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Humor

The great spider hunt, the constitution & the gospels, hospital calls and wine.

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The Alaska BAR RAG

VOLUME 18, NO. 4 — *Dignitas, semper dignitas* — JULY-AUGUST, 1994

Judge von der Heydt announces retirement

By Keri Clark

After 35 years of distinguished and dedicated service as an Alaska Superior Court and United States District Court judge for the District of Alaska, Senior Judge James A. von der Heydt has decided to take retirement status effective July 15, 1994. It is the court's good fortune, however, that in this instance, the use of the word "retire" is broadly applied. More on that later.

Judge James A. von der Heydt

Judge von der Heydt's first contact with Alaska came in 1943 when he worked war construction on the Alcan Highway and at Marks Air Force Base in Nome. He stayed in Nome from 1945-1948 working as a Deputy United States Marshal. From 1948-1951 he left the territory to attend Northwestern University School of Law in Chicago, Illinois. Upon his graduation he returned to Nome where he served two years as U.S. Attorney from 1951-1953. He then opened his own law office in Nome, practicing from 1953-1959. During all this activity he also served as a member of the Alaska Legislature, House of Representatives from 1957-1959 and as a member of the Alaska Legislative Council. From 1958-1959 he was president of the

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In Search of Arachnida Page 5

Uniform laws & the wonders of the legislative process

By Arthur H. Peterson

Among life's mysteries is the legislative process. On the surface, it seems simple enough: a senator or a representative or a legislative committee introduces a bill, one or more committees hold hearings on the bill, it is scheduled for floor action in the first house, and then if it passes it goes through the committee and floor process in the second house. Committees are organized by the dominant party or coalition. But expectations are not always met — neither in life nor in the legislature.

A person would think that a bill introduced by the "powerful Judiciary Committee" to update ancient law adopted for the District of Alaska, one introduced when both houses were controlled by the same political party, one that had the support of the executive branch, one that received only favorable testimony at committee hearings, one that passed the first house unanimously, and one that had not a single word spoken against it, would be quickly enacted. The death of the Uniform Fraudulent Transfer Act (HB 439) in the legislative session that adjourned May 10 poses an unsolved mystery.

Three bills on Uniform Acts were enacted: HB 280, Uniform Custodial Trust Act (now ch. 10, SLA 1994); HB 316, Uniform Statutory Rule Against Perpetuities (now ch. 82, SLA 1994); and HB 394, Uniform Limited Partnership Act amendments dealing with the certificate of limited partnership (now ch. 87, SLA 1994). In addition to HB 439, two others didn't make it: SSHB 307, Uniform Probate Code amendment of Article II (wills, etc.) and Article VI (nonprobate transfers); and HB 465 (with identical SB 302), Uniform Interstate Family Support Act.

Although the National Conference of Commissioners on Uniform State Laws (NCCUSL) does not hold a copyright on the label "Uniform . . . Act," the legal profession has properly come to assume that an Act bearing that label is a product of the NCCUSL — as are the six just mentioned. The NCCUSL (sometimes shortened to "ULC," Uniform Laws Conference), in conjunction with the American

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Outstanding CLE 9th Circuit Judges to Join Panel . . .

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President's Column

Presidential mandate to stop and smell the roses

I had two notable comments about my inaugural column on swinging cats by the tail. One was from a well-known Anchorage pro per who sent some materials my way "in preparation to when I swing a cat in your direction, Danny Boy." The second was from a law school classmate of mine who is pregnant with her first child. Speaking to her pregnancy, she preferred the Mark Twain quote about a man who set out to carry a cat home in a bag — that he was about to gain a great deal of experience that would always be fresh in his mind and never grow dim or distant. My initial reaction to my friend's quote was that Mark Twain's creator must have had some interesting times with his pets. My second reaction, especially when I realized the deadline was closing in for this column, was that this was an opportune time to talk about the need to stop and smell the roses as we lead our lawyerly lives.

Mother's Day and Father's Day are long past. Summer is in full swing. The July 4th weekend will have come and gone by the time you read this column. Yet the office continues its never-ending siren call, seducing me from more adventurous fun with my wife and kids; it's that darn Type A personality stuff, I guess. Why do I continue to go to the office on weekends when I could

Daniel Winfree

be at our lake cabin playing with the boat or the jetskis? My daughter is about 9, probably 2/3 of the way through the time she will listen to me, let alone want to spend time with me, and probably 1/2 of the way through the time she will leave home. My three year old son will probably beat her records for those times. It's really now or never.

At the risk of convincing you that I never have an original thought, I want to share with you some extracts of a law school commencement address given by Vince Foster at the University of Arkansas shortly before he killed himself, presumably because of the stress of his White House duties. I picked this up on one of my Bar trips and have kept it close by my desk ever since. If Mr. Foster had heeded his own advice, he might well be around today — the title of his address was "Roads We Should Travel:"

A word about family: You have amply demonstrated that you are achievers willing to work hard, long hours, to set aside your personal lives. It reminds me of that observation that no one was ever heard to say on their death bed, I wish I had spent more time at the office.

Balance wisely your professional life and your family life. If you are fortunate to have children, your parents will warn you that your children will grow up and be gone before you know it. I can testify that it is true. God only allows us so many opportunities with our children to read a story, go fishing, play catch, say our prayers together. Try not to miss a one of them. The office can wait. It will be there when your children are gone.

•••

Take time out for yourself. Have some fun, go fishing, every once in a while take a walk in the woods by yourself. Learn to relax, watch more sunsets. Those of you who do not have your life planned out, don't worry. It wouldn't turn out the way you planned it in any event.

•••

I hope you will consider trying the wide variety of professional opportunities that the practice of law will offer you. Spend some time in public service, whether as an assistant to the prosecutor or a public defender, or a legal service program. Or go to Washington and work for a congressional delegation or one of the federal agencies. Or go to your state capitol and work for a state agency or state commission. Or run for the legislature, school board, city council, or teach at your community college.

•••

But whatever you do, choose a professional life that satisfies you and helps others. If you find yourself getting burned out or unfulfilled, unappreciated or the profits become more important that your work, then have the courage to make a change.

•••

No matter how successful you are financially, your professional lives will be unhappy if you do not devote some measure of your task to improving your profession and your community. You can do good and still do well.

The practice of law is not easy. It's easier if you stop and smell the roses. Or, in my case, if I head out on the jetski with my daughter. I'm outta here.

Editor's Column

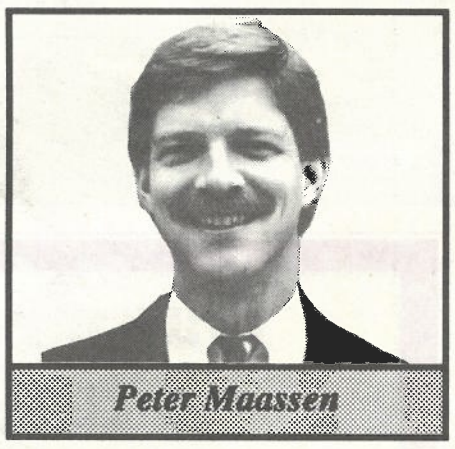
All *Bar Rag* submissions are welcome

The highlight of the last meeting of the *Bar Rag* writers was an appearance by President Dan Winfree, who shared his thoughts on the future of the Bar and, by so doing, left some food for the rest of us. Caught up in the euphoria of the moment, we pledged in return to maintain the high editorial standards that have made the word "Rag" a synonym throughout the country for a certain type of popular journalistic endeavor.

"What high editorial standards?" you ask, and well you might. Unlike most periodicals that survive on freelance submissions, the *Bar Rag* doesn't advertise its standards in *Writer's Market* or other publications that cater to wannabes of the Woodward-and-Bernstein persuasion. We like to keep the world guessing. Will your sweat-soaked brainchild make it into print? Ha ha ha. Wait and see.

But I can give you a few tips. Potential *Bar Rag* writers should bear in mind that most readers turn to us for practical, day-to-day help in being a lawyer. For example, just the other day I got a letter from a satisfied reader who stacks old copies of the *Bar Rag* next to his copier for sopping up spilled toner. "I cannot say that I've ever been absorbed by your publication," he writes. "Yet I find it absorbing. Kudos to your entire staff."

Practical advice on trial techniques, too, is always timely. Take, for example, the subject of demonstrative evidence. The word "demonstrative" comes from the Latin root "demon," meaning literally "devil," added to



Peter Maassen

"strata" (layers), and "ive" (in parts of London, where bees live). Thus "demonstrative" means literally, "devils piled on top of a beehive," which is something sure to get the jury's attention. Where but the *Bar Rag* could you learn something like that?

Which brings me back, circuitously, to our editorial standards. An astute reader may note that a number of the articles in this publication explain or take issue with recent court decisions. I certainly admire the scholasticism of Messrs. Schneider, Gutsch, O'Tierney, and others. To some few of us, however, how a particular case is decided is of little consequence compared to how the court strings its words together. To even fewer of us, any opinion is a success if it manages to avoid using the word "violative," as in "appellant argues that a search of his underwear by infrared laser is violative of his constitutional rights." "Is violative of " is apparently a kinder, gentler way of saying "violates;" the named offense doesn't quite "violate" the right, but it comes awfully darn close. Consider the following similar usages: "O.J. Simpson was elusive of his pursuit and managed to be evasive of arrest for several hours." "His confession was implicative of others." "Ducks in springtime are migratory toward the north." "The barbarians were invasive of Rome."

The Ninth Circuit did a similar semantic tiptoe in *Mitchell v. U.S.*, 213 F.2d 951, 954 (1954), when it noted that a witness "was excused from the stand when a message was received by the Court that her husband was in a dying condition at a local hospital." "In a dying condition" is apparently a less emphatic way of saying "dying," perhaps intended to convey that the poor man, like the phrase, was lingering longer than expected. Thank goodness that he wasn't dead, as the phrase "in a dead condition" is even harder to get away with.

So here comes the summing up, as we lawyers say. The *Bar Rag's* editorial standards are these: All submissions are welcome, especially those from the Bar membership, and they're likely to get printed regardless of your second thoughts on the matter. Avoid use of the word "violative." If you just can't, that's okay, we'll probably print it anyway.

But get help. It may be demonstrative of some deep-seated problem.

The Alaska BAR RAG

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Bar People

The Law Firm of Bliss Riordan dissolved and the following firms were formed: Office of **Ronald L. Baird,** — Ronald L. Baird and **J. Anthony Smith** (Of Counsel); Bliss & Wilkens — **Ronald L. Bliss, James K. Wilkens, Alfred Clayton, Jr.** and **Jean E. Kizer** (Of Counsel); Law Offices of William H. Ingaldson — **William H. Ingaldson** and **Maryanne A. Boreen;** the law firm of **Mark C. Manning;** Matthews & Zahare — **Thomas A. Matthews, A. Michael Zahare, Thomas L. Hause** and **Jean E. Kizer** (Of Counsel); Cohen & Associates — **Charles W. Cohen.**

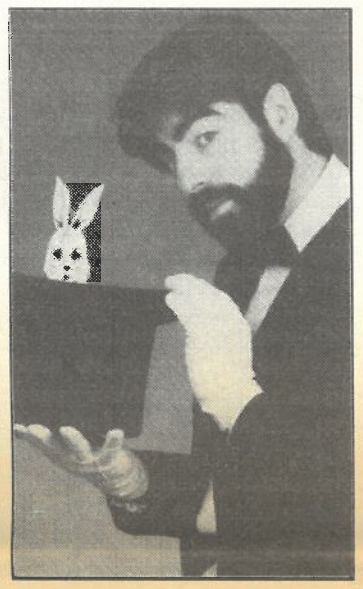
J. Douglas Burke has relocated from Anchorage to Kodiak....**Charles Cole** has open a law office in Fairbanks....**Thomas Dahl,** formerly with Condon, Partnow, is now and assistant attorney general in Juneau....**Douglas Davis,** formerly with Bliss Riordan, is now with Keesel, Young & Logan.

Tred Eyerly is with the Law Offices of Vicente Salas in Saipan....**Barbara Fullmer,** formerly with the A.G.'s office is now with the Department of Natural Resources, Division of Oil and Gas....**James Hopper,** formerly with Boyko & Flansburg, has opened his own law office in Anchorage....**Frederick Hahn,** formerly with Dayan, Hahn & Wensel, has opened his own law office in Anchorage....**Robert Molloy** and David Landry have formed the firm of Molloy & Landry.

Philip Reever, formerly with the Kenai Peninsula Borough is now the Borough Attorney with the North Slope Borough....**Patrick Rumley** has returned from several years in Japan and has opened his own law office in Anchorage....**Herbert H. Ray,** formerly with Bliss Riordan, is now with Keesel, Young & Logan....**Alan Schon** has relocated from Fairbanks to Virginia....**Wev Shea** has opened a law office in Anchorage....**Ken Schoolcraft,** formerly with Bliss Riordan, is now with LeGros, Buchanan & Paul in Anchorage.

Colette Thompson is now a deputy borough attorney for the Kenai Peninsula Borough....Hughes, Thorsness, et. al. has closed its Juneau office and opened an office in Valdez overseen by **William Walker**....**Michael Woodell,** formerly with Bliss Riordan, is now with Keesal, Young & Logan in Anchorage....**Joseph Wrona,** formerly with Birch, Horton, et. al., is now an assistant D.A. with the D.A.'s office in Bethel....**Charles Silvey** announces his departure from the firm of Cook, Schuhmann & Groseclose, and the relocation of his offices as the owner of Willner's Fuel and Fairbanks Sand & Gravel.

Kevin Shores, formerly with the Alaska Court System, is now with the P.D.'s office in Juneau. Upon payment of his bar dues he asks the Bar office to "please send the donuts right away"....**Cliff Groh II,** formerly with the D.A.'s office, is now with the Anchorage Municipal Attorney's Office....**James Wendt** has relocated from Ketchikan and is now with the P.D.'s Agency in Anchorage.



Pradell practices magic in law & on stage.

Steven Pradell and Associates open second office in Anchorage

On July 1, 1994, the law firm of Steven Pradell and Associates opened a second office in South Anchorage in the Huffman Plaza directly above Blockbuster Video. The office will be located at 12350 Industry Way Suite 206, Anchorage, AK 99515, telephone number 279-4529, or 345-3855.

The firm will continue to practice primarily in the areas of domestic, criminal and personal injury law. The downtown office, located at 1009 W. 7th Ave., will remain open.

You may wonder how Pradell can be in two places at one time. Perhaps you have seen him in a top hat and bow tie waving a magic wand when he is not practicing law. But he won't be using magic to operate two offices. The offices will be staffed with a growing number of attorneys who now work with Pradell. On June 13, 1994, attorney John Shaw jointed the firm, which presently includes attorney D. Kevin Williams. Attorney Brock Shamberg became "of counsel" to the firm on July 1, 1994.

Kimberlee Anne Colbo elected president of AAWL

The law firm of Hughes Thorsness Gantz Powell & Brundin is please to announce that Kimberlee Anne Colbo, an attorney with the firm since 1992, has been elected president of the Anchorage Association of Women Lawyers (AAWL). The AAWL was founded in 1976 and today has grown to have more than 450 Alaskan members including attorneys, judges and legal assistants.

"The Anchorage Association of Women Lawyers is part of a national network of women attorneys and as such plays an important role in terms of networking and developing the profession for women," said Colbo. "Great strides have been made in developing equal opportunities for women," she said, but occasionally it can still be a challenge to be a woman lawyer. AAWL provides us with a wealth of resources for continuing legal education, but perhaps more important, it provides the opportunity to meet with other successful women attorneys — ranging from judges to sole practitioners — who share ideas and information on how to improve our careers and the practice of law."

The Anchorage Chapter of AAWL meets the fourth Wednesday of every month at The Westmark Hotel. Ms. Colbo's term of office will run until 1995. For more information on AAWL, you may call Kimberlee Colbo at (907) 263-8224.

Estate Planning Corner

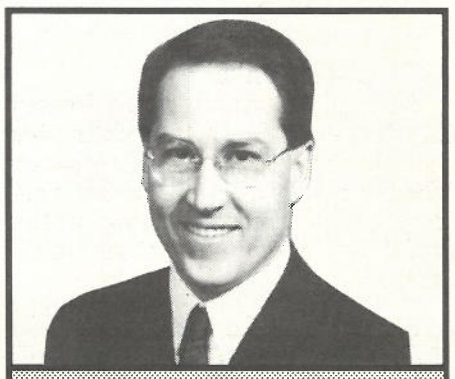
Pitfalls in using the ascertainable standard

When drafting trusts we may subject the trustee's distribution power to the so-called ascertainable standard in order to avoid problems under the tax laws. But sometimes the ascertainable standard will not help avoid tax problems, and other times the ascertainable standard may create tax problems.

Consider a married couple, domiciled in Alaska, both U.S. citizens. They have no debts and neither has ever made a taxable gift. Their assets are all in Alaska and total $1.2 million.

Suppose the husband dies, giving everything to his surviving spouse, who does not disclaim. Suppose she dies a year or so later with a taxable estate of $1.2 million. The surviving spouse's estate would, under current law, owe $235,000 in estate taxes (IRC Sec. 2001, 2010, 2011, and A.S. 43.31.011).

These taxes could have been completely avoided had the husband used his unified credit against estate taxes (IRC Sec. 2010). The couple could have equalized their estates, by separating their assets so that each owns $600,000. Then the husband could have signed a Will or Living Trust that gives the unified credit equivalent amount, which is currently $600,000, to a trust that would be available to the surviving spouse, but which would not be included in her estate for tax purposes.



Steven T. O'Hara

This trust is often called a "credit-shelter trust," since it shelters the unified credit equivalent amount from estate taxes. It is also often called a "bypass trust," since it bypasses the surviving spouse's estate for tax purposes.

Suppose in our example that the couple had equalized their assets and adopted Wills or Living Trusts that create a credit-shelter trust on the death of the first of them to die. But suppose the husband named his surviving spouse as the trustee of the credit-shelter trust.

Under such circumstances, if the surviving spouse is considered to have a so-called general power of appointment over the credit-shelter trust, she will be considered the owner of the trust for tax purposes and thus the purpose of the trust will be defeated (IRC Sec. 2041(a) (2), 2514(b), and 2652(a) (1)).

