

**AMENDING THE NEW HAMPSHIRE LIMITED LIABILITY
COMPANY ACT TO MEET THE NEEDS OF
UNREPRESENTED LLC FOUNDERS AND MEMBERS**

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I. INTRODUCTION

I was privileged to be a member of the committee that drafted the original text of the New Hampshire Limited Liability Company Act in 1993 and the 1997 amendments to that Act.ⁱⁱ However, when our committee did this drafting, the LLC form, both in New Hampshire and generally, was new and unfamiliar. Thus, the members of the committee could only guess as to how LLC business organization law would evolve in this and other states; whether significant numbers of New Hampshire residents would form New

Hampshire LLCs;ⁱⁱⁱ what types of people would form them; how many members New Hampshire LLCs would typically have; and for what purposes they would be used.

What answers to the above questions are available to us today? I think that there is significant evidence for the answers set forth below. I suspect that many New Hampshire lawyers will agree with most or all of these answers on the basis of their own practice experience.

1. Frequency of LLC usage. Since 1997, the LLC form has replaced all other business organization forms as the form of choice for New Hampshire business start-ups. To illustrate: New Hampshire Secretary of State statistics indicate that in 2007, more than seven LLCs were formed under the New Hampshire LLC Act for every corporation formed under the New Hampshire Business Corporation Act.^{iv}
2. Member numerosity. Internal Revenue Service filing statistics suggest that about one-third of all LLCs formed under the New Hampshire LLC Act and under other U.S. LLC acts have only one member; about one-third have two members; about one-sixth have three members; and about one-sixth have four or more members.^v
3. LLC purposes. The LLC certificates of formation on file with the Corporate Division of the New Hampshire Secretary of State make clear that while as many as 25% of all New Hampshire LLCs are used to acquire and hold New Hampshire real estate, the rest are used for a vast variety of non-real estate purposes.^{vi}
4. The complexity of LLC law as applicable to multi-member LLCs. LLC business organization law governing single-member LLCs—and especially those whose

members are individuals rather than entities—is relatively straightforward.

However, even in the case of relatively simple two-member LLCs, such as those whose members are spouses, this law as it has evolved since 1993, can be very complex—indeed, in some cases, much more complex than corporate law.

To illustrate: Corporate law provides for only a single management structure—namely, the classic shareholder-director-officer structure; and most corporate business organization law issues likely to affect the owners of small businesses have long since been resolved in reported corporate cases. By contrast, LLC law permits at least a dozen different ownership structures, including a sole proprietorship structure; a simple general partnership structure; a complex general partnership structure involving one or more managing members or a management committee; and numerous types of limited partnership structures. Furthermore, while there are now more than 850 reported cases on LLC law, all LLC statutes, including the New Hampshire Act, expressly or implicitly provide that LLC agreements (called “operating agreements” under most state LLC acts) trump case law.^{vii} This means that the case of many multi-member LLCs, a highly tailored LLC agreement and not any statute or case law is the law of the case.

Finally, as any New Hampshire lawyer experienced in LLC formation practice can attest, if an LLC agreement for even a relatively simple multi-member LLC is to be reasonably comprehensive, it must address dozens of important business organization law issues, much of which are non-intuitive and require complex resolutions.^{viii}

5. Relatively few founders of New Hampshire LLCs use lawyers in forming them.

A substantial number of New Hampshire LLCs are formed by their founders without the assistance of lawyers.^{ix, x}

6. Many New Hampshire multi-member LLCs lack adequate LLC agreements.

Even assuming that a significant number of unrepresented members enter into LLC agreements that define their respective rights and duties, it is probable that because of the complexity of LLC business organization law, many and perhaps most of these agreements fail to address numerous LLC business organization law issues likely to be important to these members.^{xi}

7. The “time bomb” factor. The fact that many New Hampshire LLCs lack LLC agreements creates a ticking time bomb for the members of these LLCs. This is because if, after their formation, serious disputes arise among the members of these LLCs, these disputes may be difficult or impossible for the members to resolve without expensive litigation. However, their inability to resolve them may often result in serious or even fatal harm to their LLCs.

