

THE IMPACT OF TEAM PRODUCTION THEORY ON LLC FORMATION PRACTICE

By John M. Cunningham¹

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I. INTRODUCTION

- A. Current theories about the nature of business firms; the potential impact of these theories on LLC formation practice

Multi-member LLCs are statutory legal entities whose principal constitutive documents – called under most LLC acts their “operating agreements” - have as their primary function the expression of LLC deals in legally enforceable terms.²

However, LLCs, like corporations, general partnerships and other state-law business organizations, are not only legal entities; they are also *business firms*. Thus, the meaning

¹ John Cunningham is of counsel to the law firm of Ransmeier & Spellman, P.C., Concord, New Hampshire. His practice focuses on providing legal and tax advice and services to business start-ups. He is the author of *Drafting Limited Liability Company Operating Agreements* (Aspen Law & Business), a leading LLC practice manual and formbook.

² The focus of this article is on LLCs that are “firms” – i.e., business *collectives*. Thus, all references to LLCs in the article are to multi-member LLCs.

Under the LLC acts of most states, an LLC’s constitutive documents – i.e., the documents that give the LLC its basic legal structure – are (i) its operating agreement (called under some LLC acts its “LLC agreement” or “regulations”); and (ii) its articles of organization (called, under the some LLC acts, its certificate of formation or articles of oramation).

that a lawyer who assists clients in forming multi-member LLCs ascribes to the concept of business firm – i.e., in the language of the law journals, the lawyer’s “theory of the firm” – may have a critical impact on the manner in which he or she renders this assistance. The fact that a lawyer’s theory of the firm affects the lawyer’s LLC formation practice at an unconscious level may make its impact all the greater.

Among economists, legal scholars and other academic specialists, there are currently two principal theories of the firm – the contractarian theory and the team production theory. As discussed in greater detail below, the first of these theories is familiar to most lawyers who engage in LLC formation practice, and exercises a substantial influence on this practice. The second is less familiar to LLC practitioners but arguably should be well understood by them and should have a far greater impact on their LLC formation practice than it presently has.

B. The contractarian theory

The theory of the firm that has dominated business organization law scholarship for several decades and that is undoubtedly dominant as well in the minds of most LLC clients and lawyers is the “contractarian” theory.³ Under this theory, a business firm is essentially a “nexus of contracts” among the firm’s participants – its investors, its management, its employees, etc. – and these explicit and implicit contracts reflect the participants’ efforts to maximize their respective economic self-interests. The contractarian theory is not trust-based; it assumes that each person who is a party to the nexus of contracts that constitutes a particular firm will “opportunistically” maximize his or her profits from the firm regardless of the impact this may have on the other parties.

To illustrate: John Jones is interested in becoming a member of XYZ, LLC and investing substantial cash in it. Jones’s lawyer is Mary Smith. Jones wants the LLC’s operating agreement to provide him with a share of XYZ profits and losses and with voting power in XYZ that are at least proportionate to his share of cash investment in XYZ, and Smith considers it her professional duty to achieve these arrangements by every lawful means. In seeking this outcome, both Jones and Smith are driven by the contractarian theory of the firm.

While the contractarian theory is sometimes expressed by scholars in obscure technical jargon and difficult mathematical formulas, its essential truth is evident to any experienced LLC lawyer. These lawyers implicitly know, even if they have never expressly reflected on the fact, that a large part of their job is to negotiate the best possible *economic* deal for their clients and to document this deal in a manner that ensures maximum contractual enforceability. Furthermore, the contractarian theory is the theory that, at least on an implicit level and often very explicitly, dominates law school teaching of LLC law and other business organization law.

³ A useful summary of the contractarian theory may be found in Bainbridge, *Corporation Law and Economics*, Chapter 1 (“An Introduction to the Corporation”), § § 1.4 and 1.5. Bainbridge’s book systematically applies the contractarian theory to the classical issues of the law of business corporations.

