Exhibit A

Default Report

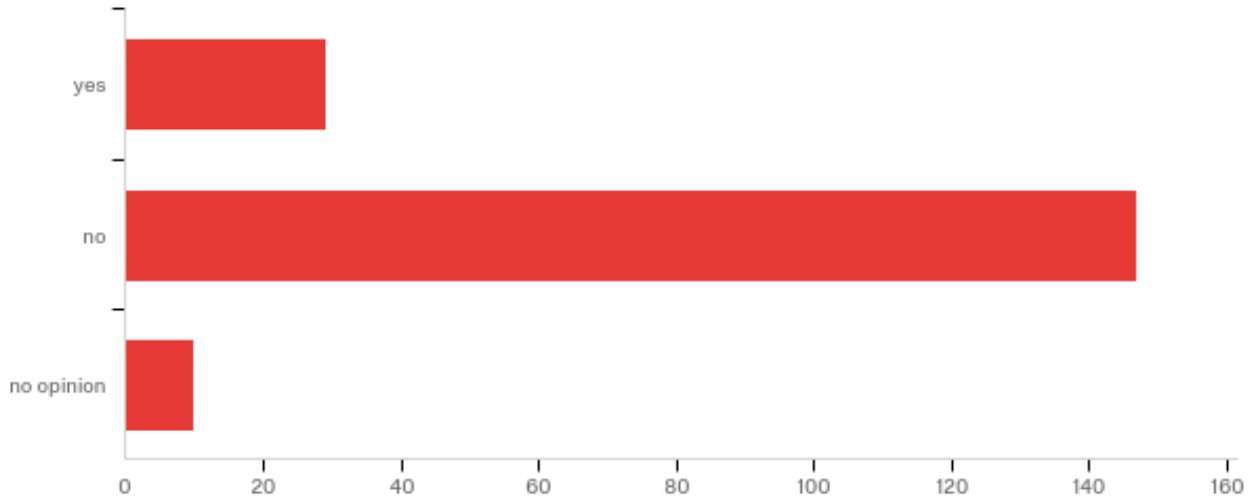
2017 Business Law Section LLCL Survey

August 17th 2017, 1:53 pm MDT

NYSBA Business Law Section

New York Limited Liability Company Law ("LLCL") Survey

The LLCL should permit oral operating agreements:



#	Answer	%	Count
1	yes	15.59%	29
2	no	79.03%	147
3	no opinion	5.38%	10
	Total	100%	186

Comments:

Comments:
Yes, but solely as implied agreement with the baseline provisions of the NYLLCL
There is enough litigation with a written requirement. Allowing oral agreements may give rise to more claims.
issues of enforceability
We have enough difficulty with the written agreement in defining member's rights. Oral agreement will only complicate matters and create unnecessary litigation.
Exception should be made for single member LLCs.
As a general proposition New York should permit whatever Delaware permits, and should be as flexible as Delaware.
Oral operating agreements are an invitation to intra-partner disputes, contested dissolution and expensive litigation. It is better to require venturers to spend the time to think through their organization, economic and exit objectives when they're looking forward to a working relationship.
Written operating agreements should be required if there are two or more members.
If the agreement is oral, the default should be to statutory provisions.
Only for single member LLCs.
What good is an oral agreement?
To permit oral operating agreements would open the door to "he said/she said" claims. It's a necessary discipline.
I do not think having a written agreement is onerous and it prevents, at least some disputes.
Only for single member
Oral operating agreements are as useful as any other oral agreement--good only for litigators.
Pay attention to the Beneficial Ownership Rule issued by the Financial Crimes Enforcement Bureau of the United States Treasury and the Know Your Customer Rules under the Bank Secrecy Act and The USA Patriot Act. Don't make it more difficult for LLCs to properly document themselves in order to comply with these laws and to establish accounts with financial institutions and to have access to the banking and payment systems.
"for the avoidance of doubt"
A written OA is needed for evidence of the OA and authority which can be relied upon. In addition, terms among the members must be reduced to a writing which can be relied upon and enforced.
Allowing oral operating agreements will result in more litigation and encourage dishonest business behavior.
in a one person LLC, yes
Either put in writing or stay with the statute.
Oral operating agreements would present the same evidentiary challenges as would any oral contract, but the practical benefits of having that flexibility can be invaluable in the real world, in the 99% of situations that don't end in litigation.
an oral contract is not worth the paper it is written on

The statute should provide for default provisions which govern the affairs of an llc. While the LLCL should continue the very broad freedom to vary arrangements from default provisions in the statute, those varying arrangements should be in writing.

We can default to the statute.

Particularly withtwo-member LLC's, permitting oral operating agreements would unnecessarily complicate litigation. Absent a written operating agreement, the courts should turn to the default rules of the statute. I can think of no compelling reason not to apply the statute of frauds to any alleged oral operating agreement.

The law is unclear about what happens if the members do not have a written agreement. Many LLCs are formed by the members themselves or by an accountant (without legal advice) and the members have no idea that a written agreement is required.

Only for single members.

There are too many necessary items in a properly prepared operating agreement that oral agreements would either never cover or would be subject to disputes as to what was said or meant.

Or at least make clearer what happens if you don't have a written operating agreement until sometime after formation.

Having a simple written agreement for single-member LLCs is no big deal. Allowing for oral agreements for LLCs with multiple members creates, if not enhances, the possibility of disputes as to what was agreed upon.

Statute should expressly provide that in the absence of a written agreement, the LLCL applies. Where appropriate, LLCC should have default provisions (as opposed to statements such as, "If stated in the operating agreement...." or "The operating agreement may provide for...."

This would invite disputes over intent and lead to an increase in litigation. In the absence of a written agreement, statutory default rules should apply.

Oral agreements would lead to too much uncertainty, particularly if they could be considered "in combination" with written agreements. Perhaps an exception for single-member LLCs would be appropriate.

Too much uncertainty and makes it impossible for a "third" party to deal with the LLC. In my opinion, the LLC law should instead have a default condition that if there is no written operating agreement then the following rules apply - X, Y and Z.

My NO response is based on two factors. A properly drafted operating agreement which addresses the "what if's" that will be encountered by and between the members is essential. In addition, a single member LLC may not stay that way as the business progresses. In my experience when a single member business later adds an additional member, the members do not even think about the operating agreement and whether if is still sufficient. A formal operating agreement is necessary whether the LLC is a single member or multiple member company.

Practical - and similar to Delaware, et al

Litigation bar must be behind this one.

Really? this idea is good for litigators, bad for business owners.

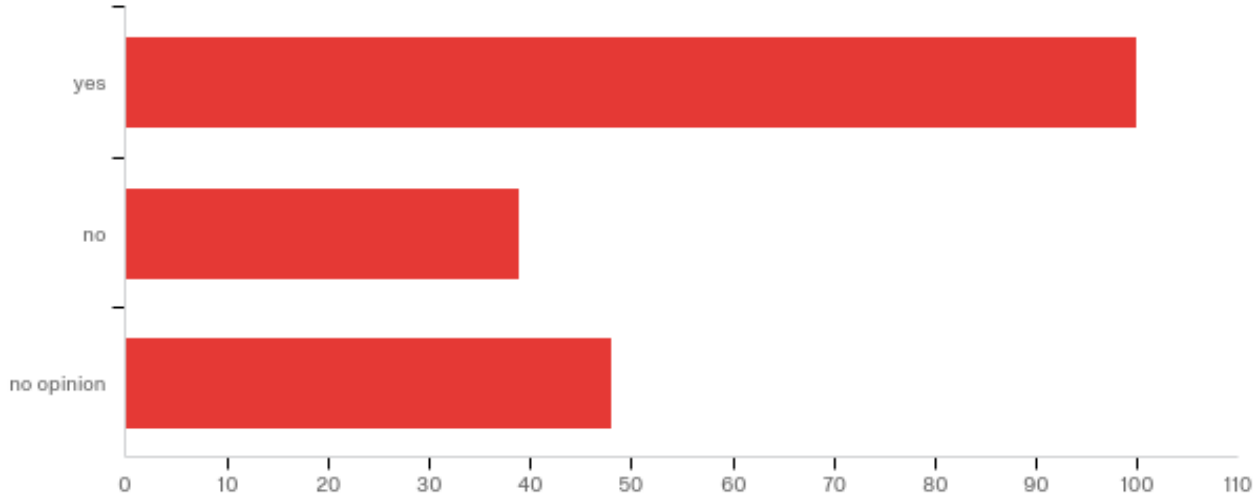
really bad idea. Most of my clients forgot what they agreed to in writing...needs to be memorialized for reference.

Yes. The statute can provide default gap fillers.

I see no difference between operating agreement and any other permissible oral contract. The statute of frauds should still be applicable. That is to say, a written agreement should not be required; in the absence, the statutory rules govern. However an oral agreement, if provable under the statute of frauds and other rules, should be allowed.

I think the Operating Agreement is necessary to guide the managers and members.