In my view, the above considerations lead to a clear and compelling conclusion—namely, that, except for its core purpose of authorizing LLC formations, the most important purpose of the New Hampshire Limited Liability Company Act should be to provide an “off-the-shelf LLC agreement” for unrepresented members. To the maximum extent possible, this off-the-shelf agreement should identify and resolve LLC business organization law issues in a manner that meets the needs of these members.^{xii}

However, as shown in Part II of this article, the New Hampshire Act as presently drafted fails to address many issues potentially important to unrepresented members, and many provisions of the Act directly conflict with these members' legal needs.^{xiii}

II. PROPOSALS FOR AMENDMENTS TO THE NEW HAMPSHIRE ACT TO MEET THE NEEDS OF UNREPRESENTED MEMBERS

A. INTRODUCTION

In order to ensure that the New Hampshire Act meets the LLC business organization law needs of unrepresented members, I propose the amendments to the Act set forth below.

In Part III of this article, I will propose additional amendments that I believe are important in order to ensure the soundness of the Act but that do not focus exclusively or primarily on the needs of unrepresented members. I am confident that most of the amendments set forth below will be self-explanatory. However, where it seems useful, I will provide brief explanations.

B. AMENDMENTS TO MEET THE NEEDS OF UNREPRESENTED MEMBERS— FIDUCIARY AMENDMENTS

The fiduciary provisions in an LLC act are those:

- That establish ethical rules among the members and managers of an LLC and the LLC's "team spirit;" and
- That provide procedures and penalties to address breaches of these rules.

In my experience, sound fiduciary rules can be indispensable for all types of LLCs, but especially for those formed by unrepresented members. Indeed, a review of the roughly

850 reported federal and state cases in the LLC field since 1990 (the year when significant use of the LLC form began in the United States) indicates that, by a substantial margin, the most common grounds for disputes among LLC members have been alleged member or manager breaches of the fiduciary duties of loyalty, care, and candor and of the quasi-fiduciary duties of good faith and fair dealing.^{xiv}

Thus, for the benefit of both represented and unrepresented LLC members and also for the benefit of lawyers seeking to provide sound guidance to LLC members and managers with regard to disputes among them, it is critical that the New Hampshire Act comprehensively define the fiduciary duties that apply to the members and managers of New Hampshire LLCs and the procedures and penalties available to members to address fiduciary breaches. Set forth below are the principal amendments to the New Hampshire Act that, in my view, are likely to enable the Act to accomplish these goals.^{xv}

1) Duty of loyalty. The New Hampshire Act presently imposes no explicit duty of loyalty on LLC members or managers. I propose that the Act be amended to address this duty as follows:

Unless otherwise provided in a limited liability company agreement, in all matters relating to the business and internal affairs of the limited liability company, each member of a limited liability company that is managed by its members and each manager of a limited liability company that is managed by managers shall act in a manner that the member or manager reasonably believes to be in the best interest of the limited liability company.

2) Duty of care; standard of care. The New Hampshire Act contains no express provisions subjecting LLC members and managers to a duty of care, nor does it

specify any standard of care. In my view, that standard is appropriate principally in governing the essentially deliberative functions of corporate directors. Thus, I propose an amendment imposing a more multi-dimensional duty-of-care standard that would apply not only to the planning and supervisory functions of LLC members and managers but also to their hands-on management functions. The following is an illustration of the kind of provision I have in mind:

Unless otherwise provided in a limited liability company agreement, the members of a limited liability company managed by the members and the managers of a limited liability company managed by managers shall perform their management duties with the knowledge, judgment, skill, diligence and timeliness that an ordinarily competent person in a like position would use under similar circumstances.