C. The team production theory.

However, in the past three years, a new theory of the firm – referred to by some scholars as “team production theory” – has emerged and has come to occupy an increasingly important place in business organization law thought.⁴ Team production theory defines a business team as an aggregate of two or more participants who join together in a production unit because they know they cannot achieve the business results they desire if they seek these results separately. Team production theory acknowledges and builds upon the obvious fact that for many firms, a viable economic deal is by no means sufficient to ensure business success. Rather, team production theory takes into account that many firms, whatever may be the economic terms on which they are founded, cannot succeed unless their key participants constitute a *productive business team*,⁵ and that the basis of team productivity is mutual trust. The emphasis of team production theory on mutual trust radically distinguishes it from the contractarian theory, which, as noted, presupposes among the participants in a business firm a total *absence* of trust.

The characteristics that make a business team productive cannot readily be quantified. Rather, a business team is productive because of the *qualitative* characteristics of its members’ interpersonal relationships and their modes of personal interaction. The best method of ascertaining these characteristics is through sensitive empirical observation of actual business teams.

The author suspects that although few LLC practitioners have ever heard of team production theory as such, most of them have at least an implicit awareness of this theory – that is, they instinctively know that business firms are successful not merely for economic reasons but also because of company morale, and they know that companies with low morale, such as the fictional company for which the cartoon character Dilbert works, are doomed to failure. However, LLC case law and secondary sources are devoid of reference to the team production theory and, in particular, to the possible importance of this theory in LLC formation practice and very few law schools teach the theory. This author suspects that the inattention to team production theory among legal scholars and LLC practitioners is due principally to two factors:

⁴ There are three seminal articles on the relevance of team production theory to business organization law, all of them co-authored, by Margaret M. Blair, Ph.D., an economist with the Brookings Institution, and Lynn A. Stout, a law professor at UCLA Law School. The titles of these articles are “Team Production in Business Organizations: An Introduction,” 24 *J. Corp. L.* 743 (1999); “A Team Production Theory of Corporation Law,” 85 *U. Va. L. Rev.* 247 (1999), and “Trust, Trustworthiness and the Behavioral Foundations of Corporate Law,” 149 *U. Pa. L. Rev.* 1735 (June 2001).

⁵ In addition to playing a vital role in the achievement of business success, a productive team is also an end in itself, since, for most human beings, the sense of belonging to a vital community of co-workers is important to their happiness even if it does not make them rich. In other words, a productive team is not merely an instrumental good but a consummatory good. *See generally*, John Dewey, *Art as Experience* (Henry Holt and Company 1934), in which the distinction between instrumental and consummatory goods is central to Dewey’s analysis not only of works of art but also of other important human productions.

- Male culture. As noted above, team production theory is about interpersonal relations. Until recently, both the teaching and the practice of law have been dominated by men. For powerful cultural reasons, men are typically less attuned to the importance of interpersonal relationships than women. In the author's view, it is no accident that, as noted above,⁶ both of the authors of the three seminal law journal articles on team production theory are women.
- Overemphasis on contractual enforceability. The primary function of lawyers engaged in LLC formation practice is to negotiate and draft operating agreements. It is natural for lawyers to assume that operating agreements, like other types of contracts, should contain only provisions that are legally enforceable. However, not all of the directives that make for productive business teams can be expressed in legally enforceable terms. As discussed in greater detail below, in operating agreements, as in other contracts that address ongoing relationships rather than mere transactions, the inclusion of "normative" terms may be indispensable in providing adequate service to one's clients.

D. The relationship between the contractarian theory and team production theory

Team production theory is important as a complement to the contractarian theory but also as a counterweight to it. Team production theory does not replace or supersede the contractarian theory. Rather, it provides LLC clients and their lawyers with an explicit theoretical framework and vocabulary for understanding more clearly and implementing a very different *dimension* of business firms than the dimension focused upon by contractarian theory. Individuals schooled in team production theory will see these firms *both* as a nexus of contracts *and* as team production units.

However, in many LLC formations, the dictates of team production theory will conflict with those of the contractarian theory. In these conflict situations, their awareness of the importance of team productivity may cause one or more participants in the formation to forgo economic self-interest to some degree – perhaps even to a substantial degree - in order to create the possibility of a more productive team.

