

Staying Out of Trial by Staying on the Trail:

The Role of the Business Lawyer
as Guide and Scout

Jeremy M. Brook, Esq.
The Brook Law Firm, PLLC
Jeremy@brooklawfirm.com
www.brooklawfirm.com

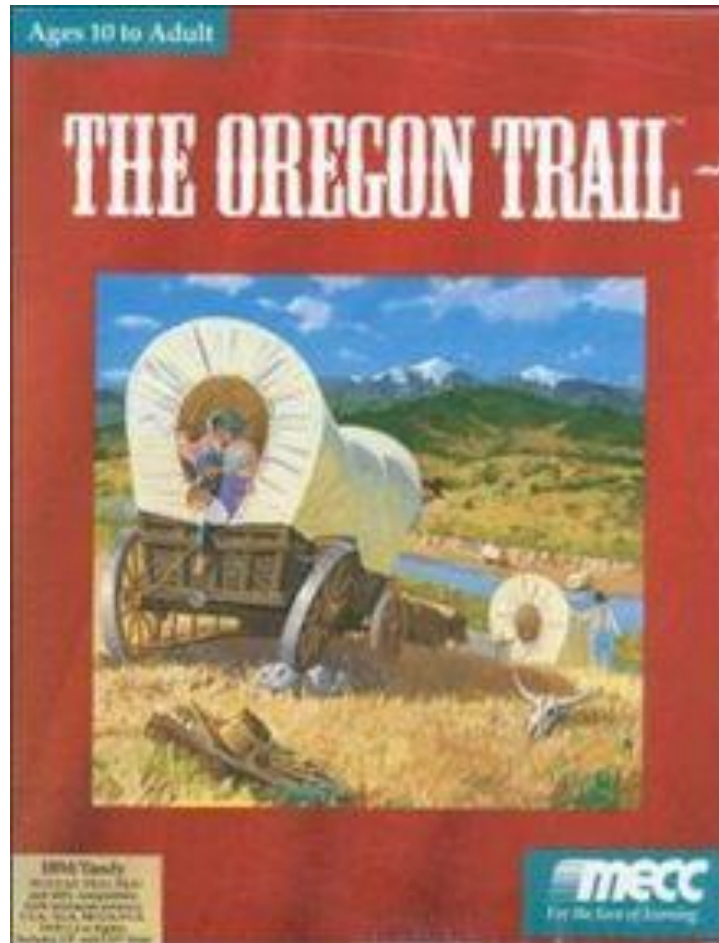


Tactical Skills
for the Growing Business

Stuffy Lawyer Disclaimer

- The following is not intended to be legal advice. It is a presentation on some general legal and business concepts intended to help entrepreneurs and business owners navigate and work with an attorney. You should consult your own attorneys and tax advisors for advice regarding specific legal matters.
- If there were racecars in this presentation, they would be operated by professional drivers on a closed course. Alas, there are no racecars.

