REMBOLT LUDTKE & BERGER LLP
Attorneys at Law

The COMPASS

SERVING ALL POINTS OF NEBRASKA AND THE MIDWEST

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Rembolt Ludtke & Berger LLP
Practice Groups

Last year, the lawyers of Rembolt Ludtke & Berger LLP conducted a major retreat to examine how we serve our clients and how we should deliver the highest quality legal services. After several hours of discussion, we organized into two principal practice groups - Business Services and Litigation. In this and the next issue of ***The Compass***, the Business Services Section addresses the life cycle of a significant business transaction - the purchase or sale of a business.

The Business Services Section includes 10 major areas of practice. These subgroups focus on the specialties and areas of law that we offer to our clients. These subgroups, and the Practice Group Leader of each, are the following:

Business Transactions/Entity Formation and Compliance: Alan D. Slattery
Estate Planning/Probate: James E. Rembolt
Creditors' Rights/Bankruptcy/Financial Institutions: Rick D. Lange
Labor/Employment: Mark A. Fahleson
Franchising/Intellectual Property: Timothy L. Moll
Real Estate: Alan D. Slattery
Taxation: Timothy L. Moll
Administrative/Government Relations/Telecommunications: Timothy F. Clare
Municipal Finance/Bonds/Securities Regulations: Kevin C. Siebert
Agricultural Law: Kevin C. Siebert
Insurance Regulatory/Insolvency: Robert L. Nefsky

Other members of the Business Services Group are David A. Ludtke, John H. Binning, Britt J. Ehlers, Michelle S. Kugler and Troy S. Kirk. All of our business law attorneys participate in more than one of these subgroups.

A WELL RUN BUSINESS IS ALWAYS STRUCTURED FOR SALE

Even if a company owner has no plans to sell it, a well run company is always structured for sale. A knowledgeable buyer will pay much more for a business that is organized and well run, and a business owner will generally achieve a greater investment return on such a business.

One of the best ways to determine if a business is well run is to look at it through the eyes of a knowledgeable buyer who is conducting a preliminary review of the business.

Initial Impressions Are Important

Initial impressions are very important, not only to a potential buyer, but also to customers or clients of a business. The initial impression is determined by a number of things, such as:

- What is the general reputation of the company?
- Are the business premises clean, neat and efficiently organized? Appearance is important. A buyer or customer who sees dirty surroundings, peeling paint, accumulated trash and unorganized piles of files or inventory likely forms the impression that the company is disorganized and unprofitable, even if it is actually growing so fast it can't keep up.
- Are employees friendly, motivated and knowledgeable?
- Do the company's printed materials, such as business cards, brochures, letterhead and sales materials, describe its products or services in a professional manner?
- Does the company use available technology?

Due Diligence

Before proceeding to buy a business, a knowledgeable buyer will conduct "due diligence," which is a detailed examination of all aspects of the business. Due diligence is comparable to an "x-ray" of the business. The nature of the business, size of the transaction, financing requirements and other considerations determine the extent and depth of the due diligence. The following are some of the items that are commonly examined.

