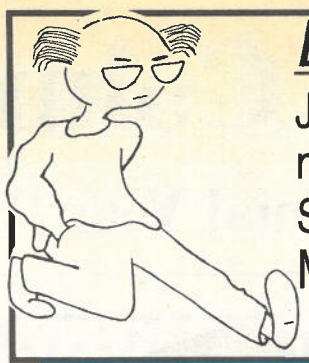

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The Alaska BAR RAG

VOLUME 19, NO. 4 — *Dignitas, semper dignitas* — JULY-AUGUST, 1995

Malpractice insurance verdict: Nothing wins

3 attorneys analyze survey

By Marc June

Over the last three years, the issue of uninsured attorneys has been a repeated topic of discussion during Board of Governor meetings. Most commonly, the discussion would begin during disciplinary proceedings concerning a victimized client and an insolvent attorney. It was surprising how many attorneys there were who did not have even minimal financial ability to correct mistakes made in their practice. It was also surprising how, because of the lack of insurance, attorneys would respond to mistakes and make a bad situation worse.

This scenario occurred frequently enough that the Board decided to "tiptoe" into the area of what, if anything, to do about uninsured attorneys. A Legal Malpractice Insurance Survey was conducted to see if our colleagues in general were aware of this problem and, if so, what Alaska lawyers believed should be done.

Related coverage: pages 10-11

The results of the Survey seemed to confirm the potential problem. Over 20%· of the private bar is, in fact, uninsured with sole practitioners and part-time lawyers being the most likely not to have insurance. That something should be done about clients unknowingly hiring uninsured lawyers seemed to be recognized by 60% of the respondents. The balance of the survey responses suggest that substantial more thought and discussion should be devoted to just how to respond.

As attorneys, we represent ourselves to be professionals and actively solicit the public to bring us their most serious problems, problems including criminal charges, catastrophic loss, and the management of complex business and personal affairs. In soliciting clients, each lawyer invariably presents him or herself as a person of both competence and substance. One can only imagine the reaction of the injured client who learns that this portrayal was false and that his lawyer is uninsured, lacking even a minimal financial ability to correct malpractice. The result is the further deterio-

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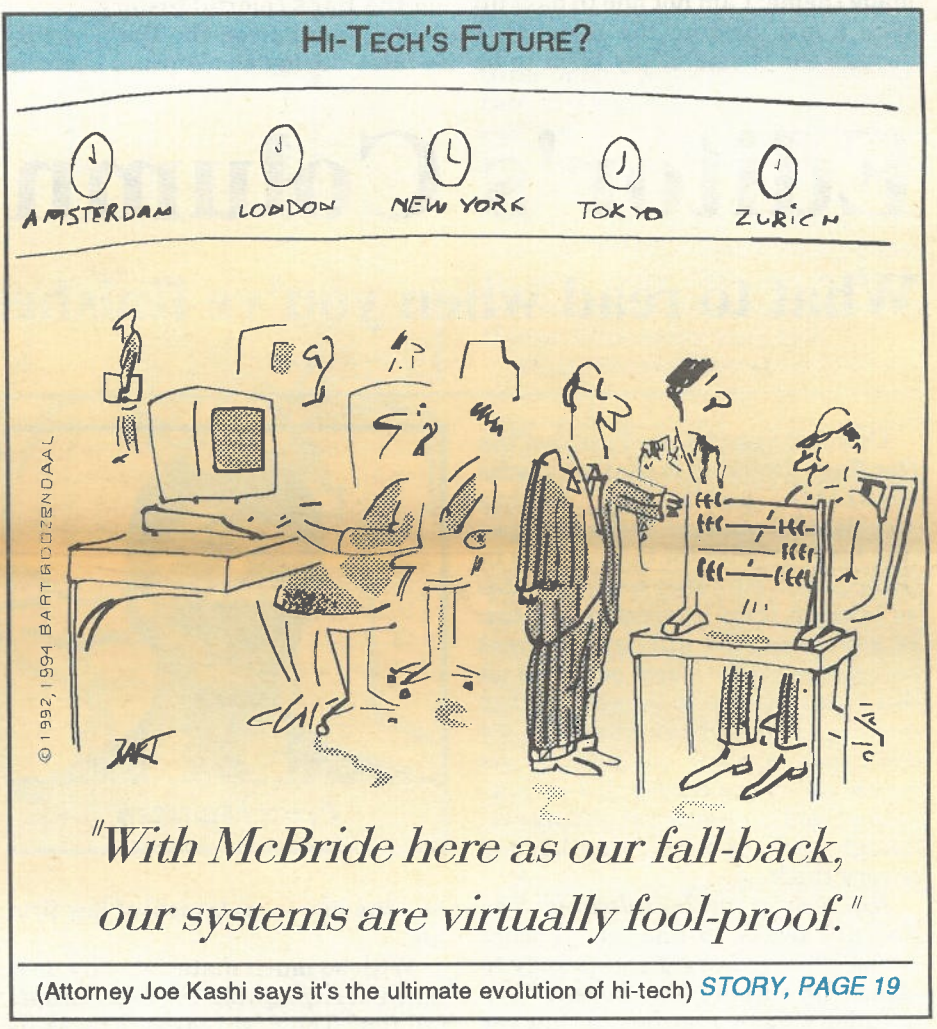

(Attorney Joe Kashi says it's the ultimate evolution of hi-tech) *STORY, PAGE 19*

The 1995 legislature deals with four uniform codes

By Art Peterson

Family support, fraud, and probate raised their legal heads to entertain the Alaska Legislature this year. Commerce promises to have a go at it next year.

During the 1995 legislative session, the legislature passed the Uniform Interstate Family Support Act, considered and is still pondering the Uniform Fraudulent Transfer Act, and plans to work on the Uniform Probate Code Articles II (wills and intestate succession) and VI (nonprobate transfers) during the legislative interim and next session. A bill proposing the revision of Uniform Commercial Code Article 8 (investment securities) will probably be introduced next year.

Family Support

Governor Knowles introduced SB 115 and HB 242, proposing enactment of the Uniform Interstate Family Support Act (UIFSA) and a comprehensive revision of the Uniform Reciprocal Enforcement of Support Act (URESA). (See his transmittal letters at 1995 Senate Journal, page 517, and 1995 House Journal, page 643.) The final version was signed by the governor, and is now ch. 57, SLA 1995, effective January 1, 1996. It is codified at AS 25.25.

UIFSA was drafted by the National Conference of Commissioners on Uniform State Laws to replace URESA, which it also drafted. URESA was enacted in all United States jurisdictions, and UIFSA, promulgated in 1992, has already been enacted in at least 21 states and is pending in several others.

In updating URESA, UIFSA recognizes the growing number of problems stemming from single-parent households, resolves problems stemming from jurisdictional disputes and multiple support orders, and makes a number of other improvements. It streamlines support enforcement proceedings, avoids court delays, eliminates confusion, and generally benefits all parties. Interstate uniformity is especially important in this area, considering the mobility of people and the need for cooperation among the states.

The single, most significant point of this Act is its virtual elimination of the possibility of multi-state jurisdiction and conflicting support orders. That current flaw in URESA has been the bane of both obligees and obligors, as well as of the state agencies and courts charged with administering the old Act. Another significant feature of UIFSA is its adaptation of the traditional "long arm" jurisdiction concept to this family support context.

The final version of SB 115 CSSB 115(Fin) am — incorporates SB 116 (also introduced by the governor), dealing with establishment of paternity. In doing so, it picks up a wrinkle added by the Senate Finance Committee (and then modified on the Senate floor) to the SB 116 sections to provide for disestablishment of paternity. That wrinkle could cause

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President's Column

Theme is "The Centennial Year"

What has 2,621 highly active legal members and is about to celebrate its 100th birthday? If you answered "The Alaska Bar Association," then give yourself a pat on the back!

Recently, the offices of the Alaska Bar Association began receiving inquiries from vendors of commemorative memorabilia as to what type of trinkets the Bar planned to order to celebrate its Centennial. The clue prompted us to do some investigation, and we found that, indeed, the Alaska Bar Association was founded in November 1896 in Juneau. The constitution adopted by the association provided for a quorum of six members. Dues were $1 per year.

What a stroke of luck to become president in a year with a ready-made theme. I am not one to pass up such a gift. Seizing the moment, I declare the theme of my term to be

Diane F. Vallentine

"THE CENTENNIAL YEAR."

During this year, you can look forward to the following:

1. A Centennial banquet during the 1996 Bar Convention with a speaker on the Bar's colorful history.

2. A seminar on the Bar's history — also during the Annual Convention.

3. A traveling display on the Bar's history to be organized by the Bar historian's Committee.

4. The publication of the book "Seizing the Frontier" by Alaska Attorney Pamela J. Cravez. The book reports significant events in the history of the Alaska Bar. One of the events reported is what is usually referred to as "The Great Bar Fight," when the Alaska Supreme Court, led by Chief Justice Buell A. Nesbett and the Alaska Bar Association engaged in a titanic struggle over control of the Bar Association. The Cravez book will be published through the Alaska Bar Association during the Centennial year.

5. The publication of a history of the Alaska Department of law. Attorney General Bruce Botelho has commissioned the writing of this history with the stated goal of publishing during the Centennial year.

6. Also, we hope that each local bar association will sponsor one historic event during this Centennial.

While on the subject of history, I am eager to mention the good works of the Historian's Committee. Under the energetic leadership of Chairman Leroy J. Barker, the Historian's committee has collected many photographs and historical records concerning the Bar's history. These are currently being stored at the Bar Association office in Anchorage. Negotiations are under way for the records to be archived at the University of Alaska Anchorage. Also, the committee is actively working to expand this collection of historic records. Any member wishing to use this expeditious method of cleaning out your records storage room is encouraged to contact Deborah O'Regan, Executive Director of the Bar. The Historian's Committee is also putting together all of the Centennial's programs for the 1996 Annual Convention in Anchorage.

This year will be an opportunity for all of us to improve our knowledge of the Bar's history and to understand the road we have traveled over the last 100 years. Welcome aboard for the Centennial Year.

Editor's Column

What to read when you've finished "Prosser on Torts"

One of the unexpected perks of the *Bar Rag* editorship is that otherwise reputable publishing houses occasionally send me books in hopes that I will arrange for their review in these pages. Why they would see this as being in their interest is unclear. In any event, the universe of great books is so vast — and our time on this dusty sphere so meager — that reading for fun about what I do for work has always seemed to me bordering on the criminal. Two law-related books recently caught my eye, though, perhaps because neither one is very thick.

Explaining the Inexplicable: The Rodent's Guide to Lawyers (Pocket Books 1995) is lawyer self-parody to excess. Its author, "The Rodent," is a pseudonymous California lawyer who, "fearing reprisals from his own law firm and the State Bar," appears on the dust jacket in pinstripes, power tie, and rat mask. The Rodent writes a regular column (even the *Bar Rag* has run one or two) and circulates a more-or-less underground newsletter to poor beleaguered megafirm associates across the continent, in which he satirizes law firm life and pokes fun at the big, bloated targets that dominate The Rodent's world: lawyer egos, lawyer greed, lawyer manipulativeness, lawyer lies.

Like many Alaskan lawyers, I've put in some time in the Big City at a hundred-lawyer law firm, where 3,000-billable-hour years were not unusual (though they certainly were for me); where every in-house conference had to include the rainmaker partner, a litigation partner, a junior partner, a senior associate, a couple of junior associates, and a paralegal or two, all billing .25 for every ten respirations; where my secretary called me Mister; where a partner went to jail for hiding lavish personal expenditures in a client's bills. This is the stuff on which The Rodent thrives, and which *Explaining the Inexplicable* portrays —in "personality profiles," annotated time sheets, cynical advice columns,

Peter Maassen

and the like — as typical of law firm life.

With so much material, why does much of *Explaining the Inexplicable* fall flat? The first reason, I think, is its timing. What would have been hilarious expose' ten years ago has by now been overexposed. With a decade of snappy lawyer jokes behind us, a lawyer joke stretched into a two-page parody goes stale long before it's over.

The second reason why The Rodent lacks bite is that the life he satirizes has little relevance to most Alaskan practitioners today. The Rodent concedes this, directing his admittedly "gross generalizations" only toward "the vast majority of lawyers who devote their lives to thriving at 'The Firm.'" Few Alaskan firms qualify as "The Firm." They haven't got the hierarchy, the lifestyle, the predominance of ego and avarice; nor, I think, can they get away with bilking their clients the way The Firm contrives to do. Thus, at least for most of us, *Explaining the Inexplicable* doesn't satirize our own reality; it satirizes the Big City stereotypes that we've come to know through lawyer jokes, T.V. shows, and John Grisham novels. The Rodent would be funnier if he hit closer to home.

Finally, The Rodent's satire loses luster when contrasted to the real-life news tidbits interspersed throughout the book: *e.g.* Skadden, Arps billing a client $33.60 for coffee, juice, and Danishes for four from its in-house cafeteria (I know that doesn't sound so bad in Alaska during tourist season); a Texas law firm setting an annual goal of 6,000 billable hours per attorney (that's 23 hours a day); Leona Helmsly's New York law firm billing her for 43 hours of paralegal time — *by one paralegal, in one day*. Now that's tantalizing stuff, and it's hard for the fiction to beat it. With a lot more of this outrageous reality in it, *Explaining the Inexplicable* would have been a great read.

Another and more serious book, *Law v. Life: What Lawyers Are Afraid to Say About The Legal Profession* (Four Directions Press 1995), considers why lawyers like The Rodent and those he satirizes are so embittered and negative. "How can so many who occupy a position of privilege in a profession so favored be so unhappy with their lives?" asks Walt Bachman, the author. A Minnesotan, Bachman has worked in big and small firms and as a prosecutor, discipline counsel, and state bar president; his credentials for analyzing his profession are among the best. In this slender volume, he thoughtfully examines various aspects of lawyers' lives and comes up with nine "Lessons," none of which is obvious but most of which had me nodding my head.

Bachman begins, for example, with the tale of a sadistic experiment in which two monkeys are strapped side by side and periodically shocked; with the right moves, one monkey can avert the shock for both, but the other cannot affect what happens no matter what he does. Oddly, it is the monkey with the power to affect the outcome that gets overstressed first. Hence Bachman's Lesson One: "Though the risks and consequences of a legal dispute are more dire for the client, it is often the lawyer who gets the ulcer." Losing clients will often accept what the system metes out, then put it behind them and get on with their lives, while their lawyers continue to relive the litigation and second-guess themselves for years afterward.

Another of Bachman's theories is that children of dysfunctional families make the best lawyers: they've learned early how to keep secrets, how to put the best public face on a private embarrassment, how to dissemble, how to suspect. Combine these attributes with what

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The Alaska BAR RAG

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Joyce Weaver Johnson
Sally J. Suddock, Managing Editor
Contributing Cartoonist
Mark Andrews
Design & Production:
The Alaska Group
Advertising Agent:
Linda Brown
507 E. St., Suite 204
Anchorage, Alaska 99501
(907) 272-7500
Fax 279-1037

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Letters from the Bar

Strange encounters of the human kind

About eight or nine years ago I received a telephone call from an Alaska Native man whom I had met at Point Possession in 1948. His family had a salmon setnet site there.

I spent about six weeks there in the summer of 1948, with a friend of mine who also fished. It was a pleasant time for me then because I didn't work as hard as the fishermen. I met all the fishermen, took saunas with them, ate fish head stew and heard many folk lore tales from Shem Pete, Billy Pete, Billy Nikolai and others who were there.

The purpose of the telephone call was to tell me that the caller had sold fish to a Japanese fish buyer at the fish site. When he got back to town he found the check he had received was no good. He told me several other fishermen had the same problem. He and the others had called the fish buyer who had an office and freezer plant in Anchorage but received nothing but stalls and evasive answers as to when they could get their money. As I remember, each of the three or four fishermen involved held checks of $3,00 to $5,000 each.

I told the men I would do what I could. I called the buyer's office and was told he wasn't in. I then wrote a letter which I hand delivered to the office of the buyer. I then called again, and was told by the secretary that the buyer would be in at a certain hour. I told her I would be there.

I went to the office and was introduced to the head man, a Japanese I'll call Mr. Namura (not his true name). Namura showed me into his office. He was barely five feet tall. He told me that only his wife handled the money to make the checks good and she wasn't due in for an hour. I said I'd wait.

We sat in his office and tried to make small talk, not a comfortable session in that I was pressing him for money. Aside from the purpose of my errand we had nothing to talk about. I asked a few questions about his business and he told me about the problems he had.

We soon exhausted the subject of the fish business. Mr. Namura started to give me his world philosophy. "You know, Missa Atkinson, the biggest 'tret' to the world is those one billion Chinese. Ever since Nixon opened up China in 1972 there is a computer in every village hooked into a central government computer in Beijing. If the government computer told all the people to get up on tables and then told them all to jump down at the same time, they would knock the earth out of orbit. No more four seasons, no more 24-hours days."

He seemed deadly serious and looked at me closely for my reaction to this statement. I tried to remember all my physics lessons but couldn't seem to think of anything but Archimedes' statement that he could move the earth if he had a lever long enough and a place for the fulcrum to rest. That didn't seem to be pertinent to what Namura had said. I just smiled in a neutral manner which I hoped he would infer was appreciation for his sage observation but didn't commit me to endorsement of its correctness in either its physical aspect or its seeming anti-Chinese bias. Shortly afterward his wife arrived with the money for the checks and I left Mr. Namura. I haven't forgotten him, though. I often think of one billion Chinese jumping off tables and kicking the earth out of orbit.

One of the fascinating things about the practice of law is the bizarre encounters with people one has. Lawyers are often accused of being creative about factual scenarios and explanations of matters. My experience has been that the most ordinary person, client or witness, can or will, with all seriousness, advance explanations for events and actions that no lawyer could invent.

I agreed to buy some land from a man once and discovered that the acreage was about one-half that shown on the BLM plat. I suspect that the reason for the discrepancy was that the plat maker in computing the area of the approximately right triangle parcel had multiplied the base by the height of the triangle but forgot to divide by two to get the correct area. When I called the owner to tell him of the discrepancy in acreage from the plat figure he said without hesitating: "Mr. Atkinson, you know that land has hills on it. If it were all flattened out the acreage shown on the plat is correct."

I bought the land with a discount, not pro-rata however, for the diminished area. I did appreciate the novel explanation and believed it should be compensated for.

I am sure all lawyers have had experiences similar to mine.

Kenneth R. Atkinson

Editor's Column

continued from page 2

Bachman sees as the highest value taught in law schools — "the ability to come up with convincing reasons in support of any argument, whether one personally agrees with them or not, and to defend those reasons with cogent and convincing logic, on behalf of anybody"— and you get to one of Bachman's corollaries: "You don't have to be screwed up to be a good lawyer, but it may help."

Bachman also observes that a lawyer's clients are much more likely to be contentious, unreasonable jerks than a sampling of society at large. It is not surprising, thus— in Bachman's view—that the more time a lawyer spends on the job, and the more the lawyer nurtures those skills that society prizes in a lawyer, the unhappier he or she becomes.

