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ARTICLE

# Information Rights — A Survey<sup>1</sup>

*Allen Sparkman\**

ABSTRACT

This paper traces the development of the rights of owners of entities to examine and copy the entity's books and records. The paper then surveys the current state of the law for corporations, limited liability companies, limited partnerships, and partnerships and makes recommendations.

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\* The author practices transactional law in Houston and Denver.

1. The author's discussion of corporate cases relating to information rights is largely taken from the commentary to the Revised Model Business Corporation Act. The author's discussion of cases relating to information rights in unincorporated entities is largely based on the excellent summaries of LLC cases prepared as a tremendous service to the bar by Professor Elizabeth Miller of Baylor Law School.

## I. INTRODUCTION

Information rights serve several purposes. They allow owners who are not in management to obtain information relevant to their ownership. For those who are in management, the majority of statutes and cases recognize that they need almost unfettered access to information about the entity they are responsible for managing.<sup>2</sup> Information rights often do not receive the attention they should. Bill Callison<sup>3</sup> observed that if a non-manager member is permitted access to important business information of the LLC, the LLC may not have recourse if the member uses that information for personal benefit, even if in competition with the LLC.<sup>4</sup>

A decision of the bankruptcy court for the Eastern District of Pennsylvania illustrates Callison's concern. *In re South Canaan Cellular Investments, LLC (South Canaan Cellular Investments, LLC v. Lackawaxen Telecom, Inc.)* involved two Delaware LLCs, the debtors in bankruptcy, who sued Frank M. Coughlin, a member of the LLCs, and Lackawaxen Telecom, Inc. ("LTI"), a corporation of which Coughlin was president and a shareholder, for breach of fiduciary duty based on Coughlin's obtaining information from the LLCs regarding the LLCs' indebtedness to a bank and LTI's purchase of the indebtedness from the bank.<sup>5</sup> The court concluded Coughlin did not owe any fiduciary duty to the LLCs because he was not a managing or controlling member.<sup>6</sup> The court also rejected an argument that Coughlin had breached the implied covenant of good faith and fair dealing, relying in part on the statutory provisions governing access by LLC members to information about the LLC.<sup>7</sup> The court pointed out that the managers of the LLC need not disclose confidential information if they believed it would harm the LLC.<sup>8</sup> Moreover, the court found the Delaware LLC statute to implicitly recognize that non-fiduciaries obtaining information may make use of that information for their own benefit.<sup>9</sup> The court stated that "[p]resumably, defendant Coughlin sought information from the debtors under section 18-305(a)(1) or (6)."<sup>10</sup> The provision of the Delaware LLC Act at issue provides that a member's inspection rights are

subject to such reasonable standards (including standards governing what information and documents are to be furnished at what time and location and at whose expense) as may be set forth in a limited liability company

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2. See *infra* notes 42, 98–109, 211–29 and accompanying text. Nevada is an outlier in that it provides no greater rights to managers of LLCs than to members. See *infra* notes 176–81, 232–36 and accompanying text. Moreover, Nevada's corporate statute provides no express information rights to directors. NEV. REV. STAT. § 78.257 (2017).

3. J. William Callison is a partner in the Denver office of Faegre Baker Daniels LLP.

4. J. William Callison & Allan W. Vestal, "They've Created a Lamb with Mandibles of Death": Secrecy, Disclosure, and Fiduciary Duties in Limited Liability Firms, 76 IND. L. J. 271, 279 (2001).

5. *In re S. Canaan Cellular Invs., LLC*, 427 B.R. 85 (Bankr. E.D. Pa. 2010).

6. *Id.* at 96, 109.

7. *Id.*

8. *Id.* at 109.

9. *Id.*

10. *Id.*

agreement or otherwise established by the manager or, if there is no manager, then by the members.<sup>11</sup>

*In re South Canaan Cellular* cautions advisors to consider if appropriate restrictions on information should be included in a company agreement.

This article aims to provide a useful summary of where we are with respect to information rights, including how we got there. This article concludes with some recommendations.

## II. GENESIS OF INFORMATION RIGHTS — COMMON LAW DEVELOPMENT OF SHAREHOLDER RIGHTS

Before the enactment of statutes permitting the inspection of a corporation's books and records by a shareholder, the common law provided inspection rights if the shareholder established that the inspection would be made for a proper purpose and at a proper time.<sup>12</sup>

Stockholder inspection rights in Delaware date from the turn of the twentieth century, when the courts recognized them under the common law.<sup>13</sup> In that era and for a long time afterwards, courts logically focused on paper documents, but times have changed. “Books as we know them may cease to exist in the evolution of the Information Age.”<sup>14</sup> Today, over 90% of business documents are stored electronically.<sup>15</sup> Limiting “books and records” to physical documents “could cause Section 220 [of the Delaware General Corporate Law] to become obsolete or ineffective.”<sup>16</sup>

For example, *Sarni v. Meloccaro* involved litigation which began before Rhode Island adopted statutory inspection rights.<sup>17</sup> The court in *Sarni* held that a proper purpose was established by evidence that apparently gratuitous payments by the close corporation to the shareholder had terminated without explanation, and that the shareholder had been deprived of any information concerning the management of the corporation.<sup>18</sup>

*Otis-Hidden Co. v. Sheirich* allowed a minority shareholder to inspect correspondence between its nonresident president, who was the majority shareholder, and its active manager.<sup>19</sup> The court held that the common law of inspection included all documents, contracts, and papers relating to the business affairs of the corporation.<sup>20</sup>

As incidents of the common law inspection right, the shareholder was entitled to employ independent experts,<sup>21</sup> and to make copies of those books and records as were “essential and sufficient” to furnish the needed information.<sup>22</sup>

11. DEL. CODE ANN. tit. 6, § 18-305(a) (2014).

12. MODEL BUS. CORP. ACT §§ 16.01–.02 (AM. BAR ASS'N 2006).

13. See, e.g., *State ex rel. De Julvecourt v. Pan-Am. Co.*, 63 A. 1118 (Del. 1906).

14. Francis G.X. Pileggi, Kevin F. Brady & Jill Argo, *Inspecting Corporate 'Books and Records' in a Digital World: The Role of Electronically Stored Information*, 37 DEL. J. CORP. L. 163, 165 (2012).

15. *Id.*

16. *Id.* at 164.

17. *Sarni v. Meloccaro*, 324 A.2d 648 (R.I. 1974).

18. *Id.* at 653.

19. *Otis-Hidden Co. v. Sheirich*, 219 S.W. 191 (Ky. 1920).

20. *Id.*

21. *Feick v. Hill Bread Co.*, 103 A. 813 (N.J. 1918), *aff'd*, 105 A. 725 (N.J. 1919).

Information rights developed at common law because, as one court stated:

Since the stockholders are, in a sense, the beneficial owners of the corporate assets, and thus the persons primarily interested in seeing that the corporation is efficiently and profitably managed, it is generally held that they are entitled to inspect books and records in order to investigate the conduct of management, to determine the financial condition of the corporation, and generally to seek an account of the stewardship of the officers and directors.<sup>23</sup>

The court in *Sarni* then quoted the U.S. Supreme Court:

Stockholders are entitled to inspect the books of the company for proper purposes at proper times . . . [a]nd they are entitled to such inspection, though their only object is to ascertain whether their affairs have been properly conducted by the directors or managers. Such a right is necessary to their protection. To say that they have the right, but that it can be enforced only when they have ascertained, in some way without the books, that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases.<sup>24</sup>

The Massachusetts Supreme Court explained the common law right to examine books and records as follows:

The common law right of a stockholder to examine the books and accounts of the corporation is not an absolute right but is a qualified one. Stockholders are the beneficial owners of all the assets of the corporation, and they are entitled to reliable information as to the financial condition of the corporation, the manner in which its business has been conducted and its affairs have been managed, and whether those to whom they have entrusted their property have acted faithfully and efficiently in the interests of the corporation. A stockholder who is acting in good faith for the purpose of advancing the interests of the corporation and protecting his own interest as a stockholder is generally entitled to examine the corporate records and accounts. But he has no such right to an examination if his purpose be to satisfy his curiosity, to annoy or harass the corporation, or to accomplish some object hostile to the corporation or detrimental to its interests.<sup>25</sup>

The principles applicable to shareholder requests to examine the books and records of a corporation that the courts developed under the common law will be evident in the statutes discussed later in this article.

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22. *State ex rel. Rogers v. Sherman Oil Co.*, 117 A. 122 (Del. Super. Ct. 1922).

23. *Sarni*, 324 A.2d at 653.

24. *Id.* (citing *Guthrie v. Harkness*, 199 U.S. 148, 154–55 (1905)).

25. *Albee v. Lamson & Hubbard Corp.*, 69 N.E.2d 811, 813 (Mass. 1946).

### III. EFFECT OF STATUTORY INSPECTION RIGHTS ON COMMON LAW RIGHTS

*Parsons v. Jefferson Pilot Corp.* held that the North Carolina corporate statute did not limit the power of the court to compel the production of corporate records for inspection under common law rights independent of those created by the statute.<sup>26</sup> In *Bank of Giles County v. Mason*, the court stated that the newly-adopted Virginia inspection statute was “not materially differ[ent]” from the common law.<sup>27</sup> However, the court in *Caspary v. Louisiana Land & Exploration Co.* held that the common law right of inspection in Maryland was superseded by the Maryland statute limiting inspection rights to shareholders holding more than 5% of the corporation’s shares,<sup>28</sup> but *Tucson Gas & Electric Co. v. Schantz* held that common law rights still applied in Arizona because the Arizona legislature had not manifested a clear intent to repeal the common law or declare the statute to be exclusive.<sup>29</sup>

More recently, *Pomerance v. McGarth*<sup>30</sup> held the following:

[u]nder New York law, shareholders have both statutory and common-law rights to inspect a corporation’s books and records, so long as the shareholders seek the inspection in good faith and for a valid purpose [, stating]

[s]tatutory inspection rights complement, but do not eliminate, common-law inspection rights, which potentially encompass a far greater range of records. While inspection rights permit shareholders to examine records that are relevant and necessary for a valid purpose, they do not grant shareholders a right to be involved in day to day management. Whether a shareholder asserts statutory or common-law inspection rights, the shareholder may be required to demonstrate good faith and a valid purpose, and inspection may be limited to the scope of records relevant and necessary for such purpose.<sup>31</sup>

The court also noted,

In a prior appeal in this case, plaintiff sought to inspect a list of unit owners and their contact information to assist her in campaigning for upcoming condominium board elections. Although Real Property Law § 339-w, unlike Business Corporation Law § 624, does not grant unit owners a statutory right to examine a list of unit owners, we held that a condominium unit owner has the right to receive from the board a list of unit own-

26. *Parsons v. Jefferson Pilot Corp.*, 426 S.E.2d 685 (N.C. 1993).

27. *Bank of Giles Cty. v. Mason*, 98 S.E.2d 905 (Va. 1957).

28. *Caspary v. La. Land & Expl. Co.*, 707 F.2d 785 (4th Cir. 1983).

29. *Tucson Gas & Elec. Co. v. Schantz*, 428 P.2d 686 (Ariz. 1967). Earlier cases holding that statutes did not limit common law inspection rights include *Holdworth v. Goodall-Sandford, Inc.*, 55 A.2d 130 (Me. 1947) and *State ex rel. Cochran v. Penn-beaver Oil Co.*, 143 A. 257 (Del. 1926). But *Morris v. Broadview*, 52 N.E.2d 769 (Ill. 1944) held that the corporate statute before it changed the shareholder’s absolute right of inspection at common law to a limited right of inspection that required a proper purpose.

30. *Pomerance v. McGarth*, 143 A.D.3d 443 (N.Y. App. Div. 2016).

31. *Id.* at 444.

ers and their contact information . . . . In so holding, we observed that ‘the rationale that existed for a shareholder to examine a corporation’s books and records at common law applies equally to a unit owner vis-à-vis a condominium.’ (*id.* at 441, 961 N.Y.S.2d 83 [internal citation omitted]).<sup>32</sup>

The court also held that the plaintiff was entitled to make copies of documents she was allowed to examine and to receive electronic copies.<sup>33</sup>

*King v. DAG SPE Managing Member* denied the request of Robert L. King to investigate the books and records of defendant under both the Delaware statute<sup>34</sup> and the common law.<sup>35</sup> King was a non-stockholder and former member of defendant’s board of directors.<sup>36</sup> The court based its holding on the fact that King was no longer a director and the fact that the Delaware statute had been construed to require that the director be a current director.<sup>37</sup> The court expressed doubt that the common law of inspection rights still applied in Delaware because Delaware courts had enforced the common law only until 1981, when the Delaware statute was enacted.<sup>38</sup>

A Missouri court held that Missouri’s shareholder inspection statute<sup>39</sup> does not “expressly or impliedly abrogate common law right[s] of inspection.”<sup>40</sup>

North Carolina provides the following:

Notwithstanding the provisions of this section or any other provisions of this Chapter or interpretations thereof to the contrary, a shareholder of a public corporation shall have no common law rights to inspect or copy any accounting records of the corporation or any other records of the corporation that may not be inspected or copied by a shareholder of a public corporation as provided in G.S. 55-16-02(b).<sup>41</sup>

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32. *Id.* at 445.

33. *Id.* at 446.

34. *King v. DAG SPE Managing Member, Inc.*, C.A. No. 7770-VCP, 2013 WL 6870348, at \*7 (Del. Ch. Dec. 23, 2013) (citing DEL. CODE ANN. tit. 8, § 220(d) (2010)).

35. *Id.*

36. *Id.* at \*1.

37. *Id.* at \*6.

38. *Id.* at \*7.

39. Mo. Rev. Stat. § 351.215 (2017).

40. *State ex rel. Brown v. III Investments, Inc.*, 80 S.W.3d 855, 859 (Mo. Ct. App. 2002).

41. N.C. GEN. STAT. § 55-16-02(i) (1993). § 55-16-02(b) states:

- (a) A qualified shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (c) and gives the corporation written notice of his demand at least five business days before the date on which he wishes to inspect and copy:
  - (1) Records of any final action taken with or without a meeting by the board of directors, or by a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders and records of action taken by the shareholders without a meeting, to the extent not subject to inspection under G.S. 55-16-02(a);
  - (2) Accounting records of the corporation; and
  - (3) The record of shareholders: provided that a shareholder of a public corporation shall not be entitled to inspect or copy any accounting records of the corporation or any records of the corporation with respect to any matter which the corporation determines in good faith may,

Whether any common law inspection rights still exist is, of course, a question that will be answered differently state to state. The author believes, however, that most states provide a comprehensive statutory scheme for the inspection of the books and records of an entity; accordingly, common law rights likely no longer exist in most states.

#### IV. DEVELOPMENT OF STATUTORY RIGHTS

Statutory rights developed first in the corporate context and then in the unincorporated context. This article begins its discussion of statutory provisions with a discussion of a model act and three uniform acts.

##### *A. Corporations — Model Business Corporation Act*

The Model Business Corporation Act (“MBCA”) states that a shareholder is entitled to inspect and copy, during regular business hours at the corporation’s principal office, any records of the corporation described in MBCA § 1601(e) if the shareholder gives the corporation written notice of the shareholder’s demand at least five business days before the date on which the shareholder wants to inspect and copy.<sup>42</sup>

Note that MBCA § 1602(a) does not require that the shareholder have any particular purpose, or any purpose at all, to be entitled to inspect the records described in MBCA § 1601(e).<sup>43</sup> The records described in MBCA § 1601(e), which might be described as the fundamental records of the corporation, are the following:

- The corporation’s articles or restated articles of incorporation, all currently effective amendments, and any notices to shareholders referred to in MBCA § 1.20(k)(5) regarding facts on which a filed document is dependent;
- The corporation’s bylaws or restated bylaws and all currently effective amendments;
- Resolutions adopted by the corporation’s board of directors creating one or more classes or series of shares, and fixing their relative rights, preferences, and limitations, if shares issued pursuant to those resolutions are outstanding;
- The minutes of all meetings of the corporation’s shareholders, and records of all action taken by the corporation’s shareholders without a meeting, for the last three years;
- All written communications to the corporation’s shareholders generally within the last three years, including the financial statements furnished for such years under MBCA § 16.20;

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if disclosed, adversely affect the corporation in the conduct of its business or may constitute material nonpublic information at the time the shareholder’s notice of demand to inspect and copy is received by the corporation.

42. MODEL BUS. CORP. ACT § 16.02(a) (AM. BAR ASS’N 2006).

43. *Id.*



- A list of the names and addresses of the corporation's current directors and offices; and
- The corporation's most recent report to the applicable state filing office.<sup>44</sup>

If a shareholder's demand is made in good faith and for a proper purpose, the shareholder describes with reasonable particularity the shareholder's purpose and the records the shareholder wants to inspect, and the requested records are directly connected with the shareholder's purpose,<sup>45</sup> then the shareholder may inspect<sup>46</sup> the following records:

- Excerpts from minutes of any meeting of the corporation's board of directors, records of any action of a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the corporation's shareholders, and records of action taken by the shareholders or the board of directors, to the extent not subject to inspection under MBCA § 1602(a);
- Accounting records of the corporation; and
- The corporation's record of shareholders.<sup>47</sup>

The right of inspection granted by MBCA § 1602 may not be abolished or limited by a corporation's articles of incorporation or bylaws.<sup>48</sup>

MBCA § 1602 does not affect a shareholder's rights to inspect records under MBCA § 7.20 or, if the shareholder is in litigation with the corporation to the same extent as any other litigant, nor does it affect the power of a court to compel the production of corporate records for inspection independently of the MBCA.<sup>49</sup>

The MBCA provides that a director is always entitled to inspect books and records of the corporation so long as the request is reasonably related to the director's duties, is not for an improper purpose and the director's use of the information would not violate any duty to the corporation.<sup>50</sup>

## *B. Unincorporated Entities*

### *i. Revised Uniform Limited Liability Company Act*

The Revised Uniform Limited Liability Company Act ("RULLCA")<sup>51</sup> provides,

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44. *Id.* § 16.01(e).

45. *Id.* § 16.02(c).

46. *Id.* § (b) (The shareholder's inspection under § 16.02(b) is subject to the notice and other requirements of § 1602(a) except that the place for inspection will be "a reasonable location specified by the corporation.")

47. *Id.* §§ 16.02(b)(1)–(3).

48. *Id.* § (d).

49. *Id.* § (e).

50. *Id.* § 16.05(a). This article discusses representative and not so representative corporate statutes. See discussion *infra* notes 66–137 and accompanying text.

51. See REVISED UNIF. LTD. LIAB. CO. ACT (UNIF. LAW COMM'N 2013).

in the case of a member-managed LLC the following:

- On reasonable notice, a member may inspect and copy during regular business hours, at a reasonable location specified by the company, any record maintained by the company regarding the company's activities, financial condition, and other circumstances, to the extent the information is material to the member's rights and duties under the operating agreement or the applicable statute;<sup>52</sup>
- Without demand, the company shall furnish to each member any information concerning the company's activities, financial condition, and other circumstances known to the company that is material to the proper exercise of the member's rights and duties under the operating agreement or the applicable statute except to the extent the company can establish that it reasonably believes the member already knows the information;<sup>53</sup>
- On demand, any other information concerning the company's activities, financial condition, and other circumstances except to the extent the demand or information demanded is unreasonable or otherwise improper under the circumstances;<sup>54</sup> and
- The obligation of the company to furnish certain information without demand and other information on demand also applies to each member to the extent the member knows any such information.<sup>55</sup>

In a manager-managed LLC, the above information rights and the duty of the members apply to the managers and not the members.<sup>56</sup>

In addition, in a manager-managed LLC, RULLCA provides that, during regular business hours and at a reasonable location specified by the company, a member may obtain from the company, inspect, and copy full information regarding the activities, financial condition, and other circumstances of the company as is just and reasonable under the following conditions:

- The member seeks the information for a purpose material to the member's interest as a member;
- The member makes a demand in a record received by the company, describing with reasonable particularity the information sought and the purpose for seeking the information; and
- The information sought is directly connected to the member's purpose.<sup>57</sup>

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52. *Id.* § 410(a)(1).

53. *Id.* § (a)(2)(A).

54. *Id.* § (a)(2)(B).

55. *Id.* § (a)(3).

56. *Id.* § (b)(1).

57. *Id.* § (b)(2). RULLCA makes an appropriate distinction between the information rights available to members in a member-managed LLC and in a manager-managed LLC. Bill Callison has observed that if a non-manager member is permitted access to important business information of the LLC, the LLC may not have recourse if the member uses that information for personal benefit even if in competition with the LLC. Callison & Vestal, *supra* note 4, at 279; *see supra* notes 3–9 and accompanying text.

- Within ten days after receiving a member's demand pursuant to RULLCA § 410(b)(2), the company is required in a record to inform the member of the following:
- The information that the company will provide in response to the demand and when and where the company will provide the information; and
- If the company declines to provide any demanded information, the company's reasons for doing so.<sup>58</sup>

Although the RULLCA information rights provision does not contain any permissible restrictions on those rights, RULLCA requires that information made available under § 410(a)(1) must be "material to the member's rights and duties under the operating agreement" or the applicable statute.<sup>59</sup> The same standard applies to the information the company is required to provide without demand.<sup>60</sup> Information that the company is required to furnish on demand is subject to the standard that the demand or information demanded not be unreasonable or otherwise improper under the circumstances.<sup>61</sup> Moreover, in a manager-managed LLC, a member requesting information must have a proper purpose and must make a written demand "describing with reasonable particularity the information sought and the purpose for seeking the information."<sup>62</sup> In addition, the information sought must be "directly connected to the member's purpose."<sup>63</sup> RULLCA implies that some further restrictions are permissible by stating that an operating agreement may not "unreasonably restrict the duties and rights stated in Section 410."<sup>64</sup>

RULLCA makes an appropriate distinction between the information rights available to members in a member-managed LLC and in a manager-managed LLC. Bill Callison has observed that if a non-manager member is permitted access to important business information of the LLC, the LLC may not have recourse if the member uses that information for personal benefit even if in competition with the LLC.<sup>65</sup>

## *ii. Revised Uniform Partnership Act*

The Revised Uniform Partnership Act (1997 last amended 2013)<sup>66</sup> provides the following:

- (a) A partnership shall keep its books and records, if any, at its principal office.
- (b) On reasonable notice, a partner may inspect and copy during regular business hours, at a reasonable location specified by the partnership, any record maintained by the partnership regarding the partnership's busi-

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58. REVISED UNIF. LTD. LIAB. CO. ACT § 410(b)(3) (UNIF. LAW COMM'N 2013).

59. *Id.* § (a)(1).

60. *Id.* § (a)(2)(A).

61. *Id.* § (a)(2)(B).

62. *Id.* § (b)(2).

63. *Id.*

64. *Id.* § (c)(6).

65. Callison & Vestal, *supra* note 4, at 279; *see supra* notes 3–9 and accompanying text.

66. REVISED UNIF. P'SHIP ACT § 408 (UNIF. LAW COMM'N 2013).

ness, financial condition, and other circumstances, to the extent the information is material to the partner's rights and duties under the partnership agreement or this [act].

(c) The partnership shall furnish to each partner:

- (1) without demand, any information concerning the partnership's business, financial condition, and other circumstances which the partnership knows and is material to the proper exercise of the partner's rights and duties under the partnership agreement or this [act], except to the extent the partnership can establish that it reasonably believes the partner already knows the information; and
- (2) on demand, any other information concerning the partnership's business, financial condition, and other circumstances, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

(d) The duty to furnish information under subsection (c) also applies to each partner to the extent the partner knows any of the information described in subsection (c).

(e) Subject to subsection (j), on 10 days' demand made in a record received by a partnership, a person dissociated as a partner may have access to information to which the person was entitled while a partner if:

- (1) the information pertains to the period during which the person was a partner;
- (2) the person seeks the information in good faith; and
- (3) the person satisfies the requirements imposed on a partner by subsection (b).

(f) Not later than 10 days after receiving a demand under subsection (e), the partnership in a record shall inform the person that made the demand of:

- (1) the information that the partnership will provide in response to the demand and when and where the partnership will provide the information; and
- (2) the partnership's reasons for declining, if the partnership declines to provide any demanded information.

(g) A partnership may charge a person that makes a demand under this section the reasonable costs of copying, limited to the costs of labor and material.

(h) A partner or person dissociated as a partner may exercise the rights under this section through an agent or, in the case of an individual under legal disability, a legal representative. Any restriction or condition imposed by the partnership agreement or under subsection (j) applies both to the agent or legal representative and to the partner or person dissociated as a partner.

(i) Subject to Section 505, the rights under this section do not extend to a person as transferee.

(j) In addition to any restriction or condition stated in its partnership agreement, a partnership, as a matter within the ordinary course of its business, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including des-

ignating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the partnership has the burden of proving reasonableness.<sup>67</sup>

### *iii. Revised Uniform Limited Partnership Act*

The Revised Uniform Limited Partnership Act<sup>68</sup> provides the following:

(a) On 10 days' demand, made in a record received by the limited partnership, a limited partner may inspect and copy required information<sup>69</sup> during regular business hours in the limited partnership's designated office. The limited partner need not have any particular purpose for seeking the information.

(b) During regular business hours and at a reasonable location specified by the limited partnership, a limited partner may obtain from the limited partnership and inspect and copy true and full information regarding the state of the activities and financial condition of the limited partnership and other information regarding the activities of the limited partnership as is just and reasonable if:

- (1) the limited partner seeks the information for a purpose reasonably related to the partner's interest as a limited partner;

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67. *Id.*

68. REVISED UNIF. LTD. P'SHIP ACT § 304 (UNIF. LAW COMM'N 2013).

69. *Id.* §102(18) defines "required information" as "the information that a limited partnership is required to maintain under Section 111." § 111 states:

A limited partnership shall maintain at its designated office the following information:

- (1) a current list showing the full name and last known street and mailing address of each partner, separately identifying the general partners, in alphabetical order, and the limited partners, in alphabetical order;
- (2) a copy of the initial certificate of limited partnership and all amendments to and restatements of the certificate, together with signed copies of any powers of attorney under which any certificate, amendment, or restatement has been signed;
- (3) a copy of any filed articles of conversion or merger;
- (4) a copy of the limited partnership's federal, state, and local income tax returns and reports, if any, for the three most recent years;
- (5) a copy of any partnership agreement made in a record and any amendment made in a record to any partnership agreement;
- (6) a copy of any financial statement of the limited partnership for the three most recent years;
- (7) a copy of the three most recent annual reports delivered by the limited partnership to the [Secretary of State] pursuant to Section 210;
- (8) a copy of any record made by the limited partnership during the past three years of any consent given by or vote taken of any partner pursuant to this [Act] or the partnership agreement; and
- (9) unless contained in a partnership agreement made in a record, a record stating:
  - (A) the amount of cash, and a description and statement of the agreed value of the other benefits, contributed and agreed to be contributed by each partner;
  - (B) the times at which, or events on the happening of which, any additional contributions agreed to be made by each partner are to be made;
  - (C) for any person that is both a general partner and a limited partner, a specification of what transferable interest the person owns in each capacity; and
  - (D) any events upon the happening of which the limited partnership is to be dissolved and its activities wound up.

- (2) the limited partner makes a demand in a record received by the limited partnership, describing with reasonable particularity the information sought and the purpose for seeking the information; and
- (3) the information sought is directly connected to the limited partner's purpose.
- (c) Within 10 days after receiving a demand pursuant to subsection (b), the limited partnership in a record shall inform the limited partner that made the demand:
  - (1) what information the limited partnership will provide in response to the demand;
  - (1) what information the limited partnership will provide in response to the demand;
  - (2) when and where the limited partnership will provide the information; and
  - (3) if the limited partnership declines to provide any demanded information, the limited partnership's reasons for declining.
- (d) Subject to subsection (f), a person dissociated as a limited partner may inspect and copy required information during regular business hours in the limited partnership's designated office if:
  - (1) the information pertains to the period during which the person was a limited partner;
  - (2) the person seeks the information in good faith; and
  - (3) the person meets the requirements of subsection (b).
- (e) The limited partnership shall respond to a demand made pursuant to subsection (d) in the same manner as provided in subsection (c).
- (f) If a limited partner dies, Section 704<sup>70</sup> applies.
- (g) The limited partnership may impose reasonable restrictions on the use of information obtained under this section. In a dispute concerning the reasonableness of a restriction under this subsection, the limited partnership has the burden of proving reasonableness.
- (h) A limited partnership may charge a person that makes a demand under this section reasonable costs of copying, limited to the costs of labor and material.
- (i) Whenever this [Act] or a partnership agreement provides for a limited partner to give or withhold consent to a matter, before the consent is given or withheld, the limited partnership shall, without demand, provide the limited partner with all information material to the limited partner's decision that the limited partnership knows.
- (j) A limited partner or person dissociated as a limited partner may exercise the rights under this section through an attorney or other agent. Any restriction imposed under subsection (g) or by the partnership agreement applies both to the attorney or other agent and to the limited partner or person dissociated as a limited partner.

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70. *Id.* § 704 provides:

If a partner dies, the deceased partner's personal representative or other legal representative may exercise the rights of a transferee as provided in Section 702 and, for the purposes of settling the estate, may exercise the rights of a current limited partner under Section 304.

(k) The rights stated in this section do not extend to a person as transferee, but may be exercised by the legal representative of an individual under legal disability who is a limited partner or person dissociated as a limited partner.<sup>71</sup>

RULPA provides that the partnership agreement may not vary:

the information required under Section 111 or unreasonably restrict the right to information under Sections 304 or 407, but the partnership agreement may impose reasonable restrictions on the availability and use of information obtained under those sections and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use.<sup>72</sup>

RULPA provides the following information rights to general partners:

- (a) A general partner, without having any particular purpose for seeking the information, may inspect and copy during regular business hours:
  - (1) in the limited partnership's designated office, required information; and
  - (2) at a reasonable location specified by the limited partnership, any other records maintained by the limited partnership regarding the limited partnership's activities and financial condition.
- (b) Each general partner and the limited partnership shall furnish to a general partner:
  - (1) without demand, any information concerning the limited partnership's activities and activities reasonably required for the proper exercise of the general partner's rights and duties under the partnership agreement or this [Act]; and
  - (2) on demand, any other information concerning the limited partnership's activities, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.
- (c) Subject to subsection (e), on 10 days' demand made in a record received by the limited partnership, a person dissociated as a general partner may have access to the information and records described in subsection (a) at the location specified in subsection (a) if:
  - (1) the information or record pertains to the period during which the person was a general partner;
  - (2) the person seeks the information or record in good faith; and
  - (3) the person satisfies the requirements imposed on a limited partner by Section 304(b).
- (d) The limited partnership shall respond to a demand made pursuant to subsection (c) in the same manner as provided in Section 304(c).
- (e) If a general partner dies, Section 704<sup>73</sup> applies.

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71. *Id.* § 304.

72. *Id.* § 110(b)(4).

73. *Id.* § 704 provides:

(f) The limited partnership may impose reasonable restrictions on the use of information under this section. In any dispute concerning the reasonableness of a restriction under this subsection, the limited partnership has the burden of proving reasonableness.

(g) A limited partnership may charge a person dissociated as a general partner that makes a demand under this section reasonable costs of copying, limited to the costs of labor and material.

(h) A general partner or person dissociated as a general partner may exercise the rights under this section through an attorney or other agent. Any restriction imposed under subsection (f) or by the partnership agreement applies both to the attorney or other agent and to the general partner or person dissociated as a general partner. The rights under this section do not extend to a person as transferee, but the rights under subsection (c) of a person dissociated as a general may be exercised by the legal representative of an individual who dissociated as a general partner under Section 603(7)(B) or (C).<sup>74</sup>

## V. CURRENT STATUTORY PROVISIONS GOVERNING INSPECTION OF BOOKS AND RECORDS

### A. Corporations

#### i. Representative Statute

Corporate statutes generally require the maintenance of specified records and provide that shareholders have a right to inspect and copy those records in specified circumstances. Connecticut provides a statute that is representative in many respects.

#### ii. Corporate Duty to Keep Records

The statute first establishes the corporation's duty to keep records:

(a) A corporation shall keep as permanent records minutes of all meetings of its shareholders and board of directors, a record of all actions taken by the shareholders or board of directors without a meeting and a record of all actions taken by a committee of the board of directors in place of the board of directors on behalf of the corporation.

(b) A corporation shall maintain appropriate accounting records.

(c) A corporation or its agent shall maintain a record of its shareholders, in a form that permits preparation of a list of the names and addresses of all shareholders, in alphabetical order by class of shares showing the number and class of shares held by each.

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If a partner dies, the deceased partner's personal representative or other legal representative may exercise the rights of a transferee as provided in Section 702 and, for the purposes of settling the estate, may exercise the rights of a current limited partner under Section 304.

74. *Id.* § 407.



(d) A corporation shall maintain its records in the form of a document, including an electronic record, or in another form capable of conversion into paper form within a reasonable time.

(e) A corporation shall keep a copy of the following records at its principal office:<sup>75</sup>

- (1) Its certificate of incorporation or restated certificate of incorporation, all amendments to them currently in effect and any notices to shareholders referred to in subsection (1) of section 33-608 regarding facts on which a document is dependent;
- (2) its bylaws or restated bylaws and all amendments to them currently in effect;
- (3) resolutions adopted by its board of directors creating one or more classes or series of shares and fixing their relative rights, preferences and limitations, if shares issued pursuant to those resolutions are outstanding;
- (4) the minutes of all shareholders' meetings and records of all action taken by shareholders without a meeting for the past three years;
- (5) all written communications to shareholders generally within the past three years, including the financial statements furnished for the past three years under section 33-951;
- (6) a list of the names and business addresses of its current directors and officers; and
- (7) its most recent annual report delivered to the Secretary of the State under section 33-953.<sup>76</sup>

### *iii. Basic Inspection Right*

The Connecticut statute then establishes the shareholder's basic inspection right:

A shareholder of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office, any of the records of the corporation described in subsection (e) of section 33-945 if he gives the corporation a signed written notice of his demand at least five business days before the date on which he wishes to inspect and copy.<sup>77</sup>

The records described in Conn. Gen. Stat. § 33-945(e) may be thought of as the fundamental records of the corporation.

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75. Compare CONN. GEN. STAT. § 33-945(e) (2011) (typical provision), with VT. STAT. ANN. tit. 11, § 16.02(a) (1993) (a unique variation which provides that a shareholder is entitled to inspect and copy specified books and records, during normal business hours, at the corporation's principal office. If the corporation's principal office is not in Vermont, the inspection is to take place at the corporation's registered office).

76. CONN. GEN. STAT. § 33-945.

77. *Id.* § 33-946(a).

#### ***iv. Requirements for Examination of Additional Records***

The Connecticut inspection statute then establishes how a shareholder may examine records of the corporation in addition to the records described in Conn. Gen. Stat. § 33-945(e):

(c) A shareholder of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder meets the requirements of subsection (d) of this section and gives the corporation a signed written notice of his demand at least five business days before the date on which he wishes to inspect and copy:

- (1) Excerpts from minutes of any meeting of the board of directors or a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders and records of action taken by the shareholders, the board of directors or a committee of the board without a meeting, to the extent not subject to inspection under subsection (a) of this section;
- (2) accounting records of the corporation; and
- (3) the record of shareholders.

(d) A shareholder may inspect and copy the records described in subsection (c) of this section only if:

- (1) His demand is made in good faith and for a proper purpose;
- (2) he describes with reasonable particularity his purpose and the records he desires to inspect; and
- (3) the records are directly connected with his purpose.<sup>78</sup>

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78. *Id.* §§ 33-946(c)–(d). Other jurisdictions have similar requirements. ALASKA STAT. § 10.06.430(b) (1989); ARIZ. REV. STAT. ANN. §§ 10-1602(B)–(C) (1996); COLO. REV. STAT. §§ 7-116-102(2)–(3) (2004); D. C. CODE § 29-313.02 (2011); FLA. STAT. §§ 607.1602(2)–(3) (1997); GA. CODE ANN. §§ 14-2-1602(c)–(d) (2004); IND. CODE §§ 23-1-52-2(b)–(c) (1986); IOWA CODE §§ 490.1602(3)–(4) (2014); KY. REV. STAT. ANN. §§ 271B.16-020(2)–(3) (West 1998); LA. STAT. ANN. §§ 12:1-1602(C)–(D) (2016); ME. STAT. tit. 13-C, §§ 1602(3)–(4) (2001); MD. CODE ANN., CORPS. & ASS’NS § 2-512 (West 2009); MASS. GEN. LAWS ch. 156D, §§ 16.02(b)–(c) (2004) (except that Massachusetts includes in (4)(c) that:

[T]he corporation shall not have determined in good faith that disclosure of the records sought would adversely affect the corporation in the conduct of its business or, in the case of a public corporation, constitute material non-public information at the time when the shareholder’s notice of demand to inspect and copy is received by the corporation); MINN. STAT. § 302A.461, subd. 4(b) (2010); MISS. CODE ANN. §§ 79-4-16.02(b)–(c) (2013); MONT. CODE ANN. § 35-1-1107 (1997) (except that Montana includes (3)(d): “the shareholder has been a shareholder of record for at least 6 months preceding the demand or the shareholder is a holder of record of at least 5% of all the outstanding shares of the corporation.”); NEB. REV. STAT. §§ 21-2, 222(c)–(d) (2018); N.H. REV. STAT. ANN. §§ 293-A:16:02(c)–(d) (2016); N.J. STAT. ANN. § 14A:5-28(3) (West 1988); N.C. GEN. STAT. § 55-16-02(b) (1993); OR. REV. STAT. §§ 60.774(2)–(3) (1987); S.C. CODE ANN. §§ 33-16-102(b)–(c) (1976); S.D. CODIFIED LAWS §§ 47-1A-1602.1, 47-1A-1602.2 (2005); Tenn. Code Ann. §§ 48-26-102(b)–(c) (1986); UTAH CODE ANN. §§ 16-10a-1602(2)–(3) (West 1992) (except that Utah’s statute includes directors in this provision). *See infra* note 97 and accompanying text; VT. STAT. ANN. tit. 11A, §§ 16.02 (b)–(c); VA. CODE §§ 13-1-771(C)–(D) (except that (D) adds (4), which states: “The records are directly connected with the shareholder’s purpose.”); WASH. REV. CODE §§ 23B.16.020(2)–(3) (2009); W. VA. CODE §§ 31D-16-1602(b)–(c) (2002); WYO. STAT. ANN. §§ 17-16-1602(b)–(c) (2009) (except that Wyoming requires that the shareholder have been of record for at least six (6) months immediately

The Connecticut statute then states that the rights established by § 33.946 may not be abolished or limited by the corporation's articles of incorporation or bylaws.<sup>79</sup>

#### v. *Other Requirements and Permissions*

Connecticut also provides that a shareholder's inspection may be through an attorney or other agent.<sup>80</sup> Every state but Missouri provides for inspection by an agent.<sup>81</sup>

Other states establish requirements for any shareholder inspection, including an inspection of what this article has termed fundamental records of the corporation, such as requiring that the shareholder have been a shareholder for at least six months or be a holder of at least 5% of some class of stock.<sup>82</sup> Nevada requires that a shareholder have at least 15% of the outstanding stock to be entitled to inspection rights.<sup>83</sup>

Every state requires some sort of notice to the corporation — it may be simply a written notice of at least five days in advance,<sup>84</sup> a requirement for a written

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preceding making a demand and shall be the holder of record of at least five percent (5%) of all the outstanding shares of the corporation).

