

THE CREATION, OPERATION, AND DISSOLUTION OF A LIMITED PARTNERSHIP IN ALASKA

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I. INTRODUCTION

A limited partnership is a creature of state statute, rather than common law development. Indeed, there is a notable absence of case law on limited partnerships not only in Alaska, but across the country as well. This void will probably be filled in years to come, as the wide use of limited partnerships is only a relatively recent phenomenon. In the meantime, for the attorney working in the area of syndications and securities, planning these transactions is sometimes very difficult. In tailoring a limited partnership's certificate and agreement to obtain the legal consequences his client desires, he¹ must become intimately familiar with Alaska's Uniform Limited Partnership Act² ("U.L.P.A.") and Alaska's Uniform Partnership Act³ ("U.P.A.") without the aid of instructive precedent.

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1. For convenience, the masculine form of pronouns is used throughout this article in its generic sense, to refer to the masculine, feminine, or neuter.

2. ALASKA STAT. §§ 32.10.010-.290 (1962).

3. *Id.* § 32.05.010-.430 (unless otherwise noted, all subsequent citations to Alaska's Uniform Limited Partnership Act and the Uniform Partnership Act are to the Acts as enacted in 1962). Alaska's Uniform Partnership Act ("U.P.A.") applies to limited partnerships in Alaska. The U.P.A. provides: "This chapter applies to limited partnerships except insofar as the statutes relating to limited partnerships are inconsistent with this chapter." *Id.* § 32.05.010(b). Alaska's Uniform Limited Partnership Act ("U.L.P.A.") incorporates appropriate provisions of the U.P.A. The U.L.P.A. provides that, with some major exceptions, "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." *Id.* § 32.10.080. In addition, the U.L.P.A. provides that a

This article is in part designed to aid the drafter of a limited partnership certificate and agreement in his effort to reflect the wishes of his clients within the framework provided by Alaska statutes. The attorney's role in this process, however, often goes beyond interpreting and applying state law and involves questions of federal income tax law. Accordingly, where relevant, this article also discusses federal income tax issues, with emphasis on structuring the limited partnership so that all its members enjoy the favorable tax treatment of a partnership while obtaining for most members the insulation from unlimited liability usually associated with a corporation.

Given the paucity of case law in the area of limited partnerships in Alaska, this article is designed not only to summarize the law for those who have the opportunity to draw up limited partnership certificates and agreements, but also to suggest to the courts and to the bar in general potential resolutions of issues in the law of limited partnerships that will inevitably arise with more frequency in Alaska.

II. THE LIMITED PARTNERSHIP DEFINED

Since the statutory definition of a limited partnership includes the word "partnership," the meaning of this term must be first understood. Alaska law defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."⁴ Significantly, the potential partners must act with a profit motive or the entity will not be recognized as a partnership under Alaska state law or federal income tax law.⁵ For federal income tax purposes, this joint-profit motive requirement has developed into a requirement that the general partners, as a class, must have at least a one percent profit and loss interest in the limited partnership.⁶ Otherwise the Internal Revenue Service ("I.R.S.") may challenge the partnership's classification for tax purposes, arguing that the general partners have no real profit motive.

The limited partner's liability for partnership debts and obligations is confined to the amount of capital he has contributed and has agreed to contribute to the partnership. Under the U.L.P.A.

[a] limited partnership is a partnership formed by two or more persons under § 10 of this chapter which has as members one or more general partners and one or more limited partners. A limited part-

limited partner has *some* of the same rights as a general partner. *Id.* § 32.10.090. These rights will be discussed *infra* notes 104-05 and accompanying text.

4. ALASKA STAT. § 32.05.010(a).

5. 3 A. WILLIS, J. PENNELL, & P. POSTLEWAITE, PARTNERSHIP TAXATION § 184.02 (1981) [hereinafter cited as WILLIS].

6. *Id.*

ner as such is not bound by the obligations of the partnership.⁷

Moreover, the U.L.P.A. provides that

[a] limited partner is not 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

General partners, however, are jointly liable for all debts and obligations of the partnership.⁹ In addition, all general partners are jointly and severally liable for any torts and breaches of trust a partner commits while acting in the ordinary course of the partnership's business.¹⁰

The principal purpose of the limited partnership organization is therefore to permit some partners to contribute money or property to the partnership without subjecting their individual, personal assets to the hazards of the partnership business. As one commentator explained:

The limited partnership was developed as an intermediate step between lending money to a business enterprise and becoming a general partner with full liability to the partnership creditors. The investor may participate in profits of the limited partnership in accordance with the partnership agreement, yet, at the same time, have his liability limited to the amount of his investment plus any additional amount he is obligated to contribute under the partnership agreement.¹¹

Thus, to limit his liability, the prospective limited partner must be certain that the partnership qualifies as a limited partnership under state law. The prospective limited partner should also be certain that the partnership will be taxed as a partnership, and not as a corporation. Without partnership tax status, the I.R.S. treats "partnership" income the same as it treats corporate income.¹² The partnership's taxable income would be subject to tax at the partnership level.¹³ In addition, the limited partner would have to pay tax on any partnership distributions, which would be treated as dividends,¹⁴ and he would not

7. ALASKA STAT. § 32.10.280.

8. *Id.* § 32.10.060. It is far from clear, however, what constitutes taking part in "control of the business." See *infra* notes 143-49 and accompanying text.

9. ALASKA STAT. §§ 32.05.100(2), .10.080.

10. *Id.* at §§ 32.05.100(1), .10.080. Under these provisions, joint and several liability means that a creditor may, at his option, sue and collect from one or more of the general partners, the partnership, or all of them together.

11. 3 WILLIS, *supra* note 5, at § 181.02.

12. Specifically, if a partnership is deemed an "association" for tax purposes, it is taxed as a corporation. See *infra* note 51 and accompanying text.

13. See I.R.C. § 11(a) (1985) (providing for taxation of corporate income).

14. This result follows from the treatment of partnership income as corporate income. Dividends are generally treated as ordinary income to shareholders receiving them. See I.R.C. § 301 (1985).

be able to offset partnership tax losses from his other income.¹⁵ Accordingly, the following sections will discuss state law formation issues and federal income tax issues as they relate to a limited partnership.

III. FORMATION OF A LIMITED PARTNERSHIP

A. State Law Formation

In return for the protection of limited liability granted by state law, limited partnerships must satisfy numerous statutory requirements. Formation of a limited partnership is governed by Alaska statute section 32.10.010, which requires that "[t]wo or more persons desiring to form a limited partnership"¹⁶ must "sign and swear to a certificate,"¹⁷ which includes numerous specific provisions.¹⁸ The cer-

15. This proposition also follows from the treatment of partnership income as corporate income. The losses would be offset against the partnership's income, not the partner's income.

16. Although this requirement suggests subjective intent, one can become a partner by estoppel. ALASKA STAT. § 32.05.110.

17. The certificate of limited partnership is not the limited partnership agreement, although the certificate contains provisions on important matters concerning the partners' relationship to the partnership and with each other. The difference between the two instruments will be discussed in the following subsection (*see infra* notes 26-27 and accompanying text) but, in general, a limited partnership agreement should go beyond the provisions required in a certificate. For example, provisions on matters such as the partnership's accounting methods, the partnership's use of cash flow, the general partner's management responsibilities, securities law restrictions, and investor suitability standards could be included in the agreement.

18. ALASKA STAT. § 32.10.010(a)(1) lists the provisions which the certificate must include.

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 shall 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 partner 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 his contribution,
 - (J) 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,

tificate must be properly filed, and, if it is in "substantial compliance in good faith" with the specified statutory requirements, then a limited partnership is formed.¹⁹

B. Function of the Certificate

The formation of a limited partnership is not complete until a certificate of limited partnership is filed in the recorder's office for the recording district in which the limited partnership is located.²⁰ The function of the certificate is to give notice to the world in general, and prospective creditors in particular, of the organization's limited partnership status. Most importantly, the certificate documents the limited liability of some of the partnership's members. As the Alaska Supreme Court has said, "[t]he purpose of the recording requirement is to provide notice to the firm's creditors of a limited partner's circumscribed liability."²¹

Significantly, if the certificate is not recorded, the majority rule across the country is that a general partnership and not a limited partnership has been formed.²² As a result, each intended partner — including each "limited partner" — is personally liable for all of the debts and obligations of the partnership.²³ The Alaska Supreme Court, however, has not explicitly adopted this rule; rather, in *Betz v. Chena Hot Springs Group* the court acknowledged the majority rule but neither adopted nor rejected it, since the court's decision did not require resolution of the issue.²⁴ Therefore, when confronted with the issue, the court may decide that failing to file the certificate is not fatal to limited partnership status *if* creditors who deal with the partnership

(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 the 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 his contribution

Subject to minor exceptions, the partnership's name cannot include the surname of a limited partner. ALASKA STAT. § 32.10.040. *See infra* notes 150-53 and accompanying text. Additionally, a limited partner may not contribute services to the partnership. *Id.* § 31.10.030.

19. *Id.* § 32.10.010(a)(2), (b).

20. *Id.* § 32.10.010(a)(2).

21. *Betz v. Chena Hot Springs Group*, 657 P.2d 831, 833 (Alaska 1982).

22. *Id.* at 834.

23. *Id.*

24. *Id.*

know that the partnership was intended to be a limited partnership and also know which partners were intended to have limited liability.²⁵

The *Betz* decision also illustrates the difference between the certificate and the limited partnership agreement. The partnership agreement controls the rights and duties of the partners among themselves, even if the certificate has not been recorded.²⁶ In short, while the certificate becomes operative only when it is recorded, the partnership agreement is operative from the moment it is executed.²⁷ Moreover, while the certificate affects the partners' relations with creditors as well as their relationship with the partnership and among and between the partners themselves, the partnership agreement generally affects only the partners' relations with the partnership and among and between the partners.

In real estate syndications, the general practice is to incorporate the limited partnership agreement into the certificate. This practice insures that the certificate is complete when filed, and avoids the preparation of two documents with the accompanying risk of inadvertent conflicts between them. In addition, incorporating the agreement into the certificate lays a strong foundation for the argument that creditors, and prospective assignees of limited partnership interests, had notice of *all* the limitations of the respective partners and the partnership itself.

Some commentators have maintained, however, that "it is better practice to draft a separate certificate of limited partnership setting forth only the information required by the ULPA."²⁸ The argument is

25. In addition, in the right fact situation, an innocent investor, thinking he has become a limited partner, may be protected from unlimited partnership liability.