What to do about it? Part of the prescription is to nurture your nonlegal diversions. "10% of a lawyer's soul dies for every 100 billable hours worked in excess of 1,500 per year," Bachman writes.

But Bachman doesn't purport to resolve all the dilemmas he identifies. "[T]he first step towards addressing any set of problems is a detailed descriptive diagnosis," he writes. *Law v. Life* provides it, in intelligent and well-written form.

Estate Planning Corner

Deathbed planning with retirement accounts

The federal estate tax is determined on a tax-inclusive basis. No deduction is allowed for estate taxes or for income taxes on income earned but not recognized before death (Treas. Reg. § 20.2053-6).

Consider a client domiciled in Alaska. He is 61 years of age and single. He has never made a taxable gift. His assets total $650,000, including an Individual Retirement Account with a balance of $200,000. His sole beneficiary under his Will and IRA is his adult child.

Suppose the client dies in 1995 and, also in 1995, his child as his designated beneficiary takes a lump-sum distribution of the IRA. For whatever reason, the child does not wish to take annual distributions

Steven T. O'Hara

from the IRA based on his life expectancy (IRC §§ 408(a)(6) & 401(a)(9)(B)(iii)). The child lives in a state that has an 8.5 percent income tax.

Under such circumstances, the client's estate would owe about $19,000 in estate taxes, and his child could owe $48,000 in federal income tax and another $10,000 in state income tax (IRC §§ 2001, 2010, l(c), Treas. Reg. § 1.691(c)-1(a) & AS 43.31.011).

In other words, in calculating estate taxes, no allowance is given for the fact that after taxes, the client's beneficiary will receive approximately $573,000, which is $27,000 less than the $600,000 threshold we normally consider when determining estate taxes.

By contrast, suppose the client had terminated his IRA in January 1995 by taking a lump-sum distribution of the full $200,000. Suppose the client died shortly thereafter with no other income for 1995.

Under such circumstances, no estate taxes would be owed. His estate would be entitled to an estate tax deduction of approximately $58,000 for the income tax owed by the decedent by reason of his taking the $200,000 out of his IRA before his death (IRC § l(c) & Treas. Reg. § 20.2053-6(f)). Thus his taxable estate would be $600,000 or less (i.e., $650,000 minus $58,000).

The $58,000 in income tax owed by the decedent is no more than the income taxes owed under the previous example. So the savings over the previous example is $19,000 in estate taxes.

Accordingly, when consulted by a client whose death is believed to be imminent, consider whether there would be any advantage for the client to cash out his retirement accounts before death. Consideration of this issue takes coordination with the client's beneficiaries, who may prefer to leave the retirement accounts intact in order to defer income taxation as long as possible.

Chopped Liver II

Legislature finds good help is hard to find

The following submission arrived too late for consideration in the Bar Rag's "So What Are We, Chopped Liver?" Contest, which asked contestants to explain why the Alaska Legislature had to go to Washington, D.C. to find an attorney to represent it in State of Alaska v. Babbitt. It is published here solely for its educational value.

I almost didn't recognize the voice on the phone. Drue sounded desperate.

"Please," she said, "You gotta help me. You gotta help us!"

"Drue, honey," I said, "Get a grip. What is it?"

"I've called everybody! Well, almost everybody. Everybody in Juneau and Anchorage anyway. No one will take the case. Please! We need a lawyer!"

Miffed, I said, "You called everybody else first? How many? Who?"

"You're the 2,004th." Then she added quickly, "But only because I knew someone of your stature and reputation would be way too busy! But I appeal to your sense of duty — your sense of responsibility as a citizen of the Great State of Alaska!...Eight stars of gold on a field of bloooo—"

"Drue, please. Don't sing. What's the problem?"

"It's that damned liberal Democratic governor that the damned liberal press got elected! He's dropping *Alaska v. Bobbit*! Can you believe it?"

"No! I didn't even know John Bobbit was in Alaska. What'd he do to us, anyway?"

"Huh?"

"*Alaska v. Bobbit*. Why are we suing some guy with no . . ."

"Not *that* Bobbit" The Interior guy!"

"You mean Babbitt? Bruce Babbitt?"

"Whatever. — Can you believe that liberal lunatic governor and his liberal lunatic Attorney General Botelho want to drop the case?"

"Wasn't Botelho appointed by Wally Hickel?"

"It was a trick," she said. "We never would've confirmed him if we'd known Knowles would keep him."

"Never mind," I sighed. "What is it you want a lawyer for?"

"You gotta help us sue the governor and the AG."

"The legislative branch wants to sue the executive?"

"Well," she said, "We really want to sue the feds. But Bruce and Tony want to drop it. So we want to make them NOT drop it."

"Drue? Drue, they get to make that decision."

"But they're DEMOCRATS," she wailed.

I decided to try a different approach.

:From a fiscal responsibility standpoint," I said, "do you think it's a wise use of public resources for one branch of the state government to be suing the other over a lost cause?"

"Lost cause?" She sounded confused.

"The subsistence issue," I said gently. "You know. Federal management of wildlife resources on federal land?"

"But the feds overstepped their authority!" she howled. "*They're* the ones who passed a law that conflicted with OUR constitution!"

I took a deep breath. "Drue," I said, "Have you ever heard of the supremacy clause?"

"Sure," she said, "It's in the Constitution. It says the right to bear arms is supreme above all other rights. Or something like that. Why?"

"Oh, never mind," I said.

"Let's get back on the subject," she said, a little testily. "Are you gonna help us or not?"

"I can't Drue. I'm really busy. Maybe someone from Fairbanks."

"I already called everybody in Fairbanks."

"I thought you called everybody in Juneau and Anchorage."

"And Fairbanks," she said. "There's only 225 lawyers left to call! What am I gonna do if they all say 'no'?"

"Try Bob Bork," I suggested. "I hear he's looking for work."

By Toni B. London

Lawyers in Sports Briefs

Give me lawyers to match my mountains

Compiled from Wire Service Reports

Those bar-bashers who say that lawyers don't have the brains God gave a gaffed halibut were disappointed on July 4, 1995, when all but a handful of the State's lawyer population stayed away from Seward's annual Mount Marathon race.

This year, the run from downtown Seward to the 3,022-foot pinnacle of Mount Marathon—and back—included Anchorage legal luminaries *Roger Kemppel* (1:06:49), *Jim Boardman* (1:12:21), *Jim Forbes* (1:17:03), *Al Clayton* (1:20:37), and *Tom Meacham* (1:24:21), all of whom are hardened veterans of the legendary run and ought to know better.

In an emphatic comment on the nature of evolution (what that comment was, exactly, *Bar Rag* researchers are still studying), it was lawyer offspring who dominated the women's race. Nancy Pease, daughter of Anchorage lawyer *Ted Pease,* won it going away for the sixth time (53:50). In second place was Nina Kemppel, daughter of the aforesaid Roger (58:10). Not far back in the pack was Tracy Middleton, daughter of Anchorage lawyer *Tim Middleton* (1:14:11).

How, you ask, is the Mount Marathon race the perfect metaphor for a legal career? Runner Jim Forbes has the answer, having spent a good hour and a quarter with little else to take his mind off the pain. First, like the law, the race is hard to get into (one applicant paid $185 for an auctioned entry spot). The race from downtown to the base of the mountain, says Forbes, "is sort of like law school: You deplete all your resources and build up tremendous debt."

Once at the mountain, you first need to conquer the sheer cliff at the mountain's base (the bar exam). Then, says Forbes, you toil in obscurity through the underbrush for what seems like forever, your nose stuck in the posterior of the person right in front of you. Finally you clear the trees, and your freedom of movement — your ability to chart your own path dependent on your own strengths — increases dramatically.

Then there's the summit— cheers and elation — and the descent, when your workload drops dramatically and, assuming no major missteps, you know that you're home free.

Finally, exhausted, you cross the finish line, where you are either swathed in glory or damned to the company of other sufferers in the first aid tent.

Has Forbes, in his anguished extremis, nabbed the perfect metaphor for a legal career? Close, but not quite. Mount Marathon racers get to try it again next year.

Judges support these courtroom practice "guidelines"

One of the topics discussed by the Alaska Conference of Judges during the Judicial Conference this May was the issue of whether a uniform list of courtroom practice guidelines should be developed for use by judges around the state. The purpose of these guidelines would be to provide lawyers, judges and parties with an expected standard of conduct in judicial proceedings. Prior to the conference, all judges were surveyed on their views as to appropriate courtroom decorum. Although there was a lack of consensus among the judges as to the use of a uniform set of protocols statewide, the judges did think that it might be helpful to share with the Alaska Bar a list of those requirements with which at least 80% of judges surveyed were in agreement. They are as follows:

1. Be punctual for court hearings. If you are detained in another courtroom or have other hearings in another courtroom which will make you late, please let the judge know where you are.

2. Stand when addressing the court and when the court enters or leaves. Some judges may wish you to stand when questioning jurors and witnesses and making objections.

3. Ask permission before approaching the bench. Some judges may also wish you to ask permission before approaching witnesses or the clerk.

4. After approaching a witness to provide an exhibit, please do not remain inappropriately close to the witness for questioning.

5. Address jurors and opposing counsel by their last names. Some judges may wish you to address witnesses by their last names as well.

6. Refrain from making facial expressions, gestures, or audible comments to indicate approval or disapproval of testimony, argument, or the court's ruling.

7. Show exhibits to opposing counsel before handing them to witness or moving them into evidence.

8. Only one attorney for each party may examine or cross examine a witness.

9. Only one attorney for each party may object to testimony of a witness being questioned by opposing counsel.

10. When making an objection, please state only the legal basis of the objection (e.g. "hearsay" or "leading") and do not elaborate or argue unless asked to do so by the court. Responses to objections should be similarly brief unless the court requests more.

11. Refrain from making comments, statements, or remarks during examination.

12. Refrain from making disparaging remarks or displaying ill will toward opposing counsel and refer to opposing counsel in courteous terms.

13. Do no interrupt opposing counsel's argument unless necessary to state an objection.

14. Do not argue after the court has ruled.

15. Dress appropriately for court in business attire.

Solid Foundations

Foundation approves grants of $164,000

1995-96 IOLTA grants were awarded by the Trustees of the Alaska Bar Foundation on May 31, 1995. Although grant requests totaled more than $225,000, interest earned on IOLTA funds provided for approval of grants of $164,000:

• **Alaska Pro Bono Program:** $150,000 for the delivery 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. More than 50 percent of the members of the Alaska Bar Association participate in the Alaska Pro Bono Program, and the program is one of the most successful voluntary programs in the country. 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 for CHILDREN:*** $3,000 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.

• ***Catholic Social Services:*** $6,000 for its Immigration/Refugee Program. CSS provides legalization assistance to potential immigrants of various nationalities and religious backgrounds. The program includes: preparation and presentation of cases before the immigration judge; small claims court filings; meeting with attorneys to interpret; filing of complaints with human rights commissions; preparation of legalization and asylum appeals; traffic court appearances; and intervention in workers' compensation cases.

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 97 percent of the funds available. The remainder was allocated to the administration of justice through Anchorage Youth Court activities.

Willard selected for national post

Alaskan attorney Donna C. Willard is in line to become the first from our state to be elected an officer of the American Bar Association Board of Governors.

New officers and Board of Governor's members will be chosen at the close of the ABA's annual meeting, held (where else) in Chicago Aug. 3-9. They'll assume their terms immediately.

Donna Willard at the AK Bar Association convention in May.

The ABA says Donna C. Willard stands as the candidate for secretary of the Board, with N. Lee Cooper, president-elect, of Birmingham, Ala.; and John A. Krsul Jr., treasurer; of Detroit. Current president-elect Roberta Cooper Ramo, of Alburquerqe will assume the presidency.

To appear on the slate of candidates, Willard ran against Vernon F. L. Char, of Honolulu, on a contested ballot; no other seats were contested. She has long been active in bar association activities, serving as a member of the American Bar's House of Delgates from 1980-84 and since 1986; president of the Alaska Bar Association in 1979-80; president of the National Conference of Bar Foundations; and president of the Western States Bar Conference. She is a sole practitioner in Anchorage.

Willard was vacationing in the woods as the *Bar Rag* was being assembled, but is expected to return with a full report from the rest of the nation's bar.

Delegates and attendees at the August convention in downtown Chicago will hear from Jesse Jackson; U.S. Sen. Carol Mosely-Braun; Bella Abzug; Sen. Orrin Hatch; ABC News' Coki Roberts; author Scott Turow; and Slovak Republic President Michel Kovac. More than two dozen seminars are scheduled, ranging in topics from Hollywood to electronic communication and violence. The 1995 ABA Expo is expected to be heavily populated with technology, and there are many social events. This is a large convention; the ABA has 300,000 members.

Hotel space is still available; to request a registration packet via mail or fax, call 1-312-988-5870.

'95 legislature deals with four uniform codes

continued from page 1

problems. For example, in sec. 14 of the final version, AS 2 5 .2 7 . 166 (d) applies a *dis*establishment-of-paternity decision retroactively to extinguish arrearages in child support, which conflicts with 45 CFR 302.70(a) (9) (iii) and 303.106. At any rate, UIFSA, itself, was *not* changed in this way, and adheres very closely to the national version.

The expected result of the new Act is a system that is more efficient and cheaper to operate, and more easily understood and fairer to the parties involved in the process, thus producing a much higher level of meeting family support obligations and helping kids.

FRAUD

Representative Brian Porter introduced HB 72 to enact the Uniform Fraudulent Transfer Act (UFTA). His HB 493, proposing the same Act last year, got "lost" in the Senate Rules Committee in the closing days of the 1994 session. With not a word spoken against it during its entire legislative course, it *almost* passed then.

This year, a group of attorneys and others in Anchorage raised a question about the bill after it passed out of its second committee of referral. Alaska's Uniform Laws Commissioners and that group will be trying to resolve the question, regarding application of the Act's protection to future creditors, during the legislative interim. That question is the subject of a separate article in this issue of the *Bar Rag*.

Our current fraudulent transfer 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 National Conference (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 72 responds to that need.

The Act works as a deterrent to artificial insolvency that may be 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. It has been enacted in at least 33 states.

PROBATE

As mentioned in my 1992, 1993, and 1994 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 wills and intestate succession. This new version, introduced by Representative Sean Parnell as HB 308, 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 at least five states.

The revision responded to three basic themes that emerged 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 so proliferated that they now form a major (if not *the* major) form of 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 by previous marriages and in the acceptance of a partnership or 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. Although not every state has enacted the complete Uniform Probate Code, Alaska has, and it is important to keep it up to date.

These amendments include the following separable packages (either as a new feature or as an amendment of current provisions):

— 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.

One feature of the "official," national version of the Article II revision that HB 308 does *not* include is the phase-in approach to the surviving spouse's elective share. (See proposed AS 13.12.202, at page 14 of the bill, retaining Alaska's current version, which allows a surviving spouse a flat one-third of the "augmented estate.") The phase-in approach allows a range of three percent, to a spouse who was married to the decedent for one but less than two years, to 50 percent to a spouse married for 15 years or more.

At least part of the theory behind this new approach is that the longer a spouse was married, the more he or she shared in the marital life and economics of the decedent and contributed to the development of the estate. A corollary is that it is fairer to the children of a prior marriage to limit the relatively rarely used elective-share entitlement of a surviving spouse who entered into a late-in-life marriage. This approach mimics community property laws. The flat one-third, traceable to dower and a spouse's share in intestacy under early English law, has been the subject of much scholarly criticism, especially by women.

The Article VI amendments (nonprobate transfers) 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.

At least 19 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.

COMMERCE

It is anticipated that the NCCUSL's revision of the investment securities article of the Uniform Commercial Code will be introduced next year. Copies, with much background information, were distributed this spring; a packet went to the chair of the Alaska Bar's Business Law Section.

This revision goes beyond the NCCUSL's 1978 amendments, which Alaska finally enacted in 1990. A key element is the recognition of current handling of investment securities by electronic means instead of paper and by the use of clearing corporations and securities intermediaries. The concept of "uncertificated securities," presented in the 1978 amendments, did not adequately solve the paperwork crisis that developed in the 1960's, but those amendments serve as a prelude to this revision.

The revision was promulgated by the NCCUSL in 1994, has already been enacted in at least five states, and has been introduced in the legislature ·of at least 17 additional states. A major push is being made to get all jurisdictions to enact it soon, to provide the legal structure for the way securities are being handled in practice.

THE CONFERENCE AND ITS METHOD

As I mentioned last year, although the National Conference of Commissioners on Uniform State Laws 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 those discussed here. The NCCUSL (sometimes shortened to "ULC," Uniform Laws Conference), in conjunction with the American 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 to achieve enactment.

The NCCUSL is a nonprofit, unincorporated association, comprised of approximately 300 commissioners who represent the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, and the U. S. Virgin Islands. The commissioners are state and federal judges and justices, law professors, public and private law practitioners, and legislators who are lawyers. The Conference is in its 103rd year, and Alaska has been a member since 1912.

MORE DETAIL

As with my previous reports, this synopsis does not do justice to any of the Uniform Acts mentioned — neither the one that passed nor the others. And, of course, the 1995 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.

Ethics Opinion Subscriptions Available
Full Set of Opinions Also Available

Alaska Bar Association Ethics Opinion subscriptions are now available from the Bar Association for an annual subscription of $15.00. The subscription period runs from July 1 through June 30. Opinions will be mailed out following each board of Governors meeting at which opinions were adopted. (The next Board of Governors meeting is mid-August.)

The subscription of those attorneys and firms who have five year subscriptions is expiring June 30 (except for a few attorney subscribers who were recently admitted.) If you are not certain whether you or your firm has a subscription, please contact Norma Gammons at the Bar office.

Also available are full sets of ethics opinions. Included are over 300 pages of ethics opinions which have been adopted by the board of Governors since 1968 to the present. These are available for $50.00 from the Bar office.

Name: _____ Phone: _____
Firm: _____
Address: _____
City: _____ State: _____ Zip: _____
Phone No.: _____ Alaska Bar Member # _____

❒ I want a one year subscription. Enclosed is $15.00.
❒ Please check if subscription should be listed under firm's name.
❒ I want a complete set of ethics opinions. Enclosed is $50.00
❒ I will pick up my set of opinions at the Bar office. ❒ Please mail the opinions to me. Enclosed is $5.00

The Public Laws

No crime too small to get a youth's attention

In the past few years there has been a great deal of debate and concern expressed over increases in juvenile delinquency and crimes committed by youths.

Proposals to address the problem range from increased parental responsibility, to streamlined procedures for waiver of juveniles to adult court, to increased penalties for juvenile offenses.

In the rush to take decisive action to combat a threat to the safety and sense of well being of the community, proposals which call for draconian penalties on parents or treating children as adults have a strong visceral appeal. However, a systematic review of where we are and how we got there indicates that the problem calls for attention to small details rather than headline-grabbing harsh responses to high-profile crimes.

"Many minor offenses, the type that are most likely to be a minor's first contact with the criminal justice system, result in little more than a lecture."

