

Starting Places –

- PLF's Guide to Opening a Law Firm (excellent checklist!)
- anyone who's ever run a business! (Chamber of Commerce may be a good resource)

Initial Considerations

- Learning the applicable ethical rules & responsibilities (client trust accounts, keeping originals and client records, etc) and necessary reporting to the bar, the PLF, and other agencies
- Realize you will be taking responsibility for the thousands of "little things" that "someone else" does when you work for an Employer
 - Payroll if you have employees
 - Paying bills for your business
 - Keeping books for your business
 - Reporting to state and federal taxing authorities
 - Self-employment taxes for yourself
 - Making coffee
 - Greeting clients
 - Marketing your services
 - Working with vendors
 - Keeping files whether paper or electronic & organizing them
 - Buying pens and paper
 - Setting up fax and Internet services and all computer programs you need
 - Working the copier or printer!
 - Doing your own e-filing or manual filing of court documents and figuring out who and how to serve those documents
 - Creating and mailing out client bills
 - Collecting and applying client payments (and holding retainers in trust accounts)
- The "Plop a Laptop at Your Kitchen Counter" myth
 - Lawyers usually have clients. They often have to actually talk to these clients. Where will that be? At your home?
 - You can often "rent" conference room or meeting space or share with another lawyer or law firm and that's good for creating a professional environment and keeping some separation between work and home (and your sanity!)
 - Systems & software – it can take a LOT of time to get things in place to be a lawyer, particularly if you spend time trying to research "the best"

- Business books (Quickbooks, for example)
- billing software, conflict checking systems, tickling/calendaring systems
- filing (e-mails and document management systems)
- special software – (bankruptcy petition software or programs to allow you to e-file, for example)
- getting accounts set up like OJIN or PACER, etc
- Cloud-based systems vs. server/network systems
- Mail and filings
 - How will you receive mail? How will you get things to the courts and to your clients? What if you need to mail something on a rush? Consider a PO Box or a mailbox store if you don't have a physical office address
- "The Books" and payments
 - How will you handle receiving payments and depositing them and paying your bills? Quickbooks rocks!
- Benefits for Yourself
 - What happens when you go on vacation? Do you have staff back-up or attorney back-up?
 - Benefits – health insurance?

It Takes a Village To Run a Small Practice

- Enlisting friends and family
 - Ask anyone and everyone you know for advice, particularly if they've ever run a business (less so if they're just a lawyer at a big firm because they may not know the nitty gritty!)
- PAYING for assistance and advice
 - Bookkeeper
 - Accountant
 - Computer "guy"
 - A good bank!!
 - An employment lawyer if you will have employees and/or a business lawyer to set up your entity
 - If you set up a physical office,
 - a good landlord
 - myriad of vendors & suppliers (office supplies, printer/copier/fax/phone repair persons, water cooler, someone to change light bulbs because, if you do it, you're not billing clients and not bringing in money!)

Funding and Personnel

- Determine what you need to operate
 - Overhead: office rent, office supplies, Internet/phone service, advertising budget, transportation expense, computer & office equipment, OSB dues and section memberships, INSURANCES!! (PLF, business, worker's comp, medical/dental, property)
 - Employee costs: Salary + costs of benefits (health insurance premiums) + approximately 15% of salary for taxes that you must pay as an employer
 - Have an accountant or friend show you a sample Profit & Loss statement (or look at Financial Statements for Dummies!) to help you identify all the kinds of expenses there can be in a business
 - **Do a business budget!!** If you don't know how much things cost because you've got no business experience, ask friends or other colleagues or an accountant to share some insights with you. Many small business owners like to talk about these kinds of things so you might just ask the person running your neighborhood mom-and-pop business!
- Determine how much you need to be able to provide for your family and consider that if you have employees, you've got to cover payroll (and payroll TAXES) or else expose yourself to serious liability. So, if there's not enough to cover that, then you'll have to pay that yourself plus not get a paycheck yourself Ouch!
- **Consider collection issues** – what kind of practice will you be doing and how long will it take for you to bring money in the door? If you charge up front (“earned on receipt retainer” or “flat fee” case), you have the money “now” but won't have it later when you will have to be putting in some of the time. If you charge a retainer plus hourly rates, you're going to have to figure the following:
 - How long will it take for money to start coming in – if you bill monthly, then clients have at least 30 days to pay their invoice from when they receive it
 - Build in some percentage for bad debt (you do work, client doesn't pay – it's reality for most practices)
- **Example on Budgeting Income:**
 - You decide to set your billing rate at \$150/hour (after researching what's reasonable in the community and what the market will bear depending on your practice area)
 - You estimate you can bill 5 hours a day (this is a fair number, especially if you are going to be running all other aspects of the business yourself)
 - You plan to work 5 days a week
 - You plan to work 47 weeks a year (2 weeks worth of holidays plus 3 weeks of vacation/sick time built in)
 - So that's $\$150 \times 5 \times 5 \times 47 = \$176,250$ gross income but to get a real rate, apply some factor for bad debt to that so say 70% (pretty conservative) = budgeted income of $\$123,375 / 12 = \$10,282$ per month (and then start taking off your overhead and see if there's any of that left for you!)

- **Start-up money:** If you can get a realistic operating budget (with a salary for yourself built in), multiply that by at least 3 to get a 3-months operating budget and look for at least that much funding (personal money, money from friends, or a loan through a bank (probably personally if you have no business history or business assets to collateralize a loan with)
 - Avoid credit cards to start up if you can or you might end up coming to see me!
- **Whether or when to hire employees or other attorneys**
 - Pros: Help with all that stuff on the first page of this hand-out!, back-up for you, good employees are simply *indispensable!!*
 - Cons: hard to find “good” employees and turnover can kill you; your time in training, assisting, and handling requests (vacation, sick days) by an employee must be figured in to the “hard costs” of having an employee
 - **Consider:** Are you spending too much on all those things it takes to run a practice so that you can't be a lawyer and bill and get money in the door? You can hire part-time, non-benefitted positions but you will likely get less qualified applicants (unless it's friends or family!)
 - eventually you probably will need at least one full-time employee
 - or a partner-in-crime ... for example, husband and wife lawyers running own firm but one of them is NOT going to do much lawyering!)

Feel free to call or e-mail me!

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Professional Liability Fund

Thursday, February 16, 2012

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The practice aids listed below are available as a free service of the Professional Liability Fund. Click on the category of interest to view the available documents, then click on the desired document to download. The file format is Adobe® Acrobat® and is accessible to both Mac And PC users. If you do not have the Adobe Acrobat Reader®, it is available as a free download.

PC/Windows users may also download the forms in Word® format. Word® documents can be opened directly in WordPerfect® or users can strip out Word® coding using the WordPad accessory before bringing the document into WordPerfect®. Click here for more information on how to convert documents from Word® to WordPerfect®. Click here to download practice aids. Lawyers and staff are encouraged to visit this page frequently for updates.

For a complete list of all practice aids available from the Professional Liability Fund, click here.

