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ORGANIZING THE BUSINESS TO LIMIT LIABILITY

In our observations, far more aviation businesses have failed as a result of poor business practices than from poor aviating. This chapter examines the selection of a form of business organization to protect owners from personal vicarious liability for torts committed by other employees of the business in the scope of their employment. It also examines attitudes, approaches, and practices that we have often seen bring aviation businesses to grief.

The purpose of this chapter is to provide you with an appreciation of the value of selecting and maintaining the appropriate form of business to protect the owners of the business from such liability and to provide you with a practical working knowledge of how to manage a business to avoid the most common and dangerous legal pitfalls.

Forms of Business

The form in which your aviation business is organized is one factor that can be used to control the potential consequences of legal risks inherent in doing business. The primary forms of business organization are:

- sole proprietorship,
- general partnership,
- limited partnership,
- limited liability company (LLC),
- limited liability partnership (LLP), and
- corporation.

Some states also provide for more complex forms of organization generally applicable only to professional practices in law, medicine, etc., or appropriate

for very narrow and complex tax situations not relevant to the context of this book.

While the form of your business cannot protect you personally from liability for your own negligence or intentional torts, it may protect you from:

- vicarious personal liability for torts committed by employees of the business within the scope of their employment, and
- personal liability for the debts of the business.

In a *sole proprietorship*, the business is owned by a single individual who is personally responsible for debts of the business and (under the principle of vicarious liability discussed in the preceding chapter) for torts committed by employees of the business while acting within the scope of their employment. Thus, people who choose to do business as sole proprietors continually risk not only what they have invested in the business but all of their personal assets (including homes, savings, airplanes, cars, and everything else they may own) in the event of an accident that causes injury to others, or difficulty in paying business debts. While the freedom to "be your own boss" afforded by the sole proprietorship is greater than that in any other form of business organization, it comes with a very high risk attached.

The same personal exposure to liability applies to each of the partners in a *general partnership*, and even *limited partnerships* are required to have at least one general partner whose personal assets are at risk for business liabilities (although the limited partners enjoy protection from personal liability similar to that afforded shareholders of a corporation).

Until fairly recently, the *corporation* was the only form of business in which no owner (shareholder) of the business took on the added risk of vicarious personal liability for torts committed by employees of the business or for debts of the business. In recent years, however, states have adopted laws permitting a business to be organized as a *limited liability company (LLC)*, or *limited liability partnership (LLP)*, both of whose owners enjoy the same protection against personal liability as the shareholders of a corporation. (Although relatively new to the U.S., the LLC is hardly a bold experiment, having existed in Europe and South America since the nineteenth century.) Tax considerations of the particular enterprise drive the choice between a corporation, LLC, or LLP as the more appropriate form of business. (A properly formed LLC or LLP, as well as a small business corporation that elects to be taxed as a partnership under Subchapter S of the Internal Revenue Code

—called an "S Corp"—can possess both the limited liability of a corporation and the pass-through tax treatment of a partnership.) However, not even a corporation, LLC, or LLP will protect you from personal liability for the consequences of your own negligence.

Consider this scenario: One of your company's charter pilots is flying the president of your local bank, the most prosperous physician in the county, and a high-rolling investor to the Big City for a meeting. Severe icing is encountered on the approach and the pilot loses control of the aircraft, crashing into a schoolyard full of children playing at recess. There are no survivors aboard the aircraft and many of the children are killed or injured. Assume further that for some reason the accident is either not covered by your aircraft liability insurance policy (more on this in the next chapter) or that the losses are in excess of the amount covered by that policy. If the business is a sole proprietorship or a general partnership, the sole proprietor or general partners can be held personally liable for the pilot's negligence that caused the accident and could lose everything he/they have. If the business is a limited partnership, only the general partner risks being held vicariously liable for the pilot's negligence and losing everything, with the limited partners' maximum risk being that their investment (their share of the business) will become worthless. But if the business is a corporation, LLC, or LLP, its owners (the corporation's shareholders) have no exposure to personal vicarious liability for the pilot's negligence that caused the accident. The worst that can happen to them is that the accident will bankrupt the business so that their investment (stock) becomes worthless.