To illustrate: Mary Smith, who has invested \$1,000,000 in XYZ, LLC, wants XYZ's operating agreement to provide maximum protection to her investment. One way to do so is to impose maximum personal liability on XYZ's member-managers if they breach their duty of care. However, on the basis of team production theory, Mary decides that the better way to obtain effective management services from these managers and thus to protect her investment is to provide managers in XYZ's operating agreement with the contractual protection of the business judgment rule – which, in essence, will provide them with *immunity* from personal liability for negligence as long as they are loyal to the LLC and act on its behalf in good faith and with reasonable diligence.⁷

⁶ See footnote 4, *supra*.

⁷ See Blair and Stout, Trust, "Trustworthiness, and the Behavioral Foundations of Corporate Law," *supra*, 1789-1799; see Cunningham, *Drafting Limited Liability Company Operating Agreements*, *supra*, Form 1 ("Model Operating Agreement for Member-Managed Multi-Member LLC"), Section 9 ("Duty of Care"),

More broadly, the core characteristic of a productive team is, as discussed in greater detail below, the mutual trust of its members. However, the very process of negotiating an LLC deal and reducing it to binding contractual terms may be antithetical to the growth of mutual trust among the participants. Thus, in negotiating and drafting LLC operating agreements, lawyers who accept the validity of team production theory are likely to be much more careful than those unaware of the theory to avoid the “overlawyering” that is the natural tendency of contractarian lawyers.⁸

E. Addressing the impact of team production theory on LLC formation practice; the 12 chief characteristics of productive business teams

Lawyers who believe that the application of team production theory may be able to improve their service of clients in LLC formations must address and answer three principal questions:

- What are the characteristics of a productive business team?
- How, if at all, should lawyers who assist clients in LLC formations address team production theory with these clients?
- How, if at all, should team production theory affect the terms that these lawyers include in LLC operating agreements?

Regrettably, no book or other writing has been published to date that provides a comprehensive inventory of the characteristics of productive business teams. However, the author’s study of team production theory as discussed in law journals, in writings in the field of business organization theory, sports psychology and related fields and his own professional experience suggest that productive business teams typically have most or all of the following 12 chief characteristics:⁹

Subsection 9.4 (“No Member Liability for Actions Taken in Good Faith, Etc.”). This subsection provides as follows: “ No member shall be personally liable for a breach of any duty of the member under this Section 9 if, with respect to the matter in question, the member has acted (a) in good faith; (b) in the reasonable belief that the action was in the best interest of the LLC; and (c) with reasonable diligence.”

⁸ Blair and Stout, “Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law,” *supra*, 1799-1806.

⁹ In compiling the above list, the author has been influenced by his experience in serving for the past seven years as the general counsel of AeroSat Corporation, a New Hampshire company engaged in the development of high-speed, low-cost methods of providing two-way Internet communications to passengers in airplanes, marine vessels and other moving vehicles. The remarkable technical achievements of AeroSat are undoubtedly attributable in good measure to the company’s deep and sustained commitment to the values identified in team production theory.

- 1) Trust. The members of a productive business team have a high level of mutual trust.¹⁰
- 2) Clear team mission. Productive business teams have clearly defined team missions and goals.
- 3) Clear team roles. Each member of a productive business team has a clearly defined team role.
- 4) Team member commitment. Each member of a productive business team has a high level of commitment to the team's mission and to the member's role on the team.
- 5) Leadership. A productive business team has a leader whom all team members respect and who is committed to fostering the characteristics of business team productivity outlined here.
- 6) Cooperation. Each member of a productive business team cooperates with each other member.
- 7) Candor. Each team member deals honestly with the other members and takes the initiative to share promptly with the other members all of the member's factual perceptions and ideas that the member believes may be material to the success of the team.
- 8) Access to information. Each member of a productive business team has ready access to all team information relevant to the member's role on the team.
- 9) Listening. All members of a productive business listen carefully and respectfully to one another concerning team matters and with an openness to changing their views on the basis of what they hear.
- 10) Members' participation in team decision-making. Each member of a productive business team has a reasonable opportunity to participate in the decision of all team matters and to influence those decisions.
- 11) Team commitment to self-evaluation. Productive business teams engage in continuing evaluation of their productivity.
- 12) Conflict management. Productive business teams resolve disputes among team members fairly and constructively.

