THE RIGHT WAY TO START A SOLO PRACTICE

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I. INTRODUCTION

The practice of law is business. This CLE provides some advice and information needed to make a decision to start a small or solo firm, focusing on the solo practitioner. During the 2014 Kentucky Bar Association (KBA) Annual Convention, attendees were told that for the foreseeable future, for every two law school graduates, only one would find a job in the legal profession. The number of attorneys at large and medium law firms are shrinking. For many new attorneys, the only way to practice law is to hang their own shingle.

Practicing law is much more than writing briefs and making court appearances. A solo attorney will wear many hats, at least at the beginning: accountant, marketing director, office manager, computer technician, janitor, etc. According to the Small Business Administration’s Office of Advocacy, about half of all small businesses fail in the first five years. Some estimates are as high as 80 percent of businesses failing in the first eighteen months, but it really depends on how the terms “business” and “fail” are defined.

Along with all the drawbacks of practicing law as a solo, also come benefits: You set your own hours and your own rates. You choose which cases to take. You decide the kind of technology to use and change your mind if it does not work out as expected. The motto of a solo practitioner could easily come from the last two lines of William Ernest Henley’s poem Invictus: “I am the master of my fate: I am the captain of my soul.”

II. BUSINESS PLAN

With all new business ventures, the first step should be a business plan. This document is the map for a new business. It is almost always required if a business loan is needed to cover the start-up costs. A good business plan starts with a concise statement that clarifies the business goals, the value proposition you bring, and gives the reader a reason to believe that the business will be successful. Often called the elevator speech portion of a business case, it is the passionate sales pitch and core belief of the firm.

A business plan also needs to be realistic about the market, the competition, and the areas of practice for the firm. Are there enough potential clients to keep you busy? Is the market already saturated with well-respected attorneys in this area? A sports or entertainment law practice will be unsustainable in a small town. If there is only one other attorney focusing on family law in your town, you may be

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The local chamber of commerce should be able to help with the market analysis.

The business plan needs to contain a financial plan, including forward-looking balance sheets, cash flow statements, and profit and loss sheets. This process will help you realistically look at the costs related to running a business, set goals for revenue, and assure backers that you have a vision for the firm. Some business plans are rejected by bankers when the plans omit plans to provide a salary. Unless you have documented a separate revenue stream, e.g., a spouse or life partner who plans to support you during the start-up phase, you will need a personal budget to cover your living expenses. It is essential that you maintain separate books for personal and business expenses. Co-mingling funds is the fastest way to a bar complaint and professional discipline.

III. LEGAL FORM AND NAME OF THE FIRM

While preparing the business plan, a decision on the legal form for the new business must be made. Every kind of business entity has both benefits and detriments. A Sole Proprietorship is easy, but limits growth. A Partnership is fine, as long as the partnership and friendship can withstand the strains of the start-up period. A limited liability company is still relatively easy to create, and offers more protection and separation between the business and personal. A corporation offers great protection, but adds cost and overhead that may be difficult for a solo to manage.

Once legal form of the firm is determined, a name is the next step on the checklist. Both the Kentucky Bar Association's Advertising and Ethics Commissions as well as the Kentucky Supreme Court Rules have restrictions on the naming of a firm. The underlying rule is quite simple. The name of the firm cannot be misleading. A solo practitioner cannot claim to be affiliated with others, if that is not the case (e.g., Jeff Sallee and Associates implies there are associates in the solo's firm). A firm cannot indicate it is a different legal form than it really is. (Partnerships cannot call themselves a PLLC.)

The last step in the naming process is to verify that the name is not already taken. Not only would this be an issue from a trademark perspective, it can be considered to be misleading. Even if the name is not an existing legal firm, you can run into trouble. An attorney named Kimberly Clark or a partnership of Procter & Gamble will receive immediate and unwanted attention.