Obviously, the corporate form, LLC, and LLP afford the best protection against personal liability arising out of vicarious liability for torts committed by a business's employees and for debts of the business. While such protection is a very important consideration in choosing the form of your aviation business, it is by no means the only consideration. Other considerations that also bear upon selecting the appropriate form for your business include costs (particularly legal) of formation, capitalization requirements and sources, ease of transfer of ownership interests, duration, and tax considerations (particularly avoiding double taxation).

Choosing the optimum form for your business before you begin operations is an important risk management step. You should consult both your accountant and your lawyer to help you reach an informed decision. The professions of law and accountancy are very similar to the practice of medicine in that

prevention can be far more cost-effective than subsequent attempts to cure a situation that has been allowed to get out of hand. The initial organization of your aviation business is a prudent occasion to invest in preventive lawyering and accountancy.

Forming and Operating a Corporation

If you choose to incorporate the business, inquire whether your lawyer would be willing to serve as the corporation's *agent for service of process*. If the corporation is sued, this is the person upon whom the process server must serve the Summons and Complaint, the first representative of the corporation to find out about the lawsuit. As mentioned in the previous chapter, your attorney may have only twenty days (and even less under some circumstances) to file an Answer or other pleading with the court. Having your attorney as the corporation's agent for service of process can eliminate the possibility of someone getting a default judgment against the corporation because the Summons and Complaint were not delivered to the corporation's attorney in time.

The *articles of incorporation* are to a corporation as a constitution is to a nation. They are the most basic document expressing what has been created. Although most states allow you to create a corporation by completing and filing a very simple form and paying a small filing fee, you will probably find that the cost of having your attorney draft original customized articles of incorporation is well worth the modest additional cost. When the state accepts your articles of incorporation and issues a *certificate of incorporation*, the legal equivalent of a birth in the family occurs. The law recognizes the corporation as a "person" having rights and an existence separate from and independent of its owners (unlike any other form of business organization). Sole proprietorships and partnerships are considered to be identical to their owners. Similar filing requirements and documentation formalities accompany the creation of an LLC or LLP.

This birth alone, however, may not be sufficient to protect you from personal liability for the torts of the employees or for debts of the business. This is because of the *alter ego doctrine*. Under that doctrine if, notwithstanding the fact of incorporation, you continue to *operate* the business as though it were a sole proprietorship or partnership, a plaintiff's attorney may later be able to "pierce the corporate veil" to reach your personal assets to satisfy liabilities or debts of the business. The key to avoiding such a revolting turn of events is to take great pains to make it obvious to the public, including

customers and suppliers of the business, that they are dealing with a corporation. (The same is true of an LLC or LLP.) This is done by carefully following the "duck rule."

It is said that if you come upon a creature in the wild and it looks like a duck, quacks like a duck, waddles like a duck, and leaves a slippery trail of spoor like that of duck, you may safely assume that the creature is a duck. This is the duck rule. To ensure that people know that they are dealing with a corporation, you must be sure that the business looks like a corporation, quacks like a corporation, waddles like a corporation, and leaves the trail of spoor left by a corporation.

No single factor discussed here automatically determines whether a plaintiff can pierce your corporate veil. The issue of whether the business was really being operated like a corporation rather than a sole proprietorship or partnership is a complex question of fact that the judge or jury will ultimately decide, based on many factors. But ignoring any of these factors increases the risk that a plaintiff's attorney will succeed in piercing the corporate veil to reach your personal assets.

Looking Like a Corporation

Below are some essentials of looking like a corporation.

