

GOING SOLO IN ARIZONA:

TIPS FOR STARTING AND MAINTAINING A SUCCESSFUL SOLO PRACTICE

Practice 2.0



Acknowledgements

The State Bar of Arizona and Practice 2.0, the State Bar's practice management program, gratefully acknowledge the invaluable contributions of the members of the State Bar's CLE Committee who first had the idea for this book, along with the following lawyers and legal support professionals who contributed to this book. Without these individuals, this book would not have been possible.

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TABLE OF CONTENTS

INTRODUCTION.....	1
CHAPTER ONE: Is Solo Practice Right for You?.....	2
CHAPTER TWO: Business Planning & Budgeting	4
Creating a Business Plan for Your Law Practice	4
What is a business plan?.....	4
Executive summary or general description	5
Financial analysis & plan	5
Management plan.....	6
Marketing plan.....	6
FAQs: What you always wanted to know from a lender but were afraid to ask.....	7
Why do I need a business plan?.....	7
Where may I find a sample business plan?.....	7
What are the parts of a business plan & what is an executive summary?.....	7
Who really reads the business plan?	7
How long should the business plan be?.....	8
How much time do banks or potential investors spend reading my proposed business plan?	8
So what does a banker or lender really want to know?	8
How much detail do you need?	8
If the bank wants to jump to the “good” part – what part is that?.....	9
Is it essential to have a business plan to borrow money or establish a line of credit?	9
My law firm will be an LLC – does my own credit history matter?	10
CHAPTER THREE: Your Office	11
Virtual Law Office v. Bricks & Mortar – which is right for you?	11
Considering virtual offices	11
Term	11
Work space	11
Meeting space.....	11
Office staff.....	12
Practical logistics.....	12
Ethical considerations	12
Owning office space	13
Tips for a More Traditional Office Setting	14
Furniture, fixtures, & equipment.....	14
Support Services – IT (Information Technology) or MIS (Management Information Systems)	20
Choosing a company	20
In-person versus online IT assistance	21
Disaster recovery	22

Should you consider working from home?.....	23
Creating a location	24
Practical logistics.....	25
Business cards.....	26
Family dynamics.....	26
Isolation.....	27
Self-care	28
Setbacks	28
Considering Office Sharing.....	29
Ethics issues to consider when sharing an office.....	29
Office personnel.....	29
Shared equipment & spaces	29
Firm names & letterhead	30
Other considerations	30
CHAPTER FOUR: Professional Liability Insurance FAQs.....	31
What is professional liability insurance?	31
Securing professional liability insurance.....	31
Selecting a broker	31
Applications.....	32
Selecting an insurer.....	32
Selecting limits of liability	33
Claim reporting	34
Glossary.....	34
CHAPTER FIVE: Business Entity, Capitalizing/Partnerships v. LLC – Business Entity “Alphabet Soup”	36
Do you legally have to file documents with a state agency to form an entity for your law practice? ...	36
What is the difference between forming a professional entity & a non-professional entity?.....	37
Do both PCs & PLLCs provide limited liability protection?	39
What is the difference in management structure for a PC compared to a PLLC?.....	39
What is the difference in how a PC is taxed compared to a PLLC?	41
What is the difference in the formation filing requirements for a PC compared to a PLLC?	42
Conclusion.....	44
CHAPTER SIX: Fees	45
Types of Fees & Fee Agreements.....	45
Fee Agreement Specifics.....	45
Ethical Rule 1.5.....	46
Ethical Billing Tips to Get Paid.....	48
Bill regularly – even when there’s nothing to bill	49
Use Complete Sentences	49
Proofread	50
Never block bill or use excessive minimum units	50
Keep track of time – even for contingent & flat fee matters.....	51
Always identify whether the money is coming from trust or owed	51
If you change your fees, you must notify the clients, in writing, BEFORE you bill them!.....	52
You cannot be cloned, so you cannot “double bill” time	52

Do not bill for administrative services	52
Know the clients' billing policies & your audience	53
CHAPTER SEVEN: Revenue Budgeting, Cost Analysis, & Profitability.....	54
Revenue Budgeting	54
Revenue budget model.....	55
Hourly billing rates	55
Revenue capacity	56
Realization.....	56
Cost Basis Hourly Rate Analysis	57
Profitability.....	59
Improving profitability	60
Timekeeping.....	61
CHAPTER EIGHT: Trust Accounting Systems & Procedures.....	63
First, do you need a trust Account?	63
How do I open a client trust account?	64
If You Have Funds in a Trust Account, You Are a Fiduciary	64
Trust Account Records You Need to Maintain.....	65
The Most Important Step: Monthly Three-Way Reconciliation	66
Separate Clients, Separate Accounts	67
You can not spend what your client does not have	67
You can not play the game unless you know the score.....	68
The Final Score Is Always Zero	69
Final Tips	70
CHAPTER NINE: Managing People – Hiring, Training, & Supervising Staff.....	71
Overview	71
What do I need to have accomplished?.....	71
What kind of assistance do I need?	72
On what basis do I need the assistance?	72
Hiring.....	73
Introduction	73
Options for hiring	74
W-2 vs. 1099	74
Labor & employment laws that apply to the practice	76
Federal labor & employment laws.....	76
Arizona labor & employment laws.....	77
Other hiring options.....	78
Six steps for hiring & dos & don'ts.....	78
Recruitment	78
Job description	79
Special note on FLSA	80
Screening.....	80
Interviewing	81
Checking references & documentation	82
Evaluation & selection	83

Final note	83
Staff Training	83
Communications & professionalism	84
Confidentiality.....	84
Conflicts of interest.....	84
Finances & the trust account	84
Avoiding the unauthorized practice of law	85
Office procedures & safety	85
Human resources policies	85
Employee retention	86
Management & supervision.....	86
Human Resources	87
Human resources policies, handbooks & notices	87
Personnel file	88
Performance evaluation.....	89
Corrective action.....	90
Termination.....	91
Effectively utilizing your paralegal	92
CHAPTER TEN: Practice Management Software & Technology.....	93
Selecting Practice Management Software.....	93
Security in the Cloud	94
Paperless or Paper on Demand.....	96
Calendaring	96
Conflicts checking & contacts	97
CHAPTER ELEVEN: Communication	98
CHAPTER TWELVE: Legal Research.....	99
CHAPTER THIRTEEN: Marketing for the Small Firm	100
The Rules That Apply.....	100
The Tips to Ethical Marketing	100
Print, online, & television advertisements – & general requirements	100
Direct mail soliciting.....	101
Client consent – when it’s required	101
Solicitation in general	102
Direct solicitation: Never in-person or by phone – except for 4 limited groups	102
Never pay someone for sending you a referral	102
Seminars for prospective clients & booths at expos	103
Law firm names/affiliations	103
The internet: The rules still apply – be careful	104
Lawyer marketing/advertising – what is your niche?	107
Become a rain maker	107
Yellow pages	108
Print advertisement	109
Billboards	110
Radio/television	112

CHAPTER FOURTEEN: Networking.....	114
General Networking Tips	114
Where to Meet People & Network Effectively	114
The Elevator Pitch	115
Dress Well	117
Marketing Techniques	117
Turning Connections into Cases.....	118
CHAPTER FIFTEEN: Consider a Mentor for Professional Development, Marketing, & Human Contact	120
CHAPTER SIXTEEN: Work-Life Balance & the Sole Practitioner	121
The Precocious Puppy	122
Paper-Training the Precocious Puppy	126
Finding Work-Life Balance, One Breath at a Time	127
Sowing Your Dream Garden.....	129
CHAPTER SEVENTEEN: The Ethical Obligations When Lawyers Change Firms.....	130
Duties of Firms & Lawyers When Someone Leaves.....	130
Ethical obligation to communicate to certain clients	130
Which clients to tell	131
How to tell clients	131
Other people who should be told about the departure	132
Trust Account Monies	133
Fee Divisions in General.....	133
When the firm is dissolved.....	133
When the firm remains but a lawyer leaves & takes cases	134
Files	135
Phones, Email, & Mail	136
Partners & Associates Leaving Must Abide by Fiduciary Duties to Firm	136
Associates forming new firms.....	137
Partnership obligations.....	138
Additional Ethical Duties When Switching Firms.....	139
Duties of lawyers interviewing with other firms – check for conflicts	139
Screening an “infected” lateral hire.....	140
Law Firm Mergers	141
Selling a Law Firm.....	143
Death of a Lawyer	143
RESOURCES.....	A-1
Additional Resources for Starting Your Business	A-1
SAMPLE ORGANIZATIONAL CHART.....	B-1
PRACTICE 2.0 CHECKLIST FOR HOME OFFICES.....	C-1
CHECKLIST FOR NAMING YOUR LAW FIRM.....	D-1
ONBOARDING A NEW EMPLOYEE: The First Hour	E-1
CONFLICTS CHECKING CHECKLIST	F-1

Introduction

Going solo and hanging a shingle can be both an exciting prospect and a daunting one. Initially, starting a law firm requires considering the business structure that will be used, selecting office space, procuring malpractice insurance, determining what technology to implement, and – most importantly – giving careful consideration to practice areas.

Lawyers are also well advised to consider the systems and procedures that will be used in the law firm. It is much easier to have these systems in place while the firm is still small; implementing them later, when the practice is large and thriving, can derail forward progress. Marketing and methods of generating business are also a necessary area of focus. Later, as the business becomes larger and more profitable, there are additional considerations, such as selecting a staff. Of course, working well with clients should always be at the forefront. This manual attempts to provide guidance in a number of these areas and more.

The State Bar offers a variety of practice management resources for lawyers through Practice 2.0, the Bar's voluntary, confidential practice management program. As you engage in this exciting process of starting, building, and growing your practice, please remember that Practice 2.0 is there for you. You may reach Practice 2.0 at 602-340-7332.

Chapter One: Is Solo Practice Right for You?

Before you go any further, think carefully about whether a solo practice is the right fit for you. Being a solo practitioner does not mean that you will be absolutely cut off from the legal community; but, it does mean that you will be spending lots of quality time with yourself, in the absence of colleagues. Having a solo practice may also mean that, at least initially, you are both lawyer and support staff – you will be both practicing law and managing the business of the practice.

If you are transitioning from a firm to a solo practice, be realistic about the differences you are about to make in your environment.

Here are some considerations:

- Are you an introvert or an extrovert? Maybe you've done the Meyers-Briggs Type Indicator, or some other personality profile, or maybe you haven't. This question assumes that you know yourself and whether you are outgoing or quiet; whether you are comfortable in a crowd or entering a room full of strangers and making conversation, or whether that sounds like the seventh circle of hell. If you are the type of person who needs to get up and chat with someone else intermittently through the day, or needs the hum generated by other people working and interacting around you to be happy, then perhaps solo practice isn't for you.
 - On the other hand, if you yearn for quiet, are easily distracted, or are a true introvert who is shy or uncomfortable around other people, perhaps solo practice is the right decision.
 - If you are easily distracted, however, this may be a factor to consider later in deciding whether a home office will work for you.
- Do you do your best work by bouncing ideas off other people, by thinking out loud, and reasoning through issues with someone else? If the answer is yes, and if you are a solo, how will you do this? What resources do you have to enable you to accomplish your best work for your client?
 - You may wish to consider joining a State Bar section in your practice area, or making contacts with other lawyers in your practice area, to give you the sounding board you need.
 - Do you need or want a mentor to help your professional growth in the way of having a partner, or do you need other associates around you as if you were to join a firm?
 - If you are used to working together with other lawyers, are you flexible enough to adapt to a new way of working?

- Are you entering into an area of practice unfamiliar to you? If you are, consider whether solo practice is the right step for you, at this time. Sometimes the best learning tool in a new practice area is an association with one or more experienced attorneys. Would you rather try joining a firm, regardless of the size, to learn this area of law and then branch off on your own?
 - If the answer is that you are still committed to opening a solo practice, what other resources will you access to gain competence in this area?
 - Is there a practice area better suited to solo practice or, conversely, ill-suited to solo practice? There is no easy answer to that question. During your consideration of this mode of practice, consider whether you have the resources – both personal and financial – to do the kind of work your chosen practice area will require. For example, if you are entering an area of the law in which the lawyer would necessarily have to advance considerable costs and you don't have that cash reserve, you may need the backing of a firm and its coffers to successfully practice.
- Are you comfortable marketing yourself? To develop a successful solo practice, you must be ready, willing and able to market yourself. Yes, you can hire contractors to create your website and advise you about your online presence. What they cannot do, however, is be you – the person the client is hiring. As a solo, you need to be able to develop leads, gather referral sources, and network. If you aren't comfortable selling yourself in a confident, yet professional, manner you may wish to consider joining up with one or more lawyers, or a firm, who can help you with that.
- Are you comfortable managing the business of the practice of law? This may include billing, accounts receivable and payable, and other tasks traditionally considered “back office” tasks. Are you comfortable with the support functions you will be performing for yourself – formatting documents and pleadings; maintaining and using a conflicts checking system; maintaining a client trust account; doing client intake; and lots more. These are all necessary functions that cannot be ignored. There are resources available to assist you, but the bottom line is – as always – the buck stops with you.

Chapter Two: Business Planning and Budgeting

Creating a Business Plan for Your Law Practice

First, you need a business plan.

Whether starting out as a new graduate, or leaving a firm to launch a practice on your own, a good business plan is essential. A business plan helps you visualize where you are going, and gives you a firm foundation when seeking funding from outside sources. As hard as it is to accept, the road to success is not necessarily paved by working harder – it is paved by working smarter. This section will outline some of the basics in preparing a business plan, as well as the practical realities of putting your plan to use for you and your practice.

Building a law practice is building a business, whether you believe you are business-savvy or not. A vast amount of knowledge on the First Amendment may impress your law professors (and perhaps even your clients), but it will not pay the rent, meet payroll, or help you build a practice. To build a business, you have to have a plan. You cannot hang out a shingle and expect clients to start flocking to your door. Once you get clients, without a well-thought-out plan, you cannot expect those clients to simply throw money at you. A good business plan details the roadmap for your practice (the practice area and geographic area in which you will practice) and the ways you will bill clients and bring in revenue. Without a plan, your practice becomes a series of haphazard decisions, which may not allow you to best capitalize on your skills and talents as a lawyer.

Hard work alone does not guarantee financial success. A business plan and budget are essential for any firm, new or old, and can help you better understand the finances of your practice to ensure a more profitable future.

Your business plan will not be set in stone; it will not be inviolate. Just as important as the final product is the process you go through in getting it. As Dwight D. Eisenhower noted, “Plans are nothing; planning is everything.” A business plan is essential because it requires you to take the time to actually think about your law practice as a business. Putting together a plan of action requires careful thought and analysis pertaining to many factors and topics tied into the practice of law – as a business – that you may not have considered, prior to setting out on your own.

What Is a Business Plan?

There are as many variations of a business plan as there are articles and web pages describing them. Whether attorneys need to divide their business plan into three parts or four, include an executive summary or not, all depends on what you need to tell others about you and your practice.

In general, most authorities agree that your business plan should have:

1. An executive summary or general description of your business
2. A financial analysis and plan
3. A management plan
4. A marketing plan

Each of these categories may include sub-categories, which will be discussed shortly.

Executive Summary or General Description

This is the quick nutshell description of the “who, what, when, where, how, and why” of your proposed law practice enterprise. How many lawyers will be involved, what practice area, where will you be located, who is your target market, and how will you strategize and project the growth of your practice.

Financial Analysis and Plan

The financial plan should include your budget for the first twelve months. Lawyers need to explain their expected and reasonable costs, and their expected and reasonable expenses. Where will the money come from? How many clients and legal matters may a lawyer reasonably expect to have the first year? For example, if you plan to have a personal injury practice, which is traditionally based on contingent fees collected at the conclusion of the representation, how will you support yourself for the first twelve months before you successfully collect your first settlements?

It is important to prepare a budget (a detailed month-by-month analysis) for your first year of practice. This budget should include any and all expenses that you can predict and anticipate, as well as a cushion for the unexpected, since costs may well be more than expected. As a practice grows, you may face unanticipated costs. Once you’ve prepared the costs analysis, compare that to the anticipated revenue. If you don’t have enough history to forecast your income or revenue, make a reasonable, educated estimate, based on an individual marketing plan; talking to other solo practitioners with more experience may also provide some input to allow you to better forecast revenue for your first year of practice. Practice 2.0 staff can also discuss this with you and offer guidance in identifying expenses to consider.

Whether putting together a budget for a business plan or an ongoing practice, it is important to take an active role in the management of the firm’s finances. Many lawyers find they have neither the time nor the temperament to handle the finances of their practice – this is a mistake. Avoiding active financial planning, or abdicating control of the firm’s finances to a third party, can cause critical business and ethical missteps. As a lawyer, it is critical to maintain proactive and day-to-day control over a firm’s current finances; a thorough understanding of the short-term and long-term financial goals is vital, if an attorney expects a law practice to remain profitable and successful.

Management Plan

Who will be responsible for the running of the practice, and for certain key roles in the business? What is the proposed business entity? If the firm is a Limited Liability Company (LLC), who will be the one making the day-to-day decisions? Who will be responsible for accounting, hiring (and firing) staff, ordering supplies, or fixing the problem when the Internet goes down? How will profits be distributed and what percentage ownership will various stakeholders or partners have? What is the exit strategy in case someone wants to leave or get bought out? All of these issues should be contemplated and addressed in the management section of your business plan.

Marketing Plan

How will you really get your clients? Will you start a web page (fairly inexpensive and very popular in today's market)? Will you use social media, such as Twitter, LinkedIn, or Facebook? Will you take out an ad in the Yellow Pages (very expensive and less popular in today's market)? What is the market niche you want to be in? Who are the competitors? Whatever the marketing strategy, you must not only hope it is successful, you also have to ensure that it is ethical.

Marketing for a law firm must comply with certain Rules of Professional Responsibility, and is not like marketing for many other business entities. Be aware of your ethical obligations as a lawyer, as well as your responsibilities as a business owner, when contemplating the marketing plan for your law practice. Lawyers are held to a stringent professional standard and are responsible for the conduct of those they employ, including advertising or marketing companies; always remember that.

The discussion above offers a general guideline of what should be included in a business plan; the following gives answers to frequently asked questions.

FAQs: What You Always Wanted to Know From a Lender but Were Afraid to Ask

Why do I need a business plan?

It is important to have a business plan if you are seeking a loan from a bank for a law practice. When borrowing money from a bank, if you have less than three years of practice, you will most likely be required to have a business plan to present to the bank. The lender or bank needs documentation proving that the business is well-thought-out and viable in order for a lawyer to secure a loan. The bank requires a solid financial analysis, including the projected costs and revenues, and also an understanding of how the business will work and what the strategy is to be successful in the business world.

Where may I find a sample business plan?

There are countless sources of sample business plans on the Internet. There are tools, outlines, and samples available – either for free or for a price. Many banks prefer working with the Small Business Administration (SBA), and many start-ups use the SBA for assistance and guidance. There are great resources available through the official SBA website (www.SBA.gov), including a guided “Business Plan Tool” (www.sba.gov/tools/business-plan/1) and a “Business Plan Template” training booklet (<http://imedia.sba.gov/vd/media1/training/2/sbabp/bptemplate.pdf>). The SBA also offers online classes and supports SCORE (www.sba.gov/tools/local-assistance/score), a nonprofit association that provides free mentoring and consulting to start-ups. Some people prefer to hire a business consultant to work with them in preparing a business plan. New lawyers can also establish a relationship with a representative from the commercial lending department of a bank, and work with these professionals when putting together a business plan.

What are the parts of a business plan, and what is an executive summary?

You will find many samples and, in those samples, a myriad of ways of putting them together but, as previously discussed, four elements are key: 1) the Executive Summary, 2) Financial Analysis, 3) Marketing Plan, and 4) Management Plan. The executive summary is, essentially, the nutshell version of your business plan.

Who really reads the business plan?

If you have been working with a commercial lender, your business plan may have been created with help from the lender or another professional business consultant. Each point person at the bank will help you prepare your business plan for submission to the bank’s underwriters. The bank’s underwriters will review your plan and focus specifically on the description of your practice, financial analysis, and parties involved. The underwriters will also prepare an analysis to recommend an approval, declination, or counteroffer based upon the information provided.

You may choose to get financing through other avenues, such as family or other investors. You may need to establish a line of credit, or prove to suppliers that you are ready to open your doors for business. You can use the business plan you have prepared to show others that you mean business. You can use it to show banks, other lenders, and suppliers that you have done your due diligence to develop your law practice as a viable and profitable business.

How long should the business plan be?

A business plan can be anywhere from a few pages to a few hundred pages. Putting in due diligence and doing research on a business is highly advisable; but, keep in mind, it is not likely that the bank will read an exceedingly long business plan in its entirety. In general, the bank wants you to have done your research on any number of *qualitative factors* that may affect their business, such as current demographics, market conditions, competitors, or transportation issues that may affect a lawyer's client base. However, the bottom line is this – will or won't you be able to pay back your loan?

It may serve you well as a lawyer starting a practice to put immense amounts of time into researching the choice demographic, best cloud-based case management system, or practice areas of other lawyers in your respective zip code. It will undoubtedly serve you well to practice due diligence in exploring best office locations, office-sharing options (including considering a virtual office), or the going rate for a paralegal assistant. This information, while vital to the planning and strategy of any firm, may not be as important to the underwriter at the bank who is evaluating whether or not you get the loan. Do the necessary homework and put the research results in your business plan to help you better prepare and strategize for your future, but know that the bank may not take as keen an interest in some of these more qualitative factors as you do.

How much time do banks or potential investors spend reading my proposed business plan?

There is no bright line rule for this. In general, an underwriter may spend an hour reading through a rather simple, straightforward plan; they may take longer if the plan is more complicated. The underwriter then spends much more time preparing the analysis of each individual plan.

So what does a banker or lender really want to know?

They want to know if a particular lawyer is worth the risk. Bottom line – will the projected revenues and expenses of a law practice give you the ability to meet your loan demands and financial obligations?

How much detail do you need?

The underwriters will focus on several factors, in considering whether your law practice is a good risk for a bank loan. The devil is in the details. Can you realistically bring in the clientele you project? Can you realistically charge the clients your proposed fees? What fees will the market bear, and are those fees the

market rate for your location and particular practice area of the law? How many competing lawyers exist in your particular zip code? What do they charge? Will you need an office, or will you be an e-Lawyer? Will you lease an office? Do you need capital for tenant improvements? Will you buy an office? Have you accounted for property taxes? What type of office equipment will you need? Will you hire a staff?

In general, it is advisable to provide a realistic – but optimistic – analysis of the overall projected earnings. Don't be too conservative or restrictive in the detail. The underwriters will review each individual projection and be careful in their analysis. Your job is to aim high, but realistically, and come up with the "best case scenario." The underwriters will determine how realistic the projections are based on their experience and market analysis; they will do a "base case" or "bank case" analysis, as well as a "worst case scenario." That's their job. The bank uses *qualitative data* – such as current market conditions, trends in the legal market, and the human resources of your firm – to provide background for their *quantitative analysis*.

CAUTION: As much as you may value establishing a "green" practice and want to devote pages in your business plan to recycling policies, or have strong beliefs in providing pro bono work or devoting the bulk of your time to the underserved, there is a place for those ideals (your heart) and a place to avoid them (your business plan). The bank wants to ensure that you make enough money to pay back the loan; the bank is not interested in knowing that lawyers plan to work for free. Pouring all of your energy and resources into representing a pro bono client may earn you points in the hard work column, but will leave you with nothing toward meeting your monthly overhead and operating expenses. Having said that, make sure to be honest and realistic in your revenue projections if you plan to offer a considerable amount of services for free; this will inevitably impact your bottom line.

If the bank wants to jump to the "good" part – what part is that?

If you want to think of this as jumping ahead to the end of the book to see how it will end, the banker's equivalent would be skimming the initial executive summary, then jumping forward to the financial analysis. It is in this analysis – where you project your income and your costs – which the lender decides whether a particular business (your law firm) is worth the risk.

Is it essential to have a business plan to borrow money or establish a line of credit?

If you are a new lawyer (in practice for less than three years), it is essential to have a business plan if you want to borrow money from a commercial lender. The lender needs to determine that your practice is worth the risk. If you have an established practice with a healthy financial history, the bank may not require a business plan. It is you, the new lawyer – with a short or, perhaps, checkered financial history – who requires the bank's heightened scrutiny and, thus, a business plan.

My law firm will be an LLC – does my own credit history matter?

Yes, credit history does matter. If you or your law partners plan to have more than a 20% stake in the practice, you will need to be a guarantor. The bank will need the full financial histories of any and all major shareholders in the law practice. It does matter if you or your partners have defaulted on a mortgage, walked away from a residence, or defaulted in any way on a federal loan. Defaulting on a federal loan, or filing for bankruptcy, may make you ineligible for a Small Business Administration loan, and many banks rely on SBA guidelines to determine whether they will lend money. If you are planning to start a law firm with partners and seek financial backing from a bank, you need to know the credit histories of their proposed partners, as well.¹

¹ Special thanks to Jeremy H. Johnson, Senior Business Relationship Manager, Vice President, Professional Banking Services, Wells Fargo Bank.

Chapter Three: Your Office

Virtual Law Office v. Bricks & Mortar – Which Is Right for You?

Considering Virtual Offices

Virtual office spaces are unique because they offer a standard office setup, but only on an as-needed basis. Clients will be greeted by a receptionist, who will call you when they arrive. Virtual office receptionists often perform rudimentary administrative duties; for example, they may take documents that clients have dropped off and retrieve your mail. If a client drops by unannounced and you are not present, the receptionist can contact you on your cell phone or tell the client that you are not available. Virtual office arrangements allow lawyers unique professional flexibility and can be used short-term or long-term. Finding the right virtual office arrangement may require visiting and comparing several locations. Please keep in mind, like shared office space, there are ethical considerations to account for.

Term

Virtual spaces can be used on an as-needed basis, month-to-month, or for a specific lease term. You may decide to have multiple virtual office space in multiple locations so that you can meet clients in varying locations in your city or state. In that case, using a virtual office space on an as-needed basis may be the most useful option. If you are trying out the office space, a month-to-month arrangement could work well. Many lawyers use virtual offices as a long-term solution; therefore, a longer lease may be useful, in order to lock-in a satisfactory monthly rental amount.

Work Space

Virtual offices vary in their offerings. Supplementing a small office or a home office by renting a conference room at the virtual office might be a useful option. Keep in mind, some virtual offices also offer co-working space; in this type of setup, you may have a dedicated desk in a large space where others work. Or, you may choose to use the meeting space offered at the virtual office and do your non-face-to-face work from another location, like home. Ultimately, workspace at a virtual office is meant to be flexible – that way, you can pay for only what you need.

Meeting Space

Virtual office spaces typically offer a variety of meeting spaces. Some might include small lounges, small conference rooms, furnished offices, and state-of-the-art conference rooms. If you rent a dedicated office at the office space, you will usually be entitled to a limited number of free hours of conference room space. If you choose to use the virtual office for its address (a monthly fee), you may have to pay an hourly

fee to use conference room space. Keep in mind, you will likely need to reserve conference room space ahead of time.

Office Staff

Virtual office spaces generally offer a receptionist to answer your phone calls. That person would also be there to accept documents and packages, on your behalf, as well as greet your clients when they come in. In using the services of a shared receptionist, you must consider confidentiality issues (see checklist in the Appendix), and also potential conflicts of interest if the receptionist serves more than one attorney, depending on the functions you have the receptionist perform.

Practical Logistics

Phone Number: Virtual offices will provide you with a phone number, but be sure to note who owns the phone number. If you leave the office space, will you be able to take the phone number with you? If not, consider getting your own phone number and having those phone calls forwarded to the receptionist at the virtual office.

Fax: Most virtual offices will also provide you with a fax number. If it is a fax number to a dedicated fax machine in a common area, consider confidentiality and security of information issues. If the fax number delivers faxes directly to your email inbox, security and confidentiality concerns will not be such an issue.

Address: The main reason for using a virtual office is to have an address and office front space. At your virtual office, you should be able to access your mail, allow clients to drop off documents if you are not present, and have a place to meet with clients. In addition, it allows you to avoid using your home address, or a post office box, as your firm address.

Ethical Considerations

Many of the same considerations for sharing an office will need to be made when selecting a virtual office. There will likely be more than one law firm housed at the virtual office space. Lawyers need to ensure that they have taken necessary measures to protect the confidentiality of their clients' information. A checklist for sharing an office is included this chapter.

Additionally, many lawyers who chose to rent a virtual office do so to enable them to work from home. Check the "Home Office" section found in this chapter, as well.

The following ethics rules and opinions should be specifically consulted before using a virtual office:

- ER 1.6 Confidentiality of Information – In the absence of informed consent, lawyers shall not reveal information related to the representation. Consider ways to preserve confidentiality in a shared space, such as:
 - A confidentiality agreement for the receptionist

- Location and storage of client files
- Use of shared printers and fax machines
- Mailroom procedures
- ER 1.7 Conflict of Interest: Current Clients and ER 1.8 Conflict of Interest: Current Clients: Specific Rules
 - Consider whether office support staff are sources of conflicts.
 - If those you share an office with are in the same practice area, beware of representing an adverse party.
- ER 5.3 Responsibilities Regarding Non-Lawyer Assistants
 - Ensure that staff members are properly trained.
- ER 5.4 Professional Independence of a Lawyer
 - Even if you do not own the office space you are using, do not allow a third party to interfere with your professional judgment. Consider the best ways to allow you to comply with the ethics rules and speak to your landlord about them.
- ER 7.5 Firm Names and Letterhead
 - Only imply that you practice in a partnership or other organization when it is true, not if you are merely sharing office space.
 - Ensure that letterhead, business cards, signs, etc. provide an accurate firm name.
- 01-09: Advertising and Solicitation; Sharing Office Space; Referrals – This ethics opinion addresses lawyers of separate firms who share an office space and a common phone number.

Owning Office Space

There are pros and cons to owning office space. When you own office space, you have the added responsibility of taking care of the building. This includes upkeep, repairs, cleaning, and landscaping. Taking care of these issues may take time away from your law practice. One way to avoid this responsibility is to hire a property management company that will take care of these things for you (at a cost, of course). In either case, maintenance expenses are an added expenditure that will need to be made up through having other tenants or taking more cases. Other expenses may add up too, such as electricity, water, and insurance. Be mindful that the time you spend keeping up with these things is time that you are not spending practicing law.

On the other hand, owning office space means that you have an asset. Eventually, your building will be paid off and it is an investment that renting office space does not provide. A commercial real estate

agent can help you weigh the benefits of purchasing a space. When you own your own office building, you can do what you want with it. If you want to renovate your office space to make it more suitable for your practice, you do not have to obtain the permission of a landlord.

Tips for a More Traditional Office Setting

Furniture, Fixtures, and Equipment

Choosing Office Furniture

You cannot decide on furniture or fixtures until you know the specifics of the available physical space and needs of the firm. You need to know the physical layout, including egress points, walls, and windows. Make a scaled floor plan; be sure to include electrical outlets, along with phone and computer access points.

Next, determine what should be public versus private space. The firm's entrance, reception area, and conference rooms are generally considered public spaces. On the other hand, the firm's private spaces are the individual offices, file room, storage area, and lunch room. This is very important – consider security. Depending on the size of the space and your firm, some areas may be doing double duty.

Once you have determined the physical layout and how each room shall be used, you are ready to determine the necessary furniture. Identify any special requirements, then consider what you need and the kinds of features that work best for you.

- **Desk Options:**
 - Large table tops
 - Lots of drawers
 - File storage
 - Space for multiple monitors
 - Do you want to consider a standing desk?
- **Chair Options:**
 - Ergonomic
 - Side chairs for you, staff, and visitors
- **Table Options:**
 - Conference – either in main conference area or in individual offices
 - Work for large projects
 - Side tables for visitor chairs
 - Sofa tables for display

- **Kitchen Items:**
 - Kitchen table and chairs
 - Appliances
 - Tools and accessories
- **File Storage Options:** (keep in mind, even a “paperless office” needs storage equipment)
 - File cabinets
 - File shelves
- **Other Items to Consider:**
 - White boards or projection screens
 - Wall hanging boards
 - Sound buffering or privacy screens
 - Are there any items that are necessary for the convenience of your clients and provide added convenience, such as a telephone nook or separate work desk?

Armed with your list of needs and wants, visit a few furniture stores to determine the type and style of furniture that will best fit your needs. Consider practicality, cost, value, size, and style. Some furniture might be able to serve more than one purpose (for example, a rolling file cabinet that can be used as a table top or desk that has an attached wing for a computer). Keep in mind the needs of the people who will be using the furniture.

Do not purchase or lease anything at this stage. Instead, return to your new office and layout the proposed furniture.

- Use boxes to help visualize dimension and tape outlines on the floor. It’s one thing to see a floor plan and another to see how the furniture will actually fit, once the pieces are physically laid out.
- Walk through the outlines to determine flow.
- Look for bottlenecks that may decrease efficiency or hinder daily movement through the office.
- Look at the sightlines. This goes back to the discussion about public and private areas – you will want some areas to be open and others to be secure and/or private.

Do not buy on a whim – in the long run, impulse purchasing will be a waste of money. Buy or rent only what you must have, at this time. Make a list of items that can or should be purchased a few months and budget accordingly for these futures purchases.

Buy or rent? This is always a dilemma for every startup company. Examine the cost, over time. Determine the transient nature of the furniture or equipment. Most likely, the furniture you choose will be in your office for many years – therefore, it is important to buy good-quality items. If possible, try to

avoid purchasing new furniture. There are plenty of used furniture stores (including those that exclusively sell office furniture) with good-quality furniture items for reasonable prices. Tables, desks, client chairs, kitchen appliances, shelving, and conference tables can all be purchased at very reasonable prices, if you spend some time shopping locally or online stores. Most likely, you will find good-quality furniture that is one or two-years-old. Do not buy used desk chairs, unless they are in extremely good shape; you and any staff you may have need good-quality chairs – do not skimp on this item.

What should you rent? Consider renting items that will be used up or outdated in two or three years. Again, do a financial analysis to determine the long-term expense. You may find that purchasing disposable items is more economical than renting them. This includes office equipment such as copiers, computers, scanners, etc.

Choosing Office Fixtures

Simply put, a fixture is something that is permanently attached to real property. “Permanently attached” means the personal property cannot be removed without causing some damage to the wall or building. Items such as built-in shelves, ceiling fans, chandeliers, towel racks, carpet, etc. are normally considered fixtures. If you are leasing your new office, determine whether or not the lease provides for the attached shelves to become fixtures. If the lease is silent on this issue, you should come to some agreement before signing the lease. You can easily invest thousands of dollars on shelving, cabinets, fans, fancy paneling, built-in desks, etc. – however, most likely these items are all considered fixtures and must stay with the property when you terminate your lease. Negotiate this with the landlord at the beginning of your relationship, not at the end in litigation.

