

**PART 10. THE USEFULNESS OF PLANNING MEMOS IN DRAFTING
OPERATING AGREEMENTS**

OVERVIEW

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EXHIBIT 10-1 Planning Memo for Cosmic Widgets, LLC

A. WHAT ARE PLANNING MEMOS? WHAT ARE THEIR PURPOSES?

- 1) Planning memos are plain-English memos from lawyers to their LLC formation clients about the lawyers' proposals to their clients concerning:
 - a) The background facts relevant to these formations,
 - b) The legal and tax structure of the LLCs,
 - c) The provisions in their operating agreement, and
 - d) Related matters.
- 2) The primary purpose of planning memos is to help clients evaluate these proposals before the lawyers draft their operating agreements. However, as discussed below, planning memos can also be highly useful to the lawyers that draft them.

B. QUESTION FOR ATTENDEES ABOUT PLANNING MEMOS

Do any attendees at today's seminar routinely use planning memos in forming LLCs?

C. THE BENEFITS OF PLANNING MEMOS

In my experience, planning memos can provide major benefits both for LLC formation clients and for their lawyers.

- 1) For LLC formation clients.
 - a) Planning memos help clients understand and evaluate the process of the formation of their LLC and their lawyers' plans for their operating agreement.
 - b) Operating agreements necessarily contain many technical legal and tax terms and have highly formal structures. For these reasons, many LLC formation clients find it painful and difficult to review them. The review process will often be much easier and more fruitful for them if, before they undertake it, they have an opportunity to review planning memos.

2) For their lawyers.

- a) Planning memos help lawyers ensure that in the LLC formation in question, they are proceeding on the basis of a correct factual understanding and that they are not overlooking significant issues.
- b) The drafting of planning memos takes time and thus increases LLC formation fees. They are thus useful to lawyers from an economic viewpoint. However, my experience is that the extra cost of planning memos is cost-effective for virtually all LLC formation clients and thus is a “reasonable” extra cost under Utah Rules of Professional conduct, Rule 1.5 (requiring that legal fees be “reasonable”).

D. WHAT ISSUES SHOULD BE ADDRESSED IN PLANNING MEMOS?

Set forth below is a basic outline for drafting a template outline for planning memos. The text of a planning memo for “Cosmic Widgets, LLC” is set forth in Exhibit 10-1.

- 1) Introduction
 - a) Purpose of the memo
 - b) Engagement terms
- 2) Facts
- 3) Non-tax choice of entity
- 4) Choice of governing LLC act
- 5) Tax choice of entity
- 6) Identification of operating agreement issues and proposed treatment of them
- 7) Miscellaneous (such as discussions about insurance issues and veil-piercing issues)