

LIMITED LIABILITY COMPANY

For many years, the primary business entities in use in the United States were sole proprietorships, general and limited partnerships, and corporations. The limited liability company has been rapidly accepted and is one of the more popular forms of business organizations today. Rarely has a new form of organization been so accepted for widespread use.

The limited liability company combines the operational flexibility and favorable tax treatment of partnerships with the limited liability feature of a corporation. The initial statutes authorizing the formation of limited liability companies have borrowed heavily from the Model Business Corporation Act and the Revised Uniform Limited Partnership Act, incorporating the most desirable features of each act. The first limited liability company statute was enacted in Wyoming in 1977. Florida followed Wyoming's example five years later. Rapidly, states adopted variations of these initial and analogous uniform statutes. A Uniform Limited Liability Company Act that was drafted in 1995 and modified in 1996, has been the basis for recent amendments to and initial adoptions of statutes authorizing limited liability companies. All states now have a limited liability company act.¹

The limited liability company may elect to have pass-through tax advantages, like Subchapter S corporations and partnerships, but may avoid several restrictive and burdensome requirements of the Subchapter S election.² A Subchapter S corporation may not have more than seventy-five shareholders, and those shareholders cannot include other corporations, nonresident aliens, general or limited partnerships, trusts, pension plans, or charitable organizations; but a limited liability company is not restricted to a specific number of members, nor are the members limited to individual citizens. A Subchapter S corporation may not own more than eighty percent of the stock of another corporation,³ while a limited liability company can own any percentage or all of the stock in a corporation. The limited liability company also allows flexibility in distributions and special allocations to members, as compared with the one class of stock limitation imposed upon a corporation electing to be taxed under Subchapter S.⁴

All members of a limited liability company are granted limited liability protection from debts of the business. In partnership law, all general partners in a general partnership are individually liable for the debts and obligations of the partnership. A limited partnership exposes at least one partner, the general partner, to liability, even though personal liability may be avoided by using a corporate general partner. Historically, tax

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rules impose requirements that the corporate general partner must have a minimum ownership interest in the partnership and a substantial capitalization (so that there are assets of the general partner available for creditors of the partnership). Only the limited partners of a limited partnership are afforded the benefits of limited liability, and even the limited partners may risk losing this protection if they actively participate in control of the business of the partnership. It is now possible to form partnerships (both general and limited) that permit limited liability for the partners and the recently adopted Uniform Limited Partnership Act has eliminated liability exposure for limited partners who are participating in management activities of the partnership. However, potential liability of partners is always a source of concern in the planning and operation of any partnership.⁵

CHARACTERISTICS OF A LIMITED LIABILITY COMPANY

A limited liability company is recognized as a separate legal entity apart from the owners who own the membership interest, similar to the separate existence of a corporation.⁶ A limited liability company is also entitled to exercise statutory powers very similar to the powers of a corporation. Under the Uniform Act, limited liability companies have the same powers as an individual to do all things necessary or convenient to carry on its business or affairs.⁷

While the limited liability company can function only in accordance with the power given to it by statute and the authority granted in its articles of organization by the members of the company, it should be obvious that the statutory power under the Uniform Act is very broad and extensive, encouraging the participation of limited liability companies in nearly any business transaction.

Many state statutes predate the Uniform Act and still provide similar, yet diverse, rules for the formation and operation of the limited liability company. Eventually, the Uniform Act will be used as the basis for amendments to these statutes. In the meantime, however, it is very important to review the specific state statutes to detect local variations and idiosyncracies that will affect the operation of such a company formed in that state. For example, many statutes provide that the limited liability company can only be formed for a certain duration, such as 30 years. This feature was initially required primarily to accommodate tax issues when the regulations would not permit the entity to have “continuity of life” for tax purposes.⁸ Under the Uniform Act, a limited liability company may last for any period of time desired (such as “100 years from the date of filing the articles of organization”), but if the articles of organization do not specifically so state, the duration of the company is “at will,” meaning the withdrawal of any member will potentially dissolve the company.⁹

In either case, the limited liability company is not appropriate for certain types of businesses. For example, any business that desires longevity through many generations could not operate as a limited liability company if the statute required that it have a limited duration. Similarly, businesses that require long-term lending arrangements, such as public utilities and real estate investment businesses, could not operate under this business form because they typically borrow money over a period longer than the statutory period would permit and the length of time in which they pay back their loans exceeds the authorized duration of the entity. Under most current state statutes and the Uniform Act, it is now possible to carefully draft the organizing documents for a limited liability company to make it adaptable to most businesses, but it takes some thought and creativity to maneuver through the statutory variations to shape the organization to fit all the needs of the business.

The operations of a limited liability company are also governed by rules and regulations adopted by the organizers of the business. The articles of organization and the operating agreement (both discussed in detail later) are used to impose rules for operation and structure for the company.

The limited liability company is often used in businesses or ventures where limited liability and pass-through tax consequences are particularly desirable. For example, professional

service businesses (such as those of lawyers or physicians) can benefit substantially from this form of business organization where so permitted under state law. Businesses that are expected to mature and prosper with only a few owners for the predictable future are also appropriately organized as limited liability companies. While it would be possible to have a publicly owned limited liability company, the fact that all members have some rights and obligations that are similar to partners in a partnership would make the operations of a publicly owned limited liability company unwieldy. The company is also particularly adaptable to businesses that require unique provisions for sharing of profits and losses or cash and management structures that can accommodate a single manager or no managers at all.

In summary, the limited liability company is an attractive alternative to conventional partnerships and corporations. It grants limited liability, favorable tax treatment, and operational flexibility without many of the restrictive requirements imposed on corporations and limited partnerships. It is treated as a legal entity, distinct from the members who own and manage it. Under the Uniform Act, the lawyer or paralegal is free to alter most of the statutory provisions in the organizing documents; thus, the entity can be nearly any form and shape desired with unique features to accommodate any client. These are all the reasons why this form of business organization is becoming very popular for closely held businesses.

STATUTORY POWERS OF A LIMITED LIABILITY COMPANY

The limited liability company obtains power to operate its business from the authority of the state statute. Because this form of business organization is intended to be a rational alternative to partnerships and corporations, the powers of a limited liability company are typically quite broad. For example, the Uniform Act grants a limited liability company the power to

- (a) sue and be sued, and defend in the company name;
- (b) purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with real or personal property, or any legal or equitable interest in property, wherever located;
- (c) sell, convey, mortgage, grant a security interest in, lease, exchange, and encumber or dispose of all or any part of its property;
- (d) purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, grant a security interest in, or otherwise dispose of and deal in and with shares or other interests in or obligations of any other entity;
- (e) make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations, which may be convertible into or include the option to purchase other securities of the limited liability company, and secure any of its obligations by a mortgage on or a security interest in any of its property, franchises, or income;
- (f) lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;
- (g) be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity;
- (h) conduct its business, locate offices, and exercise the powers granted by this Act within or without the State;
- (i) elect managers and appoint officers, employees, and agents of the limited liability company, define their duties, fix their compensation, and lend them money and credit;
- (j) pay pensions and establish pension plans, pension trusts, profit sharing plans, share bonus plans, share option plans, and benefit or incentive plans for any or all of its current or former members, managers, officers, employees, and agents;
- (k) make donations for the public welfare or for charitable, scientific, or educational purposes; and
- (l) make payments or donations, or do any other act, not inconsistent with law, that furthers the business of the limited liability company.¹⁰

Notice the similarity between the foregoing powers and the powers granted to business corporations in Chapter 6. The drafters of the limited liability statutes obviously borrowed the rules of corporate statutes in defining the power to do business in a limited liability company.

The limited liability company is given power necessary and convenient to effect all of the “business” for which it is organized.¹¹ The business purposes of the company, which are described in the statute, are typically broad. For example, a limited liability company usually can conduct any lawful business. Delaware, in its inimitable simplicity, broadly grants limited liability companies “all the powers and privileges granted” by the enabling statute, any other law, or its operating agreement, “together with any powers incidental thereto, so far as such powers and privileges are necessary or convenient to the conduct, promotion or attainment of the business, purposes or activities of the limited liability company.”¹²

Any desired restrictions on the power of a limited liability company can be placed in its articles of organization or operating agreement. The articles of organization are filed in a state filing office, usually the Secretary of State, and are available for public inspection and information. The operating agreement is a private agreement among members of the limited liability company and is accessible only to the members and managers of the company unless it is voluntarily disclosed to others.

The purposes of the limited liability company are usually described in the articles of organization, which delineate the business objectives the company intends to pursue, such as owning and operating an apartment building, practicing law, selling and leasing equipment, or any other defined business operation. With appropriate drafting of articles of organization and operating agreement, counsel can tailor the specific features of the limited liability company to the precise powers and purposes that the organizers desire for its operation.¹³

Because of the similarity between the statutory powers of a limited liability company and the statutory powers of a corporation, it is expected that corporate cases interpreting corporate powers will be applicable by analogy to the powers of a limited liability company.¹⁴

OWNERSHIP AND MANAGEMENT OF A LIMITED LIABILITY COMPANY

The owners of a limited liability company, called **members**, are analogous to partners in a partnership and to shareholders in a corporation. Under the Uniform Act and in many states it is now possible to have a single-member limited liability company, in which only one person forms the company and is its only member. This allows a sole proprietor, for example, who prefers the sole ownership and management of his or her business to achieve limited liability from obligations of the business by forming a limited liability company and transferring the sole proprietorship’s assets to it. The possibility of a single-member company also makes the limited liability company more adaptable than a partnership, since any form of partnership requires at least two members.

The members’ contribution may consist of tangible or intangible property or other benefit to the company, including money, promissory notes, services performed, or other obligations to contribute cash or property, or contracts for services to be performed.¹⁵ Like corporate shareholders, the members of a limited liability company may be passive investors whose contributed capital is used for the operation of the business, and whose opinion is solicited only for certain significant decisions required to be made by the members by statute, such as the admission of new members or the dissolution of the company. It is also possible to provide that the members will manage the business; and like partners, they are integral to the operation of the business insofar as their death, retirement, or resignation will cause a dissolution of the company.¹⁶ The specific rights and obligations of the members and their participation in the business are defined in the articles of organization or the operating agreement.

Right to Vote

Members have certain statutory voting rights, including typically the right to vote for managers of the company,¹⁷ the right to approve amendments to the articles of organization and the

operating agreement, the admission of a new member to the company, transfers of membership interests by other members,¹⁸ and consent to dissolve the company.¹⁹ Several statutory variations of these voting rights exist. In some states, the members are the managers unless managers are specifically provided in the structure of the company as described in the articles of organization.²⁰ In Maryland, the members are the agents of the company and can obligate the company even if managers are appointed.²¹ In some states, the transferee of a membership interest may become a member automatically upon the transfer without the consent of the other members.²² In the Uniform Act and all states, the members have the right to vote on any matter as provided in the operating agreement, subject to any statutory provisions that require a majority or unanimous vote, consent, or agreement of the members.²³

Admission and Dissociation

A member may **dissociate** from a limited liability company at any time by giving written notice of his or her resignation to the other members. However, if the resignation violates the operating agreement, the company may recover damages from the resigning member for a breach of the operating agreement or for resigning before the expiration of the term of the company.²⁴ A resigning member is entitled to receive any distribution to which the member is entitled under the operating agreement; if the operating agreement is silent on this subject, the member is entitled to receive fair value of the membership interest in the company as of the date of resignation (minus damages caused by his or her breach of the agreement).²⁵ A member may also dissociate involuntarily by death, bankruptcy, or expulsion from the company as provided in the operating agreement.²⁶ In order to protect creditors, in most states the member (or the member's estate) may not receive any distributions from the company if the company's assets do not exceed its liabilities.²⁷ If a member has received any part of the contribution in violation of the operating agreement or the statute, the member is liable for the amount of the contribution wrongfully returned. Even if a member has received the contribution consistently with the operating agreement or the statute, the member must be prepared to return the distribution to the extent necessary to discharge the company's liabilities to creditors.²⁸ The Uniform Act refers to the payments to a dissociated member as a **distributional interest**, the fair value of which can be determined by a court, if necessary, considering the going concern value of the company, any agreement among the members specifying a formula for determining value, or the recommendations of an appraiser appointed by the court.²⁹

In the Uniform Act and states that attribute partnership characteristics to limited liability companies, new members cannot be admitted to a limited liability company without the written consent of all existing members.³⁰ Similarly, in many states, the death, retirement, resignation, expulsion, bankruptcy, or dissolution of a member or any other event that terminates the continued membership of a member in the company causes a dissociation of the member and a dissolution of the company unless the company purchases the distributional interest of the dissociated member.³¹ In modern practice, where the underlying state statute so permits, the operating agreement addresses the consequences of the withdrawal of a member by death or some other event, and provides for the membership interest of the withdrawn member to be purchased by the company or other members upon terms and conditions that will not disrupt the ongoing operations of the business.

Right to Remove Manager

If the company has managers, the manner in which the managers can be removed is usually covered in the operating agreement. However, if the operating agreement does not provide for the removal of managers, some state statutes provide that the managers may be removed with or without cause by a vote of the majority of the members entitled to vote for an election of the managers.³²

Right to Information

Members of a limited liability company have a right to inspect and copy records as provided by the statute and to obtain from the managers, subject to any reasonable standards set forth in

the operating agreement, true and full information regarding the state of the business and financial condition of the limited liability company. The members also are entitled to receive from the managers any other information regarding the affairs of the company and to have the federal, state, and local income tax returns for each year. The operating agreement may provide for access and dissemination of other information to members as well. In the Uniform Act, members are entitled to all information concerning the company's business or affairs "reasonably required for the proper exercise of the member's rights and performance of the member's duties under the operating agreement."³³ In some states, members are entitled, like partners in a partnership, to a "formal accounting" of affairs whenever circumstances render it "just and reasonable."³⁴

Meetings

Some of the more elaborate statutes authorizing limited liability companies describe corporate-type provisions for meetings and membership action. In states that do not have specific statutory requirements, the articles of organization or the operating agreement should address any issues relating to meetings of members.

