LIMITED LIABILITY PARTNERSHIPS: 
NEED ONLY PROFESSIONALS APPLY?

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INTRODUCTION

Over the last several years, the Nebraska Legislature has given Nebraska businesses and legal practitioners a strong dose of alphabet soup when it comes to business entities. First came L.L.C.s (Limited Liability Companies), next came the RMBCA (Revised Model Business Corporation Act), and most recently the RMNCA (Revised Model Nonprofit Corporation Act) and L.L.P.s (Limited Liability Partnerships). For this, we can primarily thank the vision and efforts of Senator Douglas A. Kristensen of Minden who sponsored each of the referenced laws as priority legislative bills. Certainly, these changes have finally moved Nebraska business into the 20th Century.

Although all of the legislation modifying Nebraska’s business statutes probably deserve further discussion in a forum such as this, the focus of this article will be on limited liability partnerships. Effective July 18, 1996, Nebraska businesses and practitioners were free to choose L.L.P.s as a form of business entity. This Article will analyze the development of limited liability partnerships and legal issues.

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3. L.B. 681, 94th Leg., 2nd Sess., 1996 Neb. Laws 190. Sections 1 to 177 of LB 681 constitute the new Nebraska Nonprofit Corporation Act, which is based upon the Revised Model Nonprofit Corporation Act, and will take effect as of January 1, 1997. Sections 198 to 214 of LB 681 contain the provisions relating to limited liability partnerships. Although sections 198 to 214 may be more accurately described as an amendment to the Uniform Partnership Act, those sections will be referred to generally as the “Nebraska Limited Liability Partnership Act.” The remaining sections of LB 681 amend other business entity statutes which do not impact the topic of this article.
4. A “priority” bill assures that the bill will be heard by the appropriate committee ahead of non-priority bills in committee and assures, if the bill is advanced out of the committee, that it will be heard by the Unicameral ahead of non-priority bills. See Nebraska Unicameral Rule 5, § 5. In each legislative session, each state senator has one priority bill, each committee has two priority bills and the speaker of the Unicameral has twenty-five priority bills. Id. The Unicameral is in session for ninety “legislative days” in odd-numbered years and sixty “legislative days” in even-numbered years. See NEB. CONST. art. III, § 10.
5. Sections 198 to 214 of LB 681, Laws 1996, were not subject to the emergency clause in the bill and, therefore, became effective three months after the adjournment of the 1996 legislative session, which occurred on April 18, 1996. L.B. 681, 94th Leg., 2nd Sess., § 215, 1996 Neb. Laws 190, 251.
which have arisen or may arise surrounding L.L.P.s; and will en-
deavor to determine the short and long-term usefulness of L.L.P.s as a
planning tool.

I. THE CRASH COURSE ON LIMITED LIABILITY
PARTNERSHIPS

A. What Are They?

Limited liability partnerships ("L.L.P.s") are a relatively new
business entity. L.L.P.s attempt to entice the prospective user with
the two darlings of business and tax planning: flow-through taxation
and limited liability.

At its core, a limited liability partnership remains a general part-
nership. A partnership is "[a] voluntary contract between two or more
competent persons to place their money, effects, labor, and skill, or
some or all of them, in lawful commerce or business, with the under-
standing that there shall be a proportional sharing of the profits and
losses between them." The operations of a partnership have always
been, and continue to be, taxed at only one level, that being the indi-
vidual tax brackets of the partners (e.g., flow-through taxation). As
will be discussed further in this Article, the limited liability provided
by statute for limited liability partnerships should not change or mod-
ify this flow-through taxation.

Obviously, "limited liability" was one of the catalysts for the con-
cept of limited liability partnerships. All business owners desire to
limit their "liability" in whatever legal manner possible. Although
there are ways to provide protection against liability (e.g., insurance),
a shield against liability is considered most desirable if obtainable.
Although limited liability partnerships, now available in Nebraska,
provide "limited liability," it is more limited than is available through
other business entities. As a result, a key question which will be
addressed by this Article is whether the limited liability available
through the use of a limited liability partnership in Nebraska is suffi-
cient to make L.L.P.s a useful business form.

7. See infra Part III.
8. BLACK'S LAW DICTIONARY 1120 (8th ed. 1990). Section 67-306 of the Nebraska Revised Statutes defines a partnership as "[a] partnership is an association of persons organized as a separate entity to carry on a business for profit." Neb. Rev. Stat. § 67-
306 (Reissue 1990).
10. For example Limited Partnerships retained their flow through taxation attrib-
utes despite their limited liability. See infra notes 56-59 and accompanying text.
11. See infra notes 25-27, 76 and accompanying text.
B. What is the Genesis?

As noted above, the first limited liability partnership act was enacted by the State of Texas.12 L.L.P.s are now available virtually throughout the United States.13

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12. See supra note 6 and accompanying text.

13. As of the writing of this article, the author found that 44 states, including Nebraska, and the District of Columbia, had adopted limited liability partnership statutes. As with Nebraska, the Limited Liability Partnership “Acts” in other jurisdictions were adopted generally as amendments to the partnership laws of those jurisdictions. The provisions are, therefore, codified at scattered locations throughout the general partnership and related statutes. To follow is a list of the states (and the District of Columbia) and the general location of the statutes where the Limited Liability Partnership “Act” can be found in each jurisdiction:

- Alabama (Uniform Partnership Act of 1996, No. 96-528, 1996 Ala. Acts 796 (effective Jan. 1, 1997);
- Idaho (Idaho Code §§ 53-302 to -504 (Supp. 1995));
- Iowa (Iowa Code Ann. §§ 486.2-46 (West Supp. 1996));
- Minnesota (Minn. Stat. Ann. §§ 319A.02-.12 (West 1996));
- Missouri (Miss. Code Ann. §§ 79-12-3 to -177 (Supp. 1995));
- New Hampshire (Act effective Aug. 9, 1996, ch. 212, 1995 NH H.B. 580);
- North Dakota (N.D. Cent. Code §§ 45-22-01 to -27 (Supp. 1995));
- Ohio (Ohio Rev. Code Ann. §§ 1775.05-1777.03 (Banks-Baldwin 1994));
- Rhode Island (Act of Aug. 6, 1996, ch. 96-270, 1995 RI H.B. 8082));
- South Dakota (S.D. Codified Laws §§ 48-1-1 to -111 (Michie Supp. 1995));
- Utah (Utah Code Ann. §§ 48-1-1 to -48 (Supp. 1995));
C. How Did They Come About?

