What Your Owners' Agreement Has to Cover

Your company's governing documents run the company. They say nothing about the deal you have been running on trust with someone outside it.

You have a company. You have been doing business with someone else: a co-venturer, a collaborator, another firm, a referral partner, or the person you plan to start a company with once the idea is proven.

None of that is written down. This is the document that writes it down.

Two Documents, Two Jobs

An operating agreement or set of bylaws is vertical. It governs the relationship between one company and its own owners: who owns what percentage, who votes, who manages, what happens when an owner leaves. It looks inward.

An Owners' Agreement is horizontal. It governs a deal between separate parties: what the venture is, who performs which obligations, whose money is at risk, how revenue is divided, and who answers for what when something goes wrong. It looks outward, at the deal.

Your operating agreement can be flawless and still leave you with nothing to point to when the business you have been working with says the split was sixty-forty.

An Owners' Agreement fits:

- **Two businesses collaborating** on a project, a product, or a customer.
- **A joint venture** that has not formed, and may never form, its own entity.
- **A revenue split** or referral arrangement between independent parties.
- **Founders before an entity exists,** setting out who contributes what and how ownership will be divided once the company is formed.

Think of it as the prenup: the terms you settle while everyone gets along, so a stranger's default rules do not settle them later.

If You Co-Own One Company

If the people you need terms with are your co-owners in the same company, an Owners' Agreement is the wrong document. Terms among co-owners of one company belong in that company's operating agreement or shareholder agreement. In many states, any agreement signed by all the members about the company's affairs is treated as part of the operating agreement, whatever it is called. A separate side agreement among members can end up amending your

operating agreement by accident, or contradicting it.

The company law of the state where the company was formed governs those terms. The route there is Document Review & Revision: I review the governing document you have and revise it to say what the owners agreed. Where a revision turns on the company law of a state where I am not licensed, you engage an attorney licensed there, at your own expense, to advise on that question, and I build their advice into the document.

The Default You May Already Have

This is the part most people do not know, and it is the reason this document matters more than it sounds like it should.

In nearly every state, a partnership forms when two or more persons associate to carry on a business for profit as co-owners, whether or not they intended to form a partnership, and whether or not anything was signed. Intent to be partners is not required. Intent to do the things partners do is enough.

If that has happened, several default rules apply that almost nobody would have chosen:

- **Profits are shared equally,** regardless of who contributed more capital, more work, or more clients.
- **Each partner can bind the others.** A partner acting in the apparent ordinary course of the business creates obligations for everyone.
- **Liability is joint and several.** Each partner is exposed to the full amount of partnership obligations, not a proportional share.
- **Partners owe each other fiduciary duties** of loyalty and care, enforceable whether or not anyone knew they existed.

Then there is the consequence that matters most: a default general partnership sits outside your company. You formed the entity. You maintained it. And if the venture you have been running with someone else was never placed inside a written structure, your company's liability shield may not be standing between you and it.

A written agreement is how you displace the defaults and confirm what the arrangement actually is.

Who Is Actually a Party

Answer this before anything else, because it is answered wrong constantly.

- **Name the entities, not the people,** unless you intend the people to be bound. If your company is the party, the agreement says so, identifies it by exact legal name and state of formation, and is signed by an authorized person in a stated capacity. If you sign in your own name, you are the party, and your entity is not in the deal.
- **Confirm authority on both sides.** Whoever signs for each entity should have the authority to do it under that entity's own governing documents, and a resolution or written

consent should exist to prove it. Sophisticated counterparties ask for this. So do lenders and acquirers, years later.
- **Decide about guarantees deliberately.** If either side wants a person standing behind an entity's obligations, that is a personal guarantee, and it should be a negotiated term rather than an accident of who held the pen.
- **Check your own operating agreement first.** If it requires member approval for actions outside the ordinary course, or restricts what a manager may commit the company to, get the consent before you sign, not after.

What the Venture Is, and What It Is Not

Scope is defined as much by what sits outside it as by what sits inside.

Define the field: the products, services, territory, customer segment, or specific project the arrangement covers. Then define what each party retains for itself. Most disputes in collaborative arrangements are not about the work inside the scope. They are about the opportunity that arrived nearby and only one party pursued.

