

**Mississippi Secretary of State
2008 Business Reform Committees
Minutes of the LLC/Partnership Study Group, Meeting # 2
July 10, 2008**

The second meeting of the LLC/Partnership Study Group was called to order on Thursday, July 10, 2008 at 11:30 A.M. at the Office of the Secretary of State, 700 North Street, Jackson, Mississippi. A list of the persons who were present in person or by telephone is attached at Exhibit A.

Introduction

The minutes from the first meeting were approved and Cheryn Baker, Assistant Secretary of State, Policy and Research Division, introduced the panelists for the meeting. The panelists (who were present by teleconference) were:

- Thomas E. Rutledge
- Elizabeth S. Miller
- Scott E. Ludwig
- Robert R. Keatinge

Biographies of the four panelists are attached as Exhibit B.

Presentation by the Panelists

- Overview of the Revised Uniform Limited Liability Company Act (“RULLCA”)

The panelists described RULLCA as an act containing many provisions that are more specific than those contained in earlier uniform limited liability company (“LLC”) statutes. Furthermore, the panelists explained that there were some provisions in RULLCA which are not found in any other statutes. Scott Ludwig noted that one of the best aspects of RULLCA was its inclusion of provisions regarding what can and cannot be modified or eliminated in a written operating agreement. He stated that the drafters of RULLCA attempted to decouple the idea of management being statutorily authorized so that the authority to bind the company would be contained in the operating agreement. Mr. Ludwig explained that any LLC act must be reviewed and updated on a yearly basis.

- Written Operating Agreement Requirement

The panelists agreed that any LLC statute should be flexible enough to allow both written and implied operating agreements. Moreover, the panel cautioned against adopting a provision stating that an unwritten operating agreement would serve no function. Mr. Keatinge explained that courts increasingly analyze the parties’ course of conduct to determine the terms of verbal or implied operating agreements. Ms. Miller added that certain provisions of an operating agreement

that are regulated by the statute of frauds must be in writing in order to be enforceable.

- Default Provisions

The panel agreed that in the event that an issue was not addressed by a written or verbal operating agreement, then default provisions in the LLC would act to fill in any gaps that were left.

- Conversion Statutes

Mr. Keatinge explained that Colorado had faced the problem of its corporation conversion provisions and LLC conversion provisions being inconsistent with one another. He stated that Colorado solved the problem by creating a separate statute which served as a “junction box” and contained one conversion provision that was consistent for corporations and LLCs. In relation to post-conversion documents, Mr. Keatinge noted that there was not much that could be done to address this issue by statute. Mr. Ludwig added that a corporate conversion to an LLC dramatically changes the shareholder’s rights; therefore, a shareholder’s rights should be carefully considered before such a conversion is made.

- Series LLCs

The panel explained that a significant problem with series LLCs is that across the country there is no uniform understanding of what constitutes a series LLC. The panel listed several questions which are still outstanding in the area of series LLCs, including:

- Whether a series LLC is a separate entity;
- How series LLCs are to be treated in bankruptcy;
- How state revenue commissions should look at series LLCs;
- How real estate can be transferred from one series to another;
- Whether, if a single series of a multiple-series LLC transacts business in a state that does not recognize series LLCs, there is a tax nexus.

Mr. Rutledge suggested that it would better to take Colorado’s approach of studying these issues, but waiting to see how other states resolve the problems which have arisen in regard to series LLCs. As for Texas, Ms. Miller explained that the state had determined that the time was not yet ripe to adopt series LLC provisions.

- Fiduciary Duties

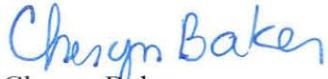
The panel explained that there are two main schools of thought in regard to fiduciary duties: one whose aim is to protect all of the LLCs participants, and second, a school which first and foremost values the freedom of contract. Furthermore, Mr. Ludwig explained that choosing between the two depended on

the state and the state's thought process. Mr. Keatinge added that the idea of eliminating fiduciary duties becomes more of an issue than it should more often than not. He explained that Delaware has a baseline that one can not eliminate the duties of good faith and fair dealing.

Conclusion of Meeting

Mrs. Baker concluded by stating that certain group members had been assigned to the Model Registered Agent Act subcommittee. She indicated that the subcommittee would have a separate notebook with information explaining how the act pertained to each type of business entity. Steve Hendrix, Co-Chairman of the LLC/Partnership Study Group, noted that there was a great deal of information which the group needed to digest. He explained that in the next meeting the group would discuss which areas of the LLC act it should address. Mr. Hendrix opined that subcommittee assignments should be held off until the next meeting. With no further business, the meeting was adjourned at 12:45 P.M.