- The company's organizational documents, minutes and ownership records, including compliance therewith and authority to authorize major transactions.
- Voting trusts, irrevocable proxies, shareholder agreements or other agreements restricting the transfer or other rights pertaining to the company's ownership.
- The state or states in which the company is legally qualified to do business and a description of its activities in any other states.
- Financial statements (preferably audited) and tax returns for the past 5 years.
- The tangible property (vehicles, machinery, equipment, furniture, supplies, tools, dies, jigs, molds, etc.).
- Legal descriptions, surveys and title insurance policies for all real property.
- The intellectual property (patents, trademarks, copyrights, trade names, etc.) owned by the company, together with a description of any infringement claims or actions relating to such property.
- Leases of real or personal property.
- Description of the nature and amount of the company's backlog of unfilled purchase orders; the names and addresses of the purchasers and the extent that the backlog is under firm commitments.
- Major customers or clients, with summaries of sales made to each during the previous year, including any known intent of a customer or client to materially alter the amount of business it is presently doing with the company.
- Investments owned by the company.
- Subsidiaries or affiliates of the company.
- Any actions by the company to recover monies due or damages sustained.
- Debts and liabilities.
- Loan or similar agreements with lenders.
- Pledges, conditional sales, mortgages, assignments or security agreements of the company.
- Threatened or actual claims, demands, litigations, arbitrations, or administrative or other proceedings involving the company.
- The past and present toxic waste disposal procedures, including compliance with permits and laws.
- Any actual or potential liabilities not appearing on the company's financial statements.
- The company's bad debts and any related agreements or arrangements.
- Whether the company has any net operating or capital losses that may be carried forward.
- Agreements and licenses the company has entered into with others relating to inventions, patents, trade secrets, confidential information (including customer lists), trademarks, trade names and covenants not to compete.
- Employment contracts, collective bargaining agreements, pension, profit-sharing, stock options or other agreements or arrangements providing employee benefits or remuneration.
- Distributor's or manufacturer's representative or agency agreements and any output or requirements agreements.

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- Names of any person holding a power of attorney for the company and the purposes for which it was given.
- List of all banks in which the company is maintaining accounts, credit arrangements, or safe deposit boxes; and all persons authorized to withdraw from such accounts and boxes, or to borrow under such credit arrangements.
- The names, addresses and components furnished by the main suppliers of the company, together with copies of all associated contracts or agreements.
- Insurance policies concerning the business or properties of the company, including the name of the insurance company, type of coverage, amounts of coverage and the names and addresses of the brokers or agents.
- List of employees, including names, position, annual compensation and fringe benefits.
- Product warranties, guaranties and other obligations given by the company in connection with its products or services.
- Previous claims and litigations involving the company or its products or services.
- List of any agents and representatives of the company, including the annual compensation paid to each.
- Any employee manual and/or description of the company's general personnel policies.

Even if a company is not for sale, a good manager generally continually evaluates the performance of the company with respect to the items listed above, and maintains organized records regarding such items.

- James E. Rembolt, Esq.

CONFIDENTIALITY AGREEMENTS

Are you thinking about buying a business? Or maybe selling one? Or perhaps you have designed a better mousetrap, and you want to begin discussions with a local fabrication facility about making the product. Or you have met a distributor of widgets who wants to add your mousetrap to his line of products but you both need more information before you can agree to the terms of a possible relationship?

What is the first pre-contractual document that you will likely need to sign in each of the scenarios described above before any serious discussions can take place? Before you or the other prospective parties to your transaction will want to divulge any information, you will want assurance that it will be protected in the event the purchase, the sale, or the manufacturing or distribution arrangement falls through.

The most common way to protect your trade secrets, financial data, designs, original ideas, customer lists or other confidential information, is through the use of a well drafted Non-Disclosure, Confidentiality, or Confidential Disclosure Agreement.

The first and most important job of the Confidential Disclosure Agreement is to describe, or categorize, the kinds of information that the parties will agree to treat as confidential. In addition, the Agreement will say whether the information will have to be marked or labeled "Confidential" or "Secret", in order to come within its protections. The obvious limitation of such a requirement is that much important, even crucial, information may be imparted orally, or in some other form that cannot easily be "labeled." Other such information may simply be overlooked or forgotten.

Just as important, the Agreement will outline the conditions under which information can lose protection or fall outside its purview. The Agreement should also describe the people who may have access to the information and on what basis, as well as what the penalties for inappropriate disclosure of the information will be.

Typically, the Agreement will permit involuntary disclosure of the information under certain circumstances, such as under court order. And just as important, the Agreement will describe, in some detail, what should happen to the information in the event the transaction is not successfully or amicably completed. The Agreement will also typically contain a provision extending its protections for a period of time, often several years, after the Agreement is terminated. This is especially important when transactions fail to consummate.

When a business is bought or sold, the Confidentiality Agreement may well contain two other provisions not usually seen in other contexts. First, there may be a "standstill" clause, which requires the parties to forego parallel discussions or negotiations with third parties while the primary negotiations are underway. Second, the Agreement will often prohibit the parties from making offers of employment to the other party's personnel, both during the course of the negotiations, and for some extended period afterward. Finally, if one of the parties to the transaction is a publicly traded entity, there may be special protections against hostile takeovers and insider trading in the stock of one or both of the parties.