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 interests in the profits of the business or other compensation by way of income.

ALASKA STAT. § 32.10.100.

26. The partnership agreement is a contract between the partners. If the requirements of a valid contract are met, the partners then acquire contractual rights and duties that the parties to the contract may enforce.

27. Although a partnership agreement becomes operative as soon as it is executed, this is not to imply that a limited partnership agreement *must* be in writing. To best protect the rights of the limited partnership's members, its partnership agreement should be in writing, but having recorded its certificate, a limited partnership's members could orally agree upon all matters not covered by the certificate.

28. 3 WILLIS, *supra* note 5, at § 181.02.

that by drafting and filing a separate certificate, the limited partnership agreement is not exposed to public view.²⁹ If, however, the offering of partnership interests is registered with the Alaska Division of Banking and Securities,³⁰ the partnership agreement becomes a public record, negating the argument that a separate partnership agreement can remain private. In support of the separate drafting of certificates and partnership agreements, critics also cite the requirement that the certificate must be amended each time there is a change in the partnership's membership or a material change in the partnership agreement. The argument is that it is easier to amend a certificate that contains

29. *Id.*

30. There is little doubt that a partnership interest held by a limited partner, and not a general partner, is regulated by the state and federal securities laws. Alaska Statutes section 45.55.130(12) provides in relevant part that a "security" means a . . . certificate of interest or participation in any profit-sharing agreement [or] investment contract" The definition of a security under federal law is substantially the same. See 15 U.S.C. § 77(b)(1) (1982). See generally *Marine Bank v. Weaver*, 455 U.S. 551, 556 (1982) ("The test is what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospects."); *United Housing Foundation, Inc. v. Forman*, 421 U.S. 837, 852 (1975) ("The touchstone is the presence of [1] an investment [2] in a common venture [3] premised on a reasonable expectation of profits [4] to be derived from the entrepreneurial or managerial efforts of others."); *SEC v. W. J. Howey Co.*, 328 U.S. 293, 298-99 (1946) ("an investment contract . . . means a contract, transaction or scheme whereby a person [1] invests his money in [2] a common enterprise and [3] is led to expect profits [4] solely from the efforts of the promoter or a third party"); *SEC v. Glen W. Turner Enterprises, Inc.*, 474 F.2d 476, 482 (9th Cir.), cert. denied, 414 U.S. 821 (1973) (The critical inquiry is "whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which effect the failure or success of the enterprise."); *American Gold & Diamond Corp. v. Kirkpatrick*, 678 P.2d 1343, 1345-46 (Alaska 1984) (a security is a contract, transaction or scheme whereby a person [1] invests [2] in a common enterprise with [3] the expectation of profits that [4] will be derived solely by the efforts of the promoter or a third party).

Having recognized that a limited partnership interest is a security, the drafter of a limited partnership certificate and agreement must fully apprise his client of the rule that all securities must be registered with the Securities and Exchange Commission ("S.E.C.") and with the Alaska Division of Banking and Securities, unless an exemption from registration can be found. Securities Act of 1933, § 5, 15 U.S.C. § 77c-e (1982); ALASKA STAT. § 45.55.070 (1980). This fundamental principle must be firmly understood, for the remedies available against a limited partnership that fails to register or find an exemption under both federal and state laws include rescission, interest and an award of damages. Securities Act of 1933, § 12, 15 U.S.C. §§ 77k(e) (1982); ALASKA STAT. § 45.55.220(a) (1980). These remedies are available even if the limited partnership scrupulously disclosed every material fact to the investor, but failed to register or find an exemption. *Id.* Such failure may also constitute a criminal act. 15 U.S.C. § 77e (1982); ALASKA STAT. § 45.55.010(a)(1) (1980).

Although sorely in need of updating, good background in this regard may be found in Schlosberg, *Financing Alaskan Enterprises: Securities Law Implications*, 4 U.C.L.A.-ALASKA L. REV. 12 (1974).

only the required information than to file an amended limited partnership agreement.³¹ A general partner may overcome this second problem, however, by filing, for each amendment, a short statement similar in effect to a codicil to a will, incorporating the earlier certificates and agreements by reference where appropriate, and setting forth only the changes in membership or in the agreement.

C. Tax Consequences of Certificate Provisions

1. *The Importance of Care in Defining Business Purpose.* The certificate of limited partnership must state the "character" of the partnership's business.³² As a practical matter, this requirement is satisfied by a statement that defines the business purpose for which the partnership is formed. This statement should be very specific and limited in scope.³³ By contrast, when forming a corporation in Alaska, the careful drafter need not be specific when defining the corporation's business purpose.³⁴ A broad purpose statement in a partnership agreement, however, is unwise not only under Alaska state law, but also under federal income tax law.

First, a fundamental tenet of state law holds partners liable for any actions their fellow partners take in the ordinary course of the partnership business.³⁵ Therefore, if the drafter defines the partnership business as broadly as he might define a corporation's business, the general partners might become liable for the debts and obligations resulting from, for example, one partner's ordering millions of dollars of diamonds or pursuing some other type of investment not originally contemplated by the parties. Of course, the limited partner's liability would still be limited to the capital that he has contributed and has

31. 3 WILLIS, *supra* note 5, at § 181.02.

32. ALASKA STAT. § 32.10.010(a)(1)(B).

33. For example, the certificate of a limited partnership might provide the following statement of business purpose:

The partnership shall acquire the unimproved land located at Block X, Anchorage, Alaska, more particularly described on Exhibit B, attached hereto and made a part hereof, and will erect on such land a hotel containing approximately 500 rooms. Upon completion of construction, the partnership shall hire and fire, as it deems proper from time to time, a hotel management firm to operate the hotel.

34. The business purpose of a corporation may be stated as broadly as the following example:

The purpose of the corporation is to engage in any lawful act or activity for which a corporation may be organized under and pursuant to the Alaska Business Corporation Act, any act amendatory thereof, supplemental thereto, or substituted therefor, and any other lawful act not otherwise prohibited by the Alaska Business Corporation Act.

35. ALASKA STAT. §§ 32.05.100, .10.080-.090.

agreed to contribute to the partnership.³⁶ The drafter of the certificate and partnership agreement should, therefore, define the business purpose of the partnership clearly and narrowly.

A second, more technical reason for the drafter to clearly and narrowly define the business purpose of the partnership rests in tax law. Specifically, subsection 707(a)(1) of the Internal Revenue Code of 1954, as amended ("Code"), provides that "[i]f a partner engages in a transaction with a partnership other than in his capacity as a member of such partnership, the transaction shall, except as otherwise provided in this section, be considered as occurring between the partnership and one who is not a partner."

Normally a partnership's payment in cash or in kind to a partner is deemed a distribution under section 731 of the Code, which means that the partnership cannot deduct that payment as an ordinary and necessary business expense in determining its taxable income or loss. Under subsection 707(a), however, the partnership may be able to deduct as a business expense a payment to a partner that is part of a transaction falling under that provision.

The careful drafter's concern here can be illustrated by *Pratt v. Commissioner*.³⁷ In *Pratt* a limited partnership was formed for, among other purposes, "the management of shopping centers."³⁸ The limited partnership deducted reasonable shopping center management fees owed to its three general partners as ordinary and necessary business expenses.³⁹ As a result, all partners had higher distributive shares of loss than they would have had if the payments were considered to be distributions under Code section 731.⁴⁰ These deductions were challenged by the Internal Revenue Service. The partnership claimed that it could treat the management fees paid to the general partners as subsection 707(a) payments. The Fifth Circuit rejected that argument, however, stating:

Congress determined that in order for the partnership to deal with one of its partners as an "outsider" the transaction dealt with must be something outside the scope of the partnership. If, on the other hand, the activities constituting the "transaction" were activities which the partnership itself was engaged in, compensation for such transaction must be treated merely as a rearrangement between the partners of their distributive shares in partnership income.⁴¹

Accordingly, since the partnership itself was formed in part to manage

36. *Id.* § 32.10.060.

37. 550 F.2d 1023 (5th Cir. 1977).

38. *Id.* at 1026.

39. *Id.* at 1027.

40. *See id.* at 1025.

41. *Id.* at 1026.

shopping centers, the transaction between the partnership and the general partners under which the partnership "hired" the general partners to provide management services could not be a subsection 707(a) transaction. As the Fifth Circuit said, "The particular provision relied on by the taxpayers here [subsection 707(a)] simply does not permit a partnership to treat as a deduction for ordinary and necessary business expenses amounts paid to partners, as partners, for the performance of services for which the partnership exists."⁴²

Therefore, if the limited partnership plans to deduct the fees that it will pay its general partners, the drafter of the certificate should attempt to define the partnership's business purpose so that it does not encompass the services for which the general partner will be paid. For example, if the limited partnership plans to deduct the fees it will pay its general partner for operating and managing an apartment complex the partnership will construct, the partnership's business purpose should not include the operation and management of apartment buildings.⁴³ Rather, the business purpose should be limited to constructing and owning the complex.

Finally, the drafter should carefully define the partnership's business purpose in order to preserve capital gains treatment on the proceeds of any gain realized from the sale of partnership property. The Tax Court in *Goodwin v. Commissioner*⁴⁴ has held that "the reference to the trade or business of the 'taxpayer' in section 1221(1) 'clearly refers to the trade or business of the partnership, despite the fact that under section 701 partnerships are not subject to income tax.'"⁴⁵ The *Goodwin* court further emphasized "that the intent of the partnership, rather than the intent of any specific partner, determined whether certain sales of real estate were made in the ordinary course of business and were therefore ineligible for capital gain treatment."⁴⁶

Therefore, under subsection 702(b) of the Code, the partnership is

42. *Id.* at 1027.

43. Of course, any such payment may be otherwise deductible under subsection 707(c) of the Code, which provides that:

To the extent determined without regard to the income of the partnership, payments to a partner for services or the use of capital shall be considered as made to one who is not a member of the partnership, but only for the purposes of section 61(a) [relating to gross income] and, subject to section 263, for purposes of section 162(a) [relating to trade or business expenses].

It is interesting to note that the Internal Revenue Service has ruled that the management fees paid by the partnership in *Pratt* were guaranteed payments and thus deductible under subsection 707(c). Rev. Rul. 81-300, 1981-2 C.B. 143, 144.

44. 75 T.C. 424 (1980).

45. *Id.* at 436 (explaining the court's holding in *Podell v. Commissioner*, 55 T.C. 429, 433 (1970)).

