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Connecticut
GENERAL STATUTES ANNOTATED

Under Arrangement of the Official
General Statutes of Connecticut
Revision of 1958

Volume 29

Titles

- 53a. Penal Code § 53a-187-En1
- 54. Criminal Procedure
- 55. Concluding Provisions

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§§ 54-34, 54-35
Repealed

1902 Rev. § 1497

See now § 54-33f

Former § 54-35, relating to condemnation of gambling implements, was derived from:

1961, P.A. 255, § 1

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1961, P.A. 214

1949 Rev. § 8758

1930 Rev. § 6441

1918 Rev. § 6591

1917 P.A. ch. 68

1902 Rev. § 1498

See now § 54-33g

PART III

SEIZED PROPERTY

§ 54-36. Repealed. (1971, P.A. 74-221, § 9, eff. June 17, 1971)

Historical Note

See now §§ 54-36a, 54-36h

§ 54-36a. "Contraband", "stolen property", "owner" defined; seized property; inventory filed with clerk, court orders re. return of compliance, criminal contempt

(a) As used in this section, sections 53-278c and 54-36c: (1) "Contraband" means any property, the possession of which is prohibited by any provision of the general statutes; (2) "stolen property" shall include, but not be limited to, cash or the proceeds from the sale of such property obtained by theft or other illegal means; (3) "owner" means a person or persons entitled to seized property as a matter of law or fact.

(b) Whenever property is seized in connection with a criminal arrest or seized pursuant to a search warrant without an arrest, the law enforcement agency seizing such property shall file, on forms provided for this purpose by the office of the chief court administrator, an inventory of the property seized. The inventory, together with the uniform arrest report, in the case of an arrest, shall be filed with the clerk of the court for the geographical area in which the criminal offense is alleged to have been committed; except, when the property is stolen property and, in the opinion of the law enforcement officer, does not exceed two hundred fifty dollars in value, or when an attempt was made to steal the property but the property at all times remained on the premises in a sealed container, the filing of an inventory shall not be required and such property may be returned to the owner. In the case of property seized in connection with a search warrant without an arrest, the inventory shall be attached to the warrant and shall be filed with the clerk of the court for the geographical area in which the search

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warrant was issued. If the seized property is stolen property, within ten days of the seizure, the law enforcement agency seizing the property shall notify the owner of the property if known, or, if the owner of the property is unknown at the time of seizure, such agency shall within ten days of any subsequent ascertainment of the owner notify such owner, and, on a form prescribed by the office of the chief court administrator, advise the owner of his rights concerning the property and the location of the property. Such written notice shall include a request form for the return of the property. The owner may request the return of the property by filing such request form with such law enforcement agency, and upon receipt of such request, the law enforcement agency shall forward it to the clerk of the court for the geographical area in which the criminal offense is alleged to have been committed. The clerk of the court shall notify the defendant or defendants of the request to return the property. The court shall order the return of the property within thirty days of the date of filing such return request by the owner, except that for good cause shown, the court may order retention of the property for a period to be determined by the court. Any secondary evidence of the identity, description or value of such property shall be admissible in evidence against such defendant in the trial of such case. The fact that the evidence is secondary in nature may be shown to affect the weight of such evidence, but not to affect its admissibility. If any criminal proceeding is transferred to another court location, then the clerk with whom the inventory is filed shall transfer such inventory to the clerk of the court location to which such action is transferred.

(c) Unless such seized property is stolen property and is ordered returned pursuant to subsection (b) of this section or unless such seized property is adjudicated a nuisance in accordance with section 54-33g, or unless the court finds that such property shall be forfeited or is contraband, or finds that such property is a controlled drug, a controlled substance or drug paraphernalia as defined in subdivision (8), (9) or (20) of section 21a-240, it shall, at the final disposition of the criminal action or as soon thereafter as is practical, or, if there is no criminal action, at any time upon motion of the prosecuting official of such court, order the return of such property to its owner within six months upon proper claim therefor.

(d) When the court orders the return of the seized property to the owner, the order shall provide that if the seized property is not claimed by the owner within six months, the property shall be destroyed or be given to a charitable or educational institution or to a governmental agency or institution, except that (1) if such property is money it shall be remitted to the state or (2) if such property is a valuable prize it shall be disposed of by public auction or private

sale in which case the proceeds shall become the property of the state; provided any person who has a bona fide mortgage, assignment of lease or rent, lien or security interest in such property shall have the same right to the proceeds as he had in the property prior to the sale.

(e) If such seized property is adjudicated a nuisance or if the court finds that such property shall be forfeited or is contraband other than a controlled drug, a controlled substance or drug paraphernalia as defined in subdivision (8), (9) or (20) of section 21a-240, the court shall order that such property be destroyed or be given to a charitable or educational institution or to a governmental agency or institution, except that (1) if such property is money, the court shall order that it be remitted to the state or (2) if such property is a valuable prize, the court shall order that it be disposed of by public auction or private sale in which case the proceeds shall become the property of the state; provided any person who has a bona fide mortgage, assignment of lease or rent, lien or security interest in such property shall have the same right to the proceeds as he had in the property prior to sale.

(f) If the court finds that such seized property is a controlled drug, a controlled substance or drug paraphernalia as defined in subdivision (8), (9) or (20) of section 21a-240, the court shall order the forfeiture and destruction of such property or order it delivered to the commissioner of consumer protection pursuant to section 54-36g.

(g) Any order made under the provisions of subsections (b), (c), (d), (e) and (f) of this section or section 54-33f or 54-33g, shall upon notification from the clerk, be complied with by the person or department having custody or possession of such property.

(h) A return of compliance with the court order, on a form prescribed by the office of the chief court administrator, shall be filed with the clerk of the court by the person or department to whom notice is sent in accordance with the provisions of subsection (g) of this section. If the court ordered the seized property returned to the owner within six months upon proper claim therefor, the return of the compliance shall be filed upon the return of the property to the owner. If the owner does not claim the property within six months, then the return of compliance shall be filed upon immediate compliance with the order of the court pursuant to subsection (d) of this section. If the court renders an order concerning the disposition of the property other than an order to return the property to the owner, the return of compliance shall be filed with the clerk forthwith. Failure to file the return of compliance or to comply with the court order shall constitute criminal

contempt. Anyone convicted of criminal contempt may be punished by a fine of not more than one hundred dollars.

(1974, P.A. 74-221, §§ 1 to 6, 1975, P.A. 75-530, §§ 16, 17, eff. June 30, 1975; 1976, P.A. 76-77, § 1, 1978, P.A. 78-280, § 1, eff. July 1, 1978, 1979, P.A. 79-392, 1981, P.A. 81-240, § 1, eff. July 1, 1981, 1982, P.A. 82-235, 1985, P.A. 85-263, § 1)

Historical Note

1975, P.A. 75-530, § 16, eff. from passage, June 30, 1975, in subsection (b), in the first sentence, substituted "arrest or seizure pursuant to a search warrant without an arrest, the law enforcement agency for 'offense the person'", and divided the sentence after "inventory of the property seized" by inserting ". The inventory shall be filed in the case of an arrest.", in the new second sentence, substituted "or geographical area" for "or circuit" following "judicial district", deleted "from which such seizure arose" following "the criminal offense", and added at the end "and, in the case of a * * * the search warrant was issued"; and inserted the third sentence in subsection (b).

1975, P.A. 75-530, § 17, eff. from passage, June 30, 1975, in subsection (c) substituted "or unless" for "the court shall enter an order concerning the disposition of the seized property at the final disposition of any civil or criminal action, as soon thereafter as is practical, provided if" following "section 54-33g", substituted "finds" for "does not find" following "the court", and inserted ", at the final disposition * * * prosecuting official of such court."

1976, P.A. 76-77, § 1, divided the second sentence of subsection (b) by substituting "except, where the property * * * may be returned to the owner. In" for "and in"; amended the second sentence of subsection (b) by substituting ", together with the uniform arrest report," for "shall be filed"; and by inserting "shall be filed" following "in the case of an arrest"; amended the third sentence by inserting "property seized in connection with" and by inserting "the inventory shall be attached to the warrant and shall be filed"; divided the former third sentence (now, fourth) of subsection (b), by substituting "or the court or a judge thereof * * * When any" for "provided, if"; inserted, in the fourth sentence of subsection (b), "if an inventory is re-

quired"; inserted in the fifth sentence of subsection (b), "under the provisions of this section"; substituted, in subsection (c), "six months" for "one year"; substituted, in the second sentence of subsection (c), "six months" for "one year" in two places, and substituted "forthwith" for "promptly" at the end; and substituted, in the first sentence of subsection (f), "six months" for "one year".

1978, P.A. 78-280, § 1, changed "county" or "county or judicial district" to "judicial district".

Section 127 of 1978, P.A. 78-280, provided that § 1 of the act takes effect July 1, 1978.

1979, P.A. 79-392 amended subsection (a) by inserting "As used in this section, sections 53-278c and 54-36c. (1)" at the beginning, by deleting "as used in this section, sections 53-278c and 54-36c" following "Contraband", and added subds. (2) and (3).

1981, P.A. 81-240, § 1, amended the fourth sentence of subsection (b) by substituting "the seized" for "such" following "if", and by substituting "within forty-eight hours of the seizure, * * * and the location of the property," for "it may, after the filing of the inventory if an inventory is required, be returned to its owner in the discretion of the law enforcement agency seizing such property after consultation with the prosecuting official of the court in which the charge for which the arrest was made is pending or the court which issued such search warrant, as the case may be, or the court or a judge thereof, may if it is determined to be just and reasonable, order the return of such property upon the application to the court or judge by the owner."; substituted, in the fifth sentence of subsection (b), "Such written notice shall * * * be determined by the court. Any" for "When any such return under the provisions of this section has deprived any defendant in a criminal

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case of the opportunity to examine, test, or appraise such property to such defendant's prejudice, any"; deleted from the ninth sentence of subsec (b), "not following "value of such property shall"; inserted, in subsec (b), the tenth sentence; substituted, at the end of subsec (c), "in accordance with subsection (b) of this section" for "within six months upon claim therefor"; in subsec (e), deleted the former second sentence which read "If the court ordered the seized property returned to the owner within six months upon proper claim therefor, the return of compliance shall be filed at the termination of the six month period or upon the return of the property to the owner, whichever occurs first", and deleted, from the beginning of the second sentence, "(otherwise)".

Section 3 of 1981, P.A. 81-240, provided that § 1 of the act takes effect July 1, 1981.

1982, P.A. 82-235 substituted, in the first sentence of subsec. (b), "office of the chief court administrator" for "executive secretary of the judicial department"; deleted "judicial district or" following "court for the" from the second, third and sixth sentences of subsec (b); in the fourth sentence of subsec. (b) substituted "ten days" for "forty eight hours" following "stolen property, with in" and following "agency shall within"; substituted "office of the chief court administrator" for "executive secretary of the judicial department"; inserted "location" following "court" in two places and substituted "whom" for "which" preceding "the inventory is filed" in the eleventh sentence of subsec. (b); in subsec. (c) inserted "stolen property and is ordered returned pursuant to subsection (b) of this section or unless such seized property is", and substituted "within six months upon proper claim therefor" for "in accordance with subsection (b) of this section" at the end; substituted, in subsec (d), "subsections (b) and" for "subsection" following "under the provisions of"; substituted, in the first sentence of subsec. (e), "office of the chief court administrator" for "executive secretary of the judicial department"; inserted, in subsec. (e), the second sentence; and deleted, from the end of the fourth sentence of subsec. (e),

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"and imprisoned for not more than four days, or both"

1985, P.A. 85-267, § 1, in subsec (b) inserted in the second sentence "two hundred" preceding "fifty dollars in value," and inserted "or when an attempt was made to steal the property but the property at all times remained on the premises in a sealed container"; in subsec (c), inserted "funds that such property is a controlled drug," added references to subds (8) and (20) of § 21a-21a and changed punctuation; added subsec. (d), (e), (f), added the subsection designation (g) and added the references to subsecs (d), (e) and (f), redesignated former subsec (e) as subsec (h), in subsec (h), in the first sentence, substituted the reference to subsec "(g)" for "(f)", in the second sentence deleted "at the termination of the six month period or" following "shall be filed" and deleted "whichever occurs first" at the end of the sentence, inserted the third sentence regarding filing the return of compliance, and in the fourth sentence substituted "If the court renders an order concerning the disposition of the property other than an order to return the property to the owner" for "Otherwise", and deleted former subsec. (f), which read:

"(f) If a return of compliance with a court order states that the seized property was not claimed by the owner within six months, the clerk shall notify the court and the court shall order that such property be destroyed or given to a charitable or educational institution or to a governmental agency or institution, provided, if such property is money or valuable prize, it shall become the property of the state. The court may also order that such property be sold by public sale or at public auction, in which case the proceeds shall become the property of the state. The clerk shall notify the custodian of such property of the court order and he shall comply with the court order and file a return of compliance."

Prior Laws:

1973, P.A. 73-667, § 1
1973, P.A. 73-116, § 22
1969, P.A. 669, § 31
1958 Rev., § 54-36
1949 Rev., § 8759
1941, Supp. § 870f

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Note 3

Law Review Commentaries

Permanent confiscation of prison contraband - Fifth amendment behind bars (1984) 94 Yale L.J. 901

Library References

Searches and Seizures 2-5
C.J.S. Searches and Seizures §§ 91 to 97 112 to 114

United States Supreme Court

Investigative detention of luggage must be limited in scope to comply with intrusion on Fourth Amendment interests on less than probable cause, see United States v. Place, 1983, 103 S.Ct. 2637, 102 U.S. 696, 77 L.Ed.2d 110

Notes of Decisions

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1. In general

This section relied upon as authority for forfeiture applies only to property which has been seized and not to that which has come into possession of state in some other manner. State v. Pirro (1984) 470 A.2d 210, 192 Conn. 98

Courts had inherent power to direct that property taken from accused be returned or otherwise disposed of when no longer required. Bruchal v. Smith (1922) 145 A. 491, 109 Conn. 316

2. Forfeitures

Defendant, who voluntarily gave \$20,000 to policeman, relinquished both title and possession to money once funds were delivered, which passed to state through policeman as its agent. State v. Pirro (1984) 470 A.2d 240, 192 Conn. 98

Where there was no search warrant used prior to trial court order forfeiting defendant's radar detector to state upon conviction of defendant for using radar detection device in violation of motor vehicle regulation and violation of such regulation did not constitute "crime" under statutory definition of such term,

court ordered forfeiture of radar detection device could not be sustained either under § 54-13g providing for forfeiture of items seized under search warrant or under this section relating to forfeiture of items used in commission of crime State v. Anonymous (1980) 421 A.2d 667, 36 Conn.Sup. 551.

Order, in summary proceeding to forfeit money taken in course of gambling prosecution, directing return of money to claimant, did not, and could not without violating due process, determine question of title Aponte v. Rivera (1964) 199 A.2d 182, 2 Conn.Cir. 237.

Summary proceeding to forfeit money taken in course of gambling prosecution was for sole purpose to decide whether money was object of forfeiture, in furtherance of public policy of discouraging gambling activity by destroying or confiscating means used in it, in addition to imposing prescribed penalties - *Id.*

3. Return of property

At moment order, which directed that seized money be returned to claimant, was issued in rem proceeding following sentence in gambling prosecution, city and police department ceased to exercise legal custody of money Aponte v. Rivera (1964) 199 A.2d 182, 2 Conn.Cir. 237.

Money declared forfeited on account of its connection with gambling became state property, while money which was ordered returned to claimant was subject to immediate return. *Id.*

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Note 4

4. Garnishment

Money seized by police in course of gambling prosecution, and held for use as evidence and later disposition pursuant to statute, was in custodia legis and immune from garnishment. *Apointe v. Rivera* (1964) 199 A.2d 182, 2 Conn.Cir. 337.

5. Acquittal

Defendant seeking return of alleged bribe following acquittal in criminal action for bribery is in same position as any other person who claims to have been damaged by some action of state or its agents: unless particular statute can be found waiving state's sovereign immunity, his only recourse is to claim commission. *State v. Pierro* (1984) 470 A.2d 240, 192 Conn. 98.

6. Civil action

Although seizure of property used for illegal purposes is part of criminal proceeding, action to condemn such property is not a criminal proceeding but is a separate civil action, in rem, in which guilt or innocence of owner of property is not in issue but in which res is considered the offender. *State v. Rosales* (1964) 199 A.2d 575, 2 Conn.Cir. 399.

7. Parties

City, which claimed that gambling prosecution defendant owned money that was taken in course of prosecution, and which sought to impress fund with lien it claimed against defendant, must assert its right as creditor and could not accomplish that purpose as custodian of alleged contraband, by asserting that defendant, not claimant, owned property.

§ 54-36b. Examiner of seized property, appointment, duties

There shall be an examiner of seized property who shall be appointed and be subject to supervision by the chief court administrator of the judicial department. The examiner of seized property may prescribe forms and procedures to be used in identifying and labeling seized property, shall recommend to the judges any procedures which may be necessary to implement the provisions of this section, sections 53-278c and 54-36a, may inspect records maintained by clerks of court in connection with accounting for seized property, and may inspect offices where seized property is kept to

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Apointe v. Rivera (1964) 199 A.2d 182, 2 Conn.Cir. 337.

Neither city nor police department, which held money that had been taken in course of gambling prosecution and that had been ordered returned to claimant, had any interest in money as object of forfeiture, and neither had standing to challenge decision on forfeiture, since only the state could have been adversely affected. *Apointe v. Rivera* (1964) 199 A.2d 182, 2 Conn.Cir. 337.

8. Evidence

Testimony of state trooper that torn pieces of paper seized from glove compartment of automobile constituted a legal gambling record, based upon trooper's direct observation of paper, together with his expertise, and certain information he had previously obtained from wiretap investigation of illegal gambling, was sufficient to support finding that automobile had been used to store illegal gambling record in violation of the law, and thus, was subject to forfeiture, even though the wiretap information had been obtained by state trooper two months prior to seizure of automobile. *State v. One 1977 Buick Auto* (1985) 493 A.2d 874, 196 Conn. 171.

9. Review

Where there was no showing that defendant ever sought to examine test or otherwise see currency taken from victim, but returned to victim before trial, claimed error that currency was not made exhibit before secondary evidence in the form of testimony was affirmed was not reviewable. *State v. Tinsley* (1980) 435 A.2d 1002, 181 Conn. 309, certiorari denied 101 S.Ct. 874, 449 U.S. 1086, 66 L.Ed.2d 811.

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insert the filing of inventories and compliance with other provisions of said sections. The examiner of seized property shall conduct or contract for any public auction required pursuant to the provisions of section 54-36a, section 54-33g and section 53-278c and, at his discretion, such property may be sold by him to the highest bidder in whatever locality of the state he determines affords the most favorable market. The examiner of seized property may decline the highest bid at any such sale and reoffer the property at a later sale if he considers the bid insufficient. He may dispose of any such property by private sale if, in his opinion, the probable cost of public sale will exceed the value of the property. He may also, at his discretion, dispose of such property to a charitable or educational institution or to a governmental agency or institution.

(1974, P.A. 74-221, § 7, 1975, P.A. 75-530, § 18, eff. June 30, 1975; 1976, P.A. 76-77, § 2; 1985, P.A. 85-110, § 6, 1985, P.A. 85-263, § 3.)

Historical Note

1975, P.A. 75-530 § 18, eff. from passage, June 30, 1975, on the third sentence inserted "or contract for" following "shall conduct", and added "and, at his discretion, . . . the most favorable market", and added the fourth through the sixth sentences.

1976, P.A. 76-77 § 2, inserted in the third sentence, the reference to "section 54-33g".

1985, P.A. 85-110 § 6 in the first sentence, substituted "chief court administrator" for "executive secretary".

1985, P.A. 85-263, § 3, in the third sentence deleted "subsection (f) of" preceding "section 54-36a," and deleted "subsection (e) of" preceding "section 53-278c".

Prior Law:

1973, P.A. 73-667, § 1.
1973, P.A. 73-116 § 22.
1969, P.A. 669, § 31.
1958 Rev., § 54-36.
1949 Rev., § 4759.
1941, Supp. § 870f.

§ 54-36c. Disposition of seized property on order of the examiner of seized property

If there is no criminal action, property seized prior to October 1, 1974, held by law enforcement agencies in connection with a crime, which has not been claimed by the owner, except property held for disposition pursuant to section 54-33g, shall, upon notification by the police authority, be disposed of on the order of the examiner of seized property if he obtains the consent of the prosecuting official of such court. Property, seized after October 1, 1974, in connection with a crime for which an inventory need not be filed and held by law enforcement agencies for six months and which has not been claimed by the owner, shall be disposed of by an order of the examiner of seized property if he obtains the consent of the prosecuting official of such court. In disposing of property pursuant to this section, the examiner of seized property may order that such property be destroyed or be given to a charitable or education-

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al institution or to a governmental agency or institution; provided, (1) if such property is money, he shall order that it be remitted to the state or (2), if such property is a valuable prize, he shall order that it be disposed of by public auction or private sale, in which case the proceeds shall become the property of the state; provided any person who has a bona fide mortgage, assignment of lease or rent, lien or security interest in such property shall have the same right to the proceeds as he had in the property prior to sale.

(1975, P.A. 75-530, § 19, eff. June 30, 1975; 1976, P.A. 76-77, § 11)

Historical Note

1976, P.A. 76-77, § 3, amended the first sentence by deleting "at any time upon the motion of the prosecuting official of such court," following "no criminal action," by deleting "other than stolen property," following "prior to October 1, 1974," by deleting "for one year" following "law enforcement agencies", by substituting "a crime," for "which there has been no arrest and" following "in connection with", and by adding "if he obtains the consent of the prosecuting official of such court" at the end, and substituted the second sentence for former second sentence which read, "Stolen property seized before October 1, 1974, held by law enforcement agencies, and in connection with which there has been no arrest and which has not been claimed by the owner, shall, upon notification by the police authority, be disposed of on the order of the examiner of seized property if he determines that the property will not be needed in connection with any criminal trial as evidence."

Library References

Searches and Seizures ¶5.
C.J.S. Searches and Seizures §§ 91 to 97, 112 to 114.

§ 54-36d. Proceedings under chapters 211, 220 and 190 concerning cigarettes, alcohol and fisheries and game, respectively, exempt from certain licensing and disposition requirements

Sections 21-1, 54-36a, 54-36b and 54-36c, shall not be applicable to the proceedings taken pursuant to chapters 214, 220 and 190.¹ (1975, P.A. 75-530, § 23, eff. June 30, 1975.)

¹ Sections 12-285 et seq., 12-433 et seq. and 26-1 et seq.

Library References

Searches and Seizures ¶5.
C.J.S. Searches and Seizures §§ 91 to 97, 112 to 114.

§ 54-36e. Firearms to be turned over to state police

(a) Except as provided in sections 26-85 and 26-90, firearms, adjudged by the court to be contraband, pursuant to subsection (c)

of section 54-36a, or adjudicated a nuisance pursuant to section 54-33g, shall be turned over to the bureau of identification of the Connecticut division of state police within the department of public safety for destruction or appropriate use or disposal by sale at public auction.

(b) Firearms turned over to the state police pursuant to subsection (a) of this section which are not destroyed or retained for appropriate use shall be sold at a public auction held annually on or before the thirtieth of June, conducted by the commissioner of administrative services or his designee. Pistols and revolvers as defined in section 53a-3, which are antiques, as defined in section 29-33, or curios or relics, as defined in the Code of Federal Regulations, title 27, chapter 1, part 178, or modern pistols and revolvers which have a current retail value of one hundred dollars or more may be sold at such public auction, provided such pistols and revolvers shall be sold only to persons who have a valid permit to sell a pistol or revolver, or a valid permit to carry a pistol or revolver, issued pursuant to section 29-28. Rifles and shotguns, as defined in section 53a-3, shall be sold only to persons qualified under federal law to purchase such rifles and shotguns. The proceeds of any such sale shall be paid to the state treasurer and by him deposited in the general fund.

(1976, P.A. 76-77, § 8; 1977, P.A. 77-614, § 486, eff. Jan. 1, 1979; 1985, P.A. 85-263, § 11)

Historical Note

1977, P.A. 77-614, § 486, changed "state police commissioner" or "commissioner of state police" to "commissioner of public safety" and "state police department" to "division of state safety within the department of public safety". 1985, P.A. 85-263, § 4, inserted subsection designation (a) and added "or disposal by sale at public auction" at the end of that subsection and added subsection (b).

Section 610 of 1977, P.A. 77-614, provided that § 486 of the act takes effect Jan. 1, 1979.

Library References

Searches and Seizures ¶5.
C.J.S. Searches and Seizures §§ 91 to 97, 112 to 114.

§ 54-36f. Receipt for seized property to be given by law enforcement officials

Whenever property is seized in connection with a criminal arrest or seized pursuant to a search warrant without an arrest, the law enforcement agency seizing such property shall give a receipt

therefor to the person or persons from whom such property was seized or to the person or persons having a possessory interest in the premises from which such property was seized. The receipt, on a form provided for this purpose by the office of the chief court administrator, shall list with specificity the property seized, be signed by the law enforcement official or officials who seized the property and be given to the person or persons from whose person or premises the property was seized at the time of such seizure or, if the property was seized from premises in the absence of the person or persons having a possessory interest therein, be mailed to such person or persons by registered or certified mail within five days of such seizure.

(1984, P.A. 84-222.)

Library References

Searches and Seizures 495
C.J.S. Searches and Seizures §§ 91 to
97, 112 to 114

§ 51-36g. Destruction of controlled drugs, controlled substances and drug paraphernalia held as evidence in criminal proceedings. Petition, notice and hearing. Representative samples. Certificate of results. Destruction upon final disposition of criminal action. Records

(a) At any time after the seizure of a controlled drug or a controlled substance, as defined in subdivision (8) or (9) of section 21a-240, or drug paraphernalia, as defined in subdivision (20) of section 21a-240, in connection with a criminal arrest or pursuant to a search warrant without an arrest, the prosecuting official of the court for the geographical area in which the criminal offense is alleged to have been committed may petition the court for destruction of such controlled drug, controlled substance or drug paraphernalia. After notice, by certified or registered mail to the defendant and his attorney, and hearing on the petition, the court may order the forfeiture and destruction of such controlled drug, controlled substance or drug paraphernalia, under procedures and to the extent determined by the court, or order it delivered to the commissioner of consumer protection as soon as possible. Such order shall be in writing and shall provide for the analysis of representative samples of such controlled drug, controlled substance or drug paraphernalia. The results of such analysis shall be recorded on a certificate signed by the person making the analysis, witnessed and acknowledged pursuant to section 1-29. Such certificate shall be

prima facie evidence of the composition and quality of such controlled drug, controlled substance or drug paraphernalia.

