

D R A F T

FOR DISCUSSION ONLY

**REVISED
UNIFORM LIMITED LIABILITY COMPANY ACT**

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-THIRTEENTH YEAR
PORTLAND, OREGON
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**REVISED
UNIFORM LIMITED LIABILITY COMPANY ACT**

WITH PREFATORY AND REPORTERS' NOTES

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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**DRAFTING COMMITTEE ON REVISIONS TO
UNIFORM LIMITED LIABILITY COMPANY ACT**

DAVID S. WALKER, Drake University Law School, Des Moines, IA 50311, *Chair*
ANN CONAWAY ANKER, Widener University, School of Law, P.O. Box 7474, Wilmington,
DE 19803
DONALD K. DENSBN, 8888 Keystone Crossing, Suite 1400, Indianapolis, IN 46240
STEVEN G. FROST, 111 W. Monroe St., Suite 1500, Chicago, IL 60603-4006
HARRY J. HAYNSWORTH, IV, William Mitchell College of Law, 875 Summit Ave., St. Paul,
MN 55105
TIMOTHY J. HEINSZ, University of Missouri-Columbia, School of Law, 203 Hulston Hall,
Columbia, MO 65211
MICHAEL HOUGHTON, P.O. Box 1347, 1201 N. Market St., 18th Floor, Wilmington, DE
19899, *Enactment Plan Coordinator*
HARRIET LANSING, Court of Appeals, Judicial Bldg., 25 Rev. Dr. Martin Luther King Jr.
Blvd., St. Paul, MN 55155
CARTER G. BISHOP, Suffolk University Law School, 120 Tremont St., Boston, MA 02108-
4977, *Co-Reporter*
DANIEL S. KLEINBERGER, William Mitchell College of Law, 875 Summit Ave., St. Paul,
MN 55105, *Co-Reporter*

EX OFFICIO

FRED H. MILLER, University of Oklahoma, College of Law, 300 Timberdell Road, Room
3056, Norman, OK 73019, *President*
REX BLACKBURN, 1673 West Shoreline Dr., Suite 200, P.O. Box 7808, Boise, ID 83702
Division Chair

AMERICAN BAR ASSOCIATION ADVISOR

ROBERT R. KEATINGE, 555 17th St., Suite 3200, Denver, CO 80202-3979

AMERICAN BAR ASSOCIATION SECTION ADVISORS

WILLIAM J. CALLISON, Suite 3200, 1700 Lincoln St., Denver, CO 80203, *ABA Business Law
Section Advisor*
WILLIAM H. CLARK, JR., One Logan Square, 18th and Cherry Streets, Philadelphia, PA
19103-6996, *ABA Business Law Section Advisor*
THOMAS EARL GEU, University of South Dakota, School of Law, 414 Clark St., Suite 214,
Vermillion, SD 57069-2390, *ABA Real Property, Probate and Trust Law Section Advisor*
JON T. HIRSCHOFF, One Landmark Square, 14th Floor, Stamford, CT 06901, *ABA Business
Law Section Advisor*
ROBERT KRAPP, One Rodney Square, 920 King St., P.O. Box 551, Wilmington, DE 19899,
ABA Real Property, Probate and Trust Law Section Advisor
SCOTT E. LUDWIG, 200 Clinton Ave. W., Suite 900, Hunstville, AL 35801-4900, *ABA
Business Law Section Advisor*

JOHN R. MAXFIELD, 555 17th St., Suite 3200, Denver, CO 80201, *ABA Tax Section Advisor*
ELIZABETH STONE MILLER, Baylor Law School, 1114 S. University Parks Dr., Waco, TX
76706, *ABA Business Law Section Advisor*

BARRY NEKRITZ, 8000 Sears Tower, 233 S. Wacker Dr., Chicago, IL 60606, *ABA Real
Property, Probate and Trust Law Section Advisor*

THOMAS E. RUTLEDGE, 1700 PNC Plaza, 500 W. Jefferson St., Louisville, KY 40202-2874,
ABA Business Law Section Advisor

EXECUTIVE DIRECTOR

WILLIAM H. HENNING, University of Alabama School of Law, Box 870382, Tuscaloosa, AL
35487-0382, *Executive Director*

WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director
Emeritus*

Copies of this Act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS
211 E. Ontario Street, Suite 1300
Chicago, Illinois 60611
312/915-0195
www.nccusl.org

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REVISED UNIFORM LIMITED LIABILITY COMPANY ACT

PREFATORY NOTE

*Background to this Drafting Project:
Developments Since the Conference Considered and Approved the Original
Uniform Limited Liability Company Act (ULLCA)*

The Uniform Limited Liability Company Act (“ULLCA”) was conceived in 1992 and first adopted by the Conference in 1994. By that time nearly every state had adopted an LLC statute, and those statutes varied considerably in both form and substance. Many of those early statutes were based on the first version of the ABA Model Prototype LLC Act.

ULLCA’s drafting relied substantially on the then recently adopted Revised Uniform Partnership Act (“RUPA”), and this reliance was especially heavy with regard to member-managed LLCs. ULLCA’s provisions for manager-managed LLCs comprised an amalgam fashioned from the 1985 Revised Uniform Limited Partnership Act (“RULPA”) and the Model Business Corporation Act (“MBCA”). ULLCA’s provisions were also significantly influenced by the then-applicable federal tax classification regulations, which classified an unincorporated organization as a corporation if the organization more nearly resembled a corporation than a partnership. Those same regulations also made the tax classification of single-member LLCs problematic.

Much has changed. All states and the District of Columbia have adopted LLC statutes, and many LLC statutes have been amended several times. LLC filings are significant in every U.S. jurisdiction, and in some states new LLC filings approach or even outnumber new corporate filings on an annual basis. Manager-managed LLCs have become a significant factor in non-publicly-traded capital markets, and increasing numbers of states provide for mergers and conversions involving LLCs and other unincorporated entities.

In 1997, the tax classification context changed radically, when the IRS’ “check-the-box” regulations became effective. Under these regulations, an “unincorporated” business entity is taxed either as a partnership or disregarded entity (depending upon the number of owners) unless it elects to be taxed as a corporation. Exceptions exist (e.g., entities whose interests are publicly-traded), but, in general, tax classification concerns no longer constrain the structure of LLCs and the content of LLC statutes. Single-member LLCs, once suspect because novel and of uncertain tax status, are now popular both for sole proprietorships and as corporate subsidiaries.

ULLCA was revised in 1996 in anticipation of the “check the box” regulations and has been adopted in several states, but state LLC laws are far from uniform. In many other states, the LLC statute includes RUPA-like provisions. In 1995, the Conference amended RUPA to add “full-shield” LLP provisions, and today every state has some form of LLP legislation (either through a RUPA adoption or similar revisions to a UPA-based statute). While some states still provide only a “partial shield” for LLPs, many states have adopted “full shield” LLP provisions. In full-shield jurisdictions, LLPs and member-managed LLCs offer entrepreneurs very similar

attributes and, in the case of professional service organizations, LLPs might dominate the field.

Sixteen years have passed since the IRS issued its gate-opening Revenue Ruling 88-76, declaring that a Wyoming LLC would be taxed as a partnership despite the entity's corporate-like liability shield. More than seven years have passed since the IRS opened the gate still further with the "check the box" regulations. Now seems an opportune moment identify the best elements of the myriad "first generation" LLC statutes and to infuse those elements into a new, "second generation" uniform act.

Overarching Issues

At this very preliminary stage of the drafting process, the reporters have identified three overarching issues:

1. Is a limited liability company more properly understood as:
 - a. a contractual relationship that primarily owes its existence to the private arrangement of its members and is "housed" within a statutorily-recognized entity merely to provide a liability shield for the members, or
 - b. a creature of statute, formed by filing a public document, properly thought of conceptually as well as legally as an entity separate from its members?
2. Given the decision made at the most recent Committee meeting to preserve the member-managed/manager-managed structure:
 - a. is a member-managed LLC essentially the same as an LLP (except that an LLC has perpetual duration)?
 - b. is a manager-managed LLC essentially the same as a LLLP?
 - c. what distinguishes an LLC from other entities beyond having a foundational statute that contemplates two alternate management structures?
3. What are the prospects for enactment of a second generation uniform LLC act, given that:
 - a. radical innovations will place the new Act "too far ahead of the curve" and are unlikely to find favor either with the Conference or with state bar associations,
 - b. incremental improvements will meet resistance in the majority of states (which have not adopted ULLCA I), because practitioners accustomed to their own state LLC act will question whether the improvements in the new Act are worth the costs of jettisoning their old knowledge and learning the new Act.

1 **REVISED UNIFORM LIMITED LIABILITY COMPANY ACT**

2
3
4
5 **[ARTICLE] 1**

6 **GENERAL PROVISIONS**

7 **SECTION 101. SHORT TITLE.** This [act] may be cited as the Revised Uniform
8 Limited Liability Company Act.

9 **Reporters' Notes**

10 This act is intended as a wholesale replacement for the current uniform act.
11

12 **SECTION 102. DEFINITIONS.** In this [act]:

13 (1) "Articles of organization" means the articles required by Section 201. The
14 term includes the articles as amended or restated.

15 (2) "Contribution" means any benefit provided by a person to a limited liability
16 company in order to become a member or in the person's capacity as a member.

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

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

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

22 (4) "Designated office" means:

23 (A) with respect to a limited liability company, the office that the limited
24 liability company is required to designate and maintain under Section 113; and

25 (B) with respect to a foreign limited liability company, its principal office.

1 (5) “Distribution” means a transfer of money or other property from a limited
2 liability company to a member in the member’s capacity as a member or to a transferee on
3 account of a transferable interest owned by the transferee.

4 (6) “Foreign limited liability company” means an unincorporated entity formed
5 under the laws of a jurisdiction other than this state and denominated by those laws as a limited
6 liability company.

7 (7) “Governance responsibility” means the responsibility to determine principal
8 policies and strategies for a limited liability company and superintend the limited liability
9 company’s overall operations. The term includes decisions as to whether a proposed distribution
10 complies with Section 408.

11 (8) “Limited liability company”, except in the phrase “foreign limited liability
12 company”, means an entity formed under this [act].

13 (9) “Manager” means a person that is a manager under Section 407(b)(5) of a
14 manager-managed limited liability company. The term does not include a person that has ceased
15 to be a manager under Section 407(b)(5).

16 (10) “Manager-managed limited liability company” means a limited liability
17 company which is so designated in its articles of organization.

18 (11) “Member” means a person that is a member of a limited liability company
19 under Section 401. The term does not include a person that has dissociated as a member under
20 Section 601.

21 (12) “Member-managed limited liability company” means a limited liability
22 company which is so designated in its articles of organization.

23 (13) “Operating agreement” means an agreement of all the members concerning

1 the limited liability company. The term includes the agreement as amended.

2 (14) “Operational responsibilities” include responsibilities for implementing the
3 policies established for a limited liability company by those with governance authority,
4 managing the day-to-day activities of the limited liability company, and carrying out tasks on
5 behalf of the limited liability company.

6 (15) “Person” means an individual, corporation, business trust, estate, trust,
7 membership, limited liability company, association, joint venture, government; governmental
8 subdivision, agency, or instrumentality; public corporation, or any other legal or commercial
9 entity.

10 (16) “Principal office” means the office where the principal executive office of a
11 limited liability company or foreign limited liability company is located, whether or not the
12 office is located in this state.

13 (17) “Record” means information that is inscribed on a tangible medium or that is
14 stored in an electronic or other medium and is retrievable in perceivable form.

15 (18) “Required information” means the information that a limited liability
16 company is required to maintain under Section 111.

17 (19) “Sign” means, with the present intent to authenticate a record:

18 (A) to execute or adopt a tangible symbol; or

19 (B) to attach or logically associate an electronic symbol, sound, or
20 process to or with a record.

21 (20) “State” means a state of the United States, the District of Columbia, Puerto
22 Rico, the United States Virgin Islands, or any territory or insular possession subject to the
23 jurisdiction of the United States.

1 (21) “Transfer” includes an assignment, conveyance, deed, bill of sale, lease,
2 mortgage, security interest, encumbrance, gift, and transfer by operation of law.

3 (22) “Transferable interest” means a member’s right to receive distributions.

4 (23) “Transferee” means a person to which all or part of a transferable interest
5 has been transferred, whether or not the transferor is a member.

6 **Reporters’ Notes**

7 **Paragraph (6) [Foreign limited liability company]** – Some statutes have elaborate
8 definitions addressing the question of whether a non-U.S. entity is a “foreign limited liability
9 company.” The NY statute, for example, defines a “foreign limited liability company” as:

10
11 an unincorporated organization formed under the laws of any jurisdiction,
12 including any foreign country, other than the laws of this state (i) that is not
13 authorized to do business in this state under any other law of this state and (ii) of
14 which some or all of the persons who are entitled (A) to receive a distribution of
15 the assets thereof upon the dissolution of the organization or otherwise or (B) to
16 exercise voting rights with respect to an interest in the organization have, or are
17 entitled or authorized to have, under the laws of such other jurisdiction, limited
18 liability for the contractual obligations or other liabilities of the organization.
19

20 NY CLS LLC § 102. ULLCA § 101(8) takes a similar but less complex approach (“an
21 unincorporated entity organized under laws other than the laws of this State which afford limited
22 liability to its owners comparable to the liability under Section 303 and is not required to obtain
23 a certificate of authority to transact business under any law of this State other than this [Act]”).
24 This Draft follows Delaware’s still simpler approach. Del. Code Ann. tit. 6, § 18-101(4)
25 (“denominated as such”).
26

27 **Paragraph (7) [Governance responsibility]** – This definition is key to Sections 409
28 and 410, the Act’s operative provisions on standards of conduct and liability. As initially
29 drafted, the word “important” appeared instead of “principal”.
30

31 Jim McKay, the drafting committee’s liaison to the Committee on Style, made this
32 observation of “important”: “The word ‘important’ is very fuzzy. You have provided no
33 standards from separating ‘important’ from ‘nonimportant’ matters. I suggest you delete
34 “important” and add language making an exception for ministerial or routine matters.” The
35 suggested approach would go too far, and so “principal” is offered (albeit tentatively).
36 Following the April 2004 meeting of the Drafting Committee, at the suggestion of an ABA
37 Business Law Section Advisor, the co-reporters added “strategies” to the definition.
38

39 **Paragraph (9) [Manager]** – This term is ubiquitous in LLC statutes, but it can cause

1 confusion given other common usages of the term. For example, a member-managed LLC might
2 well have an “office manager” or a “property manager.” Moreover, in a manager-managed LLC,
3 the “property manager” is not likely to be a manager as the term is used in this act.
4

5 **Paragraph (21) [Transfer]** – Following RUPA and ULPA (2001), this Act uses the
6 words “transfer” and “transferee” rather than the words “assignment” and “assignee.” See
7 RUPA § 503.
8

9 The reference to “transfer by operation of law” is significant in connection with Section
10 502 (Transfer of Member's Transferable Interest). That section severely restricts a transferee's
11 rights (absent the consent of the members), and this definition makes those restrictions
12 applicable, for example, to transfers ordered by a family court as part of a divorce proceeding
13 and transfers resulting from the death of a member.
14

15 **Paragraph (22) [Transferable Interest]** – On this point of terminology, this Draft
16 follows RUPA and ULPA (2001) rather than ULLCA, which refers to “distributional interest.”
17 ULLCA § 101(6).
18

19 **Paragraph (23) [Transferee]** – “Transferee” has displaced “assignee” as the
20 Conference’s term of art.
21

22 **SECTION 103. KNOWLEDGE AND NOTICE.**

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

24 (b) A person has notice of a fact if the person:

25 (1) knows of it;

26 (2) has notice of it under subsection (c);

27 (3) has received a notification of it under subsection (e); or

28 (4) has reason to know it exists from all of the facts known to the person at

29 the time in question.

30 (c) A person has notice of:

31 (1) another person’s dissociation as a member of a member-managed
32 limited liability company, 90 days after the effective date of a statement of dissociation
33 pertaining to the other person;

1 (2) another person's ceasing to be a manager of a manager-managed
2 limited liability company, 90 days after the effective date of a statement of manager cessation
3 pertaining to the other person;

4 (3) a limited liability company's dissolution, 90 days after the effective
5 date of a statement of dissolution;

6 (4) a limited liability company's termination, 90 days after the effective
7 date of a statement of termination; and

8 (5) a limited liability company's conversion, domestication, merger
9 **[reserved pending META]**

10 (d) Subject to subsection (f), a person notifies or gives a notification to another
11 person by taking steps reasonably required to inform the other person in ordinary course,
12 whether or not the other person knows it.

13 (e) Subject to subsection (f), a person receives a notification when the
14 notification:

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

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

18 (f) Subject to subsection (c) and Sections 301, 302, and 303, a person other than
19 an individual knows, has notice, or receives a notification of a fact for purposes of a particular
20 transaction when the individual conducting the transaction for the person knows, has notice, or
21 receives a notification of the fact, or in any event when the fact would have been brought to the
22 individual's attention if the person had exercised reasonable diligence. A person other than an
23 individual exercises reasonable diligence if it maintains reasonable routines for communicating

1 significant information to the individual conducting the transaction for the person and there is
2 reasonable compliance with the routines. Reasonable diligence does not require an individual
3 acting for the person to communicate information unless the communication is part of the
4 individual's regular duties or the individual has reason to know of the transaction and that the
5 transaction would be materially affected by the information.

