The Alaska BAR RAG

VOLUME 22, NO. 4 — *Dignitas, semper dignitas* — $3.00 — JULY - AUGUST, 1998

Inside:

Diversity of thought — uniformity of law:

Our legislature reacts, or doesn't

By Art Peterson

At its centennial in 1992, the National Conference of Commissioners on Uniform State Laws adopted the motto "Diversity of Thought — Uniformity of Law." It signifies the national, philosophical, and legal diversity of the NCCUSL's membership and thinking, along with the desirability of uniformity among the states in certain areas of the law.

Alaska has been an active participant in the conference since 1912 and a major beneficiary of its work product, with something like 75 uniform laws enacted. The recently adjourned 20th Alaska State Legislature added four of them — one last year and three this year. It missed its chance for two more — both dying inexplicably in the Senate Judiciary Committee.

Here's a quick synopsis:

FAMILY SUPPORT

The Uniform Interstate Family Support Act, promulgated by the NCCUSL in 1992, was enacted here in 1995, replacing the decades-old Uniform Reciprocal Enforcement of Support Act. (See AS 25.25.) I won't detail here the extensive changes made by that comprehensive revision. Generally, UIFSA simplifies procedures when two or more states are involved, and provides more efficient means of collecting child support. (See the July/August 1995 *Bar Rag*, p. 1.)

Last year, Alaska enacted the National Conference's UIFSA amendments to respond to the federal "Welfare Reform Act." The majority of them were in Article 5, on income withholding, and Article 6, on registration and modification of support orders.

This year, SCS CSHB 344 am S (ch. 132, SLA 1998), a lengthy bill dealing with various aspects of child support and paternity establishment, includes two additional UIFSA amendments to satisfy federal requirements. It thus assures that our version is up to date and

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YEAR 2000 LITIGATION AHEAD — PAGE 15

Dedication planned in memory of Jan Hansen

By Jessica Van Buren

Jan Hansen, Clerk of the Appellate Courts of the State of Alaska, died at home on Sunday, June 7, 1998.

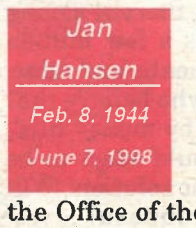
She was born in Pocatello, Idaho on February 8, 1944, the second of seven children. She grew up on a farm, and her father said she was the best farmhand he ever had. She was her high school salutatorian.

She served as a missionary for the Church of Jesus Christ of Latter-day Saints (Mormon) in France and Belgium in 1966 - 1967. Displaying a penchant for making the most of her time even then, her family recalls her preparing for her mission by taping French lessons to the side of cows so she could study while she milked. She had the standard lessons she would be teaching memorized before she reported, unlike most missionaries who spent the first few months of their missions learning them.

In 1968 she came to Alaska, and in 1978 she graduated magna cum laude from University of Alaska Fairbanks with a B.A. in English and French. In 1982 she received her JD from Brigham Young University Law School, where she graduated second in her class and was a member of the Order of the Coif.

Jan returned to Alaska and worked as a Hearing Officer for the Workers' Compensation Division from 1982 until 1987, when she was promoted to Chief of Adjudications, a position she held until 1991. In July 1991 she was appointed Clerk of the Appellate Courts. In order to be conversant with the statutes and rules relevant to her new job she recorded all of the appellate rules onto cassettes and listened to them repeatedly before her first day of work.

Jan brought many changes to the Office of the Clerk of the Appellate Courts. Her main goals for the Appellate Courts were to improve office efficiency and to keep pace with technological developments. She completely reorganized the Office of the Clerk of the Appellate Courts, upgrading the job classification for deputy clerks and making them responsible for handling cases from start to finish, instead of working on specific tasks. She supervised and trained appellate law clerks and secretaries in Anchorage, Fairbanks and Juneau. Over the course of several years she bought and upgraded new computers for the Appellate Courts. She worked with the Alaska Judicial Council on a project to design and implement the Appellate Court Case Management System (CMS), which became operative in January of 1995. CMS allows the Appellate Courts to track detailed information about every appellate case. In May 1998 non-confidential parts of CMS were made available over the internet, allowing attorneys and the public access to real-time case information. Jan was pleased with the early success of this recent project, and was proud of the compliments the system was receiving.



During Jan's tenure as chair of the Appellate Rules Committee she advocated many innovations in appellate procedure, such as requiring docketing statements with every appeal, replacing designation of record with a requirement for excerpts of record on appeal, and collecting filing fees and cost bonds in the Clerk's Office. She had recently begun ex-

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Territorial lawyers gather for stories

By Pamela Cravez

The sun broke through rainy clouds as lawyers who practiced in Alaska before statehood gathered at Russ Arnett's house June 10 for a potluck dinner and a chance to swap stories.

About 25 lawyers, their wives and a few members of the Alaska Bar Association's Historian Committee, mingled at Arnett's hillside home overlooking Cook Inlet. The get-together, the brainchild of Arnett and David Thorsness, brought together territorial lawyers, many of whom had not seen each other for over 30 years.

While lawyers socialized on the deck and first floor, others headed downstairs where the NBA finals were playing on the television. But few actually followed the game as conversation turned to stories from the 1940s and 50s.

David Thorsness, Judge James Fitzgerald, Cliff Groh, Ken Atkinson, Roger Cremo, and Arnett reminisced about their fellow lawyers while Carolyn Rader, Helen Williams, Karen Fitzgerald and Heidi Ely listened, sometimes asking questions to keep the stories flowing.

Many of the stories involved Bill Renfrew, a colorful old-time lawyer who with Ed Davis founded the law firm that later included John Hughes and David Thorsness. Thorsness remembered one story about Renfrew going duck hunting and going over the limit. A fish and wildlife official stopped him as he was about to board his airplane. Renfrew stalled the officer, "Why weren't you here two hours ago, before I loaded the plane," he boomed. "Just follow me back," he ordered the officer, Thorsness remembered. And the officer acquiesced, getting into his own plane to follow Renfrew in his.

"The first cloud he found Renfrew flies up the valley," Thorsness recalled. He left the officer behind and landed at Two Lakes, unloaded the illegal ducks and then flew into Anchorage. When he got there he was told to taxi immediately to fish and wildlife. First thing Renfrew says when he sees the officer is, "Where in the hell have you been?"

The crowd laughed.

Judge Fitzgerald shook his head remembering the story a little differently. He'd been hunting with Renfrew, and Renfrew had loaded his geese in his floats, remembered Fitzgerald. The officer was going to check the floats when Renfrew took off and the officer took off after him. Renfrew's plane was faster than the officer's and he beat him back to town.

Roger Cremo remembered another story about Renfrew.

Cremo's client had shot at Renfrew's client in a claim jumping case. "Yeah, I shot in his direction just to scare him," Cremo's client admitted on the stand. When Cremo questioned him further he said he'd gotten the idea of shooting at his opponent while drinking at the Fairview Inn with some other people, and he'd explained his problem to the other drinkers. One told him, "Take a gun with you and shoot the bastard."

"Who was that fellow?" Cremo asked. "It was Renfrew."

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Editor's Column

Dictum of the Month, The Great Seal, and Tort Reform

☐ Peter Maassen

The Bar Rag is happy to announce a new Dictum of the Month ("DOM"). As in the past, the grand prize goes to the first lawyer or judge to use the DOM convincingly in a brief or written decision — preferably in some sort of quasi-logical context. Special bonus points are awarded if the DOM is quoted as controlling. This month's DOM is: "The need to resolve conflicting applications of Finnish accounting principles is manifest." *Carnival Cruise Lines, Inc. v. Oy Wartsilla AB,* 159 B.R. 984, 998 (S.D.Fla. 1993). Entries must be postmarked by July 31, 1998, and winners will be announced, if there are any, whenever we feel like doing it.

And now for the mail.

Dear Editor:

As you probably know if you have ever been there, a huge wooden rendition of the Alaska State Seal looms over the shoulders of the Chief Justice in the courtroom of the Alaska Supreme Court. I've heard various intriguing stories about its genesis, *e.g.* that it was chiseled out of native Alaskan redwood by Grandma Moses during her Brown Period, that Benny Benson did it with one stroke of an axe while singing the Alaska Flag Song, that pioneer missionary Hudson Stuck rolled it down from the summit of Mount McKinley in the belief that its pictographs comprised Chapter Two of the Ten Commandments ("Thou shalt not interpose thyself directly between the creatures of the earth and the hunters thereof"). What I want to know is, does it revolve very slowly around a hidden axle? I'm sure I saw this happening once during oral argument, but no one in authority will confirm it.

— Seal Watcher

Dear SW:

Funny things happen, physiologically speaking, when you're being grilled in public on points that hadn't even occurred to you until seconds before. What you are seeing when you see the seal "revolve" is actually the incremental shifting of your ocular nerve to correct for the "spinning" of your brain. A similar but slightly more amusing phenomenon results if you focus on the face of a particular justice instead. Health care professionals tell us that the problem of "brain-spin" can be minimized with skewers, but the entry points have to be chosen carefully.

In an interesting semantic coincidence, the oversized seal does have something to do with the rotation of the position of Chief Justice. Since it's definitely curtains for whomever is sitting in the center seat when the nails give way, the folks over at the Judicial Employees Retirement System require that the Chief Justice change from time to time in order to equalize the seal's effect on the actuarial assumptions. Just when the Chief is getting good at his new job, the Sword of Damocles forces him to move over.

Dear Editor:

In high school English class I learned that the phrase "well-settled" needs a hyphen when it is attributive, *i.e.*, when it directly precedes the noun it modifies, but not when it appears alone as a predicate phrase. Thus "the law is well settled" is correct, as is "the well-settled law," but heaven forefend "the law is well-settled" or "the well settled law." I see, however, that this dichotomous usage is far from well settled in the reported opinions of our two appellate courts, as anyone can confirm with rudimentary computer research. Am I right about the rules? What gives?

