

community BANKER

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Welcome to the latest issue of the COMMUNITY BANKER.

The Community Banker is prepared by attorneys at Olson & Burns P.C. to provide information pertaining to legal developments affecting the field of banking. In order to accomplish this objective, we welcome any comments our readers have regarding the content and format of this publication. Please address your comments to:

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The attorneys at Olson & Burns represent a wide range of clients in the financial and commercial areas. Our attorneys represent more than 30 banks throughout North Dakota.

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ENTITY BORROWERS: GETTING THE SIGNATURES AND GETTING IT RIGHT

Back by popular demand, we're re-running this signature review from several years ago.

ENTITIES. North Dakota recognizes a number of business structures, including the: **1)** Sole Proprietorship; **2)** General Partnership; **3)** Limited Partnership; **4)** Limited Liability Partnership (LLP); Limited Liability Limited Partnership (LLLP); **5)** Professional Limited Liability Partnership (PLLP); **6)** the Limited Liability Company (LLC); **7)** the Farm Limited Liability Company; **8)** Professional Limited Liability Company (PLLC); **9)** General Business Corporation; **10)** Farm Corporation; **11)** Professional Corporation; and the **12)** Cooperative Association. Additionally, lenders enter into transactions with non-business entities such as trusts.

IDENTIFY THE BORROWER. The borrower entity's legal name is found on the formation document that it files with its home state to create the entity (*e.g.*, Articles of Incorporation/Partnership/Organization/Formation). The formation document is the *only* document that discloses the legal name of the entity, and should be the *only* document relied upon by the lender to determine the business entity's name. The good standing certificate should be reviewed to confirm that the borrower is in good standing in its jurisdiction of organization

The lender should also review other entity documentation, such as licenses required for the operation of the business, to confirm that the legal name appears on all such documentation. If the business operates under any other names, the lender should verify that a fictitious name or trade name filing has been made for such names; if no filing has been made, a lender may want to require one so that anyone dealing with the business entity under the fictitious name will be able to identify the actual business entity.

Whether an entity is a corporation, a limited liability company, a trust, a partnership, or something else, a lender must determine whether the person signing the loan documents is properly authorized to do so. Having the correct signature on loan documents is key to enforceability and liability; while legal theories such as apparent authority may sometimes save the day, best practice is sufficient due diligence to ensure that the signatory has actual authority to sign loan documents.

Issues regarding proper authority can arise in many different ways. For example, under the terms of an operating agreement, a manager of a manager-managed LLC may need unanimous consent of the members in order to pledge an interest in the assets of an LLC. Alternatively, the bylaws of a corporation may require that any note executed by the corporation requires the signature of two officers.

If someone executes loan documents on behalf of an entity, but is not authorized to do so, the shareholders, members, or other owners of that entity may be able to raise a defense that the entity was not properly authorized to enter into the transaction. The lender may be unable to enforce loan documents against an obligor for lack of authority; therefore, lenders should always review the entity documents for each obligor to determine whether the person signing on behalf of the entity is actually *authorized* to do so.

To the extent additional written authority is required in order for an officer or manager to bind the entity, the lender should require a copy of such written authorization prior to closing.

For a corporation this would be a corporate resolution, signed by the secretary or person with authority over the entity's records, authorizing a specific officer to sign documents. A copy of the minutes giving someone this authority is *not* the appropriate document.

Additionally, reviewing the business entity's governing documents will also reveal ownership of the entity. Copies of the corporation's stock ledger should identify all owners of the corporation; a partnership agreement should contain a list identifying all partners; a limited liability company's operating agreement should contain a list identifying all members. The individuals with an ownership interest in the entity but who are protected by the liability shield are the individuals from whom lenders *should obtain guaranties*.

HOW DOCUMENTS ARE SIGNED: Entities are "persons" but they are not "alive." So, despite being legal persons, entities need human agents to act for them. Because the entity's loan documents are signed by an actual human being, it's important to be clear that the human is signing the contract on *behalf* of the entity and not in his or her individual capacity.

