

## What's in a Name? Challenges and Pitfalls in Naming a New Business

by Michael A. Bondi

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## Deadline for Limited Liability Companies

by Richard J. Kelber and Christopher D. Stall

Owners of Minnesota LLCs formed under the old law ("Old LLCs") have been allowed to voluntarily subject themselves to the new law from August 1, 2015 through December 31, 2017. Starting on January 1, 2018, all of the old form LLCs will automatically become subject to the new law.



# Moss & Barnett

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## What's in a Name? Challenges and Pitfalls in Naming a New Business

By Michael A. Bondi | 612-877-5307 | Michael.Bondi@lawmoss.com

A common misconception when starting a new business in Minnesota is that if the secretary of state (or another government agency in charge of registering businesses) does not object to a proposed name during the formation process, then that name can be used freely and without potential risks. Unfortunately, the reality is very different.

A new business faces many challenges during the start-up process and spending time and money just to select a name for the business entity may seem like a waste of time and energy. However, if a business happens to choose and utilize a name that violates another person's or entity's existing trademark rights, the new business owners could find themselves in a messy and expensive battle. Spending the time and money to defend a trademark infringement lawsuit can often prove fatal to a new business.

When a person wishes to incorporate a new corporation or organize a new limited liability company or other form of business entity, the process starts with filing the required documents with the applicable state agency that registers business entities (*i.e.*, secretaries of state, divisions of corporations, etc.). Most of these agencies will perform a very cursory search of existing and previously used business names to verify that the name chosen for the new entity is available. As long as there is any kind of difference, no matter how minor, between the new business name and existing names, the new business name is rarely, if ever, rejected.

For example, there are literally dozens of entities listed in the Minnesota Secretary of State's database that begin with "McDonald." If a business were to apply for registration as "McDonald Grill, Inc." and that name is not already registered

in Minnesota, the registration would likely be successful. However, the business adopting that name could be opening itself to potentially significant risk, especially if the business will operate as a restaurant. McDonald's Corporation would almost certainly send a cease and desist letter (if not commence a trademark infringement lawsuit) shortly after the first meal was served at the McDonald Grill.

In view of the preceding, it is important for new businesses to do additional research before selecting a name. A key factor in determining the appropriate amount of research on the availability and use of a business name depends on both the nature and intended scope of the business. A very limited, local business does not likely warrant much of a review, while a business with nation-wide aspirations should undertake a more substantial review.

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## Kevin Busch and Tim Gustin Re-Elected to Board of Directors

**Kevin M. Busch** and **Timothy L. Gustin** were recently re-elected to three-year terms as members of our Board of Directors.

Kevin serves as the firm's Chief Operating Officer, is the chair of the firm's Commercial Department and banking and commercial transactions team, and is a member of the business law; mergers, acquisitions, and corporate finance; and multifamily and commercial real estate finance teams.

Tim serves as the Chair of the Board, is the chair of the firm's multifamily and commercial real estate finance team, and is a member of the firm's banking and commercial transactions and real estate teams.

Kevin and Tim will each continue practicing law on a full-time basis in addition to handling their management responsibilities. They are joined on the Board by co-directors, **Jana Aune Deach**, **Brian T. Grogan**, **Richard J. Johnson**, and **Thomas J. Shroyer**.



Kevin Busch and Tim Gustin

## Aaron Dean, Susan King, and Taylor Sztainer Elected Shareholders

We are pleased to announce that **Aaron A. Dean**, **Susan A. King**, and **Taylor D. Sztainer** have been elected shareholders of the firm.

**Aaron** is a member of the firm's litigation team. His 20-year legal career spans all facets of the construction industry. He has a contractor-side construction law practice, representing general contractors, subcontractors, and suppliers. In addition to his role as legal advisor, Aaron is a sought-after construction industry thought leader, speaking frequently at key trade events on timely construction topics and serving as an instructor for national and local contractor trade groups.

**Susan ("Susie")** is a member of the firm's wealth preservation and estate planning team. She focuses her practice in the areas of estate planning, probate, trust, guardianship/conservatorship, and elder law. A frequent speaker, she has also contributed to published works on an array of elder law issues. In 2013, Susie was appointed by the judges of the Fourth Judicial District of the State of Minnesota to the Hennepin County Guardianship/Conservatorship Attorney Panel.

