Every College meeting reinforces for me not only what a wonderful organization ACREL is but evidences the unique talents, interests and insights of our members. It is the intangibles which have made ACREL the premier organization of real estate attorneys. I suspect you can tell I am truly excited about the prospects of serving as president of ACREL. Our meeting in Vancouver was a success in every way. The Gods of Canadian weather were gracious and the scenery was absolutely breathtaking; whether you enjoyed it as some of our daredevil members from a hydroplane, on the Rocky Mountain Goldleaf Service train or on a gentle stroll through Stanley Park. It was wonderful. Even more impressive was the program on Friday highlighted by several insightful presentations on portfolio loan transactions and Saturday presentations which focused on multi-state practice and ethics. We greatly appreciate the work of the program organizers Neil Kessler, T. Mary McDonald, Patrick Randolph and Michael Rubin. This program continued the College's tradition of having cutting edge (and useful) presentations. The weekend couldn't have been capped any better than by the final night 007 event. This meeting would not have been possible without the efforts of many College members, who worked on the program, publications and committees and, of course, John Hastie, who did a terrific job as President. In fact, during John's tenure, the College improved many of its structural processes, including adopting revised by-laws, finalizing an agreement with ALI-ABA (resulting in improved ACREL Papers), developing formalized policies and procedures for the operation of the College and the formalization of a specific system of committee appointments and assignments.

I am happy to report that the Program Committee has developed another outstanding program for our Spring meeting which will be held in Palm Desert, CA on March 30 - April 2, 2000. A more extensive description of the events will be provided soon. The program focus will be on developing forms of construction-related documents and practices and will analyze many complex issues (and effective solutions). We have invited some spectacular non-ACREL presenters for this event, which should help to make it very beneficial.

I can assure you that our efforts to maintain the vitality of the College are in full swing. Last Spring, Caryl Welborn, John Hastie and Dick Cantlin, other officers and I commenced the process of developing a written operations plan for the year 2000. We had extensive discussions about all aspects of the College and how we might improve even our best practices. Our efforts have resulted in the first annual operations plan for ACREL. Our purpose was to develop a consistent approach which would not only reaffirm the best ideas in the College but also develop new ideas and practices. It was a wonderful experience.
President's Message...
continued from page 1

working with the officers and the Board of Governors in developing the plan (which was approved at our Vancouver meeting). A very brief summary of the plan is on the ACREL website, so when you have a few moments, please take a look. Highlights of the plan include the following:

Technology: We know that technology offers exceptional opportunity for allowing us to share information, and we intend to use it to facilitate ACREL becoming a "virtual" organization. With this in mind, the College has invested in converting some of its systems and we have established a special technology committee headed by Linda Strieفسky (other members are: Philip Korb, Norman Gutmacher, Tom Roberts, Robert Wright, Kevin Shepherd, Patrick Randolfi, Richard Cantlin and Mike Rubin). The purpose of the committee is two-fold. First, it is to identify and share with members ways in which the College can make the best and most effective practices used by other real estate lawyers and other real estate professionals available to our members relative to the use of technology. Secondly, it is to develop systems which will allow our members to more effectively communicate and exchange information, forms, documents and the like, both on an ad hoc basis and through our committee structure. We have e-mail addresses for 459 of our members and we contemplate that with our new system, committees will be constantly sharing ideas and information. This, when fully developed, will make the private side of the ACREL website an absolute premier resource for our members. Linda's committee is set to have its recommendations to the board by this Spring and I encourage you to communicate any suggestions or ideas you may have to her at (lstriefsky@thf.com).

Substantive Committees. The "substantive" committees of the College offer the ability to gather and share the most recent information and developments (whether it involves capital markets, leasing, insurance or any of our other 11 committees). Caryl Welborn and I organized a meeting of the leaders of the substantive committees in Vancouver and had a terrific meeting, explaining our vision for the committees and encouraging not only the production of programs but the use of our website to benefit our members. We are happy to report that virtually all of the chairs and vice-chairs attended and their response has been absolutely amazing. For those of you who would like to be more actively involved with any committee, please contact me at jwd@quarles.com.

External College Enhancement. We all know and treasure the College as an institution. The College, however, has increasingly become visible to many publics and this enhancement inures to both the benefit of the College and our members. Portia Morrison is chairing a committee to develop an array of activities designed to create greater public exposure for the College, its members and its publications. Again, if you have suggestions or alternatives, please contact Portia (portia.morrison@piperudnick.com). David Van Atta, Ruth Kinsolving, Martin Polevoy, Michael Rubin and Leopold Sher are also members of the committee.

Best Practices. Finally, Wayne Hyatt (whyatt@hspclegal.com) is heading a committee which is searching national and international organizations for best practices that may be beneficial for the College's growth and development. Other members of the committee include John Hastie, Philip Weller, Mark Senn, Barbara Banks, David Tang and Thomas Homburger. This year we will enhance the vitality of the College, by maintaining our cherished collegiality and creating new opportunities using our improved technology. Of course, the College's strength remains the active commitment of our members and their ideas. I encourage you to share any thoughts you may have.

John W. Daniels, Jr.
Another Supreme Court Win For Property Owners

Michael M. Berger, Berger & Norton, Santa Monica, CA

By now, you've probably heard that the U.S. Supreme Court decided a regulatory taking case toward the end of May. Given the intense political spin being applied to that decision by organizations of government lawyers, you may be forgiven for not knowing who won. Thus, this brief commentary. In a nutshell, the property owner won; don't let them tell you (or some court) otherwise.

City of Monterey v. Del Monte Dunes, 119 S.Ct 1624 (1999) is a fact-intensive case. That's not unusual. The Court has been saying for years that each regulatory taking case is unique, and must be decided "ad hoc," on its own facts. (E.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 [1992])

The property is a roughly rectangular parcel of land on the Pacific Ocean coast at the northern end of the City of Monterey. For many years, it was a Phillips Petroleum Co. terminal and tank farm where large quantities of oil were delivered, stored, and re-shipped. When Phillips ceased using the property, it removed its large oil storage tanks, but left behind pieces of pipe, broken concrete, and oil that had soaked into the sand. It was, in short, an abandoned industrial site that would need cleaning and restoration before it could be used for anything.

In addition to the post-industrial debris (and trash that local citizens surreptitiously dumped on the site), Phillips Petroleum had left behind non-native ice plant, planted to prevent erosion around its oil tanks. As ice plant covers the ground, it secretes a substance that forces out other plants, including the native buckwheat, the only known habitat for an endangered insect known as Smith's Blue Butterfly. There were scattered buckwheat plants on the property but, absent human intervention, the ice plant would wholly displace them. Although buckwheat is the natural habitat of the Smith's Blue Butterfly, no eggs, larvae, or adults of the species were found during extensive searches of this property in 1981, 1982, 1983, and 1984; one larva was found late in 1984; none in 1985. Smith's Blue Butterfly lives for only one week, travels 200 feet (maximum) and must land on a mature, flowering buckwheat plant in order to survive. The site is quite isolated from other possible habitats, so that travel to or from this property (for a butterfly with limited range) is unlikely, if not impossible. Ironically, without Del Monte's project (that would remove all ice plant and sow additional buckwheat) the putative Smith's Blue Butterfly habitat was about to be overrun and eliminated by ice plant.

