DANIEL R. SCHRAMM, L.L.C.
Attorney at Law
121 Chesterfield Business Parkway
Chesterfield, Missouri 63005
Phone: (636) 532-2300
Fax: (636) 532-6002
Email: daniel@dschrammlaw.com
Web site: www.dschrammlaw.com

HOW TO COMPLY WITH THE MISSOURI LIMITED LIABILITY COMPANY ACT

A. Avoiding Trouble with Concise Articles of Organization

Anyone wishing to form a limited liability company first must file articles of organization with the Missouri Secretary of State. The Missouri Limited Liability Company Act spells out quite clearly what the articles must contain. The articles must state: (1) the name of the company, (2) the purpose or purposes of the business, (3) the name and address of the registered agent and registered office in Missouri, (4) whether the management of the company is vested in managers or members, (5) the events by which the company is to dissolve or the number of years the company is to exist, which may be any number or perpetual; and (6) the name and address of each organizer. §347.039.[1]

Under the historic *ultra vires* doctrine, drafters of articles of incorporation and bylaws had to be careful to draft the purposes of a corporation broadly to insure that acts undertaken by corporate officers and directors would not be construed as outside their legal authority. Technically, this doctrine still might apply to an LLC if the managers or members take an action that falls outside the scope of the articles of organization. As a practical matter, however, this is unlikely.

[1] All references to Missouri statutes are to RSMo (2016).

The statute allows the organizers to say in the articles that the purpose of the company may include "the transaction of any or all lawful business for which a limited liability company may be organized under sections 347.010 to 347.187." §347.039.1(2). Many organizers file articles that say no more than that as the purpose of the business. That kind of broad clause pretty well covers anything the managers or members might do so long as the conduct of the business is lawful.

To give the public some notice about the nature of the business, some lawyers will draft the articles to state the primary purpose the business, and add a clause to indicate that the company may perform all acts necessary for the conduct of such business. Finally, just to be safe, the lawyers will throw in the "catch-all" clause under the statute about the transaction of any and all lawful business that may be conducted by limited liability companies. An alternative approach is to provide a laundry list of actions authorized by the Act plus the "catch-all" clause. Either approach should be sufficient to avoid an *ultra vires* complaint.

A limited liability company's articles of organization will be construed according to the general rules of contracts. *CB3 Enters. LLC v. Damas*, 415 S.W.3d 163, 166 (Mo.App. W.D. 2013). The primary rule of interpretation is to determine the intent of the parties and to give effect to that intent. *Id.* at 166-67.

Because most articles say little about the actual conduct of the business, the bigger question is more likely to be whether the managers or members have conducted their business in a manner authorized by the Act and the operating agreement. As noted in Section I of this program, the members have broad discretion to include in their operating agreement provisions on the following topics:

(1) vesting the management of the company in the managers or members, and imposing limitations on how those management powers may be exercised;

(2) providing classes of members with different rights, powers and duties;
(3) dividing the exercise of management or voting rights among the different classes;
(4) providing for meeting notices, actions by consent, waiver of notices, quorum requirements, authorization by proxy, and any other matters over the exercise of voting or approval rights;
(5) authorizing certain managers or members to execute or file documents on behalf of the company;
(6) restricting the transfer of membership interests, including buy-sell provisions in the event of death or disability, and giving rights of first refusal for any offers by third parties.
(7) allocating income gains, deductions, losses, and credits among the members; and
(8) making tax elections and authorizing managers or members to make such elections.

See, §347.081.1.

The rights, duties and obligations of members and managers spring from a combination of the Act, the operating agreement and the articles of organization. *Hibbs v. Berger*, 430 S.W.3d 296, 314 (Mo.App. E.D. 2014) (holding operating agreement abridged fiduciary duty otherwise imposed by the statute).

To show how this works, say, for example, a company's manager performs an unauthorized act by selling substantially all the assets of the company without obtaining membership approval. That kind of issue under the operating agreement ordinarily will be governed by basic rules of contracts. If the operating agreement is silent, however, the members would look to the Act to see if membership approval was required for the transaction. Unlike with a corporation, the Act contains no specific requirements for the sale of substantially all the assets of an LLC. But Section 347.079.4 generally requires approval of a majority of authorized persons to decide matters connected with the business of the company, except as otherwise provided in the operating agreement, or

another section of the Act. A lawyer drafting the operating agreement thus must be aware of the consequences under the Act of including or failing to include particular provisions in the agreement.