Part II of this article briefly explains each of these characteristics and suggests the practical impact of each on LLC operating agreements.

¹⁰ See generally, Blair and Stout, "Trust, Trustworthiness and the Behavioral Foundations of Corporate Law," *supra*; Lewis, *Trusted Partners – How Companies Build Mutual Trust and Win Together* (The Free Press 1999).

II. APPLYING TEAM PRODUCTION THEORY IN NEGOTIATING AND DRAFTING OPERATING AGREEMENTS

A. How, if at all, should lawyers address team production theory with their clients?

The extent to which lawyers forming LLCs should address team production theory with their clients – and indeed, whether they should do so at all – will obviously depend on the unique relationship between the lawyers and clients in question. Many clients in LLC formations want their lawyers only to perform the narrow technical functions of identifying and negotiating LLC legal issues and drafting LLC documents. Many others, however, want their lawyers to act in a more holistic manner – namely, to do everything that their training and experience enable them to do to help the clients develop a *successful business*. This latter group of clients may well appreciate their lawyers’ explaining team production theory to them and reflecting key tenets of the theory in their operating agreement.¹¹

B. “Positive” vs. “normative” provisions in LLC operating agreements

As noted above, the primary role of lawyers in forming LLCs should normally be that of helping their clients to arrive at contractually enforceable deal terms. Thus, most of the terms of an LLC operating agreement – and especially those reflecting the LLC’s economic deal – should be written in the form of “positive” legal directives – i.e., those that maximize the likelihood of legal enforceability.

For many LLC clients, however, LLC operating agreements will be of greater practical utility if they function not only as legal contracts in the narrow technical sense but also as pre-formation teaching documents that instruct prospective members as to the key terms of their business interrelationship and as post-formation operating manuals that show members how to foster and deepen this relationship on a continuing basis. Thus, a number of key terms in many operating agreements – and especially those intended to foster a productive team spirit – should be primarily “aspirational” or “normative” rather than exclusively “positive.” That is, they should express the business team ideals of the members even if these ideals may not necessarily be enforceable by a court or arbitrator.

The discussion below suggests both “normative” and “positive” changes that may be appropriate in particular LLC operating agreements to take account of the importance of team production theory in fostering an LLC’s business success.¹²

¹¹ The focus of Part II.C of this article is on how to foster the values of team production theory through the inclusion of specific provisions in operating agreements. Lawyers who believe there is value for multi-member LLCs in team production theory but who, because of the potential unenforceability of these provisions or for other reasons, are hesitant to make use of them in operating agreements may wish, instead, to provide them to their clients in the form of a letter or other non-contractual document setting for LLC team ideals.

¹² For simplicity, the focus of the discussion below is on multi-member LLCs that are “member-managed” – i.e., those in which each member, like each partner in a traditional general partnership, is entitled to vote on all LLC matters and has full LLC agency authority. The author believes, however, that the applications of team production theory to member-managed multi-member LLCs outlined in this discussion can also be

C. Applying the 12 chief characteristics of productive business teams in LLC formations

Characteristic 1. THE MEMBERS OF PRODUCTIVE BUSINESS TEAMS TRUST EACH OTHER

Discussion. Trust means making oneself vulnerable to others in the expectation that others will act trustworthily toward oneself – i.e., will respond positively to trust and will not take selfish advantage of being trusted. In order for a business team to be a productive team, each member of the team must trust each other member. Trust pervades the life of any productive team. However, the three most important areas in which trust is manifested in such a team are these:

- (a) “Don’t shoot the messenger.” Team members must trust that they can be candid with one another without suffering penalties for their candor. In other words, they must trust that the team will not “shoot the messenger.” Without this trust, it will be impossible for the team to achieve the high level of communication and sharing of facts and ideas that most firms need in order to achieve their business goals.
- (b) Reciprocity in commitments. All team members must trust that each of them is fully committed to the team. Otherwise, given the inherently interdependent nature of teams, it may make no sense for *any* of them to make this commitment.
- (c) Competence. Each team member must trust in the competence of each other member.