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CHECKLIST FOR OPENING A LAW OFFICE

- Decide what form of entity your business will be. (For solos: sole practitioner, professional corporation, single-member LLC. For multi-member firms: professional corporation, partnership, LLC, LLP.)
- Name your business. If you form an entity, your PC, LLC, or LLP status must be disclosed in the name of your firm. OSB Formal Ethics Opinion No. 2005-49. The name of your business must not be misleading as to the identity of the lawyers practicing under the name. ORPC 7.5(c)(1). Specifically, use of "and Associates" violates the rule if there are no associates or no relationship exists among lawyers in an office share attempting to use this designation. Use of trade names and historical names of deceased or retired lawyers is permitted under ORPC 7.5(c)(2) and (3). For more information, review *What's In a Name: Things to consider before hanging that shingle*, by Sylvia E. Stevens, November 2006 *Oregon State Bar Bulletin*.
- Choose a location (downtown, suburbs, virtual or home office).
- Choose space option (rent office space, share office space, executive suite, virtual office and/or home office).
- Determine office needs:
 1. Furniture:
 - a. Lawyer's office (desk, chair, guest chairs, file cabinet, chair mat, wastebasket)
 - b. Reception area (chairs, coffee table, lamp, pictures, magazine rack)
 - c. Staff (desk, chair, chair mat, wastebasket, file cabinet)
 - d. Conference (table, chairs)
 2. Equipment:
 - a. Telephone(s) with answering machine (or arrange for voice mail service)
 - b. Computer(s) with appropriate software and printer, including Internet connection
 - c. Copier/Scanner
 - d. Paper shredder
 - e. Fax machine (or arrange for eFax service)
 - f. Calculator and typewriter
 - g. Dictation equipment (if necessary)
 - h. Coffee pot and cups
 3. Supplies (stationery, business cards, paper, envelopes, ball-point pens, highlighter pens, pencils, stapler, staple remover, post-it notes and flags, two and three hole punch, copy stamp, date stamp, file folders, rubber bands, tape and tape dispenser, paper clips, phone message pads, legal pads)
 4. Personnel (secretary/administrative assistant, paralegal, receptionist, bookkeeper)
 5. Library (Vols. I and/or II of ORS, Oregon Advance Sheets, CLE materials in area of practice) Note: Many resources are now available online, including [BarBooks](#) statutes, case law, the Oregon Rules of Appellate Procedure, Oregon Rules of Civil Procedure, Uniform Trial Court Rules, and Supplementary Local Rules. Use the Oregon State Bar's online legal research service or follow the links to other online resources from the bar's web site at www.osbar.org. Download Professional Liability Fund practice aids at www.osbplf.org.
- Develop business plan and budget. Identify potential client markets and capital needed to carry business through first three months.
- Open appropriate bank accounts (general office, lawyer trust account) and file Notice of Enrollment in IOLTA program.

CHECKLIST FOR OPENING A LAW OFFICE

- Obtain necessary insurance (professional liability, business liability, etc.) and a business license.
- Consider consulting with a CPA or accountant concerning payment of quarterly estimated taxes and other tax liabilities.
- Determine what type of marketing and advertising you will use (yellow page ad, lawyer referral listing, brochures, business cards, sign for office, announcements, Web site). Review applicable Oregon Rules of Professional Conduct and OSB Formal Ethics Opinion No. 2007-180.
- Establish necessary office systems:
 1. Docket/calendar
 2. Ticker
 3. Accounting (general office and trust)
 4. Time and billing
 5. Filing (open files, closed files, organization of electronic documents)
 6. Conflict
- Take advantage of Web resources, including:
 1. [Oregon Corporation Division Home page](#) and [Business Registration Services](#)
 2. [Answers to Frequently Asked Questions](#) from the Oregon Corporation Division.
 3. [Oregon Business Wizard](#) (provides customized information to help you start and operate an Oregon-based business.)
 4. Oregon Business Guides – [How to Start a Business in Oregon](#) and [Employer's Guide for Doing Business in Oregon](#)
 5. [Small Business Administration](#) – tools and resources to start and manage your business, including [how to write a business plan](#), [marketing your business](#), [preparing your finances](#), and more.
- Call the Professional Liability Fund's practice management advisors at 503-639-6911 or 1-800-452-1639 for assistance or answers to any questions.

START-UP BUDGET

Start-Up Capital or Line of Credit

\$ _____

Equipment

Computer/Server and Backup System	\$ _____
Software	\$ _____
Printer	\$ _____
Fax	\$ _____
Scanner	\$ _____
Shredder	\$ _____
Copier	\$ _____
Telephone (Cell/landline)	\$ _____
Calculator	\$ _____

Total Equipment

\$(_____)

Furnishings and Decor

Lawyer's desk	\$ _____
Lawyer's chair	\$ _____
Lawyer's chair mat	\$ _____
Client chairs (at least 2)	\$ _____
Lawyer's file cabinet	\$ _____
Credenza/computer table	\$ _____
Waste baskets (2)	\$ _____
Pictures and other decor	\$ _____
Reception area chairs	\$ _____
Coffee table	\$ _____
Conference Table	\$ _____
Conference Chairs (4-6)	\$ _____
Staff desk	\$ _____
Staff chair	\$ _____
Staff chair mat	\$ _____
Staff file cabinet	\$ _____

Total Furnishings and Decor

\$(_____)

Supplies

Paper, envelopes, ball-point pens, highlighter pens, pencils, stapler, staple remover, post-it notes and flags, two and three hole punch, copy stamp, date stamp, file folders, rubber bands, tape and tape dispenser, paper clips, phone message pads, legal pads

\$ _____

Total Supplies

\$(_____)

START-UP BUDGET

Library

Legal research - Oregon State Bar (OSB)	FREE
Supplemental online legal research	\$ _____
BarBooks online through OSB	FREE
Other CLE publications	\$ _____

Total Library \$(_____)

Marketing and Printing

Stationery/Business cards	\$ _____
Announcements	\$ _____
Print Advertising (Newspaper/Yellow Pages)	\$ _____
Radio or TV Advertising	\$ _____
Internet Advertising	\$ _____
Other	\$ _____

Total Marketing and Printing \$(_____)

Miscellaneous

Business entity formation fees	\$ _____
Business sign(s)	\$ _____
Business license	\$ _____
Bar dues	\$ _____
Professional liability coverage	\$ _____
Excess professional liability coverage	\$ _____
Bond (for staff)	\$ _____
Business insurance (including liability, fire/casualty, disability/overhead/business interruption, premises liability, and valuable papers)	\$ _____

Total Miscellaneous \$(_____)

Balance \$ _____

Notes:

Managing Your Practice

Business Essentials:

Tips for the Small Firm and Sole Practitioner

By Sheila Blackford, Dee Crocker & Beverly Michaelis

According to the American Psychological Association, almost three-quarters of adults report that money is a “very significant” source of stress. Add the pressure of running a solo practice or small firm, and financial worries can quickly spiral out of control. So how can you get on track, meet your goals and create a vision for the future? It starts with planning and a little number-crunching.

Create a Business Plan

Every solo or small-firm practitioner should have a written business plan. If you are applying for a loan or line of credit, the bank will require it. But it isn't just an exercise for new lawyers or those seeking financing. Your business plan serves as a roadmap for the future. It describes your reason for going into business, why you are entering into (or continuing) a particular type of practice, your projected income and expenses, how you will market yourself and how your business will be structured. It requires research, organization and reflection. However, it doesn't have to be a daunting task. The Small Business Administration is a great place to start. See

<http://tinyurl.com/smallbusinessadmin>

For tools specific to the legal profession, try these free resources from the **Law Society of British Columbia**, <http://tinyurl.com/lawsocietyBC>, **FindLaw**, <http://tinyurl.com/findlawbizplan> and **Whittier Legal**, <http://tinyurl.com/whittierlegal>. The American Bar Association offers the 2011 edition of *The Lawyer's Guide to Creating a Business Plan*, a step-by-step software package with self-calculating worksheets, detailed financial plans, and preformatted documents. www.abanet.org/abastore/index.cfm. *Creating a Business Plan*, excerpted from *Flying Solo: A Survival Guide for the Solo and Small Firm Lawyer*, is a bargain at \$19.95. All ABA Web store products may be ordered through the Professional Liability Fund at a discount. From the PLF website, www.osbplf.org select ABA Products, and note the PLF promotional code.

Your Mission Statement

A mission statement is an important component of your written business plan. How can you express your talents, passion and values in a concise paragraph or two? Four simple exercises developed by Terry Leahy will help you craft a concise, professional mission statement. See this post for more information: <http://tinyurl.com/pracmqmtmission>

Your Financial Plan

Your financial plan is a key component of your business plan and ultimately the success of your law practice. It includes a statement of your financial goals. Tracking the ebb and flow of income and expenses will allow you to project revenue, create a budget and monitor the financial health of your law firm. Start by reviewing your expenses. Some are more essential and time-sensitive than others, such as your annual bar dues and PLF assessment. Both require planning to ensure you have adequate cash on hand to make these payments.