Entrepreneurs Are Pioneers

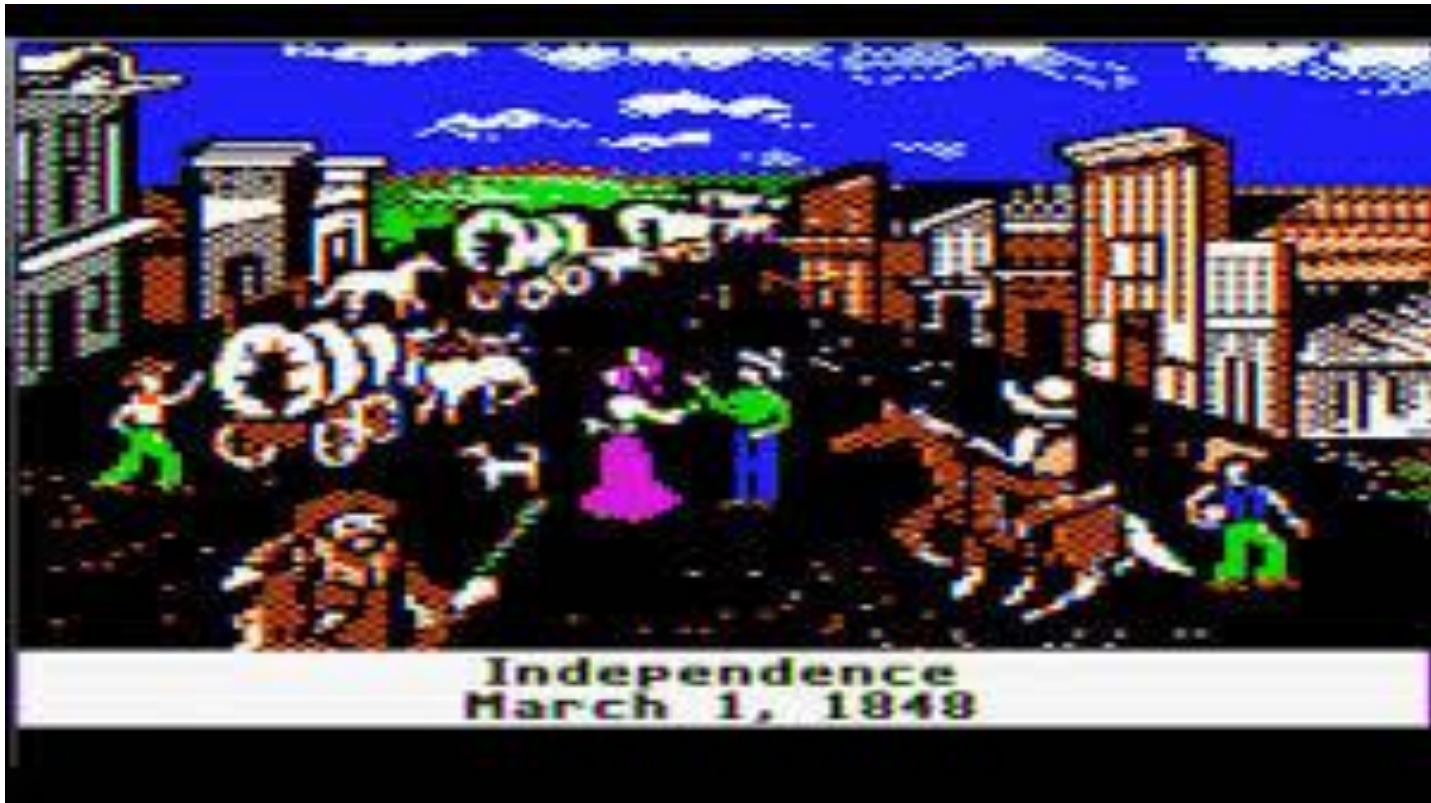


A journey of 2,170 miles begins with...



- What are your business goals?
- What's the path to get there?
- What do you need to start out?
- What do you need along the way?
- What decisions are you going to have to make?

Welcome to Independence. What Now?



TYPHOID
BROKEN LEG
FEVER
DROWNING
BROKEN ARM
DYSENTERY
DIPHTHERIA
DIARRHEA
MEASLES
SNAKEBITE
CHOLERA

What do you need to know before you start out?

- The legal landscape:
 - Consumer products?
 - Real estate?
 - Financial markets?
- How to structure your business
- Financing and capitalization
- Intellectual Property
- How to manage business relationships

What's the Landscape?

- State law vs. federal law
 - Most will be state
 - Some, like copyright, debt collection, and maritime law, will be exclusively or primarily federal
 - Some, like securities laws, will be both
- Are you in a highly regulated industry?
 - Banking and financial services
 - Food and beverage, pharmaceuticals
 - Healthcare





- Is there a specific body of law that covers what you're doing, or some aspect of your business?
 - E.g., real estate law
 - Franchise law
- Taxes
- Employment law
- Business licenses

A Vehicle for Your Vehicle

- Your choices are:
 - Sole proprietorship
 - Partnership (general, limited, limited liability)
 - Corporation
 - Limited liability company



Sole Proprietorship

- This is you on the trail with no cover on your wagon. Don't do it.
- Advantage: Reduced filing fees and administrative work, possible tax savings.
- Disadvantage: No liability protection.

Pard'nership

- This is you and a friend with no cover on your wagon.
- Advantage: Reduced filing fees and administrative work, possible tax savings. Flexible structure.
- Disadvantage: No liability protection.

