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Who's Your Client? Use of Engagement Letters; and Choice of Entity (Including Tax Considerations)

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Biography

Allen Sparkman is a founding partner of Sparkman + Foote LLP, which has offices in Denver and Houston. 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*.

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); Mergers and Acquisitions; Middle Market and Small Business (chair, business entities governance subcommittee); 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). 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 "Through the Looking Glass: Series LLCs in 2015," available at www.ssrn.com/abstract2591548 (forthcoming *Business & Bankruptcy Law Journal*), "The Rescission Doctrine: Everything Old is New Again," available at www.ssrn.com/abstract/2512948 (forthcoming *American University Journal of Business Law*), "Series LLCs", 53 *The REPTL Reporter* No. 2 (Real Estate, Probate and Trust Law Section, State Bar of Texas, February, 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. Who's Your Client?

- A. Special challenges arise when a lawyer is approached to form an entity to conduct business.
- B. Possible scenarios include:
 - 1. Represent entity only.
 - 2. Represent only one of the owners and no one else.
 - 3. Represent all of the owners as a group.
 - 4. Represent entity plus all of the owners as a group.
 - 5. Represent the entity plus one or more but not all of the owners.
- C. Ethical rules that are implicated:
 - 1. Rule 1.06 of the Tex. Disciplinary R. Prof. Conduct provides, in part:
 - (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
 - (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyers firm; or
 - (2) reasonably appears to be or become adversely limited by the lawyers or law firm's responsibilities to another client or to a third person or by the lawyers or law firm's own interests.
 - (c) A lawyer may represent a client in the circumstances described in (b) if:
 - (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
 - (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation

and the advantages involved, if any.

(d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

(e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.

(f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

2. The comments to Rule 1.06 explain some of its implications:

- a. Rule 1.06 is based on the lawyers' duty of loyalty to clients. Cmt.1.
- b. "Loyalty to a client is impaired not only by the representation of opposing parties ... but also in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests or responsibilities to others." Cmt. 4. Note that the "responsibilities to others" is not limited to clients.
- c. "In certain situations, such as in the preparation of loan papers or the preparation of a partnership agreement, a lawyer might have properly undertaken multiple representation and be confronted subsequently by a dispute among those clients in regard to that matter. Paragraph (d) forbids the representation of any of those parties in regard to that dispute unless informed consent is obtained from all of the parties to the dispute who had been represented by the lawyer in that matter." Cmt. 9.
- d. "Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree." Cmt. 13.
- e. "For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to

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"Back to Basics: Entity Formation from A to Z"