



Leyendecker & Lemire, LLC

An Intellectual Property and Business Law Firm



THE VIRTUAL BUSINESS CONSULTATION

1. I see that places like Legal Zoom and We The People offer incorporation packages. What's the difference between those and going with an attorney to form my business?
2. What should I look for in a Business Formation package and what do yours include?
3. What is the registered agent of the business?
4. What is the Incorporator (in a corporation) or the Organizer (in a LLC)?
5. I have heard of something called piercing the corporate veil - what is it exactly and am I at risk?
6. I just bought a car [insert any other commitment you may have committed to] and signed all of the contracts and paperwork, I now want to return in and unwind the transaction because [insert various reasons here]. Can I cancel the contract? Isn't there a 3 day recion right in Colorado?

1. I see that places like Legal Zoom and We The People offer incorporation packages. What's the difference between those and going with an attorney to form my business?

When we talk with most people, the question "why do I need an attorney to help me start my business" is inevitably asked. If you have ever been to the Colorado Secretary of State's web site, you may be asking the same question since on the surface it looks like all you have to do is fill out a one page form and write a check for the filing fees. While it is convenient that the Secretary of State has stream lined the process, one unintended effect is to make the process of forming a business entity look simpler than it really is. Don't get me wrong - it is not exactly rocket science, but there are many subtleties to forming a business entity some of which could have large effects down the road. We even know of attorney's that ran into problems when they formed an LLC themselves because they did not practice business law and had a whole host of unintended consequences due to the way they set up their LLC. These unintended consequences cost them a lot more money than it would have cost them to have the business properly set up in the first place. A business attorney can help guide you through the process to help insure that the form that you choose for your business matches your goals and visions for the company.

Additionally, in very few instances will the documents that are filed with the Secretary of State stand alone. Other documents such as By-laws, Buy/sell Agreements, Shareholder Agreements Operating Agreements, or Partnership Agreements play a critical role in the operation of a business. In addition, in order to be able to take advantage of the liability protection that many of the business entities offer you must conduct your business and hold yourself out to the public in a certain manner. An attorney can advise you on what you need to do to minimize your risk of loosing your liability protection. In fact at the

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end of every business formation I sit down with the clients and approximately an hour long meeting to go through the documents, explain what they mean and give them tips on the proper operation of a business from the legal stand point, as well as from a practical standpoint. This sort of advice helps to minimize the chance that the client will have legal troubles down the line with the LLC or corporation. These are services that the formation companies do not and cannot provide you because they are not attorneys.

There is a temptation for both the users of the documentation preparation services and the well meaning employees of a Legal Zoom or a We The People to respectively ask legal questions and give legal advise. The key hear is that these well meaning employees are not lawyers and while they may think they know the answers, from our experience it appears that a lot of times they are wrong. We have had cases of clients taking the advice of employees at document preparation companies only to find out that because they listened to bad advice, their federal trademark registration is completely invalid, their corporate formation was incomplete, or their provisional patent application is insufficient to base a utility patent on. In some cases it just costs the clients extra money, but some cases result in a loss of rights or placing those rights in serious jeopardy. When it comes down to it these sorts of companies are caught in the ultimate catch 22 - they try to take the place of lawyers, but they can't act like lawyers or provided the services and valuable advice lawyers provide. If they attempt to provide that advice - they are violating the law.

2. What should I look for in a Business Formation package and what do yours include?

The first thing you want to look for is completeness I have seen a few formations from document service companies in particular that are just incomplete. Any corporate package you get should include the following items:

1. Articles of Incorporation
2. By-laws
3. Stock certificates
4. Minutes to (or a written consent in lieu of a meeting) of the Shareholders, Directors and Officers of the company, with appropriate directors resolutions
5. Federal Employer Identification number (tax ID Number)
6. S-Corp election

Additionally, any complete LLC package should contain:

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1. Articles of Organization
2. Operating Agreement
3. Initial Resolutions
4. Federal Employer Identification number (tax ID Number)

The next thing to look for is whether or not the package includes filing fees and who is responsible for filing the documents. More complete packages will do the filing for you. Lastly, I would look for what sort of support or guidance the package comes with - even beware of attorneys! I have seen attorney's that consider their formation services similar to a fast food drive through and just had the client a big stack of documents at the end of it all and turn the clients loose to fend for themselves, or if they do offer guidance it is at their hourly rate.