(b) Upon final disposition of the criminal action or, if there is no criminal action, at any time upon motion of the prosecuting official, the court shall order the destruction of any controlled drug, controlled substance or drug paraphernalia not previously destroyed pursuant to an order under subsection (a) of this section, or order it delivered to the commissioner of consumer protection as soon as possible.

(c) The law enforcement agency seizing the controlled drug, controlled substance or drug paraphernalia shall keep a full and complete record of the time and place where such controlled drug, controlled substance or drug paraphernalia was seized, the kinds, quantities and weight of drugs received, by whom the controlled drug, controlled substance or drug paraphernalia were delivered and received and the date and manner of destruction or disposition of such controlled drug, controlled substance or drug paraphernalia. Such record and the certificate of the results of the analysis shall be disclosed only to attorneys of record in the case, the defendant and to federal and state officers charged with enforcement of federal and state narcotic laws.

(1984, P.A. 84-44, § 1; 1985, P.A. 85-263, § 2.)

Historical Note

1985, P.A. 85-263, § 2, inserted reference to "controlled drug" throughout, in subsec. (a), inserted reference to subd. (8) of § 21a-240, in subsec. (b), inserted "or, if there is no criminal action, at any time upon motion of the prosecuting official"

Library References

Searches and Seizures 495
C.J.S. Searches and Seizures §§ 91 to
97, 112 to 114

§ 51-37. Repealed. (1971, P.A. 871, § 129.)

Historical Note

The repealed section, relating to confinement of persons acquitted by reason of insanity, was derived from
1929 Rev. § 8749.
1941, Supp. § 886f.
1930 Rev. § 6432.
1918 Rev. § 6385.
1902 Rev. § 1473.
1963, P.A. 642, § 65.
1959, P.A. 523, § 1.
1959, P.A. 28, § 150.
1953, Supp. §§ 2506c, 33214.
See, now, § 53a-47.

§ 54-37a
Repealed

CRIMINAL PROCEDURE

§ 54-37a. Repealed. (1980, P.A. 80-116.)

Historical Note

The repealed section, which related to release of persons confined under order in October 1, 1969, was derived from 1967 P.A. 261.

§§ 54-38, 54-39. Repealed. (1971, P.A. 871, § 129.)

Historical Note

Former § 54-38, relating to petition for release of persons confined after acquittal by reason of insanity was derived from

1967 P.A. 261, § 2
1949 Rev. § 8750
1930 Rev. § 6433
1918 Rev. § 6586
1902 Rev. §§ 2474, 2780

See, now, § 53a-47.

Former § 54-39, relating to continued confinement of a person acquitted by

reason of insanity after maximum period set by court was derived from

1965 P.A. 435 § 2
1963 P.A. 642, § 84
1955 Supp. § 23253
1953 Supp. § 2507c
1949 Rev. § 8751
1930 Rev. § 6434
1918 Rev. § 6587
1909 P.A. ch. 143

1902 Rev. § 1472
See, now, § 53a-47

§ 54-10. Transferred to § 51-56d in Gen.St., Rev. to 1981

§ 54-10a. Transferred to § 51-1i in Gen.St., Rev. to 1981

§ 54-11. Transferred to § 51-352c in Gen.St., Rev. to 1981

CHAPTER 959a WIRETAPPING AND ELECTRONIC SURVEILLANCE

Section

- 51-41a Definition.
51-41b Application for order authorizing interception.
51-41c Information in application.
51-41d Issuance of order.
51-41e Statement by panel on issuance of order. Contents of order.
51-41f Execution of order; progress reports.
51-41g Extensions of order.
51-41h Privileged wire communications: issuance of order and interception prohibited.
51-41i Recording of interception; sealing, custody and destruction.
51-41j Sealing, custody, storage and destruction of applications and orders.
51-41k Service of notice of interception; inspection of intercepted communications, applications and orders; postponement of service.
51-41l Intercepted communication admissible as evidence, when.
51-41m Motion to suppress.
51-41n Report by panel to chief court administrator.
51-41o Reports by state's attorneys.
51-41p Disclosure of contents of wire communication. Unauthorized disclosure: Class D felony.
51-41q Authority of communication common carrier to intercept, disclose or use wire communication.
51-41r Remedies of party intercepted: defense.
51-41s Illegal possession, sale, distribution of equipment: Class D felony.
51-41t Unauthorized or illegal interception: Class C felony.

§ 51-11a. Definitions

The following words and phrases, as used in this chapter, shall have the following meanings, unless the context otherwise requires:

(1) "Wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of telephone or telegraph between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of intrastate, interstate or foreign communications;

(2) "Intercept" means the intentional overhearing or recording of a wire communication through the use of any electronic, mechanical or other device;

(3) "Electronic, mechanical or other device" means any device or apparatus which can be used to intercept a wire communication other than (A) any telephone or telegraph instrument, equipment or

Original Sponsor(s): SEN. COGHILL

1 IN THE SENATE

2 CS FOR SENATE BILL NO. 457 ()
3 IN THE LEGISLATURE OF THE STATE OF ALASKA
4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the return of property in the
7 custody of law enforcement agencies."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 * Section 1. AS 12.36.020 is amended by adding new subsections to read:

10 (d) Except as provided in AS 12.36.070, a law enforcement agency
11 shall return unforfeited property in its custody to the owner of the
12 property or to the agent of the owner if

13 (1) the return is authorized under (a) of this section;

14 (2) the owner or agent of the owner makes a written demand
15 for return of the property under AS 12.36.070 and delivers the demand
16 to the agency having custody of the property; and

17 (3) the agency does not have cause to refuse the demand
18 under AS 12.36.070(b).

19 (e) For the purposes of (a)(1) of this section

20 (1) property is no longer "in custody in connection with a
21 children's court proceeding or a criminal proceeding" when there has
22 been a final disposition of the case;

23 (2) property is no longer "in custody in connection with an
24 official investigation of a crime" when the investigation is complete
25 and the earliest of the following events occurs:

26 (A) six months elapse from the completion of the
27 investigation;

28 (B) the prosecuting authority does not initiate pro-
29 ceedings as a result of the investigation; or

1 (C) the prosecuting authority initiates criminal
2 proceedings or proceedings in children's court as a result of the
3 investigation, in which case the property becomes property in
4 custody in connection with a children's court proceeding or a
5 criminal proceeding.

6 * Sec. 2. AS 12.36 is amended by adding a new section to read:

7 Sec. 12.36.070. PROCEDURE FOR CLAIMING UNFORFEITED PROPERTY.

8 (a) A person claiming unforfeited property under this chapter shall
9 file a notice of claim with the law enforcement agency having custody
10 of the property. The notice must include a list of the items of
11 property whose return is sought, the basis for the claimant's claim of
12 ownership, the case numbers of all judicial proceedings involving the
13 items, and the date of final termination of the proceedings. If the
14 property was the subject of a criminal or children's court proceeding,
15 the notice may not be filed until 30 days after the final disposition
16 of that proceeding.

17 (b) The law enforcement agency having custody of the property
18 that is the subject of a claim under this section shall return the
19 property within 30 days of the receipt of the claim unless

20 (1) the claim does not meet the requirements of (a) of this
21 section;

22 (2) the property is not subject to return under this chap-
23 ter;

24 (3) the property is a prohibited weapon as defined in
25 AS 11.61.200, a controlled substance as defined in AS 11.71.900 or
26 paraphernalia for the use of the controlled substance, an alcoholic
27 beverage as defined in AS 04.21.080 when possession of the beverage
28 was illegal, or material whose distribution would be illegal under
29 AS 11.61.125;

1 (4) the person claiming the property does not present
2 satisfactory proof of ownership; if the agency determines that the
3 proof of ownership is unsatisfactory, it shall, within 30 days of the
4 receipt of the claim, notify the claimant in writing of the reasons
5 for not returning the property; or

6 (5) the agency acquired the property in connection with the
7 investigation of a serious offense, the identity of the offender is
8 unknown or there is insufficient evidence to proceed against a sus-
9 pected offender, and the return of the property would hamper future
10 prosecution if evidence later acquired by a law enforcement agency
11 warranted the commencement of criminal proceedings or proceedings in
12 children's court.

13 (c) If a law enforcement agency is aware that more than one
14 person claims an ownership interest in property that is the subject of
15 a demand for return under this section, the agency shall determine
16 which person has the superior claim to the property, and shall provide
17 written notification of this determination to all claimants of which
18 the agency has knowledge 10 days before releasing custody of the
19 property. If the agency provides the notification required under this
20 subsection, the agency is immune from liability for releasing the
21 property. If the person demanding return of the property presents
22 satisfactory proof that the person is acting on behalf of all claim-
23 ants of which the agency has knowledge, the agency is not required to
24 provide the written notification specified in this subsection, and is
25 immune from liability for releasing the property to the person demand-
26 ing its return.

27 (d) If a law enforcement agency fails to return claimed property
28 in a timely manner under this section or refuses to return claimed
29 property, the claimant may file a civil action in the superior court

1 against the state if the law enforcement agency is a state agency, or
2 against a political subdivision, if the law enforcement agency is a
3 municipal agency. The court may not order the property returned if
4 the defendant shows that return would be improper under (b) or (c) of
5 this section.

6 * Sec. 3. AS 12.36.020(c) is repealed.

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S B

475

FISCAL NOTE

REQUEST:

Revision Date: _____
 Title: "An Act relating to payment of legal services by indigent persons . . ."
 Sponsor: Senator Faiks
 Requestor: Senate Judiciary

Agency Affected: Dept. of Administration
 BRU: Public Defender Agency
 Components: Third Judicial District

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary) FY90 impact is zero.

This bill represents a positive emphasis on mitigating the public cost for an increasingly expensive criminal justice system. There is no fiscal impact on the Public Defender system, nor does the executive branch keep data which would enable a prediction of revenue.

Prepared by: John B. Salemi, Public Defender
 Division: Public Defender Agency
 Approved by Commissioner: Frank S. Baxter
 Agency: Department of Administration

Phone: 279-7541
 Date: 2/21/90
 Date: 2/22/90

Distribution (by preparer) :

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)

DEPARTMENT OF LAW

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE (907) 465-3600

OFFICE OF THE ATTORNEY GENERAL

December 14, 1989

The Honorable Warren Matthews
Alaska Supreme Court
303 K Street
Anchorage, AK 99501

Dear Chief Justice Matthews:

We understand that the Supreme Court will soon consider a proposal to amend Criminal Rule 39 that would allow the recovery of some of the costs of defense services to indigent citizens.

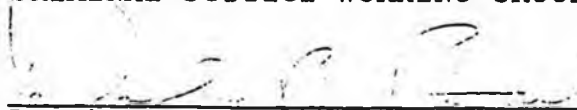
We support this concept, especially where the charges are directly related to the level of service provided to clients by the Alaska Public Defender's Agency and the Office of Public Advocacy. The fee schedule contained in the proposed amendment accomplishes this goal by setting out charges that are generally proportionate to the professional work required in individual cases.

We are particularly concerned that any recovery system include provisions designed to streamline the administrative and legal process for collection of these funds. The creation of an efficient and effective system holds the promise of recovering a significant portion of the high costs of defense services.

Finally, it is clear that the current mechanism of cost recovery has not worked. We applaud your efforts to develop a fair and effective recovery plan.

Respectfully submitted,

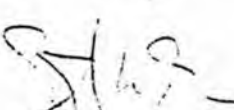
CRIMINAL JUSTICE WORKING GROUP



Douglas B. Bailly
Attorney General



Date



Brant McGee, Director
Office of Public Advocacy
Department of Administration



Date

[Handwritten initials]

1-10-90

John Salemi, Director Date
Public Defender Agency
Department of Administration

Myra W. Munson *Dec. 14, 1989*
Myra Munson, Commissioner Date
Department of Health and Social Services

Susan Humphrey-Barnett *12/27/89*
Susan Humphrey-Barnett, Commissioner Date
Department of Corrections

Art English *12-14-89*
Art English, Commissioner Date
Department of Public Safety

Duane Udland *12-20-89*
Duane Udland, Representative Date
Alaska Association of Chiefs of Police

BM/gh

Alaska State Legislature



Senate Judiciary Committee

MEMORANDUM

March 29, 1990

TO: All Senators

FROM: Senator Jan Faiks, Chairman
Senate Judiciary Committee

SUBJECT: SB 475 "An Act relating to payment of legal services and related costs by indigent persons using the services of the Public Defender Agency."

SB 475 was introduced at the suggestion of the Alaska Court System. This bill streamlines the manner in which indigent persons are ordered to pay legal costs when represented by the Public Defender.

As you know, the state is constitutionally obligated to provide attorneys to indigent defendants in criminal prosecutions. Currently, the law provides that an indigent person may be ordered to repay the legal expenses and court costs incurred by the state to the extent that the person is able to do so. The courts have interpreted this to mean that a hearing must be held before an indigent person can be ordered to pay any expenses; calculating the value of the representation is difficult, and the ability of the court to fully consider future income is also questionable. Experience has shown that this system simply does not work. Legal costs are virtually never recovered from persons represented by the Public Defender, regardless of the person's ability to pay some of the expenses at the time of the representation or in the future.

SB 475 has the effect of eliminating the need for a hearing, and allowing a defendant's future ability to pay to be taken into account. If passed, the supreme court intends to adopt a schedule of fees for various offenses (a copy of this schedule can be found in proposed Criminal Rule 39, which you will find attached). An indigent person who received services from the Public Defender would automatically be assessed a fee depending on the type of service provided. At the end of a

criminal proceeding, a civil judgement in that amount would be entered against the defendant. During the ten year period in which a civil judgement is enforceable, the state could pursue the judgement if the defendant had the ability to pay some of the fees at the time of the representation, or in the event that the defendant ever obtained a financial windfall in the future. Obviously, the state could not enforce the judgement in cases where the defendant was truly indigent and remained so.

This method of fee collection has been endorsed by both the Department of Law and the Public Defender, because it fulfills the government's responsibility to indigent persons, while ensuring that resources available to indigent persons ultimately go to people who really are in need. I urge your support.

Alaska State Legislature



Senate Judiciary Committee

MEMORANDUM

February 22, 1990

TO: Judiciary Committee Members

FROM: Senator Jan Faiks, *Chairman*

SUBJECT: SB 475 "An Act relating to payment of legal services and related costs by indigent persons using the services of the Public Defender Agency."

SB 475 was introduced at the suggestion of the Alaska Court System. This bill streamlines the manner in which indigent persons are ordered to pay legal costs when represented by the Public Defender.

As you know, the state is constitutionally obligated to provide attorneys to indigent defendants in criminal prosecutions. Currently, the law provides that an indigent person may be ordered to repay the legal expenses and court costs incurred by the state to the extent that the person is able to do so. This has been interpreted to mean that a hearing must be held before a court may order the indigent person to pay any expenses; the ability of the court to consider future income is also questionable. Experience has shown that this system simply does not work. Legal costs are virtually never recovered from persons represented by the Public Defender.

SB 475 has the effect of eliminating the need for a hearing, and allowing a defendant's future ability to pay to be taken into account. If passed, the supreme court intends to adopt a schedule of fees for various offenses. An indigent person who received services from the Public Defender would automatically be assessed a fee depending on the type of service provided. At the end of a criminal proceeding, a civil judgement in that amount would be entered against the defendant. During the ten year period in which a civil judgement is kept alive, the state could enforce the judgement in the event that the defendant ever obtained a financial windfall. Obviously, it could not do so in cases where the defendant remains indigent.

This method of fee collection has been endorsed by both the Department of Law and the Public Defender, because it fulfills the government's responsibility to indigent persons, while ensuring that resources available to indigent persons ultimately go to people who really are in need. I urge your support.

A M E N D M E N T # 1

OFFERED IN THE HOUSE

TO: SB 475

Page 1, line 15, after "judgment":

Insert ". Upon a showing of financial hardship, the court shall allow a person subject to an order entered under this subsection to make payments under a payment schedule. The payment schedule may not exceed five years. Payments made under this subsection shall"

Page 1, lines 15 - 16:

Delete "] . The payments shall"

Insert ". THE PAYMENTS SHALL]"

A M E N D M E N T # 2

OFFERED IN THE HOUSE

TO: SB 475

Page 1, line 11, after "(c)":

Delete "The"

Insert "Upon the person's conviction, the"

A M E N D M E N T #3

OFFERED IN THE HOUSE

TO: SB 475

Page 1, line 15, after "judgment":

Insert ", but execution may not commence until three years after
release of the defendant from incarceration"

6-2174E
Chenoweth
4/26/90

Original sponsor(s): SEN. FAIKS

1 IN THE SENATE

2 HOUSE CS FOR SENATE BILL NO. 475 ()

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 SIXTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to payment of legal services and
7 related costs by indigent persons using the services
8 of the Public Defender Agency and the office of
9 public advocacy, and court-appointed counsel."

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

11 * Section 1. AS 18.85.120(c) is repealed and reenacted to read:

12 (c) Upon the person's conviction, the court may enter a judgment
13 that a person for whom counsel is appointed pay for the necessary ser-
14 vices and facilities of representation and court costs, [but execution
15 of the judgment may ^{be delayed} ~~not commence~~ until three years after release of
16 the defendant from incarceration ~~unless for good cause shown, the~~
17 ~~court considers it appropriate to execute earlier.~~ Upon a showing of
18 financial hardship, the court shall allow a person subject to a judg-
19 ment entered under this subsection to make payments under a payment
20 schedule. Payments made under this subsection shall be paid into the
21 state general fund.

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23 - all delayed 3 years, unless good cause shown
24 - all payable monthly, unless good cause or 3,000 delay
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Bailiff's failure to deliver a jury deadlock note to the trial judge precluded an opportunity to conduct proceedings on the record in defendant's presence and thus constituted reversible error. *Wamser v. State*, Op. No. 2571, 652 P2d 98 (Alaska 1982).

Where either prior to or immediately following the jury's verdict the court received a communication from the jury that they felt threatened by the presence of defendant's boyfriend, the court's failure to notify the defense of the communication was reversible error. *Newman v. State*, Op. No. 174, 655 P2d 1302 (Alaska App. 1982).

Failure to notify the defendant of a jury communication is constitutional error that requires reversal on appeal unless the error is found harmless beyond a reasonable doubt. *Jones v. State*, Op. No. 622, 719 P2d 265 (Alaska App. 1986).

Rule 38.1. Telephonic Participation in Criminal Cases.

(a) In any proceeding at which the defendant's presence is required under Criminal Rule 38(a), as modified by Rule 38.2, the defendant may waive the right to be present and request to participate by the telephone. The defendant's waiver of the right to be physically present may be obtained orally on the record or in writing. The court may allow telephonic participation of one or more parties, counsel or the judge at any proceeding in its discretion. The court may allow telephonic participation of witnesses at bail hearings, omnibus hearings, probation revocation hearings or at trial with the consent of the prosecution and the defendant. The court may allow telephonic participation of witnesses at other hearings in its discretion.

A motion to allow telephonic testimony in a grand jury proceeding must be submitted to the presiding judge of the judicial district or the presiding judge's designee. The motion must be accompanied by an affidavit of the prosecuting attorney which states the reasons telephonic testimony is requested. If telephonic testimony is allowed, the prosecuting attorney is responsible for ensuring that the requirements of Civil Rules 99(b)(3) are followed.

(b) The provisions of AS 12.35.015 shall govern the issuance of search warrants by telephone.

(Amended by SCO 622 effective June 15, 1985; by SCO 897 effective July 15, 1988; and by SCO 960 effective July 15, 1989).

Rule 38.2. Televised Appearance by Defendant.

(a) The Administrative Director of the Alaska Court System, after consultation with the presiding judge, Public Defender Agency, and Attorney General's Office, may enter into agreements with the Department of Public Safety and Department of Corrections which approve systems allowing judges to provide for the appearance by a defendant at certain criminal proceedings by way of television equipment in lieu of the physical presence of the

defendant in the courtroom. Such an agreement must provide for a procedure by which the defendant may confer with the defendant's attorney in private.

(b) In those court locations in which a television system has been approved by the supreme court and has been installed, in custody defendants shall appear by way of television for arraignment, pleas, and non-evidentiary bail reviews in traffic and misdemeanor cases; and initial appearance hearings, non-evidentiary bail reviews, and guilty plea arraignments in felony cases, unless otherwise ordered for cause stated by the presiding judge. With the defendant's consent, sentencings may be done by way of television in traffic and misdemeanor cases.

In any particular case, the trial court may order that the defendant be transported to court for court proceedings if the trial judge finds that the defendant's rights would be prejudiced by use of the system.

(c) Facsimile telecopy orders issued in proceedings conducted under this rule are acceptable as originals for the purposes of release or detention by correctional officers.

(d) Nothing in this rule diminishes any other existing right of a criminal defendant.

(Added by SCO 719 effective August 1, 1986; amended by SCO 863 effective July 15, 1988).

Rule 39. Appointment of Counsel.

(a) **Informing Defendant of Right to Counsel.** If the defendant appears for arraignment or trial without counsel, the court shall advise him of his right to have counsel, and shall ask him if he desires the aid of counsel.

(b) **Appointment of Counsel for Persons Financially Unable to Employ Counsel.**

(1) If

(i) the defendant states that

(aa) he desires the aid of counsel, and

(bb) he is financially unable to employ counsel, and

(ii) the court determines after inquiring of the defendant under oath as to his financial status that he is an "indigent person" as defined by statute, then the defendant is entitled to have counsel provided at public expense, and the court shall immediately notify the Alaska Public Defender Agency that the Agency has been appointed to represent the defendant and immediately appoint the Public Defender to represent the defendant. As a condition of receiving the services of counsel at public expense, the defendant shall execute a general waiver authorizing release of income information to the court as required by statute.

(2) If the Agency has a conflict or is otherwise unable to represent the defendant, the court shall appoint counsel to represent him pursuant to statute.

(3) In the absence of a request by a defendant, otherwise entitled to appointment of counsel, the court shall appoint counsel for him unless he demonstrates that he understands the benefits of counsel and knowingly waives the same.

(4) The court, in its discretion, may appoint counsel in any case in which appointment best serves the interest of justice.

(c) Ability of Defendant to Pay Cost of Counsel — Determination by Court — Order — Execution.

(1) In any case in which the defendant is furnished counsel, either through the Public Defender Agency or private counsel appointed by the court, upon or prior to the conclusion of the criminal proceedings in the trial court, the court may, after a hearing, make a determination of the defendant's present ability to pay all or a portion of the cost of representation.

(2) At the hearing, the defendant shall be entitled to have, but shall not be limited to

(i) the opportunity to be heard in person,

(ii) to present witnesses and other documentary evidence,

(iii) to confront and cross-examine adverse witnesses, and

(iv) disclosure of the evidence against him pertaining to his ability to pay for representation.

(3) If the court, after the hearing, determines that the defendant has the present ability to pay all or part of the cost, it may order payment of the sum to the state general fund or, if the defense costs were paid by a municipality, to that municipality in any installments and in a manner which it believes reasonable and compatible with the defendant's financial ability. The court shall file written findings, a copy of which shall be provided to the defendant. No default or failure in the making of any such payment shall in any way affect or reduce the rendering of services on appeal or any other phase of the defendant's case. The order shall not be enforceable by contempt. Execution on the order is to be made by the attorney general, or the municipality which paid for the defense costs, in the same manner as on a judgment in a civil action.

(4) The cost of services of counsel shall be calculated at the hourly rate provided in Administrative Rule 12(d)(2)(F). At the hearing, counsel for the defendant shall provide evidence of:

(i) the hours he or she has expended to date;

(ii) an estimate of the hours, if any, still required to be expended on behalf of the defendant; and

(iii) any costs and expenses that are expected to be incurred or that have actually been incurred by private counsel or by the Public Defender Agency, including a reasonable estimate of the cost to the Public Defender Agency of any services provided on behalf of the defendant by investigators employed by the Public Defender Agency. Reimbursement for costs and expenses incurred by private counsel shall not exceed \$250.00 unless authorization was obtained in advance in accordance with Administrative Rule 12(d)(2)(G) and (H).

(5) Prior to the furnishing of counsel in the trial court, the court shall give notice to the defendant that the court may, after a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost of representation. The court shall also give notice that, if the court determines that the defendant has such present ability, the court may order him to pay all or part of such cost. The notice shall inform the defendant that the order shall have the same force and effect as a judgment in a civil action and shall be subject to execution.

(6) In making a determination of the defendant's present ability to pay all or a portion of the cost of representation, the court shall take into account the defendant's current income, assets and obligations, including necessary living expenses of the defendant and his dependents, if any. The defendant may not be required to pay any amount, or to liquidate any property that would be exempt from execution by law.

(7) The court may refer matters under section (c) of this rule to a master.

(Adopted by SCO 4 October 4, 1959; amended by SCO 90 Effective July 24, 1967; by SCO 157 effective February 15, 1973; by Amendment No. 4 to SCO 157 dated March 12, 1973; by SCO 187 effective July 2, 1974; by SCO 328 effective January 1, 1979; by SCO 448 effective November 24 1980; by SCO 677 effective June 15, 1986; and by SCO 888 effective July 15, 1988)

Annotations

Cases

- I. Right to Counsel
 - A. In General
 - B. Indigents
- II. Waiver of Right to Counsel
- III. Effective Assistance of Counsel

- I. Right to Counsel
 - A. In General

A defendant in a criminal proceeding has a constitutional right to court appointed counsel at a preliminary hearing only when the preliminary hearing is in the nature of a critical stage of the proceeding. *Merrill v. State*, No. 392, 423 P2d 686 (Alaska 1967).

Where the court over defendant's explicit protest, dismisses counsel from a public defender agency on the belief that the agency has exhibited a lack of preparation and then appoints unwanted counsel to represent the defendant, the court deprives the defendant of his right to counsel of his choice. *McKinnon v. State*, Op. No. 1075, 526 P2d 18 (Alaska 1974).

Where a defendant has been denied the right to be represented by his chosen counsel, the subsequent entry of a plea of guilty or *nolo contendere* does not shield a conviction from challenge on appeal, since the voluntariness and reliability of such a plea is inherently suspect. *McKinnon v. State*, Op. No. 1075, 526 P2d 18 (Alaska 1974).

The advice given to a nonindigent defendant concerning the right to counsel must include at least a brief explanation of the benefits of counsel. *Swensen v. Municipality of Anchorage*, Op. No. 2179, 616 P2d 874 (Alaska 1980).

It is within the court's discretion to allow both defendant and counsel to participate actively in the trial, so that a defendant may represent himself and also have the assistance of counsel. *Cano v. Municipality of Anchorage*, Op. No. 20, 627 P2d 660 (Alaska 1980).