If the firm is planning to practice across state lines, be certain that the name meets the requirements of all the jurisdictions involved. Although some states allow attorneys to practice under trade names, the KBA issued an ethics opinion that doing so in Kentucky is not allowed.

IV. PHYSICAL LOCATION OF THE FIRM

The business plan already determined the general location for the firm. Although the real estate mantra of "location, location, location" sounds good, a new firm

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may need to find a more affordable location at the beginning. The key features for a new law firm are visibility, accessibility, and parking. If people cannot find the office, have difficulty getting into the office, or cannot park near the office, they are likely to go elsewhere.

For some, a virtual office or home office might be an option. This will depend on the business plan and zoning. Neighbors are likely to cause issues if clients are taking their parking spaces, showing up at odd hours, or if clients get into loud discussions with other parties in front of a personal residence. Another concern for a home office is that you may not want to have all your clients meet you in your home.

Many new firms look for space sharing options. Sometimes another small firm might have an office you could rent. Sharing a building can minimize your office costs, but it can also be rife with ethical concerns. Attorneys sharing an office can be seen by the public as a law firm. Do not use letterhead that includes the names of the other attorneys sharing the office building. If there is a receptionist shared by the group, it is best to have a separate phone number than an extension, and the phone should never be answered in a way that infers the attorneys are acting as a firm. Be cautious about printing to a shared laser printer so you can maintain the confidentiality of the material printed. Be very cautious about sharing computer servers for data storage.

V. TAXATION, ACCOUNTING, AND INSURANCE

Some new attorneys think that once they have a law license, it is the only license they need. That is not true. One aspect of taxation is directly related to the physical location of the firm. Counties and many cities require a business license (occupational tax) to operate in their jurisdictions as a way to tax activities, including the practice of law. These ordinances were being enforced even on attorneys who only had limited contacts with the city or county. This became an issue that the KBA brought to the Attorney General for an opinion. OAG 14-002 was published on June 13, 2014. Although specifically referencing the ordinance in La Grange, it should be applicable to similar ordinances. Attorneys need to "regularly and continuously" practice in the jurisdiction in order to be subject to the license requirement. "Isolated and infrequent" contacts provide an insufficient nexus.

A surprise to many entrepreneurs is that they get to pay twice as much Social Security tax, since they pay both the employer's as well as the employee's portion. Another difference is that as an employee, the employer withholds taxes every pay period. With a firm, taxes are paid on a quarterly basis. Getting the taxation and payment processes in place is something that should not be taken lightly. Failure to do this right will result in significant tax penalties. Most firm and practice management software either provide accounting features or they integrate into popular accounting packages.

Several forms of insurance may be needed for a small firm. The first kind of insurance to consider is professional liability insurance. The rates differ based on the practice areas. Health insurance is more accessible than ever, even if the costs continue to rise. Renter's insurance can address loss of firm's physical
Business disruption insurance can be helpful in the event of a fire or a prolonged sickness would make it impossible to continue business operations.

VI. LEAVING A FIRM TO START A NEW ONE

Leaving a firm to start a practice can bring some additional headaches. The firm will be concerned about losing clients as well as the attorney. The attorney wants to bring as many clients as possible to the new firm. The KBA's Ethics Opinion E-424 makes it clear that the decision belongs to the client. Both the firm and the attorney have a duty to protect the client's interest.

The attorney and the firm should inform the client that the attorney is leaving the firm and give the client the option to retain the lawyer or stay with the firm. The client can request the files be given to the attorney, but the firm may need to keep a copy of the records. The client still has a duty to pay the firm for work done and the firm cannot hold the files pending that payment. Work product, however may be retained. If the attorney only did some peripheral legal work or research, then there is an insufficient nexus to require the client notification.

Another thing that the leaving attorney needs to do is to ensure that the attorney has enough client data to perform conflict checks. This does not mean that the attorney should be able to take the firm's entire client database, just enough data to perform conflict checks based on the clients where the leaving attorney provided significant legal representation and the opposing parties.

