Robert Keatinge--Chair Volume XVII, No. 2

Peter D. Hutcheon -- Editor February 2001

FROM THE CHAIR

By: Robert Keatinge
Denver, Colorado

It has been said that a partnership is no more an entity than a friendship, and the past few months have reminded us all of the closeness of the friends we have in the practice of partnership law. The passing of Sandy Liebschutz on December 22 of last year and Marty Lubaroff on January 1 have deprived us of the humor and wisdom of two of our closest and most thoughtful friends. Both Sandy and Mary had worked on the ReRULPA project and had contributed in many ways to the development of unincorporated business law in their respective states and nationally. Their contributions will continue to be an important part of the law with which we work. Their ideas, warmth, and perspective informed much of what we have done over the past decade, and I continue to analyze questions with their perspective in mind.

Sandy was a visitor from the world of real property law, but quickly became an active participant in all of our discussions. He has acted as an advisor on the uniform acts dealing with LLCs, LLPs, and limited partnerships. He was a leader within the ABA Real Property Probate and Trust Law Section, and worked actively to make sure that the sections worked together effectively to promote good law. Sandy's perspective as a retired army officer was helpful more than once in bringing order to the chaos that sometimes characterized our discussions. Sandy will be missed.

Marty Lubaroff has been so much a part of the development of partnership law in the United States that it is difficult fully to describe his impact. While maintaining a successful practice as one of the leading Delaware practitioners in the area of unincorporated associations (or as Marty liked to refer to them, "alternative" entities), Marty devoted a considerable amount of time to the development of partnership and LLC law nationally. Marty led many of the discussions we had with respect to partnerships and LLCs. His (and Paul Altman's) book on Delaware limited partnerships is a standard on that important subject. Marty was never hesitant to take the minority view on an issue of partnership law and, using a combination of articulate persuasion and a wry sense of humor, almost always managed to help the rest of us catch up with his thinking. Each of us who knew Marty carries a more complete understanding of peculiar area in which we practice for having known him. Virtually everyone who came in contact with Marty has at least one very personal story of Marty's kindness or humor. Not only is the partnership law better for Marty's work, but we are all better people for having known him.

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Marty was an important player in the discussions of RUPA and the development of LLCs, taking the lead in drafting Delaware's LLC statute. He was an obvious choice for the ABA Business law Section/NCCUSL Joint Editorial Board on Unincorporated Organizations and was an active participant in the Committee on Partnerships in Bankruptcy. When
NCCUSL undertook the ReRULPA project, Marty became the ABA Advisor, providing valuable leadership to both the drafting committee and our review committee. Marty’s ability to bring clarity to complex and subtle issues made all of our efforts more effective. Marty did all of this with such warmth that many of us numbered Marty not only as one of the best lawyers we knew, but also one of our closest friends. We can only hope that we can keep some of Marty’s wisdom and warmth in our hearts as we go forward. I am sure the question, “How would Marty have approached this?” will continue to be a standard of all of our deliberations.

The Committee had a good meeting in Washington in November. Dan Kleinberger, the reporter for the ReRULPA project, joined us to discuss the current status of the work and members of the NCCUSL Inter-Entity Merger Statute drafting committee joined us for an interesting working lunch. The ReRULPA project is nearing completion, and the Inter-Entity Merger Statute starting. In addition, the Business Law Section Entity Rationalization project is getting under way. These projects will be discussed at the Partnership Committee meetings at the mid-year meeting of the Business Law Section from March 22 through 24, 2001 at the Philadelphia Marriott, 1201 Market Street Philadelphia, Pennsylvania 19101 (215-625-2900) and the Pennsylvania Convention Center. Our Subcommittee meetings and drafting sessions will take place on Thursday and Friday and we will have programs on Friday afternoon (followed by a reception) and Saturday morning. Ellisa, Scott (with a lot of help from Tom Rutledge), George, and Bill have put together good programs on important topics.

AGENDA

Thursday, March 22

1:00-4:00 p.m. Draft of Prototype Limited Liability Company Act Rooms 106 A and B, 1st floor, Pennsylvania Convention Center

4:00-5:30 p.m. Limited Liability Companies, Rooms 106 A and B, 1st floor, Pennsylvania Convention Center

Friday, March 23

8:00-10:00 a.m. Combined meeting of the Subcommittee on Limited Partnerships, and Task Force on Comment on Proposed Revised Uniform Limited Partnership Act Room 102A, 1st floor, Pennsylvania Convention Center

10:00 a.m.-noon Combined meeting of the Subcommittee on General Partnerships and Joint Ventures and the Task Force on Entity Rationalization Room 102A, 1st floor, Pennsylvania Convention Center

12:00-12:30 p.m. Executive Committee Meeting Room 112A, 1st floor, Pennsylvania 7 Convention Center

2:30-4:30 p.m. Program: Financing Transactions: Using the Best Entity for the Deal Ellisa Opstbaum Habbart and Amy Williams, Co-Chairs, Room 102A, 1st floor, Pennsylvania Convention Center

4:30-6:00 p.m. Subcommittee on REITS, REMICS and Financing Trusts Room 102B, 1st floor, Pennsylvania Convention Center

Saturday, March 24
8:00-10:00 a.m. Program: Introduction of the Prototype Partnership Agreement for a Limited Liability Partnership, Scott Ludwig, Chair, Rooms 104 A and B, 1st floor, Pennsylvania Convention Center Program

10:30 a.m.-12:30 p.m. Program Comparing Fiduciary Duties of Management Persons in Unincorporated Entities — Is Rationalization Possible or Desirable? George W. Coleman and William Clark, Co-Chairs, Rooms 104 A and B, 1st floor, Pennsylvania Convention Center

12:30-2:00 p.m. Committee Luncheon (with the Taxation Committee) Salon K, 5th floor, Philadelphia Marriott

Recent events have made me appreciate how important my friends in the Committee are and how important the work that people like Marty and Sandy have done is. I look forward to seeing you all in Philadelphia.

SECTION OF BUSINESS LAW FELLOW JOINS COMMITTEE

By: Joseph K. Beach

Atlanta, Georgia

I am one of five young lawyers who recently received an appointment as an ABA Section of Business Law Fellow for the class of 2000-2002. The Committee asked me to take this opportunity to introduce myself and tell you about the Fellows program. I live in Atlanta with my wife, Laura, and two children, where I am in private practice in Atlanta with the firm of Merritt & Tenney LLP. I am also active in the ABA Young Lawyers Division.

The ABA desires to give active members of the ABA Young Lawyers Division the opportunity to become involved in the substantive work of the Section and develop future leaders of the Section. Toward that end, the Section sponsors the attendance of the Fellow at the Section meeting, the ABA annual meeting, and any stand alone Committee meetings. In turn, the Section asks that each Fellow select a Committee within the Section and become involved in its work and continue the overall work of the Section through various initiatives, including the recruitment of other young lawyers. I routinely work in the area of limited partnerships and limited liability companies. Accordingly, I chose to serve on the Partnerships and Unincorporated Business Organizations Committee as part of my appointment.