Decide whether the arrangement is exclusive, and in which direction. Exclusivity can run one way. It usually should not run both ways by default.

State whether either party may pursue competing or adjacent business, and whether opportunities that arise through the venture must be offered to it first.

Who Does What

Vague obligations are unenforceable obligations. "Both parties will use their best efforts to grow the business" is not a term. It is a sentiment.

- **Specific deliverables and functions.** Who sells, who delivers, who invoices, who handles support, who owns the client relationship, who signs the contracts with customers.
- **Decision rights.** What each party decides alone, what requires the other's consent, and what threshold triggers joint approval. Pricing, hiring, taking on debt, and signing a customer contract above a stated size are the common ones.
- **Standard of performance.** Distinguish obligations that are absolute from obligations qualified by reasonable efforts, and say which is which.
- **Time and resource commitments,** where the value one side brings is attention rather than capital.
- **What happens when someone does not perform.** Notice, a cure period, and a consequence. Without a consequence, the obligation is advisory.

The Money

This is where written agreements earn their cost. Work through it in this order.

- **Define the pool before you divide it.** "Revenue" is ambiguous. Is it gross receipts, collected cash, or invoiced amounts? Does it include reimbursed expenses, taxes

collected, refunds, chargebacks, or amounts never actually paid by the customer? A split of an undefined number is not an agreement.

- **Say what comes off the top.** Direct costs, pass-through expenses, third-party fees, and which of these require approval before they are incurred. Set an approval threshold in dollars.
- **Then set the split,** and say whether it changes: at volume, after a party recovers its investment, or on a defined date.
- **Decide whose account the money lands in.** Whoever invoices and collects controls the cash and, in practice, controls the relationship. If one party collects and remits to the other, specify the payment date, what backup accompanies it, what happens when payment is late, and whether the collecting party holds those funds in a segregated account.
- **Provide for reporting and inspection.** Periodic statements in a defined format, and the right to examine the underlying records on notice. Address who pays for the examination, and what happens if it uncovers a material discrepancy.
- **Distinguish contributions from loans.** Money one party puts in is either capital or debt. If it is debt, there should be a note, a rate, and a repayment priority. If it is capital, say what it buys.
- **Address losses and overruns, not just profits.** Who funds a shortfall, and what happens if one party will not.
- **Get the tax characterization right.** An unincorporated arrangement to share profits and losses can be a partnership for federal tax purposes even with no entity formed and no intent to form one. That brings a partnership return, K-1s, and allocation rules. Sometimes the answer is to elect out where the arrangement qualifies. Sometimes the answer is to form an entity for the venture and stop straddling. Either way, decide it deliberately, because the default answer arrives as a surprise in the spring.

Who Bears Which Risk

- **Indemnities.** Each party should stand behind claims arising from its own acts, its own employees, and its own representations. Mutual, specific, and tied to conduct.
- **Insurance.** Required coverage types and minimum limits for each party, with the other named as an additional insured where appropriate, and certificates delivered rather than promised.
- **Limitation of liability.** A cap, and carve-outs from the cap for the things that should never be capped: indemnity obligations, confidentiality breaches, and misappropriation.
- **No authority to bind.** State plainly that neither party may obligate the other outside the agreement. This is the express term that rebuts the apparent authority a default partnership would otherwise create, and it is the single most valuable sentence in the document.
- **Relationship disclaimer.** If you do not intend to create a partnership in the legal sense, say so, and then act consistently with what you said. A disclaimer contradicted by conduct is worth very little.

Intellectual Property and Work Product

Background IP, whatever each party brought in, stays with the party that brought it, with a

license to the other only to the extent the venture requires.

Developed IP is the harder question, and joint ownership is rarely the right answer even when it feels like the fair one. Under default rules, a co-owner of intellectual property may have broad rights to exploit it independently, sometimes without accounting to the other. That is usually not what either side pictured.

Name a single owner and grant the other a license with defined scope, field, and duration. Then say what happens to that license when the arrangement ends.

Address data separately. Customer data, usage data, and contact lists frequently turn out to be the most valuable thing the venture produced, and are the thing least often mentioned.