Showing the Corporate Name

A corporation's "last name" must always be *Incorporated* (or the abbreviation *Inc.*), *Corporation* (or the abbreviation *Corp.*), or *Limited* (or the abbreviation *Ltd.*). (The latter is not the same thing as an LLC or a limited partnership, but is one acceptable way of denominating a corporation.) One of these becomes the legal last name of this new person, the corporation. You always use both your first name and your last name in business dealings. Corporations, LLCs and LLPs must do the same thing. Remember: You're trying to be sure that everyone you're doing business with knows he is dealing with a corporation, LLC or LLP. Every piece of paper that has the business's name on it must include that official last name because that puts the person on notice that he is dealing with a corporation, LLC or LLP. The same is true of signs around your facility, on the aircraft, and on other equipment (Figure 5-1). Wherever the name of the business appears, the entire correct legal name should appear.

Figure 5-1. Although the "Inc." on this FBO's sign looks like an afterthought, it should suffice to put the public on notice that they're dealing with a corporation.

One single sign, website, or piece of paper not conforming to this rule can put your corporate, LLC, or LLP protection in jeopardy. The plaintiff can present that piece of paper as an exhibit at trial and testify, "You can see from this that I had no reason to know that I was dealing with a corporation, LLC, or LLP." This problem most often comes up when a business that began as a sole proprietorship or partnership later incorporates or reorganizes as an LLC or LLP, simply adding Inc., Corp., or Ltd., or the counterpart terms for LLC or LLP, to the previously used trade name. Frugal managers may decide to

use up all the old stationery, invoices, checks, and other printed forms before having the new last name of the business added at the next printing. Others have been known to deliberately omit the new legal last name for aesthetic reasons. Such an approach may defeat the liability limiting purpose of incorporating the business or organizing it as an LLC or LLP.

Once the corporation, LLC, or LLP is formed, every last blank piece of letterhead, form, check, and other office and shop supplies having the old name (which does not reflect the new legal status) should be shredded, then burned. If even one escapes, Murphy's Law ("If anything can go wrong, it will.") dictates that you will see that piece of paper later, at trial, as Exhibit A in the plaintiff's attempt to pierce the corporate veil to reach your personal assets. And update the name on the business's website and any social media pages immediately.

Adequate Capitalization

There is no hard-and-fast rule on how much capitalization (money and assets) is required for a corporation. But the more you strive to keep it an empty shell having no assets exposed to potential claimants, the more likely it is that a judge or jury will pierce that corporate veil to reach your personal assets. Your attorney and accountant can help you decide what assets should be held in the corporation's name, given the nature and circumstances of your particular business.

Multiple Shareholders

While a single shareholder may legally own a corporation, this is another factor a judge or jury could consider as one brush stroke in the big picture of whether it was really being operated as a corporation. Having more than one shareholder makes the business look more like a real corporation to most people.

Quacking Like a Corporation

If your nickname is "Buzz" and you start your business as a sole proprietorship under the trade name Buzz's Flying Service, then later incorporate the business, you need to change your way of talking and writing to people. You must carefully avoid giving them the impression that they're really still doing business with good old Buzz and not with this new faceless corporate person, Buzz's Flying Service, Inc. For starters, make it an office policy that anyone

who answers the telephone now answers it with "Buzz's Flying Service, *Inc.* How may we help you?"

In your business conversations and correspondence, you must change your old style, now taking care to avoid personalization. Back when the business was a sole proprietorship, it was all right to say things like "*My company* can install that new synthetic vision equipment in your plane" or "I can't imagine why you haven't received payment for that last parts invoice but *I'll* take care of that today." If the business is really organized as a partnership, then it's entirely appropriate for you to say things like "*My partner*, Ace, can do an annual inspection for you." But if the business is a corporation, this kind of talk can be the undoing of your protection because it doesn't sound to the listener as though she is dealing with a corporation, but with only you individually or with your partner or partners.

