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FOR DISCUSSION ONLY

PROPOSED REVISIONS OF UNIFORM LIMITED PARTNERSHIP ACT (1976) WITH 1985 AMENDMENTS

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PROPOSED REVISIONS OF UNIFORM LIMITED PARTNERSHIP ACT (1976) WITH 1985 AMENDMENTS

WITH PREFATORY NOTE AND REPORTER'S NOTES

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PREFATORY NOTE

Re-RULPA's Overall Approach

Re-RULPA is a "stand alone" act, "de-linked" from the general partnership act. To be able to stand alone, Re-RULPA incorporates many provisions from RUPA and some from ULLCA. As a result, Re-RULPA is far longer and more complex than RULPA.

Re-RULPA is being drafted for a business world in which limited liability partnerships and limited liability companies can meet many of the needs formerly met by limited partnerships. Re-RULPA therefore targets two types of enterprises that seem largely beyond the scope of LLPs and LLCs: (i) sophisticated, manager-entrenched commercial deals whose participants commit for the long term, and (ii) estate planning arrangements (family limited partnerships). Re-RULPA accordingly assumes that, more often than not, people utilizing the Act will want:

- strong centralized management, strongly entrenched, and
- passive investors with little right to exit the entity

Re-RULPA's rules, and particularly its default rules, have been designed to reflect these assumptions.

LLLP Status as the Default Setting

A growing number of States allow limited partnerships to become limited liability limited partnerships. A limited liability limited partnership ("LLLP") is a limited partnership in which general and limited partners benefit from a corporate (and LLC) like liability shield.

Since its very first draft, Re-RULPA has permitted LLLPs. Under the early drafts, non-LLLP status was the "default setting," but a limited partnership could become a limited liability limited partnership simply by including a one line statement in the certificate of limited partnership.

At its October, 1999 meeting, the Drafting Committee voted to change the Act's default setting with respect to LLLP status. The Committee revisited and reiterated that decision at its April, 2000 meeting. The current draft therefore

provides that a Re-RULPA limited partnership will be an LLLP unless the certificate of limited partnership provides otherwise. In this respect, Re-RULPA parallels ULLCA. See ULLCA §§ 303(c) and 203(a)(7).

The Drafting Committee recognizes that this decision is important and controversial and plans to revisit the issue again. The Drafting Committee's decision on this point – like all other decisions made to date – is merely provisional.

Nonetheless, some strong arguments favor the Drafting Committee's current position. The overwhelming majority of limited partnerships formed under current law use indirect means to provide a liability shield for the general partner. Typically, the general partner is itself a corporation or a limited liability company. It therefore seems likely that almost every Re-RULPA limited partnership will be an LLLP.

Except in extraordinary circumstances, a statute's default setting should mirror the choices that most users of the statute would make on their own. It therefore seems logical to make LLLP status the default setting for Re-RULPA.

The Reporter is aware that some very experienced and knowledgeable practitioners currently oppose making LLLP status the default setting, and the Reporter is trying to understand in detail the rationale behind this opposition. The Reporter is also trying to identify situations in which a knowledgeable practitioner would recommend to a person forming a limited partnership that the general partner go "unshielded" vis á vis **all** creditors and obligees of the limited partnership.

Comparison of RULPA and Re-RULPA

The following table compares some of the major characteristics of RULPA and Re-RULPA. In most instances, the rules involved are "default" rules – i.e., subject to change by the partnership agreement.

Characteristic	RULPA	Re-RULPA
relationship to general partnership act	linked § 1105	de-linked (but many RUPA provisions inserted into Re-RULPA)
constructive notice via publicly filed documents	only that limited partnership exists and that designated general partners are general partners, § 208	RULPA constructive notice provisions carried forward, § 103(c), plus constructive notice, 90 days after appropriate filing, of: general partner dissociation and of limited partnership dissolution, termination, merger and conversion, § 103(d)
duration	specified in certificate of limited partnership § 201(a)(4)	perpetual; subject to change in partnership agreement § 104(d)
use of limited partner name in entity name	prohibited, except in unusual circumstances § 102(2)	permitted §108(a)
annual report	none	required, § 210
limited partner liability for entity debts	none unless limited partner "participates in the control of the business" and person "transact[s] business with the limited partnership reasonably believing . . . that the limited partner is a general partner," § 303(a); safe harbor lists many activities that do not constitute participating in the control of the business, § 303(b)	none, "even if the limited partner participates in the management and control of the limited partnership," § 303
limited partner duties	none specified	obliged to "discharge duties . . . and exercise right consistently with the obligation of good faith and fair dealing," § 305(c); fiduciary duties apply to the extent the partnership agreement allocates general partner duties to a limited partner and the limited partner exercises those duties, § 305(b)

partner access to information – required records	all partners have right of access; no requirement of good cause; Act does not state whether partnership agreement may limit access; §§ 105(b) and 305(1)	list of required records expanded slightly; Act expressly states that partner does not have to show good cause; §§ 304(a), 407(a); however, the partnership agreement may set reasonable restrictions on access to and use of required records, § 110(b)(3)
partner access to information – other information	limited partners have the right to obtain other relevant information "upon reasonable demand," § 305(2); general partner rights linked to general partnership act, § 403	for limited partners, RULPA approach essentially carried forward, with procedures and standards for making a reasonable demand stated in greater detail, plus requirement that limited partnership supply known material information when limited partner consent/vote sought, § 304; general partner access rights made explicit, borrowing from ULLCA and RUPA, including obligation of limited partnership and general partners to volunteer certain information, § 407
general partner liability for entity debts	complete, automatic and formally inescapable, § 403(b) (n.b. – in practice, most limited partnerships use a general partner that has its own liability shield; e.g. a corporation or limited liability company)	none, unless the certificate of limited partnership provides otherwise, § 404
general partner duties	linked to duties of partners in a general partnership, § 403	RUPA general partner duties imported, § 408; general partner's non-compete duty continues during winding up, § 408(b)(3); following ULLCA § 409(h)(4), general partner relieved of responsibility to the extent partnership agreement vests managerial authority in one or more limited partners, § 408(f)

allocation of profits, losses and distributions	provides separately for sharing of profits and losses, § 503, and for sharing of distributions, § 504; allocates each according to contributions made and not returned	eliminates as unnecessary the allocation rule for profits and losses; allocates distributions according to contributions made, § 503 (n.b. – in the default mode, Re-RULPA formulation produces the same result as RULPA formulation)
partner liability for distributions	recapture liability if distribution involved "the return of . . . contribution"; one year recapture liability if distribution rightful, § 608(a); six year recapture liability if wrongful, § 608(b)	following ULLCA §§ 406 and 407, Re-RULPA adopts the RMBCA approach to improper distributions, §§ 508 and 509
limited partner voluntary dissociation	theoretically, limited partner may withdraw on six months notice unless partnership agreement specifies a term for the limited partnership or withdrawal events for limited partner, § 603; practically, virtually every partnership agreement specifies a term, thereby eliminating the right to withdraw (n.b. – due to estate planning concerns several States have amended RULPA to prohibit limited partner withdrawal unless otherwise provided in the partnership agreement)	no "right to dissociate as a limited partner before the termination of the limited partnership," § 601(a); power to dissociate expressly recognized, § 601(b)(1).
limited partner involuntary dissociation	not addressed	lengthy list of causes, § 601(b), taken with some modification from RUPA
limited partner dissociation – payout	"fair value . . . based upon [the partner's] right to share in distributions," § 604	no payout; person becomes transferee of its own transferable interest, § 602(3)
general partner voluntary dissociation	right exists unless otherwise provided in partnership agreement, § 602; power exists regardless of partnership agreement, § 602	RULPA rule carried forward, although phrased differently, § 604(a); dissociation before termination of the limited partnership is defined as wrongful, § 604(b)(2)

general partner involuntary dissociation	§ 402 lists causes	following RUPA, Re-RULPA § 603 expands the list of causes, including expulsion by court order, § 603(5)
general partner dissociation – payout	"fair value . . . based upon [the partner's] right to share in distributions," § 604, subject to offset for damages caused by wrongful withdrawal, § 602	no payout; person becomes transferee of its own transferable interest, § 605(5)
transfer of partner interest – nomenclature	"Assignment of Partnership Interest," § 702	"Transfer of Partner's Transferable Interest," § 702
transfer of partner interest – substance	economic rights fully transferable, but management rights and partners status are not transferable, § 702	same rule, but Re-RULPA §§ 701 and 702 follow RUPA's more detailed and less oblique formulation
rights of creditor of partner	limited to charging order, § 703	essentially the same rule, but, following RUPA and ULLCA, Re-RULPA has a more elaborate provision that expressly extends to creditors of transferees, § 703
dissolution by partner consent	requires unanimous written consent, § 801(3)	requires consent of all general partners and limited partners "owning a majority of the rights to receive distributions owned by persons as limited partners," § 801(2)

dissolution following dissociation of a general partner	occurs automatically unless all partners agree to continue the business and, if there is no remaining general partner, to appoint a replacement general partner, § 801(4)	if at least one general partner remains, no dissolution unless a general partner gives notice of dissolution or limited partners owning a majority of the rights to receive distributions owned by limited partners consent to dissolve, § 801(3)(A); if no general partner remains, dissolution occurs unless limited partners owning a majority of the rights to receive distributions owned by limited partners consent to continue the business and admit at least one new general partner, § 801(3)(B)
filings related to entity termination	certificate of limited partnership to be cancelled when limited partnership dissolves and begins winding up, § 203	limited partnership may amend certificate to indicate dissolution, § 803(a), and may file statement of termination indicating that winding up has been completed and stating a date of termination, § 203
procedures for barring claims against dissolved limited partnership	none	following ULLCA §§ 807 and 808, Re-RULPA adopts the RMBCA approach providing for giving notice and barring claims, §§ 806 and 807
conversions and conversions	no provision	Article 11 permits conversions to and from and mergers with any "business organization," defined as "a domestic or foreign general partnership, including a limited liability partnership, a limited partnership, including a limited liability limited partnership, a limited liability company, a business trust, a corporation, and any other entity having owners and ownership interests under its governing statute," §1101(1)

writing requirements	some provisions pertain only to written understandings; *see e.g.* §§ 401 (partnership agreement may "provide in writing for the admission of additional general partners"; such admission also permitted "with the written consent of all partners"), 502(a) (limited partner's promise to contribute "is not enforceable unless set out in a writing signed by the limited partner"), 801(2) and (3) (dissolution occurs "upon the happening of events specified in writing in the partnership agreement" and upon "written consent of all partners"), 801(4) (dissolution avoided following withdrawal of a general partner if "all partners agree in writing")	removes most writing requirements; but see § 801

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[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [Act] may be cited as the Revised Uniform Limited Partnership Act (20___).

SECTION 102. DEFINITIONS. In this [Act]:

(1) "Business" means any lawful activity, whether or not carried on for profit.

(2) "Certificate of limited partnership" means the certificate referred to in Section 201 and the certificate as amended or restated.

(3) "Contribution" means any benefit provided by a person to a limited partnership in order to become a partner or in the person's capacity as a partner.

(4) "Debtor in bankruptcy" means a person that is the subject of:

(A) an order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application; or

(B) a comparable order under federal, state, or foreign law governing insolvency.

(5) "Designated office" means:

(A) with respect to a limited partnership, the office that a limited partnership is required to maintain under Section 114; and

(B) with respect to a foreign limited partnership, its principal office.

(6) "Distribution" means a transfer of money or other property from a limited partnership to a partner in the partner's capacity as a partner or to a transferee on account of a transferable interest owned by the transferee.

(7) "Domestic limited partnership" means a limited partnership formed under this [Act]. The term includes a limited liability limited partnership. The term does not include a foreign limited partnership or foreign limited liability limited partnership.

(8) "Entity" means a person other than an individual.

(9) "Foreign limited partnership" means a partnership formed under the laws of a jurisdiction other than this State and required by those laws to have as partners one or more general partners and one or more limited partners. The term includes a foreign limited liability limited partnership.

(10) "Foreign limited liability limited partnership" means a foreign limited partnership whose general partners are from liability for the obligations of the foreign limited partnership under a provision similar to Section 404(c).

(11) "General partner" means:

(A) with respect to a domestic limited partnership, a person that has been admitted to a limited partnership as a general partner under Section 401; and

(B) with respect to a foreign limited partnership, a person that has rights, powers and obligations similar to those of a general partner in a domestic limited partnership.

(12) "Limited liability limited partnership" means a limited partnership whose certificate of limited partnership does not include a statement made pursuant to Section 404(b).

(13) "Limited partner" means:

(A) with respect to a domestic limited partnership, a person that has been admitted to a limited partnership as a limited partner under Section 301; and

(B) with respect to a foreign limited partnership, a person that has rights, powers and obligations similar to those of a limited partner in a domestic limited partnership.

(14) "Limited partnership," except in the phrases "foreign limited partnership" and "foreign limited liability limited partnership, means a domestic limited partnership.

(15) "Ownership interest" means an owner's proprietary interest in a business organization.

(16) "Partner" means a limited or general partner.

(17) "Partnership agreement" means a valid agreement, written or oral, of the partners as to the affairs of a limited partnership and the conduct of its business.

(18) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government,

governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(19) "Principal office" means the office where the principal executive office of a domestic or foreign limited partnership is located, whether or not the office is located in this State.

(20) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(21) "Required records" means the records that a limited partnership is required to maintain under Section 106.

(22) "Sign" means to identify a record, whether in writing, electronically, or otherwise, by means of a signature, mark, or other symbol, with intent to authenticate the record.

(23) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

(24) "Transfer" includes an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, and gift.

(25) "Transferable interest" means a partner's share of the profits and losses of the limited partnership and the partner's right to receive distributions.

(26) "Transferee" means a person to which all or part of a transferable interest has been transferred, whether or not the transferor is a partner.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether the definition of "business" should be revised, so that the definition better comports with common usage (see Reporter's Notes to paragraph (1), below); whether definitions of and references to "limit liability limited partnership" (paragraphs 7, 9 10 and 12) are necessary in light of the Drafting Committee's decision to make LLLP status the Act's default setting; whether the definition of foreign limited partnership is too restrictive (given Re-RULPA's significantly more powerful liability shield for limited partners); whether the definition of limited partner with respect to foreign limited partnerships is too restrictive (given Re-RULPA's significantly more powerful liability shield for limited partners)

"Business" [(1)] – At its October, 1998 meeting, the Drafting Committee decided not to confine limited partnerships to "business" activities and to permit a limited partnership to pursue any lawful purpose. The word "business" appears throughout RULPA, and at its March, 1999 meeting the Committee adopted this definition of "business" to allow the word to encompass whatever activities a limited partnership may undertake. So, for example, Section 105(b) provides that, subject to an exception not relevant here, "a limited partnership has the same powers as an individual to do all things necessary or convenient to carry on its business." Earlier drafts had followed RUPA § 101(1), stating: "'Business' includes every trade, occupation, and profession." *Compare* ULLCA § 101(3))(defining "business" to include "every trade, occupation, profession, and other lawful purpose, whether or not carried on for profit.")

The Reporter respectfully disagrees with the Committee's decision. The term "business" connotes *economic* activity. *See* Black's Law Dictionary ("Employment, occupation, profession, or commercial activity engaged in for gain or livelihood. Activity or enterprise for gain, benefit, advantage or livelihood. Enterprise in which person engaged shows willingness to invest time and capital on future outcome. That which habitually busies or occupies or engages the time, attention, labor, and effort of persons as a principal serious concern or interest or for livelihood or profit.") (citations omitted). A defined term should not contradict common usage, because a Humpty Dumpty definition makes trouble for the non-expert reader. "Definitions should not be too artificial. For example–'dog' includes a cat is asking too much of the reader; 'animal' means a dog or a cat would be better." Memorandum on Drafting of Acts of Parliament and Subordinate Legislation (1951), Department of Justice, Ottawa, Canada, quoted in Ritchie, Alice Through the Statutes, 21 McGill L.J. 685 (1975) and in *In re Elbridge*, 61 B.R. 484, 489 (Bankr. E.D.Mich. 1986). *See also TVA v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 2291 n. 18 (1978) (decrying a Humpty Dumpty approach to defining a term).

"Certificate" [2] – RULPA § 101(2), unchanged.

"Contribution" [(3)] – RULPA's definition has been changed to replace a list of items with a more general term ("benefit") that encompasses those items and to avoid using the word "contribute" as part of the definition of the term "contribution." The word "benefit" comes from Section 501 (Form of contribution), which in turn is taken, per the Committee's instruction, from ULLCA § 401. Some earlier drafts used "consideration" rather than "benefit." Changes from RULPA § 201(2) are as follow:

> "Contribution" means any ~~cash, property, services rendered, or a promissory note or other binding obligation to contribute cash or property or to perform services, which a partner contributes~~ benefit provided by a person to a limited partnership in order to become a partner or in ~~his~~ the person's capacity as a partner.

"Debtor in bankruptcy" [(4)] – Source: RUPA § 101(2).

"Designated office" [(5)] – Defining this term makes for easier drafting of certain provisions that relate both to foreign and domestic limited partnerships.

"Distribution" [(6)] – Derived from RUPA § 101(3). Changes from RUPA are as follows:

> "Distribution" means a transfer of money or other property from a limited partnership to a partner in the partner's capacity as a partner or to ~~the partner's~~ a transferee on account of a transferable interest owned by the transferee.

Aside from referring to the partnership as "a **limited** partnership," the Re-RULPA provision differs from RUPA § 101(3) in two ways. First, RUPA §101(3) refers to "the partner's transferee" rather than "a transferee." Re-RULPA's Section 101(26) defines "transferee," making inappropriate a reference to "the partner's transferee." The difference is primarily but not exclusively stylistic. Consider payments to the transferee of a "partner's transferee." Suppose that a partner transfers part of its transferable interest to a non-partner, and that person later re-transfers that interest to a third person. Are payments to that third person distributions? Under Re-RULPA, they clearly are. Under RUPA, the question appears to depend on whether RUPA §101(3) considers the third person to be "the partner's transferee."

The second substantive difference between Re-RULPA and RUPA is the definition's concluding phrase. The phrase does not appear in RUPA § 103 and was added (to Draft #2) based on a suggestion made at the Committee's July, 1997 meeting.

"Domestic limited partnership" [(7)] – This definition is added per the recommendation of the Representative of the Committee on Style.

"Entity" [(8)] – Source: ULLCA § 101(7). "Entity" is somewhat of a misnomer, because the term encompasses legal persons that might still be thought of as aggregates, or part aggregate/part entity (i.e., UPA general partnerships).

"Event of withdrawal" [deleted; formerly RULPA § 101(3)] – This definition is no longer needed because this draft follows RUPA and uses the term "dissociation." At its July, 1997 meeting, the Committee directed the Reporter to consider providing a definition of "dissociation." After reviewing UPA, RUPA, and ULLCA, the Reporter decided that Re-RULPA should not define "dissociation." Accordingly, Draft #2 did not define the term. Draft #3 preserved Draft#2's approach and produced no objection at the October, 1998 meeting.

The Reporter's rationale is fealty to RUPA and ULLCA. UPA § 29 defines dissolution in a way that gave rise to the RUPA/ULLCA concept of dissociation: "Dissolution . . . is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." However, neither RUPA nor ULLCA define "dissociation." Instead, those statutes list events causing "dissociation" and explain the meaning of the term through a Comment. Each Comment essentially mirrors UPA § 29. See RUPA § 601, Comment 1, first paragraph; ULLCA § 601, Comment, first sentence. In this instance, the Reporter sees no reason for Re-RULPA to deviate from the pattern established by RUPA and ULLCA.

"Foreign limited partnership" [(9)] – RULPA § 101(4), changed slightly to correct an inaccuracy and expanded to expressly encompass foreign LLLPs and limited partnerships formed under the laws of other jurisdictions and not just other U.S. States . As for the inaccuracy, the RULPA provision defines a foreign limited partnership as "having as partners one or more general partners and one or more limited partners." A limited partnership does not cease being a limited partnership merely because it ceases to have at least one general and one limited partner. A dissolved limited partnership continues in existence through winding up and until termination.

"Foreign limited liability limited partnership" [(10)] – This definition was new in the July, 1999 Draft and is used both in Section 108 (Name) and Section 902 (Application for certificate of authority).

"General partner" [(11)] – RULPA § 101(5) provides: "'General partner' means a person who has been admitted to a limited partnership as a general partner in accordance with the partnership agreement and named in the certificate of limited

partnership as a general partner." There are two reasons for the change. First, Re-RULPA changes the rules on how a person becomes a general partner. Second, putting those rules in the definition section would make for a very cumbersome definition. The reference to foreign limited partnerships is necessary, because definitions pertaining to foreign limited partnerships refer to general partners of those partnerships.

"Limited liability limited partnership" [(12)] – This definition was changed in the March, 2000 Draft to reflect the Drafting Committee's decision to make LLLP status the Act's default setting. See the Prefatory Note and the Reporter's Notes to Section 404. If that decision remains in effect, this definition is probably unnecessary.

"Limited partner" [(13)] – The reference to foreign limited partnerships is necessary, because definitions pertaining to foreign limited partnerships refer to limited partners of those partnerships.

"Ownership interest" [(15)] – This definition is located here per the suggestion of the Representative of the Committee on Style. However, this location is problematic for two reasons. First, paragraph (1)'s very broad definition of "business" is troubling in this context. Second, this definition depends on the term "business organization," which is defined in Article 11. Resolution of these problems is deferred pending the Drafting Committee's reconsideration of the broad definition of "business."

The adjective "proprietary" comes from the RMBCA's new provisions, § 11.01. "Equity" is a possible alternative. Whatever the adjective, the definition excludes transferable interests in a limited partnership which are owned by a person that is not a partner. This [Act] does not recognize that person as an owner. The same is true for RUPA transferable interests owned by non-partners.

"Partner" [(16)] – RULPA § 101(8), without change.

"Partnership agreement" [(17)] – RULPA § 101(9), without change, except a style change suggested by the Representative of the Committee on Style. Earlier drafts proposed adding "implied from conduct." At its October, 1998 meeting, the Drafting Committee rejected the proposed addition.

"Partnership interest" [deleted; formerly RULPA § (10)] – In a modified form this concept now appears in the definition of "Transferable interest."

"Person" [(18)] – Source: ULLCA § 101(14). ULLCA § 101(14) adds "limited liability company" to the list contained in RUPA § 110(10). RULPA

§ 101(11) listed few examples: "'Person' means a natural person, partnership, limited partnership (domestic or foreign), trust, estate, association, or corporation."

"Principal office" [(19)] – This term appears in several places, and previous Drafts inadvertently omitted the definition. The definition comes, essentially verbatim, from ULLCA § 101(15).

"Record" [(20)] – Source: ULLCA § 101(16). ULLCA moved into, or at least into contemplation of, the brave new world in which documentation no longer requires documents. Beginning with Draft #2, Re-RULPA has followed suit. See Section 206(a). ULLCA § 101(16) portends more than it commands. ULLCA § 206(a) requires the [Secretary of State] to determine what media are permissible for filing, and in general "[o]ther law must be consulted to determine admissibility in evidence, the applicability of statute of frauds, and other questions regarding the use of records." ULLCA § 101, Comment.

"Sign" [(22)] – Derived from ULLCA § 101(17). The phrase "whether in writing, electronically or otherwise" has been added to make clear that signing may occur electronically. This definition will be re-visited in light of the Uniform Electronic Transactions Act ("UETA"). With regard to each instance in which Re-RULPA requires someone to "sign" something, the question is whether Re-RULPA means to require some written method of authentication

"State" [(23)] – Source: RUPA § 101(12). Replicated in ULLCA § 101(18).

"Transfer" [(24)] – Source: ULLCA § 101(20), which states more examples than the comparable RUPA provision, RUPA § 101(14). Draft #3 used the RUPA provision but added a reference to "transfer by operation of law." This reference prompted concerns about unintended effects. The key reason for referring to operation of law is to buttress Article 7's limitations on transferability. Draft #4 deleted the reference to operation of law.

"Transferable interest" [(25)] – Source: RUPA § 502. This definition appears here, rather than later in the statute (as in RUPA), because the term is used throughout the Act.

"Transferee" [(26)] – The last phrase ("whether or not the transferor is a partner") was added at the October, 1998 drafting meeting.

SECTION 103. KNOWLEDGE AND NOTICE.

(a) A person knows a fact if the person has actual knowledge of it.

(b) Except as otherwise provided in subsections (c) and (d), a person has notice of a fact if the person:

(1) knows of it;

(2) has received a notification of it; or

(3) has reason to know it exists from all of the facts known to the person at the time in question.

(c) Subject to subsection (d), a certificate of limited partnership on file in the [office of the Secretary of State] is notice that the partnership is a limited partnership and the persons designated in the certificate as general partners are general partners but is not notice of any other fact.

(d) A person has notice:

(1) of another person's dissociation as a general partner, 90 days after the effective date of an amendment to the certificate of limited partnership which states that the other person has dissociated or 90 days after the effective date of a statement of dissociation pertaining to that other person, whichever occurs first;

(2) of a limited partnership's dissolution, 90 days after the effective date of an amendment to the certificate of limited partnership stating that the limited partnership is dissolved;

(3) of a limited partnership's termination, 90 days after the effective date of a statement of termination;

(4) of a limited partnership's conversion under [Article] 11 90 days after the effective date of the articles of conversion; and

(5) of a merger under [Article] 11, 90 days after the effective date of the articles of merger.

(e) A person notifies or gives a notification to another by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person learns of it.

(f) A person receives a notification when the notification:

(1) comes to the person's attention; or

(2) is duly delivered at the person's place of business or at any other place held out by the person as a place for receiving communications.

(g) Except as otherwise provided in subsection (h), an entity knows, has notice, or receives a notification of a fact for purposes of a particular transaction when the individual conducting the transaction for the entity knows, has notice, or receives a notification of the fact, or in any event when the fact would have been brought to the individual's attention if the entity had exercised reasonable diligence. An entity exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the individual conducting the transaction for the entity and there is reasonable compliance with the routines. Reasonable diligence does not require an individual acting for the entity to communicate information unless the communication is part of the individual's regular duties or the

individual has reason to know of the transaction and that the transaction would be materially affected by the information.

(h) A general partner's knowledge, notice, or receipt of a notification of a fact relating to the limited partnership is effective immediately as knowledge by, notice to, or receipt of a notification by the limited partnership, except in the case of a fraud on the limited partnership committed by or with the consent of the general partner. A limited partner's knowledge, notice, or receipt of a notification of a fact relating to the limited partnership is not effective as knowledge by, notice to, or receipt of a notification by the limited partnership.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether subsection (c) should continue to follow RULPA § 208 and provide constructive "notice that the partnership is a limited partnership."

Source: RUPA § 102, except for subsections (c) and (d), which are new, subsection (g) which follows ULLCA in using "entity," and subsection (h), which confines the information attribution rule to general partners.

Subsection (c) – This subsection was new in the July, 1999 Draft, and, together with subsection (d), centralizes the Act's constructive notice provisions. The first sentence was initially taken verbatim from RULPA § 208 but has been changed slightly according to a suggestion by the representative of the Style Committee. At its October, 1999 meeting, the Drafting Committee decided to restore the last clause of that sentence ("but it is . . .").

It remains unclear why RULPA § 208 provides constructive notice "that the partnership is a limited partnership." *See Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997, 1001-1003 (Colo. 1998) (interpreting a comparable provision of the Colorado LLC statute and holding that the provision neither changes common law agency principles nor provides "constructive notice of the company's limited liability status, without regard to whether any part of the company's name or even the fact of its existence has been disclosed"). To the extent a limited partnership has a liability shield, that shield functions because the statute establishes it – not because third parties have constructive notice of the shield.

Subsection (d) – will work in conjunction with several sections to curtail the power to bind and personal liability of general partners and dissociated general partners. Following RUPA (in substance, although not in form), the constructive notice has a 90-day delay. The 90 days will run from the date of filing, unless the filed record states a later effective date. See Section 206(c).

Subsection (h) – RUPA merely refers to a "partner's knowledge," etc., and the Comment to RUPA § 102 states in part: "It is anticipated that RULPA will address the issue of whether notice to a limited partner is imputed to a limited partnership." At its October, 1999 meeting, the Drafting Committee decided to state expressly that information possessed by a limited partner is not attributed to the limited partnership. Attribution is an aspect of agency power, and in the default mode limited partners have neither the right to manage the limited partnership nor the power to bind it. Sections 302 and 406(a). Of course, a limited partner that acts in a different capacity viz a viz the limited partnership might have agency power in that capacity. For example, if the partnership agreement vests managerial authority in a limited partner, Sections305(a) and 408(f), information possessed by that limited partner might be attributed to the limited partnership according to principles of agency law.

SECTION 104. NATURE AND DURATION OF ENTITY; WHEN PARTNER PROPER PARTY.

(a) A limited partnership is an entity distinct from its partners.

(b) A partner is not a proper party to a proceeding by or against a limited partnership unless:

(1) an object of the proceeding is to determine or enforce a partner's right against or liability to the limited partnership;

(2) the proceeding includes a claim that the partner is personally liable under Section 404 or 405 or on some basis not dependent on the partner's status as partner; or

(3) the partner is bringing a derivative action under [Article] 10.

(c) A limited partnership remains the same entity regardless of whether its certificate of limited partnership includes or ceases to include a statement made under Section 404(b).

(d) A limited partnership has a perpetual duration.

Reporter's Notes

Subsection (a) – Source: RUPA § 201. ULLCA § 201 contains essentially the same provision. Before the July, 1999 Draft, this sentence appeared as part of Section 200.

Subsection (b) – In Drafts before the July, 1999 Drafts, this language appeared as Section 403C-2. The language applies to limited as well as general partners and therefore does not belong in Article 4. This subsection seems a proper location, because the "not a proper party" rule follows conceptually from the status of a limited partnership as "an entity distinct from its partners."

Subsection (b)(1) – The March, 2000 Draft changed "the" to "an," because a proceeding might involve other issues.

Subsection (b)(3) – In Draft #4, this provision referred only to limited partners. For an explanation of the change, see Reporter's Notes to Section 1002.

Subsection (c) – A similar provision appears at RUPA § 201(b).

Subsection (d) – In Drafts before the July, 1999 Draft, this subsection appeared as part of Section 200. Draft #3 required that changes in the default term be made in the certificate of limited partnership. At its October, 1998 meeting, the Drafting Committee decided that the partnership agreement could change the default. The Drafting Committee reaffirmed that decision at its April, 2000 meeting. As a result, on this point Re-RULPA is at odds with ULLCA and the RMBCA. *See* ULLCA § 203(a)(5) (requiring a limited liability company's articles of organization to state "whether the company is to be a term company and, if so, the term specified") and RMBCA § 3.02 (providing that "[u]nless its articles of incorporation provide otherwise, every corporation has perpetual duration").

SECTION 105. PURPOSE AND POWERS.

(a) A limited partnership may be organized under this [Act] for any lawful purpose.

(b) A limited partnership has the same powers as an individual to do all things necessary or convenient to carry on its business, including the power to:

(1) sue and be sued and defend in its own name, including an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership;

(2) 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;

(3) sell, convey, mortgage, grant a security interest in, lease, exchange, and otherwise encumber or dispose of all or any part of its property;

(4) 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, ownership interests in or obligations of any other entity;

(5) 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 partnership, and secure any of its obligations by a mortgage on or a security interest in any of its property, franchises, or income;

(6) lend money, invest and reinvest its money, and receive and hold real and personal property as security for repayment;

(7) be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity;

(8) conduct its business, locate offices, and exercise the powers granted by this [Act] within or without this State;

(9) appoint officers, employees, and agents of the limited partnership, define their duties, fix their compensation, and lend them money and credit;

(10) pay pensions and establish pension plans, pension trusts, profit sharing plans, bonus plans, option plans, and benefit or incentive plans for any or all of its current or former partners, officers, employees, and agents;

(11) make donations for the public welfare or for charitable, scientific, or educational purposes; and

(12) make payments or donations, or do any other act, not inconsistent with law, that furthers the business of the limited partnership.

Reporter's Notes

Subsection (a) – In Drafts before the July, 1999 Draft, this subsection appeared as Section 106(a). At its October, 1998 meeting, the Drafting Committee decided not to confine limited partnerships to "business" activities and to permit a limited partnership to pursue any lawful purpose. This subsection differs from ULLCA § 112(a) in omitting that provision's concluding phrase ("subject to any law of this State governing or regulating business"). The Committee deleted that phrase at the October, 1998 meeting as both redundant and under inclusive. As to redundancy – if some other law prohibits a limited partnership from engaging in a particular activity, pursuing that activity would not be a "lawful purpose." As to under inclusiveness – the reference to "any law of this State governing or regulating business" appears too limited because a limited partnership is not restricted to business activities.

Subsection (b) – Derived from ULLCA § 112, which in turn appears to have relied heavily on RMBCA § 3.02. In Drafts before the July, 1999 Draft, this subsection appeared as Section 106(b).

Subsection (b)(1) – The last phrase ("including . . .") comes from RUPA § 405(a).

Subsection (b)(4) – ULLCA § 112(b)(4) refers to "shares or other interests." That reference derives verbatim from RMBCA § 3.02(6). In a limited partnership act there is no reason to give special mention to corporate ownership interests.

Subsection (b)(7) – ULLCA did not mention limited liability companies, but perhaps Re-RULPA should.

Subsection (b)(10) – In Drafts before the July, 1999 Draft, this provision referred to "general" partners. At its October, 1998 meeting, the Drafting Committee deleted the word "general." (RMBCA § 3.02(12) and ULLCA § 112(10) differ as to whether the entity has the power to provide pensions for a mere passive owner. The RMBCA provision does not mention shareholders, while the ULLCA provision refers to members. The ULLCA provision therefore appears to allow pensions for members in manager-managed LLC. Perhaps ULLCA's approach reflects the statutory default mode of member management.)

Earlier versions of subsection (b) included the following additional provision: "(13) transact any lawful business that will aid governmental policy." That provision appears at RMBCA § 3.02(14) but not in ULLCA. At its October, 1998 meeting, the Drafting Committee decided to follow ULLCA.

Former subsection (c) – In earlier drafts this section included a subsection (c), which permitted the certificate of limited partnership to limit the powers of a limited partnership. At its October, 1999 meeting, the Drafting Committee decided to delete subsection (c), even though ULLCA § 112(b) recognizes the power of the publicly-filed document to alter an LLC's powers. (Re-RULPA had stated this power separately to make mandatory the power of a limited partnership to sue and be sued in its own name. That power is of the essence of a limited partnership's nature as a legal entity, and any change in that power would significantly affect the rights of nonpartners.)

The notion of limitation through a public document is problematic for ULLCA and would have been doubly problematic for Re-RULPA. If a statute authorizes restrictions on an entity's normal powers, the statute should also contemplate what will happen if restrictions exist and the entity transgresses them. *See, e.g.*, RMBCA §§ 3.02 (allowing the articles of incorporation to restrict a corporation's powers) and 3.04 (dealing with ultra vires acts). ULLCA contemplates restrictions but not transgressions.

Re-RULPA has an additional problem. A certificate of limited partnership is not precisely analogous to an LLC's articles of organization or a corporation's articles of incorporation. Although all three documents function to create an entity, certificates of limited partnership typically play a far weaker role in governing the entity's structure and operations. Indeed, at its July, 1997 meeting the Committee rejected Draft #1's attempt to strengthen the certificate's role, deleting provisions that would have made the certificate dispositive in determining the identity of general partners.

In light of the weak role of a certificate of limited partnership, it seemed anomalous to empower the certificate to restrict a limited partnership's powers. The Drafting Committee therefore decided to delete the language allowing the certificate to restrict a limited partnership's powers. If a limited partnership wishes to restrict its operations, it should indicate so in its partnership agreement. Whether those restrictions will bind third parties will depend on Sections 402 (general partner agent of limited partnership) and 403 (limited partnership liable for general partner's actionable conduct).

SECTION 106. GOVERNING LAW. The law of this State governs relations among the partners and between the partners and the limited partnership and the liability of partners for an obligation of a limited partnership.

Reporter's Notes

Derived from RUPA § 106. In Drafts before the July, 1999 Draft, this material appeared as Section 101D.

RUPA provides two different choice-of-law rules, one applicable to ordinary general partnerships and one applicable to LLPs. As to the former, RUPA provides, *as a default rule*, that the partnership's internal affairs are governed by "the law of the jurisdiction in which a partnership has its chief executive office." RUPA § 106(a). RUPA does not indicate which law governs the liability of partners for an obligation of an ordinary general partnership. As to LLPs, RUPA provides that "[t]he law of this State" governs both an LLP's internal affairs and "the liability of partners for an obligation of a limited liability partnership." The partnership agreement cannot change this rule. RUPA § 103(b)(9).

At first glance it might seem that the presence of a liability shield transforms RUPA's choice-of-law rule from a default rule to a mandatory rule. However, the most recent Comments to RUPA § 106 indicate otherwise. "Unlike a general partnership which may be formed without any filing, a partnership may only become

a limited liability partnership by filing a statement of qualification. Therefore, the situs of its organization is clear. Because it is often unclear where a general partnership is actually formed, the decision to file a statement of qualification in a particular State constitutes a choice-of-law for the partnership which cannot be altered by the partnership agreement."

The rationale for the mandatory rule thus seems to be as follows: where the situs of organization is clear, the choice of that situs constitutes a nonwaivable decision as to choice-of-law. Since the situs of organization is always clear for a limited partnership, Section 105 states a nonwaivable rule applicable to all limited partnerships. (The term "limited partnership" includes limited liability limited partnerships. See Section 101(7) and (14).)