Confidentiality, Clients, and Restraint

- **Confidentiality obligations,** with a definition of what is covered and a survival period.
- **Non-solicitation** of each other's employees and contractors, for a stated period.
- **Who keeps the client.** The question everyone avoids. If the arrangement ends, which party holds the customer relationships originated through it, and does the other receive anything on account of them? Decide it while you are getting along.

How It Ends

Every collaborative arrangement ends. Most of them end without either party planning for it.

- **Term.** Fixed, renewing, or open-ended.
- **Termination for convenience,** and the notice required. Long notice periods protect the party with more to unwind.
- **Termination for cause,** with a definition of cause and a cure period.
- **In-flight work.** What happens to projects underway, customer commitments already made, and obligations that outlast the relationship.
- **Trailing revenue.** If income continues to arrive after termination (renewals, residuals, recurring subscriptions, deferred payments), say who gets it and for how long. This is the most commonly litigated omission in this category of agreement.
- **Wind-down mechanics.** Return of property and confidential information, transition assistance, final accounting, and a deadline for it.
- **Survival.** Which provisions outlive the agreement: confidentiality, indemnity, IP, restrictive covenants, dispute resolution.
- **Founders who never form the company.** If the agreement anticipates an entity, say what happens to contributed work, IP, and money if the entity is never formed, and how the agreement's terms carry into the company's governing documents if it is.

Disputes

Choose an escalation path before litigation: a conversation between principals, then mediation, then a binding forum.

Select governing law and venue deliberately, and confirm they are consistent with what each party's own governing documents already say. Two documents governing one relationship under two different states' laws, with two different dispute forums, is a problem you create for yourself and discover at the worst time.

If the venture involves a deadlock risk between two equal participants, build the tie-breaker into the agreement.

Papering What Has Already Happened

You are not starting fresh, and the agreement should not pretend otherwise.

- **Use two dates.** An effective date reaching back to when the arrangement actually began, and a signature date reflecting when it was signed.
- **Confirm the history.** State how the parties have been operating, and that the written terms govern from the effective date forward.
- **Reconcile the money already moved.** Contributions made, distributions taken, expenses absorbed, and invoices paid by the wrong party. Put the reconciliation in a schedule and agree on the closing numbers.
- **Address the pre-agreement period explicitly.** Either the new terms apply retroactively to it, or the parties release each other for it, or it is carved out and left alone. Silence leaves it open indefinitely.
- **Do not paper over an unresolved disagreement.** If the two of you remember the split differently, the agreement is where that gets settled. Signing a document that leaves the question ambiguous makes the dispute more expensive, not less.

Before You Sign

Read your own company's governing documents and this agreement side by side. Confirm that consent thresholds, transfer restrictions, governing law, dispute forum, and confidentiality terms do not contradict each other. Confirm the signing party has the authority the document assumes.

Then keep the executed original with your company records, along with the schedules, the resolutions authorizing it, and the certificates of insurance. An agreement nobody can locate is functionally an oral agreement with extra steps.

Related reading at bjoffrionconsult.com/blog: "Your LLC has an operating agreement. Your partnership doesn't." and "Starting a business with someone is a lot like getting married."

If You Want This Drafted or Reviewed for Your Arrangement

Owners' Agreement — from $1,850. The written deal between separate parties: a joint venture, a collaboration between two businesses, a revenue split, or founders before the company is formed. Who contributes what, who does what, the money, IP, risk, and how it ends.

Document Review & Revision — from $1,400. For co-owners of one company: your operating agreement or shareholder agreement revised to say what the owners actually agreed, delivered as

revised text rather than a list of suggestions. Where a revision turns on the company law of a state where I am not licensed, you engage an attorney licensed there, at your own expense, to advise on that question, and I build their advice into the document.

Multi-Entity or Multi-Member Plan — from $1,600. For arrangements involving more than one owner or more than one company: whether the venture belongs inside an existing entity or needs its own, how ownership and capital are structured, what each governing document has to contain, and how the entities deal with each other.

The fee for a consultation is credited in full toward any written work you commission within 30 days.

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