As the title to this Article indicates, it would be hard to suggest that limited liability partnerships were developed for a reason other than the protection of professionals, most specifically lawyers and accountants. Historically, many law and accounting firms have operated through general partnerships. Although the rationale for such firms operating as general partnerships may not be well documented, it probably relates to the fact that the previously available options for business entity forms never seemed to provide any other viable option, especially if the firms had multi-state and/or international operations. The corporate format left an impossible maze of rules and restrictions. Limited partnerships were not an option because most, if not all, of the partners were active in the management and control of the business, and a limited partner loses limited liability protection if he or she "participates in the control of the business." Even the limited liability company probably seemed inappropriate for much the same reasons (if not even more so) as those set forth above, relating to corporations.

As previously noted, limited liability partnerships are at their core, partnerships. In fact, the Nebraska Limited Liability Partnership Act amends the Nebraska Uniform Partnership Act. The limited liability partnership provided professional organizations with an opportunity to obtain some limited liability even if the benefits were not yet consistent throughout the country or internationally. Even if a state did not recognize the limited liability aspects of limited liability partnerships, these jurisdictions would recognize the entity as a general partnership for all other purposes.

As is also obvious from the title of this Article, the main question that the author had when hearing of the passage of the Nebraska Lim-

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19. The "formation" process for a limited liability partnership is a simple registration of a general partnership. The unavailability of this registration process in a state or foreign country should not impact the existence or non-existence of a general partnership.
LIMITED LIABILITY PARTNERSHIP Act is whether this business entity form provides a useful opportunity and planning tool for businesses, other than professionals, or whether it simply provides a safe haven for professionals located in Nebraska. The only way that this question can be adequately addressed is to first analyze the new Nebraska Limited Liability Partnership Act, then compare and contrast it with other business entity forms now available in Nebraska, and finally to analyze the issues which may arise in the use of this business entity.

II. NEBRASKA LIMITED LIABILITY PARTNERSHIP ACT

A. LIMITED LIABILITY PROVISIONS

As was previously noted, the term “Nebraska Limited Liability Partnership Act” is probably a misnomer, because the provisions for limited liability partnerships were contained in a legislative bill governing several different types of business entities, including partnerships. The “Act” is an amendment to the Nebraska Uniform Partnership Act, which is contained at Nebraska Revised Statute sections 67-301 et seq. The cogent terms of the Nebraska Limited Liability Partnership Act are contained at Nebraska Revised Statute section 67-315(2)-(4) which provides as follows:

(2) Subject to subsection (3) of this section, a partner in a registered limited liability partnership is not liable directly or indirectly, including by way of indemnification, contribution, assessment, or otherwise, for debts, obligations, and liabilities of or chargeable to the partnership or another partner or partners, whether in tort, contract, or otherwise, arising from omissions, negligence, wrongful

20. The author of the bill, Senator Kristensen, obviously felt that the Nebraska Limited Liability Partnership Act had broad application because he advised his fellow senators as follows in a memorandum:

An LLP may be especially attractive to small businesses and start-up ventures (e.g., corner grocery stores, plumbing supply companies, beauty salons, etc.). This is because LLP's have low start-up costs and the hassle-free advantages of a partnership while affording protection to the owner's personal assets against litigation. Other forms of organization that provide protection for the personal assets of a business owner often carry with them significant costs. Other business forms may require a significant level of sophistication to deal with federal and state tax requirements, corporate filings, director's meetings and minutes, stock issuance and similar types of financial requirements. The owners of many small and start-up ventures often struggle to cope with these many requirements.

Memorandum from Sen. Douglas A. Kristensen to members of the Nebraska Legislature 1 (on file with the CREIGHTON LAW REVIEW).

21. See supra note 3 and accompanying text.

22. Id.
acts, misconduct, or malpractice performed or committed while the partnership is a registered limited liability partnership and in the course of the partnership business by another partner or an employee, agent, or representative of the partnership.

(3) Subsection (2) of this section shall not affect the liability of a partner in a registered limited liability partnership for his or her own omissions, negligence, wrongful acts, misconduct, or malpractice or that of any person under the direct supervision and control of the partner.

(4) A partner in a registered limited liability partnership is not a proper party to a proceeding by or against a registered limited liability partnership if the object of the proceeding is to recover damages or enforce the obligations arising out of the omissions, negligence, wrongful acts, misconduct, or malpractice of the type described in subsection (2) of this section unless the partner is personally liable under subsection (3) of this section.23

It should be noted that the term “registered” is utilized throughout the Nebraska Limited Liability Partnership Act, which reflects the manner in which the entity is formed.