In a statutory scheme, member's meetings may be held at any place stated or fixed in the operating agreement; and if the agreement does not address the place of the meeting, the meeting is held at the registered office of the company. Annual and special meetings are authorized by most statutes, and special meetings may be called by any persons so authorized in the articles of organization, the operating agreement, or the statute.³⁵

Notice of meetings is required by some statutes, similar to notice for corporate meetings. The notice usually must be sent within a certain time period prior to the meeting, and must specify the type of business to be conducted for a special meeting of the members.³⁶

Unless otherwise provided in the articles of organization or the operating agreement, a majority of the members entitled to vote will be quorum at a meeting of members. If a quorum is present, the affirmative vote of the majority of the members represented at the meeting and entitled to vote on the subject matter will bind the members. The articles of organization or the operating agreement can increase to the size of the quorum or the vote required.³⁷

The Uniform Act and most states permit members of limited liability companies, like stockholders in corporations, to take action by signing a unanimous written consent instead of attending a meeting.³⁸

The specific procedures and requirements for formal meetings of limited liability companies and corporations are discussed in more detail in Chapter 10.

MANAGERS

General Powers

The management of the business and affairs of a limited liability company may be conducted by the members or, if the members agree, may be vested in a **manager** or managers. In some states, managers are called a *board of governors* or *directors*, and in some states, the company is required to have at least one *chief manager*.³⁹ These persons act in a manner similar to the general partners of a limited partnership and the directors of a corporation. The articles of organization or the operating agreement of the limited liability company may apportion management responsibility and voting powers among the various named managers.⁴⁰

Since a limited liability company generally is operated in the same manner as a partnership, it is possible to specify, in the operating agreement or the articles of organization, particular duties for managers and certain issues on which the managers are required to act as a group. The limited liability company structure permits maximum flexibility in granting or restricting the authority of individual managers or the group of managers collectively.

Election and Term

A limited liability company may operate with a single manager or several managers, as determined by the organizers in the articles of organization or the operating agreement. The num-

ber of initial managers is normally fixed in the articles of organization; and if the operating agreement does not provide otherwise, the number stays the same as that provided in the articles of organization.⁴¹

Similar to a board of directors of a corporation, the initial managers hold office until the first annual meeting of the members or until their successors have been elected and qualified.⁴²

The managers are elected by a majority of the members, unless the operating agreement provides for a different method of appointment of managers.⁴³

Like the corporate model, the structure of the limited liability company makes it possible to stagger or classify managers so that the entire group of managers does not have to be re-elected each year. Typical statutory authority on staggering or classification permits a division of the managers into either two or three classes, so that each class is elected in successive years. For example, if there are nine managers and the group of managers is classified into three classes, three managers serve until the first annual meeting, three managers serve until the second annual meeting, and three managers serve until the third annual meeting. Each year, the company elects three new managers to join the six managers whose terms have not yet expired.⁴⁴

It is also possible to describe a method of election of managers in the operating agreement so that individual managers represent a constituency of members who elect them. Because the operating agreement (like a partnership agreement) generally may include any provision agreed to by the members, the members may allocate representation among the managers in any way they wish.

Qualifications

A manager usually must be a natural person, but in some states a manager can be another entity such as a corporation, partnership, or trust. States that require natural persons have adopted the philosophy that individual management decisions are appropriate in operating a business under the limited liability company structure. Managers may have to be a certain age⁴⁵ but usually do not have to be members of the limited liability company.⁴⁶ The articles of organization or the operating agreement may provide other qualifications desired by the members.⁴⁷

Vacancies

If a vacancy occurs in the group of managers, either because of the death, removal, or retirement of a manager or by an amendment increasing the number of managers, the vacancy can be filled by a majority of the remaining managers.⁴⁸ At least one state requires a written agreement among the managers in order to fill such a vacancy.⁴⁹

A manager selected to fill a vacancy serves the unexpired term of the predecessor manager or, if the vacancy results from an increase in the number of managers, until the next annual meeting of members when a successor is elected and qualified.⁵⁰

Removal

Managers, like directors of corporations, serve at the pleasure of the members of the limited liability company. Their positions are not as secure as general partners in a partnership (whose expulsion must be specifically described in the partnership agreement). A manager may be removed with or without cause, as provided in the operating agreement, or if the operating agreement is silent, by the vote of the majority of members who would have been entitled to elect the manager.⁵¹

Duties

Managers are agents of the limited liability company. In fact, the Uniform Act and some statutes specifically describe the manager's duties as those of an agent.⁵² As agents, they are authorized to conduct the business of the limited liability company in the usual way consistent with the purposes described in the articles of organization and consistent with the authority granted to the

managers in the operating agreement. As long as a manager is acting within the scope of his or her authority and the business purposes of the company, the acts of the manager legally bind the limited liability company.⁵³

Under some statutes, the manager is required to perform specific duties. For example, only the managers of the company may be able to contract for debts of the company⁵⁴ or to execute instruments and documents provided for the acquisition, mortgage, or disposition of real or personal property of the company.⁵⁵ Managers generally are expected to perform duties similar to those of a director of a corporation.⁵⁶ Thus, managers generally are required to act in good faith, in a manner reasonably believed to be in the best interests of the company, and with such care as an ordinarily prudent person in a like position would use under similar circumstances.⁵⁷ Most statutes permit managers to rely upon information obtained from employees or other agents, attorneys or other professional advisers, or committees of the managers in making decisions on behalf of the company.⁵⁸

The Uniform Act describes two fiduciary duties of managers: a duty of care and a duty of loyalty. The manager's duty of care is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.⁵⁹ The duty of loyalty requires a manager to account to the company and hold "as trustee" for it property, profit, or benefits derived by a manager in the conduct or winding up of the company's business or derived from any use by the manager of the company's property, including the appropriation of an opportunity in which the company would be interested in exploiting; to refrain from dealing with people having an interest adverse to the company; and to refrain from competing with the company's business.⁶⁰ Although not described as a fiduciary duty of a manager, the Uniform Act also requires managers to perform their duties consistently with the obligation of good faith and fair dealing.⁶¹

The manager's duties may be expanded or contracted in the articles of organization or the operating agreement; indeed, like a partnership agreement, the operating agreement should specify the manager's duties in detail so that the structure of the business can be tailored specifically to the desires of the organizers. The articles of organization and the operating agreement are binding on managers, and the managers must scrupulously follow the duties and obligations imposed upon them by those documents.⁶²

Like directors of a corporation but unlike general partners of a partnership, managers of a limited liability company are not liable for any obligations of the company.⁶³ Under most limited liability company statutes, managers are entitled to be indemnified for expenses or liabilities suffered for claims made against them because of acts done in their "official capacities" as managers on behalf of the limited liability company.⁶⁴ The indemnification method generally follows the scheme used by a corporation to indemnify its officers and directors and is often confirmed and amplified in the operating agreement.⁶⁵

TRANSFERABILITY OF MEMBERSHIP INTEREST

The ownership interest in a limited liability company is an interesting blend of ownership of stock in a corporation and ownership of an interest in a partnership. The Uniform Act calls the member's ownership interest in the company the "distributional interest."⁶⁶ On the one hand, the membership interest is personal property of the member, like stock in a corporation, and may be transferred or assigned in the manner provided in the operating agreement.⁶⁷ Consequently, the operating agreement typically provides for the basis upon which membership interest can be transferred, and may impose any agreed-upon restrictions or conditions to the transfer of membership interest.⁶⁸

In some states and in the Uniform Act, on the other hand, a feature of partnership is superimposed on the ability of members to sell a membership interest. If all other members of the limited liability company do not approve of a proposed transfer by unanimous written consent, the purchaser of a membership interest has no right to participate in the management or business affairs or to become a member.⁶⁹ This rule is based on the concept that a member of a limited liability company is an integral part of the company, which is a carryover of the concept

that a partner is an integral part of the partnership. No new members are permitted unless all other members agree. If the other members do not agree to a transfer of a membership interest, the purchaser is entitled only to the share of profits or other compensation and the return of contributions to which the selling member would have been entitled.⁷⁰ If all other members consent to a transfer of membership interest, however, the purchaser becomes a substituted member and has all the rights of the member from whom the interest is purchased or received.⁷¹

FINANCE

Contributions

The contributions of capital to a limited liability company can be made tangible or intangible property or other benefit to the company (such as a guaranty of the company's indebtedness), including money, promissory notes, services performed, or other obligations to contribute cash or property, or contracts for services to be performed.⁷² Most statutes anticipate that the articles of organization and the operating agreement will address this subject by placing restrictions on or defining the types of consideration that can be received in exchange for membership interest. In some elaborate statutory schemes, provisions for contributions to a limited liability company are defined in considerable detail. For example, in Minnesota, the statute provides the following details concerning these contributions:

1. The board of governors (the Minnesota name for "managers") accepts the contribution on behalf of the limited liability company, describing the contribution, including terms of future performance, and stating the value of the contribution.
2. The determination of the board of governors as to the amount or fair value of the contribution and the terms of payment or performance must be made in good faith and on the basis of accounting methods or a fair valuation or other method reasonable in the circumstances.
3. The governors who intentionally or without reasonable investigation accept a consideration that is unfair to the company or overvalue property or services received will be liable to the company for the damage caused to the members.
4. The types of membership interests may be set by the articles of organization, and may include more than one class of membership interest with various terms, including the right of the company to redeem membership interests, entitling the members to preferential distributions, entitling the members to convert from one class of membership interest to another, and having various voting rights on various matters.
5. A "would-be contributor" must sign a written contribution agreement.
6. The contribution agreement is irrevocable for six months.
7. The contribution agreement must be paid or performed in full at the times or in the installments specified in the contribution agreement or, if there is no such provision, as determined by the board of governors uniformly among all contributors for membership interest of the same class.
8. If a would-be contributor fails to perform a contribution agreement, the company may sue to recover the amount due or may declare a forfeiture of the contribution agreement and cancel it.
9. Upon forfeiture of a contribution agreement, the membership interest is offered for sale by the company, and any excess net proceeds realized by the company over the amount owed by the delinquent would-be contributor are paid to the delinquent would-be contributor. If the membership interest does not sell for more than the amount due, the company may cancel the contribution agreement and retain a portion of the price paid up to ten percent of the price stated in the contribution agreement.
10. If a new contribution is received by a limited liability company subsequent to another contribution, the board must restate the value of the old contribution.⁷³

Distributions

Members of a limited liability company are entitled to receive distributions from the company at the times and on the events specified in the articles of organization or operating agreement, as the managers (if any) specify, or as the members shall agree.⁷⁴ These distributions, like those of a partnership, include allocations of profits, losses, deductions, credits, and cash. The operating agreement or the articles of organization may specify the manner in which the distributions will be shared; and some statutes contain a “default provision,” stating that distributions and allocations will be made on the basis of the members’ capital value if no contrary provisions appear in the organizing documents.⁷⁵ A dissociating member, like a resigning or withdrawing partner in a partnership, is entitled to receive distributions to which he or she is entitled under the operating agreement or articles of organization; and if this situation is not addressed in those documents, the member is entitled to receive the fair value of the member’s membership interest in the company as of the date of dissociation.⁷⁶ Members are entitled to receive distributions from the company in cash; unless otherwise provided in the operating agreement or articles of organization, members may not be compelled to accept distributions of any assets in kind that would have to be shared with other members entitled to distributions from the company.⁷⁷

When a member becomes entitled to receive a distribution, that member, similar to a shareholder in a corporation, has the status of and is entitled to all remedies available to a creditor of the company for the amount of the distribution.⁷⁸ However, most states impose the same restrictions on distributions of limited liability companies that are imposed on those of corporations: the company must be able to pay its debts as they become due in the usual course of business, and the company’s assets must exceed its liabilities.⁷⁹

Members who receive distributions in violation of the statutory restrictions are liable for the return of those distributions if the assets are needed to pay creditors.⁸⁰ Similarly, any managers who vote for distributions in violation of the statute may be liable to the company, like directors of corporations who are liable for improperly distributed corporate dividends.⁸¹

CONTINUITY OF EXISTENCE AND DISSOLUTION

Statutory Term

The statutes permitting the formation of limited liability companies provide that the articles of organization must set forth whether the duration of the company is for a specified term, and, if so, the period specified.⁸² Today, most state statutes and the Uniform Act allow a limited liability company to last indefinitely if no period of duration is specified in the articles of incorporation. When limited liability companies were first authorized, many were formed with a limited duration, so that organizers could ensure that the company received pass-through taxation. The tax rules governing this issue were based on partnership taxation, and the regulations required that such an entity must lack certain corporate characteristics, one of which is **continuity of life**.⁸³ New tax regulations now allow a limited liability company to elect to be treated as a partnership, and the term of existence of the company does not affect its tax status.⁸⁴ Imposing any limitation on the term of existence should be carefully considered in preparing a limited liability company for a client, since it is not possible to extend the limited liability company beyond its term. At the expiration of the term, it is necessary to dissolve the company, convert it into a new entity, or transfer its assets to a different organization to continue conducting its business; either option may have significant tax consequences.⁸⁵

Dissolution

A limited liability company is dissolved under circumstances similar to those under which a partnership is dissolved. A dissolution typically occurs by

1. an event specified in the operating agreement;
2. consent of the number or percentage of members specified in the operating agreement;
3. the expiration of the term of duration;

4. an event that makes it unlawful for all or substantially all of the business of the company to be continued, but any cure of illegality within 90 days after notice to the company of the event is effective retroactively;
5. a court order on application by a member or a dissociated member or a transferee of a member of an at-will company that the economic purpose of the company is likely to be unreasonably frustrated; it would be not reasonably practicable to carry on the company's business because of the acts of a member; if the company failed to purchase a dissociated member's distributional interest; or the managers or members in control of the company have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent, or unfairly prejudicial to the member.⁸⁶

States have taken different approaches to the issue of dissolution upon the dissociation of a member because of death, retirement, resignation, expulsion, bankruptcy, or dissolution (of an entity member). Some statutes require an "absolute" dissolution of the company and require that dissociation will *always* lead to dissolution, unless the members, by unanimous consent given after the dissolution, elect to continue the business.⁸⁷ Other states have "flexible" statutory rules and permit members to provide in the organizing documents that such events will not result automatically in dissolution of the company.⁸⁸ In the latter situation, the drafter of the articles of organization or the operating agreement must consider whether the flexibility of continuation of the business is desirable considering the personal contribution to the company that each member is making. If a member's managerial expertise is critical to the operation of the business, it may be preferable to require dissolution upon a dissociation of that member. On the other hand, if the member's participation in the business is merely that of an investor or can easily be replaced by other persons, the dissolution should be avoided to ensure continuity of the business.