Remember: A corporation is a separate legal entity, a "person" in the eyes of the law, and its customers and suppliers must be put on notice that it is the corporation, not an individual or group of partners, they are dealing with. Thus, it would be more appropriate to say, "Yes, *the corporation* can install that color radar set in your airplane" or "I'll check on why you haven't received payment for that last parts invoice and see if *the corporation* can send you a check for that today." The word *partner* must be banished from your language. You may say, "Our shop foreman, Ace, can do an annual inspection for you." Even if you and Ace are each the holder of 50 percent of the shares of stock in the corporation, you are not "partners." It may be a hard habit to break, especially if you have grown up in the rural West where *partner* often serves as a generic term of friendship or esteem (as in "Howdy, partner.") rather than an expression of a form of business relationship. But if you want to get the most liability protection out of your corporation, you'll eliminate that kind of language.

The Corporate Waddle and the Corporate Spoor

This is a matter of acting like a corporation and leaving a trail of paperwork that shows it. Although a corporation is a person in the eyes of the law, only human persons can do the corporation's work.

How to Sign for a Corporation

Although a corporation can legally enter into a contract, it takes a human person acting on behalf of the corporation to sign the contract and write the

check. If you are that person, you want to ensure that it is apparent to the world that you are signing that contract or writing that check only on behalf of the corporation, as its agent and not personally. There is only one proper format in which to sign anything if you are signing it for the corporation and not individually. This signature block must include three elements: the corporation's full legal name, your signature, and your corporate title (*see* Figure 5-2). If you omit the first or third of these elements, you risk personal liability. On corporate correspondence, if the letterhead shows the corporation's full legal name, that need not be repeated in the signature block.

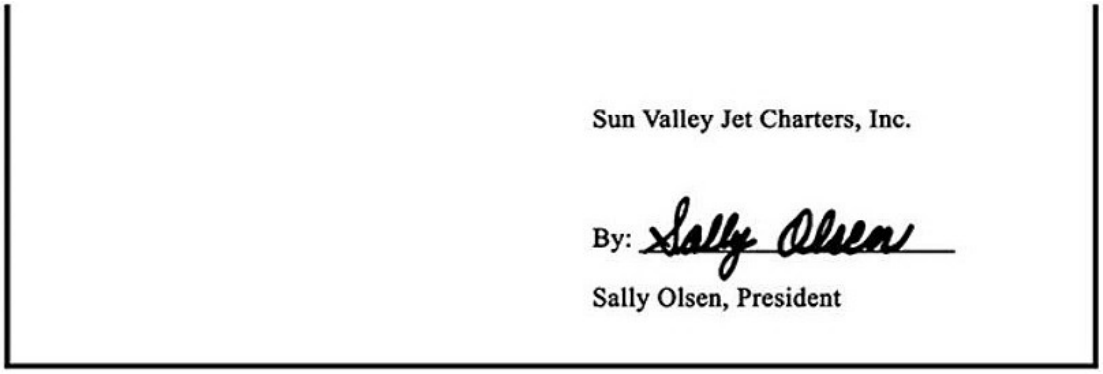

Figure 5-2. Proper form of corporate signature.

Keeping Personal and Corporate Assets Separate

If you want the world to recognize the corporation as a separate person, then you must do so too. Don't put that person's money in your pocket. Care must be taken never to commingle personal and corporate funds or other assets, and corporate debts should never be paid directly from personal funds. Corporate debts should be paid only from corporate funds. If you pay them from your personal funds, that is not acting like a corporation but like a sole proprietorship. This is not to say that you can't find a way to get the money into the corporation to enable the corporation to pay its debts. The corporation can acquire funds in the following ways: (1) sale of shares of stock (capital investment), (2) income from operations, (3) debt (loans), and (4) sale or leasing out of assets.

