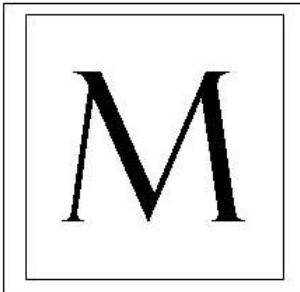


# “BUSINESS LAWYERS SERVING BUSINESS”



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### **Welcome**

Dear Friends,

In an effort to continue to address questions and issues that are facing you, we are pleased to present our latest McCarrey Law Group Newsletter. With the continuing uncertainty in the credit markets, volatility in the real estate markets and concerns about inflation, we know that each of you are facing new challenges in conducting your business. With difficult times, however, come new opportunities and we have been excited to see the new ventures and businesses that many of you are entering and creating.

This edition of our newsletter addresses the issue of whether Delaware or Nevada is the best venue in which to incorporate and also looks at the differences between

limited partnerships and general partnerships. In addition, we take a brief look at the new cell phone driving restrictions about to become law in California and how this law may impact you and your employees.

We remain appreciative of the opportunity that we have to serve you. As your lawyers, we are mindful of the trust that is involved in the lawyer-client relationship and look forward to our continuing association with you. The mission of the McCarrey Law Group is to provide sound legal advice tempered by the realities of the business world. Our lawyers operate in the real world and understand the challenges that business faces. The purpose of "Business Lawyers Serving Business" is to highlight both issues and solutions to problems facing you and the rest of our diverse group of clients.

The McCarrey Law Group is a boutique firm that provides legal services to real estate professionals, financial institutions, entrepreneurs and businesses operating among the NAFTA countries. We are worldwide in our view, but never forget that our business is our clients. We desire to provide you with the best legal service possible and hope that you will find "Business Lawyers Serving Business" helpful and informative.

If there are issues that you would like to see addressed in our Newsletter, please contact us. We prize our relationship with you and look forward to continuing our association.

## **THE MCCARREY LAW GROUP**

### **Nevada vs. Delaware Incorporation**

For a long time, the venue of choice for incorporation has been Delaware. Perceiving benefits of having corporations domiciled in their jurisdiction, states have taken steps to cause companies to reconsider the long time tradition of Delaware incorporation. Nevada has been on the forefront of this effort to attract new businesses.

Several of the benefits of a Nevada corporation over that of a Delaware corporation are listed below.

- State Taxes. In Delaware, corporations pay income tax on income earned in the State of Delaware. In Nevada, however, there are no income taxes on corporate income whether earned inside or outside of Nevada state boundaries.
- Annual Franchise Tax. Unlike Delaware and most other states which have annual franchise tax assessments, there is no such assessment in Nevada.
- Officer and Directory Indemnity. Nevada provides greater liability protection for officers and directors acting within the scope of their employment than do similar provisions under Delaware law.
- Annual Disclosures. In Delaware, an annual disclosure must be made of officers, dates of shareholder meetings and other corporate minutiae. Nevada merely requires a current list of officers and directors, all of which may be the same individual in many cases.
- Bearer Certificates. Initially, corporate shares were treated like bonds and entitled the bearer of a stock certificate to all of the benefits of ownership. As time passed, many states and corporations recognized a benefit to the corporation of keeping an internal stock ledger identifying the owners of the

corporation. While Delaware has outlawed “bearer” stock certificates, Nevada permits bearer stock certificates. While generally, there is little reason to hide the identity of corporate ownership, in certain instances, there may be legitimate reasons for doing so and Nevada law provides this flexibility.

- Information Sharing. Nevada is different from most states when it comes to sharing information with the Internal Revenue Service. Delaware, for instance, shares tax related information with the IRS, but not Nevada. While on its face, this may seem to be desirable, it does appear that there is a higher probability of being audited by the IRS as a result of the lack of information sharing.

Although there are many benefits to being incorporated in a non-corporate tax environment like that of Nevada, the restrictions imposed by other state law may be imposed on your corporation. For instance, if your principal place of business is in a non-Nevada jurisdiction, there is still a requirement that the corporation be registered in that state and there may also be additional tax considerations. Further, non-Nevada state tax liability may attach to income earned within the borders of that state.

