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## Usually Neglected, But Always Important: An Attorney's Perspective on Corporate Records

**Bart A. Basi, CPA/Attorney at Law**  
**The Center for Financial, Legal & Tax Planning, Inc.**

### Introduction

Corporate records are one of those items that few people in business concern themselves with. The business owner is usually concerned with the here and now items such as making payroll, getting the jobs done, collecting receivables, and paying bills. The absence of records is usually ignored year to year. While this may sound like a no-harm, no-foul prospect, having little or no records can become a dire situation. In fact, in a recent case the court ruled that, due to the lack of records, the corporation was for the most part, invalid and liability extended into the owners of the business.

Thousands of business people operate as corporations for the purpose of conducting business while limiting personal liability. What many people don't realize is that the limited liability is effective only if certain requirements are met. One of the requirements to avoid losing the protection of limited liability, also known as **piercing the corporate veil**, is to hold meetings and keep accurate records. Failure to keep records does not mean certain failure in court.

### Definition and Requirements

Corporate records are documents prepared by a business to fulfill requirements imposed by law. Under the Model Business Corporation Act, a corporation shall keep as permanent records, minutes of all meetings of its shareholders and board of directors, a record of all actions taken by the shareholders or board of directors without a meeting, and a record of all actions taken by a committee of the board of directors on behalf of the corporation. Records must also be kept of resolutions creating all classes of stock, all written communications to the shareholders, the most recent annual report, and names of shareholders.

The form of the requirements state that the records be kept in written form or in a form that can be reduced to writing in a reasonable time and be made available to shareholders or the government upon request. Regular meetings can have their notice requirement waived. At a minimum, corporate meetings are required to be held once per year.

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## A CASE STUDY

The Tax Court ruled that an estate was not entitled to a deduction for a settlement payment in a case where an estate faced a will contest and ended the case with a settlement. In this case the estate went through a will contest where a caregiver and various other people submitted a will made subsequent to that of the will benefitting the testatrix's grandchildren. It was known that this subsequent will was made when the testatrix had Alzheimer's disease. The estate argued undue influence and the parties settled for an undisclosed amount.

The estate claimed this settlement as a deductible expense. The Court ruled for that such an item is not deductible for estate tax purposes. The court reasoned that the payment was not deductible because it lacked adequate consideration and it matched the intent of the testatrix. The payment in fact, as structured, was a payment of a distributive share not a claim against the estate. To add insult to injury, the court ordered that the value of the life insurance be included in the gross estate because the testatrix had "incidents of ownership" over the insurance policy at the time of her death. It was with this the estate was not entitled to a deduction.

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**Discussion**

After reviewing the above requirements, are your records up to par? If you've been in business for 12 years, can you count 12 meeting notes in your records? If not, let me use an example to illustrate just how the lack of minutes can be used to cause you problems.

Oftentimes, business owners will use their own personal property for business purposes. Being that the property is used for the business, it is indecipherable who owns the property, the individual or the corporation. During a lawsuit to seize assets, any assets located in the building can be presumed to be business property. In this example, unless the business owner has a corporate record of his personal property being authorized for use by the corporation, it is very likely that the property will be presumed to be that of the corporation's and be subject to the lawsuit.

As in the introduction, "piecing the corporate veil", also occurs. Corporate officers and owners can face lawsuits as individuals. Records will be seized under a subpoena power of the court. If the corporate records do not exist or have not been kept up, it maybe too late to produce them.

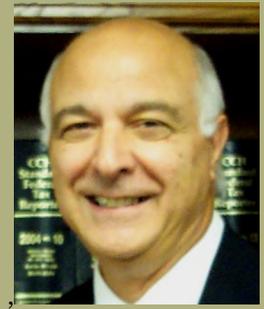
The person suing at that point has another foot forward in proving that your corporation is merely an alter ego of the owner. Under this theory, a court can pierce the corporate veil to attach the owner's personal assets to satisfy claims against it.

**IT IS IMPORTANT TO KEEP RECORDS.** Granted you will not be legally bulletproof with them, but without them you are a sitting duck!

**Conclusion**

There is no requirement or rule stating that records cannot be created for past events. Therefore, records can be created for events that happened long ago, from memory.

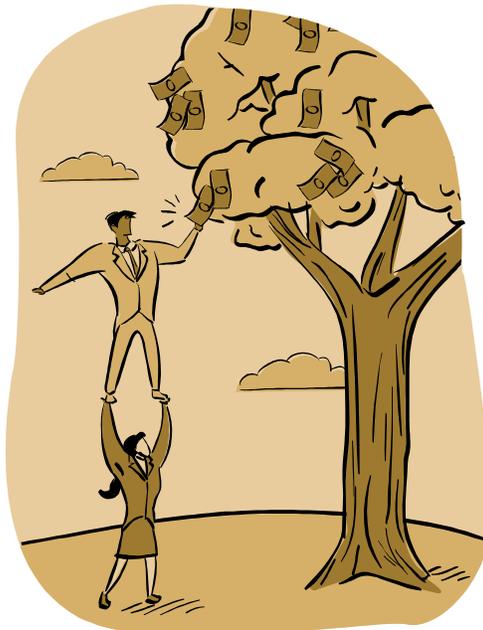
However, records must be maintained in a particular format. Writing "had a meeting on 4/15/13 to discuss tax problem" is not sufficient. There is a format used to show formality both of the record and of the meeting. The Center maintains corporate records for numerous clients. If you would like the professionals at The Center to assist you with your record keeping, please give us a call. Remember, the law states that you should have corporate records and keep them current!



