

## LEGAL BRIEF

Understand All the Legal Aspects of Partnerships and Independent Contractors in your Practice  
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Should I take on a partner or associate? For those just starting out and want to minimize risk or are expanding their practice, this is a question you may ask. There are general terms you should know about the different types of partnerships and independent contractors, and how they are formed.

### **General Partners**

General partners (GPs) are two or more individuals or co-owners of a business for profit. Each general partner assumes management duties and full personal liabilities of the debts of the partnership. The two main elements of a partnership include:

1) Community interest in the business and sharing of profits. A partnership engages in a continuous business for a definite period of time, usually more than 1 year. This is not to be confused with a joint venture, where owners share profits. A joint venture is usually formed for a single transaction or a specific period of time and is more limited in scope. It can become a partnership with no real consequences, as the rights and liabilities of the joint venture are the same as general partnerships in most aspects.

2) Aggregates of the individual partners—State laws differ in that some treat the partnership as an entity, apart from the individual GPs. Others hold that a partnership can be sued as an entity, but not in the firm name. Some state laws allow GPs to be sued as individuals of the partnership, while other states allow partnerships to be sued in the firm's name. Generally, if the firm is sued, the individual GPs will also be named in the suit. Check your particular state laws regarding partnerships.

Formation of a general partnership: Property rights, unless agreed upon, will be the property of the partnership. The chief criteria for partnership property, is whether the GP intended to devote the property to the partnership. Any and all property agreed to, originally brought into the partnership, and acquired or purchased is partnership property.

Each GP has certain partnership rights: specific property, interest in the partnerships, and participation in management decisions. Each GP has equal rights of possession of property, which is usually not assignable, except to other partners. A GP's interest in the partnership are sharing of profits, and assuming liabilities/debts. Creditors of individual partners generally have no right to attach partnership assets.

A written agreement is usually not necessary to form a partnership. However certain written agreements are required for the partnership to be effective: 1) mandatory continuance of the partnership for a period of 1 year or longer; and 2) authorizes GPs to deal in real property and contract issues. If the partnership has a fixed term that is agreed upon, then it is valid until the expiration of the specific term. If there is any prior dissolution of the partnership in bad faith before the end of the term, it is considered a breach of the partnership. If a new GP is going to be considered to join the partnership, all GPs must agree.

Sometimes disputes arise in partnerships as to whether or not there is a partnership. In such cases, the courts attempt to find the intent of the parties as expressed by their acts or agreements. Joint ownership of property is not necessary to establish a partnership, but the profits shared for the use of the property is. The contribution of capital or sharing gross income may not form a partnership, but the sharing of profits from the partnership is strong evidence that it may exist. There are exceptions to sharing of profits, such as bonuses or wages to employees, rent to landlords, interest on loans or consideration for sale, and the goodwill of the partnership.

Each GP has a fiduciary duty to each other in the areas of accounting in any profits derived personally from transactions connected with the formation, conduct, and liquidation of the partnership. A GP does not have the right to engage in any competitive business without the

consent of all GPs. Each must devote full time and exclusive services to the partnership business, as the GP's time is considered an asset of the partnership.

Most GP disputes arise over accounting issues. Generally, there can be no action by law by one GP against another. The individual partner can bring an equitable suit for dissolution and/or accounting. However, there are a few exceptions in which a suit may be filed, such as 1) if there are no complex accounting issues involving partnership transactions; 2) when it is not related to partnership business; 3) if there is fraud committed by GPs; and 4) during conversion of assets by a partner of the GP.

**Dissolution of the general partnership:** The dissolution of a partnership is defined as any change in the relationship of any particular GP ceasing to be associated with the partnership. However, the partnership continues until all partnership affairs have been completed or the end of the partnership term has expired. The causes for dissolution are: 1) expiration of the term; 2) expulsion of a GP for bad faith as set forth in the agreement; 3) choice of GP to dissolve partnership in good faith; 4) death or bankruptcy of any GP; 5) court decree, insanity, or misconduct by breach of the agreement.

### **Limited Partnerships**

Limited partners (LPs) make a contribution of cash or other property to the partnership, but have no active management, and whose liabilities for debts are limited to their contribution. Maximum loss of a limited partnership in the business is usually in the amount of their investment. If an LP takes on any management role, they become liable like a GP.

LPs' rights are essentially the same as GPs, except they have no rights to management decisions and no access to books and records of the partnership, or any accounting business of the partnership. A LP may lend money and transact business with the partnership. Unlike a GP, a LP's interest in the business may be assignable.

**Formation of a limited partnership:** A limited partnership must execute a certificate outlining the name of the partnership, address, all partners' names, and capital and property contribution. The certificate must designate which partners are general or limited and their respective rights and duties. A copy must be filed with the clerk of the court in the county where the business is located. In some cases, a copy must be filed with the Secretary of State's Office in the state the business is located. In addition, the necessary paperwork has to be filed with the Internal Revenue Service if applicable. The purpose of the certificate is to give all potential creditors notice of the limited liability of the limited partners.

**Dissolution of a limited partnership.** Dissolution occurs upon insanity, death, or retirement of any of the GPs. Death of a LP does not dissolve the partnership. Instead the decedent's executor is given all the rights of the LP to settle the estate.

### **Independent Contractors**

An independent contractor (IC) is one who renders services in the course of an independent occupation that has contracted with an employer only as to the results to be accomplished. Tort liability of the employer for employee conduct usually does not apply to ICs. An employer may be held liable for the results ordered from an IC, and many times, the extent of control by the employer is disputed or unclear.

These factors are relevant to the determination of an IC: 1) extent of control of the employer over the IC; 2) whether the IC is engaged in an occupation or business distinct from that of the employer; 3) whether the work is usually done under the direction of the employer without supervision; 4) whether the employer supplies the work tools and location for the IC; 5) length of time the IC is employed; 6) method of payment (by time or job); and 7) degree of skill of the IC.

Frequent problems occur when chiropractors are hired by the employer to treat a third party, the patient. If the IC is negligent, the employer is liable. When the services of a chiropractor are primarily for the benefit of the employer rather than the treatment of a third party, the chiropractor is still considered an employee, not an IC, with the employer liable for the actions of the employee. Both these are considered an employee-employer relationship where the employer is liable.

Most courts hold that doctors or lawyers are ICs even though employed by an employer. The rationale is that the practice of chiropractic is a skilled art, and it would be incompatible to say that chiropractors are subject to control of another.

If the doctor is an IC, and the employer is not considered liable for a negligent act, some courts have held the employer is liable in the selection of the chiropractor to perform the services or job if he commits a negligent act. CP

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Due to varying differences from state to state concerning partnerships, the information in this article is not intended or construed as legal advice. Check your state laws governing partnerships and independent contractors.