6 **Reporters' Notes**

7 The April 2004 Draft expanded on ULLCA § 102 by providing for constructive notice
8 (following RUPA and ULPA (2001)) and by addressing the question of whether a member's
9 knowledge, notice, etc. is attributed to the limited liability company. The Drafting Committee
10 rejected the latter expansion as more properly handled in a Comment to the section concerning
11 the power of members to bind the limited liability company.
12

13 The Committee also expressed concern as to whether the section as a whole is necessary
14 or appropriate, because the section seems to be an attempt to codify certain principles of the
15 common law of agency for the limited purposes of this act. Considerable concern was also
16 expressed that the rules stated in this section might be applied outside the parameters of this Act,
17 especially where a limited liability company is involved in a transaction with another party. For
18 example, in a dispute between a limited liability company and its bank, the bank might assert
19 that subsection (f) determines whether notice delivered to a receptionist is notice to the limited
20 liability company.
21

22 The Drafting Committee decided to insert the following provision at the beginning of the
23 section: "The rules stated in this section apply only for the purposes of this [act]." However, the
24 liaison from the Committee on Style strenuously objected to that addition, remarking
25 "Unnecessary and confusing. Numerous uniform acts have this section, but none have felt a
26 need to add such a provision." The Chair of the Drafting Committee decided, at least
27 temporarily, to accede to view of the Style Committee liaison. The Drafting Committee will
28 likely re-visit this section.
29

30 **SECTION 104. NATURE, PURPOSE, AND DURATION OF ENTITY.**

31 (a) A limited liability company is an entity distinct from its members.

32 (b) A limited liability company may have any lawful purpose, regardless of
33 whether for profit.

34 (c) A limited liability company has perpetual duration.

Reporters' Notes

Subsection (b) – This language states more directly what is the substance of the current uniform act. ULLCA § 112(a) provides that a limited liability company may be organized for any “lawful” purpose but contains two vestiges of a “business purpose” approach. The Section’s caption refers to “Nature of Business,” and subsection (a) is expressly subject to “any law of this State governing or regulating business.” The phrase “any lawful purpose” encompasses activities not intended to produce a profit, but ULLCA § 112(a) does not include the phrase “whether or not for profit.” (However, ULLCA § 101(3) defines “Business” as including “every trade, occupation, profession, and other lawful purpose, whether or not carried on for profit.”)

Most states permit a limited liability company to be organized for any “lawful purpose” but do not include the phrase “whether or not for profit.” A few states combine the expansive “lawful purpose” language with that further clarifying phrase. *See, e.g.*, 6 Del. C. § 18-106, K.S.A. § 17-7668, 18 Okl. St. §2002, and W. Va. Code § 31B-1-112. Some states impose a “lawful business” requirement. *See, e.g.*, Cal. Corp Code § 17002, C.R.S § 7-80-103, or refer to any business purpose subject to other law. *See e.g.*, Minn. Stat. § 322B.10, N.D. Cent. Code, § 10-32-04, and Tex. Rev. Civ. Stat. art. 1528n 2.01A . (The MBCA takes the “lawful business” approach. *See* MBCA § 3.01(a).)

The expansive approach is the modern trend for LLC statutes and comports with the Conference’s most recently-adopted business entity statute. ULPA (2001) § 104(b) follows ULLCA § 112(a) and allows a limited partnership to be organized for any “lawful” purpose. It is thus possible to have a limited partnership that has no “for profit” purpose. *Compare* UPA § 6 (defining a general partnership as organized for profit), RUPA § 101(6) (same), and RULPA (1976/85) § 106 (delineating the “Nature of [a limited partnership’s] Business” by linking back to “any business that a partnership without limited partners may carry on”).

The subsection does not bar a limited liability company from being organized to carry on charitable activities, and this act does not include any protective provisions pertaining to charitable purposes. Those protections must be (and typically are) found in other law, although sometimes that “other law” appears within a state’s non-profit corporation statute. *See, e.g.*, Minn. Stat. § 317A.811 (providing restrictions on charitable organizations that seek to “dissolve, merge, or consolidate, or to transfer all or substantially all of their assets” but imposing those restrictions only “corporations,” which are elsewhere defined as corporations incorporated under the non-profit corporation act). A comment will identify this issue, and perhaps a legislative note will suggest the need to assure that such other law refers not only to corporations but also to limited liability companies.

Subsection (c) – In this context, the word “perpetual” is a misnomer, albeit one commonplace in LLC statutes. Like all current LLC acts, this act provides several avenues to avoid perpetuity: a term specified in the operating agreement or articles; an event specified in the operating agreement or articles; member consent. *See* Section 701 (events causing dissolution). There are other formulations possible, but the Drafting Committee has chosen to use the most common terminology, rather than the most technically precise.

1 Because a private document (the operating agreement) can vary this subsection, the
2 public record pertaining to a limited liability company will not necessarily reveal whether the
3 limited liability company actually has a perpetual duration. *Accord* ULPA (2001) § 103,
4 comment to subsection (c) (“The partnership agreement has the power to vary this subsection
5 [which provides for perpetual duration], either by stating a definite term or by specifying an
6 event or events which cause dissolution. . . . [The limited partnership act] also recognizes
7 several other occurrences that cause dissolution. Thus, the public record pertaining to a limited
8 partnership will not necessarily reveal whether the limited partnership actually has a perpetual
9 duration.”)
10

11 **SECTION 105. POWERS.** A limited liability company has the capacity to sue and be
12 sued in its own name and the power to do all things necessary or convenient to carry on its
13 activities.

14 **Reporters’ Notes**

15 Following ULPA (2001), this Draft omits as unnecessary any detailed list of specific
16 powers. Compare ULLCA § 112, which contains such a list.
17

18 The capacity to be sued is mentioned specifically so that Section 110(b) can prohibit the
19 operating agreement from varying that capacity. The April 2004 version mentioned specifically
20 the power to maintain an action against a member to establish that the limited liability company
21 itself has standing to enforce the operating agreement. In this draft, that point is made instead in
22 Section 110 (concerning the operating agreement). In any event, the limited liability company’s
23 standing to enforce the operating agreement is subject to change in the operating agreement.
24

25 Query whether an LLC should have the power to create series within it. *See e.g.* Del.
26 Code Ann. tit. 6, § 18-215.
27

28 **SECTION 106. GOVERNING LAW.** The law of this state governs:

- 29 (1) an operating agreement;
30 (2) relations among the members as members;
31 (3) relations between the limited liability company and a member as a member;
32 (4) relations between a manager-managed limited liability company and a
33 manager;

1 (5) relations between a manager of a manager-managed limited liability company
2 and the members as members;

3 (6) the liability of a member as member for an obligation of the limited liability
4 company; and

5 (7) the liability of a manager as manager for an obligation of a manager-managed
6 limited liability company.

7 **Reporters' Notes**

8 As discussed at length in the April 2004 meeting, the only complexity here is that a
9 contract between an LLC and a non-member manager should be able to choose the applicable
10 law that pertains to matters that do not affect the manager's duties as manager under this Act.
11 that the Act's *inter se* reach (whatever that may be) is subject to the operating agreement.
12

13 **SECTION 107. SUPPLEMENTAL PRINCIPLES OF LAW.** Unless displaced by
14 particular provisions of this [act], the principles of law and equity supplement this [act].

15 **SECTION 108. NAME.**

16 (a) The name of a limited liability company must contain "limited liability
17 company" or "limited company" or the abbreviation "L.L.C.", "LLC", "L.C.", or "LC".
18 "Limited" may be abbreviated as "Ltd.", and "company" may be abbreviated as "Co".

19 [(b) Unless authorized by subsection (c), the name of a limited liability company
20 must be distinguishable in the records of the [Secretary of State] from:

21 (1) the name of each person, other than an individual, incorporated,
22 organized, or authorized to transact business in this state; and

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

25 (c) A limited liability company may apply to the [Secretary of State] for

1 authorization to use a name that does not comply with subsection (b). The [Secretary of State]
2 shall authorize use of the name applied for if, as to each conflicting name:

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

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

10 (d) Subject to Section 805, this section applies to any foreign limited liability
11 company transacting business in this state, having a certificate of authority to transact business in
12 this state, or applying for a certificate of authority.]

13 **Reporters' Notes**

14
15 Subsection (a) is taken verbatim from ULLCA § 105(a). The rest of the section is taken
16 from ULPA (2001) § 108, which reflects the Conference's latest reworking of such provisions.
17 At its April 2004 meeting, the Drafting Committee decided to bracket subsections (b) through
18 (d), in recognition of the fact that in many jurisdictions this type of provision is routinely revised
19 to fit the jurisdiction's standard approach to such matters.
20

21 **[SECTION 109. RESERVATION OF NAME.**

22 (a) The exclusive right to the use of a name that complies with Section 108 may
23 be reserved by:

24 (1) a person intending to form a limited liability company under this [act]
25 and to adopt the name;

26 (2) a limited liability company or a foreign limited liability company

1 authorized to transact business in this state intending to adopt the name;

2 (3) a foreign limited liability company intending to obtain a certificate of
3 authority to transact business in this state and adopt the name;

4 (4) a person intending to form a foreign limited liability company and
5 intending to have it obtain a certificate of authority to transact business in this state and adopt the
6 name;

7 (5) a foreign limited liability company formed under the name; or

8 (6) a foreign limited liability company formed under a name that does not
9 comply with Section 108(b), but the name reserved under this paragraph may differ from the
10 foreign limited liability company's name only to the extent necessary to comply with Section
11 108(b).

12 (b) A person may apply to reserve a name under subsection (a) by delivering to
13 the [Secretary of State] for filing an application that states the name to be reserved and the
14 paragraph of subsection (a) which applies. If the [Secretary of State] finds that the name is
15 available for use by the applicant, the [Secretary of State] shall file a statement of name
16 reservation and thereby reserve the name for the exclusive use of the applicant for 120 days.

17 (c) An applicant that has reserved a name pursuant to subsection (b) may reserve
18 the same name for additional 120-day periods. A person having a current reservation for a name
19 may not apply for another 120-day period for the same name until 90 days have elapsed in the
20 current reservation.

21 (d) A person that has reserved a name under this section may deliver to the
22 [Secretary of State] for filing a notice of transfer that states the reserved name, the name and
23 street and mailing address of some other person to which the reservation is to be transferred, and

1 the paragraph of subsection (a) which applies to the other person. Subject to Section 206(c), the
2 transfer is effective when the [Secretary of State] files the notice of transfer.]

3 **Reporters' Notes**

4
5 This section is bracketed for the reason stated in the Reporters' Notes to Section 108.
6

7 **SECTION 110. EFFECT OF OPERATING AGREEMENT; NONWAIVABLE** 8 **PROVISIONS.**

9 (a) A limited liability company may have an operating agreement, which may be
10 oral, in a record, or implied, or in any combination thereof. An operating agreement is
11 enforceable whether or not there is a writing signed or record authenticated by a party against
12 which enforcement is sought, even if the provision is not capable of performance within one year
13 of its making.

14 (b) An operating agreement and any amendment to an operating agreement must
15 be consented to by each member. A person that becomes a member in a limited liability
16 company is bound by any operating agreement then in effect. Whether or not a limited liability
17 company has itself manifested assent to the operating agreement, the limited liability company is
18 bound by and may enforce the operating agreement.

19 (c) A limited liability company with one member may have an operating
20 agreement. A sole member may make an operating agreement in any manner the member
21 desires, including by signing a record stating the terms of the agreement and that the agreement
22 is the limited liability company's operating agreement.

23 (d) To the extent an operating agreement does not otherwise provide, this [act]
24 governs the limited liability company, its activities, and the relations among the limited liability

1 company, its members and any managers.

2 (e) This [act] must be applied to give maximum effect to the principle of freedom
3 of contract and to the enforceability of operating agreements. However, an operating agreement
4 may not:

5 (1) vary a limited liability company's capacity under Section 105 to sue
6 and be sued in its own name;

7 (2) vary the law applicable under Section 106, but an agreement between a
8 limited liability company and a manager who is not also a member may select, consistent with
9 otherwise applicable choice of law rules, a different law to govern any term of that agreement
10 which does not address a matter governed by this [act];

11 (3) vary the requirements of Section 204;

12 (4) **[duty of loyalty waiver limitation; reserved until the Drafting**
13 **Committee has made a firmer decision concerning the contents of that duty];**

14 (5) **[duty of care waiver limitation; reserved until the Drafting**
15 **Committee has made a firmer decision concerning the contents of that duty – will permit**
16 **the operating agreement to eliminate money damage liability for duty of care breach];**

17 (6) eliminate the obligation of good faith and fair dealing under Sections
18 409 and 410, but the operating agreement may prescribe the standards by which the performance
19 of the obligation is to be measured, if the standards are not manifestly unreasonably;

20 (7) vary the power of a court to decree dissolution in the circumstances
21 specified in section 701(a)(5);

22 (8) vary the requirement to wind up the limited liability company's
23 business as specified in Section 702;

1 (9) unreasonably restrict the right to maintain an action under [Article] 9;

2 (10) **[reserved pending META for a provision prohibiting waiver of a**
3 **member’s protection against “interest holder liability”] or**

4 (11) restrict the rights under this [act] of a person other than a member or
5 transferee.

6 **Reporters’ Notes**

7 **Still pending issues** -- whether a non-member may be a party to the operating
8 agreement; e.g., a non-member manager, a non-member lender; whether (and, if so, how) an
9 operating agreement can bind a non-manager member who is not a party to the agreement.

10
11 **Subsection (a)** – The second sentence is included in response to an issue raised by the
12 President of the Conference. The language comes from UCC § 8-113.
13

14 **SECTION 111. REQUIRED INFORMATION.** A limited liability company shall
15 maintain at its designated office the following information:

16 (1) a copy of the initial articles of organization and all amendments to and
17 restatements of the articles and signed copies of any powers of attorney under which any articles,
18 amendment, or restatement has been signed;

19 (2) a copy of the three most recent annual reports delivered by the limited liability
20 company to the [Secretary of State] pursuant to Section 210; and

21 (3) a copy of any federal, state, and local income tax returns and reports of the
22 limited liability company for the three most recent years, except for any year in which the
23 limited liability company has only one member.

24 **Reporters’ Notes**

25 The Drafting Committee has not yet discussed whether to include any required
26 information provision. This Draft takes a minimalist approach, requiring retention only of
27 records whose existence is required either by this Act (articles of organization; annual reports) or

1 tax law (tax returns). Even this minimalist approach raises the question of who is responsible for
2 maintaining the records in a member-managed LLC. Query whether this section should be
3 limited to manager-managed LLCs.
4

5 This Section could be expanded to required retention of other information that happens to
6 exist in record form. That is, the Act could say, in essence, “You don’t have to have this
7 information in record form, but if you do, you must maintain a copy at your designated office.”
8 could the Drafting Committee will likely consider whether any of the following items should be
9 included in an expanded provision on required information:
10

- 11 • a current list showing the full name and last known street and mailing address of each
12 member in alphabetical order,
- 13 • a copy of any operating agreement made in a record and any amendment made in a
14 record to any operating agreement;
- 15 • a copy of any financial statement of the limited liability company for the three most
16 recent years;
- 17 • a copy of any record made by the limited liability company during the past three years of
18 any consent given by or vote taken of any member pursuant to this [act] or the operating
19 agreement; and
- 20 • any record stating:
 - 21 • the amount of cash, and a description and statement of the agreed value of the
22 other benefits, contributed and agreed to be contributed by each member;
 - 23 • the times at which, or events on the happening of which, any additional
24 contributions agreed to be made by each member are to be made;
 - 25 • any events upon the happening of which the limited liability company is to be
26 dissolved and its activities wound up.

27
28 (This list is drawn from ULPA (2001), § 111.
29

30 Following the April 2004 meeting of the Drafting Committee, the co-reporters added
31 language to paragraph (3) to exclude tax records for a single member LLC. Such LLCs are
32 typically “disregarded” for federal and state income tax purposes and, before the revision,
33 paragraph (3) could have been read to allow “later acquired” members to demand copies of the
34 tax records of the formerly sole member. E.g., In year 1, Miller, Inc. (“Miller”) is the sole
35 member of Conference, LLC (“Conference”). The economic activity of Conference appears as
36 part of Miller’s tax returns. In year 2, Miller uses Conference as joint venture vehicle with
37 Swibel, Ltd. (“Swibel”). Swibel becomes a second member of Conference. Swibel should not
38 have the statutory right to demand access to those portions of Miller’s year 1 tax records which
39 pertain to Conference. That information would be inextricably related to (or subsumed into)
40 other information about Miller.
41

42 **SECTION 112. BUSINESS TRANSACTIONS OF MEMBER WITH LIMITED**
43 **LIABILITY COMPANY.** A member may lend money to and transact other business with the

1 limited liability company and has the same rights and obligations with respect to the loan or
2 other transaction as a person that is not a member.

3 **Reporters' Notes**

4
5 At the suggestion of the ABA Advisor, the Comment to ULPA (2001), § 112 is
6 replicated here with appropriate changes:

7
8 This section has no impact on a member's duty under Section [TBD] (duty of loyalty
9 includes refraining from acting as or for an adverse party) and means rather that this Act does
10 not discriminate against a creditor of a limited liability company that happens also to be a
11 member. *See, e.g., BT-I v. Equitable Life Assurance Society of the United States*, 75 Cal.App.4th
12 1406, 1415, 89 Cal.Rptr.2d 811, 814 (Cal.App. 4 Dist.1999). and *SEC v. DuPont, Homsey &*
13 *Co.*, 204 F. Supp. 944, 946 (D. Mass. 1962), vacated and remanded on other grounds, 334 F2d
14 704 (1st Cir. 1964). This section does not, however, override other law, such as fraudulent
15 transfer or conveyance acts.
16

17 **SECTION 113. OFFICE AND AGENT FOR SERVICE OF PROCESS.**

18 (a) A limited liability company shall designate and continuously maintain in this
19 state:

20 (1) an office, which need not be a place of its activity in this state; and

21 (2) an agent for service of process.

22 (b) A foreign limited liability company shall designate and continuously maintain
23 in this state an agent for service of process.

24 (c) An agent for service of process of a limited liability company or foreign
25 limited liability company must be an individual who is a resident of this state or other person
26 authorized to do business in this state.

27 **Reporters' Notes**

28 Source: ULPA (2001), § 114.
29
30

31 **SECTION 114. CHANGE OF DESIGNATED OFFICE OR AGENT FOR**

1 **SERVICE OF PROCESS.**

2 (a) A limited liability company or foreign limited liability company may change
3 its designated office, agent for service of process, or the address of its agent for service of
4 process by delivering to the [Secretary of State] for filing a statement of change containing:

5 (1) the name of the limited liability company or foreign limited liability
6 company;

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

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

10 (4) the name and street and mailing address of its current agent for service
11 of process; and

12 (5) if the current agent for service of process or an address of the agent is
13 to be changed, the new information.