When a dissolution occurs by a member's dissociation, if the remaining members elect to continue the business of the company without liquidating its affairs, the company must purchase the distributional interest of the dissociated member, less any damages caused by the member's untimely dissociation or breach of the operating agreement.⁸⁹ However, if the members do not have the authority (or the will) to continue the business once a dissolution has occurred, the company must begin to wind up its affairs, usually commencing with filing a statement of intent to dissolve the company with the state.⁹⁰ This statement is intended to notify creditors that the company will be liquidating its assets and distributing them to creditors and members.

In settling accounts after dissolution, the assets of the limited liability company are distributed using a scheme similar to that used in partnership distributions. First, creditors must be paid. Then, depending upon the provisions of the operating agreement, assets are distributed to members to return their contributions and to share any profits of the business.⁹¹

Once the liabilities of a dissolving company have been paid or provided for and the remaining assets have been distributed to the members, the company must file articles of dissolution or **articles of termination** with the state.⁹²

CONVERSION OF OTHER ENTITIES AND MERGER

A unique feature of limited liability companies is the right granted under some state statutes to convert general or limited partnerships into limited liability companies by filing articles of organization that meet the requirements of the statutes. This statutory authority is unique, because rarely is it possible to convert one type of business organization into another by simply filing an additional document. Normally, substantial documentation must be prepared to convert the ownership of a sole proprietor into a partnership or to convert a partnership into a corporation.

The Uniform Act permits conversion of a partnership or a limited partnership into a limited liability company.⁹³ Several states have adopted statutes permitting conversion of a partnership to a limited liability company. In Virginia, for example, conversion is accomplished by filing articles of organization and a document that names the partnership and describes the date and place of filing of the original certificate of partnership.⁹⁴

One of the hybrid corporate features enjoyed by limited liability companies in the Uniform Act and several states is the authority to **merge** or consolidate one limited liability company with another or to merge limited liability companies with limited partnerships or corporations.⁹⁵ Partnerships cannot be merged in most states, and a merger of a partnership with a corporation also is not normally authorized. Consequently, the enabling legislation for the merger of limited liability companies with other companies, partnerships, or corporations is novel. The procedure for merger and **consolidation**, when authorized, is very similar to that for corporations, described in Chapter 15.

TAXATION OF A LIMITED LIABILITY COMPANY

The taxation of a limited liability company has been uncertain and confusing in the early development of the entity. The Internal Revenue Service initially suggested that the limited liability company formed under the Wyoming statute—the first enabling statute—be taxed as a corporation. The draft regulations to that effect were withdrawn after significant criticism from tax specialists. Following an extensive study, the Internal Revenue Service ruled in 1988 that a limited liability company under the Wyoming statute would be treated as a partnership for tax purposes.⁹⁶

Taxation as a partnership is a significant advantage of the limited liability company. Before 1997, most cautious practitioners relied only on private or public letter rulings from the Internal Revenue Service that interpret and compare the local statutes to their predecessors.⁹⁷ In 1997, the Internal Revenue Service adopted new regulations that permit limited liability companies to elect the tax status for the entity. Thus, a limited liability company could elect to be taxed like a corporation (if the organizers preferred to accumulate income for expansion and did not want the members to be taxed on income they do not receive), or it automatically will otherwise be taxed like a partnership.⁹⁸ A single-member limited liability company will automatically be taxed as a sole proprietorship—that is, the income is attributable to the member and may be reported on his or her personal tax return. Most states authorizing the formation of a limited liability company tax it as a partnership.⁹⁹

FORMATION AND DOCUMENTATION OF A LIMITED LIABILITY COMPANY

The formation of a limited liability company involves the drafting of documents that are similar to partnership agreements and the documents required for the formation of a corporation. The articles of organization parallel the articles of incorporation for corporations; the operating agreement contains issues that typically are addressed in partnership agreements and in the bylaws of corporations.

Name


All states that permit the formation of limited liability companies impose restrictions on the names of the companies. The name must include the words “Limited Liability Company” or some authorized abbreviation such as “L.L.C.” or “L.C.” (these vary from state to state). Limited liability companies are authorized to use assumed business names in some states, provided they make appropriate filings under the assumed business name statutes.¹⁰⁰ The name of the limited liability company cannot be deceptively similar to any other registered corporate, partnership, or limited liability company name. It can be reserved and registered in advance like a partnership or corporate name. (See Exhibit 5–1, Reservation of Limited Liability Company Name.)

Limitation on Purposes

Although most states permit limited liability companies to be organized for any lawful purpose, some enabling statutes restrict the activities of these companies. Wyoming and Nevada

Exhibit 5-1.

Reservation of Limited Liability Company Name (Louisiana)

<p style="text-align: center;">W. Fox McKeithen Secretary of State</p> 	<p>RESERVATION OF CORPORATE/LIMITED LIABILITY COMPANY NAME (R.S. 12:23, 12:204, 12:303, 12:1307 & 12:1344)</p>
<p style="text-align: center;">Enclose \$25 filing fee Make remittance payable to Secretary of State Do Not Send Cash</p>	<p>Return to: Commercial Division P. O. Box 94125 Baton Rouge, LA 70804-9125 Phone (225) 925-4704 Web Site: www.sec.state.la.us</p>
<p>The Secretary of State, State of Louisiana is requested to reserve the following name for use as a corporate/limited liability company name:</p> <p>_____</p> <p>Said name is requested to be reserved on behalf of _____ _____, for a period of sixty days from the date of your receipt of this application.</p> <p style="text-align: right;">Name _____</p> <p style="text-align: right;">Address _____</p> <p style="text-align: right;">City/State/Zip _____</p> <p style="text-align: right;">Area code/phone number _____</p> <p style="text-align: right;">Submitted by: _____</p> <p style="text-align: right;">Date _____</p> <p>If the requested name is not available, please return this application and the filing fee to the above.</p>	
398 Rev. 03/03	(see instructions on back)

prohibit them from participating in banking and insurance industries.¹⁰¹ Many states allow the use of partnerships and corporations for professional services, such as the practice of law, medicine, or accounting, and have recently amended this statutory authority to include limited liability companies.¹⁰² Unless a local statute or rule permits the practice of professional services in a limited liability company, the formation of a limited liability company to render such services is not allowed. Often, local statutes provide that even if professional practices may occur in a limited liability company structure, the person rendering the services remains personally liable for all acts or omissions causing damage to a client or patient.¹⁰³ In such cases, the only advantage of forming a limited liability company for a professional practice is that the professional's colleagues will not be liable for his or her malpractice.

Exhibit 5–2.Articles of Organization
(Oklahoma)

FILING FEE: \$100.00 FILE IN DUPLICATE PRINT CLEARLY	<p>ARTICLES OF ORGANIZATION OF AN OKLAHOMA LIMITED LIABILITY COMPANY</p> <p>TO: OKLAHOMA SECRETARY OF STATE 2300 N Lincoln Blvd., Room 101, State Capitol Building Oklahoma City, Oklahoma 73105-4897 (405) 522-4560</p> <p>The undersigned, for the purpose of forming an Oklahoma limited liability company pursuant to the provisions of 18 O.S., Section 2004, does hereby execute the following articles:</p> <p>1. The name of the limited liability company (Note: The name <u>must</u> contain either the words limited liability company or limited company or the abbreviations LLC, LC, L.L.C. or L.C. The word limited may be abbreviated as Ltd. and the word Company may be abbreviated as Co.):</p> <p>_____</p> <p>_____</p> <p>2. The street address of its principal place of business, wherever located:</p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="border-top: 1px solid black; width: 50%;">Street address</td> <td style="border-top: 1px solid black; width: 20%;">City</td> <td style="border-top: 1px solid black; width: 10%;">State</td> <td style="border-top: 1px solid black; width: 20%;">Zip Code</td> </tr> </table> <p>3. The name and street address of the resident agent in the state of Oklahoma:</p> <table style="width: 100%; border-collapse: collapse;"> <tr> <td style="border-top: 1px solid black; width: 20%;">Name</td> <td style="border-top: 1px solid black; width: 30%;">Street Address</td> <td style="border-top: 1px solid black; width: 10%;">City</td> <td style="border-top: 1px solid black; width: 10%;">State</td> <td style="border-top: 1px solid black; width: 30%;">Zip Code</td> </tr> <tr> <td colspan="5" style="text-align: center; font-size: small;">(P.O. Boxes are not acceptable.)</td> </tr> </table> <p>4. The term of existence: _____</p> <p>Articles of organization <u>must</u> be signed by at least one person who need not be a member of the limited liability company.</p> <p style="text-align: right;">Dated: _____</p> <p>Signature: _____</p> <p>Type or Print Name: _____</p> <p>Address: _____</p> <p style="text-align: right; font-size: x-small;">(SOS FORM 0073-11/99)</p>	Street address	City	State	Zip Code	Name	Street Address	City	State	Zip Code	(P.O. Boxes are not acceptable.)				
Street address	City	State	Zip Code												
Name	Street Address	City	State	Zip Code											
(P.O. Boxes are not acceptable.)															

Interstate Business

Theoretically, a limited liability company is entitled to do business in any state in addition to the state in which the company is formed. Like partnerships and sole proprietorships, the company is required to comply with any local licensing and filing requirements. Provisions for qualification of foreign limited liability companies, which are similar to the requirements for qualification of foreign corporations, must be followed.¹⁰⁴

Articles of Organization

The creation of a limited liability company depends on the filing of **articles of organization** with an appropriate filing officer, usually the secretary of state. The articles of organization must state certain matters required by statute, and may contain other rules for the operation of the company that are desired by the organizers. (See Exhibit 5–2, Articles of Organization).

The juxtaposition of the articles of organization and the operating agreement in a limited liability company deserves special comment, considering the rules that apply to corporations,

which are discussed in detail later. The articles of organization are filed with a public office and can be amended only by a formal procedure that requires a filing of an amendment to the articles of organization. The formal procedure usually involves a recommendation of the amendment by the managers (if the company is managed by managers) and a vote by the members to approve the amendment. The membership vote required to approve an amendment is usually a majority, unless the articles of organization or operating agreement increase the percentage vote required for amendments. On the other hand, the operating agreement, which also contains rules for the operation of the business, is an agreement among *all* members. Consequently, an amendment to the operating agreement can probably be accomplished only by the unanimous consent of all members unless otherwise expressly provided in the agreement. Thus, in a limited liability company, rules desiring permanence should be included in the operating agreement, and those rules that may be expected to change from time to time should be placed in the more easily amended articles of organization. The converse is true for corporations: articles of incorporation can be amended only by a cumbersome formal voting procedure, while bylaws may be informally amended by directors or shareholders.¹⁰⁵

The items that are to be addressed in the articles of organization and the operating agreement should be determined in an early conference with the organizers of the company when all statutory requirements and other drafting issues for the formation of the entity are discussed. A checklist for this conference is Exhibit I-3 in Appendix I.

According to the Uniform Act, the articles of organization must set forth the following:

1. The name of the company;
2. The address of the initial designated office;
3. The name and street address of the initial agent for service of process;
4. The name and address of each organizer;
5. Whether the duration of the company is for a specified term and, if so, the period specified;
6. Whether the company is to be manager-managed, and, if so, the name and address of each initial manager;
7. Whether the members of the company are to be liable for its debts and obligations.

The articles of organization *may* set forth the following:

1. Provisions permitted to be set forth in an operating agreement; or
2. Any other matters not inconsistent with law.¹⁰⁶

The specific requirements of the applicable state statute should be carefully reviewed, since the acts permitting the formation of limited liability companies vary widely. Typical requirements are discussed briefly here.

Name

The articles of organization must contain the name of the company, which usually cannot be deceptively similar to any other corporate, partnership, or assumed business name in the state. The name may be previously reserved, but the filing of the articles of organization permanently reserves the name for the duration of the company.

Name

The name of the limited liability company is Independent Enterprises, Limited Liability Company.