You should become familiar with three particular financial statements that will be an important focus of your financial planning process. You can create these reports yourself or hire an accountant to assist you.

1. The Balance Sheet. A balance sheet is a statement of your assets and your liabilities at a specific point in time — a financial snapshot. Some firms create a balance sheet at year end, while others prepare this statement monthly or quarterly.

2. The Income Statement or Profit and Loss Statement. This is a summary of all the income received and all the expenses paid during a specific period of time, usually a month, a quarter and/or a full year.

3. The Cash Flow Statement. This worksheet shows your cash inflows and outflows over a period of time: monthly, quarterly and/or yearly. It allows you to see the peaks and valleys in your cash flow so you can plan for periodic big expenses and set aside reserves for meeting emergencies. A sample 12-month cash flow statement is available on the PLF website, www.osbplf.org. Select Practice Aids and Forms, then Financial Management. A cash flow statement can also be created in QuickBooks or similar software.

Sample balance sheets and income statements, along with other forms, can be found by searching the SBA Website, <http://www.sba.gov/>.

Use a Budget

Every law office should have a budget. Without one, it's easy to overspend and hard to plan for future purchases. Knowing your overhead costs will help you decide how much revenue you need to make and how much you need to charge to bring in that amount. Failure to budget can cause financial problems. Lawyers with financial problems may take on new clients who have money in hand, leaving the work for existing clients unfinished. This can lead to disciplinary complaints from clients whose work is not completed.

How will you find the right amounts for your initial budget? If available, gather the last three years of tax returns, including pertinent schedules. Reevaluate your expenditures. Are there places you could cut back? Is it time to invest in new technology or hire support staff? Keep your business objectives in mind. Your budget should be crafted to meet the short, mid-range and long-term goals of your plan.

If you are just starting out, estimate your expenses and then adjust your estimates over time based on what you are actually spending. This will allow you to create a realistic budget.

If you have accounting software, you can create a budget and run reports and graphs that compare actual to budgeted income and expenses by category. Both Quicken and QuickBooks have this feature. These programs can also create a budget automatically from actual income and expenses you've previously entered.

If you don't have accounting software, you can use online resources like **Mint**, www.mint.com or **Wesabe**, www.wesabe.com. Both are free and allow you to budget, manage investments, set spending alerts and generate reports. Additionally, Mint offers a free iPhone app to track expenses on the go.

If you want to focus specifically on what your hourly rate should be, try **Freelance Switch**, <http://freelanceswitch.com/rates> an easy-to-use hourly rate calculator.

Mint, Wesabe, and Freelance Switch are secure sites. No personal identifying information is required. But if the idea of entering financial data online makes you uneasy, the PLF offers budget forms. From the PLF website, select Practice Aids and Forms, then Financial Management.

Industry-Specific Data for Lawyers

Every five years, the Oregon State Bar sends out an economic survey to a random sample of the bar membership. The most recent survey was conducted in 2007 and is available on the bar's website at <http://tinyurl.com/osbar07survey>. Information on billing practices begins on page 26. Hourly rate data is captured by geographic location, total years admitted to practice and areas of private practice. The following bar sections participated in a supplemental hourly rates survey in 2008: Antitrust, Business Law, Business Litigation, Civil Rights, Construction Law, Consumer Law, Energy Law, Environmental, Intellectual Property, International, and Litigation. The supplemental survey can be found here: <http://tinyurl.com/osbar08suppsurvey>

Use this data, in conjunction with your budget or calculations from Mint, Wesabe or Freelance Switch, to decide how much you should charge for your services.

Avoid Common Pitfalls that Lead to Non-Paying Clients

Getting paid can be a stressful part of practicing law. It's easy to sabotage yourself if you don't consider some common pitfalls and how to avoid them:

Discuss fees at the outset of the representation. Carefully screen new clients to minimize the number who don't pay for your services because they can't afford your fees.

Avoid clients with unrealistic expectations. The client who frequently complains or needs constant handholding is often the same client who is unhappy with your bill.

Review your billing practices with new clients. Make sure they understand that time will be billed in tenths of an hour, statements will be issued monthly and payment is expected within 30 days. Include a due date on all your bills.

Use written fee agreements to prevent misunderstandings and communicate what will happen if the client does not pay.

Since most people are paid on the first of the month, send your bills out by the 25th of the month so they will have your bill in hand when they are paid.

Monitor accounts receivable closely and establish a collection procedure ahead of time. Assuming you generate bills on the 25th of the month and clients are expected to pay within 30 days, your procedure might be: On Day 31, past-due clients automatically are sent a second billing notice. On Day 40, past-due clients receive a phone call. On Day 50, past-due clients receive a (form) letter, and so on. The idea is to establish specific steps that follow a timeline.

Remember, these situations rarely get better. If you need to withdraw, comply with the Oregon Rules of Professional Conduct (ORPC). See "How to Fire a Client: Do's and Don'ts When Ending Representation," Beverly Michaelis, *Oregon State Bar Bulletin* (July 2007) and "Tying Up Loose Ends: How to End a Relationship," Helen Hirschbiel, *Oregon State Bar Bulletin* (October 2010).

Offer incentives, such as a discounted or hourly rate or flat fee, if the client establishes a retainer or pays your fee up front. Comply with OSB Formal Opinion 2005-151 if you intend to charge a fixed fee "earned upon receipt." Recent amendments to ORPC 1.5 and 1.15-1 explicitly require a written fee agreement signed by the client informing the client: 1) The funds will not be deposited into the lawyer trust account; 2) The client may discharge the lawyer at any time; 3) In the event the lawyer is discharged or discontinues representation, the lawyer may be

required to refund all or part of the fee if the services for which the fee was paid have not been completed.

Consider an early-payment discount. If the client pays your outstanding bill within 10 days rather than 30, give the client a percentage discount off the total amount due.

Accept credit cards. Avoid bookkeeping hassles by using a private credit card processor who will take merchant fees only from your business account, *not your lawyer trust account*. Be sure to read and comply with OSB Formal Opinion 2005-172.

Collect the “last month’s rent.” Require that the client pay a security deposit to be held in the lawyer trust account. Invoice the client as usual. At the end of the matter, use the security deposit to pay the client’s final bill. Alternatively, the funds may also be used if the client fails to pay a monthly invoice. Put this arrangement in writing. Keep in mind that if the client’s funds can earn net interest, you are required to establish a separate interest-bearing account for the client or obtain a waiver of the client’s right to interest. See OSB Formal Opinion 2005-117 for additional details.

Use “evergreen” retainers. In this type of arrangement, the client agrees to maintain a specified retainer balance at all times. Your bill should reflect the beginning retainer balance, fees and costs incurred during the month, total funds disbursed from the client’s retainer, any balance remaining, and the amount needed to replenish the retainer to the required amount.

Consider interest charges carefully. Unless you and the client have entered into an enforceable written agreement to charge interest at a higher rate, you may charge only the statutory rate of nine percent on a past-due account. See OSB Formal Opinion No. 2005-97.

Resist the temptation to modify your fee agreement with current clients. OSB Formal Opinion 2005-97 also stands for the proposition that modification of a fee agreement in the lawyer’s favor requires client consent preceded by an explanation of the reason for the change and its effect on the client. In addition, any modification must be objectively fair. Meeting this standard isn’t impossible, but it isn’t easy, either. If you discover you have made a bad bargain, the best course is to learn from experience and change your fee agreement *prospectively* with future clients. Otherwise, you may find yourself in the middle of a fee dispute, even if your client initially agrees to the modification.

Think twice before suing a client for fees. The decision is yours, and economic pressures are hard to ignore. Before you take this ultimate step, however, be sure you’ve considered all the issues, including the possible effect on your PLF coverage. See “Fee Disputes and Binding Arbitration — Impact on PLF Coverage,” Roger Westendorf, *In Brief* (June 2009).

