SUFFOLK ACADEMY OF LAW
The Educational Arm of the Suffolk County Bar Association
560 Wheeler Road, Hauppauge, NY 11788
(631) 234-5588

2018 BRIDGE THE GAP
DAY THREE

FACULTY
Harvey Besunder, Esq.
John Calcagni, Esq.
George Roach, Esq.

Program Coordinators: Barry Smolowitz, Esq., Stephen Kunken, Esq., William Ferris, Esq.

February 5, 2018
Suffolk County Bar Center, NY

Webcast & Live

Date	Presenter	Topic	Credit Category	Number of Credits	Time
Monday, January 29, 2018	Barry Smolowitz	The Grievance Process	Ethics	1.0	5:30-6:20
Break					6:20-6:30
Monday, January 29, 2018	Hon. Theresa Whelan	Practicing in Family Court	Professional Practice	2.0	6:30-8:10
Break					8:10-8:20
Monday, January 29, 2018	Barry Lites	Foreclosure	Professional Practice	1.0	8:20-9:10
Wednesday January 31, 2018	A. Craig Purcell, James Fagan	Handling a Civil Case	Professional Practice	2.0	5:30-7:10
Break					7:10-7:20
Wednesday January 31, 2018	Stephen Kunken William Ferris	Handling a Criminal Case	Professional Practice	2.0	7:20-9:00
Total Both Evenings				**8** Ethics – 1 Professional Practice – 7	

Live Only

Date	Presenter	Topic	Credit Category	Number of Credits	Time
Monday, February 5, 2018	Harvey Besunder	Practical Ethics	Ethics	1	5:30-6:20
Break					6:20-6:30
Monday, February 5, 2018	John Calcagni	Forming a Small Business	Skills	1.5	6:30-7:55
Break					7:55-8:05
Monday, February 5, 2018	George Roach	Elder Law	Skills	1.5	8:05-9:30
Wednesday, February 7, 2018	Audrey Bloom	Residential Real Estate	Skills	1.5	5:30-6:55
Break					6:55-7:05
Wednesday, February 7, 2018	Richard Weinblatt	Will, Trusts and Estates	Skills	1.5	7:05-8:30
Wednesday, February 7, 2018	Michael Isernia	New York Notary Law	Ethics	1.0	8:30-9:20
Q & A					9:20-9:30
Total Both Evenings				**8** Ethics – 2 Skills - 6	

HARVEY B. BESUNDER

Mr. Besunder was admitted to the practice of law in 1967, and from 1991-2010 had had his own law practice in Suffolk County. In September 2010 he merged his firm with that of Bracken & Margolin, to form Bracken Margolin Besunder LLP. Prior to that time, he was a member of the firm of Cruser, Hills, Hills & Besunder, an Assistant County Attorney for Suffolk County in the Condemnation Department, a member of the Suffolk County Attorney's Office and a Law Assistant in the Suffolk County District Court.

From 1993-1994, Mr. Besunder served as President of the Suffolk County Bar Association, and has been a member and/or Chair of that Association's Condemnation Committee, Grievance Committee, Judiciary Committee, and Bench-Bar Committee.

Mr. Besunder is also an active member of the New York State Bar Association. From 1993 to 1997, he served on the Executive Committee of the Association's Real Property Section, and was a member of the Association's House of Delegates, Committee on Lawyer Discipline, By-Laws Committee and the Nominating Committee. From 1996-1999, he served as Chair of the Committee on Lawyer Discipline.

From 1988 to 1996, he served as a member of the Grievance Committee for the Tenth Judicial District, and in 1997, he was appointed to serve on the Judicial Salaries Commission and served on the Independent Judicial Qualifications Commission from 2007-2011. He is currently a member of the Committee on Character and Fitness.

He has lectured extensively on behalf of the Suffolk Academy of Law, on such topics as ethics and the disciplinary process, real property issues, and for the State Bar on Condemnation valuation issues.

Mr. Besunder has received several awards of Recognition including a Special Award of Recognition, as well as two awards for Pro Bono service. In 2010 Mr. Besunder received the prestigious Presidents Award for Service to the Legal Profession.

HARVEY BRUCE BESUNDER
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EDUCATION

Brooklyn Law School
LL.B June, 1967 (By permission of the State of New York, this degree is now changed to Juris Doctor).

Adelphi University
Bachelor of Arts, History, 1964

ADMISSION

New York (Second Department), December, 1967.
U.S. District Court, Southern District of New York, February, 1973.
U.S. District Court, Eastern District of New York, February, 1973.
United States Supreme Court, May, 1974.
U.S. Court of Military Appeals, May, 1993.
U.S. Court of Federal Claims, May 1993.
U.S. Court of Appeals for the Federal Circuit, July 1993.

EMPLOYMENT RECORD

Bracken Margolin Besunder--- Partner-2010-Present

Law Offices of Harvey B. Besunder, P.C. 2006 - 2010

Partner, Pruzansky & Besunder, LLP, 2001 - 2005

Law Offices of Harvey B. Besunder, 1993 - 2001

Partner, Besunder and Burner, 1991 - 1993

Partner, Cruser, Hills, Hills & Besunder, 1979 - 1990

Partner, Bazell & Besunder, 1975 - 1979

Assistant County Attorney, Condemnation Department, Suffolk County Attorney's Office, 1972 - 1979

Assistant County Attorney, Chief, Family Court Department, 1971 - 1972

Judicial Law Clerk, Suffolk County District Court, 1969 - 1971

AFFILIATIONS

Suffolk County Bar Association
Member, Suffolk County Bar Association

President	1993 - 1994
President Elect	1992 - 1993
First Vice President	1991 - 1992
Second Vice President	1990 - 1991
Treasurer	1989 - 1990
Secretary	1988 - 1989
Director	1986 - 1988

Condemnation Committee	1978 - present
Member	1978 - present
Chairman	1978 - 1980

Grievance Committee	
Co-Chair	1982 - 1984
Overall Chair	1984 - 1986

Judiciary Committee	
Member	1982 - 1986

Bench Bar Committee	
Chair	1991-1993
Member	1993-present

Professionalism Committee and Ethics	1998 - present

New York State Bar Association
Member, New York State Bar Association

Member, Condemnation and Tax Certiorari Committee of the Real Property Section

Real Property Section, Executive Committee	
Member	1993 - 1998

House of Delegates	
Delegate	1990 - 1994
	1996 - 1998

Committee on Lawyer Discipline	
Member	1999 - present
Chair	1996 - 1999

By-Laws Committee	
Member	1999 - 2003

APPOINTMENTS

Tenth Judicial District Grievance Committee	
Member	1988 - 1996
Judicial Salaries Commission	1997 – 1998
Character and Fitness Committee	2006-Present
Independent Judicial Election Qualification Commission	2007-2011
Commercial Division Advisory Council	2013

AWARDS-

Awards include several awards of Recognition of the Suffolk County Bar Association, Two Pro Bono Awards, A special award of Recognition and the President's Award in 2010; Suffolk County Bar Association Lifetime Achievement Award (2014)

LECTURES & PROGRAMS

Suffolk Academy of Law

- Legal Ethics and Disciplinary Process
- The Effect of New York State Wetlands Act on Valuation in Condemnation
- Valuation of Special Purposes Properties
- Trial Demonstration of a Condemnation Involving Wetlands
- Contested Wills and Estates
- A General Law Practice, a lecture on the general practice of law to high school students and for adult education programs given by the Lions Club and Kiwanis Club, Suffolk County Chapters
- Judge, New York State Bar Association Moot Court Competition
- Tax Grievance Procedure, Suffolk County Women's Bar Association
- Basics of Eminent Domain

Association of the Bar, City of New York

- Effect of Eminent Domain Procedure Law on Villages, Towns and Cities

Lorman Education Services

- Trial Preparation and Trial-Eminent Domain

NY State Bar Association

- Ethics
- Condemnation

John R. Calcagni is a member of Haley Weinblatt & Calcagni, LLP where he concentrates his practice in advising clients involved in business transactions and commercial real estate transactions. He received a J.D. from St. John's University Law School in 1980 where he served as Articles Editor of the St. John's Law Review.

From 1980 to 1984, Mr. Calcagni was an associate at Willkie Farr & Gallagher where his practice included public offerings of debt and equity securities, private placements, acquisitions and SEC filings. From 1984 to 1988 Mr. Calcagni was Assistant General Counsel to The Allen Group Inc., a former New York Stock Exchange traded company, where his responsibilities included overseeing the company's securities law compliance and acquisitions and sales of the company's businesses.

Mr. Calcagni is currently an Adjunct Professor in the Graduate Management/MBA Program at St. Joseph's College where he teaches Business Law. He has also participated as a lecturer in Continuing Legal Education Programs for the Suffolk County Bar Association, the Queens County Bar Association and the Suffolk Chapter of the American Institute of Certified Public Accountants. He is a past President of the Suffolk County Bar Association and a past Dean of the Suffolk Academy of Law.

GEORGE L. ROACH

Past President
Suffolk County Bar Association (2001-02)

George L. Roach received his B.A. in government **cum laude** from Manhattan College and his law degree from St. John's University School of Law. He was with the Legal Aid Society of Suffolk County for 30 years, dealing exclusively with the problems of the elderly and the elderly poor. He was the attorney in charge of the Legal Aid Society of Suffolk County's Senior Citizen's Division. Mr. Roach is now with the Smithtown law firm Grabie & Grabie, LLP.

Mr. Roach is a former Dean of the Suffolk Academy of Law and has also served as Associate Dean of the Academy. He was the first chairperson of the SCBA's Elder Law Committee, a committee that he helped to launch, and has also served as chair of the Federal Court Committee. Mr. Roach received the Association's highest award, its President's Award, for his contributions in legal and public education. He is also a member of the American Bar Association, the NYS Bar Association and the National Academy of Elder Law Attorneys. He is licensed to practice law in both New York and Hawaii.

In September 2012, Mr. Roach was the first Public Interest Service Award recipient from his alma mater, St. John's University School of Law, where he is currently an Adjunct Professor of Law teaching Elder Law and Estate Planning.

In May 1998, Mr. Roach was chosen as the Suffolk County Office of the Aging's "Community Leader of the Year." This honor was bestowed upon him by then Suffolk County Executive Robert J. Gaffney.

Mr. Roach spends his free time training for and participating in Triathlon.

PRACTICAL ETHICS BRIDGE THE GAP

I- RETAINERS
   a. PART 1215 OF THE JOINT RULES OF THE APPELLATE DIVISION
   b. RULES OF PROFESSIONAL CONDUCT 1.5

II- DECLINING OR TERMINATING REPRESENTATION
   a. RULES OF PROFESSIONAL CONDUCT 1.16—22 NYCRR130.1.1(C)

III- COMPETENT REPRESENTATION AND CONFLICTS
   a. RULE 1.1 (a)--COMPETENCE
   b. RULE 1.3 (a) REASONABLE DILIGENCE
   c. RULE 1.3 (b) NEGLECT
   d. RULE 1.16 (e) STEPS TO AVOID PREJUDICE
   e. RULE 8.4 (c), (d), (h)—MISCONDUCT, DISHONESTY, FRAUD, DECEIT, MISREPRESENTATION, PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, CONDUCT ADVERSELY REFLECTING ON FITNESS AS A LAWYER
   f. RULE 1.7 (a) 2—CONFLICT REGARDING FINANCIAL INTERESTS
   g. RULE 1.8 (e)—ADVANCING FINANCIAL ASSISTANCE TO A CLIENT

IV- DISCIPLINE BY CONSENT—22 NYCRR 1240.8 (a) 5

V- CASES
   a. MATTER OF JOFFE---2018 NY SLIP OF 00124
   b. MATTER OF D'ANGELO---2017 WL 6626128
   c. MATTER OF IZZO 155 A.D. 3d 109
   d. MATTER OF DITTAKAVI—155 A.D. 3d 10
   e. MATTER OF MANN---2018 WL 456157
   f. MATTER OF SCHANK---152 A.D. 3d 39

Matter of Joffe
2018 NY Slip Op 00124
Decided on January 4, 2018
Appellate Division, First Department
Per Curiam
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on January 4, 2018 SUPREME COURT, APPELLATE DIVISION First Judicial Department
Judith J. Gische, Justice Presiding,
Richard T. Andrias
Cynthia S. Kern
Jeffery K. Oing
Anil C. Singh,Justices.

M-2884

[*1]In the Matter of Michael Joffe, an attorney and counselor-at-law: Attorney Grievance Committee for the First Judicial Department, Petitioner, Michael Joffe, Respondent.

Disciplinary proceedings instituted by the Attorney Grievance Committee for the First Judicial Department. Respondent, Michael Joffe, was admitted to the Bar of the State of New York at a Term of the Appellate Division of the Supreme Court for the Second on April 13, 1994.

Jorge Dopico, Chief Attorney,

Attorney Grievance Committee, New York

(Kevin M. Doyle, of counsel), for petitioner.

Gregg D. Weinstock, Esq. for respondent.

PER CURIAM

Respondent Michael Joffe was admitted to the practice of law in the State of New York by the Second Judicial Department on April 13, 1994. At all times relevant to this proceeding, respondent maintained an office for the practice of law within the First Judicial Department.

In 2016, the Attorney Grievance Committee (Committee) brought 10 charges against respondent alleging violations of New York Rules of Professional Conduct (22 NYCRR 1200.0) rules 1.1(a) (failure to provide competent representation), 1.3(a) (failure to act with reasonable diligence and promptness), 1.3(b) (neglect), 1.16(e) (failure to take reasonable steps to avoid foreseeable prejudice to client upon termination of representation), 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), 8.4(d) (conduct prejudicial to the administration of justice), and 8.4(h) (other conduct adversely reflecting on fitness as a lawyer).

The charges stemmed from respondent's neglect of two immigration matters, and his false statements and submission of forged documents to the Committee during its investigation.

In his answer respondent admitted the material facts alleged by the Committee, but neither admitted nor denied the charges and "defer[red] to the Court to reach legal conclusions regarding the [charges]."

A referee held a hearing on the charges at which the Committee called respondent's client, A.E., as a witness, and introduced evidence relating to respondent's representation of another client, A.A. Respondent testified on his own behalf.

In May 2009, respondent represented A.E., in her application for removal of the conditional basis for her "Green Card" and to obtain permanent resident status. A.E.'s

conditional permanent resident status was to expire on September 7, 2009, and in fact did expire because respondent failed to timely file an I-751 application. As a result, in October 2009, the U.S. Citizenship and Immigration Services (USCIS) informed A.E. that her Green Card had been canceled, and, thus, she became subject to deportation.

A.E. retained new counsel, G.S., who filed an I-751 application on her behalf. However, it was rejected because respondent had belatedly made such a filing on November 2, 2009 upon learning that A.E.'s Green Card had been canceled. In November 2009 and December 2010, G.S. requested that respondent forward A.E.'s file to him, but respondent did not turn over the file. G.S. eventually obtained A.E.'s file from the Office of the Immigration Court.

In March 2011, A.E. filed a complaint against respondent. Respondent submitted an answer in which he falsely stated that he had filed a timely I-751 application in June 2009, but later found out it was rejected because an incorrect filing fee was sent. Respondent adhered to these false statements when he appeared before the Committee for an examination under oath, and in an amended answer he submitted shortly thereafter. At a subsequent deposition and at the hearing, respondent admitted that he gave inaccurate information to the Committee, but denied that his statements were intentionally false and attributed them to mistaken recollection and incorrect assumptions on his part.

Respondent offered three excuses for his failure to turn over A.E.'s file to her new counsel: he claimed that the file was too cumbersome to mail; the mail could not be trusted to deliver it; and finally he admitted that he did not send the file because it was easier to have it picked up so that he did not have to go out of his way to the post office. Respondent ultimately conceded that he fell short in his duty to forward his client's file to her new counsel.

The Referee sustained charges one through five finding that respondent failed to provide A.E. with competent representation, failed to act with reasonable diligence and promptness in representing her, neglected her matter, failed to take steps to avoid foreseeable prejudice to A.E. by not promptly forwarding her file to successor counsel, and falsely represented to the Committee that he filed a timely I-751 application on A.E.'s behalf in violation of rules 1.1(a), 1.3(a), 1.3(b), 1.16(e), 8.4(c) and 8.4(d).

In October 2009, A.A. retained respondent to file an application to register permanent residence or to adjust status based on his marriage to a U.S. citizen. A.A. was also required to file an I-601 application for waiver of grounds of inadmissibility because he had previously entered the United States through the fraudulent use of a passport. Respondent filed the I-601 application in November 2010, but it was rejected in April 2011 for failure to pay the application fee. Respondent appealed the decision, but the appeal was rejected because of nonpayment of [*2]the application fee and respondent's failure to address the nonpayment in the appeal.

In December 2012, A.A. filed a complaint with the Committee against respondent. In his answer to the complaint, respondent falsely stated that he paid the I-601 application fee and had addressed the nonpayment issue in his appeal. To substantiate these false statements, respondent submitted an altered filing receipt from another matter and a copy of his notice of appeal which he altered to include a discussion of the fee payment issue. Notably, A.A. alleged in his complaint that he provided respondent with the filing fee for his I-601 application.

The Committee learned of respondent's deception in the A.A. matter by comparing the documents he submitted to the Committee with the actual documents he submitted to the USCIS. When confronted with them at his deposition, respondent admitted that he submitted falsified documents.

