

## Protecting My Life's Work: Choosing the Proper Form of Business Entity

By David S. Rosenbaum

**"I'm a business owner (or soon to be one) what type of entity should I choose?"**

At McDowall Cotter, we make two classifications: "non-asset protection" and "asset protection" entities. General partnerships and sole proprietorships fall into the former; corporations and limited liability companies fall into the latter. We look at asset protection as keeping your life savings away from business creditors, judgment creditors and the IRS.

A **sole proprietorship** is the simplest form of business organization, in which an individual engages in business personally and without either co-owners or the use of an entity such as a corporation. A sole proprietorship avoids many of the formalities and reporting requirements of business entities, but the **business owner is personally liable** for the debts and obligations of the business.

California law defines a **general partnership** according to the corporations code as "association of two or more persons to carry on as co-owners a business for profit; the "persons" may be individuals, corporations, limited liability companies, or other partnerships." **General partners are personally liable**, jointly and severally, for all debts and obligations and most wrongdoing of the partnership, unless agreed

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## The ABC's of Health Care Directives, part 2

By Robert D. Vale

In our previous edition of McDowall News we explained what an Advance Health Care Directive is. In this edition we will talk about what is not an Advance Health Care Directive. Specifically, we will discuss DNR's and POLST's.

### What is not an Advance Health Care Directive?

Often times, individuals will confuse an Advance Health Care Directive with the Physician Orders for Life Sustaining Treatment (**POLST**) form or a pre-hospital Do Not Resuscitate Order (**DNR**).

Because of its color, the **POLST** is often referred to as the "Pink Form." It complements, but does **not** replace, an Advance Health Care Directive. The POLST is completed and signed by the patient **and** the patient's physician. If the patient is not able to sign the POLST, it may be signed by the patient's agent on behalf of the patient. The directions on the POLST may include a pre-hospitalization DNR Order. It also contains additional instructions selected by the patient for other medical interventions. Once at the hospital, a patient will be assessed by a physician who will issue appropriate orders.

A pre-hospital **DNR Order** is properly titled an "Emergency Medical Services Prehospital Do Not Resuscitate Form." It is an official state document which instructs medical professionals to **forego pre-hospital** resuscitation. Thus, if an individual with a DNR stops breathing and emergency personnel are summoned,



William D. McDowall\*  
Bernard T. Cotter\*  
Robert D. Vale  
David S. Rosenbaum  
Brett S. Lytle  
Stephanie Zeller  
Jaclyn B. Smith

*\*Of Counsel*

Carolyn J. Navarro, Paralegal  
Andrew Aragon, Paralegal  
Sylvia Hart, Client Services  
Irene Dominguez, Client Services  
Barbara Barrett, Bookkeeper  
Assistant Client Services:  
Stephanie Hart  
Sarah Lytle  
Rachel Shing

### Referrals

Referrals constitute a majority of our business. If you have a family member, friend or co-worker that needs our assistance, please feel free to give them our number. Rest assured they will receive the same ingenuity, integrity, and common sense approach that you received. **Referrals are the greatest compliment we can receive.** Thank you!

the emergency personnel are to forego attempts at resuscitation if they have confirmation of the DNR. The DNR form needs to be signed by a physician and readily accessible when Emergency Medical Assistance arrives.

As you can appreciate, while Advance Health Care Directives are for everybody over 18 years of age, a POLST or DNR is generally for those individuals who are aged and/or suffer from a severe medical condition such that

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otherwise by the claimant or provided by law, and except for any partnership obligation incurred before a person is admitted as a partner. Corp C §16306(a)-(b). A judgment against a partnership may not be satisfied from a partner's separate assets unless there is also a separate judgment against the partner individually, or under other specified circumstances. Corp C §16307(c)-(d). All partners have fiduciary duties of loyalty and care to each other. Corp C §16404.



Conversely, in a **corporation**, **shareholders are not personally liable** for corporate debts and obligations unless the shareholders: personally

guarantee corporate debts or obligations; engage in tortious conduct; receive improper distributions; are subject to "alter ego" claims for commingling personal and corporate matters; or breach duties to other shareholders or the corporation. Shareholders who also serve as officers

and directors may have additional liability exposure due to the additional control they have over corporate matters.