At the Committee meeting on November 10 in Washington, D.C., I had the opportunity to meet several members of the Committee and learn about our ongoing projects. Thank you for the warm reception you gave me. I hope to be able to contribute to these efforts over the next couple of years and beyond. One reason I was very excited about the appointment to this Committee was that the Committee Chair, Bob Keatinge, is also my mentor. I have always respected Bob for the work he has done in this area and look forward to getting to know him better through the work of the Committee.

Fellows appointments are for two years. The Section is currently in its third class of Fellows and will be selecting the Class of 2001-2003 later this year. If any young lawyers would be interested in applying for appointment as a Fellow, I would strongly encourage you to do so. If you have any questions, please contact me at jbeach@merritt-tenney.com.

Thank you to the Section for this opportunity. I look forward to seeing you in Philadelphia on March 22-25, 2001 at the Spring Meeting.
Report on NCCUSL ReRULPA Progress: NCCUSL Drafting Committee Retains Default Limited Liability Shield for General Partners Under ReRULPA

By: Lauris Rall

New York, New York

On December 1st to 3rd, 2000, Lauris Rall, as the Advisor from the ABA Section of Business Law, and Bob Keatinge, as Acting Advisor from the ABA, attended a meeting in St. Petersburg, Florida, of the National Conference of Commissioners on Uniform State Laws Drafting Committee which is working on a revision of the Revised Uniform Limited Partnership Act (code name, "ReRULPA").

The meeting was highlighted on the first day by Marty Lubaroff's participation by conference telephone call. Marty had recently submitted a memorandum to the Committee and Advisors on issues which were the subject of much discussion. All in attendance remarked on how well Marty sounded and how "on point" his comments were on issues being discussed by the Drafting Committee. Several Committee members and Advisors told Marty how happy the group was to hear from him and how much we all looked forward to his return "in person" to the process to help finish the effort. Unfortunately, as we now know, Marty will not return to this process, except in the very real sense that his guidance and approach to analyzing the important issues challenging the drafters will be with us all forever. The Committee will miss him terribly.

The major issue addressed by the Drafting Committee on the first day of this meeting was the same issue that has been with the Committee for a considerable length of time: Should the default rule in the limited partnership statute be that general partners do not have personal liability for the debts of the partnership? This issue has been debated numerous times by the Drafting Committee, and by the Partnerships Committee and its Task Force on ReRULPA. I will not restate the various arguments pro and con here.* Because there were only five Commissioners in attendance on the first day of the drafting meetings, there was a vote of only 3 to 1 (with the Chairman not voting, although clearly indicating his position against the general partner limited liability rule) in favor of continuing the liability shield which is included as the default rule in the current ReRULPA draft.

The Committee spent considerable time discussing the transition rules applicable to the statute, in light of the significant change of law resulting from the imposition of a liability shield for the general partners as a default rule. Although no definitive conclusion was reached, the Committee seemed to be supporting a lengthy "drag-in" period of five years. Another related issue is nomenclature: The Committee was split evenly as to whether the name of ReRULPA should be changed to the Limited Liability Limited Partnership Act, whether limited partnerships formed under the new act should be called "limited liability limited partnerships" and whether names of such limited partnerships should include the designation "LLLP" (required by the current draft).

The Committee considered several issues raised by Commissioner Ann Conaway Anker relating to Article 11 of ReRULPA, which covers mergers and conversions. Commissioner Anker is the Chair of the NCCUSL Drafting Committee charged with preparing a uniform "cross-entity" merger statute, which would govern mergers of limited partnerships into other business entities, such as limited liability companies. It appears that the work of the "Cross-Entity" group may impact ReRULPA.

Substantial time was spent by the Drafting Committee devoted to analyzing various provisions (including Sections 303, 601, 603, 801 (subsection 801(3) was revised at the Task Force's suggestion to eliminate the unilateral right of a remaining general partner to dissolve a limited partnership following another general partner's dissociation) and 813) to determine whether "two tracks" were needed for partnerships with
general partners with general liability and for partnerships with general partners with limited liability. The Reporter agreed to make changes in the next draft for approval by the Drafting Committee.

Finally, the Drafting Committee considered and resolved various open issues identified by the Reporter in the Commentary to the draft ReRULPA, including:

1. The definition of business.

2. The impact of the new UCC Article 9 on ReRULPA, specifically Sections 702(f), 806 and 807.

3. Section 305 (b) was revised to read: "A limited partner that pursuant to the partnership agreement manages or controls the limited partnership's business is, to the extent of such management or control, held to the standards of conduct for a general partner under this [Act]." In a related change, Section 408(f) was deleted.

4. The Reporter requested the ABA Task Force’s input as to the desirability of Section 603(4), permitting the expulsion of a general partner by the unanimous vote of the limited partners, and Section 603(5), which permits the judicial expulsion of a general partner and is designated as a "non-waivable" provision by Section 110.

Other changes, more in the character of drafting or "style" changes (eg, using "vote" or "consent") were referred to the "Fine Tooth Comb Committee," a subcommittee composed of the Reporter, some Commissioners and some Advisors (including yours truly).

Any member of the Task Force or the Partnerships Committee requesting additional information about the ReRULPA process is encouraged to contact Lauris Rall at lrall@thacherproffitt.com or by telephoning him at 212-912-7439.

Proposed Programs to be Sponsored by the Partnerships Committee at the August 2001 ABA Annual Meeting in Chicago

At the meeting of the Executive Committee of the Partnerships Committee in Washington DC in November 2000, a consensus was reached to offer a number of varied and interesting programs during the August 2001 ABA Annual Meeting in Chicago. Together with the Committee on Taxation, the Partnerships Committee intends to conduct a program on "Inter-entity Mergers and Conversions" which will address the business law and tax law issues related to business combinations of a variety of types of alternative business entities. Secondly, with the Section on Science and Technology, the Partnerships Committee expects to hold a program on "Emerging Businesses - Entity Choices" which will discuss the alternative choices for new ventures, especially those engaged in technology and Internet businesses. Finally, the Executive Committee noted that the Annual Meeting usually was the situs of a well-attended program regarding "Annual Case Law Update" and that it would be appropriate to sponsor and conduct that program in Chicago.

Lauris Rall is currently serving as the Programs and Section Liaison for the Partnerships Committee. Both he and Bob Keatinge, the Chair of the Committee, would welcome your ideas and suggestions for programs for future meetings and your interest in participating in programs. Please contact Lauris at lrall@thacherproffitt.com or by telephoning him at 212-912-7439.