Respectfully submitted,



Cheryn Baker
Assistant Secretary of State
Policy and Research Division

EXHIBIT A
To the Minutes of LLC/Partnership Committee Meeting

In Attendance:

Mark Buys
Chad Davidson
George Fair
Robert Gage
Ronnie McMillan
Jim Nippes
Ben Roberson
Joseph Stinson
Paul Varner
Ashley Wicks
Margaret Williams
Martin Willoughby
Eric Wooten
David Webb
Stephen Hendrix
David Grishman
Ken Rector

In Attendance by telephone:

Jody Varner
Jack Turner
Rusty Russell
Chris Wilson
Stephen Burrow
Bill Williams

Secretary of State Staff:

Delbert Hosemann, Secretary of State
Cheryn Baker, Assistant Secretary of State, Policy and Research
Doug Jennings, Senior Attorney, Policy and Research
Phillips Strickland, Division Coordinator
Brian Bledsoe, Intern
Jeff Lee, Intern

EXHIBIT B
To the Minutes of LLC/Partnership Committee Meeting

Thomas E. Rutledge

Thomas E. Rutledge is a member of Stoll Keenon Ogden PLLC (Louisville, Kentucky), where his practice is devoted to business and securities law with a specialized focus on the law of business organizations. He was a member of the committees that drafted the Kentucky Limited Liability Company Act and the Limited Liability Partnership amendments to the Kentucky Uniform Partnership Act and the 1994 and 2002 amendments to the Kentucky Business Corporation Act. He was the principal drafter of the Kentucky Revised Uniform Partnership Act (2006) and the Kentucky Uniform Limited Partnership Act (2006) and as well the 2007 amendments made among all the Kentucky business entity laws. Tom is actively involved in the LLCs, Partnerships and Unincorporated Entities Committee of the Section of Business Law, American Bar Association where he serves as editor of the PUBOGRAM (the committee newsletter), chair of the Subcommittee on Limited Liability Companies, and as co-chair of both the Model Limited Liability Company Act and Model LLC Transactional Documents subcommittees. He served as co-chair of the subcommittee that drafted the *Prototype Limited Liability Partnership Agreement*, and served as co-chair and reporter for the subcommittee that drafted the *Model Limited Liability Company Membership Interest Redemption Agreement*. He is also active with the Ad-Hoc Committee on Entity Rationalization and is an ABA Section of Business Law advisor to the National Conference of Commissioners of Uniform State Laws project to update the Uniform Limited Liability Company Act as well as to the drafting committees for the Uniform Entity Transactions Act and the Uniform Statutory [Business] Trust Act. Tom is a Fellow at the University of Louisville, School of Law and an Adjunct Professor at the University of Kentucky, College of Law. A frequent speaker and writer on business entity law, he has published in the *Kentucky Law Journal*, *Northern Kentucky Law Review*, *Baylor Law Review*, *South Dakota Law Review*, *St. Louis University Law Journal*, the *LLC Reporter*, the *LLC Advisor*, *Bench & Bar*, *Business Entities*, *Corporate Counsel Weekly*, *The Delaware Journal of Corporate Law*, *The Business Lawyer*, the *Brandeis Law Journal* and *Probate and Property*, and has articles forthcoming for *The Business Lawyer*, *Suffolk Law Review* and the *American Business Law Journal*. Tom is an editor of STATE LIMITED LIABILITY COMPANY AND PARTNERSHIP LAWS and of STATE LIMITED PARTNERSHIP LAWS, is a regular columnist to the *Journal of Passthrough Entities*, is named in both CHAMBER'S USA - AMERICA'S LEADING BUSINESS LAWYERS and BEST LAWYERS IN AMERICA, and is a member of the American Law Institute.

Scott E. Ludwig

Scott E. Ludwig is a member of the regional law firm of Bradley Arant Rose & White LLP (Huntsville, Alabama office), where his practice is devoted to business law (incorporated and unincorporated entities) and tax law. Scott is a member of the American College of Tax Counsel; listed in *The Best Lawyers in America*

