

DRAFT

FOR DISCUSSION ONLY

REVISED UNIFORM

LIMITED LIABILITY COMPANY ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

February 2005

WITH PREFATORY AND REPORTERS' NOTES

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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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 to 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.~~

Agenda for the February, 2005 Meeting

Friday morning
(meeting begins promptly at 8:30 AM)

1. Management structure

a. key issues

- i. should the default management structure be essentially identical for a manager-managed and member-managed LLC, except that a few key matters [which?] should be, in the default mode, reserved to members even in a manager-managed LLC?
- ii. in the default mode, should the default management structure of a manager-managed LLC and a member-managed LLC differ from the default management structure of, respectively, a limited partnership and a general partnership, and, if so, how?
- iii. what effect, if any, should management structure have on the causes of dissociation?

b. sections to be read

- i. Section 407, Management of a Limited Liability Company
- ii. Section 601, Events Causing Dissociation

2. Information duties

a. key issues

- i. should the Act continue the Conference's approach of treating information duties as statutory rather than fiduciary?
- ii. does the revised language adequately handle the various scenarios raised at the fall, 2004 meeting?

b. section to be read – Section 411, Right to Information of Members, Managers, and Former Members

3. Statements of authority

a. key issues

- i. in general, can this provision be streamlined, or is it better to follow (as in the current draft) the RUPA structure?
- ii. does the current language state correctly the reliance requirements and the effect of statements that do not concern real property?

b. sections to be read

- i. Section 302, Statement of Limited Liability Company Authority
- ii. Section 303, Statement of Denial

Friday afternoon

(meeting begins promptly 90 minutes after the end of the morning session and continues until 5:30 PM)

4. Charging orders

a. key issues

- i. is the modernized approach an improvement in general?
- ii. even if so, are there specific improvements to be made (e.g., providing that a person who has redeemed is entitled to interest on the amount paid to discharge the charging order; providing expressly that a charging order is self-executing – i.e., that the order necessarily directs the LLC to pay over to the holder of the order any distributions that would otherwise be paid to the member/transferee [there is some old authority to the contrary])
- iii. should the caption be changed to include the phrase “charging order”?
- iv. should the concept of redemption be re-labeled to avoid confusion? (to the uninitiated, the notion of a non-debtor redeeming property can be confusing)
- v. should the provision expressly state the interface with Article 9, and, if so, how?

b. sections to be read

- i. Section 503, Rights of Judgment Creditor of Member or Transferee
- ii. for context:
 - (A) Section 501, Member’s Transferable Interest
 - (B) Section 502, Transfer of Member’s Transferable Interest

5. Becoming a member

a. key issues

- i. does the current language in Section 401 adequately resolve the issue of “formed by filing” vs. “formed by agreement”?
- ii. is the relationship between Section 401 and Section 701(a)(3) appropriate?
- iii. should the caption to Section 401 be changed to “Becoming a Member”?

b. sections to be read

- i. Section 401, How a Person Becomes a Member
- ii. Section 701(a)(3) (dissolution occurs upon “the passage of 90 days during which the limited liability company has no members”)

Saturday

(meeting begins promptly at 9 AM, recesses for lunch, resumes 90 minutes later, and continues until 5:30 PM)

6. Operating agreement

a. key issues

- i. is there significance to the designation “operating agreement” other than the resulting power to modify the statutory default rules?

- ii. where (statutory text, comment, or not at all) should the point be made that – given the definition of “operating agreement” – once an LLC comes into existence and has a member, the LLC necessarily has an operating agreement
 - iii. whether the definition of “limited liability company” should refer to the operating agreement; e.g., “an entity formed under this Act . . . and having an operating agreement”
 - iv. should the Act expressly authorize “no oral modification” provisions and other “channeling” methods to control “he said/she said” disputes?
 - v. should the Act permit a non-member to be party to the operating agreement?
 - vi. should the Act permit the operating agreement to (A) extend rights to a third party [no big deal – standard third party beneficiary law] and (B) provide that the agreement may not be amended without the consent of a non-party [arguably a significant change in third party beneficiary law]?
 - vii. assuming that a non-member is not party to the operating agreement and has no express rights under the operating agreement (e.g., a non-member manager), what rights should the non-member have if a change in the operating agreement prejudices the non-member’s rights under an agreement between that non-member and the LLC (e.g., damages only, damages plus injunctive relief if available under ordinary principles of equity, a right under the Act to prevent the change to the operating agreement)?
 - viii. in light of the expansive definition of “operating agreement,” *inter se* the members will the articles often (or sometimes) be evidence of the content of the operating agreement?
 - ix. in light of the complexity of the concept of the operating agreement, should the Act eschew a simple definition based on the RUPA approach and substitute ““operating agreement” has the meaning stated in Section 110”?
 - x. can the language concerning conflicts between the articles and the operating agreement be streamlined?
 - xi. should the Act give more direction as to the meaning of the “manifestly unreasonable” standard (e.g., whether the standard is applied as of the time a provision is adopted/agreed to, or as of the time the provision is applied; whether “manifestly” has any meaning at all)?
 - xii. whether the Act should include any specification of non-waivable provisions (the RULPA/ULLCA/ULPA(2001) approach) or instead leave that topic to the courts under the rubric of public policy.
 - xiii. does the revised language in Section 110 adequately handle these issues and the other issues raises at the fall, 2004 meeting?
- b. sections to be read
- i. Section 102(12) (definition of operating agreement) [renumbered due to deletion of definition of “governance responsibility”]
 - ii. Section 110, Effect of Operating Agreement; Nonwaivable Provisions
 - iii. Section 201(d) (conflicts between provisions of articles and operating agreement)

Sunday morning
(meeting begins promptly at 8 AM and continues until 11 AM)

7. the direct/derivative distinction

a. key issue – whether the distinction makes sense for a closely held LLC, especially a member-managed LLC, and whether the Act should somehow indicate that for a [defined] closely held LLC, the operating agreement can eliminate the distinction

b. sections to be read:

i. Section 901, Direct Action by Member

ii. for contrast (to be provided in the Reporters' Notes section to Section 901)

(A) RUPA § 405 (b) (no direct/derivative distinction; no derivative cause of action)

(B) ULLCA § 410 (direct claims authorized, while Article 11 provides for derivative claims)

8. knowledge, notice provisions

a. key issue: should this Act set aside the elaborate (and, some would say, confusing) provisions that NCCUSL imported from the UCC into RUPA, ULLCA, and ULPA (2001) ?

b. section to be read: Section 103, Knowledge and Notice

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 **Issues to be considered:** given that tThis act is intended as a wholesale replacement for
11 the current uniform act, whether "Revised" is an appropriate description-
12

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

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

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

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

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

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

23 (4) "Designated office" means:

24 (A) with respect to a limited liability company, the office that the limited
25 liability company is required to designate and maintain under Section ~~413~~112; and

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

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

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

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

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

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

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

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

1 (1211) “Member-managed limited liability company” means a limited liability
2 company which is so designated in its articles of organization.

3 (1312) “Operating agreement” means ~~an~~ any agreement (whether referred to as an
4 operating agreement and whether oral, in a record, implied, or in any combination thereof) of all
5 the members, including a sole member, concerning the limited liability company. The term
6 includes the agreement as amended.

7 ~~(14) “Operational responsibilities” include responsibilities for implementing the~~
8 ~~policies established for a limited liability company by those with governance authority,~~
9 ~~managing the day to day activities of the limited liability company, and carrying out tasks on~~
10 ~~behalf of the limited liability company.~~

11 (1513) “Person” means an individual, corporation, business trust, estate, trust,
12 ~~membership~~ partnership, limited liability company, association, joint venture, government;
13 governmental subdivision, agency, or instrumentality; public corporation, or any other legal or
14 commercial entity.

15 (1614) “Principal office” means the office where the principal executive office of
16 a limited liability company or foreign limited liability company is located, whether or not the
17 office is located in this state.

18 (1715) “Record” means information that is inscribed on a tangible medium or that
19 is stored in an electronic or other medium and is retrievable in perceivable form.

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

22 (1916) “Sign” means, with the present intent to authenticate a record:

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

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

4 ~~(2017)~~ “State” means a state of the United States, the District of Columbia,
5 Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the
6 jurisdiction of the United States.

7 ~~(2118)~~ “Transfer” includes an assignment, conveyance, deed, bill of sale, lease,
8 mortgage, security interest, encumbrance, gift, and transfer by operation of law.

9 ~~(2219)~~ “Transferable interest” means a member’s right to receive distributions.

10 ~~(2320)~~ “Transferee” means a person to which all or part of a transferable interest
11 has been transferred, whether or not the transferor is a member.

12 Reporters’ Notes

13 **Issues to be considered:** whether in paragraph 8 (manager) it is clear that the term
14 “manager” applies to an ex-manager with regard to events occurring before the person ceased to
15 be a manager; whether in paragraph 10 (member) it is clear that the term “member” applies to a
16 former member with regard to events occurring before the person dissociated as a member;
17 whether in paragraph 12 (operating agreement) the phrase “concerning the limited liability
18 company” is sufficient to indicate the all-encompassing scope of the operating agreement;
19 whether in paragraph 12 (operating agreement) the all-encompassing scope of the definition
20 means that any activity involving unanimous consent of the members comprises part of the
21 operating agreement
22

23
24 **Paragraph (6) [Foreign limited liability company]** – Some statutes have elaborate
25 definitions addressing the question of whether a non-U.S. entity is a “foreign limited liability
26 company.” The NY statute, for example, defines a “foreign limited liability company” as:

27
28 an unincorporated organization formed under the laws of any jurisdiction,
29 including any foreign country, other than the laws of this state (i) that is not
30 authorized to do business in this state under any other law of this state and (ii) of
31 which some or all of the persons who are entitled (A) to receive a distribution of

1 the assets thereof upon the dissolution of the organization or otherwise or (B) to
2 exercise voting rights with respect to an interest in the organization have, or are
3 entitled or authorized to have, under the laws of such other jurisdiction, limited
4 liability for the contractual obligations or other liabilities of the organization.
5

6 NY CLS LLC § 102. ULLCA § 101(8) takes a similar but less complex approach (“an
7 unincorporated entity organized under laws other than the laws of this State which afford limited
8 liability to its owners comparable to the liability under Section 303 and is not required to obtain a
9 certificate of authority to transact business under any law of this State other than this [Act]”).
10 This Draft follows Delaware’s still simpler approach. Del. Code Ann. tit. 6, § 18-101(4)
11 (“denominated as such”).
12

13 **Former Paragraph (7) [Governance responsibility]** – ~~This definition is key to~~
14 ~~Sections 409 and 410, the Act’s operative provisions on standards of conduct and liability. As~~
15 ~~initially drafted, the word “important” appeared instead of “principal”.~~
16

17 ~~—— Jim McKay, the drafting committee’s liaison to the Committee on Style, made this~~
18 ~~observation of “important”: “The word ‘important’ is very fuzzy. You have provided no~~
19 ~~standards from separating ‘important’ from ‘nonimportant’ matters. I suggest you delete~~
20 ~~“important” and add language making an exception for ministerial or routine matters.” The~~
21 ~~suggested approach would go too far, and so “principal” is offered (albeit tentatively).~~
22 ~~Following the April 2004 meeting of the Drafting Committee, at the suggestion of an ABA~~
23 ~~Business Law Section Advisor, the co-reporters added “strategies” to the definition. Deleted~~
24 ~~because the Draft’s provisions on fiduciary duty no longer refer to this term.~~
25

26 **Paragraph (98) [Manager]** – This term is ubiquitous in LLC statutes, but it can cause
27 confusion given other common usages of the term. For example, a member-managed LLC might
28 well have an “office manager” or a “property manager.” Moreover, in a manager-managed LLC,
29 the “property manager” is not likely to be a manager as the term is used in this act.
30

31 **Paragraph (12) [Operating Agreement]** – This definition must be read in conjunction
32 with Section 110, which further describes the operating agreement. The current wording mostly
33 follows ULPA (2001), which itself was an amalgam of RUPA and ULLCA. There is no
34 standard NCCUSL wording. The text of those uniform act definitions as well as the Delaware
35 definition are provided below.
36

37 An agreement to form an LLC is not itself an operating agreement, because the term
38 “operating agreement” presupposes the existence of members, and a person cannot have
39 “member” status until the LLC exists. However, the Act’s very broad definition of “operating
40 agreement” means that, as soon as a limited liability company is formed with even one member,
41 the limited liability company has an operating agreement. For example, suppose (i) two persons
42 orally and informally agree to join their activities in some way through the mechanism of an
43 LLC, (ii) they form the LLC or cause it to be formed, and (iii) without further ado or agreement,

1 they become the LLC’s initial members. The LLC has an operating agreement, because “all the
2 members” have agreed on who the members are” and that agreement – no matter how informal
3 or rudimentary – is an agreement “concerning the limited liability company.”
4

5 _____ The same result follows when a person becomes the sole initial member of an LLC. It is
6 not plausible that the person would lack any understanding or intention with regard to the LLC.
7 That understanding or intention constitutes an “agreement of all the members, including a single
8 member, concerning the limited liability company.” See also Section 110(d) (“A sole member
9 may make the operating agreement in any manner the member desires . . .”).
10

11 _____ The Committee may want to consider whether “concerning the limited liability company”
12 is sufficient to indicate the all-encompassing scope of the operating agreement, or whether
13 (perhaps paradoxically) more limiting phrasing might better connote broad scope. See the
14 ULLCA and Delaware provisions below.
15

16 _____ The Committee may also want to consider whether the all-encompassing scope of this
17 definition means that any activity involving unanimous consent of the members comprises part
18 of the operating agreement. For example, if pursuant to an operating agreement, all the members
19 consent to the redemption of one-half of the managing-member’s transferable interest, does that
20 action become part of the operating agreement? Moreover, does the answer to that conceptual
21 question make any practical difference?
22

23 _____ As noted by the ABA Advisor (in a discussion in January, 2005, on the Drafting
24 Committee’s list serv):
25

26 _____ An agreement among less than all the members with respect to . . . the LLC (e.g.,
27 an agreement among some of the members to support or oppose an action) would
28 not be an operating agreement but might be effective among the parties to the
29 agreement.
30

31 _____ Query also whether this definition should follow ULLCA, which in its statutory text cross
32 references to the later section that deals extensively with the agreement, or RUPA and ULPA
33 (2001), which do not.
34

35 _____ The operating agreement.
36

37 _____ RUPA § 101(7) [partnership agreement] -- “the agreement, whether
38 written, oral, or implied, among the partners concerning the partnership, including
39 amendments to the partnership agreement.”
40

41 _____ ULLCA § 101(13) [operating agreement] – “the agreement under Section
42 103 concerning the relations among the members, managers, and limited liability
43 company. The term includes amendments to the agreement.”

1
2 ULPA (2001) § 101(13) [partnership agreement] -- “the partners’
3 agreement, whether oral, implied, in a record, or in any combination, concerning
4 the limited partnership. The term includes the agreement as amended.”
5

6 Del. Code Ann. tit. 6, § 18-101(7) [limited liability company agreement] –
7 “any agreement (whether referred to as a limited liability company agreement,
8 operating agreement or otherwise), written or oral, of the member or members as
9 to the affairs of a limited liability company and the conduct of its business.”
10

11 **Former Paragraph (14) [“Operational responsibilities”]** -- Deleted because the
12 Draft’s provisions on fiduciary duty no longer refer to this term.
13

14 **Former Paragraph (18) [“Required information”]** – Deleted because at its October,
15 2004 meeting, the Drafting Committee decided to delete Section 111, thereby removing any
16 obligation for an LLC to maintain particular types of information.
17

18
19 **Paragraph (2118) [Transfer]** – Following RUPA and ULPA (2001), this Act uses the
20 words “transfer” and “transferee” rather than the words “assignment” and “assignee.” See
21 RUPA § 503.
22

23 The reference to “transfer by operation of law” is significant in connection with Section
24 502 (Transfer of Member's Transferable Interest). That section severely restricts a transferee's
25 rights (absent the consent of the members), and this definition makes those restrictions
26 applicable, for example, to transfers ordered by a family court as part of a divorce proceeding
27 and transfers resulting from the death of a member.
28

29 **Paragraph (2219) [Transferable Interest]** – On this point of terminology, this Draft
30 follows RUPA and ULPA (2001) rather than ULLCA, which refers to “distributional interest.”
31 ULLCA § 101(6).
32

33 **Paragraph (2320) [Transferee]** – “Transferee” has displaced “assignee” as the
34 Conference’s term of art.
35

36 **SECTION 103. KNOWLEDGE AND NOTICE.**

37 (a) A person knows a fact ~~if the earliest~~ the person;

38 (1) has actual knowledge is consciously aware of it; or

39 (2) is deemed to know it under subsection (b) or (e).

