IV. March 1991 Draft - Revised Uniform Partnership Act (RUPA)

A. Edited transcript of the first partial second reading (after the two first readings in 1989 and 1990) of the August 1991 Draft of RUPA by NCCUSL at its Meeting in Naples, Florida on August 5 and 6, 1991. Topics addressed by the Commissioners and pages where the discussions are found are as follows:

<table>
<thead>
<tr>
<th>Topics</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>Explanation of the impact of partial second reading (Articles 1 to 5 only) with the rest deferred with a 1992 meeting.</td>
<td>1 and 97-98</td>
</tr>
<tr>
<td>Introduction of participants, commendation of the Reporter and an overview of 77 years of UPA and the events that led to the RUPA project, especially the 1983 ABA Partnership Committee Report.</td>
<td>1-5</td>
</tr>
<tr>
<td>Drafting Committee Chair statement of four key points about RUPA: RUPA is a default statute, so due consideration must be given to “mom and pop” partnerships; RUPA provisions, with very few exceptions, can be varied by agreement; RUPA adopts the entity rather than the aggregate theory; and RUPA will continue to govern limited partnerships unless the provisions of the Revised Uniform Limited Partnership Act are inconsistent</td>
<td>5-7</td>
</tr>
<tr>
<td>Report of the NCCUSL Review Committee authorizing proceeding with the RUPA project.</td>
<td>7</td>
</tr>
<tr>
<td>Prof. Donald Weidner, Reporter for RUPA summarized five major decisions which were discussed in a policy issue statement provided to meeting participants; those five decisions are: (i) partners have the ability to contract out of obligations among each other and the partnership, other than the duty of good faith and fair dealing; (ii) a partnership in an entity not an aggregate; (iii) creating and using a statement of partnership authority; (iv) an expanded statement of fiduciary duties owed inter se; and (v) material revision of the rules governing partnership break-ups (e.g. the departure of a partner does not end the entity), including buyouts</td>
<td>8-13</td>
</tr>
<tr>
<td>SECTION 101 DEFINITIONS, including suggested revisions to “Debtor in bankruptcy” and “Partnership Agreement” (including how to deal with agreement by conduct) and whether all post-formation agreements among the partners are “Partnership Agreements”); impact of the definition “person” to include partnership</td>
<td>13-18</td>
</tr>
<tr>
<td>SECTION 103 KNOWLEDGE AND NOTICE, including imputed notice, effect of receipt of notice from a fraudfeasor, constructive notice (especially via a recorded Statement of Partnership Authority), actual knowledge and conscious awareness</td>
<td>18-25</td>
</tr>
<tr>
<td>SECTION 104 SUPPLEMENTAL PRINCIPLES OF LAW,</td>
<td>25-27</td>
</tr>
<tr>
<td>Question</td>
<td>Pages</td>
</tr>
<tr>
<td>----------</td>
<td>-------</td>
</tr>
<tr>
<td>questioning whether the text suggested a state law based consent to bankruptcy contrary to the Supremacy Clause</td>
<td>27-28</td>
</tr>
<tr>
<td>SECTION 105 EFFECT OF PARTNERSHIP AGREEMENT, including non-alterable provisions, namely: access to records; duty of good faith and fair dealing; power of a partnership to expel a partner; wind-up requirements (they may not be changed post hoc;)</td>
<td>27-28</td>
</tr>
<tr>
<td>Further discussion of whether access to information should be mandatory for all partners (citing law firm compensation decisions);</td>
<td>28-34</td>
</tr>
<tr>
<td>Further discussion of the implications of non-alterability generally and especially as it relates to the duty of good faith and fair dealing versus the duties of loyalty and due care.</td>
<td>34-38</td>
</tr>
<tr>
<td>SECTION 201, DEFINITION AND EXISTANCE OF A PARTNERSHIP, discuss whether joint tenancy can be seen as a partnership, including whether joint tenancies may be partnerships, the classification of tax shelter partnerships, whether aggregate theory provisions remain in RUPA (including unlimited liability of partners and fiduciary duties inter se, the status of and relationship to Limited Partnerships (not defined as “Partnership” under RUPA), whether a partnership conducting illegal activities is a “Partnership” under RUPA, and the impact of participating in a shared appreciation mortgage on whether the participants are partners.</td>
<td>38-53</td>
</tr>
<tr>
<td>SECTION 202 PARTNERSHIP OWNS PARTNERSHIP PROPERTY AND PROPERTY AS PARTNERSHIP PROPERTY &amp; SECTION 203 WHEN PROPERTY IS PARTNERSHIP PROPERTY, including partners acquiring property in the name of a partnership, impact of provisions (especially concerning inheritance) in property transfer documents, the use by a partnership of a fictitious name, the impact on State law homestead exemptions if partners, (e.g. a husband and wife and the family farm) own property in partnership form.</td>
<td>53-60</td>
</tr>
<tr>
<td>SECTION 301, PARTNER AGENT OF PARTNERSHIP AS TO PARTNERSHIP BUSINESS - Partner as an agent of the Partnership, including questions concerning the knowledge of third parties as to the scope and authority of a partner and the impact of a Statement of Partnership Authority as permitted by Section 303, and a discussion of the scope of inquiry duty.</td>
<td>60-73</td>
</tr>
<tr>
<td>SECTION 302, TRANSFER PARTNERSHIP PROPERTY IF TITLE RECORDED, including the difference between vested title and record title, whether “right” should be replaced by “interest” in subsection (b) of the Section (concerning the impact of the absence of an indication of the partnership’s involvement in record title entities), the interaction between this Section and Section 203 and how partnership property is titled (including the impact on a</td>
<td>73-112</td>
</tr>
</tbody>
</table>
chain of title, conveyancing and title searches), implications from partnership personal property and the ability to recover property transferred without authority, whether property in the names of individual partners is partnership property or property held by tenancy-in-common

SECTION 303, STATEMENT OF PARTNERSHIP AUTHORITY, including the impact of requiring five year renewals, the Statement should reference the principal executive office, whether to provide for (and if so what information is required for) a Statement for a foreign partnership, what persons are bound by the existence of a recorded Statement, the Statement's requirement for street addresses, discussions how many partners must sign a Statement, and additional discussion of knowledge versus notice (see discussions Section 103, page 19-26), where authority limitations in a Statement are recorded only in land title records.

B. Commentaries

1. March 19, 1991:. Correspondence from Gerald V. Niesar to H. Lane Kneedler. * *

   Letter explaining the Ad Hoc Subcommittee's comments on the RUPA drafts and why the Subcommittee felt a more detailed analysis was needed in the reports. The Subcommittee stated therefore, that a summary of their recent discussions would not be provided at this time so as to have a more thorough work product.


   Enclosed were the following commentaries:

   a. May 29, 1991: Correspondence from Lauris G. L. Rall to H. Lane Kneedler. *


   The Subcommittee explained what language they found confusing under Article IV, why it believed section 601(11) should be deleted and proposed changes to Section 602 and 603 regarding dissociation. They commented on the "value" of a departing partner's interest for purposes of Section 702 and acknowledged possible tax implications. Discussions continued into what should be the rights of a partnership and/or of the dissociating partner at the time of dissociation.

   * Comment Letter to the RUPA Drafting Committee.
Section 703 addressed the issue of creditors who transact business with a dissociated partner and the Subcommittee recommended and discussed a "safe harbor period". Under Section 802, the Subcommittee noted that they believe a partnership should continue unless a majority of the remaining partners elect to dissolve it, and the Subcommittee explained their reasons why.

b. June 17, 1991: Correspondence from Gerald V. Niesar to H. Lane Kneedler. *

A statement of what the Ad Hoc Subcommittee for Comments on RUPA was trying to accomplish and the principles upon which they based their reviews and comments.

3. July 26, 1991: Correspondence from Allan B. Duboff and James L. Jerue to H. Lane Kneedler. *

Comments on Articles 1 through 3, Sections 101 through 309, of the proposed RUPA draft for the August 1991 NCCUSL meeting. These comments supplemented the October 29, 1990 letter with respect to Sections 1 through 18 contained in the July 1990 RUPA draft. Specifically, they commented upon the following sections:

§ 101 - Definitions
§ 103 - Knowledge and Notice
§ 105 - Effective Partnership Agreement
§ 201 - Definition and Existence of Partnership
§ 202 - Partnership Owns Partnership Property
§ 203 - When Property is Partnership Property
§ 302 - Transfer of Property to Partnership if Title Recorded
§ 304 - Notice of Denial of Status of Partner or Authority


5. October 1, 1991: Correspondence from Gerald V. Niesar to the Ad Hoc Subcommittee Distribution List.

Discussions concerning the future status of the RUPA project in preparing for the November 7, 1991 Meeting of Business Law Section's Committee on Partnerships and Unincorporated Business Organizations.

Enclosed were the following commentaries:

a. August 19, 1991: Correspondence from Lauris G. L. Rall to Gerald V. Niesar.
Report on NCCUSL's August 5-6, 1991 meeting of the second reading of the first portion of RUPA. Mr. Rall gave a synopsis of each section discussed and what comments or suggestions were made. Comments from the Commissioners ranged from technical changes to substantive and policy oriented ones; many sections were the subject of considerable debate.

Enclosed: UPA (1991) Drafting Committee Proposed Changes:
§ 103 - Knowledge and Notice
§ 301 - Partner Agent of Partnership as to Partnership Business
§ 302 - Transfer of Property of Partnership If Title Recorded
§ 303 - Statement of Partnership Authority
§ 304 - Notice of Denial of Status as Partner or Authority
§ 306 - Partner's Liability
§ 307 - Actions Against Partnerships and Partners

ARTICLE 1
DEFINITIONS

§ 101. DEFINITIONS.

AS USED IN THIS ACT, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(A) "ARTICLES OF ORGANIZATION" MEANS DOCUMENTS FILED UNDER § 203 OF THIS ACT FOR THE PURPOSE OF FORMING A LIMITED LIABILITY COMPANY.

[(B) "AUTHORIZED PERSON" MEANS A PERSON, WHETHER OR NOT A MEMBER, WHO IS AUTHORIZED BY THE ARTICLES OF ORGANIZATION, BY AN OPERATING AGREEMENT, OR OTHERWISE, TO ACT ON BEHALF OF A LIMITED LIABILITY COMPANY OR FOREIGN LIMITED LIABILITY COMPANY, WHETHER AS AN OFFICER, MANAGER OR OTHERWISE.]

(C) "BANKRUPT" MEANS BANKRUPT UNDER THE UNITED STATES BANKRUPTCY CODE, AS AMENDED, OR INSOLVENT UNDER A STATE INSOLVENCY ACT.

(D) "BUSINESS" MEANS ANY TRADE, OCCUPATION, PROFESSION OR OTHER COMMERCIAL ACTIVITY ENGAGED IN FOR GAIN, PROFIT OR LIVELIHOOD.

(E) "CAPITAL CONTRIBUTION" MEANS ANYTHING OF VALUE THAT A PERSON CONTRIBUTES TO THE LIMITED LIABILITY COMPANY AS A PREREQUISITE FOR, OR IN CONNECTION WITH MEMBERSHIP, INCLUDING CASH, PROPERTY, SERVICES RENDERED, OR A PROMISSORY NOTE OR OTHER BINDING OBLIGATION TO CONTRIBUTE CASH OR PROPERTY OR TO PERFORM SERVICES.
(F) "CAPITAL INTEREST" MEANS THE FAIR MARKET VALUE AS OF THE DATE CONTRIBUTED, OF A MEMBER'S CAPITAL CONTRIBUTION, OTHER THAN A CONTRIBUTION OF SERVICES OR A BINDING OBLIGATION TO PERFORM SERVICES, WHETHER OR NOT RETURNED TO THE MEMBER.

(G) "CONSTITUENT ENTITY" MEANS EACH LIMITED LIABILITY COMPANY, LIMITED PARTNERSHIP, OR CORPORATION PARTY TO A PLAN OF MERGER OR CONSOLIDATION (PURSUANT TO § 1002 OF THIS ACT).

(H) "CORPORATION" MEANS A CORPORATION FORMED UNDER THE LAWS OF THIS STATE OR A FOREIGN CORPORATION AS DEFINED IN § 101(C) OF THIS ACT.

(I) "COURT" INCLUDES EVERY COURT AND JUDGE HAVING JURISDICTION IN THE CASE.

(J) "FOREIGN CORPORATION" MEANS A CORPORATION FORMED UNDER THE LAWS OF ANY STATE OTHER THAN THIS STATE, OR UNDER THE LAWS OF THE DISTRICT OF COLUMBIA OR ANY FOREIGN COUNTRY.

(K) "FOREIGN LIMITED LIABILITY COMPANY" MEANS A LIMITED LIABILITY COMPANY FORMED UNDER THE LAWS OF ANY STATE OTHER THAN THIS STATE.

(L) "FOREIGN LIMITED PARTNERSHIP" MEANS A LIMITED PARTNERSHIP FORMED UNDER THE LAWS OF ANY STATE OTHER THAN THIS STATE, OR UNDER THE LAWS OF THE DISTRICT OF COLUMBIA OR ANY FOREIGN COUNTRY.

(M) "LIMITED LIABILITY COMPANY" OR "DOMESTIC LIMITED LIABILITY COMPANY" MEANS AN ENTITY THAT IS AN UNINCORPORATED ASSOCIATION HAVING TWO OR MORE MEMBERS THAT IS ORGANIZED AND EXISTING UNDER THE LAWS OF THIS STATE.
(N) "LIMITED PARTNERSHIP" MEANS A LIMITED PARTNERSHIP FORMED UNDER THE LAWS OF THIS STATE OR A FOREIGN LIMITED PARTNERSHIP AS DEFINED IN § 101(D) OF THIS ACT.

(O) ["MANAGER" OR "MANAGERS" MEANS A PERSON OR PERSONS DESIGNATED BY THE MEMBERS OF A LIMITED LIABILITY COMPANY TO MANAGE THE LIMITED LIABILITY COMPANY AS PROVIDED IN THE ARTICLES OF ORGANIZATION OR AN OPERATING AGREEMENT.]

(P) "MEMBER" MEANS A PERSON WITH AN OWNERSHIP INTEREST IN A LIMITED LIABILITY COMPANY WITH THE RIGHTS AND OBLIGATIONS SPECIFIED UNDER THIS ACT.

(Q) "MEMBERSHIP INTEREST" OR "INTEREST" MEANS A MEMBER'S RIGHTS IN THE LIMITED LIABILITY COMPANY, COLLECTIVELY, INCLUDING THE MEMBER'S SHARE OF THE PROFITS AND LOSSES OF THE LIMITED LIABILITY COMPANY, THE RIGHT TO RECEIVE DISTRIBUTIONS OF THE LIMITED LIABILITY COMPANY'S ASSETS, AND ANY RIGHT TO VOTE OR PARTICIPATE IN MANAGEMENT.

(R) "NEW ENTITY" MEANS THE ENTITY INTO WHICH CONSTITUENT ENTITIES CONSOLIDATE, AS IDENTIFIED IN THE ARTICLES OF CONSOLIDATION PROVIDED FOR IN § 1004 OF THIS ACT.

(S) "OPERATING AGREEMENT" MEANS ANY AGREEMENT OF THE MEMBERS AS TO THE AFFAIRS OF A LIMITED LIABILITY COMPANY AND THE CONDUCT OF ITS BUSINESS.

(T) "PERSON" MEANS A NATURAL PERSON, PARTNERSHIP, DOMESTIC OR FOREIGN LIMITED PARTNERSHIP, DOMESTIC OR FOREIGN LIMITED LIABILITY COMPANY, TRUST, ESTATE, ASSOCIATION OR CORPORATION.
(U) "STATE" MEANS A STATE, TERRITORY OR POSSESSION OF THE UNITED STATES, THE DISTRICT OF COLUMBIA, OR THE COMMONWEALTH OF PUERTO RICO.

(V) "SURVIVING ENTITY" MEANS THE CONSTITUENT ENTITY SURVIVING THE MERGER, AS IDENTIFIED IN THE ARTICLES OF MERGER PROVIDED FOR IN § 1004 OF THIS ACT.

COMMENTARY

Articles of organization: This is the formal legal document which brings into existence the limited liability company.

Authorized person: Currently, Maryland's statute is the only statute which utilizes this term. Because limited liability companies are contractual arrangements among the members, the individuals who act on behalf of the enterprise act as agents within the scope of their authority. It was thought that it was not necessary to define the parameters of the authority in the Act. [This is a subject for deliberation.]

Bankrupt: The reference to the United States Bankruptcy Code is designed to bring the Act in conformity with current nomenclature. Any sort of insolvency proceeding, state or federal, will, however, trigger the dissolution provisions of § 1004.

Business: This definition is fairly narrow and will exclude not-for-profit activities, such as charitable endeavors. [This is a subject for deliberation.]

Capital Contribution: Like the Revised Uniform Limited Partnership Act, § 101(2), a promise to, in the future, contribute property or cash or to perform services, is acceptable as a capital contribution.

Capital Interest: This definition is tied to the rights of a member by virtue of § 1003. [This is a subject for deliberation.]

Court: Of the seven statutes reviewed, five had similar provisions.
Foreign limited liability company: Of the three states which defined this term, Virginia and Colorado leave open the possibility that non-U.S. limited liability companies might qualify to do business. This definition was designed to make it clear that only U.S. limited liability companies would qualify.

Limited liability company or domestic limited liability company: These terms are defined to (1) assure that the entity is an unincorporated association and (2) has two or more members. Both of these characteristics are critical to the qualification of limited liability companies as partnerships for federal income tax purposes.

Member: The definition of this term is intended to make it clear that a member has all rights incident to ownership, not only the economic rights. Thus, a mere assignee is not a member.

Membership interest or interest: [Leave for discussion.]

Operating agreement: This is the principal document which governs the affairs of the limited liability company. While the articles of organization may be an operating agreement, there is no requirement that the operating agreement be a public document. Indeed, there is no requirement that it even be in writing. This is consonant with the principle that a limited liability company is essentially contractual in nature and the expectation that many of these entities will operate informally. In those cases, the members will often enter into oral agreements. If the term "operating agreement" were limited, the expectations of the parties would often be frustrated.

Person: This is defined broadly in almost every act and is adapted from the provisions of the Revised Uniform Limited Partnership Act.

State: This is defined to include all jurisdictions in the United States.
ARTICLE 2
FORMATION

§ 201. PURPOSE.

A LIMITED LIABILITY COMPANY MAY BE ORGANIZED UNDER THIS TITLE AND MAY CONDUCT BUSINESS IN ANY STATE FOR ANY LAWFUL PURPOSE, EXCEPT THE BUSINESS OF [HERE DESIGNATE PROHIBITED ACTIVITIES].

COMMENTARY

This section follows RULPA § 106. Currently only Kansas does not limit the types of business which may be conducted by a limited liability company.
§ 202. POWERS.

EACH LIMITED LIABILITY COMPANY MAY:

(A) SUE, BE SUED, COMPLAIN AND DEFEND IN ALL COURTS;

(B) TRANSACT ITS BUSINESS, CARRY ON ITS OPERATIONS AND HAVE AND EXERCISE THE POWERS GRANTED BY THIS ARTICLE IN ANY STATE, TERRITORY, DISTRICT OR POSSESSION OF THE UNITED STATES, AND IN ANY FOREIGN COUNTRY;

(C) MAKE CONTRACTS AND GUARANTEES, INCUR LIABILITIES, AND BORROW MONEY;

(D) SELL, LEASE, EXCHANGE, TRANSFER, CONVEY, MORTGAGE, PLEDGE, AND OTHERWISE DISPOSE OF ANY OF ITS ASSETS;

(E) ACQUIRE BY PURCHASE OR IN ANY OTHER MANNER, TAKE, RECEIVE, OWN, HOLD, IMPROVE, AND OTHERWISE DEAL WITH ANY INTEREST IN REAL OR PERSONAL PROPERTY, WHEREVER LOCATED;

(F) ISSUE NOTES, BONDS AND OTHER OBLIGATIONS AND SECURE ANY OF THEM BY MORTGAGE OR DEED OF TRUST OR SECURITY INTEREST OF ANY OR ALL OF ITS ASSETS;

(G) PURCHASE, TAKE, RECEIVE, SUBSCRIBE FOR OR OTHERWISE ACQUIRE, OWN, HOLD, VOTE, USE, EMPLOY, SELL, MORTGAGE, LOAN, PLEDGE OR OTHERWISE DISPOSE OF AND OTHERWISE USE AND DEAL IN AND WITH STOCK OR OTHER INTERESTS IN AND OBLIGATIONS OF DOMESTIC AND FOREIGN CORPORATIONS, ASSOCIATIONS, GENERAL OR LIMITED PARTNERSHIPS, LIMITED LIABILITY COMPANIES, BUSINESS TRUSTS, AND INDIVIDUALS;
(H) INVEST ITS SURPLUS FUNDS, LEND MONEY FROM TIME TO TIME IN ANY MANNER WHICH MAY BE APPROPRIATE TO ENABLE IT TO CARRY ON THE OPERATIONS OR FULFILL THE PURPOSES SET FORTH IN ITS ARTICLES OF ORGANIZATION, AND TAKE AND HOLD REAL PROPERTY AND PERSONAL PROPERTY AS SECURITY FOR THE PAYMENT OF FUNDS SO LOANED OR INVESTED;

(I) ELECT OR APPOINT AGENTS AND DEFINE THEIR DUTIES AND FIX THEIR COMPENSATION;

(J) SELL, CONVEY, MORTGAGE, PLEDGE, LEASE, EXCHANGE, TRANSFER AND OTHERWISE DISPOSE OF ALL OR ANY PART OF ITS PROPERTY AND ASSETS;

(K) BE A PROMOTER, STOCKHOLDER, PARTNER, MEMBER, ASSOCIATE, OR AGENT OF ANY CORPORATION, PARTNERSHIP, LIMITED LIABILITY COMPANY, JOINT VENTURE, TRUST OR OTHER ENTERPRISE;

(L) INDEMNIFY AND HOLD HARMLESS ANY MEMBER, AGENT OR EMPLOYEE FROM AND AGAINST ANY AND ALL CLAIMS AND DEMANDS WHATSOEVER, EXCEPT IN THE CASE OF ACTION OR FAILURE TO ACT BY THE MEMBER, AGENT, OR EMPLOYEE WHICH CONSTITUTES WILLFUL MISCONDUCT OR RECKLESSNESS, AND SUBJECT TO THE STANDARDS AND RESTRICTIONS, IF ANY, SET FORTH IN THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT;

(M) MAKE AND ALTER OPERATING AGREEMENTS, NOT INCONSISTENT WITH ITS ARTICLES OF ORGANIZATION OR WITH THE LAWS OF THIS STATE, FOR THE ADMINISTRATION AND REGULATION OF THE AFFAIRS OF THE LIMITED LIABILITY COMPANY;
(N) CEASE ITS ACTIVITIES AND DISSOLVE; AND

(O) DO EVERY OTHER ACT NOT INCONSISTENT WITH LAW WHICH IS APPROPRIATE TO PROMOTE AND ATTAIN THE PURPOSES SET FORTH IN ITS ARTICLES OF ORGANIZATION.

COMMENTARY

This section follows the proposed Maryland Act and is derived from Wyo. Stat. § 17-5-103 (1977). It is substantively the same as the Wyoming statute. Florida's, Kansas's, and Colorado's statutes are substantially the same as Wyoming's, except that Florida and Kansas exclude the power to lend money to and assist members and add the powers to aid governmental policy and to have pension and profit sharing programs for employees.

Most states have granted limited liability companies powers comparable to those set forth in the Act. To the extent that powers are not explicitly set forth, they are nevertheless intended to be encompassed under the "catch-all" provisions of § 202(o) if corporations in the adopting state can adopt similar powers. However, if the particular state requires a corporation to have explicit authority to carry out an act which is not enumerated in this section, then this section ought to be amended to the extent necessary to make it consistent with the state's corporate statute.
§ 203. FORMATION.

(A) IN GENERAL. -- TWO (2) OR MORE PERSONS MAY FORM A LIMITED LIABILITY COMPANY BY FILING EXECUTED ARTICLES OF ORGANIZATION FOR RECORD WITH THE DEPARTMENT.

(B) EFFECT OF ACCEPTANCE OF ARTICLES FOR RECORD. --

(1) WHEN THE DEPARTMENT ACCEPTS THE ARTICLES OF ORGANIZATION FOR RECORD, THE PROPOSED ORGANIZATION BECOMES A LIMITED LIABILITY COMPANY UNDER THE NAME AND SUBJECT TO THE PURPOSES, CONDITIONS, AND PROVISIONS STATED IN THE ARTICLES.

(2) ACCEPTANCE OF THE ARTICLES FOR RECORD BY THE DEPARTMENT IS CONCLUSIVE EVIDENCE OF THE FORMATION OF THE LIMITED LIABILITY COMPANY.

COMMENTARY

Subsections (A) and (B) of this section follow the proposed Maryland Act which in turn is analogous to Md. Corps. Ass'n Art. § 2-102. Just as a corporation is conclusively formed when articles of incorporation are filed with the statutory office, a limited liability company is conclusively formed upon filing of articles of organization. This procedure is similar to the procedures of Wyoming, Colorado, Kansas and Florida.

This Act requires two persons to form a limited liability company, as do Wyoming, Kansas and Florida. Like all other existing limited liability company statutes (except Colorado's), this Act does not require the forming party to be a natural person.

Under this section, acceptance by the appropriate officer of the articles of organization would create the limited liability company and would be conclusive evidence of formation. This would give immediate legal personality to the limited liability company, unlike certain state statutes. For example, where the articles of organization are deficient, Colorado bars relation back to the date of delivery. Florida and Wyoming do not consider that state's mere acceptance of the
articles conclusive evidence that the conditions precedent to formation have been met--only the issuance of a certificate of organization can do that.
§ 204. ARTICLES OF ORGANIZATION.

(A) THE ARTICLES OF ORGANIZATION SHALL SET FORTH:

(1) THE NAME OF THE LIMITED LIABILITY COMPANY;

(2) THE LATEST DATE ON WHICH THE LIMITED LIABILITY COMPANY IS TO DISSOLVE;

(3) THE PURPOSES FOR WHICH THE LIMITED LIABILITY COMPANY IS FORMED;

(4) THE ADDRESS OF ITS PRINCIPAL PLACE OF BUSINESS IN THIS STATE AND THE NAME AND ADDRESS OF ITS RESIDENT AGENT IN THIS STATE;

(5) ANY OTHER PROVISION, NOT INCONSISTENT WITH LAW, WHICH THE MEMBERS ELECT TO SET OUT IN THE ARTICLES, INCLUDING, BUT NOT LIMITED TO, A STATEMENT OF WHETHER THERE ARE LIMITATIONS ON THE AUTHORITY OF MEMBERS TO BIND THE LIMITED LIABILITY COMPANY.

(B) IT IS NOT NECESSARY TO SET OUT IN THE ARTICLES OF ORGANIZATION ANY OF THE POWERS ENUMERATED IN THIS TITLE.

COMMENTARY

Except as noted below, Subsection (A) is derived from Colorado's statute. However, it differs from that statute in requiring a statement of purpose, and Colorado requires the name of the company's "managers" to be listed.

Subsection (A)(2) differs from all of the existing statutes, which limit the duration of the limited liability company to a specific term of years. The drafters understand that the Internal Revenue Service has informally announced that it will not treat a provision such as this, which leaves the establishment of the term to the organizers as causing the limited liability to have unlimited life.

Maryland and Colorado each bases its provision on RULPA and, as a result, do not require information pertaining to management, financing, the admission of new members, and the limited liability company's continuity of life, as do Florida, Wyoming, and Kansas.
§ 205. EXECUTION OF ARTICLES.

(A) SIGNATORIES. -- ARTICLES REQUIRED BY THIS SUBTITLE TO BE FILED WITH THE DEPARTMENT SHALL BE EXECUTED AND ACKNOWLEDGED IN THE FOLLOWING MANNER:

(1) ARTICLES OF ORGANIZATION MUST BE SIGNED BY AT LEAST ONE PERSON WHO NEED NOT BE A MEMBER OF THE LIMITED LIABILITY COMPANY;

(2) ARTICLES OF AMENDMENT MUST BE SIGNED AND ACKNOWLEDGED BY AN AUTHORIZED PERSON; AND

(3) ARTICLES OF CANCELLATION MUST BE SIGNED AND ACKNOWLEDGED BY AN AUTHORIZED PERSON.

(B) POWER OF ATTORNEY. -- ANY AUTHORIZED PERSON MAY SIGN ANY ARTICLES OR AMENDMENTS TO ARTICLES BY AN ATTORNEY IN FACT. POWERS OF ATTORNEY RELATING TO THE SIGNING OF ARTICLES OR AMENDMENTS BY AN ATTORNEY IN FACT NEED NOT BE SWORN TO, VERIFIED OR ACKNOWLEDGED, AND NEED NOT BE FILED WITH THE DEPARTMENT.

(C) CERTIFICATION. -- THE EXECUTION OF ANY ARTICLES UNDER THIS ACT CONSTITUTES AN AFFIRMATION UNDER THE PENALTIES OF PERJURY THAT THE FACTS STATED THEREIN ARE TRUE.

COMMENTARY

This section follows the proposed Maryland Act and is the limited liability company's counterpart to the limited partnership provisions dealing with execution of a certificate and is equivalent in structure. However, unlike limited partnerships, no members of the limited liability company need to sign the articles of organization. Likewise, articles of amendment and cancellation may be signed and filed by an Authorized Person.
There is no corresponding provision in the law of Wyoming, Kansas, Colorado or Florida. Florida has a separate section which covers amendments, but requires all amendments to be signed and sworn to by all members on a form promulgated by its Department of State. Colorado and Kansas require all amendments to be signed by all members.

Subsection (B) and (C) generally are derived from § 204(B) and § 204(C) of RULPA.
§ 206. FILING WITH THE DEPARTMENT.

(A) DOCUMENTS FAILING TO CONFORM WITH LAW NOT TO BE
RECORDED; ACKNOWLEDGMENTS. -- THE DEPARTMENT MAY NOT ACCEPT ANY
DOCUMENT OF A LIMITED LIABILITY COMPANY FOR FILING WHICH DOES
NOT CONFORM WITH LAW. HOWEVER, ANY SUCH DOCUMENT WHICH PURPORTS
TO BE ACKNOWLEDGED MAY BE TREATED BY THE DEPARTMENT AS PROPERLY
ACKNOWLEDGED.

(B) PAYMENT OF FILING FEES AND SPECIAL FEES. -- THE
DEPARTMENT MAY NOT ACCEPT FOR FILING ANY ORGANIZATIONAL
DOCUMENT, QUALIFICATION, REGISTRATION, CHANGE OF RESIDENT AGENT
OR PRINCIPAL OFFICE, REPORT, SERVICE OF PROCESS OR NOTICE, OR
OTHER DOCUMENT UNTIL ALL REQUIRED RECORDING, FILING, AND OTHER
FEES HAVE BEEN PAID TO THE DEPARTMENT.

(C) DUTIES OF THE DEPARTMENT. -- WHEN THE DEPARTMENT
ACCEPTS THE ARTICLES OR ORGANIZATION OR ANY OTHER DOCUMENT, THE
DEPARTMENT SHALL:

(1) ENDORSE ON THE DOCUMENT THE DATE AND TIME OF ITS
ACCEPTANCE FOR RECORD;
(2) RECORD PROMPTLY THE DOCUMENT;
(3) ISSUE A CERTIFICATE WHICH STATES:
(I) THAT THE DOCUMENT WAS ACCEPTED FOR FILING BY
THE DEPARTMENT; AND
(II) THE DATE AND TIME OF THE ACCEPTANCE FOR FILING.

(C) APPEAL FROM NONACCEPTANCE.

(1) IF THE DEPARTMENT DESIGNATED IN (A) FAILS TO APPROVE ANY ARTICLES OF ORGANIZATION, AMENDMENT, OR CANCELLATION OR ANY OTHER DOCUMENT REQUIRED BY THIS ARTICLE AND DECLINES IT TO THE DEPARTMENT, THE DEPARTMENT SHALL, WITHIN TEN DAYS OF ITS DELIVERY TO HIM, GIVE WRITTEN NOTICE OF DISAPPROVAL TO THE PERSON OR LIMITED LIABILITY COMPANY DELIVERING THE SAME, SPECIFYING THE REASONS THEREFOR.

(2) SUCH PERSON OR LIMITED LIABILITY COMPANY MAY APPEAL THE DISAPPROVAL TO THE APPROPRIATE COURT BY FILING WITH THE CLERK OF SUCH COURT A PETITION SETTING FORTH A COPY OF THE ARTICLES OR OTHER DOCUMENTS SOUGHT TO BE FILED AND A COPY OF THE WRITTEN DISAPPROVAL THEREOF BY THE DEPARTMENT; WHEREUPON, THE MATTER SHALL BE TRIED DE NOVO BY THE COURT, AND THE COURT SHALL EITHER SUSTAIN THE ACTION OF THE OFFICER, OR DIRECT HIM TO TAKE SUCH ACTION AS THE COURT DEEMS PROPER.

(3) APPEALS FROM ALL FINAL ORDERS AND JUDGMENTS ENTERED BY THE COURT PURSUANT TO THIS SECTION IN REVIEW OF ANY RULING OR DECISION OF THE DEPARTMENT MAY BE TAKEN AS IN OTHER CIVIL ACTIONS.

COMMENTARY

The language of this section follows that of the proposed Maryland Act, but uses just the term "filing" rather than "for
record or filing." The filing procedures of Wyoming, Kansas, Colorado and Florida vary according to local practice.

Subsection (C) is adopted from § 7-80-206 of the Colorado Act.
§ 207. NAME.

RESTRICTIONS ON LIMITED LIABILITY COMPANY NAME.

THE NAME OF EACH LIMITED LIABILITY COMPANY AS SET FORTH IN ITS ARTICLES OF ORGANIZATION:

(A) SHALL CONTAIN EITHER THE WORDS "LIMITED LIABILITY COMPANY" OR THE ABBREVIATION "L.L.C." OR THE ABBREVIATION "L.C."

(B) MAY NOT CONTAIN ANY WORD OR PHRASE WHICH INDICATES OR IMPLIES THAT IT IS ORGANIZED FOR ANY PURPOSE NOT STATED IN ITS ARTICLES OF ORGANIZATION; AND

(C) MAY NOT BE THE SAME AS OR MISLEADINGSLY SIMILAR TO:

(1) THE NAME OF ANY CORPORATION, LIMITED PARTNERSHIP, OR LIMITED LIABILITY COMPANY ORGANIZED UNDER THE LAWS OF THIS STATE.

(2) THE NAME OF ANY FOREIGN CORPORATION, FOREIGN LIMITED PARTNERSHIP, OR FOREIGN LIMITED LIABILITY COMPANY REGISTERED OR QUALIFIED TO DO BUSINESS IN THIS STATE; OR

(3) ANY NAME WHICH IS RESERVED OR REGISTERED UNDER [CITATIONS].

COMMENTARY

This section is generally derived from the proposed Maryland Act. A limited liability company name may contain the name of a member, and the term "limited liability company" can be abbreviated as "L.L.C. or L.C." The Wyoming and Florida statutes are substantially the same except that they contain a provision making it clear that a limited liability company is liable for all damages caused by failure to include the term "limited liability company" in the entity's name. Colorado's corresponding provision is substantially the same as Maryland's.
Each state allows a limited liability company to use a different abbreviation for the term "limited liability company." Wyoming allows "Ltd. Liability Company," and Colorado allows "Ltd. Liability Co.". Florida and Kansas require only "Limited Company" to be included in the name and also allow the abbreviation "L.C.".
§ 208. RESERVATION OF NAME; TRANSFER OF RESERVED NAME.

(A) WHO MAY RESERVE. -- THE EXCLUSIVE RIGHT TO USE A SPECIFIED NAME FOR A DOMESTIC OR FOREIGN LIMITED LIABILITY COMPANY MAY BE RESERVED BY:

(1) A PERSON WHO INTENDS TO ORGANIZE A DOMESTIC LIMITED LIABILITY COMPANY;

(2) A DOMESTIC LIMITED LIABILITY COMPANY WHICH PROPOSES TO CHANGE ITS NAME;

(3) A FOREIGN LIMITED LIABILITY COMPANY WHICH INTENDS TO REGISTER TO DO BUSINESS IN THIS STATE; OR

(4) A FOREIGN LIMITED LIABILITY COMPANY REGISTERED TO DO BUSINESS IN THIS STATE WHICH PROPOSES TO CHANGE ITS NAME.

(B) PROCEDURE.

(1) A PERSON MAY RESERVE A SPECIFIED NAME BY FILING A SIGNED APPLICATION WITH THE DEPARTMENT.

(2) IF THE DEPARTMENT FINDS THAT THE NAME IS AVAILABLE FOR USE BY A LIMITED LIABILITY COMPANY, THE DEPARTMENT SHALL RESERVE THE NAME FOR 60 DAYS FOR THE EXCLUSIVE USE OF THE APPLICANT.

(C) TRANSFERABILITY. -- THE EXCLUSIVE RIGHT TO USE A RESERVED NAME MAY BE TRANSFERRED TO ANOTHER PERSON BY FILING WITH THE DEPARTMENT A NOTICE OF THE TRANSFER WHICH SPECIFIES THE
NAME AND ADDRESS OF THE TRANSFEREE AND IS SIGNED BY THE APPLICANT FOR WHOM THE NAME WAS RESERVED.

COMMENTARY

This section follows the proposed Maryland Act but allows reservation for 60, not 30, days. Thirty days is a very short time. Colorado has an equivalent provision, but allows a name to be reserved for 120 days and allows persons intending to organize a foreign limited liability company but not having done so to reserve a name as well. None of the other existing limited liability company states allows names to be reserved.
§ 209. PRINCIPAL OFFICE AND RESIDENT AGENT.

(A) IN GENERAL. -- EACH LIMITED LIABILITY COMPANY SHALL HAVE:

(1) A PRINCIPAL OFFICE IN THIS STATE; AND
(2) AT LEAST ONE RESIDENT AGENT WHO SHALL BE EITHER:
   (I) A CITIZEN OF THE STATE WHO RESIDES HERE; OR
   (II) A DOMESTIC CORPORATION OR DOMESTIC LIMITED LIABILITY COMPANY.

(B) DESIGNATION OR CHANGE OF PRINCIPAL OFFICE, RESIDENT AGENT, OR ADDRESS OF RESIDENT AGENT.

(1) A LIMITED LIABILITY COMPANY MAY DESIGNATE OR CHANGE ITS RESIDENT AGENT OR PRINCIPAL OFFICE BY FILING FOR RECORD WITH THE DEPARTMENT A STATEMENT SIGNED BY ANY AUTHORIZED PERSON WHICH AUTHORIZES THE DESIGNATION OR CHANGE.

(2) A LIMITED LIABILITY COMPANY MAY CHANGE THE ADDRESS OF ITS RESIDENT AGENT BY FILING FOR RECORD WITH THE DEPARTMENT A STATEMENT OF THE CHANGE SIGNED BY ANY AUTHORIZED PERSONA.

(3) A DESIGNATION OR CHANGE OF A PRINCIPAL OFFICE OR RESIDENT AGENT OR ADDRESS OF THE RESIDENT AGENT FOR A LIMITED LIABILITY COMPANY UNDER THIS SUBSECTION IS EFFECTIVE WHEN THE DEPARTMENT ACCEPTS THE STATEMENT FOR RECORD.

(C) STATEMENT OF CHANGE OF ADDRESS BY RESIDENT AGENT.
(1) A resident agent who changes his address in the state may notify the office of the change by filing for record with the office a statement of the change signed by him or on his behalf.

(2) The statement shall include:

   (I) the name of the limited liability company for which the change is effective;

   (II) the old and new addresses of the resident agent; and

   (III) the date on which the change is effective.

(3) If the old and new addresses of the resident agent are the same as the old and new addresses of the principal office of the limited liability company, the statement may include a change of address of the principal office if:

   (I) the resident agent notifies the limited liability company in writing; and

   (II) the statement recites that the resident agent has done so.

(4) The change of address of the resident agent or principal office is effective when the department accepts the statement for record.

(D) Resignation of resident agent.

(1) A resident agent may resign by filing with the office a counterpart or photocopy of the signed resignation.
(2) UNLESS A LATER TIME IS SPECIFIED IN THE RESIGNATION, IT IS EFFECTIVE:

(I) AT THE TIME IT IS FILED, IF THE LIMITED LIABILITY COMPANY HAS MORE THAN ONE RESIDENT AGENT; OR

(II) TEN DAYS AFTER IT IS FILED, IF THE LIMITED LIABILITY COMPANY HAS ONLY ONE RESIDENT AGENT.

COMMENTARY

This section follows the proposed Maryland Act. Wyoming, Colorado and Florida have functionally equivalent provisions which vary according to local practice. However, Wyoming and Florida require proof that a change of business office or registered agent was authorized by a majority vote of the limited liability company's members. Also, Florida and Colorado provide for some form of suspension of status of limited liability companies which fail to appoint a successor to a resident agent who resigns. Kansas allows changes of business office and changes of registered agent to be done by the resident agent himself. The registered agent merely files notice of such changes with the secretary of state. Only if the resident agent dies or resigns without appointing a successor is action required by the limited liability company.
§ 210. AMENDMENT OF ARTICLES OF ORGANIZATION.

(A) THE ARTICLES OF ORGANIZATION SHALL BE AMENDED WHEN:

(1) THERE IS A CHANGE IN THE NAME OF THE LIMITED LIABILITY COMPANY;

(2) THERE IS A FALSE OR ERRONEOUS STATEMENT IN THE ARTICLES OF ORGANIZATION;

(3) THERE IS A CHANGE IN THE TIME AS STATED IN THE ARTICLES OF ORGANIZATION FOR THE CANCELLATION OF THE LIMITED LIABILITY COMPANY;

(4) THE MEMBERS DESIRE TO MAKE A CHANGE IN ANY OTHER STATEMENT IN THE ARTICLES OF ORGANIZATION IN ORDER TO ACCURATELY REPRESENT THEIR AGREEMENT.

(B) AN AMENDMENT TO THE ARTICLES OF ORGANIZATION OF A LIMITED LIABILITY COMPANY SHALL BE IN THE FORM AND MANNER DESIGNATED BY THE DEPARTMENT.

COMMENTARY

The proposed Maryland Act does not appear to have a similar provision. This one has been adopted from the Colorado Act § 7-80-209.
§ 211. CERTIFICATES OF CORRECTION.

(A) IF ANY DOCUMENT FILED WITH THE DEPARTMENT UNDER THIS ACT CONTAINS ANY TYPOGRAPHICAL ERROR, ERROR OF TRANSCRIPTION, OR OTHER TECHNICAL ERROR OR HAS BEEN DEFFECTIVELY EXECUTED, THE DOCUMENT MAY BE CORRECTED BY THE FILING OF A CERTIFICATE OF CORRECTION.

(B) A CERTIFICATE OF CORRECTION SHALL SET FORTH:

(1) THE TITLE OF THE DOCUMENT BEING CORRECTED;
(2) THE NAME OF EACH PARTY TO THE DOCUMENT BEING CORRECTED;
(3) THE DATE THAT THE DOCUMENT BEING CORRECTED WAS FILED; AND
(4) THE PROVISION IN THE DOCUMENT AS PREVIOUSLY FILED AND AS CORRECTED AND, IF EXECUTION OF THE DOCUMENT WAS DEFFECTIVE, THE MANNER IN WHICH IT WAS DEFFECTIVE.

(C) A CERTIFICATE OF CORRECTION MAY NOT MAKE ANY OTHER CHANGE OR AMENDMENT WHICH WOULD NOT HAVE COMPLIED IN ALL RESPECTS WITH THE REQUIREMENTS OF THIS ARTICLE AT THE TIME THE DOCUMENT BEING CORRECTED WAS FILED.

(D) A CERTIFICATE OF CORRECTION SHALL BE EXECUTED IN THE SAME MANNER IN WHICH THE DOCUMENT BEING CORRECTED WAS REQUIRED TO BE EXECUTED.

(E) A CERTIFICATE OF CORRECTION MAY NOT:

(1) CHANGE THE EFFECTIVE DATE OF THE DOCUMENT BEING CORRECTED; OR
(2) AFFECT ANY RIGHT OR LIABILITY ACCRUED OR INCURRED BEFORE ITS FILING, EXCEPT THAT ANY RIGHT OR LIABILITY ACCRUED OR INCURRED BY REASON OF THE ERROR OR DEFECT BEING CORRECTED SHALL BE EXTINGUISHED BY THE FILING IF THE PERSON HAVING THE RIGHT HAS NOT DETRIMENTALLY RELIED ON THE ORIGINAL DOCUMENT.

COMMENTARY

This section follows § 2(A)-205 of the proposed Maryland Act.
ARTICLE 3
MANAGEMENT AND MANAGEMENT RIGHTS OF MEMBERS

§ 301. MANAGERS.
(A) EXCEPT AS OTHERWISE PROVIDED IN THE ARTICLES OF ORGANIZATION, OPERATING AGREEMENT, OR THIS ACT, A LIMITED LIABILITY COMPANY SHALL BE MANAGED BY OR UNDER THE AUTHORITY OF ONE OR MORE MANAGERS WHO MAY, BUT NEED NOT BE, MEMBERS.

(B) THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT MAY PRESCRIBE QUALIFICATIONS FOR MANAGERS.

(C) THE NUMBER OF MANAGERS SHALL BE SPECIFIED IN OR FIXED IN ACCORDANCE WITH THE ARTICLES OR ORGANIZATION OR OPERATING AGREEMENT.

COMMENTARY

The management provisions of the limited liability company act shall be drafted in light of the following considerations:

(a) In the absence of a clear basis of concern for the rights of members of limited liability companies or third parties, the parties to these companies should have the maximum flexibility to agree on management and governance provisions.

(b) In order to minimize the parties' contracting costs, the statute should provide for default provisions that anticipate the parties' likely preferred.

(c) The default rules should not be unduly formal or detailed. It is difficult to anticipate in a statutory standard form the precise rules that would be preferred by particular companies. In deals that are large enough to justify substantial contracting costs, the parties would prefer to make their own customized rules. Parties to smaller deals probably would want relatively simple default rules without detailed procedural requirements.
(d) The management provisions should work together with other applicable tax and governance rules. The members of a limited liability form of business are likely to be less involved in management than personally liable general partners. On the other hand, members may prefer greater powers to oversee managers than limited partners have because limited liability company managers, unlike general partners, may not be "disciplined" by personal liability. Finally, tax rules make it appropriate to restrict transferability of interests in a limited liability company. Accordingly, members may need more voice in management than corporate shareholders, who are in a better position to sell if they are dissatisfied.

The statute should provide as a default term for management by managers rather than directly by the members. Because this is a limited liability form of business, it can be assumed that the members would seek the passivity of corporate shareholders and limited partners rather than the direct involvement in management of general partners. See Ribstein, An Applied Theory of Limited Partnership, 37 Emory L.J. 880-82 (1988).

On the other hand, the statute should not require management by managers. There is no justification for mandating governance form. Even in a limited partnership, where it might be argued that managers' personal liability matters to third parties, there is little justification for mandating this through the "control" rule. See id. at 882-86. In any event, a mandatory governance rule creates confusion because it can be skirted through borderline representational governance. And, as is discussed in the comment to the Maryland provision, the Colorado approach would force centralized management for tax purposes, so that the firm must have free transferability and continuity of life to qualify for partnership treatment.

This section, consistent with RULPA, does not specify any qualifications for managers, including that they be natural persons.

Sources and comparison:

MBCA 8.01 is primary source.

Colo. 7-80-401 requires management by managers.

Md. 4A-403 and Va. 13.1-1022, 1024 Provide for management by members but permit parties to agree in operating agreement to management by managers.

Fla. 608.422, Kan. 12 and Wyo. 17-15-116 provide for management by members unless otherwise provided in the articles of organization.
§ 302. ELECTION AND REMOVAL OF MANAGERS.

UNLESS OTHERWISE PROVIDED IN THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT:

(A) ELECTION OF MANAGERS TO FILL INITIAL POSITIONS OR VACANCIES SHALL BE BY MAJORITY VOTE OF THE MEMBERS.

(B) ANY OR ALL MANAGERS MAY BE REMOVED, WITH OR WITHOUT CAUSE, AT A MEETING CALLED EXPRESSLY FOR THAT PURPOSE BY A MAJORITY OF THE MEMBERS.

COMMENTARY

This section is intended to be a simple default provision for companies that do not have detailed operating agreements. It is expected that larger, more sophisticated, companies will provide for more detailed rules in their operating agreements.

Annual meetings for election of managers are unnecessary. Regular meetings make sense in corporations where wide dispersal of owners may prevent them from coordinating sufficiently to initiate a meeting. Because limited liability companies probably will not have free transferability of interests, they almost certainly will be closely held. Companies that want annual meetings can provide for them in operating agreements.

Sources and comparisons:

Va. 13.1-1024(D)-(F) is the primary source.

Colo. 7-80-402-405 provide for detailed rules regarding annual election, removal and classification of managers.

Fla. 608.422, KAN. 12 and Wyo. 17-15-116 provide for annual election of managers.
§ 303. MANAGEMENT BY MEMBERS.

THE ARTICLES OF ORGANIZATION MAY PROVIDE THAT THE BUSINESS OF THE LIMITED LIABILITY COMPANY SHALL BE MANAGED WITHOUT DESIGNATED MANAGERS. SO LONG AS SUCH PROVISION CONTINUES IN EFFECT:

(A) UNLESS THE CONTEXT CLEARLY REQUIRES OTHERWISE THE MEMBERS SHALL BE DEEMED TO BE MANAGERS FOR PURPOSES OF APPLYING PROVISIONS OF THIS [ACT]; AND

(B) THE MEMBERS SHALL HAVE AND BE SUBJECT TO ALL DUTIES AND LIABILITIES OF MANAGERS.

COMMENTARY

This provision in effect subjects managing members to liabilities of managers under § 304, and makes acts of managing members binding under § 307.

Requiring the firm to disclose its election for direct management by members in the articles of organization in order makes it easy for third parties to determine whether members' or managers' acts bind the firm. A potential argument against such a requirement is that it can be a trap for the unwary. See, e.g., Zion v. Kurtz, 50 N.Y.2d 92, 405 N.E. 2d 681 (1980). But because § 301 lets the parties provide for representational government in the operating agreement, the parties' management provisions are not subject to nonenforcement merely because of technical noncompliance with disclosure provisions. Only the parties' fiduciary and agency liabilities, and not enforcement of their agreement, turn on disclosure the articles under this section.

Sources and comparisons:

Delaware § 351 is the primary source. For comparisons as to disclosure in the operating agreement see the comment to § 301.
§ 304. DUTIES OF MANAGERS.

SUBJECT TO § 305 OF THIS ACT:

(A) A MANAGER SHALL DISCHARGE HIS DUTIES AS A MANAGER IN GOOD FAITH, WITH THE CARE AN ORDINARY PRUDENT PERSON IN A LIKE POSITION WOULD EXERCISE UNDER SIMILAR CIRCUMSTANCES, AND IN THE MANNER HE REASONABLY BELIEVES TO BE IN THE BEST INTERESTS OF THE LIMITED LIABILITY COMPANY.

(B) IN DISCHARGING HIS DUTIES, A MANAGER IS ENTITLED TO RELY ON INFORMATION, OPINIONS, REPORTS OR STATEMENTS,INCLUDING FINANCIAL STATEMENTS AND OTHER FINANCIAL DATA, IF PREPARED OR PRESENTED BY:

(1) ONE OR MORE EMPLOYEES OF THE LIMITED LIABILITY COMPANY WHOM THE MANAGER REASONABLY BELIEVES TO BE RELIABLE AND COMPETENT IN THE MATTERS PRESENTED;

(2) LEGAL COUNSEL, PUBLIC ACCOUNTANTS, OR OTHER PERSONS AS TO MATTERS THE MANAGER REASONABLY BELIEVES ARE WITHIN THE PERSON'S PROFESSIONAL OR EXPERT COMPETENCE; OR

(3) A COMMITTEE OF MANAGERS OF WHICH HE IS NOT A MEMBER IF THE MANAGER REASONABLY BELIEVES THE COMMITTEE MERITS CONFIDENCE.

(C) A MANAGER IS NOT ACTING IN GOOD FAITH IF HE HAS KNOWLEDGE CONCERNING THE MATTER IN QUESTION THAT MAKES RELIANCE OTHERWISE PERMITTED BY SUBSECTION (B) OF THIS SECTION UNWARRANTED.
(D) A MANAGER IS NOT LIABLE FOR ANY ACTION TAKEN AS A MANAGER, OR ANY FAILURE TO TAKE ANY ACTION, IF HE PERFORMED THE DUTIES OF HIS OFFICE IN COMPLIANCE WITH THIS SECTION.

(E) EXCEPT AS OTHERWISE PROVIDED IN THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT, EVERY MANAGER MUST ACCOUNT TO THE LIMITED LIABILITY COMPANY AND HOLD AS TRUSTEE FOR IT ANY PROFIT OR BENEFIT DERIVED BY THE MANAGER WITHOUT THE INFORMED CONSENT OF THE MEMBERS FROM ANY TRANSACTION CONNECTED WITH THE CONDUCT OR WINDING UP OF THE LIMITED LIABILITY COMPANY OR FROM ANY PERSONAL USE BY HIM OF ITS PROPERTY.

COMMENTARY

Managers of limited liability companies are comparable to corporate directors, and therefore should have comparable default duties. Unlike partners, they do not necessarily have any personal interest in the company or liability for its debts that might temper the need for a duty of care.

Note that the duty of care specified in this section is an objective duty. Compare the subjective "good faith" gauge in the Virginia statute. This section also differs from the Virginia statute in not including a burden-of-proof provision. Obviously the plaintiff member has the burden of establishing breach of the duty provided for in this section.