Like RUPA § 106(b), Section 105 chooses the law applicable both to a partnership's internal affairs and to "the liability of partners for an obligation of" the organization. Unlike RUPA § 106(b), Section 105 applies that choice even for a limited partnership that has not elected "limited liability" status. Even an ordinary limited partnership has a shield, and general choice of law principles suggest that the law of the State of organization should govern the interpretation and application of that shield.

SECTION 107. SUPPLEMENTAL PRINCIPLES OF LAW.

(a) Unless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act].

(b) If an obligation to pay interest arises under this [Act] and the rate is not specified, the rate is that specified in [applicable statute].

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: determining what, if any, guidance to give courts as they seek to determine how de-linking affects (i) existing, "settled" limited partnership case law, and (ii) the applicability of general partnership cases to limited partnership disputes.

In Drafts before the July, 1999 Draft, this material appeared as Section 101C.

Source: RUPA § 104 (ULLCA § 104 replicates RUPA § 104 verbatim). RULPA addresses this topic at § 1105, but both RUPA and ULLCA will condition

readers to look for this provision in this location. At its October, 1998 meeting, the Drafting Committee deleted proposed new language that sought to more explicitly protect the partnership agreement from judicial re-writing. The Committee also deleted proposed new language that sought to "de-link" general partnership case law and to guide courts in the use of that case law.

SECTION 108. NAME.

(a) The name of a limited partnership may contain the name of any partner. If the limited partnership's certificate of limited partnership does not contain a statement made pursuant to Section 404(b), the limited partnership's name must contain "limited liability limited partnership" or the abbreviation "LLLP" or "L.L.L.P." and must not contain the abbreviation "L.P."or "LP." If the limited partnership's certificate of limited partnership does contain a statement made pursuant to Section 404(b), the limited partnership's name must contain "limited partnership" or the abbreviation "L.P."or "LP" and must not contain "limited liability limited partnership" or the abbreviation "LLLP" or "L.L.L.P.." Subject to Section 905, the same requirements apply to the name of a foreign limited partnership authorized to transact business in this State.

(b) Unless authorized by subsections (c) and (d), the name of a limited partnership and, subject to Section 905, of a foreign limited partnership authorized to transact business in this State, must be distinguishable upon the records of the [Secretary of State] from:

(1) the name of any entity incorporated, organized, or authorized to transact business in this State; and

(2) any name reserved or registered under Section 109 or 906 or [other state laws allowing the reservation or registration of business names, including fictitious name statutes].

(c) A domestic or foreign limited partnership may apply to the [Secretary of State] for authorization to use a name that is not distinguishable upon the records of the [Secretary of State] from one or more of the names described in subsection (b). The [Secretary of State] shall authorize use of the name applied for if, as to each conflicting name:

(1) the present user, registrant, or owner of the conflicting name consents to the use in a signed record and submits an undertaking in form satisfactory to the [Secretary of State] to change the conflicting name to a name that is distinguishable upon the records of the [Secretary of State] from the name applied for and from all of the names described in subsection (b); or

(2) the applicant delivers to the [Secretary of State] a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use in this State the name applied for.

(d) A domestic or foreign limited partnership may use a name, including a fictitious name, shown upon the records of the [Secretary of State] as being used by another entity, if the domestic or foreign limited partnership proposing to use the name:

(1) has merged with the other entity;

(2) has been formed by reorganization with the other entity;

(3) has been converted from the other entity; or

(4) has acquired substantially all of the assets, including the name, of the other entity.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether the "signifiers" required by subsection (a) make sense, given the possibility of pinpoint holes in the LLLP shield; whether, given Section 404's approach to the liability shield, subsection (a) will work with regard to foreign limited partnerships.

This section is substantially different than RULPA § 102, and the differences reflect more modern attitudes toward permissible names. The advent of LLLPs requires that a choice be made as to the use of a partner's name in the name of the limited partnership. Either general partners' names must be prohibited from the name of a LLLP or limited partners' names should be includable in the name of both ordinary limited partnerships and LLLPs.

At its October, 1998 meeting, the Drafting Committee choose the latter approach. That choice makes sense. RULPA's approach derives from the 1916 Uniform Limited Partnership Act. In 1916, most business organizations were either unshielded (i.e., general partnerships) or partially shielded (i.e., limited partnerships), and it was reasonable for third parties to believe that an individual whose own name appeared in the name of a business would "stand behind" the business. Today most businesses have a full shield (e.g., corporations, limited liability companies, most limited liability partnerships), and corporate, LLC and LLP statutes generally pose no barrier to the use of an owner's name in the name of the entity.

Subsection (a) does require particular phrases or abbreviations to signify the limited partnership's status. Permitting abbreviations differs from RULPA but is certainly consistent with current views. *See, e.g.*, ULLCA § 105(a) and RMBCA § 4.01(a)(1). Subsection (a) arguably permits fewer abbreviations than ULLCA. ULLCA § 105(a) allows both initials (e.g., LLC) and partial abbreviations (Ltd. and Co.)

As to the location of the specified signifiers within the limited partnership's name, subsection(a) follows current law and does **not** require that the signifiers appear at the end of the limited partnership's name. *Accord* ULLCA § 105(a) (requiring signifiers but omitting any "end with" requirement) and RMBCA § 4.01(a)(1) (same). *Compare* RUPA §§ 1002 (requiring the name of an LLP to "end with" specified signifiers) and 1102(a)(1) (requiring a foreign LLP to file a

statement of foreign qualification containing the foreign LLP's name "which . . . ends with" specified signifiers.)

Subsections (b), (c), and (d) are derived from ULLCA § 105(b). At its October, 1998 meeting, the Drafting Committee decided to replace ULLCA's list of other entities with a more generic term.

Applicability to foreign limited partnerships – To streamline the provisions relating to certificates of authority for foreign limited partnerships, the July, 1999 Draft made this section applicable both to domestic and foreign limited partnerships. Subsections (a) and (b) refer to Section 905. That section permits a foreign limited partnership to obtain a certificate of authority under a fictitious name if the foreign limited partnership's actual name does not comply with this section.

Subsection (a) – Section 404(b) allows the certificate of limited partnership to "put a hole in the shield" for some or all of the general partners as to some or all of the limited partnership's obligations. See Reporter's Notes to Section 404(b). Under subsection (a), the presence of the smallest hole prevents a limited partnership from using in its name either the abbreviation "LLLP" or the phrase "limited liability limited partnership."

Subsection (b)(2) – This provision does not appear in ULLCA.

Subsection (c) – derived from ULLCA § 105(c). Subsection (c)'s reference to "authorization to **use** a name" (emphasis added) comes verbatim from ULLCA § 105(c), pertains only to the limited role of the [Secretary of State] and implies nothing about other areas of law such as intellectual property law.

Subsection (c)(1) – This provision differs from ULLCA § 105(c)(1) in four respects: (i) ULLCA refers only to "reserved name," but that reference appears under inclusive. Subsection (b) also encompasses other names, i.e., names in use. So long as the owner of the conflicting name agrees to change it, why shouldn't the applicant have a right to the formerly conflicting name? (ii) ULLCA does not require the record of consent to be signed. (iii) ULLCA does not include the phrase "and from all of the names described in subsection (b)." The phrase "an undertaking in form satisfactory to the [Secretary of State]" is arguably inadequate to express the substantive requirement that the new name "be distinguishable" from other names "upon the records of the [Secretary of State]." (iv) This provision applies both to domestic and foreign limited partnerships.

Subsection (c)(2) – This provision differs from ULLCA § 105(c)(2) in the placement of "in this State." ULLCA places the phrase at the end of the provision.

That placement makes the provision arguably ambiguous, since the name has been applied for "in this State."

Subsection (d) – Derived from ULLCA § 105(d). The differences are as follow:

(d) A domestic or foreign limited ~~liability company~~ partnership may use the name, including a fictitious name, shown upon the records of the [Secretary of State] as being used by [A]~~of~~ another ~~domestic or foreign company~~ entity ~~which is used in this State if the other company is organized or authorized to transact business in this State and the company~~[B] if the domestic or foreign limited partnership proposing to use the name ~~has~~:

(1) has merged with the other ~~company~~ entity;

(2) has been formed by reorganization with the other ~~company~~ entity;

(3) has been converted from the other entity; or

~~(3)~~ (4) has acquired substantially all of the assets, including the name, of the other company.

[A]the reference to the records of the Secretary of State is added because this provision is part of a set of rules that enable the Secretary of State to determine whether a limited partnership's name is acceptable. As to possible conflicts with other names, the Secretary of State's exclusive reference is to the Secretary of State's records. The added language makes that situation explicit.

[B]This language differs from ULLCA § 105(d) by: (i) broadening the referred-to entities that might be using a conflicting name; and (ii) deleting ULLCA's reference to entities "organized or authorized to transact business in this State." The added reference to the records of the [Secretary of State] make that precondition unnecessary.

SECTION 109. RESERVATION OF NAME.

(a) Subject to Section 108, the exclusive right to the use of a name may be reserved by:

(1) a person intending to organize a limited partnership under this [Act] and to adopt that name;

(2) a domestic limited partnership or any foreign limited partnership authorized to transact business in this State which, in either case, intends to adopt that name;

(3) a foreign limited partnership intending to obtain a certificate of authority to transact business in this State and adopt that name;

(4) a person intending to organize a foreign limited partnership and intending to have it obtain a certificate of authority to transact business in this State and adopt that name;

(5) a foreign limited partnership formed under the name; and

(6) a foreign limited partnership formed under a name that does not comply with Section 108(a), but the named reserved under this paragraph may differ from the foreign limited partnership's name only to the extent necessary to comply with Section 108(a).

(b) The reservation under subsection (a) must be made by delivering for filing with the [Secretary of State] an application, signed by the applicant, to reserve a specified name. If the [Secretary of State] finds that the name is available for use by a domestic or foreign limited partnership, the [Secretary of State] shall reserve the name for the exclusive use of the applicant for a period of 120 days. An applicant that has so reserved a name may reserve the same name for additional 120-day periods. A person having a current reservation for a name may not apply

for another 120-day period pertaining to the same name until 90 days have elapsed in the current reservation. The right to the exclusive use of a reserved name may be transferred to any other person by delivering for filing in the [office of the Secretary of State] a notice of the transfer, signed by the applicant for which the name was reserved and specifying the name and address of the person to which the transfer was made.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: whether to use ULLCA rather than RULPA language for this section.

ULLCA § 106 essentially derives from the RULPA language in this section. Consistent with the Drafting Committee's instructions to preserve current RULPA language absent good cause to do otherwise, this draft follows RULPA rather than ULLCA. The Reporter wonders, however, whether those instructions still make sense. It now appears that Re-RULPA will incorporate substantial amounts of ULLCA's language while preserving little of RULPA's language. It might make better sense, therefore, for Re-RULPA to follow ULLCA rather than RULPA, absent a policy reason to the contrary.

In any event, there is a substantive difference between RULPA and ULLCA worth noting. Under RULPA § 103, when a reservation expires the registrant must wait 61 days before re-applying for the same name. ULLCA § 106(a) states merely that a reservation is for "a nonrenewable 120-day period." It is unclear whether that language means that: (i) once the first reservation expires the same applicant can never apply for the same name, or (ii) once a 120-day period actually expires the same applicant can apply for the same name immediately, with the application being considered a new application rather than as a renewal. See also RMBCA § 4.02(a) (apparently the source for ULLCA § 106(a); uses the same language).

At its October, 1998 meeting, the Drafting Committee decided to explicitly allow reservations for successive 120-day periods. The Committee did not decide how far in advance of the expiration of one 120-period a person can apply for next 120-day period. Some limitation must exist; otherwise a person could effectively eliminate the 120-day limit by filing simultaneously reservations for several successive periods. Draft #4 created a 30-day window at the end of each 120-day period, and at the March, 1999 meeting no one objected to that approach. That approach was therefore preserved.

Subsection (a)(1) – The March, 2000 draft added the introductory language to make clear that a person may not reserve a name that does not comply with Section 108.

Subsection (a)(5) and (6) – These paragraphs are added, because at its October, 1999 meeting the Drafting Committee decided this section's authorization of successive renewals made Section 906 unnecessary. That section had permitted a foreign limited partnership to register its name without having to obtain or intend to obtain a certificate of authority.

SECTION 110. EFFECT OF PARTNERSHIP AGREEMENT; NONWAIVABLE PROVISIONS.

(a) Except as otherwise provided in subsection (b), the partnership agreement governs relations among the partners and between the partners and the partnership. To the extent the partnership agreement does not otherwise provide, this [Act] governs relations among the partners and between the partners and the partnership.

(b) The partnership agreement may not:

(1) vary the law applicable to a limited partnership under Section 106;

(2) vary the rights and duties under Section 204;

(3) vary the list of records required under Section 111 or unreasonably restrict the right to information under Sections 304 and 407, but the partnership agreement may impose reasonable limitations on the availability and use of information obtained under those sections and may define appropriate remedies, including liquidated damages, for a breach of any reasonable limitation on use;

(4) eliminate the duty of loyalty under Section 408, but the partnership agreement may:

(A) identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; and

(B) specify the number or percentage of 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;

(5) unreasonably reduce the duty of care under Section 408(c);

(6) eliminate the obligation of good faith and fair dealing under Sections 305(c) and 408(d), but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

(7) vary the power of a person to dissociate as a general partner under Section 604(a), except to require that the notice under Section 603(1) be in writing;

(8) vary the right of a court to expel a partner in the events specified in Sections 601(b)(5) and 603(5);

(9) vary the right of a court to decree dissolution in the circumstances specified in Section 802;

(10) vary the requirement to wind up the partnership's business as specified in Section 803(a);

(11) unreasonably restrict the right to bring an action under [Article] 10;

(12) restrict the right of a partner to approve a merger or conversion under Section 1110; or

(13) restrict rights under this [Act] of a person other than a partner or a transferee.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether, in light of Re-RULPA's "target audience" (see Prefatory Note), a Re-RULPA partnership agreement should have more power than a RUPA partnership agreement – in particular, more power to affect the rules relating to fiduciary duty; whether the Act identifies with sufficient clarity which statutory sections are subject to change by the partnership agreement; whether subsection (b)(3)'s reference to liquidated damages is unnecessary; whether the partnership should have the burden of proving reasonableness as to restrictions permitted under subsection (b)(3); whether subsection (b)(4)(B) should be subject to an "if not manifestly unreasonable" limitation; whether, as is currently the case, the partnership agreement should be able to deprive a limited partner of the power to dissociate, even though a dissociating limited partner has no right to any payout; whether the partnership agreement should be able to provide for a limited partnership's continued existence even though the limited partnership falls permanently below the one general/one limited minimum.

In Drafts before the July, 1999 Draft, this material appeared as Section 101B.

Source: RUPA § 103. At its October, 1998 meeting the Drafting Committee deleted proposed variations from RUPA § 103(a), including a reference to implied-in-fact agreements, an express authorization for a partnership agreement to "exclude [alternate language: preclude] oral agreements and . . . specify the extent, if any, that the conduct of the partners and the partnership are to be considered in determining and interpreting the partnership agreement," and an express authorization for a partnership agreement to be executed before the limited partnership is formed.

The Reporter remains concerned as to whether it is sufficiently clear which statutory provisions are outside the domain of "relations among the partners" (and therefore not susceptible to change by the partnership agreement). For example, may the partnership agreement change Section 114's requirement that a limited partnership maintain an in-state office?

As discussed at the Committee's July, 1997 meeting, the Reporter believes that the Committee should eventually review each section of the Act in light of subsection (a). The Committee will be far more familiar with the Act than the typical attorney or judge. If the Committee has difficulty determining which provisions of the Act are subject to change by the partnership agreement, *a fortiori* attorneys and judges will be confused.

Subsection (a) – The first sentence deviates from RUPA so as to substitute the active for the passive voice.

Subsection (b)(1) – Source: RUPA § 103(9). Understanding this provision requires understanding RUPA's approach to choice of law. See the Reporter's Notes to Section 106.

Subsection (b)(2) – Source: RUPA § 103(b)(1). The referenced section describes who must sign various documents.

Subsection (b)(3) – The "unreasonably restrict" aspect of this provision is derived from RUPA § 103(b)(2), which imposes this standard viz a viz "access to books and records." Section 304 states a limited partner's right of access, and Section 407 states a general partner's right. Sections 304(g) and 407(f) permit the *limited partnership* unilaterally to impose restrictions on the *use* of information obtained by a partner. A Comment will indicate that some restrictions on access to some required records (e.g., names of other limited partners) are not *per se* unreasonable.

Subsection (b)(4) – Paragraph (A) is taken essentially verbatim from RUPA § 103(b)(3)(i). At its October, 1998 meeting, the Drafting Committee decided to follow ULLCA rather than RUPA and use "and" instead of "or" between paragraphs (A) and (B) and use in paragraph (B) ULLCA's reference to "disinterested managers" [in Re-RULPA: disinterested general partners]. However, at its April, 2000 meeting, the Drafting Committee decided to delete the reference to "disinterested general partners." The Committee then declined to subject paragraph (B) to an "if not manifestly unreasonable" limitation.

As to Paragraph (A), a Comment will indicate that it is not manifestly unreasonable to permit a general partner to compete with the limited partnership.

Subsection (b)(7) – Previous drafts applied this exception to the power to dissociate of limited as well as general partners. At its October, 1998 meeting, the Drafting Committee decided that a partnership agreement can prevent a limited partner from voluntarily dissociating. The Committee made this decision despite that fact that, in the default mode, a limited partner's dissociation merely means that

the limited partner becomes a transferee of its own transferable interest; i.e., dissociation means the abandonment of all nonfinancial rights. Even if the dissociating limited partner is the only limited partner, the general partner(s) can avoid dissolution by admitting a new limited partner. See Section 801(4). An anomaly can result if the partnership agreement purports to preclude dissociation even of a limited partner who dies. The same issue exists under RUPA. RUPA § 601(7)(i) lists the death of an individual as an event of dissociation, and RUPA § 103 does not make § 601(7)(i) nonwaivable.

Subsection (b)(8) – Source: RUPA § 103(b)(7). As discussed at the October, 1998 meeting, this provision could be read to limit a partnership agreement's power to provide for arbitration. That is, an agreement to arbitrate all disputes – including expulsion disputes – could be seen as an attempt to "vary the right of a court expel a partner." Such a reading would put this statute at odds with federal law. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the Federal Arbitration Act preempts state statutes that seek to invalidate agreements to arbitrate) and *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995) (same). A Comment will indicate that an agreement to arbitrate expulsion disputes is permissible, but that no agreement can narrow the substantive grounds for expulsion.

Subsection (b)(9) – At its October, 1998 meeting, the Drafting Committee decided to add this provision to the list of nonwaivable provisions. The **caveat** concerning arbitration applies here as well.

Subsection (b)(11) – This subsection was new in The July, 1999 Draft. ULLCA § 103 has no corresponding provision. However, derivative suits were originally equitable in nature; they originated without statutory sanction to protect passive owners against management abuses. *See* Bishop & Kleinberger, Limited Liability Companies: Tax and Business law, ¶ 10.07[2], nn. 233 and 234. This Act should not permit a partnership agreement to eviscerate the derivative remedy. At its October, 1999 meeting, the Drafting Committee decided that the partnership agreement may impose reasonable restrictions on a partner's rights to bring a derivative suit. The March, 2000 Draft therefore authorized the partnership agreement to limit a court's power to do equity. At its April, 2000 meeting, the Drafting Committee decided that the partnership agreement should also be able to reasonably restrict the rights of a partner to bring a direct action.

Subsection (b)(12) – This paragraph was new in the March, 2000 Draft and pertains to mergers and conversions that result in a partner being personally liable for the obligations of the surviving or converted business organization. See Section 1110 and the Reporter's Notes to that section.

Subsection (b)(13) – At its April, 2000 meeting, the Drafting Committee decided to rephrase this provision to make clear that the provision applies only to those specific rights granted to third parties by this Act.

SECTION 111. REQUIRED RECORDS.

(a) A limited partnership must maintain at its designated office the following required records:

(1) a current list showing the full name and last known address of each partner, separately identifying the general partners, in alphabetical order, and the limited partners, in alphabetical order;

(2) a copy of the certificate of limited partnership and all amendments to the certificate, together with signed copies of any powers of attorney pursuant to which any certificate or amendment has been signed;

(3) a copy of any filed articles of conversion or merger;

(4) a copy of the limited partnership's federal, state, and local income tax returns and reports, if any, for the three most recent years;

(5) a copy of any written partnership agreements and any written amendments to any of those agreements and of any financial statements of the limited partnership for the three most recent years;

(6) a copy of the three most recent annual reports delivered by the limited partnership to the [Secretary of State] pursuant to Section 210;

(7) a copy of any record made by the limited partnership during the past three years of any consents given by or votes taken of any partner pursuant to this [Act or the partnership agreement; and

(8) unless contained in a written partnership agreement, a writing stating:

(A) the amount of cash, and a description and statement of the agreed value of the other benefits, contributed by each partner and which each partner has agreed to contribute;

(B) the times at which or events on the happening of which any additional contributions agreed to be made by each partner are to be made;

(C) for any person that is both a general partner and a limited partner, a specification of what transferable interest the person owns in each capacity; and

(D) any events upon the happening of which the limited partnership is to be dissolved and its affairs wound up.

(b) Sections 304 and 407 govern access to the records required by this section.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether to replace subsection (a)(5)'s reference to "written" agreements and amendments with the more modern concept of a "record"; whether to retain Section 111(8)(D).

Source: RULPA § 105. In Drafts before the July, 1999 Draft, this material appeared at Section 105. Changes from RULPA are stylistic except as stated below.

Subsection (a)(1) – At its October, 1999 meeting, the Drafting Committee decided to delete "business." The Act's very broad definition of that word, *see* Section 102(1), makes the word unuseable here.

Subsection (a)(2) – It can be confusing to have the same word – certificate – refer both to an original document and to the documents that amend that original document. Re-RULPA therefore refers to "amendments" rather than "certificates of amendments."

Subsection (a)(3) – This provision does not exist in RULPA, since RULPA does not provide for merger or conversion.

Subsection (a)(5) – RULPA § 105(4) does not mention amendments.

Subsection (a)(6) – RULPA does not require annual reports, so RULPA § 105 does not include this requirement.

Subsection (a)(7) – This provision reflects a decision made by the Drafting Committee at its October, 1998 meeting. The provision does **not** require a limited partnership to make a record but does create a retention requirement for those records the limited partnership does create. The three years runs from the date the record is created, not from the date the consent or vote occurs.

Subsection (a)(8)(A) – RULPA § 105(7)(i) refers to "other property or services" rather than to "other benefits." The change is to correspond with Re-RULPA's broader definition of "contribution." See Section 101(3).

Subsection (a)(8)(C) – In RULPA § 105(a)(7), this provision refers to "any right of a partner to receive, or of a general partner to make, distributions to a partner which include a return of all or any part of the partner's contribution." For the reasons stated in the Reporter's Notes to Section 503, beginning with the July, 1999 Draft Re-RULPA eschews the concept of "a return of contribution." The new provision relates to information needed when a "dual capacity" partner dissociates. See Sections 602 and 606. The former provides that, upon a person's dissociation as a limited partner, "any transferable interest owned by the person immediately before dissociation *in the person's capacity as a limited partner* is owned by the person as a mere transferee." (Emphasis added.) The latter states the parallel rule for a person dissociated as a general partner.

Subsection (a)(8)(D) – This is a curious provision, albeit taken verbatim from RULPA § 105(7)(iv). Can the required records alone make an occurrence an event of dissolution? Or does this provision mean that, for dissolution to occur under an oral agreement, the required records must memorialize that agreement?

The provision was added in the 1985 amendments to RULPA. The Official Comment explains:

> In view of the passive nature of the limited partner's position, it has been widely felt that limited partners are entitled to access to certain basic documents and information, including the certificate of limited partnership ~~and~~, any partnership agreement, and a writing setting out certain important matters which, under the 1916 and 1976 Acts, were required to be set out in the certificate of limited partnership. (Underlining and strikeouts indicate changes from the text of the 1976 Comment.)

Subsection (b) – RULPA § 105(b) states simply: "Records kept under this section are subject to inspection and copying at the reasonable request and at the expense of any partner during ordinary business hours." Re-RULPA provides more elaborate access provisions.

SECTION 112. BUSINESS TRANSACTIONS OF PARTNER WITH PARTNERSHIP. A partner may lend money to and transact other business with the limited partnership and, subject to other law, has the same rights and obligations with respect thereto as a person that is not a partner.

Reporter's Notes

Source: RULPA § 107. In Drafts before the July, 1999 Draft, this material appeared as Section 107.

To the uninitiated, this section appears to conflict with Section 408(b)(2) (general partner's loyalty duty includes refraining from acting as or for an adverse party). However, this section has no connection with the duty of loyalty and is intended only to deal with claims by creditors of the limited partnership. The unartful formulation is retained for historical reasons and because including language that differs substantially from RUPA and ULLCA would exacerbate rather than ameliorate the confusion.

N.b. – both RUPA and ULLCA locate this provision elsewhere, within the section dealing with fiduciary duty. *See* RUPA § 404(f) and ULLCA § 409(f). Re-RULPA keeps the provision here, because it applies both to limited and general partners.

SECTION 113. DUAL CAPACITY. A person may be both a general partner and a limited partner. A person that is both a general and limited partner has the rights, powers, duties, and obligations provided by this [Act] and the partnership agreement in each of those capacities. When the person acts as a general partner, the person is subject to the obligations and restrictions under this [Act] and the partnership agreement for general partners. When the person acts as a limited partner, the person is subject to the obligations and restrictions under this [Act] and the partnership agreement for limited partners.

Reporter's Notes

Derived from RULPA § 404, but redrafted for reasons of style and clarity. RULPA § 404 provides:

> A general partner of a limited partnership may make contributions to the partnership and share in the profits and losses of, and in distributions from, the limited partnership as a general partner. A general partner also may make contributions to and share in profits, losses, and distributions as a limited partner. A person who is both a general partner and a limited partner has the rights and powers, and is subject to the restrictions and liabilities, of a general partner and, except as provided in the partnership agreement, also has the powers, and is subject to the restrictions, of a limited partner to the extent of his [or her] participation in the partnership as a limited partner.

In Drafts before the July, 1999 Draft, this material appeared at Section 404. The July, 1999 Draft relocated the section here, because the section concerns both limited and general partners.

The second sentence of the Re-RULPA version originally referred only to "rights and powers." Draft #4 changed the phrase to "the rights, powers, duties and obligations," so as to clearly encompass sins of omission.

SECTION 114. OFFICE AND AGENT FOR SERVICE OF PROCESS.

(a) A limited partnership must designate and continuously maintain in this State:

(1) an office, which need not be a place of its business in this State; and

(2) an agent for service of process.

(b) A foreign limited partnership must designate and continuously maintain in this State an agent for service of process.

(c) An agent for service of process must be an individual resident of this State, a domestic entity, or a foreign entity authorized to do business in this State.

Reporter's Notes

In Drafts before the July, 1999 Draft, this material appeared at Section 104. Draft #3 revised this section to conform to ULLCA § 108. That conformity was necessary, because Draft #3 incorporated ULLCA §§ 109 – 111 and those sections depend on the revised language. However, at its October, 1998 meeting, the Drafting Committee decided to return to RULPA's approach.

That decision also entailed deleting Section 104A, Change of Designated Office or Agent for Service of Process. Derived from ULLCA § 109, Section 104A allowed a limited partnership to "change its designated office or agent for service of process by delivering to the [Secretary of State] for filing a statement of change." However, Re-RULPA continued to include former Section 211 [now Section 210] (Annual Report for [Secretary of State]). Beginning with the July, 1999 Draft, Section 210(2) requires a limited partnership to report annually, *inter alia*, "the address of its designated office and the name and address of its agent for service of process in this State."

Following the March, 1999 meeting, the Reporter discovered a problem with Re-RULPA's halfway adoption of ULLCA's approach – namely, what would happen if a limited partnership's annual report stated an office or agent that varied from the office or agent stated in the certificate of limited partnership? The [Secretary of State] was not expressly authorized to reject an annual report for that reason, so the possibility existed of having an inconsistent public record.

Moreover, upon reflection the Reporter saw no reason to require an amendment to the certificate of limited partnership in order to change either the required in-state office or the agent for service of process. *See* RMBCA § 5.02

(allowing such changes without amendment to the articles of incorporation) and Official Comment (stating that, in the corporate realm, such changes should not require action by the board of directors).

The Reporter therefore believed that Re-RULPA should follow ULLCA and go one step further: adopt the "statement of change" approach (per ULLCA) and further provide that an annual report automatically updates a limited partnership's designation of its in-state office and agent for service of process. See Section 210(e). At its October, 1999 meeting, the Drafting Committee accepted the Reporter's suggestion. At that meeting the Committee also decided not to require a foreign limited partnership to maintain an in-state office.

Subsection (a) – The initial designation occurs pursuant to Section 201 (certificate of limited partnership). A limited partnership can change the designation in any of three ways: an amendment to the certificate (Section 202), a statement of change (Section 114), and the annual report (Section 210).

Subsection (b) – This subsection reflects a compromise between RULPA and ULLCA. RULPA requires neither an in-state agent nor an in-state office for a foreign limited partnership. ULLCA requires both. Compare RULPA § 902 with ULLCA § 108. A State may well prefer that the [Secretary of State] **not** be agent of first resort, but why require an in-state office for a foreign entity? The initial designation will occur in the application for a certificate of authority. See Section 902. Updating will occur via a statement of change. See Section 115.

Subsection (c) – This subsection goes beyond both RULPA and ULLCA in the types of entities permitted to act as agents for service of process.

SECTION 115. CHANGE OF DESIGNATED OFFICE OR AGENT FOR SERVICE OF PROCESS. A limited partnership or foreign limited partnership may change its designated office, agent for service of process, or the address of its agent for service of process, by delivering to the [Secretary of State] for filing a statement of change which sets forth:

(1) the name of the domestic or foreign limited partnership;

(2) the street address of its current designated office;

(3) if the current designated office is to be changed, the street address of the new designated office;

(4) the name and address of its current agent for service of process; and

(5) if the current agent for service of process or street address of that agent is to be changed, the new address or the name and street address of the new agent for service of process.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether the statutory apparatus is adequate for updating and correcting records filed by a foreign limited partnership; whether this section's inclusion of foreign limited partnerships should be deleted in favor of RULPA § 905.

Derived from ULLCA § 109. The ULLCA provision refers only to domestic entities. *But see* ULLCA § 1006(a)(1)(iv) (grounds for revoking a foreign limited partnership's certificate of authority include failing to "file a statement of a change in the name or business address of the agent as required by this [article]"). Also, the reference to changing "the address of its agent for service of process" does not appear in ULLCA's lead-in phrase. However, ULLCA § 109(5) contemplates that type of change.

ULLCA's approach differs from RULPA's. Under RULPA § 201(a)(2), the certificate of limited partnership must include "the address of the office and the name and address of the agent for service of process." Changing that information therefore requires an amendment to the certificate. RULPA § 202(c). In contrast, ULLCA requires an LLC's articles of organization only to include only "the address of the **initial** designated office" and "the name and street address of the **initial** agent for service of process." ULLCA § 203(a)(2) and (3) (emphasis added). ULLCA does not specifically state who has the authority to file a statement of change on behalf of an LLC.

This provision appeared in Draft #3 as Section 104A but was deleted in Draft #4. For an explanation of the provision's resurrection, see the Reporter's Notes to Section 114.

Correcting/updating records filed by foreign limited partnerships – Beginning with the July, 1999 Draft, Re-RULPA mostly follows ULLCA's approach to records required to be filed by the foreign counterpart entity. ULLCA

relies on the following records to update information previously filed by a foreign LLC: a statement of change, the annual report, a statement of correction. There are two potential gaps in ULLCA's approach. First, it is unclear under ULLCA whether a statement of correction can be used to correct a record that was accurate when filed. For Re-RULPA, the answer is no. See Reporter's Notes to Section 207. Second, ULLCA does not require the updating of all the information contained in the application for a certificate of authority. See ULLCA § 1006(a).

RULPA § 905, which has no analog in ULLCA, takes a more centralized approach to the issue and requires updating of all information:

> SECTION 905. CHANGES AND AMENDMENTS. If any statement in the application for registration of a foreign limited partnership was false when made or any arrangements or other facts described have changed, making the application inaccurate in any respect, the foreign limited partnership shall promptly file in the office of the Secretary of State a certificate, signed and sworn to by a general partner, correcting such statement.

SECTION 116. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.

(a) An agent for service of process of a limited partnership or foreign limited partnership may resign by delivering to the [Secretary of State] for filing a record of the statement of resignation.

(b) After filing a statement of resignation, the [Secretary of State] shall mail a copy to the designated office and another copy to the limited partnership at its principal office if the address of that office appears in the records of the [Secretary of State].

(c) An agency is terminated on the 31st day after the statement is filed in the [office of the Secretary of State].

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether to preserve the mandatory delayed effective date for an agent's resignation.

Source: ULLCA § 110, which applies only to agents of domestic limited liability companies. In Drafts before the July, 1999 Draft, this material appeared as Section 104B and, following ULLCA, referred only to agents of domestic limited partnerships.

Subsection (b) – The reference to a limited partnership's principal office is from ULLCA § 110(b). Under ULLCA, a *foreign* limited liability company's application for a certificate of authority must designate the principal office. As to a *domestic* limited liability company, the [Secretary of State] must glean the information from the annual report. *See* ULLCA § 211(a)(3). Because the annual report is not due upon formation, ULLCA § 211(c), for some months after an LLC's organization the [Secretary of State] does not know the LLC's principal office and therefore cannot strictly comply with ULLCA § 110(b). The same anomaly exists under this Draft. To recognize the anomaly, beginning with the July, 1999 Draft, Re-RULPA adds the phrase "if the address of that office appears in the records of the [Secretary of State]."

Subsection (c) – The delayed effective date follows ULLCA § 110(c) but is at odds with the general law of agency. Moreover, if the would-be resigning agent fails to forward documents during the 30-day interim, the appointing limited partnership or foreign limited partnership might be significantly prejudiced. It might be better to allow an immediate effective date and provide for service on the [Secretary of State] if a resignation leaves the appointing partnership without an agent for service of process.

SECTION 117. SERVICE OF PROCESS.

(a) An agent for service of process appointed by a limited partnership or a foreign limited partnership is an agent of the limited partnership or foreign limited partnership for service of any process, notice, or demand required or permitted by law to be served upon the limited partnership or foreign limited partnership.

(b) If a limited partnership or foreign limited partnership fails to appoint or maintain an agent for service of process in this State or the agent for service of

process cannot with reasonable diligence be found at the agent's address, the [Secretary of State] is an agent of the limited partnership or foreign limited partnership upon which process, notice, or demand may be served.

(c) Service of any process, notice, or demand on the [Secretary of State] may be made by delivering to and leaving with the [Secretary of State], the [Assistant Secretary of State], or clerk having charge of the limited partnership department of the [office of the Secretary of State] duplicate copies of the process, notice, or demand. If the process, notice, or demand is served on the [Secretary of State], the [Secretary of State] shall forward one of the copies by registered or certified mail, return receipt requested, to the limited partnership or foreign limited partnership at its designated office. Service is effected under this subsection at the earliest of:

(1) the date the limited partnership or foreign limited partnership receives the process, notice, or demand;

(2) the date shown on the return receipt, if signed on behalf of the limited partnership or foreign limited partnership; or

(3) five days after its deposit in the mail, if mailed postpaid and correctly addressed.

(d) The [Secretary of State] shall keep a record of all processes, notices, and demands served pursuant to this section and record the time of and the action taken regarding the service.

(e) This section does not affect the right to serve process, notice, or demand in any manner otherwise provided by law.

Reporter's Notes

Source: ULLCA § 111. Requiring a foreign limited partnership to name an agent for service of process is a change from RULPA. *See* RULPA § 902(3).

Subsection (c) – ULLCA § 108(a)(1) requires both domestic and foreign LLCs to "maintain in this State . . . an office." RULPA does not require an "out-of-state" limited partnership to have an "in-state" office. RULPA § 902(5). Neither does Re-RULPA. Section 902.

SECTION 118. CONSENT AND PROXIES OF PARTNERS.

(a) Action requiring the consent or vote of partners under this [Act] may be taken without a meeting.

(b) A partner may appoint a proxy to vote or otherwise act for the partner by signing an appointment instrument, either personally or by the partner's attorney in fact.

Reporter's Notes

Source: ULLCA § 404(d) and (e). In prior Drafts, these provisions appeared twice – in Section 304(c), pertaining to limited partners, and in Section 406, pertaining to general partners. At its October, 1999 meeting, the Drafting Committee directed the Reporter to consolidate the provisions and locate them in Article 1.

[ARTICLE] 2

FORMATION; CERTIFICATE OF LIMITED PARTNERSHIP AND OTHER FILINGS

SECTION 201. CERTIFICATE OF LIMITED PARTNERSHIP.

(a) In order to form a limited partnership, a certificate of limited partnership must be executed and delivered for filing in the [office of the Secretary of State]. The certificate must include:

(1) the name of the limited partnership;

(2) the address of the initial designated office and the name and address of the initial agent for service of process;

(3) the name and the address of each general partner;

(4) if one or more of the general partners is liable for the limited partnership's debts and obligations under Section 404(b), a statement to that effect; and

(5) any additional information required by [Article] 11.