1 (b) A person is deemed to know of a limitation on authority to transfer real
2 property as provided in Section 302(d).

3 (~~b~~c) A person has notice of a fact ~~if~~ the earliest the person:

4 (1) knows of it;

5 (2) ~~has~~ is deemed to have notice of it under subsection (~~e~~d) or (e);

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

7 ~~_____~~ (~~4~~) has reason to know it exists from all of the facts known to the person at
8 the time in question.

9 (~~e~~d) A person has notice of:

10 (1) another person's dissociation as a member of a member-managed
11 limited liability company, 90 days after the effective date of a Section 604 statement of
12 dissociation pertaining to the other person;

13 (2) another person's ceasing to be a manager of a manager-managed
14 limited liability company, 90 days after the effective date of a Section 412 statement of manager
15 cessation pertaining to the other person;

16 (3) a limited liability company's dissolution, 90 days after the effective
17 date of a Section 710(1) statement of dissolution;

18 (4) a limited liability company's termination, 90 days after the effective
19 date of a Section 710(2) statement of termination; and

20 (5) a limited liability company's conversion, domestication, merger

21 **[reserved pending META]**

1 ~~(d)~~ A limited liability company is deemed to know or have notice of a fact
2 relating to the limited liability company:

3 (1) in a member-managed limited liability company, immediately when a
4 member knows or has notice of the fact, except in the case of a fraud on the limited liability
5 company committed by or with the consent of the member;

6 (2) in a manager-managed limited liability company, immediately when a
7 manager knows or has notice of the fact, except in the case of a fraud on the limited liability
8 company committed by or with the consent of the manager.

9 (f) In a manager-managed limited liability company, a member's knowledge or
10 notice of a fact relating to the limited liability company is not knowledge of or notice to the
11 limited liability company, unless:

12 (1) the member is also a manager; or

13 (2) as provided:

14 (A) in a Section 302 statement of authority; or

15 (B) by law other than this [act].

16
17
18
19 ~~Subject to subsection (f), a person notifies or gives a notification to another person by taking~~
20 ~~steps reasonably required to inform the other person in ordinary course, whether or not the other~~
21 ~~person knows it.~~

1 ~~_____ (e) Subject to subsection (f), a person receives a notification when the~~
2 ~~notification:~~

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

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

6 ~~_____ (f) Subject to subsection (c) and Sections 301, 302, and 303, a person other than~~
7 ~~an individual knows, has notice, or receives a notification of a fact for purposes of a particular~~
8 ~~transaction when the individual conducting the transaction for the person knows, has notice, or~~
9 ~~receives a notification of the fact, or in any event when the fact would have been brought to the~~
10 ~~individual's attention if the person had exercised reasonable diligence. A person other than an~~
11 ~~individual exercises reasonable diligence if it maintains reasonable routines for communicating~~
12 ~~significant information to the individual conducting the transaction for the person and there is~~
13 ~~reasonable compliance with the routines. Reasonable diligence does not require an individual~~
14 ~~acting for the person to communicate information unless the communication is part of the~~
15 ~~individual's regular duties or the individual has reason to know of the transaction and that the~~
16 ~~transaction would be materially affected by the information.~~

17 **Reporters' Notes**

18 Issues to be considered: whether this Act should set aside the elaborate provisions that
19 NCCUSL imported from the UCC into RUPA, ULLCA, and ULPA (2001)

20
21 At its October, 2004 meeting, the Drafting Committee instructed the co-reporters to
22 attempt to significantly "slim down" this section, leaving to the common law of agency those
23 imputation rules that are not specifically tailored to this Act. This Draft attempts to fulfill that
24 assignment.
25

1 Several aspects of the proposed approach warrant particular note. First, the defined term
2 “notification” has been deleted, because that term appears nowhere in the Act. Second, generally
3 applicable provisions concerning when an organization is charged with knowledge or notice have
4 been deleted, because those imputation rules are (i) core topics within the law of agency, (ii) very
5 complicated, and (iii) should not have any different content under this Act than in other
6 circumstances.

7
8 Third, this draft reinstates a provision, deleted in April, 2004, explaining the imputation
9 effects of knowledge and notice of LLC members. —The April 2004 Draft had expanded on
10 ULLCA § 102 by providing for constructive notice (and following followed RUPA and ULPA
11 (2001)) and by addressing the question of whether a member’s knowledge, notice, etc. is
12 attributed to the limited liability company. The Drafting Committee The April, 2004 meeting
13 rejected the latter that expansion as more properly handled in a Comment to the section
14 concerning the power of members to bind the limited liability company. With the generally
15 applicable provisions on how an organization knows or has notice stricken from this draft,
16 bringing the LLC-specific provision back into the statutory text seems appropriate and probably
17 necessary.

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

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

35
36 **Subsection (a)** – This Draft proposes changing the definition of “knowledge” from a
37 tautology (knowledge = actual knowledge) to a conceptualization similar to the one expressed in
38 the Comment to RUPA, § 103. (“Knowledge is cognitive awareness.”) The Restatement (Third)
39 of Agency, like the Restatement (Second), does not define “knowledge” in its black letter. The
40 Reporter’s Notes to the Restatement (Third), § 1.04 state:

41
42 e. Knowledge and notice. The definition of notice is drawn from Restatement
43 Second, Agency § 9. "Knowledge" itself is not defined in black letter by the

1 Restatement Second of Agency. The Revised Uniform Partnership Act defines
2 knowledge as "conscious [sic – should be cognitive] awareness." See Rev. Unif.
3 Partnership Act § 102(a) comment. Under Model Penal Code § 2.02(b), a person
4 acts "knowingly" with respect to a material element of an offense when, "if the
5 element involves the nature of his conduct or the attendant circumstances, he is
6 aware that his conduct is of that nature or that such circumstances exist; and ... if
7 the element involves a result of his conduct, he is aware that it is practically
8 certain that his conduct will cause such a result."
9

10 **Subsection (b)** -- The reference to Section 302 (statements of authority) and deemed
11 knowledge is consistent with the Act's principle of using this section as a central reference for all
12 knowledge and notice provisions.
13
14
15

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

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

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

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

21 **Reporters' Notes**

22 **Subsection (b)** – This language states more directly what is the substance of the current
23 uniform act. ULLCA § 112(a) provides that a limited liability company may be organized for
24 any “lawful” purpose but contains two vestiges of a “business purpose” approach. The Section’s
25 caption refers to “Nature of Business,” and subsection (a) is expressly subject to “any law of this
26 State governing or regulating business.” The phrase “any lawful purpose” encompasses
27 activities not intended to produce a profit, but ULLCA § 112(a) does not include the phrase
28 “whether or not for profit.” (However, ULLCA § 101(3) defines “Business” as including “every
29 trade, occupation, profession, and other lawful purpose, whether or not carried on for profit.”)
30

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

1 10-32-04, and Tex. Rev. Civ. Stat. art. 1528n 2.01A . (The MBCA takes the “lawful business”
2 approach. See MBCA § 3.01(a).)
3

4 The expansive approach is the modern trend for LLC statutes and comports with the
5 Conference’s most recently-adopted business entity statute. ULPA (2001) § 104(b) follows
6 ULLCA § 112(a) and allows a limited partnership to be organized for any “lawful” purpose. It
7 is thus possible to have a limited partnership that has no “for profit” purpose. *Compare* UPA § 6
8 (defining a general partnership as organized for profit), RUPA § 101(6) (same), and RULPA
9 (1976/85) § 106 (delineating the “Nature of [a limited partnership’s] Business” by linking back
10 to “any business that a partnership without limited partners may carry on”).
11

12 The subsection does not bar a limited liability company from being organized to carry on
13 charitable activities, and this act does not include any protective provisions pertaining to
14 charitable purposes. Those protections must be (and typically are) found in other law, although
15 sometimes that “other law” appears within a state’s non-profit corporation statute. *See, e.g.,*
16 Minn. Stat. § 317A.811 (providing restrictions on charitable organizations that seek to “dissolve,
17 merge, or consolidate, or to transfer all or substantially all of their assets” but imposing those
18 restrictions only on “corporations,” which are elsewhere defined as corporations incorporated
19 under the non-profit corporation act). A comment will identify this issue, and perhaps a
20 legislative note will suggest the need to assure that such other law refers not only to corporations
21 but also to limited liability companies.
22

23 Another comment will state specifically that the phrase “regardless of whether for profit”
24 indicates the issue of profit *vel non* is irrelevant to the question of whether an LLC has been
25 validly formed.
26

27 **Subsection (c)** – In this context, the word “perpetual” is a misnomer, albeit one
28 commonplace in LLC statutes. Like all current LLC acts, this act provides several avenues to
29 avoid perpetuity: a term specified in the operating agreement or articles; an event specified in
30 the operating agreement or articles; member consent. See Section 701 (events causing
31 dissolution). There are other formulations possible, but the Drafting Committee has chosen to
32 use the most common terminology, rather than the most technically precise.
33

34 Because a private document (the operating agreement) can vary this subsection, the
35 public record pertaining to a limited liability company will not necessarily reveal whether the
36 limited liability company actually has a perpetual duration. *Accord* ULPA (2001) § 103,
37 comment to subsection (c) (“The partnership agreement has the power to vary this subsection
38 [which provides for perpetual duration], either by stating a definite term or by specifying an
39 event or events which cause dissolution. . . . [The limited partnership act] also recognizes
40 several other occurrences that cause dissolution. Thus, the public record pertaining to a limited
41 partnership will not necessarily reveal whether the limited partnership actually has a perpetual
42 duration.”)

1 _____ ~~(6) the liability of a member as member and a manager as manager for an~~
2 obligation of the limited liability company; ~~and~~

3 _____ ~~(7) the liability of a manager as manager for an obligation of a manager-managed~~
4 ~~limited liability company.~~

5 _____ (b) An agreement between a limited liability company and a manager that is not
6 also a member may select, consistent with otherwise applicable choice of law rules, a different
7 law to govern any term of that agreement which does not address a matter governed by this [act].

8 _____
9 **Reporters' Notes**

10 At its October, 2004 meeting, the Drafting Committee decided to substitute the concept
11 of “internal affairs” for the prior draft’s list of seven items. That list is restated below and may
12 become part of a Comment.

13
14 **Subsection (a)** – Restatement (Second) of Conflict of Laws § 302, comment a, defines
15 “internal affairs” (with reference to a corporation) as “the relations inter se of the corporation, its
16 shareholders, directors, officers or agents.” Like any other legal concept, the concept of “internal
17 affairs” may be indeterminate at its edges, but the concept certainly includes interpretation and
18 enforcement of the operating agreement, relations among the members as members; relations
19 between the limited liability company and a member as a member, relations between a manager-
20 managed limited liability company and a manager, and relations between a manager of a
21 manager-managed limited liability company and the members as members.

22 The Restatement does not consider the liability of owners and managers to third parties to
23 be an internal affair. See, e.g., Restatement (Second) of Conflict of Laws § 307 (Shareholders'
24 Liability). A few cases do, but many do not. See, e.g., *Kalb, Voorhis & Co. v. American*
25 *Financial Corp.*, 8 F.3d 130, 132 (2nd Cir. 1993). All sensible authorities agree, however, that,
26 except in extraordinary circumstances, “shield-related” issues should be determined according to
27 the law of the state of organization.

28
29 **Subsection (b)** – In the prior draft, this provision was Section 110(g)(3) (June 16, 2004
30 teleconference version) and is relocated here per the Committee’s instructions at the October,
31 2004 meeting. As discussed at length in the April 2004 meeting, the only complexity here is that
32 a contract between an LLC and a non-member manager should be able to choose the applicable
33 law that pertains to matters that do not affect the manager’s duties as manager under this Act.
34 that the Act’s *inter se* reach (whatever that may be) is subject to the operating agreement.

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

SECTION 108. NAME.

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

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

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

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

(c) A limited liability company may apply to the [Secretary of State] for authorization to use a name that does not comply with subsection (b). The [Secretary of State] shall authorize use of the name applied for if, as to each conflicting name:

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

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

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

7 **Reporters' Notes**

8
9 Subsection (a) is taken verbatim from ULLCA § 105(a). The rest of the section is taken
10 from ULPA (2001) § 108, which reflects the Conference's latest reworking of such provisions.
11 At its April 2004 meeting, the Drafting Committee decided to bracket subsections (b) through
12 (d), in recognition of the fact that in many jurisdictions this type of provision is routinely revised
13 to fit the jurisdiction's standard approach to such matters.
14

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

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

18 ~~_____ (1) a person intending to form a limited liability company under this [act]~~
19 ~~and to adopt the name;~~

20 ~~_____ (2) a limited liability company or a foreign limited liability company~~
21 ~~authorized to transact business in this state intending to adopt the name;~~

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

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

4 ~~_____ (5) a foreign limited liability company formed under the name; or~~

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

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

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

18 ~~_____ (d) A person that has reserved a name under this section may deliver to the~~
19 ~~[Secretary of State] for filing a notice of transfer that states the reserved name, the name and~~
20 ~~street and mailing address of some other person to which the reservation is to be transferred, and~~
21 ~~the paragraph of subsection (a) which applies to the other person. Subject to Section 206(c), the~~
22 ~~transfer is effective when the [Secretary of State] files the notice of transfer.]~~

1 [(a) A person may reserve the exclusive use of the name of a limited liability company,
2 including a fictitious name for a foreign company whose name is not available, by delivering an
3 application to the [Secretary of State] for filing. The application must set forth the name and
4 address of the applicant and the name proposed to be reserved. If the [Secretary of State] finds
5 that the name applied for is available, it must be reserved for the applicant's exclusive use for a
6 [nonrenewable] [renewable] 120 day period.

7 [(b) The owner of a name reserved for a limited liability company may transfer the
8 reservation to another person by delivering to the [Secretary of State] for filing a signed notice of
9 the transfer which states the name and address of the transferee.]

10 **Reporters' Notes**

11
12 **Issue to be addressed:** whether the address referred to in subsection (a) needs to be both
13 a mailing and street address.

14
15 _____This section is bracketed for the reason stated in the Reporters' Notes to Section 108. At
16 its October, 2004 meeting, the Drafting Committee decided to follow ULLCA rather than ULPA
17 (2001) for this section, except to indicate that the question of renewability is a matter of choice
18 for each legislature (thus the brackets within subsection (a)). This Draft accordingly replicates
19 ULLCA § 106, with a slight change made in subsection (b) to conform to the convention used
20 throughout this act regarding "delivered to the [Secretary of State] for filing."
21

22 **SECTION 110. EFFECT OF OPERATING AGREEMENT; NONWAIVABLE** 23 **PROVISIONS.**

24 (a) Except as otherwise provided in subsection (b), the operating agreement
25 governs relations among the members and between the members and the limited liability
26 company. To the extent the operating agreement does not otherwise provide, this [act] governs
27 relations among the members and between the members and the limited liability company.