Subsection (E) applies the partnership rule to what is commonly characterized as the duty of "loyalty." These rules work for non-partner managers. Further elaboration for such matters as conflict of interest and self-dealing transactions is unnecessary in light of the substantial judicial gloss on UPA Section 21 encompassing these situations. The more extensive corporate rules on conflict of interest transactions are unwieldy in the less formal context of closely held limited liability companies.

It is no more necessary to apply these rules to non-managing members than it is to have statutory rules regarding the duties of non-managing corporate shareholders. Duties of loyalty and care are needed to protect owners from self-interested acts of non-owner agents.
Colo. 7-80-409, Md. 4A-404 and Va. 13.1-1026 authorize members to engage in business transactions with the company. It is not clear why such a rule regarding managers or members is necessary. The rule muddies the prohibition on self-interested transactions and creates the risk of "negative pregnant" construction that could limit members' and managers' freedom to engage in non-self-dealing transactions.

Sources and comparisons:

MBCA 8.30 is the source for subsections (A)–(D). Va. 13.1-1024(G) and Colo. 7-80-406 are consistent, except that the Virginia provision does not include subsection (D).

UPA 21 (with some modifications proposed by the ABA revised UPA Subcommittee) is the source of subsection (E).

Md. 4A-401(f) is consistent, except that it applies to members.
§ 305. LIMITATION OF LIABILITY AND INDEMNIFICATION OF MANAGERS.

(A) SUBJECT TO SUBSECTION (B) OF THIS SECTION, THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT MAY:

(1) ELIMINATE OR LIMIT THE PERSONAL LIABILITY OF A MANAGER FOR MONETARY DAMAGES FOR BREACH OF ANY DUTY PROVIDED FOR IN § 304 OF THIS ACT; AND

(2) PROVIDE FOR INDEMNIFICATION OF THE MANAGER FOR JUDGMENTS, SETTLEMENTS, PENALTIES, FINES, OR EXPENSES INCURRED IN A PROCEEDING TO WHICH AN INDIVIDUAL IS A PARTY BECAUSE HE IS OR WAS A MANAGER.

(B) NO PROVISION PERMITTED UNDER SUBSECTION (A) OR (B) SHALL LIMIT OR ELIMINATE THE LIABILITY OF A MANAGER FOR THE AMOUNT OF A FINANCIAL BENEFIT RECEIVED BY A MANAGER TO WHICH HE IS NOT ENTITLED, OR FOR AN INTENTIONAL VIOLATION OF CRIMINAL LAW.

COMMENTARY

Just as a manager's default liability should be comparable to that of a corporate director, so the liability should be comparably subject to variation by agreement. The statute should, however, provide for more flexibility and less formality than the corporate statute, which is designed for firms with very dispersed holders.

Sources and comparisons:

MBCA 202(b)(4) is the primary source for (A), except that it also limits exculpations for unlawful dividends and intentional infliction of harm on the corporation.
Va. 13.1-1025 provides for mandatory limitation of liability to the greater of $100,000 or preceding year's cash compensation.

Colo. 7-80-410 includes an extensive corporate-type indemnification provision.
§ 306. VOTING BY MANAGERS.

EXCEPT AS OTHERWISE PROVIDED IN THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT, IF THE LIMITED LIABILITY COMPANY HAS MORE THAN ONE MANAGER, ALL DECISIONS OF THE MANAGERS SHALL BE MADE BY MAJORITY VOTE OF THE MANAGERS.

COMMENTARY

None of the statutes provide voting rules for managers. By comparison, corporate statutes commonly provide extensive voting, quorum and meeting rules for directors. Some default rule is necessary for the informally run business, although it is expected that the parties will provide for more detailed rules in operating agreements. The rule in UPA § 18(h) for unanimity in extraordinary transactions should not be applied to limited liability company managers whose major decisions are approved by the members.
§ 307. AGENCY POWER OF MANAGERS.

(A) EVERY MANAGER IS AN AGENT OF THE LIMITED LIABILITY COMPANY FOR THE PURPOSE OF ITS BUSINESS, AND THE ACT OF EVERY MANAGER, INCLUDING THE EXECUTION IN THE LIMITED LIABILITY COMPANY NAME OF ANY INSTRUMENT FOR APPARENTLY CARRYING ON IN THE USUAL WAY THE BUSINESS OF THE LIMITED LIABILITY COMPANY OF WHICH HE IS A MANAGER, BINDS THE LIMITED LIABILITY COMPANY, UNLESS SUCH ACT IS IN CONTRAVENTION OF THE ARTICLES OF ORGANIZATION, THE OPERATING AGREEMENT, OR THIS ACT, OR UNLESS THE MANAGER SO ACTING OTHERWISE LACKS THE AUTHORITY TO ACT FOR THE LIMITED LIABILITY COMPANY AND THE PERSON WITH WHOM HE IS DEALING HAS KNOWLEDGE OF THE FACT THAT HE HAS NO AUTHORITY.

(B) PERSONS DEALING WITH MANAGERS OF THE LIMITED LIABILITY COMPANY SHALL BE DEEMED TO HAVE KNOWLEDGE OF RESTRICTIONS ON THE AUTHORITY OF MANAGERS CONTAINED IN A WRITTEN OPERATING AGREEMENT IF THE ARTICLES OF ORGANIZATION OF THE LIMITED LIABILITY COMPANY CONTAIN A STATEMENT THAT SUCH RESTRICTIONS EXIST.

COMMENTARY

Note that, as provided in § 303, the limited liability company may be managed by its members. If so, by § 303, this section would cause the act of any member to bind the company, just as does the act of a general partner in a partnership. If, on the other hand, the members are not managers, their acts should not be binding, any more than corporate shareholders' acts bind corporations (assuming the shareholders are not acting in some other capacity).
Query whether we need additional UPA-type rules concerning notice, admissions and wrongful acts?

Sources and comparisons:

UPA § 9 is the source of subsection (A). Colo. 7-80-406 and Md. 4A-401 are consistent, except that the Maryland provision applies to members.

Md. 4A-401(E) is the source of subsection (B).
§ 308. VOTING RIGHTS OF MEMBERS.

(A) UNLESS OTHERWISE PROVIDED IN THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT, THE MEMBERS OF A LIMITED LIABILITY COMPANY SHALL VOTE IN PROPORTION TO THEIR CONTRIBUTIONS TO THE CAPITAL OF THE LIMITED LIABILITY COMPANY, AS ADJUSTED FOR ANY ADDITIONAL CONTRIBUTIONS OR WITHDRAWALS;

(B) UNLESS OTHERWISE PROVIDED IN THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT, A MAJORITY VOTE SHALL BE REQUIRED TO APPROVE THE FOLLOWING MATTERS:

(1) THE DISSOLUTION AND WINDING UP OF THE LIMITED LIABILITY COMPANY;

(2) THE SALE, EXCHANGE, LEASE, MORTGAGE, PLEDGE, OR OTHER TRANSFER OF ALL OR SUBSTANTIALLY ALL OF THE ASSETS OF THE LIMITED LIABILITY COMPANY;

(3) MERGER OF THE LIMITED LIABILITY COMPANY WITH ANOTHER PERSON OTHER THAN A NATURAL PERSON;

(4) THE INCURRENCE OF INDEBTEDNESS BY THE LIMITED LIABILITY COMPANY OTHER THAN IN THE ORDINARY COURSE OF ITS BUSINESS;

(5) A TRANSACTION INVOLVING AN ACTUAL OR POTENTIAL CONFLICT OF INTEREST BETWEEN A MANAGER AND THE LIMITED LIABILITY COMPANY; AND

(6) AN AMENDMENT TO THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT.
(C) THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT MAY PROVIDE FOR ANY OTHER VOTING RIGHTS OF MEMBERS.

COMMENTARY

Although excessive formality should be avoided, the act should at least specify voting rights on certain matters. Because managers of limited liability companies do not have personal liability, they are not entitled to the relative autonomy accorded general partners in the limited partnership statutes. See Ribstein, Applied Theory, 37 Emory L.J. at 848-51.

Sources and comparisons:

Subsection (A) is consistent with Va. 13.1-1022(B), Fla. 608.422, Kan. 12, and Md. 4A-403. Colo. 7-80-706 and RULPA § 302 simply leave the manner of voting to the parties' agreement.

The voting rights in subsection (B) are based on the rights authorized as part of the safe harbor from control liability specified in RULPA § 303. RULPA § 302 provides that the limited partners have only those voting rights specified in their agreement.

Md. 4A-405 requires consent of members in writing, Md. 4A-703 and 901 require unanimity for merger and dissolution, respectively, but does not specify voting rights on other matters.

Colo. 7-80-707-711 and Kan. § 14 provide detailed rules concerning voting, meetings, and quorum.
§ 309. RECORDS AND INFORMATION.

(A) EACH LIMITED LIABILITY COMPANY SHALL KEEP AT THE OFFICE REFERRED TO IN SECTION 209(A)(1), THE FOLLOWING:

(1) A CURRENT LIST OF THE FULL NAME AND LAST KNOWN BUSINESS ADDRESS OF EACH MEMBER AND MANAGER;

(2) COPIES OF RECORDS THAT WOULD ENABLE A MEMBER TO DETERMINE THE RELATIVE VOTING RIGHTS OF THE MEMBERS;

(3) A COPY OF THE ARTICLES OF ORGANIZATION, TOGETHER WITH ANY AMENDMENTS THERETO;

(4) COPIES OF THE LIMITED LIABILITY COMPANY'S FEDERAL, STATE, AND LOCAL INCOME TAX RETURNS AND REPORTS, IF ANY, FOR THE THREE MOST RECENT YEARS;

(5) A COPY OF ANY OPERATING AGREEMENT THAT IS IN WRITING;

(6) COPIES OF ANY FINANCIAL STATEMENTS OF THE LIMITED LIABILITY COMPANY FOR THE THREE MOST RECENT YEARS.

(B) A MEMBER MAY:

(1) AT THE MEMBER'S OWN EXPENSE, INSPECT AND COPY ANY LIMITED LIABILITY COMPANY RECORD UPON REASONABLE REQUEST DURING ORDINARY BUSINESS HOURS;

(2) OBTAIN FROM TIME TO TIME UPON REASONABLE DEMAND TRUE AND COMPLETE INFORMATION REGARDING THE STATE OF THE BUSINESS AND FINANCIAL CONDITION OF THE LIMITED LIABILITY COMPANY;
(II) PROMPTLY AFTER BECOMING AVAILABLE, A COPY OF THE LIMITED LIABILITY COMPANY'S, STATE, AND LOCAL INCOME TAX RETURNS FOR EACH YEAR; AND

(III) OTHER INFORMATION REGARDING THE AFFAIRS OF THE LIMITED LIABILITY COMPANY AS IS JUST AND REASONABLE; AND

(3) HAVE A FORMAL ACCOUNTING OF LIMITED LIABILITY COMPANY'S AFFAIRS WHENEVER CIRCUMSTANCES RENDER IT JUST AND REASONABLE.

COMMENTARY

The statutes noted above provide for records concerning partner contributions. These should not be required for limited liability company members any more than they are required for corporate shareholders, except to the extent necessary to inform members of their relative voting rights.

Sources and comparisons:

RULPA §§ 105 and 305 are the sources. Colo. 7-80-411 and 712 and Va. 13.1-1028 are generally consistent.
§ 310. LIABILITY TO THIRD PARTIES OF MEMBERS AND MANAGERS.

A PERSON WHO IS A MEMBER OR MANAGER, OR BOTH, OF A LIMITED LIABILITY COMPANY IS NOT LIABLE FOR THE OBLIGATIONS OF A LIMITED LIABILITY COMPANY SOLELY BY REASON OF BEING SUCH MEMBER OR MANAGER OR BOTH.

COMMENTARY

Sources and comparisons:

Va. 13.1-1019 is consistent. Wyo. 17-15-113, Fla. 608.436 and Kan. 20 are similar but do not specify non-liability "solely by reasons" of member status. That point is clarified in the comment to Md. 4A-301, which provides that the section is not intended to relieve members of liabilities they incur in their individual capacity.
ARTICLE 4
DISTRIBUTIONS

§ 401. SHARING OF DISTRIBUTIONS.

EXCEPT AS OTHERWISE PROVIDED IN THE OPERATING AGREEMENT, MEMBERS SHALL BE ENTITLED TO DISTRIBUTIONS FROM THE LIMITED LIABILITY COMPANY IN PROPORTION TO THEIR RESPECTIVE RIGHTS TO SHARE IN THE PROFITS OF THE LIMITED LIABILITY COMPANY.

COMMENTARY

This section is intended to prescribe the basis upon which distributions will be made in the absence of an agreement to the contrary.

It is intended to provide, in conjunction with the sections of the Act setting forth the basis upon which profit and loss will be allocated and a member's interest will be calculated, a format that minimizes the risk that the members will make a special allocation that lacks economic substance.

Thus, in the absence of an agreement to the contrary, distributions will be made in proportion to the members' respective shares of profits. Profits will be allocated among the members in proportion to their interests in capital and interests in capital will be calculated in a manner consistent with Internal Revenue Service regulations dealing with the maintenance of capital accounts.

Colorado provides that, in the absence of an agreement to the contrary, distributions are to be made on the basis of the value of contributions. See § 7-80-504 of the Colorado Act.

Florida does not address the issue of how distributions are to be made in the absence of an agreement. See § 608.426 of the Florida Act.

Kansas does not address distributions at all.

Maryland provides that, in the absence of an agreement to the contrary, distributions will be in proportion to the members' respective rights to share in profits. See § 505 of the Maryland Act.
Michigan's distributions provision follows Florida's. See § 16 of the Michigan Act.

Utah provides that, in the absence of an agreement to the contrary, distributions will be made on the basis of the value of the contributions of the members that have not been returned. See § 48-26-129 of the Utah Act.

Virginia provides that, in the absence of an agreement to the contrary, distributions will be made on the basis of the value of the members' contributions. See § 13.1-1030 of the Virginia Act.

Wyoming does not address the manner in which distributions are to be made in the absence of an agreement. See § 17-15-119 of the Wyoming Act.
§ 402. INTERIM DISTRIBUTIONS.

EXCEPT AS PROVIDED IN THIS ACT, A MEMBER IS ENTITLED TO RECEIVE DISTRIBUTIONS FROM A LIMITED LIABILITY COMPANY BEFORE THE WITHDRAWAL OF THE MEMBER FROM THE LIMITED LIABILITY COMPANY AND BEFORE THE DISSOLUTION AND WINDING UP OF THE LIMITED LIABILITY COMPANY TO THE EXTENT AND AT THE TIMES UPON WHICH THE MEMBERS UNANIMOUSLY AGREE OR AS PROVIDED IN THE OPERATING AGREEMENT.

COMMENTARY

This provision is similar to § 601 of RULPA. Hence, practitioners should be familiar with it.


The Florida, Kansas, Michigan and Wyoming acts each provide that the limited liability company may distribute its property "from time to time." This may, in effect, accomplish the same thing that this section is intended to accomplish, but it is much less precise. See § 608.426 of the Florida Act, § 15 of the Kansas Act, § 16 of the Michigan Act, and § 17-15-119 of the Wyoming Act.

Maryland has no specific provision concerning interim distributions.
§ 403. DISTRIBUTIONS UPON WITHDRAWAL.


COMMENTARY

This provision is based upon § 604 of RULPA.

Because the Act generally follows RULPA, it was felt that the provision for distributions upon withdrawal should generally follow RULPA as well, especially in view of the fact that this section gives the parties the right to provide in the operating agreement a limitation on the right to receive distributions upon withdrawal.

Colorado and Virginia each has an analogous provision in its limited liability company statute. See § 7-80-603 of the Colorado Act and § 13.1-1033 of the Virginia Act. However, both of these provisions apply only to resignations and not to withdrawals in general.

The Florida, Kansas, Maryland, Utah and Wyoming Acts do not have corresponding provisions.
§ 404. DISTRIBUTION IN KIND.

EXCEPT AS PROVIDED IN THE OPERATING AGREEMENT:

(A) A MEMBER, REGARDLESS OF THE NATURE OF THE MEMBER'S CONTRIBUITION, HAS NO RIGHT TO DEMAND AND RECEIVE ANY DISTRIBUTION FROM A LIMITED LIABILITY COMPANY IN ANY FORM OTHER THAN CASH; AND

(B) NO MEMBER MAY BE COMPELLED TO ACCEPT FROM A LIMITED LIABILITY COMPANY A DISTRIBUTION OF ANY ASSET IN KIND TO THE EXTENT THAT THE PERCENTAGE OF THE ASSET DISTRIBUTED TO THE MEMBER EXCEEDS THE PERCENTAGE WHICH THE MEMBER'S INTEREST IN THE LIMITED LIABILITY COMPANY IS OF ALL OF THE INTERESTS IN THE LIMITED LIABILITY COMPANY.

COMMENTARY

This provision is derived from § 605 of RULPA and is similar to § 13.1-1034 of the Virginia Act and § 7-80-604 of the Colorado Act.

The proposed Maryland Act contains a provision which corresponds to subsection (1) of this section. See § 506 of the proposed Maryland Act.

The Florida, Kansas, Michigan, Utah and Wyoming Acts do not have corresponding provisions.
§ 405. RESTRICTIONS ON MAKING DISTRIBUTIONS.

(A) IN GENERAL. NO DISTRIBUTION MAY BE MADE IF, AFTER GIVING EFFECT TO THE DISTRIBUTION:

(1) THE LIMITED LIABILITY COMPANY WOULD NOT BE ABLE TO PAY ITS DEBTS AS THEY BECOME DUE IN THE USUAL COURSE OF BUSINESS; OR

(2) THE LIMITED LIABILITY COMPANY'S TOTAL ASSETS WOULD BE LESS THAN THE SUM OF ITS TOTAL LIABILITIES PLUS, UNLESS THE OPERATING AGREEMENT PROVIDES OTHERWISE, THE AMOUNT THAT WOULD BE NEEDED, IF THE LIMITED LIABILITY COMPANY WERE TO BE DISSOLVED AT THE TIME OF THE DISTRIBUTION, TO SATISFY THE PREFERENTIAL RIGHTS OF OTHER MEMBERS UPON DISSOLUTION WHICH ARE SUPERIOR TO THE RIGHTS OF THE MEMBER RECEIVING THE DISTRIBUTION.

(B) DETERMINATION OF WHETHER DISTRIBUTION PERMITTED. THE LIMITED LIABILITY COMPANY MAY BASE A DETERMINATION THAT A DISTRIBUTION IS NOT PROHIBITED UNDER SUBSECTION (A) OF THIS SECTION EITHER ON:

(1) FINANCIAL STATEMENTS PREPARED ON THE BASIS OF ACCOUNTING PRACTICES AND PRINCIPLES THAT ARE REASONABLE UNDER THE CIRCUMSTANCES; OR

(2) A FAIR VALUATION OR OTHER METHOD THAT IS REASONABLE UNDER THE CIRCUMSTANCES.

(C) MEASURING EFFECT OF A DISTRIBUTION. EXCEPT AS PROVIDED IN SUBSECTION (E) OF THIS SECTION, THE EFFECT OF A DISTRIBUTION UNDER SUBSECTION (A) OF THIS SECTION IS MEASURED
AS OF (I) THE DATE THE DISTRIBUTION IS AUTHORIZED IF THE PAYMENT OCCURS WITHIN 120 DAYS AFTER THE DATE OF AUTHORIZATION; OR (II) THE DATE PAYMENT IS MADE IF IT OCCURS MORE THAN 120 DAYS AFTER THE DATE OF AUTHORIZATION.

(D) STATUS OF INDEBTEDNESS TO MEMBER. A LIMITED LIABILITY COMPANY'S INDEBTEDNESS TO A MEMBER INCURRED BY REASON OF A DISTRIBUTION MADE IN ACCORDANCE WITH THIS SECTION IS AT PARITY WITH THE LIMITED LIABILITY COMPANY'S INDEBTEDNESS TO ITS GENERAL UNSECURED CREDITORS, EXCEPT TO THE EXTENT SUBORDINATED BY AGREEMENT.

(E) STATUS OF INDEBTEDNESS.

(1) IF TERMS OF THE INDEBTEDNESS PROVIDE THAT PAYMENT OF PRINCIPAL AND INTEREST IS TO BE MADE ONLY IF, AND TO THE EXTENT THAT, PAYMENT OF A DISTRIBUTION TO MEMBERS COULD THEN BE MADE UNDER THIS SECTION, INDEBTEDNESS OF A LIMITED LIABILITY COMPANY, INCLUDING INDEBTEDNESS ISSUED AS A DISTRIBUTION, IS NOT A LIABILITY FOR PURPOSES OF DETERMINATIONS MADE UNDER SUBSECTION (B) OF THIS SECTION.

(2) IF THE INDEBTEDNESS IS ISSUED AS A DISTRIBUTION, EACH PAYMENT OF PRINCIPAL OR INTEREST ON THE INDEBTEDNESS IS TREATED AS A DISTRIBUTION, THE EFFECT OF WHICH IS MEASURED ON THE DATE THE PAYMENT IS ACTUALLY MADE.

COMMENTARY

This section is analogous to § 503 of the proposed Maryland Act and § 13.1-1305 of the Virginia Act. Both of these
provisions draw heavily from the corresponding provision concerning restrictions on distributions which is contained in the Model Business Corporation Act.

The Model Business Corporation Act does not distinguish between distributions which represent a return of capital and other distributions. No such distinction is drawn in this Act either because the articles of organization, like articles of incorporation, are not intended to give notice to creditors of the capitalization of the entity.

The Colorado, Florida, Kansas, Michigan and Wyoming Acts have corresponding sections, but they treat the restrictions on making distributions in a more abbreviated manner.
§ 406. LIABILITY UPON WRONGFUL DISTRIBUTION.

IF A MEMBER HAS RECEIVED A DISTRIBUTION IN VIOLATION OF THE OPERATING AGREEMENT OR SECTION 405 OF THIS ACT, THE MEMBER WHO HAS RECEIVED THE DISTRIBUTION AND ANY OTHER MEMBER OR AUTHORIZED PERSON WHO APPROVES OR AUTHORIZES THE DISTRIBUTION IS LIABLE TO THE LIMITED LIABILITY COMPANY FOR A PERIOD OF SIX YEARS AFTER THE DATE OF RECEIPT OF THE DISTRIBUTION FOR THE AMOUNT OF THE DISTRIBUTION WRONGFULLY MADE.

COMMENTARY

This section, as do the corresponding sections of the Colorado and Virginia laws and the proposed Maryland Act, establishes a six year period of limitations for the recovery of a wrongful distribution. See § 7-80-607 of the Colorado Act, § 405 of the Maryland Act, and § 13.1-1036 of the Virginia Act. This is analogous to the RULPA period of limitations for the recovery of contributions which were wrongfully returned.

In addition, Utah and Colorado provide for the recovery of contributions even when the funds were not returned improperly. See § 48-26-133 (3) of the Utah Act and § 7-80-607 of the Colorado Act. However, it was felt that this treatment blurred the distinction that should exist between the limited partnership and the limited liability company. No such provision should be included in this Act because the members of the limited liability company, in this respect, should be treated like stockholders of a corporation.

Neither Florida, Michigan, or Kansas establishes a period of limitations for the recovery of returned contributions, whether those contributions were returned properly or improperly.
§ 407. RIGHT TO DISTRIBUTION.

AT THE TIME A MEMBER BECOMES ENTITLED TO RECEIVE A DISTRIBUTION, THE MEMBER HAS THE STATUS OF, AND IS ENTITLED TO ALL REMEDIES AVAILABLE TO, A CREDITOR OF THE LIMITED LIABILITY COMPANY WITH RESPECT TO THE DISTRIBUTION.

COMMENTARY

This section is derived from § 507 of the Maryland Act and § 13.1-1037 of the Virginia Act, which, in turn, are derived from § 606 of RULPA.

No other limited liability company statute has a corresponding provision.
§ 501. CONTRIBUTIONS TO CAPITAL.

THE CONTRIBUTION OF A MEMBER TO A LIMITED LIABILITY COMPANY MAY BE IN CASH, PROPERTY, SERVICES RENDERED, OR A PROMISSORY NOTE OR OTHER BINDING OBLIGATION TO CONTRIBUTE CASH OR PROPERTY OR TO PERFORM SERVICES.

COMMENTARY

Colorado's provision dealing with contributions to capital is exactly the same as this provision. Maryland's and Virginia's proposed provisions are also identical to this provision. In contrast, neither Wyoming nor Florida permits contributions of services or obligations to perform services. Kansas has no provision dealing with this subject.
§ 502. LIABILITY FOR CONTRIBUTION.

(A) REQUIRED CONTRIBUTION.

(1) EXCEPT AS PROVIDED IN THE OPERATING AGREEMENT, A MEMBER IS OBLIGATED TO THE LIMITED LIABILITY COMPANY TO PERFORM ANY PROMISES SET FORTH IN THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT TO CONTRIBUTE CASH OR PROPERTY OR TO PERFORM SERVICES, EVEN IF HE IS UNABLE TO PERFORM BECAUSE OF DEATH, DISABILITY OR OTHER REASON.

(2) IF A MEMBER DOES NOT MAKE THE REQUIRED CONTRIBUTION OF PROPERTY OR SERVICES, HE IS OBLIGATED, AT THE OPTION OF THE LIMITED LIABILITY COMPANY, TO CONTRIBUTE CASH EQUAL TO THAT PORTION OF VALUE (AS STATED IN THE OPERATING AGREEMENT) OF THE STATED CONTRIBUTION THAT HAS NOT BEEN MADE.

(B) COMPROMISE OF OBLIGATION.

(1) THE OBLIGATION OF A MEMBER TO MAKE A CONTRIBUTION OR RETURN MONEY OR OTHER PROPERTY PAID OR DISTRIBUTED IN VIOLATION OF THIS TITLE MAY BE COMPROMISED ONLY UPON COMPLIANCE WITH THE OPERATING AGREEMENT, OR, IF THE OPERATING AGREEMENT DOES NOT SO PROVIDE, WITH THE UNANIMOUS CONSENT OF THE MEMBERS.

(2) A COMPROMISE DOES NOT AFFECT THE RIGHTS, IF ANY, OF ANY CREDITOR OF A LIMITED LIABILITY COMPANY TO ENFORCE THE OBLIGATION OR TO REQUIRE THE OBLIGATION TO BE ENFORCED.

(C) REMEDIES. -- AN OPERATING AGREEMENT MAY PROVIDE THAT THE INTEREST OF A MEMBER WHO FAILS TO MAKE ANY CONTRIBUTION OR OTHER PAYMENT THAT THE MEMBER IS REQUIRED TO MAKE SHALL BE

COMMENTARY

Subsection B(2) takes into account the fact that the articles of organization are not likely to contain a statement of the amounts contributed or obligated to be contributed to the limited liability company, as was formerly required in the case of a certificate of limited partnership. Therefore, creditors are not likely to be relying on statements in any statutory filings when extending credit to the limited liability company. Hence, they are to have the same rights and remedies, if any, as creditors of a corporation in the case of the compromise of a member's obligation to make a contribution to the limited liability company. Colorado, Florida, Kansas, Maryland, Virginia and Wyoming extend rights to creditors which are similar to those set forth in this Section.
§ 503. RESTRICTIONS ON MAKING DISTRIBUTIONS.

(A) IN GENERAL. -- A DISTRIBUTION MAY NOT BE MADE IF, AFTER GIVING EFFECT TO THE DISTRIBUTION:

(1) THE LIMITED LIABILITY COMPANY WOULD NOT BE ABLE TO PAY ITS DEBTS AS THEY BECOME DUE IN THE USUAL COURSE OF BUSINESS; OR

(2) THE LIMITED LIABILITY COMPANY'S TOTAL ASSETS WOULD BE LESS THAN THE SUM OF ITS TOTAL LIABILITIES PLUS, UNLESS THE OPERATING AGREEMENT PERMITS OTHERWISE, THE AMOUNT THAT WOULD BE NEEDED, IF THE LIMITED LIABILITY COMPANY WERE TO BE DISSOLVED AT THE TIME OF THE DISTRIBUTION, TO SATISFY THE PREFERENTIAL RIGHTS UPON DISSOLUTION OF MEMBERS Whose PREFERENTIAL RIGHTS ARE SUPERIOR TO THE RIGHTS OF MEMBERS RECEIVING THE DISTRIBUTION.

(B) DETERMINATION OF WHETHER DISTRIBUTION PERMITTED. -- THE LIMITED LIABILITY COMPANY MAY BASE A DETERMINATION THAT A DISTRIBUTION IS NOT PROHIBITED UNDER SUBSECTION (A) OF THIS SECTION ON:

(1) FINANCIAL STATEMENTS PREPARED ON THE BASIS OF ACCOUNTING PRACTICES AND PRINCIPLES THAT ARE REASONABLE IN THE CIRCUMSTANCES; OR

(2) A FAIR VALUATION OR OTHER METHOD THAT IS REASONABLE IN THE CIRCUMSTANCES.

(C) MEASURING EFFECT OF DISTRIBUTION. -- EXCEPT AS PROVIDED IN SUBSECTION (E) OF THIS SECTION, THE EFFECT OF A DISTRIBUTION UNDER SUBSECTION (A) OF THIS SECTION IS MEASURED
AS OF (I) THE DATE THE DISTRIBUTION IS AUTHORIZED, IF THE PAYMENT OCCURS WITHIN 120 DAYS AFTER THE DATE OF AUTHORIZATION; OR (II) THE DATE THE PAYMENT IS MADE IF IT OCCURS MORE THAN 120 DAYS AFTER THE DATE OF AUTHORIZATION.

(D) STATUS OF INDEBTEDNESS TO MEMBER. -- A LIMITED LIABILITY COMPANY'S INDEBTEDNESS TO A MEMBER, INCURRED BY REASON OF A DISTRIBUTION MADE IN ACCORDANCE WITH THIS SECTION, IS AT PARITY WITH THE LIMITED LIABILITY COMPANY'S INDEBTEDNESS TO ITS GENERAL, UNSECURED CREDITORS, EXCEPT TO THE EXTENT SUBORDINATED BY AGREEMENT.

(E) STATUS OF INDEBTEDNESS.

(1) IF THE TERMS OF THE INDEBTEDNESS PROVIDE THAT PAYMENT OF PRINCIPAL AND INTEREST IS TO BE MADE ONLY IF, AND TO THE EXTENT THAT, PAYMENT OF A DISTRIBUTION TO MEMBERS COULD THEN BE MADE UNDER THIS SECTION, INDEBTEDNESS OF A LIMITED LIABILITY COMPANY, INCLUDING INDEBTEDNESS ISSUED AS A DISTRIBUTION, IS NOT A LIABILITY FOR PURPOSES OF DETERMINATIONS MADE UNDER SUBSECTION (B) OF THIS SECTION.

(2) IF THE INDEBTEDNESS IS ISSUED AS A DISTRIBUTION, EACH PAYMENT OF PRINCIPAL OR INTEREST ON THE INDEBTEDNESS IS TREATED AS A DISTRIBUTION, THE EFFECT OF WHICH IS MEASURED ON THE DATE THE PAYMENT IS ACTUALLY MADE.

COMMENTARY

This provision is based upon the Maryland and Virginia proposed statutes, which are designed to assure that a distribution will not render a corporation insolvent under
either of two tests. The Maryland proposed statute does not distinguish between distributions which represent a return of capital and other distributions. This is consistent with the Maryland proposed statute's de-emphasis of the articles of organization as a document which provides notice to creditors of the capital structure of the company.

Colorado, Florida, Kansas and Wyoming all limit distributions only if the distributions render the limited liability company insolvent based upon a "fair value" test. These states and Virginia also distinguish between distributions of contributed capital and other distributions.
§ 504. LIABILITY UPON WRONGFUL DISTRIBUTION.

IF A MEMBER HAS RECEIVED A DISTRIBUTION IN VIOLATION OF THE OPERATING AGREEMENT OR SECTION 503 OF THIS TITLE, THEN HE IS LIABLE TO THE LIMITED LIABILITY COMPANY FOR A PERIOD OF 3 YEARS FROM THE DATE OF THE DISTRIBUTION FOR THE AMOUNT OF THE DISTRIBUTION WRONGFULLY MADE.

COMMENTARY

This section is identical to § 504 of the proposed Maryland statute and is intended to establish the period of limitations for the recovery of wrongful distributions to a member. Neither Wyoming, Florida nor Kansas establishes a period of limitations. Colorado limits the period of recovery to one (1) year, while Virginia provides for a six (6) year recovery period.
§ 505. SHARING OF PROFITS AND LOSSES, DISTRIBUTIONS.

EXCEPT AS OTHERWISE PROVIDED IN THE OPERATING AGREEMENT:

(A) THE PROFITS AND LOSSES OF A LIMITED LIABILITY COMPANY SHALL BE ALLOCATED AMONG THE MEMBERS IN PROPORTION TO THEIR RESPECTIVE CAPITAL INTERESTS; AND

(B) DISTRIBUTIONS OF THE LIMITED LIABILITY COMPANY SHALL BE MADE TO THE MEMBERS IN PROPORTION TO THEIR RIGHT TO SHARE IN THE PROFITS OF THE LIMITED LIABILITY COMPANY.

COMMENTARY

This section is identical to § 505 of the proposed Maryland statute and is intended to establish the basis upon which profits and losses will be allocated among the members and distributions made to them in the absence of a specific agreement. Colorado has a similar method of allocating profits and losses. The proposed Virginia statute is similar to the proposed Maryland statute but provides that allocations of profits and losses and distributions may be set forth in the Articles of Organization.

Wyoming does not address the manner in which these items are to be dealt with if they are not mentioned in an operating agreement. Florida, although it addresses distributions, does not address the sharing of profits or losses. Kansas does not address allocations or distributions at all.
§ 506. DISTRIBUTION UPON WITHDRAWAL.

EXCEPT AS OTHERWISE PROVIDED IN THIS TITLE, ON WITHDRAWAL A
WITHDRAWING MEMBER IS ENTITLED TO RECEIVE ANY DISTRIBUTION TO
WHICH THE MEMBER IS ENTITLED UNDER THE OPERATING AGREEMENT; OR,
IF NOT OTHERWISE PROVIDED IN THE OPERATING AGREEMENT, WITHIN A
REASONABLE TIME AFTER WITHDRAWAL, THE FAIR VALUE OF THE
MEMBER’S INTEREST IN THE LIMITED LIABILITY COMPANY AS OF THE
DATE OF WITHDRAWAL.

COMMENTARY

Maryland’s proposed statute contains an identical provision as § 506. Colorado’s statute contains a similar provision. Virginia’s proposed statute also contains a similar provision, but provides that the withdrawing member is entitled to receive distributions to which such member is entitled under either the Operating Agreement or the Articles of Organization. However, neither Wyoming, Florida, nor Kansas contain this statement regarding a member’s right to a distribution upon his withdrawal.
§ 507. DISTRIBUTION IN KIND.

UNLESS OTHERWISE PROVIDED IN THE OPERATING AGREEMENT, A MEMBER, REGARDLESS OF THE NATURE OF THE MEMBER'S CONTRIBUTION, HAS NO RIGHT TO DEMAND AND RECEIVE A DISTRIBUTION FROM A LIMITED LIABILITY COMPANY IN A FORM OTHER THAN CASH.

COMMENTARY

Maryland's proposed statute contains an identical provision as § 507. The first sentence of Colorado's corresponding provision is the same as Maryland's. However, Colorado adds a sentence giving a member the right to refuse to accept certain in kind distributions. Wyoming, Florida, Kansas do not have corresponding provisions.
§ 508. STATUS OF CREDITOR.

WHEN A MEMBER BECOMES ENTITLED TO RECEIVE A DISTRIBUTION, THE MEMBER HAS THE STATUS OF, AND IS ENTITLED TO ALL REMEDIES AVAILABLE TO, A CREDITOR OF THE LIMITED LIABILITY COMPANY WITH RESPECT TO THE DISTRIBUTION.

COMMENTARY

The Maryland and Virginia proposed statutes contain identical provisions. No other limited liability company statute has a corresponding provision.
ARTICLE 6

ASSIGNMENT OF MEMBERSHIP INTERESTS

§ 601. NATURE OF MEMBERSHIP INTEREST.

A MEMBERSHIP INTEREST IS PERSONAL PROPERTY. A MEMBER HAS NO INTEREST IN SPECIFIC LIMITED LIABILITY COMPANY PROPERTY.
§ 602. ASSIGNMENT OF MEMBERSHIP INTEREST.

(A) UNLESS OTHERWISE PROVIDED IN THE ARTICLES OF ORGANIZATION OR AN OPERATING AGREEMENT:

(1) A MEMBERSHIP INTEREST IS ASSIGNABLE IN WHOLE OR IN PART;

(2) AN ASSIGNMENT OF A MEMBERSHIP INTEREST DOES NOT INVOLVE A LIMITED LIABILITY COMPANY OR ENTITLE THE ASSIGNEE TO BECOME OR TO EXERCISE ANY RIGHTS OR POWERS OF A MEMBER;

(3) AN ASSIGNMENT ENTITLES THE ASSIGNEE TO RECEIVE SUCH DISTRIBUTION OR DISTRIBUTIONS TO WHICH THE ASSIGNOR WAS ENTITLED TO THE EXTENT ASSIGNED; AND

(4) A MEMBER CEASES TO BE A MEMBER AND TO HAVE THE POWER TO EXERCISE ANY RIGHTS OR POWERS OF A MEMBER UPON ASSIGNMENT OF ALL OF HIS MEMBERSHIP INTEREST. UNLESS OTHERWISE PROVIDED IN THE ARTICLES OF ORGANIZATION OR AN OPERATING AGREEMENT, THE PLEDGE OF, OR GRANTING OF A SECURITY INTEREST, LIEN OR OTHER ENCUMBRANCE IN OR AGAINST, ANY OR ALL OF THE MEMBERSHIP INTEREST OF A MEMBER SHALL NOT CAUSE THE MEMBER TO CEASE TO BE A MEMBER OR TO HAVE THE POWER TO EXERCISE ANY RIGHTS OR POWERS OF A MEMBER.

(B) THE ARTICLES OF ORGANIZATION OR AN OPERATING AGREEMENT MAY PROVIDE THAT A MEMBER'S INTEREST IN A LIMITED LIABILITY COMPANY MAY BE EVIDENCED BY A CERTIFICATE OF MEMBERSHIP INTEREST ISSUED BY THE LIMITED LIABILITY COMPANY AND MAY ALSO
PROVIDE FOR THE ASSIGNMENT OR TRANSFER OF ANY MEMBERSHIP
INTEREST REPRESENTED BY SUCH A CERTIFICATE AND MAKE OTHER
PROVISIONS WITH RESPECT TO SUCH CERTIFICATES.

(C) UNLESS OTHERWISE PROVIDED IN THE ARTICLES OF
ORGANIZATION OR AN OPERATING AGREEMENT AND EXCEPT TO THE EXTENT
ASSUMED BY AGREEMENT, UNTIL AN ASSIGNEE OF A MEMBERSHIP
INTEREST BECOMES A MEMBER, THE ASSIGNEE SHALL HAVE NO LIABILITY
AS A MEMBER SOLELY AS A RESULT OF THE ASSIGNMENT.
§ 603. RIGHTS OF JUDGMENT CREDITOR.

ON APPLICATION TO A COURT OF COMPETENT JURISDICTION BY ANY JUDGMENT CREDITOR OF A MEMBER, THE COURT MAY CHARGE THE MEMBERSHIP INTEREST OF THE MEMBER WITH PAYMENT OF THE UNSATISFIED AMOUNT OF JUDGMENT WITH INTEREST. TO THE EXTENT SO CHARGED, THE JUDGMENT CREDITOR HAS ONLY THE RIGHTS OF AN ASSIGNEE OF THE MEMBERSHIP INTEREST. THIS ACT DOES NOT DEPRIVE ANY MEMBER OF THE BENEFIT OF ANY EXEMPTION LAWS APPLICABLE TO HIS MEMBERSHIP INTEREST.
§ 604. RIGHT OF ASSIGNEE TO BECOME A MEMBER.

(A) AN ASSIGNEE OF A MEMBERSHIP INTEREST MAY BECOME A MEMBER IF AND TO THE EXTENT THAT:

(1) THE ARTICLES OF ORGANIZATION OR AN OPERATING AGREEMENT PROVIDES; OR

(2) [ALL MEMBERS] [MEMBERS HOLDING A MAJORITY OF MEMBERSHIP INTERESTS] CONSENT[.]; OR

[(3) THE ASSIGNMENT IS CAUSED BY OPERATION OF LAW, IS ORDERED BY A COURT OF COMPETENT JURISDICTION [, OR IS MADE PURSUANT TO A COURT APPROVED SETTLEMENT, INCLUDING A SETTLEMENT IN CONNECTION WITH A DISSOLUTION OF MARRIAGE OR A BANKRUPTCY PROCEEDING].]

[FOR PURPOSES OF THE FOREGOING CLAUSE (2), A "MAJORITY OF ALL MEMBERSHIP INTERESTS" SHALL MEAN MEMBERSHIP INTERESTS REPRESENTING CAPITAL INTERESTS WHICH EQUAL MORE THAN 50% OF THE AGGREGATE CAPITAL INTERESTS OF ALL MEMBERS.] THE CONSENT OF A MEMBER MAY BE EVIDENCED IN ANY MANNER SPECIFIED IN THE ARTICLES OR ORGANIZATION OR AN OPERATING AGREEMENT FOR THE LIMITED LIABILITY COMPANY, BUT IN THE ABSENCE OF SUCH SPECIFICATION, CONSENT SHALL BE EVIDENCED BY A WRITTEN INSTRUMENT, DATED AND SIGNED BY THE MEMBER, OR EVIDENCED BY A VOTE TAKEN AT A MEETING OF MEMBERS CALLED IN ACCORDANCE WITH [REFERENCE TO SECTIONS ON MEETINGS].
(B) An assignee who has become a member is, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a member under the articles of organization, any operating agreement and this act. Notwithstanding the foregoing, unless otherwise provided in the articles of organization or an operating agreement, an assignee who becomes a member is liable for the obligations of his assignor to make contributions as provided in section 502 of this act, but shall not be liable for the obligations of his assignor under section 504 of this act. However, the assignee is not obligated for liabilities, including the obligations of his assignor to make contributions as provided in section 502(a) of this title, unknown to the assignee at the time he became a member.

(C) Whether or not an assignee of a membership interest becomes a member, the assignor is not released from his liability to the limited liability company under section 502 and section 504 of this act.
§ 605. POWERS OF ESTATE OF A DECEASED OR INCOMPETENT MEMBER.

IF A MEMBER WHO IS AN INDIVIDUAL DIES OR A COURT OF COMPETENT JURISDICTION ADJUDGES HIM TO BE INCOMPETENT TO MANAGE HIS PERSON OR HIS PROPERTY, THE MEMBER'S EXECUTOR, ADMINISTRATOR, GUARDIAN, CONSERVATOR OR OTHER LEGAL REPRESENTATIVE MAY EXERCISE ALL OF THE MEMBER'S RIGHTS FOR THE PURPOSE OF SETTLING HIS ESTATE OR ADMINISTERING HIS PROPERTY, INCLUDING ANY POWER UNDER THE ARTICLES OF ORGANIZATION OR AN OPERATING AGREEMENT OF AN ASSIGNEE TO BECOME A MEMBER. IF A MEMBER IS A CORPORATION, TRUST OR OTHER ENTITY AND IS DISSOLVED OR TERMINATED, THE POWERS OF THAT MEMBER MAY BE EXERCISED BY ITS LEGAL REPRESENTATIVE OR SUCCESSOR.

COMMENTARY

The proposed language governing assignment of membership interests is taken almost entirely from the Delaware Revised Uniform Limited Partnership Act (DRULPA), except for obvious changes in terminology. DRULPA was used because it contains all of the provisions of the Revised Uniform Limited Partnership Act (1976) with the 1985 Amendments ("RULPA") as well as a few provisions that add clarification or are otherwise useful additions. Those additional provisions found in DRULPA are:

(A) A statement in the section entitled "Nature of [Membership] Interests" as follows: "A member has no interest in specific [limited liability company] property." This statement appears to be a useful clarification.

(B) A statement in the section entitled "Assignment of [Membership] Interest", as follows: "Unless otherwise provided in the [articles of organization or an operating] agreement, the pledge of, or granting of a security interest, lien or other encumbrance in or against, any or all of the [membership] interest of a [member] shall not cause the [member] to cease to be a [member] or to have the power to exercise any rights or powers of a [member]." This, too, appears to be a useful clarification.
(C) A subsection within the section entitled "Assignment of a [Membership] Interest" which states that the [articles of organization or an operating agreement] may provide that an interest may be represented by a certificate and may also make other provisions with respect to such certificates. Since this subsection is permissive and has no effect unless implemented by a governing document, it would appear to be a useful addition.

(D) A subsection within the section entitled "Assignment of a [Membership] Interest" which provides that until an assignee becomes a [member], such assignee shall have no liability of a [member] solely as a result of the assignment. This is a useful clarification.

(E) A clause in the section entitled "Right of assignee to become a member" that allows the [articles of organization or an operating agreement] to modify the liabilities of assignees who become members. There is no apparent reason not to provide flexibility to limited liability companies in this regard, although the RULPA does not do so. In addition, the DRULPA states that an assignee who becomes a [member] shall be liable for unpaid capital commitments of his assignor, if known to the assignee, but not unlawful distributions made to the assignor. In contrast, the RULPA imposes liability on the assignee for both unpaid capital commitments and unlawful distributions, if, in either case, the obligation was known to the assignee. The approach of the DRULPA avoids the risk of intractable disputes since knowledge of unlawful distributions would be difficult to establish or refute in most cases. The DRULPA, but not the RULPA, includes a provision to the effect that knowledge of unpaid capital commitments will not relieve the assignee of liability if the unpaid capital commitment could have been ascertained from the partnership agreement. The RULPA had a provision similar to the DRULPA provision, but the RULPA provision was deleted in the 1985 amendments. The proposed language for the prototype act adopts the RULPA approach, not that of DRULPA, because assignees are not likely to learn of unpaid capital contributions from a review of the articles of organization and the operating agreement.

The approach of the proposed language is to provide maximum flexibility to limited liability companies to adopt governing provisions. That is, most of the statutory provisions are qualified by the phrase "unless otherwise provided in the articles of organization or an operating agreement." The few provisions not so qualified are for the benefit of creditors or are not likely to be modified by agreement, such as the section establishing the powers of a third party to settle the estate of a member. One provision that does not provide for modification by agreement is the provision stating that an
assignor of a membership interest remains liable, after assignment of his membership interest, for unpaid capital contributions owed by the assignor and unlawful distributions received by the assignor. It seems unlikely that this provision would be changed by agreement because it benefits all the non-assigning members.

There are two issues that should be resolved by the subcommittee. First is the question of whether the prototype act should permit the transfer of a membership interest with the consent of a majority of membership interests, or whether unanimous consent should be required (in either case, the articles of organization or the operating agreement could supersede the statutory provision). All states except Utah impose a unanimous consent requirement. It should be noted, however, that the IRS staff has informally indicated that a majority consent requirement would not create free transferability of interests. (See letter from Barbara C. Spudis, Baker & McKenzie, to Subcommittee on Limited Liability Companies, dated December 7, 1990, Re: Meeting with the Internal Revenue Service.) If majority consent is provided for in the prototype act, should "majority" be defined? Should the means of giving consents be specified?

The second issue for the subcommittee is whether the prototype act should provide for transfers of membership interests by operation of law, by court order, or by court-approved settlement. If the latter, should divorce and bankruptcy proceedings be mentioned specifically? Such statutory language might be important in situations where the articles of organization and the operating agreement of a limited liability company are minimal in scope. Moreover, by including language in a statute that can be superseded by the articles of organization or an operating agreement, it is more likely that the issues addressed in the statutory provision will be considered at the time the articles of organization and the operating agreement are prepared.

Generally, the proposed language on assignment of interests is more comprehensive in scope than the corresponding language in the statutes thus far adopted. There is no apparent advantage to brevity, particularly when the statutory language can be modified by the articles of organization or an operating agreement.
ARTICLE 7
DISSOLUTION

§ 701. DISSOLUTION.

A LIMITED LIABILITY COMPANY IS DISSOLVED AND ITS AFFAIRS SHALL BE WOUND UP UPON THE HAPPENING OF THE FIRST TO OCCUR OF THE FOLLOWING:

(A) AT THE TIME SPECIFIED IN THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT;

(B) UPON THE HAPPENING OF EVENTS SPECIFIED IN WRITING IN THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT;

(C) BY THE UNANIMOUS WRITTEN CONSENT OF ALL MEMBERS;

(D) UPON THE DEATH, RESIGNATION, EXPULSION, BANKRUPTCY, OR DISSOLUTION OF A MEMBER, OR THE OCCURRANCE OF ANY OTHER EVENT WHICH TERMINATES THE CONTINUED MEMBERSHIP OF A MEMBER IN THE LIMITED LIABILITY COMPANY, UNLESS THE LIMITED LIABILITY COMPANY IS CONTINUED BY THE UNANIMOUS CONSENT OF THE REMAINING MEMBERS; OR

(E) ENTRY OF A DECREE OF JUDICIAL DISSOLUTION UNDER § 702.

COMMENTARY

The word "Nonjudicial" is deleted from the caption because there is a reference to a judicial dissolution in paragraph (5).

Paragraph (2) is taken from the RULPA although no state appears to have included it in its limited liability company statute.
Under paragraphs (2) and (3), dissolution will only occur on the occurrence of events specified in writing or upon written consent. Because dissolution is an event of consequence, the formality of a writing may be appropriate. I anticipate that this issue will be dealt with as we discuss whether the operating agreement must be in writing.

Colorado's language requiring there to be at least two remaining members has not been included. It may be appropriate to add language to the end of paragraph (4) to accommodate the two-person limited liability company such as:

"... and the admission of one or more members or managers if necessary or desirable."

The requirement of unanimous consent for the continued operation of the limited liability company has been retained. We may want to consider the proposed Texas statute which provides:

"... unless there is at least one remaining member and the business of the limited liability company is continued by consent of the number of members or class thereof stated in the articles of organization or regulations of the limited liability company or, if not so stated, by all remaining members."

No statement of intent to dissolve is required. As discussed above, most states require some sort of notice of intent to dissolve. If the articles of dissolution are filed at the time of dissolution rather than at the time of completion of winding up, as suggested below, there is no need for a notice of intent to dissolve. This also avoids the logical inconsistency of stating that the limited liability company intends to dissolve after it has already dissolved under the statute.

The language "...the occurrence of any other event which terminates the continued membership of a member in the limited liability company..." in paragraph (4) has been retained. All current limited liability company statutes contain this language although RULPA does not.

The concept of "dissolution" is obviously one of the key factors in the classification determination. Under Reg. § 301.7701-2(b)(2) dissolution is described as follows:

"For purposes of this paragraph, dissolution of an organization means the alteration of the identity of an organization by reason of a change in the relationship between its members as determined by local law. For
example, the resignation of a general partner from a general partnership destroys the mutual agency which exists between such partner and his co-partners and thereby alters the personal relation between the partners which constitutes the identity of the partnership itself. A corporation, however, has a continuing identity which is detached from the relationship between its stockholders. The death, insanity, or bankruptcy of a shareholder or the sale of a shareholder's interest has no effect on the identity of the organization. An agreement by which an organization is established may provide that the business will be continued by the remaining members in the event of the death or withdrawal of any member, but such agreement does not establish continuity of life if under local law the death or withdrawal of any member causes a dissolution of the organization. Thus, there may be a dissolution of the organization and no continuity of life although the business is continued by the remaining members."

Note that the statute above, and RULPA both provide that a determination to continue the business actually avoids a dissolution. This distinction has been approved for both limited partnerships and limited liability companies. As summarized in Rev. Rul 88-76:

"Section 301.7701-2(b)(1) of the regulations provides that if the death, insanity, bankruptcy, retirement, resignation, or expulsion of any member will cause a dissolution of the organization, continuity of life does not exist. Section 301.7701-2(b)(2) provides that an agreement by which an organization is established may provide that the business will be continued by the remaining members in the event of the death or withdrawal of any member, but such agreement does not establish continuity of life if under local law the death or withdrawal of any member causes a dissolution of the organization.

Under the Act, unless the business of M is continued by the consent of all the remaining members, M is dissolved upon the death, retirement, resignation, expulsion, bankruptcy, dissolution of a member or occurrence of any other event that terminates the continued membership of a member in the company. If a member of M ceases to be a member of M for any reason, the continuity of M is not assured, because all remaining members must agree to continue the business. Consequently, M lacks the corporate characteristic of continuity of life."

The term "insanity" has been omitted from all of the statutes and "retirement" has been deleted from the list of items based upon its removal from the Virginia statute.
§ 702. JUDICIAL DISSOLUTION.

ON APPLICATION BY OR FOR A MEMBER, THE [DESIGNATE THE APPROPRIATE COURT] COURT MAY DECREE DISSOLUTION OF A LIMITED LIABILITY COMPANY WHENEVER IT IS NOT REASONABLY PRACTICABLE TO CARRY ON THE BUSINESS IN CONFORMITY WITH THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT.

COMMENTARY

The provision governing judicial dissolution, like that of Virginia, follows is the simpler RULPA form. The alternative is to allow judicial dissolution upon the occurrence of the events which permit the dissolution of an incorporated entity. Because a limited liability company, if dissolved, may constitute a general partnership, the reasons for involuntary dissolution should not be as broad as those applicable to a corporation. Fees and annual reports should be dealt with in a separate section.

The corporate approach to dissolution adopted in most states, would cause dissolution of the limited liability company upon the occurrence of such events as:

(A) procuring of the articles of organization through fraud;

(B) continuing to exceed or abuse the authority conferred upon it by law;

(C) failing to appoint and maintain a registered agent;

(D) failing to file a statement of change of registered agent.

(E) committing a violation of any provision of law whereby the limited liability company has forfeited its charter;

(F) carrying on, conducting, or transacting its business in a persistently fraudulent or illegal manner; or

(G) abusing of its powers contrary to the public policy of the state.
If a limited liability company could be judicially dissolved (and the members arguably subjected to personal liability) for such indefinite concepts as the violation of public policy, disgruntled members would be encouraged to make this sort of allegation in limited liability company breakups.

