

Heckerling 2017 - Report No. 8 (Wednesday 1/11/17)

The report described various fiduciary cases that Dana Fitzsimons presented. Dana on a daily basis runs an online search of fiduciary cases. I suggest reading the report to get a feel for trends in litigation.

Tax and Estate Planning Considerations for Foreign Persons Owning U.S. Assets was presented by some leading members of ACTEC's International Estate Planning Committee. I have not compared the report to the report covering Michelle's prior lecture, but I'm sure Josh and Marnin contributed more than the report indicates.

The report on life insurance is a useful summary, and the materials are excellent, so I commend it for your reading. Being in the insurance industry, the reporter was well suited to cover the topic.

Larry and Mary Ann have lectured often on life insurance, and Charlie is known for his ability to pick apart policies. I am a big fan of insuring children in case something unexpectedly happens to make them uninsurable (an idea my father gave me). In November, I mentioned that to Charlie, and he recommended variable universal life, which can be funded modestly before the insured is in a position to save and then can be funded more aggressively later. He suggested that converting term policies might not be as favorable as this VUL strategy.

Steve

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From: Joseph G. Hodges Jr.

Sent: Saturday, January 14, 2017 4:23 PM

Subject: Heckerling 2017 - Report No. 8 (Wednesday 1/11/17)

As we have done in January for the last twenty years, and again with the permission of the University of Miami School of Law Center for Continuing Legal Education, we will be posting daily Reports to this list containing highlights of the proceedings of the 51st Annual Philip E. Heckerling

Institute on Estate Planning that is being held on January 9-13, 2017 at the Orlando World Center Marriott Resort and Convention Center in Florida. A complete listing of the proceedings and the Institute's 2017 brochure are available at www.law.miami.edu/heckerling and the listing of the proceedings was also published as part of **Introduction Part 2** that was distributed on 1/4/17.

We also will be posting the full text of each of these Reports on the ABA RPTE Section's Heckerling Reports Website, as we have since the 2000 Institute. Those Reports from 2000 to 2016 can now be found at URL http://www.americanbar.org/groups/real_property_trust_estate/events_cle/heckerling_reports.html. In addition, each Report from 2006 to date can also be accessed at any time from the ABA-PTL Discussion List's Web-based Archive that now only goes as far back as January of 2006 and is located at URL <http://mail.americanbar.org/archives/aba-ptl.html>.

Editor's Comments: This Report #8 completes our coverage of the Wednesday afternoon Special Sessions #2, starting with Special Session #2-C on Fiduciary Cases, then #2-D on Financial Exploitation of Seniors, then #2-E on Tax Considerations for Foreign Persons Owning US Assets, and finally #2-F on Life Insurance Selection and Design.

Coverage of the Thursday Main and Special Sessions will begin in Report #9.

Are you in need of producing some fiduciary court accountings for an estate or trust that conform to the 1975 National Fiduciary Accounting Standards and Model Account Formats (see ACTEC Study #19 at the ACTEC Quicken Templates website at http://www.actec.org/assets/1/6/National_Accounting_Standards_and_Model_Account_Formats.pdf) but you can not afford any of the fiduciary accounting software programs that are currently available that can do that for you, such as GEMS, Lackner 6-in-1, TEdec, Thomson's OneSource or Faster, and the ACTEC Quicken Templates at only \$150 are just not your "cup of tea," then you ought to contact the TEdec Service Bureau about having them prepare these accountings for you, which they can do at very affordable prices based on the accounting data that you supply to them. Just contact them for a free cost estimate and estimated time frame. If you missed them as an exhibitor at Heckerling this year, just call them at (716) 938-9137 and tell them the ABA-PTL List Moderators told you to call, or go to their Website at www.tedec.com and check them out for yourself.

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Wednesday, January 11th, 3:50 to 5:20 pm

SS 2-C Review of the Past Year's Significant, Curious, or Downright Fascinating Fiduciary Cases (at least it seems to me) [LIT]

Presenter: Dana G. Fitzsimons, Jr.

Reporter: Joanne Hinde

This session reviewed recent cases from across the country to assist fiduciaries and their advisors in identifying and managing contemporary fiduciary challenges. It is a companion to and builds on the substance of the Special Session 1-C presentation done by Lauren J. Wolven, Todd A. Flubacher and Stacy E. Singer involving Drafting Trusts to Minimize Fiduciary Risks (see Heckerling Report #6).

