
- Employee Benefit Services – Access to Group Life and Health Benefits; Supplemental Life, Dental, Vision, Short-Term Disability, Long-Term Disability, Accident and Critical Care Insurance; Workers Comp



Human Resources (continued)

Other HR Needs and Alternatives

- Human Resources Outsourcing (HRO) –the coordinator and manager of selected HR processes. Flexible to allowing a tailored package to fit each situation.
- Employee Benefits Services – Brokerage services providing competitive, tailored benefits packages to help attract and retain employees.
- Payroll Services – Complete payroll solutions including Payroll Processing, New Hire Reporting, Tax Filings & W2s, Tax/Agency Remittance all for a competitive monthly head count fee.
- Payroll Tax Outsourcing & Consulting – Payroll Tax compliance and consulting to companies who are processing payroll in-house or with another vendor.



Financial / Human Resources / Technology

How do you deal with it all?

- Early stage - Outsourcing very attractive in most cases.
- Growth - Certain functions will begin to move in-house.
- Later Stage - More and more functions in-house, but many large companies continue to outsource specific functions.

Above all, deal with it!



Questions?

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Understanding Contracts

A Framework for Entrepreneurs

Steve Wood

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What is a contract?

- Exchange of a promise by one party for something from the other party, generally:
 - a payment,
 - a promise to pay,
 - a promise to do something else, and/or
 - a promise not to do something
- Can be oral, but always should be written
- Need not be formal (e-mail exchange can create a contract), but in many cases it should be
- Online click-through agreements generally are binding contracts
- Beware of contracts made unintentionally – orally or by e-mail

Framework

- Key provisions
 - The basic business deal
 - Allocating the risks of unknowns
 - Contract mechanics
- Important considerations
 - Breach
 - Indemnification
 - Signature

Key provisions – the basic business deal

- The promise(s)
 - Who
 - What
 - When
 - Where
 - How
- Payment terms (or sometimes how the pie will be split)
- Term of agreement
 - Expiration
 - Renewal
 - Termination

Key provisions – allocating the risks of unknowns

- Representations – facts a party is relying upon to enter contract
- Warranties – circumstances that, if not true later, will allow a party to terminate and/or give a party a some other right
- Limitation of liability – if things go awry, what's the worst that can happen to a party (and conversely, what's the most the other party can get)?
 - Consequential damages
 - Direct damages
 - Carve-outs

Key provisions – contract mechanics

- Exhibits; statements of work (SOWs)
- Definitions
- Dispute resolution
 - Procedure – escalation; mediation; arbitration vs. court
 - Governing law and venue
 - Attorney fees
- Notices
- Amendment
- Entire agreement (“integration”)
- Assignment

Breach

- Types of breach
 - Breach of covenant – failure to fulfill promise
 - Breach of representation – things weren't as represented when parties entered contract (sometimes rises to level of fraud)
 - Breach of warranty – things didn't go as one party said they would
- Cure periods
- Remedies for breach
 - Monetary damages (subject to limitations of liability)
 - Injunctive relief – compelled performance

Indemnification

- Indemnification is a promise to make the other party whole if someone else sues that party (i.e., protection against third-party claims)
- Usually includes a promise to defend the suit, which can be very expensive
- Indemnifying party should have the right to control the defense
- Indemnifying party should have the right to settle the claim, but only if it doesn't impose obligations on the other party
- Indemnification obligations often excluded from limitation of liability, so potential to bankrupt indemnifying party
- Many nuances to indemnification – don't try this at home

Signature

- Contract is intended as obligation of company, not of the individual owners or employees
- Absolutely critical to sign contract in capacity as officer of company
 - Be sure company name is indicated above signature line
 - Be sure signer's title follows his or her name under the signature line

XYZ Software, Inc.