Based on respondent's admissions and the evidence presented, the Referee found that respondent failed to provide A.A. with competent representation, failed to act with reasonable diligence and promptness in representing him, neglected A.A.'s matter, and sought to mislead the Committee via his false statements in his answer to A.A.'s complaint and his submission of forged documents in violation of rules 1.1(a), 1.3 (a), 1.3(b), 8.4(c), and 8.4(d) and accordingly sustained charges seven through nine [FN1].

The Referee held a sanctions hearing. Respondent again testified on his own behalf, called two former clients as mitigation witnesses, and introduced documentary evidence. Respondent testified that he is a solo practitioner, has no secretarial or support staff, and must manage all aspects of his law practice himself. In addition, he is currently experiencing marital and familial conflicts. Respondent acknowledged that his marital issues were not causally related to his misconduct.

Respondent called two clients and submitted affidavits from two others each of whom attested that they were satisfied with the services he provided. In addition, he offered two letters he sent to A.E. and A.A. (two days before the sanctions hearing) in which he enclosed checks to each for $200 toward partial refunds of the legal fees they paid (A.E. paid $750 and A.A. paid $500) with the remaining balances to be paid in installments.

Respondent expressed remorse for his misconduct. He acknowledged that he made a mistake and that he was wrong to try to cover up his error, a response he said was the result of fear.

In aggravation, the Committee introduced three prior Admonitions. In 2006 respondent was admonished for neglect of a client's immigration matter;[FN2] in 2011 he was admonished for inadequate record keeping with respect to client funds he deposited into his attorney special account; and in 2013 he was admonished for using a retainer agreement which contained an impermissible nonrefundable retainer fee clause.

The Referee found that respondent's misconduct was aggravated by the vulnerability of his two immigration clients; his repeated false statements to the Committee and at the hearing that his representation that he filed a timely I-751 application on A.E.'s behalf was inadvertent; his submission of falsified documents to the Committee in connection with the A.A. matter; and [*3]his three prior Admonitions, one of which the Referee found bore strong similarity to his current misconduct. The Referee noted that respondent admitted that his marital difficulties did not contribute to his misconduct. The Referee further noted that respondent did not present evidence of good character, pro bono work, community service, or contributions to, or good standing in, the legal community. His voluntary payment of child support weighed in his favor. The Referee also noted that respondent had made partial refunds to his aggrieved clients and accepted his counsel's representation that the unpaid balances would be remitted within the next several months. As to his remorse, the Referee found that "[r]espondent's verbal expression of contrition was not borne out by his demeanor, which conveyed little genuine remorse or regret (or, for that matter, any other emotion)."

The Referee cited to, inter alia, *Matter of Meyers* (108 AD3d 158 [1st Dept 2013]) in which the attorney was suspended for two years for, inter alia, neglecting three

immigration matters and misrepresentations to his clients and fabricating documents to conceal his neglect. Meyers had two prior Admonitions for similar misconduct and mitigation included mental health issues and financial obligations for his elderly mother and two college age children. The Referee also cited to *Matter of Samuely* (80 AD3d 163 [1st Dept 2010]) and *Matter of Cohen* (40 AD3d 61 [1st Dept 2007]).

The Referee concluded that respondent be suspended from the practice of law for two years.[FN3]

The Committee seeks an order, pursuant to the Rules for Attorney Disciplinary Matters (22 NYCRR) § 1240.8(b) and the Rules of the Appellate Division, First Department (22 NYCRR) § 603.8-a(t), affirming the Referee's liability findings and the sanction recommendation of suspending respondent for two years.

Respondent opposes the motion to the extent that it seeks to affirm the Referee's two-year suspension recommendation, and requests this Court impose no greater sanction than a three-month suspension. He further contends that this Court has imposed suspensions of three to six months for arguably similar misconduct and cites to, inter alia, *Matter of Brenner* (44 AD3d 160 [1st Dept 2007]), *Matter of Becker* (24 AD3d 32 [1st Dept 2005]), and *Matter of Chazan* (252 AD2d 323 [1st Dept 1999]). Respondent contends that a two-year suspension is too harsh a sanction under the circumstances because, inter alia, at the time of his misconduct he was faced with a sudden separation from his wife with whom he is now involved in an adversarial divorce proceeding, and he is voluntarily paying child support for his teenage daughter, such that a long suspension would make it difficult for him to continue to do so.

In addition, respondent points to the fact that none of the charges against him concerned dishonesty or selfish motive with respect to client funds. To date he has refunded $400 to A.E. and $600 to A.A., and will pay the remaining balances owed them in the near future. His three prior Admonitions did not concern matters in which he acted dishonestly and none of the clients suffered actual harm. He argues that a long suspension would force his immigration clients, many of whom have hearings scheduled in 2017 and 2018, to find new counsel, which may be difficult for them due to financial and other reasons.

Lastly, respondent avers that the purpose of New York's Rules of Professional Conduct is to ensure that the public receives competent and ethical representation, and contends a lesser sanction than a two-year suspension is sufficient to put him, the legal profession, and the public on notice that the misconduct at issue will not be tolerated.

The Committee contends that respondent's request for no greater sanction than a three-month suspension is inappropriate because this Court has recognized that financial and family hardships are inherent in any significant suspension, but are not sufficient to avoid such sanction when merited (*see Matter of Alperin*, 66 AD3d 309, 313 [1st Dept 2009]; *Matter of Leavitt*, 291 AD2d 37, 39 [1st Dept 2002]). The Committee further notes that the Referee's findings that respondent continued to lie that he mistakenly stated that he filed a timely I-751 application on A.E.'s behalf, and that he expressed insincere remorse are well founded. Lastly, the Committee points out that respondent admitted that his marital issues were not causally linked to his misconduct.

The Referee's findings are firmly supported by the record and should be affirmed. As to the sanction, the Referee's recommendation of a two-year suspension is in accord with this Court's precedent involving similar misconduct, and is appropriate given respondent's neglect of two client matters which he compounded by his false statements and submission of fabricated documents to the Committee, and which is aggravated by his lack of sincere remorse and three prior Admonitions (*see e.g. Matter of Maranga*, 151 AD3d 31 [1st Dept 2017]; *Matter of Meyers*, 108 AD3d at 158; *Matter of Samuely*, 80 AD3d at 163; *Matter of Alperin*, 66 AD3d at 309; *Matter of Cohen*, 40 AD3d at 61; *Matter of O'Shea*, 25 AD3d 203 [1st Dept 2005]; *Matter of Leavitt*, 291 AD2d at 37.

Accordingly, the Committee's motion should be granted, the Referee's findings of fact and conclusions of law are affirmed, and respondent is suspended from the practice of law in the State of New York for a period of two years and until further order of the Court.

All Concur.

Order Filed. [January 4, 2018]

Gische, J.P., Andrias, Kern, Oing, Singh, JJ.

Committee's motion is granted affirming the Referee's findings of facts and conclusions of law. Respondent is suspended from the practice of law in the State of New York for a period of two years, and until further order of this Court.

Footnotes

Footnote 1: The Referee did not sustain charges six and ten (violations of rule 8.4[h]). Also, by way of a stipulation, respondent admitted charge seven which alleged violations of rules 1.1(a), 1.3(a), and 1.3(b) in connection with one of two of the immigration matters.

Footnote 2: Respondent failed to notify his client that a hearing on his political asylum application had been ordered and the client was ordered deported in abstentia. A copy of the deportation order was sent to respondent, but he took no steps to contact his client. The client retained new counsel and was able to re-open the proceeding.

Footnote 3: The Referee also noted that because respondent's initial failures of omission may have been related to his being a solo practitioner the Court may wish to impose a requirement that respondent take a CLE course in small law office practice management before resuming the practice of law. The Committee did not seek imposition of this recommendation as an additional sanction. As such, we decline to address the merits of this recommendation.

Return to Decision List

2017 WL 6626128
Supreme Court,
Appellate Division, Second Department, New York.

In the MATTER OF Frank G. D'ANGELO, Jr., an attorney and counselor-at-law.
Grievance Committee for the Tenth Judicial District, petitioner;
v.
Frank G. D'Angelo, Jr., respondent.
(Attorney Registration No. 2069243)

2016-01326
|
December 29, 2017

DISCIPLINARY PROCEEDING instituted by the Grievance Committee for the Tenth Judicial District. By decision and order on motion of this Court dated August 24, 2016, the Grievance Committee was authorized to institute and prosecute a disciplinary proceeding against the respondent based on the acts of professional misconduct set forth in a verified petition dated January 28, 2016, the respondent was barred, based upon the doctrine of collateral estoppel, from relitigating any of the factual allegations raised in charges one through four of the petition, and the matter was referred to the Honorable Elaine Jackson Stack, as Special Referee, to hear and report. The respondent was admitted to the Bar at a term of the Appellate Division of the Supreme Court in the Second Judicial Department on July 9, 1986.

Attorneys and Law Firms

Catherine A. Sheridan, Hauppauge, N.Y. (Robert H. Cabble of counsel), for petitioner.

Michael F. Mongelli II, P.C., Flushing, NY, for respondent.

RANDALL T. ENG, P.J., WILLIAM F. MASTRO, REINALDO E. RIVERA, MARK C. DILLON, RUTH C. BALKIN, JJ.

OPINION & ORDER

PER CURIAM.

*1 The Grievance Committee for the Tenth Judicial District served the respondent with a verified petition, dated January 28, 2016, containing 12 charges of professional misconduct. Following a prehearing conference on December 1, 2016, and a hearing on January 30, 2017, and February 14, 2017, the Special Referee sustained all the charges. The Grievance Committee now moves to confirm the Special Referee's report and impose such discipline as the Court deems just and proper. The respondent opposes the motion to the extent that charges three, seven, and eleven, each alleging that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, were sustained. The respondent contends that the cases cited by the Grievance Committee are inapposite, and that disbarment is not warranted. The respondent asks that the Court impose a public censure in view of the mitigating circumstances.

Charges One to Four: Surcharge

Charge one alleges that the respondent engaged in conduct that adversely reflects on his fitness as a lawyer, in violation of former Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]) and its successor, rule 8.4(h) of the Rules of Professional Conduct (22 NYCRR 1200.0), as follows: By order dated September 30, 1997, the Supreme Court, Queens County, determined that Albert K. was unable to manage his person and property by reason that his functional level was substantially impaired by dementia, and appointed a guardian for his person and property pursuant to article 81 of the Mental Hygiene Law. By order dated July 23, 2004, the Supreme Court, Queens County, appointed the respondent the successor guardian of the person and property of Albert K., who was then a 76-year-old incapacitated person. In and around early 2007, the respondent, in his capacity as guardian, appointed his wife, Ann Marie D'Angelo (hereinafter Ann Marie), as the nurse geriatric care manager for Albert K. Ann Marie provided geriatric care management services to Albert K. through her solely-owned entity named Family Care Connections, LLC (hereinafter Family Care), which she formed in and around January 2007. Family Care operated from the same office suite as the respondent's law firm. The respondent paid to Family Care out of Albert K.'s estate the aggregate sum of $111,881.98 for services to Albert K.

In an order dated October 13, 2009, the Supreme Court, Queens County, among other things, confirmed the report of a court-appointed examiner regarding the respondent's accounts pertaining to the guardianship of Albert K., and

directed a hearing to be held to address the objections of the examiner to the payments the respondent made to Family Care on Albert K.'s behalf, and whether the respondent should be surcharged for those payments. A hearing was held on December 7, 2009, at which the respondent and Ann Marie offered testimony.

*2 In a decision dated December 8, 2010, the Supreme Court determined that the respondent's final account should be approved; however, it determined that the sum of $108,881.59 constituted excessive fees paid to Family Care and Ann Marie. It approved the sum of only $3,000 paid to Family Care for the period May 2007 through September 2007, when Albert K. was at home. The Supreme Court further determined that: (1) the respondent should be denied commissions and an attorney's fee, "as his actions were in the best interests of him and his family rather than his ward"; (2) the respondent was personally liable to pay the court examiner's legal fees in the amount of $14,625 for identifying and asserting objections to the account; and (3) the respondent should be surcharged the amount of the foregoing items in the aggregate sum of $123,506.59, without interest. The Supreme Court issued an order dated December 28, 2010, consistent with its decision dated December 8, 2010, judicially settling the account. In an order dated May 11, 2011, the Supreme Court denied the respondent's motion for reargument.

The respondent appealed the order to this Court, and the Public Administrator of Queens County (hereinafter the Public Administrator) cross-appealed. By decision and order dated June 6, 2012, this Court affirmed the order insofar as appealed from, reversed the order insofar as cross-appealed from, and granted the Public Administrator's request to include 9% interest on the sum surcharged (*see Matter of Albert K. [D'Angelo]*, 96 A.D.3d 750, 946 N.Y.S.2d 186). This Court found, inter alia, that to the extent that the court examiner's fees exceeded the statutory guidelines, the respondent's "covert self-dealing demonstrates the requisite 'extraordinary circumstances' which entitle a court to depart from the statutory schedule" (*id.* at 753, 946 N.Y.S.2d 186, quoting 22 NYCRR former 806.17[c]).

Charge two alleges that the respondent engaged in conduct prejudicial to the administration of justice, in violation of former Code of Professional Responsibility DR 1–102(a)(5) (22 NYCRR1200.3[a][5]), and rule 8.4(d) of the Rules of Professional Conduct (22 NYCRR 1200.0), based on the factual specifications alleged in charge one. Charge three alleges that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of former Code of Professional Responsibility DR 1–102(a)(4) (22 NYCRR 1200.3[a][4]), and rule 8.4(c) of the Rules of Professional Conduct (22 NYCRR 1200.0), based on the factual specifications alleged in charge one. Charge four alleges that the respondent engaged in a conflict of interest in which his professional judgment was, or was at risk of being, adversely affected by his own financial, business, property, or other interests, in violation of former Code of Professional Responsibility DR 5–101(a) (22 NYCRR 1200.20[a]), and/or rule 1.7(a)(2) of the Rules of Professional Conduct (22 NYCRR 1200.0), based on the factual specifications alleged in charge one.

Charges Five to Eight: Sale of Bridgehampton Property

Charge five alleges that the respondent engaged in conduct that adversely reflects on his fitness as a lawyer, in violation of former Code of Professional Responsibility DR 1–102(a)(7) (22 NYCRR 1200.3[a][7]) and its successor, rule 8.4(h) of the Rules of Professional Conduct (22 NYCRR 1200.0), as follows: In his capacity as guardian for Albert K., the respondent determined that it was in the best interest of Albert K. to sell a real estate parcel owned by Albert K. located in Bridgehampton (hereinafter the Bridgehampton property). The respondent negotiated the sale of the Bridgehampton property with attorney Carolyn Naranjo, who acted as the real estate broker for the purchasers, through her real estate brokerage, Elleira Realty Corp. (hereinafter Elleira Realty). The respondent and Naranjo knew each other from their involvement in the Columbian Lawyers Association, and Naranjo occasionally referred clients to the respondent's law firm.

As guardian for Albert K., the respondent executed a contract of sale for the Bridgehampton property, dated December 8, 2005. Among other things, the contract provided for a purchase price of $3.1 million, the appraised value of the property. The contract of sale provided that the purchasers, Gregory G. Galdi and Linda M. Galdi, had not dealt with any other realtor except Elleira Realty, and that the purchasers agreed to pay the brokerage commission earned thereby pursuant to a separate agreement. Pursuant to a letter dated December 7, 2005, the purchasers agreed to pay Elleira Realty a purchaser's commission of 3% of the purchase price of the Bridegehampton property. The purchasers eventually paid to Elleira Realty the sum of $94,200 in connection with the purchase of the Bridgehampton property. Naranjo formed Elleira Realty on or about December 5, 2005.

*3 At the time of the contract of sale for the Bridgehampton property, the respondent was also a real estate broker. The respondent engaged Naranjo to form a

real estate brokerage, Castleworks Realty, LLC (hereinafter Castleworks), which was formed on or about December 14, 2005. Castleworks was located in the same office suite as the respondent's law firm, and Ann Marie was the chair or chief executive officer and registered agent for Castleworks. The respondent was a signatory on the bank account of Castleworks.

The respondent testified at an examination under oath that he and Naranjo formed their respective real estate brokerages to work together in real estate matters to supplement their law practices.

After obtaining court approval for the sale of the Bridgehampton property, the closing occurred on or about March 31, 2006.

In and around April 2006, the respondent received a check from Elleira Realty, drawn on its account, dated April 13, 2006, in the amount of $47,100, payable to Castleworks. The memo section of the check referenced "Galdi-Bridgehampton." The respondent deposited the check into the corporate account for Castleworks. The proceeds were later disbursed by the respondent for various purposes, including to his law firm and his and Ann Marie's personal accounts. Castleworks performed no brokerage services in the marketing and sale of the Bridgehampton property, and there was no co-brokerage agreement between Castleworks and Elleira Realty for the Bridgehampton property.

The respondent did not disclose to the Supreme Court, which had approved the sale of the Bridgehampton property, that he had received, deposited, and disbursed one-half of the commission Elleira Realty received in connection with the sale of the Bridgehampton property.