At Leyendecker & Lemire, LLC we do not believe in hidden charges or cutting corners. For standard formations that are not overly complex or require significant customized structures or provisions we offer complete \$600.00 flat fee packages that include the following:

Corporations:

1. Articles of Incorporation
2. By-laws
3. Stock certificates
4. Minutes to (or a written consent in lieu of a meeting) of the Shareholders, Directors and Officers of the company, with appropriate directors resolutions
5. Federal Employer Identification number (tax ID Number)
6. S-corp election
7. Preparation of Colorado Business registration form and sales tax license form (if applicable)
8. Final consultation to go over documents, answer any questions and give some practical pointers on operating the business
9. All filing fees

LLC'S

1. Articles of Organization
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3. Initial Resolutions

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4. Federal Employer Identification number (tax ID Number)
5. Preparation of Colorado Business registration form and sales tax license form (if applicable)
6. Final consultation to go over documents, answer any questions and give some practical pointers on operating the business
7. All filing fees

3. What is the registered agent of the business?

There seems to be a lot of confusion out there as to what exactly the registered agent of a business is, and more particularly what powers they have or do not have. Realistically, the registered agent is a lot more boring and doesn't have nearly the power that a lot of people think it has. Simply put, a registered agent is an individual over the age of 18 who resides in Colorado (or a 3rd party company that meets certain statutory criteria) appointed by the company whose sole job and **ONLY** power is to receive service of process (i.e. the actual paperwork) in the event the corporation is sued. The registered agent's sole responsibility is to turn those documents over to the appropriate corporate officers (CEO, President, General Counsel etc.) and then they have no more responsibility to the company as it pertains to that particular lawsuit. That's it folks. The registered agent just by virtue of being the registered agent cannot make any decisions for the company, bind the company in any manner, dissolve the company or anything else! I told you it was boring! In most cases the registered agent is one of the owners, the company's attorney or one of the corporate officers. We offer registered agent services (in case you don't want to deal with it) for \$200.00 per year.

4. What is the Incorporator (in a corporation) or the Organizer (in a LLC)?

The Incorporator(s) and Organizer(s) are essentially the individual or individual's that cause a corporation or LLC to be formed. Their names and addresses are listed with the Secretary of State of Colorado and are public record. Essentially, the incorporator or the organizer are in charge of a corporation or LLC in the time between the actual legal formation of the company and the time that the ownership interests are issued to the owners and representatives and decision making body of the company is chosen (a board of directors in a corporation and the members/officer in a LLC). In that meeting or written document, the incorporator resigns as the incorporator and the owners of the company ratify any actions taken by the incorporator prior to the initial meeting (or signature of the written consent) of the owners of the company. Usually we list one or more of the eventual owners of the company to act as the incorporator. However, if you are concerned about your personal information being in the public record, or for other strategic purposes would like to keep the company's owners secret we can act as the incorporator and as the

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registered agent (the two required disclosures of peoples names and addresses under Colorado law) and nobody would know that you own the company (unless you tell them). I have heard from a few client's that Nevada is really promoting this as a benefit of forming your company in Nevada - rest assured you can do it in Colorado also!

5. I have heard of something called piercing the corporate veil - what is it exactly and am I at risk?

Basically, piercing the corporate veil is a way that Corporations or LLC's can loose the liability protection for their owners. Under principles of corporate law a valid incorporation results in the formation of a separate and distinct entity apart from its shareholders. The corporation retains a separate legal identity and is responsible for all of its legal, business and economic activities, and obligations. In this manner shareholders are shielded by the "veil" of the corporation and cannot be held personally liable for the activities and obligations of that corporation. This protection is a means of promoting economic development and protecting corporate employees from actions and debts of the corporations. However, there are instances where this protection can be set-aside and shareholders of a corporation can become personally liable for corporations actions. This doctrine is called piercing the corporate veil.