By: _____
Janet Smith, President

- Failure to do so can give rise to personal liability for any breach by the company (basically, you become a co-signer for the business)

Frequently encountered clauses (FECs)

- Definition of “confidential information” in NDA
- Term/termination of NDA
- Non-competition in employment, consulting, or acquisition context
- Non-solicitation of customers and/or employees
- Infringement indemnification (or non-infringement warranty)
- “Work made for hire”
- Disclaimers of implied warranties (USUALLY IN ALL CAPS)
- License granting language

Contact Us

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EntrepreneurCenter

What We Do

We Assist Entrepreneurs By Providing...

Access!

- To have their idea screened & heard
- To seed capital
- To expertise via credible, capable, engaged mentors
- To an expanded knowledge network
- A supportive community / environment

EntrepreneurCenter

Entrepreneurs come in all ages, shapes, sizes, and colors...

A group photograph of approximately 15 diverse individuals of various ages and ethnicities, dressed in professional or business-casual attire, standing together against a white background.

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Entrepreneurship is **Hard!**

BUSINESS-PLAN

- Most startup companies fail.
- Even those entrepreneurs who have achieved success have stories of challenges and failures.

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What Investors Want

Investors realize that all new businesses must walk through the **valley of death** prior to becoming a Viable Business.

The ability of a business venture to pass through this valley in a predictable and timely way determines its ultimate viability.

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Essential Ingredients for Success

- Process for Vetting the Idea with Potential Customers
- Identifying Engagement & Growth Opportunities
- Assistance by Seasoned / Successful Entrepreneurs
- Business Modeling
- Seed Capital
- Training and Mentoring
- Startup Tools & Resources

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The "4M" Framework for Business

4M's:

- ✓ Management
- ✓ Model
- ✓ Market
- ✓ Money
- ✓ **Momentum**

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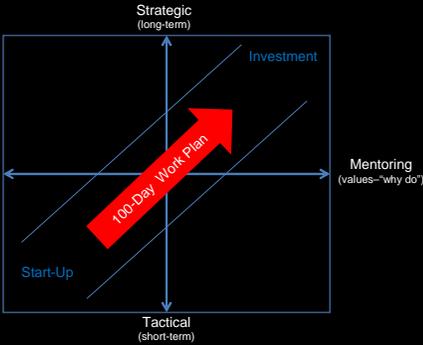
So... how does this make money?

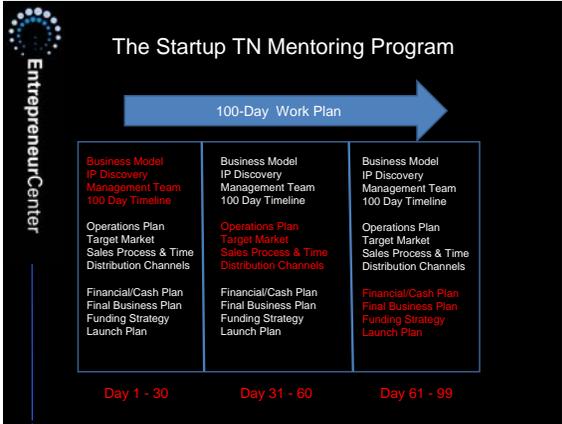


If the entrepreneur's shiny object doesn't make money, then it is art, not a business...

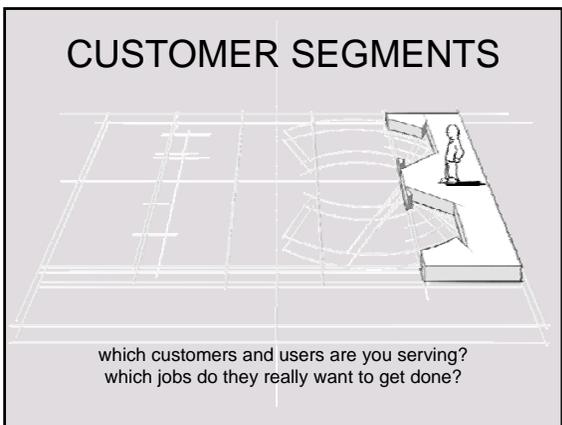
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The Mentor Matrix