The process for reviewing juvenile violation referrals is set forth in AS 47.10.020, which provides, in part, that the court shall appoint a competent person or agency to make a preliminary inquiry and report for the information of the court to determine whether the interests of the public or the minor require that further action be taken. The court system, by Delinquency Rule 6, has provided that juvenile offenses shall be referred to the Department of Health & Human Services for action, including intake interviews. Delinquency Rule 6 also authorizes informal supervision. It is under this informal supervision authority that the juvenile intake office may refer juveniles to treatment programs rather than pursuing prosecution of the offense.

An example of the way the system is working now can be seen from the operations of the Anchorage Youth Corrections intake unit at McLaughlin Youth Center.

Currently, when a minor is caught violating a law, he or she may be taken into custody and taken to McLaughlin, or arrested and released to a parent or guardian at the scene with the police reports on the incident taken to McLaughlin for intake screening. The juvenile intake officers review the reports and determine whether a petition for delinquency should be filed, or whether the offense should be addressed through administrative resolution.

Administrative resolution may range from a letter to the parents to a conference with the parents, to a supervised referral to a diversionary program. If a petition for delinquency is filed, then the juvenile may be supervised by a juvenile probation officer for a period of time. Most delinquency filings are resolved by agreement, with about 10% of delinquency filings resulting in contested hearings.

Putting numbers to these categories, in calender year 1993 Anchorage Youth corrections had 2,935 referrals, 598 of which were for felony offenses. Of these 2,935 referrals, approximately 500 resulted in delinquency petitions and the remainder were administratively resolved. In calender 1994 there were 3,395 referrals with 567 resulting in petitions for delinquency. Of the 1994 referrals, 702 were for felonies. The 3,395 referrals in 1994 involved 2312 individual youths. The largest area of increase between 1993 and 1994 was in the category of drug and alcohol offenses. Statewide the juvenile intake under DHHS handled 7,520 referrals and 1,352 petitions for delinquency in Fiscal Year 1993 (July 1, 1992-June 30, 1993) and 8,872 referrals and 2,026 petitions in F.Y. 1994.

Scott Brandt-Erichsen

What resources are available to address these numbers of violations? There is a juvenile detention facility at McLaughlin Youth Center. It has a capacity for 120 juveniles in long term treatment and 50 in detention. This facility costs the state about $8.6 million per year to operate. There are five probation officers and one intake supervisor located at McLaughlin, and an additional nine probation officers and two supervisors in the downtown Anchorage DHHS juvenile probation office. Each probation officer monitors a caseload of approximately 35-40 juveniles for whom delinquency petitions have been filed. The statewide budget for juvenile intake and probation is approximately $4.5 million for F.Y. 1995. DHHS employs a total of 58 juvenile intake and probation officers and supervisors statewide.

It doesn't take a mathematician to figure out that even when juveniles are caught engaging in illegal activity, there is a small chance that they will receive punishment which includes supervision beyond brief contact by a correctional or governmental power. The vast majority will receive the proverbial "slap on the wrist". Due to the natural tendency to concentrate on more egregious offenses, those who have not committed a felony or an offense involving a weapon are not likely to receive significant attention from the authorities.

The diversionary programs that are available report very good success rates. There is a misdemeanor theft school operated by the Alaska Coalition to Prevent Shoplifting, a citizen organized non-profit Alaska Corporation, which also has an alcohol education program, the Special Program for At Risk Kids (SPARK). According to the director, Dr. Thel Davis, they have approximately 1,200 juveniles per year referred through the antishoplifting program. They report a recidivism rate of less than 10%. There is a lack of diversionary options for those who are between first-time shoplifters and serious (felony) offenders. These "chronic mischief-makers" who commit offenses such as vandalism, joyriding, multiple shoplifting offenses, minor assaults, or misdemeanor property damage are least likely to receive effective attention.

Turning to some recent changes designed to address the problem, it appears that the methods being tried now, with the exception of the "Use it, Lose it" alcohol law, do not reach the larger problem. The potential effectiveness of imposing greater parental responsibility for the misdeeds of children is largely untested. Undoubtedly there are questions about the due process issues raised by vicarious criminal responsibility of parents. The more traditional avenue of civil liability may be made more severe by raising the extent of liability. However, the effect of increased civil liability of parents is uncertain, as parental liability has not been imposed to any great extent, even though parental civil liability for damages caused by their children has been available for years.

Juvenile waiver changes may go far in terms of pacifying the societal urge to mete out punishment for heinous crimes, but they do not appear to be designed for or be effective as a deterrent to minor offenses. Relaxed juvenile waiver for felonies is no more a tool for reducing minor offenses committed by juveniles than the possibility of imposition of the death penalty for murder is a tool for reducing shoplifting or drunk driving.

The offenses for which juvenile waiver is now easier are the most severe felonies. Misdemeanors and infractions committed by juveniles are still given the same or less severe treatment as they were five years ago. Most who have experience with children would agree that the consequences must be swift and sure if the desired deterrent value is to be achieved. Our current system provides punishment which is neither swift nor sure. Many minor offenses, the type that are most likely to be a minor's first contact with the criminal justice system, result in little more than a lecture. This sends a message that the system isn't really serious about punishment and, rather than deterring improper conduct, is likely to reduce fear of getting caught in many instances.

One exception to this general rule is the "Use it, Lose it" law that went into effect in July of 1994. Under that law, minors who are caught in possession of alcohol may have their driver's licenses or driving privileges revoked whether they are in a vehicle or not. The penalty is swift and sure, even for a minor offense which would otherwise only receive a letter or phone call to the home for a first offender with no other record. While this may have a significant deterrent value, two concerns about its effectiveness are raised by the follow up. First, what can you do if revoking the operator's license is ineffective? and second, how will the system treat these individuals when and if they drive without a license?

"There is a great concern about addressing juvenile crime, but there is a lack of tangible attention to what many, including myself, consider to be the most effective long-term strategy."

These issues, and the balance of the severity of the punishment in view of the violative conduct (picture a 20-year-old with a single beer on the sidewalk outside of his or her house), may make this approach less desirable than a more comprehensive system providing for education and diversionary programs, including education and community service for a broad range of minor offenses.

The overall conclusion I draw is that there is a great concern about addressing juvenile crime, but there is a lack of tangible attention to what many, including myself, consider to be the most effective long-term strategy, attention to first time minor offenses with education and counseling. Once a juvenile has received the "slap on the hand" a couple of times, most would concur that the effectiveness of threats of punishment is diminished.

In order to remedy the situation there is an apparent need for devotion of resources to juvenile intake and probation for minor offenses, including a heavy emphasis on education, responsibility, and monitoring.

IN THE TRIAL COURTS FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

In the Matter of:	)	
Implementation of Civil Rule	)	3AN-AO-95-06
16.1 in Anchorage Superior	)	
Court Civil Cases.	)	

ORDER

Effective July 15, 1995 all civil cases (regardless of their estimated trial time requirement) filed in the Anchorage Superior Court with the exception of domestic, adoption proceedings, children's proceedings, probate proceedings, confessions of judgment, registrations of foreign judgment, writs of habeas corpus, Criminal Rule 35.1 proceedings, change of name proceedings, enforcement of arbitration awards, and class actions will be presumptively subject to the provisions of Alaska Rule of Civil Procedure 16.1. (This is commonly known as the fast track rule.) Medical malpractice actions will be subject to the provisions of Civil Rule 16.1 beginning with the filing of the expert advisory panel's report. Eminent domain actions will be subject to the provisions of Civil Rule 16.1 beginning with the filing of the master's report. In these cases, deadlines under Civil Rule 16.1 will be calculated from the date of filing the report rather than the date of service of the summons and complaint.

If counsel believe a case should not be subject to the fast track timetable because of special circumstances, including but not limited to complexity, number of parties, or unavoidable time requirements to complete pretrial discovery , counsel must make application to the judge assigned the case to be relieved of the fast track timetable requirements. Upon a showing of good cause and after giving the opposing sides an opportunity to file a response, the assigned judge may remove the case from the fast track. Upon removing a case from fast track application, the assigned judge shall set the date for the pretrial scheduling conference provided for under Alaska Rule of Civil Procedure 16(b)

This order is entered pursuant to Civil Rule 16.l(b)(1)

DATED at Anchorage, Alaska this 30th day of June, 1995.

/s/ Karl S. Johnstone
Presiding Judge

NEWS FROM THE BAR

At the Board of Governors meeting on May 8-10, 1995, the Board of Governors took the following action:

• Rejected a stipulation for a 3 month suspension and recommended bar counsel come back with a stipulation for a public censure because there was little potential injury to the client and the mitigators outweigh the aggravators;

• Accepted a stipulation for disbarment;

• Rejected a stipulation for discipline for a public censure because they believed that a short period of suspension would be appropriate and the probation period needs to be longer;

• Adopted the findings in a discipline case but rejected the recommendation for a 1 year suspension and recommended to the court that there be a 3 year suspension with 2 years to serve;

• Voted to publish in the Bar Rag a proposed rule amendment which would give the board or hearing committee the ability to impose sanctions of up to $500 on attorneys appearing before them;

• Voted to send two amendments to the fee arbitration rules to the supreme court;

• Granted permission to bar counsel to use information obtained from a Lawyers' Fund for Client Protection claim for discipline purposes;

• Certified the admission of the applicants who had passed the February 1995 bar exam;

• Approved the admission of the reciprocity applicants, pending the receipt of their fingerprint card reports from the FBI;

• Heard a report from the Executive Director on the lack of participation in the Minority Applicants Tutorial program and directed that it be available for one more bar exam and reviewed again at the August meeting;

• Heard a report from Pat Kennedy, chair of the Discipline Process Committee on the committee's work reviewing the discipline system and voted to recommend an amendment to Bar Rule 12 that would change the make-up of the appointments to the hearing committees;

• Voted to have the president appoint a committee to examine the Keller issues on mandatory bars and to get back to the board with recommendations for bylaw changes;

• Met with Judges Fabe and Greene about the draft Courtroom Protocal Guidelines and gave their input on the guidelines to the judges;

• Heard the CLE report and asked the CLE Director what it would cost to edit some of the videotapes without some of the graphics on a more regular basis;

• Voted on amendments to the Unauthorized Practice of Law rule and voted to publish it in the Bar Rag;

• Voted to deny a dues waiver request

• Voted to grant a request to waive the penalty for late payment of dues;

• Declined an invitation to sponsor a video on the courts put together by a D.C. organization;

• Voted to do several brochures, some aimed at the bar members, and others geared toward the public;

• Made the appointments to the ALSC Board of Directors as indicated by the advisory poll;

• Accepted the resignations of Jack Coyne and James Bamberger;

• Approved the transfer of Barbara Caulfield, Renee Erb, Thomas Roberts and Robin Jager-Gabbert from inactive to active status;

• Heard a report on the status of the new computer acquisition;

• Approved the minutes from the March Board of Governors meeting;

• Reviewed the resolutions for the annual business meeting

• Reviewed the results of the malpractice insurance survey and voted to create a solo and small firm practitioner committee to investigate the problems and needs of those groups; also decided to have several board members write Bar Rag articles of their impressions of the survey results and to publish some of the tables in the Bar Rag;

• Heard a report from Historians committee chair Leroy Barker on the plans of the committee to commorate the Bar's 100th anniversary in 1996 and agreed that the bar president and staff will work with the committee on this;

• Met with Ethics committee chair Bob Mahoney, and reviewed the ethics opinion regarding surreptitious taping of conversations and decided to ask the Ethics committee to draft an opinion that comes to the same result, using whatever analysis the committee thinks is appropriate, for the Board to consider and determine whether to substitute for the current version;

• Selected the following slate of officers: President, Diane Vallentine; president-elect, Beth Kerttula; vice president, David Bundy; secretary, Ethel Staton; Treasurer, John Franich;

• Reviewed the Board of Governors's goals for the past year; decided to continue the public relations subcommittee, chaired by Philip Volland.

Proposed Bar Rule 33.3

Defining the practice of law for injunctive purposes

The Board of Governors invites comments on the following proposed rule. Direct them to Deborah O'Regan at the Bar office.

Section 1. UNAUTHORIZED PRACTICE OF LAW PROHIBITED.

No person may practice law in the State of Alaska, unless that person is an active member in good standing of the Alaska Bar Association.

Section 2. "PRACTICE OF LAW" DEFINED.

For the purposes of AS 08.08.210, the practice of law includes any act, other than that excluded by Section 3 of this Rule, whether performed in court, an office or elsewhere, which attorneys or the courts customarily identify as the practice of law, including; but not limited to:

(a) holding oneself out as an attorney or lawyer admitted to practice in Alaska;

(b) providing advice, for compensation, as to the legal rights and duties applicable to the specific circumstances of any person;

(c) appearance in or conduct of litigation or performance of any act in connection with proceedings, pending or prospective, before any court or any governmental body constituted by law in this state which is operating in its adjudicative capacity;

(d) preparation of pleadings and other documents, for compensation, to be used in legal proceedings;

(e) preparation of documents and contracts, for compensation, by which legal rights are affected; or,

(f) engaging in any act or practice determined by any court of this state to constitute the practice of law.

Section 3. EXCEPTIONS TO DEFINITION OF PRACTICE OF LAW.

The following acts shall not constitute the practice of law for the purposes of Section 2 of this Rule:

(a) acts performed for and on behalf of oneself as an individual;

(b) acts performed by a paralegal or other non-lawyer assistant under the supervision and control of an attorney, and who is both legally and ethically responsible for the acts of the paralegal or nonlawyer assistant and who is (i) admitted to practice in this state or (ii) excepted from the operation of this rule by 3(j) of this rule;

(c) acts performed pursuant to the authority and in accord with the provisions of Alaska Civil Rule 81(a) (2) and Alaska Bar Rules 43, 43.1, 44, and 44.1;

(d) acts described in 2(d) of this rule when performed in the regular course of a business or non-profit organization having a primary purpose other than the performance of those acts, provided the acts are limited to the completion of forms adopted by the court system for use by nonattorneys or standardized forms prepared or reviewed by counsel;

(e) acts described in 2 (b) and (e) of this rule when performed in the regular course of a business, association, labor organization or non-profit organization having a primary purpose other than the performance of those acts;

(f) acts described in 2(c) and (d) before administrative agencies when they are specifically authorized by Supreme Court rule, statute, administrative regulation, or ordinance;

(g) acts performed by a court-appointed guardian, conservator or guardian ad litem or a governmental employee provided that such acts are part of the duties of such person and such employee is designated to perform such acts by the Commissioner or Executive Director of the agency to which such employee is assigned;

(h) acts performed by a public official as part of the duties of that official;

(i) acts described in 2(b) and (d) when performed without compensation by an incarcerated person for another incarcerated person.

(j) subject to Alaska Civil Rule 81, acts described in 2(a) - (f) when performed by an attorney authorized to practice law in another jurisdiction provided that such attorney (i) does not represent himself or herself to be a member of the Alaska Bar Association and (ii) does not have his or her principal place of business in Alaska.

Section 4. REMEDIES FOR UNAUTHORIZED PRACTICE OF LAW.

The Attorney General, the Alaska Bar Association or any affected person may maintain an action for injunctive relief in the superior court against any person who performs any act consisting or which may constitute the unauthorized practice of law within the provisions of this Rule. The superior courts may issue temporary, preliminary or permanent orders and injunctions to prevent and restrain violations of this Rule, without bond.

Section 5. DEFINITION.

The term "person" as used in this Rule includes a corporation, company, partnership, firm, association, organization, labor union, business trust, banks, governmental entity, society, or any other type of organization, as well as a natural person.

Approved for publication by Board of Governors at May 1995 meeting.

NOTICE

Bankruptcy practitioners

The Bankruptcy Reform Act of 1994 (Pub. Law 103-394), mandates the increase in compensation for a chapter 7 trustee and requires the development of a method for raising the funds sufficient to cover the increase. The Committee on the Administration of the Bankruptcy System proposed and the Judicial Conference of the United States agreed to increase the fee payable at the commencement of a chapter 7 case by $15.00 to cover the increase. In addition, a $15.00 fee will be payable to the Clerk at the time a case is converted from a chapter 12 or 13 case to a chapter 7 case.

The increases will take place on August 1, 1995, and will apply to chapter 7 cases filed on or after that date and to cases converted to chapter 7 on or after that date, regardless of when they were originally filed. Any questions can be directed to Wayne W. Wolfe, Clerk of Court, at 605 West Fourth Ave., Suite 138, Anchorage, AK 99501-2296 or Phone 271-2655.

NEWS FROM THE BAR

Bar members' views are divisive, vitriolic

By Venable Vermont, Jr.

I think these comments by the three of us about the insurance survey results may tell as much about us as they do about the results, so let me tell you up front where I am coming from. I have spent my entire 17 year career as a lawyer in the "government" sector - either as a public defender or assistant attorney general. I have never had to buy malpractice insurance, so I cannot comment on your remarks about costs or amount of coverage or discussions with clients on whether or not to reveal coverage, amounts, etc.

That said, let me move on to what impressed me. I was amazed at the divisiveness of the views, and at the vitriol with which they were expressed. Specifically, the "armed camps" were government lawyers, solo and small firm private practitioners, and larger firm practitioners. The comments reflected suspicion, mistrust, and envy all the way around.

The lines are most clearly drawn in comments to Option 5 (the "Oregon plan"). As a government lawyer, it made sense to me to question why I had to pay 100 bucks to support a program that was meant to protect the public from private practitioners. Many government lawyers - of which there were 22.7 percent in the summary - seem to agree. Yet *many* comments came in from private practitioners complaining of the proposed "free ride" for government lawyers. Government lawyers pay their own bar dues, pay into the client security fund, cannot get any kind of tax deduction, and generally don't see themselves making as much money as those in the private world. Yet many in the private bar seem to think we are over paid and over-benefitted, and would be given a free ride by the reduced rate in Option 5.

My guess is that large firm lawyers (the 38 percent of you in firms of 6 or more) are all within the 80 percent of all members who have malpractice insurance and that you have your bar dues and your premiums paid out of firm business accounts. Your main interest in the survey may be mostly theoretical, since you have already purchased insurance as part of a business decision on how to practice, and your overhead reflects the cost. The third camp - part-timers, solos, small firmers, and new practitioners - see your economic existence threatened by mandatory proposals, and want to be able to run your businesses as you see fit, including going "bare" as a legitimate lifestyle choice!

The next most interesting thing to me is that you aren't for anything - at least by majority. This is a typical Alaskan election result as far as I can tell. You are *against* all four of the "take action" proposals (1, 2, 3, and 5) and *also against* the "do nothing - no requirements" proposal (by 60 percent to 40 percent). At least you are consistent. But this does raise the issue of what you are *for*. All of us scrutinized the comments closely to see if there was a hint as to what you might favor. I, at least, could find nothing that was overwhelmingly clear.