The surviving spouse will be considered to have a general power of appointment over the credit-shelter trust if she, as trustee, has the power to distribute property to herself — that is, unless her distribution power is limited by an ascertainable standard relating to her needs for health, education or support (Treas. Reg. Sec. 20.2041-1(c) (2) and 25.2514-1(c) (2)).

A circumstance where an ascertainable standard will not help is where the surviving spouse, as trustee, has the power to distribute property to discharge her personal legal obligation, such as to support a child. Here the surviving spouse is considered to have a power to distribute property to herself to the extent of her personal legal obligation (Treas. Reg. Sec. 20.2041-1(c) (1) and 25.2514-1(c) (1)). The ascertainable standard exception is no help because the surviving spouse's power to distribute property to discharge her personal legal obligation is not limited by *her* needs for health, education or support. Rather, the exercise of the power is based on the needs of the child.

There are at least two other instances where the ascertainable standard will not help, but in fact may create adverse tax consequences.

The first is a minor's trust under Section 2503(c) of the Internal Revenue Code. If a gift is made under this trust, the gift will be deemed to be a gift of a present interest and thus may be sheltered from gift tax by the $10,000 annual exclusion (IRC Sec. 2503(b) and (c)).

To qualify as a minor's trust under Section 2503(c), the trustee's discretion may not be subject to substantial restrictions (Treas. Reg. Sec. 25.2503-4(b) (1)). An ascertainable standard could be considered a substantial restriction for these purposes. For example, in 1991 a court ruled that a trust did not qualify under Section 2503(c), and thus the $10,000 annual gift-tax exclusion was lost, where the trustee could make distributions only for education or in the event of an accident, illness or disability (*Illinois National Bank of Springfield v. U.S.*, 756 F. Supp. 1117 (C.D. Ill. 1991)).

Another instance where we, as drafters, need to be careful in using the ascertainable standard is where the client ("grantor") creates any living irrevocable trust, naming his spouse or children as beneficiaries. If the trustee may use the trust to discharge the grantor's personal legal obligation, such as to support his children or spouse — indeed, if the trustee is subject to an ascertainable standard relating to the support needs of the grantor's children or spouse — the IRS may assert that the grantor has retained a beneficial interest in the trust (Treas. Reg. Sec. 20.2036-1(b) (2)). Thus the IRS may argue that the trust is includable in the grantor's gross estate — that is, to the extent of his personal legal obligation to support his children or spouse.

Optical imaging and business record management

By Joseph L. Kashi, M.S., J.D.

The widely reported, sophisticated technology used in the recent *Exxon Valdez* trial has spotlighted document imaging and how it can be used with devastating effect for trial preparation and in the courtroom. Foremost among this new technology ie "document imaging", which you might analogize to a form of electronic microfilm that can be indexed and computer-searched at blinding speed.

As document imaging software has matured, the long-promised "paperless office" ie nearly here for the average small law firm. This is a technology with which all lawyers will become familiar sooner or later. Letters, invoices, receipts and nearly any other type of paper record can now be run through an optical scanner and changed into a computer-retrievable graphical image of each page. The ability to find any document immediately will become a basic technology for any office that handles or archives significant amounts of paper files.

Scanned images can be used daily in the office if they are stored on laser-controlled optical hard disks or transferred to longer-lived CD-ROM disks. Depending upon the resolution with which you scan documents, between 10,000 and 30,000 such pages are will fit on a CD-ROM disk. Ten thousand pages is about three to four filing cabinet drawers.

You can archive typed records, hand-written notes, drawings, receipts or any other kind of paper record except oversize documents like engineering drawings. The only typing that you'll do is adding optional index terms. Some programs can use typed records already in your computer by converting them to images from a hard disk or floppy disk without printing a paper copy.

Some imaging products use your archive record storage to further automate your office by automatically routing records to the next person who must work upon them after the prior user has completed his or her part of the job. This is called "workflow" technology and is very popular in companies that process a large number of similar transactions, such as insurance billing. It adds great value to your stored records. Workflow technology still requires a substantial amount of custom setup, so it's still too expensive for most offices.

If you've converted your documents to CD-ROM, then each stored image page can be read on most Windows-based PC computers equipped with an inexpensive CD-ROM drive and the right software. Instead of three or four large, flammable boxes of paper (just try finding something quickly in that pile), your records fit on to a small CD disk. And, if you have the right equipment , you call easily make duplicate disks, one to use in your office and a second archive copy that's safe in a fireproof off-premises place like a bank vault - If your office has a computer network, then you can store all of your records centrally and all authorized persons can have instant access to them.

If you have added some index keywords when scanning your records, then it's feasible to find all of the records on any particular topic, for example, which clients for whom you prepared trusts just prior to changes in the Tax Code, something that's not possible with either paper records or microfilm. Imaging all of the documents pertaining to large litigation projects provides the quickest and easiest method to find an important bit of evidence or a particular motion within those four banker boxes of paper. When you are cross-examining someone, you need the contradicting document now, not fifteen minutes later.

It's very hard to lose or misplace critical records if they're scanned into computer images, particularly when a duplicate CD-ROM has been safely stored away. This capability makes on-line record imaging particularly useful for businesses and governmental agencies that have numerous employees, personnel from other agencies, and members of the public searching through the single set of paper records in a critical case. I am aware, for example, of several cases where critical files have been lost, at least in part, during the middle of important legal actions by governmental agencies.

Once a record is made into a CD-ROM disk, it's unchangeable and provides a clear audit trail if challenged. Although I am not aware of any caselaw upholding the evidentially validity of this new technology, I believe that it is only a matter of time. We already admit paper photocopies and duplicate photographs, which are more easily altered than a date-stamped, unchangeable CD-ROM record archive disk.

CD disks usually are rated as having a 25 or more year usable life span. Because of the proliferation of CD drives and publications, you're likely to find usable CD hardware available 10 or 20 years from now. After all, you must be sure that you can still find hardware to retrieve those carefully archived records. Utility programs are available to check any CD disk made of your scanned records and to verify that everything copied correctly.

The hardware necessary to read CD disks ie not very expensive. Most new entry level computers can run the necessary software and a top of the line CD-ROM drive now costs under $500. If you have a network, then it's possible to centrally install numerous CD-ROMs disks at a lower cost per disk if you use networked mechanical changers. In that case, each user would not require their own CD drive.

Producing your own CD-ROM disks ie still expensive and technically complex. Plan on spending about $10,000 for basic imaging hardware and another $7,000-$10,000 for the additional equipment needed to make CD-ROM disks in your own office. In the near future, most businesses will use probably third parties to actually make the CD disks in a manner analogous to current microfilm vendors.

Here's how I believe that a CD disk might be made using a third party business. Your own employees would take archive paper files to the CD maker and, using a high speed scanner, make computer images of each page. Security and confidentiality ie preserved by only allowing your own employee to actually handle the records.

After scanning, raw images are transferred to intermediate storage. This is usually an optical "laser" hard disk using removable, interchangeable elements. It ie not the CD drive itself, but a different sort of optical hard disk whose capacity closely matches that of a regular CD disk. Unlike the one-time CD-ROM disk, these removable disk elements can be erased and reused indefinitely, just like a regular computer hard disk. When this optical hard disk is full, it is copied to a CD disk via yet another

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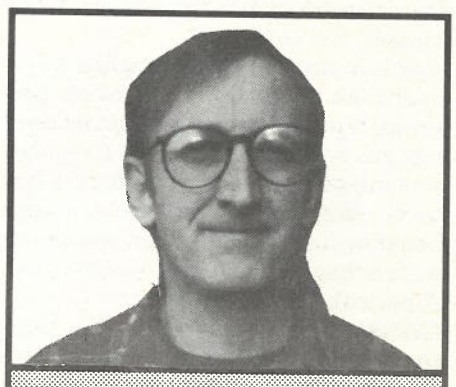
Eclectic Blues

Bug hunt

WARNING: This is an almost true story. The names and much of the story line have been changed to confuse the innocent.

In the deepest subbasement of a major university research building, a pudgy entomologist pushes aside spider vials to make room for stacks of Alaskan medical records. It's late. Professor Kleinschmidt is discouraged and about to return home to catch a black widow special on public TV when he finds what he is looking for in emergency room records from a Ketchikan regional hospital.

"Scarab scat," he shouts, "*tegenarin agrestis* can survive in the temperate Alaskan rain forests. If only those knuckleheads at the National Academy of Science could forget the sexual habits of mammals for a minute and cough up some grant money, I could be collecting specimens in Ketchikan before the October die-off. Then the Munch prize for excellence in arachnid studies would be mine."



Dan Branch

While the good professor returns to his digs muttering to himself about breast-fixated mammalogists controlling foundation purse strings, a small brown spider explores the vast expanses of a Ketchikan futon. He is not alone on the low slung bed. Mere feet away, a forest service trail crew worker named Bruce enjoys the sleep of innocence that only comes to those who work hard with their hands. He rolls suddenly in his dreams, to avoid a falling cedar.

His efforts to escape phantom danger brings his leg close to a real danger. Sensing a threat, the arachnid bites, then scuttles off leaving his corrosive venom in the sleeping Bruce's leg.

When Bruce awakes with painful swelling and a weeping wound, he heads for the local emergency room. The doctor on call stumbles upon Professor Kleinschmidt's notice jammed in the insect bite section of a treatment manual. It asks physicians to call the professor if they find evidence of *tegenarin agrestia.*

"Professor Kleinschmidt," the call begins, "I am Doctor Noyes, the on-call physician at the Ketchikan Emergency Room."

"So?" answers our reclusive professor.

"Professor, I am looking at an upper thigh showing evidence of interaction with a *tegenarin agrestis*," the good doctor explains.

"Weeping wound, painful swelling, the start of tissue damage?" Professor Kleinschmidt asks breathlessly.

"Yes," confirms the good doctor.

"Great! Get an address and I'll be right up. Oh, make sure that no one fumigates your patient's home until I get there," replies the professor before terminating the professional exchange.

Doctor Noyes is upset that the professor broke off without providing a treatment plan. Later he discovers that there is no treatment for the loathsome spider bites.

Herr professor is as good as his word. After wrenching a small travel advance from the tightfisted grasp of the college treasurer, he jams a vinyl overnight bag with killing vials and other tools of his trade and boards the next flight to Alaska's first city.

•

On a rain-stained Saturday Professor Kleinschmidt enters my life. I am looking forward to a tuna fish on whole wheat when the family dog announces his arrival at our front door. The professor stands, watchcap rimmed with moisture, in the mud room. Glass kill vials ring harmonically when he pulls a handkerchief from his pocket.

In the quiet tones of a man careful not to scare shy prey, he describes his walk from the airport. "I prospected the Tongass." he explains, "without luck." He goes on to describe a close encounter that morning with the subject of his inquiry.

His explanation produces more questions than answers.

"Who are you?" I ask.

"Are you not Bruce, a recent victim of the *tegenarian agrestis*?" he inquires in reply.

"No," I say. Showing my extensive knowledge of small town facts I add, "He lives north of town."

Sitting down on a pile of half-dressed Barbie dolls left on the plywood settee by our four-year-old, Professor Kleinschmidt explains his quest. Seeing a chance to avoid cleaning out the basement, I offer to convert the family Dodge into a research vehicle.

First stop is the forest service bunkhouse where Bruce fell to Professor Kleinschmidt's prey. Unfortunately Bruce is away at his winter home in Florida. Before leaving he set off 25 bug bombs in the barracks which rendered the site useless to the professor. Next we hit Ketchikan's largest nursery.

Thinking it best to keep a low profile, I tell the proprietor that my companion is a major university researcher seeking to establish the northern migration of a Seattle spider. Soon we are turning over clay pots in the nursery Greenhouses. Domestic lookalikes are the only spiders to fill the doctor's kill jars.

As we leave for more fruitful venues, the good doctor blows our cover by telling the nurseryman, "We are looking for a deadly spider, if we find it we will report it to the proper authorities." Fortunately, the proprietor is too busy potting shrubs to spread panic on the local gossip net.

Next we stop off at the totem carving shed in Saxman where Dr. Kleinschmidt finds a small relative of *tegenarin agrestis*. The two carvers register some concern when he gives his dangerous spider speech.

Needing to return to my domestic tasks, I leave the good doctor to wander the city greenhouse and other downtown locales. The next morning he is back in our mud room to report his failure to locate the deadly spider. Fortunately, while he conducted this fruitless task, I stumbled on a *tegenarin* victim,

A friend reported waking up to see a brown spider crawling away from her leg. She went back to sleep only to wake up with a nasty wound. Dr. Kleinschmidt becomes visually excited while listening to how poison from the bite worked its damage. I could almost read his thoughts, "Yes, this is the proof I need." His excitement was contagious as we drove out the North Tongass Highway toward the spider's lair.

Rain slams hard into the windshield as we pull up to the house. Following directions, we find a large wooden trap door giving access to the house crawl space. Brown spiders scurry away from the doctor as he slides fearlessly into the void. Twenty minutes later he emerges with vials full of harmless spiders. His deadly prey avoided detection.

As I drive a clearly dejected spider expert back to town, I search for another hunt site. The basement of my church comes to mind. The church secretary is happy to permit inspection. A doubtful doctor carefully searches around mounds of carnival booths, old rugs and candlesticks for his spider. Along a bank of windows he finds what he is looking for. Funnel shaped webs are discovered a few feet apart along the floor. A spider is captured and web samples secured for evaluation. He doesn't say so, but I suspected he has his proof. "I wouldn't let anyone sleep down there," was all the now cagey specialist would tell the church secretary.

I haven't heard back from the professor. Perhaps the Munch Prize committee rejected his claim to have established the arrival of *tegenarian agrestis* in Alaska. Perhaps not. I hope he is not intending to use the church basement as a research center.

A high percentage of last month's collection went towards pest control.

"We are looking for a deadly spider."

Solid Foundations

Foundation approves grants of $136,500

1994-95 IOLTA grants were awarded by the Trustees of the Alaska Bar Foundation on June 8, 1994. Although grand requests totalled over $250,000, the Trustees approved grants of $136,500:

Alaska Pro bono Program: $130,000 for the deliver of free legal services to low income Alaskans. The program is an example of an extremely successful collaboration of the Alaska Bar Association and the Alaska Legal Services Corporation. In addition to providing the economically disadvantaged with free legal representation, the program sponsors many statewide classes and clinics.

Mary Hughes

Anchorage Youth Court: $5,000 for operation of its legal education program. The alternative preadjudicatory system for Anchorage youth allows juveniles accused of breaking the law to be judged by their peers; it also benefits students in junior and senior high school by training them in the American Justice system.

CASA's for CHILDREN: $1,500 for the training of, and emergency and direct services from, CASA volunteers. In an effort to improve advocacy services for abused and neglected children, a CASA volunteer is a trained community member who is assigned to represent the best interest of a child in court. The CASA provides the judge with carefully researched information on the child's background and needs in order to help the court make a sound decision about the child's future.

Because of a lack of IOLTA funds, the Trustees prioritized the goals of IOLTA funding. The foremost goal, funding legal services for the disadvantaged, received ninety-six percent of the funds available. The remainder was allocated to the administration of justice through Anchorage Youth Court activities.

Hospital calls II

Have the state troopers pay the hospital bills

By William Satterberg

A hospital incident which I found particularly interesting occurred as a result of a bureaucratic war between the State Troopers, the Correctional Center, and the hospital.

Several years ago, the State of Alaska Supreme Court indicated that a blood test was to be offered any time an intoximeter reading was taken. This blood test, moreover, could either be drawn at state expense at the correctional facility, or at the suspect's own expense, at the facility of his choosing anywhere within the Fairbanks North Star Borough. (One issue which has yet to arrive is when the defendant wants his blood drawn *in Salcha, Alaska, at the outer edges of* the borough.)

On one particular case, due to an inordinately low intoximeter reading, following consultation, my client and I decided that a blood test, drawn independently at the hospital, was in order.

Any time such a request is made, the troopers become somewhat agitated. There is a reason for this, of course, in that it requires additional work, standby time, and the taking of a suspect to the hospital. And more often than not, that suspect is not always the most publicly presentable of sorts.

On this particular case, I accompanied my client/suspect to the emergency room. It was then that bureaucracy took advantage over justice.

In the past, the State of Alaska had paid for blood draws to be taken at the emergency room. Due to an administrative decision by the district attorney's office, however, a new policy had been adopted, unbeknownst to the particular trooper, stating that all blood draws would be taken at the Correctional Center. Furthermore, that policy dictated that blood draws which were to be taken at the hospital were to be at the client's expense.

There is an ethical rule that says an attorney may not loan money to his client. Always the most ethical of attorneys, I decided to abide completely by that rule and, when my client requested a donation for his blood draw, I politely, yet firmly, refused. Besides, there is something to be said about having a retainer first.

The hospital indicated to the trooper that the blood draw would not take place without my client's financing. The trooper indicated that he would not pay for the blood draw, and I still refused to become the Bank of Satterberg.

A standoff of sorts ensued for approximately two hours. During that time, frantic calls were made by the trooper regarding what alternate procedures to follow, especially recognizing that an attorney was present, continually muttering things about archaic concepts such as "due process." Needless to say, more than one supervisor was brought forward from a deep sleep to respond blurry-eyed to the troopers and trainees regarding what procedure to follow.

Eventually, the decision was made to draw my client's blood at state expense. The hospital balked, again, for quite awhile, indicating that the state's credit was not necessarily so good at the hospital, and that a purchase voucher or some other bureaucratic paperwork would be required. Eventually, compromises were reached, and a decision was made to draw my client's blood on credit. The blood, apparently, would be held as collateral, Of course, that didn't sit well either with the trooper, who needed to seize the blood in the official blood draw kit. More negotiations followed and, ultimately, the decision to draw blood was made.

After several minutes of trying to find veins in my client's arm, to which I kept muttering things about cruel and unusual punishment, the blood draw ensued. It was following that particular moment, when the serum was taken, that I launched into my diatribe regarding the fact that the blood should not be released to the troopers, but to his attorney. I indicated that the blood was being drawn for the benefit of counsel, and not the State, and that the State had no right to the blood. That issue, incidentally, is still somewhat unresolved.