The key provision of the statutory language quoted above provides that a partner is not liable for “omissions, negligence, wrongful acts, misconduct or malpractice” unless that partner is at fault or is in direct supervision and control of the parties involved. Later, this Article will discuss whether limited liability can be beneficial to business ventures other than professionals, and if so, what other issues may be raised.24

The “limited liability” afforded by the Nebraska Limited Liability Partnership Act (the “Act”) is truly “limited” in that it only provides protection against vicarious liability for “wrongdoing” of others not under that partner’s control.25 In this sense, the Act is consistent with the limited liability partnership legislation the majority of states have adopted.26 However, a growing number of states have expanded the concept of limited liability for limited liability partnerships to include the general debts and obligations of the partnership.27

24. See infra text Part IV.
25. See supra note 23 and accompanying text. The Nebraska Limited Liability Partnership Act does not extend limited liability to protect a partner against the general debts and obligations of the partnership.
26. See generally Bromberg & Ribstein, supra note 15, §§ 3.02, 3.03.
27. Alabama, California, Georgia, Idaho, Indiana, Missouri, Montana, New York, Maryland, Massachusetts, Minnesota, North Dakota, Oregon and South Dakota have these types of statutes. See Larry E. Ribstein, Possible Futures for Unincorporated
B. FORMATION OF A NEBRASKA LIMITED LIABILITY PARTNERSHIP

Certainly, of all Nebraska business entities, a limited liability partnership is the easiest to "form." Limited liability partnerships are at their core a general partnership and, as such, they continue to be governed by the Nebraska Uniform Partnership Act. Therefore, the only action necessary to become a "limited liability partnership" in Nebraska is to "register" a general partnership. The registration process is simple. It requires only that the partnership file with the Nebraska Secretary of State an application setting forth (i) the name of the partnership, (ii) the address of its principal office, (iii) the street address of its registered office and the name and street address of the registered agent for service of process in Nebraska, (iv) a brief statement of the business in which the partnership engages, (v) any other matters the partnership determines to include, and (vi) a statement that the partnership is applying for registration as a registered limited liability partnership. A foreign limited liability partnership is required to file a similar application, including, in addition to the requirements of a Nebraska limited liability partnership, (i) the state or other jurisdiction or county in which the foreign limited liability partnership is registered, and (ii) a statement that the partnership is applying for registration as a foreign registered limited liability partnership. In essence, the filing required by a partnership to become a limited liability partnership is less burdensome than the current requirement of county filing and notice for general partnerships.

After registration, a limited liability partnership is required to use the words "registered limited liability partnership" or the abbreviation "L.L.P." or "LLP."
C. Special Provisions

1. Regulatory Oversight

As with the Nebraska Professional Corporation Act and the Nebraska Limited Liability Company Act, the Limited Liability Partnership Act contains a provision which specifically reserves to each regulatory body that licenses professionals in the State of Nebraska the “authority and duty” to

regulate the practice of any profession that is within the jurisdiction of the regulatory body licensing such professionals within the state notwithstanding that the person is a partner of a registered limited liability partnership and rendering professional services or engaging in the practice of the profession through a registered limited liability partnership.34

The language quoted is significant to attorneys and law firms. By way of explanation, the Nebraska Professional Corporation Act specifically provides that a professional may not insulate himself or herself from professional malpractice actions by incorporating under that Act.35 Many attorneys and law firms incorrectly thought that the Limited Liability Company Act would resolve this problem and that they could guarantee themselves limited liability, even for malpractice actions, through the use of a limited liability company entity. Soon thereafter, the Advisory Committee of the Nebraska State Bar Association dashed the hopes of attorneys by ruling that Nebraska attorneys may not limit their liability for malpractice by engaging in the practice of law through a limited liability company.36


Since the limited liability company is a newly designated entity which, by statute, purports to afford limited liability to its members, and recognizing that our Supreme Court, in Rule I pertaining to professional service corporations, has set forth specific requirements for the organization and operation of professional service corporations mandating joint and several liability of PC shareholders, it is the opinion of this committee that Nebraska lawyers should not engage in the practice of law as a limited liability company in this state unless and until the Nebraska Supreme Court enacts rules specifically authorizing practice as a limited liability company. These rules would, in all probability, contain requirements similar to those set forth in the Supreme Court's Rule I governing professional service corporations. In addition, the organizational documents of the limited liability company would have to comply with Disciplinary Rule 5-107(C) and Ethical Consideration 5-24 prohibiting ownership by, association with, or the sharing of management responsibilities with, a non-
It is likely that the Advisory Committee and/or the Nebraska Supreme Court will take the same position with regard to the use of a limited liability partnership by attorneys. By way of explanation, the Nebraska Supreme Court takes the position in its rules governing professional service corporations that shareholders have "joint and several liability" for malpractice actions, regardless of whether a

lawyer, and with provisions of DR 6-102(A) prohibiting the limiting of liability to a client for his personal malpractice.

As can be seen, the Advisory Committee believed that even if attorneys in Nebraska were eventually able to avail themselves of the limited liability company structure, they would not be able to do so in a way which would protect them against malpractice actions. In addition, Paragraph F of Rule I of the Nebraska Supreme Court Rules governing Professional Service Corporations highlights the conviction of the Nebraska Supreme Court in protecting a client's right to pursue a malpractice action, and the protection of clients. It provides for "joint and several liability" for all shareholders. It would, therefore, seem unlikely that the Nebraska Supreme Court would allow attorneys to operate under a limited liability partnership or limited liability company without imposing joint and several liability for malpractice.

The following is the text of Rule I of the Nebraska Supreme Court Rules governing Professional Service Corporations:

PROFESSIONAL SERVICE CORPORATIONS

I.

Lawyers may incorporate for the practice of law under the Nebraska Professional Corporation Act, providing that such corporations are organized and operated in accordance with the provisions of this Rule. The articles of incorporation of such corporation shall contain provisions complying with the following requirements:

A. The corporation shall be organized solely for the purpose of conducting the practice of law only through persons qualified to practice law in the State of Nebraska.

B. The corporation may exercise the powers and privileges conferred upon corporations by the law of Nebraska only in furtherance of and subject to its corporate purpose.