—Unsettled

Dear Un:

My source book actually says that these rules, while preferred, are not arbitrary if the meaning is otherwise clear. A word to the wise nonetheless: A certain judge who sometimes disregarded these supposedly "non-arbitrary" rules was languishing on the lower bench until he used both "well-settled" and "well settled" appropriately within sentences of each other (*see Simmons v. State*, 899 P.2d 931, 936 (Alaska App. 1995)); soon afterward he was elevated to the Highest Court in the Land. According to judicial insiders, Judge Carpeneti's appropriate *pro tem* usage in *Gardner v. Harris*, 923 P.2d 96, 99 (Alaska 1996) ("it is a well-settled principle that . .") gives him a leg up for the upcoming vacancy.

Dear Editor:

Those of us who till the fertile soil of personal-injury litigation and are tired of abuse from the "Tort Reform" crowd should take a cue from the real farmers. The government pays them to let their fields lie fallow periodically, doesn't it? Why not pay us lawyers not to litigate? I'd be happy to sit on the sidelines for a year for a mere hundred grand, thereby saving corporate defendants a few million in judgments, settlements, and attorneys' fees. To those who believe that p.i. suits are driven by money-hungry lawyers, this would seem to be an obviously economic solution. Will you carry the flag to Juneau?

— Happily Fallow Fellow

Dear Hap:

This proposal is not as dubious as it appears. In fact, it has actually made it through committee several times during the course of the last few Tort Reform debates in the Legislature. The sticking point has been the legislators' fear that trial lawyers with too much time on their hands will run for the Legislature, themselves. Given the demonstrated ease with which they sway jurors in palpably meritless lawsuits, trial lawyers would likely win in landslides throughout the State, and the face of our codified laws would never be the same.

The Alaska Bar Rag

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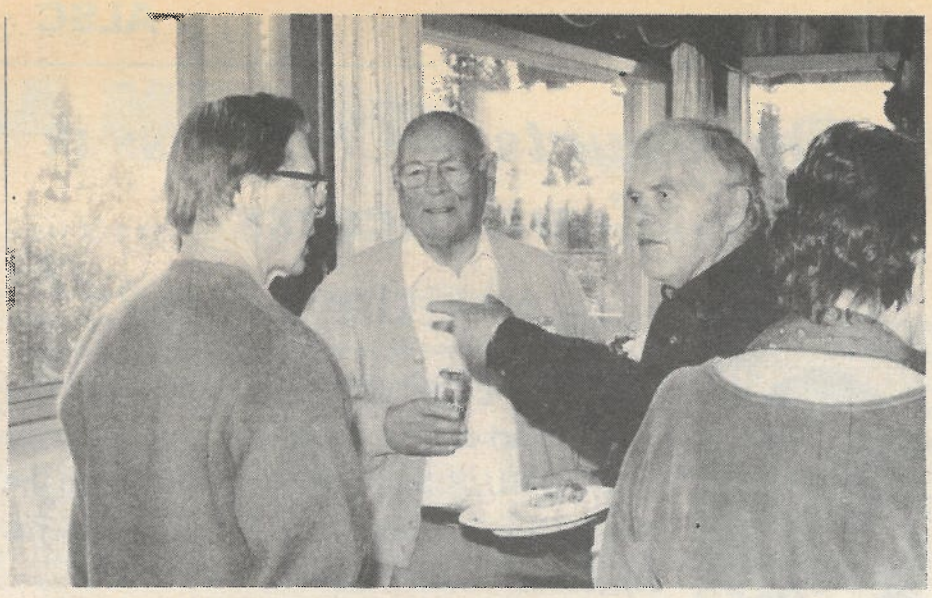
Left to right: John Rader, John Hughes, Jan Wilson



Left to right: George Hayes, Dan Cuddy, Gene Williams

Territorial lawyers gather for stories

Continued from page 2

By the end of the evening it was agreed that there was not nearly so much humor in the courtroom now as there had been in the past.

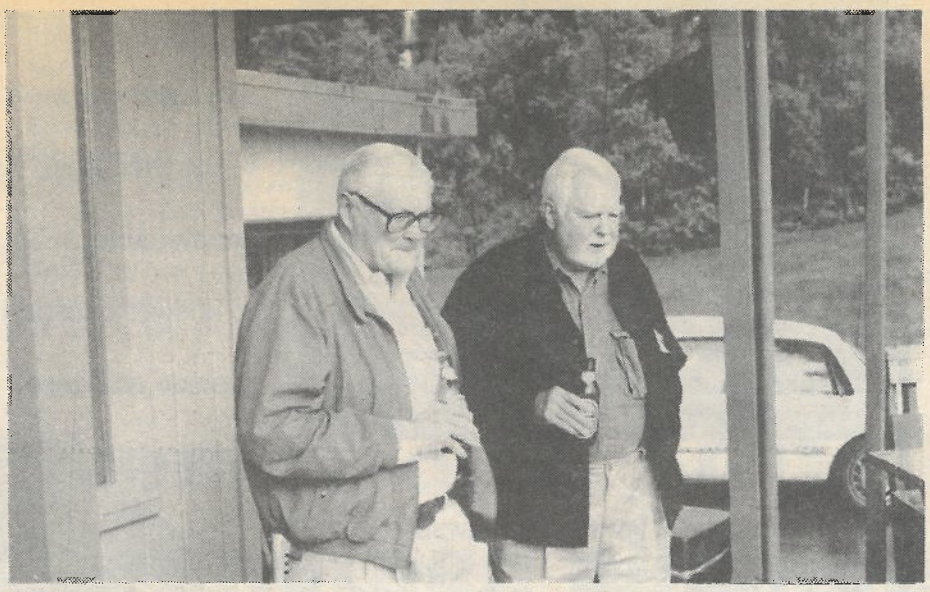
Among those enjoying the evening was Juliana (Jan) Wilson, one of the few surviving women attorneys from Alaska's territorial days. A member of the U.S. Armed Forces during World War II, Wilson attended law school and the University of North Carolina at Chapel Hill from 1947-50, came to Alaska to work as a legal secretary for J.L McCarrey, Jr., until she sat for the bar exam in 1950. Wilson was admitted to the Alaska Bar in January, 1951.

Before leaving lawyers gathered for a commemorative photo on Arnett's deck in the sunshine.

Front row left to right: John Rader, Carolyn Rader, Betty Cuddy, Roger Cremo, Paul Robison (seated), Betty Arnett (kneeling), Helen Williams, Cliff Groh, Russ Arnett, Ken Atkinson, Suzanne Barker, Claire Pease. Back row left to right: Marjorie Hughes, John Hughes, Jim Fitzgerald, Dan Cuddy, Jim von der Heydt, Verna von der Heydt, Mildred Opland, Bob Opland, Priscilla Thorsness, Dave Thorsness, George Hayes, Jim Delaney, Ted Pease, Gene Williams, Seaborn Buckalew, Leroy Barker.

Photos by Tim Lynch

Left to right: Dan Cuddy, John Hughes



Left to right: Seaborn Buckalew, John Rader

Left to right: Ted Pease, Ken Atkinson, Dan Cuddy

Left to right: Priscilla Thorsness, Heide Ely, Claire Pease, John Conway

The *Courts & Congress v. Equal Access*

☐ Arthur H. Peterson

The legal services world kind of lost two court cases since my last report – one in the U. S. Supreme Court and one in the Ninth Circuit. But those battles aren't yet concluded.

In a 5-4 decision on June 15, the U. S. Supreme Court held that client money in an IOLTA (Interest on Lawyers Trust Account) is "private property" for the purpose of applying the Takings Clause of the Fifth Amendment, and that any interest that accrues to that money attaches as a property right incident to the ownership of the money. In the majority opinion, Chief Justice Rehnquist stated that ". . . [w]hile IOLTA interest may have no economically realizable value to its owner, its possession, control, and disposition are nonetheless valuable rights."

However, the court left for consideration on remand to the Fifth Circuit "the question whether IOLTA funds have been 'taken' by the State, as well as the amount of 'just compensation,' if any, due respondents." See, *Phillips et al. v. Washington Legal Foundation et al.*, No. 96-1578. So, even that case, concerning the Texas mandatory IOLTA system, is not yet concluded. And voluntary systems are not covered.

American Bar Association President Jerome J. Shestack stated, regarding that decision: The decision did not resolve the critical issues here but sent them back to the lower court for further review. We are confident that, ultimately, the courts will uphold the constitutionality of this vital resource for the public good. We will continue to work to preserve this program, which provides tens of thousands of the most needy members of our society access to our civil justice system to enforce their rights and resolve their grievances.

Since IOLTA money has been a significant supplement to the funding of legal services programs – essential to assuring equal access to justice – that case, not quite over yet, dealt a blow to poor people's access. You will probably be hearing and reading a lot more about that decision, so I will not go into detail here.

Another setback to serving the legal needs of the poor was received when, on May 18, the Ninth Circuit affirmed the District Court's decision in *Legal Aid Society of Hawaii, et al. v. Legal Services Corporation*, 981 F. Supp. 1288 (D. Hi. 1997). Retired U. S. Supreme Court Justice Byron White, sitting by designation, wrote the opinion for the three-judge panel. This is the case in which the Alaska Legal Services Corporation is a plaintiff.

The panel held that, under the current version of the Legal Services Corporation's regulations (45 C.F.R. Part 1610), the application of those regulations' restrictions on a recipient's *non*-federal money, as mandated by Congress, do not on their face violate the plaintiffs' First Amendment rights of free speech and association. You will recall that those restrictions severely limit the types of cases an LSC-funded recipient may take and the types of clients it may serve – even with *non*-LSC money. See my report in the March/April 1997 *Bar Rag*.

WE ARE CONFIDENT THAT, ULTIMATELY, THE COURTS WILL UPHOLD THE CONSTITUTIONALITY OF THIS VITAL RESOURCE FOR THE PUBLIC GOOD.

One of the restrictions – the one preventing an LSC-funded recipient from collecting attorney fees from the losing party when the recipient wins – is especially troublesome in Alaska, with our Civil Rule 82 having provided a substantial supplemental source of funding for ALSC.

So, we lost. But a petition for certiorari will possibly be filed in the U. S. Supreme Court. And those of you who attended the Alaska Bar convention will recall Professor Erwin Chemerinsky's comments on the statistics showing the overwhelming probability of the Ninth Circuit being reversed by the Supreme Court. We haven't lost hope.