VII. SETTING UP THE OFFICE

Four bare walls and a floor do not make a very inviting law office. In order to meet with clients in an office, the office needs to appear inviting. This means a desk, chairs, lighting, etc. are needed. Some new firms have made some mistakes with the very basic process for designing their offices. In general, a new firm should consider the basics and their clientele. Hiring an interior designer and purchasing high-end furniture are great ideas if the firm has the capital and an expensive office would be expected by the clients. For most firms, a low key approach is probably best. A new firm with a polished office can lead clients to think that they are paying more for the office than for the legal services.

Years ago, new attorneys needed to start a law library, to purchase lockable filing cabinets, and find an assistant to transcribe notes and do the filing. With the changes in the practice of law, legal research is moving more online, files are stored on servers, and attorneys are creating and filing their own documents. By scanning and filing documents on computers, less paper storage is required. On March 21, 2014, KBA's Ethics Opinion E-437 officially blessed the use of cloud computing for storing confidential client information. The attorney needs to follow the Rules of Professional Conduct and keep the information confidential and ensuring proper supervision. Storing content on the cloud can also reduce a firm's need to provide disaster recovery solutions.

The decision on the "right" computer to buy or the "right" software is somewhat personal. The essential decisions come down to budget and to the level of comfort with the systems. In addition to a computer, other needed hardware
includes a printer, a scanner, and a copier. Increasingly, multifunction devices are available that combine these features. Fax machines are rapidly disappearing as are desk phones, but a central phone line and fax may still make sense in the near term.

For software, the key considerations are practice management software, accounting software, and a basic office suite. Simply purchasing the software packages is not enough. For a small firm or solo practitioner to compete effectively against larger firms, productivity is essential. To be most productive with software packages, attorneys need to spend time training.

Although an attorney may feel entirely comfortable with low cost software options, it is important to consider that clients will be exchanging documents with the firm. The need to be able to read eDiscovery documents may also lead the attorney to buy a more robust office suite to be effective. The KBA provides access to CaseMaker, but it may make sense to set up a Westlaw or LexisNexis account for legal research.

VIII. MAKING MONEY

Now that a firm has a place to conduct business, revenue is needed to keep the doors open. The firm needs to have a marketing plan and spend some funds on advertising to bring in clients. The market research should have indicated what kind of rates are customary in the region. Some work can be done by flat fees. For very new firms with limited capital, contingency fees cases can be risky.

One possible revenue stream is court-appointed work. The pay may not be in line with the expectations of a new lawyer, but this work can help new attorneys make ends meet. This work also provides new attorneys with experiences. Doing a good job with these clients will also bring in referrals from friends and acquaintances of the people helped through these appointments.

It is common for new attorneys to contract with other firms in the area to provide legal services on a project basis. The contract work is done under the supervision of the hiring attorney, and conflict checks will be needed for the work. The contract attorney is not the attorney of record and the client relationship remains with the hiring lawyer.

"Of counsel" arrangements are another possibility for new attorneys. These relationships often develop as a result of long-term quality contract work from an attorney. While a contract attorney performs mostly behind-the-scenes work, an "of counsel" attorney may have a wider variety of relationships with the other firms. In these relationships, the "of counsel" attorney may even appear in the firm's letterhead. The attorney can maintain a private practice while continuing to take work that the larger firm does not have staffing to manage. Sometimes extended "of counsel" arrangements can result in the attorney being hired into the larger firm.
IX. CLIENT DOCUMENTATION

Before meeting with new clients, ensure that you gather enough information to do a conflict check. Failure to do this before meeting to discuss the merits of a case could not only lose you the prospective client, but prevent you from representing a current client in a matter that conflicts with the prospective client. Almost every practice management software package includes a conflict check feature. The client intake process should include a form that the client completes before meeting with you.