[A] Expand the concept of series of members to permit creation of separate "Series LLCs" each series with its own purpose, members and assets, and without liability for obligations of the other series or the LLC:

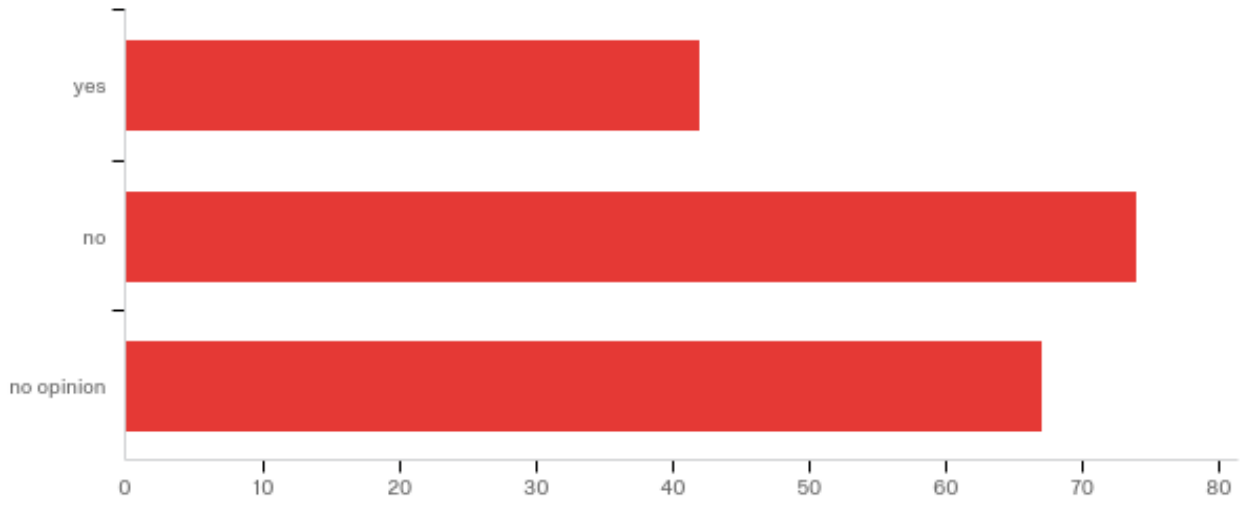


#	Answer	%	Count
1	yes	53.48%	100
2	no	20.86%	39
3	no opinion	25.67%	48
	Total	100%	187

Comments:

Comments:
Generally, I have found that even the most sophisticated Operating Agreements can deal with "Series" issues by simply forming separate classes and providing applicable indemnity mechanics within the Operating Agreement
I do not know enough about this to comment
But I favor the limit in B below.
Series LLCs can be a useful tool in many cases.
This can already be accomplished by forming subsidiary or partner LLC's
This can be done under existing LLC law.
Personally, I'm not a fan of series LLCs, but there is a national push to have them.
I'm not sure how often I would use this feature, but greater flexibility is good.
There seems to me to be no good reason for series LLCs given the potential issues. The burden of creating separate LLCs for different investments is not so great.
Only if there is clarification on the Federal and state level that each series is, for tax purposes, a separate flow through entity
ABSOLUTELY - reduce the waste of the publication requirement. BUT the LLCL should require that the articles of organization state that it is a series LLC, again so that third parties know what they are dealing with. Establish a short form amendment filing procedure to add the series concept to existing LLCs with no publication for the amendment required.
Yes, provided the relationship between members of the parent LLC and the various series LLC's is clearly defined. I believe the key issue will be Veil Piercing of a series to reach its members and whether that can be extended into the parent LLC.
There are still serious issues with Delaware's program. We have higher priorities than becoming another test case state.
I'd like to learn more about this proposal.
No. Businesses will still use DE series LLCs.
But based on what I have seen in the literature I think there are questions in bankruptcy and other insolvency laws as to the effectiveness of such LLCs.
I think series LLCs are a bad idea, and inform my clients not to use them.

[B] Permit "Series LLCs" only if formed and operated for a statutorily prescribed purpose, such as passive investments:



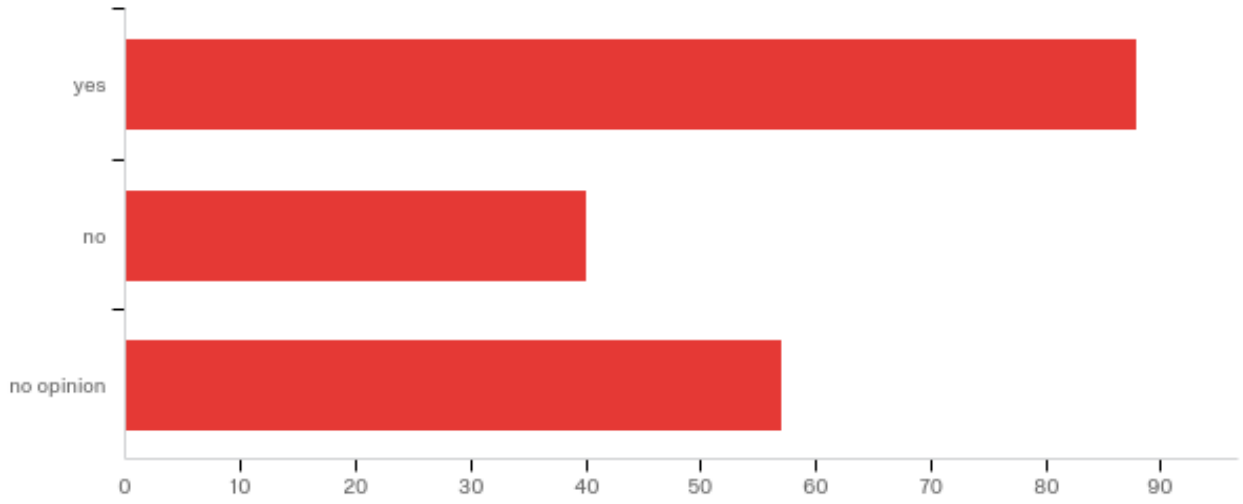
#	Answer	%	Count
1	yes	22.95%	42
2	no	40.44%	74
3	no opinion	36.61%	67
	Total	100%	183

Comments:

Comments:

Why limit it? No strong basis. Would you prohibit a holding company from engaging in two businesses at the same time?
Very important when a client has multiple real estate operations and one operating entity.
unless passive investments include real estate,
Too confusing should LlC expand its purpose outside the prescribed area
otherwise it is likely that court interpretations will become unclear as to whether a holding for a particular purpose applies to a different purpose.
Let Wall St go to Delaware.
I do not know enough about this to comment
(i) defeats creativity and therefore dampens the likelihood of investment; (ii) creates extra work for lawyers, who will go to great lengths to rope in the things their clients really want to do to come within the prescribed purposes. Let's not make this any more complicated than it has to be.

[A] Shelf LLCs should be expressly permitted:

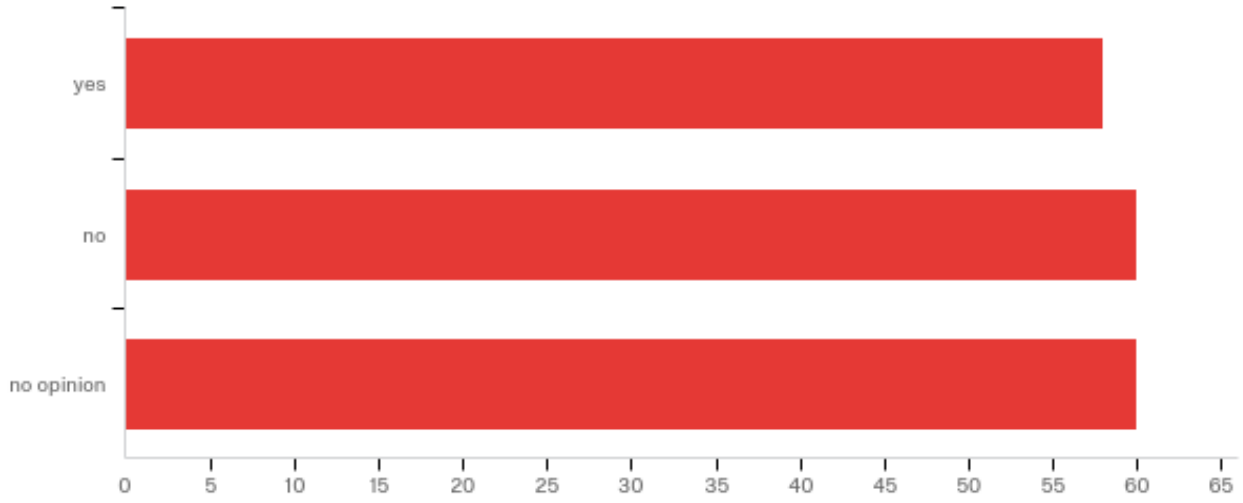


#	Answer	%	Count
1	yes	47.57%	88
2	no	21.62%	40
3	no opinion	30.81%	57
	Total	100%	185

Comments:

Comments:
With expedited processing, LLCs can already be formed fairly quickly.
This proposed requirement should not be necessary.
Should be expressly permitted, but expressly controlled, as below.
Only if Item B below is included.
helpful in real estate dealings
don't require publication (if the requirement is kept) until operations are commenced or an expiration date
Why should LLCs be any different from corporations in this regard?
Problem is that there will be a lot of names taken for entities that might never do anything.
As a simply chicken and egg query, if an LLC has to have a member at the time of its formation, and you can't be a member of something that doesn't exist, how can you even technically form an LLC?
Only for limited duration.
Why not? Corporations do not have to commence operations, so why should LLCs? It doesn't seem like there is a major risk of fraud, but I would want to hear arguments on the fraud potential before taking a firm position.
Allowing entities to create and hold "Aged" companies is an invitation to fraud and other unsavory activities.
since the formation is so easy and can be filed electronically, thee is no need for shelf LLCs
It is just not that complicated to form LLCs, other than the publication requirement, so I see no benefit in shelf LLCs.