1 (b) An operating agreement and any amendment to an operating agreement must
2 be consented to by each member. An operating agreement may provide for the manner in which
3 it may be amended, including by requiring the approval of a person that is not a party to the
4 operating agreement or the satisfaction of conditions, and, subject to the law of waiver, an
5 amendment is ineffective if its adoption does not conform to the specified manner or satisfy the
6 specified conditions.

7 (c) A person that becomes a member in a limited liability company is bound by
8 any operating agreement then in effect. Whether or not a limited liability company has itself
9 manifested assent to the operating agreement, the limited liability company is bound by and may
10 enforce the operating agreement. An operating agreement is enforceable whether or not there is a
11 record signed by a party against whom enforcement is sought, even if the operating agreement is
12 not capable of performance within one year of its making.

13 (d) A sole member may make the operating agreement in any manner the member
14 desires, including by signing a record stating the terms of the agreement and that the agreement
15 is the limited liability's operating agreement.

16 (e) A person not a member may be party to the operating agreement. An
17 operating agreement may provide rights to a person that is not a party to the operating
18 agreement.

19 (f) An operating agreement may not:

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

22 (2) vary the law applicable under Section 106(a);

1 (43) vary the requirements of Section 204;

2 (54) eliminate the duty of loyalty under Sections 409(b) and 603(a)(2) or
3 unreasonably reduce the duty of care under Sections 409(c) and 603(a)(3), but:

4 (i) the operating agreement may identify specific types or
5 categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable;

6 (ii) all of the members or a number or percentage specified in the
7 operating agreement may authorize or ratify after full disclosure of all material facts a specific
8 act or transaction that otherwise would violate the duty of loyalty;

9 (iii) the operating agreement may provide indemnification for a
10 member or manager and may eliminate a member or manager's liability to the limited liability
11 company and members for money damages, except for breach of the duty of loyalty, a financial
12 benefit received by the member or manager to which the member or manager is not entitled, a
13 breach of a duty under Section 406, intentional infliction of harm on the limited liability
14 company or a member, or an intentional violation of criminal law; and

15 (iv) to the extent the operating agreement of a manager-managed
16 limited liability company expressly and specifically relieves a manager of a responsibility that
17 the manager would otherwise have under this [act] and imposes that responsibility on one or
18 more members, the operating agreement may also eliminate or limit any fiduciary duty the
19 manager would have had pertaining to that responsibility.

20 (65) eliminate the obligation of good faith and fair dealing under Section
21 409(d), but the operating agreement may prescribe the standards by which the performance of
22 the obligation is to be measured if the standards are not manifestly unreasonable;

1 (76) unreasonably restrict the obligations and rights stated in Section 411;

2 (87) vary the power of a court to decree dissolution in the circumstances
3 specified in Section 701(a)(5);

4 (98) vary the requirement to wind up the limited liability company's
5 business as specified in Section 702;

6 (109) unreasonably restrict the right to maintain an action under [Article]
7 9;

8 (140) [reserved pending META for a provision prohibiting waiver of a
9 member's protection against "interest holder liability"]; or

10 (121) restrict the rights under this [act] of a person other than a member, a
11 former dissociated member, or a person in its capacity as a transferee.

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

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

1 ~~_____ (c) A limited liability company with one member may have an operating~~
2 ~~agreement. A sole member may make an operating agreement in any manner the member~~
3 ~~desires, including by signing a record stating the terms of the agreement and that the agreement~~
4 ~~is the limited liability company's operating agreement.~~

5 ~~_____ (d) To the extent an operating agreement does not otherwise provide, this [act]~~
6 ~~governs the limited liability company, its activities, and the relations among the limited liability~~
7 ~~company, its members and any managers.~~

8 ~~_____ (e) This [act] must be applied to give maximum effect to the principle of freedom~~
9 ~~of contract and to the enforceability of operating agreements. However, an operating agreement~~
10 ~~may not:~~

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

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

17 ~~_____ (3) vary the requirements of Section 204;~~

18 ~~_____ (4) [duty of loyalty waiver limitation; reserved until the Drafting~~
19 ~~Committee has made a firmer decision concerning the contents of that duty];~~

20 ~~_____ (5) [duty of care waiver limitation; reserved until the Drafting~~
21 ~~Committee has made a firmer decision concerning the contents of that duty — will permit~~
22 ~~the operating agreement to eliminate money damage liability for duty of care breach];~~

1 ~~_____ (6) eliminate the obligation of good faith and fair dealing under Sections~~
2 ~~409 and 410, but the operating agreement may prescribe the standards by which the performance~~
3 ~~of the obligation is to be measured, if the standards are not manifestly unreasonably;~~

4 ~~_____ (7) vary the power of a court to decree dissolution in the circumstances~~
5 ~~specified in section 701(a)(5);~~

6 ~~_____ (8) vary the requirement to wind up the limited liability company's~~
7 ~~business as specified in Section 702;~~

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

9 ~~_____ (10) [reserved pending META for a provision prohibiting waiver of a~~
10 ~~member's protection against "interest holder liability"] or~~

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

13 Reporters' Notes

14 Still pending issues to be resolved:— whether there is significance to the designation
15 "operating agreement" other than the resulting power to modify the statutory default rules; where
16 (statutory text, comment, or not at all) should the point be made that – given the definition of
17 "operating agreement" – once an LLC comes into existence and has a member, the LLC
18 necessarily has an operating agreement; whether the definition of "limited liability company"
19 should refer to the operating agreement (e.g., "an entity formed under this Act . . . and having an
20 operating agreement"); whether the Act should expressly authorize "no oral modification"
21 provisions and other "channeling" methods to control "he said/she said" disputes; whether the
22 last sentence of subsection (c) should also refer to an amendment to the operating agreement
23 (and not simply to the operating agreement) ;whether the Act should permit a non-member to be
24 party to the operating agreement; whether the Act should permit the operating agreement to (A)
25 extend rights to a third party [no big deal – standard third party beneficiary law] and (B) provide
26 that the agreement may not be amended without the consent of a non-party [arguably a
27 significant change in third party beneficiary law]; assuming that a non-member is not party to the
28 operating agreement and has no express rights under the operating agreement (e.g., a non-
29 member manager), what rights should the non-member have if a change in the operating
30 agreement prejudices the non-member's rights under an agreement between that non-member

1 and the LLC (e.g., damages only, damages plus injunctive relief if available under ordinary
2 principles of equity, a right under the Act to prevent the change to the operating agreement); in
3 light of the expansive definition of “operating agreement,” whether inter se the members the
4 articles will often (or sometimes) be evidence of the content of the operating agreement; in light
5 of the complexity of the concept of the operating agreement and this Section’s extensive
6 delineation of that complexity, whether the Act should eschew a simple definition based and
7 substitute in Section 102 “‘operating agreement’ has the meaning stated in Section 110”;
8 whether the language concerning conflicts between the articles and the operating agreement can be
9 streamlined (see below for suggested revisions); whether the Act should give more direction as
10 to the meaning of the “manifestly unreasonable” standard (e.g., whether the standard is applied
11 as of the time a provision is adopted/agreed to, or as of the time the provision is applied; whether
12 “manifestly” has any meaning at all); whether the Act should include any specification of non-
13 waivable provisions (the RULPA/ULLCA/ULPA(2001) approach) or instead leave that topic to
14 the courts under the rubric of public policy; whether the revised language in Section 110
15 adequately handles these issues and the other issues raises at the October, 2004 meeting?whether
16 a non-member may be a party to the operating agreement; e.g., a non-member manager, a non-
17 member lender; whether (and, if so, how) an operating agreement can bind a non-manager
18 member who is not a party to the agreement.

19
20 The language proposed here is based on the Drafting Committee’s discussion at its
21 October, 2004 meeting of the June 2004 teleconference draft (which was adopted during that
22 teleconference and read as the Committee’s language at the 2004 Annual Meeting).

23
24 The red-line version of this Section is therefore not particularly useful because that
25 version compares the new language to the language that existed before the June 2004
26 teleconference.

27
28 **Subsection (a)** -- The operating agreement is the exclusive consensual process for
29 modifying statutory default rules. As noted by the ABA Advisor (in a discussion in January,
30 2005, on the Drafting Committee’s list serv, an agreement among less than all the members with
31 respect to the operation of the LLC (e.g., an agreement among some of the members to support
32 or oppose an action) would not be an operating agreement but might be effective among the
33 parties to the agreement. On the other hand,

34
35 **Subsection (b):** It is important to remember that this subsection is a default rule.
36 Therefore, if the operating agreement (initially agreed to by all the members) permits amendment
37 by the consent of a majority of the members, an amendment agreed to by a majority of the
38 members would be effective.

39
40 The effect of the second sentence is to permit non-members (as well as members) to have veto
41 rights over amendments to the operating agreement. Such veto rights are likely to be sought by
42 lenders but may also be attractive to non-member managers.

1 EXAMPLE: A non-member manager enters into a management contract with the
2 LLC, and that agreement provides in part that the LLC may remove the manager
3 without cause only with the consent of members holding 2/3 of the profits
4 interests. The operating agreement contains a parallel provision, but the non-
5 member manager is not a party to the operating agreement. Later the LLC
6 members amend the operating agreement to change the quantum to a simple
7 majority and thereafter purport to remove the manager without cause. Although
8 the LLC has undoubtedly breached its contract with the manager, the LLC
9 probably has the power to effect the removal and the manager is remitted to a
10 damage claim – unless the operating agreement provided the non-member
11 manager a veto right over changes in the quantum provision.

12
13
14
15 The second sentence is derived from Del. Code Ann. tit. 6, § 18-302(e), which states:

16
17 If a limited liability company agreement provides for the manner in which it may
18 be amended, including by requiring the approval of a person who is not a party to
19 the limited liability company agreement or the satisfaction of conditions, it may
20 be amended only in that manner or as otherwise permitted by law (provided that
21 the approval of any person may be waived by such person and that any such
22 conditions may be waived by all persons for whose benefit such conditions were
23 intended).

24
25 **Subsection (c):** The last sentence is included in response to an issue raised by the
26 President of the Conference. Query whether the sentence should also refer to an amendment to
27 the operating agreement.

28
29 **Subsection (e):** The second sentence is consistent with third party beneficiary law. It is
30 the section sentence of subsection (d) that innovates.

31
32 **Subsection (f)(54)** – This provision combines the references to duty of loyalty and duty
33 of care in order to avoid repetition; two of the clauses [(iii) and (iv)] pertain to both duties.

34
35 **Subsection (f)(121):** This provision qualifies the category of “transferee” with “a person
36 in its capacity as a” to make clear that:

- 37 ▪ while a transferee takes a transferable interest subject to the operating agreement
38 (including later amendments [but subject to Section 701(a)(5)(B) – oppression remedy]),
39 ▪ the agreement cannot affect any other rights of a person who happens to be a transferee
40 (unless, of course, the person has become a member or has otherwise assented to the
41 agreement).

42 ▪—

1 ~~Subsection (a)~~—The second sentence is included in response to an issue raised by the
2 President of the Conference. The language comes from UCC § 8-113.
3

4 ~~SECTION 111. REQUIRED INFORMATION.~~ A limited liability company shall
5 maintain at its designated office the following information:

6 ~~————— (1) a copy of the initial articles of organization and all amendments to and~~
7 ~~restatements of the articles and signed copies of any powers of attorney under which any articles,~~
8 ~~amendment, or restatement has been signed;~~

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

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

14 **Reporters' Notes to Former Section 111 [Required Information]**

15
16 At its October, 2004 meeting, the Drafting Committee deleted this section, reasoning that
17 the informal nature of the LLC made a required records provision inappropriate.

18
19 ~~The Drafting Committee has not yet discussed whether to include any required~~
20 ~~information provision. This Draft takes a minimalist approach, requiring retention only of~~
21 ~~records whose existence is required either by this Act (articles of organization; annual reports) or~~
22 ~~tax law (tax returns). Even this minimalist approach raises the question of who is responsible for~~
23 ~~maintaining the records in a member-managed LLC. Query whether this section should be~~
24 ~~limited to manager-managed LLCs.~~

25
26 ~~————— This Section could be expanded to required retention of other information that happens to~~
27 ~~exist in record form. That is, the Act could say, in essence, “You don’t have to have this~~
28 ~~information in record form, but if you do, you must maintain a copy at your designated office.”~~
29 ~~could the Drafting Committee will likely consider whether any of the following items should be~~
30 ~~included in an expanded provision on required information:~~

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

17
18 (This list is drawn from ULPA (2001), § 111.
19

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

32 **SECTION ~~112~~111. BUSINESS TRANSACTIONS OF MEMBER WITH LIMITED**
33 **LIABILITY COMPANY.** A member may lend money to and transact other business with the
34 limited liability company and has the same rights and obligations with respect to the loan or
35 other transaction as a person that is not a member.

36 **Reporters’ Notes**
37

1 At the suggestion of the ABA Advisor, the Comment to ULPA (2001), § 112 is replicated
2 here with appropriate changes:
3

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

13 **SECTION ~~113~~112. OFFICE AND AGENT FOR SERVICE OF PROCESS.**

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

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

17 (2) an agent for service of process.

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

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

23 **Reporters' Notes**

24 Source: ULPA (2001), ~~§~~ § 114.
25

26 **Issue to be considered:** whether to add the word "registered" to both office and agent.
27

28 At its October, 2004 meeting, the Drafting Committee discussed using the adjective
29 "registered" for both office and agent, in conformity with MBCA § 5.01. That usage is
30 inconsistent with ULPA (2001) § 114, ULLCA § 108, RULPA § 104. Query why to change
31 what has been consistent Conference usage since 1976.
32

1
2 **SECTION ~~114~~113. CHANGE OF DESIGNATED OFFICE OR AGENT FOR**
3 **SERVICE OF PROCESS.**

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

7 (1) the name of the limited liability company or foreign limited liability
8 company;

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

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

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

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

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

18 **Reporters' Notes**

19 **Source** – ULPA (2001) § 115, which is based on ULLCA § 109.
20

21 **Subsection (a)** – This Draft uses “may” rather than “shall” here because other avenues
22 exist. A limited liability company may also change the information by an amendment to its
23 articles of organization, Section 202, or through its annual report. Section 210(e). A foreign
24 limited liability company may use its annual report. Section 210(e). However, neither a limited
25 liability company nor a foreign limited liability company may wait for the annual report if the

1 information described in the public record becomes inaccurate. See Sections 208 (imposing
2 liability for false information in record) and ~~H7116~~(b) (providing for substitute service).
3

4 **SECTION ~~H5114~~. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.**

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

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

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

16 **Reporters' Notes**

17 **Source** – ULPA (2001) § 116, which is based on ULLCA §110.
18

19 **SECTION ~~H6115~~. SERVICE OF PROCESS.**

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

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

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

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

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

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

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

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

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

3 **Reporters' Notes**

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

1
2 [ARTICLE] 2

3 FORMATION; ARTICLES OF ORGANIZATION AND OTHER FILINGS

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

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

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

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

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

15 (b) Articles of organization may also contain matters other than those required by
16 subsection (a) but:

17 _____ (1) are not effective as a statement of authority (Section 302); and

18 _____ (2) may not vary or otherwise affect the provisions specified in Section
19 110(b) in a manner inconsistent with that section.

20 (c) A limited liability company is formed when the [Secretary of State] files the
21 articles of organization, unless the articles state a delayed effective date pursuant to Section
22 206(c). If the articles state a delayed effective date, a limited liability company is not formed if,

1 before the articles take effect, the person who signed the articles signs and delivers to the
2 [Secretary of State] for filing a statement of cancellation.