**Taylor** is a member of the firm's litigation, accountant law, employment law, and creditors' remedies and bankruptcy teams. She is a business attorney focusing on litigation. Her areas of emphasis include employment-related disputes, including non-compete litigation, breach of contract, discrimination, harassment, and retaliation claims; business and personal torts; professional liability claims; shareholder disputes; and commercial disputes. Prior to practicing law, Taylor was a law clerk for the Honorable Elizabeth H. Martin in Minnesota District Court's Tenth Judicial District.

***Congratulations to Aaron, Susie, and Taylor!***



Aaron Dean, Susie King, and Taylor Sztainer

## New Service Team Focuses on Multifamily and Commercial Real Estate Finance

We are pleased to announce an expansion of the firm's service offering with the creation of a new practice area devoted to Multifamily and Commercial Real Estate Finance.

The team of seventeen attorneys provides advice to financial institutions throughout the United States on commercial real estate lending investments – negotiating and structuring deals, preparing loan documents, examining real estate due diligence, closing loan transactions, and advising on loan servicing events.

The team advises a full range of private and publicly owned providers of commercial real estate debt, including mortgage banks, investment advisors, life insurance companies, and community, regional, and money center banks.

The team has particular depth in multifamily housing finance – including market rate housing, targeted affordable housing, senior housing, student housing, and manufactured housing – serving as counsel nationally



to Freddie Mac Seller / Servicers and Fannie Mae DUS Lenders, where knowledge and experience with the lending programs of these providers is essential for legal representation. Moss & Barnett lawyers also serve as single counsel to a number of mortgage banks and Freddie Mac as part of Freddie Mac's Small Balance Loan (SBL) program.

The firm's Chairman and the leader of this new practice group, Tim Gustin, noted:

*"The number of professionals at Moss & Barnett dedicated to representing lenders on multifamily and commercial real estate transactions continues to grow. This new practice area enables us to more readily share knowledge, experience, and resources and deliver enhanced service and value to our clients."*

## Moss & Barnett's New Certified Paralegal

**Debra L. LaTerza**, a paralegal with our accountant law and litigation teams, was recently certified as a Minnesota Certified Paralegal (MnCP). Debbie supports and assists the firm's attorneys in all phases of the litigation process and her extensive experience includes assisting in-house attorneys and working with outside counsel, litigation support specialists, and vendors.

In June 2014, the Minnesota Paralegal Association announced its voluntary certification program to establish a standard of competency for paralegals in Minnesota. The program is an opportunity for Minnesota paralegals to validate their qualifications and offers a credential to paralegals who meet certain education and experience requirements. Debbie joins the ranks of our other MnCPs: **Joe Avechuco, Martha Berreman, Loralee Berle, Shelly Doerr, Stacie Iverson, Mara Gollin-Garrett, Carolyn McCune, and Carol Yerks**. Paralegals are key elements of the firm's practice teams, assisting the firm's attorneys in providing efficient, cost-effective solutions to the legal needs of our clients.



Debra LaTerza

## Deadline for Limited Liability Companies

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**Rick Kelber** is a member of our business law and wealth preservation and estate planning teams. He represents clients in buying and selling businesses, financial transactions, and estate and succession planning. Having worked in a corporate setting, he also brings a financial and business approach to his practice.

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**Chris Stall** is a member of our business law and mergers, acquisitions, and corporate finance teams. Chris has extensive experience in providing regulatory and business legal services to the insurance, financial, and professional service sectors. He works with businesses on transactions involving all aspects of their life cycle, from formation and capital raising to joint ventures, strategic business contracts, succession planning, and exit.

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Do your limited liability company governing documents need a tune up? If your limited liability company ("LLC") was formed under Minnesota law prior to August 1, 2015, the answer could be yes. In 2015, the Minnesota Legislature totally overhauled the law regarding formation and governance of LLCs known as "Chapter 322B" by adopting a new statute, "Chapter 322C." All LLCs formed in Minnesota after August 1, 2015, have been formed under the new law.