B. How Much Protection From Liability Do LLCs Provide?

1. The Limited Liability Protection of §457.057

The liability protections of the Act are not absolute. Yet the Act is clear. A person who is a member or manager of a limited liability company is not subject to liability for company's obligations or the acts of others solely by reason of being a member or manager:

> A person who is a member, manager, or both, of a limited liability company, or both, is not liable, solely by reason of being a member or manager, or both, under a judgment, decree or order of a court, or in any other manner, for a debt, obligation or liability of the limited liability company, whether arising in contract, tort or otherwise or for acts or omissions of any other member, manager, or agent or employee of the limited liability company.

§347.057.

The Southern District applied this statutory protection to absolve an LLC member from any personal liability on an unjust enrichment claim. *JF Contr., Inc. v. Bierman*, 147 S.W.3d 814, 819 (Mo.App. S.D. 2004). The court noted that the opposing party in a contract dispute failed to show how the member was benefited individually and not as a member of the limited liability company. The Southern District thus reversed a $2 million judgment against the member.

The Eighth Circuit also applied §347.057 to criticize a bankruptcy court for its erroneous conclusion that the creditors of an LLC in bankruptcy had to be paid before a member received her individual share from the settlement of a lawsuit. *Debold v. Case,* 452 F.3d 756, 762 (8th Cir. 2006). Because of the rule that neither the managers nor members were liable for the company's debts, the bankruptcy court erred in its allocation of the settlement proceeds. *Id.* at762.

I admit this sampling of decisions is small. But the decisions confirm an important point. A small business owner is far better off with the statutory protection of §347.057 than to be subject to an unlimited personal risk. The statute will not insulate a member from liability for his or her own wrongful or tortious acts. Nor will it protect a member who signs a personal guaranty. Yet the statute will protect the member from liability for the intentional or negligent torts committed by another member or manager. And it can protect the member from liability for any breach by the company on a contract with one of its customers or suppliers. In most instances, this kind of protection also should insulate the members from personal liability if someone is injured on the company premises.

2. Protection from Foreclosure to Satisfy a Member's Debt.

A common misconception about limited liability companies is that Missouri provides less creditor protection than other states. This faulty view stems primarily from the procedure when a creditor of one of the members tries to use a charging order satisfy a debt. A charging order is a post-judgment remedy that allows a judgment creditor of an individual debtor-member of a limited liability company to enforce the judgment by charging the individual member's distributional interest with the unsatisfied amount of the judgment. *Regions Bank v. Alverne Assocs*., LLC, 456 S.W.3d 52, 53 (Mo.App. E.D. 2014). Just like with general partnerships, the charging order procedure is permitted for LLCs under §347.119. The purpose of the charging order procedure actually is to protect

the LLC or partnership business and to prevent the disruption that would result if creditors could execute directly on LLC or partnership assets. *Regions Banks,* 456 S.W.3d at 59.

I recently read an article suggesting the personal creditor of one of the members could use the charging order procedure to foreclose on the assets of the limited liability company. And because of this perceived risk, the members were advised to consider creating their LLC in another state with more protectionist rules. Recent case law compels the conclusion that this advice is now incorrect. Unlike with general partnerships, the Missouri statute for limited liability companies does not allow foreclosure as a remedy. *DiSalvo Props., LLC v. Bluff View Commer. LLC,* 464 S.W.3d 243, 247 (Mo.App. E.D. 2015). "A foreclosure of court-ordered sale of charged membership interests in an LLC is not expressly contemplated by section 347.119 or any other section of the Missouri LLC Act." *Id.* at 247.

C. Handling Mergers and Conversions

The Act provides for mergers and consolidations of limited liability companies under §§347.127 to 347.135. A merger occurs when one or more businesses combine with another business to create a surviving entity. A consolidation occurs when two or more businesses combine to create new entity. The Act allows domestic limited liability companies in Missouri to participate in such mergers and consolidation with other domestic or foreign LLCs, or other kinds of entities. §347.127.

Any limited liability company that is a party to a merger or consolidation must enter into a written agreement. The agreement must include the following elements: (1) the name and location of each of the LLCs participating and the name of the surviving or new company; (2) the terms and conditions of the merger or consolidation; (3) the manner of basis for converting the interests of the LLCs into the surviving or new entity; (4) in the case

of a merger, such amendments to the surviving entities documents that will be required; and (5) such other provisions as may be necessary or desirable. §347.128.

