

Business Law Annual Forum

May 9, 2019

Tennessee Bar Center – Nashville, Tenn.



Producer: Matt Lyon, *Lincoln Memorial University Duncan School of Law*

Total Credits: 5.0 General, 1.0 Dual

Originating in Wyoming in 1977 and spreading thereafter to all fifty states, including to Tennessee in 1994, the limited liability company (LLC) has become the most popular form of entity for newly created businesses in the United States. Particularly since the IRS's adoption of "check the box" regulations twenty years ago, entrepreneurs are drawn to the LLC due to its flexibility. State LLC Acts, including Tennessee's, contain primarily default provisions and very few regulatory provisions. This makes the private ordering of the LLC through the drafting of the operating agreement absolutely essential to defining the rights and responsibilities of the LLC's members.

The TBA Business Law Section's 2019 Annual CLE Forum will help business lawyers learn and refresh their knowledge about issues that may arise when drafting an LLC operating agreement. Topics will include an overview of the two extant Tennessee LLC acts and a comparison of those acts with the Delaware LLC Act; other distinctions of Tennessee law that impact the operating agreement; drafting key provisions, including distribution and allocation, employee and member compensation, and exit rights; and ethical considerations for lawyers drafting LLC operating agreements.

9 a.m. – 9:30 a.m.



Registration/Welcome

9:30 a.m. – 10:30 a.m.

Overview of Tennessee LLC Acts

This session features an overview of the Tennessee Limited Liability Act (the Prior Act) and the Tennessee Revised Limited Liability Act (the Revised Act), including an important reminder that the Prior Act is alive and well, remains effective, and continues to govern LLCs formed prior to January 1, 2006 that have not elected to be governed by the Revised Act. Specifically, the presentation addresses significant distinctions between the Prior Act and the Revised Act, including those with respect to:

- management paradigms;
- agency authority of members, managers, governors, directors, and officers;
- termination of membership interests;
- dissolution; and
- private ordering of affairs under LLC documents.

This part of the program is designed to illustrate why both business transactional attorneys and litigators should be familiar with both the Prior Act and the Revised Act, should be able to recognize and understand the consequences of the distinctions between the two acts, and should consider recommending that their clients with Prior Act LLCs opt into the Revised Act.

Van East III, *Frost Brown Todd LLC*

10:30 a.m. – 11:30 a.m.

Comparison of Tennessee and Delaware LLC Acts

This session will feature an overview of the Delaware LLC Act and discuss some key distinctions between the Delaware and Tennessee acts. These include waiver and scope of fiduciary duties, management structures, agency rules, state franchise and excise taxes, and use of series LLCs. By the end of the session, attendees should have a better idea about when to recommend to clients that they form their LLC in Delaware rather than in Tennessee or another jurisdiction.

Willa B. Kalaidjian, *Chambliss Bahner & Stophel, P.C.*

Matt Lyon, *Lincoln Memorial University Duncan School of Law*

11:30 a.m. – 11:45 a.m.



Lunch Provided

11:45 a.m. – 12:45 p.m.

DUAL

Operating Ethically: Professional Conduct and the Drafting of LLC Operating Agreements

This session features experts on professional conduct and limited liability company practice addressing common ethical quandaries encountered in drafting limited liability company operating agreements. Among the questions and dilemmas the panelists will cover are: whether a lawyer who does not practice tax law can and should draft limited liability company operating agreements, how a lawyer properly identifies the client in an engagement that includes drafting a limited liability company operating agreement, and the extent to which Tennessee lawyers can ethically provide advice to clients on the law of Delaware or other states—or to members who reside outside of Tennessee—in connection with the drafting of limited liability operating agreements.

Brian Faughnan, *Lewis Thomason*

Joan Heminway, *The University of Tennessee College of Law*

12:45 p.m. – 1:45 p.m.

Tax & Economic Provisions

For many business attorneys, the tax allocations and economic provisions of LLC operating agreements are a collection of mysterious paragraphs that the "tax people" will look at and not the domain of the business lawyer. However, these provisions can have substantial impacts on the members of an LLC. In this session, you'll learn about what these sections mean, why they are important, and the different approaches that can be used in drafting them.

Alexander Davie, *Riggs Davie PLC*

1:45 p.m. – 2 p.m.



Break

2 p.m. – 3 p.m.

Employees and LLC Members

This session will address issues specific to members who are also employees of an LLC and the provisions in an operating agreement addressing such issues. Among the topics to be covered are: considerations in deciding whether to make an employee a member, alternatives to granting membership interests to employees, ownership structure concerns, the interplay of rights and duties of an equity holder versus that of an employee, and the need for synchronization of operating agreements and employment agreements.

Justin Joy, *Lewis Thomason*

R. Christopher Trump, *Egerton, McAfee, Armistead & Davis, P.C.*

3 p.m. – 4 p.m.

Exit Rights

Exits of members from LLCs can be fraught with problems for a number of reasons. This session will discuss various areas for consideration to be included in operating agreements in an effort to facilitate an orderly departure of a member and minimize some of the risk when a member leaves—voluntarily or otherwise—an LLC. Some specific areas that will be covered are membership interest valuation methodology considerations, statutory rights, and special considerations with the departure of members who are also employees of an LLC.

Justin Joy, *Lewis Thomason*