- 3) Business judgment rule. The New Hampshire Act contains no provision similar to the corporate business judgment rule. I propose that the Act be amended to include this rule in approximately the following terms:

No member or manager shall be personally liable for money damages for a breach of the member's or manager's duty of care under this section if, with respect to the matter in question, the member or manager has acted in good faith; in the reasonable belief that the member's or manager's actions were in the best interest of the limited liability company; and on the basis of reasonably adequate investigation of the relevant facts.

- 4) Duty of candor. I propose that the New Hampshire Act be amended to include a default provision providing that in connection with the formation, operation and

dissolution of LLCs, an LLC's members and managers have an affirmative fiduciary duty of candor such as that outlined in Justice Cardozo's classic partnership law decision in *Meinhard v. Salmon*, 164 NE 545, 546 (N.Y. Court of Appeals 1928).^{xvi} I suggest the following terms for this amendment:

In connection with the formation, operation, dissolution and winding-up of a limited liability company, each member and manager shall, promptly after becoming aware of any information that is objectively material to the business or internal affairs of the limited liability company, disclose this information to each other member and manager.

- 5) Duties of good faith and fair dealing. Although I am confident that any New Hampshire court would rule that duties of good faith and fair dealing are implicit in the New Hampshire Act, I propose that the act be amended to provide a mandatory provision expressly imposing these duties. I propose the following terms for these amendments:

In connection with the formation, operation and winding-up of a limited liability company, each member shall act in good faith toward the limited liability company and each other member and shall deal fairly with the limited liability company and each other member. For purposes of this section, the good faith of a member shall mean the member's honesty in fact; and a member shall be considered to deal fairly if the member deals in a manner consistent with customary practice in contractual matters of the kind in question.

**C. AMENDMENTS TO MEET THE NEEDS OF UNREPRESENTED MEMBERS—
MISCELLANEOUS AMENDMENTS**

1) Certificates of formation. Section 12 of the New Hampshire Act and Article V of Form LLC 1, the Secretary of State's form for certificates of formation, require persons forming LLCs to specify in their certificate of formation whether their LLCs will be member-managed or manager-managed.^{xvii} Since it is clear that very few unrepresented LLC members and managers are likely to understand the distinction between these two LLC management structures, the Act should require the Secretary of State to revise Form LLC to explain this difference.

In addition, a major risk for all single-member LLCs whose members are individuals is the risk that these members will be unable to exercise their management functions because of death, illness, injury or unexpected absence and that these events will result in a harmful or even fatal discontinuity of LLC management. The same risk applies to a lesser degree even in the case of multi-member LLCs. To address this risk, the New Hampshire Act and Form LLC 1 should provide LLC founders with an option to identify in that form one or more individuals or entities who will have agency authority for their LLCs if, for any reason, the members or managers of the LLC are unable to exercise this authority.

2) Validity of oral LLC agreements. Section 1,VI of the New Hampshire Act presently provides, in effect, that only written LLC agreements will be valid. However, it appears probable that at least a substantial portion of multi-member LLCs formed by unrepresented members of New Hampshire LLCs have only oral agreements covering the terms of their LLC deal. To me, it is clear that to the extent these members can prove these terms in accordance with normal rules of evidence, their agreements should be respected and their parties should be entitled to enforce them. Thus, I

propose that the New Hampshire Act be amended to validate oral LLC agreements.^{xviii}

III. REVISING THE STYLE AND FORMAT OF THE NEW HAMPSHIRE ACT; MISCELLANEOUS AMENDMENTS TO THE ACT NOT PRIMARILY RELEVANT TO UNREPRESENTED MEMBERS

A. MATTERS OF STYLE

Obviously, if the New Hampshire Act is amended to meet the needs of unrepresented members, it will be efficient to include in it at the same time all other amendments and changes likely to improve it. In Part III(B) of this article, I will propose 15 specific amendments.

However, if the Act as amended is to be as useful as it ought to be either to unrepresented members and to other persons who have occasion to read it, including New Hampshire lawyers, I believe that its writing style must be revised to better meet plain English standards of legal prose. Presently, many important provisions of the Act fail to do so. See, e.g., Sections 1,I(a), 1,III(a), 1,IV, 22,III-VI and 35.