Application in forming LLCs. In discussing LLC deals with their clients and even in negotiating these deals, lawyers may often find it appropriate to discuss the importance of trust to business team productivity. However, it is questionable whether they should address trust in any direct or explicit way in LLC operating agreements. This is true above all because of the highly interpersonal nature of trust and its dependence on delicate human feelings.

To illustrate: John Doe, a member of XYZ, LLC, decides to take the risk of constructively criticizing Jane Roe, another XYZ member, for her recent team performance. John knows that Jane, rather than responding constructively to his criticism, may seek revenge. If Jane responds trustworthily to John’s criticism – i.e., with gratitude and positive action – John’s trust in her and the trust of the XYZ team as a whole will grow; otherwise it will diminish and may eventually die out altogether.

The delicate and continually evolving process of trust-building as described above, like the process of the growth of love between spouses, is likely to be harmed rather than

implemented with relatively minor adjustments in *manager*-managed multi-member LLCs – i.e., LLCs that, like traditional limited partnerships, are managed by fewer than all of their members.

The discussion below concerning the application of team production theory to the operating agreements of member-managed multi-member LLCs is intended merely to be illustrative; it makes no pretense of being exhaustive. An exhaustive discussion of this subject would far exceed the few pages of this article.

helped by the coolly analytical process of contractualization.

Characteristic 2. PRODUCTIVE BUSINESS TEAMS HAVE CLEARLY DEFINED TEAM MISSIONS

Discussion. In order to focus the attention and energies of its members, a business team must have a clearly defined mission. The management theorist Peter Drucker has written extensively about the difficulty that businesses often encounter in defining their mission, in adhering to this mission once they have defined it, and in redefining it as their business environment evolves.¹³

Application in forming LLCs. Lawyers assisting in LLC formations should ensure that before launching their business, their clients have defined their firm's mission with the greatest possible clarity, and the operating agreements of these LLCs should clearly state this mission. These agreements should also expressly call upon the members to consider from time to time whether its mission should change to meet new circumstances.¹⁴

Characteristic 3. THE MEMBERS OF PRODUCTIVE BUSINESS TEAMS HAVE CLEARLY DEFINED TEAM ROLES

Discussion. Each member of a productive team should have a clearly defined role on the team, even if this role is defined in general terms as that of a team "utility infielder." Otherwise, the commitment of the members to the firm will necessarily be weakened and unfocused.

Application in forming LLCs. Lawyers forming LLCs should ensure that the founders clearly define the role of each member of the LLC's team in conducting the LLC's business and that these definitions are clearly stated in the LLC's operating agreement.¹⁵

¹³ See generally, *The Essential Drucker in One Volume: The Best of Sixty Years of Peter Drucker's Essential Writings on Management* (HarperBusiness, 2001). Drucker has also written about the importance to business firms of defining their missions in terms of meeting the needs of their customers and not merely those of themselves as business organizations.

¹⁴ Form 1, Section 1.7 addresses the issue of LLC mission in very brief terms; it provides only that "the LLC's principal purpose shall be _____." Team production theory suggests that Section 1 ("Preliminary Provisions"), Subsection 1.7 ("LLC Purpose") should contain additional terms to the following effect: "The members shall redefine this purpose and the LLC's mission and goals from time to time to respond to changes in the business environment of the LLC and other relevant circumstances." In other words, the inevitability of change should be expressly emphasized in the subsection.

¹⁵ See Form 1, Section 7 ("Members' Titles and Function Responsibilities As Members; Related Matters"), Subsection 7.6 "Member Time Commitments and Specific Responsibilities"), which provides as follows: "Each member shall commit time to the LLC and shall be responsible for LLC functions as set forth in the attached Exhibit I. The members hereby acknowledge and agree that the time commitments and functional responsibilities set forth in Exhibit I comprehensively address the LLC's initial operational needs."

Characteristic 4. EACH MEMBER OF A PRODUCTIVE BUSINESS TEAM IS COMMITTED TO THE TEAM'S MISSION AND TO THE MEMBER'S ROLE ON THE TEAM

Discussion. Each member of a productive team must be strongly committed to the team's mission and to the member's role on the team. Without this commitment - which, as readers will no doubt note, is closely akin to the traditional fiduciary duty of loyalty - the participants in a firm are less likely to achieve the other characteristics that are necessary to a productive business team. For example, the deeper the commitment of the members of a business team to the LLC and to their respective LLC roles, the greater the skill, diligence and care with which they are likely to fulfill these roles. In other words, commitment drives care.