There is no provision allowing creditors to bring an action for judicial dissolution. While creditors may bring such an action against a corporation, much of the same argument set forth above applies to an action by creditors.

The ability of the secretary of state to dissolve the limited liability company for failure to pay fees or file reports is not discussed here, but will ultimately have to be addressed somewhere within the act.
§ 703. WINDING UP.

EXCEPT AS OTHERWISE PROVIDED IN THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT, THE MEMBERS WHO HAVE NOT WRONGFULLY DISSOLVED A LIMITED LIABILITY COMPANY MAY WIND UP THE LIMITED LIABILITY COMPANY'S AFFAIRS; BUT THE [DESIGNATE THE APPROPRIATE COURT] COURT MAY WIND UP THE LIMITED LIABILITY COMPANY'S AFFAIRS ON APPLICATION OF ANY MEMBER, HIS LEGAL REPRESENTATIVE, OR ASSIGNEE.

COMMENTARY

Again, in keeping with the desire to maintain consistency with RULPA where possible, both the term "winding up" and the language of the section are taken from RULPA. This is essentially consistent with the Virginia statute as opposed to the statutes of most other states which go into detail concerning the acts attendant to winding up. Because there is no statement of intent to dissolve under § 701, this will occur after the filing of the articles of dissolution. The limited liability company should not go through the two step dissolution process which is applicable to corporations, particularly, if the members may be personally liable for "ultra vires" acts during the winding up process. The absence of an express requirement of a notice to creditors may be a problem with some legislatures.
§ 704. DISTRIBUTION OF ASSETS.

UPON THE WINDING UP OF A LIMITED LIABILITY COMPANY, THE ASSETS SHALL BE DISTRIBUTED AS FOLLOWS:

(A) TO CREDITORS, INCLUDING MEMBERS WHO ARE CREDITORS, TO THE EXTENT PERMITTED BY LAW, IN SATISFACTION OF LIABILITIES OF THE LIMITED LIABILITY COMPANY OTHER THAN LIABILITIES FOR DISTRIBUTIONS TO MEMBERS UNDER § 402 OR § 403 [§ 506];

(B) EXCEPT AS PROVIDED IN THE ARTICLES OF ORGANIZATION OR WRITTEN OPERATING AGREEMENT, TO MEMBERS OR FORMER MEMBERS IN SATISFACTION OF LIABILITIES FOR DISTRIBUTIONS UNDER § 402 OR § 403 [§506]; AND

(C) EXCEPT AS PROVIDED IN THE ARTICLES OF ORGANIZATION OR OPERATING AGREEMENT, TO MEMBERS AND FORMER MEMBERS FIRST FOR THE RETURN OF THEIR CONTRIBUTIONS AND SECONDLY RESPECTING THEIR MEMBERSHIP INTERESTS, IN PROPORTIONS IN WHICH THE MEMBERS SHARE IN DISTRIBUTIONS.

COMMENTARY

Again the statute follows the RULPA and the Virginia statute, including the allowing of members to share as creditors in the distribution. This is the general rule in most states. Michigan appears to deny any distribution to members as a first priority.
§ 705. ARTICLES OF DISSOLUTION.

UPON THE DISSOLUTION AND THE COMMENCEMENT OF WINDING UP OF THE PARTNERSHIP, A CERTIFICATE OF CANCELLATION SHALL BE FILED IN THE OFFICE OF THE DEPARTMENT AND SET FORTH:

(A) THE NAME OF THE LIMITED LIABILITY COMPANY;

(B) THE DATE OF FILING OF ITS ARTICLES OF ORGANIZATION AND ALL AMENDMENTS THERETO;

(C) THE REASON FOR FILING THE ARTICLES OF DISSOLUTION;

(D) THE EFFECTIVE DATE (WHICH SHALL BE A DATE CERTAIN) OF THE ARTICLES OF DISSOLUTION IF THEY ARE NOT TO BE EFFECTIVE UPON THE FILING; AND

(E) ANY OTHER INFORMATION THE MEMBERS OR MANAGERS FILING THE CERTIFICATE DETERMINE.

COMMENTARY

All states except Virginia and Maryland (in its revision) have used the term "articles of dissolution" as opposed to the "cancellation of certificate" language in the RULPA. This change is appropriate as the commencement of a limited liability company is based upon the filing of articles of organization.

I have used the RULPA date of dissolution (See § 203) rather than the date of completion of winding up as is used in Virginia as the appropriate date for filing the certificate. This precludes the necessity of certifying that all debts have been paid or provided for and is not only consistent with RULPA but also with § 14.03 of the Model Business Corporation Act. The idea of notifying the world that dissolution has occurred and that winding up is going on may be more useful than the fact that the winding up is complete. In dealing with a limited liability company, it is helpful to know the limitations on the actions that the entity may take. Nonetheless, reasonable people may differ on this approach. There is not a statutory way of notifying creditors and barring claims under the RULPA as there is under the MBCA. I believe
that this constitutes an important point of discussion. If the committee determines to adopt the corporate model used in most states, these provisions will have to be rethought.
ARTICLE 8
FOREIGN LIMITED LIABILITY COMPANIES

§ 801. LAW GOVERNING.

SUBJECT TO THE CONSTITUTION OF THIS STATE, (i) THE LAWS OF THE STATE OR OTHER JURISDICTION UNDER WHICH A FOREIGN LIMITED LIABILITY COMPANY IS ORGANIZED SHALL GOVERN ITS ORGANIZATION AND INTERNAL AFFAIRS AND THE LIABILITY OF ITS MANAGERS AND MEMBERS AND (ii) A FOREIGN LIMITED LIABILITY COMPANY MAY NOT BE DENIED REGISTRATION BY REASON OF ANY DIFFERENCE BETWEEN THOSE LAWS AND THE LAWS OF THIS STATE. A FOREIGN LIMITED LIABILITY COMPANY HOLDING A VALID REGISTRATION IN THIS STATE SHALL HAVE NO GREATER RIGHTS AND PRIVILEGES THAN A DOMESTIC LIMITED LIABILITY COMPANY. THE REGISTRATION SHALL NOT BE DEEMED TO AUTHORIZE THE FOREIGN LIMITED LIABILITY COMPANY TO EXERCISE ANY OF ITS POWERS OR PURPOSES THAT A DOMESTIC LIMITED LIABILITY COMPANY IS FORBIDDEN BY LAW TO EXERCISE IN THIS STATE.

COMMENTARY

The first sentence originates from RULPA. A similar sentence is contained in the Colorado, Kansas and Virginia Acts. The proposed Maryland Act also contains a similar sentence, but is silent about which law governs the liability of managers and members. The second and third sentences are based on the Virginia Act, and are inserted into this section to (1) clarify that a foreign limited liability company possesses the same rights and privileges as a domestic limited liability company and (2) provide that limitations placed on domestic limited liability companies by a state must be observed by foreign limited liability companies that transact business within that state. The proposed Maryland Act has a different formulation of the second and third sentences, but the substance is the same.
§ 802. REGISTRATION.

BEFORE TRANSACTING BUSINESS IN THIS STATE, A FOREIGN LIMITED LIABILITY COMPANY SHALL REGISTER WITH THE DEPARTMENT. IN ORDER TO REGISTER, A FOREIGN LIMITED LIABILITY COMPANY SHALL SUBMIT TO THE DEPARTMENT AN APPLICATION IN DUPLICATE FOR REGISTRATION AS A FOREIGN LIMITED LIABILITY COMPANY, SIGNED BY A MANAGER, MEMBER OR OTHER AUTHORIZED PERSON, AND SETTING FORTH:

(A) THE NAME OF THE FOREIGN LIMITED LIABILITY COMPANY AND, IF DIFFERENT, THE NAME UNDER WHICH IT PROPOSES TO TRANSACT BUSINESS IN THIS STATE;

(B) THE STATE OR OTHER JURISDICTION AND DATE OF ITS ORGANIZATION;

(C) THE NAME AND ADDRESS OF A REGISTERED AGENT IN THIS STATE WHICH AGENT SHALL BE AN INDIVIDUAL RESIDENT OF THIS STATE, A DOMESTIC CORPORATION, OR A FOREIGN CORPORATION HAVING A PLACE OF BUSINESS AND AUTHORIZED TO DO BUSINESS IN THIS STATE;

(D) A STATEMENT THAT THE DEPARTMENT IS APPOINTED THE AGENT OF THE FOREIGN LIMITED LIABILITY COMPANY FOR SERVICE OF PROCESS IF NO AGENT HAS BEEN APPOINTED UNDER PARAGRAPH (C); OR IF APPOINTED, THE AGENT'S AUTHORITY HAS BEEN REVOLED OR IF THE AGENT CANNOT BE FOUND OR SERVED WITH THE EXERCISE OF REASONABLE DILIGENCE;

(E) THE ADDRESS OF THE OFFICE REQUIRED TO BE MAINTAINED IN THE STATE OF ITS ORGANIZATION BY THE LAWS OF THAT STATE OR, IF NOT SO REQUIRED, OF THE PRINCIPAL OFFICE OF THE FOREIGN LIMITED LIABILITY COMPANY; AND
(F) SUCH ADDITIONAL INFORMATION AS MAY BE NECESSARY OR APPROPRIATE IN ORDER TO ENABLE THE DEPARTMENT TO DETERMINE WHETHER SUCH LIMITED LIABILITY COMPANY IS ENTITLED TO TRANSACT BUSINESS IN THIS STATE.

COMMENTARY

The preamble, as well as subsections (a) through (e) originate from RULPA. Similar provisions are contained in the Colorado, Indiana, Kansas, proposed Maryland and Virginia Acts. Subsection (f), however, originates solely from the Colorado Act. Subsection (f) is a catchall provision designed to allow a state the ability to request additional information from a foreign limited liability company. Interestingly, the Indiana, Kansas and Maryland Acts also require information regarding the general character of the business, that the foreign limited liability company proposes to transact. The reason no similar provision is contained in this section is because it is unclear whether such a provision would provide any useful information in light of the broad catchall language (i.e., "engage in any lawful act or activity") that will be used in many articles of organization to describe the general character of the limited liability company's business.
§ 803. ISSUANCE OF REGISTRATION.

(A) IF THE DEPARTMENT FINDS THAT AN APPLICATION FOR
REGISTRATION CONFORMS TO THE PROVISIONS OF THIS ARTICLE AND ALL
REQUISITE FEES HAVE BEEN PAID, IT SHALL:

(1) ENDORSE ON THE APPLICATION THE FORD "FILED," AND
THE MONTH, DAY, AND YEAR OF THE FILING;

(2) FILE IN ITS OFFICE A DUPLICATE ORIGINAL OF THE
APPLICATION; AND

(3) ISSUE A CERTIFICATE OF REGISTRATION TO TRANSACT
BUSINESS IN THIS STATE.

(B) THE CERTIFICATE OF REGISTRATION, TOGETHER WITH A
DUPLICATE ORIGINAL AND THE APPLICATION, MUST BE RETURNED TO THE
PERSON WHO FILED THE APPLICATION OR HIS REPRESENTATIVE.

COMMENTARY

Section 803 originates from RULPA. Almost identical
provisions are contained in the Colorado, Kansas, proposed
Maryland and Virginia Acts.
§ 804. NAME.

No certificate of registration shall be issued to a foreign limited liability company unless the name of such company satisfies the requirements of section 207. If the name of a foreign limited liability company does not satisfy the requirements of the above referenced section, to obtain or maintain a certificate of registration:

(A) The foreign limited liability company may add the words "limited company," or the abbreviation "L.L.C." to its name for use in this state; or

(B) If its real name is unavailable, the foreign limited liability company may use a designated name that is available, and which satisfies the requirements of section 207, if it informs the state of the designated name.

COMMENTARY

This section originates from the Virginia Act. It will, of course, have to be reviewed and possibly revised to correspond with the applicable section relating to the name of a domestic limited liability company. In order for a foreign limited liability company to be issued a certificate of registration, its name must satisfy the requirements relating to a domestic limited liability company. In the event that the name does not satisfy those requirements, the foreign limited liability company can either add the words "limited company" or the abbreviation "L.L.C." to its name, or use a designated name.
The Colorado and Maryland Acts have a similar provision to the first sentence of this section by requiring a foreign limited liability company to apply for a certificate of registration under any name which would be available to a domestic limited liability company. The Kansas Act also contains a similar provision to the first sentence of this section by requiring a foreign limited liability company's name to be distinguishable from the names of other limited liability companies, corporations or limited partnerships. Neither the Colorado, Kansas, nor Maryland Acts have provisions which are similar to the second sentence of this section.
§ 805. CHANGES AND AMENDMENTS.

IF ANY STATEMENT IN THE APPLICATION FOR REGISTRATION OF A FOREIGN LIMITED LIABILITY COMPANY WAS FALSE WHEN MADE OR ANY ARRANGEMENTS OR OTHER FACTS DESCRIBED HAVE CHANGED, MAKING THE APPLICATION INACCURATE IN ANY RESPECT, THE FOREIGN LIMITED LIABILITY COMPANY SHALL PROMPTLY FILE IN THE OFFICE OF THE DEPARTMENT A CERTIFICATE, SIGNED BY A MANAGER, MEMBER OR OTHER AUTHORIZED PERSON, CORRECTING THE STATEMENT.

COMMENTARY

This section originates from RULPA. The Colorado, Kansas Maryland and Virginia Acts contain similar language. This section, however, adopts the Colorado Act's formulation that the correcting statement be signed by a manager, member or other authorized agent (person). By comparison, the Kansas Act provides that a member should execute the certificate, the Maryland Act provides that an authorized person should execute the certificate and the Virginia Act leaves silent as to who should execute the certificate.
§ 806. CERTIFICATE OF WITHDRAWAL.

(a) A FOREIGN LIMITED LIABILITY COMPANY AUTHORIZED TO TRANSACT BUSINESS IN THIS STATE MAY WITHDRAW FROM THIS STATE UPON PROCURING FROM THE DEPARTMENT A CERTIFICATE OF WITHDRAWAL. IN ORDER TO PROCURE SUCH CERTIFICATE, THE FOREIGN LIMITED LIABILITY COMPANY SHALL DELIVER TO THE DEPARTMENT AN APPLICATION FOR WITHDRAWAL, WHICH SHALL SET FORTH:

(1) THE NAME OF THE FOREIGN LIMITED LIABILITY COMPANY AND THE STATE OR OTHER JURISDICTION UNDER THE LAWS OF WHICH IT IS ORGANIZED;

(2) THAT THE FOREIGN LIMITED LIABILITY COMPANY IS NOT TRANSACTING BUSINESS IN THIS STATE;

(3) THAT THE FOREIGN LIMITED LIABILITY COMPANY SURRENDERS ITS CERTIFICATE OF REGISTRATION TO TRANSACT BUSINESS IN THIS STATE;

(4) THAT THE FOREIGN LIMITED LIABILITY COMPANY REVOKES THE AUTHORITY OF ITS REGISTERED AGENT FOR SERVICE OF PROCESS IN THIS STATE AND CONSENTS THAT SERVICE OF PROCESS IN ANY ACTION, SUIT, OR PROCEEDING BASED UPON ANY CAUSE OF ACTION ARISING IN THIS STATE DURING THE TIME THE FOREIGN LIMITED LIABILITY COMPANY WAS AUTHORIZED TO TRANSACT BUSINESS IN THIS STATE MAY THEREAFTER BE MADE ON SUCH FOREIGN LIMITED LIABILITY COMPANY BY SERVICE THEREOF UPON THE DEPARTMENT;

(5) AN ADDRESS TO WHICH A PERSON MAY MAIL A COPY OF ANY PROCESS AGAINST THE FOREIGN LIMITED LIABILITY COMPANY;
(6) SUCH ADDITIONAL INFORMATION AS IS NECESSARY OR APPROPRIATE IN ORDER TO ENABLE THE DEPARTMENT TO DETERMINE AND ASSESS ANY UNPAID FEES PAYABLE BY SUCH FOREIGN LIMITED LIABILITY COMPANY AS PRESCRIBED IN THIS ARTICLE.

(B) THE APPLICATION FOR WITHDRAWAL SHALL BE IN THE FORM AND MANNER DESIGNATED BY THE DEPARTMENT AND SHALL BE EXECUTED BY THE FOREIGN LIMITED LIABILITY COMPANY BY ONE OF ITS MANAGERS, MEMBERS, OR AUTHORIZED PERSONS, OR, IF THE FOREIGN LIMITED LIABILITY COMPANY IS IN THE HANDS OF A RECEIVER OR TRUSTEE, BY SUCH RECEIVER OR TRUSTEE ON BEHALF OF THE FOREIGN LIMITED LIABILITY COMPANY. THIS REPORT SHALL BE ACCOMPANIED BY A WRITTEN DECLARATION THAT IT IS MADE UNDER THE PENALTIES OF PERJURY.

COMMENTARY

This section originates from the Colorado Act. The Virginia Act has a similar provision, wherein a foreign limited liability company can cancel its certificate of registration by delivering a certificate of cancellation. The information that the Virginia Act requires to be included in its certificate of cancellation is similar to that required by this section. By comparison, RULPA, as well as the Indiana, Kansas and proposed Maryland Acts merely provide that the foreign limited liability company may cancel its registration and that such cancellation does not prevent the authority of the Department to accept service of process. In each of RULPA, the Indiana, Kansas and proposed Maryland Acts no detail is provided as to the procedure for canceling the registration.
§ 807. REVOCATION OF REGISTRATION.

(A) THE CERTIFICATE OF REGISTRATION OF A FOREIGN LIMITED LIABILITY COMPANY TO TRANSACT BUSINESS IN THIS STATE MAY BE REVOKED BY THE DEPARTMENT UPON THE OCCURRENCE OF ANY OF THE FOLLOWING:

(1) THE FOREIGN LIMITED LIABILITY COMPANY HAS FAILED TO:

   (i) FILE ITS LIMITED LIABILITY COMPANY REPORT WITHIN THE TIME REQUIRED BY THIS ARTICLE OR HAS FAILED TO PAY ANY FEES OR PENALTIES PRESCRIBED BY THIS ARTICLE;

   (ii) APPOINT AND MAINTAIN A REGISTERED AGENT AS REQUIRED UNDER § 802(C);

   (iii) FILE A REPORT UPON ANY CHANGE IN THE NAME OR ADDRESS OF THE REGISTERED AGENT; AND

   (iv) FILE IN THE OFFICE OF THE DEPARTMENT ANY AMENDMENT TO ITS APPLICATION FOR A CERTIFICATE OF REGISTRATION UNDER § 805.

(2) A MISREPRESENTATION HAS BEEN MADE OF ANY MATERIAL MATTER IN ANY APPLICATION, REPORT, AFFIDAVIT OR OTHER DOCUMENTS SUBMITTED BY SUCH FOREIGN LIMITED LIABILITY COMPANY UNDER THIS ARTICLE.

(B) NO CERTIFICATE OF REGISTRATION OF A FOREIGN LIMITED LIABILITY COMPANY SHALL BE REVOKED BY THE DEPARTMENT, UNLESS:

(1) THE DEPARTMENT HAS GIVEN THE FOREIGN LIMITED LIABILITY COMPANY NOT LESS THAN SIXTY DAYS' NOTICE THEREOF BY MAIL ADDRESSED TO ITS REGISTERED OFFICE IN THIS STATE OR, IF
Said foreign limited liability company fails to appoint and maintain a registered agent in this state, addressed to the office required to be maintained pursuant to § 802(E); and

(2) During such sixty-day period, the foreign limited liability company has failed [to file such limited liability company report,] to pay such fees or penalties, to file such report of change regarding the registered agent, to file any such amendment, or to correct such misrepresentation.

(C) Upon the expiration of sixty days after the mailing of such notice, the authority of the foreign limited liability company to transact business in this state shall cease.

COMMENTARY

This section is derived from the Colorado Act. Paragraph (a) authorizes the Department to revoke a foreign limited liability company's certificate of registration in the event it does not pay certain fees or penalties, appoint and maintain a registered agent, notify the state of a change in the name or address of said registered agent or file an amendment to its application for its certificate of registration. Depending on whether the registered agent is required to file certain reports by other sections of this article, a failure to file such reports could also constitute grounds for revocation of a foreign limited liability company's certificate of registration. Paragraph (b) places certain limitations on the authority of the Department to revoke a foreign limited liability company's certificate of registration by requiring the Department to give notice to the company of its potential violation(s) and to allow the company up to sixty days to cure said violation(s). RULPA, as well as the Indiana, Kansas, Maryland and Virginia Acts, does not have any similar provisions.
§ 808. TRANSACTION OF BUSINESS WITHOUT REGISTRATION.

(A) A FOREIGN LIMITED LIABILITY COMPANY TRANSACTING BUSINESS IN THIS STATE MAY NOT MAINTAIN AN ACTION, SUIT, OR PROCEEDING IN A COURT OF THIS STATE UNTIL IT HAS REGISTERED IN THIS STATE.

(B) THE FAILURE OF A FOREIGN LIMITED LIABILITY COMPANY TO REGISTER IN THIS STATE DOES NOT IMPAIR THE VALIDITY OF ANY CONTRACT OR ACT OF THE FOREIGN LIMITED LIABILITY COMPANY OR PREVENT THE FOREIGN LIMITED LIABILITY COMPANY FROM DEFENDING ANY ACTION, SUIT, OR PROCEEDING IN ANY COURT OF THIS STATE.

(C) A FOREIGN LIMITED LIABILITY COMPANY, BY TRANSACTING BUSINESS IN THIS STATE WITHOUT REGISTRATION, APPOINTS THE DEPARTMENT AS ITS AGENT FOR SERVICE OF PROCESS WITH RESPECT TO A CAUSE OF ACTION ARISING OUT OF THE TRANSACTION OF BUSINESS IN THIS STATE.

(D) A FOREIGN LIMITED LIABILITY COMPANY WHICH TRANSACTS BUSINESS IN THIS STATE WITHOUT A VALID CERTIFICATE OF REGISTRATION SHALL BE LIABLE TO THE STATE FOR THE YEARS OR PARTS THEREOF DURING WHICH IT TRANSACTED BUSINESS IN THIS STATE WITHOUT SUCH CERTIFICATE IN AN AMOUNT EQUAL TO ALL FEES WHICH WOULD HAVE BEEN IMPOSED BY THIS ARTICLE UPON THAT FOREIGN LIMITED LIABILITY COMPANY HAD IT DULY OBTAINED SUCH CERTIFICATE, FILED ALL REPORTS REQUIRED BY THIS ARTICLE, AND PAID ALL PENALTIES IMPOSED BY THIS ARTICLE. THE ATTORNEY GENERAL SHALL BRING PROCEEDINGS TO RECOVER ALL AMOUNTS DUE THIS STATE UNDER THE PROVISIONS OF THIS SECTION.
(E) A FOREIGN LIMITED LIABILITY COMPANY WHICH TRANSACTS BUSINESS IN THIS STATE WITHOUT A VALID CERTIFICATE OF REGISTRATION SHALL BE SUBJECT TO A CIVIL PENALTY, PAYABLE TO THE STATE, NOT TO EXCEED $________. EACH MANAGER, MEMBER OR AUTHORIZED PERSON WHO AUTHORIZES, DIRECTS, OR PARTICIPATES IN THE TRANSACTION OF BUSINESS IN THIS STATE ON BEHALF OF A FOREIGN LIMITED LIABILITY COMPANY WHICH DOES NOT HAVE SUCH CERTIFICATE SHALL BE SUBJECT TO A CIVIL PENALTY, PAYABLE TO THE STATE, NOT TO EXCEED $________.

(F) THE CIVIL PENALTIES SET FORTH IN SUBSECTION (D) OF THIS SECTION MAY BE RECOVERED IN AN ACTION BROUGHT WITHIN A COURT BY THE ATTORNEY GENERAL. UPON A FINDING BY THE COURT THAT A FOREIGN LIMITED LIABILITY COMPANY OR ANY OF ITS MEMBERS, MANAGERS, OR AUTHORIZED PERSONS HAVE TRANSACTED BUSINESS IN THIS STATE IN VIOLATION OF THIS ARTICLE, THE COURT SHALL ISSUE, IN ADDITION TO THE IMPOSITION OF A CIVIL PENALTY, AN INJUNCTION RESTRAINING FURTHER TRANSACTIONS OF THE BUSINESS OF THE FOREIGN LIMITED LIABILITY COMPANY AND THE FURTHER EXERCISE OF ANY LIMITED LIABILITY COMPANY'S RIGHTS AND PRIVILEGES IN THIS STATE. THE FOREIGN LIMITED LIABILITY COMPANY SHALL BE ENJOINED FROM TRANSACTING BUSINESS IN THIS STATE UNTIL ALL CIVIL PENALTIES PLUS ANY INTEREST AND COURT COSTS WHICH THE COURT MAY ASSESS HAVE BEEN PAID AND UNTIL THE FOREIGN LIMITED LIABILITY COMPANY HAS OTHERWISE COMPLIED WITH THE PROVISIONS OF THIS ARTICLE.
(G) A MEMBER OF A FOREIGN LIMITED LIABILITY COMPANY IS NOT LIABLE FOR THE DEBTS AND OBLIGATIONS OF THE LIMITED LIABILITY COMPANY SOLELY BY REASON OF SUCH COMPANY'S HAVING TRANSACTED BUSINESS IN THIS STATE WITHOUT A VALID CERTIFICATE OF REGISTRATION.

COMMENTARY

Subsections (a) through (c) of this section originate from RULPA. The Colorado, Kansas, proposed Maryland and Virginia Acts have nearly identical provisions; however, both the proposed Maryland and Virginia Acts use the term "doing business" instead of "transacting business." Subsections (d) through (g), however, originate from the Colorado Act. Subsection (d) was inserted to clarify that a limited liability company that transacts business without a valid certificate of registration is nevertheless liable for all fees which were to have normally been imposed, as well as any applicable penalties. This subsection also authorizes the attorney general to bring a proceeding to recover all amounts due. Subsection (e) provides that both the company and each manager, member or authorized person who authorized, directed or participated in said business is liable for civil penalties. Subsection (f) provides that the attorney general is authorized to file suit to collect such civil penalties, as well as to request certain equitable remedies restraining the company from transacting any further business. Subsection (g) excludes members of limited liability companies from being liable for debts and obligations of their company solely by reason of that company's having transacted business without a valid certificate of registration.

The proposed Maryland Act has a similar provision to subsection (d) by authorizing a penalty to be imposed on the foreign limited liability company. Furthermore, the proposed Maryland Act provides that each member and agent who does intrastate, interstate or foreign business without registering shall be guilty of a misdemeanor and on conviction, subject to a fine. In addition, the Virginia Act has a similar provision to subsection (d) by authorizing a civil penalty to be imposed on the foreign limited liability company, each member, manager or employee who does any such business knowing that a certificate of registration is required and has not been obtained. Finally, the Kansas Act does not provide for actual penalties or fines, but does authorize the attorney general to seek equitable remedies.
§ 809. TRANSACTIONS NOT CONSTITUTING TRANSACTING BUSINESS.

(A) THE FOLLOWING ACTIVITIES OF A FOREIGN LIMITED LIABILITY COMPANY, AMONG OTHERS, DO NOT CONSTITUTE TRANSACTING BUSINESS WITHIN THE MEANING OF THIS ARTICLE:

1. MAINTAINING, DEFENDING, OR SETTLING ANY PROCEEDING;

2. HOLDING MEETINGS OF ITS MEMBERS OR CARRYING ON ANY OTHER ACTIVITIES CONCERNING ITS INTERNAL AFFAIRS;

3. MAINTAINING BANK ACCOUNTS;

4. MAINTAINING OFFICES OR AGENCIES FOR THE TRANSFER, EXCHANGE AND REGISTRATION OF THE FOREIGN LIMITED LIABILITY COMPANY'S OWN SECURITIES OR MAINTAINING TRUSTEES OR DEPOSITARIES WITH RESPECT TO THOSE SECURITIES;

5. SELLING THROUGH INDEPENDENT CONTRACTORS;

6. SOLICITING OR OBTAINING ORDERS, WHETHER BY MAIL OR THROUGH EMPLOYEES OR AGENTS OR OTHERWISE, IF THE ORDERS REQUIRE ACCEPTANCE OUTSIDE THIS STATE BEFORE THEY BECOME CONTRACTS;

7. CREATING OR ACQUIRING INDEBTEDNESS, MORTGAGES, AND SECURITY INTERESTS IN REAL OR PERSONAL PROPERTY;

8. SECURING OR COLLECTING DEBTS OR ENFORCING MORTGAGES AND SECURITY INTEREST IN PROPERTY SECURING THE DEBTS;

9. HOLDING, PROTECTING, RENTING, MAINTAINING AND OPERATING REAL OR PERSONAL PROPERTY IN THIS STATE SO ACQUIRED;

10. SELLING OR TRANSFERRING TITLE TO PROPERTY IN THIS STATE TO ANY PERSON; OR
(11) CONDUCTING AN ISOLATED TRANSACTION THAT IS COMPLETED WITHIN THIRTY (30) DAYS AND THAT IS NOT ONE IN THE COURSE OF REPEATED TRANSACTIONS OF A LIKE NATURE.

(B) THE TERM "TRANSACTING BUSINESS" AS USED IN THIS SECTION SHALL HAVE NO EFFECT ON PERSONAL JURISDICTION UNDER § .

(C) FOR THE PURPOSES OF THIS SECTION, ANY FOREIGN LIMITED LIABILITY COMPANY WHICH OWNS INCOME-PRODUCING REAL OR TANGIBLE PERSONAL PROPERTY IN THIS STATE, OTHER THAN PROPERTY EXEMPTED BY SUBSECTION (A), WILL BE CONSIDERED TRANSACTING BUSINESS IN THIS STATE.

(D) THE LIST OF ACTIVITIES IN SUBSECTION (A) OF THIS SECTION IS NOT EXHAUSTIVE. THIS SECTION DOES NOT APPLY IN DETERMINING THE CONTRACTS OR ACTIVITIES THAT MAY SUBJECT A FOREIGN LIMITED LIABILITY COMPANY TO SERVICE OF PROCESS OR TAXATION IN THIS STATE OR TO REGULATION UNDER ANY OTHER LAW OF THIS STATE.

COMMENTARY

This section originates from the Indiana, proposed Maryland and Virginia Acts. There is, however, no similar provision in RULPA, the Colorado or Kansas Acts. The rationale for its inclusion is to give guidance to managers, members and authorized persons as to which activities do not require a certificate of registration to be filed. Subsections (A)(9), (A)(10) and (C) are derived from the proposed Maryland Act and are inserted to clarify that owning income-producing real or tangible property is considered transacting business.
§ 810. ACTION BY ATTORNEY GENERAL.

THE ATTORNEY GENERAL MAY MAINTAIN AN ACTION TO RESTRAIN A FOREIGN LIMITED LIABILITY COMPANY FROM TRANSACTING BUSINESS IN THIS STATE IN VIOLATION OF THIS ARTICLE.

COMMENTARY

This section originates from RULPA. Nearly identical sections are contained in the Colorado, Kansas, proposed Maryland and Virginia Acts.
ARTICLE 9

DERIVATIVE ACTIONS

§ 901. RIGHT OF MEMBER TO BRING DERIVATIVE ACTION.

A MEMBER MAY BRING AN ACTION IN THE RIGHT OF THE LIMITED LIABILITY COMPANY TO RECOVER A JUDGMENT IN ITS FAVOR IF ALL OF THE FOLLOWING CONDITIONS ARE MET:

(A) EITHER (1) MANAGEMENT OF THE LIMITED LIABILITY COMPANY IS VESTED IN A MANAGER OR MANAGERS WHO HAVE THE SOLE AUTHORITY TO CAUSE THE LIMITED LIABILITY COMPANY TO SUE IN ITS OWN RIGHT, OR (2) MANAGEMENT OF THE LIMITED LIABILITY COMPANY IS RESERVED TO THE MEMBERS BUT THE PLAINTIFF DOES NOT HAVE THE AUTHORITY TO CAUSE THE LIMITED LIABILITY COMPANY TO SUE IN ITS OWN RIGHT UNDER THE PROVISIONS OF AN OPERATING AGREEMENT; AND

(B) THE PLAINTIFF HAS MADE DEMAND ON THOSE MANAGERS OR THOSE MEMBERS WITH SUCH AUTHORITY REQUESTING THAT SUCH MANAGERS OR SUCH MEMBERS CAUSE THE LIMITED LIABILITY COMPANY TO SUE IN ITS OWN RIGHT; AND

(C) THE MEMBERS OR MANAGERS WITH SUCH AUTHORITY HAVE WRONGFULLY REFUSED TO BRING THE ACTION OR, AFTER ADEQUATE TIME TO CONSIDER THE DEMAND, HAVE FAILED TO RESPOND TO SUCH DEMAND; AND

(D) THE PLAINTIFF (1) IS A MEMBER OF THE LIMITED LIABILITY COMPANY AT THE TIME OF BRINGING THE ACTION, AND (2) WAS A MEMBER OF THE LIMITED LIABILITY COMPANY AT THE TIME OF THE TRANSACTION OF WHICH HE COMPLAINS, OR HIS STATUS AS A MEMBER OF
THE LIMITED LIABILITY COMPANY THEREAFTER DEVOLVED UPON HIM PURSUANT TO THE TERMS OF THE OPERATING AGREEMENT FROM A PERSON WHO WAS A MEMBER AT SUCH TIME; AND

(E) THE PLAINTIFF FAIRLY AND ADEQUATELY REPRESENTS THE INTERESTS OF THE MEMBERS IN ENFORCING THE RIGHT OF THE LIMITED LIABILITY COMPANY.

COMMENTARY

No state currently gives members of a limited liability company the statutory right to bring a derivative action. The proposed Maryland statute contains provisions allowing a member to bring a derivative action "to the same extent that a stockholder may bring an action for a derivative suit under the corporation law of Maryland." (§ 4A-801). Section 4A-801 also provides that "[s]uch an action may be brought if members with authority to do so have refused to bring the action or if an effort to cause those members to bring the action is not likely to succeed."

It is not clear under the proposed Maryland statute which members have authority to cause a limited liability company to bring suit. On the one hand, §4A-401(A) provides that "[e]xcept as otherwise provided in the operating agreement, every member is an agent of the limited liability company for the purpose of its business." Section 4A-403, on the other hand, states that "[u]nless otherwise provided in the operating agreement, management of the limited liability company shall be vested in the members in proportion to their respective interests in profits of the limited liability company."

Resolution of this issue is important in determining the necessity for, and scope of, a derivative action provision. Such a provision makes little sense, for example, if any member already has authority to cause the limited liability company to sue in its own right. Presumably, such would be the case, if management were reserved to the members and the operating agreement did not provide otherwise. If management of the limited liability company is vested in managers, members presumably would not have authority to cause the limited liability company to sue except through a derivative action. If, therefore, the right to cause the limited liability company to sue is vested in managers or in only certain members, a derivative action provision may be appropriate.
As currently drafted, § 901 allows a derivative suit to be brought when management is vested in managers. The words "and one or more of such managers have the sole authority to cause the limited liability company to sue in its own right" may be deleted if there is no possibility of both managers and members having management rights. Subsection (A)(2) is directed to the situation where members retain management rights but there are differing classes of members, etc., so that not every member has authority to cause the limited liability company to sue in its own right. The words "because of a restriction set forth in the articles of organization or an operating agreement" may be redundant.

Subsection (B) takes a position not normally associated with derivative litigation by requiring demand in every case and not providing for a demand futility exception. See arguments in favor of this position in In re Bankamerica Sec. Litig., 636 F.Supp. 419, 422 (C.D. Cal. 1986); Kamen v. Kemper Fin. Serv., Inc., 908 F.2d 1338, 1341-47 (7th Cir.), cert. granted in part, 59 U.S.L.W. 3405 (1990).

The words "wrongfully refused" in paragraph (c) are intended to reference the business judgment rule which generally applies to business decisions of corporate officers and directors and the fact that, as a general rule, the decision of whether litigation is in the best interests of a company is a business decision best left to the judgment of those with managerial responsibility for the company, i.e., in a corporation -- the board of directors.

Subsection (D) is a variation of § 1002 of RULPA.
§ 902. PLEADING.

IN A DERIVATIVE ACTION, THE COMPLAINT SHALL SET FORTH WITH THE PARTICULARITY THE EFFORT OF THE PLAINTIFF TO SECURE INITIATION OF THE ACTION BY THE MANAGERS OR THE MEMBERS WHO WOULD OTHERWISE HAVE THE AUTHORITY TO CAUSE THE LIMITED LIABILITY COMPANY TO SUE IN ITS OWN RIGHT.

COMMENTARY

This provision closely follows § 1003 of RULPA.
§ 903. EXPENSES.

(A) IF A DERIVATIVE ACTION IS SUCCESSFUL, IN WHOLE OR IN PART, OR IF ANYTHING IS RECEIVED BY THE PLAINTIFF AS A RESULT OF A JUDGMENT, COMPROMISE OR SETTLEMENT OF AN ACTION OR CLAIM, THE COURT MAY AWARD THE PLAINTIFF REASONABLE EXPENSES, INCLUDING REASONABLE ATTORNEYS' FEES, AND SHALL DIRECT HIM TO REMIT TO THE LIMITED LIABILITY COMPANY THE REMAINDER OF THOSE PROCEEDS RECEIVED BY HIM.

(B) IN ANY ACTION HEREAFTER INSTITUTED IN THE RIGHT OF ANY DOMESTIC OR FOREIGN LIMITED LIABILITY COMPANY BY A MEMBER OR MEMBERS THEREOF, THE COURT HAVING JURISDICTION, UPON FINAL JUDGMENT AND A FINDING THAT THE ACTION WAS BROUGHT WITHOUT REASONABLE CAUSE, MAY REQUIRE THE PLAINTIFF OR PLAINTIFFS TO PAY TO THE PARTIES NAMED AS DEFENDANTS THE REASONABLE EXPENSES, INCLUDING FEES OF ATTORNEYS, INCURRED BY THEM IN THE DEFENSE OF SUCH ACTION.

COMMENTARY

Subsection (A) closely follow § 1004 of RULPA. Subsection (B) closely follows the second paragraph of § 49 of the Model Business Corporation Act.
ARTICLE 10

MERGER

§ 1001. MERGER OR CONSOLIDATION.

(A) ANY ONE OR MORE LIMITED LIABILITY COMPANIES MAY MERGE OR CONSOLIDATE WITH OR INTO ANY ONE OR MORE LIMITED LIABILITY COMPANIES, LIMITED PARTNERSHIPS, OR CORPORATIONS, AND (B) ANY ONE OR MORE LIMITED PARTNERSHIPS OR CORPORATIONS MAY MERGE OR CONSOLIDATE WITH OR INTO ANY ONE OR MORE LIMITED LIABILITY COMPANIES.
§ 1002. PLAN OF MERGER OR CONSOLIDATION.

(A) EACH CONSTITUENT ENTITY SHALL ENTER INTO A WRITTEN PLAN OF MERGER OR CONSOLIDATION, WHICH SHALL BE APPROVED IN ACCORDANCE WITH § 1003 OF THIS ARTICLE.

(B) THE PLAN OF MERGER OR CONSOLIDATION SHALL SET FORTH:

(1) THE NAME OF EACH LIMITED LIABILITY COMPANY, CORPORATION, AND LIMITED PARTNERSHIP WHICH IS A CONSTITUENT ENTITY IN THE MERGER OR CONSOLIDATION AND THE NAME OF THE SURVIVING ENTITY INTO WHICH EACH OTHER CONSTITUENT ENTITY PROPOSES TO MERGE OR THE NEW ENTITY INTO WHICH EACH CONSTITUENT ENTITY PROPOSES TO CONSOLIDATE;

(2) THE TERMS AND CONDITIONS OF THE PROPOSED MERGER OR CONSOLIDATION;

(3) THE MANNER AND BASIS OF CONVERTING THE INTERESTS IN EACH LIMITED LIABILITY COMPANY, THE SHARES OF STOCK OR OTHER INTERESTS IN EACH CORPORATION AND THE INTERESTS IN EACH LIMITED PARTNERSHIP THAT IS A CONSTITUENT ENTITY IN THE MERGER OR CONSOLIDATION INTO INTERESTS, SHARES, OR OTHER SECURITIES OR OBLIGATIONS, AS THE CASE MAY BE, OF THE SURVIVING ENTITY OR THE NEW ENTITY, OR OF ANY OTHER LIMITED LIABILITY COMPANY, CORPORATION, LIMITED PARTNERSHIP, OR OTHER ENTITY, OR, IN WHOLE OR IN PART, INTO CASH OR OTHER PROPERTY.

(4) IN THE CASE OF A MERGER, SUCH AMENDMENTS TO THE ARTICLES OF ORGANIZATION OF A LIMITED LIABILITY COMPANY, ARTICLES OR CERTIFICATE OF INCORPORATION OF A CORPORATION OR
CERTIFICATE OF LIMITED PARTNERSHIP OF A PARTNERSHIP, AS THE CASE MAY BE, OF THE SURVIVING ENTITY AS ARE DESIRED TO BE EFFECTED BY THE MERGER, OR THAT NO SUCH CHANGES ARE DESIRED;

(5) IN THE CASE OF A CONSOLIDATION, ALL OF THE STATEMENTS REQUIRED TO BE SET FORTH IN ARTICLES OF ORGANIZATION OF ANY NEW ENTITY THAT IS A LIMITED LIABILITY COMPANY, ARTICLES OF CERTIFICATE OF INCORPORATION OF ANY NEW ENTITY THAT IS A CORPORATION, OR CERTIFICATE OF LIMITED PARTNERSHIP OF ANY NEW ENTITY THAT IS A LIMITED PARTNERSHIP, AS THE CASE MAY BE; AND

(6) SUCH OTHER PROVISIONS RELATING TO THE PROPOSED MERGER OR CONSOLIDATION AS ARE DEEMED NECESSARY OR DESIRABLE.
§ 1003. APPROVAL OF MERGER OR CONSOLIDATION.

(A) A PROPOSED PLAN OR MERGER OR CONSOLIDATION COMPLYING WITH THE REQUIREMENTS OF § 1002 SHALL BE APPROVED IN THE MANNER PROVIDED BY THIS SECTION:

(1) A LIMITED LIABILITY COMPANY PARTY TO A PROPOSED MERGER OR CONSOLIDATION SHALL HAVE THE PLAN OF MERGER OR CONSOLIDATION AUTHORIZED AND APPROVED BY THE UNANIMOUS CONSENT OF THE MEMBERS, UNLESS THE OPERATING AGREEMENT OF SUCH LIMITED LIABILITY COMPANY PROVIDES OTHERWISE;

(2) A CORPORATION PARTY TO A PROPOSED MERGER OR CONSOLIDATION SHALL HAVE THE PLAN OF MERGER AUTHORIZED AND APPROVED IN THE MANNER AND BY THE VOTE REQUIRED BY THE LAWS OF THIS STATE;

(3) A LIMITED PARTNERSHIP PARTY TO A PROPOSED MERGER OR CONSOLIDATION SHALL HAVE THE PLAN OF MERGER AUTHORIZED AND APPROVED IN THE MANNER AND BY THE VOTE REQUIRED BY ITS LIMITED PARTNERSHIP AGREEMENT AND IN ACCORDANCE WITH THE PARTNERSHIP LAWS OF THIS STATE.

(B) AFTER A MERGER OR CONSOLIDATION IS AUTHORIZED, UNLESS THE PLAN OF MERGER OR CONSOLIDATION PROVIDES OTHERWISE, AND AT ANY TIME BEFORE ARTICLES OF MERGER OR CONSOLIDATION (AS PROVIDED FOR IN § 1004 OF THIS ARTICLE) ARE FILED, THE PLAN OF MERGER OR CONSOLIDATION MAY BE ABANDONED (SUBJECT TO ANY CONTRACTUAL RIGHTS), IN ACCORDANCE WITH THE PROCEDURE SET FORTH IN THE PLAN OF MERGER OR CONSOLIDATION OR, IF NONE IS SET FORTH, AS FOLLOWS:
(1) BY THE UNANIMOUS CONSENT OF THE MEMBERS OF EACH LIMITED LIABILITY COMPANY THAT IS A CONSTITUENT ENTITY, UNLESS THE OPERATING AGREEMENT OF ANY SUCH LIMITED LIABILITY COMPANY PROVIDES OTHERWISE;

(2) BY THE VOTE OF THE BOARD OF DIRECTORS OF ANY CORPORATION THAT IS A CONSTITUENT ENTITY;

(3) BY THE PARTNERS OF ANY LIMITED PARTNERSHIP THAT IS A CONSTITUENT ENTITY IN ACCORDANCE WITH ITS PARTNERSHIP AGREEMENT AND APPLICABLE PARTNERSHIP LAW.
§ 1004. ARTICLES OF MERGER OR CONSOLIDATION.

(A) After a plan of merger or consolidation is approved as provided in § 1003 of this article, the surviving entity or the new entity shall deliver to the department for filing articles of merger or consolidation duly executed by each constituent entity setting forth:

1. The name of each constituent entity;
2. The plan of merger or consolidation;
3. The effective date of the merger or consolidation if later than the date of filing of the articles of merger or consolidation;
4. The name of the surviving entity or the new entity; and
5. A statement that the plan of merger was duly authorized and approved by each constituent entity in accordance with § 1003 of this article.

(B) A merger or consolidation takes effect upon the later of the effective date of the filing of the articles of merger or consolidation or the date set forth in the plan of merger or consolidation.

(C) The original and one or more signed, photocopies, or conformed copies of the articles of merger or consolidation shall be delivered to the department, who, after determining that such documents appear in all respects to conform to the requirements of this article, shall file the original articles
OF MERGER OR CONSOLIDATION AND ENDORSE ON EACH ADDITIONAL COPY DELIVERED THE WORD "FILED" WITH THE APPLICABLE DATE AND RETURN SUCH ADDITIONAL COPIES TO THE SURVIVING ENTITY OR THE NEW ENTITY OR THEIR REPRESENTATIVE.
§ 1005. EFFECTS OF MERGER OR CONSOLIDATION.

CONSUMMATION OF A MERGER OR CONSOLIDATION HAS THE EFFECTS PROVIDED IN THIS SECTION:

(A) THE CONSTITUENT ENTITIES PARTY TO THE PLAN OF MERGER OR CONSOLIDATION SHALL BE A SINGLE ENTITY, WHICH, IN THE CASE OF A MERGER SHALL BE THE ENTITY DESIGNATED IN THE PLAN OF MERGER AS THE SURVIVING ENTITY, AND, IN THE CASE OF A CONSOLIDATION, SHALL BE THE NEW ENTITY PROVIDED FOR IN THE PLAN OF CONSOLIDATION;

(B) THE SEPARATE EXISTENCE OF EACH CONSTITUENT ENTITY PARTY TO THE PLAN OF MERGER OR CONSOLIDATION, EXCEPT THE SURVIVING ENTITY OR THE NEW ENTITY, SHALL CEASE;

(C) THE SURVIVING ENTITY OR THE NEW ENTITY SHALL THEREUPON AND THEREAFTER POSSESS ALL THE RIGHTS, PRIVILEGES, IMMUNITIES, POWERS, AND FRANCHISES, OF A PUBLIC AS WELL AS A PRIVATE NATURE, OF EACH CONSTITUENT ENTITY AND IS SUBJECT TO ALL THE RESTRICTIONS, DISABILITIES, AND DUTIES OF EACH OF SUCH CONSTITUENT ENTITIES TO THE EXTENT SUCH RIGHTS, PRIVILEGES, IMMUNITIES, POWERS, FRANCHISES, RESTRICTIONS, DISABILITIES, AND DUTIES ARE APPLICABLE TO THE FORM OF EXISTENCE OF THE SURVIVING ENTITY OR THE NEW ENTITY;

(D) ALL PROPERTY, REAL, PERSONAL AND MIXED, AND ALL DEBTS DUE ON WHATSOEVER ACCOUNT, INCLUDING PROMISES TO MAKE CAPITAL CONTRIBUTIONS AND SUBSCRIPTIONS FOR SHARES, AND ALL OTHER CHOSES IN ACTION, AND ALL AND EVERY OTHER INTEREST OF OR
BELONGING TO OR DUE TO EACH OF THE CONSTITUENT ENTITIES SHALL BE VESTED IN THE SURVIVING ENTITY OR THE NEW ENTITY WITHOUT FURTHER ACT OR DEED;

(E) THE TITLE TO ALL REAL ESTATE AND ANY INTEREST THEREIN, VESTED IN ANY SUCH CONSTITUENT ENTITY SHALL NOT REVERT OR BE IN ANY WAY IMPAIRED BY REASON OF SUCH MERGER OR CONSOLIDATION;

(F) THE SURVIVING ENTITY OR THE NEW ENTITY SHALL THENCEFORTH BE RESPONSIBLE AND LIABLE FOR ALL LIABILITIES AND OBLIGATIONS OF EACH OF THE CONSTITUENT ENTITIES SO MERGED OR CONSOLIDATED, AND ANY CLAIM EXISTING OR ACTION OR PROCEEDING PENDING BY OR AGAINST ANY SUCH CONSTITUENT ENTITY MAY BE PROSECUTED AS IF SUCH MERGER OR CONSOLIDATION HAD NOT TAKEN PLACE, OR THE SURVIVING ENTITY OR THE NEW ENTITY MAY BE SUBSTITUTED IN THE ACTION;

(G) NEITHER THE RIGHTS OF CREDITORS NOR ANY LIENS ON THE PROPERTY OF ANY CONSTITUENT ENTITY SHALL BE IMPAIRED BY THE MERGER OR CONSOLIDATION;

(I) In the case of a consolidation, the statements set forth in the articles of consolidation and which are required or permitted to be set forth in the articles of organization, articles or certificate of incorporation, or certificate of limited partnership, as the case may be, of the new entity, shall be deemed to be the original articles of organization, articles or certificate of incorporation, or certificate of limited partnership of the new entity;

(J) The membership or other interests in a limited liability company, shares or other interests in a corporation, partnership or other interests in a limited partnership that is a constituent entity, as the case may be, that are to be converted or exchanged into interests, shares or other securities, cash, obligations or other property under the terms of the articles of merger or consolidation are so converted, and the former holders thereof are entitled only to the rights provided in the articles of merger or consolidation or the rights otherwise provided by law; and

(K) Nothing in this article shall abridge or impair any dissenter's or appraisal rights that may otherwise be available to the members or shareholders or other holders of an interest in any constituent entity.
§ 1006. MERGER OR CONSOLIDATION WITH FOREIGN ENTITY.

(A) ANY ONE OR MORE LIMITED LIABILITY COMPANIES OF THIS STATE MAY MERGE OR CONSOLIDATE WITH OR INTO ONE OR MORE FOREIGN LIMITED LIABILITY COMPANIES, FOREIGN CORPORATIONS OR FOREIGN LIMITED PARTNERSHIPS, OR ANY ONE OR MORE FOREIGN LIMITED LIABILITY COMPANIES, FOREIGN CORPORATIONS OR FOREIGN LIMITED PARTNERSHIPS MAY MERGE OR CONSOLIDATE WITH OR INTO ANY ONE OR MORE LIMITED LIABILITY COMPANIES OF THIS STATE, IF:

(1) THE MERGER OR CONSOLIDATION IS PERMITTED BY THE LAW OF THE STATE OR JURISDICTION UNDER WHOSE LAWS EACH FOREIGN CONSTITUENT ENTITY IS ORGANIZED OR FORMED AND EACH FOREIGN CONSTITUENT ENTITY COMPLIES WITH THAT LAW IN EFFECTING THE MERGER OR CONSOLIDATION;

(2) THE FOREIGN CONSTITUENT ENTITY COMPLIES WITH § 1004 OF THIS ARTICLE IF IT IS THE SURVIVING ENTITY OR THE NEW ENTITY; AND

(3) EACH DOMESTIC CONSTITUENT ENTITY COMPLIES WITH THE APPLICABLE PROVISIONS OF §§ 1001-1003 AND, IF IT IS THE SURVIVING ENTITY OR THE NEW ENTITY, WITH § 1004.

(B) UPON A MERGER INVOLVING ONE OR MORE DOMESTIC LIMITED LIABILITY COMPANIES TAKING EFFECT, IF THE SURVIVING ENTITY OR THE NEW ENTITY IS TO BE GOVERNED BY THE LAWS OF ANY STATE OTHER THAN THIS STATE OR BY THE LAWS OF THE DISTRICT OF COLUMBIA OR OF ANY FOREIGN COUNTRY, THEN THE SURVIVING ENTITY OR THE NEW ENTITY SHALL AGREE:
(1) THAT IT MAY BE SERVED WITH PROCESS IN THIS STATE IN ANY PROCEEDING FOR ENFORCEMENT OF ANY OBLIGATION OF ANY CONSTITUENT ENTITY PARTY TO THE MERGER OR CONSOLIDATION THAT WAS ORGANIZED UNDER THE LAWS OF THIS STATE, AS WELL AS FOR ENFORCEMENT OF ANY OBLIGATION OF THE SURVIVING ENTITY OR THE NEW ENTITY ARISING FROM THE MERGER OR CONSOLIDATION;

(2) TO IRREVOCABLY APPOINT THE DEPARTMENT AS ITS AGENT FOR SERVICE OF PROCESS IN ANY SUCH PROCEEDING, AND THE SURVIVING ENTITY OR THE NEW ENTITY SHALL SPECIFY THE ADDRESS TO WHICH A COPY OF THE PROCESS SHALL BE MAILED TO IT BY THE DEPARTMENT.