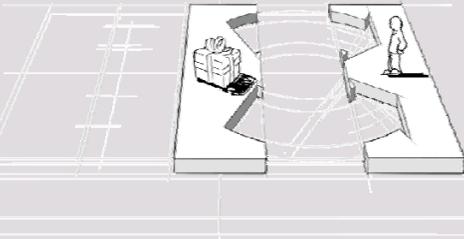




The Business Model:
Any company can be described in 9 building blocks

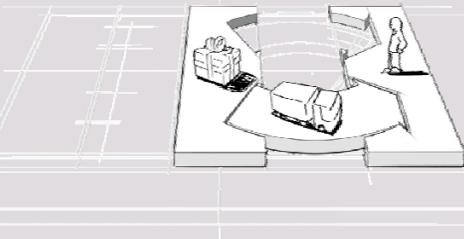


VALUE PROPOSITIONS



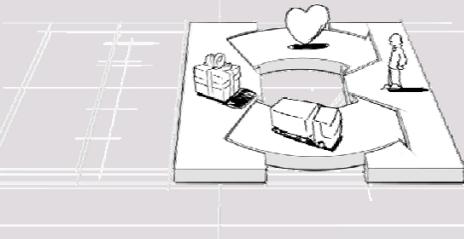
what are you offering them? what is that getting done for them? do they care?

CHANNELS



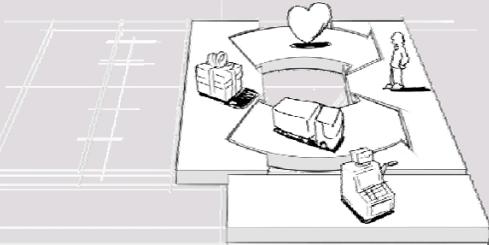
how does each customer segment want to be reached?
through which interaction points?

CUSTOMER RELATIONSHIPS



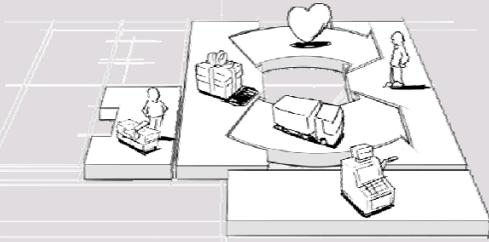
what relationships are you establishing with each segment?
personal? automated? acquisitive? retentive?

REVENUE STREAMS



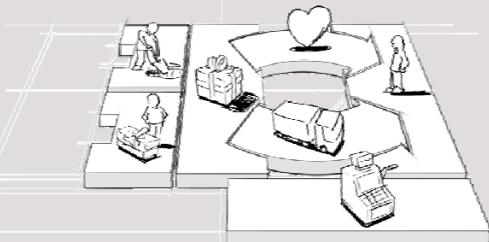
what are customers really willing to pay for? how?
are you generating transactional or recurring revenues?

KEY RESOURCES



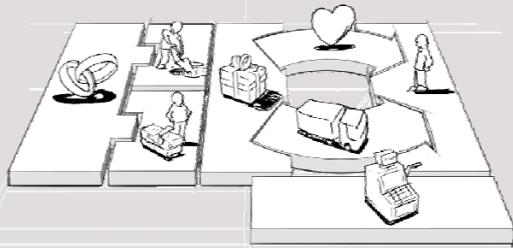
which resources underpin your business model? which
assets are essential?

KEY ACTIVITIES



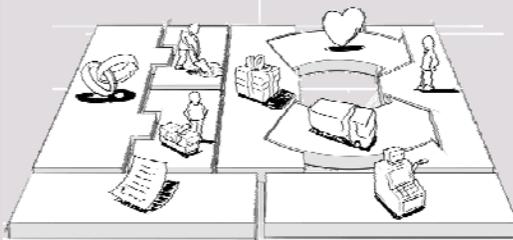
which activities do you need to perform well in your
business model? what is crucial?