Under Colorado Law, in the absence of some exception, neither the officers nor the directors of a corporation are personally responsible for the debts of a corporation merely because they are officers or directors of the corporation. When, however, the corporate structure is used so improperly that the continued recognition of the corporation as a separate legal entity would be unfair, the corporate entity may be disregarded and corporate principals held liable for the corporation's actions. Thus, if it is shown that shareholders used the corporate entity as a **"mere instrumentality for the transaction of their own affairs without regard to separate and independent corporate existence, or for the purpose of defeating or evading important legislative policy, or in order to perpetrate a fraud or wrong on another, equity will permit the corporate form to be disregarded and will hold the shareholders personally responsible for the corporation's improper actions."**

Colorado courts rarely have allowed the corporate form to be disregarded and view this as a severe doctrine only to be applied with extreme care and prudence. The principle of piercing the corporate veil is equitable in nature and will be applied by the courts as justice requires. While generally applied in cases of fraud and criminal activity there is no standard formula that Colorado courts follow in applying this doctrine. Instead, the court will look at the totality of the circumstances on a case by case basis whether the corporate form should be disregarded. However there are certain established factors that the courts will consider.

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Piercing the corporate veil can also apply to subsidiary corporations as well. In this case an aggrieved party is attempting to pierce the corporate veil of the subsidiary corporation and hold the principle corporation or its owners liable for the subsidiaries actions and obligations. The corporate veil may be pierced where the subsidiary is merely an "alter ego" of the principal. Under Colorado Law to establish the alter ego doctrine it must be shown that the **"stockholder's disregard of the corporate entity made it a mere instrumentality for the transaction of their own affairs; that there is such unity of interest and ownership that the separate personalities of the corporation and the owners no longer exist; and to adhere to the doctrine of corporate entity would promote injustice or protect fraud."**

Similar to incorporations, managers or partners of a Limited Liability Corporation (LLC) are generally not liable for the debts, obligations of their LLC. Under Colorado Law the same common law principles of piercing the corporate veil apply to LLC's. One of the significant differences for LLC's as opposed to corporations is that the legislature, apparently understanding that LLC's tend to be smaller, less-sophisticated and more informal, provided that **"failure of a LLC to observe the formalities or requirements relating to the management of its business and affairs is not in itself a ground for imposing personal liability on the members for liabilities of the limited liability company."**

As you can see fraud is a key element in piercing the corporate veil. In all of the reported decisions in Colorado, we cannot say that in our opinion an "innocent" person has been the victim of piercing the corporate veil. However, that does not mean that in a potential lawsuit an allegation will not be brought against you. There are certain things you can do to increase the likelihood that you will be able to dismiss a claim of piercing early on in the litigation, saving you the expense and worry of having to defend such a claim.

6. I just bought a car [or insert other commitment you may have committed to] and signed all of the contracts and paperwork, I now want to return in and unwind the transaction because [insert various reasons here]. Can I cancel the contract? Isn't there a 3 day rescission right in Colorado?

This is probably one of the biggest legal urban legends out there and unfortunately it gets a lot of people into some serious trouble - especially with cars. For the record: **THERE IS NO GENERAL RIGHT OF RECISSION, 3 DAYS OR OTHERWISE, OF A CONTRACT IN THE STATE OF COLORADO!** There are certain specific recession rights granted by statute, but they apply only to specific types of contracts. In general there is a three day right of recession for contracts that place a lien on your house and for door to door sales. There is a one day right of recession for contracts that are solicited over the phone. **That is about it!** Notice that the sale of a car or a big screen TV is not in the list! Sometime contracts may be

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cancelled if you have been pressured or rushed to sign - but don't count on it. Those cases are rare and usually very hard to win. Always read a contract carefully before you sign and if it is a major purchase or obligation - do not rush into it. Take your time and figure out if you have any doubts about whether or not this is a transaction you want to enter into. If you have any questions or concerns about a contract consult an attorney.

Leyendecker & Lemire, LLC is a Denver-based law firm offering a full spectrum of Intellectual Property, Business and Entertainment related legal services for entrepreneurs, individual inventors, and businesses of all sizes. We pride ourselves in providing large firm quality, but with personalized service and attention the large firms do not provide to their smaller clients. Our strength is working with a client from the beginning of his/her venture to maximize the venture's value and potential, as well as, help minimize the risk of legal disputes. Call (303) 768-0123 or e-mail us at info@coloradoiplaw.com today to see how we can help you!

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