46. *Id.*

considered an independent entity from its individual members in determining the character of items included in a particular partner's distributive share.⁴⁷ For example, suppose individuals A, B and C form ABC partnership, each taking an equal interest in the partnership, and then ABC buys and sells a piece of real estate, realizing a gain for the taxable year of ninety dollars. The question whether or not each partner enjoys capital gains treatment on his thirty-dollar recognized gain depends on whether the *partnership* held the real estate primarily for sale to its customers in the ordinary course of its trade or business. Any individual partner's intention with respect to the property sale is irrelevant. The question of the intent of the partnership is, of course, one of fact.

In determining the intent of the partnership with respect to the property, the court would likely focus on the answers to questions such as the following: Was the partnership engaged in a trade or business and, if so, what business? Was the partnership holding the property primarily for sale in that business? Were the sales contemplated by the partnership "ordinary" in the course of that business?⁴⁸

To preserve capital gains treatment of returns to partners, the careful drafter may want to provide in the partnership's purpose statement that the partnership intends to purchase property for investment only and to make property sales thereof that are consistent with the partnership's investment objective. Of course, if the partnership makes frequent and substantial sales of its property, then the partnership's purpose statement, no matter how carefully drawn, would be of no avail in attempts to preserve capital gains treatment. The Fifth Circuit has indicated that whether or not the partnership makes frequent and substantial sales of its property is highly relevant in answering questions of the partnership's intent with respect to purchased property.⁴⁹ Nevertheless, in a close case, a poorly drafted purpose statement might be the deciding factor in an administrative or court decision to treat the gain as ordinary income, rather than as a capital gain.

On the other hand, the drafter must recognize and advise his client that the partnership may be giving up needed flexibility in adopting a purpose statement that is too narrowly drawn. For example, the market may be such that the majority of partners would actually be better off if the partnership subdivided its land and sold it in divisible units. The partners may still receive more net cash if the gain on the sale must be recognized as ordinary income than they would if the

47. *Podell*, 55 T.C. at 432-34.

48. *Suburban Realty Co. v. United States*, 615 F.2d 171, 178 (5th Cir. 1980).

49. *Id.*

gain could be considered a capital gain. The general partner could not subdivide that property, however, if to do so would contravene the narrowly drawn certificate, unless all the limited partners agreed with his decision.⁵⁰ So if one limited partner withheld his consent, there probably would be no subdivision.

2. *“Corporate Characteristics” Affecting the Tax Treatment of Partnerships.* An organization that qualifies as a limited partnership under Alaska law may be classified as an “association” for federal income tax purposes. “The term ‘association’ refers to an organization whose characteristics require it to be classified for purposes of taxation as a corporation rather than as another type of organization such as a partnership or trust.”⁵¹

In determining whether a limited partnership will be classified as an association, and therefore taxed as a corporation, the I.R.S. examines the organization for the following corporate characteristics: (1) free transferability of interests, (2) centralization of management, (3) continuity of life, and (4) limited liability.⁵² If the partnership has more corporate characteristics than noncorporate characteristics it will be considered a corporation for tax purposes.⁵³ If two of the characteristics apply to the partnership but two of them do not, then the partnership will be taxed as a partnership. For example, a limited partnership that lacks continuity of life and limited liability will not be classified as an association even though it has centralized management and free transferability of interests. Thus, in drafting the certificate and limited partnership agreement the attorney must make sure that at least two of the four corporate characteristics do not apply to the newly created entity.

a. Free transferability of interests. Alaska law requires that the certificate must state “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.”⁵⁴ Accordingly, when a client wants to

50. ALASKA STAT. § 32.10.080(1).

51. Treas. Reg. § 301.7701-2(a)(1).

52. *Id.* § 301.7701-2(a)(2).

53. *Id.* § 301.7701-2(a)(3).

54. ALASKA STAT. § 32.10.010(a)(1)(J); *see supra* note 18 for the text of this statute. Noteworthy in this regard is ALASKA STAT. § 32.10.180(d), which provides in part that a limited partner’s assignee may become a substituted limited partner “if the assignor being so empowered by the certificate gives the assignee that right.” As subsection (f) of that section further provides, “[a] 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.”

provide in the certificate that each limited partner has the right to substitute an assignee as a limited partner in the assignor's place, the drafter should immediately recognize that such a provision may give the partnership the corporate characteristic of free transferability of interests. Free transferability exists if those partners owning substantially all of the interests in the limited partnership have the power, without the consent of the other partners, to substitute persons who previously had not been partners for themselves, thereby conferring upon the new persons all of the rights and powers of the assignors.⁵⁵ Since the limited partners typically own substantially all the interests in a syndicated limited partnership, this regulation may often be applicable.

The drafter should advise his client that a free transferability provision might render the partnership taxable as a corporation, and also that it allows any limited partner to substitute a potentially unfriendly limited partner for himself. This person may at the least become a nuisance by, for example, constantly requiring information from the general partners and inspecting the partnership's books. Limited partners have a right of access to internal partnership information and thus the opportunity to upset the partnership's normal business practices.⁵⁶ The unfriendly substituted limited partner may also test his power to dissolve the partnership by court decree.⁵⁷

The Treasury Regulations further provide that if a limited partner may transfer his interest only after he offers his interest to the other partners at its fair market value, then a "modified form of free transferability of interests exists."⁵⁸ In classifying an organization either as an association or a partnership, a modified form of free transferability of interests, as with any modified corporate characteristic, will be accorded less significance than an unmodified form of that characteristic.⁵⁹

b. Centralization of management. Many of the limited partnerships an attorney encounters will have the corporate characteristic of centralization of management. Under the Treasury Regulations, "[a]n organization has centralized management if any person (or any group of persons which does not include all the members) has continuing exclusive authority to make the management decisions necessary to

55. Treas. Reg. § 301.7701-2(e)(1) (1967).

56. ALASKA STAT. § 32.10.180(c).

57. See *infra* notes 65-68 and accompanying text.

58. Treas. Reg. § 301.7701-2(e)(2) (1967). See *infra* note 122 and accompanying text for other examples of reasonable transfer restrictions.

59. *Id.*

the conduct of the business for which the organization was formed."⁶⁰ The Regulations also specifically address the issue of centralized management with regard to limited partnerships.

[L]imited partnerships subject to a statute corresponding to the Uniform Limited Partnership Act [including the Alaska act] . . . generally do not have centralized management, but centralized management ordinarily does exist in such a limited partnership if substantially all the interests in the partnership are owned by the limited partners.⁶¹

Commentators tell us that, "It is generally understood that the Internal Revenue Service will agree that the limited partners do not own substantially all of the interests in the partnership if the interests of the general partners total at least 20% of all interests in the partnership."⁶² They further observe that since "in most syndicated limited partnerships, the general partners frequently do not have a 20% interest . . ., counsel for the partnership must concede that the limited partnership is like an association, insofar as this test is concerned."⁶³

If the limited partnership contemplated by an attorney's clients has the corporate characteristics of free transferability of interests and centralized management, the remaining two tests become crucially important. If that partnership has either one of these remaining characteristics, it will likely be treated as a corporation for tax purposes. This means double taxation and the limited partners' inability to use partnership losses on their individual tax returns.⁶⁴

c. Continuity of life. Under the Alaska U.L.P.A., a limited partnership will never have the corporate characteristic of continuity of life because "a limited partner has the same rights as a general partner to . . . have dissolution and winding up by decree of court."⁶⁵ In

60. *Id.* § 301.7701-2(c)(1).

61. *Id.* § 301.7701-2(c)(4).

62. 3 WILLIS, *supra* note 5, at § 184.06.

63. *Id.*

64. *See supra* notes 13-15 and accompanying text.

65. ALASKA STAT. § 32.10.090(a)(3). Although unclear, this provision may mean that a limited partner can exercise rights under ALASKA STAT. § 32.05.270, a provision of Alaska's U.P.A. that sets forth the circumstances allowing dissolution at the request of a partner. It provides:

(a) On application by or for a partner the court shall decree a dissolution whenever:

- (1) a partner is declared a lunatic in any judicial proceeding or shown to be of unsound mind,
- (2) a partner becomes in any other way incapable of performing his part of the partnership contract,
- (3) a partner is guilty of conduct that tends to affect prejudicially the carrying on of the business,
- (4) a partner willfully or persistently commits a breach of the partnership

addition, any limited partner is entitled to dissolve⁶⁶ the partnership and wind up its affairs if either (1) he has rightfully but unsuccessfully demanded a return of his capital contribution or (2) he is otherwise entitled to a return of his capital contribution⁶⁷ and the other partnership liabilities have not been paid or the partnership is insolvent.⁶⁸

In light of these statutory rights, the Internal Revenue Service has provided in its Regulations that "a limited partnership subject to a statute corresponding to the Uniform Limited Partnership Act . . . lack[s] continuity of life."⁶⁹ Even if none of the limited partners has the right under the partnership agreement to seek a dissolution by court decree, each general and limited partner has the power, as opposed to the right, under state law to dissolve the limited

agreement, or otherwise conducts himself in matters relating to the partnership business so that it is not reasonably practicable to carry on the business in partnership with him,

- (5) the business of the partnership can only be carried on at a loss,
- (6) other circumstances make a dissolution equitable.

In the limited partnership context, presumably the word "partner" in the numbered clauses of this statute refers only to general partners and those limited partners who take part in the partnership's business, as the remaining limited partners would not be in a position to prejudice the partnership.

66. The difference between a limited partnership's dissolution and its termination for tax purposes must be kept in mind. As used in the Treasury Regulations, "dissolution . . . means an alteration of the identity of an organization by reason of a change in the relationship between its members as determined under local law." *Treas. Reg. § 301.7701-2(b)(2)* (1967). This definition is clearly consistent with the definition of dissolution under the U.P.A., which provides: "[t]he dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." *ALASKA STAT. § 32.05.240*. Moreover, the definition used in the Regulations is consistent with the only arguable definition of dissolution under the U.L.P.A. — namely, *ALASKA STAT. § 32.10.190*, which provides: "*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.*" (emphasis added).

By contrast, a partnership may continue for federal income tax purposes even though it has been dissolved under Alaska law. As some commentators have put it, "[t]he dissolution of a partnership has no materiality for income tax purposes other than as one of the four tests to be applied in determining whether a limited partnership is to be treated as an association." 3 *WILLIS, supra* note 5, at § 184.04.