KEY PARTNERS

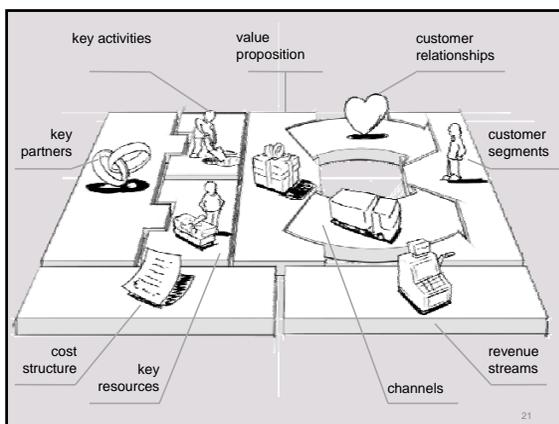


which partners and suppliers leverage your model?
who do you need to rely on?

COST STRUCTURE



what is the resulting cost structure?
which key elements drive your costs?



BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

Top Ten Ways to Reduce the Risk of Employment Litigation

Presented By

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The Countdown Begins at the Beginning

10. Make Sure Your Employment Application Is In Compliance With State and Federal Laws

- Arrest / convictions
- Disability
- Verification of truth / accuracy

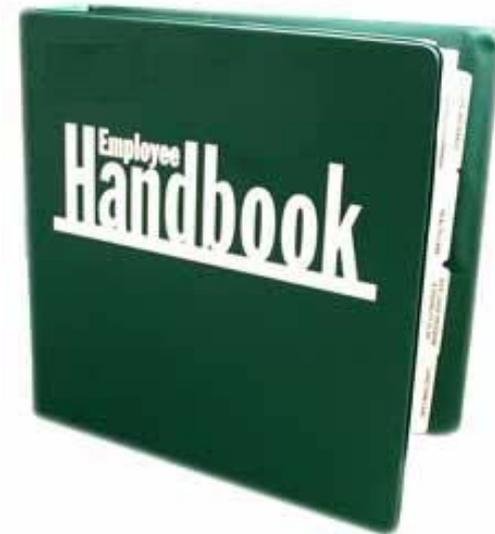
9. Set Up A Legal Process For Background Checks

- Hire an agency!
- Fair Credit Reporting Act
- Use of convictions



And once you have employees . . .

8. Create an Employee Handbook with AT LEAST the following:
 - At will statement
 - Anti-harassment / discrimination policy
 - Rules for workplace behavior
 - Explanation of benefits
 - Complaint procedure



** DO NOT INCLUDE POLICIES YOU WON'T FOLLOW! **

It's the Little Things That Cost Big Bucks

7. Make sure employees are classified correctly for wage and hour purposes and pay them accordingly.
 - Non-exempt employees must keep records of all hours worked and must be paid minimum wage and overtime
 - Exempt employees must meet certain legal tests to be exempt from minimum wage and overtime.



Who Is an Employee?

6. Understand the difference between employees and independent contractors – obligations to employees:

- Withhold taxes
- Covered / protected by MANY employment laws (Title VII, FMLA, ADEA, ADA)
- Workers' compensation
- Unemployment benefits

5. Temporary employees are still YOUR employees for the purpose of many employment laws like harassment, discrimination, and retaliation



Key Lessons to Learn

4. Respond quickly and appropriately to employee complaints about possible employment law violations and understand they have a legally protected right to complain.
 - Discrimination / Harassment
 - Wages
 - Safety Issues



Key Lessons to Learn

3. Do not wait for the straw that broke the camel's back before taking action – Investigate!
 - Prompt
 - Thorough
 - Appropriate Remedial Action
 - Confidential



Don't Be Penny Wise and Pound Foolish

2. Train your managers on employment laws and leadership skills

- Recognize harassment, discrimination, request for accommodation
- Know reporting / action is required
- Document discipline
- Be accurate in performance evaluations

1. Develop a relationship with an EMPLOYMENT lawyer.



Questions



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Top Ten Ways to Reduce the Risk of Employment Litigation