79. CONN. GEN. STAT. § 33.946(e). Only 16 states do not include such a provision. They are Alaska, Delaware, Florida, Illinois, Kansas, Maryland, Michigan, Minnesota, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Rhode Island, and Texas. Pennsylvania law states that there may be no relaxation of its shareholder inspection rights by the corporation's articles of incorporation. 15 PA. STAT. AND CONST. STAT. ANN. § 1508 (West 2001). Missouri law states that a shareholder's right to examine the books and records of a corporation is subject to the bylaws. MO. REV. STAT. § 351.215(1) (1996). Georgia provides that a corporation's articles of incorporation or bylaws may limit the inspection rights of a shareholder who owns 2% or less of the corporation's outstanding shares. GA. CODE ANN. § 14-2-1602(e).

80. CONN. GEN. STAT. § 33.947(a). Delaware requires that, if an attorney or other agent seeks to inspect books and records, the shareholder's demand under oath must be accompanied by a power of attorney or other writing authorizing the attorney or other agent to so act on behalf of the shareholder. DEL. CODE ANN. tit. 8, § 220(b)(2)b.2. (2010). Indiana requires that a shareholder's attorney or agent be "authorized in writing." IND. CODE § 23-1-52-3(a). Michigan requires that an attorney or other agent be authorized by a power of attorney or other writing that authorizes the attorney or other agent to act for the shareholder in demanding records. Mich. Comp. Laws § 450.1487(2) (1989). New York requires that an attorney or agent be authorized by a writing that would satisfy the New York proxy rules. N.Y. BUS. CORP. LAW § 624 (McKinney 1998).

81. The Missouri statute does not mention agents and provides that a shareholder's inspection rights are subject to the corporation's bylaws. MO. REV. STAT. § 351.215(1). North Dakota expresses the right to use an agent by stating that the inspection may be "in person or by a legal representative." N.D. Cent. Code § 10-19.1-84(4) (2011). Minnesota uses similar language. MINN. STAT. § 302A.461, subd. 4(a). Perhaps in recognition of the lobbying prowess of the accounting profession, Texas law provides that "the examination may be conducted in person or through an agent, accountant, or attorney." TEX. BUS. ORGS. CODE ANN. § 21.218(b) (West 2017). Indiana law requires that the agent or attorney must be authorized in writing. IND. CODE § 23-1-52-3(a).

82. ARIZ. REV. STAT. ANN. § 10-1602(A) (Arizona); N.M. STAT. ANN. § 53-11-50(B) (1983) (New Mexico); N.J. STAT. ANN. § 14A:5-28(3) (New Jersey); *Id.* § 14A:5-28(4) (stating the court has power, upon shareholder's proof of proper purpose, to order inspection irrespective of length of time or number of shares); N.C. GEN. STAT. §§ 55-16-02(a), (g) (North Carolina); TEX. BUS. ORGS. CODE ANN. § 21.218(b) (Texas) (with same exception as New Jersey (*Id.* § 21.218(c))).

83. NEV. REV. STAT. § 78.257 (2001).

84. ALA. CODE § 10A-1-6.02(a) (2016); ARIZ. REV. STAT. ANN. § 10-163; FLA. STAT. § 16.02 (1995) (five business days); GA. CODE ANN. § 14-2-1602(b) (five business days); IDAHO CODE § 30-29-1602(1) (2015) (five business days); IND. CODE § 23-1-52-2(a) (five business days); IOWA CODE § 490.1602(1) (2014); KY. REV. STAT. § 271B.16-020(1) (1988) (five business days); LA. STAT. ANN. §

demand with no time specified,<sup>85</sup> or a written demand made under oath stating the purpose of the inspection.<sup>86</sup> Some statutes have no requirement but a provision that the corporation has to produce the requested records within seven days after the request is made;<sup>87</sup> other statutes require a written demand describing with reasonable particularity his or her purpose and the records he or she desires to inspect, and that the records sought are directly connected with the purpose.<sup>88</sup> Some have no requirement for notice unless set out in the corporation's bylaws.<sup>89</sup> The requirements may be more substantial, such as a written, verified demand stating the purpose of the request.<sup>90</sup>

### *vi. Features Common to Corporate Inspection Statutes*

The provisions of the Connecticut statutes quoted or cited above<sup>91</sup> contain several features that are common to corporate inspection statutes:

- Examination must be at a reasonable time;
- The examination may be in person or through an agent;
- The shareholder may make extracts from the books and records;
- The shareholder may be charged for the corporation's costs in providing copies of records;
- The shareholder must have a proper purpose; and
- The shareholder must make a written demand.

This article discusses some of the differences among the corporate statutes below.

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1-1602(A) (2016) (five business days; must be signed); ME. STAT. tit. 13-C, § 1602(1) (2011) (five business days); MASS. GEN. LAWS ch. 156D, § 16.02(a) (2004) (five business days); MISS. CODE ANN. § 79-4-16.02(a) (2013) (five business days; must be signed); MONT. CODE ANN. § 35-1-1107(1) (1997) (five business days); NEB. REV. STAT. § 21-2,222(a) (2018) (five business days); NEV. REV. STAT. § 78.257(1); N.H. REV. STAT. ANN. § 293-A:16:02(a) (2016) (five business days); N.J. STAT. ANN. § 14A-5-28(1); N.Y. BUS. CORP. LAW § 624(b); N. C. GEN. STAT. § 55-16-02(a) (five business days); N.D. CENT. CODE § 10-191.1-84(4); Ohio Rev. Code Ann. § 1701.37(C) (West 2002); OKLA. STAT. tit. 18, § 1065(B) (2004); OR. REV. STAT. § 60.774(1) (2018) (five business days); 7 R.I. GEN. LAWS § 7-1.2-1502(b) (2005); S.C. CODE ANN. § 33-16-102(a) (1988) (five business days); S.D. CODIFIED LAWS § 47-1A-1602 (2005) (five business days); UTAH CODE ANN. § 16-10a-1602(1) (West 1992) (five business days); Vt. Stat. Ann. tit. 11A, § 16.02(a) (1993) (five business days); VA. CODE ANN. § 13.1-771(A) (2010) (five business days); WASH. REV. CODE § 23B.16.020(1) (2009) (five business days); W. VA. CODE § 31D-16-1602(a) (2002) (five business days); WYO. STAT. ANN. § 17-16-1602(a) (2009) (five business days).

85. 805 ILL. COMP. STAT. 5/7.75(b) (1986); MINN. STAT. § 302A.461, subd. 4(a); N.M. STAT. ANN. § 53-11-50(B).

86. Del. Code Ann. tit. 8, § 220(b) (2010). Kansas and Oklahoma are the same. KAN. STAT. ANN. § 17-6510(b) (2016); OKLA. STAT. tit. 18, § 1065(B).

87. MD. CODE ANN., CORPS. & ASS'NS § 2-512(b) (2009).

88. MICH. COMP. LAWS § 450.1487(2) (1989).

89. MO. REV. STAT. § 321.215(1) (1996).

90. 15 PA. CONS. STAT. § 1508(b) (2001) (if the shareholder uses an attorney or other agent, the shareholder must also provide the corporation with a verified power of attorney).

91. See *supra* notes 76–80 and accompanying text.

**vii. Financial Information**

Other states provide that a shareholder is entitled to certain financial information upon request:

(a) A corporation shall furnish its annual financial statements to each shareholder who requests a statement, which may be consolidated or combined statements of the corporation and one or more of its subsidiaries, as appropriate, that include a balance sheet as of the end of the fiscal year, an income statement for that year, and a statement of changes in shareholders' equity for the year unless that information appears elsewhere in the financial statements. If financial statements are prepared for the corporation on the basis of generally accepted accounting principles, the annual financial statements must also be prepared on that basis. If the financial statements for the corporation are not prepared on the basis of generally accepted accounting principles, the annual financial statements furnished [by] shareholders may be prepared either on the same basis used by the corporation for filing its United States income tax returns or as required by appropriate regulatory agencies.

(b) If the annual financial statements are reported upon by a public accountant or certified public accountant, his or her report must accompany them. If not, the statements must be accompanied by a statement of the president or the person responsible for the corporation's accounting records:

- (1) Stating his or her reasonable belief whether the statements were prepared on the basis of generally accepted accounting principles and, if not, describing the basis of preparation; and
- (2) [d]escribing any respects in which the statements were not prepared on a basis of accounting consistent with the statements prepared for the preceding year.

(c) A corporation shall mail or deliver by electronic transmission the annual financial statements to each shareholder who requests a statement within 120 days after the close of each fiscal year. Thereafter, on written request from a shareholder who was not mailed the statements, the corporation shall mail or deliver by electronic transmission him or her the latest annual financial statements.<sup>92</sup>

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92. ALA. CODE § 10A-2-16.20(a) (2009). Other states also provide for shareholders to receive some form of financial information. ALASKA STAT. § 10.00.443 (2015) (Alaska); ARIZ. REV. STAT. § 10-1620 (1999) (Arizona); COLO. REV. STAT. § 7-116-105 (1994) (Colorado); 805 ILL. COMP. STAT. 5/7.75(e) (1986) (Illinois); KY. REV. STAT. ANN. § 271B.16-200 (1988) (Kentucky); MASS. GEN. LAWS ch. 156D, § 16.20 (2004) (Massachusetts); MICH. COMP. LAWS § 450.1487(1) (Michigan); MINN. STAT. § 302A.463 (1993) (Minnesota); MONT. CODE ANN. § 35-1-1110 (1991) (Montana); NEB. REV. STAT. § 21-2, 227 (2017) (Nebraska); N.H. REV. STAT. ANN. § 293-A:16.20 (2017) (New Hampshire); N.J. STAT. ANN. § 14A:5-28(2) (West 1988) (New Jersey); N.M. STAT. ANN. § 53-11-50(D) (1983) (New Mexico); N.Y. BUS. CORP. § 624(e) (McKinney 1998) (New York); N.C. GEN. STAT. § 55-16-02 (1993) (North Carolina); TENN. CODE ANN. § 48-26-201 (1983) (Tennessee); TEX. BUS. ORGS. CODE ANN. § 21.219 (West 2006) (Texas); UTAH CODE ANN. § 16-10a-1605 (West 1992) (Utah); VA. CODE ANN. § 13.1-774 (2010) (Virginia); WASH. REV. CODE ANN. § 23B.16.200 (2000) (Washington); W.

Although not all states provide for financial information to be furnished to shareholders, all corporate statutes require the corporation to maintain appropriate accounting records. A corporation's accounting records will be subject to inspection by its shareholders if the shareholder satisfies applicable conditions. Nevada, which limits shareholder information rights more than most states, permits no inspection unless the shareholder either "owns not less than 15% of all of the issued and outstanding shares of the stock of such corporation or has been authorized in writing by the holders of at least 15% of all its issued and outstanding shares"<sup>93</sup> provides that such a shareholder will be entitled to inspect "all financial records of the corporation, to make copies of records, and to conduct an audit of such records."<sup>94</sup>

### ***viii. Information About Subsidiaries***

Some states provide that a shareholder may examine information about the corporation's subsidiaries. For example, Delaware provides:

- (b) Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from:
- a. The corporation's stock ledger, a list of its stockholders, and its other books and records; and
  - b. A subsidiary's books and records, to the extent that:
    - i. The corporation has actual possession and control of such records of such subsidiary; or
    - ii. The corporation could obtain such records through the exercise of control over such subsidiary, provided that as of the date of the making of the demand:
      1. The stockholder inspection of such books and records of the subsidiary would not constitute a breach of an agreement between the corporation or the subsidiary and a person or persons not affiliated with the corporation; and
      2. [t]he subsidiary would not have the right under the law applicable to it to deny the corporation access to such books and records upon demand by the corporation.<sup>95</sup>

Kansas<sup>96</sup> and Oklahoma<sup>97</sup> have statutes similar to Delaware's with regard to inspection of subsidiaries.

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VA. CODE ANN. § 31D-16-1620 (2002) (West Virginia); WIS. STAT. ANN. § 180.1620 (1989) (Wisconsin).

93. NEV. REV. STAT. § 78.257(1) (2003).

94. *Id.*

95. DEL. CODE ANN. tit. 8, § 220(b) (2010). The Delaware statute defines "subsidiary" as follows: "Subsidiary" means any entity directly or indirectly owned, in whole or in part, by the corporation of which the stockholder is a stockholder and over the affairs of which the corporation directly or indirectly exercises control, and includes, without limitation, corporations, partnerships, limited partnerships, limited liability partnerships, limited liability companies, statutory trusts and/or joint ventures. *Id.* § 220(a)(2).

96. KAN. STAT. ANN. § 17-6510(b) (2016).

### **ix. Possible Defense to a Shareholder's Demand**

Some statutes provide a possible defense to a shareholder's demand:

It shall be a defense to any action for penalties under this Section that the person suing therefor[e] has within two years sold or offered for sale any list of shareholders of such corporation or any other corporation or has aided or abetted any person in procuring any list of shareholders for any such purpose, or has improperly used any information secured through any prior examination of the books and records of account, or minutes, or records of shareholders of such corporation or any other corporation.<sup>98</sup>

New York has a similar provision that also authorizes the corporation to condition inspection on the presentation of an affidavit from the shareholder that the shareholder has not engaged in any of these acts.<sup>99</sup>

### **x. Other Reports**

Four states provide for reports to be made to the shareholders if the corporation indemnifies a director or officer, or advances expenses.<sup>100</sup> In addition, two states also require that a report be made if a person receives stock for a promissory note or a promise to provide services.<sup>101</sup> Alaska requires that the board "send an annual report to the shareholders no later than 180 days after the close of the fiscal year or the date on which notice of the annual meeting in the next fiscal year is sent under AS 10.06.410, whichever is first."<sup>102</sup> Unless required by its articles or bylaws, a corporation with fewer than 100 shareholders of record is exempt from this requirement.<sup>103</sup> If an annual report is provided, it must contain the following:

[A] balance sheet as of the end of the fiscal year and an income statement and statement of changes in financial position for the fiscal year, accompanied by a report on the fiscal year by independent accountants or, if there is no such report, the certificate of an authorized officer of the corporation that the statements were prepared without audit from the books and records of the corporation.<sup>104</sup>

In addition to the required financial information, in the case of a corporation having 100 or more holders of record of its shares, unless the corporation has a nonexempt class of securities registered under 15 U.S.C. 781 (Securities Exchange

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97. OKLA. STAT. tit. 18, § 1065(B)(2) (2004).

98. 805 ILL. COMP. STAT. 5/7.75(d) (1991). Delaware and Kansas have similar statutes. DEL. CODE ANN. tit. 8, § 220 (2010); KAN. STAT. ANN. § 17-6510(c).

99. N.Y. BUS. CORP. LAW § 624(c) (McKinney 1998).

100. These states are Alabama, Kentucky, Montana, and Oregon. ALA. CODE § 10A-2-16.21 (2009); KY. REV. STAT. ANN. § 271B.16-210(1) (West 2017); MONT. CODE ANN. § 35-1-1111(1) (1991); OR. REV. STAT. § 60.784 (1987).

101. These states are Montana and Tennessee. MONT. CODE ANN. § 35-1-1111(2); TENN. CODE ANN. § 48-26-202 (1986).

102. ALASKA STAT. § 10.06.433(a) (2015).

103. *Id.* § (b).

104. *Id.* § (a).

Act of 1934) or files reports under 43 U.S.C. 1606(c), 1607(c), and 1625 (Alaska Native Claims Settlement Act), its annual report must also briefly describe:

- (1) all transactions, excluding compensation of officers and directors, during the previous fiscal year involving an amount in excess of \$40,000, other than contracts let at competitive bid or services rendered at prices regulated by law, to which the corporation or its parent or subsidiary was a party, and in which a director or officer of the corporation or of a subsidiary or, if known to the corporation, its parent, or subsidiary, a holder of more than 10 percent of the outstanding voting shares of the corporation had a direct or indirect material interest; the report must include the name of the person, the person's relationship to the corporation, the nature of the person's interest in the transaction and, if practicable, the amount of the interest; in the case of a transaction with a partnership of which the person is a partner, only the interest of the partnership need be stated; a report is not required in the case of transactions approved by the shareholders under AS 10.06.478;
- (2) the amount and circumstances of indemnifications or advances aggregating more than \$10,000 paid during the fiscal year to an officer or director of the corporation under AS 10.06.490; a report is not required in the case of indemnification approved by the shareholders under AS 10.06.490(d)(3).<sup>105</sup>

Alaska makes its statute applicable to Alaska corporations and to foreign corporations having their principal executive office in Alaska or customarily holding meetings of its board in Alaska.<sup>106</sup>

### ***xi. Charges to Shareholders for Copies***

Several corporate information statutes provide that a corporation may impose a reasonable charge for providing copies of records to shareholders.<sup>107</sup>

105. *Id.* § (b).

106. *Id.* § (g).

107. These statutes are ALA. CODE § 10A-2-1603(c) (209) (Alabama); ARIZ. REV. STAT. ANN. § 10-1603(C) (1996) (Arizona); ARK. CODE ANN. § 4-27-1603(c) (1987) (Arkansas); CONN. GEN. STAT. § 33-947(d) (2011) (Connecticut); D.C. CODE § 29-313.03(d) (2011) (District of Columbia); FLA. STAT. § 607.1603(3) (1997) (Florida); GA. CODE ANN. § 14-2-1603(c) (1988) (Georgia); HAW. REV. STAT. § 414-470(b) (2000) (Hawaii); IDAHO CODE § 30-29-1603(4) (2015) (Idaho); IOWA CODE § 490.1603(4) (2014) (Iowa); KY. REV. STAT. ANN. § 271B.11-030(3) (West 1988) (Kentucky); LA. STAT. ANN. § 12:1-1603(D) (2015) (Louisiana); ME. STAT. tit. 13-C, § 1603(3) (2003) (Maine); MINN. STAT. § 302A.461 (2010) (Minnesota) (except for share register and all documents referred to in (2)); MISS. CODE ANN. § 79-4-16.03(d) (2001) (Mississippi); NEV. REV. STAT. § 78.257(2) (2003) (Nevada); N.H. REV. STAT. ANN. § 293-A:16.03(d) (1992) (New Hampshire); N.C. GEN. STAT. § 55-16-03(c) (2005) (North Carolina); OKLA. STAT. tit 18, § 1065(C)(1) (2004) (Oklahoma) (if corporation doesn't reply to a shareholder's demand within 5 days, the court may order production subject to the shareholder bearing reasonable costs); OR. REV. STAT. § 60.777(3) (1987) (Oregon); S.C. CODE ANN. § 33-16-103(b) (1984) (South Carolina); S.D. CODIFIED LAWS § 47-1A-1603 (2005) (South Dakota); TENN. CODE ANN. § 48-26-103(c) (2012) (Tennessee); VT. STAT. ANN. tit. 11, § 4058(c) (2015) (Vermont); VA. CODE ANN. § 13.1-772(C) (2012) (Virginia); WASH. REV. CODE § 23B.16030(3) (1989) (Washington); W. VA. CODE § 31D-16-1603(d) (2002) (West Virginia); WIS. STAT. §§ 180.1603(2), 180.0720(2)(b) (1989) (Wisconsin) (Shareholder or shareholder's agent may copy the shareholder's list at the shareholder's expense under § 180.1604(1). If a corporation does not within a reasonable time allow a



### ***xii. Directors' Rights to Information***

Corporate inspection statutes often have a specific reference to a director's rights to information. For example, Delaware provides that "[a]ny director shall have the right to examine the corporation's stock ledger, a list of its stockholders and its other books and records for a purpose reasonably related to the director's position as a director."<sup>108</sup> California is more emphatic:

Every director shall have the absolute right at any reasonable time to inspect and copy all books, records and documents of every kind and to inspect the physical properties of the corporation of which such person is a director and also of its subsidiary corporations, domestic or foreign. Such inspection by a director may be made in person or by agent or attorney and the right of inspection includes the right to copy and make extracts. This section applies to a director of any foreign corporation having its principal executive office in this state or customarily holding meetings of its board in this state.<sup>109</sup>

Apart from Delaware and California, most corporate statutes fall into one of two general approaches to director information rights. Connecticut illustrates one approach:

A director of a corporation is entitled to inspect and copy the books, records and documents of the corporation at any reasonable time to the extent reasonably related to the performance of the director's duties as a director, including duties as a member of a committee, but not for any other purpose or in any manner that would violate any duty to the corporation.<sup>110</sup>

Kansas illustrates a more relaxed approach:

Any director shall have the right to examine the corporation's stock ledger, a list of its stockholders and its other books and records for a purpose reasonably related to the director's position as a director.<sup>111</sup>

Under either approach, the responsibility to police a director's inspection demands falls on the corporation, and it appears unlikely that the additional language at the end of the Connecticut statute make a practical difference. Any director who seeks information for a purpose unrelated to the director's duties, or who appears

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shareholder to inspect and copy the demanded records, then § 180.1604(2), if the court then orders inspection, it shall also order the corporation to pay the shareholder's costs and expenses, including reasonable attorney fees, notwithstanding § 814.04(c) (relating to costs in civil actions), and the court shall also specify whether the corporation may impose a charge under § 180.1603(2) for copying the records demanded.); WYO. STAT. ANN. § 17-16-1603(d) (2009) (Wyoming).

108. DEL. CODE ANN. tit. 8, § 220(d) (1953).

109. CAL. CORP. CODE § 1602 (1976).

110. CONN. GEN. STAT. § 33-949(a). Note that the Connecticut approach follows the MBCA. See *supra* note 42 and accompanying text.

111. KAN. STAT. ANN. § 17-6510(d) (1988).

to be proceeding in a manner that would violate a duty to the corporation would almost certainly not be considered to be seeking the information for a purpose reasonably related to the director's position as a director.

Many jurisdictions follow either the Connecticut formulation<sup>112</sup> or the Kansas approach.<sup>113</sup> As notes 102 to 103 show, the Connecticut formulation is the clear winner on numbers.

Some states provide information rights to directors on the same or a similar basis to that of shareholders. For example, Pennsylvania provides the following:

(a) General rule.--To the extent reasonably related to the performance of the duties of the director, including those arising from service as a member of a committee of the board of directors, a director of a business corporation is entitled:

(1) in person or by any attorney or other agent, at any reasonable time, to inspect and copy corporate books, records and documents and, in addition, to inspect and receive information regarding the assets, liabilities and operations of the corporation and any subsidiaries of the corporation incorporated or otherwise organized or created under the laws of this Commonwealth that are controlled directly or indirectly by the corporation; and

(2) to demand that the corporation exercise whatever rights it may have to obtain information regarding any other subsidiaries of the corporation.<sup>114</sup>

Rhode Island takes the following approach:

Any director, shareholder or holder of voting trust certificates for shares of a corporation, upon written demand stating the purpose for the demand, has the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its relevant books and records of account, minutes, and record of shareholders and to make extracts from those books and records of account, minutes, and record of shareholders.<sup>115</sup>

Finally, Utah provides the following:

(1) A shareholder or director of a corporation is entitled to inspect and copy, during regular business hours at the corporation's principal office,

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112. These are D. C. CODE § 29-313.05(a) (District of Columbia); FLA. STAT. § 607.1605(1) (Florida); IDAHO CODE § 30-29-1605(1) (Idaho); IOWA CODE § 490.1605(1) (Iowa); LA. STAT. ANN. § 12.1-1605(A) (Louisiana); ME. STAT. tit 13, § 1605(1) (Maine); MASS. GEN. LAWS ch. 156D, § 1605(a) (2003) (Massachusetts); MISS. CODE ANN. § 79-4-16.05(a) (Mississippi); NEB. REV. STAT. § 21-2, 225(a) (2014) (Nebraska); N.H. REV. STAT. ANN. § 293-A:16.05(a) (New Hampshire); N. C. GEN. STAT. § 55-16-05(a) (North Carolina); S.D. CODIFIED LAWS § 47-1A-1605 (South Dakota); TENN. CODE ANN. § 48-26-105(a) (Tennessee); VA. CODE ANN. § 13.1-773.1(A) (Virginia); W. VA. CODE § 31D-16-1605(a) (West Virginia); WYO. STAT. ANN. § 17-16-1605(a) (Wyoming).

113. These are Oklahoma, Michigan, and Texas. OKLA. STAT. tit. 18, § 1065D (2004); MICH. COMP. LAWS § 450.1487(4) (1989); TEX. BUS. ORGS. CODE ANN. § 3.152(a) (West 2003).

114. 15 PA. STAT. AND CONS. STAT. ANN § 1512 (West 2001).

115. 7 R. I. GEN. LAWS § 7-1.2-1502 (2005).

any of the records of the corporation described in Subsection 16-10a-1601(5) if he gives the corporation written notice of the demand at least five business days before the date on which he wishes to inspect and copy.

(2) In addition to the rights set forth in Subsection (1), a shareholder or director of a corporation is entitled to inspect and copy, during regular business hours at a reasonable location specified by the corporation, any of the following records of the corporation if the shareholder or director meets the requirements of Subsection (3) and gives the corporation written notice of the demand at least five business days before the date on which he wishes to inspect and copy:

- (a) excerpts from:
  - (i) minutes of any meeting, records of any action taken by the board of directors, or by a committee of the board of directors while acting on behalf of the corporation in place of the board of directors;
  - (ii) minutes of any meeting of the shareholders;
  - (iii) records of any action taken by the shareholders without a meeting; and
  - (iv) waivers of notices of any meeting of the shareholders, of any meeting of the board of directors, or of any meeting of a committee of the board of directors;
- (b) accounting records of the corporation; and
- (c) the record of shareholders described in Subsection 16-10a-1601(3).

(3) A shareholder or director is entitled to inspect and copy records as described in Subsection (2) only if:

- (a) the demand is made in good faith and for a proper purpose;
- (b) the shareholder or director describes with reasonable particularity his purpose and the records he desires to inspect; and the records are directly connected with his purpose.<sup>116</sup>

As one can see, Utah treats directors no better than shareholders; some records are readily available, but to see others, the director must jump through some hoops. No reason appears why Pennsylvania, Rhode Island, and Utah would not have been just as well served by the Connecticut or Kansas approach.

Nevada does not mention directors in its corporate inspection statute and limits the inspection rights of shareholders in unique ways. Nevada limits the right to shareholders who have “been a stockholder of record of any corporation and owns not less than 15 percent of all of the issued and outstanding shares of the stock of such corporation or has been authorized in writing by the holders of at least 15 percent of all its issued and outstanding shares.”<sup>117</sup> Even these shareholders are denied inspection rights under the Nevada statute if the corporation furnishes to its stockholders a detailed, annual financial statement or if the corporation that has filed during the preceding 12 months all reports required to be filed pursuant to

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116. UTAH CODE ANN. § 16-10a-1602 (West 1992).

117. NEV. REV. STAT. § 78.257(1) (2003).

section 13 or section 15(d) of the Securities Exchange Act of 1934.<sup>118</sup> An apparently unnecessary provision expressly states that the Nevada statute applies to S corporations.<sup>119</sup>

### ***xiii. Grounds for Denying Access to Books and Records***

Of course, any corporation may deny a shareholder's request to examine its books and records if the shareholder fails to satisfy the requirements of the applicable inspection statute. Some states provide additional reasons:

A corporation may deny any demand for inspection made pursuant to subsection (2) if the demand was made for an improper purpose, or if the demanding shareholder has within 2 years preceding his or her demand sold or offered for sale any list of shareholders of the corporation or any other corporation, has aided or abetted any person in procuring any list of shareholders for any such purpose, or has improperly used any information secured through any prior examination of the records of the corporation or any other corporation.<sup>120</sup>

The rights authorized by subsection 1 may be denied to any stockholder upon the stockholder's refusal to furnish the corporation an affidavit that such inspection, copies or audit is not desired for any purpose not related to his or her interest in the corporation as a stockholder. Any stockholder or other person, exercising rights set forth in subsection 1, who uses or attempts to use information, records or other data obtained from the corporation, for any purpose not related to the stockholder's interest in the corporation as a stockholder, is guilty of a gross misdemeanor.<sup>121</sup>

### ***xiv. Penalties and Defenses to Penalties for Failure to Provide Access to Books and Records***

Several states impose penalties for a corporation's failure to allow a shareholder who has complied with the applicable statute to inspect the corporation's books and records. For example, the Alaska Corporations Code provides the following:

An officer or agent who, or a corporation that, refuses to allow a shareholder, or the agent or attorney of the shareholder, to examine and make copies from its books and records of account, minutes, and record of shareholders, for a proper purpose, is liable to the shareholder for a penalty in the amount of 10 percent of the value of the shares owned by the shareholder or \$5,000, whichever is greater, in addition to other damages

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118. *Id.* § (6).

119. *Id.* The author is unaware of any state where the federal tax status of a corporation makes a difference in the non-tax treatment of the corporation under state law.

120. FLA. STAT. § 607.1602(6) (1997). New York's statute is similar except that the New York period is five years. N.Y. BUS. CORP. LAW § 624(c) (McKinney 1998).

121. NEV. REV. STAT. § 78.257(4).

or remedy given the shareholder by law. It is a defense to an action for penalties under this section that the person suing has within two years sold or offered for sale a list of shareholders of the corporation or any other corporation or has aided or abetted a person in procuring a list of shareholders for this purpose, or has improperly used information secured through a prior examination of the books and records of account, minutes, or record of shareholders of the corporation or any other corporation, or was not acting in good faith or for a proper purpose in making the person's demand.<sup>122</sup>

The Texas penalty provision is somewhat different:

A corporation that refuses to allow a person to examine and make copies of account records, minutes, and share transfer records under Section 21.218 is liable to the shareholder for any cost or expense, including attorney's fees, incurred in enforcing the shareholder's rights under Section 21.218. The liability imposed on a corporation under this subsection is in addition to any other damages or remedy afforded to the shareholder by law.<sup>123</sup>

California takes a different approach, apparently concentrating on getting the requested records disclosed:

Upon refusal of a lawful demand for inspection, the superior court of the proper county, may enforce the right of inspection with just and proper conditions or may, for good cause shown, appoint one or more competent inspectors or accountants to audit the books and records kept in this state and investigate the property, funds and affairs of any domestic corpora-

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122. ALASKA STAT. § 10.06.430(c) (1989). Alabama imposes a similar penalty with the same defense except that the Alabama penalty is just the 10% of value. ALA. CODE § 10A-2-16.02(c) (1994). Illinois is the same as Alabama. 805 Ill. Comp. Stat. 5/7.75(d) (1986). New Mexico is substantially the same as Alabama. N.M. STAT. ANN. § 53-11-50(B) (1983). The penalty in Missouri is \$250 per offense. MO. REV. STAT. § 351.215(2) (1996). Nevada's statute is somewhat different:

If any officer or agent of any corporation keeping records in this State willfully neglects or refuses to permit an inspection of the books of account and financial records upon demand by a person entitled to inspect them, or refuses to permit an audit to be conducted, as provided in subsection 1, the corporation shall forfeit to the State the sum of \$100 for every day of such neglect or refusal, and the corporation, officer or agent thereof is jointly and severally liable to the person injured for all damages resulting to the person. NEV. REV. STAT. § 78.257(4).

Nevada also provides a potential defense to a shareholder's demand. *See supra* note 93 and accompanying text. Rhode Island is the same as Alabama. 7 R. I. GEN. LAWS § 7-1.2-1502(c) (2005).

123. TEX. BUS. ORGS. CODE ANN. § 21.222(b) (West 2011); it is a defense to an action brought under § 21.222(b) that the person suing:

- (1) has, within the two years preceding the date the action is brought, sold or offered for sale a list of shareholders or of holders of voting trust certificates for shares of the corporation or any other corporation;
- (2) has aided or abetted a person in procuring a list of shareholders or of holders of voting trust certificates for the purpose described by Subdivision (1);
- (3) has improperly used information obtained through a prior examination of the books and account records, minutes, or share transfer records of the corporation or any other corporation; or
- (4) was not acting in good faith or for a proper purpose in making the person's request for examination.

tion or any foreign corporation keeping records in this state and of any subsidiary corporation thereof, domestic or foreign, keeping records in this state and to report thereon in such manner as the court may direct.<sup>124</sup>

The California statute requires all of the expenses of the investigation or audit to be paid by the shareholder unless the court decides that the corporation should pay all or a part of the expenses.<sup>125</sup>

Missouri imposes a penalty of \$250 per offense,<sup>126</sup> and also provides that it is a misdemeanor if any officer or agent, or the corporation, refuses to exhibit the books and records of the corporation for examination by the Secretary of State or the Supervisor of Corporations.<sup>127</sup>

New Jersey, which generally requires that a shareholder have been a shareholder for at least six months or be the holder of at least 5% of the shares (either directly or through agreement with other shareholders) also affirms the power of a court to allow other shareholders access to information:

Nothing herein contained shall impair the power of any court, upon proof by a shareholder of proper purpose, irrespective of the period of time during which the shareholder shall have been a shareholder of record, and irrespective of the number of shares held by him, to compel the production for examination by such shareholder of the books and records of account, minutes, and record of shareholders of a corporation. The court may, in its discretion prescribe any limitations or conditions with reference to the inspection, or award any other or further relief as the court may deem just and proper. The court may order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within this State and kept in this State upon whatever terms and conditions as the order may prescribe. In any action for inspection the court may proceed summarily.<sup>128</sup>

New York,<sup>129</sup> Oklahoma,<sup>130</sup> and Pennsylvania<sup>131</sup> simply affirm a shareholder's right to seek judicial redress if the shareholder is wrongly denied access to information. Presumably, a shareholder would have this right in any event.

Several states that impose penalties for failure to allow a shareholder to inspect books and records provide a statutory defense:

It is a defense to an action for penalties under this section that the person suing has within two years sold or offered for sale a list of shareholders of the corporation or any other corporation or has aided or abetted a person in procuring a list of shareholders for this purpose, or has improperly used information secured through a prior examination of the books and

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124. CAL. CORP. CODE § 1603(a) (West 1977).

125. *Id.* § (c).

126. MO. REV. STAT. § 351.215.

127. *Id.* § 351.710.

128. N.J. STAT. ANN. § 14A:5-28(4) (West 2018).

129. N.Y. BUS. CORP. LAW § 624(d) (McKinney 1998).

130. OKLA. STAT. tit. 18, § 1065(C)(1) (2004).

131. 15 PA. STAT. AND CONST. STAT. ANN. § 1508(c) (West 2001).

records of account, minutes, or record of shareholders of the corporation or any other corporation, or was not acting in good faith or for a proper purpose in making the person's demand.<sup>132</sup>

#### ***xv. Penalties for Misuse of Information***

Some states also penalize shareholders who misuse information. Florida, for example, provides a \$5,000 civil penalty for any person who "sell[s] or otherwise distribute[s] any information or records inspected under this section, except to the extent that such use is for a proper purpose as defined in subsection (3)."<sup>133</sup> Other states simply admonish the parties:

(a) The use and distribution of any information acquired from records inspected or copied under the rights granted by this chapter or by IC 23-1-30-1 are restricted solely to the proper purpose described with particularity under section 2(c) of this chapter.

(b) This section applies whether the use and distribution are by the shareholder, the shareholder's agent or attorney, or any person who obtains the information (directly or indirectly) from the shareholder or agent or attorney.

(c) The shareholder, the shareholder's agent or attorney, and any other person who obtains the information shall use reasonable care to ensure that the restrictions imposed by this section are observed.<sup>134</sup>

Massachusetts states that a corporation may impose reasonable restrictions on the use or distribution of records by a demanding shareholder.<sup>135</sup>

Utah provides the following:

A shareholder or director may not use any information obtained through the inspection or copying of records permitted by Subsection (2) for any purposes other than those set forth in a demand made under Subsection (3).<sup>136</sup>

#### ***xvi. Protective Orders***

Minnesota provides for protective orders in certain circumstances:

On application of the corporation, a court in this state may issue a protective order permitting the corporation to withhold portions of the records of proceedings of the board for a reasonable period of time, not to exceed 12 months, in order to prevent premature disclosure of confidential information which would be likely to cause competitive injury to the cor-

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132. ALASKA STAT. § 10.06.450(c) (1989). Alabama, New Mexico, and Rhode Island are similar. ALA. CODE § 10A-2-16.02(c) (2009); N.M. STAT. ANN. § 53-11-50 (1983); 7 R. I. GEN. LAWS § 7-1.2-1502(c) (2005).

133. FLA. STAT. § 607.1602(7) (1997).

134. IND. CODE § 23-1-52-5 (1986). Minnesota is similar. MINN. STAT. § 302A.461, subd. 4b (2010).

135. MASS. GEN. LAWS ch. 156D, § 16.03(e) (2004).

136. UTAH CODE ANN. § 16-10a-1602(7) (West 1992).

poration. A protective order may be renewed for successive reasonable periods of time, each not to exceed 12 months and in total not to exceed 36 months, for good cause shown. In the event a protective order is issued, the statute of limitations for any action which the shareholder, beneficial owner, or holder of a voting trust certificate might bring as a result of information withheld automatically extends for the period of delay. If the court does not issue a protective order with respect to any portion of the records of proceedings as requested by the corporation, it shall award reasonable expenses, including attorney's fees and disbursements, to the shareholder, beneficial owner, or holder of a voting trust certificate.<sup>137</sup>

### *B. Limited Liability Companies*

#### *i. General Requirements*

As with corporate inspection statutes, the statutes governing the inspection of the books and records of an LLC share many characteristics.

- Inspection must be at a reasonable time.
- Although not as common in LLC statutes as in the corporate context, 22 state LLC statutes permit a member to use an agent when examining books and records. This article discusses issues that arise in a state that does not permit the use of agents by statute if a member wants to use an agent.<sup>138</sup>
- Some LLC statutes permit a dissociated member or the legal representative of a deceased or incapacitated member to inspect books and records — in the case of a dissociated member, only for the period the person was a member.
- Some LLC statutes also extend inspection rights to the legal representative of a member that is an entity and that has been dissolved or terminated.
- A few LLC statutes extend information rights to assignees or transferees.

This article discusses the differences among the LLC statutes below.

#### *ii. Requirement that the Member Pay the Costs of the Inspection*

Some LLC statutes require the member seeking inspection to pay the costs of copying records.<sup>139</sup>

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137. MINN. STAT. § 302A.461, subd. 4a. North Dakota has a similar statute. N.D. CENT. CODE § 10-19.1-84(8) (2011).

