



Weekly Information Sheet 01

General Legal Principles -

The simple **DEFINITION** of the concept of **LAW** is:

Rules by which civilization is ordered.

The simple **DEFINITION** of the concept of **RIGHTS** is:

The legally recognized ability to exercise power and control over an action or object.

Types and Priority of Law

- The three basic types of law are **Constitutions, Statutes** and **Case Law**.
- The priority or ranking of law is as follows:
 - 1. Constitution;**
 - 2. Statute;**
 - 3. Regulation;**
 - 4. Executive Order or Policy.**
- It should be noted that **Case Law (Common Law)** is not ranked or given a priority order because its purpose is merely to decide a case in controversy or interpret or explain a constitution, statute, regulation or executive order.
- The **Constitution (both federal and state)** are the supreme law, and no other law within the federal or state systems can out rank them.
- Other than the **Constitution**, no other law can ever out rank a statute.
- A statute is a law enacted by **Congress (federal)** or the **legislature (state)**.

Freedom is the Fundamental Pillar of American Law

- *Freedom derives from the **fundamental respect for the individual**.*
- *In order to secure our Freedom, the law protects our rights.*
- *These are **individual rights**, not community or collective rights.*
- *Freedom can be a scary thing. For is not the power to do what everyone thinks is a good idea, but rather what some think is a bad one.*

Founders and Individual Rights

- The founders maintained a clear grasp of the connection between liberty, freedom and individual rights.
- They understood that a person's unfettered ability to freely exercise their property rights, is the gateway of liberty.
- Throughout the Declaration of Independence, the Constitution and the Bill of Rights, individual rights, and a person's ability to freely exercise their individual rights, is deemed sacrosanct.
- Individual rights are thereby a foundational pillar upon which American government is built.

Common Law

Because it developed from the Common Law, most law of Business, Property and Corporations is:

State Law

The Pathway to Liberty

FREEDOM → RIGHTS → LAW

Evolution of Rights

- In our Constitutional system of law, government principle purpose is to protect the rights of individuals, especially property rights.
- Derived from Rome and England, America's legal system was the first in world history to provide such protections and recognize individual rights.
- Under American law these rights are unalienable.
- **St. Thomas Aquinas** transformed the concept of Rights by means of his concept of Grace, citing that all people had an individual relationship with God, and men like William Ockham and John Wycliffe, used this perspective to assert that human beings are instruments of God, with fundamental, individual, natural rights).

The Transformation of the Meaning of Rights

Steps in the Evolution of Rights and Protection of Individual Freedom

1. *Greek Democracy*
2. *Roman Law*
3. *The Development of English Common Law*
4. *The Magna Carta*
5. *Clerical Philosophy and the Recognition of Natural Law*
- Magna Carta - 4th Lateran Council - St. Thomas Aquinas - William Ockham - John Wycliffe
6. *Thomas Hobbes and the Social Contract Theory*
7. *John Locke and the Pronouncement of Property Rights*

Lineage of the Law

- Our laws have an important history from ancient times to today.
- The first real concept of a body of law, with an executive to enforce it, a senate to debate it, and courts to decide it, was in:

Rome

- The reason the first set of laws was developed in Rome was because they viewed their society and culture as lasting longer than a human lifetime.
- They viewed **Law** as a means to maintain that society and to:
 - **Promote the continuity of trade and commerce;**
 - **Help administrate military conquests; and**
 - **Instill consumer confidence.**
- The law we respect today has a lineage over time and distance.
- Beginning in Rome, it was transported to England as a Roman Colony.
- As English law developed, it was then brought to America when we were a British Colony.
- The law we know today in the **United States** is descended from:

England

- As a result, the body of law that was the most prevalent in Colonial and Early America, as descended from England was:

The Common Law

- **Common law** was the law made by **Judges** in deciding cases based upon precedent and custom.
- Most of the cases involved property disputes.
- In making the decisions that created the **Common Law**, **Judges** followed the legal principle of **“Stare Decisis”** which means:

“Let the Decision Stand”

Law and Equity

- Prior to 1800, Courts were divided between Law and Equity.
 - **Equity had sole jurisdiction over injunctions. Its judges were clergy.**
 - **Law had sole jurisdiction over damages (\$). Its judges were lawyers.**

Reporting on the Law

- The man who was the first to compile the reports and explanations of Case (Common) Law in British Courts, into his famous "Commentaries", that would become known as the "Bible of the Law", was:

Sir William Blackstone

- Blackstone's Commentaries would be used as the primary legal authority for common law courts in England and America until the middle of the nineteenth century, and are still often cited today.

Magna Carta

- The first real battle that was fought and won for property rights was:

The Battle of Runnymede in 1215

- At the Battle of Runnymede, the landed knights (freemen land owners) made **King John I** of England sign the **Magna Carta**, which is Latin for:

"Great Charter"

- King John was the son of King Henry and Brother to King Richard.
- A king following the Norman line started by William the Conqueror in 1066.
- The Magna Carta, signed by King John, was one of the forerunners of modern British law.
- The Magna Carta and the Fourth Lateran Council were each major developments in the evolution of rights across the world.
- It was also one of the foundational documents for the US Constitution and its Amendments (the Bill of Rights).
- Originally known by the people of England as the Charter of Liberties.
- It became a guiding document of both England, and several other countries.
- It expanded the rights and liberties of the people, and limited the power of the government.

What is in the Magna Carta

- Containing 63 clauses, this landmark document:
 - Created a council to the King (a forerunner to parliament);
 - Promised all freemen access to courts and a fair trial;
 - Specified many property rights from infringement by the king and his agents;
 - Eliminated unfair fines and punishments;
 - Gave certain legal powers to the Catholic Church; and
 - Addressed many lesser specific issues of the day.
- It should be noted, however, that **one major right the Magna Carta did not recognize, was that it did not abolish the condition of involuntary servitude (serfdom)**, since the freemen who drafted the document, depended upon this feudal system for their wealth, power and life.

Sovereignty

- Sovereignty, in which law recognizes the power of ruling, is vested in Great Britain in the government (the King in Parliament).
- In the United States, however, sovereignty vests in the people.
- Such is why the first three words in the Constitution are:

“We The People”

Constitution:

“The fundamental and organic law of a nation or state that establishes the institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties.”

What the purpose of a Constitution is:

- To Establish the Structure of Government;
- Define the Powers of Each Structure; and
- Enumerate the Rights of Citizens.

American Constitutional Government

- American Government is based upon the representative, republican model (where people are elected to represent the voters).
- The purpose of government in that system is to protect the rights of individual people, and the **sovereignty of the government is vested in the people themselves.**

American Constitutional Government Continued

- Both the States and the Federal Government are founded upon written constitutions. The first governments in human history to do so.
- When these constitutions were first drafted, they all followed the Adams framework, in his **“Thoughts on Government”** Essay.
- Under this Adams framework, all these governments contain three
 - separate, ○ independent, ○ competing and ○ co-equal branches, that would provide checks and balances, against the powers of each other.
- That is why, to this day, all the early state governments have a common structure.
- The federal government, which was modeled after these states, thus also has a similar structure.
- The states added after the US Constitution was adopted, then also followed this structure.