C. All shareholders of the corporation shall be persons duly licensed by the Supreme Court of the State of Nebraska to practice law in the State of Nebraska, and who at all times own their shares in their own right.

D. Provisions shall be made requiring any shareholder who ceases to be eligible to be a shareholder to dispose of all his shares forthwith either to the corporation or to any person having the qualifications described in paragraph C above.

E. The president shall be a shareholder and a director, and to the extent possible all other directors and officers shall be persons having the qualifications described in paragraph C above.

F. The articles of incorporation shall provide and all shareholders of the corporation shall be deemed to agree by virtue of becoming shareholders or members, that all shareholders or members shall be jointly and severally liable to the extent that the assets of the corporation are insufficient to satisfy any liability incurred by the corporation, for the acts, errors and omissions of the shareholders or members and other employees of the corporation or association arising out of the performance of the professional services by the corporation or association while they are shareholders or members to the same extent as if the shareholders were practicing in the form of a general partnership.

G. A corporation which discontinues the practice of law may nevertheless continue in operation for an additional period of up to 2 years for the purpose of dissolving and winding up the administrative business of the firm.

Id.
particular shareholder committed the malpractice or was supervising or in control of the employee committing the malpractice.\textsuperscript{37} If the Advisory Committee and/or the Nebraska Supreme Court took a consistent position with respect to limited liability partnerships, the "limited liability" provided by limited liability partnerships would be nullified, and the registration of a partnership of lawyers under the Nebraska Limited Liability Partnership Act would be largely irrelevant.\textsuperscript{38}

2. \textit{Initiative 300}\textsuperscript{39}

As most legal practitioners in Nebraska are certainly aware, the Constitution of the State of Nebraska provides that, "[n]o corporation or syndicate shall acquire, or otherwise obtain an interest, whether legal, beneficial, or otherwise, in any title to real estate used for farming or ranching in this state, or engage in farming or ranching."\textsuperscript{40} The definition of "syndicate" in the constitution includes only limited partnerships and specifically excludes general partnerships.\textsuperscript{41}

In the Nebraska Limited Liability Partnership Act, the Nebraska Legislature includes a provision that provides specifically as follows:

A limited liability partnership is a syndicate for purposes of Article XII, section 8 of the Nebraska Constitution, except that a registered limited liability partnership in which the partners are members of a family, or a trust created for the benefit of a member of that family, related to one another within the fourth degree of kindred according to the rules of civil law, or their spouses, at least one of whom is a person residing on or actively engaged in the day-to-day labor and management of the farm or ranch and none of whom are non-resident aliens, is not a syndicate for purposes of Article XII, section 8, of the Constitution of Nebraska.\textsuperscript{42}

The Nebraska Legislature is attempting to prevent limited liability partnerships from owning farm or ranch land and/or from operating

\textsuperscript{37} Id.

\textsuperscript{38} The registration would be irrelevant because the "limited liability" provided for by the Nebraska Limited Liability Partnership Act would not be available to attorneys in Nebraska for legal malpractice. The Nebraska Supreme Court would apparently have this authority pursuant to the amendments to Nebraska Revised Statute § 67-306 contained at section 203 of LB 681, previously discussed at Part 2 C 1, \textit{supra}, which reserves "jurisdiction" to each "regulatory body," including the Nebraska Supreme Court for attorneys.

\textsuperscript{39} \textit{NEB. CONST.} art. XII, § 8. This provision has become known as Initiative 300 because it was adopted as Initiative Measure No. 300 in 1982, in accordance with the initiative procedure in Nebraska, as provided in the Nebraska Constitution, art. III, § 4.

\textsuperscript{40} \textit{NEB. CONST.} art XII, § 8.

\textsuperscript{41} Id.

\textsuperscript{42} L.B. 681, § 203, 94th Leg., 2nd Sess., 1996 Neb. Laws 190, 246 (codified as amended at \textit{NEB. REV. STAT.} § 67-306(3)).
farms or ranches in Nebraska, unless all partners are family members or a trust for the benefit of family members. Legal practitioners in Nebraska have debated whether a similar provision in the Nebraska Limited Liability Company Act was effective to include a limited liability company in the definition of a "syndicate" under Initiative 300.

It is the author's view that such action is specifically allowed by the final paragraph of Article VII, section 8, which states: "[t]he Nebraska Legislature may enact, by general law, further restrictions prohibiting certain agricultural operations that the legislature deems contrary to the intent of this section."

Although one may argue that the language allowing "further restrictions prohibiting certain agricultural operations" may be less than artful in attempting to include expansion of certain defined terms, it is again the author's view that a reasonable interpretation of that language would include authority granted to the legislature to expand the definition of "syndicate," as it has in the Nebraska Limited Liability Partnership Act.

III. COMPARISON WITH OTHER LEGAL "ENTITIES"

It may be a misnomer to refer to partnerships of any form, including limited liability partnerships, as an "entity." These "entities" are more accurately associations of parties in a common business venture that allows them to use a business title, and related rights and powers, under statutory law. However, for ease of discussion, business operation formats allowed by Nebraska statutes will generically be referred to as "entities."

In determining what business form to use for a business venture, the options must be carefully considered. Although the author believes it is beyond the scope of this Article to provide a detailed analysis of all of the considerations in choosing a business entity, a brief discussion of available business entities and a comparison among them may be beneficial in the ultimate discussion of this article as to the usefulness of limited liability partnerships in business planning.

A. CORPORATIONS

The best place to begin the discussion of a comparison of various business entity options is with corporations. Corporations, other than corporations which are authorized to qualify under Subchapter S of the Internal Revenue Code of 1986, as amended, are subject to "double taxation." Double taxation means that there is an income tax imposed

43. Neb. Const. art. XII, sec. 8.
on the profit of the business and on dividends to shareholders. Inevitably, business planning has focused on the avoidance of double taxation, and the interest to limit personal liability of the investors in the business.