138. See *infra* Part IV.E (Right to Use an Agent When Statute is Silent).

139. These statutes are ALA. CODE § 10A-5A-4.09(d) (2014) (Alabama); ARK. CODE ANN. § 4-32-405(b) (1993) (Arkansas) (stating: "Upon reasonable request, a member may, at the member's own expense inspect and copy during ordinary business hours, any limited liability company record, wherever the record is located."); CONN. GEN. STAT. § 34-255(e) (2017) (Connecticut); D.C. CODE § 29-



### *iii. Restrictions on Information Rights Permitted by Statute*

All LLC statutes allow some inspection rights to members and managers. However, LLC statutes often allow the LLC to establish reasonable standards for the examination of the LLC's books and records. For example, the Delaware LLC statute provides that a member's right to information is subject to reasonable standards:

Subject to such reasonable standards (including standards governing what information and documents at what time and location and at whose expense) as may be set forth [in an LLC agreement] or otherwise established by the manager, or if there is no manager, then by the members.<sup>140</sup>

The Delaware LLC statute further provides that the manager of a LLC may keep confidential from the members any information the manager reasonably believes to be the following:

[I]n the nature of trade secrets or other information the disclosure of which the manager in good faith believes is not in the best interest of the limited liability company or could damage the limited liability company or its business or which the limited liability company is required by law or by agreement with a third party to keep confidential.<sup>141</sup>

Texas states that a company agreement “may not unreasonably restrict a person's right of access to records and information.”<sup>142</sup>

The author believes a restriction that would be permitted under the Delaware statute would be a reasonable restriction under Texas law. Colorado law<sup>143</sup> and

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804.10(d) (2013) (District of Columbia); FLA. STAT. § 605.0410(6) (2016) (Florida); GA. CODE ANN. § 14-11-313(2) (1993) (Georgia) (similar to Arkansas); HAW. REV. STAT. § 428-408(a) (1996) (Hawaii); IDAHO CODE § 30-25-410(e) (2015) (Idaho); 805 ILL. COMP. STAT. 180/10-15(e) (2017) (Illinois); IND. CODE § 23-18-4-8(b) (Indiana) (similar to Arkansas); IOWA CODE § 489.410(4) (2009) (Iowa); KY. REV. STAT. ANN. § 275.185(2) (West 2013) (Kentucky) (similar to Arkansas); LA. STAT. ANN. §12:1319(B)(1) (1992) (Louisiana) (similar to Arkansas); ME. STAT. tit 31, § 1558(3) (2011) (Maine); MASS. GEN. LAWS ch. 156C, § 9(b) (Massachusetts); MICH. COMP. LAWS § 450.4503(3) (2010) (Michigan) (similar to Arkansas); MINN. STAT. § 322C.0410, subd. 4 (Minnesota); Mo. Rev. Stat. § 347.091(2)(1) (1993) (Missouri) (similar to Arkansas); MONT. CODE ANN. § 35-8-405(2)(a) (1999) (Montana) (similar to Arkansas); NEV. REV. STAT. § 86.241(4) (2015) (Nevada); N.H. REV. STAT. ANN. § 304-C:55(II) (2013) (New Hampshire) (operating agreement may set forth at whose expense records are to be provided); N.J. STAT. ANN. § 42:2C-40(d) (2012) (New Jersey); N.M. STAT. ANN. § 53-19-19(B) (1993) (New Mexico) (similar to Arkansas); N.Y. LTD. LIAB. CO. LAW § 1102(b) (McKinney 1994) (New York) (similar to Arkansas); N.C. GEN. STAT. § 57D-3-04(e) (2014) (North Carolina) (LLC may require the member to pay); OKLA. STAT. tit. 18, § 2021(B)(1) (1993) (Oklahoma); OR. REV. STAT. § 63.777(3) (1993) (Oregon); 15 PA. STAT. AND CONST. STAT. ANN. § 8850(e) (West 2017) (Pennsylvania); 7 R. I. GEN. LAWS § 7-16-22(b)(1) (1997) (Rhode Island); S.C. CODE ANN. § 33-44-408(a) (1996) (South Carolina) (company may impose a reasonable charge); S.D. CODIFIED LAWS § 47-34A-408(a) (2010) (South Dakota) (company may impose a reasonable charge); TENN. CODE ANN. § 48-228-103(c) (1994) (Tennessee); TEX. BUS. ORGS. CODE ANN. § 101.502(a) (West 2006) (Texas); UTAH CODE ANN. § 48-3a-410(5) (Utah); WIS. STAT. § 183.0405(2) (2017) (Wisconsin); WYO. STAT. ANN. § 17-29-410(d) (2010) (Wyoming).

140. DEL. CODE ANN. tit. 6, § 18-305(a) (2014).

141. *Id.* § (c). For a case illustrating what may happen if an advisor fails to include such a permitted restriction in the company agreement, see *supra* notes 3–9 and accompanying text.

142. TEX. BUS. ORGS. CODE ANN. § 101.054(e).

New York<sup>144</sup> law are similar. The California limited partnership statute permits similar restrictions.<sup>145</sup> The California limited liability statute does not contain such a provision. RULLCA §410(a)(2)(B) would appear to permit such a provision,<sup>146</sup> and California must have decided to omit that provision when it adopted RULLCA. It may be that the RULLCA provision was thought to be unnecessary. California provides only limited inspection rights to members. A California LLC is required to make available for inspection and copying to a member who requests for a purpose reasonably related to interest of that person as a member, any of the records required to be maintained by § 17701.13.<sup>147</sup>

The Alabama LLC statute contains a restrictive provision similar to Delaware's,<sup>148</sup> as does Colorado.<sup>149</sup> Connecticut's LLC Act permits similar restrictions<sup>150</sup> and also imposes the duty to provide information to members.<sup>151</sup> The District of Columbia and Idaho LLC statutes are substantially the same as Connecticut.<sup>152</sup> The Florida LLC statute states the following:

In addition to a restriction or condition stated in the operating agreement, a limited liability company, as a matter within the ordinary course of its activities and affairs, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure

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143. COLO. REV. STAT. § 7-80-408(3) (2007).

144. N.Y. LTD. LIAB. CO. LAW § 1102(c).

145. CAL. CORP. CODE §§ 15903.06(g), 15904.07(f) (West 2015).

146. REVISED UNIF. LTD. LIAB. CO. ACT § 410(a)(2)(B) (UNIF. LAW COMM'N 2013) (states that the company shall furnish: on demand, any other information concerning the company's activities, financial condition, and other circumstances, *except to the extent the demand or information demanded is unreasonable or otherwise improper under the circumstances*) (emphasis added).

147. CAL. CORP. CODE § 17704.10(b) (the operating agreement may not vary a member's rights under § 17704.10); § 17701.10(d). § 17701.13(d) requires the LLC to maintain:

- (1) A current list of the full name and last known business or residence address of each member and of each transferee set forth in alphabetical order, together with the contribution and the share in profits and losses of each member and transferee.
- (2) If the limited liability company is a manager-managed limited liability company, a current list of the full name and business or residence address of each manager.
- (3) A copy of the articles of organization and all amendments thereto, together with any powers of attorney pursuant to which the articles of organization or any amendments thereto were executed.
- (4) Copies of the limited liability company's federal, state, and local income tax or information returns and reports, if any, for the six most recent fiscal years.
- (5) A copy of the limited liability company's operating agreement, if in writing, and any amendments thereto, together with any powers of attorney pursuant to which any written operating agreement or any amendments thereto were executed.
- (6) Copies of the financial statement of the limited liability company, if any, for the six most recent fiscal years.
- (7) The books and records of the limited liability company as they relate to the internal affairs of the limited liability company for at least the current and past four fiscal years.

148. ALA. CODE § 10A-5A-4.09(g) (2014).

149. COLO. REV. STAT. § 7-80-408(3) (2007). The Colorado LLC Act also permits the operating agreement to impose restrictions on the information rights so long as the restrictions imposed are not unreasonable. *Id.* § (2)(b).

150. CONN. GEN. STAT. § 34-255i(i) (2017).

151. *Id.* § (a)(3). See discussion *infra* Part V.B.iv (Propriety of Placing Obligation to Provide Information on Members).

152. D.C. CODE § 29-804.10 (2013). § 29.801.07(c)(6) states that an operating agreement may not "unreasonably restrict the duties and rights stated in § 29-804.10."

and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the company has the burden of proving reasonableness. This subsection does not apply to the request by a member for the records described in subsection (1).<sup>153</sup>

The Illinois LLC statute is similar to Florida's in this regard.<sup>154</sup> By contrast to the above LLC statutes, the Georgia LLC statute states that a member may, "at the member's own expense, inspect and copy *any limited liability company record* upon reasonable request during ordinary business hours."<sup>155</sup>

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153. FLA. STAT. § 605.0410(10) (2016) (the records described in subsection (1) are basic information about the LLC:

(1) A limited liability company shall keep at its principal office or another location the following records:

- (a) A current list of the full names and last known business, residence, or mailing addresses of each member and manager.
- (b) A copy of the then-effective operating agreement, if made in a record, and all amendments thereto if made in a record.
- (c) A copy of the articles of organization, articles of merger, articles of interest exchange, articles of conversion, and articles of domestication, and other documents and all amendments thereto, concerning the limited liability company which were filed with the department, together with executed copies of any powers of attorney pursuant to which any articles of organization or such other documents were executed.
- (d) Copies of the limited liability company's federal, state, and local income tax returns and reports, if any, for the 3 most recent years.
- (e) Copies of the financial statements of the limited liability company, if any, for the 3 most recent years.
- (f) Unless contained in an operating agreement made in a record, a record stating the amount of cash and a description and statement of the agreed value of the property or other benefits contributed and agreed to be contributed by each member, and the times at which or occurrence of events upon which additional contributions agreed to be made by each member are to be made).

IDAHO CODE § 30-25-410(h) (2015) (The operating agreement may not unreasonably restrict the duties and rights under § 30-25-410, but the operating agreement may impose reasonable restrictions on the availability and use of information obtained under that section and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use). The Florida limited liability company statute provides that an operating agreement may not:

Unreasonably restrict the duties and rights stated in § 605.04.10, but the operating agreement may impose reasonable restrictions on the availability and use of information obtained under that section and may define appropriate remedies, including liquidated damages, for a breach of a reasonable restriction on use.

FLA. STAT. § 605.0105(3)(h).

154. 805 ILL. COMP. STAT. 180/10-15(h) (2017).

155. GA. CODE ANN. § 14-11-313(2)(A) (1993). The Georgia LLC statute does not define "limited liability company record." Presumably, the phrase includes at least the records required by § 14-11-313(1):

- (1) Each limited liability company shall keep at its principal office the following:
  - (A) A current list of the name and last known address of each member and manager;
  - (B) Copies of records that would enable a member to determine the relative voting rights, if any, of the members;
  - (C) A copy of the articles of organization, together with any amendments thereto;
  - (D) Copies of the limited liability company's federal, state, and local income tax returns, if any, for the three most recent years;
  - (E) A copy of any operating agreement that is in writing, together with any amendments thereto; and
  - (F) Copies of financial statements, if any, of the limited liability company for the three most recent years.

The Hawaii LLC statute contains a simple records provision,<sup>156</sup> and provides that the operating agreement may not unreasonably restrict a right to information or access to records under § 428-408.<sup>157</sup>

Kansas provides that a member's inspection rights are "subject to such reasonable standards, including standards governing what information and documents are to be furnished at what time and location and at whose expense, as may be set forth in an operating agreement or otherwise established by the manager or, if there is no manager, then by the members."<sup>158</sup> Kansas also provides the following:

The manager of a limited liability company shall have the right to keep confidential from the members, for such period of time as the manager deems reasonable, any information which the manager reasonably believes to be in the nature of trade secrets or other information the disclosure of which the manager in good faith believes is not in the best interest of the limited liability company or could damage the limited liability company or its business or which the limited liability company is required by law or by agreement with a third party to keep confidential.<sup>159</sup>

Kansas further states the following:

The rights of a member or manager to obtain information as provided in this section may be restricted in an original operating agreement or in any subsequent amendment approved or adopted by all of the members or in compliance with any applicable requirements of the operating agreement.<sup>160</sup>

Kentucky provides the following restriction:

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156. HAW REV. STAT. § 428-408 (1996):

(a) A limited liability company shall provide members and their agents and attorneys access to any of its records at reasonable locations specified in the operating agreement. The company shall provide former members and their agents and attorneys access for proper purposes to records pertaining to the period during which they were members. The right of access includes the opportunity to inspect and copy records during ordinary business hours. The company may impose a reasonable charge, limited to the costs of labor and material, for copies of records furnished.

(b) A limited liability company shall furnish to a member, and to the legal representative of a deceased member or member under legal disability:

(1) Without demand, information concerning the company's business or affairs reasonably required for the proper exercise of the member's rights and performance of the member's duties under the operating agreement or this chapter; and

(2) On demand, other information concerning the company's business or affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

(c) A member has the right, upon a signed record given to the limited liability company, to obtain at the company's expense a copy of any operating agreement in record form.

157. *Id.* § 428-103(b)(1).

158. KAN. STAT. ANN. § 17-7640(a) (2014).

159. *Id.* § (c).

160. *Id.* § (g).

A written operating agreement may impose reasonable limitations upon the inspection and use of any record of or information with respect to a limited liability company. Except as to limitations set forth in a written operating agreement to which a member requesting information has assented, the limited liability company bears the burden of proof in demonstrating the reasonableness of any restrictions imposed.<sup>161</sup>

Subject to the restriction quoted immediately above, Kentucky provides that “upon reasonable written request to the limited liability company, a member may, at the member’s own expense, inspect and copy during ordinary business hours any limited liability company record, where the record is located or at a reasonable location.”<sup>162</sup>

The Maryland LLC Act has a provision similar to the above permitting reasonable restrictions on information rights,<sup>163</sup> and states the following:

Unless a member seeking information executes a confidentiality or non-disclosure agreement reasonably acceptable to the limited liability company restricting the use and disclosure of the information, a limited liability company shall have the right to keep confidential from members, for a reasonable period of time:

- (1) Any information that the limited liability company reasonably believes to be in the nature of trade secrets;
- (2) Information the disclosure of which the limited liability company in good faith believes:
  - (i) Is not in the best interest of the limited liability company; or
  - (ii) Could damage the limited liability company or its business; or
- (3) Information the limited liability company is required by law or by agreement with a third party to keep confidential.<sup>164</sup>

Maine’s LLC statute is similar to Maryland’s,<sup>165</sup> Minnesota’s LLC statute is similar to Kentucky’s in the type of restrictions it allows.<sup>166</sup>

The Missouri LLC statute information rights provision does not contain a restriction like those of Minnesota, Kentucky, and others.<sup>167</sup> Moreover, it is unclear what, if any, restrictions could be included in the operating agreement of a Missouri LLC because Missouri Revised Statute § 347.081(1) states the following:

The member or members of a limited liability company shall adopt an operating agreement containing such provisions as such member or members may deem appropriate, subject only to the provisions of sections 347.010 to 347.187 and other law. The operating agreement may contain any provision, not inconsistent with law, relating to the conduct

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161. *Id.* § 275.185(5).

162. *Id.* § (2).

163. MD. CODE ANN., CORPS. & ASS’NS § 4A-406(c) (West 2012).

164. *Id.* § (d).

165. ME. REV. STAT. tit. 31, § 1558(6) (2011).

166. MINN. STAT. § 322C.0410, subd. 7 (2015). An operating agreement may not “unreasonably restrict the duties and rights stated in [§] 322C.0410.” *Id.* § 322C.0110, subd. 3.

167. MO. REV. STAT. § 347.091 (1993).

of the business and affairs of the limited liability company, its rights and powers, and the rights, powers and duties of its members, managers, agents or employees.<sup>168</sup>

The Missouri information rights provision is one of the sections included in the “subject only to the provisions of sections . . . “ in the quoted provision.

The Mississippi LLC statute provides that a member’s demand for information must be “for any good faith purpose reasonably related to the member’s interest as a member of the limited liability company”<sup>169</sup> and reads as follows:

subject to such reasonable standards, including standards governing what information and documents are to be furnished at what time and location and at whose expense, as may be set forth in an operating agreement or otherwise established by the manager or, if there is no manager, then by the members.<sup>170</sup>

The Montana LLC statute inspection provision provides that an LLC will keep specified records at its principal place of business “[u]nless otherwise provided in the articles of organization or a written operating agreement.”<sup>171</sup> However, “[a] member may, at the member’s own expense, inspect and copy *any* limited liability company record, *wherever the record is located*, upon reasonable request during ordinary business hours.”<sup>172</sup> The operating agreement of a Montana LLC may not “unreasonably restrict a right to information or access to records under 35-8-405.”<sup>173</sup>

The Nebraska LLC statute states the following:

In addition to any restriction or condition stated in its operating agreement, a limited liability company, as a matter within the ordinary course of its activities, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the company has the burden of proving reasonableness.<sup>174</sup>

The Nevada LLC statute contains an unusual provision:

The rights authorized by NRS 86.241 may be denied to a member or manager, as the case may be, or to such person’s attorney or other agent, upon the refusal of the member or manager to furnish to the limited-liability company an affidavit that the provision or examination of rec-

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168. *Id.* § 347.081(1).

169. MISS. CODE ANN. § 79-29-315(1) (2011).

170. *Id.*

171. MONT. CODE ANN. § 35-8-405(1) (1999).

172. *Id.* § (2)(a) (emphasis added).

173. *Id.* § 35-8-109(3)(a).

174. NEB. REV. STAT. § 21-139(g) (2011). In Nebraska, the operating agreement may not unreasonably restrict the duties and rights stated in section 21-139.” § 21-110)(b)(6).

ords is not desired for a purpose which is in the interest of a business or object other than the business of the company and that such person has not at any time sold or offered for sale any list of members of any domestic or foreign limited-liability company or any list of stockholders of any domestic or foreign corporation or aided or abetted any person in procuring any such record for any such purpose.<sup>175</sup>

Nevada permits a number of other limits on information rights. The Nevada statute first makes any request of a member or manager subject to the requirement of a “reasonable demand” and that it be for a purpose reasonably related to the member’s interest as a member of the LLC or, in the case of a manager, a purpose reasonably related to the manager’s duties as manager.<sup>176</sup> Further, any demand by a member or manager is “subject to such reasonable standards regarding at what time and location and at whose expense records are to be furnished as may be set forth in the articles of organization or in an operating agreement.”<sup>177</sup>

Then, the demanding member or manager must comply with the following:

Any demand by a member or manager under this section must be in writing and must state the purpose of such demand. When a demanding member seeks to obtain or a manager seeks to examine the records described in subsection 2, the demanding member or manager must first establish that:

- (a) The demanding member or manager has complied with the provisions of this section respecting the form and manner of making a demand for obtaining or examining such records; and
- (b) The records sought by the demanding member or manager are reasonably related to the member’s interest as a member or the manager’s rights, powers and duties as a manager, as the case may be.<sup>178</sup>

Finally, the Nevada statute provides the following:

The rights of a member to obtain or a manager to examine records as provided in this section may be restricted or denied entirely in the articles of organization or in an operating agreement adopted by all of the members or by the sole member or in any subsequent amendment adopted by all of the members at the time of amendment.<sup>179</sup>

The Nevada LLC Act’s provision regarding operating agreements does not restrict what the operating agreement may do to information rights.<sup>180</sup>

The North Carolina LLC statute’s provision on information rights provides the following restriction:

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175. NEV. REV. STAT. § 86.243(1) (2009).  
176. *Id.* §§ 86.241(2)–(3).  
177. *Id.* § (4).  
178. *Id.* § (5).  
179. *Id.* § (7).  
180. *Id.* § 86.286.

The exercise of a member's rights to inspect and copy the LLC's records is to take place at the LLC's principal office, or other location or locations selected by the LLC, during the LLC's regular hours of operation unless the LLC directs otherwise. The LLC may require a member to pay the labor, material, and other costs it incurs or would otherwise incur to comply with the member's demand to inspect and copy the LLC's records. The LLC (i) need not disclose to any member or any agent or representative of a member any information related to any other interest owner, except to the extent required by subdivision (3) of subsection (a) of this section, but subject to the restrictions that may be imposed under clauses (ii) and (iii) of this subsection, or is not otherwise related to the member's ownership interest; (ii) may impose conditions, restrictions, limitations, and standards on the exercise of a member's inspection and other information rights, including redacting names and other confidential information, providing summaries of documents, or requiring the member to enter an agreement to not disclose and otherwise maintain the confidentiality of the information provided; and (iii) need not disclose or otherwise make available to a member, manager, or other company official trade secrets or other confidential information of a nature that its disclosure could adversely affect the LLC, to the extent that the managers or other applicable company officials determine the information cannot be adequately safeguarded by other means, until either there no longer is a risk that its disclosure will adversely affect the LLC or the LLC becomes able to protect itself in some other way.<sup>181</sup>

The North Dakota LLC inspection rights provision states, in part, the following:

In addition to any restriction or condition stated in its operating agreement, a limited liability company, as a matter within the ordinary course of its activities, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the company has the burden of proving reasonableness.<sup>182</sup>

New Hampshire provides that LLC information rights are the following:

[S]ubject to any reasonable standards that are set forth in an operating agreement or established by the manager or, if there is no manager, by the members. These may include standards governing what information

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181. N. C. GEN. STAT. §§ 57D-3-04(e)–(f) (2014).

182. N.D. CENT. CODE § 10-32.1-42(7) (2015). The operating agreement may not “[u]nreasonably restrict the duties and rights stated in section 10-32.1-42.” *Id.* § 10-32.1-13(3)(f).



and documents are to be furnished, at what time and location, and at whose expense.<sup>183</sup>

Further, LLC information rights in New Hampshire are subject to the following:

The manager of a limited liability company shall have the right to keep confidential from the members, for such period of time as the manager deems reasonable:

- (a) Information which the manager reasonably believes to be in the nature of trade secrets;
- (b) Other information if the manager believes in good faith that the disclosure (1) is not in the best interest of the limited liability company or (2) could damage the limited liability company or its business; and
- (c) Information which the limited liability company is required by law or by agreement with a third party to keep confidential.<sup>184</sup>

The New Hampshire LLC statute does not have the provision that most LLC statutes have limiting the effect of an operating agreement. The New Jersey LLC statute contains a permissible limitation on information rights like that of North Dakota.<sup>185</sup>

New York provides that any member of an LLC may act as follows:

[S]ubject to reasonable standards as may be set forth in, or pursuant to, the operating agreement, inspect and copy at his or her own expense, for any purpose reasonably related to the member's interest as a member, the records referred to in subdivision (a) of this section, any financial statements maintained by the limited liability company for the three most recent fiscal years and other information regarding the affairs of the limited liability company as is just and reasonable.<sup>186</sup>

The New York statute additionally states the following:

If provided in the operating agreement, certain members or managers shall have the right to keep confidential from other members for such period of time as such certain members or the managers deem reasonable, any information which such certain members or the managers reasonably believe to be in the nature of trade secrets or other information the disclosure of which such certain members or the managers in good faith believe is not in the best interest of the limited liability company or its business or which the limited liability company is required by law or by agreement with a third party to keep confidential.<sup>187</sup>

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183. N.H. REV STAT. ANN. § 304-C:55(II) (2013).

184. *Id.* § (IV).

185. N.J. Stat. Ann. § 42:2C-40(g) (West 2013).

186. N.Y. LTD. LIAB. CO. LAW § 1102(b) (McKinney 1994).

187. *Id.* § (c).

Other than the provision in the information rights section quoted above, the New York LLC statute does not provide authority for the operating agreement to vary the information rights provisions.<sup>188</sup>

The Ohio LLC statute provides that a member is entitled to inspect a broad range of information “[s]ubject to any reasonable standards stated in the operating agreement or otherwise established by the members.”<sup>189</sup> The Ohio statute further states the following:

The reasonable standards authorized by division (A)(1) of this section may include standards governing the type and nature of information and documents that are to be furnished, the time and location at which they are to be furnished, and the person who is to pay the expense of furnishing them.<sup>190</sup>

Ohio goes on to authorize the following:

Unless otherwise provided in the operating agreement, a limited liability company has the right to keep confidential from its members for a reasonable period of time any information that the company reasonably considers to be in the nature of trade secrets or any other information as follows:

- (1) Information the disclosure of which the company in good faith reasonably believes is not in the best interest of the company or could damage the company or its business;
- (2) Information that the company is required by law or by agreement with a third person to keep confidential.<sup>191</sup>

The books and records provision of the Oklahoma LLC Act does not contain any protective language.<sup>192</sup> The operating agreement provision of the Oklahoma LLC Act does not restrict what the operating agreement may do about access to books and records.<sup>193</sup> Like Oklahoma, the books and records provisions of the Oregon LLC Act do not contain any protective language.<sup>194</sup> The Oregon provision regarding operating agreements is one of the shortest of all and does not restrict what the operating agreement may do with regard to books and records: “The operating agreement, if any, may provide for the regulation and management of the affairs of the limited liability company in any manner not inconsistent with law or the articles of organization and may be in writing or oral.”<sup>195</sup>

It appears, therefore, that the operating agreements of Oklahoma and Oregon LLCs could restrict information rights however the members desired. It is probably true that some restrictions members might dream up at the margins would be

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188. *Id.* § 417.

189. OHIO REV. CODE ANN. § 1705.22(A)(1) (West 1994).

190. *Id.* § (A)(2).

191. *Id.* § (B). In Ohio, the operating agreement may not “[u]nreasonably restrict the right of access to books and records.” *Id.* § 1705.081(B)(2).

192. OKLA. STAT. tit. 18, § 2021 (1993).

193. *Id.* § 2012.2.

194. OR. REV. STAT. §§ 63.771, 63.777 (1991 & 1993).

195. *Id.* § 63.057.

found by a court to violate public policy, but most commercially reasonable restrictions should certainly be permitted.

Like many states, Pennsylvania includes the following in the books and records provision of its LLC statute:

In addition to any restriction or condition stated in the operating agreement, a limited liability company, as a matter within the ordinary course of its activities and affairs, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing non-disclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the company has the burden of proving reasonableness.<sup>196</sup>

Pennsylvania allows an operating agreement to “impose reasonable restrictions on the availability and use of information obtained under section 8850 and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use.”<sup>197</sup>

Rhode Island’s books and records provision is broad and does not contain any limiting language.<sup>198</sup> The Rhode Island LLC statute also does not contemplate that an LLC will necessarily have an operating agreement. The Rhode Island LLC statute in its powers section simply authorizes, but does not require, a LLC to have an operating agreement: “To 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 business and affairs of the limited liability company.”<sup>199</sup>

Although the South Dakota LLC Act’s provision on books and records<sup>200</sup> does not contain any restrictive language, the South Dakota LLC Act permits an operating agreement to “restrict a right to information or access to records” if the restriction is not manifestly unreasonable.<sup>201</sup>

The Utah LLC Act provides the following:

In addition to any restriction or condition stated in the operating agreement, a limited liability company, as a matter within the ordinary course of its activities and affairs, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing non-disclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this Subsection (9),

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196. 15 PA. CONS. STAT. § 8850(h) (2017).

197. *Id.* § 8815(d)(1)(iii).

198. R.I. GEN. LAWS § 7-16-22 (1997) (the Rhode Island statute provides:

A member may:

- (1) At the member’s own expense, inspect and copy any limited liability company records required to be kept under this section upon reasonable request during ordinary business hours; and
- (2) Obtain from time to time, upon reasonable request, information regarding the state of the business and financial condition of the limited liability company).

199. *Id.* § 7-16-4(12).

200. S.D. CODIFIED LAWS § 47-34A-408 (2010).

201. *Id.* § 47-34A-103(c)(1).

the limited liability company has the burden of proving reasonableness.<sup>202</sup>

The Utah LLC Act also provides that an operating agreement may not “unreasonably restrict the duties and rights under [s]ection 48-3a-410, but the operating agreement may impose reasonable restrictions on the availability and use of information obtained under that section and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use.”<sup>203</sup>

The Vermont LLC Act states that “a limited liability company may impose reasonable restrictions and conditions on access to and use of information to be furnished under [its information rights section], including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient.”<sup>204</sup> Further, the Vermont LLC Act provides that an operating agreement may not do the following:

[U]nreasonably restrict the duties and rights with respect to books, records, and other information stated in section 4058 of this title, but the operating agreement may impose reasonable restrictions on the availability and use of information obtained under that section and may define appropriate remedies, including liquidated damages, or a breach of any reasonable restriction on use.<sup>205</sup>

The Virginia LLC Act’s information rights statute provides the following:

[T]he rights of a member to obtain information as provided in such [statute] may be restricted in writing in an original operating agreement or any subsequent written amendment to an operating agreement approved or adopted by all of the members and in compliance with any applicable requirements of the operating agreement.<sup>206</sup>

The Virginia LLC Act provides that an operating agreement “may contain any provisions regarding the affairs of a limited liability company and the conduct of its business to the extent that such provisions are not inconsistent with the laws of the Commonwealth or the articles of organization.”<sup>207</sup>

The Washington LLC Act’s information rights provision<sup>208</sup> does not contain any express restrictive language like many LLC statutes do, but the Washington statutory provision regarding operating agreements implies that restrictions may be imposed by stating that an operating agreement may “not unreasonably restrict the right to records or information under RCW 25.15.136.”<sup>209</sup>

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202. UTAH CODE ANN. § 48-3a-410(9) (West 2014).

203. *Id.* § 48-3a-112(3)(h).

204. VT. STAT. ANN. tit. 11, § 4058(h)(1) (2015).

205. *Id.* § 4003(b)(6).

206. VA. CODE ANN. § 13.1-1028(C) (2016).

207. *Id.* § 13.1-1023(A)(1).

208. WASH. REV. CODE § 25.15.136 (2016).

209. *Id.* § 25.15.018(3)(g).

The Wisconsin LLC Act provision on information does not contain any restrictions other than requiring that a request be reasonable and provide the following:

Members or, if the management of the limited liability company is vested in one or more managers, managers shall provide, to the extent that the circumstances render it just and reasonable, true and full information of all things affecting the members to any member or to the legal representative of any member upon reasonable request of the member or the legal representative.<sup>210</sup>

The Wisconsin Act does not have a provision regarding operating agreements.

The West Virginia Act provision on information does not contain any restriction other than the requirement that the member seeking information have a proper purpose.<sup>211</sup> Like the Washington statute, however, the West Virginia statute implies that restrictions are permissible by stating that an operating agreement may not “unreasonably restrict a right to information or access to records.”<sup>212</sup>

Wyoming provides the following:

In addition to any restriction or condition stated in its operating agreement, a limited liability company, as a matter within the ordinary course of its activities, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the company has the burden of proving reasonableness.<sup>213</sup>

Wyoming further provides that an operating agreement may not unreasonably restrict the rights and duties stated in the information rights provision.<sup>214</sup>

#### ***iv. Propriety of Placing Obligation to Provide Information on Members***

Under RULLCA, in a member-managed LLC, the obligation of the company to furnish certain information without demand, and other information on demand also applies to each member to the extent the member knows any such information.<sup>215</sup> This is not typical of adopted LLC statutes that are not based on RULLCA. Moreover, the Prefatory Note and Commentary to RULLCA do not explain why this provision was included, other than the statement that “ULLCA’s [the predecessor of RULLCA] drafting relied substantially on the then recently adopted Revised Uniform Partnership Act (“RUPA”), and this reliance was espe-

210. WIS. STAT. § 183.0405(3) (1995).

211. W. VA. CODE § 31B-4-408(a) (1996).

212. *Id.* § 31B-1-103(b)(1).

213. WYO. STAT. ANN. § 17-29-410(g) (2010).

214. *Id.* § 17-29-410(c)(vi).

215. *See supra* note 57 and accompanying text.

cially heavy with regard to member-managed LLCs.”<sup>216</sup> Many non-RULLCA states do not include such a provision.<sup>217</sup> Six of the 18 states that have adopted RULLCA have omitted this provision.<sup>218</sup> The other states that have adopted RULLCA have included RULLCA § 410(a)(3).<sup>219</sup> Some non-RULLCA states have included a similar provision in its LLC statute. Ark. Code § 4-32-405(c) states the following:

Members, if the management of the limited liability company is vested in the members, or managers, if management of the limited liability company is vested in managers, shall render, to the extent the circumstances render it just and reasonable, true and full information of all things affecting the members to any member and to the legal representative of any deceased member or of any member under legal disability.<sup>220</sup>

The Kentucky and Montana LLC Acts contain a provision identical to that of the Arkansas statute in K.R.S. § 275.185 and M.C.A § 35-8-405(3). Virginia has a somewhat broader provision stating that each member has the right to, do the following, *inter alia*:

Obtain from the manager or managers, or if the limited liability company has no manager or managers, from any member or other person with access to such information, from time to time upon reasonable demand (i) true and full 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 federal, state and local income tax returns for each year, and (iii) other information regarding

216. REVISED UNIF. LTD. LIAB. CO. ACT prefatory n. 1 (UNIF. LAW COMM’N 2013).

217. For non-RULLCA states that do not include such a provision, *see, e.g.*, COLO. REV. STAT. § 7-80-408 (2007); DEL. CODE ANN. tit. 6, § 18-305 (2014); TEX. BUS. ORGS. CODE ANN. § 101.502 (2006). Other non-RULLCA states that do not impose a requirement to provide information on members are ARIZ. REV. STAT. § 29-607 (2005) (Arizona); GA. CODE ANN. § 14-11-313 (1993) (Georgia); Haw. Rev. Stat. § 428-408 (1996) (Hawaii); IND. CODE § 23-18-4-8 (2007) (Indiana); KAN. STAT. ANN. § 17-7690 (2014) (Kansas); LA. STAT. ANN. § 12:1319 (1992) (Louisiana); MD. CODE ANN., CORPS. & ASS’NS § 4A-406 (West 1991) (Maryland); ME. REV. STAT. ANN. tit. 31, § 1558 (2011) (Maine); MICH. COMP. LAWS § 450.4503 (2010) (Michigan); MO. REV. STAT. § 347.091 (1993) (Missouri); MISS. CODE ANN. § 79-29-315 (2011) (Mississippi); N.C. GEN. STAT. § 57D-3.04 (2005) (North Carolina); N.H. Rev. Stat. Ann. § 304-c55 (2005) (New Hampshire); N.M. STAT. ANN. § 53-19-19 (1993) (New Mexico); NEV. REV. STAT. § 86.241 (2015) (Nevada); N.Y. LTD. LIAB. CO. LAW § 1102 (McKinney 1994) (New York); OHIO REV. CODE ANN. § 1705.22 (West 1994) (Ohio); OKLA. STAT. tit. 18, § 2021 (1993) (Oklahoma); OR. REV. STAT. §§ 63.771, 63.777 (1999) (Oregon); 7 R.I. GEN. LAWS § 7-16-22 (1997) (Rhode Island); S.D. CODIFIED LAWS § 47-34A-408 (1998) (South Dakota); TENN. CODE ANN. § 48-228-101 (1994) (Tennessee); VT. STAT. ANN. tit. 11, § 4058 (2015) (Vermont); W. VA. CODE § 31B-4-408 (West Virginia).

218. ALA. CODE § 10A-5A-4.09 (1975); CAL. CORP. CODE § 17704.10 (2016); 805 Ill. Comp. Stat. 180/10-15 (2017); S.D. CODIFIED LAWS § 47-34A-408; VT. STAT. ANN. tit. 11, § 4058; WASH. REV. CODE § 25.15.136 (2016).

219. CONN. GEN. STAT. § 34-225i(a)(3) (2012); D.C. CODE § 29-804.10(a)(3) (2013); FLA. STAT. § 605.0416(2)(d) (2013); IDAHO CODE § 30-25-410(a)(3) (2015); IOWA CODE § 489.410(1)(c) (2009); MINN. STAT. § 322C.0410, subd. 1(3) (2015); NEB. REV. STAT. § 21-139(a)(3) (2011); N.J. STAT. ANN. § 42:2C-40a(3) (West 2012); N.D. CENT. CODE § 10-32.1-42(1)(c) (2015); 15 PA. STAT. AND CONS. STAT. ANN. § 8850(a)(3) (West 2017); UTAH CODE ANN. § 48-3a-410(1)(c) (West 2014); WYO. STAT. ANN. § 17-29-410(a)(iii).

220. ARK. CODE ANN. § 4-32-405(c) (1993).

the affairs of the limited liability company, except to the extent the information demanded is unreasonable or otherwise improper under the circumstances.<sup>221</sup>

Wisconsin has a provision similar to those of Arkansas, Kentucky, and Montana:

Members or, if the management of the limited liability company is vested in one or more managers, managers shall provide, to the extent that the circumstances render it just and reasonable, true and full information of all things affecting the members to any member or to the legal representative of any member upon reasonable request of the member or the legal representative.<sup>222</sup>

States that have provisions making members responsible for providing information should reconsider those provisions. Member-managed LLCs may bear some similarities to general partnerships, but they are few, and LLCs are not general partnerships. LLCs, which may be subject to taxes that do not apply to general partnerships,<sup>223</sup> are limited liability entities, and generally have more continuity of life than general partnerships. If a state determines that it is desirable to retain an obligation on members to provide information, careful thought should be given to what standards should apply to a member's obligation. Why should a member who may be more observant, studious, or prescient be obligated to share his information with other members if he has not agreed to do so? Although courts have sometimes likened closely-held corporations to partnerships, no corporate inspection statute puts a disclosure burden on the shareholders.

#### ***v. Inspection Rights of Governing Persons***

The MBCA provides that a director is always entitled to inspect books and records so long as the request is reasonably related to the director's duties and is not for an improper purpose and the director's use of the information would not violate any duty to the corporation.<sup>224</sup> In states that have adopted RULLCA, managers have the rights of members to information that are stated in RULLCA § 410(a):

(1) On reasonable notice, a member may inspect and copy during regular business hours, at a reasonable location specified by the company, any record maintained by the company regarding the company's activities, financial condition, and other circumstances, to the extent the information is material to the member's rights and duties under the operating agreement or this [act].

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221. VA. CODE ANN. § 13.1-1028 (2016).

222. WIS. STAT. § 183.0405(3) (2017).

223. For example, the Texas margin tax does not apply to general partnerships composed solely of individuals that are not limited liability partnerships. *See generally* TEX. TAX CODE ANN. § 171.001 (West 2015). Moreover, general and limited partnerships, but not LLCs, may be exempt from the Texas margin tax if they are passive entities. *Id.* § 171.002(a).

224. MODEL BUS. CORP. ACT § 16.05(a) (AM. BAR ASS'N 2006).

- (2) The company shall furnish to each member:
- (A) without demand, any information concerning the company's activities, financial condition, and other circumstances which the company knows and is material to the proper exercise of the member's rights and duties under the operating agreement or this [act], except to the extent the company can establish that it reasonably believes the member already knows the information; and
- (B) on demand, any other information concerning the company's activities, financial condition, and other circumstances, except to the extent the demand or information demanded is unreasonable or otherwise improper under the circumstances.
- (3) The duty to furnish information under paragraph (2) also applies to each member to the extent the member knows any of the information described in paragraph (2).<sup>225</sup>

Apart from RULLCA, Delaware is one of the states that does provide specific rights for managers. Delaware provides that each manager shall have the right to examine all of the information listed below "for a purpose reasonably related to the position of manager":

- (1) True and full information regarding the status of the business and financial condition of the limited liability company;
- (2) Promptly after becoming available, a copy of the limited liability company's federal, state and local income tax returns for each year;
- (3) A current list of the name and last known business, residence or mailing address of each member and manager;
- (4) A copy of any written limited liability company agreement and certificate of formation and all amendments thereto, together with executed copies of any written powers of attorney pursuant to which the limited liability company agreement and any certificate and all amendments thereto have been executed;
- (5) True and full information regarding the amount of cash and a description and statement of the agreed value of any other property or services contributed by each member and which each member has agreed to contribute in the future, and the date on which each became a member; and
- (6) Other information regarding the affairs of the limited liability company as is just and reasonable.<sup>226</sup>

The information rights of a manager of a Delaware LLC may be restricted by the company agreement.<sup>227</sup> The Kansas and Mississippi statutes are the same as Delaware.<sup>228</sup>

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225. REVISED UNIF. LTD. LIAB. CO. ACT § 410(b)(1) (UNIF. LAW COMM'N 2013).

226. DEL. CODE ANN. tit. 6, §§ 18-305(a)–(b) (2014).

227. *Id.* § (g).