Charge six alleges that the respondent engaged in conduct prejudicial to the administration of justice, in violation of former Code of Professional Responsibility DR 1-102(a)(5) (22 NYCRR 1200.3[a][5]), and rule 8.4(d) of the Rules of Professional Conduct (22 NYCRR 1200.0), based on the factual specifications alleged in charge five. Charge seven alleges that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of former Code of Professional Responsibility DR 1-102(a)(4) (23 NYCRR 1200.3[a][4]), and rule 8.4(c) of the Rules of Professional Conduct (22 NYCRR 1200.0), based on the factual specifications alleged in charge five. Charge eight alleges that the respondent engaged in a conflict of interest in which his professional judgment was, or was at risk of being, adversely affected by his own financial, business, property, or other interests, in violation of former Code of Professional Responsibility DR 5-101(a) (22 NYCRR 1200.20[a]), and rule 1.7(a)(2) of the Rules of Professional Conduct (22 NYCRR 1200.0), based on the factual specifications alleged in charge five.

Charges Nine to Twelve: Wills

Charge nine alleges that the respondent engaged in conduct that adversely reflects on his fitness as a lawyer, in violation of former Code of Professional Responsibility DR 1-102(a)(7) (22 NYCRR 1200.3[a][7]) and its successor, rule 8.4(h) of the Rules of Professional Conduct (22 NYCRR 1200.0), as follows: On or about May 22, 1997, approximately 21 days prior to the petition for the appointment of a guardian, Albert K. executed a will (hereinafter the 1997 will). The 1997 will provided, among other things, that Albert K.'s partner, Seymour Russman, was to be executor and a principal beneficiary. In and around April 2009, Russman died.

*4 The respondent apprised Albert K. of Russman's death. At that time, Albert K., who was living at the Sands Point Nursing Home, was still afflicted with a language disorder known as aphasia as a result of a stroke, and was largely confined to bed. On May 8, 2009, the respondent drafted a will (hereinafter the May 8, 2009, will) for Albert K., who executed the will in his room in the nursing home. Albert K. could not read the will, so the respondent read it to him. The May 8, 2009, will was witnessed by Ann Marie and the respondent's mother. The May 8, 2009, will provided that the respondent was the sole executor, and provided for the creation of a charitable trust with the respondent as the sole trustee, to handle the assets of Albert K.'s estate, which exceeded $3 million.

On or about July 8, 2009, Albert K. executed another will (hereinafter the July 8, 2009, will). There were no witnesses to this execution. The July 8, 2009, will was virtually identical to the May 8, 2009, will, with the exceptions that Ann Marie was named as alternate executor, and she was also named as alternate trustee for the $3 million trust.

The $3 million charitable trust provided for in the May 8, 2009, will was not created or established. The respondent did not prepare, and Albert K. did not execute, an inter vivos trust document to create the $3 million charitable trust.

Albert K. died on July 29, 2009.

The respondent offered for probate the May 8, 2009, will, and the Surrogate's Court of Queens County issued him

preliminary letters on or about September 22, 2009. The Public Administrator petitioned the Surrogate's Court to direct the respondent to produce the 1997 will. By order dated December 8, 2009, the Surrogate's Court ordered an inquiry under SCPA 1401, and directed the respondent to attend and submit to an examination, and to produce and file any paper writings purporting to be the last will and testament of Albert K.

In a separate order dated December 8, 2009, the Surrogate's Court directed that the Public Administrator may petition for the denial of probate of the May 8, 2009 will; that temporary letters of administration be issued to the Public Administrator; that the preliminary letters issued to the respondent be suspended; and that a hearing would be held on January 7, 2010, to determine whether to revoke the respondent's preliminary letters.

In a decree dated January 26, 2010, upon the respondent's consent, the Surrogate's Court revoked the respondent's preliminary letters.

By decree dated August 25, 2010, upon the stipulation of the parties dated July 29, 2010, the May 8, 2009, will was denied probate.

In a decision dated July 16, 2012, the Surrogate's Court determined that the 1997 will would be denied probate, since at the time of its execution Albert K. lacked testamentary capacity. The court based its decision on the report of a competency evaluation administered to Albert K. on June 9, 1997, by Dr. James J. Johnson, Jr., done in connection with the petition to appoint a guardian pursuant to article 81 of the Mental Hygiene Law. The court noted that the report stated, in pertinent part, that Albert K. suffered "from a severe and probably progressive neurologic disease known as multi-infarct dementia," and that he had "severe impairment of his language and comprehension of his surroundings."

Charge ten alleges that the respondent engaged in conduct prejudicial to the administration of justice, in violation of former Code of Professional Responsibility DR 1–102(a)(5) (22 NYCRR 1200.3[a][5]), and rule 8.4(d) of the Rules of Professional Conduct (22 NYCRR 1200.0), based on the factual specifications alleged in charge nine. Charge eleven alleges that the respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of former Code of Professional Responsibility DR 1–102(a)(4) (22 NYCRR1200.3[a][4]), and rule 8.4(c) of the Rules of Professional Conduct (22 NYCRR 1200.0), based on the factual specifications alleged in charge nine. Charge twelve alleges that the respondent engaged in a conflict of interest in which his professional judgment was, or was at risk of being, adversely affected by his own financial, business, property, or other interests, in violation of former Code of Professional Responsibility DR 5–101(a) (22 NYCRR 1200.20[a]), and rule 1.7(a)(2) of the Rules of Professional Conduct (22 NYCRR 1200.0), based on the factual specifications alleged in charge nine.

*5 Special Referee's Report

The Special Referee sustained all 12 charges, concluding in her report as follows:

> "Respondent demonstrated little remorse for his conduct. He did suggest, in some instances, that it might have been prudent to have involved the court either for consent or advice, in some of the matters before us. For the most part, he seemed to suggest that it was all really all right and that his conduct should not be subject to discipline.
>
> "Much of the conduct complained of demonstrated that respondent was eager to increase his income and that he could do so by donning the 'two hats' referred to by his wife in another context. Their incomes were intertwined. He paid her an extravagant sum for her services as geriatric care manager. Her realty firm was his 'cover' for the receipt of funds as commission for which he had done no work or made no legal agreement.
>
> "He knew or should have known that his conduct violated the Rules of Professional Conduct. 'The guiding principle must be whether a reasonable attorney, familiar with the Code and its ethical structures would have notice of what conduct is proscribed.... [Respondent] was plainly on notice that [his] conduct in this case ... could be held to reflect adversely on [his] fitness to practice law. [Respondent] knew or should have known that such [conduct] ... tends to undermine public confidence in the judicial system' (*Matter of Holtzman*, 78 N.Y.2d 184 [573 N.Y.S.2d 39, 577 N.E.2d 30] (1991)."

The Special Referee also dismissed all seven affirmative defenses asserted by the respondent in his answer to the petition.

Charges Three, Seven, and Eleven

The respondent contests charges three, seven, and eleven only, which each allege that he engaged in dishonesty, fraud, deceit, or misrepresentation, in violation of former

DR 1-102(a)(4) (22 NYCRR 1200.3[a][4]), and rule 8.4(c) of the Rules of Professional Conduct (22 NYCRR 1200.0), with regard to the imposition of the surcharge, the sale of the Brideghampton property, and the drafting/execution of the May 8, 2009, and July 9, 2009, wills, respectively.

Charge three alleges that the respondent engaged in dishonesty, fraud, deceit, or misrepresentation with respect to the surcharge matter, which was the subject of an appeal in this Court (*see Matter of Albert K. [D'Angelo]*, 96 A.D.3d 750, 946 N.Y.S.2d 186). The respondent contends that he merely committed a negligent or reckless mistake that is being unfairly characterized as deceit. In support thereof, the respondent highlights the fact that his payments to his wife and Family Care were "open and notorious," and that he has always comported himself in a candid and truthful manner with regard to the matter.

In sustaining this charge, the Special Referee found that self-dealing is a type of dishonesty, that the respondent's failure to see this is "unconscionable," and that denying it is deceitful. In affirming the surcharge imposed by the lower court, this Court also affirmed the court examiner's legal fees in the sum of $14,625, and to the extent that the fees exceeded the statutory guidelines set forth in 22 NYCRR 806.17(c), this Court found that the respondent's "covert self-dealing demonstrates the requisite 'extraordinary circumstances' which entitle a court to depart from the statutory schedule" (*Matter of Albert K. [D'Angelo]*, 96 A.D.3d at 753, 946 N.Y.S.2d 186, quoting 22 NYCRR former 806.17[c]). It cannot reasonably be argued that the respondent did not engage in deceitful conduct when his conduct was found to be a form of "covert self-dealing." The respondent's payments to Family Care, a business solely owned by the respondent's wife, were indirect payments to himself, since the respondent and his wife shared accounts and finances. Using Family Care as a cover for payments to himself was plainly deceptive. There is no merit to the respondent's contention. Accordingly, charge three was properly sustained.

*6 Charge seven alleges that the respondent engaged in dishonesty, fraud, deceit, or misrepresentation with respect to the sale of the Bridgehampton property and payment of $47,100 in unearned commission fees to Castleworks, a brokerage company owned by the respondent's wife. The respondent similarly contends that his conduct was merely negligent, not deceitful. In support thereof, the respondent underscores the fact that Albert K. was in no way harmed by the respondent's receipt of a commission, and that, in fact, the respondent acted to save the estate higher commission fees by insisting that he would not agree to the normal rate of 6% to 7%. The respondent argues that he never tried to hide the transaction through a cash payment, and always candidly testified to receipt of a commission.

In sustaining charge seven, the Special Referee found that the "allegation speaks for itself," reasoning as follows:

> "Respondent accepted funds for work unearned. He deposited those funds in the account of a realty company in which his wife is CEO and he is a signatory on the corporate account. Once deposited, he utilized those funds and distributed them to his and his wife's personal accounts and to pay for other bills. The receipt and deposit of the funds were deceitful acts, which are now recognized by respondent as conduct he should not have undertaken."

The hearing evidence revealed that the respondent created Castleworks, and placed ownership of the company in Ann Marie's name only, ostensibly to avoid any ethical conflict from being both broker and attorney on a real estate transaction. However, following the creation of Castleworks, the company was used only as a cover to disguise an income stream to the respondent. At the time of the sale of the Bridgehampton property, the only person involved with Castleworks to hold a broker's license was the respondent. Upon receipt of the commission, the respondent immediately deposited the check into Castleworks' account and used the funds to pay various bills, including a $25,000 payment to the respondent's law firm for rent and other expenses that Castleworks supposedly owed the law firm. While the respondent sought court approval for the sale, he never disclosed to the court his receipt of the $47,100 in commission fees. On these facts, it cannot reasonably be argued that the respondent did not engage in deceitful conduct. The subject conduct is another instance of "covert self-dealing." Accordingly, charge seven was properly sustained.

Charge eleven alleges that the respondent engaged in dishonesty, fraud, deceit, or misrepresentation with respect to execution of the May 9, 2009, will and the July 8, 2009, will. The respondent contests this charge on the ground that there was no direct evidence, only circumstantial evidence, that Albert K. lacked testamentary capacity to execute the May 8, 2009, will.

and argues that the fact that Albert K. may not have understood legalese did not establish lack of competence. In this case the circumstantial evidence that Albert K. did not understand the contents of the May 8, 2009, or July 8, 2009, wills was overwhelming. Twelve years earlier, on June 9, 1997, Dr. James J. Johnson, Jr., conducted a mental status and competency evaluation of Albert K. in connection with the petition to appoint a guardian for him pursuant to article 81 of the Mental Hygiene Law. Dr. Johnson concluded that Albert K. suffered "from a severe and probably progressive neurologic disease known as multi-infarct dementia," and that he had "severe impairment of his language and comprehension of his surroundings." The respondent testified at the hearing that he had been given a copy of Dr. Johnson's report when he was appointed successor guardian to Albert K., and that during the time that he was Albert K.'s guardian, Albert K. had exhibited mental confusion and could not understand complex sentences. The respondent further testified that, at the time that the May 8, 2009, will was executed, Albert K. would not have understood what an "executor" or a "trustee" was. Ann Marie testified at the hearing that by 2009, Albert K. was showing progressively worsening symptoms of aphasia. This evidence supported the Special Referee's conclusion that the respondent's contention that Albert K. understood the contents of the May 8, 2009, and July 8, 2009, wills was deceitful. Accordingly, charge eleven was properly sustained.

*7 Based on the evidence adduced, and the respondent's admissions, the Grievance Committee's motion to confirm the report of the Special Referee is granted, and all twelve charges of professional misconduct are sustained.

In mitigation, the respondent asks the Court to bear in mind that this is not a case of an attorney stealing escrow funds or absconding with settlement proceeds; that he did not engage in deliberate or intentional conduct; that he has never retained Ann Marie as a geriatric care manager on any other guardianship; that he has since withdrawn himself from the list of attorneys eligible to be appointed as guardians; and that he will never in the future accept any matter in which he is not proficient or which poses a risk of a conflict of interest. Citing no authority, the respondent asks that the Court impose a public censure in view of the fact that he has handled dozens of guardianships and all his accountings have been approved, with the exception of Albert K.; a suspension or disbarment would severely impact not only himself, but also all his employees; the individuals who benefit from his pro bono activities would be deprived of a resource; and he is a person of good character as evidenced by newly-submitted character affidavits.

Notwithstanding the aforementioned mitigation, including the facts that the respondent paid in full the surcharged amounts, that the incident appears to be an isolated occurrence in an otherwise unblemished 30–year career, and that the respondent actively contributes to the Bar and his community and church, we find that the severest of sanctions is warranted (*see Matter of Taylor*, 113 A.D.3d 56, 975 N.Y.S.2d 48; *Matter of Aversa*, 88 A.D.3d 339, 930 N.Y.S.2d 508). This case involves a course of covert self-dealing by the respondent, who abused his position as guardian of Albert K., an incapacitated person. Albert K., who was elderly, incapacitated, and later terminally ill, was unusually vulnerable. In three separate instances, the respondent acted against the interests of his ward. He exploited his ward's deteriorating mental and medical condition to generate different incomes streams for himself, using his wife as cover, in at least two instances. Of note, the Special Referee found that the respondent demonstrated little remorse for his conduct. Furthermore, the respondent, having been appointed in dozens of guardianship cases, cannot claim inexperience. There were no allegations that the respondent's judgment was clouded by personal circumstances or financial difficulties during the relevant time period.

Under the totality of circumstances, we conclude that the respondent's misconduct warrants his disbarment from the practice of law, effective immediately.

ORDERED that the petitioner's motion to confirm the Special Referee's report is granted; and it is further,

ORDERED that the respondent, Frank G. D'Angelo, Jr., is disbarred, effective immediately, and his name is stricken from the roll of attorneys and counselors-at-law; and it is further,

ORDERED that the respondent, Frank G. D'Angelo, Jr., shall comply with the rules governing the conduct of disbarred or suspended attorneys (*see* 22 NYCRR 1240.15); and it is further,

*8 ORDERED that pursuant to Judiciary Law § 90, effective immediately, the respondent, Frank G. D'Angelo, Jr., shall desist and refrain from (1) practicing law in any form, either as principal or as agent, clerk, or employee of another, (2) appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission, or other public authority, (3) giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) holding himself out in any way as an attorney and counselor-at-law; and it is

further,

ORDERED that if the respondent, Frank G. D'Angelo, Jr., has been issued a secure pass by the Office of Court Administration, it shall be returned forthwith to the issuing agency, and the respondent shall certify to the same in his affidavit of compliance pursuant to 22 NYCRR 1240.15(f).

ENG, P.J., MASTRO, RIVERA, DILLON, and BALKIN, JJ., concur.

All Citations

--- N.Y.S.3d ----, 2017 WL 6626128, 2017 N.Y. Slip Op. 09277

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155 A.D.3d 109
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of Luigi IZZO, an attorney and counselor-at-law.
Grievance Committee for the Ninth Judicial District, petitioner; Luigi Izzo, respondent.
(Attorney Registration No. 4589131).

Nov. 8, 2017.

Synopsis

Background: Disciplinary proceeding was brought against attorney. Grievance Committee and attorney moved for discipline by consent and request the imposition of a public censure.

Holding: The Supreme Court, Appellate Division, held that public censure was warranted in view of attorney's admitted misconduct in connection with his assignment of 25% of net legal fees he received from certain clients directly to lender.

Motion granted; public censure ordered.

West Headnotes (1)

[1] **Attorney and Client**
⟜Public Reprimand; Public Censure; Public Admonition

Discipline by consent would be granted, and public censure was warranted for attorney's admitted misconduct of violating professional rules by impermissibly advancing and/or guaranteeing financial assistance to a client, other than court costs and expenses of litigation, while representing that client in contemplated or pending litigation, knowingly revealing confidential client information to third party which was protected by attorney-client privilege, engaging in improper communications with represented party, and failing to timely amend his attorney registration information, in connection with his representation of disbarred attorney in criminal matter and assignment of 25% of net legal fees he received from certain personal injury cases directly to lender until the disbarred attorney's $63,272 debt was paid in full. Rules of Prof.Conduct, Rule 8.4; 22 NYCRR 1240.8(a)(5).

Cases that cite this headnote

Attorneys and Law Firms

*523 Gary L. Casella, White Plains, NY (Forrest Strauss of counsel), for petitioner.

Richard M. Maltz, New York, NY, for respondent.

RANDALL T. ENG, P.J., WILLIAM F. MASTRO, REINALDO E. RIVERA, MARK C. DILLON, and JOSEPH J. MALTESE, JJ.

Opinion

PER CURIAM.