Corporations generally have six attributes, (i) profit motive, (ii) associates (in the case of corporations, shareholders), (iii) limited liability, (iv) continuity of life, (v) centralization of management, and (vi) free transferability of interest. Because all entities, including partnerships, have the first two attributes listed above, the remaining four attributes can be generally described as the attributes which identify an entity as a "corporation." In determining whether an entity will be taxed as a corporation ("double taxation"), or a partnership ("flow-through taxation", e.g., one tax at the investor level), is determined based upon the existence or non-existence of those "corporate attributes." If an entity has three or four of the attributes listed in (iii) - (vi) above, it will be taxed as a corporation, either because it is a corporation or because it will be deemed an association which should be taxed as a corporation. All four attributes can be important in planning for a business organization. As a result, state legislatures have been left with a maze of decision-making as to business options that they make available to businesses in their jurisdiction.

As noted, a corporation has all four attributes, each of which can be very important in planning; but corporations also carry with them the "evil" of double taxation, unless the corporation can fit within the somewhat restrictive rules for Subchapter S corporations, which provide flow-through taxation. Corporations provide the most broad and recognizable form of limited liability available, which is virtually complete, except for the potential loss of the individual shareholder's investment.

47. Id.
48. Id.
49. See generally 26 U.S.C. §§ 1361-99 (1994). In order to be qualified to make an S Corporation election, a corporation must not have: (i) more than 75 shareholders, (ii) a shareholder that is not a natural person (except certain trusts and tax-exempt entities), (iii) a nonresident alien as a shareholder, or (iv) have more than one class of stock. I.R.C. § 1361(b)(1) (1996).
B. General Partnerships

General partnerships lack all four of the corporate characteristics. Although some centralization of management is possible by agreement among the partners, the other three characteristics are clearly lacking in all general partnerships. First, there is no limited liability. Second, there is no continuity of life because a general partnership is easily dissolved. For example, the death of a partner that is a natural person dissolves a partnership. Finally, there is no free transferability of interest because a partner may transfer their right to receive distributions but may not transfer the actual partnership interest without the consent of other partners. Although a general partnership provides for flow-through taxation, it exposes the partners to joint and several liability for all partnership debts and obligations as well as joint and several liability for wrongful acts and breaches of trust.

C. Limited Partnerships

Limited partnerships provide limited liability for limited partners which is akin to that provided to shareholders in corporations. Limited partnerships also provide for the centralization of management in the general partner or partners. The entities, however, like general partnerships, do not have the corporate attributes of continuity of life or free transferability of interest, and thus enjoy flow-through taxation.

As noted above, the limitation of liability is only provided to some partners, those being the “limited partners.” Each limited partnership must have at least one general partner and each general partner remains fully liable as if they were in a general partnership. As a result, limited liability is not extended to all investors, as it is in a corporation.

51. Oftentimes, partners will name a “managing partner” and vest that person or entity with certain powers to operate the business on a day to day basis.
52. NEB. REV. STAT. §§ 67-313 to -315 (Reissue 1990). Note that partners are jointly and severally liable for wrongful acts and breaches of trust but jointly liable for debts and obligations. See NEB. REV. STAT. §§ 67-315(a), -315(b) (Reissue 1990).
53. See generally NEB. REV. STAT. § 67-331 (Reissue 1990).
57. NEB. REV. STAT. § 67-256 (Reissue 1990).
61. NEB. REV. STAT. § 67-256(b) (Reissue 1990).
Also, probably the most important rule regarding limited partnerships is that limited partners may not participate in the management or operation of the limited partnership or those limited partners will lose their limited liability protection. On the other hand, in corporations, part or all of the shareholders can be fully active.

D. LIMITED LIABILITY COMPANY

Limited liability companies clearly lack two corporate characteristics, continuity of life and free transferability of interest. Limited liability companies attempt to provide full limited liability and provide flexibility on the issue of centralization of management.

Although Nebraska's Limited Liability Company Act has not received a revenue ruling from the Internal Revenue Service confirming that organizations formed under that Act will be provided flow-through taxation, the Act is based generally on other "model" acts which have received such letter rulings. The author understands that it is unlikely that a Revenue Ruling will ever be forthcoming from the Internal Revenue Service, which leads to some level of uncertainty and difficulty with respect to limited liability companies.

E. SECURITIES LAW ISSUES

Although certainly securities laws are outside of the scope of this Article, all legal practitioners need to be aware of the securities law implications of selecting a business entity. Although this Article has focused on the "two darlings of business planning," limited liability and flow-through taxation, securities law implications can be just as important, if not more so. As legislatures have developed new "entities," the issues relating to whether an interest in the entity, a security, have become more complex. By way of example, it has always been generally understood that stock in a corporation and partnership interests in a limited partnership are "securities," while an interest in a general partnership is not a "security."

Limited liability companies raised a different question, however. The Nebraska Department of Banking and Finance took the position that member-managed limited liability companies, those in which the

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members share management equally, are not securities. In contrast, those interests in manager-managed limited liability companies, those being managed by a manager or managers, are a “security.” This position was adopted by the Nebraska Legislature in an amendment to the definition of “security” contained in the Nebraska statutes. Whether limited liability partnership interests should be deemed a “security” for federal or state securities law purposes is an interesting question which will certainly develop an answer over time.

IV. L.L.P.s: A PLANNING TOOL?; EXAMPLES; PUBLIC POLICY ISSUES

A. A PLANNING TOOL?

Certainly, limited liability partnerships provide a true option and planning tool for professionals in the State of Nebraska (except perhaps for attorneys). However, if professionals are the only “industry” in which limited liability partnerships have applicability, the entity will be of limited usefulness to businesses and legal practitioners in Nebraska. The author’s view is that the Nebraska Limited Liability Partnership Act can provide benefits to many businesses.