67. For example, the certificate might provide that a limited partner shall be entitled to a return of his capital contribution on a certain date. *ALASKA STAT. § 32.10.010(a)(1)(H)*.

68. The condition that a limited partner may only seek dissolution if the partnership's liabilities have not been paid excludes its liabilities to general partners and to limited partners on account of their contributions. *ALASKA STAT. § 32.10.150(d)*.

69. *Treas. Reg. § 301.7701-2(b)(3)* (1967).

partnership.⁷⁰

Moreover, if an Alaska limited partnership agreement expressly provides that the limited partnership shall continue, for example, for a term of twenty years notwithstanding the retirement, death, or insanity of a general partner, an Alaska limited partnership still does not have the corporate characteristic of continuity of life. Under Alaska law, any partner may at least theoretically dissolve the limited partnership by court decree, thereby destroying the required continuity.⁷¹

Interestingly, Treasury Regulations provide that “[a]n organization has continuity of life if the death, insanity, bankruptcy, retirement, resignation, or expulsion of any member will *not* cause a dissolution of the organization.”⁷² Under Alaska law a limited partnership is not dissolved on the retirement, death, or insanity of a general partner if “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.”⁷³ This provision raises the question whether the limited partnership has continuity of life under Alaska law if the right to continue the business is provided in the certificate or if all of the remaining general and limited partners agree to continue the business. The answer, however, is clearly “no” because under several Alaska statutes any of the partners may, under certain circumstances, dissolve the limited partnership.⁷⁴

70. For example, suppose the following provision were in the limited partnership agreement:

The parties hereby agree that irreparable damage would be done to the goodwill and reputation of the partnership if any partner should bring an action in court to dissolve the partnership. Care has been taken in this Agreement to provide what the parties feel is fair and just payment in liquidation of the interest of all partners. Accordingly, each party hereby waives and renounces his right to such a court decree of dissolution or to seek the appointment by the court of a liquidator for the partnership.

3 WILLIS, *supra* note 5, at app. B-15 § 12.4. Notwithstanding this provision, a limited partner of a limited partnership created under Alaska’s U.L.P.A. may under certain circumstances have the power, as distinguished from the right, which has been contractually waived here, to obtain a dissolution by court decree. *See infra* notes 180-86 and accompanying text.

71. Noteworthy in regard to dissolution is ALASKA STAT. § 32.10.190, which provides: “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.” As a practical matter then, if the certificate is silent on this point, any limited partner can dissolve the partnership by not consenting to continuation of the partnership’s business on the retirement, death, or insanity of a general partner. It is critical, therefore, that the drafter of the certificate inquire into his client’s intent in this regard.

72. Treas. Reg. § 301.7701-2(b)(1) (1967).

73. ALASKA STAT. § 32.10.190.

74. *Id.* § 32.10.090(a)(3) (dissolution and winding up by court decree); *id.*

d. Limited liability. The corporate characteristic of limited liability is defined in the Treasury Regulations.

An organization has the corporate characteristic of limited liability if under local law there is no member who is personally liable for the debts of or claims against the organization. Personal liability means that a creditor of an organization may seek personal satisfaction from a member of the organization to the extent that the assets of such organization are insufficient to satisfy the creditor's claim.⁷⁵

The regulations further provide that "in the case of a limited partnership subject to a statute corresponding to the Uniform Limited Partnership Act, personal liability exists with respect to each general partner, *except as provided in subparagraph (2) of [section 301.7701-2(d)].*"⁷⁶

Under the Alaska U.L.P.A., a general partner is of course personally liable for the debts of the partnership.⁷⁷ By contrast, "[a] limited partner is not 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."⁷⁸

Nevertheless, under subparagraph (2) of the Treasury Regulation referred to above, a limited partnership created under the Alaska U.L.P.A. may have the corporate characteristic of limited liability if (1) the general partner has no substantial assets other than his interest in the partnership *and* (2) he is merely acting as an agent of the limited partners.⁷⁹ Therefore, if a general partner (whether an individual, corporation, partnership, or other entity) has substantial assets other than his interest in the partnership that could be reached by the limited partnership's creditors, personal liability exists.⁸⁰ Moreover, reading the regulations strictly, even if the general partner has insubstantial assets, personal liability will exist as long as the general partner is not "merely a 'dummy' acting as the agent of the limited partners."⁸¹

Although Treasury Regulations suggest that a limited partnership could potentially have the corporate characteristic of limited liability, case authority suggests that in nearly every limited partnership

§ 32.10.150(d) (dissolution upon partner's demand for return of contribution or when liabilities to others left unpaid); *id.* § 32.10.190(2) (dissolution with consent of all members); Treas. Reg. § 301.7701-2(b)(3) (1967) (notwithstanding express agreement to continue partnership, partnership lacks continuity of life if any member has power to dissolve partnership under local laws).

75. Treas. Reg. § 301.7701-2(d)(1).

76. *Id.* (emphasis added). See *infra* notes 79-81 and accompanying text.

77. ALASKA STAT. § 32.10.080, .05.100.

78. *Id.* § 32.10.060.

79. Treas. Reg. § 301.7701-2(d)(2).

80. *Id.*

81. *Id.*

some partner will have personal liability; in other words, a limited partnership will very rarely have the corporate characteristic of limited liability. In *Zuckman v. United States*,⁸² the limited partnership at issue had one general partner, a corporation with a capitalization of only \$500.⁸³ Nevertheless, the Court of Claims held that even if the general partner with its clearly insubstantial assets were a dummy acting as an agent of the limited partners, personal liability would exist because the limited partners themselves would be personally liable as the principals of the general partner.⁸⁴ *Zuckman* arguably renders nugatory the narrow category of potential limited liability partnerships created by the Treasury Regulations.⁸⁵

The cautious tax adviser should not rely solely on the *Zuckman* opinion. To guarantee that his clients are not found to have assumed the corporate characteristic of limited liability, an attorney should ascertain whether the general partner will be acting as the limited partners' so-called "dummy" agent. On a more objective level, he should also determine whether the general partner will have "substantial assets," other than his interest in the partnership.⁸⁶

D. Amendment to Certificate

A limited partnership must amend its certificate from time to time to prevent it from containing false or erroneous statements.⁸⁷ Any partner could be liable for damages caused by reliance on a false certificate, if he knew of the false statement in the certificate at the time he signed it, or if after discovering the false statement he failed to correct it.⁸⁸

Moreover, under state law the certificate must be amended to reflect changes in the statutorily-required provisions of the certificate.⁸⁹ For example, the certificate must be amended when "there is a change in the name of the partnership or in the amount or character of the contribution of a limited partner"⁹⁰ Similarly, the certificate must be amended each time a limited partner withdraws any part of

82. 524 F.2d 729 (Ct. Cl. 1975).

83. *Id.* at 731.

84. *Id.* at 741.

85. See 3 WILLIS, *supra* note 5, at § 184.07 n.44.

86. Although the Treasury Regulations do not define substantial assets, Rev. Rul. 72-13, 1972-1 C.B. 735, sets forth safe harbor rules on what constitutes substantial assets where a corporation is the sole general partner of a limited partnership.

87. ALASKA STAT. § 32.10.230(b)(7).

88. *Id.* § 32.10.050.

89. *Id.* § 32.10.230(b). The statutorily-mandated provisions of the certificate are listed in ALASKA STAT. § 32.10.010. See *supra* note 18.

90. *Id.* § 32.10.230(b)(1).

his contribution.⁹¹

Each amendment must be signed and sworn to by all partners and filed in the office where the certificate is recorded.⁹² An amendment substituting a limited partner must be signed by both the assigning limited partner and the member to be substituted.⁹³ An amendment adding a limited or general partner must also be signed by the member to be added.⁹⁴ Significantly, if a withdrawing general partner fails to sign the amended certificate evidencing his retirement he may continue to be treated as a general partner. His failure to sign may not expose him to liability, however, if a creditor dealing with the partnership knows of the withdrawal.

If a person who is required to sign an amendment refuses to do so — for example, an assigning limited partner — the partnership may petition a court of competent jurisdiction to order the amendment of the certificate.⁹⁵ As a practical matter, however, the signature requirement is often facilitated by having each limited partner appoint one or more of the general partners as his attorney-in-fact to sign and acknowledge the certificate on his behalf. To provide stability, the general partner should seek a power of attorney that is irrevocable, survives the incapacity of the limited partner, and is coupled with an interest. After the certificate is amended, either by agreement among the partners or by court order, the amended certificate becomes for all purposes the certificate.⁹⁶

IV. CONTRACTUAL FLEXIBILITY

Whether and to what extent provisions in a limited partnership agreement may differ from the scheme established by the U.L.P.A. or the U.P.A. is unclear. The issue has rarely been litigated, but it may arise in three contexts: (1) where there is no applicable U.L.P.A. or U.P.A. provision, (2) where the applicable statutory provision expressly permits a contractual override clause, and (3) where the applicable statutory provision contains no contractual override clause and affirmatively specifies a scheme which differs from the terms of the limited partnership agreement.

Provisions in a limited partnership agreement that are not ad-

91. *Id.* § 32.10.150(a)(3); see *infra* note 111 and accompanying text.

92. *Id.* § 32.10.240(a)(2), (e).

93. *Id.* § 32.10.240(a)(2).

94. *Id.*

95. *Id.* § 32.10.240(c). As subsection (d) of that statute further provides “[i]f 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 . . . amendment of the certificate.”

96. *Id.* § 32.10.240(f).

dressed in the U.L.P.A. or U.P.A. are generally enforceable⁹⁷ and will, therefore, govern the relationship of the partners. The partners are entitled to include any reasonable provision that is not prohibited by statute, case law, or considerations of public policy in the partnership agreement. In addition, applicable statutory provisions sometimes expressly permit the partners to override the statutory partnership scheme by an alternative scheme of their own design.⁹⁸

By contrast, where a statutory provision and a contractual term of the partnership agreement are in conflict, the law is unclear on which provision controls. One argument is that the statute should govern the relationship among the partners, especially where the rights of third-party creditors would be adversely affected or where the contractual term is unconscionable or against public policy. The contractual term may also be attacked as an ineffective or imperfect waiver of rights otherwise guaranteed by statute. For example, as discussed earlier, under the Alaska U.L.P.A., a limited partner may request a court decree dissolving the partnership and winding up partnership affairs. Suppose, however, that the limited partnership agreement contained the following provision:

The parties hereby agree that irreparable damage would be done to the goodwill and reputation of the partnership if any partner should bring an action in court to dissolve the partnership. Care has been taken in this agreement to provide what the parties feel is fair and just payment in liquidation of the interest of all partners. Accordingly, each party hereby waives and renounces his right to such a court decree of dissolution or to seek the appointment by the court of a liquidator for the partnership.