As of this writing (7/9/98), the latest word I have on the federal appropriation is that the Senate has reduced President Clinton's requested $340 million for the LSC to $300 million. The relevant House subcommittee and the full House Appropriations Committee have recommended a meager $141 million. You will recognize these figures – same as last year's. When last year's conference committee report was adopted, compromising between the House's final $250 million and the Senate's $300 million, LSC ended up with $283 million, which was also the prior year's amount. (Our Don Young had voted *against* the House floor amendment that raised the committee-recommended $141 million to the $250 million figure. Let's explain to him that he should *not* do that again.)

Despite court setbacks and government-funding difficulties, ALSC continues to provide quality legal service to the indigent in Alaska. But it needs help with funding. In the past, the private bar has not been able to compensate for the shortfall in government funding (which some politicians have suggested). This is an election year, so talk with the candidates and explain to them how the universally touted "equal access to justice" is provided, and how it needs vigorous Congressional and legislative support.

Foundation approves grants of $207,000 ☐ Mary Hughes

On May 28, 1998, the Trustees of the Alaska Bar Foundation awarded IOLTA grants for the 1998-1999 fiscal year. Thanks to the many firms and attorneys who participated in the IOLTA program, the Foundation allocated $207,000 to various non-profit organizations. This amount is $6,000 more in IOLTA funding than was available last year.

Seven organizations received grants.

THE ALASKA PRO BONO PROGRAM

In granting $180,000 to APBP, the Foundation sought to further its primary mission to provide legal services to the poor. APBP provides legal representation to the needy and sponsors many statewide clinics and classes. This program is one of the most successful voluntary legal services in the country, closing 1,200 cases a year. More than 50% of the Alaska Bar Association members participate in the pro bono program.

CASA'S FOR CHILDREN

CASA's received $4,000 to continue its mission to provide children in Anchorage, Kenai and Matanuska-Susitna Valley with legal representation. CASA's are volunteers who work to insure children have their best interests represented in court. These volunteers research information on a child's background in order to help the court system make more informed decisions about the child's future.

ALASKA WOMEN'S RESOURCE CENTER

AWRC received $5,000 to help further its goal of providing legal information and referrals to needy women in the Anchorage community. AWRC assists more than 5,000 individuals on a yearly basis, of which some 2,000 are in need of legal information and/or referral.

KENAI PENINSULA YOUTH COURT

KPYC received an IOLTA grant of $5,000 to help serve the communities of Soldotna, Kenai, Nikiski, Kasilof, Ninilchik, Anchor Point, Homer, Nikolaevsk, and Voznesnenka. KPYC was created in 1996.

NORTH STAR YOUTH COURT

A grant of $5,000 will help fund a teacher's salary, a course in the American legal system, and additional legal advisor/trainer services for NSYC.

KODIAK TEEN COURT

KTC received $5,000 to assist in the hiring of a legal advisor and a youth/school/court liaison. KTC began in the fall of 1995 and is an alternative diversion program for juvenile offenders.

ALASKA MOCK TRIAL TEAM

A grant of $3,000 was given to the team to help defray the student participants' expense of traveling to the national competition.

The Trustees are hopeful that increased participation in the IOLTA program by Alaskan attorneys and law firms will make more grants possible next year.

Foundation stays IOLTA course

To: Alaska Bar Association Board of Governors

re: *Phillips, et al. v. Washington Legal Foundation*

The Board of Trustees of the Alaska Bar Foundation held a meeting to discuss how we should respond to the Phillips decision.

It is our unanimous recommendation that we stay the course at this time and until the *Phillips* decision is finally resolved by the U.S. Supreme Court. The Supreme Court in its decision only determined that the interest on the IOLTA funds was in fact, property. The Court remanded to the lower court to determine the question of whether the funds had been taken by the state as well as the amount, if any, of just compensation. Until these latter two issues are resolved, we believe that it is prudent to continue on our present course rather than dismantle the IOLTA program.

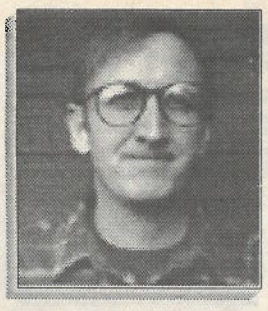
It is the unanimous recommendation of the Bar Foundation that the Alaska Bar Association officially advise the Alaska Supreme Court, as well as all of the members of the Bar Association, that the IOLTA program will remain as it presently exists until all of the issues raised in the *Phillips* decision have been resolved.

—Leroy J. Barker, President

ECLECTIC BLUES

Holding on won't keep it around

☐ Dan Branch



In early summer lilac and wild rocket blossoms send a strong scent down Chicken Ridge.

Walking past a lilac in early summer I find myself wishing that its blooms will never fade to brown. They always do.

By the time the neighborhood crows launch this year's brood, the early summer blossoms will be composting.

Soon magenta-colored fireweed flowers will set off the beauty of Mendenhall Glacier for those traveling the Brotherhood Bridge trail. When the fireweed goes to seed, it'll be time to try for silver salmon and deer meat. Summer goes too fast in Alaska, even in the Southeastern banana belt.

Every June or July I try to squeeze a little more out of summer by taking a few kayak trips. Sometimes they last 10 days, other times two. A couple of weeks ago, I joined a friend for a paddle around Douglas Island.

The Island of Douglas forms the south shore of Gastineau Channel while Juneau and Thane form the north shore. In summer, the island provides a green backdrop for the cruise ships that rise high above the downtown waterfront.

Our plan was to drop the boats in near the North Douglas Boat Ramp and paddle down the back side toward Point Hilda. It was hot, sunny, and calm when reached the boat ramp. While looking for a place to launch we spotted a deer swimming towards us from Spuhn Island. A curious seal followed at a respectful distance. The deer seemed a good omen for the trip.

After loading and launching the kayaks we paralleled North Douglas Highway and then passed False Outer Point. A stiffening breeze pushed in clouds from the Admirality Island side of Stephen's Passage. Soon we were in one- to two-foot chop. By the time we reached Middle Point we were taking wind and waves on the beam.

The Necky kayak I use is a long, thin, lively boat that jumps around a bit in a beam sea. When the chop built up to three-foot breaking waves we had to tack into the sea for a bit and then run with the waves quartering into the stern for a while more. On the tacks into the wind I could watch the wind blow back the spouts of a humpback whale feeding nearby.

The seas continued to build until we made Inner Point. Here I watched my friend, in the other kayak, drop into the troughs of waves until all I could see were his head and shoulders. We were in a bit of a tide rip, and normal paddling effort was required just to maintain position. With a little extra work we broke free and headed towards Point Hilda. The wind from Young Bay was then on our tail, blowing 25 giving us a nice push all the way to the point. There we made camp.

WE WERE IN A BIT OF A TIDE RIP, AND NORMAL PADDLING EFFORT WAS REQUIRED JUST TO MAINTAIN POSITION.

Point Hilda is on the back side of Douglas, maybe 7 or 8 miles from Juneau, but it is still a wild place. The flowers of early summer—shooting stars, chocolate lilies, lupine and beach peas, showed good color in the meadows. Wild flag iris would be next. The trunk and roots of a large spruce lay nearby on the beach; a collection of rocks, some the size of a head, others, of fists, imprisoned in the roots. A loon landed to laugh in front of camp while we ate dinner.

The next morning we continued along towards Marmion Island where we would make the turn into Gastineau Channel for a six-mile paddle to the town of Douglas. We still had our tailwind, which provided a push and a small following sea. I watched a pod of humpback whales as they moved past Oliver's Inlet up Stephen's Passage. One of the whales breached as we passed them.

The sun showed briefly as we paddled around the reef at Marmion Island where we were greeted by a 30 mph headwind blowing down Gastineau Channel. Hoping for the wind to drop, we took a long rest on Marmion. You can see the island from my office, which makes it ordinary and special at the same time. There is beauty there, but I was ready to head for home.

The wind continued to build as we waited at Marmion. The tide was running from low to high and we would lose the chance to get a push from it if we waited much longer so we shoved off. The little bay, which normally provides protection, was filled with small breaking waves. Pulling into a 50 mph wind, we made Gastineau Channel and headed for home.

The wind didn't raise much sea but it made it hard to paddle. While approaching Lucky Me, on the Douglas side of the channel, we got into a pod of killer whales. They were hammering king salmon trying to return to the DIPAC hatchery in Juneau. It was a good size pod with four or five bulls, some calves, and cows. The side markings on the newborn calves were still pink.

While we watched them feed, two of the female whales casually swam within 150 feet of us and then moved off. Otherwise, the whales didn't seem to pay us much attention.

Afterwards, I told my friend that it was great to watch whales without stressing them. "Stressing them?" he answered, "Those two females were swimming over to see if we were something to eat."

THE NOISE OF MAKING MONEY GREW AS WE NEARED TOWN. IT'S ONE OF THE PRICES OF LIVING SO NEAR ALASKA.

The wind dropped some after Lucky Me and we rode the tide push into Douglas. Overhead, helicopters and float planes hauled cruise ship tourists to various venues. Commercial fishing boats and cruise ships ran the waters of the channel. The noise of making money grew as we neared town. It's one of the prices of living so near Alaska.

Diversity of thought — uniformity of law: our legislature reacts, or doesn't

Continued from page 1

consistent with the "official" version of the Uniform Act.

The amendment of AS 25.25.602(a) drops a requirement that a person provide a sworn list of all potential third-party resources when registering a foreign child-support order for enforcement in Alaska. The amendment of AS 25.25.611(a) makes stylistic changes, providing courts direction on modification of child-support orders of another state. The bill contains provisions "sunsetting" the federally required provisions July 1, 2001, which means that the legislature will have to address the issue again before then in order to avoid putting the state out of compliance with the federal requirements (and losing huge amounts of federal money).