14 (b) Subject to Section 206(c), a statement of change is effective when filed by the
15 [Secretary of State].

16 **Reporters' Notes**

17 **Source** – ULPA (2001) § 115, which is based on ULLCA § 109.

18
19 **Subsection (a)** – This Draft uses “may” rather than “shall” here because other avenues
20 exist. A limited liability company may also change the information by an amendment to its
21 articles of organization, Section 202, or through its annual report. Section 210(e). A foreign
22 limited liability company may use its annual report. Section 210(e). However, neither a limited
23 liability company nor a foreign limited liability company may wait for the annual report if the
24 information described in the public record becomes inaccurate. See Sections 208 (imposing
25 liability for false information in record) and 117(b) (providing for substitute service).
26

27 **SECTION 115. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.**

1 (a) In order to resign as an agent for service of process of a limited liability
2 company or foreign limited liability company, the agent shall deliver to the [Secretary of State]
3 for filing a statement of resignation containing the name of the limited liability company or
4 foreign limited liability company.

5 (b) After receiving a statement of resignation, the [Secretary of State] shall file it
6 and mail a copy to the designated office of the limited liability company or foreign limited
7 liability company and another copy to the principal office if the address of the office appears in
8 the records of the [Secretary of State] and is different from the address of the designated office.

9 (c) An agency for service of process terminates on the 31st day after the
10 [Secretary of State] files the statement of resignation.

11 **Reporters' Notes**

12 **Source** – ULPA (2001) § 116, which is based on ULLCA §110.
13

14 **SECTION 116. SERVICE OF PROCESS.**

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

19 (b) If a limited liability company or foreign limited liability company does not
20 appoint or maintain an agent for service of process in this state or the agent for service of process
21 cannot with reasonable diligence be found at the agent's address, the [Secretary of State] is an
22 agent of the limited liability company or foreign limited liability company upon whom process,
23 notice, or demand may be served.

1 (c) Service of any process, notice, or demand on the [Secretary of State] may be
2 made by delivering to and leaving with the [Secretary of State] duplicate copies of the process,
3 notice, or demand. If a process, notice, or demand is served on the [Secretary of State], the
4 [Secretary of State] shall forward one of the copies by registered or certified mail, return receipt
5 requested, to the limited liability company or foreign limited liability company at its designated
6 office.

7 (d) Service is effected under subsection (c) at the earliest of:

8 (1) the date the limited liability company or foreign limited liability
9 company receives the process, notice, or demand;

10 (2) the date shown on the return receipt, if signed on behalf of the limited
11 liability company or foreign limited liability company; or

12 (3) five days after the process, notice, or demand is deposited in the mail,
13 if mailed correctly addressed and with postage prepaid.

14 (e) The [Secretary of State] shall keep a record of each process, notice, and
15 demand served pursuant to this section and record the time of, and the action taken regarding,
16 the service.

17 (f) This section does not affect the right to serve process, notice, or demand in
18 any other manner provided by law.

19 **Reporters' Notes**

20 **Source** – ULPA (2001) § 117, which is based on ULLCA §111.

1 [ARTICLE] 2

2 FORMATION; ARTICLES OF ORGANIZATION AND OTHER FILINGS

3
4 SECTION 201. FORMATION OF LIMITED LIABILITY COMPANY;
5 ARTICLES OF ORGANIZATION.

6 (a) One or more persons may sign and deliver to the [Secretary of State] for
7 filing articles of organization, which must state:

8 (1) the name of the limited liability company, which must comply with
9 Section 108;

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

12 (3) whether the limited liability company is member-managed or
13 manager-managed.

14 (b) Articles of organization may also contain matters other than those required by
15 subsection (a) but may not vary or otherwise affect the provisions specified in Section 110(b) in
16 a manner inconsistent with that section.

17 (c) A limited liability company is formed when the [Secretary of State] files the
18 articles of organization, unless the articles state a delayed effective date pursuant to Section
19 206(c). If the articles state a delayed effective date, a limited liability company is not formed if,
20 before the articles take effect, the person who signed the articles signs and delivers to the
21 [Secretary of State] for filing a statement of cancellation.

22 (d) Subject to subsection (b), if any provision of an operating agreement is
23 inconsistent with the filed and effective articles of organization or with a filed and effective

1 statement of authority, termination, or change, or filed articles of domestication, conversion, or
2 merger:

3 (1) the operating agreement prevails as to members and transferees; and

4 (2) the filed and effective articles or statement prevail as to persons, other
5 than members and transferees, that reasonably rely to their detriment on the filed and effective
6 record.

7 **Reporters' Notes**

8 **Subsection (a)(3)** – As drafted, this provision does not reflect a default rule. That is, a
9 person seeking to form a limited liability company must make an affirmative choice between
10 member-management and manager-management. The articles will be rejected as non-
11 conforming unless they specify the choice. Query whether this approach is appropriate, given
12 that LLC statutes (including ULLCA) typically default to member-management.
13

14 **Subsection (c)** – The second sentence is new, suggested by either a member of or advisor
15 to the Drafting Committee at the most recent meeting.
16

17 **Subsection (d)** – Source: ULLCA Section 203(c), which is also followed in ULPA
18 (2001) § 201(d). The following three paragraphs are from the comment to ULPA (2001) §
19 201(d), revised to refer to a limited liability company.
20

21 A limited liability company is a creature of contract as well as a creature of statute. It
22 will be possible, albeit improper, for the operating agreement to be inconsistent with the articles
23 of organization or other specified public filings relating to the limited liability company. For
24 those circumstances, this subsection provides the rule for determining which source of
25 information prevails.
26

27 For members and transferees, the operating agreement is paramount. For third parties
28 seeking to invoke the public record, actual knowledge of that record is necessary and notice
29 under Section 103(c) or (d) is irrelevant. A third party wishing to enforce the public record over
30 the operating agreement must show reasonable reliance on the public record, and reliance
31 presupposes knowledge.
32

33 This subsection does not expressly cover a situation in which (i) one of the specified filed
34 records contains information in addition to, but not inconsistent with, the operating agreement,
35 and (ii) a person, other than a member or transferee, detrimentally relies on the additional
36 information. However, the policy reflected in this subsection seems equally applicable to that
37 situation.
38

1 Query whether the lead-in to this section could be streamlined by replacing the list of
2 publicly-filed records with the phrase “the filed and effective articles of organization or any
3 other record delivered by the limited liability company to [Secretary of State] for filing and
4 effective under this under this [act]”? Or streamlined either further by also eliminating the
5 specific reference to articles of organization? In any event, the lead-in will be revised to reflect
6 META. The subsection might, therefore, read as follows:
7

8 Subject to subsection (b), if any provision of an operating agreement is
9 inconsistent with ~~the filed and effective articles of organization or with a filed and~~
10 ~~effective statement of authority, termination, or change, or filed articles of~~
11 ~~domestication, conversion, or merger~~ a record delivered by the limited liability
12 company to the [Secretary of State] for filing and effective under this [act] or a
13 record filed and effective under [META]:

- 14 (1) the operating agreement prevails as to members and transferees; and
15 (2) the ~~filed and effective articles or statement~~ record prevails as to
16 persons, other than members and transferees, that reasonably rely to their
17 detriment on the ~~filed and effective~~ record.
18

19 Or as follows:
20

21 Subject to subsection (b), if a record delivered by the limited liability company to
22 the [Secretary of State] for filing and effective under this [act] or a record filed
23 and effective under [META] is inconsistent with a any provision of an operating
24 agreement is ~~inconsistent with the filed and effective articles of organization or~~
25 ~~with a filed and effective statement of authority, termination, or change, or filed~~
26 ~~articles of domestication, conversion, or merger:~~

- 27 (1) the operating agreement prevails as to members and transferees; and
28 (2) the ~~filed and effective articles or statement~~ record prevails as to
29 persons, other than members and transferees, that reasonably rely to their
30 detriment on the ~~filed and effective~~ record.
31

32 Note – both the current language and the contemplated revisions exclude records filed by others.
33 Also, once the Drafting Committee has finalized the list of records that may be filed by a limited
34 liability company, the language of this subsection must be cross-checked against that list.
35

36 **SECTION 202. AMENDMENT OR RESTATEMENT OF ARTICLES OR**
37 **ORGANIZATION.**

38 (a) In order to amend its articles of organization, a limited liability company shall
39 deliver to the [Secretary of State] for filing an amendment stating:

- 40 (1) the name of the limited liability company;

1 (2) the date of filing of its articles of organization; and

2 (3) the changes the amendment makes to the articles as most recently
3 amended or restated.

4 (b) Articles of organization may be amended or restated at any time as
5 determined by the limited liability company.

6 (c) Restated articles of organization may be delivered to the [Secretary of State]
7 for filing in the same manner as an amendment. Restated articles of organization must be
8 designated as such in the heading and state in the heading or in an introductory paragraph the
9 limited liability company's present name and, if it has been changed, all of its former names and
10 the date of the filing of its initial articles of organization.

11 (d) Subject to Section 206(c), an amendment to or restatement of articles of
12 organization is effective when filed by the [Secretary of State].

13 (e) If a member of a member-managed limited liability company, or a manager of
14 a manager-managed limited liability company, knows that any information in filed articles of
15 organization was false when the articles were filed or has become false owing to changed
16 circumstances, the member or manager shall promptly:

17 (1) cause the certificate to be amended; or

18 (2) if appropriate, deliver to the [Secretary of State] for filing a statement
19 of change pursuant to Section 114 or a statement of correction pursuant to Section 207.

20 **Reporters' Notes**

21 **Subsection (b)** – At the April 2004 meeting, the Drafting Committee asked for more
22 explanation about restated articles. In response, this subsection expressly authorizes restating
23 the articles.

24 **Subsection (c)** – For the reason stated in the Notes to subsection (b), this draft includes
25

1 an additional sentence (the second), which is taken verbatim from ULLCA. Query whether any
2 name change should trigger the requirement for additional information or only a name change
3 being made by the restatement itself. (The purpose of the additional information appears to be to
4 facilitate tracking back through the Secretary of State’s database.)
5

6 **Subsection (e)** – This subsection is taken from ULPA (2001) § 202(c), which imposes
7 the responsibility on general partners. ULLCA has no comparable provision. This provision
8 imposes an obligation directly on the members and managers rather than on the limited liability
9 company. A member or manager’s failure to meet this responsibility exposes the member or
10 manager to liability to third parties under Section 208(a)(2) and might constitute a breach of the
11 member or manager’s operational duties under Section 409(a)(2). In addition, an aggrieved
12 person may seek a remedy under Section 205 (Signing and Filing Pursuant to Judicial Order).
13

14 **SECTION 203. STATEMENT OF TERMINATION.** A dissolved limited liability
15 company that has completed winding up may deliver to the [Secretary of State] for filing a
16 statement of termination that states:

- 17 (1) the name of the limited liability company;
- 18 (2) the date of filing of its initial articles of organization; and
- 19 (3) any other information as determined by the limited liability company.

20 **Reporters’ Notes**

21
22 This section is permissive and perhaps belongs in Article 7. Indeed, at the April 2004
23 meeting, a commissioner suggested relocating this section to that Article. However, that
24 relocation would put this Act out of synch with the Conference’s most recent enactment in the
25 area (ULPA (2001)) – not only here but, as a result of renumbering, throughout the rest of
26 Article 2. (The Drafting Committee liaison from the Committee on Style agrees that this section
27 should be relocated to Article 7.)
28

29 **SECTION 204. SIGNING OF RECORDS.**

30 (a) Records delivered to the [Secretary of State] for filing pursuant to this [act]
31 must be signed in the following manner:

- 32 (1) Initial articles of organization must be signed by at least one person
- 33 (2) A statement of cancellation under Section 201(c) must be signed by

1 each person that signed the initial articles of organization.

2 (3) Except as otherwise provided in paragraph (a)(4), a record signed on
3 behalf of an existing limited liability company must be signed by:

4 (A) at least one member, if the limited liability company is
5 member-managed; or

6 (B) at least one manager, if the limited liability company is
7 manager-managed.

8 (4) A record filed on behalf of a dissolved limited liability company that
9 has no members must be signed either by the person winding up the limited liability company's
10 activities under Section 702(b) or a person appointed under Section 702(c) to wind up those
11 activities.

12 (5) A statement of denial by a person under Section 303(a) must be signed
13 by that person.

14 (6) Any other record must be signed by the person on whose behalf the
15 record is delivered to the [Secretary of State].

16 (b) Any record to be filed under this [act] may be signed by an authorized agent.

17 **Reporters' Notes**

18
19 This Draft uses "authorized agent" rather than "attorney in fact," because the latter usage
20 seems needlessly recondite.

21
22 **Subsection (a)** – Query whether subsection (a)(3) and (7) suffice to indicate that a
23 statement of dissociation, Section 604, must be signed either by the dissociated member or the
24 limited liability company, depending on who is delivering the document to the Secretary of State
25 for filing.

26
27 **Subsection (a)(2)** – Query whether necessary to revise to accommodate situations when
28 one of the original signers has ceased to exist or lacks capacity?
29

1 **SECTION 205. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER.**

2 (a) If a person required by this [act] to sign a record or deliver a record to the
3 [Secretary of State] for filing does not do so, any other person that is aggrieved may petition the
4 [appropriate court] to order:

5 (1) the person to sign the record;

6 (2) the person to deliver the record to the [Secretary of State] for filing; or

7 (3) the [Secretary of State] to file the record unsigned.

8 (b) If the person aggrieved under subsection (a) is not the limited liability
9 company or foreign limited liability company to which the record pertains, the person shall make
10 the limited liability company or foreign limited liability company a party to the action.

11 (c) A person aggrieved under subsection (a) may pursue the remedies provided in
12 subsection (a) in the same action in combination or in the alternative.

13 (d) A record that is filed pursuant to this section is effective even if it has not
14 been signed.

15 **Reporters' Notes**

16 **Source** – ULPA (2001) § 205, which is based on RULPA § 205, which was the source of
17 ULLCA § 210.

18
19 At the April 2004 meeting of the Drafting Committee, at least two people suggested that
20 this Section might be unnecessary, given the existence of F.R.Civ. P. 70. That rule states:

21
22 If a judgment directs a party to execute a conveyance of land or to deliver deeds
23 or other documents or to perform any other specific act and the party fails to
24 comply within the time specified, the court may direct the act to be done at the
25 cost of the disobedient party by some other person appointed by the court and the
26 act when so done has like effect as if done by the party. On application of the
27 party entitled to performance, the clerk shall issue a writ of attachment or
28 sequestration against the property of the disobedient party to compel obedience to
29 the judgment. The court may also in proper cases adjudge the party in contempt.
30 If real or personal property is within the district, the court in lieu of directing a

1 conveyance thereof may enter a judgment divesting the title of any party and
2 vesting it in others and such judgment has the effect of a conveyance executed in
3 due form of law. When any order or judgment is for the delivery of possession,
4 the party in whose favor it is entered is entitled to a writ of execution or
5 assistance upon application to the clerk.
6

7 For several reasons, the co-reporters believe that the present Section should be retained.
8 (1) F.R.Civ. P. 70 requires a judgment as a predicate and therefore seems to grant a power
9 ancillary to some other already contested matter. The present Section addresses situations in
10 which the failure to sign *is* the contested matter. (2) Due to the rules of diversity jurisdiction,
11 federal courts will rarely have jurisdiction over a case involving as parties an LLC and any of its
12 members. (3) There is no assurance that in each state, the District of Columbia and each U.S.
13 territory, local law includes a provision comparable to F.R.Civ. P. 70. (4) Language similar to
14 the present Section appears in RULPA, ULLCA and ULPA (2001).
15

16 **SECTION 206. DELIVERY TO AND FILING OF RECORDS BY [SECRETARY**
17 **OF STATE]; EFFECTIVE TIME AND DATE.**

18 (a) A record authorized or required to be delivered to the [Secretary of State] for
19 filing under this [act] must be captioned to describe the record's purpose, be in a medium
20 permitted by the [Secretary of State], and be delivered to the [Secretary of State]. If all filing
21 fees have been paid, unless the [Secretary of State] determines that a record does not comply
22 with the filing requirements of this [act], the [Secretary of State] shall file the record and:

23 (1) for a statement of denial, send a copy of the filed statement and a
24 receipt for the fees to the person on whose behalf the statement was delivered for filing and to
25 the limited liability company;

26 (2) for all other records, send a copy of the filed record and a receipt for
27 the fees to the person on whose behalf the record was filed.

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

30 (c) Except as otherwise provided in Sections 115 and 207, a record delivered to

1 the [Secretary of State] for filing under this [act] may specify an effective time and a delayed
2 effective date. Subject to Sections 115, 201(c), and 207, a record filed by the [Secretary of
3 State] is effective:

4 (1) if the record does not specify an effective time and does not specify a
5 delayed effective date, on the date and at the time the record is filed as evidenced by the
6 [Secretary of State's] endorsement of the date and time on the record;

7 (2) if the record specifies an effective time but not a delayed effective
8 date, on the date the record is filed at the time specified in the record;

9 (3) if the record specifies a delayed effective date but not an effective
10 time, at 12:01 a.m. on the earlier of:

11 (A) the specified date; or

12 (B) the 90th day after the record is filed; or

13 (4) if the record specifies an effective time and a delayed effective date, at
14 the specified time on the earlier of:

15 (A) the specified date; or

16 (B) the 90th day after the record is filed.

17 **Reporters' Notes**

18 **Source** – ULPA (2001) § 206, which was based on ULLCA §206.
19

20 **Subsection (c)** – If a person delivers to the Secretary of State for filing a record that
21 contains an over-long delay in the effective date, the Secretary of State (i) will not reject the
22 record and (ii) is neither required nor authorized to inform the person that this act will truncate
23 the delay.
24

25 **SECTION 207. CORRECTING FILED RECORD.**

26 (a) A limited liability company or foreign limited liability company may deliver

1 to the [Secretary of State] for filing a statement of correction to correct a record previously
2 delivered by the limited liability company or foreign limited liability company to the [Secretary
3 of State] and filed by the [Secretary of State], if at the time of filing the record contained false or
4 erroneous information or was defectively signed.