The surviving or new LLC then must file a notice of the merger or consolidation with the Missouri Secretary of State. The notice must identify the participating entities, the effect date, the names of the surviving or new LLC, a statement that the merger or consolidation was properly approved, the name and address of the registered agent and office for the surviving or new LLC; an identification of any new or amended articles for the surviving or new company; a statement that the final merger or consolidation agreement is on file with the surviving or new company; and a statement that such agreement will be furnished, without cost, upon request by effected members. §347. 129. The merger or consolidation is effective when the notice is filed, or at such other time agreed upon by the parties not to exceed 90 days later. §347.131.

D. Property Transfers

As a general rule, a member has no interest in specific limited liability company property. §347.061.1. A member thus has no individual ownership interest or rights in the assets of the company, except indirectly by virtue of the ownership of a membership interest in the company. The member's membership interest in the company generally, including voting and management rights associated with membership interest, is considered to be personal property. §347.115.

To be safe, managers and members should ensure that any property acquired, held or ultimately conveyed by the limited liability company be titled in the name of the company. And the title should include the applicable designation of LC, LLC, L.L.C., or L.C. See, §347.061.2. This is especially important for real property, where people dealing with the property might be prejudiced if they claim to be unaware of the LLC ownership. If the titling of assets is not done properly, the company still may be able to

take can take advantage of a presumption that the property is owned by the company. The presumption could apply if the property is purchased with company funds, even if it is acquired in the name of a member. But property held in the name of members is presumed to be separate property if company funds were not used for the purchase. See, §347.061.3.

The rules for the transfer of LLC property are contained in §347.063. The proper way for managers or members to transfer LLC property held in the name of the company is to do so by an instrument of transfer executed by an authorized person acting in the name of the company. §347.063.1. If the company property is technically titled in the name of one or more members or managers with an indication that they hold such title solely in their capacity as members or managers, they may transfer the property by executing an instrument in their own names. §347.063.2. If members or managers hold property without properly indicating they own the property in a representative capacity, however, the members or managers may transfer the property to third parties free and clear of any claims of company ownership. Again, the safest approach is to avoid such questions by titling all real property, assets and bank accounts in the name of the company.

If the person executing the purported transfer of company property did not have authority to make the transfer, the company may recover the property under §347.063.3. But the company's effort to recover the property will be ineffective against a subsequent good faith purchaser for value who had no knowledge of any issue over the lack of authority. And beware! Even if the member or manager did not have authority to bind the company, the third party may prevail if the company cloaks the member or manager with apparent authority to act for the company under common law principles. *Pitman Place Dev. LLC v. Howard Invs., LLC*, 330 S.W.3d 519, 528 (Mo.App. E.D. 2010).

E. Guiding Clients Through Dissolution

The operating agreement or the Act, or a combination of the two, will spell out events that will trigger of dissolution of the company. §347.137.1. Or the members may simply agree to dissolve the company by consent. §347.137.1(2). Unless the operating agreement prohibits it, the withdrawal of a member will trigger the dissolution if a majority of the remaining members want to dissolve the company. §347.137.1(3). And a court may enter a decree of dissolution under §347.143 if, for example, the company is unable to function because of a deadlock situation. Whenever any of the events of dissolution occur, the first step in the dissolution process is to file a formal notice of winding up the company with the Missouri Secretary of State. §347.137.2.

Once the notice of winding up is filed, the company must cease carrying on its usual business activities, except to the extent necessary to wind up its business affairs. The existence of the company remains in effect during this winding up period right up until the formal notice of termination is filed at the end of the process. §347.139.1. The primary advantage of going through this formal dissolution process is to resolve or potentially cut off creditor claims. The company must collect its assets, pay, satisfy, or discharge its liabilities, sell off any property that would not otherwise be distributed to the members in kind, and then go through the final distribution of assets and proceeds under the liquidation process. §347.139.2. Anything left over after satisfying the creditors ordinarily will be distributed to the members in accordance with the operating agreement. Once the dissolution process is completed, the company will file a formal notice of termination. The termination operates to end the existence of the company, except for the very limited purposes of resolving suits or other appropriate proceedings still lingering under the Act. §347.139.3.

An essential part of the dissolution process is to notify all known creditors in writing about the dissolution and then to publish a formal notice of dissolution in the

Missouri Register and appropriate legal newspapers. The lawyer must be thorough in following the proper procedures for such notices if they are to be effective in barring creditor claims. The notice to the known creditors may set forth a deadline for submitting claims, which by statute must be new fewer than 90 days from the date of the notice. §347.141.1(3). The notice published in the Missouri Register and legal newspapers gives constructive notice to any other creditors that their claims are barred unless a proceeding is commenced to enforce the claim within three years from the date of publication. §347.141.3. The lawyers should caution clients not to cut corners in giving the necessary notices because of the importance of resolving and cutting off creditor claims.