An S-corporation allows pass-through tax treatment and limited liability for all owners. S-corporation status limits the parties' flexibility in structuring their financial arrangements because of the requirements that the corporation have no more than one class of stock (IRC §1361(b)(1)(D)) and that items of income, gain, loss, deduction, or credit be taken into account in accordance with the shareholders' prorata share of the corporation's stock (IRC §1366). Furthermore, only individuals who are U.S. citizens or resident aliens, estates, certain types of trusts, and certain tax-exempt organizations are permitted to be S-corporation shareholders (IRC §1361(b)(1)(B)), and an S-corporation will lose its pass-through tax treatment if an ineligible entity becomes a shareholder. There are further asset protection benefits associated with corporations like setting up a 401k or other defined benefits plans. Finally, the pass-through income tax treatment offered by an S-corporation differs somewhat from that of a partnership, and this different treatment can sometimes have adverse tax consequences.

A **limited liability company** is a form

of business organization that is treated as a partnership for income tax purposes and as a corporation for liability purposes. Generally, an LLC is a legal entity formed under a statutory scheme that allows one or more owners to carry on a business with none of the owners having personal liability for the obligations of the business. An LLC can have different classes of ownership; income, gain, loss, and other items may be allocated disproportionately to ownership without affecting the LLC's pass-through tax treatment. Unlike an S-corporation, any "person"—i.e., any individual, partnership, limited partnership, trust, estate, association, corporation, other limited liability company, or other entity, whether domestic or foreign—can be a member of an LLC.

Corporate taxation is very different from the taxation of LLCs, and this can be a deciding factor in which type of business you form. At McDowall Cotter, we ask to work with your tax adviser as a team to decide on which entity suits best.

One factor to consider in choosing a corporation over an LLC is what we call "the pleasure of doing business in California." The Secretary of State

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resuscitation is not desired. If an individual completes a POLST or DNR, the use of a bracelet confirming the existence of the patient's desires and the display of the copy of the form will help to ensure that the patient's wishes will be honored.

In summary, all competent adults—that is everyone in California over 18 who is competent—should complete an Advance Health Care Directive. Whether an individual will complete a POLST or a pre-hospitalization DNR Order is a decision for the patient and the patient's

physician and is determined based on the patient's circumstances and desires.

If you have questions regarding Advance Health Care Directives, POLST's or DNR's please feel free to contact our office. You can obtain a blank Advance Health Care Directive by going to our website at [www.mcdlawyers.net](http://www.mcdlawyers.net), double click on "Resources" then double click on "Tools." POLST forms may be obtained from your physician or ordered from the POLST Task Force at [www.caPOLST.org](http://www.caPOLST.org). A DNR form, which directs only pre-hospitalization personnel, can be obtained by going

to the California Emergency Medical Services Authority at [www.emsa.ca.gov](http://www.emsa.ca.gov). Click on the link for the DNR form and then select a PDF of the form identified at the top of the list of available forms. Once you have completed a POLST or a DNR, a DNR bracelet can be obtained through MedicAlert Foundation or Caring Advocates. MedicAlert can be reached at 888-755-1448 and its website is [www.medicalert.org](http://www.medicalert.org). Caring Advocates can be reached at 1-800-647-3223 and its website is [www.caringadvocates.org](http://www.caringadvocates.org) ■

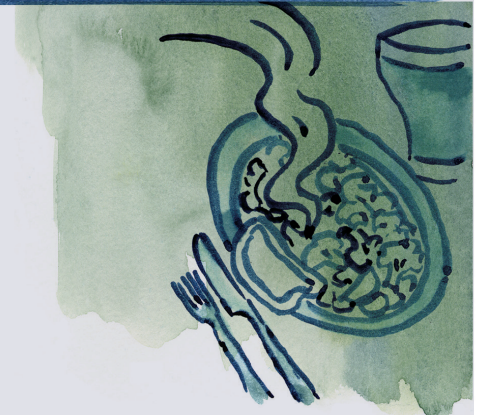


## Purpose and Scope of the Company

By Brett S. Lytle

Most people initially think that an entity is only formed and organized for asset protection. Most people don't know that if the appropriate entity is chosen and set up properly it can help meet the following goals:

- Income tax: reduction, elimination and deferral
- Provide for retirement
- Centralized management
- Facilitate gifting and taking advantage of the annual Gift Tax Exemption
- Maintain control of the entity after making gifts and sales
- Reduce estate taxes
- Allow fractional interest in the entity without fractionalizing the underlying assets
- Provide centralized policy and risk analysis for the family's investments
- Provide for wealth transfer from one generation to another
- Provide business succession planning, along with buy-sell opportunities
- Control cash flow to members
- Reduce California taxes
- Resolve family business disputes privately
- Provide confidentiality
- Avoid business interruption
- Avoid probate
- Restrict the ownership rights of non-family members and prevent transfers due to failed marriages
- Prevent commingling of assets for family members
- Make withdrawals from the entity difficult to do



- Protect members from entity creditors
- Qualify for Family Business Exclusion
- Promote knowledge of family business
- Provide medical insurance and other benefits to employees with pre-tax dollars
- Provide income for family members

For more information, please come to our Hot Lunch Tuesday on September 18, 2012 where the topic will be: Entity Formation and Asset Protection "Protecting my Life's Work." ■

## Upcoming Events

### Hot Lunch Tuesday

September 18, 2012

Registration:  
11:45 – 12:00

Roundtable:  
12:00 – 1:15

2070 Pioneer Court, San Mateo

Topic: Entity Formation and Asset Protection  
"Protecting my Life's Work"

### Ice Cream Social

September 21  
1:00pm – 5:00pm

2070 Pioneer Court, San Mateo

Everyone is welcome! Stop by our office for this fun, informal, social event, where everyone can relax with a scoop or two of ice cream and get to know each other, clients and collaborative advisors alike.



### Planning for a Loved One with Special Needs

September 25  
3:00pm – 5:00pm

2070 Pioneer Court, San Mateo

McDowall Cotter will be holding this seminar to answer many of the critical questions involved with planning for a person with special needs. Please invite anyone you know with children or parents with special needs

### Blood Drive

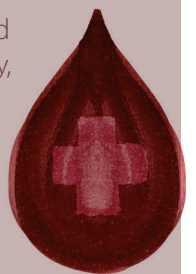
October 4  
12:30pm – 4:30pm

Lunch will be provided  
12:00 – 2:00

Refreshments served all afternoon

2070 Pioneer Court, San Mateo

You are invited to bring family, friends and neighbors to help support our Bay Area Blood Banks.



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charges an annual \$800 fee to do business. However for LLC's there is also a "gross receipts tax." It is an additional fee charged upon "total income from all sources derived from or attributable to California sources" as follows:

- \$900 fee for total income \$250,000 or more, but less than \$500,000;
- \$2,500 fee: \$500,000 or more, but less than \$1mil.
- \$6,000 fee: \$1mil. or more, but less than \$5 mil; and
- \$11,790 fee: \$5,000,000 or more

For more information, please come to our Hot Lunch Tuesday on September 18, 2012 where the topic will be: Entity Formation and Asset Protection "Protecting my Life's Work." ■

### **A Common Sense Approach to the Practice of Law**

McDowall Cotter has served clients in the greater San Francisco Bay Area for more than half a century. In that time, we have established a reputation, in the courts and in the community, for ingenuity, integrity and a common-sense approach to the practice of law.

It has been said that in some ways we are an old-fashioned law firm. We believe in civility, value long-term relationships, cultivate a healthy work environment, and provide the highest quality legal representation in matters large and small. And we agree—we are old-fashioned, but then again we've been old-fashioned for more than fifty years and still somehow we remain ahead of our time.

#### **Our services include:**

- Estate and Trust Planning
- Asset Protection and Wealth Preservation
- Probate and Trust Administration
- Will and Trust Contests
- Defense and Prosecution of Trustee Challenges
- Partition Actions
- Representing Businesses and Individuals in Civil Lawsuits
- Entity Planning and Formation
- Employer/Employee Relations
- Construction – Mechanics Liens
- Insurance Defense
- Public Entity Defense

**McDowall Cotter**

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2070 Pioneer Court • San Mateo CA 94403

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