3 (d) Subject to subsection (b), if any provision of an operating agreement is
4 inconsistent with the filed and effective articles of organization or with a filed and effective
5 statement of authority, termination, or change, or filed articles of domestication, conversion, or
6 merger:

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

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

11 Reporters' Notes

12 Issues to be considered: whether the proposed addition to subsection (b) should be
13 retained; whether to adopt a revised version of subsection (d), as suggested below; whether
14 subsection (d) should take into account that provisions of the articles could be evidenc of the
15 contents of the operating agreement; whether subsection (c)'s provision for a statement of
16 cancellation should provide a fallback rule, in case the person that signed the articles of
17 incorporation is incapacitated and therefore unable to sign a statement of cancellation; whether
18 the Committee should re-visit its early, tentative decision that subsection (a)(3) is properly
19 phrased

20
21 **Subsection (a)(3)** – ~~As drafted,~~ This provision does not reflect a default rule. That is, a
22 person seeking to form a limited liability company must make an affirmative choice between
23 member-management and manager-management. The articles will be rejected as non-
24 conforming unless they specify the choice. ~~Query whether~~ The Drafting Committee has
25 determined that this approach is appropriate, given even though many that-LLC statutes
26 (including ULLCA) typically default to member-management.

27
28 **Subsection (b)(1)** – This provision is new, added by the reporters because a person
29 searching the public records for statements of authority might not also search the articles. (The
30 Drafting Committee has previously decided that statements of authority should not be deemed
31 part of an LLC's articles.)
32

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

3
4 **Subsection (d)** – Source: ULLCA Section 203(c), which is also followed in ULPA
5 (2001) § 201(d). The following three paragraphs are from the comment to ULPA (2001) §
6 201(d), revised to refer to a limited liability company.

7
8 A limited liability company is a creature of contract as well as a creature of statute. It
9 will be possible, albeit improper, for the operating agreement to be inconsistent with the articles
10 of organization or other specified public filings relating to the limited liability company. For
11 those circumstances, this subsection provides the rule for determining which source of
12 information prevails.

13
14 For members and transferees, the operating agreement is paramount. For third parties
15 seeking to invoke the public record, actual knowledge of that record is necessary and notice
16 under Section 103(c) or (d) is irrelevant. A third party wishing to enforce the public record over
17 the operating agreement must show reasonable reliance on the public record, and reliance
18 presupposes knowledge.

19
20 This subsection does not expressly cover a situation in which (i) one of the specified filed
21 records contains information in addition to, but not inconsistent with, the operating agreement,
22 and (ii) a person, other than a member or transferee, detrimentally relies on the additional
23 information. However, the policy reflected in this subsection seems equally applicable to that
24 situation.

25
26 Query whether the lead-in to this section could be streamlined by replacing the list of
27 publicly-filed records with the phrase “the filed and effective articles of organization or any other
28 record delivered by the limited liability company to [Secretary of State] for filing and effective
29 under this under this [act]”? Or streamlined ~~either even~~ further by also eliminating the specific
30 reference to articles of organization? In any event, the lead-in will be revised to reflect META.
31 The subsection might, therefore, read as follows:

32
33 Subject to subsection (b), if any provision of an operating agreement is
34 inconsistent with ~~the filed and effective articles of organization or with a filed and~~
35 ~~effective statement of authority, termination, or change, or filed articles of~~
36 ~~domestication, conversion, or merger~~ a record delivered by the limited liability
37 company to the [Secretary of State] for filing and effective under this [act] or a
38 record filed and effective under [META]:

- 39 (1) the operating agreement prevails as to members and transferees; and
40 (2) the ~~filed and effective articles or statement~~ record prevails as to
41 persons, other than members and transferees, that reasonably rely to their
42 detriment on the ~~filed and effective~~ record.

1 Or as follows:
2

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

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

10 (2) the ~~filed and effective articles or statement~~ record prevails as to
11 persons, other than members and transferees, that reasonably rely to their
12 detriment on the ~~filed and effective~~ record.
13

14 Note – both the current language and the contemplated revisions exclude records filed by others.
15 Also, once the Drafting Committee has finalized the list of records that may be filed by a limited
16 liability company, the language of this subsection must be cross-checked against that list.
17

18 **SECTION 202. AMENDMENT OR RESTATEMENT OF ARTICLES OR**
19 **ORGANIZATION.**

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

22 (1) the name of the limited liability company;

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

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

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

28 (c) Restated articles of organization may be delivered to the [Secretary of State]
29 for filing in the same manner as an amendment. Restated articles of organization must be
30 designated as such in the heading and state in the heading or in an introductory paragraph the

1 limited liability company's present name and, if it has been changed, all of its former names and
2 the date of the filing of its initial articles of organization.

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

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

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

10 (2) if appropriate, deliver to the [Secretary of State] for filing a statement
11 of change pursuant to Section ~~414~~113 or a statement of correction pursuant to Section 207.

12 **Reporters' Notes**

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

16
17 **Subsection (c)** – For the reason stated in the Notes to subsection (b), this draft includes
18 an additional sentence (the second), which is taken verbatim from ULLCA. Query whether any
19 name change should trigger the requirement for additional information or only a name change
20 being made by the restatement itself. (The purpose of the additional information appears to be to
21 facilitate tracking back through the Secretary of State's database.)
22

23 **Subsection (e)** – This subsection is taken from ULPA (2001) § 202(c), which imposes
24 the responsibility on general partners. ULLCA has no comparable provision. This provision
25 imposes an obligation directly on the members and managers rather than on the limited liability
26 company. A member or manager's failure to meet this responsibility exposes the member or
27 manager to liability to third parties under Section 208(a)(2) and might constitute a breach of the
28 member or manager's operational duties under Section 409(a)(2). In addition, an aggrieved
29 person may seek a remedy under Section 205 (Signing and Filing Pursuant to Judicial Order).
30

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

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

7 **Reporters' Notes**

8
9 This section is permissive and perhaps belongs in Article 7. Indeed, at the April 2004
10 meeting, a commissioner suggested relocating this section to that Article. However, that
11 relocation would put this Act out of synch with the Conference's most recent enactment in the
12 area (ULPA (2001)) – not only here but, as a result of renumbering, throughout the rest of
13 Article 2. (The Drafting Committee liaison from the Committee on Style agrees that this section
14 should be relocated to Article 7.)
15

16 **SECTION 204. SIGNING OF RECORDS TO BE DELIVERED FOR FILING TO**
17 **THE [SECRETARY OF STATE].**

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

20 (1) Initial articles of organization must be signed by at least one person

21 (2) A statement of cancellation under Section 201(c) must be signed by
22 each person that signed the initial articles of organization.

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

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

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

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

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

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

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

12 Reporters' Notes

13
14 This Draft uses "authorized agent" rather than "attorney in fact," because the latter usage
15 seems needlessly recondite.

16
17 **Subsection Issues to be considered:** (a) — Query whether subsection (a)(3) and (7)
18 suffice to indicate that a statement of dissociation, Section 604, must be signed either by the
19 dissociated member or the limited liability company, depending on who is delivering the
20 document to the Secretary of State for filing; -

21
22 ——— **Subsection (a)(2)** — Query whether it is necessary to revise subsection (a)(2) to
23 accommodate situations when in which one of the original signers has ceased to exist or lacks
24 capacity?

25
26 This Draft uses "authorized agent" rather than "attorney in fact," because the latter usage
27 seems needlessly recondite.

28 SECTION 205. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER.

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

4 (1) the person to sign the record;

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

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

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

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

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

14 **Reporters' Notes**

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

17
18 At the April 2004 meeting of the Drafting Committee, at least two people suggested that
19 this Section might be unnecessary, given the existence of F.R.Civ. P. 70. That rule states:

20
21 If a judgment directs a party to execute a conveyance of land or to deliver deeds
22 or other documents or to perform any other specific act and the party fails to
23 comply within the time specified, the court may direct the act to be done at the
24 cost of the disobedient party by some other person appointed by the court and the
25 act when so done has like effect as if done by the party. On application of the
26 party entitled to performance, the clerk shall issue a writ of attachment or
27 sequestration against the property of the disobedient party to compel obedience to
28 the judgment. The court may also in proper cases adjudge the party in contempt.
29 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 assistance
5 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.

1 (c) Except as otherwise provided in Sections ~~445~~114 and 207, a record delivered
2 to the [Secretary of State] for filing under this [act] may specify an effective time and a delayed
3 effective date. Subject to Sections ~~445~~114, 201(c), and 207, a record filed by the [Secretary of
4 State] is effective:

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

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

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

12 (A) the specified date; or

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

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

16 (A) the specified date; or

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

18 **Reporters' Notes**

19 **Source** – ULPA (2001) § 206, which was based on ULLCA §206.
20

21 **Subsection (c)** – If a person delivers to the Secretary of State for filing a record that
22 contains an over-long delay in the effective date, the Secretary of State (i) will not reject the
23 record and (ii) is neither required nor authorized to inform the person that this act will truncate
24 the delay.
25

1 **SECTION 207. CORRECTING FILED RECORD.**

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

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

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

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

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

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

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

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

19 **Reporters' Notes**

20 **Source** – ULPA (2001) § 207, which was based on ULLCA §207.
21

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

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

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

6 (2) a member of member-managed limited liability company, or a
7 manager of a manager-managed limited liability company, if the record was delivered for filing
8 on behalf of the limited liability company and the member or manager has notice that the
9 information was false when the record was filed or has become false because of changed
10 circumstances for a reasonably sufficient time before the information is relied upon to enable the
11 member or manager to effect an amendment under Section 202, file a petition pursuant to
12 Section 205, or deliver to the [Secretary of State] for filing a statement of change pursuant to
13 Section ~~114~~113 or a statement of correction pursuant to Section 207.

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

16 **Reporters' Notes**

17 Source: ULPA (2001) § 207, which expanded on ULLCA § 209.
18

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

20 (a) The [Secretary of State], upon request and payment of the requisite fee, shall
21 furnish a certificate of existence for a limited liability company if the records filed in the [office

1 of the Secretary of State] show that the [Secretary of State] has filed a articles of organization
2 and has not filed a statement of termination. A certificate of existence must state:

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

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

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

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

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

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

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

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

18 (b) The [Secretary of State], upon request and payment of the requisite fee, shall
19 furnish a certificate of authorization for a foreign limited liability company if the records filed in
20 the [office of the Secretary of State] show that the [Secretary of State] has filed a certificate of
21 authority, has not revoked the certificate of authority, and has not filed a notice of cancellation.

22 A certificate of authorization must state:

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

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

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

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

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

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

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

16 **Reporters' Notes**

17 **Source** – ULPA (2001) § 209, which was based on ULLCA Section 208.
18

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

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

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

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

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

7 (4) in the case of a foreign limited liability company, the state or other
8 jurisdiction under whose law the foreign limited liability company is formed and any alternate
9 name adopted under Section 805(a).

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

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

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

1 (e) If a filed annual report contains an address of a designated office or the name
2 or address of an agent for service of process which differs from the information shown in the
3 records of the [Secretary of State] immediately before the filing, the differing information in the
4 annual report is considered a statement of change under Section ~~14~~113.

5 **Reporters' Notes**

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

1
2 **[ARTICLE] 3**

3 **RELATIONS OF MEMBERS AND MANAGERS**

4 **TO PERSONS DEALING WITH LIMITED LIABILITY COMPANY**

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

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

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

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

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

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

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

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

14 **Reporters' Notes**

15 **Source** – RUPA § 301.

16
17 This section differs somewhat from ULLCA § 301, because this Draft follows RUPA in
18 providing for statements of authority. Compare Section 302 (statements of authority) with
19 ULLCA § 301(c) (providing a somewhat comparable but more limited effect for statements in
20 the articles of organization). The RUPA approach is preferable, because it allows “duplicate
21 filing” in the real estate records without the need to file the entire articles of organization in those
22 records. See Section 302(c)(2) of this Draft.
23

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

25 **AUTHORITY.**

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

3 (1) must include the name of the limited liability company and the street
4 and mailing address of its designated office;

5 (2) may state the authority, or limitations on the authority of a specific
6 person to:

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

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

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

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

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

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

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

5 (1) Except for transfers of real property, a grant of authority contained in
6 a filed statement of limited liability company authority is conclusive in favor of a person that
7 gives value without knowledge to the contrary, so long as and to the extent that a limitation on
8 that authority is not then contained in another filed statement. A filed cancellation of a limitation
9 on authority revives the previous grant of authority.

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

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

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

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

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

7 (f) After a statement of dissolution takes effect, a limited liability company may
8 deliver to the [Secretary of State] for filing and, if appropriate, may record a statement of limited
9 liability company authority that is designated as a post-dissolution statement of authority and
10 which will operate with respect to a person not a member as provided in subsections (c) and (d),
11 whether or not the transaction is appropriate for winding up the limited liability company
12 business.

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

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

19 **Reporters' Notes**

20 Consistent with the instructions given by the Drafting Committee at its April 2004
21 meeting, this section and the following section mirror RUPA § 303 and 304 in both wording and
22 structure as much as possible. Changes have been made only to the extent that one or more of
23 the following rationales applies: (1) The Committee decided, at least provisionally, to try to
24 retain the concept of delineating authority by position, as reflected in the April 2004 draft. (2)

1 Regardless of the eventual fate of that provisional decision, a statement of authority for a
2 manager-managed LLC will be able to refer to managers. (3) There is no reason to require a
3 statement of limited liability company authority to disclose the identity of the LLC’s members.
4 (4) Following ULPA (2001), ULLCA II has centralized its constructive notice provisions.
5 Consonant with that decision, the diffuse “deemed” cancellation and limitation provisions of
6 RUPA §§ 704 and 805 are relocated into this provision.
7

8 A proposed re-write of this section appears at the end of the Reporters’ Notes to this section.
9

10 **Subsection (a)** – It might be possible to combine paragraphs (2) and (3). However,
11 paragraph (3) contains a novel provision that the Drafting Committee has only provisionally
12 accepted. This Draft uses separate paragraphs to focus attention on the contents of paragraph
13 (3). Also, a more elegant and straightforward way might exist to express the rule stated in
14 paragraph (3), but at least initially the Drafting Committee had decided to follow as closely as
15 possible both the wording and structure of RUPA § 302.
16

17 **Subsection (a)(3)** – This language permits a statement to designate authority by position
18 (or office) rather than by specific person. (Subsection (a)(2) covers the latter type of
19 designation.)
20

21 **Subsection (h)** – This subsection presupposes that statements may be amended, but the
22 section nowhere expressly authorizes amendments. Query – should the section do so?
23

24 *Proposed Re-Write to Section 302*
25

26 **Add a new definition:**

27 “Effective” means, with regard to a statement of authority, a statement of denial, an
28 amendment to a statement of authority, a cancellation of a statement of authority, that the
29 statement, amendment or cancellation has become effective under Section 206(c).
30

31 **SECTION 302. STATEMENT OF LIMITED LIABILITY COMPANY**
32 **AUTHORITY.**

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

35 (1) must include the name of the limited liability company and the street
36 and mailing address of its designated office;

37 (2) may state the authority, or limitations on the authority of a specific
38 person to:

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

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

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

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

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

8 (b) To amend a statement of authority previously filed by the [Secretary of State]
9 under Section 206(a), a limited liability company may deliver to the [Secretary of State] for
10 filing an amendment stating **[obtain IACA input re: what information is needed to link the**
11 **new filing to the old.]** To cancel a statement of authority previously filed by the [Secretary of
12 State], a limited liability company may deliver to the [Secretary of State] for filing a cancellation
13 stating **[obtain IACA input re: what information is needed to link the new filing to the old.]**

14 (c) A statement of authority affects only the power of a person to bind a limited
15 liability company to persons that are not members and does so according to the following rules:

16 (1) Except as otherwise provided in paragraphs (3), (4) and (5), a
17 limitation on the authority of a person or a position contained in an effective statement of
18 authority does not by itself cause any person to have knowledge or notice of the limitation.