CHILD CUSTODY

The Uniform Child Custody Jurisdiction and Enforcement Act was enacted this year (HB 335; ch. 133, SLA 1998). See AS 25.30. It was promulgated by the NCCUSL in 1997 to revise the 1968 Uniform Child Custody Jurisdiction Act (enacted in Alaska in 1977). It brings state law into compliance with federal statutes such as the parental Kidnapping Prevention Act and the Violence Against Women Act.

The basic changes limit child custody jurisdiction to one state (thus avoiding the potential for conflicting custody orders), and add new enforcement provisions for child custody orders. The new Act also provides for continuing exclusive jurisdiction and for emergency jurisdiction.

PRUDENT INVESTORS

Investors, of course, should be prudent. HB 321 am (ch. 43, SLA 1998), enacting the Uniform Prudent Investor Act, provides guidance and standards for trustees and similar fiduciaries regarding their investment activities. See AS 13.26.200 — 13.26.275. I'll paraphrase some information from the National Conference.

This act removes much of the common-law restriction upon the investment authority of such investors. It allows them to use modern portfolio theory to guide investment decisions. A fiduciary's performance is measured on the performance of the whole portfolio, not upon the performance of each single investment. This act allows the fiduciary to delegate investment decisions to qualified and supervised agents. It requires sophisticated risk- return analysis to guide investment decisions. Thus, this act expedites trust management, while assuring both the person creating the trust and the beneficiary of a trust of a sound set of standards for that management.

LEGISLATIVE INACTION

The legislature failed to pass two bills proposing Uniform Acts that saw *no* opposition and a great deal of support. HB 178 proposed the NCCUSL's revision of Article 5 (letters of credit) of the Uniform Commercial Code, and SB 198 proposed its revision of the Uniform Partnership Act with inclusion of the Uniform Limited Liability Partnership Act as part of the UPA itself. The chair of Senate Judiciary Committee, Robin Taylor, did not respond to letters, phone calls, or personal contacts, and just let these bills die without even holding a hearing on them. So we'll have to wait another year before realizing the benefits of these measures. They aren't really that difficult to understand. A summary of each follows.

LETTERS OF CREDIT

The House Labor and Commerce Committee held a public hearing last October on HB 178, revising Article 5 of the Uniform Commercial Code. The bill address numerous issues confronting the $200 billion letter-of-credit industry.

The committee favorably reported out the bill early in the legislative session, and it passed the House unanimously (with 35 members present and voting) on February 4, 1998. On March 26, the Senate Labor and Commerce Committee held a hearing on it, and favorably reported it out of committee. It then went to the Senate Judiciary Committee.

The basic purpose of the revision is to update the law governing letters of credit. All 50 states and Puerto Rico, the U.S. Virgin Islands, and the District of Columbia have enacted Article 5. It is now necessary to revise it, to recognize changes in technology and in commercial practices, so as to avoid litigation over the increasing number of issues that are no longer adequately dealt with in the decades-old current law. As of last September, 31 states had already enacted this revision.

One of its main features is the simplification of Article 5. Another is its express recognition of the Uniform Customs and Practices for Documentary Credits, a body of material that is used in connection with most international letters of credit. The revised article continues to provide rules that can be waived or modified by agreement between the parties.

As the NCCUSL points out, since the 1950's, when this article was originally promulgated (enacted in Alaska in 1962), "the practices and technologies employed with letters of credit have changed substantially, including the use of electronic and computer technology. Litigation has increased as the volume of credits and the uncertainties of the law have stimulated controversies."

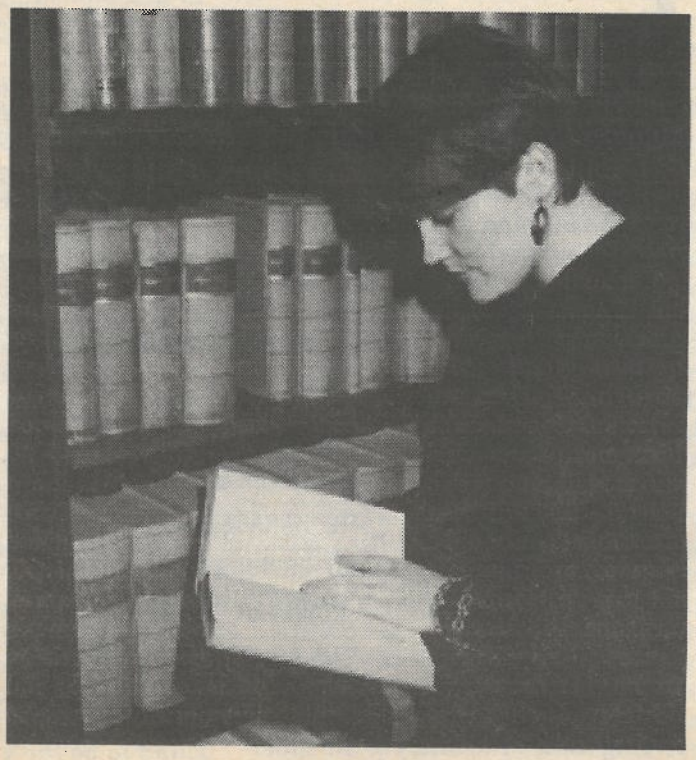
So, we need to enact this uniform revision of Article 5 to keep Alaska in the mainstream of commercial law, and now will have to wait until next year.

PARTNERSHIP

Alaska has the 1914 version of the Uniform Partnership Act, and it is time to update it. The NCCUSL produced a comprehensive revision of the Uniform Act in 1994. In 1996, it came up with amendments to the 1994 version, to include its limited liability partnership provisions.

The major change that the 1994 revision provides is the shift from the "aggregate" concept of a partnership to the "entity" concept. It establishes the partnership as a separate legal entity, not merely an aggregate of partners.

The 1994 version also recognizes the primacy of the partnership agreement over statutory rules, except for specific rules protecting specific partner interests in the partnership. It explicitly address the fiduciary responsibilities of partners to each other, providing for express obligations of loyalty, due care, and good faith. With the 1996 amendments, the Act provides limited liability for partners in a limited liability partnership.



This 1996 version was introduced in Alaska, by the Senate Labor and Commerce Committee, as SB 198. Some amendments were considered by that committee, and CSSB 198 (L&C) was offered March 25, 1998. The bill then went to the Senate Judiciary Committee, where it got stuck without a hearing and without even any acknowledgment of its existence. So, as with the UCC Article 5 revision, we'll have to wait another year to achieve this valuable update of Alaska law.

In 1992, Alaska enacted the revision of the Uniform Limited Partnership Act (repealing the old AS 32.10 and enacting AS 32.11). In 1994, we enacted AS 10.50, on limited liability *companies*. And, in 1996, ch. 52, SLA 1996 enacted a set of amendments (primarily AS 32.05.405 — 32.05.760) on limited liability partnerships.

Only that third item, the 1996 enactment of limited liability partnership statutes, dealt with part of the subject of SB 198. The committee substitute dealt with some issues of compatibility with our earlier enactments, while retaining the Uniform Act's provisions on limited liability partnerships in order to achieve the interstate benefits of the national version.

So, the bill will have to be introduced again, and the process started anew.

THE CONFERENCE AND ITS METHOD

The NCCUSL is a nonprofit, unincorporated association, comprised of some 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 NCCUSL does not own the label "Uniform . . . Act." Nevertheless, 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.

In conjunction with the American Law Institute and the American Bar Association and various scholars and advisers, the NCCUSL does the research and drafting — *at least* a two-year process. It does this work by means of drafting committees that are a cross-section of the country's legal profession. Drafts, then, are subjected to the scrutiny of and debate by the full membership at the annual meetings. A vote of the states is taken before an Act becomes an official product of the NCCUSL. Enactment is then up to the states.

MORE DETAIL

As with my previous reports, this synopsis does not do justice to any of the Uniform Acts mentioned — neither the ones that passed nor the others. And, of course, the 1997/98 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, 211 E. Ontario Street, Suite 1300, Chicago, Illinois 60611.

Attorney Admission Fees

Effective July 1,1998, Attorney Admission Fee to the Federal Bar will be increased from the one time fee of $75 to $100.

Effective January 1, 1999, the Court will begin an Annual Federal Bar Renewal Fee of $25.

U.S. Supreme Court holds employers vicariously liable for sexual harassment by supervisors

By Terry Venneberg

In two decisions handed down on June 26 of this year, the U.S. Supreme Court dramatically altered the extent to which employers may be held liable for sexual harassment of employees by supervisory personnel.

In *Faragher v. City of Boca Raton*, No. 97-282, and *Burlington Industries v. Ellerth*, No.97-569, the Court held that employers are subject to vicarious liability for the actions of supervisors who create a hostile work environment, as that term has been defined under existing sexual harassment law.

In establishing this standard, the Court also effectively eliminated the dichotomy between quid pro quo and hostile work environment sexual harassment claims, preferring instead to analyze all supervisor sexual harassment under the test set out in the opinions.

Prior to the decisions in *Faragher* and *Ellerth*, employers had argued that liability for hostile work environment sexual harassment by supervisors could only be imposed on a finding that the employer had somehow been negligent in allowing the harassment to take place. *Faragher* and *Ellerth* provided an abrupt end to that contention.

The court held in both opinions that agency principles apply to make the employer vicariously liable for sexual harassment by supervisors, even though such acts are not within the supervisors' "scope of employment."

Restatement of Agency 2d § 219(2) provides that a master may be subject to liability for the torts of a servant acting outside of the "scope of employment" where, among other situations, the employee "was aided in accomplishing the tort by the existence of the agency relation." The Court held that, when a supervisor engages in hostile environment sexual harassment, the supervisor is aided in accomplishing the harassment by the existence of his agency relation with the employer.

The establishment of employer liability for the harassing acts of supervisors was not, however, the end of the Court's analysis. The previous dichotomy of *quid pro quo* and hostile environment sexual harassment claims was replaced by the Court with a new dichotomy, dependent upon whether the employee suffered a "tangible employment action" as a result of the harassment that was encountered.

THE ESTABLISHMENT OF EMPLOYER LIABILITY FOR THE HARASSING ACTS OF SUPERVISORS WAS NOT, HOWEVER, THE END OF THE COURT'S ANALYSIS.