5 (b) A statement of correction may not state a delayed effective date and must:

6 (1) describe the record to be corrected, including its filing date, or attach a
7 copy of the record as filed;

8 (2) specify the incorrect information and the reason it is incorrect or the
9 manner in which the signing was defective; and

10 (3) correct the incorrect information or defective signature.

11 (c) When filed by the [Secretary of State], a statement of correction is effective
12 retroactively as of the effective date of the record the statement corrects, but the statement is
13 effective when filed:

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

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

17 **Reporters' Notes**

18 **Source** – ULPA (2001) § 207, which was based on ULLCA §207.
19

20 **SECTION 208. LIABILITY FOR FALSE INFORMATION IN FILED RECORD.**

21 (a) If a record delivered to the [Secretary of State] for filing under this [act] and
22 filed by the [Secretary of State] contains false information, a person that suffers loss by reliance
23 on the information may recover damages for the loss from:

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

3 (2) a member of member-managed limited liability company, or a
4 manager of a manager-managed limited liability company, if the record was delivered for filing
5 on behalf of the limited liability company and the member or manager has notice that the
6 information was false when the record was filed or has become false because of changed
7 circumstances for a reasonably sufficient time before the information is relied upon to enable the
8 member or manager to effect an amendment under Section 202, file a petition pursuant to
9 Section 205, or deliver to the [Secretary of State] for filing a statement of change pursuant to
10 Section 114 or a statement of correction pursuant to Section 207.

11 (b) A person who signs a record authorized or required to be filed under this [act]
12 thereby affirms under the penalties of perjury that the facts stated in the record are true.

13 **Reporters' Notes**

14 Source: ULPA (2001) § 207, which expanded on ULLCA § 209.
15

16 **SECTION 209. CERTIFICATE OF EXISTENCE OR AUTHORIZATION.**

17 (a) The [Secretary of State], upon request and payment of the requisite fee, shall
18 furnish a certificate of existence for a limited liability company if the records filed in the [office
19 of the Secretary of State] show that the [Secretary of State] has filed a articles of organization
20 and has not filed a statement of termination. A certificate of existence must state:

21 (1) the limited liability company's name;

22 (2) that it was duly formed under the laws of this state and the date of
23 formation;

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

3 (4) whether the limited liability company's most recent annual report
4 required by Section 210 has been filed by the [Secretary of State];

5 (5) whether the [Secretary of State] has administratively dissolved the
6 limited liability company;

7 (6) whether the limited liability company has delivered to the [Secretary
8 of State] for filing a statement of dissolution;

9 (7) that a statement of termination has not been filed by the [Secretary of
10 State]; and

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

13 (b) The [Secretary of State], upon request and payment of the requisite fee, shall
14 furnish a certificate of authorization for a foreign limited liability company if the records filed in
15 the [office of the Secretary of State] show that the [Secretary of State] has filed a certificate of
16 authority, has not revoked the certificate of authority, and has not filed a notice of cancellation.
17 A certificate of authorization must state:

18 (1) the foreign limited liability company's name and any alternate name
19 adopted under Section 805(a) for use in this state;

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

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

23 (4) whether the foreign limited liability company's most recent annual

1 report required by Section 210 has been filed by the [Secretary of State];

2 (5) that the [Secretary of State] has not revoked its certificate of authority
3 and has not filed a notice of cancellation; and

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

6 (c) Subject to any qualification stated in the certificate, a certificate of existence
7 or certificate of authorization issued by the [Secretary of State] may be relied upon as conclusive
8 evidence that the limited liability company or foreign limited liability company is in existence or
9 is authorized to transact business in this state.

10 **Reporters' Notes**

11 **Source** – ULPA (2001) § 209, which was based on ULLCA Section 208.
12

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

14 (a) Each year a limited liability company or a foreign limited liability company
15 authorized to transact business in this state shall deliver to the [Secretary of State] for filing a
16 report that states:

17 (1) the name of the limited liability company or foreign limited liability
18 company;

19 (2) the street and mailing address of its designated office and the name
20 and street and mailing address of its agent for service of process in this state;

21 (3) in the case of a limited liability company, the street and mailing
22 address of its principal office; and

23 (4) in the case of a foreign limited liability company, the state or other

1 jurisdiction under whose law the foreign limited liability company is formed and any alternate
2 name adopted under Section 805(a).

3 (b) Information in an annual report must be current as of the date the report is
4 delivered to the [Secretary of State] for filing.

5 (c) The first annual report must be delivered to the [Secretary of State] between
6 [January 1 and April 1] of the year following the calendar year in which a limited liability
7 company was formed or a foreign limited liability company was authorized to transact business.
8 A report must be delivered to the [Secretary of State] between [January 1 and April 1] of each
9 subsequent calendar year.

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

15 (e) If a filed annual report contains an address of a designated office or the name
16 or address of an agent for service of process which differs from the information shown in the
17 records of the [Secretary of State] immediately before the filing, the differing information in the
18 annual report is considered a statement of change under Section 114.

19 **Reporters' Notes**

20 **Source** – ULPA (2001) § 210, which was based on ULLCA § 211.
21

1 [ARTICLE] 3

2 RELATIONS OF MEMBERS AND MANAGERS

3 TO PERSONS DEALING WITH LIMITED LIABILITY COMPANY

4 SECTION 301. AGENCY OF MEMBERS AND MANAGERS. Subject to the effect
5 of a statement of limited liability company authority under Section 302, the following rules
6 apply.
7

8 (1) In a member-managed limited liability company the following rules apply:

9 (A) Each member is an agent of the limited liability company for the
10 purpose of its activities, and an act of a member, including the signing of an instrument in the
11 limited liability company's name, for apparently carrying on in the ordinary course the limited
12 liability company's activities or activities of the kind carried on by the limited liability company
13 binds the limited liability company, unless the member had no authority to act for the limited
14 liability company in the particular matter and the person with which the member was dealing
15 knew or had notice that the member lacked authority.

16 (B) An act of a member which is not apparently for carrying on in the
17 ordinary course the limited liability company's activities or activities of the kind carried on by
18 the limited liability company binds the limited liability company only if the act was authorized
19 by the other members.

20 (2) In a manager-managed limited liability company the following rules apply:

21 (A) A member is not an agent of the limited liability company solely by
22 reason of being a member.

23 (B) Each manager is an agent of the limited liability company for the

1 purpose of its activities, and an act of a manager, including the signing of an instrument in the
2 limited liability company's name, for apparently carrying on in the ordinary course the limited
3 liability company's activities or activities of the kind carried on by the limited liability company
4 binds the limited liability company, unless the manager had no authority to act for the limited
5 liability company in the particular matter and the person with which the manager was dealing
6 knew or had notice that the manager lacked authority.

7 (C) An act of a manager which is not apparently for carrying on in the
8 ordinary course the limited liability company's activities or activities of the kind carried on by
9 the limited liability company binds the limited liability company only if the act was authorized
10 under Section 407.

11 **Reporters' Notes**

12 **Source** – RUPA § 301.
13

14 This section differs somewhat from ULLCA § 301, because this Draft follows RUPA in
15 providing for statements of authority. Compare Section 302 (statements of authority) with
16 ULLCA § 301(c) (providing a somewhat comparable but more limited effect for statements in
17 the articles of organization). The RUPA approach is preferable, because it allows “duplicate
18 filing” in the real estate records without the need to file the entire articles of organization in
19 those records. See Section 302(c)(2) of this Draft.
20

21 **SECTION 302. STATEMENT OF LIMITED LIABILITY COMPANY**

22 **AUTHORITY.**

23 (a) A limited liability company may deliver to the [Secretary of State] for filing a
24 statement of limited liability company authority. The statement:

25 (1) must include the name of the limited liability company and the street
26 address of its designated office;

27 (2) may state the authority, or limitations on the authority of a specific

1 person to:

2 (A) execute an instrument transferring real property held in the
3 name of the limited liability company; and

4 (B) enter into other transactions on behalf of, or otherwise act for,
5 the limited liability company; and

6 (3) may, with respect to any person holding a specified position that exists
7 in or with respect to the limited liability company, state the authority, or limitations on the
8 authority of such person to:

9 (A) execute an instrument transferring real property held in the
10 name of the limited liability company; and

11 (B) enter into other transactions on behalf of, or otherwise act for,
12 the limited liability company.

13 (b) If a filed statement of limited liability company authority is signed pursuant
14 to Section 204(a)(3) and states the name of the limited liability company but not the street
15 address of its designated office, the statement nevertheless operates with respect to a person not
16 a member as provided in subsections (c), (d) and (e).

17 (c) Except as otherwise provided in subsection (g), a filed statement of limited
18 liability company authority supplements the authority of a person specified, or a person holding
19 a position specified, in the statement to enter into transactions on behalf of the limited liability
20 company as follows:

21 (1) Except for transfers of real property, a grant of authority contained in
22 a filed statement of limited liability company authority is conclusive in favor of a person that
23 gives value without knowledge to the contrary, so long as and to the extent that a limitation on

1 that authority is not then contained in another filed statement. A filed cancellation of a
2 limitation on authority revives the previous grant of authority.

3 (2) A grant of authority to transfer real property held in the name of the
4 limited liability company contained in a certified copy of a filed statement of limited liability
5 company authority recorded in the office for recording transfers of that real property is
6 conclusive in favor of a person who gives value without knowledge to the contrary, so long as
7 and to the extent that a certified copy of a filed statement containing a limitation on that
8 authority is not then of record in the office for recording transfers of that real property. The
9 recording in the office for recording transfers of that real property of a certified copy of a filed
10 cancellation of a limitation on authority revives the previous grant of authority.

11 (d) A person that is not a member is deemed to know of a limitation on the
12 authority to transfer real property held in the name of the limited liability company, if a certified
13 copy of the filed statement containing the limitation on authority is of record in the office for
14 recording transfers of that real property.

15 (e) When effective under Section 206(c):

16 (1) a statement of dissociation or manager cessation is, for the purposes of
17 subsections (c) and (d), a limitation on the authority of the person referred to in the statement;
18 and

19 (2) subject to subsection (f), a statement of dissolution or termination
20 cancels any filed statement of authority for the purposes of subsection (c) and is a limitation on
21 authority for the purposes of subsection (d).

22 (f) After a statement of dissolution takes effect, a limited liability company may
23 deliver to the [Secretary of State] for filing and, if appropriate, may record a statement of limited

1 liability company authority that is designated as a post-dissolution statement of authority and
2 which will operate with respect to a person not a member as provided in subsections (c) and (d),
3 whether or not the transaction is appropriate for winding up the limited liability company
4 business.

5 (g) Except as otherwise provided in subsections (c), (d) and (e), a person that is
6 not a member is not deemed to know of a limitation on the authority of a person merely because
7 the limitation is contained in a filed statement.

8 (h) Unless earlier canceled, a filed statement of limited liability company
9 authority is canceled by operation of law five years after the date on which the statement, or the
10 most recent amendment, was filed with the [Secretary of State].

11 **Reporters' Notes**

12 Consistent with the instructions given by the Drafting Committee at its April 2004
13 meeting, this section and the following section mirror RUPA § 303 and 304 in both wording and
14 structure as much as possible. Changes have been made only to the extent that one or more of
15 the following rationales applies: (1) The Committee decided, at least provisionally, to try to
16 retain the concept of delineating authority by position, as reflected in the April 2004 draft. (2)
17 Regardless of the eventual fate of that provisional decision, a statement of authority for a
18 manager-managed LLC will be able to refer to managers. (3) There is no reason to require a
19 statement of limited liability company authority to disclose the identity of the LLC's members.
20 (4) Following ULPA (2001), ULLCA II has centralized its constructive notice provisions.
21 Consonant with that decision, the diffuse "deemed" cancellation and limitation provisions of
22 RUPA §§ 704 and 805 are relocated into this provision.

23
24 **Subsection (a)** – It might be possible to combine paragraphs (2) and (3). However,
25 paragraph (3) contains a novel provision that the Drafting Committee has only provisionally
26 accepted. This Draft uses separate paragraphs to focus attention on the contents of paragraph
27 (3). Also, a more elegant and straightforward way might exist to express the rule stated in
28 paragraph (3), but at least initially the Drafting Committee had decided to follow as closely as
29 possible both the wording and structure of RUPA § 302.

30
31 **Subsection (a)(3)** – This language permits a statement to designate authority by position
32 (or office) rather than by specific person. (Subsection (a)(2) covers the latter type of
33 designation.)
34

1 (1) apply to each manager of the limited liability company which is a
2 member; and

3 (2) do not apply to a member in the member's capacity as a member.

4 **Reporters' Notes**

5
6 This section follows the paradigm of RUPA § 305, which combined UPA §§ 13 and 14
7 into a single section. ULLCA § 302 contains no parallel to RUPA § 305(b). That omission is
8 reversed here, in subsection (b).
9

10 RUPA § 305 contains a confusing use of the word authority, which was carried forward
11 in ULPA (2001) § 403. The following Comment to that section explains the usage issue:
12

13 **Comment [to ULPA (2001) § 403]**

14
15 Source: RUPA Section 305. For the meaning of "authority" in
16 subsections (a) and (b), see RUPA Section 305, Comment. The third-to-last
17 paragraph of that Comment states:
18

19 The membership is liable for the actionable conduct or omission of a
20 member acting in the ordinary course of its business or "with the authority of the
21 membership." This is intended to include a member's apparent, as well as actual,
22 authority, thereby bringing within Section 305(a) the situation covered in UPA
23 Section 14(a).
24

25 The last paragraph of that Comment states:
26

27 Section 305(b) is drawn from UPA Section 14(b), but has been edited to
28 improve clarity. It imposes strict liability on the membership for the
29 misapplication of money or property received by a member in the course of the
30 membership's business or otherwise within the scope of the member's actual
31 authority.
32

33 Section 403(a) of this Act is taken essentially verbatim from RUPA
34 Section 305(a), and Section 403(b) of this Act is taken essentially verbatim from
35 RUPA Section 305(b).
36

37 **SECTION 305. LIABILITY OF MEMBERS AND MANAGERS.**

38 (a) Except as otherwise provided in subsection (c), the debts, obligations, and
39 liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely

1 the debts, obligations, and liabilities of the limited liability company. A member or manager is
2 not personally liable for a debt, obligation, or liability of a limited liability company solely by
3 reason of being or acting as a member or manager.

4 (b) The failure of a limited liability company to observe any particular formalities
5 relating to the exercise of its powers or management of its activities is not a ground for imposing
6 personal liability on the members or managers for the debts, obligations, or liabilities of the
7 limited liability company.

8 (c) All or specified members or categories of members are liable in their capacity
9 as members for all or specified debts, obligations, or liabilities of a limited liability company
10 only if:

11 (1) the articles of organization contain a provision to that effect; and

12 (2) a member so liable has consented in a record to the adoption of the
13 provision or to be bound by the provision.

14 **Reporters' Notes**

15
16 As originally presented to the Drafting Committee, this section came almost verbatim
17 from ULLCA § 303.

18
19 **Subsection (b)** – At its April 2004 meeting, the Drafting Committee changed ULLCA's
20 phrase "the usual limited liability company formalities" to "any particular formalities" on the
21 theory that a limited liability company does not necessarily have any usual formalities. The
22 Committee also deleted the phrase "or requirements", which in ULLCA follows the word
23 "formalities". The effect of this change warrants further discussion. Some Committee members
24 and advisors saw the change as merely removing surplus language. Others feared a substantive
25 effect.

26
27 In any event, it might be useful for a Comment to explain that this provision does not
28 pertain to a situation in which (i) a member or manager fails to obtain the consent required to
29 have the actual authority to bind the LLC in a transaction with a third party; (ii) the member
30 nonetheless purports to bind the LLC; (iii) under Section 301 the member or manager lacks the
31 statutory apparent authority to bind the LLC; (iv) the LLC is not bound; and therefore (v) under
32 the agency law doctrine of "warranty of authority," the member or manager is liable to the third

1 party. In that circumstance, the liability is not *for* a “debt[], obligation[], [or] liability[y] of a
2 limited liability company,” but rather because the limited liability company is *not* indebted,
3 obligated or liable.
4

5 **Subsection (c)** – At its April 2004 meeting, the Drafting Committee provisionally
6 decided to retain this subsection, pending an inquiry into why the subsection was included in
7 ULLCA. The Committee also discussed whether the current language is adequate to authorize a
8 provision in the articles to set a cap on a member’s subsection (c) liability – e.g., specifying that
9 member X is liable only up to \$500,000 to a specified obligee on a specified obligation, while
10 member Y is liable for the full extent of that obligation (with or without the right of further
11 contribution from X). The Committee tentatively decided that the current language is adequate
12 in that regard but recommended that a Comment address this point.
13

14 **Subsection (c)(2)** – The April 2004 draft had changed the ULLCA language of “a
15 member” to “each member”. That change was intended to highlight a question to be resolved if
16 the Drafting Committee decides to retain subsection (c) – namely, whether an obligation
17 intended to apply to more than one member will apply to those who do consent if some of the
18 members intended to be liable do not consent. The Drafting Committee decided emphatically
19 that the answer to that question is yes. A member who wants to condition his, her or its
20 subsection (c)(2) consent on the subsection (c)(2) consent of another must arrange that protection
21 for him, her or itself. Accordingly, the ULLCA language has been reinstated.

1 [ARTICLE] 4

2 RELATIONS OF MEMBERS TO EACH OTHER AND
3 TO LIMITED LIABILITY COMPANY
4

5 SECTION 401. HOW A PERSON BECOMES A MEMBER.

6 (a) A person becomes a member in connection with the formation of a limited
7 liability company, upon the later of:

8 (1) the formation of the limited liability company; or

9 (2) the time provided in and upon compliance with an agreement among
10 the persons who are to become the initial members.