19 (2) A grant of authority not pertaining to transfers of real property and
20 contained in an effective statement of authority is conclusive in favor of a person that gives value
21 in reliance on the grant, without having knowledge to the contrary, except to the extent that the
22 statement has been cancelled **{query – or restrictively amended?}** under subsection (b) or a
23 limitation on the grant is then contained in another statement of authority that became effective
24 after the statement containing the grant became effective. If a cancellation of a limitation on
25 authority becomes effective, the cancellation revives the previous grant of authority but without
26 retroactive affect.

27 (3) An effective statement of authority to transfer real property held in the
28 name of the limited liability company, which is by certified copy recorded in the office for
29 recording transfers of that real property, is conclusive in favor of a person that gives value in
30 reliance on the grant, without knowledge to the contrary, except to the extent that: (A) the
31 statement has been cancelled **{query – or restrictively amended?}** under subsection (b) or a
32 limitation on the grant is then contained in another statement of authority that became effective
33 after the statement containing the grant became effective; and (B) a certified copy of cancellation
34 or limiting statement is then of record in the office for recording transfers of that real property.
35 The recording in that office of a certified copy of an effective cancellation of a limitation on
36 authority revives the previous grant of authority but without retroactive effect.

37 (4) All persons **{query – due to the first sentence of this section, all**
38 **persons means “all persons not members”;** is that sufficiently clear?} are deemed to know
39 of a limitation on the authority to transfer real property held in the name of the limited liability
40 company, if a certified copy of an effective statement containing the limitation on authority is of
41 record in the office for recording transfers of that real property.

42 (5) When effective under Section 206(c):

1 (A) a statement of dissociation or manager cessation is, for the
2 purposes of paragraphs (3) and (4), a limitation on the authority of the person referred to in the
3 statement; and

4 (B) subject to paragraph (6), a statement of dissolution or
5 termination cancels any filed statement of authority for the purposes of paragraph (3) and is a
6 limitation on authority for the purposes of paragraph (4).

7 (6) After a statement of dissolution takes effect, a limited liability
8 company may deliver to the [Secretary of State] for filing and, if appropriate, may record a
9 statement of limited liability company authority that is designated as a post-dissolution statement
10 of authority and which will operate as provided in paragraphs (3) and (4).

11 (7) Unless earlier canceled, an effective statement of limited liability
12 company authority is canceled by operation of law five years after the date on which the
13 statement, or the most recent amendment, became effective.

14 (8) An effective statement of denial (Section 303) operates as a limitation
15 of authority under this Section.

16
17 **SECTION 303. STATEMENT OF DENIAL.** A person named in a filed statement of
18 limited liability company authority granting that person authority may deliver to the [Secretary
19 of State] for filing a statement of denial stating the name of the limited liability company and
20 denying the grant of authority.

21
22
23 **Regarding proposed revised Section 302(c) – RUPA’s text makes this very**
24 **important point only obliquely RUPA § 303, comment 4 does so directly (“It**
25 **should be emphasized that Section 303 concerns the authority of partners to bind**
26 **the partnership to third persons. As among the partners, the authority of a partner**
27 **to take any action is governed by the partnership agreement, or by the provisions**
28 **of RUPA governing the relations among partners, and is not affected by the filing**
29 **or recording of a statement of partnership authority.”) But query whether a**
30 **statement of authority might, in some circumstances, be some evidence of the**
31 **contents of the operating agreement?**

32 Query also what happens if a statement of authority conflicts with the
33 articles. Under this language, the statement controls as to a third party who gives
34 value in reliance unless the party has “knowledge to the contrary”.

35
36 **Not included in the proposed revised version:** current subsection (b) (“ If a
37 filed statement of limited liability company authority is signed pursuant to Section
38 204(a)(3) and states the name of the limited liability company but not the street
39 and mailing address of its designated office, the statement nevertheless operates
40 with respect to a person not a member as provided in subsections (c), (d) and
41 (e).”)

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 subsections
16 (a) and (b), see RUPA Section 305, Comment. The third-to-last paragraph of that
17 Comment states:

18
19 The ~~membership partnership~~ is liable for the actionable conduct or
20 omission of a ~~member partner~~ acting in the ordinary course of its business or
21 “with the authority of the ~~membership partnership~~.” This is intended to include a
22 ~~member’s partner’s~~ apparent, as well as actual, authority, thereby bringing within
23 Section 305(a) the situation covered in UPA 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 partnership~~ for the
29 misapplication of money or property received by a ~~member partner~~ in the course
30 of the ~~membership’s partnership’s~~ business or otherwise within the scope of the
31 ~~member’s partner’s~~ actual 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.**

1 (a) Except as otherwise provided in subsection (c), the debts, obligations, and
2 liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely
3 the debts, obligations, and liabilities of the limited liability company. A member or manager is
4 not personally liable for a debt, obligation, or liability of a limited liability company solely by
5 reason of being or acting as a member or manager.

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

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

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

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

16 Reporters' Notes

17
18 Issues to be considered: whether to reinstate in subsection (b) the phrase “or
19 requirements” after the word “formalities”; whether to retain subsection (c)

20
21 As originally presented to the Drafting Committee, this section came almost verbatim
22 from ULLCA § 303.

23
24 **Subsection (b)** – At its April 2004 meeting, the Drafting Committee changed ULLCA’s
25 phrase “the usual limited liability company formalities” to “any particular formalities” on the
26 theory that a limited liability company does not necessarily have any usual formalities. The
27 Committee also deleted the phrase “or requirements”, which in ULLCA follows the word
28 “formalities”. The effect of this change warrants further discussion. Some Committee members

1 and advisors saw the change as merely removing surplus language. Others feared a substantive
2 effect.

3
4 In any event, it might be useful for a Comment to explain that this provision does not
5 pertain to a situation in which (i) a member or manager fails to obtain the consent required to
6 have the actual authority to bind the LLC in a transaction with a third party; (ii) the member
7 nonetheless purports to bind the LLC; (iii) under Section 301 the member or manager lacks the
8 statutory apparent authority to bind the LLC; (iv) the LLC is not bound; and therefore (v) under
9 the agency law doctrine of “warranty of authority,” the member or manager is liable to the third
10 party. In that circumstance, the liability is not *for* a “debt[], obligation[], [or] liability[y] of a
11 limited liability company,” but rather because the limited liability company is *not* indebted,
12 obligated or liable.

13
14 **Subsection (c)** – At its April 2004 meeting, the Drafting Committee provisionally
15 decided to retain this subsection, pending an inquiry into why the subsection was included in
16 ULLCA. Co-reporter Bishop made that inquiry and spoke with Brian Schor, the ULLCA I
17 proponent and ABA representative from NY, who has since left NY practice and is with a
18 corporation. His recollection was that the provision was included for flexibility only. Professor
19 Bishop’s own “best recollection” (as Reporter for ULLCA I) was that, during the ULLCA I
20 drafting process, someone stated that a particular, major bank would not deal with an LLC unless
21 the statutory default itself could be disconnected. In that way, the bank could have the LLC’s
22 primarily liable with the LLC and not merely as guarantors.

23 If that rationale ever made sense, in the opinion of the co-reporters, it no longer does.
24 Nothing prevents the operating agreement from varying this Section. -The co-reporters
25 rcommend that the Drafting Committee deleted subsection (c).

26 *This paragraph is moot, if the Committee accepts that suggestion.* The Committee has
27 also discussed whether the current language is adequate to authorize a provision in the articles to
28 set a cap on a member’s subsection (c) liability – e.g., specifying that member X is liable only up
29 to \$500,000 to a specified obligee on a specified obligation, while member Y is liable for the full
30 extent of that obligation (with or without the right of further contribution from X). The
31 Committee has tentatively decided that the current language is adequate in that regard but
32 recommended that a Comment address this point.

33
34 **Subsection (c)(2)** – The April 2004 draft had changed the ULLCA language of “a
35 member” to “each member”. That change was intended to highlight a question to be resolved if
36 the Drafting Committee decides to retain subsection (c) – namely, whether an obligation
37 intended to apply to more than one member will apply to those who do consent if some of the
38 members intended to be liable do not consent. The Drafting Committee decided emphatically
39 that the answer to that question is yes. A member who wants to condition his, her or its
40 subsection (c)(2) consent on the subsection (c)(2) consent of another must arrange that protection
41 for him, her or itself. Accordingly, the ULLCA language has been reinstated.

1
2 [ARTICLE] 4

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

5
6 SECTION 401. ~~HOW A PERSON BECOMES~~BECOMING A MEMBER.

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

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

10 (2) the time provided in and upon compliance with:

11 _____ (A) the understanding of the person that is to become the sole
12 initial member; or

13 _____ (B) an agreement among the persons ~~who~~ that are collectively to
14 become the initial members.

15 (b) ~~A~~ After a limited liability company has had at least one initial member, a
16 person becomes a member after the formation of a limited liability company:

17 (1) as provided in an operating agreement;

18 (2) as the result of a merger under [Article] 11 or [**TBD – pending**

19 **META**];

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

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

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

6 Reporters' Notes

7 Issues to be resolved: whether the current language in Section 401 adequately resolves
8 the issue of “formed by filing” vs. “formed by agreement”; whether subsection (b) should make
9 assenting to the operating agreement a precondition to becoming a member (Section 110(b)
10 provides that a person who becomes a member is by that action bound by the operating
11 agreement); whether the stated relationship between Section 401 and Section 701(a)(3) is
12 appropriate (allows an LLC to be formed and exist without any members for 89 days); whether
13 the caption to Section 401 should be changed to “Becoming a Member”

14
15 At the November, 2003 meeting, discussion was intense and views divided as to whether
16 this Act should allow “shelf” LLCs. The April 2004 draft tried to steer a middle course,
17 recognizing that: (i) it is the filing of a public document that creates the LLC as a legal person,
18 and (ii) LLCs are filed on behalf of one or more persons intending to become members upon
19 formation.

20
21 At its April 2004 meeting, the Drafting Committee directed the co-reporters to go “back
22 to the drawing boards” and to consider the approach taken by Del. Code Ann. tit. 6, § 18-301(a),
23 except for that provision’s reliance on the records of the LLC.

24
25 The Delaware model was of limited use, because section 18-301(a)(2) depends on the
26 notion that an LLC agreement can exist before the LLC is formed, even though Del. Code Ann.
27 tit. 6, § 18-101(7) defines an LLC agreement as being “of the member or members” and Del.
28 Code Ann. tit. 6, § 18-101(11) defines “member” as “a person who has been admitted to a
29 [presumably existing] limited liability company”.

30
31 A uniform act should not adopt such a “Klein bottle” approach, and accordingly
32 subsection (a)(2) refers to “an agreement among the persons who are to become the initial
33 members”. (A “Klein bottle” is a mathematical construct – a bottle with neither inside nor
34 outside, because the neck of the bottle is elongated and passes into the center of the bottle
35 through the side of the bottle without the presence of a hole in the side. A Klein bottle can,
36 therefore, be realized only in four dimensions.)
37

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

3
4 **Subsection (b)(4)** – This language is relocated from Section 701 (dealing with avoidance
5 of dissolution when an LLC loses its last member), where it appeared in the prior draft. The
6 legal representative could itself consent to become the member.

7
8 **Subsection (c)** – This subsection permits so-called “non-economic members.”
9

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

14 **Reporters’ Notes**

15 **Source** – ULPA (2001) § 501, which took ULLCA § 401 essentially verbatim except that
16 in ULLCA the last phrase is introduced with “or” instead of “and”.
17

18 **SECTION 403. LIABILITY FOR CONTRIBUTIONS.**

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

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

1 **Reporters' Notes**

2 **Source:** ULLCA § 402, which is taken from RULPA § 502(b), which also gave rise to
3 ULPA (2001) § 502.
4

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

17 **SECTION 404. SHARING OF AND RIGHT TO DISTRIBUTIONS BEFORE**
18 **DISSOLUTION.**

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

21 (b) A member does not have a right to any distribution before the dissolution and
22 winding up of the limited liability company unless the limited liability company decides to make
23 an interim distribution. A person’s dissociation does not entitle the person to any distribution.

24 (c) A member does not have a right to demand or receive a distribution from a
25 limited liability company in any form other than cash. Except as otherwise provided in Section
26 709(c), a limited liability company may distribute an asset in kind if each portion of the asset is
27 fungible with each other portion and each member receives a percentage of the asset equal in
28 value to the member’s share of distributions.

1 (d) When a member or transferee becomes entitled to receive a distribution, the
2 member or transferee has the status of, and is entitled to all remedies available to, a creditor of
3 the limited liability company with respect to the distribution. However, the limited liability
4 company's obligation to make a distribution is subject to offset for any amount owed to the
5 limited liability company by the member or dissociated member on whose account the
6 distribution is made.

7 **Reporters' Notes**

8 **Issues to be considered:** whether this Act should provide a default rule for the
9 allocation of profits and losses.

10 _____ This section is an amalgam of ULLCA § 405 and ULPA (2001) §§ 504 (interim
11 distributions) 505 (no distribution on account of dissociation), 506 (distribution in kind) and 507
12 (right to distribution).
13

14
15 **Subsection (d)** – The first sentence is probably redundant of Section 405(e) (limitations
16 on distributions; those entitled to distributions at parity with other general unsecured creditors).
17 The same redundancy exists under ULPA (2001) §§ 507 and 508.
18

19 **No default provision allocating profits and losses** – To date, this Act has followed both
20 ULLCA and ULPA (2001) in omitting any default rule for allocation of losses. The Comment to
21 ULPA (2001), § 503 explains that omission as follows:
22

23 This Act has no provision allocating profits and losses among the partners.
24 Instead, the Act directly apportions the right to receive distributions.

25 Nearly all limited partnerships will choose to allocate profits and losses in
26 order to comply with applicable tax, accounting and other regulatory
27 requirements. Those requirements, rather than this Act, are the proper source of
28 guidance for that profit and loss allocation.
29

30 The omission has been criticized. Franklin A. Gevurtz, BUSINESS PLANNING (3rd ed.), Supp.
31 2005 at 24.
32

33 The ULPA (2001) drafting committee followed the urging of its Advisor from the ABA Tax
34 Section and the example of ULLCA, concluded that the Act should not contain a provision that
35 has meaning only in terms of tax law, and assumed that anyone sophisticated enough to include

1 profit and loss sharing rules in a partnership agreement would be competent enough to include
2 appropriate adjustment to the statute's default distribution rules.

3
4 Query whether the same conclusion is appropriate for ULLCA II, given that (i) many people
5 form LLCs without obtaining sophisticated planning advice, and (ii) people are so used to seeing
6 statutory provisions for profits/losses and distributions in tandem that the absence of one is
7 disconcerting.

8
9
10 **SECTION 405. LIMITATIONS ON DISTRIBUTION.**

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

13 (b) A limited liability company may not make a distribution if after the
14 distribution:

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

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

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

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

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

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

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

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

11 (e) A limited liability company's indebtedness to a member incurred by reason of
12 a distribution made in accordance with this section is at parity with the limited liability
13 company's indebtedness to its general, unsecured creditors.

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

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

21 **Reporters' Notes**

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

3
4 **Subsection (c)** – This subsection appears to impose a standard of ordinary care, in
5 contrast with the more complicated approach stated in Sections 409 and 410.
6

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

8 (a) If a member of a member-managed, or manager of a manager-managed,
9 limited liability company consents to a distribution made in violation of Section 405 and the
10 limited liability company satisfies Section 410 with regard to the member’s or manager’s giving
11 of consent, the member or manager is personally liable to the limited liability company for the
12 amount of the distribution which exceeds the amount that could have been distributed without
13 the violation.