Owners of Minnesota LLCs formed under the old law ("Old LLCs") have been allowed to voluntarily subject themselves to the new law from August 1, 2015 through December 31, 2017. Starting on January 1, 2018, all of the old form LLCs will automatically become subject to the new law.

The new LLC law has new default rules that are very different from the default rules under the old law. In the absence of an operating agreement to the contrary, the following default rules would apply:

1. An LLC will be managed by its members rather than by a board of governors

2. All members would have equal voting power rather than voting in proportion to the amount of their investments or ownership
3. All members will have rights to distributions in "equal shares" rather than sharing in proportion to their differing levels of investment

All of those "default rules" can be varied by an agreement among the owners (the "Operating Agreement"), but those are the rules that will prevail if there is no agreement on those issues.

In an effort to be fair to the owners of old form LLCs, the new statute provides somewhat cryptic transition. In some cases these transition rules and the governing documents of the Old LLC will maintain governance consistent with the original intent of the owners. In other situations, however, the outcome may be unclear and the owners may need to adopt a new Operating Agreement in order to preserve the governance provisions that they originally intended to have.

[Deadline for Limited Liability Companies](#) - Continued on Page 6

## Moss & Barnett is Honored to Support Minnesota Women Lawyers



Moss & Barnett is honored to once again support Minnesota Women Lawyers (MWL) as a Silver Partner for 2017. MWL is an association of more than 1,300 attorneys, judges, law students, legal employers, and others who are dedicated to advancing the success of women attorneys and striving for a just society. The professional development of women attorneys is a major focus of Moss & Barnett, and we actively promote the recruitment and professional growth of our female professionals.

We are also honored to announce that **Jana Aune Deach**, a member of our board of directors and a shareholder in our family law team, has been selected to be Moss & Barnett's attorney representative on the newly formed MWL Partner Leadership Council, which was created to provide the opportunity to gain critical leadership skills, while discussing timely solutions to current issues and the sharing of best practices. To learn more about MWL, visit [mwlawyers.org](http://mwlawyers.org).



Jana Aune Deach

## Five New Attorneys Have Joined Our Team

**Todd J. Anlauf** has joined the firm's multifamily and commercial real estate finance, real estate, and banking and commercial transactions teams. Todd represents financial institutions throughout the United States in their commercial real estate investment lending. He negotiates, structures, documents, and closes complex transactions, including multiple property portfolio loans, multiple jurisdiction portfolio loans, and leasehold financing transactions. Todd received his J.D., *magna cum laude*, from Hamline University School of Law (now Mitchell | Hamline School of Law) and his B.S. from the University of Minnesota-Twin Cities.



Todd Anlauf

**David D. Cherner** has joined the firm's creditors' remedies and bankruptcy team. Dave counsels creditors, debt buyers, collection law firms, collection agencies, and other businesses engaged in accounts receivable management on compliance with federal, state, and local credit and collection laws, as well as compliance and risk management strategy. Prior to joining Moss & Barnett, Dave served as corporate counsel and director of state government affairs for ACA International, the Association of Credit and Collection Professionals, and as the chief compliance officer for a nationwide accounts receivable management company. Dave received his J.D. from Marquette University Law School and his B.A. from Lawrence University.



Dave Cherner

**Matthew A. Korogi** has joined the firm's multifamily and commercial real estate finance, real estate, and banking and commercial transactions teams. Matt is certified by the Minnesota State Bar Association as a Real Property Law Specialist and represents institutional and life insurance lenders and investors in all aspects of commercial real estate financing on a national scale, with particular emphasis on title and survey review and other due diligence matters. He received his J.D., *cum laude*, from Hamline University School of Law (now Mitchell | Hamline School of Law) and his B.A. from the University of Minnesota-Twin Cities.



Matt Korogi

**Joshua P. Oie** has joined the firm's litigation and accountant law teams. Josh's practice spans many areas of civil litigation and business law. As a litigator, Josh focuses primarily on complex commercial disputes, construction litigation, tort claims, accountant law cases, and appellate work. Prior to joining Moss & Barnett, Josh was an attorney and shareholder at a firm in Billings, Montana. He received his J.D., *magna cum laude*, from the University of Minnesota Law School, where he was a staff member on the *Journal of Law and Inequality* and a student attorney in the Civil Practice Clinic, and he received his B.A. from Baylor University.