Business and financial planning may not be what you went to law school for, but the ultimate success of your practice depends on your ability to understand and manage the financial nuts and bolts of running a law firm. However, you don’t have to do it by yourself. Spend some time planning for the future, use the resources available to you, and get outside assistance if needed.

The authors are practice management advisors at the Professional Liability Fund.

CHECKLIST FOR CREATING A WORK-FOR-RENT/EXPENSES AGREEMENT

1. State the length of the agreement and the effective date.
2. Specify the responsibilities of each party.

For example, Lawyer 1 agrees to provide Lawyer 2 with a place to practice law and all the necessary support staff, office supplies, and equipment to perform the work described in Paragraph 3. Lawyer 2 shall be responsible for his/her professional liability coverage, bar dues, continuing legal education expenses, and overhead costs related to his/her independent practice. (See paragraph 4.)

3. Describe the terms of the work-for-rent arrangement, including:
 - a. The quantity of legal services per month Lawyer 2 must provide to Lawyer 1 in lieu of rent (state the number of hours and hourly rate).
 - b. Steps Lawyer 2 must take in the event of insufficient work in any given month, such as making up the difference in cash or providing specified non-lawyer services.
 - c. If overflow work is anticipated, describe how Lawyer 2 will be compensated.

NOTE: Lawyer 2 should not work on any matter of Lawyer 1 without the prior consent of the client. Lawyer 2 must screen all clients for potential conflicts prior to accepting any work from Lawyer 1.

4. If the intention is that each lawyer operate an independent practice apart from the work-for-rent arrangement, recite appropriate language. *See the PLF practice aid, Office Sharing Guidelines, for more information on sole practitioners sharing office space.*
5. Describe the conditions under which the agreement may be modified or renegotiated.
6. Describe the process for terminating the agreement. Include:
 1. The timing and manner of notice.
 2. Duties of the withdrawing party.
 3. How disputes will be resolved.
7. To learn more about "work-for-rent" arrangements, see "The Win-Win Of A Work-For-Rent Arrangement" at <http://www.diamondcutlife.org/the-win-win-of-working-for-rent> (Note: While this blog post is not specifically about lawyers entering into a work-for-rent arrangement it contains some helpful hints.)

OFFICE SHARING GUIDELINES

If you want to share space with another lawyer, but do not want to be considered a de facto law firm for conflict or vicarious liability purposes, follow these guidelines:

1. Use a written office-sharing agreement. Include the names of the parties, effective date of the agreement, and term of the agreement. Specify each party's contribution toward rent, common office expenses, and secretarial or other staffing costs. Address ownership of furnishings, equipment, research, and educational materials (joint and individual). Require office-share mates to adhere to these guidelines, and provide for the timing and manner of termination of the agreement. (You may wish to include specific provisions covering death, incapacity, or automatic termination of a party who is suspended from or loses the privilege to practice law.)

Other optional clauses include:

Designation of an "office manager" to maintain an office account, collect and disburse funds, purchase common supplies, prepare an annual budget, and generally manage the affairs of the office.

Adoption of policies and procedures to ensure the respective lawyers abide by the Oregon Legal Ethics Opinions and Oregon Rules of Professional Conduct.

Standards for office décor and appearance.

Conditions under which other lawyers may be added to the office-sharing arrangement.

Resolution of disputes or disagreements.

2. Make sure your business cards, advertising, letterhead, and pleading paper are separate from your office-share mate's. List only your name or your own firm's name. The name of your office-share mate should not be on your business card, letterhead, pleading paper, yellow page ad, or Web site.
3. Make sure that all signs (such as those posted on the office door, building directory, and building exterior) present the relationship between you and the other lawyers clearly. For example, if you are a solo practitioner sharing space with a law firm, list your name separately. You can signify this separation by placing a line between the firm's name and yours. Include the phrase "sole practitioner" after your name, if possible.
4. Respect the confidentiality of information relating to the representation of your respective clients and direct your employees to do so as well.
5. Keep your respective client files separate. If they must be kept in the same file room, keep the files physically separated and ensure that appropriate limitations on access to files are made clear to and observed by all lawyers and their employees.
6. If there is a common telephone system, ensure that telephone messages, which contain confidential information or information relating to the representation of a client, are not given to or transmitted by shared employees. Ideally, each attorney should have his or her own telephone line and number.
7. Mail must not be opened by shared employees.

8. Faxes must not be read by shared employees. Fax cover sheets should be used for outgoing faxes and requested whenever possible from parties that are going to fax confidential information to the shared office fax.
9. Have the receptionist answer the phone in a manner that conveys separation from the other law firm. For example, answering the phone "Law Offices of John Doe" is an effective way of reminding the clients that you are separate from "Smith and Jones," the firm with whom you share space. Using separate phone numbers makes this easy to do and is less confusing than having one phone number that is answered, "Law Offices."
10. If you are going to have your office-share mate help you on a case, get your client's written consent first, just as you would if you were to associate an attorney who did not work at the end of the hallway. If you are going to split fees, follow Rule 1.5(d) of the Oregon Rules of Professional Conduct.
11. Maintain your own conflict-of-interest system. This preserves all of your clients' confidences and secrets and helps establish that you are a separate entity.
12. Maintain your own general and trust accounts.
13. If you share a secretary or other employee who is in possession of the confidences and secrets of both *your clients and the clients of the other lawyers in the office share*, then the simultaneous representation of adverse parties would be prohibited. To avoid this problem, exchange client names with other lawyers in the office share. Advise your client that because of the nature of your office share, there is a need to provide the client's name to the other lawyers so that a proper conflict of interest check can be performed. Your client must give informed consent, which should be confirmed in writing, before you disclose your client's name to other lawyers.
14. If you become "of counsel" to your office-share mate or your office-share mate becomes "of counsel" to you, you will be treated as a single firm for conflict-of-interest purposes. See OSB Formal Ethics Opinion No. 2005-155. Lawyers or firms in "of counsel" relationships may also have vicarious liability for one another's negligent or intentional acts under the general rules of agency and partnership.

CHECKLIST FOR CONTRACT LAWYERS

Issues to Discuss with Your Hiring Attorney

1. Potential conflicts of interest.
2. Nature of the project.
3. How long the assignment will take.
4. Applicable deadlines. (Is a short turnaround or rush required?)
5. The project budget.
6. Your fee, including any premium rates that may apply for short turnaround times or purchasing PLF coverage.
7. Payment terms, discounts for early payment, and clarification that your payment is not dependent upon the client paying the hiring attorney.
8. Whether you will work on site and have use of the hiring attorney's equipment and office staff.
9. The form and manner in which your work product will be delivered.
10. What to do if the project's time requirements and scope exceed original terms. (Seek clarification on how the assignment would be restructured or revalued.)
11. How closely supervised you will be.
12. Your PLF status.

Discuss whether you should purchase your own PLF coverage before taking the assignment, and the higher contract rate you will charge for this added security.

If you do not purchase PLF coverage, you must work within PLF exemption guidelines. As an exempt contract attorney, your work **must** be reviewed and supervised by the hiring attorney. Make sure the hiring attorney understands that you are prohibited from:

- Making strategy or case decisions
- Signing pleadings or briefs
- Attending depositions or making court appearances as attorney of record
- Holding yourself out to any client as an attorney
- Using the title "attorney," "attorney at law" or "lawyer" on any correspondence or documents

For additional resources on contract lawyering, order a free CD, DVD, or tape of the PLF seminar, "Practical Contract Lawyering," available at www.osbplf.org. Click on [Programs CD/DVD](#). The complete PLF "Law Clerk/Supervised Attorney" Exemption Guidelines are also available on the PLF Web site. From the home page, click on [Policies and Guidelines](#) under "Primary Coverage." Also see: Heidi O. Strauch, [Choosing a Contract Attorney: Tips for Establishing a Working Relationship](#), February/March 2011 *Oregon State Bar Bulletin*.