Crossing the Nation with a Corporation

- Is a separate legal entity from its owners (shareholders).
- Offers liability protection to its owners.
- Has a relatively rigid structure and set of governing laws. (E.g., must have board of directors, meetings)
- Is understood better than LLCs by foreign countries.
- Has well-developed body of law, especially in Delaware.
- Must have bylaws and board of directors.
- Federal Tax: S-Corp or C-Corp.
 - C-Corps are taxed at the entity level and again at the shareholder level.
 - S-Corps are “pass-through” entities; they are only taxed at the shareholder level.
 - S-Corps may have only individual shareholders (generally),
 - Must be US citizens, no more than 100 shareholders, and only one class of stock

Limited Liability Convoy

- Is separate legal entity from its owners (members).
- Offers liability protection for its owners.
- Flexible structure: Combines best features of partnerships and corporations.
- Very few rigid requirements. Can structure almost any way you like. It's the Burger King of registered entities.
- Can do "series LLC."
- Not understood as well by foreign governments.
- Is a "pass-through" entity for federal tax purposes, like S-corp.
- Do not need operating agreement, but should have one if more than one member.

State of Formation

- Do I need to form my entity in Delaware, Nevada, or Wyoming?
- No. The state you're operating in is usually good enough.

Business Structuring

- File your articles of organization or charter.
- Record articles or charter with the county register of deeds.
- Register with Dept. of Revenue and obtain business license.
- Adopt bylaws or operating agreement.

Piercing the Liability Shield



- Don't commingle money, ever.
- Document everything.
- Execute all contracts and documents in the name of the company.
- Treat the company as a separate entity/person from yourself.
- If you have a corporation, comply with the corporate formalities.

Financing Your Journey

- Yourself
- Equity
- Debt

Equity

- Risk is on investor.
- If the company gets dysentery, so does the investor.
- You give up some ownership and possibly control.
- Must comply with securities laws (state and federal).
 - Registration or exemption from registration
 - E.g., limited offerings, only accredited investors, not making general solicitation to public
- Deal structures can be varied: From simple exchange of funds for equity, to tiered acquisitions over time with buy-sell provisions, preferred return, etc.

Debt

- Risk is on borrower.
- Even if you get dysentery, you still have to pay it back.
- But you don't give up any ownership and control, so long as you're not in default.
- Regulation is more on the lenders
- Things to watch out for:
 - Liens
 - Guarantees
 - Restrictions on business

You Need a Crüe, However Mötley

- Your choices:
 - Wainwright, wheelwright, carpenter, blacksmith, doctor, trapper, teacher, pharmacist...
- ...and a banker, equity investor, and attorney.
- Who do you want?
 - You really like the carpenter. Amazing birdhouses and outstanding client service.
 - A wainwright would be useful, but he's subject to a non-compete with.
 - Mid-nineteenth century pioneer regulations require that, if you are going to be selling herbal medicine on the frontier, you must have a pharmacist.

Trailblazers Starting Lineup

- **The Equity Investor:** She gave you the seed capital for supplies and is a member of your LLC.

Trailblazers Starting Lineup

- **The Attorney:** Your guide. Charming, handsome, and without a doubt the most valuable member of your team, but not a member of the LLC or employee.
- Fiduciary duty, confidentiality, privilege, honesty, candor.

Trailblazers Starting Lineup

- **The Carpenter:** An employee. W-2, on your payroll, you control his work, schedule, etc.
- Employment law, state and federal. FLSA, e.g. Hours, pay, breaks, vacation time, benefits, employment taxes, hostile work environments.
 - Bonus: Which state? Missouri? Kansas? Nebraska? Wyoming? Idaho? Oregon?

Trailblazers Starting Lineup

- **The Pharmacist:** Because you might be selling herbal medicine to other pioneers and hipsters, the regulations say you need him. And if there's one thing we can say for sure about the Wild West, it's that business regulations were strictly enforced.
- He's a member of the LLC. Capital contribution: In-kind services.

Trailblazers Starting Lineup

- **The Banker:** Lent you some money for the wagon. Just along for the ride to make sure the bank's money is safe.
- **The Accountant:** Does your taxes and gives you tax advice on how to structure your bartering transactions at the Cheyenne trading post. Do you know how to allocate taxes when you trade wolf pelts and bison hide for bullets and wagon axles? Because I don't.
- **The Insurance Agent:** Because how are you going to pay for the drowned oxen, the broken front wheel, all the work you miss when you get dysentery?