Despite my most valiant efforts, the state left with the blood and my client to boot.

When, ultimately, the blood was analyzed, it was determined that blood had fallen below the .10 level. Perhaps that had something to do with the amount of hours spent in the hospital emergency room while my client had sat chained in handcuffs to the armchair of a sofa, watching cable TV while doctors, attorneys, would-be attorneys, and troopers all argued. In point of fact, even one supervisor had to respond to the hospital for this one.

Another, equally enjoyable, hospital stay occurred approximately one year ago when a client of mine who was also seriously injured, was about ready to be released from the hospital. Word had already been sent to the troopers out front and the doctor that my client was due to be discharged. I was not present when this decision had been made by my client, who had been stating, in a somewhat confused condition, that he simply did not want to stay at the hospital.

In consultation with the client in the examining room, I explained that he had one of two alternatives. Alternative A was to remain at the hospital and not under arrest. Alternative B was to discharge himself from the hospital, and be placed under immediate arrest and transported to the Fairbanks Correctional Center.

Just as we were reaching a decision, a young trooper barged into the examining room, announcing that he was going to place my client under arrest for various crimes. I explained to the trooper that I was consulting with my client, but to no avail. The trooper indicated that my client would be placed under arrest immediately, and, with his tape recorder in full view, announced this important decision. He then sat back and expected that my client would shortly be discharged by the hospital to be placed into his waiting handcuffs.

It was at that point that I consulted with the doctor, reminding him that my client had been involved in a serious accident, and that unseen injuries could exist which of course, might affect that doctor's own economic interests (*by implication and not threat*).

The doctor quickly agreed with me that discharge was against his better judgment whereupon I indicated to him that my client did not want to be discharged if the client could not be discharged in good health.

The doctor promptly announced to my client, accordingly, that he would be remaining for at least two more days.

The trooper overheard all of this and immediately went into an epileptic seizure. You see, kind reader, there is a provision in the Alaska State Troopers' manual which states that when a suspect is arrested in the hospital, not only must a guard be posted on a 24 basis outside of hospital room, but the State of Alaska must pick up all of the hospital bills. In point of fact, I inquired of the trooper as to whether or not the state would be paying my client's bill since the client was not being discharged from the hospital and the trooper responded that the state would be required to pay the bills. This development delighted my client, who immediately ordered a television set for the room.

It was late at night and approximately eight more hours before the State Troopers were able to wake up a magistrate who, quite dutifully, immediately released my client on his own recognizance.

During this period of time, numerous supervisors also had the job of being awakened and the bills continued to mount. Of course, the next day, after my client was discharged, the state attempted to impose some rather strenuous bail conditions. I reminded the good judge that he had previously released my client on his own recognizance, and to impose bail conditions at this point which exceeded those would obviously be unjust, improper, and inconsistent. The Court agreed, and my client continued on OR status.

The moral of the story? When your client is in the hospital, keep him there. The show is worth it.

Uniform laws and the wonders of the legislative process

continued from page 1

Law Institute and the American Bar Association and various scholars and advisers, does the research and drafting.

The NCCUSL's promulgation of an Act or a set of amendments culminates a minimum of two, and often several, years' work by a drafting committee and a review committee, with at least two floor debates by the full conference at its annual meetings. It's then up to the state legislatures and governors.

cess of the Uniform Transfers to Minors Act, which 43 U. S. jurisdictions, including Alaska (AS 13.46), have enacted.

HB 280 — now ch. 10, SLA 1994 — offers a very simple, inexpensive, and flexible option for handling both personal and real property. It has already been enacted in 10 other states.

STATUTORY RULE AGAINST PERPETUITIES

The legislature passed and the governor signed Representative Moses' HB 316, and thus achieved a significant improvement in both the common law rule against perpetuities and Alaska's current statutory modification of it (AS 34.27.010). See ch. 82, SLA 1994.

This new version, although using more words than the traditional statement of the common law rule, is easier to understand and to apply. It should help attorneys avoid malpractice actions based on their drafting of instruments creating future interests. (Of course, some judges might excuse the mishandling of the old rule. In *Lucas v. Hamm,* 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685, 690 (1961), the California Supreme Court found the rule so treacherous as to relieve a lawyer from liability for his error, noting that the subject has "long perplexed the courts and the bar.") And it should help assure that the donor's intent is realized, without a lot of litigation, expense, and delay.

This statutory rule retains Alaska's wait-and-see approach to the vesting of a future interest (wait and see whether the interest actually vests within the specified time rather than consider only the future, hypothetical possibility of nonvesting, as under the common law rule), but avoids the difficulties posed by our present "causal relationship" language, and sets a maximum period (90 years after creation of the interest) for the waiting. It retains the validating side of the common law rule, while removing the harshness of its *in*validating side.

For a slightly more detailed description of this statutory rule, see the governor's May 16, 1991 transmittal letter for the *Seventeenth* Legislature's HB 334, at 1991 House Journal 1478—1480.

The NCCUSL's official commentary for this Uniform Rule is analysis, and explanation especially helpful.

Alaska joins 21 other states that have enacted this rule.

LIMITED PARTNERSHIP ACT

In 1992, the 1985 version of the Uniform Limited Partnership Act was enacted, minus the NCCUSL's 1985 amendments regarding the *certificate* of limited partnership. That bill replaced Alaska's 1917 version. And, with this year's enactment of HB 394 (as ch. 87, SLA 1994), the updating is complete.

The general purpose of the 1985 NCCUSL Act is to provide a more flexible and stable basis for the organization of limited partnerships, and to help states stimulate new limited partnership business ventures.

Last year, Senator Jim Duncan introduced SB 66, and Representative Carl Moses introduced the identical HB 112, to pick up the missing amendments on certificates. The essence of those amendments is the replacement of the old long-form certificate with the modern "notice" or short-form certificate, recognizing that it is the partnership agreement itself, not the certificate, that is the constitutive document for the partnership. They also recognize that the long-form certificate is both unnecessary and infeasible in this era of limited partnerships with hundreds or thousands of partners, changing regularly. The amendments are overwhelmingly supported both nationally and in Alaska.

The legislature passed HB 112 in 1993. Unfortunately, a Senate floor amendment added a section (sec. 18 of HB 112 am S) that caused the governor to veto the bill. While supporting the unamended version of the bill, but fearing that the additional language created the possibility of judicial and Internal Revenue Service interpretations that could deprive Alaskans of some of the estate-planning and tax advantages of investment in a limited partnership, some Anchorage attorneys convinced the Department of Law and the governor that the bill should be vetoed.

Representative Carl Moses, sponsor of HB 112, introduced HB 394 this year, offering the same substance minus that Senate floor amendment. It passed both houses, and the governor signed it" Alaska has joined 33 other states in enacting the NCCUSL's 1985 amendments.

keep it up to date.

These amendments include the following separable packages:

— Uniform Testamentary Additions to Trusts Act,

— Uniform Simultaneous Death Act,

— Uniform Disclaimer of Property Interests Act,

— Uniform International Wills Act, and

— Uniform Act on Intestacy, Wills, and Donative Transfers.

The Article VI amendments (nonprobate transfers) included in the sponsor substitute bill (*SS*HB 307) update Alaska's current pay-on-death (POD) provisions and add transfer-on-death (TOD) provisions. These amendments add to the kinds of property that may be transferred without probate. The general purpose of these changes is to simplify the change of ownership upon the death of the owner, by avoiding the expense, delay, and complication of probate proceedings.

Nineteen states have enacted one or the other, or both, of these sets of Article VI provisions — either as part of their Uniform Probate Code or as the freestanding Multiple-Person Accounts Act and the Uniform TOD Registration Act.

INTERSTATE FAMILY SUPPORT ACT

The Rules Committees of both houses introduced the Uniform Interstate Family Support Act at the request of the governor. See HB 465 and SB 302. This item is a comprehensive revision of the Uniform Reciprocal Enforcement of Support Act (URESA, AS 25.25). It was promulgated by the NCCUSL in 1992, and, as of June 15, 1994, had already been enacted in 19 states, and was pending in 10 additional states.

UIFSA updates URESA, recognizes the growing number of single-parent households, resolves problems stemming from jurisdictional disputes and multiple support orders, and makes a number of other improvements. It benefits all parties, including the obligor and the state, involved in support proceedings. Interstate uniformity is especially important in this area, considering the mobility of people and the need for cooperation among the states. Legislative inaction this year has merely delayed Alaska's participation in these benefits.

MORE DETAIL

As with my previous reports, this synopsis does not do justice to any of the Uniform Acts mentioned — neither the ones that passed nor the others. And, of course, the 1994 proposals in Alaska are just a small percentage of the product of the NCCUSL.

Anyone wanting to read any of the Alaska bills should contact the nearest Legislative Information Office. Those wanting to see the official NCCUSL version, including the explanatory section-by-section commentary, could look it up in Uniform Laws Annotated. Those wanting their very own pamphlet copy of a Uniform Act, or an information packet, should contact John M. McCabe, Legal Counsel & Legislative Director, NCCUSL, 676 N. St. Clair Street, Suite 1700, Chicago, Illinois 60611.

"Our current statutes (AS 34.40) are from the 1884 adoption of Oregon civil law for the District of Alaska."

Here is a synopsis of Alaska's recent legislative activity regarding uniform laws:

FRAUDULENT TRANSFER ACT

HB 439, introduced by the House Judiciary Committee, got lost in the Senate Rules Committee, and was not calendered for Senate floor action. It passed the House March 14, 1994 by a vote of 40 to 0, was referred to the Senate Labor and Commerce Committee on March 15, which favorably reported it out April 13, and then it immediately went to Senate Judiciary. That committee favorably reported it out May 5, when it went to Senate Rules and never surfaced again. So, we'll have to wait for another legislature to improve Alaska's law on this subject.

Our current statutes (AS 34.40) are from the 1884 adoption of Oregon civil law for the District of Alaska, and can be traced back to the 1854 Laws of Oregon. Alaska never even enacted the Uniform Fraudulent Conveyance Act, promulgated by the NCCUSL in 1918.

As described by the NCCUSL, the basic purpose of this new Act is to provide a creditor "with the capacity to procure assets [that] a debtor has transferred to another person to keep them from being used to satisfy the debt." The Bankruptcy Reform Act of 1978 changed federal law, and creditor-debtor relationships have changed, so that a re-thinking of state law on fraudulent transfers has become necessary. HB 439 responded to that need.

The Act works as a deterrent to artificial insolvencies that are achieved by transferring assets in an effort to defeat the interests of creditors, and it provides creditors with a remedy. Credit is essential to the economic life of the country, and the Act provides assurances that the corresponding obligations are satisfied. As of May 1, 1994, it had been enacted in 33 states.

CUSTODIAL TRUST ACT

The House Rules Committee, chaired by Representative Carl Moses, introduced HB 280 in 1993 to enact the Uniform Custodial Trust Act. This Act, in the words of the NCCUSL's prefatory note, is "designed to provide a statutory inter vivos trust for individuals who typically are not very affluent or sophisticated, and [are] possibly represented by attorneys engaged in general rather than specialized estate practice. The most frequent use of this trust would be in response to the commonly occurring need of elderly individuals to provide for the future management of assets in the event of incapacity." This custodial-trust concept was inspired by the great suc-

"The amendments are overwhelmingly supported both nationally and in Alaska."

PROBATE CODE

As mentioned in my 1992 and 1993 uniform-laws updates in the *Bar Rag*, in 1990 the NCCUSL promulgated a major revision of Article II of the Uniform Probate Code (UPC), dealing with will; and intestate succession. This new version, introduced b; Representative Moses as HB 307, concluded a systematic study by the Joint Editorial Board for the Uniform Probate Code and a special Drafting Committee to Revise Article II. Lengthy as it is, it has already been enacted in five states.

The revision responded to three basic themes that emerge(in the 21 years since the UPC was promulgated: (1) the decline of formalism in favor of intent-serving policies; (2) the recognition that will-substitutes and other inter vivos transfers have s(proliferated that they now form a major (if not *the* major) form oi assets transmission; (3) the advent of the multiple-marriage society, resulting in a significant portion of the population being married more than once and having stepchildren and children of previous marriages and in the acceptance of a partnership 0] marital-sharing theory of marriage. Trends have developed in case law, statutory law, and the scholarly literature.

The Alaska Bar Association's Estate planning and Probate Section has been reviewing the revision since 1992. The bill will very likely be introduced again next session. Although not every state has enacted the complete Uniform Probate Code, Alaska has, and it is important to

Pinot Noir: a romantic tale

By Stephan A. Collins

If the story of Pinot Noir in America were made into a movie, it might be billed as a story of true romance between and impertinent, elusive, and temperamental young princess who ran off to seek her fortunes in strange new lands and the devoted lovers along the way who sought to give here everything that she needed so that her beauty and brilliance could take root and blossom, and be recognized for the divinely ordained royalty that she is.

On the other hand Pinot Noir in America could also be billed as an arrogant, condescending brat who ran away from her devoted French parents to take up with some Californians outside of Haight-Ashbury and then wandered aimlessly up and down the West Coast without really making something of herself.

For those of you unfamiliar with the red wine grape variety, Pinot Noir—otherwise affectionately called "Pinot," is the stuff of which great Burgundian dreams are made. It is the predominant grape variety grown in the Burgundy region of French and is responsible for some of the most expensive wine sold in the world.

Some bottles of Pinot Noir from Domaine de la Romanee-Conti, one of France's greatest Burgundy wineries, have been spotted in an Anchorage retail store with a label price hovering at $750 a bottle. A local warehouse liquor store has a mixed case of 1989 Romanee-Conti stored away in the cooler with an approximate asking price of $2,700.

Why the fuss? you might ask. Unlike Mae West, when Pinot Noir is good, it's very, very good; when it's *bad, why bother? When everything* comes together and the grape receives the most devoted care, it can produce some of the most complex, most pleasing, and most exciting wine there is in the world. Its wine can be great, sumptuous, and velvety. It has been known to make converts and instill a passion in wine lovers like no other wine.

A young Pinot Noir shows a brilliant ruby color with allusions to purple. Its aroma makes your think of black cherries, plums, and other dark berries with accents of smoke and spice. A Pinot Noir does not need much tannin to convince you that it is a good wine. In fact, a good Pinot has a medium-bodied palate, a fine balance of acidity, and moderate amounts of tannin. A more mature Pinot can reveal deeper flavors such as tar, tobacco, wild mushrooms, burning leaves, or even the smell of a forest after the rain. The truth is, that when Pinot is well made, it is the most food friendly of all red wines. Of course, this description is more reflective of French Pinot Noir than American, where until recently, the results have been less than good.

What makes Pinot Noir such an extremely elusive grape is that it is difficult to grow. In Burgundy, where Pinot has flourished since the Middle Ages, the grape grows in cool, moist, continental weather conditions. Yet, even there it can come up short, with wines occasionally tasting lean, vegetal, and raisiny. In America, the problems with growing the grape seem to have taken on a whole new, complex turn.

The problem with American Pinot Noir is that when the first 19th century American wine pioneer brought Pinot clippings to California, they were planted in a hot, dry climate. It was like taking a young French princess and plopping her down in the middle of the desert with a bunch of chickens of feed. Yet, the story of Pinot in America is not a tragic one. Ever since Pinot fist came to America, she and her admirers have struggled to adapt to each other's needs and characters, and they have worked together to make theirs and ongoing story and love and devotion.

Fade in: Our story begins. Pinot Noir grew up among French nobility. She frequently dined with the king, the prince, the Pope, and other heads of state. One day, a young man from a land across the sea came and visited her in her homeland. He became smitten with her and he knew that he had to take her home with him to America. He convinced her to go away with him and so he packed her up in one of his suitcases and left for America.

When she arrived, she found that this new place was not like her noble home back in France. Instead, she suffered in the heat and oppression of this unfamiliar land near her first California home. Yet, she endured. Pinot tried to get accustomed to her surroundings, but she wasn't satisfied. She wanted, no she needed, someplace a bit more gentle, a place more to her liking, a place more like France, a place, where the cool, gentle, moisture laden air could caress her and treat her like the nobility that she was.

Pinot soon traveled north to the Willamette Valley in Oregon where she found things more to her preference. In fact, she flourished. There, she found a place sheltered by mountains on both sides from the wet rain forest on the Pacific coast and from heat in the inland desert. As a result, in 1980, a 1975 Pinot produced at the Eyrie vineyard took second place at a blind tasting among a group of top read Burgundies. The 1980s were heralded as the age of Pinot in America.

But, there was a setback. Oregon let its true attentions wander from the delicate needs of Pinot.

In the 1990s, Oregon admitted its errors and swore to devote more attention to its precious Pinot. The similarities between the Willamette Valley and Burgundy, which are greater than most of California, have drawn the attention of one of Pinot's most noted French suitors, Robert Drouhin. In 1987, Drouhin purchased land near the Eyre vineyards and has so far invested $10 million in developing a winery there.

Meanwhile, back in California she set down roots in more cooler climates such as the Russian River (which is where some of the top American Pinot Noirs are produced) and in Carneros, a cool, foggy region between Napa and Sonoma. In Carneros, Pinot has show herself to be a delicate, fragrant, full of spice, and clean berry fruit flavor gem. The top Californian producers include Robert Mondavi, Chalone, Cambria, Williams-Selyem, and Rochioli.

In Oregon, she has show her lighter side, with crisp acidity and offer excellent varietal definition. Some of Oregon's best Pinot Noir producers include Eyrie, Ponzi Adelsheim, Cameron, Adams, Panther Creek, and Drouhin.

Pinot's admirers in Oregon and California have sworn undying devotion to her and have show greater attention to wine making techniques that cause her to shine. As Pinot enters the 1990s, the dram to produce Pinot Noir as good as in France has come as close as it ever has to becoming a reality.

Alas, we come to the end of our story. America Pinot is here to stay and some day she might entice you into becoming one of her devotees.

Even though Pinot has begun to blossom in this American soil, she still draws on some of her French habits. Namely, there isn't enough of the good stuff to go around. And this being a market—oriented economy, because of the limited quantity, good American Pinot Noir does not come cheap. While American Pinot has not yet reached the heights of a Romanee-Conti, some of the best Pinot recently produced in California fetches about $1000 a bottle. But don't worry, there is still a wide selection of great stuff between $20 and $45 a bottle and a wide selection of good stuff between $7 and $14 a bottle.