If the employee is found to be the victim of a "tangible employment action" resulting from sexual harassment by a supervisor, the employer may raise no affirmative defense to vicarious liability. If, however, the employee did not suffer a "tangible employment action" in connection with the harassment, the employer may raise an affirmative defense with the following elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Several questions are, of course, raised by the new standard. First, what constitutes a "tangible employment action" against an employee?

The Court cited several cases in other areas of discrimination law in the definition of "tangible employment action" as "a significant change in employment status, such as hiring, fixing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."

It can be expected that the meaning of "significant change in employment status" will be litigated much more extensively in the wake of *Faragher* and *Ellerth*.

For example, could the movement of an employee to a smaller or windowless constitute a "significant change in employment status" under the decisions? How about if a severe psychological injury results from the harassment? It would seem that one's employment status would necessarily be changed in both situations. Clearly, the Court did not limit "significant change in employment status" to the events listed in the decisions.

The issue of whether a "tangible employment action" has been taken against an employee who has been harassed is a critical one. As noted earlier, and emphasized here again, if a "tangible employment action" is found to have occurred in a supervisor sexual harassment case, no affirmative defense concerning prevention, correction or reporting is available at all to the employer.

IF AN EMPLOYER HAS A SEXUAL HARASSMENT POLICY IN PLACE, AND AN EMPLOYEE FAILS TO TAKE ADVANTAGE OF THAT POLICY, BOTH ELEMENTS OF THE DEFENSE SHOULD BE ESTABLISHED, AND THE EMPLOYER SHOULD BE ABLE TO AVOID LIABILITY.

If it is found that a supervisor has taken "tangible employment action" against an employee in connection with sexually harassing conduct, the employer will be liable, regardless of whether the employer had a harassment policy, or whether employee took advantage of the policy to report the harassment.

On those occasions when an employer may raise the affirmative defense recognized by the court, several issues related to the defense will need to be addressed.

First, when will an employer be seen as having "exercised reasonable care to prevent and correct promptly any sexually harassing behavior?" The Court provided a partial answer to the question in noting that, while proof of an anti-harassment policy on the part of an employer "is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating" this element of the defense.

In other words, if an employer has an effective policy concerning the prevention and reporting of sexual harassment, the first element of the defense should be met. There will certainly, however, be litigation concerning whether particular sexual harassment policies serve to satisfy the test outlined by the Court

There will also be disputes concerning the second element of the defense, whether the "plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

Again, the Court referred to the role played by an employer's sexual harassment policy, stating that, "while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." This language should prove to be extraordinarily beneficial to employers as they raise this affirmative defense.

If an employer has a sexual harassment policy in place, and an employee fails to take advantage of that policy, both elements of the defense should be established, and the employer should be able to avoid liability.

The potential fly in the ointment for employers, however, is the presence of language concerning the "reasonableness" of an employee's actions.

There is currently literature in the psychological community that speaks of the understandable reluctance on the part of employees to report sexual harassment, particularly when the acts are being committed by a supervisor. Employees will often fail to report harassment if they believe that some form of retaliation could result from the report.

This is why the first element of the defense is so important. If an employer can show that it has a procedure that provides for confidential handling of complaints, and that the complaints will be handled in a speedy and effective manner, it should make it much easier to show that the failure to complain under the procedure was unreasonable.

On the other hand, if a particular harassment policy is found to be wanting in the areas of confidentiality and/or effectiveness, or if other employees have been retaliated against for reporting harassment on previous occasions, employers will likely have a difficult time proving this element of the defense.

Another important factor in presenting and challenging the defense is the extent to which the sexual harassment policy has been distributed by the employer.

An effective policy on paper will not be seen as reasonable if it sits in a supervisor's desk, or gets posted behind a refrigerator in the workplace kitchen. Employers can hardly claim that employees act unreasonably by failing to report harassment if their policies are not fully disclosed at the workplace.

By establishing a brightline test for determining when employers will be held liable for supervisor sexual harassment, the U.S. Supreme Court has enabled both employers and employees to better know where they stand in the litigation of such claims.

While there are certainly several standards and phrases in the *Faragher* and *Ellerth* decisions that will need interpretation and definition in the coming years, the framework for analyzing supervisor sexual harassment claims is clearly in place, and should prove helpful to all those who advise clients on both sides of employment relationship.

ESTATE PLANNING CORNER

The Alaska Community Property Act

☐ Steven T. O'Hara

Last year Alaska law was changed to provide that certain discretionary trusts may have an unlimited duration (AS 34.27.050(a)(3)). Last year Alaska law was also changed to provide that a trust, whose discretionary beneficiaries include the person who created the trust, is in only limited circumstances subject to the claims of that person's creditors (AS 13.36.310 and 34.40.110).

For married couples, this year's changes to Alaska law may be even more profound. This year Alaska law has been changed to provide community property as an alternative form of ownership for married couples. Specifically, this past session the Alaska Legislature passed House Bill 199, known as the Alaska Community Property Act. On May 22, 1998, the Governor signed this bill into law. The Alaska Community Property Act is new Chapter 75 of Title 34 of the Alaska Statutes.

The creation of Alaska community property is unique. In order to create community property under Alaska law, a couple must enter into a written "community property agreement" or a written "community property trust" (AS 34.75.030, .090 and .100). Thus a married couple will not have community property under Alaska law by default.

To encourage couples to verify they know what they are doing when creating community property under Alaska law, the community property agreement or trust must contain the following language in capital letters at the beginning of the document: THE CONSEQUENCES OF THIS AGREEMENT [OR TRUST] MAY BE VERY EXTENSIVE, INCLUDING, BUT NOT LIMITED TO, YOUR RIGHTS WITH RESPECT TO CREDITORS AND OTHER THIRD PARTIES, AND YOUR RIGHTS WITH YOUR SPOUSE BOTH DURING THE COURSE OF YOUR MARRIAGE AND AT THE TIME OF A DIVORCE. ACCORDINGLY, THIS AGREEMENT SHOULD ONLY BE SIGNED AFTER CAREFUL CONSIDERATION. IF YOU HAVE ANY QUESTIONS ABOUT THIS AGREEMENT, YOU SHOULD SEEK COMPETENT ADVICE (AS 34.75.090(b) and 34.75.100(b)). The statute also spells out the other requirements to have a valid community property agreement or trust (AS 34.75.090 and 34.75.100).

It is anticipated that community property created under Alaska law will be recognized as community property for federal tax purposes. Thus the opportunity to create community property under Alaska law may be an opportunity for married couples to reduce potential income taxes.

Recall that the concept of "basis" is used in determining gain or loss from the sale or other disposition of property (IRC Sec. 1001 & 1011). For example, if a client purchases stock for $100,000, her basis in that stock is $100,000 (IRC Sec. 1012). If she then sells the stock for $500,000, her taxable gain is $400,000, which is the consideration received in excess of her basis.

Recall further that when a property owner dies, the person entitled to the property obtains, in general, a basis in the property that is "stepped up" to the fair market value of the property (IRC Sec. 1014). In this respect, community property is advantageous because both halves of the community property obtain a step up in basis. By contrast, with common-law property that is jointly owned, only the decedent's half of the property generally obtains a step up in basis (*Cf. Gallenstein v. U.S.*, 975 F.2d 286 (6th Cir. 1992) (discussed in the Nov.-Dec. 1993 issue of this column).

Consider a husband and wife who own stock as joint tenants with right of survivorship. They are the only joint tenants, and the stock is not community property. The couple purchased the stock for $100,000. Suppose the husband dies when the fair market value of the stock is $500,000.

Here the surviving spouse would obtain a partially stepped-up basis of $300,000 in the stock. Half the stock would be included in the husband's gross estate for federal estate tax purposes (IRC Sec. 2040(b) & 1014(b)(9)). That half would be considered to have a fair market value of $250,000, since the whole had a fair market value of $500,000 (IRC Sec. 2040(b)(1)).

The surviving spouse's basis in her half (which would not be included in her husband's gross estate) would be $50,000 - that is, half the couple's original purchase price of $100,000. The surviving spouse's new basis in the stock would be her original basis on her half (i.e., $50,000) plus the stepped-up basis in the half that would be considered to have passed from her husband (i.e., $250,000), thus totaling $300,000. So if the surviving spouse then sells the stock at its fair market value of $500,000, she would have a taxable gain of $200,000.

On the other hand, consider a couple who purchased the same stock with $100,000 of community property. This couple has maintained the character of the stock as community property, and the stock is recognized as community property for federal tax purposes. Both the husband and the wife have a present undivided one-half interest in the stock as community property. Suppose the husband signs a will (or community property trust) giving his half of the stock to his wife, if she survives him. Suppose he then dies when the fair market value of the stock is $500,000.

Here, since the stock is community property, the surviving spouse would obtain a fully stepped-up basis of $500,000 in the stock. She could then sell the stock for as much as $500,000 at absolutely no tax cost.

In other words, the decedent's half of community property generally passes through his estate as separately owned and thereby acquires a step-up in basis (IRC Sec. 1014(b)(1) & 2033). In addition, and what is distinctive about community property, the surviving spouse's half of community property is deemed by statute to have passed from the decedent and thus also gets a step-up in basis (IRC Sec. 1014(b)(6)).

The issue of community property versus common-law property is a good example of why clients should consider each asset from a local-law and tax standpoint. The question to consider is what opportunity (or problem) is inherent in the ownership of the asset.

Book Review

The Balance of Power

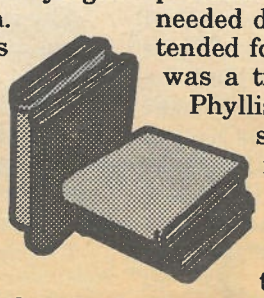
Archibald Cox: Conscience of A Nation,

by Ken Gormley, with Elliot Richardson

(Addison-Wesley 1997). 585 pages— $30

BY DON MCCLINTOCK

Final exams at the end of my freshman year in college were marked by two compelling certainties: 1) I would be fortunate to scrape together a "C" in Calculus before I could switch to my new political science major freed from the drudgery of a math and science curriculum; and 2) Senator Sam Erwin and the Senate Watergate Committee would bring President Nixon to justice and redeem the Republic through the genius of constitutional checks and balances. I was only right about the first proposition.