THE NAME OF THE ENTITY. Most loan documents (and most contracts of any type, for that matter) state the parties in the introductory paragraph. Use the exact capitalization and punctuation of the entity's legal name shown on the formation documents. For example, if a professional corporation is entering into a loan agreement with your bank, the introductory paragraph might be:

This Loan Agreement dated February 25, 2024, is made and executed by and between
Smart Lawyers Law Office, P.C., a North Dakota professional corporation, and **North
Dakota Small Town Bank**, organized under the laws of the State of North Dakota.

The names in the signature blocks for the two parties should be *identical* to the parties' names in the introductory paragraph:

Borrower: Smart Lawyers Law Office, P.C.

By: _____
Bartleby T. Scrivener
Its: President

Lender: North Dakota Small Town Bank

By: _____
George Washington
Its: Vice President of Lending

EXAMPLES OF ENTITY SIGNATURES ON LOAN DOCUMENTS. Because there are many configurations of ownership, we cannot provide example of all of them. What follows are several samples of common ownership signature formats.

A. Sole Proprietorship. The individual owner is the business, both legally and for tax purposes. When the sole proprietor owner dies, the business ceases to exist with the assets and liabilities passing to the estate. An example of a sole proprietor signature block:

Borrower:

Andrew Jackson

B. Sole Proprietorship with a “doing business as” or Trade Name: An example of a signature block for a sole proprietor doing business under a different name:

Borrower:

Andrew Jackson, d/b/a Old Hickory Carpentry

C. General Partnership. A partnership signature block must reflect that the partnership acts through its general partners. For example, if the general partner is an individual, use this format:

Borrower: Smith Brothers Farms

By: _____
John Smith, General Partner

D. Limited Partnership. A limited partnership is composed of one or more general, and one or more limited partners. A partnership signature block must reflect that the partnership acts through its general partners. For example, if the general partner is a corporation, use this format:

Borrower: Treasure Hunters LP, a limited partnership

By: Hobbits, Inc., a North Dakota corporation
Its: General Partner

By: _____
Bilbo Baggins
Its: President

E. Limited Liability Partnership. A limited liability partnership is an ordinary general partnership that elects to become a limited liability partnership. The LLP typically has a "managing partner" who is the partner charged with the management of the LLP; if no partners are specifically designated as a managing partner, then all partners are "managing partners." A partnership signature block must reflect that the partnership acts through its general partners. For example, if the general partner is a corporation, it would sign with this format:

Borrower: Everyday Bakery, LLP, a limited liability limited partnership

By: Bakeries United, Ltd., a North Dakota corporation

Its: General Partner

By: _____

Clint Eastwood

Its: Secretary and Treasurer

F. Limited Liability Company. The governing body of a limited liability company may differ from one entity to another. An LLC may be member-managed by its members board-managed by its board of governors; or manager-managed by its managers. For example, a manager-managed LLC would sign with this format:

Borrower: Airplanes R Us, a North Dakota limited liability company

By: _____

Wilbur Wright, Manager

A member-managed LLC would sign with this format:

Borrower: Airplanes R Us, a North Dakota limited liability company

By: _____

Wilbur Wright, Member

G. General Business Corporation. A corporation is an entity created by one or more persons and granted a charter as legal recognition of a separate entity. The separate entity has its own rights, privileges, and liabilities distinct from those of its shareholders. Corporation signatures may vary, but they generally follow this format:

Borrower: Eisenhower Construction, Inc.

By: _____

Dwight Eisenhower

Its: President

Borrower: Eisenhower Construction, Inc., d/b/a General Contracting

By: _____

Dwight Eisenhower

Its: President and CEO

H. Trust. A trustee is obligated to act according to the terms of the trust document and has a duty to manage and safeguard all trust property for the benefit of the trust. A Certification of Trust should always be obtained. *See* N.D.C.C. § 59-18-13. Identify the trustee as such on all trust-related paperwork:

Borrower: Lincoln Family Group Trust

By: _____

Abraham Lincoln, Trustee of the Lincoln Family Group Trust

Example where a trust owns an LLC:

Borrower: Snoopy's Doghouse Grill, LLC

By: The Charlie Brown Family Trust dated June 18, 2019, its Manager

By: _____

Charlie Brown, Trustee of The Charlie Brown Family Trust dated June 18, 2019.

Conclusion. Determining the correct signatures on loan documents should always be done with care; doing business with entities that are owned by entities may require some unraveling. As always, consult with competent counsel if you are unsure how a signature block should be crafted.