

## Question 8 – February 2018 – Selected Answer 1

1. What are the relative advantages with respect to liability concerning

a) A Limited Liability Partnership (LLP)

All partners of a limited liability partnership are protected from liabilities incurred by the LLP. Thus, partners of an LLP cannot be held personally or individually liable for obligations and liabilities incurred by the LLP either in contract or in tort. The LLP itself will be held liable for the obligations incurred by its partner's actions of partners in the ordinary course of business of the kind if the partner had actual authority to act or if the person with whom they were dealing reasonably believed they had authority to act. However, the partner who acted as an agent of the LLP will not be personally or individually liable.

Partners may still be liable for their own torts.

b) A Limited Partnership (LP)

A limited partnership consists of both limited and general partners. General partners have the right to manage the LP and conduct the day-to-day activities. Limited partners do not have the right to participate in the management of the LP unless otherwise provided in the partnership agreement. Each general partner is an agent of the LP. General partners are personally and individually liable for all obligations and liabilities incurred by the partnership and its other partners as agents. A general partner will also be held liable for torts committed in the ordinary course of business by other partners. However, a creditor must generally look first to the assets of the LP to collect its debt. Limited partners are only liable up to the amount of their contribution to the LP. However, a limited partner can lose its protection if it participates in the management of the LP so that third parties reasonably believe that the limited partner is a general partner.

The LP itself is liable for all obligations and liabilities incurred by its partners.

c) A Limited Liability Company (LLC)

A limited liability company is typically owned by "members" of the LLC. The LLC is presumed to be managed by managers of the LLC unless otherwise provided in the company agreement. The LLC's managers are agents of the LLC, and its members may be deemed agents to the extent that the company agreement provides management rights to the members. The members of the LLC and its managers are shielded from liabilities and obligations incurred by the LLC and its other managers and members. Thus, neither the members nor managers are personally or individually liable for the obligations incurred by the LLC or incurred by other members and managers.

2. What steps are required to form BTT as:

a) LLP

In Texas, an LLP can be formed by filing a certificate of formation with the Texas Secretary of State and paying a fee. The certificate of formation must provide: (1) the name of the LLP, which must include the words "limited liability partnership" or some abbreviation thereof; (2) the address of its principal place of business; (3) the names and addresses of its partners; and (4) the name and address of an agent for service of process.

b) LP

An LP may be formed by filing a certificate of formation with the Texas Secretary of State and paying a fee. The certificate of formation must be: (1) signed by all general partners; (2) give the name of the LP, which must include the words "limited partnership" or some variation thereof; (3) give the address of the LP place of business; (4) set forth the name and address of all general partners; and (5) provide the name and address of an agent for service of process.

c) LLC

An LLC may be formed by filing a certificate of formation with the Texas Secretary of State. The certificate of formation must include: (1) the name of the LLC which must contain the words "limited liability company"; (2) its duration; (3) purpose; (4) address of the LLC's principal place of business; and (5) set forth whether the LLC is to be member run or manager run.

**Question 8 – February 2018 – Selected Answer 2**

1a. The advantages with respect to liability in creating a limited liability partnership include a limitation on the liability of the individual partners for acts committed by the other partners or the corporation. It removes the joint and several liability risk for the partners, and the risk that creditors may come after the partner's individual assets. For example, if George was negligent or committed a tort while in the scope of his acting as partner of BTT, or even if any other employee did, Martha would be protected from any liability, while George would remain liable for his his, together with BTT. Both partners will be responsible for paying taxes, and will share equally in the profits and losses incurred by the partnership unless otherwise agreed.

1b. A limited partnership includes at least one general partner and one limited partner. The limited partner will be liable only to the extent of her capital contribution, which is advantageous for the limited partner. Once the limited partner's capital contribution has been exhausted, there is no other liability for her. The general partner, however, will remain jointly and severally liable for negligence and torts committed by the partnership and its partners and employees, and his personal assets may accessed by creditors once the partnerships assets have been exhausted. The limited partner, however, can lose her limited liability protection by exercising control of the partnership, or if she holds herself out in some way to be a general partner. If a third party relies on the reasonable belief that the limited partner is a general partner, then the general partner may

also lose her protection. Both partners will remain responsible for their individual tax liabilities, and will share equally in any profits or losses unless otherwise agreed.

1c. A limited liability company, similar to a limited liability partnership, will limit the liability of the individual members for acts committed by the other members, employees, or the corporation. The members will not be held jointly and severally liable, and their individual assets will remain protected. However, the members may vote to change the liability of members as it chooses. Furthermore, the limited liability company will be subject to double taxation, which means that both the members and the company will be responsible for paying taxes. However, the members may agree to alter this organization. This flexible management is one of the primary benefits of a limited liability company.