It was Archibald Cox's self-critical and cautious probing of presidential prerogative, and ultimately his courage to follow his conscience that doomed the president. Professor Gormley's biography of Archibald Cox brings back to public view the life of a man whose contributions to our country defy tally. It is also a timely insight into the genesis of the special prosecutor as an institution and a benchmark to measure the state of the institution under Kenneth Starr. Finally, it is an enjoyable visit with a man who walked honorably with the giants of our legal and political past.

Cox was a New England patrician by birth. "Billy" Cox was the scion of Puritan and American Revolution notables through his mother, including William Evarts, the successful defender of President Andrew Johnson in his infamous impeachment trial. His father, Archibald Sr., had registered the trademark for Johnson and Johnson and counted Learned Hand as a friend. Early opportunities were of the sort only white well bred males had available before the Second World War: private school, Harvard, Harvard Law School, the Law Review, family friendship and clerkship with Judge Learned Hand, and marriage to Phyllis Ames, daughter of Dean Ames of the Harvard Law School. From that background of social privilege, Archibald Cox would take the best traditions of his patrician heritage—a deep commitment to public service, modesty in his accomplishments, and forge it with a deep intellectual honesty to produce achievements that are hallmarks of political and legal institutions today.

Cox had his good luck. His marriage to Phyllis, symbolic of his marriage to the Harvard Law School, provided him with the support he needed during and between his extended forays into public service. It was a traditional marriage where Phyllis raised the children in the same house where she was raised, summered on their farm in Maine, volunteered for 4H, and on occasion, relocated to Washington D.C. to avoid the extended absences that public service brought. One is left with the impression of a strong and capable woman of great intellect and strength. The Law School itself provided Cox with credentials, a refuge from politics, and an opportunity to provide an intellectual framework to the changes he set in motion in labor and constitutional law.

World War II first lead Cox into the world of labor law, and the solicitor's general office—perhaps the two areas where his mark is the deepest. Recruited by Charlie Wyzanski to join him as an assistant to the National Defense Mediation Board, he immediately had to confront John L. Lewis of the United Mine Workers. Lewis won that first confrontation and the Mediation Board was dissolved. Cox, however, with quiet help from Learned Hand and Wyzanski, was first given a position in the Solicitor General's office, the unit within the Justice Department that exclusively handles appeals before the U.S. Supreme Court, and later, an appointment as an associate solicitor of labor. However, after the war ended, taking sound political advice from Harold Ickes, he returned to Ropes and Grey in Boston. He was immediately recruited as a professor at Harvard Law School, turning his back on fortune in favor of service—a choice that endured for the rest of his career.

By 1952, Cox was a leader in American labor law. He was an academic, however, not a practitioner. At the request of President Truman, he became the chair of the Wage Stabilization Board. To one with political ambitions, this was a risk as the Board was a discredited institution and was viewed as ineffectual. There he took his second shot at John L. Lewis, and again Lewis prevailed—Cox tendered his resignation to President Truman only five months after starting when the president would not back the Board's position. It was an act of belief and conviction that gathered little praise at the time, but would reap huge rewards when repeated later in another confrontation with the White House.

In 1960, Cox became the head of presidential candidate John F. Kennedy's group of intellectual advisors. It was both a heady and frustrating experience. The "eggheads" were to be a source of fresh ideas and policy directives for the Camelot presidency and many of their themes and ideas filtered into the campaign. However, it was the political savvy of Ted Sorensen and Dick Goodwin that prevailed in catering to the press and television. Significantly for the course of constitutional law, JFK's election led to the appointment of Cox as solicitor general.

There Cox argued and won seminal cases such as the one person one vote case of *Baker v. Carr,* and the later Reapportionment Cases. Professor Gormley lays out the careful and intellectually rigorous process that Cox used to rationalize whether *Baker v. Carr* could be extended to the imposition of a strictly equal mathematical application.

THE PERSONAL STRUGGLES OF THE VARIOUS PLAYERS IN THE WATERGATE DRAMA ADD COLOR TO THE NARRATIVE CONTENT.

Refusing political pressure from Attorney General Robert Kennedy and the Presidents' inner circle to push only that theme, he gave the Court other weaker standards to fall back upon, a quandary resolved by the Warren Court's embrace of a strong standard in *Reynolds v. Sims.* He argued and won the cases that validated the Civil Rights Act, *Heart of Atlanta Motel* and *Katzenbach v. McClung*. Before the assassination of JFK brought his office to a close, he had amassed a record of successful argument equaled by few and none in modern history. The theme of this part of the book resonates with Cox's later confrontation with President Nixon, a cautious exploration of principle and precedent, respect for the institutions with which he dealt, but ultimately the conviction to move his ideas forward. It is an excellent example of the classic theory of the evolution of legal principles, put into practice.

It is only proof that Cox was a man of all seasons that his return to Harvard Law School would soon put him in the role of dictator, in the Roman sense, in charge of decision making during the student riots. This service was symptomatic of much of Cox's service—he did it because someone should do it, despite the fact it promised frustration and little satisfaction, and he refused to parlay his service into a better position for himself.

It was, of course, a fumbled burglary that propelled Cox into the wider consciousness of the nation. Professor Gormley spends half of his book focusing on the details of Watergate and its aftermath and these chapters alone are well worth reading. The first special prosecutor position was a negotiated position, a contract. Seven others refused the position, including Warren Christopher, before it was offered to Cox.

Hired by Attorney General Elliot Richardson to conduct an independent investigation of the Watergate burglaries, Cox insisted that he could be fired only for gross misconduct or "extraordinary improprieties." He also insisted that he alone could decide what to tell the Attorney General and what he could keep confidential. In terms of value, clearly, Cox was the most productive of his successors—the original budget was only 2.8 million dollars.

The personal struggles of the various players in the Watergate drama add color to the narrative content. One feels pity for the Justice Department lawyers who fought a struggle in the press to prove they had not botched the investigation. One feels some contempt for the Assistant Attorney Henry Pedersen who leaked information back to the president for apparent self-interest.

One wonders how much Professor Charles Wright, of federal practice and procedure fame, knew about Nixon's sins while mounting his dogged defense against Cox's investigation. The close relationship between Richardson and Cox is notable for the fact that both trusted the other in an environment where trust was naive, and both had every incentive to deceive the other. Given the descent into media hell that the Starr investigation has undertaken, one is impressed by Cox's unwillingness to make his case in the press. It is for that reason, that I and much of the nation focused on the flamboyant Senate Watergate hearings, until the Saturday Night Massacre made clear the fact that Cox's probing had struck too deep into the presidential bulwarks. Despite a life marked by service and courage in his convictions, it is a regrettable irony that he shared the same fate as Judge Bork, who, after his two superiors resigned rather than honor President Nixon's order, fired Cox as special prosecutor. Politics would prove an insurmountable bar to a Supreme Court appointment.

Professor Gormley handles well the personal struggle that Cox underwent to find the proper intellec-

Continued on page 11

Bar People

Former Anchorage attorney joins Freshfields


Douglas Barker

Attorney **Douglas J. Barker,** a former Alaska resident, has joined Freshfields, one of the world's largest and oldest international law firms.

Barker, 36, has been working with Naoki Kinami, a Japanese attorney, in Tokyo since 1989 and was a member of Kinami and Associates before it merged with Freshfields effective May 1, 1998.

Freshfields has 19 offices worldwide with more than 186 partners, 980 attorneys and a staff of over 2000. The firm is the first international firm jointly able to advise on matters of Japanese law, English law and U.S. law.

Barker will continue working from the Tokyo office as a manager in mergers and acquisitions, as well as corporate and finance matters.

Barker is the first Alaska attorney to practice with Freshfields.

Barker graduated in 1979 from Anchorage's Dimond High School, Stanford University in 1983 and the University of Oregon School of Law in 1986. He externed for U.S. District Court Judge James Fitzgerald and was an associate of the former Lynch, Crosby and Sisson law firm before moving to Tokyo.

Transitions

Sheri Hazeltine is now working at the Alaska Department of Revenue in Juneau, as a hearing examiner; she previously worked at the U.S. Forest Service.....The Anchorage office of the law firm Holmes Weddle & Barcott, P.C. has relocated to: 701 W 8th Avenue, Suite 700, Anchorage, Alaska 99501. The phone number: (907) 277-4657 have remained the same.

Routh elected as USFN president

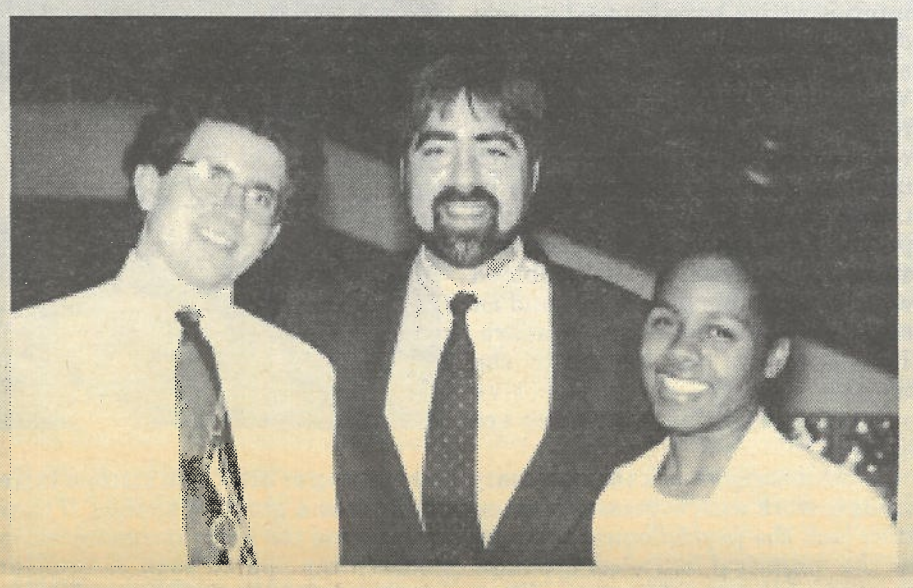
The United states Foreclosure Network (USFN) announced that **Stephen Routh** of Routh & Crabtree, APC, is the new president of its board of directors. Mr. Routh was elected at the Mortgage Bankers Association of America (MBA) Conference in New Orleans last month. He will serve on the board for a term of three years.