General Partner Liability:
A Side-by-Side Debate

By: Ira Meislik

Montclair, New Jersey
No proposed revision to the Revised Uniform Limited Partnership Act (RULPA) has engendered more debate than whether, by default, general partners should have limited liability for the debts and obligations of the partnership. There is no question that under RULPA, absent some action by the partnership, a general partner has such liability. There is also no question that a limited partnership can be structured for the opposite result, either by introducing a limited liability entity as the general partner or by taking advantage of some state’s law that allows formation of limited liability limited partnerships. Thus, the question is not whether a general partner should be shielded from liability, but whether the Act should encourage such a result by making it the “default” structure.

The debate has focused on five main issues: (a) the expectation of creditors; (b) dissonance created by changing long-established law; (c) diminution of a sense of responsibility on the part of a general partner; (d) transition difficulties; and (e) the enactability of such an Act. Without any attempt to be comprehensive or to consume every inch of the PUBOGRAM with detailed intellectual analysis, here is how the arguments stack up.

(a) Expectation of Creditors

LIABILITY: Argument is made that creditors are aware that current limited partnership law makes general partners fully liable. Therefore, they will continue to act as if the law had not changed and it would be deceptive to change a long established, fundamental premise.

NON-LIABILITY: Creditors know or should know that many, many limited partnerships are organized with single-purpose corporate or other limited liability entities as general partners. Consequently, they do not expect to collect obligations beyond the value of a partnership’s assets.

(b) Dissonance Created by Changing Long-established Law

LIABILITY: The principle of liability is so fundamental to limited partnership law, that courts will continue to follow well developed precedence, muddling the entire body of partnership jurisprudence.

NON-LIABILITY: Courts are accustomed to applying new statutes. Here, the concept of limited liability is well developed, and applying it to limited partnerships is easily accomplished.

(c) Diminution of a Sense of Responsibility

LIABILITY: A person is more cautious in his or her activities if her or his own money is at stake. Limited partners are better protected against a general partner’s improvidence if general partners are exposed to unlimited liability for the debts and obligations of the partnership. This marketplace factor supplements a general partner’s duty of care to the limited partners.

NON-LIABILITY: Whatever be the state of a hypothetical limited partner’s mind, in actuality, they commonly invest in partnerships where
the general partners have shielded themselves from unlimited liability. Just as now, persons wary of such investments don't make them. This hasn't impaired capital investment in the past, and if it does, a limited partnership can be structured with full liability.

(d) Transition Difficulties

LIABILITY: A. There is no way for third parties to know if they are dealing with what is effectively a limited liability entity because one cannot readily distinguish between new and old limited partnerships. B. Partners of existing limited partnerships are entitled to whatever benefits flow from having their general partner be liable for the debts and obligations of the partnership.

NON-LIABILITY: A. This risk already exists because in many jurisdictions, name designators, such as "company," do not indicate if an entity is a proprietorship, partnership or corporation. Also, existing limited partnerships are very often structured so that the general partners have no "real" exposure. B. The transition rules need not automatically free general partners from liability.

(e) Enactability

LIABILITY: Legislators and other interest groups such as litigators, lenders, and governmental regulators loathe relieving parties from liability for their acts and seek to preserve as large a pool of assets as possible should recourse beyond a partnership's resources be inadequate.

NON-LIABILITY: Legislators are not indisposed to authorizing limited liability entities. Corporations have long existed. Now, every state permits limited liability companies. Even as this discussion is taking place, states continue to authorize limited liability limited partnerships and partnerships.

However one comes out on the "policy" factors involved in these issues, some factors remain the same regardless of outcome. One example is that regardless of which "side" prevails in this argument, there appears to be no disagreement that the proposed RULPA revisions will provide for the option to override its default provision, i.e., to change from full liability for general partners to limited liability and vice versa. Another example is that, limited liability or not, creditors will need to make informed credit decisions, investigating the creditworthiness of their obligors as well as whether the general partners have limited liability by statute or by structure.
LLC and LLP cases not identified in previous issues of the PUBOGRAM are noted below. An effort has been made to cut down on glitches that have occurred in the electronic transmission and conversion of the text of the case law update. In previous issues, some mysterious changes have occurred in the text, such as deleted quotation marks and changes in font or certain characters. Thank you for bearing with us as we tackle these mysteries of technology.

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**Limited Liability Companies:**

**Diversity Jurisdiction**


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**Pro Se Representation**


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**Service of Process**


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**Personal Jurisdiction Over LLC and Members**

*Royal Mortgage Corporation v. Montague,* 2001 WL 41062 (Tex. App. Fort Worth Jan. 18, 2001)(finding that individual and corporation were acting as agents of LLC so as to support exercise of personal jurisdiction over LLC but concluding that there was no evidence LLC was acting as alter ego of its members for purposes of personal jurisdiction over the members).

*Biometrics, LLC v. New Womyn, Inc.,* 112 F.Supp.2d 869 (E.D. Mo. 2000)(analyzing foreign LLC’s activities in state to conclude that court had personal jurisdiction over LLC but granting motion to transfer to more convenient venue).

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**Failure of LLC to Litigate in Proper Capacity**

*In re Heartland Food and Dairy Distributors, Inc.,* 253 B.R. 32 (Bankr. S.D. Ill. 2000). A suit was mistakenly filed in the name of a corporation rather than an affiliated LLC. The suit was dismissed due to the corporation's lack of capacity, and (after various missed opportunities to cure) the LLC ended up being barred by res judicata from pursuing the complaint refiled in its name because the LLC was in privity with the
corporation that filed the initial complaint. In finding privity, the court relied in part upon the failure of the LLC and the corporation to comply with the formalities necessary to maintain separate existences. The court commented that the LLC’s own counsel was confused about which entity was his client.


- **Nature of LLC**

_Royal Mortgage Corporation v. Montague_, 2001 WL 41062 (Tex. App. Fort Worth Jan. 18, 2001)(rejecting argument that partnership tax returns established that LLC was partnership in view of indication on K-1’s and other documentation that owners were limited liability company members).

- **Admission of Members**

_Prefer v. Pharmnetrx, LLC_, 2000 WL 1509669 (Colo. App. Oct. 12, 2000) (in suit by member to challenge member’s termination as employee and manager of LLC, court refused to disturb finding that member’s written consent to admission of new members required by Colorado LLC Act was established by various writings, taken together, including proxy request sent to investors by member).

- **Derivative Suits; LLC as Indispensable Party in Suit Between Members**

_Cabrini Development Council v. LCA Vision, Inc.,_ 97 F.R.D. 90 (S.D. N.Y. 2000)(following _Weber v. King_ (E.D. N.Y. 2000) and concluding that members of a New York LLC have a common law right to bring derivative action and that LLC is indispensable party in such a suit).