(b) A certificate of limited partnership may also contain any other matters, but may not vary the nonwaivable provisions of this [Act] specified in Section 110.

(c) Subject to subsection (b), if any provision of a partnership agreement is inconsistent with the certificate of limited partnership or with a filed statement of dissociation, termination or change, or filed articles of conversion or merger:

(1) the partnership agreement prevails as to partners and transferees; and

(2) the certificate of limited partnership, statement of dissociation, termination, or change, or articles of conversion or merger prevails as to persons, other than partners and transferees, that reasonably rely on the filed record to their detriment.

(d) A limited partnership is formed at the time of the filing of the certificate of limited partnership in the [office of the Secretary of State] or, subject to Section 206(d), at any later time specified in the certificate of limited partnership if, in either case, there has been substantial compliance with the requirements of this section.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: whether subsection (d) is unnecessary, given the general scope of Section 206.

Subsection (a)(2) – ULLCA allows updating of this information without formal amendment to the formation document. ULLCA § 203(a)(2). Draft #3 conformed Re-RULPA to that approach, but at the October, 1998 meeting the Drafting Committee decided to return to RULPA. Beginning with the July, 1999 Draft, Re-RULPA returns to the ULLCA approach, for reasons explained in the Reporter's Notes to Section 114.

Subdivision (a)(3) – At its October, 1999 meeting, the Drafting Committee decided to delete "business"as a modifier to "address." The Act's very broad definition of that word, *see* Section 102(1), makes the word unuseable here.

Former subsection (a)(4) – The reference to the limited partnership's term is deleted, following the Drafting Committee's decision at the October, 1998 meeting.

Subdivision (a)(4) – This paragraph is revised to reflect the Draft Committee's decision to establish LLLP status as the Act's default mode. See Section 404 and Reporter's Notes to that section. *Compare* ULLCA § 203(7) (requiring an LLC's articles of organization to state "whether one or more of the members of the company are to be liable for its debts and obligations under Section 303(c)."

Former subsection (a)(5) – The reference to optional matters is relocated to subsection (b).

Former subsection (b) – At its March, 1999 meeting, the Drafting Committee deleted a provision that had been a much slimmed-down version of RUPA's statement of authority. *Compare* RUPA § 303.

Subsection (b) – The exception is derived from ULLCA § 203(c), which refers a bit inaccurately (albeit more succinctly) to "the nonwaivable provisions of Section . . . ."

Subsection (c) – Source: ULLCA § 203(c). At its October, 1998 meeting, the Drafting Committee directed the deletion of ULLCA's introductory phrase "As to all other matters" and the placement of this conflict provision in a separate subsection. The new introductory phrase ("subject to . . .") makes clear that the conflict rules cannot override the list of nonwaivable provisions. Thus, for example, if the certificate purports to change a nonwaivable provision and a third party relies on the certificate, the certificate **does** not prevail. (Arguably, no person could "reasonably" rely on a certificate provision that violates subsection (b), but ULLCA saw fit to make this point directly.)

The July, 1999 Draft expanded the conflict provision to include " a filed statement of dissociation, termination or change." The March, 2000 Draft added "filed articles of conversion or merger." A third party should be able to reasonably rely on these publicly filed records. Indeed, with regard to statements of dissociation and termination and articles of conversion and merger, third parties (as well as partners) are subject to constructive notice. See Section 103(d). If the information in those records can be held against a person, a person should certainly be able to reasonably rely on the information.

Subsection (d) – Section 206(d) limits the delay period to 90 days. This subsection may well be unnecessary, given the general scope of Section 206.

SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE.

(a) A certificate of limited partnership may be amended by delivering for filing in the [office of the Secretary of State] an amendment or pursuant to [Article] 11 articles of merger, stating:

(1) the name of the limited partnership;

(2) the date of filing the certificate; and

(3) the changes the amendment makes to the certificate.

(b) A limited partnership must deliver for filing an amendment to a certificate of limited partnership reflecting the occurrence of any of these events:

(1) the admission of a new general partner;

(2) the dissociation of a person as a general partner;

(3) the appointment of a person to wind up the limited partnership's business under Section 803(b) or (c).

(c) A general partner that becomes aware that any statement in a certificate of limited partnership was false when made or that any arrangements or other facts described have changed, making the certificate inaccurate in any respect, shall promptly:

(1) cause the certificate to be amended; or

(2) if appropriate, deliver for filing in the [office of the Secretary of State] a statement of change pursuant to Section 115 or a statement of correction pursuant to Section 207.

(d) A certificate of limited partnership may be amended at any time for any other proper purpose the general partners determine.

(e) A restated certificate of limited partnership may be delivered for filing in the same manner as an amendment.

Reporter's Notes

Source: RULPA § 202.

Caption – The 1986 amendments to RULPA added subsection (f) [now (e)], providing for restated certificates. Re-RULPA changes the caption to reflect that addition.

Subsection (a) – Re-RULPA does not use the term "certificate" to refer to amendments. It is confusing to use the same term to refer both to an initial document (i.e., the certificate of limited partnership) and subsequent documents that amend the initial document.

Subsection (b) – This subsection differs from its RULPA counterpart both stylistic and substantively. The stylistic change is to switch from the passive to active voice. The substantive change, made at the October, 1998 meeting, is to delete the 30-day time period allowed to make the amendment.

ULLCA contains no provision comparable to subsection (b), relying instead on ULLCA §§ 207 (permitting but not expressly requiring the correction of a filed record) and 209 (liability for false statement in filed record).

Subsection (b)(2) – In RULPA this provision refers to "withdrawal," rather than "dissociation." "Withdrawal" is no longer the term of art. "Dissociation" is.

Subsection (b)(3) – Earlier drafts deleted RULPA language referring to "the continuation of the business under Section 801 after an event of withdrawal of a general partner" and required that the certificate be amended to indicate "the dissolution of the limited partnership." However, at its October, 1998 meeting, the Drafting Committee decided to delete the "dissolution" language. At its April, 2000 meeting, the Committee reaffirmed the decision.

The decision creates serious problems for limited partners and for non-controlling general partners. Amending the certificate to indicate dissolution serves a constructive notice function. That notice aids the limited partners by curtailing the power to bind of the general partners and aids non-controlling general partners by curtailing not only the power to bind but also the general partners' lingering personal liability. If amending the certificate is merely permissive (as decided by the Drafting Committee), aggrieved partners cannot use Section 205 (Filing by Judicial Act). That section applies only "[i]f a person *required* . . . to sign any record fails or refuses to do so." (Emphasis added). N.b. – a certificate of limited partnership is not "inaccurate" under subsection (c) merely because the limited partnership has dissolved and the certificate does not state that fact.

Subsection (c) – This subsection differs from the RULPA provision in three respects: (i) "knows of " has replaced "becomes aware that," (ii) the requirement is to "cause" an appropriate amendment rather than to actually amend, and (iii) subsection recognizes that, in appropriate circumstances, other filings can correct the public record. The first difference merely implements a defined term. The second recognizes that in some circumstances an amendment requires a signature from more than one general partner. See Section 204. Section 205 (Filing by Judicial Act) is available to a general partner that cannot convince fellow general partners to sign. The third difference encompasses statements of change and statements of correction.

What if the partnership agreement places all responsibility and power to amend the certificate on one general partner and another partner becomes aware of an inaccuracy? Does the agreement relieve the second partner of responsibility under this provision? Presumably not – the certificate is not squarely within the domain of the partnership agreement, because inaccuracies in the certificate have an effect on third parties. Moreover, Section 208 imposes personal liability on general partners for failure to correct the public record. If there is doubt on this point, however, perhaps this provision should be included in the list of nonwaivable provisions.

Former subsection (e) [personal liability for inaccuracies] – The Drafting Committee dwelled on this subsection at the October, 1998 meeting, initially deciding to delete the provision and then deciding to reinstate it. The July, 1999 Draft relocated the provision to Section 208.

That section now provides extensive rules on liability for inaccuracies in filed records. N.b. – those rules do not relate to the liability of the limited partnership itself. Suppose, for example, that (i) the certificate of limited partnership states that X is a general partner with the power to bind the limited partnership to transactions involving amounts less than $100,000, (ii) X has dissociated as a general partner but the remaining general partner has not caused the certificate to be appropriately amended and X has not filed a statement of dissociation, (iii) X purports to commit the limited partnership to a third party through a contract involving $50,000, and (iv) that third party reasonably relies on the unamended certificate in entering into the contract. The limited partnership is bound on the contract. See Section 606. Section 208 is irrelevant to that outcome but will apply to determine whether the remaining general partner is liable to the limited partnership for any harm suffered by the limited partnership as a result of the contract.

Subsection (e) – This subsection comes almost verbatim from RULPA § 202(f) and appeared as subsection (f) in Drafts before the July, 1999 Draft. Re-RULPA omits RULPA's reference to execution of documents. As a matter of

organization, that reference belongs in Section 204, which deals with signing requirements. Also, moving the reference will make it easier to correct the current rule's simplistic approach. Who must sign a restated certificate depends on the nature of the changes reflected in the restated certificate. Some changes might require a single general partner's signature, while others might require two or more.

SECTION 203. STATEMENT OF TERMINATION. A dissolved limited partnership that has completed winding up may deliver for filing in the [office of the Secretary of State] a statement of termination that states:

(1) the name of the limited partnership;

(2) the date of filing of its original certificate of limited partnership;

(3) the effective date of termination, which must be a date certain and is subject to Section 206(d), if the statement is not to be effective upon filing; and

(4) any other information the general partners filing the statement determine.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: how to clarify the consequences of filing a statement of termination; whether to provide expressly that a limited partnership continues in existence for some period after the filing of a statement of termination, for the purposes of being sued.

Derived from RULPA § 203, which is captioned "Cancellation of Certificate" and mandates the filing of a certificate of cancellation "upon the dissolution and the commencement of winding up of the partnership or at any other time there are no limited partners."

Re-RULPA switches the focus from dissolution to termination. Canceling the certificate upon dissolution (current law) is misleading because a dissolved limited partnership is not terminated. However, given past usage it would be confusing to apply the word "cancellation" to a document filed to indicate the termination of a limited partnership's existence. Re-RULPA therefore uses "statement of termination" for that purpose. (Drafts before the July, 1999 Draft referred to a "declaration of termination.")

Re-RULPA also makes the filing permissive rather than mandatory. The Drafting Committee took this position at its October, 1998 meeting. At the same meeting the Committee deleted a provision requiring a limited partnership to amend its certificate to indicate dissolution.

Subsection (a)(2) – Re-RULPA adds "original" to RULPA's language, to distinguish any restated certificates.

Subsection (a)(3) – Section 206(d) limits the delay period to 90 days.

Former subsection (b) – At its October, 1999 meeting, the Drafting Committee decided to delete this subsection, which had provided that the filing of a statement of termination terminates the existence of the limited partnership. At its April, 2000 meeting, the Committee agreed that the filing of a statement of termination does not affect a person's ability to sue a limited partnership. The statement of termination retains its constructive notice function. See Section 103(d)(3).

SECTION 204. SIGNING OF RECORDS.

(a) Each record pertaining to a domestic or foreign limited partnership and delivered for filing pursuant to this Act in the [office of the Secretary of State] must be signed in the following manner:

(1) An original certificate of limited partnership must be signed by all general partners listed in the certificate.

(2) An amendment making, modifying or deleting a statement under Section 404(b) must be signed by all general partners listed in the certificate.

(3) An amendment designating as general partner a person admitted under Section 801(3)(B) following the dissociation of a limited partnership's last general partner must be signed by that person.

(4) An amendment required by Section 803(b) or following the appointment of a person to wind up the dissolved limited partnership's business must be signed by that person.

(5) Any other amendment must be signed by:

(A) at least one general partner listed in the certificate;

(B) each other person designated in the amendment as a new general partner; and

(C) each person that the amendment indicates has dissociated as a general partner, unless:

(i) the person is deceased or a guardian or general conservator has been appointed for the person and the amendment so states; or

(ii) the person has previously delivered for filing a statement of dissociation.

(6) A restated certificate of limited partnership must be signed by at least one general partner listed in the certificate, and, to the extent the restated certificate effects a change under any other paragraph of this subsection, the certificate must be signed in a manner that satisfies that paragraph.

(7) A statement of termination must be signed by all general partners listed in the certificate or, if the certificate of a dissolved limited partnership lists no general partners, by the person appointed under Section 803(b) or 803(c) to wind up the dissolved limited partnership's business.

(8) Articles of conversion must be signed by each general partner listed in the certificate of limited partnership.

(9) Articles of merger must be signed as provided in Section 1108(a).

(10) Any other record signed by or on behalf of a limited partnership must be signed by at least one general partner listed in the certificate.

(11) A statement by a person pursuant to Section 605(4) stating that the person has dissociated as a general partner must be signed by that person.

(12) A statement of withdrawal by a person pursuant to Section 306 must be signed by that person.

(13) A record signed by or on behalf of a foreign limited partnership must be signed by at least one general partner of the foreign limited partnership.

(b) Any person may sign by an attorney in fact any record to be filed pursuant to this [Act].

Reporter's Notes

Subsection (a) – ULLCA § 205 (Signing of records) refers to "a record to be filed by or on behalf of a limited liability company." This draft omits that language because paragraph (a)(11) contemplates a dissociated general partner filing a record on his, her or its own behalf. Departing from ULLCA, Re-RULPA states a signing requirement for records delivered for filing by or on behalf of foreign limited partnerships (e.g., annual reports, applications for a certificate of authority).

Subsection (a)(1) – At its July, 1997 meeting, the Committee decided that a person can be a general partner even though not listed in the certificate. This phrase "listed in the certificate" reflects that decision.

Subsection (a)(2) – Per Section 406(b), in the default mode *as among the partners* this change requires the consent of all partners. However, execution of the necessary publicly-filed document remains the province of the general partners.

Subsection (a)(3) – At its October, 1998 meeting, the Drafting Committee directed the Reporter to consider the "interloper" problem – i.e., whether this provision allows a stranger to the limited partnership to muddle the public record with a false filing. The Reporter recognizes the problem but believes this provision should remain as drafted. A false filing risks both criminal and civil liability. Section 208. Moreover, no simple solution exists. For example, requiring the signature of at least one limited partner does not help, because the public record does not identify limited partners. ULLCA suffers from a comparable problem. Any member may execute a record on behalf of a member-managed LLC, ULLCA § 205(a)(2), but the public record does not identify an LLC's members. ULLCA §§ 203(a) (stating the information required in the articles of organization and omitting the identity of members) and 211(a) (same as to the contents of the LLC's annual report).

Subsection a(4) – This subsection has the same "interloper" problem as exists under subsection a(3).

Subsection (a)(5)(C) – This provision was new in the July, 1999 Draft. Both the limited partnership and the dissociated general partner have reasons for wanting the public record to reflect the dissociation. If a person dissociated as a general partner fails or refuses to sign an amendment to the certificate, the limited partnership can invoke Section 205 (Filing By Judicial Act). If the limited partnership fails to amend the certificate, the person dissociated as a general partner can deliver for filing a statement of dissociation. Section 605(4).

The March, 2000 Draft added the reference to a person for whom "a guardian or general conservator of the person has been appointed." That language comes from Section 603(7)(C).

Subsection (a)(7) – In early Drafts this subsection's alternative provision applied if "the dissolved limited partnership has no general partners." Draft #4 added language to recognize that a person can be a general partner without being listed in the certificate. Such persons may have rights and obligations despite their unlisted status, but they cannot act as general partners for the purpose of affecting the public record.

Although the Drafting Committee did not expressly decide this point at the October, 1998 meeting, the result is implied in a decision the Committee did make. Subsection (a) contains various references to records requiring the signature of a general partner. The Committee instructed the Reporter to qualify those references with the phrase "listed in the certificate." That qualification suggests that under this section only certificate-listed general partners may sign records on behalf of a limited partnership.

Subsection(a)(8) – If articles of conversion are filed, the limited partnership will be converting to some other type of business organization. If some other type of business organization is converting to a limited partnership, the converting business organization will file a certificate of limited partnership containing the additional information required by Section 1104.

Subsection (a)(10) – This subsection applies, e.g., to annual reports, Section 210, and articles of correction, Section 207. The signature of one general partner is sufficient to sign articles of correction, even if the record being corrected required additional signatures. A general partner that uses articles of correction to make a substantive change to a record will run afoul of Section 208(b).

Former subsection (a)(10) – At its October, 1998 meeting, the Drafting Committee deleted a proposed paragraph (10), which referred to " a statement by a person pursuant to Section **[TBD]** declaring that the person is not and has not been a general partner must be signed by that person." Two remedies remain. If the person has invested in the limited partnership, the person can file a declaration of withdrawal under Section 306. In any event, the person can sue under Section 205 (Filing by Judicial Act) to force a correction.

Subsection (a)(13) – This provision was new in the July, 1999 Draft, has no analog in ULLCA, and is derived from RULPA §§ 902, 905, and 906.

Subsection (b) – At its October, 1998 meeting, the Drafting Committee adopted a minimalist approach to this provision. *Compare* ULLCA § 205(c) (stating that a power-of-attorney need not be filed but must be retained by the LLC).

Former subsection (c) – This provision has been relocated to Section 208(b).

SECTION 205. FILING BY JUDICIAL ACT.

(a) If a person required by [this Act] to sign any record fails or refuses to do so, any other person that is adversely affected by the failure or refusal may petition the [appropriate court] to order the person to sign the record or order the [Secretary of State] to file the record unsigned. If the adversely affected person is not the limited partnership or foreign limited partnership to which the record pertains, the

adversely affected person shall make that limited partnership or foreign limited partnership a party to the action.

(b) A person adversely affected may seek both remedies provided in subsection (a) in the same action, in the alternative. If the court finds that it is proper for the record to be signed and that a person required by [this Act] to sign the record has failed or refused to do so, the court shall order the person to sign the record or order the [Secretary of State] to file an appropriate record unsigned, which is effective without being signed.

Reporter's Notes

Derived from RULPA § 205. This section differs from RULPA § 205 in four ways. First, following ULLCA, Re-RULPA uses "sign" as a defined term. Second, at the request of the representative of the International Association of Corporate Administrators, the section deletes as inappropriate RULPA's mandate that the [Secretary of State] sign a record. Third, pursuant to the Committee's decision at its October, 1999 meeting, the section makes clear that an adversely affected party may seek an order for an unsigned filing without first showing that the non-signer has disobeyed a prior court order mandating signing. Fourth, the section requires that the limited partnership or foreign limited partnership to which the record pertains be or be made a party to the action.

RUPA contains another approach, allowing various persons to file documents to correct the public record. *See* RUPA §§ 304 (authorizing a person "named as a partner in a filed statement of partnership authority" to file "a statement of denial"); 704 (authorizing a dissociated partner to file a statement of dissociation); and 805(a) (authorizing a partner who has not wrongfully dissociated to file a statement of dissolution).

It makes sense for Re-RULPA to differ from RUPA in this respect. RUPA assumes decentralized management, so decentralizing the power to affect the entity's public record is consistent with RUPA's overall paradigm. Re-RULPA, however, assumes centralized management. The general partners run the business and, it can be argued, should have exclusive authority and responsibility to maintain the limited partnership's public record. So far the only exceptions relate to a person dissociated as a general partner, Sections 204(a)(11) and 605(4), and a person that has invested in the business and has been erroneously listed as a general partner,

Sections 204(a)(12) and 306(a)(2). (The latter two provisions apply in other situations as well.)

At its October, 1998 meeting, the Drafting Committee decided to make permissive rather than mandatory an amendment to the certificate indicating dissolution. That decision probably makes this section inapplicable to such amendments. Suppose, for example, the limited partnership dissolves, the general partner declines to amend the certificate and a limited partner wishes to curtail the general partner's power to bind the dissolved partnership. The limited partnership is not "required" to file the amendment.

SECTION 206. FILING IN [OFFICE OF SECRETARY OF STATE].

(a) A record authorized to be filed under this [Act] must be in a medium permitted by the [Secretary of State] and must be delivered to the [office of the Secretary of State]. Unless the [Secretary of State] determines that a record fails to comply as to form with the filing requirements of this [Act], and if all filing fees have been paid, the [Secretary of State] shall file the record and:

(1) for a statement of dissociation, send:

(A) a receipt for the statement and the fees to the person which the statement indicates has dissociated as a general partner; and

(B) a copy of the statement and receipt to the limited partnership;

(2) for a statement of withdrawal, send:

(A) a receipt for the statement and the fees to the person on whose behalf the record was filed; and

(B) if the statement refers to an existing limited partnership, a copy of the statement and receipt to the limited partnership; and

(3) for all other records, send a receipt for the record and the fees to the person on whose behalf the record was filed.

(b) Upon request and payment of a fee, the [Secretary of State] shall send to the requester a certified copy of the requested record.

(c) Except as otherwise provided in subsection (d), a record filed by the [Secretary of State] is effective:

(1) at the time of filing on the date it is filed, as evidenced by the [Secretary of State's] endorsement of the date and time on the record; or

(2) at the time specified in the record as its effective time on the date it is filed.

(d) A record may specify a delayed effective time and date, and if it does so the record becomes effective at the time and on the date specified. If a delayed effective date is specified but the time is not specified, the record is effective at the close of business on that date. If a delayed effective date is later than the 90th day after the record is filed, the record is effective on the 90th day.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: whether under subsection (c)(2) a record may provide for a retroactive effective date; whether subsection (d) takes the correct position in providing for a truncated delayed effective date rather than requiring the [Secretary of State] to reject a record which seeks a delay of more than 90 days.

Source: ULLCA § 206.

Subsection (a)(1) and (2) – These provisions have no analog in ULLCA.

Subsection (c)(1) – At its October, 1998 meeting, the Drafting Committee decided to deviate from ULLCA and delete the word "original," which in ULLCA § 206(c)(1) appears immediately before the word "record."

Subsection (d) – This subsection is taken verbatim from ULLCA § 206(d). At its October, 1998 meeting, the Drafting Committee discussed whether the truncating provision in the subsection's last sentence is good policy or whether the subsection should provide instead for rejection of a record that seeks to delay its effective date more than 90 days. ULLCA § 206(c) and (d) appear to have been taken, essentially verbatim, from RMBCA § 1.23. The RMBCA does not have a truncating provision. The Committee has postponed a decision on this issue.

SECTION 207. CORRECTING FILED RECORD.

(a) A limited partnership or foreign limited partnership may correct a record filed by the [Secretary of State] if at the time of filing the record contained false or erroneous information or was defectively signed.

(b) A record is corrected by:

(1) preparing a statement of correction that:

(A) describes the record, including its filing date, or attaches a copy of it to the statement of correction;

(B) specifies the incorrect information and the reason it is incorrect or the manner in which the signing was defective; and

(C) corrects the incorrect information or defective signing; and

(2) delivering the corrected record to the [Secretary of State] for filing.

(c) A statement of correction is effective retroactively on the effective date of the record the statement corrects, but the statement is effective when filed:

(1) for the purposes of Section 103(c) and (d); and

(2) as to persons relying on the uncorrected record and adversely affected by the correction.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: whether the reliance referred to in subsection (c)(2) should be reasonable reliance.

This section is derived mostly verbatim from ULLCA § 207, which in turn derives mostly verbatim from RMBCA § 1.24. In Drafts before the July, 1999 Draft, this material appeared as Section 206A.

The ULLCA provision has no Comment. The RMBCA Comment explains that:

> This correction procedure has two advantages: (1) filing articles of correction may be less expensive than refiling the document or filing articles of amendment, and (2) articles of correction do not alter the effective date of the underlying document being corrected.

ULLCA § 207 refers to "articles of correction." Beginning with the July, 1999 Draft, Re-RULPA uses "statement of correction" and replaces ULLCA's references to inaccurate "statements" with references to inaccurate information.

Subsection (a) – Pursuant to discussion at the Drafting Committee's July, 1999 meeting, this subsection makes clear that a statement of correction cannot be used to correct a record that was accurate when filed but has become inaccurate due to subsequent events.

Subsection (c)(1) – This provision makes clear that, for the purposes of constructive notice, a statement of correction carries its own 90 day delay. The provision does not exist in ULLCA.

SECTION 208. LIABILITY FOR FALSE INFORMATION IN RECORD.

(a) If a record filed under this [Act] contains false information, a person that suffers loss by reliance on the information may recover damages for the loss from:

(1) a person that signed the record, or caused another to sign it on the person's behalf, and knew the statement to be false at the time the record was signed; and

(2) a general partner that has notice that the information is false within a sufficient time before the information was relied upon to have reasonably enabled that general partner to effect an amendment under Section 202, file a petition pursuant to Section 205, or deliver for filing a statement of change pursuant to Section 115 or a statement of correction pursuant to Section 207.

(b) The signing of a record authorized or required to be filed under this [Act] constitutes an affirmation under the penalties of perjury that the facts stated in the record are true.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: whether the reliance referred to in subsection (a) should be required to be reasonable.

Derived from RULPA §§ 207 and 204(e). In Drafts before the July, 1999 Draft, this material appeared as Section 207. ULLCA takes a far narrower approach.

General Background – At its October, 1998 meeting, the Drafting Committee struggled with this section, initially deciding to delete it and then deciding to reinstate it. Draft #4 did some "clean up" work on the section, and the Committee made no changes during its March, 1999 meeting.

The July, 1999 Draft further refined Re-RULPA's approach, and the March, 2000 deleted as unnecessary a phrase from subsection (a). The following redlined version shows the variations from RULPA § 207:

SECTION ~~207~~ 208. LIABILITY FOR FALSE ~~STATEMENT~~ INFORMATION IN ~~CERTIFICATE~~ RECORD.

(a) If ~~any certificate of limited partnership or certificate of amendment or cancellation~~ a record filed under this [Act] contains ~~a~~ false ~~statement~~ information, one who suffers loss by reliance on the ~~statement~~ information may recover damages for the loss from:

(1) ~~any~~ a person ~~who executes the certificate~~ that signed the record, or ~~causes~~ caused another to ~~execute~~ sign it on ~~his~~ the person's behalf, and knew~~, and any general partner who knew or should have known,~~ the statement to be false at the time the ~~certificate was executed~~ record was signed; and

(2) ~~any~~ a general partner ~~who~~ that has notice that the information is false ~~knows or should have known that any arrangement or other fact described in the certificate has changed, making the statement inaccurate in any respect~~ within a sufficient time before the ~~statement~~ information was relied upon ~~reasonably~~ to have reasonably enabled that general partner to ~~cancel or amend the certificate~~ effect an amendment under Section 202~~;~~ or ~~to~~ file a statement of change pursuant to Section 115, a petition ~~for its cancellation or amendment~~ pursuant to Section 205 , or a statement of correction pursuant to Section 207.

(b) The signing of a record authorized or required to be filed under this [Act] constitutes an affirmation under the penalties of perjury that the facts stated in the record are true.

Technical changes from RULPA – Several technical points warrant attention in this revision:

- "Sign" replaces "execute," and "record" replaces "certificate." These changes conform to terminology changes made throughout Re-RULPA.

- The defined term "has notice" replaces the "knows or has reason to know" formulation.

- "Information" replaces "statement," because the latter is a term of art in this [Act].

Substantive differences with RULPA – Two substantive points also warrant attention:

- The 30-day grace period from RULPA § 202(e) is **not** preserved. The "sufficient time" provision adequately protects general partners.

- A general partner's liability extends to circumstances omitted by RULPA §207 – namely, a general partner who **after** the signing of a record gains notice of an **initially** false statement.

Liability of the limited partnership – The October, 1998 meeting raised but did not resolve the issue of whether the limited partnership should itself be liable for loss suffered in reliance on a false statement. ULLCA does not create any such liability for an LLC. The Reporter believes that the liability of the limited partnership should depend on other provisions of the Act. See Reporter's Notes to Section 202, former subsection (e). This section can, however, create liability *to* the limited partnership.

Overarching policy issue (ULLCA vs. RULPA) – In addition to these narrower points, the Drafting Committee must reconcile Re-RULPA with ULLCA. Section 208 reaches much further than the comparable ULLCA provision. ULLCA § 209 provides:

> If a record authorized or required to be filed under this [Act] contains a false statement, one who suffers loss by reliance on the statement may recover damages for the loss from a person who signed the record or caused another to sign it on the person's behalf and knew the statement to be false at the time the record was signed.

ULLCA omits personal liability for those who learn of a misstatement, have the authority to correct it but fail to do so. ULLCA also omits liability for those who merely have reason to know of the misstatement.

It is difficult to justify Re-RULPA and ULLCA having such radically different approaches. In particular, it is difficult to justify imposing a more demanding standard on those who manage a limited partnership than on those who manage an LLC. It is true that general partners have personal liability for the entity's debts and LLC members and managers do not. However, Section 208 liability is **not** liability for the entity's debt; it is liability for mismanaging the public record. How does the existence of the former type of liability justify imposing the latter?

Reporter's Notes to Former Sections 208 (Scope of Notice) and 209 (Delivery of Certificates to Limited Partners)

Former Section 208 has been subsumed into Section 102(c). Section 209 was deleted by the Drafting Committee at its October, 1998 meeting.

SECTION 209. CERTIFICATE OF EXISTENCE OR AUTHORIZATION.

(a) A person may request the [Secretary of State] to furnish a certificate of existence for a limited partnership or a certificate of authorization for a foreign limited partnership.

(b) A certificate of existence for a limited partnership must state:

(1) the limited partnership's name;

(2) that it is duly formed under the laws of this State and the date of formation;

(3) whether all fees, taxes and penalties due to the [Secretary of State] under this [Act] or other law have been paid;

(4) whether its most recent annual report required by Section 210 has been filed by the [Secretary of State];

(5) that no statement of termination has been filed by the [Secretary of State]; and

(6) other facts of record in the [office of the Secretary of State] which may be requested by the applicant.

(c) A certificate of authorization for a foreign limited partnership must state:

(1) the foreign limited partnership's name and any alternate name adopted under Section 905(a) for use in this State;

(2) that it is authorized to transact business in this State;

(3) whether all fees, taxes and penalties due to the [Secretary of State] under this [Act] or other law have been paid;

(4) whether its most recent annual report required by Section 210 has been filed by the [Secretary of State];

(5) that its certificate of authority to transact business has not been revoked and a certificate of cancellation has not been filed; and

(6) other facts of record in the [office of the Secretary of State] which may be requested by the applicant.

(d) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the [Secretary of State] may be relied upon as conclusive evidence that the domestic or foreign limited partnership is in existence or is authorized to transact business in this State.

Reporter's Notes

Source: ULLCA § 208. In Drafts before the July, 1999 Draft, this material appeared at Section 210.

Subsection (b)(2) – At its October, 1998 meeting the Drafting Committee decided that certificate of limited partnership need not refer to a limited partnership's term. The Committee therefore deleted from the end of this provision the phrase "and the limited partnership's specified term."

Subsection (b)(3) – In previous Drafts, this provision followed ULLCA essentially verbatim and stated:

> (3) if payment is reflected in the records of the [Secretary of State] and if nonpayment affects the existence of the limited partnership, that all fees, taxes, and penalties owed to this State have been paid

The current version reflects a decision made on Section 803E(1) [now Section 809(1)] by the Drafting Committee at its March, 1999 meeting. Following ULLCA, Section 803E(1) provided for administrative dissolution for nonpayment of fees,

taxes and penalties "imposed by this [Act] or other law." The Committee decided to restrict the provision to "any fees, taxes and penalties due to the [Secretary of State] under this [Act] or other law."

Subsection (c)(3) – Changed in the July, 1999 Draft to differ with Draft #4 (and ULLCA) for the reasons stated above, in the Notes to subsection (b)(3).

Subsection (c)(5) – The March, 2000 Draft expanded this paragraph to encompass involuntary as well as voluntary ends to a foreign limited partnership's authority to transact business.

SECTION 210. ANNUAL REPORT FOR [SECRETARY OF STATE].

(a) A limited partnership, and a foreign limited partnership authorized to transact business in this State, shall deliver to the [Secretary of State] for filing an annual report that sets forth:

(1) the name of the limited partnership or foreign limited partnership ,including any alternate name adopted under Section 905(a), and the State or other jurisdiction under whose law the domestic or foreign limited partnership is formed;

(2) the address of its designated office and the name and address of its agent for service of process in this State; and

(3) in the case of a limited partnership, the address of its principal office.

(b) Information in an annual report must be current as of the date the annual report is signed on behalf of the limited partnership.

(c) The first annual report must be delivered to the [Secretary of State] between [January 1 and April 1] of the year following the calendar year in which a limited partnership was formed or a foreign limited partnership was authorized to

transact business. Subsequent annual reports must be delivered to the [Secretary of State] between [January 1 and April 1] of the ensuing calendar years.

(d) If an annual report does not contain the information required in subsection (a), the [Secretary of State] shall promptly notify the reporting limited partnership or foreign limited partnership and return the report to it for correction. If the report is corrected to contain the information required in subsection (a) and delivered for filing to the [Secretary of State] within 30 days after the effective date of the notice, it is timely delivered.

(e) If a filed annual report contains an address of a designated office or the name or address of an agent for service of process that differs from the information shown upon the records of the [Secretary of State] immediately before the filing, the differing information in the annual report is considered a statement of change under Section 115.

Reporter's Notes

Derived from ULLCA § 211. In Drafts before the July, 1999 Draft, this material appeared at Section 211.

Subsection (a)(2) – At its October, 1998 meeting, the Drafting Committee rejected ULLCA's concept of a "designated" in-state office for domestic and foreign limited partnerships. Accordingly, Draft #4 removed a reference to a "designated office" and substituted appropriate cross-references. For the reasons stated in the Reporter's Notes to Section 114, beginning with the July, 1999 Draft, Re-RULPA returns to ULLCA's concept of a "designated office."

Subsection (a)(3) – For a foreign limited partnership, the designated office is the principal office. See Section 102(5)(B).

Former subsection (a)(4) – This provision, referring to "the names and business addresses of its general partners," has been deleted to avoid possible conflicts between the information provided in the annual report and the information

stated in the certificate of limited partnership. No comparable problem exists under ULLCA, even though ULLCA § 211(a)(4) requires the annual report to include "the names and business addresses of any managers." ULLCA requires the articles of organization to include only "the name and address of each **initial** manager." ULLCA § 203(a)(6). Re-RULPA, in contrast, requires the certificate of limited partnership to list the general partners and requires the certificate to be amended to keep the list up to date. Sections 201(a)(3) and 202(b)(1) and (2).

Subsection (e) – This subsection was new in the July, 1999 Draft and was included for the reasons stated in the Reporter's Notes to Section 114.

[ARTICLE] 3

LIMITED PARTNERS

SECTION 301. ADMISSION OF LIMITED PARTNER. A person becomes a limited partner:

(1) as provided in the partnership agreement;

(2) as the result of a merger or conversion under [Article] 11; or

(3) with the consent of all the partners.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: whether to combine this section and Section 401 into a single section (to be included in Article 1) on the admission of partners.

Derived loosely from RULPA § 301.

SECTION 302. NO RIGHT OR POWER AS LIMITED PARTNER TO BIND LIMITED PARTNERSHIP. A limited partner has neither the right nor the power as a limited partner to act for or bind the limited partnership.

Reporter's Notes

In Drafts before the July, 1999 Draft, this material appeared as Section 302(e). The concept is so fundamental to Re-RULPA's vision of a limited partnership, however, that the July, 1999 Draft gave the provision a section of its own. As for "the vision thing," see the Prefatory Note.

The phrase "as a limited partner" is intended to recognize that: (i) this provision does not disable a general partner that also owns a limited partner interest, (ii) a separate agreement can empower and entitle a person that is a limited partner to act for the limited partnership in another capacity; e.g., as an agent, and (iii) under Section 305(b) the partnership agreement may delegate to a limited partner "some or all of . . . the managerial authority vested in a general partner by this [Act]."

The fact that a limited partner *qua* limited partner has no power to bind the limited partnership means that information possessed by a limited partner is not attributed to the limited partnership. Attribution of information is an aspect of the power to bind. Beginning with the March, 2000 Draft, Section 103(h) makes that point explicitly.

At its October, 1999 meeting, the Drafting Committee directed the Reporter to relocate this section's concluding phrase. However, the original syntax was subsequently approved by the representative of the Style Committee.

SECTION 303. NO LIABILITY AS LIMITED PARTNER TO THIRD PARTIES. A limited partner is not liable for a debt, obligation, or other liability of the limited partnership solely by reason of being a limited partner, even if the limited partner participates in the management and control of the limited partnership.

Reporter's Notes

In Drafts before the July, 1999 Draft, this material appeared at Section 303.

This section eliminates the RULPA rule that makes a "limited partner [who] participates in the control of the business . . . liable . . . to persons who transact business with the limited partnership reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner." RULPA § 303(a). This section also eliminates RULPA's lengthy list of safe harbors. RULPA § 303(b).

This section establishes a liability shield for limited partners which will be analogous to the corporate shield for shareholders. Nothing in the limited partner's shield affects claims for which limited partner status is not an element. Thus, this section does not prevent a limited partner from being liable as a result of the limited partner's own conduct to the extent that the same conduct would result in liability for a person that is not a limited partner. Moreover, this section does not eliminate a limited partner's liability for promised contributions, Section 502, and improper distributions. Section 509. That liability is not on account of a person's status as a limited partner.