Application in forming LLCs. Lawyers assisting in LLC formations should emphasize with their clients the central importance of the duty of loyalty and, with rare exceptions, the LLC's operating agreement¹⁶ should contractualize this duty in clear and emphatic terms.

Characteristic 5. PRODUCTIVE BUSINESS TEAMS HAVE LEADERS WHO ARE COMMITTED TO TEAM PRODUCTION VALUES

Discussion. Except in the case of small, close-knit teams where it is possible to operate by member consensus, a productive team must have a leader whom all members respect and trust. This leader must embody to a high degree the team's goals and values, and, in particular, its team productivity values.

Application in forming LLCs. As noted above, the focus of this article is on member-managed multi-member LLCs. In this type of LLC, each member is, in effect, an equal leader of the business team. Thus, each of them must embody the team's commitment to team production. Since, however, the characteristics of a productive business team are complex, it is doubtful where this commitment can be expressed in any reasonably succinct contractual form.

Characteristic 6. THE MEMBERS OF PRODUCTIVE BUSINESS TEAMS COOPERATE WITH ONE ANOTHER.

Discussion. Cooperation is closely related to commitment. However, the focus of commitment is general. The focus of cooperation is specifically operational. In order for a business team to be a productive team, each member must cooperate to the fullest reasonable extent with the other members in seeking the success of the team, and each member must make every reasonable effort to support the activities of the other members. In addition, cooperation sometimes requires a particular team member to unselfishly subordinate his or her personal interests to the interests of the team as a whole.

¹⁶ Form 1, Section 8 ("Members' Duty of Loyalty"), Subsection 8.1 ("Duty of Loyalty – General Rule") provides as follows: "In matters relating to the business and internal affairs of the LLC, members in their capacity as members shall act in the best interest of the LLC and the other members and not merely in their own personal interest."

Application in forming LLCs. Lawyers should consider including express provisions in LLC operating agreements requiring the members to cooperate with one another, and these provisions should spell out at least in general terms the above implications of a member's commitment to cooperation.¹⁷

It should be noted that the duty of cooperation as outlined above has deep roots in the fiduciary duty of obedience reflected in traditional agency case law and in the Restatement of Agency 2d.

Characteristic 7. THE MEMBERS OF PRODUCTIVE BUSINESS TEAMS ARE CANDID WITH ONE ANOTHER

Discussion. In order for a business team to be productive, the members of the team must be candid with each other on a continuing basis about all significant team issues. This means not only that team members must be truthful in all of their statements to other team members but also that they must take the initiative to promptly communicate to the team all of their significant factual perceptions and ideas about it.

Application in forming LLCs. The duty of candor as described above is closely related to the traditional partnership fiduciary duty of candor.¹⁸ Lawyers assisting in LLC formations generally should explain this duty and its practical importance to their clients and should consider formalizing it as an express fiduciary duty in LLC operating agreements.¹⁹

Characteristic 8. THE MEMBERS OF PRODUCTIVE BUSINESS TEAMS HAVE READY ACCESS TO TEAM INFORMATION THAT THEY NEED

Discussion. In order for a business team to be productive, each member of the team must have prompt and full access to all information that the member needs in order to perform his or her team role.

¹⁷ Form 1, Section 10 (Members' Duty of Cooperation") provides as follows: "Each member shall promptly comply with all reasonable instructions approved by members holding a majority of member votes." In order to reflect fully the insights of team production theory, this section arguably should be revised to, among other things, emphasize the duty of members to support one another and, when necessary to sacrifice personal interests in the interest of the team.

¹⁸ See, e.g., Hillman, "Business Partnerships and Fiduciaries: Reflections on the Limits of Doctrine," 22 Cardozo L. Rev. 51 (November 2000), in which the author states at page 51 that "disclosure is the essence of the duty of a fiduciary." See also Giannini, "'Punctilio of Honor' or 'Disintegrating Erosion'?" The Fiduciary Duty to Disclose for Partners, Corporate Directors, and Majority Shareholders," 27 Sw. U. L. Rev. 73 (1997).