CLIENT RELATIONS DO'S AND DON'TS

DO treat your client with courtesy by:

1. Keeping appointments promptly.
2. Returning telephone calls, or having staff call to explain any delay.
3. Completing work as promised, or letting the client know why if it cannot be done. Do not force your client to repeatedly nag to get something done.
4. Keeping the client informed of the progress of his or her case by sending copies of pleadings, correspondence, *etc.*, as well as occasional status reports.

DON'T create unreasonable expectations. Assess your client's case realistically and present it to the client that way.

DO explain clearly, and confirm in writing, exactly what your legal services will consist of and exactly how the fee will be determined. Carefully confirm in writing any legal matters you are not going to handle, and if the client or another professional is going to do a portion of the work. Provide specific written details to avoid misunderstandings.

DO comply with ORPC 1.4, which states: (a) "A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

DO use a written fee agreement and/or engagement letter for all client matters.

DO comply with Exclusion 8 of the PLF Coverage Plan relating to business transactions with clients. See the *Disclosure Form ORPC 1: "Lawyer Engages in Business Transaction with Client"* on the PLF Web site, www.osbplf.org Select Practice Aids and Forms, then Conflicts of Interest.

DON'T sue your client for a fee without first attempting to arbitrate the fee dispute through the Oregon State Bar Fee Arbitration Program, <http://www.osbar.org/rulesregs/feearb.htm>

DO confirm all advice in writing, particularly if the client chooses not to follow your advice. Explain alternatives and their ramifications, and then let your client decide.

DON'T take any material action which may prejudice your client, settle a case, agree to judgment, or dismiss a party, *etc.*, without the express consent of your client.

DON'T lose the human touch. Treat all clients with empathy and practice good listening skills. Often the most important client need you can meet is the need to be heard and understood. If you are struggling with a difficult client, contact the Oregon Attorney Assistance Program (OAAP) for confidential advice at (503) 226-1057 or (800) 321-6227.

DO take measures to produce a professional work product. Work closely with staff to ensure that all documents, pleadings, correspondence, and client bills are accurate and error-free.

DO contact the PLF for advice if a claim or potential claim for malpractice develops.

CHOICE OF ENTITY FOR A LEGAL PRACTICE IN OREGON

By David Culpepper
Thede Culpepper Moore et al.

NOTE: This outline is a general overview of the issues involved in entity formation for attorneys practicing in Oregon. It does not purport to offer legal advice. Practitioners should conduct their own independent research and consult with appropriate business and tax professionals before making any decisions as to form of entity.

I. AVAILABLE FORMS OF PRACTICE IN OREGON

A. Sole Professional Practice

1. Sole Proprietorship
2. Single Shareholder Professional Corporation ("PC")
 - a. "C" corporation
 - b. "S" corporation
3. Single Member Limited Liability Company ("LLC")

B. Multiple Professional Practice

1. General Partnership ("GP")
2. Limited Liability Partnership ("LLP")
3. Multiple Shareholder PC
 - a. "C" corporation
 - b. "S" corporation
4. Multiple Member LLC
5. GP, LLP or LLC with Single Shareholder PCs or Single Member LLCs as partners or members (a "Multiple Tier Organization")

II. PERSONAL LIABILITY IN OREGON

A. Types of Liability

1. Professional Liability (Malpractice)
 - a. Direct (including liability for subordinates under direct control and supervision)
 - b. Vicarious
2. Other (Non-professional) Tort Liability
 - a. Direct
 - b. Vicarious
3. Contractual Liability

B. Sole Practitioners and Partners of GP

Attorneys who practice as sole practitioners or partners in a professional GP have unlimited personal liability for all types of liability of the practice, including acts or omissions of associates/employees. In a GP, a partner may have rights to indemnification or contribution from other partners, but as to creditors, the partner has unlimited joint and several liability.

C. Single Shareholder PC or Single Member LLC

An attorney who is the sole shareholder of a PC or the sole member of an LLC will have:

1. Unlimited personal liability for professional liability (because such liability will always be direct, unless perhaps liability arises from acts of employees);
2. Unlimited personal liability for direct non-professional tort liability (e.g., the attorney negligently bumps the client through a plate glass window);
3. No personal liability for non-professional torts committed by employees (unless the claimant can establish negligent delegation or supervision); and
4. No personal liability for contractual liability (absent personal guarantees).

Query: Is a single shareholder/member always responsible for supervision of negligent employees/associates? If not, personal liability may be limited as described in D.2. below.

D. Partner in LLP, Member in Multiple Member LLC, Shareholder in Multiple Shareholder PC

An attorney who is an owner of an interest in an LLP, LLC, or PC, will have:

1. Unlimited personal liability for direct professional liability resulting from his or her own acts or those of others under his or her direct supervision and control;
2. Limited personal liability for vicarious professional liability resulting from acts of other partners, shareholders, members or employees, notwithstanding the lack of direct supervision and control. Vicarious liability limited to \$400,000 (with a \$2.65 million limit for entire firm) in a year;
3. Unlimited personal liability for direct non-professional tort liability; and
4. No personal liability for non-professional torts committed by others in firm or for contractual liability.

Note that a Multiple Tier Organization may eliminate vicarious professional liability.

E. Impact of Personal Liability on Choice of Entity

For purposes of limiting personal liability, any form of practice other than a sole proprietorship or GP provides essentially the same protection. In Oregon, the playing field for PCs, LLPs and LLCs is level.

F. Multiple Tier Organizations

An attorney who is the sole owner of a PC or LLC that is a shareholder, partner or member in a PC, LLP or LLC will be treated in a manner similar to the attorney referenced in Section D above, except that as to items 1 and 2 above, personal liability MAY be avoided in some circumstances:

1. The statute requires for direct, supervisory or vicarious liability that the services in question be rendered on behalf of the entity. If we are focusing on the liability of the owner of a single owner entity practicing as a shareholder, partner or member of a PC, LLP or LLC, are the services in question being rendered on behalf of the PC, LLP or LLC with whom the client has the direct relationship or on behalf of the single owner entity?
2. Further, if the statute refers to the umbrella entity and every owner of such entity is a single owner entity, there would not be any "licensed" owner of the umbrella entity to which the statute would impose direct or vicarious liability because entities are not licensed, only individuals are licensed.
3. On the other hand if one penetrates the tiers to the negligent licensee's single owner entity and imposes direct liability on that owner, the statute's reference to "other shareholders [members or partners]" may not cover the other licensees since they are not co-owners in the negligent party's entity on whose behalf the negligent licensee is performing services.
4. Under either view, looking at the entity being held out to the public as the main firm or looking at the entity wholly-owned by the negligent attorney through which he or she practices, a strong argument can be made that the statute precludes imposing personal liability on the other owners of the lower tier entities which have ownership interests in the firm.

III. **TAX TREATMENT**

A. Sole Proprietorship

A sole proprietor reports income on Schedule C on his or her personal tax return for the practice. There is no separate tax return for the practice. The sole practitioner with employees should get an employer identification number (EIN) for reporting payroll of employees. All earned income is subject to self employment tax (similar to FICA).

B. Single Member LLC

A single member LLC is disregarded for income tax purposes (but not for liability protection purposes). An attorney practicing in a single member LLC reports income in the same manner as a sole proprietor and should get an EIN for the LLC if the attorney has any employees. All earned income is subject to self employment tax (similar to FICA).

C. GPs, LLPs, Multiple Member LLCs

All GPs, LLPs, and Multiple Member LLCs are treated as partnerships for income tax purposes, unless the entity elects to be treated as a corporation. The partnership files a separate partnership tax return (Form 1065) but does not itself pay any tax. The partnership income is allocated among the partners or members and reported on Schedule K-1 to the Form 1065. Each partner reports the income on his or her Schedule K-1 on his or her

personal income tax return. Partnership tax provisions of subchapter K of the Internal Revenue Code apply equally to all GPs, LLPs, and Multiple Member LLCs. All earned income is subject to self employment tax (similar to FICA). Certain post year-end adjustments of income shares can be made.