In addition, the Act should be revised to ensure its provisions are arranged in a logical and user-friendly order. Thus, for example, all of the fiduciary provisions in the amended Act should be grouped together, and provisions addressing procedures that New Hampshire LLCs undertake infrequently—e.g., those relating to mergers and statutory conversions—should be relegated to the end of the Act.

Finally, the system for numbering the sections and subsections of the New Hampshire Act, which, at present, is antiquated and cumbersome, should be replaced with the

modern and user-friendly system employed in the New Hampshire Business Corporation Act, RSA 293-A.

B. MISCELLANEOUS AMENDMENTS OF THE ACT NOT PRIMARILY RELEVANT TO UNREPRESENTED MEMBERS

- 1) Member voting power. Section 24,V of the New Hampshire Act provides, in effect, that unless an LLC agreement provides otherwise, each member shall have one vote on each matter on which the members may vote. In my experience, the members of at least a substantial plurality of New Hampshire multi-member LLCs want the voting power of their members be to proportionate to the value of their respective contributions to the LLC. Thus, I propose that Section 24,V be amended to reflect this preference.
- 2) Defined term for totality of a member’s rights. Section 1,VII of the New Hampshire Act contains a defined term—namely, the term “limited liability company interest”—for the right of members to share in LLC profits and losses and to receive LLC distributions. However, unlike a number of other LLC acts, the New Hampshire Act contains no defined term for the *totality* of the rights of LLC members under the Act and under any applicable LLC agreement, including, for example, the members’ buy-sell rights and their management rights and other non-economic rights (such as their voting, informational, dispute resolution and fiduciary rights). I propose that the term “membership rights” be added to Section 1 of the Act and that this term be defined to mean the totality of a member’s rights as a member.
- 3) Systematic use of the phrase “unless otherwise provided in a limited liability company agreement.” It is critically important that all rules in the New Hampshire

Act that are intended to function as default rules rather than as mandatory rules be expressly identified as default rules through the use of the phrase “unless otherwise provided in a limited liability company agreement.” There are a number of important rules in the Act whose status as mandatory or default rules is unclear; but it is clear that most or all of these rules should be default rules, not mandatory ones. See, e.g., Section 40 (governing LLC interim distributions to the members^{xix}); Section 27, IV (governing member expulsions); Section 76 (governing derivative suits).^{xx} I propose that the New Hampshire Act be systematically amended to clarify any ambiguity as to whether a particular rule is a default or a mandatory rule; and that all mandatory rules in the Act that ought instead to be default rules be amended by the addition of the above phrase.

- 4) Interim distributions. As noted, Section 40 provides, in effect, that if there is no provision in the relevant LLC agreement on the subject, an LLC may make no interim distribution to the members except upon the unanimous vote of the members. However, in my experience, it is often important to a majority of the members to make interim distributions from time to time to provide, for example, for “tax distributions”—i.e., distributions of cash to enable members to pay federal and other taxes owed by them on their shares of LLC income.

Thus, I propose that the New Hampshire Act be amended to include a default provision providing that upon a majority vote of the members of a member-managed multi-member LLC or of the managers of a manager-managed multi-member LLC, the LLC must make interim distributions to the members in the amount and at the time required by the vote.

5) Delegations by members and managers. Section 7, II(j) of the New Hampshire Act provides that “every limited liability company” may appoint “employees and agents.” This section can reasonably be construed to provide that only an LLC as such and not any of its members or managers may validly make such an appointment or otherwise delegate LLC agency authority to a member or a third party. In my experience, it is often unduly cumbersome to obtain a majority vote of the members of a multi-member LLC in order to accomplish these delegations. Thus, I propose that the New Hampshire Act be amended to provide that unless the LLC agreement provides otherwise, any member of a member-managed multi-member LLC and any manager of a manager-managed multi-member LLC may delegate LLC agency authority to any person.