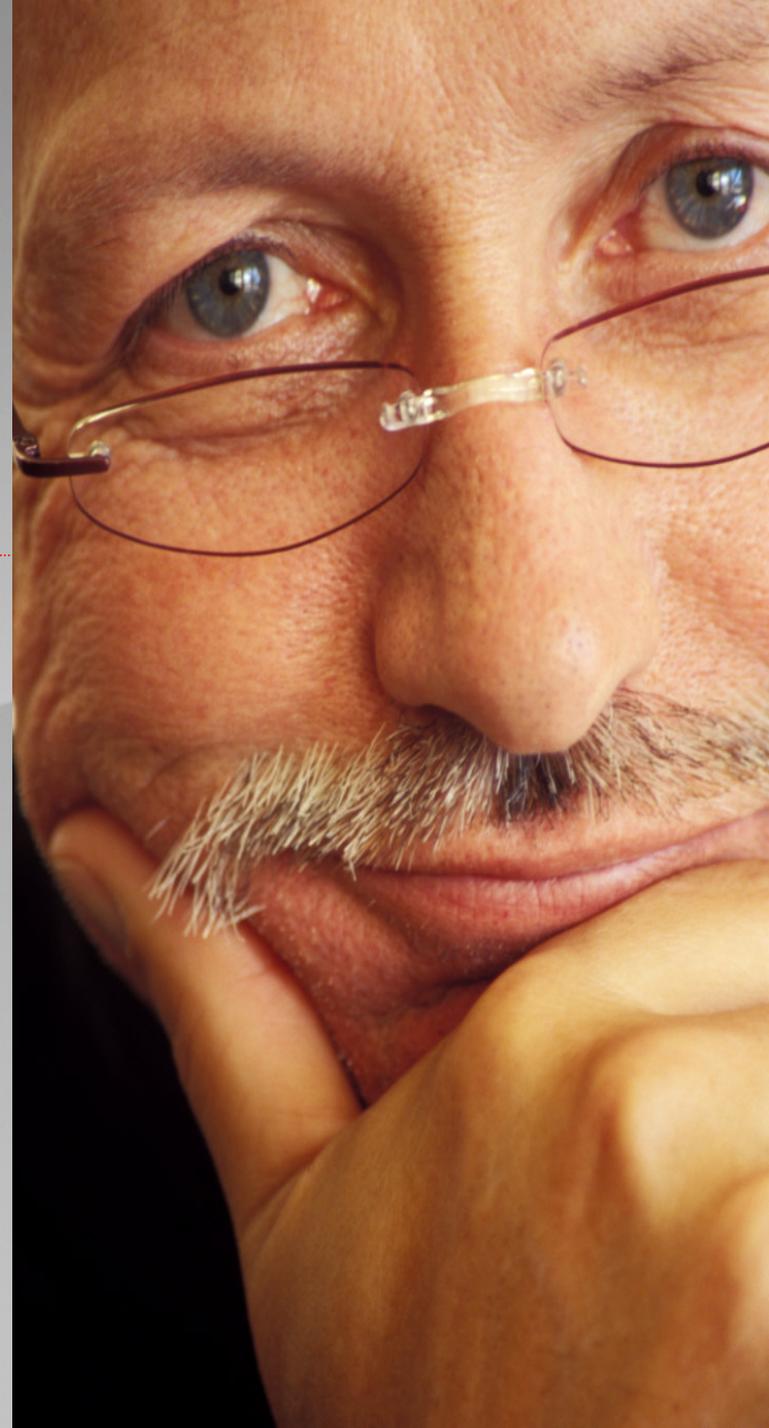
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Federal and State Tax Planning, Compliance, and Tax Reform

Emerging Company Boot Camp

Scott D. Smith
Washington, D.C. / Nashville

November 16, 2011

BAKER DONELSON
BEARMAN, CALDWELL & BERKOWITZ, PC

EXPAND YOUR EXPECTATIONSSM

Discussion Topics

- LLC choice of tax form
- Interests for services; guaranteed payments
- Earn-out payments
- State tax jurisdiction and other trends
- Other audit focus areas
- Foreign disclosure and reporting
- Debt, deficits and tax reform

