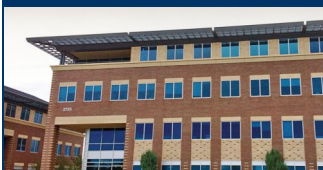




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**Inside this issue:**

The First Decision in  
Forming a Business:  
What Type of Entity?  
By: Corey Moore

1

Meet OBP's Newest Staff  
Members

2

Don't Let Emotional  
Support Animals Drive  
You Crazy

3

## The First Decision in Forming a Business: What Type of Entity?



By: Corey W. Moore, Esq.

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Choosing the appropriate entity for a new business is not as easy as one might think. Most people tend to gravitate towards a limited liability company, or LLC, for its relative ease of formation and asset protection, however there are various other entities that can be beneficial for an emerging business. The various entity types, including C and S corporations, LLCs, and partnerships all have aspects that can be useful to a new business and should be examined before selecting an entity. Businesses with Multiple Owners

If the new business entity will have multiple owners with different rights and interests when it comes to control, income, business losses, or assets upon liquidation, ownership rights may need to be structured differently for each owner.

If the new entity is a C or S corporation, ownership is limited to company issued stock and those owning the majority of outstanding stock control the business, whereas partnerships and LLCs are flexible and can customize and define control and interests through the entity's operating agreement. The ability to customize LLCs and partnerships can allow the owners to set up a business structure that can take into account the differences each owner may bring to the business.

### Earnings Bailout Potential

Further, it is important for the new business owners to fully understand the earnings bailout potential of various entities. With S corporations, LLCs, and partnerships, it is fairly easy to remove earnings from the business and pass them on to the owners. In this case the profits generated by the business are taxed directly to the owners, so the distribution of profits in the form of dividends or partnership distributions will not carry tax consequences for the entity. However, when a C corporation distributes earnings to owners, or shareholders, in the form of dividends, the dividend distribution is not deductible to the corporation. Instead, it is double taxed, once to the entity and once to the owner, which can be a huge

*(Continued on page 2)*

**Timothy R. Odil and Lee J. Morehead selected as honorees in the 2016 Greeley Tribune *Business Connect* 20 Under 40**



Tim's practice focuses on complex commercial litigation and appeals, government and commercial contract negotiation and disputes, regulatory compliance, licensing, and rulemaking issues, as well as employment law matters.

The Tribune's  
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contest recognizes  
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younger than 40  
in Weld County.



Lee's practice focuses on complex real estate, business and probate litigation, and oil and gas transactions and litigation.

## Meet OBP's Newest Members



Corey W. Moore is an associate attorney working primarily with our transactions team. He most recently worked as a law clerk at Donahoe & Young, LLP in Valencia, California, where he handled bankruptcy, business, and real estate matters. Corey holds a BA in History from the University of California, Berkeley and earned his J.D. from Pepperdine University School of Law, where he focused on estate and tax planning.



An associate with our firm, Lia's practice centers around business law, agricultural law, real estate law, complex commercial litigation, and trust and probate litigation. Lia obtained her undergraduate degree from Washington State University and her J.D. from the University of Colorado School of Law. While in law school, Lia received the best overall combined brief and oral argument award in the Colorado Appellate Advocacy Competition, and represented CU in the American Bar Association's Client Counseling Competition.



Kelley Wilson is the paralegal to attorneys Jeffrey Bedingfield, Timothy Brynteson and John Kolan in our Loveland office. She received her Post-Bachelor Paralegal Certificate in 2001 from Colorado State University and has 13 years of experience in the legal field. Prior to joining Otis, Bedingfield & Peters, LLC, she was a patent paralegal at an intellectual property law firm in Fort Collins for nine years.