Since before 1981, the property had been zoned for multi-family residential use, in keeping with the commercial, industrial, and multi-family residential uses virtually surrounding it — 29 units per acre, or more than 1,000 homes for the entire parcel. But the owners didn't ask for 1,000 units. Rather, in 1981, they submitted an application for only a 344-home development. The City's Planning Commission rejected the proposal, but said that a plan with only 7 units per acre, or 264 units, "would be received favorably."

So the owners, at considerable expense, accepted this illegal de facto downzoning and redesigned the project accordingly, keeping in constant contact with the City's planners to ensure that their new plan would be appropriate. In 1983, they submitted their plan for the 264 units the City said it wanted. However, the City Planning Commission turned down the application. This time, the planners said that a 224-unit proposal "would be received favorably."

The owners then complied with the City's 224-home demand. But when they took that one to City Hall, in early 1984, the same Planning Commission that solicited this proposal said "no." The owners appealed to the City Council, which remanded the matter to the Planning Commission with directions to consider a 190-unit development, representing a further 15% reduction in homes and a corresponding 15% reduction in ground coverage.

Back the owners went. Another redesign; another resubmittal; another Planning Commission denial; another administrative appeal to the City Council. The City Council again overruled the Planning Commission and approved the 190-unit
could not recover compensation on these facts, then the odds of anyone ever recovering would become astronomical. I firmly believe that, if the city had convinced the Supreme Court to rule in its favor (whether on substantive or procedural grounds is, in my view, irrelevant), landowners' constitutional rights would have shrunk to an unattainable platitude. It would be foolhardy for lawyers to continue advising clients to file such suits if not even those facts could yield compensation.

The important thing to remember about the Del Monte Dunes decision is that the Supreme Court of the United States looked at those facts and blanched. Knowing that a process that puts a developer through that kind of sausage grinder is not favorably received ought to send a clear message. Some people are a hard sell, however. After the Supreme Court handed down its opinion and affirmed a million and a half dollar judgment against the City of Monterey for a temporary taking of the property (with interest and attorneys' fees to be added later), the Monterey City Attorney reacted by saying, "Will it change anything? No. It was clear we complied with the law then. We comply with the law now." Hopefully, others will react more reasonably. Otherwise, litigation will multiply. Count on it.

What the government side asked the Supreme Court to do was to essentially immunize regulatory bodies from judicial review — either by a judge sitting alone or by a jury. It didn't work. The Court's response was curt and to the point: "To the extent the city argues that, as a matter of law, its land-use decisions are immune from judicial scrutiny under all circumstances, its position is contrary to settled regulatory takings principles. We reject this claim of error." (119 S.Ct. at 1637.)

By far the greatest part of the majority opinion (and all of Justice Scalia's concurrence opinion and Justice Souter's dissent) dealt with the question of whether the city's actions should have been reviewed by the trial judge alone or by the jury under proper judicial instructions. The majority chose the jury. The dispute between the majority and the dissent quickly devolved into a historical dispute over how things were done in England at the time the 7th Amendment (the one that guarantees Americans the right to a jury trial) was adopted. Recognizing that the case before the Court was a federal civil rights action (42 U.S.C. § 1983) and that such actions are akin to tort actions, the majority concluded that tort actions for damages
were entitled to juries in England, and are so entitled here, as well.

That being so, the Court examined what the jury did here, and concluded that it properly applied the standards for regulatory takings that the Court has been laying down for the past two decades. In affirming the judgment, the Court had to find sufficient evidence to sustain a judgment against the city because its actions either failed to substantially advance a legitimate state interest and that those actions denied the developer economically productive use of the land. It plainly found the evidence sufficient.

As is so often the case, the lawyers (and there were seven sets of *amicis curiae* on each side) wanted to argue the law, but it was the facts that proved determinative. It was clear from the questioning at oral argument that these facts even disturbed those Justices who eventually dissented. It may also be noteworthy that the dissenters discussed only the jury trial issue, indicating a belief that the trial judge would reach the same conclusion based on those facts. (119 S.Ct. at 1661, fn. 14.)


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**Save the Dates!**

ACREL's Mid-Year Meeting will be held

**March 30 - April 2, 2000**

**at Mariott's Desert Springs Resort**

in Palm Springs, CA.

Registration information will be mailed in early January, but now is a good time to mark your calendar for the new year.

**REMINDER!**

Membership proposals are due January 14, 2000. Additional proposal forms may be downloaded from the ACREL website, www.acrel.org. Completed forms should be sent to:

Mark Mehlman, Esq.
Member Selection Committee Chair
Sonnenschein Nath & Rosenthal
8000 Sears Tower
Chicago IL 60606
Internal Revenue Code §467
Accountant's Dream - Lawyer's Nightmare

Marvin Leon, Mitchell, Silberberg & Knupp, Los Angeles, CA

It has often been said about pornography that one knows it when one sees it. The same should be true about tax avoidance leases. However, for many years, Congress, the Internal Revenue Service and most real estate lawyers hid their eyes from the possible tax avoidance potential where a long-term lease was entered into between an accrual-basis taxpayer tenant and a cash-basis taxpayer landlord or vice versa. The issue may be illustrated in its simplest terms by the following example:

Assume an accrual-basis tenant enters into a twenty-year lease with a cash-basis landlord providing for an agreed rental of $100,000 per year, but requiring only a single rent payment of $2,000,000 at the end of the lease term. For the first nineteen years of the term, the landlord, a cash-basis taxpayer, would report no income. However, during that same nineteen year period, the tenant, an accrual-basis taxpayer, would be entitled to a rent deduction of $100,000 each year.

Congress finally awoke to such egregious tax avoidance schemes, and in 1984, Congress enacted Internal Revenue Code §467. The expressed intent of Section 467 was to level rents for tax purposes over the life of a lease to eliminate mismatches of income and expense. If a lease falls within the purview of §467, then from and after 1984, cash-basis landlords will be required to pay tax on rents not received, and accrual basis tenants will lose anticipated rent deductions. It took almost twelve years after the enactment of §467 for the Treasury Department to issue temporary regulations under §467. The temporary regulations were complex and very difficult to understand. They attempted to “cover the waterfront” and tried to deal with almost every possible variation in lease rental terms. The temporary regulations were subject to much comment. In May 1999, the Service published final regulations under §467. The final regulations are lengthy and confusing, to put it mildly, and do little to provide understandable parameters for real estate lawyers representing landlords and tenants. Computations required under the Final Regulations, however, will be an accountant’s joy.

The thrust of what follows is simply to alert the real estate practitioner that a potential tax problem lurks in every lease that has either deferred or prepaid rents or that provides for increasing or decreasing rents over the term of the lease. Since almost every real property commercial lease currently being negotiated includes some type of provisions for increased rents or stepped rents over the life of the lease, almost every real estate lease is subject to being trapped in the web of §467.