The New York State Constitution:

- **First State Constitution was drafted at the White Plains Convention, during military operations across New York, in 1777.**
- **Its principal author, John Jay, was a brilliant lawyer who later became the first Chief Justice of the United States Supreme Court.**
- **Followed the “Adams” Thoughts on Government model with independent, separate, co-equal, elected branches, for a Governor, Bicameral legislature (Senate and Assembly) and Judiciary.**
- **Declared sovereignty in the people, was republican in form, and provided for protection of individual rights.**
- **First Elections were held immediately after convention approved it, electing George Clinton, New York’s first Governor.**
- **Today’s Constitution is remarkably similar to the “bones” of the first one drafted by John Jay.**
- **It contains Twenty Articles, contains a Bill of Rights, retains separate, co-equal, branches, for a Governor, Bicameral legislature (Senate and Assembly) and Judiciary, and has Articles on specific areas of state needs.**
- **Amendments are authorized by passing a joint resolution by two successive legislatures, by a majority vote, that is then approved by the voters, also by majority vote, or by means of a convention then approved by the voters.**

The United States Constitution:

- **The United States Constitution was drafted at the Philadelphia Convention, 11 years after the Declaration of Independence in 1787.**
- **Its principal author, James Madison, was also brilliant lawyer who later became the Congressman who authored the Bill of Rights, then later the President of the United States.**
- **Also basically followed the “Adams” Thoughts on Government model with independent, separate, co-equal, branches, for a President (indirectly elected by the electoral college), Bicameral legislature (Senate – now directly elected by state but originally appointed by state legislatures and House of Representatives – directly elected in apportioned districts) and Judiciary (appointed by the President upon advice and consent of the Senate).**
- **Declared sovereignty in the people, was republican in form, and provided for protection of individual rights (after passage of the first ten amendments).**
- **First Elections were held immediately in 1788 after convention approved it, and it was ratified by at least 9 states, electing George Washington, the first President of the United States.**
- **Today’s Constitution contains Seven Articles, a Bill of Rights (first ten amendments), and has been amended 27 times.**
- **Amendments are authorized by passing a joint resolution by a two-thirds vote in both the House and the Senate, and then being ratified by $\frac{3}{4}$ of the state legislatures, or by means of a convention then ratified by the $\frac{3}{4}$ of the states.**



Weekly Information Sheet 03

Generally -

The simple **DEFINITION** of the concept of **Executive** is:

The branch of government responsible for effecting and enforcing laws

The simple **DEFINITION** of the concept of **Judiciary** is:

The branch of government consisting of the courts, whose function is to interpret, apply and enforce the laws."

The simple **DEFINITION** of the concept of **Legislative** is:

The branch of government, consisting of a legislature, whose function is responsible for the enacting of laws."

The Executive:

- ***The founders wanted to consolidate Executive Power in a single person, for nimbleness of action and accountability.***
- ***Designed to represent and administrate the government, and the nation or state at large, the Executive is charged with providing public protection, securing civil rights, and faithfully enforcing laws made by the Legislature and the Courts.***
- ***There have been 45 Presidents and every President, except for Franklin Roosevelt, served a maximum of two terms. There is no term limit for New York State Governor.***
- ***The President is elected by the electoral college, the governor of New York is directly elected by the people. Both serve 4 year terms.***
- ***The President must be at least 35, the governor of New York must be at least 30 years of age.***
- ***Executives use departments and agencies to Regulate, License, Adjudicate, investigate and Enforce.***
- ***70 percent of employees who work for agencies are appointed under the civil service system.***

The Judiciary:

- **The founders designed the judiciary to *hear cases in controversy and appeals*, and are charged with providing impartial decisions to secure civil rights, interpret and apply the law, and faithfully enforce laws made by the Congress and State Legislatures.**
- **The Federal Courts are Courts of *LIMITED Jurisdiction*. To get into Federal Court you must either have a federal question or complete diversity of parties (meaning residents of different states) and at least \$75000 in damages.**
- **The State Courts are Courts of *BROAD Jurisdiction*. Most law is state law. There are few restrictions to sue in state court.**
- **The Federal Courts include:**
 - **Supreme Court of the United States – The Highest Federal Court,**
 - **Federal Circuit Courts of Appeals,**
 - **Federal District Courts – The Federal Trial Court,**
 - **The US Court of International Trade,**
 - **Foreign Intelligence Surveillance Courts (FISA),**
 - **Federal Bankruptcy Courts, and**
 - **United States Court of Federal Claims.**
- **The Courts of the Unified Court System in New York Include:**
 - **Court of Appeals of the State of NY – The Highest State Court,**
 - **Appellate Division of the Supreme Court,**
 - **Supreme Courts – The State Trial Court,**
 - **Court of Claims – Suits against the State,**
 - **County Courts – The State Criminal Court,**
 - **Surrogate’s Courts, and**
 - **Family Courts.**
- **Local Courts in New York Include:**
 - **County Courts – Criminal (felony) and up to \$25,000 of civil,**
 - **Family Court – Minor Family Related Criminal and Custody,**
 - **Surrogate Court – Wills, Trusts and Estates, Adoptions,**
 - **City Court – Misdemeanor Crimes, Arraignments \$15k civil,**
 - **Town and Village Courts – Misdemeanor Crimes, Arraignments \$3k civil.**
 - **City Court Judges must be lawyers, Town and Village Justices do not**

The Legislature:

- **Congress Designed to enact written statutes involving the issues of federal concern, and provide oversight over all three branches of the federal government, the Congress is charged with enacting laws and taking measures to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty.**
- **The State Legislature was Designed to enact written statutes involving the issues of state concern, and provide oversight over all three branches of the state government, the Senate and Assembly are charged with enacting laws and taking measures to secure the blessings of liberty.**
- **Both Congress and the New York State Legislature are Bicameral (two house) legislatures whose members are elected directly by the people. Members of Congress and all State Legislators serve for a Term of Two Years. United States Senators serve for a term of 6 years.**
- **There are 435 members of the House of Representatives and 100 United States Senators. There are 150 members of the New York State Assembly and 63 New York State Senators.**
- **Legislative bodies pass bills by a majority vote which must be signed by the executive to become law (unless a veto is overridden by a 2/3 vote). They also use their Committees to conduct investigations and obtain information.**
- **United States Senators are elected from their states. All other legislators in Congress and in the states are elected from districts, which must be nearly equally apportioned within their respective houses (same size).**

Local Governments:

- **Counties:**
 - **There are 62 Counties in New York State.**
 - **The Legislative Branch of a County is known as the **County Legislature, or the County Board of Supervisors**, and the Executive Branch is known as the **County Executive**. They are elected.**
- **Cities:**
 - **There are also 62 Cities in New York State.**
 - **The Legislative Branch of a City is known as the **City Council**, and the Executive Branch is known as the **Mayor**. They are elected.**
- **Towns:**
 - **There are 932 Towns in New York State.**
 - **The Legislative Branch of a Town is known as the **Town Council**, and the Executive Branch is known as the **Supervisor**. They are elected.**
- **Villages:**
 - **There are also 551 Villages in New York State.**
 - **The Legislative Branch of a Village is known as the **Board of Trustees**, and the Executive Branch is known as the **Mayor**. They are elected**

**Bob
Farley**



Blaw 321 - Law of Business Organizations

Weekly Information Sheet 04

Principles and Nature of Business Organizations

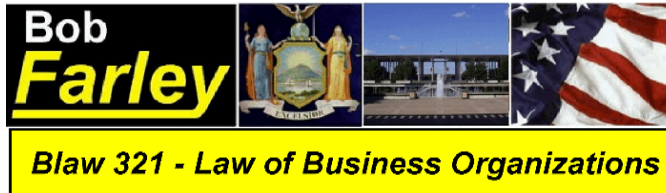
The Principles of Business Organization:

1. Business Organizations are creatures of law;
2. Agents stand in the shoes of their Principles;
3. Sole proprietorships are the easiest and most prominent form of ownership, with 3/4 of all businesses operating in that form;
4. In a Partnership, your partner can be more important than your spouse;
5. Business Corporations are artificial persons under the law, with rights of a person. They are formed for one purpose: to conduct a business for profit. Profit is not a dirty word. It is one of the greatest human motivators, providing jobs, opportunities and innovation;
6. Limited Liability Companies are the child of Partnerships and Corporations;
7. Public Authorities are Corporations designed to do the work of Government;
8. Freedom is the most powerful form of human existence. True freedom is linked to the worth of the individual, and their ability to pursue life, liberty, and property (happiness).

The Nature of Business Organizations:

- This is a class on the *Law of Business Organizations*
- One can not have a true understanding the *Law of Business* and the *Organizations* which are its vehicle to accomplish its goals, unless they have a true understanding of the *Law*.
- Moreover, to truly understand the *Law of Business*, we need to understand these *Organizations* as the vehicle which delivers the needs of Commerce.
- That requires us to have an *understanding* of the *Law* which governs the rules of the road upon which we drive that vehicle.





Weekly Information Sheet 04

Law of Agency

The Elements of the Agency Relationship:

1. A fiduciary relationship

2. Created:

- a. by express contract;
- b. by implied contract; or
- c. by law,

3. In which one party (the agent) may act

4. On behalf of another party (the principal)

5. and bind such principal (via their authority)

6. by words or actions.