*Dr. Bart A. Basi is an attorney, CPA, and the Senior Advisor of The Center for Financial, Legal & Tax Planning, Inc, a full service company specializing in financial, legal & tax matters. Basi is a nationally recognized author, lecturer, and advisor on how to structure deals to minimize taxes. Tax structure makes the difference between getting the deal done and watching the deal fall apart. Many of you may be familiar with Basi and the topics he covers in the Financial, Legal & Tax Advisory which may be read in various industry-specific trade publications.*

**Points of Interest**

- **Corporate records are one of those items that few people in business concern themselves with.**
- **The absence of records is usually ignored year to year.**
- **There is no requirement or rule stating that records cannot be created for past events.**



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## A CASE STUDY CONTINUED:

Editor's Comment: In this case, the decedent had two separate wills. During the litigation phase of the case, it became apparent that the decedent's intent was to give a large part of her estate to her caregivers for whatever reason. The subsequent will contest and settlement rewarded the care givers with a substantial bequest much to the dismay of her grandchildren. This case is important because it illustrates the vulnerability one experiences during the end of one's life. It was extremely unprofessional of the caregivers to accept such bequest, but people are people. It is with this that we recommend that family members need to stay well informed of what elders and disable people in their lives are doing. Don't let your parents become the victims of unscrupulous people.



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## 5 Things You Should Never Say While Negotiating - Part 2 *This is the second of a two-part article adapted from a Jan 2011 INC. Magazine article of the same title.*

Every business owner spends some time negotiating, whether it is with customers, suppliers, investors, or would-be employees. Most business owners are street smart, and seem to naturally perform well in negotiations. You probably have a trick or two—some magic phrases to say, perhaps—that can help you gain the upperhand. But, often, the moment you get into trouble in a negotiation is when something careless just slips out. If you are new to negotiation, or feel it is an area where you can improve, check out these tips on precisely what not to say.

4. "Why don't you throw out a number?" There are differing schools of thought on this, and many people believe you should never be the first person in a negotiation to quote a price. Let the other side start the bidding, the thinking goes, and they will be forced to show their hands, which will provide you with an advantage. But some research has indicated that the result of a negotiation is often closer to what the first mover proposed than to the number the other party had in mind; the first number uttered in a negotiation (so long as it is not ridiculous) has the effect of "anchoring the conversation." And one's role in the negotiation can matter, too. In the book *Negotiation*, Adam D. Galinsky of Northwestern's Kellogg School of Management and Roderick I. Swaab of INSEAD in France write: "In our studies, we found that the final outcome of a negotiation is affected by whether the buyer or the seller makes the first offer. Specifically, when a seller makes the first offer, the final settlement price tends to be higher than when the buyer makes the first offer."

5. "Screw you." Whenever you negotiate, remember that it pays to stay calm. The savviest negotiators take nothing personally; they are impervious to criticism and impossible to fluster. And because they seem unmoved by the whole situation and unimpressed with the stakes involved, they have a way of unnerving less-experienced counterparts. This can be an effective weapon when used against entrepreneurs, because entrepreneurs tend to take every aspect of their businesses very personally. Entrepreneurs often style themselves as frank, no-nonsense individuals, and they can at times have thin skin. But whenever you negotiate, remember that it pays to stay calm, to never show that an absurdly low counter-offer or an annoying stalling tactic has upset you. Use your equanimity to unnerve the person who is negotiating with you. And if he or she becomes angry or peeved, don't take the bait to strike back. Just take heart: You've grabbed the emotional advantage in the situation. Now go close that deal!

If you know of someone who's thinking of selling or buying a business and who might benefit from a free, confidential, consultation, have them contact me directly at 813.299.7862, or [mertel@lmaallc.com](mailto:mertel@lmaallc.com)

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## Frequently Asked Questions...



**Q. I am the owner of an S Corporation. If in any given year I do not take any money out of the company, will I have to pay taxes on the income from the business?**

**A. S Corporations are what is known as "flow through entities". If an S Corporation turns a profit, that profit flows through to the owner(s) of the company. Regardless of what distributions or cash the owner takes from the company, the shareholder will see income from the profit of the company.**

**Q. I just opened a business and formed it as a limited liability company under my state's laws. For federal tax purposes, how do I classify my LLC?**

**A. An LLC may be classified for federal tax purposes as a sole proprietorship, a partnership, or a corporation. If the LLC has only one owner, the LLC will automatically be treated as a sole proprietorship unless another election is made by the owner. On the other hand, if the LLC has two or more owners, it will be classified as a partnership unless an election is made.**

**Q. How do I deduct expenses from an estate to arrive at the true value of the estate?**

**A. The estate can deduct estate expenses from the estate itself using form 706 or it can use form 1041 to deduct expenses from the income of the estate.**

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