¹⁹ Form 1 contains two sections – namely, Section 11 and 12 – which address the fiduciary duty of candor. Section 12 provides as follows: "In all LLC matters, each member shall deal honestly with the other members, and, promptly after learning of any information that is material to the business and affairs of the LLC, shall disclose this information to the other members; PROVIDED, that no member shall be required to disclose any information under this Section 12 that is confidential under any federal or state law concerning individual privacy."

Application in forming LLCs. Lawyers assisting in LLC formations should consider providing in the LLC's operating agreement that each member is entitled to prompt and full access to all LLC information in the possession or control of the LLC and of other members, whether or not contained in written records.

Characteristic 9. THE MEMBERS OF PRODUCTIVE TEAMS LISTEN TO EACH OTHER

Discussion. In order for a business team to be productive, all of the members of the team must listen carefully and respectfully to one another on team matters and with an openness to changing their views on the basis of what they hear.

Application in forming LLCs. Lawyers assisting in LLC formations should consider including in an LLC's operating agreement a provision requiring each member to listen to the other members in the manner described above.

Characteristic 10. PRODUCTIVE BUSINESS TEAMS HAVE FAIR AND EFFECTIVE DECISION-MAKING PROCEDURES

Discussion. In order for a business team to be a productive team, each member must have a reasonable opportunity to participate in all significant team decisions and to influence that decision.

Application in forming LLCs. In general, the members of a business team are likely to be more productive if they freely accept on a personal level the decisions made by the team majority. Thus, in addition to the usual operating agreement provisions addressing member voting power, voting requirements and voting procedures, lawyers should consider including in operating agreements a provision stating that before members vote on an LLC matter, they must seek diligently and in good faith to reach a consensus on that matter (and, obviously, their reaching such a consensus will obviate the need for any vote).²⁰

Characteristic 11. PRODUCTIVE BUSINESS TEAMS ENGAGE IN REGULAR SELF-EVALUATION

Discussion. In order for a business team to be productive, the team must engage in continuous evaluation of the productivity of the team itself and of each team member, and the team must seek on a regular basis to improve this performance.

Application in forming LLCs. Lawyers assisting in LLC formations should consider including in LLC operating agreements a provision stating that the team shall meet quarterly or at other specified intervals to evaluate the performance of the team as a whole and of each member and that, at these meetings, the team shall determine what

²⁰ Matters relating to member voting in Form 1 are addressed in Section 4 of that form. Subsection 4.4 (b), ("Voting Procedures – [Members'] Opportunity to Be Heard"), provides that "each member shall have a reasonable opportunity to be heard on each matter on which the members vote." In order to take adequate of team production theory, the section arguably should be revised to state that the members shall take no vote on any LLC matter until they have sought diligently and in good faith to resolve the matter by consensus.

specific measures it can adopt to improve this performance.

Characteristic 12. PRODUCTIVE BUSINESS TEAMS HAVE CONSTRUCTIVE CONFLICT MANAGEMENT PROCEDURES

Discussion. Even in the most productive business team, conflicts among the members are inevitable. A team must address these disputes fairly and constructively if it is to retain its productivity.

Application in forming LLCs. The most important provisions to include in an operating agreement to ensure fair and constructive business team dispute resolution are probably two provisions already discussed above – namely, those relating to candor, listening and decision-making. However, it may also be useful to provide in these agreements that in addressing team disputes:

- The members may not resort to third-party dispute resolution until each party to the dispute has sought diligently and in good faith to resolve the dispute internally; and
- If the matter is referred to a judge, arbitrator or other independent decision-maker, that person in deciding the matter shall give significant weight to each party's good faith and diligence in seeking an internal resolution of the dispute.

III. CONCLUSION

Within the past three years, a new theory about the nature of business firms – referred to by scholars as team production theory – has received growing attention among scholars in the field of business organization law. This theory focuses on the interpersonal relations among business team members that make for team productivity. Team production theory constitutes an important complement to the long-dominant contractarian theory of the firm; it provides a needed counterweight to that theory; and it has important implications for LLC formation practice.