Dana covered a number of areas and highlighted a number of cases contained within his outline. For more detail on all the cases you need to see the presentation materials.

Powers of Attorney

Dana said that States are grappling with the proper use of POAs and with their abuses. He said they are referred to as “the most effective tool for burglary”.

He summarized the Cashion case about a nephew who stole all of the uncle’s assets through the use of the POA and the Glass case in which a POA holder was able to distribute assets from a revocable trust.

State Nexus and Taxation

Dana summarized the Bank of America case in which the trustee filed for abatement of tax – issue revolved around whether the trustee was an “inhabitant” of Massachusetts. Court held that Bank trustee was an inhabitant and subject to fiduciary income tax for the trusts at issue.

He also covered the Kaestner case which addressed taxation of a wholly discretionary trust based on residence of beneficiaries without other contacts. The court held that this violated the Due Process and Commerce Clauses and the NC Court of Appeals affirmed the decision. However, one month ago the NC Supreme Court has agreed to hear the appeal.

Dana covered the Benson case in which the issue was a dispute about ability of the Louisiana settlor of a Texas trust to substitute New Orleans trust assets for a promissory note. The court held that the Texas trustee has sufficient jurisdictional contacts with Louisiana. The court also held that discovery requests must be tailored to the narrow issues in the case of the value of the companies and the value of the proposed promissory note and the settlor’s creditworthiness and privileges will be respected although communication between the settlor’s employees and his expert witness are not privileged.

Dana discussed whether swapping assets for an unsecured note is a swap or a loan and referred to a 2014 California case in which the court held that the action was a loan not a swap.

He summarized the Schinazi case in which the settlor’s substitution of partnership interests in trust for a promissory note was unsuccessful for failure to comply with formal transfer requirements of the partnership agreement and the trust was allowed to bring claims related to substitution attempt.

Spousal claims

Dana described a number of cases addressing spousal claims such as Lovett in which the court held that emotional absence does not eliminate spousal right to elect against the estate.

He also mentioned the King case in which the court held that physical separation alone does not establish willful abandonment that bars intestate inheritance.

Also see Talerico in which the court held that post-separation extramarital affairs caused the loss of spousal rights to the estate.

Dana also mentioned the Brown case in which the court held that a legally void post-separation polygamous marriage bars by estoppel a surviving spouse’s priority right to appointment as personal representative of the estate of the husband and leaves in place the appointment of a

claimed common law second wife.

He also discussed the Estes case in which the court held that spousal intestate share claims were extinguished by desertion and abandonment.

Business Interests

Dana summarized the *Osborn* case in which summary dismissal was denied on claims that brothers abused multiple fiduciary offices to prevent sisters from acquiring an interest in the family company and related properties where parents estate plan left entire company equally to 11 children.

Dana also mentioned a case not in the materials: Ellis 2016 Kansas App Lexis 65 - widower abused position of trustee of wife's trust – put all the assets into his own revocable trust and left the assets to charity.

Investments

Dana covered the Adams case in which the court held that the trustee did not breach its duty in retaining its own stock in trust and seizing stock pledged as collateral upon debt default where the trust terms authorized the retention and the beneficiary signed a retention letter, the pledge existed before the trustee was appointed, and the court approved the pledge, and the claims were additionally barred by limitations.

Dana said that generally cases involving concentrated positions are decided in favor of trustee where the equities are clean – no allegations of conflicts of interest. He said it is essential to show a good process and good communication.

Fiduciary compensation and costs

Dana covered the Rauschenberg Foundation case in which the court correctly applied the reasonable compensation standard in awarding trustee \$24.6 million in compensation.

He also covered the Hink case in which the court found that attorney's fees incurred by a beneficiary to defend and retain her trust interest against the remaindermen are not payable out of trust corpus under the common fund doctrine.

Disclosure to beneficiaries

Dana addressed the Schrage case in which the court held that a specific distributee is not a beneficiary under the UTC entitled to a complete copy of trust instrument. Beneficiary was only entitled to trust certification.