A summary of recent vintage ratings, according to the *Wine Spectator,* for both Oregon and California is as follows:

Vintage	Rating	Comments
1991	88-91	Complex, will benefit with age
1990	91	Rich and complex; a must buy
1989	84	Uneven style, drink early
1988	87	Pleasant, drink now.

Optical imaging

continued from page 4

high speed conventional magnetic hard disk. Until the intermediate disk ie filled to the CD disk's capacity, your employee will take it back to your office after each scanning session, first making a tape backup to guard against possible information loss. The paper records should never be left with a third party or be unavailable to your business for any length of time.

When the intermediate disk is full, it's time to convert it to one or more CD disks using yet another high speed hard disk and a special CD "burner". The CD "burner" actually makes the final CD disk. If you don't want to take the records out of your office, then you need only buy the scanner, the intermediate optical hard disk, and a big tape drive to back up your work. The optical disk cartridge can then be taken off premises and its data converted to CD disks.

It's easy to make paper copies of your imaged records using an ordinary laser printer. Typically, these printouts will be nearly as good as the originals if you have used a high quality scanner in the first place.

Generally, it's best to begin using CD record imaging gradually, unless you have a particular records retrieval or storage problem. Ae with ally other computer database project, there's little economic benefit to undertaking a massive project to image your closed files. Rather, start imaging current files only.

SOLICITATION OF VOLUNTEER ATTORNEYS

The court system maintains lists of attorneys who volunteer to accept court appointments. The types of appointments are listed in Administrative Rule 12(d)(2)(B). Compensation for these services is made pursuant to the guidelines in Administrative Rule 12(d)(2)(E)-(I).

Attorneys may add their names to the volunteer lists by contacting the area court administrator(s) for the appropriate judicial district(s):

First District:
Kristen Carlisle
415 Main St. Rm 318
Ketchikan, AK 99901-6399
(907) 225-9875

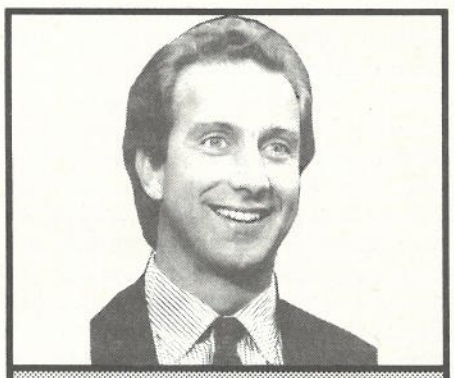
Second District:
Mike Hall
303 K Street
Anchorage, AK 99501-2099
(907) 264-8250

Third District:
Al Szal
303 K Street
Anchorage, AK 99501-2083
(907) 264-0415

Fourth District:
Ron Woods
604 Barnette St. Rm 202
Fairbanks, AK 99701
(907) 452-9201

Juris Prudence

Common law changes



Daniel Patrick O'Tierney

In a recent decision, the Alaska Supreme Court expanded the duty of care which must be exercised by landlords toward their residential tenants. In doing so, the Supreme Court rejected the traditional common law rule that limited a landlord's liability for negligence.

Subject to certain exceptions, the traditional common law rule is that landlords are generally not liable to their tenants for injuries caused by dangerous conditions on the leased premises. The tenant had to inspect for himself and occupy the property as he found it (caveat emptor); the landlord enjoyed limited immunity from negligence lawsuits.

However, in *Newton v. Magill* the Alaska Supreme Court determined that the modern duty of a landlord is to use reasonable care to discover and remedy conditions which present an unreasonable risk of harm under the circumstances. The case involved a tenant in Petersburg, Alaska who slipped on a wooden entryway to her trailerpark home, broke an ankle and sued the landlord for negligence. The walkway was partly covered by an overhang, had no handrailing and no "anti-slip" material on its surface.

The trial court judge entered summary judgment for the landlord because the injury occurred on the entryway which was for the sole use of the tenant and, therefore, the tenant had the duty to maintain it in a safe condition. In other words, the landlord could not have breached the tenants's duty. Thus, the case did not go to a jury for a decision. The tenants appealed. They argued that in Petersburg the wet climate causes wooden floorboards to become dangerously slippery and that permanent installation of "anti-slip" material is the general community standard.

The Supreme Court recognized that under the traditional common law rule governing landlord liability, even the failure of the landlord to meet a community standard would be irrelevant. The Court decided, however, to reject the traditional rule in light of its interpretation of the Uniform Residential Landlord and Tenant Act (URLTA) enacted by the Alaska Legislature in 1974 to modernize the law in this area. AS 34.03.010-380.

The Supreme Court found it necessary to reconcile different provisions of URLTA which specify the respective duties of tenants and landlords. As a result, the Court interpreted the tenant's duty to involve light maintenance activities (e.g. cleaning, snow removal) pertaining to the safety of the premises which do not involve alteration of the premises; whereas, the landlord's duty relates to the inherent physical qualities of the premises.

The Court expanded the landlord's duty of care beyond the historical common law rule because it found that it would be inconsistent with a landlord's continuing duty to repair premises imposed under URLTA to exempt a landlord from liability who fails in this duty. The Court's opinion concluded that a jury could find that a landlord in a wet climate like that of Petersburg should take any one of a number of steps to prevent a board walkway from becoming dangerously slippery when wet. Therefore, the case was returned to the lower court for a determination of whether the landlord breached his duty to the tenant to exercise reasonable care in light of all the circumstances regarding the condition of the walkway.

The Supreme Court did indicate, however that the expanded duty of care does not make landlords liable as insurers, automatically liable for any injury that occurs. It must be proved that the landlord breached the duty of reasonable care under the circumstances in order to establish negligence. Further, the Court noted that a landlord should not be held liable in negligence unless he knew or reasonably should have known of a defect and had a reasonable opportunity to repair it.

Although the ultimate outcome in the Newton case has yet to be determined, the Supreme Court's decision to expand the duty of care which must be exercised by residential landlords in Alaska is an example of how the common law changes in light of contemporary conditions.

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Judge announces retirement

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Alaska Bar Association and a member of the Board of Governors from 1955-1959.

In 1959 he was appointed to the Alaska Superior Court in Juneau, First Judicial District where he served until 1966. Judge von der Heydt was appointed to the federal bench in 1966 by President Lyndon Johnson. In 1973 he became chief judge, serving in that position until 1984 when he took senior status. However, even as senior judge he maintained active cases in Anchorage, as well as the Juneau calendar.

In another Native rights case, *People of Gambell v. Clark,* Judge von der Heydt determined, and was upheld by a unanimous decision of the United States Supreme Court, that ANILCA did not apply to lands situated on the outer continental shelf. The issue of stream buffers regarding timber cutting was one issue in *Stein v. Barton.* In that case, Judge von der Heydt agreed that logging too close to streams would endanger habitat, and required that buffers zones be established along certain waterways. The ninth circuit upheld a substantial award of damages in *Yako v. United States* where Judge von der Heydt determined that a physician was negligent in failing to diagnose meningitis.

"The depth of his decisions evidence fairness as well as decisiveness."

Decisions, Decisions

During his tenure on the federal bench, Judge von der Heydt has handled innumerable cases, many of which have served to shape new law in the state. The breadth of his decisions include: the Native Claims Settlement Act litigation; the numerous injunctive suits filed regarding the pipeline construction; tax protestor cases; aboriginal title cases; the native artifact case; timber and mining cases; Federal Tort Act Claim cases including the child meningitis cases; and numerous significant admiralty cases.

The depth of his decisions evidence fairness as well as decisiveness. A few examples include the following: In *Aleut Corp. v. Arctic Slope Regional Corp.* Judge von der Heydt was asked to decide whether certain revenues received by a regional corporation which were not attributable to a subsurface estate were to be shared with sister regional corporations pursuant to Section 7(i) of the Settlement Act. The court determined that the revenues were subject to the sharing provision. The issue of ownership of native artifacts was central in *Chilkat Indian Village v. Johnson.* In that case, Judge von der Heydt recognized the power of tribal courts in deciding ownership of artifacts.

Words, Words, Words

A mere summary of Judge von der Heydt's position and achievements as a lawyer and a judge does not begin to describe this remarkable individual. It would take a compendium of words to describe him. Those which immediately come to mind include learned, wise, cultured, elegant, understanding, compassionate, and perhaps most fitting of all, courtly. Suffice it to say Judge von der Heydt is unique, there being no one else on the bench or in the bar quite like him.

Notwithstanding his new "official" status as a retired federal judge, Judge von der Heydt will retain his chambers. He will be available to conduct bench trials for other judges, and he will continue to conduct settlement conferences.

For the nonce, Judge von der Heydt plans to pursue his two bents: creative writing and painting. Chapter one of his latest book is written and new watercolor paintings will be forthcoming. Be sure and fetch one when they come out.

The several liability decision: Two views

Benner will give litigators guidance

By Kenneth M. Gutsch

In the unanimous 3-0 decision of *Richard Benner, et al. v. Wichman,* [4086 — May 27, 1994], the Alaska Supreme Court recently construed the Tort Reform Ballot Initiative and the apportionment of fault of persons or entities not made parties to a civil suit. The Ballot Initiative provided that "the court shall enter judgment against each party liable on the basis of several liability in accordance with that party's percentage of fault." The *Benner* court followed the decisions of *Robinson v. U-Haul* 785 F.Supp. 1378 (D. Alaska 1993) and *Dunaway v. The Alaska Village. Inc.*, No. 3AN-90-3526 Civil (Alaska Super., July 25, 1991), by construing "party" as a party to the lawsuit. *Benner* therefore limited the apportionment of fault to named parties.

However, like the *Robinson and Dunaway* decisions, *Benner* allows defendants to implead non-parties (with the exception of employers immune under the Worker's Compensation Act) as third-party defendants to have their fault apportioned. *Benner* characterized the basis for such impleader as "equitable apportionment", and indicated that the procedural mechanism for the impleader of non-party tortfeasors may be Alaska Civil Rule 14(a), 13(h), and 20(a). (The *Benner* court said that the question would be referred to the Civil Rules Advisory Committee.)

Overruling of Vertecs

In adopting "equitable apportionment", the Supreme Court backtracked from its rejection of the similar construct of equitable indemnity in *Vertecs v. Reichhold Chemicals, Inc.*, 661 p.2d 619 (Alaska 1983). The *Benner* court noted that it had rejected equitable indemnity in *Vertecs* because of the availability of contribution. Since the Ballot Initiative repealed the contribution statute (AS 09.16 et seq.), equity required that defendants have an avenue for impleading non-party tortfeasors who may be liable to the plaintiff.

Distinction of Fabre

The Alaska Supreme Court noted that the Florida Supreme Caurt in *Fabre v. Marin,* 623 So. 2d 1182 (Fla. 1993), had recently grappled with the same issue and similar statutory language. The court in *Fabre* had found that the jury could apportion the fault of non-parties. However, the Alaska Supreme Court distinguished *Fabre* because the Florida statute did not define the term "party". The Supreme Court held that "in AS 09.17.080(a) 'party' is defined as a party to the action, including third-party defendants and persons who have been released under AS 09.16.040."

Disagreement With Carriere

The Supreme Court disagreed with *Carriere v. Cominco Alaska. Inc.,* 823 F. Supp. 680 (D. Alaska 1993) (which allowed the apportionment of fault of non-parties) and noted that *Carriere* had mistakenly assumed that the Supreme Court would not overrule *Vertecs's* rejection of equitable indemnity in light of the Ballot Initiative's repeal of contribution. (The court did not address *Carriere's* heavy reliance on the ballot pamphlet, which arguably informed the voters that the Initiative would prevent a defendant from being held financially responsible for someone else's fault, ragardless of whether that someone else was a named party.)

The Uniform Comparative Fault Act

Finally, the *Benner* court noted that AS 09.17.080's provision for apportionment of fault was substantially similar to the provision for joint and several liability under the Uniform Comparative Fault Act. The commentary to the Uniform Act states that "the limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties." (Arguably, the Uniform Act's commentary is inapposite since joint and several liability moots the apportionment of fault to non-parties. To avoid joint and several liability, the named defendant had to prove that the non-party was 100 percent at fault.)

New Questions

Benner will give litigants and the courts much-needed guidance on the apportionment of fault. In most cases, the apportionment of fault will entail a straightforward analysis. However, in a significant number of cases, "equitable appartionment" may raise new considerations for counsel in planning their litigation strategy.

Plaintiff's Recovery Against the Third-Party Defendant

Once a third-party is impleaded, does the plaintiff have to move to amend his complaint to assert a direct claim to recover against the third-party defendant? The answer is by no means clear. However, in footnote 17 of the *Benner* opinion, the court notes that "what is involved in cases like this one is not a third party's duty to pay the defendant, but the third party's duty to pay the plaintiff, . . ." Thus footnote 17 suggests in dictum that a third-party defendant impleaded by a first-party defendant may have to pay the plaintiff for his share of the plaintiff's damages, without the plaintiff amending his complaint.

Rule 82 Attorneys Fees

If a plaintiff may theoretically recover against a third-party defendant without amending the complaint, this may lead to the additional question of who would be responsible for the third party defendant's Rule 82 attorney's fees if the third-party defendant prevailed? The first-party defendant will argue that since the plaintiff may recover against the third-party defendant, the plaintiff should bear the risk of having to pay the third-party defendant's Rule 82 attorney's fees. The plaintiff will counter that he should not be responsible for a third-party defendant's Rule 82 attorney's fees because the plaintiff did not want to sue that third-party defendant in the first place.

Affirmative Defenses - Statute of Limitation

Another issue will be the application of the third-party defendant's affirmative defenses such as the statute of limitation. A third-party defendant may not have been sued by the plaintiff because the applicable statute of limitation may have run against that third-party defendant. If, however, the third-party defendant is impleaded by a defendant for "equitable apportionment", may the plaintiff or third-party defendant raise the affirmative defense of the statute of limitation, as "immunizing" that third-party defendant from equitable apportionment? (Just as an employer is "immunized" from equitable apportionment under the Workers Compensation Act. see e.g. *Lake v. Construction Machinery Inc.,* 787 P.2d 1027, 1030 (Alaska 1990)). Or will the impleader of the third-party defendant be treated like a contribution claim for purposes of the statute of limitation, which claim, under former AS 09.16., could have been brought up to one year after the judgment issued, regardless of the two-year statute of limitation?

Treatment of Settling/Released Defendants

Another issue is the treatment of persons or entities that settle out with the plaintiff and are released from liability. Will settling defendants be impleaded back into the lawsuit? By its plain terms, AS 09.17.080(a)(2) only allows the apportionment of fault of the parties to each claim, defendant, third-party defendant, and persons who have been released from liability under AS 09.16.040. Since the Ballot Initiative repealed AS 09.16.040, arguably the settling/released defendant could not have his fault apportioned, unless they were impleaded back into the suit on the basis of equitable apportionment.

Brenner anticipates this question in footnote 18, holding that the statute should be given a,

> "reasonable and practical interpretation in accordance with common sense. . . Consequently, the definition of **'party'** in AS 09.17.080(a) **encompasses settling and released parties.** Any other interpretation would be contrary to reason and good sense."

Thus, a party that has settled with the plaintiff and has been released, may probably still have their fault apportioned without being re-impleaded into the lawsuit on the basis of equitable apportionment.

Treatment of Settling Non-Parties

Moreover, what happens if a non-party person or entity settles with and receives a release from an injured person? Under AS 09.17.080(a)(2) fault may be apportioned to persons released under AS 09.16.040 prior to the plaintiff's filing suit. However, with the Ballot Initiative's repeal of AS 09.16.040, persons may no longer be released under AS 09.16.040 and arguably only "parties" to the lawsuit can have their fault apportioned. If that were true, the named defendant might have to implead that released person or entity as a third-party defendant to allow the equitable apportionment of that settling person's fault.

Equitable Contribution

Now that the Ballot Initiative has repealed statutory contribution (AS 09.16), would a settling joint tortfeasor have any sort of contribution rights against other joint tortfeasors to recoup some of the money paid in settlement? Arguably that settling tortfeasor's sole contribution-type recourse against other joint tortfeasors is to implead those tortfeasors into the suit on the basis of equitable apportionment. If a joint tortfeasor settles with a claimant before suit is filed, the settling joint tortfeasor probably has no chance of obtaining any equitable contribution from the other joint tortfeasors.

Apportionment And Vicarious Liability

Yet another issue is how the apportionment of fault will apply to situations where one defendant is, at common law, vicariously liable for the acts of another defendant. (E.g. where a retailer is vicariously liable for a manufacturer's defective product, or where a master is held vicariously liable for the acts of his servant.) Arguably, the Ballot Unitiative was intended to ensure that a defendant only be held liable for his share of the

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The several liability decision: Two views

Supreme Court issues first opinion on several liability

By Michael J. Schneider

I. INTRODUCTION.

On May 27, 1994, the supreme court issued its Opinion No. 4086 in a case styled *Richard Benner, Individually, Richard Benner, d/b/a State Leasing & Equipment, and State Leasing & Equipment. Inc., an Alaska Corporation, appellants. v. Allen C. Wichman, appellee.* The court held that, in order to be a "party" to whom fault could be allocated under the provisions of A.S. 09.17.080, the individual or entity must be or have been a party to the action. *Id.* at 20-22. The court implied a cause of action that it called "equitable apportionment" (Id. at 18, n. 17) to allow defendants to bring in parties they believe to be responsible where plaintiff has failed to do so. Finally, the court refused to allow a percentage of fault allocation to plaintiff's employer. *Id.* at 15-16.

The voters passed Proposition 2 in November of 1988. The first and most important question facing trial and appellate courts was whether to seize upon one of the available theories for striking down Proposition 2[1] or to bend law and logic to salvage this effort by the electorate to shoot itself in the foot. While interpreting A.S. 09.17.080 differently, various members of the state and federal judiciary have consistently chosen the latter course. With the announcement of its decision in *Benner,* our Supreme Court has, for better or worse, chosen to follow that lead.