(C) THE EFFECT OF SUCH MERGER OR CONSOLIDATION SHALL BE AS PROVIDED IN § 1005 OF THIS ARTICLE, IF THE SURVIVING ENTITY OR THE NEW ENTITY IS TO BE GOVERNED BY THE LAWS OF THIS STATE. IF THE SURVIVING ENTITY OR THE NEW ENTITY IS TO BE GOVERNED BY THE LAWS OF ANY JURISDICTION OTHER THAN THIS STATE, THE EFFECT OF SUCH MERGER OR CONSOLIDATION SHALL BE THE SAME AS PROVIDED IN § 1005, EXCEPT INSOFAR AS THE LAWS OF SUCH OTHER JURISDICTION PROVIDE OTHERWISE.

COMMENTARY

The draft merger and consolidation provisions set forth herein ("Draft Merger Provisions") are generally modeled on the merger provisions of (i) the Model Business Corporations Act (the "Model Act"), (ii) § 263 of the Delaware General Corporations Act, providing for a merger or consolidation of a corporation and a limited partnership, and (iii) Subtitle 7 of the draft Maryland Limited Liability Company Act, providing for merger of limited liability companies, business trusts, corporations, and limited partnerships. RULPA has no similar
merger provisions. To the extent that each state has adopted modifications to the Model Act provisions for mergers, we would expect that it would consider the necessity to adopt similar modifications to the Draft Merger Provisions.

The Draft Merger Provisions allow for merger or consolidation of limited liability companies, corporations, and limited partnerships. The Committee may wish to discuss the advisability of including other types of business entities such as business trusts, and of distinguishing between stock and non-stock corporations. To the extent that a particular state has chosen to recognize those other types of business entities or distinctions, such state may choose to reflect such recognition in its adoption of the Draft Merger Provisions.

No provision has been made in the Draft Merger Provisions for allowing appraisal or dissenters' rights for members of a merging or consolidating limited liability company. Under the terms of § 1003(a)(1) of the Draft Merger Provisions, a merger or consolidation involving a limited liability company must be approved by the unanimous consent of the members or in the manner prescribed in the operating agreement, which is presumably signed by all the members. Theoretically, dissenters' rights are not necessary to protect a member who has signed an operating agreement providing for less than unanimous consent of the members for approval of a merger or consolidation. This is, however, a subject for discussion of the Committee.

The Committee may also wish to provide an alternative set of model merger provisions for those states who do not choose to allow mergers between limited liability companies and other entities, but wish to provide for mergers between limited liability companies.

None of Wyoming, Florida, or Colorado provide for limited liability company mergers. The Kansas (§ 50) and Utah (§ 48-2b-149) statutes allow for mergers and consolidation of limited liability companies with other limited liability companies. The Virginia statute contemplates mergers of foreign limited liability companies owning property in Virginia and requires a filing in that state. [§ 13.1-1060]
ARTICLE 11
MISCELLANEOUS

§ 1101. FILING, SERVICE, AND COPYING FEES.
THE COMMISSION SHALL CHARGE AND COLLECT:
(A) FOR FILING THE ORIGINAL ARTICLES OF ORGANIZATION, A FEE OF $__________;
(B) FOR AMENDING THE ARTICLES OF ORGANIZATION, A FEE OF $__________;
(C) FOR FILING ARTICLES OF MERGER AND ISSUING A CERTIFICATE OF MERGER, A FEE OF $__________;
(D) FOR FILING A NOTICE OF WINDING UP, A FEE OF $__________;
(E) FOR FILING ARTICLES OF TERMINATION AND ISSUING A CERTIFICATE OF TERMINATION, A FEE OF $__________;
(F) FOR ISSUING A CERTIFICATE FOR ANY PURPOSE WHATSOEVER, A FEE OF $__________;
(G) FOR FURNISHING WRITTEN INFORMATION ON ANY LIMITED LIABILITY COMPANY A FEE OF $__________;
(H) FOR FURNISHING A COPY OF ANY DOCUMENT OR INSTRUMENT, $__________ PLUS $__________ PER PAGE;
(I) FOR ACCEPTING AN APPLICATION FOR RESERVATION OF A NAME, OR FOR FILING A NOTICE OF THE TRANSFER OR CANCELLATION OF ANY NAME RESERVATION, A FEE OF $__________;
(J) FOR FILING A STATEMENT OF CHANGE OF ADDRESS OF REGISTERED OFFICE OR STATUTORY AGENT, OR BOTH, A FEE OF $__________; AND
(K) FOR ANY SERVICE OF NOTICE, DEMAND, OR PROCESS UPON THE COMMISSION AS RESIDENT AGENT OF A LIMITED LIABILITY COMPANY, $________, WHICH AMOUNT MAY BE RECOVERED AS TAXABLE COSTS BY THE PARTY TO BE SUED, ACTION, OR PROCEEDING CAUSING SUCH SERVICE TO BE MADE IF SUCH PARTY PREVAILS THEREIN.
§ 1102. EXECUTION BY JUDICIAL ACT.

ANY PERSON WHO IS ADVERSELY AFFECTED BY THE FAILURE OR REFUSAL OF ANY PERSON TO EXECUTE AND FILE ANY ARTICLES OR OTHER DOCUMENT TO BE FILED UNDER THIS CHAPTER MAY PETITION THE SUPERIOR COURT IN THE COUNTY WHERE THE REGISTERED OFFICE OF THE LIMITED LIABILITY COMPANY IS LOCATED OR, IF NO SUCH ADDRESS IS ON FILE WITH THE COMMISSION, IN THE COUNTY OF MARICOPA, TO DIRECT THE EXECUTION AND FILING OF THE ARTICLES OR OTHER DOCUMENT. IF THE COURT FINDS THAT IT IS PROPER FOR THE ARTICLES OR OTHER DOCUMENT TO BE EXECUTED AND FILED AND THAT THERE HAS BEEN FAILURE OR REFUSAL TO EXECUTE AND FILE SUCH DOCUMENT, IT SHALL ORDER THE COMMISSION TO FILE THE APPROPRIATE ARTICLES OR OTHER DOCUMENT.
§ 1103. APPLICABILITY OF PROVISIONS TO FOREIGN AND INTERSTATE COMMERCE.

THE PROVISIONS OF THIS ACT SHALL APPLY TO COMMERCE WITH FOREIGN NATIONS AND AMONG THE SEVERAL STATES ONLY AS PERMITTED BY LAW.
§ 1104. RULES OF CONSTRUCTION.

(A) THE RULES THAT STATUTES IN DEROGATION OF THE COMMON LAW ARE TO BE STRICTLY CONSTRUED SHALL HAVE NO APPLICATION TO THIS CHAPTER.

(B) THE LAW OF ESTOPPEL SHALL APPLY TO THIS CHAPTER.

(C) THE LAW OF AGENCY SHALL APPLY UNDER THIS CHAPTER.

(D) THIS CHAPTER SHALL NOT BE CONSTRUED SO AS TO IMPAIR THE OBLIGATIONS OF ANY CONTRACT EXISTING WHEN THE CHAPTER GOES INTO EFFECT, NOR TO AFFECT ANY ACTION OR PROCEEDINGS BEGUN OR RIGHT ACCRUED BEFORE THIS CHAPTER TAKES EFFECT.
§ 1105. JURISDICTION OF THE [INSERT NAME OF APPROPRIATE COURT.]

THE [INSERT NAME OF APPROPRIATE COURT] COURTS SHALL HAVE JURISDICTION TO ENFORCE THE PROVISIONS OF THIS CHAPTER.
§ 1106. SEVERABILITY.

IF ANY PROVISION OF THIS CHAPTER OR ITS APPLICATION TO ANY PERSON OR CIRCUMSTANCE IS HELD INVALID, THE INVALIDITY DOES NOT AFFECT OTHER PROVISIONS OR APPLICATIONS OF THIS CHAPTER WHICH CAN BE GIVEN EFFECT WITHOUT THE INVALID PROVISION OR APPLICATION. TO THIS END, THE PROVISIONS OF THIS CHAPTER ARE SEVERABLE.
§ 1107. RULES FOR CASES NOT PROVIDED FOR IN THIS CHAPTER.

IN ANY CASE NOT PROVIDED FOR IN THIS CHAPTER, THE RULES OF LAW AND EQUITY, INCLUDING THE LAW MERCHANT, SHALL GOVERN.
§ 1108. TAXATION.

A LIMITED LIABILITY COMPANY CREATED UNDER THIS CHAPTER OR ENTERING THE STATE PURSUANT TO THIS CHAPTER SHALL PAY SUCH TAXES AS ARE IMPOSED BY THE LAWS OF THIS STATE OR ANY POLITICAL SUBDIVISION THEREOF ON DOMESTIC AND FOREIGN LIMITED PARTNERSHIPS ON AN IDENTICAL BASIS THEREWITH.
§ 1109. TERMINOLOGY AND STATUTORY CONSTRUCTION.

(A) HEADINGS TO SECTION ARE SUPPLIED IN THIS CHAPTER FOR THE PURPOSE OF CONVENIENT REFERENCE AND DO NOT CONSTITUTE PART OF THE LAW.

(B) AS USED IN THIS CHAPTER:

(1) WORDS IN THE PRESENT TENSE INCLUDE THE FUTURE AS WELL AS THE PRESENT.

(2) WORDS IN THE SINGULAR NUMBER INCLUDE THE PLURAL, AND WORDS IN THE PLURAL NUMBER INCLUDE THE SINGULAR.

(3) WORDS OF THE MASCULINE GENDER INCLUDE THE FEMININE AND THE NEUTER.

(4) WORDS OF THE FEMININE GENDER INCLUDE THE MASCULINE AND THE NEUTER.
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
PROCEEDINGS IN COMMITTEE OF THE WHOLE
UNIFORM PARTNERSHIP ACT

Monday, August 2 – 9, 1991
Ritz Carlton Hotel
Naples, Florida

Reported by:
RICHARD S. ADAMS
JEWEL MICHELSOn

Adams
16 Farm Road
San Rafael, CA 94903
Telephone
(415) 472-0350
SEVENTH SESSION
UNIFORM PARTNERSHIP ACT
MONDAY, AUGUST 5, 1991

Peter J. Dykman of Minnesota, presiding.

CHAIRMAN DYKMAN: We will come to order.

There was a question on what partial approval means. It means that this whole act will not be read, only as much as five articles. We hope to have those read as final and come back next year for the rest of the act. But if only four articles can be read and dealt with, then only four articles will be final and coming up on Thursday for a vote by the states.

I think we should start off with the chairman of the committee, commissioner Kneedler, talking about a brief intro.

COMMISSIONER H. LANE KNEEDLER (Virginia):
Thank you, Mr. Chairman. We are delighted to be here. We had two first readings. Now we are here for a first partial reading of our act. What we’re going to do is, hopefully, complete Articles 1 through 5 of the act for a final reading this year.

What I would like to do is briefly introduce the members of the committee who are here. I will start on my left. Curtis Reitz, both a member of the committee and the Chairman of Division A. Gay Taylor
from Utah, member of the committee. Mendes Hershman from New York, member of the committee. Morris Macey from Georgia. Howard Swibel from Chicago, Illinois.

On the right, Harry Haynsworth, Dean of the Southern Illinois University Law School, our official ABA adviser. Bob Cornell from California. Tom Jones from Alabama. Judge Bill Gardner from Washington, D.C. Fran Pavetti from Connecticut. Our reporter, Don Weidner, was Professor Don Weidner from Florida State University Law School, now just recently appointed Dean. So, Dean Don Weidner of Florida State University Law School.

I have said the last two years, I have thanked Don for his extraordinary time and effort devoted to this project. I just want to repeat that again this year. He has been a terrific reporter. For those of you who have had the opportunity to serve as a chair for a conference committee, you know how important a reporter is to the success of your project. Don has been just terrific. Once again, Don, I want to thank you personally and publicly for all you’ve done. You have been terrific.

We have had a number of advisers from various ABA committees and outside the ABA. I just want to make two comments on the advisers. I want to remind -- and
this has been quite helpful -- remind the conference that we have been fortunate enough to have three of the original five members of the ABA’s Committee on Partnership and Unincorporated Business Association, they had a subcommittee on the Uniform Partnership Act that began work in 1984. We have been fortunate enough to have three members of that committee as our advisers: Allan Donn from Norfolk, Virginia, Joel Adelman, Detroit, Michigan, and Harry Haynsworth. That has been extremely helpful so that there has been some continuity between the early ABA work and our own.

We have also had a number of observers. One of them is here today that I would like the conference -- I would like to ask him to stand and be recognized. Lars Rowles [Lauris Ralls] from New York, a member now of the new ABA ad hoc committee on the Revised Uniform Partnership Act. Lars [Lauris], thank you for being here with us today.

This year marks the 77th anniversary of the Uniform Partnership Act. I think it’s fair to say that the act either the or certainly one of the conference’s oldest, yet still active, acts. It was adopted by the conference in 1914 by all of the states with the exception of Louisiana. As I have said each of the past couple of years, I hope we can persuade Louisiana this
time around.

In addition and importantly, it has been the subject of remarkably few amendments over those 77 years. Given this 77-year history of essentially undisturbed existence of the act, I want to remind the conference why there has been an interest in revisiting and, in some cases, substantially revising the act.

We did begin, I want to assure you with a principle that it seems to me is appropriate in these circumstances with an act that is 77 years old and essentially undisturbed, that if it ain’t broke, don’t fix it. ...

There were two efforts in the mid 1980’s that the conference was trying to be responsive to that led to the appointment of this Drafting Committee. The first was to work of George’s committee on its Uniform Partnership Act that proposed, and then the legislature adopted, substantial revisions to that Partnership Act in 1983.

Secondly was the ABA’s effort that I mentioned previously. They undertook a major study of the act in 1984, also keeping in mind that the act had been around for 77 years and had in many ways stood the test of time. Yet, the committee did recommend 150 changes in the act, including 12 new provisions. Now, 66 of those
changes are from what is now Article 6 on, dealing with dissolution, and we won’t get to those this year, but, in short, a substantial number of changes.

The committee was appointed in 1987 and has had 11 full meetings, like so many of the acts, hotly debated meetings, over the past several years and hours of conference calls and our subcommittees as well. We may not have all the answers right, but I hope you will, find that we have devoted substantial time to the major policy issues.

I want to make four general points about the act, then ask Curtis Reitz to report on behalf of the Review Committee, ask Don Weidner to say a couple of comments about the major policy issues, and then get to the line by line reading of the act.

Four general points. RUPA, the Revised Uniform Partnership Act, like the UPA, continues to be in effect a default statute -- that is, it addresses the partnership, often the small or inadvertent partnership, that does not have a partnership agreement, or even for the larger partnership where the partnership agreement does not work or does not address a particular issue. What I ask you to keep in mind is what we constantly tried to keep in mind, and that is the small partnership, we used as a symbol an old beat-
up pickup truck, a small partnership dealing with fire wood. Now, call it RUPA and Friends, if you wish. RUPA and Friends partnership, small partnership, informal partnership, no partnership agreement, in which this act as a default statute will apply.

The second point is, and related, almost all of the provisions of the RUPA can be amended or varied by agreement. There are some exceptions that cannot be or may not be varied, and we will note them as we go along.

The third point is the entity versus aggregate approach to partnership. Don Weidner described this issue in detail last year, and he will touch on it again briefly today. We may have some questions on that issue and we can get into the issue in even greater detail if you issue.

In short, however, RUPA, like the UPA, is a mixed approach, adopting some of entity approach to partnerships and some of aggregate, although it is, as the ABA subcommittee recommended, primarily and predominantly an entity approach.

Finally, while it’s true certainly that RUPA governs general partnerships, please keep in mind that it also covers limited partnerships, except where the Revised Uniform Limited Partnership Act is
inconsistent, in which case it is governed by the Limited Partnership Act.

Mr. Chairman, that is all I have by way of introduction. I would ask for a report from the Review Committee and then ask Don Weidner to make some comments on some general policy issues. Thank you.

CHAIRMAN DYKMAN: Commissioner Reitz.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): Mr. Chairman, the Review Committee consisted of David Barkhausen, Roger Morgan and John Fox Arnold. None of those members are with us at the moment. We have their report in writing, which I will read.

The Review Committee has reviewed the draft of Articles 1 through 5 inclusive of the Revised Uniform Partnership Act to be submitted to the National Conference of Commissioners on Uniform State Laws at its meeting in Naples, Florida, and has determined that the scope of the draft conforms to the assignment given to the special committee, that the policy decisions considered by the special committee are fairly presented in the policy issues memorandum under the date of June 17, 1991, and that the draft is ready for submission to the Committee of the Whole.

....

MR. DONALD J. WEIDNER (Reporter): ...
There are two documents that have been handed out. One is a policy issue statement. I want to not read that to you, but I want to put a little spin on it. The second is a handout on Drafting Committee proposed changes.

The policy issues statement breaks down the policy issues in this act into two kinds. Part 1 describes relatively major decisions, and then Part 2, describes relatively minor decisions. I simply want to say something to you today about each of the five relatively major decisions, and I will try to make it brief.

Decision A, No. 1, RUPA introduces a blanket provision in Section 105 that says that with certain limited exceptions partners may contract out of the rules in RUPA that govern their relations among themselves. The basic policy judgment is that the partnership agreement is supreme as to the relations of the partners as among themselves.

Section 105 does provide that a very limited number of rules in RUPA may not be abrogated by agreement. Most importantly, a partner’s duty of good faith and fair dealing may not be eliminated.

Second major policy decision. RUPA contains a number of provisions that adopt an entity theory to
achieve simplicity. When this conference first commissioned the drafting of the UPA at the turn of the century, it instructed that it be drafted according to an entity theory. Before the UPA was finalized in 1914, there had been a major retreat from that decision.

When we started our work four years ago, roughly 75 years after that, we reviewed the commentary, and the clear thrust of the commentary was that to the extent you had adopted an entity theory, the statute was successful, and to the extent you had adopted an aggregate theory, the statute needed improvement. This was the consensus of the ABA report. That has been the single -- Harry’s committee -- the single most influential document in our discussions, particularly in our early discussions. Nevertheless, we decided at the outset not to “across-the-board” draft the provisions according to the entity theory. We decided to take the decision one issue at a time. And that is what we did. As we took these issues, we tried to craft practical solutions to specific problems. After we finished doing that, we came before the floor and you folks said that we, the committee, had drafted an entity statute, and we had done everything except call the partnership an entity.

We went back after Milwaukee, looked at the
statute, and we changed Section 201, now finally to state that the partnership is an entity. To emphasize, the adoption of an entity approach by us reflects the result of a series of decisions that are designed to simplify and clarify the law. In particular, the provisions adopting an entity approach simplify the law concerning partnership property. In further particular, the provisions of this draft permit partnerships to continue, even after a member leaves.

Third major decision. RUPA Section 303 contains a provision for recording on a voluntary basis and at the state level a statement of partnership authority. The basic purpose of the statement is to bind the partnership by a recorded declaration that a partner has authority to enter a transaction. RUPA Section 303 distinguishes an extraordinary grant of authority from an extraordinary restriction on a partner’s authority. Section 303 also distinguishes real property transactions from other transactions.

In short, a recorded grant of extraordinary authority binds the partnership to a person who gives value without knowledge that there is no authority. If the grant concerns real property, it must also be recorded with the land titles to bind the partnership. A recorded restriction on authority only binds non-
partners who know of it. If the restriction concerns real property, it is effective only if it is recorded with the lane titles.

The fourth major policy decision is that RUPA contains an expanded and exclusive statement of the fiduciary duties of a partner. Over the past four years, this committee has been unswerving in its belief that the partnership act should give greater guidance on the fiduciary duties of a partner. And there are two issues. No. 1, what are the duties among partners who have not addressed the matter in their agreement? No. 2, which of these duties can the partners draft away -- that is, contract out of? If a rule can be drafted away, it’s merely a default rule. On the other hand, if it cannot drafted away, it’s a mandatory rule.

RUPA Section 404 states that the only fiduciary duties a partner owes to the partnership and the other partners are the duty of good faith and fair dealing, the duty of loyalty and the duty of care as described in Section 404.

Under Sections 404 and 105, the duty of good faith and fair dealing is a mandatory rule, whereas the duty of loyalty and the duty of care are merely default rules.

Fifth and last major policy decision was to
rewrite the rules on partnership breakups, while retaining much of the substance of present law. We shall not read the breakup rules to you this year, but. I must note them briefly and I will do it only very briefly.

Under the UPA, the rules on partnership breakups are activated by, and only by, a dissolution, which is defined as the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on of the business. The UPA definition and use of the term “dissolution” have led to considerable confusion.

As Lane mentioned, the ABA white paper recommended 66 changes to those dissolution rules. Under the UPA definition, the departure of any partner is the beginning of the end of the old partnership and is the creation of a new partnership. The result is that there are court decisions that states that the new partnership might not succeed to all of rights of the old partnership. Title lawyers are unsure about the need to convey property from the old partnership to the new partnership if the business is to continue.

Now, while retaining much of the substance of the UPA rules on breakups, in order to address these problems, RUPA redefines the term “dissolution” and.
significantly limits its significance. Under RUPA, the departure of a partner does not automatically cause a dissolution. Under our draft, a dissolution does not take place unless one of a series of special events causes the liquidation of the business of the partnership to begin. Without the causing of such a liquidation, the departure of a partner does not interfere with the continuity of the partnership. Instead, the departing partner is simply bought out and the partnership continues.

One contribution of this draft is that for the first time, it describes the provision of the partnership buyout in some detail.

CHAIRMAN DYKMAN: Commissioner Kneedler will read Section 101.

COMMISSIONER H. LANE KNEEDLER (Virginia):

Thank you, Mr. Chairman. ...

"SECTION 101. DEFINITIONS. In this [Act]:

"(1) ‘Business’ includes every trade, occupation, and profession.

"(2) ‘Debtor in bankruptcy’ means a person who is the subject of:

an order for relief, or a voluntary case under Title 11 of the United States Code;

"(ii) a comparable order or case under a
successor statute of general application; or

"(iii) a comparable order or case under a state insolvency act.

"(3) ‘Partnership Agreement’ means an agreement, written or oral, of the partners concerning the partnership business.

"(4) ‘Partnership at will’ means a partnership in which the partners have not agreed to remain partners until the expiration or completion of a definite term or undertaking;

"(5) ‘Person’ means an individual, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

"(6) ‘Property’ means all property, real, personal or mixed, tangible or intangible, or any interest therein.

"(7) ‘Record title’ means a statement of ownership of property which is duly filed, recorded, or registered under applicable law, and which is effective against a purchaser or holder of a security interest or other encumbrance, for value without notice.

"(8) ‘Transfer’ includes an assignment, conveyance, lease, mortgage, deed and encumbrance.”
CHAIRMAN DYKMAN: Yes, Commissioner.

COMMISSIONER BRADLEY J.B. TOBEN (Texas): It’s no great matter of consequence, but in Line 14 I think that the words “or a voluntary case” could be eliminated without changing the meaning since, of course, the order for relief is entered upon the filing of a petition in a voluntary case. The wording, “order for relief” would take care of the involuntary case. The partnership is not a debtor in bankruptcy until the issues regarding involuntary relief have been determined. It’s a redundancy.

MR. DONALD J. WEIDNER (Reporter): We just finished discussing that at a meeting this morning. That’s a better way to take care of it, I think.

COMMISSIONER TOBEN: In Line 21, is there any reason that “written or oral” or by conduct -- if you want to use the word “implied” -- I prefer the word “conduct” -- is not included there? That seems to be especially important since in your pickup truck partnership, many of the matters have been agreed upon by implied contract as opposed to any written or oral agreement.

COMMISSIONER MORRIS W. MACEY (Georgia): We have been working on the definition. A lot of people have come up with suggestions. Let us study it and I
think we will probably go with it.

COMMISSIONER TOBEN: One matter in connection with that, you might want to take a look at your draft of Section 308 because there you do have the words “written or by conduct,” words “spoken or written by conduct.” There might be a good reason to have consistency there, as well as completeness in the definition here.

Thank you.

CHAIRMAN DYKMAN: Commissioner Cutler.

COMMISSIONER EDWARD I. CUTLER (Florida): Is there any good reason other than the fact that you want to distinguish other things in Article 2 not to include definition of partnership right up here in the first article, the first section?

COMMISSIONER H. LANE KNEEDLER (Virginia): Commissioner Cutler, we have discussed that in the past. The answer is we just felt it fit better here. Can it go in the beginning? Yes, I suppose it could.

COMMISSIONER CUTLER: At the very least, I guess there ought to be a cross reference to it somewhere up front in the comment. I would think that if I were looking for what is a partnership and we have a partnership act, I would look right up front for it.

CHAIRMAN DYKMAN: Commissioner Coggeshall.
COMMISSIONER BRUCE A. COGGESHALL (Maine): Line 21, I wonder if the partnership agreement ought to be the agreement creating the partnership rather than any old agreement that concerns the partnership agreement—partnership business. Substitute the word "creating," then delete the word "business."

CHAIRMAN DYKMAN: What page and line are you talking about again?

COMMISSIONER COGGESHALL: Page 4, Line 21: Partnership agreement is defined as an agreement concerning the partnership business. Now, there well may be a multitude of those, but I don’t think each one of those is a partnership agreement. Really we are talking here about the agreement that creates the partnership.

COMMISSIONER ROBERT H. CORNELL (California): So many of the partnerships are created without an express agreement to start with and evolve. I don’t think we want to limit it to just the agreement that creates the partnership. You don’t necessarily have a formal agreement the way you would in a limited partnership arrangement.

COMMISSIONER COGGESHALL: Then any agreement concerning the business after the creation of the partnership is a partnership agreement under this
definition?

COMMISSIONER CORNELL: Yes.

COMMISSIONER COGGESHALL: I think that creates some problems later on in the statute.

COMMISSIONER CORNELL: Mr. Haynsworth brings out the point that this also tracks the language where it is more formal in the limited partnership act, the same language is used, the business of the partnership rather than the creation.

....

COMMISSIONER THOMAS L. JONES (Alabama):

Section 103 is in the handout, as has been mentioned. There is one additional change right down at the end that I will read to you. Initially I will read from the handout.

"SECTION 103. KNOWLEDGE AND NOTICE.

"(a) A person 'knows' a fact if the person is aware of it.

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

"(1) knows of it;

"(2) has received a notice or notification of it; or

"(3) has reason to know it exists from all of the facts known at the time in question."
“(c) A person ‘notifies’ or gives a notice or notification to, another by taking steps reasonably required to inform the other person in the ordinary course of business, whether or not the other person actually learns of it.

“(d) A person ‘receives notice or a notification’ when it:

“(1) comes to that person’s attention; or

“(2) is duly delivered at the person’s place, of business or at any other place held out by that person as the place for receipt of communications.

“(e) Except as provided in subsection (f), notice or a notification received by a partnership becomes effective for a particular transaction when it is brought to the attention of the individual conducting the transaction and in any event when it would have been brought to that individual’s attention if the partnership had exercised due diligence. A partnership exercises due diligence if it maintains reasonable routines for communicating significant information to the individual conducting the transaction and there is reasonable compliance with the routines. Due diligence does, not require an individual acting for the partnership to communicate information unless the communication is part of individual’s
regular duties or the individual has reason to know of
the transaction and that the transaction would be
materially affected by the information.

“(f) Receipt of notice by a partner of any
matter relating to partnership affairs becomes
effective immediately as notice to the partnership,
except in the case of a fraud on the partnership
committed by or with the consent of that partner.”

CHAIRMAN DYKMAN: Commissioner Cutler.

COMMISSIONER EDWARD I. CUTLER (Florida): I
know the doctrine of imputed knowledge is undoubtedly
covered somewhere in this notice and knowledge section.
I wonder whether you could point me to it. We know that
that certainly has to apply in various kinds of
business organizations, that if someone in the
organization has notice or knowledge of it, it is
imputed to the rest of the organization.

COMMISSIONER JONES: Commissioner, I think, we
intended to cover that in (e). It’s imputed only to the
extent that it -- let me find the exact wording -- that
it would be brought to the attention of the individual
conducting the transaction in the regular routine.

COMMISSIONER CUTLER: Is this meant to be a
limitation on the doctrine of imputed knowledge as it
has heretofore existed?
COMMISSIONER H. LANE KNEEDLER (Virginia):

Commissioner Cutler, that is also taken care of by (f), receipt of notice by a partner serves as notice to the partnership.

COMMISSIONER CUTLER: Except in the case of a fraud in which the person who had the notice --

COMMISSIONER KNEEDLER: Correct. That is right out of the UPA, that last phrase.

COMMISSIONER CUTLER: May I suggest that something be put in the comment to refer to it, if it is limited or at least say that that is the provision covering imputed knowledge. Thank you.

COMMISSIONER DALE G. HIGER (Idaho): I have a question, a concern about notice in Section 103. Does that mean constructive notice? For example, if you have a recorded limitation of authority as provided in 303? It’s really not clear. Certainly in the recording “statutes you have imputed notice or constructive notice as a result of the recording. I think the committee needs to address that issue -- if the committee understands my concern.

COMMISSIONER JONES: I am not quite sure what you’re asking for. I think constructive notice will be notice under this.

COMMISSIONER HIGER: I don’t think the act is
clear on that point.

COMMISSIONER JONES: Do you think a comment would satisfy you on that, or do you think it needs to be spelled out more clearly?

COMMISSIONER HIGER: I think it should be addressed in the act itself, but maybe a well written comment to address it.

COMMISSIONER KNEEDLER: I don’t understand the problem. Can you give me an example.

COMMISSIONER HIGER: For example, if you have under Section 303 a limitation on the authority to convey, and yet another partner conveys title, and a person for good value buys the property and later says, “I didn’t know about this limitation of authority,” it’s not clear that that would not pass title. It seems to me if you had something as far as knowledge, a definition, notice by constructive notice, it would solve that problem.

MR. DONALD J. WEIDNER (Reporter): I think that your problem as to the statement of partnership authority may be addressed under that provision itself.

I think generally in this act we incorporate agency, general agency principles. I think that would cover the partnership through its agent as a corporation through its agent, we get the same kind of
notice you would get from things like recording acts. We tried to confine our act to issues that were peculiar to partnerships.

COMMISSIONER HIGER: I just wonder whether under 103(b) you could not add a sub (4), receives constructive notice or something like that.

COMMISSIONER KNEEDLER: If you want, to draft something, we will be happy to look at it. But I think the reaction of the committee is that the particular issue that you have raised is addressed in 303 itself, and that there does not need to be a general statement here with regard to constructive notice. But if you want to submit something to us, we will be happy to look at it.

CHAIRMAN DYKMAN: Commissioner Coggeshall.

COMMISSIONER BRUCE A. COGGESHALL (Maine): In Section 103(a), it says a person knows a fact if he is aware of it. Is being aware of it any different than "having actual knowledge?"

COMMISSIONER JONES: Commissioner, I don’t think it’s much different from actual knowledge. You might look, the comment, Sections (a) through (e) of this have been an effort to align notice and knowledge under this act somewhat with the UCC. I think part of that language is from there. At someone’s suggestion
earlier, we tried to align this. I think it essentially means the same thing that it would mean under the UCC.

COMMISSIONER COGGESHALL: I think people generally know what actual knowledge means. I am not sure the people know what being aware of something means. I would think it would be preferable to say here that a person knows a fact if the person has actual knowledge of it. If that is the intent, I think that is the way it ought to be drafted.

CHAIRMAN DYKMAN: The committee will look at that. Thank you very much.

COMMISSIONER COGGESHALL: May I make one other point on this section. Subsection (b)(3), Line 10, after the word "known," would the committee consider inserting language "to such person"?

COMMISSIONER H. LANE KNEEDLER (Virginia): Where are you, Commissioner?

COMMISSIONER COGGESHALL Line 10, Page 7 after the word "known," would you insert the language "to such person"?

COMMISSIONER JONES: I think we are going to have a problem with "such," to say the least.

COMMISSIONER KNEEDLER: Commissioner, are you reading from the blue book or --

COMMISSIONER COGGESHALL: I am reading from the
blue book. It says: "A person has 'notice' of a fact if the person has reason to know it exists from all the facts known at the time in question." I think you're talking about all the facts known to that person, not all the facts known in the universe.

COMMISSIONER KNEEDLER: Commissioner; we will take a look at that. My understanding is this is the exact language out of the UCC.

COMMISSIONER COGGESHALL: Perhaps we can improve on that.

COMMISSIONER KNEEDLER: We will take a look at it, commissioner.

CHAIRMAN DYKMAN: Will you please read Section 104, please.

COMMISSIONER JONES: "SECTION.104. SUPPLEMENTAL PRINCIPLES OF LAW.

"(a) Unless displaced by particular provisions of this [Act], the principles of law and inequity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause, supplement this [Act].

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

CHAIRMAN DYKMAN: Commissioner.

COMMISSIONER BRADLEY J.B. TOBEN (Texas): Line 2, the mention of “bankruptcy,” given preemption almost seems to be presumptuous on our part. I am talking here at Line 2, Page 10.

MR. DONALD J. WEIDNER (Reporter): You’re suggesting that it’s arrogance to suggest that we’re in a position to consent to the application of bankruptcy law?

COMMISSIONER TOBEN: Arrogance. As a matter of constitutional law, it’s not necessary and it seems to be perhaps arrogant.

COMMISSIONER EUGENE A. BURDICK (North Dakota): I think that language is found in a great many of our acts. It might be more conspicuous by its absence than having it in there.

COMMISSIONER ROBERT H. CORNELL (California): There are also a number of state bankruptcy acts which have secondary position.

COMMISSIONER TOBEN: I think we should refer to state insolvency act rather than bankruptcy.

....

COMMISSIONER JONES: There is an insertion in 105 that I will read to you. Also, I would suggest to
you that Section 105 is the effect of partnership agreement and can be stated generally that anything in this act is subject to change by agreement by the partnership agreement except the ones that are listed here. Some of them are in sections that will be read at some point later. In fact, all of them will be read at some point later. And some will not even be read this year. We will refer to these in more detail and they will, be flagged for you in the subsequent sections.

"SECTION 105. EFFECT OF PARTNERSHIP AGREEMENT.

"Unless the partnership agreement provides otherwise, this [Act] governs relations among the partners" -- and this where we add the insertion --“and between the partners and the partnership.” Words have been added, “and between the partners and the partnership. However, the partnership agreement may not:

"(1) unreasonably restrict a partner’s access to the books and records under Section 403(b);

"(2) eliminate the duty of good faith and fair dealing under Section 404(a);

"(3) vary the power to withdraw as a partner under Section 601(1), except to require the notice to be in writing;

"(4) vary the right to expulsion of a partner
by a court in the events specified in Section 601(3); or

“(5) vary the requirement to wind up the partnership business in the events specified in Sections 802(5), 802(6), and 802(9).”

CHAIRMAN DYKMAN: Commissioner Coggeshall.

COMMISSIONER BRUCE A. COGGESHALL (Maine): As I read the first phrase in Section 105, in order to take advantage of this provision, the partnership agreement has got to say that this act does not govern relationships between the parties. It seems to me that is not what is intended. What really is intended is that this act will govern except to the extent otherwise provided in the partnership agreement. What I would suggest to the committee is that the language be changed by deleting the word “unless” and just adding the words “except to the extent that.”

MR. DONALD J. WEIDNER (Reporter): I think that is a good idea.

....

CHAIRMAN DYKMAN: Commissioner, “except to the extent the partnership agreement provides otherwise”? COMMISSIONER COGGESHALL: “Except to the extent that.”

COMMISSIONER H. LANE KNEEDLER (Virginia): Commissioner, we will look at it.
COMMISSIONER COGGESHALL: As partnerships are changing from day to day and year to year, there are a whole bunch of different types of partners and rights of partners within these partnerships. There may be equity partners and non-equity partners and a whole bunch of different kinds of partners. It may very well be that the partners agree that a certain class of partners or certain partners within the partnership are not-entitled to certain financial records. The partners ought to be able to freely agree as to which records the partners are going to get and which the records are not going to get.

Let me given you an example. In my own firm, which is about a hundred lawyers, we do not give access to the individual partners information on the compensation of the other partners. Only the Compensation Committee knows that and the individual partners know that. Now, people in this room may think that that is absurd, but I can tell you that due to the traditions and the culture in my firm, that is what we have all agreed to, that is the way we all want it. If you tell us we can’t do it, I think that is wrong. I think that this provision ought not be there. I think that the parties ought to be able to agree what records
the partners are going to see, what records the partners are not going to see.

If a brand-new partner in my law firm came to a senior partner and said, “I want to see the records of this firm,” he would probably be fired.

You may say you have to fit that within the range of reasonableness. I am saying we think that is just fine, we think it is reasonable and it works very well for us and we-ought to be free to do that.

I would like to see this section taken out.

COMMISSIONER THOMAS L. JONES (Alabama): Commissioner, I you think you partially given my response. You think that is not incorporated or encompassed in the unreasonable restriction concept?

COMMISSIONER COGGESHALL: I don’t know. I think if you went around this room, you would have a whole bunch of different opinions as to whether that is reasonable or not. But if it has worked for us and it is something that as you sign off and it’s something you agree to, why shouldn’t we be able to do it?

COMMISSIONER MORRIS W. MACEY (Georgia): I don’t think this can be really -- is this on -- unless we move on to 403(b), why don’t we take another look at it when we get to 403(b).
COMMISSIONER JONES: You have another-shot at that when we talk about 403(b). In the meantime, I suppose the other extreme is whether or not you say they have access to no records.

COMMISSIONER ROBERT H. CORNELL (California):

Mr. Chairman, I think this is a policy matter. If there is a strong feeling about it, perhaps this is the time to look at it. We were looking for a minimum standard that could not be waived.

If that young partner comes in your firm and he becomes a general partner, subject to all the liabilities and everything he owns is at risk, it may -- we are looking for a very minimum amount of right. If is reasonable for him not to know what the compensation is, that’s one thing. But if need comes for him to look at the books of the partnership and he has waived that right, we think that is too much of a waiver. That is the policy that I think the committee has come down on. I think our saying we will look at it is really not an answer to you because we may be persuaded otherwise. But that is the policy that we have right now.

COMMISSIONER H. LANE KNEEDLER (Virginia): Let me suggest, Commissioner, I agree with what Commissioner Cornell said. We have been through this debate and obviously have a policy disagreement with
you. You could make the motion now, or we plan, as we go through each of the provisions that are now included in this list, to remind you that this is something that cannot be varied. Our thought was that that, for at least some members of the conference, might make better sense once we have been through the substantive provision. If you want to raise it now, that is fine. But the point is, we will raise it again when we get 403 if you don’t now.

COMMISSIONER COGGESHALL: Let me ask what the committee’s feeling might be about putting something in the comments to the effect that it may under certain circumstances be reasonable to deny access to certain records to certain classes of partners or to certain members of the partnership.

COMMISSIONER KNEEDLER: It does say now “may not unreasonably restrict.” In fact, I asked Don Weidner as you were making your comment whether under these circumstances you might be able to say that was not unreasonably restricting. I think we both agree that that probably would be an unreasonable restriction the way we have written it. But that is still a possibility.

MR. DONALD J. WEIDNER (Reporter): We had considered and had included in earlier drafts
provisions respecting particular classes of partners and decided to drop those provisions. We had, for example, special rules governing management partners. The conceptual problem is essentially how can the same act cover democratic, egalitarian partnerships and hierarchic partnerships and there is going to be a tension there.

COMMISSIONER COGGESHALL: All I’m suggesting is you that might put in the comment that there may be circumstances that would make a complete denial to access to certain records a reasonable restriction.

COMMISSIONER WILLIAM GARDNER (Washington, D.C.): Another factor that might be considered here is the fact that a partner is jointly and severally liable for partnership business and conduct and so forth and so on. That might have a bearing upon his right to see books and records.

COMMISSIONER MORRIS W. MACEY (Georgia): I would point out to the commissioner that under the present Uniform Partnership Act, which Maine has adopted, Section 19 with reference to partnership books provides that the partnership books shall be kept subject to, et cetera, et cetera, every partner should at all times have access to and may inspect and copy any of them. And Section 20 says that partner shall
render on demand true and full information of all things affecting the partnership. So, apparently --

COMMISSIONER COGGESHALL: I am not sure that that is an agreement that cannot be varied under the existing Uniform Partnership Act.

COMMISSIONER MACEY: You have to be able to deal --

COMMISSIONER COGGESHALL: We can vary that the existing act.

CHAIRMAN DYKMAN: Commissioner Lisman.

COMMISSIONER CARL H. LISMAN (Vermont): I would urge the commissioner from Maine to defer further discussion until we reach the substantive provision. I think part of the problem is that sub (a) of the substantive provision talks about books and records, and it may be that that would be a location to discuss what precisely is meant and which books and records we are talking about.

CHAIRMAN DYKMAN: Commissioner Miller.

COMMISSIONER FRED H. MILLER (Oklahoma): What is the purpose of Section 105?

MR. DONALD J. WEIDNER (Reporter): In the UPA, there are many places when the UPA provides that a rule governing the relation among partners is subject to a contrary agreement or subject to the agreement among...
the partners. Many people who have looked at the UPA said that one of the problems is that there appear to be rules that are subject to be subject to agreement by the partners that not stated to be. And under exclusio alterius there is uncertainty about whether this rule that is in Maine right now is a default rule or mandatory rule.

People asked us to be straight up about the policy decisions and make it clear which rules are default rules and which rules are mandatory rules. The purpose of this is to pull together a list and be specific in one place about those rules that are mandatory as among the partners. If it’s not listed here, then it can be contracted away and it saves us saying subject to agreement among the partners 20 or 30 times, or more, and forgetting it in some places.

COMMISSIONER MILLER: I take it, for example, it is redundant with Section 404(a), which purports to say the same thing, the duty may not be alienated by agreement.

COMMISSIONER H. LANE KNEEDLER (Virginia): No, that is not the case. 404(a), I believe, says it may not be eliminated, but then says it may be varied. That is the only place where we have done that, I believe, and that is because we wanted to say that --
COMMISSIONER MILLER: Well, to the extent that the two are the same, Lane, it seems to me to be redundant. But my point, which I am getting to, is that 404(a) then goes on to indicate that it can set a standard. But also am I to take it that the duty of loyalty in 404 and the duty of care in 404 may be completely eliminated?

I think what you’re really doing, as the reporter explained, is in Section 105 you are making a road map. It’s not a substantive provision. You get to, perhaps, the substance in 404(a). I think you ought to make that clearer. It’s not at all clear when you look at that particular instance to me whether you really do intend this to be an absolute limitation so that in effect by implication you can completely eliminate the duty of loyalty and the duty of care.

COMMISSIONER KNEEDLER: May I make a suggestion on this. There may be others with specific suggestions, but, Fred, I think, at least to us, this all became clearer as we got through the entire act. Our intent is because over half of these provisions are in what we are going to cover next year is to -- I know we are going to as a committee, and I am sure the floor, come back to 105. It may be that there will be other problems with the general language, not just with the
list of what else should be added or what should be subtracted from that list. Our intent is to come back, at least wish this provision and the first five articles covered again next year.

CHAIRMAN DYKMAN: Commissioner Langbein.

COMMISSIONER JOHN H. LANGBEIN (Connecticut):

In keeping with Fred Miller’s remarks, I think there are two separate issues involved in 105. One is the question of whether it is sensible or useful to collect in one place, up front, what amount to road mark indications of where you have mandatory non-waivable sections in what is otherwise a default statute.

Point 2 is whether you have done that thoroughly, completely, whether you have captured everything.

I think those are two separate issues that are at stake here. I think Fred was pointing to problems where you had not fully captured all of the mandatory measures that are out there later in the statute.

For myself, I think that it is indeed a wise idea to indicate up front to capture for people in one place the notion of where those mandatory rules are. what I would to be sure is that the label is a little different. I think it probably ought to indicate something to the effect non-waivable provisions,
mandatory provisions, some such thing, as opposed to the bland title that you have got, and the later on that you make very sure that your substance matches with your aspiration.

COMMISSIONER ROBERT H. CORNELL (California): Fred, we actually, much to your horror, did intend the result that you mentioned with respect to duty of care and duty of loyalty. Your objection will be when those sections come up, not to the road map, but to where the road map is going.

By the same token, as we go through the act, if there is anything that looks like it should not be varied under any circumstances, if that offends you, 105 really should be visited on those items. The general principle is anything is changeable by contract under this act. It is all up for grabs, except for the few limitations that are set forth here. We made a policy decision, which you may disagree with, with respect to duty of care. We think it should be varied by agreement. But, if you disagree with that, then at this time you may want to revisit 105.

....

COMMISSIONER HOWARD J. SWIBEL (Illinois)

"SECTION 201. DEFINITION AND EXISTENCE OF A PARTNERSHIP."
"(a) A partnership is an entity resulting from the association of two or more persons to carry on as co-owners a business for-profit.

"(b) An association created pursuant to a statute other than this (Act) or a statute of another jurisdiction comparable to this [Act], is, not a partnership.

"(c) Except as provided by Section 308, persons who are not partners as to each other are not partners at to other persons.

"(d) In determining whether a partnership exists, the following rules apply:

"(1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

"(2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

"(3) The receipt by a person of a share of the profits of a business is prima facie evidence that the person is a partner in the business, but that inference may not be drawn if the profits were received in
payment:

"(1) of a debt by installments or otherwise;

"(2) for services as an independent contractor, or of wages or other compensation to an employee;

"(3) of rent;

"(4) of an annuity or other retirement or health benefit to a beneficiary, representative, or designee of a deceased or retired partner;

"(5) of interest—or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership interest in the collateral, or rights to income, proceeds, or increase in value derived from the collateral; or

"(6) of consideration for the sale of the goodwill of a business or other property by installments—or otherwise."

CHAIRMAN DYKMAN: Commissioner Lisman.

COMMISSIONER CARL H. LISMAN (Vermont): I have two comments on this section. The first goes to (d)(1).

I guess I am little disturbed -- maybe that is too strong -- a little surprised that the establishment of a joint tenancy or a tenancy by the entirety might give rise to the assertion that it's really a
partnership in tenancy clothes. I would have thought that sub (1) would have been more aggressive in the presumption that the establishment of a relationship as those described on Lines 20 and 21 are presumed not to be a partnership -- affirmatively presumed not to be a partnership.

COMMISSIONER HOWARD J. SWIBEL (Illinois): That Section (d)(1) that you are referring to is almost a verbatim carry forward of Section 7(2) of the existing Uniform Partnership Act.

COMMISSIONER LISMAN: I understand that.

COMMISSIONER SWIBEL: We were not aware that it had caused problems that needed to be addressed.

COMMISSIONER LISMAN: I sympathize with the "if it's not broke, don't fix" rule, but I think that when you have an opportunity to eliminate a potential ambiguity, you should take it.

....

COMMISSIONER LISMAN: Subject (e), I wonder if the committee give any consideration on incorporating in the concept in addition to a share of the profit a share of the tax benefits.

MR. DONALD J. WEIDNER (Reporter): We didn't consider the tax issues on that particular point. We had gone in at one earlier point in the project about
two years ago, we went in and rewrote a lot of this. We decided, well, let's do it right, even though it ain't broke, let's make it read a bit better. We tried to improve on it, frankly, and excited an awful lot of interest in the project. We were persuaded basically we were beaten back to this point. I feel comfortable with that. Throughout, though, the issue of how deal with tax shelter partnerships has come, in and out of the project.

COMMISSIONER EDWARD I. CUTLER (Florida): First, with regard to the tax item, let me point out that would probably be a mistake, particularly, if you're dealing with personal property leases, you all know how tax allocations are made in those transactions.

That is not why I rose. I rose to the first line in this section, Line 8, "A partnership is an entity," and, so forth. As the committee knows, I dealt with this issue or referred to it last year, and I have had an ongoing concern about it. "If ain't broke, don't fix it" could certainly apply to this, I suppose. And I guess the conclusion is, although there was a fight between Dean Ames and Dean Louis a year or two after I was born, that maybe they were wrong and it needs to be corrected. I am willing to keep an open mind until the
rest of the act is read.

In the opening remarks, it was stated that in some aspect the ... [aggregate] theory still applies in this act. And I wonder how this provision, subsection (a), squares with that. ... I would like to know whether you can tell us in which provisions the aggregate theory prevails or still applies under this act. And, if so, whether there shouldn't be a listing of those, some exception which, says an. entity except that for certain purposes is not an entity.

MR. DONALD J. WEIDNER (Reporter): As to the debate at they turn, of century, I think what we are saying is that Ames was right and Lewis was wrong.

In terms of our debate, we discussed just before this meeting, we want to report to you when we are fragmented and when, we are together. We are really together on this, both within the committee and with the ABA.

I have not received a single comment from ABA, other State Bar associations, people in this conference that have pointed to a particular adoption of the entity theory in this act and said it is inappropriate as a matter of partnership law. There are people who have suggested: that it may have untoward consequences, under other bodies of law, such as the Fifth Amendment
privilege against self-incrimination. But people, haven't been suggesting it's been inappropriate under 
this act.

I have to confess my failure to update the comments to conform with what we have done. I was one of the people initially resisting a quick adoption of the entity theory. I think some of the commentary overstates the continued vitality of the aggregate theory. The one place that could be seen as most incorporating an aggregate theory is in our statement of the fiduciary duties among partners. However, I think it's merely an articulation in terms of duties running from one partner to another or one partner to a group of partners that is not inconsistent with an entity theory, just as articulating a fiduciary duty, from a majority shareholder to a minority shareholder is not viewed as inconsistent with the entity theory of corporations.

I think the answer is that in terms of the logic of the theory driving a result, I can't think of a place in the act where it does.

COMMISSIONER CUTLER: ...

I buy your explanation. I accept your explanation, that even within corporations, particularly small corporations, there may be a
fiduciary relationship between shareholders. So, the mere fact that you say that could be an exception to the entity theory, but you don't agree with that, I agree with you on that point.

On the other hand, if the only reason for calling a partnership an entity is to provide for the ability to sue or be sued in its own name or to have title taken in the fictitious name of the partnership, I don't see why you need an entity for that. Because, as you know, in a number of states, that has been accomplished simply by saying it can be done and not destroying the entity theory.

I guess we will have to go through the act, but if nobody does know of any reason to say that the aggregate theory applies anywhere, then I guess we have to buy your conclusion. Lane may be prepared to say something different. If his only explanation is with regard to the fiduciary relationship, I will sit down.

MR. WEIDNER: I have been asked by a couple, of people to mention that there is a continued vitality of the aggregate theory insofar as each partner is unlimitedly personally liable for the conduct of the partnership, where stockholders are not.

COMMISSIONER CUTLER: That is a very significant difference.
MR. WEIDNER: Much of the protections we have in this act, like the mandatory acts as to records, are in there because we're saying this partner is a special kind of animal, this partner has everything on the hook. To that important extent, it's still an aggregate conception.

I think, on the whole, moving to the entity approach wasn't merely a technical matter of bringing suit, but, for example, the greatest amount of rewriting that we have done has been in the breakup rules. And essentially what we do is simplify the law of partnership breakups by treating it as an entity from which people can withdraw without disrupting the whole partnership.

COMMISSIONER CUTLER: I must confess, my original concern -- and I no longer really practice tax law -- was that if you called it an entity, the IRS, would say it's an association and tax it as an association rather than a partnership. But my tax partners have ruled me out of order on that, so I will go along with you.

COMMISSIONER BRUCE A. COGGESHALL (Maine): I wonder if there might be a gap in subsection (b). As I read this, neither a limited partnership nor a partnership formed prior to the adoption of this act is
a partnership.

MR. WEIDNER: There seem to be two points in there. No. 1, a limited partnership is not a partnership.

COMMISSIONER COGGESHALL: Wait a minute, look at Section 102. It says: This act governs limited partnerships.

MR. WEIDNER: It governs, limited partnerships even though they're not general partnerships.

COMMISSIONER COGGESHALL: But they're still a class of partnership, they're still a partnership.

....

MR. WEIDNER: I don't think, if you read the two acts, that we have increased any-uncertainty about the extent to which this act applies to limited partnership acts.

I think your other point is a point about transition rules, and we haven't worked out the transition rules. That is coming in the back part of the statute that we plan to give a first reading to next year, but we just haven't done, that yet.

COMMISSIONER COGGESHALL: I don't know how you can say in Section 102 that this act governs limited partnerships to the extent not provided for by the limited partnership act and say in this section that
unless you're formed under this act you're not a partnership. It, would be. a simple thing to say an association created pursuant to a statute other than this act or the limited partnership, act or the other thing that you've got listed here is not a partnership.

CHAIRMAN DYKMAN: The committee will have to take a look at that.

COMMISSIONER COGGESHALL: In last year's draft you did take care of the problem of a preexisting partnership in this section.

MR. WEIDNER: We will take a look at it.

COMMISSIONER EUGENE A. BURDICK (North Dakota): Subsection (a) raises a question in my mind, can you have a partnership formed to engage in ... [an] illicit business?

MR. WEIDNER: There are probably many of those in this country.

COMMISSIONER BURDICK: Is that good policy to recognize that they are partnerships?

COMMISSIONER HOWARD J. SWIBEL (Illinois): Not to be facetitious, but I think we thought they would be outside the scope of this act. The 1914 act had basically the same language, except it didn't use the word "entity." We're carrying forward on a commercial basis the same concept. We are not talking about
whether it's morally repugnant or against criminal statutes, or something else.

COMMISSIONER BURDICK: That's what I was wondering, if the partnership is to engage in drug traffic, illicit drug traffic, is that going to be recognized as a partnership?

COMMISSIONER THOMAS L. JONES. (Alabama) Commissioner, it's the same as a business corporation act.

COMMISSIONER BURDICK: I am just wondering if we should be recognizing these entities as legal entities, where they're so engaged

MR. WEIDNER: We have not considered a provision that excludes an illegal activity group from the definition of partnership. In the first place, we have, in the back of the statute, Section 802, provides that if the activity -- substantially all the activity of the partnership is illegal, the partnership must be liquidated.

CHAIRMAN DYKMAN: Commissioner Ossen.

COMMISSIONER NEAL OSSEN (Connecticut): I would like to talk about (e)(5), which you state comes from the uniform act that has not been enacted in any states, the fettering or the clogging of the title. It seems like you haven't been with full candor in your
comments, what you're really doing is overruling a Second Circuit case, and then when you make reference to your revenue ruling, it deals with residential loans, not commercial loans. I want to know if the committee would be willing to consider deleting (e)(5).

