Instructor’s Outlines and Notes

MODULE VII
WEEK #7

FORMATION AND OPERATION ESSENTIALS OF THE
BUSINESS PARTNERSHIP

(Resources)
Read Chapters 33, 34.

Required: Professor's outline and lecture notes, module VII, in its entirety.

Read Chapters 33, 34.

1.) How are partnerships created and in what manner do they operate?

All partnership businesses are, in the final analysis, based upon the same fundamental tenets of a contract. Partnerships agreements, like contracts, can occur as written agreements, oral agreements or simply implied agreements (derived from the behavior of the parties involved).

Ordinarily and most commonly, partnership agreements are the result of written contracts/agreements. This is certainly the preferred method of creation. Written
documents, hopefully, set forth in a clear manner the rights, responsibilities and liabilities of each of the partners. A written agreement, if one exists, is known as the ARTICLES OF PARTNERSHIP. The articles should be dated, set forth the names and addresses of all partners, the general nature of the business endeavor, contributions of each of the partners, circumstances in which a dissolution of the partnership may be had by any of the partners, and, finally, the signatures of all of the partners.

The partners may apportion differing amounts as to initial contributions, percentiles of various entitlement of profits earned, varied degrees of liabilities in the case of loss of monies or capital, authority of each of the members or any other variance among the partners. Typically, however, the partnership is in the simplest of forms in that each of the partners contributes identical amounts of monies and capital, share equally in the decision making processes of the partnership and share equally in all profits and losses. Only if the articles of partnership state differently does this vary. In the absence of any written agreement, the partners will indeed share equally in each of the aforementioned.

Usually, the existence of a partnership is evident and straightforward, either by way of a written contract among the parties or oral statements made by the partners to each other and the public that indicate an ongoing business partnership. Sometimes, however, there exists no written contract, nor specific oral evidence to indicate that a partnership may exist. In some of these instances, a partnership may nonetheless exist by the conduct of the parties. For example, it may be plain to the reasonable observer that such persons are conducting business together with other persons in which no one person is clearly the owner of the business. If two or more persons contribute resources to a business, in the form of monies, capital or labor, and likewise share in the profits or losses of the endeavor, then the law may well presume the existence of a partnership and treat all members of the partnership accordingly.

2.) How must or should partnerships be titled or named?
There is no requirement that a partnership have a title whatsoever, though it is obviously preferred that a name is had for the partnership. The partnership may have a singular name, not including the single names of the individual partners, for example, a title such as "Lacrosse Fur Trading Group" could be the singular title of a partnership. A partnership may also be titled in the names of some or all of the partners of the partnership, for example the name "Little, Seeger and Brown Fur Trading Group" would be an example of a partnership title that utilizes the names of the individual partners. If a partnership chooses to use a fictitious name (as we referred to earlier) then such fictitious name for the partnership would, in all likelihood, be required to be registered with the state.

3.) How are partnership properties and monies to be titled?

Assets belonging to the partnership may be titled in two primarily different ways. Assets may be titled in the individual name of one of the partners, but this is invariably a mistake. The simplest means of titling partnership assets is to have title to the property held in the name of the partnership itself. This makes clear precisely the entity ownership of the property. If the property is titled in the name of the partnership, then such property is deemed to be owned in a tenancy in partnership. Here each of the individual partners may only own and sell or convey a pro rata share of the partnership monies or property and no more. Conveying ownership of partnership monies or property to a third party or entity does not bestow partnership to the buyer, only ownership of the portion conveyed. For example, a partner in a business may well assign, by sale or gift, her interests in a partnership interest of the business, but doing so only allows this third party the right to receive profits that the previous owner may have received, nothing more. Likewise, the third party recipient would not be allowed to participate in the management of the partnership either.

While a partner may convey his rights to receive profits from a business partnership of another, he may not convey any of the partnership property to a third person. Only the partnership itself may do so. Even in the instance in which a creditor of one of the
partners seeks to receive partnership property, or even a pro rata share of the partnership property, in order to satisfy a debt, this is not allowed. The creditor may not attach partnership property or any portion thereof. The creditor must look specifically and only to other properties owned by the individual partner not associated with the partnership.