In an effort to bring some order out of chaos, we will try here to focus only on the more basic provisions of §467. Our discussion, therefore, will be limited to the following:

1. What types of leases are covered by §467?
2. Should real estate lawyers seek new warranties as to tax status and tax brackets of landlords and tenants when negotiating a lease?
3. What types of rent adjustments, if any, fall outside the purview of §467?
4. If the lease falls within §467, how will rent be computed for tax purposes?
5. The possibility of Rent Recapture on Sale or Assignment.

What Types of Leases are Covered by IC §467

Congress did not intend that §467 cover all leases. For example, leases of intangible property are not covered. Real estate, however, is tangible property. Therefore, any lease for commercial, industrial, agricultural or residential real estate which provides for increasing or decreasing rents may run afoul of §467 unless the lease falls within certain exclusions. Among such exclusions are the following:

(i) a lease which provides for aggregate rent of $250,000 or less;
(ii) a lease which provides for a single rent holiday of three months or less at the beginning of the lease term;
(iii) a long-term lease or leaseback which provides a reasonable rent holidays in accordance with local practice not to exceed the lesser of 24 months or 10% of the lease term.

Thus, a ten-year leaseback cannot have more than twelve monthly rent holidays (10% of 120 months) and a 50-year ground lease cannot have more than 24 months of rent holidays or such leases may run afoul of §467.
Even if a leaseback or long-term real estate lease meets the rent holiday exclusion test, it still will be covered under IRC §467 if the rent allocated to each year varies from average rent by more than 15%. This variance is reduced to 10% for non-leasebacks or non-long-term leases. For this purpose, any rent holidays and contingent rents are disregarded. For example, assume a ten-year leaseback of store premises commencing January 1, 2000 with fixed rents as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Annual Fixed Rent</th>
<th>1 month rent holiday</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>$25,000</td>
<td></td>
</tr>
<tr>
<td>2001</td>
<td>$35,000</td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td>$50,000</td>
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<tr>
<td>2003</td>
<td>$70,000</td>
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</tr>
<tr>
<td>2004</td>
<td>$90,000</td>
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<tr>
<td>2005</td>
<td>$120,000</td>
<td></td>
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<tr>
<td>2006</td>
<td>$130,000</td>
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<tr>
<td>2007</td>
<td>$140,000</td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>$150,000</td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td>$190,000</td>
<td></td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$1,000,000</strong></td>
<td><strong>10 months of rent holidays</strong></td>
</tr>
<tr>
<td>Average Rent</td>
<td>$100,000</td>
<td></td>
</tr>
</tbody>
</table>

Although the lease meets the rent holiday exclusion for leasebacks (i.e.: less than 10% of the lease term and less than two years), the lease will fall within the purview of §467 because the rent varies from the average rent of $100,000 by more than 15% in every year but 2004. Long-term leases and leasebacks are given special scrutiny to determine whether tax avoidance is a principal purpose of the stepped rental provisions providing for increasing or decreasing rent over the life of the lease. For this purpose, a long-term lease of real estate is one for more than 14-1/4 years. A leaseback exists where the tenant or a related person has had an ownership-type interest in the property (other than a de-minimus interest) at any time during the two-year period ending on the agreement date. Such an interest includes an option or purchase right. In order to determine whether or not tax avoidance is a principal purpose of the stepped rent provisions, the Service will look at all relevant facts and circumstances.

The Need For New Warranties When Negotiating Leases

If the stepped rents for leasebacks or long-term

leases vary from the average by more than 15%, a long-term lease or leaseback will likely be determined to be a tax avoidance lease if at the time the lease is signed it can be expected that at some time during the lease term there will be a significant difference between the marginal tax rates of the landlord and the tenant (i.e.: if the landlord’s marginal tax rate is reasonably expected to exceed that of the tenant by more than 15% during any rental period to which the lease allocates rent which is less than average rent, or if tenant’s marginal tax rate is reasonably expected to exceed by 15% that of the landlord during any period which the rent payable under the lease exceeds average rent). The differential from average is lowered to 10% for other stepped rental leases. It is most important to note that the marginal tax rate test takes into account loss carry forwards at the corporate level; tax at the shareholder level for Sub-S corporations; and tax at the member or partner level for limited liability companies and partnerships. Thus, real estate attorneys negotiating leases may now be required to inquire about tax rates of landlords and tenants in every situation where lease rents over the lease term vary significantly from average rents. Failing such scrutiny, the real estate lawyer may find himself or herself subject to a malpractice claim for negotiating a lease which ultimately falls within the clutches of §467. Similarly, real estate lawyers should now seek warranties from tenants that such tenants had no ownership interest in the property in the two-year period prior to the commencement of the lease; otherwise, the lease may fall within the definition of a leaseback.

Some Rent Adjustments Will Fall Outside the Purview of IRC §467

Code §467 left for the Internal Revenue Service to determine by regulations whether all types of rent adjustments should bring leases within the purview of §467. To its credit, the IRS recognized that some rental increases or decreases actually comply with good commercial practice and therefore should not subject a lease to the provisions of §467. Thus, increases in rent determined by (i) reference to price indexes; (ii) percentages of tenant sales or receipts; (iii) third-party costs (i.e.: taxes, insurance, maintenance charges, etc.); (iv) option exercise; or (v) services (i.e.: tenant improvements) generally will be excluded in determining whether increasing rents cause a lease to fall within the purview of §467. However, certain restrictions apply to these exclusions. Rents adjusted by

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price indexes cannot escape the clutches of $467 unless the price index reflects inflation or deflation occurring over time under a generally recognized index such as the CPI-U published by the Bureau of Labor Statistics of the Department of Labor. The Constant Rate Rule applies to long-term leases or leasebacks which are disqualified leases under §467. The Constant Rate Rule makes the reportable rent constant throughout the term of the lease. The Constant Rate Rule also treats part of the rent as interest. The Constant Rate Rule calculates a constant rent which is the amount that if paid at the end of each rental period would result in a present value equal to the present value of all amounts payable under the disqualified leaseback. Assume a five-year leaseback commencing January 1, 2000 with no rent payable for three years and then $175,000 to be paid as rent in each of the fourth and fifth years. One would think the Constant Annual Rate should be $70,000 per year. However, that is not the case. The Constant Rate Rule requires reporting of a constant rent plus an interest factor that varies, but the sum of both the rent and the interest factor for the five-year term must total $350,000. To determine the Constant Rate, one must first compute the present value at the commencement of the lease of the $175,000 payments in the fourth and fifth years of the lease term using the Applicable Federal Rate ("AFR"). Assuming the AFR was 11%, the present value of the rental payments would be $210,515. Next, one must calculate the present value at the commencement of the lease of $1 to be received at the end of each rental period. Assume that present value is $3.60. Lastly, one is required to divide the approximate $210,000 present value of the rent payments by 3.60. That would result in a constant rental amount of approximately $58,400. The difference between five times $58,400 or $292,000 and $350,000 would be treated as interest and also be allocated over the five years based on assumptions that each year the tenant had borrowed the unpaid constant rental amount at the Applicable Federal Rate, less the payments at the end of each year. Alternatively, if a lease is a disqualified lease under §467 and is not a long-term lease or leaseback, the lease will be subject to the Proportionate Adjustment Rule. The Proportionate Adjustment Rule multiplies an amount of fixed rent allocated to each period over the life of the lease by a fraction, the numerator of which is the present value of the rents payable under the lease and the denominator of which is the total rent payable under the lease. This rule creates a constructive loan from the tenant to the landlord when the tenant prepaids rent, or a constructive loan from the landlord to the tenant when rent is deferred. The Proportionate Adjustment Rule computes interest on that loan at the AFR, requires the parties to report interest paid and received, and then adjusts the time and reporting of rent. Assume a three-year lease which
Applicable Federal Rate is for each year, but allows the tenant an option to pay for the reportable portion would be to figure the present value of $300,000 paid three years from now. Assume that amount is $234,800. Then, one computes the present value of each year’s allocated rental payment. Assume the total of those present values is $252,600. The ratio of those two amounts is approximately 93%. Next, the 93% figure is applied to the allocated rent to determine reportable rent for the first year. A similar calculation is made for each of the second and third years. Then an interest calculation is added thereto for the reportable interest.