MR. WEIDNER: (e)(5) is -- actually the one substantive course correction we have made in the act statement of what constitutes a partnership or not, that, frankly, I am willing to confess to ignorance but not lack of candor. That came to us from a number of sources. It was surprising, people from within the conference and outside the conference urged the other uniform act on us as containing this language, which people said would be good to add to this section to help us give some comfort to a shared appreciation mortgagee to say that to say that a shared appreciation mortgagee isn't automatically a partner. I don't know of the case that you're referring to.

COMMISSIONER OSSEN: You're overruling the case that you cited in the comments.

MR. WEIDNER: You mean Farley Realty?

COMMISSIONER OSSEN: Yes.

MR. WEIDNER: Farley Realty is an old tax case that's got the old-time religion conception of loans. It has nothing to do with the kinds of issues that are
in the partnership statute it's sad that that's -- Farley Realty is reaching to find authority, on the status of shared appreciation mortgagee.

COMMISSIONER OSSEN: Let me suggest that when you have a shared appreciation mortgage in which 50 percent of the gross profit upon sale goes to the lender, and throughout the whole term of the mortgage loan, ten years, fifteen years, you have a lock box agreement where the borrower gets a pittance pursuant to some lock box agreement, you can't tell me in today's world that there is not a partnership arrangement there. The lender can't have it on one side where he gets everything and the borrower gets nothing.

I would like -- I won't make a motion now, but I would like the committee to consider that some of these arrangements are too close, that they shouldn't be considered partnership arrangements for the purposes when the deal goes south.

MR. WEIDNER: I think that is a good policy issue. I think the same issue arises in the case of a traditional straight debt when you exact lots of interest and lots of fees. You could do the same thing that way.

COMMISSIONER OSSEN: Subject to perhaps usury.

CHAIRMAN DYKMAN: Commissioner Cutler.
COMMISSIONER-EDWARD I. CUTLER (Florida): I hope you won't get into when is a lender a partner. The real issue is one of control, I should tell you. And I suppose there are other provisions in this act that say if you control a partnership you're a partner. But I think this committee would be going astray going into all the features under which a particular circumstance a lender could be a partner.

COMMISSIONER H. LANE KNEEDLER (Virginia): I want to respond to something Commissioner Ossen said. Commissioner Ossen, I didn't hear the first part of your comment. But if you said that we said that came from the UPA, that's not accurate. We said it came from the Land Security Act, and that's accurate.

COMMISSIONER OSSEN: But I also said it was also an act that has not seen the light of day in any of the 50 states.

COMMISSIONER KNEEDLER: That may be but we did not imply that it was something really being carried forward from the UPA.

COMMISSIONER BRUCE A. COGGESEHALL (Maine): Given the theory of the act that partners by agreement can define the relationships between themselves, can a partnership agreement say that in spite of all the indicia of partnership that we have in this business
arrangement, we have decided that we are not partners.

MR. WEIDNER: 105 is as between themselves they might decide they're not partners. With respect to the rest of the world they would be.

COMMISSIONER COGGESHALL: But you concede that under 105 they could say we're not partners. And by doing that, opting out of all the mandatory provisions of the act.

MR. WEIDNER: Among themselves, they could opt out of any protection under the act, but they would be exposed as general partners to the rest of the world.

COMMISSIONER COGGESHALL: Do you think that is a good result?

MR. WEIDNER: Yes I think so.

CHAIRMAN DYKMAN: Commissioner Swibel will read Section 202

COMMISSIONER HOWARD J. SWIBEL (Illinois):

"SECTION 202. PARTNERSHIP OWNS PARTNERSHIP PROPERTY.

"(a) Property transferred to or otherwise, acquired by a partnership becomes property of the partnership and not of the partners individually.

"(b) Partnership property is not subject to exemptions, homesteads, or allowances of a partner."

....
COMMISSIONER SWIBEL: "SECTION 203. WHEN PROPERTY IS PARTNERSHIP PROPERTY.

"(a) Property may be acquired in the partnership name or in the names of all of the partners with an indication that they are doing business as a partnership. Title to property so acquired vests as partnership property in the partnership itself and not in the partners individually.

"(b) Property is partnership property if acquired in the partnership name or in the names of all of the partners with an indication that they are doing business as a partnership.

"(c) Property is presumed to be partnership property if purchased with partnership funds, even if acquired in the name of one or more partners.

"(d) Property acquired in the name of an individual partner without use of partnership funds, is presumed to be the separate property of that partner. even if used for partnership purposes.

"(e) If record title to property is not in the partnership name or in the names of all of the partners with an indication that they are doing business as a partnership, the property is not partnership property as against a person not a partner unless the person knew it was partnership property."
"(f) A transfer to a partnership in the partnership name even without words of inheritance, passes the entire estate or interest of the grantor; unless a contrary intent appears."

....

COMMISSIONER CARL H. LISMAN (Vermont): If real estate taken in the names of A and B doing business as Naples Realty, how does that fit in the context of the first sentence of subsection (a)? I have understood that if it doesn't say doing business as Naples Realty, a partnership, it doesn't satisfy the standards of (a). Am I right?

COMMISSIONER H. LANE KNEEDLER (Virginia): I thought in your hypo they took it doing business as --

COMMISSIONER LISMAN: As Naples Realty, but it didn't say a partnership.

COMMISSIONER-KNEEDLER: Commissioner Lisman, it says in your hypo it was acquired in the partnership name, right?

COMMISSIONER LISMAN: Title was taken as A and B doing business as Naples Realty.

COMMISSIONER KNEEDLER: That is the way it was taken?

COMMISSIONER LISMAN: That is the way it was taken.
COMMISSIONER SWIBEL: Your question really goes to the reading. I understand. We had the same question come in our committee meeting this morning. It's my understanding that the phrase with an indication that they're doing business as a partnership modifies the names of all the partners. But if the name of the partnership is Naples Realty; and it simply says doing business as Naples Realty, then it does satisfy (a), the way we have intended it to be read.

COMMISSIONER LISMAN: The way that you satisfy -- you can do it one of two ways. You can say A and B doing business as Naples Realty, if there is some other place a partnership, designation Naples Realty, or, it, would be A, a partner, and B, a partner.

COMMISSIONER SWIBEL: Exactly. Or A and B as partners, or something like that.

CHAIRMAN DYKMAN: Commissioner Toben.

COMMISSIONER BRADLEY J.B. TOBEN (Texas): In subsection (f), last line, which is Line 14 on the page, unless a contrary intent appears, is that a contrary intent that is evident in the instrument of transfer or may we go outside of the instrument of transfer to establish that intent.

MR. DONALD. J. WEIDNER (Reporter): I am not sure of the case law on this. I understood this to be a
section that simply says you don't need the words, quote, and their heirs.

COMMISSIONER TOBEN: I think it's very critical.

MR. WEIDNER: I did not research this. I assumed it meant that the contrary intent could appear outside the document, especially if the initial grantors and initial grantees were involved.

COMMISSIONER TOBEN: I would agree with you in regard to the parties to the transaction, the grantor and the grantee. But that more or less underscores the need to consider the matter further in regard to the non-immediate parties, because without a rule here, I think we may be opening a real Pandora's box in regard to evidence of intent when we are dealing with subsequent transferees.

COMMISSIONER SWIBEL: There probably is a very specific answer to your question because this precise language has existed since 1914. If the Pandora's box was opened, it was opened up long ago. If it has caused problems, they probably have been reported somewhere. I can understand the question. There probably is an answer to it.

COMMISSIONER TOBEN: I am not aware of it being treated in partnership law. It has, of course, been
treated in real estate finance law. But I would ask the committee to take a look at it.

CHAIRMAN DYKMAN: Commissioner Cutler.

COMMISSIONER EDWARD I. CUTLER (Florida): Are we dealing with 203(a)?

CHAIRMAN DYKMAN 203.

COMMISSIONER CUTLER: With regard to (a), I heard the story about the partnership having a name like somebody's apartments. There are quite a few instances where a partnership has its own partnership name, but still does business in another fictitious name. You could have West Coast Realty Limited and it trades as West Coast Apartments.

Is there any reason why this section shouldn't exclude something which says "or an authorized fictitious name"? The fictitious name laws of our state would require a statement publicly made in an affidavit that is filed of the composition of the business entity using a fictitious name. Frequently, affairs are conducted in that fictitious name, particularly an apartment house or a shopping center and the like. Is there any reason why that should not be included in 203(a)?

COMMISSIONER H. LANE KNEEDLER (Virginia): It seems to me there is a positive reaction on the
committee. We will take a look at that.

CHAIRMAN DYKMAN: Commissioner Baggett.

COMMISSIONER BRYCE A. BAGGETT (Oklahoma): May we go back to 202 for a moment.

....

COMMISSIONER BAGGETT: Does this mean that a husband-wife partnership cannot enjoy a farming partnership, cannot enjoy homestead exemption in the family farm?

COMMISSIONER KNEEDLER: No.

COMMISSIONER BAGGETT: Isn't that what it says? A husband and wife own a farming partnership and the family farm is in their names as farming partners. Have they given up homestead exemption?

MR. HARRY HAYNSWORTH (ABA Adviser): This has been the law since the 1914 act. There never has been a right of a partner in partnership property. It belongs to the partnership. But a partner's interest in the partnership -- that is, the right to the income and other distribution from the partnership, in that interest, a partner can claim a homestead or whatever other exemption law would apply.

COMMISSIONER BAGGETT: But this language doesn't then mean what it says, that if they put the family farm in the partnership, they have lost the
homestead exemption.

MR. HAYNSWORTH: If they put the land into the partnership, yes. If they simply are operating a partnership and the land is in their individual title, which is very commonly done, then that land would be subject to whatever homestead rights they have. But if they put the land in the partnership, it would not.

COMMISSIONER BAGGETT: If they own the land jointly anyway and they haven't excluded the possibility of being the partnership, are they subject to some evidentiary problems of whether or not it's in the partnership? As a creditor, I might want to go after it. You have given, me a new idea I haven't had since 1914.

COMMISSIONER MORRIS W. MACEY (Georgia): Commissioner Baggett, it's been pretty clear, and there are a lot of reasons why one can't claim a homestead on exemption in property of the partnership. One can claim an exemption on homestead in one's interest in property ... [outside] the partnership.

....

COMMISSIONER MENDES HERSHMAN (New York):

"SECTION 301. PARTNER AGENT OF PARTNERSHIP AS TO PARTNERSHIP BUSINESS. Subject to Section 303:

"(1) Each partner is an agent of the
partnership for the purpose of its business, and the act of each partner, including the execution of an instrument in the partnership name, for apparently carrying on in the usual way the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner in fact has no authority to act for the partnership in the particular matter and the person with whom the partner is dealing, knows that, the partner lacks that authority.

"(2) An act of a partner which is not apparently for carrying on in the usual way the partnership business or business of the kind carried on by the partnership does not bind the partnership unless authorized by the other partners.

"(3) An act of a partner in contravention of a restriction on authority does not bind the partnership to persons knowing of the restriction.

COMMISSIONER DALE G. HIGER (Idaho): I want to ask a question of the committee on 301(1), Line 13, "knows." If the certificate of partnership authority or statement of partnership authority restricts a partner from conveying title, maybe restricts Partner A from conveying title and vests that with Partner B, and the partnership authority is filed with the Secretary of
State and also recorded in the county, where the real
property is located, and then Partner A proceeds to
transfer title to a third party and that person does
not examine either the Secretary of State's file or the
county records, does this person know that, Partner A
does not have authority to transfer the property? That
goes back to my earlier comment about constructive
notice.

COMMISSIONER HERSHMAN: I think it does. If he
knows, then that is the end of that.

COMMISSIONER HIGER: But if he does not know --

COMMISSIONER HERSHMAN: If he does not know, I
would think perhaps that the instruments of record
would indicate that. If it is a question of title to
real estate, there would be instruments of record.

COMMISSIONER HIGER: Are you saying that he
knows that because of the filing of the partnership
authority?

COMMISSIONER HERSHMAN: Yes.

COMMISSIONER HIGER: My question is, I don't
think the act is entirely clear. You either have to do
it by way of a comment, or I am asking for purpose of
clarity that the act be amended to make that clear.

COMMISSIONER H. LANE KNEEDLER (Virginia): We
were talking on this side, I didn't hear the answer
over there, but I think "knows" as it appears here would mean actual knowledge, not constructive knowledge with it being final.

COMMISSIONER HIGER: The commissioner on the other side disagrees with you.

COMMISSIONER HERSHEYMAN: We start off with "subject to Section 303" Look at 303, see if that doesn't solve your problem.

COMMISSIONER HIGER: With all due respect, I have read 303 and 301. I think that it's not addressed by the act. I think there is confusion. All you are, going to be doing, if you don't make the change you are going to be inviting litigation to make a determination as to whether Partner A had that authority. I think that if we are going to revise the act, we ought to try to solve this problem.

COMMISSIONER HERSHEYMAN: If you look at 303, you have a statement of partnership authority, lists the name of the partnership and the street address of the office of the partnership in the state, if there is one, or the principle executive office lists the name and street addresses of either all of the partners or an agent appointed and maintained by the partnership. It is signed and acknowledged by all of the partners, if there are tenor fewer partners, and by at least ten
partners.

You really know everything about that property if you follow 303. Must specify the partners required to sign a transfer of real property; held in the name of the partnership. May contain any other matters the partnership chooses, including the authority or limitations upon the authority of some or all of the partners to enter into other transactions on behalf of the partnership.

COMMISSIONER KNEEDLER: I was incorrect, Commissioner Hershman is correct, 303 does cover the issue you have raised.

COMMISSIONER HIGER: Then you're saying that you do have constructive knowledge.

COMMISSIONER KNEEDLER: In the 303 situation, which is, what you posited, is that correct?

COMMISSIONER HIGER: Right. But what I am saying is why don't you go back in Section 103 and make some recognition that constructive notice does apply, because I don't think the act is clear.

COMMISSIONER ROBERT H. CORNELL (California): Correct me, Mr. Reporter, or Lane if I am wrong on this, I think that under 301(1) we require [that] the [level of] knowledge of [someone who] "knows that the partner lacked that authority" means actual knowledge,
as defined. Constructive notice is a limited constructive notice given under 303. This starts out: Except as provided or subject to Section 303. In 303 we have given some constructive notice on that certificate, but when we go into it you will see it is very limited, constructive notice, it only applies to real estate with respect to lack of -- if it's anything other than real estate, there will be no constructive notice given.

MR. DONALD J. WEIDNER (Reporter): Page 22, Line 18, after the title, it says "subject to Section 303."

COMMISSIONER H. LANE KNEEDLER (Virginia): In the handout, Page 3, Line 4, says "subject to 303." Mr. Weidner just stated where it is in the blue book.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): If I can supplement that, if you will look at 303(i)(2), you will find, that a limitation on the grant of authority is constructive, notice to anyone not a partner.

CHAIRMAN DYKMAN: Commissioner Miller.

COMMISSIONER FRED H. MILLER (Oklahoma): I would suggest that we could have shortened that confusion if instead of subject to 303 you had been more specific, because it seems very misleading when
you define "knows" to mean actual knowledge.

But let me ask the broader question outside of that context. That means then, in essence, that you're protecting somebody who may have all the reason in the world and actually close that person eyes to prevent actual knowledge. Is that a policy that has existed for a long time, and what is the defense of that policy?

COMMISSIONER MENDES HERSMAN (New York): I didn't know that that policy ever existed.

MR. WEIDNER The language that I think is of concern, the general language, apart from the statement of partnership authority at the end of 301(1) is original language, I think it's less than perfect. All it says is a partnership can be bound by a partner's apparent authority unless the person he was dealing with knows that he had no authority. That is all it says. It's almost baby talk. It's a general statement that partners are bound by either actual authority or apparent authority. And if there is an appearance of authority, that is not good enough to stick the partnership if the person perceiving the appearance knows better. And it's never been interpreted in the way you suggest. I think you're quite right, if it were interpreted that way, it would be offensive and I think would be offensive to this committee.
COMMISSIONER HOWARD J. SWIBEL (Illinois): To be direct in responding to your question, Fred, the existing act does not use the word "knows," it uses "has knowledge." It defines knowledge to be actual knowledge or where the circumstances show bad faith. So, the current act is a little broader.

COMMISSIONER MILLER: Yes, it is. You narrowed this -- I am not sure I would even subscribe to that because it means essentially -- well, maybe it doesn't mean you can close your eyes and avoid actual knowledge because I suppose one can argue that is bad faith. But I don't know we want to go as broad as just "notice."

What's the policy for at least reducing the purview from the present act? Is there a problem there?

COMMISSIONER KNEEDLER: Commissioner Miller, what if it changed to "has notice"? Does that take care of your problem? Would you say that was too broad?

COMMISSIONER MILLER: I don't know.

COMMISSIONER KNEEDLER: "Has notice" is defined as notice of it, which is the actual knowledge or aware, has received a notice or notification or has reason to know it exists from all of the facts known at the time in question.

COMMISSIONER MILLER: Is there some reason not to have a duty of inquiry?
COMMISSIONER SWIBEL: Yes, there would be a policy reason, because right now there is no such thing as filing statements of authority, there is nothing to check as far as record. The current act does not impose any due diligence on people doing business with partnerships. And one of the advisers pointed out to us that one of the contributions this act could make is to make it easier for partnerships to do business with lenders and others.

COMMISSIONER MILLER: It certainly would, do that. But I mean you seem awfully ambivalent about this. You're willing to go from a restriction, now you suggest maybe "notice" would --

COMMISSIONER KNEEDLER: I am asking how you felt. I am asking whether that took care of your problem. I don't know how the committee feels about that, Fred.

MR. WEIDNER: I will be pleased to be rigid on this issue. I think the whole concept of apparent authority is precisely to make transactions more efficient and remove the burden from third parties to investigate the internal affairs of the partnership. So, I would be very comfortable with it as it is.

....

COMMISSIONER BRUCE A. COGGESHALL (Maine): I am
up to speak on the same point that Fred was just speaking on. It seems to me that if somebody has received notice of a limitation or has reason to know of it based on all the facts known to him at the time, that being the definition of notice, then he ought not to be able to take advantage of a limitation on authority. It seems to me that the word "knows" ought to be deleted, and the words "has notice" be substituted. You do the same thing in section 3. Rather than say "knowing," say "having notice." It just seems unfair that if somebody under all the circumstances ought to know, he ought to be bound by that knowledge.

CHAIRMAN DYKMAN: Do you wish to make a motion?

COMMISSIONER COGGESHALL: I would like to make a motion that on Line 27, Page 22, the words "has notice" be substituted for the word "knows." And on Line 5, Page 23, the words "having notice" be substituted for the word "knowing."

....

---o0o---
EIGHTH: SESSION

UNIFORM PARTNERSHIP ACT

TUESDAY, AUGUST 6, 1991

....

COMMISSIONER BRUCE A. COGGESHALL (Maine): The motion, ...

on Page 3, Line 13. Substitute the words "has notice" for the word "knows." And on Line 22, substitute the words "having notice" for the word "knowing."

....

COMMISSIONER COGGESHALL: ... As I understand the definition of the word "knows," that means having actual knowledge.

Somebody that has received notice of a partnership limitation ought to be bound by that notice. If I send notice to a bank that only the managing partner of the partnership is entitled to sign notes for that partnership, the bank is not entitled to ignore that notice, is not entitled to say: I didn't know about that and therefore I am not bound by that limitation. And by expanding the "knows" to having notice," I think that takes care off that problem. That is the way it ought to be. That is the general standard, as I understand it, in the commercial code,
is one of having notice.

CHAIRMAN DYKMAN: Okay. Would the committee like to answer?

MR. DONALD J. WEIDNER (Reporter): We discussed this last night after this session broke up, and the committee wants to stand with "knowing."

I think the qualification to the basic definition of knowing is actual knowledge that we deleted from the UPA was not operative here.

I think the basic point is that this language operates when a person acting for the partnership, when a partner has apparent authority, when it appears to the outside that the person is doing business as usual.

The point of the apparent authority concept here is that it is an agency law -- is to say that the burden is on the inside to clean up its act, that outsiders shouldn't be put to the task and the burden of finding out whether every person who deals with the business in the usual way really has that authority.

We mean to keep it with knowledge because I think the way you are using notice in this context, it really second guesses the apparent authority.

COMMISSIONER COGGESHALL: All right. Why should the person who has received notice -- I have sent him a written notice saying: Only John Jones is entitled to
sign for my partnership. That notice sits on his desk for three weeks and he doesn't look at it and the transaction comes up and somebody else signs for the partnership that isn't authorized.

Why should that party be entitled to ignore that notice? Under this definition, be entitled to say: I didn't know about it. And he has got a perfectly legitimate defense.

CHAIRMAN DYKMAN Does the ABA adviser wish to have a comment on this?

MR. HARRY HAYNSWORTH (ABA Adviser): In the particular situation, I am not sure that he would have a defense because of the actual knowledge test under the Uniform Commercial Code definition of actual knowledge.

But let me go back to the point I think Don was trying to make, what is stated here in 301 is the normal agency rule of apparent authority. And if we were to change that, you would have a situation where when you're dealing with a partnership, the third party would have a much higher duty of inquiry than would be the case with dealing with a corporation or with any other business entity. And it would put it in a very difficult situation. Because you could never know other than actual authority, so you'd have to get affidavits
from everybody saying that the partner, et cetera, had authority. That would be a problem.

COMMISSIONER COGGESHALL: That is not true. It's not a question of going out and seeking to determine whether or not that person has authority, but simply, if you've got notice, then you are bound by that notice.

MR. HAYNSWORTH: But that would be the effect. The notice is such a broader concept than knowledge, it would create the ambiguity which would necessitate the third party to have to, make the inquiry. And it would make partnership different from every other type of business or every other type of agency relationship. That is the basic objection to it.

CHAIRMAN DYKMAN: The motion is, on the handout, Page 3, Line 13, substitute "has notice" for "knows," and on Line 22, substitute "having notice" for "knowing."

Okay. I will call the question. All those in favor, say "aye."

Those opposed, say "no." Okay. The "noes" have it.

... COMMISSIONER MENDES HERSHMAN (New York): "SECTION 302. TRANSFER OF PROPERTY OF
PARTNERSHIP IF TITLE RECORDED.

"(a) If record title to property is in the partnership name, any partner may transfer it by a transfer executed, in. the partnership name. However, the partnership may recover the property if it proves that the partner's act did not bind the partnership under Section 301, unless the property has been transferred by the grantee or a person claiming through the grantee to a holder for value without knowledge that the partner, in making the transfer, exceeded the partner's authority.

"(b) If record title to partnership property is in the name of one or more, but fewer than all, of the partners and the record does not disclose the right of the partnership, the partners in name the record stands may transfer it. However, the partnership may recover the property if it proves that the partners' act did not bind the partnership under Section 301, unless the purchaser or the purchasers assignee gave value, without knowledge that the partners, in making the transfer, exceeded their authority.

"(c) If record title to partnership property is in the name of one or more of the partners, or a third person in trust for the partnership, a transfer executed by a partner in the partnership name passes
the equitable interest of the partnership unless the partnership proves that the partner, in making the transfer, exceeded the partner's authority, and that the person with whom the partner dealt knew that the partner lacked that authority.

"(d) If record title to partnership property is in the names of all of the partners, a transfer executed by all of the partners passes all of the interest in the property."

CHAIRMAN DYKMAN: Any comments or motions on 302? Commissioner Coggeshall.

COMMISSIONER BRUCE A. COGGESHALL (Maine): On Line 3, it would seem that that sentence ought to be preceded by the words "except as limited by the statement of authority under Section 303."

MR. DONALD J. WEIDNER. (Reporter): If you feel that, would you feel that all of 302 ought be qualified by that sentence?

COMMISSIONER COGGESHALL: I would think so. I would think that perhaps that ought to be a lead in for this whole section.

MR. WEIDNER: The comment was, that we, in the text of Section 302, express that the provisions of 302 are subject to the new statement of partnership, authority provisions in 303, and the committee will
look at that

COMMISSIONER COGGESHALL: My second comment. Should the provisions of subparagraph (a) or subsection (a) also apply to the situation where record title is in the name of all of the partners with an indication that they are doing business as a partnership -- the situation on 203(a) which makes a partnership property?

MR. WEIDNER: I think it's a good question. I would have thought that situation was addressed in (d) -- that is, the basic distinction made among-these sections -- (a), within chain of title; (b), within chain of title; (c), not within chain of title; (d), within chain of title by the individuals in the name of all the partners.

COMMISSIONER COGGESHALL: I mean, Section 203(b) says that if it is acquired in the name of all of the partners with an indication that they are doing business as a partnership, then becomes partnership property. And really that has the same effect, I think, as taking it in the name of the partnership, and the transfer out of the partnership ought to be governed by the same rules as if it were just in the name of the partnership.

MR. HARRY HAYNSWORTH (ABA Adviser) There is a difference, however. There is a difference between it
being partnership property and who has record title, for purposes of title purposes.

202 deals with whether or not it is partnership property. 302 deals with how you convey it out.

COMMISSIONER COGGESHALL: Well, excuse me, but Section 203(a) says that property so acquired -- title to that property vests in the partnership.

MR. HAYNSWORTH: It does vest, but it's a question of the record title -- what appears on the real estate property records. That is what the 302 situation is trying to deal with.

COMMISSIONER COGGESHALL: I have a little difficulty with saying that the property is vested in the partnership because the record indicates: that it's taken by the partners doing business as a partnership and saying that that is not record title.

MR. DONALD J. WEIDNER (Reporter): I think we have to look at it, because, again, there are two ways, I suppose, for individuals to indicate they're doing business as a partnership.

One is by saying they're doing business as a partnership and the other is by naming the partnership and saying they're doing business in that name. This section refers to when title is taken in that name.
And, you see, depending on how we inserted "is doing best as a partnership," it might include -- we don't want to include the situation in which the property is not taken in the partnership name.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): I think your question is asking whether if the record title shows that the property had the indication that the property was taken in the name of the partnership. If record title contains that indication, I think your question makes a good deal of sense, whether one partner --

COMMISSIONER COGGESHALL: I don't know how else the record title would be. If the deed says "to the partnership" -- "to the partners doing business as a partnership," that is what goes on record. That is the record title.

COMMISSIONER REITZ: The committee has discussed more generally when and how the indication that property has been taken in the name of a partnership would apply in a general situation. But I think with particular reference to record title, if the, deed that is on file has an indication on the face of the deed that even though it was taken in the names of all the partners, it also indicates on the deed in the record title that they're taking it as a
partnership, then I think you're correct, that there is no reason to differentiate that from a deed which is taken solely in the name of the partnership.

COMMISSIONER COGGESHALL: Isn't that what Section 203 contemplates, that this should be a deed put on record that indicates that they're doing business as a partnership?

COMMISSIONER REITZ: As I understand 203, it is broader than record title.

COMMISSIONER COGGESHALL: Oh, I agree. But if we are talking about real estate, we are obviously talking about record title.

COMMISSIONER REITZ: In real estate we are talking about both title and record title. They're not necessarily the same thing.

CHAIRMAN DYKMAN: The reporter would like to comment on this, too.

MR. WEIDNER: I agree, that 203 is broader. On the other hand, in Section 302, suppose the partnership name is Baker partnership and the conveyance is signed by all of the partners Able and Zulu doing business as a partnership, without the Baker name. There is no conveyance in the partnership.

This section, 302(a), is narrowly focused on enabling recording of title in the name of the Baker
partnership. And it says: If title is in that name of the Baker partnership, then either Able or Zulu can pass title by conveyance in the name of Baker partnership.

Under your hypothetical, there is no title in the entity.

COMMISSIONER COGGESHALL: Well, let me ask you this: If the deed says "to A and B doing business as A and B partnership," is that record title in the partnership or in the partners?

MR. HARRY HAYNSWORTH (ABA Adviser): In many states it would be in the name of A and B. I know that would be the case in -- they would not record it in name of a DBA.

COMMISSIONER COGGESHALL: Doesn't this statute say that that property is vested in the partnership?

MR. HAYNSWORTH: It says it's partnership property, but it cannot affect the record title. The record title is governed by your title statutes.

COMMISSIONER COGGESHALL: Wait a minute. This statute says that that property is vested in the partnership, and if you record a deed that vests property in an entity, record title is in that entity.

MR. HAYNSWORTH: It's not the way it would be, recorded, though.
COMMISSIONER COGGESHALL: I can't understand that.

MR. HAYNSWORTH: It's the same problem you have under the Uniform Commercial Code. If you have somebody doing business as, the debtor is the individual, not the doing business as.

COMMISSIONER COGGESHALL: That's a different. Here, by statute, we are, saying: If it says it is coming in to you as doing business as a partnership, it vests in the partnership. It says the owner is the partnership.

If the owner is the partnership and that deed, is on record, the partnership is the record owner. There is no question about that.

MR. HAYNSWORTH: But if it is recorded that way, that would be fine. But I know it would not in many states be recorded that way. It would be recorded in the name of the individual partners.

COMMISSIONER COGGESHALL: You record the deed, and the deed is recorded that says A and B doing business as A and B partnership. That is what goes on record.

CHAIRMAN DYKMAN: Commission Lisman.

COMMISSIONER CARL H. LISMAN (Vermont): On the point raised by Commissioner Coggeshall, if the
committee is not receptive to what he is saying, I would urge him to propose an amendment and we can focus the debate on that amendment. And while he is doing that, if he is going to do that at all, I have two what, I hope are minor questions.

The first is on Line 15 of the handout on Page 4. Am I correct in understanding that the word "right," way over on the right-hand side of that line, means interest or ownership?

MR. DONALD J. WEIDNER (Reporter): Yes.

COMMISSIONER LISMAN: Would you be more comfortable if you said ownership rather than right? It might be a little clearer.

COMMISSIONER H. LANE KNEEDLER (Virginia): We think that is a good point.

COMMISSIONER LISMAN: Thank you. Let me keep my streak going here.

MR. WEIDNER: I would add the qualification, though -- we don't want to set up the implication that we are unconcerned with estates lesser than fee estates.

COMMISSIONER LISMAN: Then perhaps "interest" is a better word.

Can you tell me -- I, thought I heard a glimmer of an explanation a moment ago from the
reporter on an answer to another question. But is there a reason why what I've labeled the exception in A and B and C refers in A to a grantee, in B to a purchaser, and C to a person?

I am looking at Lines 9 and 20 on Page 4 and Line 4 on Page 5. Is there some reason why you used a different word to describe the transferee in each of those instances?

MR. WEIDNER: Where is your third reference?

COMMISSIONER LISMAN: Page 5, Line 4, person.

MR. WEIDNER: I think it's a good question.

COMMISSIONER H. LANE KNEEDLER (Virginia):

Commissioner Lisman, at least the first two references are carry-overs from the, UPA, but we will look at it.

COMMISSIONER LISMAN: Thank you

CHAIRMAN DYKMAN: Commissioner Read.

COMMISSIONER HAROLD E. READ, JR. (Connecticut): I want to address Commissioner Coggeshall's point in anticipation of his coming up with an amendment for a motion.

The most confusing and controversial and uncertain area of partnership title in real state is exactly what he is describing. A, B, C and D, all of the partners of the A B Company, or whatever it may be
-- there is no question, never has been any question in my mind that that puts title in the partnership. Almost every title company in the United States will tell you that that puts title in the partnership, and, of course, also in all of the individual partners. And they will require a conveyance to bear the name of all of the partners.

If this committee does nothing else, you ought to clarify that one way or the other. And since at least to me it's always been perfectly obvious the title goes' into the partnership, you should say clearly that in that circumstance it is partnership property conveyable as other partnership property.

COMMISSIONER ROBERT H. CORNELL (California): I agree. I think there is some confusion here as to what is meant by property in the partnership name.

I heard Mr. Haynsworth's answer. I don't necessary agree with that, and I think the committee has to take a look at what we intend on that and clarify it because that is confusing.

I think the purpose of (1) is that someone is put on notice" that this is partnership property. You'll notice requirements there are a lot more severe under (1) than they are under (2) because the transferee has been put on notice, and, therefore, at
the transferee level, between the transferee and the partnership, the partnership, would prevail.

COMMISSIONER HOWARD J. SWIBEL (Illinois): Commissioner Read, we had an adviser from the title insurance industry as well from institutional lenders. And they put the second sentence in 203(a), saying that title to property so acquired vests as partnership property in the partnership itself, which, I think is responsive to the point you made. But they also acknowledged -- and I think the act acknowledges -- that just because we put it that way does not ensure that there is going to be universal cooperation with this provision. And the title company could, nevertheless, in some jurisdiction which is not necessarily subject to this particular act treat it as if it was not titled as partnership property.

COMMISSIONER HAROLD E. READ, JR. (Connecticut): That would be normal title company conduct --

COMMISSIONER SWIBEL: Correct.

COMMISSIONER. READ: -- if they disregarded what we wrote. But the least ought to do is try to write it clearly so that they have an instruction as to how to do it.

Would you read that language to me again,
Howard.

COMMISSIONER SWIBEL: Title to property this would be Property acquired in the partnership name or in the names of all of the partners with an indication that they're doing best as a partnership. Title to property so acquired vests, as partnership property in the partnership itself, and not in the partners individually.

They put that in, and they thought that that was what they needed to cover the point that is being raised as far as going in, that you put it in the name of the partnership. That is in 203(a).

COMMISSIONER READ: All right. I understand what you're saying. But going back to 302, A is property in the partnership name. B is title to partnership property in the name of one or more but fewer than all. C is partnership property in the name of one or more partners or in trust. And D is in the name of all the partners.

Now, if D carries the meaning that you're describing from. Section 203, shouldn't Section 302 be saying that? This is different. I mean, this is not saying the same thing that 203 says. And you're dealing with the same subject matter.

COMMISSIONER SWIBEL: I don't know where the
discrepancy is C and D both deal with the title not
being in the partnership name C and D.

COMMISSIONER READ: Yes. But what I am telling
you is that if the title, as Mr. Coggeshall has told
you, is in the name of all of the partners as partners
doing business as Jones and Company, then that title is
in the partnership name.

COMMISSIONER SWIBEL: In which case A would --

COMMISSIONER READ: Under 203, that title is in
the partnership name and conveyance should not require
the signature of all the partners.

You know, you just don't reach that issue as
far as I can see. I think 203 and 302 are inconsistent.

COMMISSIONER SWIBEL: I don't want to be
repetitious, but if the title companies follow, as, you
say, the instruction in 203(a), they will put the title
in the name of the partnership itself, and 302(a) will
govern the situation, where the record title would be
in the partnership name.

But since the scope of this statute -- this is
not a title statute or recording statute -- if the
title company nevertheless does not put the title in
the partnership name, then that is where C and D would
kick in. If you think there is something missing, then
--
COMMISSIONER READ: All right.

COMMISSIONER H. LANE KNEEDLER (Virginia): Mr. Chairman, I am not saying that -- obviously, there is some confusion out there. Frankly, I am not seeing it.

203 talks about when it becomes partnership property. 302 talks about how you are conveying it. If in the example Commissioner Coggeshall gave it is actually recorded in the partnership name, then 302(a) would kick in. Butt if, as in some states, as Mr. Haynsworth has suggested, it, ends up being recorded in the names of all the partners, then 302(d) would kick in. But if, in fact, it is recorded in the partnership name, then 302(a) would apply.

I don't understand the confusion.

COMMISSIONER READ: That's the confusion I am trying to convince you that the committee should clearly solve. You should take into account the very common circumstance when property is conveyed to individuals as partners and doing, business as so and so.

I know what Howard says. 203 says that is partnership property. But 302(d) seems to say that all of the partners must sign. I can't see how it would hurt to cover in 302 what may or may not be picked up from 203, especially in the light of the way that title
companies conduct themselves in the United States.

CHAIRMAN DYKMAN: Would, the reporter like to comment?

MR. WEIDNER: Can I just see if I understand your point? What Section 302 does is say -- just take the situation which there is a title in the partnership name -- that there are going to be situations in which one partner conveys partnership property in which the partner had no authority to convey the partnership property.

If the partnership can prove there was a lack of authority, the partnership can get the property back from the original grantee.

On the other hand, if the original grantee has further conveyed the property to a good faith purchaser for value without knowledge, then that further grantee wins.

That being our understanding of the section, then, there is no difference in principle between that situation and the situation in which the partners take title in their individual names with an indication that they're doing business as a partnership.

Is that the point? I am sorry if I didn't see that. Is that the point?

COMMISSIONER READ: We keep going --
MR. WEIDNER: In other words, that's what the section is doing, and that is why you have the grantee language.

COMMISSIONER READ: I understand the law about the transfer of the property and that one person may transfer it, without authority and one may not. You're not talking about that entirely. You are talking about what happens on the land records of all the counties of the United States and in all the title policies that are this way.

Would you object to saying in paragraph (d), ...

....

If record title to partnership property is in the name of all the partners without designation of their ownership as partners -- or something like that.

203 says, Howard tells me, that if the record says it's all of the partners doing business as partnership, that is partnership property.

Now, if it is partnership property, it shouldn't require the signature of all of the partners any more than it would in any of the other things covered in Section 302.

COMMISSIONER CARL H. LISMAN (Vermont): I wonder if there isn't a simple solution to this problem, which would be in 203 -- and I look to our
real property acts for some guidance, in which we drew a really thick line and said: In order to make this thing work, you've got to label it.

Part of the problem that we have in 203 is the conveyance to A and B doing business as, Naples Realty Company without saying the additional two words "a partnership."

If that were a bright line test, by saying "a partnership," then the conveyance would be recorded in the name of the partnership. And the rules of 302 would fall in real easy sequence.

The problem is the ambiguity when the property is conveyed to A and B doing business as Naples Realty without the designation that it's a partnership.

203 doesn't require you to say, quote, a partnership. Maybe that is a compromise.

MR. WEIDNER: I think -- again, this may be a point made earlier -- 203 is doing something either much broader -- 203 is not addressing the record title situation. 203 is attempting to do two things. It is attempting to say that when a partnership owns property, it's just like a corporation owning property -- just to set out the general principle that ownership is in the entity, with the consequence that the different partners don't have any more rights in
partnership property than shareholders do in corporate property.

That is the first section of 203(a). That's all that does. That says: Insofar as the ownership of property is concerned, a partnership is treated like a corporation. All right. The rest of Section 203 simply intends to give more guidance than present law on when a particular piece of property is either partnership property or the separate property of a partner.

One person says: Well, the particular truck -- one person will say, well, that is the partnership truck. And one of the partners may say: No. I never contributed that to the partnership. That was simply my truck.

That is all 203 is aimed at. We don't use the record title concept there. We are not trying to answer your question there.

COMMISSIONER LISMAN: I think all we are saying is that one of the fundamental problems, of the relationship between partnership law and real property law is when property is conveyed to A and B doing business, as Naples Realty, without any designation as to whether it is a partnership or a tenancy, in common or whatever it may be. Because when that property is to be sold, there is a question as to who has to sign the
You try to answer who has to sign the deed in 302 subsections without solving what I think is an easier solution to saying whether or not that's partnership property back in 203. Now, I am not sure that I am getting a lot of support from the committee, and I think I will stop. But that is the point that I wanted to make. And I think that is the way to fix the problem.

COMMISSIONER: H. LANE KNEEDLER (Virginia): Commissioner Lisman, what is your solution you're suggesting?

COMMISSIONER LISMAN: The solution that I am suggesting I am taking from the real property acts of the conference, which say that form matters, style matters over form in some cases, and a designation -- conveyance of property to A and B and C doing business as Naples Realty, a partnership, has a legal significance greater than A and B and C doing business as Naples Realty, period.

COMMISSIONER CURTIS R. REITZ (Pennsylvania): I think what the committee is struggling with is reflected in what the reporter said, just a minute ago, that if Don is right, the statute as drafted does not address when real property comes into a partnership,
what should the recording clerk do with it?

And until we address that, we can't address the problem on the floor that is troubling Commissioners Coggeshall and Read of how does a partnership convey property out?

Because 302 is addressed to the question of making sure that the conveyance out is based on record title. But the statute doesn't yet decide or define how record title is established on a conveyance into a partnership. And the two have to mesh.

COMMISSIONER HAROLD E. READ, JR. (Connecticut): I hope this may well try to do that.

COMMISSIONER REITZ: I think some of the members of the committee believe that the second sentence of 203(a) which was provided by title insurance companies was intended to clarify record title. But I think the reporter is right. As it is written, it doesn't do that.

And if I understand what you're trying to reach, Ted, the statute would say would direct a recording clerk on a deed that is to A and B, doing business as a partnership, to record that in the partnership name, perhaps also in the individual names, but to record in the partnership name -- and that a conveyance could then be made in the partnership name,
and that the grantor-grantee index would show that title in the partnership name.

You have got to get the chain of title coming in in the partnership name in order for a deed out to be in the partnership name.

It is that chain of title problem that is, I think, the one that is troubling the committee at the moment. Some of the commissioners don't think that this act could direct a recording clerk to record property in the name of the partnership coming in.

I don't know whether that is right or not. I don't know enough about real property law. But in Article 9 of the UCC, we direct recording clerks on how to record property that is being taken in a record name for security interest purposes.

I don't know why in the partnership act we could not direct title clerks how to record property coming into a partnership.

COMMISSIONER HAROLD E. READ, JR. (Connecticut): You know, with due respect, Curt, this doesn't have anything to do with telling a clerk how to index something.

In my experience in the circumstances we are talking about, they index in the title of A, B, C, D and the partnership. Because that is what the deed
says. Title goes into the name of those entities. The clerk doesn't try to say: Well, you know, this isn't really a partnership, so I will only index it in the name of the individuals. He takes all of the people who are named as grantees and their initials and aliases and guidelines and everything else.

So, the indexing -- everywhere I have ever run into it would include, all of the names -- in this instance, the names of all the partners and the name of which they refer to as their, partnership, or, in Carl's example, their doing business alias.

COMMISSIONER REITZ: But I think, Ted, as Harry Haynsworth said, that may not be universally true.

COMMISSIONER READ: Who cares if it's universally true? It is very, very common.

COMMISSIONER REITZ: Well, it has to be universally true in a uniform act if we are going to say that a deed coming in in that form will, be recorded.

COMMISSIONER READ: You're telling me you are not going to do anything about a problem because county clerks follow different philosophies in maintaining their indexes? That is crazy.

COMMISSIONER REITZ: No. What I am saying, Ted, is that we have to be sure that if the deed out is in
is the partnership name the title has to be recorded: in the index in the partnership name.

CHAIRMAN DYKMAN: Commissioner Swibel.

COMMISSIONER HOWARD J SWIBEL (Illinois):
Commissioner Read, now that you have identified the problem for us, would you permit us, please, to go back and look at whether we should add something to deal with this problem?

COMMISSIONER READ: I appreciate it if you would. Let me ask one question while I am here, of the chair. We said at the start that the provisions of this act that we are reading today are first reading, but they are never going to be read again, or something like that?

CHAIRMAN DYKMAN: No. They’re second reading.

COMMISSIONER READ: These are second reading?

COMMISSIONER H. LANE KNEEDLER (Virginia): This is a final reading of the provisions that are being presented this year. I don’t know how much experience the conference has had with partial final readings, but that obviously means that the whole act will be up before the conference next year.

My understanding is that what this means is that we don’t have to read all the sections next year. Those that we complete this year will not have to be
read next year. I don’t think that means — in fact, I am sure that if the committee finds something, we may recommend a change. When it comes before the floor next year, I don’t think that means that you couldn’t make amendments as we go along. It just avoids the necessity of having to read everything.

COMMISSIONER READ: The point of my question is, perhaps we have taken much too long on this and perhaps I could have abbreviated it by just making a motion and have everybody vote on it, and perhaps we would have less discussion and more result.

MR. DONALD J. WEIDNER (Reporter): That wouldn’t be any fun.

COMMISSIONER HENRY M. KITTLESTON (Florida): I sense, as Commissioner Read has also sensed, that the word “record” — record the title — means something to Professor Haynsworth and Professor Reitz that it does not mean to me or to Commissioner Read or to Commissioner Lisman.

The clerk, in my experience, and it involves a number of states, does not record a title in anybody’s name. The clerk records a deed of conveyance, and it’s up to the title examiner to determine who the owner of the property is.

True, the indexer in the clerk’s office may
make some decisions as to what names are put into the alphabetical index to recorded instruments, but that is not recording the title. Most clerks would do, I think, what Commissioner Read just stated, there would be multiple names indexed for that instrument. There are three persons named doing business as XYZ partnership. It would be indexed under four different names. You could find the same instrument four different ways. Some clerks might not do that, but probably because of negligence.

MR. WEIDNER: If I could just point out. We define record title as a term of art in Section 101(7). And I see what you’re saying is consistent with what we have done. At Page 5, our definition of record title simply says that there is a statement of ownership or evidences of ownership recorded somewhere.

COMMISSIONER KITTLESON: Do you mean a deed?

MR. WEIDNER: Yes.

COMMISSIONER KITTLESON: I never heard a deed called a statement of ownership before, but I guess it fits.

MR. WEIDNER: Come back to me if I am wrong on this. This is a new concept in this act, this record title, because what we did was begin with the UPA, some UPA provisions that only applied to real property. And
the ABA came in and said: No, expand those provisions beyond real property to include all personal property.

We decided that we wouldn’t go that far. We would expand it, however, to middle ground to include this record title of property concept. So, in effect --

MR. KITTLESON: But you see, personal property don’t have a record title, typically.

MR. WEIDNER: We were thinking of things such as boats and cars and other items that are included here. That is what we are bring in by that definition of record title.

But I think what you are saying is consistent with our philosophy. We are simply saying: If a record of title is treated a certain way under state law, under the law of the recording acts, and we are dealing with not only different theories of real property recording acts, but different theories of personal property title recording, then we, will proceed.

COMMISSIONER KITTLESON: Question as to the committee’s intention were particular word or words used in Sections 203 and in 302(b)?

In 203, the word is “indication,” indication that it’s partnership property. 302 uses the word “disclose” the right of the partnership.

Question is one that commissioner Lisman has
raised, and I do not understand the committee’s response. I mean, I don’t know what the committee’s response was.

CHAIRMAN DYKMAN: The committee has said they will take that under advisement.

COMMISSIONER KITTLESON: This is Jones, Smith and Williams doing business as -- use Naples Realty. The word “partners” doing business is not used, and Naples Realty, a “partnership,” is not used. The word “partner” or “partnership” is not used.

Is that an indication? Is that a disclosure?

CHAIRMAN DYKMAN: Commissioner Kittleson, they have agreed to take this under consideration. They fully hope and expect to come back this annual meeting with the comments that were from last night and -- yesterday afternoon, rather -- and today. They hope to have some time. Right now I think there are maybe a handful of questions out.

COMMISSIONER KITTLESON: Thank you.

CHAIRMAN DYKMAN: Commissioner.

COMMISSIONER NEAL OSSEN (Connecticut): I would like to turn my attention to personalty, which there is, according to your definition of record title, automobiles, trucks, patents, trademarks, boats maybe.

First, do I take that the expression, “the
partnership may recover" to mean the transaction is a avoidable transaction so that a trustee in bankruptcy under 544 could set aside an unauthorized transfer?

CHAIRMAN DYKMAN: Please cite the page and line.

COMMISSIONER OSSEN: Page 4, it says:

However, the partnership may recover the property if it proves that the partner’s act did not bind the partnership.

You use the same phrase throughout. So, we are now saying a transfer of partnership assets may be a voidable transfer which a trustee in bankruptcy could set aside under 544?

COMMISSIONER ROBERT H. CORNELL (California): If there is no apparent authority.

COMMISSIONER OSSEN: My next question, what obligation does a purchaser of personalty in which there is some written indicia of ownership have to search the Secretary of State’s office for the certificate of authority which you have allowed?

For example, if I am purchasing a fleet of trucks and I say to the seller, “I need to see the titles,” and the titles are A and B Partnership, do I now have to go to the Secretary of State’s office to see if in fact there is a certificate of authority

C:\Documents and Settings\laura\Desktop\book test\IV A August 2 - 9, 1991 Transcript.doc
which says “partnership property must be signed by all partners,” or am I home free by not having to go to the Secretary of State’s office?

You have made it clear that you got to check the land records when it is a transfer of realty, but I want to know what obligation there is upon the purchaser of partnership personalty.

CHAIRMAN DYKMAN: Would that be better brought up under Section 303?

COMMISSIONER OSSEN: I don’t know. I am asking the committee.

COMMISSIONER HOWARD J. SWIBEL (Illinois): Section 303 deals with central filing and the question of what effect it has on third parties. So, can we look at that when we get there?

COMMISSIONER OSSEN: Yes.

COMMISSIONER DALE G. HIGER (Idaho): I would just like to go back on this transfer of real property issue and propose an amendment to Section 302(a) by on the handout, Page 4, Line 4, adding, after “partnership name,” comma, the following: Or if record title to partnership property is in the name of all the partners with an indication that they are doing business as a partnership, comma -- I would so move.

I think that then makes Section 302(a)
consistent with Section 203 and would satisfy, I think, the concerns on record title and vesting.

CHAIRMAN DYKMAN: Could you please read it slowly so -- then bring it forward, too. Page 4, Line 4, after “partnership name.”

COMMISSIONER HIGER: “Partnership name,” add, “or if record title to partnership property is in the names of all of the partners with an indication that they are doing business as a partnership,” comma. That’s verbatim language from Section 203.

CHAIRMAN DYKMAN: Could you bring it forward.

MR. HARRY HAYNSWORTH (ABA Adviser): That would satisfy all the problems that have been raised and would solve my problem of what they record it as as well, yes.

....

COMMISSIONER HIGER: “All of the partners with an indication that they are doing business as a partnership.”

....

COMMISSIONER MARION W. BENFIELD (North Carolina): I think I like the thrust of the amendment, but I think it may be irrelevant whether it names all of the partners or not if it indicates that this is a partnership.
When you go down to sub (b), you say: Fewer than all the partners and the record does not disclose the right of the partnership. In that case, if you’ve got partners A, B, C and the deed end says to A and B doing business as -- named partnership -- probably also ought to be subject to the same rule as is now proposed for sub (a).

COMMISSIONER DALE G. HIGER (Idaho): Mr. Chairman, I am just picking up what the committee used in Section 203(a), where they say: Property may be acquired in the name -- acquire the partnership name or in the names of all of the partners with an indication that they’re doing business as a partnership.

So, I think my proposed amendment makes it consistent with the other section of the act.

CHAIRMAN DYKMAN: Does the committee have a position?

COMMISSIONER H. LANE KNEEDLER (Virginia): Commissioner, I think the committee is willing to go along with that. This is a technical drafting thing. Do you have any objection if we just make it -- you said: Or you record -- you repeated -- if record title to partnership property.

Do you have any problem if it is just, after “partnership name,” just comma, “or in the names of all
the partners,” with an indication that they’re doing business as a partnership?

COMMISSIONER HIGER: I have no problem with that.

CHAIRMAN DYKMAN: The committee is probably going to accept that, but they would like to look at it. Do you wish to proceed with your motion?

COMMISSIONER HIGER: If the committee will look at it, I will withdraw my motion with that understanding.

COMMISSIONER KNEEDLER: We will look at it.

COMMISSIONER RICHARD E. FORD (West Virginia): With regard to Line 15, subsection (b), did I understand that the committee had adopted the suggestion to insert in lieu of the word “right” the word “interest”?

CHAIRMAN DYKMAN: Yes.

COMMISSIONER FORD: I had it on my notes. I just wanted to make sure the committee had it on its notes.

COMMISSIONER KNEEDLER: Yes.

COMMISSIONER RICHARD V. WELLMAN (Georgia): My question is on sub (d) of 302. Are there some implications there that if property is in the name of several people -- A, B and C -- a conveyance by less
than all three does nothing? What is the answer to that, please?

COMMISSIONER ROBERT H. CORNELL . (California): I think we should take a careful look not only at 302 but also 203 with respect to the requirement that it be all of the partners. I think the important thing here is that it be in the partnership name or an indication that it’s held as a partnership, but would like an opportunity to take a look at that. But when we take a look at change here, I think we should also take a look, as to whether we require all the partners. I think that may be not be necessary.

COMMISSIONER WELLMAN: I guess I question whether you need (d) at all. It seems to state the obvious. It seems to be in here because you, are rounding out a sequel or a sequence, and it does have several troubling implications. I mean, the old law of who owns property deeded to A, B and C is that they all three own it. They each have an undivided interest. And each can convey his undivided interest.

If it’s off the record partnership property, we get into, I guess, knowledge on the part of the taker of the property, or the purchaser.

But I guess my question is, not can the whole of the property be transferred, but does any part of
the property pass by the transfer of one of fewer than all -- one but not all partners? Does it turn on whether the purchaser knows it’s partnership property?

COMMISSIONER CORNELL: No.

COMMISSIONER HOWARD J. SWIBEL (Illinois): No.

COMMISSIONER WELLMAN: Nothing passes. Is that the answer?

COMMISSIONER CORNELL: No. Either you pass all the property or -- partnership interest or none, because the partnership property is held by the partnership and not by the individual partner.

COMMISSIONER WELLMAN: Of course, if it looks on the record to be tenancy in common, your answer would change, right?

COMMISSIONER CORNELL: That is right.

COMMISSIONER WELLMAN: Even though in fact it’s partnership because it was bought with partnership funds.

COMMISSIONER CORNELL: No.

COMMISSIONER WELLMAN: So, where are you now?

MR. WEIDNER: There is a lot of litigation on that. Even under the present UPA, they say that if one partner attempts to convey his undivided interest in the partnership property, it is an invalid act as to the conveyance of the direct interest in the property.
To give it some effect, the courts treat it as conveyance of his interest in the partnership.

COMMISSIONER WELLMAN: Are you going to deal with that somewhere in this act?

COMMISSIONER CORNELL: Section (b) takes a look at that situation.

COMMISSIONER WELLMAN: If the title is in the name of one or more but fewer than all, the partners in whose name it may pass -- it doesn't deal with my case. My case is property in the name of three or four people and less than three or four transfers.