14 (b) A member or transferee that receives a distribution knowing that the
15 distribution to that member or transferee was made in violation of Section 405 is personally
16 liable to the limited liability company but only to the extent that the distribution received by the
17 member or transferee exceeded the amount that could have been properly paid under Section
18 405.

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

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

22 (2) implead in the action any person that received a distribution in
23 violation of subsection (b) and compel contribution from the person in the amount the person
24 received in violation of subsection (b).

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

3 **Reporters' Notes**

4 **Source** – Same derivation as Section 405.
5

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

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

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

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

15 (2) A difference arising among members as to a matter in the ordinary
16 course of the activities of a limited liability company may be decided by a majority of the
17 members. An act outside the ordinary course of activities of a limited liability company may be
18 undertaken only with the consent of all the members. An amendment to the operating agreement
19 may be made only with the consent of all the members.

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

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

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

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

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

6 (A) amend the operating agreement;

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

10 (C) **[TBD]**

11 (5) A manager may be chosen at any time by the consent of a majority of
12 the members and remains a manager until a successor has been chosen, unless the manager
13 sooner resigns, is removed, dies, or, in the case of a manager that is not an individual, terminates.
14 A manager may be removed at any time by the consent of a majority of the members, and those
15 members need not state or have cause and ~~not need~~ not inform the manager in advance or
16 ~~provide the manager with advance notice or an opportunity to be heard.~~ A person need not be a
17 member in order to be a manager, but the dissociation of a member who is also a manager
18 removes the person as a manager. If a person that is both a manager and a member ceases to be a
19 manager, that cessation does not cause the person to dissociate as a member.

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

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

4 **Reporters' Notes**

5
6 **Source:** ULLCA § 404; ULPA (2001) § 406

7
8 **Issues to be considered:** whether the default management structure should be essentially
9 identical for a manager-managed and member-managed LLC, except that a few key matters
10 [which?] should be, in the default mode, reserved to members even in a manager-managed LLC;
11 whether, in the default mode, the default management structure of a manager-managed LLC and
12 a member-managed LLC should differ from the default management structure of, respectively, a
13 limited partnership and a general partnership, and, if so, how

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

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

27
28 **Subsection (d)** – Query whether, in a manager-managed LLC, a wrongfully dissolving
29 member should lose even the limited rights of a member to participate in management? Note
30 that this subsection does not govern management authority a member might have not as a
31 manager or member but rather, under a separate agreement, as an agent of the LLC.
32

33 **SECTION 408. MEMBER'S AND MANAGER'S RIGHTS TO PAYMENTS AND** 34 **REIMBURSEMENT.**

35 (a) A limited liability company shall reimburse a member of a member-managed
36 limited liability company for payments made and indemnify the member for liabilities incurred

1 [reserved until the Committee has made a firmer decision concerning the nature of the
2 fiduciary duties owed by a member in a member-managed LLC and a manager in a
3 manager-managed LLC].

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

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

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

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

18 Reporters' Notes

19
20 **Source:** ULLCA § 403

21
22 **Subsections (a) and (b)** – These indemnification provisions will be fleshed out once the
23 Drafting Committee has made a firmer decision with regard to the standards of conduct and
24 liability stated in Sections 409 and 410.
25
26

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

3
4 _____ (a) The only fiduciary duties a member owes to the limited liability
5 company are the duty of loyalty and the duty of care set forth in subsections (b) and (c).

6 _____ (b) A member's duty of loyalty to a member-managed limited liability company is
7 limited to the following:

8 _____ (1) to account to the limited liability company and to hold as trustee for it
9 any property, profit, or benefit derived by the member in the conduct or winding up of the
10 limited liability company's business or derived from a use by the member of the limited liability
11 company's property, including the appropriation of a limited liability company opportunity;

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

15 _____ (3) to refrain from competing with the limited liability company in the
16 conduct of the limited liability company's business before the dissolution of the limited liability
17 company.

18 _____ (c) A member's duty of care to a member-managed limited liability company in
19 the conduct of and winding up of the limited liability company's business is limited:

20 _____ (1) when exercising discretionary authority in making decisions to take or
21 not to take action, to acting:

22 _____ (i) independently;

1 (ii) in a manner the member reasonably believes to be in the best
2 interest of the limited liability company; and

3 (iii) after considering information the member reasonably believes
4 appropriate in the circumstances, including information provided by another person that the
5 member reasonably believes is a competent and reliable source for the information; and

6 (2) in all other circumstances, to acting with the care that a person in a like
7 position would reasonably exercise under similar circumstances.

8 (d) A member of a member-managed company shall discharge the duties under
9 this [act] or under the operating agreement and exercise any rights consistently with the
10 obligation of good faith and fair dealing.

11 (e) A member of a member-managed limited liability company does not violate a
12 duty or obligation under this [act] or under the operating agreement merely because the member's
13 conduct furthers the member's own interest.

14 (f) In a manager-managed company:

15 (1) subject to paragraph (4), a member does not have any duties or
16 obligations under this section in the member's capacity as a member, except that subsections (d)
17 and (e) apply to the member's conduct in that capacity;

18 (2) a manager is held to the same standards of conduct prescribed for a
19 member in subsections (a) through (d), except that the obligation stated under subsection (b)(3)
20 continues until winding up is completed;

21 (3) subsection (e) does not apply to a person in the person's capacity as a
22 manager;

1 (4) if an operating agreement imposes on a member that is not a manager a
2 responsibility that this [act] would otherwise impose on a manager, the standards of conduct
3 prescribed by this subsection for a manager apply to the member with regard to that
4 responsibility.

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

6 ~~_____ (1) Each member, when discharging its governance responsibility, shall~~
7 ~~act:~~

8 ~~_____ (A) in good faith;~~

9 ~~_____ (B) in a manner the member reasonably believes to be in the best~~
10 ~~interests of the limited liability company;~~

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

14 ~~_____ (D) with the care that a person in a like position would reasonably~~
15 ~~believe appropriate in the circumstances.~~

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

19 ~~_____ (3) Each member shall:~~

20 ~~_____ (A) account to the limited liability company and hold as trustee for~~
21 ~~it any property, profit, or benefit derived by the member in the conduct and winding up of the~~

1 ~~limited liability company's activities or derived from a use by the member of limited liability~~
2 ~~company property, including the appropriation of a limited liability company opportunity;~~

3 ~~_____ (B) refrain from dealing with the limited liability company in the~~
4 ~~conduct or winding up of the limited liability company's activities as or on behalf of a party~~
5 ~~having an interest adverse to the limited liability company; and~~

6 ~~_____ (C) refrain from competing with the limited liability company in~~
7 ~~the conduct or winding up of the limited liability company's activities before dissolution of the~~
8 ~~limited liability company.~~

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

11 ~~_____ (1) A member does not have any obligation under this section in the~~
12 ~~member's capacity as a member.~~

13 ~~_____ (2) The obligations stated in subsection (a) apply to each manager.~~
14 ~~However, the obligation stated under subsection (a)(3)(C) continues until winding up is~~
15 ~~completed.~~

16 ~~_____ (c) To the extent the operating agreement of a manager managed limited liability~~
17 ~~company imposes governance responsibility or operational responsibilities on a member that is~~
18 ~~not a manager, the obligations stated in subsection (a)(1) and (2) apply to that member. To the~~
19 ~~extent the operating agreement of a manager managed limited liability company expressly~~
20 ~~relieves a manager of a specified governance responsibility or operational responsibility, the~~
21 ~~obligations stated in subsection (a)(1) and (2) do not apply to that manager.~~

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

5 **Reporters' Notes**

6
7 **Source:** ~~MBCA § 8.30 (considerably streamlined) and NCCUSL's standard provisions~~
8 ~~on the duty of loyalty.~~

9
10 **Issues to be considered:** whether to return the gross negligence formulation for the duty
11 of care; whether to delete "only" from subsection (a); whether to change "is limited to" in
12 subsection (b) to "includes"; whether to recognize the duty of disclosure as a fiduciary duty;
13 whether in subsection (d) "or" should be "and" (see below); whether subsection (e) is overbroad
14 (see below)

15
16 This section already has a lengthy history.

17
18 At its November, 2003 meeting, at the urging of Commissioner Blackburn, the Drafting
19 Committee decided to try to (i) eschew the "gross negligence" standard of care first promulgated
20 in RUPA and afterwards followed in ULLCA and ULPA (2001); and (ii) incorporate something
21 like the standard of care/standard of liability dichotomy recently adopted in MBCA §§ 8.30 and
22 8.31. Under the MBCA, that dichotomy exists principally for directors and not for officers, *cf.*
23 MBCA 8.42(c) (stating that director standard of liability principles apply to officers if they "have
24 relevance), and those positions reflect categorically different kinds of responsibilities.

25 In response, the co-reporters drafted and the Committee considered a version of this
26 This section and a companion section, Section 410, that together attempted to parallel
27 functionally that the MBCA's positional distinction by using the defined terms "governance
28 responsibility" and "operational responsibilities." (The draft also

29
30 ~~_____ This section also differs differed from the MBCA approach by leaving unaffected the~~
31 ~~traditional rules for duty of loyalty violations.)~~

32
33 At its April 2004 meeting, the Drafting Committee discussed ~~this and the following~~
34 ~~section~~ the proposal at length and with good-natured intensity. When the dust cleared, no one
35 had moved to change any language. However, there was considerable sentiment expressed in
36 favor of collapsing the two sections into one provision and somehow reinstating the gross
37 negligence standard in combination with a business judgment rule formulation.

1 The chair of the Committee has then directed the co-reporters to draft a single section,
2 which ~~will be~~ was presented to and adopted by the Committee ~~via during~~ a teleconference ~~and~~.
3 ~~will provide somewhat as follows: (i) the section exhaustively states the applicable fiduciary~~
4 ~~duties — i.e., “only” will be reinstated; (ii) when performing a “governance” function, a person is~~
5 ~~obligated to comply with the presuppositions of the business judgment rule; (iii) for non-~~
6 ~~governance functions, the gross negligence standard applies; (iv) the Conference’s standard duty~~
7 ~~of loyalty rules apply (as in the current draft), (v) a person is liable for breach of the duties~~
8 ~~specified in the section; (vi) the operating agreement has the power to eliminate a person’s~~
9 ~~monetary liability for breach of the duty of care. That single section was distributed to the 2004~~
10 ~~Annual Meeting as a supplement to the Act and was read in place of the Sections 409 and 410~~
11 ~~included in the Annual Meeting draft. At its October, 2004 meeting, the Drafting Committee~~
12 ~~again vigorously debated the topic of fiduciary duty, but no changes were moved.~~

13 The language shown above is therefore the Drafting Committee’s current position in the
14 matter.

15
16 Subsection (d): -- Query whether “or” should be “and”.

17
18 Subsection (de) – In RUPA, ULLCA and ULPA (2001), the rule stated in the second
19 sentence applies more broadly — not only to the obligation of good faith and fair dealing but also
20 to duties created by the Act and by the owners’ agreement (i.e., partnership agreement, operating
21 agreement). That broader scope is Query whether this subsection is overbroad, because (i) as to
22 the Act’s duty of loyalty, self-interest is at the core of the wrong, and (ii) an agreement among
23 owners could certainly proscribe self-interested behavior.
24

25 ~~SECTION 410. STANDARDS OF LIABILITY FOR GOVERNANCE~~

26 ~~RESPONSIBILITY.~~

27 ~~_____ (a) A person is not liable to the limited liability company or any of its members~~
28 ~~for a breach of the person’s governance responsibilities under Section 409, unless the party~~
29 ~~asserting liability establishes:~~

30 ~~_____ (1) that the challenged conduct consisted or was the result of:~~

31 ~~_____ (A) action not in good faith;~~

32 ~~_____ (B) a decision:~~

1 ~~_____ (i) that the person did not reasonably believe was in the~~
2 ~~best interests of the limited liability company; or~~
3 ~~_____ (ii) as to which the director was not informed to the extent~~
4 ~~the director should have reasonably believed appropriate in the circumstances;~~
5 ~~_____ (C) sustained failure by the person to devote reasonably sufficient~~
6 ~~time and attention to the person’s governance responsibility, if particular facts and circumstances~~
7 ~~of significant concern existed which would have alerted a reasonable person in a like position to~~
8 ~~the need for timely attention and appropriate inquiry; or~~
9 ~~_____ (D) a breach of the person’s duties under Section 409(a)(3); and~~
10 ~~_____ (2) if the party asserting liability claims damages, as distinguished from~~
11 ~~disgorgement, rescission, an accounting, a constructive trust or other equitable relief, that the~~
12 ~~challenged conduct proximately caused harm to the limited liability company or one or more of~~
13 ~~its members.~~
14 ~~_____ (b) A member’s right to assert liability for a person’s breach of governance~~
15 ~~responsibilities is subject to [Article] 9.~~

16 **Reporters’ Notes**

17 ~~_____ **Source:** MBCA § 8.31 (streamlined and simplified).~~
18 ~~_____ See the discussion in the Reporters’ Notes to Section 409~~
19 ~~_____ **Subsection (a)(2)** Query whether the “as distinguished from” list should also refer to~~
20 ~~non-damage claims authorized by this Act, e.g., liability under Section 406 for authorizing~~
21 ~~improper distributions.~~
22 ~~_____ **Subsection (b)** Article 9 preserves the direct/derivative distinction.~~
23
24
25
26

1 **SECTION 411. RIGHT TO INFORMATION OF MEMBERS, MANAGERS, AND**
2 **~~FORMER-DISSOCIATED~~ MEMBERS.**

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

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

6 _____ ~~(A) in the limited liability company's designated office, required~~
7 ~~information; and~~

8 _____ ~~(B)~~, at a reasonable location specified by the limited liability
9 company, any ~~other~~ records maintained by the limited liability company regarding the limited
10 liability company's activities and financial condition.

11 (2) The limited liability company shall furnish to each member and each
12 member shall furnish to each other member:

13 (A) without demand, any existing information concerning the
14 limited liability company's activities, condition, and circumstances which is reasonably required
15 for the proper exercise of the recipient member's rights and duties under the operating agreement
16 or this [act], except to the extent that the person otherwise obligated under this provision:

17 _____ (i) does not have possession, control, or access to the
18 information; or

19 _____ (ii) has notice that the would-be recipient already knows
20 the information; and

1 (B) on demand, any other information concerning the limited
2 liability company's activities, condition, and circumstances, except to the extent the demand or
3 the information demanded is unreasonable or otherwise improper under the circumstances.

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

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

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

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

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

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

20 (C) the information sought is directly connected to the member's
21 purpose.

1 (43) Within 10 days after receiving a demand pursuant to paragraph
2 (32)(B), the limited liability company shall in a record inform the member that made the
3 demand:

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

6 (B) when and where the limited liability company will provide the
7 information; and

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

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

14 (c) Except as otherwise provided in subsection (d), on 10 days' demand made in a
15 record received by the limited liability company, a ~~person~~ dissociated as a member may have
16 access to whatever information ~~and records~~ the person was entitled to while a member if (i) the
17 information ~~or record~~ pertains to the period during which the person was a member; (ii) the
18 person seeks the information or record in good faith; and (iii) the person satisfies the
19 requirements imposed on a member by subsection (b)(32). The limited liability company shall
20 respond to a demand made pursuant to this subsection in the same manner as provided in
21 subsection (b)(43).

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

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

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

8 (g) A member or ~~person that is dissociated as a member~~ may exercise the rights
9 under this section through an agent or, in the case of an individual under legal disability, a legal
10 representative. Any restriction imposed under subsection (e) or by the operating agreement
11 applies both to the agent or legal representative and the member or ~~person dissociated as a~~
12 member.

13 (h) Whenever a member purchases or sells any part of a transferable interest, or
14 other right a member or transferee has under this [act] or the operating agreement, from or to
15 another member, the limited liability company, or a transferee, each party to the transaction shall
16 provide to the other, without demand, all material information concerning the limited liability
17 company known by the party unless the party with the disclosure obligation believes reasonably
18 and in good faith that the other party knows the information.