For example, imagine that the corporation's hangar rent and payroll are coming due and the corporation is short of cash to make these payments (perhaps because especially horrible winter weather has severely cut back on income for the month's flight operation revenues). If you are a shareholder in the corporation and are in a financial position to help out, there are several ways you can do so without opening up the possibility of someone being able

to pierce the corporate veil to reach your personal assets as a consequence. You could loan money to the corporation to cover its needs; you could buy some more stock in the corporation; or you could purchase assets from the corporation (and lease them back to the corporation if they are needed to continue operations).

Any of these transactions is proper since each respects the corporation as the separate legal person it is. Care must be taken, however, to document the transaction properly, leaving the all-important paper trail. If you choose to make a loan, then a *promissory note*, which includes a commercially reasonable rate of interest, should be filled out. If you choose to purchase corporate stock, the corporate minute book and stock certificate book should reflect that this transaction was handled in the manner prescribed in the corporation's articles of incorporation or bylaws. A properly signed and sealed *stock certificate* should be issued to you in exchange for the funds and the transaction recorded in the corporation's *stock certificate register*. If you purchase assets from the corporation, a *bill of sale* should be issued and the transaction reflected on the corporation's financial records. If you lease the purchased equipment back to the corporation, that should also be done by a written *lease*.

While all this is somewhat time-consuming, it is the proper way of doing business and absolutely necessary to preserve the maximum personal protection from doing business in the corporate form. You can bet that if there's an accident that is not completely covered by the corporation's liability insurance, the plaintiff's attorney is going to examine your corporate books and records during the discovery process. He'll search in hope of being able to pierce the corporate veil to reach the personal assets of the owners (shareholders). If you have been careful to document each such transaction, that effort will be frustrated. Your corporate lawyer and accountant should be called upon to assure that these transactions are properly documented in the corporation's financial records, minute book, and stock certificate book.

Making and Documenting Corporate Decisions

Part of the process of acting like a corporation is making corporate decisions at the appropriate level and keeping the paper trail that proves you have done so. Corporate decisions may be made at several levels: the shareholders, the board of directors, an executive committee of the board of directors, officers, or employees.

The powers, duties, responsibilities, and procedures for corporate decision making should be spelled out as clearly as possible in the articles of incorporation or bylaws. In normal corporate operations, the only decision the shareholders have the right to make is to elect a board of directors to govern the corporation. The board of directors elects officers. Typically, the board of directors makes decisions affecting corporate policy and major business decisions, while officers (such as a chief executive officer or CEO) execute that policy and make the day-to-day business decisions.

When in doubt whether a particular decision can be made by a corporate officer or should be referred to the board of directors, a good rule of thumb is to ask yourself, "Is this what the corporation is in business to do?" If the answer is "yes," then the officer can probably make the decision. If the answer is "no," then the matter should probably be taken up with the board of directors.

Take, for example, a full-service FBO. A customer wants to rent an airplane. If the corporation is in the business of renting airplanes, one would expect that the decision of whether to rent the individual an airplane could be made by an employee, following written corporate policy.

Suppose instead that the airport manager calls to inform the FBO that another enterprise on the airport is going out of business and the airport authority wants to know whether the FBO would like to take over and operate that facility under lease, in addition to or instead of the FBO's present facility. Although physical facilities are necessary to the corporation in operating its business, renting space from the airport authority is not what the corporation is in business to do. Moving or expanding is a big decision, a matter of policy. Therefore, this is a decision that is probably going to have to be made by the board of directors.

Whenever a meeting of the shareholders or the board of directors takes place, a written record (referred to as *minutes*) must be prepared. The minutes detail when and where the meeting occurred, who was present, and what was decided. (Minutes generally are not required to reflect everything that was discussed, only decisions that were reached.) These minutes should be kept in the corporate minute book, the primary paper trail that serves as evidence that the corporation was operated as a corporation, with decisions being made in the proper manner at the proper level of authority. An empty or long-neglected corporate minute book turned up in litigation by the inquisitive process of discovery can be a powerful weapon to a plaintiff's attorney who is trying to pierce the corporate veil to reach your personal assets.