When the composition of partnerships changes through death of one of the partners, the surviving partners do not take or receive the deceased partners share (as would be the case if property had been held in joint tenancy). The rights of pro rata profits may be received by bequest within the deceased partner’s estate by will or trust.

4.) What are the primary duties and responsibilities of the individual partners?

Because the partners in a business are in a close fiduciary relationship, the duties owed one to the other are great. Each of the individual partners owes such duty to the partnership itself, as well as to each of the other partners individually. These duties include the duty of loyalty and good faith, the duty to abide by the majority will of the partnership, the duty to keep necessary and proper business records, the duty to work prudently for the sake of the partnership and the duty to keep all other partners apprised and informed of any information important to the partnership as a whole.

These duties are, for the most part, straightforward and obvious. Should any of the partners fail to abide by these duties, and a loss of capital or profit should occur, then the offending partner is liable to the partnership and to each of the individual partners.

When the individual partners are conducting partnership business, each is obligated to use reasonable and prudent care in doing so. A failure to do so, even if done inadvertently (yet negligently) may result in the individual partner being held liable to the partnership and each of the individual partners. A partner is not held absolutely responsible for any action he may take that may result in loss for the partnership (there is no absolute liability), only those actions that were clearly improper or negligent.
5.) **How does a partnership make and effectuate business decisions and actions?**

In the absence of a written agreement to the contrary, a partnership governs all major decisions by virtue of a simple majority vote. For this reason, it is imprudent to have an even number of partners. If an even number of partners exists, then it is wise for the partnership to place in the articles in partnership a specific mechanism to break the tie (one common mechanism is to choose an individual partner whose judgment the other partners hold in high esteem). All major decisions of the partnership fall to the majority except for a single exception; any decision to change the fundamental and basic business character requires a unanimous vote of the partners. For example, a decision to change the business from developing residential housing to developing commercial buildings would constitute a fundamental change in the nature of the partnership, and as a result, a unanimous consent the partners would be required.

During the conducting of business, each of the partners has the duty to participate in insuring that adequate recordkeeping is maintained. All partners share in this duty alike, though no specific method or manner is an absolute requirement. Likewise, each partner has the duty to keep each of the other partners informed of ANY information that could have an effect, for good or ill, on the partnership or individual partners. Again, no specific method or protocol is required.

With the duties of the individual partners come the corresponding rights of the individual partners. The primary rights of the partners mirror the duties, to wit: Each of the parties has the right to participate in the management of the partnership, each has the right to examine the business records of the partnership, each has the right to compensation for any past individual contribution made for the benefit of the partnership, each has the right to receive profits and/or to receive advances from the partnership.

As we stated earlier, in the absence of an agreement to the contrary, each partner may participate in the management of the partnership, primarily through the mechanism of
voting. No one partner may exert his will over that of the other partners. Again, usually, a simple majority vote controls.

At any time, any of the partners may examine business records and, upon reasonable request, have demonstrated or explained any question remaining about a transaction of the business. None of the partners may agree (or conspire with another partner to agree) to withhold, or make secret any of the business dealings of the partnership.

The right of contribution occurs when any one or more members of the partnership satisfies a partnership debt or obligation from personal funds in order to benefit the partnership. If such is done, the partner or partners who satisfied the debt or obligation are entitled to receive reimbursement from the partnership.

If a partner loans to the partnership monies above and beyond the initial contribution of the partners, that partner is entitled to receive (withdraw from the partnership) those loaned monies as well as any interests that may have accrued. Such loaned monies must be treated separately from the monies contributed by each of the individual partners.

Usually, the decision to distribute profits from a partnership is triggered by a majority vote of the partners, though it may also occur in accordance with the articles in partnership (for example, an article that states that all profits will be distributed on a quarterly basis). The right to receive any and all profits by virtue of majority vote or the articles in partnership is an absolute right of the individual partners.