He also reviewed the Meyers case in which summary judgment dismissing breach of trust claims as untimely under UTC limitations periods was not warranted where a formal report was not provided to the beneficiaries and letters, emails and other communications were not clearly adequate under the statute, and where the trustee continued to exercise sole fiduciary authority after delivering a resignation letter.

He also talked about the Anderson case in which it was held that the 120-day limitations period on trust contest following notice does not bar claims where the trustee intentionally omits a trust amendment from the notice.

Dana then mentioned another case not in the materials Turkish 2016 Fla App Lexis 17684 in which the listing of a promissory note that is worthless was held not to be adequate notice since the information was not complete and accurate.

Spendthrift and Asset Protection trusts

Dana covered the rather famous and recent Pfannenstiehl trust case in which a son's beneficiary interest in a spendthrift trust created by the father was included in the marital estate of the son incident to divorce.

He also covered the Pratt case in which a Shutdown clause in trust does not bar enforcement of child support against otherwise mandatory principal distributions and that liens can attach to future distributions to satisfy community property judgment.

Dana said that courts are unpredictable in their decisions regarding spendthrift and asset protection trusts and therefore pre-marital agreements are still viable to protect trust assets.

He concluded this area by talking about the Erskine case in which the court held that calling a trust Irrevocable but retaining the power to revoke, and the trust terms state that the settlor is not a beneficiary but provide for income distributions and withdrawal rights to the settlor, are not adequate to remove the trust assets from bankruptcy.

Cy Pres and charitable trusts

Dana covered two cases in this area: Estate of Loucks in which the court held that a perpetual income only charitable trust will not be modified to allow invasion of principal and Shriners Hospitals in which the court held that the charity cannot compel early termination of long-term charitable trust holding ranch property contrary to settlors' purpose of providing for long term management of the ranch property.

Revocable trusts

Dana pointed out that the UTC states tend to be more protective of settlor rights and that remainder beneficiaries generally have no rights while the settlor is alive. However, cases show a split when allegations of abuse of settlor by remainder beneficiaries is asserted.

Dana concluded his presentation with a list of his favorite cases and said that the theme of 2016 is the volume of cases. He also said that estate planning lawyers should work hard to protect the interests and rights of those wealthy individuals who are now entering a period of physical and mental decline.

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Wednesday, January 11th, 3:50 to 5:20 pm

SS 2-D Mom Wanted Me to Have It: A Panel Discussion on the Legal, Ethical, and Practical Considerations Involving the Financial Exploitation of Seniors [ELD]

Presenters: Stuart C. Bear, Mary F. Radford and Francis J. Rondoni

Reporter: Herb Braverman

This session provided practical advice and guidance from the perspective of an elder law lawyer, a legal ethicist, and an estate litigator and criminal prosecutor. The focus was on how to protect vulnerable seniors from others, as well as from themselves, when a senior's judgment is impaired, which is an area of increasing concern in the fields of estate and financial planning and administration.

The report for this Session is included at the end of the Tuesday Main Session by Stuart Bear in Report #4 as follows:

In the afternoon Special Session, (SS-2D), Mr. Bear was joined by his partner, Mr. Fondoni, and by Professor Mary Radford, to discuss a dozen or so case studies with catchy titles, like "Granny Snatching", "Fury Friends", etc... each one designed to highlight and to promote discussion about undue influence issues and diminished capacity complications. Those in attendance took an active part in the several discussions, indicating a very high level of interest in the subject, as well as the wealth of experience many of us have in these matters. Of course, these discussions cannot be fully related here, but a couple of points should be helpful.

Mr. Rondoni has also been a criminal prosecutor in Minnesota and he made it clear that some of what is going on in these areas have increasing criminal consequences, both for the perpetrators and the advisers, as localities encounter more of these cases and become more aware of the insidious nature of "what is going on".

Professor Radford noted the strict obligations of counsel under the applicable Rules of MRPC throughout, while Mr. Bear seemed to place an even greater emphasis on the moral obligations we have to our clients whom we have served over many years and/or who are of advanced age and perhaps exposed to the undue influences around them, including an increased level of paranoia as they discover their own limitations.