Along with the client intake form, every attorney should have at least one client engagement letter form. Do not provide any legal advice without an engagement letter that specifies the scope of the engagement. If the meeting with the client does not go well, an attorney should send a form letter to ensure that the client is aware that there is no attorney-client relationship based on the meeting. If the meeting does go well, send a letter confirming the scope of the engagement, the rate structure, client and attorney expectations, and what steps could lead to a dissolution of the attorney-client relationship. After the legal services have been provided, send a disengagement letter to thank the client and let the client know that the legal representation has concluded. Encourage the client to return if they need legal services in the future.

The primary rule with any client arrangement is to get at least a retainer up front. These funds should be placed in a client trust account. The quickest way to insolvency is for attorneys to work without payment. The quickest way to professional discipline is to mix client and firm funds. Since the engagement letter should address fee arrangement, it should be clear the amount needed to begin the case and the points where additional payments are needed.

When first starting out, a new firm will usually do their own accounting. It is common for a firm to hire an accountant to set up the books or software, and even reconcile the books on a monthly or quarterly basis. If an accountant is used, the attorney must be diligent in protecting client confidentiality.

Regardless of who is doing the account payable work, it is important to send a bill every month for active cases. Regular billing is important for many reasons. It informs the client of the action taken on their behalf. It keeps the case in the mind of the attorneys, even if the case is a slow-moving case. It also improves the cash flow. Billing more frequently is unproductive. If the case draws down the retainer rapidly, work with the client to increase the amount. If billing is less frequent than monthly, it could upset the client with sticker shock.

If a client is unwilling or unable to pay, it is important to discover that early in the case. If you continue to provide legal services, knowing that the client is unable to pay, it is unlikely that the situation will change as the case progresses. It looks bad when an attorney tries to use a collection agent or sues the client for unpaid fees. Most clients seem reluctant to pay for legal work. The attorney will be questioned about every charge. The contingency fee will be seen as too high. Without clear communication throughout the case and without regular billing, the process of receiving payment for services is tough. If a settlement check is to be made to the client, ask that the firm also be a party to the check. This requires
both the client and the firm to endorse the check. Another option is for the settlement to be deposited in the trust account.

The transfer of funds from the trust account to the firm’s operating account is part of the billing process. Never take money directly out of the trust account to pay a firm’s expenses. While the money is in the trust account, it belongs to the clients, not the firm.

X. MARKETING AND BUSINESS DEVELOPMENT

In Kentucky, law firms must adhere to the rules of the Attorney Advertising Commission as defined in SCR 3.130(7.01) through 3.130(7.60). The purpose of this CLE is not to dive into those rules. Advertising is only one aspect of marketing. Before going forward with an advertising plan, attorneys must ensure that they are meeting the advertising requirements.

When considering where to spend the firm’s advertising budget, both new and old advertising venues should be considered. The business case defined the target market for your services. Do these clients read the newspaper? Do they have Internet access? Do you have the time to maintain a firm web site?

Professional organizations are a source of new business leads. Being a member of the local bar can give you access to the lawyer referral service as well as contacts with other local attorneys. Participation in a KBA Section or Division can give you additional exposure, which can also lead to referrals. Joining a business organization like Kiwanis or the Chamber of Commerce can give you access to potential business clients.

One popular marketing model divides the process into four phases called moments of truth.4 The first and second moments were developed by Procter & Gamble. Google added the zero moment. Pete Blackshaw, a former P&G employee, created the third moment.

From a legal services perspective, the Zero Moment of Truth is the point where the potential clients are determining their needs and where to go in order to find out how to meet those needs. Attorneys need to consider where their family law, personal injury, etc. clients would likely look for an attorney when they need one.

The First Moment of Truth is the point where the client first encounters the advertising material created by the firm to entice new clients. Will the TV spot be well received, or is it considered tasteless? Is the firm’s website engaging, or does it seem stale and dated? If the client does not respond to the advertisement, the relationship ends before it can truly begin.

The Second Moment of Truth is the point where the client meets with and uses the attorney’s legal services. The client’s experience will determine if the

relationship will continue or if the initial experience did not satisfy the client and is the end of the relationship.