I was quite surprised at the number of people who favored Option 5. That proposal was *disfavored* by 85.6 percent; 13.8 percent favored it. My initial impression of that option was that it was the stupidest thing I had ever seen; and it is still my impression, and apparently, a lot of you feel the same way. I could not believe anyone would support it. The 13.8 percent seem to reflect the view that we all as a group of lawyers owe a collective duty to all clients; from the comments, some of you believed that Option 5 might result in cheaper premiums than what some of you are paying now. Making the unsupported assumption that those two groups of supporters are roughly equal, that still leaves almost 7 percent of you who believe in a Big Brother Bar Association. I would have thought natural selection would have weeded you out by now.

Another interesting note on option 5 is how many of you seem to think it was a product of the insurance industry trying to get premiums from people who are going "bare." I was not on the board when the issue came up originally, but my understanding is that it was the product of plaintiffs' lawyers who wanted to assure themselves of the pot of money to go against when they could not collect from "bare" lawyers in malpractice cases. It doesn't make much difference - this proposal is dead in the water as long as I have anything to say about it.

Finally, I agreed with the comments and questions from many of you who wondered where the problem was. Were there really that many unsatisfied judgments arising out of legal malpractice claims? I have not seen the evidence of a problem, I was not aware of it, and I still can't say if it exists or not. The other board members at my first meeting (in May, in Fairbanks) assured me there was, based on the number of matters which they say come before them as problems between lawyers and clients. I am willing to listen and watch, but I am not inclined to assist in setting up a mandatory insurance program which most of you think is bad social policy and bad business practice in order to solve a problem that affects only a small handful of lawyers and clients a year.

One thing united many of you, from all sectors, and that was a feeling that you don't get very much for your $450 bar dues and that this insurance business looked like another way that the Bar Association would add to its size, function, complexity, and INTERFERENCE IN OUR BUSINESS!

Based on the statistical results and comments, one thing is clear to me - the burden is on the parties who think we need a change to show why we need it, and to provide some concrete examples. More than a few of you said: "If it ain't broke, don't fix it." If I had to guess, this whole idea won't go very far, certainly no farther than some sort of reporting requirement with no provision for mandatory coverage (similar to Option 3, which was preferred by 47 percent of you).

Any way you cut it, there is plenty of good reading here. Stop by the Bar office and look through the complete results and comments, or give me a call and borrow my copy. All of the other Board Members have a complete copy too. Just remember, there are "lies, damned lies, and statistics." There is something here for everybody.

About the insurance survey

By Diane Vallentine

As you are aware, the Board of Governors of the Alaska Bar Association has been studying the feasibility of requiring lawyers to either disclose whether or not they maintain malpractice insurance or require malpractice insurance as a condition of licensure.

Initially, uninsured attorneys became a concern of the Board during discipline proceedings where the Board saw instances of victimized clients and attorneys without malpractice insurance. The Board began investigating the possibility of a rule mandating disclosure of insurance coverage to clients. Then, at the May 1994 Annual Meeting, the Board was advised that some solo and small firm practitioners had been denied insurance. The Board considered the fact that there were practitioners desiring to obtain malpractice insurance who were unable to do so as a very serious issue affecting the Bar. The Board appointed a committee to study the possibilities for providing members with malpractice insurance, including establishing a self-insurance fund like the Oregon State Bar has had since 1978, by coverage through a commercial carrier, or by legislatively creating a pool which would distribute the risk among all insurance companies writing malpractice coverage within the state.

Then, a year ago, Robert Minto, the President of ALPS (Attorneys Liability Protection Society, the lawyer-owned malpractice insurance company which is sponsored by twelve state bars including Alaska) gave his annual report to the Board of Governors. He said that if the Board wanted to consider a mandatory insurance program, there was a "window" in the insurance market in which to act. He subsequently presented the Board with a preliminary proposal relating to such a program. Initially, the Board's reaction was that such a program would simply be too expensive for many practitioners.

Last March, the Board of Governors conducted a survey of the membership regarding malpractice insurance. The Board wanted to determine how many Alaska lawyers are in private practice without malpractice insurance and to assess whether there was a need for rules requiring either mandatory disclosure of insurance or mandatory malpractice insurance.

The Board reviewed the results of the survey at its May meeting. The results indicated that 21% of the respondents did not have malpractice insurance. A majority of the respondents were against all of the options for mandatory insurance or disclosure. Interestingly, however, a majority were also against the "do nothing" option. Over 200 pages of comments were received from members.

Three Board members have written their impressions of the survey results. If you are interested in receiving or reviewing the results and comments, contact Deborah O'Regan at the Bar office at 272-7469.

Supreme Court issues two orders

In the Disability Reinstatement matter involving Darrel J. Gardner, April 18, 1995:

IT IS ORDERED: The stipulation for discipline by consent filed on March 23, 1995, and numbered S-7001, is APPROVED. The petition for reinstatement, filed on Sept, 27, 1994 (response filed on March 23, 1995) is GRANTED. Petitioner is reinstated to Active Status effective April 15, 1995. *ninc pro tunc*. Entered by direction of the court on April 18, 1995.

--ABA File Nos. 1992D139, 1993D026; Supreme Court No. S-5544

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In the Disciplinary matter involving Jacalyn L. Bachlet, May 23, 1995:

On consideraiton of the Alaska Bar Association's request for interim suspension filed under Bar Rule 26(a), on April 28, 1995,

IT IS ORDERED: Effective immediately, the interim suspension of Jacalyn Bachlet is APPROVED. The suspension shall continue in effect pending final disposition of the disciplinary proceeding relating to this conviction.

Entered by direction of the Court on May 23, 1995.

--ABA File No. 1994D089; Supreme Court No. S-7034

State-Federal Joint Gender Equality Task Force
MEETINGS
Second Wednesday each month
Courtroom 3, Federal Courthouse
7:15 a.m.

For additional information, please call 271-3198.

NEWS FROM THE BAR

Board "tiptoes" into malpractice issue

continued from page 1

ration of the public's perception of the legal profession. If the concept of minimal financial responsibility is accepted in other contexts, we, as lawyers, should be prepared not only to encourage lawyers to maintain minimal insurance but also to alert potential clients to the fact that some lawyers are uninsured.

The Bar Survey attempted to learn what lawyers thought of five possible responses to uninsured attorneys, including doing nothing. The first option was to require minimum malpractice insurance as a condition of practice. Such a proposal raised issues as to cost and availability. If attorneys are required to be insured, it makes sense that insurance should be available to all at a reasonable price. An additional issue which was raised was whether all lawyers such as judges, public attorneys and in-house counsel truly needed malpractice insurance because they had no "clients" per se. In any event, 58% of the Alaska Bar does not support a minimum insurance requirement with the most strident opponents being uninsured attorneys. Interestingly, 56% of the lawyers working at lawfirms were supportive.

The second option was to require disclosure of insurance information. In theory, this disclosure could be solely whether an attorney was uninsured, a system comparable to California. If this were done, the client could then make the decision whether to hire the lawyer with open eyes. I was surprised that 67% of the respondents reacted negatively to this proposal with comments suggesting concerns about encouraging litigation and the invasion of privacy. Certainly, restricting disclosure to the absence of insurance would minimize interference with lawyer-client relationships and provide an incentive for attorneys to obtain insurance in order to avoid disclosure. In reviewing the survey, my conclusion was that Option 2 perhaps could have been more clearly stated.

A third option sought certification to the Alaska Bar Association as to whether an attorney was insured with the public able to obtain such information upon request. This option also was found objectionable by a slight majority, 52%, of the survey respondents. The most negative reaction to the proposal came again from uninsured lawyers. In contrast, members of law firms and government lawyers were slightly supportive (51%).

A fourth option was simply to do nothing about uninsured attorneys. While no action was favored strongly by sole practitioners and part time lawyers, 60% of the respondents in general disagreed, stating that some action should be taken to encourage minimal financial responsibility.

A final option to create a mandatory insurance program based on member assessments was resoundingly disapproved by a 86% margin. The comments suggested that this alternative was too costly for the average lawyer and too cumbersome in its administration.

Where do the survey results leave us? The problem of the uninsured and assetless lawyer injuring a client will continue to be with us. At the same time, if the problem is to be effectively addressed, I suspect that something needs to be done to make insurance available to all at reasonable expense, including sole practitioners and part-time lawyers. As a member of the profession, I think this is an issue meriting further thought.

THE OPTIONS & THE SURVEY RESULTS

NONE ARE PREFERRED, BUT 3 IS CLOSE

1 Require annual certification to the Bar of a minimum level of malpractice ($100/300) as a condition of active practice.

Do you favor Option 1?	Frequency	Valid Percent
No	920	58.2
Yes	656	41.5
Other Answer	6	0.4
Unsure	17	Missing
No Answer	69	Missing
Total	1668	

2 Require disclosure of malpractice insurance information to clients in every fee agreement as to whether the attorney is covered.

Do you favor Option 2?	Frequency	Valid Percent
No	1056	67.6
Yes	502	32.2
Other Answer	3	0.2
Unsure	5	Missing
No Answer	102	Missing
Total	1668	

Disclose amounts?	Frequency	Valid %
No	432	62.9
Yes	253	36.8
Other Answer	1	0.3
Unsure	3	Missing
No Answer/Not Applic.	978	Missing
Total	1668	

3 Require annual certification to the Bar about whether or not the attorney has malpractice insurance coverage, and that information is available to the public.

Do you favor Option 3?	Frequency	Valid Percent
No	822	52.6
Yes	735	47
Other Answer	6	0.4
Unsure	3	Missing
No Answer	102	Missing
Total	1668	

Disclose to public?	Frequency	Valid %
No	399	54.1
Yes	334	45.3
Other Answer	5	0.7
Unsure	2	Missing
No Answer/Not Applic.	928	Missing
Total	1668	

4 No requirements for attorneys to carry insurance or disclose information about malpractice insurance.

Do you favor Option 4?	Frequency	Valid Percent
No	931	60.1
Yes	616	39.7
Other Answer	3	0.2
Unsure	7	Missing
No Answer	111	Missing
Total	1668	

5 Require a mandatory insurance program based on member assessments to a self-governed fund. The assessments would be part of an attorney's dues, and the program would include liability coverage in the amount of $100,000/$300,000--with a $1,000 deductible; a full scale loss-prevention program tied into existing CLE programs; and a program specifically tied into the prevention, evaluation, and management of substance abuse problems.

Do you favor Option 5?	Frequency	Valid Percent
No	1318	85.6
Yes	213	13.8
Other Answer	8	0.5
Unsure	25	Missing
No Answer	104	Missing
Total	1668	

Are you presently covered by legal malpractice insurance?.

*Presently covered by legal malpractice insurance?**	*Frequency*	*Valid Percent*
No	349	20.9
Yes	1315	78.9
Another Answer	2	0.1
No Answer	2	Missing
Total	1668	

Note: Data corrected for government employment.

All five options defeated; course of action needed

BY BRANT MCGEE

The only certain conclusion to be drawn from the recent bar survey is that there is no consensus among Alaska lawyers regarding malpractice insurance issues. Every reform option was defeated. Even the do-nothing option lost in a 60/40% split.

A strong majority of members do not want to require the purchase of malpractice insurance or even to disclose malpractice insurance information to clients. The mandatory insurance program would be similar to Oregon's though, at a cost of nearly $3,600, it is more than twice that state's individual fee. Eighty-six percent of us voted against the mandatory program.

The only reform measure to even come close was the requirement for annual certification to the bar about whether or not an attorney has malpractice insurance coverage. This measure, which would also make the information available to the public, failed by a 53% - 47% vote.

In my review of the hundreds of comments offered by the membership, I was surprised by many commentators willingness to blame different segments of the bar and the degree to which we are splintered among government lawyers, small firm attorneys, and sole practitioners. Many resented the very notion of additional regulation by the Bar Association, while others believed that mandatory insurance was the only way that our profession could fully protect the public.

One of the best features of my job at the Office of Public Advocacy is the many contacts I have on a regular basis with lawyers around the state. While OPA contractors are required to carry malpractice insurance, I know many other lawyers who choose not to purchase malpractice coverage. Most of these individuals provide quality representation, strive to maintain a low overhead, and charge lower rates. Not a few of them are women lawyers with children who maintain a part-time practice.

While I believe that every lawyer should carry malpractice insurance, I am not yet willing to impose such a requirement on my colleagues. I might change my mind if it were demonstrated that substantial numbers of citizens were suffering uncompensated losses at the hands of attorneys.

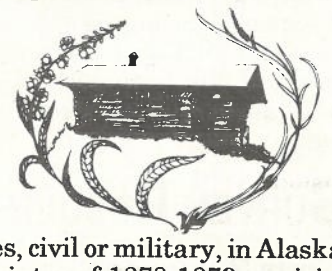
The Board of Governors should table this extraordinarily divisive issue but give the reform advocates every chance to persuade membership of the right course of action. The Board should continue its efforts to serve the bar and the public by enlarging its program to help us all become more effective lawyers.

The origins of the Alaska Bar Association

By Russ Arnett

Next year the Alaska Bar Association celebrates the one hundredth anniversary of its creation.

In 1878, Mottrone Ball, a lawyer from Virginia and a former Confederate army officer, came to Sitka as Collector of Customs. He was the only representative of the United



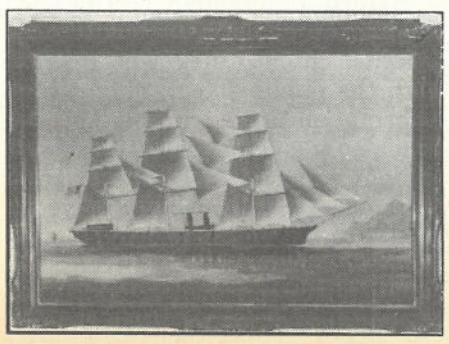
States, civil or military, in Alaska. In the winter of 1878-1879 a crisis developed between an Indian faction living near Sitka and the less than three hundred whites in the town. Two Indians had been charged with homicide and were in the Sitka guardhouse. Other tribe members had been lost at sea while employed by sealers, and the tribe was demanding compensation from Sitka's residents. The Indians were certain to attack the town. An attack was averted only because a plea for help reached the English warship *Osprey,* which placed the Indian village under the cover of its guns. Eventually the American warship *Alaska* replaced the English. The arrival of the *Alaska*, wrote Judge Arthur K. Delaney in his 1901 article on Government in Alaska, was

"when Naval rule in Alaska fairly began, and which continued to be the sole government for the Territory until the present apology for civil government was established under the Act of Congress of May 17th, 1884, known as the Organic Act."

This legislation established the District Court in and for the District of Alaska. The Court was formally organized by District Judge McAllister in May 1884 in the old barracks building in Sitka. Three attorneys were admitted to practice. The Carter Act of June 6, 1900 provided a code of practice and procedure and created three divisions, with a District Judge presiding in each. Lower court judges were called Commissioners and were given a wide variety of functions. Prior to the creation of these courts, Miner's Courts operated by common consent of the residents. A huge steel triangle would be struck, according to Judge Delaney, "and a saying which passed into a sort of miners' maxim is, that when the triangle rings nothing but justice will be dispensed." Even though Alaska contributed more to the national treasury than any other territory, it was given no legislature or delegate to Congress, unlike the other territories, all except one of which had fewer residents. Instead of convening a territorial legislature, Congress simply decided to make the statutes of Oregon the law of Alaska.

Between 1890 and 1896, the white population of Alaska increased from 4298 to 10,000. Though mining activity was increasing, the gold rush did not start until midsummer 1897, when the *S.S. Portland* returned from St. Michael to Seattle with a "ton of gold."

Town of Juneau circa 1896. Juneau Courthouse (which later burned) is on hill in upper right of picture. Photo courtesy of Alaska State Library, Juneau, Historical Photographs, Winter & Pond Collection, Photo Number PCA117-18.



U.S. Alaska, 2nd Rate, Homeward Bound, Hong Kong, China. Artist: Chinese School. Photo courtesy of Anchorage Museum of History and Art.

In November 1896, a constitution for the Alaska Bar Association was adopted. Fee for admission was one dollar, with annual dues the same. By 1901 there were more than forty lawyers in Alaska. In the early 1950s there were not many, if any, more. The bar then functioned primarily through local bar associations.

The Alaska Bar Act was passed by the 1955 Legislature, to a large extent because of two Anchorage disciplinary cases and problems with the annual bar exam.

Herald Stringer was a lawyer and the Third Division's most powerful Republican at the time of the death of District Judge Anthony J. Dimond in 1953. Herald backed the appointment of J.L. McCarrey, Jr. as his successor and told some of the Anchorage lawyers that they were going to get him whether they liked it or not. He was right. Not long afterwards he found himself before Judge McCarrey on a disciplinary matter. Judge McCarrey disqualified himself and sent the case to Fairbanks. The Fairbanks judge sent the case back to Anchorage. Assistant United States Attorney Jim Fitzgerald prosecuted the case, and Judge McCarrey suspended Herald. In the Ninth Circuit "Stringer, represented by many attorneys [Grigsby, Kay, Davis, Butcher], vehemently complained of a procedure in which he acquiesced. In our judgment, once having disqualified himself for cause, on his own motion, it was incurable error for the district judge to resume full control and try the case."

Bailey Bell was handcuffed in his law office by a Deputy Marshal because of a disciplinary charge against him and marched across the street to the old Federal Building. A Fairbanks judge who was new to Alaska and had spent most of his time in Fairbanks tried the case. He held that the prevailing ethical standards in Anchorage were so abysmal that it would be unfair if only Bailey were punished. We now realized that something had to be done, if only to quit referring Anchorage grievances to Fairbanks judges.

Three of the five unsuccessful candidates for the 1952 bar exam filed *In re Fink, Herman and Arnett,* alleging that questions were given to some candidates prior to the exam and that the secrecy system of grading was violated by at least one examiner [by announcing the first day's results that evening in the Bubble Room]. Judge Folta held, "If a member violates his oath, it is doubtful whether any system could be devised that would assure secrecy in the particular under discussion. The remedy indicated is the administrative one of removal, rather than invalidation of the examination by judicial process." He also held there was no showing of "a scheme or conspiracy, participated in by the remaining board members, or some of them, to flunk the petitioners." The smart flunkee, instead of litigating, went to work for the Attorney General, who ran the exam, and his score improved from the mid 60's in the 1952 exam to the mid 90's in the 1953 exam.

Others complained that the examiners did not expeditiously grade the exams because they took five months one year and eleven months another year to grade fewer than twenty papers.

The 1955 Legislature had a good number of able lawyers. Led by Representative Kalamarides, they answered the question of whether the lawyers could do a better job on discipline and admissions with "Why not?" The Legislature passed our Bar Act.

Bankruptcy Briefs

Personal injury awards and exceptions

Not infrequently when an individual suffers a personal injury bankruptcy follows. This article examines the extent to which a personal injury award is exempt.

If federal exemptions are elected there are two provisions specifically applicable, the right to receive or property traceable to: (1) "$15,000 on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss" [BC § 522(d) (11) (D); and (2) "payment in to the extent compensation of loss of future earnings * * * to the extent reasonably necessary for the support" [BC § 522(d) (11) (E)]. In addition, to the extent compensation consists of social security benefits or a right to receive disability payments, e.g., worker's compensation benefits, BC § 522(d) (10) (A) or (C) may apply. Also, a debtor may claim up to $8,300 as exempt under BC § 522(d) (5).