Since the negotiation and implementation of the Confidential Disclosure Agreement occurs so early in the relationship between the parties, it often becomes the flashpoint for tensions that may arise later in the negotiations. This can actually prove useful to the savvy negotiator who will see clues to future areas of sensitivity. All too often, however, parties either fail to pay attention to the details of the Agreement, or, at the other end of the spectrum, permit the tensions that arise during the negotiations to derail the transaction before it ever has a chance to get off the ground. Either way, the valuable functions of the Confidential Disclosure Agreement are lost.

If you are thinking of buying or selling a business, or entering any other transaction that would require you to divulge valuable, confidential information, you need a Confidential Disclosure Agreement. Contact one of the professionals at Rembolt Ludtke & Berger LLP to assure your interests are protected.

- Penny J. Berger, Esq.

Business Services Practice Group
of
Rembolt Ludtke & Berger LLP

James E. Rembolt

Jim is a recognized authority in estate planning and probate administration, and has taken a very active role in helping to provide opportunities for continuing education in these areas. He graduated with distinction from the University of Nebraska College of Law, and has spent his professional life with our firm. Jim has held leadership roles with many community organizations, and recently completed a term as president of the Nebraska State Bar Association.

Penny J. Berger

Penny earned her A.B. from Barnard College, her M.A. from Columbia University and her J.D. with distinction from the University of Nebraska College of Law. She has recently achieved membership on the American Arbitration Association Panel of Neutrals. Penny has taken active roles in various community organizations, including serving as president of the Lincoln City Library Foundation Board.

Alan D. Slattery

Alan earned his B.A. from Creighton University, and his J.D. with distinction from the University of Nebraska College of Law, where he was Assistant and Associate Editor for the Nebraska Law Review. Alan has been active in the local business community, serving in the Chamber of Commerce and various City task forces and committees, all of which enhances his practice with business owners.

Robert L. Nefsky

Bob graduated with distinction from the University of Nebraska College of Law, where he was an assistant editor of the Nebraska Law Review. He has been a leader in the arts community, serving in leadership roles in various fine arts organizations, and is currently serving as the President of the Nebraska Art Association.

Kevin C. Siebert

Kevin joined Rembolt Ludtke & Berger LLP in 1983, after receiving his B.S. and J.D. degrees, with high distinction, from the University of Nebraska, where he was the Executive Director of the Nebraska Law Review. He was an adjunct Professor at the University of Nebraska College of Law, and has lectured at seminars and continuing education programs around the state, and contributed articles to several publications.

Rick D. Lange

Rick's practice in creditor's rights has led him to his current position as a Chapter 7 Panel Bankruptcy Trustee for the United States Bankruptcy Court for Nebraska. He received his B.S. and his J.D. with distinction from the University of Nebraska, where he was Executive Editor of the Nebraska Law Review. Rick has also been a regular educational speaker and has assumed leadership positions with several local non- profits.

Timothy F. Clare

Tim is a frequent speaker in the Lincoln area on estate planning issues, and appears regularly before the Public Service Commission. He joined the firm upon graduating from the University of Nebraska College of Law in 1993. Tim also holds an M.B.A. from Creighton University, and his education and experience assists him in helping business owners. Tim has also taught business courses as an adjunct professor at the University of Nebraska.

Timothy L. Moll

Tim received his B.A. from Concordia College and his J.D., with highest distinction, from the University of Nebraska College of Law. He was the Managing Editor of the Nebraska Law Review and, after graduation, served as Chambers Attorney for The Honorable C. Arlen Beam of the Eighth Circuit Court of Appeals. Tim joined Rembolt Ludtke & Berger LLP in 1995. He has co-authored several published articles, and been an adjunct professor at the University of Nebraska College of Law.