The Drafting Committee has not yet discussed whether Re-RULPA should address the concept of "piercing the veil." The concept is an equitable doctrine and presumably applies to limited partnerships through Section 107.

Reporter's Notes to Former Section 304

Prior Drafts contained a section captioned "MANAGEMENT RIGHTS OF LIMITED PARTNERS." At its April, 2000 meeting, the Drafting Committee decided to delete the section.

Former subsection (a) – This subsection listed approximately 15 governance-related rights of limited partners and provided that, except for the listed rights, "[a] limited partner has no right to participate in the management of the limited partnership." The list consisted mostly of cross references to other sections of the Act. At its April, 2000 meeting the Drafting Committee decided that it was unnecessary to include the list in the Act and directed the Reporter to preserve the list for a Comment. See Reporter's Notes to Section 406.

Former subsection (b) – This subsection required unanimous consent to amend the partnership agreement and to switch in or out of LLLP status. These provisions now appear in Section 406(b).

SECTION 304. LIMITED PARTNER'S AND FORMER LIMITED PARTNER'S RIGHT TO INFORMATION.

(a) On 10 days' written demand to the limited partnership, a limited partner may inspect and copy the required records during regular business hours in the limited partnership's designated office. A partner making demand pursuant to this subsection need not demonstrate, state, or have any particular purpose for seeking the information.

(b) A limited partner may, during regular business hours and at a reasonable location specified by the limited partnership, obtain from the limited partnership and inspect and copy true and full information regarding the state of the business and financial condition of the limited partnership and other information regarding the affairs of the limited partnership as is just and reasonable if:

(1) the limited partner seeks the information for a purpose reasonably related to the partner's interest as a limited partner;

(2) the limited partner makes a written demand on the limited partnership, describing with reasonable particularity the information sought and the purpose for seeking the information; and

(3) the information sought is directly connected to the limited partner's purpose.

(c) Within 10 days after receiving a demand pursuant to subsection (b), the limited partnership shall in writing inform the limited partner that made the demand:

(1) what information the limited partnership will provide in response to the demand;

(2) when and where the limited partnership will provide that information; and

(3) if the limited partnership declines to provide any demanded information, the limited partnership's reasons for declining.

(d) Subject to subsection (f), a person dissociated as a limited partner may inspect and copy a required record during regular business hours in the limited partnership's designated office if:

(1) the record pertains to the period during which the person was a limited partner;

(2) the person seeks the information in good faith; and

(3) the person meets the requirements of subsection (b).

(e) The limited partnership must respond to a demand made pursuant to subsection (d) in the same manner as provided in subsection (c).

(f) If an individual who is a limited partner dies, Section 704 applies.

(g) The limited partnership may impose reasonable limitations on the use of information obtained under this section. In a dispute concerning the reasonableness of a restriction under this subsection, the limited partnership has the burden of proving reasonableness.

(h) A limited partnership may charge a limited partner or person dissociated as a limited partner that makes a demand under this section reasonable costs of copying, limited to the costs of labor and material.

(i) Whenever [this Act] or a partnership agreement provides for a limited partner to vote on or give or withhold consent to a matter, before the vote is taken or the consent given or withheld the limited partnership shall, without demand, provide the limited partner with all information which the limited partnership knows and is material to the limited partner's decision.

(j) A limited partner or person dissociated as a limited partner may exercise the rights under this section through an attorney or other agent. In that event, any limitations on availability and use under subsection (g) apply both to the limited partner or person and to the attorney or other agent. The rights under this section extend to the legal representative of a person under legal disability who is a limited partner or person dissociated as a limited partner. The rights stated in this section do not extend to a transferee, but subsection (d) creates rights for a person

dissociated as a limited partner and subsection (f) recognizes the rights of the executor or administrator of a deceased limited partner.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: whether to relocate Section 704 (Power of Estate of Deceased Partner) as a subsection of this section.

At its October, 1998 meeting, the Drafting Committee made substantial changes to this section, in accordance with the Committee's rejection of the two-tiered approach to required records. See Reporter's Notes to Section 111. The Committee decided to retain Draft #3's corporate-like provisions relating to process but to change the substance of the information accessible for cause.

Specifically, the Committee decided to use the language from RULPA § 305(a)(2)(i) and (iii). Those paragraphs require the limited partnership to provide, on proper demand, "true and full information regarding the state of the business and financial condition of the limited partnership and other information regarding the affairs of the limited partnership as is just and reasonable." *Compare* RUPA § 403(a) and ULLCA § 408(b) (giving access *inter alia* to "other information concerning the [entity's] business or affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances") and RMBCA § 16.02 (limiting access to specified records).

Subsection (b) – The language describing the information to be provided comes verbatim from RULPA § 305(a)(2)(i) and (iii). Earlier drafts had deleted this language as imposing too open-ended a burden on the limited partnership. At its October, 1998 meeting, the Drafting Committee reinstated the RULPA language.

As to the location where the information is made available, Draft #1 referred to "the limited partnership's in-state office." The Committee deleted that reference in favor of the current language, which is taken from RMBCA § 16.02.

Subsection (b)(1) – Derived from RMBCA, § 16.02(c). That provision refers to "proper purpose." This draft substitutes for that phrase the explanation given in the RMBCA Comment. Draft #1 followed RMBCA § 16.02(c)(1) in imposing a "good faith" requirement. Subsequent Drafts have omitted that specific requirement as redundant, given a limited partner's generally-applicable duty of good faith.

Subsection (c)(3) – In a dispute concerning demanded information, general principles of civil procedure will impose the burden of proof on the party seeking relief; i.e., the person making demand.

Subsection (d) – For the notion that former owners should have access rights, see ULLCA 408(a). The reference to subsection (f) was new in the July, 1999 Draft and is explained below.

Subsection (f) – This subsection is new and has been added consonant with a decision made by the Drafting Committee at its March, 1999 meeting. Reviewing Section 705 of Draft #4 [now Section 704], the Committee decided to reinstate RULPA's language as to the estate of a deceased partner. That decision gives the estate considerably more informational rights than those enjoyed by other dissociated limited partners. See Section 704.

Subsection (g) – Following discussion at the October, 1998 meeting, this subsection was revised to authorize the partnership agreement to restrict availability (as well as use) of information. The March, 2000 Draft relocated to Section 110 the provisions pertaining to the partnership agreement. As revised, the subsection still has two noteworthy aspects:

i. It permits the general partners to impose use limitations, even if the partnership agreement is silent. The Committee adopted this position at it's the July, 1997 meeting.

ii. It imposes on the limited partnership the burden of proving the reasonableness of any restriction.

Subsection (h) – At its October, 1998 meeting, the Drafting Committee directed the Reporter to consider expanding this subsection to encompass costs a limited partnership incurs in generating information under subsection (b). In fealty to RUPA and ULLCA, the subsection is not expanded. *See* RUPA § 403(b) and ULLCA § 408(a) (charges limited to copying costs). The phrase "limited to the costs of labor and material" has been added, following ULLCA. (The RUPA provision refers to "covering the costs . . .")

Subsection (i) – In its July, 1997 meeting, the Drafting Committee deleted from Draft #1 the following provision as unduly burdensome and expansive:

> Whenever [this Act] or a partnership agreement provides for a limited partner to vote on or give or withhold consent to a matter, before the vote is taken or the consent given or withheld the limited partnership shall, without demand, provide

the limited partner with all information which the general partners possess or have access to and which is material to the limited partner's decision.

The deleted provision derived from ULLCA § 408(b), which provides comparable rights to LLC members even in a manager-managed LLC. At its April, 2000 meeting, the Drafting Committee reversed its earlier decision and substantially revived the deleted provision. The duty to volunteer material information is limited to information which the limited partnership "knows." A limited partnership will "know" what its general partners know. See Section 103(h). A limited partnership may also know information known by the "individual conducting the transaction for the entity." Section 103(g). As for the obligation to volunteer information to *general* partners, see Section 407(b)(1).

Subsection (j) – In prior Drafts, this provision was subsection (i). At the Committee's March, 1998 meeting the Reporter was directed to refer to ULLCA § 408(b) and provide comparable protections for the estate of a deceased partner. New subsection (f) takes care of that issue.

SECTION 305. LIMITED DUTIES OF LIMITED PARTNERS.

(a) Except as otherwise provided in subsection (b), a limited partner does not have any fiduciary duty to the limited partnership or to any other partner.

(b) A limited partner that pursuant to the partnership agreement exercises some or all of the rights of a general partner in the management and conduct of the limited partnership's business is held to the standards of conduct for a general partner to the extent that the limited partner exercises the managerial authority vested in a general partner by this [Act].

(c) A limited partner shall discharge duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise rights consistently with the obligation of good faith and fair dealing.

(d) A limited partner does not violate a duty or obligation under this [Act] merely because the limited partner's conduct furthers the limited partner's own interest.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: whether to relocate subsections (c) and (d) to Article 1 where they would avoid duplication by referring to both limited and general partners.

In Drafts before the July, 1999 Draft, this material appeared as Section 302A.

Subsection (a) – Draft #1 included the phrase "on account of that status" following the word "not." The Drafting Committee deleted that phrase as unnecessary. A limited partner can assume fiduciary obligations on account of some other relationship to the limited partnership. For example, a limited partner that acts as a broker or attorney for the limited partnership will owe the limited partnership fiduciary duties in that role. See also Section 113 (Dual Capacity).

Subsection (b) – Prior Drafts contained two different versions of this subsection: one derived from ULLCA § 409(h)(3) and the other derived loosely from RMBCA § 7.32(e). At its April, 2000 meeting, the Drafting Committee chose the version derived from ULLCA. (The RMBCA-based version had stated: "To the extent the partnership agreement vests the discretion or powers of a general partner in a limited partner, that limited partner has the duties of a general partner with respect to the vested discretion or powers.")

Like ULLCA § 409(h)(3), subsection (b) can be read to omit nonfeasance; i.e., if the partnership agreement vests certain managerial rights in a limited partner and the limited partner fails to exercise those rights, the limited partner has not breached a fiduciary duty. Depending on the wording of the partnership agreement, however, the limited partner could be liable for breach of the agreement.

In any event, subsection (b) does not apply if the limited partner exercises powers under a separate agreement. Note, however, that a general partner is relieved from fiduciary duty only when a delegation occurs via the partnership agreement. See Section 408(f). When a separate agreement delegates power to a limited partner, that delegation will not discharge the general partner's fiduciary duty.

Of course, a limited partner that enters a separate agreement will have whatever contractual duties that agreement provides. Morever, if the agreement reflects or establishes a fiduciary relationship (e.g., an agency), that relationship will impose fiduciary duties as well.

Subsection (c) – Derived from RUPA § 404 (d). Subsection (c) also appears in Section 406, pertaining to general partners. Relocating the subsection to Article 1 would avoid the repetition.

At its April, 2000 meeting, the Drafting Committee deleted a second sentence, which the Committee had added at a previous meeting and which had provided: "The obligation stated in this subsection displaces any obligation of good faith and fair dealing at common law or otherwise." The Committee decided that, despite the vagaries of the common law concepts of good faith and fair dealing, it was unwise to ask courts to work without reference to those concepts.

Following is a proposed Comment on good faith and fair dealing. (In Drafts ##1and 4 this Comment appeared following Section 302A. In Drafts ## 2 and 3 the Comment appeared following Section 101. Underlining and strikeouts indicate changes to the proposed Comment made in Draft #3 and continued in subsequent drafts).

Draft Comment on Good Faith and Dealing: The obligation of good faith and fair dealing is *not* a fiduciary duty, does not command altruism or self-abnegation, and does not prevent a partner from acting in the partner's own self-interest. Courts should not use the obligation to change *ex post facto* the parties' or this [Act's] allocation of risk and power. To the contrary, the obligation should be used only to protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable person could have contemplated when the arrangements were made. The more open-ended is a grant of power or discretion, the less plausible is a claim of breach of the obligation of good faith and fair dealing.

The partnership agreement or this [Act] may grant discretion to a partner, and that partner may properly exercise that discretion even though another partner suffers as a consequence. Conduct does not violate the obligation of good faith and fair dealing merely because that conduct substantially prejudices a party. Indeed, parties allocate risk precisely because prejudice may occur. The exercise of discretion constitutes a breach only when the party claiming breach shows that the conduct has no ~~genuine,~~ legitimate, honestly-held ~~business~~ purpose. Once such a purpose appears, courts should not second guess a party's choice of method in serving that purpose, unless the party invoking the

obligation of good faith and fair dealing shows that the choice of method itself lacks any ~~genuine,~~ legitimate, honestly-held ~~business~~ purpose.

Subsection (d) – Source: RUPA § 404(e). This provision also appears in Section 406, pertaining to general partners. Relocating the provision to Article 1 would avoid the repetition. Draft #1 contained the following statement, which the Committee deleted as more appropriate for a Comment: "This section does not prevent a limited partner from assuming fiduciary or other duties in some capacity other than limited partner."

SECTION 306. PERSON ERRONEOUSLY BELIEVING SELF LIMITED PARTNER.

(a) Except as otherwise provided in subsection (b), a person that makes an investment in a business enterprise and erroneously but in good faith believes that the person has become a limited partner in the enterprise is not liable for its obligations by reason of making the investment, receiving distributions from the enterprise, or exercising any rights of or appropriate to a limited partner, if, on ascertaining the mistake, the person:

(1) causes an appropriate certificate of limited partnership, amendment, or statement of correction to be signed and delivered for filing in the [office of the Secretary of State]; or

(2) withdraws from future equity participation in the enterprise by signing and delivering for filing in the [office of the Secretary of State] a statement of withdrawal under this section.

(b) A person that makes an investment described in subsection (a) is liable to the same extent as a general partner to any third party that transacts business with

the enterprise (i) before the person withdraws and an appropriate statement of withdrawal is delivered for filing in the [office of the Secretary of State], or (ii) before an appropriate certificate, amendment, or statement of correction is delivered for filing in the [office of the Secretary of State] to show that the person is not a general partner, but in either case only if the third party actually believed in good faith that the person was a general partner at the time of the transaction.

(c) If a person makes a diligent effort in good faith to comply with subsection (a)(1) and is unable to cause the appropriate certificate of limited partnership or amendment to be executed and delivered for filing with [the Secretary of State], the person has the right to withdraw from the enterprise pursuant to subsection (a)(2) even if otherwise the withdrawal would breach an agreement with others that are or have agreed to become co-owners of the enterprise.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether Re-RULPA should include a "defective formation" provision to protect a general partner that starts an enterprise erroneously believing the enterprise to be an LLLP.

Source: RULPA § 304. In Drafts before the July, 1999 Draft, this material appeared at Section 304.

Style issue – This is an elliptically drafted provision. Its components function to produce the desired result, but the reader has to work through the details before seeing the big picture. To state the rule directly would, however, require a much longer provision. In light of the rare use of the current provision and the need to keep the statute to a manageable length, this draft makes no substantial revisions.

Defective formation of LLLPs – Neither this provision nor any other in this Draft protects a general partner that starts an enterprise erroneously believing the enterprise to be an LLLP. This issue can be labeled "defective formation" and only arises with regard to full shield entities. The Drafting Committee's decision to make LLLP status the Act's default setting increases the importance of this issue. With an

ordinary limited partnership, the general partner is always liable for the business' debts and so the niceties of formation have little impact on a general partner's liability.

Corporate law has dealt with this issue in various ways, including: MBCA § 146 (persons assuming to act when de jure corporation not yet formed); RMBCA § 2.04 (liability for preincorporation transactions); the doctrines of de facto incorporation and corporation by estoppel. ULLCA does not address the subject.

If the Committee wishes, the next Draft can include a provision immunizing general partners that in good faith but erroneously believe themselves to be general partners of an LLLP. It can be argued that such people are indistinguishable from "persons purporting to act as or on behalf of a corporation [not] knowing there was no incorporation." RMBCA § 2.04. However, in deciding this point it is well to consider that a LLLP resembles an LLC at least as much as a corporation and that ULLCA is a very recent Uniform Act. Absent a good reason to the contrary, why not follow ULLCA rather than the RMBCA?

Changes from RULPA § 304 – The following redlined version shows how this section differs from RULPA § 304:

SECTION ~~304~~ 306. PERSON ERRONEOUSLY BELIEVING ~~HIMSELF [OR HERSELF]~~ SELF LIMITED PARTNER.

(a) Except as otherwise provided in subsection (b), a person ~~who~~ that makes ~~a contribution to~~ an investment in a business enterprise and erroneously but in good faith believes that ~~he [or she]~~ the person has become a limited partner in the enterprise ~~is not a general partner in the enterprise and~~ is not ~~bound by~~ liable for its obligations by reason of making the ~~contribution~~ investment, receiving distributions from the enterprise, or exercising any rights of or appropriate to a limited partner, if, on ascertaining the mistake, ~~he [or she]~~ the person:

(1) causes an appropriate certificate of limited partnership or ~~a certificate of~~ amendment to be ~~executed~~ signed and filed; or

(2) withdraws from future equity participation in the enterprise by ~~executing~~ signing and filing in the office of the [Secretary of State] a ~~certificate declaring~~ statement of withdrawal under this section.

(b) A person ~~who~~ that makes ~~a contribution~~ an investment ~~of the kind~~ described in subsection (a) is liable to the same extent as a general partner to any third party ~~who~~ that transacts business with the enterprise (i) before the person

withdraws and an appropriate ~~certificate~~ statement is filed to show withdrawal, or (ii) before an appropriate certificate, amendment or statement of correction is filed to show that ~~he [or she]~~ the person is not a general partner, but in either case only if the third party actually believed in good faith that the person was a general partner at the time of the transaction.

(c) If a person makes a diligent effort in good faith to comply with subsection (a)(1) and is unable to cause the appropriate certificate of limited partnership or amendment to be executed and filed, the person has the right to withdraw from the enterprise pursuant to subsection (a)(2) even if otherwise the withdrawal would breach an agreement with others that are or have agreed to become co-owners of the enterprise.

Subsection (a) – "Investment" replaces "contribution," because in this Draft "contribution" is a defined term and relates to an investment in a de jure limited partnership. This provision is not limited to that situation. As to the phrase "business enterprise" – even though the Committee has decided that a limited partnership need not have a "business" purpose, the word "business" should probably remain here. This provision addresses the personal liability that arises from co-ownership of a would-be profit-making enterprise.

The deleted phrase "is not a general partner" is redundant to the extent the phrase is intended to protect the would-be limited partner from personal liability to third parties. Moreover, the phrase may be confusing in relation to Section 402 (General Partner Agent of Limited Partnership). If this section is intended to override Section 401, this section should say so explicitly. If not (which the Reporter thinks is and should be the case) the phrase "is not a general partner" does not belong here.

The addition of "or appropriate to" is intended to cover situations in which no certificate of limited partnership is on file and therefore no limited partnership has come into existence. In those circumstances, a person cannot have the rights of a limited partner because no limited partner interests can yet exist.

Subsection (a)(2) – This change is intended to aid clarity by reserving the term "certificate" for the certificate of limited partnership.

Subsection (b) – The phrase "to the same extent" is added to accommodate the possibility that the certificate of limited partnership will make some or all general partners liable for the debts of the limited partnership. The use of "any" rather than "a" covers situations in which the certificate makes liable some but not all general partners. If at the relevant moment the limited partnership is a LLLP, no personal liability results.

Subsection (c) – This rule is perhaps implicit in the current language, but seems worth stating directly, especially in light of the new approach to limited partner withdrawal. The provision's purpose is to protect the withdrawing person from claims from other partners or would-be partners but not, for example, to give the withdrawing person a statutory right to avoid a personal guarantee made to a lender.

[ARTICLE] 4

GENERAL PARTNERS

SECTION 401. ADMISSION OF GENERAL PARTNER. A person becomes a general partner:

(1) as provided in the partnership agreement:

(2) under Section 801(3)(B) following the dissociation of a limited partnership's last general partner;

(3) as the result of a conversion or merger under [Article] 11; or

(4) with the consent of all the partners.

Reporter's Notes

General Partner Status and the Certificate of Limited Partnership – At its July, 1997 meeting, the Committee decided that a person could be a general partner without being so designated in the certificate of limited partnership. Therefore, if a person is a general partner according to the partnership agreement but not according to the certificate, that person has:

- all the rights and duties of a general partner as to the limited partnership and the other partners;
- the powers of a general partner to bind the limited partnership under Sections 402 and 403
- no power to sign records on behalf of the limited partnership for filing with the [Secretary of State] (see Comment to Section 204(a)(7))

The certificate of limited partnership is consequently a far less powerful document that envisioned in Draft #1. With regard to the status of general partners, the certificate merely serves as notice that those persons so listed are general partners. See Section 103 (c) and (d). The absence of a name is not affirmatively significant. Suppose, for example, that a third party believes X to be a general partner, but the certificate of limited partnership does not list X as a general partner. That omission does not dispositively undercut X's bona fides in the eyes of the third

party – even if the third party has reviewed the certificate. (It might be argued, however, that such a third party has at least a duty to inquire further.)

At its March, 1999 meeting, the Drafting Committee deleted provisions that gave the certificate power over the authority of general partners to transfer real property.

SECTION 402. GENERAL PARTNER AGENT OF LIMITED PARTNERSHIP.

(a) Each general partner is an agent of the limited partnership for the purposes of its business. An act of a general partner, including the execution of an instrument in the partnership's name, for apparently carrying on in the ordinary course the limited partnership's business or business of the kind carried on by the limited partnership binds the limited partnership, unless the general partner did not have authority to act for the limited partnership in the particular matter and the person with which the general partner was dealing knew, had received a notification, or had notice under Section 103(d) that the general partner lacked authority.

(b) An act of a general partner which is not apparently for carrying on in the ordinary course the limited partnership's business or business of the kind carried on by the limited partnership binds the limited partnership only if the act was authorized by all the other partners.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: whether subsection (a) will continue to use the vague concept of "authority."

Source: RUPA § 301. In Drafts before the July, 1999 Draft, this material appeared at Section 403A.

Location of constructive notice provisions – Early Drafts made this section subject to former Section 208 (Effect of Information Contained in Certificate of Limited Partnership). Re-RULPA now centralizes all constructive notice provisions in Section 103. See the Reporter's Notes to Section 103. Subsection (a) now refers not only to knowledge and "notification" (as in RUPA) but also to "notice under Section 103(d)."

Authority to transfer real estate – Like RUPA, early Drafts specifically contemplated statements granting or restricting a general partner's authority to transfer real property and gave special legal effect to those statements. See Draft #4, Sections 201(b) (authorizing the certificate of limited partnership to contain such statements) and 208 (b) and (c) (detailing the effect of such statements). At its March, 1999 meeting, the Drafting Committee decided that a limited partnership's tightly centralized management structure made such statements unnecessary.

Like prior Drafts, the May, 2000 Draft follows ULLCA in omitting any parallel to RUPA § 302, Transfer of Partnership Property. RUPA § 302 derives from UPA § 10, and both those sections address issues arising from the former aggregate aspect of *general* partnerships.

Allocating the risk of a general partner's unauthorized acts – When a general partner acts in an apparently/usual manner but without actual authority, both the third party and the entity are at risk. The entity's risk essentially devolves on the entity's owners, even those that benefit from a shield (e.g., limited partners, general partners in an LLP). Unauthorized conduct endangers their equity.

The law must allocate the risk between the third party and the owners, and RUPA chose to favor strongly the third party. Under RUPA § 301(1), a general partner's apparently/usual act binds the general partnership unless "the person with whom the partner was dealing knew or had received a notification that the partner lacked authority." Even if the third party "has reason to know [of the lack of authority] from all of the facts known to the [third party] at the time in question," the partnership is bound. The quoted language is from RUPA's definition of "notice." RUPA § 102(b)(3).)

RUPA thus tilts further toward the third party than did the UPA. *See* J. Dennis Hynes, "Notice and Notification under the Revised Uniform Partnership Act: Some Suggested Changes," 2 J. Small & Emerging Bus. L. 299. UPA § 9(1) negates a general partner's apparently/usual power if "the person with whom [the partner] is dealing has knowledge of the fact that [partner] has no . . . authority." UPA § 3(1) states that "[a] person has 'knowledge' of a fact within the meaning of this act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith."

Professor Hynes argues that RUPA is mistaken on this issue. *Id.* Whether or not RUPA is correct, on this point it is arguable that Re-RULPA should **not** follow RUPA. The equities are arguably different. In a general partnership, absent a contrary agreement "each partner has equal rights in the management and conduct of the partnership business." RUPA § 401(f). Therefore, arguably at least:

- the general partners collectively are better positioned than a third party to determine whether an individual general partner is acting without authority;

- general partners are thus always "on notice" of the need to monitor their fellow partners; and

- it is fair to bind the general partnership even when the third party has "notice" of the lack of authority.

With a limited partnership, the situation is quite different. A general partner' unauthorized act puts the **limited** partners at risk, and they have less ability than the typical third party to oversee individual acts by the general partner. A third party can always demand evidence of the general partner's authority, but limited partners have no significant right to participate in the management of the limited partnership and no say over most "matter[s] relating to the business of the limited partnership." Section 406(a).

The Reporter had therefore recommended that the last clause of subsection (a) be revised to read "the person with whom the general partner was dealing had notice that the general partner lacked authority." At its April, 2000 meeting, the Drafting Committee rejected the Reporter's recommendation.

Ambiguous and conflicting meanings for "authority" – Draft #1 substituted the phrase "the general partner had actual authority for the act or the limited partnership ratified the act" for RUPA § 301(2)'s phrase "authorized by the other partners." An endnote to Draft #1 explained the substitution as follows:

> The Comment to RUPA § 301 explains what RUPA means by "authority" in this context. This draft merely takes RUPA's explanation and puts that explanation into the statute.

Draft #2 returned to the RUPA language, in accordance with the Drafting Committee's instructions at the July, 1997 meeting, and of course subsequent Drafts have continued that approach.

The Reporter continues to urge the Committee to return to Draft #1's approach in this instance and notes that RUPA Comments ascribe various meanings

to the word "authority." *See* RUPA §§ 301, Comment 3 (interpreting RUPA § 301(2), which contemplates an act "not apparently for carrying on in the ordinary course" as being "authorized by the other partners;" stating that the subsection "makes clear that the partnership is bound by a partner's actual authority, even if the partner has no apparent authority"); 305, Comment, third paragraph (explaining that the phrase "with the authority of the partnership" in § 305(a) "is intended to include a partner's apparent, as well as actual, authority"); 305, Comment, fifth paragraph (interpreting, without quoting, the phrase "with authority of the partnership" in § 305(b) and indicating that the phrase refers to "the scope of the partner's actual authority").

The March, 2000 Draft revised subsection (b) to clarify that, absent a contrary provision of the partnership agreement, the authorization must come from all the partners. This revision responds to a question posed by the representative of the Style Committee.

SECTION 403. LIMITED PARTNERSHIP LIABLE FOR GENERAL PARTNER'S ACTIONABLE CONDUCT.

(a) A limited partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a general partner acting in the ordinary course of business of the limited partnership or with authority of the limited partnership.

(b) If, in the course of the limited partnership's business or while acting with authority of the limited partnership, a general partner receives or causes the limited partnership to receive money or property of a person not a partner, and the money or property is misapplied by a general partner, the limited partnership is liable for the loss.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: whether this section will continue to use the vague concept of "authority."

Source: RUPA § 305. In Drafts before the July, 1999 Draft, this material appeared at Section 403B.

Subsection (a) – For the sake of clarity, Draft #1 included immediately before the word "authority" the phrase "actual or apparent." RUPA § 305(a) is the source of this subsection, and the Comment to RUPA § 305(a) states "[t]his is intended to include a partner's apparent, as well as actual, authority." Remarkably, the Comment to RUPA § 305(b) interprets the phrase "acting with the authority of the partnership" to refer only to "the scope of the partner's actual authority." To avoid confusion, Draft #1 inserted the applicable adjective into the text of the statute.

In accordance with the Committee's instructions at the July, 1997 meeting, Draft #2 returned to the RUPA language, and of course subsequent drafts have continued that approach. The Reporter continues to urge the Committee to return to the Draft #1 language.

Subsection (b) – ULLCA omits this provision. Subsection (a) would suffice to cover subsection (b), except that – according to the RUPA comments – subsection (a) includes apparent authority while subsection (b) does not. According to the Comment to RUPA § 305(b), that subsection's phrase "acting with authority of the partnership" refers only to "the scope of the partner's actual authority." As to various meanings RUPA Comments ascribe to the word authority, see the Reporter's Notes to subsection (a), above.

SECTION 404. GENERAL PARTNER'S LIABILITY.

(a) Except as otherwise provided in subsection (b), the debts, obligations, and liabilities of a limited partnership, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the limited partnership. A general partner is not personally liable for a debt, obligation, or liability of the limited partnership solely by reason of being or acting as a general partner.

(b) All or specified general partners of a limited partnership are liable in their capacity as general partners for all or specified debts, obligations, or liabilities of the limited partnership if:

(1) the certificate of limited partnership contains a provision to that effect; and

(2) a general partner so liable has consented in writing to the provision or to be bound by the provision.

Reporter's Notes

Source: ULLCA § 303(a) and (c).

LLLP Status as the Act's Default Setting – Since its very first draft, Re-RULPA has permitted LLLPs. Under the early drafts, non-LLLP status was the "default setting," but a limited partnership could become a limited liability limited partnership simply by including a one line statement in the certificate of limited partnership.

At its October, 1999 meeting, the Drafting Committee voted to change the Act's default setting with respect to LLLP status. The Committee revisited and reiterated that decision at its April, 2000 meeting. The current draft therefore provides that a Re-RULPA limited partnership will be an LLLP unless the certificate of limited partnership provides otherwise. In this respect, Re-RULPA parallels ULLCA. See ULLCA §§ 303(c) and 203(a)(7).

The Drafting Committee recognizes that this decision is important and controversial and plans to revisit the issue again. The Drafting Committee's decision on this point – like all other decisions made to date – is merely provisional.

Nonetheless, some strong arguments favor the Drafting Committee's current position. The overwhelming majority of limited partnerships formed under current law use indirect means to provide a liability shield for the general partner. Typically, the general partner is itself a corporation or a limited liability company. It therefore seems likely that almost every Re-RULPA limited partnership will be an LLLP.

Except in extraordinary circumstances, a statute's default setting should mirror the choices that most users of the statute would make on their own. It therefore seems logical to make LLLP status the default setting for Re-RULPA.

The Reporter is aware that some very experienced and knowledgeable practitioners currently oppose making LLLP status the default setting, and the Reporter is trying to understand in detail the rationale behind this opposition. The Reporter is also trying to identify situations in which a knowledgeable practitioner

would recommend to a person forming a limited partnership that the general partner go "unshielded" vis á vis **all** creditors and obligees of the limited partnership.

N.b. – the LLLP shield protects a general partner only against automatic "owner's liability" for the limited partnership's debts. The shield is irrelevant to claims that a general partner has breached a fiduciary duty.

LLLP Shield and Piercing – The Committee needs to consider what, if anything, the Act should say about the doctrine of "piercing the [corporate] veil." The doctrine has little relevance for ordinary limited partnerships, because, except in the most extraordinary circumstances, the general partner's management control and personal liability render the doctrine moot. (Piercing remains relevant, as a matter of corporate law, with regard to the shareholders of a corporate general partner.)

Piercing is, however, an important issue with regard to LLLPs, because an LLLP has a full, corporate-like liability shield. Following ULLCA, this draft does not directly mention piercing. However, ULLCA § 303(b) does state: "(b) The failure of a limited liability company to observe the usual company formalities or requirements relating to the exercise of its company powers or management of its business is not a ground for imposing personal liability on the members or managers for liabilities of the company." That language makes sense only in reference to piercing.

In any event, following ULLCA, RUPA and UPA, Section 107(a) of this draft provides that "[u]nless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act]." Piercing is an equitable doctrine.

Subsection (b) – When the Drafting Committee decided to make LLLP status the default rule, the Committee also decided to follow ULLCA and abandon the "all or nothing" approach to the LLLP shield. Earlier Drafts contemplated only two types of limited partnerships: an ordinary limited partnership in which all general partners are automatically liable for the entity's obligations, and limited liability limited partnerships, in which no general partners have "owner's liability" for any of the entity's obligations. In contrast, the current Draft establishes an LLLP shield as the default rule and allows the certificate of limited partnership to affect the shield by creating specific holes or removing the shield entirely. The holes may be many or few, large or small. They may pertain to some obligations and not others, and to some general partners and not others.

Burden Sharing Among Those With "Owner's Liability" Under Section 404(b) – Re-RULPA's provisions on owner's liability, general partner dissociation, and conversion and merger combine to raise some very complicated

issues which the Drafting Committee has not yet considered and which the current Draft does not adequately address. In particular, Re-RULPA does not yet adequately answer the question of burden sharing among persons with owner's liability for particular entity obligations. The following points may help in addressing the question of burden sharing.

1. The issue of apportioning burden arises only if more than one person has owner's liability for a particular obligation.

    a. Determining who has owner's liability for a particular obligation depends first on the certificate of limited partnership and Section 404(b).

    b. Also relevant, however, are the rules relating to: discharge of owner's liability following dissociation, Section 607(a)(d) and (e); incurring owner's liability following dissociation, Section 607(b) and (c); discharge of owner's liability following conversion or merger, Section 1111(a); and incurring owner's liability following conversion or merger, Section 1111(b).

2. Apportionment may depend in part on whether any of the persons with owner's liability for a limited partnership's obligation were at fault in causing the limited partnership to incur the obligation.

    a. For example: binding the limited partnership under Section 402 (General Partner Agent of Limited Partnership) while lacking the actual authority to do so; binding the limited partnership under Section 606 (Dissociated General Partner's Power to Bind . . . Before Dissolution) or a successor entity under Section 1112 (Power of General Partner or Person Dissociated as General Partner to Bind After Conversion or Merger); making the limited partnership liable under Section 403 (Limited Partnership Liable for General Partner's Actionable Conduct).

    b. Should such fault prevent a person from seeking contribution, or should a contribution right exist subject to set off?

        i. Suppose, for example, a person's unauthorized conduct obligates a limited partnership on a contract for $50,000, but the damage to the limited partnership is only $10,000. (For instance, the limited partnership intended to make a comparable contract but at a lower price.)

        ii. Should it matter whether, at the time of the fault, the person was still a general partner?

(1) There might be some argument for imposing a less harsh rule on a person who was a general partner than on a person who was dissociated as a general partner.

(2) Assume that a general partner acted wrongfully in causing a limited partnership to incur an obligation. Nonetheless, the general partner **may** have been trying in good faith to further the interests of the limited partnership.

(3) In contrast, when a person dissociated as a general partner acts to bind the limited partnership, it is highly unlikely that the person is acting in good faith to further the interests of the limited partnership.

3. Rights of contribution and indemnification should depend on whether a person with owner's liability for a limited partnership obligation was a general partner when the obligation was incurred or merely a person dissociated as a general partner.

a. Assuming that a person was dissociated as a general partner and not a fault in causing the limited partnership to incur the obligation, that person should probably have:

i. indemnity rights against the limited partnership

(1) likely moot, because owner's liability is subject to execution only when the limited partnership cannot respond to claims, Section 405(c)

ii. indemnity rights against any general partners who have owner's liability for the obligation

(1) A dissociated general partner will be liable only on account of a lingering appearance of liability. That liability exists as a further protection of entity creditors and not to relieve general partners of their burden.

iii. contribution rights against other dissociated general partners who have owner's liability for the same obligation

(1) These contribution rights would be relevant only to the extent the above-mentioned indemnities do not suffice (e.g., the parties owing the indemnities are insolvent).

(2) Contribution probably should be apportioned per capita.

(a) It is not possible to allocate contribution liability in proportion to distribution shares in effect when the limited partnership incurred the obligation, because, by hypothesis, the obligation was incurred when all these persons were already dissociated. See Section 607 (Dissociated General Partner's Liability to Other Persons).

b. Assuming that a person dissociated as a general partner was at fault in causing the limited partnership to incur the obligation, that person should certainly be liable for any damage to the limited partnership and to other persons with owner's liability for the obligation.

i. Perhaps the at-fault person should be cut off from any indemnification and contribution rights. See the discussion at point 2-b-ii, above.

ii. If not, provisionally there seems no reason to vary the indemnification and contribution scheme just described – except to make it subject to a set off for damages.

4. Persons that were general partners when the limited partnership obligation was incurred and have owner's liability for the obligation should share the burden *inter se* according to distribution rights in effect when the obligation was incurred.

a. This is the allocation arrangement that applies at dissolution. See Section 813.

5. The right to contribution and indemnification should not depend on dissolution.

a. Why force the formalities of dissolution when there is nothing to be divided except burdens?

b. Moreover, some of the persons involved may not be partners when the contribution or indemnification right arises and may lack the power to cause dissolution.

c. Indeed, if a conversion or merger has occurred, there may not be a limited partnership to dissolve.

SECTION 405. ACTIONS BY AND AGAINST PARTNERSHIP AND PARTNERS.

(a) An action may be brought against the limited partnership and, to the extent not inconsistent with Sections 104(a) and 404, any or all of the general partners may be joined in the same action or separate actions may be brought.

(b) A judgment against a limited partnership is not by itself a judgment against a general partner. A judgment against a limited partnership may not be satisfied from a general partner's assets unless there is also a judgment against the general partner.

