

## ESSAY QUESTION NO. 6

### Answer this question in booklet No. 6

A group of investors has decided to create a new for-profit business corporation in Alaska in order to provide road maintenance services to certain government entities. The investors desire that their company will be associated with and provide services to the West Slope Borough, a local government that provides service in western Alaska. The investors met with a marketing professional, who recommended the following names:

- 1) West Slope Borough Road Maintenance Service
- 2) Road Maintenance West, Inc.

Assume for these questions that no federal or state trademark issues exist.

There is already a company organized in Alaska with the name, "Western Rhode Mayn-T-Nynts, Inc." Another company is organized in Alaska with the name, "Road Maintenance West, LLC."

1. Discuss the legality of using the recommended names.
2. The investors have chosen a name, but they are not ready to organize the corporation. Instead, they plan to start making use of the name in about 90 days. One of the investors is aware that a competitor plans on starting a company offering similar services in the same geographic region. Discuss available methods, under the Alaska corporations code, for ensuring that the investors can use their desired name when they are ready to start the company in 90 days without organizing the company before then.
3. It has come time for the investors to actually form the corporation. The investors themselves will serve as incorporators, and are qualified to do so. Two of the investors, but only two, are willing to serve as officers. The investors want to limit the number of individuals that serve as officers. They also want to limit the total number of officer positions as much as possible. They want these limits to exist at the formation of the company, and at all times after formation. The investors may or may not be directors of the corporation after formation. Discuss how the investors may minimize the number of individuals who serve as officers and the number of officer positions, both at formation and at all times after formation.

## GRADER'S GUIDE

### \*\*\* QUESTION NO. 6 \*\*\*

#### SUBJECT: BUSINESS LAW

Alaska law is concise on the use of corporate names. In order to be used, names must be available for use, which means they cannot be in use and they must be distinguishable from names that are either reserved or in use. AS 10.06.105(d). Also, names must not use the words “city,” “borough,” “village,” or otherwise imply that the company is a municipality. AS 10.06.105(b). Corporate names must include the word “incorporated,” “corporation,” “company,” or “limited” or an abbreviation of these. AS 10.06.105(a).

**Question 1:** Discuss the legality of using the recommended names. (30 pts)

#### A. LEGALITY ON THE FACE OF THE PROPOSED NAMES

##### a) West Slope Borough Road Maintenance Service

This name does not include “incorporate,” “corporation,” “company,” or “limited” or an abbreviation of these as required by law. Also, it includes the word “borough,” and gives the impression that the company is a division of a municipality. The name cannot lawfully be used for a corporation in Alaska.

##### b) Road Maintenance West, Inc.

This name is acceptable for use by a corporation in Alaska, provided it does not conflict with an existing registered use or with a name reservation. The use of a geographic name may cause trademark or related issues, but the problem explicitly states that it does not. The use of a place name does not, by itself, disqualify the name unless it gives the impression that the company **is** a municipality (not just that it is present in the municipality).

#### B. LEGALITY IN LIGHT OF EXISTING USES

The name of a new corporation must be “distinguishable on the records of the department [of Commerce, Community and Economic Development] from the name of any other organized entity and from a reserved ... name.” AS 10.06.105(d). Guidance as to what constitutes a distinguishable name is given by the department’s regulations. In particular, 3 AAC 16.120 provides that a name is distinguishable if, *inter alia*, “one of the key words is different,” “the key words are the same, but they are in a different order,” or “the key words are the same, but the spelling is creative, unusual, or artistic”. 3 AAC 16.120(a)(1)(B), (C) and (D). In fact, it is enough to make the names distinguishable if one key word differs from another only in the addition of an ‘s’ to make it plural. 3 AAC 16.120(a)(1)(G). “Key word” means a word other than an article, preposition, conjunction, or entity identifier.” 3 AAC 16.120(b). An entity identifier is the appellation that identifies what kind of business entity it is (ie – “Inc.” or “LLC” or the like). *Id.* Here, both of the existing

entities were organized in Alaska. Thus, their names are present in the records of the department, and the proposed name is only available if it is distinguishable.

The analysis as to whether the names are distinguishable must begin by identifying the key words. Here, the key words in the first existing use are “Western Rhode Mayn-T-Nynts” and the key words in the proposed names are “West Slope Borough Road Maintenance” and “Road Maintenance West”. As between the existing use and the proposed names, key words are different. One proposed name includes “Slope” but the existing use does not. The proposed names use “West” but the existing use instead uses “Western.” One of the proposed names (illegally) uses the word “Borough.” In one of the proposed names, the key words are in a different order. Moreover, the existing use utilizes “creative, unusual,” and arguably “artistic” spelling of the remaining two key words, while the proposed use does not. Disregarding any trademark concern, the availability of the proposed names, “Road Maintenance West” and “West Slope Road Maintenance, Inc.”, is not impacted by the existing use of “Western Rhode Mayn-T-Nynts, Inc.”