MR. WEIDNER: Commissioner, if I could point you to Section 501 at Page 78. It says: A partner has no interest that can be transferred, either voluntarily or involuntarily, in partnership property.

COMMISSIONER WELLMAN: Without reference to the notice by the record to the purchaser? How am I know that it is partnership property? The record doesn't say anything about it. If it is tenancy in common property, I can buy and acquire without the consent of the others.

MR. WEIDNER: Again, I think the protection of the purchaser then is under the recording acts. We are not trying to put into this statute a separate
recording act for partnerships.

We are obviously interfacing with the recording acts but we are not supplanting them.

COMMISSIONER WELLMAN: I think there is some intrusion on the area of recording statutes here. If your answer is that the act doesn’t cover it, then we are back to background law of apparent title and bona fide purchase. That is all right, I guess. But I think this paragraph sub (d) is troublesome. It seems to open up this thing and leave you hanging with the questions of ---

MR. WEIDNER: Again, we have tried, especially after the Hawaii meeting, we have tried to avoid saying it’s in there because it’s always been in there, and we have tried to have our own justification for the statute. But that language is the language that has been in there. This section is essentially Section 10 of the Uniform Partnership Act, and I don’t think that language has caused a problem.

CHAIRMAN DYKMAN: Commissioner Burdick.

COMMISSIONER EUGENE A. BURDICK (North Dakota): I am wondering if in (d), Line 14, and (c), Line 24, if this wouldn’t read better if you said: In the name of fewer than all. If the title is in the name of only one of the partners, are either of those sentences
necessary?

So, you’re really talking, I think, about two or more, which would be fewer than all. It seems to me that if it is in the name of only one, you don’t need either of those sentences. It seems to me to trigger the thing if it is in the name of fewer than all of the partners.

PRESIDENT BUGGE: The committee will look into it.

....

COMMISSIONER JOSHUA M. MORSE, III (Florida): May I ask what subsection (d) of 302 does? Does it change any existing law? Is it necessary, I guess, is what I am saying.

COMMISSIONER HOWARD J. SWIBEL (Illinois): Well, (d) was passed by this conference in 1914. It is Section 10.

....

It is in Section 10(5) of the Uniform Partnership Act.

COMMISSIONER MORSE: Does this do anything, though, is what I am asking. Is it necessary? If record title ---

....

COMMISSIONER MORSE: 302(d) says that if title
is in the names of all the partners if all the partners executed deed out, then it passes title. That would be the case whether this section were in or not, wouldn’t it?

MR. DONALD J. WEIDNER (Reporter): I think so. It seems to state the obvious.

....

So, the two comments are: By stating the obvious, it is causing confusion.

CHAIRMAN DYKMAN: Commissioner Cornell.

COMMISSIONER ROBERT H. CORNELL (California): One of the problems you have is, you have had something in the law for 70 years. What does it mean when you take it out?

....

"SECTION 303. STATEMENT OF PARTNERSHIP AUTHORITY.

"(a) A partnership may execute and file in the office of [the Secretary of State] a statement partnership authority.

"(b) A statement of partnership authority:

"(1) must list the name of the partnership and the street address of an office of the partnership in this State, if there is one, or of the principal executive office of the partnership;
“(2) must list the names and street addresses of either all of the partners or an agent appointed and maintained by the partnership;

“(3) must be signed and acknowledged by all the partners, if there are ten or fewer partners, and by at least ten partners, if there are more than ten partners;

“(4) must specify the partners required to sign a transfer of real property held in the name of the partnership; and

“(5) may contain any other matters the partnership chooses, including the authority, or limitations upon the authority, of some or all of the partners to enter into other transactions on behalf of the partnership.

“(c) If a statement of partnership authority lists an agent, the agent shall maintain a list of all the partners and make it available to any other person on request for good cause shown.

“(d) An amendment to a statement of partnership authority must meet the requirements for execution of an original statement unless otherwise provided in the statement. A notice of denial under Section 304 is not an amendment under this subsection.

“(e) Even if a filed statement of partnership
authority or an amendment thereto does not conform to all the requirements of subsections (b) and (c), it operates with respect to other persons as provided in subsections (h) and (i) if it is signed and acknowledged by the number of partners specified in subsection (b)(3).

“(f) Partners filing a statement of partnership authority, or an amendment thereto, shall promptly send copies of the statement or amendment to all of the partners or other persons named as partners.” The next sentence was added, if any of you are following the book. “Failure to send a copy under this subsection does not affect the validity of the statement or amendment with respect to other persons.

“(g) A person may sign and acknowledge a statement of partnership authority, or an amendment thereto, by an attorney in fact.

“(h) A filed statement of partnership authority supplements the authority of a partner under Section 301 to enter into transactions on behalf of a partnership as follows:

“(1) Except as provided in paragraph (2), a grant of authority to a partner contained in a statement of partnership authority is conclusive, in favor of a person who gives value without knowledge to
the contrary, that the partners stated to be authorized to transfer partnership property or enter into other transactions on behalf of the partnership are authorized.

“(2) A grant of authority to a partner contained in a statement of partnership authority to transfer real property is conclusive in favor of a person who gives value without knowledge to the contrary only if the record title to the real property is in the partnership name and the statement, or a certified copy thereof, is recorded in the place for recording transfers of that real property.

“(i) A filed statement of partnership authority limits the authority of a partner under Section 301 to enter into transactions on behalf of a partnership as follows:

“(1) Except as provided in paragraph (2), a limitation on the authority of a partner contained in the statement is effective against a person not a partner only if the person knows of the limitation.

“(2) A limitation on the authority of a partner to transfer real property contained in the statement, is effective against a person not a partner if record title to the property is in the partnership name and the statement, or a certified copy thereof, is
recorded in the place for recording transfers of that property.

“(j) A partnership may record, in the place for recording transfers of real property, a certified copy of the statement of partnership authority, or any amendment thereto or notice of denial thereof, that has been filed in the office of [the Secretary of State].

“(k) A partnership may cancel a statement of partnership authority by filing an amendment that identifies the statement and states that it is canceled. A statement of partnership authority that is not otherwise canceled is canceled by operation of law upon the expiration of five years after the day on which it is filed with [the Secretary of State].

“(l) The [Secretary of State] may collect a fee for the filing of a statement of partnership authority, or any amendment thereto, as may [the officers responsible for] recording transfers of real property.”

CHAIRMAN DYKMAN: Commissioner Kneedler.

COMMISSIONER H. LANE KNEEDLER (Virginia): I just want to respond to something I think said in response to Commissioner Read earlier about whether we would have more floor time to come back. And we were planning to meet after this session this morning,
respond, take votes on your various suggestions, and come back to the floor this year with whatever suggestions that we decided to adopt.

I now understand that we are not going to have further time on the floor this year. We will, of course, and we already have been considering your suggestions thus far. That may make a difference in whether you want to make an actual motion now as opposed to just letting us consider matters.

The net effect of all this, I gather, is that when we come back next year for the final, final reading, we won’t have to read line by line the sections that we have already read. We would just note for you the changes that we have made in those sections and then pick up next year line by line wherever we leave the statute this year.

Commissioner Read, I don’t know if that makes a difference in what you were pursuing or not.

COMMISSIONER FRANK W. DAYKIN (Nevada): My approach is linguistic but my question goes to the substance. And I will make a motion only if the chairman so suggests.

Where we have talked in the act about partnership property or partnership liabilities, we are talking about the property or liabilities of the
partnership.

Here, in this section, where we speak of partnership authority, we are talking, it seems to me, subject to correction by wiser members of the committee, not about the authority of the partnership but the authority of the partners.

Should we not therefore label this document, which is something new from the old uniform act, as a statement of partners authority.

The reporter concurs. I make no further observation.

COMMISSIONER JUSTIN L. VIGDOR (New York): I have a question about 303(b)(1) and wonder if “or” on Line 17 should be “and.”

As it reads, it seems to permit a foreign partnership that has an office in the state not to disclose that office when it files.

....

MR. HARRY HAYNSWORTH (Reporter): It’s to change the word “or” in Line 17 on Page 5 to “and.” And the answer should be “yes.”

COMMISSIONER VIGDOR: May I continue, Mr. Chairman?

CHAIRMAN DYKMAN: Yes.

....
COMMISSIONER VIGDOR: If that is the case -

MR. WEIDNER: We had provisions that were requiring that it be kept current, and we wound up deleting those.

COMMISSIONER VIGDOR: Right. I thought that was the case. Then my suggestion that perhaps in (c) there should be a requirement that the agent shall maintain a current list. Perhaps currency can be provided for by imposing that obligation on the registered agent.

COMMISSIONER ROBERT H. CORNELL (California): A little background to this whole section. This is permissive. And what we think will happen here, this has been used successfully, this type of certificate, a slightly different form, has been used successfully in California to expedite commerce when there are partnerships trying to transfer property.

What will normally happen is, this certificate of authority will be prepared and filed and so forth in anticipation of a complicated real estate transaction to satisfy the banks, the insurance company, the lender, the title company, and so forth, on authority. And then they will forget about it.

That’s why we have a five-year sunset. So, since it’s permissive, the attempt to bring it up to date will probably be ignored. We don’t really have a
mechanism to enforce that. The reason we don’t have a certificate of partnership in all cases is that this act applies to lot of people who don’t know their partners at the time they are doing business and then suddenly, under the act, they are partners again -- fellows on the truck.

MR. DONALD J. WEIDNER (Reporter): If I could just make one more comment to Bob Cornell’s comment on the previous point.

If your question would concern subsection (c), it’s a disclosure tax that is really independent of the operation of the section, of the basic operation of the section. It doesn’t hurt the operation of the section that the disclosure doesn’t have to be current.

COMMISSIONER HENRY M. KITTLESTON (Florida): I think this Section 303, statement of partnership authority, is a wonderful idea.

I addressed 303(b) as in Baker (4), the August 4 handout, Page 6, top of the page. It says that the statement must specify the partners required to sign a transfer of real property held in the name of the partnership.

Does the committee mean by the word “specify” that the statement must name the individuals or the persons who are the partners required to sign, or
could, for example, the statement of partnership authority say a transfer of real property must be signed by any three partners, without naming them? The latter?

MR. DONALD J. WEIDNER (Reporter): Yes.

COMMISSIONER KITTLESON: Could you make that clear in the comment?

MR. WEIDNER: Yes.

CHAIRMAN DYKMAN: Okay. Commissioner Coggeshall.

COMMISSIONER BRUCE A. COGGESHALL (Maine): In 303(b)(1), the reference to the principal executive office I think ought to be to the principal place of business, which is the place where the partnership is required to keep its records.

CHAIRMAN DYKMAN: What page and line is that?

COMMISSIONER COGGESHALL: I am looking at the blue book rather than the handout. It’s 303(b)(1).

MR. HAYNSWORTH: The answer should be “yes.” There shouldn’t be the dichotomy using principal place of business in one place and chief executive officer in another.

CHAIRMAN DYKMAN: Commissioner.

COMMISSIONER COGGESHALL: On Section (i)(1), which is on Page 7 of the handout, on Line 13, the
phrase starting out, “except as provided in paragraph (2),” is really a statement of limitation. But if you look at subparagraph (2), subparagraph (2) doesn’t limit subparagraph (1) at all. It actually adds another circumstance under which the grant of authority is conclusive.

It would seem to me that that ought to be stricken.

The effect is that the limitation is effective, one, if he had knowledge, two, if you record it.

MR. DONALD J. WEIDNER (Reporter): But (h) (1) says that the recorded statement binds the partnership. Subsection (2) says: However, if the statement concerns real property, it must be recorded locally to bind the partnership.

COMMISSIONER COGGESHALL: No. (1) says: If you know about it, it binds the partners. It binds the person who knows about it. And (2) says: Even if you don’t know about it, if it is recorded, it binds the partnership -- or binds the person who is involved with the real estate transfer.

MR. WEIDNER: We mean (1) to say that if the partnership makes an extraordinary grant of authority to one of its members, enhances his agency power beyond
the normal powers --

COMMISSIONER COGGESHALL: No. (1) is dealing with the limitation.

MR. WEIDNER: I am sorry. I thought you said (h)(1). You are on (i)?

COMMISSIONER COGGESHALL: I am on (i), yes. I may have said (h). I meant (i).

(i)(1) says that if you know about it, you’re bound by it. (2) says: Even if you don’t know about it, if it is recorded, you’re bound by it with respect to real estate transactions.

And therefore the language of limitation in Section 1 should not be there.

COMMISSIONER HOWARD J. SWIBEL (Illinois): On (h)(2), which is Line 25 on Page 7, we have the word “only.” Now -- is only if the record title is in the name and statement is filed, is recorded. We don’t have that word on Page 8. But I believe it is our intention that that would be the case, which would be on Line 13, Page 8 in (i)(2). There is “only if record title is in the partnership name and it is recorded in the place.” If we put “only” in, I think that --

COMMISSIONER COGGESHALL: That would be fine.

CHAIRMAN DYKMAN: Commissioner.

COMMISSIONER MARLIN J. APPELWICK (Washington):
I guess I would like to urge you to consider a general change of philosophy on this section about the five-year period and updates.

The point I think you made was that the voluntary statement was to facilitate commerce in particular transactions. It occurs to me that the absence of an update could cause significant problems.

A registered agent designated, lawyer checks that, sends a required notice, only to discover later the transaction has a problem because that person is no longer effectively a registered agent but has relied on that disclosure that’s not been updated. Or that you have authorized one partner to transact real property transactions in the disclosure. Subsequently that person has been stripped of it but someone else in reliance on this statement and the assertion of the partner goes forward with the transaction.

Now, certainly those things can be remedied by litigation, but it seems to me one of the points of the statute is to avoid litigation to facilitate transactions and make them stick.

I would simply suggest that we adopt something that would require at least as to some aspects of the disclosure an annual update or make the disclosure only annual in duration so that if it’s not refiled or
updated, it expires of its own volition.

I just urge you to reconsider that as an annual update so that we might not have this inadvertently cloud transactions.

COMMISSIONER ROBERT H. CORNELL (California): Again, if you do elect to use the certificate and you don’t keep it up, you do so between yourself and innocent people at your peril. And that is what this is intended to do, so that the people who do take, relying on the certificate -- there is a conclusive presumption in their favor.

We think the mandatory rules won’t apply because people -- they will be ignored and there is no way to enforce it, and if you were to do that, you’d have to say: This is only conclusive against people where it has been filed within 12 months of the date of the transaction. And that is what we are trying to avoid.

COMMISSIONER APPELWICK: I understand that. Leaving it in place for five years seems to me too long. Not all partners in a partnership are necessarily managing hands-on and knowledgeable, and so someone who is not designated as a managing agent or hands-on is at risk by that filing for an extended period. You may be wise to simply bracket that duration, if you don’t
accept the annual or the one-year durational recommendation.

....

COMMISSIONER PETER F. LANGROCK (Vermont):
Almost. Just a very minor matter. In (b) (1) and (2), you use the street address. And that’s not a term of art that I am specifically familiar with.

I take it what you are getting at is to try to have the actual physical location of where the partners live in (b)(2)? The street address is a bit confusing. For instance, I don’t have one. My mailing address would be my street address in my case, which is simply a town.

But is there some policy reason why you want the street addresses rather than the mailing address of the individual partners?

COMMISSIONER HOWARD J. SWIBEL (Illinois):
There is no policy reason why we don’t --

COMMISSIONER LANGROCK: I will make a suggestion -- okay.

COMMISSIONER BRUCE A. COGGEHALL (Maine): I would agree with the commissioner that spoke on the duration of the partnership authority. Five years does seem like an awful long time if there isn’t any required update.
I also think that there ought to be, on the other side of the coin, the ability to continue it by filing so that it isn’t automatically -- whatever date is picked -- whatever the duration you eventually decide on -- is not automatically killed and you have to file a whole new statement. I think there ought to be a mechanism for filing similar to a continuation statement under the Uniform Commercial Code:

COMMISSIONER SWIBEL: This whole section was subjected to intensive review by the ABA advisers and other persons who practice regularly in this area, and they viewed the whole certificate of authority mechanism as a way to facilitate commerce, to make it less confusing for people to deal with partnerships. And I think they were concerned about the transaction costs of having to do these updates. It’s simply a balancing question.

COMMISSIONER COGGESHALL: I am not suggesting you do an update. What I am suggesting is that there be an ability to continue that beyond its stated duration if the partnership is ongoing rather than having to file a whole new certificate. That would reduce the transaction cost, not increase it.

MR. HARRY HAYNSWORTH (ABA Adviser): That is an issue we have not considered.
COMMISSIONER COGGESHALL: I would also suggest that whatever the duration of it is, it ought to be measured not from the time of initial filing, but from the date of the last amendment.

CHAIRMAN DYKMAN: Thank you. Commissioner Read.

COMMISSIONER HAROLD E. READ, JR. (Connecticut): Mr. Chairman, we were talking a little while ago about the people who have to sign transfers of real estate where one partner or two or three may sign, depending upon the nature of the recorded title.

At the bottom of Page 5, we require that this certificate be signed and acknowledged by all the partners, or at least ten.

So, I point out to you that in order to establish that one partner is authorized to transfer real estate, you need to have a document signed and acknowledged by at least ten, if there are more than ten partners.

I understand that this is said to be something that the partners may record, the statement. But I suggest to you that the world of real estate conveyancing being what it is, the title companies and other conveyancers are going to take a look at this and say: Wow, that is a great idea. We get that on record and we have totally eliminated the problem of partner
authority.

So that creating, as I say, creating -- ten people to guarantee that one has the authority to sign and putting that in a recorded document just seems to me wrong and I don’t think that we should do it.

MR. DONALD J. WEIDNER (Reporter): We discussed it in that context. And our approach has been that although the certificates are voluntary, that they would be required of lenders.

This, by the way, is related to a change earlier, when we -- in 301, what we did was eliminate from 301 what had been the UPA list of acts that required unanimous consent of all the partners. And this provision is really a check on that. The two are related. But we assumed that an extraordinary grant of authority would be required in many cases by the lenders. We approached it on that basis.

That is one of the reasons why we didn’t require all this updating, because we assumed that lenders would require it as a one-shot matter and that most of the force of the document would be spent, and we didn’t want to get partners in trouble by having this thing -- by imposing an unnecessary requirement that it be updated. And we wanted to sunset it. It may be that sunsetting it, even within less than a year,
would do just fine in most cases.

COMMISSIONER READ: Most partnership conveyances are signed by one or two partners, I think, not a lot of them. Do we really want to require ten partners to execute and record a statement that the signature of two is required? Does may make sense?

COMMISSIONER ROBERT H. CORNELL (California): Ted, our experience has been that if you have 30 partners in a general partnership, we can’t get title insurance unless all 30 of them sign, no matter what your partnership agreement says, unless we have something under this act. The reason we adapted this act was, once we do it, we have that certificate, and we can rely on that and give one person—or two people the authority to execute deeds.

COMMISSIONER READ: You see, you’re talking about a 30-person partnership. I guess I am thinking of the mom-and pop partnerships. They’re a respectable word around this conference. It doesn’t seem to me that you should have to get all the partners of a small partnership to say that one partner has the authority to convey when this act has already gone to great lengths to say that less than ten have the authority to convey.

COMMISSIONER CORNELL: Are you talking about a
partnership of less than ten people?

COMMISSIONER READ: No. I am talking about --

COMMISSIONER CORNELL: Well, mom and pop is
usually pretty small.

COMMISSIONER READ: Well, this is mom and pop
and brother and sister and mistress and ---

COMMISSIONER CORNELL: You are talking about a
partnership of over ten people.

COMMISSIONER READ: Expanded family. Not that.
A small business, not a giant business.

MR. DONALD J. WEIDNER (Reporter): We discussed
that at great length. The idea was this: Suppose this
certificate grants to one partner the power to convey
all partnership real property.

Now, do you want every partner to be subject
to that risk? Suppose you have a five-person
partnership. Do you want one person, you know, two
people in the partnership to be able to sign a
certificate that will bind the partnership?

We were concerned about the partner who was
left off the certificate. And our theory was, we didn’t
want to give extraordinary agency power. Remember, this
certificate only comes in to apply here -- this grant
of authority provision is essentially the biggie -- if
you’re trying to give one partner much more power than
the partner usually has.

The question is, if you are going to give one of your partners in a small partnership much more power than a partner usually has, should you be required to sign on to it before you can be held liable? You are right, it makes the certificate less effective if every partner in a ten-person partnership has to sign it.

COMMISSIONER READ: We might as well, get the ten people and have them sign the deed and forget the certificate.

The other thing I would say is that it has been increasingly the philosophy of this conference to dispense with formalities, extra formalities in the execution of documents -- land transactions, for example, eliminates the requirement of witnesses and acknowledgement. I don’t see in particular why this statement needs to be acknowledged. At the very least, I would eliminate that.

COMMISSIONER MORRIS W. MACEY (Georgia): Commissioner Read, what do you think? You think this certificate would be appropriately signed by only one partner?

We were trying to reach a balance. We thought there ought to be more than one. We were thinking about the huge partnerships in connection with the smaller
ones -- that it would seem to be unnecessary.

What is your view on that?

COMMISSIONER READ: If the partnership is authorizing one partner to sign the deed, why not?

MR. HARRY HAYNSWORTH (ABA Adviser): May I respond to that, please? My position was, it should be one. The title insurance people took the position it should be all, even if it was 2,000. And the ten ended up -- I started, all right, if not one, why not two? And ten was -- well, we would accept that. We’d be comfortable with ten. That is rather arbitrary.

As to the acknowledgement, I raised the same issue. Why not just have it notarized, something like that. The same issue came up. They said: No. The acknowledgement is what we want, to give it more sanctity.

COMMISSIONER READ: The title companies are, at the very least, consistent. They have been saying that forever. And we have been saying the contrary, however, for quite some time. I don’t think the fact that they say that should lead us to require an acknowledgement when it is essentially meaningless in modern society.

Those acknowledgements don’t mean a damn thing. They are just an extra inconvenience and extra burden for the title transaction.
CHAIRMAN DYKMAN: Commissioner Benfield.

COMMISSIONER MARION W. BENFIELD (North Carolina): I have a related point, perhaps a more minor point. I think there is an inconsistency between 302(a) and 303(i)(2), which is what we have been talking about. 302(a) says: If record title to property is in the partnership name, any partner may transfer it by a transfer executed in the partnership name.

That is effective unless a transferee has knowledge that the transfer was not authorized. However, in 303(i)(2) on Page 8 of the handout, you make effective against transferees things recorded in the land records, which limit the rights. But, of course, knowledge and notice in the land records are traditionally two entirely different ideas. And you give a false signal in 302 as to the relationship between knowledge and notice.

I thought earlier about commenting about the fact that you use knowledge in 302 generally rather than the more common notice in the real estate transfer world. I don’t know why you chose knowledge rather than notice there. And I wasn’t going to say anything about it until I saw this inconsistency between the two sections.

I think you might want to go just to the
ordinary real estate transfer idea of you have to be without notice of the inability to transfer.

CHAIRMAN DYKMAN: Commissioner Cutler.

COMMISSIONER EDWARD I. CUTLER (Florida): This is also somewhat related. I don’t know whether are any of you ever tried to get ten persons who were in different locations all to sign and acknowledge one paper. Could we at least in the comment, if not in the text, provide that this may be done by counterparts? Thank you.

CHAIRMAN DYKMAN: Thank you. Commissioner.

COMMISSIONER JUSTIN L. VIGDOR (New York): A minor matter. Line 10, Page 7. I question whether the word “supplements” is an appropriate word. As I read and reread it, it seems to me that a better word might be “affects.” I didn’t believe there is an additional grant of authority here.

CHAIRMAN DYKMAN: Page what?

COMMISSIONER VIGDOR: Page 7, Line 10. I don’t see an additional grant of authority. I think the word “supplements” might better be “affects.”

COMMISSIONER DALE G. HIGER (Idaho): I have a point of inquiry about what the committee’s action is going to be on my proposed amendment to Section 302(a) in light of the chairman’s comment that this is a final
reading and you will not have any more floor time.

Are you going to accept that proposed amendment, or do we need to do a motion and act on it?

That was amending Line 4, Page 4, Section 302(a).

CHAIRMAN DYKMAN: Commissioner.

COMMISSIONER H. LANE KNEEDLER (Virginia): We haven’t had a chance to discuss this, but I think the committee is inclined to accept it.

MR. HARRY HAYNSWORTH (ABA Adviser): You’d have no objection if we added “some or all,” which was Professor Benfield’s suggestion?

COMMISSIONER KNEEDLER: No. COMMISSIONER NIGER: I think that is a different issue.

COMMISSIONER KNEEDLER: I think the committee is inclined to accept your amendment.

COMMISSIONER HIGER: Okay.

CHAIRMAN DYKMAN: Where is the President?

COMMISSIONER BRUCE A. COGGESHALL (Maine): Mr. Chairman, could I turn to Page 7 of the handout? On Lines 2, 3, 4, and 5. On Line 2, I don’t know what that means when it says “to all of the partners or other persons named as partners.”

Shouldn’t it simply say to all persons named as partners? I am on Page 7 of the handout, starting at Line 2.
MR. DONALD J. WEIDNER (Reporter): Not all partners have to be named.

COMMISSIONER COGGESHALL: Then we are going to say, then send it to all partners.

MR. WEIDNER: This provision is a partner protective provision.

COMMISSIONER BRUCE A. COGGESHALL (Maine): what this is requiring is that a copy of this be sent to all partners, so we strike the language “or other persons named as partners”?

MR. WEIDNER: “And if anybody else is named as a partner, that person.”

COMMISSIONER COGGESHALL: If in fact he is not a partner? Is that the idea?

MR. WEIDNER: Yes.

COMMISSIONER COGGESHALL: Okay. Now, failure to send a copy does not affect the validity of a statement with respect to other persons.

Who does that refer to?

MR. WEIDNER: Non-partners, people who might rely on the record.

COMMISSIONER COGGESHALL: Why should failure to send affect his validity with respect to anyone?

MR. WEIDNER: What we are saying is, as among the partners, if they don’t tell each other what they
are doing or if they have breached their agreement with respect to these certificates, they can have a cause of action against each other, but that is a fight as among themselves and doesn’t affect a properly recorded document as to third parties.

COMMISSIONER COGGESHALL: Well, it doesn’t affect it as to anybody, does it? Shouldn’t you put a period after the word “amendment” and strike the rest?

MR. WEIDNER: I see the point. Okay.

....

---o0o---
March 19, 1991

Mr. Lane Kneedler
Office of Attorney General
101 N. Eighth Street
Richmond, Virginia 23219

Re: Comments on Draft RUPA

Dear Mr. Kneedler:

As you will recall, I chair the ABA Partnership Committee's Ad-Hoc Subcommittee to comment on drafts of the Revised Uniform Partnership Act. Some time ago, I indicated to you that we would be forwarding you another comment letter before your meeting scheduled for March 22-23. Unfortunately, we are unable to complete the work necessary for that next report prior to your meeting.

When we met in Chicago last month, we decided that our reports to you and the drafting committee have not been thorough enough. What we believe is lacking is more of the analysis and the reasons underlying our recommendations for particular positions. Based upon our discussions on this subject, we have decided that our reports to you and your drafting committee must include more detailed analysis and, where possible, case citations illustrating the problems to which we are reacting.

Unfortunately, having launched on a more extensive endeavor, we find that we are now falling behind our timing goals. Based on an informal poll of some of my committee members, I find overwhelming support for the notion that we should not present to your committee incomplete and hastily prepared work product. Thus, I regret to inform you that we will not be able to provide you a summary of our recent discussions in time for your next meeting.

Very truly yours,

Gerald V. Niesar
Chairman, Ad-Hoc Subcommittee on RUPA

GVN:Cmm

cc: Ad Hoc Committee Members
June 24, 1991

Ad Hoc Subcommittee to Comment on RUPA Distribution List

Re: Recent Activities

1. Enclosed is the final "general comment letter" to the NCCUSL Drafting Committee along with my brief cover letter forwarding it to Lane Kneedler.

2. Also enclosed is the comment letter regarding Article VI and Sections 702, 703 and 802. This was prepared primarily by Lauris Rall, Bob Keatinge and Tony van Westrum.

3. Allan Duboff is working on one or two of his partners, and the Real Estate Section Liaison, to get them to put together a comment letter addressing especially Sections 202 and 203, which deal with partnership property. In our discussions at Williamsburg, we found numerous problems with the sections dealing with partnership property and decided that we would aggressively pursue the Real Estate Section for input on these particular provisions.

4. Our next meeting will be in Atlanta on August 12, probably at 9:30. We decided in Williamsburg that we would have a very short meeting in Atlanta because, with all the conflicts, it would probably be difficult to have a working session. I am hoping that we will be able to get Lane Kneedler to join us for a brief meeting. Hopefully, Mr. Kneedler and Lauris Rall can report on what happened at the NCCUSL meeting August 5.

I look forward to seeing all of you in Atlanta.

Very truly yours,

McKENNA & FITTING

By Gerald V. Niesar

GVN:cm
Enclosures
PARTNERSHIP COMMITTEE
AD HOC SUBCOMMITTEE ON RUPA
DISTRIBUTION LIST

Gerald V. Niesar, Chair
McKenna & Fitting
595 Market Street, Suite 1600
San Francisco, CA 94105
Tel: (415) 243-9100
Fax: (415) 243-9276

Prof. Norwood P. Beveridge
Oklahoma City University
School of Law
2501 N. Blackwelder
Oklahoma City, OK 73106
Tel: (405) 840-4770
Fax: (405) 521-5172

Allan B. Duboff
Katten, Muchin & Zavis
2029 Century Park East
Suite 200
Los Angeles, CA 90067
Tel: (213) 788-4515
Fax: (213) 788-4471

Michael L. Gravelle
Baker & McKenzie
130 E. Randolph Dr., Ste 3100
Chicago, IL 60601
Tel: (312) 861-8879
Fax: (312) 861-2899

George Hook
McBridge, Baker & Coles
500 W. Madison Street
Chicago, IL 60606
Tel: (312) 715-5734
Fax: (312) 993-9350

James L. Jerue
Katten, Muchin & Zavis
525 West Monroe Street
Suite 1600
Chicago, IL 60606-3693
Tel: (312) 902-5293
Fax: (312) 902-1061

Alan Kailer
Jenkins & Gilchrist
1445 Ross Avenue, Ste 3200
Dallas, TX 75202
Tel: (214) 855-4361
Fax: (214) 855-4300

Robert Keatinge
460 S. Marion Pkway 1904
Denver, CO 80209
Tel: (719) 481-7475

Martin I. Lubaroff
Richards, Layton & Finger
P.O. Box 551
Wilmington, DE 19899
Tel: (302) 651-7610
Fax: (302) 658-6548

Thurston R. Moore
Hunton & Williams
P.O. Box 1535
Richmond, VA 23212
Tel: (804) 788-8295
Fax: (804) 788-8726

Paul McCarthy
Baker & McKenzie
One Prudential Plaza
130 East Randolph Drive
Chicago, IL 60601
Tel: (312) 861-2858
Fax: (312) 861-2899

William G. Pusch
Davis, Wright & Tremaine
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101
Tel: (206) 628-7744
Fax: (206) 628-7040
Lauris G.L. Rall
Thacher, Proffitt & Wood
Two World Trade Center
New York, NY 10048
Tel: (212) 912-7400
Fax: (212) 912-7751

Larry E. Ribstein
Professor of Law
George Mason University
School of Law
3401 No. Fairfax Drive
Arlington, VA 22201-4498
Tel: (703) 841-2638
Home: (703) 978-3482

Anthony van Westrum
Burns, Wall, Smith & Mueller
303 E. Seventeenth Avenue
Suite 800
Denver, CO 80203
Tel: (303) 830-7000
Fax: (303) 830-6708

Robert H. Zimmerman
Blank, Rome, Comisky & McCauley
Four Penn Center Plaza
Philadelphia, PA 19103
Tel: (215) 569-5698
Fax: (215) 569-5555
Fax: (719) 481-7448
Interested Persons:

Allan G. Donn
1800 Sovran Center
Norfolk, VA 23510
Tel: (804) 628-5521
Fax: (804) 628-5566

Harry J. Haynsworth, IV
Southern Illinois Univ.
School of Law
Carbondall, IL 62901-6804
Tel: (618) 536-7711
Fax: (618) 453-8769

Peter D. Hutcheson
(Editor-PUBOGRAM)
Norris, McLaughlin & Marcus
P.O. Box 1018
721 Route 202-206
Somerville, NJ 08876
Tel: (201) 722-0700
Fax: (201) 722-0755

Edward S. Merrill
McCutchen, Doyle, Brown
& Enersen
P.O. Box V
Walnut Creek, CA 94596
Tel: (415) 975-5358
Fax: (415) 975-5390

Gregory P.L. Pierce
Katten, Muchin & Zavis
525 W. Monroe
Suite 1600
Chicago, IL 60606
Tel: (312) 902-5541
Fax: (312) 902-1061

John H. Small
(Chairman, Partnership Committee)
1310 North King Street
Wilmington, DE 19899
Tel: (302) 888-6510
Fax: (302) 658-8111

Prof. Donald J. Weidner
(Reporter for RUPA)
Florida State University
Tallahassee, FL 32306-1034
Tel: (904) 644-2800
Fax: (904) 644-5487

Caryl B. Welborn
Morrison & Foerster
345 California Street
San Francisco, CA 94104-2675

GVN755\RUPA.LST
May 2, 1991
May 29, 1991

Mr. Lane Kneedler  
Office of Attorney General  
101 N. Eighth Street  
Richmond, Virginia 23219

Re: Revised Uniform Partnership Act

Dear Mr. Kneedler:

At Gerry Niesar's request, I am pleased to submit this report of the meeting on February 22 and 23, 1991 of the Ad Hoc Committee (the "Subcommittee") of the ABA Committee on Partnership and Unincorporated Business Organizations (Section of Business Law) which is reviewing the NCCUSL draft of the Revised Uniform Partnership Act.

As Gerry mentioned to you in his letter dated March 19, 1991, the Subcommittee was unable to complete this report in time for your meetings in March. We have been advised by Harry Haynsworth, the ABA Liaison to the NCCUSL Drafting Committee, that the principal focus of your March meetings was Sections 702 and Section 802. The Subcommittee's report to you dated January 25, 1991, included our comments and recommendations concerning the major issues in those sections, as we perceived them. We understand from Harry that our positions were considered and rejected at that time. We believe that further explanation of our reasons for our recommendations, and our analysis thereof, may be helpful to NCCUSL in its further consideration of those sections.

Also included in this report are comments to RUPA Article VI, including a marked version thereof to indicate recommended changes, and our comments on and analysis of Section 703. Various members of our Subcommittee have contributed to this
process and to this written report, and our commentary is divided into four sections below related to (1) Article VI, (2) Section 702, (3) Section 703 and (4) Section 802.

(1) Article VI.

While most of the marked changes indicated on the enclosed copy of Article VI are self-explanatory, certain changes are discussed below. The Subcommittee continues to believe that written notice of a partner's intention to withdraw is desirable, for the reasons set forth in the January 25th Report. Even if the Subcommittee's recommendations for Section 802 are not adopted, the current NCCUSL Draft Section 802(2) provides for a 90 day period commencing with withdrawal. It seems critical to us that a partner have written confirmation of when that time period is triggered.

Draft Section 601(3)(B) is confusing to us, because it is unclear whether the phrase "to the extent it is not reasonably practicable to carry on the business in partnership with that partner" was intended to qualify both the "breach of the partnership agreement" and the breach of "a partnership duty". Our interpretation of the current UPA is that the former phrase is intended only to qualify a breach of a duty. The Subcommittee believes that the willful or persistent material breach of the partnership agreement should be sufficient grounds for expulsion. And a separate category for expulsion should include conduct making it not reasonably practicable to retain that partner, similar to the formulation in Section 802(9)(iii).

The Subcommittee also believes that Section 601(11) should be deleted. If a person rescinds his agreement to be a partner, through judicial order or otherwise, the effect of that rescission, with respect to the other partners, is to nullify the partnership relationship as to that person. Thus, since the rescinding person was never a partner, he would not need to dissociate from the partnership. Furthermore, if included as a dissociation event under Section 601, rescission would give rise to a buyout right under Section 702. However, the usual remedy for a rescinding partner is the return of his investment. Perhaps a rescission remedy could be added to Section 405.

The changes proposed to Section 602 and 603 are principally technical in character to clarify the meaning thereof. The Subcommittee believes that adding Section 602(e) is important so that any consequences of wrongful dissociation are referenced in this Section. (The Subcommittee disagrees with Draft Section 702(f) for the reasons set forth below and in our January 25th Report.) The Subcommittee also recommends making the affirmative statement in Section 603(a) that dissociation does terminate that
partner's obligations to the other partners for future partnership liabilities.

(2) Section 702.

With respect to Section 702 of RUPA (formerly UPA Section 38), the Subcommittee agrees with the clarification that the value of the dissociating partner's interest should be determined at the time of the dissociation. We also agree with the elimination of the rule under Section 38(2) of the UPA that discounts the value of the departing partner's interest for "goodwill." In other respects, we continue to believe that certain decisions of the NCCUSL Drafting Committee should be reconsidered.

The Subcommittee strongly believes that the new concept of "fair market value" with a definition taken from the Treasury Regulations is not an improvement. The 1987 ABA Report on the UPA recommended that the revised act clarify value. In the recommended changes to UPA Section 42 (which has been combined with Section 32 and converted to Section 702 of RUPA) the Report recommended: "Specify that the 'value of the interest' means fair market value, not book value or some other accounting convention." 43 Bus. Law. 121, 180 (November 1987). It was not the intention that the concept of valuation be completely removed from its historic business law context. We believe that the historically developed common law applicable to partnerships and other business entities should be maintained with refinements which clarify the issues. For this reason, we recommend that the term "fair market value" be replaced with either the term "value", as in the current law or "fair value" as in the Model Business Corporation Code. The addition of the concept of "fair market value" and the use of a definition taken from the federal estate tax regulations has the effect of engrafting a large and not particularly helpful body of law onto a commercial statute.

The Subcommittee appreciates that the aforementioned change was made in part in response to the ABA Report and in part to the comparatively large amount of litigation over the "value" of a partners's interest. As the prodigious number of cases in the estate tax area over the question of valuation indicates (not to mention the recent addition of an entire new chapter to the Internal Revenue Code dealing almost exclusively with the issue of valuation of small businesses), the question of value is an inherently factual one which cannot be resolved by adding additional definitional language. The danger of such specificity is not only that it adds the tax law and its multitudinous interpretations, but that it invites states to memorialize in their version of the UPA the local case law on valuation, which tends to be heavily fact oriented. In other words, if tough cases make bad common law, they probably make awful statutory law.
We continue to believe that Section 702(c) and (d) should require the payment of the amount believed appropriate by the partnership to the dissociating partner within a short period of time (we suggest 120 days) after dissociation. The payment would be without prejudice to the dissociating partner's right to commence action within a short period of time (either 90 or 120 days after payment) for a judicial determination of the amount due. In either case, the amount due should be the fair value of the partner's interest as discussed above reduced by the damages, if any, occasioned by any dissociation in violation of the partnership agreement. In this way, the rights of both parties could be promptly and finally determined.

This requirement for partial payment of the amount not in dispute, like the procedures for purchasing the shares of a dissenting shareholder, provides a fair result, and reduces the amount in controversy to the difference in estimation of fair value. By adding the award of attorneys' fees to the prevailing party (or to the party whose estimation of amount due to the dissociating partner is the closest to that ultimately determined), the incentive to litigate is considerably reduced. Obviously, there will be good faith disputes both as to the fair value of the dissociating partner's interest and the damage resulting when the dissociation is wrongful, and these disputes will continue to be litigated. The requirement of payment of the dissociating partner's interest within 120 days does not necessarily constitute a radical departure from prior law. Under current law, except in the case of a partner's withdrawing in violation of the agreement, the withdrawal forces a winding up. The new provision would allow the partnership to determine within the 120 day period after dissociation whether it wishes to wind up or continue. If the partnership chooses to wind up the dissociating partner would be treated in the same manner as the other partners on winding up, while if the partnership chose to continue, the dissociating partner would be entitled to receive prompt payment. The proposed modification therefore merely allows the partnership the opportunity to avoid winding up if it so desires through the prompt payment of the value of the dissociating partner's interest.

It is intended that this rule apply equally to a partner who dissociates in violation of the agreement. Section 602 provides that a partner who dissociates in violation of the agreement is liable for damages caused by the breach. The amount to be paid to the wrongfully dissociating partner will be the fair value less any damages occasioned by the wrongful dissociation. Thus, the value of the partner's interest would be reduced by the damages sustained by the partnership as a result of having to obtain financing or liquidating the partnership assets to fund the buyout or replace the capital of the dissociating partner.
In the case of a dissociation not in violation of the agreement, the partnership can decide within the payment period whether the partnership would be better served by continuation or winding up. If the losses resulting from the cost of obtaining financing or distributing or liquidating assets are less than those resulting from winding up, both the partner and the partnership will be better off by paying off the partner. The partnership can make the same determination with respect to the dissociation of a partner in violation of the agreement. In that case, however, the partnership can factor the recovery of the damages into the determination. In both cases, the Subcommittee's recommendation has the benefit of allowing the partnership (rather than the dissociating partner) to determine whether the entity should be continued.

Finally, the Subcommittee believes that it is appropriate to continue the rule currently provided in UPA § 38(2)(b) that a dissociating partner will be indemnified against all present and future liabilities. The protection afforded under the UPA to partners wrongfully causing dissolution should be extended to all dissociating partners under RUPA. The amount paid to a departing partner, regardless of how determined, presumably constitutes a full settlement of that partner's interest. Such determination will entail the estimation of the amount of outstanding liabilities and of the value of partnership property and good will. The dissociating partner does not participate in changes in value or in decreases in liability which occur after the dissociation. The proposed rule under § 702(e) would have the dissociating partner liable, however, for any existing liabilities which were not accounted for at the time of dissociation. The current rule, which requires that the partners choosing to continue the business bear the risk of unincluded liabilities, is a sound one. Liabilities should be accounted for as part of the determination of the amount to be paid to the dissociating partner. If the remaining partners are uncomfortable with unascertainable existing liabilities, they may elect to wind up the partnership rather than continue it. The rule as currently set forth in 702(e) puts the dissociating partner in the position of continuing to be at risk for past liabilities while having no interest in or control over the ongoing business.

(3) Section 703.

Section 703 as presently drafted covers two related but separate matters: (a) the power of a dissociating partner to bind the partnership after dissociation and (b) the dissociating partner's liability to third persons for partnership obligations incurred after dissociation. The common theme of the two parts of Section 703 is that both the creditor who extends credit to a partnership in reliance on the creditworthiness of a dissociating partner and the creditor who apparently transacts business with a
partnership through a dissociated partner should be able to pursue their claims against the dissociated partner or the partnership, as the case may be, if the creditor in either case "reasonably believed the person was a partner and acted reasonably on the belief." Notwithstanding the commonality of the theme, the Subcommittee determined that the power of a dissociating partner to bind the partnership after dissociation should be moved to Article 6 of RUPA, out of the buyout provisions of Article 7.

The Subcommittee believes that the appropriate language should not be that the dissociating partner is empowered to bind the partnership following dissociation. Rather, RUPA should clarify that dissociation terminates the dissociating partner's authority, as a partner, to act on behalf of the partnership and should acknowledge that the dissociating partner may have a continuing power to bind the partnership under applicable principles of general agency law. It should not attempt to detail the factual situations under which that continuing power exists, as the clause of subsection 703(a) which begins "unless the transaction is one that would..." presently does.

As to the second part of Section 703, the Subcommittee identified the basic principle to be that, upon dissociation, the dissociating partner severs the relationship that would subject him to liability for the future obligations of the continuing partnership. Given that principle, the question is one of providing for appropriate exceptions. And the Subcommittee concluded that any exception should be based upon the reasonable reliance of the creditor claiming against the dissociating partner that such partner was still a partner.

Clearly there is a need to balance the interests of creditors and departing partners in this regard, with a careful weighing of any burden the statute may impose upon creditors to take steps to ascertain who are the partners on whose creditworthiness they rely against the burden it imposes upon dissociating partners to ascertain who are the creditors who may be relying upon their presence in the partnership and to terminate that reliance through some kind of notice. Certainly, the Subcommittee is cognizant of the need to avoid a curtailment of credit to partnerships as a result of an imposition of an excessive burden on creditors.

Based upon the Subcommittee's extensive discussions of these competing interests (and members of the Subcommittee have had experience representing lenders to partnerships and partnership borrowers), the Subcommittee recommends the following:

1. Section 703 should offer a "safe harbor" that would enable the dissociating partner to preclude a creditor from relying on the supposition that he continues as a partner. The dissociating partner
would thereby terminate his liability to the creditor for partnership obligations incurred after his dissociation. The Subcommittee would make that safe harbor the giving of actual notice to persons whom the dissociating partner knows or should know are creditors of the partnership at the time of his dissociation and by publishing notice to all other persons (the details for such notice need to be defined). As to the method and extent of publication, the Subcommittee would require publication only in a newspaper of general circulation in the place where the partnership's principal place of business, at the time of dissociation, is located. A requirement that notice be given in all places in which the partnership conducts business is unduly burdensome to the dissociating partner, without significant practical value to creditors, and the omission of such a requirement would be balanced by the requirement of actual notice to known creditors. The Subcommittee's position is in accord with the provisions of the Revised Model Business Corporation Act governing notice to creditors at the dissolution of a corporation and the need to make any claims within a stated period of time. (The concept of a principal place of business for a partnership is found in RUPA Section 403(a).)

2. A safe harbor should also be provided to partnership creditors. That is, a creditor, who at the time the liability is created obtains from the partnership a list of the identities of the partners in the partnership, can rely on that list as accurate. The creditor can proceed against a dissociated partner who appears on that list. Thus a creditor should not be able to claim that he relied on the continuing partner status of the dissociating partner simply because the creditor recalled that the dissociating partner was once a partner, without making any contemporaneous effort to confirm that person's continued status as a partner.

In its deliberations, the Subcommittee concluded that we can now generally rely on the "entity" theory and need not carry forward UPA concepts that arose out of the principle that dissociation leads to dissolution. While recognizing that each partner is liable for the obligations of the partnership, the Subcommittee believes, with the frequent additions and departures of individual partners in modern partnerships while the partnership as an enterprise continues, that it is reasonable to impose some affirmative responsibility upon creditors to ascertain
with whom they deal, if they are not willing to rely solely upon the continuation and creditworthiness of the partnership entity itself. In this regard, of course, the drafting principle that RUPA will deal primarily with small partnerships that do not have all encompassing partnership agreements has less relevance, because Section 703 will govern the claims of creditors of today's huge multistate and multinational partnerships as well as the partnerships formed by small businessmen. The Subcommittee believes that its approach is more suitable in view of the existence of large partnerships, whose creditors rarely care about the presence or absence of individuals as partners, while at the same time providing adequate protection for the creditors of smaller commercial partnerships as well.

(4) Section 802.

Based upon our discussions with Harry Haynsworth, we have enclosed a draft of Section 802 to reflect our comments thereto communicated in the January 25th letter. The Subcommittee continues to believe that upon a partner dissociation, the partnership should continue unless a majority of the remaining partners elect to dissolve. We understand that the NCCUSL Drafting Committee has several concerns with this proposal. We will attempt to address those of which we are aware.

If the dissociating partner is not permitted to cause a dissolution of the partnership, then he continues to be exposed for liabilities which arose while he was a partner. And although the dissociating partner is indemnified for those liabilities (which the Subcommittee would require to be an indemnification against any and all such liabilities), the remaining partners may not be financially capable of fulfilling that indemnity. The Subcommittee discussed this section extensively, principally focusing on the expectations of businessmen in small commercial partnerships. Unless the parties contract differently, the Subcommittee believes that most businessmen would not expect to be able to terminate the business of which they are a part, merely because they decide to withdraw. The remaining partners also have an interest to be protected from partnership liabilities, and those remaining partners may well believe that continuing the partnership is the best course of action to satisfy the existing liabilities. We believe the general expectation would be that the majority of the remaining partners would have the right to decide whether to buy the departing partner's interest or to dissolve the partnership. If that is the expectation, then, failing agreement to the contrary, that should be the RUPA default rule.

Secondly, the NCCUSL Committee apparently believes that its approach eliminates the problems caused by technical dissolutions under the UPA. The Subcommittee believes it does not, principally because the NCCUSL approach grants the
dissociating partner the right to cause the dissolution, thus making the remaining partners subject to all of the problems caused by a dissolution, in reorganizing the business, if they so desire.

Thirdly, the Subcommittee is well aware of the various tests promulgated by the IRS with respect to the tax status of a partnership. It is unclear whether the changes proposed to the UPA are qualitatively different, for tax purposes, than the changes made to the ULPA relating to dissolution and the power of the remaining partners to continue. However, the Subcommittee expects to request assistance on this issue from the ABA Tax Section at the appropriate time.

Please telephone the undersigned, or either of the other principal draftsmen of this report, Robert Keatinge (719-481-7475) or Anthony van Westrum (303-830-7000), should you have any questions or if you would like additional information concerning any of the foregoing.

Finally, at Gerry Niesar's request, I would like to accept your invitation to attend the NCCUSL meeting in August so that I can observe the first reading of RUPA, on behalf of the Subcommittee. Please advise me with whom I should communicate to make arrangements to attend.

Very truly yours,

Lauris G. L. Rall
on behalf of the Ad Hoc Subcommittee on RUPA

cc: Prof. Donald J. Weidner
Gerald V. Niesar, Chairman
Ad Hoc Subcommittee on RUPA
June 17, 1991

Lane Kneedler, Esq.
Office of Attorney General
101 N. Eighth Street
Richmond, Virginia 23219

Re: ABA Partnership Committee

Dear Mr. Kneedler:

I enjoyed talking with you while I was in Williamsburg and am very sorry that we were unable to meet in person. I hope that such a meeting might occur while the ABA is meeting in Atlanta in August. I was very much encouraged by our discussion and look forward to a working meeting between some of the drafting committee members and some of our members this fall, if possible.

Enclosed is a copy of the letter I mentioned that we were putting together. The purpose of this letter is so that you and the members of your drafting committee will have a good understanding of what we on the Ad Hoc Subcommittee for Comment on RUPA are attempting to accomplish.

Finally, I would like to advise you that one of our Subcommittee members, Lauris Rall, has agreed to attend the NCCUSL deliberations on RUPA which we understand is scheduled for Monday, August 5. We appreciate your inviting us to have an observer at those discussions.

Very truly yours,

MCKENNA & FITTING

By Gerald V. Niesar

GVN:cm
Enclosure

cc: Lauris G.L. Rall
John H. Small
RE: Ad Hoc Subcommittee for Comment on RUPA

During the past several months, various members of our Subcommittee have met with members of your RUPA Drafting Committee to exchange ideas, views, backgrounds, etc. As a result of those discussions, we felt it would be appropriate to give you and the Drafting Committee a more complete statement of our Subcommittee's composition and experience base, as well as an explanation of the fundamental principles upon which we base our reviews and comments.

1. Composition of Subcommittee. The Subcommittee consists of approximately 20 attorneys, all of whom are members of the ABA Committee on Partnerships and Unincorporated Business Associations, which is a committee of the Business Law Section. We work in connection with liaisons from the ABA Real Estate Section, with whom we find we are almost always in complete agreement. Our Subcommittee has had five two-day meetings during each of which approximately 12 members were participating. Members of the Subcommittee are all experienced in partnerships, joint ventures and limited partnerships. Generally, our experience is primarily in structuring transactions and advising entities; a few members of the Subcommittee have extensive litigation experience involving partnership issues, but they are the exception rather than the rule. As can be seen from the attached distribution list, our members are drawn from nine states, specifically including the major commercial states. We also have two professors who participate in our deliberations and discussions, in addition to Harry Haynsworth, who has been at part of each meeting so far.
2. UPA v. RUPA. One fundamental principle against which we test all of our discussions is the "U" in UPA/RUPA. We have long since adopted a policy governing our deliberations to the effect that the final version of RUPA must be one which will be uniformly acceptable in virtually all of the States. The general partnership is the "default" entity of business; if the parties have not made a conscious choice to form a corporation, a limited partnership, a limited liability company, or some other such entity, they are going to be, by default, a general partnership. And, whether they have chosen to use the partnership form or have simply defaulted to it, if they engage in business in more than one state, they are going to be affected by the separate partnership laws of each of the states in which they are active. It is critical that those laws be the same. There is no similar concern with the other kinds of entities because of the conscious choices involved; indeed, the variations among the state corporation laws may be a good thing, as it enables the parties to shop among the states for those provisions that are most suitable to their needs. Further, the RUPA must be uniform in order that it provide the basis for a national body of case law on the subject. Because of the relative infrequency with which partnership issues receive treatment in reported opinions, the need to be able to look to other state court opinions is apparent.

Given this critical need for uniformity, the RUPA that results from your efforts must

1. Be such an improvement on the UPA that the great bulk of the states will be anxious to adopt it, and the balance of the states will not be reluctant to adopt it in order to maintain uniformity; and

2. Be so well-crafted in content, phrasing, and even punctuation, that state drafting committees will have no inclination to "fiddle" with particular provisions and thereby impair uniformity.

Therefore, in our deliberations, when we believe that a given proposal for RUPA would be rejected by any of the states, we are inclined to reject that proposal in favor of one which we believe would be uniformly acceptable.