_Trademark Retail, Inc. v. Apple Glen Investors, LP_, 196 F.R.D. 535 (N.D. Ind. 2000)(holding that LLC was indispensable party in suit by one member against another for breach of fiduciary duty and interference with contractual and business relations).

_Carson v. Lynch Multimedia Corporation_, 123 F.Supp.2d 1254 (D. Kan. 2000)(concluding that minority member’s breach of fiduciary duty claim against majority member, managers and individual who allegedly controlled managers was derivative and that the complaint must therefore address the demand requirement under Federal Rule 23.1, but finding that futility of demand was adequately reflected in complaint).

- **Piercing LLC Veil**

_Leisure Resort Technology, Inc. v. Trading Cove Associates_, 2000 WL 1682535 (Conn. Super. Oct. 13, 2000)(granting motion to strike allegations that two LLC members and two individuals referred to as directors of the LLC were personally liable under veil piercing alter ego theories because allegations were mere conclusions of law rather than facts that would demonstrate veil should be pierced if proven true).
**Hamilton v. AAI Ventures, L.L.C.,** 768 So.2d 298 (La. App. 2000) (applying corporate veil piercing principles and upholding trial court’s piercing of LLC veil to impose personal liability on LLC member for breach of LLC’s contract).

**Royal Mortgage Corporation v. Montague,** 2001 WL 41062 (Tex. App. Fort Worth Jan. 18, 2001) (concluding that there was no evidence that LLC was acting as alter ego of its members for purposes of personal jurisdiction over the members).

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**Limited Liability of LLC Member; Personal Liability of Member Under Agency or Other Principles**

**United States v. Washington Mint, L.L.C.,** 115 F.Supp.2d 1089 (D. Minn. 2000). Referring to an LLC member as a controlling shareholder of the LLC’s stock, the court concluded that such status was not alone sufficient to impose liability on the LLC member for the LLC’s copyright or trademark infringement. The court also found that ownership of a significant interest in the controlling member and a position on what the court referred to as the board of directors of the LLC did not amount to a showing of any direct participation and control over the LLC’s activities sufficient to impose liability for the copyright and trademark violations. A corporation that leased employees to the LLC and certain individual officers of the corporation as well as the CEO of the LLC were found to have sufficient involvement in the LLC’s activities to be liable for some or all of the violations.

**ABC, LLC v. State Ethics Commission,** 2000 WL 1701226 (Conn. Super. Oct. 11, 2000) (mentioning Commission’s ruling that individual members of an LLC can be subjected to civil penalties with respect to prohibited contingent fee lobbying agreements entered by LLC).

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**Arbitration Clause**


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**Forum Selection Clause**


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**Fiduciary Duties of Managers and Members**
**Carson v. Lynch Multimedia Corporation**, 123 F.Supp.2d 1254 (D. Kan. 2000). The Robert C. Carson Revocable Trust (the "Carson Trust") owned a 20% interest in an LLC, and Robert C. Carson was the president and general manager of the LLC. The LLC was retained under a management agreement to manage Carson Communications. After a dispute over whether Carson took a business opportunity without first offering it to the LLC, the LLC’s board of managers voted to terminate Robert Carson as president and general manager. The new president and general manager then terminated the management agreement between the LLC and Carson Communications. Carson and the Carson Trust sued the majority member, the three individual managers appointed by the majority member and an individual who allegedly influenced and controlled the managers for breach of fiduciary duty in terminating Carson and the management agreement. The defendants moved to dismiss on the basis that the plaintiffs failed to state a claim. The court refused to dismiss the breach of fiduciary duty claim against Gabelli, the individual who allegedly influenced and controlled a majority of the managers, concluding that the allegations of influence and control over a majority of the LLC managers was sufficient to permit the plaintiffs to go forward in their attempt to prove an implied or imputed fiduciary duty. The court also rejected the defendants' argument that the business judgment rule required dismissal. The court stated that the business judgment rule presupposes that directors act on an informed basis and in the honest belief that their actions are in the best interest of the company, and the court pointed out that the complaint alleged that the actions were taken for reasons wholly unrelated to the business of the LLC. The court also rejected the defendant's argument that the LLC Act protected the defendants from liability for breach of fiduciary duty or minority oppression because of the provision that no member or manager is liable for the debts and obligations of the LLC. Contrary to the defendants' assertion that the operating agreement must provide for any remedy for breach of fiduciary duty, the court stated that the Act recognizes that a manager or member may owe fiduciary duties and allows the operating agreement to expand or restrict those duties. The court distinguished liability for the debts and obligations of the LLC from liability for breach of fiduciary duty.

**VGS, Inc. v. Castiel**, No. C.A. 17995, 2000 WL 1277372 (Del. Ch. Aug. 31, 2000). An LLC with three entities as members and three individuals as managers entered a merger approved by two of the three managers pursuant to the operating agreement. In the merger, two members with a combined 75% in the LLC were relegated to a 37.5% minority interest in the surviving corporation, and Castiel, the individual who controlled the two members with the 75% interest, was excluded from management. Castiel appointed two of the three managers of the LLC (these managers consisted of Castiel and another appointee), but the third manager (the owner of the 25% member) convinced Castiel's appointee to join him in a written consent to merge the LLC without notice to Castiel. The court determined that the LLC agreement permitted a merger to be approved by a vote of a majority of the managers and that Section 18-404(d) of the Delaware LLC Act literally permits written majority consents without notice to other managers, but the court concluded that the two managers breached their duty of loyalty to Castiel by failing to give him notice. The following comment by the court regarding the application of Section 18-404(d) is representative of the court's tone throughout the opinion: "The General Assembly never intended, I am quite confident, to enable two managers to deprive, clandestinely and surreptitiously, a third manager representing the majority interest in the LLC of an opportunity to protect that interest by taking an action that the third manager's member would surely have opposed if he had knowledge of it. My reading of Section 18-404(d) is grounded in a classic maxim of equity -- "Equity looks to the intent rather than to the form."

The court stated that the two managers who took the action to merge owed a duty of loyalty to the LLC, its investors and Castiel, their fellow manager. The court observed that the LLC agreement allowed the action to merge to be taken by a simple majority of managers (rather than following the default member approval requirement) because all parties understood that Castiel had the right to...
requirement because all parties understood that Castiel had the right to appoint and remove a majority of the managers. Had notice been given, Castiel of course would have attempted to remove his appointee and block the action. The court rejected the argument that the managers were protected by the business judgment rule. The court said the managers owed Castiel a duty to give him prior notice even if he would have interfered with a plan that they conscientiously believed to be in the best interest of the LLC. If Castiel was not suited to run the company, as claimed by the other two managers, this was an issue to be determined in board meetings with all managers present or in future litigation, if necessary.