Q16 - [B] Shelf LLCs should expire after one year of existence or another outside date unless operations are commenced prior to the expiration date:

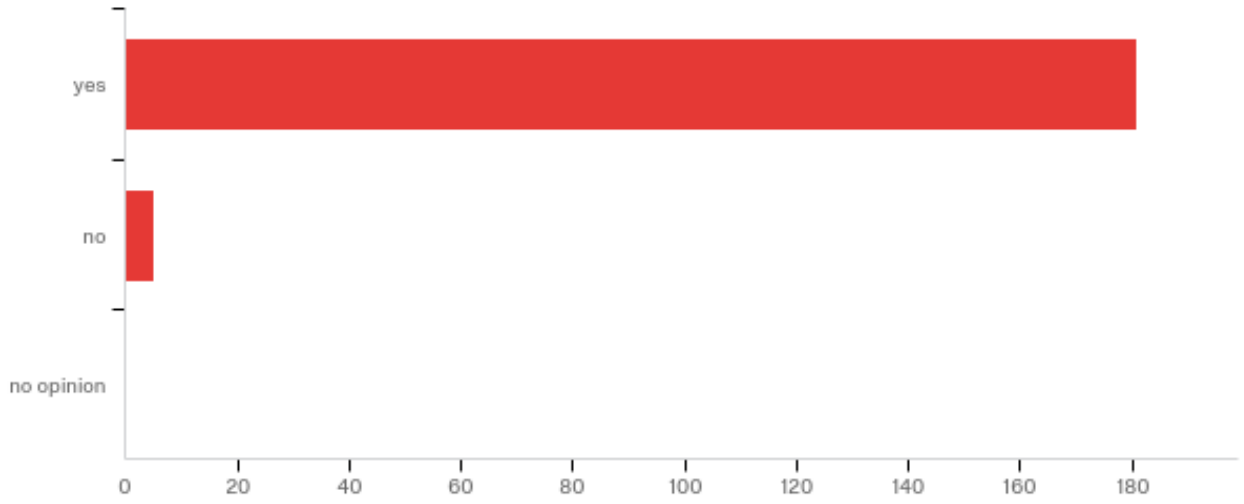


#	Answer	%	Count
1	yes	32.58%	58
2	no	33.71%	60
3	no opinion	33.71%	60
	Total	100%	178

Comments:

Comments:
I am not sure that "commencing operations" is the right bogey here, as I believe that will prove to be administratively difficult and many LLCs do not "commence operations" despite the sole member feeling that it is "in business" under that LLC. I would suggest that the bogey for expiration be the adoption of an Operating Agreement and/or carrying out of business of the LLC.
Need some time period
I do not know enough about the ramifications to comment
Define "operations"--should not include mere administrative actions like opening a bank account or having an office. "Operations" should be sufficient to justify some kind of independent classification, like NAICS or something along those lines.
avoids the cost and expense of forming a new entity if one entity intended for a deal isn't used (for any number of reasons, including a deal that did not transpire)
Some transactions require more than 1 year.
There should not be shelf LLCs
If shelf LLCs are allowed, then this should be implemented.
But see comment above re: fraud potential.
if shelf LLC's are permitted, there must be a short window to commence operations.

[A] Abolish the publication requirement:



#	Answer	%	Count
1	yes	97.31%	181
2	no	2.69%	5
3	no opinion	0.00%	0
	Total	100%	186

Comments:

Comments:

I have a white paper on the subject from a campaign to abolish the requirement under Pataki.
The is an absolute must. I have had numerous clients choose separate jurisdictions simply because of the publication costs, especially in New York County. Publication is antiquated in light of publicly available DOS information.
It's expensive, burdensome and serves no public benefit. It also encourages companies to not form/qualify LLCs in NY or at least not with an office in NY county.
This is an exorbitant cost in NYC, and has no purpose other than to enrich the publishers.
Absolutely. The publication requirement is the main reason why I recommend against LLCs for start up businesses doing business in NY.
It is particularly unfair that the county clerk gets to choose the newspapers as that means that there is little if any price competition. To the extent that prices do vary,the county clerk is requiring people forming LLCs are to pay different amounts to do so.
In the words of Meg Ryan from When Harry Met Sally, Yes, Yes, Yes, Yes..... Or at least end the monopoly of the Law Journal as approved publication
Abolition of the publication requirement must be a Top Priority.
Absurd!!! I've always thought that the publishing lobby must be very powerful. I realize that legal publishing keeps many a newspaper afloat, but the cost is ridiculous and the variation between costs at a major city paper and a small town paper is hugely unfair.
I feel very strongly about this issue. It is a complete waste of money, We don't have publication requirements for corporations why do we have them for LLC's?
The publication process serves NO purpose other than to payoff newspapers and periodicals. It does not provide the public with any additional information that they can easily find with the NY Sec of State.
Either abolish it, or reconfigure it to allow for publication in additional papers.
Its time for the Finkelstein tax to die a natural death across the board.
Yes! LLCs are underused in NY because of publication costs.
The publication requirement is not needed and is a major obstacle to organizing and LLC. The expense is unnecessary. The Department of State too frequently rejects Certificates of Publication.
It's a transparent subsidy to the newspaper industry, adding needless cost. In general, the only people who read legal notices are attorneys, and publication confers no apparent benefit to the public at large.
Seems like a waste of $
This should be a very high priority.
There is ZERO value to the exercise to the public in NY. If this stays, I want the Legislature to specify exactly what the benefit is and not hide behind a general statement. Then I want the Legislature to explain in the context of corps (which have never had a publication requirement) how the situation differs.
There is no longer any justification for this requirement. While partnerships and LLPs have no public record besides the publication, an LLC must file a certificate of formation. Therefore, the public is already on notice of the entity's existence and the need to conduct diligence in advance of interacting with it.
The notice feature of a publication requirement could be useful.

It's a pointless anachronism -- even Delaware has figured that out.

It serves no legitimate purpose except to benefit local newspapers.

ABSURD, RIDICULOUS, USELESS, ANTIQUATED--am I making myself clear?

Absolutely. This information now being publicly available on-line and NY is the only or one of the only states requiring this step, it is antiquated and a nuisance. There is no purpose in this notification process nor spending needless fees. Another example of NYS making it expensive to start and operate a business.

Useless waste of money

worthless waste of money. Treat it like a corporation

Publication serves no real purpose.

YES.

nobody reads them anyway.

The publication requirement really advances no public purpose and simply fills the pockets of some newspapers. Allow for a (free) online publication requirement if you must have a publication requirement, but no other state has this.

Corporations have no such requirement and the publication requirement is abused - newspapers charge ridiculous rates, the filer has no say over the paper which makes the selection process suspect. There is no point to it.

this was set up by ex Senator Bruno to throw a bone to the NYS Newspaper publishers in exchange for favorable political reporting. We do not do it for corps and the ads are not informative at all to the public. Just another unnecessary cost to do business in the S of NY

This is the biggest tax on innovation - most startups don't have the $2000 required to advertise in NYS and it is just a sop to the a dying legal publication industry

It serves no practical purpose other than to have businesses find ways to not form in NYS

It is an unnecessary expense and serves no real purpose.

Completely useless. It is only a means for newspapers to make money. No one reads the publication and no one reads newspapers any more.

I discourage clients from forming LLCs in New York because of the publication requirement.

This is long overdue. This was a bone that was thrown to the newspapers and has no relevance in the digital age.

publication requirement is really outrageous and is the number one thing that needs to get addressed

this is a ridiculous requirement. Not sure if NY is the only state, but I know it is very easy to form LLCs in CO, CA, FL.

Requirement is asinine

This is an unnecessary barrier to business and is merely a private tax to the publications. This information could be provided on the SOS website for free. An LLC is a logical entity choice for small businesses in low-income communities but the publication costs make it impossibility. There is no logical need for a publication requirement in this day and age.

For many of my clients, the cost of publishing is prohibitive. It can be well over $2,000 for a business being operated out of the home of an individual who lives in Manhattan. This one change could make LLCs more accessible to everyone. There is no reason for LLCs to be treated differently from corporations in this regard.

Good luck abolishing this! What a waste of money and reward for political patronage.

Expensive and unnecessary. A boon only to the newspaper lobby.

This arcane requirement creates an unnecessary expense for companies without significant public benefit.

Serves no purpose other than newspaper revenue. No clear consequence of not publishing.

The need for such a requirement is unclear, and the often prohibitive cost both encourages noncompliance with indeterminable effects and otherwise undermines New York as a competitive jurisdiction for attracting business and commercial activity.

Completely unnecessary.

The publication requirement serves no legitimate purpose. The consequence of suspension of authority to do business is vague, particularly since it does not affect the enforceability of contracts entered into while such authority is suspended or the ability of the entity to defend itself in court. Also, the suspension is annulled by subsequent publication. Very few, if any, other states impose such a requirement.

I believe it is an illegal bribe by the legislature to the newspapers and the legislature doesn't even have to pay the bribe. I don;'t care if Sheldon Silver's conviction was overturned. I believe that anyone who votes in favor of the publication requirement should GO DIRECTLY TO JAIL.

As an aside, no one reads newspapers anymore, so the publication isn't really providing actual notice.

Publication serves no real purpose and is merely a financial windfall to print publications. Although, good luck getting any elected politician to support doing away with the publication requirement. No politician is going to stick his finger in the eye of his local paper if she/he wants to be re-elected.

1 - It serves NO purpose other than to enrich the newspaper lobby. 2. Inadequate info is required and no need to update which makes the publication useless. 3. Change would be in keeping with statute in other states which do not require publication

Dying newspaper lobby should not make unique policy with in NY. Makes us non- competitive with other jurisdictions.

I could not feel more strongly that the publication requirement should be abolished for NY LLCs and LLCs formed in other states doing business in New York. It is a $2,000 expense that is unnecessarily burdensome, especially for emerging companies and there is no legitimate business purpose. If we want to encourage job building in NY, we should find ways to do it other than by legislating support of small periodicals that publish these notices that no one reads anyway. This expense drives small, new companies out of the State.

Silliest thing to require the expense of this ...no value

Yes. A complete waste of time and money and serves no legitimate purpose.