B. Indigents

Even when read in relation to recent United States Supreme Court decisions, AS 12.25.150(b) does not require the appointment of counsel for an indigent immediately after his arrest. *Martinez v. State*, Op. No. 389, 423 P2d 700 (Alaska 1967).

Mere speculation as to what might have been done by a defense counsel during an interval between arrest and appearance for arraignment when counsel was assigned cannot be a basis for inferring that indigent defendant in a criminal case was deprived of counsel during a critical stage of the proceedings. *Martinez v. State*, Op. No. 389, 423 P2d 700 (Alaska 1967).

Where the direct penalty for conviction of an offense may be incarceration, loss of a valuable license, or a fine heavy enough to indicate criminality, such offense is a "serious crime" within the public defender statute. A defendant who is charged with any such misdemeanor and who cannot afford to hire his own lawyer is eligible for representation by a public defender. *Alexander v. City of Anchorage*, Op. No. 738, 490 P2d 910 (Alaska 1971).

A indigent defendant is not entitled to representation by any particular attorney. *McKinnon v. State*, Op. No. 1075, 526 P2d 18 (Alaska 1974).

Once counsel is appointed to represent an indigent defendant, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained. *McKinnon v. State*, Op. No. 1075, 526 P2d 18 (Alaska 1974).

II. Waiver of Right to Counsel

To be valid, a waiver of the right to counsel must be made with an apprehension of the nature of the charges, the offenses included within them, the range of punishments, possible defenses, mitigating circumstances and all other facts essential to a broad understanding of the whole matter. *Gregory v. State*, Op. No. 1269, 550 P2d 374 (Alaska 1976).

Magistrate must ascertain whether defendant understands benefits of counsel by recorded colloquy with defendant before right to counsel may be waived. *Gregory v. State*, Op. No. 1269, 550 P2d 374 (Alaska 1976).

When defendant is unable to make an intelligent choice as to waiver of right to counsel it is the duty of the court to assign counsel. *Gregory v. State*, Op. No. 1269, 550 P2d 374 (Alaska 1976).

When defendant pleads guilty without the assistance of counsel, the plea is invalid unless defendant waived his right to counsel. *Gregory v. State*, Op. No. 1269, 550 P2d 374 (Alaska 1976).

Failure of arraignment or trial record to demonstrate that defendant understood what he was giving up by declining the assistance of counsel was cause for reversal even though record

showed that defendant had been advised of his right to counsel. *O'Dell v. Municipality of Anchorage*, Op. No. 1588, 576 P2d 104 (Alaska 1978).

Failure of court to ask questions of defendant to assure that he understood precisely what rights he was giving up by declining legal representation at sentencing hearing required vacation of sentence. *Smith v. State*, Op. No. 134, 651 P2d 1191 (Alaska App. 1982).

Trial judge committed reversible error in not allowing defendant, charged with drunk driving in 1984, to have a 1975 drunk driving conviction set aside on the ground that, although informed by the magistrate taking his guilty plea in 1975 of his right to an attorney, he was not informed of what an attorney could do for him. *Petranovich v. State*, Op. No. 547, 709 P2d 867 (Alaska App. 1985).

Failure of the trial court to assure by an on-the-record inquiry that the accused understood the benefits of counsel and the dangers of self-representation prior to waiving his right to counsel was reversible error notwithstanding the accused's previous contacts with the criminal justice system. *James v. State*, Op. No. 669, 730 P2d 811 (Alaska App. 1987).

Defendant's waiver of his right to counsel prior to pleading guilty to a DWI charge was valid where the magistrate advised him of the maximum and minimum penalties for the offense and after he responded affirmatively to the question: "Do you know what a lawyer is?" *Tobuk v. State*, Op. No. 683, 732 P2d 1099 (Alaska App. 1987).

III. Effective Assistance of Counsel

A defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undelighted by conflicting considerations. *Risher v. State*, Op. No. 1053, 523 P2d 421 (Alaska 1974).

All that is required of counsel in rendering effective assistance of counsel is that his decisions, when viewed in the framework of trial pressures, be within the range of reasonable actions which might have been taken by an attorney skilled in the criminal law, regardless of the outcome of such decisions. *Risher v. State*, Op. No. 1053, 523 P2d 421 (Alaska 1974).

A defendant does not suffer an unconstitutional deprivation of effective assistance of counsel because of an error committed by his attorney which in no manner contributes to the conviction. *Risher v. State*, Op. No. 1053, 523 P2d 421 (Alaska 1974).

A defendant who has not demonstrated that he understands the benefits of counsel cannot be said to have waived counsel. *Gregory v. State*, Op. No. 1269, 550 P2d 374 (Alaska 1976).

Rule 40. Time.

(a) **Computation.** Except as otherwise specifically provided in these rules, in computing any period of time, the day of the act or event from which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday. When a period of the prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) **Enlargement.** When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion:

appeal in the absence of a showing of clear abuse of the wide discretion allowed under this rule. *Ahritton v. Estate of Larson*, Op. No. 413, 428 P2d 379 (Alaska 1967).

Where in a personal injury action the defendant had filed a payment document which, in itself, could be considered at best a deposit in court under Civil Rule 67(a) but by stipulation between the parties was converted into an offer of judgment, and by virtue of such stipulation and the court's order appended thereto, plaintiff's causes of action were dismissed with prejudice, the action had been settled pursuant to Civil Rule 68 and under the "with costs then accrued" portion of said rule the trial court was vested with wide discretion in determining award of attorney's fees. *Ahritton v. Estate of Larson*, Op. No. 413, 428 P2d 379 (Alaska 1967).

If the judgment recovered at trial is less than an offer of judgment, the offeror is liable for the costs incurred by the offeror subsequent to the time the offer was made. *Miklautsch v. Dominick*, Op. No. 538, 452 P2d 438 (Alaska 1969).

For purposes of this rule, an offer of judgment that specifies only a total sum must be construed as including the defendant's assessment of all the damages that the plaintiff is entitled to, including that occasioned by the loss of the use of the money. *Davis v. Chism*, Op. No. 919, 513 P2d 475 (Alaska 1973).

An offer of judgment will be construed as including the defendant's assessment of all the damages that plaintiff is entitled to, including costs and attorney's fees. *Bayly, Martin & Fay, Inc. v. Arctic Auto Rental, Inc.*, Op. No. 993, 517 P2d 1406 (Alaska 1974).

An award of costs and attorney's fees to both the plaintiff and the defendant are properly computed as of the date the offer of judgment is made and not at a later time when accepted. *Bayly, Martin & Fay, Inc. v. Arctic Auto Rental, Inc.*, Op. No. 993, 517 P2d 1406 (Alaska 1974).

Where radically different standards of partial compensation are applied in awarding attorney's fees to the parties, the award will be considered an abuse of discretion unless there are findings or an explanation by the trial court supporting such disparate treatment. *Irving v. Bullock*, Op. No. 1261, 549 P2d 1184 (Alaska 1976).

This rule does not require that costs incurred prior to an offer of judgment be awarded; such awards are within the trial court's discretion. *Continental Ins. Co. v. U.S. Fid. & Guar. Co.*, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

An award of \$5,000.00 for attorney's fees to defendant, a "limited prevailing party" under Civil Rule 68, was not manifestly unreasonable when actual attorney's fees were \$14,053.12, considering that Rule 68 is designed to encourage reasonable settlement after a lawsuit is filed. *Scott v. Robertson*, Op. No. 1674, 583 P2d 188 (Alaska 1978).

An award of attorney's fees under Civil Rule 68 is designed to "partially" compensate the prevailing party. *Scott v. Robertson*, Op. No. 1674, 583 P2d 188 (Alaska 1978).

Court should make factual determination of offeror's actual expenses incurred after offer of judgment, then take into account the partial recovery principles of Civil Rule 82 in making of reasonable partial attorney's fees and costs determination. *Farnsworth v. Steiner*, Op. No. 1955, 601 P2d 206 (Alaska 1979).

Where a judgment on offer and acceptance was signed January 18, but the action was not dismissed by court order until July 24, a request by counsel filed August 1 for a hearing on the amount of attorney fees was timely, July 24 being the proper date from which the request period should have been calculated. *Salmine v. Knagin*, Op. No. 2501, 645 P2d 148 (Alaska 1982).

Partial attorney's fees, not actual attorney's fees, are to be awarded to a prevailing party after an offer of judgment. *Truckweld Equipment Co. v. Swenson Trucking*, Op. No. 2545, 649 P2d 234 (Alaska 1982).

When counsel requests attorney's fees, other than based on the schedule in the Civil Rules, accurate records of the hours expended

and a brief description of the services reflected by those hours, will be submitted. *Hayes v. Arroy Corp.*, Op. No. 3045, 718 P2d 100 (Alaska 1986).

Prevailing defendant was entitled to costs incurred after date of his offer of judgment. *Hutchins v. Schwab*, Op. No. 3110, 724 P2d 1194 (Alaska 1986).

As the prevailing party at trial, defendant could receive maximum amount of attorney fees under Civil Rule 82, the fact that defendant had made an offer of judgment under Civil Rule 68 would not increase or diminish the award of attorney fees. *Hutchins v. Schwab*, Op. No. 3110, 724 P2d 1194 (Alaska 1986).

A defendant who ultimately fares better than his offer of judgment is entitled only to partial compensation for post-offer attorney's fees. *Wickwire v. State*, Op. No. 3116, 725 P2d 695 (Alaska 1986).

In an action against the State for wrongful termination of an assistant attorney general, trial court, in awarding attorney's fees, improperly considered additional expenses incurred by the State resulting from plaintiff's decision to sue several individual defendants as well as the State, where a stipulation dismissing the individual defendants provided that each side would pay its own attorney's fees. *Wickwire v. State*, Op. No. 3116, 725 P2d 695 (Alaska 1986).

B. Prejudgment Interest

The phrase "judgment finally obtained" by the offeror" under this rule includes the amount assessed as prejudgment interest, does not require the prejudgment interest to be tacked onto the offer of judgment if the offer is accepted and does not require the trial court to compare the jury's verdict plus prejudgment interest with the defendant's offer of judgment plus prejudgment interest. *Davis v. Chism*, Op. No. 919, 513 P2d 475 (Alaska 1973).

Prejudgment interest is in the nature of compensatory damages. It is reasonable for the trial court to include that figure in its "judgment finally obtained by the offeror" and to compare that total to the amount of the offer of judgment in order to determine whether the offeror should pay the costs. *Davis v. Chism*, Op. No. 919, 513 P2d 475 (Alaska 1973).

The date of the offer, not the date of the ultimate judgment, is the critical time in determining whether the offer, including prejudgment interest, is sufficient to avoid the operation of this rule. *Davis v. Chism*, Op. No. 919, 513 P2d 475 (Alaska 1973).

Trial judge may properly, as an exercise of discretion, refuse to award offer of judgment on a judgment from the date of the offer through date of judgment when offeror ultimately recovers less than amount offered. *Continental Ins. Co. v. U.S. Fid. & Guar. Co.*, Op. No. 1298, 552 P2d 1122 (Alaska 1976).

A party who succeeds at trial but who rejected an offer of judgment which exceeded his trial recovery, is permitted to recover expenses and fees — including prejudgment interest, only from the date the cause of action accrues to the date of the rejected offer of judgment. *Farnsworth v. Steiner*, Op. No. 1955, 601 P2d 206 (Alaska 1979).

Since interest is not "costs," a successful offer of judgment does not terminate the running of prejudgment interest. *Farnsworth v. Steiner*, Op. No. 2454, 638 P2d 181 (Alaska 1981).

Rule 69. Execution—Examination of Judgment Debtor—Restraining Disposition of Property—Execution After Five Years.

(a) Execution — Discovery. Process to enforce a judgment shall be by a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with these rules and

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applicable statutes. In aid of the judgment or execution, the judgment creditor or his successor in interest, when that interest appears of record, may obtain recovery from any person, including the judgment debtor, in the manner provided in these rules.

(b) Examination of Judgment Debtor in Court.

(1) Before or after the issuing of an execution against property, the judgment debtor may be made to appear before the court, or before a master appointed by such court, at a time and place specified by an order, and to answer under oath all questions concerning property the judgment debtor has which may be subject to execution. The court may also order the debtor to bring to the examination documents concerning property which may be subject to execution.

(2) The examination may be reduced to writing and filed with the clerk by whom the execution was issued. Either party may examine witnesses in his behalf. If by such examination it appears that the judgment debtor has any property liable to execution the court shall make an order requiring the judgment debtor to apply the same in satisfaction of the judgment, or that such property be levied on by execution, or both, as may seem most likely to effect the object of the proceeding.

(c) Order Restraining Disposition of Property. At the time of allowing the order prescribed in subdivision (b)(1) of this rule or at any time thereafter pending the proceeding, the court may make an order restraining the judgment debtor from selling, transferring, or in any manner disposing of any of his property liable to execution pending the proceeding. For disobeying any order or requirement authorized by this rule the judgment debtor may be punished as for a contempt.

(d) Execution After Five Years. Whenever a period of five years shall elapse after the entry of a judgment without an execution being issued thereon, no execution shall issue except on order of the court in the following manner:

(1) The judgment creditor shall file a motion supported by affidavit with the court where the judgment is entered for leave to issue an execution. The motion and affidavit shall state the names of the parties to the judgment, the date of its entry, the reasons for failure to obtain the writ within five years after the entry of judgment and the amount claimed to be due thereon or the particular property of which possession was adjudged to the judgment creditor remaining undelivered.

(2) At any time after filing such motion and affidavit the judgment creditor may cause a summons to be served on the judgment debtor in accordance with the provisions of Rule 4. In the event the judgment debtor is deceased, the summons may be

served upon his representative. The summons shall state the amount claimed or the property sought to be recovered under the judgment.

(3) The judgment debtor, or, in the event of his death, his representative, may file and serve a verified answer to such motion within the time allowed to answer a complaint, alleging any defense to such motion which may exist. The judgment creditor may file and serve a verified reply to such answer. The judgment debtor waives all defenses and objections which he does not present by answer as herein provided.

(4) The order shall specify the amount for which execution is to issue, or the particular property possession of which is to be delivered.

(5) At the time of filing the motion for leave to issue execution or at any time thereafter before the final order is entered, the judgment creditor may cause the property of the judgment debtor to be attached and held during the time said motion is pending and until the final order is entered. Such attachment shall be made in accordance with these rules and applicable statutes, and for the purpose of such attachment the judgment shall be deemed an implied contract for the direct payment of money. In the event that the court shall order that execution be issued, it shall further order that any property of the judgment debtor attached hereunder shall be sold for the satisfaction of such execution and the peace officer shall apply the property attached by him or the proceeds thereof upon the execution.

(e) Multiple Executions.

(1) Only one original writ of execution and one original writ of execution for garnishment of earnings may be issued and outstanding at any one time except:

(a) An additional writ of execution may be issued while another is outstanding if either of the writs is to be served on the Department of Revenue to seize the debtor's Alaska Permanent Fund Dividend; or

(b) Additional writs may be issued if the creditor alleges facts by affidavit which show there is property which cannot be served by the process server holding an outstanding writ because the property is outside the community in which the process server is authorized to operate and there is good cause to believe the debtor may remove or dispose of the property unless immediate action is taken.

(2) A process server to whom a writ of execution is issued may make copies of the writ as necessary. However, no writ or copies may be transferred to another process server except within the same firm. If the creditor discovers property which could be seized under the writ in another community in which the original process server does not serve, the outstanding writ must be returned to the court so

that the clerk of court can cancel the first writ and issue a new writ to a process server serving the other community.

(f) **Return of Writ of Execution.** A process server who receives money as a result of a levy must deliver the money and a return of service to the court on the next day of business after receipt. The process server must file the original writ unless the money received by the server will satisfy only part of the judgment and the server expects to seize more money or property with the writ. In this situation, the process server may make a partial return by delivery to the court of all money received, a return of service and a copy of the writ. The original writ must be returned to the court when the process server no longer expects to seize more money or property with the writ.

(g) **Confirmation of Sale of Real Property on Execution — Objections — Disposition of Proceeds.**

(1) *Confirmation.* Where real property has been sold on execution the plaintiff in the writ of execution, on motion, is entitled to have an order confirming the sale, after the expiration of 10 days after the filing of the return of sale, unless the judgment debtor has filed objections to the sale within 10 days after the filing of the return of sale.

(2) *Objections.* If objections are filed the court shall determine at a hearing whether there were substantial irregularities in the proceedings of sale which caused probable loss or injury to the judgment debtor. If not, the order confirming the sale shall be granted. If so, the court shall deny the motion and direct that the property be resold, in whole or in part as upon an execution received of that date.

(3) *Disposition of Proceeds of Sale.* After entry of an order confirming the sale of real property, the clerk shall apply the proceeds of the sale, or so much thereof as may be necessary, in satisfaction of the judgment and costs. Any proceeds remaining shall be paid to the judgment debtor. Such payments shall be made prior to the entry of the order of confirmation if the judgment debtor files with the clerk a waiver of all objections made or to be made to the proceedings concerning the sale.

(Adopted by SCO 5 October 9, 1959; amended by SCO 56 effective November 1, 1963; by SCO 258 effective November 15, 1976; by SCO 465 effective June 1, 1981; by SCO 675 effective June 15, 1986; and by SCO 721 effective December 15, 1986)

Cross References

CROSS REFERENCES: AS 09.30.030; AS 09.35.010 — AS 09.35.330

- (a) CROSS REFERENCE: AS 09.35.010
- (b)(1) CROSS REFERENCES: AS 09.35.070 — AS 09.35.090
- (d)(1) CROSS REFERENCES: AS 09.35.020
- (d)(2) CROSS REFERENCES: AS 09.35.060
- (e)(1) CROSS REFERENCE: AS 09.35.180
- (e)(2) CROSS REFERENCES: AS 09.35.180

Annotations

Cases

Offset bid of \$2000 on a judgment of \$388.13 was a substantial irregularity having a natural tendency to deter the right to redress and was therefore a proper consideration in trial judge's decision to set aside execution sale. *Law Offices of Murphy L. Clark v. Altman*, Op. No. 2811, 680 P2d 1125 (Alaska 1984).

Rule 70. Judgment for Specific Acts— Vesting Title.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

(Adopted by SCO 5 October 9, 1959)

Annotations

Cases

An order pursuant to Civil Rule 70 compelling a vendor to comply with a purchaser's request was erroneous to the extent that it required more of the vendor than was required by the underlying judgment and agreement. *Byrnes v. Mercier*, Op. No. 1804, 590 P2d 906 (Alaska 1979).

Rule 71. Process in Behalf of and Against Persons Not Parties.

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party, and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

(Adopted by SCO 5 October 9, 1959)

Rule 72. Eminent Domain.

(a) **Applicability of Other Rules.** The procedure for the condemnation of property under the power of eminent domain shall be governed by these rules, except as otherwise provided in this rule.

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Revisor's notes. — Reorganized in 1986 to alphabetize the defined terms.

NOTES TO DECISIONS

"Person" is defined without regard to place of habitation. *Adams v. Pipeliners Union* 798, Sup. Ct. Op. No. 2936 (File No. S-181), 699 P.2d 343 (1985).

"Employer". — A federal credit union with membership open to military and civilian personnel at Elmendorf, Adak and Shemya military bases, members of the Air National Guard, senior members of the Civil Air Patrol, shareholders in 10 native regional corporations, and employees of certain contractors of Alyeska Pipeline Service Company was held to be an "employer" within the meaning of paragraph (4) of this section and not entitled to an exclusion as a "fraternal organization." *Alaska USA Fed. Credit Union v. Fridriksson*, Sup. Ct. Op. No. 2478 (File No. 5230), 642 P.2d 804 (1982).

Paragraph (12) does not include membership organizations. — Since paragraph (12) should not be construed to

encompass a membership organization such as the Jaycees, the exclusion of women from full membership in the Jaycees does not violate AS 18.80.230. *United States Jaycees v. Richardet*, Sup. Ct. Op. No. 2682 (File Nos. 5889, 5890), 666 P.2d 1008 (1983).

"Place". — According to the common and approved usage of the term "place," it would not encompass a service organization lacking a fixed geographical situs. *United States Jaycees v. Richardet*, Sup. Ct. Op. No. 2682 (File Nos. 5889, 5890), 666 P.2d 1008 (1983), construing paragraph (7) defining "public accommodation."

Applied in *Morris v. City of Soldotna*, Sup. Ct. Op. No. 1296 (File No. 2286), 553 P.2d 474 (1976).

Cited in *Brown v. Wood*, Sup. Ct. Op. No. 1551 (File Nos. 2564, 2565), 575 P.2d 760 (1978).

Chapter 85. Public Defender Agency.

Section

- 10. Public defender agency established
- 20. Administration
- 30. Appointment and term
- 40. Removal
- 50. Vacancy
- 60. Eligibility
- 70. Private practice prohibited
- 80. Delegation of functions
- 90. Agency staff
- 100. Right to representation, services and facilities

Section

- 110. Notice and provision for representation
- 120. Determination of indigency
- 130. Contracts with private attorneys
- 140. Waiver
- 150. Recovery from defendant
- 155. Payment by municipality
- 160. Records and reports
- 170. Definitions
- 180. Short title

Collateral references. — 21 Am. Jur. 2d, Criminal Law, §§ 809, 810.
23 C.J.S., Criminal Law, §§ 978, 979(1).

Construction and effect of statutes providing for office of public defender. 36 ALR3d 1403.

Sec. 18.85.010. Public defender agency established. There is created in the Department of Administration a Public Defender Agency to serve the needs of indigent defendants. (§ 1 ch 109 SLA 1969; am Executive Order No. 42 § 2 (1980))

NOTES TO DECISIONS

Applied in Alaska Pub. Def. Act (1978); Alaska Legal Servs. Corp. v. Agency v. Superior Court, Sup. Ct. Op. Thomas, Sup. Ct. Op. No. 2292 (File No. No. 1733 (File No. 3842), 584 P.2d 1106 4482), 623 P.2d 342 (1981).

Sec. 18.85.020. Administration. The agency is administered by the public defender. (§ 1 ch 109 SLA 1969)

Sec. 18.85.030. Appointment and term. The governor shall appoint the public defender from among two or more persons nominated for that position by the judicial council. The appointment is subject to confirmation by majority of the members of the legislature in joint session. The public defender shall serve a term of four years. If the governor decides to retain the public defender for another term the governor need not call for nominations from the judicial council; however, the retention must be approved by a majority of the members of the legislature in joint session. (§ 1 ch 109 SLA 1969)

Sec. 18.85.040. Removal. The public defender is subject to removal by the governor for good cause. If the public defender is removed, the governor shall submit to the legislature a report stating the reasons for removal. The report shall be submitted within 10 days after the action has been taken if the legislature is in session, or if the legislature is not in session, within 10 days after the convening of the next regular or special session. (§ 1 ch 109 SLA 1969)

Sec. 18.85.050. Vacancy. If the position of public defender becomes vacant for any reason, the governor may appoint an acting public defender to serve until the regular appointment procedures under AS 18.85.030 are complied with. The governor and the judicial council shall act under AS 18.85.030 as soon as possible after the vacancy occurs. A person appointed under that section to fill a vacancy begins a new four-year term. (§ 1 ch 109 SLA 1969)

Sec. 18.85.060. Eligibility. A person is not eligible to be the public defender or an assistant public defender unless admitted to the practice of law in this state or, with the approval of the Board of Governors of the Alaska Bar Association, in another state. (§ 1 ch 109 SLA 1969)

Sec. 18.85.070. Private practice prohibited. The public defender and assistant public defenders shall devote all of their time to the duties of their respective offices and may not engage in the practice of law except in their official capacities in the agency. (§ 1 ch 109 SLA 1969)

Sec. 18.85.080. Delegation of functions. The public defender may assign the functions vested in the public defender or in the agency to subordinate attorneys and employees. (§ 1 ch 109 SLA 1969)

Sec. 18.85.090. Agency staff. The public defender may appoint and remove assistant public defenders, clerks, investigators, stenographers and other employees the public defender considers necessary to enable the public defender to carry out the responsibilities of the public defender, subject to existing appropriations. Each person appointed to a subordinate position established by the public defender is under the supervision and control of the public defender. (§ 1 ch 109 SLA 1969)

Cross references. — For provisions the partially exempt service, see AS applicable to persons holding positions in 39.25.120(c)(5).

Sec. 18.85.100. Right to representation, services and facilities.
 (a) An indigent person who is being detained by a law enforcement officer in connection with a serious crime, or is under formal charge of having committed, or is being detained under a conviction of a serious crime, or is on probation or parole, or is entitled to representation under the Supreme Court Rules of Children's Procedure, or against whom commitment proceedings for mental illness have been initiated, is entitled

(1) to be represented by an attorney to the same extent as a person retaining an attorney is entitled; and

(2) to be provided with the necessary services and facilities of this representation, including investigation and other preparation.

(b) Subject to the provisions of AS 18.85.155, the attorney services and facilities and the court costs shall be provided at public expense to the extent that the person, at the time the court determines indigency, is unable to provide for payment without undue hardship. Appointment of any guardian ad litem or attorney shall be made under the terms of AS 25.24.310, to the extent that that section is not inconsistent with the requirements of this chapter. [§ 1 ch 109 SLA 1969; am § 1 ch 16 SLA 1974; am § 3 ch 167 SLA 1975; am § 1 ch 125 SLA 1984)

Effect of amendments. — The 1984 amendment added "Subject to the provisions of AS 18.85.155" at the beginning of the first sentence in subsection (b).

Opinions of attorney general. — If the individual is represented by the public defender agency pursuant to this section, AS 18.85.110(d) and 18.85.120 and if the

expense is a necessary incident of representation, then any necessary transportation expenses that may properly be authorized at public expense should be paid by the public defender agency pursuant to this section. October 7, 1977 Op. Att'y Gen.

If the individual is represented by a

running the courts, which are attributable to prosecutions initiated by the political subdivision. Since the cost of providing counsel seems indistinguishable from the cost of providing these judicial services, it should be treated in the same way. *Alexander v. City of Anchorage*, Sup. Ct. Op. No. 738 (File No. 1373), 490 P.2d 910 (1971).

A trial court cannot order Alaska Legal Services Corporation to reimburse the state for attorney's fees paid by the state to counsel appointed for an indi-

gent defendant when Alaska Legal Services represents the plaintiff. *Alaska Legal Servs. Corp. v. Thomas*, Sup. Ct. Op. No. 2292 (File No. 4482), 623 P.2d 342 (1981).

Tests to determine effectiveness of counsel. — See *McCracken v. State*, Sup. Ct. Op. No. 1028 (File No. 1498), 521 P.2d 499 (1974).

Quoted in *Flores v. Flores*, Sup. Ct. Op. No. 1875 (File No. 3832), 598 P.2d 893 (1979).