EXAMPLE

Initial Designated Office or Principal Place of Business

The initial designated office or principal place of business of the company must be stated. Under most statutes, the initial designated office or principal place of business may be either within or outside of the state of organization of the company.

EXAMPLE**Principal Place of Business**

The principal place of business of the Limited Liability Company is 423 W. 54th St., New York, New York.

Duration

If the limited liability company will have a stated term, the latest date upon which the limited liability company is to dissolve and other events of dissolution must be stated in the articles of organization. If no duration is stated, under the Uniform Act, a limited liability company is an at-will company.

EXAMPLE**Duration**

This Limited Liability Company shall dissolve and terminate 30 years from the date of filing these Articles of Organization with the Secretary of State.

Registered Office and Agent

Like a corporation and some limited partnerships, the limited liability company must maintain a registered office and agent for receipt of official notices and legal matters. The registered agent usually can be any person or entity maintaining an office within the state, although some statutes describe specific qualifications for registered agents. Each statute should be consulted separately to determine the appropriate requirements.

EXAMPLE**Registered Agent**

The registered agent of this Limited Liability Company in this state is Glenna McKelvy, and the business address of the registered agent is 303 Hopkins Boulevard, Minneapolis, Minnesota 55102.

Initial Managers

If the company is to be managed by managers, instead of the members, the names and business addresses of the initial managers usually must be stated in the articles of organization. Managers generally must be natural persons, but in some states, they may be other entities such as partnerships, corporations, or other limited liability companies. The articles of organization can impose qualifications for managers if the organizers so desire.

EXAMPLE**Initial Managers**

The names and business addresses of the initial Managers who are to serve as Managers until the first annual meeting of the Members or until their successors are elected and qualified are as follows:

<i>Name</i>	<i>Address</i>
Boutrous Archibald	1156 Humboldt Street, Denver, Colorado 80218
Sally Endive	1968 Jasmine Street, Denver, Colorado 80220

Classification of Managers

Some states permit the staggering or **classification** of managers, sometimes depending on the number of managers (e.g., six or more). Classification of the managers provides continuity of management, since the entire group of managers is not reelected at each annual meeting.

Instead, a few of the managers are elected each year. A provision for the staggering or classification of managers should be included in the articles of organization.

Classification of Managers

The Managers shall be divided into three classes, each class to be three Managers, and the term of the office of Managers of the first class will expire at the first annual meeting of Members after their election. The term of the office of Managers of the second class will expire at the second annual meeting after their election. The term of the Managers of the third class will expire at the third annual meeting after their election. At each annual meeting after such classification, the number of Managers equal to the number of the class whose term expires at the time of such meeting shall be elected to hold office until the second succeeding annual meeting, if there are two classes, or until the third succeeding annual meeting, if there are three classes. No classification of Managers shall be effective prior to the first annual meeting of Members.

EXAMPLE

Members

In many states, if the members are to manage the business (instead of managers), the articles of organization must state the names and addresses of the initial members. Many states and the Uniform Act now authorize single-member limited liability companies; other statutes require that there be at least two members of the limited liability company upon formation, and that fact should be stated in the articles of organization. The articles of organization also may state any qualifications for membership, such as professional licensure, residence, age, and similar qualifications.

Members

There will be at least two Members of this Limited Liability Company upon formation.

EXAMPLE

Initial Members

The names and business addresses of the initial Members of the Company who will manage the Company, instead of Managers, are as follows:

<i>Name</i>	<i>Address</i>
Edward M. Giles	1225 Seventeenth Street Suite 2900 Denver, Colorado 80202
Edward F. O'Keefe	1225 Seventeenth Street Suite 2900 Denver, Colorado 80202

EXAMPLE

Qualifications of Members

The members of this limited liability company shall be limited to attorneys licensed to practice law in the state of Colorado who are residents of Colorado and are at least 32 years of age or older.

EXAMPLE

Purposes

Many states permit a limited liability company to be organized for any lawful purpose. If any restrictions are desired on the business objectives of the company, they should be stated in the articles of organization. Similarly, any statutory restrictions that may apply to the company's business should be observed. For example, in some states, these companies cannot engage in the businesses of insurance or banking.

EXAMPLE**Purposes**

The purposes for which this Limited Liability Company is formed are to own and operate apartment buildings within the city limits of Denver, Colorado; and to engage in any other lawful business.

Indemnification of Managers

Managers, especially those who are not members, may need protection from liability and expenses incurred in their position as managers, which can be provided by indemnification. The provisions allowing indemnification by limited liability companies vary widely from state to state, and specific statutory authority for indemnification should be carefully reviewed.

EXAMPLE**Indemnification**

The Managers of this Company shall be entitled to the full indemnification provided by law and the Company shall be obligated to indemnify and hold harmless a Manager who is subject to any claim while a Manager of the Company, or who is or was serving at the Company's request as a director, officer, partner, trustee, employee or agent of any other foreign or domestic corporation, partnership, joint venture, trust, limited liability company, or employee benefit plan so long as the Manager qualifies for such indemnification under the terms of this Operating Agreement or by law.

Right to Continue Business

Since under many statutes the limited liability company dissolves as a result of the death, retirement, resignation, expulsion, bankruptcy, or dissolution of a member, the articles of organization should address the manner in which the business may be continued and the circumstances under which members must consent to the continuation. Similarly, the purchase of the distributable interest owned by the deceased, retired, resigned, expelled, or bankrupt member should be described.

EXAMPLE**Right to Continue Business**

Upon the death, retirement, resignation, expulsion, bankruptcy, or dissolution of a Member or the occurrence of any other event that terminates the continued Membership of a Member ("Dissolution Event") in the Limited Liability Company, the business of the Limited Liability Company may be continued as long as there are at least two remaining Members and all Members consent to the continuation of business. The Managers of the Limited Liability Company shall call a special meeting of Members within ninety (90) days after the Dissolution Event for purposes of determining whether the business should be continued.

Upon the occurrence of a Dissolution Event, the Company shall purchase the Membership Interest owned by the deceased, retired, resigned, expelled, or bankrupt Member by paying to him or her the fair value of his or her Membership in the Limited Liability Company in cash within ninety (90) days following the Dissolution Event. A "fair value" shall be the value determined and agreed upon by the Company and the Member owning the Membership Interest, or if no agreement can be reached, the value determined by the accountant then engaged by the Limited Liability Company, whose determination shall be conclusive for all purposes.

Optional Provisions

The articles of organization may contain any other provision, not inconsistent with law, that the members elect to set out for the regulation of the internal affairs of the limited liability company. These optional provisions usually may include any provisions required or permitted to be set forth in the **operating agreement**. However, since the existing statutes authorizing limited liability companies are not based upon the Uniform Act but have been drafted, in many

cases, through the collective ideas of various state legislators, they are less than precise on the placement of certain important provisions in the company's operations documents. In many cases, the statutes state that certain provisions may be included in the operating agreement, but fail to state that similar provisions may be included in the articles of organization. Conversely, some provisions that must be included in the articles of organization are not allowed to be included in the operating agreement. The drafter of the articles of organization and the operating agreement for a limited liability company must review carefully the local statutes and observe the statutory requirements for placement of operational rules in the appropriate documents.

Operating Agreement

The operating agreement for a limited liability company is similar to a partnership agreement for a partnership. In fact, all the issues typically addressed in a partnership agreement should be addressed in the operating agreement, since the relationship among members of a limited liability company is very similar to that of partners in a partnership. Like a partnership agreement, the operating agreement of a limited liability company can change most statutory rules that the organizers desire to modify for the structure of the business. At least two important distinctions, however, differentiate the operations of a limited liability company from those of a partnership:

1. The decisions of the limited liability company may be made by managers elected by members, and if that structure is desired, a procedure for the administration of the activities of both managers and members must be included; and
2. The articles of organization are also a governing document that provides rules for the operations of the business. Consequently, the operating agreement must be consistent with the articles of organization.

Under the Uniform Act, the operating agreement may vary all statutory "default" provisions, except that the operating agreement may not

1. unreasonably restrict a member's right to information or access to records;
2. eliminate the duty of loyalty, but the agreement may identify specific types or categories of activities that do not violate the duty of loyalty (if not manifestly unreasonable) and specify the number or percentage of members or disinterested managers that may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;
3. unreasonably reduce the duty of care;
4. eliminate the obligation of good faith and fair dealing, but the agreement may determine the standards by which the performance of the obligation is to be measured (if the standards are not manifestly unreasonable);
5. vary the right to expel a member;
6. vary the requirement to wind up the company's business in case of certain dissolutions;
7. restrict rights of third parties as provided in the statute.¹⁰⁷

For the drafter, the preparation of documents for a limited liability company is quite a challenge, since almost all of the clauses that would be used in a partnership agreement and in corporate articles of incorporation and bylaws need to be included to cover thoroughly all the issues that may arise in the operations of the limited liability company.

Some state statutes describe the items that are to be addressed in the operating agreement. For example, Maryland states that the operating agreement may include provisions establishing

1. the manner in which the business and affairs of the limited liability company shall be managed, controlled, and operated, which may include the grant of exclusive authority to manage, control, and operate the limited liability company to persons who are not members;
2. the manner in which the members will share the assets and earnings of the limited liability company;

3. the rights of the members to assign all or a portion of their interest in the limited liability company;
4. the circumstances in which any assignee of a member's interest may be admitted as a member of the limited liability company;
5. the member's right to have a certificate evidencing the member's interest in the limited liability company, and the procedure by which the certificate is to be issued by the company;
6. the procedure for assignment, pledge, or transfer of any interest represented by a member's interest; and
7. the method by which the operating agreement may from time to time be amended.¹⁰⁸

The operating agreement must be tailored to the specific desires of the organizers and members. The following checklist with examples and references to the detailed discussions of this chapter may be used as a guide for preparing the agreement.

Checklist

1. Acknowledge the articles of incorporation and provide for conflicts between the articles of organization and the operating agreement.

EXAMPLE

Articles of Organization and Conflicts

This Company is organized pursuant to the provisions of the Limited Liability Company Laws of the State of Colorado, pursuant to Articles of Organization filed with the Secretary of State on February 10, 2005, and the rights and obligations of the Company and the Members shall be provided in the Articles of Organization and this Operating Agreement. If there is any conflict between the provisions of the Articles of Organization and this Operating Agreement, the terms of [the Articles of Organization] or [this Operating Agreement] shall control.

2. **Contributions**—Provide for the initial and additional capital contributions by the members for the purchase of their membership interest.

EXAMPLE

Contributions

The capital contributions to be made by the Members with which the Company shall begin business are as follows:

<i>Member Name</i>	<i>Contribution</i>
Susan Bartic	\$10,000 in cash
Glenna McKelvy	\$25,000 in cash
Brent Karasiuk	\$15,000 in property as described on Schedule A.

EXAMPLE

Additional Capital Contributions

In the event that the cash funds of the Company are insufficient to meet its operating expenses or to finance new investments deemed appropriate to the scope and purpose of the Company as determined by the Managers, the Members shall make additional capital contributions in the proportion of their capital contributions. The amount of the additional capital required by the Company and the period during which such additional capital shall be retained by the Company shall be determined by the Managers.

3. **Loans**—If the Company is to be authorized to borrow money, provisions authorizing the loans and providing for any restrictions on the authority of the Managers or Members with respect to such loans should be stated.

Loans

EXAMPLE

In lieu of voting an additional assessment of capital to meet operating expenses or to finance new investments, the Company may, as determined by the Managers, borrow money from one or any of the Managers, Members, or third persons. In the event that a loan agreement is negotiated with a Manager or Member, he or she shall be entitled to receive interest at a rate and upon such terms as determined by the Managers, excluding the Manager making said loan, if applicable, and said loan shall be repaid to the Manager or Member, with unpaid interest, if any, as soon as the affairs of the Company permit. The loan shall be evidenced by a promissory note obligating the assets of the Company. Such interest and repayment of the amounts so loaned are to be entitled to priority of payment over the division and distribution of capital contributions and profit among Members.

- 4. **Establishment of capital and income accounts**—A limited liability company financial structure is similar to a partnership, providing for **capital accounts** for members and their membership interest. Similarly, an income account should be established to reflect distributions of profits, losses, gains, deductions, and credits.

Capital Accounts

EXAMPLE

A separate capital account shall be maintained for each Member. The capital accounts of each Member shall initially reflect the amounts specified as initial capital to be contributed by each member, and if a Member has merely promised to contribute such amounts, the Company shall maintain a corresponding subscription receivable on behalf of that Member. No Member shall withdraw any part of his or her capital account, except upon the approval of the Managers. If the capital account of a Member becomes impaired, or if he or she withdraws from said capital account with approval of the Managers, his or her share of subsequent Company profits shall be credited first to his or her capital account until that account has been restored, before such profits are credited to his or her income account. During the period when a Member's capital account is impaired or he or she has withdrawn funds therefrom as hereinbefore provided, if an additional contribution is required of the Members for purposes specified in this Operating Agreement, the Member with the withdrawn or impaired capital account shall be required to contribute his or her proportionate share of the additional capital contribution and restore the deficiency then existing in his or her capital account, so as to return the capital accounts to the same proportion existing as of the date of the additional contribution. No interest shall be paid on any capital contributions to the Company.

Income Accounts

EXAMPLE

A separate **income account** shall be maintained for each Member. Company profits, losses, gains, deductions, and credits shall be charged or credited to the separate income accounts annually unless a Member has no credit balance in his or her income account, in which event losses shall be charged to his or her capital account. The profits, losses, gains, deductions, and credits of the Company shall be distributed or charged to the Members as provided in this Operating Agreement. No interest shall be paid on any credit balance in an income account.