Mark A. Fahleson

Mark received his B.S. and J.D., with high distinction, from the University of Nebraska. He joined Rembolt Ludtke & Berger LLP in 1997, practicing in the areas of labor and employment issues, telecommunications and utilities, and government relations. Prior to that date, Mark practiced law in Omaha and served as chief of staff/legislative director for a member of the U.S. House of Representatives. He has published several articles, is a frequent seminar speaker, and has been an adjunct professor at the University of Nebraska College of Law.

Michelle Shandera Kugler

Michelle earned her B.A. from the University of Nebraska and her J.D. with distinction from the University of Nebraska College of Law, where she was a member of the Order of the Coif. Michelle's business law and creditor's rights practice has focused most recently on transactional matters and on handling creditor's matters for a national lending company.

Britt J. Ehlers

Britt's work with employment law issues fits in well to his business-oriented practice. He is a frequent lecturer on various management-side employment and labor law topics. Britt received his J.D. magna cum laude from Washburn University School of Law, where he was Executive Editor of the Washburn Law Journal. He has been with the firm since 1999, and is active in several youth-oriented service agencies.

Troy S. Kirk

Mr. Kirk is a graduate of the University of Nebraska-Lincoln (B.S., with highest distinction, 1999) and the University of Nebraska College of Law (J.D., with distinction, 2002). He served as judicial clerk to the Honorable John F. Wright, Nebraska Supreme Court, from 2002 to 2003. Mr. Kirk's practice areas include entities formation and governance, employment law, and commercial transactions.

David A. Ludtke

David's accomplishments over his distinguished career have established him as one of this region's foremost authorities on tax law. He earned his B.A. from Harvard, and his J.D. magna cum laude from the University of Michigan. David taught at the University of Nebraska College of Law, has published numerous articles and books, and is a frequent seminar speaker. He has been with the firm since 1973.

John H. Binning

John has enjoyed a long and distinguished career in private practice, public service, and corporate settings. His previous positions include Nebraska Director of Insurance and CEO of a major insurance company. John enjoys a national reputation for his abilities in the areas of insurance and reinsurance arbitration and receivership. He has a number of published articles to his credit, and is a member of the American Arbitration Association National Panel of Neutrals.

LETTER OF INTENT EVIDENCES AGREEMENT ON MAIN POINTS

It is common for the buyer and seller of a business to enter into a letter of intent (sometimes called "memorandum of understanding" or "agreement in principle") as the first formal indication of their intent to proceed with the transaction. Some common reasons for using a letter of intent are:

- To assure to the parties that each is committed to proceeding with the transaction. Both parties may be reluctant to commit substantial time and resources to a transaction without such assurance.

- To memorialize agreement on the major terms of the transaction.

- To provide the buyer with an exclusive right to negotiate with the seller for a limited period of time. This prevents the seller from being able to shop the deal to others, or create an auction situation.

- To provide the seller protection from the buyer's misusing the seller's confidential information or raiding its employees. In many instances, the parties may be competitors and they may want protections in place in the event the transaction is not completed. In most instances, it is best that these assurances be contained in a separate confidentiality agreement executed by the parties prior to any discussions.

- To assist in gaining necessary approvals. Approvals may be necessary from boards of directors, investors, lenders, potential financiers, creditors or regulatory authorities. The letter of intent is useful as evidence of the proposed transaction when initially seeking such approvals.

The letter of intent is generally signed after the parties have reached agreement on the major terms of the transaction, but further negotiations and examination of the company (due diligence) by the buyer is required.

Common clauses in a letter of intent include:

- Whether the parties intend that the letter of intent is legally binding or merely an expression of their intent; or whether certain terms are legally binding while others are not.

- What will be purchased (such as assets, stock or other ownership interests) and what is excluded; whether any liabilities will be assumed by the buyer; the purchase price; and how the purchase price will be paid.

- A commitment to continue to negotiate in good faith.

- Conditions to each party's obligation to proceed with the transaction. Conditions commonly include the execution of a definitive Purchase Agreement; satisfactory completion of the buyer's due diligence; the availability of financing for the buyer (if needed); whether legal opinions will be required; whether funds will be escrowed to protect the buyer from contingent or undisclosed liabilities; obtaining all required consents and approvals from third parties; and reaching agreement on the seller's continued employment, consultation or non-competition.