In re Garrison-Ashburn, L.C., 253 B.R. 700 (Bankr. E.D. Va. 2000)(see footnote stating that, while managers owe a statutory duty of good faith business judgment, members of a Virginia LLC do not owe fiduciary duties to one another or the LLC).


- Rights of Dissociated Member

Lieberman v. Wyoming.com LLC, 11 P.2d 353 (Wyo. 2000). The court interpreted the Wyoming LLC Act and the operating agreement of a Wyoming LLC to determine the rights of Lieberman, a dissociated member. Lieberman’s contribution upon formation of the LLC was documented at $20,000, consisting of services rendered and to be rendered. When Lieberman was terminated as vice-president of the LLC, he served a notice of withdrawal and demand for the return of his share of the current value of the company, which he estimated at $400,000. The remaining members avoided dissolution of the LLC by electing to continue the LLC and approved the return of Lieberman’s $20,000 capital contribution. The court discussed a provision of the Wyoming LLC Act that entitles a member to demand the return of the member’s capital contribution if the operating agreement does not prohibit or restrict the right. Since the LLC operating agreement did not restrict this right, Lieberman was entitled to the return of his $20,000 contribution. The question remained whether he was entitled to receive any further distribution. A provision permitting a member to compel dissolution upon an unsuccessful demand for the return of the member’s contribution was not applicable since the LLC agreed to return Lieberman’s contribution. Noting the absence of a provision in the Wyoming LLC Act governing dissociation, the court turned to various provisions of the operating agreement dealing with membership certificates, transfer of interest, quorum and voting and concluded that it remained unclear what became of Lieberman’s ownership interest beyond his capital contribution. Thus, the court remanded for a further determination in this regard.

- Removal of Member

Walker v. Resource Development Company Limited, L.L.C., No. CIV. A. 1843-S, 2000 WL 1336720 (Del. Ch. Aug. 29, 2000). Walker, a first cousin of former President Bush, was brought in as a member of a Delaware LLC in order to utilize his connections and reputation to help the LLC secure needed financing. After Walker failed to secure financing and the other members became concerned about Walker’s drinking problem, financial irresponsibility and other matters, he was relieved of his official duties for a period of time. He was later given his job back, and the members entered into a formal operating agreement designating Walker as
an 18% member. Ultimately, however, the relationship soured completely, and
the other members purported to remove him as a member and
terminate his ownership interest. The members referred to Walker's poor
performance and misconduct in the written notice of his removal, but there
was also a dispute over whether Walker had a side deal that constituted a
conflict of interest. The court concluded that the other members had no
authority to remove Walker as a member either under the Delaware LLC
Act or the operating agreement. The court rejected the argument that the
members had the inherent power to remove Walker and deprive him of his
ownership interest based upon his alleged breach of fiduciary duty.
Although the court recognized that there was a relationship of sufficient
trust and confidence to impose on Walker a duty to disclose a material
fact such as a conflict of interest, the court concluded that the members
did not rely on any understanding that Walker was independent in entering
into the operating agreement. Thus, the court rejected the members’
representation claim against Walker. The court also rejected the
members’ claim that they were protected from liability for their effort to
appropriate Walker's interest based upon a good faith reliance on the
operating agreement. After purporting to remove Walker, a series of
financing transactions led to the exchange of the members’
membership interests in the LLC into shares of a Canadian corporation.
Walker failed to prove the value of his 18% interest in the LLC, thus there was no basis
for an award of damages; however, the court imposed a constructive trust
in Walker’s favor upon 18% of the shares the other members had received
in the Canadian corporation.

In the Matter of the Application of Proto, 2000 WL 1593350 (S.D. N.Y.
Oct. 24, 2000). (refusing to vacate arbitration award upholding expulsion
of LLC member and application of alleged oral no net deficit rule because a
misapplication of the rules of contract interpretation does not arise to a
manifest disregard of law).

Dissolution/Winding Up - Improper Distributions

In re Chicago Trading Group, Inc., Fogel v. Spike Trading, L.L.C.,
sued an LLC and its members seeking to recover from the members
improper distributions made during the winding up of the LLC. The parties
agreed that under Illinois law an LLC member may be liable for a
dissolved LLC’s debts to the extent of any improper distributions received.
The trustee argued that he had a direct cause of action against the LLC
members resulting from improper distributions, but the court agreed with
one of the LLC members that the trustee could only recover in
supplementary proceedings after obtaining a judgment against the LLC.
Since the trustee had not obtained a judgment against the LLC, the claim
against the member failed. Additionally, the court stated that the trustee
would have to identify property of the debtor held by the member and the
value of the property.

Bankruptcy

this case, a member of a Virginia LLC filed bankruptcy, and the court
concluded that the LLC operating agreement was not an executory
contract and thus not within the provisions of Bankruptcy Code 365(c)
and (e) preventing enforcement of certain ipso facto clauses. The court
explained the history of and reasons for amendments to the Virginia LLC
Act that eliminated reference to events that would automatically dissolve
an LLC. Pursuant to the amendments, events that formerly triggered
dissolution became events of dissociation. Under the amended statute,
the bankruptcy of a member results in dissociation, and the dissociated
member stands in the same relationship to the LLC as an assignee of a
membership interest. The court distinguished the DeLuca and Broyhill cases as having been decided prior to the check the box regulations and changes to the Virginia statute. The court pointed out that this case did not involve an entity whose organic documents or enabling statute dissolved the LLC on the member’s bankruptcy, and the operating agreement merely provided for the management structure of the LLC. It imposed no additional duties or responsibilities on members and permitted a member to resign from all offices and committees at any time without breaching the agreement. The court stated that such a person would stand in an analogous position to the LLC as a shareholder to a corporation. Under these circumstances, the court said, there is no executory contract.

- Receivership

**Baker v. David Alan Dorfman, P.L.L.C.**, 232 F.3d 121 (2nd Cir. 2000). The District Court’s opinion in this case was summarized in the last issue of the PUBOGRAM. The court held that a PLLC law firm had successor liability on a judgment against the member, assigned the judgment creditor a 75% interest in the LLC and appointed the judgment creditor’s attorney receiver of the PLLC. The order appointing the receiver granted sweeping authority over the PLLC’s operations, and the court of appeals raised sua sponte a concern regarding protection of the attorney-client relationship between the judgment debtor and his clients. The court of appeals remanded for further consideration of the receivership order in light of the law and rules of legal ethics governing the attorney-client relationship and the practice of law.