Sec. 18.85.110. Notice and provision for representation. (a) If a person having a right to representation under AS 18.85.100 is not represented by an attorney, the law enforcement officers concerned, upon commencement of detention, or the agency, or the court, as the case may be, shall

(1) clearly inform the person of the right of an indigent person to be represented by an attorney at public expense; and

(2) if the person detained or charged does not have an attorney, notify the agency or the court, as appropriate, that the person is not so represented.

(b) In (a) of this section "commencement of detention" includes the taking into custody of a probationer or parolee.

(c) Upon commencement of a later judicial proceeding relating to the same matter, the court shall clearly inform the person detained or charged of the right of an indigent person to be represented by an attorney at public expense.

(d) If a court determines that the person is entitled to be represented by an attorney at public expense, it shall promptly notify the agency or the office of public advocacy.

(e) Upon notification or assignment under this section, the agency or the office of public advocacy shall represent the person with respect to whom the notification or assignment is made.

(f) If the agency, before consideration by the court, determines that the person is entitled to be represented by an attorney at public expense, it shall promptly undertake representation. (§ 1 ch 109 SLA 1969; am §§ 9, 10 ch 55 SLA 1984)

Effect of amendments. — The 1984 amendment substituted "or the office of public advocacy" for "or assign a private attorney for him under AS 18.85.130" in subsection (d) and "or the office of public

advocacy" for "or assigned private attorney" in subsection (e).

Cross references. — For right to counsel, see Crim. Rules 5(c), 15(c) and 39.

NOTES TO DECISIONS

Applied in Alaska Legal Servs. Corp. v. Thomas, Sup. Ct. Op. No. 2292 (File No. 4482), 623 P.2d 342 (1981).

Quoted in Plant v. State, Ct. App. Op. No. 500 (File No. 7734, A-37), P.2d (1985).

Sec. 18.85.120. Determination of indigency. (a) The determination of a person's indigency shall be made by the court in which an action against the person is pending.

(b) In determining whether a person is indigent and in determining the extent of the person's inability to pay, the court shall consider such factors as income, property owned, outstanding obligations, and the number and ages of dependents. Release on bail does not preclude a finding that a person is indigent. In each case, the person, subject to the penalties for perjury, shall certify under oath, and in writing or by other record, material factors relative to the person's ability to pay that the court prescribes.

(c) To the extent that a person is able to provide for an attorney, the other necessary services and facilities of representation, and court costs, the court may order the person to pay for these items. The payments shall be paid into the state general fund.

(d) As a condition of receiving services under this chapter, a person shall affirm indigency under oath to the court and execute a general waiver authorizing the release to the court of income information regarding any income source the person has had for a period of three years immediately preceding the person's first court appearance in connection with each cause. At the conclusion of all services by the public defender to the person, the court shall upon request release to the attorney general all information received under this subsection except information that might incriminate or tend to incriminate the person. (§ 1 ch 109 SLA 1969; am § 2 ch 16 SLA 1974; am § 17 ch 208 SLA 1975)

Cross references. — For determining party's financial inability to employ counsel, see Crim. Rule 39(c).

Sec. 18.85.130. Contracts with private attorneys. When the public interest requires, and a person is entitled to representation by the agency under this chapter, the public defender may contract with one or more private attorneys to assist the public defender. Except as provided in AS 18.85.155, the public defender shall pay for these services out of appropriations to the agency. (§ 1 ch 109 SLA 1969; am § 3 ch 16 SLA 1974; am § 11 ch 55 SLA 1984; am § 2 ch 125 SLA 1984)

Cross references. — As to appointment of counsel, see C.im. Rule 39. As to compensation of court appointed attorneys, see Admin. Rule 15.

Effect of amendments. — The first 1984 amendment rewrote the catchline, which formerly read "Substitute defender," repealed former subsection (a), relating to the appointment of an attorney other than the public defender, and, in the

remaining language, deleted the subsection designation "(b)," and in the present first sentence deleted "In addition to substitution under (a) of this section" at the beginning and substituted "the public defender" for "him" at the end of the first sentence.

The second 1984 amendment added "Except as provided in AS 18.85.155" at the beginning of the last sentence.

NOTES TO DECISIONS

Applied in *Alaska Legal Servs. Corp. v. Thomas*, Sup. Ct. Op. No. 2292 (File No. 4482), 623 P.2d 342 (1981).

Sec. 18.85.140. Waiver. A person who has been appropriately informed under AS 18.85.100 may waive in writing, or by other record, any right provided by this chapter, if the court concerned, at the time of or after waiver, finds of record that the person has acted with full awareness of the person's rights and of the consequences of a waiver. The court shall consider such factors as the person's age, education, familiarity with the English language and the complexity of the crime involved in making the finding. (§ 1 ch 109 SLA 1969)

Sec. 18.85.150. Recovery from defendant. (a) A person who has received assistance under this chapter shall pay the state for the assistance if the person was not entitled to it at the time indigency was determined.

(b) The attorney general may bring an action on behalf of the state to recover payment from a person described in (a) of this section who refuses to make the payment. The action shall be brought within six years after the conclusion of the proceeding for which the assistance was provided.

(c) *[Repealed, § 5 ch 16 SLA 1974.]*

(d) Amounts recovered under this section shall be paid into the state general fund. (§ 1 ch 109 SLA 1969; am §§ 4, 5 ch 16 SLA 1974)

Sec. 18.85.155. Payment by municipality. (a) When a municipality prosecutes a person who has been determined by the court to be indigent under AS 18.85.120 for a violation of a municipal ordinance that is a serious crime, the municipality shall pay for the services of the attorney appointed by the court to defend the indigent person.

(b) A municipality shall provide for defense attorney services under (a) of this section by contracting with private attorneys or the Alaska Public Defender Agency or by establishing a municipal public defense agency.

(c) In a prosecution subject to this section, the court may order the defendant to pay to the municipality the costs of the attorney services and other court costs to the extent that the defendant is able to do so. (§ 3 ch 125 SLA 1984)

Sec. 18.85.160. Records and reports. (a) The public defender shall keep appropriate records respecting each needy person represented by the agency under this chapter.

(b) The public defender shall submit an annual report to the legislature and supreme court showing the number of persons represented under this chapter, the crimes involved, the outcome of each case, and the expenditures (totalled by kind) made in carrying out the responsibilities imposed on the agency by this chapter. (§ 1 ch 109 SLA 1969)

Sec. 18.85.170. Definitions. In this chapter

(1) "agency" means the public defender agency created by AS 18.85.010;

(2) "detain" means to have in custody or otherwise deprive of freedom of action;

(3) "expenses," when used with reference to representation under this chapter, includes an expense of investigation, other preparation, and trial;

(4) "indigent person" means a person who, at the time need is determined, does not have sufficient assets, credit, or other means to provide for payment of an attorney and all other necessary expenses of representation without depriving the party or the party's dependents of food, clothing or shelter and who has not disposed of any assets since the commission of the offense with the intent or for the purpose of establishing eligibility for assistance under this chapter;

(5) "serious crime" includes

(A) a criminal matter in which a person is entitled to representation by an attorney under the Constitution of the State of Alaska or the United States Constitution;

(B) an act that, but for the age of the person involved, would otherwise be a serious crime. (§ 1 ch. 109 SLA 1969)

NOTES TO DECISIONS

The public defender agency is to act in criminal matters, and a criminal matter under this section is one in which a person is entitled to representation either under the state or federal constitutions. *Public Defender Agency v. Superior Court*, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

"Serious crime". — Since an indigent

defendant is entitled to representation by counsel when prosecuted for an offense the direct penalty for which may be incarceration, loss of a valuable license, or a fine heavy enough to indicate criminality, it follows that any such offense is a serious matter and a "serious crime" within the meaning of the Public Defender Act (AS 18.85.010 et seq.). Therefore, a defen-

dant charged with any such misdemeanor who cannot afford to hire his own lawyer is eligible for representation by the public defender. *Alexander v. City of Anchorage*, Sup. Ct. Op. No. 738 (File No. 1373), 490 P.2d 910 (1971).

The supreme court has defined a "criminal prosecution" as any offense for which incarceration could be a direct penalty, and from this definition have flowed the rights to jury trial and court-appointed counsel in misdemeanor cases, based upon constitutional considerations. *Public Defender Agency v. Superior Court*, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

Under paragraph (5)(A), the public defender is empowered to represent an indigent defendant in a civil contempt for nonsupport proceedings. *Public Defender Agency v. Superior Court*, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

Although the legislature, at the time of enactment of this chapter, may not have foreseen the development of the law in the area of enforcement of child support orders and, therefore, might not have foreseen the precise application of this chapter to defendants in contempt for nonsupport proceedings, there is no indication that it intended to exclude this class of defendants from representation. *Public Defender Agency v. Superior Court*, Sup. Ct. Op. No. 1140 (File No. 2071), 534 P.2d 947 (1975).

The offense of harassment as defined in an ordinance was not a "serious crime" within the meaning of AS 18.85.170(5), where no provision had been made for imprisonment for violation of the ordinance and the maximum punishment was a \$100.00 fine; harassment did not connote traditional criminal conduct; and contemporary social values were not so offended as to cause the conduct involved to connote criminality in the constitutional sense. Therefore, the Alaska Public Defender Agency had no authority to represent a person who was accused of this offense. *Alaska Pub. Defender Agency v. Superior Court*, Sup. Ct. Op. No. 1733 (File No. 3842), 584 P.2d 1106 (1978).

Payment of costs. — Based upon AS 22.15.270, most of the major political subdivisions of the state have entered into contractual arrangements with the Alaska court system whereby the political subdivision has agreed to pay the salaries of the district judges, and all other costs of running the courts which are attributable to prosecutions initiated by the political subdivision. Since the cost of providing counsel seems indistinguishable from the cost of providing these judicial services, it should be treated in the same way. *Alexander v. City of Anchorage*, Sup. Ct. Op. No. 738 (File No. 1373), 490 P.2d 910 (1971).

Sec. 18.85.180. Short title. This chapter may be cited as the Public Defender Act. (§ 1 ch 109 SLA 1969)

Chapter 90. Alaska King Crab Marketing and Quality Control Act.

[Repealed, § 6 ch 106 SLA 1981. For current law see AS 16.51.010 — 16.51.180.]

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ORDER NO. _____

Amending Criminal Rule 39
concerning appointment of
counsel for indigents.

IT IS ORDERED:

Criminal Rule 39 is amended to provide:

Criminal Rule 39: Appointment of Counsel.

(a) Informing Defendant of Right to Counsel. The court shall advise a defendant who appears for arraignment or trial without counsel of the right to be represented by counsel, and ask if the defendant desires the aid of counsel. The court shall not allow a defendant to proceed without an attorney unless the defendant understands the benefits of counsel and knowingly waives the right to counsel.

(b) Appointment of Counsel for Persons Financially Unable to Employ Counsel.

(1) If the defendant desires the aid of counsel but claims a financial inability to employ counsel, the court shall inquire of the defendant under oath as to his or her financial status in order to determine whether the defendant is an "indigent person," as defined by statute. The court shall advise the

defendant that a judgment will* be issued against the defendant to cover the costs of an appointed counsel. As a condition of receiving the services of counsel at public expense, the defendant shall execute a general waiver authorizing release of income information to the court. The court also may require the defendant to sign an assignment of the defendant's permanent fund dividend check to the state and may enter such orders as appear reasonably necessary to prevent the defendant from fraudulently dissipating assets to avoid a repayment order.

(2) Information provided by the defendant concerning eligibility for appointed counsel may not be used against the defendant in any criminal proceedings, except that such information may be used in a prosecution for perjury or at a hearing for determining the defendant's ability to pay a fine or make restitution. Upon request, the defendant must be allowed to present the requested financial information in a confidential setting, outside the presence of the prosecuting attorney. The court may have the financial inquiry conducted by pretrial services.

(3) If the court determines that the defendant is an "indigent person," the

* The alternative draft, under which the court would hold an "ability to pay" hearing if requested before imposing costs, would substitute "may" for "will" here.

court shall appoint counsel pursuant to Administrative Rule 12 and notify counsel of the appointment. The court may require the defendant to attempt to arrange private representation before making a final decision on indigency.

(4) In the absence of a request by a defendant otherwise entitled to appointment of counsel, the court shall appoint counsel unless the court finds that the defendant understands the benefits of counsel and knowingly waives the right to counsel.

(5) If the trial court denies the defendant's request for appointed counsel, the defendant may request review of this decision by the presiding judge of the judicial district by filing a motion with the trial court within three days of the trial court's denial of representation. The trial court shall forward the motion, relevant materials from the court file and a cassette tape of any relevant proceedings to the presiding judge. The presiding judge or his or her designee shall issue a decision within three days of receipt of these materials.

(c) Cost of Counsel.

(1) At the conclusion of the criminal proceedings in the trial court, the court or the clerk shall issue a judgement against a defendant represented by appointed

counsel for the cost of representation. The cost of appointed counsel will be determined by reference to the fee schedule in paragraph (e).**

(2) The court may require payment in installments or in any manner which the court finds is reasonable. The judgment of repayment must be in writing and a copy must be provided to the defendant.

(3) All proceedings to enforce a repayment judgment are civil in nature. The judgment has the same force and effect as a judgment in a civil action in favor of the prosecuting authority and is subject to execution. The judgment is not enforceable by contempt, nor may repayment be made a condition

** The alternative draft would replace this subparagraph with two subparagraphs which would provide:

(1) At the beginning or conclusion of the criminal proceedings in the trial court, the court may order a defendant represented by appointed counsel to pay all or part of the costs of representation in an amount not to exceed the defendant's ability to pay for these costs. The cost of appointed counsel will be determined by reference to the fee schedule in paragraph (e). A defendant with only a partial ability to pay costs may be ordered to pay one-half of the amount specified in the fee schedule.

(2) Prior to entering an order of repayment, the court shall advise the defendant that he or she may present testimonial and documentary evidence concerning an ability to pay for representation.

of a defendant's probation. Default or failure to make repayment may not affect or reduce the rendering of services on appeal or any other phase of the defendant's case in any way. The defendant does not have a right to be represented by appointed counsel in connection with any repayment proceeding.

(d) Appointment in the Interest of Justice. The court may appoint counsel for a criminal defendant in any case in which appointment best serves the interest of justice.

(e) Cost of Representation Schedule. The following schedules govern the assessment of the cost of representation under subparagraph (c)(1):

Misdemeanors

Trial	\$ 500.00
Change of plea	200.00
Dismissal after substantive motion	200.00
Dismissal without substantive motion	50.00

Felonies

Final Disposition	Class B & C	Class A and Unclassified (Except Murder)	Murder in the 1st and 2nd Degrees
Trial	1,500	2,500	5,000
Change of plea after substantive motion work and hearing	1,000	1,500	2,500
Dismissal after substantive motion work and hearing	500	1,000	2,000
Change of plea post-indictment but prior to substantive motion work and hearing	500	1,000	2,000
Change of plea prior to indictment	300		
Dismissal without substantive motion	200		

DATED: _____

EFFECTIVE DATE: _____

Chief Justice Matthews

Justice Rabinowitz

Justice Burke

Justice Compton

Justice Moore

IN THE SUPREME COURT FOR THE STATE OF ALASKA

ORDER NO. _____

Amending Appellate Rule 209(b)
concerning appointment of
counsel for indigents in
criminal appeals.

IT IS ORDERED:

Appellate Rule 209(b) is amended to provide:

(b) Criminal Matters.

(1) In criminal matters the trial court shall authorize appeals by appointed counsel in accordance with Criminal Rule 39 and Administrative Rule 12 [AT PUBLIC EXPENSE ON BEHALF OF PERSONS FINANCIALLY UNABLE TO PAY THE COSTS OF APPEAL IN ACCORDANCE WITH THE RULES AND DECISIONS OF THE APPELLATE COURTS OF ALASKA AND WHERE SUCH APPEALS ARE REQUIRED TO BE PROVIDED BY STATE COURTS BY DECISIONS OF THE SUPREME COURT OF THE UNITED STATES]. Where such appeals are authorized [BY THE TRIAL COURT] the costs which shall be borne at public expense [BY THE STATE SHALL] include those of providing counsel and of preparing a transcript and briefs. [CRIMINAL RULE 39 SHALL BE FOLLOWED IN MAKING THE DETERMINATION OF FINANCIAL INABILITY.]

(2) A defendant authorized to proceed at public expense in the trial court is presumed to be entitled to proceed at public expense on appeal.

(3) The action of the trial court in authorizing or declining to authorize an appeal at public expense is reviewable by a motion in the appellate court, ancillary to the appeal.

(4) Counsel appointed to represent the defendant in the trial court pursuant to Criminal Rule 39 shall remain as appointed counsel throughout an appeal at public expense authorized under this subdivision and shall not be permitted to withdraw except upon the grounds authorized in Administrative Rule 12. In addition, an attorney appointed by the court under Administrative Rule 12(b)(1)(B) will be permitted to withdraw upon a showing that either the public defender agency or the office of public advocacy is able to represent the defendant on appeal. If an appeal is to be taken, in no event will trial counsel be permitted to withdraw until the notice of appeal and the documents required to be filed therewith by Rule 204(b) have been accepted for filing by the clerk of the trial courts [COMPELLING REASONS].

(5)* At the conclusion of the appellate proceeding, the Appellate clerk shall issue a judgment against a defendant represented by appointed counsel for the cost of representation on appeal. The cost of

* This paragraph would be deleted in the alternative version.

representation will be determined based on the following schedule:

<u>Type of Appellate Proceeding</u>	<u>Misdemeanor</u>	<u>Felony</u>
<u>Sentence Appeal</u>	<u>250</u>	<u>500</u>
<u>Merit Appeal</u>	<u>750</u>	<u>1,500</u>
<u>Combined Merit and Sentence Appeal</u>	<u>1,000</u>	<u>2,000</u>
<u>Other Appellate Actions</u> <u>(Petition for Review, Petition for Hearing, etc.)</u>	<u>500</u>	<u>1,000</u>

DATED: _____

EFFECTIVE DATE: _____

Chief Justice Matthews

Justice Rabinowitz

Justice Burke

Justice Compton

Justice Moore

S B

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STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

February 1, 1990

SUBJECT: Attorney fees in limited partnership deriva-
tive actions
(Work Order No. 6-2049)

TO: Senator Pat Rodey

FROM: Theresa L. Bannister *TLB*
Legislative Counsel

This memo accompanies the draft of the bill that you requested to add certain derivative action provisions to AS 32.10, the state's Uniform Limited Partnership Act. Please note that in light of Alaska's rule of awarding attorney fees to the prevailing party, I amended the suggested provision to delete the authorization to award attorney fees and retained the provision directing the court to require the plaintiff to turn over the settlement or court proceeds to the limited partnership after deduction of the attorney fees. If this is not what you intended or if you need other assistance with the draft, please advise.

TLB:pl
WKP1/058

Enclosure

LAW OFFICES OF
MILLARD F. INGRAHAM, P.C.

MILLARD F. INGRAHAM

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ANCHORAGE, ALASKA 99501

(907) 276-1863
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October 12, 1989

Senator Pat Rodey
Chair, Senate Committee
on Banking and Finance
3111 C Street, Suite 510
Anchorage, AK 99503

Dear Senator Rodey:

Since at least 1949 Alaska has had in effect the Uniform Limited Partnership Act (ULPA), AS 32.10.010-290. In 1976 the Commissioners on Uniform State Law completely revised the Act and in 1983 and 1985 made further substantial amendments to the 1976 revision. According to Note, The Status of Enforcing Fiduciary Duties in a Limited Partnership After Dupuis v. Becnel Co., 49 La.L.Rev. 1217, 1222 n.32 (1989) as of January 1, 1989 thirty-eight jurisdictions had adopted the revised Uniform Limited Partnership Act (RULPA).

I am not sufficiently familiar with business law to understand the reasons for all of the changes made by the revision or by the amendments to the revision, but I am aware of at least one problem created by the original ULPA which was remedied by the revision. That problem is how may the limited partners in a limited partnership enforce the fiduciary duties owed to them by the general partner. Some courts have held the limited partners have no remedy against mismanagement or other breach of fiduciary duty by the general partner except to sue for dissolution of the partnership or to withdraw from the partnership upon six months notice. This result was reached by a combination of the common law rule barring suits among partners prior to the dissolution of the partnership and the wording of Section 26 of the ULPA, AS 32.10.250, that a contributor, unless the contributor is a general partner, is not a proper party to a proceeding by or against a partnership. In the 1960's some courts began to allow derivative actions by limited partners on behalf of the partnership against the general partner to enforce the general partner's fiduciary duties. These courts held that such actions should be allowed by analogizing the position of the limited partner to a shareholder in a corporation. Shareholders had always had the right to enforce directors' fiduciary duties to the shareholders by means of a derivative action. The Alaska Supreme Court has not yet addressed the issue of whether it will allow a derivative action by a limited partner on behalf of the partnership to enforce the fiduciary obligations of the general partner to the limited partners.

Senator Pat Rodey
October 12, 1989
Page 2

If for no reason other than that the RULPA permits derivative actions by the limited partners, Secs. 1001-1004, the Alaska Legislature should adopt the revision made by the Commissioners on Uniform State Law in 1976 and the amendments to the revision in 1983 and 1985. Since limited partnerships are used so extensively to finance real estate investments, your committee seemed to be the appropriate one to address the revision and its amendments.

I am enclosing a copy of the original Uniform Limited Partnership Act (which is substantially the Alaska Act) the 1976 Uniform Limited Partnership Act, the 1983 amendment and the 1985 amendments. These copies were taken from VIII Martindale-Hubbell Law Directory. I am also enclosing a copy of a portion of Note, The Status of Enforcing Fiduciary Duties in a Limited Partnership After Dupuis v. Becnel Co., 49 La.L.Rev. 1217 (1989), containing an excellent historical overview of the rights of a limited partner against a general partner at common law and under ULPA. If you have any questions or comments I would be happy to address them.

I am sending a copy of this letter to John Abbott, of the Code Revision Commission, for his review and comments.

Yours very truly,



Millard F. Ingraham

MFI/jnr30

xc: John Abbott

Enclosure

The Status of Enforcing Fiduciary Duties in a Limited Partnership After *Dupuis v. Becnel Co.*

Louisiana courts have adhered to the traditional rule barring suits among partners prior to dissolution. Louisiana jurisprudence adopted this rule from the common law states, where the rule still exists in the area of general partnerships. Our courts have applied this rule to both general partnerships and to limited partnerships, without consideration of the clear differences between the two forms of business associations. In a recent decision, however, the Louisiana Supreme Court abrogated this rule and expressly overruled all prior cases which had held that a partner was barred from maintaining an action prior to the dissolution of the partnership.

The case, *Dupuis v. Becnel Co.*,¹ involved a Louisiana limited partnership formed as part of a commercial real estate transaction. Five years after formation, the limited partners brought an action against the general partners, alleging among other claims that the general partners had breached their fiduciary duties. The limited partners sought damages for the general partners' actions or, in the alternative, a dissolution and an accounting of the partnership. The general partners defended the claim for damages by asserting the traditional rule barring actions between partners prior to dissolution.²

The Louisiana Third Circuit Court of Appeal, applying the traditional rule, held that the action by the limited partners was barred prior to dissolution.³ The court recognized that other Louisiana circuits had developed exceptions to the traditional rule,⁴ but chose not to follow those decisions. The proper remedy for the limited partners, said the court, was a proceeding for dissolution and accounting, not an action for damages against the general partners.

On review, the Louisiana Supreme Court unanimously overruled the court of appeal's decision and, in doing so, abolished the traditional rule barring suits between partners. Writing for the court, Justice

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1. 535 So. 2d 375 (La. 1988).

2. The general partners also argued that the limited partners could not withdraw by forcing a dissolution because the partnership had been formed for a thirty-five year term.

3. *Dupuis v. Becnel Co.*, 527 So. 2d 18 (La. App. 3 Cir. 1988).

4. *Beninate v. Bruno*, 497 So. 2d 1022 (La. App. 5th Cir. 1986); *Dohm v. O'Keefe*, 458 So. 2d 964 (La. App. 4th Cir.), writ denied, 460 So. 2d 1046 (1984).

Watson stated that since no statutory authority supported the rule, it "must fall."⁵

While the result reached in *Dupuis* may seem correct and in keeping with a nationwide trend, the reasoning of the court is open to criticism. *Dupuis* presented an opportunity for the court to clear up the confusion regarding the enforcement of fiduciary duties. But instead of formulating a policy for lower courts to follow, the *Dupuis* decision poses more questions than answers.

The purpose of this note is to analyze the abrogation of the traditional rule and its effects on Louisiana partnership law. The analysis begins with the history of the rule in Louisiana and in other states. Next, the *Dupuis* decision is discussed. Finally, a better method of enforcing fiduciary duties with regard to limited partnerships will be suggested.

HISTORICAL OVERVIEW

Rights of a Limited Partner at Common Law

Because limited partnerships can be traced to early French law, it is not surprising that its origin in the United States did not begin in the common law states.⁶ Louisiana was the first state to adopt the limited partnership concept.⁷ The concept was soon embraced by other states, the first being New York in 1822.⁸ The courts, however, strictly interpreted and enforced the enabling legislation. The slightest deviation from the terms of the enabling statute⁹ exposed limited partners to unlimited liability. This state of affairs quite naturally diminished the attractiveness of the limited partnership.

The Uniform Limited Partnership Act (ULPA) was introduced in 1916 to remedy the courts' harsh treatment of limited partners.¹⁰ The ULPA made great strides in protecting the limited partner from un-

5. *Dupuis*, 535 So. 2d at 378.

6. Limited partnerships can be traced to the twelfth century. They developed as a means for capitalists to enjoy a passive investment with limited liability. From this early concept, the modern notion of limited partnership evolved. For a good discussion on the history of limited partnerships, see Comment, Standing of Limited Partners to Sue Derivatively, 65 Colum. L. Rev. 1463 (1965) [hereinafter Comment, Standing of Limited Partners], and Comment, An Examination of Louisiana Limited Partnership—The Partnership in Commendam, 55 Tul. L. Rev. 515 (1981).

7. See Comment, Partnership in Commendam—Louisiana's Limited Partnership, 35 Tul. L. Rev. 815, 817 (1961) [hereinafter Comment, Partnership in Commendam]; Comment, Standing of Limited Partners, *supra* note 6.

8. Comment, Standing of Limited Partners, *supra* note 6, at 1464.

9. *Id.*

10. *Id.* at 1465.

limited personal liability in certain parts in restraining their the permissive act partners from taking unlimited liability without fear of i of power created mismanagement.¹¹ refused any effective advantage of the ULPA was interpreted party in a suit for limited partner authority but lack for mismanagement he could sue for upon six months much protection

11. Uniform Limited Partnership Act (ULPA) gave the right to demand a formal accounting by court order, and allowed the limited partner to demand the return of the limited partner's property.

