American Bar Association
Section of Business Law
Pubogram Newsletter
Committee on Partnerships and Unincorporated Business Organizations

Pubogram Newsletter

George W. Coleman - Chair
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As the long hot summer fades into the long hot fall (in Dallas that is) thoughts (of clients) turn to the fall ABA meeting in Washington DC at the Renaissance Mayflower Hotel. On Friday, Nov. 7th, we start at 8:30 am with the Limited Partnership Subcommittee meeting to discuss the first public draft of proposed revisions to the Revised Uniform Limited Partnership Act being considered by NCCUSL. The General Partnership Subcommittee meets at 11:00 am and the LLC Subcommittee meets at 2:00 pm.

On Saturday, Nov. 8th, the ABA - Prototype LLC Operating Agreement Drafting Committee meets at 8:00 am to begin work on the prototype agreement. This meeting will continue at least until noon and probably into the afternoon.

The subcommittee chairs, Bitsey Hester and Doc Merrill need to be thanked for agreeing to continue running their subcommittees and Jim Wheaton needs to be thanked for taking over from Jim Reynolds the LLC subcommittee.

Also, Lou Conti needs to be thanked for taking on the responsibilities as chair of the Prototype Drafting Committee.

Thinking about the amount of great volume of work the subcommittees produce,

I ask myself why we keep working this hard, where's the fun. Having asked the question, the answer's are not necessarily rational. I believe we keep doing this committee work because we enjoy the intellectual challenge. We get satisfaction from working on "national" projects. But, all of that is for us, do we give anything to our fellow lawyers and to our clients. I hope so and I believe we do. Two fine examples are current projects. When the proposed amendments to the Revised Uniform Limited Partnership Act are finally approved about two years from now they will set the course for amendments to the RULP acts in each state and thereby improve the operation of LPs from a commercial view Hopefully these changes will make LPs more user friendly.

When published, the Prototype LLC Operating Agreement will provide a service to our members and will raise the standards for drafting these agreements. Hopefully, the Prototype LLC Operating Agreement will permit lawyers to more efficiently provide legal services for clients using LLCs. A goal worth achieving!
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Taxation Committee Meeting

By Robert Keatinge
Denver, Colorado

The Taxation Committee will meet at the Renaissance Mayflower, in Washington, D.C. on Friday, November 7, 1997 at 3:00 p.m. in connection with the Committee on Partnerships and Unincorporated Associations. Among the topics that will be discussed at this meeting are: (1) the effect of the new Taxpayer Relief Act on business organizations, (2) Developments in universal business organization statutes, and (3) future projects and continuing legal education programs for the of Taxation.

In addition, the Taxation Committee will co-host a lunch on Friday, November 7 with the Partnership Committee and will cosponsor a meeting on Saturday, November 8 starting at 8:00 am at the Renaissance hotel at which Lou Conti’s committee to draft a prototype operating agreement will be held. Together with the Partnership Committee and the drafting Committee, we anticipate two full days of useful discussion of current taxation developments and appropriate business responses to them.
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Some Interesting Notes on the Restatement of the Law Governing Lawyers

By Robert Keatinge

Denver, Colorado

Section 79 of the Restatement of the Law Governing Lawyers, which, in its early iteration (Tentative Draft No. 4 (1994)) stated:

"A law firm and each of its principals is civilly liable for damages legally caused to a person by the wrongful act or omission of any principal or employee of the firm acting in the ordinary course of the firm's business or with actual authority."

This conclusion was supported by a comment that stated:

"When a firm is organized as a professional corporation, a professional association, or a similar professional organization, its shareholder-principals as well as the corporation are ordinarily vicariously liable in the same way they would be in a partnership for the negligence or misconduct of principals or employees in the rendition of legal services. A few jurisdictions do not follow this Section's principle but authorize professional corporations in which the shareholder-principals are not liable for negligence or misconduct in which they themselves are not involved directly or as lawyers in charge of a matter; such limited liability is sometimes allowed only when the corporation has adequate insurance coverage. Whether a professional corporation's principals are liable, in addition to the corporation, for other liabilities, such as the corporation's obligation to pay rent for its office, depends on the law of the jurisdiction."