The results are reversed when the rent is prepaid.

Rent Recapture on Sale by Landlord (or Tenant)

I.R.C. §467 also attempts to deal with sales by landlords of property subject to §467 leases which qualify as either leasebacks or long-term leases, at a time when rents have increased substantially. If those increased rents are economically attributable to the later past paid rents, the Code seeks to recapture part of the sales price as ordinary income not capital gain. This recapture amount will be the lesser of the prior past understated rents or the reportable §467 gain on the sale.

The model of clarity in the foregoing simple statement of the recapture amount then proceeds to break down as the Congress and the Service attempt to define the prior understated rents. The prior understated rents are defined as the excess, if any, of the aggregate §467 rent and interest for the period during which the landlord held the property over the amount of rent and interest actually taken into account by the landlord. The §467 gain is the amount realized from the disposition of the property over its adjusted basis. Special rules are added for dispositions by gift; dispositions occasioned by death; tax free exchanges; like-kind exchanges and involuntary conversions. Thus, there is no recapture on a gift or a transfer occasioned by death. On like kind exchanges, the §467 gain is limited to the sum of the gain, if any, recognized on the exchange plus the fair market value of the property acquired not subject to a §467 rental agreement.

The calculations to compute the prior understated rents as described in the final regulations simply boggle the mind. The accounting fees alone may equal the landlord’s entire profit on the sale. Thus, it behooves the lawyers for landlords to attempt to make certain that their clients do not fall into the §467 trap.

Lest tenants think that they may have escaped from the clutches of §467 when they assign a §467 lease that is a leaseback or long-term lease, the final regulations also questionably deal with assignments by lessees. Questionably, because the Code provisions do not deal with lessee transfers. Nevertheless, the Code section gives the Secretary of the Treasury broad power to prescribe regulations as may be appropriate to carry out the purposes of §467. It is under this power the Secretary has issued regulations which seek to snare lessee transfers. Thus, under the final regulations, if a lessee assigns its interest under a §467 lease, both it and its successor assignee will get tagged with §467 treatment. The assigning lessee will be charged with recapture of an appropriate share of accumulated §467 rent in the year of the assignment. The amount of the obligation is subject to an incredibly complicated set of calculations which will gladden any accountant’s heart as well as swell his wallet. The assignee will be subject to §467 rules for the post transfer period. Careful lawyers representing assignees must be aware that a stepped rental leaseback or long-term lease can bring potential tax grief to his assignee clients and perhaps should seek appropriate warranties and indemnities from the assignors.

The Effect of Lease Modifications

Finally, practitioners must be cognizant of the provisions of the Final Regulations which treat substantial modifications of existing leases as a new agreement for the purpose of determining whether the new agreement constitutes a §467 lease or is a leaseback or a long-term lease. The determination is based only on the terms that relate to the post modification period. However, if the principal purpose of the modification is to avoid the purpose or intent of §467, the Commissioner may treat the entire agreement as modified as a single agreement for purposes of applying the §467 rules. Further, notwithstanding the general rule that the modification will be treated as a new agreement, the agreement will retain its original character. Thus, if the original lease were a leaseback, the post modification agreement will also be treated as a leaseback. Modifications which add provisions which are in compliance with the safe harbor rules such as percentage rents or CPI increases will not be considered substantial so as to bring §467 into play.

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Working Group on External Affairs

For the coming year, President John Daniels has appointed a Governors' Working Group on External Affairs, whose purpose is to identify ways to enhance the public image, visibility and reputation and elevate the stature of the College and its work among the bar, the real estate industry and the general public. The Working Group encourages input and ideas from College members, as we develop plans and projects to serve this objective. Initiatives already identified include improving the public side of the College web site, in terms of both content and linkages from other sites, and enhancing our ties with major news organizations to encourage them to seek out College sources as background for real estate stories. We also hope to pinpoint opportunities, through the College's liaisons and substantive committees, to participate with other groups in important real estate legal initiatives (such as the ABA/ACREL real estate secured transactions opinion project of a few years ago) where association of the ACREL "brand" with the project calls positive public attention to the College. Please think creatively about the Working Group's objectives and share your thoughts and ideas with Working Group Chair, Portia Morrison, and any of the members, David Van Atta, Ruth Kinsolving, Marty Polevoy, Lee Sher and Mike Rubin.

Internal Revenue . . . continued from page 9

Conclusion

The length and complexity of the Final Regulations under §467 will leave many practitioners unable to determine whether any particular lease will become subject to §467. The complexity may also result in many but the most egregious tax avoidance leases from coming under scrutiny. However, if a lease does become subject to §467, the tax calculations may bring unpleasant surprises. Such calculations will be difficult and will require hours of expensive accounting time. Therefore, real estate lawyers must be aware of the potential problems created by §467 when negotiating leases, and should consult their tax partners as well as the accountants for their clients in any situation where a lease contemplates significant rent increases or decreases or rent prepayments or deferrals, or where there is even the slightest suspicion that the marginal tax rates of the landlord and the tenant (and/or their partners or members) may be substantially different at some point or points during the life of the lease.