- Seller's agreement not to look for other buyers for a specified period of time.

- The timing and procedures for buyer's due diligence examination of the company.

- Allocation of costs and expenses associated with buyer's due diligence and the transaction.

- Agreement prohibiting any public announcement of the transaction unless both buyer and seller agree.

It is important that the legal and financial advisors of the parties be involved in the discussions between the parties from the start. They can provide invaluable advice on structuring the transaction to achieve the goals of their respective clients. They should be actively involved in the negotiation and drafting of the letter of intent, since it establishes the overall structure and major terms of the transaction.

The letter of intent begins the formal acquisition process, but there is much to accomplish after it is signed. The transaction still may not occur. However, the letter of intent moves the process to a more formal phase and generally increases the likelihood of a successful transaction.

- James E. Rembolt, Esq.

YOUR TEAM OF ADVISORS

The business owner has three questions when considering the sale of a business: what is the value of the business; how can more than this value be obtained; and how will the transaction be managed? A prospective purchaser is also interested in determining the value of the business for his purposes, and how the transaction will be managed. Both parties typically engage a team of experts and advisors to assist with the resolution of these questions.

- Business brokers and finders will assist by finding either the buyer or the seller. The broker usually begins by assembling a disclosure document that describes the past and present performance of the business, as well as its future prospects. The broker will typically handle initial contacts with prospects to determine whether they are feasible and qualified. As the first contact with prospects, the broker will arrange for all prospects to sign a confidentiality agreement before any confidential information is provided. Brokers and finders are usually paid a contingent (success) fee, and they usually are not compensated if their efforts are not successful.
- Lenders and sources of equity capital will finance the transaction. The lender will require collateral. Negotiating loan terms and documents and coordinating with the banker or investment banker can be a transaction in itself that is at least as complex as the sale transaction. The seller's lenders may also be a significant part of the transaction, especially if only a division or a part of the business is being sold, or if the seller's debt will not be paid in full at closing. If the buyer is seeking equity capital, an investment banker is likely to be involved. In addition, federal and state securities laws may apply to the method of obtaining the equity capital, with potentially significant disclosure and legal requirements.
- Lawyers should be engaged who have corporate acquisition experience rather than just general practice experience. The lawyer needs to be involved from the very beginning, to structure the business for sale and prepare the confidentiality agreement and letter of intent, and to negotiate the major transaction documents. The role continues until the deal closes and all post-closing matters are completed. The lawyer will prepare the agreements with other members of the team to ensure that the client understands the commitments to these parties. Lawyers will typically work on an hourly basis, but because of their significant involvement in the transaction, there may be additional fees charged in connection with issuing legal opinions or closing the transaction.
- Accountants. If there is no investment banker, then accountants are likely to be involved to analyze the financial and tax aspects of the deal. They might also be called upon to evaluate the value of the business, provide or update financial statements, conduct closing audits, organize books and financial records, or recast a financial history. Most accountants calculate their fees on an hourly basis.
- Appraisers. Appraisers may be engaged by either party, or by the buyer's lender, to value the entire business, or to value elements of the business. This might include parcels of real estate, leasehold rights, or intangible property, such as patents, trade marks or software programs.

Each member of the team has a specific role. Written agreements with these professionals will define the scope and role of each, and the method of compensation. These agreements will also address:

- The circumstances and consequences of terminating the engagement;
- The terms of the engagement, and whether a fee will be due if the business is not sold, or if it is sold to a prospect identified during the term but the closing occurs after the term expires;
- How prospects will be identified, either by broad exposure to the market (and generalized advertising), or to a controlled list of prospects to protect the confidential nature of the sale; and
- Dealing with the seller's employees during the marketing period.

-Alan D. Slattery, Esq.