228. KAN. STAT. ANN. §§ 17-7690(b), (g) (2014); MISS. CODE ANN. §§ 79-29-315(2), (7) (2011).



Colorado's LLC statute is substantially the same as Delaware.<sup>229</sup> Colorado provides that the operating agreement may not unreasonably restrict the rights of managers to information.<sup>230</sup>

Nevada's LLC Act includes a provision much like that of Delaware, Colorado, and Kansas:

Each manager of a limited-liability company managed by a manager or managers is entitled to examine from time to time upon reasonable demand, for a purpose reasonably related to the manager's rights, powers and duties as such, the records described in subsection 2.<sup>231</sup>

Unlike the statutes in other states, however, Nevada restricts, or provides possible restrictions on a manager's rights to information, that other states apply only to members:

Any demand by a member or manager under subsection 2 or 3 is subject to such reasonable standards regarding at what time and location and at whose expense records are to be furnished as may be set forth in the articles of organization or in an operating agreement.<sup>232</sup>

Further, the Nevada statute states the following:

Any demand by a member or manager under this section must be in writing and must state the purpose of such demand. When a demanding member seeks to obtain or a manager seeks to examine the records described in subsection 2, the demanding member or manager must first establish that:

- (a) The demanding member or manager has complied with the provisions of this section respecting the form and manner of making a demand for obtaining or examining such records; and
- (b) The records sought by the demanding member or manager are reasonably related to the member's interest as a member or the manager's rights, powers and duties as a manager, as the case may be.<sup>233</sup>

Finally, the Nevada statute says "[t]he rights of a member to obtain or a manager to examine records as provided in this section may be restricted or denied entirely in the articles of organization or in an operating agreement."<sup>234</sup>

Another provision in the Nevada LLC Act suggests that the legislature either is hostile to the idea of information rights or had heard some horror stories about misuse of information rights:

The rights authorized by NRS 86.241 may be denied to a member or manager, as the case may be, or to such person's attorney or other agent,

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229. COLO. REV. STAT. § 7-80-408 (2007).

230. *Id.* § 7-80-108(2)(b).

231. NEV. REV. STAT. § 86.241(3) (2015).

232. *Id.* § (4).

233. *Id.* § (5).

234. *Id.* § (7).

upon the refusal of the member or manager to furnish to the limited-liability company an affidavit that the provision or examination of records is not desired for a purpose which is in the interest of a business or object other than the business of the company and that such person has not at any time sold or offered for sale any list of members of any domestic or foreign limited-liability company or any list of stockholders of any domestic or foreign corporation or aided or abetted any person in procuring any such record for any such purpose.<sup>235</sup>

North Carolina law states as follows:

In connection with any member, manager, or other company official exercising management or other control rights or performing that person's duties to the LLC or the members, the LLC shall provide that person with, or access to, all information related to the applicable matter that is known by the LLC and is material to the proper exercise and performance of those rights and duties.<sup>236</sup>

Oklahoma provides that “[a] manager, for any purpose reasonably related to his position, may inspect and copy any limited liability company records upon reasonable request during ordinary business hours.”<sup>237</sup> Presumably, Oklahoma law would permit the operating agreement to modify this language to some extent. In Oklahoma, the operating agreement governs generally “[t]he rights and duties under the Oklahoma Limited Liability Company Act of a person in the capacity of manager.”<sup>238</sup>

South Carolina provides that an LLC shall furnish to a manager the following:

- (1) Without demand, information concerning the company's business or affairs reasonably required for the proper exercise of the manager's performance of the manager's duties under the operating agreement or this chapter; and
- (2) On demand, other information concerning the company's business or affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.<sup>239</sup>

South Carolina would permit some modification of a manager's information rights. The South Carolina LLC Act states that an operating agreement may restrict a right to information or access to records under § 47-34A-408 if the restriction is not manifestly unreasonable.<sup>240</sup>

235. *Id.* § 86.243(1).

236. N. C. GEN. STAT. § 57D-3-04(c) (2014). In North Carolina, the operating agreement may not “[d]iminish the rights and protections of members under G.S. 57D-3-04(a), except as permitted by and otherwise subject to subsections (b) through (f) of G.S. 57D-3-04.” *Id.* § 57D-2-30(b)(4) (this protection is limited to members, and, accordingly, it appears that North Carolina would permit an operating agreement to restrict a manager's information rights).

237. OKLA. STAT. tit. 18, § 2021(C) (1993).

238. *Id.* § 2012.2(A)(2).

239. S.D. CODIFIED LAWS § 47-34A-4.08(b) (1998).

240. *Id.* § 47-34A-103(c)(1).

Washington provides as follows:

Each manager, or each member of the manager if the manager is a board, committee, or other group of persons, without having any particular purpose for seeking the information, may inspect and copy during regular business hours:

- (a) At the limited liability company's principal office, the records required by subsection (1) of this section; and
- (b) At a reasonable location specified by the limited liability company, any other records maintained by the limited liability company regarding the limited liability company's activities and financial condition, or that otherwise relate to the management of the limited liability company.<sup>241</sup>

In Washington, the operating agreement may not "unreasonably restrict the right to records or information."<sup>242</sup>

This article's review of the statutory provisions governing the rights of a manager to inspect books and records suggests that the company agreement's provisions for limiting or expanding the manager's information rights should be negotiated by any person who is asked to serve as a manager.

#### *vi. Inspection by Member's Agent*

Somewhat surprisingly, not all LLC statutes expressly provide that a member may examine records through an agent.<sup>243</sup> Indeed, RULLCA does not contain such a provision. The right to use an agent was recognized at common law,<sup>244</sup> and perhaps the drafters of RULLCA thought the right was so well established as to not need mentioning. On the other hand, some states that adopted RULLCA added a provision permitting the use of agents. Only 22 LLC statutes permit examination of records through an agent.<sup>245</sup>

241. WASH. REV. CODE § 25.15.136(12) (2016).

242. *Id.* § 25.15.018(3)(g).

243. *See infra* Part V.E (Right to Use an Agent when Statute is Silent).

244. *See* Feick v. Hill Bread Co., 103 A. 813 (N.J. 1918), *aff'd*, 105 A. 725 (N.J. 1919).

245. The statutes are ALA. CODE § 10A-5A-4.09(b) (2014) (Alabama) (RULLCA state); ALASKA STAT. § 10.50.870(a) (1994) (Alaska); DEL. CODE ANN. tit. 6, § 18-305(a) (2014) (Delaware); HAW. REV. STAT. § 428-408(a) (1996) (Hawaii); ME. STAT. tit. 31, § 1558(4) (2011) (Maine); MD. CODE ANN., CORPS & ASS'NS § 4A-406(a) (West 2012) (Maryland); MINN. STAT. § 322C.0410, subd. 5 (2015) (Minnesota) (RULLCA state); NEV. REV. STAT. § 86.241(6) (2015) (Nevada) (but in another illustration of wariness about information rights, Nevada requires:

In every instance where an attorney or other agent of a member or manager seeks to exercise any right arising under this section on behalf of such member or manager, the demand must be accompanied by a power of attorney signed by the member or manager authorizing the attorney or other agent to exercise such rights on behalf of the member or manager); N.J. STAT. ANN. § 42:2C-40(e) (West 2013) (New Jersey); N.M. STAT. ANN. § 53-19-19(B) (1993) (New Mexico); N.C. GEN. STAT. § 57D-3-04(b) (2014) (North Carolina); N.D. CENT. CODE § 10-32.1-42 (2015) (North Dakota) (RULLCA state); OR. REV. STAT. § 63.777(1) (1993) (Oregon); 15 PA. STAT. AND CONS. STAT. ANN. § 8850(f) (West 2016) (Pennsylvania) (RULLCA state); S.C. CODE ANN. § 33-44-408(a) (1996) (South Carolina); S.D. CODIFIED LAWS § 47-34A-408(a) (South Dakota) (RULLCA state); TEX. BUS. ORG. CODE ANN. § 101.502(a) (West 2006) (Texas); UTAH CODE ANN. § 48-3a-410(b) (West 2014) (Utah); Vt. Stat. Ann. tit. 11, § 4058(f)(1) (2015) (Vermont) (RULLCA state); WASH. REV. CODE § 25.15.136(10) (Washington) (RULLCA state); W. VA. CODE §

**vii. Inspection and Copying by Non-Members**

Unincorporated entity statutes often do not provide inspection rights to transferees and assignees. This is not an issue in the corporate context because a transferee of shares receives all the rights associated with the shares. In LLCs and partnerships, the member or partner has a transferable interest, which is only the member or partner's economic rights. The transferee or assignee of a member or partner typically will have no management-of-information rights unless, and until, admitted as a member or partner. Some states provide exceptions to the general rule. For example, some LLC statutes provide that a deceased member's personal representative, or other legal representative who holds the deceased member's transferable interest may, for purposes of settling the estate, exercise the rights of a current member to information.<sup>246</sup>

It is good policy for an LLC statute to provide information rights to the legal representative of a deceased or incapacitated member. Otherwise, the legal representative may face difficulties in carrying out his or her responsibilities. Other states provide that dissociated members may access information relating to the period of their membership.<sup>247</sup> Texas extends information rights to assignees.<sup>248</sup> As this article discusses with respect to transferees,<sup>249</sup> extending information rights to assignees will likely benefit the personal representative of a deceased member, but is not likely to benefit the legal representative of an incapacitated member.<sup>250</sup> The personal representative of a deceased member should be considered an assignee, but the legal representative of an incapacitated member likely would not be.

**viii. Information Rights Extended to Representative of Deceased or Incapacitated Members**

For example, although the Alabama LLC statute provides that inspection rights do not extend to transferees,<sup>251</sup> it does provide that a deceased member's personal representative or other legal representative who holds the deceased member's transferable interest may, for purposes of settling the estate, exercise the rights of a current member to information.<sup>252</sup> Moreover, an individual under legal disability may exercise information rights through a legal representative under the Alabama statute.<sup>253</sup> Alaska,<sup>254</sup> Arkansas,<sup>255</sup> Connecticut,<sup>256</sup> Florida,<sup>257</sup>

31B-4-408(a) (1996) (West Virginia); WYO. STAT. ANN. § 17-29-410(e) (2010) (Wyoming) (RULLCA state).

246. See *infra* notes 251–76 and accompanying text.

247. See *infra* notes 279–301 and accompanying text.

248. TEX. BUS. ORGS. CODE ANN. § 101.502.

249. See *infra* note 272 and accompanying text.

250. Colorado has a potentially useless statute providing that the legal representative of a deceased or incapacitated member “may exercise all the powers of an assignee or transferee of the member.” COLO. REV. STAT. § 7-80-704 (2006) (the Colorado LLC Act provides no meaningful powers to an assignee or transferee).

251. ALA. CODE § 10A-5A-4.09(f) (2014).

252. *Id.* § 10A-5A-5.04.

253. *Id.* § 10A-5A-4.09(e).

254. ALASKA STAT. § 10.50.880 (1994).

255. ARK. CODE ANN. § 4-32-405(c) (1993).

256. CONN. GEN. STAT. § 34-29 (1979).

Hawaii,<sup>258</sup> Indiana,<sup>259</sup> Kentucky,<sup>260</sup> Montana,<sup>261</sup> New Mexico,<sup>262</sup> New York,<sup>263</sup> South Carolina,<sup>264</sup> South Dakota,<sup>265</sup> Washington,<sup>266</sup> Wisconsin,<sup>267</sup> and West Virginia<sup>268</sup> are substantially the same as Alabama. Idaho,<sup>269</sup> Pennsylvania,<sup>270</sup> and Utah<sup>271</sup> extend these rights only to the personal representative of a deceased member.

The California LLC statute extends inspection rights to transferees.<sup>272</sup> It may be noted that, although the term “transferee” would likely be construed to include the personal representative or other successor to a deceased member, the term would not appear to include the legal representative of an incapacitated member because the appointment of a guardian for an incapacitated member, or the assumption of power by an agent named in a power of attorney, typically would not involve a transfer.

Florida’s LLC statute is similar to those of Alabama and the other states listed above, but it also extends inspection rights to the legal representative of a dissolved entity member “[i]f 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.”<sup>273</sup>

The Hawaii LLC statute provides that “[a] limited liability company shall provide members and their agents and attorneys access to any of its records at reasonable locations specified in the operating agreement.”<sup>274</sup> Further, the company is required to do as follows:

[F]urnish to a member, and to the legal representative of a deceased member or member under legal disability:

- (1) Without demand, information concerning the company’s business or affairs reasonably required for the proper exercise of the member’s rights and performance of the member’s duties under the operating agreement or this chapter; and
- (2) On demand, other information concerning the company’s business or affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.<sup>275</sup>

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257. FLA. STAT. § 605.0410(4) (2016).

258. HAW. REV. STAT. § 428-408 (1996).

259. IND. CODE § 23-28-4-8(c) (1986).

260. KY. REV. STAT. ANN. § 275.185(3) (West 2013).

261. MONT. CODE ANN. § 35-8-405(2)(b) (1999).

262. N.M. STAT. ANN. § 53-19-34 (1993).

263. N.Y. LTD. LIAB. CO. LAW § 608 (McKinney 1994).

264. S.C. CODE ANN. § 33-44-408(b) (1996).

265. S.D. CODIFIED LAWS § 47-34A-408(c) (2010).

266. WASH. REV. CODE § 25.15.136(6) (2015).

267. WIS. STAT. § 183.0405(3) (1995).

268. W. VA. CODE § 31B-4-408(b) (1996).

269. IDAHO CODE § 30-25-504 (2015).

270. 15 PA. CONS. STAT. § 8850(c) (2016).

271. UTAH CODE ANN. §§ 48-3a-410(8), 48-3a-504 (West 2013).

272. CAL. CORP. CODE § 17704.10 (2015).

273. FLA. STAT. § 605.0504 (2014).

274. HAW. REV. STAT. § 428-408(a) (1996).

275. *Id.* § (b).

The South Carolina, South Dakota, and Utah LLC statutes are substantially the same as Hawaii.<sup>276</sup>

***ix. Information Rights Extended to Representative of Dissolved or Terminated Entity Member***

In addition to extending information rights to the legal representative of a deceased or incapacitated member, some LLC statutes also extend information rights to the liquidating trustee, or other legal representative of a member who is not an individual who has been dissolved or terminated. These states are New Mexico<sup>277</sup> and New York.<sup>278</sup>

***x. Information Rights Extended to Dissociated Members***

Alabama provides information rights to a dissociated member for the period the person was a member.<sup>279</sup> Connecticut,<sup>280</sup> the District of Columbia,<sup>281</sup> Florida,<sup>282</sup> Hawaii,<sup>283</sup> Idaho,<sup>284</sup> Illinois,<sup>285</sup> Iowa,<sup>286</sup> Maine,<sup>287</sup> Minnesota,<sup>288</sup> Montana,<sup>289</sup> Nebraska,<sup>290</sup> New Jersey,<sup>291</sup> North Dakota,<sup>292</sup> Pennsylvania,<sup>293</sup> Utah,<sup>294</sup> Vermont,<sup>295</sup> and Wyoming<sup>296</sup> provide the same rights, and, as discussed elsewhere, some of these states provide other rights as well.

Oklahoma provides that “[t]he obligations of a limited liability company and its members to an assignee or dissociated member are governed by the operating agreement.”<sup>297</sup> Texas provides assignees of members of LLCs the same inspection

276. S.C. CODE ANN. § 33-44-408 (1996); S.D. CODIFIED LAWS § 47-34A-408 (2010); UTAH CODE ANN. §§ 48-3a-410(3), (6), (8), 48-3a-504 (2013).

277. N.M. STAT. ANN. § 53-19-34 (1993).

278. N.Y. LTD. LIAB. CO. LAW § 608 (1993).

279. ALA. CODE § 10A-5A-4.09 (2015).

280. CONN. GEN. STAT. § 34-255i(c) (2017).

281. D.C. CODE § 29-804.10(c) (2013).

282. FLA. STAT. § 605.0410(4) (2016).

283. HAW. REV. STAT. § 428-408(a) (1996).

284. IDAHO CODE § 30-25-410(c) (2015).

285. 805 ILL. COMP. STAT. 180/10-15(d) (2016).

286. IOWA CODE § 489.410.3 (2008).

287. ME. REV. STAT. ANN. tit. 31, § 1558.2 (2009).

288. MINN. STAT. § 322C.0410, subd. 3 (2014).

289. MONT. CODE ANN. § 35-8-405(2)(b) (1999).

290. NEB. REV. STAT. § 21-139(c) (2010).

291. N.J. Rev. Stat. § 42:2C-40(c) (2012).

292. N.D. CENT. CODE § 10-32.1-42(3) (2015). It appears, however, that the obligation to furnish information to dissociated members may be overridden by the operating agreement:

The obligations of a limited liability company and its members to a person in the capacity of the person as a transferee or dissociated member are governed by the operating agreement. Subject only to any court order issued under section 10-32.1-45, to effectuate a charging order, an amendment to the operating agreement made after a person becomes a transferee or dissociated member is effective with regard to any debt, obligation, or other liability of the limited liability company or its members to the person in the capacity of the person as a transferee or dissociated member. *Id.* § 10-32.1-15.

293. 15 PA. CONS. STAT. § 8850(c) (2016).

294. UTAH CODE ANN. § 48-3a-410(3) (West 2013).

295. VT. STAT. ANN. tit. 11, § 4058(f) (2015).

296. WYO. STAT. ANN. § 17-29-410(c) (2010).

297. OKLA. STAT. tit. 18, § 2012.2(D) (2017).

rights as members.<sup>298</sup> The records members and assignees of a Texas LLC are entitled to inspect are found in TBOC §§ 3.151<sup>299</sup> and 101.501.<sup>300</sup> As this article discusses with respect to transferees,<sup>301</sup> a dissociated member is not an assignee.

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298. TEX. BUS. ORGS. CODE ANN. § 101.502 (West 2003).

299. The records that members and assignees are entitled to inspect under *id.* § 3.151 are:

- (a) Each filing entity shall keep:
    - (1) books and records of accounts;
    - (2) minutes of the proceedings of the owners or members or governing authority of the filing entity and committees of the owners or members or governing authority of the filing entity;
    - (3) at its registered office or principal place of business, or at the office of its transfer agent or registrar, a current record of the name and mailing address of each owner or member of the filing entity; and
    - (4) other books and records as required by the title of this code governing the entity.
  - (b) The books, records, minutes, and ownership or membership records of any filing entity, including those described in Subsection (a)(4), may be in written paper form or another form capable of being converted into
- The records required by Subsection (a)(2) need not be maintained by a limited partnership or a limited liability company except to the extent required by its governing documents.

300. *Id.* § 101.501 states:

- (a) In addition to the books and records required to be kept under Section 3.151, a limited liability company shall keep at its principal office in the United States, or make available to a person at its principal office in the United States not later than the fifth day after the date the person submits a written request to examine the books and records of the company under Section 3.152(a) or 101.502:
  - (1) a current list that states:
    - (A) the percentage or other interest in the limited liability company owned by each member; and
    - (B) if one or more classes or groups of membership interests are established in or under the certificate of formation or company agreement, the names of the members of each specified class or group;
  - (2) a copy of the company's federal, state, and local tax information or income tax returns for each of the six preceding tax years;
  - (3) a copy of the company's certificate of formation, including any amendments to or restatements of the certificate of formation;
  - (4) if the company agreement is in writing, a copy of the company agreement, including any amendments to or restatements of the company agreement;
  - (5) an executed copy of any powers of attorney;
  - (6) a copy of any document that establishes a class or group of members of the company as provided by the company agreement; and
  - (7) except as provided by Subsection (b), a written statement of:
    - (A) the amount of a cash contribution and a description and statement of the agreed value of any other contribution made or agreed to be made by each member;
    - (B) the dates any additional contributions are to be made by a member;
    - (C) any event the occurrence of which requires a member to make additional contributions;
    - (D) any event the occurrence of which requires the winding up of the company; and
    - (E) the date each member became a member of the company.
- (b) A limited liability company is not required to keep or make available at its principal office in the United States a written statement of the information required by Subsection (a)(7) if that information is stated in a written company agreement.
- (c) A limited liability company shall keep at its registered office located in this state and make available to a member of the company on reasonable request the street address of the company's principal office in the United States in which the records required by this section and Section 3.151 are maintained or made available.

301. See *supra* note 272 and accompanying text.

***xi. Penalties and Defenses to Penalties for Not Allowing Inspection of the Books and Records of an LLC***

Fewer LLC statutes than corporate statutes impose penalties for the failure to allow inspection of books and records, but the following do.<sup>302</sup>

Alaska provides the following:

A manager, or, if the company is not managed by a manager, a member, who, or a limited liability company that, refuses to allow a member, or the agent or attorney of the member, to examine and make copies from its books and records of account, minutes, and record of members, for a proper purpose, is liable to the member for a penalty in the amount of 10 percent of the value of the limited liability company interests owned by the member or \$5,000, whichever is greater, in addition to other damages or remedy given the member by law.<sup>303</sup>

Alaska also provides as follows:

It is a defense to an action for penalties under this section that the person suing has within two years sold or offered for sale a list of members of the company or any other limited liability company or has aided or abetted a person in procuring a list of members for this purpose, or has improperly used information secured through a prior examination of the books and records of account, minutes, or record of members of the company or any other limited liability company, or was not acting in good faith or for a proper purpose in making the person's demand.<sup>304</sup>

Alabama imposes a penalty similar to Alaska's except that the Alabama provision is limited to "an amount not to exceed 10 percent of the fair market value of the transferable interest of the member."<sup>305</sup>

Texas imposes the following penalties for failure to provide members with the required information:

(a) A limited liability company that refuses to allow a member to examine and copy, on written request that complies with Section 101.502(a), records or other information described by that section is liable to the member for any cost or expense, including attorney's fees, incurred in enforcing the member's rights under Section 101.502. The liability imposed on a limited liability company under this subsection is in addition to any other damages or remedy afforded to the member by law.

(b) It is a defense to an action brought under this section that the person suing:

(1) has improperly used information obtained through a prior examination of the records or other information of the limited liability

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302. See *supra* notes 122–32 and accompanying text.

303. ALASKA STAT. § 10.50.870(b) (1994).

304. *Id.*

305. ALA. CODE § 10A-5A-4.09(b) (2015).



- company or any other limited liability company, under Section 101.502; or
- (2) was not acting in good faith or for a proper purpose in making the person's request for examination.<sup>306</sup>

Note that the penalty applies only to requests by members even though the Texas LLC statute extends the same information rights to assignees as it does to members. The Texas limited partnership statute, which also extends the same information rights to assignees as to limited partners, does include requests by either in its corresponding penalty provision.

The following LLC statutes limit inspection rights to members without exception:

- Arizona: A.R.S. § 29-607.
- Colorado: C.R.S. § 7-80-408.
- Delaware: 6 Del. Code Ann. § 18-305.
- Georgia: OCGA § 14-11-313.
- Kansas: K.S.A. § 17-7690.
- Louisiana: La. R.S. § 12:1319.
- Maryland: Md. Code, CA § 4A-406.
- Michigan: MCL § 450.4503.
- Mississippi: Miss. Code § 79-29-315.
- Missouri: RS Mo. § 347.091.
- New Hampshire: R.S.A. § 304-C:35.
- North Carolina: N.C. Gen. Stat. § 57D-3-04.
- Ohio: R.C. § 1705.22.<sup>307</sup>
- Oklahoma: Okla. Stat. tit. 18, § 2021.
- Oregon: O.R.S. §§ 63.771, 63.777.
- Rhode Island: R.I. Gen. Laws § 7-16-22.

Tennessee's statute, T.C.A. § 48-222-102, provides that members are entitled to inspect the records required to be maintained by T.C.A. § 48-222-101 and that this right cannot be limited or modified by the operating agreement.<sup>308</sup> The records required by § 101 are:

- (a) Board-Managed LLC. If an LLC has elected to be board-managed, it shall keep at its principal executive office, or at another place or places within the United States determined by the board of governors:
- (1) A current list of the full name and last-known business, residence, or mailing address of the chief manager, secretary and each member and governor;

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306. TEX. BUS. ORGS. CODE ANN. § 101.503 (West 2017).

307. As with many LLC statutes, the Ohio statute provides that the operating agreement may not unreasonably restrict the right of access to books and records. OHIO REV. CODE ANN. § 1705.081(B)(2) (West 2016).

308. TENN. CODE ANN. §§ 48-228-102(a)-(b) (2010).

- (2) A current list of the full name and last-known business, residence, or mailing address of each assignee of financial rights and a description of the rights assigned;
  - (3) A copy of the articles and all amendments to the articles;
  - (4) Copies of the currently effective operating agreement and/or any agreements concerning classes or series of membership interests;
  - (5) Copies of the LLC's federal, state, and local income tax returns and reports, if any, for the three (3) most recent years;
  - (6) Financial statements required by § 48-228-201 and accounting records of the LLC;
  - (7) Records of all proceedings of members, if any;
  - (8) Any written consents obtained from members under chapters 201-248 of this title;
  - (9) Records of all proceedings of the board of governors for the last three (3) years;
  - (10) A statement of all contributions accepted under § 48-232-101, the identity of the contribution and the agreed value of the contribution;
  - (11) A copy of all contribution agreements and contribution allowance agreements; and
  - (12) A copy of the LLC's most recent annual report delivered to the secretary of state under § 48-228-203.
- (b) Member-Managed LLC. If an LLC has elected to be governed by the members directly, it shall keep at its principal executive office, or at another place or places within the United States determined by its members:
- (1) All records required by subsection (a), except for subdivision (a)(6) and other records relating solely to a board of governors, the identity of governors, or actions of a board of governors; and
  - (2) Financial information sufficient to provide true and full information regarding the status of the business and financial condition of the LLC.<sup>309</sup>

The Virginia LLC statute limits inspection rights to members and contains interesting wording permitting the LLC to either keep the required records at its principal office or provide each member access as an electronic record, as defined in § 13.1-603, on a network or system.<sup>310</sup>

RULLCA limits inspection rights to members, but some states that have adopted RULLCA have extended inspection rights to dissociated members<sup>311</sup> and

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309. *Id.* § 48-222-101.

310. VA. CODE ANN. § 13.1-1028(a) (2016); § 13.603 defines electronic record as “information that is stored in an electronic or other medium and is retrievable in paper form through an automated process used in conventional commercial practice.”

311. ALA. CODE § 10A-5A-4.09 (2014) (Alabama); D.C. CODE § 29-804.10(c) (2013) (District of Columbia); CONN. GEN. STAT. § 34-255i(c) (2017) (Connecticut); IDAHO CODE § 30-25-410(c) (2015) (Idaho); 805 Ill.Comp. Stat. 180/10-15(d) (2017) (Illinois); IOWA CODE § 489.410(3) (2008) (Iowa); MINN. STAT. § 322C.0410, subd. 3 (2015) (Minnesota); NEB. REV. STAT. § 21-139(c) (2010) (Nebraska); N.D. CENT. CODE § 10-32.1-42(3) (2015) (North Dakota); 15 PA. CONS. STAT. § 8850(c) (2016) (Pennsylvania); UTAH CODE ANN. § 48-3a-410(3) (West 2013) (Utah); VT. STAT. ANN. tit. 11, §

the legal representative of deceased or incapacitated members.<sup>312</sup> One RULLCA state extends information rights to transferees.<sup>313</sup>

### C. Limited Partnerships

#### i. General Requirements

As with corporate inspection statutes, the statutes governing the inspection of the books and records of a limited partnership share many characteristics.

- Inspection must be at a reasonable time;
- Although not as common in limited partnership statutes as in the corporate context, 23 limited partnership statutes permit both a general partner and a limited partner to use an agent when examining books and records. Sixteen limited partnership statutes permit the general partner to use an agent. Michigan provides the right to use an agent to limited partners but not to general partners.<sup>314</sup> Nine limited partnership statutes do not provide for either the general partner or a limited partner to use an agent. This article discusses issues that arise in a state that does not permit the use of agents by statute if a member wants to use an agent.<sup>315</sup>
- Some limited partnership statutes permit a dissociated partner, or the legal representative of a deceased or incapacitated partner to inspect books and records — in the case of a dissociated partner, it is only for the period the person was a partner;
- Some limited partnership statutes also extend inspection rights to the legal representative of a partner that is an entity and that has been dissolved or terminated.
- A few limited partnership statutes extend information rights to assignees or transferees.

This article discusses the differences among the limited partnership statutes below.

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4058(f) (2015) (Vermont); WASH. REV. CODE § 25.15.136(6) (2016) (Washington); WYO. STAT. ANN. § 17-29-410(c) (2017) (Wyoming).

312. FLA. STAT. § 605.0504 (2014) (Florida); IDAHO CODE §§ 30-25-410, 30-25-504 (Idaho) (only deceased members); IND. CODE § 23-18-4-8(c) (2007) (Indiana); 15 PA. CONS. STAT. § 8854 (2016) (Pennsylvania) (only deceased members); S.D. CODIFIED LAWS § 47-34A-408(c) (2010) (South Dakota); UTAH CODE ANN. § 48-3a-504 (Utah); WASH. REV. CODE §§ 25.15.131(1)(f), 25.15.136 (Washington).

313. CAL. CORP. CODE § 17704.10 (West 2016).

314. MICH. COMP. LAWS §§ 449.20, 449.21, 449.1305(1), 449.2106 (2018).

315. See *infra* Part V.E (Right to Use an Agent When Statute is Silent).

**ii. Requirement that the Limited Partner Pay the Costs of the Inspection**

Some limited partnership statutes require the limited partner seeking inspection to pay the costs of copying records.<sup>316</sup>

Although RULPA extends information rights to dissociated partners and the legal representative of deceased or incapacitated partners,<sup>317</sup> some limited partnership statutes limit inspection rights to limited partners. This article first discusses limited partnership statutes that do not limit inspection rights to limited partners.

**iii. Information Rights Extended to Legal Representative of Deceased or Incapacitated Limited Partner**

As this article discusses above<sup>318</sup> with respect to LLCs, the author believes it is good policy for a limited partnership statute to extend inspection rights to the legal representative of a deceased or incapacitated limited partner. Otherwise, the legal representative may face difficulties in discharging his or her responsibilities.

The Alabama limited partnership statute states the following: “But if a limited partner dies, the deceased partner’s legal representative can exercise the information rights of a current limited partner for purposes of settling the estate.”<sup>319</sup> Hawaii,<sup>320</sup> Idaho,<sup>321</sup> Montana,<sup>322</sup> and New Mexico<sup>323</sup> are the same. Illinois is substantially the same as Alabama, Hawaii, and Idaho, except that Illinois also provides the following:

The rights stated in this Section do not extend to a person as transferee, but may be exercised by the legal representative of an individual under legal disability who is a limited partner or person dissociated as a limited partner.<sup>324</sup>

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316. These statutes are ALA. CODE § 10A-9A-3.04(h) (Alabama); ARK. CODE ANN. § 4-47-304(h) (2009) (Arkansas); D. C. CODE § 29-703.04(h) (District of Columbia); FLA. STAT. § 620.1304(8) (Florida); GA. CODE ANN. § 14-9-305(a)(2) (2017) (Georgia); HAW. REV. STAT. § 425E-304(h) (2010) (Hawaii); IDAHO CODE § 30-24-304(g) (Idaho); 805 ILL. COMP. STAT. 215/304(h) (Illinois); IOWA CODE § 488.304(8) (Iowa); KY. REV. STAT. ANN. § 362.2-704 (West 2006) (Kentucky); ME. STAT. tit. 31, § 1344(8) (2008) (Maine); MINN. STAT. § 321.0304(h) (2005) (Minnesota); MISS. CODE ANN. § 79-14-304(g) (2015) (Mississippi); MONT. CODE ANN. § 35-12-705(8) (2017) (Montana); NEV. REV. STAT. § 87A.355(8) (2007) (Nevada); N.M. STAT. ANN. § 54-2A-304(H) (2008) (New Mexico); N.Y. P’SHP LAW § 121-106(b) (McKinney 1990) (New York); OKLA. STAT. tit. 54, § 500-304A(h) (2011) (Oklahoma); 15 PA. CONS. STAT. § 8634 (2016) (Pennsylvania); TENN. CODE ANN. § 61-2-304(a) (1988) (Tennessee); TEX. BUS. ORGS. CODE ANN. § 153.552(a) (West 2018) (Texas); UTAH CODE ANN. § 48-2e-304(7) (Utah); WASH. REV. CODE § 25.10.331(8) (Washington).

317. REVISED UNIF. LTD. P’SHP ACT §§ 407(d)–(f) (UNIF. LAW COMM’N 2013).

318. See *supra* notes 246-50 and accompanying text.

319. ALA. CODE §§ 10A-9A-3.04(f), 10A-9A-7.04.

320. HAW. REV. STAT. §§ 425E-304(f), 425E-704.

321. IDAHO CODE §§ 30-24-304(i), 30-24-704.

322. MONT. CODE ANN. §§ 35-12-705(6), 35-12-1105 (2011).

323. N.M. STAT. ANN. §§ 54-2A-304(F), (K), 54-2A-704 (2007).

324. 805 ILL. COMP. STAT. 215/304(k) (2005); see also 805 ILL. COMP. STAT. 215/304(f), 215/704.

Arkansas,<sup>325</sup> Connecticut,<sup>326</sup> Kentucky,<sup>327</sup> Maine,<sup>328</sup> Minnesota,<sup>329</sup> Mississippi,<sup>330</sup> North Dakota,<sup>331</sup> Oklahoma,<sup>332</sup> Pennsylvania,<sup>333</sup> and Utah<sup>334</sup> are substantially the same as Illinois. California follows RULPA, which makes it substantially the same as Illinois.<sup>335</sup>

Several states, for example Michigan, have one inspection statute that limits inspection rights to limited partners,<sup>336</sup> but have another statute providing the following:

If a partner who is an individual dies or a court of competent jurisdiction adjudges the partner to be unable to manage his or her property or incompetent to manage his or her person or property, the partner's personal representative, executor, administrator, guardian, conservator, or other legal representative may exercise all the partner's rights for the purpose of settling the partner's estate or administering his or her property, including any power the partner had to give an assignee the right to become a limited partner. If a partner is a corporation, trust, or other entity, and is dissolved or terminated, the powers of that partner may be exercised by its legal representative or successor.<sup>337</sup>

The states that follow the Michigan approach are Colorado,<sup>338</sup> Delaware,<sup>339</sup> Indiana,<sup>340</sup> Kansas,<sup>341</sup> New Jersey,<sup>342</sup> New York,<sup>343</sup> North Carolina,<sup>344</sup> Ohio,<sup>345</sup> Oregon,<sup>346</sup> Rhode Island,<sup>347</sup> South Carolina,<sup>348</sup> South Dakota,<sup>349</sup> Tennessee,<sup>350</sup>

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325. ARK. CODE ANN. §§ 4-47-304(f), 4-47-704 (2007).

326. CONN. GEN. STAT. § 34-18 (1961).

327. KY. REV. STAT. ANN. §§ 362.2-304(6), (11), 362.2-704 (West 2018).

328. ME. STAT. tit. 31, §§ 1344(6), 1384 (2005).

329. MINN. STAT. §§ 321.0304, 321.0704 (2004).

330. MISS. STAT. ANN. §§ 79-14-304, 79-14-704 (2015).

331. N.D. CENT. CODE §§ 45-10.2-34(6), 45-10.2-65 (2005).

332. OKLA. STAT. tit. 54, §§ 500-304A(f), 500-704A (2010).

333. 15 PA. CONS. STAT. §§ 8634, 8674 (2016).

334. UTAH CODE ANN. §§ 48-2e-304(5), (8), (10), 48-2e-704 (West 2013) (the Utah statute also applies to dissociated limited partners).

335. CAL. CORP. CODE §§ 15903.04(f), 15907.04 (West 2018); REVISED UNIF. LTD. P'SHIP ACT §§ 304(f), (k), 704 (UNIF. LAW COMM'N 2013). *See supra* notes 68–74 and accompanying text.

336. MICH. COMP. LAWS § 449.1106 (1982).

337. *Id.* § 449.1705.

338. COLO. REV. STAT. §§ 7-62-305, 7-62-705 (2004).

339. DEL. CODE ANN. tit. 6, §§ 17-305, 17-705 (1973).

340. IND. CODE §§ 23-16-4-5, 23-16-8-5 (1988).

341. KAN. STAT. ANN. §§ 56-1a205, 56-1a405 (1983).

342. N.J. STAT. ANN. §§ 42:2A-29, 42:2A-50 (West 2018).

343. N.Y. P'SHIP LAW §§ 121-106, 121-706 (McKinney 1990).

344. N.C. GEN. STAT. §§ 59-305, 59-705 (1999).

345. OHIO REV. CODE ANN. §§ 1782.21, 1782.43 (LexisNexis 2018).

346. OR. REV. STAT. §§ 70.050, 70.305 (1985).

347. R.I. GEN. LAWS §§ 7-13-21, 7-13-43 (1985). Rhode Island also provides:

In case of the death of any person who was at the time of his or her decease a member of any copartnership, either general or limited, the surviving partner shall, upon the demand in writing of the administrator or executor of the deceased copartner, and within ten (10) days subsequently, make out and deliver to the administrator or executor a detailed statement of the assets and liabilities of the copartners as they existed at the time of the decease of the copartner, which statement shall be verified by the oath of the surviving copartner. *Id.* § 7-12-12.

And:

Texas,<sup>351</sup> Vermont,<sup>352</sup> Virginia,<sup>353</sup> Washington,<sup>354</sup> West Virginia,<sup>355</sup> Wisconsin,<sup>356</sup> and Wyoming.<sup>357</sup>

Nevada follows RULPA in its limited partnership information rights statute, which makes it substantially the same as Illinois.<sup>358</sup> This means that Nevada has much more liberal inspection rights for limited partners than for members or managers of LLCs.<sup>359</sup> Ohio follows RULPA in its limited partnership information rights statute, which also makes it substantially the same as Illinois.<sup>360</sup>

Tennessee has perhaps the broadest exception to its general rule that only limited partners are entitled to information from a limited partnership.<sup>361</sup> Tenn. Code Ann. § 61-2-304(a) states the following:

Any person shall have the right to examine the current list of the names and addresses of all general and limited partners of any partnership formed under this chapter at the registered office of the partnership during reasonable business hours, and, upon payment of reasonable costs of duplication, to make a copy thereof.<sup>362</sup>

The Texas limited partnership statute, like the Texas LLC statute, extends the same information rights to assignees of limited partners as to limited partners.<sup>363</sup> As with LLCs, the Texas limited partnership statute now provides for a potential penalty if a limited partnership fails to provide requested information:

(a) A limited partnership that refuses to allow a partner or assignee of a partnership interest to examine and copy, on written request that complies with Section 153.552(a), records or other information described by that section is liable to the partner or assignee for any cost or expense, including attorney's fees, incurred in enforcing the partner's or assignee's

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The administrator or executor may enter upon the premises and examine the books and affairs of the copartnership and take an inventory of the personal property in which his or her intestate or testate may have had an interest at the time of his or her decease.

*Id.* § 7-12-13.