- Securities Laws

**Tschetter v. Berven**, 2000WL 33116695 (S.D. Jan 17, 2001). The South Dakota Supreme Court applied the Howey and Williamson tests to conclude that the plaintiffs’ membership interests in the LLC in question (a restaurant) were not securities under South Dakota law. The court pointed out that the operating agreement vested management in the members and gave the members substantial power and authority. The court also stated that the record established that the plaintiffs were informed and active in the affairs of the LLC and were aware of and capable of exercising their powers as members. Although the LLC’s management was contracted out to another entity, the court said the LLC retained the ability to terminate the management contract upon a failure to perform as required, and the members retained substantial power and the ability to conduct the necessary oversight of the LLC’s operations. A dissenting opinion characterized the situation as one in which the plaintiffs had very little control and concluded that a question of fact existed as to whether the membership interests were securities.

- Successor Liability

**Crane Construction Company v. Klaus Masonry, LLC.**, 114 F.Supp.2d 1116 (D. Kan. 2000). The court in this case acknowledged that corporate successor liability rules apply to other forms of business organizations and cited the Libutti case, in which the mere continuation doctrine was applied where the predecessor was a sole proprietorship and the successor an LLC. The court refused to apply the mere continuation doctrine to this case, in which a creditor of a deceased sole proprietor was attempting to impose liability on the LLC formed to carry on the business after the sole proprietor’s death by the sole proprietor’s son.

- Attorney Liability, Disqualification
**Roller v. Walsh,** 2000 WL 1874729 (N.Y. A.D. 4 Dept. Dec. 7, 2000) (reversing dismissal of suit by three LLC members against attorney who provided services in connection with formation and operation of LLC and allegedly breached his fiduciary duty and duty of care by advancing the interests of the fourth member).

**Levy v. Mukdisi,** No. 99-2507, 2000 WL 1473475 (Mass. Super. Aug. 2, 2000). The court disqualified an attorney who represented a member of an LLC against the other members in a dispute arising out of their dental practice LLC. The court found that an attorney-client relationship had existed between the attorney and the defendant members and that the current representation of one of the members was adverse to the interests of the other three. The court rejected the attorney’s argument that the services were solely for the benefit of the LLC, pointing to the fact that the individual members paid for his services. The court stated that the attorney represented the individual interests of all of the members when he prepared the agreement to associate and the subsequent operating agreements.

**New Jersey Appellate Court**

**Dismayed By Partnership Structure Complexity**

By: Peter D. Hutcheon

Somerville, New Jersey

In **Zeiger v. Wilf,** 333 N.J. Super. 258 (A.D. 2000), a panel of New Jersey’s intermediate appellate court held that an individual who was the vice president of the corporate general of a limited partnership, one of whose limited partners was a general partnership in which the individual was a general partner, did not have personal liability to the seller of real estate. The seller was supposed to get $23,000 per year for 16 years as a consulting fee. The real estate development project failed and both the limited partnership and its corporate general partner filed bankruptcy. The seller, unable to collect from those parties, argued that the individual, who functioned as the key operating officer of the corporate general partner had also acted as a limited partner participating in management and thus, become personally liable. The appellate court examined New Jersey’s version of RULPA and especially the equivalent of Section 303 and found express statutory protection for one who serves as an officer of a corporate general partner. The court also rejected any argument about reliance on appearances. This case will be of significant assistance in resisting claims that a limited partner has participated in management.

This case may also gain wide readership or at least citation for its first paragraph quoted here:

This case offers a virtual primer in the Byzantine relationships among various forms of business organizations employed in a modern venture capital project. It includes a limited partnership, a corporation, a general partnership and several sophisticated individuals all involved in the proposed redevelopment of a hotel/office building in downtown Trenton. It also demonstrates the significance of limited individual liability which is a key reason for employing some of those entities, and the inevitable risk that anticipated rewards from such a venture may not be realized.

New Jersey Enacts RUPA

http://apps.americanbar.org/abanet/common/login/secureddarea.cfm?areaType=committee&role=CLS90000&url=/buslaw/committees/CLS90000/newsletter/pu...
New Jersey Enacts RUPA
By: Allan Donn
Norfolk, Virginia

RUPA became the law in New Jersey on December 7, 2000. New Jersey modifies the fiduciary provisions of RUPA in interesting ways. RUPA Section 404(a) and NJRUPA Section 24.a each provide that the only fiduciary duties a partner owes to the partnership and to the other partners are the duty of loyalty and the duty of care. Subsection (b) of each statute provides that a partner’s duty of loyalty is limited to complying with three specific rules. The first rule is to account for any property, profit or benefit derived from a use of partnership property, including a partnership opportunity. The second rule under RUPA is to refrain from acting adversely to the partnership. The New Jersey version enjoins a partner to refrain from knowingly dealing with the partnership in a manner materially adverse to the partnership. The third RUPA duty of loyalty rule is to refrain from competing with the partnership. New Jersey has a different formulation, requiring a partner to refrain from actions "intended to cause material injury to the partnership . . . ."

RUPA Section 404(d) further directs that a partner discharge its duties to the partnership and to the other partners under the statute or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing. New Jersey RUPA omits that RUPA provision entirely. That raises the question of why the reference to an obligation of good faith and fair dealing was omitted. One interpretation is that the legislature intended to omit any obligation of good faith and fair dealing in the conduct of the partnership. Another interpretation is that the legislature concluded that the common law obligation of good faith and fair dealing applies to the partnership agreement, as in the case of all contracts, and that there is no need to include that general principle of contract law in the section prescribing the general standards of partner’s conduct. Larry Ribstein, the co-author of the leading treatise on partnership law, has criticized the inclusion of the good faith obligation in RUPA as both unnecessary and likely to result in an unintended change in partnership law. He criticized RUPA because it implied that good faith is a particular type of obligation that exists in all partnerships rather than simply a mechanism for interpreting contracts of which a partnership agreement is one form. The New Jersey courts have applied the obligation of good faith in the interpretations of contracts. In the absence of an express indication that the New Jersey legislature intended that the general principle of contract interpretation not apply to partnership agreements, the more likely interpretation of legislative intent is that the legislature accepted the Ribstein position that the provision was unnecessary.

RUPA Section 103(a) and New Jersey RUPA Section 4.a set forth the general rule that the relations among the partners and between the partners and the partnership are governed by the partnership agreement. However, subsection (b) of each statute states that certain provisions of RUPA are mandatory and cannot be waived or varied by agreement beyond what is authorized. In the case of fiduciary duties, RUPA Section 103(b)(3) provides that the partnership agreement may not eliminate the duty of loyalty, but that the agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable, or all of the partners or a number or percentage specified in the agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that would otherwise violate the duty of loyalty. In contrast, the New Jersey formulation simply provides that the partnership agreement must not reduce the duty of loyalty "so as to permit a partner to engage in conduct which is intentionally injurious to the partnership; . . . ."

Consistent with the determination to omit the statutory obligation of good faith and fair dealing from the partner’s standards of conduct section,
NJRUPA omits RUPA Section 103(b) (5) to the effect that the agreement may not eliminate the obligation of good faith and fair dealing.