Stephen has been a member of the USFN since 1988 and has served as a board member since 1991. He serves on the USFN's Executive and Liaison Committees and recently completed a two year term as president-elect.

The USFN is the largest national non-profit, association of attorneys, trustee companies and other entities that provide education training, qualified referrals, and industry support to the mortgage servicing industry. The organization, is celebrating its 10th anniversary this year.

Routh formed Routh & Crabtree, a legal professional corporation in the late 1970's. It provides legal representation in the areas of mortgage banking and collections, special credits, title insurance, real estate and commerce. Routh & Crabtree has offices in Anchorage, Washington, Oregon, and Idaho.

Youths receive award


Left to right: David Grinder, Steven Pradell, Elizabeth Posey

On May 19, 1998 at a special swearing in and awards ceremony held at the Anchorage Museum of History and Art, the law firm of Pradell and Associates awarded $500 in scholarship and achievement award funds to the two members of the Anchorage Youth Court who best demonstrated the qualities of Leadership, Effort, Aptitude, Dedication, Ethics, Responsibility & Service while serving as member of the Anchorage Youth Court Bar. David Grinder, a senior at Chugach High School, received the scholarship. David was the president of the Anchorage Youth Court for the 1997-1998 term. Elizabeth Posey, a junior at Dimond High School and home school, received the achievement award. Elizabeth is the chief judge of the Anchorage Youth Court.

Book Review

Continued from page 10

tual basis for his attack on executive privilege and its repercussions on the Presidency and the security of the country. He handles equally well the negotiating sessions between the parties and Cox's exploration of the rules of engagement. Cox had no template to follow in deciding how to make the Presidency bend to the rules of civil procedure. Even the serving of the subpoena for the first set of tapes seemed problematic and a constitutional crisis was avoided when the presidential staff accepted service of the subpoena.

What one gleans from the struggle between the special prosecutor and the embattled president, is that all were unwilling to depart from the settled expectations that are created by a system of laws. Richardson's refusal to fire Cox without grounds was a brave political act (for which Richardson gleaned little subsequent political advantage) but was also rooted in the fact that he had not made an at will appointment. Richardson believed that made a difference that should guide his actions. The acceptance of the subpoena for the tapes was not required, in fact, the arguments of Charles Wright could have provided a basis for refusing service. But no one gave serious thought to simply ignoring it. But who would have won the battle between a process server and the Secret Service or the Marines?

Professor Gormley examination of Archibald Cox's life is the bright side of how our constitutional democracy has managed to diffuse conflict with a respect for law. Cox's life was largely free from the conflict that the generation earlier experienced between police and the courts and labor, of massacres, and judicially condoned murder and injustice. The period of his intellectual flowering was instead one where personal courage and the use of fair laws began unraveling racial injustice and confirmed limits on the presidential power.

But one cannot help a sense of relief that Cox's confrontation with the President was not met with the attitude and temperament of someone like John L. Lewis, who believed more in his goals than the laws that frustrated their achievement, and unlike Nixon, had the force of will to bring it about.

A Note about the author: Professor Ken Gormley of Duquesne Law School has written for diverse publications such as Rolling Stone and the ABA Journal. A student of Professor Cox at Harvard Law School, Prof. Gormley also made his own mark on the institution as a senior founding member of the Somerville Law Review where he was known for his prolific contributions to the bar. It is fitting that in the Who's Who list of acknowledgments made in writing this book, which are quite impressive, Professor Gormley remembered to honor his beginnings with an acknowledgment to the SBR.

Witness Preparation

Creating minor miracles in the courtroom

By Howard Varinsky

Is there a trial lawyer alive who hasn't had a witness that, in one way or another, just didn't "get it"?

Who hasn't had the urge to pull a floundering witness off the stand and testify for him? Every litigator has had the experience of watching a blundering witness drag down an otherwise winnable case. Unfortunately, no matter how effective their opening statement or closing argument may be, trial lawyers are completely dependent on their witnesses' credibility. In fact, studies show that the single greatest factor in juror decision-making is witness testimony.

Through conducting more than 1,000 focus groups and post verdict interviews, we have learned a great deal about how jurors perceive, evaluate and react to witnesses. We've also learned exactly what jurors need from witnesses to respect, believe and identify with them. Witness performance can be tremendously enhanced if standard preparation—the review of facts and answers to questions—is combined with some simple psychology and an understanding of human nature. Trial attorneys are amazed by the transformation of ineffective witnesses when these principles are applied.

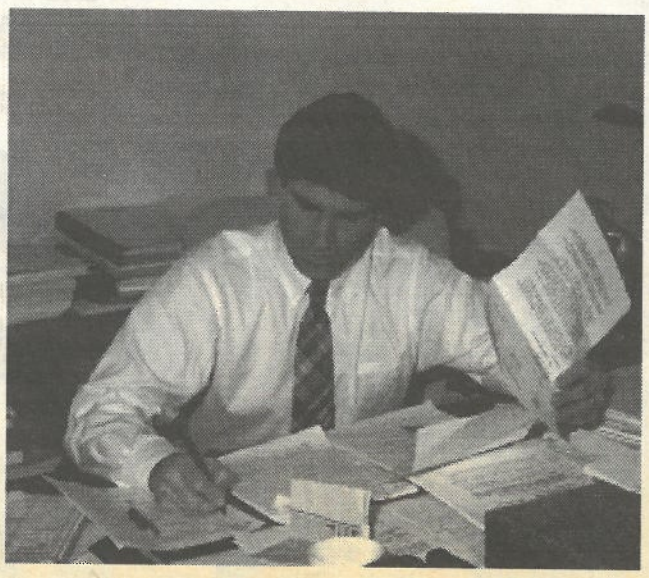
Most attorneys lack the necessary skills to work with witnesses because they lack the psychological training or the empirical knowledge of how *jurors evaluate* witnesses. They accept substandard performances from their witnesses because they simply don't know how to successfully intervene. In our experience nearly all witness problems can be resolved by providing witnesses with the insight and tools they need to improve performance at trial.

UNDERSTANDING THE TERRAIN

Witnesses perform better when they understand the terrain—by learning the rules and culture of the courtroom, and by knowing what each side is attempting to achieve during direct and cross examination. Like anyone else, witnesses need to have a sense of control in order to do their best work. Simply reviewing their testimony is not enough. Teach witnesses that testifying involves two separate and distinct crafts or skill sets—one for direct and one for cross-examination.

DIRECT EXAMINATION: USING TEACHING TECHNIQUES

The skills involved in testifying on direct differ from those needed in cross-examination. Witnesses need to understand that direct testimony requires them to explain their facts to the jurors. Research shows that witnesses who communicate as teachers are more positively received by jurors than witnesses who don't. To teach and communicate facts effectively, witnesses need to face jurors, speaking to them the same way they would explain something to a familiar group such as they sometimes do at work, home or in social situations. When working with witnesses, have them imagine they



are sitting at their own kitchen table talking to a group of friends. If they can access the same communication skills they use in such a familiar environment, they will be much more comfortable on the stand. They need to employ their own language and vocabulary in presenting this information. Witnesses who are scripted or told exactly what to say by their lawyers often make mistakes or are perceived by jurors as rehearsed. When they use their own words to tell their story, they are more likely to answer with confidence and consistency.

Our research on the components of witness credibility has taught us that the major concern of jurors during direct testimony is whether the witness can look them in the eye when testifying. We have heard thousands of times that jurors did not like a particular witness because that person had little or no eye contact with them. This is a basic human reaction; all of us judge a person's credibility by noticing whether they can look us in the eye while speaking.

Jurors are also very sensitive to witness testimony that is perceived as manipulative. Bring to the witness' attention any behavior that involves selling or ingratiating themselves to the jury, as well as any attempts at acting. Jurors pick this up—consciously or unconsciously—and react negatively to it. The trial attorney is the sales person, not the witness. Anything that interferes with a clear, straight recitation of the facts negatively impacts a witness's credibility.

CROSS-EXAMINATION: UNDERSTANDING THAT IT'S ALL TECHNIQUE

Putting a lay person onto the stand with a skilled cross-examiner is analogous to putting him into a boxing match with a prizefighter. The hapless victim in the ring would have no idea of the feints, jabs, punches and combinations the boxer would throw at him. In essence, he would be a sitting duck. The same is true on the witness stand. Cross-examiners score points by using refined technique on unsuspecting witnesses. When witnesses are taught to be aware that EVERYTHING the cross-examiner does is simply technique, they are far more effective on the stand.

It is important to explain to witnesses that the cross-examiner is attempting to control them at all times, that he or she has no intention of letting them tell their story, and that the cross-examiner's main purpose is to make the witness look like a liar, cheat, fool or someone who is mistaken or has memory problems. Witnesses must learn how to deal with hostile questions, interruptions, abrupt changes of subject, sarcasm and derogatory remarks. Prepare witnesses to respond to compound statements and questions, attempts at controlling the pace, traps, and "gotcha's."

Train witnesses to keep their eyes on the cross-examiner at all times and be aware of what he is attempting to do. Witnesses must learn that trial lawyers use technique to command the interaction and use wordcraft to misconvey and mischaracterize facts to the jury. The witness must be taught how to stand up for himself and respectfully defuse the cross-examiner's tactics. For example, in the William Kennedy Smith case one of the first questions the prosecutor asked after Kennedy's direct testimony was whether Kennedy expected the jury to believe the story he had just told. Kennedy simply—and very successfully— replied: "It's not a story, it's the truth."