II. THE FACTS.[2]

Plaintiff Wichman was employed by B-C. He was injured on the job and received worker's compensation benefits from B-C. Plaintiff's injury was legally caused by the negligence of Benner against whom plaintiff brought suit. At trial, without attempting to bring in plaintiff's employer, B-C, or the general contractor, Benner sought to have the jury apportion fault to plaintiff, plaintiff's unnamed employer, and the unnamed general contractor. The trial court refused to allow allocation of fault to plaintiff, finding plaintiff to be fault free as a matter of law. This determination was reversed by the supreme court. *Id.* at 14. The trial court refused to allow the jury to allocate fault to plaintiff's employer or to the general contractor. Plaintiff obtained a verdict against Benner, and the appeal followed.

III. "PARTY" DEFINED FOR PURPOSES OF FAULT ALLOCATION.

The court, acknowledging competing authority, elected to define "party" narrowly for the purpose of fault allocation and the application of AS 09.17.080(d) to mean:

> "Parties to an action, including third-party defendants and settling parties . . . ."

Id. at zz.

Under the court's approach, if your name isn't in the caption, or wasn't previously in the caption, the jury will not be given the opportunity to apportion fault to you as otherwise required by AS 09.17.080(d).

But what if plaintiff has cleverly named only one (well-insured) defendant amongst a broader universe of probably responsible players? Read on . . . .

IV. A NEW CAUSE OF ACTION: EQUITABLE APPORTIONMENT.

Depending on how AS 09.17.080 is read, it is, even in the face of many very logical readings, "indecipherable," as observed by at least one department of the superior court.[3] Our supreme court has made the statute a bit less indecipherable with the gift of this new cause of action by which defendants can bring in additional parties to the litigation, contend that their acts and omissions were a legal cause of plaintiff's claimed damages, cause the jury to evaluate the fault of these new players, and thus make an allocation among more "parties" than originally envisioned when plaintiff filed the lawsuit:

> "In the absence of contribution, we hold that equitable apportionment is available as a means of bringing other tortfeasors into the action."

Id. at 18-19.

V. EVEN THOUGH GUILTY OF FAULT, PLAINTIFF'S EMPLOYER MAY NOT BE JOINED AS A "PARTY" VIA A CLAIM FOR EQUITABLE APPORTIONMENT.

The heading states the rule that the court appears to have adopted:

> "As to B-C, the premise of this argument is wrong because 'as a result of this exclusive liability provision (of the worker's compensation law, AS 23.30.055) an employer may be joined as a third-party defendant only when another party asserts an express indemnity claim against it.' *Lake v. Construction Machinery, Inc.,* 787 p.2d 1027, 1030 (Alaska 1990). Benner does not purport to have a claim for contractual indemnity against B-C and therefore could not have joined B-C."

Id. at 15-16. It is extremely important to note, in my view, that it was not determined, stated, or implied, that plaintiff's employer, B-C, was fault free. Remember that, under *Lake,* the jury must allocate 100 percent of the fault to the employer (thus providing the named third-party defendant(s) with a complete defense on negligence and/or causation theories), or no fault at all. *Lake, supra,* at 1031, Under *Benner* and *Lake,* it is theoretically possible to have a situation where plaintiff's damages were caused 97 percent by plaintiff's employer and one percent by each of three defendants. These defendants with three percent of the total fault will pay 100 percent of plaintiff's damages.

V. QUESTIONS TO PONDER.

If plaintiff's employer, who has paid substantial benefits to plaintiff through the workers' compensation system for the immunity from equitable apportionment described in both *Lake* and *Benner,* cannot be sued because that employer is legally unavailable to plaintiff, how can other potential parties, legally unavailable to plaintiff, and from whom plaintiff has received no benefit whatsoever, be treated otherwise? Examples that come to mind include defendants as to whom the statute of limitations has run and defendants whose obligation to plaintiff has been discharged in bankruptcy.

As a practical matter (and practical issues often have due-process implications), is a potential party that is judgment proof any different than a party that could respond in damages but is legally inaccessible to plaintiff (*e.g.*, employer, bankrupt potential defendant, defendant as to whom statute of limitations has run . . .)?

> As Judge Singleton has observed: It is a venerable principle, long enshrined in the common law, that a plaintiff is master of her complaint.

Robinson. et al., v. U-Haul Co.. et al., Case No. A90-0467 CI, Order of February 21, 1992, p. 7, n. 5. The supreme court's decision in Benner would appear to leave this concept intact. One of the probable implications of this approach is to burden a defendant asserting a cause of action against a potential party for equitable apportionment with Alaska R. Civ. P. 82 exposure. *See Robinson v. U-Haul, id.* at n. 6.

VI. CONCLUSION.

It has been observed that, once upon the back of a runaway horse, one is possessed of few choices, none of them particularly attractive . . . . Stick around, it should be an interesting ride.

CORRECTION

In the last installment of the *Bar Rag,* it was reported that HB 517, purporting to immunize licensed real estate professionals from non-negligent misrepresentation, died in committee. In fact, this bill passed the legislature nanoseconds before adjournment.

[1]Though upholding Proposition 2, *see* thoughtful discussion of the statute's infirmities generally in *Zollman v. City of Soldotna,* 3KN-92-6960 CI, Jonathan H. Link, Judge, Memorandum and Order of August 5, 1993.

[2]A number of other issues are discussed in the *Benner* decision. Neither those issues nor the facts required to frame them will be set forth in this article.

[3]See Zollman v. City of Soldotna, 3KN-92-696 CI, Memorandum and Order of August 5, 1993, p. 20, Jonathan H. Link, Judge.

The Decision

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"fault" (which AS 09.17.900 defines in both negligence and strict liability terms) and, to that extent, superseded the common law of vicarious liability.

The Worms

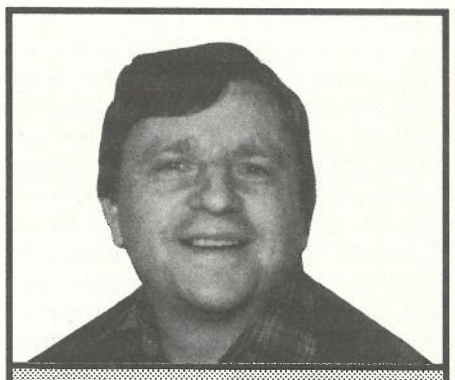
Benner v. Wichman offers much-needed guidance on the apportionment of fault in multi-party tort litigation. In the majority of cases a party will only be liable for their "share" of the fault. However, in a significant minority of cases, a party's "share" of the fault may include both his fault and the fault of a person or entity that was immune and could not be impleaded into the lawsuit.

Further, the apportionment of fault remains a can of worms fraught with potential surprises for the unwary litigator. The can was pried open with the Ballot Initiative and repeal of contribution. The Ballot Initiative could have avoided many of the foregoing legal issues if it had used the terminology "person/entity" instead of "party". Whether the Ballot Initiative's use of "party" was intentional or inadvertent, these derivative legal issues are very real and it may cost legal consumers dearly to slug out such additional disputes.

The Bar Rag welcomes articles from its readers

View from the Periphery

An external spotlight on the constitution & gospels



Walt Arden

The Constitution of the State of Alaska was adopted ratified by the people of Alaska on April 24, 1956. In light of all the Church and State debates these days, I wondered:

How does the Alaska Constitution do under the scrutiny of holy scripture? If Article I, the Declaration of Rights, can pass muster, the successive articles could well fall under the penumbra of sanctification.

•

Article I Section I. Inherent Rights. *This constitution is dedicated to the principles that all persons have a natural right to life, liberty and the pursuit of happiness, and the enjoyment of the regards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.*

This section is all right, even though "natural" is not always used in a positive sense in scripture: "But these, as natural brute beasts, made to be taken and destroyed, speak evil of the things they understand not." (*II Peter*). Concerning rewards of one's industry, this is fair enough, but a caveat can be seen concerning the life of Jeroboam the son of Nebat: one of the few good things that was said about him was that he was industrious (*I Kings 11*). Equal rights is seen throughout the Bible when strangers partook of the same blessings as countrymen; but in *Exodus* 22:18 we are admonished: "Thou shalt not suffer a witch to live." Such discrimination was probably necessary since witches were less likely to feel corresponding obligations to the people and to the State.

Section 2. Source of Government *All Political power is inherent in the people. All government originates with the people, is founded on their will only, and is instituted solely for the good of the people as a whole.*

Hey, wait a minute. This seems arrogant and imperious. But Section 2 is probably saved by including "the good of the people as a whole." Besides, God probably eschews politics: "For my thoughts are not your thoughts, neither are your ways my ways, saith the Lord." (*Isaiah*).

Section 3. Civil Rights. *No person is to be denied the enjoyment of any civil or political rights because of race, color, creed, sex, or national origin.*

No problem at all here. "There is neither Jew nor Greek, there is neither bond nor free, there is neither male nor female: for ye are all one..." (Acts 3). The Apostle Paul himself said that he was a debtor both to the Greeks and the Barbarians (Romans 1).

Section 4. Freedom of Religion. *No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.*

Jeroboam (section I *supra*) tried to establish a religion, "which he devised of his own heart." He set up golden calves to worship, appointed his own priests and made up a holy day on the 15th day of the eighth month. It did not prosper. (*I Kings 12*). Also, he was very much against those who did not approve of him or his religion (*I Kings 13*). It was clear that God was against him.

Section 5. Freedom of Speech. *Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.*

Jeroboam did not let the prophet speak, and his arm withered. See also Ecclesiastes: "Neither say thou before the angel, that it was an error: wherefore should God be angry at thy voice...?" Section 5 of the Constitution incorporates these principles.

Section 6. Assembly; Petition. *The right of the people peaceably to assemble, and to petition the government shall never be abridged.*

Elijah sat on the top of a hill, and when a band of 50 soldiers said, "you'd better come with us," fire came down from heaven and consumed them. When another band of 50 said "come with us, now," they were also consumed by fire. The captain of the third band fell on his knees and pleaded for their lives, and Elijah went along with them. The difference? The latter assembled peaceably. Section 6 passes muster.

Section 7. Due Process. *No person shall be deprived of life, liberty, or property, without due process of law.*

...

Violation of this ordained principle is seen again and again. Micaiah was summarily imprisoned indefinitely on bread and water (*I Kings 22*). Jeremiah was peremptorily thrown into a miry dungeon, but the king secretly wanted help from him anyway. (*Jeremiah*). Paul, upon secret rehearing, might have been acquitted except for the fact that he had appealed to Caesar, and the appeal could apparently not be withdrawn (*Acts 26*).

Section 8. Grand Jury.

This provision seems to protect against violation of the Ninth Commandment ("Thou shalt not bear false witness against thy neighbor.") (*Exodus* 20) and appears wholly appropriate. Also, 12 is a spiritual number. There were 12 tribes (*Genesis* 49), 12 disciples (*Mark* 5), Jesus was 12 when he debated with the doctors of law (*Luke* 2). The framers of the Constitution could have had all this in mind.

Section 9. Jeopardy and Self-Incrimination. *No person shall be put in jeopardy twice for the same offense. No person shall be compelled in any criminal proceeding to be a witness against himself.*

Jeremiah had been in and out of prison and was tired of it. When he was released he got up to go back to his people. However, a minion named Irijah was suspicious of his motives, hauled him back to the tribunal and he was smitten and imprisoned again. (*Jeremiah* 37). Jesus was asked if he were what he claimed to be, and upon his response the multitude dispensed with witnesses and rushed him to Pilate. (*Luke* 22-23). The Alaska Constitution protects against such hysteria.

Section 10. Treason.

Athaliah had destroyed all the seed royal and became the ruler herself. When the rightful ruler was crowned later, "...all the people of the land rejoiced, and blew with trumpets: and Athaliah rent her clothes, and cried, Treason, Treason." (*II Kings 11*). In most cases, however, levying war against the government is bad, so Section 10 is a good provision.

Section 11. Rights of Accused.

The pentateuch, in *Exodus 21-23*, sets out a fairly sophisticated criminal code. It has other provisions like Numbers 35:30, calling for no capital punishment by the testimony of only one witness. There was no necessary provision like Cr.R. 45, calling for a speedy trial within 120 days. A speedy and public trial provision would have helped Paul when Felix, failing to elicit a bribe from Paul for his release, left Paul bound for two years to please his constituents. (*Act* 23) Biblical juries tended to be groups of witnesses. Bail was not a noted principle, though it could be argued that when Simeon was bound in Egypt to assure the return of his brothers, he was a form of collateral. (*Genesis* 42).

Adam's right of confrontation of witnesses and compulsory process was fulfilled when Eve, and then the serpent, were brought before God. Eve, accused by Adam, in turn implicated the snake, who did not have a leg to stand on. (*Genesis* 3). Adam might have achieved more leniency if he hadn't been such blameshifter and had turned over a new leaf.

Section 12. Excessive Punishment.

"But I will punish you according to the fruit of your doings, saith the Lord" — (*Jeremiah 21*). That punishment was not to be cruel and unusual is a biblical concept. When Moses made the people who had danced idolatrously in front of the golden calf drink the gold which had been ground to powder, it was an appropriate punishment. (*Exodus 32*). Ezra specifically noted that the punishment of the people is less than their iniquities deserve (*Ezekial 9*).

Section 13. Habeas Corpus.

Use of the habeas corpus concept in scripture can be illustrated in the fact that Evilmerodach, king of Babylon, lifted the former ruler of Judah Jehoiachin out of prison (after 37 years) and "he spake kindly to him, and set his throne above the throne of the kings that were with him in Babylon; (a)nd changed his prison garments: and he did eat bread continually before him all the days of his life." (*II Kings 25*).

Section 14. Searches and Seizures.

Section 15. Prohibited State Action.

Section 19. Right to Bear Arms

Section 20. Quartering of Soldiers.

Section 21. Construction (Inherent Rights).

The rights and prohibitions of these constitutional sections are good and valid biblical principles. All of these principles are embodied in the story of a civil war which was taking place in *Judges 9*.

"Then went Abimelech to Thebez, and encamped against Thebez, and took it. But there was a strong tower within the city, and thither fled all the men and women, and all they of the city, and shut it to them, and gat them up to the top of the tower. And Abimelech came unto the tower, and fought against, and went hard unto the door of the tower to burn it with fire. And a certain woman cast a piece of a millstone upon Abimelech's head, and...brake his skull. Thus God rendered the wickedness of Abimelech... (and his men) upon their heads."

This historical account also undergirds Alaska Constitution Section 18:

Section 18. Eminent Domain. *Private property shall not be taken or damaged for public use without just compensation.*

The army had no intent whatsoever of paying for the tower of Thebez which they were going to burn.

Section 16. Civil Suits.

Trial by Jury. (This principle is actually not illustrated by the above story; but please see discussion of Section 8, *supra.*)

Section 17. Imprisonment for Debts. *There shall be no imprisonment for debt. This section does not prohibit civil arrest of absconding debtors.*

"Therefore is the kingdom of heaven likened to a certain king... one was brought to him, which owed him 10,000 talents. But forasmuch as he had not to pay, his lord commanded him to be sold, and his wife, and children, and all that he had, and payment to be made. The servant therefore fell down, ... saying 'Lord, have patience with me, and I will pay thee all.' Then the lord of that servant was moved with compassion, and loosed him, and forgave him the debt.

"But the same servant went out, and found one of his fellowservants, which owed him an hundred pence: and he laid hands on him, and took him by the throat, saying, Pay me that thou owest. And his fellowservant fell down at his feet,... saying, 'Have patience with me, and I will pay thee all.' And he would not, but went and cast him into prison, till he should pay the debt...(and the lord of the first debtor) was wroth, and delivered him to the tormentors, till he should pay all that was due unto him." (*Matthew 18*).

A close reading of this parable indicates that debtors' prisons were not favored. Rather, forgiveness should be practiced.

Section 22. Right of Privacy. *The right of the people to privacy is recognized and shall not be infringed.*

Generally privacy is favored, *see Matthew 14:23.* However, there is a limit: "For the greatness of thine iniquity are thy skirts discovered, and thy heels made bare." (*Jeremiah 13*).

I can therefore report that the Constitutional Convention and the people of Alaska were guided wisely in these constitutional enactments. Moreover, this was the framers' express intent, as stated in the Preamble to the Alaska Constitution.

What every attorney needs to know

Home confinement in the federal district of Alaska

By Helen M. Harris

The U.S. Probation/Pretrial Service & Office in Anchorage has operated a Home Confinement and Electronic Monitoring Program since April, 1992. Home confinement, more commonly known as house arrest, is a condition of pretrial or postconviction supervision which may be monitored with or without the assistance of electronic equipment, and, with the exception of the curfew program, may be imposed only as an alternative to incarceration.

STATUTORY AUTHORITY

I. Pretrial Release

The statutory authority for the imposition of a condition of release requiring that the defendant comply with home confinement restrictions is 18 U.S.C. § 3142(c)(B)(xiv).

II. Probation

The statutory authority for the imposition of a special condition of probation is 18 U.S.C. § 3563(b). That statute states that the court may impose a discretionary condition requiring that the probationer "remain at his place of residence during nonworking hours and, if the Court finds it appropriate, that compliance with this condition be monitored by telephonic or electronic signaling devices, except that a condition under this paragraph may be imposed only as an alternative to incarceration..." (18 U.S.C. § 3563(b)(20).

III. Supervised Release

The statutory authority for the imposition of a special condition of supervised release is 18 U.S.C. § 3583(d), which Permits the Court to impose the same condition stated above in **II.**

IV. Parole

The statutory authority for imposition of a special condition of parole requiring a parolee to adhere to the restrictions of home confinement is 18 U.S.C. § 4209 (repealed). This applies to persons incarcerated for offences committed prior to November 1, 1987.

V. Pre-Release

The statutory authority for placement of Bureau of Prisons' inmates in a home confinement program for pre-release purposes is 18 U.S.C. § 3624(C). The length of placement is limited to the last ten percent of the inmate's term, but is not to exceed six months.

SENTENCING GUIDELINES

According to U.S.S.G.§ 5F1.2, "Home Detention may be imposed as a condition of probation or supervised release, but only as a substitute for imprisonment." See also U.S.S.G. § 5B1.4(b)(20) am u.S.S.G. § 5C1.l(c), (d), and (e).