11 (b) A person become a member after the formation of a limited liability company:

12 (1) as provided in an operating agreement;

13 (2) as the result of a merger under [Article] 11 or [TBD – pending
14 META];

15 (3) with the consent of all the members; or

16 (4) if within 90 days after the limited liability company ceases to have any
17 members, the legal representative of the last person to have been a member consents to have the
18 person become a member and the person consents to become a member.

19 (b) A person may become a member without making or being obligated to make
20 a contribution to the limited liability company or acquiring a transferable interest.

21 **Reporters' Notes**

22 At the November, 2003 meeting, discussion was intense and views divided as to whether
23 this Act should allow “shelf” LLCs. The April 2004 draft tried to steer a middle course,
24 recognizing that: (i) it is the filing of a public document that creates the LLC as a legal person,

1 and (ii) LLCs are filed on behalf of one or more persons intending to become members upon
2 formation.

3
4 At its April 2004 meeting, the Drafting Committee directed the co-reporters to go “back
5 to the drawing boards” and to consider the approach taken by Del. Code Ann. tit. 6, § 18-301(a),
6 except for that provision’s reliance on the records of the LLC.

7
8 The Delaware model was of limited use, because section 18-301(a)(2) depends on the
9 notion that an LLC agreement can exist before the LLC is formed, even though Del. Code Ann.
10 tit. 6, § 18-101(7) defines an LLC agreement as being “of the member or members” and Del.
11 Code Ann. tit. 6, § 18-101(11) defines “member” as “a person who has been admitted to a
12 [presumably existing] limited liability company”.

13
14 A uniform act should not adopt such a “Klein bottle” approach, and accordingly
15 subsection (a)(2) refers to “an agreement among the persons who are to become the initial
16 members”. (A “Klein bottle” is a mathematical construct – a bottle with neither inside nor
17 outside, because the neck of the bottle is elongated and passes into the center of the bottle
18 through the side of the bottle without the presence of a hole in the side. A Klein bottle can,
19 therefore, be realized only in four dimensions.)

20
21 **Subsection (a)(2)** – A Comment will make emphatically clear that in this context the
22 plural includes the singular and that an LLC may be formed to have only one member.

23
24 **Subsection (b)(4)** – This language is relocated from Section 701 (dealing with avoidance
25 of dissolution when an LLC loses its last member), where it appeared in the prior draft. The
26 legal representative could itself consent to become the member.

27
28 **Subsection (c)** – This subsection permits so-called “non-economic members.”
29

30 **SECTION 402. FORM OF CONTRIBUTION.** A contribution may consist of
31 tangible or intangible property or other benefit to the limited liability company, including
32 money, services performed, promissory notes, other agreements to contribute cash or property,
33 and contracts for services to be performed.

34 **Reporters’ Notes**

35 **Source** – ULPA (2001) § 501, which took ULLCA § 401 essentially verbatim except that
36 in ULLCA the last phrase is introduced with “or” instead of “and”.
37

38 **SECTION 403. LIABILITY FOR CONTRIBUTIONS.**

1 (a) A person's obligation to make a contribution of money, property, or other
2 benefit to, or to perform services for, a limited liability company is not excused by the person's
3 death, disability, or other inability to perform personally. If a person does not make the required
4 contribution of property or services, the person is obligated at the option of the limited liability
5 company to contribute money equal to the value of that portion of the contribution which has not
6 been made.

7 (b) A creditor of a limited liability company which extends credit or otherwise
8 acts in reliance on an obligation described in subsection (a), and without notice of any
9 compromise under Section 407, may enforce the original obligation.

10 **Reporters' Notes**

11 **Source:** ULLCA § 402, which is taken from RULPA § 502(b), which also gave rise to
12 ULPA (2001) § 502.

13
14 This version differs from ULLCA § 402 in only four respects, none of them substantive.
15 (1) In the first sentence of subsection (a), “make a contribution” replaces “contribute” so that the
16 subsection’s opening phrase uses a defined term. (2) The second sentence of subsection (a)
17 omits the word “stated” immediately before the second occurrence of “contribution” (“value of
18 the stated contribution which has not been made”). There is no apparent referent for this
19 adjective (which appears in the ULLCA version), so it has been deleted. (3) Throughout
20 subsection (a), “person” replaces “member” to indicate that the section applies not only to
21 members but also to persons who have promised contributions and whose membership is
22 conditioned on the making of the promised contribution (or some other event). (4) In subsection
23 (b), consistent with the Style Committee’s current approach, “which” replaces “who” following
24 “creditor of the limited liability company”.
25

26 **SECTION 404. SHARING OF AND RIGHT TO DISTRIBUTIONS BEFORE** 27 **DISSOLUTION.**

28 (a) Any distributions made by a limited liability company before its dissolution
29 and winding up must be in equal shares.

30 (b) A member does not have a right to any distribution before the dissolution and

1 winding up of the limited liability company unless the limited liability company decides to make
2 an interim distribution. A person's dissociation does not entitle the person to any distribution.

3 (c) A member does not have a right to demand or receive a distribution from a
4 limited liability company in any form other than cash. Except as otherwise provided in Section
5 709(c), a limited liability company may distribute an asset in kind if each portion of the asset is
6 fungible with each other portion and each member receives a percentage of the asset equal in
7 value to the member's share of distributions.

8 (d) When a member or transferee becomes entitled to receive a distribution, the
9 member or transferee has the status of, and is entitled to all remedies available to, a creditor of
10 the limited liability company with respect to the distribution. However, the limited liability
11 company's obligation to make a distribution is subject to offset for any amount owed to the
12 limited liability company by the member or dissociated member on whose account the
13 distribution is made.

14 **Reporters' Notes**

15 This section is an amalgam of ULLCA § 405 and ULPA (2001) §§ 504 (interim
16 distributions) 505 (no distribution on account of dissociation), 506 (distribution in kind) and 507
17 (right to distribution).

18
19 **Subsection (d)** – The first sentence is probably redundant of Section 405(e) (limitations
20 on distributions; those entitled to distributions at parity with other general unsecured creditors).
21 The same redundancy exists under ULPA (2001) §§ 507 and 508.
22

23 **SECTION 405. LIMITATIONS ON DISTRIBUTION.**

24 (a) A limited liability company may not make a distribution in violation of the
25 operating agreement.

26 (b) A limited liability company may not make a distribution if after the

1 distribution:

2 (1) the limited liability company would not be able to pay its debts as they
3 become due in the ordinary course of the limited liability company's activities; or

4 (2) the limited liability company's total assets would be less than the sum
5 of its total liabilities plus the amount that would be needed, if the limited liability company were
6 to be dissolved, wound up, and terminated at the time of the distribution, to satisfy the
7 preferential rights upon dissolution, winding up, and termination of members whose preferential
8 rights are superior to those of persons receiving the distribution.

9 (c) A limited liability company may base a determination that a distribution is not
10 prohibited under subsection (b) on financial statements prepared on the basis of accounting
11 practices and principles that are reasonable in the circumstances or on a fair valuation or other
12 method that is reasonable in the circumstances.

13 (d) Except as otherwise provided in subsection (g), the effect of a distribution
14 under subsection (b) is measured:

15 (1) in the case of distribution by purchase, redemption, or other
16 acquisition of a transferable interest in the limited liability company, as of the date money or
17 other property is transferred or debt incurred by the limited liability company; and

18 (2) in all other cases, as of the date:

19 (A) the distribution is authorized, if the payment occurs within 120
20 days after that date; or

21 (B) the payment is made, if payment occurs more than 120 days
22 after the distribution is authorized.

23 (e) A limited liability company's indebtedness to a member incurred by reason of

1 a distribution made in accordance with this section is at parity with the limited liability
2 company's indebtedness to its general, unsecured creditors.

3 (f) A limited liability company's indebtedness, including indebtedness issued in
4 connection with or as part of a distribution, is not a liability for purposes of subsection (b) if the
5 terms of the indebtedness provide that payment of principal and interest are made only to the
6 extent that a distribution could then be made to members under this section.

7 (g) If indebtedness is issued as a distribution, each payment of principal or
8 interest on the indebtedness is treated as a distribution, the effect of which is measured on the
9 date the payment is made.

10 **Reporters' Notes**

11 **Source** – ULPA (2001) § 508, which was derived from ULLCA § 406, which was in turn
12 derived from MBCA § 6.40.

13
14 **Subsection (c)** – This subsection appears to impose a standard of ordinary care, in
15 contrast with the more complicated approach stated in Sections 409 and 410.
16

17 **SECTION 406. LIABILITY FOR IMPROPER DISTRIBUTIONS.**

18 (a) If a member of a member-managed, or manager of a manager-managed,
19 limited liability company consents to a distribution made in violation of Section 405 and the
20 limited liability company satisfies Section 410 with regard to the member's or manager's giving
21 of consent, the member or manager is personally liable to the limited liability company for the
22 amount of the distribution which exceeds the amount that could have been distributed without
23 the violation.

24 (b) A member or transferee that receives a distribution knowing that the
25 distribution to that member or transferee was made in violation of Section 405 is personally

1 liable to the limited liability company but only to the extent that the distribution received by the
2 member or transferee exceeded the amount that could have been properly paid under Section
3 405.

4 (c) A person against which an action is commenced under subsection (a) may:

5 (1) implead in the action any other person that is liable under subsection
6 (a) and compel contribution from the person; and

7 (2) implead in the action any person that received a distribution in
8 violation of subsection (b) and compel contribution from the person in the amount the person
9 received in violation of subsection (b).

10 (d) An action under this section is barred if it is not commenced within two years
11 after the distribution.

12 **Reporters' Notes**

13 **Source** – Same derivation as Section 405.

14
15 Query – is it adequately clear that liability under this section is not affected by a person
16 ceasing to be a member, manager or transferee after the time that the liability attaches? Consider
17 Section 102(9) and (10) (defining “manager” and “member” to exclude former managers and
18 former members).
19

20 **SECTION 407. MANAGEMENT OF A LIMITED LIABILITY COMPANY**

21 (a) In a member-managed limited liability company, the following rules apply:

22 (1) Each member has equal rights in the management and conduct of the
23 limited liability company's activities.

24 (2) A difference arising among members as to a matter in the ordinary
25 course of the activities of a limited liability company may be decided by a majority of the
26 members. An act outside the ordinary course of activities of a limited liability company may be

1 undertaken only with the consent of all the members. An amendment to the operating agreement
2 may be made only with the consent of all the members.

3 (b) In a manager-managed limited liability company, the following rules apply:

4 (1) Except as expressly provided in this [act], any matter relating to the
5 activities of the limited liability company may be exclusively decided by the managers.

6 (2) Each manager has equal rights in the management and conduct of the
7 activities of the limited liability company.

8 (3) A difference arising among managers as to a matter in the ordinary
9 course of the activities of a limited liability company may be decided by a majority of the
10 managers. Subject to subsection (b)(4), an act outside the ordinary course of activities of a
11 limited liability company may be undertaken only with the consent of all the managers.

12 (4) The consent of each member is necessary to:

13 (A) amend the operating agreement;

14 (B) sell, lease, exchange, or otherwise dispose of all, or
15 substantially all, of the limited liability company's property, with or without the good will, other
16 than in the usual and regular course of the limited liability company's activities;

17 (C) **[TBD]**

18 (5) A manager may be chosen at any time by the consent of a majority of
19 the members and remains a manager until a successor has been chosen, unless the manager
20 sooner resigns, is removed, dies, or, in the case of a manager that is not an individual, terminates.
21 A manager may be removed at any time by the consent of a majority of the members, and those
22 members need not state or have cause and not need provide the manager with advance notice or
23 an opportunity to be heard. A person need not be a member in order to be a manager, but the

1 dissociation of a member who is also a manager removes the person as a manager. If a person
2 that is both a manager and a member ceases to be a manager, that cessation does not cause the
3 person to dissociate as a member.

4 (c) Action requiring the consent of members under this [act] may be taken
5 without a meeting, and a member may appoint a proxy to consent or otherwise act for the
6 member by signing an appointment record, either personally or by the member's agent.

7 (d) The dissolution of a limited liability company does not affect the application
8 of this section. However, a person that wrongfully causes dissolution of the limited liability
9 company loses the right to participate in management as a member and a manager.

10 **Reporters' Notes**

11
12 **Source:** ULLCA § 404; ULPA (2001) § 406

13
14 **Subsection (b)(4)** – Query whether the consent of any non-member manager should also
15 be necessary? Other consent requirements may be sprinkled throughout the Act; e.g., consent to
16 mergers under Article 10.

17
18 **Subsection (b)(5)** – When an entity is a manager, should dissolution or termination of
19 the entity be an event that terminates the entity's status as manager? The current language refers
20 to termination. *Compare* Section 601(4)(E) (providing for dissociation of a member that is a
21 partnership or limited liability company upon the entity's dissolution). It is possible that both
22 this provision and Section 601(4)(E) have it wrong. Perhaps dissociation should occur only
23 upon termination, but cessation of manager status should occur upon dissolution. (If so, query
24 the effect of dissolution on the management rights of an entity that is a member in a member-
25 managed LLC.)

26
27 **Subsection (d)** – Query whether, in a manager-managed LLC, a wrongfully dissolving
28 member should lose even the limited rights of a member to participate in management? Note
29 that this subsection does not govern management authority a member might have not as a
30 manager or member but rather, under a separate agreement, as an agent of the LLC.

31 32 **SECTION 408. MEMBER'S AND MANAGER'S RIGHTS TO PAYMENTS AND** 33 **REIMBURSEMENT.**

1 (a) A limited liability company shall reimburse a member of a member-managed
2 limited liability company for payments made and indemnify the member for liabilities incurred
3 **[reserved until the Committee has made a firmer decision concerning the nature of the**
4 **fiduciary duties owed by a member in a member-managed LLC and a manager in a**
5 **manager-managed LLC].**

6 (b) A limited liability company shall reimburse a manager of a manager-managed
7 limited liability company for payments made and indemnify the manager for liabilities incurred
8 **[reserved until the Committee has made a firmer decision concerning the nature of the**
9 **fiduciary duties owed by a manager in a manager-managed LLC and a manager in a**
10 **manager-managed LLC].**

11 (c) A limited liability company shall reimburse a member for an advance to the
12 company beyond the amount of contribution the member agreed to make.

13 (d) A payment or advance that gives rise to an obligation of a limited liability
14 company under subsections (a) through (c) constitutes a loan to the limited liability company,
15 which accrues interest from the date of the payment or advance.

16 (e) A member is not entitled to remuneration for services performed for a limited
17 liability company even in the capacity of a manager of a manager-managed limited liability
18 company, except for reasonable compensation for services rendered in winding up the activities
19 of a limited liability company.

20 **Reporters' Notes**

21
22 **Source:** ULLCA § 403

23
24 **Subsections (a) and (b)** – These indemnification provisions will be fleshed out once the
25 Drafting Committee has made a firmer decision with regard to the standards of conduct and
26 liability stated in Sections 409 and 410.

1 **SECTION 409. STANDARDS OF CONDUCT FOR MEMBERS AND**
2 **MANAGERS.**

3 (a) In a member-managed limited liability company, the following rules apply:

4 (1) Each member, when discharging its governance responsibility, shall
5 act:

6 (A) in good faith;

7 (B) in a manner the member reasonably believes to be in the best
8 interests of the limited liability company;

9 (C) on the basis of information, including information provided by
10 others, that a person in a like position would reasonably believe to be appropriate under the
11 circumstances; and

12 (D) with the care that a person in a like position would reasonably
13 believe appropriate in the circumstances.

14 (2) Each member, when carrying out its operational responsibilities, shall
15 act in a manner consistent with the duties of a paid agent, whether or not the member is receiving
16 remuneration for those responsibilities.

17 (3) Each member shall:

18 (A) account to the limited liability company and hold as trustee for
19 it any property, profit, or benefit derived by the member in the conduct and winding up of the
20 limited liability company's activities or derived from a use by the member of limited liability
21 company property, including the appropriation of a limited liability company opportunity;

22 (B) refrain from dealing with the limited liability company in the
23 conduct or winding up of the limited liability company's activities as or on behalf of a party

1 having an interest adverse to the limited liability company; and

2 (C) refrain from competing with the limited liability company in
3 the conduct or winding up of the limited liability company's activities before dissolution of the
4 limited liability company.

5 (b) Except as otherwise provided in subsections (c) and (d), in a manager-
6 managed limited liability company the following rules apply.

7 (1) A member does not have any obligation under this section in the
8 member's capacity as a member.

9 (2) The obligations stated in subsection (a) apply to each manager.
10 However, the obligation stated under subsection (a)(3)(C) continues until winding up is
11 completed.

12 (c) To the extent the operating agreement of a manager-managed limited liability
13 company imposes governance responsibility or operational responsibilities on a member that is
14 not a manager, the obligations stated in subsection (a)(1) and (2) apply to that member. To the
15 extent the operating agreement of a manager-managed limited liability company expressly
16 relieves a manager of a specified governance responsibility or operational responsibility, the
17 obligations stated in subsection (a)(1) and (2) do not apply to that manager.

18 (d) A member shall discharge its duties to the limited liability company and the
19 other members under this [act] or under the operating agreement and exercise any rights
20 consistently with the obligation of good faith and fair dealing. A member does not violate this
21 obligation merely because the member's conduct furthers the member's own interest.

