

Memorandum

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TO: Legislative Counsel Bureau

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RE: AB 207: State Bar of Nevada, Business Law Section Reforms

INTRODUCTION

Nevada is consistently ranked among the top 10 most business-friendly states in the country and is the second most popular out-of-state domicile for corporations, behind only Delaware. It's known as the Nevada business advantage. With that distinction comes commitment to ensuring that Nevada laws are constantly **creating**, not simply cutting and pasting from other states, but instead innovating to safeguard that stable environment that our business leaders have come to expect. Nevada business laws also must **catch-up to and surpass** states like Delaware. Lastly, Nevada laws should be as **clean and clear** as possible in order to foster ease of use and predictability. All three of these tenets – which bolster the Nevada business advantage – are accomplished by the 2019 Assembly Bill.

Since 1928, the State Bar of Nevada and its members have been at the forefront of drafting and promoting legislation to further develop and advance Nevada's business laws and policies. The Executive Committee of the Business Law Section of the State Bar of Nevada (the "Executive Committee") is a team with decades of combined experience navigating, interpreting and applying Nevada's business laws and understands firsthand the nuanced business law distinctions that most directly impact Nevada transactions and business litigation. With this vast experience and a commitment to preserving and procuring the Nevada business advantage, the Executive Committee brings a bill that accomplishes these three critical tenets. A few examples are listed below, followed by an in-depth look at the bill in its entirety.

CREATION

- **Clarifying Fiduciary Duties of an LLC:** Selecting a business structure is one of the first critical steps entrepreneurs take. More than two-thirds of new companies formed are limited liability companies (LLCs), a contract-driven entity structure added by the Nevada Legislature in 1991 aimed at securing flexibility for business owners and unique customization that allows owners to build a company to fit their precise needs and desires. This bill enhances that predictability by positioning Nevada as a national leader in business legislation surpassing the likes of Delaware. Currently, the Nevada Revised Statutes do not directly address fiduciary duties for LLC members and managers, as they do for directors and officers of corporations. Without a definitive statute to guide, judges are left relatively unaided to decipher fiduciary duties principles, rather than deferring to the intentions of the businesspersons that formed the LLC. The bill preserves the minimum contractual duty of good faith and fair dealing – a concept that already exists in NRS 86.285(5) – and permits parties to expand, restrict or eliminate any and all other duties of managers and members, in the way that best suits their business and management structure. The proposed statutory construct is consistent with and bolsters the freedom-of-contract principles and governance flexibility that are fundamental to the desirability of the LLC as a business entity. Currently in Nevada and Delaware, courts are left to assign these duties after-the-fact, without a statutory baseline, thereby creating unpredictable outcomes for business owners and managers. The revision remedies current ambiguities, and serves as a clear distinguishing feature of Nevada limited liability companies versus those of other states, including Delaware. The bill is innovative and only promotes synergy of the well-rooted principle of contractual freedom and with the added benefits of predictability.

CATCHING UP AND SURPASSING

- **Delivery of Records:** This amendment seeks to clarify the intention of a 2015 revision, SB 39, which made changes to the record-keeping and inspection requirements. The 2015 changes did not make clear whether the obligation to send records applies regardless of whether physical inspection has already been made available. The 2019 amendment alleviates companies of the burden of having to send records, when in fact that company has offered the records for inspection. This amendment avoids redundant obligations and related costs.
- **Broker Non-Votes:** NRS 78.320 has created some confusion relating to stockholder meetings of large, public companies. This amendment will help clarify the treatment of “broker non-votes” – where a stockholder does not instruct its broker on how to vote on matters where stock exchange rules prohibit the broker from voting. The bill seeks to clarify NRS 78.320 so that shares represented at a stockholder meeting by proxy will count toward a quorum as long as the shares are present in person or by proxy regardless of whether the proxy has the power to vote on any matter. The revisions result in a clearer standard as to when a quorum is present and brings the standard in line with that of the Model Business Corporation Act and Delaware law.