RUPA Sections 602(a) and NJRUPA Section 32.a each provide that a partner has the power to dissociate at any time, rightfully or wrongfully by express will. RUPA Section 103(b)(6) provides that the partnership agreement may not vary the power of a partner to dissociate except to require written notice. NJRUPA omits that provision, making New Jersey the only RUPA state that permits the partners to eliminate the power to dissociate by agreement.

RUPA Section 701 (a) provides that if a partner's dissociation does not result in a dissolution and winding up of the partnership, the partnership shall cause the dissociated partner's interest to be purchased for a "buyout price." That term is defined as the amount that would have been distributable to the dissociated partner on the settlement of accounts on liquidation if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date." NJRUPA defines "buyout price" as "the fair value as of the date of withdrawal based upon the right to share in distributions" from the partnership."

RUPA Section 801 (1) provides that a partnership at will is dissolved and its business must be wound up upon the partnership's receiving notice of a partner's express will to withdraw as a partner. That is the default rule and may be changed by agreement of the partners. The NJRUPA counterpart "seems intended to provide that in a partnership at will the default rule is that dissolution occurs upon notice of withdrawal from a partner, unless the partnership agreement provides that no dissolution occurs until 90 days following the partnership's receipt of the notice, during which period a majority in interest of the remaining parties may agree to continue the partnership.

RUPA Section 801(2) provides that a term partnership may be dissolved before the expiration of the term after a partner's dissociation by death or otherwise under Section 601(6) through (10), or upon wrongful dissociation under Section 602(b) if within 90 days after the dissociation at least half of the remaining partners express their will to dissolve the partnership. NJRUPA provides that a term partnership will dissolve 90 days after one of those specified events unless before that time a majority in interest of the remaining partners agree to continue the partnership. Thus, under RUPA the default rule is for partnership continuation and under NJRUPA the default rule is for partnership dissolution.

**Short Swing Profits Turned to Losses**

By: Peter D. Hutcheon

Somerville, New Jersey

_Feder v. Frost et al._ 220 F3d 29 (2d Cir. 2000), was an interesting insider trading case. An individual, Frost, was a statutory insider (an officer and director of one and a director of the other) of two public companies. Frost also owned 100% of the stock of a corporate general partner of an investment limited partnership which owned shares in both public companies, so that he was the beneficial owner of almost 13% of one company and over 17% of the other. Frost and the partnership bought more shares in one of the public companies at a time that the other public company was selling shares of that same stock. Although any profit on the sales of stock was realized at the public company level, the Second Circuit had no difficulty holding Frost and his investment partnership liable to disgorge the profits under an applicable SEC rule.
Over Thirty

Ludwig Wittgenstein in the *Tractatus Logico-Philosophicus* examined in close detail the way in which thought and expression accrete into concepts. It is at heart essentially a nominalist view: “The world reduces itself to fundamental or atomic facts.” Yet at the end of the Tractatus he writes:

Whereof one cannot speak, thereabout must one be silent.

For the sum of all atomic facts does not yet explain the grandeur of life. Neither does the robustness of our rather modest genome (no matter how the exons and introns may yet prove to be the Josephson junction of humankind) reveal the essence of man and even more so of any one man.

So of our friend and colleague, Martin Lubaroff, permit me to hold fast to Wittgenstein's insight:

PdH

ADDENDUM

Eulogies

Delivered in Memory of

Martin I. Lubaroff, Esq.

At

Memorial Services

In

Wilmington, Delaware
January 3, 2001

IN MEMORIAM
MARTIN I. LUBAROFF

By: Stephen E. Herman

Wilmington, Delaware

The death of Marty Lubaroff has saddened us all. We meet here today to honor him and to express, in small measure, the gratitude we feel for all that he shared with us. We meet in sorrow at his loss, and our hearts go out to his loved ones at this time of their great loss.

Sandy asked that I speak, not as Marty’s friend (which I was), but, rather, she asked me, as President of Richards, Layton & Finger, to talk about Marty as a lawyer and as a law partner. Sandy knew that Marty truly embraced the practice of law. Marty did not look to cut back or retire, he liked what he did. Many of you who knew him as a friend, as a leader in
the Jewish community and in the other many facets of his life, knew of Marty’s passion for what he did as a lawyer but probably were unaware of what he did day by day. I am confident that I will not be able to fully explain as Sandy asked me to what Marty did, but let me begin.

First, Marty joined Richards, Layton & Finger after graduating from Franklin & Marshall and Harvard Law School in 1966. He became a partner in 1971. When Marty started at Richards, Layton & Finger, there were fewer than 15 lawyers. The firm has now over 120 lawyers, some of whom Marty would undoubtedly have called his best friends. It can be said generally that Marty’s practice was commercial transactions and banking throughout his career. His quick and incisive mind made him someone that was looked to locally and nationally for advice.

From the beginning of the credit card banking business in Delaware, Marty’s practice included forming banks and working with perhaps a dozen Delaware credit card banks including MBNA in the esoteric area of securitization of credit card receivables. Marty particularly enjoyed and was proud of his positions both as a director of Wachovia’s credit card bank here in Delaware, and the close advisory position he had with Cross Country Bank, and the special recognition as advisor which he received from Cross Country Bank in December, 1999. Marty had indicated on a number of occasions that when he came back to work after his illness, he had plans for expanding our banking practice.

However, I think that it is fair to say that a majority of Marty’s time was taken with his role in the last twenty years as the head of the Richards, Layton & Finger alternative entity practice. An area where we had two lawyers in the early 1980’s, and which in 2000, had more than 20 lawyers practicing in that area.

Now, in Delaware, an alternative entity is anything which is not a real person or a corporation. Let me explain:

In the 1980’s there was a national effort to establish a Uniform Limited Partnership Act. A type of organization that is not a person or a corporation – an alternative entity. Marty participated at the national level in the development of that Act. However, not all of his suggestions were taken. Marty had a view that the limited partnership entity should be engrafted with the same qualities of user-friendliness that made the Delaware Corporation Law much admired and much used. Marty, with others at Richards, Layton and the Delaware Bar, then went about having Delaware draft and adopt the Delaware Limited Partnership Act with the kinds of changes from the uniform law which would give it the flexibility of the Delaware corporate law.

In no small measure because of Marty’s work in developing the specifics of the Delaware Limited Partnership Act, limited partnerships have become an important part of the way that American business does business. It was said of Henry Ford that he didn’t invent the automobile, but he invented the automobile business. Marty did not invent limited partnerships, but he played a major role in developing the American limited partnership business. So, if you own or are going to own an interest in a limited partnership, especially, from any of the major brokerage firms – Merrill Lynch, Paine Webber, etc. – you probably own a Delaware limited partnership forged out of Marty’s practice of law.