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Wednesday, January 11th, 3:50 to 5:20 pm

SS 2-E Tax and Estate Planning Considerations for Foreign Persons Owning U.S. Assets: A Deeper Dive [INT]

Presenters: Michelle B. Graham, Marnin J. Michaels and Joshua S. Rubenstein

Reporter: Michael Sneeringer

This session took a deeper dive into the Wednesday Main Session (see Report #5) dealing with the tax and estate planning considerations for non-U.S. persons who are either contemplating purchasing U.S. assets or who already own U.S. assets. The session assumes a basic understanding of the U.S. tax laws. It provided practical advice to the practitioner on tax and estate planning considerations for non-U.S. persons investing in the U.S., including a discussion of how best to hold title to U.S. assets.

Ms. Graham first educated the audience on considerations for planning with foreign persons. She took the audience on a journey from intake to income, gift, estate and GST tax planning.

Her opening remarks indicated that foreigners are increasingly looking to invest in the U.S. She

noted that in other countries it is difficult to get money out of the country. She indicated that our free economy makes investment in the U.S. attractive to foreign clients. Ms. Graham more or less followed her outline during her presentation.

Ms. Graham first discussed some of the non-tax issues in working with a foreign client. She discussed due diligence with respect to working with foreign clients including client intake procedures. She noted the stringent due diligence requirements that U.S. banks must follow. She indicated that there is a pressure of more regulation on attorneys to have the same money laundering diligence (she indicated the American Bar Association pushed back against this because it would alter the attorney-client relationship). She highlighted the 60 Minutes program which exposed the world of offshore assets and investment, and the role attorneys play in this planning area.

She indicated that after the potential client passes her law firm's due diligence procedures, she looks to the type of law in place in the client's country of domicile for the next steps. She noted that the attorney needs to know whether the country is a: 1) common law country (U.S. and Canada); 2) a civil law country (70% of the countries in the world are this; many have forced heirship); or 3) an Islamic property law country (very difficult to generalize here). She noted that in many civil law countries there are no full time estate planning attorneys and this makes the estate planning attorney's work challenging, depending on the jurisdiction. She indicated that civil law countries do not have joint ownership that passes on death.

Ms. Graham next discussed conflict of laws. She indicated that in most cases, the law of where the property is situated applies.

Ms. Graham then discussed income tax issues in working with a foreign client. She noted that the query begins with whether the person is a U.S. person or not. She indicated that there are three ways a person becomes a U.S. citizen: (1) birth; (2) substantial presence; and (3) electing. She noted that unless the person renounces citizenship, they are taxed on worldwide income.

Ms. Graham mentioned that U.S. residents are also taxed on their worldwide income. She indicated that the easiest way to determine whether the person is a U.S. resident (besides counting days) is whether the person holds a Green Card. She noted that the rule of thumb is 120 days in the U.S. (not 180 days) for income tax purposes. More on this particular issue can be found in Ms. Graham's materials. She noted that there are certain visas that will not subject the foreign person to U.S. income taxation.

She indicated that foreign persons can make an election to become a U.S. citizen (and become taxed on his or her worldwide income). She noted that one spouse would do this so that the spouses could file a joint U.S. Federal income tax return.

Ms. Graham then discussed the estate tax with respect to foreign persons. She noted that a resident for income tax purposes differs from whether the person is a resident for estate tax purposes. Ms. Graham went through the two pronged approach used to determine whether the foreign person is a U.S. person for estate tax purposes.

Ms. Graham also described the process for determining what a U.S. situs asset is. She noted that stock in U.S. companies is subject to estate tax depending on the amount of shares owned. She highlighted that this rule catches clients off guard. She discussed the case of Estate of Fung v.

Commissioner regarding mortgages.

Ms. Graham briefly discussed qualified domestic trusts (“QDOT”) for use with surviving foreign spouses.

Ms. Graham then noted that civil law jurisdictions do not recognize the concept of trusts, and this could create significant consequences in terms of property purchase in the U.S. (i.e., to avoid probate in states such as California). Ms. Graham noted the importance of a threshold question of how does the home country deal with what the attorney and client are proposing to do?

Ms. Graham concluded with a discussion regarding the gift and generation-skipping transfer (“GST”) taxes. She noted that there typically is no gift tax on gifts by foreign persons to U.S. persons; however, the gift must be reported by the U.S. recipient. She noted that real estate and tangible personal property differ and will be subject to gift tax.