LLC Choice of Federal Tax Form

- Multi-member LLC
 - Default: Flow-through (partnership) federal tax treatment
 - Election: "C" or "S" corporation
- Single member LLC
 - Default: Disregarded entity
 - Election: "C" or "S" corporation
- Other important tax considerations
 - Tax deductions, losses, and credit utilization – Special allocations
 - Multistate income taxation
 - Single member LLCs and federal excise taxes and state transactions taxes

Guide

	C corporation	S corporation	LLC	Partnership
Level of federal income tax	Entity	Flow-through	Multi-member: flow-through (unless make C or S corp. election) Single member: disregarded (unless make C or S corp. election)	Flow-through (unless make C corp. election)
Number and type of owners	1 or more; no restrictions	1-100; other corporation, nonresident alien, certain trusts are ineligible	2 or more (multi-member LLC); no restrictions Single member LLCs and series LLCs	2 or more; no restrictions
Subsidiary corporations	Yes	Yes, if "QSub" or a disregarded single member LLC	Yes	Yes

Guide

	C corporation	S corporation	LLC	Partnership
Classes of ownership interests	One or more classes of stock permitted	Only single class of stock permitted	One or more types of interests permitted	One or more types of interests permitted
Sale of ownership interest	Capital gain or loss (ordinary loss if section 1244 stock)	Capital gain or loss (ordinary loss if section 1244 stock)	Ordinary income to extent of unrealized receivables and inventory; remainder is capital	Ordinary income to extent of unrealized receivables and inventory; remainder is capital
State income taxes	Separate return or unitary combined report	Some states treat as taxable entity; nonresident shareholder tax withholding or composite tax filings required/permitted	Some states treat as taxable entity; nonresident member tax withholding or composite tax filings required/permitted	Some states treat as taxable entity; nonresident partner tax withholding or composite tax filings required/permitted

Guide

	C corporation	S corporation	LLC	Partnership
Guaranteed payments to owners	No	No	Yes (if taxed as a flow-through)	Yes (if taxed as a flow-through)
Special tax allocations of income, deduction, loss or credit	No	No	Yes (if taxed as a flow-through)	Yes (if taxed as a flow-through)
Distributions	Taxable as ordinary income to shareholder; qualifying dividends (capital gain rate)	Generally not taxable to shareholder to extent of stock basis	Generally not taxable, with exception of certain distributions	Generally not taxable, with exception of certain distributions

LLC Interest for Member's Contribution of Services

- The scenario
- General rule: tax-free contribution under IRC § 721
- Taxable receipt of a capital interest
 - Capital interest is property received for services provided and is treated as taxable compensation
- Non-taxable receipt of profits interest, if -
 - Safe harbors are satisfied - IRS Rev. Proc. 93-27 and Rev. Proc. 2001-43

Guaranteed Payments to Members

- Defined (fixed, not guaranteed) – a payment made by a partnership or LLC to a partner/member for services that is determined without regard to partnership/LLC income
- “Partner-capacity” transactions
 - Included in partner’s/member’s ordinary income when partnership/LLC deducts or capitalizes the payment
- “Non-partner-capacity” transactions
 - Different timing of recognition

Earn-Out Payments

- Contingent future payments (earn-outs) are an important component of taxable business acquisitions and seller's tax treatment
- Installment method tax treatment
 - Presence or absence of cap on payments
 - Earn-out term
- Sale of S corporation with IRC § 338(h)(10) election

State Tax Jurisdiction

- Is the physical presence requirement limited to sales and transactions taxes?
 - Trend of economic presence “nexus” (trademark licensing, franchisors, financial services)
- Internet and mail order sales
 - “Amazon laws” – NY, AR, CA (delayed), CT, IL, NC, RI
 - California and Tennessee agreements with Amazon.com
- Independent contractors
- Travelling sales and other personnel
- Service providers and remote services