The same is true if you own the office building. When the building is sold, the fixtures will need to stay attached, unless agreed to otherwise.

As far as renting versus purchasing fixtures – it is fairly rare to rent something that will become a fixture. If so, you will be asked to sign an agreement that takes precedent over the landlord’s right. Again, determine these rights before entering into these agreements.

Choosing Office Equipment

Computers: Computers are essential for your practice; therefore, it is extremely important that you commit the time and finances necessary to buy good-quality computers that will accommodate all the needs of your office. When determining the needs of your office, you need to build-in a growth factor of at least 50%. In other words, do not buy a computer for the needs you have today – buy for the needs you will have in one or two years. This same theory applies to most of the other equipment in your office.

Whether to lease or purchase is an economical decision. Do not make this decision without guidance from an experienced IT professional. Given the price of computers, it probably is best to purchase (not rent). You should plan on replacing a computer every three to four years; many computer gurus will tell you to replace a computer every 18 months, but that is not necessarily the time-frame you need to follow. Always buy brand names and make sure to find a local computer company that will build and repair the units on-site. Consider whether the manufacturer or retailer has an "on-site" service agreement. Do not buy ready-made units that must be returned to the manufacturer for repair; you will be unable to function without your computer for the days or weeks it would take to send it back to the manufacturer. Do not underestimate the value of getting advice from an IT consultant – by this, we do not mean a family member who is tech-savvy (unless they are also an actual IT professional).

Be willing to dedicate the time necessary to learning to operate your new computer – both hardware and software; yes, we are all computer savvy these days, at least to some degree. But learning how to effectively use the equipment you have installed is essential. The more efficient you (and your staff) are on your computer equipment, the greater advantage your firm will have over fellow lawyers who may be overconfident in their abilities. Consider investing some time and/or money in formal computer training; for example, learning how to most efficiently use *styles* in Microsoft Word may save you hours and forestall the need for outside administrative help. The same is true for other software products you install.

Do your homework before buying or leasing computer equipment. Make sure to purchase only the equipment you actually need – again, no impulse purchases. Determine how new equipment will merge with your existing equipment. Where are you going to put the new equipment? Who is going to use it? How will the users access the equipment? Do you already have equipment that could accomplish this purpose? For instance, many of us have used peripherals (older computers, keyboards, routers, monitors, etc.) sitting unused in our storage rooms.

Office Policies: If you have assistance of any kind, whether part-time or full-time, you will need policies regarding the use of office equipment (including computers) and supplies. Each office may have unique issues therefore, your policies need to be carefully thought out, put in writing, and honored by all. Whatever your office policies may be, please remember the following: your computers store all the information in your office and, without that information, your firm is dead (or, at least, in the infirmary for some time). Set steadfast policies on security and the protection of your electronic information; this should include a policy on social media and personal devices (BYOD) brought into the workplace.

Printers: Check out online product reviews and talk to your peers. Before buying a printer, investigate the costs of toner cartridges, printer heads, and any other items that must be periodically replaced. The

costs of these items vary among manufacturers and could lead to an otherwise inexpensive printer being very expensive to operate. Other features to consider are a single sheet feeder, single or double paper trays, and an envelope feeder. Depending on the nature of your practice, speed may be a consideration, as well.

Copier: As before, analyze the individual needs of your office. A document feeder and adjustable paper size should be a requirement. Depending on finances, consider a unit with a built-in document feeder, multiple trays for various sizes of paper, reduction/enlargement capabilities, a color option, and an option to work with photographs and transparencies. Make sure you investigate the costs of maintenance and operation, including the costs of the toner and drum. Do you plan to use your copier as a printer and scanner, as well? This may impact the cost and longevity of the copier.

Scanner: First, determine your scanner use and volume – those answers will dictate the size and power you require. There are several possibilities, and a wide range of options and prices; for instance, Fujitsu's ScanSnap scanners generally receive excellent reviews. Research and due diligence will help you to successfully determine what type of scanner will work best for you.

Fax Machine: First, do you need a fax machine? If you decide that you do, you have two options: 1) a freestanding machine, or 2) a virtual scanner through your computer. If you choose to use a freestanding machine, it must include a memory feature; that way, if it runs out of paper, it will automatically hold the images until the paper tray is refilled. Other options you may wish to include in your fax machine are a built-in answering machine, a built-in converter from regular phone to fax (important if the incoming lines are limited), and a broadcast feature, if you are mass faxing documents.

Virtually all computers include an internal fax/modem. If this is the only office fax, it cannot receive faxes when it is turned off. This issue is a policy decision that must be made with a view of the operation of the entire office. Although many firms still have freestanding fax machines, you will need to make that decision for yourself. Be aware, however, if you are going to leave your computer on around the clock, you may be more susceptible to hacking. You will, of course, need a good firewall for protection, along with a thorough backup of all of your data and systems, to effectively restore your practice should you fall victim to hacking, malware, or ransomware.

Combination Copier/Scanner/Fax/Printer: Be careful about using a 4-in-1 unit, if this will be the office's only fax, printer, or copier; if it breaks, your office may be at a standstill. The key benefit of a 4-in-1 is that it saves space – it is only one piece of equipment, rather than three or four.

Internet Access (Cable/Wi-Fi): Make sure you have control over your internet access, that you secure your network or access, and are not dependent on others to provide you access. Virtually, all smartphones

have “hot spot” capability. This is great to use when you are on the road, but may not be cost effective in the office. Compare various options, including cable, DSL, and Wi-Fi. Determine the best price for access, but also investigate issues related to security, speed, and access for the entire office (as well as the dependability of that access). Cheap access is worthless if it is unavailable most of the work day or slows down if too many people in your office, or surrounding offices, happen to be online at the same time.

Networks, Routers, and Other Devices: Talk to an IT professional to determine what type of systems or devices would be the best fit for your firm, as far as security and sharing of information and/or equipment. A router needs to be able to handle the workload of the entire office; this includes sharing resources like files, printers, games, or other applications, plus access to the Internet. Routers may be wired or wireless; when using a wireless network, you must consider heightened security issues, including network hacking.

Firewalls: An effective firewall, whether software-based or hardware-based, is essential to your firm. The primary objective of a firewall is to keep your network secure from uninvited “guests” by controlling the incoming and outgoing network traffic; the firewall does this by analyzing each piece of electronic information and determining whether it should be allowed through or not, based on a predetermined set of rules. A network's firewall builds a bridge between an internal network (assumed to be secure and trusted) and other networks (assumed to be not secure or trusted). Some firewalls have the ability to stop individuals inside the office from accessing information outside the office, including undesirable websites.

Telephones and Telephone Lines: Do you want a “landline?” Once you have employees (even part-time) the answer is probably yes. A client or prospective client should be able to easily contact your firm without keeping track of multiple, individual phone numbers. A landline still has the advantage of not being subject to the variety of issues that may impact cell phone coverage (notwithstanding the fact that many telephone providers are switching to VOIP service vs. a traditionally wired landline). Once you have a landline, each person in the firm should have an assigned telephone. Firm size, as well as traffic, will dictate the number of phone lines you need. A solo firm should have a minimum of two telephone lines. The first line should serve as a dedicated main office line, while the second should serve as a “back-line” – this will be the line on which you make outgoing calls.

Make sure to take advantage of the following phone options (yes, we often take these for granted):

- Caller ID
- Hold
- Conferencing
- Mute
- “Do Not Disturb”

- Speakerphone (*see below*)
 - **WARNING:** Many clients and other lawyers find a speakerphone to be objectionable. If you are too busy to pick up the phone and talk directly to your clients, your clients may seek out another lawyer who is willing to treat them with more respect. Confidentiality is easily compromised on speakerphone, especially in an office where other clients and other lawyers (who are not members of your firm) are apt to overhear your conversations.

Keep in mind, you may want to disable the call waiting feature on your primary office line, as it is far too distracting for you and your callers and does not promote a professional image.

Establish a habit of turning off the phone's ringer (or at least putting it on vibrate) during non-business hours, unless you have made special arrangements to receive late or weekend calls. Your voice message may include your firm's "telephone hours" as part of the announcement. Proper voicemail usage will leverage the time everyone in your office spends answering calls. To get the most out of your voicemail:

- Keep your outgoing voice message updated daily; this inspires confidence and gives your clients the impression that you are attending to business matters, albeit you are obviously very busy.
- Encourage callers to leave detailed voice messages and include a good time for you to return their calls; this will help avoid the frustration of "telephone tag."
- Offer an "urgent" feature on your voicemail, should the caller be so inclined.
- Consider preloading additional phone lines with automated messages that callers can access, should the need arise. For instance, you may want to consider spelling out your website address on your voicemail; that way, callers can find standard firm information and/or FAQs at any time. This may help to eliminate routine calls which will, in turn, save you (and any staff) time and effort.
- Invest in a wireless Bluetooth headset; it will be an invaluable tool for note-taking during calls.

Support Services – IT (Information Technology) or MIS (Management Information Systems)

When it comes to IT, you ultimately have two options: 1) have good IT support on-call, or 2) go without IT support, hope for the best, and engage in crisis management when something goes wrong. Having IT support does not mean that you will have someone sitting idly by, waiting for your computer equipment to fail; it means that you will have an experienced professional on call who is familiar with your unique system and has the proper skills to address any technological issues that arise (within a reasonable time).

Choosing a Company

Choosing a good fit is a challenge. Seek out an experienced IT company that employs knowledgeable personnel, is readily available for standard maintenance, has procedures in place for emergencies, and is

committed to staying in business. You do not want to work with an overly busy company that does not have time for “the little guy.” If possible, choose an IT company (or a consultant) who has worked with lawyers before and is familiar with the unique challenges the legal profession presents.

Relying on a single individual may be risky – one person, no matter how skilled, will not be available 24/7. When choosing an IT company, examine their staffing situation and plans for backup if the regular team is busy or unavailable; be sure to ask about their average wait time and how long it takes them to respond to a call. There are also other factors to consider including reputation, cost, and level of expertise. One of the downsides to choosing a larger IT company is that they will be more expensive (perhaps, too expensive for your solo practice, at this time).

Talk to other lawyers to find out– they may be able to recommend someone they have used in the past (or warn you about someone they would not work with again). Reaching out to your network will increase your chances of finding a suitable IT company that is “not too small and not too large, instead they are just right.” Ask about rates – they may offer an hourly rate for services, as well as a monthly fee to handle all the computers in your office, including regular maintenance, device monitoring, basic software upgrades, and on-site assistance, whenever necessary.

In-Person versus Online IT Assistance

At least 80% of standard IT work can be carried out online or by phone. An IT professional may be able to log in to your account remotely and provide assistance, without being physically present – this may be a valuable, cost-saving measure. This same option is available for assistance with specific software back up. Your IT person will have complete access to client files or information; therefore, you must have a thorough confidentiality agreement with them that clearly explains the confidentiality rules under which you must practice.

All information on your firm's computers must be backed up on a regular basis – preferably, at least once per day. You never know when your computer will fail; if all information is properly backed up, it will be a fairly painless process to get the office up and running again. When deciding on a backup method, it is important to know how long it will take to restore your computer systems and data, in the event of a data loss. There are three basic backup issues: 1) Saving information as it is produced, 2) creating a system that will save all your data, and 3) rebuilding your hard drive completely, so that data and software is restored and in the same format it was in before the unfortunate crash. There are a variety of services available for automating this backup process.

There are several different ways for you to back up your work. Set up your word processing program to automatically back up data every five or ten minutes; that way, you will only have to retype five or ten

minute's worth of work if the electricity goes off or if the word processing program fails. However, this type of backup protects only your files or data – not the software program, itself.

The second (and more important) method is to back up your software and your files. The following is true, regardless of whether you are a solo with one computer or have a large office with multiple computers feeding into a server. If you use cloud-based case management software, automatic backup of your data and electronic files should be included with your service. Be sure to ask about cost (which is usually based on the amount of information stored), security, and the time it would take to restore. There are a several issues you will need to consider before choosing a practice management software product – Practice 2.0 staff are available to assist you in formulating your inquiry and offer insight into these issues.

You will also need to prepare for a potentially catastrophic computer and/or network failure. Several cloud-based backup systems are available; luckily, many of the best are reasonably priced and offer excellent security for your files – again, Practice 2.0 can help steer you in the right direction on this.

In the alternative, you may choose to create a mirror image of the server's hard drive on another hard drive, either internal or external; this can be done by simultaneously writing to two hard drives as the information is being created ("mirroring"). An alternative to constant mirroring is to copy one hard drive to another on a regular basis (daily or weekly). There are several software programs that can accomplish this process; regardless of which you choose, you must make absolutely certain the primary hard drive is copying all of its information to the secondary hard drive – including all data, programs, hidden files, and operating system commands. Ideally, you should create a backup hard drive that can be used as a complete replacement for the damaged hard drive. Remember to keep your secondary hard drive in a separate location from your primary hard drive; your backup will be pointless if it is lost along with your primary drive, in the event of a crash.

If your computer's hard drive becomes infected, corrupted, or altered as a result of a virus or bad software, you will want the option to restore the drive to an earlier date. Luckily, a number of software programs exists purely for this purpose; they are is easy to install and are virtually seamless their ability to rebuild the hard drive to a time when the computer was working properly. By using this type of software, you can easily protect against a potential disaster – when all factors are considered, this is very cheap insurance.

Disaster Recovery

At the heart of most computer-related disasters is the loss of corporate servers and their connections. A loss of this nature may severely damage (or delete, entirely) the firm's data, internal and external links, and the vital day-to-day operations of applications including communications, client/file lists, calendaring,

email, and accounting. Although total disasters are rare, many say that 50% of companies lacking a proper recovery plan will go out of business following a disaster.

Therefore, developing a disaster recovery plan is essential; the broad outline follows common sense: 1) assess the risk, 2) develop solutions, 3) implement the plan, and 4) maintain the plan. Of course, in practice it is not quite that simple. For example, a large enterprise with multiple locations (especially those with multiple IT locations) have very different disaster recovery requirements than a small business would.

When developing a plan, it is key to ask yourself: "How much downtime can my company afford?" In essence, computers are the heartbeat of the modern law firm; if the firm's computers are destroyed, or the information is interrupted, the firm's operations will come to a screeching halt. Unless the firm has an off-site backup, all of the firm's data, contacts, documents, calendars, and to-do lists will be lost if the building burns to the ground, is destroyed in an earthquake or tornado, or if another disaster occurs.

Every firm, regardless of its size, must plan for a complete disaster. If you employ staff, they, too, should be committed to the plan; consider running drills to determine the plan's effectiveness (or, lack thereof).

Should You Consider Working from Home?

Lawyers who operate solo practices have the option of working from home. Keep in mind, however, homebound work presents unique challenges. If you are just starting out, with little to no experience, working from home may cause mild discomfort – at least, at the beginning. You may have concerns about your client base, professional reputation, confidence, or have an inkling about how your home dynamic may change. If you have young children or get distracted by other things going on at home, the challenges multiply. But, if you do not have a better option, working at home is certainly something to consider. Start where you are – ample guidance is available (in this publication and from Practice 2.0), so you will not lack initial direction. Moreover, working from home has never been a more viable option than it is today.

Location, Location, Location

Before starting a home office, make sure that your municipality, subdivision, co-op, or lease allow it. If you have a lease that limits you to residential use only, you will need to renegotiate with your landlord. Certain subdivisions, co-ops, or municipal areas similarly restrict home office opportunities; therefore, be sure to review any applicable deed restrictions, subdivision covenants, and municipal zoning regulations. Restrictions and covenants are included in property records and recorded in the county recorder's office.

Some states require you to have a physical law office address – at this time, Arizona does not. Nonetheless, you need to be aware of your home address’s specific prohibitions (if any) against home additions, signs, client visits, and client parking, in order to remain in compliance.

Many attorneys – out of necessity and/or due to the type of clients and client matters they handle – choose to create a fluid work space, by working at home and in the outside world. This will prove to be a much more convenient option for some client; for instance, some attorneys meet their clients at jail or another work space. When making this decision, you will need to consider the types of clients you will be representing and whether you will be comfortable having them in, or adjacent to, your home.

Please do not be tempted to meet clients in a public venue, like the local library, café, or other public gathering place; those type of venues lead to significant concerns about confidentiality. Having otherwise confidential conversations in a public place, where anyone present may overhear, greatly compromises confidentiality and may violate ER 1.6 (confidentiality). Instead, consider reserving a conference room or inquire through your local chamber of commerce about renting private, hourly space at a nearby, vacant commercial location. Keep in mind, the State Bar has several conference rooms that may be used for free (based upon availability, of course). Other options include virtual meetings, through a free conference call service, or collaborating on a cloud to work “privately” on virtual documents. The need for confidentiality applies to a lawyer’s home and car space, as well; when bringing clients into your home or doing business on the road, you need to carefully and adequately protect client conversations, files, and any property stored there.

Practice Tip: Do not leave business-related information laying on your car seats, dining table, counter, floor or anywhere else where others may see it (purposefully or by accident).

Creating a Location

If you have unfinished space in your home that you’ve earmarked for your home office, including a basement or garage, you must determine who will perform any necessary construction – will you try to do it yourself or will you hire contractors and/or maintenance workers? Regardless, create a renovation plan and stick to it – be sure to acquire estimates and any necessary building permits before you start the project. Transforming a basement or outdoor shed by adding a separate entryway, windows, electric wiring, lighting, heating or cooling, security, insulation, water and sewer pipes, and fixtures may conservatively run \$30,000 or more; high-quality woodworking and/or fixtures will likely incur a much higher cost. Discussing renovation plans with contractors will inevitably help you form new ideas (as will seeing your space develop), but try to resist changing plans, save for unearthing a startling discovery; with every change-order, costs increase.

The good news is that you don't need an expensive lobby, or even a physical "law library," to practice law. With today's abundant "paperless" office and connectivity options, micro-office excellence has actually become feasible. If you consider yourself to be one of those who may be space-challenged, take heart. Ultimately, unique space that is private, functional, and pleases you in some way will likely enable your best work.

Practical Logistics

Wiring: Consider wiring early-on. In addition to lighting, you will need a powerful computer (with one or more monitors), router, office scanner/copier, plug-in phone, and shredder; in addition, you may want to consider some small electric items in your home office, including a coffee pot, electric heater, and small refrigerator. Powering these items may require 7000 watts or more, whereas the wiring design for a room within an average home is a mere 1800 watts. Determine which items you need, where you need them, and (before renovating) design a plan to ensure that your office equipment is not competing for power with your family's refrigerator, stereo, etc. Of course, hiring a licensed electrician is highly advisable; novice, do-it-yourself electrical work can potentially lead to disastrous results, including home fires.

Lighting: Do you want daylight full-spectrum lighting? While it's not necessary, this type of lighting can be a huge benefit if you tend to be sensitive to indoor lighting. Light has the ability to impact your mood and production; the right lighting can provide warmth and clarity, relieve eyestrain, and even help the bottom line. Standard incandescent lamps tend to be three to five times less efficient, with a ten to twenty times shorter life span than current fluorescent alternatives. Keep in mind, however, alternatives have improved considerably in recent years. You can inexpensively enhance a small room by maximizing "light bounce" by adding a mirror or painting the walls with a clean, light-enhancing color. Do not neglect the ceiling (your room's "5th wall"), as it can also help to augment daylight. Finally, do you want outdoor lighting and, if so, how much?

Connectivity: Each incoming contact is the lifeblood of a home business, so consider who will be answering your phone, emails, and/or text messages – a missed communication may be a missed opportunity. Clients appreciate accessibility, but you will not want to be on-call 24/7. How will you manage incoming contacts during your "down" time? Consider a VoIP/FoIP line for home office use; several companies offer this service, so you will want to do some research and use due diligence. Seek a good price, as well as decent sound quality. Will voicemails go directly into your email inbox? Or, will they forward to your cell phone?

It may be worth investing in a virtual receptionist service; these companies generally offer an hourly or package rate and may give your home office a more professional profile. Plus, hiring a virtual receptionist is far more economical than hiring an actual person.

Professional presentation is important for any lawyer; it is important not to let professionalism get lost in the casual atmosphere of a home office. Consider the following extras, for taking things up a notch:

Curb Appeal: If your home office has its own entrance, it may provide curb appeal (provided covenants allow this). A polished outward appearance does not require major extravagance; add small touches, such as a small, custom-made law firm name plate installed next to the entry door.

Décor: Always keep in mind, your home office is an office – not an extension of your home. Your décor should be professional-looking and lend luster to, rather than diminish, your home office.

Business Cards

Make, carry, and share them often. Having a home office, a place that's tucked away and out-of-site, means you must employ business cards as your silent ambassadors (e.g. high-quality business cards) and know how to properly use them. Keep small stacks of cards in your car, in different purses, etc., so that you always have them ready and available to share. Unless you are completely confident that you can produce a business card that you would be proud to offer to a Supreme Court Justice, do not print them yourself. Online business card vendors are plentiful; for a relatively nominal fee, you can get a thousand or more.

Holiday Cards (and Other Contact Management Strategies): Send holiday cards to your clients, anyone who refers clients to you, colleagues who have been helpful, and anyone else deserving of good cheer – showing genuine goodwill and gratitude helps networking capabilities. Make sure, however, that you send non-sectarian cards – send “Seasons Greetings” instead of “Merry Christmas.” Use professionally printed cards, but add a personal signature or note.

Keep a record of dates and other information important to your clients (both current and former). Sending an email or note to a client celebrating a milestone birthday, anniversary, or other important life event may be a good way to maintain goodwill and show that you don't consider your clients merely as a revenue source. Software exists that will help you with this once you are very busy but, at first, a simple log on your calendar or an Excel spreadsheet will certainly suffice.

Family Dynamics

Unless others at home are already 100% onboard with your home business, talk with them to develop their support – you will need it. “The talk” should include discussing problematic issues that you foresee and negotiating clear solutions to potential issues that may be problematic. Examples of this may include:

- Confidentiality: Your family needs to understand your duty to uphold confidentiality and that the contents of your office (such as paper and/or paperless files, records, and client information) are completely off-limits to them. This may be true, as well, of your desktop computer, laptop, or other office equipment that may contain client information. There need to be clear boundaries.
- Space: Are you proposing to claim space already used by your family? If so, acknowledge that possibility and discuss options. Is yours a “higher use” than theirs? Can you reason with them or offer any incentives? Explain that the confidential nature of law practice requires exclusivity; also, for tax purposes, space and utilities exclusively used for your home office can be considered business expenses and may be written off, while shared space cannot.
- Noise: Do you expect your proposed office to be noise proof during normal business hours and, if so, is this a realistic option? Have you accounted for child, pet, and/or yard maintenance-related sounds? If complete silence is not a realistic option for you and your family, you may want to consider adding add sound-proofing insulation to your office’s walls, doors, and windows. On a related note, do you know how to quickly mute your phone to protect against broadcasting unexpected outbursts from the next room? For some phones, it’s *6 to mute and #6 to unmute. For others, it’s a special button or command buried in the phone’s instruction manual.
- Other Interruptions: Do your family members expect that you will always be available to them, since you will plan to work in their immediate vicinity? If so, clearly communicate if/when/how you may be appropriately interrupted. For instance, leave your door open to provide a clear signal for when you *can* be interrupted and close your door when you *cannot* be. This can be an issue for non-family members, out-of-town relatives, or any other groups with which you are involved; they may be under the impression that they may call about non-legal matters at any time, even during business hours, just because you are “home.” Working hours should be working hours, to the extent possible.
- Homes with Young Children: Lawyers who work from home and happen to share their home with young children have the most substantial interruption challenges to address. Unexpected noise and background drama can force many to abandon home-based work and seek quiet elsewhere. Working in a home office should not mean that you are also available for full-time parenting. Childcare during the work day is essential in order to build and maintain a thriving law practice.
- Pets: Do your pets reside indoors or outdoors? For instance, if you have indoor cats, will they sleep on your keyboard and/or pack your keyboard with fur? Can you minimize potential damage with

a keyboard drawer or hard cover? Will you regularly use it? Do you want your clients hearing a barking dog or other pet-related noise?

Isolation

At times, working alone at home can feel profoundly lonely on a professional and/or personal level. Prepare to have very few real, personal interactions, apart from your clients' calls and emails. You cannot amble down a hall to another attorney's office and kick around ideas, nor are you developing office-based camaraderie. No one will be able to keep you out of trouble, grow your business, help measure success and/or failure, or celebrate important milestones with you – do not trivialize this problem.

Working solo can lead to a feeling of intense alienation, whether you work from home or elsewhere within this adversarial system. Within such a culture, remaining an honest, outgoing problem-solver may become increasingly challenging. There are steps you can take, however, to seek social stimulation, while also challenging and improving our culture's sometimes disaffecting fringe:

- Join a State Bar Section or committee.
- Volunteer for Wills for Heroes or offer to help other attorneys at the local Legal Aid office.
- Join an affinity bar or Inn of Court; many enable you to converse and/or commiserate with fellow attorneys, as well as become one of the many helping to identify and solve shared problems.
- The Arizona Foundation for Legal Services and Education has a variety of volunteer opportunities, including the Modest Means project, annual Mock Trial Competition, We the People, and more.

Self-Care

This is an intensely personal matter, but do not “let yourself go” just because you work at home. You do not need to “dress up” in a suit/tie/dress/stockings, but merely as a matter of self-esteem, you should shower and wear clean clothes. Maintain a neat appearance and straighten your desk, from time to time – never give in to bad habits, like turning on Netflix midday. Do not keep unhealthy snacks and drinks in your work area and always have a glass of water within reach (in a clean glass). Take “flex hours” or “flex days” as needed, in order to make up for any odd hours worked, and leave your phone behind enough to remember what that feels like. If you plan to be away for more than a few hours, set an out-of-office message to inform clients when you will be available. Stay in shape by walking, running or other exercise.

Setbacks

Careers are like children – and, much like children, attorneys tend to make mistakes as they develop. The same is true with your law office; you will face setbacks, some of which will be spectacular (e.g. not catching a huge, refurbished antique mirror that shatters completely, catching a computer virus, etc.) For some types of set-backs, there is comfort in insurance, backup hard drives, and excellent IT professionals.

In addition to maintaining your legal liability insurance, consider upping your property insurance coverage; consider videotaping your office's more expensive investments, including your computer and/or scanner, and keep a copy in a safe place. If you have help in your office, consider worker's compensation coverage.

To avoid finding yourself at home with a deadline and facing a computer virus, take time now to find an IT professional you trust, who you can call at any hour, who may remotely access your computer and fix any technological affliction.

Considering Office Sharing

Office sharing may be a good option if you would like to share responsibility, and any expenses that come with having an office space, with another lawyer or business. It allows you to save money by sharing areas (meeting space, conference rooms, reception areas, restrooms, etc.), as well as maintenance costs, since having an office space requires having someone to clean, maintain, fix, landscape, secure, and insure it. Equipment like copy machines, fax machines, and legal research materials (such as statutes and practice guides) can be shared. Given the costs of having your own office space, office sharing may be an option you wish to consider.

Keep in mind, office sharing may also come with a set of unique issues. All businesses that operate within a shared office space need to be completely distinct; you cannot imply that you are part of a law firm, if you are not. There are also several confidentiality and ethics issues to address.

Ethics Issues to Consider When Sharing an Office

Are you going to be sharing fees with another lawyer?

- Is the division of the fee proportional to the services performed by each lawyer? See, E.R. 1.5 Fees; See, also Arizona Ethics Opinion 15-02.
- If not proportional, does each lawyer receiving a portion of the fee assume joint responsibility for the representation? See, E.R. 1.5 Fees.
- Did the client agree in writing to the participation of all lawyers involved and the division of fees and responsibilities between the lawyers? See, E.R. 1.5 Fees.
- Is the total fee reasonable? See, E.R. 1.5 Fees.

Office Personnel

- Did the receptionist sign a confidentiality agreement? See, E.R. 1.6 Confidentiality.
- Are staff members properly trained? See, E.R. 5.3 Responsibilities Regarding Non-Lawyer Assistants.

- If you share an office with other lawyers in the same practice area, be cognizant of the implications for representing an adverse party. See, E.R. 1.7 Conflict of Interest: Current Clients and E.R. 1.8, Conflict of Interest: Specific Rules.

Shared Equipment and Spaces

- Have you considered the security of where client files or information is stored? See, E.R. 1.6 Confidentiality.
- Are there safeguards in place for sharing a printer or copier? See, E.R. 1.6 Confidentiality.
- Are there safeguards in place for sharing a fax machine? See, E.R. 1.6 Confidentiality.
- Are there safeguards in place for the mailroom? See, E.R. 1.6 Confidentiality.

Firm Names and Letterhead

- Ensure that your firm name does not imply that you practice in a partnership or other organization if you are merely sharing office space. See, E.R. 7.5 Firm Names and Letterhead.
- Ensure that your letterhead, business cards, and signs provide an accurate firm name. See, E.R. 7.5 Firm Names and Letterhead.

Other Considerations

- When considering the safeguards, policies, and procedures that will work best for your law firm and allow you to best comport with your ethical obligations, do not allow third parties to interfere with your professional judgment. See, E.R. 5.4 Professional Independence of a Lawyer.

Chapter Four: Professional Liability Insurance FAQs

What Is Professional Liability Insurance?

Professional liability insurance is insurance that financially covers a lawyer in the event that he or she is accused of malpractice.

- Are lawyers licensed in Arizona required to carry professional liability insurance?

No, there is no affirmative requirement that lawyers must carry this type of insurance, nor is there a State Bar of Arizona requirement that specifically mandates that lawyers carry any other type of insurance. Local, state, and federal laws may require that lawyers carry other types of insurance. It is a best practice, however, to carry professional liability insurance.

- Do I have to inform the State Bar about whether or not I have malpractice insurance?

Yes, per Arizona Supreme Court Rule 32(c)(12), members of the State Bar of Arizona must certify whether or not they have professional liability insurance yearly on their dues statements and if the coverage is no longer in effect, must notify the State Bar of Arizona within 30 days.

- How do I inform the State Bar about whether or not I carry professional liability insurance?

You may do so on your annual dues statement or on the State Bar's Insurance Disclosure webpage (<http://www.azbar.org/membertools/myprofile/insurancedisclosure/>).

- What professional liability insurance carrier should I use?

The State Bar cannot direct you to a specific professional liability insurance carrier. Practice 2.0 maintains a list of brokers and providers on the State Bar's Practice Tools webpage (<http://www.azbar.org/media/1454121/malpracticeinsurancebrokersandcarriers-may2017.pdf>).

There are also member discounts for State Bar members including one with a professional liability insurance broker (<http://www.azbar.org/membership/memberdiscounts/>).

Securing Professional Liability insurance

Selecting a Broker

You may wish to engage a broker, but it is not necessary. Lawyers' malpractice insurance is definitely not a commodity – a broker with expertise and experience in this field may prove to be an invaluable ally, but you may wish to access a direct writer of insurance – a company that deals directly with clients and does not typically market through brokers.

Referrals from bar associations, as well as trusted friends in the legal community, are excellent starting points for your search.

If you decide to use a broker, you may wish to consider following factors:

- Ideally, the broker should specialize in this line of coverage. Engaging a general business insurance broker to procure this coverage is equivalent to asking a corporate lawyer to prepare a will. They might be able to do an adequate job, but they certainly do not have the requisite training and experience to do a superlative job.
- The broker should represent multiple insurers. If a broker only represents one or two insurers, the best terms and conditions are unlikely to be obtained. Different insurers have different risk appetites and pricing profiles (which shift relatively frequently), and failure to approach as many of them as possible for quotations will yield sub-optimal results.

Applications

It is critical to carefully complete the application for insurance completely, honestly, and legibly. Even though for a small firm or sole practitioner the application is often the first and only opportunity to make a positive impression on potential insurers, otherwise diligent lawyers sometimes take shockingly cavalier attitudes toward this step in the process. The “best case” if an application is inadequately or sloppily completed is wasted time and inability to secure the best terms and conditions. The worst case is the potentially devastating consequence of policy rescission if the insurer finds that material facts have been suppressed, omitted or misstated. Savvy lawyers approach the application process as akin to completing a project on behalf of a very demanding client, who will be reviewing it extraordinarily closely in the event of a claim.

Selecting an Insurer

Using the lowest premium quotation as the sole criteria for choosing an insurer is not recommended. As a wise insurance coverage lawyer once observed, “If you pay a dollar for a policy and it fails to respond when you have a claim, you’ve paid a dollar too much.”

While premium should be an important consideration, the savvy professional liability insurance buyer realizes they are paying for the transfer of a very serious (and potentially very expensive) risk, and the failure of an insurer to respond appropriately to a large malpractice claim can lead to the dissolution of a small firm. This is not a purchase for which corners should be cut.

Three of the most important considerations are:

1. *What is the insurer’s claim paying reputation and experience?*

This is where the counsel of a broker that specializes in this line of coverage is critical. The broker should be able to provide specific examples of an insurer paying significant claims without an excess of friction (or when an insurer has not done so, which should be a significant red flag).

Moreover, it is important to glean this information for this specific line of coverage. Some insurers

have been inappropriately blackballed by lawyers over the years due to a bad experience with that insurer's personal lines branch, or some other line of insurance unconnected to professional liability.

2. What is the insurer's financial strength?

The two key metrics from the A.M. Best Company are the insurer's rating and its outlook. A company with a rating below A- should be avoided. Outlooks of "positive" and "stable" are best. "Under review" and "negative," while not deal-killers, justify heightened scrutiny.

3. Who are the potential defense counsel the insurer will select to defend a claim?

Policies written for a small firm or sole practitioner will be written on a "duty to defend" basis, meaning the insurer has the right and duty to select the lawyer who will defend the claim. While some insurers may accept input on the choice of defense counsel from the insured law firm, most will be selecting the defense lawyer from their list of pre-set "panel counsel." It is critical to review an insurer's panel counsel prior to binding coverage, in order to ensure there are no surprises regarding the identity of the chosen defense lawyer if a claim is made.

Beyond these issues, the specific language of each potential insurer's policy should be carefully reviewed. Again, this is where an experienced broker can be helpful, by identifying differences in definitions, exclusions and coverage grants, and (most critically) providing counsel regarding the importance of any particular policy term.

Selecting Limits of Liability

While there is no hard and fast formula to limit selection, the following factors should be considered:

1. Claims involving matters in dispute for even relatively small amounts can still easily generate defense costs well into six figures.

It is important to keep in mind the limits of liability for these policies include defense costs, and having adequate limits in place enables defense counsel to mount a robust defense as appropriate. Firms that purchase inadequate limits of liability run the risk of being effectively "forced" to settle spurious claims for policy limits, due to the fear of being exposed to personal loss in excess of the available insurance limit.