After much debate, this position was revised in Tentative Draft No. 8 (1997) which was approved at the 1997 annual meeting containing the following language:

1. A law firm is subject to civil liability for injury legally caused to a person by any wrongful act or omission of any principal or employee of the firm who was acting in the ordinary course of the firm's business or with actual authority.
2. Each of the principals of a law firm organized as a general partnership is liable jointly and severally with the firm.
3. A principal of a law firm organized other than as a general partnership as authorized by law is vicariously liable for the acts of another principal or employee of the firm to the extent provided by law.

This change appears to be a more accurate statement of the existing law, although the reporter points out that the courts regulating the practice of law have the inherent power to accept or reject legislation to allow attorneys to practice in limited liability forms.
Partnership Committee Activities

By: Robert Keatinge
Denver, Colorado

The Committee on Partnerships and Unincorporated Business Organizations has another busy meeting in San Francisco. In addition to an subcommittee meetings by all of the subcommittees of the committee, the committee sponsored three important programs, a timely program headed by Jack Mollenkamp dealing with FASITs, for which Jack deserves the herding cats award, one dealing with developing area of limited liability entities in bankruptcy and the third chaired by Beth Miller surveying the way courts are dealing with limited liability entities. The programs were timely, well attended and well worth the time spent. Gerry Neisar and his wife hosted a wonderful dinner and wine tasting at their place in the Napa valley which provided a chance for all of the participants at the ABA meeting to catch their breath.

Committee members jumped back into the thick of things shortly after the annual meeting in several ways. Lou Conti, working with John DeBruyn and Jim Reynolds have put together a drafting session on a prototype operating agreement in Washington. This meeting is largely being put together over the internet, a powerful tool for sharing ideas - which may make it ideal for other committee projects. This will be a joint project with the ABA Real Estate Section to try to create a workable starting document for use in the post check the box world. In addition, the project to rerevise the Uniform Limited Partnership Act moves along with several new ideas being added to partnership law. There will be a drafting session a week before out meeting and there should be much to report in Washington.

In addition, the ABA Business Law Section/NCCUSL Joint Editorial Board met to discuss the future projects. Among the discussions were the direction of limited liability company legislation, business trusts, responses to the "check the box" legislation and the emergence of junction box merger statutes. These will be discussed at the meeting in Washington.

We continue to live in exciting times. No one can describe unincorporated practice as static. As the statutory, tax and common law continues to develop, the benefit of the committee and its hard working members is increasingly important. The ability to share ideas with others coming to terms with the changes in all areas of the law will help all participants take advantage of the new landscape without falling victim to some of the pitfalls that change entails (Block that Metaphor)
An Update on Single Member LLC's

By: Robert Keatinge
Denver, Colorado

Currently roughly a third of the states do not provide for the organization of single member LLCs under their own statutes. Some of these have indicated that they will recognize foreign single member LLCs while in others it is unclear whether a single member LLC organized under another statute will be recognized as a "foreign LLC." In light of the new treasury classification regulations, in 1997, 22 states adopted legislation authorizing single member LLCs, and it is likely that the remaining states will do so within the next few years. The states that currently do not have such legislation are: Alabama, California, District of Columbia, Florida, Kansas, Kentucky, Massachusetts, New Hampshire, New Jersey, Nevada, Ohio, Pennsylvania, South Dakota, and Tennessee. The other states have provided for single member LLCs in a variety of fashions with a variety of changes, varying from simply removing the reference to a two member requirement to providing a detailed description of what constitutes an "operating agreement" in a single member LLC and changing rules for admission of a transferee in a single member LLC.

Although rules governing such matters as allocations of profits and losses and voting may seem inappropriate in an organization in which all profits and losses are allocated to a single member and that member makes all management decisions, there is nothing in the LLC statutes that prohibits such an arrangement.

Other provisions, such as those governing the liability of the member, the ability to the LLC to hold and dispose of property, and the authority of the members and managers will operate in much the same way regardless of the number of members that the LLC has.

Finally, some features of the multiple member LLC need to be modified for single member LLCs. For example, provisions requiring consent of the "remaining members" for the admission of a transferee or the continuance of the LLC after the dissociation of a member. The statutes permitting single member LLCs generally provide enough flexibility to deal with these issues in the operating agreement, although as the statutes develop they may provide for separate rules in these areas for single member LLCs.