- 5. **Allocations to members**—The ratio for sharing profits, losses, deductions, credits, and cash among the members should be specified.

Allocations among Members

EXAMPLE

The profits, gains, and cash of the Company shall be divided and the losses, deductions, and credits of the Company shall be borne in the following proportions:

- Susan Bartic 20%
- Glenna McKelvy 50%
- Brent Karasiuk 30%

- 6. **Distributions of assets**—The limitations on distributions of assets and the allocations among members should be stated clearly in the operating agreement. The statutes provide

the conditions upon which distributions may be made and the circumstances under which a member has a right to receive a distribution from the company in kind. The operating agreement should be clear on these issues.

EXAMPLE

Distributions of Assets

- (1) All distributions of assets of the Company, including cash, shall be made in the same allocations among Members as described in this Operating Agreement.
- (2) The Managers shall determine, in their discretion, whether distributions of assets of the Company should be made to the Members; provided, however, that no distribution of assets may be made to a Member if, after giving effect to the distribution, all liabilities of the Company, other than liabilities to Members on account of their capital and income accounts, would exceed the fair value of the Company assets.
- (3) A Member has no right to demand and receive any distribution from the Company in any form other than cash.

7. **Admission of members**—The circumstances under which additional members may be admitted to the company should be described.

EXAMPLE

Admission of New Members

Additional Members may be admitted upon the unanimous written consent of all Members.

8. **Voting members**—The circumstances under which members are entitled to vote and matters upon which their votes will be solicited should be described. The agreement should provide the percentage of the members' votes required to approve any issues.

EXAMPLE

Voting of Members

A Member shall be entitled to one vote on any matter for which Members are required to vote. A Member may vote in person or by proxy at any meeting of Members. All decisions of the Members shall be made by a [majority] or [unanimous] vote of the Members at a properly called meeting of the Members at which a quorum is present, or by unanimous written consent of the Members.

9. **Meetings of members**—Most state statutes do not describe a procedure for meetings for members. Consequently, the rules desired by the organizers and the members should be described in the operating agreement.

EXAMPLE

Meetings of Members

- (1) Meetings of Members may be held at such time and place, either within or without the State of Colorado, as may be determined by the Managers or the person or persons calling the meeting.
- (2) An annual meeting of the Members shall be held [on the 5th day of March in each year] or [at such time and place as shall be determined by a resolution of the Managers during each fiscal year of the Company].
- (3) Special meeting of the Members may be called by the Managers and by at least one-tenth of all of the Members entitled to vote at the meeting.
- (4) Written notice stating the place, day, and hour of the meeting and, in the case of a special meeting, the purpose for which the meeting is called, shall be delivered not less than ten days nor more than fifty days before the date of the meeting, either personally or by mail, by or at the direction of the Managers or any other person calling the meeting, to each Member of record entitled to vote at the meeting. A waiver of notice in writing that is signed by the Member before, at, or after the time of the meeting stated in the notice shall be equivalent to the giving of such notice.

(5) By attending a meeting, a Member waives objection to the lack of notice or defective notice unless the Member, at the beginning of the meeting, objects to the holding of the meeting or the transacting of business at the meeting. A Member who attends a meeting also waives objection to consideration at the meeting of a particular matter not within the purpose described in the notice unless the Member objects to considering the matter when it is presented.

EXAMPLE

(continued)

Quorum and Adjournment

EXAMPLE

A majority of the Members entitled to vote shall constitute a quorum at the meeting of Members. If a quorum is not represented at any meeting of the Members, the meeting may be adjourned for a period not to exceed sixty days at any one adjournment; provided, however, that if the adjournment is for more than thirty days, a notice of the adjourned meeting shall be given to each Member entitled to vote at the meeting.

10. **Powers of managers**—The operating agreement may broaden or restrict the powers of the managers. Most state statutes do not limit the authority of managers in any way; if the members desire any limitations, they should specifically describe them. Managers may be authorized by the members to do any or all acts to manage the company.

General Powers

EXAMPLE

Management and the conduct of the business of the Company shall be vested in the Managers. The Managers may adopt resolutions to govern their activities and the manner in which they shall perform their duties to the Company.

Duties of Managers

EXAMPLE

- (1) The Managers shall have the duties and responsibilities as described in the Colorado Limited Liability Company Act, as amended from time to time [with the following limitations and restrictions:].
- (2) The Managers, or any one of the Managers designated by resolution of the Managers, shall execute any instruments or documents providing for the acquisition, mortgage, or disposition of the property of the Company.
- (3) Any debt contracted or liability incurred by the Company shall be authorized only by a resolution of the Managers, and any instruments or documents required to be executed by the Company shall be signed by the Managers or by any one of the Managers designated by resolution of the Managers.
- (4) The Managers may designate to any one of the Managers or delegate to an employee or agent the responsibility for daily and continuing operations of business affairs of the Company. All decisions affecting the policy and management of the Company—including the control, employment, compensation, and discharge of employees; the employment of contractors and subcontractors; the control and operation of the premises and property including the improvement, rental, lease, maintenance, and all other matters pertaining to the operation of the property of the business—shall be made by the Managers.
- (5) Any Manager may draw checks upon the bank accounts of the Company and may make, deliver, accept, or endorse any commercial paper in connection with the business affairs of the Company.

11. **Qualifications of managers**—Any qualifications required by the statute or desired by the organizers should be stated in the operating agreement.

Qualifications of Managers

EXAMPLE

Managers shall be natural persons eighteen years of age or older and shall be residents of the State of Colorado.

12. **Number, election, and term**—Provisions should state the number of managers, how they will be elected, and the term of their office.

EXAMPLE**Number, Election, and Term**

- (1) The number of Managers shall be three. The number of Managers shall be increased or decreased by the vote or consent of the Members.
- (2) The initial Managers shall hold office until the first annual meeting of Members and until their successors have been elected and qualified. Thereafter, each Manager elected by the Members shall hold office for a one-year term or until his or her successor has been elected and qualified.
- (3) Managers shall be elected by a vote or consent of the Members at an annual meeting or at a special meeting called for that purpose.

13. **Meeting and voting of managers**—Only a few statutes provide a statutory scheme for the meetings and voting of managers. The operating agreement should address these issues.

EXAMPLE**Meetings and Voting**

- (1) Meetings of the Managers may be held at such time and place as the Managers by resolution shall determine.
- (2) Written notice of meetings of the Managers shall be delivered at least twenty-four hours before the meeting, personally or by telecopier or mail actually delivered to the Manager within the twenty-four-hour period. A waiver of notice in writing that is signed by the Manager before, at, or after the time of the meeting stated in the notice shall be equivalent to the giving of such notice.
- (3) By attending a meeting, a Manager waives objection to the lack of notice or defective notice unless the Manager, at the beginning of the meeting, objects to the holding of the meeting or the transacting of business at the meeting.
- (4) A majority of the Managers entitled to vote shall constitute a quorum at the meeting of Managers.
- (5) All decisions of the Managers shall be made by a [majority] or [unanimous] vote of the Managers at a properly called meeting of the Managers at which a quorum is present, or by unanimous written consent of the Managers.

14. **Devotion to duty**—The operating agreement should provide that each manager, like the partners in a partnership, must devote reasonable time and attention to the duties of the company.

EXAMPLE**Devotion to Duty**

At all times during the term of a Manager, each Manager shall give reasonable time, attention, and attendance to, and use reasonable efforts in the business of, said Company; and shall, with reasonable skill and power, exert himself or herself for the joint interest, benefit, and advantage of said Company; and shall truly and diligently pursue the Company's objectives.

15. **Books and records**—Provisions concerning access, inspection, copying, and methods of accounting in regard to the books and records of the company should be described in the operating agreement. Each state statute is different in terms of the financial information that must be available to the members. The applicable statute should be reviewed carefully to be certain that all information required to be communicated by the statute is included in the operating agreement.

EXAMPLE**Location of Records**

The books of the Company shall be maintained at the principal office of the Company or at such other place as the Managers by vote or consent shall designate.

Access to Records and Accounting

EXAMPLE

Each member shall at all times have access to the books and records of the Company for inspection and copying. Each Member shall also be entitled:

- (1) to obtain from the Managers upon reasonable demand for any purpose such information reasonably related to the Member’s Membership Interest in the Company;
- (2) to have true and full information regarding the state of the business and financial condition and any other information regarding the affairs of the Company;
- (3) to have a copy of the Company’s federal, state, and local income tax returns for each year promptly after they are available to the Company; and
- (4) to have a formal accounting of the Company affairs whenever circumstances render an accounting just and reasonable.

Accounting Rules

EXAMPLE

The books shall be maintained on the cash basis. The fiscal year of the Company shall be the calendar year. Distributions to income accounts shall be made annually. The books shall be closed and balanced at the end of each calendar year, and if an audit is determined to be necessary by vote or consent of the Managers, it shall be made as of the closing date. The Managers may authorize the preparation of year-end profit and loss statements, balance sheets, and tax returns by a public accountant.

16. **Dissolution**—The causes of dissolution and the circumstances under which the business may be continued should be described in the operating agreement.

Causes of Dissolution

EXAMPLE

The Company shall be dissolved upon the occurrence of any of the following events:

- (1) at any time by unanimous agreement of the Members;
- (2) upon the expiration of the period fixed for the duration of the Company in its Articles of Organization; or
- (3) upon the death, retirement, resignation, expulsion, bankruptcy, or dissolution of a Member.

Continuation of Business

EXAMPLE

Notwithstanding a dissolution of the Company, the Members may elect to continue the business of the Company, as long as there are at least two Members remaining who then consent to do so, by purchasing the deceased, retired, resigned, expelled, or bankrupt Member’s (“Withdrawn Member”) Membership Interest.

17. **Provisions for purchase of a withdrawn member’s membership interest**—If the business is to continue after a member withdraws from the company, the provisions should state the basis upon which the withdrawn member’s interest in the company will be purchased.

Purchase of Withdrawn Member’s Membership Interest

EXAMPLE

- (1) If the Members elect to continue the business, the purchase price of the Withdrawn Member’s Membership Interest shall be equal to the Withdrawn Member’s capital account as of the Effective Date, plus his or her income account as of the end of the prior fiscal year, decreased by his or her share of the Company losses, deductions, and credits computed to the Effective Date, and decreased by withdrawals such as would have been charged to his or her income account during the present year to the Effective Date. The purchase price is subject to set-off for any damages incurred as a result of the Withdrawn Member’s actions, and nothing in this paragraph is intended to impair the Company’s right to recover

EXAMPLE*(continued)*

damages for the Withdrawn Member’s wrongful dissolution of Company by reason of the Withdrawn Member’s expulsion, retirement, resignation, or bankruptcy.

(2) The purchase price shall be paid to the Withdrawn Member in cash within ninety (90) days from the Effective Date.

(3) The “Effective Date” shall be the date of death of a deceased Member; the date personal notice is received, or the date the certified mail is postmarked, in the case of a retired, resigned, or expelled Member; or the date the notice is delivered to a Withdrawn Member, or to the place of business of the Company in the case of bankruptcy of a Member.

18. **Distribution of assets**—If the business is not continued, the operating agreement should provide for the basis upon which assets of the company will be distributed.

EXAMPLE**Distribution of Assets If Business Is Not Continued**

In the event of dissolution of the Company and if the Members do not elect to or are unable to continue the business of the Company following dissolution, the Managers shall proceed with reasonable promptness to sell the real and personal property owned by the Company and to liquidate the business of the Company. Upon dissolution, the assets of the Company business shall be used and distributed in the following order:

- (1) any liabilities and liquidating expenses of the Company shall be paid;
- (2) the reasonable compensation and expenses of the Managers in liquidation shall be paid;
- (3) the remaining amount shall be paid to and divided among the Members in accordance with the statutory scheme for distribution and liquidation of the Company under the Colorado Limited Liability Company Act, as amended from time to time.

19. **Expulsion**—The circumstances justifying expulsion of a member should be specifically detailed, and the procedure for expulsion should be stated.

EXAMPLE**Causes of Expulsion**

A Member shall be expelled from the Company upon the occurrence of any of the following events:

- (1) if a Member shall violate any of the provisions of this Agreement;
- (2) if a Member’s Membership Interest is subject to a charging order or tax lien that is not dismissed or resolved to the satisfaction of the Managers of the Company within thirty days after assessment or attachment; or
- (3) if a Member is caught picking his or her nose.

EXAMPLE**Notice of Expulsion**

Upon the occurrence of an event justifying Expulsion, written notice of Expulsion shall be given to the violating Member either by serving the same by personal delivery or by mailing the same by certified mail to his or her last known place of residence as shown on the books of said Company. Upon the receipt of personal notice, or the date of the postmark for certified mail, the violating Member shall be considered expelled and shall have no further rights as a Member of the Company, except to receive the amounts to which he or she is entitled under this Operating Agreement for the purchase of the violating Member’s Membership Interest.

20. **Bankruptcy**—Provisions should be included for the continuation of the business in case of bankruptcy of a member and the basis upon which the member’s membership interest will be purchased.

Bankruptcy Defined

EXAMPLE

A Member shall be considered “bankrupt” if the Member files a petition in bankruptcy (or an involuntary petition in bankruptcy is filed against the Member and the petition is not dismissed within sixty (60) days) or makes an assignment for the benefit of creditors or otherwise enters into any proceeding or agreement for compounding his or her debts other than by the payment of them in the full amount thereof, or is otherwise regarded as insolvent under any Colorado Insolvency Act.