An argument could be made that this contractual term is contrary to public policy, although it implicitly has the blessing of Willis, Pennell, and Postlewaite, as it appears in their form limited partnership agreement.⁹⁹ In addition it might be attacked on the grounds that the limited partners did not intentionally or voluntarily relinquish their right to a dissolution by court decree. Since limited partners are rarely involved in negotiating and drafting the limited partnership agreement, they could also argue that they were not fully informed about their rights, raising securities fraud issues.

97. See, e.g., *Bassan v. Investment Exch. Corp.*, 83 Wash. 2d 922, 925, 524 P.2d 233, 236 (1974) ("Partners may include in the partnership articles practically any agreement they wish . . .").

98. For example, ALASKA STAT. § 32.10.150(c) provides: "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." The partners are obviously free to vary the general rule articulated in this statute.

99. 3 WILLIS, *supra* note 5, at app. B-15 § 12.4.

On the other hand, so long as the rights of third-party creditors are not adversely affected and the agreed provision is neither unconscionable nor against public policy, the better view is that the partners' agreement should govern their relationship. The U.L.P.A.'s provisions are primarily for the benefit of the limited partnership's creditors who can look only to the general partners' nonpartnership assets in the event of partnership insolvency. If the drafted partnership agreement adequately protects creditors' interests, the limited partnership's members should then be permitted to structure the partnership to fit their preferences.¹⁰⁰ For example, Alaska's U.L.P.A. provides that distributions in liquidation of the partnership must be made in the following order: first, to creditors of the partnership, other than general partners; second, to the limited partners; third, to the general partners who are creditors of the partnership; and finally, to the general partners.¹⁰¹ While the partners must maintain the distribution to the partnership's creditors as a first priority, the partners should be able to vary the statutory framework by providing that once the creditors have been paid, all partners, both general and limited, will receive distributions in accordance with their respective partnership interests.¹⁰²

In our opinion, the limited partnership agreement should also be permitted to vary the statutory scheme to minimize the risk that a

100. Indeed, the U.L.P.A. can rationally be analogized to the intestate succession provisions of the Uniform Probate Code ("U.P.C."). If a person dies intestate, the U.P.C. controls the creation, operation, and distribution of the decedent's estate. In effect, the U.P.C. represents a testamentary plan that all persons can adopt simply by not executing a will that varies the terms of the U.P.C. The U.L.P.A. is similar in effect. It will control at least the operation and dissolution of the limited partnership unless the partners execute an agreement that, while maintaining the favorable position of creditors under the U.L.P.A., varies the terms of the U.L.P.A. as they relate to the relations among and between the partners.

101. ALASKA STAT. § 32.10.220.

102. The Supreme Court of Texas offers support for the argument permitting statutory variance in stating, "[w]e look to the Texas Uniform Partnership Act [which, it will be recalled, is expressly applicable to limited partnerships] for guidance only when the partnership agreement is silent. In this case, we shall often consider it only as an interpretive aid." *Park Cities Corp. v. Byrd*, 534 S.W.2d 668, 672 (Tex. 1976). In addition, the Supreme Court of Washington has said that "Partners may include in the partnership articles practically any agreement they wish . . ." *Bassan*, 83 Wash. 2d at 925, 524 P.2d at 236. See also Basile, *Admission of Additional and Substitute General Partners to a Limited Partnership: A Proposal for Freedom of Contract*, 1984 ARIZ. ST. L.J. 235, 254 (arguing in favor of revision of the U.L.P.A. to permit contractual modification of the consent requirement for admission of additional and substitute general partners to a limited partnership).

To assure that a court accepts the provisions in the partnership agreement, the limited partnership's promoter must be careful to obtain a waiver of statutory rights from each limited partner. This waiver may be obtained by means of a well written offering circular informing the prospective investor of his rights under the partnership agreement vis-a-vis what those rights might otherwise be under the U.L.P.A.

minority of the limited partners could disrupt the continuation of the partnership business. For example, suppose the sole general partner of a limited partnership has recently been diagnosed as having a fast-moving cancer and has only weeks to live. The limited partnership would be best served if the general partner could name a person who shares his investment knowledge and philosophy to serve as an additional general partner, subject to a simple majority vote of the limited partners. If the simple majority vote provision had not been provided in the partnership agreement, a single unfriendly limited partner could dissent to the admission of the additional general partner and thus assure the dissolution of the limited partnership upon the death of the original general partner.¹⁰³

V. RIGHTS AND DUTIES OF LIMITED PARTNERS

A. Statutory Rights

The Alaska U.L.P.A. does not grant limited partners rights commensurate with general partners. Still, 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.¹⁰⁴

In addition to sharing the above rights with the general partners, a limited partner has a statutory right to receive a share of partnership profits or other compensation, as well as a return of his capital contribution under certain circumstances.¹⁰⁵

1. *Profits, Compensation and the Return of Capital.* Significantly, a limited partner is entitled to receive a distribution of his share of partnership profits or other compensation only if, after the distribution, the partnership's assets would exceed all of its liabilities except liabilities to limited partners on account of their contribution and to general partners.¹⁰⁶ If this condition is not satisfied, the distribution is wrongful. Therefore, the limited partner holds the distributed money or property as trustee for the partnership,¹⁰⁷ and he may be forced to give it back to the partnership for the benefit of its creditors.

This balance-sheet analysis is also among the requirements a lim-

103. See *infra* note 126 and accompanying text.

104. ALASKA STAT. § 32.10.090(a).

105. *Id.* § 32.10.090(b).

106. *Id.* § 32.10.140.

107. *Id.* § 32.10.160(b)(2).

ited partner must satisfy before he is entitled to withdraw any part of his capital contribution. Specifically, a limited partner may not receive a return of any part of his contribution until (1) all liabilities of the partnership have been paid, except for liabilities to limited partners on account of their contribution, unless the partnership would retain enough property to pay the liabilities after the limited partners' contributions have been returned, (2) all members consent when necessary,¹⁰⁸ and (3) the certificate is cancelled or amended to reflect the withdrawal or reduction.¹⁰⁹ Subject to these limitations, a limited partner may rightfully demand the return of his contribution (1) on the dissolution of the partnership, (2) on the date set aside in the certificate for him to receive the return, or (3) if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership, after he has given six months' notice in writing to all other partners.¹¹⁰

As mentioned above, the certificate must be amended in order for a limited partner to receive any part of his capital contribution. Although the limited partner may receive a cash distribution that constitutes a return of his capital contribution — for example, after each limited partner's share of profits has been distributed — the limited partner will continue to be liable for a return of those funds until the certificate has been amended to reflect the withdrawal or reduction.¹¹¹ Accordingly, the limited partnership should carefully maintain capital accounts and regularly amend the certificate to reflect the reductions in capital contributions.

Also as mentioned above, if the certificate does not specify a time for either the dissolution of the partnership or the return of the limited partner's contribution, a limited partner may rightfully demand a return of his contribution after giving six months' notice in writing to all other partners. Significantly, if any partner makes such a demand, but is unsuccessful in getting a return of his contribution, he is entitled to have the partnership dissolved and its affairs wound up.¹¹² A limited partner may also have a partnership dissolved and its affairs wound up if the limited partner is for other reasons entitled to a return of his

108. Consent to a partner's withdrawal of his capital is unnecessary if the limited partner is rightfully demanding his return of his contribution under ALASKA STAT. § 32.10.150(b), discussed below.

109. *Id.* § 32.10.150(a).

110. *Id.* § 32.10.150(b).

111. As ALASKA STAT. § 32.10.160(b)(1) provides, "[a] limited partner holds as trustee for the partnership . . . specific property stated in the certificate as contributed by him, but which . . . has been wrongfully returned . . ." Here the "wrongful" return lies simply in the fact that the certificate has not been amended.

112. ALASKA STAT. § 32.10.150(d)(1).

contribution¹¹³ and the other partnership liabilities have not been paid or the partnership is insolvent.¹¹⁴

A limited partner is not entitled to an "in kind" distribution of property to reduce his capital contribution, unless all the partners consent or the certificate provides for this type of distribution.¹¹⁵ Otherwise, regardless of the nature of his contribution, he has only the right to demand and receive cash in return for his contribution.¹¹⁶

2. *Simultaneous Treatment as Limited and General Partner.* Alaska's U.L.P.A. provides that a limited partner may also be a general partner in the same partnership at the same time.¹¹⁷ This right may appear contradictory to the statutory rule that a limited partner forfeits his limited liability by taking part in the control of the business.¹¹⁸ The statute reconciles this apparent conflict with the following provision:

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 his contribution, he has the rights against the other members which he would have had if he were not also a general partner.¹¹⁹

Therefore, as against third-party creditors dealing with the partnership, such a partner has personal and unlimited liability. With respect to his contribution as a limited partner, however, he has the same rights against his partners that he would have if he were merely a limited partner. For example, upon dissolution of the partnership, he is entitled to a liquidating distribution of his limited partner contribution before any general partner receives a liquidating distribution.¹²⁰

3. *Assignment of the Limited Partner's Interests.* A limited partner also has the right to assign his limited partnership interest.¹²¹ This right, however, is not absolute. Under reasonable circumstances, a limited partner may waive his right to assign his interest in the limited

113. For example, the partner would be entitled to a return of his contribution if the certificate provided for the return.

114. The partnership liabilities that must be paid before a partner is entitled to a return of his capital exclude liabilities to general partners and to limited partners on account of their contributions. *Id.* § 32.10.150(d)(2).

115. *Id.* § 32.10.150(c).

116. *Id.*

117. *Id.* § 32.10.110(a).

118. *Id.* § 32.10.060.

119. *Id.* § 32.10.110(b).

120. *Id.* § 32.10.220(a). Here it is assumed that the limited partnership agreement does not contain a different liquidating distribution scheme, which the limited partnership should be free to insert. See *supra* notes 98-102 and accompanying text.