22 **Reporters' Notes**

23 **Source:** MBCA § 8.30 (considerably streamlined) and NCCUSL's standard provisions
24

1 on the duty of loyalty.
2

3 At its November, 2003 meeting, at the urging of Commissioner Blackburn, the Drafting
4 Committee decided to try to (i) eschew the “gross negligence” standard of care first promulgated
5 in RUPA and afterwards followed in ULLCA and ULPA (2001); and (ii) incorporate something
6 like the standard of care/standard of liability dichotomy recently adopted in MBCA §§ 8.30 and
7 8.31. Under the MBCA, that dichotomy exists principally for directors and not for officers, *cf.*
8 MBCA 8.42(c) (stating that director standard of liability principles apply to officers if they “have
9 relevance), and those positions reflect categorically different kinds of responsibilities. This
10 section attempts to parallel *functionally* that *positional* distinction by using the defined terms
11 “governance responsibility” and “operational responsibilities.”
12

13 This section also differs from the MBCA approach by leaving unaffected the traditional
14 rules for duty of loyalty violations.
15

16 At its April 2004 meeting, the Drafting Committee discussed this and the following
17 section at length and with good-natured intensity. When the dust cleared, no one had moved to
18 change any language. However, there was considerable sentiment expressed in favor of
19 collapsing the two sections into one provision and somehow reinstating the gross negligence
20 standard in combination with a business judgment rule formulation.
21

22 The chair of the Committee has directed the co-reporters to draft a single section, which
23 will be presented to the Committee via a teleconference and will provide somewhat as follows:
24 (i) the section exhaustively states the applicable fiduciary duties – i.e., “only” will be reinstated;
25 (ii) when performing a “governance” function, a person is obligated to comply with the
26 presuppositions of the business judgment rule; (iii) for non-governance functions, the gross
27 negligence standard applies; (iv) the Conference’s standard duty of loyalty rules apply (as in the
28 current draft), (v) a person is liable for breach of the duties specified in the section; (vi) the
29 operating agreement has the power to eliminate a person’s monetary liability for breach of the
30 duty of care.
31

32 **Subsection (d)** – In RUPA, ULLCA and ULPA (2001), the rule stated in the second
33 sentence applies more broadly – not only to the obligation of good faith and fair dealing but also
34 to duties created by the Act and by the owners’ agreement (i.e., partnership agreement, operating
35 agreement). That broader scope is overbroad, because (i) as to the Act’s duty of loyalty, self-
36 interest is at the core of the wrong, and (ii) an agreement among owners could certainly
37 proscribe self-interested behavior.
38

39 **SECTION 410. STANDARDS OF LIABILITY FOR GOVERNANCE**
40 **RESPONSIBILITY.**

41 (a) A person is not liable to the limited liability company or any of its members

1 for a breach of the person’s governance responsibilities under Section 409, unless the party
2 asserting liability establishes:

3 (1) that the challenged conduct consisted or was the result of:

4 (A) action not in good faith;

5 (B) a decision:

6 (i) that the person did not reasonably believe was in the
7 best interests of the limited liability company; or

8 (ii) as to which the director was not informed to the extent
9 the director should have reasonably believed appropriate in the circumstances;

10 (C) sustained failure by the person to devote reasonably sufficient
11 time and attention to the person’s governance responsibility, if particular facts and circumstances
12 of significant concern existed which would have alerted a reasonable person in a like position to
13 the need for timely attention and appropriate inquiry; or

14 (D) a breach of the person’s duties under Section 409(a)(3); and

15 (2) if the party asserting liability claims damages, as distinguished from
16 disgorgement, rescission, an accounting, a constructive trust or other equitable relief, that the
17 challenged conduct proximately caused harm to the limited liability company or one or more of
18 its members.

19 (b) A member’s right to assert liability for a person’s breach of governance
20 responsibilities is subject to [Article] 9.

21 **Reporters’ Notes**

22 **Source:** MBCA § 8.31 (streamlined and simplified).

23 See the discussion in the Reporters’ Notes to Section 409
24
25

1 **Subsection (a)(2)** – Query whether the “as distinguished from” list should also refer to
2 non-damage claims authorized by this Act, e.g., liability under Section 406 for authorizing
3 improper distributions.
4

5 **Subsection (b)** – Article 9 preserves the direct/derivative distinction.
6

7 **SECTION 411. RIGHT TO INFORMATION OF MEMBERS, MANAGERS, AND**
8 **FORMER MEMBERS.**

9 (a) In a member-managed limited liability company, the following rules apply:

10 (1) A member may, without having any particular purpose for seeking the
11 information, inspect and copy during regular business hours:

12 (A) in the limited liability company’s designated office, required
13 information; and

14 (B) at a reasonable location specified by the limited liability
15 company, any other records maintained by the limited liability company regarding the limited
16 liability company’s activities and financial condition.

17 (2) The limited liability company shall furnish to each member and each
18 member shall furnish to each other member:

19 (A) without demand, any information concerning the limited
20 liability company’s activities, condition, and circumstances which is reasonably required for the
21 proper exercise of the recipient member’s rights and duties under the operating agreement or this
22 [act]; and

23 (B) on demand, any other information concerning the limited
24 liability company’s activities, condition, and circumstances, except to the extent the demand or
25 the information demanded is unreasonable or otherwise improper under the circumstances.

1 (b) In a manager-managed limited liability company, the following rules apply:

2 (1) The information rights and obligations stated in subsection (a) apply to
3 the managers instead of the members.

4 (2) On 10 days' demand, made in a record received by the limited liability
5 company, a member may inspect and copy required information during regular business hours in
6 the limited liability company's designated office. The member need not have any particular
7 purpose for seeking the information.

8 (3) During regular business hours and at a reasonable location specified by
9 the limited liability company, a member may obtain from the limited liability company and
10 inspect and copy true and full information regarding the activities, condition, and circumstances
11 of the limited liability company as is just and reasonable if:

12 (A) the member seeks the information for a purpose reasonably
13 related to the member's interest as a member;

14 (B) the member makes a demand in a record received by the
15 limited liability company, describing with reasonable particularity the information sought and
16 the purpose for seeking the information; and

17 (C) the information sought is directly connected to the member's
18 purpose.

19 (4) Within 10 days after receiving a demand pursuant to paragraph (3)(B),
20 the limited liability company shall in a record inform the member that made the demand:

21 (A) the information that the limited liability company will provide
22 in response to the demand;

23 (B) when and where the limited liability company will provide the

1 information; and

2 (C) if the limited liability company declines to provide any
3 demanded information, the limited liability company's reasons for declining.

4 (5) Whenever this [act] or an operating agreement provides for a member
5 to give or withhold consent to a matter, before the consent is given or withheld, the limited
6 liability company shall, without demand, provide the member with all information that is known
7 to the limited liability company and is material to the member's decision.

8 (c) Except as otherwise provided in subsection (d), on 10 days' demand made in a
9 record received by the limited liability company, a person dissociated as a member may have
10 access to whatever information and records the person was entitled to while a member if (i) the
11 information or record pertains to the period during which the person was a member; (ii) the
12 person seeks the information or record in good faith; and (iii) the person satisfies the
13 requirements imposed on a member by subsection (b)(3). The limited liability company shall
14 respond to a demand made pursuant to this subsection in the same manner as provided in
15 subsection (b)(4).

16 (d) If a member dies, Section 504 applies.

17 (e) The limited liability company may impose reasonable restrictions on the use
18 of information obtained under this section, including designating information confidential and
19 imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning
20 the reasonableness of a restriction under this subsection, the limited liability company has the
21 burden of proving reasonableness.

22 (f) A limited liability company may charge a person that makes a demand under
23 this section reasonable costs of copying, limited to the costs of labor and material.

1 (g) A member or person that is dissociated as a member may exercise the rights
2 under this section through an agent or, in the case of an individual under legal disability, a legal
3 representative. Any restriction imposed under subsection (e) or by the operating agreement
4 applies both to the agent or legal representative and the member or person dissociated as a
5 member.

6 (h) The rights provided in this section do not extend to a person as transferee.

7 **Reporters' Notes**

8
9 **Source:** ULPA (2001) §§ 304 and 407.

10
11 **Subsection (e)** – ULPA (2001) does not contain the phrase “designating information
12 confidential and imposing non-disclosure and safeguarding obligations on the recipient.” The
13 addition is to address concerns raised by Bill Callison and Alan Vestal. See J. William Callison
14 & Allan W. Vestal, “They’ve Created a Lamb With Mandibles of Death”: Secrecy, Disclosure,
15 and Fiduciary Duties in Limited Liability Firms, 76 IND. L. J. 271 (2001) and “The Want of a
16 Theory, Again,” ___ Suffolk L. Rev. ___ (forthcoming spring 2004).

1 [ARTICLE] 5

2 TRANSFERABLE INTERESTS AND RIGHTS OF TRANSFEREES AND CREDITORS

3
4 SECTION 501. MEMBER'S TRANSFERABLE INTEREST.

5 (a) Except as otherwise provided in subsection (c), the only interest of a member
6 which is transferable is the member's transferable interest. The interest is personal property.

7 (b) If the operating agreement so provides:

8 (1) a transferable interest may be evidenced by a certificate of the interest
9 issued by the limited liability company in record form; and

10 (2) subject to Section 502, the interest represented by the certificate may
11 be transferred by a transfer of the certificate.

12 (c) A member may transfer a right to consent on a matter under the operating
13 agreement or this [act] to another member without obtaining the consent of the other members.

14 **Reporters' Notes**

15 **Source** – This Article most directly follows ULPA (2001), Article 7, because ULPA
16 (2001) reflects the Conference's most recent thinking on the issues addressed here. However,
17 ULPA (2001), Article 7 is quite similar in substance to ULLCA, Article 5, and both those
18 Articles derive from Article 5 of RUPA.

19
20 This Draft does not include ULLCA § 501(a), which provides: "A member is not a co-
21 owner of, and has no transferable interest in, property of a limited liability company."
22 Substantially equivalent language appeared in Section 104(a) of the April 2004 draft, but the
23 Drafting Committee decided to delete that language as surplus and perhaps confusing.

24
25 **Subsection (b)** – As initially drafted, this subsection was taken verbatim from ULLCA §
26 501(c) (with the addition of the phrase "in record form") and read as follows:

27
28 An operating agreement may provide that a transferable interest may be
29 evidenced by a certificate of the interest issued in record form by the limited
30 liability company and, subject to Section 502, may also provide for the transfer of
31 any interest represented by the certificate.

1
2 The current language implements the salutary suggestions of our liaison from the Committee on
3 Style.
4

5 **Subsection (c)** – At its November, 2003 meeting, the drafting committee decided,
6 consistent with current law, that a member may transfer governance rights to another member
7 without obtaining consent from the other members. Thus, the Act does not itself protect
8 members from control shifts that result from transfers among members (as distinguished from
9 transfers to non-members who seek thereby to become members). This subsection reflects the
10 November, 2003 decision.
11

12 **SECTION 502. TRANSFER OF MEMBER’S TRANSFERABLE INTEREST.**

13 (a) A transfer, in whole or in part, of a member’s transferable interest:

14 (1) is permissible;

15 (2) does not by itself cause the member’s dissociation or a dissolution and
16 winding up of the limited liability company’s activities; and

17 (3) does not, as against the other members or the limited liability
18 company, entitle the transferee to:

19 (A) participate in the management or conduct of the limited
20 liability company’s activities;

21 (B) require access to information concerning the limited liability
22 company’s transactions except as otherwise provided in subsection (c); or

23 (C) inspect or copy the required information or the limited liability
24 company’s other records.

25 (b) A transferee has the right to receive, in accordance with the transfer:

26 (1) distributions to which the transferor would otherwise be entitled; and

27 (2) upon the dissolution and winding up of the limited liability company’s
28 activities, the net amount otherwise distributable to the transferor.

1 (c) In a dissolution and winding up, a transferee is entitled to an account of the
2 limited liability company's transactions only from the date of dissolution.

3 (d) Except as otherwise provided in Section 601(a)(4)(B) and (C), upon transfer
4 the transferor retains the rights of a member other than the interest in distributions transferred
5 and retains all duties and obligations of a member.

6 (e) A limited liability company need not give effect to a transferee's rights under
7 this section until the limited liability company has notice of the transfer.

8 (f) A transfer of a member's transferable interest in the limited liability company
9 in violation of a restriction on transfer contained in the operating agreement is ineffective as to a
10 person having notice of the restriction at the time of transfer.

11 (g) A transferee that becomes a member with respect to a transferable interest is
12 liable for the transferor's obligations under Sections 403 and 406. However, the transferee is not
13 liable for obligations unknown to the transferee at the time the transferee became a member.

14 **Reporters' Notes**

15
16 **Subsection (b)** – Query whether subsection (b)(2) is a subset of subsection (b)(1) and
17 therefore redundant.

18
19 **Subsection (d)** – Section 601(a)(4)(ii) and (iii) create a risk of dissociation when a
20 member transfers all, or substantially all, of the member's transferable interest.

21
22 **Subsection (e)** – Query whether “has notice” should be replaced with “receives a
23 notification”.

24
25 **Subsection (g)** – Query whether this transferred liability should include Section 406(a)
26 “decision maker” liability or just Section 406(b) “recipient” liability.
27

28 **SECTION 503. RIGHTS OF JUDGMENT CREDITOR OF MEMBER OR** 29 **TRANSFeree.**

1 (a) On application by a judgment creditor of a member or transferee, a court may
2 enter a charging order against the transferable interest of the judgment debtor for the unsatisfied
3 amount of the judgment. To the extent necessary to effectuate the collection of distributions
4 pursuant to the charging order, the court may:

5 (1) appoint a receiver of the share of the distributions due or to
6 become due to the judgment debtor in respect of the transferable interest, with the power to make
7 all inquiries the judgment debtor might have made; and

8 (2) make all other orders which the circumstances of the case may
9 require.

10 (b) A charging order constitutes a lien on the judgment debtor's
11 transferable interest. At any time, the court may order a foreclosure of a transferable interest that
12 is subject to a charging order. The purchaser at the foreclosure sale is a transferee.

13 (c) At any time before foreclosure, any of the following may, by satisfying
14 the judgment, extinguish a charging order and redeem the transferable interest that was subject to
15 the charging order:

16 (1) the judgment debtor;

17 (2) one or more of the members, with property other than limited
18 liability company property; or

19 (3) the limited liability company, with the consent of all of the
20 members whose transferable interest is not subject to the charging order.

21 (d) If a transferable interest is redeemed under subsection (c) by a person other
22 than the judgment debtor:

23 (1) the redemption does not affect the ownership of the transferable

1 interest and does not create a debt, liability, or other obligation from the owner of the
2 transferable interest to that person; and

3 (2) that person is entitled to receive the share of the distributions due
4 or to become due to the owner of the transferable interest until that person has recovered the
5 amount that person paid to satisfy the judgment.

6 (e) This [act] does not deprive any member or transferee of the benefit of any
7 exemption laws applicable to the member's or transferee's transferable interest.

8 (f) This section provides the exclusive remedy by which a judgment creditor of a
9 member or transferee may satisfy a judgment out of the judgment debtor's transferable interest.

10 **Reporters' Notes**

11 Charging order provisions appear in various forms in UPA, ULPA, RULPA, RUPA,
12 ULLCA, and ULPA (2001). At its April, 2004 meeting, the Drafting Committee authorized the
13 Reporters to attempt to modernize the language and make explicit certain points that have been
14 at best implicit. The language in this section reflects the Reporters' efforts and has not yet been
15 approved by the Drafting Committee.

16
17 The Reporters have also discovered a new issue, raised by the modern phenomenon of
18 unincorporated entities participating in mergers and other entity transactions. What is the effect
19 of a charging order when the interest charged is subject to such a transaction? The Reporters
20 will have a proposal for the Drafting Committee at its next meeting.

21
22 **Subsection (a)** – The phrase “judgment debtor” encompasses both members and
23 transferees.

24
25 **Subsection (c)(3)** – Query why the consent of all the members should be necessary in a
26 manager-managed LLC.

27
28 **SECTION 504. POWER OF PERSONAL REPRESENTATIVE OF DECEASED**
29 **MEMBER.** If a member dies, the deceased member's personal representative or other legal
30 representative may exercise the rights of a transferee as provided in Section 502 and, for the
31 purposes of settling the estate, may exercise the rights of a current member under Section 304.

1

Reporters' Notes

2

This language was inserted in ULPA (2001) § 704 at the behest of the representative of
3 the Probate Section of the ABA.

3

1 [ARTICLE] 6

2 MEMBER'S DISSOCIATION

3
4 SECTION 601. EVENTS CAUSING DISSOCIATION .

5 (a) A person does not have a right to dissociate as a member before the
6 termination of the limited liability company.

7 (b) A person is dissociated from a limited liability company upon the occurrence
8 of any of the following events:

9 (1) the limited liability company's having notice of the person's express
10 will to withdraw as a member or on a later date specified by the person;

11 (2) an event agreed to in the operating agreement as causing the person's
12 dissociation;

13 (3) the person's expulsion as a member pursuant to the operating
14 agreement;

15 (4) the person's expulsion as a member by the unanimous consent of the
16 other members if:

17 (A) it is unlawful to carry on the limited liability company's
18 activities with the person as a member;

19 (B) the limited liability company is a manager-managed limited
20 liability company and there has been a transfer of all of the person's transferable interest in the
21 limited liability company, other than:

22 (i) a transfer for security purposes; or

23 (ii) a court order charging the person's transferable interest

1 which has not been foreclosed;

2 (C) the limited liability company is a member-managed limited
3 liability company and there has been a transfer of all or substantially all of the person's
4 transferable interest in the limited liability company, other than:

5 (i) a transfer for security purposes; or

6 (ii) a court order charging the person's interest which has
7 not been foreclosed;

8 (D) the person is a corporation and, within 90 days after the
9 limited liability company notifies the person that it will be expelled as a member because the
10 person has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its
11 right to conduct business has been suspended by the jurisdiction of its incorporation, the
12 certificate of dissolution has not been revoked or its charter or right to conduct business has not
13 been reinstated; or

14 (E) the person is a limited liability company or partnership that has
15 been dissolved and whose business is being wound up;

16 (5) on application by the limited liability company, the person's expulsion
17 as a member by judicial order because:

18 (A) the person engaged in wrongful conduct that adversely and
19 materially affected the limited liability company's activities;

20 (B) the person willfully or persistently committed a material
21 breach of the operating agreement or the person's duties or obligations under Section 409; or

22 (C) the person engaged in conduct relating to the limited liability
23 company's activities which makes it not reasonably practicable to carry on the activities with the

1 person as a member;

2 (6) in the case of a person who is an individual:

3 (A) the person's death;

4 (B) if the limited liability company is a member-managed limited

5 liability company:

6 (i) the appointment of a guardian or general conservator for

7 the person; or

8 (ii) a judicial determination that the person has otherwise

9 become incapable of performing the person's duties as a member under the operating agreement;

10 (7) if the limited liability company is a member-managed limited liability

11 company, the person's:

12 (A) becoming a debtor in bankruptcy;

13 (B) execution of an assignment for the benefit of creditors;

14 (C) seeking, consenting to, or acquiescing in the appointment of a

15 trustee, receiver, or liquidator of the person or of all or substantially all of the person's property;

16 (8) in the case of a person that is a trust or is acting as a member by virtue

17 of being a trustee of a trust, distribution of the trust's entire transferable interest in the limited

18 liability company, but not merely by reason of the substitution of a successor trustee;

19 (9) in the case of a person that is an estate or is acting as a member by

20 virtue of being a personal representative of an estate, distribution of the estate's entire

21 transferable interest in the limited liability company, but not merely by reason of the substitution

22 of a successor personal representative;

23 (10) termination of a member that is not an individual, membership,

1 limited liability company, corporation, trust, or estate;

2 (11) the limited liability company’s participation in a merger under
3 [Article] 10 or or a merger, conversion or domestication under [META], if the limited liability
4 company:

5 (A) is not the domesticated, converted, or surviving entity; or

6 (B) is the domesticated, converted, or surviving entity but, as a
7 result of the domestication, conversion, or merger, the person ceases to be a member.