2. The value of the matters a firm routinely handles should set a rough benchmark.

A law firm should put itself in the shoes of a potentially dissatisfied client, and make a good faith estimate of what the realistic damage demand would be in a malpractice suit. If the available limits are objectively inadequate, plaintiffs (and their counsel) will typically ignore them, and focus

on lawyers' personal assets in order to satisfy a judgment or get to an appropriate settlement figure.

3. Benchmark what other similarly situated firms purchase.

The broker should be able to easily provide a number of "comparables" on an anonymous basis, in order to provide a good idea of what other firms with comparable practices deem to be proper limits.

Claim Reporting

It is critical to understand lawyers' professional liability insurance is written on a "Claims Made" basis.

To fully grasp this concept, it is important to realize there are two parts to every claim:

1. The wrongful act that gave rise to it, and
2. The actual notice that the claim happened.

For professionals such as lawyers, there can be a significant passage of time between these two events. If a lawyer makes a mistake on a document they are preparing today, it can be months or even years into the future before this mistake is discovered, and additional time often further passes before the aggrieved client makes a claim. This period of time (the gap between the alleged wrongful act and notice thereof) is known as the "tail" – professional liability insurance for professionals is thus known as "long tail" coverage. (In contrast, an example of "short tail" insurance would be automobile collision coverage, where the time gap between the wrongful act and notice thereof is usually instantaneous.)

Typical claims reporting language in a lawyer's professional liability policy will state:

"If you become aware of a claim or potential claim, you must advise us immediately in writing, giving us all details..." (*emphasis added*).

The key takeaway is if matters are not reported to the insurer during the policy period (or during a short post-policy "claim reporting grace period"), coverage will be denied. There is not an opportunity under these policies to take a "wait and see" attitude on what at first blush appear to be "bogus" allegations – the best practice is to report each and every claim immediately.

Glossary

ERP: Extended Reporting Period – An endorsement to a policy that provides for an additional period of time to report claims, beyond the expiration date of the policy (as long as the alleged wrongful act took place prior to the expiration date of the policy). Offered for a set period of time (typically for between one to seven years) for an additional premium, extended reporting periods provide protection for lawyers who are retiring, or establishing new coverage without prior acts protection.

Hammer Clause – A policy provision setting out if an insured lawyer does not consent to a settlement that is acceptable to the insurance company and the plaintiff, the insurance company's liability for the claim will be capped at that amount. Thus, if the insured lawyer wishes to continue to litigate, it will be on the lawyer's own dime, and he or she runs the risk of being liable for any ultimate settlement amount in excess of the prior amount at which the claim could have been settled. Some insurers will agree to pay a percentage of amounts incurred in excess of the amount for which the claim could have been settled, which would be reflected in the policy by a "modified hammer clause."

I v. I: Insured v. Insured – This is a standard exclusion setting out that the policy will not provide coverage for any claim brought by one insured against another.

Prior Acts Coverage – This is the term for coverage for wrongful acts alleged to have taken place prior to the inception date of the policy. Lawyers starting new firms will likely not be granted prior acts coverage. Prior acts coverage for long-established firms can, on the other hand, stretch back for decades.

Retroactive (or "Retro") Date – This is the date noted in policies that sets the start of prior acts coverage – the policy will not respond to claims alleging wrongful acts that took place prior to this date. Accordingly, when contemplating changing insurers, it is important to ensure any new potential insurer will recognize the "old" retroactive date, in order to ensure continuity of coverage.

Tail. The period of time between an alleged wrongful act and notice thereof. Also slang for extended reporting period, as in "I'm retiring soon, so I need to make sure I have solid tail coverage in place."

Chapter Five: Business Entity, Capitalizing/Partnerships v. LLC – Business Entity

“Alphabet Soup”

A solo attorney can open a law practice in Arizona using a variety of business entities, including sole proprietorships, professional limited liability companies (“PLLCs”), and professional corporations (“PC”). Partnerships such as general partnerships, limited partnerships, limited liability partnerships, and limited liability limited partnerships are also available—but are far less common. As this guide is designed for solos, this Chapter will focus on PLLCs and PCs.² However, the choice of the right business entity for a solo attorney ultimately depends on that attorney’s specific fact situation.

This Chapter will follow a hypothetical solo attorney, deciding on whether to form an entity and if so, the type of entity. To make this simpler to follow (and more personal), we’ll be referring to the hypothetical attorney as “You.”

Do you legally have to file documents with a state agency to form an entity for your law practice?

You have just been admitted to the State Bar of Arizona; you have decided to open your own solo practice for the first time either as your first legal job or after having been with a firm for some time. You get some business cards printed with your name “You, Attorney at Law” and phone number and you start handing them out to your family and friends. Without filing any documents with any state agency to form an entity, you have “formed” a solo proprietorship by default. While a solo proprietorship is arguably the easiest and cheapest way to operate a law practice, it means that you have unlimited personal liability and your personal assets are at risk for the law practice’s liabilities.

A couple of months have passed and you are very pleased to have obtained some clients. You enjoy working for yourself and want to continue your solo practice. Finally, having a few brief moments to reflect, you wonder whether you would benefit from operating your practice through a limited liability company (“LLC”) or a corporation. Although you took a course on business entities in law school, you

² As discussed below, most law firms are formed as professional entities even though there is no express requirement that they do so. Therefore, the same information will apply to professional and non-professional entities except as otherwise noted in this Chapter. *See* A.R.S. § 10-2202 (“Chapters 1 through 17 of this title apply to professional corporations, both domestic and foreign, to the extent they are not inconsistent with the express provisions of this chapter.”); A.R.S. § 29-843 (“Professional limited liability companies shall be governed by the laws applicable to other limited liability companies except insofar as such laws shall be limited or enlarged by or contrary to the provisions of this article, in any of which events this article shall be controlling.”).

decide to “refresh your recollection” by researching the advantages and disadvantages of the various available types of legal entities and consulting with your business law counsel.

What is the difference between forming a professional entity and a non-professional entity?

Chapter 20 of the Arizona Corporation Code, A.R.S. § 10-2201 *et seq.*, and Article 11 of the Arizona Limited Liability Company, A.R.S. § 29-841 *et seq.*, allow certain persons to form and own PCs and PLLCs to render professional services. “Professional service” is defined as “a service that may be lawfully rendered only by a person licensed or otherwise authorized by a licensing authority in this state to render the service.” *See* A.R.S. §§ 10-2201(6) and 29-841(5). Because a law firm fits the definition of rendering professional services, an attorney can elect to form a PC or a PLLC.

According to A.R.S. § 10-2213(C), licensed professionals “may render a professional service, in any other business form or entity, . . . , unless the use of the form or entity is expressly prohibited by the licensing law of this state applicable to the profession or by the licensing authority with jurisdiction over the profession.” *See also* A.R.S. § 29-842(A). Although there currently is no requirement that attorneys use a professional entity form for their law practice, most attorneys use the professional entity form because:

- other law firms are formed as PLLCs or PCs.
- the “professional” designation distinguishes the business as one providing professional services, i.e. legal services.
- the word “professional” conveys validity and authenticity to the law firm.
- the law firm can be marketed as a professional entity.

Some may use the professional entity form because of a misconception that a professional entity provides additional liability protection. However, in the case of a professional such as an attorney, the limited liability protection does not protect the owner-professional from liability for rendering professional services. An owner-professional “is personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by the [owner-professional] or by any person under the [owner-professional’s] direct supervision and control while rendering professional services on behalf of the [business entity] to the person for whom the professional services are rendered.” *See* A.R.S. §§ 10-2234 and 29-846. Therefore, regardless of whether your law firm is a professional entity or a non-professional entity you, the solo attorney, will still be personally responsible for any legal services rendered.

Unlike regular corporations and LLCs, professional entities have specific restrictions regarding who can be owners and have managerial authority:

1. PCs

- a. Shareholders: Under A.R.S. § 10-2220(A)(1), a PC is limited to issuing voting shares to “[i]ndividuals who are licensed by law in this or another state” to render legal services. Although the Arizona Corporate Code allows non-professionals to own up to 49% of the PC, see A.R.S. § 10-2220(A)(4), Arizona Supreme Court Rule 42, Rules of Professional Conduct, Ethical Rule (“ER”) 5.4(d)(1) prohibits non-attorneys from owning an interest in a law firm, regardless of whether the law firm is a professional entity or a non-professional entity. As such, if you want to add additional owners to your law firm, those additional owners must also be attorneys.
- b. Director and Officers: A.R.S. § 10-2230 requires that at least one-half of the directors of a PC and its president to be licensed in Arizona or another state to render legal services. However, ER 5.4(d)(2) requires that all of the directors and officers of a law firm be attorneys, regardless of whether your law firm is a professional entity or a non-professional entity.

2. PLLCs

- a. Members: Similar to a PC, a PLLC is limited to issuing membership interests to “[i]ndividuals who are licensed by law in this or another state” to render legal services. See A.R.S. § 29-844(B)(1). Although the Arizona Limited Liability Company Act allows non-professionals to own up to 49% of a PLLC, see A.R.S. § 29-844(B)(4), Arizona Supreme Court Rule 42, Rules of Professional Conduct, Ethical Rule (“ER”) 5.4(d) prohibits non-attorneys from owning an interest in a law firm, regardless of whether the law firm is a professional entity or a non-professional entity. As such, if you want to add additional owners to your law firm, those additional owners must also be attorneys.
- b. Managers: ER 5.4(d)(2) provides that anyone that “occupies the position of similar responsibility” as a corporate director or officer must be an attorney, regardless of whether the law firm is a professional entity or a non-professional entity. Therefore, the managers of a limited liability company, as those who hold similar management authority as directors and officers of a corporation, must also be attorneys.

The same filing requirements for a regular corporation or a LLC apply, except that the PC or PLLC must describe in the Articles of Incorporation or Articles of Organization, as the case may be, the professional

services that will be provided by the PC or PLLC and the name must contain the word “professional” or the letter “P” in the abbreviation (e.g., You, P.C. or You, PLLC). See A.R.S. §§ 10-2210 and 29-841.01.

Do both PCs and PLLCs provide limited liability protection?

Both PCs and PLLCs provide limited liability protection for its owners. The limited liability protection means that the owners are not personally liable for their acts and omissions while acting on behalf of the corporation or LLC. For example, if a PC enters into a contract and defaults on that contract, the other party can only pursue the PC and its assets for the default and cannot pursue the shareholders of the PC. In other words, although you may be the owner of the PC, your personal assets are not at risk for the PC’s or PLLC’s liabilities. To maintain this limited liability protection, you as the owner of the corporation or LLC must keep your personal transactions separate from your business transactions, including:

- having separate company bank accounts;
- preventing the commingling of personal and business funds; and
- entering into and executing documents on behalf of the business instead of individually.

What is the difference in management structure for a PC compared to a PLLC?

1. PCs

Corporations have been around a long time so most people are familiar with the basics of the management structure of a corporation. A corporation has shareholders, who elect a Board of Directors to manage the corporation. The Board of Directors in turn hire officers (i.e., President, Secretary, and Treasurer) to manage the day-to-day operations of the corporation. The distinct rights and responsibilities of these three roles create a system of corporate formalities that must be maintained to avoid losing the limited liability protection provided by forming a corporation as discussed above. In the case of a solo practice, one person will probably be the sole shareholder, director, and officer of the business.

In addition, most people are conversant with the types of documents that govern the management of a corporation. Arizona law requires corporations to have Articles of Incorporation, a Certificate of Disclosure, and Bylaws. The Articles of Incorporation form the corporation, the Certificate of Disclosure provides information about any misconduct or insolvency of persons related to the corporation, and the Bylaws set forth the rules for management of the corporation. Corporations with multiple shareholders should consider adopting other documents such as buy-sell agreements, voting agreements, and other shareholders’ agreements governing the relations among the shareholders. Even if a corporation and its shareholders did not enter into these documents, the Arizona Corporation Code, found at Title 10 of the Arizona Revised Statutes, has a framework of default rules. In addition, because the Arizona Corporate

Code is based on the Model Business Corporation Act, which has been adopted in some form by most states, numerous cases interpreting corporate law exist.

While this fixed management structure provides predictability and specific formalities for a corporation's owners to follow, you as a solo attorney may not need the more complicated corporate management structure and may want fewer formalities.

2. PLLCs

The LLC entity form provides great flexibility for management of a law firm. An LLC can be member-managed or manager-managed. In a member-managed LLC, all of the members are managers. This means that any of the members can bind the LLC, unless otherwise provided for in an Operating Agreement. A member signing documents on behalf of the LLC should sign as "Member" or "Manager," not as "Managing Member" as that term is not recognized under Arizona law. Arizona law requires that a member-managed LLC list all of its members on its Articles of Organization, regardless of percentage ownership. Member-managed LLCs are usually formed if there is one member or all of the members are actively involved in the business.

Otherwise, the preferred form is a manager-managed LLC. In a manager-managed LLC, the LLC is managed by managers so only the managers can bind the LLC. If an LLC is manager-managed, the members can decide on:

- the number of managers;
- whether there will be a minimum or maximum number of managers;
- the qualifications for being a manager such as being a member of the LLC;
- the number or percentage of managers required to make a decision on behalf of the LLC; and
- the limitations on the managers' authority.

These limitations, which would need to be set forth in an Operating Agreement, may include which LLC decisions require the majority or unanimous vote of the members in order for the managers to act. In addition, the LLC can establish a management committee made up of certain managers to govern a large number of managers or to oversee specific matters.

An LLC also permits an attorney to manage the LLC like a corporation. The LLC can have a Board of Directors and officers similar to that of a corporation or it can choose to have only a Board of Directors or only officers. In other words, the LLC can borrow any management aspect of a corporation and incorporate it into the LLC's management. A solo attorney may want to do this because more people are familiar with the corporate form, they want to use corporate titles such as "President" and "CEO," or they want a more formal management structure. Further, some industries are more comfortable with

conducting business with executives in a corporate structure rather than in the mutable LLC structure. Arizona law only requires an LLC to have Articles of Organization but contemplates that the LLC would have an Operating Agreement to govern the management of the LLC and the rights and obligations of the members and managers, similar to provisions that would exist in the Bylaws, a buy-sell agreement, a voting agreement, and a shareholders' agreement. Unlike the Arizona Corporate Code, the Arizona Limited Liability Company Act, found at Title 29, Chapter 4 of the Arizona Revised Statutes, does not contain many default rules if the LLC does not have an Operating Agreement. As such, LLCs with more than one owner should have an Operating Agreement that describes the rights and obligations of the managers in relation to the members, as well as the relations between the members. Moreover, because LLCs are a newer entity form than corporations, there are fewer cases, especially in Arizona, interpreting the Arizona Limited Liability Company Act, creating some risk about how Arizona courts will rule on certain issues affecting LLCs.

In your case, as a solo attorney who is the sole member and manager, your preferences will determine whether the LLC is member-manager or manager-managed or if it has management similar to that of a corporation. Although you may not need an Operating Agreement, it may still be beneficial to have one to provide in writing any company formalities and to override certain default rules in the Arizona Limited Liability Company Act.

Because of this flexibility in management and fewer company formalities, many solo attorneys prefer to form PLLCs instead of PCs.

What is the difference in how a PC is taxed compared to a PLLC?

While this section will address the general distinctions between the taxation of corporations and LLCs, you should consult with a certified public accountant or other tax advisor regarding the tax implications of these two entities on your individual financial circumstances.

1. PCs

A corporation formed under Arizona law can choose to be taxed as a C-Corporation under Subchapter C of the Internal Revenue Code or as an S-Corporation under Subchapter S of the Internal Revenue Code. Because the default is to be taxed as a C-Corporation, a corporation has to make an S-election with the Internal Revenue Service to be taxed as an S-Corporation.

As a C-Corporation, the corporation will be federally taxed on its income at the corporate level and the shareholders will be personally taxed on the dividend income they receive. Most business owners want to avoid this double taxation, but there are special deductions that a C-Corporation can take that

may make it advantageous to be taxed as a C-Corporation (e.g., deductible benefits to employees). In addition, losses incurred by a C-Corporation do not flow through to its owners.

As an S-Corporation, the corporation and its owners will avoid double taxation because the corporation's income will "pass through" to the owners and is taxed only at the owners' level. However, there are five relatively confining requirements to qualify to be an S-corporation:

- the corporation must be formed in a state or territory of the United States;
- partnerships and corporations generally cannot be shareholders;
- there cannot be more than 100 shareholders;
- the shareholders must be citizens or residents of the United States; and
- the corporation can only have one class of voting stock (but can have voting and non-voting stock).

2. PLLCs

Because the Internal Revenue Code has yet to recognize the LLC entity form, an LLC cannot be federally taxed as an LLC. Instead, an LLC can choose if it wants to be treated as a "disregarded entity" (this is the default if there is only one member), a partnership (this is the default if there are two or more members), a C-Corporation, or an S-Corporation. As a single-member LLC and treated as a "disregarded entity," the Internal Revenue Service would treat the LLC as a solo proprietorship for income tax purposes, unless the LLC affirmatively elects to be treated as a C-Corporation or an S-Corporation. If the solo attorney adds another owner to the law firm, the LLC will by default be taxed as a partnership, unless the LLC affirmatively elects to be treated as a C-Corporation or an S-Corporation.

What is the difference in the formation filing requirements for a PC compared to a PLLC?

1. PCs

A.R.S. § 10-202 provides that a corporation is formed by submitting Articles of Incorporation and a Certificate of Disclosure to the Arizona Corporation Commission for filing and describes the information that must be included in these documents. Forms for the Articles of Incorporation (including the statutory agent acceptance form) and Certificate of Disclosure can be found (<http://ecorp.azcc.gov/Entity>). The known place of business must be a physical address and cannot be a post office box. The statutory agent must be a resident of Arizona and must execute the statutory agent acceptance form, agreeing to be the corporation's statutory agent.

The filing fee for the Articles of Incorporation and Certificate of Disclosure is \$60.00 plus an optional \$35.00 to expedite the filing. It is recommended to pay the expedite fee so that the Articles of Incorporation and Certificate of Disclosure are filed within one week instead of two to three weeks. The

Arizona Corporation Commission publishes its document processing times each Monday on its website at (<http://www.azcc.gov/Divisions/Corporations/document-processing-times.pdf?d=818>). Within sixty days after the Arizona Corporation Commission approves the filing of the Articles of Incorporation, the corporation must publish the Articles of Incorporation in a newspaper of general circulation in the county of the known place of business in Arizona for three consecutive publications. A.R.S. § 10-203(D).³ Although not required, it is recommended that the Affidavit of Publication be submitted to the Arizona Corporation Commission for filing to evidence compliance with the publication requirement.

To maintain the corporation, the corporation is required to file annually an Annual Report and a Certificate of Disclosure, which filing fee is \$45. See A.R.S. § 10-1622. The Annual Report can be filed online or by submitting paper forms by mail or in person. Failure to timely file an Annual Report is grounds for administrative dissolution. See A.R.S. § 10-1420. Although the Arizona Corporation Commission no longer notifies corporations of the due date of the Annual Report, a corporation can sign up for an email reminder of the due date on the Arizona Corporation Commission's webpage for that corporation.

2. PLLCs

A.R.S. § 29-632 provides that an LLC is formed by submitting Articles of Organization to the Arizona Corporation Commission for filing and describes the information that must be included in the Articles of Organization. However, no Certificate of Disclosure is required. The form for the Articles of Organization (including the statutory agent acceptance form) can be found (<http://ecorp.azcc.gov/Entity>). The known place of business must be a physical address and cannot be a post office box. The statutory agent must be a resident of Arizona and must execute the statutory agent acceptance form, agreeing to be the LLC's statutory agent. .

The filing fee for the Articles of Organization is \$50.00 plus an optional \$35.00 to expedite the filing. It is recommended to pay the expedite fee so that the Articles of Organization are filed within one week instead of two to three weeks. The Arizona Corporation Commission publishes its document processing times each Monday on its website (<http://www.azcc.gov/Divisions/Corporations/document-processing-times.pdf?d=818>). Within sixty days after the Arizona Corporation Commission approves the filing of the Articles of Organization, the LLC must publish the Articles of Organization in a newspaper of general circulation in the county of the known place of business in Arizona for three consecutive publications.

³ Effective January 1, 2017, the corporation (if its known place of business is located in Maricopa County or Pima County) may satisfy the publication requirement by requesting the Arizona Corporation Commission input the information into its database as prescribed by A.R.S. § 10-130.

A.R.S. § 29-635(C).⁴ Although not required, it is recommended that the Affidavit of Publication be submitted to the Arizona Corporation Commission for filing to evidence compliance with the publication requirement.

Unlike corporations, LLCs do not have an annual filing requirement. No annual maintenance is one of the reasons business owners choose the LLC entity form.

Name of Entity

Regardless of whether the law practice is formed as a PC or PLLC, the Arizona Rules of Professional Conduct provide that the name of the law firm “may be designated by the names of all or some of its members, the names of deceased or retired members where there has been a continuing succession in the firm’s identity, or by a trade name such as the ‘ABC Legal Clinic.’” See Comment 1 to ER 7.5.

Conclusion

Even after you do your research, and even if you have actually retained a lot of the information you learned in the business entities course in law school, you would be best served by speaking to a certified public accountant or other tax advisor about the tax implications of your law firm being treated as a “disregarded entity,” a C-Corporation, or an S-Corporation so you can finalize your decision about whether to form a PLLC or PC.

⁴ Effective January 1, 2017, the LLC (if its known place of business is located in Maricopa County or Pima County) may satisfy the publication requirement by requesting the Arizona Corporation Commission input the information into its database as prescribed by A.R.S. § 10-130.

Chapter Six: Fees

Types of Fees and Fee Agreements

There are a number of fee types from which you may choose. Some fee types are typically used in certain areas of practice – for example, personal injury plaintiff’s attorneys may more commonly use contingent fees; criminal defense attorneys may more commonly use flat or hourly fees. There are a few restrictions about which you must be aware; they are enumerated in ER 1.5(d). Some types of fees carry with them additional requirements – for instance, an agreement for a contingent fee requires that the agreement be in writing, signed by the client, and must state the manner in which the fee will be determined, *see* ER 1.5(c). A lawyer charging a non-refundable, earned upon receipt fee must also simultaneously inform the client that they may, at the termination of the representation be entitled to a refund. Advance fees – funds provided by the client against which you will bill, usually hourly, must be deposited in a client trust account.

Before deciding on the type of fee you wish to charge, you should check the Rules of Professional Conduct, specifically ER 1.5, and you may wish to consult with Practice 2.0 about the requirements attendant with that type of fee. There are also a number of Arizona ethics opinions relating to fees, most recently Ethics Opinion 10-03 that advised that lawyers may charge an advance, earned-upon-receipt fee under certain circumstances.

You may collect advance fees, or may bill upon completion of services, or some combination of the two. There are pros and cons to both type of fees. It is important to keep in mind that billing and collection of fees takes time; time during which you might otherwise be practicing law. Setting up a structure for collecting, billing and accounting for fees charged is something which you should do at the beginning of your practice. Again, the staff at Practice 2.0 will assist you in working through some of these issues. Sample fee agreements, as well as a document with helpful miscellaneous terms may be found on the Practice 2.0 website (<http://www.azbar.org/professionaldevelopment/practice20/forms/>).

Fee Agreement Specifics

1. *Mandatory Clauses*

The Rules of Professional Conduct *require* that clients be informed of three things in writing. It is a best practice, therefore, to make that writing a fee agreement. The three things are:

- a. Who is the client?
- b. What is the scope of the representation?

- c. What are the fees and how will fees and costs will be calculated? *See below, Ariz.R.Sup.Ct. R. 42 Ethical Rule 1.5.*

If the fee is contingent (ER 1.5(c)) or split between two or more firms (ER 1.5(e)), the client *must sign the fee agreement*. The best practice is to have ALL clients sign fee agreements. If the fee is “non-refundable” or “earned upon receipt” the fee agreement MUST say: 1) the client always retains the right to fire the lawyer; and 2) a portion of the fee may be refundable. ER 1.5(d)(3).

If someone other than the client is paying your legal fees (including insurance companies, employers, girlfriends, relatives, etc.), the fee agreement needs to discuss Ethical Rule 1.8(f)’s requirements that: a) information about the representation will remain confidential; b) the client directs the representation; and c) the client consents to the third party payer. In addition, the fee agreement should also recite to whom any refund will be made if any funds are unused at the conclusion of the representation. In addition to making sure the client understands this, the third party payer must also be advised about this possible circumstance.

2. Additional Clauses

Fee agreements also should, at a minimum, discuss the following topics:

- Communicating with you and the firm in general (including whether there are minimum billing increments, such as .2 for all phone calls, and not sending confidential information by email from public computers), and what the client may expect in terms of response time from you or your staff.
- Communicating with third parties who either are guarantors or just friends and family members and how such communications, if permitted by the client, may waive the attorney/client privilege.
- Joint representations: ALWAYS discuss potential conflicts and what will happen if the co-clients disagree, how confidentiality will work among them, and who pays the fees.
- Insurance coverage and/or fee shifting application.
- File AND data retention policies of the firm. If you do not include this provision you may have to retain files and data indefinitely. This may not seem like a problem now, but at the conclusion of a long career this can be a daunting issue.
- Advance waivers to notify clients that the firm represents other clients who may be adverse to this client on unrelated matters. Advance waivers only go so far and may not ultimately be

binding if the conflict later arises that creates an un-waivable conflict. Therefore, keep in mind that notwithstanding this advance waiver, you must be vigilant to conflicts and continually reexamine whether any new conflict may prevent you from continuing the representation. Also be mindful that if such a conflict does arise, and if it is a waivable conflict, both clients must consent to the continuation of the representation.

- Client obligations to: a) keep you informed about changes in contact information or changes in the material facts; and b) to assist in the representation.
- Your obligation to withdraw in certain circumstances, such as conflicts or failure of the client to assist in the representation.
- Interest charges/collection agencies: You cannot charge interest on overdue accounts or send an account receivable to collections unless you notify the clients in the fee agreement that you will do so.
- Discovery obligations – particularly e-discovery for corporate clients.
- Severability and choice of law provisions.
- Arbitration clauses for disputes between you and the client. You may arbitrate through private arbitration or in the event of a fee dispute you may choose to use the State Bar of Arizona’s Fee Arbitration program (free to you and to the client).
- Electronic communication (email, texts, file sharing provisions) – confirm that the client’s email address is secure, confirm client does not have any special security requirements that would prohibit cloud data storage or sharing (such as for government security clearances), and confirm how data will be stored.
- It is a good idea to advise the client that in the event of a recovery, or receipt by you of funds for the benefit of the client, that funds will not be available from the firm trust account until ten business days after deposit of the proceeds.

There are several Arizona Ethics Opinions regarding file retention, including keeping documents electronically (07-02), the duty to safeguard files and have a retention policy (08-02), and what to do with client files when a lawyer leaves the firm (10-02). For examples of detailed fee agreements, and other helpful forms including engagement and disengagement letters, check the Practice 2.0 website (<http://www.azbar.org/professionaldevelopment/practice20/forms/>).

One Other Helpful Tip: Do Not Use the Word “Retainer” When You Mean “Advance Fee Deposit.”

Because *many* lawyers mistakenly use the term “retainer” in fee agreements when they mean an advance fee deposit that is billed against, you should review Comment [7] to ER 1.5, which is unique to Arizona’s Rules and provides specific definitions:

[7] Advance fee payments are of at least four types. The "true" or "classic" retainer is a fee paid in advance merely to insure the lawyer's availability to represent the client and to preclude the lawyer from taking adverse representation. What is often called a retainer, but is in fact merely an advance fee deposit, involves a security deposit to insure the payment of fees when they are subsequently earned, either on a flat fee or hourly fee basis. A flat fee is a fee of a set amount for performance of agreed work, which may or may not be paid in advance but is not deemed earned until the work is performed. A nonrefundable fee or an earned upon receipt fee is a flat fee paid in advance that is deemed earned upon payment regardless of the amount of future work performed. The agreement as to when a fee is earned affects whether it must be placed in the attorney's trust account, see ER 1.15, and may have significance under other laws such as tax and bankruptcy. But the reasonableness requirement and application of the factors in paragraph (a) may mean that a client is entitled to a refund of an advance fee payment even though it has been denominated "nonrefundable," "earned upon receipt" or in similar terms that imply the client would never become entitled to a refund. So that a client is not misled by the use of such terms, paragraph (d)(3) requires certain minimum disclosures that must be included in the written fee agreement. This does not mean the client will always be entitled to a refund upon early termination of the representation (e.g., factor (a)(2) might justify the entire fee), nor does it determine how any refund should be calculated (e.g., hours worked times a reasonable hourly rate, *quantum meruit*, percentage of the work completed, etc.), but merely requires that the client be advised of the possibility of the entitlement to a refund based upon application of the factors set forth in paragraph (a). In order to be able to demonstrate the reasonableness of the fee in the event of early termination of the representation, it would be advisable for lawyers to maintain contemporaneous time records for all representations undertaken on any flat fee basis.

Ethical Billing Tips to Get Paid

The following are general suggestions for all practices and practice areas. Note that billing procedures may deviate from these suggestions when agreed to with a client and with firm management. For instance, in many insurance defense representations or retainer situations, clients do not want detailed statements

with each activity broken out by time. Discuss your billing procedures with clients at the beginning of a representation to assure compliance with the client's needs.

Bill Regularly – Even When There's Nothing to Bill

Clients never see or hear most of what lawyers do on their behalf. Clients do not see research, they do not see drafting, and frequently clients do not even see negotiations with other parties. One way to keep clients informed about what is going on in their legal matter is to tell them in invoices – regularly. View the invoice as a running chronology that should list for the client everything done on their behalf, with complete descriptions and entries for all communications (including emails), document review and preparation, research, and meetings/negotiations/hearings. This does not mean word-for-word transcripts of conversations or meetings, but a summary sufficient to let the client know what has been going on is a valuable communication tool.

In addition to keeping clients informed, regular (i.e., monthly) billing assures regular cash flow and managing clients who begin to have payment “problems.” Clients are far more likely to pay monthly bills that are moderate than one huge bill every six months. Failing to keep clients informed about their mounting fees also could be construed as failing to communicate in violation of the lawyer's ethical obligations. Additionally, if you do not bill at least monthly, or keep contemporaneous time records, you are far more likely to forget billable tasks performed, or the time it took to do them, and are more prone to under-bill.

Include “no charge” entries in your billing statements – clients love to see that they are getting something for “free” and including the “no charges” is necessary to document an accurate chronology of what work was performed for the client during the month.

Send a monthly bill even if there was no new activity this month, especially if a client owes an outstanding balance. It serves as a reminder of overdue fees but also tracks for you that you have communicated with the client that nothing went on this month.

Use Complete Sentences

The monthly invoice is one of the most effective communication tools you have to document for the client everything done for the client and why.

Demonstrate the value in your services by providing the client with complete explanations. For example, instead of saying “Witness prep – 12 hours” a more useful billing entry would state something like “Meeting with witness Jane Doe, witness on causation issues, to review 400 exhibits including deposition testimony from six other witnesses and Jane's prior declaration, and discussion of her

involvement in the production of the widget at issue in the case – 12 hours.” This reminds the client of the importance of Jane’s testimony as well as the amount of work that goes into preparing a fact witness for trial – all of which the client might not have seen or might not appreciate.

Acronyms and cryptic time entries only cause confusion, not payment. For example, “Draft document,” “telephone call with RSS,” and “Research” are insufficient billing entries. What document and for what purpose? What did you discuss with “RSS” and are we sure that there is only one person with the initials “RSS”? A time entry that just says “research” without explaining what issue, or for what purpose is pointless. The more explanation you add to a bill, the more likely the client will understand what you did and be willing to pay. Detailed sentences also help in the event that the client *does not* pay and you must ask a court or arbitrator to decide if the fee was reasonable for the services performed. Never assume your understanding of an acronym will be the same as a client. Remember, for example, that “SOL” has one connotation to lawyers and possibly another for clients.

If acronyms *must* appear, try using an index that is attached to the invoice or provided in the engagement letter to give clients a quick reference to exactly what you mean by PTO, TTAB, AUSA, UFO, etc.

Proofread

Clients hate to have their names misspelled. They frequently will raise this as an objection to fees in fee arbitration hearings – both in the billing and if you misspell their names in pleadings. Do not be sloppy – proofread.

Clients also do not like to be referred to in billing statements or in letters as “client” – use their names.

Never Block Bill or Use Excessive Minimum Units

The Ninth Circuit has held that block billing may inflate a bill and makes it difficult to ascertain the reasonableness of the charges for a particular activity. *Welch v. Metropolitan Life*, 480 F.3d 942 (9th Cir. 2007). In a recent Arizona Court of Appeals, Division One, decision, the Court cited to *Welch* and discouraged the use of block billing. *Sleeth v. Sleeth*, 226 Ariz. 171, 244 P.3d 1169 (Div. One. December 09, 2010). The Court also frowned upon using minimum billing increments of .5. Block billing consists of grouping all the activities in a day together, without breaking out the time for each activity. For instance:

8/23/07 TC w/ client; Conf. w/ opp. Counsel;
R choice of law; office conf. w/ co-counsel = 15.4 hours

That billing entry is an improper block bill. To correctly bill this time, try:

8/23/07 Telephone call with client Jane regarding hearing (.4); Conference with opposing counsel John Smith to discuss discovery deadlines (1.0); Research choice of law requirements in California (11.0); office conference with co-counsel Larry Lawyer to review deposition schedule and expert witness testimony for motion for summary judgment (3.0) = 15.4 hours

CAUTION: The *Welch* decision also upheld the district court's 20% reduction in the fee request because it found that a minimum billing unit of .25 hour for *everything* was excessive. Lawyers are warned – do not use .25 as a minimum unit for everything.

Keep Track of Time – Even for Contingent and Flat Fee Matters

Law firms are businesses. You, and your firm, cannot quantify whether you are handling matters efficiently, whether a flat fee or contingent fee accurately reflects the *actual* costs of performing the services, and whether you should consider alternate billing arrangements unless you and (if you use them) paralegals keep track of their time.

Even if you charge a flat fee for a service or a contingent fee, all professionals should record their time. In contingent fee cases, it is crucial to keep time records because otherwise you will not be able to make a *quantum meruit* claim if the representation is terminated prior to settlement or the completion of the case/matter.

In addition to determining profitability on flat or contingent fee matters, tracking time on hourly matters is necessary to calculate your realization rate. The realization rate calculates how much of the time billed actually is *paid* by clients. Factors affecting realization including clients not paying invoices but also the amount of time that you decide to “write-off” and do not charge a client.