## **Limited Partnership vs. General Partnership**

### ***Limited Partnerships***

A limited partnership or a “LP” is an entity that must be created pursuant to the provisions of state law. A limited partnership has at least two classes of partners—limited and general. Generally, a limited partner is one who invests in a venture, does not participate in the day to day operations of the business and, provided that statutory mandated formalities are observed, has no liability for the debts or obligations of the partnership beyond his or her investment. General partners, on the other hand, are responsible for the day to day management of the venture, may or may not have made an investment in the business and have unlimited liability with respect to the affairs and operations of the partnership. A single person or entity may be both a limited and a general partner of a LP.

In order to receive the benefit of being a limited partnership, state mandated filings are required. These filings are made at the time that the partnership is formed, when key provisions of the LP agreement change and at the time that the partnership ceases to do business. In addition, a written partnership agreement is required to state the duties and liabilities of the various classes of partners. The LP agreement, among other things, delineates those areas where the limited partners are permitted to vote and effect partnership change, which normally are limited to the sale all of the assets of the partnership, the amending of the LP agreement or the determining of whether the partnership should take advantage of debt amelioration statutes.

### ***General Partnerships***

General partnerships are significantly different from a LP. For instance, there is no requirement of state filings or even that of a written agreement for a general partnership to be formed. From a definitional standpoint, a partnership is nothing more than an association between two or more individuals to carry on a “for profit” business. From a tax standpoint, partners in a general partnership are treated as an association of co-owners and all of the partners have equal responsibility for the debts of the general partnership and share equally in any of its profits. While there

is a long history of case law interpreting the rights and obligations of partners vis-à-vis each other as well as their respective duties to the public, it would be the height of folly not to have a written agreement that at a minimum details the duties of each of the partners and the scope of the business to be conducted by the partnership. Failure to do so could subject partners to the vagaries of judges and juries if disputes arise and judicial interpretation is required.

### ***Benefits of Partnerships***

As a general rule, partnerships have less formal requirements and fewer filing obligations than do most other forms of doing business. It cannot be overstated, however, that there are big benefits to having a well drafted partnership agreement and the failure to have a partnership agreement can subject partners to laws that may not be consistent with the desires of the partners. In the case of a limited partnership, a written agreement is a necessity if the limited partners are to obtain the protection afforded that class of partner.

Partnerships also provide certain tax benefits. Under the law, partnerships are not considered separate legal entities and therefore, income and losses are passed through to the partners and are taxed at the individual partners' respective tax rates.

### ***Disadvantages of Partnerships***

The most obvious disadvantage of partnerships is that partners become liable for the actions of their partners. In the case of limited partners, this liability is limited to their investment in the partnership. In a general partnership, all of the general partners are liable for the actions of the other partners and the business of the partnership. Without a written agreement to the contrary, any general partner can bind the partnership and in the case of a general partnership, this means that one partner can bind the other partners well beyond that which might have been anticipated when the partnership was formed.

Unlike a corporation which issues shares of stock which are generally easy to transfer, partnership interests are usually illiquid. This means that a partnership agreement cannot be transferred without complying with the requirements of law and the partnership agreement.

## **California Cell Phone Driving Restrictions**

Beginning July 1, 2008, the use of a handheld mobile device while driving a car will be prohibited in the state of California. The California Wireless Automobile Safety Act prohibits the use of a cellular phone without a hands free headset while driving and prohibits all drivers under the age of 18 from driving while using their cell phone under any condition.

The effect of this Act on business is not known, but if an employee is on official business and is involved in an accident while using a cell phone, it is almost a certainty that your business will become an interested party in the litigation that may follow. Because of this, if your business requires that you or your employees use a cell phone while driving, prudent business practice would require that provision be made to provide your employees with an appropriate headset for use while conducting business. In addition, a conservative company would also consider revising its employee handbook to make clear that while driving on company business calls should be made using an appropriate hands free device. In the

alternative, you might want to consider a policy that prohibits driving and talking on a cell phone with or without a hands free device.

## **Contact Us**

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