*Tax Reform Act of 1984 (Public Law 98-369), Section 92(a).*
*61 FR 27834, 1996-2 CB 462.*
*T.D. 8820, May 18, 1999.*
*I.R.C. §467(d)(1).*
*I.R.C. §467(d)(2).*
*Reg. 1.467-3(c)(3)(i)(B)(1).*
*Reg. 1.467-3(c)(3)(ii)(B)(2).*
*Reg. 1.467-3(c)(1)(i).*
*Reg. 1.467-3(c)(4)(i).*
*Reg. 1.467-3(b)(3)(ii)(C).*
*Reg. 1.467-3(b)(2).*
*Reg. 1.467-3(c)(1).*
*Reg. 1.467-3(c)(3)(i)(B).*
*Reg. 1.467-3(c)(3)(ii)(B).*
*Reg. 1.467-3(c)(2)(ii).*
*I.R.C. §467(b).*
*Reg. 1.467-1(c)(iii)(B).*
*Reg. 1.467-1(b)(10).*
*Reg. 1.467-1(b)(9).*
*Reg. 1.467-1(b)(8)(i).*
*Reg. 1.467-1(b)(8)(ii).*
*Reg. 1.467-1(b)(8)(iii).*
*Reg. 1.467-1(b)(8)(iv).*
*Reg. 1.467-1(b)(7).*
*Reg. 1.467-1(c)(3).*
*Reg. 1.467-1(a)(3).*
*Reg. 1.467-3(d)(1).*
*Reg. 1.467-3(e) Example 6.*
*Reg. 1.467-3(c).*
*Reg. 1.467-2(c).*
*Reg. 1.467-2(c) Example 3.*
*I.R.C. §467(c).*
*I.R.C. §467(c)(2) (3).*
*I.R.C. §467(c)(4).*
*I.R.C. §467(c).*
*I.R.C. §467(h).*
*Reg. 1.467-7(d).*
*Reg. 1.467-7(g).*
Can a religious landlord refuse to rent to unmarried couples? Don't worry if you don't know the answer. Courts and legislatures are still battling this issue out around the country.

The "Intercourse" Commerce Clause

The New York Times reported on July 15th that the U. S. House of Representatives passed the Religious Liberty Protection Act, which would prohibit states from placing a "substantial burden" on the exercise of religion unless officials could demonstrate a compelling reason for doing so. Opponents argue that if the law passes, it could be used as a defense by landlords accused of violating state or local anti-discrimination laws, e.g., discriminating against homosexuals and co-habiting singles.

A similar bill, based on the 14th Amendment's guarantee that all citizens' rights are equally protected, had been declared unconstitutional on the ground that its restrictions were too broad. The current bill was rewritten based on the authority of Congress to regulate interstate commerce! (Pundits may now label that constitutional provision the "intercourse commerce clause.")

Right now the answers to the opening question lies in where the couple intends to cohabit. For example, appellate courts in Massachusetts and California have held that landlords who ban unmarried couples from renting may violate fair housing laws - even if such cohabitation violates these landlords' religious beliefs.

On the other hand, two recent cases have held that the fair housing laws are trumped by landlords' constitutional rights to exercise their religious beliefs. See Thomas v. Anchorage Equal Rights Commission, 165 F.3d 692, (9th Cir. 1999); and McCready v. Hofera, 586 N.W. 2d 723 (Mich. 1998), vacated and remanded in part by, 1999 Mich. LEXIS 694. The courts struggled with these decisions. They each generated strong dissents, and the McCready Court not only reversed the Court of Appeals of Michigan, but it also reversed itself by vacating its earlier decision this year.

Living in Sin

This issue raises an interesting clash between the various civil rights acts around the country, which essentially prohibit discrimination on the basis of "religion, race, color, national origin, age, sex" and sometimes "familial status"; and the landlord's constitutional freedom of religion under the United States Constitution and State Constitutions. Tenants argue that anti-discrimination laws are constitutional because they prohibit all discrimination and have no religious motivation.

In some states like Michigan (see McCready, supra) discrimination for "marital status" is specifically prohibited. Landlords maintain that their refusal to rent is based on the couple's conduct of co-habitation, and not on their unmarried or "familial status.

The evidence in the Anchorage case was that the landlords were professed Christians who believed that cohabitation between unmarried individuals constitutes the sin of fornication and that facilitating cohabitation is tantamount to facilitating sin. The judge cited several religious sources: "It is God's will that you should be sanctified: that you should avoid sexual immorality; that each of you should learn to control his own body in a way that is holy and honorable, not in passionate lust like the heathens, who do not know God." 1 Thessalonians 4:3-4.

Also: "There is nothing more opposed to holiness than the impurity of fornication, which corrupts the whole man." John Calvin, Calvin's Commentaries: The Epistles of Paul to the Romans and to the Thessalonians, 359 (David W. Torrance & Thomas S. Torrence, eds., Ross MacKenzie Trans., 1960).

The court stated that the landlords' conduct clearly fit within the ban of Alaska's anti-discrimination laws. However, it held that constitutional protections of religious rights take priority over the fair housing laws.

It cited the case of Hernandez v. Commissioner, 490 U.S. 680 (1989) which required the court to determine "whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden." Thomas, 165 F.3d at 712. The landlords
argued that the laws presented them with a "trilemma" among (1) violating their religious beliefs; (2) suffering punishment for refusing to rent to unmarried couples; and (3) forsaking their livelihoods as apartment owners altogether.

The court's next inquiry was whether the "substantial burden on religious exercise may be justified by a showing that a regulation's restrictions are necessary to the achievement of some compelling state interest." *Id.* The court found a lack of a "firm national policy" against marital-status discrimination, pointing out that the Supreme Court has never accorded marital status any heightened scrutiny under the Equal Protection Clause, as it has for both race and gender. It then noted that Alaska "underenforce[d]" its purported interest in eradicating marital status discrimination. Thus, the court found no support for recognizing a compelling government interest in eradicating marital-status discrimination that would excuse a violation of the Free Exercise Clause.

The court determined that by supporting the landlords' claim, it was not "establishing" or otherwise endorsing Christianity as an official state religion. However, it stated that its opinion "reflects nothing more than the governmental obligation of neutrality in the face of religious differences." *Id* at 718.

**What Evidence?**

One troubling aspect of these cases is how the courts will draw the lines. Why are landlords permitted to assume that unmarried couples living together will be committing sins? What if the couple plans to live in different rooms with separate bathrooms? What if the couple has a mere intellectual or Platonic relationship and they have teamed up merely to save money? What if one of the couple is gay?

Why should the landlord automatically assume that a male and female couple will be "sinning" any more than two males or two females of the same age? What kind of evidence can a couple present to overcome the landlords' negative presumptions? Suppose the couple is 90 years old? Neither *Thomas* nor McCready discussed these issues, but many unanswered questions are raised by these decisions, and by the Religious Liberty Protection Act.

**Ode to Singles**

To commemorate the *Thomas* decision I have written a little doggerel (with apologies to Ogden Nash and Dr. Seuss):

**Alaska's Spawn**

Alaska spawned a God-fearing man.
He owned some land and knew God's plan
to ban unwed couples who cohabit.
No tempting sin by that low habit.
He wouldn't lease 'em and shut his eyes;
He claimed his faith's free exercise.
No difference if they're young or old,
Or whether they'd be froze out cold.
He didn't care 'bout vacancies,
Or if they begged on bended knees.
He didn't care if he had proof.
They couldn't live beneath his roof.
They could swear in vain they weren't lovers.
He couldn't trust 'em 'neath the covers.
When he finally reached the court
The judge gave him solid support:
"Against singles don't discriminate
Unless you think they'll fornicate."
Over the past ten years, the writer has been a close observer of the currents of opinion bearing upon the use of dispute resolution techniques from the choices available to parties and their legal counsel in the broad spectrum of dispute resolution. This piece, as you would expect, is oriented to the interest of transactional real estate lawyers.