8 **Reporters’ Notes**

9 **Source** – ULLCA § 601; RUPA Section 601; ULPA (2001) §§ 601 and 603.

10
11 This section follows ULPA (2001)’s approach to *limited* partner dissociation except for
12 member-managed limited liability companies. In that context, this section follows RUPA’s and
13 ULPA (2001)’s approach to the dissociation of general partners. Query whether the section
14 should use the organization shown above, in which member-managed provisions are interspersed
15 or, instead, collect all those provisions in a separate subsection.

16
17 **Subsection (a)** – Query whether this subsection should be relocated to Section 602.

18
19 **Subsection (b)(11)** – If the Conference approves META substantially as proposed, this
20 act will deal directly only with “same species” mergers – i.e., mergers involving only LLCs. If
21 so, query whether this act should provide definitions for the concepts of “domesticated,
22 converted or surviving entit[ies]” and, if so, query whether the appropriate definitions would be
23 a cross-references to META’s definitions. Query also whether the concept of domestication
24 belongs in subsection (b)(11)(A).
25

26 **SECTION 602. MEMBER’S POWER TO DISSOCIATE; WRONGFUL** 27 **DISSOCIATION.**

28 (a) A person has the power to dissociate as a member at any time, rightfully or
29 wrongfully, by express will under Section 601(b)(1).

30 (b) A person’s dissociation is wrongful only if:

31 (1) it is in breach of an express provision of the operating agreement; or

1 (2) it occurs before the termination of the limited liability company and:
2 (A) the person withdraws as a member by express will;
3 (B) the person is expelled as a member by judicial determination
4 under Section 601(b)(5);
5 (C) the limited liability company is member-managed and the
6 person is dissociated under Section 601(b)(7)(A) by becoming a debtor in bankruptcy; or
7 (D) in the case of a person that is not an individual, trust other than
8 a business trust, or estate, the person is expelled or otherwise dissociated as a member because it
9 willfully dissolved or terminated.
10 (c) A person that wrongfully dissociates is liable to the limited liability company
11 and, subject to Section 901, to the other members for damages caused by the dissociation. The
12 liability is in addition to any other obligation of the member to the limited liability company or
13 to the other members.

14 **Reporters' Notes**

15 **Source** – ULPA (2001) § 603, which is based on RUPA Section 602. ULLCA § 602 is
16 functionally identical in some respects but is not a good overall source, because that section
17 presupposes the term/at-will paradigm.
18

19 **SECTION 603. EFFECT OF PERSON'S DISSOCIATION AS A MEMBER.**

20 (a) When a person dissociates as a member:
21 (1) the person's right to participate as a member in the management and
22 conduct of the limited liability company's activities terminates;
23 (2) the person's duty of loyalty as a member [**reserved until the**
24 **Committee has made at least a tentative decision as to the contents of that duty]**

1 (3) the person’s duty of care [**reserved until the Committee has made at**
2 **least a tentative decision as to the contents of that duty**];

3 (4) subject to Section 504, [Article] 10, and [**TBD – pending META**],
4 any transferable interest owned by the person immediately before dissociation in the person’s
5 capacity as a member is owned by the person as a mere transferee;

6 (5) any power the person had in its capacity as a member under Sections
7 301 and 304 to bind the limited liability company terminates, but, subject to Sections 103(c) and
8 604, the termination does not affect the person’s power to bind the limited liability company
9 under law other than this [act].

10 (b) A person’s dissociation as a member does not of itself discharge the person
11 from any obligation to the limited liability company or the other members which the person
12 incurred while a member.

13 **Reporters’ Notes**

14 **Source** – ULPA (2001) § 603, which was drawn from RUPA Section 603(b). ULLCA §
15 603 is functionally identical in some respects but is not a good overall source, because that
16 section presupposes the term/at-will paradigm.

17
18 **Subsection (b)(5)** – A Comment will explain that “other law” includes the agency law
19 doctrine of “lingering apparent authority.” See Restatement (Third) Of Agency § 3.11, comment
20 c (T.D. No. 2, 2001). The statement of dissociation, see Section 604, will be effective to cut off
21 lingering apparent authority.
22

23 **SECTION 604. STATEMENT OF DISSOCIATION.**

24 (a) A limited liability company or a person dissociated as a member may deliver
25 for filing in the office of the [Secretary of State] a statement of dissociation stating the name of
26 the limited liability company and that the member is dissociated from the limited liability
27 company.

1
2
3
4
5
6

Source: ULLCA § 704. A statement of dissociation has constructive notice effect under Section 103(c).

Query: why should a member have the right to file a statement of dissociation, especially in a manager-managed limited liability company?

1 [ARTICLE] 7

2 DISSOLUTION AND WINDING UP

3
4 SECTION 701. EVENTS CAUSING DISSOLUTION.

5 (a) A limited liability company is dissolved, and its business must be wound up,
6 upon the occurrence of any of the following:

7 (1) an event specified in the operating agreement;

8 (2) the consent of all the members;

9 (3) the passage of 90 days during which the limited liability company has
10 no members;

11 (4) on application by a member or by a person that has dissociated as a
12 member but still owns a transferable interest pertaining to the former membership or is still
13 responsible, whether under Section 305(c), as a guarantor or otherwise, for a debt, obligation, or
14 liability of the limited liability company, the entry by [appropriate court] of an order dissolving
15 the limited liability company on the grounds that:

16 (A) the conduct of all or substantially all of limited liability
17 company's activities is unlawful; or

18 (B) it is not reasonably practicable to carry on the limited liability
19 company's activities in conformity with the articles of organization and the operating agreement;

20 or

21 (5) on application by a member or transferee, the entry by [appropriate
22 court] of an order dissolving the limited liability company on the grounds that the managers or
23 those members in control of the limited liability company:

1 (A) have acted, are acting, or will act in a manner that is illegal or
2 fraudulent; or

3 (B) have acted or are acting in a manner that is oppressive and has
4 caused, is causing, or will cause direct harm to the applicant.

5 (b) In a proceeding brought under subsection (a)(5), the court may order a remedy
6 other than dissolution.

7 **Reporters' Notes**

8
9 At its April, 2004 meeting, the Drafting Committee had extended and amicably intense
10 discussions about this section. Paragraphs (1) to (3) of subsection (a) were not controversial.
11 Paragraphs (4) and (5) and subsection (b) were.

12
13 **Subsection (a)(4)** – The standard stated here is conventional. What might be claimed as
14 novel is conferring standing on *former* owners who still have an economic stake in the
15 enterprise. The danger of doing so is the risk that former members will use the provision to
16 “freeze the deal” after their departure. ULLCA § 801(4) has an even broader provision, but non-
17 ULLCA statutes generally have nothing comparable. Under this Draft, the provision is a default
18 rule, so the danger can be obviated by agreement. In contrast, the ULLCA provision is non-
19 waivable. ULLCA §103(b)(6).

20
21 **Subsection (a)(5)** – ULLCA § 801(4)(v) contains a comparable provision, and, even
22 without aid of that provision, courts have begun to apply close corporation “oppression” doctrine
23 to LLCs. At its April, 2004 meeting, the Drafting Committee deleted language that would have
24 cabined somewhat the vague term “oppressive.” The deleted language provided that:

25
26 oppressive conduct has occurred only if the conduct complained of has directly
27 harmed the applicant and:

28 (1) constitutes a material, uncured breach of the operating agreement or of
29 the obligation of good faith and fair dealing stated in Section 409(d); or

30 (2) although not constituting a material, uncured breach under paragraph
31 (1), has substantially defeated an expectation of the applicant which is entitled to
32 protection because the expectation:

33 (A) is not contradicted by any term of the operating agreement nor
34 by the reasonable implication of any term of that agreement;

35 (B) was central to the applicant's decision to become a member of
36 the limited liability company or for a substantial time has been centrally
37 important in the member's continuing membership;

38 (C) was known to other members, which expressly or impliedly
39 acquiesced in it;

1 (D) is consistent with the reasonable expectations of all the
2 members; and
3 (E) is otherwise reasonable under the circumstances.
4

5 Subsection (a)(5) is non-waivable. See Section 110(e)(7).

6 **Subsection (b)** – In the close corporation context, many courts have reached this position
7 without express statutory authority, most often with regard to court-ordered buyouts of
8 oppressed shareholders. The Drafting Committee preferred to save courts and litigants the
9 trouble of re-inventing that wheel in the LLC context. Because subsection (a)(5) is non-
10 waivable, query whether subsection (b) should be non-waivable as well.
11

12 **SECTION 702. WINDING UP.**

13 (a) A limited liability company continues after dissolution only for the purpose of
14 winding up its activities.

15 (b) In winding up its activities, the limited liability company:

16 (1) may file a statement of dissolution, preserve the limited liability
17 company activities and property as a going concern for a reasonable time, prosecute and defend
18 actions and proceedings, whether civil, criminal, or administrative, transfer the limited liability
19 company's property, settle disputes by mediation or arbitration, file a statement of termination,
20 and perform other necessary acts; and

21 (2) shall discharge the limited liability company's liabilities, settle and
22 close the limited liability company's activities, and marshal and distribute the assets of the
23 limited liability company.

24 (c) If a dissolved limited liability company has no members, the legal
25 representative of the last person to have been a member may wind up the activities of the limited
26 liability company and has the powers of a member under Section 703(a). If the legal
27 representative declines or fails to wind up the limited liability company's activities, a person

1 may be appointed to do so by the consent of transferees owning a majority of the rights to
2 receive distributions as transferees at the time the consent is to be effective. A person appointed
3 under this subsection:

4 (1) has the powers of a member under Section 703(a); and

5 (2) shall promptly amend the limited liability company's articles of
6 organization to state:

7 (A) that the limited liability company has no members;

8 (B) that the person has been appointed pursuant to this subsection
9 to wind up the limited liability company; and

10 (C) the street and mailing address of the person.

11 (d) On the application of any member, the [appropriate court] may order judicial
12 supervision of the winding up, including the appointment of a person to wind up the dissolved
13 limited liability company's activities, if:

14 (1) a limited liability company does not have member, the legal
15 representative of the last person to have been a member declines or fails to wind up the limited
16 liability company's activities, and within a reasonable time following the dissolution no person
17 has been appointed pursuant to subsection (c); or

18 (2) the applicant establishes other good cause.

19 (e) If a dissolved limited liability company has no members, a transferee may
20 make an application under subsection (d).

21 **Reporters' Notes**

22 **Source** – ULPA (2001) § 803, which was based on RUPA Sections 802 and 803.

23
24 Subsection (d) should be revised to take into account court-ordered dissolution

1 proceedings in which standing extends to a person dissociated as a member or to a transferee.
2 See Section 701(a)(4) and (5).
3

4 **SECTION 703. POWER OF MEMBERS AND MANAGERS TO BIND LIMITED**
5 **LIABILITY COMPANY AFTER DISSOLUTION.**

6 (a) A member of a member-managed, and a manager of a manager-managed,
7 limited liability company binds the limited liability company by an act after dissolution which:

8 (1) is appropriate for winding up the limited liability company's activities;

9 or

10 (2) would have bound the limited liability company under Section 301
11 before dissolution, if, at the time the other party enters into the transaction, the other party does
12 not have notice of the dissolution.

13 (b) Subject to Section 103(c)(1) and (3), law other than this [act] governs whether
14 a person dissociated as a member binds a member-managed limited liability company through an
15 act occurring after dissolution.

16 **Reporters' Notes**

17 **Subsection (a)** – Source: ULPA (2001) § 804, which was based on RUPA § 804.
18

19 **SECTION 704. KNOWN CLAIMS AGAINST DISSOLVED LIMITED**
20 **LIABILITY COMPANY.**

21 (a) Except as otherwise provided in subsection (d), a dissolved limited liability
22 company may dispose of the known claims against it by following the procedure described in
23 subsection (b).

24 (b) A dissolved limited liability company may notify its known claimants of the

1 dissolution in a record. The notice must:

2 (1) specify the information required to be included in a claim;

3 (2) provide a mailing address to which the claim is to be sent;

4 (3) state the deadline for receipt of the claim, which may not be less than
5 120 days after the date the notice is received by the claimant; and

6 (4) state that the claim will be barred if not received by the deadline.

7 (c) A claim against a dissolved limited liability company is barred if the
8 requirements of subsection (b) are met and:

9 (1) the claim is not received by the specified deadline; or

10 (2) in the case of a claim that is timely received but rejected by the
11 dissolved limited liability company, the claimant does not commence an action to enforce the
12 claim against the limited liability company within 90 days after the receipt of the notice of the
13 rejection.

14 (d) This section does not apply to a claim based on an event occurring after the
15 effective date of dissolution or a liability that is contingent on that date.

16 **Reporters' Notes**

17 **Source** – ULPA (2001) § 806, which was based on ULLCA § 807, which in turn was
18 based on MBCA § 14.06.

19
20 Query whether some definition is needed of “known claims”. For example, what if the
21 limited liability company knows of claim but does not have any contact information for the
22 claimant?
23

24 **SECTION 705. OTHER CLAIMS AGAINST DISSOLVED LIMITED LIABILITY** 25 **COMPANY.**

26 (a) A dissolved limited liability company may publish notice of its dissolution

1 and request persons having claims against the limited liability company to present them in
2 accordance with the notice.

3 (b) The notice must:

4 (1) be published at least once in a newspaper of general circulation in the
5 [county] in which the dissolved limited liability company's principal office is located or, if it has
6 none in this state, in the [county] in which the limited liability company's designated office is or
7 was last located;

8 (2) describe the information required to be contained in a claim and
9 provide a mailing address to which the claim is to be sent; and

10 (3) state that a claim against the limited liability company is barred unless
11 an action to enforce the claim is commenced within five years after publication of the notice.

12 (c) If a dissolved limited liability company publishes a notice in accordance with
13 subsection (b), the claim of each of the following claimants is barred unless the claimant
14 commences an action to enforce the claim against the dissolved limited liability company within
15 five years after the publication date of the notice:

16 (1) a claimant that did not receive notice in a record under Section 704;

17 (2) a claimant whose claim was timely sent to the dissolved limited
18 liability company but not acted on; and

19 (3) a claimant whose claim is contingent or based on an event occurring
20 after the effective date of dissolution.

21 (d) A claim not barred under this section may be enforced:

22 (1) against the dissolved limited liability company, to the extent of its
23 undistributed assets; and

1 (2) if assets of the limited liability company have been distributed after
2 dissolution, against a member or transferee to the extent of that person's proportionate share of
3 the claim or of the assets distributed to the member or transferee after dissolution, whichever is
4 less, but a person's total liability for all claims under this paragraph does not exceed the total
5 amount of assets distributed to the person after dissolution.

6 **Reporters' Notes**

7 **Source** – ULPA (2001) § 807, which was based on ULLCA § 808, which in turn was
8 based on MBCA § 14.07.

9
10 **Subsection (c)** – Query whether this language sufficiently indicates that a claim that
11 could have been addressed under Section 704 cannot be extinguished under this Section.
12

13 **SECTION 706. ADMINISTRATIVE DISSOLUTION.**

14 (a) The [Secretary of State] may dissolve a limited liability company
15 administratively if the limited liability company does not, within 60 days after the due date:

16 (1) pay any fee, tax, or penalty due to the [Secretary of State] under this
17 [act] or other law; or

18 (2) deliver its annual report to the [Secretary of State].

19 (b) If the [Secretary of State] determines that a ground exists for administratively
20 dissolving a limited liability company, the [Secretary of State] shall file a record of the
21 determination and serve the limited liability company with a copy of the filed record.

22 (c) If within 60 days after service of the copy the limited liability company does
23 not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the
24 [Secretary of State] that each ground determined by the [Secretary of State] does not exist, the
25 [Secretary of State] shall administratively dissolve the limited liability company by preparing,

1 signing and filing a declaration of dissolution that states the grounds for dissolution. The
2 [Secretary of State] shall serve the limited liability company with a copy of the filed declaration.

3 (d) A limited liability company administratively dissolved continues its existence
4 but may carry on only activities necessary to wind up its activities and liquidate its assets under
5 Sections 702 and 709 and to notify claimants under Sections 704 and 705.

6 (e) The administrative dissolution of a limited liability company does not
7 terminate the authority of its agent for service of process.

8 **Reporters' Notes**

9 **Source** – ULPA (2001) § 809, which was based on ULLCA §§ 809 and 810. See also
10 RMBCA §§ 14.20 and 14.21.
11

12 **SECTION 707. REINSTATEMENT FOLLOWING ADMINISTRATIVE** 13 **DISSOLUTION.**

14 (a) A limited liability company that has been administratively dissolved may
15 apply to the [Secretary of State] for reinstatement within two years after the effective date of
16 dissolution. The application must be delivered to the [Secretary of State] for filing and state:

17 (1) the name of the limited liability company and the effective date of its
18 administrative dissolution;

19 (2) that the grounds for dissolution either did not exist or have been
20 eliminated; and

21 (3) that the limited liability company's name satisfies the requirements of
22 Section 108.