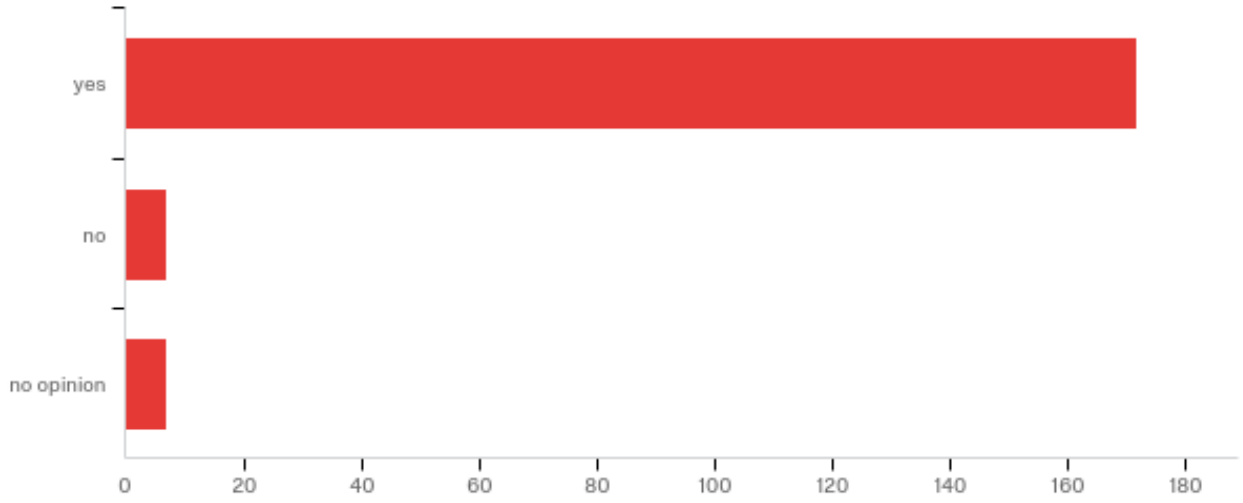
The current publication requirement favors the placement of ads in certain ethnic groups' newspapers which have zero to do with announcing the LLC formation to the general public. This results in an unfair practice. The ads should go in papers with a readership from the general population. It should not favor current ethnic groups as is the case with the current system. Very unfair.

This serves no real purpose other than to subsidize publishers

Absolutely without a shadow of a doubt.

Yes!!! It's completely unnecessary and nothing but a boondoggle to the newspaper industry.

[B] If the publication requirement cannot be abolished, then reduce the publication period to two weeks:



#	Answer	%	Count
1	yes	92.47%	172
2	no	3.76%	7
3	no opinion	3.76%	7
	Total	100%	186

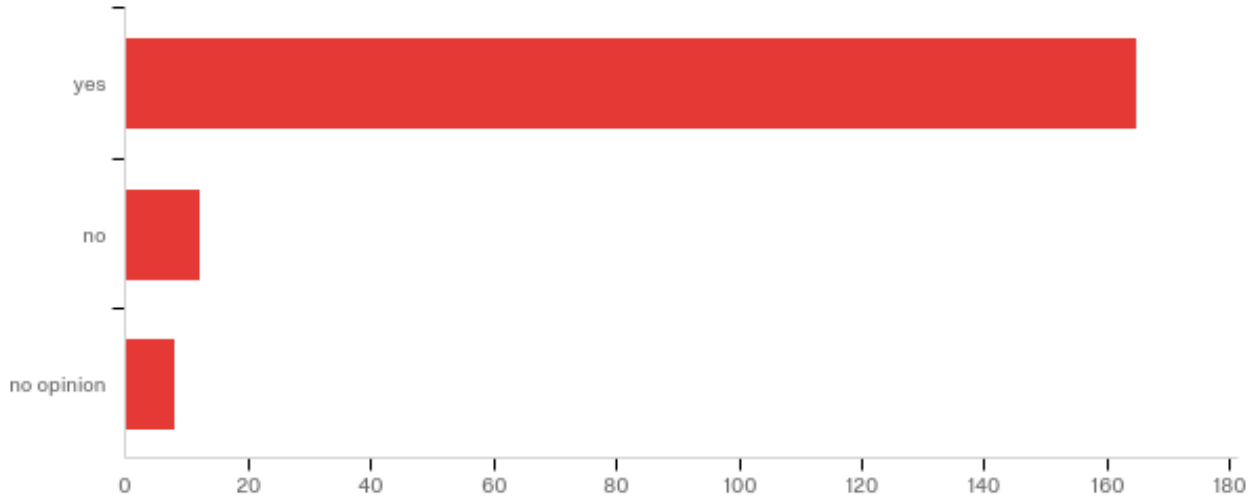
Comments:

Comments:
Again why can't the publication requirement be abolished. What is the stated reason for it?
That would at least speed things up.
Less bad is good.
See above. A 2-week period is even stupider than the present requirement, and must be seen as a sop to the publishers.
The time frame is irrelevant. It's an unnecessary process and expense. Generally, $50 x 2 newspapers plus $50 to NY for the Certificate and then add the cost of services provided by a law firm. Not business friendly.
if that's what it takes, however it still seems unnecessary. Other states seem to do OK without it
just abolish it.
1 week is more than enouigh
Just get rid of it!
It should be abolished
and make it cheaper
There is no reason for the publishing requirement for LLC's
There is no reason not to abolish this requirement.
Anything that would make it cost a little less would be helpful. It is truly burdensome.
If the politics prevent the abolishment of the publication requirement substantially reducing the time of publication (even to a single week) would help reduce the cost and time to form the LLC.
A reduction would mitigate cost only.
Reduce to the greatest extent possible.
Only as a last resort compromise.
In addition, reduce it to one newspaper.
but why 2? a single publication would be as effective, since the publication requirement is not effective for any purpose anyway.
Once publication is commenced the timing makes no difference. Moreover, I assume that the publication fee being charged would not change, whether it be for 2 weeks or 10 weeks
Better half a loaf than nothing.
Why two weeks? Why not one? As I said above, no one reads them. If it is published once, it will be captured by the internet, where anyone looking for this type of information would go in any case. Even The Forward, where many of these notices are published, has gone all electronic. This rule is pre-internet and deserves a burial. What do you mean "cannot"? The press lobbies the legislature not to permit abolishment?
Yes, limiting it to two weeks is a good option. It is very expensive to publish in New York County and this puts those businesses at a great disadvantage with the current system.

And allow the LLC to choose the publication. Then maybe the costs will be reasonable.

ALSO, REMOVE THE REQUIREMENT OF TWO NEWSPAPERS, OR AT LEAST THE REQUIREMENT THAT ONE NEWSPAPER BE A DAILY PAPER.

[C] If the publication requirement cannot be abolished, clarify the "suspension" sanction for failure to timely file the certificate of publication:



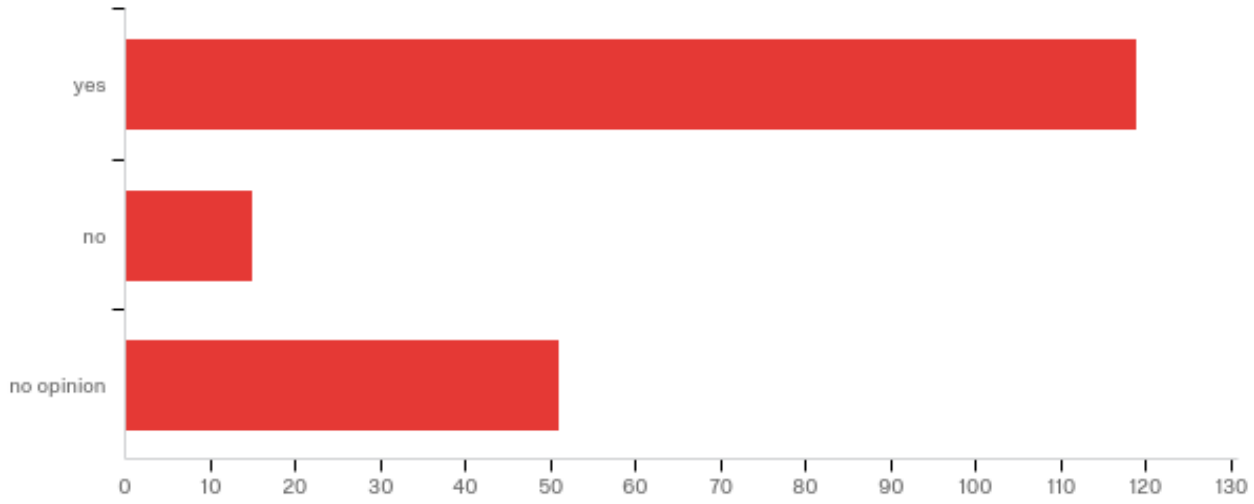
#	Answer	%	Count
1	yes	89.19%	165
2	no	6.49%	12
3	no opinion	4.32%	8
	Total	100%	185

Comments:

Comments:

If we are going to persist in this stupidity, and there is going to be a sanction, give it some teeth. Suspension for failure to publish within x months, suspension and fines (or increased costs for reinstatement) for failure to publish within y months, dissolution for failure to publish within z months. Make it mean something or get rid of it. And while we're at it, include penalties for lawyers who repeatedly fail to meet the publishing requirements. If we fail to punish them, we're not only punishing their clients for the attorney's misconduct, we're punishing the attorneys who do comply.
What purpose does the sanction serve? Again, it is the state's way of punishing those who don't or fail to publish.
as above
The clarification could be worse than what we have now.
It is far better that the penalty remains uncertain.
There is no reason not to abolish this requirement.
This is a poorly written law and is unenforceable in its current form. It is a disgrace.
Many of my clients are in limbo because they did not publish right after they formed the LLC.
Also, clarify that failure to file can be cured at any time.
Yes, see comment above.
Certainty may encourage compliance.
Minimize the suspension sanction to the greatest extent possible.
Cannot recommend clarification with knowing what such clarification would be.
Anything to make the publication requirement less onerous.
Many of my small business clients (including mom-preneurs) aren't aware of the "suspension" status or that they need to publish at all. Often they form an LLC online using a site like www.legalzoom.com that doesn't take care of the publication requirements, and come to me to fix it sometimes years after they formed.
I like the fact there is no real penalty, but the banks don't always know that and insist on publishing before they will grant a loan. They should be prohibited from forcing publication in return for a loan. That is wrong.
Have no idea what clarify means. Discontinue suspension, or just have suspension mean that they can't institute litigation in NY until they publish. I am so opposed to the publication requirement to begin with that merely modifying it is unacceptable.
Yes. This is a difficult issue to explain to clients when they ask about the real consequences of not publishing.
It depends on what it means to clarify. If the clarification would make the LLC more susceptible to issues/problems if it does not comply, then I would prefer to leave the language as is.