F. Practical Uses for One-Person LLCs

A single member may operate as an LLC to avoid the unlimited personal liability exposure of a sole proprietor. Many small business owners operate as single member LLCs for this purpose. Just like a corporation with a single shareholder, the Act explicitly authorizes single member limited liability companies:

> No limited liability company formed before the effective date of this act shall be deemed not in compliance with this chapter for the reason that such limited liability company was formed with, had or has only one member.

§347.017.

I personally operate my own law practice as a single member LLC. A professional will not be able to use the LLC to avoid professional liability exposure for malpractice claims. The professional thus must maintain an appropriate amount of malpractice insurance. And the single-person LLC form of ownership will not prevent a landlord, bank or other creditor from insisting on personal guarantees for the company's contractual obligations. But I strongly recommend that most one-person businesses either (1) take this form of single-person LLC ownership; or (2) form a corporation with limited

liability protection. A corporation could more sense for taxes or other reasons. But I see no reason for a sole proprietor to expose himself or herself to unlimited personal liability when the formation an LLC is such a simple process.

G. Why Foreign LLCs?

A "foreign limited liability company" is an LLC formed under the laws of any jurisdiction other than the State of Missouri. §347.010 (9). Before a foreign LLC transacts business in the State of Missouri, the LLC must register with the Secretary of State, and pay the required filing fee. The application must contain the name of the foreign LLC, the jurisdiction in which it was formed and the date of registration, the purpose of the business, the name and address of a registered agent and office in this State for accepting service of process, a statement that the Secretary of State may accept service if the agent is not registered or cannot be found, and the address of the company in its own jurisdiction. §347.153.

The Act spells out different types of isolated transactions that would not constitute the transaction of business in the State of Missouri by a foreign LLC. So, for example, the mere existence of a local bank account or the holding of meetings within the State would not necessarily trigger the duty of registration. Nor would a foreign LLC have a duty to register if it conducts an isolated transaction within the course of 30 days and the transaction is not repeated on a regular basis. See, §347.163.5. But a foreign LLC that regularly transacts business in the State and fails to properly register is subject to prosecution for a fine of not less than $1,000, and it will be barred from defending or bringing lawsuits within the State. §347.163.1. These rules operate independently from the question of whether the foreign LLC is subject to taxation by the Department of Revenue for its business activities within the State of Missouri.

H. Special Rules for Regulated Professionals

The Act makes no reference to a particular type of LLC formed for the purpose of conducting professional services. The Act merely defines the "business" that may conducted by an LLC as covering "every trade, occupation or profession." §347,010(4). And an LLC is authorized generally to "conduct or promote any lawful businesses or purposes within this state or any other jurisdiction." §347.035. So, unlike a professional corporation formed under the Missouri corporation laws, there is no special form of LLC in Missouri organized for the purpose of providing professional services.

Any lawyer assisting a professional or group of professionals forming an LLC nonetheless must consult the rules of the particular licensing authority to make sure there are no restrictions on business ownership. Common rules may prevent unlicensed persons from participating with professionals as joint owners of the licensed business. For instance, Missouri lawyers generally are prohibited from practicing in a professional corporation or association authorized to practice law for profit if a non-lawyer owns an interest in the corporation or association. See, Missouri Rules of Professional Conduct, Rule 4-5.4(d). Licensing rules for some professions, like accounting and dentistry, explicitly allow for the formation of an LLC. See, 20 CFR 2010.2.095(1) Ownership of CPA Firms; 20 CFR 2110.2.150(1) Dental Practices. Other licensing rules, however, on silent on the subject. See, Rule M.R.P.C. Rule 4-5.4(d) above. Any questions of this nature first should be addressed to the particular licensing authority.

I. Exceptions to Limited Liability

As mentioned in Section B, a person who is a member or manager of a limited liability company is generally protected from liability for the company's obligations or the acts of others solely by reason of being a member or manager. §347.057. This is a significant legal protection and a primary reason why you should consider forming an

LLC for your business. But the formation of an LLC will not protect you from liability if you personally guarantee a debt of the business. Nor will it protect you if you engage in professional malpractice. And it will not protect you if you personally commit an intentional or negligent tort that causes damage or injury to another person or entity. Because of these kinds of exceptions, the formation of an LLC does not provide absolute protection from liability. The members thus should be advised by counsel to purchase appropriate business and liability insurance coverage to insure against possible claims.