

BEST PRACTICES IN FORMING LLCs UNDER THE REVISED UTAH LIMITED LIABILITY COMPANY ACT

A FOUR-HOUR SEMINAR SPONSORED BY THE BUSINESS SECTION
OF THE UTAH BAR ASSOCIATION

SALT LAKE CITY—MAY 8, 2013

SEMINAR PRESENTER: JOHN M. CUNNINGHAM¹

PART 1. INTRODUCTION

- 1) Welcome to the seminar. I feel quite honored to teach this seminar. I very much hope the seminar will be useful to you.
- 2) Self-introduction of the speaker. A word about my background insofar as relevant to the seminar.
 - a) My firm and my practice.
 - i) I am of counsel to a 90-lawyer New Hampshire-based law firm named McLane, Graf, Raulerson & Middleton, P.A. Our coordinating firm in SLC is Parsons Behle & Latimer, which, like the McLane firm, is a member of the TerraLex global consortium of law firms.
 - ii) I am my firm's in-house LLC specialist. I'm licensed to practice in New Hampshire and Massachusetts.
 - b) My professional focus on LLCs. I've devoted most of my professional time since 1992—a total of more than 21 years—to studying, writing and teaching about LLC law, tax and practice and to handling LLC matters.
 - c) Drafting Limited Liability Company Operating Agreements as the basis for this seminar.
 - i) I am the principal author of *Drafting Limited Liability Company Operating Agreements*, published by Wolters Kluwer, a global professional publisher.
 - ii) *Drafting Limited Liability Company Operating Agreements*, originally published in 1998, is a comprehensive LLC formbook and practice manual. The co-author is Vern Procter of the Delaware Bar. I update it twice a year. In writing *Drafting Limited Liability Company Operating Agreements*, I've tried to identify every significant legal and tax issue relevant to LLC formation practice and to think and write systematically about each.
 - iii) Writing *Drafting Limited Liability Company Operating Agreements* is the basis for this seminar. By this, I mean that I've sought to include in the seminar every important idea in *Drafting Limited Liability Company Operating Agreements*, and that I have relied on the contents of the book in

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writing this sentence outline (the “Outline”). All of the key ideas in *Drafting Limited Liability Company Operating Agreements* are reflected in the Outline.

- d) My role in drafting and revising the New Hampshire LLC Act.
 - i) I was the instigator and a participant in drafting the original New Hampshire Limited Liability Company Act in 1993 and in drafting the major amendments to it in 1997.
 - ii) I formed and chaired the drafting of the Revised New Hampshire Limited Liability Company Act, and I was its principal architect and drafter. The Revised New Hampshire Limited Liability Company Act became effective on January 1, 2013.
 - iii) I hope this experience will enable me to be useful to you in discussing the New Act.
- 3) The duration, purpose and content of the seminar
 - a) Length and duration of seminar—overview. This is a four-hour seminar. The principal purpose of the seminar is to address the issue of how to form LLCs under the Utah Revised Uniform Limited Liability Company Act (the “New Act”) in accordance with LLC formation best practices. As you no doubt know, the New Act will become effective on January 1, 2014 for all Utah LLCs formed on and after that date.
 - b) The preeminence of LLCs in Utah; the irreducible complexity of forming them in accordance with best practices
 - i) As you no doubt know, LLCs are, by a wide margin, the entities of choice for Utah business start-ups. For example, thus far in 2013, Utahns have formed more than five times as many LLCs as corporations. For detailed Utah entity formation statistics, see attached Exhibit 1-1.
 - ii) However, as we’ll see, LLC formation practice is complex and, to form them in accordance with best practices requires substantial knowledge and skill.
 - iii) Thus, for many hundreds of Utah’s 8,600 lawyers, and perhaps for a thousand or more of them, forming LLCs in accordance with best practices is an important topic.
 - c) The New Act. The Business Section has asked that, in addition to addressing LLC formation best practices, I address the New Act for one hour and, in particular, that I identify any pitfalls I may see in it and provide suggestions as to how to deal with them.
 - d) Professional conduct issues. Finally, the Business Section has asked me to devote one hour of the seminar to a discussion of the issues that can arise under the Utah Rules of Professional conduct in forming LLCs under the New Act.
 - e) The unity of the seminar. However, I’m confident that my discussions of the New Act and of professional conduct issues will tie in very closely with the above best practices issue, since:

- i) LLC formation best practices under the New Act include obtaining a solid basic knowledge of that Act as relevant to LLC formations;
 - ii) Forming Utah LLCs in accordance with Utah professional conduct rules is a key best practice in these formations.
- 4) LLC tax. In this seminar, I will address LLC federal income tax only very briefly and Utah state taxation of LLCs and their members not at all. The focus of the seminar will on be LLC *business organization law* and on LLC formation practice.
- 5) The sentence outline and exhibits. I assume that many of you have downloaded and printed out the Outline or are viewing it on your PCs. In this seminar, I will closely follow the Outline.
- 6) The seminar materials. The seminar materials include the following materials:
 - a) A table of contents of the seminar materials;
 - b) Eleven numbered parts. They include eleven numbered parts (including this part)—one part for each of the eleven main topics addressed in the seminar.
 - c) Ten numbered exhibits. They include a total of ten exhibits, numbered in accordance with the parts of the Outline that they accompany. For example, the two exhibits that accompany Part 6 are numbered Exhibits 6-1 and 6-2.
 - d) Two general-purpose model operating agreements. They include two general-purpose model operating agreements (“forms”), which I will briefly describe below.
 - e) The New Act, with summary and detailed tables of contents. They include the text of the New Act, together with a summary table of contents and a detailed table of contents that I have added to that text.
- 7) The two forms.
 - a) The two forms—overview. Wolters Kluwer permits me to provide “limited materials” from *Drafting Limited Liability Company Operating Agreements* to attendees of my seminars. The materials for this seminar include the two *Drafting Limited Liability Company Operating Agreements* general-purpose model operating agreements (“forms”) that I believe are likely to be the most useful to Utah lawyers—namely, namely, the forms designated in *Drafting Limited Liability Company Operating Agreements* as Forms 1.2 and 3.1. I’ve tailored both forms to reflect the provisions of the New Act.
 - b) Form 1.2. Form 1.2 is for use in forming a Utah single-member LLC whose members are individuals, which are managed by their members and by non-member assistant managers, and which is taxable as a sole proprietorship.
 - c) Form 3.1. Form 3.1 is for use in forming a Utah multi-member LLC that has two equal members and a general partnership management structure and that is taxable as a partnership.
 - d) The two forms are merely starting points. I believe that both forms are generally consistent with the New Act. However, like all forms, they are mere starting

- points, and, assuming that you want to make any use of them in your LLC formation practice, you may well want first of all to make significant changes in them on the basis of your study of the New Act.
- e) The relationship of the two forms to the other forms in *Drafting Limited Liability Company Operating Agreements*. *Drafting Limited Liability Company Operating Agreements* contains 26 other general-purpose operating agreement. However, Form 1.2 can be fairly readily be transformed into any of the other forms for single-member LLCs in the book, and Form 3.1 can fairly readily be transformed into any of the other forms in the book for multi-member LLCs.
 - 8) Questions from attendees during the seminar. I will welcome questions during the seminar, but before asking your question, please make sure it is likely to be of general value to attendees. You should also feel free to call or e-mail me with any questions you may have about matters addressed in this seminar. My contact information is in footnote 1 on the first page of the Outline.
 - 9) Questions for attendees. Before I begin the seminar, I'd like to ask a few questions about your LLC formation backgrounds:
 - a) How many attendees have never formed Utah LLCs?
 - b) How many have formed LLCs with initial capitalizations exceeding \$1 million?
 - c) How many have a solid basic knowledge of LLC statutory law?
 - d) In particular, how many have a reasonably detailed understanding of the terms of the pick-your-partner and charging order provisions of the current Utah LLC Act (the "Current Act") and their importance in LLC formation practice?
 - 10) Getting through the Outline during the seminar.
 - a) As you will see, the Outline for this seminar is very detailed. I will do my best to address at least briefly during the seminar all of the key points in the Outline, since I think my doing so may help you understand and remember these points.
 - b) However, especially if there are a significant number of questions during the seminar, I will probably have to omit discussion of many of these points. I hope that, to the extent I do so, you will find it worthwhile to review these points by reading the Outline after the seminar.