Before launching a discussion of the applicability and interaction of these exemptions, one must bear in mind three basic rules: (1) exemptions are liberally construed in favor of the debtor [*Augustine v. United States,* 675 F2d 582 (CA3 1982)]; (2) the burden of proof is on the party objecting to the claimed exemption [FRBP 4003(c)]; and (3) an objection to exemptions must be made timely [FRBP 4003(b)] or the "exemption by declaration" rule may apply [*Taylor v. Freeland & Kronz,* 503 US 638 (1992); but see *Mercer v. Monzack,* 53 F3d 1 (CA5 1995), *In re Bernard,* 40 F3d 1028 (CA9 1994) *cert. den.* 115 SCt 1695 (1995) and *In re Kahan,* 28 F3d 79 (CA9 1994) *cert. den.* 115 SCt 1100 (1995) for exceptions to application].

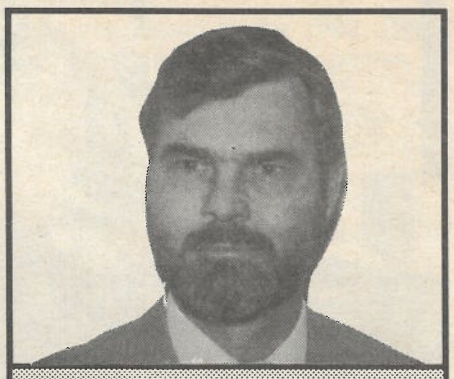
It is also necessary to note the differences between the subsections involved.

(1) 522(d) (11) (D) applies only to "bodily" injuries, while 522(d) (11) (E) applies to compensation for loss of future earnings irrespective of the source. For example, a wrongful discharge or discrimination award would not fall within 522(d) (11) (D) but, to the extent it was compensation for lost future (but not past) earnings it would be covered by 522(d) (11) (D); on the other hand, an award to an automobile accident victim may fall within both 522 (d) (11) (D) and (E) .

(2) 522(d) (11) (D) is limited to a fixed amount ($15,000), while 522(d) (11) (E) extends to the amount necessary for support.

(3) 522(d) (11) includes the right to receive as well as property traceable to payments already received; if it otherwise qualifies, the residue of the payment or the property into which it has been converted is exempt.

(4) While unlimited in amount, 522(d) (10) reaches only the right to receive benefits in *futuro;* benefits already received are not exempt whether or not "traceable to" the disability payments. [*Matter of Treadwell,* 699 F2d 1050 (CA11 1983); *In re Williams,* 1995 WL 274340 (Bkrtcy.WD.Mich 1995)]



Thomas Yerbich

(5) Application of 522(d) (10) (C) is limited to contractual benefits or public assistance programs and is inapplicable to tort awards. [*See In re Haynes,* 146 BR 779 (Bkrtcy.SD.Ill 1992) (construing identical Illinois statute); *In re Buchholz,* 144 BR 443 (Bkrtcy.ND.Ia 1992) (construing identical Iowa statute)]

(6) Generally, although 522(d) (11) (D) and (E) may be applied to the same award [*In re Territo,* 36 BR 667 (Bkrtcy.ED.NY 1984); *see In re Cramer,* 130 BR 193 (Bkrtcy.ED.Pa 1991); *contra In re Russell,* 148 BR 564 (Bkrtcy.ED.Ark 1992)], where 522(d) (10) (C) applies, e.g., worker's compensation awards, it alone applies and 522(d) (11) is inapplicable [*In re Williams,* supra]

(7) If the debtor has suffered multiple accidents the better view, based on the plain language of the statute, is that a debtor is entitled to an exemption for each separate accident. [*In re Marcus,* 172 BR 502 (Bkrtcy.D.Conn 1994); but see *In re Rhodes,* 147 BR 443 (Bkrtcy.ND.Ill 1992)]

Timing of the bankruptcy filing is the first question addressed. If the applicable exemption is 522(d) (11), it does not matter when the bankruptcy petition is filed, the exemption extends to proceeds (or "fruits") already received. On the other hand, 522(d) (10) does not exempt proceeds (or "fruits") received before the petition is filed. Where 522(d) (10) applies, should bankruptcy be a distinct possibility, serious consideration should be given to filing the petition before the award is made. This is particularly true where the debtor expects a lump-sum award based on permanent disability.

One question that frequently arises, since it excludes pain and suffering, actual pecuniary loss, and future earnings covered by 522(d) (11) (E), the traditional pillars of personal injury recovery, just what does 522(d) (11) (D) cover? The answer is really quite simple, there are other compensable losses associated with bodily injury: (1) loss of a limb; (2) diminished mobility; (3) disruption or diminution in lifestyle, either temporary or permanent; (4) loss of consortium; and (5) functional impairment. Moreover, the pain and suffering exclusion has also been narrowly construed - excluding only mental, *not physical,* pain and suffering, the latter being the very essence of "bodily injury" [*In re Territo, supra*]

Another frequent question involves the so-called "structured settlement" where the debtor receives annuity-type payments spread over several years using a spendthrift trust funded by the tortfeasor. Does this change the character so as to exclude the award under BC § 541(c) (2)? Probably not, because structured settlements are effectively settlor trusts, which are not generally recognized as spendthrift trusts. [*In re Ziegler,* 156 BR 151 (Bkrtcy.WD.Pa 1993)] However, it may nevertheless be exempt under 522(d) (11) (E) as compensation for lost future earnings. [*See In re Chaney,* 151 BR 147 (Bkrtcy.WD.Tenn 1993) (applying identical Tennessee law)]

Once you have determined 522(d) (11) applies, how do you determine the amount that may be claimed as exempt? The first problem commonly faced is allocation of the award between its various elements, e.g., medical expenses, lost wages, lost future earnings, and pain and suffering. If the award is allocated either by special verdict or the settlement agreement, that is determinative of the allocation. However, where, as is the usual case, the award is in a lump-sum, some other evidence of allocation must be adduced. If the award came after a trial, the evidence of damages introduced is the best source of allocation. If the award resulted from a settlement, one may refer to any discovery conducted pre-settlement or the "demand letter" from debtor's counsel to opposing counsel, which may provide a breakdown of damages.

Because the burden of proof falls on the party objecting to the claimed exemption, the quantum of evidence required by the debtor to support claimed exemptions is relatively light. Courts commonly either assume that the award must have included an amount equal to the 522(d) (11) (D) limit for bodily injury or, debtor having introduced some credible evidence supporting characterization within 522(d) (11) (D) or (E), accepts debtor's characterization in the absence of evidence to the contrary that outweighs debtor's evidence.

One cautionary note, a prior inconsistent position may come back to haunt the debtor. For example, a debtor who has previously testified the award was paid for lost earnings or claimed the entire award was on account of personal injury to avoid payment of taxes on any part of the award, may be precluded from asserting that the award was for lost future earnings. [*In re Rockefeller,* 100 BR 874 (Bkrtcy.Ed.Mich) *aff'd* 109 BR 725 (ED.Mich 1989); *In re Davis,* 105 BR 288 (Bkrtcy.WD.Pa 1989) *rev'd on other grounds sub nom Taylor v. Freeland & Kronz,* 938 F2d 420 (CA3 1991) affld 503 US 638 (1992)]

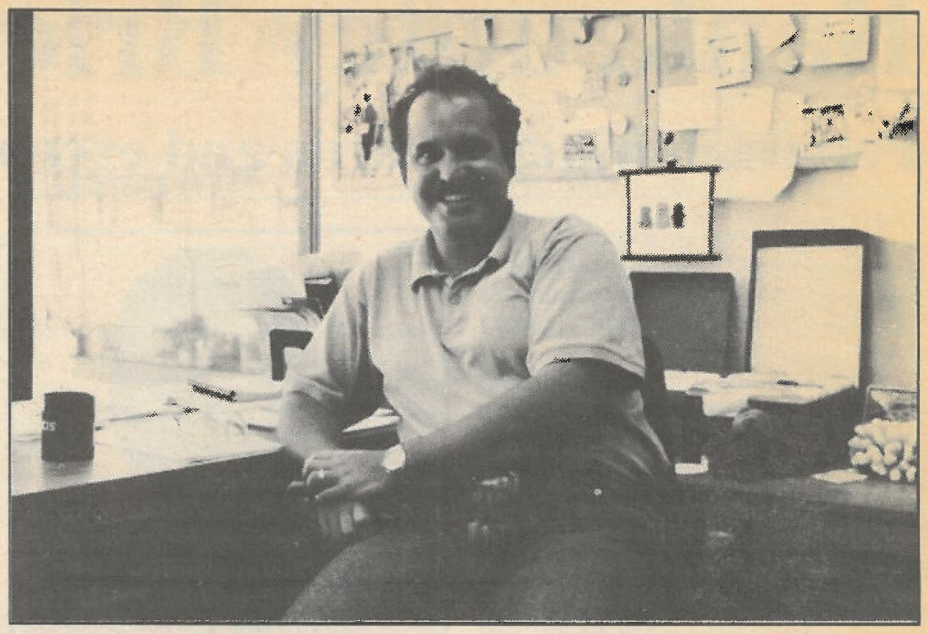
Another factor to be weighed in "characterization" is the monetary limits of each applicable subsection. If claimed under 522(d) (11) (D), the exemption caps at $15,000, while 522(d) (11) (E) is limited by "reasonably necessary for support." In applying the "reasonably necessary" limitation, which appears in several provisions of the Code, the courts look at multiple factors: (1) present and anticipated living expenses; (2) present and anticipated income from all sources; (3) age of debtor and any dependents; (4) health of debtor and dependents; (5) ability to work and make a living; (6) job skills, training, experience and education; (7) other assets, including exempt assets; (8) liquidity of assets; (9) special needs of debtor or dependents; and (10) other financial obligations, including support obligations.

In the event the debtor is a dependent of the injured party, he or she is entitled to claim the exemptions under 522(d) (11) (D) and (E). In addition, if the award results from a wrongful death, a dependent of the decedent may claim the proceeds as exempt under 522(d) (11) (B), subject to the "reasonably necessary for support" limitation.

If state (Alaska) exemptions are elected, the exemption of earnings and liquid assets applies to disability benefits [AS S 09.38.030(e) (1)] and bodily injury awards [AS § 09.38.030(e)(3)]. However, the Alaska exemption is of dubious value to a debtor. Unless the award has not been received, thereby triggering 09.38.030(a) [$402.50 weekly], a debtor is limited to the $1,650 provided by 09.38.030(b). Whether 09.38.030(a) of 09.38.030(b) applies, the exemption available is considerably less than is available under the federal exemptions. [It is hard to imagine that, despite the parsimonious attitude of the Alaska Legislature regarding the cost of living (except, of course, when it comes to legislative per diem), "reasonably necessary" for support does not exceed $402.50/weekly!]

In representing a plaintiff in a personal injury lawsuit, it is never too early to consider the possibility of bankruptcy with a view to building an evidentiary base for allocation.

Some day, you'll be on Seth's list



Seth and his card file in his Anchorage office.

If you haven't heard from Seth Eames, you will. Some day, when you least expect it, when life is going smooth, all your clients are happy, and you actually have mad money left over for the month (and time to do something with it)....that's when you'll hear from Seth Eames.

As the pro-bono coordinator for the Alaska Legal Services Corp. (ALSC), Eames searches for donated legal time to assist Alaskans in problems that need a lawyer's expertise, whether they can afford it or not. Eames handles the "or not" segment of the consumers of legal services in civil matters.

His job is to convince Alaska's lawyers to volunteer an average of 20 hours to help someone in need. He has 950 lawyers on his list—including Marilyn Stowell, Skip Cook, Bob Groseclose, and Barbara Schuhmann.

All of these attorneys, along with Eames himself, received distinguished pro bono awards during the Alaska Bar Association annual meeting in May. (If you missed the convention, you really ought to consider going next year.) Here's why they won, and why attorney involvement has ranked Alaska's Bar as first in the nation for pro bono participation.

Seth Eames

Eames came to Alaska because he ran out of money in western Canada and refused to call his New York family for more. Eames is not an attorney and has a liberal arts degree from Sarah Lawrence College and a master's degree in existential theater from Hunter College in the City University of New York system. It's a good thing Eames is an actor, because it helps. His tactics to procure free time appear to be shameless. "I've had no legal training at all, I'm just a con man," says Eames. Clearly, Eames is glowing from his award, bestowed by the lawyers, themselves, at the very highest level of the Bar Association. (And a mandatory bar, at that).

The roaming-actor-and-stage-manager by training from the East Coast wandered into town in 1981 with $15 (far more than Wally Hickel's 37.5 cents, but then, with inflation, they might be equal). He worked at the Anchorage Opera Co. as production director. Got fired by the opera twice for infuriating "head honchos," as Seth puts it. He was good, but he didn't adapt to the laid-back Alaska stage. He believed in the discipline and structure you find in the theater on the East Coast. He sold hotdogs on the street for awhile, and fell in love with "a gorgeous blond woman" at the Dancing Bears Square Dance Club weekend getaway. They were married, of course, and now, 10 years later, Seth has three great children, aged 7, 6 and 4.

During this last decade, Seth Eames discovered that he'd better settle down, and that's how he landed at the Alaska Pro Bono program. "I was looking for regular work—I was thinking: I can't type, can't spell, can't do plumbing, but I can think and shoot the blarney with the best of them—the Law!" Eames got a bunch of legal books, studied for the LSAT, and decided to become a paralegal. He heard about a job in the ALSC office (a temporary file clerk, $6 per hour) and took it. "I was desperate. I'd sent out maybe 1,000 resumes and only one called me back," said Eames. After 8 weeks, he asked Robert Hickerson, the ALSC executive director for a raise to $8; it was suggested that he apply for the vacant pro bono coordinator position. He did and got the job for $20,000 per year.

He's been in hog heaven ever since. His family has a long, long history of public service social activism, and they would approve of such work. It was a program he could build from the ground up. And build it he has.

Alaska's pro bono program gets 5,000 requests for service each year. Perhaps 20% of them will result in that call from Eames for attorney assistance. To meet the needs of the people who walk in the ALSC's door, Eames has managed to compel 60% of Alaska's potential pro bono attorneys to sign up as volunteers. No other state comes close to this participation. (Judges, DA's, legal services attorneys and public defenders are among those who are excluded from pro bono work referrals from ALSC).

Eames does a yearly registration drive by mail, lurks at "baby attorney" swearing-in ceremonies, buttonholes attorneys at parties and luncheons, calls by phone, and stops people on the street to find volunteers. "You pretty much have to die to get off my list," he said.

He's not overly fond of mandatory pro bono programs, because he feels doing the work should be "what you want to do or feel ethically obliged to do—not because your license depends on it," Eames says. "I've never had anyone in Alaska say no to me. Every attorney does pro bono work of some sort; I try to make it as painless as possible."

Eames uses a filing system of 5 x 8 index cards to keep tabs on the roughly 1,000 volunteers he has on his list. But The List does not stop there. He's got 125 doctors, 12 CPA's, 12 private investigators, 26 paralegals, and 100% of court reporters (Alaska Stenotype Reporters received a pro bono award this year.) Other miscellaneous specialists--engineers, for example--volunteer time to make their expertise accessible to ALSC clients in legal matters. No other state has extended its pro bono program to embrace these related, costly services.

And, reasoning that there are some legal problems that are commonplace, he organized clinics around the state to educate low-income Alaskans on their rights in family, divorce, child custody, and bankruptcy matters—a way to serve more clients and stretch staff time. Eames uses pro bono volunteers for the clinics, too. Other states don't do clinics, either.

No matter how esoteric your expertise in law, there will be an Alaska Legal Services Corp. case that will need it. Seth will probably give you a call.

Cook Schuhmann & Groseclose

Skip Cook's lawfirm—Cook Schuhmann & Groseclose, Inc. in Fairbanks — received the distinguished pro bono award for law firm participation.

Chief Justice Daniel Moore (left) gives Skip Cook the 1995 award for pro bono service by a law firm.

Why? "I'm not entirely sure," said Cook. "I suppose it's because we've been willing to take our share and more of cases when Seth Eames calls us...or we're dumb enough not to say 'no'. I guess Seth is just a sweet-talker."

Cook Schuhmann & Groseclose handles primarily family law cases for ALSC. "As a matter of practice, we say that our attorneys will take one case a year," said Cook. But some cases require significantly more than one year's effort; still others are emergencies in which the client needs assistance immediately.

For Cook's lawfirm, accepting the call from ASLC is simply a matter of obligation. "We don't force our people to take a pro bono case, but we encourage them to do so. There are people in need of legal assistance; some of them can't afford it; and it's got to be provided somewhere," said Cook.

He estimates that the firm's partners and associates log about 600 hours annually in pro bono work for ALSC. Beyond that, the firm assists non-profit organizations that attorneys in the office may be associated with.

"We felt very honored to get this award," said Cook.

Marilyn Stowell

As if the press of city business isn't enough, Marilyn Stowell contributes her time for pro bono work in her off hours. By day, Stowell is Deputy City Attorney for the City of Fairbanks, handling civil lawsuits and municipal utility matters.

Marilyn Stowell receives the individual award from Chief Justice Moore.

In her off hours, Stowell helps ALSC with divorce, custody and family law cases. "The cases sometimes can take a lot of time," says Stowell. "There's a lot of hand-holding and working with people to help them through a difficult situation." She'll get calls from clients in the middle of the night—calls for help in a crisis or bad moment. Her employer understands the value of the pro bono work that crosses the deputy attorney's desk. "The city's always very good about giving me the time to go to court when I need to," she said; in turn, office work must frequently be done after hours. She's not alone. Linda Dewey assists her whenever needed.

How did Stowell get involved with these cases? Someone got off Eames' list. Stowell was working for Art Robson in the mid-1980's, when an attorney in the office moved on, passing along a pro bono case to Stowell upon his departure. "I've been getting cases ever since; Seth calls a couple times a year." Since the Alaska Pro Bono Program started in 1984, you could say that Stowell was in on the ground floor.

Although she handles "just one at a time," Stowell always has a case pending. "As soon as a case is resolved, I turn in my final report to ASLC. It's not long after that before I get another call from Seth."

—Sally J. Suddock

1995 CLE Calendar

#30 August 7 2.75 cles	Chapter 13 - Bankruptcy Law Replay Site with LIVE facilitation	Centennial Hall Juneau
#30 August 8 2.75 cles	Chapter 13 - Bankruptcy Law Replay Site with LIVE facilitation	Westmark Cape Fox Ketchikan
#32 September 13 cles TBA	Trust Accounts (ALPS)	Hotel Captain Cook Anchorage
#17 September 15 6.75 cles	Elder Law Issues	Hotel Captain Cook Anchorage
#88 September 19 2.5 cles	Mandatory Ethics for New Admittees	Hotel Captain Cook Anchorage
#18 POSTPONED TIL '96	Alternate Dispute Resolution	Hotel Captain Cook Anchorage
#88 September 22 2.5 cles	Mandatory Ethics for New Admittees (NV)	Centennial Hall Juneau
#88 October 6 2.5 cles	Mandatory Ethics for New Admittees (NV)	Westmark Hotel Fairbanks
#10 October 18 cles TBA	8th Annual AK Native Law Conference	Hilton Hotel Anchorage

Getting Together

Collaborating with the enemy and good old boys

The phrase I use must often to describe win-win negotiations of which mediation is a structured format, is "collaborative negotiations." A few yeas ago however, a participant in a mediation workshop I was presenting was a master sergeant from Fort Richardson. Upon hearing the phrase he announced that he hated it. After all, collaboration is something that you do with the enemy.