6) Fuller articulation of charging order protections. Section 47 of the New Hampshire Act provides statutory charging order protections for LLCs and their members, and, when read together with *Baybank v. Catamount Construction, Inc.*, 693 A.2d 1163 (N.H. 1997), the section is best construed as implying that these protections are the *sole* remedy for creditors of LLC member-debtors-in-default with respect to an LLC’s assets. However, because of the critical importance of Section 47 to many New Hampshire LLC members, I propose that the section be amended to provide for the express and comprehensive protections provided, for example, in the charging order provisions set forth in Section 18-703 of the Delaware LLC Act.^{xxi}

In addition, it is clear that the legislative purpose of charging order protections under the charging order provisions of all U.S. LLC acts is to protect innocent *non*-debtor members of *multi*-member LLCs from judgments arising from the misconduct of

member-debtors-in-default arising outside of the course of LLC business.

Accordingly, I propose that Section 27 be amended to limit the charging order protections afforded by that section to multi-member LLCs and their members.

- 7) Better articulation of member information rights. In my experience, Section 28, I of the New Hampshire Act unduly restricts the right of non-manager members of manager-managed multi-member LLCs to obtain LLC information. I propose that Section 28, I be amended to provide for clearer, fairer and more comprehensive information rules, such as those contained, for example, in Section 18-305(a) of the Delaware Act.
- 8) Electronic filing. Many LLC acts of other states, including the Massachusetts Act, contain provisions authorizing online filing of forms with the Secretary of State (or equivalent state officers). These provisions provide a major convenience to persons that want to create LLCs under these acts. I propose that the New Hampshire Act be amended to provide for online filing of all LLC forms required to be filed with the New Hampshire Secretary of State under the Act.
- 9) Clarification of Section 17-a (concerning statutory conversions of entities that own real property). The New Hampshire Act and a majority of other U.S. LLC acts authorize statutory procedures known to LLC practitioners as “statutory conversions.” By means of a statutory conversion, an entity, upon the vote of members holding a specified portion of member votes, can change its business organization form while remaining the same legal person. In the absence of statutory conversion provisions, entities can effect these conversions only through statutory or non-statutory mergers,

which will usually be substantially more complex and expensive to implement than statutory conversions.

It is clear that when an entity changes its business organization form either to or from the LLC form under New Hampshire statutory conversion provisions, the fact that only a single entity is involved in the conversion means that there can be no transferor or transferee of entity assets and thus no transfer of these assets nor any resulting transfer tax. However, to remove any ambiguity about this issue, I propose that the statutory conversion provisions of the New Hampshire Act and of other relevant New Hampshire business organization law statutes be amended to make explicit that statutory conversions under New Hampshire law cannot trigger transfer taxes.

In addition, since there are a few types of statutory conversions which New Hampshire statutory law does not authorize,^{xxii} I propose that the New Hampshire LLC Act and other New Hampshire business organization law statutes be amended to provide that any New Hampshire entity having any type of business organization form may change this form to any other form by statutory conversion.

10) Authorized third-party signers. The New Hampshire Act currently provides that certificates of formation may only be signed by persons who will be their members or managers upon their formation. Section 2, VI(a) and (b). These provisions of Section 2 often needlessly complicate the LLC formation process. I propose that the Act be amended to provide that not only prospective members and managers of New Hampshire LLCs but also lawyers and other authorized third parties be permitted to sign certificates of formation and other documents required to be filed with the New Hampshire Secretary of State.