3. Getting it Right. We believe it is fair to say that essentially all lawyers who work extensively
with partnerships want to see a RUPA that will clear up many of the ambiguities, problems and concerns with UPA. As we observed with respect to uniformity, however, we also believe that substantially the entirety of that group of lawyers also would prefer to continue a few more years under UPA, rather than rush to adopt a RUPA that is incompletely thought through, internally inconsistent, or otherwise lacks solutions to some of the problems that currently exist in the partnership law. We are concerned that NCCUSL may be putting too much stress on accomplishing something, rather than ensuring an extremely well drafted, consistent and satisfactory model statute. We believe that we have detected a sense of urgency in the Drafting Committee to complete the revision work and get the Revised Act before the states quickly. To the extent that this sense of urgency stems from prior work and statements by members of the Partnership Committee, we wish to clarify our position. Several of our members have been involved in this effort in one way or another from the time the original "White Paper" was completed in 1985 that pointed out the need for a reexamination of UPA. Also, various of our members participated in the several years of effort to "clean up" the original RULPA which was promulgated to the states in 1976. We believe that spending another year, two or three doing the analysis and clean-up work before promulgation of RUPA is far preferable to repeating the RULPA experience. The desirability of this approach is greatly underscored when one takes into consideration the effect the 1976 RULPA had in producing non-uniform laws and a long period of confusion and uncertainty while the various iterations of RULPA were being adopted, rejected and/or tinkered with by the many states. It is our hope, desire and objective to assist the Commissioners in producing a RUPA that will last another 80-100 years as a uniform law throughout all United States jurisdictions. That objective requires time, very careful thinking, debate and reexamination of all prior positions. While we have not reached this conclusion yet, we believe that both the Drafting Committee and our Subcommittee have tacitly acknowledged that we are no longer revising the UPA. The changes, additions and clarifications required are accumulating to the extent that a "restated" UPA may be what is being created. Perhaps freely acknowledging this decision would free up the drafting process and allow us to escape from some of the troublesome problems which arise repeatedly as barriers to achieving the best possible RUPA.
4. Anti-Litigation Bias. All of our members, including those who have extensive litigation experience, are very much driven by the notion that litigation is a commercial disaster for most partnerships and partners. Thus, another fundamental premise of our approach is that the provisions ultimately adopted should be those which are more likely to force or encourage a non-litigation resolution of disagreements. Alternatively, where litigation will ultimately ensue, the RUPA provisions should, if possible, minimize the litigated issues rather than expand them. In some cases, detailed statutory provisions afford additional issues for litigation, as opposed to limiting the inquiry to the real economic dispute.

5. Small Partnership Frame of Reference. While the majority of the Subcommittee members are practicing attorneys from large firms, our discussions generally tend to focus on how the provisions under study would impact the "mom and pop" partnership. We believe that the joint venture between two Fortune 500 companies will have a very extensive and detailed agreement spelling out every conceivable matter of concern to the partners. Thus, it is unlikely that the "default provisions" of RUPA would be of much relevance to those partnerships. Our primary concern is to generate a default "agreement" that we believe would most meet the expectations and the needs of the small partnerships who have no written agreement or an incomplete written agreement. Notwithstanding our "big firm" backgrounds, substantially all of our participating members have had numerous transactions involving the "mom and pop" partnerships. Also, all of us have had to deal with the problems of the two and three person partnerships with limited funds and a hole in the agreement.

While we are mindful of the needs of small partnerships, we also examine each provision in the light of its potential impact on larger partnerships. Of particular importance is the ability to predict with great certainty how the Act will affect creditors and their ability to assess the degree of risk associated with extending credit to partnerships and partners.

6. Avoidance of Undue Restrictions. Collectively, the various practicing attorneys on our Subcommittee have dealt with several hundred different partnership arrangements. Almost every issue that is raised in discussions is debated by two or more members who have encountered the issue in similar fact patterns...
leading to different results. This extensive experience has instilled in most of us a very deep respect for the inability of any group of lawyers and professors to be able to predict with reasonable assurance how a given provision of a statute or contract might affect every possible partnership combination and permutation that will be encountered in the next eighty years. As a consequence, we are of the firm belief that very little, if anything, in RUPA should be made unwaivable by a written agreement. This would apply even to the notion of fiduciary duties. Because of the uncertain boundaries surrounding fiduciary duties in the partnership context, often they must be waived in order to permit a transaction to occur between parties who, for example, intend to engage in businesses in competition with the one conducted by the partnership itself. Generally speaking then, this experience has pointed us in the direction of freedom of contract and away from the direction of attempting to impose our collective "wisdom" as to how knowledgeable business people should conduct themselves vis-a-vis one another.

7. Tax Concerns. Consistent with our belief that RUPA should be constructed as a good statement of law that is internally consistent and understandable, we believe that drafting should not be affected by undue concern for federal income tax consequences. Obviously, we understand that partnerships must continue to be taxed as partnerships if the vehicle is to be useful. However, we also believe that tax concerns should not drive the drafting and formulating process. The four factor test that the IRS developed is used to determine whether other entities look like partnerships. Presumably, one can exercise a great deal of freedom in drafting the partnership law itself. The end result may require the IRS to redefine its four factor test if there is a fundamental change in the basic partnership law as embodied in the ultimate statement of RUPA. Finally, if there is any doubt whatsoever as to IRS treatment of entities formed under RUPA, the ABA should be able to take the lead in obtaining IRS determination of this issue as it did for RULPA.

8. Limited Partnership Interface. One of the constantly recurring problems in addressing RUPA is attempting to mesh it completely with RULPA and the several state variations of the Limited Partnership Act. In this context, we have begun a study of the question of whether the two Acts should be "delinked." Delinkage would require drafting a supplement to RULPA to
cover the RUPA matters that are not currently addressed by RULPA. However, the benefits of being able to address the issues as specifically related to limited partnerships may outweigh the extra effort involved. In addition to specifically addressing the limited partnership issues, the approach would also allow more freedom in designing RUPA so that it would address only general partnerships and joint ventures.

We appreciate the openness and receptivity you and the members of your Drafting Committee have expressed concerning our comments and ideas. To date, we feel we have been somewhat remiss in not providing sufficient analysis, case citations and justifications to back many of our suggestions. This, in part, is due to time constraints. We hope our future comment letters will be more helpful in this regard. If we still remain in serious disagreement over major issues after this year’s efforts, we will suggest an ABA-sponsored “conference session” between your Committee and ours to see if we can close the gap.

In your letter of April 11 you suggested a possible combined meeting of our two groups sometime this fall. We also had considered making a similar suggestion. We would hope that a meeting be scheduled after we know the results of the full Commission’s deliberations on August 5. To that end, we hope we can meet with you, at least briefly, during the ABA Annual Meeting in Atlanta.

Very truly yours,

[Signature]
Gerald V. Niesar
Chair, Ad Hoc Subcommittee on RUPA

[Signature]
John H. Small
Chair, Committee on Partnerships and Unincorporated Business Organizations of the American Bar Association
Section of Business Law
Mr. H. Lane Kneedler  
Office of the Attorney General  
101 North 8th Street  
Richmond, Virginia 23219

Re: Revised Uniform Partnership Act Sections 101-309

Dear Mr. Kneedler:

This letter is submitted to provide comments on Sections 101-309 of the Revised Uniform Partnership Act ("RUPA") draft which is to be presented to the National Conference of Commissioners on Uniform State Laws ("NCCUSL") at its August 1991 meeting. These comments have been prepared by members of the Ad Hoc Subcommittee (the "Subcommittee") of the ABA Committee on Partnerships and Unincorporated Business Organizations (Section of Business Law) and reflect the general agreement of the majority of the members of the Subcommittee at its meeting in Williamsburg on April 13, 1991.

At that time, the Subcommittee had its first opportunity to review the March 11, 1991 draft and the Subcommittee delegated the preparation of comment letters on each article to various members of the Subcommittee. Thus, while this letter addresses only Articles 1 through 3, additional comment letters will be forwarded to you by other members of the Subcommittee with respect to the remaining Articles. As we have only just received copies of the RUPA draft which is to be presented at the August 1991 NCCUSL meeting, the Subcommittee has not had an opportunity to review or discuss the newest draft. Accordingly, we expect that additional comments resulting from revisions to the March 11, 1991 draft may be forwarded after the NCCUSL meeting.

This letter also is intended to supplement the October 29, 1990 letter (the "October Letter") from James Jerue on behalf of the Subcommittee with respect to Sections 1-18 contained in the July 1990 draft of RUPA. We appreciate the consideration that the October Letter received and we recognize that numerous comments were incorporated into the March 11, 1991 draft or the comments contained therein. However, in light of the Drafting Committee's reorganization of RUPA, the modification of existing language and the addition of new paragraphs, we believe that the following additional comments are appropriate. Where we feel strongly about comments contained in the October Letter that were not adopted, these comments are restated.
1. Section 101 - Definitions.

We substantially agree with the definitions set forth in this Section. However, we do not believe that this Section goes far enough as it omits numerous terms which are used in RUPA. For example, the term "distribution" appears in Sections 402, 502, 503 and 807, the term "contributes" is used in Section 401, and the term "interest" is used in Sections 501, 502, 701 and 808. To avoid any ambiguity either within a state or among the states with respect to the meanings of those terms, we recommend that RUPA define those terms. As noted in UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations, Section of Business Law, American Bar Association, "Should the Uniform Partnership Act be Revised?", 43 Business Lawyer 121 (1987) ("ABA Report"), definitions of certain of these terms may be similar to the definitions contained in the Revised Uniform Limited Partnership Act (1976) with 1985 amendments as approved by NCUSSL in August of 1985 ("RULPA"). See RULPA Sections 101(2) and 101(10).

We also suggest that the definition of "property" be revised as follows:

"Property" means all property, real, personal or mixed, tangible or intangible, or any estate or interest therein."

By adding the reference to "estates we believe that other references throughout RUPA to "estates or interest in property" may be simplified to a reference to "property."

2. Section 103 - Knowledge and Notice.

We recognize that Section 103 now substantially reflects the recommendation contained in the ABA Report. However, Section 103(e), which adds the UCC rule on notice "received by an organization," fails to deal comprehensively with the effect of notice to a partner. There are significant differences between notice to a partner and notice to other people working for an "organization." Because of partners' extensive powers, a third party ought to be able to assume in most cases that notice to a partner of a matter relating to partnership affairs is effective to bind the partnership. Accordingly, Section 103 should include a provision that is analogous to UPA Section 12, but which clarifies when notice to a non-acting or defrauding partner binds the partnership. Although Section 103(f) addresses the non-acting partner issue, we are concerned about that Section. The terms "regular duty" and "significant information" are unclear and invite litigation. If a statutory presumption exists, we believe that the presumption should provide appropriate guidance to both partners and persons doing business with partnerships and avoid ambiguity wherever possible.
3. **Section 105 - Effective Partnership Agreement.**

We appreciate that certain comments from the October Letter have been incorporated in Section 105. However, we continue to question the prohibition against varying the requirement that the partnership business must be wound up upon an event described in Section 802(5). As stated in the October Letter, the assignee of a partner's interest presumably is interested in being paid. Sections 503 and 504 (which are referred to in Section 802(5)) apply only to the economic incidents of ownership of a partnership interest. Giving the assignee only the right to receive the economic value of the partnership interest (as is the case for a partner to be bought out under Section 701) would appear to address its only concern while allowing the remaining partners to continue the existing partnership in their discretion.

If this position is not accepted, we suggest that winding up should not be required where a provision to the contrary was contained in a written partnership agreement before accepting the assignment was accepted. We believe that it is reasonable to charge an assignee with a duty to obtain and review a written partnership agreement, in this regard, particularly where there is no interference with his right to be paid.

4. **Section 201 - Definition and Existence of a Partnership.**

We appreciate that some of the comments contained in the October Letter have been incorporated in Section 201. However, we still believe that this Section should be revised further to reflect our earlier suggestion that the partnership entity also be available in transactions in which the presence of a pure "profit" motive may be questionable (for example, the October Letter referred to arrangements to hold title to real estate or tax oriented transaction). In addition to avoiding potential litigation, this provision would avoid issues where lawyers render legal opinions regarding the existence and validity of partnerships in real estate transactions and certain transactions involving not for profit entities. As stated in the October Letter, we suggest that Section 201(a) be revised to read as follows:

"(a) A partnership is an entity resulting from the Association of two or more persons (1) to carry on as co-owners of business of profit or (2) who execute and file a statement of partnership authority in substantial compliance with the requirements of Section 303."
We also note that Section 201(a) does not refer to the exception to partnership status contained in Section 201(b). This is inconsistent with the drafting style contained in a number of other sections (for example, Sections 301, 303(h)(1), 303(j)(1), 307(c) and 702). To remove any ambiguity, we suggest that the phrase "subject to Section 201(b)" be added at the beginning of Section 201(a).

We also suggest clarifying Section 201(b) by revising it to read as follows:

"(b) An association created pursuant to a statute, other than this [Act] or other than a statute of another jurisdiction comparable to this [Act], is not a partnership."

5. Section 202 - Partnership Owns Partnership Property.

A close review of Sections 202, 203 and 501 has led us to the conclusion that these Sections may be simplified by combining Section 202(a) with Section 203 and combining Section 202(b) with Section 501. We believe that Section 202(a) and Section 203 all deal with the acquisition or holding of partnership property and should be included in a single section which may be entitled "Partnership Property." Although a discussion of Section 501 is beyond the scope of this letter, we see little reason to distinguish Section 202(b) ("Partnership property is not subject to exemptions, homesteads or allowance of a partner") from the second sentence of Section 501 ("Partnership property is not subject to exemptions, allowances or rights of a partner's spouse, heirs or next of kin"). Instead, we suggest that these two sentences be combined in a single sentence which appears in Section 501 (please note that additional comments regarding Section 501 may be set forth in a later comment letter).

With respect to Section 202(a), we suggest that a more forthright statement of the acquisition of a property by a partnership be made such as:

"(a) Property transferred to or otherwise acquired by a partnership is property of the partnership."

6. Section 203 - When Property is Partnership Property.

In furtherance of our comments in Paragraph 5 above, we suggest that the title to this Section be deleted and that the paragraphs be renumbered to become part of Section 202.

We also suggest that the second sentence appear as a separate section or subsection rather than an additional sentence in Section 203(a) to establish clearly this fundamental principle that a partnership may hold title to property. This sentence may be revised as follows:
"Title to property acquired in partnership name or in the name of all partners with the indication that they are doing business as a partnership vests in the partnership itself rather than in the partners individually."

We disagree with the Drafting Committee's decision to delete "exception language" from Sections 203(b), (c) and (d). Without language such as "subject to subsection (e) below" it is quite likely that the interpretation of the interplay between these subsections will vary among or within jurisdictions. While we recognize that the comment to Section 203 specifies that those subsections are all subject to subsection (e), we know that many jurisdictions do not adopt the official comments as part of their statutes. In the interest of drafting economy, this could be accomplished by adding the phrase "Notwithstanding the other provisions of this Section," to the beginning of Section 203(e).

7. Section 302 - Transfer of Property to Partnership if Title Recorded.

We agree with the ABA Report that UPA Section 10 should be modified to apply to all property. While Section 302 does include such personal property as may be within the definition of "record title", we see no basis for specifically applying Section 302 provisions to all real property and some personal property while being silent with respect to the treatment of other personal property.

We agree with the Drafting Committee's decision to delete UPA Section 10(2). This stated rationale for deleting that provision (the comments contained in the ABA Report and in Bromberg & Ribstein) also supports the deletion of Section 302(c). The substance of Section 302(c) can be covered entirely by Section 302(b). Additionally, Section 302(c) presents two problems aside from the potential ambiguity with Section 302(b). As the comment to Section 302 notes with respect to UPA Section 10(2), this Section does not define "equitable interest of the partnership." This lack of definition also is evident in Section 302(c). As quoted in the comment from Bromberg & Ribstein, "It would be better either to clarify that the holder in this situation has no rights against those other than the partnership, or to eliminate this subsection entirely... ."

In addition, Section 302(c) may require recovery of partnership property even if the purchaser or the purchaser's assignee gave value, without knowledge that the partner in making the transfer exceeded the partner's authority. If our recommendation to delete Section 302(c) is not followed, we strongly suggest that this Section be revised to prohibit recovery if the purchaser or the purchaser's assignee gave value without knowledge that the partner in making the transfer exceeded the partner's authority.
9. **Section 303 - Statement of Partnership Authority.**

We are in general agreement with most of the provisions of this Section. However, we note that the recent revisions to Section 303(i)(2) have resulted in the modification of the term "real property" to "property" in two places. While that revision may simplify the Section, it is in inconsistent with Section 303(h)(2), which continues to use the term "real property." To avoid the possibility that the stylistic revision to Section 303(i)(2) may be interpreted different than the language in Section 303(h)(2), we recommend that corresponding revisions be made to Section 303(h)(2).

Sections 303(h)(1) and (2) each refer to a "person who gives value without knowledge" without specifically describing the matter as to which the person does not have knowledge. We suggest that this subsection be revised to refer to a "person who gives value without knowledge as to the actual authority of the partner... ."

10. **Section 304 - Notice of Denial of Status as Partner or Authority.**

While we are generally in agreement with respect to this Section, we believe that two clarifications should be made. First, we suggest that the first sentence of Section 304(b) be revised to read as follows:

"A person named as a partner in a statement of partnership authority may deny present or previous membership in the partnership by filing a notice of denial described in Section 304(a)."

This revised language will clarify the method by which a person may make such denial.

Section 304(c) permits a partner to deny a supplemental grant of authority contained in a Statement of Partnership. We agree that a person should have the ability to file a notice of denial of a grant of authority to place parties on notice that the public record may not reflect the actual agreement among the parties. The denial should call into question the right of any third party to enter into a transaction with a partner who has denied the validity of a previously filed Statement of Partnership Authority. However, we are concerned that the use of the term "effective" in Section 304(c) may permit a partner to unilaterally revise the terms of a partnership agreement by the simple act of filing a notice of denial. To avoid that potential problem, we suggest that an additional sentence be added to the effect that the filing of a notice of denial does not affect the partners' rights or obligations under the partnership agreement or the Act.
We hope that these comments will be helpful to the Drafting Committee. Please contact Allan Duboff at (213) 788-4515, James Jerue at (312) 902-5293 or Gerald V. Niesar, Chairman of the Subcommittee at (415) 243-9100, if you would like us to expand on any of the matters covered in this letter.

Very truly yours,

Allan B. Duboff

on behalf of the

Ad Hoc Subcommittee on RUPA
Questions on the March 11, 1991 Draft of the Revised Uniform Partnership Act

As used herein, (a) "RUPA" refers to the March 11, 1991 Draft of the Revised Uniform Partnership Act promulgated by the National Conference of Commissioners on Uniform State Laws ("Commissioners"), and (b) "UPA" refers to the Uniform Partnership Act drafted by the Commissioners and adopted at its conference on October 14, 1914. All references used herein, unless specified to the contrary, refer to RUPA. Please keep in mind when answering these questions that RUPA (as its predecessor UPA) will govern both general partnerships and limited partnerships to the extent not covered by the Revised Uniform Limited Partnership Act.

1. Partnership Agreement. A number of provisions under the UPA stated a particular provision applied "unless the partnership agreement provided otherwise". The question often left unanswered was if a particular section did not state "unless the partnership agreement provides otherwise", could the parties alter that provision by agreement? RUPA has modified this approach by: (a) deleting the foregoing phrase from all sections and (b) affirmatively stating that, except for a few enumerated sections, the provisions of RUPA can be varied by the partnership agreement. Section 105 (Effect of Partnership Agreement) is intended to clarify that the partnership agreement can vary any portion of RUPA as to the relation among the partners except that:

...the partnership agreement may not:

(1) unreasonably restrict a partner's access to books and records under Section 403(b);

(2) eliminate the general duty of good faith and fair dealing under Section 404(a);

(3) vary the power to withdraw as a partner under Section 601(1) [this is the power to withdraw as a partner, but not the right to withdraw without a penalty], except to require a notice to be in writing;

(4) vary the right to expulsion of a partner by an appropriate forum in the events specified in Section 601(3) [a judicial determination that a partner has engaged in conduct materially prejudicial to the partnership's business or the partner has wilfully or persistently breached the partnership agreement or duty to other partners to the extent it is not reasonably practical to carry on the business of the partnership]; or

(5) vary the requirements to wind up the partnership business in the events specified in Sections 802(5) [pursuant to a court order by a purchaser of a partnership interest for at will partnerships], 802(6) [unlawful activities] and 802(9) [when an appropriate forum decrees the
economic purpose is likely to be unreasonably frustrated, not practical to carry on the business, or based upon a partner's conduct vis-a-vis his partners].

(See RUPA Section 105.)

Question: The general approach (allowing the partnership agreement to control the relationship among the partners except for certain limited exceptions) taken in Section 105 is:

Responses:

<table>
<thead>
<tr>
<th>Response</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very good idea</td>
<td>21</td>
</tr>
<tr>
<td>Good idea</td>
<td>4</td>
</tr>
<tr>
<td>Indifferent</td>
<td>0</td>
</tr>
<tr>
<td>Bad idea</td>
<td>0</td>
</tr>
<tr>
<td>Very bad idea</td>
<td>0</td>
</tr>
<tr>
<td>Do not know</td>
<td>0</td>
</tr>
<tr>
<td>Did not answer</td>
<td>2</td>
</tr>
</tbody>
</table>

Comments:

B - In favor of party autonomy pursuant to statutory certainty.

D - I am not sure there should be as many exceptions; my view of RUPA is that it should cover situations where the agreement is poorly drafted (e.g., provisions omitted) or there is no written agreement at all. If sophisticated parties wish to draw the agreement as they wish, I question whether any substantial restrictions are appropriate.

G - Is it possible for partners to completely exempt themselves from the provisions of the Act altogether? The introductory sentence of § 105 seems to create this possibility, which I am not certain is the drafters' intent.

K - In my experience, most attorneys assume that, generally, the partnership document(s) could alter the statutory language even where not expressly so provided.

N - There is not a good reason, it seems to me, to leave this important question open.

O - Provided that one need not declare in each instance the intent to vary from RUPA.

R - This change will provide clarity and eliminate "drafting traps" for practitioners.
AA- I'm a freedom of contract person.

Question: Would you delete any of the sections which cannot be varied by the partnership agreement?

Responses:

Yes 7:  A, B, D, G, O, P, Q
Did not answer 2:  E & L

Comments:

B - Possible amendments to items (4) and (5).

D - (1) What does "unreasonably" mean? (3) I have done agreements where it is essential that there be no right to withdraw until a particular project is completed (4) there may be remedies other than expulsion which are more appropriate.

G - The right to withdraw is the right to avoid future liabilities, or at least compel the remaining partners to pay those liabilities prior to seeking compensation from the withdrawing partner. In certain instances in which the partner's participation is material consideration for the formation of the partnership in the first place, the right to withdraw, if absolute, frustrates the entire venture, even if a claim for damages survives. Some thought might be given to eliminating item (3) for this reason.

O - The power to withdraw. Withdrawal may create a tax termination of the partnership with tax consequences to the non-withdrawing partner. Partners should be able to negotiate as to that.

P - If there are only 2 partners, the withdrawal of a partner under 601(1) will give the partner the right to dissolve the partnership where there is an agreement not to do so.

Q - 802(9) is too broad and would let court second-guess likelihood of purpose succeeding.

AA- I wouldn't be opposed to deleting (1) and (2) but I don't feel particularly strongly about it. I also think the addition of (2) helps clarify that most (if not all) duties can be eliminated. Powers to withdraw, expel & terminate are important.
Question: Are there any additional sections you would add to Section 105 and thereby prohibit the partners from varying the terms of such added section?

Yes 3: A,G,I
Did not answer 3: E,L,N

Responses:

B - Good - also converse - statute as default agreement.

D - See general comments under first question.

G - c. Vary the disassociation caused by bankruptcy as stated in § 601(5). This may run afoul of the bankruptcy statutes, but I would leave it in anyway. Also, no restriction on the right to seek compensation from the tortious activity of one partner toward another partner.

H - Good faith and fair dealing limit should be qualified to clarify that competitive activities during and after term, referring business opportunities within Partnership purpose and affiliated party transactions are not covered by 105. These matters should be negotiated.

I - Examples: Sec. 103(e), Sec. 202(a) and Sec. 501.

J - None.

AA - Interesting aspect is how can vary #2.

2. Partnership as an Entity. Section 201(a) states "A partnership is an entity resulting from the association of two or more persons to carry on as co-owners a business for profit." The reference "entity resulting from the" was inserted to this Section by the Commissioners after completing most of the other revisions to RUPA which generally adopt the entity concept. Proponents state one of the benefits of this change is that the real estate industry would now be able to specifically identify a partnership as a separate legal entity.

Question: Generally, what do you think of the specific reference to a partnership being an entity?
Responses:

<table>
<thead>
<tr>
<th>Response</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very good idea</td>
<td>19</td>
</tr>
<tr>
<td>Good idea</td>
<td>7</td>
</tr>
<tr>
<td>Indifferent</td>
<td>1</td>
</tr>
<tr>
<td>Bad idea</td>
<td>0</td>
</tr>
<tr>
<td>Very bad idea</td>
<td>0</td>
</tr>
<tr>
<td>Do not know</td>
<td>0</td>
</tr>
<tr>
<td>Did not answer</td>
<td>0</td>
</tr>
</tbody>
</table>

Comments:

B - The recognition of the entity concept should help draw a bright line between old case law and RUPA.

D - This has not been a particular problem in California but has raised issues in less sophisticated jurisdictions regarding ability to hold title, the nature of partnership property, etc.

I - See comment.

N - For almost all purposes, "entity" controls "aggregate," anyway.

O - Need to know consequences of entity status. Will IRS now contend no tax pass-through? What effect on partnership interest? Will it now be treated like stock?

U - In Maryland and D.C., a general partnership (as distinguished from a "joint venture") is already so recognized.

AA - I think it could be even clearer, but generally the other provisions help this out.

Question: Would the specific reference to the entity approach have any affect on a partnership's ability to transact business in your jurisdiction?

Responses:

<table>
<thead>
<tr>
<th>Response</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes, a positive effect</td>
<td>10</td>
</tr>
<tr>
<td>Yes, a negative effect</td>
<td>1</td>
</tr>
<tr>
<td>No effect at all</td>
<td>14</td>
</tr>
<tr>
<td>Did not answer</td>
<td>2</td>
</tr>
</tbody>
</table>
Comments:

B - See above.

D - See above.

E - Most practitioners treat partnership as entity, but this will clarify any dubious areas. May widen transfer-tax liability for real estate entities.

F - At least I am not aware of any difficulties recognized by courts or commentators in Virginia on this point.

G - Washington takes the general view that a partnership is an entity, but there is general confusion as to the effect of the withdrawal of a partner on the existence of the "entity." This would help in convincing title companies and the state taxing authorities that the "entity" survives the withdrawal of one or more partners.

I - No negative effects and some positive effects.

J - The only possible effect would be the potential that recently enacted business activity taxes may be imposed under the entity approach and not otherwise. This legislation was only recently passed and I have not had the opportunity to digest its full effect.

R - This would merely reinforce the prevailing view in Michigan.

S - Michigan generally espouses the entity concept at the present time. The specific reference may make it easier for a partner to require a creditor to attempt to collect amounts owed from the partnership before attempting to collect from one of the partners.

T - Clarify that entity survives individual partner disability/death and contracts remain intact.

V - No material effect.

AA - Have marginal positive effect on manner of doing business.

3. Joint Ventures. The comment to Section 201 states that "Relationships that are called 'joint ventures' are partnerships if they otherwise fit the definition of partnership." It is clear that the phrase "joint venture" is used in many ways in our society, in many cases to refer to persons coming together to do one particular transaction, whether that transaction is implemented in the form of a corporation, limited partnership, or a general partnership. The general partnership act is the default statute used when people fail to qualify as another type of an entity.
Question: Should RUPA explicitly state (in order to clarify) that a joint venture, which is not specifically organized as another entity (i.e., a corporation), shall be deemed to be a partnership?

Responses:

No 3: B,M & T
Did not answer 0

Comments:

A - I would ideally like to see language allowing a joint venture to be a specific purpose partnership with a limitation on apparent authority to bind the partnership.

B - In most cases, the judges will get there. However, its absence may still create a title issue.

D - This is a relatively frequent practical problem in dealing with lawyers not particularly familiar with partnership law. To specifically clarify that a joint venture is a partnership as provided above should be beneficial.

E - Also should help with real estate area - that parties hold as partners rather than tenants in common.

G - If RUPA is a default statute, then it should cover all entities which qualify as partnerships under its definitions, whether called "joint ventures," "associations," or some other name. If this is not the case, people can simply opt out of the statute by naming the entity something other than a "partnership" and in that case, why have the act at all.

J - To clarify this situation, the explicit statement should be included.

K - Third parties should not have to look behind the scenes in order to determine whether a joint venture is something other than a general partnership.

M - I like the way the comment addresses this question. So many forms of business organization are referred to as "joint ventures" that I fear providing for their classification as a partnership will cause unintended results in many instances, e.g., where for reasons of state law persons do not wish to designate themselves as partners, but also do not wish to create another form of entity.
A partnership is the best "default mechanism" for joint ventures which was generally thought of to be a form of "business venture." This will assist courts in determining that a joint venture is nothing more than a "partnership" (and not an association) unless another specific "entity form" is chosen by the parties.

U - See above comment - it is wise to clarify the point.

X - New Jersey does not recognize a "joint venture" as a legal entity. This change will properly categorize a "joint venture" as a partnership.

Y - It wouldn't hurt.

Z - It would eliminate any possible argument that a joint venture (which is not another entity like a corporation) is anything more than a single purpose partnership.

AA - I waiver but I generally prefer the "default" concept. On the other hand, it's maybe tough to have a "default" concept for JVs within a "default" statute and the commentary hopefully will cause a similar result. I would prefer the clarity of an express statement.

Question: In your jurisdiction, (a) if an entity or collection of people is named a "joint venture" (and does not specifically qualify as a corporation or limited partnership), is it a general partnership; (b) is there a difference between a partnership and a joint venture (other than a joint venture being a single purpose partnership)?

Responses:

   No 4: I, O, U & X
   Did not answer 3: E, L & W

   Did not answer 4: E, G, L & W

Comments:

A - The courts in Pennsylvania use UPA for guidance but proclaim a joint venture is not the same as a general partnership. In practice there seems to be no difference.
B - These statements are true in black letter terms but they may not be good enough for the title industry.

D - In California, a joint venture is generally acknowledged to be a general partnership for a limited purpose unless otherwise organized as a limited partnership, corporation, etc.

E - Probably a tenancy-in-common intent of the parties control. Partnership liability will probably be imposed, but for conveyancing purposes, parties would probably be "tenants-in-common".

F - But must make clear that entity is a partnership or it may not be recognized as an entity authorized to transact business in Virginia.

G - The generally accepted rule in Washington is that a joint venture is a partnership for a particular purpose. However, title companies will not issue a title policy in the name of a joint venture without a specific provision in the joint venture agreement calling for the application of UPA, because "joint ventures" are not recognized as entities under any Washington statute.

N - (b) Only in that cases have said that to have a joint venture there must be a sharing of losses, as well as profits.

R - There is some confusion but Michigan appears to treat a joint venture as a form of partnership.

S - Recently, our clients have used the term "joint venture" to refer to a general partnership created for a specific purpose (e.g. own one project). Traditionally, though, joint ventures were either general partnerships or methods of parties owning real estate as tenants in common.

T - (a) yes, unless tenants in common; (b) no, unless tenants in common.

U - No such thing - the document creating the venture must specifically identify the nature of the entities - e.g., a general partnership governed by UPA.

V - Generally want some verification by venturers - do not rely on general rule of partner power and authority to bind - may be issue as to joint and several liability.

W - N/A - Deal with partnerships from many jurisdictions.

X - See answer to previous question.

AA - But note that this interpretation is not accepted by all title insurance companies, etc.
Section 201 provides a general guideline in determining whether a partnership exists. In connection therewith, subsection (e) states that an interest in the profits of an entity is prima facie evidence that the recipient is a partner. This inference does not arise if the profits were received from the specified list of items, which includes wages, interest or other charge on loans, etc.

Question: Should RUPA contain specific safe harbors that would essentially assure contracting parties that a partnership relationship has not been formed in certain circumstances (For example, when lenders make participating loans, should they have available to them a statutory safe harbor to prohibit the argument [as opposed to merely negating the statutory inference] that they are a partner based upon such participating loans)?

Responses:

No 5:  M, R, S, U & Y
Did not answer 1:  L

Comments:

A - The agreement, however, should not allow control to the extent a partner has a vote or control.

B - I dislike the exercise, but it may be a necessity for commercial certainty.

D - This is always a difficult issue when you are trying to establish an economic relationship which should clearly not be considered a partnership. I think a well thought out safe harbor list is an excellent idea.

E - Certainly would be extremely helpful.

G - If the intent of the drafters to exclude participating loan arrangements from the status of partnerships, why not say so directly rather than merely creating negative inferences for the purpose of litigation?

H - Another tax/state law problem is tenants in common who retain the same management company as agent. Neither wants the other as a partner.

K - An employee can receive a profit interest without being a partner even if there is no reference to wages. Likewise, lenders may receive profit interest without being considered partners. Perhaps focus should be placed on gross profits, net profits and cash flow.
M - Such matters should, in my opinion, be handled by state law.

N - This is a troublesome issue. On balance, I believe that parties should be able to, by contract, share profits without having a mutual agency/fiduciary/joint and several liability relationship.

Q - There is also the question (in the participating loan context) of whether "partnership-like" duties arise even absent a partnership having been created. For example, in California there is a general rule of good faith and fair dealing; in a complex participating loan a court could imply certain duties based on expectations of how the relationship would work.

R - "Equity participation" and "equity kicker" loans are creatures of specific facts and circumstances. Courts must evaluate all of the facts and circumstances, the agreement of the parties, intent, purpose and motive to determine whether a joint venture or partnership arrangement exists. A "safe harbor" should not be used because the then "stated intent" of the parties may control the actual conduct of the parties.

S - A lender with a profit interest is only one type of non-partner who could be viewed as a partner. I don't think it would be possible to come up with a comprehensive list of persons/entities to exclude from being categorized as partners. You listed some types of non-partners, it could be argued that anyone not specifically excluded was, indeed, a partner.

U - There are many types of participating loans, participating leases, etc.

Z - Safe harbors would be helpful.

AA - I'm most inclined in the participating lender area where a safe harbor would be useful.

5. Partner's Authority Generally. UPA Section 9(3) contains a specified list of actions which required the unanimous consent of all partners. In contrast, Section 301(b) of RUPA provides "each partner is an agent of the partnership for the purpose of its business, and the act of each partner, including the execution of an instrument in the partnership's name, for apparently carrying on in the usual way of the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner in fact has no authority to act for the partnership in the particular matter, and the person with whom the partner is dealing knows that the partner lacks that authority." By taking this approach, the Committee has decided to leave it to the courts to decide the limits on the agency power of partners which can be flexible or modified to fit a particular transaction.
Question: What do you think of the elimination of the specific list?

Responses:

<table>
<thead>
<tr>
<th>Responses</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very good idea</td>
<td>10</td>
</tr>
<tr>
<td>Good idea</td>
<td>7</td>
</tr>
<tr>
<td>Indifferent</td>
<td>5</td>
</tr>
<tr>
<td>Bad idea</td>
<td>5</td>
</tr>
<tr>
<td>Very bad idea</td>
<td>0</td>
</tr>
<tr>
<td>Do not know</td>
<td>0</td>
</tr>
<tr>
<td>Did not answer</td>
<td>0</td>
</tr>
</tbody>
</table>

Comments:

A - As stated with respect to joint ventures I would prefer some method of limiting liability in the case of special or limited purpose partnerships.

D - This has always been somewhat of a problem. First, it is often overlooked by many lawyers which leads to some difficult problems in dealing with agreements drafted by others. Second, it restricts the ability of parties to do their own agreement as they wish.

G - I think it is a good idea, although in the absence of a statutory provision, the tendency on the part of third parties (i.e., lenders) will be to simply require all partners to sign everything.

I - Good idea.

J - This seems to be an unnecessary elimination of certainty in specified situations. It would also seem to place an unwarranted burden on the person dealing with the partnership to determine actual authority.

K - This answer assumes, as previously noted, that the partners can determine themselves where someone does not have any authority.

M - I don't think the list is effective unless the partnership agreement is recorded. Section 303 of RUPA has apparently resolved this problem.

N - When a formal relationship, parties will define limits by agreement. When informal, . . .

O - Provided partners can by recorded statement of partnership restrict power of partners and bind third parties by constructive notice.
R - Since all partners have liability for the actions of all other parties
( unlike limited partnerships with limited liability), partners should have
the right to be protected against certain actions of their partners and
third parties dealing with partnerships should know that under certain
circumstances consent of all partners is required.

U - On balance, this is probably the right approach. I worry however that a AP
will always have apparent authority (barring specific nature - or law) - to
the contrary, making the "unless" clause practically meaningless.

V - Provided agreement may effectively proscribe specified actions and provided
agreement establishes the essence of "in fact" authority.

AA- On the one hand, it would be good to have parameters. This will result in
the adoption of lots of new and state-variable law, but UPA is probably
impractical. Agency was the concept in other respects and this appears
somewhat consistent. The major problem is how to identify/limit the
power/agency in re third parties.

Question: The Committee was unable to compose a list which all
members could agree upon which would require the unanimous consent of all
partners. If such a list were to be adopted, what actions would you include?

Comments:

A - Confession of Judgment
   Debts in excess of a specific dollar amount

D - I don’t think such a list is appropriate. See above.

E - Amendment adversely affects business considerations.

F - 1) Changes in purpose/authorized activities
   2) Acquisitions, borrowings, sales outside the ordinary course.

G - Sale of any real property; execution of any mortgage or similar
   instrument; dissolution, except by operation of law or in accordance with
   agreement; material amendment of agreement.

H - Change of purpose; change of partner to whom control is delegated.

I - None, if Section 401 remains intact except signing the statement of
   partnership by all partners.
J - Sale or encumbrance of all or substantially all of partnership assets; acts in violation of partnership agreement or law; confess a judgment; any act that would not permit the partnership to carry on its business.

K - Confess a judgment
   Incur a debt liability in excess of a specified amount

L - None. Unanimous consent ridiculous - 3/4 at most.

M - 1. Purchase and Sale of Property
   2. Mortgage and Borrowing
   3. Dissolution
   4. Adding partners

N - Sell all or substantially all assets; file bankruptcy (Bk. Code would probably control, though); initiate litigation; amend agreement

O - Sale, financing and borrowings which subject partners to personal liability - contracts in excess of ___% of capital of P/S.

P - None.

Q - Sale of principal business.

R - 1) Sale of assets or business, 2) assignments for the benefit of creditors, 3) advance of real property. However, a provision should be added to the statute stating that such list of items will not require unanimous consent if and only if the Partnership Agreement expressly provides otherwise.

S - In a real estate partnership, conveying all or essentially all of the partnership property either in a standard sale or by means of deed in lieu of foreclosure (See 9(3)(c) of UPA)

T - None - given item 1 above.

U - Actions in liquidation or to make it impossible to carry on Partnership business

V - Incurring recourse liability; acts effectively rendering carrying on of business impossible (disposition of assets, e.g.,); admission of partners; amendment of partnership agreement

Y - Same as current.
6. **New Statement of Partnership Authority.** (a) Section 303 (Statement of Partnership Authority) is a new concept introduced by RUPA. The statement of partnership authority would be filed with the Secretary of State's Office and include the following:

1. The name and address of the partnership;
2. The names and addresses of all partners or an agent who must maintain a list of all partners;
3. Be signed by all partners if there are ten or fewer partners in the partnership and by at least ten partners if there are more than ten partners in the partnership;
4. Indicate which partners are required to sign in transactions involving real property; and
5. Contain any other matters, including authority or limitations on authority of various partners, which the partnership desires.

The statement of partnership creates a conclusive presumption, in favor of a person who gives value without knowledge, that the partners stated to be authorized to convey or encumber partnership property or enter into other transactions on behalf of the partnership are authorized to do so (see Section 303(h)). For real property this conclusive presumption will be effective based on constructive notice, but only if the statement of partnership is also recorded in the place for recording transfers or other encumbrances of that real property.

To the extent the statement of partnership limits the authority of a partner, such limitation will only be effective against a person who knows of such limitation. For transactions involving real property, constructive notice is assumed provided the statement of partnership containing such limitation was recorded in the place for recording transfers or encumbrances of real property.

**Question:** Should RUPA contain the statement of partnership provisions?
Responses:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>No</td>
<td>4:</td>
<td>H,T,U &amp; Y</td>
</tr>
<tr>
<td>Did not answer</td>
<td>1:</td>
<td>L</td>
</tr>
</tbody>
</table>

Comments:

B - Expedite title transactions.

D - Somewhat similar to existing provisions of the California version and is very helpful in real property conveyances and in other areas as well from a practical standpoint.

E - Record centrally.

G - This is probably o.k. - certainly the title companies would like this.

H - 1. Creates additional administrative complexity. 2. People dealing with partnership real property get actual information and constructive notice concepts are of little utility.

J - Seems consistent with entity theory; however, the information of record should be very limited and go only to existence of the partnership. This would also seem to be a negative re confidentiality of identity of partners - RULPA - gen. partners only; Corp’s officers and directors only.

M - I think this is an excellent, and important, improvement.

N - But, only on an optional basis (and I really don’t care).

R - This would greatly assist third parties in relying upon the authority of partners. Provisions should be made for an amendment to the statement which takes effect upon filing.

S - I think it would be useful for the other party in a transaction to have some evidence that the parties signing documents on behalf of a partnership has the authority to do so. It would also make it easier for title companies reviewing conveyancing instruments and for attorneys.

T - 3 parties in non-ordinary course transactions must inquire as to authority - recordation of limits is cumbersome, lacks privacy and gives no actual notice except upon inquiry.
U - More information is required under RUPA. The issue of authority to convey real property is a special problem which can be resolved with local opinions title insurance and is not so needed that this additional certificate needs to be prepared and filed.

Y - If it's switched to the state level, attorneys will continue to file locally anyway.

**Question:** If there is to be a statement of partnership, where should it be filed:

**Responses:**

<table>
<thead>
<tr>
<th>State Level Only</th>
<th>County or local level only</th>
<th>Both</th>
<th>Did not answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>0</td>
<td>11</td>
<td>1</td>
</tr>
</tbody>
</table>

**Comments:**

B - At least for real property purposes.

D - Should be filed at state level and recorded in each county where the partnership owns real property. This makes it easier for title companies as they are not particularly adept at central filing pickups.

G - In Washington, the filing should be at the state level, which corresponds with the filings required under the RULPA and corporate filings. This is not the office where deeds are recorded, but the recorder’s office should not be bothered by this filing, particularly since there appears to be no legal description attached which would allow for proper indexing.

H - All should sign but P of A should be allowed.

J - Consistent with entity theory. Perhaps at local level but only in county where principal place of business is located.

M - A partnership may conduct its business in several counties, but would not want to bear the expense of recording in each county, while filing only in its home county would be more effective than filing with the Secretary of State.
N - Covers real estate and non-real estate situations.

O - For real property.

P - Basic filing should be at the State level with county filing only in the case of real estate.

R - State filing would provide the same assistance as central filing for UCC financing statements and local filing would assist real estate transactions.

S - Requiring the statement to be filed at both the state and county level seems duplicative and a trap for the unwary. I am particularly bothered by this because Michigan requires for filing a certificate of co-partnership where a partnership does business. If a partnership's business office and real estate project are located in different counties, partnership filings would have to be made in 2 counties plus at the state level.

U - So long as in Maryland with Certificate of UPA the state forwards it to county for 2d filing.

Z - There is no valid reason to force local filings. State level filings alone are valid for other entities and are all that is needed.

AA - I don't feel strongly on this, but I think it should be sufficient to check in one location.

(b) Pursuant to Section 303, if a partnership consists of ten or fewer partners, all partners must sign the statement of partnership, and, if the partnership contains more than ten partners, at least ten must sign. Some people have suggested that because of the conclusive presumption attached to authority stated in the statement of partnership, all partners should be required to sign the original statement. Others have argued that fewer than ten should be allowed to sign for large partnerships. The drafting committee selected ten as a reasonable number, which they hoped would alleviate fraud in most cases.

Question: Would you prefer a different number of partners to sign?

Responses:

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Did not answer</td>
<td>2:  L &amp; U</td>
</tr>
</tbody>
</table>
Comments:

A - I question whether it is appropriate to encourage large partnerships with personal liability and no personal control. Is it reasonable to expect participants in worldwide partnerships to have unlimited liability.

D - All partners, as there is no reason not to sign when they sign the original agreement. It is too important a document to require less than all since in my view this should go to the heart of partnership authority.

E - Three - should be enough to prevent fraud.

G - Why not all partners? They all have to sign the agreement. Also, how are amendments to be handled?

K - All partners should sign the original statement.

M - I do think that the 10 who sign should be required to certify that all partners have agreed on the content of the statement, either by execution of the partnership agreement or otherwise.

O - 30 - would eliminate most possibilities of fraud and yet is a reasonable number.

P - A smaller number, say 5, would be less cumbersome - perhaps 75% of profits interest would also work.

Q - Add minimum percentage of both (i) capital and (ii) profits.

R - 10 is a reasonable number for large syndicated partnerships provided the Partnership Agreement contains a provision authorizing only 10 and containing a power of attorney giving one of the partners the authority to select the 10 partners.

U - See above.

V - All - these are general partnerships.

AA- Lesser number of authorized parties (less than 10) but I don't feel strongly. See arguments for going to all parties.

(c) Currently the statement of partnership authority is an optional filing. Some people have proposed making it a mandatory filing, with the only consequence of failing to file being a lack of access to the courts until such a statement has been filed. Those who believe it should be optional feel that the partnership act is the default statute to cover business activities which do not meet the criteria for corporations, limited partnerships or other entities.
Question: If there is to be a statement of partnership authority, what do you think of the optional approach which is contained in the current draft?

Responses:

<table>
<thead>
<tr>
<th>Response</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very good idea</td>
<td>5</td>
</tr>
<tr>
<td>Good idea</td>
<td>9</td>
</tr>
<tr>
<td>Indifferent</td>
<td>4</td>
</tr>
<tr>
<td>Bad idea</td>
<td>8</td>
</tr>
<tr>
<td>Very bad idea</td>
<td>1</td>
</tr>
<tr>
<td>Did not answer</td>
<td>0</td>
</tr>
</tbody>
</table>

Comments:

A - This is similar to fictitious names in most states.

B - See joint ventures above.

D - I think the statement of partnership should be key to the authority of the general partners who can act for the partnership and should be mandatory.

E - 1. Statement should be filed centrally - not where realty transactions are filed. 2. Would have statement signed by only 3 partners - ten are too many.

G - Washington already has an assumed named statute which applies to partnerships and which denies court access unless the statement is filed. The statement is very close to what is contemplated by RUPA, but there is no presumption attached to the filing for the benefit of third parties.

K - Prefer mandatory filing.

M - I think the filing should be mandatory, no lenders and those dealing with partnerships would have an instrument they can rely on. If mandatory, failure to file should not be considered evidence of the lack of existence of a partnership.

N - Not clearly helpful enough to require it.

O - Statement should be mandatory to provide constructive notice.

R - Many general partnerships result from the failure of people to properly create other entities. Accordingly, some body of law and rules should govern and the court should be left to interpret those cases in which the partners have failed to make the optional filing, as is the current case.
S - It's fine so long as the filing requirements are reasonable. I would also propose that it serve to replace the certificates of co-partnerships or certificates of assumed name presently provided for under some state statutes.

U - If there is to be such a thing, unless it is filed why provide for it?

Z - Mandatory filings should not be used in a default statute - even if the consequences are minor.

AA - I was persuaded that the compulsory filing would put certain entities in "entity limbo".

7. Partner's Ability to Sue Its Partnership. Section 305 (Partnership Bound by Partner's Actionable Conduct) provides in part "if loss or injury is caused to any person or any penalty is incurred as a result of actionable conduct by an act or omission of a partner acting in the ordinary course of the partnership's business or with the actual or apparent authority of the partnership, the partnership is liable therefor." This section is a continuation of the UPA Section 13, except that the phrase "not being a partner in the partnership," was deleted as a limitation upon those who could claim a loss or injury was caused to them. By deleting this section, RUPA now allows a partner to sue the partnership on a tort or other theory, rather than limiting a partner's right to seeking a dissolution and accounting of the partnership.

Question: What do you think of this revision?

Responses:

Very good idea - 6: D, I, O, X, Z & AA
Indifferent - 2: R & Y
Bad idea - 3: E, G & N
Very bad idea - 1: M
Do not know - 2: L & S
Did not answer - 1: V

Comments:

B - Every in-road on the dissolution-accounting hurdle is fine with me.

D - I have never felt the existing limitation to dissolution/accounting offered the flexibility of remedies required to address partnership agreement breaches.
E - Would permit action against the partner or partners causing the damage not the partnership.

G - There seems to be some inherent problems in suing an entity which is comprised, at least in part, by the plaintiff. Why not allow the suit simply against the partner who is the tortfeasor.

H - I would modify the old provision to allow litigation for injury not related to status as a partner. Complaints about treatment as a partner should be limited to dissolution or accounting.

M - I think the provision will give rise to a rash of litigation by frustrated (as opposed to injured) partners.

N - Seems like a change to a unique relationship.

O - Dissolution and accounting are unwieldy. Direct right of action is preferable. Dissolution could result in partition or sale and unwanted tax consequences.

R - An action against the partnership will adversely effect the interest of the injured partner. A better approach is to specifically provide that the injured partner may sue the other partner for breach of a fiduciary duty, breach of good faith and fair dealing, etc.

S - I don't understand this provision. If a partner has executed a partnership agreement giving another partner the authority to do something, why would the first partner have a cause of action against the partnership? The first partner might be able to bring an action based on breach of fiduciary duty, but that would be against the second partner.

T - Entity theory.

V - Who bears liability? All partners or the defaulting partner?

8. Liability of Partners. Section 306 (Nature of Partners' Liability) provides that "unless otherwise agreed by the claimant or provided by law, all partners are liable jointly and severally for all debts and obligations of the partnership." To date, only approximately ten states provide for joint and several liability for all partnership obligations. UPA Section 15 generally provides for joint and several liability for tort related liabilities and only joint liability for other liabilities arising under UPA Sections 13 and 15. The expansion of joint and several liability to all debts and obligations of the partnership was to conform the act to people's general expectations and to facilitate actions against a partnership. Under the UPA, obligations for which partners would be jointly liable required naming all partners in any action to enforce such claim. (This procedural requirement could be an exceedingly difficult task in large partnerships such as accounting firms and law firms.)
Question: What do you think of the revision imposing joint and several liability for all of the partnership's debts and obligations?

Responses:

<table>
<thead>
<tr>
<th>Response</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very good idea</td>
<td>C,D,I,K,O,P,V,X,Z &amp; AA</td>
</tr>
<tr>
<td>Good idea</td>
<td>A,B,E,F,H,J,N,R,T,U,W &amp; Y</td>
</tr>
<tr>
<td>Indifferent</td>
<td>F,M</td>
</tr>
<tr>
<td>Bad idea</td>
<td>S</td>
</tr>
<tr>
<td>Very bad idea</td>
<td></td>
</tr>
<tr>
<td>Do not know</td>
<td>Q</td>
</tr>
<tr>
<td>Did not answer</td>
<td>L</td>
</tr>
</tbody>
</table>

Comments:

A - I believe in a balance between accepting liability and giving up procedural safeguards to ensure debts are properly imposed.

B - Follows from entity concept.

D - The distinction between joint for some and several for others has never made a lot of sense to me.

J - Joint and several liability for all debts and obligations has been adopted in Nevada. Seems to provide more certainty in transactions, particularly loans; the lender knows who is ultimately liable. Does seem inconsistent with entity theory.

O - Partner is in best position to sue other partners for contribution. Third party should not be required to serve large numbers of partners.

R - Third parties expect the partnership and all partners to be liable for its obligations. This will force the partners to seek contribution among themselves, solve procedural problems and permit the third party to collect directly from "collectible" partners.

U - The answer may depend on your point of view (plaintiff versus defense work) but, on balance if this is already the rule in such matters, the change may not be so traumatic but may aid the claimant in getting his claim to court.

V - Particularly if partners have right of action against each other.

Z - Matches the general expectations of parties.

Question: What do you think of the procedural result of not having to name all partners for certain actions against the partnership?
Responses:

<table>
<thead>
<tr>
<th>Rating</th>
<th>Responses</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very good idea</td>
<td>C, H, I, K, O, X, Z &amp; AA</td>
</tr>
<tr>
<td>Good idea</td>
<td>B, E, G, J, M, R, U, W &amp; Y</td>
</tr>
<tr>
<td>Indifferent</td>
<td>D &amp; S</td>
</tr>
<tr>
<td>Bad idea</td>
<td>A, N, P &amp; T</td>
</tr>
<tr>
<td>Very bad idea</td>
<td>0</td>
</tr>
<tr>
<td>Do not know</td>
<td>F &amp; Q</td>
</tr>
<tr>
<td>Did not answer</td>
<td>L &amp; V</td>
</tr>
</tbody>
</table>

Comments:

A - I believe when one's personal assets are directly threatened they should receive notice and opportunity to defend without naming them, it will be difficult to have this opportunity. One compromise might be to have specific waiver provisions which could be incorporated in the Statement of Partnership Authority.

D - If you don't name them all, they can always rectify the situation through contribution remedies.

J - If entity theory, should have agent to accept service and put burden on agent to notify all partners.

N - Depends - if you still have to sue the Partner to collect, then not a big deal. But, maybe Partner should have chance to defend on behalf of Partnership.

O - See above.

P - If there is joint liability, all partners should be named. If several liability is chosen by plaintiff, then only should be required to name targets.

T - Bad idea in J & S liability.

U - See above.

V - If the statement of partnership is filed, why not have all? Is statement amended to reflect changes?

9. Action Against Partnerships and Partners. Section 307 (Actions Against Partnerships and Partners) has been revised to provide, among other things, that a partnership may sue and be sued in its own name (i.e., not in the name of all partners) and that a creditor of the partnership must generally first seek to enforce its judgment against partnership assets prior to proceeding against any partner individually. This section also clarifies that
an action against a partner will not automatically result from a judgment against a partnership. What do you think of the change making it more difficult (i.e., proceeding first against the partnership) to collect from partners?