Agency In General – Agents you can think of

- Real Estate
- Insurance
- Sports
- Music / Theatrical / Publishing

Agency In General – Contract Liability

Contract liability in agency refers to

the legal relationship

whereby one party (called an agent)

is authorized to represent

the other party (called a principal)

in business dealings with third parties.

A principal may appoint an agent to do any act

EXCEPT an act, which

by its nature, by public policy, or by contract,

requires personal performance by the principal.

Law of Agency Continued

NATURE OF THE AGENCY RELATIONSHIP

- *The agent stands in the shoes of the principal.*

CREATION OF THE AGENCY RELATIONSHIP

1. Capacity:

A condition precedent to the creation of an agency relationship is that the respective parties must have capacity.

- **Principal Must Have Contractual Capacity**

Generally, one who has contractual capacity may be a principal and enter into a contract through an agent.

- **Agents Generally Need Not Have Contractual Capacity**

As a general rule, any person may be an agent, even if they have no contractual capacity. But there are limitations to this rule.

- **Disqualification of Agents**

A person, however, can be disqualified from being an agent.

2. Formalities:

A. Consent – Must Always Have Consent

As the relationship is a contract, consent must be manifested by both the principal and the agent to create an agency relationship.

B. No Consideration Required

Unlike a standard contract, however, consideration is not necessary for the creation of an agency relationship.

C. Writing – No Written Contract Required

General Rule - No Writing Required: Another exception to this contractual relationship is that normally, the existence of the agency DOES NOT have to be evidenced by a writing.

3. Modes of Creation of the Agency Relationship

A. By Act of the Parties

There are four ways in which the parties may create an agency relationship. They are as follows:

- **Actual Authority**

The principal may, by direct communication to the agent, orally or in writing, actually appoint and authorize the agent to act on the principal's behalf.

- **Apparent Authority**

The principal may, by communication to the third party, orally or in writing, indirectly authorize the agent to act on the principal's behalf.

Law of Agency Continued

CREATION OF THE AGENCY RELATIONSHIP Cont.

3. Modes of Creation Continued:

A. By Act of the Parties Continued

- **Inherent Authority**

The principal, by authorizing the agent to act, may be liable for acts of the agent, even if such acts are in violation of the principal's orders.

- **Ratification**

An agency relationship may be created by the principal's later, subsequent affirmation (ratification) of the actions of one who purported to be acting on behalf of the principal.

Basically, a ratification affirms a previously unauthorized act.

A transaction which involves a violation of law may not be ratified.

B. By Operation of Law

Under certain circumstances, the law may impose an agency relationship. Such is by **Estoppel** or by **Statute**.

TERMINATION OF THE AGENCY RELATIONSHIP

1. Grounds for Termination

Once having determined that the requisite formalities exist and that there is express or implied actual authority, you should ask whether the authority has been terminated.

Termination of actual authority may occur in the following ways:

- **By Lapse of Time**

- **By Happening of Event**

- **By Breach of Agent's Fiduciary Duty**

- **By Change of Circumstances**

- Destruction of the subject matter of the authority;
- A drastic change in business conditions;
- A change in relevant laws; and
- Insolvency of the agent or principal, if relevant.

- **By Unilateral Act of Principal or Agent**

- **By Operation of Law**

- Death;
- Incapacity of Principal; or
- Dissolution of Corporation, LLC or Partnership.

Law of Agency Continued

TERMINATION OF THE AGENCY RELATIONSHIP

2. Irrevocable Agencies

There are two types of agencies that may not be unilaterally terminated by the principal:

- **Subject Matter**

Where the agent has an interest in the subject matter of the agency

- **Security**

Where the agent has a power given for security.

NATURE OF THE AGENCY RELATIONSHIP

1. Rights and Duties Between Principal and Agent:

What is Duty?

- **Duty Defined:**

Black's Law Dictionary defines "DUTY" as:

- "A person's action which is exactly conformable to the laws which require the person to obey them"; or
- A legal or moral obligation"; or
- Conduct or service which is obligatory; or
- A mandatory obligation to perform.

A Simple definition of "Duty" is:

"A legally recognized obligation requiring certain conduct by one person to another."

2. Duties Between Principals and Agents

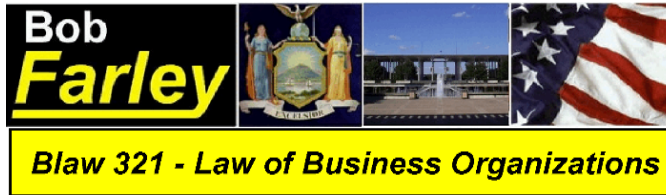
Duties of Agent to Principal

- **Duty of Loyalty**
- **Duty of Obedience**
- **Duty of Reasonable Care**

Duties of Principal to Agent

- **Duty of Compensation**
- **Duty of Reimbursement**
- **Duty to Cooperate**

Both Principals and Agents also have a duty to abide by any provisions of a contract that they make pursuant to the agency.



Weekly Information Sheet 04

THE EMPLOYMENT RELATIONSHIP

The Elements of the Employment Relationship

1. Employment Defined:

What is Employment?

Black's Law Dictionary defines "Employment" as:

- Act of employing or state of being employed; or
- That which engages or occupies; or
- That which consumes time or attention; or
- An occupation, profession, trade, post or business.

Labor Law Definition:

"A relationship where someone is "permitted or suffered to work"

Simple Definition:

"An act to engage or hire one's service, in return for payment for such service."

2. Employment v. Independent Contractor

The Employer- Employee Relationship

Independent Contractor:

A clear example of an independent contractor is one who has a calling of his own, is hired to do a particular job, is paid a given amount for that job, and who follows his own discretion in carrying out the job.

A principal has no right to control the manner and method in which an independent contractor performs the job.

THE EMPLOYMENT RELATIONSHIP Continued

The Elements of the Employment Relationship Continued

2. Employment v. Independent Contractor Continued

Employee:

A clear example of an employee is one who works full-time for his employer, is compensated on a time basis, and is subject to the supervision of the principal in the details of his work.

An employer has the right to control the manner and method in which an employee performs the job.

Determination of Right to Control:

The single overriding factor in determining whether a person is an employee is whether the principal (employer) has the right to control the manner and method by which the individual performs his tasks.

3. Employment at Will v. Employment Contract

Employment at Will Concept

New York State is an Employment at Will state.

This means that an employer can pay the employee what they wish (so long as it is above minimum wage), provide whatever benefits (if any) that they wish, and dismiss (fire/dismiss/discharge) an employee for any reason, or no reason at all, as long as it is not for an illegal reason (such as a violation of the Federal Civil Rights law or New York State Human Rights law).

Employment Contract

An exception to the employment of will doctrine is where the employee and employer have an employment contract.

In such instance, the contract terms will govern the parameters of the employment.

A collectively bargained employee is determined to have an employment contract as negotiated and approved by the employer and the employee's representative (union).

What Constitutes An Employment Contract?

Under certain circumstances whether an employment contact exists can be unclear.

With such circumstances, courts have imposed other documents (such as an employee manual) to constitute an employment contract.

THE EMPLOYMENT RELATIONSHIP Continued

The Elements of the Employment Relationship Continued

4. Employment Regulation

Equal Opportunity

Federal Civil Rights Law:

The Federal Civil Rights Law prohibits employment discrimination on the basis of race, color, religion, sex, or national origin, age, gender, disability and pregnancy.

Such discrimination can be contested by means of a civil action under 42 U.S.C. Section 1983.

State Human Rights Law:

Section 290 of the NYS Executive Law provides that the “opportunity to obtain employment without discrimination because of age, race, creed, color, national origin, sexual orientation, military status, sex, marital status, or disability, is hereby recognized as and declared to be a civil right.”

Either Venue Can Be Pursued:

An aggrieved party can pursue a remedy under either the Federal Civil Rights Law or the State Human Rights Law. Under both laws, a person’s rights can be enforced either through administrative action or by a civil lawsuit.