And for all matters, make sure you enter your time every day. Some writers estimate that law firms lose as much as 50% of their billable time because lawyers fail to make daily time entries. That is a lot of money. Mobile technology can make this task easier as there are a number of time-keeping apps or software that make this task more convenient.

Always Identify Whether the Money Is Coming from Trust or Owed

Billing statements must, according to ER 1.15 and Supreme Court Rule 43, identify whether client money will be coming out of trust to pay the invoice or whether the client must pay the invoice. The Ethical Rule and Supreme Court Rule require regular accountings of how client money being held in trust is disbursed. Thus, if a client has paid an advance fee deposit (aka, retainer) and part of that deposit will be applied to the bill, the invoice should note how much will be applied and how much will be left in trust.

If You change your fees, you must notify the clients, in writing, BEFORE you bill them!

The Arizona Supreme Court amended Ethical Rule 1.5, effective January 1, 2011, to *require* that lawyers notify clients, in writing, in advance of any fee change. Even if your fee agreement says something like “The firm may increase our hourly rate from time to time,” that does not authorize you to increase the fees in the next invoice without giving the clients advance written notice that the rate increase is coming. *In re Elliot J. Peskind*, Ariz. Supreme Court No. SB-09-0080-D (2009).

In addition to the ethical rules requiring advance notice, it is simply good client relations to notify clients *before* you increase their rates. This can be accomplished either in a letter or in the monthly invoice preceding a rate increase. If you opt to notify the client in the monthly invoice, be sure that the notice is prominent so that it doesn’t get lost in the detail of the rest of your bill. This is a best practice to avoid later claims by clients that they were unaware of the increased billing rate.

You Cannot Be Cloned, so You Cannot “Double Bill” Time

Hypothetical: You are flying from one city to another for client X, which takes four hours. You spend the four hours working on a brief for client Y. You CANNOT bill 8 hours.

ABA Ethics Opinion 93-379 clearly explains:

In addressing the hypotheticals regarding (a) simultaneous appearance on behalf of three clients, (b) the airplane flight on behalf of one client while working on another client's matters and (c) recycled work product, it is helpful to consider these questions, not from the perspective of what a client could be forced to pay, but rather from the perspective of what the lawyer actually earned. A lawyer who spends four hours of time on behalf of three clients has not earned twelve billable hours. A lawyer who flies for six hours for one client, while working for five hours on behalf of another, has not earned eleven billable hours. A lawyer who is able to reuse old work product has not re-earned the hours previously billed and compensated when the work product was first generated.

Rather than looking to profit from the fortuity of coincidental scheduling, the desire to get work done rather than watch a movie, or the luck of being asked the identical question twice, the lawyer who has agreed to bill solely on the basis of time spent is obliged to pass the benefits of these economies on to the client. The practice of billing several clients for the same time or work product, since it results in the earning of an unreasonable fee, therefore is contrary to the mandate of the Rules of Professional Conduct and the Model Rules.

Do Not Bill for Administrative Services

Your hourly rates already include overhead. But what about if you or paralegal is standing at a photocopier, simply copying documents – can you bill for that time? Usually – no.

Many corporations, including insurance companies, specify what constitutes “clerical” activities for which lawyers cannot bill. These include, for instance: Opening and processing mail; creating new client files, filing papers for client matters, maintaining attorney and office calendars, stamping documents and typing envelopes, photocopying, transcribing, faxing and emailing on behalf of lawyers, and assembling documents to file with courts and/or mail to clients. In addition, in terms of client satisfaction, much as clients love to see “no charges” on their bills, they resent having to pay for your overhead. Be sure your fees are sufficient to pay for these costs of doing business.

Know the Clients’ Billing Policies and Your Audience

Most large corporations and insurance companies do not permit billing for in-office meetings among lawyers, even though that may be some of the most productive time spent on a case. Know what policies each client has before billing time that will not be paid.

Many large companies also use Uniform Task-Based Management System billing codes. Know which clients require such coding or your time not only will not be paid, the client may reject the entire invoice!

The ABA, in conjunction with the Association of Corporate Counsel and Price Waterhouse in the 1990’s developed “Uniform Task-Based Management System, (UTBMS)” which is a system of uniform task and activity codes explained on the ABA Litigation Section’s website, in part, as follows:

Aside from "need" narrowly defined, there are significant benefits to both law firms and law departments in terms of administrative simplicity and cost reduction to be gained from standardization. In addition, the development of standard billing categories will permit introduction of billing based on Electronic Data Interchange (EDI). This technology is already widely employed in other areas of commercial activity. By linking the suppliers and consumers of legal services, EDI offers the prospect of "paperless billing" and a new level of administrative and cost efficiency.

The need, therefore, is for a uniform set of billing and task categories - detailed describers of legal work that would be acceptable to both law departments and firms, and that could prevail across American industry, financial services, and commerce. Analogous to the role of standards in other industries and functions, standard billing categories would make it possible for law firms to standardize their billing systems and for corporate law departments to work with their law firms in a far more efficient manner than prevails today.

Chapter Seven: Revenue Budgeting, Cost Analysis and Profitability

Revenue budgeting, cost per hour calculations, realization rate monitoring and profitability analysis tools are designed to provide reasoned methods upon which better decisions can be reached in the management of your firm. This chapter is intended to provide you a few simple tools that can help you develop a consistent approach to projecting your future revenue, analyzing the cost of operating your firm and measuring profitability.

Revenue Budgeting

Many firms, large or small, do a good job budgeting expenses and managing costs. It is much less common to find a firm that has an approach to revenue budgeting and projecting future revenue other than a best guess basis. A typical approach to projecting revenue is to look at last year's collections, perhaps by client, and to simply guess about the amount of legal work that will be collected. How do you really know if next year's revenue will be more, less, or about the same as the prior year? Good question.

To take revenue budgeting one step further, it could be helpful to look at your list of active matters and make an educated guess about the amount of services that would typically be required to complete those kind of engagements; that information would give you one more component in determining your revenue budget and projection of future revenue.

Another educated guess could be made regarding the number of new matters typically opened per month (and the work they will require) that will sustain your practice after the current active matters are completed. For this to be helpful, you would need to have some idea of the average fees received per matter. That would require a system to track and analyze fees charged and collected (perhaps an average) for each matter. Tracking the expected value per matter might however, require a significant amount of time and effort, perhaps more effort than the information is worth.

These approaches to projecting revenue may be about as good as it gets in many circumstances. If you happen to have the good fortune to represent clients that provide you a predictable volume and steady flow of cases (such as insurance defense matters that come from an insurance carrier client) your attempt to project revenues would certainly be much easier than if your work comes from a variety of unrelated clients that do not have the need for regular or repeating legal services (such as family law).

In either circumstance, there are ways to approach revenue budgeting from a cost basis that might provide a better understanding of firm profitability so you have a consistent method to guide decision making and management of the firm's business.

Revenue Budget Model

First, look at the basic components that would be used in a revenue budget model.

- Annual billable hours 1,800
- Standard billing rate \$300
- Standard value of annual billable hours \$540,000 (revenue capacity)
- Projected fee revenue \$487,350
- Realization 90.25%
- Collected rate \$270.75 (90.25% of \$300)

Based upon these assumptions, the projected fee revenue and revenue budget for this lawyer is \$487,350.

Changing any of the assumptions in the model would give you an idea how that set of assumptions would affect your projected fee revenue. For example, a realization rate of 95% would result in fee revenue of \$513,000.

BILLABLE HOURS

Billable hours in a revenue budget could be projected based upon several factors:

- (1) The lawyer's estimate of the current pipeline of work.
- (2) The amount of hours historically recorded.
- (3) The amount of legal work the lawyer should be able to or would like to produce.

The basis for determining which approach to use in your budgeting process would depend on what kind of budget you are attempting to create. If you are trying to project an accurate estimate of expected revenue, it would be preferable to base the budget on evaluation of the legal work in the pipeline. If the revenue budget was intended to create a goal of hours billed and collected, then the revenue budget might be based upon the estimated capacity to produce work. Either method would be a useful tool to compare against actual results and the variances to budget.

Hourly Billing Rates

Billing by the hour and rate is the most common approach to determining the amount of billing for legal services. Regardless of the billing rate used to determine the amount to bill, the primary criteria should be the "value" of the services to the client and whether or not the fees are reasonable according to the criteria outlined in ER 1.5 (a) of the Arizona Bar Rules of Professional Conduct. ER 1.5 (a) states that the factors to be considered in determining the reasonableness of a fee include the following:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services and the degree of risk assumed by the lawyer.

The billing rate you choose may also be affected by the rates charged by other lawyers in the market for similar services and by lawyers that are of similar skill and experience level as you. Obviously, charging higher than market rates would not be advisable.

Note: It is not uncommon for certain types of legal services to be billed at a flat rate (or some other alternative fee arrangement) that is not purely based on billable hours x billing rate basis. It is highly recommended that even if the amount to be billed is a flat rate, a record of the actual hours spent on the matter be maintained so you can analyze how efficient and profitable a matter is compared to your target billing rate. Without accurate time records, it would be difficult to effectively manage the revenue and profitability aspects of your practice.

Revenue Capacity

A determination of your revenue capacity requires a set of assumptions regarding the number of billable hours you are able to produce given your energy level, efficiency and the resources available to you in your practice. Applying your anticipated billing rate to your capacity in terms of hours will give you an estimate of the revenue you are capable of producing. Of course, actual revenue generated will be affected by the ability to achieve an adequate number of billable hours *and collect* for the services at the anticipated billing rate. Revenue capacity can be a useful tool to help you establish an estimate of your revenue budget, and analyzing the variances between actual revenue and budget are helpful in evaluating performance and profitability.

Realization

It is common for lawyers to compare fee revenue collected to the amount of *billings* included on the invoices to client. For example, on the \$540,000 that was available to be billed at your standard billing rate of \$300, the amount that was actually billed might have been only \$513,000. That means only 95% of the standard value of your time was billed. This could be referred to as the *billing realization*.

To complete the calculation of realization, if in this example \$487,350 was collected, the *collection realization* is also 95%. The combination of *billing and collection realization* is the *total realization* achieved.

For example:

1,800 hours x \$300 = \$540,000

Fee billings = \$513,000 Billing Realization = 95%

Fee collections = \$487,350 Collection Realization = 95%

Total realization = \$540,000

\$487,350 = 90.25% total realization

The calculation of realization = \$540,000 x 95% x 95% = 90.25%.

Realization may also be determined by dividing the collected rate of \$270.75 by the standard Rate of \$300 (90.25%).

Collected rate = \$270.75

Billing rate \$300.00 = 90.25% Total realization rate

Understanding how to calculate realization rates is the simplest way to make sure your practice is financially healthy. If you are not able to collect 90% or more of your billable value, it could indicate that:

- (1) The rate being charged for the work is too high, compared to other lawyers performing similar work in the market.
- (2) Too many hours were spent to produce the work than should be required (poor efficiency).
- (3) Economic circumstances are affecting the client's ability to pay.
- (4) The expectations of the client regarding the fees to be charged were not adequately discussed at the beginning of the engagement.

Improvement of a lawyer's realization rate is arguably the quickest way to increase revenue and profitability. It does not require an increase in billable hours or billing rate and it does not depend on opening additional new matters. It only requires collecting a higher percentage of the work you have already done.

Cost Basis Hourly Rate Analysis

The cost to produce legal work should also have a bearing on revenue budgeting and the setting of hourly rates. Many business-minded lawyers have a fairly good idea of what the overhead and operating expenses are for the firm. These costs can be easily described in terms of the cost per hour to produce work. Consider the following example:

Annual operating expenses (excluding compensation or profit).

Staff wages and benefits	\$80,000	
Occupancy costs	\$35,000	
Insurance	\$10,000	
Equipment	\$10,000	
Marketing	\$ 7,350	
Office supplies	\$10,000	
Taxes	\$57,650	
Other	\$15,000	
Total operating costs	\$225,000	= (Cost rate of \$125 per hour).

Based upon this example, if the cost to produce 1,800 billable hours is \$225,000, the cost rate per hour, excluding compensation, would be \$125.

The significance of this analysis is if the rate that can be collected for a particular matter is less than \$125 per hour, there is nothing left for lawyer compensation. Knowing the actual cost to produce work is crucial in the process of pricing legal services, negotiating fees and determining the profitability of work at the client, matter and practice area levels.

It is important to note that, because most of the costs associated with producing legal work are generally fixed, the variable component in the lawyer's profitability model is lawyer compensation. Operating costs tend to be fixed because, for example, rent is not typically based upon the amount of revenue generated but rather based on a long term lease commitment with a fixed amount of rent due each month. Similarly, unless you are using contract labor paid by the hour, the cost of having staff as regular employees is the same (absent consideration of overtime pay, etc.) from one pay period to the next, regardless of the actual revenue produced. The cost of maintaining office equipment and an infrastructure of technology is also typically a fixed monthly cost.

Knowing the cost required to produce legal work is necessary as part of the effective financial management of your practice. For example, knowing the cost hourly rate is crucial when evaluating whether to take on lower rate work that is based on a discount from your standard hourly rate or priced on a flat fee or some other alternative fee arrangement. Without the cost per hour reference point, it is difficult to tell just how much your compensation (or profit pool) might be affected by the discount.

Profitability

Determining profitability for a sole practitioner is relatively straightforward. At the end of any period, the amount of revenue collected, minus expenses should equal the amount available for compensation (profit) for the practicing attorney. Whether you are solo, or in a group practice, using the cost rate calculations and understanding realization rates are helpful in creating profitability models that can guide your decision making and planning. Knowing what it means to be profitable can help you make more informed decisions regarding:

- hiring
- growth
- client retention
- pricing of services and setting of standard rates
- compensation of partners, associates, paralegals

Profitability can be analyzed at the individual lawyer, entire firm, individual client or practice group level, depending on the complexity of your profitability model. The cornerstone of any profitability model is to determine the cost to produce work, as described above. The calculation of your cost per hour is calculated by dividing overhead expenses by billable hours. Depending on the purpose of the calculation, billable hours could be based on budgeted (expected) hours or actual hours recorded.

A simple profitability model can be created by taking the total expenses for the firm *minus* the direct costs allocated to timekeepers. Direct costs should include salaries, bonuses, benefits and payroll taxes. The balances of expenses not included in the direct cost category are indirect costs, commonly referred to as the “overhead” of the firm.

Note the cost per hour calculation is expanded to include all compensation paid to lawyers and paralegals, but excluding the “profit” pool that would be shared by partners. Draws to partners can be included or exclude based upon the firm’s compensation system. Profit bonuses to partners are excluded from the calculation of direct costs.

	Revenue	Cost per Hour		
Billable Hours	1,800			
Billing Rate	\$300			
Billable Value	\$ 540,000			
Realization Rate	90.25%			
Fee Revenue	\$ 487,350		\$ 487,350	
Staff Wages and Benefits			\$ 80,000	16.4%
Occupancy Costs			\$ 35,000	7.2%
Insurance			\$ 10,000	2.1%
Equipment			\$ 10,000	2.1%
Marketing			\$ 7,350	1.5%
Office Supplies			\$ 10,000	2.1%
Taxes			\$ 57,650	11.8%
Other			\$ 15,000	3.1%
Total Expenses (Overhead)		\$ 125	\$ 225,000	46.2%
Partner Salary/Draw		\$ 110	\$ 198,000	40.6%
Profit		\$ 36	\$ 64,350	13.2%

In this firm, the required collected rate to pay overhead is \$125 per hour. To also cover the expected partner salaries, a collected rate of \$235 per hour is required. Any collected rate above \$235 per hour would generate additional bonus compensation (profit). Comparison of cost rates to collected rates for the firm or on a particular matter is a strong indication of the level of profitability being achieved.

Improving Profitability

INCREASE REVENUE? CUT EXPENSES? IMPROVE PROFITS?

Most lawyers would assume the best way to improve profitability would be to produce more work, charge higher rates or cut expenses. Those options are sometimes not that easy to accomplish. There is, however, an alternative.

Consider this example of how an increase of realization rates can significantly affect profitability:

Assume your overhead is 50% of revenue and, and you are able to increase your realization rate on a particular matter to achieve a 10% increase in revenue (*without an increase in expenses*). The result is an increase in your profit by 20%. Revenue is increased by simply collecting a higher percentage of your billings, without an increase in the volume of billable hours (working more) or charging higher rates.

Billable value \$120,000

\$120,000

Realization rate	83%		91%
Revenue	\$100,000	Increase revenue by 10%	\$110,000
Overhead	<\$ 50,000>		<\$ 50,000>
Profit	\$ 50,000	(20% Increase)	\$ 60,000

Timekeeping

Another way to improve profitability without working more hours or increasing billing rates is to be more efficient and accurate when recording your time. Timekeeping has long been the bane of the legal profession and there is no perfect or universal solution that works for everyone. Most certainly, using a good time and billing software package can make the task of time keeping and billing less of a burden. I do suggest good practices like the following could help you find more billable hours that otherwise might be “lost”:

Record Time Promptly

Recording your time immediately after completing a task is the best way to ensure accuracy. Attempting to reconstruct a day’s (or week’s or month’s) billable time after-the-fact is difficult and less accurate. Understating the amount that should be billed would obviously affect profitability. Conversely, overstating the billing threatens client satisfaction. Realistically, you may find it impractical to enter each task into your timekeeping software the moment you complete it, so it is wise to develop a system that works for you that encourages prompt time keeping. Time and billing software or a module of your practice management software solution that allows you to enter time on a variety of devices, including cell phones and tablets, will assist in this effort. The most efficient process, assuming adequate typing skills, would be to post time entries directly to your time and billing system, preferably at the end of the day instead of reconstructing time records at the end of the week or month. If you go “old school” and keep manual records, be certain to set aside time daily, or at least weekly, to enter your time into your system.

Use Detailed Billing Descriptions

Detailed time entries are a fundamental component of an easy-to-understand invoice. Time entries should contain sufficient detail to allow the client to understand the services you provided and the value received. Clear descriptions of services could reduce the frequency of client questions about your bills and improve the chances the billings will be paid.

Implementing these simple approaches to revenue budgeting, cost per hour calculations, realization rate monitoring and profitability analysis tools will provide a solid platform upon which better decisions can be reached in managing your firm. These concepts can easily be implemented and are applicable to any size firm.

Chapter Eight: Trust Accounting Systems & Procedures

The following information is a summary of systems and procedures. Practice 2.0's comprehensive Trust Account Manual may be found on the State Bar's Trust Accounting webpage (<http://www.azbar.org/professionaldevelopment/practice20/trustaccounting/>).

Forms to assist you in managing your trust account may be found on the State Bar's Forms webpage (<http://www.azbar.org/professionaldevelopment/practice20/forms/>).

First, do you need a trust account?

The first thing to do is determine whether you even need a client trust account. You only need a client trust account if you are going to have funds in your possession that belong to a client or third party in connection with a legal representation. The second thing to do is to read Rule 42, ER 1.15 and Rule 43, Ariz.R.Sup.Ct. There is much useful and crucial information in these rules, and you are responsible for understanding and implementing them. Rule 43(b), Ariz.R.Sup.Ct, is very specific in outlining what you must do to properly maintain your trust account.

Who owns the money and what do I do with it?

The first thing to do when you receive funds is decide to whom it belongs. The answer to the question of ownership does not turn on the amount of money received or that the money will belong to you tomorrow or next week. For example, some lawyers believe if the amount of money received is small, there is no reason why it has to go into a trust account. Others believe if they will earn all or most of the money within the next week anyway, there is no point in making a trust account deposit and a subsequent transfer to an operating account. Neither assumption is correct. Money that does not belong to you when you receive it must go in a client trust account.

Funds belonging to you or your firm do not go in the trust account, unless it falls within two limited exceptions. You can keep your own funds in the trust account to pay service or other charges or fees imposed by your bank that relate to the operation of the trust account, but only in an amount reasonably estimated to be necessary for that purpose. So, you cannot keep a slush fund in the client trust account to avoid overdrafts. If you accept payment by credit card, you can also keep your money in the client trust account to cover charges related to any credit card fees, but again only in an amount reasonably necessary for that purpose.

If you receive funds that belong in part to you and in part to a client or third party, the money has to initially be deposited in a trust account. For example, you might receive a check that includes an amount for services already performed and billed and an additional amount as an advance against anticipated

costs. You cannot take your portion by noting a cash withdrawal on your deposit slip (aka a “split” deposit). If you receive a check that includes both funds that should appropriately go to your trust account and funds that could appropriately go directly to your operating account, you must deposit the entire amount to your trust account, wait until the check has cleared and then transfer the funds.

How do I open a client trust account?

It is best to open a client trust account before you need one, but if you are at the point where a client gives you funds that belong in a trust account, you will need to establish one. The most common trust account will be an IOLTA account. IOLTA is Interest on Lawyer Trust Accounts and it is a pooled account of your clients’ money. Interest paid on an IOLTA goes to the Arizona Foundation for Legal Services and Education. Under certain circumstances, you may need to open a separate trust account for a particular client. If you need information regarding non-IOLTA accounts, a good place to start is Rule 43(f)(3)-(4) or you may call the State Bar’s Trust Account Hotline at 602-340-7305. Calls to the hotline are confidential pursuant to ER 8.3(c).

You need to establish your client trust account using the taxpayer identification number of the Arizona Foundation for Legal Services and Education, not your firm’s taxpayer identification number or your social security number. You need to open your trust account at a bank approved by the Arizona Foundation for Legal Services and Education. A list of approved banks may be found on the Foundation’s website at (<http://www.azflse.org/azflse/IOLTA/allbanks.cfm>). Ask your chosen bank if they are familiar with establishing client trust accounts. If not, you may obtain information from the State Bar of Arizona by calling the Trust Account Hotline at 602-340-7305. Alternatively, you may obtain the forms needed from the Foundation’s website (<http://www.azflse.org/azflse/IOLTA/>). The Foundation’s Taxpayer ID No. is 95-3351710.

If You Have Funds in a Trust Account, You Are a Fiduciary

The comments to ER 1.15 state a lawyer should hold property of others with the care required of a professional fiduciary. This means you must, on an ongoing basis, directly supervise maintenance of the trust account. You may have assistance to do so, such as a staff member or outside accountant or accounting firm, but the buck stops with you. You must understand client trust accounting concepts and must assure that if you have a staff member assisting with trust account maintenance they have the necessary knowledge, skills and integrity to adequately protect clients’ money, and that they are familiar with the provisions of ER 1.15 and Rule 43.

Keeping your client's money safe and acting in compliance with the trust account rules does not just happen. You need to establish internal controls. Internal controls are methods and measures used to monitor assets, prevent fraud, and minimize errors. An easy internal control is to have all bank statements (not just the trust account statement) come directly to you, unopened. If you review each month's statement, you will readily notice discrepancies, such as unusually high or low balances that do not seem in keeping with the transactions you are familiar with. Other red flags include NSF (Non-Sufficient Funds) and returned item charges. You should also check the cancelled checks for any unauthorized signatures. If possible, separate the duties; do not have the same person who makes the deposits also write the checks. Be careful who has access to your client trust account. Be aware of temptation, need, and opportunity.

Trust Account Records You Need to Maintain

By now you know that you have a responsibility to protect and keep track of money that has been entrusted to you. It is important you know what funds you are holding, when they were received and how you disposed of them. Every time a transaction occurs you should promptly record it. It needs to be recorded not only on a general ledger (similar to your personal check register) but also on an individual client trust ledger.

You must maintain a client ledger card (or the equivalent) for each client whose funds you hold, as well as an administrative funds ledger if you have your own money in the account (as permitted by Rule 43(a) and ER 1.15(b)). The records must reflect the date of the deposit and the payor, the date of the disbursement and the payee, and the balance remaining after the disbursement or deposit. You also need to record the check number, the amount, and the applicable client, and the reason for the disbursement. If a check is written but not promptly recorded and deducted from the transaction records, it will erroneously appear to someone writing the next check that those funds are still available. This can result in overdrawing the amount being held for a particular client, which in turn can result in inadvertent misappropriation (conversion) of other clients' funds.

You are required to keep duplicate deposit slips, or the equivalent. Every deposit you make into the client trust account should indicate at a minimum from whom the money came. You can do this by making a note of the name, and/or case or file number, on the deposit slip. If the deposit contains money from more than one source, list the names and amounts on the deposit slip. An alternative is to make a copy of the deposited check(s) and attach the copy or copies to the copy of the deposit slip. If you are not using

a duplicate deposit slip, complete a deposit log or some other documentation to identify the date of deposit, the payor, the amount, and the corresponding client.

You must keep trust account records for five years after the representation has ended. In some cases, this will mean you are holding trust account records for a very long time. You must make sure you are able to access your client trust account records at any given time. It is a good idea to keep your trust account records together in a secure location. You may leave copies in the actual client file, but you should never store original trust account records that have not yet reached the five year mark.

The Most Important Step: Monthly Three-Way Reconciliation

You are required to perform a monthly three-way reconciliation of the client ledgers, the general ledger and the bank statement. This is very important, as it is not only necessary that the bank and the lawyer's books agree on the total being held, but also that your account for every penny being held for each individual client.

There are four main steps to the three-way reconciling of your records:

1. Reconcile the general ledger/check register with the individual client ledgers (including the "administrative funds" ledger) to make sure they agree with one another. The purpose of this step is to make sure that the entries in your individual client ledgers (including the "administrative funds" ledger) agree with the entries in your general ledger/check register.
2. Enter bank charges and interest shown on the bank statement into your general ledger/check register and client ledgers (including the "administrative funds" ledger) as appropriate. The purpose of this step is to make sure bank charges and interest credits and debits are also reflected in your records.
3. Reconcile the general ledger/check register and client ledgers (including the "administrative funds" ledger) with the bank statement to make sure your records agree with the bank's records. The purpose of this step is to make sure the bank's records of the deposits and withdrawals you have made to your client trust account during the past month match your records. You may need to make adjustments for outstanding checks (those that have not yet cleared), deposits in transit (those that were made after the cut-off date for the period covered by the statement), and any fees or interest assessed. Since you have already reconciled the client ledgers with the general ledger/check register, you know that the entries in the client ledgers agree with the ones in the general ledger/check register. Therefore, unless you find a mistake, during this stage of the

reconciliation process you only have to compare the bank statement with the general ledger/check register.

4. If you find a mistake, you will need to enter corrected monthly balances and corrected current running balances into your general ledger/check register and individual client ledgers (including the “administrative funds” ledger).

Most computerized accounting systems are designed such that the overall total and the totals broken out by individual client will automatically match. That doesn’t mean, however, that an input error could not result in money being designated for the wrong client. You still need to review the breakout of funds being held for each client to assure all entries were made properly.

If someone other than you is reconciling the account, you still have a responsibility to personally review both the reconciliation report and relevant supporting documentation to assure all has been done properly.

NOW YOU KNOW WHAT TO DO, BUT WHY ARE YOU DOING IT?

The following key concepts are all the background you need in order to understand your client trust accounting responsibilities.

Separate Clients, Separate Accounts

Client A’s money has nothing to do with Client B’s money. Even when you keep them in a common client trust account, each client’s funds are completely separate from those of all your other clients. In other words, you are never allowed to use one client’s money to pay either another client’s or your own obligations.

When you keep your client’s money in a common client trust account (your IOLTA account), the way to distinguish one client’s money from another’s is to keep a client ledger card (or the equivalent) of each individual client’s funds. The ledger tells you how much money you have received on behalf of each client, how much money you have paid out on behalf of each client, and how much money each client has left in your common client trust account. If you are holding money in your common client trust account for 10 clients, you have to maintain 10 separate ledgers (remember you also will have a ledger for administrative funds you maintain in the client trust account).

If you keep each client’s ledger properly, you will always know exactly how much of the money in your common client trust account belongs to each client. If you do not, you will lose track of how much money each client has, and when you make payments out of your client trust account, you will not know which client’s money you are using.

You Can Not Spend What Your Client Does Not Have

Each client has only his or her own funds available to cover their expenses, no matter how much money belonging to other clients is in your common client trust account. Your common client trust account might have a balance of \$100,000, but if you are only holding \$10.00 for a certain client, you cannot write a check for \$10.50 on behalf of that client without using some other client's money.

The following example illustrates this concept. Assume you are holding a total of \$5,000 for four clients in your common client trust account as follow:

Client A	\$1,000
Client B	\$2,000
Client C	\$1,500
Client D	<u>\$ 500</u>
Total:	\$5,000

If you write a check for \$1,500 from the common client trust account for Client D, \$1,000 of that check is going to be paid for by Clients A, B, and C. The funds you are holding in trust for them are being used for Client D's expenses. You should have a total of \$4,500 for Clients A, B, and C, but you only have \$3,500 left in the trust account.

There must never be a negative balance – either on an individual client ledger or on the general ledger/check register.

Even though improper, it is not uncommon in personal checkbooks for people to write checks against money they have not deposited yet or money deposited that is uncollected, and show this as a negative balance. In client trust accounting, you may not do this. Until funds are deposited and collected, you may not disburse against them. There should never be a negative balance. A negative balance is at best a sign of negligence and, at worst, a sign of theft. In client trust accounting, there are only three possibilities:

- You have a *positive* balance (while you are holding money for one or more clients, or have administrative funds on deposit to cover the costs of maintaining the account);
- You have a *zero* balance (when all the clients' money has been paid out and you have no administrative funds on deposit); or
- You have a *negative balance in either an individual ledger or in the common client trust account* – and you have a problem.

You Can Not Play the Game Unless You Know the Score

In client trust accounting, there are two kinds of “unexpended” balances: the “unexpended balance” of the money you are holding for each client, and the “unexpended balance” of the trust account.

An unexpended balance of the trust account is the amount you have in the account after you add in all the deposits and subtract all the money paid out (including bank charges for items such as returned items or checks drawn on insufficient funds). In other words, the unexpended balance is what is in the trust account at any given time. The unexpended balance for each client is kept on the client ledger, and the unexpended balance for the trust account is kept on the general ledger (which can also be known as a transaction register or a checkbook register or the stub of detachable checks). You may be using a computer program that provides the same information in electronic format.

Maintaining an unexpended balance for a client is simple. Every time you make a deposit on behalf of a client, write the amount of the deposit in the ledger and add it to the previous balance. Every time you make a payment or disbursement on behalf of a client, write the amount in the ledger and subtract it from the previous balance. The result is the unexpended balance. That is how much money the individual client has left to spend.

You calculate the unexpended balance for the client trust account the same way. Every time you make a deposit to the client trust account, write the amount of the deposit in the general ledger and add it to the previous balance. Every time you make a payment from the client trust account, write the amount in the general ledger and subtract it from the previous balance. The result is the unexpended balance. That is how much money is in the account as a whole.

Since “you can’t spend what you don’t have,” you must check the unexpended balance on each client’s ledger card before you write any client trust account checks for that client. In that way, when you keep your records accurate and up-to-date, it is almost impossible to pay out more money than the client has in the account.

The Final Score Is Always Zero

The goal in client trust accounting is to make sure every dollar you receive on behalf of a client is ultimately paid out and accounted for. What comes in for each client must equal what goes out for that client; no more, no less. Many lawyers have small, inactive balances in their client trust accounts. Sometimes these balances are the result of a mathematical error, sometimes they are part of a fee that was not withdrawn, and sometimes a check that never cleared or was not cashed.

Whatever the reason, as long as the money is in your client trust account, you are responsible for it. The longer these funds stay in the bank, the harder it is to account for them. Therefore, you should resolve those small, inactive balances as soon as possible, including if necessary, following up with payees to find out why a check has not cleared.

If you cannot find the owner of client trust account funds you are holding or if you are unable to determine the ownership, you should consult the Arizona Ethics Opinion 97-03 for guidance, seek ethics advice from private counsel or from the State Bar Ethics Counsel, or call the Trust Account Hotline. All ethics opinions dating to 1985 are available on searchable format on the State Bar's Internet web page at (<http://www.azbar.org/ethics/ethicsopinions/>). You may also sign up for automatic notification of all ethics opinions.

Final Tips

- *DO NOT* use an ATM or withdrawal slip to withdraw funds.
- *DO NOT* include automatic overdraft protection on the client trust account.
- *DO NOT* make a signature block or stamp for your client trust account checks.
- *DO NOT* pre-sign blank client trust account checks.
- *DO NOT* make payments out of your client trust account to cover your own expenses, personal or business, or for any other purpose that is not directly related to carrying out your duties to an individual client.
- *DO NOT* pay yourself legal fees that your client is disputing, whether or not you feel you have earned them.
- *DO NOT* disburse from the client trust account before the funds are collected. Wait ten business days before disbursing, unless you have a limited risk deposit. *See*, Rule 43(b)(4), Ariz.R.Sup.Ct.

Additional Resources

The State Bar of Arizona offers numerous resources for trust accounting including a Trust Account Hotline and a detailed Trust Account Manual. CLEs on trust accounting are offered throughout the year in both live and on-demand format. For more information, call the Trust Account Hotline at 602-340-7305 or visit the State Bar website (<http://www.azbar.org/professionaldevelopment/practice20/>).

Chapter Nine: Managing People – Hiring, Training, & Supervising Staff

Overview

You need to answer three questions before considering hiring or engaging staff or assistants:

1. What do I need to have accomplished?
2. What kind of assistance do I need?
3. On what basis do I need the assistance?

What do I need to have accomplished?

The answer to this question depends upon what types of services you intend to provide to clients. The late Peter Drucker, father of modern management, in creating his self-assessment tool for organizations⁵ taught that organizational leaders must ask five important questions:

1. What is our mission?
2. Who is the customer (for you, the client)?
3. What does the customer (client) value?
4. What are our results?
5. What is our plan?

You must first ascertain and articulate your mission. Prof. Drucker said a “mission statement” should fit on a T-shirt. As explained elsewhere, it is imperative that you know what kinds of clients you want to serve.

If your mission is to serve many clients in a particular field like worker compensation, Social Security disability or plaintiff personal injury, you will need more staff than if you intend to practice a strictly transactional business with one or two major clients. All staff and/or assistants must “fit” the mission of your practice.

After ascertaining the mission of your practice, i.e., what types of individuals or businesses or organizations you want to serve, you need to ask the next set of questions before considering whether you need help.

- Can I diligently perform work for clients all by myself?
- Can I competently perform work for clients all by myself?
- What is the best way to serve the clients?

⁵ Drucker, P. THE DRUCKER FOUNDATION SELF ASSESSMENT TOOL Josey-Bass (1999).

- How much time am I spending on non-client related issues that someone with an hourly rate or cost ratio less than mine could handle?
- Are important matters currently not being handled in a timely fashion or “falling through the cracks?”
- Can work be accomplished without the addition of staff, e.g., improving the processes, increasing utilization of technology, eliminating unnecessary work, or a different assignment of the workflow?