D. PCs (Single and Multiple Shareholder)

1. "C" Corporation. A regular, or "C" corporation, is subject to a corporate level tax. The corporation files its own tax return (Form 1120) and pays tax on its taxable income, i.e., income after the payment of salaries, bonuses, and other deductible expenses. Corporate taxable income that is paid out to shareholders is subject to another tax at the shareholder level (the so-called "double tax").

Typically, to reduce the risk of double taxation PCs operated as "C" corporations pay out salaries and bonuses to their shareholder employees in an amount sufficient to reduce the corporation's taxable income to near zero. Salary payments, including salary payments to employees who are also shareholders, are (subject to reasonable compensation limitations) deductible by the PC in computing its taxable income. This takes some careful planning at the end of the corporate year and the calendar year. Special rules apply to year-end selection and tax planning.

2. "S" Corporations. A PC that timely elects to be treated as an "S" corporation files a corporate tax return (Form 1120S) but generally does not itself pay tax. Rather, the income, after salaries, bonuses, and other deductible expenses, is allocated among the shareholders (in proportion to their number of shares) and reported on the shareholders' Schedule K-1 (and then on their individual tax returns). Thus, S corporation's earnings generally are not subject to a double tax and they do not have to be as careful in computing and timing year-end bonuses. However, there are special restrictions on choice of year end, shareholder qualifications and the types of economic distinctions that may be made between shareholders.

A shareholder-employee of an "S" corporation PC receives two types of income from the PC: (a) salary payments (that are subject to withholding and social security taxes) and (b) "S" corporation actual or constructive dividends (the net income that flows through on Schedule K-1 regardless of whether or when it is distributed to shareholders). The dividend income is not subject to income tax withholding and provided at least adequate compensation is paid, it is not subject to social security taxes. However, only salary and bonus payments, and not actual or constructive dividend payments, may be taken into consideration for retirement plan contribution purposes.

E. Tax Benefit Differences

1. Pension Plans. Although "C" corporations used to have a significant additional benefit with respect to pension and profit sharing plan contribution limits, these differences have been eliminated. The limits are now the same for sole proprietorships, partnerships, "C" corporations, and "S" corporations.
2. Health Care Expenses. "C" corporations have an advantage for health care expenses. Effectively, shareholder-employees of a "C" corporation PC can both deduct health insurance premiums and participate in cafeteria plans (so-called "flexible benefit or 125 plans"). Self-employed persons (which for this purpose include sole proprietors, partners of a GP or an LLP and members of an LLC) and employees with at least a certain interest in an "S" corporation cannot participate in a cafeteria

plan and the amount of their health insurance premiums that they can deduct is limited by their earned income.

3. FICA Benefit. Shareholder-employees of PCs ("C" or "S" corporations) have the ability to avoid social security taxes on income amounts received or allocated to them as dividends rather than compensation provided a reasonable amount of compensation is paid.
4. Miscellaneous "C" Corporation Benefits. PCs operated as "C" corporations have some other miscellaneous benefits over partnerships, sole proprietorships, and "S" corporations.

Deduction for disability insurance premiums (but, if the PC claims the deduction, the benefits will be taxable to the shareholder-employee, regardless of "C" or "S" status);

Deduction for parking expense;

Deduction for group term life insurance (for coverage up to \$50,000).

5. Retirement Payments. Partnerships (including LLPs and multiple member LLCs) have an advantage in structuring retirement payments to former partners. Payments for good will and receivables can be structured to be deductible by the partnership. PCs cannot deduct any payments for redemption of stock.

Any tax advice contained herein is not a "covered opinion" under Circular 230 and therefore cannot be used, by itself, for the purpose of avoiding any tax penalties that may be imposed.

*Originally appeared in Chapter 11 of "Learning the Ropes," the companion materials to the Professional Liability Fund's continuing legal education seminar of the same name.
Reviewed and updated courtesy of Robert K. Winger and David Culpepper.*

LAWYERS AS PCs, LLCs & LLPs

By Robert K. Winger

Today, more and more lawyers are considering practicing in limited liability partnerships (LLP), limited liability companies (LLC) or professional corporations (PC). In many instances, the vicarious liability aspect of the entity is the driving force behind the formation of the entity. This article reviews how the vicarious liability of the owners of these entities works and its interplay with professional liability coverage. It does not address the tax and other issues that may be relevant in determining what form of entity to use.

Since ORS 58.185 dealing with the professional liabilities of licensed shareholders in PCs applies equally to the licensed owners in LLCs and LLPs as well (*see ORS 58.037, 63.074 and 67.025*), the rules discussed in this article apply equally to PCs, LLCs and LLPs when discussed using the terms "Entity" and "Owner." Also, when reading the main statute regarding professional liability ORS 58.185, it may be helpful to substitute these words for "corporation" and "shareholder." If a rule applies only to one form of Entity, the type of Entity and type of Owner will be specifically referred to in this article.

DIRECT LIABILITY

Owners of professional entities have direct and unlimited personal liability for their own professional negligence. ORS 58.185. The statute does not address the liability of the Entity, but, under the doctrine of

respondeat superior, the Entity and its assets, including its accounts receivable, are liable for the professional negligence of its Owners or employees acting within the course and scope of their employment. Under general indemnity principles, the Entity has an indemnity claim against a directly negligent Owner or employee.

SUPERVISORY STATUS LIABILITY

In addition, an Owner is also vicariously liable for any professional negligence committed by another person (licensed or not) who is under the Owner's direct supervision and control. A supervisor is liable for negligent supervision but under ORS 58.185 a supervising Owner's liability may not be limited to negligent supervision. It has been argued that the statute imposes liability on the supervising Owner merely on account of his or her status as the supervisor of the tortfeasor.

Since the statute does not contain any definition of "direct supervision and control," some managing partners, associate mentors, and others with general management roles have been concerned that they *might* be held personally liable *without limit* for the acts of others with whom they have had no direct contact as to the matter involved.

Conversely, firms train young associates and for a period of time encourage them to build a client base. As the associate develops, the need for

supervision and control lessens so that often, before an associate becomes an Owner, he or she is practicing without any direct supervision or control.

LIMITED LIABILITY

Non-negligent, non-supervising Owners have joint and several vicarious liability for professional negligence of others in their Entity. This is limited to those Owners who (1) are licensed to practice in this state, (2) are in the profession for which the Entity was formed, and (3) practice more than incidentally in this state.

As of 2006, this vicarious non-supervisory liability is limited to \$400,000, (the "individual limit") with an aggregate \$2.65 million limit (the "aggregate cap") on vicarious liability of all non-supervising Owners. These limits are adjusted every six years beginning in 1994.

HOW THE LIABILITY CAPS WORK

What is often misunderstood by professionals is the interplay between the individual limit and the aggregate cap. For example, assume that an Owner causes \$3 million dollars of damages due to professional negligence. If there are four Owners, three of whom are non-negligent, non-supervising Owners, the liability of the three non-negligent, non-supervising Owners is limited to \$400,000 each, for a total of \$1,200,000. The aggregate cap would not come into play. The client would be unable to collect

more than \$1,200,000 from the three vicariously liable Owners. The client would, however, retain his or her right to collect the full amount from the negligent Owner and the Entity.

In the example above, the aggregate cap does not get triggered, since the total amount of liability of the three vicariously liable Owners was \$1,200,000 and, therefore, less than the \$2.65 million. In order for the aggregate cap to apply, the Entity would have to have at least seven non-negligent, non-supervising Owners.