Collective Bargaining

National Labor Relations Act:

The National Labor Relations Act (Wagner Act – 29 U.S.C Section 151 et seq.) provides that private sector employees have a right to collectively bargain.

State Labor Relations Act:

New York has a nearly identical law to the NLRA (Article 20 of the State Labor Law)

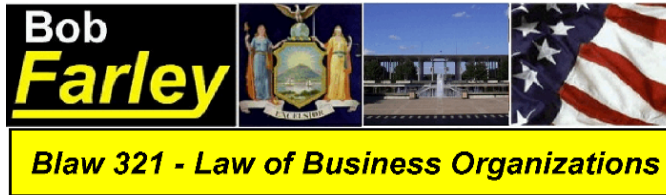
Taylor Law:

New York Law (Article 14 of the State Civil Service Law) grants public sector employees the right to collectively bargain.

Health and Safety

Health and Safety Laws:

Both the Federal and State Government have health and safety laws (Such as OSHA and the Labor Law) which regulate workplace conditions, minimum wages, and hours of employment.



Weekly Information Sheet 05

SOLE PROPRIETORSHIPS

1. Sole Proprietorships

A sole proprietorship is a business established, owned, and controlled by a single person.

Sole proprietorships come in all shapes and sizes.

The owner realizes all the profits and assumes responsibility for all losses.

They also personally manage the business and are responsible for making all management decisions.

Advantages of a Sole Proprietorship

- Sole proprietorships are simple to start.
- No formal action is required.
- May be started immediately.
- The owner has total control.
- The business is nimble / easily adaptable.
- The owner receives all the profits.
- The business itself pays no income tax.

Disadvantages of a Sole Proprietorship

- No Liability Protection.
- The business can be easily dissolved or ended.
- The owner has total control.
- The owner is solely responsible for all capital
- The business is inherently limited
- Owner is solely liable for all losses / damages.
- The owner pays all the taxes for the business

The sole proprietorship is still today the most prominent of the four forms of business organization ownership in America.

2. DBA's – "Doing Business As"

A DBA is a certificate filed with a local government that designates that a sole proprietorship is being operated within that community under a specific name.

The local government will require the business owner to provide their name, address, and type of business operated on the DBA application.

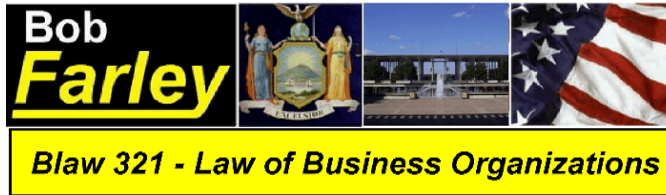
There is often a small filing fee for a DBA

3. Franchises

Franchises are licensing agreements under intellectual property laws that allow businesses to operate in a standardized, uniform manner.

These businesses are individually and privately owned, but conform to uniform standards due to the franchise agreement.

Such agreements allow for standardization of products and processes so as to build brand uniformity and satisfy customer expectation. Famous franchises include businesses such as Subway, McDonalds, and Exxon-Mobil Gas Stations. Franchises do not include big companies like GE, Walmart, Microsoft or wholly owned private companies like Price Chopper, Koch Industries and Dell Computers.



Weekly Information Sheet 05

PARTNERSHIPS

1. Defined

• "Partnership" Defined

The Uniform Partnership Act ("U.P.A.") [Chapter 39, McKinney's Consolidated Laws of New York] defines a partnership as

"An association of two or more persons to carry on as co-owners of a business for profit, and includes a registered limited liability partnership". [P.L. §10 (1)]

The law of partnership is based on the law of **contracts** and **agency**.

• Joint Venture Vs A Partnership

Courts sometimes seek to distinguish a joint venture (i.e., a single or limited enterprise or venture) from a partnership. However, a joint venture is a partnership, and the legal consequences of a joint venture are almost identical to those of a partnership. [See Pedersen v. Manitowoc Co., 25 N.Y.2d 412 (1969)].

2. Not A Legal Entity

A partnership is unlike a corporation in that it lacks some of the entity characteristics of a corporation.

For example, the debts of the partnership are the debts of the individual partners, and any one partner may be held liable for the partnership's entire indebtedness.

However, in some cases, the partnership, at least in form, is treated as an entity.

• Title to Land

Title to land may be taken in the partnership name. [P.L. §12 (3)]

• Lawsuits

A partnership may sue or be sued in the partnership name. [N.Y. Civ. Prac. L. & R. (hereafter "CPLR") 1025]. But this is really a legal fiction, as the individual partners themselves are the actual plaintiffs and defendants, and must pay, and get to receive, any judgments. Additionally, service of process on any one partner is service on the partnership. [CPLR 310(a)].

PARTNERSHIPS Continued

3. Important Attributes of Partnerships

- **Partnership Agreements**

Not all partnership agreements must be in writing. They can be oral.

Only those partnership agreements which cannot by their terms be performed within a year must be in written form, signed by the party to be charged (Under the statute of frauds).

- **Illegal Activities**

As with all Agency-Principal relationships, a partnership formed for an illegal activity will not be recognized under New York law.

- **Disposition of Property**

Absent an agreement to the contrary, partners share equally in the profits and losses of the business.

- **Partnership Relations**

Upon the establishment of a partnership, partners have:

- A fiduciary duty to each other;
- A right to participate in the management of the business; and
- A right to distributions.

4. The Law of Agency under Partnerships

The legal authority of a partner to bind the partnership when dealing with third parties is governed by the law of agency.

- **Imputed Knowledge**

Knowledge of one Partner can be legally imputed to the other partners (they are legally deemed to have the same knowledge even if they don't actually have such knowledge). This is based upon a duty of one partner to inform the others.

- **Dissolution**

A partnership can be dissolved by:

- Act of the Partners: Agreement, Mutual Assent, Expulsion of Partner
- Operation of Law: Death of a Partner, Illegal Activity, Bankruptcy

5. Major Partnerships

Some prime example of Major Partnerships include:

- Major Law Firms
- Big Four Accounting Firms
- Major Movie Production Firms

Weekly Information Sheet 06

THE NATURE OF CORPORATIONS

What is a "Corporation"

A corporation is a legal entity (an artificial person), separate and distinct from the legal personalities of those who own and manage the corporation.

A creature of law, its existence and attributes arise from state-enabling statutes, which give business participants significant freedom to choose their own customized relationships.

In New York, as elsewhere, corporate law is mostly statutory, and most of the statutory law relating to general business corporations (i.e., corporations for profit) is contained in the New York Business Corporation Law ("BCL").

The Rise of the Corporation:

Roman Law:

Founded in Rome: The modern corporation is actually of ancient origin, and like most things created from Rome, it arose as a practical solution to fill a need.

Based in Roman Law: The first corporation arose when Roman commerce and trade grew to a sophisticated level, and traders and merchants needed a business organization that could last beyond a person's natural lifetime, and have its own identity before the courts.

An Artificial, Separate, Person Under the Law: This Roman legal invention was treated as if it had a distinct personality apart from that of its owners or members, continued to exist beyond their lifetime, and was allowed to bring an action in law before Roman courts, as a distinct entity rather than under the name of any individual.

What's in A Name: This Roman legal invention was termed "corporation", meaning a business entity which is viewed as a separate and independent legal person under the law. It is a derivation of the Latin term "corpus" meaning "body".

English Law:

England Evolves Roman Law: These Roman principles were resurrected in England, a former Roman colony, as early as the 12th century.

Paralleled the Common Law: The corporation was first brought into the Anglo-American Legal System by Henry the Second. His innovations also developed much of what we know today as the English Common Law.

More than Just Business: King Henry adapted the concept of the Roman corporation to meet his needs of governmental organization and public infrastructure development. He used the sovereign authority to create fictitious legal persons through the granting of Royal charters.

Application to Business: Later rulers, then expanded this idea of the corporation by employing the corporate mechanism to establish trade guilds. These organizations would establish by-laws to govern all persons engaged in a specified field (such as weavers, tailors, goldsmiths, and haberdashers).

A British Staple of Law: By the time of the founding of Colonial America, the corporation attained a status in the social constitution of Great Britain and its colonies.