CLARITY

- **Forum Selection:** A company's choice of forum – selecting the jurisdiction at which all company disputes should be heard – can make or break that company's survival amid litigation. The importance of a forum selection clause lies in its inherent predictability. For years, corporations have been including provisions in their articles of incorporation or bylaws mandating that certain claims regarding the internal affairs of the corporation be brought in the courts of the corporation's incorporation. Many Nevada corporations have included this type of provision in their governing documents in order to ensure that Nevada courts are the forum for these types of claims, which inherently involve application of Nevada corporate law. This bill adds Nevada to the growing list of states that have specific forum selection authority in its statutes, expressly confirming (as Delaware has done) such provision are permitted and valid.

Assembly Legislation: Section-by-Section Purpose and Conceptual Changes to NRS

Bill Section	NRS Section	Description of Proposed Amendment
1	78.130	Forum Selection. In the past few years, corporations have included provisions in their governing documents (<i>e.g.</i> , articles of incorporation or bylaws) that specified the courts in which any, all or specified actions must be brought in. Although provisions such as these have been included in the governing documents of corporations for decades, only recently have corporate statutes specifically referenced forum selection provisions. This update makes clear that Nevada is now added to the list of states.
2, 17, 22	78.105 82.181 86.241	Delivery of Records. This amendment seeks to clarify the intention of a 2015 revision, SB 39, which made changes to the record-keeping and inspection requirements, including the insertion of an obligation to affirmatively send the required materials to the requesting stockholder/member(s) if the materials were kept out of state. The 2015 changes did not make clear whether the obligation to send applies regardless of whether physical inspection has been made available. In discussing this issue with the Nevada Registered Agent Association, the Executive Committee confirmed that there was no intent to require delivery of materials in the instance where actual inspection is available or occurs. Accordingly, the bill proposes language to clarify that materials may be sent only when physical inspection has not been made available. This amendment avoids any redundant obligations.
3	78.138	Duties of Directors and Officers. The minor amendments to this section are intended to simplify and clean-up the section.
4-6	78.205	Fractional Shares. The bill revises certain provisions in NRS

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	78.2055 78.207	Chapter 78 relating to fractional shares and the extent to which certain dissenter’s rights are triggered. The proposed revisions are not substantive and are designed only to clarify existing language.
7	78.288	Standard as to Distributions. The bill proposes amendments to sections relating to distributions to stockholders, with the revisions to subsections (1) and (2) of NRS 78.288 being clean-up in nature. The addition of subsection (7) to NRS 78.288 is designed to preclude a potentially conflicting fraudulent transfer analysis under NRS 112.
8	N/A	[Deleted by amendment.]
9, 15- 16	78.315 78.7502 78.751	Simplification of Indemnification Provisions. The bill proposes amendments to the indemnification statutes to provide for clearer language as to discretionary indemnification and mandatory indemnification, including language in a new subsection (4) to NRS 78.751 that makes the corporation the primary obligor unless the articles state, the bylaws, or an agreement between the parties says otherwise.
10	78.320	Broker Non-Votes. The bill proposes to revise NRS 78.320 to clarify that shares represented at a stockholder meeting by proxy will count toward a quorum as long as the shares are present in person or by proxy regardless of whether the proxy has the power to vote on any matter. The current statutory language counts shares represented by proxy “regardless of whether the proxy has authority to vote on <i>all</i> matters,” which has created some confusion. The revisions result in a clearer standard as to when a quorum is present and makes the standard the same as that under the Model Business Corporation Act and Delaware law.
11	78.3788	Definition of “Issuing Corporation”. The bill proposes an amendment to NRS 78.3788 that is intended to curb any possible abuse of the acquisition statutes whereby stockholders scatter record ownership of small numbers of shares to Nevada residents in order to improperly trigger the restrictions under the statutes.
12-13	78.390 78.580	Procedural Requirements related to Actions by Written Consent. The bill suggests amendments to both NRS 78.390 and NRS 78.580 relating to actions by written consent and/or notices relating to the same. The revisions are consistent with the principle that any action required of the stockholders may be taken by written consent in lieu of an actual meeting. In terms of NRS 78.580, the proposed amendments address whether approval of a dissolution by written consent and requires that notice of the proposed dissolution be given