Sales and Transactions Taxes

- Software – custom and prewritten
 - Trend: both types taxable (TN; SSUTA)
 - E-delivery: Exempt (e.g., CA, FL, NJ) v. taxable (TN; SSUTA)
 - Other SSUTA States: AR, GA, KY, NC, WV
 - TN DOR: Consulting services performed as part of sale of software are also taxable (unbundle software services)
 - TN DOR Letter Ruling 11-30 – industrial processing exemption and software
- Mixed transactions (nontaxable services and taxable sale of TPP)
 - “True Object Test”: TN (*Prodigy Services*)
 - Services cost included in taxable consideration for sale of TPP (e.g., TX)
 - Technology transfer – CA (*Nortel*)

Sales and Transactions Taxes (con't.)

- “Specified Digital Products” – TN/SSUTA v. NY
- Cloud Computing
 - “software as a service”?
 - Cloud-hosted software as taxable TPP – NY, MA, MI, UT, WA
 - Cloud-hosted software as data processing – TX (taxable; data processing service not taxable in TN)
 - Cloud-hosted software as nontaxable E-delivery – CA, FL

Other State Tax Considerations

- Apportionment of services income
- Qualification and utilization of income tax credits and incentives
- State tax amnesties and voluntary compliance programs

Worker Classification

- Employee or independent contractor?
 - IRS 20 factor test
 - Control
 - Other questions
- IRS audit initiative – 6,000 employers in three years (worker classification, executive compensation, fringe benefits)
- IRS Voluntary Worker Classification Settlement program
- State audit initiatives

Other IRS (and State) Tax Audit Focus Areas

- Payment of fees to a related party
 - *Weekend Warrior Trailers, Inc.* – management fees paid by S corp. to related S corp.
 - *Fuhrman* – management fees paid by single member LLC to wholly owned C corp.
 - State income tax legislation and audit focus area
- Reasonable compensation
 - Objective factors analysis
 - Return on equity analysis
- Codification of economic substance doctrine
 - IRS guidance
 - Related penalty

Foreign Disclosure and Reporting

- Report of Foreign Bank and Financial Accounts (“FBAR”)
 - Accounts targeted
 - U.S. citizens and residents with direct or indirect financial interest in, or signature authority over, financial account(s) with foreign financial institution(s) in aggregate amount of \$10,000 at any time during the taxable year.
 - Penalties
 - IRS 2011 Offshore Voluntary Disclosure Initiative
- Foreign Account Tax Compliance Act (“FATCA”)
 - Assets targeted
 - U.S. citizens and residents with \$50,000 in aggregate amount of interest(s) in “specified foreign financial assets”
 - Tax withholding (30%) on payments to “FFI” or “NFFE,” unless FFI or NFFE enters agreement with Treasury to report and disclose U.S. asset accounts
 - Effective for payments to FFIs starting Jan. 1, 2013 and to NFFEs starting Jan. 1, 2014
 - NFFE: Privately held businesses, professional services firms, and other non-publicly held entities not engaged in banking or investment management

Today's Math Problem

- Public Debt as of 10/31/11 = \$10.256 trillion (67% of GDP; 98% of GDP if include intragovernmental debt holdings (SSA))
- Spending on Social Security, Medicare, Medicaid and interest on national debt will swallow every dollar of tax revenue by 2025
- Annual interest on national debt projected to be \$1 trillion by 2020
- Discretionary spending is only 16% of budget
- Deficit Reduction Committee – must achieve \$1.2 trillion deficit reduction over 10 years or else across the board cuts (*cf.* "Gang of Six" \$4 T, Bowles/Simpson \$6 T)

Tax Reform – On the Table?

- Corporate and individual rate reductions?
- “Flattening” of the Code to “pay for” rate reductions?
- Energy tax credits and subsidies (renewables to oil and gas)?
- Change taxation of carried interests?
- Limit or means-test home mortgage interest deduction?
- Eliminate tax-free treatment of contributions to health care plans?
- Eliminate capital gains/qualifying dividends special tax treatment?
- Permanent R&D deduction?
- Shift from worldwide to territorial tax regime?

Contact

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