Expanded to Meet Economic Needs: As the needs of English society changed, the corporation was further developed. To meet these needs, British royal sovereigns began to grant charters for such purposes as constructing public works projects such as churches, hospitals, universities, waterways and canals.

A Means to Colonize: By the start of the 17th century, as England arose to the stature of a world superpower, Queen Elizabeth decided to deploy the corporation format to extend national influence into the area of colonization. Chartering such entities as the East India Trading Company, the Hudson's Bay Company, the Virginia Company and the Massachusetts Bay Company, England became the British Empire, using corporate powers to develop, settle and institute commercial operations all across the globe.

The Rise of the Corporation Continued:

English Law Continued:

Corporations as a Tool of Government and Business: These corporations were thus developed into a tool, granted by a king, to extend his rule and power, using the initiative of private individuals, to accomplish certain public purposes.

The Rise of Limited Liability: Most importantly, starting with the joint stock corporation, such charters could also provide, as aforementioned, for an extension of sovereign immunity, so as to limit the liability and financial exposure of corporate investors to only the amount of their investment.

A Powerful Mechanism: Accordingly, perhaps the most important factor, which has led to the dominance of the corporation as a business organization entity, is the development of this limited liability attribute. Moreover, at the time of its first inclusion in corporate charters, the concept of limiting one's liability to only the amount of their capital investment was not otherwise anywhere else recognized at common law.

Colonial America:

British Law Operated in the Colonies: By the time of the founding of Colonial America, the corporation was a well settled institution within the English Common Law. Under such, it had attained extensive acceptance and application in the domain of business. As a result, it is therefore not surprising that from a very early date, the corporation played a prominent role in American life.

Most Businesses Were Not Corporations: Despite the myriad of business organizations available under English Law, the business landscape of Colonial America contained only a handful of Corporation and was dominated by sole proprietorship businesses.

A Small But Growing Economy: As the American Colonies began to grow and prosper, they began to move toward independence from England. The pull of freedom was very strong. From farmers to merchants, single persons owned and worked their own businesses. Their sense of self reliance and independence was very strong. Although most people still were engaged in small businesses, with the growth of the economy, their new sense of an independent future, many began to envision a day when a growing number of businesses, would grow large enough to need a corporate charter.

Another Reason for Rebellion: In all of America, however, there were only 335 corporate charters granted by the British sovereign. This unwillingness to treat American businesses as equal their English Counterparts, only underscored America's desire for independence. They wanted freedom, including freedom to pursue their economic dreams in the manner they wished.

Competitive Advantage for Corporations: Those businesses, that did maintain the corporate form had a competitive advantage. They operated with the formidable strength and capital of limited liability, and the purpose and power of the state.

Another Unfair Power of the Crown: With the dawn of the American Revolution, all edicts of the Crown, including the corporation, became circumspect. As the denunciation of the king, and "his long train of abuses", became a rallying cry for American independence, this unfettered exercise of the state's authority by the British King, selectively granting corporate charters to British businesses, while denying them to Americans, was seen by the founders as another impediment against a truly free society.

British Parliament Began Granting Charters Too: Concurrently, at this same time the British Parliament also began to more frequently deploy its own legislative power to create corporations through the issuing of charters by statute. They were, however equally stingy in granting them to American concerns.

State Legislatures Began to Grant Corporate Charters: After the Revolution, corporate charters throughout America, began to be granted to individuals by special acts of their state legislature.

New York's General Incorporation Policy:

A New Law: In 1846 a modern method of forming business corporations was born in New York State:

"Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed." (Art X, Section1).

Through this provision, New York State established the policy of allowing businesses to incorporate by filing, pursuant to qualified rules established by statute. (known as the Business Corporation Law).

As a result, businesses no longer needed a special act of the state legislature to obtain corporate personhood through a charter granted by an individual dedicated law.

The Rise of the Corporation Continued:

New York's General Incorporation Policy Continued:

Effect of the Constitutional Amendment: This constitutional amendment, and the enabling statutes that followed, had the effect of transferring the monitoring of corporations from the legislature (through the crafting of a special laws awarding a charter) to the courts (through the administration of justice for statutory compliance).

Exponential Increase In Corporations: The amendment further resulted in an exponential increase in corporate organizations and provided the impetus to make New York State the commercial capital of the nation.

As Corporations Grow, Business Grows: As a consequence, by the time of the civil war, just fifteen years later, New York State developed a gross domestic product index over four times that of all the confederate states combined.

Corporate Personhood: In addition to the provisions outlined in Article 10, Section 1, the 1846 State Constitutional Convention also provided for a direct expression of corporate personhood. This section 4 of Article X reads as follows:

"The term corporations as used in this section and in sections 1 (the power to make general incorporation statutes), 2 (the power to hold incorporators liable for dues of the corporation) and 3 (limiting the legislature's ability to make special charters just for banking purposes) of this article shall be construed to include all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue and shall be subject to be sued in all courts in like cases as natural persons."

Present Status of Corporations in New York: Almost immediately, upon the ratification of these amendments, enabling corporation statutes also began to evolve. From that time to the present we have thereupon seen the enactment of such controlling corporation laws as:

- **the Business Corporation Law,**
- **the Benevolent Orders Law;**
- **the Cooperative Corporations Law;**
- **the Limited Liability Companies Law;**
- **the Not for Profit Corporations Law;**
- **the Religious Corporations Law; and**
- **the Transportation Corporation Law.**

Definition of a "Corporation"

"A corporation is an artificial person or legal entity created by or under the authority of the laws of the state or nation, which has an existence distinct from that of its associated individuals, and has a duration that is either perpetual or for a limited term of years, and which acts as a unit in matters relating to the common purpose of the association and within the scope of the powers conferred upon it by law."

Types of Corporations:

- **Private Corporations**
 - **Business Corporations**
 - **Foreign / Domestic**
 - **Close / Publically Traded**
 - **Professional Corporations**
 - **Subchapter S Corporations**
- **Public Corporations**
 - **Public Benefit Corporations**
 - **Public Authorities**
 - **Municipalities**
- **Not-for – Profit Corporations**

Types of Corporations Continued:

Private Corporations: A private corporation is a corporation organized under state law for purposes of finance, industry, and commerce. Often called “public” in business circles, when their stock is sold, due to the fact that such stock is offered for sale to the general public. They can be **foreign corporations** (meaning they are formed and chartered outside of the state), **domestic corporations** (meaning they are formed and chartered inside the state), **publically traded corporations** (meaning any person over the age of 21 may purchase their stock), or **close corporations** (meaning only their stock is not publically traded and that only select persons may purchase their shares, such as family members, employees or members of a certain class – including people with the same characteristics or locations or hobbies or vocations).

Business Corporations: are corporations organized under the New York State Business Corporation Law, to operate a business for profit.

Professional Corporations: are corporations where one or more individuals, duly authorized by law to render the same professional service within the state, may organize, or cause to be organized, a professional service corporation for pecuniary profit.

Public Benefit Corporations: are corporations (often called public authorities) that are chartered by an act of the State Legislature or Congress, to perform the work of the chartering entity for the benefit of the public.

Municipal Corporations: are Municipalities that have been formed by corporate charter. Some were chartered by the state government, but many were chartered before the formation of the United States, pursuant to a charter granted by a king. The City of Albany, and the City of New York, were both formed by Royal Charter in 1686.

Not-for-Profit Corporations: are a Corporation formed pursuant to the New York State Not-for-Profit Corporation Law, exclusively for an authorized purpose (such as civic, charitable, educational, scientific, religious, or other non-business purpose and not for pecuniary profit or financial gain).

Elements of Corporation

Principal Characteristics:

In general, corporations have the following principal characteristics:

Limited Liability: Because a corporation is a separate legal entity, its debts and obligations are treated as being distinctly its own; its shareholders and managers are ordinarily not liable for corporate indebtedness. One exception is the liability of the 10 largest shareholders of non-publicly traded corporations for the wages of corporate employees. [BCL §630]

Entity Powers: Since the time of their establishment under Roman Law, corporations have been held to be an Artificial Person under the Law. This Corporate “Personhood” means that the corporation is viewed as separate entity, a corporation can contract in its own name, sue or be sued, own or convey property, and be held criminally liable for crimes that it commits. (BCL §202)

Centralized Management: Control of a corporation is centralized in a board of directors elected by shareholders. In general, the shareholders have only extremely limited power to make management decisions (except insofar as they may elect and remove directors).