[A] Add an article covering derivative actions:

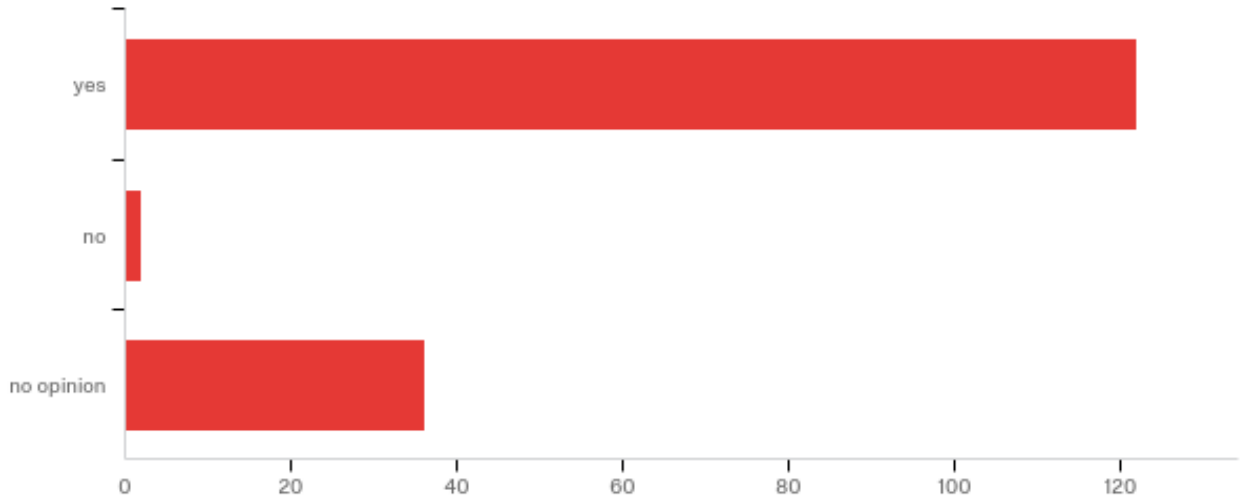


#	Answer	%	Count
1	yes	64.32%	119
2	no	8.11%	15
3	no opinion	27.57%	51
	Total	100%	185

Comments:

Comments:
Very helpful for minority members
Should be permitted
With reasonable parameters.
Would add greater certainty.
I am not a litigator and I believe litigation is a waste of time in most cases, but I have seen situations in which a manager needed to be sanctionedfor misdeeds against the entity.
Nothing on this, and with LLCs being the default business entity now by far, this would be helpful.
Only if the LLC is publicly traded on an exchange

[B] Assuming yes to (A), clarify the difference between derivative and direct actions

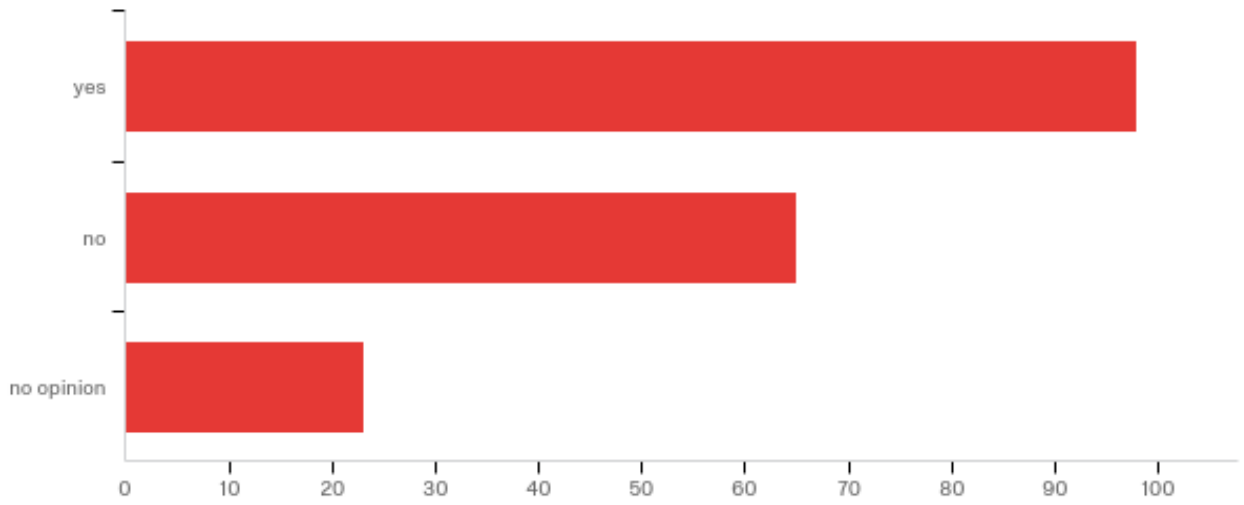


#	Answer	%	Count
1	yes	76.25%	122
2	no	1.25%	2
3	no opinion	22.50%	36
	Total	100%	160

Comments:

Comments:
Same as the BCL
Isn't that obvious or am I missing the point?
Why not.

Change the concept that every member has “statutory apparent authority” to manage the LLC, except as otherwise stated in the articles of organization or the operating agreement:

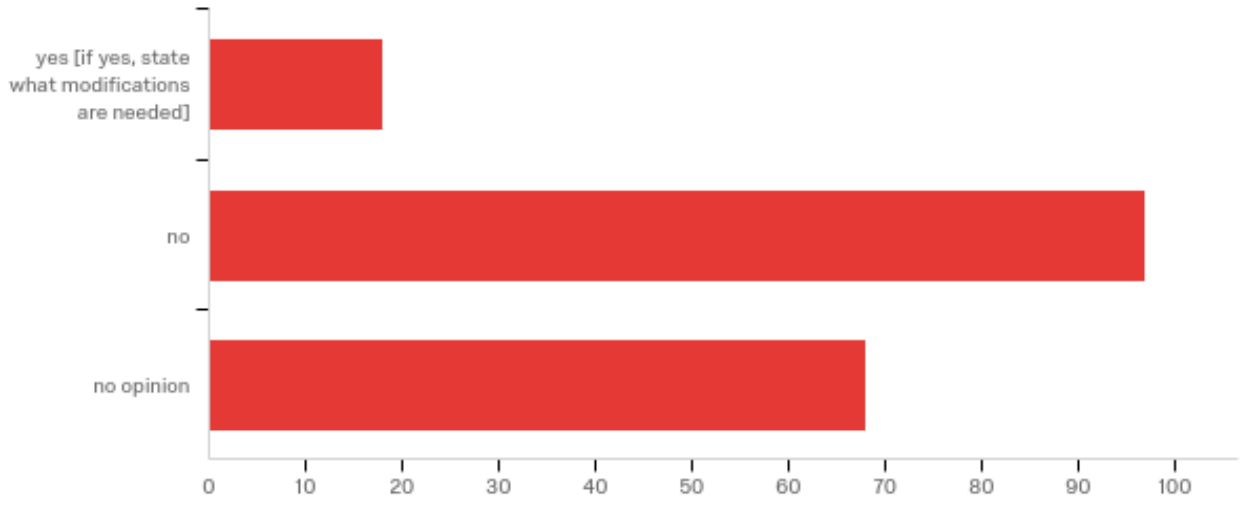


#	Answer	%	Count
1	yes	52.69%	98
2	no	34.95%	65
3	no opinion	12.37%	23
	Total	100%	186

Comments:

Comments:
In the case of a deadlocked member-managed LLC, this provision can prove dangerous and even counterproductive to the members coming to agreement to emerge from deadlock in that each member is incentivized to "go their own way" in representing the LLC
I do not know enough about this to comment
If the members fail to timely execute an OA, changing the concept would leave the LLC unable to act.
be clear and consistent.
This clause encourages the use of written OA's that (hopefully) calrify roles of Members.
The document establishing who has authority to manage the LLC must be a publicly available document.
I don't mind this provision, because the members can vary it in the articles or the operating agreement.
Section 408(a) requires articles of organization to provide for managers. Delaware does not have this requirement. We've spent unnecessary money amending articles to add/remove management by managers/members due to changes after initial filing. Operating agreement should be the source of type of management, with LLCL providing for management by members if no written OA.
The Managing Member(s) concept is confusing. It should all be manager managed or member managed.
How else can a third party deal with the LLC. Reliance is fundamental and the third party should not take the risk that the LLC members are dishonest vis a vis each other.
The default should remain that members are the managers, unless stated otherwise in article or operating agreement.
change it to what? This question needs to be fleshed out in greater detail.
Long overdue.
Yes. If LLC is manager-managed, members should have no statutory apparent authority to bind the LLC.

[A] Modify the general statutory standards governing a manager's fiduciary duties:



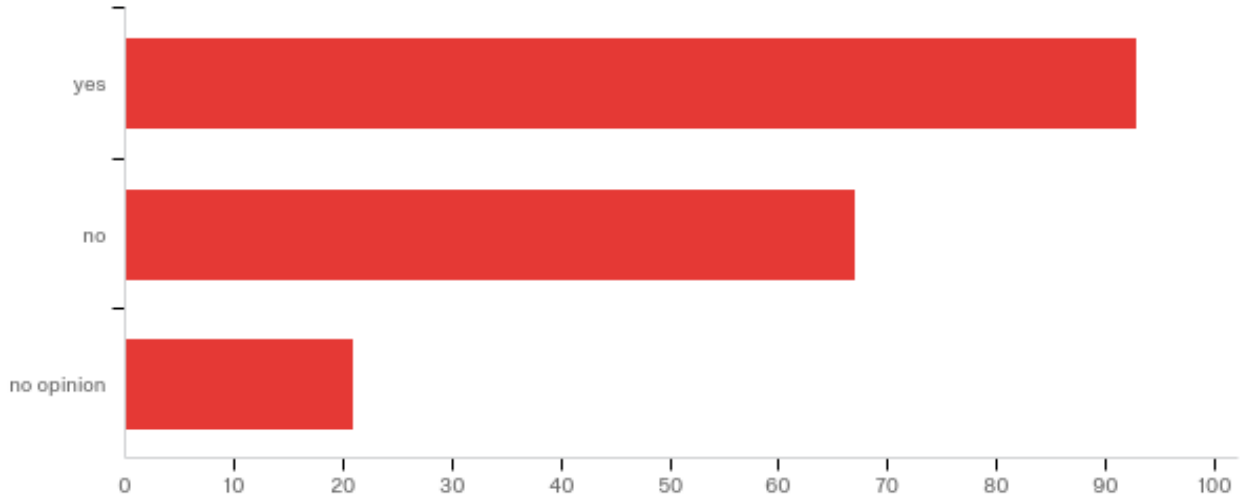
#	Answer	%	Count
1	yes [if yes, state what modifications are needed]	9.84%	18
2	no	53.01%	97
3	no opinion	37.16%	68
	Total	100%	183

