



A REPORT TO MEMBERS OF
THE SOUTH CAROLINA BAR
YOUNG LAWYERS DIVISION

Location, Location, Location: Where Should I Organize My LLC and Why Does It Matter (SC vs DE)?



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There are a variety of reasons why an individual would choose to form a limited liability company (an “LLC”), the most common being the benefit of added liability protection together with tax flexibility. The LLC structure offers multiple key characteristics that business owners find intriguing, but before an owner (also called a “member”) can enjoy the perks of company ownership she must first choose where to organize it.

Perhaps the most important question, then, is not *whether* to form an LLC but *where* to do so.

It doesn't seem as though this determination would find its way to the top of the list when there are seemingly countless other issues at hand to consider when forming a new company, but the question of “location” can actually impact not only the steps for organization, but also the company's governance structure, taxes and fees, annual maintenance, fiduciary duties, and the scope of potential liability. With this in mind, one of the most common questions clients in South Carolina ask is where to form their LLC and, specifically, if they are better off organizing in their home state of South Carolina (SC) or Delaware (DE), which is famed for being uniquely business-friendly. This article highlights the key differences of SC versus DE organization, serving as a short-and-sweet guide to clients across the state who are asking the same question.

South Carolina

South Carolina offers the more afford-

able option, hands down. It costs only \$110 to file the Articles of Organization with the SC Secretary of State. Upon filing, which can be done online or in person, the Secretary's Office instantly confirms the formation of the company and returns the filed Articles almost immediately, time-stamped to that effect. From the time of existence, other notable filing fees are:

- \$110 to amend the Articles of Organization
- \$2 to file Articles of Correction
- \$10 to change the Registered Agent or Registered Office, or both
- \$10 to adopt a Fictitious Name, also known as a “d/b/a”
- \$10 to file Articles of Dissolution

An added bonus, assuming the company defaults, like most, to being taxed as a sole proprietorship or partnership, is the absence of annual reports and fees. (*It is well-known that LLCs offer increased flexibility of taxation as well, allowing owners to elect their companies to be taxed as C-Corps or S-Corps to meet certain business goals. These elections, of course, require annual filings, additional fees, and in the case of an S-Corp election, a carefully crafted operating agreement to meet all of the rather rigid S-Corp rules.*) The absence of annual report filings combined with the low “resource” fees listed above not only mean less overall upkeep for the company's management, but also that the business is cheaper to own and operate in SC than it would be in other states. In short, organizing in South Carolina is a relatively stress-free and cost-effective process that compliments the overall simplicity of LLCs that drives owners to the business structure in the first place.

One thing to note about a South Car-

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olina company is that, while cheaper and easier to manage, the tradeoff is having arguably less corporate case law available should an issue arise with someone feeling particularly litigious. Other states, such as Delaware, are more friendly toward business entities and offer well-developed case law in the event the company—or a member, manager, officer, agent, organizer, or related individual—is named in a lawsuit. That said, while this may be the preferred route for large companies with outside investors and high working capital, single-member and smaller family-owned businesses may find it fitting to avoid the lofty fees and routine filings associated with Delaware and opt instead for the more laid back “home-state” advantage. Each lawyer’s personal familiarity is also an important consideration. Generally, South Carolina lawyers can handle most SC LLC issues, but not many SC lawyers will have the same knowledge of DE law. Finally, another factor to keep in mind is the cost and convenience of litigation. If formed in Delaware, certain LLC matters might need to be litigated in DE courts, which is certainly an added expense, though this may be good or bad depending on whether the business owner is the plaintiff or the defendant.

If your client lives in South Carolina, organizing in her home state creates what is called a Domestic LLC, which can be appealing for a number

of reasons. First, as discussed above, Domestic LLCs are not required to file annual reports in SC; this means less work and no annual state-mandated expenses. Second, as a resident of the state, a business owner may elect to be the legally designated point-of-contact for the business (commonly referred to as the Registered Agent) herself; this eliminates the need to find (or, in many cases, hire) an Agent as would otherwise be required in a state where the owner does not have a valid address. Third, if an SC business owner were to form her company in DE and then qualify it to do business in the Carolinas, she would be filing tax returns in two or more states; this added cost can be avoided by organizing directly in SC. Finally, there is always something to be said about filing the Articles in the state where the client (and her lawyer) feels most comfortable with the statutes, regulations, procedures, forms, and leadership with which—and with whom—she likely has already familiarized herself.

Delaware

Whereas South Carolina has its many benefits, so too does Delaware—albeit for different reasons. It is no surprise that the added liability protections Delaware can offer come a higher cost of doing business. Although DE’s initial \$90 filing fee is negligibly less than its SC counterpart, the state demands higher fees in all other catego-

ries across the board:

- \$200 to amend the Certificate of Formation
- \$200 to file Articles of Correction
- \$200 to change the Office Address or Company Name
- \$50 to change the Registered Agent
- \$200 to file a Certificate of Termination

In addition to these filing fees, Delaware also requires an added \$50 charge if a company’s Registered Agent is located in a different municipality from the LLC itself, as well as a mandatory annual \$300 Business Entity Tax (which also requires filing an annual partnership tax return) that can be met with late penalties that quickly accrue interest. Moreover, an unfortunate side effect of the COVID-19 Pandemic was greater wait times and costs to expedite even routine filings; these range from an additional \$78 for service within 1-2 business days to \$1,100 for a turnaround time of 1-4 hours, and they fluctuate regularly. In contrast, the SC Secretary of State usually provides same-day or next-day service at no added cost. And still, these calculations do not factor in the cost of hiring a professional agency to file routine forms and/or serve as Registered Agent, which Delaware requires if an LLC owner resides out-of-state.