Josh Oie

**Jeffrey S. Waldron** has resumed his practice in the firm's business law; mergers, acquisitions and corporate finance; and wealth preservation and estate planning teams. Jeff assists companies in all phases of the business life cycle, including formation, operation, acquisition, and ownership succession. He advises clients on a variety of matters, including contract drafting and analysis, tax planning, corporate governance, and other general business issues. Jeff received his LL.M. in Taxation from New York University Law School; his J.D., with high distinction, from Drake University Law School; and his B.A., *summa cum laude*, from Minnesota State University-Mankato.



Jeff Waldron

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The first step in determining whether your intended business name might be problematic is very simple and inexpensive: an Internet search such as using Google. It does not cost the business anything but a few hours (or less) of the new owner's time and an Internet connection to identify other businesses with potentially conflicting names and where they are located.

If no obvious issues can be identified during the Internet search, the next step is a formal trademark search. This search should not only encompass the words included in the desired business name, but also the products or services that the company desires to offer, both initially and in the future. While one can, via the Internet, obtain free access to the trademark records of the U.S. Patent & Trademark Office as well as many state databases (for trademarks and registered business names), obtaining reliable results can be very challenging for anyone who is not experienced in conducting these kinds of searches. Such a search and opinion is typically less than \$1,000.

For larger entities, especially those that are intended to have a national or international scope, the name search should encompass all state business databases (e.g., secretaries of state), trade publications, and even domain name registrations.

These more extensive searches should nearly always be conducted by a law firm or other

experienced researcher. It has become more of an art than a science to effectively conduct searches that reveal potential naming conflicts. Lawyers and professional search providers know where and how deep to look for relevant information.

Even for the most comprehensive of searches, the cost would likely be less than a few thousand dollars. When viewed in light of the overall investment involved in starting a business and the potential risks and expenses that such a search can help a new venture avoid, this start-up cost is really quite a small, yet wise, expenditure. For example, a comprehensive name/trademark search will cost considerably less than the cost of updating a website, a store-front sign, or any printed materials related to the business when it is later determined that the entity cannot continue under its current name.

Once the business has determined that its name can be freely used, the final step in protecting a business name is to file a trademark application with the U.S. Patent & Trademark Office. By obtaining a trademark registration, the name will be in the federal trademark database, which discourages other companies from using a similar business name or trademark. Because a federal trademark registration applies throughout the United States, registration provides a business with the ability to start the business in one particular area while

retaining the ability to expand into other areas of the country without the fear of potentially infringing on another name or trademark in a different state or locality. In the majority of situations, the total cost involved in filing for a federal trademark and ultimately obtaining a registration of that mark is less than a few thousand dollars.

By investing some time and a little capital on a professional search and, potentially, the registration of its intended name, a new business will avoid potential significant future risks and costs while also protecting its name and its brand for many successful years to come.



**Michael Bondi** focuses on the preparation and prosecution of U.S. and foreign patent and trademark applications. He brings his extensive patent and trademark management experience to clients in a broad range of industries and enjoys the variety of working with both large companies who have complex multi-national trademark and patent portfolios, as well as smaller companies and individuals who are selecting their first trademark or filing their first patent application.

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### Deadline for Limited Liability Companies - Continued from Page 4

We therefore recommend that owners of LLCs formed prior to August 1, 2015, have their LLC governing documents reviewed before the new law becomes mandatory on January 1, 2018. In particular, if the old form LLC has been "board-managed," which is generally the case, it is important to examine the documents to make sure that

will continue to be the case. In addition, LLCs with multiple classes of membership interests, with capital accounts that are disproportionate to percentage interests, or that have issued a "profits interest," may need attention. Most important of all, if the old form LLC does not have in place a Member Control Agreement and Bylaws

embodying the intent of the owners, it is important to put an Operating Agreement in place prior to the deadline. Without proper documentation, the new LLC law may give you a very different result from what you expected under the old LLC law.