DEFINITIONS

I. Home Confinement

Home confinement is a generic term that refers to any judicially or administratively imposed condition of supervision requiring a participant to remain in the approved residence for any portion of the day. In order of increasing severity, the levels of home confinement are curfew, home detention, and home incarceration.

A. Curfew

Curfew is a form of home confinement requiring the participant to remain in the residence during specified hours, usually at night.

B. Home Detention

Home detention requires that the participant remain at home at all times, except for approved leave for employment, education, medical, and correctional treatment purposes. Additional leave may be granted if the program permits.

C. Home Incarceration

This is the most restrictive type of home confinement. It restricts the participant to the residence at all times. Special leave is usually granted only for religious or medical reasons.

II. Electronic Monitoring

An enforcement tool which uses any electronic equipment to provide information about the location of a participant having a home confinement condition. A small radio transmitter is worn as an ankle bracelet by the participant. The transmitter emits a uniquely coded signal that identifies the individual participant and contains special circuitry which detects tampering or removal and sends a special signal when either event has occurred.

A field monitoring device (FMD), a box smaller than a VCR, is connected to the participant's telephone line. This device is tuned to receive the unique signal emitted by the transmitter worn by the defendant. The FMD uses the participant's telephone line to transmit key events to a central computer. The FMD notifies the central computer that the telephone connections are intact, the equipment is functioning properly, and notes each time the participant enters and leaves the residence.

A battery backup allows storage of information during the time of any electrical power failure. The computer generates a special alarm message when the participant is not home as scheduled, there is a power or telephone failure, the FMD is not communicating with the computer center, or there are other problems. The remote computer is continuously monitored by experienced operators who maintain contact with the probation officer as needed.

III. Non-Electronic Monitoring

The monitoring of a participant with a home confinement requirement may be accomplished without using electronic equipment. This may include frequent home visits and/or periodic telephone calls to verify participant compliance. This method is less reliable and more labor intensive of the probation/pretrial service officers, thus is usually a less desirable approach than using electronic monitoring.

NOTE: U.S.S.G. § 5F1.2, comment. (n.1) states that electronic monitoring "ordinarily should be used in connection with home detention. However, alternative means of surveillance may be used as long as they are as effective as electronic monitoring".

DISTRICT OF ALASKA PROGRAM

Because of limited staffing resources and safety considerations the present federal home confinement program in Alaska is limited to the Anchorage area and to five participants at any one time. It is anticipated that additional staff will be provided for this program when Congress makes funding available. Staff limitations will impact our recommendations regarding potential participants who may requires more surveillance then we may be able to provide.

PARTICIPANT SELECTION

It is critical that the probation/pretrial services officers have an opportunity to evaluate potential participants

Continued on page 19

Getting Together

"Getting It" about win-win negotiations

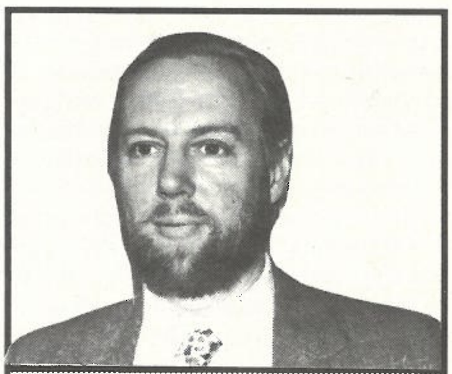
One of the frustrating realities for those of us who have been captivated by the concept of win-win negotiations, especially by those of us who are lawyers, is that so many of our respected colleagues just "don't get it."

It seems that we lawyers are so set in our competitive ways, that we have a hard time understanding what the concept of bargaining for mutual gain is all about. It is a joke in the mediation training community that lawyers are the least able individuals to grasp the concepts are the lawyers. In contrast elementary school students have the easiest time understanding the concepts.

The point has been brought home to me recently in two separate ways that seem instructive on the nature of the problem. I believe that the issue is a critical one in the development of this field of win-win negotiations that I love.

My first revelation came from reading the "Big Book" of Alcoholics Anonymous, mostly written by Bill Wilson in 1938 (Bill W. died in 1971; the AA tradition does not require anonymity beyond the grave). I believe that the founding of AA by Wilson and Dr. Bob Smith in 1935 may be seen by history as the single most significant development of the 20th century. It was also a development that is very much like the win-win negotiations movement, in that it required a different way of looking at the world. Indeed, I believe that the two movements are different aspects of the same consciousness shift that is currently occurring in the way that people think about the world.

In the Big Book's chapter titled: "To Employers," Bill W. tells the story of a



Drew Peterson

conversation with an officer of a major national bank concerning an executive of the bank. From the description given, it was clear that the executive in question was an alcoholic. So Bill spent hours telling the bank officer about alcoholism, the malady, the symptoms, and the Alcoholics Anonymous plan. The officer's response was: "Very interesting. But I'm sure this man is done drinking. He has just returned from a three-month leave of absence, has taken a cure, looks fine, and to clinch the matter, the board of directors told him this was his last chance."

Bill responded that if the executive in question followed the usual course, he would go on a bigger binge than ever. Why not bring him into contact with the AA crowd, to give him a better chance? The AA method was succeeding in many cases deemed hopeless by the medical community. "Oh no," said the bank officer. "This chap is either through with liquor, or he is minus a job. If he has your will power and guts, he will make the grade."

Bill tried to convince the bank officer that will power and guts had nothing to do with it, but to no avail. Sure enough, the executive soon had another slip and was fired. This time he was brought into AA, and began the long road to recovery. The bank lost a skilled executive in whom they had invested much time and expense, and whom they might have salvaged had they just gotten the point.

I see the same phenomenon over and over again in the legal community. Individuals are convinced that they could never work together to resolve disputes outside of a courtroom. It might make sense for others but not for their particular dispute. The litigation then takes on an ugly life of its own. Only years later, if they are lucky, are the parties able to reestablish a decent working relationship. Particularly heartbreaking are those cases where innocent parties, often children, are caught in the middle of the legal dispute.

The second incident reminding me of the issue occurred in a non-profit group with which I have been involved. The group was contacted by a local business and offered a service that was touted as mutually beneficial, The group had very little money, and was aware that similar services offered to other groups had financial strings attached. These they knew they were unable to pay, and the business was told so. "Don't worry," they were assured. "We really believe in the goals of your group, and will waive our normal requirements." Thus reassured, the group agreed to the proposal and moved forward on it, with a substantial investment of time and energy.

When the project neared completion, however, the group was suddenly informed that a mistake had been made, and that the normal requirements could not be waived. When reminded of the earlier promises, the business eventually relented and agreed to provide the service at no cost, but at only half of the scope originally promised. Thereafter, they also instituted a new sales plan directed at the group members and made it clear that they expected the group's support for their efforts, based upon the "favor" bestowed.

I was not directly involved in the negotiations. But my impression as a group member was that what was initially presented as a win-win opportunity was instead a set up for manipulation and a sophisticated "bait and switch." Ironically, what seemed to start out as a real opportunity for mutual benefit, with a real appreciation by the group members for the business, ended up with resentment towards the business by many group members who had previously been neutral towards it.

Once again the business simply didn't "get it." They seized upon the jargon of win-win, which is becoming catchy and popular. But they looked at the transaction in traditional ways, and hereby turned an opportunity for good will and potential mutual gain into the possible ill will of many of the members of the group. And marketing researchers tell us that the average dissatisfied customer will tell 16 friends about their unhappiness,

Some time ago I gave a 45 minute presentation on win-win conflict resolution to a homeless transitional program. The short presentation to an unsophisticated audience led me to think about the essence of the win-win principles. I concluded that it comes down to two basic points:

1. Treating people with respect. This includes being open and honest with people and telling them you what you really want, as well as what you have to offer.

2. Helping people to see each other's point of view. This means not only learning their point of view, but helping them to understand your own.

How often do we do either, I wonder, in our traditional lawyerly ways of looking at disputes? The irony is that as we do so, we are able to make deals that are more in our clients' and our own interests. At the same time, they and we can build long-term relationships that can pay dividends for years to come.

A CLE SHOPPING LIST

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Effective Witness Preparation

By David Illig

Witness preparation is one of the most important, most ignored, aspects of litigation. Months of excellent legal work can be wasted communicating effectively.

Working with a wide variety of witnesses and excellent attorneys all across the country has consistently demonstrated to me the need for extensive witness training. Either a trial or a deposition is a very unique communication situation. It is unlike almost any life experience. Hardly anyone is really prepared to be a good witness in their own litigation. Yet we assume most can do it. And so much depends on it.

Here are some recommendations from the world of trial consulting that may be helpful in your practice.

1. Create a realistic simulation for the witness to practice getting their truth across. Ideally, an unfamiliar and hostile attorney does the adverse questioning. The client's attorney stays an ally. The attorneys come prepared to question the witness in all substantive areas, adverse, direct, and cross.

2. Video tape the proceeding. It drastically increases behavior change and attitude change. Analyze communication style as well as the content. Frequently review with the witness and isolate behaviors that need to be increased and decreased.

3. Interventions should be very audience focused. Are the witnesses having the impact they are seeking on the target audience? Intention is different that impact. But only impact matters.

4. Remember that the target audience is almost never an attorney.

5. Focus extensively on the behaviors, communications, and attitudes that influence the jury perception of credibility, likability, believability, sincerity, competence. These impressions are strongly created by the nonverbal behavior, sound and appearance, rather than the content.

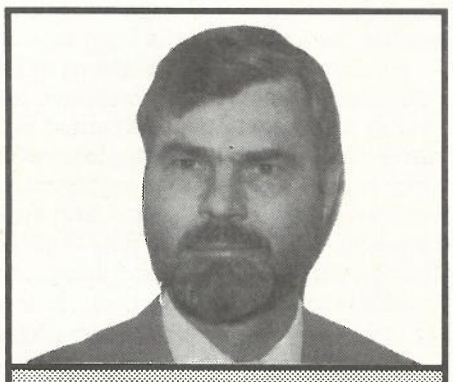
Continued on page 15

Bankruptcy Briefs

Sanctions for violation of automatic stay

As most are aware, 11 USC 362 (h) authorizes a bankruptcy court to award an individual injured by a violation of the automatic stay damages, including attorney's fees and, in appropriate cases, punitive damages. The Ninth Circuit recently held that 362 (h), by its very language, is limited to natural persons and does not extend to artificial entities, e.g., corporations, partnerships and estates. [*In re Goodman,* 991 F2d 613 (CA9 1993)] Thus, if the injured party is not a natural person, 362 (h) is inapplicable and may not form the basis for sanctioning the party violating the stay. However, the inquiry does not end there.

The Ninth Circuit has also held that a bankruptcy court may award actual damages for the willful violation of the automatic stay independent of 362 (h). [*In re Computer Communications, Inc.,* 824 F2d 725 (CA9 1987)] This holding was reaffirmed by the court in *Goodman,* noting the primary difference between 362 (h) and 105 (a) is that award of damages is mandatory under 362 (h) and discretionary under 105 (a). The court opined that allowing recovery of actual damages for violations of the automatic stay by all entities injured thereby would "encourage would-be violators to obtain declaratory judgments before seeking to vindicate their interests . . ., and thereby protect debtors' estates from incurring potentially unnecessary legal expenses in prosecuting stay violations." [991 F2d at 920]



Thomas Yerbich

However, to cloud matters, the Ninth Circuit has also held that bankruptcy judges have no inherent contempt powers, nor does § 105 (a) confer such power. [*In re Sequoia Auto Brokers, Ltd.,* 827 F2d 1281 (CA9 1987)] Unfortunately, the Ninth Circuit has not yet provided specific guidelines or standards on the extent to which bankruptcy courts may impose sanctions under 105 (a) for a willful violation of the automatic stay. In short, does the term damages in the context of an award under 105 (a) include "attorney's fees" or "punitive damages" as does 363 (h)? This author suggests it does not.

First, although there is a measure of inconsistency between the holdings in *Sequoia Auto* (bankruptcy courts lack contempt power) and *Computer Communications* (permitting bankruptcy courts to award damages for the violation of an automatic stay), awarding of sanctions by a Bankruptcy Court for violation of the automatic stay where 363 (h) is inapplicable is, in reality and as a practical matter, synonymous with the second purpose of "civil contempt." Sanctions for civil contempt can be imposed for one or both of two distinct purposes: (1) to compel or coerce obedience to a court order; and (2) to compensate the contemnor's adversary for injuries resulting from the contemnor's noncompliance. [*Shuffler v. Heritage Bank,* 720 F2d 1141 (CA9 1983)]

In *Computer Communications,* the Bankruptcy Court awarded actual damages plus punitive damages. On appeal, the District Court affirmed the decision of the Bankruptcy Court and reversed the award of punitive damages. The Court of appeals affirmed the District Court decision. This author suggests that *Computer Communications,* construed in light of the subsequent decision in *Sequoia Auto,* is indicative that "sanctions" imposed for a violation of the automatic stay, in cases where § 362 (h) is inapplicable, are limited to actual compensatory damages and may not be punitive in nature.

Awarding attorney's fees in connection with the prosecution of a violation of the automatic stay is contrary to the "American rule" that successful litigants are not ordinarily entitled to recover attorney's fees absent statutory authorization or an enforceable contract. *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 US 240 (1975)] *Alyeska* recognized three judicially created exceptions to this rule: (1) recovery of a "common fund"; (2) the losing litigant acts in bad faith; or (3) in a contempt action for willful disobedience of a court order. The Ninth Circuit has held on several occasions that, in the absence of bad faith or harassment, attorney's fees are not awarded in connection with litigation of issues of Federal bankruptcy law [*In re Fobian,* 951 F2d 1149 (CA9 1991) *cert. den.* 112 SCt 3031, 3032 (1992) and the cases cited therein], but that attorney's fees are recoverable in connection with the successful prosecution of a civil contempt action for a willful violation of a court order [*Perry v. O'Donnell* 759 F2d 702 lCA9 1985)). That prosecution of a violation of 362 (a) is a purely a matter of Federal bankruptcy law is beyond cavil. The civil contempt exception, in light of *Sequoia Auto,* is likewise inapplicable. That is not to say, however, that bankruptcy courts lack the power to impose attorney's fees in all cases. In appropriate cases, bankruptcy courts may still award attorney's fees under *Fobian* and its predecessors provided the bad faith or harassment relates to the proceedings either seeking to enforce the automatic stay or the sanctions hearing itself.

"It would be incongruous to hold that bankruptcy courts lack civil contempt powers."

The author suggests the appropriate standard to be applied to an award of sanctions for a violation of the automatic stay, where § 362 (h) is inapplicable, is:

1. The sanctions are monetary;
2. The sanctions are imposed to compensate for actual damages directly resulting from the violation of the automatic stay, not to punish or coerce; and
3. Sanctions are imposed only after adequate notice, an opportunity to present a defense and hearing under Rule 9014, Federal Rules of Bankruptcy Procedure.

Not limiting the sanctions awarded to actual damages effectively grants punitive powers to bankruptcy courts beyond the civil contempt powers of Article III courts. In civil contempt proceedings before the District Court, recovery is limited to the actual loss resulting from the contemnor's noncompliance with the court order and may not be punitive. [*In re Crystal Palace Gambling Hall Inc.,* 817 F2d 1361 (CA9 1987)]

It would be incongruous to hold that bankruptcy courts lack civil contempt powers, as the Ninth Circuit did in Sequoia Auto, and yet grant the same court even greater powers, actually bordering on, if not encompassed by, the criminal contempt power to punish.

A secondary problem encountered in using the civil contempt powers for violations of the automatic stay is that it is a violation of a statutory provision not a court order; thus it does not fit the "mold" of civil contempt, intended to facilitate enforcement of court orders. [*In re Calstar,* 159 B.R. 247 (Bktrcy. D. Minn 1993)] As Congress "imposed" the automatic stay, it is for Congress, not the courts, to prescribe sanctions for its violation. This it did in enacting 362 (h). Congress presumably had the opportunity to and did consider, but declined to adopt, alternative or more expansive sanctions. In the absence of a clear indication to the contrary, lacking in this situation, application of the doctrine of *expressio unius exclusio alterius* precludes inferring any Congressional intent to include sanctions beyond those specifically provided by 362 (h). While a bankruptcy court is unquestionably granted broad powers by 105 (a), those powers are not unlimited and must be exercised within the confines of the Bankruptcy Code; when a specific Bankruptcy Code section addresses the issue, 105 (a) may not be employed to expand what the Code provides. [*Matter of Fesco Plastics Corp.,* 996 F2d 152 (7th Cir. 1993)]

Finally a brief note on the contempt powers of a bankruptcy court. The author recognizes that *Sequoia Auto* was decided before the effective date of the 1987 amendments to the Federal Rules of Bankruptcy Procedure adding Rule 9020 addressing the contempt powers of bankruptcy courts. At least one learned commentator has suggested that the Ninth Circuit may reexamine *Sequoia Auto* and conceivably rule that such power exists under Rule 9020. [9 King, *Collier on Bankruptcy,* ¶ 9020.03 (15th ed.)] However, that issue need not be addressed if the standards suggested by the author are employed in the stay violation situation: they do not involve the first purpose of the civil contempt power ("coercion"), a violation of the automatic stay involves the second purpose - an award of compensatory damages. Thus, a bankruptcy court may follow *Computer Communications* and *Goodman* regarding compensatory damages without deciding whether a violation of the automatic stay is a "civil contempt." In short, *Computer Communications* and *Sequoia Auto* may be reconciled without disturbing the essence of *Sequoia Auto* or getting into the conundrum of whether civil contempt applies at all.

On the other hand, faced with the recalcitrant creditor who is determined to go on his merry way continuing to violate the automatic stay, the bankruptcy court is not with remedies. It may enter an independent order "enjoining" the conduct. Then if the creditor continues his conduct and the bankruptcy court desires to "coerce compliance," it may be referred to the U.S. District Court (under *Sequoia Auto* and Rule 9020), which has the full panoply of civil and criminal contempt powers. [Why a creditor would want to do this does seem irrational. There is no "upside," all actions taken in violation of the automatic stay are absolutely void in any event [*In re Schwartz,* 954 F2d 569

(CA9 1992)], and the "downside" risk is that the U.S. District Court imposes sanctions for criminal contempt, including incarceration.]