(c) A judgment creditor of a general partner may not levy execution against the assets of the general partner to satisfy a judgment based on a claim against the limited partnership, unless the partner is personally liable for the claim under Section 404 and:

(1) a judgment based on the same claim has been obtained against the limited partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part;

(2) the limited partnership is a debtor in bankruptcy;

(3) the general partner has agreed that the creditor need not exhaust limited partnership assets;

(4) a court grants permission to the judgment creditor to levy execution against the assets of a general partner based on a finding that limited partnership assets subject to execution are clearly insufficient to satisfy the judgment, that

exhaustion of limited partnership assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers; or

(5) liability is imposed on the general partner by law or contract independent of the existence of the limited partnership.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether this section should apply not only to general partners but also to persons dissociated as a general partner; whether this section should create a right of contribution in favor of those persons who are levied against under subsection (c)

Derived from RUPA § 307.

Effect on this section of using LLLP status as the Act's default setting – Much of this section may be unnecessary if the Drafting Committee maintains its decision to use LLLP status as the Act's default setting. Given the tentative nature of that decision, the current Draft does not make major changes to the section.

SECTION 406. MANAGEMENT RIGHTS OF GENERAL PARTNER.

(a) Each general partner has equal rights in the management and conduct of the limited partnership's business. Except as expressly provided in this [Act], any matter relating to the business of the limited partnership may be exclusively decided by the general partner or, if there is more than one general partner, by a majority of the general partners.

(b) The consent of each partner is necessary to:

(1) amend the partnership agreement;

(2) authorize a limited partnership to amend its certificate of limited partnership to include, modify, or delete a statement under Section 404(b); and

(3) sell, lease, exchange, or otherwise dispose of all, or substantially all of the limited partnership's property (with or without the good will) otherwise than in the usual and regular course of the limited partnership's business.

(c) A limited partnership must reimburse a general partner for payments made and indemnify a general partner for liabilities incurred by the general partner in the ordinary course of the business of the partnership or for the preservation of its business or property.

(d) A limited partnership must reimburse a general partner for an advance to the limited partnership beyond the amount of capital the general partner agreed to contribute.

(e) A payment or advance made by a general partner which gives rise to an obligation of the limited partnership under subsection (c) or (d) constitutes a loan to the limited partnership which accrues interest from the date of the payment or advance.

(f) A general partner is not entitled to remuneration for services performed for the partnership.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: whether to replace the language of subsection (b)(3) (sale of all, or substantially all, of a limited partnership's property) with the "bright line" approach now under consideration for the comparable RMBCA provision; whether subsection (b)(3) should make explicit that its rule does not apply during winding up.

Derived from ULLCA § 404 and RUPA § 401. In Drafts before the July, 1999 Draft, this material appeared at Section 403.

Subsection (a) – At its July, 1997 meeting, the Committee decided to use ULLCA's language for this provision. Accordingly, this paragraph follows ULLCA § 404(b)(1) and (2) largely verbatim. At its April, 2000 meeting, the Drafting Committee decided to delete former Section 304, which had listed the governance-related rights of limited partners. Before that decision, the second sentence of subsection (a) began "Except for matters listed in Section 304." The second sentence now begins "Except as expressly provided in this [Act]."

Deadlock Among General Partners – ULLCA does not specifically address deadlock, i.e., when the decision-makers split 50-50 on an issue, so neither does subsection (a). In a deadlock situation, any proposed decision will fail, because a majority is more than 50%. The consequences of deadlock will depend on the seriousness of the situation. If the deadlock involves a crucial issue, a court might order dissolution under Section 802(a).

Authority to Commence Lawsuits – At its March, 1999 meeting, the Drafting Committee discussed (but did not decide) whether one of several general partners has the authority to commence and prosecute a lawsuit in the name of the limited partnership. The discussion arose during the Committee's review of Article 10, and in particular with regard to the question of whether a *general* partner may bring a derivative lawsuit. For an analysis of that particular issue, see the Reporter's Notes to Section 1002.

As for the broader question, Re-RULPA's provisions essentially follow RUPA's, with some complex results. That is:

- Section 402 determines whether a general partner has the *power* viz a viz third parties (including the court and other parties to the suit) to institute and prosecute the lawsuit.

- Section 406(a) determines whether a general partner has the *right* viz a viz the limited partnership to institute and prosecute the lawsuit. Common law doctrines of actual authority supplement this subsection. See Section 107. According to those doctrines, if: (i) the limited partnership has more than one general partner, and (ii) one of those general partners is contemplating initiating a suit but has reason to believe that other general partners may disagree, then (iii) the one general partner lacks the right to bring the suit without first receiving the approval of a majority of the general partners.

Of course, a partnership agreement may provide that a general partner has the right to bring suit without first receiving approval from, or even consulting, fellow general partners.

Due to the interplay between the *power* and the *right* to prosecute a lawsuit, a general partner that initially has the power may subsequently lose it. Suppose, for example, that:

- One of three general partners initiates a lawsuit in the name of the limited partnership against one of the limited partnership's suppliers.

- The lawsuit fits within Section 402's apparently/usual rubric. Therefore, when the summons and complaint are served and filed, the one general partner has the apparently/usual power to bring the suit.

- When the other two general partners learn of the suit, they voice their strong disapproval and then vote to withdraw the suit. The first general partner disagrees and vows to continue the suit.

- The other two general partners make the circumstances known to the defendant and the court and seek on the limited partnership's behalf to voluntarily dismiss the lawsuit.

Assuming that the rules of civil procedure allow voluntary dismissal, the court should dismiss the lawsuit. Under Section 406(a) and common law principles, the first general partner lacks the right to continue the suit. Because this lack of "authority" is known to the court and defendant, under Section 402(a) the first general partner lacks the power as well. As to whether the first general partner could prosecute the suit as a derivative action, see Section 1002.

Under this analysis, a minority general partner lacks the actual authority to cause a limited partnership to initiate a lawsuit against another general partner or an affiliate of another general partner. Obviously, the minority partner will have reason to believe that the other general partner will disagree. Except in the most extraordinary circumstances, a minority general partner that uses the apparently/usual power to begin such a suit will be engaging in vexatious litigation. The appropriate course is a derivative lawsuit. See Section 1002.

Governance Rights of Limited Partners – At its April, 2000 meeting, the Drafting Committee decided to delete former Section 304, which had listed the governance-related rights of limited partners. The Committee directed the Reporter to preserve the list for a Comment. The list includes: (1) amendment to the partnership agreement under Section 406(b)(1); (2) authorization or ratification under Section 110(b)(3)(B) of acts or transactions that would otherwise violate the duty of loyalty; (3) a decision under subsection (b) to authorize the limited partnership to amend its certificate of limited partnership to include, modify or delete a statement under Section 404(b); (4) access to the required records and

other information under Section 304; (5) admission of a new partner under Sections 301 (limited partner), 401 (general partner), or 801(3)(B) (new general partner following dissociation of sole general partner); (6) a decision under Section 502(c) to compromise a claim against a partner; (7) expulsion of a limited partner under Section 601(b)(4) or a general partner under Section 603(4); (8) a decision under Section 703(c)(3) to use limited partnership property to redeem an interest subject to a charging order; (9) a decision under Section 801(2) whether to dissolve the limited partnership; (10) a decision under Section 801(3)(A)(ii) whether to dissolve the limited partnership following the dissociation of a general partner; (11) a decision under Section 801(3)(B) whether to continue the limited partnership and appoint a new general partner following the dissociation of the limited partnership's last general partner; (12) a decision under Section 803(b) to appoint a person to wind up the dissolved limited partnership's business; (13) application to a court pursuant to Section 803(c) for the appointment of a person to wind up the dissolved limited partnership's business; (14) bringing of an action under [Article] 10; and (15) approval under [Article] 11 of a plan of conversion or merger.

Subsection (b) – Subsection (b)(1) and (2) formerly appeared in subsection 304(b) and were relocated here following the Drafting Committee's decision (April, 2000) to delete Section 304. See Reporter's Notes to former Section 304. At that same meeting, the Drafting Committee reversed an earlier decision and decided to require unanimous consent for the sale of all or substantially all of a limited partnership's property. Subsection (b)(3) implements that decision and is taken essentially verbatim from the current version of RMBCA § 12.02(a).

Subsection (c) – Source: RUPA § 401(c). The draft does not include any parallel provision for limited partners, because they are assumed to be passive. To the extent a limited partner has authority to act on behalf of the limited partnership, agency law principles will apply to create an indemnity obligation. In other situations, principles of restitution might apply.

Subsection (d) – Source: RUPA § 401(d).

Subsection (e) – Source: RUPA § 401(e).

Subsection (f) – Derived from RUPA § 401(h), but this draft omits RUPA's exception "for reasonable compensation for services rendered in winding up the business of the partnership." In a limited partnership, winding up is a foreseeable consequence of being a general partner.

Former subsection (h) – At its July, 1997 meeting, the Committee decided to delete subsection (h). That section, taken from RUPA § 401(k), provided: "This section does not affect the obligations of a limited partnership to other persons

under Section 403A." An endnote to subsection (h) questioned that subsection's accuracy, noting that some provisions of this section do affect a general partner's actual authority and therefore can affect a limited partnership's obligations to third parties.

SECTION 407. GENERAL PARTNER'S AND FORMER GENERAL PARTNER'S RIGHT TO INFORMATION.

(a) Without having to demonstrate, state, or have any particular purpose for seeking the information, a general partner may during regular business hours inspect and copy:

(1) in the limited partnership's required office, the required records; and

(2) at a reasonable location specified by the limited partnership any other records maintained by the limited partnership regarding the limited partnership's business, affairs, and financial condition.

(b) Each general partner and the limited partnership must furnish to a general partner:

(1) without demand, any information concerning the limited partnership's business and affairs reasonably required for the proper exercise of the general partner's rights and duties under the partnership agreement or this [Act]; and

(2) on demand, any other information concerning the limited partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

(c) Subject to subsection (e), on 10 days' written demand to the limited partnership, a person dissociated as a general partner may have access to a record described in subsection (a) at the location specified in subsection (a) if:

(1) the record pertains to the period during which the person was a general partner;

(2) the person seeks the record in good faith; and

(3) the person meets the requirements under Section 304(b).

(d) The limited partnership must respond to a demand made pursuant to subsection (c) in the same manner as provided in Section 304(c).

(e) If an individual who is a general partner dies, Section 704 applies.

(f) The limited partnership may impose reasonable limitations on the use of information under this section. In any dispute concerning the reasonableness of a restriction under this subsection, the limited partnership has the burden of proving reasonableness.

(g) A limited partnership may charge a person dissociated as a general partner that makes a demand under this section reasonable costs of copying, limited to the costs of labor and material.

(h) A general partner or person dissociated as a general partner may exercise the rights under this section through an attorney or other agent. In that event, any limitation on availability and use under subsection (f) apply to the attorney or other agent as well as to the general partner or person dissociated as a general partner. The rights under this section extend to the legal representative of a

person that has dissociated as a general partner because of death or legal disability. The rights under this section do not extend to a transferee, but subsection (c) creates rights for a dissociated general partner and subsection (e) recognizes the rights of the executor or administrator of a deceased limited partner.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: whether this section and Section 304 should be combined and relocated to Article 1.

In Drafts before the July, 1999 Draft, this material appeared as Section 403E.

This section and Section 304 have substantial overlap, which could be reduced by combining the sections. The combined section might be captioned "Access to Required Records and Other Information" and follow the section listing required records, i.e., Section 111.

Draft #4 revised this section in light of the revisions made in Section 304 [formerly Section 305], and for the same reason the July, 1999 Draft added subsection (e). For detailed explanation, see the Reporter's Notes to Section 304.

Subsection (a) – In contrast to Draft #3, Draft #4 stated explicitly that a general partner need have no particular purpose to examine or copy existing records. At the March, 1999 meeting, no one objected to this language. Subsequent drafts therefore preserve it.

Subsection (b) – Source: RUPA § 403(c). The RUPA provision also requires disclosure "to the legal representative of a deceased partner or partner under legal disability." See Reporter's Notes to Section 304(f).

Subsection (b) states a very broad disclosure obligation. If the partnership agreement authorizes a general partner to compete with the limited partnership, it would be wise to explicitly protect from mandated disclosure confidential information generated in that competing enterprise.

Subsection (b)(1) – Like RUPA, Re-RULPA leaves unclear the relation between information available from the entity's records and a general partner's obligation under this subsection. Does a general partner that knows of material information in the limited partnership's records have an affirmative obligation to disseminate that information to fellow general partners, or does each general partner

have an individual obligation to keep up to date on the information in those records? Probably no categorical answer exists, but arguably in most circumstances it is not "reasonably necessary" to furnish to a fellow general partner information apparent in the limited partnership's records.

Subsection (b)(2) – The exception seems very vaguely stated, but it appears in both in RUPA § 403(c) and ULLCA § 408(b)(2).

Subsection (c) – This provision mirrors Section 304's approach to former limited partners.

Subsection (e) – For an analysis of this language, see the Reporter's Notes to Section 304(f).

Subsection (f) – Following discussion at the October, 1998 meeting, this subsection was revised to authorize the partnership agreement to restrict availability (as well as use) of information. The March, 2000 Draft relocated to Section 110 the provisions pertaining to the partnership agreement. As revised, the subsection still has two noteworthy aspects:

i. It permits the general partners to impose use limitations, even if the partnership agreement is silent. The Committee adopted this position at it's the July, 1997 meeting.

ii. It imposes on the limited partnership the burden of proving the reasonableness of any restriction.

Subsection (g) – No charge is allowed for current general partners, because in almost all cases they would be entitled to reimbursement under Section 406(c).

Subsection (h) – At the Committee's March, 1998 meeting the Reporter was directed to refer to ULLCA § 408(b) and provide comparable protections for the estate of a deceased partner. See Reporter's Notes to Section 304.

SECTION 408. GENERAL STANDARDS OF GENERAL PARTNER'S CONDUCT.

(a) The only fiduciary duties that a general partner has to the limited partnership and the other partners are the duty of loyalty and the duty of care under subsections (b) and (c).

(b) A general partner's duty of loyalty to the limited partnership and the other partners is limited to the following:

(1) to account to the limited partnership and hold as trustee for it any property, profit, or benefit derived by the general partner in the conduct and winding up of the limited partnership's business or derived from a use by the general partner of limited partnership property, including the appropriation of a limited partnership opportunity;

(2) to refrain from dealing with the limited partnership in the conduct or winding up of the limited partnership's business as or on behalf of a party having an interest adverse to the limited partnership; and

(3) to refrain from competing with the limited partnership in the conduct or winding up of the limited partnership's business.

(c) A general partner's duty of care to the limited partnership and the other partners in the conduct and winding up of the limited partnership's business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A general partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(e) A general partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the general partner's conduct furthers the general partner's own interest.

(f) A general partner is relieved of liability imposed by law for violation of the standards prescribed by subsections (b) through (e) to the extent the partnership agreement vests managerial authority in one or more of the limited partners.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether subsection (a)'s restrictive approach to fiduciary duty is appropriate, in light of the limited partners' dependence on the general partners; whether the language added to subsection (f) properly clarifies that provision; whether subsection (f) should also apply when the delegation is to one or more *general* partners; whether vesting general partner powers in a limited partner implicates Sections 402 and 403.

Source: RUPA § 404.

Subsection (a) – In general, the extent of a person's fiduciary duties tends to correspond with the amount of power that person has over the interests of the person to whom the duties are owed. Given the advent of LLPs, a general partner in a general partnership has less power over the interests of fellow partner than does a general partner in a limited partnership. In a general partnership, absent a contrary agreement all the partner have equal management rights, RUPA § 401(f), and therefore the ability to monitor and even control their co-partners. In contrast, limited partners are passive and general partners have correspondingly greater power. See Sections 304 and 406. Arguably, therefore, RUPA's approach is too narrow for Re-RULPA.

The reference to "the other partners" is not intended to blur the distinction between direct and derivative claims. See Section 1001(b).

Subsection (b)(3) – As originally drafted, this provision cam essentially verbatim from RUPA and ended non-compete duty at dissolution. At its April, 2000 meeting, the Drafting Committee decided that RUPA's approach does not fit a limited partnership. When a general partnership dissolves, absent a contrary agreement each partner that has not wrongfully dissociated has an equal right to participate in winding up. RUPA § 803(a). If one partner chooses to compete with the partnership during winding up, the other partners can look out for the interests

of the partnership. With a limited partnership, in contrast, the limited partners are passive and consequently more vulnerable.

Subsection (d) – Beginning with the July, 1999 Draft this subsection included a second sentence displacing common law concepts of good faith and fair dealing. At its April, 2000 meeting, the Drafted Committee decided to delete that sentence. For the Committee's rationale, see the Reporter's Notes to Section 305(c).

Subsection (f) – Derived from ULLCA § 409(h)(4). The phrase "one or more of" was new in the July, 1999 Draft and does not appear in ULLCA. The added language makes clear that the subsection applies whether the reallocation of responsibility is to limited partners collectively, to one or more classes of limited partners, or to one or more particular limited partners. At its April, 2000 meeting, the Drafting Committee decided to further revise the language to make clear that, for the subsection to apply, the partnership agreement must accomplish the reallocation of authority. The revised language also addresses a potential ambiguity caused by ULLCA's use of the word "delegated" (rather than "vests"). Under common law principles, a person whose responsibility is delegated to another person remains liable on the original obligation. As revised, subsection (f) clearly permits a general partner's responsibility to be extinguished by being reallocated.

Also at the April, 2000 meeting, the Drafting Committee decided against extending this subsection to situations in which a limited partnership has more than one general partner and the partnership agreement reserves certain responsibilities to one of the general partners.

RUPA § 404(f) has been omitted, because Section 112 covers the topic. RUPA § 404(f) provides:

> A general partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the general partner are the same as those of a person who is not a partner, subject to other applicable law.

RUPA § 404(g) has also been omitted. That subsection provides:

> This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

In this draft, Section 803(b)(1) covers the issue addressed by RUPA § 404(g).

[ARTICLE] 5

CONTRIBUTIONS, PROFITS, AND DISTRIBUTIONS

SECTION 501. FORM OF CONTRIBUTION. A contribution of a partner may consist of tangible or intangible property or other benefit to the limited partnership, including money, promissory notes, services performed, other agreements to contribute cash or property, and contracts for services to be performed.

Reporter's Notes

Per the Committee's instructions at its March, 1998 meeting, this language (added in Draft #3) is taken, essentially verbatim, from ULLCA § 401. RULPA § 501 provides: "The contribution of a partner may be in cash, property, or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services." Both RULPA's language and the new language partially overlap Section 102(3)'s definition of "contribution." That overlap is present in RULPA as well.

SECTION 502. LIABILITY FOR CONTRIBUTION.

(a) A partner's obligation to contribute money, property, or other benefit to, or to perform services for, a limited partnership is not excused by the member's death, disability, or other inability to perform personally.

(b) If a partner does not make a promised contribution of property or services, the partner is obligated at the option of the limited partnership to contribute money equal to that portion of the value, as stated in the required records, of the stated contribution which has not been made.

(c) The obligation of a partner to make a contribution or return money or other property paid or distributed in violation of this [Act] may be compromised only by consent of all partners. A creditor of a limited partnership that extends credit or otherwise acts in reliance on an obligation described in subsection (a), and without notice of any compromise under this subsection, may enforce the original obligation.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: whether subsection (b) should be expanded to apply to a person that has promised to make a contribution, whose admission as a partner is contingent on making that contribution and that fails to make the contribution.

Subsection (a) – At its March, 1998 meeting, the Drafting Committee decided to delete the writing requirement contained in RULPA's subsection (a). That requirement was added to RULPA in 1985, but ULLCA contains no comparable provision. ULLCA § 402.

That deletion "promoted" some of what had been subsection (b) into subsection (a). Per the Committee's instructions, given at the March, 1998 meeting, that promoted language was revised to follow ULLCA, which in turns derives from the RULPA language being modified here.

Deleting the writing requirement will make more open-ended litigation about allegedly promised contributions. *See, e.g.*, *Wilson v. Friedberg*, 473 S.E.2d 854, 857, n. 3 (S.C.App. 1996; *cert. granted June 4, 1997*) (invoking the writing requirement of current law and rejecting limited partners' claim that general partner had breached an oral promise to contribute).

Subsection (b) – At its March, 1998 meeting, the Committee decided to begin a new subsection here. The separation makes clear that the obligation to pay money applies whenever, and for whatever reason, the partner fails to make a required in-kind contribution. The reference to required records does not appear in ULLCA, because ULLCA has no required records provision.

Following ULLCA § 402(a), this subsection does not by its terms apply to a person that has promised to make a contribution, whose admission as a partner is contingent on making that contribution and that fails to make the contribution.

Subsection (c) – At its March, 1998 meeting the Committee decided to use the approach taken by ULLCA §§ 402(b) and 404(c)(4). These revisions implement that decision. The revised language is taken essentially verbatim from ULLCA § 402(b).

Reporter's Notes to Former Section 503

At its April, 2000 meeting, the Drafting Committee accepted the recommendation of the ABA Taxation Section Advisor and decided to delete former Section 503, "Allocation of Profits and Losses." The Committee recognized that profit and loss allocations have no independent significance under either RULPA or Re-RULPA. Tax law may require limited partnerships to allocate profits and losses, but there is no need to reiterate those requirements in Re-RULPA.

This change does not affect the substance of any operative rule of Re-RULPA. In prior Drafts, profits and losses were allocated in proportion of contributions made to the limited partnership. In turn, that allocation determined distribution shares and some voting rights. As revised, Re-RULPA links distribution shares directly to contributions made and determines some voting rights by distribution share.

SECTION 503. SHARING OF DISTRIBUTIONS. A distribution by a limited partnership is shared among the partners on the basis of the value, as stated in the required records when the limited partnership decides to make the distribution, of the contributions the limited partnership has received from each partner.

Reporter's Notes

At its April, 2000 meeting, the Drafting Committee decided to delete former Section 503, necessitating substantial revision in the form (but not the substance) of this section. In prior drafts, this section based distribution shares on profit allocation. See Reporter's Notes to former Section 503. Now this section links distribution shares directly to contribution value.

As did the March, 2000 Draft (in former Section 503), this Draft allocates according to contributions received *without reference to the return of contributions.* Both RULPA and ULLCA use the concept of returned contributions, but RULPA's

definition of the concept is, at best, abstruse, and ULLCA provides no definition. *See* RULPA § 608(c) and ULLCA § 806(b).

This difference in approaches is **not** substantive. So long as a limited partnership does not vary the default rules on distributions, both approaches produce the same results.

Draft #2 included language establishing a formal mechanism by which a limited partnership would announce distributions. At its March, 1998 meeting, the Committee rejected that language. In Drafts ##3 and 4, the Section referred to the declaration of a distribution. The July, 1999 Draft removed the concept of declaration.

SECTION 504. INTERIM DISTRIBUTIONS. A partner does not have a right to any distribution before the dissolution and winding up of the limited partnership unless the limited partnership decides to make an interim distribution.

Reporter's Notes

Re-RULPA's major change from RULPA § 601 is the elimination of any reference to a partner's "put" right. In the default mode that right no longer exists. Other changes are stylistic or to conform with this Draft's approach to the powers of a partnership agreement.

Although it will be the limited partnership that actually makes any interim distributions, it will be the general partners that decide whether interim distributions will be made. See Section 406(a).

SECTION 505. NO DISTRIBUTION ON ACCOUNT OF DISSOCIATION. A person does not have a right to receive any distribution on account of dissociation.

Reporter's Notes

In Drafts before the July, 1999 Draft, this material appeared at Section 604. (In Draft #2 this provision read: "A partner's dissociation does not entitle that partner to any distribution." The change reflects a style suggestion made by a Committee member at the March, 1998 meeting.)

Under Sections 602 (Effect of Dissociation as a Limited Partner) and 605 (Effect Dissociation as a General Partner), the person's status degrades to that of a transferee.

SECTION 506. DISTRIBUTION IN KIND. A partner does not have a right to demand or receive any distribution from a limited partnership in any form other than cash. A limited partnership may distribute an asset in kind, subject to Section 813(b) and only to the extent that each partner receives a percentage of the asset equal to the partner's share of distributions.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: whether the section's second sentence accurately restates the second sentence of RULPA § 605.

Derived from RULPA § 605. In Drafts before the July, 1999 Draft, this material appeared at Section 605.

The second sentence was new in the July, 1999 Draft. The second sentence of RULPA § 605 states:

> A partner may not be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed to the partner exceeds a percentage of that asset which is equal to the percentage in which the partner shares in distributions from the limited partnership.

The July, 1999 Draft revised that language so as to accommodate Section 813(b) (which requires liquidating distributions to be made in cash) and to express more directly and explicitly the restrictions of RULPA § 605's second sentence.

SECTION 507. RIGHT TO DISTRIBUTION. At the time a partner becomes entitled to receive a distribution, the partner has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution. However, the limited partnership's obligation to make a

distribution is subject to offset for any amount owed to the limited partnership by the partner or dissociated partner on whose account the distribution is made.

Reporter's Notes

Source: RULPA § 606. The last sentence does not appear in RULPA. In Drafts before the July, 1999 Draft, this material appeared at Section 606.

The reference to "dissociated partner" encompasses circumstances in which the partner is gone and all that remains are that dissociated partner's transferable interests.

SECTION 508. LIMITATIONS ON DISTRIBUTION.

(a) A limited partnership may not make a distribution in violation of the partnership agreement.

(b) A limited partnership may not make a distribution if after the distribution:

(1) the limited partnership would not be able to pay its debts as they become due in the ordinary course of business; or

(2) the limited partnership's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the limited partnership were to be dissolved, wound up, and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up, and termination of partners whose preferential rights are superior to those of persons receiving the distribution.

(c) A limited partnership may base a determination that a distribution is not prohibited under subsection (b) on financial statements prepared on the basis of

accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

(d) Except as otherwise provided in subsection (g), the effect of a distribution under subsection (b) is measured:

(1) in the case of distribution by purchase, redemption, or other acquisition of a transferable interest in the limited partnership, as of the date money or other property is transferred or debt incurred by the limited partnership; and

(2) in all other cases, as of the date:

(A) the distribution is authorized, if the payment occurs within 120 days after that date; or

(B) the payment is made, if payment occurs more than 120 days after that date.

(e) A limited partnership's indebtedness to a partner incurred by reason of a distribution made in accordance with this section is at parity with the limited partnership's indebtedness to its general, unsecured creditors.

(f) A limited partnership's indebtedness, including indebtedness issued in connection with or as part of a distribution, is not considered a liability for purposes of determinations under subsection (b) if the terms of the indebtedness provide that payment of principal and interest are made only to the extent that a distribution could then be made to partners under this section.

(g) If indebtedness is issued as a distribution, each payment of principal or interest on the indebtedness is treated as a distribution, the effect of which is measured on the date the payment is made.

Reporter's Notes

This section is derived mostly from ULLCA § 406, which appears to have derived, almost verbatim, from RMBCA § 6.40. In Drafts before the July, 1999 Draft, this material appeared at Section 607.

Subsection (a) – ULLCA § 406 does not include this provision, but ULLCA § 407 (Liability for Unlawful Distributions) establishes personal liability for anyone "who votes for or assents to a distribution made in violation of . . . the articles of organization, or the operating agreement." Similarly, RULPA § 608(b) imposes consequences for receiving a return of contribution "in violation of the partnership agreement." It makes for cleaner drafting to directly prohibit distributions that violate the partnership agreement.

Subsection (b)(1) – Source: ULLCA § 406(a)(1).

Subsection (b)(2) – Source: ULLCA § 406(a)(2).

Subsection (c) – Source: ULLCA § 406(b). N.b. – this subsection imposes a more rigorous standard of care than the "gross negligence" standard applicable under Section 408(c). The import of the more rigorous standard is unclear, however. See Reporter's Notes to Section 509(a).

Subsection (d) – Source: ULLCA § 406(c).

Subsection (d)(1) – The RMBCA has an alternate date, if earlier – when the owner being redeemed ceases to be an owner. The Comment to ULLCA § 406 does not explain why ULLCA omits the alternate date.

Subsection (d)(2) – The RMBCA has another category – distributions of indebtedness not involved in a redemption. The Comment to ULLCA § 406 does not explain why ULLCA omits this additional category.

Subsection (e) – This subsection and Section 507 refer to different things. This subsection refers to indebtedness issued as a distribution. Section 507 refers to the obligation that exists when a limited partnership has declared but not yet made a distribution. In contrast to Section 507, this subsection contains no explicit set-off right. Such a right might interfere with negotiability.

Subsection (g) – This provision is stated as a separate subsection, to make clear that "indebtedness" is not limited to the types of indebtedness referred to in the immediately preceding sentence – i.e., "indebtedness [whose terms] provide that payment of principal and interest are made only to the extent that a distribution could then be made to partners under this section."

SECTION 509. LIABILITY FOR IMPROPER DISTRIBUTIONS.

(a) A general partner that votes for or assents to a distribution made in violation of Section 508 is personally liable to the limited partnership for the amount of the distribution which exceeds the amount that could have been distributed without the violation if it is established that in voting for or assenting to the distribution the general partner failed to comply with Section 408.

(b) A partner or transferee that knew a distribution was made in violation of Section 508 is personally liable to the limited partnership but only to the extent that the distribution received by the partner or transferee exceeded the amount that could have been properly paid under Section 508.

(c) A general partner against which an action is brought under subsection (a) may:

(1) implead in the action any other person that as a general partner voted for or assented to the distribution in violation of subsection (a) and compel contribution from that person; and

(2) implead in the action any person that received a distribution in violation of subsection (b) and compel contribution from that person in the amount that person received in violation of subsection (b).

(d) A proceeding under this section is barred if it is not commenced within two years after the distribution.

Reporter's Notes

Re-RULPA replaces RULPA's antiquated "clawback" provisions with a more modern approach derived from RMBCA § 8.33(a) and ULLCA § 407(a). (The ULLCA provision closely follows the RMBCA provision.) In Drafts before the July, 1999 Draft, this material appeared at Section 608.

Caption – RMBCA § 8.33 and ULLCA § 407 both refer to "Unlawful" distributions, but that term fits poorly with liability imposed for distributions that merely breach the partnership agreement or some comparable document (e.g., a corporation's articles of incorporation, an LLC's articles of organization or operating agreement).

Subsection (a) – Section 408 contains the general duties of general partners. Section 508(c) imposes a separate duty with regard to reliance on financial statements, accounting principles, etc.

N.b. – Section508(c) imposes a higher standard of care than does Section 408. This apparent anomaly does not exist under the RMBCA (from which both Re-RULPA and ULLCA derive their respective provisions on liability for improper distributions). The RMBCA's general standard of care is ordinary care, RMBCA § 8.30(a)(2), not the mere avoidance of gross negligence.

One way to resolve the apparent anomaly is to hold general partners liable not only under Section 408 but also under Section 508(c). Section 508(c) is a crucial aspect of a rule intended to protect entity creditors, and there is some logic for imposing in this context a higher standard than the avoidance of gross negligence. At its April, 2000 meeting, however, the Drafting Committee decided against imposing liability on general partners merely for unreasonably relying on financial statements or other valuation methods. Discussion on the issue suggested that *both* of the following would have to occur before a violation of Section 508(c) could occasion personal liability for a general partner under Section 509:

- In voting for or assenting to a distribution, a general partner "base[s] a determination that a distribution is not prohibited . . . on financial statements prepared on the basis of accounting practices and principles that are [not] reasonable in the circumstances or on a [not] fair valuation or other method that is [not] reasonable in the circumstances." [Section 508(c)]

AND

- The general partner's decision to rely on the improper methodology constitutes "grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." [Section 408(c)]

Subsection (b) – The July, 1999 Draft made transferees subject to liability, and subsequent Drafts have continued that approach..

Subsection (c) – This subsection does not allow a limited partner to implead anyone else, because a limited partner's liability is limited to the amount by which the limited partner's distribution exceeded the permissible amount. Following ULLCA, Draft #2 referred to "this section." At its March, 1998 meeting, the Committee approved the narrower reference to subsection (a).

Subsection (c)(2) – Source: ULLCA § 407(c). Consistent with the change to subsection (b)in the July, 1999 Draft, this paragraph encompasses transferees.

The ULLCA language is a bit imprecise. For example, strictly speaking, subsection (b) does not establish a prohibition that can be violated; it states a remedy. The implied prohibition is against receiving an improper distribution while knowing that the distribution is improper.

Moreover, § 407(c)(2) refers first to "members" and then to "the member." It is important to make clear that the limitation applies to each member severally, not to all members jointly.

Subsection (d) – This subsection follows ULLCA § 407(d), which differs from the RMBCA. Under RMBCA § 8.33(c) the clock runs from "the date on which the effect of the distribution [is] measured" under the provision limiting distributions. The Comments to ULLCA do not explain ULLCA's departure from the RMBCA.

[ARTICLE] 6

DISSOCIATION

SECTION 601. DISSOCIATION AS LIMITED PARTNER.

(a) A person does not have a right to dissociate as a limited partner before the termination of the limited partnership.

(b) A person is dissociated from a limited partnership as a limited partner upon the occurrence of any of the following events:

(1) the limited partnership's having notice of the person's express will to withdraw as a limited partner or on a later date specified by the person;

(2) an event agreed to in the partnership agreement as causing the person's dissociation as a limited partner;

(3) the person's expulsion as a limited partner pursuant to the partnership agreement;

(4) the person's expulsion as a limited partner by the unanimous vote of the other partners if:

(A) it is unlawful to carry on the limited partnership's business with that person as a limited partner;

(B) there has been a transfer of all of the person's transferable interest in the limited partnership, other than a transfer for security purposes, or a court order charging the person's interest, which has not been foreclosed;

(C) the person is a corporation and, within 90 days after the limited partnership notifies the person that it will be expelled as a limited partner because it

has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, there is no revocation of the certificate of dissolution or no reinstatement of its charter or its right to conduct business; or

(D) the person is a limited liability company or partnership that has been dissolved and whose business is being wound up;

(5) on application by the limited partnership, the person's expulsion as a limited partner by judicial determination because:

(A) the person engaged in wrongful conduct that adversely and materially affected the limited partnership's business;

(B) the person willfully or persistently committed a material breach of the partnership agreement or of the obligation of good faith and fair dealing under Section 305(c); or

(C) the person engaged in conduct relating to the limited partnership's business which makes it not reasonably practicable to carry on the business with the person as limited partner;

(6) in the case of a person who is an individual, the person's death;

(7) in the case of a person that is a trust or is acting as a limited partner by virtue of being a trustee of a trust, distribution of the trust's entire transferable interest in the limited partnership, but not merely by reason of the substitution of a successor trustee;

(8) in the case of a person that is an estate or is acting as a limited partner by virtue of being a personal representative of an estate, distribution of the estate's entire transferable interest in the limited partnership, but not merely by reason of the substitution of a successor personal representative;

(9) termination of a limited partner that is not an individual, partnership, limited liability company, corporation, trust, or estate;

(10) the limited partnership's participation in a merger or conversion under [Article] 11, if the limited partnership:

(A) is not the converted or surviving entity; or

(B) is the converted or surviving entity but, as a result of the conversion or merger, the person ceases to be a limited partner.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether to create a separate Article for provisions relating to partner dissociation; whether to revise subsection (b)(4)(C).

In Drafts before the July, 1999 Draft, this material appeared at Section 603.

Organizational issue – The causes of limited partner dissociation substantially overlap the causes of general partner dissociation. That overlap could be avoided (or, rather, exploited) by having one section captioned "Partner Dissociation." That section would list separately events that cause dissociation of any partner and events that cause dissociation only for general partners.

Substantive issues – As decided by the Drafting Committee at its March, 1998 meeting, Re-RULPA adopts the RUPA dissociation provision essentially verbatim, except for the omission of provisions inappropriate to limited partners. At its October, 1998 meeting, the Committee discussed whether limited partners should lack the power as well as the right to withdraw by express will. To the best of the Reporter's recollection, the Committee decided to preserve that power in the default mode but to allow the partnership agreement to negate the power. *See* Section 110(b)(7) and Reporter's Notes to that paragraph.

Subsection (b)(4)(C) – Suppose a corporate limited partner is dissolved and terminated, but the other partners cannot muster a unanimous vote to expel. Does the limited partnership continue with a non-existent limited partner? Are the remaining partners forced to seek dissolution under Section 802?

Subsection (5) – Following RUPA, this provision originally included the phrase "or another partner." The Reporter recommended deleting the phrase, out of concern that the phrase would invite confusion as to the distinction between direct and derivative claims and undermine the limited partner's authority to manage the business. At its March, 1998 meeting, the Committee accepted the Reporter's recommendation.

Subsection (b)(5)(C) – In RUPA the concluding phrase is "carry on the business in partnership with the partner." Given the possible dual status of a general partner in a limited partnership, RUPA's phrase "in partnership with the partner" would be overbroad in Re-RULPA.

In contrast to the Re-RULPA provision on dissociation as a general partner, this provision does not provide for dissociation on account of bankruptcy or insolvency.

Subsection (b)(6) – In contrast to the provision on dissociation as a general partner, this provision does not provide for dissociation on account of an individual's incompetency.

SECTION 602. EFFECT OF DISSOCIATION AS LIMITED PARTNER.

Upon a person's dissociation as a limited partner:

(1) subject to Section 704, the person does not have further rights as a limited partner;

(2) the person's obligation of good faith and fair dealing as a limited partner under Section 305(c) continues only as to matters arising and events occurring before the dissociation;

(3) subject to Section 704 and [Article] 11, any transferable interest owned by the person in the person's capacity as a limited partner immediately before dissociation is owned by the person as a mere transferee; and

(4) the dissociation does not of itself discharge the person from any obligation to the limited partnership or the other partners which the person incurred while a limited partner.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether this section should contain a rule to parallel Section 604(c) (stating that a general partner that dissociates before the termination of the limited partnership is liable to the limited partnership and to other partners for any damages caused by the dissociation).