12. ULPA § 7 p

A limited partner to the exercise of the control of the partnership.

13. See Comment of the General Partnership.

14. ULPA § 26

A contributor, whether by or against a partner's right to demand the return of the limited partner's property.

15. ULPA § 16

(1) A limited partner may not demand the return of any property.

(a) All liability to limited partner remains property.

(b) The consent may be rightful.

(c) The certificate or reduction.

(2) Subject to the demand the return.

(a) On the demand.

limited personal liability by expressly allowing limited partners to take part in certain partnership transactions without violating the provision restraining their management of the partnership.¹¹ However, beyond the permissive activities of the ULPA, section 7 forbade the limited partners from taking part in control of the partnership at the risk of unlimited liability.¹² The general partners could control the business without fear of interference from the limited partners. This division of power created ample opportunities for fraudulent self-dealing and mismanagement.¹³ To make matters worse, the limited partner was refused any effective judicial relief when the general partner took advantage of the opportunities for misconduct, for section 26 of the ULPA was interpreted as barring a limited partner from being a proper party in a suit for damages against the general partner.¹⁴ This left the limited partner unable to protect his investment because of his limited authority but lacking procedural capacity to sue the general partner for mismanagement. The limited partner had only two options: either he could sue for dissolution of the partnership or he could withdraw upon six months notice.¹⁵ Neither remedy offered the limited partner much protection in the interim.

11. Uniform Limited Partnership Act [hereinafter ULPA] § 10 gave limited partners the right to demand information through inspection of the partnership books, to demand a formal accounting under certain circumstances, to seek a dissolution of the partnership by court order, and to share in the profits by way of a salary or income. ULPA § 13 allowed the limited partner to loan money and transact other business with the partnership.

12. ULPA § 7 provides:

A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business.

13. See Comment, Procedures and Remedies in Limited Partners' Suits for Breach of the General Partner's Fiduciary Duty, 90 Harv. L. Rev. 763 (1977).

14. ULPA § 26 provides:

A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership.

15. ULPA § 16 provides in pertinent part:

(1) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until

(a) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them,

(b) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of paragraph (2), and

(c) The certificate is cancelled or so amended as to set forth the withdrawal or reduction,

(2) Subject to the provisions of paragraph (1) a limited partner may rightfully demand the return of his contribution

(a) On the dissolution of a partnership, or

the case of *Klebanow v. New York Produce Exchange*.¹⁹ *Klebanow* involved a suit brought by limited partners on behalf of the partnership to enforce the fiduciary duties owed by the general partners to the partnership. The general partners had refused to maintain an action because they themselves would be included as defendants. The federal district court dismissed the action, citing the New York version of section 26 of the ULPA. By strictly construing this law, as had most courts interpreting section 26, the court concluded that the limited partners could not sue the general partners for mismanagement so long as the partnership existed.²⁰

The Second Circuit refused to interpret the New York provision so narrowly and reversed the lower court's decision.²¹ Judge Friendly, writing for the court, read the New York version of section 26 to mean only that limited partners need not be joined in an action by or against the partnership.²² The judge also stated that another intended purpose of section 26 was to restrain limited partners from interfering in management of the business.²³ This reading allowed the possibility of a derivative action by the limited partners.

The judge concluded that a limited partner derivative action was the best alternative. First, Judge Friendly likened a limited partner to a corporate shareholder. Both expect to share in the profits of the business; both are subordinated to outside creditors; and both enjoy limited control of the business through their authority to vote on internal matters. The telling difference between the two types of investors was that while the shareholder could bring an action on behalf of the corporation against those who controlled, the directors, the limited partners had no similar right against those who controlled the limited partnership, the general partners. Judge Friendly next recognized that both investors take the risk of self-dealing and mismanagement by those in control of the entity; however, while the corporate shareholder could seek redress through a derivative action, the limited partners' only remedy was withdrawal or dissolution. Dissolution, however, is often an expensive way to enforce fiduciary duties.²⁴ Furthermore, withdrawing from the partnership when there were still existing claims meant that the withdrawing partner would receive too little for his interest. The only sensible solution to the difficulties limited partners faced, concluded Judge Friendly, was a partnership derivative action.

19. 344 F.2d 294 (2d Cir. 1965). See also Comment, *supra* note 13 for a discussion of the *Klebanow* decision.

20. N.Y. Partnership Law § 115 (McKinney 1988).

21. *Klebanow*, 344 F.2d at 298.

22. *Id.*

23. *Id.*

24. See *infra* note 53 and accompanying text.

The limited partners were allowed to pursue claims on behalf of the partnership, with any recovery being paid directly to the partnership.

Initially, the New York courts did not follow *Klebanow*.²⁵ But the issue was ultimately settled in *Riviera Congress Associates v. Yassky*.²⁶ Here, the highest court of New York held that a limited partner may sue derivatively when the general partners wrongfully failed to enforce partnership claims. The *Riviera* court interpreted section 26 as only restraining the limited partners from interfering with the rights of the general partners to manage the business.²⁷ Next, the court followed Judge Friendly's analogy of the limited partner to the corporate shareholder and found that the limited partner required protection from mismanagement just as the shareholder. To reconcile this new right with its interpretation of section 26, the court reasoned that when the general partners wrongfully refuse to pursue proper claims of the partnership, they are not carrying out their duties to manage the business. Therefore, concluded the court, a derivative action did not interfere with the management of the partnership. Although the court's reasoning was rather weak, the *Riviera* decision set the course for subsequent decisions recognizing the right of a limited partner to bring a derivative action.²⁸

After the *Klebanow* and *Riviera* decisions, both New York and Delaware amended their partnership laws to give limited partners the statutory right under certain circumstances to sue on behalf of the partnership.²⁹ The 1976 Revised Uniform Limited Partnership Act (RULPA) incorporated similar provisions.³⁰ In effect, these new provisions allow a limited partner to maintain a derivative action, a procedure that resembles Rule 23.1 of the Federal Rules of Civil Procedure and similar state laws.³¹ Presently, thirty-nine states have adopted a version of these provisions of the RULPA.³²

25. *Millard v. Newmark & Co.*, 24 A.D.2d 333, 266 N.Y.S.2d 254 (1966).

26. 18 N.Y.2d 540, 223 N.E.2d 876 (Ct. App. 1966).

27. *Id.* at 543, 223 N.E.2d at 879.

28. *Phillips v. Kula*, 2 Haw. App. 206, 629 P.2d 119 (1981); *McCully v. Radack*, 27 Md. App. 350, 340 A.2d 374 (1975); *Jaffe v. Harris*, 109 Mich. App. 786, 312 N.W.2d 381 (1981); *Strain v. Seven Hills Assocs.*, 75 A.D.2d 360, 429 N.Y.S.2d 424 (1980).

29. N.Y. Partnership Law § 115 (McKinney 1968); Del. Code Ann. tit. 6, § 1-32 (1974).

30. RULPA §§ 1001-04 (1976).

31. Fed. R. Civ. P. 23.1. A listing of state provisions can be found in DeMott, *Demand in Derivative Actions: Problems of Interpretation and Function*, 19 U.C.D. L. Rev. 461, 463-64 n.3 (1986).

32. Thirty-eight jurisdictions have adopted the RULPA as of Jan. 1, 1959. New York has not incorporated the Act but allows for a derivative action by a similar statute. N.Y. Partnership Law § 115-a (McKinney 1968). Indiana, a state not adopting the Act, has prospectively repealed their § 26 statute. Ind. Code Ann. § 23-2-26 to be abrogated on July 7, 1993.

Harsh Treatment

Louisiana has ULPA that denies courts applied there where partners are of the relationship 1821 in Louisiana partners was adopted

Our courts are a different view of partnership a partnership enjoy common law tradition of personal relationship theory. The partnership its individual motivations for the rule the rule should be

This rule still to general partnership the context of a partnership enjoy the between the usual event of a lawsuit longer exists, and remain in business before allowing a

It is also possible to bar suits among The courts would partnership dispute rule could have been partnership if the partnership

The most protection creditors. If a partnership, to the recovering

33. *Dromgoole v.*

34. *Clay v. Grub*

35. Other reasons an action between partnership partner were allowed 322, 325 (1841); *Ivy*

UNIFORM LIMITED PARTNERSHIP ACT

(Note: This Act was superseded by the Uniform Limited Partnership Act (1976), which was, together with its 1983 Amendments, in turn, superseded by the Uniform Limited Partnership Act (1976) with 1985 Amendments.)

§ 1. Limited Partnership Defined.—A limited partnership is a partnership formed by two or more persons under the provisions of §2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.

§ 2. Formation.—(1) Two or more persons desiring to form a limited partnership shall:

- (a) Sign and swear to a certificate, which shall state:
 - I. The name of the partnership,
 - II. The character of the business,
 - III. The location of the principal place of business,
 - IV. The name and place of residence of each member, general and limited partners being respectively designated,
 - V. The term for which the partnership is to exist,
 - VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,
 - VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,
 - VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned,
 - IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,
 - X. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,
 - XI. The right, if given, of the partners to admit additional limited partners,
 - XII. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority,
 - XIII. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and
 - XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.
- (b) File for record the certificate in the office of [here designate the proper office].

(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph (1).

§ 3. Business Which May Be Carried On.—A limited partnership may carry on any business which a partnership without limited partners may carry on, except [here designate the business to be prohibited].

§ 4. Character of Limited Partner's Contribution.—The contributions of a limited partner may be cash or other property, but not services.

§ 5. A Name Not to Contain Surname of Limited Partner; Exceptions.—(1) The surname of a limited partner shall not appear in the partnership name, unless:

- (a) It is also the surname of a general partner, or
 - (b) Prior to the time when the limited partner became such the business had been carried on under a name in which his surname appeared.
- (2) A limited partner whose name appears in a partnership name contrary to the provisions of paragraph (1) is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner.

§ 6. Liability for False Statements in Certificate.—If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false:

- (a) At the time he signed the certificate, or
- (b) Subsequently, but within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate, or to file a petition for its cancellation or amendment as provided in §25 (3).

§ 7. Limited Partner Not Liable to Creditors.—A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business.

§ 8. Admission of Additional Limited Partners.—After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of §25.

§ 9. Rights, Powers and Liabilities of a General Partner.—(1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to:

- (a) Do any act in contravention of the certificate,
- (b) Do any act which would make it impossible to carry on the ordinary business of the partnership,
- (c) Confess a judgment against the partnership,
- (d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose,
- (e) Admit a person as a general partner,

(f) Admit a person as a limited partner, unless the right so to do is given in the certificate,

(g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

§ 10. Rights of a Limited Partner.—(1) A limited partner shall have the same rights as a general partner to:

- (a) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them;
- (b) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable, and
- (c) Have dissolution and winding up by decree of court.

(2) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in §§15 and 16.

§ 11. Status of Person Erroneously Believing Himself a Limited Partner.—A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income.

§ 12. One Person both General and Limited Partner.—(1) A person may be a general partner and a limited partner in the same partnership at the same time.

(2) A person who is a general, and also at the same time a limited partner, shall have all the rights and powers and be subject to all the restrictions of a general partner; except that, in respect to his contribution, he shall have the rights against the other members which he would have had if he were not also a general partner.

§ 13. Loans and Other Business Transactions with Limited Partner.—(1) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. No limited partner shall, in respect to any such claim:

- (a) Receive or hold as collateral security any partnership property, or
- (b) Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners,

(2) The receiving of collateral security, or a payment, conveyance, or release in violation of the provisions of paragraph (1) is a fraud on the creditors of the partnership.

§ 14. Relation of Limited Partners Inter Se.—Where there are several limited partners the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made it shall be stated in the certificate, and in the absence of such a statement all the limited partners shall stand upon equal footing.

§ 15. Compensation of Limited Partner.—A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partners, except liabilities to limited partners on account of their contributions and to general partners.

§ 16. Withdrawal or Reduction of Limited Partner's Contribution.—(1) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until:

- (a) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them,
- (b) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of paragraph (2), and
- (c) The certificate is cancelled or so amended as to set forth the withdrawal or reduction.

(2) Subject to the provisions of paragraph (1) a limited partner may rightfully demand the return of his contribution

- (a) On the dissolution of a partnership, or
- (b) When the date specified in the certificate for its return has arrived, or
- (c) After he has given six months' notice in writing to all other members, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership,

(3) In the absence of any statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of his contribution, has only the right to demand and receive cash in return for his contribution.

(4) A limited partner may have the partnership dissolved and its affairs wound up when

(a) He rightfully but unsuccessfully demands the return of his contribution, or

(b) The other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required by paragraph (1a) and the limited partner would otherwise be entitled to the return of his contribution.

§ 17. *Liability of Limited Partner to Partnership.*—(1) A limited partner is liable to the partnership:

(a) For the difference between his contribution as actually made and that stated in the certificate as having been made, and

(b) For any unpaid contribution which he agreed in the certificate to make in the future at the time and on the conditions stated in the certificate.

(2) A limited partner holds as trustee for the partnership:

(a) Specific property stated in the certificate as contributed by him, but which was not contributed or which has been wrongfully returned, and

(b) Money or other property wrongfully paid or conveyed to him on account of his contribution.

(3) The liabilities of a limited partner as set forth in this section can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partnership, who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities.

(4) When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return.

§ 18. *Nature of Limited Partner's Interest in Partnership.*—A limited partner's interest in the partnership is personal property.

§ 19. *Assignment of Limited Partner's Interest.*—(1) A limited partner's interest is assignable.

(2) A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned his interest in a partnership.

(3) An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled.

(4) An assignee shall have the right to become a substituted limited partner if all the members (except the assignor) consent thereto or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.

(5) An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with §25.

(6) The substituted limited partner has all the rights and powers, and is subject to all the restrictions and liabilities of his assignor, except those liabilities of which he was ignorant at the time he became a limited partner and which could not be ascertained from the certificate.

(7) The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under §§6 and 17.

§ 20. *Effect of Retirement, Death or Insanity of a General Partner.*—The retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners:

(a) Under a right so to do stated in the certificate, or

(b) With the consent of all members.

§ 21. *Death of Limited Partner.*—(1) On the death of a limited partner his executor or administrator shall have all the rights of a limited partner for the purpose of settling his estate, and such power as the deceased had to constitute his assignee a substituted limited partner.

(2) The estate of a deceased limited partner shall be liable for all his liabilities as a limited partner.

§ 22. *Rights of Creditors of Limited Partner.*—(1) On due application to a court of competent jurisdiction by any judgment creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt, and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require.

(2) The interest may be redeemed with the separate property of any general partner, but may not be redeemed with partnership property.

(3) The remedies conferred by paragraph (1) shall not be deemed exclusive of others which may exist.

(4) Nothing in this act shall be held to deprive a limited partner of his statutory exemption.

§ 23. *Distribution of Assets.*—(1) In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:

(a) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners,

(b) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions,

(c) Those to limited partners in respect to the capital of their contributions,

(d) Those to general partners other than for capital and profits,

(e) Those to general partners in respect to profits,

(f) Those to general partners in respect to capital.

(2) Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims.

§ 24. *When Certificate Shall be Cancelled or Amended.*—(1) The certificate shall be cancelled when the partnership is dissolved or all limited partners cease to be such:

(2) A certificate shall be amended when:

(a) There is a change in the name of the partnership or in the amount or character of the contribution of any limited partner,

(b) A person is substituted as a limited partner,

(c) An additional limited partner is admitted,

(d) A person is admitted as a general partner,

(e) A general partner retires, dies or becomes insane, and the business is continued under §20.

(f) There is a change in the character of the business of the partnership,

(g) There is a false or erroneous statement in the certificate,

(h) There is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution,

(i) A time is fixed for the dissolution of the partnership, or the return of a contribution, no time having been specified in the certificate, or

(j) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them.

§ 25. *Requirements for Amendment and for Cancellation of Certificate.*—(1) The writing to amend a certificate shall:

(a) Conform to the requirements of §2 (1a) as far as necessary to set forth clearly the change in the certificate which it is desired to make, and

(b) Be signed and sworn to by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

(2) The writing to cancel a certificate shall be signed by all members.

(3) A person desiring the cancellation or amendment of a certificate, if any person designated in paragraphs (1) and (2) as a person who must execute the writing refuses to do so, may petition the [here designate the proper court] to direct a cancellation or amendment thereof.

(4) If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the [here designate the responsible official in the office designated in §2] in the office where the certificate is recorded to record the cancellation or amendment of the certificate; and where the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree setting forth the amendment.

(5) A certificate is amended or cancelled when there is filed for record in the office [here designate the office designated in §2] where the certificate is recorded:

(a) A writing in accordance with the provisions of paragraph (1), or (2) or

(o) A certified copy of the order of court in accordance with the provisions of paragraph (4).

(6) After the certificate is duly amended in accordance with this section, the amended certificate shall thereafter be for all purposes the certificate provided for by this Act.

§ 26. *Parties to Actions.*—A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership.

§ 27. *Name of Act.*—This Act may be cited as the Uniform Limited Partnership Act.

§ 28. *Rules of Construction.*—(1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this Act.

(2) This Act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(3) This Act shall not be so construed as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action on proceedings begun or right accrued before this act takes effect.

§ 29. *Rules for Cases not Provided for in this Act.*—In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

§ 30. *Provisions for Existing Limited Partnerships.*—(1) A limited partnership formed under any statute of this state prior to the adoption of this Act, may become a limited partnership under this Act by complying with the provisions of §2; provided the certificate sets forth:

(a) The amount of the original contribution of each limited partner, and the time when the contribution was made, and

(b) That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners.

(2) A limited partnership formed under any statute of this state prior to the adoption of this Act, until or unless it becomes a limited partnership under this

Act, shall continue to be governed by the provisions of [here insert proper reference to the existing limited partnership act or acts], except that such partnership shall not be renewed unless so provided in the original agreement.

§ 31. Act (Acts) Repealed.—Except as affecting existing limited partnerships to the extent set forth in Section 30, the Act (Acts) of [here designate the existing limited partnership Act or Acts] is (are) hereby repealed.

with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed.

§ 1002. Proper Plaintiff.—In a derivative action, the plaintiff must be a partner at the time of bringing the action and (1) at the time of the transaction of which he complains or (2) his status as a partner had devolved upon him by operation of law or pursuant to the terms of the partnership agreement from a person who was a partner at the time of the transaction.

§ 1003. Pleading.—In a derivative action, the complaint shall set forth with particularity the effort of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort.

§ 1004. Expenses.—If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct him to remit to the limited partnership the remainder of those proceeds received by him.

ARTICLE 11

Miscellaneous

§ 1101. Construction and Application.—This Act shall be so applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among states enacting it.

§ 1102. Short Title.—This Act may be cited as the Uniform Limited Partnership Act.

§ 1103. Severability.—If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

§ 1104. Effective Date, Extended Effective Date and Repeal.—Except as set forth below, the effective date of this Act is _____ and the following Acts [list prior limited partnership acts] are hereby repealed:

(1) The existing provisions for execution and filing of certificates of limited partnerships and amendments thereunder and cancellations thereof continue in effect until [specify time required to create central filing system], the extended effective date, and Sections 102, 103, 104, 105, 201, 202, 203, 204 and 206 are not effective until the extended effective date.

(2) Section 402, specifying the conditions under which a general partner ceases to be a member of a limited partnership, is not effective until the extended effective date, and the applicable provisions of existing law continue to govern until the extended effective date.

(3) Sections 501, 502, and 608 apply only to contributions and distributions made after the effective date of this Act.

(4) Section 704 applies only to assignments made after the effective date of this Act.

(5) Article 9, dealing with registration of foreign limited partnerships, is not effective until the extended effective date.

§ 1105. Rules for Cases Not Provided for in This Act.—In any case not provided for in this Act the provisions of the Uniform Partnership Act govern.

1983 AMENDMENTS TO UNIFORM LIMITED PARTNERSHIP ACT (1976)

The following changes to the Uniform Limited Partnership Act (1976) were approved by the National Conference in 1983:
(Additions Underlined, Deletions Stricken)

§ 304(a)(2):
(2) withdraws from future equity participation in the enterprise by executing and filing in the office of the Secretary of State a certificate declaring withdrawal under this Section.

§ 403:
(a) Except as provided in this Act or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the

restrictions and liabilities of a partner in a partnership without limited partners.

(b) Except as provided in this Act, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners. Except as provided in this Act or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners.

UNIFORM LIMITED PARTNERSHIP ACT (1976) WITH 1985 AMENDMENTS

(Additions and Deletions in the Act are indicated by Underscore and Strikeout)

ARTICLE 1 GENERAL PROVISIONS

- Section
- 101. Definitions.
 - 102. Name.
 - 103. Reservation of Name.
 - 104. Specified Office and Agent.
 - 105. Records to be Kept.
 - 106. Nature of Business.
 - 107. Business Transactions of Partner with Partnership.

ARTICLE 2

FORMATION; CERTIFICATE OF LIMITED PARTNERSHIP

- 201. Certificate of Limited Partnership.
- 202. Amendment to Certificate.
- 203. Cancellation of Certificate.
- 204. Execution of Certificates.
- 205. Execution by Judicial Act.
- 206. Filing in Office of Secretary of State.
- 207. Liability for False Statement in Certificate.
- 208. Scope of Notice.
- 209. Delivery of Certificates to Limited Partner.

ARTICLE 3

LIMITED PARTNERS

- 301. Admission of Limited Partners.
- 302. Voting.
- 303. Liability to Third Parties.
- 304. Person Erroneously Believing Himself [or Herself] Limited Partner.
- 305. Information.

ARTICLE 4 GENERAL PARTNERS

- Section
- 401. Admission of Additional General Partners.
 - 402. Events of Withdrawal.
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ARTICLE 1

General Provisions

§ 101. Definitions.—As used in this [Act], unless the context otherwise requires:

- (1) "Certificate of limited partnership" means the certificate referred to in Section 201, and the certificate as amended or restated.
- (2) "Contribution" means any cash, property, services rendered, or a promissory note or other binding obligation to contribute cash or property or to perform services, which a partner contributes to a limited partnership in his capacity as a partner.
- (3) "Event of withdrawal of a general partner" means an event that causes a person to cease to be a general partner as provided in Section 402.
- (4) "Foreign limited partnership" means a partnership formed under the laws of any State state other than this State and having as partners, one or more general partners and one or more limited partners.
- (5) "General partner" means a person who has been admitted to a limited partnership as a general partner in accordance with the partnership agreement and named in the certificate of limited partnership as a general partner.
- (6) "Limited partner" means a person who has been admitted to a limited partnership as a limited partner in accordance with the partnership agreement and named in the certificate of limited partnership as a limited partner.
- (7) "Limited partnership" and "domestic limited partnership" mean a partnership formed by two or more persons under the laws of this State and having one or more general partners and one or more limited partners.
- (8) "Partner" means a limited or general partner.
- (9) "Partnership agreement" means any valid agreement, written or oral, of the partners as to the affairs of a limited partnership and the conduct of its business.
- (10) "Partnership interest" means a partner's share of the profits and losses of a limited partnership and the right to receive distributions of partnership assets.
- (11) "Person" means a natural person, partnership, limited partnership (domestic or foreign), trust, estate, association, or corporation.
- (12) "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

§ 102. Name.—The name of each limited partnership as set forth in its certificate of limited partnership:

- (1) shall contain without abbreviation the words "limited partnership";
- (2) may not contain the name of a limited partner unless (i) it is also the name of a general partner or the corporate name of a corporate general partner, or (ii) the business of the limited partnership had been carried on under that name before the admission of that limited partner;
- (3) may not contain any word or phrase indicating or implying that it is organized other than for a purpose stated in its certificate of limited partnership;
- (4) (3) may not be the same as, or deceptively similar to, the name of any corporation or limited partnership organized under the laws of this State or licensed or registered as a foreign corporation or limited partnership in this State; and

~~(5)~~ (4) may not contain the following words [here insert prohibited words]

§ 103. Reservation of Name.—

- (a) The exclusive right to the use of a name may be reserved by:
 - (1) any person intending to organize a limited partnership under this [Act] and to adopt that name;
 - (2) any domestic limited partnership or any foreign limited partnership registered in this State which, in either case, intends to adopt that name;
 - (3) any foreign limited partnership intending to register in this State and adopt that name; and
 - (4) any person intending to organize a foreign limited partnership and intending to have it register in this State and adopt that name.
- (b) The reservation shall be made by filing with the Secretary of State an application, executed by the applicant, to reserve a specified name. If the Secretary of State finds that the name is available for use by a domestic or foreign limited partnership, he [or she] shall reserve the name for the exclusive use of the applicant for a period of 120 days. Once having so reserved a name, the same applicant may not again reserve the same name until more than 60 days after the expiration of the last 120-day period for which that applicant reserved that name. The right to the exclusive use of a reserved name may be transferred to any other person by filing in the office of the Secretary of State a notice of the transfer, executed by the applicant for whom the name was reserved and specifying the name and address of the transferee.

§ 104. Specified Office and Agent.—Each limited partnership shall continuously maintain in this State:

- (1) an office, which may but need not be a place of its business in this State, at which shall be kept the records required by Section 105 to be maintained; and
- (2) an agent for service of process on the limited partnership, which agent must be an individual resident of this State, a domestic corporation, or a foreign corporation authorized to do business in this State.

§ 105. Records to be Kept.—

(a) Each limited partnership shall keep at the office referred to in Section 104 (1) the following:

- (1) a current list of the full name and last known business address of each partner, ~~set forth, separately identifying the general partners (in alphabetical order) and the limited partners (in alphabetical order);~~
- (2) a copy of the certificate of limited partnership and all certificates of amendment thereto, together with executed copies of any powers of attorney pursuant to which any certificate has been executed;
- (3) copies of the limited partnership's federal, state and local income tax returns and reports, if any, for the three most recent years; and
- (4) copies of any then effective written partnership agreements and of any financial statements of the limited partnership for the three most recent years; and
- (5) unless contained in a written partnership agreement, a writing setting out:

- (i) the amount of cash and a description and statement of the agreed value of the other property or services contributed by each partner and which each partner has agreed to contribute;
- (ii) the times at which or events on the happening of which any additional contributions agreed to be made by each partner are to be made;
- (iii) any right of a partner to receive, or of a general partner to make, distributions to a partner which include a return of all or any part of the partner's contribution; and
- (iv) any events upon the happening of which the limited partnership is to be dissolved and its affairs wound up.

(b) ~~These records~~ Records kept under this section are subject to inspection and copying at the reasonable request and at the expense of any partner during ordinary business hours.

§ 106. Nature of Business.—A limited partnership may carry on any business that a partnership without limited partners may carry on except [here designate prohibited activities].