## The First Decision in Forming a Business: What Type of Entity? (Continued)

hit against company profits. This tax trap can be avoided if the shareholders are employed by the corporation and receive earnings in the form of taxable compensation. The compensation would then be deductible to the corporation, which results in a tax at shareholder level only.  
Business Losses:

A new entity can also benefit from utilizing losses generated by the business. The threshold issue is whether the losses should be retained by the entity or passed through to the owners. Losses generated by C corporations are retained in the business and can be carried backwards or forwards to be deducted against earned income. This can be a valuable tool in lowering the business's tax liability once the business makes a profit, but the shareholders never benefit from the losses of the business. In an S corporation, LLC, and partnership, losses can be passed through to the owners. For example, when losses are anticipated in the first year of the business, passing the losses on to

the owners may generate tax advantages if the owners have other taxable income against which those losses can be offset.  
Ability to Restructure:

Additionally, the ability of an existing organization to restructure without being penalized can be a helpful tool for a business down the road. For a C corporation looking to restructure, the options are limited. If it converts to a partnership or LLC, the corporation will recognize gain on all its assets, and the shareholders will recognize gain on the liquidation of their stock, leading to tax liability. An S corporation and other pass through entities, on the other hand, can convert without triggering the type of gain and tax consequences you would see with a C corporation.  
Estate Plan Integration

Although most people do not consider it when starting a business, it is also important to integrate a new business entity with the owners' estate plan. Owners may want to shift

income to a lower tax bracket, freeze or slow down the growth of an estate, or utilize the annual gift tax exclusion. To make use of these options, LLCs and partnerships provide the best options and flexibility.  
Potential of Sale:

Finally, although most people will not think about it when beginning a business, it is important to consider the possibility of selling the business or going public. If the business is an S corporation, partnership, or LLC when the assets are sold, the gains realized on the sale of the assets are taxed to the owners in proportion to their interests in the business. In a C corporation there will be taxes levied on the proceeds at the corporate level and then upon distribution to the shareholders. The shareholders will pay capital gains tax on the difference between the amount they received in distribution and their individual basis in the corporation's stock. While there are ways for C corporations to mitigate their tax liability, it would be easier

to sell a business if it was not a C corporation. However, if the company is funded with outside capital, as many emerging companies are these days, and the plan is to eventually go public, then a C corporation is the only option. The interests of outside investors and potential gain that can be found on the public market may trump any of the other concerns discussed above.

Deciding which type of entity to use for a new business venture may not be a difficult decision for some, but it is important to look at all the factors before creating the entity. The above discussion does not address every factor to consider nor is it a thorough discussion of the factors mentioned. The point is to make sure to fully analyze and understand how the choice of entity decision can help or hinder the goals of the business.

-Corey W. Moore

## Don't Let Emotional Support Animals Drive You Crazy



By: Brandy E. Natalzia, Esq.

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If you own or manage residential rental property in Colorado, you may have noticed a growing trend in tenant requests for "reasonable accommodations" in the form of emotional support animals (ESAs). Reasonable accommodations are defined as when a tenant asks a landlord to make a change in an existing rule or policy so they may have an equal opportunity to enjoy the unit and surrounding property. The Federal Fair Housing Act and the Americans with Disabilities Act require landlords to provide reasonable accommodations for tenants with disabilities, and ESAs typically do qualify as such an accommodation. This means that if your property is a "no-pet" property, you would be required to modify your policy to allow an animal that is claimed to be an ESA.

Landlords cannot refuse to rent to

tenants with disabilities nor can landlords ask applicants and tenants about the details of any conditions. Sometimes the disability is apparent, such as a tenant in a wheelchair, but many times a person's disability is not obvious to observers. An ESA is a companion animal which provides therapeutic benefit, such as alleviating or mitigating some symptoms of an individual's mental or psychiatric disability. ESAs are typically dogs and cats, but may include other animals.

Many homeowners, property managers, and homeowners associations have become all too familiar with health professionals producing letters for individuals seeking to keep an emotional support animal in a property based on an online health questionnaire. Unlike service animals under the ADA, standards governing emotional support animals are virtually non-existent and there are no restrictions on the types of animals that qualify as assistance or companion pets. Associations frequently end up relying on statements made by unlicensed individuals who may be out of state and never even met the individuals making requests. The standards are vague enough that landlords and property managers may face a risk if they fail to make a proper determination regarding a tenant's request for a reasonable

accommodation.

