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Choice of Business Entity 2008:
Practical Issues in Forming Business Ventures

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The Alphabet Soup of Unincorporated Business Law: What is Happening With LLCs, LPs, LLPs, GPs, LLLPs, & BTs and Dealing with (R)UPA, (ReR)ULPA, (R)ULLCA, UnETA, MITA, & META

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All forms of business organization are essentially the same, mere variations on the same theme. Entity is found with and without limited liability; there is limited liability without entity; and there are quasi-entities with and without limited liability. The constructs of business law are not immutable verities, ideal forms, but rather a rough patchwork partly the result of historical accident, partly the result of invention and partly the result of eclectic combination of forms. And each of the 50 states has its own patches on the

The world of business organizations was once such an organized place. Law and other professional firms were organized as partnerships under the ubiquitous Uniform Partnership Act, with some of the more avant garde adopting the Professional Service Corporation format. Most of our clients were organized as corporations, and with the notable exception of Delaware, most of corporation codes were based on the Model Business Corporation Act (“MBCA”). Occasionally we would encounter a limited partnership, typically in one of its traditional applications for real estate or other financing in which the investors were expected and expecting to take a passive role, which would have been organized under the Uniform Limited Partnership Act (1976) or that same Act with the 1985 Amendments.

Today things are far less well organized. The number of organizational forms has increased. The complexities within the new organizational forms, and in the new incarnations of the old forms, have increased. The opportunities for mixing and matching disparate forms within a business have increased, as have the opportunities for mixing disparate forms between businesses.

Whether the increase in the number of organizational forms is in itself good, and whether it has been well-reasoned, is a matter of academic debate. What is not academic is that


practitioners need to understand and be able to make profitable use of the new organizational forms.

It is well beyond the permitted time of this presentation to review all aspects of this expanded range of organizational options. What we hope to accomplish today is to give you a flavor for each of these new structures.

**Where We Were & Where We Are (Going?)**

**The (Venerable?) Partnership -**

From its initial promulgation in 1914 through 1993, the Uniform Partnership Act ("UPA") governed partnership law throughout 49 of the states (UPA was never adopted in Louisiana). As one consequence of the national uniformity among partnership law, there arose a largely uniform body of case law that could be utilized when interpreting partnership questions. Furthermore, uniformity led to common expectations amongst those who would be partner. Still, there existed the tradeoff of this uniformity, namely the retention of liability (either joint and several or joint, depending on the nature of the claim) among all of the partners for claims against the partnership.

Today, that earlier universe of uniformity of both law and expectation has been violated. A new uniform partnership act, most predominately the 1997 version, has now been adopted in a majority of the states. As such, uniformity between the new uniform partnership act ("RUPA") and those states still utilizing UPA no longer exists. Significant choice of law questions, as well as the violation of expectations, can result from this situation. RUPA, as contrasted with UPA, makes significant changes in what the fiduciary duties of partners are, when those duties arise and how those duties may be modified. RUPA also introduces a series of "statements" that may be filed by, on behalf of or with respect to a partnership, thereby, for the first time, making information with respect to general partnerships available as public records.³

³ Authoritative treatises on partnership law include J. WILLIAM CALLISON AND MAUREEN SULLIVAN, PARTNERSHIP LAW AND PRACTICE and ALAN BROMBERG & LARRY RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIPS. An authoritative review of the Uniform Partnership Act (1997) is ROBERT W. HILLMAN, ALLAN W. VESTAL AND DONALD J. WEIDMER, THE
To date RUPA has been adopted in 34 states (most recently Kentucky, Maine, and Nevada), the District of Columbia, and the U.S. Virgin Islands. It was not under consideration by any state legislature in 2007.

The Limited Partnership -

[Is the limited partnership worth much attention at a time when the limited liability company seems to be the vehicle of choice for most unincorporated business enterprises?]

As to the latter question, recent statistics compiled by the International Association of Commercial Administrators (AICA) indicate that the limited partnership remains a significant entity choice. AICA’s members report more than 63,000 new limited partnerships filings in 2000, more than 55,000 in 2001, and more than 63,000 in 2002.

Although the numbers of new limited partnerships are small in comparison to the number of new limited liability companies, and the trend is gradually down, thousands form limited partnerships each year. Moreover, there are hundreds of thousands of existing limited partnerships whose legal character and relations (both among the partners and with third parties) depend in part on the relevant limited partnership act. In the scheme of things, the limited partnership’s may have diminished, but it has not disappeared.4

Traditionally, the limited partnership has been the structure of choice for real estate and similar financing ventures in which significant investments were sought from passive partners to be applied by a sophisticated promoter who would act as the general partner. While each of the limited partners, ab initio, would enjoy limited liability, that benefit was not afforded to the general partner. Tax rules mandated minimum capitalization and other requirements in order for the partnership to enjoy the benefits of taxation under Subchapter K of the Internal Revenue Code. Furthermore, limited partners ran the risk that, if overly involved in management, they would lose their limited liability and become subject to the general liability imposed upon the general partners.

REVISED UNIFORM PARTNERSHIP ACT (2007, Thompson/West).