Responses:

<table>
<thead>
<tr>
<th>Response</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very good idea</td>
<td>12</td>
</tr>
<tr>
<td>Good idea</td>
<td>9</td>
</tr>
<tr>
<td>Indifferent</td>
<td>2</td>
</tr>
<tr>
<td>Bad idea</td>
<td>2</td>
</tr>
<tr>
<td>Very bad idea</td>
<td>1</td>
</tr>
<tr>
<td>Do not know</td>
<td>0</td>
</tr>
<tr>
<td>Did not answer</td>
<td>1</td>
</tr>
</tbody>
</table>

Comments:

B - NY law is approximately there.

D - Consistent with the entity approach, I believe it is beneficial to require exhaustion of partnership assets before going after parties personally.

G - The practice in the real estate business in Washington is to obtain separate guarantees from the partners. This change will simply reinforce this practice.

K - Although a partnership may be an entity, parties doing business with it rely on the ability to look to its general partners. Otherwise, let the parties forming the entity pick a corporation, S corporation, trust, limited partnership or limited liability company.

L - The expectation of creditors is to rely on individual partners. All this section will do is force the use of guarantees by creditors.

O - Partner should not be liable if firm assets can satisfy debt.

Q - Should be more difficult only when claimant contracted with the partnership, i.e. should not be more difficult in tort situation or where contract was in a partner's name.

R - The rights of third parties should be protected and they should not be confronted with a procedural delay and difficulty in realizing on the assets of the partnership as a precondition to suing and/or collecting against the partners directly. General partners are the functional equivalent of guarantors and third parties should have the right to pursue the partnership and partners simultaneously.
S - This would clear up an issue which lingers in Michigan since there is only one appellate decision squarely on point.

U - Currently, generally, the law in Maryland.

10. Classes of Partners. In discussing potential revisions to Section 401 (Rules Determining Rights and Duties of Partners), the Committee declined to include provisions that expressly authorize different classes of partners. While partners are free to agree among themselves as to the respective rights and obligations (and thereby effectively create different classes of partners such as in law partnerships with equity and non-equity partners), these agreements have no effect on third parties. What do you think of the decision not to include an authorization of different classes of partners?

Responses:

<table>
<thead>
<tr>
<th>Response</th>
<th>Vote</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very good idea</td>
<td>2</td>
</tr>
<tr>
<td>Good idea</td>
<td>11</td>
</tr>
<tr>
<td>Indifferent</td>
<td>8</td>
</tr>
<tr>
<td>Bad idea</td>
<td>6</td>
</tr>
<tr>
<td>Very bad idea</td>
<td>0</td>
</tr>
<tr>
<td>Do not know</td>
<td>0</td>
</tr>
<tr>
<td>Did not answer</td>
<td>0</td>
</tr>
</tbody>
</table>

Comments:

A - While this avoids complexity, it exposes minority interests to unreasonable liability limits.

D - As long as clauses are not prohibited, I see no reason to specifically authorize.

J - Inconsistent with entity theory.

M - Persons who wish to create different classes of investors can choose from other available business vehicles. To create classes of parties in a partnership would necessitate some sort of notice of the classes, making for burdensome filing requirements.

O - Partnership law already contemplates liability differentiation, to wit limited partners. It should accommodate other differences as well.

P - There should be a provision for classes of partners which will be binding on third parties, if disclosed in filed statement of partnership.
Q - There should be a single unified act dealing with general partnerships and limited partnerships.

R - See comment to No. 9.

U - Would be unnecessary.

Z - This prohibits granting the partners the needed flexibility in certain situations - at least to third parties with notice of the different classes.

AA - I don't see why authorization is necessary under a default statute of this type.

11. Fiduciary Duties. (a) Section 404 (Fiduciary Duties of Partner) is intended to be a complete list of all "fiduciary" duties which a partner owes to the partnership and to the other partners. These duties are limited to:

(i) the duty of good faith and fair dealing,

(ii) the duty of loyalty, and

(iii) the duty of care.

The duty of good faith and fair dealing is non-waivable in the partnership agreement (see Section 105(2)). RUPA does provide, however, that the partners "by agreement may identify specific conduct that does not violate the general duty of good faith and fair dealing if the conduct is not manifestly unreasonable". See Section 404(a). This duty of good faith and fair dealing is intended to be the same duty that is found in all contractual relationships.

The focus of the duty of loyalty provision requires that in any transaction between the partnership and a partner, the "informed consent" of the parties is required.

Finally, the duty of care would only be violated by a partner's gross negligence or wilful misconduct.

Question: Do you agree with the Committee's proposition that all fiduciary duties should be explicitly listed in RUPA?
**Responses:**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Very good idea</td>
<td>5:</td>
</tr>
<tr>
<td>Good idea</td>
<td>12:</td>
</tr>
<tr>
<td>Indifferent</td>
<td>4:</td>
</tr>
<tr>
<td>Bad idea</td>
<td>2:</td>
</tr>
<tr>
<td>Very bad idea</td>
<td>1:</td>
</tr>
<tr>
<td>Do not know</td>
<td>0</td>
</tr>
<tr>
<td>Did not answer</td>
<td>3:</td>
</tr>
</tbody>
</table>

A: One item that often comes up in real estate partnerships is the right of partners to engage in competing projects. Related to this is participation in ventures separately from the partnership that are near the partnership project and came to the attention of the venturers/partners while in the partnership. The question that arises is whether the venturer/partner has unfairly received information, good will, etc. from the partnership which gave him his opportunity to participate in the venture.

B: This involves a series of gut reactions to define a partner’s obligation rather than the amorphous "punctillo" in business transactions.

D: I have mixed feelings. It is hard to be inclusive about fiduciary obligations because in my opinion it is a very complex subject. The more important issue is the extent these can be waived (with proper disclosure) allowing the parties to write their own standards into the agreement.

E: Different classes of partners may not have common interests.

G: In Washington the duty owed by one partner to another is that of a "fiduciary" (i.e. the duty of a trustee) with the highest degree of loyalty. Given the agency relationship between the partners and the ability of one partner to incur debts which must be paid by the other partners, any limitation on this fiduciary duty seems to be an unwarranted departure from common law.

H: See reference to Sec. 105 question; RUPA list, however, shouldn’t be exclusive; leave room for case law.

N: Should limit litigation somewhat.

Q: What about conflict of interest situation, such as where the managing partner’s decision should be for the overall benefit of the partnership even if a different decision would be more favorable for the managing partner.
R - Statement of these duties will assist the courts in interpreting their scope and put the partners on notice that they have specific fiduciary duties to each other.

S - Litigation in the partnership area in Michigan (at least at the lower court level) has focused on partners usurping a partnership opportunity. Is this covered in one of the enumerated duties?

Z - This area of law needs to be clarified. This helps!

AA - Too much confusion under current law.

**Question:** Should fiduciary duties instead be deleted entirely from RUPA, thereby allowing case law rather than RUPA to govern?

<table>
<thead>
<tr>
<th>Yes</th>
<th>2:</th>
<th>C &amp; G</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did not answer</td>
<td>4:</td>
<td>D,E,J &amp; L</td>
</tr>
</tbody>
</table>

**Comments:**

D - Maybe. See my comments above. My concern is that the parties define their own standards (more like Delaware) rather than leaving it to the Act or the courts.

H - See previous comments.

Q - RUPA should have nonexclusive list.

S - Judges need guidance as to what fiduciary duty in a partnership setting means.

Z - The courts are confused enough as it is on this issue and should be given direction (which this version provides).

**Question:** Are there any other duties that should be enumerated in RUPA?

<table>
<thead>
<tr>
<th>Yes</th>
<th>3:</th>
<th>H,O,Q</th>
</tr>
</thead>
<tbody>
<tr>
<td>Did not answer</td>
<td>7:</td>
<td>C,E,J,L,S,U &amp; Y</td>
</tr>
</tbody>
</table>
Comment:

H - Non-competition, business opportunities, affiliated party transactions.

O - Duty of notice. Partner should be required to disclose what he knows and comes to know.

Q - Fiduciary duty where one partner transacts directly with another partner, e.g. to purchase that partner’s interest. There should be the same disclosure duty as for transactions with the partnership.

Question: Do you agree that the duty of good faith and fair dealing should not be able to be waived by the agreement of the partners?

Responses:

 Indifferent 0
 Bad idea 2: D & AA
 Very bad idea 0
 Do not know 0
 Did not answer 0

Comments:

B - Chicken and egg problem.

D - As mentioned before, I think they should be waivable in the sense that the partners should have full latitude to set their own standards by agreement.

H - So long as good faith required; in virtually all commercial agreements use this standard.

L - Partial waiver for specific enumerated situations only.

N - Unique, mutual agency relationship.

R - This is the fundamental basis upon which partnership agreements and businesses are based.

AA - I think the exploration of the relevant conduct that will net a duty is insufficient and will not help in interpretation.
Question: Should the duty of care standard be gross negligence?

No  8:  A,E,G,M,O,T,W & AA
Did not answer  0

If no, what standard should be used and why?

Comments:

A - Gross negligence is fine in most circumstances. But, what about a managing partner particularly if he is a professional that is receiving extra compensation for certain duties. Should he or she hold to a higher standard.

E - Should be "reasonable".

G - I am owed a standard of care with reference to "negligence" by every third party in the world - why should there be a lesser standard imposed on someone who is my partner?

I - See comments.

M - Simple negligence, i.e., that of a reasonable person under the circumstances. Many partnerships have a managing partner, whom the partners should expect to act as a reasonable man.

N - As a default provision.

O - Ordinary negligence.

R - Mere negligence actions should be permitted only when they result in a breach of the partnership agreement; gross negligence permits a separate tort action and therefore should be based upon a higher standard.

T - Case law.

U - Close call, but would be consistent with an attempt to reduce litigation.

(b) Both the duty of good faith and fair dealing and the duty of loyalty apply to the formation, conduct, and liquidation of the partnership. This is a carry-over from the original UPA language that the duty of loyalty applied to the "formation, conduct, and liquidation of the partnership" and the Committee's observation that there had been no problems in the case law dealing with formation. Section 404(c) provides that neither the duty of good faith and fair dealing nor the duty of loyalty shall be considered to have been
violated "merely because a partner's actions furthered the partner's individual interest." Additionally, this subsection (c) now specifically allows a partner to purchase for its own account the assets of the partnership in a foreclosure sale or upon liquidation of the partnership.

Question: Do you agree with the Committee that the duty of good faith and fair dealing should apply to the formation of the partnership; that is, to negotiations and conduct prior to execution of a partnership agreement?

Responses:

<table>
<thead>
<tr>
<th>Option</th>
<th>Number of Votes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very good idea</td>
<td>7</td>
</tr>
<tr>
<td>Good idea</td>
<td>6</td>
</tr>
<tr>
<td>Indifferent</td>
<td>0</td>
</tr>
<tr>
<td>Bad idea</td>
<td>10</td>
</tr>
<tr>
<td>Very bad idea</td>
<td>1</td>
</tr>
<tr>
<td>Do not know</td>
<td>2</td>
</tr>
<tr>
<td>Did not answer</td>
<td>0</td>
</tr>
</tbody>
</table>

Comments:

A - There is a difficulty, however, because this approach may lead to assertion of matters in conflict with representations in partnership agreements, thus destroying the effect of integration clauses. The standard for using preformation representations to upset signed agreements should be very high.

B - This covers the period before a party has agreed to become a partner and is a far heavier duty than the absence of fraud.

D - I have always been concerned that this may interfere with the ability to negotiate the best deal for a client who is to be a constituent partner.

E - Good faith and fair dealing should always be present.

I - See comment.

N - Not partners yet - all's fair.

O - As long as 404(c) provision re purchase at foreclosure remains.

R - The imposition of such a duty may reduce claims of fraud in the inducement; conversely, people should have a free reign to negotiate the "best deal" in the creation and formation of the partnership.
S - I think it will lead to arguments as to whether in the light of subsequent events, a partner received a fair "deal" in terms of his respective rights, benefits and obligations.

U - The negotiation of a partnership is an adversarial process by definition much as is the negotiation of a contract between buyer and seller or borrower and lender.

Y - Assuming equal bargaining positions.

Z - Until the partnership is formed, no fiduciary duties should arise.

AA - This duty is relatively basic, though in general it may open up can of worms.

Question: Similarly, do you agree with the Committee that the duty of loyalty should apply to the formation of the partnership?

Responses:

<table>
<thead>
<tr>
<th>Category</th>
<th>Voter Count</th>
<th>Grade</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very good idea</td>
<td>6</td>
<td>K,O,P,W,X &amp; Z</td>
</tr>
<tr>
<td>Good idea</td>
<td>5</td>
<td>A,C,J,M &amp; V</td>
</tr>
<tr>
<td>Indifferent</td>
<td>3</td>
<td>F,R &amp; S</td>
</tr>
<tr>
<td>Bad idea</td>
<td>10</td>
<td>B,C,D,E,H,N,Q,U,Y &amp; AA</td>
</tr>
<tr>
<td>Very bad idea</td>
<td>2</td>
<td>I &amp; T</td>
</tr>
<tr>
<td>Do not know</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Did not answer</td>
<td>1</td>
<td>L</td>
</tr>
</tbody>
</table>

Comments:

B - See above.

D - Same problem as with fair dealing, etc.

E - No - parties may have different interests, but should deal "fairly and in good faith".

N - Same.

O - See above.

R - See previous comment.
Question: Do you agree with the Committee that the duty of good faith and fair dealing should apply to the liquidation of the partnership?

Responses:

<table>
<thead>
<tr>
<th>Response</th>
<th>Count</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very good idea</td>
<td>10</td>
<td>F, J, I, K, N, O, P, W, X &amp; Z</td>
</tr>
<tr>
<td>Good idea</td>
<td>16</td>
<td>A, B, C, D, E, H, N, Q, R, S, T, U, V, Y &amp; AA</td>
</tr>
<tr>
<td>Indifferent</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Bad idea</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Very bad idea</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Do not know</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Did not answer</td>
<td>1</td>
<td>L</td>
</tr>
</tbody>
</table>

Comments:

A - While it is not appropriate for the laws to facilitate a buccaneer approach where everyone grabs for what he or she can get, it must be recognized when there are deficits to be funded. Partners will naturally see to it.

B - Absolutely they are partners and this is a period fraught with potential for overreacting.

D - Subject to be earlier comments on waivability in the sense of setting standards by agreement.

N - Why shouldn't it?

R - Once formed, the duty of good faith and fair dealing should apply to all aspects of the partnership.

Question: Do you agree with the Committee that the duty of loyalty should apply to the liquidation of the partnership?

Responses:

<table>
<thead>
<tr>
<th>Response</th>
<th>Count</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very good idea</td>
<td>8</td>
<td>F, H, I, K, N, O, P, X &amp; Z</td>
</tr>
<tr>
<td>Indifferent</td>
<td>2</td>
<td>F, W</td>
</tr>
<tr>
<td>Bad idea</td>
<td>1</td>
<td>E</td>
</tr>
<tr>
<td>Very bad idea</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Do not know</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>Did not answer</td>
<td>1</td>
<td>L</td>
</tr>
</tbody>
</table>
12. **Partner's Remedies.** The Committee has expanded the UPA provisions dealing with a partner's remedies (which allowed a partner to seek an accounting) into new Section 405 (Remedies of Partners), which is intended to provide partners with a broad range of remedies. RUPA allows a partner to bring an action to: (a) enforce a partner's rights under Section 401 (Rules Determining Rights and Duties of the Partners), (b) enforce a partner's right to obtain the fair market value of its interest in the partnership as provided in Section 702(a), (c) compel a winding up of the partnership business pursuant to Section 802, (d) enforce a partner's rights under the partnership agreement, or (e) otherwise protect the rights and interest of a partner. This provision enforces the view that, when there is a disagreement among partners, a partner should have the benefits of the courts without having to seek a dissolution and accounting of the partnership.

**Question:** Do you agree with this more expansive approach?

**Responses:**

<table>
<thead>
<tr>
<th>Opinion</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very good idea</td>
<td>12:</td>
</tr>
<tr>
<td>Good idea</td>
<td>14:</td>
</tr>
<tr>
<td>Indifferent</td>
<td>1:</td>
</tr>
<tr>
<td>Bad idea</td>
<td>0</td>
</tr>
<tr>
<td>Very bad idea</td>
<td>0</td>
</tr>
<tr>
<td>Do not know</td>
<td>0</td>
</tr>
<tr>
<td>Did not answer</td>
<td>0</td>
</tr>
</tbody>
</table>

**Comments:**

A - It may be necessary, however, where differences are irreconcilable to dissolve the partnership.

B - You bet.

D - As indicated earlier, broadening rights/remedies in partnership disputes is beneficial as long as all of these may be varied by agreement.
E - But withdrawing partners, if not in default, should bear costs of withdrawal - if in default, should still obtain value of interest, subject to damages or reasonable liquidated damages.

O - It's about time.

R - This "expansive approach" should be subject to the actual terms of the partnership agreement. Accordingly, the partnership agreement could restrict the remedies, provide different remedies, etc.

U - I suppose there is logic to the approach, but litigation is a lousy way to resolve parties' differences. I prefer private resolution techniques found in many partnership agreements.

Question: If you do not agree with this more expansive approach, how would you limit it?

Comments:

L - None.

U - I really could accept its entirety.

13. Assignees of Partnership Interests. UPA Section 26 stated "A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property." RUPA Section 502 (Nature of a Partner's Transferable Interest in the Partnership) states that a partner's transferable interest in the partnership is only that partner's interest in distributions and that such interest in the partnership is personal property. Section 503 (Assignment of Partner's Transferable Interest) then clarifies what happens upon the assignment of a partner's transferable interest. Specifically, Section 503 states that such a transfer is permissible, does not cause a winding-up of the partnership's business, does not entitle the assignee to participate in the management or business affairs of the partnership or have access to any information or right to inspect the partnership books, but only permits the assignee to receive the distributions to which the assignor would be otherwise entitled. All remaining rights and obligations of the assigning partner remain with the assignor. Note that pursuant to Section 101(7) "Transfer" is defined to include "an assignment, conveyance, lease, mortgage, deed, and encumbrance."

Question: Should an assignee of a partnership interest have greater, lesser, or the same rights as provided in RUPA?
Responses:

<table>
<thead>
<tr>
<th></th>
<th>10:</th>
<th>1:</th>
<th>15:</th>
<th>1:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lesser</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Same</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Did not answer</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Comments:

B - Assignee is not a voluntary partner.

D - This is a difficult issue to treat by statute. It also has tax and liability implications which I don't feel have been properly addressed in this provision. I think this section needs a lot of additional work.

G - Since this is one of those sections that can be changed by the agreement itself, it may not be that important. However, in connection with collateral assignments, it is not uncommon to attempt to restrict the partner's ability to vote for certain items, further encumber assets, etc. These types of "negative" covenants would appear to be ineffective with this language.

H - Should have allocable share of profits and losses.

J - Should have rights in specific partnership property and capital accounts. In absence of agreement to be bound by partnership agreement, no rights in management.

K - This answer assumes that a partnership interest can be transferred with the consent of a specified percentage of the other partners.

L - The Agreement should control but lacking agreement no rights to participate except as to profits and losses.

M - Provision should be made for the substitution of partners if desired.

N - What does "distributions" cover? Capital account? Loans?

O - However remain concerned about effect of RUPA in bankruptcy. Will compelled sale of partnership interest leave bankrupt in management without right in money?

R - Rights provided by RUPA are consistent with the concept of an assignment of the "economic value" of the partnership, rather than an assignment which substitutes one partner for another. The provisions of RUPA should apply unless the partnership agreement provides otherwise.
S - Partners should be allowed to transfer all of their bundles of partnership rights (including voting and subsequent rights), and assignees should be entitled to be admitted as substitute partners, so long as the partnership agreement permits such transfers and the transfer conforms with the agreement.

V - Assignee who has foreclosed or purchased at foreclosure should have access to information and books and records.

AA - The only problem is determining when you have a true and complete assignee - do we need a novation?

14. Charging Order. Section 504 (Partner’s Transferable Interest Subject to Charging Order) allows for a judgment creditor of a partner or a partner’s assignee to "charge" the transferable interest of such debtor for the amount of the judgment debt, together with interest thereon. Section 504(b) defines a charging order as "a lien on the judgment debtor's transferable interest in the partnership." The court is empowered to order a foreclosure of the charging order, and the purchaser at a foreclosure sale has all of the rights of an assignee. Section 504(e) provides that this section is the exclusive remedy for a judgment creditor to satisfy its judgment out of the debtor’s interest in the partnership.

Question: Some commentators have suggested that the charging order should be made available to all creditors who have the right, under local law, to the assets of the debtor. Do you agree with the Commissioners’ approach to restrict charging orders to judgment creditors only?

No 2: H & M
Do not know 3: L, Q & U
Undecided 1 J

Comments:

A - A prohibition against liens, encumbrances, etc., in the agreement should prohibit a charging order. In any event this should be addressed in the RUPA.

B - Prejudgment remedies too onerous.

D - It is difficult enough dealing with general partnership interests in the case of transfers and creditor realizations. I believe the judgment creditor restriction is appropriate.
G - What other creditors do these commentators have in mind? I suppose a trustee in bankruptcy or a receiver might be included, but these people could get to the interest through a court order as well.

J - Undecided.

N - Contractual or judgment seems adequate.

R - This limitation assures a judicially supervised proceeding in which the partner has had notice and an opportunity to defend. Extending the right to other creditors should exist only under the same circumstances.

**Question:** Under UPA, have you ever been involved in imposing a charging order against a partner's interest in a partnership?

**Responses:**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>6: A,B,D,F,G,S</td>
</tr>
<tr>
<td>Did not answer</td>
<td>1: L</td>
</tr>
</tbody>
</table>

**Comments:**

A - A bank that was a creditor of one of the partners asked for additional security. It was helpful to use the charging order provision to draft a security instrument recorded against partnership assets but in effect subordinate to the interest of existing creditors, other partners, and new creditors who grant new loans to fund deficits or partnerships.

B - It's not fun.

D - I had one of my partners in the creditors rights area handle it and it was a procedural nightmare.

E - Would like to know the experience of others. Also - have others ever issued execution against a partnership interest owed by a judgment debtor?

G - A very unprofitable exercise in one instance; extremely valuable in another instance.

S - We represented a partnership. A judgment creditor sought a charging order against the interest of one partner. There was incredible confusion among the creditor, court, partnership and partners as to the creditor's rights under UPA. The statute is unclear, the case law and commentaries were murky, and the parties (including our firm) had little experience in the effect the charging order was to have. The creditor bank kept trying to
treat it as if it were a foreclosure under Article 9 of the UCC under which it would acquire "title" to the interest, the right to review books and records, and voting rights.
SUMMARY OF RESPONDENTS

A - Arnold B. Kogan, Goldberg, Katzman & Shipman, P.C., 320 E Market Street, P.O. Box 1268, Harrisburg, PA 17108-1268
Jurisdiction: Pennsylvania
Years of Practice: 21
Practice Concentration Area: Tax and Real Estate

B - Samuel W. Ingram, Jr., 530 Fifth Ave., NY, NY 10036
Jurisdiction: New York
Years of Practice: 31
Practice Concentration Area: Real Estate

C - Kenneth J. Alcott, Riverfront Plaza, 951 East Byrd St., Richmond, VA 23219-4074
Jurisdiction: Virginia
Years of Practice: 8
Practice Concentration Area: Corp. and Partnership

D - John E. Kehoe, Esq., Latham & Watkins, 633 West 5th St., Suite 4000, Los Angeles, California 90071
Jurisdiction: California
Years of Practice: 29
Practice Concentration Area: Real Estate Partnerships; Financing

E - Robert Freedman, 2200 PSFS Bldg., 12 S. 12th St., Phila, PA 19107.
Jurisdiction: Pennsylvania
Years of Practice: 35
Practice Concentration Area: Real Estate

F - Carol C. Honigberg, Hazel & Thomas, P.C., 3110 Fairview Park Dr., Suite 1400, Falls Church, VA 22042
Jurisdiction: Virginia
Years of Practice: 11
Practice Concentration Area: Real Estate/Real Estate Finance

G - Scott B. Osborne, Graham & Dunn, 1420 Fifth Avenue, #3300, Seattle, Washington 98101-2390
Jurisdiction: Washington State
Years of Practice: 16
Practice Concentration Area: Real Estate

H - Irvin A. Leonard, 901 Lakeside Ave., Cleveland, Ohio 44114
Jurisdiction: Ohio
Years of Practice: 24
Practice Concentration Area: Corporate, Real Estate
I - Nelson Irvine, 1000 Tallan Building, Chattanooga, TN 37402-2502. Jurisdiction: Tennessee Years of Practice: 22 Practice Concentration Area: Business Organizations and Transactions

J - Layne J. Butt, 300 South Fourth Street, #1700, Las Vegas, Nevada 89101 Jurisdiction: Nevada Years of Practice: 7 Practice Concentration Area: Real Estate

K - Stefon F. Tucker, 1615 G Street, N.W., Suite 400, Wash., D.C. 20036 Jurisdiction: Washington, D.C. Years of Practice: 28 Practice Concentration Area: Tax, Estate Planning and Real Estate

L - J. Robert Foster Jurisdiction: California Years of Practice: 26 Practice Concentration Area: Business and Estate Planning

M - W. Lee Corbett, Ste. 1050 American Center, 3100 West End Avenue, Nashville, TN 37203 Jurisdiction: Tennessee Years of Practice: 22 Practice Concentration Area: Business Associations, Real Estate

N - Steven A. Waters Jurisdiction: Texas Years of Practice: 16 Practice Concentration Area: Real Estate/Banking

O - Marvin Leon, 11377 W. Olympic Blvd., Los Angeles, CA 90064 Jurisdiction: California Years of Practice: 35 Practice Concentration Area: Real Estate

P - Melvin K. Lippe, 10 S. Wacker Dr. - 4000, Chicago, IL 60606 Jurisdiction: Illinois Years of Practice: 33 Practice Concentration Area: Real Estate

Q - John Cauble, Cox, Castle & Nicholson, 2049 Century Park East, 28th Floor, Los Angeles, CA 90067 Jurisdiction: California Years of Practice: 10 Practice Concentration Area: Real Estate Joint Ventures, Sales and Financial Planning
R - Robert R. Nix II, Kerr, Russell and Weber, 2100 Comerica Building, Detroit, Michigan 48226
Jurisdiction: Michigan
Years of Practice: 20
Practice Concentration Area: Real Estate Finance, Business, Business Litigation, Real Estate Litigation

S - C. Leslie Banas, 2290 First National Building, Detroit, Michigan 48226
Jurisdiction: Michigan
Years of Practice: 15
Practice Concentration Area: Real Estate

T - Thomas N. Keltner, Jr., 60 East 42nd Street, New York, NY 10165.
Jurisdiction: New York
Years of Practice: 16
Practice Concentration Area: Real Estate Finance

U - David A. Cohen, Linowes and Blocher, 1010 Wayne Avenue, Silver Spring, MD 20910
Jurisdiction: Maryland, Washington, D.C.
Years of Practice: 18
Practice Concentration Area: Tax, Partnerships, Real Estate

V - James A. McGraw, c/o Day, Barry & Howard, 185 Asylum Street, Hartford, CT 06103-3499
Jurisdiction: Connecticut
Years of Practice: 16
Practice Concentration Area: Real Estate

W - Suzann Mooney, 2 Houston Center, Suite 2907, Houston, TX 77010.
Jurisdiction: Texas
Years of Practice: 9
Practice Concentration Area: Real Estate Investing (Institutional Investing)

X - Kenneth Williams, Jr., Gateway One, Newark, NJ, 07102
Jurisdiction: New Jersey, New York and Pennsylvania
Years of Practice: 23
Practice Concentration Area: Real Estate and Finance

Y - Gregory J. Anderson
Jurisdiction: Arizona
Years of Practice: 9
Practice Concentration Area: Real Estate, Business
Z - Gregory P.L. Pierce  
Jurisdiction: Illinois  
Years of Practice: 7  
Practice Concentration Area: Transactional; Real Estate; Corporate  
Years of Practice:

AA - Caryl B. Welborn, Morrison & Foerster, 345 California Street,  
San Francisco, CA 94104  
Jurisdiction: California  
Years of Practice: 15  
Practice Concentration Area: Real Property Joint Venture
October 1, 1991

TO: Distribution List

FROM: Gerald V. Niesar

RE: Status of RUPA Project; Committee Schedule
NEXT MEETING: November 7-8
Washington, D.C. -- See Details Below and Jerry Pusch’s Letter

Several developments and future plans were reported and hatched, respectively, during the ABA Annual Meeting.

1. **NCCUSL Second Reading of RUPA.** The Conference only achieved a second (quasi-final) reading of the first two and one-half articles -- through Section 303. Apparently, several 11th hour changes were suggested by the Drafting Committee; more changes were introduced and adopted during the floor discussion/vote. Lauris Rall attended as our Committee’s observer and has prepared a report which is enclosed.

2. **Future for RUPA.** Whether a Second Reading of the remainder of RUPA can be completed in 1992 is very much open to question. Opinions range from complete confidence that such an event will occur, to total disbelief that anyone seriously considers this a realistic possibility. It should be noted that the divergent views were sometimes expressed by the same persons. In short, nobody knows, but it seems unlikely that NCCUSL will allocate enough time at the 1992 session for completion of the second reading. In any case, we should assume a final reading will occur in 1992 and finish our comments by next Spring.

3. **Most Recent RUPA Draft.** I believe all of you have the most recent draft; the cover page is enclosed. If you do not have that draft, please let me know.

4. **Special NCCUSL Sub-Group Review of Sections 202 and 203.** In Williamsburg, we experienced significant frustration understanding the Sections dealing with property of the partnership and transfers thereof. The NCCUSL Drafting Committee also had trouble with these and has appointed Bob Cornell to head a special drafting subcommittee on these sections. We will contact Bob
Cornell and see if we can use the results of our Williamsburg meeting to assist in drafting the new provisions.

5. Preparation for November Meeting. The Partnership Committee will meet Thursday, November 7, in Washington. Our Subcommittee will meet for a full day on Friday, November 8. I request each sub-group which has written a comment letter to review the comments in your letter against the August '91 draft RUPA. Please come to the November meeting with a concordance (in the Biblical sense) comparing our comments to the draft RUPA. Perhaps marking up a copy of the letter itself would be a good approach. Plan on having fifteen copies of the "report" available. I hope we can review all of these on November 8 and decide what, if anything, we need to pursue further. So that no comment letter is overlooked, I propose to have the following assigned responsibilities, leaving it to the designated responsible person to arrange for a substitute if he will not be at the November meeting:

<table>
<thead>
<tr>
<th>Letter Date</th>
<th>Subject</th>
<th>Responsible Person</th>
</tr>
</thead>
<tbody>
<tr>
<td>10/29/90</td>
<td>UPA Sections 1-18</td>
<td>Jim Jerue</td>
</tr>
<tr>
<td>12/7/90</td>
<td>UPA Section 21</td>
<td>Gerry Niesar</td>
</tr>
<tr>
<td>1/25/91</td>
<td>UPA Sections 29-32</td>
<td>Alan Kailer</td>
</tr>
<tr>
<td>5/29/91</td>
<td>RUPA Art. VI; Sections 702, 703, 802</td>
<td>Tony Van Westrum</td>
</tr>
<tr>
<td>7/26/91</td>
<td>RUPA Sections 101-309</td>
<td>Allan Duboff</td>
</tr>
</tbody>
</table>

6. Real Estate Section Report. Enclosed is a copy of a survey distributed to members of the Real Estate Section, together with a summary of responses. I believe the results are generally consistent with our comment letters but there are a few potential differences. One is in the area of fiduciary duty (see p. 32 of the survey); a majority of respondents seems to favor the "fiduciary" duty of good faith and fair dealing at the formation stage. We may not disagree with a formation stage obligation of good faith and fair dealing, but probably would disagree if it is characterized as a fiduciary duty. (I note our good friend Greg Pierce thinks this is a "very bad idea" -- perhaps indicative that those who have had the opportunity to discuss the questions may have different views from persons merely answering a survey.)
7. **Meetings with RUPA Drafting Committee.** We are invited to send two representatives to the future RUPA drafting sessions. One would be a "constant," attending all meetings; the other would be a "specialist," i.e., one of the people most familiar with the matter to be discussed at the specific meeting. The next Drafting Committee meeting is October 25-27 in Atlanta and will cover Articles 8, 9 and possibly 6. Please call if you can help on this meeting.

8. **Details on November 8 Meeting.** Paul McCarthy has been kind enough to arrange for a conference room in his Washington office. Moreover, coffee and pastries will be available in the morning, and sandwiches will be available for lunch. Therefore, we should be able to have a full-day meeting and are planning to do so as follows:

   Friday, November 8  
   Baker & McKenzie  
   815 Connecticut Avenue  
   10th Floor  
   9:00 a.m. to 5:00 p.m.  
   Local Contact: Mr. Mike Callaway  
   (202) 542-7000  
   (202) 452-7074 (Fax)

   Please send back the return mailer so we will know how many to plan for.

   See you in November.
To: Gerry Niesar

From: 

I will □ will not □ be at the November 8 meeting in Washington.

I am interested □ not interested □ in representing the Subcommittee at one or more NCCUSL Drafting Sessions.

Return immediately to:

Gerald V. Niesar
McKenna & Fitting
595 Market Street, Suite 1600
San Francisco, CA 94105

Or FAX to:

Gerald V. Niesar
(415) 243-9276
September 30, 1991

Mr. Gerald V. Niesar
McKenna & Fitting
595 Market Street
San Francisco, California 94105

By Fax Transmission
(415) 243-9276

Dear Gerry:

Since talking with you a week or so ago, I have confirmed that our Washington D.C. office has adequate conference room facilities. We would be happy to host the Subcommittee meeting on Friday, November 1, if you need to find a home D.C.

Also, Northwest Airlines has a promotion allowing free companion travel if you stay over Saturday night. I plan to take advantage of this opportunity. If you need certificates, I have extra ones and will be glad to send a set to you (or any other members of the Subcommittee).

Sincerely,

William G. Pusch

WGP/shel
MEMORANDUM

TO: Gerald V. Niesar, Chairman
Ad Hoc Subcommittee on RUPA

FROM: Lauris G. L. Rall

DATE: August 19, 1991

RE: Meeting of National Conference of Commissioners on Uniform State Laws: Naples, Florida, August 5-6, 1991

As you requested, I attended the above-referenced meeting to observe the second, and proposed final, reading of the first portion of the Revised Uniform Partnership Act. This memorandum will serve as my report.

RUPA was scheduled to be read to the full assembly of Commissioners during both the morning and afternoon sessions of Monday, August 5th. However, upon arrival and greeting by Lane Kneedler, Chairman of the NCCUSL RUPA Drafting Committee, I was advised that delays caused by the reading of other uniform acts had postponed the commencement of the RUPA reading until the afternoon session. I was invited by Kneedler to attend the Monday morning session of the Drafting Committee, which had also met all day Saturday and part of Sunday.

In attendance at the Drafting Committee session I attended were Kneedler; Bob Cornell, who acted as chairman when Kneedler left the room; seven other Commissioners, Gardner, Hershman, Jones, Macey, Pavetti, Swibel and Taylor; Haynsworth, ABA liaison; and Weidner, the Reporter. The session focused on Sections 308 through 503 (discussion on which was not complete), all sections which were not read to the full assembly at this meeting. Principal comments and changes made by the Drafting Committee were as follows:

Section 401: With respect to subsection (h), some Commissioners felt that compensation should be awarded to a partner in other circumstances. However, no change was made on the basis that such a provision could invite litigation.

Section 403: There was some debate as to whether subsection (c) should be mandatory, but no change was made.

Section 404: Extensive discussion regarding this section, concerning fiduciary duties. Surprisingly, about half of the commissioners present took the position that it would be better to delete the word fiduciary from this section, principally on the basis that by its presence courts would read in expansive duties.
However, the only change made in compromise was to add the word "Limited" before the word "Fiduciary" in the caption. Additional discussion occurred regarding the attachment of fiduciary duties to the formation stage. Haynsworth explained the Ad Hoc Committee's objection thereto, but also delivered his view which appears to be that unless the parties do become partners, then no duties apply. One of the Commissioners argued that parties in the partnership agreement can waive any claims against each other as a result of any fiduciary duties arising during the "formation". No change was made. There was considerable discussion as to whether permitting partners to waive Section 404(b) constituted a waiver of the duty of disclosure. However, some felt that the duty of disclosure was probably also contained in the duty of good faith and fair dealing. The Commissioners did approve a change to Section 404(d), adding the words "the" and "of care" before the word "duty" in line 11 (and deleting "a"). There was also considerable discussion whether waiver of Section 404(d) meant that a general partner could then engage in willful misconduct to the detriment of the limited partners, who would then have no recourse against him.

The meeting was then interrupted by NCCUSL leadership which advised that RUPA would start on the floor at 2:30pm that day, that the Committee should read fast in order to get through Article 5, and that the leadership still expected RUPA to be finished by 1992.

Section 405/406: There was some discussion about the overlap between these two sections, and the question of the meaning of waiver of these sections: Could the partners waive each other's liability and rights to enforce actions therefor, without encroaching on the nonwaivable fiduciary duties under Section 404(a)? No change was made.

Section 407: Concerns were raised about the meaning of Section 407(b), which may need rewriting.

Section 501: Considerable discussion about the overlap of this Section with Article 2. No change made.

Section 502: Uniformly agreed that a definition of the term "distributions" was needed, something like "a transfer of assets to a partner from the partnership in accordance with the partnership agreement", but no change agreed to now.

Section 503: Some discussion of whether assignment of a partner's interest can be completely prohibited by the partnership agreement. General agreement that a charging order can never be barred.
During its sessions the previous two days, the Drafting Committee had reviewed and revised Sections 101 through 307. Changes made, many of which were in response to our comment letter dated July 26, 1991, are indicated on the attachment dated August 4, 1991. With respect to the numbered changes recommended in the Ad Hoc Committee's comment letter, the NCCUSL Committee had the following responses:

1. No new definitions were added to Section 101, but the Committee did agree to formulate a definition for "distributions".

2. The Committee changes to Section 103 appear to be responsive to our comments.

3. The Committee deferred further consideration of Section 105 until the sections in RUPA which are proposed to be nonwaivable are considered further.

4. The Committee did not change Section 201, definition of partnership.

5. The Committee has appointed a subcommittee, chaired by Bob Cornell, to address the Ad Hoc Committee's comments on Sections 202, 203 and 501. Several other Commissioners also raised these and related concerns regarding these provisions.

6. See above.

7. Changes were not made in response to comments in the first two paragraphs of this numbered comment in the Ad Hoc Committee's letter, but the change requested to Section 302(c) in the third paragraph was made.

9. [No comment numbered 8 in the Ad Hoc Committee letter] No change was made in response to the first paragraph in this comment, but changes were made to Sections 303(h)(1) and (2) as requested by the second paragraph of the comment.

10. The changes made appear to be responsive to the Ad Hoc Committee's comments.

Finally, at approximately 4:00pm on Monday, August 5th, the full assembly of Commissioners took up RUPA until about 5:30pm, and then continued with their consideration from 9:00am (after the usual opening song session) until 10:30am on August 6th. The Drafting Committee read through Section 304, although the last section discussed by the assembly was Section 303. Comments from the Commissioners were extensive. Several commissioners appeared to have read and taken an interest in the Act, and, in general, the comments were very good. Many comments concentrated on language or technical changes, most of which were

THACHER PROFFITT & WOOD
agreed to in principle by the Drafting Committee, which promised
to consider such changes and report back (presumably in 1992).
Some comments were substantive or policy-oriented, and engendered
considerable debate. No formal motions were made by the
Commissioners; thus one could argue that the sections read are
final, but perhaps subject to amendment next year if the
Commissioners do not like the form in which they are presented at
that time. They may not have to be read in their entirety. A
summary of the comments made from the assembly follows:

Section 101: Delete the words "or a voluntary case" from (2)(i).
Add the words "or by conduct" after the word "oral" in (3).

Section 103: Replace the words "is aware of it" with "has actual
knowledge of it" in (a). Add the words "to that person" after the
word "known" in (b)(3).

Section 104: Delete "bankruptcy" from (a). (May not be an
appropriate deletion because of state bankruptcy acts.)

Section 105: Replace the first word "Unless" with "Except to the
extent that" and consider changing the section title. (The
Drafting Committee announced that this section would be revisited
next year and also agreed to add the words "and between the
partners and the partnership" at the end of the first sentence.)

Section 201: Need to clarify that limited partnerships and pre­
existing general partnerships are partnerships and that (e)(5)
includes participants in shared appreciation mortgages. One
Commissioner pointed out that since Section 105 permits waivers of
all sections other than those enumerated, the parties could agree
that their relationship as between themselves was not a
partnership (in effect, waiving the definition of partnership),
and then the agreement governing their relationship could
presumably vary even those provisions mandated by Section 105.
The Drafting Committee was unable to respond to this comment,
leaving the impression that they were in agreement therewith.

Section 202: Need to consider effect upon family farms held as
partnerships.

Section 203 and 302: Extensive discussion regarding these
sections, leading to assurances by the Drafting Committee that
further review and revision would be undertaken.

Section 301: Change "knows" to "has notice" in next to last line
of (1) and change "knowing" to "having notice" in the last line of
(3).

Section 303: Delete "street" and change "executive office" to
"place of business" in (b)(1). Delete "street" in (b)(2).
Delete "and acknowledged" in (b)(3). Reduce the number of partners required to sign in (b)(3). Replace "or" with "and any" in line 4 and delete the last words "with respect to other persons" of (f). Replace "supplements" with "effects" in (h). Add the word "only" after "partner" in line 3 of (i)(2). Reconsider the five year expiration of the statement of partnership provided in (k) and consider providing for the filing of a short form of continuation statement.

The Drafting Committee met for a short while following the termination of consideration by the assembly. The members were clearly disappointed that their time on the floor had been severely reduced, and they resolved to work for substantial time next year. They openly wondered whether in fact they could complete the task next year. They tentatively agreed to meet three times during the year, dates to be determined. The Reporter announced that he was considering resigning, because of additional professional duties. If he does not resign, he will certainly need the services of an Associate Reporter, to assist with redrafts between meetings. The Committee urged him to continue, and that help would be sought.

The Chairman invited the Ad Hoc Committee to have a representative present at each meeting of the Drafting Committee this year. I agreed to communicate that suggestion to our Committee, but reminded the Chairman that we had tentatively agreed to have a joint meeting of representatives from both committees, probably sometime this Fall. The Chairman indicated that he would discuss this further with the Ad Hoc Committee's Chairman.

My personal observations are:

1. We should attend each meeting of the NCCUSL Drafting Committee. That Committee's discussions are similar in many respects to those we have held, and further explanation of the rationale of our positions (supplementing that provided by Harry Haynsworth and our comment letters) would almost certainly help those positions prevail some of the time. In general, our members have greater experience as practitioners of partnership law, and the Drafting Committee could learn from that experience.

2. We should continue to express our interest and willingness to attend a joint meeting. Several of the Commissioners may be inclined to give greater weight to our deliberations, since some of the positions expressed in the short time I spent with them are close to our positions in some areas (eg fiduciary duties).

3. The Commissioners in the full assembly are able and willing to make extensive comments concerning the Act. These
include language and technical comments that we deem critical to the Act's ultimate acceptance. The Ad Hoc Committee's positions are not generally available to the Commissioners in assembly. We should consider whether we would benefit by educating certain interested Commissioners with copies of our comment letters.

4. The pace of review in full assembly is remarkably slow. It seems highly unlikely that the Act can be finished next year. Harry Haynsworth suggested that it would take two full days of consideration to finish next year. I believe that even if the remainder of the Act could be read in two days, that the Drafting Committee would be faced with a large amount of redrafting, which I think would have to be resubmitted to the assembly for final adoption. However, not being intimate with this process, I cannot give any assurances that the process will not be completed next year.

5. I believe that all sections of RUPA at this time are still fully open to further revision. Based on the extensive commentary and the problems raised with the first sections read, the Drafting Committee appears to be resigned to significant work still to be done. As they grow somewhat weary from their task, I believe that they may be willing to concede to well presented comments. I think it is essential that we keep up with the NCCUSL Committee and its efforts, and present thoughtful suggestions (including proposed written changes, inserts, deletions, etc.) to help them with their task.

I would be pleased to discuss this further with you or with any member of the Ad Hoc Committee.

[Signature]
SECTION 103. KNOWLEDGE AND NOTICE.

(a) A person "knows" a fact if the person is aware of it.

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

(1) knows of it;

(2) has received a notice or notification of it; or

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

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

(d) A person "receives notice or a notification" when it:

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

(2) is duly delivered at the person's place of business through which the contract was made or at any
other place held out by that person as the place for
receipt of communications.

(e) Notice, knowledge. Except as provided in
subsection (f), notice or a notification received by a
partnership becomes effective for a particular
transaction when it is brought to the attention of the
individual conducting the transaction and in any event
when it would have been brought to that individual's
attention if the partnership had exercised due
diligence. A partnership exercises due diligence if it
maintains reasonable routines for communicating
significant information to the individual conducting the
transaction and there is reasonable compliance with the
routines. Due diligence does not require an individual
acting for the partnership to communicate information
unless the communication is part of the individual's
regular duties or the individual has reason to know of
the transaction and that the transaction would be
materially affected by the information.

(f) A partner is presumed to have a regular duty
to communicate significant information to the individual
conducting the transaction Receipt of notice by a
partner of any matter relating to partnership affairs
becomes effective immediately as notice to the
partnership, except in the case of a fraud on the
partnership committed by or with the consent of that partner.

SECTION 301. PARTNER AGENT OF PARTNERSHIP AS TO PARTNERSHIP BUSINESS. Subject to Section 303:

(1) Each partner is an agent of the partnership for the purpose of its business, and the act of each partner, including the execution of an instrument in the partnership name, for apparently carrying on in the usual way the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner in fact has no authority to act for the partnership in the particular matter and the person with whom the partner is dealing knows that the partner lacks that authority.

(2) An act of a partner which is not apparently for carrying on the business of the partnership in the usual way the partnership business or business of the kind carried on by the partnership does not bind the partnership unless authorized by the other partners.

(3) An act of a partner in contravention of a restriction on authority does not bind the partnership to persons knowing of the restriction.
SECTION 302. TRANSFER OF PROPERTY OF PARTNERSHIP IF TITLE RECORDED.

(a) If record title to property is in the partnership name, any partner may transfer it by a transfer executed in the partnership name. However, the partnership may recover the property if it proves that the partner's act did not bind the partnership under Section 301, unless the property has been transferred by the grantee or a person claiming through the grantee to a holder for value without knowledge that the partner, in making the transfer, exceeded the partner's authority.

(b) If record title to partnership property is in the name of one or more, but fewer than all, of the partners and the record does not disclose the right of the partnership, the partners in whose name the record title stands may transfer it. However, the partnership may recover the property if it proves that the partners' act did not bind the partnership under Section 301, unless the purchaser or the purchaser's assignee gave value, without knowledge that the partners, in making the transfer, exceeded their authority.

(c) If record title to partnership property is in the name of one or more of the partners, or a third person in trust for the partnership, a transfer executed by a partner in the partnership name passes the
equitable interest of the partnership unless the partnership proves that the partner, in making the transfer, exceeded the partner's authority and that the person with whom the partner dealt knew that the partner lacked that authority.

(d) If record title to partnership property is in the names of all of the partners, a transfer executed by all of the partners passes all of the interest in the property.

SECTION 303. STATEMENT OF PARTNERSHIP AUTHORITY.

(a) A partnership may execute and file, in the office of [the Secretary of State], a statement of partnership authority.

(b) A statement of partnership authority:

(1) must list the name of the partnership and the street address of an office of the partnership in this State, if there is one, or of the principal executive office of the partnership;

(2) must list the names and street addresses of either all of the partners or an agent appointed and maintained by the partnership;

(3) must be signed and acknowledged by all of the partners, if there are ten or fewer partners, and by at least ten partners, if there are more than ten partners;
(4) must specify the partners required to sign a transfer of real property held in the name of the partnership; and
(5) may contain any other matters the partnership chooses, including the authority, or limitations upon the authority, of some or all of the partners to enter into other transactions on behalf of the partnership.

(c) If a statement of partnership authority lists an agent, the agent shall maintain a list of all of the partners and make it available to any other person on request for good cause shown.

(d) An amendment to a statement of partnership authority must meet the requirements for execution of an original statement unless otherwise provided in the statement. A notice of denial under Section 304 is not an amendment under this subsection.

(e) Even if a filed statement of partnership authority or an amendment thereto does not conform to all of the requirements of subsections (b) and (c), it operates with respect to other persons as provided in subsections (h) and (i) if it is signed and acknowledged by the number of partners specified in subsection (b) (3).

(f) Partners filing a statement of partnership authority, or an amendment thereto, shall promptly send
copies of the statement or amendment to all of the partners or other persons named as partners. Failure to send a copy under this subsection does not affect the validity of the statement or amendment with respect to other persons.

(g) A person may sign and acknowledge a statement of partnership authority, or an amendment thereto, by an attorney in fact.

(h) A filed statement of partnership authority supplements the authority of a partner under Section 301 to enter into transactions on behalf of a partnership as follows:

(1) Except as provided in paragraph (2), a grant of authority to a partner contained in a statement of partnership authority is conclusive, in favor of a person who gives value without knowledge to the contrary, that the partners stated to be authorized to transfer partnership property or enter into other transactions on behalf of the partnership are authorized.

(2) A grant of authority to a partner contained in a statement of partnership authority to transfer real property is conclusive in favor of a person who gives value without knowledge to the contrary only if the record title to the real property is in the partnership name and the statement, or a certified copy
thereof, is recorded in the place for recording transfers of that real property.

(i) A filed statement of partnership authority limits the authority of a partner under Section 301 to enter into transactions on behalf of a partnership as follows:

(1) Except as provided in paragraph (2), a limitation on the authority of a partner contained in the statement is effective against a person not a partner only if the person knows of the limitation.

(2) A limitation on the authority of a partner to transfer real property contained in the statement, is effective against a person not a partner if record title to the property is in the partnership name and the statement, or a certified copy thereof, is recorded in the place for recording transfers of that property.

(j) A partnership may record, in the place for recording transfers of real property, a certified copy of the statement of partnership authority, or any amendment thereto or notice of denial thereof, that has been filed in the office of [the Secretary of State].

(k) A partnership may cancel a statement of partnership authority by filing an amendment that identifies the statement and states that it is canceled. A statement of partnership authority that is not otherwise canceled is canceled by operation of law upon
the expiration of five years after the day on which it
is filed with [the Secretary of State].

(1) The [Secretary of State] may collect a fee
for the filing of a statement of partnership authority,
or any amendment thereto, as may [the officers
responsible for] recording transfers of real property.

SECTION 304. NOTICE OF DENIAL OF STATUS AS PARTNER
OR AUTHORITY.

(a) A partner or other person named as a partner
in a statement of partnership authority, or the person's
legal representative, may sign, acknowledge, and file in
the office of [the Secretary of State] a notice of
denial stating the name of the partnership and the fact
that is being denied.

(b) A person named as a partner in a statement of
partnership authority may deny present or previous
membership in the partnership by filing a notice of
denial as provided in subsection (a). However, the
filing of a notice of denial does not relieve a
departing partner of compliance with Articles 6, 7, and
8.

(c) If a partner or a person named as a partner
in a filed statement of partnership authority denies a
supplemental grant of authority contained in the
statement, the statement with respect to the grant of
authority ceases to be effective against a person not a partner. But, if the statement is recorded in the place for recording transfers of real property, the denial is not effective unless it, or a certified copy, is also recorded in the same place.

(d) A present or former partner filing a notice of denial shall promptly send a copy of the notice to the other persons named as partners in the statement of partnership authority, and to any agent named in the statement. Failure to send a copy under this subsection does not affect the validity of the denial with respect to other persons.

SECTION 306. PARTNER'S LIABILITY. All partners are liable jointly and severally for all debts and obligations of the partnership as provided in Section 307, unless otherwise agreed by the claimant or provided by law.

SECTION 307. ACTIONS AGAINST PARTNERSHIPS AND PARTNERS.

(a) A partnership may sue and be sued in the partnership name.

(b) A suit may be instituted against the partnership and any or all of the partners in the same action or in separate actions.
(b) (c) A judgment against a partnership is not by itself a judgment against a partner. A judgment against a partnership may not be satisfied from a partner's assets unless there is a judgment against the partner.

(c) (d) Except as provided in subsection (d), a judgment creditor of a partner may not levy execution against the assets of the partner to collect a judgment based on a claim that could have been successfully asserted against the partnership unless:

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

(d) A claimant may proceed directly against the assets of a partner without first obtaining a judgment against the partnership if:

(1) (2) an involuntary case under Title 11 of the United States Code has been commenced against the partnership and has not been dismissed within 60 days after commencement, or the partnership has commenced a voluntary case under Title 11 of the United States Code and the case has not been dismissed;
(3) The claimant and the partner have agreed that the claimant creditor need not exhaust partnership assets;

(4) The court grants permission to the claimant judgment creditor to proceed levy execution against the assets of a partner based on a finding that the partnership assets subject to execution within this State are clearly insufficient to satisfy the judgment, that exhaustion of partnership assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's inherent equitable powers; or

(5) Liability is imposed on the partner by law or contract independent of the existence of the partnership.
DRAFT
FOR PARTIAL APPROVAL

UNIFORM PARTNERSHIP ACT (199_)

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDREDTH YEAR
NAPLES, FLORIDA
AUGUST 2-9, 1991

UNIFORM PARTNERSHIP ACT (199_)
With Comments

The ideas and conclusions herein set forth, including drafts of proposed legislation, have not been passed upon by the National Conference of Commissioners on Uniform State Laws. They do not necessarily reflect the views of the Committee, Reporters or Commissioners. Proposed statutory language, if any, may not be used to ascertain legislative meaning of any promulgated final law.