In Drafts before the July, 1999 Draft, this material appeared at Section 603A.

Paragraph (1) – Derived from RUPA § 603(b)(1). At its October, 1998 meeting, the Drafting Committee directed that this paragraph be subject to the rights of the estate of a deceased partner. Section 704 states those rights.

Paragraph (2) – Section 605 (Effect of Dissociation as a General Partner) has no parallel provision, because RUPA § 603(b)(3) does not refer to the duty of good faith and fair dealing.

Paragraph (3) – Section 605(4) contains parallel language pertaining to a person's dissociation as a general partner. The Reporter's Notes to that provision explain the language in detail.

Paragraph (4) – Discussion at the Committee's March, 1998 meeting suggested the need for this type of provision with regard to limited partners. The language is included in Section 605 as well, to preclude any misunderstanding that might result from a lack of parallel treatment. The word "discharge" is derived from RUPA § 703(a).

In Draft #4 this provision referred to any obligation "which pertains to the time during which the person was a general partner." That language seems

ambiguous, and the July, 1999 Draft substituted the concept of incurring an obligation. The latter concept is used elsewhere in the [Act].

At its March, 1998 meeting, the Committee voted to delete subsection (b), which had provided:

> (b) A limited partner who dissociates before the termination of the limited partnership is liable to the limited partnership and to other partners for any damages caused by the dissociation.

Compare Section 604(c)(stating the rule for persons that dissociate as general partners).

SECTION 603. DISSOCIATION AS GENERAL PARTNER. A person is dissociated from a limited partnership as a general partner upon the occurrence of any of the following events:

(1) the limited partnership's having notice of the person's express will to withdraw as a general partner or on a later date specified by the person;

(2) an event agreed to in the partnership agreement as causing the person's dissociation as a general partner;

(3) the person's expulsion as a general partner pursuant to the partnership agreement;

(4) the person's expulsion as a general partner by the unanimous vote of the other persons that are partners if:

(A) it is unlawful to carry on the limited partnership's business with that person as a general partner;

(B) there has been a transfer of all or substantially all of the person's transferable interest in the limited partnership, other than a transfer for security

purposes, or a court order charging the person's interest, which has not been foreclosed;

(C) the person is a corporation and, within 90 days after the limited partnership notifies the person that it will be expelled as a general partner because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, there is no revocation of the certificate of dissolution or no reinstatement of its charter or its right to conduct business; or

(D) the person is a limited liability company or partnership that has been dissolved and whose business is being wound up;

(5) on application by the limited partnership, the person's expulsion as a general partner by judicial determination because:

(A) the person engaged in wrongful conduct that adversely and materially affected the limited partnership affairs;

(B) the person willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under Section 408; or

(C) the person engaged in conduct relating to the limited partnership's business which makes it not reasonably practicable to carry on the affairs of the limited partnership with the person as a general partner;

(6) the person's:

(A) becoming a debtor in bankruptcy;

(B) execution of an assignment for the benefit of creditors;

(C) seeking, consenting to, or acquiescing in the appointment of a trustee, receiver, or liquidator of that partner or of all or substantially all of that general partner's property; or

(D) failure, within 90 days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the general partner or of all or substantially all of the person's property obtained without the person's consent or acquiescence, or failing within 90 days after the expiration of a stay to have the appointment vacated;

(7) in the case of a person who is an individual:

(A) the person's death;

(B) the appointment of a guardian or general conservator for the person; or

(C) a judicial determination that the person has otherwise become incapable of performing the person's duties as a general partner under the partnership agreement;

(8) in the case of a person that is a trust or is acting as a general partner by virtue of being a trustee of a trust, distribution of the trust's entire transferable interest in the limited partnership, but not merely by reason of the substitution of a successor trustee;

(9) in the case of a person that is an estate or is acting as a general partner by virtue of being a personal representative of an estate, distribution of the estate's

entire transferable interest in the limited partnership, but not merely by reason of the substitution of a successor personal representative;

(10) termination of a general partner that is not an individual, partnership, limited liability company, corporation, trust, or estate;

(11) the limited partnership's participation in a merger or conversion under [Article] 11, if the limited partnership:

(A) is not the converted or surviving entity; or

(B) is the converted or surviving entity but, as a result of the conversion or merger, the person ceases to be a general partner.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether to combine this section with the section on dissociation as a limited partner; whether paragraph (4)'s reference to "vote" should be changed to "consent"; whether paragraph (4)'s expulsion provision should be retained; whether paragraph (4)(C) is correct in requiring a unanimous vote to expel a corporate general partner whose existence has terminated.

Source: RUPA § 601. In Drafts before the July, 1999 Draft, this material appeared as Section 602.

Strictly speaking, general partner dissociation involves the dissociation of a person *as a general partner* rather than the dissociation *of a general partner*. This distinction, adopted at the Committee's March, 1998 meeting, is important because a person may be simultaneously a general and limited partner. *See* Section 113 (Dual Capacity). Dissociation therefore applies to the capacity rather than to the person.

Paragraph (1) – This provision could be problematic if a limited partnership has a sole general partner and no employees or other agents of its own. Whom does the would-be withdrawing general partner notify? Telling every limited partner will not suffice, because "[t]he fact that a limited partner has no power to bind the limited partnership means that information possessed by a limited partner is not attributed to the limited partnership." Section 302, Reporter's Notes. The same

problem might exist under ULLCA § 601(1) when the LLC has one manager, who is a member, and that member-manager wishes to dissociate as a member.

Paragraph (4) – At its March, 1998 meeting, the Drafting Committee discussed but did not decide whether affiliates of the would-be expelled person should be excluded from the vote. At its April, 2000 meeting, the Committee revisited the issue and decided that Re-RULPA will not expressly address the question. In making this decision, the Committee determined that defining "affiliate" would be unduly cumbersome and that courts can use alter ego concepts to handle problematic situations. The Committee did revise Paragraph (4) to take care of a "dual capacity" problem. Under the revised language, a general partner that is also a limited partner cannot block its expulsion as a general partner by acting in its capacity as a limited partner.

Query – should "vote" be changed to "consent"? Given that Section 118(a) provides that "Action requiring the consent or vote of partners under this [Act] may be taken without a meeting," what is the difference between "consent" and "vote"?

Paragraph (4)(C) – Suppose a corporate general partner is dissolved and terminated, but the other partners cannot muster a unanimous vote to expel. Does the limited partnership continue with a non-existent general partner? Are the remaining partners forced to seek dissolution under Section 802?

Paragraph (5) – Following RUPA, this provision originally permitted the application to come either from the limited partnership "or another partner." The Reporter recommended deleting the latter reference, out of concern that the reference would invite confusion as to the distinction between direct and derivative claims and undermine the general partner's authority to manage the business. At its March, 1998 meeting, the Committee accepted the Reporter's recommendation.

Paragraph (5)(C) – In RUPA the concluding phrase is "carry on the business in partnership with the partner." Given the possible dual status of a general partner in a limited partnership, RUPA's phrase "in partnership with the partner" would be overbroad in Re-RULPA.

Paragraph (7)(B) – In this respect, in the default mode a general partner has fewer rights than a limited partner. If a guardian or general conservator is appointed for a limited partner, the limited partner is not dissociated and the guardian or conservator may exercise the limited partner's rights *ad infinitum*. For a general partner, in contrast, the appointment causes dissociation, which in turns relegates the dissociated general partner to a mere transferee of the transferable interest associated with the general partnership interest.

Paragraph (8) – RUPA's approach, replicated here, might seem anomalous when compared with the status of a general partner that transfers "all or substantially all of that partner's transferable interest in the partnership." RUPA § 601(4)(ii), incorporated in Re-RULPA as Section 602(4)(B). In that latter event, dissociation occurs only upon "the unanimous vote of the other partners." Why should a harsher rule apply to a trust, especially if the distribution of the trust's transferable interest was foreseeable (e.g., ordained by the terms of the trust) at the time the trust became a general partner? At the March, 1998 meeting, Committee members explained this approach as beneficial to the trust, since the trustee will not wish to remain a general partner once that trust has no further economic interest in the limited partnership.

SECTION 604. PERSON'S POWER TO DISSOCIATE AS GENERAL PARTNER; WRONGFUL DISSOCIATION.

(a) A person has the power to dissociate as a general partner at any time, rightfully or wrongfully, by express will pursuant to Section 603(1).

(b) A person's dissociation as a general partner is wrongful only if:

(1) it is in breach of an express provision of the partnership agreement; or

(2) it occurs before the termination of the limited partnership, and:

(A) the person withdraws as a general partner by express will;

(B) the person is expelled as a general partner by judicial determination under Section 603(5);

(C) the person is dissociated as a general partner by becoming a debtor in bankruptcy; or

(D) in the case of a person that is not an individual, trust other than a business trust, or estate, the person is expelled or otherwise dissociated as a general partner because it willfully dissolved or terminated.

(c) A person that wrongfully dissociates as a general partner is liable to the limited partnership and, subject to Section 1001, to the other partners for damages caused by the dissociation. The liability is in addition to any other obligation of the general partner to the limited partnership or to the other partners.

Reporter's Notes

In Drafts before the July, 1999 Draft, this material appeared at 602A.

Subsection (b)(1) – This language, taken verbatim from RUPA, limits and may even preclude remedies if a general partner's dissociation "merely" breaches the partner's obligation of good faith. Consider subsection (c), under which wrongful dissociation gives rise to a remedy, in light of the interpretative maxim of *expressio unius est exclusio alterius*.

Arguably at least, RUPA's approach does not fit limited partnerships, because general and limited partnerships differ both as the presumed balance of negotiating power at formation and in the assumed allocation of management power during operations. It seems implicit in RUPA that the typical general partnership involves an arrangement among co-equals. Indeed, RUPA's default rules are "set" at that expectation. See RUPA § 401(h).

Re-RULPA, in contrast, envisions a very different situation. As to ongoing operations, the presumption for limited partners is passivity. See Sections 302 and 406. As to formation, discussions at past meetings of the Drafting Committee suggest that – more often than not (but, of course, not always) – the general partner will be "driving the deal." Thus, in most limited partnerships the general partner(s) will have far greater influence over the drafting of the "express provision[s] of the partnership agreement" and far greater control over the circumstances that become the context in which those express provisions operate. In short, a general partner's opportunity for sharp dealing through premature dissociation seems greater in a limited partnership than in a general partnership.

Therefore, when it comes to determining the wrongfulness of general partner dissociation in a limited partnership, it is arguable that Re-RULPA should not only

enforce the "express provision[s] of the partnership agreement" but also " protect [the limited partners' interests in the] agreed-upon arrangements from conduct [by a dissociating general partner] that is manifestly beyond what a reasonable person could have contemplated when the [express] arrangements were made." Section 305, Reporter's Notes (proposed Comment on good faith). It is arguable that subsection (b)(1) should be revised to read: "it is in breach of an express provision of the partnership agreement or the person's obligations of good faith under Section 408(d)." However, at its April, 2000 meeting, the Drafting Committee considered and rejected this idea.

Subsection (b)(2) – The roughly analogous passage of RUPA, § 602(2), states: "in the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking." The different language in the current Draft originated in Draft #3 and reflects a different assumption about the partners' deal – namely, that in a limited partnership, absent a contrary agreement, the general partner is expected to shepherd the limited partnership through winding up.

Under this Draft, a person's obligation to remain as general partner through winding up continues even if another general partner dissociates and even if that dissociation leads to the limited partnership's premature dissolution under Section 801(3)(A). The obligation also continues if for some other reason dissolution occurs before the expiration of the limited partnership's term. Other default rules are certainly plausible, but would require more complicated language. *See, e.g.*, RUPA § 602(b)(2). This Draft's approach seems at least equally plausible and has the virtue of greater simplicity.

Following the dissociation of a person as general partner, each remaining general partner has the power to dissolve the limited partnership by "express will." Section 801(3)(A). A remaining general partner can exercise that power without thereby dissociating as a general partner. The "express will" to dissolve is different from the "express will" to dissociate.

Subsection (b)(2)(A) – RUPA uses "withdrawal." For the sake of internal consistency, the Reporter would prefer "dissociates." The analogous RUPA passage continues: "unless the withdrawal follows within 90 days after another partner's dissociation by death or otherwise under Section 601(6) through (10) or wrongful dissociation under this subsection." RUPA § 601(6) through (10) provide for automatic dissociation in the event of, e.g., bankruptcy, death, distribution of a trust's entire transferable interest in the partnership. It is unclear whether that default rule is appropriate for a limited partnership. Where a limited partnership has more than one general partner, absent a contrary agreement the limited partners

might expect each general partner to "stay the course" at least for the purposes of winding up, regardless of whether the other general partners do.

Subsection (b)(2)(C) – Why not also include the events that Section 602(5), following RUPA 601(5), considers comparable or tantamount to becoming a debtor in bankruptcy?

Subsection (c) – Source: RUPA § 602(c). The language "subject to Section 1001" was new in Draft #3 (where it referred to former Section 1005) and was inserted in accord with discussions at the March, 1998 meeting. The language is intended to preserve the distinction between direct and derivative claims and to make clear that a partner seeking to claim damages under Section 604(c) has to prove some harm independent of harm suffered by the limited partnership.

SECTION 605. EFFECT OF DISSOCIATION AS GENERAL PARTNER.

Upon a person's dissociation as a general partner:

(1) the person's right to participate as a general partner in the management and conduct of the partnership's business terminates;

(2) the person's duty of loyalty as a general partner under Section 408(b)(3) terminates;

(3) the person's duty of loyalty as a general partner under Section 408(b)(1) and (2) and duty of care under Section 408(c) continue only with regard to matters arising and events occurring before the person's dissociation as a general partner;

(4) the person is obligated to sign, at the request of the limited partnership, an amendment to the certificate of limited partnership which states that the person has dissociated, and may sign and deliver for filing a statement of dissociation pertaining to the person;

(5) subject to Section 704 and [Article] 11, any transferable interest owned by the person immediately before dissociation in the person's capacity as a general partner is owned by the person as a mere transferee; and

(6) the dissociation does not of itself discharge the person from any obligation to the limited partnership or the other partners which the person incurred while a general partner.

Reporter's Notes

Source: RUPA § 603(b), except for paragraphs (4) and (5), which are new. In Drafts before the July, 1999 Draft, this material appeared at Section 602B.

Paragraph (1) – This paragraph differs from its RUPA analog in two respects. First, the paragraph adds the phrase "as a general partner" to cover circumstances in which a person dissociates as a general partner but remains as a limited partner. Second, this clause omits RUPA's exception for winding up. Unlike a dissociated RUPA general partner, a dissociated Re-RULPA general partner has no rights to participate in winding up.

Paragraph (3) – The RUPA provision continues certain duties if the dissociated person participates in winding up. RUPA § 603(b)(3). For the reasons stated in the Reporter's Notes to Paragraph (1), this Draft eschews that approach.

Following RUPA, this section does not refer to the duty of good faith and fair dealing. Compare Section 602(2) (stating how limited partner dissociation affects that duty).

Paragraph (4) – This provision was new in the July, 1999 Draft.

Paragraph (5) – As decided at the March, 1998 meeting, Paragraph (5) refers only to transferable interests owned by the dissociated person in the capacity of a general partner rather than to all of the person's transferable interests. Comparable language appears in Section 602(3), in connection with a person's dissociation as a limited partner. The July, 1999 Draft added language to Section 111 so that "for any person who is both a general partner and a limited partner, [the limited partnership's records must include] a specification of what transferable interest the person owns in each capacity." Section 111(8)(C).

The reference to Section 704 is to the power of the estate of a deceased individual general partner. The reference to "subject to [Article] 11" encompasses mergers and conversions. If a person dissociates as a general partner through a merger or conversation, Paragraph (4) will not apply if:

- the limited partnership survives but the person is bought out, in which case the person no longer owns a transferable interest in any capacity, or

- the limited partnership does not survive, in which case no transferable interest of the limited partnership will exist to be owned by anybody.

Paragraph (6) – Discussion at the Committee's March, 1998 meeting suggested the need for this type of provision with regard to *limited* partners. See Section 602(4). The language has been included here, as well, to preclude any misunderstanding that might result from a lack of parallel treatment. The word "discharge" is derived from RUPA § 703(a).

In Draft #4 this provision referred to any obligation "which pertains to the time during which the person was a general partner." That language seems ambiguous, and the July, 1999 Draft substituted the concept of incurring an obligation. The latter concept is used elsewhere in the [Act].

SECTION 606. DISSOCIATED GENERAL PARTNER'S POWER TO BIND AND LIABILITY TO PARTNERSHIP BEFORE DISSOLUTION.

(a) After a person is dissociated as a general partner and before the limited partnership is dissolved, converted under [Article] 11 or merged out of existence under [Article 11], the limited partnership is bound by an act of the person only if:

(1) the act would have bound the limited partnership under Section 402 before the dissociation; and

(2) at the time the other party enters into the transaction:

(A) less than two years has passed since the dissociation; and

(B) the other party does not have notice of the dissociation and reasonably believes that the person is a general partner.

(b) If a limited partnership is bound under subsection (a), the person dissociated as a general partner is liable:

(1) to the limited partnership for any damage caused to the limited partnership arising from that obligation; and

(2) if a general partner or a person dissociated as a general partner is liable for that obligation, to that general partner or other person for any damage caused to that general partner or other person arising from that liability.

Reporter's Notes

Derived from RUPA § 702. In Drafts before the July, 1999 Draft, this material appeared at Section 602C.

SECTION 607. DISSOCIATED GENERAL PARTNER'S LIABILITY TO OTHER PERSONS.

(a) A person's dissociation as a general partner does not of itself discharge the person's liability as a general partner for a limited partnership's obligation incurred before dissociation. Except as otherwise provided in subsections (b) and (c), the person is not liable for a limited partnership's obligation incurred after dissociation.

(b) A person whose dissociation as a general partner resulted in a dissolution and winding up of the limited partnership's business is liable to the same

extent as a general partner under Section 404 on an obligation incurred by the limited partnership under Section 804.

(c) A person that has dissociated as a general partner but whose dissociation did not result in a dissolution and winding up of the limited partnership's business is liable to the same extent as a general partner under Section 404 on a transaction entered into after the dissociation by the limited partnership, only if:

(1) a general partner would be liable on the transaction; and

(2) at the time the other party enters into the transaction:

(A) less than two years has passed since the dissociation; and

(B) the other party does not have notice of the dissociation and reasonably believes that the person is a general partner.

(d) By agreement with the limited partnership's creditor and the limited partnership, a person dissociated as a general partner may be released from liability for a limited partnership's obligation.

(e) A person dissociated as a general partner is released from liability for a limited partnership's obligation if a limited partnership's creditor, with notice of the person's dissociation as a general partner but without the person's consent, agrees to a material alteration in the nature or time of payment of the limited partnership's obligation.

Reporter's Notes

Derived from RUPA § 703. In Drafts before the July, 1999 Draft, this material appeared at Section 602D.

Subsection (a) – The second sentence of this subsection varies from its RUPA analog to make clear that a different rule applies when the person's dissociation does result in dissolution. The *rule* is the same under RUPA. The deviation from RUPA's *language* is a follows:

> ~~The~~ Except as otherwise provided in subsections (b) and (c), the person is not liable for a limited partnership obligation incurred after dissociation~~, except as otherwise provided in subsection (b)~~.

(The exception is moved to the beginning of the sentence per the suggestion of the representative of the Style Committee.)

Subsection (b) – This provision is new and makes explicit a point left implicit in RUPA.

Subsection (c) – This provision is taken from RUPA, with changes made in the lead-in language to indicate more clearly or succinctly that (i) the subsection applies even after dissolution occurs *if* the dissolution did *not* result from the person's dissociation as a general partner, (ii) a different rule applies when the person's dissociation does result in dissolution, and (iii) a dissociated person is only liable under this subsection only if a general partner would be liable. The *rule* is the same under RUPA. The deviation from RUPA's *language* is mostly per the suggestions of the representative of the Style Committee

A detailed comparison of RUPA and Re-RULPA on this issue was posted in June, 1999 on the Drafting Committee's list serv and is available from the Reporter.

Subsection (c)(1) – This provision needs revision, because it still reflects the "all or nothing" approach that earlier Drafts took toward the LLLP shield. See Reporter's Notes to Section 404(b).

Subsection (c)(2) – This provision has been changed in the same manner and for the same reasons as Section 606(a).

Subsection (d) – RUPA § 703(c) reads: "the partners continuing the business." Re-RULPA's differing language reflects the Draft's entity view of limited partnerships.

[ARTICLE] 7

TRANSFERABLE INTERESTS AND RIGHTS OF TRANSFEREES AND CREDITORS

SECTION 701. PARTNER'S TRANSFERABLE INTEREST. The only transferable interest of a partner is the partner's right to receive distributions. The interest is personal property.

Reporter's Notes

Derived from RUPA § 502. In prior Drafts, the first sentence of this section read: "The only transferable interest of a partner is the partner's allocation of the profits and losses of the partnership and the partner's right to receive distributions." The reference to profits and losses has been deleted in light of the Drafting Committee's decision to delete from Re-RULPA the section allocating profits and losses. See Reporter's Notes to former Section 503.

Section 507 provides that a partner's right to distributions is subject to offset.

SECTION 702. TRANSFER OF PARTNER'S TRANSFERABLE INTEREST.

(a) A transfer, in whole or in part, of a partner's transferable interest in the limited partnership:

(1) is permissible;

(2) does not by itself cause the partner's dissociation or a dissolution and winding up of the limited partnership's business; and

(3) does not, as against the other partners or the limited partnership, entitle the transferee to participate in the management or conduct of the limited partnership's business, to require access to information concerning the limited

partnership's transactions except as provided in subsection (c), or to inspect or copy the limited partnership's books or records.

(b) A transferee of a partner's transferable interest in the limited partnership has a right to receive, in accordance with the transfer:

(1) distributions to which the transferor would otherwise be entitled; and

(2) upon the dissolution and winding up of the limited partnership's business the net amount otherwise distributable to the transferor.

(c) In a dissolution and winding up, a transferee is entitled to an account of the limited partnership's transactions only from the date of dissolution.

(d) Upon transfer, the transferor retains the rights of a partner other than the interest in distributions transferred and retains all duties and obligations of a partner.

(e) A limited partnership need not give effect to a transferee's rights under this section until it has notice of the transfer.

(f) A transfer of a partner's transferable interest in the limited partnership in violation of a restriction on transfer contained in the partnership agreement is ineffective as to a person having notice of the restriction at the time of transfer.

(g) A transferee that becomes a partner with respect to a transferable interest is liable for the transferor's obligations under Sections 502 and 509. However, the transferee is not obligated for liabilities unknown to the transferee at the time the transferee became a partner.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether the notice element in subsection (e) should be changed to "received notification"; whether the knowledge element in the second sentence of subsection (g) should be changed to notice.

Source: RUPA § 503. Although for the most part RULPA's language "works," the formulation is oblique. In this instance, the benefits (especially for the uninitiated) of a more direct formulation outweigh the preference for retaining familiar language. Re-RULPA therefore takes RUPA language in place of RULPA language. (Draft #1 rearranged the provisions of RUPA § 503 so that the affirmative aspects were stated first and the limitations or negative aspects were stated second. Consistent with the Committee's instructions at the July, 1997 meeting, Draft #2 provided the RUPA provisions without significant change, while preserving Draft #1's language as an alternative version. At its March, 1998 meeting, the Committee rejected the alternative version, and that version has therefore been omitted from subsequent drafts.)

Subsection (b) – Drafts before the July, 1999 Draft included subsection (b)(3), which authorized a transferee to "to seek under Section 802(b) a judicial determination that it is equitable to wind up the limited partnership business." The July, 1999 Draft eliminated subsection 802(b).

Subsection (c) – RUPA § 503(c) reads: "the latest account agreed to by all of the partners." At its March, 1998 meeting, the Committee decided to deviate from RUPA.

Subsection (d) – The transfer itself does not affect a partner's duties, but a transfer of all of a person's transferable interest could lead to dissociation via expulsion, Sections 601(b)(4)(B) and 603(4)(B), which in turn could affect the partner's duties. Sections 602 and 605.

Subsection (g) – This subsection is derived from RULPA § 704(b). At its March, 1998 meeting, the Committee instructed the Reporter to preserve the substance of RULPA § 704(b)'s second and third sentences. Changes from RULPA § 704(b) are as follows:

~~An assignee who has become a limited partner has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a limited partner under the partnership agreement and this [Act]. An assignee~~ A transferee ~~who~~ that becomes a ~~limited~~ partner with respect to a transferable interest ~~also~~ is liable for the transferor's obligations ~~of his [or her] assignor to make and return contributions as provided in Articles 5 and 6~~ under Sections

502 and 509. However, the ~~assignee~~ transferee is not obligated for liabilities unknown to the ~~assignee~~ transferee at the time ~~he [or she]~~ the transferee became a ~~limited~~ partner.

In the first sentence of subsection (g), the phrase "with respect to a transferable interest" was new in the July, 1999 Draft. The following example illustrates the operation of subsection (g).

Ann and Tom are both partners in a limited partnership. Ann transfers all of her transferable interest to Howard, who does not become a partner. Howard is not liable for Ann's obligations under Sections 502 and 509.

Later, Tom transfers one-half of his transferable interest to Howard, who does become a partner with respect to that transfer. Howard is liable for *all* of Tom's obligations under Sections 502 and 509. However, Howard's status as a partner does not retroactively make him liable for Ann's obligation's under those sections.

SECTION 703. RIGHTS OF CREDITOR OF PARTNER OR TRANSFEREE.

(a) On application to a court of competent jurisdiction by any judgment creditor of a partner or transferee, the court may charge the transferable interest of the judgment debtor with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of a transferee. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances of the case may require to give effect to the charging order.

(b) A charging order constitutes a lien on the judgment debtor's transferable interest. The court may order a foreclosure upon the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee.

(c) At any time before foreclosure, an interest charged may be redeemed:

(1) by the judgment debtor;

(2) with property other than limited partnership property, by one or more of the other partners; or

(3) with limited partnership property, by the limited partnership with the consent of all partners whose interests are not so charged.

(d) This [Act] does not deprive any partner or transferee of the benefit of any exemption laws applicable to the partner's or transferee's transferable interest.

(e) This section provides the exclusive remedy by which a judgment creditor of a partner or transferee may satisfy a judgment out of the judgment debtor's transferable interest.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether a receiver with respect to a charging order should have greater rights of inquiry than the judgment debtor [subsection (a)]; whether the redemption by the limited partnership of "an interest charged" should require the consent of all the partners or merely a decision by disinterested general partners.

Caption – RUPA captions its comparable section "Partner's Interest Subject to Charging Order." RUPA § 504. ULLCA captions its comparable section "Rights of Creditor." ULLCA § 504.

Subsection (a) – RULPA § 703 does not refer to transferees; Re-RULPA's approach comports with both RUPA § 504(a) and ULLCA § 504(a). Subsection

(a)'s last sentence originated in RUPA § 504(a). ULLCA § 504(a) incorporated the RUPA language but added the last phrase ("to give effect . . . ."), apparently in an effort to limit the extent to which the "or which" clause empowers a court to intervene in the entity's affairs. The Drafting Committee should consider why a receiver should have greater rights of inquiry than the judgment debtor.

Subsection (b) – Source: RUPA § 504(b).

Subsection (c) – Source: RUPA § 504(c) and ULLCA § 504(c).

Subsection (c)(3) – Source: RUPA § 504(c)(3). According to the RUPA provision, the redemption is by "one or more of the other partners." At its March, 1998 meeting, the Committee substituted the phrase "the limited partnership," making clear that the entity does the redemption. The Committee rejected language that would have allowed disinterested general partners to make the redemption decision.

Subsection (e) – Source: RUPA § 504(e).

SECTION 704. POWER OF ESTATE OF DECEASED PARTNER. If a partner who is an individual dies, the deceased partner's executor, administrator, or other legal representative may exercise the rights of a transferee as provided in Section 702 and, for the purposes of settling the estate, may exercise the rights of a current limited partner under Section 304.

Reporter's Notes

Before the July, 1999 Draft, Re-RULPA gave no special powers to the estate of a deceased partner or the guardian of an incompetent partner. Although this section appeared in those Drafts, in essence it restated the rules relating to dissociation: for a deceased partner and an incompetent general partner, transformation to a mere transferee; for an incompetent limited partner, no change.

At its March, 1999 meeting, the Drafting Committee directed the Reporter to reinstate RULPA language so as to provide sufficient informational rights to the estate of a deceased partner. Unfortunately, however, much of RULPA's language conflicts with major policy decisions made by the Committee. For example, under RULPA § 705 the estate of a deceased partner appears to have the power to manage the limited partnership until the estate is wound up. The guardian of an

incompetent partner appears to have the power to manage the limited partnership indefinitely. ("If a partner who is an individual dies or a court of competent jurisdiction adjudges him [or her] to be incompetent to manage his [or her] person or his [or her] property, the partner's executor, administrator, guardian, conservator, or other legal representative may exercise all the partner's rights for the purpose of settling his [or her] estate or administering his [or her] property, including any power the partner had to give an assignee the right to become a limited partner.")

Therefore, the July, 1999 Draft eschewed much of RULPA's language while seeking to provide additional informational rights to the estate of a deceased partner. Giving the estate the informational rights of a current limited partner allows the estate information about the ongoing operations and value of the limited partnership.

[ARTICLE] 8

DISSOLUTION

SECTION 801. NONJUDICIAL DISSOLUTION. A limited partnership is dissolved, and its business must be wound up, only upon the occurrence of any of the following events:

(1) the happening of an event specified in writing in the partnership agreement;

(2) the written consent of all general partners and of limited partners owning a majority of the rights to receive distributions owned by persons as limited partners;

(3) after the dissociation of a person as a general partner:

(A) if the limited partnership has at least one remaining general partner:

(i) the limited partnership's having notice within 90 days after the dissociation of the express will of any remaining general partner to dissolve the limited partnership; or

(ii) the written consent to dissolve the limited partnership given within 90 days after the dissociation by limited partners owning a majority of the rights to receive distributions owned by persons as limited partners immediately following the dissociation; or

(B) if the limited partnership does not have a remaining general partner, the passage of 90 days after the dissociation, unless within that 90 days partners owning a majority of the rights to receive distributions owned by limited partners immediately following the dissociation consent to continue the business and to admit

at least one general partner and at least one person is admitted as a general partner in accordance with that consent;

(4) the passage of 90 days after the dissociation of the limited partnership's last limited partner, unless before the end of the 90 days the limited partnership admits at least one limited partner;

(5) the signing of a declaration of dissolution by the [Secretary of State] under Section 810(b); or

(6) entry of a decree of judicial dissolution under Section 802.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether to retain the reference to "writing" in Paragraph (1) and "written" in Paragraph (2); whether, for the purposes of Paragraphs 3(A)(ii) and 3(B), the majority should be calculated against the rights to receive distributions owned by persons as limited partners immediately after dissolution (as in this Draft) or against the rights to receive distributions owned at the time the consent is obtained; whether under paragraph 3(B) the limited partners should have more than 90 days to actually admit a new general partner.

Paragraph (1) – In other places, Re-RULPA has done away with writing requirements. If some documentation requirement is retained, the reference to "writing" should be reconsidered when the Drafting Committee considers how to reconcile Re-RULPA with the UETA.

Paragraph (2) – Beginning with Draft #3, this Paragraph referred to "interests in profits [or profits interests] owned by persons as limited partners." That reference no longer makes sense, given the Drafting Committee's decision to delete from Re-RULPA the section allocating profits and losses. See Reporter's Notes to former Section 503.

The substitute reference is to "limited partners owning a majority of the rights to receive distributions owned by persons as limited partners." This formulation continues the approach of prior Drafts – i.e., excluding economic rights that are owned by transferees that are not also partners. The phrase also excludes economic rights owned by general partners in their capacity as general partners.

The notion of a right to receive distributions comes from Section 701. ("The only transferable interest of a partner is the partner's right to receive distributions.")

At its March, 1998 meeting, the Committee deleted the following proposed new language, which had been derived from RUPA § 801(4) and ULLCA § 801(3):

> the passage of 90 days after the limited partnership has notice of an event that makes it unlawful for all or substantially all of the business of the limited partnership to be continued, unless the illegality is cured before the end of the 90 day period;

Paragraph (3) – See Reporter's Notes to Paragraph (2) for an explanation of why this Paragraph refers to " rights to receive distributions" rather than, as formerly, "interests in profits."

Paragraph (3)(A)(i) – A remaining general partner can exercise this power to cause dissolution without thereby dissociating as a general partner. The "express will" to dissolve is different from the "express will" to dissociate.

Paragraph (3)(A)(ii) – Excluded from the calculation are rights to receive distributions owned by a transferee that is not a limited partner. Rights to receive distributions owned by a person that is both a general and a limited partner figure in *only to the extent those rights can be said to be held in the person's capacity as a limited partner*. The July, 1999 Draft added language to Section 110 [now Section 111] so that "for any person who [now "that"] is both a general partner and a limited partner, [the limited partnership's records must include] a specification of what transferable interest the person owns in each capacity." Section 111(8)(C).

Query: should the majority be calculated against the rights to receive distributions owned by persons as limited partners immediately after dissolution (as in this Draft) or against the rights to receive distributions owned at the time the consent is obtained? The latter calculation would produce a different result if, prior to the consent, a second dissociation occurs and that dissociation causes a transfer to a person that is not a limited partner. Indeed, under the current approach *all* the remaining limited partners might consent and yet be unable to invoke this provision.

The following scenario illustrates the problem:

> An individual is the sole general partner and also holds a majority of limited partner units. A court declares the individual incompetent, which automatically dissociates him or her as a general partner but not as a limited partner. Before the remaining limited partners (including the individual, acting through his or her guardian) can appoint a new general partner, the individual dies, dissociating as

a limited partner. As of that moment it is impossible to muster the "majority of the rights to receive distributions owned by limited partners immediately following the [individual's] dissociation [as a general partner]," because the majority of those interests is now owned by a mere transferee.

Paragraph (3)(B) – This language requires that all of the following occur within the 90 days: consent to avoid dissolution, consent to appoint a new general partner and admission of a new general partner in accordance with that consent. This language is arguably too narrow. For example, suppose that the requisite consent is obtained within the 90 days, in contemplation of a particular person becoming a general partner. Shortly before the end of the 90 days, the person refuses to be admitted as a general partner. To avoid dissolution the limited partners would have to find a substitute general partner and obtain new consents before the 90 day period expires. The rule is, however, merely a default rule. Before the 90 days expire the limited partners can amend the partnership agreement to extend the deadline.

The query posed in the Comment to paragraph (3)(A)(ii) applies here as well. The Act should take the same approach to both these provisions.

SECTION 802. JUDICIAL DISSOLUTION. On application by or for a partner the [appropriate court] court may decree dissolution of a limited partnership if it is not reasonably practicable to carry on the business in conformity with the partnership agreement.

Reporter's Notes

Source: RULPA § 802. Both RUPA § 801 and ULLCA § 801 include nonjudicial and judicial dissolution in the same section. This draft preserves RULPA's approach, dividing the two types of dissolution into two sections.

Differences with RUPA and ULLCA – This section differs substantially from RUPA and ULLCA. The differences include:

- RUPA § 801(5) and ULLCA § 801(4) each permit a court to decree dissolution when the economic purpose of the entity is likely to be unreasonably frustrated. At its March, 1999 meeting, the Drafting Committee deleted a comparable provision from Re-RULPA.

- RUPA § 801(5) and ULLCA § 801(4)(i) each permit judicial dissolution when an owner has engaged in conduct relating to the entity's business which makes it not reasonably practicable to carry on the business with that owner. Draft #3 included a comparable provision, which was deleted for Draft #4 and subsequent Drafts.

RUPA § 801(6)(i) and ULLCA § 801(5)(i) each permit judicial dissolution on application by a transferee when the entity continues in existence beyond the term in effect when the transferee became a transferee. At its March, 1999 meeting the Drafting Committee deleted a comparable provision, which appeared as subsection (b) and would have applied only if "at the time of the transfer or entry of the charging order that gave rise to the transferee's interest the partnership agreement provided in writing for the limited partnership to have a term other than perpetual."

- ULLCA § 801(4)(v) includes a concept developed in the law of closely held corporations and permits a court to decree dissolution when "the managers or member in control of the company have acted in a manner that is illegal, oppressive, fraudulent, or unfairly prejudicial to the petitioner." At its October, 1998 meeting, the Drafting Committee discussed but did not adopt a comparable provision.

SECTION 803. WINDING UP.

(a) A limited partnership continues after dissolution only for the purpose of winding up its business. In winding up its business the limited partnership may amend its certificate of limited partnership to state that the limited partnership is dissolved, preserve the limited partnership's business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle and close the limited partnership's business, dispose of and transfer the limited partnership's property, discharge the limited partnership's liabilities, distribute the assets of the limited partnership under Section

813, settle disputes by mediation or arbitration, deliver for filing a statement of termination under Section 203, and perform other necessary acts.