121. ALASKA STAT. § 32.10.180(a).

partnership. For example, to avoid a technical termination of the partnership for federal income tax purposes, the limited partnership agreement may restrict a limited partner's right to assign his interest until the general partner has consented and has received a favorable opinion of counsel regarding the assignment's impact on the partnership's tax status.¹²²

After the limited partner assigns his interest, all the members of the partnership (except the assignor) must approve admission of the assignee before he becomes a substituted limited partner, unless the certificate provides that the assignor may confer "substituted limited partner" status upon an assignee without partnership approval.¹²³ The certificate must also be appropriately amended before the assignee becomes a substituted limited partner.¹²⁴

Significantly, the substitution of the assignee as a limited partner does not release the assignor from possible liability for (a) false statements in the certificate, (b) any difference between the contribution he actually made and the amount stated in the certificate, (c) any unpaid

122. Under subsection 708(b)(1) of the Code, a partnership will be considered terminated for federal income tax purposes if "within a 12-month period there is a sale or exchange of 50 percent or more of the total interest in partnership capital and profits." I.R.C. § 708(b)(1). Since limited partners generally own substantially all of the interests in a syndicated limited partnership, they should not have the unchecked right to assign their respective interests as they wish.

The partnership agreement may also restrict a limited partner's right to assign his interest in order to assure compliance with federal or state securities laws. For example, under the S.E.C.'s "safe harbor" rule on intrastate offerings (Rule 147), a limited partner cannot resell his partnership interest to a nonresident until nine months from the date of the last sale under the offering. If this rule is broken, the partnership is subject to the risk that the whole offering may be rescinded as in violation of federal securities registration requirements. Securities Act of 1933, § 12, 15 U.S.C. § 77(l) (1982). Even if no partner would actually threaten rescission, the partnership may find it difficult to borrow funds if, for example, the bank learns that the partnership could be successfully sued for a return of the offering proceeds plus interest. The reader should be aware of the S.E.C.'s position that, in syndications involving a series of contributions by the limited partners, the offering is not completed until all contributions have been paid. Only then does the nine-month waiting period begin to run.

123. ALASKA STAT. § 32.10.180(d).

124. *Id.* § 32.10.180(e). "Substituted limited partner" status is important because, as ALASKA STAT. § 32.10.180(f) provides, "[a] 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." In addition, ALASKA STAT. § 32.10.180(c) further provides:

An assignee, who does not become a substituted limited partner, has no right to require 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.

contributions that he agreed in the certificate to make in the future, (d) specific property stated in the certificate as contributed by him, but which was not contributed or which was wrongfully returned to him, (e) money or other property wrongfully distributed to him on account of his contribution, or (f) rightfully returned capital contributions, with interest, to the extent necessary to discharge partnership liabilities to all creditors who extended credit or whose claims arose before the contributions were returned.¹²⁵

4. *Veto Powers over General Partner.* Limited partners have certain statutory veto powers over the general partner. Specifically, Alaska law provides that without the written consent or ratification of the specific act by *all* limited partners, the general partner has no authority to

- (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.¹²⁶

Limited partnership agreements often provide, however, that a general partner may be admitted to the partnership upon an affirmative vote of the limited partners representing fifty-one percent of the limited partnership units. At first glance, this provision appears to conflict with the U.L.P.A., but a good argument can be made that when each of the limited partners agreed to this provision, he consented to the admission of other persons as a general partner.¹²⁷ Moreover, as discussed earlier, a strong argument can be made that a limited partnership agreement may vary the terms of the U.L.P.A.¹²⁸ Although there is no direct authority on point, a court should uphold the partners' alteration of the statutory plan as long as each of the limited partners had knowledge, either actual or constructive, of their veto right under the U.L.P.A. and intended to relinquish that right. To assure that the limited partners' waiver will be upheld, the promot-

125. ALASKA STAT. § 32.10.180(g).

126. *Id.* § 32.10.080.

127. Basile, *Admission of Additional and Substitute General Partners to a Limited Partnership: A Proposal for Freedom of Contract*, 1984 ARIZ. ST. L.J. 235, 245-50.

128. See *supra* notes 99-103 and accompanying text.

ers of the limited partnership must inform prospective limited partners of their rights under the U.L.P.A. as compared to their rights under the partnership agreement.¹²⁹

B. Nature of Limited Partner's Interest

State law defines both the limited partner's interest and the general partner's interest in the partnership as personal property.¹³⁰ A creditor seeking a security interest in a partner's partnership interest should, therefore, use a Uniform Commercial Code financing statement, security agreement, or both, regardless of the character of the partnership's property. Upon the death of a partner, even if the partnership's sole asset is real estate, his partnership interest passes to his estate as personal property, not as real property.¹³¹

Since a limited partner of an Alaska limited partnership has no interest in the partnership's assets, these assets are not subject to attachment or execution by the limited partner's creditors.¹³² A judgment creditor of a limited partner may, however, petition a court to charge the partnership interest of the indebted limited partner with payment of the judgment debt, to appoint a receiver, and to "make all orders, directions and inquiries which the circumstances of the case may require."¹³³ State law further provides that a limited partner's "interest may be redeemed with the separate property of a general partner, but may not be redeemed with partnership property."¹³⁴ This means that if a general partner wants to get rid of a troublesome creditor of a limited partner, he can pay the creditor off with his own non-partnership property, thus purchasing all or a part of the indebted limited partner's interest in the partnership.¹³⁵

129. *Id.*

130. ALASKA STAT. §§ 32.10.170, .210.

131. The passing of partnership property as personal property may be particularly disconcerting where, for example, a testator, intending that his daughter receive all his right, title, and interest in an apartment building owned by a partnership of which he was a 50% partner, provides in his will that his "half of the apartment" is hers, while all his personal property goes to his son. Here his daughter may end up receiving nothing from his estate because the partnership interest is personal property, thus unwittingly given to his son. It is interesting to note, in this connection, that a partnership may be a useful vehicle to circumvent Alaska law that provides that unmarried persons cannot own real estate in joint tenancy. ALASKA STAT. § 34.15.130. To obtain the right of survivorship, two or more persons could create a partnership, contribute their jointly-owned real estate to the partnership, and then hold their interests in the partnership as joint tenants with right of survivorship.

132. ALASKA STAT. § 32.10.210(a).

133. *Id.*

134. *Id.* § 32.10.210(b).

135. An aggressive creditor may try to use ALASKA STAT. § 32.10.210(b) to invalidate a cram-down provision in the partnership agreement that provides, for example,

C. Limited Partner as Partnership Creditor

A limited partner of an Alaska limited partnership may lend money to and transact other business with the partnership. Unless he is also a general partner, the limited partner may receive a pro rata share of the partnership's assets along with all other general creditors to satisfy any claims against the partnership resulting from his business dealings with the partnership.¹³⁶ A limited partner-creditor does not enjoy the same status as a third-party creditor, however, since the partnership is prohibited from making any payments to him in discharge of his claims unless the assets of the partnership at the time of payment are sufficient to discharge all other third-party claims against the partnership.¹³⁷ Additionally, a limited partner-creditor may not receive or hold partnership property as collateral for any claim he has against the partnership; therefore, his debt must be unsecured.¹³⁸ The limited partner-creditor's receipt of partnership property as collateral, or of a payment, conveyance, or release at a time when the partnership has insufficient assets is a fraud on the third-party creditors of the partnership.¹³⁹

D. Preserving Limited Liability

The limited partnership agreement may, of course, provide other rights and duties to limited partners.¹⁴⁰ A critical concern in forming limited partnerships is determining how much power to advise, review, manage, or veto a limited partner may possess or exercise without becoming liable as a general partner for taking part "in the control of the business."¹⁴¹ It is far from clear what constitutes taking part in control of the business; thus, the partners should evaluate any "part-

that if any limited partner's interest is subject to a charging order, the partnership may redeem the limited partner's interest for an amount equal to the limited partner's capital account balance. The creditor would no doubt be furious if the limited partner's interest had a substantially greater value than the value of the capital account balance.

136. ALASKA STAT. §§ 32.10.120(a), .220(a)(1).

137. *Id.* § 32.10.120(a).

138. *Id.*

139. *Id.* § 32.10.120(b).

140. For example, the agreement might provide that a group of limited partners with a certain aggregate percentage interest may remove a general partner. In addition, many partnership agreements provide that the general partner must furnish to the limited partners reports on specified matters affecting either the general partner personally or the partnership itself. Such provisions can give substance to the limited partners' power to obtain partnership dissolution by court decree. Some partnership agreements may provide for annual meetings and even the approval of a majority of limited partners before partnership assets may be sold. These greater levels of limited partner involvement are generally not recommended, however, for the reasons discussed in this section.

141. ALASKA STAT. § 32.10.060.

nership democracy provisions" carefully before adopting them.¹⁴²

For example, although a limited partnership agreement should always leave the management of the partnership's ordinary investment activities to the general partners, suppose the limited partnership agreement authorized the limited partners to veto the general partners' decision to dispose of specific property contributed to the partnership. An argument could be made that this veto is not participation in control because the limited partners were simply exercising their veto rights under state law¹⁴³ to prevent the general partners from doing an act that makes it impossible for the partnership to carry on its ordinary business. Accordingly, as a general rule, partnership agreements should authorize the limited partners to veto identified actions rather than empowering them to initiate the actions. In addition, if the agreement confers voting rights, these rights should only be exercisable on extraordinary and non-recurring matters, rather than on matters that could be viewed as arising in the ordinary course of the partnership's business.

Many commentators have suggested that the test of exercise of control is essentially a reliance standard,¹⁴⁴ in which case the question becomes whether the limited partner's participation in partnership activities could reasonably induce a prospective third-party creditor to rely on the apparent general liability of the limited partner.¹⁴⁵ In 1976, however, the National Conference of Commissioners on Uniform State Laws suggested a new control test.¹⁴⁶ The provision it drafted does not require that a creditor rely on the limited partner's apparent status as a general partner before imposing liability on the limited partner,¹⁴⁷ suggesting that reasonable reliance by creditors may not be the rationale for imposing liability on a limited partner for his participation in the control of the business. As one commentator observed, "The absence of reliance suggests that the theoretical basis for the unlimited liability . . . is the limited partner's assumption of responsibility, through the exercise of control, for the results of the

142. Feld, *The "Control" Test for Limited Partnerships*, 82 HARV. L. REV. 1471, 1474 (1969).

143. See *supra* note 126 and accompanying text.

144. Feld, *supra* note 142, at 1479.

145. For example, suppose the limited partnership agreement provided that all checks written on a partnership account must be cosigned by one of a few limited partners. This participation would no doubt render those limited partners liable as general partners. See *id.* at 1475.