Later in the 1990’s, other alternative entity concepts -- the limited liability company and the limited liability partnership -- sprang up. In many respects, history repeated itself. Marty, again with the assistance of other lawyers at Richards, Layton & Finger and the Delaware Bar, developed user friendly Delaware forms of limited liability companies and limited liability partnerships. For example, when the large accounting firms decided to take advantage of the limited liability partnership law concept, they looked to Marty, and all but one reformed themselves as Delaware limited liability partnerships. And, throughout the ‘90s, when dot com companies were deciding on how to be formed and how to become financially viable, many of them started out as Delaware limited liability
companies, and then became Delaware corporations when they eventually went public, Marty’s alternative entities.

Because of his expertise in these alternative entities, Marty was a much sought-after writer and speaker. The number of his published articles over the years goes on and on. Year in and year out, Marty spoke at national and international conferences on the topics of alternative entities. Marty, in collaboration with our partner, Paul Altman, published Lubaroff and Altman on Delaware Limited Partnerships, a dry-sounding treatise which has become the definitive work and the mandatory tool of transactional lawyers around the country.

In recent years, the National Conference of Commissioners on Uniform State Laws has again met to revise the Uniform Limited Partnership Act. The American Bar Association appointed Marty as the advisor to that project. The American Bar Association also appointed Marty to numerous ABA Committees on alternative entities. And, until his illness, Marty chaired and was very active on various Delaware Bar Association committees on alternative entities.

Marty once explained to me that he was aware of the old joke about lawyers – lawyers are like beavers: They both enter the mainstream and then dammed things up. Marty said that it was his view that lawyers really should make things flow more easily. And certainly, that was part of the legal legacy which he left.

Now that I’ve spoken about what Marty did, let me mention how he did it. First, I would have to say that Marty did it carefully – very carefully. Marty was a very careful person and a very careful lawyer. But, even with the care with which he gave every project, Marty was able to juggle a myriad of different transactions, and focus on different aspects and types of law. Only Marty and his secretary of 28 years, Lee Cleaver, know how many phone calls Marty received a day, but there were many, many, many every day. Most of these were from lawyers who sought Marty’s counsel from around the country. These telephone relationships grew to true friendships, and there are lawyers here today from Washington, New York, Virginia and around the country. This was not only because Marty’s advice was helpful, but because Marty took the time and the interest to develop personal relationships with the people with whom he was dealing. They knew of his love of his family and he inquired and cared about theirs.

This of course was true not only for the people from out of town, but for the lawyers in the Firm. Because of the way the practice of law has developed, there have been many associates who have sat in the two chairs in front of Marty’s desk over the years, and listened and watched as he practiced law. You will hear in a few minutes from Tom Ambro, now a judge on the United States Court of Appeals for the Third Circuit, who was one of Marty’s mentees. Marty never asked an associate to work harder than he did, and indeed, few lawyers in America work as hard as Marty Lubaroff worked. Far from resenting the amount of time that he put into the practice of law, he loved it.

Sandy, Beth, Ricky, the practice of law is what Marty did and what he did well. Before he received the news just two weeks ago that the leukemia had returned, he was planning his coming back to the office in mid-January. He looked forward to coming back and being with his friends and colleagues, and resuming his work with people locally and nationally.

Our Firm, our profession are richer and better because of Marty Lubaroff. We will miss him. I will miss him.

EULOGY FOR MARTY LUBAROFF

By: The Hon. Thomas Ambro

Wilmington, Delaware
Sandy, Mr. Lubaroff, Beth, Rick, Terri, Chuck, Rick’s fiancé – Terri, other members of Marty’s and Sandy’s families, Rabbi Satlow and friends of Marty Lubaroff.

Today I stand on this sacred ground to affirm to you that Marty Lubaroff upheld one of Judaism’s great traditions. He was a teacher.

I speak as one taught by Marty Lubaroff. I speak not only for myself, but also Marty’s former students currently at Richards, Layton & Finger, including Paul Altman, Jim Leyden, Bernie Kelley, Bill Yemc, and Greg Ladner. I speak as well for those who preceded them, including Mike Meehan, Alesia Marinelli and Dave Stratton. Alesia repeated last night what she had often said before: "Looking back, I realize that he was my best teacher." Marty was never an easy teacher, but tough. For Marty, as someone said of experience, gave the test first, the lesson later.

In the summer of 1976 when I first joined Richards, Layton & Finger, I already knew of Marty’s reputation as a tough teacher, and found out after my first month that I was assigned to work for him. I went to Norm Veasey, now our Chief Justice and then the managing partner of the firm. I started off, "Mr. Veasey" He said, "Call me Norm." "Alright," I said, "Mr. Norm. I understand that I have been assigned to work for Marty Lubaroff and that he works on things like the Uniform Commercial Code." "Well," I continued, "I just want you to know that I thought I was hired to litigate. In fact, I took a UCC course pass/fail in law school, and dropped it for lack of interest." Norm responded, "Give it a shot. You may come to enjoy it." That was the start of my relationship with Marty. From it, I learned more than I have time to tell.

So snippets must suffice. How many aphorisms spoken by Marty have crept into our vocabulary and been passed on to other associates (and now even to my clerks). Among them are:

For a small mistake that we shrugged off, Marty would shake his head and warn, "Little things mean a lot."

When he asked where we got certain awkward language and we pointed to a form, he would admonish, "Never be married to a form."

When he criticized something and we pulled out a document where he had only recently used the same language, he would intone dryly, "The state of the art has changed."

As I would muse about a vacation, he would ask "Do you want some advice?" When I nodded yes, he would counsel, "Go Jewish." When I looked quizzical, he would say, "Go first class. Do it right."

While we waited interminably in his office to talk to him while he was on the telephone, Marty would put his hand over the receiver and say, "Don’t worry, you’ll learn a lot just by sitting there."

And we did. What we saw was Marty taking on the world, one person at a time. He did it himself. And only this last year did he realize and appreciate fully the rooting section of friends he had.

I have a cardboard sign at home containing someone’s 21 suggestions for success. After the first two, the rest don’t matter. They are:

Marry the right person, for that alone will determine 90% of your happiness or misery; and
Work at something you enjoy, and that is worthy of your time and talent.

Marty married Sandy, and he was happy. He enjoyed his work, and made it worthy of his time and talent. What for some could be a grind, for Marty was fun. It was what he did, and he did it exceedingly well. It and his family gave him meaning.

As my wife, Mary Lou, said on learning of Marty’s death, “He worked hard and he played hard.” By the clock Marty’s life was not long. But the Roman philosopher Seneca was correct: “Life is long if it is full.” Marty lived fully. He was larger than life. He always went Jewish. And so should we.

Thank you and good-bye, good teacher.

For additional information, please contact the Business Law Section: businesslaw@abanet.org