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		to each stockholder whether or not entitled to vote. Although actions by written consent do not require any notice to be provided to the stockholders, due to the termination of the corporation itself, the Executive Committee thought it appropriate for notice to be provided to stockholders for an action by written consent approving the dissolution of the corporation.
14	78.747	Alter Ego Clarifications. In reviewing the current alter ego standards relating to corporations in the context of whether similar standards should be adopted for limited liability companies, the bill proposes clarifying amendments to NRS 78.747 so that the focus is on the relevant person (rather than a stockholder, director or officer) such that a person can be liable for perpetuating the “corporate fiction” concept. These clarifications will also be used in the language for a new section to NRS 86.
18-19	New Section	Alter Ego Standards for Limited Liability Companies. Based on inquiries received at the 2016 State Bar Annual Meeting, the Executive Committee discussed whether the corporate standard of alter ego liability is applicable to limited liability companies or whether some standard should be applied to limited liability companies. In understanding that our courts were already analogizing the current alter ego standard of NRS 78.747 to limited liability companies, the bill suggests language for a new section to NRS 86 to apply specifically to limited liability companies based on NRS 78.747 and tailored for limited liability companies.
18, 20	New Section	Fiduciary Duty Standards for Managers and/or Members of Limited Liability Companies. As discussed above, the proposal would be to adopt a minimum standard of fiduciary duty, the implied contractual duty of good faith and fair dealing, and to permit the parties of the limited liability company exercise their freedom of contract and adopt any additional duties to be imposed on managers and/or members through the articles of organization or operating agreement for such limited liability company. The proposed standard would apply prospectively, i.e., to limited liability companies organized after the effective date of this bill, so as to not impact any limited liability companies as they currently exist.
21	86.131	Series LLC. This proposal was a request from an estate planning attorney to help strengthen the use of series LLCs outside the State of Nevada. Due to the authorization of series LLCs in Nevada and the lack of wholesale adoption of series LLCs by other states (including the most recent Revised Uniform Limited Liability Company Act),

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		the Executive Committee was agreeable to the proposed revision.
23-25	86.281 86.301 86.321	Rights of Series. Due to the use of series limited liability companies in estate planning, the Executive Committee received a request to specifically authorize series of a limited liability company with the right to hold real and other property in its own name, i.e., the name of the series itself, instead of the series limited liability company. In terms of specifically providing for the requested amendments, the Executive Committee identified the following sections of NRS Chapter 86: NRS 86.281, NRS 86.301, and NRS 86.321.
26	86.531	Clarification as to Dissolution. NRS 86.531(1) requires articles of dissolution to be filed as soon as practicable after dissolution. However, NRS 86.351(1)(b) says that the articles must contain a statement that the LLC has been or will be dissolved. In order to address this potential inconsistency, the bill proposes to amend NRS 86.531 to delete the phrase “or will be” from subsection (1)(b).
27	New Section	Authorization of Intermediate Form Merger. The bill proposes to amend NRS Chapter 92A to provide for a means of “short form” merger or “intermediate form” merger that would permit holders of a majority of the voting power (i.e., the voting power sufficient to approve a merger) to approve a merger of a publicly-traded Nevada corporation through an action of the board of directors without the need for separate stockholder approval. The concept is similar to Section 251(h) of the Delaware general corporation law, which permits the consummation of second-step mergers without stockholder approval following a tender or exchange offer. The key features of the proposal are: (1) the broader scope in that it covers more than situations where the acquirer owns sufficient shares to approve the merger only by tender or exchange offer; (2) the requirement that the ownership threshold must have been met for a minimum of six months prior to the adoption of the agreement and plan of merger; and (3) the requirement that notice of the proposed merger be sent to all stockholders at least 30 days prior to the effective date of the merger.
28	92A.380	Effect of Dissenter’s Rights. The bill requests amendments to NRS 92A.380 that are designed to clarify the language used therein and to specifically counteract precedent permitting dissenting stockholders to challenge business combinations even though they voted in favor of the business combination. The key revision relates to subsection (2) where the standard for challenging the relevant corporate action was clarified to require actual fraud – versus merely fraudulent.

Bill Section	NRS Section	Description of Proposed Amendment
29	92A.390	Clarification on Dissenter’s Rights. The bill proposes amendments to NRS 92A.390 designed to clarify the language used therein.
30	92A.410	Consistent Use of “Stockholder of Record”. In prior legislative sessions, the Executive Committee amended the dissenter’s rights statutes to make clear that references to “stockholder” were references to “stockholder of record”. The proposed revisions to NRS 92A.410 correct one use of “record stockholders” and another use of “stockholders.