The inherent beauty of limited liability partnerships is their simplicity. General partnerships are formed by something as simple as an oral agreement or “handshake,” or they can be formed by a complicated legal arrangement with lengthy partnership agreements or other governing documents. In Nebraska, there are no specific legal requirements for the “formation” of a general partnership. There is a filing required at the county level to evidence the partnership, but that process is simple. The additional burden to become a limited liability partnership is also minimal, as previously discussed.

It is appropriate to again look at the language of the Nebraska Limited Liability Partnership Act. The Act specifically shields partners from liability for “omissions, negligence, wrongful acts, misconduct or malpractice performed or committed . . . by another partner or an employee, agent or representative of the partnership,” although

70. The author discussed this issue with Patricia A. Herstein, General Counsel, Nebraska Department of Banking and Finance, on August 28, 1996. Ms. Herstein indicated that the Department had not yet taken a position on whether a limited liability partnership interest should be considered a “security.” For a more detailed discussion of that topic, Bromberg & Ribstein, supra note 13, at § 7.01.
71. See supra notes 34-38 and accompanying text.
73. See supra note 32 and accompanying text.
74. See supra Part II B.
there is no protection from liability for "his or her own omissions, negligence, wrongful acts, misconduct or malpractice or that of any person under the direct supervision and control of the partner."\(^{75}\) It is obvious that the limited liability protection granted by the Nebraska Limited Liability Partnership Act is not comparable to the protection of being a shareholder in a corporation, a member in a limited liability company or a limited partner in a limited partnership.\(^{76}\) However, with the minimal effort required to register a limited liability partnership, a Nebraska attorney would be remiss (and possibly negligent) if they do not at least advise a client or potential client of the limited liability partnership option.

One unfortunate fact which should be noted here is that often individuals who operate through a general partnership vehicle do not seek the advice of an attorney. As noted elsewhere in this Article, often these business formations may be affected by a "handshake." However, when given the opportunity, legal practitioners should make their clients aware of the L.L.P.

One hurdle to the effectiveness of limited liability partnerships would appear to be uncertainty in the business community as to what the L.L.P. is and how it operates. Probably all legal practitioners have dealt with the uncertainties of clients and business representatives in dealing with limited liability companies. Moreover, this uncertainty and difficulty will likely be prevalent with limited liability partnerships.

In order to identify the various issues which might arise with the formation and operation of a limited liability partnership, the author would like to pose a few examples.

B. EXAMPLES OF ISSUES

Example 1: Imagine a family farm which has operated for 50 years, initially as a sole proprietorship by the father and later as a general partnership among the father and his son and daughter. The father operated the farm as a sole proprietorship because he was not aware of potential risks and liabilities, but also because he did not like lawyers. As with many families, the son and daughter retained many of their father's traits, including his dislike for lawyers. They likewise did not understand the potential risks incident to their business. When talking with a neighboring farmer, the father became aware of


\(^{76}\). This is because the Nebraska Limited Liability Partnership Act does not insulate a partner from the general debts and obligations of the partnership. See supra Part II A.
the new entity available called a limited liability partnership, as well as other options. The father was not sure, but he assumed that based on his tax return what he and his son and daughter were currently operating was a "partnership." The concept of "limited liability" intrigued the father.

Notwithstanding his dislike for attorneys, he comes to your office. He explains that he is currently not active in the physical labor or machine operation aspects of the business but still wants you to protect him and his family. He asks you about the limited liability partnership option.

We should, for argument's sake, assume that you implement a limited liability partnership for the family farm by registering their family partnership with the Secretary of State. Did you consider discussing with the father and his children the concept that, in some instances, you may have created a de facto limited partnership? By way of example, if the father is no longer active in the business, other than keeping the books and coordinating purchasing of materials, what happens if the son or daughter injures a hired farm hand through their sole negligence? Is only the son or daughter, whose negligence caused the accident, exposed to a loss of their personal assets? The partnership assets would be exposed to such a liability, but the operation of the terms of the Nebraska Limited Liability Partnership Act would seem to make the other partners and their assets immune from a lawsuit or any claim for damages with respect to that accident. Since the father is not active in the physical labor or machine operation aspects of the business, he is in essence a limited partner for liabilities arising out of operational "wrongdoing." In this family farm context, this may or may not be the intended result, but certainly one that every legal practitioner should consider.

Example 2: Consider a general partnership between two computer programmers which is evidenced by a "partnership agreement" written on a napkin. The partners' goals are to become the next Microsoft but currently all they are doing is performing simple, but specialized, programming functions on a contract basis. In dealing with their customers, it is uncertain as to whether they are truly part of a business organization. For example, they have business cards which include the name of their partnership, but otherwise they appear to be acting independently. They work alone and do not attend business meetings together.

Imagine that they come to you and indicate that their intention is to participate jointly in the business operations and to share equally

the risks of the business operation. You recommend, because it is the new entity in the statutes, a limited liability partnership. You recommend that they should consider restating the terms of their partnership agreement, but indicate that this could be done later. Per your advice, their partnership is registered as required by the Nebraska Limited Liability Partnership Act. Their business cards are changed to include "L.L.P." in the partnership name.

Further assume that one of the partners was involved prior to and after the registration in a project providing specialized program updating for a large company which previously developed and continues to maintain very sophisticated, integrated software which runs its entire business. Imagine that partner makes a mistake in their work, after the registration as an L.L.P., which destroys the only machine readable version of the source code for the company's software. Although the company has its source code in written form, it takes a month to regenerate it in machine readable form, which causes an estimated $1,000,000 in damages. Assume further that there are few partnership assets, and the partner that made the mistake has virtually no assets, while the other partner is independently wealthy and would have the ability to pay the full $1,000,000 in damages.