[Author's Note: The issues raised in this article have been briefed and are awaiting argument before the Ninth Circuit at this time. We may have a definitive answer by the end of 1995.]

Effective Witness Preparation

Continued from page 14

This impacts depositions also.

6. The witness must demonstrate the ability to communicate the substance in a way that is understandable and believable to the appropriate audience. A story must be built that holds together.

7. Talking about behaviors and attitudes is different than actually engaging in them. Unless you see it happen and continue to happen, assume it won't happen. Obtaining agreement that eye contact makes a difference is a good first step. However, it rarely changes the relevant behavior. Only training and practice will change these behaviors. Behavior is the best predictor. Repeat until you get it consistently.

8. Practice the witness behaviors that are "counter-natural," that is, behaviors that are unlikely in such a situation. For example, it is hardly normal to act pleasant and helpful when a powerful person is criticizing and attacking you. But this behavior usually works best when communicating to a jury. Trial and depo require us to frequently respond in ways that don't fit the situation but are very effective.

9. Even temporary behavior change takes time and numerous repetitions. Devote a full day for trial witness preparation, a minimum of 4 hours if you can do it. Make the investment and you'll get big returns. Jury research shows that juries expect a witness to have prepared extensively. Clients appreciate it. Investing in this important communication protects other investments.

Use these suggestions and I guarantee you will improve on the results you are getting with increased client satisfaction.

Litigation Psychology, founded by David Illig Ph.D., and located in Eugene and Seattle has been bringing behavioral science techniques to law practices across the country. Litigation Psychology provides services in the areas of Witness Preparation, Jury Selection and Analysis, Focus groups / Trial Simulations, Courtroom communication and Strategy, and finally Mediation of Conflict. Dr. Illig is a member of the American Society of Trial Consultants.

NEWS FROM THE BAR

Attorneys disbarred, suspended, censured

Misconduct includes misappropriation, dishonesty, conflict of interest, abandonment, neglect and failure to respond in disciplinary proceedings

Melody Crone Disbarred

Attorney Melody J. Crone was disbarred on March 31, 1994 for misconduct including misappropriation of funds, failure to account, neglect and failure to cooperate with attorney discipline proceedings.

In one case, Crone collected commercial lease rents in her capacity as agent for the landlord. Crone promised to disburse money to a tenant who was entitled to refund of a rent deposit. However, she failed to deliver the money and failed to make any account of it. In another case, Crone entered her appearance as defense counsel then failed to answer the complaint on behalf of her client. Default judgment was entered as a result. Crone failed to notify the client, who learned of the default when the plaintiff executed on the judgment. Another client claimed that he had entrusted Crone with money to pay his debts while he was in jail, but she did not make the payments and failed to account for the funds.

Crone acknowledged personal service of the grievances but despite numerous reminders from the Bar Association she failed to respond to the charges against her, and rejected correspondence from the Bar. Bar Counsel found probable cause to believe that Crone violated DR 6-101(A)(3) (neglect), DR 7-101(A) (intentional prejudice to client), DR 1-102(A)(4) (dishonesty), DR 9-102 (misappropriation of funds) and other disciplinary rules. After public charges were filed, Crone apparently avoided personal service and had to be served by publication; she failed to answer, and the charges against her were deemed admitted. After a hearing on sanctions, the Hearing Committee and the Disciplinary Board recommended disbarment, which the Supreme Court ordered. The public record is available for inspection at the Bar Association office in Anchorage.

David Grashin Suspended

Attorney David E. Grashin was suspended for nine months by an order of the Alaska Supreme Court issued March 31, 1994. The court approved a stipulation between Grashin and Bar Counsel after an investigation showed that Grashin engaged in a conflict of interest, charged an excessive fee and failed to promptly deliver property to which a client was entitled.

Grashin represented a client in a divorce. When his fees went unpaid, Grashin prepared and the client signed a quitclaim deed to her condominium. Grashin did not explain to the client the legal significance of the transaction, including that the client remained liable on the underlying mortgage obligation, and he did not advise her to consult other counsel before entering the transaction. The equity value of the property was probably more than five times the amount of fees owed. When other counsel later explained to the client that she had conveyed her entire interest to Grashin, she demanded that it be reconveyed to her. Grashin refused to reconvey unless the client paid an amount exceeding his legal fee. During these negotiations, Grashin misrepresented the amount of his legal fees actually earned.

Bar Counsel found violations of DR 5-101(A) (conflict with attorney's own interests), DR 2-106(A) (excessive fee) and DR 9-102(B)(4) (failure to convey money or property to which client is entitled). Bar Counsel and Grashin also agreed that his misrepresentations concerning the value of his legal services were reckless and grossly negligent, in violation of DR 6-101. The stipulation entered between the parties, and approved by the Disciplinary Board and the Supreme Court, also provides that Grashin pass the Multi-State Professional Responsibility Examination and that he pay restitution to his client of $10,000.

Kenneth Cusack Suspended

Attorney Kenneth J. Cusack received a 60-day suspension for neglecting the legal interests of a married couple, then deceiving them about the status of the representation. The discipline was imposed by way of a stipulation approved by the Alaska Supreme Court.

Cusack represented the couple concerning an insurance claim for disability payments. He failed to respond to a notice of dismissal for lack of prosecution; after the case was dismissed, he failed to notify the clients or to take steps to reinstate the action. When the clients inquired about the status of the case, Cusack falsely advised them that settlement negotiations were pending. In another case involving the same clients, Cusack represented the couple on appeal after they prevailed at trial. He failed to file an appellee's brief and failed to appear for oral argument. The judgment was reversed.

Bar Counsel found a violation of DR 1-102(A)(4), which prohibits conduct involving dishonesty, fraud, deceit or misrepresentation, and of DR 6-101(A)(3), which prohibits neglect. Disciplinary authorities indicate that the appropriate sanction for such misconduct is suspension for six months or more. In this case there were a variety of mitigating factors including full restitution to the clients, personal problems Cusack underwent at the time, remorse, and cooperation with the disciplinary process.

Bar Counsel and Cusack entered a stipulation for suspension of six months with all but 60 days suspended. The Supreme Court approved the stipulation on a 3-2 vote; two justices would have insisted on suspension with a minimum six months to serve.

Jon Wiederholt on Interim Suspension

The Alaska Supreme Court on June 3, 1993 entered an order of immediate interim suspension against Anchorage attorney Jon E. Wiederholt. A disbarment recommendation from the Disciplinary Board is under advisement in the Supreme Court. The public record is available for inspection at the Bar Association office.

As the *Bar Rag* went to press, editors learned that on July 8, 1994 the Supreme Court issued an order disbarring Mr. Wiederholt. Details will appear in the next issue of the *Bar Rag*.

Bruce Rausch Censured

Attorney Bruce W. Rausch was publicly censured by the Alaska Supreme Court on March 31, 1994 for neglecting a legal matter entrusted to him, a violation of DR 6-101(A)(3) and intentionally failing to carry out a contract of employment, a violation of DR 7-101(A)(2). Rausch failed to wrap up a case by filing necessary findings of fact and conclusions of law. Bar Counsel referred the matter to conciliation under Bar Rule 13(g). Rausch still failed to file the necessary papers, which defeated the conciliation and amounted to separate misconduct. After Bar Counsel opened formal proceedings, the charges against Rausch were deemed admitted when he failed to answer. He later appeared at the sanctions phase of proceedings.

The Hearing Committee and Disciplinary Board recommended, and the Supreme Court ordered, that Rausch be censured. Additional conditions included that he pass the Multi-State Professional Responsibility Examination, and that he pay to the Bar Association costs of proceedings totaling $386. The public record is available for inspection at the Bar Association office.

NOTICE
CHANGES IN APPEAL PROCEDURES
Effective July 15, 1994 (SCO 1155)

Some of the main changes in appeals to the **Supreme Court** and **Court of Appeals** are:

- Notices of appeal *must* be filed directly with the Clerk of Appellate Courts in Anchorage, Fairbanks or Juneau. The district and superior courts will *not* accept these appeals.
- The notice of appeal must be accompanied by a docketing statement, a copy of the judgement and a designation of transcript. See Appellate Rule 204(b). Docketing statement forms are available from the Clerk of the Appellate Courts.
- All opening motions, such as motions to waive filing fee, waive or reduce cost bond, accept late-filed appeal, must be filed with the Clerk of the Appellate Courts.
- Papers, including notices of appeal, may be filed by mailing them to the Clerk or the Appellate Courts at 303 K Street, Anchorage, AK 99501.
  The date of mailing, as shown by the postmark or other proof from the post office, will be deemed to be the date of filing. A postmark date from a privately owned postage meter will not suffice as proof of the date of mailing and papers postmarked in this manner will be deemed filed on the date of receipt by the clerk. Appellate Rule 501(d).
- Appellant will no longer file a Designation of Record on Appeal. Instead, parties will submit ***excerpts*** of the record on appeal with their brief in appeals under Rule 204, 218 and 219. Instructions for preparing ***excerpts*** will be printed in the 1994-95 edition of the Rules of Court and are available from the Clerk of the Appellate Courts.
- The new rules apply to appeals filed on or after July 15. In appeals filed prior to July 15, parties may follow the except of record procedure under the conditions set out in paragraph 17 of SCO 1155.

Please direct all questions concerning these appeals to the Appellate Courts in Anchorage. Phone: 264-0608.

The main change in **administrative appeals to the Superior court** is:

- Parties will submit ***excerpts*** of the record on appeal with their briefs.

Lawyers professional liability policies:

What are we really paying for?

By Robert W. Minto, Jr.,

ALPS is the Alaska Bar Association's captive professional liability company in which it participates with the sate bar associations of Montana, Idaho, West Virginia, South Dakota, Kansas, Vermont, Delaware, South Carolina, North Dakota, Nevada & Wyoming.

"Many Alaska attorneys will now have the privilege of looking at their options both as to price as well as coverage and most importantly levels of service."

The market for attorney's professional liability insurance seems to change daily in the ALPS universe of states. The market may be hard and the options limited in one area of the country, or one or more areas of practice, while others look at more options (insurers) than the attorneys know what to do with. This latter phenomenon is often referred to as a "soft market". For the first time in well over a decade, Alaska lawyers appear to be looking at conditions that approach a soft market. Many Alaska attorneys will now have the privilege of looking at their options both as to price as well as coverage and most importantly levels of service (what do attorneys really get for the premiums they pay).

Several years ago I assisted the American Bar Association Standing Committee on Lawyers Professional Liability in the development of a truly unique PC-based computer program which analyses the levels of coverage afforded attorneys by the various policies available in their particular state. The program is **"Coverage Quest™"** for those that want to do a more detailed analysis of the subject matter covered by this article, it is available through the ABA (contact Patti Korn at (312) 988-5754 or write to Patti at 541 N. Fairbanks Ct, Chicago, IL 60611). The comparative information found in this article was all derived from the current version of the **"Coverage Quest™"** data base which should contain the most recent versions of each of the reviewed carriers policies. Those comparisons will not cover any individually negotiated policy conditions or limitations, or endorsement that the various companies' underwriting departments have determined to be appropriate for a specific insurance contract. Accordingly, all the comparison in this article should be viewed as general rather than specific comments and any individualized questions about a firm's own policy should be addressed directly to the specific insurer or its broker.

ALPS started writing policies six years ago with the intent of making insurance more available for attorneys in Alaska and other ALPS affiliated states. The current market stability has occurred not only because ALPS insures a number of attorneys in Alaska and elsewhere, but also because ALPS' presence in the marketplace provides the competition which forces the other providers of professional liability insurance to price their products competitively, and provide coverage which offers broad quality protection.

By way of example, in the latter part of 1992 and most of 1993, several commercial insurers in Alaska refused to write or renew policies for sole practitioners, small firms and those firms with significant plaintiff's personal injury practices. This left ALPS as the only insurer willing to write these risks. During this period ALPS added a good many firms with these types of exposure to our roster of insureds. ALPS provided risk management advice and programs to many of these firms and in fact experiences good underwriting results from this new book of insured firms. In mid 1994, partly as a result of ALPS' success, and in part due to an expansion of general casualty capacity (the amount of insurance company capital available to back up losses), we noticed an abrupt change. Other companies decided that this group of attorneys and Alaska attorneys generally were indeed acceptable risks, and there is now more competition for attorney's professional liability insurance business than ever before. Today, there are two or three companies sole practitioners, small firms and plaintiff's attorneys can go to for coverage. It may not be inexpensive, but pricing is definitely down and it is available. With prices stabilizing the issue turns to service and coverage. While many attorneys don't recognize the importance of these two issues, the specifics that follow should demonstrate that price, while a consideration, is not the most important factor in reaching the decision as to which company should provide a firm's professional liability protection.

THE MARKET AS A WHOLE

Today, there are eight different underwriting groups (with a total of nine companies) who offer professional liability protection to lawyers in Alaska: The Attorneys Liability Protection Society, A Mutual Risk Retention Group (ALPS), Attorneys Liability Assurance Society (ALAS), American International Group (AIG) comprised of The Lexington (LEXINGTON) and National Union (NU) insurance companies, Association of Trial Attorneys' sponsored program (ATLA), CNA, Evanston Insurance Company (EVANSTON), The Defense Research Institute Risk Retention Group (DRI) and VASA North Atlantic Casualty (VASA). Five of these are commercial insurers (Lexington, NU, CNA, EVANSTON, and VASA) who offer their Products through independent agents. Four are association affiliates (ALPS, ALAS, DRI, and ATLA) and are available directly from the companies and generally only to those who are members of a specific association or group. The ATLA and DRI programs could be described as a purchasing groups in that they offer coverage to members through fronting companies. ATLA uses the Farmington Insurance Company and DRI uses The International Insurance Company. Though they are association programs, the underwriting and insurance service functions are all performed by a commercial company or a broker affiliate.

"Today, there are eight different underwriting groups (with a total of nine companies) who offer professional liability protection to lawyers."

The other two association affiliates (ALPS and ALAS) operate on a membership only basis and provide their own coverage. ALPS, the Alaska Bar Association affiliate, is an open market for all of Alaska lawyers. As the bar association affiliate, ALPS competes with all other providers, offering an alternative for lawyers in all firm sizes. ALAS, on the other hand, is essentially captive owned by the largest law firms in the country. It generally accepts only firms of fifty attorneys or more who are willing to hold very high self-insured retentions (a lot like a deductible). They provide a solid program for those largest firms throughout the nation. Because of its makeup and underwriting criteria, ALAS is not a market for the vast majority of Alaska lawyers.

COVERAGE

While no attorneys plan to commit malpractice or ever need their professional liability coverage, statistically each attorney will face a claim about twice during their careers. Most attorneys purchase professional liability insurance out of sense of responsibility to their clients and families. Let's face it, Professional Liability Insurance offers security to clients and comfort for ourselves and families in the rare event that we make a mistake or at least a client perceives that we have. Only then does the real difference between malpractice policies and companies become important. Obviously, this is the wrong time to become concerned that maybe the coverage or company service level isn't everything it should be.

In an effort to help Alaska attorneys consider their options for professional liability insurance coverage, I have set out some of the more important questions that you should address as the coverage comes up for renewal.

Who is insured by the policy?

There is very little difference in the definition of who is actually insured by the policies offered in Alaska. Most companies cover present, future and former firm lawyers. The policies also protect non-attorney employees, those attorneys who act "Of Counsel", heirs, executors, administrators and legal representatives of the estate of covered attorneys. Any actions taken as a notary or as trustee, executor or administrator of an estate are also generally covered. Coverage varies as to attorneys who serve as arbitrators, mediators and title insurance agents. Many companies add endorsements to policies to define and further broaden the definition of "Professional Services" so as to further clarify these and other activities so that they are considered covered under the insuring agreement found in the particular policy. These factors differ from firm to firm and should be addressed up front so as to avoid any gaps in coverage or confusion when a claim arises. All insurers should be more than willing to address the specifics during the renewal or initial coverage negotiations, and any that won't should be avoided at all cost. A company's willingness to discuss or negotiate issues in the beginning is a good indicator of their probable posture in the handling of claims at a later date.

When is coverage applicable?

All insurers of professional liability exposures use a "claims made" policy form instead of an "occurrence" form which is typical in general casualty or property lines. This is an important distinction for all attorneys to understand. In a claims made form the events that trigger the insurer's obligations under the policy are both the *occurrence of the "act, error or omission,* constituting malpractice, during a period of time covered by the policy and *the date on which the claim is actually made* (and in most cases reported to the insurer). Simply stated if an act of malpractice occurs during a covered policy period, but is not discovered and reported until after the policy has lapsed, there is generally no coverage.

Some insurers define when a claim is made as "that point in time when the insured first receives written notice that would reasonably be construed as a claim against the attorney." Other insurers define a claim more broadly; for example the ALPS policy, defines claim as "... a demand received by an Insured for money or services, including the service of suit or institution of arbitration proceedings against an insured." Note there is no requirement that written notice be received. This definition is designed to encourage policyholders to report all incidents that could evolve into a claim. It serves to assure that coverage will exist because the reporting is timely. More importantly, it allows ALPS' professional claims staff to assist the insured by exploring ways that the claim might be avoided by early corrective action.

"Statistically each attorney will face a claim about twice during their careers."

What about changing firms?

An important issue to consider when changing firms, and for a firm making lateral hires, is whether or not prior acts (those that occurred while working for another firm) of the new attorney

will be covered if a claim is made after the attorney has moved to his/her new firm. On its face it may seem that a firm would always want to afford this coverage to a lateral hire, but consider the issue of the firm's deductible. This kind of coverage exposes the current firm's deductible to a claim against an attorney that occurred while he or she worked for another firm. The ALTA policy does not cover either the firm or the new attorney for any prior acts committed by the new attorney. Those policies written by AIG do not cover the new attorney, but will cover the firm in these instances in instances where the new firm is a named party. The ALPS policy allows the firm to decide if it wants to provide the coverage and expose its deductible to the risk by providing for a no additional cost endorsement to provide the coverage.