The Third Moment of Truth is the point where clients transition from satisfied customers to enthusiastic supporters. These clients will share their experiences with others. This is often done online. This can be an issue for attorneys because the clients could call an attorney an expert in social media. It is also possible that the clients are so dissatisfied that they publish negative content. Attorneys are quick to jump on negative online comments as libel and sue their former clients.5

XI. HIRING STAFF

Most new firms do not have the capital or income stream to hire staff. The business plan should contain a section setting targets to achieve before starting the hiring process. The chief requirement for hiring someone is that the firm is showing a profit, after salaries, to cover the additional expenses: payroll, taxes, insurance, training, additional equipment, etc. Before hiring your first employee, work with an accountant to ensure that the accounting processes are set up to handle these needs. Do not forget the need to complete IRS I-9 forms for new employees.

It is also important to have an employee handbook, or at least a documented set of policies and processes for the attorneys. This is especially important for attorneys due to the requirement to adequately supervise employees and because the employees will have access to confidential client information. Good job descriptions are also needed to clarify the expectations of the employees.

XII. SUMMARY

A. Business Plan

• Reason to believe – elevator speech
• Areas of practice
• Market research
• Competitive analysis
• The Program - Compelling biography of the players
• Measures
  ○ Number of clients
  ○ Number of cases
  ○ Practice areas

• Business Model - Revenue
  ○ Services provided
  ○ Client profile
  ○ Advertising plan

• Anticipated Costs
  ○ Rent
  ○ Legal research plans
  ○ Salaries
  ○ Utilities

• Start-up Funding
  ○ Cash reserves
  ○ Credit sources

• Projected Financials (Forward Looking)
  ○ Profit & Loss Statements
  ○ Cash Flow Statements
  ○ Balance Sheets

B. Law Firm and Name of the Firm

• Deciding on business format
  ○ Sole Proprietorship
  ○ Partnership / Limited Liability Partnership
  ○ Professional Limited Liability Company / Limited Liability Company
  ○ Professional Services Corporation

• Naming Issues
  ○ Ethical issues
  ○ Intellectual Property

C. Physical Location of the Firm

• Home-based options
• Space sharing and related ethical issues
• Facilities: Rent vs. Own, Parking, etc.
• Local/County Business License

D. Taxation and Accounting

• Business License / Occupational Tax
• Taxes
• Insurance

E. Leaving a Firm to Start a New One

• Notifying the clients
• Ownership of the client files
• Ensuring accounts are paid
• Conflict check information

F. Setting up the Office
• Furniture
• Paperless office – what’s the professional responsibility risk?
  ○ Security
  ○ Cloud computing
• Paper Files
  ○ Information retention and destruction
  ○ Storage (on and off site)
• Hardware: Computer, Phone(s), Printer, Scanner, Fax Machine
• Software: Office Suite, Billing Software, Matter Management, Legal Search Tools
• Disaster Recovery

G. Making Money
• Of Counsel arrangements
• Court appointments
• Profitability
• Rate
• Hours

H. Client Documentation
• Engagement and disengagement letters
• Conflict checks
• Billing practices
• Collection techniques

I. Marketing and Business Development
• Advertising rules
• Positioning your practice
• Advertising methods
  ○ Old: Yellow Pages, Newspaper, Radio, TV
  ○ New: Firm website, social media, Avvo, LinkedIn
• Professional Organizations
  ○ Local Bar
  ○ KBA Section
  ○ Social Organizations
• Marketing 101
  ○ Zero Moment of Truth (from Google)
  ○ First Moment of Truth (from Procter & Gamble)
  ○ Second Moment of Truth (from Procter & Gamble)
  ○ Third Moment of Truth (from Pete Blackshaw)

J. Hiring Staff

• Office Manual (Policies & Procedures)
• Office Manager/assistant

K. Additional Resources:

• The ABA’s How to Build and Manage a Practice series, ABA