

Question 12 – February 2016 – Selected Answer 1

1. Alex & Bert LP is a general partnership. At issue here is what entity is formed when no documents were filed with the Texas Secretary of State.

A general partnership is formed when two or more people come together to form a business for profit. Intent to form a general partnership is not required but is a factor when considering the type of entity that was formed. Other factors that show a general partnership formation include agreement to split profits or losses, managing rights, and whether any contributions were made to the partnership. The formation of a general partnership does not require any documents to be filed with the Texas Secretary of State.

A limited partnership does require a certificate of formation to be filed with the Texas Secretary of State before it can be formed. A limited partnership requires at least one general partner and at least one limited partner. An LP also requires that either "LP" or "limited partner" be included with the partnership name. But by putting an "LP" in the partnership name without properly filing with the Texas Secretary of State, an LP is not formed.

Here, Alex and Bert formed Alex & Bert LP. They did not, however, file any documents with the Texas Secretary of State. Even though they have "LP" in their partnership name, a limited partnership was not created. Because of that, a General Partnership was created. They both came together to form a business for profit. They agreed to split profits equally in their partnership agreement.

Alex and Bert are both general partners and are both personally liable for any obligations of the partnership. Their partnership agreement naming Alex as General Partner and Bert as a Limited partner will be invalid and will not limit the liability of Bert in the partnership.

2. Alex, Bert and Cathy cannot lawfully form a Professional Limited Liability Company (PLLP). At issue here are the requirements to form a PLLP.

To lawfully form a PLLP, the partnership must perform only one professional service. Each member must be licensed for the same profession. If one of the members holds a different license from the others, a PLLP is not lawfully formed. Even if that member does have a professional license, it must be the same license that the other members have for the services that form the PLLP.

Here, Alex and Bert are both licensed Texas Attorneys. Between the two of them, they would be able to form a lawful PLLP. Cathy, however, is a licensed physician. While she did go to law school, she did not take the bar exam and is not a licensed attorney.

Because they do not all hold the same professional license, Alex, Bert and Cathy cannot lawfully form a PLLP.

(1) Alex & Bert LP is a general partnership under Texas law. The issue is whether a written partnership agreement and an indicia of a limited partnership in a partnership's name is sufficient to form a limited partnership under Texas law. It is not. A general partnership can be formed under Texas law with no formalities, other than an agreement between two individuals (or entities) to enter into an arrangement to make profits. A general partnership has the advantage of flexibility and few formalities, but all partners in a general partnership are jointly and severally liable for the partnership's tort and contractual liabilities. Partners can choose to limit this liability by forming another type of partnership, including a limited partnership, but to do so, they must follow additional formalities in formation. Under Texas law, a limited partnership can only be formed by filing a certificate of formation with the Secretary of State, including a partnership name that indicates it is a limited partnership (e.g., "LP" or "Limited Partnership"), and paying the necessary fee. In a limited partnership, at least one partner is a general partner who exercises control in the partnership, but is jointly and severally liable for partnership contract and tort liability, and at least one partner is a limited partner, who does not exercise control, but who is also not personally liable for the debts and tort liabilities of the partnership. Here, it is clear that Alex and Bert intended to form a limited partnership. They included "LP" in their name, which is sufficient indicia of a limited partnership. Moreover, their written partnership agreement provides that there would be one general partner, Alex, who is jointly and severally liable for the debts and torts of the partnership, and one limited partner, Bert, who would not be personally liable for any of the debts of the partnership. This arrangement fits the requirements for a limited partnership under Texas law in terms of the *structure*. But, their failure to file the appropriate forms with the Secretary of State, including their partnership name Alex & Bert LP, and a fee to form the partnership, precludes them from being a limited partnership. As such, they have only formed a general partnership (which requires no filings with the Secretary of State or fees). Both Alex and Bert are jointly and severally liable for the obligations of the partnership, despite their intent to limit Bert's liability.

(2) Alex and Bert cannot form an professional limited liability company ("PLLC") with Cathy. The issue here is whether professionals from different professions can form one PLLC. Under Texas Law, a group of licensed professionals, such as doctors or lawyers, can create a PLLC. However, Texas law proscribes licensed professionals from different professions--or different licenses--from forming a PLLC together. Instead, a PLLC must be comprised of professionals all having the same type of license. Although Alex and Bert could form a PLLC with each other, or any other licensed attorney in Texas, they cannot form a PLLC with Cathy, a licensed physician.

(1) Alex & Bert LP is a General Partnership

There are several different types of partnerships in Texas. In a limited partnership, there must be at least one general partner and at least one limited partner. The general partner is personally liable for any and all obligations and debts of the partnership, but the limited partner is liable only up to the extent of his capital contribution to the partnership. To form a limited partnership, the partners must register with the State, and the name of the partnership must contain "Limited Partnership" or "LP." There must also be a written partnership agreement. In order to form a general partnership, two or more people need only to agree to operate a for profit business together as co-owners. No filing needs to be made with the state, and there does not need to be a written partnership agreement. Each general partner will be personally liable for the debts and obligations of the partnership.

Here, Alex and Bert attempted to form a limited partnership called Alex & Bert limited partnership. Although the partnership was properly named, and there was a written partnership agreement specifying the division of profits and liabilities of the partners, a valid LP was not created because neither Alex nor Bert registered the partnership with the State.

However, even though Alex and Bert failed to create a valid limited partnership, they did create a general partnership. Alex and Bert clearly intended to operate a for-profit business as co-owners because they agreed to open a law practice together. Law practices are for-profit, and their intent to operate as co-owners can be found in the written partnership agreement where they state they will share profits equally. Alex and Bert's failure to file any sort of documentation with the state is irrelevant because general partnerships do not require any filings with the state. Finally, the statement in the partnership agreement providing that Bert will not be personally liable for any debts or obligations of the partnership is not fatal. Because the law requires general partners to be personally liable for such debts, this clause in the agreement will simply be considered unenforceable by a court. Thus, Alex & Bert LP is a general partnership.

(2) Alex, Bert, and Cathy Cannot Form a PLLC

Partnerships are generally allowed to change their organization structure if the partners agree and the requirements for forming the new organization are met. A professional limited liability company (PLLC) is an organization that can only be formed by professionals in order to practice their profession. Recognized professions include the practice of law and medicine. In order to form a PLLC, the shareholders must all be professionals. Additionally, the shareholders must all be members of the same profession. To form a PLLC the shareholders must file a certificate with the state that includes the profession the PLLC will practice, the names and addresses of the members, an agent for service of process, and the duration of the company. The shareholders must also adopt bylaws or a governing shareholder agreement.

Here, Alex, Bert, and Cathy cannot create a valid PLLC. Although Alex, Bert, and Cathy are all professionals, they are not all members of the same profession. Even though Cathy went to law school, she is currently a licensed physician and would join the proposed PLLC as a practicing doctor. Alex and Bert cannot form a PLLC with Cathy because Alex and Bert are lawyers and would be engaged in the practice of law. This means that even if all of the other formation requirements were satisfied, Alex, Bert, and Cathy could not come together to form a PLLC that share the profits of Alex and Bert's practice of law with Cathy's practice of medicine.