(b) If a dissolved limited partnership does not have a general partner, limited partners owning a majority of the rights to receive distributions owned by partners may appoint a person to wind up the dissolved limited partnership's business. A person appointed under this subsection:

(1) has the powers of a general partner under Section 804; and

(2) shall promptly amend the certificate of limited partnership to:

(A) state that the limited partnership does not have a general partner and that the person has been appointed to wind up the limited partnership; and

(B) give the address of the person.

(c) On the application of any partner, a court may order judicial supervision of the winding up, including the appointment of a person to wind up the dissolved limited partnership's business, if:

(1) a limited partnership does not have a general partner and within a reasonable time following the dissolution no person has been appointed pursuant to subsection (b); or

(2) the applicant establishes other good cause.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether to adopt the alternative language proposed below for subsection (a); whether an appointment under subsection (b) should require the *written* consent of the partners.

This section differs from RULPA § 803 so as to: (i) provide, as a default matter, that so long as a dissolved limited partnership has at least one general

partner, the limited partnership management structure remains in place during winding up; and (ii) incorporate many of the mechanical refinements of RUPA § 803. (RUPA § 803 is also the source for ULLCA § 803.)

Both RUPA § 802(b) and ULLCA § 802(b) allow the unanimous consent of partners/members to "un-do" a dissolution. For two reasons Re-RULPA does not include that provision. First, both RUPA and ULLCA provide for the buy-out of a dissociated owner in the event that dissociation does not cause dissolution. Re-RULPA, in contrast, freezes in a dissociated owner (as a transferee of its own transferable interest) until dissolution. It seems inequitable, therefore, to allow a waiver of dissolution without some consent of those transferees that are former partners. Second, providing for transferee consent would require at best an intricate statutory provision, and – given the limited partnership's durability in the default mode – the intricacy hardly seems warranted.

Subsection (a), first sentence – Both RUPA § 802(a) and ULLCA § 802(a) use this language. Based on years of explaining the dissolution and termination to the uninitiated, the Reporter prefers: "A dissolved limited partnership is not terminated but continues its existence only for the purpose of winding up its business."

Subsection (a), style issue – The language of this subsection comes essentially verbatim from RUPA 803(c). For two reasons the Reporter prefers the reformulation set out below. First, the RUPA language is exclusively permissive, and some of the listed items should be mandatory. Second, the reformulation gives more guidance to the uninitiated by creating two functionally distinct categories. The first category concerns the general processes of winding up. The second category concerns specific tasks necessary to close down the business. The reformulation would read as follows:

In winding up its business the limited partnership:

(1) may amend its certificate of limited partnership to state that the limited partnership is dissolved, preserve the limited partnership business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, transfer the limited partnership's property, settle disputes by mediation or arbitration, file a statement of termination as provided in Section 203, and perform other necessary acts; and

(2) shall discharge the limited partnership's liabilities, settle and close the limited partnership's business, and martial and distribute the assets of the partnership.

Subsection (b) – At its July, 1997 meeting, the Committee eliminated writing requirements pertaining to most consents. Consistent with that action, Draft #2 eliminated Draft #1's requirement that the partners consent in writing to this appointment. However, given the special circumstances involved here, the Committee might wish to reinsert the writing requirement here.

Subsection (b)(1) – The appointee has neither the liabilities of a general partner to third parties nor the duties of a general partner. Prior Drafts had provided that the appointee would have the duties of a general partner, but at its March, 1999 meeting the Drafting Committee rejected that position. The appointee may well have comparable duties under other law (e.g., agency).

Subsection (b)(2) – Draft #3 also required the amendment to indicate that the limited partnership had dissolved. Such an indication is no longer mandatory, but will often be prudent.

Subsection (c) – Derived from RUPA § 803(a), which is replicated in ULLCA § 803(a). Prior Drafts gave standing to a transferee. Like the July, 1999 Draft, this draft does not, in accordance with the Drafting Committee's March, 1999 decision to delete former Section 802(b).

Former subsection (d) – Prior Drafts stated that "Except as ordered by the court, a person appointed under subsection (c) has the same powers and duties of a person appointed under subsection (b)." At its March, 1999 meeting, the Drafting Committee decided that this matter should be left to the court.

SECTION 804. POWER OF GENERAL PARTNER AND PERSON DISSOCIATED AS GENERAL PARTNER TO BIND PARTNERSHIP AFTER DISSOLUTION.

(a) A limited partnership is bound by a general partner's act after dissolution which:

(1) is appropriate for winding up the limited partnership's business; or

(2) would have bound the limited partnership under Section 402 before dissolution and at the time the other party enters into the transaction the other party does not have notice of the dissolution.

(b) A person dissociated as a general partner binds a limited partnership through an act occurring after dissolution if:

(1) at the time the other party enters into the transaction:

(A) less than two years has passed since the person's dissociation as a general partner; and

(B) the other party does not have notice of the dissociation and reasonably believes that the person is a general partner; and

(2) the act:

(A) is appropriate for winding up the limited partnership's business; or

(B) would have bound the limited partnership under Section 402 before dissolution and at the time the other party enters into the transaction the other party does not have notice of the dissolution.

Reporter's Notes

Changes from Draft #4 – The July, 1999 Draft substantially revised this section.

Relationship between this section and Section 606 – The July, 1999 Draft clarified the relationship between this section and Section 606 (power to bind the partnership before dissolution of person dissociated as a general partner). A new subsection (b) replaces former subsection (e).

Statements regarding real property – The July, 1999 Draft deleted former subsections (b), (c), and (d). Those subsections involved statements granting or

limiting authority to transfer real property, and at its March, 1999 meeting the Drafting Committee eliminated those statements.

Subsection (a) – This subsection is taken from RUPA § 804. In Drafts before the July, 1999 Draft, this material appeared at Section 803A(a). Subsection (a)(2) has been slightly restyled to improve clarity and to parallel subsection (b)(2)(B).

Subsection (b) – Paragraph (1) replicates the provisions stated in Section 606 for disabling a person dissociated as a general partner. Paragraph (2) replicates the provisions of subsection (a) for limiting the post-dissolution power to bind. For a person dissociated as a general partner to bind a dissolved limited partnership, the person's act will have to satisfy both paragraphs.

SECTION 805. LIABILITY AFTER DISSOLUTION OF GENERAL PARTNER AND PERSON DISSOCIATED AS GENERAL PARTNER TO LIMITED PARTNERSHIP, OTHER GENERAL PARTNERS, AND PERSONS DISSOCIATED AS GENERAL PARTNER.

(a) If a general partner having knowledge of the dissolution causes a limited partnership to incur an obligation under Section 804(a) by an act that is not appropriate for winding up the partnership's business, the general partner is liable:

(1) to the limited partnership for any damage caused to the limited partnership arising from the obligation; and

(2) if another general partner or a person dissociated as a general partner is liable for the obligation, to that other general partner or person for any damage caused to that other general partner or person arising from that liability.

(b) If a person dissociated as a general partner causes a limited partnership to incur an obligation under Section 804(b), the person is liable:

(1) to the limited partnership for any damage caused to the limited partnership arising from the obligation; and

(2) if a general partner or another person dissociated as a general partner is liable for that obligation, to that general partner or other person for any damage caused to that general partner or other person arising from that liability.

Reporter's Notes

Derived from RUPA § 806.

Former subsection (a) – The July, 1999 Draft deleted as unnecessary former subsection (a). That provision, taken essentially verbatim from RUPA § 806(a), stated:

> Except as otherwise provided in subsection (b), after dissolution a general partner is liable to the other general partners for the general partner's share of any partnership liability incurred under [Section 804].

A limited partnership remains a limited partnership during winding up. The rules regarding loss sharing among general partners are not limited to a limited partnership's pre-dissolution phase. Moreover, strictly speaking, general partners in a limited partnership do not "share" losses.

Subsection (a) – Derived from RUPA § 806(b), with several modifications. The only substantive change is Paragraph (2), which is new and gives a damage action to general partners and persons dissociated as general partners that are personally liable on the limited partnership's obligations.

The other changes are stylistic. This subsection refers to limited partnership obligations rather than liabilities, because new Paragraph (2) uses the concept of liability for a different purpose. Also, this subsection refers to a general partner "caus[ing] a limited partnership to incur an obligation" rather than "incur[ring] a partnership liability." Strictly speaking, the partner or person dissociated as a general partner does not incur the obligation. Finally, the syntax is re-styled slightly so as to parallel the syntax of new subsection (b), which does not exist in RUPA.

Subsection (a) is not an exclusive rule, and liability can arise from other sources. For example, "[i]f a general partner having knowledge of the dissolution causes a limited partnership to incur an obligation under Section 804(a) by an act that **is** . . . appropriate for winding up the partnership's business" but is nonetheless

outside the general partner's actual authority as specified in the partnership agreement, the law of agency and the law of contracts may each provide a damage remedy.

The liability described in subsection (a)(2) includes liability arising from guarantees.

Subsection (b) – This subsection does not exist in RUPA. In Article 8 of RUPA, the term "partner" encompasses dissociated partners.

Possible amalgamation of subsections (a) and (b) – These subsections have language in common and could be merged into a single subsection. However, in the Reporter's opinion, the merger would decrease readability. The merged section would be as follows:

If a general partner having knowledge of the dissolution causes a limited partnership to incur an obligation under Section 804(a) by an act that is not appropriate for winding up the partnership business, or a person dissociated as a general partner causes the limited partnership to incur an obligation under Section 804(b), the general partner or person is liable:

(1) to the limited partnership for any damage caused to the limited partnership arising from the obligation, and

(2) if another general partner or other person dissociated as a general partner is liable for the obligation, then to that other general partner or other person for any damage caused to that other general partner or other person arising from that liability.

SECTION 806. KNOWN CLAIMS AGAINST DISSOLVED LIMITED PARTNERSHIP.

(a) In this section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution.

(b) A dissolved limited partnership may dispose of the known claims against it by following the procedure described in this section.

(c) A dissolved limited partnership must notify its known claimants in writing of the dissolution. The notice must:

(1) specify the information required to be included in a claim;

(2) provide a mailing address to which the claim is to be sent;

(3) state the deadline for receipt of the claim, which may not be less than 120 days after the date the written notice is received by the claimant;

(4) state that the claim will be barred if not received by the deadline; and

(5) unless the limited partnership's certificate of limited partnership has never contained a statement under Section 404(b), state that the barring of a claim against the limited partnership will also bar any corresponding claim against any present or dissociated general partner which is based on Section 404(b).

(d) A claim against a dissolved limited partnership is barred if the requirements of subsection (c) are met and:

(1) the claim is not received by the specified deadline; or

(2) in the case of a claim that is timely received but rejected by the dissolved limited partnership, the claimant does not commence a proceeding to enforce the claim against the limited partnership within 90 days after the receipt of the notice of the rejection.

Reporter's Notes

Section 806 is derived from ULLCA § 807 and RMBCA § 14.06. This section does not express its relationship to other bases of liability, such as fraudulent transfer and piercing. But see Section 107 (Supplemental Principles of Law).

In Drafts before the July, 1999 Draft, this material appeared at Section 803B. In Drafts before the May, 2000 Draft, subsection (a) appeared as subsection

(d). That sequence followed RMBCA and ULLCA but was set aside at the suggestion of the representative of the Style Committee.

If this draft did not allow for LLLPs, Sections 806 and 807 would probably be unnecessary. The sections seem warranted, however, because many limited partnerships will be fully-shielded.

ULLCA lifted its provisions on this topic virtually verbatim from the RMBCA. This draft takes the same approach, making a few stylistic changes plus a few substantive additions necessitated by the personal liability of general partners in an ordinary (i.e., non-LLLP) limited partnership.

It is arguable that Sections 806 and 807 should apply only to liabilities incurred while a limited partnership is an LLLP. However, that approach would complicate even further two provisions that are already very complicated. An intermediate approach would apply Sections 806 and 807 to all liabilities while eliminating Section 808 (barring claims against former general partners when the corresponding claim against the limited partnership has been barred).

Subsection (c) – This subsection uses the word "must" per the suggestion of the representative of the Style Committee. Subsection (c) is mandatory only to the extent that the limited partnership wishes to invoke the claims bar protection of this section.

Subsection (c)(5) – This provision is included due to Section 404(b) and does not appear in the RMBCA formulation. ULLCA has an analog to Section 404(b) but no analog to this provision. *Compare* ULLCA §§ 303(c) and 806.

Subsection (d)(2) – The phrase "against the limited partnership" is added to make clear that bringing a claim against an allegedly liable present or dissociated general partner does not save a claim against the limited partnership.

SECTION 807. OTHER CLAIMS AGAINST DISSOLVED LIMITED PARTNERSHIP.

(a) A dissolved limited partnership may publish notice of its dissolution and request persons having claims against the limited partnership to present them in accordance with the notice.

(b) The notice must:

(1) be published at least once in a newspaper of general circulation in the [county] in which the dissolved limited partnership's principal office is located or, if it has none in this State, in which the limited partnership's designated office is or was last located;

(2) describe the information required to be contained in a claim and provide a mailing address to which the claim is to be sent;

(3) state that a claim against the limited partnership is barred unless a proceeding to enforce the claim is commenced within five years after publication of the notice; and

(4) unless the limited partnership's certificate of limited partnership has never contained a statement under Section 404(b), state that the barring of a claim against the limited partnership will also bar any corresponding claim against any present or dissociated general partner which is based on Section 404.

(c) If a dissolved limited partnership publishes a notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences a proceeding to enforce the claim against the dissolved limited partnership within five years after the publication date of the notice:

(1) a claimant that did not receive written notice under Section 806;

(2) a claimant whose claim was timely sent to the dissolved limited partnership but not acted on; and

(3) a claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(d) A claim not barred under this section may be enforced:

(1) against the dissolved limited partnership, to the extent of its undistributed assets;

(2) if the assets have been distributed in liquidation, against a partner or transferee to the extent of that person's proportionate share of the claim or the limited partnership's assets distributed to the partner or transferee in liquidation, whichever is less, but a person's total liability for all claims under this paragraph may not exceed the total amount of assets distributed to the person as part of the winding up of the dissolved limited partnership; or

(3) against any person liable on the claim under Section 404.

Reporter's Notes

Derived from ULLCA § 808 and RMBCA § 14.07. In Drafts before the July, 1999 Draft, this material appeared at Section 803C. This section does not express its relationship to other bases of liability, such as fraudulent transfer and piercing. But see Section 107 (Supplemental Principles of Law).

This section generated intense discussion at the Drafting Committee's March, 1999 but went without objection at the October, 1999 meeting.

Subsection (b)(4) – This provision is included due to Section 404(b) and does not appear in the RMBCA formulation. ULLCA has an analog to Section 404(b) but no analog to this provision. *Compare* ULLCA §§ 303(c) and 806.

Subsection (d)(2) – This paragraph is quite complex, and variations among ULLCA, RMBCA and Re-RULPA are best indicated through notes, as follow:

(2) if the assets have been distributed in liquidation, against a partner [A] or transferee[B] to the extent of that person's proportionate[C] share of the claim or the limited partnership's assets distributed to the partner or transferee in liquidation,

whichever is less, but a person's total liability for all claims under this paragraph[D] may not exceed the total amount of assets distributed to the person as part of the winding up of the dissolved limited partnership.[E]

[A] Arguably the reference should be "dissociated" or "former" partner, since the termination of a limited partnership ends partner status, but ULLCA uses "members" and RMBCA uses "shareholders."

[B] ULLCA § 808(d)(2) does not include transferees.

[C] RMBCA § 14.07(d)(2) uses "pro rata." ULLCA § 808(d)(2) uses "proportionate."

[D] RMBCA and ULLCA refer to "this section." In light of subsection (d)(3), that reference is overbroad for Re-RULPA.

[E] Re-RULPA adds the concluding phrase ("as part of the winding up of the dissolved limited partnership") to emphasize that the "clawback" relates only to liquidating distributions.

Subsection (d)(3) – The referenced section permits the certificate of limited partnership to make one or more specified general partners liable for the debts of the limited partnership.

SECTION 808. EFFECT OF BAR ON CLAIMS OF PERSONAL LIABILITY OF PARTNERS AND DISSOCIATED PARTNERS. If a claim against a dissolved limited partnership is barred under Section 806 or 807, any corresponding claim under Section 404 is also barred.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: whether to follow ULLCA and eliminate this provision (assuming the LLLP status remains the default rule).

In Drafts before the July, 1999 Draft, this material appeared at Section 803D.

This section requires a person to preserve its claim against the limited partnership in order to preserve a personal liability claim against the general

partners. This requirement is arguably inconsistent with Section 405 (requiring claimants generally to exhaust limited partnership resources before pursuing a general partner but allowing some exceptions, most notably when the limited partnership is bankrupt). It might seem more consistent to specify circumstances in which a claimant could preserve its claim against a current or former general partner by proceeding against that partner without having to proceed against the limited partnership.

For the following three reasons, however, Re-RULPA eschews that approach. First, that approach would add complexity to an already complex series of sections. Second, if one dissociated or present general partner remains at risk, the other dissociated or current partners should have some means of learning of that risk. (They could be at risk by way of a claim for contribution or indemnification.) A proceeding against the limited partnership is a good (albeit imperfect) way of bringing the ongoing risk to the attention of all current and former general partners. Third, futility is the essential rationale for the exceptions provided by Section 405 to the exhaustion requirement. That is, there is no reason to require exhaustion when even extensive efforts to collect from the limited partnership are destined to be futile. That rationale does not apply here, because a simple, discrete act (i.e., the commencement of the proceeding against the limited partnership) accomplishes the desired result – i.e., preventing the bar.

ULLCA has no comparable provision.

SECTION 809. GROUNDS FOR ADMINISTRATIVE DISSOLUTION.

The [Secretary of State] may commence a proceeding to dissolve a limited partnership administratively if the limited partnership does not:

(1) pay any fees, taxes, or penalties due to the [Secretary of State] under this [Act] or other law within 60 days after they are due; or

(2) deliver its annual report to the [Secretary of State] within 60 days after it is due.

Reporter's Notes

Source: ULLCA § 809. In Drafts before the July, 1999 Draft, this material appeared at Section 803E.

At its March, 1999 meeting, the Drafting Committee decided to limit the scope of Paragraph (1). Following ULLCA, that paragraph formerly read: "pay any fees, taxes, or penalties imposed by this [Act] or other law within 60 days after they are due."

RMBCA includes three other grounds, omitted from ULLCA. See RMBCA § 14.20(3)-(5) (being without a registered agent or in-state office for 60 days or more; failing for 60 days or more to notify Secretary of State of certain changes in registered agent or in-state office; expiration of period of duration specified in articles of incorporation). Bert Black, the representative of the International Association of Corporation Administrators, suggests that "there needs to be some 'stick' to get the limited partnership to appoint a new agent" when the old agent resigns. He suggests administrative dissolution as that stick.

SECTION 810. PROCEDURE FOR AND EFFECT OF ADMINISTRATIVE DISSOLUTION.

(a) If the [Secretary of State] determines that a ground exists for administratively dissolving a limited partnership, the [Secretary of State] shall enter a record of the determination and serve the limited partnership with a copy of the record.

(b) If within 60 days after service of the copy the limited partnership does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the [Secretary of State] that each ground determined by the [Secretary of State] does not exist, the [Secretary of State] shall administratively dissolve the limited partnership by signing a declaration of dissolution that states the grounds for dissolution and its effective date. The [Secretary of State] shall file the original of the declaration and serve the limited partnership with a copy of the declaration.

(c) A limited partnership administratively dissolved continues its existence but may carry on only business necessary to wind up and liquidate its business and affairs under Sections 803 and 813 and to notify claimants under Sections 806 and 807.

(d) The administrative dissolution of a limited partnership does not terminate the authority of its agent for service of process.

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether a filed declaration of dissolution should have the same constructive notice effect as amending the certificate of limited partnership to state that the limited partnership is dissolved; whether administrative dissolution should take effect when the declaration is served (or filed) and not when the declaration has merely been signed; whether subsection (d) should be deleted as unnecessary.

Source: ULLCA § 810, which closely follows RMBCA § 14.21. In Drafts before the July, 1999 Draft, this material appeared at Section 803F.

Subsection (b) – ULLCA § 810(b) locates the "within" phrase in the middle of the sentence. The change from ULLCA is for ease in reading. ULLCA § 801(b) refers to "service of the notice" rather than "service of the copy" – an apparent residue from the RMBCA formulation. ULLCA § 810(b) refers to a "certificate of dissolution." As much as possible, Re-RULPA reserves the term "certificate" for the certificate of limited partnership. This section uses the term "declaration of dissolution" to distinguish the [Secretary of State's] act from the statement a limited partnership may file pursuant to Section 803.

Subsection (d) – The same thing is true for non-administrative dissolution, but this draft does not say so. Query: should it?

SECTION 811. REINSTATEMENT FOLLOWING ADMINISTRATIVE DISSOLUTION.

(a) A limited partnership that has been administratively dissolved may apply to the [Secretary of State] for reinstatement within two years after the effective date of dissolution. The application must state:

(1) the name of the limited partnership and the effective date of its administrative dissolution;

(2) that the ground or grounds for dissolution either did not exist or have been eliminated; and

(3) that the limited partnership's name satisfies the requirements of Section 108.

(b) If the [Secretary of State] determines that the application contains the information required by subsection (a) and that the information is correct, the [Secretary of State] shall cancel the declaration of dissolution and prepare a declaration of reinstatement that states this determination and the effective date of reinstatement, file the original of the declaration of reinstatement, and serve the limited partnership with a copy.

(c) When reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the limited partnership may resume its business as if the administrative dissolution had never occurred.

Reporter's Notes

Source: ULLCA § 811, which closely follows RMBCA § 14.22. In Drafts before the July, 1999 Draft, this material appeared at Section 803G.

Subsection (a)(2) – ULLCA § 811(a)(3) refers only to "ground." RMBCA § 14.22(a)(2) refers to "ground or grounds." The ULLCA version may reflect an

oversight, since that version uses "have" – i.e., "the ground for dissolution either did not exist or have [sic] been eliminated."

Former subsection (a)(4) – Following ULLCA, prior Drafts also required the application to "(4) contain a certified statement from the [taxing authority] reciting that all taxes owed by the limited partnership have been paid." Consistent with the Drafting Committee's decision as to Section 809(1), The July, 1999 Draft omits that language.

Subsection (b) – ULLCA § 811(b) refers to "certificate of reinstatement." Re-RULPA seeks to confine the term "certificate" to the certificate of limited partnership.

SECTION 812. APPEAL FROM DENIAL OF REINSTATEMENT.

(a) If the [Secretary of State] denies a limited partnership's application for reinstatement following administrative dissolution, the [Secretary of State] shall serve the limited partnership with a record that explains the reason or reasons for denial.

(b) The limited partnership may appeal from the denial of reinstatement to the [appropriate court] within 30 days after service of the notice of denial is perfected by petitioning the court to set aside the dissolution. The petition must contain a copy of the [Secretary of State's] declaration of dissolution, the limited partnership's application for reinstatement, and the [Secretary of State's] notice of denial.

(c) The court may summarily order the [Secretary of State] to reinstate the dissolved limited partnership or may take other action the court considers appropriate.

Reporter's Notes

Source: ULLCA § 812. In Drafts before the July, 1999 Draft, this material appeared at Section 803H.

Drafts ##1 and 2 omitted any parallel provision to ULLCA § 812 on the theory that, absent good reason to the contrary, a State's generally applicable provisions for appealing the actions of an administrative agency should apply to the Secretary of State's denial of reinstatement. Consistent with instructions to follow RUPA/ULLCA, Draft #3 included an analog to ULLCA § 812.

At its March, 1999 meeting, the Drafting Committee deleted former subsection (d) as unnecessary. Following ULLCA, that subsection provided: "The court's final decision may be appealed as in other civil proceedings."

SECTION 813. SETTLING OF ACCOUNTS AND DISTRIBUTION OF ASSETS.

(a) In winding up a limited partnership's business, the assets of the limited partnership, including the contributions required by this section, must be applied to discharge its obligations to creditors, including, to the extent permitted by law, partners that are creditors.

(b) Any surplus remaining after the limited partnership complies with subsection (a) must be paid in cash as a distribution.

(c) If the limited partnership's assets are insufficient to discharge all of its obligations under subsection (a), with respect to each undischarged obligation incurred when certificate of limited partnership contained a provision authorized by Section 404(b), the following rules apply:

(1) Each person that was a general partner and bound by that provision when the obligation was incurred and that has not been released from that obligation under Section 607 shall contribute to the limited partnership for the purpose of

enabling the limited partnership to discharge that obligation. The contribution due from each of those persons is in proportion to the right to receive distributions in the capacity of general partner in effect for each of those persons when the obligation was incurred.

(2) If a person fails to contribute the full amount required under paragraph (1) with respect to an undischarged limited partnership's obligation, the other persons required to contribute by paragraph (1) on account of that obligation shall contribute the additional amount necessary to discharge the obligation. The additional contribution due from each of those other persons is in proportion to the right to receive distributions in the capacity of general partner in effect for each of those other persons when the obligation was incurred.

(3) If a person fails to make the additional contribution required by paragraph (2), further additional contributions are due and are determined in the same manner as provided in that paragraph.

(d) A person that makes an additional contribution under subsection (c)(2) or (3) may recover from any person whose failure to contribute under subsection (c)(1) or (2) necessitated the additional contribution. A person may not recover under this subsection more than the amount additionally contributed. A person's liability under this subsection may not exceed the amount the person failed to contribute.

(e) The estate of a deceased person is liable for the person's obligations under this section.

(f) An assignee for the benefit of creditors of a limited partnership or a partner, or a person appointed by a court to represent creditors of a limited partnership or a partner, may enforce a person's obligation to contribute under subsection (c).

Reporter's Notes

Issues for Further Consideration by the Drafting Committee: whether subsection (a)'s requirement that a limited partnership "discharge its obligations to creditors" should be modified to allow a limited partnership to "discharge or make provision for the discharge of its obligations to creditors"; whether subsection (c) should apportion contribution obligations in terms of rights to distributions in the person's capacity as a general partner; whether, assuming LLLP status remains the default status, subsection (c) should be deleted.

Derived from RUPA § 807. RUPA § 807(b) is omitted, however, because that provision rests on RUPA's concept of a partner's account. RUPA § 401(a). Re-RULPA does not adopt the "partner's account" approach. Also, this section does not refer to return of contributions. See Notes to subsection (b), below.

In Drafts before the July, 1999 Draft, this material appeared at Section 804.

Subsection (a) – Source: RUPA § 807(a). A partner previously entitled to receive a distribution is a creditor. See Section 507.

Subsection (b) – This subsection differs substantially in form from RUPA § 807(b), in part because Re-RULPA does not specify the structure of each partner's "account." RUPA § 807(b) depends on RUPA § 401(a)'s concept of a partner's account.

Also, this Draft (like the July, 1999 Draft) does not refer to the "return of all contributions that have not previously been returned." In Drafts before the July, 1999 Draft, subsection (b) provided:

> (b) Any surplus existing under subsection (a) shall be distributed first as a return of all contributions that have not previously been returned and second as a distribution of profits allocated under Section 504. If the surplus does not suffice to return all contributions, the surplus shall be allocated in proportion to the unreturned contributions.

As explained in the Reporter's Notes to Section 503, beginning with the July, 1999 Draft Re-RULPA eschews the unneeded concept of "return of contribution." So long as a limited partnership conforms to the default rules on sharing of distributions, Re-RULPA's simpler approach will produce the same results as RULPA's abstruse language. See RULPA § 608(c) (defining return of contribution).

Subsection (c) – This draft's approach is more complex than RUPA's, because (i) this draft does not rely on the "partner's account" concept, and (ii) does provide for contributions from dissociated general partners. RUPA does not need the latter provision, because in the default mode the buy-out price of a dissociated RUPA partner reflects any liabilities outstanding at the time of dissociation. See RUPA § 701(b).

In Drafts before the May, 2000 Draft, this subsection allocated contribution liability in proportion to loss shares. As explained in the Reporter's Notes to former Section 503, Re-RULPA no longer provides for the allocation of profit and losses. As a result, subsection (c) now refers to rights to receive distributions.

In making that revision, the Reporter discovered a latent ambiguity in both the original and revised approaches. A person that is a general partner may also be a limited partner. See Section 113 (Dual Capacity). A person with such "dual capacity" can have distribution rights (and, under prior Drafts, loss allocations) in each capacity. See Section 111(8)(C) (requiring that, "for any person that is both a general partner and a limited partner," the required records specify "what transferable interest the person owns in each capacity"). Should subsection (c) allocate contribution obligations in terms of *all* economic rights owned at the relevant time by a person that is a general partner, or only in terms of economic rights owned by the person at the relevant time *in the person's capacity as a general partner*?

Prior Drafts neither recognized nor addressed this issue, and the Drafting Committee has never considered it. Very provisionally, the Reporter has chosen to allocate contribution obligations of general partners in terms of economic rights owned in the capacity of general partner. (Section 801 poses a comparable issue. However, no ambiguity exists there. Section 801(2) and (3) state consent rights in terms of "limited partners owning a majority of the rights to receive distributions owned by persons *as limited partners*." (Emphasis added.))

Subsection (c) contains a very elaborate provision which will be relevant only if a limited partnership chooses to put holes in the LLLP shield, the limited partnership has more than one general partner and the general partners fail to agree

in advance as to contribution obligations. Assuming LLLP status remains Re-RULPA's default status, perhaps subsection (c) should be deleted.

Subsection (e) – Derived from RUPA § 807(e), but query: why is this provision necessary? Is there something in other law that would excuse or release the estate? In any event, RUPA's formulation has been changed to include all obligations under subsection (c); i.e., not only a person's obligation to contribute to the limited partnership but also the liability of under-contributors to over-contributors.

[ARTICLE] 9

FOREIGN LIMITED PARTNERSHIPS

SECTION 901. GOVERNING LAW.

(a) The laws of the State or other jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its partners.

(b) A foreign limited partnership may not be denied a certificate of authority by reason of any difference between the laws of the jurisdiction under which the foreign limited partnership is organized and the laws of this State.

(c) A certificate of authority does not authorize a foreign limited partnership to engage in any business or exercise any power that a limited partnership may not engage in or exercise in this State.

Reporter's Notes

Source: ULLCA § 1001.

Although ULLCA's Article 10 is based on RULPA's Article 9, ULLCA does differ from RULPA in some substantial ways. For two reasons Re-RULPA follows ULLCA. First, ULLCA's foreign registration provisions are dovetailed with various other ULLCA provisions adopted by Re-RULPA (e.g. Section 114 [change of designated office or agent], Section 210 [annual report]). Second, many of ULLCA's changes constitute improvements over RULPA.

Subsection (b) – ULLCA 1001(b) refers to "another jurisdiction under which the foreign limited partnership is organized" rather than "the jurisdiction . . . ." At its October, 1999 meeting, the Drafting Committee decided that it is unnecessary to make subsection (b) expressly subject to Section 905.

SECTION 902. APPLICATION FOR CERTIFICATE OF AUTHORITY.

(a) A foreign limited partnership may apply for a certificate of authority to transact business in this State by delivering an application to the [Secretary of State] for filing. The application must state:

(1) the name of the foreign limited partnership and, if that name does not comply with Section 108, an alternate name adopted pursuant to Section 905(a).

(2) the name of the State or country under whose law it is organized;

(3) the street address of its principal office, and if the laws of the jurisdiction under which the foreign limited partnership is organized require the foreign limited partnership to maintain an office in that jurisdiction, the street address of that required office;

(4) the name and street address of its initial agent for service of process in this State;

(5) the name and address of each of its general partners; and

(6) whether the foreign limited partnership is a foreign limited liability limited partnership.

(b) A foreign limited partnership must deliver with the completed application a certificate of existence or a record of similar import authenticated by the [Secretary of State] or other official having custody of limited partnership's records in the State or country under whose law it is organized.

Reporter's Notes

Derived from ULLCA § 1002.

At its October, 1999 meeting, the Drafting Committee decided not to require a foreign limited partnership to have an in-state office and to require a foreign limited partnership to have an in-state agent for service of process (in addition to the Secretary of State).

Subsection (a)(1) – This provision differs from ULLCA as follows:

> the name of the foreign ~~company or~~ limited partnership and, if ~~its~~ that name ~~is unavailable for use in this State~~ does not comply with Section 108, an alternate name adopted pursuant to ~~that satisfies the requirements of~~ Section ~~1005~~ 905(a).

Subsection (a)(3) – ULLCA does not contain the latter requirement, but RULPA §902(5) does. The RULPA provision requires disclosure of the principal office only if the law of the foreign jurisdiction does not require an office in that jurisdiction.

Subsection (a)(4) – This paragraph reflects a change from current law. RULPA does not require a foreign limited partnership to name an in-state agent for service of process. RULPA § 902(3) and (4).

Subsection (a)(5) – RULPA § 902(6) states this requirement. ULLCA § 1002(7) states the parallel requirement as to *initial* managers. At its October, 1999 meeting, the Drafting Committee decided to delete the requirement of a *business* address.

Subsection (a)(6) – This provision is derived from ULLCA § 1002(8). Both provisions pertain to displacing the statutory default rule on owner liability. The ULLCA provision refers to situations in which the articles of organization make owners liable for the entity's debts. The Re-RULPA provision refers to situations in which the certificate of limited partnership produces the opposite result for general partners. This provision may require revision, depending on whether the Drafting Committee maintains its decision to use LLLP status as the Act's default setting.

ULLCA provisions omitted from Re-RULPA – Re-RULPA omits the following provisions from this section.

> (4) the address of its initial designated office in this State;[A]
>
> . . .
>
> (6) whether the duration of the company is for a specified term and, if so, the period specified;[B]

(7) whether the company is manager-managed, and, if so, the name and address of each initial manager;[C] and

(8) whether the members of the company are to be liable for its debts and obligations under a provision similar to Section 303(c).[D]

[A] RULPA does not require a foreign limited partnership to maintain an in-state office and on this issue Re-RULPA follows RULPA.

[B] This provision is inapposite, because the Drafting Committee has decided that the partnership agreement can vary the term of a domestic limited partnership. As a result, domestic limited partnerships need not disclose in their certificates of limited partnership any variation from the perpetual term established by the [Act]. See the Reporter's Notes to Sections 201 and 801. It makes no sense, therefore, to require such a disclosure from foreign limited partnerships. If the Drafting Committee changes its decision on domestic limited partnerships, a corresponding change should be made in this section.

[C] Subsection(a)(5) makes the analogous provision for general partners.

[D] Subsection(a)(6) makes a roughly analogous provision for LLLPs.

SECTION 903. ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS.

(a) Activities of a foreign limited partnership which do not constitute transacting business in this State within the meaning of this [article] include:

(1) maintaining, defending, and settling an action or proceeding;

(2) holding meetings of its partners or carrying on any other activity concerning its internal affairs;

(3) maintaining bank accounts;

(4) maintaining offices or agencies for the transfer, exchange, and registration of the foreign limited partnership's own securities or maintaining trustees or depositories with respect to those securities;

(5) selling through independent contractors;

(6) soliciting or obtaining orders, whether by mail or electronic means or through employees or agents or otherwise, if the orders require acceptance outside this State before they become contracts;

(7) creating or acquiring indebtedness, mortgages, or security interests in real or personal property;

(8) securing or collecting debts or enforcing mortgages or other security interests in property securing the debts, and holding, protecting, and maintaining property so acquired;

(9) conducting an isolated transaction that is completed within 30 days and is not one in the course of similar transactions of a like manner; and

(10) transacting business in interstate commerce.

(b) For purposes of this [article], the ownership in this State of income-producing real property or tangible personal property, other than property excluded under subsection (a), constitutes transacting business in this State.

(c) This section does not apply in determining the contacts or activities that may subject a foreign limited partnership to service of process, taxation, or regulation under any other law of this State.

Reporter's Notes

Subsection (a)(6) – The phrase "or electronic means" does not appear in ULLCA.

At its October, 1999 meeting, the Drafting Committee decided not to expand the safe harbor list in subsection (a) to include: "having partners who reside, are organized under the laws of, are authorized to transact business in, or in their separate capacities do transact business in this State." The Drafting Committee deemed such language unnecessary, since the rule follows from the entity nature of a limited partnership. Suppose: (i) a foreign limited partnership has a general partner that is an entity; (ii) the entity is authorized to do business in this State; (iii) the entity does business in this State; and (iv) the business does not relate to the foreign limited partnership. The foreign limited partnership is *not* transacting business in this State.

SECTION 904. FILING OF CERTIFICATE OF AUTHORITY. Unless the [Secretary of State] determines that an application for a certificate of authority fails to comply as to form with the filing requirements of this [Act], the [Secretary of State], upon payment of all filing fees, shall file the application, file a certificate of authority to transact business in this State, and send a conformed copy of the certificate, together with a receipt for the fees to the foreign limited partnership or its representative.

Reporter's Notes

Derived from ULLCA § 1004 and RULPA § 903(3). In Drafts before the May, 2000 Draft, the caption was "ISSUANCE OF CERTIFICATE OF AUTHORITY."

This section differs from ULLCA in expressly requiring the creation of an actual certificate. ULLCA seems to implicitly deem the receipt to be the certificate. The difference from ULLCA is as follows.

> . . . the [Secretary of State], upon payment of all filing fees, shall file the application, file a certificate of authority to transact business in this State and send a conformed copy of the certificate, together with a receipt for ~~it and~~ the fees, to the foreign limited partnership or its representative.