348. S.C. CODE ANN. §§ 33-42-450, 33-42-1250 (1984).

349. S.D. CODIFIED LAWS §§ 48-7-305, 48-7-705 (1986).

350. TENN. CODE ANN. § 61-2-705 (1988).

351. TEX. BUS. ORGS. CODE ANN. §§ 153.552, 153.113 (West 2018).

352. VT. STAT. ANN. tit. 11, §§ 3425, 3465 (1997).

353. VA. CODE §§ 50-73.26, 50-73.48 (1985).

354. WASH. REV. CODE §§ 25.10.331(14), 25.10.561, 25.10.331(10) (2010) (the Washington statute also extends information rights to dissociated limited partners for the period that they were limited partners).

355. W. VA. CODE §§ 47-9-21, 47-9-43 (1981).

356. WIS. STAT. §§ 179.25, 179.65 (2018).

357. WYO. STAT. ANN. §§ 17-14-405, 17-14-805 (1979).

358. NEV. REV. STAT. § 87A-335 (2007); REVISED UNIF. LTD. P'SHIP ACT §§ 304(f), (k), 704 (UNIF. LAW COMM'N 2013). *See supra* notes 68–74 and accompanying text.

359. *See supra* notes 175–80 and accompanying text; *infra* note 418 and accompanying text. Nevada's limited partner inspection rights are also more favorable to limited partners than Nevada's shareholder inspection rights are to shareholders. *See supra* notes 117–19 and accompanying text.

360. OHIO REV. CODE § 1782.43 (1992); REVISED UNIF. LTD. P'SHIP ACT §§ 304(f), (k), 704 (UNIF. LAW COMM'N 2013). *See supra* notes 68–74 and accompanying text.

361. TENN. CODE ANN. § 61-2-304 (1989).

362. *Id.* § (a).

363. TEX. BUS. ORGS. CODE § 153.552 (2016).

rights under Section 153.552. The liability imposed on a limited partnership under this subsection is in addition to any other damages or remedy afforded to the partner or assignee by law.

(b) It is a defense to an action brought under this section that the person suing:

- (1) has improperly used information obtained through a prior examination of the records or other information of the limited partnership or any other limited partnership under Section 153.552; or
- (2) was not acting in good faith or for a proper purpose in making the person's request for examination.<sup>364</sup>

Note that the penalty provision of the Texas limited partnership statute applies to requests by assignees as well as requests by limited partners. The corresponding penalty provision of the Texas LLC statute applies only to requests by members, even though the information rights provided in the LLC statute, like those in the limited partnership statute, extend to assignees.<sup>365</sup> Utah follows RULPA in its limited partnership information rights statute.<sup>366</sup>

#### ***iv. Information Rights Extended to Legal Representative of Entity Limited Partner that is Dissolved or Terminated***

In addition to extending information rights to the legal representative of a deceased or incapacitated limited partner, several limited partnership statutes also extend information rights to the liquidating trustee or other legal representative of a limited partner that is an entity that has been dissolved or terminated. These states are Connecticut,<sup>367</sup> Delaware,<sup>368</sup> Florida,<sup>369</sup> Indiana,<sup>370</sup> Kansas,<sup>371</sup> New Jersey,<sup>372</sup> New York,<sup>373</sup> North Carolina,<sup>374</sup> Ohio,<sup>375</sup> Oregon,<sup>376</sup> Rhode Island,<sup>377</sup> South Carolina,<sup>378</sup> South Dakota,<sup>379</sup> Tennessee,<sup>380</sup> Vermont,<sup>381</sup> Virginia,<sup>382</sup> West Virginia,<sup>383</sup> Wisconsin,<sup>384</sup> and Wyoming.<sup>385</sup>

364. *Id.* § 153.5521.

365. *See supra* note 306 and accompanying text.

366. UTAH CODE ANN. § 48-2e-304 (West 2014).

367. CONN. GEN. STAT. § 34-29 (1979).

368. DEL. CODE ANN. tit. 6, § 17-705 (1997).

369. FLA. STAT. §§ 605.0410(7), 605.0504 (2016).

370. IND. CODE § 23-16-8-5 (1989).

371. KAN. STAT. ANN. §§ 56a-601(g), 405 (1998).

372. N.J. STAT. ANN. § 42:2A-50 (West 2013).

373. N.Y. P'SHIP LAW § 121-706 (1990).

374. N.C. GEN. STAT. § 59-705 (1986).

375. OHIO REV. CODE § 1782.43 (1992).

376. OR. REV. STAT. § 70.305 (1985).

377. 7 R.I. GEN. LAWS § 7-13-43 (1985).

378. S.C. CODE ANN. § 33-42-1250 (1986).

379. S.D. CODIFIED LAWS § 48-7-705 (1986).

380. TENN. CODE ANN. § 61-2-705 (1988).

381. VT. STAT. ANN. tit. 11, § 3465 (2014).

382. VA. CODE ANN. § 50-73.48 (1988).

383. W. VA. CODE § 47-9-43 (1981).

384. WIS. STAT. § 179.65 (2018).

385. WYO. STAT. ANN. § 17-14-805 (1979).

The following limited partnership statutes restrict inspection rights to limited partners without exception:

- Alaska: Alaska Stat. § 32.11.140.
- Delaware provides as follows:

Each limited partner, in person or by attorney or other agent, has the right, subject to such reasonable standards (including standards governing what information and documents are to be furnished, at what time and location and at whose expense) as may be set forth in the partnership agreement or otherwise established by the general partners, to obtain from the general partners from time to time upon reasonable demand for any purpose reasonably related to the limited partner's interest as a limited partner [the information specified in the statute].<sup>386</sup>

- Georgia: Ga. Code Ann. § 14-9-305.
- Louisiana provides as follows:

In Louisiana, a limited partnership is also known as a partnership in commendam.<sup>387</sup> The Louisiana statute provides that “the provisions of the other chapters of this Title apply to partnerships in commendam to the extent they are consistent with this chapter.”<sup>388</sup> Presumably, this would include the following:

- (a) A partner may inform himself of the business activities of the partnership and may consult its books and records, even if he has been excluded from management. A contrary agreement is null.
- (b) He may not exercise his right in a manner that unduly interferes with the operations of the partnership or prevents other partners from exercising their rights in this regard.<sup>389</sup>

- Massachusetts: Mass. Gen. Laws § 109.21.

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386. DEL. CODE ANN. tit. 6, § 17-305(a) (2014). (the information specified in § 17-305(a) is:  
 (1) True and full information regarding the status of the business and financial condition of the limited partnership;  
 (2) Promptly after becoming available, a copy of the limited partnership's federal, state and local income tax returns for each year;  
 (3) A current list of the name and last known business, residence or mailing address of each partner;  
 (4) A copy of any written partnership agreement and certificate of limited partnership and all amendments thereto, together with executed copies of any written powers of attorney pursuant to which the partnership agreement and any certificate and all amendments thereto have been executed;  
 (5) True and full information regarding the amount of cash and a description and statement of the agreed value of any other property or services contributed by each partner and which each partner has agreed to contribute in the future, and the date on which each became a partner; and  
 (6) Other information regarding the affairs of the limited partnership as is just and reasonable).

387. LA. CIV. CODE ANN. art. 2837 (1981) (stating the following: “A partnership in commendam consists of one or more general partners who have the powers, rights, and obligations of partners, and one or more partners in commendam, or limited partners, whose powers, rights, and obligations are defined in this Chapter.”).

388. *Id.* art. 2836.

389. *Id.* art. 2813.



- Missouri: Mo. Rev. Stat. § 359.221. The Missouri statute specifying what records a limited partnership must keep contains this unusual provision:

Any general partner of a limited partnership may be individually subject to the following sanctions if the general partner fails to deliver the partnership list to the secretary of state's office within twenty days after receiving the written demand for such list:

- (1) Assessed a civil penalty in the amount of fifty dollars a day for each day the list has not been delivered to the secretary of state but not to exceed ten thousand dollars;
- (2) Prosecuted criminally with any resulting conviction being deemed a class A misdemeanor.<sup>390</sup>

- Nebraska: Neb. Rev. Stat. § 67-253.
- Nevada: Nev. Rev. Stat. § 88-440.
- New Hampshire: N.H. Rev. Stat. Ann. § 304-B:21.
- North Carolina: N.C. Gen. Stat. § 59-305.

#### ***v. Restrictions Permitted by Limited Partnership Statutes***

The Alabama limited partnership statute contains a provision similar to that in its LLC Act allowing the imposition of reasonable restrictions on access and confidentiality requirements.<sup>391</sup> Arkansas permits a limited partnership to impose reasonable restrictions on the use of information obtained from the limited partnership.<sup>392</sup> Colorado,<sup>393</sup> The District of Columbia,<sup>394</sup> Florida,<sup>395</sup> Georgia,<sup>396</sup> Hawaii,<sup>397</sup> Idaho,<sup>398</sup> Illinois,<sup>399</sup> Maryland,<sup>400</sup> Maine,<sup>401</sup> Minnesota,<sup>402</sup> and Utah<sup>403</sup> limited partnership statutes contain similar provisions.<sup>404</sup> Delaware states the following:

A general partner shall have the right to keep confidential from limited partners for such period of time as the general partner deems reasonable, any information which the general partner reasonably believes to be in the nature of trade secrets or other information the disclosure of which the general partner in good faith believes is not in the best interest of the limited partnership or could damage the limited partnership or its busi-

390. MO. REV. STAT. § 359.051 (1990).

391. ALA. CODE § 10A-9A-3.04 (2016).

392. ARK. CODE ANN. § 4-47-304(g) (2009).

393. COLO. REV. STAT. § 7-62-305 (2004).

394. D. C. CODE § 29-703.04(g) (2013).

395. FLA. STAT. § 620.1304(7) (2006).

396. GA. CODE ANN. § 14-9-305(a)(3)(C) (1988).

397. HAW. REV. STAT. §§ 425E-304(f), (k) (2010).

398. IDAHO CODE § 30-24-304(j) (2015).

399. 805 ILL. COMP. STAT. 215/304(g) (2005).

400. MD. CODE ANN., CORPS. & ASS'NS § 10-305(c) (West 1988).

401. ME. STAT. tit. 31, § 1344(7) (2008).

402. MINN. STAT. § 321.0304(g) (2005).

403. UTAH CODE ANN. §§ 48-1d-403(11), 48-2e304(11) (West 2014).

404. The Wisconsin limited partnership statute does not contain such a provision. WIS. STAT. § 179.25 (1984). A similar provision does apply to the information rights of general partners of Wisconsin limited partnerships. *Id.* §§ 178.048(10), 179.10(2).

ness or which the limited partnership is required by law or by agreement with a third party to keep confidential.<sup>405</sup>

Delaware further provides:

The rights of a limited partner to obtain information as provided in this section may be restricted in an original partnership agreement or in any subsequent amendment approved or adopted by all of the partners or in compliance with any applicable requirements of the partnership agreement. The provisions of this subsection shall not be construed to limit the ability to impose restrictions on the rights of a limited partner to obtain information by any other means permitted under this chapter.<sup>406</sup>

Kansas provides that a limited partner's inspection rights are "subject to any reasonable standards set forth in the partnership agreement. . . ."<sup>407</sup> Kentucky provides that "[t]he partnership agreement may impose reasonable limitations upon use of information obtained under this section."<sup>408</sup>

The Montana,<sup>409</sup> Nevada,<sup>410</sup> New Mexico,<sup>411</sup> North Dakota,<sup>412</sup> Oklahoma,<sup>413</sup> and Washington<sup>414</sup> limited partnership statutes are like Kentucky. Louisiana provides that a partner may not exercise information rights "in a manner that unduly interferes with the operations of the partnership or prevents other partners from exercising their rights in this regard."<sup>415</sup>

Mississippi's limited partnership statute provides as follows:

In addition to any restriction or condition stated in its partnership agreement, a limited partnership, as a matter within the ordinary course of its activities and affairs, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the partnership has the burden of proving reasonableness.<sup>416</sup>

Nebraska provides the following:

A general partner shall have the right to keep confidential from limited partners for such period of time as the general partner deems reasonable

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405. DEL. CODE ANN. tit. 6, § 17-305(b) (2014).

406. *Id.* § (f).

407. KAN. STAT. ANN. § 56-1a205 (1998).

408. KY. REV. STAT. ANN. § 362.2-304(7) (West 2006).

409. MONT. CODE ANN. §§ 35-12-705(7), 35-12-810(8) (2011).

410. NEV. REV. STAT. §§ 87A.335(10), 87A.380(8) (2007).

411. N.M. STAT. ANN. §§ 54-2A-304(G), 54-2A-407(H) (2008).

412. N.D. CENT. CODE §§ 45-10.2-34(7), 45-10.2-43(8) (2005).

413. OKLA. STAT. tit. 54, §§ 500-304A(g), 500-401A(h) (2011).

414. WASH. REV. CODE §§ 25.10.331(7), 25.10.431(8) (2010).

415. LA. CIV. CODE ANN. art. 2813 (1981) (this section appears to be applicable to limited partnerships because of § 2837).

416. MISS. CODE ANN. § 79-14-304(j) (2015).

any information which the general partner reasonably believes to be in the nature of trade secrets or other information the disclosure of which the general partner in good faith believes is not in the best interest of the limited partnership or could damage the limited partnership or its business or which the limited partnership is required by law or by agreement with a third party to keep confidential.<sup>417</sup>

Unlike its LLC statute, which contains several restrictions on the rights of members and managers to information, Nevada's limited partnership statute provides a comparatively liberal provision:

Each limited partner has the right to do the following:

1. Inspect and copy any of the partnership records required to be maintained by NRS 88.335; and
2. Obtain from the general partners from time to time upon reasonable demand:
  - (a) True and full information regarding the state of the business and financial condition of the limited partnership;
  - (b) Promptly after becoming available, a copy of the limited partnership's federal, state and local income tax returns for each year; and
  - (c) Other information regarding the affairs of the limited partnership as is just and reasonable.<sup>418</sup>

The Tennessee limited partnership statute states that a limited partner's information rights are as follows:

[S]ubject to such reasonable standards (including standards governing what information and documents are to be furnished, at what time and location and at whose expense) as may be set forth in the partnership agreement or otherwise established by the general partners, upon reasonable demand for any purpose reasonably related to the limited partner's interest as a limited partner.<sup>419</sup>

In addition, Tennessee permits the following:

A general partner shall have the right to keep confidential from limited partners for such period of time as the general partner deems reasonable, any information which the general partner reasonably believes to be in the nature of trade secrets or other information the disclosure of which the general partner in good faith believes is not in the best interest of the limited partnership or could damage the limited partnership or its busi-

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417. NEB. REV. STAT. 67-253(b) (1989). The Ohio Statute is similar. OHIO REV. CODE ANN. § 1782.21(B) (1994).

418. NEV. REV. STAT. § 88.440 (1985).

419. TENN. CODE ANN. § 61-2-304(b) (1989).

ness or which the limited partnership is required by law or by agreement with a third party to keep confidential.<sup>420</sup>

***vi. Inspection by Limited Partners Through an Agent***

Although RULPA § 304(j) provides that a limited partner may exercise his or her inspection rights through an attorney or agent, the actual state statutes are inconsistent.<sup>421</sup> Some provide that both limited partners and general partners may act through agents. Other states do not provide that limited partners may exercise inspection rights through an agent but provide that a general partner of the same limited partnership may do so. This follows from the fact that most general partnership statutes provide for inspection through an agent, and many of those statutes are linked to the corresponding limited partnership statute, which typically includes an inspection statute applying to limited partners but not one applying to general partners unless the state has adopted RULPA.

The following states authorize both general and limited partners to exercise inspection rights through an agent:

- Alabama: Ala. Code §§ 10A-8-4.03(b), 10A-9A-3.04(i).
- Arkansas: Ark. Code Ann. §§ 4-47-304(i), 4-47-407(h).
- California: Ca. Corp. Code §§ 15903.04(k), 15904.07(h).
- Delaware: Del. Code Ann. tit. 6, §§ 17-305(a), 17-1105, 17-403.
- District of Columbia: D.C. Code §§ 29-703.04(i), 29-704.07(h).
- Florida: Fla. Stat. §§ 620.1304(10), 620.1407(8).
- Hawaii: Haw. Rev. Stat. §§ 425E-304(j), 425E-304(h).
- Idaho: Idaho Code §§ 30-24-304(h), 30-24-407(h).
- Illinois: 805 Ill. Comp. Stat. 215/304(j), 407(h).
- Iowa: Iowa Code §§ 488.304 10, 488.407 8.
- Kentucky: Ky. Rev. Stat. Ann. §§ 362.2-304(1), 362.2-407(8).
- Maine: Me. Stat. tit. 31, §§ 1344 10, 1357 8.
- Maryland: Md. Code Ann. Corps. & Ass'ns §§ 9A-403(b), 10-305(a), 10-108.
- Minnesota: Minn. Stat. §§ 321.0304(i), 321.0407(h).
- Mississippi: Miss. Code Ann. §§ 79-14-304(h), 79-14-704(h).
- Montana: Mont. Code Ann. §§ 35-12-705(10), 35-12-810(8).
- Nevada: Nev. Rev. Stat. §§ 87A.335 10, 87A.380 8.
- New Mexico: N.M. Stat. Ann. §§ 54-2A-304J, 54-2A-407H.
- North Dakota: N.D. Cent. Code §§ 45-10.2-34 10, 45-10.2-43 8.
- Oklahoma: Okla. Stat. tit. 54, §§ 500-304(j), 407(h).
- Pennsylvania: 15 Pa. Cons. Stat. §§ 8634(f), 8647(h).
- Utah: Utah Code Ann. §§ 48-2e-304(8), 48-2e-407(8).
- Washington: Wash. Rev. Code §§ 25.10.331(9), 25.10.431(8).

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420. *Id.* § (c).

421. *See infra* Part V.E (Right to Use an Agent When Statute is Silent).

The following states provide that general partners of limited partnerships may inspect books and records through an agent, but make no such provision for limited partners:

- Alaska: Alaska Stat. §§ 32.11.40, 32.06.403(b).
- Arizona: Ariz. Rev. Stat. §§ 29-321, 29-1033B.
- Colorado: Colo. Rev. Stat. §§ 7-62-305, 7-62-1104, 7-64-403(2).
- Connecticut: Conn. Gen. Stat. §§ 34-18, 34-337.
- Kansas: Kan. Stat. Ann. §§ 56-1a, 205, 56-1a, 604, 56a-403(b).
- Nebraska: Neb. Rev. Stat. §§ 67-253, 67-294, 67-423(2).
- New Jersey: N.J. Stat. Ann. §§ 42:2A-29, 42:2A-3, 42:1A-23b.
- Ohio: Ohio Rev. Code Ann. §§ 1776.43(b), 1782.21, 1782.60.
- Oregon: Or. Rev. Stat. §§ 67.150(2), 70.050, 70.615.
- South Dakota: S.D. Codified Laws §§ 48-7-305, 48-7-1105, 48-7A-403(b).
- Tennessee: Tenn. Code Ann. §§ 61-1-403(b), 61-2-304(b), 61-2-1205.
- Vermont: Vt. Stat. Ann. tit. 11, §§ 3233(b), 3425, 3502.
- Virginia: Va. Code Ann. §§ 50-73.26, 50-73.75, 50-73.101B.
- West Virginia: W. Va. Code §§ 47-9-21, 47-9-63, 47B-4-3(b).
- Wisconsin: Wis. Stat. §§ 178.048(8), 179.10, 179.25.
- Wyoming: Wyo. Stat. Ann. §§ 17-14-405, 17-21-403.

The following states do not provide for either limited partners or general partners of limited partnership to exercise information rights through an agent:

- Georgia: Ga. Code Ann. §§ 14-8-19, 14-9-305, 14-9-1204.
- Indiana: I. C. §§ 23-4-1-19, 23-4-1-20, 23-16-12-3, 23-26-4-5.
- Massachusetts: Mass. Gen. Laws §§ 108A.19, 108A.20, 109.21.
- New Hampshire: N.H. Rev. Stat. Ann. §§ 304-A:19, 304-A:20, 304-B:21, 304-B:63.
- New York: N. Y. P'ship Law §§ 41, 42, 121-106.
- North Carolina: N. C. Gen. Stat. §§ 59-49, 59-50, 59-305, 59-1102.
- Rhode Island: 7 R.I. Gen. Laws §§ 7-12-30, 7-12-31, 7-13-21, 7-13-63.
- South Carolina: S.C. Code Ann. §§ 33-41-520, 33-41-530, 33-42-450, 33-42-2020.
- Texas: Tex. Bus. Orgs. Code Ann. §§ 152.213(a), 153.552.

Michigan provides agency rights to limited partners but not general partners.<sup>422</sup>

### ***vii. Information Rights of General Partners of Limited Partnerships***

RULPA states that a general partner, without having any particular purpose, may inspect all records of the limited partnership.<sup>423</sup> A dissociated general partner

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422. MICH. COMP. LAWS §§ 449.20, 449.21, 449.1305(1), 449.2106 (1983).

may inspect information pertaining to the period during which the person was a general partner if the person seeks the information in good faith, and the person satisfies the requirements that § 304(b)<sup>424</sup> of RULPA imposes on a limited partner.<sup>425</sup> If a general partner dies, the deceased general partner's personal representative or other legal representative may exercise the information rights of a current limited partner for purposes of settling the deceased general partner's estate.<sup>426</sup>

The following states provide general partners of limited partnerships substantially the same information rights as RULPA:

- Alabama: Ala. Code § 10A-9A-4.07.
- Alaska: Alaska Stat. §§ 32.06.403, 32.11.170.
- Arizona: Ariz. Rev. Stat. §§ 29-324, 29-363, 29-1003.
- Arkansas: Ark. Code Ann. § 4-47-407.
- California: Ca. Corp. Code § 15904.07.
- Colorado: Colo. Rev. Stat. §§ 7-62-403, 7-62-1104(1), 7-64-403.
- Connecticut: Conn. Gen. Stat. §§ 34-17, 34-337.
- District of Columbia: D.C. Code § 29-704.07.
- Florida: Fla. Stat. § 620.1407.
- Hawaii: Haw. Rev. Stat. § 425E-407.
- Idaho: Idaho Code § 30-24-407.
- Illinois: 805 Ill. Comp. Stat. § 215/407.
- Iowa: Iowa Code § 488.407.
- Kansas: Kan. Stat. Ann. §§ 56-1a, 604, 56a-403.
- Kentucky: Ky. Rev. Stat. Ann. §§ 362.523, 362.1-403.
- Maine: Me. Stat. tit. 31 § 1357.
- Maryland: Md. Code Ann. Corps. & Ass'ns §§ 9A-403, 10-108.
- Minnesota: Minn. Stat. § 321.0407.
- Mississippi: Miss. Code Ann. § 79-14-407.
- Montana: Mont. Code. Ann. § 35-12-810.
- Nevada: Nev. Rev. Stat. § 87A.380.A-23.
- New Mexico: N.M. Stat. Ann. § 54-2A-407.
- North Dakota: N.D. Cent. Code § 45-10.2-43.
- Oklahoma: Okla. Stat. tit. 54, § 500-407A.
- Pennsylvania: 15 Pa. Cons. Stat. § 8647.
- South Dakota: S.D. Codified Laws § 48-7A-403.
- Tennessee: Tenn. Code Ann. § 61-1-403.
- Utah: Utah Code Ann. § 48-2e-407.
- Vermont: Vt. Code. Ann. tit. 11, §§ 3233, 3502.
- Virginia: Va. Code Ann. §§ 50-73.101, 50-73.75.
- Washington: Wash. Rev. Code. § 25.10.431.
- West Virginia: W. Va. Code §§ 47-9-62, 47B-4-3.
- Wisconsin: Wis. Stat. §§ 178.0408, 179.10.

423. REVISED UNIF. LTD. P'SHIP ACT § 407(a) (UNIF. LAW COMM'N 2013).

424. *Id.* § (e).

425. *Id.*

426. *Id.* §§ (i)(1), 704.

- Wyoming: Wyo. Stat. Ann. § 17-21-403.

Delaware extends information rights to former partners and the legal representative of a deceased or incapacitated partner.<sup>427</sup> However, the Delaware statute also provides as follows:

A partnership agreement may provide that the partnership shall have the right to keep confidential from partners for such period of time as the partnership deems reasonable, any information which the partnership reasonably believes to be in the nature of trade secrets or other information the disclosure of which the partnership in good faith believes is not in the best interest of the partnership or could damage the partnership or its business or affairs or which the partnership is required by law or by agreement with a third party to keep confidential.<sup>428</sup>

The rights of a partner to obtain information as provided in this section may be restricted in an original partnership agreement or in any subsequent amendment approved or adopted by all of the partners or in compliance with any applicable requirements of the partnership agreement.<sup>429</sup>

Georgia permits every general partner access to all books and records of the partnership.<sup>430</sup>

Indiana provides that partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under a legal disability.<sup>431</sup>

Louisiana provides the following:

A partner may inform himself of the business activities of the partnership and may consult its books and records, even if he has been excluded from management. A contrary agreement is null.

He may not exercise his right in a manner that unduly interferes with the operations of the partnership or prevents other partners from exercising their rights in this regard.<sup>432</sup>

Massachusetts provides that every general partner shall at all times have access to and may inspect and copy any of the partnership books and records.<sup>433</sup>

Michigan provides that every general partner shall, at all times, have access to and may inspect and copy any of the partnership books and records<sup>434</sup> and that “partners shall render on demand true and full information of all things affecting

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427. DEL. CODE ANN. tit. 6, §§ 17-1105, 15-403(a) (2001 & 2014).

428. *Id.* § 15-403(b).

429. *Id.* § (f).

430. GA. CODE ANN. §§ 14-9-403, 14-8-19 (1996 & 1984).

431. IND. CODE §§ 23-4-1-20, 23-16-5-3(a) (2017).

432. LA. CIV. CODE ANN. art. 2813 (1980).

433. MASS. GEN. LAWS §§ 109.62, 108A.19 (1982 & 2017).

434. MICH. COMP. LAWS § 449.19 (2018).

the partnership to any partner or the legal representative of any deceased partner or partner under legal disability.<sup>435</sup>

Missouri,<sup>436</sup> New Hampshire,<sup>437</sup> New York,<sup>438</sup> North Carolina,<sup>439</sup> Ohio,<sup>440</sup> Oregon,<sup>441</sup> Rhode Island,<sup>442</sup> and South Carolina<sup>443</sup> are substantially the same as Michigan.

#### *D. General Partnerships*

The author's research for this article did not find any cases involving general partnerships. The author believes this to be because most general partnership statutes require not only the partnership but also general partners having the same information as the partnership to provide the information.<sup>444</sup> Georgia states its information requirements for general partnerships a little differently, requiring that every partner shall at all times have access to the books of the partnership and may inspect and copy them.<sup>445</sup> Georgia further requires that "partners shall render, to the extent the circumstances render it just and reasonable, true and full information of all things affecting the partners to any partner and the legal representative of any deceased partner of any deceased partner of any partner under legal disability."<sup>446</sup> The New Hampshire, New York, South Carolina, and South Dakota statutes are the same as the Georgia statute.<sup>447</sup> The Colorado and Washington general partnership statutes are the same as the Georgia statute with the addition of rights of former partners.<sup>448</sup> The Kansas statute is similar to the Georgia statute, but perhaps a little broader:

Each partner and the partnership shall furnish to a partner, and to the legal representative of a deceased partner or partner under legal disability:  
 (1) Without demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this act; and

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435. *Id.* §§ 449.20, 449.2106.

436. MO. REV. STAT. §§ 358.190, 358.200 (2017).

437. N.H. REV. STAT. ANN. §§ 304-A:19, 304-A:20 (2018).

438. N.Y. P'SHIP LAW §§ 41, 42, 121-403(a) (McKinney 1990 & 2018).

439. N.C. GEN. STAT. §§ 59-49, 59-50, 59-1103 (1985 & 2017).

440. OHIO REV. CODE ANN. §§ 1776.43, 1782.60 (West 1985 & 2008).

441. OR. REV. STAT. §§ 67.150, 70.615 (1997 & 2017) (rights also extended to former partners).

442. 7 R.I. GEN. LAWS §§ 7-13-63, 7-12-30, 7-12-31 (1957 & 1985).

443. S.C. CODE ANN. §§ 33-41-520, 33-41-503, 33-42-2020 (1962, 1976, & 1986).

444. REVISED UNIF. LTD. P'SHIP ACT §§ 408(c)-(d) (UNIF. LAW COMM'N 2013); ALA. CODE § 10A-8-4.03(c) (1996); ALASKA STAT. § 32.06.403(c) (2000); ARIZ. REV. STAT. ANN. § 29-1033(C) (1996); ARK. CODE ANN. § 4-46-403(c) (1999); CAL. CORP. CODE § 16403(c) (West 2004); COLO. REV. STAT. § 7-64-403(3) (1997); CONN. GEN. STAT. § 34-337(c) (1997); DEL. CODE ANN. tit. 6, § 15-403(a) (2014); D.C. CODE § 29.604.06(c) (2013); FLA. STAT. § 620.8403(3) (1995); HAW. REV. STAT. § 425-122(c) (1999); IDAHO CODE § 30-23-408(c) (2015); MICH. COMP. LAWS § 449.20 (2018); TEX. BUS. ORGS. CODE ANN. § 152.203(a) (West 2006). Montana applies the duty to provide information only to the partnership. MONT. CODE ANN. § 35-10-402(2) (1993).

445. GA. CODE ANN. § 14-8-19 (1984).

446. *Id.* § 14-8-20.

447. N.H. REV. STAT. ANN. § 304-A:20 (2018); N.Y. P'SHIP LAW § 42 (McKinney 2018); S.C. CODE ANN. § 33-41-530; S.D. CODIFIED LAWS § 48-7-403 (1986).

448. COLO. REV. STAT. § 7-64-403; WASH. REV. CODE § 25.05.160 (1998).



(2) on demand, any other information concerning the partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.<sup>449</sup>

The Kentucky, Maine, Maryland, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, and Tennessee statutes are the same as that of Kansas.<sup>450</sup> The North Dakota statute adds the requirement that "[the partnership] shall provide former partners and their agents and attorneys access to books and records pertaining to the period during which they were partners."<sup>451</sup>

The Missouri general partnership statute states that "[p]artners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability."<sup>452</sup> The North Carolina statute is the same as Missouri.<sup>453</sup> The Ohio, Oklahoma, Oregon, Pennsylvania, Vermont, and Virginia statutes are the same as North Dakota.<sup>454</sup>

Rhode Island provides that "[p]artners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability."<sup>455</sup> If a partner dies, and the deceased partner was a member of a copartnership, general or limited, Rhode Island requires the following:

[T]he surviving partner shall, upon the demand in writing of the administrator or executor of the deceased copartner, and within ten (10) days subsequently, make out and deliver to the administrator or executor a detailed statement of the assets and liabilities of the copartners as they existed at the time of the decease of the copartner, which statement shall be verified by the oath of the surviving copartner.<sup>456</sup>

In addition, in the case of a copartnership, the following is permitted:

The administrator or executor may enter upon the premises and examine the books and affairs of the copartnership and take an inventory of the personal property in which his or her intestate or testate may have had an interest at the time of his or her decease.<sup>457</sup>

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449. KAN. STAT. ANN. § 56a-403(c) (1998).

450. KY. REV. STAT. ANN. § 362.1-403(3) (West 2006); ME. REV. STAT. ANN. tit. 31, § 1043(3) (2007); MD. CODE ANN., CORPS. & ASS'NS § 9A-403(c) (West 1998); MINN. STAT. § 323A.0403(c) (2017); MISS. CODE ANN. § 79-13-403(c) (2004); NEB. REV. STAT. § 67-423(3) (1997); NEV. REV. STAT. § 87.4335(3) (2006); N.J. STAT. ANN. § 42:1A-23(c) (West 2000); N.M. STAT. ANN. § 54-1A-403(c) (1997); N.D. CENT. CODE § 45-16-03(3) (1995); TENN. CODE ANN. § 61-1-403(c) (2002).

451. N.D. CENT. CODE § 45-16-03(2).

452. MO. REV. STAT. § 358.200 (2017).

453. N.C. GEN. STAT. § 59-50 (1941).

454. See *supra* note 451 and accompanying text. OHIO REV. CODE § 1776.43 (1997); OKLA. STAT. tit. 54, § 1-403 (1997); OR. REV. STAT. § 67.150 (1997); 15 PA. CONS. STAT. §§ 8446, 8455 (2017); VT. STAT. ANN. tit. 11, § 3233 (1997); VA. CODE § 50-73.101 (1997).

455. 7 R.I. GEN. LAWS § 7-12-31 (1956).

456. *Id.* § 7-12-2.

457. *Id.* § 7-12-3.

The Texas general partnership statute extends the duties of partners to provide information to assignees.<sup>458</sup>

The Utah general partnership statute extends information rights to dissociated partners and the legal representative of a deceased partner.<sup>459</sup>

The Wisconsin<sup>460</sup> and Wyoming<sup>461</sup> general partnership statutes extend information rights to former partners and the legal representatives of deceased or disabled partners.

### *E. Right to Use an Agent When Statute is Silent*

The author's research disclosed that only 22 LLC statutes permit a member to inspect the books and records of an LLC through an agent. Indeed, RULLCA does not mention the use of an agent. This is interesting in light of the possible explanation of why RULLCA, in a member-managed LLC, puts the disclosure obligation on members as well as the LLC. The Prefatory Note and Commentary to RULLCA states that "ULLCA's [the predecessor to RULLCA] drafting relied substantially on the then recently adopted Revised Uniform Partnership Act ("RUPA"), and this reliance was especially heavy with regard to member-managed LLCs."<sup>462</sup> RUPA does include a provision stating that a partner may exercise information rights "through an agent or, in the case of an individual under legal disability, a legal representative."<sup>463</sup> If a member requests to be permitted to have the member's agent inspect the LLC's books and records, the LLC might respond that its governing statute did not contemplate the use of agents, and question how the LLC could know that an agent was properly authorized.

The author's research also disclosed that only 24 limited partnership statutes permit a limited partner to inspect the books and records of the limited partnership through an agent — even though RULPA states that a limited partner may act through an agent when exercising information rights.<sup>464</sup> As with LLCs, if a limited partner in one of the other 26 states requests to have the limited partner's agent inspect the limited partnership's books and records, the general partner might respond that its governing statute did not contemplate the use of agents, and question how the limited partnership could know that an agent was properly authorized.

These are legitimate concerns, but it is also legitimate for a member or limited partner to seek to examine books and records through an agent even in the absence of specific statutory authorization. As a general rule in American juris-

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458. TEX. BUS. ORGS. CODE ANN. § 152.213 (West 2006) (stating the following:

(a) On request and to the extent just and reasonable, each partner and the partnership shall furnish complete and accurate information concerning the partnership to:

(1) a partner;  
 (2) the legal representative of a deceased partner or a partner who has a legal disability; or  
 (3) an assignee.

(b) A legal representative of a deceased partner or a partner who has a legal disability and an assignee are subject to the duties of a partner with respect to information made available).

459. UTAH CODE §§ 48-1d-403, 48-1d-605 (1953).

460. WIS. STAT. §§ 178.0408, 178.0505 (2016).

461. WYO. STAT. ANN. § 17-21-403 (1993).

462. REVISED UNIF. LTD. LIAB. CO. ACT Prefatory n. 1 (UNIF. LAW COMM'N 2013).

463. REVISED UNIF. P'SHIP ACT § 408(h) (UNIF. LAW COMM'N 2013).

464. REVISED UNIF. LTD. P'SHIP ACT § 304(h) (UNIF. LAW COMM'N 2013).

prudence, people are entitled to act through agents, and agency law provides numerous protections for third parties who deal with a principal's agent.<sup>465</sup> To be sure, as a matter of basic contract law, a third party should be able to decline to deal with an agent instead of the principal, and this approach might apply through the company agreement or partnership agreement.

The author submits that a reasonable approach is that followed by the Delaware LLC and limited partnership statutes. Delaware provides that whenever the member or partner uses an attorney or other agent, "the demand shall be accompanied by a power of attorney or such other writing which authorizes the attorney or other agent to so act on behalf of the member [or limited partner]."<sup>466</sup> Another possible approach is suggested by *Henshaw v. American Cement Corp.*, which held that when inspection was to be made by a person other than the shareholder, the corporation may require evidence of that person's authority to act on behalf of the shareholder.<sup>467</sup> In this case, the shareholder's "demand, under oath, met that requirement by naming his agents and attorneys who were to make the inspection."<sup>468</sup> An LLC or limited partnership could protect itself further by requiring the member or partner and the agent execute a confidentiality agreement. For a case approving the requirement of a confidentiality agreement, see *NAMA Holdings, LLC v. World Market Center Venture, LLC*,<sup>469</sup> discussed in Part V, Section D below.

Absent prior bad conduct, there appears to be reason other than obstructionism for a limited partnership or LLC to oppose a member's or limited partner's request to employ an attorney or other agent to inspect the books and records the member or limited partner is entitled to inspect.

## VI. CASE LAW INVOLVING INSPECTION OF BOOKS AND RECORDS IN CORPORATIONS AND UNINCORPORATED ENTITIES

### A. Summary of Cases

The following summary of cases shows that a requestor must have a proper purpose,<sup>470</sup> that a request will be denied if the requestor does not have a proper purpose,<sup>471</sup> what records are required to be made available,<sup>472</sup> what records are not required to be made available,<sup>473</sup> what reasonable access is,<sup>474</sup> potential liability for failure to provide records, and when the requestor's agent may conduct the

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465. See RESTATEMENT (THIRD) OF AGENCY §§ 6.01-7.01 (AM. LAW INST. 2006).

466. DEL. CODE ANN. tit. 6, §§ 17-305(d), 18-305(e) (2014).

467. *Henshaw v. Am. Cement Corp.*, 252 A.2d 125, 128 (Del. Ch. 1969).

468. *Id.*

469. *NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 412 (Del Ch. 2007).

470. See discussion *infra* Part VI.B (Proper Purpose Requirements).

471. See discussion *infra* Part VI.B.v (Proper Purpose Requirements: Purposes for Which Inspection Has Been Denied).

472. See discussion *infra* Part VI.C (Records Required to be Available for Inspection).

473. See discussion *infra* Part VI.C.ii (Records Required to be Available for Inspection: Interim Financial Statements)

474. See discussion *infra* Part VI.D (What is Reasonable Access).

inspection.<sup>475</sup> The corporate cases will, in most cases, also be relevant in the LLC context.

This article also discusses statutory protection for sensitive information<sup>476</sup> and restrictions in governing documents approved in case law.<sup>477</sup> Proper purposes include alleged corporate wrongdoing,<sup>478</sup> risks of planned corporate action,<sup>479</sup> valuing the requestor's shares,<sup>480</sup> the requestor's desire to offer shares for sale,<sup>481</sup> communicating with other shareholders for purposes of informing them of the requestor's tender offer and soliciting tenders of shares,<sup>482</sup> the requestor's intent to offer to purchase shares of other shareholders,<sup>483</sup> and facilitating a proxy challenge to incumbent directors.<sup>484</sup>

Improper purposes have included a director's desire to examine voting records of the association of which the requestor was a director,<sup>485</sup> a request by a former director,<sup>486</sup> investigation of possible waste and mismanagement where the requestor presents no evidence forming a credible basis from which the court may infer that waste or mismanagement has occurred,<sup>487</sup> where the requestor fails to show that inspection will not adversely affect the corporation's interests,<sup>488</sup> the requestor's desire to obtain names of shareholders who might sell their stock to the requestor,<sup>489</sup> a request to communicate with other shareholders in connection with a special meeting where the requestor did not show the intended communication,<sup>490</sup> a fishing expedition,<sup>491</sup> a request motivated by preexisting social and polit-

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475. See *supra* notes 80-81 and accompanying text; discussion *supra* Part V.B.vi (Inspection by Member's Agent).