Effective Date for Bankruptcy

EXAMPLE

The Effective Date of a Member’s bankruptcy shall be the date that the Managers, having learned of the Member’s bankruptcy, give notice in writing, stating that the Member is regarded as bankrupt under this Agreement. Such notice is to be served personally or by leaving the same at the place of business of the Company. As of the Effective Date, the bankrupt Member shall have no further rights as a Member of the Company, except to receive the amounts to which he or she is entitled under this Operating Agreement for the purchase of the violating Member’s Membership Interest.

- 21. **Retirement or withdrawal**—The circumstances under which a member may retire and the consequences of the retirement should be described. A noncompetition clause to restrict the business activities of the withdrawing member also may be appropriate.

Right to Retire or Resign

EXAMPLE

A Member shall have the right, at any time, to retire or resign as a Member of the Company by giving three (3) months’ notice to the Company at the Company’s place of business.

Consequences of Retirement or Resignation If the Business Is Continued

EXAMPLE

Upon giving notice of an intention to retire or resign, the Withdrawn Member shall be entitled to have his or her Membership Interest purchased as provided in this Operating Agreement, if the remaining Members elect to continue the business of the Company. Upon the receipt of notice of the remaining Members’ election to continue the business, the Membership Interest of the Withdrawn Member in the Company shall cease and terminate, and the Withdrawn Member shall be entitled only to the payments provided for the purchase of the Withdrawn Member’s Membership Interest.

Consequences of Retirement or Resignation If the Business Is Not Continued

EXAMPLE

If the remaining Members elect not to continue the business upon retirement or resignation of a Member, or are unable to do so by law, the Withdrawn Member shall be entitled only to his or her interest in liquidation, as stated in this Operating Agreement, subject to any set-off or damages caused by the Member’s retirement or resignation.

- 22. **Death of a member**—The death of a member should allow the remaining members to continue the business and purchase the deceased member’s membership interest. A provision should be included to authorize the purchase of life insurance to fund the purchase of the deceased member’s interest.

Death of a Member

EXAMPLE

Upon the death of a Member, the deceased Member’s rights as Member of the Company shall cease and terminate except as provided in this Article.

EXAMPLE**Consequences of Death If Business Is Continued**

If the surviving Members elect to continue the business, the Managers shall serve notice in writing of such election, within three (3) months after the death of the decedent, upon the executor or administrator of the decedent's estate, or if at the time of such election no legal representative has been appointed, upon any one of the known legal heirs of the decedent at the last known address of such heir. The Company shall purchase the Membership Interest of the deceased Member, and the closing of such purchase shall be within thirty (30) days of the notice of such election, except in the event the Company has life insurance on the decedent, in which event the amount and method of payment for the Membership Interest of the deceased Member will be as provided in the following paragraph.

EXAMPLE**Insurance**

The Company may contract for life insurance on the lives of each of the Members, in any amount not disproportionate to the value of each Member's Membership Interest. In the event of death of a Member, insurance proceeds paid to the Company will be used to purchase the Membership Interest of the deceased Member, and the purchase price shall be the greater of the amount determined for purchase of a Withdrawing Member's Membership Interest or the amount of insurance proceeds received by the Company. The payment of the purchase price to the decedent's representatives or heirs shall be made within thirty (30) days following receipt of the insurance proceeds by the Company. If the surviving Members do not elect to continue the business of the Company, or are unable to do so by law, the proceeds of any life insurance shall be treated as an asset of the Company for liquidation.

EXAMPLE**Consequences of Death If the Business Is Not Continued**

If the surviving Members do not elect to continue the business, or are unable to do so by law, the deceased Member shall be entitled only to his or her interest in liquidation as stated in this Operating Agreement.

23. **Restriction on sale of membership interests**—Any provisions restricting the sale of membership interests should be included in the operating agreement. Similarly, any outside indebtedness that may result in an involuntary sale of a membership interests (such as a loan or nonpayment of debts to individual creditors) should be addressed.

EXAMPLE**Provisions Restricting Sale of Membership Interests**

In the event that a Member desires to sell, assign, or otherwise transfer his or her Membership Interest in the Company and has obtained a bona fide offer for the sale thereof made by some person not a member of this Company, he or she shall first offer to sell, assign, or otherwise transfer the Membership Interest to the other Members at the price and on the same terms as previously offered him or her, and each other Member shall have the right to purchase his or her proportionate share of the selling Member's Membership Interest. If any Member does not desire to purchase the Membership Interest on such terms or at such price and the entire Membership Interest is not purchased by the other Members, no other Member may purchase any part of the Membership Interest, and the selling Member may then sell, assign, or otherwise transfer his or her entire Membership Interest in the Company to the person making the said offer at the price offered. The intent of this provision is to ensure that the entire Membership Interest of a Member will be sold intact, without fractionalization. A purchaser of a Membership Interest of the Company shall not become a Member without the unanimous consent of the nonselling Members, but shall be entitled to receive the share of profits, gains, losses, deductions, credits, and distributions to which the selling Member would be entitled.

Member’s Personal Debts

EXAMPLE

In order to protect the property and assets of the Company from any claim against any Member for personal debts owed by such Member, each Member shall promptly pay all debts owing by him or her and shall indemnify the Company from any claim that might be made to the detriment of the Company by any personal creditor of such Member.

Alienation of Membership Interest

EXAMPLE

No Member shall, except as provided in this Operating Agreement, sell, assign, mortgage, or otherwise encumber his or her Membership Interest in the Company or in its capital assets or property; or enter into an agreement of any kind that will result in any person, firm, or other organization becoming interested with him or her in the Company; or do any act detrimental to the best interests of the Company.

Filing Procedure

The articles of organization are filed with the secretary of state or some other designated public official (such as a corporation commission), and the filing scheme generally follows the procedure required for articles of incorporation for corporations. In some states, after the filing officer determines that the articles of organization have been properly prepared and all fees have been paid, the filing officer issues a certificate of organization for the company.

It is not necessary to file the operating agreement with any public office. To the extent that the company is engaged in real estate transactions or other businesses in which public records generally are maintained, it may be appropriate to file excerpts of the operating agreement for public information. For example, information regarding the duties of the managers may be important to creditors and third parties with whom the company is doing business, and the filing of the statement of those duties gives public notice of the authority of the managers. In addition, to the extent that other licensing statutes require organizational documents to be filed (e.g., statutes regarding organization of professional service corporations for lawyers, accountants, or physicians), the operating agreement and the articles of organization should be filed with the appropriate licensing authorities in order to comply with those rules.

Organizational Meetings of Managers

If the limited liability company will be managed by managers, it is appropriate to document the actions of the managers in the same manner as the actions of directors of a corporation are documented. An organizational meeting of the managers should be held to formally adopt certain actions on behalf of the company.¹⁰⁹ Exhibit 5–3 illustrates the business that typically would be conducted at the first meeting of the managers of a Colorado limited liability company.

KEY TERMS

membership	continuity of life	articles of organization
members	at-will company	classification
dissociate	articles of termination	operating agreement
distributional interest	merge	capital account
manager	consolidation	income account

Exhibit 5–3.Unanimous Consent of
Managers (Colorado)

Unanimous Consent of Managers

The undersigned, being all of the managers of a Colorado Limited Liability Company, do hereby consent to, approve, and adopt the following resolutions:

ADOPTION OF ARTICLES OF ORGANIZATION

RESOLVED, that the Articles of Organization of the Limited Liability Company as filed in the office of the Secretary of State of Colorado are hereby accepted and approved, and that said Articles of Organization shall be placed in the records of the Limited Liability Company.

ADOPTION OF OPERATING AGREEMENT

RESOLVED, that the Operating Agreement in the form reviewed by the Managers and attached hereto is hereby accepted and adopted as the Operating Agreement of this Limited Liability Company.

MEMBERSHIP CERTIFICATE

RESOLVED, that the form of membership certificate as reviewed by the Managers is hereby approved and adopted as the form of membership certificate of the Limited Liability Company.

PAYMENT OF ORGANIZATIONAL EXPENSES

RESOLVED, that the Limited Liability Company is hereby authorized and directed to pay all fees and expenses reasonably necessary for the organization of the Limited Liability Company and to reimburse those persons who have advanced said fees and expenses on behalf of the Limited Liability Company.

ACCEPTANCE OF MEMBER'S SUBSCRIPTION AGREEMENTS

RESOLVED, that the Limited Liability Company hereby accepts the Subscription Agreements offered by Members on behalf of the Limited Liability Company in the forms attached to this Consent and incorporated herein by reference.

FURTHER RESOLVED, that the Limited Liability Company shall hereby execute and deliver to the Members whose Subscription Agreements have been accepted certificates representing the Membership Interests represented thereby.

BANK ACCOUNT

RESOLVED, that the resolutions relating to the establishment of a bank account at Women's Bank, N.A., Denver, Colorado, attached hereto are hereby approved and adopted.

LOAN TRANSACTION

WHEREAS, the Limited Liability Company has need of funds in addition to the equity capital currently contributed by the Members; and

WHEREAS, Glenna McKelvy has expressed a willingness to lend the Limited Liability Company \$55,000 on the terms set forth in Exhibit A attached hereto; and

WHEREAS, the Managers believe that it is in the best interest of the Limited Liability Company to enter into such loan arrangements;

NOW, THEREFORE, BE IT RESOLVED, that the Limited Liability Company hereby approves and agrees to pay the loan described and the Managers are hereby authorized and directed to enter into and execute appropriate documents required to obtain such loan.

EMPLOYMENT CONTRACTS

RESOLVED, that the Employment Contracts on behalf of the Limited Liability Company with Susan Bartic and Brent Karasiuk in the form attached hereto are hereby approved and accepted.

FOREIGN QUALIFICATION

RESOLVED, that the Limited Liability Company is authorized to take such action as may be necessary and appropriate to obtain and maintain on behalf of the Limited Liability Company a Certificate of Authority to transact business in the states of Oklahoma and Nevada.

OTHER BUSINESS

[State other business desired to be included in the Consent.]

 Manager

 Manager

WEB RESOURCES

The articles of organization and the operating agreement are the principal documents required for the formation of a limited liability company.

The forms for articles of organization are available from the Secretary of State or Department of Commerce offices where they are required to be filed. The National Association of Secretaries of State maintains links directly to the offices of the Secretaries of State in all states. These can be accessed through

<<http://www.nass.org>>

Various sources exist for sample operating agreements that may be tailored to the specific desires of the client. In addition to the sites mentioned under “Web Resources” for General Partnerships in Chapter 3, operating agreement form templates are available on the following sites:

<<http://www.paralegal-plus.com>>

<<http://www.alberty.com>>

<<http://www.legaldocs.com>>

<<http://www.findlegalforms.com>>

Access to state laws regarding licensing and regulatory requirements may be obtained through the Legal Information Institute maintained at the Cornell Law School:

<<http://www.law.cornell.edu>>

The Uniform Limited Liability Company Act of 1996, and links to state statutes for states that have based local law on the Act also can be accessed through the Legal Information Institute:

<<http://www.law.cornell.edu>>

Tax forms, including the federal income tax returns and schedules, and the Classification of Entity tax elections may be accessed on line through

<<http://www.irs.gov>>

Searching and locating trade names can be accomplished through various services offered on the Internet. Most of these services charge a fee for useful searches. They include

<<http://www.tmexpress.com>>

<<http://www.trademark-search-services.com>>



CASES

BONNER et al. v. BRUNSON et al.

— S.E.2d —, 3 FCDR 2407

(Ga. Ct. App. —, 2003)

ANDREWS, PRESIDING JUDGE

Fred Bonner and Bonner Roofing & Sheet Metal Company, Inc. (collectively Bonner) sued T.I. Brunson, LLC and Thomas I. Brunson, individually, to collect over \$288,000 claimed due for roofing work done pursuant to a subcontract with the LLC on a condominium construction project on which the LLC acted as the general contractor. At issue is Bonner’s claim that Thomas Brunson (the owner and controlling member of the LLC) is personally liable for the alleged debt of the LLC because he abused the form of the LLC and is therefore no longer protected by the veil of a separately maintained LLC. Because we find no evidence in the record to support this claim, we

conclude Brunson was not personally liable and affirm the trial court’s grant of summary judgment in favor of Brunson, individually.

Just as the so-called “corporate veil” protects an individual shareholder of a corporation from personal liability for the debts of the separate corporate entity (so long as the corporate forms are maintained) so is a member of a limited liability company (LLC) “veiled” from personal liability for the debts of the separately maintained LLC entity. *Yukon Partners v. Lodge Keeper Group*, 258 Ga.App. 1. 5-6, 572 S.E.2d 647 (2002); OCGA §§ 14-11-303; 14-11-1107(j). In order to **pierce** this veil and hold Brunson personally liable for the alleged debt of the LLC, there must be evidence that he abused the forms by which the LLC was maintained as a separate legal entity apart from his personal business. *Fuda v. Kroen*, 204 Ga.App. 836, 837, 420 S.E.2d 767 (1992). A court may disregard the separate LLC entity and the protective veil it provides to an individual member of the LLC when that member, in order to defeat justice or perpetrate fraud, conducts his personal and LLC business as if they were one by commingling the two on an interchangeable or joint basis or confusing otherwise separate properties, records, or control. *Stewart Bros., Inc. v. Allen*, 189 Ga.App. 816, 377

S.E.2d 724 (1989); *Bone Constr. Co. v. Lewis*, 148 Ga.App. 61, 250 S.E.2d 851 (1978); *Clark v. Cauthen*, 239 Ga.App. 226, 228, 520 S.E.2d 477 (1999).