- 11) Remedy for oppression. In keeping with current trends in close corporation law, I propose that the New Hampshire Act be amended to provide a remedy for the oppression of minority members. A good model for such a remedy might be Section 701(a)(5)(B) of the Revised Uniform Limited Liability Company Act, as promulgated by the National Conference of Commissions on Uniform State Law in July, 2006.^{xxiii}
- 12) Dissociation rules applicable to single-member LLCs whose members are individuals. I propose that the New Hampshire Act be amended to provide that, unless an LLC agreement provides otherwise, a single-member LLC whose member is an individual shall not be subject to dissolution upon the death, incompetence or bankruptcy of its member or upon the member's assigning the member's entire LLC interest.
- 13) Dissociation rules applicable to multi-member LLCs. Sections 27, I,(d) and (e) of the Act currently provide that unless the LLC agreement provides otherwise, a member of an LLC shall be dissociated from the LLC—i.e., shall cease to be a member and shall retain only an economic interest in the LLC—if the member becomes incompetent or bankrupt or if there is a bankruptcy filing by or against the member. I propose that these sections be amended to provide that upon the occurrence of any of these events to a member, the other members shall have an *option* to dissociate the member, but that this dissociation shall not be automatic.
- 14) Failure to provide adequate provisions for member expulsions in the LLC agreements of multi-member LLCs. Section 27, IV of the New Hampshire Act provides in effect that the members may expel managers who are members if they are unwilling or unable to manage the LLC. Section 27, IV is a workable rule so far as it goes, but it fails to address many expulsion situations besides that of unwillingness or inability to

manage—e.g., situations in which members, whether or not they are managers, have failed to make promised contributions to their LLCs; in which they have willfully failed to maintain the confidence of LLC confidential information; or in which they have competed against the LLC. Section 27, IV should be amended to address all relevant additional situations.

15) “Sales of all or substantially all assets.” The sale of all or substantially all of the assets of a multi-owner entity is clearly a fundamental change of the nature of that entity. Thus, no entity should be able to make such a sale except upon the vote of a majority or supermajority of the members. All corporate statutes require such a vote. The New Hampshire Act, which is silent on the issue, should be amended to address it.

16) Indemnifications, advancements of litigation fees, etc. I propose that the provisions in the New Hampshire Act relating to member and manager indemnifications, advancements of litigation expenses, member consents to the engagement by other members and by managers in self-interested transactions and other similar matters be revised to the extent necessary to conform these provisions with the corresponding provisions of the Revised Model Business Corporation Act.

IV. CONCLUSION

The New Hampshire Limited Liability Company Act as currently in effect has many fine features, but it is gravely deficient in meeting the needs of that substantial portion of LLC members who, for lack of cash or legal sophistication, form their LLCs without the assistance of lawyers. To remedy this deficiency, the Act must be amended in such a

manner that, to the maximum possible extent, it will provide unrepresented members with an “off-the-shelf” LLC agreement that addresses their legal needs.

In connection with these amendments, the Act should be amended to the extent necessary to meet “plain English” drafting standards. It should also be amended to improve its provisions affecting single-member LLCs whose members are individuals; certain of its voting provisions; its charging order provisions; its provisions defining the rights of members to LLC information; its merger and statutory conversion provisions; and various other important substantive and definitional provisions.

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ⁱⁱ The New Hampshire Limited Liability Company Act (to which I will generally refer in this article as “the New Hampshire Act” or “the Act”) is codified in RSA 304-C:1 through 85. Since 1997, the only amendments to the Act have been purely technical.

ⁱⁱⁱ The phrase “New Hampshire LLC” can be used to describe either (i) LLCs formed under non-New Hampshire LLC acts but operating in New Hampshire; or (ii) LLCs that have been formed under the New Hampshire Act (regardless of where they may happen to operate). In this article, the phrase will refer only to the latter type of LLC.

^{iv} Exhibit A to this article contains current statistics compiled by the Corporate Division of the New Hampshire Secretary of State concerning the formation of LLCs and other entities under New Hampshire business organization law statutes.