It has been suggested that a single owner unincorporated limited liability organization should be a separate organization from a limited liability company as a result of the different default rules that will be applicable. While there may be (but probably is not) room for another unincorporated business organization, some flexibility will be lost if an LLC must convert to a different form when it drops to a single member. Because the single member LLC is more similar to than distinct from a multiple member LLC, there is a benefit to having one set of rules governing both single member and multiple member LLCs. In addition, by having one structure governing both types of organizations, it is not necessary to worry about the potential confusion that might arise if a single member LLC has the same name as a multiple member LLC.
An Update on Single Member LLC's

In addition, by having one structure governing both types of organizations both members and third parties can rely on most rules' being the same regardless of whether the organization has one or more members.
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New Jersey Amends LLC Act; Adopts Variant to Address 2704

by Peter D. Hutcheon Somerville, New Jersey

On June 27, 1997 the Governor of New Jersey signed into law P.L. 1997, c. 139, which amended the New Jersey LLC Act, New Jersey Statutes Annotated 42:2B-1 et seq. The amendments cover a variety of matters: adding an annual report requirement, allowing perpetual life, clarification of agency relationship in member managed LLC’s, clarification of authority to file bankruptcy, clarification that a charging order is the sole creditor remedy and distinguishing between dissociation of a member and dissolution of an LLC. In addition, revised N.J.S.A. 42:2B-39 addresses the problem raised for family businesses by Internal Revenue Code  2704.

As amended, Section 39 provides that (absent other provision in an operating agreement) a member who resigns is entitled within a reasonable time to receive the "fair value" of his limited liability company interested based upon the net present value of his right to receive distributions " . . . less all applicable valuation discounts . . . ." The section then specifies that "all applicable valuation discounts" includes discounts for lack of liquidity, relative size of holding, absence of any trading market and comparable factors. The right to receive payment is also subject to offset for a wrongful withdrawal.

In other words, the New Jersey default rule retains the right to withdraw and be paid out, but builds directly into the default calculation of payout amount the very discount factors economic planning might seek to apply. This default rule is not limited to situations to which 2704 of the IRC is applicable.
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Over Thirty

Alpha and Omega, The Beginning and The End. So in our motions (especially strong among Americans) of the linearity of time we anticipated that things will commence and relationships will cease.

Even in our own sphere, which is perhaps not the largest planetoid in the universe of abstractions, it is difficult to pass by the issues of formation and dissolution. Like most air travel, the points of greatest danger are usually at take off and landing. So we sometimes find it difficult to consider the essence of partnership without addressing its birth and its death. Indeed some - and perhaps not only the nominalists among us - would suggest that it is impossible to comprehend the nature of partnership without an adequate exploration of the start and the finish.

Absent a most improbable "partnership" of sorts, which all began over dinner in a restaurant in Atlanta in 1986, there would be no PUBOGRAM, Volume XII, No. 1, October 1997. Surely this res is the most tangible of all cooperative commitments to infinite abstraction in futuro. Each issue is a compendium, of the disparate works of many, arranged as it seems best. Usually volunteer publication falter from the absence of submitted materials. The PUBOGRAM seeks to overcome that limitation by awarding the opportunity to participate to those whose voices speak; they are the most democratic of elites, those who have raised their hands. So over the years, we have become partners in this enterprise to make a "ship", a vessel of some esse out of brief, recurring intersections of busy professional lives.

But in San Francisco, there was no intersection for the Editor; he was not there. Thus, without the special punctilio of high assistance from Messrs Coleman and Keatinge, this issue would not exist. So a special word of thanks for the partnership, formed with little attention to the takeoff, that lends continuing hand with this recurring missive.

A word also about Omega and dissociation. More than half of his existence was spent as senior then to me. Whether it was partnership depends greatly on one's sense of the connotative meanings of that word. Certainly it was association, full of discipline and discernment, impatience and some intolerance, crustiness and a fondness for language. With a deep love for the Psalms, Robbie Burns and a "wee dram" (not too "wee") of single malt, he was at the end as at my beginning, my father.1

PdH

1. Peter Hutcheon, born Edinburgh, Scotland 2/24/05, died Long Island, N.Y., 7/25/97