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Wednesday, January 11th, 3:50 to 5:20 pm

SS 2-F Life Insurance Policy Selection and Design — How to Use All We Know to Plan for All We Don’t [FIN]

Presenters: Lawrence Brody, Mary Ann Mancini and Charles L. Ratner

Reporter: Bruce Tannahill

This panel discussion reviewed the major characteristics of a number of policy types used by most clients as a part of their insurance planning, including traditional whole life, universal life, no lapse guarantee universal life, equity indexed universal life, variable universal life, and private placement variable universal life. In addition to describing the characteristics of each type of policy, the panel discussed how the client’s insurance needs effect the selection of one or more policy types to meet those needs. This was a practical “how to” session on advising clients about the appropriate type of insurance policy to consider.

Life insurance is a widely used and widely misunderstood financial product. This session attempted to de-mystify it, explain the different types of life insurance available, and how life insurance can be used in specific situations. An important takeaway is that insurance planning can involve more than one type of policy – it may often be appropriate to use a combination of a term policy and a permanent policy.

Mr. Brody began by noting that investment risk and credit risk are relevant to all permanent policies that offer a cash value feature. The big difference between them is who has the investment risk:

- Whole life (WL) – insurer has all investment risk
- Universal life (UL) – the investment risk is shared between insurer and owner
- Variable universal life (VUL) – owner has all the investment risk

He stated that policies that do not have required premiums, fully guaranteed investment returns, or guaranteed insurance costs. As a result, these life insurance policies are not buy and hold policies but are buy and manage policies. To reduce the risk that the policy will lapse, they need continual testing to reduce the risk that the policy will lapse.

Credit risk involves the risk that the issuing company expires before your client does. To deal with the risk, clients and their advisors can evaluate a carrier’s rating from the various rating agencies and regularly monitoring it. It is harder to evaluate because the credit rating agencies that evaluate

insurers also evaluated the mortgage-backed securities involved in the credit crisis.

Types of Permanent Policies - The Panel reviewed the various types of permanent policies as follows:

Traditional whole life. A whole (or ordinary) life policy has a fixed (non-increasing) premium, which is traditionally due each year over the contract life. The premiums are averaged, creating a reserve for the insurer, since mortality costs are actually lower than the average in early years and higher in later years. That reserve is essentially the policy's cash surrender value. The death benefit is generally non-increasing, if premiums paid are due. Cash value increases are guaranteed. The guarantee means a lower rate of return compared to a non-guaranteed product. The owner can borrow against policy's cash value on a non-recourse basis. Some whole life policies pay dividends, which are not guaranteed.

Universal life policies. UL policies involve some risk sharing between the policy owner and the insurer. They consist of a risk element (the death benefit) and an accumulation benefit (the cash value). UL policies were originally developed because of low rates on WL policies. Insurers tried to add some features not available in WL policies, including:

- Choice of death benefit – traditional death benefit or stated death benefit plus cash value
- Crediting (interest) rate based on market rates.
- Open architecture – statements show amount credited and expenses charged.

UL policies technically do not have a fixed premium, meaning the owner can pay what they want but the accumulation account must have enough to fund the payment of current expenses. This allows you to overfund or underfund a policy, as long as the policy complies with the tax law definition of life insurance. The owner can access the cash value through loans as with WL or through withdrawals. Unlike a WL policy, costs can increase, to a maximum stated in the contract. Carriers can increase the charges above what was illustrated, as long as the maximum is not exceeded.

No lapse guarantee UL policies have fixed premium and guarantee the death benefit will be paid if premiums have been paid, even if no policy cash value. These policies are very inflexible – in most contracts, missing a premium payment may cause loss of guarantee or cause the policy to lapse.

Equity indexed UL (EIUL or IUL). These are a hybrid between a VUL and a UL. The crediting is based on performance of an index, subject to a cap and a floor. They are not a variable product since the owner doesn't make investment decisions. These can be very expensive policies to create and maintain due to hedging required on the index used to determine the crediting rate.