Attorneys leaving other firms will likely be covered under the "former

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We are at war, losing the battle of public opinion

BY KEITH MCKINLEY

We are at war! The lawyers and legal system of this country are locked in a battle with public opinion and quite frankly, we are losing. If you have read the latest battle reports as printed in the August 9th issue of The National Law Journal or the September issue of the ABA Journal, you will have a greater appreciation for how General Custer must have felt at the Battle of the Little Big Horn.

This war is being fought on two fronts — the public's perception of the legal system, and its perception of lawyers.

Until now we have always been told that our best weapon was the education of the public about lawyers and the legal system, but it turns out that the more they know about us and the system, the lower the approval ratings.

We are regarded as lacking compassion, unethical, greedy and more concerned about our self-interest than the interests of the client.

The legal system is described as full of delays and frivolous actions where a much stricter disciplinary system for the lawyers should be instituted.

Lawyer advertising on television is viewed as perhaps the most significant contributor to the public's attitude toward lawyers. Consider for a moment that in 1977 the total advertising bill for the legal profession in this country was $100,000 and they estimate that in 1993 that figure will top $100,000,000.

"What can we do to change these perceptions?"

These are the results of national surveys and I honestly believe that the Iowa lawyers and our state legal system would come off better in a survey limited to our state. However, we cannot deny the trends reported as they impact on the perception of our profession in Iowa.

When I was chair of the Public Relations Committee, I used to say jokingly that its mission was not to make people love lawyers, but to make them hate them less. The public's perception of lawyers and the legal system is no joke. That system is the glue that holds this society together. As lawyers we are sworn to uphold and defend that system, but is it all defensible in its present state?

What can we do to change these perceptions?

Community involvement is paramount. Lawyers are regarded by 65 percent of those polled as smart and knowledgeable and yet 56 percent said they are no longer seen as leaders in the community.

Every lawyer in this state should be involved in the Volunteer Lawyer Project. The public demands that we provide free legal services to the poor. It is time that we quit using the term "pro bono" and start calling it donated legal services so the people will know what we are talking about and recognize the contribution.

Ethics to the general public has nothing to do with the Code of Professional Responsibility. They regard unanswered phone calls and the inability to reach the lawyer as unethical behavior. Poor client relations are at the bottom of nearly 40 percent of the complaints received by our Professional Ethics and Conduct Committee. These complaints are dismissed and go largely unanswered because they do not rise to the level of a violation of the Code of Professional Responsibility. Does that make them any less important to the aggrieved and frustrated clients?

As an association we have to devise a means of dealing with this particular problem!

"People want their disputes resolved in an expeditious manner at a reasonable cost."

A lawyer recently described the situation where he was deeply involved in the preparation of a case for trial. A client called several times about something which the lawyer did not regard as of great importance compared to the matter at hand. In exasperation the lawyer blurted out, "You are not my only client!" The client shot back, "But *you* are my only lawyer!"

Fortunately, lawyer advertising in Iowa is for the most part under control. I hope that our bordering states will see fit to adopt similar rules to put a stop to the tasteless carnival "hucksterism" that can be found in their TV ads. They demean the entire profession in the public's eye.

Although we are a profession and deal in services, we cannot lose sight of the fact that our clients are consumers of those services and that they have certain expectations. A system full of unwarranted delays and the unjustified expense of interminable discovery followed by a lengthy appeal procedure isn't meeting those expectations. When it's all over I'm sure many of the participants must ask themselves, "Who won?"

People want their disputes resolved in an expeditious manner at a reasonable cost. They want to get on with their lives. As a profession we have got to start meeting those expectations through some much needed reforms and the greater use of ADR.

The war that I mentioned has been going on for centuries and it is very unlikely that we will ever conquer the public's opinion of lawyers and the legal system. However, we can better train those lawyers and make that system defensible.

Perhaps then we'll experience a cease-fire followed by a peaceful co-existence.

From the Iowa Lawyer, October, 1993.

BALANCING TIPS

Here are ten ready tips for achieving balance as suggested by Austin, Texas attorney Bill Whitehurst, a former president of the Texas Bar Association and a frequent speaker and writer on how lawyers can successfully balance their lives; and Maja Ramsey, a San Francisco attorney who recently took a two-year sabbatical and now practices these balancing skills along with her practice as a well-known personal injury attorney.

1. **Schedule family or recreational activities**, including vacations and days off, on your office calendar as far in advance as possible. Consider scheduling them 6-to-12 months in advance.
2. **Schedule one day for fun** and sightseeing if you are going out of town on business. If possible, never board a plane, then take depositions or attend a meeting, and return to the office the same day.
3. **Control the number of cases** you agree to handle. This takes discipline and faith that good cases will come when you need them.
4. **Don't schedule work on evenings** or weekends unless it is an emergency. Tell the person who wants to schedule the meeting or deposition that evening and weekends are "family time."
5. **Take the time to hire good staff** and make your office pleasant to spend time in.
6. **Take calls from family** no matter what. Tell your client or supervisor that you "always take calls from my family" and as long as your family does not abuse the situation, no one should object.
7. **Never take work home.** The law is a jealous mistress and can take 24 hours per day. When at home, consider focusing your attention on family or relaxation.
8. **Participate in bar or community activities** and include your family. Become friends with other lawyers or community leaders, and you will enjoy your career more for it.
9. **Don't become a "Rambo" lawyer.** If you serve unnecessary and burdensome discovery or unnecessary motions, the opposing attorney is likely to do the same. You will be forced to spend more time than necessary in the office.
10. **Find the part of your life that brings you joy** and make time to enjoy it. Whether it is spending time in the sun and water, playing with your children, exercising, writing, or enjoying art, set aside time to bring joy, enthusiasm, and fun into your daily life. Don't wait for vacations to have fun; give yourself a little dose each day.

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Confinement in the federal district of Alaska

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for eligibility prior to placement on home confinement. Participants **must** agree to take part in the program, have an acceptable residence and a telephone without special features, and have the support and cooperation of all household members. Individuals with a history of domestic violence should not ordinarily be referred for home confinement. Careful screening of a participant's background is required to determine whether any history of assaultive or violent behavior may place the community or monitoring staff in jeopardy. Defendants with a history of certain mental/emotional/physical problems may not be willing or able to comply with the program requirements, or may need the more intensive supervision available through a community corrections facility.

After evaluating the proposed participant, the residence, and members of the household, the probation/pretrial services officer will advise the Court whether it appears that home confinement will adequately address community safety, flight risk, and/or sentencing goals.

SPECIAL CONDITIONS OF SUPERVISION

If the Court determines, after the proposed evaluation process, that home confinement is appropriate, special conditions of supervision will be imposed, requiring the participant to comply with home confinement rules. In addition, the Court will consider ordering the participant to pay the costs of electronic monitoring and, in post conviction cases, will determine whether the participant should be eligible for the earned leave program.

PARTICIPANT COSTS

Participants receiving electronic monitoring services will be responsible for maintaining a suitable residence and for maintaining electrical and telephone services, including installation of telephones with RJ 11-C (standard) connections. Optimally, participants able to afford a second telephone line, will be required to have one line dedicated to electronic monitoring and a second line for other personal use.

The current cost of basic electronic monitoring is $4.97 per day. In some cases, additional equipment requirements could raise this cost. Those participants having the ability to assume this cost will be required to do so. Certain telephone services, such as call-waiting and call-forwarding, are prohibited on the telephone line on which the monitoring equipment is installed.

SUPERVISION ISSUES

As home confinement is ordered only as an alternative to incarceration, participants must be held strictly accountable for the conditions of release. All deviations from approved schedules will be confronted. The probation/pretrial services officer must be able to locate the participant at all times.

Unannounced face to face contacts in the field are an element of supervision. Field contact will be made to verify that the participant is adhering to the approved schedule during noncurfew hours, to verify that monitoring equipment is properly installed, functioning correctly, and has not been tampered with, and that participants are in compliance with conditions.

The legal status of participants and the order establishing participation in the home confinement program will determine what travel is permissible. Unless otherwise ordered, participants will not be allowed to travel out of the district, except for a death (verified) of a family member.

When a situation arises making it impossible for a participant to maintain a suitable residence with a telephone, or to continue participating in the program, short-term placement in a CCC may be requested as an alternative to the home confinement condition.

I. Pretrial

Supervision objectives are limited to insuring Court appearances and protecting the community. A condition of release requiring home confinement also requires an intensive approach to supervision where defendants are held strictly accountable for the conditions of release.

II. Post Conviction

Supervision objectives include enforcing compliance with the conditions of release, minimizing risk to the public, and reintegrating the person into a law abiding lifestyle. A special condition for home confinement requires an intensive approach to supervision consistent with enhanced supervision guidelines. It may be used for some defendants who have violated the terms of release condition and might otherwise be detained or as a sanction for offenders who have violated supervision conditions.

III. Safety

Recommendations to the Court (or other placing authority) will be made with community safety as a primary consideration. The Court will be notified whenever it becomes apparent that a participant's continuance in the home confinement program poses an identifiable threat to community safety.

The author is Senior U.S. Probation Officer, Electronic Monitoring Coordinator.

Lawyers professional liability policies: What are we really paying for?

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attorney" provisions of the old firms policies, however there is no assurance that the old firm will continue to carry this coverage and in the case of a solo practitioner joining another practice, there is no continuation coverage. In these cases, if the new firm's insuser does not cover the prior acts of an attorney changing firms, it may be necessary for the attorney to purchase an Extended Reporting Endorsement, or "tail" from the prior carrier. There is an additional cost which is generally specified in the policy and is a percentage of the annual premium. A few of the companies operating in Alaska (ALAS, Evanston, DRI and VASA) do not offer the Extended Reporting Endorsement to individual attorneys leaving firms. The remainder of the carriers either specifically provide such coverage by policy language, or in fact offer the coverage through common custom and practice.

"The real proof of the worth of your policy shows up by how your firm is treated after you notify the company of a claim or potential claim."

There is a great deal of difference as to how much coverage will be available and the treatment of limits under the Extended Reporting Endorsement. ALPS, ALAS, ATLA and CNA offer the endorsement with an additional limit of liability (a fresh limit, ie., $1,000,000, commences with the beginning of the year the Extended Reporting Endorsement is issued). AIG, EVANSTON and DRI offer an Extended Reporting Endorsement, but consider it an extension of the last year of coverage available, meaning that any claims paid during the final year of the base policy will reduce the amount that is available to pay claims under the Extended Reporting Endorsement.

Insurers also differ as to when they allow purchase of an Extended Reporting Endorsement. While all will sell such endorsements when the insurer elects to terminate coverage, only five of the eight groups (AIG, ATLA, ALPS, CNA, and VASA) will allow policyholders who elect to terminate or non-renew coverage to purchase such an endorsement. Four of the companies require that such an endorsement be purchased within thirty days of the expiration of the policy. The other four have different time frames allowed.

A related issue concerns how long the Extended Reporting Endorsement lasts. ALAS and DRI have a stated maximum (ALAS, one year and DRI, three years) ALPS and AIG have no time limit, as long as additional premiums are paid annually for the additional extensions of reporting availability. The ATLA policy is silent on the issue and the other policies have various provisions.

The ATLA and the VASA policies specifically provides an Extended Reporting Endorsement under different terms and conditions for retired nonpracticing lawyers. The policies from all other groups are silent on an issue of special Extended Reporting Endorsements for Retirees, provide them based on common custom and practice or under the policy's general Extended Reporting Endorsement provisions.

It is important to keep in mind that under "claims made" policies, the purchase of an Extended Reporting Endorsement does not add additional coverage periods. The alleged malpractice must still have occurred within the time limits established by the preceding policy. The endorsement simply allows the policyholder additional time to receive word of a claim and still have coverage if reported to the company within the extended period.

What isn't covered?

Anyone who has looked at an insurance policy knows that there are a host of situations that insurers won't cover. These are listed as "Exclusions". All insurers exclude intentional acts, bodily injury and property damage, loss due to nuclear reaction or radiation, directors and officers liability, any claim pending at inception, criminal or malicious acts and any claim from an attorney who is a beneficiary of an estate.

Beyond that, insurers vary greatly as to which activities and types of damages they will not cover. For instance, all the reviewed policies exclude most claims that are connected with a business in which an attorney is involved as a result of being an officer, director, trustee, or employee of a business or claims made against an attorney who is a public official. All companies but one exclude claims made by one insured party against another. CNA's policy does not deal with the situation at all, so it remains an open question as to whether such coverage exists. Most of the policies exclude any claim against attorneys for discrimination of all types. The one notable exception is the ALAS policy, which does not have such an exclusion. ALPS is the only policy that has a specific exclusion for any damages alleged as a result of harassment. All of the other policies did not address that issue, leaving the issue of coverage open to interpretation but probably are excluded under the general intentional acts exclusion.

All of the policies except the ALAS and LEXINGTON policies exclude coverages for punitive damages. Likewise, all policies written in Alaska exclude payment of fines, penalties or sanctions with the exception of the LEXINGTON policy.

The ALAS policy does not exclude RICO claims, whereas The ATLA does. All of the other companies' policies do not specifically address the RICO, but would exclude the coverage under the general intentional acts exclusion of the policy.

As lawyers professional liability policies are unique to each underwriting group, and for that matter each individual underwriter, there are a number of other exclusions applied by specific endorsement which can affect coverage. Attorneys should pay specific attention to what these might be during the application process. They should be specified in the written offer of coverage. If they are not or they are unclear as to how they might apply to your practice, don't be afraid to ask. The broker or underwriter should be more than happy to explain what the coverage and the limitations of the policy may be. If they are not it serves as another indication of how things may go if a claim is made, and you probably don't want to insure with that company at any price.

WHAT ELSE DO YOU GET?

All companies pay judgments or settlements if notified of the claim in a timely fashion. Most also pay pre and post judgment interest and the cost of appeal bonds, some of the policies are silent on the issue. The real proof of the worth of your policy shows up by how your firm is treated after you notify the company of a claim or potential claim. The concerns in this area cover the gambit of "claims repair service," settlement authority and more importantly who will defend you if a suit is filed.

In any given year approximately fifty percent of all of the money spent on claims by professional liability insurers will go toward defense costs. It is important in reviewing the various policies to determine who gets to pick the lawyer to defend you and what limits should be placed on the monies available to perfect defense.

Policies written through ALPS, ATLA and LEXINGTON allow the insured to choose defense counsel in the event a suit is filed. The ALPS policy provides a preselected panel of the most qualified defense lawyers in each area to assist the insured with the selection, and will allow an insured to select from off the panel if it appears to be in the insureds best interest. The EVANSTON allows some input by insureds in selection of a defense attorney but reserves the right of appointment to its claims staff. All other carriers assign cases to defense counsel, without input from policyholders.

"When you select an insurer look at more than price. Look to their service record, look to how long they have been in this line of insurance and how long they have been offering it in Alaska."

As to the ultimate decision to settle, the ALAS and ATLA policies appear to allow the insured to decide. Policies of other insurers do not, or in two instances, are silent. The policies of all other companies except ALPS, impose a limit on ultimate payment if the insured refuses to settle when the company claims staff wants to and determines it to be appropriate. Typically, the policies state that if the insured does not give permission to settle, the insurer is obligated to pay a trial judgment of no more than it would have paid to settle. To impose this limit, it is incumbent upon the insurer to prove the plaintiff agreed to settle for a specific figure and the insurer would have done so but for the lack of agreement on the past of the insured.

ALPS policy provides for all settlements to be made in consultation with the insured and binding "Peer Review" (appeal) in the event that the insured and company do not agree on settlement. Whatever the outcome of the review process the entire limit of liability remains intact for the ultimate payment of the claim and cost of defense.

This is an issue that stays around and does not seem to have consensus resolution. Naturally, when it comes to professional liability claims, far more is at take than monetary payment when an attorney's ego and reputation get involved. Most attorneys want input into a decision that impacts their reputations, but often need a disinterested third party to advise them on what is in their best interest.

HOW MUCH COVERAGE?

Two different policies may have the same limit of liability stated on the declaration page, yet application of coverage could be vastly different, making one far more valuable to the insured than the other. With fifty percent or more of all claims payments going to pay defense costs, it is important to understand whether or not those expenses are included in the limit of liability, or will be paid in addition to that limit. All companies writing in Alaska include claims expenses within the overall limits of liability to some extent. ALPS gives most policyholders a Claim Expense Allowance Rider which establishes a separate limit for claims expenses (including defense) at the lesser of one half of the per claim limit of liability stated the declaration page, or two-hundred and fifty thousand ($250,000 dollars. CNA has the option to provide for defense cost outside the limit of liability and may apply it to Alaska insureds on a case by case basis. The ALPS policy also provides for an optional "First Dollar Defense Option" which makes the deductible applicable only to loss payments.

All companies have limits applicable to each claim and annual aggregate limits (the most that will be paid for all claims in one year). Policies written by ALPS, ALAS, DRI call for a limit of the number of deductibles which a firm must pay n any given year. For ALPS it is two per year. Coverage Quest™, is silent as to what limitations ALAS and DRI apply so the issue should be addressed directly to the company or its broker.

CONCLUSION

In the final analysis Alaska firms should find that coverage options are more plentiful and prices more stable in the near term. With this however comes an added burden. Alaska firms need to be more careful about checking to see that they are getting the coverage they expect.

When you select an insurer look at more than price. Look to their service record, look to how long they have been in this line of insurance and how long they have been offering it in Alaska. Loyalty can play a big role when and if the market turns again. If capacity shrinks, which carriers are going to leave and which will stay? Will the ones that stay have the capacity to pick up those firms abandoned by the departing carriers? As a general rule you will be safer with the association affiliates ALPS, ALAS, DRI and ATLA because of their ties to a specific group of attorneys. For ALPS part, as the Alaska Bar Association affiliate, we continue to work closely with the bar staff and leaders to assure that professional liability coverage remains available on a competitive basis for all Alaska attorneys. ALPS will continue to remain a safe harbor for most qualified Alaska attorneys.

Remember, that regardless of whether or not your firm is insured by ALPS, you have and will continue to receive the benefits of our affiliation with the Alaska Bar Association because of the stabilizing effect on the whole professional liability market in Alaska. As a further benefit, our Underwriting, Risk Management and Marketing staff remains available to answer any questions you may have and to provide advise and direction if you have coverage or claim concerns.

The author is President and CEO Attorneys Liability Protection Society, A Mutual Risk Retention Group.