^v There is no information in the records of the New Hampshire Secretary of State, the Internal Revenue Service or in other sources about the “numerosity” of New Hampshire LLCs or about LLCs in any other jurisdiction or nationally—i.e., about the percentage of these LLCs that have only one member; that have two members; and so forth. However, IRS filing statistics contain extensive information about these issues in the case of S corporations—i.e., state-law business corporations and other state-law entities that elect the pass-through taxation available under Internal Revenue Code Subchapter S. These statistics, which may be accessed at <http://www.irs.gov/pub/irs-soi/04co1120s06.xls>, show that for calendar year 2004 (the most recent year for which the relevant IRS statistical compilations are available), about one-third of all S corporations had only a single shareholder; about one-third had only two shareholders; about one-sixth had only three shareholders; and only about one-sixth had four or more shareholders. Since S corporations, like

LLCs, are closely held business entities, it is reasonable to assume that the above proportions apply not only to S corporations but also to LLCs.

^{vi} Under Section 12 of the New Hampshire Act, an LLC certificate of formation (the official form that LLC members must file with the New Hampshire Secretary of State in order to form their LLCs) must state (i) the name of the LLC being formed; (ii) its purpose; (iii) its registered agent and officer; (iv) its duration; (v) whether it will be managed by its members or by persons appointed as managers in its LLC agreement; and (vi) whether it is being formed in compliance with New Hampshire securities law. In the course of research in connection with drafting this article, I obtained from the Corporate Division of the New Hampshire Secretary of State copies of the first 500 LLC certificates of formation filed with the Secretary of State in the month of September 2007, and, with the help of research assistants, I tabulated the various data in these forms. These data suggest, among other things, that while roughly 25% of all New Hampshire LLCs are formed to acquire and hold real estate, the remaining 75% have a tremendous variety of other purposes. My tabulation of the data may be accessed by clicking the “LLC Library” tab on the left-hand side of the home page of my website. The URL of this website is www.llcformations.com.

^{vii} See, e.g., RSA Section 304-C:78, II. Unless otherwise indicated, all section references in this article are to sections of the New Hampshire Act.

^{viii} To illustrate: Form 3.1 in *Drafting Limited Liability Company Operating Agreements*—the form that, in my experience, is the form most likely to be useful to members of multi-member LLCs—is 43 pages long and contains 31 separate sections which address 212 discrete issues. While some of these issues are federal tax issues, most are LLC business organization law issues.

^{ix} The above 500 certificates of formation indicate that 234 of the 500 LLCs formed by these certificates—i.e., 48.6% of them—have non-lawyers as their registered agents. In my view, this fact strongly implies, though it obviously does not prove, that a substantial number of New Hampshire LLCs are formed without the assistance of lawyers. This conclusion is supported by the common-sense proposition that, in all probability, a substantial number of LLC founders either do not appreciate the need for legal assistance in forming their LLCs or are unwilling or unable to pay for this assistance.

^x In this article, LLC founders who form their LLCs without the assistance of lawyers will be described as “unrepresented members.”

^{xi} In my experience, these issues are likely to include, above all, those concerning LLC management structures, fiduciary matters, member dissociations, dispute resolution and buy-sells. All of these types of issues except the last two can be addressed reasonably comprehensively in LLC statutes.

^{xii} At the same time, as many substantive provisions as possible in the New Hampshire Limited Liability Company Act should be drafted as default provisions—i.e., as provisions that the Act expressly permits to be validly altered in LLC agreements. This will ensure that LLC founders who recognize their need for the assistance of lawyers in forming their LLCs and who can afford to pay these lawyers can change these provisions in their LLC agreements as their lawyers advise in order to meet their legal needs.

^{xiii} It is true that there are many LLC business organization law issues on which it is difficult to know which statutory provisions will best meet the needs of unrepresented members. However, as I believe will be clear in the remainder of this article, there are numerous issues on which this difficulty does not exist. Furthermore, with regard to issues on which there is no single approach that is likely to meet the needs of all unrepresented members, it is clear that the New Hampshire Act should be drafted to meet a “plurality” rule. That is, with regard to these issues, the resolution should be one that is likely to meet the needs of a larger portion of unrepresented members than any alternative resolution.

^{xiv} All of these cases are identified, briefed and categorized in various ways (e.g., by state and by substantive issue) in the comprehensive LLC case law survey in *Drafting Limited Liability Company Operating Agreements*.