My observations spring from a varied experience. I write, first, as a transactional real estate lawyer representing clients embarking upon myriad real estate ventures, also as an advocate of the use of ADR to persuade others to learn about and consider its use in the client's interest, as a mediator in federal and state courts and as an arbitrator or mediator selected from the Panels of Neutrals (mediation and arbitration) of the American Arbitration Association.

Some attention to definitions is in order:

- **ADR** - Alternative dispute resolution which, for our purposes, involves negotiation, mediation (both voluntary and non-binding and arbitration which is a binding proceeding with the arbitrator's award which can either be final and binding or appealable, as the parties may elect in their agreement to arbitrate;

- **Litigation** - It is to be remembered, is one of the methods for resolution of disputes available to us. It is too often thought of as being something in opposition to ADR with advocates of one or the other regarding each other with mutual hostility.

- **Pre-Dispute** - This refers to the time during which a contract is being negotiated before it has been executed.

This piece is written to encourage professionals with the responsibility of advising clients in commercial matters or representing them in the creation of contract documents, to reflect at the earliest possible time, upon the full spectrum of available techniques of dispute resolution, including litigation and ADR, in order to craft an appropriate plan in each case to achieve the optimum result, i.e., agreement on the manner of resolution of a future dispute in a timely manner, at a cost which is not excessive and with a result acceptable to the opposing parties (The Optimum Result).

There is now a strong movement in the courts, at the Bar, among clients and in government toward use of mediation in an early effort to resolve a dispute. That movement is grounded upon the recognition of several propositions. They are:

- Where parties seek the resolution of a dispute in the courts, they cannot generally project with any accuracy, the cost in time and resources aside from the uncertainty of the litigation process;
- If counsel and client are able to work together towards pre-dispute informed joint participation in the choice of the dispute resolution vehicle, the product of that participation can be a win-win result.

Where the effort of such joint strategy fails, there is not significant risk, since mediation is voluntary and can be terminated at will without prejudice;

- If mediation fails to bring a settlement, arbitration or litigation is always available as a choice for an imposed solution;
- When mediation is entered into by the parties in good faith with a skilled and perceptive mediator, it is a procedure which has a very high probability of success.

If the observations noted above are valid, we in ACREL are inescapably led to the notion that if we seek to achieve high marks for professionalism, we must learn to be comfortable with the responsibility to consider the spectrum of dispute resolution along with the substantive elements of commercial agreements, remedies and exit strategies. To achieve The Optimum Result, pre-dispute consideration of the strategy and tactics to achieve successful dispute resolution is critical.

Can we agree that the lawyers selected by the parties entering into a contract in a commercial setting have the responsibility to prepare the parties against the chance of a dispute during their relationship? Isn't it unfair to the client to leave the choice of dispute resolution to the adviser who comes upon the scene after a dispute has arisen? Post-dispute is obviously not the best time to propose and reach agreement on choices of techniques the parties are to use to seek resolution of their dispute. In the normal situation, where there is no compelling factor that mandates resolution of the dispute through litigation, litigation should be the last resort in the series of opportunities for dispute resolution in the spectrum of available techniques.

Since transactional lawyers possess the first opportunity to educate a client about the choices in

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the spectrum of dispute resolution, there is a great opportunity for the use of creative intelligence in the client's interest while constructing a dispute resolution contract addendum. Where else is there an opportunity to create a custom made dispute resolution system? The Optimum Result is likely to occur, unless by sheer accident, only after an educated consideration of alternatives.

Frequently, many potential issues of dispute in a contract yearn for an uncomplicated method of dispute resolution. It is possible to build from that beginning. For example, in a real estate contract specific issues clearly suitable for ADR resolution are:

- The question of a party's consent "which shall not be unreasonably withheld";
- Fair market value at a future date for rental determination in a lease renewal or purchase option;
- Questions of compliance with plans and specifications in a construction contract;
- Satisfaction of conditions precedent in the nature of performance of covenants to a party's right to exercise an option to acquire additional rights in real estate;
- CPI escalation calculations.
- These are all issues which invite disagreement and litigation but which can easily be removed from the problem list by provision for an arbitration by arbitrator(s) acceptable to both parties to review and decide such matters within a very short period after presentation with limited expert testimony and exchange of documents. I have uniformly found such a proposal to be acceptable. It is an avenue of incremental approach which can either be confined to few issues or result in an omnibus dispute resolution clause foreclosing litigation entirely.

The secret of effective counseling about dispute resolution in a commercial transaction is attention to the issue at the earliest possible time. The time I refer to is during the negotiation of the transaction of the documents to memorialize it because of the ever present risk of dispute during contract implementation. It is pre-dispute, a time without stress of pending conflict, during which careful attention can be most productive. It is unfortunately true, though, that at that very time, there is the least inclination for thought about the potential for dispute and its resolution.

It is time for change in traditional attitudes. Foresight has always been a valuable lawyerly trait. Effective counseling, pre-dispute, requires counsel to be simultaneously an advocate and a teacher. If there is no pre dispute consultation between client and counsel on the subject in such circumstances, the transactional lawyer has abdicated this important role. Unless and until we, as attorneys negotiating the content of agreements, accept the dual responsibility of counseling and educating, a very important opportunity may be lost. The forum and procedure for dispute resolution should be selected in an exercise of judgment to go the route chosen. It should not be the result of an abdication of responsibility.

To provide a "bright line guide" for counsel who are open to think about the responsibility mentioned above, there follows a series of principles which, if respected, will surely enhance the vision of counsel and client in their approach to the spectrum of choices for dispute resolution.

1. In the abstract, ADR is a vehicle for dispute resolution as valid as any other. In the range of choices, it should be considered in parity with litigation, but litigation is only a single alternative of several dispute resolution options.

2. When the client is about to enter into a contract with another party, the moment has arrived which is the best opportunity to generate discussion leading to a well informed judgment about dispute resolution.

3. The discussion between attorney and client leading to a judgment about the choices to be made among the modalities for dispute resolution is an important and significant component in the discharge of counsel's responsibility to clients. The education of the client is subject to a condition precedent—the education of counsel. There is substantial help available for that education. It is offered by both non-profit and profit oriented neutral providers of ADR services. They are ready, willing and able to furnish suggested texts for mediation/arbitration contract provisions as well as the full text of their respective rules of procedure for mediation or arbitration, all of which can easily be modified to meet any specific situation or be incorporated root and branch into the contract and preparation of a dispute resolution addendum.

In short, standards of professionalism require early attention to this issue. Custom and practice are fast establishing a justifiable expectation among clients that their attorneys, whether transactional lawyers or trial lawyers, will be sufficiently knowledgeable in dispute resolution techniques to be open for consultation to educate clients to make informed judgments on the choice of dispute resolution methods against the contingency of future disputes.
This article outlines a proposal for private, long-term funding of affordable housing, by modest transfer fee “endowments” collected on the sale and resale of market-rate homes, to partially solve the current affordable housing crisis in California. Subject to local statutes and ordinances, this proposal can be implemented in any state which suffers from a lack of affordable housing.