146. In 1976, the Commissioners approved the Revised Uniform Limited Partnership Act (R.U.L.P.A.) with the intention of modernizing the U.L.P.A., which had been approved in 1916. Prefatory Note, 6 U.L.A. 200 (Supp. 1985).

147. Smith, *The Delaware Revised Uniform Limited Partnership Act*, 30 PRAC. LAW. 23, 25 (1984).

exercise of managerial prerogatives."¹⁴⁸

In any event, if retaining limited liability is more important to limited partners than exercising what might be considered "suspect" powers, the careful drafter should exclude the authority for those powers from the partnership agreement. If secure insulation against liability is relatively less important to the prospective limited partners, they may be willing to assume the risk of incurring unlimited liability in return for greater protection of their partnership interests through more substantial control of the partnership. Under either approach, the attorney should make certain that the client is fully aware of the risks involved.

No case has been identified in which a limited partner was held generally liable for the obligations of the partnership merely because he possessed the *potential* ability to control the partnership's business. The law is apparently clear on this point — actual participation, not an unexercised power to control, causes a limited partner to become liable as a general partner.¹⁴⁹ A possible solution to the control problem is therefore to grant the limited partners the suspect powers and simply advise them to seek legal counsel prior to exercising such powers. Alternatively or additionally, the partnership agreement could provide that such powers may be exercised by the limited partners only if the exercise would not subject the limited partners to unlimited liability. This alternative is different from the first in form only, since in effect it would probably require the opinion of counsel prior to the exercise of such powers.

Limited partners may also be employed by the partnership without becoming generally liable if their employment does not infringe upon the general partners' powers. If, however, a limited partner-employee or -consultant usurps the general partners' power by directing the regular business operations of the partnership, he will probably be found to have taken part in the control of the business, even if the limited partner's employment agreement with the partnership clearly preserved the superior position of the general partners. The facts would simply override the contractual provision. Nevertheless, the partnership should draft the superior position of the general partners into an employment agreement because in a close case the provision may tip the balance in favor of the limited partner's retention of his limited liability.

An attorney should advise limited partners who are shareholders

148. *Id.*

149. *See also, e.g.,* ALASKA STAT. § 32.10.060; *Rathke v. Griffith*, 218 P.2d 757 (Wash. 1950) (limited partner had the power to serve as a "director" of the limited partnership, but never used it).

of a corporate general partner to avoid serving as officers or directors of the corporation. If they serve in such positions of control they may be found to have taken part in the partnership's business. Even controlling shareholders who do not serve as officers or directors should avoid any acts suggesting indirect control of the partnership's business.

As a final caution, a limited partner may lose his limited liability if his surname appears in the partnership's name.¹⁵⁰ Such a limited partner would be liable as a general partner to any third-party creditor who extended credit to the partnership without actual knowledge that the limited partner was not a general partner.¹⁵¹ The limited partner's only defense to this liability is "actual knowledge." The creditor's "constructive notice" of the limited partner's status, through the partnership's filing of the certificate in the recorder's office, is not a defense.

This general prohibition against using a limited partner's surname in the partnership's name has two exceptions. First, the limited partner's surname may be used if it is also the surname of a general partner.¹⁵² Where a limited partner also serves as a general partner this rule provides no real exception, since he faces unlimited liability because of his status as a general partner. Second, the limited partner's surname may be used if the partnership's business had been carried on under a name in which his surname appeared before the limited partner became a limited partner.¹⁵³

E. Liability for Deficit Accounts

Limited partnerships should maintain capital accounts for each of their members. The capital account of a partner generally consists of his original capital contribution plus his additional capital contributions and his share of partnership profits, less distributions to him and his share of partnership losses.

Limited partners who receive preferential distributions¹⁵⁴ and partners who receive special allocations of profit and loss¹⁵⁵ may de-

150. ALASKA STAT. § 32.10.040.

151. *Id.* § 32.10.040(b).

152. *Id.* § 32.10.040(a)(1).

153. *Id.* § 32.10.040(a)(2).

154. For example, suppose that the partnership agreement provides that before any distribution is made to any of the general partners, the limited partners shall receive distributions equaling their respective capital contributions, plus a 12% return on their investment. If a limited partner's distributions and share of losses exceeded the sum of his capital contributions plus his share of income, his capital account would show a negative balance.

155. For example, suppose a partner's distributive share of losses exceeded the sum of his capital contributions and his share of income. To give economic effect to a

velop negative capital accounts with the partnership. Indeed, even without receiving preferential distributions or special allocations, partners may develop deficit capital accounts.

The significance of this deficit capital account is unclear since neither the U.L.P.A. nor the U.P.A. expressly requires a partner to restore a capital account deficit.¹⁵⁶ The Tax Court has said in dicta that a repayment obligation does not expressly arise under the U.P.A.¹⁵⁷ By contrast, the Supreme Court of Texas has construed the Texas U.P.A. to require a general partner in a limited partnership to restore a deficit balance in her capital account of \$1,987,344.¹⁵⁸

In further evaluating his potential liability to the partnership, a general partner should recognize that every general partner has a right of contribution from his co-general partners if he pays more than his pro rata share of any of the partnership's losses, such as a judgment requiring restoration of a deficit capital account.¹⁵⁹ Limited partners should recall that a limited partner holds any amount wrongfully distributed to him in trust for the partnership.¹⁶⁰ He might therefore be forced to return any wrongful preferential distribution that created a deficit account.

The partners should anticipate and address in their agreement the possibility that property or money may have to be returned to the partnership. If the parties so intend, the partnership agreement should require a partner to restore his capital account deficit on the dissolution of the partnership.¹⁶¹

special allocation, a partnership agreement may require that if a limited partner has a negative capital account following a distribution of net proceeds upon liquidation of the partnership, he must bring his capital account deficit up to zero. Thus, he will suffer the economic loss as well as the tax loss from, for example, a depreciation deduction that was specially allocated to him. 2 WILLIS, *supra* note 5, at 86-89.

156. *Id.*

157. *Goldfine v. Comm'r*, 80 T.C. 843, 853 (1983).

158. *Park Cities Corp. v. Byrd*, 534 S.W.2d 668, 672-75 (Tex. 1976).

159. ALASKA STAT. § 32.05.350(6).

160. *Id.* § 32.10.160(b). Both a distribution of profits and a distribution of any part of a limited partner's capital contribution will be wrongful if, after the distribution, the partnership's assets do not exceed its liabilities, excluding liabilities to partners on account of their contribution. *Id.* §§ 32.10.140, .150(a)(1).

161. Any such provision requiring a partner to restore his capital account deficit upon dissolution of the partnership must be carefully considered and drafted. The provision should probably not permit any such obligation to be created as a result of preferential distributions, or uninsured or underinsured casualty or liability losses suffered by the partnership, but should generally relate only to deficits created by anticipated tax losses. *See supra* note 155.

VI. GENERAL PARTNERS

A. Rights and Powers of General Partners

A general partner of a limited partnership may be an individual, partnership, trust, or corporation. The day-to-day operation and management of the limited partnership's business is vested in the general partner.¹⁶² A general partner of a limited partnership, however, lacks the authority to take certain actions without written consent or ratification by all limited partners.¹⁶³ For example, a general partner may not admit another as a general partner without first obtaining this unanimous consent.¹⁶⁴

By contrast, the general partner is almost always empowered by the certificate to admit a person as a limited partner.¹⁶⁵ If the limited partnership is involved in a large offering, the general partner's ability to add limited partners is particularly important because it is nearly impossible to obtain all the investors by the time the certificate is first filed. In addition, the certificate should almost always empower the general partners to continue the partnership's business on the death, retirement, or insanity of a general partner, to promote the stability and continuity of the partnership.¹⁶⁶

The power of a general partner to act as an agent for the partnership and to bind the partnership to legally enforceable obligations includes the power to execute instruments in the partnership's name. This authority does not extend to the execution of the partnership certificate, however. The certificate must be signed by all of the limited partners, as well as the general partners, on its execution, amendment, and cancellation.¹⁶⁷ As a practical matter, this requirement is often facilitated by having each limited partner appoint one or more of the

162. ALASKA STAT. § 32.10.080; *see also, id.* § 32.05.130(5).

163. *See supra* note 126 and accompanying text.

164. *See supra* note 127 and accompanying text. As discussed earlier, in our opinion the limited partnership agreement may vary this provision of the U.L.P.A. by, for example, giving the general partner the authority to admit another person as a general partner upon a majority vote of the limited partnership units. Such a provision would minimize the risk that a minority of limited partners could disrupt the continuation of the partnership business. *See supra* note 103 and accompanying text.

165. The law provides that, without the written consent or ratification of the specific act by all limited partners, the general partner has no authority to admit a person as a limited partner unless this right is given to the general partner in the certificate. ALASKA STAT. § 32.10.080(6).

166. This continuation of the partnership's business would be subject to the unanimous consent of the limited partners if the general partners were not given this right in the certificate. *See supra* text accompanying note 103; *see also* ALASKA STAT. § 32.10.190.

167. ALASKA STAT. §§ 32.10.010(a)(1) (on formation of limited partnership), .240(1) (on amending and cancelling certificate).

general partners as his attorney-in-fact to sign the certificate on his behalf.¹⁶⁸

B. The General Partner as a Fiduciary

The general partners of a limited partnership owe a fiduciary duty to each other and to the limited partners.¹⁶⁹ Each general partner has a responsibility to exercise due care and act in good faith on behalf of the partnership. He also owes a duty of loyalty to the partnership, which has been strictly construed to require the general partner to avoid any temptation to represent his own interests rather than those of the partnership.¹⁷⁰ Partnership agreements, however, like nearly all agreements between associates, may authorize the general partner to "self-deal."¹⁷¹ The partnership agreement may also allow the general partner to capitalize personally upon a business opportunity whether or not the opportunity is related to the partnership's business.

Limited partnership agreements often provide that a general partner will not be liable for ordinary negligence, but only for gross negligence or actual fraud. Of course, no partnership agreement could be drafted to relieve a general partner of his duty to act in good faith on behalf of the partnership. In order to fulfill this duty, all general partners, and especially those who have been given the freedom to self-deal and preempt business opportunities, must keep abreast of the limited partnership's needs and make certain that those needs are fulfilled as completely as possible.