23 (b) If the [Secretary of State] determines that an application contains the
24 information required by subsection (a) and that the information is correct, the [Secretary of

1 State] shall prepare a declaration of reinstatement that states this determination, sign, and file the
2 original of the declaration of reinstatement, and serve the limited liability company with a copy.

3 (c) When reinstatement becomes effective, it relates back to and takes effect as of
4 the effective date of the administrative dissolution and the limited liability company may resume
5 its activities as if the administrative dissolution had never occurred.

6 **Reporters' Notes**

7 **Source** – ULPA (2001) § 810, which was based on ULLCA § 811. See also RMBCA
8 Section 14.22.
9

10 **SECTION 708. APPEAL FROM REJECTION OF REINSTATEMENT.**

11 (a) If the [Secretary of State] rejects a limited liability company's application for
12 reinstatement following administrative dissolution, the [Secretary of State] shall prepare, sign,
13 and file a notice that explains the reason or reasons for rejection and serve the limited liability
14 company with a copy of the notice.

15 (b) Within 30 days after service of the notice of rejection, the limited liability
16 company may appeal from the rejection of reinstatement by petitioning the [appropriate court] to
17 set aside the dissolution. The petition must be served on the [Secretary of State] and contain a
18 copy of the [Secretary of State's] declaration of dissolution, the limited liability company's
19 application for reinstatement, and the [Secretary of State's] notice of rejection.

20 (c) The court may summarily order the [Secretary of State] to reinstate the
21 dissolved limited liability company or may take other action the court considers appropriate.

22 **Reporters' Notes**

23 **Source** – ULPA (2001) § 811, which was based on ULLCA § 812.

24 This section uses “rejection” rather than “denial” (the word used by both ULPA (2001)
25

1 and ULLCA). The change is to avoid confusion with a “statement of denial” under Section 302.

2
3 **Subsection (c)** – Query why “summarily”.

4
5 **SECTION 709. DISTRIBUTION OF ASSETS IN WINDING UP LIMITED**

6 **LIABILITY COMPANY'S BUSINESS.**

7 (a) In winding up a limited liability company's business, the assets of the limited
8 liability company must be applied to discharge its obligations to creditors, including members
9 that are creditors.

10 (b) Any surplus remaining after the limited liability company complies with
11 subsection (a) must be applied to distribute:

12 (1) to each member, an amount equal to the value of contributions made
13 by the member and not previously returned; and

14 (2) then to all members, an equal share of any surplus still remaining.

15 (c) All distributions made under subsection (b) must be paid in cash.

16 (d) If the limited liability company does not have sufficient surplus to comply
17 with subsection (b)(1), any surplus must be distributed among the members in proportion to the
18 value of their respective unreturned contributions.

19 **Reporters' Notes**

20 **Source:** ULLCA § 806, restyled.

1 [ARTICLE] 8

2 FOREIGN LIMITED LIABILITY COMPANIES

3 SECTION 801. GOVERNING LAW.

4 (a) The laws of the state or other jurisdiction under which a foreign limited
5 liability company is formed govern:

6 (1) relations among the members of the foreign limited liability company
7 and between the members and the foreign limited liability company; and

8 (2) the liability of members as members for an obligation of the foreign
9 limited liability company.

10 (b) A foreign limited liability company may not be denied a certificate of
11 authority by reason of any difference between the laws of the jurisdiction under which the
12 foreign limited liability company is formed and the laws of this state.

13 (c) A certificate of authority does not authorize a foreign limited liability
14 company to engage in any business or exercise any power that a limited liability company may
15 not engage in or exercise in this state.

16 **Reporters' Notes**

17 **Source** – ULPA (2001) § 901, which was based in part on ULLCA §1001.

18 SECTION 802. APPLICATION FOR CERTIFICATE OF AUTHORITY.

19 (a) A foreign limited liability company may apply for a certificate of authority to
20 transact business in this state by delivering an application to the [Secretary of State] for filing.

21 The application must state:

22 (1) the name of the foreign limited liability company and, if the name does
23

1 not comply with Section 108, an alternate name adopted pursuant to Section 805(a).

2 (2) the name of the state or other jurisdiction under whose law the foreign
3 limited liability company is formed;

4 (3) the street and mailing address of the foreign limited liability
5 company's principal office and, if the laws of the jurisdiction under which the foreign limited
6 liability company is formed require the foreign limited liability company to maintain an office in
7 that jurisdiction, the street and mailing address of the required office; and

8 (4) the name and street and mailing address of the foreign limited liability
9 company's initial agent for service of process in this state.

10 (b) A foreign limited liability company shall deliver with the completed
11 application a certificate of existence or a record of similar import signed by the [Secretary of
12 State] or other official having custody of the foreign limited liability company's publicly filed
13 records in the state or other jurisdiction under whose law the foreign limited liability company is
14 formed.

15 **Reporters' Notes**

16 **Source** – ULPA (2001) § 902, which was based on ULLCA § 1002.
17

18 **SECTION 803. ACTIVITIES NOT CONSTITUTING TRANSACTING** 19 **BUSINESS.**

20 (a) Activities of a foreign limited liability company which do not constitute
21 transacting business in this state within the meaning of this [article] include:

22 (1) maintaining, defending, and settling an action or proceeding;

23 (2) holding meetings of its members or carrying on any other activity

1 concerning its internal affairs;

2 (3) maintaining accounts in financial institutions;

3 (4) maintaining offices or agencies for the transfer, exchange, and
4 registration of the foreign limited liability company's own securities or maintaining trustees or
5 depositories with respect to those securities;

6 (5) selling through independent contractors;

7 (6) soliciting or obtaining orders, whether by mail or electronic means or
8 through employees or agents or otherwise, if the orders require acceptance outside this state
9 before they become contracts;

10 (7) creating or acquiring indebtedness, mortgages, or security interests in
11 real or personal property;

12 (8) securing or collecting debts or enforcing mortgages or other security
13 interests in property securing the debts, and holding, protecting, and maintaining property so
14 acquired;

15 (9) conducting an isolated transaction that is completed within 30 days
16 and is not one in the course of similar transactions of a like manner; and

17 (10) transacting business in interstate commerce.

18 (b) For purposes of this [article], the ownership in this state of income-producing
19 real property or tangible personal property, other than property excluded under subsection (a),
20 constitutes transacting business in this state.

21 (c) This section does not apply in determining the contacts or activities that may
22 subject a foreign limited liability company to service of process, taxation, or regulation under
23 law of this state other than this [act].

1 **Reporters' Notes**

2 **Source** – ULPA (2001) § 903, which was based on ULLCA § 1003.
3

4 **SECTION 804. FILING OF CERTIFICATE OF AUTHORITY.** Unless the
5 [Secretary of State] determines that an application for a certificate of authority does not comply
6 with the filing requirements of this [act], the [Secretary of State], upon payment of all filing fees,
7 shall file the application, prepare, sign and file a certificate of authority to transact business in
8 this state, and send a copy of the filed certificate, together with a receipt for the fees, to the
9 foreign limited liability company or its representative.

10 **Reporters' Notes**

11 **Source** – ULPA (2001) § 904, which was based on ULLCA § 1004 and RULPA § 903.
12

13 **SECTION 805. NONCOMPLYING NAME OF FOREIGN LIMITED LIABILITY**
14 **COMPANY.**

15 (a) A foreign limited liability company whose name does not comply with
16 Section 108 may not obtain a certificate of authority until it adopts, for the purpose of transacting
17 business in this state, an alternate name that complies with Section 108. A foreign limited
18 liability company that adopts an alternate name under this subsection and then obtains a
19 certificate of authority with the alternate name need not comply with [fictitious name statute].
20 After obtaining a certificate of authority with an alternate name, a foreign limited liability
21 company shall transact business in this state under the alternate name unless the foreign limited
22 liability company is authorized under [fictitious name statute] to transact business in this state
23 under another name.

24 (b) If a foreign limited liability company authorized to transact business in this

1 state changes its name to one that does not comply with Section 108, it may not thereafter
2 transact business in this state until it complies with subsection (a) and obtains an amended
3 certificate of authority.

4 **Reporters' Notes**

5 **Source** – ULPA (2001) § 905, which was based on ULLCA § 1005.
6

7 **SECTION 806. REVOCATION OF CERTIFICATE OF AUTHORITY.**

8 (a) A certificate of authority of a foreign limited liability company to transact
9 business in this state may be revoked by the [Secretary of State] in the manner provided in
10 subsections (b) and (c) if the foreign limited liability company does not:

11 (1) pay, within 60 days after the due date, any fee, tax, or penalty due to
12 the [Secretary of State] under this [act] or other law;

13 (2) deliver, within 60 days after the due date, its annual report required
14 under Section 210;

15 (3) appoint and maintain an agent for service of process as required by
16 Section 113(b); or

17 (4) deliver for filing a statement of a change under Section 114 within 30
18 days after a change has occurred in the name or address of the agent.

19 (b) In order to revoke a certificate of authority, the [Secretary of State] must
20 prepare, sign, and file a notice of revocation and send a copy to the foreign limited liability
21 company's agent for service of process in this state, or if the foreign limited liability company
22 does not appoint and maintain a proper agent in this state, to the foreign limited liability
23 company's designated office. The notice must state:

1 (1) the revocation’s effective date, which must be at least 60 days after the
2 date the [Secretary of State] sends the copy; and

3 (2) the grounds for revocation under subsection (a).

4 (c) The authority of the foreign limited liability company to transact business in
5 this state ceases on the effective date of the notice of revocation unless before that date the
6 foreign limited liability company remedies each ground for revocation stated in the notice. If the
7 foreign limited liability company remedies each ground, the [Secretary of State] shall so indicate
8 on the filed notice.

9 **Reporters’ Notes**

10 **Source** – ULPA (2001) § 906, which was based on ULLCA § 1006.
11

12 **SECTION 807. CANCELLATION OF CERTIFICATE OF AUTHORITY;**
13 **EFFECT OF FAILURE TO HAVE CERTIFICATE.**

14 (a) In order to cancel its certificate of authority to transact business in this state, a
15 foreign limited liability company must deliver to the [Secretary of State] for filing a notice of
16 cancellation. The certificate is canceled when the notice becomes effective under Section 206.

17 (b) A foreign limited liability company transacting business in this state may not
18 maintain an action or proceeding in this state unless it has a certificate of authority to transact
19 business in this state.

20 (c) The failure of a foreign limited liability company to have a certificate of
21 authority to transact business in this state does not impair the validity of a contract or act of the
22 foreign limited liability company or prevent the foreign limited liability company from
23 defending an action or proceeding in this state.

1 (d) A member of a foreign limited liability company is not liable for the
2 obligations of the foreign limited liability company solely by reason of the foreign limited
3 liability company's having transacted business in this state without a certificate of authority.

4 (e) If a foreign limited liability company transacts business in this state without a
5 certificate of authority or cancels its certificate of authority, it appoints the [Secretary of State] as
6 its agent for service of process for rights of action arising out of the transaction of business in
7 this state.

8 **Reporters' Notes**

9 **Source** – ULPA (2001) § 907, which was based on RULPA § 907(d) and ULLCA §
10 1008.
11

12 **SECTION 808. ACTION BY [ATTORNEY GENERAL].** The [Attorney General]
13 may maintain an action to restrain a foreign limited liability company from transacting business
14 in this state in violation of this [article].

15 **Reporters' Notes**

16 **Source** – ULPA (2001) § 908, which was based on RULPA § 908 and ULLCA § 1009.

1 [ARTICLE] 9

2 ACTIONS BY MEMBERS

3
4 SECTION 901. DIRECT ACTION BY MEMBER.

5 (a) Subject to subsection (b), with or without an accounting a member may
6 maintain a direct action against a manager, another member, or the limited liability company to
7 enforce the member’s rights and otherwise protect the member’s interests, including rights and
8 interests under the operating agreement or this [act] or arising independently of the membership
9 relationship.

10 (b) A member commencing a direct action under this section is required to plead
11 and prove an actual or threatened injury that is not solely the result of an injury suffered or
12 threatened to be suffered by the limited liability company.

13 (c) The accrual of, and any time limitation on, a right of action for a remedy
14 under this section is governed by law other than this [act]. A right to an accounting upon a
15 dissolution and winding up does not revive a claim barred by law.

16 Reporters’ Notes

17 **Subsection (a)** – Source: ULPA (2001) § 1001(a), which was based on RUPA Section
18 405(b). The subsection has been somewhat re-styled and the phrase “for legal or equitable
19 relief” has been deleted as unnecessary.

20
21 **Subsection (b)** – Source: ULPA (2001) § 1001(b). The Comment to that subsection
22 explains:

23
24 In ordinary contractual situations it is axiomatic that each party to a contract has
25 standing to sue for breach of that contract. Within a limited liability company,
26 however, different circumstances may exist. A member does not have a direct
27 claim against another member merely because the other member has breached the
28 operating agreement. Likewise a member’s violation of this Act does not
29 automatically create a direct claim for every other member. To have standing in

1 his, her, or its own right, a member plaintiff must be able to show a harm that
2 occurs independently of the harm caused or threatened to be caused to the limited
3 liability company.
4

5 **SECTION 902. DERIVATIVE ACTION.** A member may maintain a derivative
6 action to enforce a right of a limited liability company if:

7 (1) the member first makes a demand on the other members in a member-
8 managed limited liability company, or the managers of a manager-managed limited liability
9 company, requesting that they cause the limited liability company to bring an action to enforce
10 the right, and the managers or other members do not bring the action within a reasonable time; or

11 (2) a demand would be futile.

12 **Reporters' Notes**

13 **Source** – ULPA (2001) § 1002, which was a re-styled version RULPA § 1001.
14

15 The Drafting Committee has not yet discussed whether the direct/derivative distinction
16 should apply in a member-managed limited liability company.
17

18 **SECTION 903. PROPER PLAINTIFF.** A derivative action may be maintained only
19 by a person that is a member at the time the action is commenced and:

20 (1) that was a member when the conduct giving rise to the action occurred; or

21 (2) whose status as a member devolved upon the person by operation of law or
22 pursuant to the terms of the operating agreement from a person that was a member at the time of
23 the conduct.

24 **Reporters' Notes**

25 **Source** – ULPA (2001) § 1003, which was a re-styled version RULPA § 1002.
26

27 **SECTION 904. PLEADING.** In a derivative action, the complaint must state with

1 particularity:

2 (1) the date and content of plaintiff's demand and the response to the demand by
3 the managers or other members; or

4 (2) why demand should be excused as futile.

5 **Reporters' Notes**

6 **Source** – ULPA (2001) § 1004, which was a re-styled version RULPA § 1003.
7

8 **SECTION 905. PROCEEDS AND EXPENSES.**

9 (a) Except as otherwise provided in subsection (b):

10 (1) any proceeds or other benefits of a derivative action, whether by
11 judgment, compromise, or settlement, belong to the limited liability company and not to the
12 derivative plaintiff;

13 (2) if the derivative plaintiff receives any proceeds, the derivative plaintiff
14 shall immediately remit them to the limited liability company.

15 (b) If a derivative action is successful in whole or in part, the court may award
16 the plaintiff reasonable expenses, including reasonable attorney's fees, from the recovery of the
17 limited liability company.

18 **Reporters' Notes**

19 **Source** – ULPA (2001) § 1005, which was a re-styled version RULPA § 1004.
20

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9

[ARTICLE] 10

MERGER

[reserved pending META]

(If the Conference approves META substantially as proposed, this act will deal directly only with “same species” mergers – i.e., mergers involving only LLCs.)

1 [ARTICLE] 11

2 MISCELLANEOUS PROVISIONS

3
4 **SECTION 1101. UNIFORMITY OF APPLICATION AND CONSTRUCTION.** In
5 applying and construing this Uniform Act, consideration must be given to the need to promote
6 uniformity of the law with respect to its subject matter among states that enact it.

7 **SECTION 1102. SEVERABILITY.** If any provision of this [act] or its application to
8 any person or circumstance is held invalid, the invalidity does not affect other provisions or
9 applications of this [act] which can be given effect without the invalid provision or application,
10 and to this end the provisions of this [act] are severable.

11 **SECTION 1103. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL
12 AND NATIONAL COMMERCE ACT.** This [act] modifies, limits, and supersedes the federal
13 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but
14 does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or
15 authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15
16 U.S.C. Section 7003(b).

17 **SECTION 1104. EFFECTIVE DATE.** This [act] takes effect on [effective date].

18 **SECTION 1105. REPEALS.** Effective [all-inclusive date], the following acts and parts
19 of acts are repealed: [the state limited liability company Act as amended and in effect
20 immediately before the effective date of this [act]].

21 **SECTION 1106. SAVINGS CLAUSE.** This [act] does not affect an action
22 commenced, proceeding brought, or right accrued before this [act] takes effect.
23

1 **SECTION 1107. APPLICATION TO EXISTING RELATIONSHIPS.**

2 (a) Before [all-inclusive date], this [act] governs only:

3 (1) a limited liability company formed on or after [the effective date of
4 this [act]]; and

5 (2) except as otherwise provided in subsection (c), a limited liability
6 company formed before [the effective date of this [act]] which elects, in the manner provided in
7 its operating agreement or by law for amending the operating agreement, to be subject to this
8 [act].

9 (b) Except as otherwise provided in subsection (c), on and after [all-inclusive
10 date] this [act] governs all limited liability companies.

11 (c) With respect to a limited liability company formed before [the effective date
12 of this [act]], the following rules apply except as the members otherwise elect in the manner
13 provided in the operating agreement or by law for amending the operating agreement: **[TBD –
14 this subsection will contain any provisions of ULLCA which should continue to apply
15 preexisting limited liability companies even after the “all-inclusive” date to.]**