§ 107. Business Transactions of Partner with Partnership.—Except as provided in the partnership agreement, a partner may lend money to and transact other business with the limited partnership and, subject to other applicable law, has the same rights and obligations with respect thereto as a person who is not a partner.

ARTICLE 2

Formation; Certificate of Limited Partnership

§ 201. Certificate of Limited Partnership.—

(a) In order to form a limited partnership, ~~two or more persons must execute a certificate of limited partnership. The certificate shall be must be executed and filed in the office of the Secretary of State and The certificate shall set forth:~~

- (1) the name of the limited partnership;
- ~~(2) the general character of its business;~~
- ~~(3) the address of the office and the name and address of the agent for service of process required to be maintained by Section 104;~~
- ~~(4) (3) the name and the business address of each general partner (specifying separately the general partners and limited partners);~~
- ~~(5) the amount of cash and a description and statement of the agreed value of the other property or services contributed by each partner and which each partner has agreed to contribute in the future;~~
- ~~and the times at which, or events on the happening of which any addi-~~

(7) any power of a limited partner to grant the right to become a limited partner to an assignee of any part of his partnership interest; and the terms and conditions of the power;

(8) if agreed upon, the time at which or the events on the happening of which a partner may terminate his membership in the limited partnership and the amount of, or the method of determining, the distribution to which he may be entitled respecting his partnership interest; and the terms and conditions of the termination and distribution;

(9) any right of a partner to receive distributions of property, including cash from the limited partnership;

(10) any right of a partner to receive, or of a general partner to make, distributions to a partner which include a return of all or any part of the partner's contribution;

(11) any time at which events upon the happening of which the limited partnership is to be dissolved and its affairs wound up;

(12) any right of the remaining general partners to continue the business on the happening of an event of withdrawal of a general partner; and

(4) the latest date upon which the limited partnership is to dissolve; and

(5) any other matters the general partners determine to include therein.

(b) A limited partnership is formed at the time of the filing of the certificate of limited partnership in the office of the Secretary of State or at any later time specified in the certificate of limited partnership if, in either case, there has been substantial compliance with the requirements of this section.

§ 202. Amendment to Certificate.—

(a) A certificate of limited partnership is amended by filing a certificate of amendment thereto in the office of the Secretary of State. The certificate shall set forth:

- (1) the name of the limited partnership;
- (2) the date of filing the certificate; and
- (3) the amendment to the certificate.

(b) Within 30 days after the happening of any of the following events, an amendment to a certificate of limited partnership reflecting the occurrence of the event or events shall be filed:

(1) a change in the amount or character of the contribution of any partner, or in any partner's obligation to make a contribution;

(2) the admission of a new general partner;

(3) the withdrawal of a general partner; or

(4) the continuation of the business under Section 801 after an event of withdrawal of a general partner.

(c) A general partner who becomes aware that any statement in a certificate of limited partnership was false when made or that any arrangements or other facts described have changed, making the certificate inaccurate in any respect, shall promptly amend the certificate, but an amendment to show a change of address of a limited partner need be filed only once every 12 months.

(d) A certificate of limited partnership may be amended at any time for any other proper purpose the general partners determine.

(e) No person has any liability because an amendment to a certificate of limited partnership has not been filed to reflect the occurrence of any event referred to in subsection (b) of this section if the amendment is filed within the 30-day period specified in subsection (b).

(f) A revised certificate of limited partnership may be executed and filed in the same manner as a certificate of amendment.

§ 203. Cancellation of Certificate.—

A certificate of limited partnership shall be cancelled upon the dissolution and the commencement of winding up of the partnership or at any other time there are no limited partners. A certificate of cancellation shall be filed in the office of the Secretary of State and set forth:

- (1) the name of the limited partnership;
- (2) the date of filing of its certificate of limited partnership;
- (3) the reason for filing the certificate of cancellation;
- (4) the effective date (which shall be a date certain) of cancellation if it is not to be effective upon the filing of the certificate; and
- (5) any other information the general partners filing the certificate determine.

§ 204. Execution of Certificates.—

(a) Each certificate required by this Article to be filed in the office of the Secretary of State shall be executed in the following manner:

(1) an original certificate of limited partnership must be signed by all general partners named therein;

(2) a certificate of amendment must be signed by at least one general partner and by each other general partner designated in the certificate as a new general partner or whose contribution is described as having been increased; and

(3) a certificate of cancellation must be signed by all general partners;

(b) Any person may sign a certificate by an attorney-in-fact, but a power of attorney to sign a certificate relating to the admission or increased contribution of a general partner must specifically describe the admission or increase.

(c) The execution of a certificate by a general partner constitutes an affirmation under the penalties of perjury that the facts stated therein are true.

§ 205. Amendment or Cancellation Execution by Judicial Act.—

If a person required by Section 204 to execute a certificate of amendment or cancellation fails or refuses to do so, any other partner, and any assignee of a partnership interest, person who is adversely affected by the failure or refusal, may petition the [designate the appropriate court] to direct the amendment or cancellation execution of the certificate. If the court finds that the amendment or cancellation

is proper it is proper for the certificate to be executed and that any person so designated has failed or refused to execute the certificate, it shall order the Secretary of State to record an appropriate certificate of amendment or cancellation.

§ 206. Filing in Office of Secretary of State.—

(a) Two signed copies of the certificate of limited partnership and of any certificates of amendment or cancellation (or of any judicial decree of amendment or cancellation) shall be delivered to the Secretary of State. A person who executes a certificate as an agent or fiduciary need not exhibit evidence of his [or her] authority as a prerequisite to filing. Unless the Secretary of State finds that any certificate does not conform to law, upon receipt of all filing fees required by law he [or she] shall:

(1) endorse on each duplicate original the word "Filed" and the day, month, and year of the filing thereof;

(2) file one duplicate original in his [or her] office; and

(3) return the other duplicate original to the person who filed it or his [or her] representative.

(b) Upon the filing of a certificate of amendment (or judicial decree of amendment) in the office of the Secretary of State, the certificate of limited partnership shall be amended as set forth therein, and upon the effective date of a certificate of cancellation (or a judicial decree thereof), the certificate of limited partnership is cancelled.

§ 207. Liability for False Statement In Certificate.—If any certificate of limited partnership or certificate of amendment or cancellation contains a false statement, one who suffers loss by reliance on the statement may recover damages for the loss from:

(1) any person who executes the certificate, or causes another to execute it on his behalf, and knew, and any general partner who knew or should have known, the statement to be false at the time the certificate was executed; and

(2) any general partner who thereafter knows or should have known that any arrangement or other fact described in the certificate has changed, making the statement inaccurate in any respect within a sufficient time before the statement was relied upon reasonably to have enabled that general partner to cancel or amend the certificate, or to file a petition for its cancellation or amendment under Section 205.

§ 208. Scope of Notice.—The fact that a certificate of limited partnership is on file in the office of the Secretary of State is notice that the partnership is a limited partnership and the persons designated therein as limited general partners are limited general partners, but it is not notice of any other fact.

§ 209. Delivery of Certificates to Limited Partners.—Upon the return by the Secretary of State pursuant to Section 206 of a certificate marked "Filed," the general partners shall promptly deliver or mail a copy of the certificate of limited partnership and each certificate of amendment or cancellation to each limited partner unless the partnership agreement provides otherwise.

ARTICLE 3

Limited Partners

§ 301. Admission of Additional Limited Partners.—

(a) A person becomes a limited partner:

(1) at the time the limited partnership is formed; or

(2) at any later time specified in the records of the limited partnership for becoming a limited partner.

(b) After the filing of a limited partnership's original certificate of limited partnership, a person may be admitted as an additional limited partner:

(1) in the case of a person acquiring a partnership interest directly from the limited partnership upon compliance with the partnership agreement or, if the partnership agreement does not so provide, upon the written consent of all partners; and

(2) in the case of an assignee of a partnership interest of a partner who has the power, as provided in Section 704, to grant the assignee the right to become a limited partner, upon the exercise of that power and compliance with any conditions limiting the grant or exercise of the power.

(b) In each case under subsection (a), the person acquiring the partnership interest becomes a limited partner only upon amendment of the certificate of limited partnership reflecting that fact.

§ 302. Voting.—Subject to Section 303, the partnership agreement may grant to all or a specified group of the limited partners the right to vote (on a per capita or other basis) upon any matter.

§ 303. Liability to Third Parties.—

(a) Except as provided in subsection (d), a limited partner is not liable for the obligations of a limited partnership unless he [or she] is also a general partner or, in addition to the exercise of his [or her] rights and powers as a limited partner, he [or she] takes part in the control of the business. However, if the limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he [or she] is liable only to persons who transact business with the limited partnership with actual knowledge of his participation in control reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner.

(b) A limited partner does not participate in the control of the business within the meaning of subsection (a) solely by doing one or more of the following:

(1) being a contractor for or an agent or employee of the limited partnership or of a general partner or being an officer, director, or shareholder of a general partner that is a corporation.

(2) consulting with and advising a general partner with respect to the business of the limited partnership.

(3) acting as surety for the limited partnership or guaranteeing or assuming one or more specific obligations of the limited partnership.

(4) approving or disapproving an amendment to the partnership agreement taking any action required or permitted by law to bring or pursue a derivative action in the right of the limited partnership, or

(5) voting on one or more of the following matters:

(5) requesting or attending a meeting of partners;

(6) proposing, approving, or disapproving, by voting or otherwise, one or more of the following matters:

(i) the dissolution and winding up of the limited partnership;

(ii) the sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited partnership other than in the ordinary course of its business;

(iii) the incurrance of indebtedness by the limited partnership other than in the ordinary course of its business;

(iv) a change in the nature of the business; or

(v) the admission or removal of a general partner;

(vi) the admission or removal of a limited partner;

(vii) a transaction involving an actual or potential conflict of interest between a general partner and the limited partnership or the limited partners;

(viii) an amendment to the partnership agreement or certificate of limited partnership; or

(ix) matters related to the business of the limited partnership not otherwise enumerated in this subsection (b), which the partnership agreement states in writing may be subject to the approval or disapproval of limited partners;

(7) winding up the limited partnership pursuant to Section 803; or

(8) exercising any right or power permitted to limited partners under this [Act] and not specifically enumerated in this subsection (b).

(c) The enumeration in subsection (b) does not mean that the possession or exercise of any other powers by a limited partner constitutes participation by him [or her] in the business of the limited partnership.

(d) A limited partner who knowingly permits his [or her] name to be used in the name of the limited partnership, except under circumstances permitted by Section 102(2), is liable to creditors who extend credit to the limited partnership without actual knowledge that the limited partner is not a general partner.

304. Person Erroneously Pleading Himself [or Herself] Limited Partner.—

(a) Except as provided in subsection (b), a person who makes a contribution to a business enterprise and erroneously but in good faith believes that he [or she] has become a limited partner in the enterprise is not a general partner in the enterprise and is not bound by its obligations by reason of making the contribution, receiving distributions from the enterprise, or exercising any rights of a limited partner, if, on ascertaining the mistake, he [or she]:

(1) causes an appropriate certificate of limited partnership or a certificate of amendment to be executed and filed; or

(2) withdraws from future equity participation in the enterprise by executing and filing in the office of the Secretary of State a certificate declaring withdrawal under this section.

(b) A person who makes a contribution of the kind described in subsection (a) is liable as a general partner to any third party who transacts business with the enterprise (i) before the person withdraws and an appropriate certificate is filed to show withdrawal, or (ii) before an appropriate certificate is filed to show his status as a limited partner and, in the case of an amendment, after expiration of the 30-day period for filing an amendment relating to the person as a limited partner under Section 202 that he [or she] is not a general partner, but in either case only if the third party actually believed in good faith that the person was a general partner at the time of the transaction.

§ 305. Information.—Each limited partner has the right to:

(1) inspect and copy any of the partnership records required to be maintained by Section 105; and

(2) obtain from the general partners from time to time upon reasonable demand (i) true and full information regarding the state of the business and financial condition of the limited partnership, (ii) promptly after becoming available, a copy of the limited partnership's federal, state, and local income tax returns for each year, and (iii) other information regarding the affairs of the limited partnership as is just and reasonable.

ARTICLE 4

General Partners

§ 401. Admission of Additional General Partners.—After the filing of a limited partnership's original certificate of limited partnership, additional general partners may be admitted only as provided in writing in the partnership agreement or if the partnership agreement does not provide in writing for the admission of additional general partners, with the specific written consent of each partner all partners

§ 402. Events of Withdrawal.—Except as approved by the specific written consent of all partners at the time, a person ceases to be a general partner of a limited partnership upon the happening of any of the following events—

(1) the general partner withdraws from the limited partnership as provided in Section 602.

(2) the general partner ceases to be a member of the limited partnership as provided in Section 702.

(3) the general partner is removed as a general partner in accordance with the partnership agreement.

(4) unless otherwise provided in writing in the certificate of limited partnership agreement, the general partner: (i) makes an assignment for the benefit of creditors; (ii) files a voluntary petition in bankruptcy; (iii) is adjudicated a bankrupt or insolvent; (iv) files a petition or answer seeking for himself [or herself] any reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against him [or her] in any proceeding of this nature; or (vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his [or her] properties;

(5) unless otherwise provided in writing in the certificate of limited partnership agreement, [120] days after the commencement of any proceeding against the general partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law, or regulation, the proceeding has not been dismissed, or if within [90] days after the appointment without his [or her] consent or acquiescence of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his [or her] properties, the appointment is not vacated or stayed or within [90] days after the expiration of any such stay, the appointment is not vacated;

(6) in the case of a general partner who is a natural person,

(i) his [or her] death; or

(ii) the entry of an order by a court of competent jurisdiction adjudicating him [or her] incompetent to manage his [or her] person or his [or her] estate;

(7) in the case of a general partner who is acting as a general partner by virtue of being a trustee of a trust, the termination of the trust (but not merely the substitution of a new trustee);

(8) in the case of a general partner that is a separate partnership, the dissolution and commencement of winding up of the separate partnership;

(9) in the case of a general partner that is a corporation, the filing of a certificate of dissolution, or its equivalent, for the corporation or the revocation of its charter; or

(10) in the case of an estate, the distribution by the fiduciary of the estate's entire interest in the partnership.

§ 403. General Powers and Liabilities.—

(a) Except as provided in this [Act] or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners.

(b) Except as provided in this [Act], a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners. Except as provided in this [Act] or in the partnership agreement, a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to the partnership and to the other partners.

§ 404. Contributions by General Partner.—A general partner of a limited partnership may make contributions to the partnership and share in the profits and losses of, and in distributions from, the limited partnership as a general partner. A general partner also may make contributions to and share in profits, losses, and distributions as a limited partner. A person who is both a general partner and a limited partner has the rights and powers, and is subject to the restrictions and liabilities, of a general partner and, except as provided in the partnership agreement, also has the powers, and is subject to the restrictions, of a limited partner to the extent of his [or her] participation in the partnership as a limited partner.

§ 405. Voting.—The partnership agreement may grant to all or certain identified general partners the right to vote (on a per capita or any other basis), separately or with all or any class of the limited partners, on any matter.

ARTICLE 5

Finance

§ 501. Form of Contribution.—The contribution of a partner may be in cash, property, or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services.

§ 502. Liability for Contribution.—

(a) A promise by a limited partner to contribute to the limited partnership is not enforceable unless set out in a writing signed by the limited partner.

(a)(b) Except as provided in the certificate of limited partnership agreement, a partner is obligated to the limited partnership to perform any enforceable promise to contribute cash or property or to perform services, even if he [or she] is unable to perform because of death, disability, or any other reason. If a partner does not make the required contribution of property or services, he [or she] is obligated at the option of the limited partnership to contribute cash equal to that portion of the value, as stated in the certificate of limited partnership records required to be kept pursuant to Section 105, of the stated contribution which has not been made.

(b)(c) Unless otherwise provided in the partnership agreement, the obligation of a partner to make a contribution or return money or other property paid

or distributed in violation of this [Act] may be compromised only by consent of all partners. Notwithstanding the compromise, a creditor of a limited partnership who extends credit, or whose claim arises, otherwise acts in reliance on that obligation after the filing of the certificate of limited partnership or an amendment thereto, partner signs a writing which, in such case, reflects the obligation, and before the amendment or cancellation thereof to reflect the compromise, may enforce the original obligation.

§ 503. Sharing of Profits and Losses.—The profits and losses of a limited partnership shall be allocated among the partners, and among classes of partners, in the manner provided in writing in the partnership agreement. If the partnership agreement does not so provide in writing, profits and losses shall be allocated on the basis of the value, as stated in the certificate of limited partnership records required to be kept pursuant to Section 105, of the contributions made by each partner to the extent they have been received by the partnership and have not been returned.

§ 504. Sharing of Distributions.—Distributions of cash or other assets of a limited partnership shall be allocated among the partners and among classes of partners in the manner provided in writing in the partnership agreement. If the partnership agreement does not so provide in writing, distributions shall be made on the basis of the value, as stated in the certificate of limited partnership records required to be kept pursuant to Section 105, of the contributions made by each partner to the extent they have been received by the partnership and have not been returned.

ARTICLE 6

Distributions and Withdrawal

§ 601. Interim Distributions.—Except as provided in this Article, a partner is entitled to receive distributions from a limited partnership before his [or her] withdrawal from the limited partnership and before the dissolution and winding up thereof:

(+) to the extent and at the times or upon the happening of the events specified in the partnership agreement; and

(-) if any distribution constitutes a return of any part of his contribution under Section 602(c), to the extent and at the times or upon the happening of the events specified in the certificate of limited partnership.

§ 602. Withdrawal of General Partner.—A general partner may withdraw from a limited partnership at any time by giving written notice to the other partners, but if the withdrawal violates the partnership agreement, the limited partnership may recover from the withdrawing general partner damages for breach of the partnership agreement and offset the damages against the amount otherwise distributable to him [or her].

§ 603. Withdrawal of Limited Partner.—A limited partner may withdraw from a limited partnership at the time or upon the happening of events specified in the certificate of limited partnership and in accordance with in writing in the partnership agreement. If the certificate agreement does not specify in writing the time or the events upon the happening of which a limited partner may withdraw or a definite time for the dissolution and winding up of the limited partnership, a limited partner may withdraw upon not less than six months' prior written notice to each general partner at his [other] address on the books of the limited partnership at its office in this State.

§ 604. Distribution Upon Withdrawal.—Except as provided in this Article, upon withdrawal any withdrawing partner is entitled to receive any distribution to which he [or she] is entitled under the partnership agreement and, if not otherwise provided in the agreement, he [or she] is entitled to receive, within a reasonable time after withdrawal, the fair value of his [or her] interest in the limited partnership as of the date of withdrawal based upon his [or her] right to share in distributions from the limited partnership.

§ 605. Distribution in Kind.—Except as provided in writing in the certificate of limited partnership agreement, a partner, regardless of the nature of his [or her] contribution, has no right to demand and receive any distribution from a limited partnership in any form other than cash. Except as provided in writing in the partnership agreement, a partner may not be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed to him [or her] exceeds a percentage of that asset which is equal to the percentage in which he [or she] shares in distributions from the limited partnership.

§ 606. Right to Distribution.—At the time a partner becomes entitled to receive a distribution, he [or she] has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution.

§ 607. Limitations on Distribution.—A partner may not receive a distribution from a limited partnership to the extent that, after giving effect to the distribution, all liabilities of the limited partnership, other than liabilities to partners on account of their partnership interests, exceed the fair value of the partnership assets.

§ 608. Liability Upon Return of Contribution.—

(a) If a partner has received the return of any part of his [or her] contribution without violation of the partnership agreement or this [Act], he [or she] is liable to the limited partnership for a period of one year thereafter for the amount of the returned contribution, but only to the extent necessary to discharge the limited partnership's liabilities to creditors who extended credit to the limited partnership during the period the contribution was held by the partnership.

(b) If a partner has received the return of any part of his [or her] contribution in violation of the partnership agreement or this [Act], he [or she] is liable to the limited partnership for a period of six years thereafter for the amount of the contribution wrongfully returned.

(c) A partner receives a return of his [or her] contribution to the extent that a distribution to him [or her] reduces his [or her] share of the fair value of the net assets of the limited partnership below the value, as set forth in the certificate of limited partnership records required to be kept pursuant to Section 105, of his contribution which has not been distributed to him [or her].

ARTICLE 7

Assignment of Partnership Interests

§ 701. Nature of Partnership Interest.—A partnership interest is personal property.

§ 702. Assignment of Partnership Interest.—Except as provided in the partnership agreement, a partnership interest is assignable in whole or in part. An assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights of a partner. An assignment entitles the assignee to receive, to the extent assigned, only the distribution to which the assignor would be entitled. Except as provided in the partnership agreement, a partner ceases to be a partner upon assignment of all his [or her] partnership interest.

§ 703. Rights of Creditor.—On application to a court of competent jurisdiction by any judgment creditor of a partner, the court may charge the partnership interest of the partner with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the partnership interest. This [Act] does not deprive any partner of the benefit of any exemption laws applicable to his [or her] partnership interest.

§ 704. Right of Assignee to Become Limited Partner.—

(a) An assignee of a partnership interest, including an assignee of a general partner, may become a limited partner if and to the extent that (i) the assignor gives the assignee that right in accordance with authority described in the certificate of limited partnership agreement, or (ii) all other partners consent.

(b) An assignee who has become a limited partner has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a limited partner under the partnership agreement and this [Act]. An assignee who becomes a limited partner also is liable for the obligations of his [or her] assignor to make and return contributions as provided in Article 5 and 6. However, the assignee is not obligated for liabilities unknown to the assignee at the time he [or she] became a limited partner and which could not be ascertained from the certificate of limited partnership.

(c) If an assignee of a partnership interest becomes a limited partner, the assignor is not released from his [or her] liability to the limited partnership under Sections 207 and 502.

§ 705. Power of Estate of Deceased or Incompetent Partner.—If a partner who is an individual dies or a court of competent jurisdiction adjudges him [or her] to be incompetent to manage his [or her] person or his [or her] property, the partner's executor, administrator, guardian, conservator, or other legal representative may exercise all of the partner's rights for the purpose of settling his [or her] estate or administering his [or her] property, including any power the partner had to give an assignee the right to become a limited partner. If a partner is a corporation, trust, or other entity and is dissolved or terminated, the powers of that partner may be exercised by its legal representative or successor.

ARTICLE 8

DISSOLUTION

§ 801. Nonjudicial Dissolution.—A limited partnership is dissolved and its affairs shall be wound up upon the happening of the first to occur of the following:

(1) at the time specified in the certificate of limited partnership;

(2) or upon the happening of events specified in writing in the certificate of limited partnership agreement;

(+) (3) written consent of all partners;

(+) (4) an event of withdrawal of a general partner unless at the time there is at least one other general partner and the certificate of limited partnership provisions of the partnership agreement permit the business of the limited partnership to be carried on by the remaining general partner and that partner does so, but the limited partnership is not dissolved and is not required to be wound up by reason of any event of withdrawal, if, within 90 days after withdrawal, all partners agree in writing to continue the business of the limited partnership and to the appointment of one or more additional general partners if necessary or desired; or

(+) (5) entry of a decree of judicial dissolution under Section 802.

§ 802. Judicial Dissolution.—On application by or for a partner the [designate the appropriate court] court may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.

§ 803. Winding Up.—Except as provided in the partnership agreement, the general partners who have not wrongfully dissolved a limited partnership or, if none, the limited partners, may wind up the limited partnership's affairs; but the [designate the appropriate court] court may wind up the limited partnership's

affairs upon application of any partner, his [or her] legal representative, or assignee.

§ 804. Distribution of Assets.—Upon the winding up of a limited partnership, the assets shall be distributed as follows:

(1) to creditors, including partners who are creditors, to the extent permitted by law, in satisfaction of liabilities of the limited partnership other than liabilities for distributions to partners under Section 601 or 604;

(2) except as provided in the partnership agreement, to partners and former partners in satisfaction of liabilities for distributions under Section 601 or 604; and

(3) except as provided in the partnership agreement, to partners first for the return of their contributions and secondly respecting their partnership interests, in the proportions in which the partners share in distributions.

ARTICLE 9

Foreign Limited Partnerships

§ 901. Law Governing.—Subject to the Constitution of this State, (i) the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners, and (ii) a foreign limited partnership may not be denied registration by reason of any difference between those laws and the laws of this State.

§ 902. Registration.—Before transacting business in this State, a foreign limited partnership shall register with the Secretary of State. In order to register, a foreign limited partnership shall submit to the Secretary of State, in duplicate, an application for registration as a foreign limited partnership, signed and sworn to by a general partner and setting forth:

(1) the name of the foreign limited partnership and, if different, the name under which it proposes to register and transact business in this State;

(2) the state and date of its formation;

~~(3) the general character of the business it proposes to transact in this State;~~

~~(4) (3) the name and address of any agent for service of process on the foreign limited partnership whom the foreign limited partnership elects to appoint; the agent must be an individual resident of this state State, a domestic corporation, or a foreign corporation having a place of business in, and authorized to do business in, this State;~~

~~(4) (4) a statement that the Secretary of State is appointed the agent of the foreign limited partnership for service of process if no agent has been appointed under paragraph ~~(4) (3)~~ or, if appointed, the agent's authority has been revoked or if the agent cannot be found or served with the exercise of reasonable diligence;~~

~~(5) (5) the address of the office required to be maintained in the state state of its organization by the laws of that state state or, if not so required, of the principal office of the foreign limited partnership; and~~

~~(7) if the certificate of limited partnership filed in the foreign limited partnership's state of organization is not required to include the names and business addresses of the partners, a list of the names and addresses.~~

~~(6) the name and business address of each general partner; and~~

~~(7) the address of the office at which is kept a list of the names and addresses of the limited partners and their capital contributions, together with an undertaking by the foreign limited partnership to keep those records until the foreign limited partnership's registration in this State is cancelled or withdrawn.~~

§ 903. Issuance of Registration.—

(a) If the Secretary of State finds that an application for registration conforms to law and all requisite fees have been paid, he [or she] shall:

(1) endorse on the application the word "Filed", and the month, day, and year of the filing thereof;

(2) file in his [or her] office a duplicate original of the application; and

(3) issue a certificate of registration to transact business in this State.

(b) The certificate of registration, together with a duplicate original of the application, shall be returned to the person who filed the application or his [or her] representative.

§ 904. Name.—A foreign limited partnership may register with the Secretary of State under any name, whether or not it is the name under which it is registered in its state of organization, that includes without abbreviation the words "limited partnership" and that could be registered by a domestic limited partnership.

§ 905. Changes and Amendments.—If any statement in the application for registration of a foreign limited partnership was false when made or any arrangements or other facts described have changed, making the application inaccurate in any respect, the foreign limited partnership shall promptly file in the office of the Secretary of State a certificate, signed and sworn to by a general partner, correcting such statement.