476. See discussion of statutes *supra* Part V. (Current Statutory Provisions Governing Inspection of Books and Records) (A. Corporations, B.iii Limited Liability Companies: Restrictions on Information Rights Permitted by Statute, and C.v Limited Partnerships: Restrictions in Limited Partnership Agreements).

477. See discussion *infra* Part VI.E (Protecting Sensitive Information: Restrictions in Governing Documents Approved by Case Law).

478. See discussion *infra* Part VI.B.i (Proper Purpose Requirements: Alleged Corporate Wrongdoing).

479. See discussion *infra* Part VI.B.ii (Proper Purpose Requirements: Risks of Planned Corporate Action).

480. See discussion *infra* Part VI.B.iii (Proper Purpose Requirements: Valuing the Requestor's Shareholdings).

481. See discussion *infra* Part VI.B.iii (Proper Purpose Requirements: Valuing the Requestor's Shareholdings).

482. See discussion *infra* Part VI.B.iv (Proper Purpose Requirements: Communicating with Other Shareholders).

483. See discussion *infra* Part VI.B.iv (Proper Purpose Requirements: Communicating with Other Shareholders).

484. See discussion *infra* Part VI.B.iv (Proper Purpose Requirements: Communicating with Other Shareholders).

485. See discussion *infra* Part VI.B.v (Proper Purpose Requirements: Purposes for Which Inspection Has Been Denied).

486. See discussion *infra* Part VI.B.v (Proper Purpose Requirements: Purposes for Which Inspection Has Been Denied).

487. See discussion *infra* Part VI.B.v (Proper Purpose Requirements: Purposes for Which Inspection Has Been Denied).

488. See discussion *infra* Part VI.B.v (Proper Purpose Requirements: Purposes for Which Inspection Has Been Denied).

489. See discussion *infra* Part VI.B.v (Proper Purpose Requirements: Purposes for Which Inspection Has Been Denied).

490. See discussion *infra* Part VI.B.v (Proper Purpose Requirements: Purposes for Which Inspection Has Been Denied).

ical beliefs,<sup>492</sup> a request intended to aid a competitor,<sup>493</sup> and a request in the interest of another corporation.<sup>494</sup> Records that have been required to be made available include NOBO lists and other lists of shareholders,<sup>495</sup> communications with the corporation's attorneys,<sup>496</sup> emails,<sup>497</sup> the general ledger,<sup>498</sup> and state sales tax records.<sup>499</sup>

Records that have not been required to be made available include interim financial statements,<sup>500</sup> preliminary profit and loss statements,<sup>501</sup> and valuation estimates.<sup>502</sup> The potential liability for failure to provide records includes the possible liability of attorneys, and in some states, statutory liability for LLCs and limited partnerships. This article also discusses statutory standards for restrictions on information rights in corporations<sup>503</sup> and unincorporated entities,<sup>504</sup> the statutory provisions for inspection of books and records by directors<sup>505</sup> and the governing persons of LLCs,<sup>506</sup> the statutory provisions allowing a member to use an agent to carry out an inspection of an LLC's books and records,<sup>507</sup> the propriety of obligating members of LLCs to provide information to other members,<sup>508</sup> and the statutory provisions for allowing assignees, former owners, and deceased or disabled owners or former owners information rights in unincorporated entities.<sup>509</sup>

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491. See discussion *infra* Part VI.B.v (Proper Purpose Requirements: Purposes for Which Inspection Has Been Denied).

492. See discussion *infra* Part VI.B.v (Proper Purpose Requirements: Purposes for Which Inspection Has Been Denied).

493. See discussion *infra* Part VI.B.v (Proper Purpose Requirements: Purposes for Which Inspection Has Been Denied).

494. See discussion *infra* Part VI.B.v (Proper Purpose Requirements: Purposes for Which Inspection Has Been Denied).

495. See discussion *infra* Part VI.C.i (Records Required to be Available for Inspection: Availability of NOBO Lists and Other Lists of Shareholders”).

496. See discussion *infra* Part VI.C.iii (Records Required to be Available for Inspection: Communications with Attorneys”).

497. See discussion *infra* Part VI.C.v (Records Required to be Available for Inspection: Meaning of Books and Records”).

498. See discussion *infra* Part VI.C.v (Records Required to be Available for Inspection: Meaning of Books and Records”).

499. See discussion *infra* Part VI.C.v (Records Required to be Available for Inspection: Meaning of Books and Records”).

500. See discussion *infra* Part VI.C.ii (Records Required to be Available for Inspection: Interim Financial Statements”).

501. See discussion *infra* Part VI.C.ii (Records Required to be Available for Inspection: Interim Financial Statements”).

502. See discussion *infra* Part VI.C.ii (Records Required to be Available for Inspection: Interim Financial Statements”).

503. See discussion *infra* Part V.A (Corporations).

504. See discussion *infra* Part V.B.iii (Limited Liability Companies: Restrictions on Information Rights Permitted by Statute).

505. See discussion *infra* Part V.A.xii (Corporations: Directors' Rights to Information).

506. See discussion *infra* Part V.B.v (Limited Liability Companies: Inspection Rights of Governing Persons).

507. See discussion *infra* Part V.B.vi (Limited Liability Companies: Inspection by Member's Agent).

508. See discussion *infra* Part V.B.iv (Limited Liability Companies: Propriety of Placing Obligation to Provide Information on Members).

509. See discussion *infra* Part V.B.vii (Limited Liability Companies: Inspection and Copying by Non-members, Information Rights Extended to Deceased or Incapacitated Members).

### B. Proper Purpose Requirements

Statutory inspection rights, like the common law, routinely require that the requesting owner have a proper purpose. The following cases illustrate this requirement.

#### i. Alleged Corporate Wrongdoing

*Amalgamated Bank v. Yahoo! Inc.* held that the plaintiff, Amalgamated Bank's ("Amalgamated") demands to inspect the books and records of respondent, Yahoo! Inc., pursuant to § 220 of the Delaware General Corporation Law<sup>510</sup> would be allowed, in part, where Amalgamated's stated purpose was to investigate the hiring and subsequent firing of Yahoo's Chief Operating Officer, Henrique de Castro.<sup>511</sup> This post-trial decision ordered a tailored production of some of the documents identified in the demand.<sup>512</sup> The production is subject to a condition that the resulting documents will be deemed incorporated by reference in any derivative complaint that Amalgamated may file relating to the subject matter of the demand.<sup>513</sup>

The court further stated that the plaintiff had produced credible evidence of corporate wrongdoing, including possible breaches of fiduciary duty and corporate waste.<sup>514</sup> Investigation of possible corporate wrongdoing is a proper purpose for a shareholder inspection of books and records.<sup>515</sup>

*Security First Corp. v. U.S. Die Casting & Development Co.* held that a stockholder demonstrates a proper purpose for the production of corporate books and records by showing, by a preponderance of the evidence, that there is a credible basis to find that probable corporate wrongdoing exists, but plaintiff is not required to prove the wrongdoing itself.<sup>516</sup> The court said that the required showing may be made "through documents, logic, testimony, or otherwise."<sup>517</sup> *Fleisher Development v. Home Owners Warranty* applied Delaware common law and ruled that allegations of discriminatory treatment among members of a nonstock profit corporation, which reasonably related to the requestor's membership interests, was a proper purpose to inspect corporate records.<sup>518</sup> The requestor need not come forward with proof of wrongdoing by the corporation, but the scope of inspection allowed may be limited to those documents relevant to the proper purpose.<sup>519</sup>

Also, see *Sanders v. Ohmite Holding, LLC*.<sup>520</sup>

510. DEL. CODE ANN. tit. 8, § 220 (2010).

511. *Amalgamated Bank v. Yahoo! Inc.*, 132 A.3d 752 (Del. Ch. 2016).

512. *Id.*

513. *Id.* at 761.

514. *Id.* at 780, 783–84.

515. *Id.* at 777–78.

516. *Sec. First Corp. v. U.S. Die Casting & Dev. Co.*, 687 A.2d 563 (Del. 1997) (en banc).

517. *Id.* at 568.

518. *Fleisher Dev. Corp. v. Home Owners Warranty Corp.*, 856 F.2d 1529 (D.C. Cir. 1988).

519. *Riser v. Genuine Parts Co.*, 258 S.E.2d 184 (Ga. Ct. App. 1979); *Skouras v. Admiralty Enters., Inc.*, 386 A.2d 674 (Del. Ch. 1978); *Miles v. Bank of Heflin*, 328 So. 2d 281 (Ala. 1976); *Briskin v. Briskin Mfg. Co.*, 286 N.E.2d 571 (Ill. App. Ct. 1972); *Durr v. Paragon Trading Corp.*, 1 N.E.2d 967 (N.Y. 1936) (these cases are to the same effect).

520. See *infra* note 541 and accompanying text. *Sanders* is both a case holding that valuation of the requestor's holdings is a proper purpose and a corporate wrong doing case.

### ***ii. Risks of Planned Corporate Actions***

*Conservative Caucus Research Analysis & Education Foundation Inc. v. Chevron Corp.* held that a shareholder was entitled to a shareholder list for the purpose of communicating with other shareholders about the alleged economic risks of the corporation's business in Angola.<sup>521</sup> The court held that the desire to communicate with other shareholders about a specific corporate concern, especially in connection with a pending shareholder meeting, is a proper purpose for obtaining a stockholders list.<sup>522</sup> *Food and Allied Service Trade Dept., AFL-CIO v. Wal-Mart Stores, Inc.* allowed a labor union that owned stock in a corporation to access a list of shareholders to contact them in connection with the union's planned resolution concerning the corporation's purchase of goods made in China, allegedly by forced labor.<sup>523</sup> The union proposed measures to allay the corporation's fear that the union actually intended to pursue its organizing activities.<sup>524</sup>

### ***iii. Valuing the Requestor's Shareholdings***

*CM & M Group, Inc. v. Carroll* held that a desire to value the requestor's shareholdings was a proper purpose even though the shareholder might have a "secondary purpose" to obtain financial information that might be helpful to a third person.<sup>525</sup> The court required the order to inspect be made contingent on the requirement that neither the shareholder nor his agent disclose any financial information to third persons except under specified circumstances.<sup>526</sup> The court also directed the lower court to permit up to two further inspections necessary to update the financial information on the theory that the updated information was as essential as the original information.<sup>527</sup>

In an earlier Delaware case, *Skoglund v. Ormand Industries, Inc.*, the court stated that the test for a proper purpose under the Delaware statute was whether it was reasonably related to the person's interest as a shareholder.<sup>528</sup> The court held that if a proper purpose was established, it was no defense that the shareholder had a secondary purpose (in this case, gaining control of the corporation), which may be improper.<sup>529</sup> The court also noted, however, that even a proper purpose in the sense of being related to the shareholder's interest must also not be adverse to the interests of the corporation.<sup>530</sup> *Helmsman Management Service v. A & S Consulting* followed *CM & M Group, Inc.* and listed two more proper purposes: (1) A shareholder's desire to determine the corporation's present and past ability to pay dividends; and (2) A shareholder's need to inform himself of a corporate transac-

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521. *Conservative Caucus Research, Analysis & Educ. Found., Inc. v. Chevron Corp.*, 525 A.2d 569 (Del. Ch. 1987).

522. *Id.*

523. *Food & Allied Serv. Trades Dep't, AFL-CIO v. Wal-Mart Stores, Inc.*, CIV. A. No. 12551, 1992 WL 11285, at \*1 (Del. Ch. May 20, 1992).

524. *Id.*

525. *CM & M Grp., Inc. v. Carroll*, 453 A.2d 788 (Del. 1982).

526. *Id.*

527. *Id.*

528. *Skoglund v. Ormand Indus., Inc.*, 372 A.2d 204, 207 (Del. Ch. 1976).

529. *Id.*

530. *Id.*

tion about which he would otherwise have learned and voted upon if given the proper notice.<sup>531</sup>

*Eastlund v. Fusion Systems Corp.* held that a shareholder of 4,723 shares of a privately held high technology company was entitled to access the shareholder list where the shareholder stated that his sole purpose was to determine the value of his shares and then offer a portion for sale.<sup>532</sup> The shareholder was not entitled to inspect a broad range of books and records and receive information about financial affairs beyond certain financial information he had already received.<sup>533</sup> The shareholder has previously indicated that he might disclose confidential information to competitors.<sup>534</sup> The court held that most of the information sought might, if disclosed to competitors, damage the interests of the corporation and its shareholders because very little public information is available in the high technology industry.<sup>535</sup>

*Friedman v. Altoona Pipe and Steel Supply Co.* held that determination of the value of the plaintiff's shares was a proper purpose under the Pennsylvania statute and that production of summaries rather than the original records did not comply with the statute.<sup>536</sup> The court in *In re Pearson* granted a personal representative the right to inspect corporate records to determine the value of shares in connection with a sale under a shareholder's agreement.<sup>537</sup> The court allowed inspection of records covering three years rather than one year (proposed by the corporation) or five years (proposed by the personal representative as appropriate for preparation of estate tax returns).<sup>538</sup> An earlier Indiana case, applying the common law, *Charles Hegewald Co. v. State ex rel. Hegewald*, rejected the determination of value for computing inheritance tax as a proper purpose for inspection stating the following:

In this case, where [plaintiff] is not charged with any legal duty to ascertain the value of her stock for inheritance tax purposes, but the duty to learn all pertinent facts and fix such value is imposed by law upon a public officer, who has full power to investigate and examine witnesses, and would not be bound by any investigation which [plaintiff] might make or any conclusion she might reach, the mere fact that she desires to know such value in order that she may pay the inheritance tax does not charge the corporation with a clear legal duty to submit its books to accountants employed on her behalf. Neither does her desire to inform herself so that she may report to the court by which she was appointed her conclusion as to the value of the stock for inheritance tax purposes give her a clear legal right, under the rules above laid down, to demand that the books be submitted to examination by an accountant. Neither the facts alleged, the

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531. *Helmsman Mgmt. Servs., Inc. v. A & S Consultants, Inc.*, 525 A.2d 160, 165 (Del. Ch. 1987).

532. *Eastland v. Fusion Sys. Corp.*, No. 11574, 1990 WL 126660, at \*8 (Del. Ch. Aug. 29, 1990).

533. *Id.*

534. *Id.* at \*7.

535. *Id.* at \*6–7.

536. *Friedman v. Altoona Pipe & Steel Supply Co.*, 460 F.2d 1212, 1214 (3d Cir. 1972).

537. *Application of Pearson*, 223 N.Y.S.2d 15, 16–17 (N.Y. Sup. Ct. 1961).

538. *Id.*



facts proved[,] nor the facts found were sufficient to entitle [plaintiff] to the relief asked.<sup>539</sup>

However, where the value of shares owned by a decedent must be valued for general estate administration purposes, the court sustained the personal representative's right to examine books and was not required to accept accountants' reports that the decedent had accepted.<sup>540</sup>

In *Sanders v. Ohmite Holding, LLC*, Sanders sought books and records from a Delaware LLC.<sup>541</sup> When the LLC was formed in 1998 in connection with a merger, Sanders lent \$2 million to one of the members and received a security interest in the member's units.<sup>542</sup> The loan was partially repaid in 2000, and Sanders released his lien on half of the units held as collateral.<sup>543</sup> In 2007, the member transferred his remaining units to Sanders.<sup>544</sup> Sanders was told by the member, and believed, that the units transferred to Sanders represented a 7.75% interest in the LLC.<sup>545</sup> In 2008, Sanders received a K-1 showing that he owned only a 0.000775% interest in the LLC.<sup>546</sup>

After several attempts to obtain information and the LLC's initial refusal to acknowledge that Sanders was a member, Sanders sent a letter requesting books and records relating to the dilution of the interest he had purchased.<sup>547</sup> The LLC denied the request on the grounds that Sanders did not state any facts indicating why he needed to evaluate the matters specified and could not make any assertion that the dilution was improper because he was not a member at the time of the transaction that caused the dilution.<sup>548</sup>

After Sanders filed this action, the LLC gave him copies of tax returns and unaudited financial statements for 2007-2009.<sup>549</sup> From these documents, Sanders could reasonably infer that the LLC issued units in a related-party transaction at a deep discount.<sup>550</sup> Sanders thus questioned whether the LLC received proper consideration for the additional units issued and whether the LLC was being operated exclusively for the benefit of its principal owner rather than the members as a whole.<sup>551</sup> Sanders requested books and records to answer those questions, and the LLC refused the request.<sup>552</sup> The LLC claimed that Sanders was not entitled to obtain any books and records from before the date in 2007 when he became a member.<sup>553</sup> The court noted that the provision in the LLC Agreement cited by the company only limited the rights of an assignee.<sup>554</sup> Sanders was a member, not an assignee, and the LLC Agreement did not limit the inspection rights of a member

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539. *Charles Hegewald Co. v. State*, 149 N.E. 170, 173 (Ind. 1925).

540. *Bankers Tr. Co. v. H. Rosenhirsch Co.*, 190 N.Y.S.2d 957, 959 (N.Y. Sup. Ct. 1959).

541. *Sanders v. Ohmite Holdings, LLC*, 17 A.3d 1186, 1190 (Del. Ch. 2011).

542. *Id.* at 1189.

543. *Id.*

544. *Id.*

545. *Id.* at 1189-90.

546. *Id.* at 1190.

547. *Id.*

548. *Id.* at 1191.

549. *Id.*

550. *Id.*

551. *Id.* at 1192.

552. *Id.*

553. *Id.*

554. *Id.* at 1192-93.

under the Delaware LLC Act.<sup>555</sup> Looking to corporate law addressing the proper purpose requirement, the court concluded that Sanders had a proper purpose for his request.<sup>556</sup> The court rejected the LLC's argument that Sanders could not have a proper purpose for inspecting the books and records because he was not yet a member at the time of the events he sought to investigate.<sup>557</sup> If the events he sought to investigate were "reasonably related" to his interest as a member, then he should be granted access.<sup>558</sup>

Valuing his ownership and investigating potential wrongdoing are proper purposes.<sup>559</sup> At this stage, Sanders only needed to have a credible basis to suspect wrongdoing, a standard the court said was readily met in this case.<sup>560</sup> The court also concluded that the books and records sought were reasonably required to fulfill the stated proper purpose.<sup>561</sup> Minutes of membership or management meetings relating to dilution, documents reflecting the number of units issued and consideration for the units, filings on Schedule K-1, and books and records about the opportunity of Sanders or his predecessor to buy units at the same price were all necessary to evaluate whether the dilution was wrongful.<sup>562</sup> Financial reports and tax returns going back to 2003 were necessary to evaluate whether there were extenuating circumstances that required issuance of a large number of units for a deep discount.<sup>563</sup>

*In Madison Avenue Investment Partners, LLC v. America First Real Estate Investment Partners, L.P.*,<sup>564</sup> two limited partners brought a books and records action against three Delaware limited partnerships and their general partners.<sup>565</sup> The court described the plaintiff's request, in part, as follows:

Since purchasing units in the Partnerships, [plaintiff] attempted on more than one occasion to sell its units to the general partner, demanding a premium to the market price in each instance. On January 30, 2001, [plaintiff] contacted the general partner of Real Estate Investors to demand that the partnership be liquidated. On March 22, 2001, [plaintiff] demanded access to the Real Estate Investors' books and records, with the stated purpose of determining 'whether to increase its holdings and whether liquidation would be in the best interests of the respective limited partners and shareholders, and also . . . to contact the respective limited partners and shareholders to determine whether they wish to sell their interests and to determine whether they wish to call Partnership or shareholder meetings for the purpose of liquidating the entities.'<sup>566</sup>

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555. *Id.* at 1193.

556. *Id.*

557. *Id.*

558. *Id.*

559. *Id.*

560. *Id.* at 1194.

561. *Id.* at 1195.

562. *Id.*

563. *Id.*

564. *Madison Ave. Inv. Partners, LLC v. Am. First Real Estate Inv. Partners, L.P.*, 806 A.2d 165 (Del. Ch. 2002).

565. *Id.* at 167.

566. *Id.* at 168.

After analyzing the partnership agreements<sup>567</sup> and the applicable Delaware statute, the court noted the following:

[t]he items Plaintiffs seek easily fall within the ambit of their statutory right to ‘[t]rue and full information regarding the status of the business and financial condition of the limited partnership’ and ‘[o]ther information regarding the affairs of the limited partnership as is just and reasonable.’ Because that right is not limited by the Partnership Agreements, the court concludes that the items sought by Plaintiffs are ‘books and records’ of the Partnerships.<sup>568</sup>

The court then discussed whether the plaintiff had a proper purpose for its request.<sup>569</sup> Noting that valuing one’s investment is a proper purpose, the court then discussed defendant’s assertions that plaintiff had a hidden, improper purpose.<sup>570</sup> The court stated the following:

To some extent, Defendants’ concern reflects a fear that Madison will attempt to gain an unfair informational advantage over the others, including existing limited partners, with the information it has requested. This is a legitimate concern and one that Defendants are empowered by the DRULPA to address. To allay these concerns and give effect to the statutory rights of the general partners, the final order will condition the right of access granted to Madison on the execution of a satisfactory confidentiality agreement governing the treatment of the documents and information made available to Plaintiffs.<sup>571</sup>

The court then discussed what records should and should not be given to plaintiff.

The court concluded that plaintiff was entitled to see limited partnership agreements between Real Estate Investment Partners and its subsidiaries because that was reasonably necessary to valuing plaintiff’s investment in that partnership.

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567. *Id.* at n.1 (“SECTION 9.01. BOOKS AND RECORDS:

The Partnership shall maintain its books and records at its principal office. The Partnership’s books and records shall be available during ordinary business hours for examination and copying there at the reasonable request, and at the expense, of any Partner or Unit Holder or his duly authorized representative, or copies of such books and records may be requested in writing by any partner or Unit Holder or his duly authorized representative, in each case for any purpose reasonably related to such Partner’s or Unit Holder’s interest in the Partnership, provided that the reasonable costs of fulfilling such request, including copying expenses, shall be paid by the Partner or Unit Holder making such request. The Partnership’s books and records shall include the following: (a) a current list of the full name, last known home or business address and Partnership Interest of each Partner and Unit Holder set forth in alphabetical order; (b) a copy of this Agreement and the Certificate, together with executed copies of any powers of attorney pursuant to which such Certificate, and any amendments thereto, have been executed; (c) copies of the Partnership’s federal, state and local income tax returns and reports, if any, for the three most recent years; (d) copies of the financial statements of the Partnership for the three most recent years; and (e) all appraisals, if any, obtained with respect to the Properties (which appraisals shall be maintained for at least five years”).

568. *Id.* at 173–74.

569. *Id.* at 174.

570. *Id.*

571. *Id.* at 176.

At trial, plaintiff had testified that the basis of its need for the limited partnership agreements with the subsidiary partnerships to determine the value of its shares was to determine the percentage of cash flows from the subsidiary partnerships the general partner was contractually entitled to receive. Plaintiff's testimony showed that the general partner received at least 1% and in some case as much as 10% of all cash flows generated by the subsidiary partnerships. The general partner's cash flow percentages also sometimes changed due to the passage of time. Because such a change would have a direct impact on the cash flows received by the entity in which plaintiff had invested, this information was reasonably necessary for plaintiff to value its investment.<sup>572</sup>

The court concluded, however, that neither the production of all mortgage, loan, note and debt agreements for the Partnerships (and the Real Estate Investment Partners subsidiaries) nor all non-public financial statements specifically related to the real estate of the Partnerships, was not reasonably necessary to value plaintiff's investment.<sup>573</sup>

The court accepted Madison's argument that the aggregated financial statements of the partnership as a whole mask the performance and value of the individual properties and can make it difficult to value the partnership as a whole. Accordingly, to the extent the books and records of Real Estate Investment Partners contain such information, they will be made available to Plaintiffs.<sup>574</sup>

*Thomas & Betts Corporation v. Leviton Manufacturing Co. Inc.* addresses a demand by Thomas & Betts to inspect the records of Leviton Manufacturing.<sup>575</sup> Defendant objected, in part, on the ground that Thomas & Betts had previously received information from Leviton.<sup>576</sup> Although the court stated that a shareholder's right to compel inspection is to be narrowly construed,<sup>577</sup> the court approved plaintiff's request:

I reject Leviton's argument that all relief should be denied because Thomas & Betts was twice able to place a value on Leviton. In both instances, those valuations were based on assumptions predicated on minimal information and made for a different purpose--to buy shares (or, in the second case, control) at the lowest possible price. Because of its position as a buyer, and recognizing the incompleteness of its information, Thomas & Betts used the low end of an extremely wide range of possible values to make both offers. To put it differently, although the information available to Thomas & Betts as a potential buyer enabled it to value the Blumbergs' shares at the low end of that range, now that Thomas & Betts

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572. *Id.* at 178.

573. Plaintiff argued that such information would be pertinent if the Partnerships liquidated. Nevertheless, the court concludes that non-public financial statements specifically relating to the subsidiary partnerships through which Real Estate Investment Partners invests *are* reasonably necessary to value Madison's investment in that partnership. According to trial testimony, the profits and loss information for the subsidiaries that hold much of the valuable property of Real Estate Investment Partners, as well as information relating to the level of debt on each property, is not included in the publicly available information concerning the Partnerships. *Id.*

574. *Id.* at 179.

575. *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 685 A.2d 702, 704 (Del. Ch. 1995).

576. *Id.* at 714.

577. *Id.* (citing *Willard v. Harrworth Corp.*, 258 A.2d 914, 915 (Del. Ch. 1969)); *Catalano v. T.W.A.*, No. 5352, 1977 WL 2576, at \*2 (Del. Ch. Nov. 3, 1977).

is in the position of being a potential seller, it legitimately needs more complete information. The fact that Thomas & Betts previously made “low end” valuations of Leviton should not, therefore, bar its statutory inspection right. See Carroll I.<sup>578</sup>

*Artic Financial Corporation v. OTR Express, Inc.* criticized *Thomas & Betts*:

The district court cites to a chancery court opinion from Delaware, *Thomas & Betts Corp. v. Leviton Mfg. Co., Inc.*, 685 A.2d 702 (Del.Ch.1995). We refer to it as *Thomas & Betts I*. The case was appealed to the Delaware Supreme Court and reported in 681 A.2d 1026 (Del.1996). We refer to the Supreme Court decision as *Thomas & Betts II*. In *Thomas & Betts I*, the chancery court rejected the corporation’s argument that the order for inspection should not be granted because the demand lacked specificity. 685 A.2d at 708. The court noted the depositions, trial testimony, and post-trial memoranda established a proper purpose. 685 A.2d at 708. The district court in the present case considered the reasoning in this opinion but rejected it, finding it inapplicable because the *Thomas & Betts I* court was considering the request to see stockholder lists.

However, it is clear *Thomas & Betts I* did not confine its analysis to the four corners of the demand with respect to the inspection of corporate books and records: ‘Leviton responds that Thomas & Betts’ waste and mismanagement claims are so lacking in *record support* that they cannot justify permitting it to inspect Leviton’s, or its subsidiaries’, books and records.’

Apparently, the *Thomas & Betts I* court disagreed that the record supported a finding that the corporation suffered from mismanagement, but that does not mean the court did not consider what the record contained. Thus, it is not clear what authority the district court in this case could have relied upon to exclude consideration of the affidavit and deposition testimony. Furthermore, a review of *Thomas & Betts II* shows that the court did not limit itself to the four corners of the demand for proof of a proper purpose.

Unfortunately, the district court also relied on *Thomas & Betts I* to impose a higher burden of proof upon Arctic to justify its right to inspect the books and records: ‘Where the demand for inspection seeks books and record to investigate possible mismanagement, the evidentiary burden is greater than normal and it rests with the shareholder. *Thomas & Betts, supra* 685 A.2d at 710.’

The *Thomas & Betts II* court disapproved of that language in *Thomas & Betts I*: ‘The Court of Chancery *incorrectly* articulated the governing legal standard.’ (Emphasis added.) 681 A.2d at 1031. The court further explained that ‘[a] general standard that a stockholder seeking inspection of books and records bears ‘a greater-than-normal evidentiary burden’ is unclear and could be interpreted as placing an unduly difficult obstacle in the path of stockholders seeking to investigate waste and

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578. *Thomas*, 685 A.2d at 714.

mismanagement.’ 681 A.2d at 1031-32. Rather, the Delaware court called the burden of proof a normal one.<sup>579</sup>

#### ***iv. Communicating with Other Shareholders***

*Crane Co. v. Anaconda Co.* “held that a qualified shareholder may inspect a corporation’s [share ledger] to ascertain the identity of fellow shareholders for the avowed purpose of informing them directly of its exchange offer and soliciting tenders of [shares].”<sup>580</sup> The court also held that the shareholder’s pending tender offer involving over one fifth of the corporation’s common shares was not a purpose unrelated to the business of the corporation for purposes of the New York statute.<sup>581</sup> In *NVF Co. v. Sharon Steel Corp.*, the court held that a shareholder who intended to make an offer to purchase shares from other shareholders had stated a “proper purpose” within the Pennsylvania statute for seeking access to the list of shareholders even though the shareholder intended to offer to purchase the shares for debentures and warrants.<sup>582</sup>

*Lopez v. SCM Corp.* held that under the New York statute, “inspection of shareholder lists to facilitate a proxy challenge to incumbent directors [was a proper] purpose.”<sup>583</sup> A similar holding was made in *Credit Bureau Reports, Inc. v. Credit Bureau of St. Paul, Inc.*<sup>584</sup> *General Time Corp. v. Talley Industries, Inc.* held that the solicitation “of proxies for a slate of directors in opposition to management was a proper purpose” even though the target company alleged that the shareholder would thereby violate the Securities and Exchange Act of 1934 and the Investment Company Act of 1940.<sup>585</sup> In *Fears v. Cattlemen’s Investment Co.*, the court held that solicitation of proxies from other shareholders of the corporation was a proper purpose under the Oklahoma statute even though the solicitation was “made with the intent of gaining control of the management of the corporation.”<sup>586</sup> *Nationwide Corp. v. Northwestern National Life Insurance Co.* held similarly.<sup>587</sup>

*Bond Purchase, L.L.C. v. Patriot Tax Credit Partners* involved a request by a plaintiff who was a “non-limited partner investor in [the] defendant through ownership of Beneficial Unit Certificates (“BUC\$”) [for a] list of the names and addresses of the defendant’s partners and other BUC\$ owners.”<sup>588</sup> The court approved the plaintiff’s request:

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579. *Artic Fin. Corp. v. OTR Express, Inc.*, 38 P.3d 701, 705–06 (Kan. 2002).

580. *Crane Co. v. Anaconda Co.*, 346 N.E.2d 507 (N.Y. 1976).

581. *Id.* at 512. (similar holdings allowing inspection in connection with a tender offer include: *Johncamp Realty, Inc. v. Sanders*, 415 N.Y.S.2d 192, 193 (N.Y. Sup. Ct. 1979); *Alex, Brown & Sons v. Latrobe Steel Co.*, 376 F. Supp. 1373 (W.D. Pa. 1974); and *Crouse v. Rogers Park Apartments, Inc.*, 99 N.E.2d 404, 408 (Ill. App. Ct. 1951)).

582. *NVF Co. v. Sharon Steel Corp.*, 294 F. Supp. 1091, 1094 (W.D. Pa. 1969).

583. *Lopez v. SCM Corp.*, 420 N.Y.S.2d 225, 226 (N.Y. App. Div. 1979).

584. *Credit Bureau Reports, Inc. v. Credit Bureau of St. Paul, Inc.*, 290 A.2d 691, 692 (Del. 1972).

585. *Gen. Time Corp. v. Talley Indus., Inc.*, 240 A.2d 755, 756 (Del. 1968).

586. *Fears v. Cattlemen’s Inv. Co.*, 483 P.2d 724, 728 (Okla. 1971).

587. *Nationwide Corp. v. Nw. Nat’l Life Ins. Co.*, 87 N.W.2d 671, 683 (Minn. 1958) (other cases upholding inspection for the purpose of soliciting general proxies in connection with the annual shareholder’s meeting include: *Schnell v. Chris-Craft Indus., Inc.*, 283 A.2d 852, 853 (Del. Ch. 1971); and *W. Air Lines, Inc. v. Kerkorian*, 254 A.2d 240, 241–42 (Del. 1969)).

588. *Bond Purchase, L.L.C. v. Patriot Tax Credit Props., L.P.*, 746 A.2d 842, 846 (Del. Ch. 1999).

Although the plaintiff's desire to use the list to conduct a mini-tender offer for 4.9% of the defendant's outstanding partnership interests is a "proper purpose" under 6 *Del. C.* Section 17-305(a), plaintiff does not have a statutory right to the list because the defendant's general partner in good faith believes that disclosing the list to the plaintiff is not in the best interest of the defendant. The defendant, therefore, is entitled to deny the plaintiff access to the list under 6 *Del. C.* Section 17-305(b). The plaintiff, however, does have a contractual right to the list under section 14.1 of the partnership agreement, which grants the plaintiff, as a BUC\$ owner, the right to inspect, copy or examine the defendant's books and records at all times. In arriving at this result, I conclude that in this instance the term 'books and records' as used in section 14.1 includes a list of the defendant's partners and BUC\$ owners. I also conclude that this is an instance in which the 'improper purpose defense' can be implied as a term of the partnership agreement, but that the defendant has failed to meet its burden to establish the defense in this case. Specifically, the defendant fails to prove that the plaintiff's mini-tender offer in fact would be adverse to the interests of the defendant.<sup>589</sup>

*Weber v. Continental Motors Corp.* held that a minority shareholder's desire to communicate with other shareholders with respect to (1) the corporation's continuance of dividend payments, and (2) an exchange offer was a proper purpose under Virginia law.<sup>590</sup> *Mite Corp. v. Heli-Coil Corp.* held that communicating with other shareholders in order to solicit offers to exchange common shares was a proper purpose.<sup>591</sup>

In *Western Pacific Industries, Inc. v. Liggett & Myers, Inc.*, management of Liggett & Myers denied Western Pacific's request for a list of preferred shareholders at a time when Western Pacific owned only common shares.<sup>592</sup> The court held that Western Pacific was entitled, for any proper purpose, to a list of owners of both preferred and common shares and that a proper purpose existed where the shareholder sought inspection to purchase additional shares from other shareholders.<sup>593</sup> *Nationwide Corp. v. Northwestern National Life Insurance Co.* held that inspection of the share ledger for the purpose of soliciting proxies by an unregistered investment company did not conflict with the Investment Company Act of 1940, even though the purpose might be to gain control of a corporation engaged in interstate commerce contrary to the Investment Company Act.<sup>594</sup> *Alabama Gas Corp. v. Morrow* held that the Securities Exchange Act of 1934 did not affect

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589. *Id.* at 846.

590. *Weber v. Cont'l Motors Corp.*, 305 F. Supp. 404, 406-07 (S.D.N.Y. 1969).

591. *Mite Corp. v. Heli-Coil Corp.*, 256 A.2d 855, 858 (Del. Ch. 1969) (earlier cases upholding inspection for other communication purposes include *State ex rel. Foster v. Standard Oil Co. of Kan.*, 18 A.2d 235, 237, 239 (Del. Super. Ct. 1941) (solicitation of shareholders to join in a derivative suit); *Hanrahan v. Puget Sound Power & Light Co.*, 126 N.E.2d 499, 503-04 (Mass. 1955) (dissemination of information concerning a proposed corporate merger); and *Kahn v. Am. Cone & Pretzel Co.*, 74 A.2d 160, 161 (Pa. 1950) (efforts to form a protective committee of preferred shareholders)).

592. *W. Pac. Indus., Inc. v. Liggett & Myers, Inc.*, 310 A.2d 669, 670 (Del. Ch. 1973).

593. *Id.* at 671.

594. *Nationwide Corp. v. Nw. Nat'l Life Ins. Co.*, 87 N.W.2d 671, 679, 683-84 (Minn. 1958).

inspection rights granted by a state even when the purpose was future proxy solicitation.<sup>595</sup>

*Weigel v. O'Connor* stated that the phrase “for any proper purpose” in the Illinois inspection statute included that it be made with an “honest motive” and “in good faith,” and was a purpose which sought to protect the corporation’s interests as well as those of the shareholder.<sup>596</sup> “A stockholder must be seeking something more than satisfaction of his curiosity and must not be conducting a general fishing expedition.”<sup>597</sup> The court further held that a single proper purpose was enough to satisfy the statutory requirement.<sup>598</sup> The shareholder did not have to establish a proper purpose with respect to each document that he wished to examine.<sup>599</sup>

*Fownes v. Hubbard Broadcasting, Inc.* held that under Minnesota law a prima facie case of good faith purpose was achieved by merely alleging the information was sought for a proper purpose.<sup>600</sup> The court further held the statute permitted multiple examinations of the same corporate books and records, and, where the right to inspect existed, refusal could not be justified by the corporation offering a substitute or refusing the request arguing that the information was available from other sources, or that it was not needed.<sup>601</sup> Where a shareholder’s agent demanded to inspect corporate records to acquire details of the business and the condition of its affairs and to investigate whether there was mismanagement, the Ohio Supreme Court permitted the inspection stating the “specific purpose” required by the statute must be liberally construed in the manner that best protects the interest of the shareholder.<sup>602</sup> *Smith v. Conley* held that a shareholder in a nonprofit corporation had stated a proper purpose for inspection of corporate records when he alleged that he sought inspection to determine the performance of management, the condition of the company, and whether proper records were being kept.<sup>603</sup> The court also held that the fact that a similar inspection had been requested within one year of the current request did not amount to evidence of unreasonable or repetitive requests.<sup>604</sup>

*Shioleno v. Sandpiper Condominium Council of Owners, Inc.* involved the demand by plaintiff to inspect the books and records of defendant.<sup>605</sup> At the time of his demand, plaintiff was a member of defendant’s board of directors.<sup>606</sup>

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595. *Ala. Gas Corp. v. Morrow*, 93 So. 2d 515, 518–19 (Ala. 1957).

596. *Weigel v. O'Connor*, 373 N.E.2d 421, 426 (Ill. App. Ct. 1978).

597. *Id.*

598. *Id.* at 428.

599. *Id.*

600. *Fownes v. Hubbard Broad., Inc.*, 225 N.W.2d 534, 536 (Minn. 1975).

601. *Id.* at 536–37.

602. *Grossman v. Cleveland Cartage Co.*, 157 N.E.2d 154, 157 (Ohio Ct. Com. Pl. 1959).

603. *Smith v. Conley*, 279 S.E.2d 491, 492 (Ga. Ct. App. 1981).

604. *Id.*

605. *Shioleno v. Sandpiper Condos. Council of Owners, Inc.*, No. 13-07-00312-CV, 2008 WL 2764530, at \*1 (Tex. Ct. App. July 17, 2008).