The collaborative model of solving problems is spreading. It is a part of a shift in worldview that is affecting the globe. But old ways of thinking die hard, as indeed they should when they contain valuable information which has helped society to function. Two aspects of collaboration are suspect to our traditional ways of thinking. Collaborating with the enemy is one. The other is more a matter of the enemy collaborating with themselves. Collaboration is used in "good old boy" networks, whereby the existing power structure maintains its power over the less advantaged members of society. Those of us who have been involved with poverty law or the civil rights movement are very much aware of the potential negative power of such good old boy methods.

A recent study about small claims mediation brings these concerns home to the mediation movement. The study is discussed in *Forum,* a publication of the National Institute of Dispute Resolution (Summer, 1994; Number 26). It found that in mediating cross cultural disputes, non-minority parties received superior outcomes when the mediators were also non-minority. The results were skewed even where a co-mediation model was used, if either of the co-mediators was non-minority. Only when both of the co-mediators were minority group members were the biased outcomes eliminated. Interestingly the minority parties' satisfaction level with the mediation process was equal to that of the non-minority parties, even though their outcomes were inferior.

Drew Peterson

The study raises fascinating implications for the mediation movement. From a cynical perspective it can be taken as evidence that it is impossible to level the playing field in cross cultural disputes, as mediators promise us that they can do. From a more hopeful point of view it demonstrates that we still have much to learn about how to use collaborative methods to balance power inequities between people, especially those in cross cultural disputes.

The greatest challenge to the mediation movement is to find methods and techniques that empower rather than disempower parties. This is also the greatest challenge to the American court system. Studies of disparate sentencing and cultural bias in the court system demonstrate that the issue is not limited to mediation. Those of us in the legal profession are all in the dispute resolution business; we are all in the same boat.

Traditional legal methods emphasize formal proceedings, with parties represented by spokespersons. Decisions are rendered by neutral judges and juries. Judges are to decide legal matters based upon logic, reason, and legal precedent. Juries are to decide factual issues based upon a balanced review of evidence presented to them. Such traditional legal methods are expensive, which puts impoverished individuals at a disadvantage. The use of spokespersons to do most of the talking evens out the playing field somewhat, especially if the spokespersons are of the dominant culture and the disputant is not. The judge is likely to be from the dominant culture, or at least comfortable in working in it. A primary innovation and safeguard for individuals is to have factual issues decided by a jury of their peers. Juries are likely to reflect the dominant cultural group in the community, however, which may not be of much assistance to individuals who are not in that group.

Thus the traditional system is a mixed bag of empowering and disempowering features when it comes to dealing with cultural minorities. But it does include some attractive features for empowering minorities. The proudest moments of the American legal system have come from the application of rights-based legal methods to issues of fundamental constitutional rights, notably through the civil rights movement.

In contrast to the formal methods used by the traditional legal system, collaborative methods emphasize the use of empathy and improved communications skills between parties to seek solutions to disputes that provide or neutral statements. The disputants do most of their own talking. Attorneys are used primarily as advisors, and may not even be present during the negotiation sessions. The parties are guided by the mediator through a structured negotiation process which helps them to 1.) hear each other's point of view, 2.) define the issues in dispute, 3.) seek multiple options which provide for mutual gain, 4.) find solutions that provide the maximum benefit to all sides, and 5.) formalize their agreements to insure mutual understanding and avoid future disputes.

Collaborative methods, when successful, may "feel better" to the disputants. But the lack of spokespersons involved directly in the negotiating process may leave individuals from the non-dominant culture feeling that they should defer to the other's wishes. This may be especially true when the mediators are also from the dominant cultural group. Mediators may give clues, even subconsciously, of being aligned with their cultural counterparts. Or they may be perceived as such even where it is not so.

Many techniques are being used in mediation to avoid such effects, and progress is being made. Some possibilities include:

"To provide real benefit for people of disparate cultures, collaborative methods must do more than merely feel better."

• Caucusing separately with the parties to explore their concerns

• Using objective criteria for measuring proposed solutions

•Bringing in outside experts

•Use of multiple sessions or breaks to allow time for full consideration of options outcomes.

•Bringing advocates more actively into the mediation process, or

•Joint reality testing by the mediator to anticipate and avoid skewed

Such techniques can help to avoid cultural biases in mediated cases. But they can also create further problems. Caucuses are particularly subject to abuse if any element of pressure is involved.

The primary challenge to the dispute resolution field is to find better methods of obtaining justice between people of different backgrounds and unequal power.

Collaborative methods have much to offer to this effort. But they must be used cautiously and with the goal of fairness and justice always in mind. Otherwise they can simply lead to good old boy results, perpetuating the existing power structure.

The Albuquerque study illustrates that the job is a harder one than might at first appear as those of us in the ADR movement get excited about the "feel better" aspects of collaborative methods. To provide real benefit for people of disparate cultures, collaborative methods must do more than merely feel better. They need to lead to results that are actually fair and just.

Bar People

Foster Pepper & Shefelman, a large Pacific Northwest law firm, recently opened an office in Anchorage. "Our presence in Alaska reflects Foster Pepper's commitment to our growing client base in the area," said Philo Winberry, the firm's Managing Partner. "Our Alaskan clients wanted us to be there."

Clients include the Alaska Permanent Fund, the Alaska Industrial Development and Export Authority, the Alaska Housing Finance Corporation, and numerous municipalities including the Greater Anchorage Borough (Municipality of Anchorage) and the North Slope Borough.

The office is staffed with four local lawyers: **Jon Rubini** and **Susan Reeves**, who are of counsel to the firm and practice together as Rubini & Reeves, **Gail Shubert**, and **Glenn Price.**

Foster Pepper & Shefelman's other offices are located in Seattle, Bellevue, and Portland.

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The partnership of Stump & Stump is dissolving as of July 1, 1995. **W. Clark Stump** will continue practicing as a sole proprietor using the law firm name of Stump & Stump. **C. Keith Stump** will continue practicing separately until his departure from Ketchikan in the spring of 1996.

Until then, both W. Clark Stump and C. Keith Stump will remain in the offices located at 306 Main Street, Suite 311, Ketchikan and will share the current Stump & Stump phone numbers.

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Matthew W. Claman has joined the law firm of Lane Powell Spears Lubersky in Anchorage as an associate and will concentrate his practice in professional malpractice, white collar criminal defense and appeals litigation. He was formerly with the law firm of Preston Gates & Ellis in Anchorage.

Claman received his law degree from the University of Texas Law School and his undergraduate degree from Colorado College.

Based in the Pacific Northwest, Lane Powell Spears Lubersky employs over 260 attorneys in Anchorage, Fairbanks, Seattle, Olympia, Mount Vernon, Portland, Los Angeles, San Francisco and London.

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Brent A. Johnson had an open house for clients at his new office in June. He's now at 507 E. Street, Suite 200.

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James Forbes, formerly as assistant attorney general and chief of the state's Antitrust and Consumer Protection Division, is now of counsel to Ingaldson Maassen, P.C.

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Recent Alaska Supreme Court Opinions are now available on the Internet's World Wide Web within hours of their release by the Alaska Court system. Alaska is now the second state to have its Supreme Court Opinions available on the Internet. They can be found at http://touchngo.com/sp/sp.html, which is operated by Touch N' Go Systems. The company has also set up the Alaska Legal Resource Center, providing links to the Alaska Statutes, US Supreme Court Opinions, the U.S. Code, and other Alaska and national legal resources. The Alaska Legal Resource Center can be found at "http://touchngo.com/lglcntr/lglcntr.ht

Touch N' Go Systems, established last year by local attorney **Jim Gottstein** and computer expert Steve Snyder, is a computer consulting and software development company.

Eclectic Blues

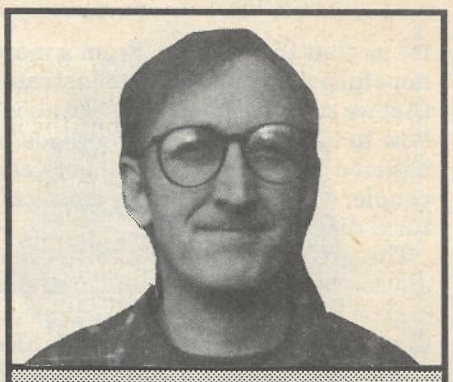
Basic truths

There are a few basic truths. Everyone dies. Most people pay taxes. Teenagers and tourists are slaves to the current goofy garment tread. We in Ketchikan know this. At least, we thought we did.

Take the cap phenomenon. Twenty-five years ago only farmers and ball players wore caps. The baseballers' caps reflected their team allegiance. Farmers wore feed caps advertising fertilizer or a seed company. The farmers in my family made it a point of honor never to pay for a feed cap unless their wives declared their old one as a health hazard before spring planting season cap giveaway.

Alaska caught the cap trend when fishing lodges and other Alaskan industries figured out that they could get people to pay to have their forehead used as advertising space. This spawned the face front feed cap movement. I developed a close relationship with a Swanson's Marina cap while in Bethel which protected my balding noggin from mosquitoes and the rain.

Alaska teenagers were quick to



Dan Branch

don caps, being, for the most part, content to keep them pointed in the right direction. Then MTV brought rap music to the great land. Thanks to that cultural Trojan Horse, our youth started wandering their favorite hangouts in baggy warm-up coats with ball caps pointed the wrong direction. In Ketchikan, where folks deal with thirteen feet of rain each year, this is not a smart use of your clothing dollar. Oversized starter jackets absorb a lot of water, and wearing a ball cap backwards won't keep rain off your face. But hey, our kids are slaves to fashion.

I was resigned to seeing my younger neighbors skulking around the Big Mac with twisted Rockies' hats when a new fashion wind swept through Alaska's First City. Young trend-setters caught up in the storm now sport windbreakers and ball caps pointed in the right direction. Before parents in the rest of Alaska begin to rejoice at this news, take care. There is a catch. Those who pass by wearing front-facing ball caps will be riding undersized bicycles and stopping in front of you on the sidewalk to perform stunts. It's stranger than middle-aged men going to work in fancy basketball shoes.

Tiny-biked teenagers are not the only trend-setters making strange fashion statements on Ketchikan's streets. The tourists are getting into the deal too. In years past, cruise ship tourists could be counted on to show up in the gaudiest outfits ever to escape from a sweat shop. On rainy days they would don clear plastic rain gear, apparently designed to let the glory of the wearer's brightly-toned running suit show through. All that has changed.

It happened in May when the first group of shiny cruise ships pulled up to Ketchikan's fancy new cement dock. Gangplanks were moved into place, allowing a steam of tourists access to waiting tour buses. Locals, expecting cheap plastic rain gear and gaudy fleece running suits, were stunned. The early crop of tourists dressed like normal folks.

This trend did not go unnoticed by the local press. Recently, two pleasantly attired tourists from Chicago were snagged off the sidewalk by a member of our local radio press corps. The stunned couple soon found themselves seated in a tiny studio.

"Where is your velour?" the newscaster asked.

"What?" one of the stunned visitors responded.

"How come you are wearing normal clothes?" they were asked again.

Clutching camcorders close to their J. Crew-clothed chests, the tourists struggled in vain for an answer. They were allowed to leave without further incident, but only after claiming to be Mr. and Mrs. Richard Daley.

I hoped that this well-dressed tourist phenomenon would end with the cheap cruise ship fares of May. Unfortunately, we are now in the throes of June and normally clothed tourists continue to come. Now, until they speak, it is hard to tell the visitors from the locals. I am worried. What will we have to talk about when the big boats leave in September?

The Northern literary life

By Mark Andrews

Me a poet! I have been chosen as a "rare talent" by none other than the National Library of Poetry, whose books are printed on fine milled paper which will last for generations as a treasured family keepsake. None of this glory would have been mine, however, if this same National Library of Poetry had not chosen humorist Dave Barry for similar honors.

In November 1994, Barry told readers of his own award from the NLP, which had chosen Barry to write one of the "best poems of 1995." Barry had not sent them a poem, but the NLP does not rest on technicalities. Here's the deal. NLP would publish Barry's poem, sight unseen. And, by the way, for the low-low price of $49.95, Barry could buy a copy of the book with his poem in it.

Barry phoned for details. The one qualification was that the poem could be no longer than 20 lines. In true Barry style, he penned a poem called "Love," which began as nonsense, went downhill from there, and eventually fell of the edge of the earth. Then Barry sent it to the NLP.

Barry closed with a plea to his ever-Alert Readers: "Send them a poem. Tell' em Dave sent you."

Inspired to become one of the best poets of 1995, I took my quill and ink, and lit the propane lamp next to the frosty window in my little log cabin with the sod roof near my dog team by my trapline near my gold claim in the valley. If you're going to be Quaintly Alaskan, you can't do things halfway.

Anyway, the Muse of the North guided my hand as I wrote "Alaska! The Great Land!":

"Alaska! Big blue glaciers zoom
in alpine fields where poets bloom.
Sourdough poets in olden times
would scout the land and pan for
rhymes.
Now the Pipeline ships those poems
from Prudhoe Bay where poets roam.
Cool poets cruise the frozen tundra,
And all poets love the Permanent
Fund-ra.
And though you print this poet's jive,
You don't get his forty-nine ninety
five."

Sweating and exhausted from this intellectual effort, I mailed my poem to the National Library of Poetry. My letter to NLP included the endorsement (warning?), "Dave sent me." A copy went to Barry.

The first answer was a nifty postcard from Barry himself. "Hey, it's brilliant," wrote the Bard of Miami, plainly a man who knows literature.

But the culture clique at NLP apparently reads neither the poems they receive nor Dave Barry's column. The National Library of Poetry sent me a congratulatory letter. The letter, somehow, speaks more volumes, more eloquently, than this poet ever could:

"It is my pleasure to inform you that, after reading and discussing your poem, our Selection Committee has certified your poem as a semi-finalist in our 1995 North American Open Poetry Contest.

"And Mark, in view of your talent, we also wish to *publish your poem* in our forthcoming anthology *Tomorrow Never Knows.*"

The poem "was selected for publication... solely on the basis of merit. We feel you have a rare talent.

"We receive thousands of poems each year and we choose only a very few for publication."

By the end of the letter, I developed frost heaves.

There is no obligation to buy, but "of course, many people do wish to own a copy of the publication in which their artistry appears." I can buy *Tomorrow Never Knows* at a special discount rate of (and I urge you to compare this number to the last two lines of my winning poem) "forty-nine ninety-five."

I duly alerted Dave Barry, who dipped into his inexhaustible supply of postcards and wrote, "Mark- Way to go. Dave Barry/ easily impressed.

There's more. The National Library of Poetry, ever vigilant to promote our precious literary heritage and the asset side of their balance sheet, continued work on my poem. In March 1995 1 received a second letter.

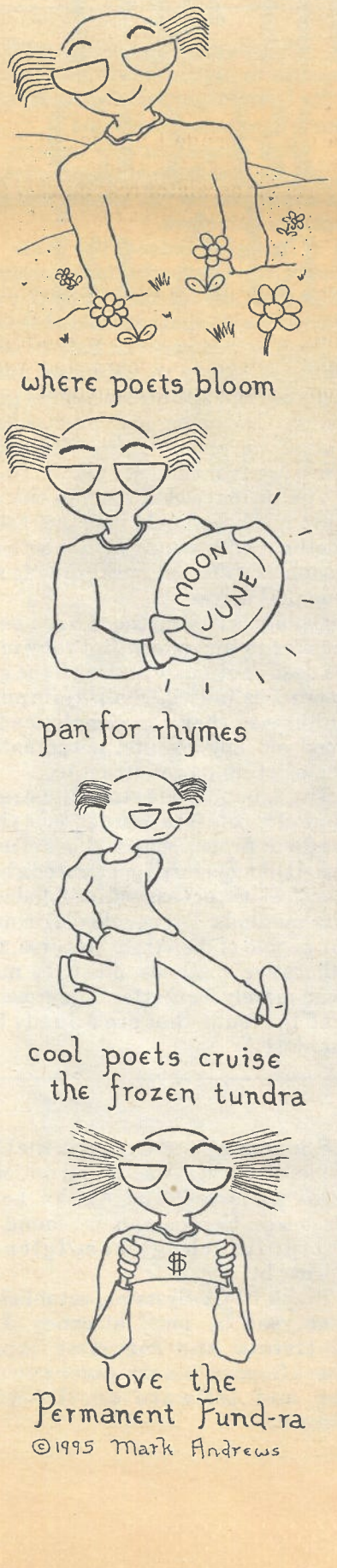
The NLP offered me not only the opportunity to buy "*Tomorrow Never Knows*" ($49.95), but also my poem mounted on a walnut-finish plaque ($38). "Every so often," said the Special Tape Acceptance Notice, "as our Editors read through the poems we receive for our contests, they personally select a few poems that they believe would have a wonderfully expressive quality if read by a professional reader." The recitation of my poem was so special that it went for $29.95.

But "Alaska! The Great Land!" will not see print on fine milled paper which will last for generations as a treasured family keepsake, nor will it grace a walnut-finish plaque, nor pass through the lips of a professional reader. You see, you must sign away your rights to the poem for this one publication, just this one.

Too much! We semi-finalists with rare talent are, and must be, very choosy where our words meet the light of day! And the newsprint of Alaska is fine by me.

All in all, I am saddened by the thought that, although a winner, I was not, like poet Dave Barry, picked as one of the best poets of 1995. But, undaunted, I look to winning in '96.

Hey, it could happen. As I read somewhere, tomorrow never knows.



Alaska, The Great Land!

By Mark Andrews

Alaska! Big blue glaciers zoom
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Sourdough poets in olden times
would scout the land and pan for rhymes.
Now the Pipeline ships those poems
from Prudhoe Bay where poets roam.
Cool poets cruise the frozen tundra,
And all poets love the Permanent Fund-ra.
And though you print this poet's jive,
You don't get his forty-nine ninety five.

Mioge revisited

Grasshopper survives Moscow Subway (no problem)

By William Satterberg

A year had passed since my 1994 participation in the State of Alaska's trade delegation to the Moscow International Oil and Gas Exhibition (MIOGE), site of the infamous MIOGE Death March of 1994. I had survived and was now a veteran of four trips to Eastern Europe.

I had learned much. Yet, there were still lessons waiting. I was the self-ordained scout for the 1995 MIOGE. In some respects, it would be a repeat performance. Still, in other ways, much had changed in the previous year.