If we change the facts above and instead assume that there are eight Owners and a \$3 million error is made, the aggregate cap does apply. The negligent Owner and the Entity would be directly liable for the full \$3 million. The seven non-supervising, non-negligent Owners would each have \$400,000 of vicarious liability exposure. Thus, the total exposure of the seven Owners would be \$2,800,000—*EXCEPT THE CAP IS TRIGGERED*. The cap reduces the non-supervising, non-negligent Owners' liability exposure from \$2,800,000 to \$2,650,000.

If the Entity has more than eight Owners, the client with the malpractice claim against the Entity can sue and recover up to the aggregate cap from *any seven* of the non-supervising, non-negligent Owners. The client is not required to pursue all of the non-supervising, non-negligent Owners in order to collect his or her damages. For example, where the Entity has eleven Owners, one of whom made a mistake and 10 of whom are not supervisors and not negligent, the client with a \$3

million claim is not obligated to collect a pro rata share of the aggregate cap limit from all 10 vicariously liable Owners. The client does not, in other words, have to collect only a pro-rata share from each of the 10 non-supervising and non-negligent Owners in order to get the aggregate cap. The client can collect the full individual limit of \$400,000 from any of the vicariously liable Owners until he has collected a total of \$2.65 million.

RIGHTS OF INDEMNITY & CONTRIBUTION

The foregoing raises a concern about the application of the principles of indemnity and contribution. "Indemnity" is the common law principle that allows one, who may be liable for an injured party's damages (without playing any active role in causing them) to recover fully for any loss incurred against those more actively involved. For example, an employer who properly maintains a vehicle may be indemnified by the employee for negligent driving within the course and scope of his employment. "Contribution" is a statutory right under ORS 18.430-460 which results in the sharing of liability between joint or joint and several tortfeasors.

The potential unlimited exposure of non-negligent, non-supervising Owners is one reason some people have been hesitant to race into becoming one of the "limited" liability Entities. In a general partnership, a partner is not directly liable unless the partner is negligent. There is no status liability for non-negligent "supervisors" comparable to what may exist in the context of these three "limited" liability Entities. The non-negligent, supervising

partner would have indemnity rights against the offending partner and the partnership, and he or she would have contribution rights against the other partners for any amount in excess of his or her pro rata share of the joint and several liability. In a general partnership, this contribution right would not be limited by the \$400,000 individual limit or the \$2.65 million aggregate cap.

For example, assume (1) ten lawyers formed a general partnership in which all partners are equal, (2) one partner caused \$4 million in damages due to professional negligence, (3) one was a non-negligent supervisor, (4) eight partners were not involved at all (other than being partners with the negligent attorney), and (5) the negligent partner and the partnership were insolvent. If the client collected from the supervising partner, the supervising partner would have a claim of contribution against the eight remaining partners for \$400,000 each or \$3.2 million, leaving the supervising partner potentially exposed to \$800,000. (The supervising partner would also have an indemnity claim against the insolvent partner and the insolvent partnership.)

The statutes relating to all three Entities provide that an Owner shall not be jointly and severally liable solely by reason of being an Owner except as provided by ORS 58.185. Since the statutes are silent as to any contribution rights of a non-negligent, supervising Owner against his or her fellow non-negligent but non-supervising co-Owners it can be argued that a non-negligent supervising Owner is liable to the full extent of the damages

incurred without any right of contribution from the vicariously liable Owners in excess of the mandatory limits. Any obligation of contribution would arise solely by reason of one's status as an Owner and therefore be limited to the \$400,000/\$2.65 million limit. As such, a \$4 million liability with one negligent Owner; one non-negligent, supervising Owner; and eight non-negligent, non-supervising Owners would result in the non-negligent, supervising Owner having a claim for contribution against the eight non-negligent, non-supervising Owners, but the claim against each would be limited to \$400,000/\$2.65 million cap. Absent indemnity from the negligent and insolvent Owner and Entity and even assuming the eight non-negligent, non-supervising Owners make good on their limited vicarious contribution liability, the non-negligent supervising Owner would be responsible for \$1.35 million, i.e., \$550,000 more than his or her exposure under the general partnership described above.

Thus, becoming an Owner in an Entity could potentially expose a non-negligent, supervising Owner to liabilities with respect to which he or she might not have the same recourse by way of contribution as he or she would have in a general partnership. To avoid this risk, special contribution provisions need to be incorporated in the operating documents of these Entities to protect the non-negligent supervisors to the same degree they would be protected in a regular general partnership.

PROFESSIONAL LIABILITY FUND COVERAGE

Substantial confusion arose in the late 1990s when the newer forms of professional limited liability entities were being born because, at that time the individual vicarious liability limit was \$300,000, which appeared to be the amount of the Professional Liability Fund malpractice coverage limit. However, the two concepts or limits were not tied together.

Unlike the vicarious liability limits in the statute, this amount is not subject to a cost of living adjustment every six years.

Only one limit of coverage is available when two or more claims arise out of related activities even if multiple lawyers in a firm are involved.

Multiple and successive errors by the same or different attorneys which cause harm or which cumulatively enhance damages or losses, are deemed to be related acts and only one set of limits will apply to the set of acts.

For example, if two attorneys work on a client's file and make a \$3 million mistake, the total coverage limit available to the client from the PLF primary fund is \$300,000. If one lawyer in the firm makes a \$3 million mistake and the PLF pays the \$300,000 policy limits on the claim, no additional coverage limits are available to pay on behalf of any other lawyer/Owner. Therefore, no additional coverage from the primary fund is available to that client for the remaining \$2,700,000 regardless of the number of lawyers who had some involvement with the matter or were Owners in the Entity. These same principles apply to excess coverage limits.

The interplay between the insurance coverage and the statutory caps on liability, in some instances, works to relieve the non-negligent, non-supervising Owners of liability. Assume, for example, that the Entity has four Owners, (one negligent Owner and three non-negligent, non-supervising Owners) and has \$1 million of liability coverage. If the negligent Owner made a \$1.5 million mistake, the liability coverage available and the statutory caps would work together to relieve the non-negligent, non-supervising Owners of liability. The non-negligent, non-supervising Owners would each have a vicarious liability cap of \$400,000. With three of the Owners, the injured party could collect up to \$1,200,000 from the vicariously liable Owners. However, if the injured party was paid \$1 million of malpractice coverage on behalf of the negligent Owner, this payment would almost cover the portion of the damages (\$1,200,000) for which the non-negligent, non-supervising, vicariously liable Owners would otherwise owe. These vicariously liable Owners would be liable for \$400,000 each, for a total of \$1,200,000, but \$1 million of this amount was already paid by the malpractice carrier. Of the remaining \$500,000 of the damages (\$1.5 million damages minus \$1 million paid in insurance) only \$200,000 would have to come from the three vicariously liable Owners and the balance would have to be collected from the negligent Owner, or the Entity. The vicariously liable Owners would not be personally liable beyond the \$200,000.

Also, some claims, such as punitive damages, sanctions,

and theft, are often not covered by the Professional Liability Fund Coverage Plan of the negligent or errant Owner. There may be, however, coverage in those instances for the vicariously liable Owners.

MULTIPLE ONE PERSON PCs OR LLCs COMBINE TO PRACTICE TOGETHER

Since the vicarious liability provisions are expressed in terms of sharing the liability with the other Owners in the Entity in which the negligence occurred, can personal vicarious liability be escaped by each professional forming separate one-person PCs or LLCs, which join to form a partnership, LLP or LLC? *NOTE: By definition you cannot have a one person LLP since it takes two or more to form a partnership under state law.* In a partnership, LLP, or LLC made up of one person PCs or LLCs, there would not be any person who is an other Owner of the Entity in which the negligent person is a co-Owner and, hence, personal vicarious liability might be escaped by the Owners of the other PCs or LLCs. Each PC and LLC and the "umbrella" entity may be liable under general partnership law, ORS 58.185, or *respondeat superior*, but the personal assets of the Owners of the other Entities might escape liability. Since most of the federal tax reasons for forming separate Entities which practice in partnership together have disappeared, if this structure works to avoid any vicarious liability, such avoidance may remain a significant benefit of the often more complicated and administratively costly structure.