§ 906. Cancellation of Registration.—A foreign limited partnership may cancel its registration by filing with the Secretary of State a certificate of cancellation signed and sworn to by a general partner. A cancellation does not terminate the authority of the Secretary of State to accept service of process on the foreign limited partnership with respect to [claims for relief] [causes of action] arising out of the transactions of business in this State.

§ 907. Transaction of Business Without Registration.—

(a) A foreign limited partnership transacting business in this State may not maintain any action, suit, or proceeding in any court of this State until it has registered in this State.

(b) The failure of a foreign limited partnership to register in this State does not impair the validity of any contract or act of the foreign limited partnership

or prevent the foreign limited partnership from defending any action, suit, or proceeding in any court of this State.

(c) A limited partner of a foreign limited partnership is not liable as a general partner of the foreign limited partnership solely by reason of having transacted business in this State without registration.

(d) A foreign limited partnership, by transacting business in this State without registration, appoints the Secretary of State as its agent for service of process with respect to [claims for relief] [causes of action] arising out of the transaction of business in this State.

§ 908. Action by [Appropriate Official].—The [designate the appropriate official] may bring an action to restrain a foreign limited partnership from transacting business in this State in violation of this Article.

ARTICLE 10

Derivative Actions

§ 1001. Right of Action.—A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed.

§ 1002. Proper Plaintiff.—In a derivative action, the plaintiff must be a partner at the time of bringing the action and (i) must have been a partner at the time of the transaction of which he [or she] complains or (ii) his [or her] status as a partner had must have devolved upon him [or her] by operation of law or pursuant to the terms of the partnership agreement from a person who was a partner at the time of the transaction.

§ 1003. Pleading.—In a derivative action, the complaint shall set forth with particularity the effort of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort.

§ 1004. Expenses.—If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct him [or her] to remit to the limited partnership the remainder of those proceeds received by him [or her].

ARTICLE 11

Miscellaneous

§ 1101. Construction and Application.—This [Act] shall be so applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

§ 1102. Short Title.—This [Act] may be cited as the Uniform Limited Partnership Act.

§ 1103. Severability.—If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable.

§ 1104. Effective Date, Extended Effective Date and Repeal.—Except as set forth below, the effective date of this [Act] is _____ and the following acts [list prior existing limited partnership acts] are hereby repealed:

(1) The existing provisions for execution and filing of certificates of limited partnerships and amendments thereunder and cancellations thereof continue in effect until [specify time required to create central filing system], the extended effective date, and Sections 102, 103, 104, 105, 201, 202, 203, 204 and 206 are not effective until the extended effective date.

(2) Section 402, specifying the conditions under which a general partner ceases to be a member of a limited partnership, is not effective until the extended effective date, and the applicable provisions of existing law continue to govern until the extended effective date.

(3) Sections 501, 502 and 608 apply only to contributions and distributions made after the effective date of this [Act].

(4) Section 704 applies only to assignments made after the effective date of this [Act].

(5) Article 9, dealing with registration of foreign limited partnerships, is not effective until the extended effective date.

(6) Unless otherwise agreed by the partners, the applicable provisions of existing law governing allocation of profits and losses (rather than the provisions of Section 503), distributions to a withdrawing partner (rather than the provisions of Section 604), and distributions of assets upon the winding up of a limited partnership (rather than the provisions of Section 804) govern limited partnerships formed before the effective date of this [Act].

§ 1105. Rules for Cases Not Provided for in This [Act].—In any case not provided for in this [Act] the provisions of the Uniform Partnership Act govern.

§ 1106. Savings Clause.—The repeal of any statutory provision by this [Act] does not impair, or otherwise affect, the organization or the continued existence of a limited partnership existing at the effective date of this [Act], nor does the repeal of any existing statutory provision by this [Act] impair any contract or affect any right accrued before the effective date of this [Act].

UNIFORM LIMITED PARTNERSHIP ACT

(1976)

See Note at head of previous Act.

ARTICLE I

General Provisions

§ 101. Definitions.—As used in this Act, unless the context otherwise requires:

(1) "Certificate of limited partnership" means the certificate referred to in Section 201, and the certificate as amended.

(2) "Contribution" means any cash, property, services rendered, or a promissory note or other binding obligation to contribute cash or property or to perform services, which a partner contributes to a limited partnership in his capacity as a partner.

(3) "Event of withdrawal of a general partner" means an event that causes a person to cease to be a general partner as provided in Section 402.

(4) "Foreign limited partnership" means a partnership formed under the laws of any State other than this State and having as partners one or more general partners and one or more limited partners.

(5) "General partner" means a person who has been admitted to a limited partnership as a general partner in accordance with the partnership agreement and named in the certificate of limited partnership as a general partner.

(6) "Limited partner" means a person who has been admitted to a limited partnership as a limited partner in accordance with the partnership agreement and named in the certificate of limited partnership as a limited partner.

(7) "Limited partnership" and "domestic limited partnership" mean a partnership formed by 2 or more persons under the laws of this State and having one or more general partners and one or more limited partners.

(8) "Partner" means a limited or general partner.

(9) "Partnership agreement" means any valid agreement, written or oral, of the partners as to the affairs of a limited partnership and the conduct of its business.

(10) "Partnership interest" means a partner's share of the profits and losses of a limited partnership and the right to receive distributions of a partnership assets.

(11) "Person" means a natural person, partnership, limited partnership (domestic or foreign), trust, estate, association, or corporation.

(12) "State" means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

§ 102. Name.—The name of each limited partnership as set forth in its certificate of limited partnership:

(1) shall contain without abbreviation the words "limited partnership";

(2) may not contain the name of a limited partner unless (i) it is also the name of a general partner or the corporate name of a corporate general partner, or (ii) the business of the limited partnership had been carried on under that name before the admission of that limited partner;

(3) may not contain any word or phrase indicating or implying that it is organized other than for a purpose stated in its certificate of limited partnership;

(4) may not be the same as, or deceptively similar to, the name of any corporation or limited partnership organized under the laws of this State or licensed or registered as a foreign corporation or limited partnership in this State; and

(5) may not contain the following words [here insert prohibited words].

§ 103. Reservation of Name.—

(a) The exclusive right to the use of a name may be reserved by:

(1) any person intending to organize a limited partnership under this Act and to adopt that name;

(2) any domestic limited partnership or any foreign limited partnership registered in this State which, in either case, intends to adopt that name;

(3) any foreign limited partnership intending to register in this State and adopt that name; and

(4) any person intending to organize a foreign limited partnership and intending to have it register in this State and adopt that name.

(b) The reservation shall be made by filing with the Secretary of State an application, executed by the applicant, to reserve a specified name. If the Secretary of State finds that the name is available for use by a domestic or foreign limited partnership, he shall reserve the name for the exclusive use of the applicant for a period of 120 days. Once having so reserved a name, the same applicant may not again reserve the same name until more than 60 days after the expiration of the last 120-day period for which that applicant reserved that name. The right to the exclusive use of a reserved name may be transferred to any other person by filing in the office of the Secretary of State a notice of the transfer, executed by the applicant for whom the name was reserved and specifying the name and address of the transferee.

§ 104. Specified Office and Agent.—Each limited partnership shall continuously maintain in this State:

(1) an office, which may but need not be a place of its business in this State, at which shall be kept the records required by Section 105 to be maintained; and

(2) an agent for service of process on the limited partnership, which agent must be an individual resident of this State, a domestic corporation, or a foreign corporation authorized to do business in this State.

§ 105. Records to be Kept.—Each limited partnership shall keep at the office referred to in Section 104(1) the following: (1) a current list of the full name and last known business address of each partner set forth in alphabetical order, (2) a copy of the certificate of limited partnership and all certificates of amendment thereto, together with executed copies of any powers of attorney pursuant to which any certificate has been executed, (3) copies of the limited partnership's federal, state and local income tax returns and reports, if any, for the 3 most recent years, and (4) copies of any then effective written partnership agreements and of any financial statements of the limited partnership for the 3 most recent years. Those records are subject to inspection and copying at the reasonable request, and at the expense, of any partner during ordinary business hours.

§ 106. Nature of Business.—A limited partnership may carry on any business that a partnership without limited partners may carry on except [here designate prohibited activities].

§ 107. Business Transactions of Partner with Partnership.—Except as provided in the partnership agreement, a partner may lend money to and transact other business with the limited partnership and, subject to other applicable law, has the same rights and obligations with respect thereto as a person who is not a partner.

ARTICLE 2

Formation: Certificate of Limited Partnership

§ 201. Certificate of Limited Partnership.—

(a) In order to form a limited partnership two or more persons must execute a certificate of limited partnership. The certificate shall be filed in the office of the Secretary of State and set forth:

(1) the name of the limited partnership;

(2) the general character of its business;

(3) the address of the office and the name and address of the agent for service of process required to be maintained by Section 104;

(4) the name and the business address of each partner (specifying separately the general partners and limited partners);

(5) the amount of cash and a description and statement of the agreed value of the other property or services contributed by each partner and which each partner has agreed to contribute in the future;

(6) the times at which or events on the happening of which any additional contributions agreed to be made by each partner are to be made;

(7) any power of a limited partner to grant the right to become a limited partner to an assignee of any part of his partnership interest, and the terms and conditions of the power;

(8) if agreed upon, the time at which or the events on the happening of which a partner may terminate his membership in the limited partnership and the amount of, or the method of determining, the distribution to which he may be entitled respecting his partnership interest, and the terms and conditions of the termination and distribution;

(9) any right of a partner to receive distributions of property, including cash from the limited partnership;

(10) any right of a partner to receive, or of a general partner to make, distributions to a partner which include a return of all or any part of the partner's contribution;

(11) any time at which or events upon the happening of which the limited partnership is to be dissolved and its affairs wound up;

(12) any right of the remaining general partners to continue the business on the happening of an event of withdrawal of a general partner; and

(13) any other matters the partners determine to include therein.

(b) A limited partnership is formed at the time of the filing of the certificate of limited partnership in the office of the Secretary of State or at any later time specified in the certificate of limited partnership if, in either case, there has been substantial compliance with the requirements of this section.

§ 202. Amendment to Certificate.—

(a) A certificate of limited partnership is amended by filing a certificate of amendment thereto in the office of the Secretary of State. The certificate shall set forth:

(1) the name of the limited partnership,

(2) the date of filing the certificate, and

(3) the amendment to the certificate.

(b) Within 30 days after the happening of any of the following events, an amendment to a certificate of limited partnership reflecting the occurrence of the event or events shall be filed:

- (1) a change in the amount or character of the contribution of any partner, or in any partner's obligation to make a contribution;
- (2) the admission of a new partner;
- (3) the withdrawal of a partner; or
- (4) the continuation of the business under Section 801 after an event of withdrawal of a general partner.

(c) A general partner who becomes aware that any statement in a certificate of limited partnership was false when made or that any arrangements or other facts described have changed, making the certificate inaccurate in any respect, shall promptly amend the certificate, but an amendment to show a change of address of a limited partner need be filed only once every 12 months.

(d) A certificate of limited partnership may be amended at any time for any other proper purpose the general partners determine.

(e) No person has any liability because an amendment to a certificate of limited partnership has not been filed to reflect the occurrence of any event referred to in subsection (b) of this Section if the amendment is filed within the 30-day period specified in subsection (b).

§ 203. Cancellation of Certificate.—A certificate of limited partnership shall be cancelled upon the dissolution and the commencement of winding up of the partnership or at any other time there are no limited partners. A certificate of cancellation shall be filed in the office of the Secretary of State and set forth:

- (1) the name of the limited partnership;
- (2) the date of filing of its certificate of limited partnership;
- (3) the reason for filing the certificate of cancellation;
- (4) the effective date (which shall be a date certain) of cancellation if it is not to be effective upon the filing of the certificate; and
- (5) any other information the general partners filing the certificate determine.

§ 204. Execution of Certificates.—

(a) Each certificate required by this Article to be filed in the office of the Secretary of State shall be executed in the following manner:

- (1) an original certificate of limited partnership must be signed by all partners named therein;
- (2) a certificate of amendment must be signed by at least one general partner and by each other partner designated in the certificate as a new partner or whose contribution is described as having been increased; and
- (3) a certificate of cancellation must be signed by all general partners;

(b) Any person may sign a certificate by an attorney-in-fact, but a power of attorney to sign a certificate relating to the admission, or increased contribution, of a partner must specifically describe the admission or increase.

(c) The execution of a certificate by a general partner constitutes an affirmation under the penalties of perjury that the facts stated therein are true.

§ 205. Amendment or Cancellation by Judicial Act.—If a person required by Section 204 to execute a certificate of amendment or cancellation fails or refuses to do so, any other partner, and any assignee of a partnership interest, who is adversely affected by the failure or refusal, may petition the [here designate the proper court] to direct the amendment or cancellation. If the court finds that the amendment or cancellation is proper and that any person so designated has failed or refused to execute the certificate, it shall order the Secretary of State to record an appropriate certificate of amendment or cancellation:

§ 206. Filing in Office of Secretary of State.—

(a) Two signed copies of the certificate of limited partnership and of any certificates of amendment or cancellation (or of any judicial decree of amendment or cancellation) shall be delivered to the Secretary of State. A person who executes a certificate as an agent or fiduciary need not exhibit evidence of his authority as a prerequisite to filing. Unless the Secretary of State finds that any certificate does not conform to law, upon receipt of all filing fees required by law he shall:

- (1) endorse on each duplicate original the word "Filed" and the day, month and year of the filing thereof;
- (2) file one duplicate original in his office; and
- (3) return the other duplicate original to the person who filed it or his representative.

(b) Upon the filing of a certificate of amendment (or judicial decree of amendment) in the office of the Secretary of State, the certificate of limited partnership shall be amended as set forth therein, and upon the effective date of a certificate of cancellation (or a judicial decree thereof), the certificate of limited partnership is cancelled.

§ 207. Liability for False Statement in Certificate.—If any certificate of limited partnership or certificate of amendment or cancellation contains a false statement, one who suffers loss by reliance on the statement may recover damages for the loss from:

(1) any person who executes the certificate, or causes another to execute it on his behalf, and knew, and any general partner who knew or should have known, the statement to be false at the time the certificate was executed; and

(2) any general partner who thereafter knows or should have known that any arrangement or other fact described in the certificate has changed, making the statement inaccurate in any respect within a sufficient time before the statement was relied upon reasonably to have enabled that general partner to cancel or amend the certificate, or to file a petition for its cancellation or amendment under Section 205.

§ 208. Notice.—The fact that a certificate of limited partnership is on file in the office of the Secretary of State is notice that the partnership is a limited partnership and the persons designated therein as limited partners are limited partners, but it is not notice of any other fact.

§ 209. Delivery of Certificates to Limited Partners.—Upon the return by the Secretary of State pursuant to Section 206 of a certificate marked "Filed", the general partners shall promptly deliver or mail a copy of the certificate of limited partnership and each certificate of amendment or cancellation to each limited partner unless the partnership agreement provides otherwise.

ARTICLE 3

Limited Partners

§ 301. Admission of Additional Limited Partners.—

(a) After the filing of a limited partnership's original certificate of limited partnership, a person may be admitted as an additional limited partner:

(1) in the case of a person acquiring a partnership interest directly from the limited partnership, upon the compliance with the partnership agreement or, if the partnership-agreement does not so provide, upon the written consent of all partners; and

(2) in the case of an assignee of a partnership interest of a partner who has the power, as provided in Section 704, to grant the assignee the right to become a limited partner, upon the exercise of that power and compliance with any conditions limiting the grant or exercise of the power.

(b) In each case under subsection (a), the person acquiring the partnership interest becomes a limited partner only upon amendment of the certificate of limited partnership reflecting that fact.

§ 302. Voting.—Subject to Section 303, the partnership agreement may grant to all or a specified group of the limited partners the right to vote (on a per capita or other basis) upon any matter.

§ 303. Liability to Third Parties.—

(a) Except as provided in subsection (d), a limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. However, if the limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he is liable only to persons who transact business with the limited partnership with actual knowledge of his participation in control.

(a) A limited partner does not participate in the control of the business within the meaning of subsection (a) solely by doing one or more of the following:

- (1) being a contractor for or an agent or employee of the limited partnership or of a general partner;
- (2) consulting with and advising a general partner with respect to the business of the limited partnership;
- (3) acting as surety for the limited partnership;
- (4) approving or disapproving an amendment to the partnership agreement; or
- (5) voting on one or more of the following matters:
 - (i) the dissolution and winding up of the limited partnership;
 - (ii) the sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited partnership other than in the ordinary course of its business;
 - (iii) the incurrence of indebtedness by the limited partnership other than in the ordinary course of its business;
 - (iv) a change in the nature of the business; or
 - (v) the removal of a general partner.

(c) The enumeration in subsection (b) does not mean that the possession or exercise of any other powers by a limited partner constitutes participation by him in the business of the limited partnership.

(d) A limited partner who knowingly permits his name to be used in the name of the limited partnership, except under circumstances permitted by Section 102(2), is liable to creditors who extend credit to the limited partnership without actual knowledge that the limited partner is not a general partner.

§ 304. Person Erroneously Believing Himself Limited Partner.—

(a) Except as provided in subsection (b), a person who makes a contribution to a business enterprise and erroneously but in good faith believes that he has become a limited partner in the enterprise is not a general partner in the enterprise and is not bound by its obligations by reason of making the contribution, receiving distributions from the enterprise, or exercising any rights of a limited partner, if, on ascertaining the mistake, he:

- (1) causes an appropriate certificate of limited partnership or a certificate of amendment to be executed and filed; or
- (2) withdraws from future equity participation in the enterprise.

(b) A person who makes a contribution of the kind described in subsection (a) is liable as a general partner to any third party who transacts business with the enterprise (i) before the person withdraws and an appropriate certificate is filed to show withdrawal, or (ii) before an appropriate certificate is filed to show his status as a limited partner and, in the case of an amendment, after expiration of the 30-day period for filing an amendment relating to the person as a limited partner under Section 202, but in either case only if the third party actually believed in good faith that the person was a general partner at the time of the transaction.

§ 305. Information.—Each limited partner has the right to:

(1) inspect and copy any of the partnership records required to be maintained by Section 705, and

(2) obtain from the general partners from time to time upon reasonable demand (i) true and full information regarding the state of the business and financial condition of the limited partnership, (ii) promptly after becoming available, a copy of the limited partnership's federal, state and local income tax returns for each year, and (iii) other information regarding the affairs of the limited partnership as is just and reasonable.

ARTICLE 4

General Partners

§ 401. Admission of Additional General Partners.—After the filing of a limited partnership's original certificate of limited partnership, additional general partners may be admitted only with the specific written consent of each partner.

§ 402. Events of Withdrawal.—Except as approved by the specific written consent of all partners at the time, a person ceases to be a general partner of a limited partnership upon the happening of any of the following events:

(1) the general partner withdraws from the limited partnership as provided in Section 602;

(2) the general partner ceases to be a member of the limited partnership as provided in Section 702;

(3) the general partner is removed as a general partner in accordance with the partnership agreement;

(4) unless otherwise provided in the certificate of limited partnership, the general partner: (i) makes an assignment for the benefit of creditors; (ii) files a voluntary petition in bankruptcy; (iii) is adjudicated a bankrupt or insolvent; (iv) files a petition or answer seeking for himself any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law, or regulation; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against him in any proceeding of this nature; or (vi) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his properties;

(5) unless otherwise provided in the certificate of limited partnership, [120] days after the commencement of any proceeding against the general partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law, or regulation, the proceeding has not been dismissed, or if within [90] days after the appointment without his consent or acquiescence of a trustee, receiver, or liquidator of the general partner or of all or any substantial part of his properties, the appointment is not vacated or stayed or within [90] days after the expiration of any such stay, the appointment is not vacated;

(6) in the case of a general partner who is a natural person,

(i) his death; or

(ii) the entry of an order by a court of competent jurisdiction adjudicating him incompetent to manage his person or his estate;

(7) in the case of a general partner who is acting as a general partner by virtue of being a trustee of a trust, the termination of the trust (but not merely the substitution of a new trustee);

(8) in the case of a general partner that is a separate partnership, the dissolution and commencement of winding up of the separate partnership;

(9) in the case of a general partner that is a corporation, the filing of a certificate of dissolution, or its equivalent, for the corporation or the revocation of its charter; or

(10) in the case of an estate, the distribution by the fiduciary of the estate's entire interest in the partnership.

§ 403. General Powers and Liabilities.—Except as provided in this Act or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions and liabilities of a partner in a partnership without limited partners.

§ 404. Contributions by General Partner.—A general partner of a limited partnership may make contributions to the partnership and share in the profits and losses of, and in distributions from, the limited partnership as a general partner. A general partner also may make contributions to and share in profits, losses, and distributions as a limited partner. A person who is both a general partner and a limited partner has the rights and powers, and is subject to the restrictions and liabilities, of a general partner and, except as provided in the partnership agreement, also has the powers, and is subject to the restrictions, of a limited partner to the extent of his participation in the partnership as a limited partner.

§ 405. Voting.—The partnership agreement may grant to all or certain identified general partners the right to vote (on a per capita or any other basis), separately or with all or any class of the limited partners, on any matter.

ARTICLE 5

Finance

§ 501. Form of Contribution.—The contribution of a partner may be in cash, property, or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services.

§ 502. Liability for Contribution.—

(a) Except as provided in the certificate of limited partnership, a partner is obligated to the limited partnership to perform any promise to contribute cash or property or to perform services, even if he is unable to perform because of death, disability or any other reason. If a partner does not make the required

contribution of property or services, he is obligated at the option of the limited partnership to contribute cash equal to that portion of the value (as stated in the certificate of limited partnership) of the stated contribution that has not been made.

(b) Unless otherwise provided in the partnership agreement, the obligation of a partner to make a contribution or return money or other property paid or distributed in violation of this Act may be compromised only by consent of all the partners. Notwithstanding the compromise, a creditor of a limited partnership who extends credit, or whose claim arises, after the filing of the certificate of limited partnership or an amendment thereto which, in either case, reflects the obligation, and before the amendment or cancellation thereof to reflect the compromise, may enforce the original obligation.

§ 503. Sharing of Profits and Losses.—The profits and losses of a limited partnership shall be allocated among the partners, and among classes of partners, in the manner provided in the partnership agreement. If the partnership agreement does not so provide, profits and losses shall be allocated on the basis of the value (as stated in the certificate of limited partnership) of the contributions made by each partner to the extent they have been received by the partnership and have not been returned.

§ 504. Sharing of Distributions.—Distributions of cash or other assets of a limited partnership shall be allocated among the partners, and among classes of partners, in the manner provided in the partnership agreement. If the partnership agreement does not so provide, distributions shall be made on the basis of the value (as stated in the certificate of limited partnership) of the contributions made by each partner to the extent they have been received by the partnership and have not been returned.

ARTICLE 6

Distribution and Withdrawal

§ 601. Interim Distributions.—Except as provided in this Article, a partner is entitled to receive distributions from a limited partnership before his withdrawal from the limited partnership and before the dissolution and winding up thereof:

(1) to the extent and at the times or upon the happening of the events specified in the partnership agreement; and

(2) if any distribution constitutes a return of any part of his contribution under Section 608(c), to the extent and at the times or upon the happening of the events specified in the certificate of limited partnership.

§ 602. Withdrawal of General Partner.—A general partner may withdraw from a limited partnership at any time by giving written notice to the other partners, but if the withdrawal violates the partnership agreement, the limited partnership may recover from the withdrawing general partner damages for breach of the partnership agreement and offset the damages against the amount otherwise distributable to him.

§ 603. Withdrawal of Limited Partner.—A limited partner may withdraw from a limited partnership at the time or upon the happening of events specified in the certificate of limited partnership and in accordance with the partnership agreement. If the certificate does not specify the time or the events upon the happening of which a limited partner may withdraw or a definite time for the dissolution and winding up of the limited partnership, a limited partner may withdraw upon not less than 6 months' prior written notice to each general partner at his address on the books of the limited partnership at its office in this State.

§ 604. Distribution Upon Withdrawal.—Except as provided in this Article, upon withdrawal any withdrawing partner is entitled to receive any distribution to which he is entitled under the partnership agreement and, if not otherwise provided in the agreement, he is entitled to receive, within a reasonable time after withdrawal, the fair value of his interest in the limited partnership as of the date of withdrawal based upon his right to share in distributions from the limited partnership.

§ 605. Distribution in Kind.—Except as provided in the certificate of limited partnership, a partner, regardless of the nature of his contribution, has no right to demand and receive any distribution from a limited partnership in any form other than cash. Except as provided in the partnership agreement, a partner may not be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed to him exceeds a percentage of that asset which is equal to the percentage in which he shares in distributions from the limited partnership.

§ 606. Right to Distribution.—At the time a partner becomes entitled to receive a distribution, he has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution.

§ 607. Limitations on Distribution.—A partner may not receive a distribution from a limited partnership to the extent that, after giving effect to the distribution, all liabilities of the limited partnership, other than liabilities to partners on account of their partnership interests, exceed the fair value of the partnership assets.

§ 608. Liability Upon Return of Contribution.—

(a) If a partner has received the return of any part of his contribution without violation of the partnership agreement or this Act, he is liable to the limited partnership for a period of one year thereafter for the amount of the returned contribution, but only to the extent necessary to discharge the limited partnership's liabilities to creditors who extended credit to the limited partnership during the period the contribution was held by the partnership.

(b) If a partner has received the return of any part of his contribution in violation of the partnership agreement or this Act, he is liable to the limited partnership for a period of 6 years thereafter for the amount of the contribution wrongfully returned.

(c) A partner receives a return of his contribution to the extent that a distribution to him reduces his share of the fair value of the net assets of the limited partnership below the value (as set forth in the certificate of limited partnership) of his contribution which has not been distributed to him.

ARTICLE 7

Assignment of Partnership Interests

§ 701. Nature of Partnership Interest.—A partnership interest is personal property.

§ 702. Assignment of Partnership Interest.—Except as provided in the partnership agreement, a partnership interest is assignable in whole or in part. An assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights of a partner. An assignment entitles the assignee to receive, to the extent assigned, only the distribution to which the assignor would be entitled. Except as provided in the partnership agreement, a partner ceases to be a partner upon assignment of all his partnership interest.

§ 703. Rights of Creditor.—On application to a court of competent jurisdiction by any judgment creditor of a partner, the court may charge the partnership interest of the partner with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the partnership interest. This Act does not deprive any partner of the benefit of any exemption laws applicable to his partnership interest.

§ 704. Right of Assignee to Become Limited Partner.—

(a) An assignee of a partnership interest, including an assignee of a general partner, may become a limited partner if and to the extent that (1) the assignor gives the assignee that right in accordance with authority described in the certificate of limited partnership, or (2) all other partners consent.