The Grievance Committee for the Ninth Judicial District served the respondent with a petition dated March 4, 2016, containing seven charges of professional misconduct. The respondent filed a verified answer dated November 4, 2016. The petitioner and the respondent now move pursuant to 22 NYCRR 1240.8(a)(5) for discipline by consent, and request the imposition of a public censure. As required by 22 NYCRR 1240.8(a)(5)(i), the parties have provided a conditional stipulation dated June 6, 2017, which provides, inter alia, as follows:

Stephen Lyman Segall was disbarred by this Court on April 26, 2011, upon his resignation (*see Matter of Segall*, 84 A.D.3d 159, 921 N.Y.S.2d 563). From in or about March 2012 through on or after January 29, 2013, the respondent represented Segall in connection with a felony criminal matter in the County Court, Westchester County. On July 24, 2012, Segall was convicted of grand larceny in the third degree in violation of Penal Law § 155.35. Prior to sentencing, Segall secured a loan from White Pine Holdings, LLC (hereinafter White Pine), in part, to facilitate his payment of restitution in the criminal proceeding, and executed a promissory note on or about October 19, 2012, obligating himself to repay the sum of $62,272.25 plus interest thereon to White Pine. In support of that loan, on or about October 22, 2012, the respondent

executed a lien letter in favor of White Pine, wherein he pledged that his law firm would assign 25% of the net legal fees received from certain personal injury cases directly to White Pine until the Segall debt ($63,272.25) was paid in full. Annexed thereto was a schedule providing information concerning more than 20 of the respondent's personal injury clients, including the name of the client, the date of injury, the insurance carrier, a description of how the claim arose, a description of the client's injuries and their current medical status, as well as the respondent's assessment of the settlement and/or post-verdict dollar value. The respondent neither advised the clients that *524 he would be releasing this information nor sought their permission to do so. Approximately two months later, on or about December 18, 2012, the respondent executed a second lien letter in which he pledged that his law firm would repay White Pine a revised principal amount of $68,272.50. The respondent also granted White Pine a blanket lien on all personal injury matters wherein "Izzo Law, P.C." is the attorney of record.

Thereafter, the respondent met with Jerry Bergson, a principal of White Pine, to discuss issues relating to the debt owed by Segall, the outstanding promissory note Segall had executed, and the two lien letters the respondent had executed. The respondent admits that he should have known or should have inquired whether Bergson was represented by counsel. He also admits that he failed to seek permission from Bergson's lawyer to speak directly with Bergson.

Further, the respondent admits that from in or about March 2008 through November 2015, he informed the Office of Court Administration Attorney Registration Unit (hereinafter OCA) that he had maintained various office addresses in White Plains, Yorktown Heights, and the Bronx. However, the office address listed on both lien letters is not an address provided to OCA.

Based upon the foregoing, the respondent also admits that he violated the following Rules of Professional Conduct (22 NYCRR 1200.0): rule 1.8(c) by impermissibly advancing and/or guaranteeing financial assistance to a client, other than court costs and expenses of litigation, while representing that client in contemplated or pending litigation; rule 1.6(a) by knowingly revealing confidential information to a third party that was gained during the representation of one or more clients, and that was protected by the attorney-client privilege; rule 4.2(a) by engaging in improper communications with a represented party; rule 8.4(d) by failing to timely amend his attorney registration information with OCA; and, by virtue of the foregoing misconduct, rule 8.4(h).

The parties advise that they have considered the respondent's prior Letter of Caution as an aggravating factor. Further, in mitigation, the respondent would have presented the following factors had this matter progressed to a hearing: that at the time that he sought to help his client by guaranteeing the loan, he had been admitted to practice for approximately four years; that he ultimately became responsible for the loan when Segall failed to honor his obligation; that he has taken steps to address his errors, and to prevent any repetition of same; and that he would have presented character evidence attesting to his honesty and integrity.

As required, the respondent has submitted an affidavit in which he conditionally admits the facts as stipulated, and consents to the agreed discipline of a public censure, which consent is given freely and voluntarily without coercion or duress. Lastly, the respondent states that he is fully aware of the consequences of consenting to such discipline.

Based upon the foregoing, we find that the request for discipline by consent pursuant to 22 NYCRR 1240.8(a)(5) should be granted, and that a public censure is warranted in view of the respondent's admitted misconduct.

ORDERED that the joint motion pursuant to 22 NYCRR 1240.8(a)(5) for discipline by consent is granted; and it is further,

ORDERED that the respondent, Luigi Izzo, is publicly censured for his misconduct.

All Citations

155 A.D.3d 109, 63 N.Y.S.3d 522, 2017 N.Y. Slip Op. 07728

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155 A.D.3d 10
Supreme Court, Appellate Division, Second Department, New York.

In the Matter of Archana DITTAKAVI, an attorney and counselor-at-law.
Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts, petitioner;
Archana Dittakavi, respondent. (Attorney Registration No. 5069406).

Oct. 18, 2017.

Synopsis
Background: In attorney disciplinary proceeding brought after attorney admitted that she signed her client's name on the verification page of a paternity petition, notarized the false signature, and then filed the petition with Family Court, Grievance Committee and attorney moved for discipline by consent.

Holding: The Supreme Court, Appellate Division, held that public censure was appropriate sanction.

Public censure ordered.

West Headnotes (1)

[1] **Attorney and Client**
Public Reprimand; Public Censure; Public Admonition

Public censure was appropriate sanction for attorney who admitted that she signed her client's name on the verification page of a paternity petition, notarized the false signature, and then filed the petition with Family Court; mitigating factors included no prior disciplinary history, no dishonest or selfish motive, continued employment, attorney's relative youth and naivete, her cooperation with Grievance Committee, her acceptance of responsibility and expressed remorse for her misconduct, her excellent reputation, and her demonstrated commitment to public service and volunteer work, and sanction of public censure was in accord with precedent. Rules of Prof.Conduct, Rule 8.4(c, d).

Cases that cite this headnote

Attorneys and Law Firms

**464 Diana Maxfield Kearse, Brooklyn, NY, for petitioner.

Michael S. Ross, New York, NY, for respondent.

RANDALL T. ENG, P.J., WILLIAM F. MASTRO, REINALDO E. RIVERA, MARK C. DILLON, and JEFFREY A. COHEN, JJ.

Opinion

PER CURIAM.

*11 The Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts served the respondent with a notice of petition and petition dated April 4, 2017, containing one charge of professional misconduct. The respondent filed an answer dated April 21, 2017, admitting the allegations of professional misconduct. The Grievance Committee and the respondent now move pursuant to 22 NYCRR 1240.8(a)(5) for discipline by consent, and request the imposition of a public censure. As provided for in 22 NYCRR 1240.8(a)(5)(i), the parties have provided a joint affirmation dated May 23, 2017, in support of the instant motion. By virtue of the stipulation contained in the joint affirmation, the parties have agreed that the following factual specifications are not in dispute:

In January 2015, while employed as a staff attorney at The Bronx Defenders Family Defense Practice, the respondent was assigned to represent a client in a child abuse proceeding commenced in the Family Court. On May 19, 2015, the respondent met with her client in a holding facility at the Bronx County Criminal Court, and had him sign the signature page of a petition to vacate acknowledgment of paternity pursuant to New York Family Court Act § 516-a (hereinafter the petition) for the purpose of filing papers on his behalf in the Family Court. The client was subsequently transported back to the Rikers Island correctional complex where he was being detained.

When the respondent arrived at her office later that day,

she reviewed the petition and realized that she had overlooked the verification page of the petition, which required her client's notarized signature. The respondent signed her client's name to the verification page of the petition, and then notarized the false signature of her client. The respondent filed the petition and verification with the Family Court on May 20, 2015.

On June 11, 2015, the respondent appeared in court with her client. The Judge presiding over the case asked the respondent's *12 client whether he recognized the signature on the January 20, 2015, acknowledgment of paternity as his own, because the name in the signature appeared misspelled. The respondent's client indicated that he did not believe the signature was his. At that point in time, the respondent realized that the signatures and handwriting of her client would be at issue in the upcoming hearing on the paternity petition.

On June 11, 2015, the respondent advised a supervising attorney in The Bronx Defenders of the fact that she had signed her client's name on the verification page **465 of the paternity petition, notarized the false signature, and then filed the petition with the Court. The respondent also eventually told these facts to her client and explained that she was seeking advice from supervisors about how to proceed. In determining not to terminate the respondent's employment, The Bronx Defenders considered the fact that she was a young attorney early in her career, she had her client's consent to file the document, and she did not gain personally or professionally from her actions.

In late September or early October of 2015, The Bronx Defenders filed an order to show cause requesting permission to withdraw the paternity petition without prejudice, and to be relieved as counsel. The Family Court granted the motion, permitting withdrawal of the paternity petition and relieving The Bronx Defenders as counsel. An attorney from the 18–B panel was assigned to represent the former client.

As required, the respondent has submitted an affidavit with this motion in which she conditionally admits the foregoing facts, and that those facts establish that she has engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and conduct that is prejudicial to the administration of justice, in violation of rule 8.4(c) and (d) of the Rules of Professional Conduct (22 NYCRR 1200.0), respectively. The respondent further consents to the agreed discipline of a public censure, which consent is given freely and voluntarily without coercion or duress. Lastly, the respondent states that she is fully aware of the consequences of consenting to such discipline.

In mitigation, the parties agree that the following factors were considered: no prior disciplinary history; no dishonest or selfish motive; continued employment by The Bronx Defenders; her relative youth and naivete; cooperation with the Grievance Committee; acceptance of responsibility and expressed remorse for her misconduct; excellent reputation; and demonstrated commitment to public service and volunteer work.

*13 As to the appropriate sanction, the parties seek the imposition of a public censure, which is in accord with precedent from this Court (*see Matter of Cohen*, 72 A.D.3d 251, 895 N.Y.S.2d 493; *Matter of Raskind*, 46 A.D.3d 129, 843 N.Y.S.2d 841).

Based upon the foregoing, we find that the request for discipline by consent pursuant to 22 NYCRR 1240.8(a)(5) should be granted, and that a public censure is warranted in view of the respondent's admitted misconduct as well as the mitigating factors presented herein.

ORDERED that the joint motion pursuant to 22 NYCRR 1240.8(a)(5) for discipline by consent is granted; and it is further,

ORDERED that the respondent, Archana Dittakavi, is publicly censured for her misconduct.

ENG, P.J., MASTRO, RIVERA, DILLON and COHEN, JJ., concur.

All Citations

155 A.D.3d 10, 62 N.Y.S.3d 463, 2017 N.Y. Slip Op. 07253

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2018 WL 456157
Supreme Court,
Appellate Division, Third Department, New York.

In the MATTER OF Matthew Joseph MANN, an Attorney.
Attorney Grievance Committee for the Third Judicial Department, Petitioner;
v.
Matthew Joseph Mann, Respondent.
(Attorney Registration No. 2597060)

D–2–18

Calendar Date: January 10, 2018

Decided and Entered: January 18, 2018

Attorneys and Law Firms

Monica A. Duffy, Attorney Grievance Committee for the Third Judicial Department, Albany (Michael K. Creaser of counsel), for petitioner.

Corrigan, McCoy & Bush PLLC, Rensselaer (Scott W. Bush of counsel), for respondent.

Before: Garry, P.J., Mulvey, Aarons, Rumsey and Pritzker, JJ.

MEMORANDUM AND ORDER

Per Curiam.

*1 Respondent was admitted to practice by this Court in 1994. He maintains an office for the practice of law in Albany County.

In January 2017, petitioner alleged by petition of charges that respondent had engaged in a conflict of interest and conduct prejudicial to the administration of justice in violation of Rules of Professional Conduct (22 NYCRR 1200.0) rules 1.7(a)(1) and 8.4(d). According to petitioner, respondent improperly prepared and urged the execution of a child custody agreement purporting to settle a dispute between parents and grandparents regarding the care of the parents' minor children. All of the parties to the agreement were not only respondent's friends to a greater or lesser extent, but they were also persons that respondent was contemporaneously representing as clients in separate legal matters unrelated to the custody dispute. After the grandparents commenced a proceeding in Albany County Family Court, respondent prepared the custody agreement unsolicited, without any input from the respective parties, and without giving them the opportunity to review the matter in advance of a meeting that he had arranged at his law office for the purpose of presenting the agreement. Although respondent inserted a provision into the agreement stating that he was not representing any of the parties with respect to the proposed custody arrangement, the petition of charges asserts that he, nevertheless, explained, discussed and provided legal advice at the meeting regarding the custody agreement. After the parties were persuaded to execute the agreement notwithstanding the father's initial objection, the dispute between the parties intensified and the grandparents, represented by separate counsel, did not settle the pending Family Court matter as provided in the agreement.

Complaints against respondent were thereafter filed by the parents, who asserted that respondent pressured them into executing a one-sided agreement that adversely affected their custody rights, without an adequate explanation of the risks of signing such an agreement, or providing a reasonable opportunity to seek independent counsel. Respondent served an answer denying the allegations and a Referee was appointed to hear and report. A full hearing was conducted in June 2017, at which respondent was represented by counsel. The Referee thereafter issued a report sustaining the petition of charges. Respondent's claims that he acted only as a disinterested mediator and that the parties to the agreement waived or consented to any conflict of interest were rejected (*see* Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.7[b]).

Petitioner now moves to confirm the Referee's report and respondent cross-moves for an order disaffirming the report and dismissing the petition of charges. Upon consideration of the facts, circumstances and record before us, and having heard the parties in support of the respective motions at oral argument, we find that the allegations in the petition of charges sustained by the Referee were established by a fair preponderance of the evidence. Accordingly, we grant petitioner's motion to confirm the Referee's report in its entirety, and deny respondent's cross motion to disaffirm.

*2 Turning to the issue of the appropriate disciplinary sanction, we have considered respondent's submissions in mitigation from colleagues and clients attesting to his good character. We further note the lack of proof that respondent's misconduct stemmed from any venal intent.

We have also heard from petitioner and observe that respondent's misconduct is aggravated by, among other things, his significant disciplinary history, which includes a two-year stayed suspension upon findings of conversion and escrow account mismanagement (*Matter of Mann*, 284 A.D.2d 719, 727 N.Y.S.2d 492 [2001]), which was later terminated upon respondent's application (*Matter of Mann*, 9 A.D.3d 676, 779 N.Y.S.2d 371 [2004]), and private discipline in the form of two admonitions and a letter of caution (*see* Rules of App.Div., 3d Dept [22 NYCRR] former § 806.4[c][1][i], [ii]). Accordingly, in order to protect the public, maintain the honor and integrity of the profession and deter others from committing similar misconduct, we find that, under the circumstances, respondent should be censured (*see e.g. Matter of Rockmacher*, 150 A.D.3d 1528, 55 N.Y.S.3d 507 [2017]; *Matter of Krzys*, 149 A.D.3d 1244, 51 N.Y.S.3d 260 [2017]; *Matter of McDonagh*, 129 A.D.3d 1199, 10 N.Y.S.3d 363 [2015]; *Matter of Musafiri*, 127 A.D.3d 1405, 4 N.Y.S.3d 925 [2015]; *Matter of Burns*, 123 A.D.3d 1284, 997 N.Y.S.2d 844 [2014]).

Furthermore, under the particular circumstances herein, we direct that respondent, within one calendar year of the date of this decision, submit documentation to petitioner establishing that he has taken and passed the Multistate Professional Responsibility Examination within that time period and, additionally, that he has completed six credit hours of accredited continuing legal education in ethics and professionalism, all in addition to the continuing legal education required of attorneys in this state (*see* Rules of App.Div.s [22 NYCRR] part 1500).

ORDERED that petitioner's motion to confirm the Referee's report is granted and respondent's cross motion to disaffirm the report is denied; and it is further

ORDERED that respondent's professional misconduct as set forth in the petition of charges is deemed established, and respondent is hereby determined to have violated Rules of Professional Conduct (22 NYCRR § 1200.0) rules 1.7(a)(1) and 8.4(d); and it is further

ORDERED that respondent is censured; and it is further

ORDERED that respondent is directed to comply with all terms and conditions set forth in this Court's decision.

Garry, P.J., Mulvey, Aarons, Rumsey and Pritzker, JJ., concur.

All Citations

--- N.Y.S.3d ----, 2018 WL 456157, 2018 N.Y. Slip Op. 00377

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152 A.D.3d 39
Supreme Court, Appellate Division, Fourth Department, New York.

Matter of Martin J. SCHANK, An Attorney, Respondent.
Grievance Committee of the Seventh Judicial District, Petitioner.

June 9, 2017.

Synopsis
Background: Disciplinary proceeding was brought against attorney.

Holdings: The Supreme Court, Appellate Division, held that:

[1] attorney committed misconduct by practicing law in Florida in violation of regulation of legal profession in that jurisdiction and by making false statements during investigation;

[2] three-year suspension from practice of law was warranted; but

[3] restitution to Florida homeowner associations in the amount of $3,500 was not warranted as sanction.

Suspension ordered.