As with many solo practices, there may be no need for staff or even outsourced assistance. On the other hand, it is truly difficult to perform every task by oneself.

What kind of assistance do I need?

If you need assistance, it usually comes in the two flavors, “professional” and “administrative.” On the professional side, you may need other lawyers to help you. One option is a co-counsel or “of counsel” relationship with another lawyer or law firm to serve either your client or the other firm’s client. If you believe that an “of counsel” relationship is what you need, you may wish to review Arizona Ethics Opinion 16-01 on some issues relating to “of counsel” relationships. You may also need temporary or episodic assistance with a particular client matter. You can engage the services of a temporary or contract lawyer to assist in these matters. Please see the discussion below about employees and independent contractors.

The balance of this chapter will be devoted to the administrative assistance available to you. You may need some or all of the following:

- An office administrator to manage the daily ebb and flow of necessary clerical and organizational issues that face your business practice.
- Clerical assistance to prepare and manage documents.
- A legal assistant or paralegal to assist with managing client matters, perform research or do other daily tasks in client service.
- A bookkeeper to handle the business and client accounts.
- Someone to travel from place to place to handle client matters or deliver documents.
- Someone to assist with business development.

On what basis do I need the assistance?

Will assistance be necessary on a full time (usually 32 to 40 or more hours per week), regular part-time (less than 40 hours per week), temporary or episodic basis? For example, if a bookkeeper is needed

monthly, then this activity can be outsourced to an independent bookkeeping service. In a high volume practice, client “handlers” are needed on a full-time basis and should be employees.

Please note the sample organizational chart in the appendix for the solo practice. There are four teams supporting the solo, who appears in the center of the circle, and both the solo and the four teams are serving the clients, who comprise the circle. Those four teams can be described as:

- Office Support Team
 - Office Administrator
 - Bookkeeper
 - Clerical
- Client Response Team
 - Paralegal/legal assistant
 - Receptionist
 - Co-counsel/contract attorney
- Professional Support Team
 - CLE
 - Malpractice provider
 - Pro bono
- Business Development Team
 - Marketing/advertising
 - Speaking engagements
 - Community activities

Please note this is not a typical hierarchical “org chart.” There is no “caste system” as in a traditional “big law firm” or corporate structure. You are an integral part of each team and each team member works on all four teams with a primary responsibility in his/her area of expertise. The main idea is to accomplish the mission – to serve the client.

Hiring

Introduction

As business guru Jim Collins teaches, hiring people is critically important because the right people have to be on the bus and in the right seats.⁶ Former Gallup pollster and business writer Marcus

⁶ See Collins GOOD TO GREAT and BUILT TO LAST

Buckingham says people join companies and leave managers.⁷ He counsels that businesses must spend more time in the hiring process and do the following:

- select for talent
- define the right outcomes
- focus on strengths
- find the right fit

Buckingham's book is a great resource for the hiring process because it identifies what employees really expect from an employer, based upon legitimate polling results. The surprise is employees do not just want high pay and great benefits.

Options for Hiring

There are several options for you to obtain assistance.

- Hire employees directly.
- Hire employees through a temporary employment agency.
- Hire employees through a Professional Employment Organization (PEO).
- Share employees with another solo or law firm or "executive suite."
- Engage the services of an outside business.
- Engage the services of an independent contractor.

Before considering these options, you must (a) know the difference between an employee and an independent contractor and (b) what labor and employment laws will apply to the practice (W-2 vs. 1099).

W-2 vs. 1099

Every taxing authority considers a worker to be an employee. Employment laws presume workers to be employees. The U.S. Department of Labor is currently emphasizing misclassification of workers as independent contractors rather than employees for targeting wage and hour investigations.

There are two main sets of legal differences between an employee and an independent contractor. The first set is known as the "right to control" factors and appears in the Restatement of Contracts, the IRS "20 questions" and most labor relations and employment statutes. The second set is known as the "economic realities" factors and appears in the federal Fair Labor Standards Act and the Arizona Minimum Wage Act.

⁷ Buckingham and Coffman, *FIRST BREAK ALL THE RULES* Simon & Schuster (1999).

The Arizona Legislature prescribed an eight-factor written contract presumptive independent contractor test, which is a hybrid of the right to control and economic realities tests, for worker compensation purposes.⁸

The right to control factors are:

- Control over process; not just outcome
- Distinct occupation or business
- Need for supervision
- Level of skill
- Provision of tools, supplies and place of work
- Duration of service
- Method of payment
- Regular business of employer
- Intent of the parties
- Is hiring entity in business?

The economic realities factors are:

- Totality of circumstances
- Is worker dependent on employer?
- Worker's services integral part of business?
- Permanency of relationship
- Amount of worker's investment
- Right to control
- Opportunities for profit and loss
- Level of worker's skill

ARS §23-902D factors are:

- Contract must be written, signed, dated, not done under duress
- No authority to supervise or control
- Disclosure that no worker comp benefits
- No requirement of exclusive work; no combination of business operations
- No provision of required licenses
- Fixed amount by contract; not wage/salary – paid to name on contract

⁸ ARS 23-902D

- Termination restrictions
- No tools or time of performance dictated

The bottom line is you will need both (a) the written agreement with the independent contractor that has all the ARS §23-902D factors and (b) the willpower to follow the agreement and realize the contractor must be left alone to perform his/her job.

Labor and Employment Laws That Apply to the Practice⁹

Federal Labor and Employment Laws

- Fair Labor Standards Act (FLSA) – even if the Firm may not be covered, its employees are covered by minimum wage, overtime and child labor laws.
- Polygraph Protection Act – same coverage as FLSA.
- Immigration Laws –all employers are covered for I-9 – the firm needs four or more employees for citizenship discrimination coverage.
- National Labor Relations Act – the Firm is covered if it has \$250,000 in revenues or \$50,000 in interstate trade
- Equal Employment Opportunity Laws
 - Title VII of the 1964 Civil Rights Act – the Firm is covered if it has 15 or more employees – Title VII prohibits discrimination and retaliation on the basis of sex, color, race, national origin, and religion.
 - Americans with Disabilities Act (ADA) - the Firm is covered if it has 15 or more employees – the ADA prohibits discrimination and retaliation on the basis of disability.
 - Age Discrimination in Employment Act- the Firm is covered if it has 20 or more employees – the ADEA prohibits discrimination on the basis of age (40 or more years).
 - Genetic Information Nondiscrimination Act – the Firm is covered if it has 15 or more employees – GINA prohibits discrimination on the basis of genetic information (which includes family medical history).
- Equal Pay Act – has the same coverage as FLSA – prohibits pay discrimination between men and women
- Occupational Safety and Health Act –all employers are covered by Arizona’s version of OSHA
- FICA/Withholding taxes – covers all employers
- FUTA/SUTA – these are unemployment taxes and cover all for profit employers

⁹ This information is in overview format. Please see the State Bar of Arizona’s ARIZONA EMPLOYMENT LAW HANDBOOK for detailed information, including citations, about federal and Arizona labor and employment laws.

- Employee Retirement Income Security Act – ERISA applies if the Firm offers group insurance or pension benefits. Please note COBRA for continuing group health and dental benefits only applies if the Firm has 20 or more employees.
- Uniform Services Employment and Re-employment Rights Act. USERRA applies to all employers. If any Firm employee is called to serve in the military, this law provides reinstatement rights.
- Family Medical Leave Act (FMLA)– this only applies if the Firm has 50 or more employees
- The Firm cannot fire an employee solely for going into bankruptcy.

Arizona Labor and Employment Laws

- Arizona Civil Rights Act
 - The ACRD prohibition of discrimination due to sexual harassment applies to all employers.
 - Other provisions of the ACRD, which prohibit discrimination on the basis of age, race, sex, religion, disability, national origin and genetic information, apply if the Firm has 15 or more employees.
- Wage and Hour laws
 - Wage definition – a wage is whatever an employee expects to be paid - this includes bonuses and vacation pay.
 - Minimum Wage – in 2016 Arizona’s minimum wage is \$8.20 per hour and is adjustable annually by the Industrial Commission of Arizona (ICA).
 - Timing of pay – employees must be paid at least twice monthly and no more than 16 days apart.
 - Type of pay – employees must be paid in cash or by check.
 - Paycheck deductions other than taxes must have the employee’s signed permission.
 - Payment upon termination is within 7 working days or the next regular payday, whichever is sooner, if the employee is involuntarily terminated (laid off or fired) or if the employee voluntarily terminates (quits, retires) by the next regular payday.
 - Wage claims – employees have an election of remedies – if the pay owed is under \$5000, the employee can go to the State Labor Department of the ICA and file a wage claim. Employees can sue for treble damages in wage cases.
 - Recordkeeping must be done by all employers.¹⁰
- Unemployment Insurance – must be carried by the Firm.

¹⁰ See AAC R20-5-1210 for the rules on recordkeeping in Arizona.

- Worker Compensation Insurance – must be carried by the Firm.
- Arizona Employment Protection Act – this law codifies employment at will in Arizona. Unless there is a written contract to the contrary, all employees are “at will” in Arizona.
- Drug Testing of Employees Act – this is an optional law for employers.
- Legal Arizona Workers Act – this applies to all employers – all new hires must go through the E-Verify process.
- Child Support Enforcement – all employers must certify to the Department of Economic Security that their new employees either owe or do not owe child support.
- The Firm cannot fire an employee solely because of the first garnishment.
- The Arizona Constitution prohibits blacklisting but the statutes are “employer-friendly” with respect to giving references for former employees.
- Job-protected leave – the Firm cannot fire an employee called to jury duty but is not required to pay that employee. The Firm must pay an employee for voting leave but only if it is required a day in advance and under certain circumstances. Employers of 50 or more employees must give crime victims and those seeking an order of protection unpaid leave. Both Arizona and federal law give job-protected leave to those in the military.

Other Hiring Options

Professional Employer Organization. The PEO is a “joint employer” with you and can provide the employees and you with employee benefits that are not available to a business with less than ten employees. The temporary agency hires the employee and assigns him/her to the solo. After a certain amount of time, you can directly hire this employee. Note that sharing employees with other lawyers or with the operator of an executive suite can put you in a joint employer position with those other business entities and may have implications with regard to a variety of ethical issues. If you decides to choose a vendor to outsource work, remember to investigate the issues of confidentiality, conflicts, privacy and security. Not all vendors will maintain clients’ confidentiality or use discretion when handling work.

Six Steps for Hiring and Dos and Don’ts

Recruitment

Many of the state and local associations for secretaries and paralegals have free job banks you can use. There are numerous Internet sources available as well, but be careful. You may receive literally hundreds of resumes, few of which are directly responsive to the job posting. Employment agencies will be happy to help, but remember they often ask for 10% of the employee’s first year’s salary, which can be daunting for someone just starting a solo practice. You may also approach the local paralegal schools.

Even though a graduate with a paralegal certificate, a new graduate may be anxious to work in a law firm and are oftentimes willing to start doing basic clerical functions. You may also post ads on a university or technical school career center or a professional association web site.

- DO advertise in the newspaper or on a recognized online source.
- DO ask current employees for names of possible hires.
- DON'T go to only one source all the time.
- DON'T forget former employees as sources of referrals.
- DO remember there are free employer resources at the county's workforce connection.
- DON'T hire the neighbor's son or daughter because they are really nice or seem really smart. Your goal is to be efficient with staff, while assuring that the staff is helping to generate a quality work product. Hiring the relative of a friend, or a relative of yours for that matter, could create difficult situations with regard to performance evaluations, pay, vacation time or time off, etc.

Job Description

You must write the job description before even considering hiring. In human resources, the acronym is KSA – Knowledge, Skills and Abilities. You must determine what needs to be done and what skills are necessary to do it. Create a job description that includes the skills that will be necessary. Sample job descriptions and resources can be found through the Association of Legal Administrators (ALA); the National Association of Legal Assistants (NALA) and the National Association of Legal Support Personnel (NALS) as well as the Society for Human Resource Management (SHRM).

The following are recommended for the job description:

- Job title
- To whom the position reports
- Principal duties and responsibilities
- Education
- Training/experience
- Essential skills
- Working conditions (travel, working hours, unusual working conditions)
- Weight to be lifted
- Hours sitting and standing
- Driving (if required)
- Supervisory responsibilities (if any)
- Wage and salary range

- DO outline your expectations.
- DO specify the required intellectual and physical knowledge, skills and abilities.
- DO specify time frames.
- DON'T forget to include all essential functions, especially attendance.
- DO remember to add "all duties as assigned."

Special Note on FLSA

Please be aware very few employees in a law office will ever be exempt from the federal Fair Labor Standards Act (FLSA). Even if your practice is not generating \$500,000 per year to qualify as a covered "enterprise," every law office employee will be using the U.S. mail, the Internet and the telephone. As such, every employee will have individual FLSA coverage.

Many employers, particularly in Arizona, believe just because an employee is paid a salary that s/he is exempt from the FLSA's requirement of being paid overtime (time and one-half) after working 40 hours in a seven consecutive day workweek. This is not only myth; it is dangerous. An employer must prove an employee is an administrative, professional or executive exempt using the strenuous standards of 29 CFR Part 541. Lawyers are professional exempts. Everyone else is probably non-exempt. Specifically, the U.S. Department of Labor regulations hold that paralegals are not professional exempts.¹¹

Non-exempts should be paid a wage (i.e. an hourly amount). There are two reasons not to pay a salary to a non-exempt. The first is it is difficult to compute overtime because it is one-half of the regular rate paid every week and the regular rate (salary over hours actually worked) is difficult to compute if there is a biweekly or bimonthly payroll. The second reason is an employer cannot dock the pay of a salaried non-exempt under any circumstances. This means the salaried non-exempt admin can come in at 10AM and leave at 3PM without consequence, other than corrective action.

Screening

One of the best ways to screen job applicants is to use a job application form. You should resist the temptation to purchase a job application at the office supply store. The job application needs to ask for information that you need to decide whether this particular job applicant will fit the mission. Here are two important items to remember:

- DO ask only questions related to the specific job.
- DON'T ask for information that you have no need to know such as:
 - Disability or worker comp claims

¹¹ 29 CFR 541.301(e)(7).

- Age, race, sex, national origin, religion
- Marital status or children

Scan the resumes for the basic qualifications. Many employers are amazed at the resumes they receive that have none of the basic requirements included in the job posting. Look for details in prior job descriptions that are consistent with what is required; make sure the candidate has a solid history of stability and hasn't been a "job-hopper."

Look for red flags. These might be a gap in the employment history, lack of advancement, vaguely worded job descriptions, and inattention to detail in the resume. Be sure to evaluate the look of the resume (and cover letter) and check for typos, misspellings, and formatting or grammar problems. A lack of attention to detail is just as critical as the essential skills can be. If more than a few resumes seem to fit the requirements, consider phone interviews first. This may help to screen out those who really were on the cusp in the process.

Note – if you have 15 or more employees, you must keep all the job applications and resumes for at least one year.

Interviewing

While it is best to try to make the candidate feel comfortable during an interview, you still need to manage the interview. Be certain that you ask the information you need to find out. It is best practice to give the candidate an opportunity at the end of the interview to tell you something s/he thinks is important for you to know. Sometimes that is something about why s/he would be the best candidate for the job, and sometimes s/he will tell you something very interesting about what s/he hated about his/her last job, or his/her last boss!

Create an interview template to ensure all candidates are asked the same basic questions. It is hard to compare when the information received is not the same. Take notes on the template but not on the job application or the resume. It is hard to remember each candidate's specific responses and it is easier to compare candidates when the interviews have been completed if there are notes to reference.

If you want to test the job applicant for particular skills, it may be best to have a responsible third party administer a standard test. You can easily place the job applicant at the computer and ask him/her to create a document or spreadsheet. More difficult skilled tests are best left to a professional provider.

Tell the candidate what the time line is for making a decision. If you can give him/her this type of information, you will receive fewer calls after the interview is over, asking if a decision has been made.

- DO have your employee posters up where the applicant can see them.
- DO script your interview questions.

- DO ask only questions related to the specific job.
- DO ask open ended questions.
- DO ask applicant to give examples.
- DO listen.
- DO have the applicant explain gaps in employment history.
- DO emphasize importance of attendance.
- DO ask about achievements and failures.
- DO ask, “What can you tell me in five minutes that would persuade me you should have the job?”
- DO NOT ask about age, race, ethnicity, religion, sex, disability, worker comp, pregnancy, citizenship, children, health, or marital status.
- DO NOT ask leading questions.
- DO NOT make promises.
- DO NOT ask questions when you have no need to know the answer. Curiosity does not rise to the level of need.

Checking References and Documentation

A critical step in the hiring process is to check the references the job applicant supplies. You need to contact both the references the applicant suggests as well as those embedded in the resumes. It is legitimate to put the job applicant’s name on the Internet to ascertain public information. On the other hand, it is not legitimate to ask the job applicant for his/her password to personal social media sites.

If you wish to perform either a credit check or a criminal background check, you must obey the federal Fair Credit Reporting Act and notify the job applicant. The best way to do this is to hire a security agency to perform these checks and let that agency deal with compliance issues. You can make a job offer contingent upon a favorable background check. If you has 15 or more employees, you need to be aware the U.S. Equal Employment Opportunity Commission has guidelines to follow for background checking.¹²

If you wish to perform a drug and/or alcohol test, you should, but are not required to, follow the Arizona Drug Testing of Employees Act. If you have 15 or more employees, you need to follow the ADA as well concerning any testing for alcohol.

One way to secure information from other sources about a job applicant is to have the applicant sign a waiver of liability for his/her former employers. This waiver can appear on the job application form. If a

¹² An easy way to do a criminal background check on a current employee is to have him or her apply to be a Notary Public.

former employer states it cannot give you information about an applicant, you can send the signed waiver to that former employer to ascertain whether the employer will then give information.

Evaluation and Selection

After the interviews, it is time to select the new employee. If you have other employees who will work with the new employee, you may wish to evaluate all the candidates with them. You then need to make a decision and contact the finalist. If the finalist rejects the offered wage, you may consider flexible hours, or other workplace options, if they suit your practice. Once you and the finalist have come to terms, it is best practice to send the finalist an offer letter. Emphasize the offer letter is not a contract and the employee will be on an at will basis.

You need to let every candidate know whether or not s/he was chosen. It is a very simple, yet very important courtesy. Regardless of what happens, the candidate will remember you favorably, and you never know when that individual may be in a position to recommend you for legal work! See the Onboarding checklist in the Appendix for the employee's first hour at your Firm.

Final Note

Prof. Drucker taught that of all the decisions an executive makes, none is as important as the decisions about people.¹³ If you put a person in a job and s/he does not perform, you have made a mistake. Prof. Drucker gave the following five steps in making effective promotion and staffing decisions:

- Think through the assignment. Although job descriptions may not change much, assignments do.
- Look at a number of potentially qualified people. Prof. Drucker suggested at least three to five candidates.
- Think hard about how to look at these candidates. No business manager can build on weaknesses; only on strengths.
- Discuss each of the candidates with several people who have worked with them.
- Make sure the appointee understands the job. Particularly with a promotion situation, the things the employee did to get the promotion are not the things required in the new job.¹⁴

Staff Training

After the hiring process, you must train the new staffer in how to accomplish the mission – to serve the client – as well as how to comply with the law and your professional responsibilities. Additionally, you

¹³ P. Drucker THE ESSENTIAL DRUCKER Harper Collins (2001).

¹⁴ *Ibid.*

need to provide continuous training to current staff. Staff training is necessary in the following seven areas.

Communications and Professionalism

The most frequent complaint by clients about lawyers deals with communication. ER 1.4 Answering the telephone by the third ring, returning telephone calls within 24 hours, returning email messages within 24 hours and having regular office hours are critical to serving clients and keeping the client and lawyer “on the same page.”

Anyone answering the telephone should have a smile in his/her voice. Whoever answers the telephone makes the first impression for your firm.

Although celebrities and politicians may not always be civil, it is imperative everyone at your firm be civil at all times. Being nice does matter.

Lawyer employees must comply with the Ethical Rules, including completing their Continuing Legal Education requirements [See Rule 45] and behaving in a professional way at all times.

Confidentiality

The duty of every employee to keep the clients’ confidences goes well beyond the traditional attorney-client privilege. What is said at the office (or courtroom or deposition room or in the parking lot) about the client is not to be repeated. In fact, information relating to the representation, including the client’s name, even if otherwise publicly available is confidential under ER 1.6.

It is best practice to have a social media policy that admonishes employees not to post confidential information about clients, cases or your law practice subject to the exceptions below. The 2012 Acting General Counsel of the National Labor Relations Board is taking an aggressive stance about prohibiting nonsupervisory employees from using social media to discuss wages, hours and working conditions. On the other hand, the solo needs to emphasize that client matters cannot be revealed.

Conflicts of Interest

Employees need continuous training on identifying actual and potential conflicts of interest to protect you from violating the Ethical Rules. Adequate information systems need to be in place to monitor conflicts.

Finances and the Trust Account

If you use an outside bookkeeper, that individual or business needs to preserve client confidences and to know the rules about the general business and trust accounts. If you do your own bookkeeping, employees need to be trained in these methods and the lawyer is ultimately responsible for the accuracy of the reporting. Practice 2.0 will speak with lawyers’ staff, as well as the lawyer, to answer questions

about trust accounting; additionally, staff may attend State Bar continuing legal education programs – the seminars and workshops on trust accounting may be particularly useful.

Any employee who handles money should be given five consecutive work days off per year so that you may conduct a desk audit. Training your employees does not mean that you thereafter do not have to supervise them.

Avoiding the Unauthorized Practice of Law

Employees, other than lawyers, need to be admonished about giving legal advice to clients and others. It is easy for a well-trained, or long-time, law office employee to cross the line into giving legal advice out of the most well-meaning intentions.

Office Procedures and Safety

Standard office procedures should not be a mystery to anyone at your firm. If you have a brick and mortar office, even if it is in your home, you may want to invite the worker compensation carrier's safety person to come to your office every year to give suggestions on safety measures. It is mythology to believe that no one can get hurt in an office setting. "Stand up" safety meetings should be held regularly and attendance should be documented.

Establish an emergency notification system within your firm. This may take the form of a telephone tree, with specific members of your firm obligated to notify other specific members; it may be a website that remains "dark" until needed for emergency notification, or it may be text messages. The time to wonder about everyone's best contact information is not at the time of the emergency or crisis. Keep a list of all telephone numbers, emails, etc. for everyone you do business with – employees, vendors, etc. – and keep it at multiple locations including locations outside of your office space. It's a good idea to keep contact information for your insurance brokers, service providers and utilities in several handy places (including ones outside of your office) for quick access.

Non-exempt employees should be reminded not to eat meals at their desks (as under the FLSA you have to pay for that time). Employees need to be reminded about keeping track of their hours and obtaining permission before working overtime.

Human Resources Policies

You should have a policy forbidding sexual harassment and train the employees concerning this policy. Similarly, you should have a policy concerning paid time off (holidays, vacations, etc.) and provide employee training on this. If you decide to have written employee policies or an employee handbook, you should do the "roll-out" of these policies at an employee training.

Employee Retention

It is expensive to go through the hiring and training process. Employee turnover can be brutal to your solo practice. Most American workers are on the job only three years. The 1990-era Gallup polls of employees reported in *First Break All the Rules* indicated in order to remain at a particular business, employees must have positive answers to the following. Please note none of the below has to do with pay or benefits.

1. Do I know what is expected of me at work?
2. Do I have the materials and equipment I need to do my work right?
3. At work, do I have the opportunity to do what I do best every day?
4. In the last 7 days, have I received recognition or praise for doing good work?
5. Does my supervisor, or someone at work, seem to care about me as a person?
6. Is there someone at work who encourages my development?
7. At work, do my opinions seem to count?
8. Does the mission/purpose of my company make me feel my job is important?
9. Are my co-workers committed to doing quality work?
10. Do I have a best friend at work?
11. In the last 6 months, has someone at work talked to me about my progress?
12. This last year, have I had opportunities at work to learn and grow?

The more affirmative answers there are to the above 12 questions, the more likely it is for you to retain good employees.

Additionally, it is a best practice to have a written policy about voluntary employee benefits such as paid vacation, paid holidays and insurance. There are only three mandatory employee benefits – worker compensation, unemployment insurance and Social Security. All other benefits are at the discretion of the employer. Confusion about these benefits causes morale problems and loss of productivity.

Management and Supervision

The management of people is an art. The manager has to have excellent communication skills as well as conflict resolution skills. The manager has to be able to effectively listen while juggling priorities. Since your firm is usually vicariously liable for the actions of a supervisor, if you have a supervisor for your staff, you must select the supervisor with care. If you are the manager (or supervisor) you must realize that your actions can make the difference between fortune and failure and can put your firm at risk every day all day long.

This section applies to you as a sole practitioner as well as to any supervisory staff you may have.

Supervisory leadership consists of the following:

- Clarify standards and desired outcomes.
- Address employee concerns promptly.
- Use corrective action and conflict resolution methods.
- Be credible.
- Be consistent and fair.
- Be a role model.
- Use emotional intelligence.

Buckingham says that a great manager does the following:¹⁵

- Discovers what is unique about each person and capitalizes on it.
- Selects good people.
- Defines clear expectations.
- Recognizes excellence immediately and praises it.
- Shows care for employees.

Human Resources

Personnel problems may take up a majority of your time, or if you have an office manager, of their time. Poor morale interferes with productivity. Essentially, human resource (HR) issues can cost you an enormous amount of money based on lost fees and opportunity costs. Large HR problems can break your practice. It is important to address HR issues in advance rather than deal with them on a crisis basis.

Human Resources Policies, Handbooks, and Notices

You should resist the temptation to purchase an employee handbook from an office supply store or to simply adopt an employee manual from a payroll company. Many “canned” employee handbooks are for large employers in states other than Arizona. Many of these standardized employee manuals look like union collective bargaining agreements. None are tailored to fit your practice or mission.

A comprehensive employee handbook is a good idea for a practice with many employees. Otherwise, a discrete set of written policies makes sense for your solo practice in order to obviate misunderstandings. Here are some suggestions for even the one employee firm:

¹⁵ Buckingham, M. THE ONE THING YOU NEED TO KNOW. Simon & Schuster 2005.

- Workplace Injuries: There needs to be a written and posted protocol for what to do if someone is hurt at work.¹⁶ You need to ensure the worker compensation posters are posted and rejection slips are available before an injury occurs. If the employee did not see the poster or there were no rejection slips, the employee can claim s/he has an election to sue your firm in personal injury instead of claiming worker compensation.
- Paid Time Off and Other Employee Benefits: Decide whether to pay employees for holidays when the office is not open; whether to give vacation or sick pay; whether to give insurance benefits or other employee benefits. Any such program should be in writing and disclosed to the employees.
- Employee Breaks: Non-exempt nursing mothers within the first year of childbirth are the only employees required to be given a break under the FLSA. There are no Arizona laws requiring work or meal breaks. A written policy prevents confusion about breaks. Managers must follow the FLSA rules about payment for breaks.
- Absences and Leave: Contrary to popular opinion, maternity leave is not required by any law other than the FMLA and it only applies to private employers of 50 or more employees. Moreover, if you have 15 or more employees and only grant maternity leave, that is discriminatory against men who would then have a right to paternity leave. You need to carefully consider what kinds of job-protected leave you (your firm) both is required and want to give employees before having a staff.
- Safety, including Fire, Exposure, and Smoking: Arizona's smoke-free laws prohibit smoking in all enclosed spaces. Safety needs to be emphasized. A protocol should be posted next to the fire extinguisher as to what to do in case of fire. Most staff have extensive contact with the public so exposure risks are present.
- Social Media: Management needs to craft a policy that is consistent with the National Labor Relations Act as well as the ethical rules dealing with confidentiality. Employees need to be reminded frequently of the obligations of you and your Firm to preserve client confidential information. A written policy is a best practice in this regard.

Personnel File

There are no laws about what is to be placed in a personnel file. It is recommended the W-2, A-4, personal information and emergency contacts be kept there. It is also recommended the personnel file contain information about changes in compensation, any promotion or demotion, termination and

¹⁶ The admonition "Don't panic," the motto in Douglas Adams' HITCHIKER'S GUIDE TO THE GALAXY, comes to mind.

corrective action. The ADA prohibits medical information from being in a personnel file with other non-medical matters (and the ADA only applies to employers of 15 or more employees).

There are no laws about what an employee may see or not see in a personnel file. The best practice is to have a personnel file on each employee. Keep the I-9 forms and copies of the supporting documents in a separate alphabetical file. Employment lawyers generally advise that you should not permit former employees to see their personnel files without a court order or subpoena. Also, do not permit current employees to see a personnel file unless you are in the room with the employee.

Performance Evaluation

Business writer Marnie Green has an excellent resource for the performance evaluation called *Painless Performance Evaluations*.¹⁷ Ms. Green identifies the following reasons to have a performance evaluation:

- Organizational objectives
 - Mission
 - Goals
 - Objectives
- Supervisor/employee communications
- HR activities - documentation
- Legal – documentation

There continues to be a lot of controversy over performance evaluations or appraisals. The key is to fit these performance appraisals with a firm culture of dialogue and collaboration. Behaviors that uphold your firm's values need to be rewarded.

Ms. Green recommends an appraisal process that is S.M.A.A.R.T:

- Specific
- Measurable
- Attainable
- Agreed Upon
- Realistic
- Time-Oriented

Here are some tips for any type of performance appraisal:

- No surprises

¹⁷ Green. M. PAINLESS PERFORMANCE EVALUATIONS. Pearson Prentice Hall (2006).

- Be honest
- Prepare
- Be objective rather than subjective
- Address behaviors
- Evaluation should be balanced and impartial
- Keep promises
- Do not conduct performance appraisals just for discipline or termination

Corrective Action and Termination

While Arizona, like every state other than Montana, is an “at will” state, there needs to be a reason for every disciplinary (corrective) action and termination on the job. That is because unemployment insurance as administered in Arizona is employee-friendly. The employer carries a heavy burden of proof to show the employee was discharged for willful misconduct so as to disqualify the employee from unemployment insurance benefits.

Corrective Action

There is no law requiring progressive discipline in the workplace, however it continues to be used as best practice. If you have an employee handbook, it should indicate corrective action is at management’s discretion and management need not follow the progressive pattern.

Labor unions developed the seven steps of just cause over 50 years ago. While just cause is not needed for employee discipline and termination unless there is a written contract to that effect, the following seven steps continue to represent best practices in assigning corrective action.

- Notice - Was the employee forewarned of the consequences of his/her actions?
- Reasonable rules & orders - Are the rules reasonably related to business efficiency and performance the employer might reasonably expect from the employee?
- Investigation - Was an effort made before discipline to determine whether the employee was guilty as charged?
- Fair investigation - Was the investigation conducted fairly and objectively?
- Proof - Was substantial evidence of the employee’s guilt obtained?
- Equal treatment - Were the rules applied fairly and without discrimination?
- Penalty - Was the degree of discipline reasonably related to the seriousness of the employee’s offense and the employee’s past record?

Termination

There are two categories of termination from employment – voluntary and involuntary. If an employee states s/he is quitting, you would be well advised to obtain the employee's decision in writing so the employee does not later go to the Department of Economic Security (DES) to file for unemployment compensation.

Very few managers like to fire people. It is a painful event and should never be a surprise to either the boss or the employee. The following are some Dos and Don'ts for the employment termination announcement. Remember this is not a dialogue or debate – it is the announcement of a decision.

Do's

- Ensure there is a reason
- Ensure the reason has nothing to do with age, sex, race, disability, religion, ethnic origin, citizenship, or a complaint about safety or harassment forbidden by Equal Employment Opportunity (EEO) laws
- Talk it over with counsel or a colleague
- Rehearse the termination speech
- Have at least one other person there
- Minimize embarrassment
- Be honest – now and forever
- Be brief
- Be gentle but firm
- Explain any termination benefits
- If employee wants to quit, let him/her do so, then document immediately

Don'ts

- Fire an employee in anger
- Fire an employee in a hurry
- Go alone into a termination interview
- Fail to document
- Be inconsistent
- Apologize

Effectively Utilizing Your Paralegal

As a sole practitioner, you may not initially have the resources to hire even a contract lawyer to help you with your work; hiring a part-time paralegal or contract paralegal may be more cost effective while improving your bottom line. Effectively utilizing a paralegal in your law practice is a crucial part of the success of a firm. A paralegal's role has evolved tremendously over the past twenty years but it remains a constant that a strong paralegal is a valuable asset to a lawyer and a law practice. You may use your paralegal for some tasks that you would otherwise handle, but remember that you must supervise the paralegal's work. There are some tasks that a paralegal, even if supervised, may not perform. You can bill your client for the work of a paralegal, but of course at a lower hourly rate than you typically charge.

While a paralegal cannot appear in court for your client, they can maintain and organize the client file, draft pleadings for your review and discovery notices, and assist in trial preparation. They also can perform legal and factual research as well as interview witnesses and clients at your direction. They cannot, however, advise a client about their rights, course of action or on any actions that would impair the client's legal rights. A paralegal should also not be able to accept representation of a client nor communicate the scope of representation nor the rate and basis of your fee.

A strong confident paralegal can serve as a second set of eyes in reviewing pleadings you have prepared in order to provide constructive criticism. Hiring a qualified paralegal is not only a win for you and your firm but it is also a win for your client.

To find a contract paralegal in Arizona, a basic Google search for contract paralegals in Arizona will produce several websites of contract paralegals. There are also numerous organizations in Arizona to which paralegals belong such as the National Association of Legal Assistants (NALA), Arizona Paralegal Association (APA), Association of Legal Administrators, and some local bar associations have paralegal divisions. You may wish to advertise with one of these organizations. In hiring a paralegal, as in any other hiring decision, be sure to exercise due diligence. This means conducting work history and background checks, as well as checking references. Be certain that your prospective employee signs an authorization for former employers to share information with you or you may end up with mere employment verifications (i.e., 'yes, s/he worked here for 6 months).

Chapter Ten: Practice Management Software and Technology

Case management systems or practice management software can help streamline your practice by integrating a number of functions into one platform. For example, in one platform you can keep track of your contacts, bill contacts (clients) for time and services, email contacts, associate contacts related to your client to the case file, store documents related to the case, send emails, etc.

Selecting Practice Management Software

A large number and wide variety of case management/practice management software exists. We have compiled a list of items to consider when selecting one of these platforms – it is available on the Practice 2.0 webpage, although a small sample is contained below. You can also call the Practice 2.0 law practice advice line for tips on selecting a provider. Many of these considerations are specifically applicable to cloud-based practice management software.

Before you go shopping, decide what functions you need now and are likely to need in the next year or two. You may be primarily interested in document management, or calendaring, but not billing or a robust accounting function. Prices will vary with the various components you choose. Also be certain that you know with what other software your new platform will integrate and what the “onboarding” process is, including cost.

