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## **Choice of Entity (Including Tax Considerations), Legislative Update, Choice of Jurisdiction, and Ethical Considerations**

**By: Allen Sparkman**

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## Biography

Allen Sparkman is a founding partner of Sparkman + Foote LLP, which has offices in Denver, Houston and Fort Worth. He has practiced tax and business law since 1973. Mr. Sparkman's practice includes the areas of business transactions, securities, tax, and professional responsibility. Mr. Sparkman's work includes the preparation of securities disclosure documents for start-up companies in a variety of fields, including offshore oil and gas exploration, foreign mining operations, real estate, and comic book certification. Mr. Sparkman also regularly prepares corporate, LLC and partnership documents, and represents buyers and sellers of businesses, including preparing or reviewing all necessary legal documents.

## Education

Mr. Sparkman earned his A.B., with honors, from Princeton University in 1968 and his J.D., with high honors, from the University of Texas School of Law in 1973, where he was a Vice Chancellor, Teaching Quizmaster, and Associate Editor of *The Texas Law Review*. In 2015, Mr. Sparkman received a Certificate in Theology and Ministry from the Princeton Theological Seminary.

## Memberships

Mr. Sparkman is a member of the State Bar of Texas, the Colorado Bar Association, the American Bar Association, and the Association of Professional Responsibility Lawyers. For the American Bar Association, Mr. Sparkman is a member of the Business Law Section and its Committees on Corporate Governance (co-chair, task force on governance of social benefit entities; co-chair, joint committee on governance of Corporate Governance Committee and Nonprofit Committee); LLCs, Partnerships and Unincorporated Associations (co-chair, task force on model Series LLC operating agreement; chair, governance subcommittee); Mergers and Acquisitions; Middle Market and Small Business (chair, business entities governance subcommittee); The Governance Subcommittees of the LLCs, Partnerships and Unincorporated Committee and the Middle Market and Small Business Committee constitute a joint subcommittee of those Committees and has joined with the Governance of Private and Family-controlled Entities Subcommittee of the Corporate Governance Committee to form a new American Bar Association Business Law Section Task Force on Contractual Governance of Business Entities. The Task Force will be led by the named governance subcommittees of the Corporate Governance Committee, the LLCs, Partnerships, and Unincorporated Associations Committee, and the Middle Market and Small Business Committee. Nonprofit Organizations; Professional Responsibility (chair, state and local liaisons committee); Tax Law Section; Real Property, Probate and Trust Law Section; General

Practice, Solo & Small Firm Division and its Agricultural, Business Law, and Estate & Financial Planning Committees; Center for Professional Responsibility He is a past chair of the Business Law Section of the Colorado Bar Association and an active member of the Business Law Section's Statutory Drafting Committee. He is a long-time member of the Colorado Bar Association's Ethics Committee.

#### Awards, Publications, & Speaking Engagements

With Herrick K. Lidstone, Jr., Mr. Sparkman is co-author of LIMITED LIABILITY COMPANIES AND PARTNERSHIPS IN COLORADO (CLE in Colorado, Inc., 2015). The first edition of the book received the 2016 Award of Outstanding Achievement from the Association for Continuing Legal Education. The second edition of the book was published in January, 2017. Mr. Sparkman has authored a number of articles relating to limited liability companies and professional entities and has also been a frequent speaker at continuing legal education programs. Mr. Sparkman is listed in THE BEST LAWYERS IN AMERICA® for both Colorado and Texas and speaks regularly at continuing legal education seminars in Colorado, Texas, and nationally on entity selection, fiduciary duties and governance, mergers and conversion, veil piercing, ethics, series LLCs, and tax planning. Mr. Sparkman has presented more than 100 papers at continuing education programs for the American Bar Association, the Colorado Bar Association, Continuing Legal Education in Colorado, the State Bar of Texas, the University of Texas School of Law, the Professional Education Broadcast Network, the Practicing Law Institute, the National Business Institute, and other continuing education providers.