West Headnotes (3)

[1] **Attorney and Client**
⚖Grounds for Discipline
Attorney and Client
⚖Deception of court or obstruction of administration of justice

Attorney committed misconduct by practicing law in Florida in violation of regulation of legal profession in that jurisdiction, engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, engaging in conduct that was prejudicial to administration of justice, and engaging in conduct that adversely reflected on his fitness as a lawyer; attorney agreed to review and revise bylaws for two homeowner associations that governed condominium complex where he maintained a residence in Florida, he sent to the associations proposed bylaws containing numerous references to Florida law and received $3,500 form the associations, and he failed to cooperate in grievance committee's investigation by failing to appear for scheduled interview, failing to produce documents in a timely manner, and making false statements. Rules of Prof.Conduct, Rule 8.4.

Cases that cite this headnote

[2] **Attorney and Client**
⚖Definite Suspension

Three-year suspension from practice of law was warranted for attorney who committed misconduct by practicing law in Florida in violation of regulation of legal profession in that jurisdiction and making false statements in grievance committee's investigation; attorney had previously received several letters of caution concerning his failure to cooperate in prior grievance investigations, and he obstructed disciplinary process by failing to file timely answer to the petition, failing to serve timely responses to discovery requests, failing to comply with directives of the referee concerning discovery and other prehearing matters, and making unsubstantiated claims that he either had complied with certain of those directives or was unable to do so for medical reasons. Rules of Prof.Conduct, Rule 8.4.

Cases that cite this headnote

[3] **Attorney and Client**
⚖Restitution

Restitution to Florida homeowner associations in the amount of $3,500 was not warranted as sanction for attorney who committed misconduct by practicing law in Florida in violation of regulation of legal profession in that

jurisdiction by reviewing and revising bylaws for two homeowner associations that governed condominium complex where he maintained a residence in Florida, since there was no evidence that attorney wilfully misappropriated or misapplied those funds. McKinney's Judiciary Law § 90(6–a); Rules of Prof.Conduct, Rule 8.4.

Cases that cite this headnote

**309 PRESENT: SMITH, J.P., CARNI, DeJOSEPH, NEMOYER, AND TROUTMAN, JJ.

Opinion

**310 PER CURIAM:

*40 Respondent was admitted to the practice of law by this Court on February 18, 1981, and formerly maintained an office in Rochester. In February 2016, the Grievance Committee filed a petition containing two charges of misconduct against respondent, including practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction and making false statements during the investigation of the Grievance Committee. Respondent filed an answer denying material allegations of the petition, and this Court appointed a referee to conduct a hearing. The Referee has filed a report sustaining the charges and making findings in aggravation, which the Grievance Committee moves to confirm. Although respondent failed to file a written response to the motion, he appeared before this Court on the return date thereof, at which time he was heard in response to the motion.

[1] With respect to charge one, the record establishes that, in 2012, respondent agreed to review and revise the bylaws for two homeowner associations that govern the condominium complex where he maintains a residence in Florida. The Referee found that, in February 2012, respondent sent to the homeowner associations a retainer agreement, which was printed on the letterhead for respondent's Rochester law office, wherein respondent agreed to review and revise those bylaws for the "discounted sum" of $5,500. The Referee further found that respondent subsequently received from the homeowner associations funds in the amount of $3,500 and, in March 2013, he sent to the homeowner associations proposed bylaws that contain numerous references to Florida law and citations to certain Florida statutes. Although respondent throughout this proceeding has asserted that he was hired by the homeowner *41 associations in his capacity as a "real estate professional" to prepare draft documents to be finalized by a Florida attorney, the Referee found that those assertions were not credible based on the documentary proof and testimony received in evidence during the hearing.

With respect to charge two, the Referee found that, from December 2015 through March 2016, respondent failed to cooperate in the investigation of the Grievance Committee by failing to appear for a scheduled interview with counsel for the Committee, failing to produce relevant documents in a timely manner, and making false statements in response to the allegations set forth in charge one.

Inasmuch as the factual findings of the Referee are supported by the record, we grant the Grievance Committee's motion to confirm them, find respondent guilty of professional misconduct, and conclude that he has violated the following Rules of Professional Conduct (22 NYCRR 1200.0):

rule 5.5 (a)—practicing law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction;

rule 8.4 (c)—engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation;

rule 8.4 (d)—engaging in conduct that is prejudicial to the administration of justice; and

rule 8.4 (h)—engaging in conduct that adversely reflects on his fitness as a lawyer.

Although the Referee made advisory findings that respondent has violated certain other disciplinary rules, we decline to sustain those alleged violations inasmuch as they are not supported by the record.

[2] [3] We have considered, in determining an appropriate sanction, that respondent has previously received from the Grievance Committee several letters of **311 caution concerning, inter alia, his failure to cooperate in prior grievance investigations. We have also considered the Referee's findings in aggravation of the charges, including that respondent obstructed the disciplinary process by failing to file a timely answer to the petition, failing to serve timely responses to discovery requests of the Grievance Committee, failing to comply with

directives of the Referee concerning discovery and other prehearing matters, and making unsubstantiated claims that he either had complied with certain of those directives or was unable to do so for medical reasons. Accordingly, after consideration of all of the factors *42 in this matter, we conclude that respondent should be suspended from the practice of law for a period of three years and until further order of this Court. Although the Grievance Committee requests that the Court direct respondent to make restitution to the homeowner associations in the amount of $3,500, we deny that request inasmuch as the record does not establish that respondent "wilfully misappropriated or misapplied" those funds within the meaning of Judiciary Law § 90(6–a).

Order of suspension entered.

All Citations

152 A.D.3d 39, 57 N.Y.S.3d 309, 2017 N.Y. Slip Op. 04751

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"Bridge the Gap"

February 5, 2018

SMALL BUSINESS FORMATION

Presenter:

John R. Calcagni, Esq.

I. Background Information (10 minutes)

A. Types of Entities:

1. Pass-Through:

(a) Sole proprietorship
(b) Partnership
(c) S Corporations
(d) Limited Liability Companies

2. Non-Pass Through:

(a) C Corporations

B. Prevalence of Each Type

II. Client Inquiries and Engagements (5 minutes)

A. Sole Proprietorship and Partnership – Rare

B. Corporations and Limited Liability Companies – Frequently

III. Corporations (20 minutes)

A. Status as a Legal Person

B. Types:

1. Classification
2. Tax Status

C. Steps in Formation:

1. Select Name

(a) Do a conflicts check with other New York entities

2. Select Jurisdiction:

(a) New York
(b) Delaware

3. File Certificate of Incorporation at the Department of State

4. Post Incorporation Organization Procedures:

(a) Elect Directors
(b) Appoint Officers
(c) Approve Form of Corporate Seal and Stock Certificate
(d) Accept Stock Subscriptions and Issue Stock

5. Basic Tax Matters:

(a) Obtain Tax Identification Number
(b) Elect Sub-Chapter S Status (if applicable)

D. Advice to Client Regarding Piercing Corporate Veil:

1. Maintain Corporate Formalities

2. Avoid Co-Mingling (Separate bank account and books for Corporation)

3. Avoid Under Capitalizing the Corporation

IV. Limited Liability Companies (15 minutes)

A. Similarities to Corporations:

1. Creature of Statute

2. Status as a Legal "Person"

3. Similar Classifications

4. Protection for Owners' Personal Assets

5. One Level of Taxation (Same as "S" Corps)

B. LLC Formation:

1. Select Name

2. Select Jurisdiction

3. File Articles of Organization with the Department of State

C. Post-Formation Steps:

1. Prepare Operating Agreement within 90 days of formation

2. Publish in 2 Newspapers and file affidavits of publication -120 days after filing:

(a) Selected by County Clerk
(b) One must be daily *i.e., Newsday* on Long Island

3. Meetings not required – option of members whether to meet

V. Differences -- LLCs vs. Corporations (20 minutes)

A. Terminology Differences

B. Allocation of Profits and Losses – Structured vs. Flexible

C. Post-Formation Management – Formal vs. Informal

D. Director/Manager Voting Rights – Structured vs. Flexible

E. Owner Voting Rights – Structured vs. Flexible

F. Types of Permitted Owners - "S" Corporations vs. LLCs

VI. Summary of Advantages – LLCs vs. Corporations (5 minutes)

A. Advantages of LLCs

B. Advantages of Corporations

THE BASICS OF SMALL BUSINESS FORMATION

PRESENTER:

JOHN R. CALCAGNI, ESQ.

SUFFOLK COUNTY BAR ASSOCIATION

ACADEMY OF LAW

"BRIDGE THE GAP"

February 5, 2018

THE BASICS OF SMALL BUSINESS FORMATION

I. CORPORATION

1. Advantages. A corporation may be advantageous because:

   A. Limited Liability. Shareholders are not personally liable for corporate debts or obligations. Instead, liability is limited to the extent of the shareholders' investment.

   B. Free Transferability. Many corporations are structured so that shareholders may freely transfer all attributes of ownership without the consent of the other shareholders (e.g., IBM stock). Furthermore, the fungible nature of shares of stock facilitates the secondary transfer of equity interests.

   C. Continuity of Life. Theoretically, a corporation can last forever. Unlike partnerships, for example, the death of a shareholder will not automatically cause the entity to dissolve.

   D. Deductible Benefits. A corporation may deduct the current cost of group-term life insurance and health benefits paid for the benefit of shareholder employees. Most shareholder/employees of S corporations must include these benefits as income.

2. Disadvantages. The principal disadvantage of a corporation is that earnings may be taxed twice: once at the entity level and then again at the shareholder level (i.e. in the form of dividends).

3. Formation. The following documents need to be drafted when forming a corporation:

   A. Certificate of Incorporation. A corporation is formed by filing the Certificate of Incorporation with the New York Department of State and paying a filing fee of $135 ($125 filing fee plus minimum organization tax of $10). The Certificate of Incorporation must include:

      i) The corporate name. The name must contain one of the following words or abbreviations: Inc., Incorporated, Corp., Corporation, Ltd., or Limited. The name also must not conflict with the name of an existing corporation within the state. You can check whether the corporate name is available by requesting the Department of State to conduct a name search or you can simply reserve the corporate name with the Department of State pursuant to B.C.L. Section 303(a). The New York Department of State also maintains a website at www.dos.state.ny.us/ where names of existing corporations can be searched to determine whether a name is already in use by another corporation.

ii) Business purpose. Rather than state a specific purpose (*e.g.*, "to engage in banking" or "to operate a real estate brokerage business"), it is usually preferable to state that the corporation "may engage in any lawful activity for which corporations may be organized pursuant to the Business Corporation Law.

iii) County where principal office is located.

iv) The number of shares the corporation may issue.

v) Designation of Secretary of State as agent for service of process.

vi) Registered agent, if any.

vii) Dissolution date, if any.

It may take the Department of State up to six weeks to process and file the Certificate of Incorporation. The processing time can be reduced to 24 hours for an additional $25.00 fee, same day handling for an additional $75 fee, and 2 hour handling for an additional $150 fee.

B. Bylaws. Bylaws govern how the corporation will be managed (See B.C.L. § 601). Typically, bylaws will include provisions relating to:

i) Management. A Corporation is managed by the Board of Directors. Under prior law, a corporation had to have at least 3 directors unless there were fewer than 3 shareholders, in which case it had to have at least the same number of directors as it had shareholders. A corporation is now permitted to have only 1 director. Committees of the Board (e.g., Executive Committee, Compensation Committee) are also required to have only 1 director rather than the 3 directors required by prior law.

Other management provisions may address:

a) The scope of Directors' authority;

b) How Directors are to be elected;

c) How Directors can be removed; and

d) The responsibilities of the President, Vice President(s), Secretary and Treasurer.

ii) Shareholder Rights. Shareholders have *limited* rights, which include the right to:

a) Elect and remove Directors;

b) Make and amend bylaws;

c) Approve mergers, sales of substantially all of a corporation's assets, voluntary dissolution, etc.; and

d) Inspect the corporate records.

The bylaws also will include provisions relating to shareholder meetings (i.e. annual and special), quorum requirements, and voting procedures (i.e. straight voting vs. cumulative voting). A majority shareholder vote is needed to amend the Certificate of Incorporation and remove Directors. For corporations formed before February 22, 1998 a two-thirds shareholder vote is needed to approve the merger, sale, consolidation or dissolution of the corporate entity or to impose a higher voting or quorum requirement, unless a charter amendment is adopted reducing the requirement to a majority of the outstanding shares entitled to vote on such matters. For corporations formed on or after February 22, 1998 such transactions may be approved by a majority vote unless the corporation's Certificate of Incorporation provides for a greater voting requirement.

iii) Capital Stock. The Certificate of Incorporation may differentiate between different types of stock (i.e. common vs. preferred) and may also specify whether shareholders are entitled to preemptive rights so as to maintain their proportional ownership in the business. Shareholders of corporations formed before February 22, 1998 have preemptive rights unless the Certificate of Incorporation denies them. Shareholders of corporations formed on or after February 22, 1998 do not have preemptive rights unless the Certificate of Incorporation grants them.

iv) Transfer Procedures. Some bylaws may specify whether shares are freely transferable or whether transfer restrictions are imposed. Separate shareholder agreements and buy/sell agreements may also be used for this purpose.

v) Miscellaneous. Other provisions may address:

a) Indemnification. The Corporation may agree to indemnify directors, officers and/or employees if they are sued as a result of corporate activity. However, the BCL restricts indemnification if the officer or director acts in bad faith or out of self-interest to the detriment of the corporation.

b) Dissolution. For corporations formed on or after February 22, 1998 or corporations whose Certificate of Incorporation so provides, a majority shareholder vote is needed to dissolve the corporation; for pre 2/22/98 corporations, a two-thirds shareholder vote is needed to

dissolve the Corporation.

c) Bylaw Amendments. Shareholders and/or Directors may have the authority to change the corporate bylaws.

C. Statement of Incorporator. This document indicates that the incorporator has adopted the bylaws and has elected the directors of the corporation.

D. Minutes of the First Meeting of the Board of Directors. The purpose of the first meeting of directors is to elect officers, approve the issuance of stock, and to address other issues that pertain to the organization, operation and the management of the corporation.

II. S CORPORATION

1. Advantages. The S Corporation may be advantageous because:

A. No Entity Taxation. Profits and losses are generally taxed to S Corporation shareholders on their personal tax returns.

B. Limited Liability. S Corporation shareholders are not personally liable for entity debts or obligations. Instead, liability is limited to the extent of the shareholder's investment.

2. Disadvantages. The disadvantages of an S Corporation include:

A. Ownership Restrictions. S Corporations are subject to significant restrictions under IRC Section 1361, including:

i. Permissible shareholders are limited to U.S. residents and citizens and certain retirement plans, charitable organizations and certain U.S. trusts, including grantor trusts, electing small business trusts and qualified subchapter S trusts;

ii. No more than 100 shareholders are permitted (all family members counted as 1 shareholder); and

iii. Only one class of stock is permitted.

B. Lack of Flexibility When Allocating Profits and Losses. Income and losses must be allocated to S Corporation shareholders on a pro rata basis in accordance with the percentages of stock owned by each shareholder. Other entities (e.g., partnerships and LLCs) have more flexibility when allocating profits and losses.

C. Gain Recognition When Appreciated Property is Distributed. Gains are recognized when appreciated property is distributed to S Corporation shareholders. Other entities (e.g., partnerships and LLCs) may usually distribute cash or property to their members without such tax consequences.

3. Formation. The same documents used to form a C Corporation are needed for form an S Corporation (i.e. Certificate of Incorporation and Bylaws). In addition, an S Corporation must file Forms 2553 and CT-6 which notify the Internal Revenue Service and New York State, respectively, that the entity elects S Corporation status so that the income will be taxed directly to the S Corporation shareholders as opposed to the entity itself.

III. PARTNERSHIP

1. Advantages. A partnership may be advantageous because:

   A. No Entity Taxation. Partners report all profits and losses on their personal tax returns.

   B. Flexibility When Allocating Profits and Losses. A partnership has some flexibility when allocating and distributing profits and losses to the various partners. If, however, the allocation has no substantial economic effect (as defined under the IRC Section 704(b)), then the IRS will reallocate the profits and losses in accordance with each partner's economic interest in the partnership.

   C. Basis Election. Partnership may elect to receive a step-up in basis when a taxable transfer occurs (i.e. transfer at death).

2. Disadvantages. The principal disadvantage of a general partnership is that partners are personally liable for entity debts and obligations. There is joint and several liability for wrongful acts and joint liability for other partnership liabilities.

3. Formation. A Partnership is probably the easiest entity to form. The following documents should be drafted when forming a partnership:

   A. Certificate of Partnership. New York partnerships are required to file a certificate of Partnership in the County Clerk's Office of each County where the partnership will do business and must include the following information:

      i) The partnership name;

      ii) The partnership address;

      iii) The names and residences of all partners; and

      iv) The identification of all partners under the age of 18.

   B. Partnership Agreement. A partnership is not required to adopt a written Partnership Agreement unless the agreement would violate the Statute of Frauds (See General Obligations Law Section 5-701). Nevertheless, a written Partnership Agreement is an effective means to protect all partners. Typically, the Partnership Agreement will include provisions relating to:

i) Admission of new partners. If the partnership agreement is silent, unanimous consent is needed to admit a new partner (See Partnership Law Section 40).

ii) Allocation of profits and losses. Some flexibility is allowed when allocating profits and losses among the various partners.

iii) Assignment of partnership interests. If the partnership agreement is silent, a partnership interest is freely assignable (See Partnership Law Section 53). The assignee, however, may not interfere with management and is merely entitled to receive the future profits and distributions to which the assigning partner would otherwise be entitled.

iv) Transferring Partnership Interests. A transfer of a partnership interest neither dissolves the partnership nor entitles assignee to management rights, rights of inspection of partnership books, or rights to obtain information about partnership affairs. Assignee merely receives rights to assigning partner's profits and his or her distributions in dissolution.

v) Dissolution. If the partnership agreement is silent, dissolution is caused by either the death or bankruptcy of a partner or the express will of any partner when no definite term or particular undertaking is specified (See Partnership Law Section 62).

vi) Miscellaneous. Other provisions may address:

a) Tax Matters Partner. A partner may be designated to make all tax decisions and elections, including fiscal year, basis elections, etc.

b) Partner in Charge of Dissolution. A partner may be designated to wind up the partnership's affairs in case of dissolution.