Bonner contends that various conduct by the LLC and Brunson supports piercing the LLC veil and holding Brunson personally liable.

Bonner argues that construction loan draw requests submitted to the lender through December 1999 on behalf of the LLC showed work done by Bonner, but that none of the money was paid to Bonner and excessive sums were paid to a Brunson-owned corporation, which was a subcontractor for heating and air work on the project.

* * *

There is nothing in the draw request evidence that shows the LLC form was abused or that Brunson commingled or confused his personal affairs with the business of the LLC.

Bonner claims Brunson commingled LLC funds with his personal funds by taking a \$360,000 check from the LLC.

* * *

The uncontradicted evidence shows that the LLC's money was paid to Brunson and repaid by him to the LLC under an agreement which maintained the LLC and its property as separate from Brunson's personal account.

Bonner contends Brunson treated LLC funds as his own when Brunson's wife, the LLC's bookkeeper, wrote 16 LLC checks to cash totaling about \$3,700. The record shows that the seven checks which Bonner specifically cites to in the record provided cash to pay for casual labor or security services for the project.

* * *

Bonner claims Brunson used LLC funds to have work done on his house. Brunson's affidavit shows that one of the subcontractors on the LLC's project also did personal work for Brunson at his house. The subcontractor submitted a single bill for \$1,080 for all the work, and the LLC mistakenly paid the entire bill which included \$408 for the work at Brunson's house. When the error was discovered, it was corrected and Brunson was billed by the LLC for the \$408. There was no evidence of abuse of the LLC form or commingling of properties.

Finally, Bonner contends that at least six payments made by the LLC to Brunson's separate corporation (a heating and air subcontractor on the project) were not related to heating and air work on the project. Even if there was evidence that the payments showed an abuse of the separate LLC and corporate forms, this would have no bearing on Bonner's claim that Brunson abused the forms legally separating the LLC from his personal affairs. *Fuda*, 204 Ga.App. at 838-839, 420 S.E.2d 767. In any event, we decline to consider the payments at issue. In support of this contention, Bonner argues only that there is an absence of evidence showing what the payments were for and cites to a 28-page list of checks in the record showing about a thousand checks written by the LLC for various purposes on the project, apparently hoping we will sift through all the checks to find and address the six or more payments. See Court of Appeals Rule 27(c)(3).

In the absence of any evidence that Brunson abused the form of the LLC by commingling or confusing LLC business with his personal affairs, the trial court correctly granted summary judgment dismissing the claim that Brunson was personally liable for the alleged debt of the LLC. *Stewart Bros.*, 189 Ga.App. 816, 377 S.E.2d 724; *Bone Constr. Co.*, 148 Ga.App. 61, 250 S.E.2d 851; *Clark*, 239 Ga.App. at 228, 520 S.E.2d 477.

Judgment affirmed.

MEYER v. OKLAHOMA ALCOHOLIC BEVERAGE LAWS ENFORCEMENT COMMISSION

890 P.2d 1361 (Okla. Ct. App. 1995)

STUBBLEFIELD, JUDGE

This is an appeal from the district court's reversal of the declaratory ruling of the Oklahoma Alcoholic Beverage Laws Enforcement Commission (ABLE) that a newly created form of business entity, a limited liability company (LLC), is not entitled to receive and hold a retail package store license. Wanda L. Meyer, holder of a retail package store license, initiated these proceedings when she petitioned ABLE requesting a declaratory judgment that she could

hold the license as an LLC, a business entity authorized by the Oklahoma Legislature in 1992 through the adoption of the Oklahoma Limited Liability Company Act (OLLC Act). . . . ABLE denied the petition, thus holding that an LLC is not eligible to hold a retail package store license.

Meyer, pursuant to the provisions of the Administrative Procedures Act, 75 O.S.1991 §§ 250-323, appealed the ABLE decision to the district court. That court focused on two provisions of the law: (1)The Oklahoma constitutional provision, which only prohibits licensing of "corporations, business trusts, and secret partnerships," Okla. Const. art. 28, § 10; and, (2)The provision in the LLC Act that authorized LLCs to "conduct business in any state for any lawful purpose, except the business of banking and insurance," 18 O.S.Supp.1992 §

2002 (emphasis added) (footnote omitted). Based upon those provisions, and a conclusion that the provisions of the Oklahoma Alcoholic Beverage Control Act “do not prohibit an LLC from holding a package store license,” the trial court reversed the ABLE ruling and ordered it to “issue such license to petitioner as a limited liability company.”

ABLE appeals, claiming that the order of the lower court is contrary to law in that an LLC is not authorized to hold a package store license.

* * *

The issue is one of first impression—whether an LLC, created pursuant to the OLLC Act, is eligible for issuance of a retail package store liquor license. Indeed, the issue could only have arisen after the 1992 legislative creation of the new form of business entity. LLCs were not a recognized business entity in this state at the time of adoption of our Constitution or at the time of adoption of the Oklahoma Alcoholic Beverage Control Act. However, both the Constitution and the Oklahoma Alcoholic Beverage Control Act do address qualifications of an applicant for a package store license. We conclude that the constitutional directives do prohibit the holding of a license by an LLC and, thus, the lower court did err in its conclusion. The pertinent constitutional provisions are Okla. Const. art. 28, §§ 4 and 10. Section 4, in pertinent part, provides:

Not more than one retail package license shall be issued to any person or general or limited partnership.

Section 10, in pertinent part, provides:

No retail package store or wholesale distributor’s license shall be issued to:

- (a) A corporation, business trust or secret partnership.
- (b) A person or partnership unless such person or all of the copartners including limited partners shall have been residents of the State of Oklahoma for at least ten (10) years immediately preceding the date of application for such license.
- (c) A person or a general or limited partnership containing a partner who has been convicted of a violation of a prohibitory law relating to the sale, manufacture, or the transportation of alcoholic beverages which constituted a felony or misdemeanor.
- (d) A person or a general or limited partnership containing a partner who has been convicted of a felony.

It is true, as noted by the trial court in its decision, that the specific constitutional prohibitions regarding license holders includes only corporations, business trusts, and secret partnerships. Of course, neither the framers nor amenders of the Constitution could have addressed the qualification or disqualification of LLCs as retail package store licensees, because the business entity did not exist in this state until 1992. Indeed, the testimony before ABLE indicated that the business form did not exist in this country until 1977. However, the Constitution did address all of the business formats as they existed at the time of adoption of the article on alcoholic beverage laws and enforcement and,

significantly, section 4 names only individuals and partnerships as those entities to which a license may be issued.

Likewise, it is true that the Oklahoma Alcoholic Beverage Control Act does not prohibit an LLC from holding a license. However, what the Act does or does not prohibit is not dispositive because the Act does not purport to address the nature of the applicant—a matter controlled by the constitutional provisions. The Act does restate some of the disqualifications set forth in section 10 of the Constitution regarding residency, criminal conviction, etc., but does not purport to prohibit the licensing of corporations, business trusts and secret partnerships, which are specifically prohibited as licensees by the Constitution. It appears that qualification as a license holder, with regard to types of business entities, was left to the constitutional pronouncement.

When the legislature adopted the OLLC Act, it provided that “[a] limited liability company may be organized under this act and may conduct business in any state for any lawful purpose, except the business of banking and insurance.” 18 O.S.Supp.1992 § 2002 (footnote omitted). Of course, such a legislative enactment could not countermand a constitutional prohibition, even if that had been the legislative intent. However, we do not believe the language of section 2002 indicates a legislative intent to extend the authority of LLCs in ways specifically prohibited elsewhere by statute, and particularly not to an act prohibited by the Oklahoma Constitution. Thus, we do not view section 2002 of the OLLC Act as sanction for the operation of a retail package store by an LLC.

If we interpreted section 2002 as argued by Meyer, then it could, in some respects, negate specific declarations of Okla. Const. art. 28, § 10. An LLC—neither a person, corporation nor partnership—is not specifically named in section 10 and, thus, if eligible as a licensee, its members would not be subject to the same restrictions regarding residence, violations of the liquor laws and status as a felon, which are imposed upon members of other permissible business entity licensees. Even the similar prohibitions in 37 O.S.1991 § 527, are not drawn with this new business entity in mind and would not clearly apply to LLC members. Meyer apparently recognized this fundamental problem with the LLC business entity and by company rule restricted membership in keeping with the prohibitions of the Constitution and section 527. However, these restrictions are set out in fully amendable articles. 18 O.S.Supp.1992 § 2011. Furthermore, the question is not whether the members of this particular LLC are eligible applicants because those members are not the applicants. The applicant is the LLC, and the question is whether the business entity is a permissible license holder.

Meyer argues that an LLC is essentially a partnership. However, the act creating the business form is in Title 18, which is entitled “Corporations.” Furthermore, a provision in our Uniform Partnership Act states that “any association formed under any other statute of this state . . . is not a

partnership under this act, unless such association would have been a partnership in this state prior to adoption of this act.” 54 O.S.1991 § 206(2).

Meyer claims that its expert witness, the only witness in all the proceedings, testified that an LLC was a partnership. However, contrary to Meyer’s contention, the witness’s testimony was not so unequivocal. The totality of the testimony was that an LLC is a hybrid that has attributes of both corporations and partnerships. The witness indicated an LLC is more like a partnership, but noted the primary difference is that all owners/members have limited liability in an LLC—something not found in partnerships. We conclude that the limitation of liability of all LLC members is a substantial difference especially relevant to the provisions of our liquor laws.

Our examination of the pertinent constitutional provisions leads us to conclude that their evident purpose was the assignment of personal responsibility for compliance with

the liquor laws. Thus, business forms that did not insure such personal responsibility were excluded from eligibility for licensing.

The OLLC Act does exactly what its name indicates. It creates a form of business that has as its most important feature the limitation of liability of its members. This liability limitation is also a shield from the very responsibility and accountability that the constitutional provisions regarding alcoholic beverage laws and enforcement sought to impose. The trial court reversed the ABLE decision as contrary to law. Based upon the foregoing analysis, we conclude that there was no such error and that the trial court erred in reversing the ABLE decision. Because of our ruling, we do not need to address ABLE’s contention that the trial court erred in ordering it to grant a license when an application had not been made. The judgment of the trial court is REVERSED.

GOODMAN, P. J., and REIF, J. (sitting by designation), concur.

JM AVALON INVESTMENTS, LLC v. NISCHAN

1997 WL 133939 (Conn. Super. 1997)

SKOLNICK, J.

On February 6, 1996, the plaintiffs, JM Avalon Investments, LLC (Avalon) and William J. Gaspero, filed a seven-count complaint alleging conversion, fraud, negligence, two counts of breach of loan agreements, and two counts in unjust enrichment against the defendants, Michel and Lori Nischan. The plaintiffs allege the following facts in their complaint. On January 27, 1994, Avalon was formed with Gaspero and Lori Nischan as its members, for the purpose of operating a restaurant in Stamford, Connecticut known as “Miche Mache.” Michel Nischan, the husband of Lori Nischan served as the chef and general manager of Miche Mache, and was assisted in the management by Lori Nischan. The plaintiffs also allege that the defendants converted cash and property of Miche Mache; fraudulently failed to transfer the trade name “Miche Mache” to Avalon; negligently damaged the plaintiffs’ property including the company car; and refused to repay loans made by Gaspero and Avalon in the amounts of \$34,000 and \$24,000.

On January 15, 1997, the defendants filed an amended motion to dismiss . . . in which they argue that the court lacks subject matter jurisdiction on the ground that Avalon lacks standing to sue.

* * *

The defendants contend that the court lacks subject matter jurisdiction because Avalon was not authorized to bring suit against the defendants, and because Avalon ceased to exist by operation of law when Lori Nischan tendered her resignation on August 30, 1995.

“Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the cause of action . . . [O]nce the question of lack of [standing] is raised, [it] must be disposed of no matter in what form it is presented . . . [A] court must have jurisdiction to determine its own jurisdiction once that has been put in issue.” (Citation omitted)

The defendants argue that Gaspero brought this action on behalf of Avalon without the consent of Lori Nischan, a fifty percent owner of Avalon. The plaintiffs maintain that they have authority to bring this action pursuant to General Statutes 34-100 et. seq. General Statutes 34-186 provides that “[s]uits may be brought by or against a limited liability company in its own name.” General Statutes 34-187(a) provides in pertinent part that “[e]xcept as otherwise provided in an operating agreement, suit on behalf of the limited liability company may be brought in the name of the limited liability company by: (1) Any member or members of a limited liability company, whether or not the articles of organization vest management of the limited liability company in one or more managers, who are authorized to sue by the vote of a majority in interest of the members. . . .”

The defendant, Lori Nischan, argues that she is fifty percent owner, and that she did not give her consent to bring suit in the name of Avalon. However, 34-187(b) provides that “[i]n determining the vote required under section 34-142 for purposes of this section, the vote of any member or manager who has an interest in the outcome of the suit that is adverse to the interest of the limited liability company shall be excluded.” The plaintiff’s complaint, with the exception of two counts, alleges tortious conduct and breach of a loan agreement by Lori Nischan against Avalon. There-

fore, the court believes that her interests in the outcome of the suit are adverse to those of Avalon. If Nischan is excluded from voting, the only remaining member of Avalon is Gaspero. Accordingly, the court finds that Gaspero has the authority to bring an action in the name of Avalon.