## Moss & Barnett Salutes Nick Tautges

**Nicholas D. Tautges**, Chief Personnel Specialist (U.S. Navy) and Moss & Barnett Accounts Payable Specialist, recently returned safely from Qatar and Kuwait. This was Nick's third deployment (Bahrain and Afghanistan were prior duty stations).

In Bahrain, Nick worked as a Boots on Ground (BOG) Analyst and was in charge of tracking all Navy personnel movements. His daily reports were used as talking points on CNN by the Commanding Admiral, Vice Admiral Gortney, and were viewed by personnel all the way to the President of the United States.

At Kabul, Afghanistan, he was the Leading Chief Petty Officer of the Administration Department and in charge of personnel accountability, awards, evaluations, and service record updates, as well as a teacher of basic computer skills to the Afghanistan National Engineering Brigade staff.

In Qatar, Nick handled military pay, intra-theater travel, awards processing, and casualty reporting. In the middle of the deployment, his billet was moved to Camp Arifjan, Kuwait, and Nick was highly involved with office layout and design for camp offices.

During each deployment, Moss & Barnett colleagues put together monthly care packages with cookies, movies, magazines, books, office supplies, toiletries, and other items for Nick and his fellow service members, plus any special requests that Nick made. Nick reports that his greatest pleasure in receiving the care packages was to share everything because most deployed military members did not receive care packages.

On Nick's nomination, Moss & Barnett was awarded the Employer Support of the Guard and Reserve (ESGR) "Above and Beyond Award," which is given in limited numbers by state and territory ESGR committees. It recognizes employers who go beyond the legal requirements for supporting active military duty. In addition, the firm received recognition from then Vice Admiral William E. Gortney, Commander, U.S. Naval Forces Central Command, in appreciation of our "Outstanding Services as a Civilian Employer," during Nick's first deployment.



Nick Tautges



Nick Tautges, during deployment

Nick's service was recognized by the awarding of the Navy and Marine Corps Achievement Medal, The Navy and Marine Corps Commendation Medal, the Joint Service Commendation Medal, plus other service and campaign awards during his three deployments.

***Welcome home, Nick, and thank you for your service to our country!***



Outstanding Services as a Civilian Employer Award

**IMPORTANT NOTICE**

This publication is provided only as a general discussion of legal principles and ideas. Every situation is unique and must be reviewed by a licensed attorney to determine the appropriate application of the law to any particular fact scenario. If you have a legal question, consult with an attorney. The reader of this publication will not rely upon anything herein as legal advice and will not substitute anything contained herein for obtaining legal advice from an attorney. No attorney-client relationship is formed by the publication or reading of this document. Moss & Barnett, A Professional Association, assumes no liability for typographical or other errors contained herein or for changes in the law affecting anything discussed herein.

## Moss & Barnett Spirit of Giving

While we pursue our professional goals, we also endeavor to improve the quality of life in our communities and around the world. Members of the Moss & Barnett team apply the same dedication to service by making significant contributions of their time and resources to charitable organizations important to all of us.

Every year, **Breaking Free** helps an average of 400-500 women and girls escape systems

of prostitution and sexual exploitation through advocacy, direct services, housing, and education. This past holiday season – and for the fourth year in a row – the firm’s women attorneys “adopted” three Breaking Free families for the holidays. Our attorneys supplied gifts and gift cards according to each family’s “wishes,” helping to ensure that these families had a joyful holiday. In addition, members of the firm continue to

donate various daily items in need such as pots and pans, silverware, and women and children’s clothing. To learn more about Breaking Free, visit [breakingfree.net](http://breakingfree.net).

***We are very grateful to have our attorneys get behind this important community initiative and to give generously of their time, talent, and financial support.***



Left to right: Betsy Kiernat, Terese West, Marcy Frost, Katherine Pasker, Jana Aune Deach, Jennifer Reussé, Marsha Stolt, Cindy Ackerman, Taylor Sztainer, Kelly McGinty, Nicole Swisher, Sarah Doerr, Caroline Simonson (not pictured: Kathy Allen, Maggie Garborg, Beth Gliedman, Susie King, Nancy Kiskis, Brittney Miller, Cecilia Ray, and Susan Rhode)