2a. In order to form BTT as a limited liability partnership, the partners must file a certificate of formation with the Texas secretary of state. This certificate should include the names and addresses of the partners, the name of partnership (which must also contain the words limited liability partnership, LLP, or some obvious indication of the fact that it is a limited liability partnership), the address of the partnership, and pay the requisite fee. The certificate of formation should also include a designated agent for service of process, the headquarters or place where the partnerships books will be kept, and if the partnership has been formed for a specific purpose or if the partnership will terminate upon the happening of a specific event. The limited liability partnership should follow all the guidelines set out by the Texas Business Organizations Code.

2b. In order to form a limited partnership, the partners must file with the secretary of state a certificate of formation naming the limited and general partners, and paying the requisite fee. In addition, the name must reflect the limited partnership status of the entity. For example, it would have to be "The Best Taffy in Texas LP" to be properly considered a limited partnership, and it cannot be so similar to another entity so as to cause confusion to the public. In addition, the certificate of formation should include the information required by the Texas Business Organizations Code, including an agent to receive service of process, the purpose of the partnership, when and if the partnership will be terminated, and the location of the partnership and where the books will be kept for inspection.

2c. In order to form a limited liability company, the members of the company must file a certificate of formation with the secretary of state, which should include the name of the company, including "limited liability company" or a variation or abbreviation thereof, in addition to the names of the members and how the company will be managed. The certificate of formation should also include the requisite Texas Business Organizations Code formalities, including the purpose of the company, the address, the location of the books, and registered agent.

### **Question 8 – February 2018 – Selected Answer 3**

(1)(a) A limited liability partnership has many advantages with respect to liability.

A limited liability partnership is a partnership with limited partners who are only liable to the extent of their contribution to the partnership. Limited partners will not be held liable for torts of the partnership or of other partners nor will they be liable for the partnership's contract liabilities. The limited partner will only be held liable for their own torts or if they assume personal liability on a contract. George and Martha will avoid liability of each other's torts, their employee's, and the partnership's torts and contract liabilities if they decide to enter into a limited liability partnership.

(1)(b) A limited partnership

A limited partnership is a partnership with at least one limited partner and at least one general partner. In a limited partnership the general partners are liable for the partnership's contract and tort liabilities while the limited partners are only liable to the extent of their contribution to the partnership, but will not be held liable for tort liabilities or contract liabilities of the partnership. In addition, a limited partner may be liable if he assumes control of the partnership or acts as a general partner. General partners have the same liability as in a general partnership where they are joint and severally liable for the torts of the partnership and the partners as well as contract obligations of the partnership. However, general partners can avoid liability by registering the limited partnership as a limited liability partnership which will then cause the general partners to avoid liability.

Here, either Martha or George would have to be a general partner and the other a limited partner, which would allow one to have joint and several liability for the partnership and the other partner and the other will only have limited liability and would not be liable for the partnership or the other partner's contract obligations or torts.

(1)(c) A limited liability company's owners are only held liable if the corporate veil is pierced.

A limited liability company is neither a corporation or a partnership, but rather has aspects of both. A limited liability company's owners, which are called members will not assume liability unless the corporate veil is pierced. A corporate veil is pierced when a person asserting liability establishes that the entity is just a facade or alter ego of the owners and the formalities are not complied with. The person will have to establish certain circumstances like, undercapitalization, the owners using the corporation's assets as their own, siphoning the corporation's funds, usurping the corporation's business, and engaging in fraud with the corporation's creditor. Once the corporate veil is pierced, then the owners can be held liable, but a court is most likely to only do this for tort claims, not contract claims.

The LLC is the best option because it will protect both George and Martha from liability of the partnership's obligations as well as other partners'.

(2)(a) A limited liability partnership is formed by filing an application with the Texas secretary of state. The limited liability application must include the name of the partnership, which must comply with the statutory requirement and include "limited liability partnership" or LLP. It must

also contain a description of the type of business, the name and address of the registered agent, name and address of the organizer, federal tax identification number. It must also comply with the statutory financial and insurance requirement. It must then be filed with the secretary of state.

(2)(b) A limited partnership is formed by filing a certificate of formation with the Texas secretary of state. The certificate of formation must include the name of the limited partnership along with the statutory requirement that it include "limited," "LP," "limited partnership" or "ltd." It must also include the name and address of the registered agent, which must be in Texas, the federal tax identification number, the number of initial general partners, their names and addresses, and the signatures of the general partners. They must pay a filing fee and file the certificate of formation with the Texas Secretary of State.

(2)(c) A Limited liability company is formed in the same way that a corporation is formed, by filing a certificate of formation with the Texas secretary of state. The certificate of formation must include the name of the corporation, the nature of the corporation or the purpose of it, the number of shares that will be distributed, the name and address of the organizer, the name and address of the registered agent, and the number of initial directors, and their names and addresses. It must also include "LLC" or "limited liability company" in their name. It must state the form of governance, whether it is member managed or manager managed. This must be filed with the Secretary of state by an organizer.