My fledgling project of 1994 was now almost a reality. I was prepared to sign yet another agreement in the litany of agreements to agree. I now knew what to pack on my trips, and what to leave at home. My suitcase was crammed with Maalox, Pepto-Bismol, and Charmin toilet paper. More importantly, I had developed a remarkable tolerance for the mainstay of the Russian diet, vodka, and had even learned certain items of etiquette, such as not to fall asleep on the host's floor.

True, virtually all of the Alaska participants on MIOGE 1995 had changed, but their naivete clearly had not. After all, they were dumb enough to go, weren't they? As a veteran, I was now charged with helping these wide-eyed, innocent rookies to survive the rigors of metropolitan Moscow.

I could not rely on Ronda Thompson anymore. Good old Ronda, our den mother. She was gone now — a victim of the 1994 elections. When last heard of, Ronda was considering eloping to Hawaii. Ronda's 20-year-old understudy from the 1994 trip, Tara Meno, was back, and was now the fearedless leader. She was assisted by Glenn Reed, another victim of the 1994 elections, who was no longer a deputy commissioner, but had a promising future as a travel agent in Seattle.

Instead of the good old Molodeznya, a remote hotel whose name I still can't pronounce, the group was now poised to arrive at the infamous Hotel Ukraine, a massive Stalinistic monolith that looked like something out of *Ghostbusters*. The Hotel Ukraine was perched on the banks of the mighty Moscow River — an easy artillery shot from the Russian House of Government as history had proven again in 1993 during one failed coup attempt.

In short, things looked pretty bad for the home team. Kevin Krauklis and I were the only hope they had, and hope was fading fast.

My task on this trip, Kevin told me, was to decipher the intricacies of the Moscow subway system. Kevin was to be my guru. Once again, I was "little grasshopper."

Unlike the subway system of New York, which has directions spray-painted by helpful gangs on each car telling the riders where to go and what to do with themselves when they get there, the Moscow system is different.

First of all, you can't read the language. Secondly, although the subway lines are officially named by reference to various colors, such as green, brown or blue, no one refers to the name of the line by colors, regardless. Instead, the riders go by ultimate destinations for the tracks.

Not that it matters, however, since no one on the subway seems to want to talk much anyway and most riders are either sleeping or reading the latest newspaper. Moreover, when you finally do find someone to answer a question, they usually point off in some direction, and proceed to give you a 30 minute lecture in Russian or Greek, or some other equally unintelligible language. Usually, it is a little round lady with a scarf on her head, who is affectionately known as a Babushka, and who voluntarily undertakes this task, with unparalleled dedication to be sure she is clearly misunderstood.

Armed with basic directions, on the first night of my arrival, Kevin and I proceeded to try to navigating back to his apartment from somewhere in the center of Moscow. We were both suitably sloshed on cheap Russian vodka, having first bar-hopped, then crawled, from hotel to hotel in search of the elusive Metro Station.

Finally, we located the station, set out by a lighted sign with a distinctive, blurred, red "M." Next came the turnstiles. Ever since that night, I have feared these guillotine-like devices, designed to immediately stop uninvited gate crashers by snapping out from the sides of the entryway with enough force to castrate the largest elephant.

Kevin went first. No problem (Read my second article on Russia - "No Problem - A Distinctly Russian Oxymoron.") True to form, the "No Problem" effect was still very much alive and well in Russia on that late evening.

I followed Kevin closely, placing my plastic token in the coin slot. As I raced through the gate, the machine must have thought that it was time to teach this young upstart a lesson in respect for the inanimate. Both mechanical jaws immediately shot out, trying to block my way, but I was going too fast.

Fortunately, because of the liberal doses of Russian pain killer I had imbibed earlier that evening, the full agony of what next happened wasn't truly realized until the following morning. Without elaborating, just let me say that I now understand why numerous sports companies market protective athletic cups at a much deserved profit. When I awoke, both of my heads were hurting.

Having negotiated the jaws of death, Kevin and I confronted a proverbial Babushka and her 30 minute monologue. We escaped by leaping onto the nearest train. We had no idea where we were going, much to the amusement of the late night riders, who responded to our pleas for directions with laughter.

The remainder of the ride home was uneventful, although the walk to the apartment left much to be desired.

For the next several days, with more than my male dignity bruised and suffering, I followed Kevin as he led me through the subterranean labyrinth. Just when I was becoming comfortable with myself, Kevin announced that it was time to solo. I would have to make my own way downtown. Despite my attempting to reason with him, Kevin pried his leg from my grasp and walked out the door, tossing a plastic subway token at me and wishing me luck. As an afterthought, he generously had his driver give me a ride halfway to the subway station.

As I was thrown from the car, a sense of profound loneliness overcame me. I was now on my own. Truly a stranger in a strange land. But I had no choice. I had to survive.

I was caught up in a throng of people as they migrated toward the large "M" (unblurred) glowing in the distance. I dawdled a little bit outside the foreboding entrance, pretending to shop from the kiosks and street vendors. There wasn't a taxicab in sight.

Plucking up my courage, and placing my brief case protectively in front of myself, I again became caught in the current of the crowd being swept to the distinctly Russian definition of work.

The mass moved unrelentingly toward the terrible turnstiles. I turned to leave, but the crowd swept me on. Soon, I was at the turnstile. I was next. I hesitated. Someone gave me a rabbit punch to the kidney. I inserted my plastic token. The jaws mercifully stayed open. I plunged forward. In seconds, I was descending into the dark abyss on an escalator bound to hell.

At that point in my life, I had to make a momentous decision. Should I go to the left or to the right? I chose the path to the right, since to go left was literally the end of the line. I crowded onto the narrow platform.

In less than a minute, I felt a foreboding wind. A hideous blue monster roared down the tunnel, rearing its lighted head. The crowd stepped back in fear. The noise was deafening. I prepared to scream. Then everything stopped. The train had arrived.

Driven by some unforeseen force, I entered the monster and clutched a Pole. (Although I thought about clutching a Ukrainian, the Pole was closer.) The doors slammed shut, and in a jerk we were off, rumbling and swaying down the tracks for several stops as an unseen voice prophetically announced the coming and going of various stations. But I had only one station in mind, Dynamo! An appropriate name for my first solo excursion.

Just when everything seemed lost, including myself, I heard the long awaited call from the unseen voice "Dynamo." I had arrived. The doors once again opened. I leapt to the platform, racing after the crowd and a young blonde I had fallen in love with while on the ride.

As the escalator rose quickly from the depths, the first rays of sunlight reached me. Yea! I could see the light at the end of the tunnel, and it wasn't just another train. In seconds, I cleared the exit turnstile and burst into the bright Moscow morning. I had overcome my fears, and was no longer the little grasshopper.

In retrospect, I believe that I handled my initiation into the Moscow subway system with a rather professional sense of accomplishment and dignity. Still, the sight of an Alaskan on his hands and knees in the morning, kissing the pavement, may have surprised some of the laughing Muscovites. As I saw it, it was their problem, not mine. No problem.

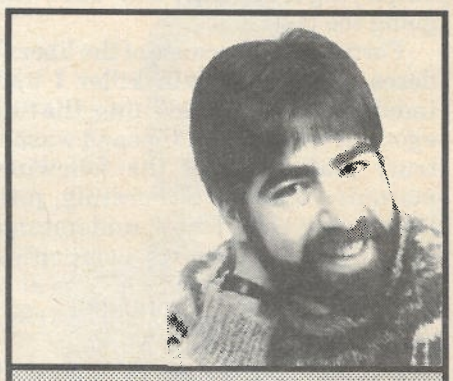
Editor's Note: A $5 bounty will be paid for anyone who sends the Bar Rag a printable, color or black and white photo of William Satterberg.

Family Law

"Grandparent's Rights" in Alaska

Many grandparents have had difficulty maintaining close contact with their grandchildren, especially after divorce proceedings have been initiated. In the past, the only avenue which may have been available to grandparents in most cases was to request that their children ask the court for grandparents' rights in an active divorce or custody case. The court could award visitation by a grandparent if it was found to be in the best interests of the grandchild.

Recently the Alaska legislature enacted Senate Bill Number 27, which is entitled "An Act relating to child visitation rights of grandparents and other persons who are not the parents of the child." This new



Steve Pradell

law, which goes into effect in August of 1995, allows a grandparent to petition the court directly for an order establishing reasonable rights of visitation between the grandparent and grandchild. The law allows grandparents to petition the court prior to the entry of a divorce or custody decree, if the grandparent has established or attempted to establish ongoing personal contact with the child, and visitation is in the best interest of the child. After a final divorce, custody or adoption decree is entered, a grandparent may petition the court only if the grandparent did not previously request visitation during the prior litigation, or if there has been a change in circumstances which justifies reconsideration of the grandparent's visitation rights. In determining grandparent visitation, the court must consider whether the child's parent who is the son or daughter of the grandparent had any history of child abuse or domestic violence. The law also provides that if parents make an agreement regarding the custody of their children, a court must determine whether their agreement should include visitation by grandparents which is in the best interests of the children.

These sweeping changes are good news for grandparents. Alaska has recognized that grandparents have the right, separate from the rights of their children, to ask the court to maintain the bond between grandparent and grandchild. Alaska has continued to focus on the needs of the children, not the needs of the adults, in fashioning visitation and custody awards. The new law is a positive step in this direction, and provides hope for grandparents who, despite bitterness created by domestic disputes, desire to maintain a loving and continuous relationship with their grandchildren.

Future of fraud: Or, should UFTA apply to future creditors?

By Art Peterson

HB 72, introduced by Representative Brian Porter, proposes enactment of the Uniform Fraudulent Transfer Act (UFTA). As mentioned in my Uniform Laws wrap-up article in this issue of the Bar Rag, this bill will update Alaska's ancient law on the subject (AS 34.40), traceable back to 1854!

The source

UFTA was promulgated by the National Conference of Commissioners on Uniform State Laws in 1984, to replace its 1918 Uniform Fraudulent Conveyance Act. Its basic purpose 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 new Act has been enacted in at least 33 states and is pending in others. The National Conference's Prefatory Note to UFTA explains that the 1918 Act

> was a codification of the "better" decisions applying the Statute of 13 Elizabeth. See Analysis of H.B. 12339, 74th Cong., 2d Sess. 213 (1936) . The English statute was enacted in some form in many states, but, whether or not so enacted, the voidability of fraudulent transfer was part of the law of every American jurisdiction. Since the intent to hinder, delay, or defraud creditors is seldom susceptible of direct proof, courts have relied on badges of fraud. The weight given these badges varied greatly from jurisdiction to jurisdiction, and the Conference sought to minimize or eliminate the diversity by providing that proof of certain fact combinations would conclusively establish fraud. In the absence of evidence of the existence of such facts, proof of a fraudulent transfer was to depend on the evidence of actual intent. An important reform effected by the Uniform Act was the elimination of any requirement that a creditor have obtained a judgment or execution returned unsatisfied before bringing an action to [void] a transfer as fraudulent.

Some history

The Conference began this revision project in 1979, influenced by (1) the Bankruptcy Reform Act of 1978, which reduced the correspondence between federal bankruptcy law and state law as set out in the 1918 Uniform Act, regarding fraudulent transfers and obligations; (2) the American Bar Association's committee revising the Model Corporation Act; (3) the Uniform Commercial Code, which had by then been enacted at least in part in all 50 states, and which had substantially modified related rules on transfer of personal property; and, later, (4) the Model Rules of Professional Conduct adopted by the House of Delegates of the ABA in 1983, forbidding a lawyer from counselling or assisting a client in conduct that the lawyer knows is fraudulent. The re-drafting process took into account several decades of court decisions and other developments since promulgation of the 1918 Uniform Act.

Alaska never enacted the 1918 version. Even the Alaska Supreme Court had occasion recently to observe that Alaska has not yet enacted the 1918 Uniform Fraudulent Conveyance Act. *Summers v. Hasen*, 852 P.2d 1165, 1169, n. 5 (Alaska 1993)

Alaska's law on the subject— AS 34.40— was adopted for Alaska by the U. S. Congress, using Oregon law, in the *1880*'s. AS 34.40.010 — our key provision — is virtually unchanged since that time, and can be traced back through the Alaska Compiled Laws Annotated 1949 (sec. 22-4-1), the Compiled Laws of Alaska 1933 (sec. 2872), the Compiled Laws of Alaska 1913 (sec. 556), and Carter's Annotated Alaska Codes 1900 (Civil Code, sec. 130) AS 34.40.010 is, in fact, based on the *1571* English fraudulent transfer statute. It's time to update it!

Future creditors

In HB 72, proposed AS 34.41.030 (Section 4 of the Conference's "official" version) is labelled "TRANSFERS FRAUDULENT AS TO PRESENT AND FUTURE CREDITORS." Its subsection (a) provides

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation
>
> (1) with actual intent to hinder, delay, or defraud a creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor
>
> (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

Its subsection (b) then lists 11 factors that may be considered in determining "actual intent under (a) (1)." These factors are some of the " badges of fraud " that the courts have identified in applying the Statute of 13 Elizabeth and Section 7 of the Uniform Fraudulent Conveyance Act. However, as the Conference's Comment under UFTA's Section 4 states, "Proof of the existence of any one or more of the factors . . does not create a presumption that the debtor has made a fraudulent transfer or incurred a fraudulent obligation."

The issue

A group of Anchorage attorneys and others is concerned about the application of proposed AS 34.41.030 to certain estate-planning situations, such as where parents convey some assets in trust for the college education of their young children, and several years later the parents incur a large debt. The Anchorage folks fear that the transfer avoidance provisions of proposed AS 34.41.060 could result in destroying that college-education trust.

Therefore, they have proposed deleting all references to future creditors. Alaska's Uniform Laws commissioners and many other people do not think that a legitimate trust like that is even remotely in danger from UFTA, and we oppose that suggestion, believing that it is contrary to sound public policy.

First, a quick definition: "future creditor" means a person who acquires a claim (such as for personal injury or on contract) against another person, and that claim arises *after* the other person transfers assets out of his or her personal ownership or control.

The Anchorage folks, as I understand them, have no objection to having the Act provide for invalidating a transfer to such a children's-college-education trust that is made to defeat the claim of a *present* creditor. I believe that we all agree on that point. And I *believe* that we all *agree* that the Uniform Act should *not* be applied to permit an unknown, unforeseen, perhaps presently non-existent future creditor to invalidate the child's trust.

Alaska case law establishes that fraud is *not* to be *presumed*. Not even the carefully developed list of "badges" *suggestive* of fraud, in proposed AS 34.41.030(b), changes that state of the law.

At the base of the Anchorage concerns is the apparent *assumption* that current Alaska law does not protect future creditors. That assumption is not well founded. Please note: (1) Current AS 34.40.010— our key, general provision— does not mention them. It does not expressly include them, but it *does not exclude* them. It is silent on the point.

(2) Current AS 34.40.020 *expressly covers* "subsequent purchasers for a valuable consideration of the land [etc.]"

(3) Current AS 34.40.*110* *does expressly include* them, with regard to a debtor who transfers assets to a trust for his own benefit.

(4) In addition, the Alaska Supreme Court, in *First Natl. Bank v. Enzler*, 539 P.2d 517 (Alaska 1975), recognized the protection accorded a creditor against a "contingent debtor" (where the extent of the debt is not certain at-the time of the transfer)— a type of future debt.

(5) The Common Law has provided protection for future creditors for a few centuries, and our **current AS 01.10.010** adopts the Common Law for Alaska, except where inconsistent with our constitution and statutes. We have no provision that excludes future creditors from protection, and I am not aware of any Alaska Supreme Court decision so holding— thus, no inconsistency.

Recommendation

Alaska's Uniform Laws commissioners recommend that the legislature enact the National Conference's version. Alaska should *reject* the suggested amendments that would delete the references to future creditors, for the following reasons:

1. In that they eliminate all references to future creditors and define "creditor" in such a way as to include only present ones, they sweep too broadly. By doing so, they remove the creditor protection provided by **current** AS 34.40.020 and 34.40.110, and they codify a false assumption about current AS 34.40.010. The Uniform Act covers more than the situation of individuals involved in their family's estate planning. It covers transfers made by corporations and partnerships, too. Simply deleting all references to future creditors would, for example, leave a shady corporation free to transfer its assets just before entering into a risky business venture, leaving legitimate future creditors without recourse under state law.

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HI-TECH IN THE LAW OFFICE

Thinking strategically about automation

By Joseph L. Kashi

Effective automation will be a cornerstone of the law practice of the future. Unfortunately, as now implemented, automation is often an expensive solution in search of the right problem. It's far too easy to simply throw a lot of expensive computers and even more expensive staff time at what is really a law practice planning problem. Law office automation's long term usefulness and profitability depend greatly upon how we plan for the future.

We often believe that "automating" will make us more efficient and profitable. In fact, ill-considered automation can often cost us money and reduce overall efficiency.

The actual purchase price of the hardware and software represents only a small fraction of the five-year cost of owning and using that computer and software. The staff time consumed trying to learn and implement a complex automation system; maintenance and setup; and staff training actually account for most of the less tangible costs of automation. These factors are frequently overlooked but become more evident when we consider why service sector productivity actually declined slightly during a decade of explosive and expensive computerization.

I believe that this productivity decline occurred largely as a result of diverting time to mastering and using immature software technology. As an analogy, consider how easily and quickly you can now travel by automobile or aircraft compared to the first few decades of this century when these craft were difficult to use and not nearly as reliable.

One of the most serious problems with office automation is that we have forgotten the planning and discipline of the mainframe era. Then, information services professionals planned for the long term and synchronized office automation to their perception of long term trends and future data usability. Now, most people view computers as a consumer good, buying systems and data based upon advertising promises, low prices, and questionably useful "features". Fashion, particularly in the software, guides more purchases than long term analysis.