(Biotechnology, Corporate, Non-Profit/Charities, Tax, and Trust and Estates) and *Who's Who in American Law*. He is actively involved in the ABA's Business Law Section where he is the Vice-Chair of the Committee on LLCs, Partnerships and Unincorporated Entities, immediate past chair of the subcommittee on Limited Liability Companies, co-chair of the Revised Prototype Limited Liability Company Act Revision Task Force, co-chair of the Prototype Limited Liability Partnership Agreement subcommittee, and a member of the Limited Partnership subcommittee, General Partnership subcommittee, Negotiated Acquisitions Committee, Task Force on Model Joint Venture Agreement, and Taxation Committee. Scott is also chair of the Section's Publications Board, where he serves as a member of the Ad Hoc Committee on Content Distribution and is an incoming member of the ABA's Standing Committee on Publication Oversight. He is an ABA Section of Business Law advisor to the National Conference of Commissions of Uniform State Laws' Revised Uniform Limited Liability Company Act and Omnibus Business Organizations Code Study Committee. Scott is also a member of the ABA's Section of Real Property, Trust & Estate Law (Committees: Asset Protection Planning, Business Investment Entities, Partnerships, LLCs and Corporations, Estate and Gift Tax, Organizational and Operational Issues of Exempt Organizations, and State and Local Law Concerns of Exempt Organizations), and Section of Taxation (Committees: Corporate Tax (Subcommittee: Taxable Acquisitions), Partnerships and LLCs (including being a member of the Comment Committees in response to Notice 2000-29 and Notice 2005-43), Disregarded Entities, Estate Planning, State Tax Issues, Tax-Free Distribution, and State and Local Taxes). He has spoken at the ABA regarding surveys on Limited Liability Company State Taxation and Professional Unincorporated Entities. Scott is a member of the Alabama State Bar having been the Chair of the Tax Section and the Alabama LLP Act Committee and a member of the Alabama LLC Act and Alabama LP Act Revision Committees. Scott chairs the Task Force on Bar Governance for the Huntsville-Madison County Bar Association. He has been President of the Alabama Federal Tax Clinic and President of the Huntsville Financial and Estate Planning Council. He co-authored, *Second Circuit Affirms McNamee: Validity of Check-the-Box Regulations Again Confirmed*, Journal of Taxation (July, 2007); and *The Sixth Circuit Affirms Littriello: Check-the-Box Regulations Are Upheld*, Journal of Taxation (June, 2007). Scott is an editor of the *State Limited Partnership Laws* and the *State Limited Liability Company Laws* treatise by Aspen Publishers. He was a contributor to the *Model Real Estate LLC Operating Agreement*, The Business Lawyer (March 2008), *Model Joint Venture Agreement with commentary*, (ABA, 2006); and *The Model LLC Membership Interest Redemption Agreement*, The Business Lawyer (May, 2006). He was a co-reporter for the *Prototype Partnership Agreement for a Limited Liability Partnership Formed Under the Uniform Partnership Act(1997)*, The Business Lawyer (February, 2003) and *Prototype Limited Liability Partnership Agreement*, American Bar Association (2003). He co-authored *Selected Pitfalls Arising From the Use of Hybrid Entities, Part 2, Business Entities*, V. 4 (November/December 2002), as well as two editions of the *Alabama Limited Liability Company Handbook*.

Robert R. Keatinge

Robert Keatinge has been a Visiting Associate Professor at Suffolk University School of Law for the 2007-2008 academic year and is Of Counsel to the Denver law firm of Holland & Hart LLP. He practices in the areas of business organizations, taxation, and professional responsibility. Mr. Keatinge has represented a wide variety of business organizations and their owners from small start-up companies to publicly traded corporations. He has written and spoken nationally in the areas of business law, taxation and professional responsibility. He is the co-author of Keatinge and Conaway on Choice of Business Entity (2008) and Ribstein and Keatinge on Limited Liability Companies Second Edition (2004) (both Thomson/West) as well as author of law review and other articles on business, tax, and professional responsibility. He has been an adjunct professor at the University of Denver, College of Law and the University of Miami, School of Law. He is a fellow of the American College of Tax Counsel, a member of the American Law Institute, and is listed in the current Best Lawyers in America in three specialties (Corporate Governance and Compliance Law, Corporate Law and Tax Law), Who's Who in America, and other publications. He is a current member of the ABA Business Law Section/National Conference of Commissioners on Uniform State Laws (NCCUSL) Joint Editorial Board on Unincorporated Business Organizations and the Association of Professional Responsibility Lawyers. He has been ABA Advisor to the NCCUSL Drafting Committees on Revisions to Uniform Limited Liability Company Act; the Revision to the Uniform Limited Partnership Act (2001) and the Uniform Limited Liability Company Act (1996) and an ABA Section of Real Property Probate and Trust Law adviser on the Model Entity Transactions Act and the Model Statutory Trust Entity Act and was a member of the Ad Hoc Subcommittee to Comment on the Revised Uniform Partnership Act. He is former Chair of the Colorado Bar Association Business Law and Taxation Sections. He is former chair of the Committees on Taxation and on Partnerships and Unincorporated Business Organizations of the ABA Business Law Section and of the Joint Editorial Board for the ABA/BNA Lawyer's Manual on Professional Conduct and a former Member of the American Bar Association House of Delegates.

Elizabeth S. Miller

Elizabeth S. Miller is a Professor of Law at Baylor University School of Law where she teaches Business Organizations, Business Planning, and related courses. Professor Miller speaks and writes extensively on business organizations topics, particularly partnerships and limited liability companies. She frequently appears on continuing legal education programs and is co-author of a three-volume treatise on *Business Organizations* published by Thomson/West as part of its Texas Practice Series. Professor Miller has just completed a term as Chair of the Partnerships and Unincorporated Business Organizations Committee of the Business Law Section of the American Bar Association. She is Chair Elect of the Council of the Business Law Section of the State Bar of Texas and is the immediate past Chair of the Partnership and Limited Liability Company Law

Committee of the Business Law Section of the State Bar of Texas. Professor Miller has been involved in the drafting of legislation affecting Texas business organizations for many years and has served in an advisory or membership capacity on the drafting committees for numerous prototype, model, and uniform statutes and agreements relating to unincorporated business organizations. She currently serves on the drafting committee for the Omnibus Business Organizations Code, a joint project of the National Conference of Commissioners on Uniform State Laws and the American Bar Association. She also serves on the drafting committee that is revising the ABA Prototype Limited Liability Company Act. Professor Miller is an elected member of the American Law Institute and a Fellow of the American Bar Foundation and the Texas Bar Foundation.