The defendants also contend that Lori Nischan resigned as a member of Avalon on August 30, 1995, thereby dissolving Avalon by operation of law, leaving it without standing to sue. Nevertheless, General Statutes 34-208(a) provides in relevant part that “[e]xcept as otherwise provided in writing in the operation agreement, the business and affairs of the limited liability corporation may be wound up (1) by the members or managers who have authority pursuant to section 34-140 to manage the limited liability company prior to dissolution . . .” General Statutes 34-140(a) provides that “[s]ubject to any provisions of sec-

tions 34-100 to 34-242, inclusive, or the articles of organization, the business, property and affairs of a limited liability company shall be managed by its members.

Since Lori Nischan resigned on August 30, 1995, that left Gaspero as the only member with authority to wind up Avalon. Section 34-208(b) provides in pertinent part that “[t]he persons winding up the business and affairs of the limited liability corporation may, in the name of, and for and on behalf of, the limited liability company: (1) Prosecute and defend suits. . . .”

The court finds, based on the relevant statutes, that Avalon has standing to bring suit. Gaspero has authority to bring suit in the name of Avalon because of Lori Nischan’s adverse interest in the outcome of the action, and because she resigned as a member of Avalon. . . . Accordingly, the defendants’ motion to dismiss is denied.

PROBLEMS

1. Describe three advantages of a limited liability company over a general partnership. Describe three disadvantages of a limited liability company compared with a general partnership.
2. Describe three advantages of a limited liability company over a limited partnership. Describe three disadvantages of a limited liability company compared with a limited partnership.
3. List two corporate characteristics of a limited liability company, and explain why they are advantages or disadvantages for operation of the business.
4. Is it better to draft operational rules that require permanence into the articles of organization or into the operating agreement, and why?
5. What makes a limited liability company more flexible for tax purposes than a Subchapter S corporation?
6. If the organizers of a company want all participants to have limited liability, what makes a limited liability company easier to form than a limited partnership?

PRACTICE ASSIGNMENTS

1. Select a limited liability company statute in your state or a state near you, and determine the answers to the following questions based upon that statute:
 - a. What is the longest permissible period of duration for the limited liability company?
 - b. Is the company managed by members or managers?
 - (1) If the company is managed by managers, how are they elected?
 - (2) If the company is managed by members, how do they meet and vote on management matters?
 - c. Can a membership interest be transferred without the consent of the other members? If consent is required, what percentage of members must approve a transfer of a membership interest?
 - d. What type of consideration is permitted for the purchase of a membership interest?
 - e. What types of business may the limited liability company lawfully conduct?
 - f. Under what circumstances will the limited liability company dissolve? Can the members continue the business after dissolution?
2. Using the same statute and assuming that a client wants to change the statutory rules for the operations of the business, make a list of those matters that may be changed only in the articles of organization, those that may be changed only in the operating agreement, and those that may be changed in either document.
3. Susan Rogers, Ed Naylor, and Adam Golodner are starting an environmental waste disposal business in Richmond, Virginia. The business will be called “Recycled Refuse,” and each of them will be involved in managing

and operating the business. Susan will be the primary administrator of the business, Ed will be the salesperson, and Adam will handle the financial affairs. They will each contribute \$50,000 to begin the business, and they expect to share all benefits from the business equally. None of them will receive a salary, but each of them would like to draw \$5,000 advances monthly against the profits of the business, and they will agree to return any draws in excess of their respective share of profits within 30 days of the end of each year (when their annual share of profits is finally determined). The offices of the company will be located at 98076 Ridge Road, Richmond, Virginia. Susan will be the registered agent of the company.

- a. Prepare articles of organization for a limited liability company to be formed to operate this business.
 - b. Prepare an operating agreement for the company, using sample Exhibit I-4 in Appendix I.
4. Paul Lewis is a sole proprietor of a business known as “Lewis Mens Wear and Storm Door Company.” Lewis wants to solicit new capital from his uncle, Louis Lewis, and his aunt, Lois Lewis, to expand his business and open two new stores. Prepare a memorandum to Paul describing the advantages of using a limited liability company for the receipt of capital from Louis and Lois and for the continued operations of the business.

ENDNOTES

1. See C. Bishop and D. Kleinberger, *Limited Liability Companies, Tax and Business Law*, Warren, Gorham & Lamont (2004).

2. See “Taxation of a Corporation—Subchapter S Election” in Chapter 6.

3. Internal Revenue Code (hereafter I.R.C.) of 1986, 26 U.S.C.A. § 1361(b) (2) (A). Since a limited liability company is treated as a partnership for tax purposes, a Subchapter S corporation would be able to own more than 80% of a limited liability company without losing the Subchapter S status. A limited liability company could be used as a vehicle for a combination of Subchapter S corporations. See Rev. Rul. 77-220, 1977-1 C.B. 263.

4. I.R.C. § 1361(b) (1) (D).

5. See “Limited Liability and Contributions” and “Management and Control” in Chapter 4.

6. See Uniform Limited Liability Company Act (“U.L.L.C.A.”) § 201.

7. U.L.L.C.A. § 112.

8. See “Taxation of a Limited Liability Company” in this chapter.

9. See, U.L.L.C.A. §§ 101(2) and 203(a)(5).

10. U.L.L.C.A. § 112.

11. U.L.L.C.A. § 112(b)(12).

12. Del. Code Ann. tit. 6, § 18-106.

13. Under U.L.L.C.A. § 103(a) the operating agreement is intended to regulate the affairs of the company and the conduct of its business and to govern relations among the members, managers, and the company. The operating agreement may vary almost all of the provisions of the statute to suit the desires of the members and managers, with only a few limitations stated in U.L.L.C.A. § 103(b).

14. See “Statutory Powers of a Corporation” in Chapter 4.

15. U.L.L.C.A. § 401; and see Okla. Stat. Ann. tit. 148, § 2023, permitting cash, property, services rendered, or a promissory note or other obligation to contribute cash or property or to perform services.

16. See Va. Code § 13.1-1046.

17. See “Managers” in this chapter; U.L.L.C.A. § 404(b)(3)(i) and Colo. Rev. Stat. § 7-80-402(2).

18. See U.L.L.C.A. § 404(c) and Colo. Rev. Stat. § 7-80-702(1). If the other members do not unanimously approve the transfer, the transferee will have no right to participate in the management.

19. U.L.L.C.A. § 404(c) and 801(b)(2).

20. McKinney’s Cons. Laws. N. Y. Ann. Ch. 34 § 401.

21. See Md. Code Ann. § 4A-401.

22. See Tex. Corps. & Ass’n’s Code Ann. tit. 605, § 4.07(A)(1).

23. U.L.L.C.A. 404 and Colo. Rev. Stat. § 7-80-706(1).

24. U.L.L.C.A. §§ 601(1) and 602.

25. U.L.L.C.A. § 701.

26. U.L.L.C.A. § 601.

27. See Colo. Rev. Stat. § 7-80-606.

28. See Colo. Rev. Stat. § 7-80-607.

29. U.L.L.C.A. § 702.

30. U.L.L.C.A. § 404(c)(7) and see Colo. Rev. Stat. § 7-80-701.

31. U.L.L.C.A. § 801.

32. See, e.g., Colo. Rev. Stat. § 7-80-405.

33. U.L.L.C.A. § 408(b)(1).

34. See, e.g., Va. Code § 13.1-1028(B) (2).

35. Colo. Rev. Stat. § 7-80-707.

36. See Colo. Rev. Stat. § 7-80-709; “Corporate Meetings—Shareholder Meetings—Notice” in Chapter 10.

37. See Colo. Rev. Stat. § 7-80-708; “Corporate Meetings—Shareholder Meetings—Quorum and Voting of Shares” in Chapter 10.

38. U.L.L.C.A. § 404(d).

39. See Minn. Stat. Ch. 322B § 322B.67.

40. U.L.L.C.A. § 103(a), and see Delaware Stat. Ann. § 6-18-404.

41. See Colo. Rev. Stat. § 7-80-402.

42. See Colo. Rev. Stat. § 7-80-402(1); “Business Corporation—Ownership and Management of a Corporation—Directors” in Chapter 6.

43. Colo. Rev. Stat. § 7-80-402(1).

44. See Colo. Rev. Stat. § 7-80-403; “Business Corporation—Ownership and Management of a Corporation—Directors” in Chapter 6.

45. Colo. Rev. Stat. § 7-80-401(2).

46. See Mass. Gen. Laws ch. 156C § 25.

47. See Colo. Rev. Stat. § 7-80-401.

48. Minn. Stat. § 322B-613.

49. Colo. Rev. Stat. § 7-80-404.

50. Colo. Rev. Stat. § 7-80-404.

51. Colo. Rev. Stat. § 7-80-405.

52. U.L.L.C.A. § 301(b)(2) and see Utah Code Ann. § 48-2b-125(2).

53. See U.L.L.C.A. § 404(b)(1).

54. Colo. Rev. Stat. § 7-80-407.

55. Colo. Rev. Stat. § 7-80-408.

56. See “Ownership and Management of a Corporation—Director’s Duties” in Chapter 8.

57. See Ohio Rev. Stat. § 1705.29(B).

58. See Minn. Stat. § 322B.620.

59. U.L.L.C.A. § 409(c) and 409(h)(2).

60. U.L.L.C.A. § 409(b) and 409(h)(2).
61. U.L.L.C.A. § 409(d) and 409(h)(2).
62. Colo. Rev. Stat. § 7-80-406(3).
63. Colo. Rev. Stat. § 7-80-705.
64. Colo. Rev. Stat. § 7-80-410.
65. See Me. Ann. Laws §31-13-654 and “The Articles of Incorporation—Optional Provisions—Indemnification of Officers and Directors” in Chapter 6.
66. U.L.L.C.A. § 101(5).
67. U.L.L.C.A. § 501(b) and see Colo. Rev. Stat. § 7-80-702(1). The Uniform Act also provides that the distributional interest can be evidenced by a certificate, like a stock certificate in a corporation. U.L.L.C.A. § 501(c).
68. See “Share Transfer Restrictions and Buy-out Agreements” in Chapter 13.
69. See U.L.L.C.A. § 502; “A Partner’s Interest in a Partnership” in Chapter 3.
70. See U.L.L.C.A. § 502.
71. See U.L.L.C.A. § 503(a).
72. See U.L.L.C.A. § 401.
73. See Minn. Stat. §§ 322B.40-42.
74. See Ill. Rev. Stat. ch. 805, § 25-1.
75. R.I. Gen. Laws §§ 7-16-26, 7-16-27.
76. U.L.L.C.A. §§ 603(a)(2) and 701(a)(2); and see Ill. Rev. Stat. ch. 805, § 25-10.
77. R.I. Gen. Laws § 7-16-30.
78. Ill. Rev. Stat. ch. 805, § 25-20.
79. Minn. Stat. § 322B.54.
80. Minn. Stat. § 322B.55.
81. See Minn. Stat. § 322B.56 and “Corporate Dividends and Other Distributions—Cash and Property Dividends” in Chapter 11.
82. See U.L.L.C.A. § 203(a)(5).
83. See Treas. Reg. § 301.7701-2.
84. See “Taxation of a Limited Liability Company” in this chapter.
85. See “Taxation of a Limited Liability Company” in this chapter.
86. See U.L.L.C.A. § 801.
87. See, e.g., Ark. Code Ann. § 4-32-802.
88. See, e.g., Tex. Corps. & Ass’ns Code Ann. tit. 605, § 6.01(A) (5); Kan. Stat. § 17-776116.
89. See U.L.L.C.A. § 701.
90. See Colo. Rev. Stat. § 7-80-801(2).
91. See U.L.L.C.A. § 808 and Colo. Rev. Stat. § 7-80-805. The Uniform Act provides that if the operating agreement does not specify otherwise, members receive the return of their contributions and any surplus is distributed to them equally. U.L.L.C.A. § 808(b).
92. See U.L.L.C.A. § 805 and Colo. Rev. Stat. § 7-80-806.
93. See U.L.L.C.A. § 902.
94. Va. Code Ann. § 13.1-1010.1.
95. See U.L.L.C.A. § 904 and Va. Code Ann. § 13.1-1070 to 13.1-1073.
96. Rev. Rul. 88-76, 1988-2 C.B. 360.
97. See I.R.C. 88-76 (relating to the classification of a Wyoming limited liability company as a partnership for federal income tax purposes); Priv. Ltr. Rul. 8937010 (relating to the classification of a Florida limited liability company as a partnership for federal income tax purposes).
98. See Treas. Reg. §§ 301-7701-1 through 7701-8 (1996).
99. Florida treats a limited liability company as an “artificial entity,” which formerly placed it within the corporate tax rules, but recently Florida has applied partnership tax rules to limited liability companies. Fla. Stat. § 608.471.
100. See the tradename affidavits and certificates for assumed business names under “Formation and Operation of a Sole Proprietorship” in Chapter 2.
101. Nev. Rev. Stat. § 86.141; Wyo. Stat. § 17-15-103.
102. Utah specifically authorizes professional services to be formed as limited liability companies in the limited liability company statute. See Utah Code Ann. § 48-2b-102(7).
103. See Utah Code Ann. § 48-2b-111.
104. See “Corporations in Foreign Jurisdictions” in Chapter 14.
105. See “Formation of a Corporation—The Articles of Incorporation” in Chapter 8.
106. U.L.L.C.A. § 203.
107. U.L.L.C.A. § 103.
108. Md. Corps. & Ass’ns Code Ann. § 4A-402(a).
109. See “Formation of a Corporation—Formalities After Formation of the Corporation—Organizational Meetings” in Chapter 8; “Corporate Meetings—Requirements for Organizational Meetings” in Chapter 10.