The first interesting question relates to liabilities among the company, the L.L.P. and its partners. Under general partnership law, the company would be entitled to sue the partnership and both partners. However, because the mistake occurred while the partnership was a registered limited liability partnership, the specific terms of the Nebraska Limited Liability Partnership Act would seem to restrict the suit to the partnership and the partner that made the mistake. Does it matter that the project began before the partnership was "registered" as an L.L.P.? Not only is this an interesting question but it is one for which there does not appear to be a definitive answer. The Nebraska Limited Liability Partnership Act is silent on this issue except for the language that:

a partner in a registered limited liability partnership is not liable . . . for debts, obligations, and liabilities of or chargeable to the partnership or another partner whether in tort, contract or otherwise arising from omissions, negligence, wrongful acts, misconduct or malpractice performed or committed while [emphasis added] the partnership is a registered limited liability partnership. . . .

78. See supra note 52.
The Nebraska statute purports by its terms to provide that the partner not involved in the negligence would not be personally liable for the facts set forth in this example.

Notwithstanding the language of the statute, a reasonable approach would be to determine the appropriateness of sharing of risks and benefits among the parties on a case by case basis. It may be that, under the facts as outlined above, the company that has been damaged is not entitled to protection. That company did not in any manner rely upon the assets of the partner that was not negligent nor did it even know that partner existed. A slight change of the facts, assuming that the company not only knew of the partnership, but required financial statements from each partner, and only gave the contract to the partnership based upon the net worth of the partner that was not negligent, should probably change the result. Certainly, in that circumstance, a court could determine that the rights and liabilities of the parties had been fixed as of the date the engagement began and that those rights and liabilities should not be impacted by a registration, absent specific notice to the company and its acquiescence or consent. That approach would seem to be the most reasonable and equitable.

Assume another slight change in the facts of this example, that being the negligence of the partner "straddles" the registration, in that it began prior to the registration and continued through and after the registration. The example of how that might happen may be better illustrated in another type of a business, such a professional/client relationship. Often, in professional relationships, what leads to the ultimate damage might occur over a lengthy period of time and may even involve more than one identifiable project. This raises an even bigger question as to how L.L.P. registration should impact the relationship.

It is the author's view that parties who are damaged by negligence or malpractice should receive a heightened level of protection, especially considering the lack of certain protections in the Nebraska Limited Liability Partnership Act that are provided in other jurisdictions. Unlike other states, the Nebraska Limited Liability Partnership Act does not require the partnership that is registering under the Act to evidence the maintenance of insurance or segregation of assets to protect against potential liabilities. The statutory language relating to "while the partnership is a registered limited liability partnership" can be adequately interpreted to provide flexibility on these issues. Certainly, a court would be free to determine that the rights and liabilities with respect to a relationship were fixed prior to the

81. See Bromberg & Ribstein, supra note 13, at § 2.06.
registration and should not be modified simply by the unilateral action of the general partnership registering as a limited liability partnership.

This example also raises interesting interrelationship issues involving the partners. Assume that the handwritten partnership agreement includes a general statement as to sharing of "all risks and rewards." This is directly contrary to the limited liability provisions in the Nebraska Limited Liability Partnership Act, but which would control? Certainly, the partner that was not negligent would argue that the registration protects them from any claims for contribution or indemnity from the other partner and/or the partnership, and also that the damaged company is not entitled to collect against them personally. The damaged company may attempt to argue that it is a third party beneficiary of the partnership agreement because it inherently contemplates business relationships and operations, including the type at issue in this example. To the extent the negligent partner loses everything they do have, they would likewise probably attempt to make an argument that they are entitled to contribution or indemnity from the other partner. The non-negligent partner would certainly argue against their partner that the act of registration stated an intent to modify the original agreement and both of the partners had agreed to the registration, which provides for limited liability against risk such as those in question.

There is no definitive answer to this hypothetical problem because the contribution rules in the Nebraska Uniform Partnership Act remain in all cases "subject to any agreement" between or among the partners. This discussion highlights the fact that where a partnership includes written documentation, it needs to be carefully drawn to be consistent with the intended protections of the limited liability partnership registration. This discussion makes it clear that although the registration process is simple, there may be other ramifications of the registration process which will require additional planning by the legal practitioner.

Example 3: Assume that a business engages an accountant that is a friend of the family to do an audit and tax work. The accountant is employed by a limited liability partnership that has been registered for years. The hired accountant is not a partner, nor does the accountant have personal assets of any significance. Assume further that that accountant does all of the work on the file and no partners in the accounting firm are involved. Assume further that the accounting firm has intentionally operated with as few assets as possible in order to

limit its exposure in the event of a claim. The final assumption, which you certainly are waiting for, is that a significant mistake is made by the accountant that ultimately results in the client's business going bankrupt.

Under the facts of this example, the Nebraska Limited Liability Partnership Act would result in the client being left with virtually no recourse. Any judgment that could be obtained against the L.L.P. would have limited benefit because of its limited assets. In addition, any judgment that might be obtained against the accountant involved would be of very little value because they have virtually no assets. Although the other partners of the partnership may have a high net worth, it would appear that there is no avenue available to seek recourse for the damages, other than malpractice insurance that may be maintained by the accounting firm. Obviously under the facts of this example, the new Limited Liability Partnership Act has significant ramifications, particularly in professional/client relationships.

A slight change of facts in this example provides an illustration of another very interesting issue. Assume that the accountant in question did all of the work but throughout the process obtained advice and counseling from a partner in the accounting firm. The partner's involvement was limited, but they certainly were aware of all of the major decisions made with respect to the account. Is this fact enough to qualify the accountant doing the work to be defined as under the "direct supervision and control of the partner"?