Mr. Sparkman is the author of numerous articles on choice of business entity, series LLCs, and other legal topics. Mr. Sparkman's published articles include "Charging Orders—A Reappraisal," available at <http://ssrn.com/abstract=2727973>, "Will Your Veil be Pierced? How Strong is Your Entity's Liability Shield?—Piercing the Veil, Alter Ego, and Other Bases for Holding an Owner Liable for Debts of an Entity," 12 *Hastings Bus. L. J.* 349 (2015-2016), available at <http://ssrn.com/abstract=267620>, With Herrick K. Lidstone, Jr., "Pick Your Partner Versus the United States Bankruptcy Code", 46 *Tex. J. Bus. L.* 23 (2015) available at <http://ssrn.com/abstract=2866418>, "Through the Looking Glass: Series LLCs in 2016", 3 *Bus. & Bankr. L.J.* 1 (2016) available at <http://ssrn.com/abstract=2591548>, "Series LLCs", 53 *The REPTL Reporter* No. 2 (Real Estate, Probate and Trust Law Section, State Bar of Texas, February, 2015), "The Rescission Doctrine: Everything Old is New Again," 4 *American University Business Law Review* 183 (2015) "Fifth Circuit Misses Opportunity to Bring Clarity to Series LLC Questions", *Business Law Today* (April 2014), "Series LLCs in Interstate Commerce" and "Tax Aspects of Series LLCs," *Business Law Today* (February 2013), and "The Series LCC: A New Planning Tool" by Adrienne Randle Bond and Allen Sparkman, 45 *Texas Journal of Business Law* (Fall 2012). Mr. Sparkman is a contributing author to William Schmidt "Preserving Your Wealth: A Guide to Colorado Probate & Estate Planning" (2012), Practitioner's Guide to Colorado Business Organizations (Colorado Bar Association, Allen E. F. Rozansky and E. Lee Reichert, Managing Editors), and

Guide for Colorado Nonprofit Organizations (Colorado Bar Association, Karen E. Leaffer, Managing Editor).

## I. Choice of Entity

A. An individual may conduct business as a sole proprietor. The individual does not have to create an entity and will have unlimited liability. If one or more persons desire to form an entity to conduct a business, the following are the most common choices:

B. General partnership—not formed by a filing and is the default entity when two or more persons join together to conduct a business. With limited exceptions, “an association of two or more persons to carry on a business for profit as owners creates a partnership, regardless of whether” the persons intend to create a partnership and whether the association is called a partnership, joint venture or other name. Texas Business Organizations Code (“BOC”) § 152.051(b).

1. Each partner has unlimited liability for the debts and obligations of the partnership. BOC § 152.304.
2. Subject to the partnership agreement, each partner has an equal right to manage. BOC §§ 152.002(a), 152.203(a).

### C. Limited Liability Partnership (“LLP”)

1. General partnership that makes a filing with the Secretary of State pursuant to BOC § 152.802. The filing fee is \$200 per partner.
2. Limits the otherwise applicable vicarious liability of the partners. BOC § 152.801.

### D. Limited Partnership

1. Formed by filing with Secretary of State—filing fee is \$750.
2. General partners have control and unlimited liability. BOC § 153.152.
3. Limited partners have no right to manage (but can have limited voting rights) and no liability for partnership obligations. BOC §153.102.

4. A limited partnership may file to become a limited liability partnership—eliminates vicarious liability of general partners and that of a limited partner who takes part in control. BOC §§ 153.351, 153.353. The filing fee is \$200 per general partner.

#### E. Limited Liability Company

1. Formed by filing with Secretary of State—filing fee is \$300.
2. Provides limited liability for members. BOC § 101.114.
3. Managed by members or managers—must be specified in certificate of formation. BOC §§ 101-251, 101-252.
4. Texas authorizes series LLCs. BOC § 101.601, et seq. Don't try this at home.

See, e.g.:

- a. Allen Sparkman, “Through the Looking Glass: Series LLCs in 2016,” 3 *Bus. & Bankr. L. J.* 1 (2016) available at [www.ssrn.com/abstract2591548](http://www.ssrn.com/abstract2591548).
- b. Allen Sparkman, “Series LLCs”, 53 *The REPTL Reporter* No. 2 (Real Estate, Probate and Trust Law Section, State Bar of Texas, February, 2015).
- c. Allen Sparkman, “Series LLCs in Interstate Commerce” and “Tax Aspects of Series LLCs,” *Business Law Today* (February 2013).

#### F. Corporation

1. Formed by filing with Secretary of State—filing fee is \$300.
2. Provides limited liability for shareholders. BOC § 21.223.
3. Managed by board of directors unless shareholders enter into a shareholders agreement pursuant to Subchapter C of Chapter 21 of the BOC or the corporation is a close corporation under Subchapter O of Chapter 21 of the BOC.
4. Ownership interests usually represented by stock certificates.
  - a. If a corporation has uncertificated shares, BOC § 3.205(a) provides:

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