Comments:

Comments:

The standard contractual carve-out here is to peg any carve out to a release from liability/breach to gross negligence (or fraud) and willful misconduct. I agree that the phrases "improper financial gain" and "wrongful distribution" are too ambiguous when applied in the real world and introduce uncertainty for any manager.
allow members to eliminate fiduciary duty similar to Delaware LLC Law
I do not know enough about this to comment
The responsibilities should flow through the manager up as many levels as is necessary to impress a human with liability for breach of fiduciary duties. Otherwise, all managers will act through a shell, and the right is eliminated by using a judgement proof entity.
Although I am uncomfortable with the idea that the LLC agreement can modify or abolish fiduciary obligations,if one accepts the concept that an LLC is a creature of contract, then the members should have this right, even if it seems to be counter to their own interest.
good faith and fair dealing only
Permit varying, as in Delaware
Clarify disclaimers
I simply do not want a Delaware form where a manager can DISCLAIM fiduciary responsibilities.
Would prefer to have more flexibility, in line with DE LLC law.
Not sufficiently knowledgeable about the precise nature of the duty under existing law.
LLCs are voluntary investments, which are not publicly traded. Buyer beware. We have fraud statutes. Do we really want a raft of litigation about what a fiduciary is in this context?
Fiduciary duties to be the same as partners to a partnership

[B] Permit the members to eliminate the manager's fiduciary duties of care, other than to act in good faith and fair dealing:

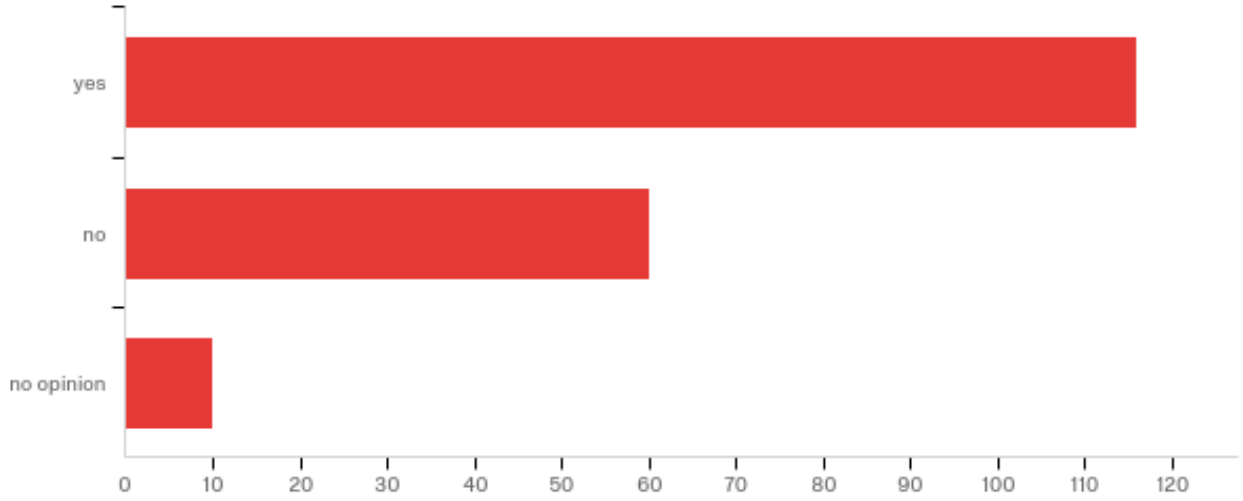


#	Answer	%	Count
1	yes	51.38%	93
2	no	37.02%	67
3	no opinion	11.60%	21
	Total	100%	181

Comments:

Comments:
Yes; the Delaware LLCA should be followed in this regard.
Every contract contains the implied covenant of good faith and fair dealing. Again, the an LLC is to be viewed as a contractual entity and not a statutory one, this exception is unnecessary.
Only by unanimous action.
There re current methods god enough to limit or eliminate fiduciary duties, so this is not needed. Worse, a statutory method will be "built in" to many operating agreements that will not be closely read by non-lawyers, getting fiduciaries --banks, real estate companies, attorneys--off the hook without the informed consent of the members. If Managers want this make them ask for it.
If this is not permitted, NY will never be able to compete with Delaware in LLCs.
I would oppose such a change in the law, unless it were limited to instances where the members retain an outside, independent manager (who is not otherwise a member of the LLC). If there is a member-manager, the manager should not be permitted to eliminate his or her duties to the company and the other members.
This is necessary if only to compete with Delaware.
If the members agree to it, that is their assumption of risk.
No, unless certain business purposes are prohibited from reducing or eliminating the manager's fiduciary duties of care. My principle concern here is in the Banking and Investment world, and including investment vehicles such as REITs.
Don't think there should be a fiduciary standard to begin with.
But only in smaller LLCs (limited number of members).

[A] Set general standards for "piercing" the limited liability veil of members in the LLCL rather than relying on judicial concepts typically looked to in veil piercing actions against corporations:

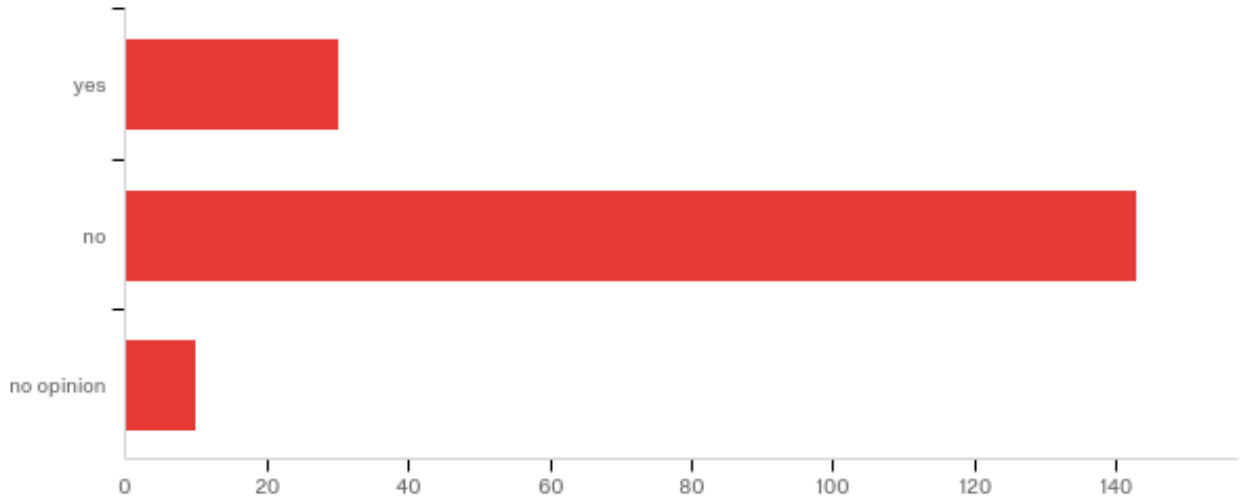


#	Answer	%	Count
1	yes	62.37%	116
2	no	32.26%	60
3	no opinion	5.38%	10
	Total	100%	186

Comments:

Comments:
Veil piercing is inherently contextual and requires a full analysis of the facts, including how egregious the damage and actions at issue were. NY courts should be encouraged, however, perhaps by a NY Bar Association memo or otherwise, amicus briefs or otherwise to limit veil piercing to actions that ring in the nature of fraud.
LLCs are inherently more informal organizations than corporations, so any clarity on the level of formality required would be helpful.
This is a confusing area and must rely on analogy with corporations
Yes, with understanding that judicial concepts related to corporations continue.
Some of the concepts in veil piercing actions against corporations might be applicable to LLCs, as well, though.
I would have to see the proposed statutory language before offering an opinion.
Set standards based on those judicial concepts.
Statutory standards cannot be applied in all circumstances and may result in an unfair outcome.
How would the standards differ?
This could be helpful, because most LLCs are managed differently from corporations and with fewer formalities -- thus, the corporate standards are not on point.
This is definitely needed. Otherwise, the case law reduces the benefits of forming an LLC in New York. Some of the cases adopt corporate veil piercing standards that are inapposite to LLCs (such as failure to follow formalities, which don't necessarily exist for many LLCs).
The more certainty, the better.
This is better left to the courts, which can weigh the facts and circumstances.
But standards should be strict and limited. Something like "if the LLC form is used to perpetuate a fraud . . . "
Not sure setting general standards is the way to think of it. But the concept of piercing the LLC veil and what judicial concepts apply (especially to single member LLCs) should be codified so that it is a concept more readily understood by members. My impression is that generally there's a belief amongst small business owners (again, usually forming their LLC online) that if they set up an LLC (especially single member LLCs) they will not have any personal liability period.
The courts are running amok with new ways to pierce. Clear definitive standards (not just "general" standards) need to be established so there is some type of certainty for members to rely on.
Limit creditor remedies to charging orders only by statute like Delaware. On less reason that we always have to form outside of NY and give all those fees to a different state.
I see no reason for their to be a separate set of standards for LLCs regarding piercing. .
Redo an entire body of law and precedent? We have bigger priorities.
There should be clarity that there is NO veil piercing except if the separate existence is ignored.

