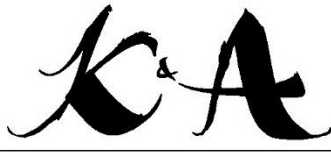

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Does My Company Really Need an Operating Agreement

Operating agreements, which are akin to corporate bylaws, dictate the management and operation of a limited liability company (“LLC”). An operating agreement serves to reinforce the limited liability status a company has elected, may prevent misunderstandings between owners, and plays an important role in determining the requisite authority for conducting LLC business and transactions.

An LLC with multiple members should utilize an operating agreement to specify the profit and loss sharing, management structure of the company, and procedures for the removal and addition of members. In the absence of an operating agreement, a Florida LLC is subject to Florida’s Statutes which may or may not be appropriate for the goals and structure particular company.

Florida law provides for the distribution of profits and losses among company members in accordance with the agreed value each member’s capital contribution to the company as stated in the company records. Capital contributions may be made in the form of cash, services, or property. Further, if an operating agreement provides for the reinvestment of profits, or portions of profits, back into the company, it is important that such allocations contemplate each member’s income tax liability with respect to their distributions. An LLC member is required to pay income tax on his or her entire distributive share, not just the portion of such share that he or she collects. Acknowledgement of the value of each member’s contribution, clearly stated in an LLC’s operating agreement, will avoid conflict among members regarding the method and manner of distributions of profits. Further, proper tax planning and consideration of such provisions when drafting an operating agreement will ensure that the applicable distribution scheme is practical for the members.

An LLC may choose to operate as a member-managed or manager-managed company. In the absence of an operating agreement, Florida law provides that an LLC shall be member-managed. This means that the power to make decisions regarding the management and operation of the LLC’s affairs are vested in proportion to each member or managing member’s percentage or profit share of the LLC, unless specified otherwise in an operating agreement. In the alternative, a manager-managed LLC may appoint a manager, or managers, with the authority to make certain decisions and conduct day to day operations on its behalf. Depending on the size, purpose, and goals of an LLC, one form of management may be more appropriate than the other and, therefore, should be considered when drafting the operating agreement.

Voting rights and requirements often become important in determining the direction and operation of an LLC as well. Typically, voting rights are structured either in accordance with each member’s

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percentage interest or each member is entitled to one vote (also known as “per capita” voting). In the absence of an operating agreement, Florida law provides for the members of an LLC to vote in proportion to their current percentage interest as stated in the LLC records or determined in accordance with each member’s respective capital contributions.

Clear procedures provided by way of an operating agreement for the removal, death, or retirement of a member and/or sale of a member’s ownership interest will further assist in the smooth operation and evolution of an LLC. Such procedures are useful for planned and unforeseen transitions, and typically eliminate any confusion or misunderstanding which may arise otherwise.

Every LLC is unique, and review and consideration of its specific goals and needs should be made when determining the structure and content of an operating agreement. However, certain essential terms, including the following, appear in most operating agreements and should be included:

- Specification of each member’s ownership percentage or interest;
- The rights and responsibilities of members;
- Distribution of profits and losses;
- Voting rights;
- Management structure;
- Meeting requirements; and
- Transitional procedures for the removal, addition, or sale of members and interests.

The assistance of an attorney, or other professional, who specializes in formation of business entities should always be sought when preparing an operating agreement.

Koontz & Associates PL assists clients throughout Florida in legal matters relating to Residential and Commercial Real Estate (including short sales), Business Law and Tax Law. From their Sarasota offices they serve clients in Sarasota County, Manatee County and throughout Florida.

The information provided in this article is for general informational purposes only and nothing contained herein should be taken as legal advice for any individual case or situation. The information contained in this article is not intended to establish an attorney-client relationship.

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