^{xv} For fiduciary purposes, the members of a member-managed multi-member LLC have, like partners in a traditional general partnership, a mutual agency relationship with one another; and the managers (whether they are member-managers or non-member managers) of manager-managed multi-member LLCs are agents of the LLC (and often, at least for liability purposes, of the members as such). The bible of the

contemporary U.S. law of agency is, of course, the Restatement (Third) of Agency, published by the American Law Institute in 2006. The basis for the enumeration of fiduciary duties in this article is that restatement. See generally, Johnson, “Having the Fiduciary Duty Talk: Model Advice for Corporate Officers (and Other Senior Agents),” 63 *The Business Lawyer* 147-161 (November 2007). The basis on which this article addresses procedural issues generally relating to fiduciary duties—e.g., issues concerning indemnification and advancement of litigation expenses—is the current version of the American Bar Association’s Revised Model Business Corporation Act.

^{xvi} The *Meinhardt* case, as decided by Justice Cardozo when he was a justice of the Court of Appeals of the State of New York (New York’s highest court), focused primarily on the duty of partners of a general partnership to deal honestly with one another. However, because of Justice Cardozo’s famous dictum in that case that “[n]ot honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior [in partnerships],” the case has been used as a basis for imposing stringent fiduciary duties on partners not only with respect to the duty of candor but also with respect to all other types of fiduciary duties, including the duties of loyalty and care.

^{xvii} Under Section 26 of the New Hampshire Act, member-managed LLCs are those whose members as such have full management rights, including contract authority, in managing the LLCs; while manager-managed LLCs are those in which these management rights are reserved to persons expressly appointed as managers in the LLC agreements of these LLCs.

^{xviii} It should be noted that oral LLC agreements are valid under a majority of other U.S. LLC acts, including the Delaware Limited Liability Company Act. Delaware Limited Liability Company Act, Section 18-101 (7).

^{xix} Interim distributions are transfers by an LLC to its members of cash and other assets other than in connection with the LLC’s liquidation or with the liquidation of a member’s membership rights.

^{xx} In addition, Section 76 should be revised to codify for LLC purposes the New Hampshire Supreme Court’s recent ruling about the right of limited partners in limited partnerships to bring direct rather than derivative actions against limited partnership general partners. See *Kessler v. Gleich*, (New Hampshire Supreme Court, No. 2006-851 (opinion issued December 6, 2007).

^{xxi} This section provides in its entirety as follows:

§ 18-703. Member's limited liability company interest subject to charging order.

(a) On application by a judgment creditor of a member or of a member's assignee, a court having jurisdiction may charge the limited liability company interest of the judgment debtor to satisfy the judgment. To the extent so charged, the judgment creditor has only the right to receive any distribution or distributions to which the judgment debtor would otherwise have been entitled in respect of such limited liability company interest.

(b) A charging order constitutes a lien on the judgment debtor's limited liability company interest.

(c) This chapter does not deprive a member or member’s assignee of a right under exemption laws with respect to the judgment debtor’s limited liability company interest.

(d) The entry of a charging order is the exclusive remedy by which a judgment creditor of a member or of a member's assignee may satisfy a judgment out of the judgment debtor's limited liability company interest.

(e) No creditor of a member or of a member’s assignee shall have any right to obtain possession of, or otherwise exercise legal or equitable remedies with respect to, the property of the limited liability company.

^{xxii} For example, New Hampshire statutory law does not currently permit entities that are trusts to make statutory conversions to other legal forms, and it does not permit entities that are business corporations to change their business organization forms to that of partnerships.

^{xxiii} Section 701(a)(5)(B) provides, in relevant part, that “a limited liability company is dissolved, and its

activities must be wound up. . . (5) on application by a member, upon the entry by [appropriate court] of an order dissolving the company on the grounds that the managers or those members in control of the company. . . (B) have acted or are acting in a manner that is oppressive and was, is, or will be directly harmful to the applicant.

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