(b) An assignee who has become a limited partner has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a limited partner under the partnership agreement and this Act. An assignee who becomes a limited partner also is liable for the obligations of his assignor to make and return contributions as provided in Article 6. However, the assignee is not obligated for liabilities unknown to the assignee at the time he became a limited partner and which could not be ascertained from the certificate of limited partnership.

(c) If an assignee of a partnership interest becomes a limited partner, the assignor is not released from his liability to the limited partnership under Sections 207 and 502.

§ 705. Power of Estate of Deceased or Incompetent Partner.—If a partner who is an individual dies or a court of competent jurisdiction adjudges him to be incompetent to manage his person or his property, the partner's executor, administrator, guardian, conservator, or other legal representative may exercise all the partner's rights for the purpose of settling his estate or administering his property, including any power the partner had to give an assignee the right to become a limited partner. If a partner is a corporation, trust, or other entity and is dissolved or terminated, the powers of that partner may be exercised by its legal representative or successor.

ARTICLE 8

Dissolution

§ 801. Nonjudicial Dissolution.—A limited partnership is dissolved and its affairs shall be wound up upon the happening of the first to occur of the following:

(1) at the time or upon the happening of events specified in the certificate of limited partnership;

(2) written consent of all partners;

(3) an event of withdrawal of a general partner unless at the time there is at least one other general partner and the certificate of limited partnership permits the business of the limited partnership to be carried on by the remaining general partner and that partner does so, but the limited partnership is not dissolved and is not required to be wound up by reason of any event of withdrawal, if, within 90 days after the withdrawal, all partners agree in writing to continue the business of the limited partnership and to the appointment of one or more additional partners if necessary or desired; or

(4) entry of a decree of judicial dissolution under Section 802.

§ 802. Judicial Dissolution.—On application by or for a partner the [here designate the proper court] court may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.

§ 803. Winding Up.—Except as provided in the partnership agreement, the general partners who have not wrongfully dissolved a limited partnership or, if none, the limited partners, may wind up the limited partnership's affairs; but the [here designate the proper court] court may wind up the limited partnership's affairs upon application of any partner, his legal representative, or assignee.

§ 804. Distribution of Assets.—Upon the winding up of a limited partnership, the assets shall be distributed as follows:

(1) to creditors, including partners who are creditors, to the extent permitted by law, in satisfaction of liabilities of the limited partnership other than liabilities for distributions to partners under Section 601 or 604;

(2) except as provided in the partnership agreement, to partners and former partners in satisfaction of liabilities for distributions under Section 601 or 604; and

(3) except as provided in the partnership agreement, to partners first for the return of their contributions and secondly respecting their partnership interests, in the proportions in which the partners share in distributions.

ARTICLE 9

Foreign Limited Partnerships

§ 901. Law Governing.—Subject to the Constitution of this State, (1) the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners, and (2) a foreign limited partnership may not be denied registration by reason of any difference between those laws and the laws of this State.

§ 902. Registration.—Before transacting business in this State, a foreign limited partnership shall register with the Secretary of State. In order to register, a foreign limited partnership shall submit to the Secretary of State, in duplicate, an application for registration as a foreign limited partnership, signed and sworn to by a general partner and setting forth:

(1) the name of the foreign limited partnership and, if different, the name under which it proposes to register and transact business in this State;

(2) the state and date of its formation;

(3) the general character of the business it proposes to transact in this State;

(4) the name and address of any agent for service of process on the foreign limited partnership whom the foreign limited partnership elects to appoint; the agent must be an individual resident of this state, a domestic corporation, or a foreign corporation having a place of business in, and authorized to do business in, this State;

(5) a statement that the Secretary of State is appointed the agent of the foreign limited partnership for service of process if no agent has been appointed under paragraph (4) or, if appointed, the agent's authority has been revoked or if the agent cannot be found or served with the exercise of reasonable diligence;

(6) the address of the office required to be maintained in the State of its organization by the laws of that State or, if not so required, of the principal office of the foreign limited partnership; and

(7) if the certificate of limited partnership filed in the foreign limited partnership's state of organization is not required to include the names and business addresses of the partners, a list of the names and addresses.

§ 903. Issuance of Registration.—

(a) If the Secretary of State finds that an application for registration conforms to law and all requisite fees have been paid, he shall:

(1) endorse on the application the word "Filed", and the month, day and year of the filing thereof;

(2) file in his office a duplicate original of the application; and

(3) issue a certificate of registration to transact business in this State.

(b) The certificate of registration, together with a duplicate original of the application, shall be returned to the person who filed the application or his representative.

§ 904. Name.—A foreign limited partnership may register with the Secretary of State under any name (whether or not it is the name under which it is registered in its state of organization) that includes without abbreviation the words "limited partnership" and that could be registered by a domestic limited partnership.

§ 905. Changes and Amendments.—If any statement in the application for registration of a foreign limited partnership was false when made or any arrangements or other facts described have changed, making the application inaccurate in any respect, the foreign limited partnership shall promptly file in the office of the Secretary of State a certificate, signed and sworn to by a general partner, correcting such statement.

§ 906. Cancellation of Registration.—A foreign limited partnership may cancel its registration by filing with the Secretary of State a certificate of cancellation signed and sworn to by a general partner. A cancellation does not terminate the authority of the Secretary of State to accept service of process on the foreign limited partnership with respect to [claims for relief] [causes of action] arising out of the transactions of business in this State.

§ 907. Transaction of Business Without Registration.—

(a) A foreign limited partnership transacting business in this State may not maintain any action, suit, or proceeding in any court of this State until it has registered in this State.

(b) The failure of a foreign limited partnership to register in this State does not impair the validity of any contract or act of the foreign limited partnership or prevent the foreign limited partnership from defending any action, suit, or proceeding in any court of this State.

(c) A limited partner of a foreign limited partnership is not liable as a general partner of the foreign limited partnership solely by reason of having transacted business in this State without registration.

(d) A foreign limited partnership, by transacting business in this State without registration, appoints the Secretary of State as its agent for service of process with respect to [claims for relief] [causes of action] arising out of the transaction of business in this State.

§ 908. Action by [Appropriate Official].—The [appropriate official] may bring an action to restrain a foreign limited partnership from transacting business in this State in violation of the Article.

ARTICLE 10

Derivative Actions

§ 1001. Right of Action.—A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners

Article 6. General Provisions.

Section		Section	
390	What constitutes "knowledge" or "notice"	410	Laws governing cases not covered by chapter
400	Construction of chapter and applicability of other laws	420	Definitions
		430	Short title

Sec. 32.05.390. What constitutes "knowledge" or "notice."

(a) A person has "knowledge" of a fact within the meaning of this chapter not only when the person has actual knowledge of the fact, but also when the person has knowledge of other facts which in the circumstances show bad faith.

(b) A person has "notice" of a fact within the meaning of this chapter when the person who claims the benefit of the notice

(1) states the fact to such person, or

(2) delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at the person's place of business or residence. (§ 28-1-3 ACLA 1949)

Sec. 32.05.400. Construction of chapter and applicability of other laws. (a) The rule that statutes in derogation of the common law are to be strictly construed has no application to this chapter.

(b) The law of estoppel applies under this chapter.

(c) The law of agency applies under this chapter.

(d) This chapter shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(e) This chapter may not be construed to impair the obligations of any contract existing on May 3, 1917, or to affect any action or proceedings begun or right accrued before that date. (§ 28-1-4 ACLA 1949)

Collateral references. — 68 C.J.S., Partnership, § 1.

Sec. 32.05.410. Laws governing cases not covered by chapter. In any case not provided for in this chapter the rules of law and equity, including the law merchant, govern. (§ 28-1-5 ACLA 1949)

Sec. 32.05.420. Definitions. In this chapter

(1) "bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any state insolvent act;

(2) "business" includes every trade, occupation, or profession;

(3) "conveyance" includes every assignment, lease, mortgage, or encumbrance;

(4) "court" includes every court and judge having jurisdiction in the case;

(5) "person" includes individuals, partnerships, corporations, and other associations;

(6) "real property" includes land and any interest or estate in land. (§ 28-1-2 ACLA 1949)

Collateral references. — 68 C.J.S., Partnership, §§ 1, 2.

Sec. 32.05.430. Short title. This chapter may be cited as the Uniform Partnership Act. (§ 28-1-1 ACLA 1949)

Chapter 10. Uniform Limited Partnership Act.

Section		Section	
10	Formation	150	Withdrawal or reduction of limited partner's contribution
20	Business which may be carried on	160	Liability of limited partner to partnership
30	Character of limited partner's contribution	170	Limited partner's interest as personal property
40	Use of surname of partner in partnership name	180	Assignment of limited partner's interest
50	Liability for false statement in certificate	190	Dissolution by retirement, death or insanity of general partner
60	Liability of limited partner	200	Death of limited partner
70	Admission of additional limited partners	210	Rights of creditors of limited partner
80	Rights, powers and liabilities of general partner	220	Distribution of assets upon dissolution
90	Rights of limited partner	230	Cancellation or amendment of certificate
100	Status of person erroneously believing to be a limited partner	240	Requirements of writing to amend or cancel certificate
110	Right to be a general and limited partner in same partnership	250	Parties to actions
120	Leases and other transactions with limited partner	260	Rules for construction of chapter
130	Priorities of limited partners interest	270	Rules for cases not covered by chapter
140	Profits or compensation to limited partner	280	Limited partnership defined
		290	Short title

Sec. 32.10.010. Formation. (a) Two or more persons desiring to form a limited partnership shall

(1) sign and swear to a certificate, which must state

(A) the name of the partnership;

(B) the character of the business;

(C) the location of the principal place of business;

(D) the name and place of residence of each member, general and limited partners being respectively designated;

(E) the term for which the partnership is to exist;

(F) the amount of cash and a description of and the agreed value of the other property contributed by each limited partner;

(G) the additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made;

(H) the time, if agreed upon, when the contribution of each limited partner is to be returned;

(I) the share of the profits or the other compensation by way of income which each limited partner shall receive by reason of the contribution of the limited partner;

(J) the right, if given, of a limited partner to substitute an assignee as contributor in place of the limited partner, and the terms and conditions of the substitution;

(K) the right, if given, of the partners to admit additional limited partners;

(L) the right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority;

(M) the right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner;

(N) the right, if given, of a limited partner to demand and receive property other than cash in return for the contribution of the limited partner;

(2) file the certificate for record in the office of the recorder for the recording district in which the limited partnership is located.

(b) A limited partnership is formed if there is a substantial compliance in good faith with the requirements of (a) of this section. (§ 28-2-2 ACLA 1949)

NOTES TO DECISIONS

The failure to record the certificate does not void the continuation requirements of the limited partnership agreement and the partners must be bound by

the agreement in their relations among one another. *Betz v. Chena Hot Springs Group*, Sup. Ct. Op. No. 2574 (File No. 6057), 657 P.2d 831 (1982).

Collateral references. — 60 Am. Jur. 2d, Partnership, §§ 370-391.
68 C.J.S., Partnership, §§ 449-489.

Application to limited partnerships of statute as to doing business under an assumed or fictitious name or designation not showing the names of the persons interested. 42 ALR2d 544.

Sec. 32.10.020. Business which may be carried on. A limited partnership may carry on any business that a partnership without limited partners may carry on. (§ 28-2-3 ACLA 1949)

Collateral references. — 60 Am. Jur. 2d, Partnership, §§ 374-376, 383.

Sec. 32.10.030. Character of limited partner's contribution. The contribution of a limited partner may be cash or other property but not services. (§ 28-2-4 ACLA 1949)

Collateral references. — 60 Am. Jur. 2d, Partnership, §§ 378, 392.

Sec. 32.10.040. Use of surname of partner in partnership name. (a) The surname of a limited partner may not appear in the partnership name unless

(1) it is also the surname of a general partner, or

(2) before the time when the limited partner became a limited partner the business had been carried on under a name in which the limited partner's surname appeared.

(b) A limited partner whose name appears in a partnership name contrary to the provisions of (a) of this section is liable as a general partner to a partnership creditor who extends credit to the partnership without actual knowledge that the limited partner is not a general partner. (§ 28-2-5 ACLA 1949)

Collateral references. — 60 Am. Jur. 2d, Partnership, § 377.

Sec. 32.10.050. Liability for false statement in certificate. If the certificate contains a false statement, one who suffers loss by reliance on the statement may hold liable any party to the certificate who knew the statement to be false at the time the party signed the certificate, or subsequently, but within a sufficient time before the statement was relied upon to enable that party to cancel or amend the certificate, or to file a petition for its cancellation or amendment as provided in AS 32.10.240(c). (§ 28-2-6 ACLA 1949)

Collateral references. — 60 Am. Jur. 2d, Partnership, §§ 374-376, 383.

Sec. 32.10.060. Liability of limited partner. A limited partner is not liable as a general partner unless in addition to the exercise of the rights and powers as a limited partner, the limited partner takes part in the control of the business. (§ 28-2-7 ACLA 1949)

Collateral references. — 60 Am. Jur. 2d, Partnership, § 381. Liability of special partner who has withdrawn his capital. 67 ALR 1096.

Sec. 32.10.070. Admission of additional limited partners. After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of AS 32.10.240. (§ 28-2-8 ACLA 1949)

Sec. 32.10.080. Rights, powers and liabilities of general partner. A general partner has all the rights and powers and is subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners may not

- (1) do an act in contravention of the certificate;
- (2) do any act which would make it impossible to carry on the ordinary business of the partnership;
- (3) confess a judgment against the partnership;
- (4) possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose;
- (5) admit a person as a general partner;
- (6) admit a person as a limited partner, unless the right so to do is given in the certificate;
- (7) continue the business with partnership property, on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate. (§ 28-2-9 ACLA 1949)

NOTES TO DECISIONS

Effect of partnership agreement where certificate not filed. — Although the limited partnership certificate was not recorded, where the agreement provided that upon notice by the general partners of their intent to continue the business, and a two-thirds vote of approval by the

limited partners, the business might be continued, the requirements of this section did not have to be followed. *Betz v. Chena Hot Springs Group, Sup. Ct. Op. No. 2594 (File No. 6057), 657 P.2d 831 (1982).*

Collateral references. — 60 Am. Jur. 2d, Partnership, §§ 379, 386.

Additional general partner: sufficiency of procedure for designating or admitting additional general partner in limited partnership. 6 ALR4th 1277.

Sec. 32.10.090. Rights of limited partner. (a) A limited partner has the same rights as a general partner to

- (1) have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them,
- (2) have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances make it just and reasonable, and

(3) have dissolution and winding up by decree of court.

(b) A limited partner has the right to receive a share of the profits or other compensation by way of income, and to the return of the contribution of the limited partner as provided in AS 32.10.140 and 32.10.150. (§ 28-2-10 ACLA 1949)

Collateral references. — 60 Am. Jur. 2d, Partnership, §§ 376, 380

Derivative action; right of limited partner to maintain derivative action on behalf of partnership 26 ALR4th 264.

Sec. 32.10.100. Status of person erroneously believing to be a limited partner. A person who has contributed to the capital of a business conducted by a person or partnership, erroneously believing that the person has become a limited partner in a limited partnership, is not by reason of the person's exercise of the rights of a limited partner a general partner with the person or in the partnership carrying on the business, or bound by the obligations of the person or partnership carrying on the business; provided that on ascertaining the mistake the person promptly renounces the person's interests in the profits of the business or other compensation by way of income. (§ 28-2-11 ACLA 1949)

Collateral references. — 60 Am. Jur. 2d, Partnership, § 384.

Sec. 32.10.110. Right to be a general and limited partner in same partnership. (a) A person may be a general partner and a limited partner in the same partnership at the same time.

(b) A person who is a general and also at the same time a limited partner has all the rights and powers and is subject to all the restrictions of a general partner, except that, in respect to the person's contribution, the person has the rights against the other members that the person would have had if not also a general partner. (§ 28-2-12 ACLA 1949)

Sec. 32.10.120. Loans and other transactions with limited partner. (a) A limited partner may lend money to and transact business with the partnership, and unless the limited partner is also a general partner, may receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. A limited partner may not in respect to a claim

- (1) receive or hold as collateral security partnership property, or
- (2) receive from a general partner or the partnership a payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

(b) The receiving of collateral security, or a payment, conveyance, or release in violation of the provisions of (a) of this section is a fraud on the creditors of the partnership. (§ 28-2-13 ACLA 1949)

Sec. 32.10.130. Priorities of limited partners inter se. Where there are several limited partners the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, and as to any other matter. If such an agreement is made it shall be stated in the certificate, and in the absence of such a statement all the limited partners stand upon equal footing. (§ 28-2-14 ACLA 1949)

Sec. 32.10.140. Profits or compensation to limited partner. A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after payment is made, whether from the property of the partnership or from that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners. (§ 28-2-15 ACLA 1949)

Sec. 32.10.150. Withdrawal or reduction of limited partner's contribution. (a) A limited partner may not receive from a general partner or out of partnership property any part of the limited partner's contribution until

(1) all liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them,

(2) the consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of (b) of this section, and

(3) the certificate is cancelled or amended to set out the withdrawal or reduction.

(b) Subject to the provisions of (a) of this section a limited partner may rightfully demand the return of the limited partner's contribution,

(1) on the dissolution of a partnership,

(2) when the date specified in the certificate for its return has arrived, or

(3) after the limited partner has given six months' notice in writing to all other members, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership.

(c) In the absence of a statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of the limited partner's contribution, has only the right to demand and receive cash in return for the contribution.

(d) A limited partner may have the partnership dissolved and its affairs wound up when

(1) the limited partner rightfully but unsuccessfully demands the return of the limited partner's contribution, or

(2) the other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required by (a)(1) of this section and the limited partner would otherwise be entitled to the return of the limited partner's contribution. (§ 28-2-16 ACLA 1949)

Collateral references. — 60 Am. Jur. 2d, Partnership, § 382.

Sec. 32.10.160. Liability of limited partner to partnership. (a) A limited partner is liable to the partnership

(1) for the difference between the limited partner's contribution as actually made and that stated in the certificate as having been made, and

(2) for any unpaid contribution that the limited partner agreed in the certificate to make in the future at the time and on the conditions stated in the certificate.

(b) A limited partner holds as trustee for the partnership

(1) specific property stated in the certificate as contributed by the limited partner, but that was not contributed or that has been wrongfully returned, and

(2) money or other property wrongfully paid or conveyed to the limited partner on account of the limited partner's contribution.

(c) The liabilities of a limited partner as set out in this section can be waived or compromised only by the consent of all members; but a waiver or compromise does not affect the right of a creditor of a partnership, who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities.

(d) When a contributor has rightfully received the return in whole or in part of the capital of the person's contribution, the contributor is nevertheless liable to the partnership for a sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before the return. (§ 28-2-17 ACLA 1949)

Collateral references. — 60 Am. Jur. 2d, Partnership, § 381.

Sec. 32.10.170. Limited partner's interest as personal property. A limited partner's interest in the partnership is personal property. (§ 28-2-18 ACLA 1949)

Sec. 32.10.180. Assignment of limited partner's interest. (a) A limited partner's interest is assignable.

(b) A substituted limited partner is a person admitted to all the rights of a limited partner who has died or assigned the person's interest in a partnership.

(c) An assignee, who does not become a substituted limited partner, does not have the right to require information or account of the partnership transactions or to inspect the partnership books; the assignee is only entitled to receive the share of the profits or other compensation by way of income, or the return of the contribution to which the assignor of the assignee would otherwise be entitled.

(d) An assignee may become a substituted limited partner if all the members, except the assignor, consent or if the assignor being so empowered by the certificate gives the assignee that right.

(e) An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with AS 32.10.240.

(f) A substituted limited partner has all the rights and powers, and is subject to all the restrictions and liabilities of the assignor, except those liabilities of which the substituted limited partner was ignorant at the time the person became a limited partner and which could not be ascertained from the certificate.

(g) The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under AS 32.10.050 and 32.10.160. (§ 28-2-19 ACLA 1949)

Sec. 32.10.190. Dissolution by retirement, death or insanity of general partner. The retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners

(1) under a right to do so stated in the certificate, or

(2) with the consent of all members. (§ 28-2-20 ACLA 1949)

Collateral references. — 68 C.J.S., Partnership, § 85.

Rights of creditors whose business continued after retirement or death of partner. 111 ALR 1093.

Sec. 32.10.200. Death of limited partner. (a) On the death of a limited partner the decedent's executor or administrator has all the rights of a limited partner for the purpose of settling the estate, and such power as the decedent had to constitute an assignee a substituted limited partner.

(b) The estate of a deceased limited partner is liable for all the decedent's liabilities as a limited partner. (§ 28-2-21 ACLA 1949)

Sec. 32.10.210. Rights of creditors of limited partner. (a) On due application to a court of competent jurisdiction by a judgment creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt, may appoint a receiver, and may make all orders, directions and inquiries which the circumstances of the case may require.

(b) The interest may be redeemed with the separate property of a general partner, but may not be redeemed with partnership property.

(c) The remedies conferred by (a) of this section are not exclusive of others which may exist.

(d) Nothing in this chapter may be held to deprive a limited partner of the limited partner's statutory exemption. (§ 28-2-22 ACLA 1949)

Sec. 32.10.220. Distribution of assets upon dissolution. (a) In settling accounts after dissolution, the liabilities of the partnership are entitled to payment in the following order:

(1) creditors, in the order of priority as provided by law, except limited partners on account of their contributions, and to general partners;

(2) limited partners in respect to their share of the profits and other compensation by way of income on their contributions;

(3) limited partners in respect to the capital of their contributions;

(4) general partners other than for capital and profits;

(5) general partners in respect to profits;

(6) general partners in respect to capital.

(b) Subject to a statement in the certificate or to subsequent agreement, a limited partner shares in the partnership assets in respect to the limited partner's claim for capital, and in respect to the limited partner's claim for profits or for compensation by way of income on the limited partner's contribution in proportion to the amount of the claims. (§ 28-2-23 ACLA 1949)

Sec. 32.10.230. Cancellation or amendment of certificate. (a) The certificate shall be cancelled when the partnership is dissolved or all limited partners cease to be limited partners.

(b) A certificate shall be amended when

- (1) there is a change in the name of the partnership or in the amount or character of the contribution of a limited partner;
- (2) a person is substituted as a limited partner;
- (3) an additional limited partner is admitted;
- (4) a person is admitted as a general partner;
- (5) a general partner retires, dies, or becomes insane, and the business is continued under AS 32.10.190;
- (6) there is a change in the character of the business of the partnership;
- (7) there is a false or erroneous statement in the certificate;
- (8) there is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution;
- (9) a time is fixed for the dissolution of the partnership or the return of a contribution, no time having been specified in the certificate; or
- (10) the members desire to make a change in another statement in the certificate in order to accurately represent the agreement between them. (§ 28-2-24 ACLA 1949)

Collateral references. — 60 Am. Jur. 2d, Partnership, § 376.

Sec. 32.10.240. Requirements of writing to amend or cancel certificate. (a) The writing to amend a certificate must

- (1) conform to the requirements of AS 32.10.010(a)(1) as far as is necessary to set out clearly the change in the certificate that is desired, and
- (2) be signed and sworn to by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

(b) The writing to cancel a certificate shall be signed by all members.

(c) A person desiring the cancellation or amendment of a certificate, if a person designated in (a) and (b) of this section as a person, who must execute the writing refuses to do so, may petition the proper court to direct a cancellation or amendment of the certificate.

(d) If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so it shall order the recorder for the recording district in the office where the certificate is

recorded to record the cancellation or amendment of the certificate. Where the certificate is to be amended, the court shall also have filed for record in that office a certified copy of its decree setting out the amendment.

(e) A certificate is amended or cancelled when there is filed for record in the office where the certificate is recorded:

- (1) a writing in accordance with the provisions of (a) or (b) of this section, or
- (2) a certified copy of the order of court in accordance with the provisions of (d) of this section.

(f) After the certificate is amended in accordance with this section, the amended certificate is for all purposes the certificate provided for by this chapter. (§ 28-2-25 ACLA 1949)

Collateral references. — 60 Am. Jur. 2d, Partnership, § 376.

Sec. 32.10.250. Parties to actions. A contributor, unless the contributor is a general partner, is not a proper party to a proceeding by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership. (§ 28-2-26 ACLA 1949)

Collateral references. — 60 Am. Jur. 2d, Partnership, § 390.

Sec. 32.10.260. Rules for construction of chapter. (a) The rule that statutes in derogation of the common law are to be strictly construed has no application to this chapter.

(b) This chapter shall be interpreted and construed to effect its general purpose to make uniform the law of those states which enact it.

(c) This chapter may not be construed to impair the obligations of a contract existing on May 3, 1917, or to affect any action or proceedings begun or right accrued before that date. (§ 28-2-28 ACLA 1949)

Collateral references. — 60 Am. Jur. 2d, Partnership, §§ 371, 372, 376.

Sec. 32.10.270. Rules for cases not covered by chapter. In any case not provided for in this chapter the rules of law and equity, including the law merchant, govern. (§ 28-2-29 ACLA 1949)

Sec. 32.10.280. Limited partnership defined. A limited partnership is a partnership formed by two or more persons under AS 32.10.010 that has as members one or more general partners and one or

or more limited partners. A limited partner as such is not bound by the obligations of the partnership. (§ 28-2-1 ACLA 1949)

Collateral references. — 60 Am. Jur. 2d, Partnership, §§ 10, 370.

Sec. 32.10.290. Short title. This chapter may be cited as the Uniform Limited Partnership Act. (§ 28-2-27 ACLA 1949)

FISCAL NOTE

REQUEST:

Revision Date: _____
 Title: "An act relating to limited
 partnership derivative actions."
 Sponsor: Senator Rodey
 Requestor: Senate Judiciary

Agency Affected: Department of Law
 BRU: Legal Services
 Components: Operations

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see the attached analysis.

Prepared by: Richard I. Pegues, Director
 Division: Administrative Services
 Approved by Commissioner: Richard I. Pegues / FOR / Douglas B. Baily, Attorney General
 Agency: Department of Law

Phone: 465-3672
 Date: April 9, 1990
 Date: April 9, 1990

Distribution (by preparer):
 Legislative Finance
 Legislative Sponsor
 Requestor
 Office of Management and Budget
 Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. SB 480

This bill amends the state's Uniform Limited Partnership Act, AS 32.10, to permit a limited partner to bring an action to recover a judgment in the partnership's favor, if general partners with authority to bring the action have refused to bring the action, or if an effort to bring the action is not likely to succeed. Because the bill deals with private sector actions it will not have a fiscal impact on the Department of Law or on other departments or agencies of government.

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