19 (i) Except as stated in subsection (h), ~~t~~The rights provided in this section do not
20 extend to a person as transferee.

21 Reporters' Notes

22 **Source:** ULPA (2001) §§ 304 and 407.
23

1
2 **Issues to be considered:** whether the Act continue the Conference’s approach of treating
3 information duties as statutory rather than fiduciary; whether the revised language adequately
4 handles the various scenarios raised at the October, 2004 meeting; whether in subsection
5 (a)(2)(A) the phrase “reasonably required” should be replaced with “material to”; whether
6 subsection (h) appropriately handles the issue of disclosure in member-to-member and member-
7 to-LLC transactions and, in particular, whether it is appropriate to end the subsection’s
8 protections to transferees; whether the Section should be expanded to give members, dissociated
9 members who retain a transferable interest, and transferees a right to demand a copy of the
10 limited liability company’s tax return, with the right subject to change or elimination by the
11 operating agreement

12
13 At its October, 2004 meeting, the Drafting Committee discussed this section at great
14 length. Most of the discussion concerned duties to disclose in the context of member-to-member
15 transactions (i.e., a sale of an interest) and LLC-to-member transactions (e.g., a redemption).
16 The discussion was informed (occasionally even learned), energetic, and inconclusive. The
17 Committee essentially directed the co-reporters to “see to it.”

18
19 The co-reporters have concluded that the difficulty in this area results from the
20 Conference’s decision to exclude disclosure duties from the rubric of fiduciary duties. The
21 Conference first made that decision in RUPA and replicated the decision in ULLCA and ULPA
22 (2001). In the opinion of the co-reporters, the Drafting Committee has four alternatives in this
23 matter:

- 24
25 1. Have the Act remain silent on this issue, trusting to other law and the obligation of good
26 faith and fair dealing.
- 27 2. Have the Act expressly refer to and preserve the common law disclosure rules, including
28 those that:
 - 29 a. require disclosure on account of a relationship involving trust and confidence;
 - 30 b. determine when a relationship that is not a fiduciary relationship nonetheless
31 qualifies as one involving trust and confidence.
- 32 3. Include in the Act a statutory disclosure obligation covering member-to-member
33 transactions and LLC-to-member transactions, and perhaps also protecting transferees.
- 34 4. Open up the Act’s approach to fiduciary, thereby inviting in the developing case law in
35 this area.

36
37 The language in subsection (i) would implement the third alternative (statutory disclosure
38 obligation). For comparison purposes, following is language to implement the second alternative
39 (express reference and preservation).

40
41 The rights and obligations stated in this section are in addition to any rights and
42 obligations provided by other law, including those that require disclosure on
43 account of a relationship involving trust and confidence and determine when a

1 relationship that is not a fiduciary relationship is nonetheless one involving trust
2 and confidence.

3
4
5 Subsection (a)(1): This provision does not require the limited liability company to create
6 any records.

7
8 Subsection (a)(2)(A): The proposed changes attempt to address concerns raised at the
9 October, 2004 meeting that the prior language created an obligation that was too open-ended.

10
11 Subsection (a)(2)(B): In most circumstances, it will be “unreasonable or otherwise
12 improper” to demand the creation of information or to demand information when the person to
13 whom the demand is made lacks possession, control, and access to the information or has notice
14 that the would-be recipient already knows the information. See subsection (a)(2)(B). However,
15 this statement is not a per se rule. In some circumstances, it might be reasonable to require the
16 limited liability company to obtain information. In other circumstances, it might be reasonable
17 to require one member to confirm that its information on a particular subject is precisely the
18 same as the information possessed by the member making the demand.

19
20 Subsection (e) – ULPA (2001) does not contain the phrase “designating information
21 confidential and imposing non-disclosure and safeguarding obligations on the recipient.” The
22 addition is to address concerns raised by Bill Callison and Alan Vestal. See J. William Callison
23 & Allan W. Vestal, “They’ve Created a Lamb With Mandibles of Death”: Secrecy, Disclosure,
24 and Fiduciary Duties in Limited Liability Firms, 76 IND. L. J. 271 (2001) and “The Want of a
25 Theory, Again,” ___ Suffolk L. Rev. ___ (forthcoming spring 2004).

26
27 Subsection (i) -- This subsection is necessitated by the Act’s current formulation of
28 fiduciary duties. That formulation arguably implies and at least suggests that members are not
29 mutual fiduciaries and that managers do not owe any fiduciary duties to members. Given that
30 background, this subsection signals courts that common law and other duties triggered by a
31 relationship of trust and confidence can still apply in member-to-member and LLC-to-member
32 transactions. See, e.g., Restatement (Second) of Agency, § 161(d) (requiring a party to a contract
33 to disclose a fact “where the other person is entitled to know the fact because of a relationship of
34 trust and confidence between them”).

35
36
37 SECTION 412. STATEMENT OF MANAGER CESSATION. If a person ceases to
38 be a manager for any reason, the limited liability company may deliver to the [secretary of state]
39 for filing a statement of manager cessation, which must state the name of the limited liability

1 company, its street and mailing address, the name of the person that has ceased to be a manager
2 and the date on which the cessation occurred.

3
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7
8

Reporters' Notes

6 **Issues to be considered:** whether this provision warrants its own section instead of
7 being part of Section 407 (Management of a Limited Liability Company)

9 If this provision remains as a separate section, the next draft will place it as Section 408
10 and will renumber the following sections.

1
2 [ARTICLE] 5

3 TRANSFERABLE INTERESTS AND RIGHTS OF TRANSFEREES AND CREDITORS

4
5 SECTION 501. MEMBER'S TRANSFERABLE INTEREST.

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

8 (b) If the operating agreement so provides:

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

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

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

15 **Reporters' Notes**

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

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

25
26 **Subsection (b)** – As initially drafted, this subsection was taken verbatim from ULLCA §
27 501(c) (with the addition of the phrase "in record form") and read as follows:
28

1 An operating agreement may provide that a transferable interest may be
2 evidenced by a certificate of the interest issued in record form by the limited
3 liability company and, subject to Section 502, may also provide for the transfer of
4 any interest represented by the certificate.
5

6 The current language implements the salutary suggestions of our liaison from the Committee on
7 Style.
8

9 **Subsection (c)** – At its November, 2003 meeting, the drafting committee decided,
10 consistent with current law, that a member may transfer governance rights to another member
11 without obtaining consent from the other members. Thus, the Act does not itself protect
12 members from control shifts that result from transfesr among members (as distinguished from
13 transfers to non-members who seek thereby to become members). This subsection reflects the
14 November, 2003 decision.
15

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

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

18 (1) is permissible;

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

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

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

25 (B) require access to information concerning the limited liability
26 company’s transactions except as otherwise provided in subsection (c) and Section 411(h); or

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

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

1 (1) distributions to which the transferor would otherwise be entitled; and
2 (2) upon the dissolution and winding up of the limited liability company's
3 activities, the net amount otherwise distributable to the transferor.

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

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

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

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

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

17 **Reporters' Notes**

18
19 **Subsection (b) Issues to be decided:**—Query whether subsection (b)(2) is a subset of
20 subsection (b)(1) and therefore redundant; whether to insert in subsection (b) language to make
21 clear that a transferee "takes subject to" the operating agreement; whether to insert into
22 subsection (b) language delineating the right of members to change the operating agreement after
23 a transferee obtains an interest; whether the transferee liability established by subsection (g)
24 should include Section 406(a) "decision maker" liability or just Section 406(b) "recipient"
25 liability
26

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

3
4 ~~**Subsection (e)** – Query whether “has notice” should be replaced with “receives a~~
5 ~~notification”.~~

6
7 ~~**Subsection (g)** – Query whether this transferred liability should include Section 406(a)~~
8 ~~“decision maker” liability or just Section 406(b) “recipient” liability.~~

9
10 **SECTION 503. RIGHTS OF JUDGMENT CREDITOR OF MEMBER OR**
11 **TRANSFeree.**

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

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

19 (2) make all other orders which the circumstances of the case may
20 require.

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

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

- 1 (1) the judgment debtor;
- 2 (2) one or more of the members, with property other than limited
3 liability company property; or
- 4 (3) the limited liability company, with the consent of all of the
5 members whose transferable interest is not subject to the charging order.

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

8 (1) the redemption does not affect the ownership of the transferable
9 interest and does not create a debt, liability, or other obligation from the owner of the
10 transferable interest to that person; and

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

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

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

18 **Reporters' Notes**

19 **Issues to be considered:** whether the modernized approach is an improvement in
20 general; whether the section should provide that a person who has redeemed is entitled to interest
21 on the amount paid to discharge the charging order; whether the section should provide expressly
22 that a charging order is self-executing – i.e., that the order necessarily directs the LLC to pay
23 over to the holder of the order any distributions that would otherwise be paid to the
24 member/transferee (there is some old authority to the contrary); the caption should be changed
25 to include the phrase “charging order”; whether the concept of redemption should be re-labeled

1 to avoid confusion? (to the uninitiated, the notion of a non-debtor redeeming property can be
2 confusing); whether the provision should expressly state the interface with Article 9, and, if so,
3 how?
4
5

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

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

17 **Subsection (a)** – The phrase “judgment debtor” encompasses both members and
18 transferees.
19

20 **Subsection (c)(3)** – Query why the consent of all the members should be necessary in a
21 manager-managed LLC.
22

23 **SECTION 504. POWER OF PERSONAL REPRESENTATIVE OF DECEASED**

24 **MEMBER.** If a member dies, the deceased member's personal representative or other legal
25 representative may exercise the rights of a transferee as provided in Section 502(c) and, for the
26 purposes of settling the estate, may exercise the rights of a current member under Section
27 304411.

28 **Reporters' Notes**

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

1
2 **[ARTICLE] 6**

3 **MEMBER'S DISSOCIATION**

4
5 **SECTION 601. EVENTS CAUSING DISSOCIATION .**

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

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

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

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

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

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

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

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

1 (i) a transfer for security purposes; or

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

3 which has not been foreclosed;

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

7 (i) a transfer for security purposes; or

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

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

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

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

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

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

3 (C) the person engaged in conduct relating to the limited liability
4 company's activities which makes it not reasonably practicable to carry on the activities with the
5 person as a member;

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

7 (A) the person's death;

8 (B) if the limited liability company is a member-managed limited
9 liability company:

10 (i) the appointment of a guardian or general conservator for
11 the person; or

12 (ii) a judicial determination that the person has otherwise
13 become incapable of performing the person's duties as a member under the operating agreement;

14 (7) if the limited liability company is a member-managed limited liability
15 company, the person's:

16 (A) becoming a debtor in bankruptcy;

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

18 (C) seeking, consenting to, or acquiescing in the appointment of a
19 trustee, receiver, or liquidator of the person or of all or substantially all of the person's property;

20 (8) in the case of a person that is a trust or is acting as a member by virtue
21 of being a trustee of a trust, distribution of the trust's entire transferable interest in the limited
22 liability company, but not merely by reason of the substitution of a successor trustee;

1 (9) in the case of a person that is an estate or is acting as a member by
2 virtue of being a personal representative of an estate, distribution of the estate’s entire
3 transferable interest in the limited liability company, but not merely by reason of the substitution
4 of a successor personal representative;

5 (10) termination of a member that is not an individual,
6 ~~membership~~ partnership, limited liability company, corporation, trust, or estate;

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

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

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

13 Reporters’ Notes

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

15
16 **Issue to be considered:** what effect, if any, should management structure have on the
17 causes of dissociation

18
19 This section follows ULPA (2001)’s approach to *limited* partner dissociation except for
20 member-managed limited liability companies. In that context, this section follows RUPA’s and
21 ULPA (2001)’s approach to the dissociation of general partners. Query whether the section
22 should use the organization shown above, in which member-managed provisions are interspersed
23 or, instead, collect all those provisions in a separate subsection.
24

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

26
27 **Subsection (b)(11)** – If the Conference approves META substantially as proposed, this
28 act will deal directly only with “same species” mergers – i.e., mergers involving only LLCs. If
29 so, query whether this act should provide definitions for the concepts of “domesticated,
30 converted or surviving entit[ies]” and, if so, query whether the appropriate definitions would be a

1 cross-references to META's definitions. Query also whether the concept of domestication
2 belongs in subsection (b)(11)(A).
3

4 **SECTION 602. MEMBER'S POWER TO DISSOCIATE; WRONGFUL**
5 **DISSOCIATION.**

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

8 (b) A person's dissociation is wrongful only if:

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

10 (2) it occurs before the termination of the limited liability company and:

11 (A) the person withdraws as a member by express will;

12 (B) the person is expelled as a member by judicial determination
13 under Section 601(b)(5);

14 (C) the limited liability company is member-managed and the
15 person is dissociated under Section 601(b)(7)(A) by becoming a debtor in bankruptcy; or

16 (D) in the case of a person that is not an individual, trust other than
17 a business trust, or estate, the person is expelled or otherwise dissociated as a member because it
18 willfully dissolved or terminated.

19 (c) A person that wrongfully dissociates is liable to the limited liability company
20 and, subject to Section 901, to the other members for damages caused by the dissociation. The
21 liability is in addition to any other obligation of the member to the limited liability company or to
22 the other members.

23 **Reporters' Notes**

1 **Source** – ULPA (2001) § 603, which is based on RUPA Section 602. ULLCA § 602 is
2 functionally identical in some respects but is not a good overall source, because that section
3 presupposes the term/at-will paradigm.
4

5 **SECTION 603. EFFECT OF PERSON’S DISSOCIATION AS A MEMBER.**

6 (a) When a person dissociates as a member:

7 (1) the person’s right to participate as a member in the management and
8 conduct of the limited liability company’s activities terminates;

9 (2) the person’s duty of loyalty as a member [**reserved until the**
10 **Committee has made at least a tentative****firmer** **decision as to the contents of that duty]**

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

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

16 (5) any power the person had in its capacity as a member under Sections
17 301, ~~and 304~~ and 703 to bind the limited liability company terminates, but, subject to Sections
18 103(c) -and 604, the termination does not affect the person’s power to bind the limited liability
19 company under law other than this [act].

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

23 **Reporters’ Notes**

1 **Source** – ULPA (2001) § 603, which was drawn from RUPA Section 603(b). ULLCA §
2 603 is functionally identical in some respects but is not a good overall source, because that
3 section presupposes the term/at-will paradigm.
4

5 **Subsection (b)(5)** – A Comment will explain that “other law” includes the agency law
6 doctrine of “lingering apparent authority.” See Restatement (Third) Of Agency § 3.11, comment
7 c (T.D. No. 2, 2001). The statement of dissociation, see Section 604, will be effective to cut off
8 lingering apparent authority. Section 703 concerns the power of members and managers to bind
9 an LLC post-dissolution.
10

11 **SECTION 604. STATEMENT OF DISSOCIATION.**

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

16 **Source:** ULLCA § 704. A statement of dissociation has constructive notice effect under
17 Section 103(c).
18

19 Query: why should a member have the right to file a statement of dissociation, especially
20 in a manager-managed limited liability company?
21

1
2 [ARTICLE] 7

3 DISSOLUTION AND WINDING UP

4
5 SECTION 701. EVENTS CAUSING DISSOLUTION.

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

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

9 (2) the consent of all the members;

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

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

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

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

1 (5) on application by a member, a dissociated member that has retained a
2 transferable interest, or transferee, the entry by [appropriate court] of an order dissolving the
3 limited liability company on the grounds that the managers or those members in control of the
4 limited liability company:

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

7 (B) have acted or are acting in a manner that is oppressive and ~~has~~
8 ~~caused, is causing, or will cause~~was, is, or will be directly harmful to the applicant.