Security should be one of your primary focuses, but not your only focus. For example, ensure that the platform provides sufficient security:

- Password security
- Multi-factor authentication
- Firewall
- Encryption
 - In transit
 - At rest
 - If insufficient security is offered, ensure that you can layer on your own
- Physical security of where the data is physically stored
- Is the software “zero knowledge?” In other words, does your provider hold the key to your data or is that information only you have?

Ensure that the data that you store on the practice management software is backed-up by the provider or that you can make your own backup.

- Where is the data kept?

- How is it backed up?
- What happens if the provider disappears?

Who owns the data?

- You should be sure that you are the owner of the data, and that you may easily retrieve it if the relationship with your provider ends, whether pleasantly or not.
- If you get your data back, in what form will it be provided to you?

Is the practice management software easily accessible?

- Do you install a copy of it on your computer or is accessed through the cloud?
- Optimized for mobile access?
- Accessible through an app?

Document Automation

- Does it offer document automation?
- Do you want document automation?
- Can you upload your own templates?
- What level of customer support is offered?

Security in the Cloud

Lawyers have a duty to provide competent representation to their clients. Arizona Supreme Court Rule 42, Ethical Rule 1.1. Such competence requires, “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Id. Recently, Comment 6 to Ethics Rule 1.1 was updated to provide that “a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology...” Id. Thus, a measure of providing competent representation also includes using technology appropriately.

There is also guidance for lawyers about protecting clients’ confidential information when using the cloud. See, Arizona Ethics Opinion 09-04. The opinion states that when using cloud based services, Arizona lawyers are required to take reasonable precautions in order to protect their clients’ confidentiality and safeguard confidential information. Id. Lawyers should consult outside assistance if they do not have the technological background to do it themselves. Id. As technology progresses, lawyers should review security precautions periodically. Id.

The following is a partial list of considerations to safeguard confidential information in the cloud. No one method is perfect and multiple safeguards should be undertaken. Additional information may be found on the Practice 2.0 website.

- Multi-factor Authentication – Multi-factor authentication makes it more difficult for an unauthorized person to access a lawyer’s email or cloud account. Multifactor authentication can be set up within the cloud or email service itself. Once enabled, the user will not only have to provide a username and password to log-in, but the user will also have to provide another piece of information that only that user has. For example, the service can text a verification code to the lawyer so that a unique code will have to be entered upon log-in.
- Strong Password – Do not create or use an easy to guess password. With the proliferation of social media, people have a host of personal information online. Passwords that include your middle name, name of your children, pets, street names, etc. might be easily discoverable with a simple Google search.

There are different schools of thought about passwords. The “traditional” model is as follows:

- Use a different password for each application and/or website. Yes, this may become a challenge of memory and fortitude. There are a number of safe ways to maintain your list of passwords but the easiest is using a password manager. There are a number available, including LastPass and Password1. Should you write down your passwords? Conventional wisdom says no, and certainly you should not write them down in a place where they may be easily discovered or accessed. But writing down your multiple passwords, and keeping them in a very safe place, is preferable to using a weak password or using the same password on all of your applications and all of the websites you access.

Here are some characteristics of a good password:

- Long (8+ characters, the longer the better)
- Does not use any names (like your username, real name, company name, etc.)
- Different from any other password that you might use on another site
- Does not contain a real word
- Contains uppercase letters
- Contains lowercase letters
- Contains numbers
- Contains symbols

In the alternative, some IT professionals now recommend that you create a phrase, one that you will reliably remember and that only you will know, and then use that as your password, or the basis for all passwords for all sites. For example, if your phrase is “The first car I bought was a Chevy and I had it for 16 years,” your “core” password might be “TfclbwaCalhif16y”. Ideally, no

one else would be able to guess the underlying facts or that this was the key to your passwords. You might want to consider adding a special character or two, and you may wish to add the name of the specific site for which you will use this password to the “core.” For example, for Google you might add a “G” to the beginning of the core password; you get the drift. If you use this “core” password for all websites, perhaps with the minor customization of the first letter of the site, or first and last letter, you will reduce the need to write it down and reduce the risk that you will forget it.

- Firewall
- Location – know where your data is physically stored
- Encryption – this means to convert information into code so that it can only be accessed by a party with a key that decodes the information
 - In-transit – this means that the information is encrypted when it travels across the internet
 - At rest – this means that the information is encrypted while it is stored
 - Consider using additional encryption if the encryption offered is insufficient
- Backup – in case provider goes out of business or site is unavailable
- Ownership – who owns your data?
- Government requests
 - How does the provider respond?
 - Does the provider inform you of the request?

Paperless or Paper on Demand

Calendaring

Missed deadlines are a potential source of malpractice claims and bar complaints. A good calendaring system, whether manual or automated, is vital to ensure that you keep track of due dates, court dates and appointments. You can also use your calendar to manage your tasks by blocking out periods of time to complete items.

Having a calendaring policy in place is a good way to ensure that you use your calendar as a tool to get your work done and stay on top of due dates. Considerations for a calendaring policy should include:

- Responsibility for opening the mail and calendaring court dates.

- If a rules based calendar system might be employed to ensure that routine deadlines for all cases are calendared.
- Updating the calendar with client appointments.
- Reviewing the calendar to allocate time to complete upcoming tasks.
- Selecting a system to use to keep the calendar.
 - Practice Management Software
 - Microsoft Outlook
 - Online calendaring services
- Ensuring that whichever calendaring platform is used that client information is kept confidential.
- Sharing the calendar with other members of the law firm as appropriate.
- Keeping and updating a backup calendar.
- Analyzing new matters, determining, and calendaring key dates.
- Setting ticklers or reminders for upcoming deadlines.
- Methods for notifying clients of important dates.
- Vacation schedules of lawyers and their staff.

Conflicts Checking and Contacts

Conflicts checking means undertaking an analysis to ensure that a law firm does not accept a case that would constitute a conflict of interest. This means examining relationships between clients, opposing parties, and other potential people related to the case that may have implications for future cases. You should have a system where you enter in a contact along with their contact information such as email address, address, phone number, aliases, and relationship to the case. You will be able to use this system both for maintaining up to date information about your contacts as well as for conducting a conflicts check.

Chapter Eleven: Communication

Communicating with your client is an important part of your relationship. It is so important that at least one ethical rule, E.R. 1.4, deals exclusively with communication. Communication enables you to develop a rapport with your client, to convey important information to your client, and to see what they think about a particular course of action before proceeding. The methods that you use for communicating with your client may depend on the circumstances. Further, some clients may have a preference on the method that you use to communicate with them.

Communication methods may include:

- In person meetings
- Telephone calls
- Emails
- Traditional correspondence

In this modern day in age, you might wonder if text message is an appropriate method for communication with clients. Although many say no, it may be, depending on the circumstances. If you do make the decision to use text messages with your clients, you should be mindful of not being too informal. Using text messaging may make keeping a record of communication more challenging. Consider whether text may be better suited to confirming an upcoming appointment or not being used at all.

Whatever method of communication that you use, you should discuss with your client the importance that such communications are secure. This means if you are going to use email with your client, you must have a conversation with the client about who might be able to access the email account. For example, emailing a client's work email address, where an employer may have the right to review email may not have the same measure of security and could compromise attorney-client privilege and confidentiality. Using encryption, or an encrypted email service, may also be a good safeguard to employ.

Lawyers should keep a record of their communications with their clients. This can be done in a communication log, placing copies of communication and notes in a file, or both. A communication log can be kept in a practice management software or as simply as in a Microsoft Excel spreadsheet. After important phone calls or meetings during which major issues were discussed made, send your client a letter or email confirming and summarizing what was discussed.

Chapter Twelve: Legal Research

You have numerous options for legal research providers. Members of the State Bar of Arizona have free access to FastCase, and discounted access to LexisNexis.

There are also a number of libraries in Arizona that offer free access to Arizona legal sources. The State Library of Arizona provides access to a number of legal materials. Arizona's two public law schools, University of Arizona Library and the Ross Blakely Law Library at Arizona State University offer access to their law libraries. Finally, the superior courts in Arizona provide free law libraries including online access to legal research databases.

Don't overlook the other possible legal research resources, including Google Scholar – a good source for secondary materials such as articles.

Chapter Thirteen: Marketing for the Small Firm

The Rules That Apply

Arizona Rules of Professional Conduct 7.1 through 7.5 – are sometimes referred to as the “advertising rules.” Whenever you hire a marketing company or advertising agency to prepare a communication regarding your legal services, give them a copy of these rules. Never assume, regardless of their prior involvement in the legal community, that they know what the Supreme Court requires for ethical marketing.

The Tips to Ethical Marketing

Print, Online, and Television Advertisements – and General Requirements

Any communication offering a lawyer’s legal services must be primarily factual and any claims in the advertisement must be able to be substantiated. The ad must not create false expectations and never compare your services to another lawyer’s unless you can corroborate the comparison. Truthful statements about credentials, experience, and results are acceptable – again, as long as they do not create false expectations of results.

The two most common mistakes made in print advertising are: 1) not listing the name of the firm or at least one lawyer responsible for the ad; and 2) not listing the *street address of the primary office*. Both of these items were required by the Rules until January, 2014 when ER 7.2 was amended – now instead of a street address, communications must include some “contact information” such as telephone number or website. If you want prospective clients to reach you, however, you should consider including this information, notwithstanding the change in the rule.

What about marketing “gifts” such as pens, coffee cups, and baseball hats? Must they include the firm street address? While there is no ethics opinion or comment in Arizona’s Rules of Professional Conduct, there is North Carolina 2012 Formal Ethics Opinion 14 that says such give-away items *do not need to have the address*. Additionally, the change to the rule makes inclusion of the address optional. Keep in mind, however, that if the primary purpose of the “gift” is to have prospective clients contact you, some contact information – usually a web address and phone number – is essential.

Also remember that ER 7.4 prohibits use of the words “specialist” or “specializes” unless you are certified as a specialist by the State Bar Board of Legal Specialization. Equally, use of the term “expert” is disfavored unless you have been qualified as an expert in that particular area of law. Claiming to be an “expert” could create a false expectation or understanding on the part of a prospective client and is therefore not advisable and would be considered the equivalent of using the term “specialist.” It is

acceptable to state that you focus your practice in a particular area, or limit your practice to a particular area of law.

Direct Mail Soliciting

Everyone knows that you cannot directly solicit prospective clients in person or by telephone (see below) but lawyers may send solicitation letters to potential clients who have a known need for legal services for a particular legal matter. ER 7.3. Letters sent to specific addressees who “have a known need for legal services for a particular matter” or “*believed likely to be in need of legal services for a particular legal matter*” must follow these guidelines:

- 1) the envelope must be marked “ADVERTISING MATERIAL” in twice the regular font size;
- 2) copies of the letters must be sent to the State Bar *and* the Arizona Supreme Court clerk’s office;
and
- 3) send the letter by regular mail – not certified or registered.

For example, you may not visit the hospital room of a car accident victim (unless he calls you and asks you to visit), but you can send him a letter, informing him you do personal injury work. Such letters may not be coercive and should explain how the lawyer obtained the prospective client’s name. If the lawyer knows that someone does *not* want to be contacted, the lawyer may not send even a letter.

Lawyers also should remember that there is a 30-day moratorium on sending letters to potential clients involving wrongful death or personal injury claims. You must wait 30 days after the event before you can send a letter.

Note that general firm announcements that are not sent to a particular recipient do not have to comply with the strict requirements of ER 7.3. For instance, if you are announcing an associate has joined your firm or a new office address, those announcements do not need to be sent to the Bar and the Court. Similarly, if you are sending everyone in a certain zip code an announcement your firm has an office in the area, and the recipients do not have a specific legal need, the announcement need not be marked “Advertising Material” and sent to the Bar and Court.

Client Consent – When It’s Required

Never, ever list clients, cases, or client matters on the internet or in lists of “clients” without obtaining client consent. Yes, that consent might be included in the initial fee agreement but do not make the mistake of assuming just because you represented a client in a reported case, that the fact you represented a client is not still “confidential” under Ethical Rule 1.6 – it is.

More importantly, it is a client relations nightmare to list a client publicly and then find out that the client does not want you to advertise they were a client. For instance, the following notation on a firm website was met with significant client anger:

- *We just successfully defended XYZ Company CEO on seven sexual harassment claims!*
- *We just entered into a settlement agreement for XYZ Widget Company with the Department of Justice to avoid a price-fixing suit!*

Mr. CEO and Widget Company (names changed to protect the guilty) were not happy. Think before you use *any client information, including their names*, for your own marketing purposes. Keep in mind as well, that ER 1.6 protects information gained through the representation even if the information is public. ER 1.6's protection is far more extensive than privilege.

Solicitation in General

Direct Solicitation: Never In-Person or by Phone – Except for 4 Limited Groups

You may not call or go to a prospective client and meet with them in person – they must call you first and request the meeting. Even if someone else calls you (including other lawyers and current clients) and tells you to call a prospective client, DON'T DO IT. Have the prospective client contact you.

There are only four categories of individuals a lawyer may contact directly by phone or in person (or in real-time internet): a) former clients; b) family members; c) other lawyers; or d) friends. ER 7.3(a). This means lawyers who are leaving a law firm may contact firm clients with whom they had significant contact to advise the client that the lawyer is leaving the firm. *Ariz. Op. 99-14*. This also means lawyers may call other lawyers and friends to solicit their business.

Even though lawyers may not solicit prospective clients at their hospital beds, or by telephone, lawyers may sponsor a booth at a business fair as long as the lawyer doesn't reach out and grab prospective clients...really...you must politely wait within the booth for potential clients to initiate contact with you. *Ariz. Op. 02-08*.

Never Pay Someone for Sending You a Referral

Lawyers may not give "anything of value" to someone for referring work to them. ER 7.2 "...except for the cost of advertising and certain *approved* lawyer referral services" (at present, only the Maricopa County Bar Association (MCBA) and the Pima County Bar Association (PCBA) referral services are approved by the State Bar). This means lawyers cannot pay referral fees to other lawyers, to clients, to doctors, to non-lawyer employees, or to "marketing" people. In addition to the ER 7.2 prohibition, ER 5.4 also prohibits sharing legal fees with non-lawyers

There are three caveats to this prohibition:

- a. *de minimus* gifts that are not a *quid pro quo* for a specific referral, are acceptable under Arizona's Rule;
- b. splitting fees with a lawyer in another firm who referred a case to you is acceptable if the division complies with ER 1.5(e) and you review *Ariz. Op. 04-02*; and
- c. you may pay a non-lawyer marketing employee a bonus for increased firm revenues in accordance with ER 5.4 and *Ariz. Op. 90-14* as long as it is not a portion of fees and the non-lawyer has no involvement in the lawyer's professional judgment.

You cannot do through a non-lawyer that which you cannot do directly

Remember – you can't do through another that which you cannot do directly. Accordingly, you can't send your paralegal to an accident scene or have your marketing director make cold-calls to individuals who have filed for bankruptcy. Paralegals may only meet with prospective clients *after* the lawyer has spoken with the individual. *Ariz. Op. 98-08*. Also note paralegals should not be the ones going over fee agreements with new clients – lawyers must establish the attorney/client relationship.

Seminars for Prospective Clients and Booths at Expos

Many lawyers offer seminars to groups of consumers (aka "prospective clients"). This is ethically acceptable, *see Ariz. Op. 92-10*, as long as you do not answer specific questions from the audience and you explain at the beginning of the program that the program does not create a lawyer/client relationship – it is simply "legal information." These two tips are important to avoid conflicts of interest with opposing parties being in the audience, and so that you do not inadvertently develop a conflict due to the educational program. The tips also are key to maintaining the attorney/client privilege if someone eventually becomes a client.

Lawyers also are becoming proactive at getting their firm identity out in locations where groups of prospective clients gather – such as business expos and conferences. Law firms may sponsor a booth at such gatherings as long as the lawyers or individuals staffing the booth do not initiate contact with the prospective clients – no, really – you must stand passively within the booth and not drag prospective clients towards you or otherwise coerce their contact with the booth. *See Ariz. Op. 02-08*.

Law Firm Names/Affiliations

Ethical Rule 7.5 governs law firm names. Starting in January, 2013, law firms may use trade names as long as they are not false or deceptive. So, for instance, a firm may be named after an equity owner ("Law Office of Jane Doe" or "The Doe Firm") or it may include descriptive terms, such as "Ethics Law of Scottsdale" – assuming: a) the firm does ethics law; and b) is located in Scottsdale. Note the use of the

term “Group” denotes *more than one lawyer* and use of the term “and Associates” requires actually employing more than one associate. *Ariz. Op. 90-01*. Similarly, “Offices” requires the firm have more than one office. *For example, “Smith and Associates” can be used only if you employ more than one associate – full time.*

Lawyers may say they are “of counsel” to a firm if their relationship with the firm is “close, personal, continuous, and regular” – really – ER 7.5, Comment [3]. This means the lawyer and firm regularly refer matters to each other or work on certain cases together.

If you share office space, make sure that you maintain separate phone lines and signage – unless you want to be one firm.

Frequently, sole practitioners or small firms will sublet space to other lawyers. Make sure you keep the firm identities separate if you do not want to be treated as one large firm. This means setting separate telephone lines, separate firm names, signage that indicates there is more than one firm in the space, and keeping the files separate. If you advertise jointly, make sure the advertisement identifies the separate entities. For instance, an advertisement that states: “Family Law Services in Central Phoenix: Jane Doe, PC and John Smith PC” would identify that these are two different firms but an advertisement that stated: “Family Law Services in Central Phoenix, Doe and Smith” implies they are practicing as one firm.

The Internet: The Rules Still Apply – Be Careful

Law firm websites must be factually accurate, able to substantiate claims, and primarily factual. You must have client consent to list client names on your website or anywhere else.

Remember the Rules of Professional Conduct apply to law firm websites. This means the information must be factually accurate, subject to substantiation, not create false expectations, and include the firm address. If a website lists client names, the firm must obtain the clients’ consent – client identities are “confidential” under ER 1.6 – even if the firm represented the client in a high profile case that was on the front page of the newspaper. This also goes for listing firm clients in your Martindale Hubbell listing or other professional index or LinkedIn or Facebook . . . you get the drift, right? Plus, it is just a professional courtesy to ask permission of a client before plastering their name in your advertising materials.

Lawyers are cautioned to place disclaimers on the website that caution readers against sending emails and information about their legal matter directly to lawyers at the firm. If you permit readers to send such communications, the sender may be deemed a “prospective client” under ER 1.18 for conflicts and confidentiality purposes. The website disclaimer also should note the jurisdictions where the lawyers are admitted and the information on the website is just that – information – and not legal advice.

Avoid unprofessional content and photos. Even though the State Bar is not authorized to function as the “taste police,” any content that could be deemed unprofessional may violate Arizona Supreme Court Rule 41(g), which prohibits engaging in “unprofessional conduct.” Keep in mind, too, that it takes a long time to develop a positive professional reputation and only an instant to destroy it. Something that you find edgy or humorous might have exactly the wrong effect on your audience and destroy what you’ve taken month and years to develop.

Website best practice tip: All law firm websites need to have the firm name, address and appropriate disclaimer: 1) sending emails to the firm will not create a lawyer/client relationship and may not be kept confidential; 2) viewing the website does not create a lawyer/client relationship and is only legal information; and 3) the firm practices in the locations listed on the website and jurisdictions where firm lawyers are admitted.

Check the Rules of Professional Conduct for *all jurisdictions where the firm has lawyers admitted* because those Rules may apply to firm websites. The Ethical Rules on advertising vary from state-to-state and some jurisdictions require review and/or filing of all advertising.

Example: Marketing director encourages all lawyers in the firm to establish LinkedIn pages. Lawyer has LinkedIn page. Lawyer asks clients to “recommend” or “endorse” her. Client Smith prints: “Lawyer is the best lawyer in Arizona. She guaranteed I would get my deal done in 20 days and she specializes in complex contract matters. And her fees are half what other lawyers charge!” Lawyer “accepts” the recommendation – is lawyer responsible for the four ethics violations contained in the endorsement? YES, because the lawyer accepted the endorsement. *See South Carolina Ethics Opinion 09-10.*

Do not use internet referral services.

As noted above, there are only two referral services “approved” by the State Bar – those run by the Maricopa County Bar Association and the Pima County Bar Association. Any other service that offers, for a price, to match specific lawyers with specific prospective clients would be an impermissible referral service. ER 7.2(b)(2). *See Ariz. Ops. 05-08 and 06-06.* If you are solicited to participate in any on-line marketing program, please review these two ethics opinions for the criteria on what makes an on-line service an impermissible referral service. If you still have questions, call Practice 2.0 or the Ethics Hotline for more information before delving into those dangerous waters.

However, a website that simply lists lawyers in certain practice areas in certain geographic areas and the prospective clients make the selection of which lawyer to contact would be an acceptable group advertisement, not an impermissible referral service.

Also avoid on-line “ask-the-lawyer” type chat rooms because any time you give legal advice, you will need to check for conflicts before giving the advice.

Be Truthful – even on the internet.

Some additional quick reminders:

- Do not buy competing law firms’ names as “ad words” so that when someone searches in Google for that firm, your advertisement comes up. In South Carolina, that was found to be a false statement that resulted in lawyer discipline.
- Improve Search Engine Optimization (“SEO”) truthfully and honestly – and do not post anything on YouTube, YELP, Avvo, or any other sites that is not 100% factually accurate and can be substantiated.
- Trade names are acceptable in Arizona as long as they are factually accurate, which means, if you do not have an office in Scottsdale that does family law, you could not be “Scottsdale Family Law Lawyers LLC.”
- New as of 2014: Firm advertising/marketing/communications do not have to list a street address but there must be some “contact information” in the materials – such as telephone number or website. So a banner at a little league field, billboard, website, television ad, radio commercial, print ad, or flier must include at least a website address or telephone number, for example:

The Smith Firm PC
www.Smithfirm.com
555-555-5555

- Do not encourage employees/friends/family members to “pretend” to be dissatisfied clients of competing lawyers and post unfavorable reviews on Google, Yelp, etc.
- Do not encourage employees/friends/family members to “pretend” to be *satisfied* clients of your firm and post false favorable reviews of your firm on Google, Yelp, etc.
- The advertising rules apply to YouTube – include your firm name and address and follow the other advertising requirements.
- Do not use your personal social media account (or employees’ accounts) to troll for clients.
- Do not answer legal questions online without first checking for conflicts!

- Do not “chat” online in chat rooms with prospective clients without being able to identify the real names of all participants, assuring that they are Arizona residents, and clarifying that you do not represent them, you are admitted only in Arizona, that chatting does not create a lawyer/client relationship, and discussing anything online with other people reading most likely waives the attorney/client privilege.
- Do take business cards to Bar association and section/committee meetings and hand them to people you meet.
- Do not pay college/family friends to send you business, and avoid representing friends and family members.
- Do join sections and committees of Bar associations – but only to the extent that you actually can contribute. People who overcommit are not remembered favorably. Volunteer to help with one project to get to know members of a specialty bar (county/local/practice groups) better. The best referral sources usually are other lawyers who know and like you!

Lawyer Marketing/Advertising – What Is Your Niche?

The most successful lawyers in this State may not be the best lawyers; it is likely that they are the best business people. Being a successful attorney is not only knowing the law, but understanding the business of law. The business of law starts with getting clients.

Become a Rain Maker

The first step is determining what type of law you want to practice. Second, can you make a living doing this type of law? Third, after making a commitment to that practice area, you must determine your target client. Finally, after you have determined what you want to do and who you want to do it for, then start putting together a marketing/advertising plan.

What area of the law do you want to practice and who your target client is have to be the most important questions you answer before implementing any type of marketing/advertising campaign. How are you different from other lawyers practicing in that area now? What makes you special? Why are people going to select you over another attorney in your practice area? What are your client's characteristics? What social economic class are they? Are they affluent, middle class, working class, or indigent? Into what age group do you see your client fitting? Male? Female? Do they live in a certain part of town? What is the target client's primary language? Do they belong to a certain group or organization?

Everyone would love to have wealthy clients who consistently request a significant amount of billable hours and always pay their bill on time. Obviously those are the toughest clients to obtain. The largest firms in this state all target and covet big corporations and the wealthiest individuals for this very reason.

How are you going to compete with them? At least initially, when you are first starting out, set your sights on a client that is obtainable. These first clients are your way to building your great reputation, getting word-of-mouth business, and building your practice.

For example, if you are starting a family law practice you likely would love to handle only high dollar divorce cases out of Paradise Valley, Scottsdale, or other affluent area of town. However, where do you think most of your competitors are setting up their offices and practicing? As a new and relatively inexperienced lawyer, you may not attract a high profile divorce; however, you may be very appealing to a working class client who needs help getting through the system.

Another clear example is in personal injury practice. There are several successful lawyers, none of whom you will recognize from a television advertising campaign, because they never utilize television to as an avenue to market. For example, some lawyers/law firms target a particular nationality or other group. You may not see these targeted ads on television or in the print media; these lawyers may focus on other means of advertising more conducive to reaching their particular target client. What makes you special? Everyone knows the discount accident law firm. What do you offer that makes you different from every other attorney practicing in your area? Is it a language you speak, or some special recognition you have received? In your personal bio, make mention honors or awards you have received. Are you a certified specialist? Do you have a skill other lawyers do not offer that would benefit your client? The list is only limited by ethics, your imagination, and relevance to what you do. The key is you have to be distinguishable from your competitors or you will be lost in the sea of lawyers.

Yellow Pages

For years, the Yellow Pages was the primary avenue of attorney advertising. It was, and still is by many, considered to be expensive. Print advertising may not be the best way to reach prospective clients, depending on your target demographic. In addition, there is a significant amount of competition, especially as it relates to advertisement placement. Firms are fighting for positioning in hopes the prospective client will see their ad first and go no further. Obviously, there is only one ad which can be top of the page or in the beginning of the specialty section. With a limited number of key spots, law firms have begun to focus on other identifying distinctions: creating something to make them stand out. Utilizing color schemes, focusing on a particular heading instead of the general attorney heading, an eye catching advertisement; the strategies go on and on. Yellow Pages representatives are great resources and will assist you with development of great ideas in an effort to make their product successful for you. Each and every year the representatives come up with new and improved ideas to try and get your

advertising dollars and help put you ahead of the competition. Remember, however, they are also pitching the same ideas to your fellow lawyers.

The pricing on Yellow Page ads varies based upon what you are attempting to accomplish. As a business you may just want a regular listing, or upgrade to a bold listing. The options will include 1 line verses several lines, color accents, webpage notations, etc. The more distinct ads are the 1/4, 1/2, and full page ads. These options come with the need to develop an effective advertisement. Keep in mind that marketing is advertising and the ethical rules apply – so be mindful of the information the Rules require you to include, and what you may not include.

What do you want your ad to say about your firm and what makes you different. Why should someone call you rather than the lawyer in the ad next to you? In addition to these options, there are premier products like the spine of the book, front cover, magnet attached, or back cover. The options go on and much deeper than you can imagine, however always come back to the basic question who is my client? Will your client be looking for you in the Yellow Pages? If the answer is yes, then use your best efforts in developing an ad and determining what type of placement will likely gain you the most return on your investment.

Print Advertisement

There are many forms of print advertisements including newspaper, magazine, and direct mail. The key to any print media is distribution. Is your target client within the distribution area, and to what degree of likelihood is your prospective client to be reached by this form of advertisement?

Direct mail is great for targeting a specific area. Ideally, your office location is within your target area. If you focus your practice on being a "Chandler attorney", you may want to use a mass mailing service to reach the zip codes within the area in which you are targeting your focus. This can be great way to make your mark within a community at a relatively low cost expense. Key is the number of households to which the mailing is distributed, and how likely is your potential client to read the mailing. These are evaluations you must give great thought to before entering into any type of advertising campaign. Just like all advertising you pay a premium for placement within the print mailer. The typical pricing ranges from 5 to 15 cents per thousand, depending on total buy (how many households you market to) and placement. As always, the more you buy the better price you will be offered.

Newspapers and magazines can also be great tools. However, this genre may be is losing its effectiveness as people begin to look to the internet more and more for their news. A large newspaper/magazine may or may not be the best focus for your advertising budget. The primary issues of readership and distribution will need to be analyzed as it relates to your needs and goals. Most

newspaper companies have recognized these issues and have developed webpages for their message, in addition to their printed version. Typically when you are advertising in multiple mediums, you are more effective; however, the cost will go up. As a solo practitioner, you may not be able to handle the potential volume which comes with multiple mediums or a city wide newspaper/magazine. The local paper can be very effective as well as more budget friendly. For example, an advertisement in the Arizona Republic may garner a substantial volume of calls on a Monday after the Sunday edition hits the streets. How are you, as a solo practitioner or small law firm, going to respond to those calls in an effective manner? Will you be able to handle the appointment volume which will go with receiving the large number of calls? These are just a few of the serious concerns which need to be considered and planned for prior to engaging in any type of large scale advertising plan.

Local periodicals with a focus on a specific geographic area are great options for the smaller law office. A large number of cities have their own newspapers or magazines which are distributed for free to all or most of their residences (Gilbert, Glendale, Ahwatukee, etc. all have area newspapers and magazines). It is my opinion that local periodicals with smaller distribution areas are better for a solo attorney trying to establish him or herself in a particular market. The readership in these smaller mediums may in fact be higher and more direct to your prospective client. Most community residents want to know what is going on within their particular neighborhood (local high school sports, crime, houses for sale, etc.). These readers will turn to their local paper/magazine as they are generally much smaller and more concentrated on a home area, as opposed to reading the large city/regional publication.

Advertising in print mediums is typically charged by the column inch. Rates always vary based upon readership/distribution as well as your negotiation power and ability. Frequency of advertising may also garner a better rate. If you plan to advertise on a weekly basis you may be able to get a better rate over a business who only advertises on the occasional basis. Again, frequency is the key to having success in any marketing campaign.

Billboards

There are several different types and sizes of billboards. Billboards can be extremely large, as often seen on the freeway, and much smaller like those on bus shelters. In addition, there are electronic billboards which change images and advertisements every 8 seconds, and regular standalone boards which do not have changing images. A key element is making sure your message is easily identified while someone is driving by at 35 to 65 mph. How will the passerby identify you and your law practice? Will the prospective client be able to locate your firm when they are considering retaining a law firm? Phone numbers are not typically written down by a person as they are driving past, so consider whether for your

purpose billboards should be a supplementary advertising tool rather than a standalone tool. Use billboards to reaffirm the message you are already putting out. Remind people who you are while they are passing by. It is a great way to stay fresh in your prospective client's mind. If prospective clients drive by your billboard 5 days a week, they will remember you, and when they need a lawyer they will look to contact you.

Billboards can be quite expensive, with costs you may not think of when first looking about purchasing/leasing boards. Billboard contracts are usually on a 12 to 24 month contract and paid monthly. When negotiating, like all other marketing tools, the more you buy the better deal you get. Rates for billboards are determined by the market and demand. Rates will always fluctuate, based upon inventory (how many are available), locations, and how many leased. Billboards are rated based upon the number of cars that pass by on a daily basis; thus, freeway boards are frequently the most expensive with the most daily traffic.

Be very careful to purchase only what you need. If you are focusing your practice area within a particular market/area it might not be the best use of your limited advertising budget to enter into a contract for boards outside of your area, no matter how great of a deal you get. Most individuals new to billboards don't realize that the price you are negotiating is only for the billboard, it has nothing to do with the paper and creation of your billboard vision. Paper quality and color choices are very important. If you select a dark color the Arizona sun may fade your board quickly and you will need to be prepared to replace the paper more often than should you select a lighter color scheme. You may also want to contact a graphic designer to help you develop your billboard. Simple is usually better than cluttered as a driver's view of a billboard will be mere seconds.

Bus shelters are similar to billboards with the need to purchase paper and develop an effective advertisement which is easily identified. They are like small billboards. The added benefit to a bus shelter is you may establish a presence in a particular area where there are no billboards or where billboards are cost prohibitive. In addition, bus shelters provide some ability to select a particular area to focus your advertisement, thus only reaching out to the prospective clients you want and limiting your advertising expenses to the select geographic area which you are comfortable servicing. The typical rates for bus shelters are approximately \$250 to \$500 per shelter per month with a year or two contract plus production cost (cost of the printing/paper). Other types of advertisements with similar limited exposure are available at bars, restaurants, arenas, grocery stores, and stadiums. These outlets also allow you to focus on a particular geographic area, but may or may not be costly, based upon how many potential clients will actually see your advertisement.

Radio/Television

Advertising on radio and television are the most effective mediums to reach a large number of individuals. It is, however, very expensive. Television and radio clearly allow the ability to capture a much larger portion of the public; the drawback is that you are not able to limit the scope of your marketing. Television may not, therefore, be the best advertising platform for a solo practitioner. The cost of television commercial time is high, and like other marketing vehicles, the cost of the commercial time is by no means a representation of the sole cost of putting a commercial spot on the air. In addition, for the marketing campaign to be successful you must have a substantial frequency (how often your commercial is seen or heard). The common rule is that an advertisement must be encountered at least 3 times to make an impression or have any hope of being effective.

Radio commercials may be easier to develop and may be less expensive to produce. The most difficult issue may be developing your script or message. By contrast, television commercials are much more complicated with a tremendous amount of moving parts. Several individuals will be needed to help with the production of the commercial to include a make-up artist, cameraman, someone to edit the commercial, location fees, and other costs you may never have thought about. The production of a high definition 30-second commercial typically may start as high as \$5,000 and goes up from there. This does not include the price of getting the commercial aired on radio or television.

Pricing for radio and television commercial time is based on the Cost Per Point (CPP) of the segment being purchased. A point is the percentage of the viewing or listening market which the commercial will likely reach. The higher the points, the more people are tuning into the programming and the more people you are likely to reach.

Radio time is typically sold in 15, 30, or 60 second increments. The rates for radio air time may vary depending on the market, and may begin at approximately \$150 to \$300 per point. The morning commute and afternoon drive times are traditionally the highest audience times, therefore the most expensive. In addition, talk radio often has a listenership with a higher loyalty (less likely to have casual listeners who frequently switch stations) than the average music station, thus making those programs more attractive. It goes without saying the more attractive, the more costly.

Television time is most often sold in 30 second increments. The time of day or the popularity of the television show dictates the cost of a 30 second spot. The more points, or people watching, the more expensive to the spot costs. Overnight programming, by nature of being watched the least, is the cheapest time to advertise. The best time or prime time advertising can cost thousands of dollars per spot depending on the show's ratings.