Employers and parents throughout much of northern and southern California are wondering where their employees and children will live, as the cost to purchase or rent new and existing housing has soared to levels which price most people out of the market. According to the California Department of Housing and Community Development, the lack of affordable housing is a major threat to the region’s economy. This proposal is an alternative to governmental intervention to address this issue.

In a nutshell, private arrangements (by use of a servitude) can provide a mechanism to raise funds for affordable housing. Here’s how it can be done: Before sale of a home by a homebuilder, the homebuilder subjects the property to a private covenant and lien, much like a mortgage. The servitude, which combines some elements of a mortgage but is not a mortgage, would impose a financial obligation secured by a lien on the property. The servitude would require an endowment fee to be paid to a designated beneficiary - a private, nonprofit Affordable Housing Foundation (“AHF”) - which would receive a payment on each transfer of the property and then distribute the transfer fees to other nonprofit housing providers, such as Habitat for Humanity or Home Aid, Inc., to assist those and similar organizations to provide affordable rental or for-sale housing.

The lien would have a term of sixty years due to the California limitations on “ancient mortgages.” Since homes typically sell within a five year period, it is reasonable to expect, on average, that at least ten to twelve sales would occur during the term of the document. Every time the home sells, a transfer fee equal to a percentage of the gross sales price (e.g., one-quarter of one percent) would be paid to AHF. The buyer and the seller would be jointly liable to pay the fee.

AHF would have the option, without obligation, to require the purchaser to sign and record a new lien each time the home sells. This will enhance the enforceability of the lien by ensuring a “privity” relationship between AHF and the new owner. If the homeowner wants to release the home from the lien encumbrance before the term of the instrument has expired, the homeowner could do so by paying a release price to AHF computed on a sliding scale depending upon the length of time remaining in the term.

Not all transfers of title would be subject to the endowment fee. For example, all transfers resulting from foreclosures of a bona fide trust deed would be exempt from the fee. Of course, the instrument could be subordinated to secondary financing at the option of AHF. Moreover, interspousal transfers, transfers between parents and children and transfers to grantor trusts would also be exempt from the endowment fee.

The marketability of this proposal is a primary key to its success. Theoretically, the sales prices of the homes are reduced by the present value of the lien instrument. However, in a reasonably strong housing market, the fee is likely to be discounted entirely, particularly if the fee is set at a low percentage of the gross sales price. This is evidenced by the strong acceptance of the community enhancement (transfer) fee by builders and homebuyers at Ladera Ranch in Orange County, California, where the fee (one-eighth of one percent on new home sales and one-quarter of one percent on resales) is paid to a nonprofit corporation formed to enhance community relations and social activities in Ladera Ranch. Moreover, in the exclusive custom lot development known as The Bridges in Rancho Santa Fe in San Diego County, purchasers pay a transfer fee equal to one-half of one percent of the sales price of the lots. The beneficiary of the transfer fee at The Bridges is the master developer, but the transfer fee does not appear to have impeded sales in the community.

The beauty of this proposal is that it is not only

Employers and parents throughout much of northern and southern California are wondering where their employees and children will live . . .

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Affordable Housing . . . continued from page 15

relatively "painless," but also inherently beneficial to the homebuilder. Implementation of the proposal requires little expenditure by volunteers and little sacrifice by the homebuilder. The fee, in whole or in part, does not have to be charged on initial sales from the homebuilder in those developments where profit margins are very narrow. The homebuilder may be able to avoid forced integration of incompatible product to the delight of market-rate homebuyers. Implementation of this proposal may also satisfy all or a portion of the affordable housing requirements of a city or county in lieu of cash or property exactions. Moreover, the payor might be entitled to a charitable income tax deduction.

The volunteer time required to properly stage traditional fundraising events is considerable. It is also asking much of the homebuilder to request volunteer labor and in-kind donations, particularly today when profit margins are narrow. This proposal is not intended to supplant valuable contributions of time, talents and cash. However, the lien document, once recorded, would require little donated time for AHF to realize its objectives, which are potentially considerable. For example, a 100-lot subdivision of homes, each selling at an average price of $400,000, would generate $200,000 from one-half of one percent endowment fees on initial sales. If we assume that the homes will on average resell every five years, then AHF will realize annually an average of $40,000 thereafter for sixty years, or an aggregate donation of $2,600,000 in today's dollars from that subdivision alone.

There is always the threat that the lien instrument will be challenged in court. There is more than one precedent for the use of this instrument where a transfer fee has been paid directly to the homebuilder for several years. In one such case, the instrument was challenged in court but allowed to remain in place by the California Superior Court. The fact that the endowment fees paid to AHF will be used to provide affordable housing, a laudable goal, should enhance the equitable defenses to protect the endowment from attacks by the Court or the legislature.
Top 10 Reasons to Visit www.acrel.org

Ira J. Waldman, Cox, Castle & Nicholson, LLP, Los Angeles, CA

The ACREL website is alive and well and functioning at http://www.acrel.org. A website can and should be a living, breathing organism. As content is added and revised, it becomes well worth periodic visits. The ACREL website is improving all the time, and will continue to do so as the year goes on. Of course you need a password to make effective use of the site. If you need (or have forgotten) your password, you can either call the ACREL office and get it, or e-mail Julia Essex, jmessex@acrel.org. There are a good many reasons to visit the ACREL website. And the top 10 reasons are:

10. When and Where is the Next Meeting? – the website is the place for information on upcoming meetings. From the private page, go to “Meetings Calendar”. As the date of the next meeting approaches additional information is posted to the site and registration information will be available, including the schedule of events and meetings, tour information, and downloadable versions of the registration forms. Links to the hotel and area attractions are typically provided as well. A major addition for the Spring, 2000 meeting in Palm Desert, California will be a listing of meeting registrants as the registrations are received by the ACREL office.

9. Access to Newsletters – if you have ever misplaced a newsletter in your office, you will find this location on the website handy. Each newsletter back to 1996 is online, and each article is available for printing. Earlier articles may searched through the same search engine that is available for program materials (the search returns matches for both newsletter articles and program materials).

8. Access to Program Material Summaries – you know there was a program about some topic several years ago, but you don’t remember when. You can’t find the program materials. The website can assist. Log into the “Publications” page, “Seminars Materials and Articles” and search for the article. You can call up a list of materials by year, title or author, or you can search by query or keyword. Natural language as well as boolean logic queries are supported in the Alta Vista designed search engine. The search engine will return a list of materials ranked by likelihood of responsiveness to the query. Any questions about searching? Log onto the “help” page and print out the help page. The guide will work with most search engines. Ordering any particular article can be done with a form that can be printed from the site and faxed to the ACREL office.

7. Substantive Committee Work Product – last year marked the first effort at providing Committee work product on the site. The Attorneys’ Opinion Committee produced, in conjunction with the ABA Real Property, Probate & Trust Section Committee on Legal Opinions in Real Estate Transactions, the All-Inclusive Opinion based on the Silverado Accord and published it on the site. The Insurance Committee published an Insurance Glossary at its site. The Board of Governors has great expectations for the publication by the Committees of substantive work product at the site. Access is available at the home page for each committee (click on “Committees” and the Committee whose work product you wish to access), and materials are referenced on the “What’s New” page.