Whereas South Carolina is evidently the more affordable option for forming a company, Delaware certainly embraces the “you get what you pay for” mentality. It is consistently the most popular state in which to organize because it is remarkably business friendly. The state’s robust corporate case law offers increased dependability and foreseeability of outcomes for business owners, making it a highly respected forum among entrepreneurs and potential investors alike. Moreover, DE’s unique Chancery Court is comprised of experienced judges specifically qualified to recognize and handle business law cases; this not only expedites matters but also ensures that outcomes are consistent, predictable, and fair.

What’s more, Delaware may be the right choice if the client knows that her company will seek to raise capital from outside investors, if it anticipates having owners residing across multi-

ple different states, if disputes among owners and managers are foreseeable, or should owners seek to fully waive fiduciary duties that managers and members would otherwise owe to one another. Further, Delaware's expansive, established, and pro-business case law lends greater protection against creditors should a member or manager be sued, or the company file for bankruptcy. Often, Venture Capital (VF) Funds, WE Funds, and other investors feel more comfortable owning and investing in companies when they know increased consistency and greater protections in the face of litigation may be available.

All this said, however, the limitations on a member's personal liabilities will be the same in Delaware as they are in South Carolina. Specifically, members' protections from liability to creditors of the company for torts and other "ordinary course of business" causes will be generally the same, which is one of the primary reasons most business owners choose to organize a business as an LLC or other entity in the first place.

Conclusion

While there are arguments to be made for both jurisdictions, where to organize an LLC ultimately depends on the members' collective needs, business model, management structure, and available resources. On the one hand, the owner of a large company qualified to do business across multiple states with high working capital and outside investors might shrug at the higher price tag, more robust upkeep schedule, and additional state tax returns if it means buying a greater liability shield and the comfort of increased certainty in the courtroom. On the other hand, the single-member or husband-and-wife team of a local family-run business may opt for lesser protections at the preferred lower rates, reduced maintenance schedule, and ease of access to both Secretary of State records and legal counsel experienced with the applicable law. While there is no one-size-fits-all approach, the best way to advise a client on this matter is to fully understand her long-term goals with the company and choose the state that offers the greatest advantages and convenience at most affordable price point.

What's Been Happening?



YLD member Adrian Carter, planned and moderated a panel discussion on the criminal justice system and how to avoid certain situations and social norms as a teenager. The discussion took place in front of over 1100 6th, 7th, and 8th grade students at Southside Middle School. The panel participants included Caroline Lawson with the Florence Public Defenders Office, Captain Darrin Yarborough of the Florence County Sheriff's Office and Susan McGill of Finklea Law Firm/City of Florence.



The 6th Circuit YLD members had an opportunity to celebrate the holiday season by hosting a Christmas party with nearly 100 attendees.

What's Been Happening? (cont.)



The Fifth Circuitry YLD members held a new admittee reception on December 1st at Hickory Tavern.

Stars of the Quarter

Mary Lee Briggs

Ally Burch

Adrian P. Carter

Elizabeth Crane

Taylor Gilliam

Mary Catherine Harbin

Caroline Lawson

Catlin Lee

Jonathan Lewis

Susan McGill

Katie Orville

Chelsea Rikard

Assatta Williams

Letter from the President



Dear Young Lawyers:

I hope this issue of SC Young Lawyer finds you doing well, having enjoyed the holiday season with friends and family. It is no secret that the practice of law can be incredibly stressful, and this time of year can be particularly hectic—balancing busy year-end business obligations and work pressures with personal commitments and an exciting, but sometimes overwhelming, holiday schedule. Please be sure to take care of yourself and make time to truly relax. Check in on your loved ones and colleagues and look out for one another's mental health.

Congratulations and welcome to all of our newly-admitted members! We are thrilled to have you join the South Carolina Bar's Young Lawyers Division. Our Circuit Representatives have been hosting New Admittee Receptions across the state to welcome the new members. As a reminder, newly admitted attorneys are automatically members of the YLD—there is no signup required and membership is completely free. Being active in the YLD is a great

way to meet other lawyers across the state, develop professionally, and give back to our communities.

Whether you are a newly-admitted member or have been a member of the YLD for several years, I encourage you to join one of our 16 committees (six that are targeted to Service to the Bar and 10 that are targeted to Service to the Community). To learn more, check out the YLD page on the Bar website, or feel free to email me. If you have not done so already, please follow us on social media (@scbaryld on Twitter and Instagram; South Carolina Bar Young Lawyers Division on Facebook) for programming/event information and to plug into the YLD.

Our YLD committees and leaders have been busy planning some incredible events and programs during the first half of the bar year. The Voices Against Violence Committee hosted its annual necessities drive, which provides necessities for individuals and their families in domestic violence shelters throughout South Carolina. The Pro Bono and Community Outreach Committee hosted a Family Law Bootcamp, which provided participants with practical knowledge for any law-

yer on topics involving child support, visitation, and divorce. The Protecting Our Youth Committee held a panel discussion at Southside Middle School in Florence, where panelists spoke with more than 1,100 students and discussed the criminal justice system and how to avoid certain situations and social norms that could negatively impact their futures. The Families Forever Committee hosted the Grady Anthony Teddy Bear Drive, during which it collected new or gently used stuffed animals for judges to give to newly adopted children across the state during National Adoption Month in November. These events are only a small sampling of the YLD's activities, and we will have more ways for you to impact your community and opportunities for personal and professional development in the upcoming quarter.

May 2023 be a wonderful year!

Warmest regards,

A handwritten signature in black ink, reading "Paige Ornduff".

Paige Chamberlain Ornduff
YLD President

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