606. *Id.* at \*1, \*5–6 (The court provided a lengthy description of plaintiff’s failed efforts to inspect defendant’s books and records:

*Shioleno* alleges and the record appears to suggest that: (1) Sandpiper repeatedly denied him access to its books and records apparently maintained at its principal office in Corpus Christi; and (2) Sandpiper continually provided incomplete information as to the financial health of the association as required by statute and by its bylaws. *Shioleno* testified that Sandpiper still had not provided all the books and records referenced in the February 2, 2006 and March 27, 2006 requests. Gosman [a forensic accountant hired by plaintiff] received 2,900 pages of a general ledger in electronic form on March 28, 2006; he received an additional 465 pages of board minutes



on March 30, 2006; and he received Sandpiper's tax returns and the management contracts between CCMS and Sandpiper on April 6, 2006. However, Gosman testified that he did not receive depreciation registers from Sandpiper until the week of the August 14, 2006 trial. Gosman further testified to the following:

Q: [Shiolen's counsel]: Had you had access to the books and records and the computer files when you were down here [Corpus], would it have been necessary for a work effort, I'll call it, by CCMS to gather this stuff and copy it and give it to you?

A: [Gosman]: Well, no. That was the basis for my being here, was to ease the effort to produce this information. If the information is right there in a file cabinet, then it's very simple to say, "Well, the information is right there." "If you want copies, fine. We'll make you copies, you can make copies, but the information is right there." See, the books and records that we asked for are what's kept in the normal course of business. It's nothing that needs to be newly created or pulled out of the ether [sic]. I mean, it's the books and records that they have to have to run their own business for their own financial reporting. So we aren't asking them to create anything, we were just simply asking access to what they already had. Q: And I believe you testified before that you were denied that access?

A: In part, yes.

Q: All right.

A: I am the first one to agree we got a lot of information, but there were some really important parts left out.

Barbieri testified that he sent an e-mail on April 21, 2006, to John Holmgreen, Sandpiper's trial counsel, as a last attempt to enforce Shiolen's inspection rights, requesting that Sandpiper make the remaining books and records available for inspection. Barbieri noted in the e-mail that he and Shiolen were in Corpus Christi from April 21 to 22 and that they could easily stop by Sandpiper's principal office and conduct the inspection of the remaining books and records. On April 22, 2006, Holmgreen sent an e-mail to Barbieri granting access to Sandpiper's remaining books and records and computer files on Sunday, April 23. Holmgreen also noted that Shiolen could inspect Sandpiper's computer systems on Saturday, April 22, at 10:00 p.m. However, Barbieri and Shiolen were not able to inspect the records on these dates because they were scheduled to leave Corpus Christi prior to 10:00 p.m. on April 22, as Barbieri had stated in his e-mail to Holmgreen.

Then, on June 15, 2006, Holmgreen sent Barbieri another letter noting that Sandpiper had granted Shiolen access to the remaining books and records and computer systems from "Monday, June 19, 2006, and continuing until Friday, June 23, 2006, from 8:30 a.m. until 5:00 p.m." Holmgreen further noted that "[t]he records to which this response applies are the records described in ¶ 15 of Mr. Gosman's communication of March 27, 2006, and ¶¶ 7, 8, and 12 of your letter of April 21, 2006," indicating that Sandpiper still had not complied with Shiolen's initial requests for inspection of its books and records.

Sandpiper relies heavily on an e-mail sent by Barbieri to Holmgreen on August 10, 2006, stating that the parties should arrange to inspect the computers and computer files at Sandpiper and CCMS after the bench trial on August 14, 2006. Sandpiper argues that this statement confirms "yet another of Appellee's repeated offers, prior to the hearing, to have Appellants inspect its computer systems." (Emphasis in original.) On appeal, Sandpiper notes that on three separate occasions, Shiolen was granted access to inspect its books and records: April 22, June 15, and August 10.

While it appears Sandpiper tried to accommodate Shiolen's schedule, in the end, according to Barbieri's August 10, 2006 e-mail, Sandpiper still had not produced much of the requested information, including: (1) backup or supporting information for the previously supplied general ledger entries; (2) fixed asset and depreciation registers for all activity between September 30, 2002, and September 30, 2005; (3) all contracts and agreements involving Sandpiper and the services of any employee, contractor, or company from October 2003 to August 2006; (4) all correspondence between Sandpiper board members other than the minutes of the board of Directors[] meetings; (5) all correspondence between Ron Park and Sandpiper from October 2003 to August 2006; and (6) all work papers provided for the audit of Sandpiper, including the Resort Fund, from September 30, 2003 through September 30, 2005.

Based on the foregoing, we conclude that Sandpiper failed to comply with section 82.114 of the property code, article 1396-2.23, and section 3.11 of its own bylaws in making its books and records available to Shiolen at a reasonable time after Shiolen's initial request for inspection).

***v. Purposes for Which Inspection Has Been Denied***

*Chantiles v. Lake Forest II Master Homeowners Assoc.*<sup>607</sup> holds that a director's rights to examine the voting records of the association are not absolute and must be balanced against the member's legitimate expectations of privacy in their voting decisions.<sup>608</sup> The court upheld the trial court's balancing of the two interests:

Chantiles states his purpose in inspecting the ballots was to determine whether he had been shorted proxy votes. It was his intention to compare the ballots with his own list of homeowners on which he monitored the proxies promised him. He would later determine whether a judicial challenge would be brought. Chantiles wanted to compare the votes he believed he had been promised to the votes he actually received. We can conceive of no greater violation of the privacy of the Association's members. Any neighbor may well have told Chantiles he would receive his or her proxy votes, but actually cast his or her votes otherwise. To now give Chantiles personal access to the names of those voting and how they voted certainly violates well-established social norms.

The trial court offered a reasonable resolution. It appointed Chantiles's own attorney to review and tally the ballots, provided he not disclose the name of any individual voter, or how he or she voted, without further order of the court. Chantiles refused this resolution, which strongly suggests his motive was not simply to check the math, but to find out how his neighbors actually voted. He cannot now complain that he was denied such an opportunity. The trial court's order was appropriate.<sup>609</sup>

*King v. DAG SPE Managing Member* denied the request of Robert L. King to investigate the books and records of defendant under both the Delaware statute,<sup>610</sup> and the common law.<sup>611</sup> The court based its holding on the fact that King was no longer a director and that the Delaware statute had been construed to require the director to be current in their position.<sup>612</sup> The court expressed doubt that the common law of inspection rights still applied in Delaware because Delaware courts had enforced the common law only until 1981, when the Delaware statute was enacted.<sup>613</sup> The court further held that, in any event, the common law cases cited by King did not support his position.<sup>614</sup>

In *Thomas & Betts Corp. v. Leviton Manufacturing Co.*, the plaintiff, Thomas & Betts, demanded inspection of an extensive list of Leviton's corporate records and documents.<sup>615</sup> Thomas & Betts had been rebuffed in several attempts to acquire Leviton and, after the next to last such attempt, acquired a sizable minority

607. *Chantiles v. Lake Forest II Master Homeowners Ass'n*, 45 Cal. Rptr. 2d 1 (1995).

608. *Id.* at 7.

609. *Id.* at 7–8.

610. DEL. CODE ANN. tit. 8, § 220(d) (2010).

611. *King v. DAG SPE Managing Member, Inc.*, No. 7770-VCP, 2013 WL 6870348, at \*9 (Del. Ch. Dec. 23, 2013).

612. *Id.* at \*6.

613. *Id.* at \*7.

614. *Id.*

615. *Thomas & Betts Corp. v. Leviton Mfg. Co.*, 681 A.2d 1026, 1029 (Del. 1996).

stake in the company from a dissident shareholder.<sup>616</sup> When Leviton's CEO (and 76.45% shareholder) once more refused to consider a sale of the company, Thomas & Betts's CEO advised the board that he intended to request a review of all Leviton's books and records to start "either a dialogue or a lawsuit."<sup>617</sup> Plaintiff's demand letter stated that inspection was sought for the purposes of (1) investigating waste and mismanagement; (2) facilitating its use of the equity method of accounting for its Leviton investment; and (3) assisting in the valuation of its Leviton shares.<sup>618</sup> The Court of Chancery held that Thomas & Betts was not motivated by its stated purposes but, rather, by the improper purpose of gaining leverage in its continuing attempt to acquire Leviton.<sup>619</sup>

The Supreme Court of Delaware affirmed.<sup>620</sup> Although inspection of books and records to investigate waste and mismanagement is a proper purpose, the shareholder seeking inspection bears the burden of proving a proper purpose exists *in fact*.<sup>621</sup> That burden is only met if the shareholder presents some credible basis from which the court may infer that waste or mismanagement may have occurred.<sup>622</sup> Plaintiff also failed to carry its burden with respect to its second stated purpose, facilitating equity accounting.<sup>623</sup> Plaintiffs need to account for its Leviton investment by a particular method concerns its relationship with its own shareholders and is, thus, an individual purpose unrelated to plaintiff's interest as a shareholder in Leviton.<sup>624</sup> Moreover, utilization of equity accounting for a minority interest depends upon a rebuttable presumption that the shareholder exercises a degree of control.<sup>625</sup> That presumption is rebutted by the controlling shareholder's hostility to plaintiff.<sup>626</sup> Plaintiff, however, was entitled to limited inspection for the purpose of valuing its shares in Leviton.<sup>627</sup>

*Retail Property Investors, Inc. v. Skeens* found that a shareholder had not made out a proper purpose to inspect a shareholder's list in order to contact other shareholders regarding a possible lawsuit against the issuer and its directors for alleged misrepresentation, mismanagement, and termination of dividends.<sup>628</sup> The stockholder testified that he wanted to learn what representations had been made to other shareholders and solicit them to join the proposed lawsuit.<sup>629</sup> A director of defendant testified that production of the list would jeopardize a confidential proposed restructuring of the issuer.<sup>630</sup> The court held that the plaintiff had not carried his common law burden of showing that inspection would not adversely affect the corporation's interests.<sup>631</sup> In fact, plaintiff testified that he had not considered

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616. *Id.*

617. *Id.*

618. *Id.* at 1030.

619. *Id.*

620. *Id.* at 1028.

621. *Id.* at 1031.

622. *Id.*

623. *Id.* at 1033.

624. *Id.*

625. *Id.* at 1034.

626. *Id.*

627. *Id.* at 1035.

628. *Retail Prop. Inv'rs, Inc. v. Skeens*, 471 S.E.2d 181, 183 (Va. 1996).

629. *Id.* at 182.

630. *Id.* at 182–83.

631. *Id.* at 183.

whether his receipt of the shareholder's list would be injurious to the corporation.<sup>632</sup>

In *Shabshelowitz v. Fall River Gas Co.*, the stockholder's motivation for inspecting the list of shareholders was to obtain the names of those who might sell their stock to him.<sup>633</sup> The court held that state law did not entitle the stockholder to inspection for this purpose, as stock trading for investment purposes is not "relative to the affairs of the corporation" as required by statute.<sup>634</sup>

*Weisman v. Western Pacific Industries, Inc.* found insufficient under the Delaware statute a demand for inspection that stated as its purpose "to communicate with other holders of shares of WPI's common stock with respect to the management of WPI and the conduct of its affairs."<sup>635</sup> The court held that unless a demand unspecific in itself as to purpose can be given an expanded reading in light of the surrounding circumstances, such as an impending meeting or tender offer, the demand failed to meet the requirement of the statute that a proper purpose can be stated.<sup>636</sup> The court relied on *Northwest Industries, Inc. v. B.F. Goodrich Co.*, where the purpose stated, "to communicate with other stockholders" of a company with reference to a special meeting of the stockholders was held insufficient as a "proper purpose" because it failed to state the substance of the shareholder's intended communication, and, thus, made it impossible for the corporation or a court to determine whether there was a reasonable relationship between its purpose and the shareholder's interest.<sup>637</sup>

In *National Consumers Union v. National Tea Co.*, a consumer's organization and an individual each owned one share of the corporation's stock.<sup>638</sup> They asserted that they wanted to examine the corporation's books and records in order to solicit proxies.<sup>639</sup> Since there was evidence showing they previously engaged in a course of conduct inimical to the corporation's interests and indicating that they desired to go on a "fishing expedition" through the books and records searching for further ammunition to "sensitize" the corporation to consumer demands, the court held that a proper purpose had not been shown.<sup>640</sup>

In *Keeneland Assoc. v. Pessin*, a corporation refused to register a new shareholder on its books on the grounds that he was a competitor of the corporation because as a shareholder he or she thereafter has access to confidential information.<sup>641</sup> The court rejected this argument, stating that an intent to destroy a corporation, to bring vexatious suits, or to take unfair advantage for competition reasons would not be "proper corporate purposes" for inspection of books and records under the Kentucky statute.<sup>642</sup>

*State ex rel. Pillsbury v. Honeywell, Inc.* held that "a shareholder who bought shares in a corporation solely for the purpose of bringing a suit to compel production of corporate books and records" and impressing his opinions on management

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632. *Id.* at 182.

633. *Shabshelowitz v. Fall River Gas Co.*, 588 N.E.2d 630, 631 (Mass. 1992).

634. *Id.* at 633.

635. *Weisman v. W. Pac. Indus., Inc.*, 344 A.2d 267 (Del. Ch. 1975).

636. *Id.* at 269.

637. *Id.* at 268 (citing *Nw. Indus., Inc. v. B.F. Goodrich Co.*, 260 A.2d 428 (Del. 1969)).

638. *Nat'l Consumers Union v. Nat'l Tea Co.*, 302 N.E.2d 118, 120 (Ill. App. Ct. 1973).

639. *Id.* at 121.

640. *Id.*

641. *Keeneland Assoc. v. Pessin*, 484 S.W.2d 849, 850 (Ky. 1972).

642. *Id.* at 852.

and other shareholders as to the desirability of producing napalm, was “motivated by preexisting social and political beliefs [rather than] concern for the economic well-being of the corporation.”<sup>643</sup> The shareholder, therefore, did not have a proper purpose.<sup>644</sup> The court further held that a trial court need not accept the shareholder’s expressed purposes but may make an independent assessment of the purpose.<sup>645</sup> The defendant corporation in a Delaware case sought to argue on the basis of *Pillsbury* that the shareholders had an improper purpose in addition to their stated proper purpose and that one of the plaintiffs was a competitor.<sup>646</sup> The Delaware Supreme Court held that the *Pillsbury* case was inconsistent with the Delaware case law applying 8 Del. C. § 220.<sup>647</sup> The Delaware Supreme Court noted

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643. *State ex rel. Pillsbury v. Honeywell, Inc.*, 191 N.W.2d 406, 407 (Minn. 1971)

644. *Id.*

645. *Id.*

646. *Credit Bureau Reports, Inc. v. Credit Bureau of St. Paul, Inc.*, 290 A.2d 691 (Del. 1972).

647. *Id.* DEL. CODE ANN., tit. 8, §220 (1967) states:

(a) As used in this section, “stockholder” means a stockholder of record of stock in a stock corporation and also a member of a nonstock corporation as reflected on the records of the nonstock corporation. As used in this section, the term “list of stockholders” includes lists of members in a nonstock corporation.

(b) Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose the corporation’s stock ledger, a list of its stockholders, and its other books and records, and to make copies or extracts therefrom. A proper purpose shall mean a purpose reasonably related to such person’s interest as a stockholder. In every instance where an attorney or other agent shall be the person who seeks the right to inspection, the demand under oath shall be accompanied by a power of attorney or such other writing which authorizes the attorney or other agent to so act on behalf of the stockholder. The demand under oath shall be directed to the corporation at its registered office in this State or at its principal place of business.

(c) If the corporation, or an officer or agent thereof, refuses to permit an inspection sought by a stockholder or attorney or other agent acting for the stockholder pursuant to subsection (b) of this section or does not reply to the demand within 5 business days after the demand has been made, the stockholder may apply to the Court of Chancery for an order to compel such inspection. The Court of Chancery is hereby vested with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought. The Court may summarily order the corporation to permit the stockholder to inspect the corporation’s stock ledger, an existing list of stockholders, and its other books and records, and to make copies or extracts therefrom; or the Court may order the corporation to furnish to the stockholder a list of its stockholders as of a specific date on condition that the stockholder first pay to the corporation the reasonable cost of obtaining and furnishing such list and on such other conditions as the Court deems appropriate. Where the stockholder seeks to inspect the corporation’s books and records, other than its stock ledger or list of stockholders, such stockholder shall first establish (1) that such stockholder has complied with this section respecting the form and manner of making demand for inspection of such documents; and (2) that the inspection such stockholder seeks is for a proper purpose. Where the stockholder seeks to inspect the corporation’s stock ledger or list of stockholders and such stockholder has complied with this section respecting the form and manner of making demand for inspection of such documents, the burden of proof shall be upon the corporation to establish that the inspection such stockholder seeks is for an improper purpose. The Court may, in its discretion, prescribe any limitations or conditions with reference to the inspection, or award such other or further relief as the Court may deem just and proper. The Court may order books, documents and records, pertinent extracts therefrom, or duly authenticated copies thereof, to be brought within this State and kept in this State upon such terms and conditions as the order may prescribe.

(d) Any director (including a member of the governing body of a nonstock corporation) shall have the right to examine the corporation’s stock ledger, a list of its stockholders and its other books and records for a purpose reasonably related to the director’s position as a director. The Court of Chancery is hereby vested with the exclusive jurisdiction to determine whether a director is entitled to the inspection sought. The Court may summarily order the corporation to permit

that *General Time Corporation v. Talley Industries, Inc.* held that under Del. C. § 220, “the desire to solicit proxies for a slate of directors in opposition to management is a purpose reasonably related to the stockholder’s interest as a stockholder,” and “any further or secondary purpose in seeking the list is irrelevant.”<sup>648</sup>

*Willard v. Harrworth Corp.* held that a shareholder’s demand for inspection of a list of shareholders who had not surrendered their shares for cancellation under a reorganization plan was not for a proper purpose.<sup>649</sup> The corporation was no longer in existence as a viable corporation and could not be revived; the shareholder sought to call a shareholder’s meeting to seek revival.<sup>650</sup>

In *White v. Jacobsen Manufacturing Co.*, the plaintiff was seeking an inspection under the Wisconsin statute not only to communicate with other shareholders but also to secure a broker’s profit.<sup>651</sup> The court found the purpose to be improper and dismissed the action.<sup>652</sup>

*Hagy v. Premier Manufacturing Co.* held it improper to exclude evidence that tended to show that a shareholder’s demand for inspection of the corporate books and records was for the purpose of aiding a competitor in which he was a shareholder; a mandatory injunction granted below was reversed.<sup>653</sup>

In *Young v. Columbia Broadcasting System, Inc.*, the shareholder’s application to inspect share ledgers and request for a postponement of the annual meeting was refused on the grounds that it was part of a “campaign of general harassment” of the corporation and its management, and that it was not intended to promote the interest of the corporation but was instead in furtherance of the interest of another corporation of which the shareholder was president and a substantial shareholder.<sup>654</sup>

*Everest Investors, LLC v. Investment Associates, II* denied plaintiffs’ request because neither of the plaintiffs’ status as assignees or attorneys-in-fact gave them the status of limited partners.<sup>655</sup>

*Kahala Royal Corporation v. Goodsill Anderson Quinn & Stifel, LLP* involved a continuous dispute over mismanagement and access to records.<sup>656</sup> Kahala Royal Corporation (“KRC”) and non-party, Mandarin Oriental Holdings (USA), Inc. (“MOHUSA”) were the general partners of Kahala Hotels Associates Limited Partnership (“KHALP”).<sup>657</sup> KHALP owned the Kahala Mandarin Oriental Hotel (the “Hotel”).<sup>658</sup> However, affiliates of MOHUSA managed the hotel on a day-to-day basis.<sup>659</sup> KHALP became dissatisfied with the management of MOHUSA’s

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the director to inspect any and all books and records, the stock ledger and the list of stockholders and to make copies or extracts therefrom. The Court may, in its discretion, prescribe any limitations or conditions with reference to the inspection, or award such other and further relief as the Court may deem just and proper.

648. *Gen. Time Corp. v. Talley Indus., Inc.*, 240 A.2d 755, 756 (Del. 1968).

649. *Willard v. Harrworth Corp.*, 258 A.2d 914, 916 (Del. Ch. 1969).

650. *Id.*

651. *White v. Jacobsen Mfg. Co.*, 293 F. Supp. 1358, 1360 (E.D. Wis. 1968).

652. *Id.* at 1358.

653. *Hagy v. Premier Mfg. Co.*, 172 A.2d 283, 338–39 (Pa. 1961).

654. *Young v. Columbia Broad. Sys., Inc.*, 215 N.Y.S.2d 950, 952 (N.Y. Sup. Ct. 1959).

655. *Everest Inv’rs, LLC v. Inv. Assocs., II*, No. CX-96-554, 1996 WL 509840, at \*1 (Minn. Ct. App. Sept. 10, 1996).

656. *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 151 P.3d 732, 735 (Haw. 2007).

657. *Id.*

658. *Id.*

659. *Id.*

affiliates and was also concerned that MOHUSA would exercise its right to put its interest in KHALP to KRC.<sup>660</sup> “Both the [p]artnership [a]greement and the [Hotel m]anagement [a]greements require[d] all disputes . . . under the agreements to be submitted to arbitration.”<sup>661</sup> “On February 12, 2001, KRC, on behalf of itself and KHALP, sought MOHUSA’s permission to inspect and review KHALP’s books and records.”<sup>662</sup> “According to KRC, such inspection was necessary in order to prepare for and substantiate the claims asserted” in the arbitrations that had been commenced approximately a month earlier.<sup>663</sup> The court described MOHUSA’s response to KRC’s request as follows:

According to a February 16, 2001 letter sent by Jones Day to KRC’s counsel, Jones Day informed KRC’s counsel that it was retained by MOHUSA and the Mandarin Managers to represent them ‘in connection with the disputes alleged by [KRC] . . . to have risen under the [Partnership Agreement] and/or the [Managers Agreements] pertaining to the [Hotel].’ Subsequently, the Lawyers, particularly Goodsill, undertook the management of the inspection process of KHALP’s books and records. The inspection process established by Goodsill--which was allegedly acting under the direction of and/or in coordination with Jones Day--required Peterson Consulting ‘to request information and/or documents and/or to pose specific questions about the particular records in writing.’ Litigation paralegals management employed by Goodsill. During or after such review, the requests were transmitted to the Hotel’s accounting staff, ‘who would, to the extent that they were able to do so, retrieve the records, create reports on requested information[,] or answer the posed questions.’<sup>664</sup>

The court then noted “KRC’s claim that the inspection process imposed by Goodsill limited its review of the books and records, MOHUSA maintained that the inspection process ‘acted to facilitate’ KRC’s request to review such books and records.”<sup>665</sup> Additional contention developed between KRC and MOHUSA because Goodsill charged \$47,920.74 for his work in connection with the inspection process.<sup>666</sup> KHALP ultimately paid Goodsill’s invoice.<sup>667</sup>

On May 30, 2001, KRC requested MOHUSA’s permission to further inspect KHALP’s books and records. KRC sought “an extensive list of particularized information from the books and records about specific areas of management practice.”<sup>668</sup> “By letter dated August 2, 2001, MOHUSA denied KRC’s request for further inspection ‘citing its duty to conserve the resources of the Hotel in the absence of a good faith business purpose being shown by [KRC] as to why the information should be generated.’”<sup>669</sup>

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660. *Id.*

661. *Id.* at 764, n. 6.

662. *Id.* at 737.

663. *Id.*

664. *Id.*

665. *Id.* at 737–38.

666. *Id.* at 738.

667. *Id.*

668. *Id.*

669. *Id.*

On April 2, 2003, an arbitration panel issued an order granting in part and denying in part KRC's claims. The order stated the following:

Turning first to the claim [that KRC] was denied appropriate access to the books and records of [KHALP], the panel is in agreement with [KRC] . . . . In the panel's view, while . . . [KRC]'s right to inspect the books and records is not as unfettered as that appropriate for an auditor, it is certainly greater in contextual environment than that which was afforded by [MOHUSA]'s procedures for inspection . . . . Without ascribing any particular motivation to the attorney review process incorporated into [MOHUSA]'s procedure, it is clear that such a review was not intended to improve [KRC]'s access to books and records that by law and under the [Partnership] Agreement [KRC] was entitled to expect . . . .<sup>670</sup>

In *Florida R&D Fund Investors, LLC v. Florida BOCA/Deerfield R&D Investors LLC*, a member of Defendant Florida BOCA/Deerfield R&D Investors, LLC (the "Joint Venture") brought a books and records action under 6 Del. C. § 18-305 and the Joint Venture's LLC agreement seeking access to the books and records of other members of the Joint Venture.<sup>671</sup> The Chancery Court denied the request.<sup>672</sup>

In *Dines v. Harris*, the Colorado Supreme Court reversed a judgment in favor of plaintiff G. W. Harris, who sought to compel officers of the Colorado & Utah Coal Company to allow petitioner to inspect all the books, accounts, and papers of the corporation.<sup>673</sup> The plaintiff apparently admitted that he was not acting in good faith or for a proper purpose when he made his demand.<sup>674</sup> The court applied the following statute:

It shall be the duty of the directors or trustees of every corporation, except railroad and telegraph companies, to cause to be kept at its principal office or place of business in this state, correct books of account of all its business, and any stockholders in such corporation shall have the right, at all reasonable times, to inspect and examine all the books, accounts and papers of the corporation, and shall have the right as aforesaid to demand of any officer, clerk, cashier, or agent of any such corporation having in his control or custody any such books, accounts, or papers, as such stockholders may desire to examine or inspect; and upon such demand being made in writing, every such officer, clerk, cashier or agent shall be bound to produce such books, accounts and papers to such stockholders, and afford due opportunity to examine and inspect the same; and such stockholders shall have the right to take copies or make extracts therefrom, but shall not remove from the office of the corporation any such books, accounts and papers.<sup>675</sup>

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670. *Id.* at 739.

671. *Fla. R & D Fund Inv'rs, LLC v. Fla. BOCA/Deerfield R & D Inv'rs LLC*, C.A. No. 8400–VCN, 2013 WL 4734834, at \*1 (Del. Ch. Aug. 30, 2013).

672. *Id.* at \*9.

673. *Dines v. Harris*, 291 P. 1024, 1030 (Colo. 1930).

674. *Id.* at 1026.

675. *Id.*



The court apparently concluded independently that plaintiff was not acting in good faith.<sup>676</sup>

*Donovan v. Ficus Investments, Inc.* approved in part and denied in part plaintiff's request to examine the books and records of Private Capital Group, LLC ("PCG"), a Florida LLC.<sup>677</sup> Plaintiff was the minority member of PCG and the defendant was the majority and managing member.<sup>678</sup> The court issued an earlier order in the case stating as follows:

The order was intended 'to provide [Donovan] with his rightful, contractually and statutorily mandated access, but to do so subject to a protocol that would not only prevent the disgruntled LLC member from disrupting or interfering with PCG's business, but that would also protect the integrity/confidentiality of any inspected books, records or documents.' The . . . [o]rder established what documents Donovan is entitled to, namely, 'all books, records and documents that are reasonably related to Donovan's membership interest, i.e. those pertaining to the profits, losses, distributions, assets, including mortgage portfolios, liabilities, and tax obligations of the Company (the Related Documents[.]).' It also clarifies which books and records Donovan's representatives will not have access to, namely, 'personnel records, administrative records, client files, and any privileged communications or documents subject to work product protection', and provides that 'Donovan's representatives shall not have access to PCG's computer system.'<sup>679</sup>

The court dismissed plaintiff's claim against defendant:

[B]y the express language of the Statute, the duty to provide access to books and records only applies to the LLC in question, not to its managers. Multiple Florida courts of appeal have endorsed this interpretation, holding that the LLC is the only entity that can be held liable for the denial of access to the LLC's books and records.<sup>680</sup>

After discussing the information rights provisions of the Florida LLC Act, the court dismissed plaintiff's action against PCG stating: "The claim against PCG is also untenable. The Statute does not entitle members of LLCs to the 'unfettered access' to books and records which Plaintiff demands."<sup>681</sup> The court further held that plaintiff's claims for damages was untenable because the applicable information rights statute did not provide for money damages, and no court interpreting the statute had held for money damages.<sup>682</sup> The court did not dismiss one of plaintiff's claims, but ordered that it be consolidated with another pending action.<sup>683</sup>

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676. *Id.*

677. *Donovan v. Ficus Invs., Inc.*, 872 N.Y.S.2d 690 (N. Y. Sup. 2008).

678. *Id.*

679. *Id.*

680. *Id.*

681. *Id.*

682. *Id.*

683. *Id.*

*Gaughan v. National Cutting Horse Association*<sup>684</sup> affirmed the trial court's grant of summary judgment to the defendant:

Later, the trial court granted the NCHA's motion for summary judgment . . . and incorporated [its previously issued] protective order into the final judgment. Gaughan contends . . . that the trial court erred by entering the protective order and thereby prohibiting her from disclosing documents designated as confidential by the NCHA, by granting summary judgment for the NCHA on the ground that the NCHA's records are entitled to confidential treatment under the law.<sup>685</sup>

*In Humble Oil & Refining Co. v. Daniel*,<sup>686</sup> the Attorney General of Texas intervened in a case in which Humble Oil & Refining was seeking to enjoin "the enforcement of certain tax assessments and collection thereof for the year 1950" by Montgomery County, Texas.<sup>687</sup> The court held that the Attorney General had intervened in the Montgomery County case as a private litigator and, therefore, did not have the broad authority to inspect the books and records of Humble Oil & Refining granted by the then applicable visitation statute.<sup>688</sup>

### *C. Records Required to be Available for Inspection*

#### *i. Availability of NOBO Lists and Other Lists of Shareholders*

*RB Associates of New Jersey v. The Gillette Company* addressed the issue of the availability of NOBO lists (lists of beneficial owners of corporation's stock who did not object to disclosure of their names and addresses by registered owner of stock to corporation for purpose of facilitating direct communication on corporate matters).<sup>689</sup> The court said that while Cede's<sup>690</sup> lists of registered owners must be procured for a requesting shareholder when they do not already exist, the same is not true for NOBO lists.<sup>691</sup> However, if the corporation has already obtained a NOBO list, it must be made available to the requesting shareholder.<sup>692</sup> In *Berger v. Pubco Corp.*, the court stated "[u]nder Delaware law, the right of inspection of a shareholder extends only to material that fairly can be said to be in the corpora-

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684. *Gaughan v. Nat'l Cutting Horse Ass'n*, 351 S.W.3d 408 (Tex. Ct. App. 2010).

685. *Id.* at 410–11.

686. *Humble Oil & Ref. Co. v. Daniel*, 259 S.W.2d 580 (Tex. Civ. App. 1953).

687. *Id.* at 581.

688. The then applicable statute stated:

Every corporation, domestic or foreign, doing business in Texas, shall permit the Attorney General or any of his authorized assistants or representatives, to make examination of all the books, accounts, records, minutes, letters, memoranda, documents, checks, vouchers, telegrams, constitution and by-laws, and other records of said corporation as often as he may deem necessary.

*Id.* at 587.

689. *RB Assocs. of N.J. v. The Gillette Co.*, CIV. A. No. 9711, 1988 WL 27731, at \*1 (Del. Ch. Mar. 22, 1988).

690. Cede & Co. is the nominee name of The Depository Trust Company, a large clearing house that holds shares in its name for banks, brokers, and institutions. *Cede & Co.*, NASDAQ, <https://www.nasdaq.com/investing/glossary/c/cede> (last visited March 22, 2018).

691. *The Gillette Co.*, 1988 WL 27731, at \*6–7.

692. *Id.*

tion's possession. A Cede list can be produced almost instantaneously and is, therefore, in the possession of the company even if it has not been produced."<sup>693</sup>

In *Scott v. Multi-Amp Corp.*, the court refused to apply a "literal reading" of the New Jersey Business Corporation Act that would permit a corporation to deny access to information that the corporation possessed about the beneficial ownership of shares held by Cede & Co.<sup>694</sup> The court, relying in part on policies established under the Securities Exchange Act of 1934, held that fairness required management to make this information available to the insurgents "so that this proxy solicitation campaign can be waged on equal terms by both sides."<sup>695</sup> The court denied disclosure of similar information about the names of shareholders owning street name shares on the grounds that such shareholders should have their desire for privacy respected and because the corporation did not have the information sought.<sup>696</sup> The court rejected an argument that the New Jersey statute permitting stockholder inspection of shareholder records should be read narrowly to include only a list of shareholders of record on the corporate books.<sup>697</sup> The court in *Bell v. Arnold* held that shareholder lists were part of the corporate books and records that shareholders had a fundamental right to inspect for any proper purpose.<sup>698</sup>

## ii. Interim Financial Statements

*Bitters v. Milcut, Inc.* held that interim corporate financial statements were not within the phrase "books and records of account."<sup>699</sup> *State ex rel. Jones v. Ralston Purina Co.* held that a preliminary profit and loss statement, a monthly profit analysis report, and a monthly tentative balance sheet were analyses or tentative studies prepared purely for the information of the management, and, being in the nature of confidential inter-office communication, were not comprehended within the meaning of "books" with respect to which shareholders have statutory inspection rights.<sup>700</sup>

Similarly, *Barnett v. Barnett Enterprises, Inc.* held that statutory inspection rights, even if not lost by a shareholder demanding appraisal, did not extend to valuation estimates prepared by the corporation's experts for use in the appraisal proceeding.<sup>701</sup> However, *E.I.F.C. Inc. v. Atnip.* granted inspection rights to dissenting shareholders who elected appraisal rights in a consolidation.<sup>702</sup> The court found a proper purpose under Kentucky law since examination of the records in question was the only way the dissenter could find out what others had paid for shares in an open, competitive market.<sup>703</sup>

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693. *Berger v. Pubco Corp.*, CIV. A. No 3414-CC, 2008 WL 4173860, at \*3 (Del. Ch. Sept. 8, 2008).

694. *Scott v. Multi-Amp Corp.*, 386 F. Supp. 44, 51 (D. N.J. 1974).

695. *Id.*

696. *Id.*

697. *Id.*

698. *Bell v. Arnold*, 487 P.2d 545, 549 (Colo. 1971).

699. *Bitters v. Milcut, Inc.*, 343 N.W.2d 418, 419 (Wis. 1983).

700. *State ex rel. Jones v. Ralston Purina Co.*, 358 S.W.2d 772, 778 (Mo. 1962).

701. *Barnett v. Barnett Enters., Inc.*, 182 So. 2d 728, 730 (La. Ct. App. 1966).

702. *E. I. F. C., Inc. v. Atnip*, 454 S.W.2d 351, 351-52 (Ky. Ct. App. 1970).

703. *Id.* at 352.

***iii. Communications with Attorneys***

In *Fogarty v. Parker, Poe, Adams, and Bernstein, L.L.P.*, the Alabama Supreme Court issued a modified opinion replacing its prior opinion of August 18, 2006.<sup>704</sup> In its modified opinion, the court reached the same conclusions regarding the claims asserted by minority members of an Alabama LLC against a North Carolina law firm and two of its attorneys based on the attorneys' role in denying them access to the books and records of the LLC.<sup>705</sup> The plaintiffs alleged that the attorneys threatened legal action against them if they (1) continued to seek access to the LLC's records; (2) misrepresented Alabama law by stating that Alabama law did not entitle them access to the LLC's books and records; and (3) removed the books and records from Alabama to prevent the plaintiffs from having access to them.<sup>706</sup>

The court held that the Alabama Legal Services Liability Act ("ALSLA") was not the exclusive remedy for the minority members' claims because the ALSLA applies only to allegations of legal malpractice, i.e., claims against legal services providers that arise from the performance of legal services.<sup>707</sup> The court stopped short of saying, as it had in its original opinion, that the ALSLA applies only to claims brought by the one who receives legal services; however, the court stated that it appeared the ALSLA did not apply to the plaintiffs' claims because the plaintiffs' complaint did not allege tortious conduct resulting from the receipt of legal services from the attorneys, and because the attorneys expressly stated that they never provided legal services to the plaintiffs.<sup>708</sup> Furthermore, the ALSLA did not apply to the attorneys because they were not licensed to practice law in Alabama, and the ALSLA applies only to attorneys licensed in Alabama.<sup>709</sup>

The court next held that Alabama recognizes a private cause of action for the unauthorized practice of law in Alabama, and concluded that the plaintiffs stated a claim for relief by alleging that the attorneys were not licensed in Alabama and that the plaintiffs were injured as a result of representations made concerning Alabama law for the majority owners and the LLC itself.<sup>710</sup> The court also found that the plaintiffs stated a claim against the attorneys based on the statutory inspection provisions of the Alabama Limited Liability Company Act.<sup>711</sup>

The court pointed out that the statute provides for personal liability of "any agent, member, or manager" of an LLC who refuses to permit a member to inspect the books and records without reasonable cause.<sup>712</sup> The plaintiffs alleged that the attorneys were acting as the LLC's agent and that they refused to permit the plaintiffs to inspect certain records without reasonable cause; therefore, the allegations supported a claim for relief under the statute, which provides for a penalty in an amount up to 10% of the fair market value of the membership interest of the member in addition to other damages.<sup>713</sup>

704. *Fogarty v. Parker, Poe, Adams and Bernstein, L.L.P.*, 961 So. 2d 784 (Ala. 2007).

705. *Id.* at 794.

706. *Id.*

707. *Id.* at 788–89.

708. *Id.* at 789.

709. *Id.*

710. *Id.* at 790–91.

711. *Id.* at 794.

712. *Id.* at 793–94.

713. *Id.*

The Delaware Supreme Court has held that if a stockholder has shown that particular documents are essential to its inspection, then the stockholder can overcome the attorney-client privilege and work product doctrine by making the showing required by *Garner v. Wolfinbarger*.<sup>714</sup>

#### ***iv. Foreign Law Not a Defense***

In *Southpaw Credit Opportunity Master Fund LP v. Advanced Battery Technologies, Inc.*, a master recommended to the court that, in the circumstances of the case, a plaintiff stockholder, who sought to inspect the books and records of a publicly traded company that was delisted from the NASDAQ and has not complied with the disclosure obligations of a public company, be permitted to examine certain books and records even though that the company was headquartered in China.<sup>715</sup> The master stated the following:

I recommend that the Court enter an order requiring ABAT to permit Southpaw to inspect books and records within the date ranges identified above for the nine categories listed in Paragraph IV(b) of its Demand, which are: (i) revenue, (ii) income before tax, (iii) new income, (iv) earnings per share, (v) cash and equivalents, (vi) total assets, (vii) current asset figures, (viii) current liability figures, and (ix) stockholder equity.<sup>716</sup>

The master further stated as follows:

ABAT has not, however, carried its burden of proving the substance of the foreign law that the company relies on as a basis to preclude inspection. At most, ABAT has shown that Management Measures exist that *may* preclude the company from exporting *some* set of its subsidiaries' books and records. ABAT has not, however, shown (1) what books and records requested in the Demand fall within the scope of the Management Measures, or (2) whether the restrictions in the Management Measures apply to both photocopies and originals. Although ABAT has shown there is some ambiguity in the Management Measures, even among attorneys who regularly practice in the PRC, ABAT has not offered anything more concrete than uncertified translations of excerpts of the Management Measures and a half-page overview in a law firm-generated client alert. In my view, that is not sufficient to excuse ABAT from its obligations under Delaware law.

Second, even if ABAT had established that foreign law prohibited it from obtaining its subsidiaries' books and records and exporting them to the United States, ABAT has not shown that it cannot produce the records Southpaw seeks for inspection. As a preliminary matter, ABAT has not established that it does not have within its possession all of the books

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714. *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103–04 (5th Cir. 1970); *see Wal-Mart Stores, Inc. v. Ind. Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1280 (Del. 2014).

715. *Southpaw Credit Opportunity Master Fund LP v. Advanced Battery Techs., Inc.*, C.A. No. 9542-ML, 2015 WL 915486, at \*1 (Del. Ch. Feb. 26, 2015).