House Bill 16-1201 ("HB 1201") was introduced to address a gaping loophole used by tenants to keep dogs and cats in communities which ban them, but was killed by the Democrats in the House Health, Insurance & Environment Committee in March on a 7 to 6 party line vote.

HB 1201 would have regulated how licensed professionals in Colorado must approach providing recommendations for ESAs under the Colorado Fair Housing Act. In particular, this bill would have required that licensed physicians, physician assistants, nurses, psychologists, social workers, marriage and family therapists, licensed professional counselors and addiction counselors must make the following findings prior to recommending that an individual should be permitted to have an emotional support animal:

1. The licensed professional must make a finding that the individual requesting the emotional assistance animal has a disability as defined by Colorado law **or** that there is insufficient information available to make a determination that the individual has a disability; and

2. The licensed professional must actually meet with the individual requesting an

(Continued on page 4)

### Attorney Spotlight

#### Congratulations to Lee J. Morehead on becoming president of the Weld County Bar Association!



On Friday, May 6, 2012, the Weld County Bar Association hosted its annual awards dinner at the Eaton Country Club. This was the 103<sup>rd</sup> annual dinner in the history of the WCBA.

The evening ended with the passing of the gavel from outgoing president Lisa Weibel to incoming president Lee Morehead, Esq., of Otis, Bedingfield & Peters, LLC.



"I am excited for the opportunity to serve as the President of the Weld County Bar Association. I look forward to building on the great work of our past presidents by assisting our members in improving their practices, supporting the justice system, and helping the community obtain legal services," said Lee Morehead.





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## **Don't Let Emotional Support Animals Drive You Crazy** (continued)

emotional support animal IN PERSON, prior to making a finding of whether the person has a disability which necessitates the emotional support animal.

This bill would have all but done away with the concept of online ESA approvals that require little more than a valid credit card to obtain. It would have given landlords a greater ability to confirm a tenant's true disability and would have decreased the current abuse of the existing policy.

While House Bill 1201 has been defeated, there is now a new bill (House Bill 16-1308) that has been introduced and referred to the Judiciary Committee. Federal and state law require places of public accommodation to allow service animals trained to do work or perform tasks for a disabled person. Under this bill, it would be a misdemeanor for a person to intentionally and fraudulently misrepresent an animal in his possession as his service animal for the purpose of obtaining any of the rights or privileges granted by law to persons with disabilities that have service animals. This bill does not have the same type of impact on

landlords since it applies to places of public accommodations, but further indicates that whether the issue is emotional support animals or service animals, there is a growing legislative reaction to perceived abuses of statutes designed to help persons with disabilities.

Many of the more recent court cases involving landlords, property owners, tenants, and animals center on the laws, rules, and regulations about ESAs, not service animals. To outsiders, it is difficult to distinguish between an ESA and a pet. As a landlord, it can be difficult to ensure that you are following federal, state, and municipal laws regarding reasonable accommodations. However, even if you believe you are in compliance with the law, it does not prevent an applicant or tenant from filing a discrimination claim if you deny the reasonable accommodation request. If a prospective tenant files a complaint with HUD, which is usually turned over to the Colorado Civil Rights Division ("CCRD"), you are required to thoroughly respond to the complaint in a timely manner. This response can be time-consuming with requests for

documentation, telephone interviews, rebuttals, etc. If the CCRD finds probable cause for discrimination, there is a mandatory conciliation that the landlord and tenant must attend, at which time the CCRD will attempt to negotiate a settlement between the parties, which usually involves a monetary payment to the tenant. If that conciliation does not result in a resolution, the matter must then be set for a trial in front of an administrative law judge.

In general, the consequences of denying a reasonable accommodation request can vary depending on location. If you find yourself with a request for a reasonable accommodation, your existing community pet restriction policies are likely inapplicable and the consequences of denying a request could be costly, both in time and money. The best course of action for most landlords is to seek legal counsel before responding to these types of requests.

- Brandy E. Natalzia, Esq.

**Congratulations to attorney  
Fred L. Otis for being recognized by  
Martindale-Hubbell for showing  
dedication, leadership and excellence in  
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