Variable universal life. With VULs, all investment risk passes through to the owner. The carrier offers mutual fund-like accounts that owner can choose to have premiums allocated to. The advantages include ability to invest in the equity and bond markets without any tax. The tax law imposes complex requirements to prevent owner from dealing with what funds invest in. Lower capital gains rate and market volatility have made them less attractive.

Life insurance policies aren't regulated by the federal government except for VULs, which are subject to some SEC rules on illustrations and agents who sell VULs must have a securities license. The subaccounts are subject to SEC regulation. VUL illustrations are just "what-if" illustrations showing straight-line growth. The sub-accounts in policy are deemed to be owned by the owner, not the carrier. This means that they are not subject to claims of the carrier's creditors.

VUL and IUL seem to require the most management. It is important to regularly compare an in-force illustration and as-sold illustration.

Private Placement VUL (PPLI). Another type of VUL, PPLI is all about how the accumulation is invested. PPLI offers flexibility of investment options, including hedge funds and tax-inefficient investments, and the ability to negotiating costs can enhance the accumulation account. PPLI can be either onshore or offshore.

- Onshore – offered by U.S. Life insurance companies. Subject to state law risk.
- Offshore – offered by non-U.S. life insurers. These insurers may not have similar restrictions to the U.S. on investments and aren't subject to state or federal requirements. Must do a lot more due diligence on them. The appropriate offshore jurisdiction based on various factors, including the purchaser's requirements.

Offshore PPLIT must stay within confines of the IRC life insurance requirements to qualify for the income tax benefits of the Code.

The "Investor control" rules under section 817 are designed to reduce benefits of PPLI v brokerage accounts and prevent the owner have talked to the investment manager. The rules also apply to VULs and IULs.

The FBAR requirements apply to offshore foreign PPLI.

Policy Selection and Design – Charles Ratner

Mr. Ratner reviewed various scenarios and vignettes that go to the core of financial arrangements. He noted that non-insurance advisors can add "more value than you can imagine" by helping client identify which policies are appropriate.

Clients may be shown one or more types of products. Which type is "right" and why depends on factors that include:

- Premium flexibility
 - Who sets the premium, the client or the carrier?
 - Does client want/need premium flexibility? Eternal vigilance is the price clients have to pay for a flexible premium product.
- Premium guarantees
 - Who wants these, the client or the agent/advisor?
 - To what extent does client want to know that premiums will support death benefit to stated age? Clients need to understand what premium guarantees give and take away. Client should see guarantees going out to certain ages.
- Cash value accumulation and distribution
- Investment flexibility – perhaps not just for the investment-minded buyer

Mr. Ratner stated that products said to be safer because of guarantees turn out to be riskiest because of lack of flexibility. Those said to be riskiest turn out to be safest due to flexibility.

He stated that he likes agents to use the illustration and supplement it with the carrier's product information. The benefit of the illustration is to show how the policy works, even if the illustration does not predict how the policy will actually perform. This review should be done every year.

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The Reporters

Our on-site local reporters who will be present in Orlando in 2017 are **Joanne Hindel Esq.**, a Vice President with Fifth Third Bank in Cleveland, Ohio; **Kimon Karas Esq.**, an attorney with McCarthy, Lebit, Crystal and Liffman Co. LPA in Cleveland, Ohio; **Craig Dreyer Esq.**, an attorney with Clark Skatoff, PA in Palm Beach Gardens, Florida; **Herb Braverman Esq.**, an attorney with Braverman & Associates in Orange Village, Ohio; **Kristin Dittus Esq.** a solo attorney in Denver, Colorado, **Michael Sneeringer Esq.**, an attorney with Akermn, LLP in Naples, Florida, **Michelle R. Mieras**, a Fiduciary Risk Manager with Bank of the West in Denver, Colorado, **Beth Anderson Esq.**, an attorney with Wyatt, Tarrant & Combs, LLP in Louisville, Kentucky, **Bruce A. Tannahill Esq.**, a Director of Estate and Business Planning in the Mass Mutual Financial Group in Phoenix, Arizona, and **Patrick J. Duffey Esq.**, an attorney with Holland & Knight in Tampa, Florida.

The **Report Editor** again in 2017 will be **Joseph G. Hodges Jr. Esq.**, a solo practitioner in Denver, Colorado. He is also the Chief Moderator of the ABA-PTL discussion list.

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