4. Limited Liability Partnerships.

A. Applicability. An existing general partnership engaged in professional services may register as a limited liability partnership (LLP).

B. Limited Liability. No partner of an LLP will be personally liable for debts or obligations of the partnership, except for the negligent or wrongful acts committed by such partner or anyone under his or her direct supervision and control. Applies whether liabilities arise in tort, contract or otherwise.

C. Liability May Be Assumed. Partners may assume personal liability if at least a majority of the partners have agreed to do so.

D. Registration. An LLP is formed by filing a Certificate of Registration with the Department of State setting forth:

i) Name of the LLP, which must contain the words Registered Limited

Liability Partnership or Limited Liability Partnership or the abbreviations R.L.L.P, RLLP, L.L.P. or LLP.

ii) Address of the LLP's principal office in New York.

iii) Profession to be practiced by the LLP and a statement that it is eligible to register as an LLP.

iv) Designation of the Secretary of State as agent upon whom process against the LLP may be served and the post office address to which the Secretary of State should mail a copy of process.

v) Registered agent, if any.

vi) A statement that the partnership is filing a registration for status as a registered limited liability partnership.

vii) If registration is to be effective later than filing date, a proposed effective date not more than 60 days from filing date.

viii) If all or specified partners are to be liable in their capacity as partners for all or specified debts of the LLP, a statement to such effect .

ix) Any other matters the partnership determines.

E. Filing fee. The filing fee is $200.00

F. Publication. Publication of a copy of the certificate of registration or a notice concerning the substance thereof is required for 6 consecutive weeks in 2 newspapers in the county in which principal office of LLP is located. County Clerk determines the 2 newspapers. Proof of publication (affidavits by the 2 newspapers) must be filed within 120 days of the effective date of the registration.

G. Failure to file proof of publication. Under amendments to the Partnership Law that became effective on June 1, 2006, the authority to carry on or transact business of an LLP that fails to comply with the publication and filing requirements will be suspended. A more detailed description of this legislation is contained in Part VI of this outline.

H. Renewal Registration Within 60 days of the 5th anniversary of the effective date of the registration of an LLP (and every 5 years thereafter) LLP must file a Status Statement with the Department of State, together with a $20 filing fee, in order to maintain its status as an LLP. Failure to file could result in Department of State's revoking LLP status.

I. Effect of Filing. LLP is the same entity that existed before registration; continues to be a general partnership under New York law.

J. No Insurance Requirement Some states have adopted requirements that LLPs maintain certain levels of malpractice or other insurance. New York does not have such a requirement.

IV. LIMITED LIABILITY COMPANY

1. Effective Date. New York's Limited Liability Company ("LLC") Law became effective on October 24, 1994.

2. Advantages. The LLC may be advantageous because:

   A. Limited Liability. Members (i.e. owners) are not personally liable for LLC debts or obligations. Instead, liability is limited to the extent of the member investment.

   B. No Entity Taxation. Profits and losses are generally taxed to members on their personal tax returns.

   C. No Ownership Restrictions. Unlike S Corporations, LLCs are not subject to onerous ownership restrictions.

   D. Participation in Management. Unlike limited partners, members will not be personally liable for entity debts and obligations even if they participate in management.

   E. Same Advantages as Partnership. Like a partnership, an LLC has flexibility when allocating profits and losses and may take advantage of certain basis elections.

3. Disadvantages. The disadvantages of an LLC include:

   A. Formation May Be Expensive. An LLC is subject to certain publication requirements which could (but does not necessarily) make it somewhat expensive to create.

   B. New Form of Entity. Many questions remain unanswered due to the relatively recent creation of this form of entity.

4. Formation. The following documents need to be drafted when forming an LLC:

   A. Articles of Organization (Sec. 206). An LLC is formed by filing the Articles of Organization with the Department of State and paying a filing fee of $200. The Articles of Organization must include:

      i) LLC name;

      ii) County where principal office is located;

      iii) Dissolution date, if any;

iv) Designation of Secretary of State as agent for service of process;

v) Registered agent, if any;

vi) Whether any LLC member is liable for all or specified debts of the LLC.

vii) Any other provisions that members elect to include for the regulation of the internal affairs of the LLC.

B. Publication Requirements (Sec. 206(c)). Within 120 days of filing, a notice containing the substance of the Articles of Organization must be published once a week for six consecutive weeks in two newspapers in the county where the principal office is located and proof of publication sent to Secretary of State. Under amendments to the Limited Liability Company Law that became effective on June 1, 2006, the authority to carry on or transact business of an LLC that fails to comply with the publication and filing requirements will be suspended. A more detailed description of this legislation is contained in Part VI of this outline.

C. Operating Agreement (Sec. 417). Within 90 days after formation, an LLC is required to adopt a written operating agreement which specifies the rights and obligations of its members and managers. A typical operating agreement will include provisions relating to:

i) Management. Unless the Articles of Organization provide for management of the LLC by a manager, management is vested in its members, who must manage the LLC as required by the LLC statute, subject to the articles of organization or the operating agreement. Each member is an agent of the LLC and thus can bind the LLC in the ordinary course of business. The operating agreement, however, may designate a class of either members or managers to run the business. Managers need not be members.

ii) Voting. Unless the operating agreement provides otherwise, the weight of each member's vote is in proportion to his or her share of the LLC's current profits. Ordinarily, a majority vote is needed to admit a member, approve extraordinary debt, or change the terms of the articles or organization or operating agreement. For LLCs formed before September 1, 1999, a two-thirds vote is needed to dissolve the LLC, sell or exchange virtually all of the LLC's assets, or merge or consolidate the LLC with another entity. LLC's formed on or after September 1, 1999 require only a majority vote to approve mergers, consolidations, sales or dissolutions. In all cases, however, the operating agreement may change these voting percentages.

iii) Meetings. Members are to meet annually, unless the operating agreement provides otherwise. Special meetings may also be called if members receive written notification between 10 and 60 days prior to the meeting.

iv) Capital Contributions. LLC contributions may be in the form of cash, property, services rendered, a promissory note or other obligation to contribute cash or property or to render services. Typically, a capital account

is maintained for each member. The value of a capital account may increase or decrease, depending on profits, losses and transfers and distributions.

v) Allocations and Distributions. Unless the operating agreement provides otherwise, profits, losses and distributions are allocated based on the proportionate value of each member's contributions to the extent they have been received and/or promised and have not been returned to the member. A distribution may not be made if it would cause the LLC to be insolvent. Upon withdrawal, a member shall receive the fair value of his or her membership interest, unless another valuation method is specified in the operating agreement.

vi) Membership Rights. An LLC membership interest is personal property. A member has no interest in specific LLC property.

vii) Assigning Membership Interest. Except as provided in the operating agreement, membership interests are freely assignable. If a member assigns the entire interest, that member (i.e. the assignor) will no longer have any voting or management powers. However, a member may make a partial assignment of his or her interest by assigning only the economic interest and retaining voting and management rights. Whether the assignment is full or partial, the assignee will be entitled to future allocations and distributions, but the assignee may not vote or participate in management without majority approval.

viii) Withdrawing Membership Interests. For LLCs formed on or before August 31, 1999, two-thirds consent is needed for a member to withdraw from the LLC. The operating agreement may specify other events that will trigger withdrawal rights. If the operating agreement is silent, and two-thirds consent is not given, withdrawal is permitted if six months' prior written notice is given to the LLC. The 1999 amendments to Section 606 of the LLC statute provided that for LLCs formed after August 31, 1999 (and those pre-existing LLCs that amend their Operating Agreements to so provide) a member may withdraw only upon events stated in the Operating Agreement. The right to withdraw on 6 months' notice was eliminated.

ix) Transferring Membership Interests. Majority approval is needed for outright transfers, unless the operating agreement provides otherwise. Some operating agreements provide for other transfer restrictions including the right of first refusal.

x) Dissolution. For LLCs formed prior to September 1, 1999 that do not amend their operating agreements regarding dissolution events, dissolution may occur upon the incapacity, withdrawal, expulsion, bankruptcy or death of any member unless within 180 days of such event the remaining members owning majority interest vote continue the business. In addition, unless otherwise provided in the operating agreement, a two-thirds vote is required to dissolve the LLC.

For LLCs formed on or after September 1, 1999, LLC will not dissolve upon the occurrence of any event that terminates the continued membership of a member unless a majority in interest of the members agree to dissolve the LLC within 180 days following the occurrence of the event. In addition, LLCs may now be dissolved by a majority in interest of their members. The 1999 amendments also provided that the legal representative of the last remaining member may continue the LLC by electing to do so within 180 days after the event that terminated the membership of that last remaining member. The continuation would be effective as of the date of such termination.

5. Consequences Of Non-Compliance With Publication Requirements.

A. Under the respective statutes authorizing their formation, New York limited liability companies (LLC's), professional service limited liability companies (PLLC's), and limited partnerships (LP's), and under the statute authorizing a partnership to register as a limited liability partnership, a limited liability partnership (LLP), is required to publish a notice containing the substance of their articles of organization or registration and to file proof of such publication with the Department of State within 120 days after they are deemed to be effective.

B. The notice is required to be published once per week for six consecutive weeks in one weekly and one daily newspaper in the county in which the office of the entity is located. At the conclusion of the six week publication period, proof of publication must be filed with the New York Department of State in the form of an affidavit of each newspaper publisher. This proof is required to be accompanied by a certificate of publication, signed by an authorized person, certifying that the affidavits of publication contain all information required by the applicable statute and that the newspapers described in the affidavits also satisfy the statutory requirements.

C. Until June 1, 2006, the statutory penalty for failure to publish and to file was that the entity could not avail itself of New York State courts to maintain an action or special proceeding until it completed these requirements. Beginning June 1, 2006 (the "Effective Date"), the penalties for failure to publish and to file affidavits of publication increased significantly. Since the Effective Date, the authority to carry on, conduct or transact business in New York of an LLC, PLLC, LLP or LP that fails to comply with the publication and filing requirements within the allowable 120-day period after formation or registration will be automatically suspended. Such suspension will not impair or limit the validity of the entity's existing contracts or acts or limit the rights of third parties against the entity. Nor will it result in any member, manager, partner or agent of the entity becoming liable for the obligations of the entity.

V. LIMITED PARTNERSHIP

1. Note that with the enactment of statutes authorizing limited liability companies (New York – 1994), conducting business through a newly formed limited partnership *is rare*. However, a description of limited partnerships is included in this outline for completeness.

2. Advantages. The Limited Partnership may be advantageous because:

A. No Entity Taxation. Partners report all profits and losses on their personal tax returns.

B. Limited Liability. Passive investors can be designated as limited partners so that they will not be personally liable for partnership debts and obligations. Instead, liability is limited to the extent of the limited partner's investment.

C. Offer Significant Estate Tax Savings. A Family Limited Partnership is a type of entity used in estate planning because it allows senior family members to retain control over family property while giving limited partnership interests to junior family members at significant discounts for gift tax purposes.

3. Disadvantages. The disadvantages of a limited partnership include:

A. Personal Liability. A limited partnership requires at least one general partner and all general partners will be personally liable for entity debts and obligation; however individual principals of the general partners(s) may avoid personal liability by assuming a limited liability form (e.g., corporation or LLC).

B. Limited Partners are Precluded from Participating in Management.

4. Formation. The following documents need to be drafted when forming a Limited Partnership:

A. Certificate of Limited Partnership. A Limited Partnership is formed by filing the Certificate of Limited Partnership with the New York Department of State and paying a filing fee of $200. The Certificate of Limited Partnership must be signed by all the general partners and must include, among other information:

i) The Limited Partnership name;

ii) Location of the principal office;

iii) Designation of Secretary of State as agent for service of process; and

iv) The names and residences of all general partners.

B. Publication Requirements. Within 120 days after filing the initial Certificate of Limited Partnership, a notice containing the substance of the Certificate of Limited Partnership must be published once a week for six weeks in two newspapers in the county where the principal office is located. Under amendments to the Partnership Law that became effective on June 1, 2006, the authority to carry on or transact business of an LP that fails to comply with the publication and filing requirements will be suspended. A more detailed description of this legislation is contained in Part VI of this outline.

C. Limited Partnership Agreement. A Limited Partnership is required to adopt a written Limited Partnership Agreement, which must be signed by all general partners (See NYRLPA Section 121-110). In addition to the provisions found in a General Partnership Agreement (e.g., relating to allocation of profits and losses, etc.), a typical Limited Partnership Agreement will include provisions relating to:

i) Withdrawing Partnership Interest. If the partnership agreement is silent, a general partner may withdraw his or her interest at anytime. If, however, the general partner's withdrawal is in violation of the partnership agreement, the Limited Partnership is entitled to damages and may offset the damages against amounts otherwise distributed to the general partner (See NYRLPA Section 121-602). For limited partnerships formed on or before August 31, 1999, if the partnership agreement is silent, a limited partner may withdraw upon the consent of all partners. If consent is not given, a limited partner may still withdraw and receive the fair value of his or her limited partnership interest provided six months' prior notice is given to the Limited Partnership (See NYRLPA Section 121-603). Limited partners of Limited Partnerships formed after August 31, 1999 no longer have a right to withdraw on six months' prior notice unless such right is granted by the limited partnership agreement.

ii) Admission of a New Limited Partner. If the partnership agreement is silent, a new limited partner may be admitted upon the written consent of all the partners. (See NYRLPA Section 121-30).

iii) Dissolution. For limited partnerships formed on or before August 31, 1999, if the partnership agreement is silent, the dissolution of the Limited Partnership may occur upon the consent of all the general partners and two-thirds of the limited partners. Dissolution of Limited Partnerships formed after August 31, 1999 requires the consent of all general partners and only a majority of limited partners, absent an agreement to the contrary (See NYRLPA Secttion121-801).

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John R. Calcagni is a member of Haley Weinblatt & Calcagni, LLP where he concentrates his practice in advising clients involved in business transactions and commercial real estate transactions. He received a J.D. from St. John's University Law School in 1980 where he served as Articles Editor of the St. John's Law Review.

From 1980 to 1984, Mr. Calcagni was an associate at Willkie Farr & Gallagher where his practice included public offerings of debt and equity securities, private placements, acquisitions and SEC filings. From 1984 to 1988 Mr. Calcagni was Assistant General Counsel to The Allen Group Inc., a former New York Stock Exchange traded company, where his responsibilities included overseeing the company's securities law compliance and acquisitions and sales of the company's businesses.

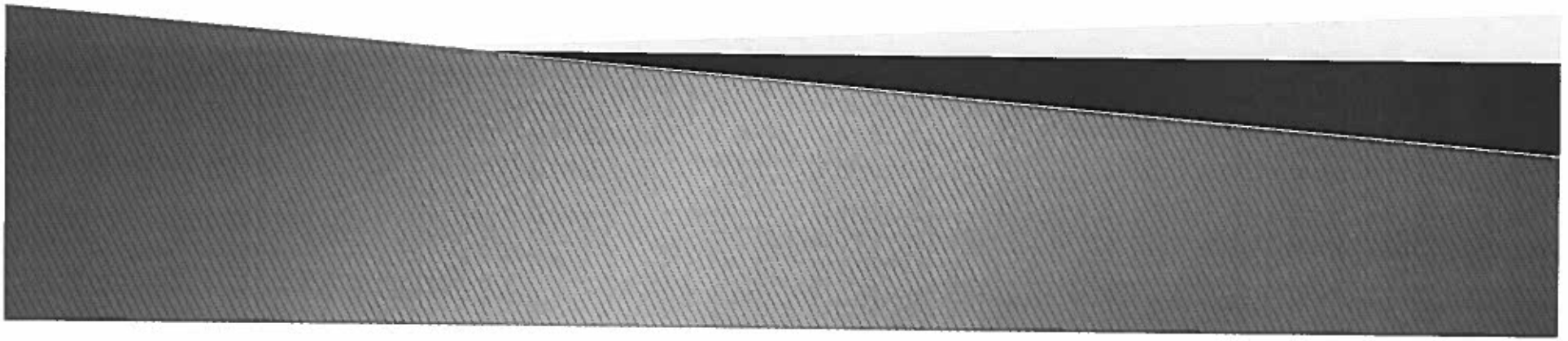
Mr. Calcagni is currently an Adjunct Professor in the Graduate Management/MBA Program at St. Joseph's College where he teaches Business Law. He has also participated as a lecturer in Continuing Legal Education Programs for the Suffolk County Bar Association, the Queens County Bar Association and the Suffolk Chapter of the American Institute of Certified Public Accountants. He is a past President of the Suffolk County Bar Association and a past Dean of the Suffolk Academy of Law.