Should you hire an advertising agency? There is no easy answer. Clearly, an advertising agency will be an additional expense. Do you have the money to have that up-front outlay? The fee is typically calculated as a percentage of what you spend in all areas of marketing. With all advertising, the more you spend the better deal you receive; this is why having a seasoned ad agency working for you can be a tremendous benefit. The agency will help negotiate the best rates available for your complete advertising plan (newspaper, television, billboards, etc.). The typical rate for an ad agency is 15% plus production costs. A good agency will have all the connections you need to develop and prepare a commercial, edit it, and get it on the air waves. As with all expenditures, be conservative in deciding to commit to anything additional; it is always a balance among what you can afford and the potential monetary benefit you may reap based on effective advertising.

Chapter Fourteen: Networking

General Networking Tips

What is networking? In short, it is about making connections and building relationships for short- and long-term mutual benefit. But as simple as this definition may seem, for many people networking is an extremely challenging process. Mere utterance of the concept causes a visceral effect in some (e.g., sweating) and an avoidance reaction in most (e.g., I'd rather have a root canal).

What is it about the actual practice of networking that causes many of us to avoid it like the plague? Typically there is anxiety that comes from not knowing how to start a conversation with a complete stranger. There may also be the feeling that you are imposing on someone's time or being pushy. These are very common feelings and reactions, but they should absolutely not stop you from employing this incredibly powerful technique that, statistically speaking, can help you find new clients.

Before you begin it is important to understand that building your network involves an investment; it is a process that involves a lot of time upfront and does not always show immediate returns. Consider that true "relationships" typically only develop over a long period of time, after many different interactions and after you have proven yourself to be reliable and trustworthy. People hire *people*, not just set of skills and qualifications.

Networking is also an activity in which you must actively *engage*. People need to believe you are very good at what you do and to see you as an expert in the field in which they need help. Most importantly, they need to believe they can turn to you for advice. Showing up at a networking event is a good start, but not enough, especially if you remain mute and glued to a corner of the room. Moreover, leaving the stack of business cards you obtained at an event untouched is just as pointless.

The actual how-tos of networking are not as complex as you might think. It does involve some preparation and strategizing in order to be effective.

Where to Meet People and Network Effectively

Meeting people can be and should be the foundation for your business generation strategy. Not only that, but you have to make talking to people a habit. If you are sitting next to someone, make a habit of talking to the person next to you. Remember that cases come from the lay public but also as referrals from other lawyers, so never shrug off an opportunity to meet someone because you think a case won't come from it. Cases can come from anyone that you met anywhere. The State Bar has events, the local bar association has events, the young lawyer division has events, there are Inns of Court, affinity bars, etc.

You should consider continuing education classes as not only a way to make sure you're up to date in your own practice area, but also to expose yourself to events that may be fruitful for networking and marketing. If you meet other lawyers at a CLE event in your practice area, those people are your competitors and are unlikely to actually send you a case. On the other hand, lawyers at a CLE outside of your practice area likely aren't your direct competitors, and if you introduce yourself and your area of practice they are more likely to refer you a case if they have something that is out of their practice area and within yours.

Along the same lines, think about the crowd that is likely to attend the events you are considering. While you may have a good time and make some friends at events titled "networking for young lawyers," most of those in attendance at events like that will probably be people like you: just starting out and looking for cases. If you attend events that cater to more established practitioners, you are more likely to meet people who are may be in a better position to send you cases in the immediate future.

The Elevator Pitch

A great place to start is preparing an "elevator pitch," or "elevator speech," which is a memorable 30-second statement that creates a positive impression and generates future referrals. Give some serious thought to how you can describe your services in a professional, succinct manner. Remember, it should be no more than 30 seconds in length and should roll off your tongue effortlessly and with energy and enthusiasm.

Here are some tips on how to get started.

- Clearly explain your primary area of practice.
- Offer an attention-getting fact or statistic about your industry.
- Briefly explain why you selected your practice area or how your clients benefit from your legal expertise.
- Provide an example of the types of clients you serve.

One example of a successful elevator pitch is:

I am Alice Jones, an estate planning attorney with Doe, Smith & Jones. Our firm has 15 lawyers based out of Phoenix but we also have an office in Sun City. We help individuals, couples and families choose the correct options for maintaining their estates after death or in case of incapacity. Our clients are comforted knowing they have some help in ensuring the continued management of their estate and knowing their wishes will be carried out.

It is completely understandable to be hesitant when getting started. If you are brand new to the networking game, allow yourself one (or two, at most) events to get the lay of the land and a sense of what networking events are like. Then start practicing your skills by doing things like introducing yourself to the people with whom you sit at a table and talking to the key-note speaker and the panelists at an event. If you see others you know at an event, they may be able to introduce you to a new person.

Many people feel uncomfortable talking about themselves. One very easy strategy to keep a conversation going is to turn it towards the person with whom you are speaking. A little-known but powerful fact of life is that most people love talking about themselves. Moreover, remember that most people will stay interested in a conversation if it is of interest *to them* in some way. So, the best networking questions prompt the other person to talk about his or her work, employer, family and interests.

Do not forget to maintain eye contact at all times. The person should feel like he or she is the most important person to you in the room at that moment. Needless to say, you should not scan the room. And never answer or look at your cell phone – yes, that includes texting. Be engaged in the moment.

Effective networking also means utilizing keen listening skills. This means demonstrating that you are, in fact, hearing what the person is saying. Stay clearly and intently focused on the speaker by maintaining eye contact and implementing non-verbal skills, like nodding your head and interjecting an “mm-hmm” every now and again.

Another way of demonstrating good listening skills is to ask a question based on something the person said during the conversation. This may sound like an obvious point, but many people freeze and resort to “canned” networking questions. While using pre-arranged questions is not a deal-killer, it certainly won’t make you memorable. Try as best as you can to add value to the conversation based on concepts, thoughts or ideas raised by the other party.

Do not to boast about your achievements or be predatory in any way. Your job is *to begin a relationship that can be continued at a later time*. Don’t walk into an event thinking that you have to walk out of it with a client or else you’ve failed miserably. In fact, taking that approach will make you kind of scary, so do your best to relax. Instead, set a workable goal for yourself. Examples include:

- Talk to at least three people.
- Collect four business cards (from people you actually intend on following up with!).
- Introduce yourself to the speakers or panelists.

If you do not know anyone at the event, begin a conversation with someone who is standing by him or herself. This of course means you will have to initiate a conversation with a complete stranger, but you never know who that person will wind up being. To complement this point, do not make the mistake of

only targeting the most reputable people in the room; valuable networking connections can come from almost *anyone*.

Dress Well

Networking opportunities can be an escape from the office, but do not be the person who walks in underdressed, or for that matter overdressed. Dress appropriately for the situation, but don't be afraid of wearing something that exhibits your interests or associations. This can often be a conversation starter. For example, wearing a clothing item (perhaps a shirt, tie or accessory) from your law school may provide the opportunity for someone to engage with you. Once you start talking, you may find that you have similar interests and that person may end up being a source for referrals.

Marketing Techniques

Before you begin spending valuable time and effort on networking, put some thought into where and how you should be spending your time. Determine where your business is coming from: is it from clients? other lawyers? This determination should drive not only how you network, but where. Logic dictates that the more you know about your potential clients, the more likely it is you will come into contact with them. The more you know, the more you can assist them and the more potential business you will have.

Here are some other tips that can assist with your marketing efforts:

- Volunteer in the community, especially with non-legal organizations.
- Consider joining the Board of a non-profit or a community-based organization. Moreover, find an organization or cause that you feel passionate about! This might be as simple as getting involved with your child's Parent Teachers Association, helping with a food drive or collecting toys for children for the holiday season.
- Do pro-bono work. Are you currently practicing family law or want to break into that area?
- Why not volunteer to be a *guardian ad litem* to help a child in need and become more familiar with the interaction between the court, state agencies and private bar.
- Join a network. Consider the State Bar's Sole Practitioner and Small Firm Section as a great starting point, whose mission is "to educate, assist, counsel, advance and promote those lawyers of the State Bar of Arizona who choose to practice law singly and solely by themselves, or in small firms." By networking, using technology, and sharing expertise, the Section has the ability to share experiences and resolving the issues that face solos without sacrificing the independence that drew you to solo practice in the first place. The Section offers networking sessions and an Online

Community for solo and small firm lawyers to easily communicate with other lawyers across the state about topics including (but not limited to) technology, office space, etc.

- Get involved with the State Bar. The Bar offers a variety of ways to engage, from committees to work groups to task forces. This kind of involvement will likely lead you to meet lawyers from outside your practice area and of all levels of experience. This is a great way to build your reputation with lawyers you might not otherwise meet.
- Create your own network. As a solo practitioner, you must be aware of your limitations when it comes to taking on issues that are outside your knowledge base. So it is critical to have resources established for referrals of these types of cases. Your relationships with other lawyers are important for purposes of hiring them on a contact or of-counsel basis, or even giving them work outright. Also consider the benefits of referring an existing client to someone you know and trust will do a good job; this makes it more likely the client will come back to you for work!
- Attend local and affinity bar meetings, often and consistently. Since regular participation is the key to visibility, a good rule of thumb is to try and attend a meaningful event at least once per week. Also consider taking on a leadership role, which will allow you to demonstrate other important traits and characteristics.
- Think outside the networking box: consider joining less-popular legal associations that are practice-area specific like the American Association of Defense Council and the Central Arizona Estate Planning Council. And do not forget about non-legal organizations like chambers of commerce.
- Network with law school classmates. They already know you and should be a good referral source for new business. This is especially true if you are trying to generate business from corporations and businesses that can be notoriously difficult to connect with.

Turning Connections into Cases

If you gave someone a business card two weeks ago, or two months ago, most likely they are probably not going to send you a case based on that initial contact. You have to follow up with them and do things to help develop the relationship. It sounds corny, but think of the connections you make as relationships you have to cultivate. Once you've met someone, send that person an email. Ask them if you can get lunch or coffee sometime.

Remember, in order to effectively connect with someone, it has to be about them. What can you do for them? If you meet a real estate agent, keep him or her in mind next time you hear a friend is looking

to buy or sell a house. If you have a new practice and you meet someone more established, ask for their help on something or ask a legal question. Once you have established a relationship with someone you need to maintain that relationship. After they send you a case, call or email them to thank them. Send a card for the holidays. Make sure to meet them in person, whether it is for lunch or at an event.

Make follow up part of your regular office tasks. After you've met someone, put their contact information in your contacts, address book, etc. Then set a task or reminder to call or email them a few days or so later. Keep open lists of people you need to send small gifts or holiday cards to. It may be useful to the cases or matters that you have received by referral source. Not only is it a constant reminder of the importance of building and maintaining networks, but it will help you remember to systemize the follow up. For example, make sending a thank you email to the referral source one of the "file opening" tasks in your office.

A final word: this chapter is but the tip of the proverbial iceberg when it comes to networking and marketing yourself as a sole practitioner. There is a wealth of additional resources available in print and on the web. The staff of Practice 2.0, the State Bar's practice management program, is always willing to brainstorm with you on this and a variety of other issues relating to building a successful practice. Call Practice 2.0 at 602-340-7332.

Chapter Fifteen: Consider a Mentor for Professional Development, Marketing and Human Contact

Mentoring is a key component in successfully marketing oneself as a legal professional. Specifically, establishing meaningful relationships with individuals who are vested in and support professional development can be the critical factor in a legal practitioner's success. A mentor can be any person who has achieved a goal similar to a goal the mentee has set for her or himself and is willing and able to assist the mentee in reaching that goal. For example, a new litigation attorney who plans to perfect their deposition skills might seek out a sixth-year attorney who has already polished those skills. Additionally, that same new litigation attorney might also plan to become general counsel for a corporation and might establish a mentoring relationship with a current corporate general counsel. Indeed, successful professionals in most industries often have multiple mentors who are at varying stages of their careers.

The best mentors assist their mentees in building and maintaining a rich and dynamic professional network. The mentor should introduce the mentee to individuals who can assist the mentee in building their practice and their legal skills. A mentor might also aid the mentee in problem solving substantive legal questions, working through legal professionalism issues, and even supporting the mentee through personal challenges. Even if the mentor does not have the experience or skills required to assist the mentee, a strong mentor will connect the mentee with the appropriate resources. Ultimately, effective mentoring relationships can assist a lawyer in navigating potential professional pitfalls, building a book of business, and becoming a skilled practitioner.

Like with other areas of their professional development, solo practitioners should proactively seek and establish effective mentoring relationships. Networking with members of various State Bar of Arizona Sections and Committees might lead to mentoring relationships. Additionally, the State Bar of Arizona's Mentor Program can assist lawyers in finding mentors. Information is available through Practice 2.0. (<http://www.azbar.org/professionaldevelopment/practice20/mentorprogram/>).

Chapter Sixteen: Work-Life Balance and the Sole Practitioner

You have seen the ads. An attractive woman in yoga pants and a comfy sweatshirt cradles a cup of tea on the porch of her cabin overlooking a valley of wildflowers. The voiceover reminds us that we need to make time for ourselves to achieve “work-life balance.” Maybe images like these have prompted you to take the leap into solo practice. Or maybe you were shoved into solo practice due to downsizing or other challenges in today’s job market. Whatever the reason, it is possible to maintain your own practice and have a balanced life. But it will take some work, primarily in organization and prioritization.

Most work-life balance books emphasize the need to cram everything important into your day. The problem with this advice is its ledger-book approach to work-life balance, where it becomes simply a matter of accounting. It goes something like this: Okay, you have to work. But you can’t neglect your spouse and kids. And you have so much more to offer the world. You owe it to yourself to be in good physical shape, so make time for workouts. And let’s not put off that cooking class any longer. And you’ve always wanted to write that novel – now’s the time to start! And think of all the places you want to see before you die. Let’s get started!

So work-life balance turns into a plate-spinning circus act. You’re now carving out time for work, and family, and health and fitness, and personal growth, and artistic expression, and, and, and. You end up like the Cat in the Hat, balancing the books and the dish and the fish on a rake while standing on a ball. And just like the Cat in the Hat, it all falls to pieces, and with no Thing 1 and Thing 2 to clean up the mess. Packing ten pounds of “life” into a five-pound bag will only split the seams. That’s called burnout. Drug and alcohol addiction. Heart attack. Stroke. Divorce. All the things that prompt those who have left the profession to brag about being “recovering” lawyers.

Now, consider the other aspects a solo practitioner has to handle, as outlined in the rest of this book: marketing; case management; continuing education; technology; administrative matters such as bookkeeping, payroll, taxes, accounts payable, accounts receivable, personnel matters, lease negotiations, vendor relations.... Well, you get the idea. The practice of law requires significant effort to keep up with client needs, trends in technology, deadlines, etc. And the solo has another level of requirements.

That’s the practical problem. But there’s another problem: fragmentation. You are not your job. You are not your spouse and kids. You are not your workout, your garden, your current mood or your bank account. You are not a jigsaw puzzle of activities or accomplishments. You are something else: the being that does all these things. By insisting on work-life balance—carefully calibrating all the things you think

you are, making sure not to undercharge or overcharge any one account – you end up with a balanced ledger-book that no one would want to read. The real You – your meaning – is elsewhere.

Ask yourself this question: What would a successful solo practice look like? How much business do you have and can you realistically expect to attract in the next 2-5 years? How many hours per week can you devote to the law practice as opposed to the business of practicing law? Do you have the requisite skills for some of the administration and technological needs your practice will have? How much money do you really need to make? How much time do you want to do things other than practice law or run a business?

It's important to know or at least think about what lifestyle you want in order to determine a realistic sense of work-life balance. Once you recognize the multi-faceted aspects of solo practice and commit to this type of practice, know that solo practice can provide rich rewards for a lawyer. Autonomy, financial independence, personal fulfillment are all achievable. But so are the burnout dangers described above, as well as isolation, loneliness and the loss of collegiality that can enhance your practice in the right setting.

But you've obviously thought all this through and read the other chapters in this book, which will help you work through the pitfalls of solo practice. So, what's the most important thing for solo practitioners who want to maintain work-life balance? Let's try a different definition of work-life balance, courtesy of an old Zen saying: "Chop wood, carry water." Sounds cryptic, but all it means is this: When you're doing something, just do that. When you're working on a client's file, work on the client's file. When you are paying bills, pay bills. When you are handling a computer problem, focus on the computer problem. Whatever you're doing in the moment gets your total attention. Call it "the zone," call it "flow," call it whatever you want. The term we prefer is *mindfulness*.

This is an entirely different concept of balance. We're not trying to balance activities or roles. We're not trying to find equal time for every worthwhile task – which is like a mother dog trying to feed a litter of 12 puppies. Instead, the balance we feel is right now, *in this very moment*.

So how do we get there? In the words of the old joke: practice, practice, practice. Start by accepting the fact that peace of mind is hard work. It takes time and patience. You don't do one bicep curl and then quit because your muscle doesn't bulge like a body builder's. If you stay with it so that it becomes routine, you will actually rewire your brain to be more focused, more relaxed, more, well, "balanced."

The Precocious Puppy

Let's start by taking a closer look at that brain of yours. The one that got you to the top of your class in college and through the rigors of law school and the bar exam. Your brain has done pretty well by you.

But your brain can also hinder your peace of mind. In Eastern philosophy, especially those in which meditation plays a role, the mind is frequently and disparagingly referred to as the “monkey mind.” You know it well: it resembles the chittering, chattering, leaping-from-tree-to-tree, feces-slinging monkey at the zoo. It seems to run best on caffeine and stress, and it often takes over at night, robbing you of much-needed rest.

At the risk of arguing with 5,000 years of contemplative tradition, this is far too ungenerous to our brain. Let’s change the metaphor. Think of your brain instead as a cute, lovable, energetic, loyal, slightly stupid, but eager-to-please puppy. That puppy may still wake you up at night or roll in horse manure. But because it wants to please you, it is trainable. Something that shrieking monkey will never be.

Before we get to the tedious task of housebreaking, a few basic principles:

1. *Your brain has no sense of past or future.*

Like that little puppy, your brain lives in the eternal present. It always wants to play. It just doesn’t realize that 3 a.m. on Thursday morning is not the best time to remind you of what you should have said to the judge on Wednesday afternoon, or of what faces you at the office today. You will not find enough money to make payroll at 2 a.m. and you probably won’t find the best way to fire your file clerk either. But, once your brain has tugged at your sleeve long enough, the rest of the thinking machine kicks in, and you spend the rest of the night tossing and turning, brooding and worrying, rousing even the drowsiest neurons to full attention.

2. *Your brain can’t distinguish between reality, memory, and imagination.*

Imagine yourself at home in your kitchen. You open the refrigerator and take out a large jar of dill pickles. When you unscrew the lid, you get a blast of garlic odor. Reach in – the brine is extremely cold – and pull out a large whole pickle. The juice is running down the heel of your hand and spilled on the counter. Look at the light shining on the green, bumpy surface. The smell of garlic fills the room. You remember that these are the sourest pickles you’ve ever had. Now put it in your mouth and take big bite.

If you’re like most people, as you read the paragraph above your mouth produced more saliva than normal. Your lips might even have puckered a little. Why? Your brain has just alerted your mouth, “Get ready for a blast of acid.” But what, in “reality,” happened? All you did was read the paragraph and invoke your powers of imagination. Yet your brain and body reacted as if a real pickle were heading to your mouth.

Here’s the cool part: A brain scan conducted moments ago would have revealed a pattern of activity *largely identical to the pattern formed by actually eating the pickle*. The same neurons firing, the same chemical transmitters being sprayed, the same higher and lower functions.

So what's your brain up to? It's playing association. It reads the paragraph and searches for links to stored information. That information includes memories, facts, emotions, -- countless neurons firing with one goal: to interpret the words on the page. You may believe your brain meticulously builds an objective, accurate rendering of the external world it receives through its senses. You'd be wrong. The process is more like making a delicious stew. All sorts of ingredients have been dumped into the pot, mixed and stirred over time, and what comes out looks very different from what went in. Our brain uses everything it has received throughout your entire life. So learning how to corral those disparate parts can help you enhance the flavors or outcomes that better serve you, and downplay those that do not.

3. *Your brain can't understand negative commands.*

When we say to our dog, "Clea, get the ball," she gets the ball. When we say to her, "Clea, *don't* get the ball," she gets the ball. Clea doesn't hear the "don't." She just hears "ball."

Your brain is the same. Think about something you like, and your brain will bring it to you. Think about something you hate, and your brain will bring it to you. It's up to you. Thich Nat Hahn, the famous Buddhist teacher, says "Change your thoughts, change your life." Sounds simple doesn't it? It is simple. But it's not easy.

Your brain is the ultimate fetching machine. This is what your mind does best, what it was designed to do. It desperately wants to please you by finding whatever it is you want. As we will see, this can be a blessing and a curse.

Your physical brain consists of innumerable interlocking systems. One of these is the Reticular Activating System (RAS), consisting of the reticular formation and its connections. The reticular formation is a network of fibers and cells housed in the brain stem, which connects the spinal cord to the rest of the brain and is one of the oldest parts of the brain. As such, it doesn't do any of the high-level reasoning we associate with the human brain – those functions belong to the cerebral cortex (the wrinkly "gray matter" that forms the brain surface), specifically the frontal lobes. The messages travel from the reticular formation throughout the brain to the cerebral cortex, which evaluates the messages and responds.

One role of the RAS, which is not entirely understood, is to filter stimuli and information. Right now, if you were to be aware of everything going on around and within, you would go mad. The noise of the air conditioner. Birds outside. The lamp's electric hum. The feel of your body where it contacts the chair. The sound of your heart beating, your lungs expanding, and the blood coursing through your arteries. Fortunately, RAS stands at the gate, shooing away the unwanted visitors and filing the others in the subconscious, to wait there patiently until you have need of them. For example, you may know the

temperature needs to be adjusted or you need to visit the restroom, but you can wait a few minutes while you finish this chapter.

But how does the RAS know what to let in and what to keep out? And what if it gets things wrong? You've trained it, like a puppy.

Your brain fetches what you focus on. The RAS, in effect, reads your mind. It assumes that whatever you're thinking about, you care about. Because it can't distinguish negative from positive, it just goes out and grabs whatever it is you're focusing on, good or bad. Your puppy knows you enjoy it when he chases the ball. He learns to focus on that activity because you seem to enjoy it and you respond to him when he brings you the ball. If you trained him to catch a Frisbee, he may ignore a ball because he knows you like the flying discs.

Let's add the next element: repetition. You probably didn't train your puppy to fetch the ball and bring it to you in one play time. You did it over and over again, rewarding the puppy with praise or treats. Similarly with stress, you have unwittingly rewarded your brain with your tendency to dwell on stressful matters. Remember the last time you brooded over something? Maybe someone insulted you, or there's a power struggle raging at work. Or you forgot to raise an important issue during oral argument which may have lost you the case. You probably played the event over and over in your mind. It woke you up at night and followed you around during the day. Why can't you get it out of your head? Especially when it's time to relax or rest? Because your brain, your puppy, thinks it's time to play, or brood.

Now let's add the final element: emotion. When you think something, neurons fire across the synapses in your brain. A thought is not one neuron, but millions firing simultaneously in numerous areas of your brain. When you think something and feel strong emotions about it, the neurons not only fire but release chemicals that cause a physical reaction in your body. These chemicals, called neurotransmitters, reinforce the firing pattern of the neurons. It's the difference between telling your puppy, "I'd be much obliged if you would stay," and "STAY!"

The neurotransmitters don't just trigger emotions in you; they also make the firing pattern more engrained. It's like the neighborhood kids wearing a path through your front yard. The path gets deeper and easier to follow. When something stimulates the neurons for this particular thought, the emotion and prior repetitions cause the pattern to fire more quickly and more forcefully. In short, you've developed a habit. Not a habit of behavior, but a habit of mind. You become your thoughts, your habits, your way of being in the world. You can't avoid thinking the way you've always thought about the problem. And as with any habit – smoking, drinking, eating ice cream – it's very hard to break. Breaking the habit starts

with reminding yourself that you are not your thoughts, not the passive recipient of whatever your brain has done in the past. You can control what your puppy fetches.

Bottom line: you want a better life? Throw a better stick.

Paper-Training the Precocious Puppy

Since your puppy lives in the eternal present, it has to keep reminding you of everything in the present. Worries, regrets, plans, deadlines, irritations, fears – one big playground for your puppy. But there is one effective way to quiet the puppy so you can get on with your life. And no, it doesn't involve smacking yourself in the head with a rolled-up newspaper.

It's this: *Write It Down!*

Don't use your mind to remind. Your brain is a creative, associative machine without equal, but it's a lousy hard drive. Trying to keep everything in your head is a major cause of stress. And energy spent remembering or trying to remember is energy wasted. If something occurs to you, write it down as soon as it occurs to you. It doesn't matter what it is, how important or trivial it is, whether it requires your immediate attention or not. Just write it down. Don't worry: this is not a task list. It's just a collection of random thoughts. You'll decide later what you want to do with them, if anything.

This is a very difficult habit to develop and to keep, so you want to eliminate as much drag on the system as you can. Do you have a very small notebook and pen you can carry with you everywhere? If not, get one. Ideas won't wait until you're sitting at your desk with your fountain pen uncapped or your computer booted up. You need to make your collection tool as mobile as your brain. That means always having something to write with and on.

The small notebook in your pocket is just your first line of defense against losing your idea. You should have one stable capture tool wherever you spend time. It may be your computer. A legal pad. A journal. A white board (these can be magical in a busy office). A stack of 3 by 5 cards. Typically, the fewer tools you have, the better; but as long as you process them regularly, you can have as many as you want.

Now that you have your capture tool, what do you write down? That's simple: *everything*. If it occurs to you, and it's worth remembering for whatever reason, write it down. Don't weed out the trivial from the profound. "End world hunger" goes on the same list as "clean dog dish." Don't prioritize, don't judge, don't edit. Most of all, don't say, "Oh, I'll remember that." You won't. Or you won't when you need to. Or to make sure you do, your puppy will remind you of it every 5 minutes.

Don't limit your list to tasks. Include random thoughts, ideas, fantasies, fears, hopes – anything that's taking up brain space. These things are on your mind because your puppy hasn't finished playing with

them yet. Your subconscious has been churning through them for some time, and every now and then they pop to the surface. You need to clean up that turbid stream and make conscious that unconscious dialogue. Otherwise, what you don't think about will shape you in ways you can't control. Remember, you are what you focus on. You, not your puppy, need to hold the leash of your attention.

Your computer goes through a similar process. Over the course of time, as you run programs and add data, your computer gets a bit sloppy with where it puts things. When it's in a hurry, it will store things out of order. It can still find them for you – it just takes a little longer. So every now and then, you have to defragment – “defrag” – your computer. You run a special application that sorts through your files and puts things where they belong.

Finding Work-Life Balance, One Breath at a Time

Now that we've cleaned the mental cupboards, we can try something a bit more subtle. Instead of focusing on all the stuff *out there* (things to do, plan, see, buy, etc.), let's spend a little time with the stuff *in here*. Too often, without our realizing it, a painful thought wells up out of the unconscious ooze, and before we realize it, our efficient RAS has grabbed it and sent it around the brain, where it triggers memories, emotions, and nervous system responses. All of this happens much faster than your frontal lobes, the higher-functioning part of your brain, can respond and remind you that now is not the time to dwell on what your client said about the last bill. By the time you've decided, “That's not something I need to think about right now,” your unconscious brain has already triggered the panic button and set your heart racing, your lungs gasping, and your skin sweating. And all of that feeds back into the system, producing more painful thoughts. Next thing you know, it's 5 a.m. and you haven't slept a wink.

How do you stop this endless loop of misery? By doing something absurdly simple: *by simply taking a breath and paying attention to what's going on right now.*

The next time you're feeling anxious, or stressed, or overwhelmed, or depressed, or excited, try this exercise: just notice what's going on in your body.

- How is your heartbeat? Fast or slow?
- Is your breathing deep or shallow?
- Are you hot or cold? Sweating or chilled?
- How is your posture? Shoulders hunched or back?
- Are your muscles tense or relaxed? Which ones?
- Any other bodily experiences?

The key to this body scan is: *Don't try to change anything*. Don't judge it (something difficult for lawyers to do). Just notice, as if you were a scientist engaged in an important experiment requiring precise observation. Within seconds, the anxiety or depression or overwhelm will vanish.

Will it come back? Probably. But each time you do the body scan, you weaken the habitual firing patterns in your brain and create new ones. You step back and step up from your usual way of thinking and feeling: you are no longer *in* the mood; rather, the mood is in you, and you can change it.

A note of caution: body scan may be simple, but it's not easy. You may get discouraged when you don't see any progress. But as we mentioned at the outset, think of this as weight training for your mind. You don't expect to look like Mr. or Ms. Universe after one bicep curl, and you can't expect to achieve serenity after one body scan. The secret is steady practice, as often as you can. After a while, you'll find yourself doing the scan without thinking about it – and you'll find yourself needing it less.

While steady, regular practice is the key to success at anything, you can do something that will supercharge your battle against stress: meditation. The body scan is just a rudimentary form.

This inventory of your mental state and slowing down for conscious breath is the cornerstone of meditation. Meditation is not religion. It's not an occult mystery. And it's not gazing at your navel while contorting yourself like a pretzel. It's just breathing and paying attention. It's just sitting with your breath.

You can read a thousand books on how to meditate, and agonize over whether you're "doing it right." Or you can just try this:

1. Find a quiet room.
2. Sit down.
3. Close your eyes.
4. Notice your breathing.
5. When your mind wanders, gently bring it back to your breathing.

That's it. Don't criticize yourself, don't work at it, don't try to "empty your mind." Meditation is not about the absence of thoughts. It's about changing your relationship to those thoughts. It's about paying attention to whatever's happening in your mind, just as in the body scan you pay attention to whatever's happening in your body. The body scan reveals that we are not our feelings (since we can change them just by noticing them). Meditation reveals that we are not our thoughts. And the habits and emotions that hold you hostage are as ephemeral as those feelings and thoughts.

Sowing Your Dream Garden

Once you have learned to manage, or even just recognize, the mental minefield that stress can present, you can see why it's important to plan for the things that feed your passions, what we like to call "sowing your dream garden." If you only think about financial worries, client's problems or personnel issues, your brain will constantly bring you more of those things to worry about. But if you make space in your brain, devote a little bandwidth to things you love, your brain will learn to fetch you things that give you delight.

For example, let's say you always wanted to visit Paris. Maybe that's not possible right now, for whatever reason. But can you spend 10 minutes researching where you'd like to go when you can make this trip? Get online and view some streetscapes, imagine your first meal, etc. You'll create a new pathway for your RAS to travel down to find other information stored deep in your brain as to why you have this dream in the first place. Ask your brain, command your puppy, to help you find a way to get to Paris and don't be surprised when you find yourself in line at the airport.

Or maybe you always wanted to develop a home yoga practice. Or race in a bicycle race. Or write a novel. Or plant an herb garden. Spending just 5-10 minutes a day or several times per week can be the beginning of reaching those dreams.

As a solo practitioner, you get to design your life. Do you work best at night? Great, maybe you can find an hour during the day to take that dance class. Are you good at working longer hours 4 days a week and then taking 3 days off to backpack in the mountains? You can do that. All it takes is evaluating your strengths, organizing your office, training your brain and taking that first step on the journey to work-life balance.

Chapter Seventeen: The Ethical Obligations When Lawyers Change Firms

Duties of Firms *and* Lawyers When Someone Leaves

Lawyers rarely stay with the same law firm their entire careers. When lawyers leave a firm, there are certain ethical obligations, client relations issues, and other duties that arise. This chapter will only address the ethical and professional considerations when lawyers change firms and not any tort, contract, or employment law issues.

From an ethics perspective, the goal is that lawyers changing firms – and their former and future firms – all behave like grown-ups. Really. Law firm changes may feel personal but as professionals, lawyers must nevertheless abide by their ethical obligations when transitioning firms.

In addition to ethical obligations to the firm and clients, departing lawyers also may be subject to both civil and criminal charges for theft of firm property, misuse of firm assets, misrepresentations, and interfering with contracts a firm has with clients. *See, e.g., Florida Bar v. Winters & Yonkers (Sept., 2012) (two lawyers suspended from the practice of law for copying firm files, which constituted theft and made misrepresentations to the firm and clients to divert clients away from firm).*

A departing lawyer should *always* tell her firm partners, first, before telling clients, staff, or others that she is leaving a firm. The recent amendments to the ABA Model Rules on Professional Conduct, ER 1.6 specifically note that lawyer may have fiduciary duties to their current firms.

Ethical Obligation to Communicate to Certain Clients

Two primary directives must be remembered when lawyers leave law firms: 1) lawyers have a duty to tell “their” (not all clients of the firm) clients that they are leaving; and 2) clients are not chattels – the firm and departing lawyer cannot decide which clients can stay and which can go – the clients decide. Lawyers must keep clients informed so that clients may make informed decisions about what the clients want to do. However, lawyers who are leaving need to tell the firm, *first*, and then communicate with clients.

Arizona Opinion 10-02 summarizes the requirements that departing lawyers and law firms have an ethical obligation to cooperate with each other and share information on client matters to avoid any prejudice or harm to clients when a lawyer leaves the firm. This means that departing lawyers who are not taking clients with them have an obligation to assure that the files on which they worked are in proper order and contain all necessary information (not to mention departing lawyers need to provide the firm with their time).

In addition to the ethical obligations departing lawyers have, they also must avoid interfering with the contracts the firm has with existing clients. *See, e.g., Raymond H. Wong Inc. v. Xue*, No. 115269/04 (N.Y. Sup. Ct. N.Y. Cty. 1/21/05)(associate enjoined from attempting to lure away firm clients); *Reeves v. Hanlon*, 33 Cal.4th 1140, No. S114811, (Cal. 8/12/04)(departed lawyers liable for damages to firm for luring away clients and associates). Business tort litigation against departed lawyers is a growing practice area. However, the caution to avoid stealing clients must be balanced against the departing lawyer's *ethical* obligation to notify clients that a lawyer is departing.

As explained in ABA Formal Opinion 99-414, "The departing lawyer and responsible members of the law firm who remain have an ethical obligation to assure that prompt notice is given to clients on whose active matters she currently is working." Remember, Ethical Rule 1.4 requires that lawyers keep clients reasonably informed – which would include notifying those clients with whom the departing lawyer has had "significant contact" that their lawyer is leaving the firm.

Which Clients to Tell

Arizona Opinion 99-14 provides some guidance on when a departing lawyer may communicate directly with *certain* firm clients. A departing lawyer who has had "significant personal contacts" with the client, should inform the client that the lawyer is leaving the firm. Note: this does not mean that an associate who met a client once or twice and has prepared discovery requests has had "significant personal contacts" – the standard is that if the client were asked "which lawyer(s) at the firm represent you?" the lawyers mentioned would be those that have had "significant personal contacts."