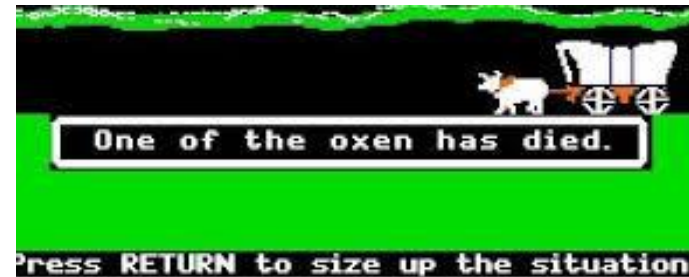
Trailblazers Starting Lineup

- **The Wainwright:** You really want him. The guy works miracles with broken wagons and makes a killer latte. So, you tell him not to worry about his non-compete and to tell that other wagon company he's not going to be under the yoke of their oppression anymore.
- You get sued for tortious interference with a business relationship, and then...



Now That You Have Your Team, You Need Your Team

- Are you buying or leasing? Is it seller-financed?
- Have you done the due diligence? Did you look in the mouth? Did you review the breeding papers?
- What happens if an ox gets sick or hurt? Or dies? Who is liable? Do they come with warranties?
- What happens if an ox gets pregnant? Who owns the calf?
- Are there restrictions on use of the oxen?
- What happens when PETA tries to internet-shame you for using animals to pull your wagon?



Date: July 31, 1848
Weather: warm
Health: fair
Food: 70 pounds
Next landmark: 132 miles



- Contracts govern relationships, and the devil is in the details.
- If the oxen are leased or seller-financed, you may not be able to sell them, and you may not own the calf.
- There may be a warranty by law, or you may contract for one, or the seller may disclaim the warranty by contract.
- The seller/lessor may not permit you to ford a river with your oxen. Which means you have to find a crossing or try to float across...



PETA?

- In the current climate, the court of public opinion is sometimes a bigger risk to a business than is a court of law.
- You have to be aware of, and prepared for, the risk that someone will be upset that you are using oxen to pull your wagon.
 - Maybe you carry on, maybe you address the controversy, maybe you allow the oxen to ride in the wagon and pull them instead.
 - Whatever you do, you cannot ignore this risk.

This IP is Your IP; this IP is My IP...

- What is intellectual property?
 - Copyright, patent, trademark, trade secrets.
 - Copyright and patent enshrined in the Constitution.
- Copyright: Protects the *expression* of ideas, not ideas themselves.
- Patent: Protects inventions.
- Trademark: Protects the identification of the source of goods and services.
- Trade Secrets: Protects information that gives a business a competitive advantage and is not known to its competitors.

Wainwright, Wheelwright, Copyright

- Expression of Ideas: E.g., written works, musical compositions, sound recordings, photographs, visual art, graphic design, audiovisual recordings, others.
- Copyright vests as soon as work is in a tangible medium.
- Grants limited monopoly. Exclusive right to:
 - Reproduction
 - Distribution
 - Public display
 - Public performance
 - Creation of Derivative Works
- Limited duration: Created after 1978—Life of author plus 70 years

Copyright

- Works Made for Hire
 - Your carpenter, whose name is Bob Dylan, writes a song called “Wagon Wheel,” which is then recorded by Darius Rucker and becomes a hit. Do you own it?
 - Probably not. Not in the course of Bob’s employment.
 - What about when he writes a brilliant new manual on woodworking while traveling the Oregon Trail? Do you own that?
 - Probably.
 - What if your pharmacist, whose name is Huey Lewis, writes a song called “I Want a New Drug” that becomes a hit. Do you own it?
 - In the absence of an agreement to the contrary, no.

Copyright

- Fair Use
 - No magic bullet
 - Fact-intensive
 - Factors:
 - Purpose and character of use
 - Nature of copyrighted work
 - Amount of work used
 - Effect on market for work
- Registration
 - Evidence of ownership
 - Can sue for infringement
 - Statutory damages
 - Public record
- “Poor Man’s Copyright” is a myth

Reinventing the Wagon Wheel: Patents

(The actual wheel. Not the song.)

- Limited monopoly on inventions
- Invention is made public, but protects against reverse engineering (unlike trade secrets)
- Has to be useful, novel, and non-obvious
- Hire a patent attorney
- What if your pharmacist invents a new herbal remedy to cure dysentery? Do you own it?
 - Maybe. Have good contracts, and hire a patent attorney.