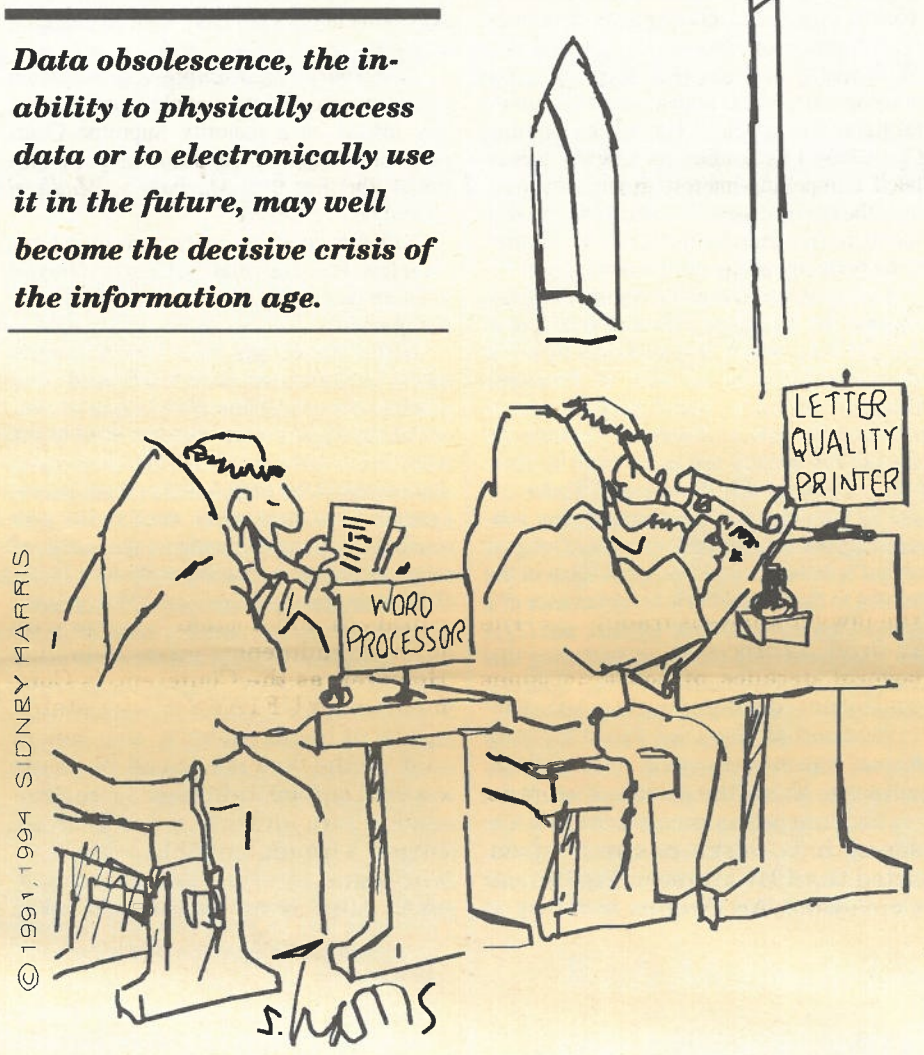
Even large corporations are beginning to experience difficulties with automation consumerism. A recent survey of major health care industry computer users, reported in the May 1, 1995 *Computer Reseller News*, included one particularly telling statistic: The largest single complaint by health care computer users, at 19% of total complaints, was the perceived lack of strategic planning, a concern that outweighed even installation and training woes.

Automation should follow strategic business planning

In order to be effective, automation must be used to cope with definable business problems that have clear-cut bottom line effects. Until you have thought through long range practice goals and business strategies, it is premature to buy new technology to get you there. Prior to buying more technology, reflect for a few months upon what will actually benefit your practice. For example, in the early 1980s word processing quickly caught on because it made the creation and revision of form documents far easier and because we could edit and improve our work product far faster and with much less wasted effort. That was a clearly defined business need.

The next step, document assembly, has been heavily promoted but in fact makes less economic sense for smaller firms. It's much more expensive to implement and you'll still need to review each completed document carefully unless you are prepared to risk malpractice by computer.

Data obsolescence, the inability to physically access data or to electronically use it in the future, may well become the decisive crisis of the information age.



Document assembly is an excellent example of how to spend money and staff time implementing a more complex technology that in fact may adversely affect your bottom line. Document assembly makes sense only where you have, or intend to promote, an extensive transactional documentation practice and have enough business to broadly spread the cost of developing your forms or where you can buy an off-the-shelf package that already includes the forms that you need. A commercial litigation firm dealing with unique lawsuits would probably see little benefit from traditional document assembly approaches. Look at your practice, engage in a structured planning process and implement the technology what will actually benefit your long term business plan.

Avoid data obsolescence

Data obsolescence, the inability to physically access data or to electronically use it in the future, may well become the decisive crisis of the information age.

Desktop automation focuses on the immediate retrieval of data during the daily course of business. Unfortunately, most office automation efforts to date have failed to adequately provide for the long term use of data.

Because of the rapid advance in hardware and software, programs and data that we use today will likely not be usable in 15 years without a great deal of effort. Even NASA is experiencing difficulties in this regard: 15-year-old computer tapes containing data from planetary exploration missions cannot be used readily on currently available mainframe tape drives. NASA has been forced to spend millions of dollars converting these tapes to modern formats and cataloging their contents.

Long term data usage provides an excellent example of why strategic planning has become so important. Suppose that you have become thoroughly modern and have moved your record archiving away from paper or microfilm to some form of optical document imaging. One obvious reason to make this expensive move is to do away with hard to research, bulky paper records. However, a paper record has a crucial advantage relative to electronic imaging: paper lasts many decades without special treatment and anyone can determine all the information existing in that record simply by holding the page and reading it. No special equipment or software is necessary to use a paper record and there will be no difficulty with "backward compatibility" 25 years from now.

Document imaging, in contrast, requires that the electronic document archiving media remain usable for decades and that the necessary hardware and software still exists to read that electronic document.

Avoid the problems of the future

Given the rate at which technology advances and given the inevitable failure of heavily used mechanical and optical devices like hard disks and rewritable optical drives, there are only a couple things of which we can be sure:

- In 10 to 15 years, it will be essentially impossible to find new optical or tape drives which can read the rewritable optical disks or tapes made today; and
- There is an extremely high chance that any computer drive that you are using today will have failed within a few years. Finding replacement components or repair parts in five years will be essentially impossible.

Recall that almost all computers sold five years ago were 8088 XT and 80286 AT machines with MFM/RLL hard disks. Today, these systems are three or four generations behind current Pentium consumer technology and you can't even buy replacement parts, such as disk controllers or system boards.

If you are using an EGA color monitor, which was extremely popular until about 1989, you might as well throw out a functioning monitor if your EGA video card dies.

Thus, the most important aspect of strategic planning is that your data will be usable and accessible into the foreseeable future.

Accessibility involves several factors.

First, data must remain usable by both current and future software. You should standardize your entire firm upon well-known and broadly popular programs made by a company that's likely to be continuing development of their products 5 or 10 years hence. At the moment, this implies using products from Microsoft, Novell/WordPerfect or a smaller but long-established vertical market company.

Future data usability also implies the desirability of using programs that store data in a standardized format that can be accessed by evolving software from other companies. Standardized data formats include ASCII text files, SQL databases, and TIFF/GIF imaging formats. At a minimum, converting standardized data to new program file formats will be smoother and less expensive 10 years hence. Unfortunately, these concepts are in tension with each other. Most popular off-the-shelf programs use unique proprietary data formats that can be converted to generic data only one file at a time. If you have accumulated 25,000 documents on your file server (as will even happen over five or six years at smaller firms), converting proprietary data formats one file at a time quickly ceases to be practical.

Second, your data must be physically accessible and transferable to more modern storage media from time to time. Given the rapid evolution of computer program and hardware standards, physical accessibility must be a primary concern. If your data cannot be read into the computer for lack of a functioning drive, all the conversion software in the world will do you little good.

For example, if you store old billing records on a backup tape, the magnetic recording on that tape will

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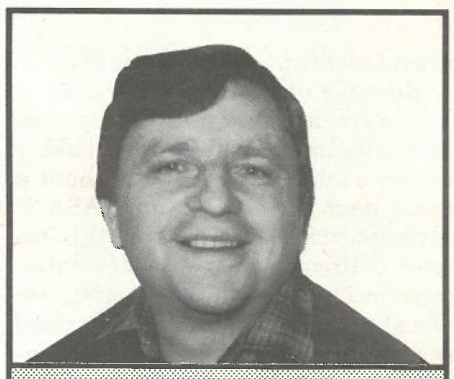
Faith & the law

RFRA should stay



Walt Arden

In 1990, the U.S. Supreme court held in *Employment Division, Dept. of Human Resources of Oregon. v. Smith*[1] that a law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has an incidental effect of burdening a particular religious practice. Although it might sound right, this holding took a tremendous bite out of religious freedom.

Justice O'Connor, concurring in the result, wrote that this sweeping opinion establishes that where there is a general applicable criminal prohibition, free exercise jurisprudence does not even apply.[2] She and Justices Brennan, Marshall and Blackmun (who dissented) stated that the majority's strained reading of the First Amendment disregarded the long heritage of case law which applied the free exercise doctrine to generally applicable regulations burdening religious conduct.[3] These four justices indicated that the majority felt it had to make a holding on a blank slate in the face of free exercise anarchy, when in fact there had been painstaking, consistent and exacting standards which were *not* being discarded.

They saw that *Cantwell v. Connecticut*[4] and *Wisconsin v. Yoder*[5] were now being extinguished; *Sherbert v. Verner,*[6] *Hobbie v. Unemployment Appeals Comm. of Florida,*[7] and *Thomas v. Review Bd. of Indiana ESD*[8] were being limited to the unemployment claim context; *Pierce v. Society of Sisters*[9] and *West Virginia Bd. of Education v. Barnette*[10] were dismissed as inapplicable because they involved another constitutional freedom as well as the free exercise clause. And newer cases, decided on specific facts, were viewed as disregarding the traditional compelling interest test because they were not decided on that basis.[11]

The majority holding of *Oregon v. Smith* became the law of the land. It became much easier to repress conduct based on religious belief.

In Alaska, the sweep of this decision, as well as its successor, *Church of the Lukumi Babalu Aye v. City of Hialeah,*[12] prevented Tom Swanner from refusing to rent to unmarried couples on spiritual grounds. The Municipality of Anchorage's policy on fair housing and nondiscrimination based on marital status was upheld.[13] The Alaska Supreme Court based its holding on a newly formulated compelling-interest ground, as well, over the strong dissent of Justice Moore, who found the free exercise test of *Frank v. State*[14] to be perfectly adequate and much fairer.[15]

In response to *Oregon v. Smith,* Congress enacted the Religious Freedom Restoration Act (RFRA), which was endorsed by many church affiliations as well as President Clinton.[16] RFRA's stated purpose was to overturn *Oregon v. Smith;* to "restore the compelling interest test as set forth in *Sherbert v. Verner*... and *Wisconsin v. Yoder...;*" and to provide that "government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person *(1)* is in furtherance of a compelling governmental interest; and *(2)* is the least restrictive means of furthering that compelling governmental interest." Spiritual congregations and libertarians were relieved.[17]

However, decisions like *Flores v. City of Boerne,*[18] are now emerging. This decision, rather than settling the question of whether a city had a compelling interest under RFRA in refusing to let a landmark church expand, declared the RFRA unconstitutional. The court was affronted that Congress would try to second-guess any majority pronouncement of the Supreme Court. Citing *Marbury v. Madison,*[19] which states that it "is emphatically the duty of the judicial department to say what the law is," the U.S. District Court in San Antonio held that "RFRA is in violation of the United States Constitution and Supreme Court precedent by unconstitutionally changing the burden of proof established in *Employment Division of Oregon v. Smith,*"[20] (*Flores* seriously questioned the finding of RFRA's legitimacy in *Belgard v. State of Hawaii.*[21] This was because of *Belgard's* use of the enabling clause of the 14th Amendment to empower Congress to restore the free exercise burden of proof, when the First Amendment does not have such an enabling clause).

If *Marbury v. Madison* prevents the elected representatives of the people from making any inroad on a majority Supreme Court decision which redefines important constitutional liberties, then *Marbury v. Madison* should be overturned.

RFRA is good law, and it merely restores prior law. I can see what the Court in *Oregon v. Smith* was trying to do; its intentions were not ignoble.

Before *Smith,* and after RFRA, departments of correction were confronted with prisoner lawsuits claiming violations of constitutional rights, when inmates tried to get benefits that were not related to true religious observance. After RFRA was enacted, prison systems have once again been faced with noxious prisoner demands in the name of religious liberty. According to Wesley Smith (*Liberty* magazine, May/June 1995), prisoners have demanded candles made from the fat of unbaptized babies and the sacrifice of "preferably Christian" virgins, for example. Some also have demanded the right to dance nude in the prison chapel, to wear turbans (even through they can conceal drugs and weapons), to distribute literature for the elimination of Jews and blacks, to join the Black Gangster Disciples, to have knives to sacrifice chickens, and to have the right to creamy peanut butter, breast implants and naked woman dancers.

Prior to *Oregon v. Smith,* according to the *Liberty* author, the states were allowed to restrict "religious" practices in prison if the restriction was reasonably related to achieving a penal goal. With this test, courts deflected situations such as the demands of the in-prison Church of the New Song (CONS), which wanted filet mignon, Harvey's Bristol Cream, and marijuana. It also dealt with the Church of the Universal Brotherhood (whose ritual demanded the right to sit naked while chanting "I am in charge of my head") and the vernal and autumnal equinox worshipers (who requested a sword, a wooden altar, and naked women to dance in the moonlight.)

Because former case law is merely being restored under RFRA, there is no reason the same test cannot be used for penal objectives as before.

Moreover, there is no reason there can't be a stricter standard for compelling interest in the unique prison situation. There is also no reason that the "least restrictive alternative" should survive a summary judgment. Because of cost factors, there often would be no alternative to the denial of unreasonable demands. This "least restrictive" test, based on much similar prison precedent, could foreclose many evidentiary hearings on whether the views of the prisoners are "genuinely held." There would also be no reason to capitulate to novel and snickering "religious beliefs."

The Supreme Court should not have limited the free exercise principle in the interest of convenience. Even under the well-established compelling interest/least restrictive alternative test for free exercise, freedoms are still necessarily curtailed in the unique prison and military situations, and other suitors cannot evade social security tax laws or any other criminal law of general applicability.[22]

The Religious Freedom Restoration Act preserves the standard of heightened scrutiny for abridgment of religious freedoms and should be retained.

FOOTNOTES

[1] 494 U.S. 872 (1990)
[2] 110 S.Ct. at 1607.
[3] *Id.* at 1706, 1616.
[4] 310 U.S. 296 (1940)
[5] 406 U.S. 205 (1972)
[6] 374 U.S. 398 (1963)
[7] 480 U.S. 136 (1987)
[8] 450 U.S. 707 (1981)
[9] 268 U.S. 510 (1925)
[10] 319 U.S. 624 (1934)
[11] *see Goldman v. Weinberger,* 475 U.S. 503 (1986). *See dissent, Id.* at 1616, referring to 1598, 1602, *ante.*
[12] 113 S.C. 2217 (1993),
[13] *Swanner v. Anchorage Equal Rights Com'n,* 874 P. 2d 274 (Alaska 1994).
[14] 604 P. 2d 1068 (Alaska 1979)
[15] *Swanner* at 285 ff.
[16] 42 USC 2000bb through 2000bb-4.
[17] *See, e.g.,* Perspectives, *Liberty* (July/August 1993) ff.
[18] 877 F.Supp. 355 (W.D. Tx 1995)
[19] 5 U.S. 137, 1 Cranch 137 (1803)
[20] *Id.* at 358.
[21] No. 93-00961 (D.Haw. Feb 3, 1995).
[22] *Smith,* 110 S. Ct. at 1610 (O'Connor, J., concurring).

Future of fraud

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2. The Anchorage amendments would also remove the *current* creditor protection in the case of a " contingent " debtor, recognized by our Supreme Court.

3. They reverse the development of the statutory law and the common law since 1571.

4. They do not afford creditor protection in even the most egregious future-creditor cases, where everyone can agree that the debtor's fraudulent intent is clear and his or her conduct is most reprehensible. They would encourage deception.

5. They do not protect a person who, in reliance on a debtor's generally good reputation, extends credit after the debtor has dumped all of his or her assets and has entered a risky venture without adequate insurance.

6. They do not protect a bank, for example, that re-finances a debtor's obligation, relying on a financial statement that might be as much as a year old, after the debtor has dumped all of his or her assets. Although the bank is a "present" creditor as to the original debt, it is a "future" one as to the new debt.

7. Since sec. 548(a)(1) of the federal Bankruptcy Code provides for both present and future creditors, the effect of Alaska's deviation from that general rule would be to force creditors to pursue federal bankruptcy remedies rather than rely on state law.

8. By deleting the future-creditor references, those amendments destroy a very important aspect of the uniformity of this Uniform Act. An essential feature of a Uniform Act is the state-to-state uniformity that it provides, thus facilitating interstate travel and business transactions.

Other issues

While UFTA has enjoyed broad support, both within Alaska and nationally, the Anchorage folks also expressed concern about the following three points:

1. the possibility that the Act's transfer-voidability provisions might be used to invalidate a trust created to maintain an older person's eligibility for Medicaid or other government benefits;

2. the uncertainty about the Uniform Act's application where a person has "disclaimed" an inheritance interest under our Uniform Probate Code (AS 13.06— 13.36, specifically AS 13.11.295); and

3. the uncertainty about the Uniform Act's application to transfers executed before the Act's effective date.

Those points could be addressed with relatively simple amendments, without damaging the Act.

The difficulty

The difference of opinion about future creditors is not between those who support fraud and those who do not, nor between those who support estate planning and those who do not. Rather, the difference of opinion stems from the difficulty of defining " fraud " and of identifying the key elements of a " fraudulent intent." (For example, is the key element the act of putting assets beyond the reach of (1) a specific creditor, (2) a specific type of creditor, (3) an *anticipated* creditor, (4) an *anticipated* and probable creditor, etc.?) We might think that we "know it when we see it," but defining it generally, for future application, is a problem. The Uniform Act, in its Section 4 (proposed AS 34.41.030) does an excellent job of it. I don't think that we can make an improvement.

Possible amendment

So, any amendment addressing the future-creditor concern should:

1. not be a wholesale deletion of references to future creditors, but merely should limit their rights when dealing with *individuals;* retain the references to them with regard to corporations and partnerships; estate-planning concerns have been raised, so, at most, we could possibly deal with them and not destroy any more of this Uniform Act's uniformity than necessary;

2. not be a wholesale deletion of those references even to individuals, since the current law (statutes and case law) recognizes the need to provide for future creditors in at least a couple of situations; exempt only the estate-planning type of case; we certainly do not want to lose the benefit of the *current law's* related provisions;

3. emphasize the "foreseeability" element by trying to pinpoint just what conduct we perceive as "fraud," justifying a creditor's right to void the transfer.

Conclusion

The meticulous, scholarly work, and century of experience, of the NCCUSL cannot simply be disregarded. Alaska is a major beneficiary of NCCUSL products, regularly relying on them, with approximately 70 Uniform Act enactments so far. We would do well to enact the Uniform Fraudulent Transfer Act as is.

Thinking strategically

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fade within a few years. If your tape drive breaks (and it will, sooner or later), you'll not be able to replace the drive with a model which can compatibly read a five year old tape and access the data. If you are attempting to store records on removable optical disks, which are quite popular now, there is little chance that replacement drives will be available in five years that will read disks that are three or four technology generations old. You will have thousands of pages of documents and no means to read them.

There are several lessons to be drawn.

• You'll need to carefully choose the hardware and software which you implement with an eye toward future upgradability.

• You should expect to implement a comprehensive data conversion and hardware upgrade procedure every three or four years while backward compatible software and hardware remains available and conversion is relatively straightforward.

• This year, transfer to user-created CD-ROM disks your archival data and complete copies of the programs necessary to read the data. Of all data storage media in use today, CD-ROM disks are the most likely to be mechanically usable and physically stable in 10 or 15 years.

• In any event, don't throw away the paper copies of your important archival records quite yet, even if you use a medium like CD-ROM that's likely to have long term usefulness!