DRAFTING CONSIDERATIONS

If one is going to practice in one of these limited liability Entities, how should the governing documents be drafted to address the allocation of professional liabilities? Clearly the "winding up" or "dissolution" section should be examined closely to ensure that there is no obligation on the part of the non-negligent, non-supervising Owners to contribute or restore capital accounts due to losses attributable to claims for which they are intending to enjoy limited liability, or at least the obligation should be limited to the extent permitted by ORS 58.185(5). Should the agreement provide recourse against the negligent Owner? Should the vicariously liable Owners share their liabilities on a per capita, profit interest, or other basis? At what point in time are those interests to be determined? Is it when the negligence occurred, the damage is incurred or the liability is satisfied? Admission agreements and withdrawal releases or settlements should be drafted carefully with these issues in mind. Addressing these difficult issues will help encourage Owners to become supervising Owners, thereby offering the firm training and second opinions which are invaluable.

MULTI-STATE PRACTICES

It is important to note that the extent of personal liability (especially vicarious liability) of professionals practicing in various limited liability entities varies from state to state and from profession to profession. The foregoing is in reference to Oregon only.

WHAT SHOULD I BE?






Adding all of the above described malpractice liability complexity to the tax differences between a general partnership, PC, LLC, and LLP makes it difficult for a group of general practitioners to determine which route to follow. There isn't one clear answer for all situations. Different situations may tip the scale in different directions. If you are not experienced in the issues involved, you may want to seek competent advice before proceeding.

Our thanks to David Culpepper, Miller Nash Wiener Hager & Carlsen, LLP, and Charles Tauman for their assistance in reviewing this article.

Originally appeared in the *In Brief* PLF newsletter.

Books for Small Firm/Solo/Contract Practitioners

Please note: All of these titles are available in the Career Center library.

	<p>Choosing Small, Choosing Smart: Job Search Strategies for Lawyers in the Small Firm Market Donna Gerson, 2005.</p> <p>Donna Gerson, an experienced career counselor, shares her expertise on the ins and outs of working in a small firm environment. This comprehensive guide offers information about understanding the small firm market, approaching firms effectively, negotiating salary and benefits, and succeeding as a small firm lawyer. Interviews with small firm practitioners, law school career services directors, and bar association professionals provide advice from the experts.</p>
	<p>How to Start and Build a Law Practice, 5th Edition Jay Foonberg, 2004.</p> <p>A thorough guide to becoming a solo practitioner.</p>
	<p>The Complete Guide to Contract Lawyering: What Every Lawyer and Law Firm Needs to Know Deborah Arron, Deborah Guyol, 2003.</p> <p>This book offers a wealth of information to guide lawyers and legal employers through the contract lawyering process. The book includes a step-by-step plan for lawyers considering temporary work. It also describes the issues and steps legal employers must address in hiring a contract lawyer. The guide also delves into ethical considerations and legal issues involved in contract lawyering.</p>
	<p>Solo By Choice: How to Be the Lawyer You Always Wanted to Be DecisionBooks, 2008.</p> <p>It's not easy to decide to become a solo practitioner right out of law school or soon afterward. This book is addressed particularly to law students and relatively recent law graduates who are contemplating that decision. In 300 information-packed pages, the author begins by addressing the decision to go solo (through chapters on reasons to solo, making the decision, and soloing out of law school). She then steps readers through the process of getting started, selecting a practice area, dealing with clients, dealing with the business side of practice, marketing and growing a practice, and outsourcing. The appendices offer a wealth of additional helpful resources as well as providing how-tos on writing a business plan and creating a sample forms library.</p>
	<p>How to Build and Manage a Family Law Practice Mark A. Chinn, 2008.</p> <p>Tips, strategies, tactics, forms, and real-word advice for starting - or building - a family law practice. Written by a successful and happy family lawyer, this book explains the skills and knowledge necessary to thrive in a challenging area of the law. It takes a no-nonsense approach in explaining the most critical issues for developing a successful career. Examples and practice tips show how to gain experience, understand the business aspects of a practice, develop and maintain the ideal client mix, and manage staff and finances. CD-ROM with forms and related materials.</p>

Suggested Resources for Solo/Small Firm/Contract Practice

Build a Solo Practice @ SPU

<http://buildasolopractice.solopracticeuniversity.com/>

BSP@SPU is a blog devoted to solo practitioners, discussing issues faced, offering advice, support, inspiration.

Sole & Small Firm Practitioners Section of the Oregon State Bar

<http://www.osbar.org/sections/ssfp.html>

<http://www.ssfps.org/>

General Practice, Solo & Small Firm Section of the American Bar Association

<http://www.abanet.org/genpractice/home.html>

Oregon Women Lawyers Contract Lawyer Service

<http://www.oregonwomenlawyers.org/services/>

The Contract Lawyers Service will connect you with contract lawyer projects and put you in touch with other lawyers who are making it as contract lawyers. Members of the Contract Lawyers list serve have access to contract projects that are posted on the listserve by Oregon employers. The list serve also provides a forum for members to communicate with other contract lawyers.

LexisNexis Communities

<http://www.lexisnexis.com/community/portal/>

Online community resource for individual attorneys. Includes some free caselaw as well as forms and other resources.

What About Clients?

<http://www.whataboutclients.com/>

A blog offering news and ideas on clients, customers, business and law around the globe. Voted one of the 100 best law blogs by the ABA Journal.

Legal Marketing Blog

<http://www.legalmarketingblog.com/>

A blog dedicated to legal marketing for any size firm. Note: The October 25, 2011 post is titled "How to Have a Successful Solo or Small Firm Practice".

My Shingle

<http://www.myshingle.com/>

This blog is published by Carolyn Elefant, author of Solo by Choice. This has many great links to other solo resources as well as good information on the site.

CONTRACT ATTORNEY GENERAL RESOURCES

OREGON STATE BAR:

www.osbar.org

Oregon New Lawyer's Division:

The ONLD has a page full of job resources information; including information on how to get on the Oregon Women's Lawyers contract referral list. Other information includes government job hotlines.

<http://www.osbar.org/onld/resources.html>

<http://www.oregonwomenlawyers.org/services/>

Economic Resources for Members:

<http://www.osbar.org/resources/economicresources.html>

This webpage from the Bar sets out some ideas and opportunities to help bar members succeed in a challenging economic environment. There are resources and tips broken up into: Practice Support; Personal Support; Career options and transitions; Discounts and cost-saving opportunities (insurance through the Multnomah County Bar).

One important tip is signing up for the bar's Lawyer Referral Service (LRS), which connects potential clients statewide with lawyers practicing all types of law. You can also sign up to help lower-income Oregonians at reduced rates through the Modest Means Program. It is a good way to get experience and help out.

Need Advice? The bar's Lawyer to Lawyer program connects Oregon attorneys working in an unfamiliar practice area with experienced attorneys willing to offer informal advice at no charge.. Any Oregon attorney can call Lawyer to Lawyer and receive the names and telephone numbers of three Resource Lawyers. To access the program, call (503) 620-0222 extension 408, or toll-free in Oregon: (800) 452-8260 extension 408.

SALARY INFORMATION:

General site to get an idea of salary ranges for different types of practices.

<http://www.indeed.com/salary>

The Oregon State Bar has a site that list survey results from salaries and economy surveys from the past years. Helpful because it is broken down by practice areas and geography.

http://www.osbar.org/surveys_research/snrtoc.html

The Posse List

Was originally for contract attorneys who worked on electronic document review, discovery, and production. Membership now is broader and includes: forensics consultants, paralegals, in-house counsel, law firm attorneys, solo practitioners, e-discovery companies, legal media entities, and other legal support professionals. You can subscribe to their information and jobs lists and receive via email commentary, articles, trends, reports of legal conferences, etc. about the ESI management and e-discovery markets. They also have some information on helping contract attorneys educate themselves about their contract work and professional development.

<http://www.theposselist.com/>