You Discover a Gap!



This is a perfect opportunity to set up your herbal medicine business and to charge admission for other wagons wanting to pass! But you need a name for your new business endeavor.

GAP

Trademarks

- Policy is to protect consumers first, brands second.
- Must be using in commerce (or intending to use in commerce)
- The more descriptive, the less protection
 - Generic (Apples for an apple farmer, GAP for a gap)
 - Descriptive (Cold and Creamy for ice cream)
 - Suggestive (Airbus)
 - Arbitrary/Fanciful (Apple for computers, Xerox, GAP for clothes)
- Protects names, logos, slogans, trade dress, other distinctive indicators of source

Trademarks

- Can change over time
 - Can become generic (Velcro)
 - Use “TM” or ®
 - Don’t use generically (e.g., photocopy vs. xerox)
 - Can become distinctive (California Pizza Kitchen)
- Common Law vs. Registration
 - Can acquire some trademark rights by using mark, but only in geographic area of operation

Trademarks

- Federal Registration:
 - Nationwide protection
 - Right to use ® symbol
 - Statutory presumption that mark is valid
 - Prevents others from registering similar mark
 - Can sue in federal court for infringement
 - Incontestable after 5 years (conclusive evidence of right to use mark)
 - Constructive notice of ownership (eliminates claim of “I didn’t know!”)
 - May serve as basis for foreign registration
 - US Customs will keep out infringing products

Trade Secrets

- Use it for your business.
- Take reasonable steps to keep it secret.
- NDAs are helpful—if you comply with them.
- Advantage over patents: Not public information, no time limit
- Disadvantage over patents: Someone can reverse engineer

How Else Do You Protect Your Journey?

- Don't want your crew divulging your path to other travelers? **Non-disclosure agreements.**
- Don't want your crew leaving to go work for another wagon company? **Non-compete, non-solicitation.**
- Want to buy another wagon? **Due diligence, warranties, financing, adequate capitalization.**
- Want to sell your oxen? **Ownership, liens, sale restrictions, reps and warranties and indemnities.**
- Want to cross the river? **Who owns the river? Do you have liability waivers?**

Common Contract Elements and Provisions

- Preamble
 - We're entering into this agreement because we want to go to Oregon.
- Covenants
 - "I promise to take you to Oregon."
- Conditions
 - "Provided my oxen don't drown and I don't get dysentery."
- Representations and Warranties
 - "These oxen do not have dysentery."
- Indemnities
 - "If I get sued because somebody gets dysentery, you're going to pay for it."

Common Contract Elements and Provisions

- Hold Harmless
 - “You’re not going to sue me if you get dysentery.”
- Payment Terms
 - “You’re going to pay me half now, and half when we get to Oregon.”
- Risk Shifting
 - “You assume the risk that this herbal remedy will not cure dysentery.”
- Merger Clause
 - “This is the whole agreement; nothing else that anyone said counts.”
- Choice of Law, Forum Selection
 - “Tennessee law governs this contract. If anyone sues, it has to be in Nashville.”

Common Contract Elements and Provisions

- Non-Assignment
 - “You can’t transfer this agreement to your cousin.”
- No Third Party Beneficiaries
 - “I’m only making a promise to you; not to your family or your business associates.”
- Liquidated Damages
 - “If you breach this agreement, you’re going to pay me 15 bison hides and 10 wolf pelts.”
 - Note: Cannot be a penalty.
- Attorneys’ Fees
 - “If there’s a lawsuit, loser pays winner’s attorney’s fees.”

General Tips for Arriving Safely in Oregon

- Get it in writing.
- If it's not in the contract, it doesn't exist.
- Oral agreements are, in most cases, valid—but hard to prove.
- Saying “ok” in an email may bind you to a contract.
- Everything through the LLC/corporation.
- Don't commingle money.
- Protect your IP—Registration, NDAs, non-generic use.
- Avoid infringing others' IP.
- Be aware of legal landscape—regulations, customs, licensure requirements, your rights, rights of others.

You Made It!



ANY FINAL QUESTIONS?

Jeremy M. Brook, Esq.
The Brook Law Firm, PLLC
jeremy@brooklawfirm.com
www.brooklawfirm.com

Remember to Complete the Speaker Survey:

Supportingstrategies.com/bootcamp > 'click' event name > scroll to
agenda > select your speaker