716. *Id.* at \*6.

and records I have determined Southpaw is entitled to inspect. ABAT's witness testified that, based upon the work reports its subsidiaries send each quarter, ABAT prepares a consolidated summary that contains most of the financial information that Southpaw seeks to inspect for purposes of valuing its stock. ABAT does not argue those consolidated summaries are subject to the Management Measures, and the source on which ABAT relies indicates such derivative materials may be exported. Therefore, it seems likely that ABAT could produce for inspection the information necessary and essential to Southpaw's requests, without resorting to exporting 'accounting archives.'<sup>717</sup>

Finally, the master stated that it would be appropriate to impose a confidentiality agreement on the plaintiff.<sup>718</sup> The master did not think it appropriate to impose trading restrictions on plaintiff nor should the court attempt to craft a confidentiality order that would allow the parties to be sure they were in compliance with federal securities law.<sup>719</sup>

#### ***v. The Meaning of "Books and Records of Account"***

In *Meyer v. Ford Industries, Inc.*, the court relied on decisions of Illinois courts and the perceived intent of the drafters of the MBCA<sup>720</sup> to hold that the term "books and records of accounts" was not limited to any ordinary, literal, or limited sense, but should be construed broadly to extend to all records, contracts, papers, and correspondence to which the common law right of inspection of a shareholder may properly apply.<sup>721</sup> However, in *Riser v. Genuine Parts Co.*, the court held that it was in the discretion of the trial court whether records other than "books and records of account" should be made available for inspection.<sup>722</sup>

In *Kasten v. Doral Dental USA, LLC*, addressing an issue of first impression in Wisconsin, the court of appeals certified to the Wisconsin Supreme Court the following issues: (1) whether the Wisconsin Limited Liability Company Act (as in effect in 2003-2004) grants members a broad right of access to LLC records that, absent contrary language in the operating agreement, embraces informal and non-financial records; and (2) if the statute grants a broad inspection right, whether e-mails may be classified as "records" that are subject to a member's inspection.<sup>723</sup> An LLC member sought access to e-mails and drafts of certain documents, and the LLC opposed the member's access.<sup>724</sup> The trial court held that the member was not entitled to inspect the drafts and e-mails.<sup>725</sup> The court of appeals discussed the arguments made by each side and appeared to lean toward a broad reading of the statute consistent with the member's position, but the court did not reach a conclu-

<sup>717</sup> *Id.* at \*8.

<sup>718</sup> *Id.* at \*9.

<sup>719</sup> *Id.* at \*1.

<sup>720</sup> MODEL BUS. CORP. ACT (AM. BAR ASS'N 2006) (the predecessor of the RMBCA).

<sup>721</sup> *Meyer v. Food Indus., Inc.*, 538 P.2d 353, 356 (Or. 1975); *Bank of Heflin v. Miles*, 318 So. 2d 697, 701 (Ala. 1975).

<sup>722</sup> *Riser v. Genuine Parts Co.*, 258 S.E.2d 184, 187 (Ga. Ct. App. 1979).

<sup>723</sup> *Kasten v. Doral Dental Usa, LLC*, No. 2005AP995, 2006 WL 861382, at \*1 (Wis. Ct. App. Apr. 5, 2006).

<sup>724</sup> *Id.*

<sup>725</sup> *Id.*

sion and deferred instead to the supreme court as the proper judicial authority to decide such a novel and significant issue.<sup>726</sup>

The court examined the provisions of the Wisconsin LLC statute and the operating agreement of the LLC in question and observed that the operating agreement appeared to grant inspection rights similar to the statute.<sup>727</sup> The court stated that the LLC's argument that the statute limited member inspection rights to the enumerated records required to be kept under the statute seemed inconsistent with the statute, which goes further and provides that, unless otherwise stated in the operating agreement, a member's right to inspect and copy records extends to "any other records" of the LLC.<sup>728</sup> The court acknowledged that the LLC statute borrowed liberally from the corporate and limited partnership statutes, which limit inspection rights to specified formal documents.<sup>729</sup> The court pointed out, however, that the LLC statute, unlike the limited partnership and corporate statutes, explicitly refers to "any other limited liability company record" and states that a member may inspect such other records unless otherwise provided in the operating agreement.<sup>730</sup> The court also commented that courts have tended to define the scope of the inspection right broadly in corporate and partnership cases.<sup>731</sup>

With regard to the possible status of e-mails as "records," the court observed that cases suggesting a broad right of access extending to "correspondence" were decided before e-mail became a primary source of business communication.<sup>732</sup> The court noted that e-mail correspondence is often more frank and unguarded than written correspondence and that it, thus, may not be appropriate to characterize an e-mail message as a company record.<sup>733</sup> On the other hand, the court stated that distinguishing between e-mail and other informal records, such as correspondence, may be a distinction without a difference.<sup>734</sup> The court noted that e-mail has been admitted into evidence as "records" or "documents" in other contexts and that the Uniform Limited Liability Company Act defines records broadly to include information stored in an electronic form.<sup>735</sup>

In *Mickman v. American International Processing, L.L.C.*, a member sought copies of the general ledgers of two Delaware LLCs.<sup>736</sup> The court analyzed the operating agreements, which provided members "access to all books and records" upon one day's written notice.<sup>737</sup> Looking to the corporate context for guidance, the court concluded that "all books and records" included general ledgers, noting that other courts had construed the narrower terms "books and records" and "books of account" to include general ledgers.<sup>738</sup> Next, relying on corporate cases, the court construed "access" to have its ordinary meaning, which includes the

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726. *Id.* at \*3–4.

727. *Id.* at \*2.

728. *Id.*

729. *Id.* at \*3.

730. *Id.*

731. *Id.*

732. *Id.* at \*4.

733. *Id.*

734. *Id.*

735. *Id.*

736. *Mickman v. Am. Int'l Processing, L.L.C.*, C.A. No. 3869-VCP, 2009 WL 2244608, at \*1 (Del. Ch. July 28, 2009).

737. *Id.* at \*2.

738. *Id.*

right to make copies.<sup>739</sup> The court also commented that the plaintiff's offer to enter into a confidentiality agreement should minimize any genuine concern about an improper purpose.<sup>740</sup>

*Sachs v. Adeli* held that a minority member of a Delaware LLC had the right to obtain state sales tax records based on statutory inspection rights of LLC members under New York LLC statute.<sup>741</sup> The court noted that the result would be the same under Delaware law.<sup>742</sup>

#### *D. What is Reasonable Access?*

In *NAMA Holdings, LLC v. World Market Center Venture, LLC*, NAMA Holdings, LLC ("NAMA"), an indirect owner of a Delaware LLC, brought an action to inspect the LLC's books and records pursuant to provisions in the LLC's operating agreement.<sup>743</sup> NAMA argued that the operating agreement granted NAMA an unrestricted right of access to sensitive and proprietary information, but the LLC sought to limit the classes of documents available to NAMA and to require NAMA to execute a confidentiality agreement before granting access.<sup>744</sup> The court concluded that, under the terms of the operating agreement, the managing members retained substantial discretion to determine the scope of access to information.<sup>745</sup>

Under the operating agreement, NAMA, as an explicit third party beneficiary, was entitled to "reasonable access at reasonable times" to books and records that the agreement required the managing members to maintain.<sup>746</sup> The court stressed the freedom of contract enjoyed under the Delaware LLC statute and characterized NAMA's argument that the contractual inspection provision should be construed to mirror the statutory inspection provision as a "non-starter."<sup>747</sup> The court stated that the statute might be a useful referent to resolve ambiguity, but the statute should not be used to overshadow the express contractual agreement reached by the parties in this case.<sup>748</sup> The court explained that inclusion of the term "reasonable" to describe the scope of NAMA's access was inconsistent with NAMA's argument that it had an unconditional right of access.<sup>749</sup> The court stated that the reasonableness limitation on the right of access indicated the parties contemplated someone making a judgment call as to exactly what would constitute "reasonable access."<sup>750</sup>

The court noted that the operating agreement vested the managing members with typical management authority, and the court concluded that the managing members had the power to determine what constitutes "reasonable access" in the absence of explicit language in the inspection provision vesting someone other

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739. *Id.* at \*3.

740. *Id.*

741. *Sachs v. Adeli*, 804 N.Y.S.2d 731, 733–35 (N.Y. App. Div. 2005).

742. *Id.* at 735.

743. *NAMA Holdings, LLC v. World Mkt. Center Venture, LLC*, 948 A.2d 411, 412 (Del. Ch. 2007).

744. *Id.* at 417.

745. *Id.* at 412.

746. *Id.* at 416.

747. *Id.* at 418 n. 17.

748. *Id.* at 418.

749. *Id.* at 419.

750. *Id.*



than the managing members with such right.<sup>751</sup> The court found that the LLC's limitation of the scope of NAMA's inspection to non-sensitive information, prohibition on photocopying of the LLC's books and records, and insistence upon execution of a confidentiality agreement were all reasonable limitations under the circumstances.<sup>752</sup> The court concluded, however, that it was not reasonable to require NAMA to conduct its inspection through a specified individual alone rather than another duly authorized representative of NAMA.<sup>753</sup> The court agreed with NAMA that a party with an inspection right must be able to enlist the sophisticated help of attorneys, accountants, and other experts in meaningfully evaluating complex information if the inspection right is to have any substantive force.<sup>754</sup>

In *Degennaro v. Midtown Bridge, LLC*, a member of a New Jersey LLC sought to inspect the LLC's financial records.<sup>755</sup> The LLC's operating agreement required the LLC to maintain books and records and to permit members to visit the properties of the LLC and discuss the business and affairs of the LLC with the managers.<sup>756</sup> The operating agreement also required the managers to prepare and provide to the members certain financial reports, and stated that the members had any right to inspect the LLC's financial records.<sup>757</sup> The court found that furnishing the reports was all that was required because the New Jersey LLC statute states that a member may obtain "true and full information regarding the status of the business and financial condition" of the LLC "subject to such reasonable standards . . . as may be set forth in an operating agreement."<sup>758</sup>

*TravelCenters of America, LLC v. Brog* dismissed a claim or access to any and all books and records of a Delaware LLC for failure to allege proper purpose (relying on corporate case law regarding the burden to establish proper purpose for inspection) and concluded that, even assuming proper purpose had been pleaded, the books and records inspection counterclaim should not be consolidated with the expedited declaratory judgment action regarding validity of defendants' notice of intent to present business and nominate directors in view of the bylaw's advance notice provision.<sup>759</sup>

*Stewart v. BF Bolthouse Holdco, LLC* involved former employees of an LLC who sued the LLC and its board of managers for breach of contract, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing in connection with the LLC's exercise of its right to repurchase the plaintiffs' membership units in the LLC when the plaintiffs voluntarily terminated their employment.<sup>760</sup> Based on the board's valuation of the units at \$0.00, the LLC cancelled the plaintiffs' units without paying any consideration.<sup>761</sup> The plaintiffs claimed that the board of managers acted in bad faith in valuing the units at \$0.00,

751. *Id.*

752. *Id.* at 420–21.

753. *Id.* at 421.

754. *Id.*

755. *Degennaro v. Midtown Bridge, LLC*, No. A-6209-99T2 (N.J. Super. Ct. App. Div. Oct. 26, 2001).

756. *Id.*

757. *Id.*

758. *Id.*

759. *TravelCenters of Am., LLC v. Brog*, No. 3516-CC, 2008 WL 868107, at \*1 (Del. Ch. Mar. 31, 2008).

760. *Stewart v. BF Bolthouse Holdco, LLC*, No. 8119-VCP, 2013 WL 5210220, at \*1 (Del. Ch. Aug. 30, 2013).

761. *Id.*

and that such action violated both the purchase agreement that governed the repurchase of the units (which required the board of managers to determine the value in good faith) and the LLC agreement (which provided that the board owed to the LLC and its members the duties owed by corporate directors to the corporation and its shareholders).<sup>762</sup> The relief sought by the plaintiffs included a declaratory judgment invalidating the repurchase and an order restoring their ownership of units in the LLC.<sup>763</sup>

The court denied in part, and granted in part the defendants' motion to dismiss the breach of contract claims, and the court granted the motion to dismiss the claims for breach of fiduciary duty and breach of the implied covenant of good faith and fair dealing because the latter claims were duplicative of the breach of contract claims.<sup>764</sup> Among the plaintiffs' breach of contract claims was a claim that the LLC breached the LLC agreement by failing to provide the plaintiffs with year-end financial information.<sup>765</sup> The court dismissed this claim on the ground that the plaintiffs were not members on the date established by the LLC Agreement for determining if a member was entitled to the year-end financial information.<sup>766</sup>

In *Janousek v. Slotky*, the plaintiff, a 40% member of a member-managed LLC, sued the majority members and the LLC, asserting claims individually and on behalf of the LLC.<sup>767</sup> The plaintiff pled in the alternative that he was and is not currently a member, but the defendants unequivocally maintained in their verified pleadings that the plaintiff remained a member of the LLC.<sup>768</sup> The LLC moved for a protective order to prevent disclosure of materials protected by the attorney-client privilege until the plaintiff's membership status was determined.<sup>769</sup> The plaintiff filed a motion to compel production of the withheld documents.<sup>770</sup> The trial court granted the motion to compel, and the defendants appealed.<sup>771</sup>

The court of appeals discussed the plaintiff's rights to information under the Illinois LLC statute and the operating agreement in the course of applying Illinois Supreme Court Rule 201, which governed the discovery dispute.<sup>772</sup> Determining whether the defendants established the existence of a privilege required the court to examine whether the defendants could have reasonably believed that the communications sought would remain confidential, and the court pointed out that both the operating agreement and the Illinois LLC statute specifically granted members the right to inspect the LLC's books and records.<sup>773</sup> Thus, the defendants and their counsel could not have reasonably believed that records of communications regarding the LLC's business could be kept confidential from the plaintiff.<sup>774</sup> Even

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762. *Id.*

763. *Id.*

764. *Id.*

765. *Id.*

766. *Id.*

767. *Janousek v. Slotky*, 980 N.E.2d 641, 643 (Ill. App. Ct. 2012).

768. *Id.*

769. *Id.* at 645.

770. *Id.*

771. *Id.* at 646–47.

772. *Id.* at 649.

773. *Id.* at 650.

774. *Id.*

assuming the plaintiff ceased to be a member, he would be entitled under the Illinois LLC statute to inspect records pertaining to the period of his membership.<sup>775</sup>

The court rejected the defendants' suggestion that the records could not include correspondence with attorneys, noting that the statutory list of required records does not constitute an exclusive definition of records or state that members have no rights to see other types of records created or kept by the LLC.<sup>776</sup> The court also concluded that the statutory requirement of a proper purpose did not help the defendants because, regardless of the plaintiff's purpose as to any specific request, the fact that there are circumstances under which members or former members have a clear right to the records means that the defendants could not reasonably believe the records regarding the LLC's communications with its attorneys would be confidential from the plaintiff during a period in which he could demand access to the records for a proper purpose.<sup>777</sup>

The court also noted that the LLC statute does not define what constitutes a proper purpose, and the defendants, who bore the burden of demonstrating that the information sought was privileged, did not outright assert that the plaintiff sought the records for an improper purpose.<sup>778</sup> Since the LLC statute and the operating agreement provided the plaintiff with management rights, it seemed "inarguable" to the court that the plaintiff had a proper purpose in protecting the LLC's financial interests as well as his own.<sup>779</sup> Finally, the court reiterated that the plaintiff's right to obtain records in discovery during litigation was governed not by the Illinois LLC statute or the operating agreement, but by Illinois Supreme Court Rule 201, which required only that the plaintiff was seeking disclosure for the purpose of obtaining relevant evidence.<sup>780</sup>

*Somerville S Trust v. USV Partners, LLC* involved a member's demand for information from a Delaware LLC.<sup>781</sup> The court's examination of this issue led the court to observe the following:

Somerville next claims that Earls mismanaged USV by not observing legal formalities while operating the business. In effect, Somerville argues, Earls used USV as his alter ego. The defendants make no effort to rebut that claim, and I find independently that Somerville's evidence supporting that claim is credible, Earls testified that USV had no officers, directors, or employees, that USV had no office, and that USV's address was Earls's home address. Moreover, USV's documents were kept at USV's office, at Earls's personal accountant's office, and at his home.

In a previous arbitration proceeding brought against Earls for his management of an unrelated single-purpose entity, the arbitrators found that there, as here, Earls was the 'sole shareholder, director, officer, and decision-maker of the PC, which has no office or employees. Either Earls or

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775. *Id.*

776. *Id.* at 650–51.

777. *Id.* at 651.

778. *Id.*

779. *Id.*

780. *Id.*

781. *Somerville S Tr. v. USV Partners, LLC*, No. Civ. A. 19444-NC, 2002 WL 1832830, at \*1 (Del. Ch. Aug. 2, 2002)

his accountant maintains PC's books and records and its mailing address is that of Earls's office or residence.' In that case, the arbitration panel also found (as Somerville claims here) that Earls had improperly used the entity's assets to secure debts, which the panel characterized as a 'pervasive disregard of corporate formalities, all of which is probative in supporting the conclusion that the LLC, PC, and the Trust were in fact merely alter egos of Earls.'<sup>782</sup>

### *E. Protecting Sensitive Information*

#### *i. Restrictions Permitted by Statute*

This article discussed restrictions permitted by corporate statutes,<sup>783</sup> LLC statutes,<sup>784</sup> and limited partnership statutes above.<sup>785</sup>

#### *ii. Restrictions in Governing Documents Approved by Case Law*

In *NAMA Holdings, LLC v. World Market Center Venture, LLC*, NAMA Holdings, LLC ("NAMA"), an indirect owner of a Delaware LLC, brought an action to inspect the LLC's books and records pursuant to provisions in the LLC's operating agreement.<sup>786</sup> NAMA argued that the operating agreement granted NAMA an unrestricted right of access to sensitive and proprietary information, but the LLC sought to limit the classes of documents available to NAMA and to require NAMA to execute a confidentiality agreement before granting access.<sup>787</sup>

The court concluded that, under the terms of the operating agreement, the managing members retained substantial discretion to determine the scope of access to information.<sup>788</sup> Under the operating agreement, NAMA (as an explicit third party beneficiary) was entitled to "reasonable access at reasonable times" to books and records that the agreement required the managing members to maintain.<sup>789</sup> The court stressed the freedom of contract enjoyed under the Delaware LLC statute and characterized NAMA's argument that the contractual inspection provision should be construed to mirror the statutory inspection provision as a "non-starter."<sup>790</sup>

The court stated that the statute might be a useful referent to resolve ambiguity, but the statute should not be used to overshadow the express contractual agreement reached by the parties in this case.<sup>791</sup> The court explained that inclusion of the term "reasonable" to describe the scope of NAMA's access was inconsistent with NAMA's argument that it had an unconditional right of access.<sup>792</sup> The

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782. *Id.* at \*7.

783. *See supra* notes 120-21 and accompanying text.

784. *See supra* notes 140-214 and accompanying text.

785. *See supra* notes 391-420 and accompanying text.

786. *NAMA Holdings, LLC v. World Mkt. Center Venture, LLC*, 948 A.2d 411, 412 (Del. Ch. 2007).

787. *Id.* at 417.

788. *Id.* at 419.

789. *Id.* at 416.

790. *Id.* at 418 n. 17.

791. *Id.*

792. *Id.* at 419.

court stated that the reasonableness limitation on the right of access indicated the parties contemplated someone making a judgment call as to exactly what would constitute “reasonable access.”<sup>793</sup> The court noted that the operating agreement vested the managing members with typical management authority, and the court concluded that the managing members had the power to determine what constitutes “reasonable access” in the absence of explicit language in the inspection provision vesting someone other than the managing members with such right.<sup>794</sup>

The court found that the LLC’s limitation of the scope of NAMA’s inspection to non-sensitive information, prohibition on photocopying of the LLC’s books and records, and insistence on execution of a confidentiality agreement were all reasonable limitations under the circumstances.<sup>795</sup> The court concluded, however, that it was not reasonable to require NAMA to conduct its inspection through a specified individual alone rather than another duly authorized representative of NAMA.<sup>796</sup> The court agreed with NAMA that a party with an inspection right must be able to enlist the sophisticated help of attorneys, accountants, and other experts in meaningfully evaluating complex information if the inspection right is to have any substantive force.<sup>797</sup>

In *Degennaro v. Midtown Bridge, LLC*, a member of a New Jersey LLC sought to inspect the LLC’s financial records.<sup>798</sup> The LLC’s operating agreement required the LLC to maintain books and records and to permit members to visit the properties of the LLC and discuss the business and affairs of the LLC with the managers.<sup>799</sup> The operating agreement also required the managers to prepare and provide to the members certain financial reports, but it did state that the members had any right to inspect the LLC’s financial records.<sup>800</sup> The court found that furnishing the reports was all that was required because the New Jersey LLC statute states that a member may obtain “true and full information regarding the status of the business and financial condition” of the LLC “subject to such reasonable standards . . . as may be set forth in an operating agreement.”<sup>801</sup>

This article discussed corporate statutes that impose sanctions for failure to provide access to books and records and corporate statutes that penalize shareholders for misuse of information above.<sup>802</sup> Texas imposes penalties for the unjustified refusal of a LLC<sup>803</sup> or limited partnership<sup>804</sup> to honor a member’s, limited partner’s, or limited partner’s assignee’s right to inspect books and records.

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793. *Id.*

794. *Id.*

795. *Id.* at 412.

796. *Id.*

797. *Id.*

798. *Degennaro v. Midtown Bridge, LLC*, No. A-6209-99T2 (N.J. Super. Ct. App. Div. Oct. 26, 2001).

799. *Id.*

800. *Id.*

801. *Id.*

802. *See supra* notes 121–176 and accompanying text.

803. *See supra* notes 305–06 and accompanying text.

804. *See supra* notes 363–64 and accompanying text.

### ***iii. Inspection Rights versus Discovery Rights in Litigation***

In *San Antonio Models, Inc. v. Peeples*, after the corporation refused to allow a shareholder to inspect corporate books and records on grounds of lack of good faith and proper purpose, the shareholder sought to obtain information about the corporation's affairs through the litigation discovery process.<sup>805</sup> The court rejected the corporation's argument that discovery of the corporation's books and records in the litigation process would deprive it of its right to a jury trial on the issues of good faith and proper purpose, noting that the rights of a party in litigation to discovery were totally independent of the corporate statute inspection rights and were governed by different principles.<sup>806</sup>

The Delaware Supreme Court has held that the Delaware shareholder inspection rights statute "does not open the door to the wide-ranging discovery that would be available in litigation."<sup>807</sup>

### ***iv. Who is Entitled to Inspect?***

*Holtzman v. Gruen Holding Corp.* granted the plaintiff shareholder's request for inspection of the corporation's records, holding that current stockholders of record may seek inspection rights despite the possibility that he might later lose his shareholder status in another proceeding.<sup>808</sup> The plaintiff was terminated from his position as chairman and chief executive officer of the corporation, and as a result was required to sell his stock back to the corporation, pursuant to a shareholder's agreement.<sup>809</sup> The plaintiff sued to enjoin the sale of his stock, challenging the grounds of his termination.<sup>810</sup> The court stated that the law accorded the plaintiff prima facie stockholder status because his name appeared on the company's stock ledger.<sup>811</sup>

*Macklowe v. Planet Hollywood, Inc.* held that stockholders entitled to demand inspection of corporate records included any stockholder and, thus, the plaintiff, the record owner but not the beneficial owner of stock in the corporation, was entitled to inspect the corporation's records provided his primary purpose for inspection was proper.<sup>812</sup>

*Benincasa v. Garrubbo* held that the facts that the name of the person seeking to compel disclosure of corporate records did not appear on the stockholders' record and that he did not physically possess stock certificates were not dispositive of whether he had required ownership.<sup>813</sup>

*Cenergy Corporation v. Bryson Oil and Gas P.L.C.* held that a shareholder was entitled to inspect the corporate stock ledger even though its affidavit provided in connection with a request for inspection was made at a time when the share-

805. *San Antonio Models, Inc. v. Peeples*, 686 S.W.2d 666, 667 (Tex. Ct. App. 1985).

806. *Id.* at 671.

807. *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 114 (Del. 2002).

808. *Holtzman v. Gruen Holding Corp.*, No. CIV. A. 13500, 1994 WL 444756, at \*3 (Del. Ch. Aug. 5, 1995).

809. *Id.* at \*1.

810. *Id.*

811. *Id.* at \*2.

812. *Macklowe v. Planet Hollywood, Inc.*, No. Civ. A. 13450, 1994 WL 560804, at \*3 (Del. Ch. Sept. 29, 1994).

813. *Benincasa v. Garrubbo*, 529 N.Y.S.2d 797, 799 (N.Y. App. Div. 1988).

holder was only a beneficial owner.<sup>814</sup> The court explained that (1) the shareholder subsequently qualified as a record shareholder under Nevada's GCLG § 78.105(2); (2) the change in status did not change its purpose in seeking the stock ledger; (3) the affidavit met the statement of purpose requirement; and (4) the corporation did not demand any other affidavits.<sup>815</sup>

*In the Matter of B & F Towing and Salvage Company, Inc.* held that the family court had the authority to order nonparty corporations to comply with reasonable discovery demands by persons outside the corporation.<sup>816</sup> In this case, the litigant's discovery was limited to those records necessary and essential to the valuation process.<sup>817</sup>

*Holdgreiwe v. The Nostalgia Network Inc.* granted a director's demand to have access to the books and records of the corporation of which he was a director.<sup>818</sup> The director stated a proper purpose in seeking access to determine whether there had been mismanagement and the corporation had failed to carry its burden of proving improper purpose.<sup>819</sup>

*Pan Ocean Navigation, Inc. v. Rainbow Navigation, Inc.* held that a corporation that did not maintain a stock ledger and ignored other corporate formalities could not object to inspection of its books and records on the ground that the shareholder seeking inspection was not a shareholder of record, but a subsidiary of the shareholder of record.<sup>820</sup> Once a court is forced to inquire into the underlying facts concerning stock ownership because the corporation has maintained no stock ledger, there is little utility in insisting that a valid demand is one made by a shareholder rather than a wholly owned subsidiary of the shareholder.<sup>821</sup> In affirming, the Delaware Supreme Court held that when the stock ledger is blank or non-existent, the Court of Chancery has the power to consider other evidence to ascertain and establish record stockholder status, which is a "mandatory condition precedent to the right to make a demand for inspection" under Delaware law.<sup>822</sup> The court stated that corporations have an affirmative duty to maintain a stock ledger.<sup>823</sup>

*State ex. rel. Schultz v. Schultz* involved a demand to inspect books and records brought by an "equitable trustee" and the beneficiaries of a constructive trust.<sup>824</sup> The record ownership was in a third person.<sup>825</sup> The interest of the plaintiffs had been adjudicated in a prior proceeding.<sup>826</sup> The Missouri statute limited inspection rights to "record-owners."<sup>827</sup> The court quashed a writ of mandamus

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814. *Cenergy Corp. v. Bryson Oil & Gas P.L.C.*, 657 F. Supp. 867, 869 (D. Nev. 1987).

815. *Id.*

816. *Petition of B & F Towing & Salvage Co.*, 551 A.2d 45, 48 (Del. 1988).

817. *Id.* at 51.

818. *Holdgreiwe v. Nostalgia Network, Inc.*, No. Civ. A. 12914, 1993 WL 144604, at \*7 (Del. Ch. Apr. 29, 1993).

819. *Id.* at \*4.

820. *Pan Ocean Navigation, Inc. v. Rainbow Navigation, Inc.*, 535 A.2d 1357, 1359 (Del. 1987).

821. *Id.* at 1361.

822. *Id.* at 1360.

823. *Id.* at 1359.

824. *State ex rel. Schultz v. Schultz*, 710 S.W.2d 507, 509 (Mo. Ct. App. 1986).

825. *Id.* at 508.

826. *Id.*

827. *Id.*

compelling inspection on the ground that the prior judicial opinion did not make the plaintiffs “record-owners.”<sup>828</sup>

*Brenner v. Hart Systems, Inc.* held that under New York law, a director has an absolute and unqualified right to examine the books and records of the corporation which is not affected by hostility between the director and the balance of corporate management.<sup>829</sup> To the same effect is *Lau V. DSI Enterprises, Inc.*, holding that under New York law, a director has an absolute and unqualified right to inspect corporate records.<sup>830</sup>

*Tolksdorf v. Langenbacher Furniture Corp.* held that the former owner of a one-half interest in a corporation who sold his interest in a transaction in which the purchase price was to be paid over several years was nevertheless entitled to inspect the corporate books and records in view of the fact that a proposal to dissolve the corporation was pending which might have affected his ability to collect the balance of the purchase price.<sup>831</sup>

*Knaebel v. Heiner* held that a shareholder who agreed to sell his shares for shares in another corporation remained a shareholder until the exchange took place and, therefore, retained the inspection rights of shareholders.<sup>832</sup>

*Naquin v. Air Engineered Systems & Services, Inc.* involved a demand to inspect records by a shareholder owning 33% of the corporation’s outstanding shares.<sup>833</sup> After the demand was received, the corporation issued additional shares to the other shareholders to reduce the ownership of the demanding shareholder to below the statutory minimum.<sup>834</sup> The court held the eligibility of a shareholder should be established at the time of the demand, and the subsequent issuance of shares did not deprive the demanding shareholder of his statutory right to inspect the corporate books.<sup>835</sup>

*Fritz v. Belcher Oil Co.* upheld the inspection rights of individuals who were shareholders of record of the requisite number of shares at the time they demanded the right to examine corporate records and at the time the corporation refused, even though they later sold their shares pursuant to a tender offer.<sup>836</sup> The court considered the Florida statute in light of its derivation from § 52 of the 1969 Model Business Corporation Act and the Illinois Business Corporation Act, and stated that it was proper to rely on judicial constructions in other states, particularly where a uniform law was involved and doing so would promote the uniformity of the law.<sup>837</sup> In the absence of Florida decisions, the court relied upon *McCormick v. Statler Hotels Delaware Corp.*, which held that under the Illinois statute, a shareholder had a cause of action when he was refused permission to inspect the corporate books for a proper purpose and need not be a shareholder at the time of trial of his action for the statutory penalty.<sup>838</sup>

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828. *Id.* at 509.

829. *Brenner v. Hart Sys., Inc.*, 493 N.Y.S.2d 881, 885 (N.Y. App. Div. 1985).

830. *Lau v. DSI Enters., Inc.*, 477 N.Y.S.2d 151, 152 (N.Y. App. Div. 1984).

831. *Tolksdorf v. Langenbacher Furniture Corp.*, 487 N.Y.S.2d 43, 44 (N.Y. App. Div. 1985).

832. *Knaebel v. Heiner*, 645 P.2d 201, 204 (Alaska 1982).

833. *Naquin v. Air Engineered Sys. & Servs., Inc.*, 423 So. 2d 713, 714–15 (La. Ct. App. 1982).

834. *Id.*

835. *Id.* at 716.

836. *Fritz v. Belcher Oil Co.*, 363 So. 2d 155, 158 (Fla. Dist. Ct. App. 1978).

837. *Id.* at 157.

838. *McCormick v. Slater Hotels Del. Corp.*, 203 N.E.2d 697, 703 (Ill. App. Ct. 1964).



*Haller v. Chiles, Heider & Co.* involved a shareholder's demand for inspection rights while litigation concerning the corporation's purchase of his shares was pending.<sup>839</sup> The outcome of the litigation was that the corporation had validly exercised its option.<sup>840</sup> Therefore, the court concluded that the plaintiff was not a shareholder at the time of demand, which occurred after the shareholder had tendered his shares to the corporation and received payment therefor.<sup>841</sup>

*Alex, Brown & Sons v. Latrobe Steel Co.* held that under the Pennsylvania statute the fact that the plaintiff was a registered securities broker-dealer did not prevent it from exercising its statutory right to obtain a shareholder's list.<sup>842</sup> The plaintiff wanted the list so it could communicate a tender offer to the shareholders.<sup>843</sup> If successful, the plaintiff would earn commissions to the extent shareholders tendered their shares pursuant to the offer.<sup>844</sup>

*Shelters, Inc. v. Mankin* held that a shareholder of record who entered into an executory contract for the sale of his shares was entitled to inspection rights.<sup>845</sup>

*Lenahan v. National Computer Analysis Corp.* held that a director who was not a shareholder was not entitled to a list of shareholders under the Delaware statute pertaining to inspection rights of shareholders of record.<sup>846</sup>

*Landgarten v. York Research Corporation* held that a shareholder in a parent corporation may inspect certain records of a subsidiary, due to evidence of possible fraud concerning transfer of funds from subsidiary to parent.<sup>847</sup>

#### **v. Inspection by Agent of Shareholder**

*Henshaw v. American Cement Corp.* held that when inspection was to be made by a person other than the shareholder, the corporation may require evidence of that person's authority to act on behalf of the shareholder.<sup>848</sup> In this case, the shareholder's "demand, under oath, met that requirement by naming his agents and attorneys who were to make the inspection."<sup>849</sup>

#### **F. Miscellaneous Issues**

##### **i. Effect of Failing to Follow Limited Partnership Statute Procedures**

*Keller v. United States* addressed an argument by the government that the transfer of bonds by two trusts as limited partners to a family limited partnership formed shortly before the death of the decedent trustee of the trusts was not effective because the schedule to the limited partnership agreement showing contribu-

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839. *Haller v. Chiles, Heider & Co.*, 252 N.W.2d 157 (Neb. 1977).

840. *Id.* at 159.

841. *Id.*

842. *Alex, Brown & Sons v. Latrobe Steel Co.*, 376 F. Supp. 1373, 1374 (W.D. Pa. 1974).

843. *Id.*

844. *Id.*

845. *Shelters, Inc. v. Mankin*, 204 S.E.2d 810 (Ga. Ct. App. 1974).

846. *Lenahan v. Nat'l Comput. Analysts Corp.*, 310 A.2d 661 (Del. Ch. 1973).

847. *Landgarten v. York Research Corp.*, 1988 WL 7392, at \*6 (Del. Ch. Feb. 3, 1988).

848. *Henshaw v. Am. Cement Corp.*, 252 A.2d 125, 128 (Del. Ch. 1969).

849. *Id.*

tions was left blank and there was no other formal documentation of the transfer.<sup>850</sup> One of the government's arguments on appeal was that the record keeping requirements of the Texas Revised Limited Partnership Act required the schedule to the partnership agreement showing contributions to be filled out before the decedent's death.<sup>851</sup> The court discussed the statutory record keeping provision and concluded that it was more sensibly construed as a mandatory record keeping provision, the breach of which may give rise to a suit for violating duties between partners, as opposed to a provision that invalidates noncompliant property transfers.<sup>852</sup>

**ii. State Court Order Requiring Members to Turn Over Documents Did Not Violate Automatic Stay**

*In re Resource Energy Technologies, LLC* holds that a state court discovery order requiring members of debtor LLC to turn over documents of the LLC did not violate automatic stay because members have rights to access, inspect, and copy LLC information under Kentucky law in their capacities as members and such action is not an act to obtain possession of or exercise control over property of the estate.<sup>853</sup>

VII. CONCLUSION AND RECOMMENDATIONS

This article has attempted to provide a useful survey of the law governing the inspection of books and records of corporations and unincorporated entities. In some instances, a reader may find it difficult to reconcile the cases. For example, *Shabshelowitz v. Fall River Gas Co.* held that a shareholder did not have a proper purpose where the shareholder sought to obtain names of shareholders who might sell their stock to him.<sup>854</sup> By contrast, in *NVF Co. v. Sharon Steel Corp.*, the court held that a shareholder who intended to make an offer to purchase shares of other shareholders stated a "proper purpose" within the Pennsylvania statute for seeking access to the list of shareholders, even though the shareholder intended to offer to purchase the shares for debentures and warrants.<sup>855</sup>

This article has noted cases in which a LLC was able to restrict examination of its books and records by imposing a reasonableness requirement.<sup>856</sup> Unincorporated entity statutes often expressly permit restrictions.<sup>857</sup> The author believes that

850. *Keller v. United States*, 697 F.3d 238, 247 (5th Cir. 2012).

851. *Id.* at 241.

852. *Id.* at 244.

853. *In re Resource Energy Techs., LLC*, 419 B.R. 746, 748 (Bankr. W.D. Ky. 2009).

854. *See supra* note 634 and accompanying text.

855. *See supra* note 582 and accompanying text.

856. *See supra* notes 140–214 and accompanying text.

857. *See* discussion of statutes *supra* notes 140–214, 391–420–42 and accompanying text, *see e.g.*, DEL. CODE ANN. tit. 18 § 305(c) (2017) (provides that the manager of a limited liability company may keep confidential from the members any information the manager reasonably believes to be "in the nature of trade secrets or other information the disclosure of which the manager in good faith believes is not in the best interest of the limited liability company or could damage the limited liability company or its business or which the limited liability company is required by law or by agreement with a third party to keep confidential). TEX. BUS. ORGS. CODE ANN. § 101.054(e) (West 2017) (stating that a company agreement "may not unreasonably restrict a person's right of access to records and information." The author believes a restriction that would be permitted under the Delaware statute would be

LLC statutes could be improved by uniformly requiring that books and records be available to assignees.<sup>858</sup> Eighteen LLC statutes limit inspection rights to members.<sup>859</sup> In the case of an assignee of a disabled or deceased member, the assignee may be hampered in carrying out his or her duties without access to the LLC's books and records. The Revised Uniform Limited Partnership Act provides a reasonable solution to this problem.<sup>860</sup> By the author's count, however, only about three-fourths of the limited partnership statutes provide inspection rights to the legal representative of a deceased or incapacitated partner. For the same reasons stated for members, the author submits that all limited partnership statutes should be amended to so provide.

The author also believes that all LLC and limited partnership statutes should permit inspection through an agent. The statutes should be drafted so that in an appropriate case, the company agreement or partnership agreement could impose reasonable restrictions on the use of agent to inspect books and records.

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a reasonable restriction under Texas law.). Colorado and New York law are similar. COLO. REV. STAT. § 7-80-408(3) (2007); N.Y. LTD. LIAB. CO. LAW § 1102(c) (McKinney 1994). The California limited partnership statute permits similar restrictions. CAL. CORP. CODE § 15904.06(g) (West 2008). The California limited liability statute does not contain such a provision. REVISED UNIF. LTD. LIAB. CO. ACT § 401(a)(2)(B) (UNIF. LAW COMM'N 2013) permits such a provision (California must have decided to omit that provision when it adopted RULLCA). *See supra* notes 135–36 and accompanying text.

858. Texas already does so. TEX. BUS. ORGS. CODE ANN. § 101.502. California does also. CAL. CORP. CODE § 17704.10(a).

859. *See supra* notes 246–48 and accompanying text.

860. REVISED UNIF. LTD. P'SHIP ACT § 304(k) (UNIF. LAW COMM'N 2013) (Providing that the inspection rights stated in that section do not extend to a person as a transferee, but may be exercised by the legal representative of an individual under legal disability who is a limited partner or person dissociated as a limited partner. Moreover, § 304(f) states that if a limited partner dies, § 704 applies, it provides: If a partner dies, the deceased partner's personal representative or other legal representative may exercise the rights of a transferee as provided in § 702 and, for the purposes of settling the estate, may exercise the rights of a current limited partner under § 304.). *See supra* note 70 and accompanying text.