To assure that general partners are fully addressing the needs of the partnership, limited partners should exercise their right to receive "information of all things affecting the partnership . . ."¹⁷² If a limited partner fails to object within a reasonable time to an unauthorized action taken by a general partner, he may have either waived his right to object or in effect ratified the action. Alternatively, under some circumstances a court may hold that the limited partner is estopped from asserting the invalidity of the action.

168. Because the limited partner must not only sign the certificate on its execution and each time it is amended, but must also have his signature acknowledged, the power of attorney should be carefully drafted to specifically authorize the attorney-in-fact to both sign the certificate and acknowledge the signature. *See id.* §§ 32.10.010(a)(1), .240(1). Moreover, to provide stability, the general partner should seek to obtain a power of attorney that is irrevocable, survives the incompetency of the limited partner, and is coupled with an interest.

169. ALASKA STAT. § 32.05.160(a).

170. *See, e.g.,* *Bassan v. Investment Exch. Corp.*, 83 Wash. 2d 922, 925, 524 P.2d 233, 236 (1974).

171. For example, a general partner may be authorized to hire, on behalf of the partnership, himself or an affiliate to provide real estate brokerage services. *See id.*

172. ALASKA STAT. § 32.10.090(a)(2).

C. Actions By and Against Limited Partners

A limited partner is not a proper party to a court action by or against a partnership, except where the action is brought to enforce a limited partner's right against or liability to the partnership.¹⁷³ The purpose of this exclusion is to restrain limited partners from interfering with the general partner's ability to carry on the partnership business. Accordingly, the general partner has the responsibility of enforcing partnership rights against third persons.

As discussed earlier, a limited partner may bring an action to dissolve the partnership by court decree.¹⁷⁴ The U.L.P.A. does not provide, however, for the removal of the general partner by a limited partner. Therefore, some partnership agreements provide that limited partners with a specified aggregate percentage interest in the partnership may remove a general partner. The limited partners' exercise of this right to remove a general partner raises the control issue discussed earlier.¹⁷⁵ Also, unless otherwise provided in the partnership agreement, a partnership would dissolve upon the expulsion of a general partner.¹⁷⁶

D. Transfer of General Partner Interest

As is true with a limited partner's interest in an Alaska limited partnership, a general partner's interest in the partnership is assignable absent agreement to the contrary.¹⁷⁷ In a general partnership, a partner may assign all of his interest in the partnership and the assignment will not dissolve the partnership.¹⁷⁸ By contrast, the assignment by a general partner of his complete interest in an Alaska limited partnership, absent a provision in the certificate to the contrary or the consent of all partners, dissolves the limited partnership.¹⁷⁹ Accordingly, a general partner cannot substitute his assignee as a new general partner absent an appropriate provision in the partnership agreement or the consent of all the partners.

VII. DISSOLUTION AND WINDING UP

The retirement, death, or insanity of any general partner will dissolve an Alaska limited partnership, unless the remaining general part-

173. *Id.* § 32.10.250.

174. ALASKA STAT. §§ 32.10.090(a)(3), .150(d). *See supra* notes 65-68 and accompanying text.

175. *See supra* notes 140-49 and accompanying text.

176. *See* ALASKA STAT. § 32.05.260(1)(D).

177. *See id.* § 32.05.220.

178. *Id.*

179. *Id.* §§ 32.10.080, .090.

ners continue the business pursuant to a provision in the certificate permitting them to do so or unless all of the general and limited partners consent.¹⁸⁰ As a practical matter, this means that if the certificate is silent on this point, any limited partner can dissolve the partnership by not consenting to continuation of the partnership's business on the retirement, death, or insanity of a general partner. The drafter of the certificate should determine his client's intent with regard to continuing the business and express that intent within the certificate. Furthermore, a general partner's retirement, death, or insanity requires an amendment to the certificate even if the event will not dissolve the partnership.¹⁸¹

To ensure that the certificate conveys the intent of the partners, it should define the terms "retirement" and "insanity." These terms have no commonly accepted meaning. For example, one may argue that a general partner must be judicially determined to be insane before the statute applies and his disability dissolves the partnership. Others may argue that a general partner who enters a monastery to become a monk is both retired and insane. One may also argue that "retirement" occurs only when a general partner withdraws from the partnership, not when he becomes inactive as a general partner. Careful drafting on these points is particularly important where the retirement or insanity of a general partner would activate a buy-out provision in the partnership agreement.

Although limited partnership agreements commonly provide that certain events evidencing the general partner's financial instability also dissolve the partnership or require the general partner to withdraw, the Alaska U.L.P.A. does not specifically address this issue. By contrast, Alaska's U.P.A. provides that the bankruptcy of any partner dissolves the partnership.¹⁸² Alaska's U.L.P.A. is not inconsistent with this provision of the U.P.A., and thus it also applies to general partners in limited partnerships.¹⁸³

Under state law, "A limited partner has the same rights as a general partner to . . . have dissolution and winding up by decree of court."¹⁸⁴ Alaska statutes allow for dissolution of a limited partnership by decree of court under certain circumstances, which are somewhat unclear. Section 32.05.270 provides:

- (a) On application by or for a partner the court shall decree a dissolution whenever:

180. *Id.* § 32.10.190.

181. *Id.* § 32.10.230(b)(5).

182. *Id.* § 32.05.260(5).

183. *See id.* § 32.05.010(b).

184. *Id.* § 32.10.090(a)(3).

- (1) a partner is declared a lunatic in any judicial proceeding or is shown to be of unsound mind,
- (2) a partner becomes in any other way incapable of performing his part of the partnership contract,
- (3) a partner is guilty of conduct that tends to affect prejudicially the carrying on of the business,
- (4) a partner wilfully or persistently commits a breach of the partnership agreement, or otherwise conducts himself in matters relating to the partnership business so that it is not reasonably practicable to carry on the business in partnership with him,
- (5) the business of the partnership can only be carried on at a loss,
- (6) other circumstances make a dissolution equitable.¹⁸⁵

As it applies to limited partnerships, the statutory reference to "partner" presumably means only general partners and limited partners who participate in the partnership's business; the remaining limited partners would not be in a position to prejudice the partnership.

In addition, any limited partner is entitled to dissolve and wind up the partnership if (1) he has rightfully but unsuccessfully demanded a return of his capital contribution or (2) he is entitled to a return of his capital contribution and the other partnership liabilities have not been paid or the partnership is insolvent.¹⁸⁶

Upon dissolution, the partnership is not immediately terminated, but continues until the winding up of partnership affairs is completed.¹⁸⁷ During the winding up of partnership affairs, the general partners may not enter into new business on behalf of the partnership. They must restrict their actions to transactions necessary to terminate, rather than to carry on, the partnership's business.¹⁸⁸

Typically, if a general partner enters into new business on behalf of the partnership during the winding up period, he is solely responsible for any losses resulting from that new business.¹⁸⁹ There are, however, two relevant exceptions. First, partnership liability will arise if the general partner enters into new business with a third person who, "having had relations with the partnership by which a credit was extended upon the faith of the partnership, has no knowledge or notice of the dissolution"¹⁹⁰ Accordingly, if the partnership gives personal notice of the partnership's dissolution to any current or past creditors, the partnership should be exempt from liability. Because

185. *Id.* § 32.05.270.

186. *Id.* § 32.10.150(d). *See also supra* notes 65-68 & 112-14 and accompanying text.

187. ALASKA STAT. § 32.05.250.

188. For example, general partners may assign and compromise claims, perform contracts made prior to dissolution, collect debts, sell partnership assets, pay off creditors, and distribute any of the partnership's assets.

189. ALASKA STAT. § 32.05.300.

190. *Id.* § 32.05.300(a)(1).

the statute applies only to present or past creditors of a partnership, a person who has dealt with a partnership solely on a cash basis and has never been a partnership creditor is not entitled to personal notice. He is only entitled to the same notice that is given to the general public, as discussed below.

Second, partnership liability will arise if the general partner enters into new business with a third person who has not "had business relations with the partnership by which a credit was extended to the partnership" if the third party (1) "has no knowledge or notice of the dissolution" and (2) proper notice of the partnership's dissolution "has not been advertised in a newspaper of general circulation of the place (or of each place if more than one) at which the partnership business was regularly carried on."¹⁹¹

In winding up the partnership's affairs, Alaska's U.L.P.A. provides that the partnership's creditors and partners are entitled to payment and distribution in the following order of priority:

- (1) creditors of the partnership, other than general partners;
- (2) limited partners, first with respect to their share of profits and then with respect to their capital contributions (in proportion to their respective shares unless otherwise agreed);
- (3) general partners who are creditors of the partnership; and finally
- (4) general partners, first with respect to their shares of profits and then with respect to their capital contributions.¹⁹²

The partners should be allowed to vary this statutory scheme, as long as the variance does not threaten the preferential right of third-party creditors.¹⁹³

Finally, the certificate of limited partnership must be cancelled when the partnership is dissolved.¹⁹⁴ A certificate is cancelled when a "writing to cancel a certificate" is signed by all of the partnership's members and then is filed for record in the office where the certificate was initially recorded.¹⁹⁵ If a person who is required to sign the writing to cancel a certificate refuses to do so, a partnership may petition a court of competent jurisdiction to order the cancellation of the certificate.¹⁹⁶ As a practical matter, the general partner will often be able to sign on behalf of all limited partners if they have made him their attorney-in-fact.

191. *Id.* § 32.05.300(a)(2).

192. *Id.* § 32.10.220. *See supra* notes 154-61 and accompanying text for a discussion of the treatment of deficit capital accounts upon liquidation.

193. *See supra* notes 99-103 and accompanying text.

194. ALASKA STAT. § 32.10.230(a).

195. *Id.* § 32.10.240(b), (e).

196. *Id.* § 32.10.240(c).

VIII. CONCLUSION

To produce the results his client desires, an attorney faced with drafting a limited partnership certificate and agreement must become quite familiar with Alaska's U.L.P.A. and U.P.A. as well as with federal tax law on limited partnerships. Even an attorney with substantial experience with limited partnerships must often grapple with new and important questions raised by clients. Unfortunately, he will find little instructive precedent to help him understand how the law will be applied in such novel situations. Under the current state of the law, if his clients wish to vary the statutory framework governing limited partnerships, an attorney can only recommend that they preserve the preferential rights of third-party creditors and fully and fairly inform prospective limited partners of the statutory rights that they will waive under the limited partnership's certificate and agreement. If these conditions are satisfied, any would-be limited partner plaintiff who challenges the certificate and agreement will be hard-pressed to show that he was somehow unduly injured by the adopted framework.