How to Tell Clients

Again - departing lawyers need to inform firm management about their anticipated departure *before* the lawyers start contacting clients. Section 9(3) of *the Restatement of the Law Governing Lawyers* (2000) provides:

"Absent an agreement with the firm providing a more permissive rule, a lawyer leaving a law firm may solicit firm clients:

- a. prior to leaving the firm:
 - i. only with respect to firm clients on whose matters the lawyer is actively and substantially working; and
 - ii. only after the lawyer has adequately and timely informed the firm of the lawyer's intent to contact firm clients for that purpose; and
- b. after ceasing employment in the firm, to the same extent as any other non-firm lawyer."

The *preferred* method of advising firm clients about the impending departure of a lawyer is a joint letter from the firm and departing lawyer to all clients with whom the lawyer had significant personal contacts. Such a letter should advise the clients:

- when the lawyer is leaving and where they are going;
- the client has the option of going with the lawyer, staying with the firm, or getting a new firm;
- how any advance fee deposit will be treated; and
- a place for the client to sign and return the letter, with instructions on where their file should go.

This letter preferably should be sent prior to the lawyer's departure and should be calendared to assure that written responses are received from all clients to confirm how each file should be handled. The letter needs to tell clients where the departing lawyer is going so that clients may check for conflicts before agreeing to a change. For those clients that want their files sent with the departing lawyer, the firm should review their malpractice policy for requirements on maintaining a copy of certain parts of the file for a period of time – that copying of course is at the firm's expense because the client file is client property that belongs to the client. ER 1.16(d).

Note that if a joint letter is not sent, separate letters may be sent by the lawyer (or the firm) to clients with whom the departing lawyer had significant personal contact as long as: 1) the letters do not disparage the firm or the departing lawyer; and 2) the letters do not involve improper solicitation in violation of ER 7.3. Lawyers that have had a lawyer/client relationship may communicate directly with those clients – that does not violate ER 7.3.

Other People Who Should Be Told About the Departure

Whenever a lawyer changes firms the following people/groups need to be notified about the new address (and other contact information), and the effective date of the change:

- State Bar Membership Records Department.
- Courts, including clerk's office *and* the Judicial Assistants for each judge where the lawyer has a pending matter
- Opposing counsels.
- Vendors, expert witnesses, court reporting services.
- Publications such as *Arizona Attorney* magazine and *Business Journal*.
- Other professional organizations in which the lawyer is a member (ABA, MCBA, etc.).
- The firm's malpractice carrier, accountant, landlord, and banker

Trust Account Monies

Clients who have given the firm an advance fee or advance cost deposit take the money with them (less earned fees and costs), if they go with the departing lawyer. While simple in theory, application sometimes can be problematic. The “old” firm should write a check, consistent with the written instructions of the client, to either the client or to the trust account for the departed lawyer’s new firm.

Fee Divisions in General

When the Firm Is Dissolved

There is some disagreement regarding how fees earned *after* a law firm split may be apportioned between the firm and the departed lawyer, when the case initiated with the old firm. For example, in contingent fee cases where some or much of the work was performed at the existing firm, but the case is going with the departing lawyer, the firm and lawyer must agree how the contingent fee will be apportioned among them, based upon their respective contributions to the case (i.e., *quantum meruit*) or based upon terms in the partnership agreement.

But can a departing lawyer keep *all* of a contingent fee case that came into the old firm but ultimately settled when the lawyer was at a new firm? Probably not, according to several cases. *See, e.g., Meyer & Susman v. Cohen*, 194 CalRptr 180 (Calif Ct App 1983)(“The partner may take for his own account new business even when emanating from clients of the dissolved partnership and the partner is entitled to the reasonable value of the services in completing the partnership business, but he may not seize for his own account the business which was in existence during the term of the partnership”). A lawyer may be entitled to only their partnership portion of the fees earned on a case, even if the departing lawyer performed most of the work after the dissolution of the firm. *See Jewel v. Boxer*, 203 CalRptr 13(Calif Ct App 1984); *Frates v. Nichols*, 167 So2d 77 (Fla Dist Ct App 1964); *Ellerby v. Spiezer*, 138 485 NE2d 413 (Ill App Ct 1985); *Resnick v. Kaplan*, 434 A2d 582 (Md Ct App 1981); *Smith v. Daub*, 365 NW2d 816 (Neb Sup Ct 1985); *Platt v. Henderson*, 361 P2d 73 (Ore Sup Ct 1961).

Moreover, some decisions hold that *all* revenue generated by cases that originated with a law firm that then dissolves belong to the originating firm – even if the work is completed after the firm disbands. *See Jewel v. Boxer*, 203 Cal Rptr. 13 (1984)(profit from transferred matters belongs to the original law firm); *Development Specialists, Inc. v. Akin Gump Strauss Hauer & Feld LLP*, 2012 WL 1918705 (S.D.N.Y. May 24, 2012).

When the Firm Remains but a Lawyer Leaves and Takes Cases

If the firm continues to exist and a lawyer leaves the firm and takes one or more cases to their new practice, the departing lawyer may be entitled to the *quantum meruit* value of the work performed after leaving the firm. Similarly, the firm will be entitled to the value of work performed at the firm. How this is calculated may be an open issue, but as a starting point, courts will look to the hours spent (lodestar) and then decide if any other factors under ER 1.5(a) apply to determine the fair apportionment of the fee between the former firm and current firm.

The *Schwartz v. Schwerin*, 85 Ariz. 242, 245-46, 336 P.2d 144, 146 (1959) analysis provides: “Before discussing the separate counts, it seems advisable that we state the well-known basic elements to be considered in determining the reasonable value of a lawyer's services. From a study of the authorities it would appear such factors may be classified under four general headings (1) *the qualities of the advocate*: his ability, his training, education, experience, professional standing and skill; (2) *the character of the work to be done*: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) *the work actually performed by the lawyer*: the skill, time and attention given to the work; (4) *the result*: whether the attorney was successful and what benefits were derived. See, 7 C.J.S. Attorney and Client § 191 a. (2), p. 1080 et seq.; 5 Am.Jur., Attorneys at Law, section 198. Cf. *Ives v. Lessing*, 19 Ariz. 208, 168 P. 506. Furthermore, good judgment would dictate that each of these factors be given consideration by the trier of fact and that no one element should predominate or be given undue weight.”

The final step in the attorney fee analysis is the reasonableness of the fees sought, which includes consideration of the hourly billing rate and the hours expended. *Schweiger v. China Doll Rest., Inc.*, 673 P.2d 927, 931-32 (Ariz.Ct.App.1983). See *Geller v. Lesk*, 644 Ariz. adv. Rep. 4 (Ariz. Ct. App. 2012)(hourly rate determines reasonable fee and any enhancement for the risk of nonpayment is reserved for exceptional cases).

Additionally, the majority view of “no extra compensation” upon dissolution of a firm does not apply to either the situation where the firm is completing work for a deceased partner or if the partnership agreement provides for a different compensation plan upon dissolution or departure. Such terms in partnership agreements will be upheld as long as they are not grossly inequitable. See *Smith v. Daub*, 365 NW2d 816 (Neb Sup Ct 1985).

Note also that Comment [9] of ER 1.5 explains that “Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm.” This means that the decision on how fees will be split between the former firm and the departed

lawyer does not need to comply with the writing and joint responsibility requirements of paragraph (e) of Rule 1.5.

Regardless of whether the fees go to the firm, are divided on a *quantum meruit* basis, or divided by agreement, the fees must be reasonable for the services performed. See *Matter of Swartz*, 141 Ariz. 266, 686 P.2d 1236 (1984). In other words, the clients cannot be charged more than a reasonable fee.

Files

Firms cannot hold client files hostage, even if the client who is leaving with the lawyer owes the current firm money. Model Rule 1.16(d) requires that the client's interests not be prejudiced when the attorney/client relationship is terminated. Have the client or a runner from the departed lawyer's new firm sign for the file – the old firm will want a record of whom took possession of the file. Also, it is appropriate to request in a litigation matter that the departed lawyer file a substitution of counsel or at least notification of address change with the court, to assure that the old firm is still not listed as counsel of record.

There are no ethics opinions or cases in Arizona that define whether a departing lawyer may take their: 1) contact information (including personal contacts as well as expert witnesses, etc.); 2) form files; and 3) CLE materials. As professionals *and* grown-ups, work out these issues prior to the dissolution – preferably in a firm policy. Generally firms permit departing lawyers to take their contact information (not lists of all clients of the firm unless the lawyer has had significant contact with them) and CLE materials. Forms that the departing lawyer prepared also usually go with the departing lawyer unless there is some proprietary claim by the firm. Downloading copious amounts of firm data before departing the firm may constitute theft unless the information is being taken to protect client interests for those clients going with the departing lawyers.

Arizona Ethics Opinion 08-02 discusses record retention policies and that if electronic copies of documents are maintained by the firm, the firm should provide the documents electronically. Thus, if a departing client wants their file transferred with a departing lawyer electronically, the firm should do so. Arizona Opinion 10-02 further explains that when lawyers leave firms, they have a duty to assure that the files on which they worked are complete and in order. This means that lawyers must assure that files are up to date so that another attorney may take over the file, if the client elects to stay with the firm.

Departing lawyers also need to maintain their professionalism when leaving a firm, which includes entering their time so that the firm can calculate final invoices. Departing lawyers need to work with the firm on collections of past due accounts if the client is leaving the firm with the lawyer. Lawyers obviously should not defer completing work at their old firm to attempt to bill that time at their new firm.

Phones, Email, and Mail

It is ethically inappropriate to have the receptionist tell callers who are looking for a lawyer who recently left the firm “we don’t know where they are.” That game is not professional and not acceptable. Assure that all staff are instructed to provide the departed lawyer’s phone number and assign a partner to answer any client inquiries – this is required by Ethical Rules 1.4 and 4.1.

Voicemail for the departed lawyer’s direct line should be changed to note the same – “the lawyer is not with the firm, the lawyer may be reached at the following new number but if the caller would like to speak to another lawyer at the firm, please press ____, and the call will be transferred.”

Emails sent to the departed lawyer’s email account should receive an automated message for a period of time, noting the departed lawyer’s new address or telephone number and providing a contact person at the original firm. Depending upon the practice areas, this automated message should be sent for at least 30 – 60 days after dissolution. Moreover, mail addressed to the departed lawyer should be forwarded to the departed lawyer unless the firm and the departed lawyer have made specific arrangements for mail from certain addresses to be opened by the firm (e.g., when a file is staying with the firm and the correspondence is from the opposing counsel’s firm).

Law firm websites need to be changed promptly after a lawyer’s departure to remove the departed lawyer’s contact information.

Partners and Associates Leaving Must Abide by Fiduciary Duties to Firm

It is worth noting *again* that lawyers who are leaving a firm have certain fiduciary duties to the firm to not interfere with the contracts that the firm has with existing clients, to not use firm resources to set up their new firm, and to not attempt to steal away associates and staff while the lawyers are still working for the firm. As explained in the *ABA/BNA Lawyers’ Manual on Professional Conduct, § 91:707 (2005)*:

In *Meehan v. Shaughnessy*, 535 NE2d 1255, 5 Law. Man. Prof. Conduct 119 (Mass Sup Jud Ct 1989), a distinction was drawn between the “logistical arrangements” made by partners planning their departure, and concerted efforts they made in secret, while still at the firm, to lure away some of the firm’s clients immediately after the lawyers’ withdrawal. The former, the court said, did not constitute a breach of the partners’ fiduciary duties. They were free to make pre-withdrawal arrangements for their new firm, such as leasing office space and obtaining financing by preparing for the bank a list of clients they expected to take with them and the fees they anticipated these clients’ cases would generate. But the secret plans to contact and persuade clients to remove their cases to the new firm were a violation of the departing lawyers’ fiduciary duties, the court said. As partners, they were required to act in utmost good faith and

loyalty toward their fellow partners, and to “render on demand true and full information of all things affecting the partnership to any partner.” These duties were contravened when, in secret, the withdrawing partners prepared authorization forms and letters, on the firm's stationery, informing clients with whom they worked of their departure and failing to make clear to the clients that they could choose to keep their business with the firm rather than removing their cases to the lawyers' new firm.

Even after the partners made known to the partnership their impending withdrawal, they continued to violate their fiduciary duties, the court said, by sending the letters to firm clients and to referring lawyers, and delaying giving a list to the partnership of clients they intended to solicit until after a majority of these clients had already authorized removal of their cases to the new firm. The court held the former partners would be required to pay to their former colleagues the profits the new firm earned on all cases taken from the partnership, except on those cases for which the former partners could prove that the clients had acted of their own accord in deciding to remove their cases to the new firm.

Lawyers should inform the firm's management as soon as possible if they are intending to leave. Once the partner informs management, the partner and firm should agree on a joint communication to all relevant clients. If that cannot be achieved, the departing lawyer may send a letter directly to clients, informing them about their choices. The firm also may contact clients to inform them about their choices. Both the firm and the departing lawyer should be professional in all written and verbal communications to clients – neither should disparage the other or offer any financial inducement to go with whichever firm.

Associates Forming New Firms

Remember that current firm resources (and time) cannot be used by departing lawyers to start establishing their new firm. While it is necessary for a departing lawyer to interview and/or arrange office space for a new firm while still employed at the “old” firm, lawyers cannot use old firm resources or work time for these endeavors. Nor can they copy firm proprietary information, such as forms and websites, to use for their new firm without firm consent (unless the forms are not proprietary to the firm but court or government templates). Not only is this dishonest (a violation of ER 8.4(c)) but it could be a business tort.

Lawyers may take client files and documents without specific client consent only in order to protect client interests while waiting for client confirmation on whether the client wants to go with the departing attorney or stay with the firm. If a client's interests could be prejudiced by leaving a firm without, for instance, covering a hearing scheduled that week, or filing an appeal due that week, the departing lawyer, who has had primary or significant client contact, may take documents/files in order to protect the clients'

interests. However, such files should be returned promptly to the firm if the client ultimately informs everyone that they want their file to stay with the firm.

Partnership Obligations

A partnership/shareholder agreement should include at least the following provisions to assure that measures are in place to address what happens when a partner leaves the firm:

- the expulsion of a partner
- the death of a partner
- what notice is to be given to the partnership by a withdrawing partner and timing of the notice
- the firm's right to accelerate the departure of a withdrawing partner
- the timing and method of notification of clients
- which clients will be contacted
- the content of the notice
- the retention and/or transfer of client files
- the compensation of partners upon withdrawal or dissolution, including repurchase of shares
- the formula for the distribution of profits and losses
- the payment of the capital account
- whether a withdrawing partner shall be paid any share of work in process and accounts receivable
- the method by which the practice and assets shall be valued
- the allocation of responsibility and compensation for closed files and ongoing financial obligations of firm

Don't place restrictions in lawyer agreements that restrict the lawyer's ability to practice (ER 5.6)

Most lawyers form partnerships with other lawyers with the anticipation that they'll stay together for a while. Thus, *no one* wants to think that the severance provisions in the partnership agreement will ever be needed. The reality is that lawyers are becoming more mobile; they change locations, they change practice areas, and they change firms. A partnership agreement cannot restrict a lawyer's ability to practice law after the lawyer leaves the firm. ABA Model Rule 5.6 provides:

A lawyer shall not participate in offering or making:

(a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement. . .

That appears to be pretty clear but apparently not – at least when it comes to firms merging with each other. In a twist on the usual departing partner scenario, the D.C. Bar Legal Ethics Committee recently explained that Rule 5.6 also precludes a firm from making an agreement among partners that they won't get paid for work done *before* the merger unless they agree to stay with the merged firm. Opinion 325 (Oct. 2004) explained that it is a violation of the Ethical Rules for a partnership agreement to say that a partner forfeited his or her right to pre-merger receivables if the partner leaves the new firm within two years of the merger (unless he dies, retires, or is sick).

As for associates leaving, Arizona Opinion 09-01 clarified that a firm may not “charge” a departing associate \$3,500 for each client matter the associate (and client) want to take – such a penalty clause to be paid before the associate may take the matter would violate ER 5.6 as a restraint on the lawyer's ability to practice as well as the client's choice of counsel.

Additional Ethical Duties When Switching Firms

Duties of Lawyers Interviewing with Other Firms – Check for Conflicts

Hypothetical: You are interviewing with Aye, Bigge & Cable for a lateral position in their corporate litigation section. While interviewing with partner Aye, she asks you what cases you're currently working on. What can you say?

Ethical Rule 1.6 prohibits disclosing “information relating to the representation of a client” unless the client consents to the disclosure or one of the exceptions to the confidentiality rule applies. This ethical duty is far broader than the evidentiary rule on attorney/client privilege. A lawyer's duty of confidentiality will even include the client's identity and whereabouts. *See In re Goebel*, 703 N.E. 2d 1045 (Indiana 1998).

This suggests that, technically, under the confidentiality Rule, you may not disclose the names of your clients to anyone outside of your current firm unless the clients impliedly authorize you to do so.

If you cannot disclose the names of your clients, how can Aye, Bigge & Cable check to see if they have any conflicts of interest, if they hire you? The firm has a duty to assure that they are not going to hire someone who will disqualify the firm from current representations.

Both ABA Opinion 09-455 and District of Columbia Bar Ethics Opinion, No. 312 (April, 2002) have several suggestions for how to survive – ethically – the interviewing dilemma. Interestingly, the ABA Opinion admits that lawyers must disclose client information to check for conflicts to comply with the ethical rules but acknowledges that there is no actual exception under ER 1.6 that specifically authorizes such disclosure.

Nevertheless, the DC Opinion provides guidance on how to check for conflicts. First, however, note that the DC Confidentiality Rule 1.6 prohibits the disclosure of “confidences and secrets,” as opposed to Arizona’s Rule language of “all information related to the representation.”

The DC Opinion is instructive in suggesting that one option for the interviewing lawyer is to disclose the *opposing parties* in matters for which he is personally involved. That list will at least notify the interviewing firm if they currently represent any of those clients who might have a conflict with you joining the firm. Another suggestion from the Opinion is to discuss the general nature of the matters that you are handling – although in some circumstances, that might disclose confidential information. For instance, if you stated that you’re working on a merger between two large amusement parks, that probably would divulge the identity of your client. Such confidential merger deals should not be disclosed without client consent.

Realistically, if you’re working on a litigation matter that has been filed, it probably is acceptable to disclose the name of your client. Another suggestion from the D.C. Opinion is to provide a list of all clients and opposing parties on matters for which you have worked and then let the new firm determine whether anyone on the list was a problem – then you would need to follow-up with them on which ones are clients – after you have client consent.

Conclusion: Be very careful when interviewing to disclose only client names to clear conflicts or have client(s) consent to the disclosure. Otherwise, the interviewing firm should first confirm whether it is adverse to the lawyer’s current law firm and then discuss with the lawyer whether there are specific matters that the interviewing lawyer *knows* are adverse and on which the lawyer has worked.

Screening an “Infected” Lateral Hire

Ethical Rules 1.10 and 1.18 now permit screening of lawyers with certain types of conflicts. ER 1.10(d) permits screening a lawyer who has a former client conflict *as long as*, among other things, it was not a litigation matter in which the conflicted lawyer played “a substantial role.” The U.S. District Court for the District of Arizona helped define what constitutes “a substantial role” in February in *Eberle Design, Inc. v. Reno A & E*, 2005 U.S. Dist. LEXIS 2323 (D. Ariz. Feb. 8, 2005). The court determined that a lawyer’s drafting of *voir dire* questions and billing only 9 hours of time to the former client did not constitute a “substantial role.” Nevertheless, in unreported decisions in Maricopa County Superior Court, judges have disqualified a firm that hired an associate who simply worked on pleadings but had no client contact. Thus, whenever a firm hires a lateral attorney, the firm should assure that it checks for conflicts *before* extending an offer.

Assuming that the conflict is one that can be screened, the screening procedures according to ER 1.10 must include the following:

1. *Prompt* notice to the affected client that the conflicted lawyer has been screened.
2. Notice to all staff regarding the lawyer or staff person who is screened.
3. Physical notice of the screen in both the paper and electronic file of the conflicted matter as follows:
 - a. This assumes that the conflicted lawyer is one that may be screened and that the other lawyers in the office will not have their independent professional judgment materially limited by the screened lawyer's conflict. In order to be effective, screening must occur as soon as the conflict is known and must be thorough.
 - b. A thorough screen should assure that:
 - i. *all* firm staff have been notified of the screen;
 - ii. measures are implemented to lock out the infected lawyer or employee from the document database;
 - iii. measures must be implemented to assure that the infected lawyer not receive emails or voicemails that discuss the matter (e.g., an email sent to all partners discussing a matter must not be sent to the infected lawyer);
 - iv. the screening notice is resent periodically to all staff; and
 - v. the paper file must have a written warning and should be in a secure location (not stored in the general file room).

Note that the "prompt" notice to the affected client must identify what screening precautions have been implemented.

Law Firm Mergers

When two firms "marry" the first thing they must do before walking down the aisle and signing the marriage/partnership agreement, is to check for conflicts.

- When considering merging with opposing counsel, you will need to tell *your* client – eventually. *Hypothetical: You are interested in moving to opposing counsel's firm. When must you tell your current client?*

ABA Op. 96-400 (1996) helps clarify when you must tell your client that you want to join the opposition. The ABA Opinion concluded that lawyers must disclose the possibility of joining the opposing firm when the lawyers' interest in combining becomes "concrete, communicated and mutual."

- When two firms are considering merging, you *will need to clear conflicts*.

In *Kinzenbaw v. Case LLC*, No. C 01-133 LRR, (N.D. Iowa 5/20/04), a court refused to disqualify a firm that only learned two years after a merger that it had a conflict of interest caused by merging with an opposing firm – but this should *not* be relied upon to ignore checking for conflicts prior to merging. In 2002 Cahill, Christian & Kunkle was acquired by Perkins Coie. At the time Perkins Coie had numerous offices. Lawyers in Perkins Coie’s Seattle office were representing Case Corp. on a variety of matters. Cahill’s Chicago office was representing a company named Kinze. When the merger occurred the conflict check between Cahill and Perkins noted that there might be a conflict with Case but for some unknown reason the red flag was not investigated further. After the merger, Seattle lawyers of Perkins continued to represent Case, while Chicago lawyers of former Cahill – now Perkins, represented Kinze - against Case.

When Perkins ultimately learned of the conflict in 2004 all work for *both clients* was frozen until Perkins could investigate the matter. Several months later the firm terminated its relationship with Case and the Chicago Cahill/Perkins lawyers continued to represent Kinze.

Ruling upon Case’s motion to disqualify Perkins, the court declined to disqualify the firm even though it did find that the firm violated DR 5-105 (Iowa’s conflict of interest rule) because the court concluded that disqualification is only one of several different sanctions that can be imposed for a conflict and the hardship that would be imposed upon Kinze for losing its counsel of choice would be too great. The court explained that a conflict of interest does not mean per se disqualification. In this matter, Perkins lawyers did not represent Case on any matters that were related to the litigation and did not have confidential information that could be used against Case.

This case presents a practical reminder: when two firms are considering merging, you will need to provide both your current and former client lists to check for conflicts. Either one lawyer from each firm or a committee of lawyers in each firm must be assigned responsibility for investigating and resolving all potential conflicts that appear when the client lists are cross-referenced. Only the information necessary to check for conflicts should be disclosed to the committee. The due diligence checklist for pre-merger should include a memo from that committee/lawyer, confirming that all potential conflicts have been resolved and providing copies of letters to affected clients obtaining their “informed consent” to waive the conflicts or memos to the file explaining the committee’s conclusion on why the firm does not need to obtain such waivers.

Selling a Law Firm

In 2003, the Ethical Rules were amended to permit the sale of law firms - with very specific requirements. The new Rule provides:

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

- a. The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the geographic area(s) in which the practice has been conducted;
- b. The entire practice, or the entire area of practice, is sold to one or more lawyers or law firms;
- c. The seller gives written notice to each of the seller's clients regarding:
 - i. the proposed sale;
 - ii. the client's right to retain other counsel or to take possession of the file; and
 - iii. the fact that the client's consent to the transfer of the client's files will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorized by a court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

- d. The fees charged clients shall not be increased by reason of the sale.

These criteria are similar to when a lawyer leaves a firm: the clients are not chattel – they get to decide who will be their lawyer *and* their fees cannot be increased because of the change.

Death of a Lawyer

Law firms with more than one lawyer always should have provisions for what happens to handle client matters if a lawyer passes away or becomes incapacitated for an extended period of time. Law firms with more than one lawyer usually do not have significant ethical issues regarding deaths within the firm. Solos must have backup counsel who can come into the firm and notify clients of the lawyer's incapacity, file for extensions of time and/or obtain new counsel for clients. Remember that partnership/shareholder interests may be paid to the estate of the deceased lawyer, pursuant to ER 5.4(a) even if this means the money will be paid to a non-lawyer surviving beneficiary.

APPENDICES AND RESOURCES

Resources

State Bar members have another valuable resource at their fingertips. Practice 2.0, the State Bar's voluntary practice management program and a benefit of membership, offers advice, education and resources about practice management, starting and running a law firm as a business, marketing, client relations and communication, technology and more.

Resources, checklists and other information is regularly added to the [Practice 2.0 webpage](#).

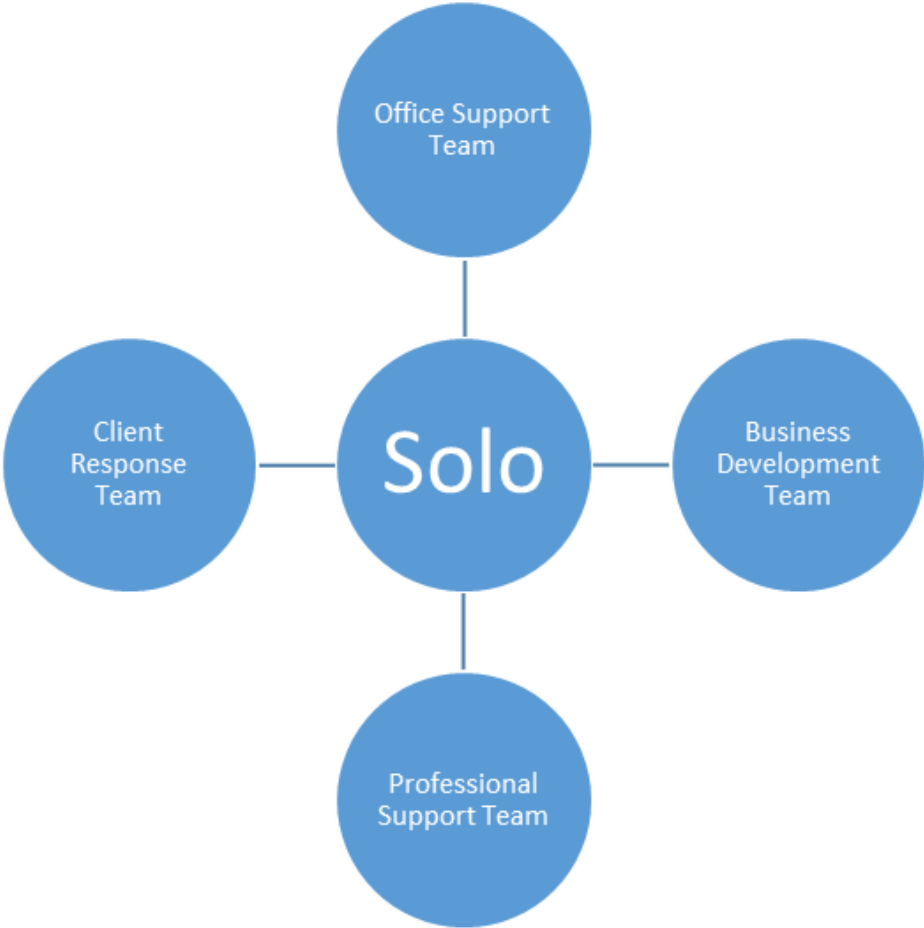
Bar members can take advantage of free 30-minute consultations (by phone or at the State Bar office) on a variety of practice management topics or may call Practice 2.0's hotline at 602-340-7332 to speak by telephone to a practice management advisor. Additionally, forms such as sample fee agreements, client intake sheets, and more, can be found on the Practice 2.0 website (<http://www.azbar.org/professionaldevelopment/practice20>).

Additional Resources for Starting Your Business

- Arizona Commerce Authority Small Business Services (<http://www.azcommerce.com/programs/small-business-services>)
- Arizona Corporation Commission, "10 Steps to Starting a Business in Arizona" (<http://www.azcc.gov/Divisions/Corporations/Ten-Steps-to-Starting-a-Business-in-Arizona.pdf>)
- Maricopa Small Business Development Center (<http://www.maricopa-sbdc.com/new-businesses/>)
- Central Arizona College, Small Business Development Center – Pinal County (http://www.centralaz.edu/Home/Business_Outreach/Small_Business_Development_Center.htm)
- Cochise College, Small Business Development Center (<http://www.cochise.edu/sbdc/>)
- Coconino County, Basic Business Empowerment (<http://coconino.az.gov/144/Basic-Business-Empowerment>)
- Mohave Community College, Small Business Development Center (<http://www.mohave.edu/community/sbdc/>)
- Pima County, Small Business Commission (<http://webcms.pima.gov/cms/One.aspx?pageId=160545%20>)
- Pinal County, Starting a Business in Pinal County (<http://pinalcountyz.gov/ed/businessconnections/Pages/Home.aspx>)

- United States Small Business Administration (<https://www.sba.gov/>)
- University of Arizona, Economic and Business Research Center (<https://ebr.eller.arizona.edu/>)
- Yavapai College, Small Business Development Center (<http://www.yc.edu/v5content/small-business-development-center/default.htm>)
- Yuma County, Small Business Development Center (<http://www.yumaaz.gov/city-administration/small-business-development-center.html>)

Sample Organizational Chart



Practice 2.0 Checklist for Home Offices

- ✓ Determine how you will use your home office
 - Will you meet with your clients at your home or will you use another space (such as a virtual office or share an office) for client meetings?
 - If you will meet with your clients at your home, how can you best help them find your office?
 - Signage
 - Separate entrance
 - Other
- ✓ Investigate the legality of running your law office from your home
 - Deed restrictions
 - Rental restrictions
 - HOA restrictions
- ✓ Secure your client files and information from house guests and family members
- ✓ Ensure that your home is equipped with all of the technology you will need
 - Phone
 - Do you need conferencing capabilities? Video conferencing?
 - Messaging
 - Speaker phone
 - Copier
 - Scanner
 - Fax machine
 - Computer
 - Paper shredder
 - Appropriate wiring
 - Internet
 - Wireless router
 - Cable modem
 - IT/technology support
- ✓ Sound proof
- ✓ Minimize interruptions
- ✓ Find ways to get out of the house. Network, join a section at the State Bar, volunteer, etc.

- ✓ Get appropriate insurance
 - Homeowners insurance
 - Insurance for equipment
 - Workers compensation insurance
- ✓ Create a distinction between your workspace and your living space
 - Have set hours
 - Physically separate the two spaces if possible

Checklist for Naming Your Law Firm

- ✓ Consult appropriate legal and tax authorities to determine what business entity you will use (e.g. PC, PLLC, LLC, LLP, etc.).
- ✓ Update your membership records with the State Bar of Arizona to reflect your law firm's name and your contact information (<http://www.azbar.org/membertools/myprofile/>).
- ✓ If you are using a trade name for your law firm, ensure that:
 - You are in private practice.
 - The name does not imply a connection with a government agency.
 - The name does not imply a connection with a charitable legal services organization.
- ✓ Do a search online to see if someone else already uses your desired business name.
- ✓ Check the Corporation Commission website to see if your desired business name is in use in Arizona (<http://ecorp.azcc.gov/Search>).
- ✓ Consult E.R. 7.1: Communications Concerning a Lawyer's Services to ensure that your law firm complies.
- ✓ Consult E.R. 7.5: Firm Names and Letterheads to ensure that your law firm complies.
- ✓ Do not state or imply that you are in a partnership or other organization if you are not.
- ✓ Read Arizona Attorney Magazine article, *Law Firm Trade Names Permissible in 2013: What You Need to Know*, by Patricia A. Sallen, for more tips on giving your law firm a trade name (http://www.myazbar.org/AZAttorney/PDF_Articles/1212TradeNames.pdf).

Onboarding a New Employee: The First Hour

- ✓ Have employee complete and sign W4 and A4 for taxes and payroll.
- ✓ Obtain signature on I-9 for eligibility to work in the U.S. Check the new employee's documentation. Then run the employee through E-Verify, as required by the Legal Arizona Workers Act. **Do not** let the employee begin work without going through this process.
- ✓ Obtain signature for Child Support obligation form from DES.
- ✓ Employee handbook or policy acknowledgement needs to be signed. Even if you are a solo, you should at a minimum have written policies about leave time, working hours, confidentiality and social media. Your policy on confidentiality should reflect your ethical obligations of confidentiality to clients, prospective, current and past.
- ✓ Employee notices and posters need to be up.
- ✓ If there is paperwork required by PEO or co-employer, it needs to be signed.
- ✓ Obtain contact information and set up personnel file.
- ✓ Have employee sign for employee benefits documentation.

Conflicts Checking Checklist

- ✓ When entering contacts, determine what information should be entered. At a minimum, enter:
 - First name
 - Last name
 - Company name
 - Spouse's name
 - Related persons
 - Aliases
 - Maiden names
 - Relationship of contact to clients, staff, and attorneys
- ✓ When will you collect information about related contacts?
- ✓ Who will conduct conflicts checks? Who is the backup?
- ✓ How many times during the representation will a conflicts check need to be performed?
 - After initial consultation
 - After discovery
 - As additional information is learned
 - Other
- ✓ Where will you store the list of contacts and how will you search it?
- ✓ If a member of your staff is conducting the conflicts search and there is a potential match, ensure the responsible attorney makes the final determination as to whether there is in fact a conflict.
- ✓ Documentation policies for conflicts
- ✓ Notification that a conflicts check has been completed for a potential matter
- ✓ Train staff on conflicts checking
- ✓ Consider impact of hiring staff and attorneys which may result in conflicts
- ✓ Read relevant ethics rules:
 - E.R. 1.7 – Conflict of Interest: Current Clients
 - E.R. 1.8 – Conflict of Interest: Current Clients; Specific Rules
 - E.R. 1.9 – Duties to Former Clients
 - E.R. 1.10 – Imputation of Conflicts of Interest: General Rule

- E.R. 1.11 – Special Conflicts of Interest of Former and Current Government Officers and Employees

If you still cannot determine whether there is a conflict, call the State Bar of Arizona Ethics Hotline at 602-340-7284.