Duties to Employees

Regardless of the form of your business (whether a corporation, limited liability company, partnership, sole proprietorship, or other form), the business has certain legal obligations toward each of its employees. These include a duty to provide *workers compensation insurance* and *unemployment compensation insurance*, to *pay agreed wages and withhold payroll taxes*, and to *provide a safe place to work*. Attempts by management to avoid carrying out these duties have brought many businesses to grief. Particularly in the small business just starting out, management may be reluctant to incur the expense and keep the records required to withhold payroll taxes and provide mandatory insurance. In such a situation, management may succumb to the temptation to call the people who work for the business *independent contractors* rather than employees, in an attempt to avoid the responsibility of providing the mandatory insurance and withholding payroll taxes. Such a decision may have catastrophic consequences.

Workers Compensation Insurance

In the popular mythology of American social welfare, state statutes making it mandatory for employers to provide workers compensation insurance coverage (to compensate their employees for on-the-job injuries) are celebrated as a great victory of the working class over exploitative employers. In reality, however, workers compensation insurance is far more advantageous to the employer than to the employee.

Because of the large number of businesses purchasing the insurance, it tends to be relatively inexpensive, although rates have risen substantially in recent years, particularly since the terrorist attacks of 9/11/01 caused so many deaths of employees of businesses that concentrated their workforces in the World Trade Center.

The law of most states provides that if the business has covered its employees with workers compensation insurance, an employee who is injured on the job is prohibited from suing the employer for such injuries. If one of your mechanics or pilots backs into a spinning prop or is otherwise killed or injured on the job, you'll be instantly convinced of the value of workers compensation insurance in protecting the business from liability. This protection is well worth the expense and paperwork involved and in most states is mandatory for businesses having *any* employees.

Withholding Taxes

The Internal Revenue Service (IRS), like dynamite, is stronger than you are and has no friends. Revenue-collecting authorities have extraordinary powers not enjoyed by other administrative and law enforcement agencies. A friend of Scott's who practices tax law extensively sometimes makes the pseudo-Freudian slip of referring to the IRS as the KGB. The analogy is entirely appropriate, given the extraordinary powers afforded revenue agents. For example, the IRS has the benefit of *hindsight review*. This means that even though a business considered certain workers independent contractors (and may even have obtained workers' signatures on contracts stating that they were independent contractors), the IRS may later decide that a person was really an employee for the purpose of the business's duties to withhold payroll taxes.

In making that determination, the IRS applies a *right to control and direct* test, examining a number of factors to determine whether a person is an independent contractor or must be considered an employee. Factors the IRS considers to favor a determination that a person is (or was) an employee (rather than an independent contractor) include if the person:

1. is required to comply with company instructions about when, where, and how work is done;
2. has been trained by the company;
3. is integrated into the company's general business operations;
4. must render services personally;
5. uses assistance provided by the company;
6. has a continuing relationship with the company;
7. is required to work a set number of hours;
8. must devote substantially full-time work to the company;
9. works on the company's premises;
10. must perform work in a preset sequence;
11. must submit regular progress reports;
12. is paid by the hour, week, or month;
13. is reimbursed for all business and travel expenses;
14. uses company tools and materials;
15. has no significant investment in the facilities that are used;
16. has no risk of loss;
17. works for only one company;

18. does not offer services to the public;
19. can be discharged by the company; or
20. can terminate the relationship (quit) without incurring liability.