6. Committees – wonder what the Committees are doing? The Committee section of the site is the place to explore. All Committees are listed on the Committee home page. Clicking on a Committee presents you with a description of the Committee mission and plans and clicking on “Committee Membership Directory” will bring you to a list of Committee members, as well as the Chair, Vice-Chair and Secretary, each of which is linked to each member’s ACREL membership information.

At the moment some committees are more active than others; however, the Board of Governors expects Committee usage of the site to increase dramatically over the course of the next year. Many committees are using the site as a means to communicate with committee members who may not have been able to attend the College meetings or participate in Committee conference calls. A prime example of this is the Title Insurance Committee, which posts a copy of the agenda for each meeting and conference call in advance, as well as an almost immediate posting of meeting and conference call in advance, as well as an almost immediate posting of meeting and conference

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call minutes. The Committee also uses its page to post announcements and provide access to a Committee questionnaire used to gauge Committee member interest in the work of the Committee. There is no limitation to creative use of the Committee's page by a Committee. The ACREL office can help any technologically phobic members of the Committees post material.

5. **Member List** – need to contact a member but cannot find your handbook, or want to search for all lawyers in a particular city or state? The membership list page provides a wide array of searching possibilities, and assures you that you will receive the latest information available to the ACREL office (since updates are published to the site regularly). Remember the member's spouse's name, but not the member? Remember the member's firm, but not the member? The search engine can help there as well. Simply type the spouse's name in the proper location, or however much of the law firm's name you remember and click on "Display Selections". And there is no time like the present to check your own personal listing for accuracy.

4. **The Links Project** – the Practice Technology Committee's links project will be well under way by the time you read this newsletter. There are many interesting real estate and real estate law oriented web sites in cyberspace that can be of use to the real estate practitioner. And the Practice Technology Committee intends to increase our awareness of what information is available. Every two weeks the website will feature at least two real estate or real estate law oriented websites and provide a brief description of what is available at these sites. The featured websites will appear on the “What's New" page under “Internet Links", and when new featured sites are presented the previous sites will be moved to the “Internet Links" page accessible from the Home Page. The Practice Technology Committee, with the help of all College members, expects to enhance the “Internet Links" page over the course of the coming months, and invites input and Links suggestions from all members.

3. **What's New** – if anything new is happening in the College or at the web site, this will be the place you can expect it to be reported. The What's New page is updated periodically by the ACREL staff and the Practice Technology Committee. You can expect to find notification of the availability of meeting registration materials, committee project announcements, new content and interesting ACREL developments. This is also the place to go to get Member Selection materials, including Nominee Profiles, as the Member Selection process continues. What's New is the first place all ACREL members should visit.

2. **Member Help** – help us make the web site work for you. Check it out and see what is available and helpful to you. Visit other industry and bar association sites and see what they do that, perhaps, we can do as well or better. Suggestions for improvements and enhancements are welcome, but if you do not surf to the site, see what is available, and provide input, the Practice Technology Committee will lose a valuable source of information and input. So, visit the web site and help us to help you.

1. **The ACREL Picture Gallery** – and the number one reason to visit the web site is to view the ACREL Picture Gallery. Starting with the Vancouver meeting, the best of the pictures taken at the meeting will be featured on the web site within a month following the meeting. The Gallery will be accessible from the “What's New" page. Bring your cameras, submit your pictures to the Practice Technology Committee member in charge of the Picture Gallery (to be announced on the web site) and see if your pictures are selected, or if your visage has made it to the Gallery. Digital cameras preferred but not required.

The ACREL web site will not be static. Greater Committee use of the site and the posting of Committee projects, both goals of the Board of Governors, will serve to make the web site a valuable tool for College work. As more substantive work is posted, the site will become a valuable resource for all of us in our practices. Eventually the College hopes to make seminar materials readily available at the site, to the extent permitted by the College’s contract with ALI-ABA. If any members have any questions about the web site, or would like to make any immediate suggestions, contact Robert Wright, Chair of the Practice Technology Committee at Robert_Wright@bakerbotts.com or Ira Waldman, Vice Chair of the Practice Technology Committee at iwaldman@ccnlaw.com, or Jill Pace jhapeace@acrel.org or Julia Essex jmessex@acrel.org at the College office.
“Pub” Crawling

Michael H. Rubin, Chair, 1999 Publications Committee

ACREL publications consist of more than simply the newsletter. The ACREL Publications Committee also coordinates and makes editorial comments on the speakers’ materials for the ACREL meetings; works with the Practice Technology Committee to put substantive materials on the ACREL website; and works with the Executive Staff of ACREL on other publication materials.

ACREL members who have attended either the Mid-Year Meeting in Florida or the most recent Annual Meeting in Vancouver noticed a change in the handouts. Instead of three-ring binders, the materials were bound as part of the “ACREL Papers” jointly published by ALI-ABA and ACREL. The ACREL Papers are going to be sold at a substantial discount to ACREL members and made available to lawyers outside of ACREL (without the discount). The ALI-ABA agreement would not have been possible without the hard work and negotiating efforts of both John Hastie and Kevin Shepherd.

If you have an idea or suggestion about ACREL Publications, the Publications Committee would welcome your input. See the ACREL website for a list of committee members.

Title Insurance News

Seldon Rubin as Chair of the ACREL Title Insurance Committee appointed Harvey L. Temkin (Wisconsin) to act as a liaison and commence communications with Joseph Bonita, as Chair of the ALTA Title Insurance Forms Committee, to provide the collective individual input of ACREL members in connection with the revision of the ALTA leasehold policy. Harvey will be posting developments concerning the revision of the ALTA leasehold policy on the ACREL Website. Please consult the Website for current developments in this connection. Neither the ACREL Title Insurance Committee nor Harvey Temkin will purport to represent ACREL or the members of the Title Insurance Committee in connection with revision of the ALTA leasehold policy. ACREL members who are responding to the request by the ALTA Title Insurance Forms Committee for input on the revision of the ALTA Leasehold Policy will be doing so on an individual basis only. Any member of ACREL who has comments or suggestions concerning the leasehold policy should contact:

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Two complete articles by Jack Murray of First American Title Insurance Company in Chicago, IL are available on the private side of the ACREL website, at www.acrel.org:

**Insured Closings: Title Company Agents and Approved Attorneys**

This article describes and analyzes the relationships and responsibilities that exist between title insurers, agents, and approved attorneys with respect to closing a transaction that is the subject of title insurance. It also analyzes the case law regarding the obligations of title insurers with respect to closing protection letters, and discusses the various forms of closing protection letters utilized in connection with insured real estate transactions.

**Title Insurance Issues in Limited Liability Company Transactions**

This article discusses and analyzes the title-insurance concerns and issues that arise in connection with real estate transactions that involve a limited liability company (LLC) as a seller, buyer, or borrower. It also contains an analysis of current state and federal (including bankruptcy) law affecting LLCs. It further discusses the availability and use of single-member LLCs, and the risks to a lender of becoming a member of an LLC/borrower entity.