Obviously, the definition of the amount of supervision and control that is necessary will need to be left to the courts, and will develop over time. In this regard, it is important to note that the language of the statute is "direct supervision and control" rather than "direct supervision or control." Courts will certainly be swayed by facts and circumstances of individual cases when it comes to the determination of what constitutes "direct supervision and control." Under the modified facts of this example, a court would find the necessary "direct supervision and control" because of the lack of other recourse for the client.

In considering the foregoing question, recall the strength of the Nebraska Supreme Court's conviction on protecting clients in the lawyer/client relationship. 83 It is likely that the Nebraska Supreme Court would attempt to find "facts" which would support a holding that the partner in this example had the "direct supervision and control" to find them liable. This discussion raises a very interesting issue: how the internal operations of entities operating as a limited liability partnership may be impacted by the selection of this form of

83. See supra note 36 and accompanying text.
entity. Certainly, one could believe that this entity choice would lead to an ultimate motivation to be less involved in the work of others. Is that a good thing?

C. Planning Considerations

As noted in this Article, the availability of the limited liability partnerships as an entity option does provide a planning tool which is available to more than just professionals. However, as the above examples illustrate, the very concept of limited liability partnerships alters the time honored understanding of general partnerships as a sharing of all benefits and burdens of a business venture. The variance may be more subtle than with other types of business entities, but it exists nonetheless. Legal practitioners need to understand the implications of a limited liability partnership so that they can properly advise their clients or potential clients as to the issues which are apparent in dealing with a limited liability partnership as compared to a general partnership. This understanding must extend not only to issues among the partners and the L.L.P., but also must include issues as to how the advent of L.L.P.s impacts customers and clients of the businesses choosing to register as an L.L.P. As with all new business entities, the limited liability partnership shifts the legal landscape of rights and obligations.

D. Public Policy Issues

In every instance where limited liability is provided to one or more parties, it inevitably shifts risk and exposure to another party. As the saying goes, "something has to give." Although it would be enjoyable to author an Article debating the public policy behind all forms of entities which provide limited liability, that is beyond the scope of this Article. However, the continued evolution of new business forms which provide limited liability certainly will impact the business environment. The Nebraska Legislature has obviously made the decision that the implementation of more limited liability entities in Nebraska is appropriate. Although that fact may be arguable, Nebraska has certainly been conservative in this regard and was probably left with little choice, considering that the state needs to provide a flexible business environment. Else the state would risk being left on the sidelines for potential business expansions and growth of various entities and businesses.

84. For a detailed discussion of that issue, see N. Scott Murphy, It's Nothing Personal: The Public Costs of Limited Liability Law, 71 IND. L.J. 201 (1995).

85. Id.
The one debate on public policy that is appropriate for discussion in this Article is whether it would be appropriate for the Nebraska Legislature to go further and provide broader limited liability in limited liability partnerships. As noted above in this Article, other states have expanded the limited liability provided to partners in a limited liability partnership to include the general debts and obligations of that partnership. Although certainly one could argue that there are public policy arguments against extending that form of limited liability in this context, the author has a difficult time recognizing those arguments. The professional/client relationship provides the best illustration.

The Nebraska Legislature has determined that it is acceptable to limit the liability of some partners for other partners' negligence in providing professional services. Why then should someone who sells paper and pencils to that professional organization maintain the right to sue partners individually if they do not get paid for their papers and pencils? It seems clear that the protection of clients or other parties who seek the actual services or products of an entity deserve at least as much protection as the business' suppliers or general creditors.

The author would further argue that the expansion of limited liability to all obligations of the limited liability partnership would expand the usefulness of this entity as a planning tool. Certainly, it is the best use of limited liability partnerships remains in the professional organization context without expanded limited liability. The expansion of the limited liability protection to include all obligations of the limited liability partnership would make it more useful and practical for many more types of businesses. Again, it is hard for the author to understand a public policy argument which should prevent the expansion of limited liability, considering the fact that the Legislature has already determined to extend the types of limited liability available through the passage of the Nebraska Limited Liability Company Act and the Nebraska Limited Liability Partnership Act.

To those who might advance an argument that such an expansion of limited liability would simply expose too many additional parties to risk, the simple answer is that the Nebraska Legislature could always consider a segregation of assets or insurance requirement for a partnership that seeks registration under the Nebraska Limited Liability Partnership Act. A consideration of those types of provisions would be appropriate in any event. If the Legislature determines not to expand the limited liability, at least in the professional context, the regulatory body which oversees the professionals should consider

86. See supra note 27.
87. See supra note 81 and accompanying text.
implementation and/or strengthening of insurance maintenance obligations for the members of the profession that it regulates. Although the author has not done an investigation with regard to all of those types of requirements, the continued expansion of limited liability seems to shift enough risks and exposure to justify further consideration of these issues.

V. SUMMARY AND CONCLUSION

When beginning the research for this Article, it was the author's initial view that limited liability partnerships amounted to no more than a windfall for professionals who are able to avail themselves of the limited liability provided by this new brand of partnership. After further consideration, however, the newest business entity allowed in Nebraska appears to provide another valuable planning tool for legal practitioners. Unfortunately, the L.L.P. also adds complication in the analysis of the choice of business entity and the appropriate advice and recommendations to be given to clients.

The author would certainly urge all legal practitioners to advise their general partnership clients of the new option of a limited liability partnership. Also, at the very least, legal practitioners should advise any party that is considering a general partnership as an entity of choice of the option of utilizing a limited liability partnership and its potential benefits and risks. As with anything that is new, it will take time to determine how the L.L.P. will impact the overall business environment, and specifically the business environment in Nebraska, but it is hoped that this Article will provide an initial road map into that great unknown. Finally, the author would encourage the Nebraska Legislature to consider expanding the limited liability protections provided for limited liability partnerships, consistent with other states.