Here is an all-too-frequent scenario: An FBO wishing to avoid the expense and paperwork inherent in insuring and withholding payroll taxes for its flight instructors elects to treat them as independent contractors. One day, IRS agents show up at the business and inquire into the whereabouts of one of these instructors, mentioning that the instructor didn't file federal income tax returns during the time he was instructing for the business. "Gee," the manager replies, "he left here a couple of years ago and I haven't seen him since, although I did hear a rumor that he was killed in the crash of a drug smuggling plane in Columbia, so you guys are probably out of luck." Undeterred, the agents explain that their investigation has further revealed that the business does not seem to have withheld payroll taxes for this individual or paid those taxes to the government, as required. "Oh, no, he wasn't an employee. He was just an independent contractor," the FBO manager explains. "We even require our flight instructors to sign a contract showing that. Here is a copy of the one he signed." Unfazed, the agents persist in their interrogation, gaining the manager's admissions that the flight instructor did give ground instruction in the FBO's classroom, had the use of a desk at the FBO, and used the FBO's FAA-approved syllabus to teach. The instruction was given in aircraft provided by the FBO, according to a schedule determined by the FBO's dispatcher. The instructor had to give the instruction himself; he couldn't send a buddy in to substitute for him if he had something else he'd rather be doing.

Applying 20/20 hindsight, the revenue agents may decide that under these facts the FBO had the "*right to control and direct*" this flight instructor's work. If so, the delinquent taxpayer was really an employee and the FBO, having failed to withhold and pay payroll taxes for this employee, must now pay those taxes to the IRS, with interest and penalties. If the business does not cooperate in promptly taking care of that obligation, IRS agents may freeze the business's bank accounts and seize its assets until the matter is resolved. It is not unusual in such a case for IRS agents in full SWAT team attire to show up at the business unannounced, armed with automatic weapons, to take over the property and lock up the hangars, offices, and aircraft.

And that's not all. If the business doesn't have the funds to pay this tax liability, the government can sell the business's assets to satisfy the debt. If the

sale of assets still doesn't satisfy the entire tax liability, then if the business is a sole proprietorship or partnership, the proprietor or partners are personally liable for the balance due the IRS. If the business is a corporation, its directors can be held personally liable for unpaid tax liabilities of the corporation. The business and its owners (or in the case of a corporation, directors) can't even escape that tax liability by filing bankruptcy. Tax liabilities are, by statute, not dischargeable in bankruptcy.

It is therefore tremendously important for businesses (whatever their form) to resist the temptation to evade the duties owed to their employees and the government through the subterfuge of trying to call such workers independent contractors. This is not to say that a business can never have independent contractors. For example, if you take one of your business's airplanes to a paint shop to be painted, specifying the type of paint and design required and receiving a price quote for the job and an expected completion date, the paint shop would be a legitimate independent contractor. The work is being done at the independent contractor's facility, not your place of business, and the independent contractor is providing the paint, equipment, and labor. If the painter chooses to do the painting between midnight and 4:00 a.m., or to remove the paint by bead blasting instead of hand stripping, she may do so without consulting you. That is a legitimate independent contractor. On the other hand, if you hire someone to paint the aircraft in your business's hangar, using your equipment, reporting for work at a specified time and working until an agreed quitting time, and doing the work under your supervision, that person is an employee. That cannot be changed even if you and she agree that she's an independent contractor and she signs a written agreement to that effect.

Lines of Defense in Risk Management

If you decide, with the advice of your lawyer and accountant, to form your business as a corporation, LLC, or LLP (to protect you from potential personal vicarious liability for torts committed by other workers), this should not constitute the entire risk management plan for the business. The problem of risk management is very similar to the problem of national security. France's experience in the last century with the Maginot Line showed that, to be effective, a defense must be in-depth and diversified. The same is true of business risk management strategies. While organizing the business as a corporation,

LLC, or LLP is an important element in the risk management plan you develop for your business, it should not be the only one.

As we have already seen, your accident prevention program should be a primary facet of your risk management plan, since accidents prevented are lawsuits prevented. Liability insurance should also be a major element in your risk management strategy. (We will examine aviation liability insurance in the next chapter.) If you cannot purchase sufficient liability insurance coverage for a particular operation, exculpatory contracts (discussed in Chapter 7) may also enter into your risk management strategy.