Suffolk Academy of Law

"Bridge the Gap"
February 5, 2018

SMALL BUSINESS FORMATION

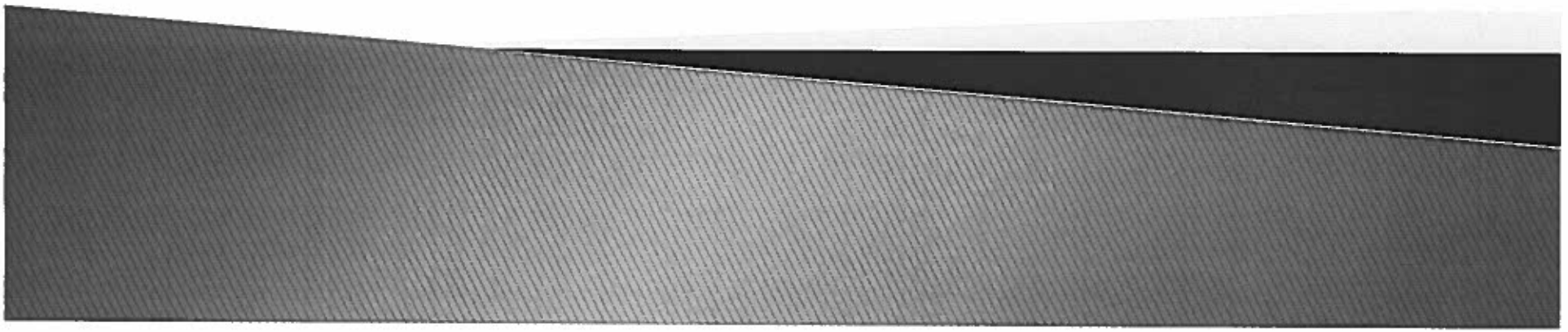
John R. Calcagni, Esq.
Haley Weinblatt & Calcagni, LLP



What We'll Cover

- Sole Proprietorships
- General Partnerships
- Limited Liability Partnerships (LLPs)
- Corporations
- Limited Liability Companies

SOLE PROPRIETORSHIPS



Sole Proprietorship

- More than 2/3 of all U.S. businesses
- Approximately 99% of sole proprietorships have revenues of less than $1 million/year

Sole Proprietorships

- Sole proprietorship may have only 1 owner.
- Owner must be a *natural* person (i.e., *not* an entity).

Sole Proprietorships

- No filing with New York Department of State ("DOS") required in order to create a sole proprietorship.

- But if doing business *other than in the name of the owner*, must file a Certificate of Assumed Name in each county where business is conducted (GBL § 130).

Sole Proprietorships

Examples:

Dr. Jane Smith is using business name "Suffolk Radiology"

James Ray is using business name "Ray's Auto Body"

Certificate of Assumed Name

- Per GBL § 130 Certificate of Assumed Name must contain:
  - Name and address of the business
  - Name and address of the business owner
- Knowing failure to file Certificate is a misdemeanor.

Sole Proprietorship Taxation

Sole proprietorship is *not* a tax paying entity. There is no separate tax return for sole proprietorships.

All profits or losses of the sole proprietorship *flow through* the business to the owner and are reported on Schedule "C" to owner's IRS Form 1040 personal income tax return.

Sole Proprietorship
Informal Management

- No requirements for meetings, minute books, officers, board of directors, etc.
- Business owner has complete managerial authority over the business.

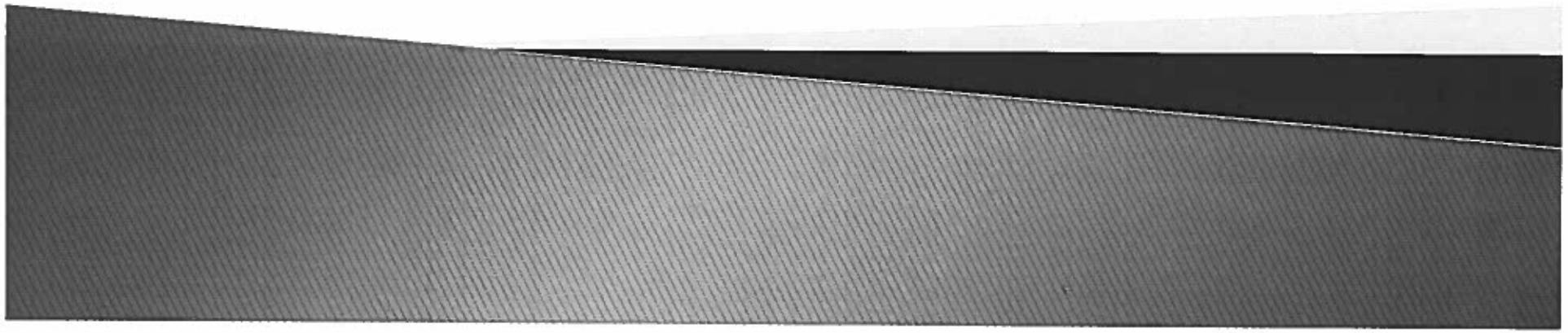
Sole Proprietorships

- Advantages:
  - Easiest and least costly method of setting up and conducting a business.
  - No formal management requirements.
  - No tax at entity level.

Sole Proprietorship

- <u>Disadvantages:</u>
  - Owner has *unlimited* personal liability for contractual and tort liabilities of the business.
  - Lack of business continuity: upon death of sole proprietor, business dies as well.

GENERAL PARTNERSHIPS



General Partnerships

New York Partnership Law defines a general partnership as an association of 2 or more persons to carry on a business *for profit*.

Eligible Partners

"Person" may be:

- Natural person
- Partnership
- Corporation
- Limited liability company
- Limited partnership

General Partnership Formation

Written partnership agreement is unnecessary for a general partnership.

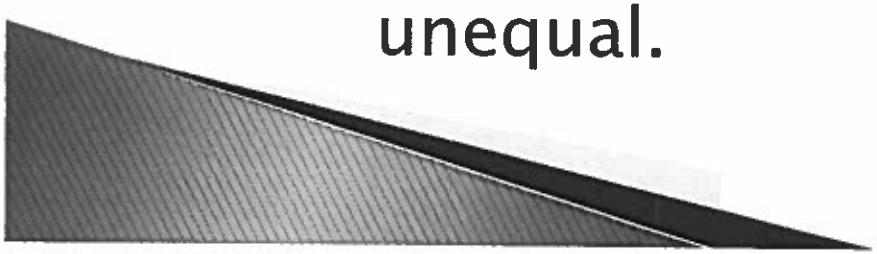
Formation may be accomplished by an oral agreement (e.g., a "handshake").

General Partnerships Governed by Partnership Law

If the partners do not have a written agreement, the rules set forth in NY Partnership Law will govern.

- Under NY Partnership Law, all partners have equal vote even if their contributions are unequal.

- Under NY Partnership Law, all partners share equally in profits and losses of partnership even if their contributions are unequal.



General Partnership Formation

No filing with the DOS or formal partnership agreement is required in order to form general partnership.

But Section 130 of GBL requires a "Certificate of Doing Business as Partners" to be filed in *each county* where partnership will do business.

Knowing failure to comply is a misdemeanor.

General Partnerships–Management

- Unlike corporations, manner of managing a general partnership is left to the discretion of the partners.

- Partners may manage as formally or informally as they agree upon.

General Partnerships
Single Level of Taxation

- Unlike a "C" corporation which pays tax at the entity level and then distributes taxable dividends to its owner/shareholders, there is no tax at the partnership entity level.

- Instead, all profits and losses of the partnership *flow through* to the individual partners and are reported on their personal tax returns.

General Partnerships

Dissolving a Partnership

- Dissolution occurs when a partner ceases to be associated in carrying on partnership business.
- Partner always has *power* to disassociate.
- May not have *right* to disassociate under Partnership Agreement.

General Partnerships

Dissolving a Partnership

- Normally entitles disassociated partner to have partnership interest purchased by partnership.
- Purchase price will be as set forth in Partnership Agreement or for "fair value" if not contained in Partnership Agreement.

General Partnerships

Advantages:

- Like a sole proprietorship, a general partnership is easy and inexpensive to set up.

- Only requirement to set up is to file a Certificate of Doing Business as Partners under GBL § 130.

General Partnerships

- Advantages:
  - No taxation at the partnership entity level
  - Unlike corporations, no requirement in Partnership Law to hold partnership meetings, keep records, etc. Therefore, easy to manage.

General Partnerships

Disadvantages:

- Each partner is personally jointly and severally liable for the *torts* (e.g., malpractice) of any partner.
- Joint and several liability means Plaintiff may sue all partners together (jointly) or may sue one or more partners separately (severally).

General Partnerships

Disadvantages:

- If Partner A commits malpractice, Partners B and C, as well as Partner A, are each personally liable to the successful plaintiff for entire liability.

General Partnerships

Disadvantages:

Each partner is personally jointly liable for the *contractual debts* of the partnership

If Partnership defaults on its rent, each partner will be personally liable for the entire amount due.

Limited Liability Partnerships

Partners in a NY *professional* general partnership can protect themselves from personal liability for the malpractice of their partners and contractual obligations of partnership by registering the partnership with the DOS as a " Limited Liability Partnership " (a/k/a "LLP").

Limited Liability Partnerships

- Therefore, if Partner A in an LLP commits malpractice, Partners B and C will not be personally liable to the successful plaintiff.

- If Partnership defaults on its rent, while *partnership* assets *will* be available to landlord, *none* of the partners will be *personally* liable to landlord.

Less Desirable Forms for Conducting Business

Sole Proprietorships

Partnerships (except professionals)

Main Reason: *Personal Liability of Owners*

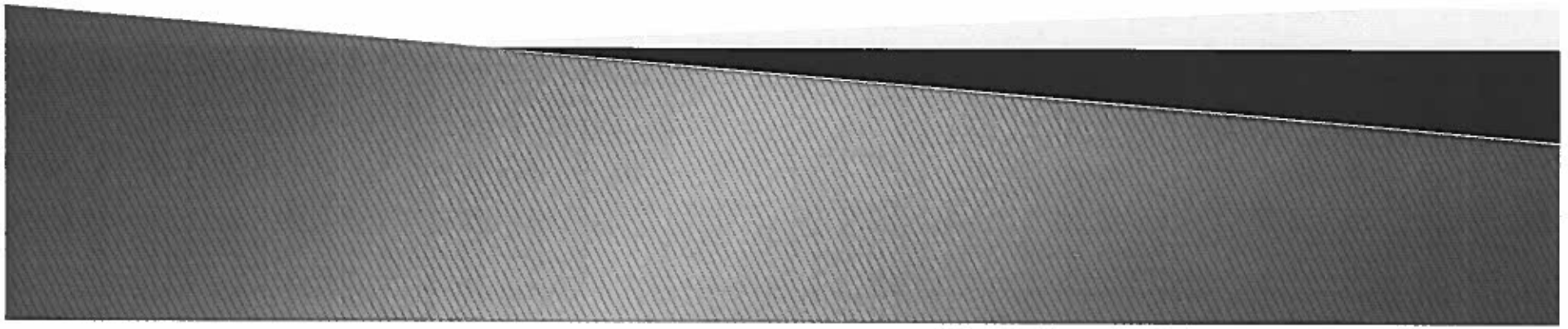
What kinds of Entities Do Clients Most Often Ask About?

Generally speaking, most common forms of entity you will be asked to help clients establish are:

Corporations (especially Subchapter "S" corporations)

Limited Liability Companies

CORPORATIONS



Corporations

- A legal entity created and recognized by state law.

- Corporations are separate from their:
  - Shareholders
  - Directors
  - Officers

Corporations

- Corporations are legal "persons"
  - Can sue/be sued
  - Can own property
  - Can borrow/loan money
  - Can create security interests in property

Types of Corporations

- Domestic
- Foreign
- Public
- Close
- Not-for-Profit
- Professional

Forming Corporation

- Step 1: Choose the corporate name.
  - Cannot be same or similar to name of another domestic or foreign entity authorized in NY.
  - If doing business in other states or over the internet, check existing names in other states to avoid infringing on trademarks.

Forming Corporation

- Step 2: Select the State of incorporation.
  - Most closely-held corporations incorporate where their principal shareholders work and live.
  - Most public and some closely-held corporations select Delaware.
    - Laws generally favor management.
    - Business-savvy judges and well-developed case law---better predictability.

Forming Corporation

Step 3: File Certificate of Incorporation with New York Department of State.

- The act of filing creates the legal entity.
- In reality, a service company will file the Certificate of Incorporation for you.

Forming Corporation

Certificate of Incorporation under Section 402 of the Business Corporation Law

The undersigned, a natural person of the age of eighteen years or over, desiring to form a Corporation pursuant to Section 402 of the Business Corporation Law of the State of New York, hereby certifies as follows:

Certificate of Incorporation of XYZ, Inc. (cont.)

FIRST: The name of the Corporation is XYZ, Inc. ("the Corporation").

SECOND: The purpose for which it is formed is to engage in any lawful act or activity for which corporations may be organized under the Business Corporation Law; provided, however, that the Corporation is not formed to engage in any act or activity requiring the consent or approval of any state official, department, board, agency or other body without first obtaining the consent of such body.

Certificate of Incorporation of XYZ, Inc. (cont.)

THIRD: The office of the Corporation in the State of New York is to be located in the County of Suffolk, State of New York.

FOURTH: The aggregate number of shares which the Corporation shall have the authority to issue is Two Hundred (200) shares of Common Stock, without par value.

Certificate of Incorporation of XYZ, Inc. (cont.)

FIFTH: The Secretary of State of the State of New York is hereby designated as the agent of the Corporation upon whom any process in any action or proceeding against the Corporation may be served, and the address to which the Secretary of State shall mail a copy of any process against the Corporation served upon him or her is _____, New York _____.

Certificate of Incorporation of XYZ, Inc. (cont.)

SIXTH: The personal liability of the directors of the Corporation and its shareholders shall be eliminated to the fullest extent permitted by the provisions of paragraph (b) of Section 402 of the Business Corporation Law of the State of New York, as the same may be amended and supplemented.

IN WITNESS WHEREOF, I have executed this Certificate of Incorporation and affirm and verify that the statements made herein are true under the penalties of perjury this __ day of_____, 2018.

Forming Corporation

- **Step 4:** Organize the Corporation:

Service Company will provide a

"Statement of Sole Incorporator":

- Appointing Directors
- Adopting Bylaws

Organizing Corporation

- Hold Organizational Meeting of Board
  - Appoint Officers
  - Approve corporate seal and the form of stock certificate
  - Accept subscriptions for stock and issue shares of stock

Why Organize the Corporation?

- Failure to observe corporate formalities may lead to "Piercing the Corporate Veil"
- Exposes shareholders to personal liability

Piercing Corporate Veil

- When corporate privilege is abused for personal benefit, courts require owners to assume personal liability to creditors.

- Courts also pierce corporate veil when corporate entity is treated in a manner that fails to distinguish it from the controlling shareholders.

Factors Leading to Piercing Corporate Veil

- Corporate formalities not observed (no directors or officers, no meetings, no corporate resolutions, etc.)

- No separate bank account established for the corporation

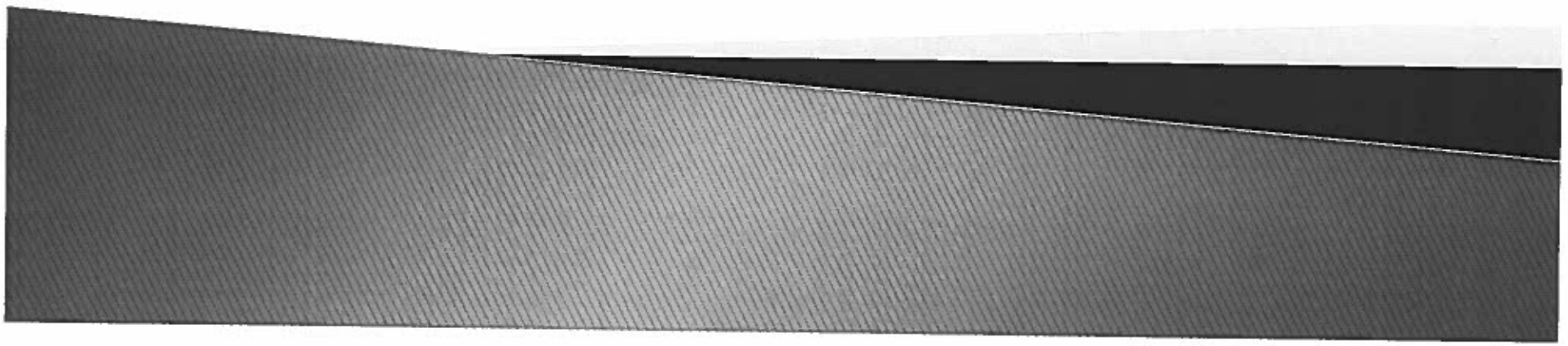
Factors Leading to Piercing Corporate Veil

- Shareholders use corporate funds to pay personal expenses (co-mingling personal and corporate assets)

- Corporation thinly capitalized- insufficient capital to meet its anticipated obligations

Taxation of Corporations

"S" corporations /"C" Corporations



"S" Corps. and "C" Corps.

For tax purposes, U.S. corporations are *either*:

"S" Corporations

or

"C" Corporations

"S" Corps. and "C" Corps.