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

11 Reporters' Notes

12
13 **Issues to be considered:** whether subsection (b) should be nonwaivable; whether to
14 provide some greater definition of “oppressive”; whether to use “dissociated member” rather
15 than “former member” and whether to define whichever term is chosen; whether the phrase
16 “dissociated member that has retained a transferable interest” is sufficient to exclude a former
17 member who, after dissociation, buys back into the LLC; whether the protections of subsection
18 (a)(5) should also extend to a dissociated member that has not retained a transferable interest but
19 has remained liable (as guarantor or otherwise) for obligations of the LLC

20
21 _____ At its April, 2004 meeting, the Drafting Committee had extended and amicably intense
22 discussions about this section. Paragraphs (1) to (3) of subsection (a) were not controversial.
23 Paragraphs (4) and (5) and subsection (b) were. The Committee revisited both provisions at its
24 October, 2004 meeting.

25
26 **Subsection (a)(4)** – The standard stated here is conventional. An earlier draft contained
27 the arguably ~~What might be claimed as novel approach of~~ is conferring standing on former
28 owners ~~who still have~~ with a continuing an economic stake in the enterprise. At its October,
29 2004 meeting the Committee considered ~~The danger of doing so is the risk that of~~ former
30 members ~~will use~~ using the provision to “freeze the deal” after their departure and decided to
31 eliminate former members from the coverage of this provision. ULLCA § 801(4) has an even
32 broader provision, but non-ULLCA statutes generally have nothing comparable. Under this
33 Draft, the provision is a default rule, so the danger can be obviated by agreement. In contrast,

1 ~~the ULLCA provision is non-waivable. ULLCA §103(b)(6). To maintain some protection for~~
2 ~~former members, subsection (a)(5) was revised to provide them standing under that provision.~~
3

4 **Subsection (a)(5)** – At its October, 2004 meeting, the Drafting Committee revised this
5 provision to extend standing to former members. Note that a former member who is bought out
6 and then subsequently becomes a transferee of another interest should *not* have standing on this
7 provision. Query whether the protections of this provision should extend to a dissociated
8 member that lacks a transferable interest but is still liable for the obligations of the LLC (e.g., as
9 a guarantor).

10
11 ULLCA § 801(4)(v) contains a comparable provision, and, even without aid of that provision,
12 courts have begun to apply close corporation “oppression” doctrine to LLCs. -At its April, 2004
13 meeting, the Drafting Committee deleted language that would have cabined somewhat the vague
14 term “oppressive.” The deleted language provided that:

15
16 oppressive conduct has occurred only if the conduct complained of has directly
17 harmed the applicant and:

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

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

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

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

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

30 (D) is consistent with the reasonable expectations of all the
31 members; and

32 (E) is otherwise reasonable under the circumstances.
33

34 Subsection (a)(5) is non-waivable. See Section 110(e)(7). **{need to check x-ref}**
35

36 **Subsection (a)(5)(B)** – The revision implements a suggestion made at the October, 2004
37 meeting by the Chair of the Conference’s Executive Committee.
38

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

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SECTION 702. WINDING UP.

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

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

(1) may file a statement of dissolution pursuant to Section 710(1), preserve the limited liability company activities and property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, transfer the limited liability company’s property, settle disputes by mediation or arbitration, file a statement of termination pursuant to Section 710(2), and perform other necessary acts; and

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

(c) If a dissolved limited liability company has no members, the legal representative of the last person to have been a member may wind up the activities of the limited liability company and has the powers of a member under Section 703(a). If the legal representative declines or fails to wind up the limited liability company’s activities, a person may be appointed to do so by the consent of transferees owning a majority of the rights to receive distributions as transferees at the time the consent is to be effective. A person appointed under this subsection:

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

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

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

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

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

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

10 (1) on application of a member, if the applicant establishes good cause;

11 (2) on the application of a transferee or a dissociated member that has
12 retained a transferable interest, if the a limited liability company does not have member, the legal
13 representative of the last person to have been a member declines or fails to wind up the limited
14 liability company's activities, and within a reasonable time following the dissolution no person
15 has been appointed pursuant to subsection (c); ~~or~~ and

16 (23) in connection with a proceeding under Section 701(a)(4) or (5).

17 the applicant establishes other good cause.

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

20 Reporters' Notes

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

1 Subsection (d) ~~should be~~ has been revised to take into account court-ordered dissolution
2 proceedings in which standing extends to a person dissociated as a member or to a transferee.
3 See Section 701(a)(4) and (5).
4

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

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

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

10 or

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

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

17 **Reporters' Notes**

18 ~~Subsection (a)~~—Source: ULPA (2001) § 804, which was based on RUPA § 804.
19
20 Former subsection (b) has been deleted as duplicative of Section 603(a)(5).
21

22 **SECTION 704. KNOWN CLAIMS AGAINST DISSOLVED LIMITED**
23 **LIABILITY COMPANY.**

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

4 (b) A dissolved limited liability company may in a record notify its known
5 claimants of the dissolution ~~in a record~~. The notice must:

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

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

8 (3) state the deadline for receipt of the claim, which may not be less than
9 120 days after the date the notice is received by the claimant; and

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

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

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

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

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

20 **Reporters' Notes**

21 **Source** – ULPA (2001) § 806, which was based on ULLCA § 807, which in turn was
22 based on MBCA § 14.06.
23

1 **Query Issues to be considered:** whether some definition is needed of “known claims”
2 (e.g., For example, what if suppose the limited liability company knows of a claim but does not
3 have any contact information for the claimant)²; whether this Act should include a provision
4 allowing for a judicial proceeding to deal with contingent and unknown claims, perhaps
5 following MBCA § 14.08.
6

7 At the October, 2004 meeting of the Drafting Committee, a question arose as to whether
8 this section and Section 705 should be modernized to conform with changes in corporate law.
9 However, the current language is quite similar to the most recent version of the MBCA.
10

11 **SECTION 705. OTHER CLAIMS AGAINST DISSOLVED LIMITED LIABILITY**
12 **COMPANY.**

13 (a) A dissolved limited liability company may publish notice of its dissolution and
14 request persons having claims against the limited liability company to present them in
15 accordance with the notice.

16 (b) The notice must:

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

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

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

25 (c) If a dissolved limited liability company publishes a notice in accordance with
26 subsection (b), the claim of each of the following claimants is barred unless the claimant

1 commences an action to enforce the claim against the dissolved limited liability company within
2 five years after the publication date of the notice:

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

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

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

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

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

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

16 **Reporters' Notes**

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

19
20 **Subsection (c)** – Query whether this language sufficiently indicates that a claim that
21 could have been addressed under Section 704 cannot be extinguished under this Section.
22

23 **SECTION 706. ADMINISTRATIVE DISSOLUTION.**

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

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

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

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

9 (c) If within 60 days after service of the copy the limited liability company does
10 not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the
11 [Secretary of State] that each ground determined by the [Secretary of State] does not exist, the
12 [Secretary of State] shall administratively dissolve the limited liability company by preparing,
13 signing and filing a declaration of dissolution that states the grounds for dissolution. The
14 [Secretary of State] shall serve the limited liability company with a copy of the filed declaration.

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

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

20 **Reporters' Notes**

21 **Source** – ULPA (2001) § 809, which was based on ULLCA §§ 809 and 810. See also
22 RMBCA §§ 14.20 and 14.21.
23

1 **SECTION 707. REINSTATEMENT FOLLOWING ADMINISTRATIVE**
2 **DISSOLUTION.**

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

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

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

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

12 (b) If the [Secretary of State] determines that an application contains the
13 information required by subsection (a) and that the information is correct, the [Secretary of State]
14 shall prepare a declaration of reinstatement that states this determination, sign, and file the
15 original of the declaration of reinstatement, and serve the limited liability company with a copy.

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

19 **Reporters' Notes**

20 **Source** – ULPA (2001) § 810, which was based on ULLCA § 811. See also RMBCA
21 Section 14.22.
22

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

1 (a) If the [Secretary of State] rejects a limited liability company’s application for
2 reinstatement following administrative dissolution, the [Secretary of State] shall prepare, sign,
3 and file a notice that explains the reason or reasons for rejection and serve the limited liability
4 company with a copy of the notice.

5 (b) Within 30 days after service of the notice of rejection, the limited liability
6 company may appeal from the rejection of reinstatement by petitioning the [appropriate court] to
7 set aside the dissolution. The petition must be served on the [Secretary of State] and contain a
8 copy of the [Secretary of State’s] declaration of dissolution, the limited liability company’s
9 application for reinstatement, and the [Secretary of State’s] notice of rejection.

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

12 **Reporters’ Notes**

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

14
15 This section uses “rejection” rather than “denial” (the word used by both ULPA (2001)
16 and ULLCA). The change is to avoid confusion with a “statement of denial” under Section 302.

17
18 **Subsection (c)** – Query why “summarily”.

19 20 **SECTION 709. DISTRIBUTION OF ASSETS IN WINDING UP LIMITED** 21 **LIABILITY COMPANY'S BUSINESS.**

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

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

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

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

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

9 (d) All distributions made under subsection (b) and (c) must be paid in cash.

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

13 **Reporters' Notes**

14 **Source:** ULLCA § 806, restyled.
15
16

17 **SECTION 710. STATEMENTS OF DISSOLUTION AND TERMINATION. A**

18 dissolved limited liability company may deliver to the [secretary of state] for filing:

19 (1) a statement of dissolution, stating the name of the limited liability
20 company and that the limited liability company is dissolved; and

21 (2) a statement of termination, stating the name of the limited liability
22 company and that the limited liability company is terminated.

23 **Reporters' Notes**

1 Issues to be considered: whether this provision warrants its own section instead of
2 being part of Section 702 (Winding Up)

3
4 If this provision remains as a separate section, the next draft will place it as Section 703
5 and will renumber the following sections.

6

1
2 **[ARTICLE] 8**

3 **FOREIGN LIMITED LIABILITY COMPANIES**

4
5 **SECTION 801. GOVERNING LAW.**

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

8 (1) relations among the members of the foreign limited liability company
9 and between the members and the foreign limited liability company; and

10 (2) the liability of members as members for an obligation of the foreign
11 limited liability company.

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

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

18 **Reporters' Notes**

19 **Source** – ULPA (2001) § 901, which was based in part on ULLCA §1001.
20

21 **SECTION 802. APPLICATION FOR CERTIFICATE OF AUTHORITY.**

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

3 The application must state:

4 (1) the name of the foreign limited liability company and, if the name does
5 not comply with Section 108, an alternate name adopted pursuant to Section 805(a).

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

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

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

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

19 **Reporters' Notes**

20 **Source** – ULPA (2001) § 902, which was based on ULLCA § 1002.
21

1 **SECTION 803. ACTIVITIES NOT CONSTITUTING TRANSACTING**

2 **BUSINESS.**

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

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

6 (2) holding meetings of its members or carrying on any other activity
7 concerning its internal affairs;

8 (3) maintaining accounts in financial institutions;

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

12 (5) selling through independent contractors;

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

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

18 (8) securing or collecting debts or enforcing mortgages or other security
19 interests in property securing the debts, and holding, protecting, and maintaining property so
20 acquired;

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

1 (10) transacting business in interstate commerce.

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

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

8 **Reporters' Notes**

9 **Source** – ULPA (2001) § 903, which was based on ULLCA § 1003.
10

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

17 **Reporters' Notes**

18 **Source** – ULPA (2001) § 904, which was based on ULLCA § 1004 and RULPA § 903.
19

20 **SECTION 805. NONCOMPLYING NAME OF FOREIGN LIMITED LIABILITY**
21 **COMPANY.**

22 (a) A foreign limited liability company whose name does not comply with
23 Section 108 may not obtain a certificate of authority until it adopts, for the purpose of transacting

1 business in this state, an alternate name that complies with Section 108. A foreign limited
2 liability company that adopts an alternate name under this subsection and then obtains a
3 certificate of authority with the alternate name need not comply with [fictitious name statute].
4 After obtaining a certificate of authority with an alternate name, a foreign limited liability
5 company shall transact business in this state under the alternate name unless the foreign limited
6 liability company is authorized under [fictitious name statute] to transact business in this state
7 under another name.

8 (b) If a foreign limited liability company authorized to transact business in this
9 state changes its name to one that does not comply with Section 108, it may not thereafter
10 transact business in this state until it complies with subsection (a) and obtains an amended
11 certificate of authority.

12 **Reporters' Notes**

13 **Source** – ULPA (2001) § 905, which was based on ULLCA § 1005.
14

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

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

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

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

1 (3) appoint and maintain an agent for service of process as required by
2 Section ~~113~~112(b); or

3 (4) deliver for filing a statement of a change under Section ~~114~~113 within
4 30 days after a change has occurred in the name or address of the agent.

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

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

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

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

18 **Reporters' Notes**

19 **Source** – ULPA (2001) § 906, which was based on ULLCA § 1006.
20

21 **SECTION 807. CANCELLATION OF CERTIFICATE OF AUTHORITY;**
22 **EFFECT OF FAILURE TO HAVE CERTIFICATE.**

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

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

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

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

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

18 **Reporters' Notes**

19 **Source** – ULPA (2001) § 907, which was based on RULPA § 907(d) and ULLCA §
20 1008.
21

1
2 **[ARTICLE] 9**

3 **ACTIONS BY MEMBERS**

4
5 **SECTION 901. DIRECT ACTION BY MEMBER.**

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

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

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

17 **Reporters' Notes**

18 **Issues to be resolved:** whether the direct-derivative distinction makes sense for a closely
19 held LLC, especially a member-managed LLC, whether the Act should somehow indicate that
20 for a [defined] closely held LLC, the operating agreement can eliminate the distinction

21
22 **Subsection (a)** – Source: ULPA (2001) § 1001(a), which was based on RUPA Section
23 405(b). The subsection has been somewhat re-styled and the phrase “for legal or equitable
24 relief” has been deleted as unnecessary.
25

1 (2) whose status as a member devolved upon the person by operation of law or
2 pursuant to the terms of the operating agreement from a person that was a member at the time of
3 the conduct.

4 **Reporters' Notes**

5 **Source** – ULPA (2001) § 1003, which was a re-styled version RULPA § 1002.
6

7 **SECTION 904. PLEADING.** In a derivative action, the complaint must state with
8 particularity:

9 (1) the date and content of plaintiff's demand and the response to the demand by
10 the managers or other members; or

11 (2) why demand should be excused as futile.

12 **Reporters' Notes**

13 **Source** – ULPA (2001) § 1004, which was a re-styled version RULPA § 1003.
14

15 **SECTION 905. PROCEEDS AND EXPENSES.**

16 (a) Except as otherwise provided in subsection (b):

17 (1) any proceeds or other benefits of a derivative action, whether by
18 judgment, compromise, or settlement, belong to the limited liability company and not to the
19 derivative plaintiff;

20 (2) if the derivative plaintiff receives any proceeds, the derivative plaintiff
21 shall immediately remit them to the limited liability company.

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[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.

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SECTION 1107. APPLICATION TO EXISTING RELATIONSHIPS.

(a) Before [all-inclusive date], this [act] governs only:

(1) a limited liability company formed on or after [the effective date of this [act]]; and

(2) except as otherwise provided in subsection (c), a limited liability company formed before [the effective date of this [act]] which elects, in the manner provided in its operating agreement or by law for amending the operating agreement, to be subject to this [act].

(b) Except as otherwise provided in subsection (c), on and after [all-inclusive date] this [act] governs all limited liability companies.

(c) With respect to a limited liability company formed before [the effective date of this [act]], the following rules apply except as the members otherwise elect in the manner provided in the operating agreement or by law for amending the operating agreement: **[TBD – this subsection will contain any provisions of ULLCA which should continue to apply preexisting limited liability companies even after the “all-inclusive” date to.]**