As to the other existing use, it impacts one of the proposed names but not the other. Again, one proposed name (illegally) uses the word “Borough,” which is not a key word in the existing use. On the other hand, the key words in the existing use are “Road Maintenance West”, which are identical to the key words of the proposed use, and in the same order. Critically, the entity identifier “LLC” is not a key word. Thus, these two names are not distinguishable on the records of the department, and the investors cannot legally name their new Alaska corporation “Road Maintenance West, Inc.”

**Question 2:** The investors have chosen a name, but they are not ready to organize the corporation. Instead, they plan to start making use of the name in about 90 days. One of the investors is aware that a competitor plans on starting a company offering similar services in the same geographic region. Discuss available methods, under the corporations code, for ensuring that the investors can use their desired name when they are ready to start the company in 90 days without organizing the company before then. (35 pts)

A person intending to organize a corporation may reserve the exclusive right to use a corporate name. AS 10.06.110. The name must be available at the time of reservation. AS 10.06.115. The person desiring to reserve the name makes an application to do so. *Id.* The department then determines whether the name is available (ie – distinguishable on the records from existing names). *Id.* If it is, the name will be reserved for a period of 120 days. *Id.* The holder of the reserved name may transfer it to another person by filing a form with the department. AS 10.06.120.

Exclusive use means at least that no other person may reserve the name, *id.*, organize a corporation with that name, AS 10.06.105(d), or register it for use by a foreign corporation. AS 10.06.125. Although it is not explicit in the statute, exclusive use may also include the right to enjoin the use of a name that is not distinguishable from the reserved name and even a cause of action for damages for improper use of the name. See AS 10.06.130 (stating that “exclusive use” includes these rights at least when the exclusive use is the result of organization, registration, or issuance of a certificate of authority).

Because the investors intend to organize a corporation, any of them may reserve the exclusive right to use their chosen name. The reservation will be good for 120 days, and may be transferred between the investors or to another person.

Some examinees may note that the investors could file Articles of Incorporation, along with the applicable filing fee, to reserve their chosen name. The filing of the Articles does not complete all requirements for organization of a corporation but would effectively protect the chosen name until the time when the investors are prepared to organize the corporation. However, examinees should recognize that the Alaska Corporations Code provides a specific procedure for reserving a name prior to commencing any act to incorporate, as explained above.

**Question 3:** It has come time for the investors to actually form the corporation. The investors themselves will serve as incorporators, and are qualified to do so. Two of the investors, but only two, are willing to serve as officers. The investors want to limit the number of individuals that serve as officers. They also want to limit the total number of officer positions as much as possible. They want these limits to exist at the formation of the company, and at all times after formation. The investors may or may not be directors of the corporation after formation. Discuss how the investors may minimize the number of individuals who serve as officers and the number of officer positions, both at formation and at all times after formation. (35 pts)

The only officers that a corporation must have are a president, a secretary, and a treasurer. AS 10.06.483(a). Any other officer positions exist only as required by the corporate bylaws. *Id.* Any two officer positions may be held by a single individual, except that no single individual may be both the president and the secretary unless he or she is the sole owner of all of the shares of the corporation. *Id.*

Even though the investors are not necessarily the board of directors for the corporation, they have the power to limit the number of officers to the three required. Prior to the election of an initial board of directors, the incorporators of a corporation may do anything necessary and proper to perfect the

organization of the company, including the adoption of bylaws. AS 10.06.225. Among the things that may be set out in the articles of incorporation or the bylaws are any other provision that is required or permitted to be stated in bylaws. AS 10.06.210(4) (articles); AS 10.06.230(e)(1) (bylaws). The bylaws are permitted to state the appointment, duties, compensation, and tenure of the officers. AS 10.06.230(e)(6); *see also* AS 10.06.483(a). Also, the articles may limit or even eliminate the ability of later boards or shareholders to amend the bylaws. AS 10.06.210(1)(E); *see also* AS 10.06.228.

This corporation is being formed by a “group of investors,” which includes at least two. Thus, the president and the secretary cannot be the same individual. Aside from this limitation, the president may also be the treasurer or the secretary may also be the treasurer. Thus, only two individuals are necessary in order to fill all of the required officer positions. The corporation need not hire any more individuals to serve as officers – the two willing investors may serve as president, secretary, and one of them additionally as treasurer.

Moreover, the investors, as incorporators of the corporation, may include in the articles or the bylaws or both provisions that limit the number of officer positions to the three that are required by statute, and even to limit those positions so that only two individuals occupy these three positions. This limit will be effective unless and until articles of amendment are adopted which eliminate the prohibition.