- When a corporation is formed, it is neither an "S" corp. or a "C" corp.
- Corporation becomes an "S" corp. or a "C" corp. depending on whether shareholders elect "S" corp. status.

Sub "S" Tax Election

"S" Corporations are flow through entities, *i.e.*, their profit and loss flow through to their shareholders *pro rata* according to the shareholders' respective percentages of stock ownership.

Sub "S" Tax Election

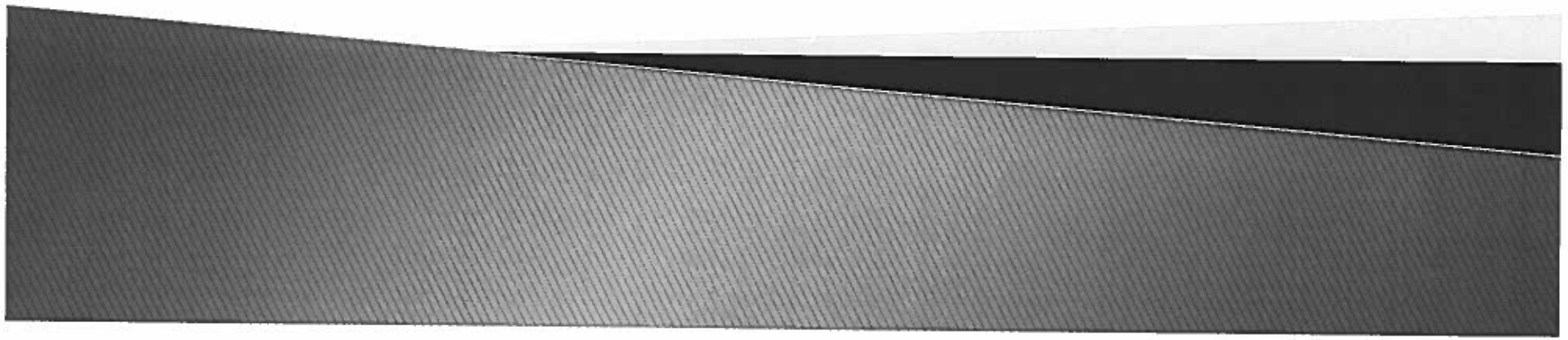
Unless all shareholders *affirmatively elect* to have corporation taxed as an "S" Corporation, by default it will be taxed as a "C" Corporation.

"C" Corporations are taxed up to 21% on their net income and their shareholders are taxed at ordinary income tax rates on dividends distributed to them-2 taxes imposed.

Electing Subchapter "S" Tax Status

- To elect Subchapter "S" tax status, must file IRS form 2553 and NYS form CT-6.
- Election must be filed *timely* or will lose right to election for that tax year
- If no election, C Corp by default

Limited Liability Companies

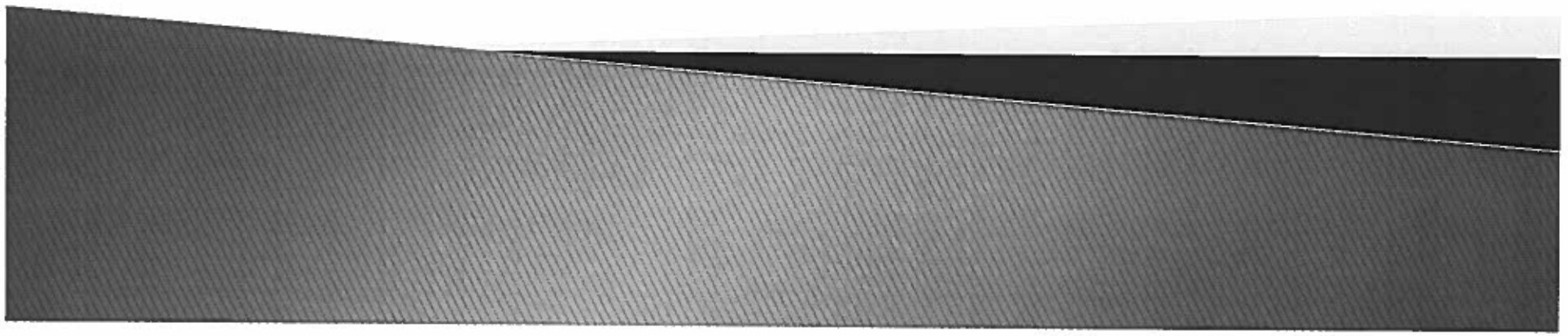


Limited Liability Companies

- A Hybrid Entity: a little like a corporation and a little like a partnership
  - Limited Liability aspects of a corporation
  - Tax advantages and management flexibility of a partnership

LLCs and Corporations

Some Similarities



LLC and Corporation Similarities

- LLCs share several traits with corporations:
  - Both are creatures of statute—must be formed and operated in accordance with state law
  - Like corporations, they are separate from their owners and managers

LLC and Corporation Similarities

Terminology used to describe *types* of LLCs is similar to that used for corporations:

- *Domestic*
- *Foreign*
- *Professional*

Corporation And LLC Similarities

Both Corporations and LLCs provide protection for personal assets of their owners:

- LLCL § 609(a)provides that no member of an LLC will be liable for LLCs debts or liabilities solely by being a member of the LLC.
- No express similar provision in BCL, but under settled common law, shareholders are not liable for corporation's debts or liabilities.

"S" Corporations and LLCs- One Level of Tax

- Neither Sub "S" Corporations nor LLCs are taxed at the entity level.
- Both permit all profit and loss of the business to flow through to the personal tax returns of their owners.
- Tax Returns are "information": returns because not tax-paying entity.

LLC and Corporation Formation Similarities

Process of forming an LLC is similar to that of a corporation:

- Select Name
- Select state of formation
- File Articles of Organization at DOS
- Organize the LLC

Corporations and LLCs
Similarities in Formation

Both BCL and LLCL contain provisions requiring entity be designated to indicate its character as a limited liability entity in its name:

- Corporation (Corp.)
- Limited (Ltd.)
- Incorporated (Inc.)

- Limited Liability Company, LLC or L.L.C.

Similarities in Formation

Name of Entity

- Previously names of New York LLCs and corporations were considered separate for purposes of name availability.

  E.g., ABC Corp. and ABC LLC were permitted.

Similarities in Formation
Name of Entity

- BCL § 301and LLCL § 204 were amended in 2004 to provide name of a corporation or an LLC may not be similar to:
  - Names of domestic corporations, domestic LLCs or domestic limited partnerships; or
  - Actual or fictitious names of foreign corporations, foreign LLCs, or foreign limited partnerships authorized to do business in NY.

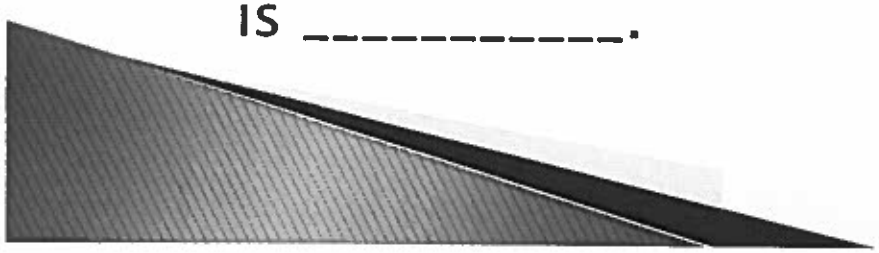
Filing Requirements for LLCs

ARTICLES OF ORGANIZATION
of
ABC, LLC

Under Section 203 of the Limited Liability Company Law.

FIRST: The name of the limited liability company is ABC, LLC.

SECOND: The county within the state in which the office of the limited liability company is to be located is _____.



ARTICLES OF ORGANIZATION
of
ABC, LLC (cont.d)

THIRD: The Company does not have a specific date of dissolution in addition to the events of dissolution set forth by law.

FOURTH: The Secretary of State is designated as agent of the limited liability company upon whom process against it may be served.

ARTICLES OF ORGANIZATION
Of
ABC, LLC (cont.d)

The post office address within or without this state to which the Secretary of State shall mail a copy of any process against the limited liability company served upon him or her is:_____, New York.

Articles of Organization
of
ABC, LLC (cont.)

FIFTH: The effective date of the Articles of Organization shall be the date of filing with the Secretary of State.

SIXTH: The limited liability company is to be managed by 1 or more managers *(if applicable).*

Articles of Organization
of
ABC, LLC (cont.)

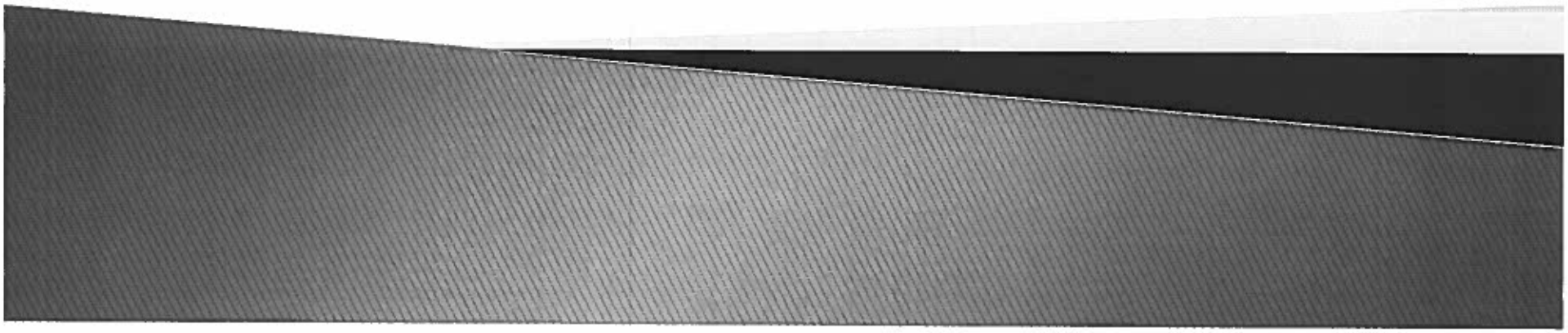
IN WITNESS WHEREOF, this certificate has been subscribed to this __ day of _____, 2018 by the undersigned who affirms that the statements made herein are true under the penalties of perjury.

_____

Organizer

LLCs vs. Corporations

Differences



LLCs and Corporations

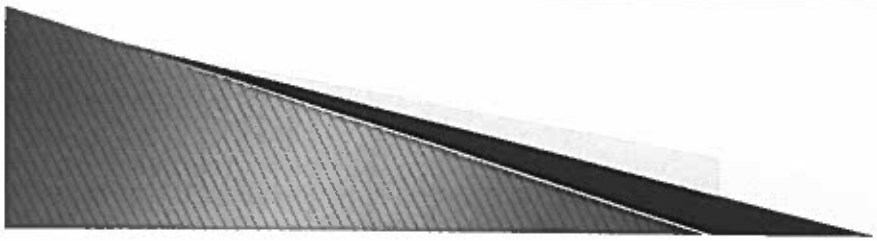
- Differences between Corporations and LLCs include:
  - Terminology Differences
  - Post-Formation Organization Differences
  - Inflexible vs. Flexible Sharing of Profits/ Losses

LLCs and Corporations

- Differences between Corporations and LLCs include:
  - Formal vs. Informal Management
  - Inflexible vs. Flexible Management Voting
  - Inflexible vs. Flexible Voting by Owners
  - Ownership Eligibility (Subchapter S)

Terminology Differences

Corporations	Term	LLCs
Certificate of Incorporation	**Formation Document**	Articles of Organization
Shareholders	**Owners**	Members
Board of Directors	**Policy Decision Makers**	Members or Managers
Officers	**Day-To-Day Decision Makers**	Members, Managers or Officers
Shares of Stock	**Units of Ownership**	Membership Interests



TO:	Local District Commissioners, Medicaid Directors
FROM:	Judith Arnold, Director Division of Eligibility and Marketplace Integration
SUBJECT:	2018 Medicaid Levels and Other Updates
EFFECTIVE DATE:	January 1, 2018
CONTACT PERSON:	Local District Support Unit Upstate (518) 474-8887 NYC (212) 417-4500

The purpose of this General Information System (GIS) message is to advise local departments of social services (LDSS) of the income levels and figures used to determine Medicaid eligibility, effective January 1, 2018.

Due to a 2.0 percent (%) cost of living adjustment (COLA) for Social Security Administration (SSA) payments effective January 1, 2018, figures used to determine Medicaid eligibility must be updated. With an increase in the Supplemental Security Income (SSI) benefits level, the Medically Needy income and resource levels will also be adjusted accordingly.

The standard monthly premium for Medicare Part B enrollees will be $134 for 2018, the same as in 2017. A statutory "hold harmless" provision applies each year to about 70 percent of Medicaid Part B enrollees. For enrollees protected by the "hold harmless" provision, any increase in Part B premiums in 2018 must be less than or equal to their increase in Social Security benefits. Due to the SSA 2% COLA, some beneficiaries who were held harmless against Part B premium increases in 2016 and 2017 will have a premium increase in 2018. An estimated 42 percent of all Part B enrollees are protected by the hold harmless provision in 2018, but will pay the full monthly premium of $134 because the increase in their Social Security benefits will be greater than or equal to the increase in their Part B premium. A percentage of Part B enrollees will be subject to the hold harmless provision in 2018 and will pay less than the full monthly premium of $134 because the increase in their Social Security benefits is not large enough to cover the full Part B premium increase.

Medicare Part B enrollees not subject to the "hold harmless" provision in 2018 include:

- beneficiaries who do not receive Social Security benefits;
- those who enroll in Part B for the first time;
- those who are directly billed for their Part B premium;
- those who are dually eligible for Medicaid and have their premium paid by Medicaid; and
- those who pay an income-related premium.

A chart with the 2018 Medicaid levels is attached. MBL will be programmed to use these figures when a "From" date of January 1, 2018, or greater is entered. Also attached is a chart with the updated reduction factors for calculating Medicaid eligibility under the Pickle Amendment.

Note: Budgets with a "From" date of January 1, 2018, or later, that utilize a Federal Poverty Level (FPL) must be calculated with the 2017 Social Security benefit amount and Medicare Part B premium amount until the 2018 FPLs are available on MBL. Upstate districts should separately identify these cases for re-budgeting once the 2018 FPLs are available as these cases will not be included in Phase Two of Mass Re-budgeting. In New York City, the 2018 Social Security benefit amounts and Part B premium should be used until Phase Two of Mass Re-budgeting. Upstate districts are instructed to update Social Security benefit amounts and Medicare Part B premium amounts for budgets that do utilize a FPL at the next contact with the consumer or at recertification, whichever occurs first.

The following figures are effective January 1, 2018.

1. Medically Needy Income and Resources Levels.

HOUSEHOLD SIZE	MEDICALLY NEEDY INCOME LEVEL		RESOURCES
	ANNUAL	MONTHLY	
ONE	10,100	842	15150
TWO	14,800	1,233	22,200
THREE	17,020	1,418	1,418
FOUR	19,240	1,603	1,603
FIVE	21,460	1,788	1,788
SIX	23,680	1,973	1,973
SEVEN	25,900	2,158	2,158
EIGHT	28,120	2,343	2,343
NINE	30,340	2,528	2,528
TEN	32,560	2,713	2,713
EACH ADD'L PERSON	2,220	185	185

2. The Supplemental Security Income federal benefit rate (FBR) for an individual living alone is $750/single and $1,125/couple.
3. The allocation amount is $391, the difference between the Medicaid income level for a household of two and one.

4. The 249e factors are .969 and .156.
5. The SSI resource levels remain $2,000 for individuals and $3,000 for couples.
6. The State Supplement is $87 for an individual and $104 for a couple living alone.
7. The Medicare Part A Hospital Insurance Base Premium is $232/month for people having 30-39 work quarters and $422/month for people who are not otherwise eligible for premium-free hospital insurance and have less than 30 quarters.
8. The standard Medicare Part B monthly premium for beneficiaries with income less than or equal to $85,000 is $134.
9. The Maximum Federal Community Spouse Resource Allowance is $123,600.
10. The Minimum State Community Spouse Resource Allowance is $74,820.
11. The community spouse Minimum Monthly Maintenance Needs Allowance (MMMNA) is $3,090.
12. Maximum Family Member Allowance remains $677 until the FPLs for 2018 are published in the Federal Register.
13. Family Member Allowance formula number remains $2,030 until the FPLs for 2018 are published in the Federal Register.
14. Personal Needs Allowance for certain waiver participants subject to spousal impoverishment budgeting is $391.
15. Substantial Gainful Activity (SGA) is: Non-Blind $1,180/month, Blind $1,970/month and Trial Work Period (TWP) $850/month.
16. SSI-related student earned income disregard limit of $1,820/monthly up to a maximum of $7,350/annually.
17. The home equity limit for Medicaid coverage of nursing facility services and community-based long-term care is $858,000.
18. The special income standard for housing expenses that is available to certain individuals who enroll in the Managed Long Term Care program (See 12 OHIP/ADM-5 for further information) vary by region. For 2018, the amounts are: Northeastern $467 (a decrease from 2017 figure); Central $417; Rochester $424; Western $365; Northern Metropolitan $935; Long Island $1,274; and New York City $1,305.

Please direct any questions to the Local District Support Unit at 518-474-8887 for Upstate and 212-417-4500 for NYC.