Continuity of Existence: Unless duration is specifically limited in the certificate of incorporation, a corporation's duration is “perpetual”; i.e., it continues until dissolved, merged, or consolidated in accordance with the BCL. The death, withdrawal, bankruptcy, or incapacity of any of its shareholders or managers has no effect on the corporation's existence. [BCL §202(a)(1)]

Free Transferability of Interests: The interest of the corporation's owners is divided into shares, and these shares may be freely transferred; that is, another person may be fully substituted in the place of the transferor as the holder of ownership interests (shares) in the corporation.

Statutory Sources of Authority: A corporation is a creature of statute; it and its managers and agents have only such authority to act as is conferred by or pursuant to statutes (principally the BCL), the case law (to a lesser extent), or legally permitted provisions of the certificate of incorporation or bylaws.

Constitutional Status: A corporation is an “artificial person” under the law. Accordingly, it is a “person” entitled to due process and equal protection of the law under the 5th and 14th Amendments. It has also been held to have similar civil rights afforded to people, such as protections under the 1st Amendment. But Courts have also held that corporations are not a “citizen” referred to by the Privileges and Immunities Clause of Article IV or the Fourteenth Amendment (meaning states can discriminate against out of state corporations), and that it holds no right against self incrimination under the 5th Amendment.

Comparison With Other Forms of Business

Comparison with Partnership:

A partnership is not a separate entity distinct from its owners, the partners. Each partner is jointly and severally liable for the debts of the partnership. (NYPL §26). Each partner has a voice in management unless the partners all agree to the contrary. The existence of the partnership cannot be perpetual, and the ownership interests are not freely transferable. Its statutory authority in New York is the Partnership Law.

Comparison with Limited Liability Company (LLC): A limited liability company in many ways is similar to a cross between a partnership and a corporation. Its owners, known as members, do enjoy limited liability, but it is not centrally managed as the members, like partners, provide the management of the company. Formed by means of an articles of organization, and managed in accordance with an operating agreement signed by all members, the LLC is a much less powerful, more streamlined, and more affordable to operate a small business with limited liability. Its statutory authority in New York is the Limited Liability Company Law.

Comparison with Sole Proprietorships: Sole proprietorships have no statutory requirements for formation, ownership or operation. There is no limited liability, and financial protections must be procured by means of the purchase of insurance. The owner is the sole manager, and all profits and all losses inure to their benefit or detriment.

Powers of a Corporation:

Transfer Property: This includes the power to transfer or mortgage all or any part of the corporation's assets. [BCL §202 (a)(5)];

Lend Money: A corporation has the power to lend money, invest its funds, and to take collateral therefor in connection with a business operation other than banking. Unless it is a banking corporation, it has no banking powers. [BCL §202 (a)(8)];

Buy and Sell Securities: A corporation has the power to acquire, hold, vote, and dispose of bonds, shares, and other securities of any other issuer (regardless of the issuer's business). [BCL §202 (a)(6)];

Contract and Borrow: A corporation has the power to make contracts, to borrow money, to issue notes, bonds and other obligations, and to give mortgages of its property as security. [BCL §202 (a)(7)];

Compensate Employees: A corporation has the power to fix compensation of employees, officers, and directors, and to pay pensions and establish retirement, incentive, and benefit plans and trusts for its employees, officers, and/or directors (including pension, profit sharing, share purchase, options, and bonus plans). [BCL §202 (a)(10) and (13)];

Participate in Other Ventures: A corporation also has the power to be a (i) promoter, (ii) partner, (iii) associate, or (iv) manager of other business enterprises or ventures. Also a New York corporation may also act as an incorporator of foreign corporations if permitted by the jurisdiction of incorporation. [BCL §202 (a) (15)];

Major Residuary Power: In addition to other specified powers, corporations may further exercise all powers that are necessary and convenient to effect any or all purposes for which the corporation is formed. [BCL §202(16)].

Contributions: The Business Corporation Law further authorizes corporations to make the following contributions:

Charitable Contributions: A corporation may make donations, irrespective of corporate benefit, for the public welfare or for charitable, educational, scientific, civic or similar purposes, subject to a certificate of incorporation. [BCL §202 (a)(12)];

Political Contributions: A corporation has the power to political contributions subject to campaign finance limits under federal and State Election Law. Federal law prohibits direct contributions to candidates from corporations and New York State Election Law (section 14-116) limits corporate contributions to a total of \$5000 for any calendar year;

Guarantees: The Business Corporation Law additionally authorizes corporations to give guarantees in furtherance of corporate purposes [BCL §202 (a)(7)], and also give a guarantee not in furtherance of corporate business when authorized by a vote of two-thirds of the shares entitled to vote [BCL §908];

Practice of Law: An ordinary business corporation may not engage in the practice of law.

Note: A professional corporation consisting of attorneys can engage in the practice of law [BCL – Article 15], as well as a court approved charitable organization helping indigents pursue civil remedies [N.Y. Jud. Law §495].

Indemnification of Directors and Officers: The Business Corporation Law also authorizes corporations to indemnify directors and officers, but the extent to which a corporation may (and must) indemnify its directors and officers for litigation related expenses is strictly controlled by law.

Acquisition of Its Own Shares: The Business Corporation Law further authorizes corporations to acquire, hold and dispose of (but not vote) its own shares, subject to certain limitations.



Weekly Information Sheet 07

CORPORATE FORMATION

Defined

"Corporation" Defined

Black's Law Dictionary defines a "Corporation" as

"An artificial person or legal entity created by or under the authority of the laws of the state or nation, which has an existence distinct from that of its associated individuals, and has a duration that is either perpetual or for a limited term of years, and which acts as a unit in matters relating to the common purpose of the association and within the scope of the powers conferred upon it by law."

Meaning

Legal Entity of to Itself: An Artificial Person Under the Law

A corporation is a legal entity (an artificial person) created in accordance with statutes.

The corporate entity is separate and distinct from the legal personalities of those who own and manage the corporation.

In New York, as elsewhere, corporate law is mostly statutory, and most of the statutory law relating to general business corporations (*i.e.*, corporations for profit) is contained in the New York Business Corporation Law ("BCL").

Principal Characteristics

In general, corporations have the following characteristics:

- **Limited Liability**
- **Entity Powers (Corporate Personhood)**
- **Centralized Management**
- **Continuity of Existence**
- **Free Transferability of Interests**
- **Statutory Sources of Authority**
- **Constitutional Status**

Corporation Attributes and Activities

• Business Corporations

Under New York Law [Section 201 of the Business Corporation Law], a Business Corporation is:

- A private corporation under the law;
- A corporation that is established to conduct a business for profit; and
- Limited in the liability of its shareholders.

• Pre-incorporation Activities

Pre-incorporation activities of promoters, such as those activities necessary to establish the corporation, or the business in which it will engage, can be ratified by the adoption of such by the board of directors, after the corporation is established.

• Formation of Corporations

Pursuant to a general incorporation acts (such as the provisions of the Business Corporation Law) incorporation of a new corporate entity can be accomplished by:

- **Having incorporators (natural people over 18) prepare a certificate of incorporation which conforms to all state laws;**
- **Filing the certificate of incorporation with the office of the secretary of state; and**
- **Paying all necessary state incorporation fees**

• Corporate Ownership

An ownership interest in a corporation is represented by shares of stock in the Corporation. Voting shares allow the shareholder to elect members of the board of directors of the corporation and control certain decisions of corporation policy.

• Limitation of Investment

Financial Investments in a corporation are made by purchasing shares of stock in the corporation.

The monies used to purchase the shares of stock, inherently limit the exposure of the investor, and the shares so purchased give investors certain rights with respect to the corporation

Corporate Formation

• In General

A corporation is formed by compliance with the formalities prescribed in the New York State Business Corporation Law (BCL).

The creation of corporations by special act of the legislature is prohibited except for municipal purposes or for cases where, in the judgment of the legislature, the corporation's objectives cannot be attained under the general laws. [See N.Y. Const., art. 10, §1].