NEBRASKA TRADEMARK LAW

A trademark is one of the most valuable assets a business has. A trademark is a word, sign, or symbol which distinguishes the Owner's goods from those of another. The only difference between a trademark and a service mark is that the service mark distinguishes services while a trademark identifies goods. Protection from unauthorized use or infringement of your trademark is of utmost importance for continued customer good will and protection of market share. The legal structure behind trademark protection involves both federal and state statutes. Both afford the opportunity to secure a trademark and protect it against unauthorized use or dilution through various mechanisms of registration and enforcement.

Although analogous, Nebraska trademark law differs somewhat from its federal counterpart. The primary difference is that while the federal law protects against trademark infringement throughout the country, Nebraska law offers protection only within the state. You must use your mark in interstate commerce in order to register under the federal law. The other notable difference involves the ability, under the federal statute, to use the federal registration symbol (®) in connection with the registered trademark. The symbol establishes the presumption that those infringing the federally registered mark know that the mark is registered.

Registration of a trademark under Nebraska's Trademark Registration Act offers basic protection of the distinctive mark of your company.

THE APPLICATION

Registering a trademark with the Secretary of State requires the submission of an application. Among other information, the application must contain:

(1) The name of the person or business applying for the registration;
(2) A description of the goods or services on which the mark will be used and the class of goods or services to which the items belong;
(3) The date the mark was first used anywhere and the date the mark was first used in Nebraska;
(4) A statement asserting:
  (a) That the applicant is the owner of the mark;
  (b) That the mark is in use;
  (c) That to the applicant's knowledge, no one else has registered the mark under federal or Nebraska law or has the right to use the mark;
  (5) Three items that show the current actual use of the mark;
  (6) A $100 application fee.

The registration of a trademark in Nebraska is effective for a period of ten years and is renewable for subsequent ten year periods upon the submission of a renewal application and another $100 fee.

Notable among the application requirements is the statement certifying that the mark is currently being used. It is not enough that the registrant invented a mark that could be of value in the distant future or even that he plans to use the mark in the near term. Rather, the mark must be in actual use, with three examples of current use included within the application.

The other application requirement that demands consideration is the statement that, to the applicant's knowledge, no one else has registered the mark under federal or Nebraska law or has the right to use the mark. In order to make this statement, the applicant will be required to conduct a federal and state trademark search. The cost of such a search is less than might be expected, especially considering the risk of liability that would otherwise arise upon improper use of a registered mark. In fact, numerous companies can be found through the internet that offer state and federal trademark searches. If you have reached the point where you will need to conduct a trademark search, Rembolt Ludtke and Berger LLP can refer you to a reputable trademark search company.

HOW ARE YOU PROTECTED?

Under Nebraska law, the registration of a trademark raises the presumption that the registrant owns the mark and has the right to use the mark in connection with the goods or services in the certificate of registration. The Nebraska statute provides that any unauthorized use, reproduction, counterfeit, copy, or colorable imitation of the registered mark may be protected by legal action. The law provides for injunction against the unauthorized use and may include the payment of all profits derived from and damages suffered by such use. The court may also order that all counterfeits or imitations be destroyed and may award attorney's fees at its discretion.

As a general rule, Nebraska law provides that in order to prevent another business from using your registered trademark, the two businesses must be in actual competition. Therefore, your registration of a trademark protects only against the infringement of the mark by those using it in connection with the same class of goods or services for which you are using it. As an example, if a company registered the trademark "Hound's Tooth" in connection with its classic menswear, it would not be protected from infringement by the use of "Hound's Tooth" by a pet food company using the mark on a box of dog biscuits. In this example there would be no actual competition between the two businesses.

While there is otherwise little harm in allowing the noncompetitive use of a registered mark, such use does blur the association between the original mark and its product. Therefore, Nebraska law also provides protection for the dilution of "famous" marks. Nebraska law does not define the term "famous," but includes certain factors relevant to that determination such as the distinctiveness of the mark, the duration of its use, the extent of advertising of the mark, and the degree of recognition of the mark.

The attorneys at Rembolt Ludtke and Berger LLP are available to help with your questions concerning trademarks and other intellectual property concerns.

- Penny J. Berger, Esq.

YOU COULD HAVE MAIL

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