The additional language is derived from RULPA § 903(3), which requires the [Secretary of State] to "issue a certificate of registration to transact business in this State." At its October, 1999 meeting, the Drafting Committee decided to preserve RULPA § 903(3)'s provision for an actual certificate of authority. The Committee also decided to have the [Secretary of State] send the foreign limited partnership a "conformed copy of the certificate."

SECTION 905. NONCOMPLYING NAME OF FOREIGN LIMITED PARTNERSHIP.

(a) A foreign limited partnership whose name does not comply with Section 108 may not obtain a certificate of authority until it adopts, for the purpose of transacting business in this State, an alternate name that complies with Section 108. A foreign limited partnership that adopts an alternate name under this subsection and then obtains a certificate of authority with that name need not comply with [fictitious name statute]. After obtaining a certificate of authority with an alternate name, a foreign limited partnership must transact business in this State under that name.

(b) If a foreign limited partnership authorized to transact business in this State changes its name to one that does not comply with Section 108, it may not thereafter transact business in this State until it complies with subsection (a) and obtains an amended certificate of authority.

Reporter's Notes

Derived from ULLCA § 1005, but modified substantially to limit overlap with Section 108. ULLCA does not specify the process for amending a certificate of authority, and neither does this Draft.

Reporter's Notes to Former Section 906

At its October, 1999 meeting, the Drafting Committee decided to subsume former Section 906 (Registered Name) into Section 108 [now 109] (Reservation of Name).

SECTION 906. REVOCATION OF CERTIFICATE OF AUTHORITY.

(a) A certificate of authority of a foreign limited partnership to transact business in this State may be revoked by the [Secretary of State] in the manner provided in subsection (b) if the foreign limited partnership fails to:

(1) pay any fees, taxes, or penalties due to the [Secretary of State] under this [Act] or other law within 60 days after they are due;

(2) deliver its annual report required under Section 210 to the [Secretary of State] within 60 days after it is due;

(3) appoint and maintain an agent for service of process as required by Section 114(b); or

(4) deliver for filing a statement of a change under Section 115 within **[TBD]** days after a change has occurred in the name or address of the agent.

(b) The [Secretary of State] may not revoke a certificate of authority of a foreign limited partnership unless the [Secretary of State] sends the foreign limited partnership notice of the revocation, at least 60 days before its effective date, by a record addressed to its agent for service of process in this State, or if the foreign limited partnership fails to appoint and maintain a proper agent in this State, addressed to the foreign limited partnership's designated office. The notice must specify the cause for the revocation of the certificate of authority. The authority of

the foreign limited partnership to transact business in this State ceases on the effective date of the revocation unless the foreign limited partnership cures the failure before that date.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: what deadline to impose on filing a statement of change pertaining to the name or address of the agent for service of process.

Source: ULLCA §1006.

Subsection (a)(1) – At its October, 1999 meeting, the Drafting Committee decided to conform the scope of this provision to the comparable provision for administrative dissolution. See Section 809(1).

Subsection (a)(4) – ULLCA § 1006(a)(1)(iv) provides: " file a statement of a change in the name or business address of the agent as required by this [article]." However, Article 10 of ULLCA does not require a statement of change.

Reporter's Notes to Former Section 908

At its October, 1999 meeting, the Drafting Committee decided to subsume former Section 908 (Cancellation of Authority) into Section 909 [now 907] (Cancellation of Certificate of Authority; Effect of Failure to Have Certificate).

SECTION 907. CANCELLATION OF CERTIFICATE OF AUTHORITY; EFFECT OF FAILURE TO HAVE CERTIFICATE.

(a) A foreign limited partnership may cancel its certificate of authority to transact business in this State by filing in the office of the [Secretary of State] a certificate of cancellation.

(b) A foreign limited partnership transacting business in this State may not maintain an action or proceeding in this State unless it has a certificate of authority to transact business in this State.

(c) The failure of a foreign limited partnership to have a certificate of authority to transact business in this State does not impair the validity of a contract or act of the foreign limited partnership or prevent the foreign limited partnership from defending an action or proceeding in this State.

(d) A partner of a foreign limited partnership is not liable for the obligations of the foreign limited partnership solely by reason of the foreign limited partnership's having transacted business in this State without a certificate of authority.

(e) If a foreign limited partnership transacts business in this State without a certificate of authority or cancels its certificate of authority, it appoints the [Secretary of State] as its agent for service of process for rights of action arising out of the transaction of business in this State.

Reporter's Notes

Source: RULPA § 907(d), followed in ULLCA § 1008.

Subsection (c) – This subsection is derived from RULPA rather than ULLCA. RULPA § 907(c) states:

> A limited partner of a foreign limited partnership is not liable as a general partner of the foreign limited partnership solely by reason of having transacted business in this State without registration.

In contrast, ULLCA § 1008(c) states:

> Limitations on personal liability of partners and their transferees are not waived solely by transacting business in this State without a certificate of authority.

SECTION 908. ACTION BY [ATTORNEY GENERAL]. The [Attorney General] may maintain an action to restrain a foreign limited partnership from transacting business in this State in violation of this [article].

Reporter's Notes

Source: RULPA § 908, followed in ULLCA § 1009.

[ARTICLE] 10

ACTIONS BY PARTNERS

SECTION 1001. DIRECT ACTIONS BY PARTNER.

(a) Subject to subsection (b), a partner may maintain a direct action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership's business, to:

(1) enforce the partner's rights under the partnership agreement;

(2) enforce the partner's rights under this [Act]; or

(3) enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

(b) A partner bringing a direct action under this section is required to plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited partnership.

(c) The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

Reporter's Notes

This section is derived from RUPA § 405 but omits RUPA § 405(a). That subsection provides: "A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership." Beginning with the July, 1999 Draft, that language appears in Section 104 [now 105](b)(1) (powers of a limited partnership).

In Drafts before the July, 1999 Draft, this material appeared at Section 1005.

Subsection (a) – Derived from RUPA § 405(b). RUPA 405(b) does not include the word "direct" to modify "action."

Subsection (a)(2) – RUPA § 405(b)(2) includes a non-exhaustive list of those rights. The Comment does not explain why some rights warrant special mention.

Subsection (b) – In ordinary contractual situations it is axiomatic that each party to a contract has standing to sue for breach of that contract. Within a limited partnership, however, different circumstances may exist. For instance, if the partnership agreement recites or establishes the general partners' duties as managers of the enterprise, breach of those duties will create a classic derivative claim. The fact that the partnership agreement incorporates those duties does not transmute the claim into a direct one. Thus, a partner does not have a direct claim against another partner merely because the other partner has breached the partnership agreement. Likewise a partner's violation of this Act does not automatically create a direct claim for every other partner. To have standing in his, her, or its own right, a partner plaintiff must be able to show a harm that occurs independently of the harm caused or threatened to be caused to the limited partnership.

The reference to "threatened" harm is intended to encompass claims for injunctive relief and does not relax standards for proving injury.

This provision has no analog in either RUPA or ULLCA.

Subsection (c) – Source: RUPA § 405(c).

SECTION 1002. DERIVATIVE ACTION. A partner may bring a derivative action to enforce a right of a limited partnership if:

(1) the partner first makes a demand on the general partners, requesting that they cause the limited partnership to bring an action to enforce the right, and the general partners do not bring the action within a reasonable time; or

(2) a demand would be futile.

Reporter's Notes

Derived from RULPA § 1001. In Drafts before the July, 1999 Draft, this material appeared at Section 1001.

At its March, 1999 meeting the Drafting Committee made two major decisions concerning the provisions on derivative actions. First, the Committee decided to modernize the language throughout those provisions. Second, after spirited debate, the Committee decided to expressly authorize a *general* partner to bring a derivative lawsuit.

Modernizing the language is not intended to change substance. Committee members disagreed as to whether permitting a general partner to bring a derivative suit changes current law. (RULPA is ambiguous, and the cases are few and in conflict.)

In any event, only minority general partners will have need of a derivative action. A general partner with majority control has the power to cause the limited partnership to sue in its own name. See Reporter's Notes to Section 406.

At the March, 1999 meeting, the Committee also discussed but did not adopt two other propositions: imposing a universal demand requirement, and giving transferees standing to bring a derivative suit.

Differences from RULPA language – The language in this section differs from the RULPA language in three ways. First, the Re-RULPA uses the concept of demand futility, rather than the older, more oblique formulation that "an effort to cause those general partners [to act] is not likely to succeed." Second, Re-RULPA refers to the general partners causing the limited partnership to bring suit, rather than the general partners themselves bringing suit. This change reflects Re-RULPA's pure entity approach.

The third difference concerns the addressees of the demand. The RULPA provision refers to those "general partners with authority" to bring suit on behalf of the partnership, and ULLCA has a comparable formulation. See ULLCA § 1101. As in other instances, the word "authority" is confusing. Does it mean the right, the power, either, or both? In any event, in the context of a limited partnership the phrase "with authority" seems superfluous. A limited partner makes demand on the general partners collectively. If the partnership agreement allocates the decision on the demand to fewer than all of the general partners, that allocation affects the way in which the general partners process a demand, not the way in which the limited partner addresses the demand.

SECTION 1003. PROPER PLAINTIFF. In a derivative action, the plaintiff must be a partner at the time of bringing the action and:

(1) the plaintiff must have been a partner when the conduct giving rise to action occurred; or

(2) the plaintiff's status as a partner must have devolved upon the plaintiff by operation of law or pursuant to the terms of the partnership agreement from a person that was a partner at the time of the conduct.

Reporter's Notes

Issue for Further Consideration by the Drafting Committee: whether this section should require the plaintiff to be a proper representative of the interests of the limited partners.

Derived from RULPA § 1002. In Drafts before the July, 1999 Draft, this material appeared at Section 1002.

RULPA § 1002 refers to the plaintiff having been a partner "at the time of the transaction of which he [or she] complains." Re-RULPA refers to "when the conduct giving rise to action occurred." Besides eliminating the "his [or her]" formulation, this change excludes the narrowing connotation associated with "transaction."

Neither RULPA nor this Draft (nor ULLCA) expressly require a derivative plaintiff to be a proper representative of other owners. Compare, e.g., Fed.R.Civ.P. 23.1, which states:

The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.

Given the possibility of a general partner bringing a derivative lawsuit, perhaps this requirement should be added.

SECTION 1004. PLEADING. In a derivative action, the complaint must state with particularity:

(1) the date and content of plaintiff's demand and the general partners' response to the demand; or

(2) why demand is excused as futile.

Reporter's Notes

Derived from RULPA § 1003. In Drafts before the July, 1999 Draft, this material appeared at Section 1003.

SECTION 1005. PROCEEDS AND EXPENSES.

(a) Except as otherwise provided in subsection (b):

(1) any proceeds or other benefits of a derivative action, whether by judgment, compromise, or settlement, belong to the limited partnership and not to the derivative plaintiff;

(2) if the derivative plaintiff receives any of those proceeds, the derivative plaintiff shall immediately remit them to the limited partnership.

(b) If a derivative action is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, from the recovery of the limited partnership.

Reporter's Notes

Derived from RULPA § 1004. In Drafts before the July, 1999 Draft, this material appeared at Section 1004.

Subsection (b) – A court can also order the defendants (or their counsel) to pay attorneys fees, if some other law allows (e.g., Rule 11).

[ARTICLE] 11
CONVERSION AND MERGER

SECTION 1101. DEFINITIONS. In this [article]:

(1) "Business organization" means a domestic or foreign general partnership, including a limited liability partnership, a limited partnership, including a limited liability limited partnership, a limited liability company, a business trust, a corporation, and any other entity having owners and ownership interests under its governing statute.

(2) "Constituent business organization" means a business organization that is party to a merger.

(3) "Converted business organization" means the business organization into which a converting business organization converts pursuant to Section 1102.

(4) "Converting business organization" means a business organization that converts into another business organization pursuant to Section 1102.

(5) "General partner" means a general partner of a limited partnership.

(6) "Governing statute" of a business organization means the statute under which the organization is incorporated, organized, formed, or created and which governs the internal affairs of the organization.

(7) "Organizational documents" means:

(A) for a domestic or foreign general partnership, its partnership agreement;

(B) for a limited partnership and a foreign limited partnership, its certificate of limited partnership and partnership agreement;

(C) for a domestic or foreign limited liability company, its articles of organization and operating agreement;

(D) for a business trust, its agreement of trust and declaration of trust;

(E) for a domestic or foreign corporation, its articles of incorporation, bylaws, and other agreements among its shareholders which are authorized by its governing statute; and

(F) for any other business organization, the basic records that create the business organization and determine its internal governance and the relations among its owners.

(8) "Owner" means:

(A) with respect to a general or limited partnership, a partner;

(B) with respect to a limited liability company, a member;

(C) with respect to a business trust, the owner of a beneficial interest in the trust;

(D) with respect to a corporation, a shareholder; and

(E) with respect to any other business organization, a person that has an ownership interest in the organization.

(9) "Owner's liability" means personal liability for a debt, obligation, or liability of a business organization which is imposed on an owner:

(A) by the organization's governing statute solely by reason of the owner's capacity as owner; or

(B) by the organization's organizational documents under a provision of the organization's governing statute authorizing those documents to make one or more specified owners liable in their capacity as owners for all or specified debts, obligations, or liabilities of the business organization.

(10) "Person dissociated as a general partner" means a person dissociated as a general partner of a limited partnership.

(11) "Surviving business organization" means a business organization into which one or more other business organizations are merged. A surviving business organization may preexist the merger or be created by the merger.

Reporter's Notes

"Business organization" [(1)] – This definition will permit a limited partnership to engage in an organic change with entities organized under the law of foreign countries but not with non-profit entities. The new provisions proposed for the RMBCA ("RMBCA's new provisions") refer to "any association or legal entity . . . organized to conduct business." RMBCA's new provisions, § 11.01(d).

"Constituent business organization" [(2)] – The RMBCA's new provisions refer instead to a "party to a merger." § 11.01(e).

"Organizational documents" [(7)] – Derived from RMBCA's new provisions, § 11.01(c). The specific examples do not appear in the RMBCA's new provisions.

Deleted Definition of "Ownership interest" [(formerly 10)] – Per the suggestion of the representative of the Style Committee, this definition has been relocated to Section 102. That relocation poses some problems, which are discussed in the Reporter's Notes to Section 102(15).

"Owner's liability" [(9)] – This definition has been revised to track the structure and content of Section 404. This definition does not encompass an

owner's personal liability for approving or receiving improper distributions from the organization because that liability is not liability for an *organization's* debts and other obligations." (Emphasis added.)]

"Surviving business organization" [(11)] – This definition comes essentially verbatim from the RMBCA's new provisions, § 11.01(g).

SECTION 1102. CONVERSION.

(a) A business organization other than a limited partnership may convert to a limited partnership, and a limited partnership may convert to another business organization pursuant to Sections 1102 through 1105 and a plan of conversion, if:

(1) those sections are not inconsistent with the governing statute of the other business organization; and

(2) the other business organization complies with its governing statute in effecting the conversion.

(b) A plan of conversion must include:

(1) the name and form of the business organization before conversion;

(2) the name and form of the business organization after conversion; and

(3) the terms and conditions of the conversion; and

(4) the organizational documents of the converted business organization.

Reporter's Notes

Conversion necessarily works cross-entity and may work cross-jurisdiction as well. The only limitations are that:

- both the converting and converted entities be business organizations (i.e., that they have "owners"), and
- either the converting or converted business organization be a limited partnership (i.e., a domestic limited partnership, formed under this [Act]).

Thus, for example, Sections 1102 to 1105 will permit:

- a Re-RULPA limited partnership to convert to a Bermuda limited liability company, if Bermuda law allows; and

- a Delaware corporation to convert to a Re-RULPA limited partnership, if Delaware law allows.

Subsection (a) – Whether the other business organization must comply with its organizational documents is determined by the other organization's governing statute, not this Act.

Subsection (b) – At its October, 1999 meeting, the Drafting Committee decided to substantially simplify subsection (b), believing that (b)(3) is sufficiently broad to make unnecessary any further specifications. Deleted specifications included: "(4) the manner and basis for converting the ownership interests of the converting business organization into any combination of money, ownership interests in the converted business organization, and other consideration; . . . (5) if the converting business organization is a limited partnership that has outstanding transferable interests owned by mere transferees, the manner and basis for converting those transferable interests into any combination of money, ownership interests in the converted business organization, and other consideration; . . . (8) any additional information required by the governing statutes of the converting business organization and the converted business organization and by the organizational documents of the converting organization."

Former subsection (c) – At its October, 1999 meeting, the Drafting Committee decided to delete subsection (c) as unnecessary. That subsection had expressly authorized terms and conditions of a conversion to "be made dependent on facts ascertainable outside the plan of conversion, provided that those facts are objectively ascertainable. The term 'facts' includes the occurrence of any event, including a determination or action by any person or body, including the converting business organization." The deleted language derived almost verbatim from the RMBCA's new provisions, §11.02(d).

Former subsection (d) – At its October, 1999 meeting, the Drafting Committee decided to delete this subsection, which had stated: "The plan of conversion may state other provisions relating to the conversion." The Drafting Committee saw no reason to expressly authorize additional material.

SECTION 1103. ACTION ON PLAN OF CONVERSION BY LIMITED PARTNERSHIP.

(a) If a converting business organization is a limited partnership, subject to Section 1110 the plan of conversion must be approved by all the partners.

(b) Subject to Section 1110 and any contractual rights, after a conversion is approved, and at any time before a filing is made under Section 1104, a converting business organization that is a limited partnership may amend the plan or abandon the planned conversion:

(1) as provided in the plan; and

(2) except as prohibited by the plan, by the same consent as was required to approve the plan.

Reporter's Notes

At its October, 1999 meeting, the Drafting Committee decided to limit the scope of this section to rules pertaining to a converting *limited partnership*. As for other converting business organizations, the rules are provided by the appropriate governing statute.

Subsection (a) – In the July, 1999 Draft, Section 1110 provided nonwaivable rights for persons with owner liability in the converted business organization. At its October, 1999 meeting, the Drafting Committee decided to delete Section 1110. Beginning with the March, 2000 Draft a new Section 1110 prevents non-unanimous approval of conversion and merger, except to the extent that each objecting partner has assented to a partnership agreement provision providing for non-unanimous approval.

The July, 1999 Draft also made Section 1110's protections applicable even when the converting entity was *not* a creature of this [Act]. The Reporter's Notes explained: "This [Act] does not countenance a person being voted into owner vicarious liability." At its July, 1999 meeting, the Drafting Committee decided to eliminate that protection.

In the July, 1999 Draft, former Section 1111 provided nonwaivable rights for non-partners holding transferable interests in a converting limited partnership. At its July, 1999 meeting, the Drafting Committee decided to delete Section 1111.

Subsection (b) – The RMBCA's new provisions, § 11.02(e) appear to allow amendment of a plan of merger only if the plan so provides.

SECTION 1104. FILINGS REQUIRED FOR CONVERSION; EFFECTIVE DATE.

(a) After a plan of conversion is approved:

(1) if the converting business organization is a limited partnership, the limited partnership must deliver for filing with the [Secretary of State] articles of conversion, which must include:

(A) a statement that the limited partnership has been converted into another business organization;

(B) the name and form of that business organization and the jurisdiction of its governing statute;

(C) the date the conversion is effective according to the governing statute of converted business organization;

(D) a statement that the conversion was approved as required by this [Act]; and

(E) a statement that the conversion was approved as required by the governing statute of the converted business organization; and

(2) if the converting business organization is a not a limited partnership, the converting business organization shall deliver for filing with the [Secretary of

State] a certificate of limited partnership, which must include, in addition to the information required by Section 201:

(A) a statement that the limited partnership was converted from another form of business organization;

(B) the name and form of that business organization and the jurisdiction of its governing statute; and

(C) a statement that the conversion was approved in a manner that complied with the business organization's governing statute.

(b) A conversion becomes effective:

(1) if the converted business organization is a limited partnership, when the certificate of limited partnership takes effect; and

(2) if the converted business organization is not a limited partnership, as provided by the governing statute of the converted business organization.

Reporter's Notes

This section does not require public disclosure of the plan of conversion.

Subsection (a)(1) – This provision states no special signing requirements because the converting business organization is a limited partnership and Section 204 applies.

Subsection (a)(1)(D) – This provision is derived from RMBCA's new provisions, § 11.05(a)(3).

Subsection (a)(2) – This provision states no special signing requirements for the converting business organization because Section 204 states the signing requirements for a certificate of limited partnership.

SECTION 1105. EFFECT OF CONVERSION.

(a) A business organization that has been converted pursuant to this [article] is for all purposes the same entity that existed before the conversion.

(b) When a conversion takes effect:

(1) all property owned by the converting business organization vests in the converted business organization;

(2) all debts, liabilities, and other obligations of the converting business organization continue as obligations of the converted business organization;

(3) an action or proceeding pending by or against the converting business organization may be continued as if the conversion had not occurred;

(4) except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of the converting business organization vest in the converted business organization; and

(5) except as otherwise agreed, if the converting business organization is a limited partnership the conversion does not dissolve the limited partnership for the purposes of [Article] 8.

(c) A converted business organization that is a foreign entity consents to the jurisdiction of the courts of this State to enforce any obligation owed by the converting business organization, if before the conversion the converting business organization was subject to suit in this State on that obligation. A converted business organization that is a foreign entity and not authorized to transact business in this State appoints the [Secretary of State] as its agent for service of process for purposes of enforcing an obligation under this subsection. Service on the [Secretary

of State] under this subsection is made in the same manner and with the same consequences as provided in Section 117(c) and (d).

Reporter's Notes

At its October, 1999 meeting, the Drafting Committee substantially revised this section. Subsections (a) and (b) are taken, essentially verbatim, from ULLCA § 903(a) and (b).

SECTION 1106. MERGER.

(a) A limited partnership may merge with one or more other constituent business organizations pursuant to Sections 1106 through 1109 and a plan of merger, if:

(1) those sections are not inconsistent with the governing statute of each of the other constituent business organizations; and

(2) each of the other constituent business organizations complies with its governing statute in effecting the merger.

(b) A plan of merger must include:

(1) the name and form of each constituent business organization;

(2) the name and form of the surviving business organization and, if the surviving business organization is to be created by the merger, a statement to that effect;

(3) the terms and conditions of the merger;

(4) if the surviving business organization is to be created by the merger, the surviving business organization's organizational documents; and

(5) if the surviving business organization is not to be created by the merger, any amendments to be made by the merger to the surviving business organization's organizational documents.

Reporter's Notes

At its October, 1999 meeting, the Drafting Committee substantially revised the Act's provisions dealing with conversions and instructed the Reporter to make analogous changes to the provisions dealing with mergers.

SECTION 1107. ACTION ON PLAN OF MERGER BY LIMITED PARTNERSHIP.

(a) Subject to Section 1110, the plan of merger must be approved by all the partners of a constituent business organization that is a limited partnership.

(b) Subject to Section 1110 and any contractual rights, after a merger is approved, and at any time before a filing is made under Section 1108, a constituent business organization that is a limited partnership may amend the or abandon the planned merger:

(1) as provided in the plan; and

(2) except as prohibited by the plan, by the same consent as was required to approve the plan.

Reporter's Notes

At its October, 1999 meeting, the Drafting Committee substantially revised the Act's provisions dealing with conversions and instructed the Reporter to make analogous changes to the provisions dealing with mergers.

SECTION 1108. FILINGS REQUIRED FOR MERGER; EFFECTIVE DATE.

(a) After each constituent business organization has approved a merger, articles of merger must be signed on behalf of:

(1) each preexisting constituent business organization that is a limited partnership, by each general partner listed in the certificate of limited partnership; and

(2) each preexisting constituent business organization that is not a limited partnership, by a duly authorized representative.

(b) The articles of merger must include:

(1) the name and form of each constituent business organization and the jurisdiction of its governing statute;

(2) the name and form of the surviving business organization, the jurisdiction of its governing statute, and, if the surviving business organization is created by the merger, a statement to that effect;

(3) the date the merger is effective;

(4) if the surviving business organization is to be created by the merger:

(A) if it will be a limited partnership, the limited partnership's certificate of limited partnership; or

(B) if it will be a business organization other than a limited partnership, the organizational document that creates the business organization;

(5) if the surviving business organization preexists the merger, any amendments provided for in the plan of merger for the organizational document that created the business organization; and

(6) a statement as to each constituent business organization that the merger was approved as required by the business organization's governing statute; and

(7) any additional information required by the governing statute of any constituent business organization.

(c) Each constituent business organization that is a limited partnership must deliver the articles of merger for filing in the [office of the Secretary of State].

(d) A merger becomes effective under this [article] upon the later of:

(1) compliance with subsection (c) and the performance of any acts required to effectuate the merger under the governing statute of each constituent business organization; or

(2) subject to Section 206, a date specified in the articles of merger.

Reporter's Notes

This section does not require public disclosure of the plan of merger.

Subsection (a) – A surviving business organization that is to be created by the merger cannot have someone sign on its behalf, because it does not come into existence until the merger becomes effective.

Subsection (b)(4) – This provision is derived from RMBCA's new provisions, § 11.05(a)(3) and (4).

Subsection (d) – Derived from RUPA §§ 905(e) and 906 and ULLCA § 906. Under this provision the merger is not effective as to a Re-RULPA limited partnership until the merger is effective as to each constituent organization. The

provision aims principally at filing requirements imposed by other governing statutes.

SECTION 1109. EFFECT OF MERGER.

(a) When a merger becomes effective:

(1) the surviving business organization continues or comes into existence;

(2) each constituent business organization that merges into the surviving business organization ceases to exist as a separate entity;

(3) all property owned by each constituent business organization that ceases to exist vests in the surviving business organization;

(4) all debts, liabilities, and other obligations of each constituent business organization that ceases to exist continue as obligations of the surviving business organization;

(5) an action or proceeding pending by or against any constituent business organization that ceases to exist may be continued as if the merger had not occurred;

(6) except as prohibited by other law, all of the rights, privileges, immunities, powers, and purposes of each constituent business organization that ceases to exist vest in the surviving business organization;

(7) except as otherwise agreed, if a constituent business organization is a limited partnership that ceases to exist, the merger does not dissolve the limited partnership for the purposes of [Article] 8;

(8) if the surviving business organization is created by the merger:

(A) if it is a limited partnership, the certificate of limited partnership becomes effective; or

(B) if it is a business organization other than a limited partnership, the organizational document that creates the business organization becomes effective; and

(9) if the surviving business organization preexists the merger, any amendments provided for in the plan of merger for the organizational document that created the business organization become effective.

(b) A surviving business organization that is a foreign entity and not authorized to transact business in this State appoints the [Secretary of State] as its agent for service of process for the purposes of enforcing an obligation under this subsection. Service on the [Secretary of State] under this subsection is made in the same manner and with the same consequences as provided in Section 117(c) and (d).

Reporter's Notes

At its October, 1999 meeting, the Drafting Committee substantially revised the Act's provisions dealing with conversions and instructed the Reporter to make analogous changes to the provisions dealing with mergers.

SECTION 1110. RESTRICTIONS ON NON-UNANIMOUS APPROVAL OF CONVERSIONS AND MERGERS.

(a) If a partner of a limited partnership will have owner's liability with respect to a converted or surviving organization, approval and amendment of a plan of conversion or merger are ineffective without the consent of that partner, unless:

(1) the limited partnership's partnership agreement provides for the approval of the conversion or merger with the consent of less than all the partners; and

(2) that partner has assented to that provision of the partnership agreement.

(b) A partner does not give the assent required by subsection (a) merely by assenting to a provision of the partnership agreement which permits the partnership agreement to be amended with the consent of less than all the partners.

Reporter's Notes

The partnership agreement may not restrict a partner's rights under this section. See Section 110(b)(12).

Reporter's Notes to Former Section 1111

At its October, 1999 meeting, the Drafting Committee decided to delete this former Section 1111 (Consent Required from Certain Transferees), leaving mere transferees no protection under this Article.

The Reporter continues to believe that this situation is ripe for mischief. Mere transferees are creatures of partnership and LLC law and pose perplexing problems that do not often exist in the corporate realm. Transferee rights should not be subject to forfeiture through a squeeze-out conversion or merger. The problem is to provide some protection for mere transferees without subjecting every conversion and merger to open-ended second guessing by the courts.

Relying on "good faith and fair dealing" will not suffice. For one thing, it is not clear that a limited partnership and its partners owe that obligation to mere transferees. The obligation developed as an aspect of contract law, and neither the limited partnership nor its partners collectively have a contractual relationship with

mere transferees. (To the extent (i) a person became a mere transferee pursuant to a contract, (ii) the transferor remains a partner, and (iii) the contract is not fully performed or otherwise discharged, that particular partner may owe an obligation of good faith to that particular transferee.)

Moreover, even if the obligation exists (or the Act were to create it), the obligation would overhang every conversion or merger contemplated by a limited partnership that has mere transferees. Every such conversion or merger would be subject to a "fairness" challenge.

SECTION 1111. LIABILITY OF GENERAL PARTNER AFTER CONVERSION OR MERGER.

(a) A conversion or merger under this article does not discharge any liability under Sections 404 and 607 of a person that was a general partner or dissociated as a general partner in a converting or constituent business organization, but:

(1) the provisions of this [Act] pertaining to the collection or discharge of that liability continue to apply to that liability;

(2) for the purposes of applying those provisions, the converted or surviving business organization is deemed to be the converting or constituent business organization; and

(3) if a person is required to pay any amount under this subsection:

(A) the person has a right of contribution from each other person that was liable as a general partner under Section 404 when the obligation was incurred and has not been released from that obligation under Section 607; and

(B) the contribution due from each of those persons is in proportion to the right to receive distributions in the capacity of general partner in effect for each of those persons when the obligation was incurred.

(b) In addition to any other liability provided by law:

(1) a person that immediately before a conversion or merger became effective was a general partner in a converting or constituent business organization and had owner's liability for that business organization's obligations is personally liable for each obligation of the converted or surviving business organization arising from a transaction with a third party after the conversion or merger becomes effective, if at the time the third party enters into the transaction the third party:

(A) does not have notice of the conversion or merger; and

(B) reasonably believes that the converted or surviving business is the converting or constituent business organization and that the person is a general partner in the converting or constituent business organization;.

(2) a person that was dissociated as a general partner from a converting or constituent business organization before the conversion or merger became effective is personally liable for each obligation of the converted or surviving business organization arising from a transaction with a third party after the conversion or merger becomes effective, if:

(A) immediately before the conversion or merger became effective the converting or surviving business organization was a limited partnership whose certificate of limited partnership included a statement under Section 404(b); and

(B) at the time the third party enters into the transaction less than two years have passed since the person dissociated as a general partner and the third party:

(i) does not have notice of the dissociation;

(ii) does not have notice of the conversion or merger; and

(iii) reasonably believes that the converted or surviving business organization is the converting or constituent business organization and that the person is a general partner in the converting or constituent business organization.

Reporter's Notes

This section will require substantial revision, depending on whether Re-RULPA continues to make LLLP status the default rule and to allow selected holes in the LLLP liability shield. In particular, subsection (b) assumes an "all or nothing" approach to the LLLP shield. See Reporter's Notes to Section 404(b).

Subsection (a)(3) – Under this provision, a person who was dissociated as a general partner when the liability was incurred has no duty to contribute, even though that person may still be liable to third parties under Section 607. See Reporter's Notes to Section 404(b).

Subsection (b)(1) – The phrase "had owner's liability" excludes general partners in LLPs and LLLPs. There is no need to state an outside limit for the lingering liability, as in, e.g., Sections 606 and 607 (two years). For the conversion or merger to become effective, a filing must occur. That filing produces constructive notice 90 days after the filing's effective date.

Subsection (b)(1)(B) – These requirements are most likely to be met when the converted or surviving business organization does business using the same name as the converting or constituent business used.

SECTION 1112. POWER OF GENERAL PARTNERS AND PERSONS DISSOCIATED AS GENERAL PARTNERS TO BIND AFTER CONVERSION OR MERGER.

(a) An act of a person that immediately before a conversion or merger became effective was a general partner in a converting or constituent business organization binds the converted or surviving business organization after the conversion or merger becomes effective, if:

(1) before the conversion or merger became effective, the act would have bound the converting or constituent business organization under Section 404; and

(2) at the time the third party enters into the transaction, the third party:

(A) does not have notice of the conversion or merger; and

(B) reasonably believes that the converted or surviving business is the converting or constituent business organization and that the person is a general partner in the converting or constituent business organization.

(b) An act of a person that before a conversion or merger became effective was dissociated as a general partner from a converting or constituent business organization binds the converted or surviving business organization after the conversion or merger becomes effective, if:

(1) before the conversion or merger became effective the act would have bound the converting or constituent entity under Section 402 if the person had been a general partner; and

(2) at the time the third party enters into the transaction, less than two years have passed since the person dissociated as a general partner and the third party:

(A) does not have notice of the dissociation;

(B) does not have notice of the conversion or merger; and

(C) reasonably believes that the converted or surviving business is the converting or constituent business organization and that the person is a general partner in the converting or constituent business organization.

(c) If a person having knowledge of the conversion or merger causes a converted or surviving business organization to incur an obligation under subsection (a) or (b), the person is liable:

(1) to the converted or surviving business organization for any damage caused to the business organization arising from the obligation; and

(2) if another person is liable for the obligation, to that other person for any damage caused to that other person arising from that liability.

Reporter's Notes

Subsection (c)(2) – The other person's liability might be owner's liability or might arise from a general guaranty.

SECTION 1113. [ARTICLE] NOT EXCLUSIVE. This [article] does not preclude an entity from being converted or merged under other law.

Reporter's Notes

Source: RUPA § 907, followed in ULLCA § 907.

At its October, 1999 meeting, the Drafting Committee decided to make Article 11 non-exclusive.

[ARTICLE] 12

MISCELLANEOUS PROVISIONS

Reporter's Notes to [Article] 12

This Article is taken, mostly verbatim, from RUPA, Article 12, which is substantially similar to RULPA's Article 11. To facilitate review of the effective date and applicability provisions, the Reporter has used the phrase "drag-in date" to refer to the date on which all preexisting limited partnerships become subject to the [Act]. That phrase appears in braces – {} – and will not be included in the official text.

SECTION 1201. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among States that enact it.

SECTION 1202. SEVERABILITY CLAUSE. If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

SECTION 1203. EFFECTIVE DATE. This [Act] takes effect January 1, 20___.

SECTION 1204. REPEALS. Except as otherwise provided in Section 1205 effective January 1, 20___ {drag-in date}, the following acts and parts of acts are repealed: [the State Limited Partnership Act as amended and in effect immediately before the effective date of this [Act]].

Reporter's Notes

The exception does not exist in RUPA and is derived from RULPA § 1104.

SECTION 1205. APPLICABILITY.

(a) Before January 1, 20___{drag-in date}, this [Act] governs only:

(1) a limited partnership formed on or after the effective date of this [Act]; and

(2) a limited partnership formed before the effective date of this [Act], that elects, as provided by subsection (d), to be governed by this [Act].

(b) Except as otherwise provided in subsection (c), beginning January 1, 20 ___{drag-in date}, this [Act] governs all limited partnerships.

(c) Each of the following provisions of [the State Limited Partnership Act as amended and in effect immediately before the effective date of this [Act]] continue to apply after January 1, 20___{drag-in date}, to a limited partnership formed before the effective date of this [Act], except as the partners otherwise elect in the manner provided in the partnership agreement or by law for amending the partnership agreement:

(1) **[TBD]**

(2)

(d) Before January 1, 20___{drag-in date}, a limited partnership formed before the effective date of this [Act] voluntarily may elect, in the manner provided in its partnership agreement or by law for amending the partnership agreement, to be governed by this [Act]. If a limited partnership formed before the effective date of this [Act] makes that election, the provisions of this [Act] relating to the liability of the limited partnership's partners to third parties apply:

(1) before January 1, 20___{drag-in date}, to:

(A) a third party that had not done business with the limited partnership within one year before the limited partnership's election to be governed by this [Act]; and

(B) a third party that had done business with the limited partnership within one year before the limited partnership's election to be governed by this [Act], only if the third party knows or has received a notification of the partnership's election to be governed by this [Act]; and

(2) after January 1, 20___{drag-in date}, to all third parties.

Reporter's Notes

Subsection (a) – RUPA locates the phrase "a [limited] partnership formed" in the introductory clause, but strictly speaking a partnership cannot be formed both before and after the effective date.

Subsection (a)(1) – RUPA refers only to "after," leaving out partnerships formed on the effective date.

Subsection (c) – The concept is derived from RULPA § 1104. The method of election comes, essentially verbatim, from RUPA § 1206(c).

Candidates for inclusion in the list: LLLP status as default status; perpetual term; no right of limited partner to withdraw; a court's power to expel a general

partner when the partnership agreement does not provide for expulsion; new rules on avoiding dissolution following the dissociation of a general partner.

Subsection (d) – Following RUPA, this subsection creates special exposure for partners of a limited partnership that elects in. The [Act] creates no special exposure for preexisting limited partnerships that are "dragged in," so the special exposure for electing limited partnerships should end at the "drag-in date." RUPA's already complex formulation has been expanded to clarify that point. The RUPA formulation reads:

> The provisions of this [Act] relating to the liability of the partnership's partners to third parties apply to limit those partners' liability to a third party who had done business with the partnership within one year before the partnership's election to be governed by this [Act] only if the third party knows or has received a notification of the partnership's election to be governed by this [Act].

SECTION 1206. SAVINGS CLAUSE. This [Act] does not affect an action or proceeding commenced or right accrued before this [Act] takes effect.