• Rules for Corporate Formations

The rules that govern a corporation come from the following sources:

- **States Constitutions**
- **State Statutes**
- **Articles of Incorporation**

Corporate Formation

• STEPS AND ENTITIES INVOLVED IN CORPORATE FORMATION:

Preliminary Incorporation Activities

- Preincorporation
- Promoters
- Subscriptions

Legal Process of Incorporation

- Incorporators
- Articles (Certificates) of Incorporation
- Office of the Secretary of State
- Filing

Post Incorporation Requirements

- Organizational Meeting
- Issuance of Shares
- Election of Board of Directors
- Appointment of Corporate Officers
- Adoption of Corporate Bylaws

• Promoters

Definition: As used by the courts, the term "promoter" has been defined as:

"A fiduciary who provides the organizational initiative for the founding of a business enterprise, and who sets in motion all that needs to be done to form the corporation that will conduct the business enterprise"

It is not defined in the business corporation law, and is not a term of art, but rather a term of Business.

Role of Promoters: *The role of a promoter includes:*

- ***Working on a plan to build, organize and bring about a new business enterprise;***
- ***Bringing together persons interested in the new enterprise;***
- ***Preparing the prospectus, advertising and documentation promoting the new company;***
- ***Aiding in the procurement of subscriptions for shares in the future corporation; and***
- ***Ending their role and liabilities upon the functioning of the new corporation.***

Generally: Promoters are persons who provide the organizational initiative for the founding of a business and for the formation of a corporation (or other form) to carry on the business.

What They Do: Promoters sell subscriptions for the purchase of stock in the proposed corporation, court prospective investors, and perform other organizational details that the corporation needs in its pre-incorporation existence.

They Have a Fiduciary Duty: Promoters have certain fiduciary duties aimed at protecting (indirectly) the "outsiders" who invest. Promoters may be, but need not be, the "incorporators."

Corporate Formation Continued

• Promoters Continued

Duties of Promoters: The duties of a promoter flow from their position as fiduciary. Accordingly, they have wide powers to organize the formation of a corporation. Although they are not an agent (since the corporation has yet to come into existence) their legal relationship as a fiduciary with the proposed corporation they promote, and as to those persons whom they induce to become shareholders, is pronounced and serious.

Liability of Promoters: Promoters are personally liable for contracts made on behalf of the corporation before its existence. The corporation is not liable on these contracts unless and until it adopts them through ratification after it comes into existence. They are also liable for any untrue statements on a prospectus, for fraud in promoting the corporation, for misapplication or wrongful retention of corporate property, for misfeasance or breach of trust in representing the corporation to third parties.

• Subscriptions

One of the most important roles of a promoter is the sale of stock subscriptions.

Defined: A pre-incorporation stock subscription is:

“A contract authorizing an investor to purchase a set number of unissued shares from the corporation, at a future date, for a specific price, upon the issuance of such shares, after corporate formation.”

Promoters Role: Subscriptions are offered and arranged by promoters with investors.

A promoter is ultimately, individually liable for the subscription contract with the investor, as the pre-incorporation stock subscription is made prior to the existence of the corporation.

Corporations will almost always ratify such stock subscriptions, thereby relieving the promoter of the liability.

As the promoter stands in a fiduciary relationship to the corporation, as well as to the investor purchasing the stock subscription, they are legally prohibited from making any secret profit at either of their expense.

Terms of Subscriptions: Pursuant to the business corporation law:

- ***Irrevocable for Three Months***
- ***Must Be In Writing and Signed by the Subscriber***
- ***Must Be Paid in Full***

Importance of Subscriptions: The sale of stock subscriptions is extremely important to a prospective corporation.

It is through the sale of these subscriptions that the corporation raises its initial capital, and sells its initial authorized shares.

Corporate Formation Continued

• Legal Process of Incorporation

- Incorporators
- Articles (Certificates) of Incorporation
- Mechanics of Incorporation

• Incorporators

Who Are Incorporators: One or more natural persons of the age of 18 or over, who act as the incorporators of a corporation. [BCL §401].

These are the persons who sign and file the incorporation forms, including the certificate (articles) of incorporation, with the New York State Secretary of State.

Role of Incorporators: The role of the incorporators is to sign (with an acknowledgment) the certificate (articles) of incorporation.

They also deliver such certificate (articles) to the New York Department of State, whereupon the department of state files the certificate.

When the corporate existence has begun (after the Secretary of State files the Certificate of Incorporation), the incorporators hold an organization meeting, for the adoption of bylaws and the election of the first board of directors. [BCL §§402, 404]

• Corporate Charters

The Corporate Charter contains three elements:

- The Articles of Incorporation;
- The Pre-Incorporation Documents; and
- The State Incorporation Laws.

• Certificates of Incorporation:

The Certificate, sometimes also referred to as the Articles, of Incorporation is the legal instrument that creates the corporation. Like a constitution for government, it sets out the general framework of what the corporation is, and can later be amended.

Contents: The Certificate of incorporation must set forth the following:

- Name of the Corporation;
- Purposes of the Corporation;
- Office of the Corporation;
- Authorized Shares and Descriptions;
- Duration of the Corporation;
- Registered Agent;
- Designation of Secretary of State; and
- Limitations on Director's Liability (if any).

Corporate Formation Continued

• Mechanics of Incorporation

Process of Incorporation: One or more natural persons or corporations may act as incorporators of a corporation by signing and filing appropriate forms, including the certificate of incorporation, with the office of the secretary of state.

Steps to Incorporate: Forming a corporation involves three essential steps:

- **Creating the Certificate**
- **Signing the Certificate**
- **Filing the Certificate**

Forming the Corporation:

- **Certificate Must Be in the English Language;**
- **Certificate Must Be Signed and Acknowledged;**
- **Delivery Can Be By Mail, In Person or By Fax;**
- **Filing Fee of \$125 Required;**
- **Filing Not Discretionary - If Certificate Complies with Law, it Must Be Filed;**
- **Filing is Conclusive Evidence of Compliance with BCL;**
- **The Secretary of State Provides A Receipt Upon Filing;**
- **Corporate Existence Commences Upon Filing;**
- **Corporation Commencement Date Can Be Delayed if Requested.**

No "Minimum Capital" Requirement: In New York State, the Business Corporation Law does not contain any requirement that any particular minimum amount of capital be paid in before the corporation may commence doing business.

• The Organizational Meeting – Generally

Organizational Meeting Required: After the corporate existence has begun, an organization meeting of the incorporator or incorporators must be held [BCL §403 (a)].

Purpose of the Meeting: The purpose of the meeting is for the adoption of by-laws, the election of directors to hold office until the first annual meeting of shareholders, the issuance of shares, and for the transaction of such other business as may come before the meeting.

Time and Notice for the Meeting: The meeting may be held at the call of any incorporator, who shall give at least five days' notice thereof by mail to each other incorporator, which notice shall set forth the time and place of the meeting. Notice need not be given to any incorporator who attends the meeting or submits a signed waiver.

Quorum and Proxies: A majority of incorporators shall constitute a quorum and the act of the majority present at a meeting at which a quorum is present shall be the act of the incorporators. An incorporator may act in person or by proxy.

Alternative to Meeting: Any action permitted to be taken at the organization meeting may be taken without a meeting if each incorporator agrees.

Corporate Formation Continued

• The Organizational Meeting – Issuance of Shares

Every corporation shall have power to create and issue the number of shares stated in its certificate of incorporation. The Certificate of Incorporation establishes the authorized shares.

Defined: Black's law dictionary defines a "*Share*" to be:

"One of the definite number of equal parts into which the capital stock of a corporation is divided, and which represents and equity, ownership interest in the corporation".