[B] Apply the veil piercing doctrine just to LLCs with a single beneficial owner:



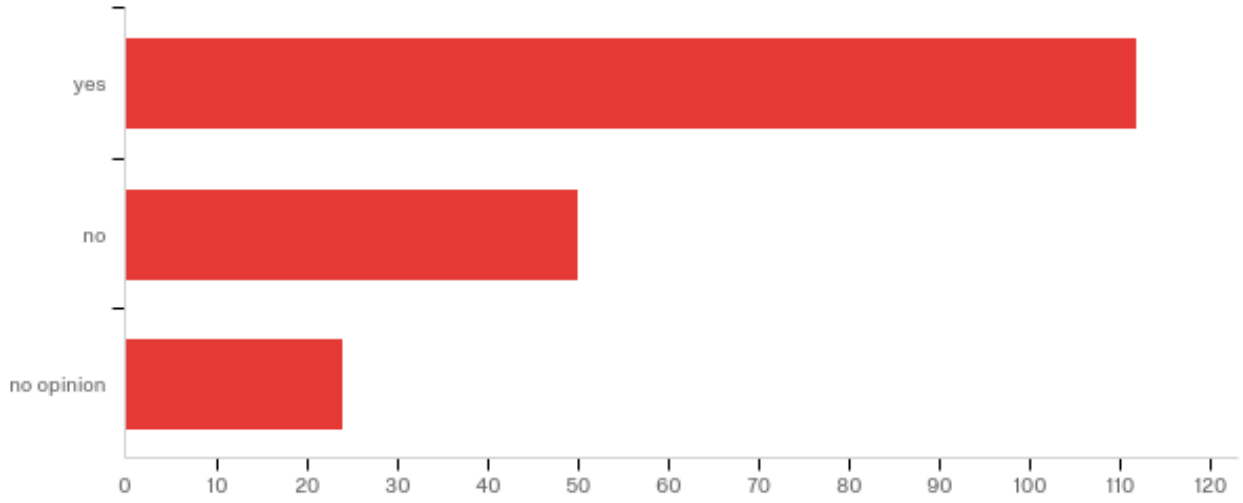
#	Answer	%	Count
1	yes	16.39%	30
2	no	78.14%	143
3	no opinion	5.46%	10
	Total	100%	183

Comments:

Comments:

The question is a bit unclear. If an individual fails to observe minimal organizational formalities, limited liability should be lost.
There should be a uniform standard for "veil piercing" across the whole state, and it should have no bearing on the number of members. A multi-member LLC could just as easily abuse the LLC form as a single member LLC could.
This seems to be newer trend - Florida, etc. Seems to me this is a trap for the unwary and small business person
I do think the doctrine is more likely to be needed for single beneficial owners, but might be needed in other contexts, as well.
If there is a group of controlling members who mix LLC assets with their own without regard to the rights of other members, it should be possible to pierce the veil.
We don't do this to corporations, why should we do it with LLCs? I don't apprehend the logic.
the whole purpose of an LLC is to eliminate as much as possible personal liability.
What would be the point of the LCC?
Since single member LLCs are allowed, they shouldn't be subject to different standa do for veil piercing. It's more important to statutorily define the standards for veil piercing that apply to all NY LLCs.
Veil piecing isn't limited to single shareholder corporations; don't see why it should only apply to single member LLCs.
It depends, but pierce on as to the persons who conducted the fraud and, as to dollar liability, perhaps as to people who benefited from it. e.g., LLC manager uses LLC form to commit fraud and gets $100,000, which is then distributed $90,000 to the manager and $10,000 to innocent members, maybe pierce for $10,000 as to the innocents, but no more.
If the doctrine is to be applied, it should apply to all LLCs.
Notwithstanding my comment above, there are times that a veil should be pierced regardless of the number of members.
See above. If operated properly, there should be no legal difference between single and multi-member.
They already do. Single owner LLCs provide NO protection against piercing, why give the impression to anyone that they do. If you wanted to eliminate single members LLCs, and insist that LLCs must have more than one member, that would be a positive.
But it could be limited to the percentage ownership of membership interests (i.e. if you own 10% you're only 10% liable for the liability once the veil is pierced. Alternatively, personal liability can only attach if the member owns above a determined threshold.

[A] Permit a member the right to seek dissolution of the LLC for alleged improper, fraudulent or oppressive conduct against him:



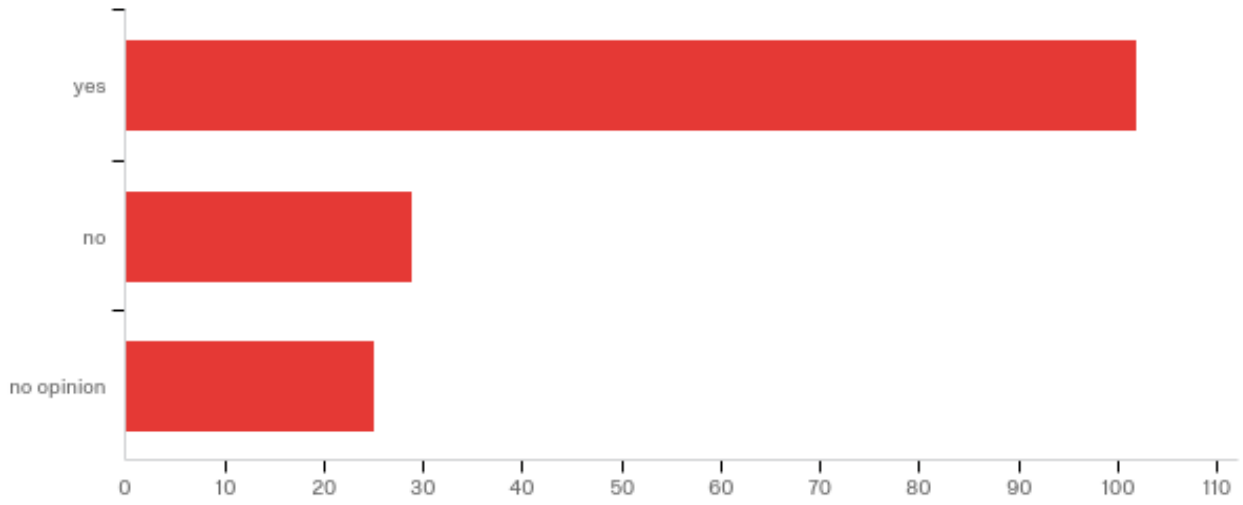
#	Answer	%	Count
1	yes	60.22%	112
2	no	26.88%	50
3	no opinion	12.90%	24
	Total	100%	186

Comments:

Comments:

A revision to Section 702 is required, however. I would suggest either revising or defining the phrase "not reasonably practicable for the LLC to carry on the business". Different judges have taken different approaches to this very point throughout the state
yes, but with the right of the remaining members to buy out the member.
I do not know enough about this to comment fully, but my initial inclination is yes
would think buy out provisions that are enforceable against members instead of dissolution
Wouldn't a better solution be to provide the oppressed member with some kind of buyout right? The value fixed at the time of buyout could take account of potential future growth benefiting the remaining members.
Same as BCL
This will give rise to frivolous litigation.
Very important - 2 member LLCs where both own 50% suffer from the lack of this provision.
Only modification would be to follow the BCL dissolution statutes
But only if the LLC is otherwise unable to make him whole.
It would be better to just provide for an effective remedy against the managers or members who act improperly.
Should track corporate dissolution requirements.
To fraught with risk of extortion by minority against majority. I have that going on right now in a corporate case in another jurisdiction. Minority is trying to extort a buyout at 200% of fair value by claiming oppression.
YES, with two caveats: 1) the members of the LLC do not have withdrawal buy-out provisions in the operating agreement or a separate buy/sell agreement (if withdrawal and redemption of interest is addressed and signed by the petitioner then it should stand as the petitioner's recourse); 2) provided a provision is included similar to BCL 1118 to allow the other members to purchase the membership interest of the petitioner. Judicial dissolution is a drastic step and I have seen it used as a threat, or for leverage between members, and simply for revenge.
too onerous and civil litigation is a better alternative
Follow corporate rules from a reasonable state, like Delaware. We don't form any NY corporations either, for reasons too numerous to mention (but you could start with BCL 630 another uniquely bad NY statute).
Return of capital only. Too many litigious people who fight for the wrong reasons.

[B] Assuming yes to [A], limit the statutory right only to member(s) holding at least a substantial minority LLC interest:

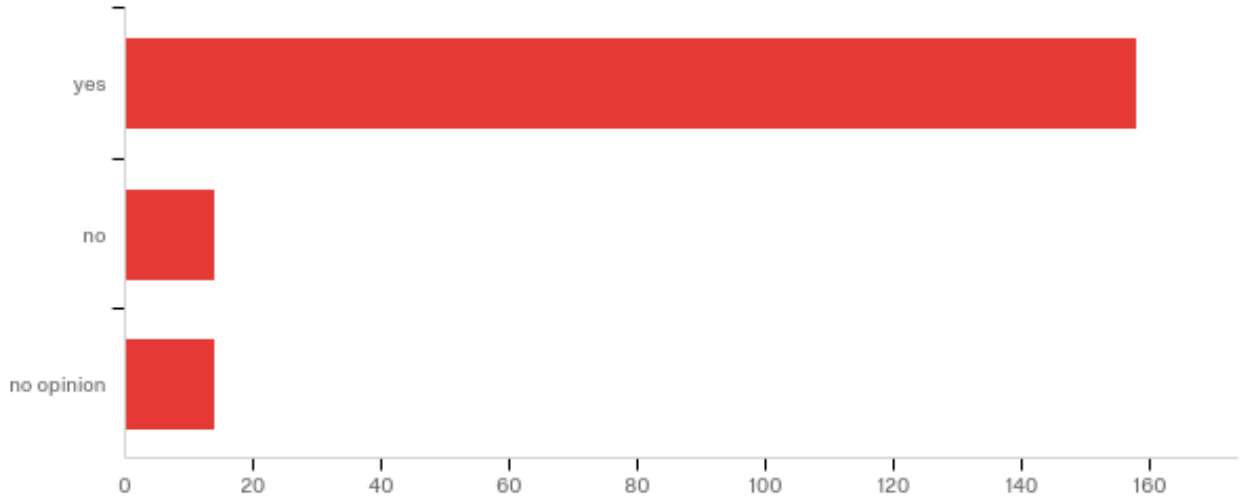


#	Answer	%	Count
1	yes	65.38%	102
2	no	18.59%	29
3	no opinion	16.03%	25
	Total	100%	156

Comments:

Comments:
I do not know enough about this to comment
I think the smaller minority member should have some rights, however.
Same as BCL
Yes, but "substantial" should be defined reasonably -- i.e., anything more than de minimis.
depends on what percentage a "substantial minority LLC interest" is. otherwise majority interest
BCL is 25%
See above
And with a significant minimum holding period for that substantial minority interest.
At least 10%
Again notwithstanding my comments above, I have seen minority owners (corporate or LLC) abused and in a situation where the person does not hold at least 20%. I disagree with the 20% requirement in BCL 1104-a. Any minority owner should be able to press the entity for redemption of the interest for fair value without triggering a judicial dissolution.
Minority rights are already too strong in NY across the board, hence the reason most informed lawyers do not form any entities in NY (but a lot of CPAs and non-professional services do).
Unwilling to assume yes. What is substantial? Should be over 45%
I might change my answer to A if B were the case. I like BCL 1118

Expand the present LLCL general indemnification provision to track applicable Business Corporation Law indemnification provisions:



#	Answer	%	Count
1	yes	84.95%	158
2	no	7.53%	14
3	no opinion	7.53%	14
	Total	100%	186

Comments:

Comments:

I believe maintaining the "flexibility of contract" of an LLC is paramount over the indemnity concern expressed in the memo.
There's no point in being inconsistent here.
It would provide greater certainty.
The beauty of the LLC is the greater flexibility it affords to contractually define the relationship. It would be ok to do this so long as the articles or operating agreement can override the statute.
Indemnification should be by default, so it exists in the absence of a written OA.
If important to the parties, it should be addressed in the written operating agreement or in the articles of organization.
But include an "except as otherwise provided in the Articles of Organization or the Operating Agreement" exception.
The courts are eventually going to take it there anyway.

Q52 - If you have comments on other parts of the LLCL not covered above, please record them here:

If you have comments on other parts of the LLCL not covered above, please r...

NY LLC conversion mechanics should be reviewed and potentially broadened to incorporate (1) conversion from a NY corp to an LLC and (2) conversion from a foreign LLC to a NY LLC.

Keep it simple

In spite of the popularity and expansive use of LLCs, they seem to me to be the worst possible business operation form, except for the benefits of accountants and other service entities...In addition except for the "innocent partner status" they are the worst business forms for liability protection.

LLCs should be better aligned with existing tax regulations. Most operating agreements are cluttered with tax provisions.

get rid of the publication requirement, which is an embarrassing and out of date subsidy for a particular industry and discourages entity formation in NY

Number one priority is to abolish the publication requirement.

Would like to see language similar to DE language in DE Act Sections 18-101(7) [other than as to oral OAs] and 18-301(d). Also, permit conversion of corporations to LLCs and vice versa and make the default be that written consents by managers can be majority vote unless OA requires a higher vote (so that in absence of written OA, majority vote would apply).

I will poll the other lawyers in my office to see if they have othersuggestions.

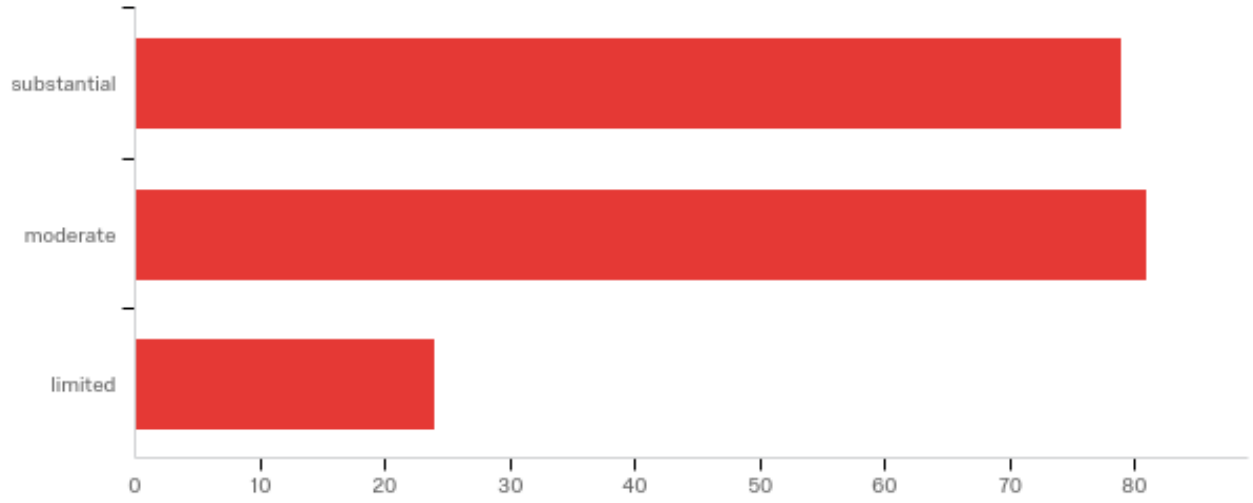
There are tons of scholarly articles about why practitioners should not create NY LLCs (or corporations for that matter) for any reason. Take a survey and come up a reform package for the LLCL that puts the client first and not creditors, employees, minority owners, newspapers or banks. Unfortunately it won't pass, but the publicity about how NY entity laws are written to please the above group and not the client starting a business may help the non-specialized bar stay out of trouble.

Single member LLCs should be eliminated. They had a purpose when there were pension plan contribution issues, but not any more. LLCs should have multiple members and if possible, multiple directors.

I was on th eoriginal taskforce that wrote the LLCL (before the check the box rules came into effect). We drafted the statute given the IRS position on partnershp taxation. There was no publication required in the draft statute. It was added on the last reading in Albany because of pressure from the newspaper lobby. Other suggestions: 1.Section 417(c) should be amended to delete the requirement that an operating agreement be entered into within 90 days of filing the articles. 2. Add a provision to deal with Certificates of Authority so that the LLC can file such certificates to avoid issues dealing with authority to sign documents. 3. Section 203(d) should be amended to delete the provision stating that an LLC is formed at the time of filing or a later date specified in the articles. The time of formation should be when the articles have been filed or an effective date specified in the articles has occurred 4. Amend Section 403 to delete the requirement for meetings of members to be held at least annually. Of course, the articles can already delete the requirement, but this provision is only a trap. Members usually have no powers, so there is nothing for them to do at the annual meetings. The default should be to require meetings of members only if so provided in the articles. 5. I would not favor allowing “written, oral or implied” operating agreements This is an opening for litigation. If there is no agreement, then the default provisions in the law should apply. If the statute allows oral agreements, then the default provisions of the statute need to be reviewed carefully to be sure that they are in alignment with what most people think is actually the case, which they are not now. 6. I would suggest that the law be amended to include electronic communications as well as faxes and other non-paper means. 7. Mergers, consolidations and conversions of LLCs with or into all kinds of domestic and foreign business

entities should be permitted. This will require that amendements be made to the BCL and Partnership Law. We amended the partnership law when we added the LLP provisions. Iwould not favor conversion into not for profits. 8. Provisions relating to derivative actions, special litigation committees, class actions, deadlock, oppression of minorities and appraisal rights should be considered. I would not favor any of these other than special litigation committees. Even though an LLC is essentially governed by contract and it is possible to put these types of provisions in, default provisions might be in order, but the Operating Agreement should be able to change the default provisions. 9. Series LLCs are too complex and our courts would probably mess things up. I would leave this to Delaware and Illinois were they have had them for a while and the courts have begun to settle law on them. 10. I would suggest that provide provisions barring claims following notices published in newspapers. 11. We shourld consider revising the default voting provisions and distribution provisions. . Providing for capital voting by default and per capita sharing of profits and losses by default seem to be appropriate ways to deal with this and probably mirror what the parties expect. Of course, the OA should be able to vary this.

My experience in advising clients about LLCs, representing LLCs and dealing with the NYLLCL is:



#	Answer	%	Count
1	substantial	42.93%	79
2	moderate	44.02%	81
3	limited	13.04%	24
	Total	100%	184

Comments:

Comments:
Thank you!
More experience with Delaware LLCs than New York LLCs.
But I include mediation and arbitration clauses to provide a more flexible and cost-effective way to resolve disputes among members.
Thank you for soliciting comments. I think that these are important issues. Also recognize that there is a significant difference between how "large businesses" use LLC's and how the every day business operator is impacted.
I tend to advise my clients not to use LLCs because (i) the perceived "privacy" of not filing charter amendments publicly very rarely comes into play, and (ii) the publishing requirement (did I make myself clear, above?) can be VERY expensive in NYC and surrounding areas.
I have been working with LLCS since 1990; probably 1/2 my practice involves LLCs.
My expertise in liability protection is substantial and I have been having this fight regarding LLCs on the practice level and academic.
More often than not, my clients end up using a Delaware LLC instead of a NY LLC, but this may change a bit if the changes recommended above are implemented.
Substantial experience with LLCs but limited experience with the New York LLCL
I have been practicing law for over 37 years, and my practice has largely focused on partnerships, limited partnerships, LLCs (since the LLCL was first adopted) an corporations.
I work as a staff attorney for a corporate service company where we have occasion to address customer issues arising from the publication requirement.
I do a lot of work for banks and often have to deal with LLCs sitting across the table. The uncertainties are problematic. I would love to come up with a way to be sure that we know who the real members are and what is the real operating agreement.
I generally represent entrepreneurs that want to form, or own, single member LLCs.
We never form them, but we get lots of cases where new clients come in with serious problems under the LLCL and we have to fix by reforming under a better state's law. That, and estate planning goals are often frustrated by having NY entities among the clients, assets, so we have to get rid of them to complete a solid estate plan.
I was asked to chair a taskforce by the CIty Bar Commercial and Uniform State Laws Committee, but had limited interest form NYSBA sections. We did have input from the Title Insurance inhous bar. This is a good project. As a member of the Section, I would like to participate in this project. The City Bar project began 4 years ago and work was done that could be of help.