- ***Shares Must be Represented by Signed Certificates;***
- ***Certificates Are Only Evidence of Share Ownership;***
- ***Every Share Entitles Owner to One Vote;***
- ***Certificate of Incorporation Controls Stock Issuance (How Many Shares are issued)***
- ***Time and Manner of Issuance:***
 - The initial stock issuance generally takes place at the organizational meeting;
 - Such shares are "issued" by the board of directors, when, by board resolution, actually sell the stock to subscribing shareholders;
 - This sale takes place in accordance with subscriptions, which are made between promoters and prospective shareholders, and such stock purchases are recorded by the secretary so as to confirm the share's voting rights.
- ***Payment for Shares shall consist of money, property, labor or services;***
 - This payment by shareholders for the stock issued is how the corporation raises capital to operate the business for profit.
- ***Treasury Stock is shares which have been authorized but not sold to a shareholder;***
- ***Voting rights: Each share purchased entitles shareholder to cast one vote;***
 - Such vote applies to the election of members of the board of directors, as well as to certain corporate governance matters as set forth in the certificate.

• The Organizational Meeting – Issuance of Shares

Function of the Board: Policy decisions of a corporation are made by a board or directors.

- ***Corporate Governance:*** This corporate "governance" is a "republican" form, whereby shareholders elect members of the board of directors, to represent them;
- ***Size of the Board:*** The size of the board of directors (how many members it contains) is generally contained in the certificate of incorporation, or in the by-laws;
- ***Board Meetings:*** Corporate action of the board of directors shall be taken at a meeting of the board;
- ***Meeting Notice:*** Notice of meetings of the board shall be made in accordance with the bylaws;
- ***Majority Vote Required:*** All decisions of the board, shall be accomplished by a majority vote;
- ***Written Resolutions Recorded:*** All actions of the board shall generally take the form of written resolutions;
- ***Length of Terms:*** The length of the term of the members is contained in the certificate or the bylaws;

Election of the First Board of Directors: The corporation's first board of directors is generally established by an election, overseen by the incorporators, held at the initial organizational meeting. Subsequent elections are held at the corporation's annual meeting.

Corporate Formation Continued

• The Organizational Meeting – Appointment of Officers

Functions of the Board and Officers: Where policy decisions of a corporation are made by a board or directors, such policy decisions are then implemented by appointed officers of the corporation, who act as the managers of the corporation.

- **Officers of the Corporation:** The corporation's officers perform the duties and responsibilities assigned to them by the board of directors for the management of the corporation;
- **Appointed by Board Resolution:** The certificate of incorporate may, but generally does not, provide for election of officers by the shareholders. Accordingly, officers are generally appointed by resolution of the board of directors, and include the following:
 - **Chief Executive Officer;**
 - **President;**
 - **Vice President(s);**
 - **Chief Financial Officer;**
 - **Treasurer; and**
 - **Secretary.**
- **Term of Office of Officers:** Unless otherwise provided in the certificate of incorporation or the bylaws, all officers shall be appointed to hold office until the meeting of the board following the next annual meeting of shareholders.

First Appointment and Removal of Officers: The first appointment of the initial officers of the corporation is often done at the organizational meeting, and any officer appointed by the board may be removed by the board with or without cause.

• The Organizational Meeting – Adoption of Bylaws

What are Bylaws:

- Whereas the Certificate of Incorporation is like the Constitution of a Corporation, its Bylaws are like its Statutes.
- Bylaws are the rules and regulations enacted by a corporation to govern its affairs, and that of its shareholders, directors, and officers.
- Bylaws are adopted by the board of directors, when authorized by the certificate of incorporation, and by the shareholders when not so permitted.
- The Bylaws are subordinate to the general law of the state, the business corporation law, and the certificate of incorporation, and any provision of a Bylaw that conflicts with such superior authority invalid.
- Bylaws that are valid are binding on all shareholders, directors, officers and employees of the corporation, regardless of whether they know of the existence of those bylaws or were among the majority that consented to their adoption.

When are Bylaws Adopted: The initial Bylaws of a corporation are adopted by its incorporator or incorporators at the organization meeting.

Thereafter, Bylaws may be adopted, amended or repealed, pursuant to resolution, by a majority vote of the directors (if so permitted by the certificate of incorporation).

What is Contained Within Bylaws: The Bylaws may contain any provision relating to the business of the corporation, the conduct of its affairs, its rights or powers, or the rights or powers of its shareholders, directors, officers, or employees, not inconsistent with the business corporation law or any other statute, or the certificate of incorporation.



Weekly Information Sheet Cases

Cases

Marbury v. Madison

This case **established the doctrine of judicial review.**

Here William Marbury, a judicial appointee of President John Adams, sued the New President's (Thomas Jefferson) Secretary of State, James Madison, for a court order to deliver the certificate of appointment that Madison was refusing to do so.

The Court, in a decision written by Chief Justice John Marshall, who was Adams' secretary of state (and the man who was initially supposed to deliver the certificate to Marbury, but didn't) wrote a decision stating that Marbury could not get the decision, because the law under which he was appointed (the Organic Act) was unconstitutional, and thus invalidated such law as unconstitutional.

How A Bill Becomes A Law

This class exercise **established the procedure as to how a bill becomes a law in New York State.**

A bill must be introduced and sponsored by both a Senator in the Senate and a Member of the Assembly in the Assembly.

After introduction, it is referred to a committee, which must vote to report such to the floor of the respective house.

Once reported, the bill is put on an active list by the leader of each house (the Majority Leader in the Senate and the Speaker in the Assembly). Once on an active list, it is brought up for a vote by all members of the House, and must pass by a vote of at least 32 Senators (out of a house of 63) and a vote of at least 76 members of the Assembly. A bill must pass both houses in the same year to be sent to the Governor.

The house that passes the bill first must send it to the Governor in the same year in which it passes. The Governor has 10 days (exclusive of Sundays) to decide whether to sign the bill. If the Governor signs the bill, it becomes law. If the Governor does not sign the bill, and does not veto the bill, it becomes law. If the Governor vetoes the bill it is returned to the Senate and Assembly for override.

If the Senate and Assembly vote to override the governor's veto, by a 2/3 majority in each house, it becomes law.

Maurillo v. Park Slope U-Haul

This case established that an agency, so long as it meets all other requirements, can be gratuitous.

Here Alex Maurillo, the father of a young man injured in a rental van, sued U-Haul, for personal injuries sustained by his son, cause by the van's defective door.

The Court, in a decision written by the New York State Appellate Division, found that Alex Maurillo and his son, who had rented the van at the request of his father, for the purpose of moving furniture from the family home to a beach house, had a principal-agent relationship, despite the fact that the father never paid his son in the arrangement.

Congel v. Malfitano

This case established that that parties forming a partnership, are free to chart their own course and contract out of provisions of the New York State Partnership Law, and that as such the Partnership Agreement is controlling.

Here Robert Congel, a minority partner, sued Marc Malfitano and other Majority Partners, over the profit shares of a venture in the Poughkeepsie Galleria Mall. Congel, seeking to unilaterally dissolve the partnership, was denied by the court, because the partnership agreement, which he signed, stated that such could only be accomplished by a majority vote of the partners.

The Court, in a decision written by the New York State Court of Appeals, found that unless the New York State Partnership Law specifically prohibited a practice, a partnership agreement, even contrary to general NYPL provisions, is controlling.

Dartmouth College v. Woodward

This case established the doctrine of the inviolability of contract and that a corporation is an "Artificial Person Under the Law".

Here the State of New Hampshire, through state legislative action, sought to convert Dartmouth College, a private institution of higher learning, established by Royal Charter in 1769, into a state university.

The United States Supreme Court, in a decision written by the famous Chief Justice John Marshall, overturned the act of the New Hampshire legislature and made two landmark holdings. First that contracts, under the United States Constitution are inviolate, meaning the charter granted by the British King was a private contract that a state legislature could not change. And Second, that Dartmouth College was a corporation, which by its very nature, is "An Artificial Person Under the Law", with many rights of natural persons, including constitutional rights.

So You Want To Start A Business

This class exercise established the process by which a person goes through in order to start and operate a business.

Such process includes the following steps:

Step 1: What Type of Business Would You Like to Start?

Step 2: Research Your Ideas

Step 3: Write a Business Plan Based Upon Thorough Research

Step 4: Intimately Learn Your Product or Service

Step 5: Name Your Business

Step 6: Retain Accountants and Attorneys

Step 7: Decide Which Type of Business Organization is Right for Your Business

Step 8: Form Your Business Organization Continued

- Sole Proprietorship
- Partnership
- Limited Liability Company
- Business Corporation
- Franchise