It's imperative to teach witnesses how to deal with the subtextual messages built into the cross-examiner's statements and questions before dealing with substance, much like Kennedy did in the above example. It is also crucial that witnesses do not try to convince the cross-examiner of the facts or get drawn into a dispute with the attorney that appears competitive or immature. Jurors view such behaviors as defensive, which is damaging to witness credibility. Teach witnesses to take control in a subtle, courteous manner. Witnesses often do not know they have the right to review documents or ask for clarification, and that they can control and slow the pace by taking a drink of water, or by asking for a restatement of the question. In short, the witness should be prepared so that he or she can sit poised in the witness stand without being unnerved by anything the cross-examiner says or does. It is a joy to watch witnesses who feel confident they can successfully manage anything the cross-examiner throws at them. This confidence communicates to a jury.

THE HIDDEN RULEBOOK

Witnesses invariably operate under an invisible set of rules when on the stand: "When I sit here, I will give up most, if not all, of my personal power and will relate and react as if placed in a mental straight jacket." They envision the judge as a domineering authority eager to suppress any self-assertion by the witness. Witnesses need to know that there are no rules requiring them to be passive and that the judge is not concerned with how they respond to the cross-examiner or how they present their testimony. Teach them that the judge's purview is in making legal decisions and acting as a legal referee, not in controlling how they answer on the witness stand.

Witnesses react to these inaccurate fantasies of courtroom rules and commandments as if they were written in stone. Point out the passive behavior that stems from following these imagined rules. The indications of this invisible rulebook are obvious during cross-examination practice. If your witness is having trouble defending himself during cross, ask him if he would be relating the same way if he was sitting at his kitchen table and someone was trying to verbally beat-up on him in front of others. How would he handle it? Ask why he reacts so differently with the same dynamic when it occurs in a courtroom? Show him how the unconscious "rulebook" in his head prevented him from taking care of himself the way he would in a natural situation.

Once a witness realizes that these rules do not exist in reality, a sense of liberation occurs. It is wonderful to watch the metamorphosis when a witness realizes he doesn't have to hang his personal power at the door when he takes the stand. This knowledge and feeling of freedom increases a witness's confidence and, consequently, credibility.

DEALING WITH UNREACHABLE, UNMANAGEABLE WITNESSES

There is no such thing as a witness who can't be helped. This concept is more a reflection of the lawyer's anxiety than of any particular witness. Everyone is reachable in some way; therefore it is always worth a try. The few witnesses who have been truly inaccessible fall into the category of severely disconnected or mentally impaired.

PUTTING IT INTO PRACTICE

A recent witness preparation case in the Deep South provides a good example of the multiple problems that can occur with witnesses in trial.

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The future of dispute resolution

☐ Drew Peterson

What are the issues of most significance for the future of appropriate dispute resolution (ADR)? Such are the questions that present themselves to me after returning from a self-imposed writing sabbatical to this column that I have enjoyed writing since 1987. Absence has not made my heart grow any less fond of this exciting new field of ADR. Yet there remain important questions to be answered for ADR to become the global approach to dispute resolution that many people, myself included, hope it to be.

WHERE ARE THE PEOPLE OF COLOR?

To me, the single most significant issue concerning the ADR movement is the lack of diversity among its practitioners. At a recent conference of the Academy of Family Mediators I observed virtually no people of color in attendance at the workshops. At one of the plenary sessions I did notice a middle-aged black woman. Shortly after I noticed her, the Academy president gave her recognition as one of the founding members of the Academy. There apparently was more diversity amongst the pioneers in the ADR field than remains today. So what happened? Why is it that the mediation field is increasingly a white middle-class field, with little apparent relevancy to people outside of the mainstream Northern European cultural tradition?

In my experience, this has been true of mediation participants as well, although not quite to the same extent. I have had a few people of color as mediation clients, but not nearly as many as the overall population would reflect. This could be explained by their going to mediators of their own cultural background, except for the lack of such practitioners in the community.

I have an African-American theoretical psychologist friend who is of the opinion that the mediation process will always be biased in favor of those disputants most closely aligned with the dominant culture, unless the mediator is of the same cultural background as the disputants.

Indeed, there seems to empirical support for such a view, from studies of small claims mediation in Pittsburgh and elsewhere.

Such a view, if correct, does not doom the field of ADR. It does, however, point to the need for much greater diversity among ADR practitioners. Unfortunately, there does not seem to be a trend in that direction. As my experience at the Academy of Family Mediators would confirm, the field seems to be getting less, rather than more, diverse.

WHERE IS THE JUSTICE? HAVE WE TRADED IT FOR HARMONY?

A related concern, and that of mediation's fiercest critics, is that ADR procedures are nothing more than methods of forced conformity, pressuring participants to trade justice for harmony. As do most ADR practitioners, I vehemently disagree with the view that mediation results in second-class justice. Such a view comes in large part, I think, from poorly designed "mediation" projects that do not meet the accepted standards of practice in the field, and also from confirmed "win-lose" advocates who believe that every dispute must be "won" regardless of the cost of that win to innocent bystanders and interested parties (read children) caught in the middle of the fight.

I VEHEMENTLY DISAGREE WITH THE VIEW THAT MEDIATION RESULTS IN SECOND-CLASS JUSTICE.

Having stated that I disagree with the concept that mediation forces second-class justice, however, I think that it must be recognized that mediation does lead towards conformity of sorts. The results of mediation may often be seen as a form of compromise and result in less being achieved than might be achieved in court.

The line between collaborative problem-solving and the "good-old-boy" method of resolving issues is a fine line (but a critical fine line). This, in turn, I believe explains much of the reluctance of many minority members in America to involve themselves with mediation, especially African Americans. Having fought long and hard to free themselves from the Jim Crow good-old-boy methods of establishing societal harmony, it only makes sense that they would resist a "new" alternative to the courts. The courts, after all, were their best friends during the early days of the civil rights movement.

In mediation training classes we discuss the Rosa Parks case as the classic case that would be inappropriate for mediation. Had Rosa taken her dispute to mediation, the result would have been an agreement that she sit in the middle of the bus but not tell anyone. Such a result would obviously have been of no precedential value to anyone other than herself, and would moreover have been doomed to failure from the onset due to the power imbalance involved.

While disagreeing with those who say that mediation forces harmony at the expense of justice, I believe that those of us in the ADR world need to acknowledge that mediation does lead toward compromise which may be inappropriate in some cases. We also need to be ever vigilant towards forms of ADR which place pressure on less powerful parties to give in under circumstances favoring their more powerful antagonists.

IS MEDIATION LIKE PIZZA? THE BATTLE OVER TERMINOLOGY.

The story is told of the Italian commission which was established to define the "true" dimensions of "pizza", which was being bastardized around the world. As with pizza, "mediation" is a term which is being used in many different ways, which is causing its own problems in the ADR world.

Like the pizza purists, many in the ADR world are of the view that theirs is the correct definition of mediation, and that all imitations must be expunged. I believe it is silly and irresponsible to assert that forms of "mediation" which are being regularly utilized in the marketplace are not in fact true mediation because they do not fit this or that definition of the term.

I have in my library a mediation textbook that says that it is malpractice to do a family mediation case without using caucuses. I have another text in my library which asserts that caucus should never be taken in family cases, and implies that it is malpractice to do so. In mediating family cases for over ten years, I have concluded that caucuses are sometime appropriate in such cases and that sometimes they are not. Moreover I have determined that caucuses can be used for both appropriate and inappropriate reasons.

Mediation is a new and evolving field, which is part of what makes it so exciting and intriguing. There are any number of issues in the field which remain unresolved, even among the most experienced of practitioners. Moreover the field is being expanded on a regular basis to new and different contexts, each of which raise unique and intriguing issues. Comparing a commercial mediation case with a special education mediation case with a victim-offender mediation case is like comparing apples with broccoli with cashews. To assert that we know all the answers about mediation is absurd. To be looking for new and important insights into the field is the duty of every ADR professional.

When I first started in the field of ADR, I would estimate that there were fewer than five people in the State of Alaska making any substantial income from the field. Today I would estimate that number at being near 100, and growing practically daily. Professor Hamilton De Saussure has opined that mediation will be the rule of law in space. I continue to believe that ADR is the legal field of the future. Becoming involved with it has been one of the most positive experiences of my life. Many important issues remain for the future development of the field, but ADR is here to stay. It behooves those of us in the field to regularly strive to make it better.

Creating minor miracles in the Courtroom

Continued from page 12

In this case, the defense lawyers were convinced that their witness—a local blue-collar sales agent--was so bad that he reeked of guilt. They felt that nothing could be done with him. To the attorneys' surprise, however, it took only one two-hour session to turn this witness around.

Sitting around the conference table with two attorneys, the witness was quiet and inarticulate, answering cross examination questions with barely audible "Yes, sir's" and "No, sir's." Besides being passive, he was clearly not a verbal type personality type. He consistently deferred to the attorneys and seemed overwhelmed by the legal environment. He appeared intimidated by highly educated professionals in a system that demands verbal proficiency, and the resulting anxiety interfered with his ability to communicate and defend himself in a courtroom situation.

This witness was also confused in that he never expected that cross-examiners would be so hostile and manipulative. He was operating under the assumption that the lawyers would all be considerate and that everyone involved was interested in justice prevailing. Once he realized that it was truly an adversarial system and that each lawyer was out to win for his respective clients, he began to understand the nature of the game.

This witness needed someone to recognize what was happening and educate him on the rules of the game. Because the lawyers were unable to correctly diagnose the reason for his problematic behavior, they became exasperated, dismissing him as a "dumb cracker" who would make a poor witness. After training, this witness realized how his anxiety and behavior stemmed from his unfamiliarity with courtroom procedures. It was then possible to build his confidence by helping him learn how to testify more effectively.

This was not accomplished all at once, but by addressing one problem at a time, letting each new insight influence how he would deal with successive questions. By educating the witness in this manner, we actually helped him to change his perspective, which then changed how he dealt with the situation. The witness also learned how his deference to educated, professional people caused him to be intimidated by them. He then understood how this intimidation would be interpreted by jurors as a sign of guilt and how it also prevented him from defending his own version of events. By the end of the two-hour session this individual was forceful when needed, dealt effectively with a variety of cross-examination techniques, and stood up for himself very well. The attorneys never thought this could be accomplished. They thought he was a lost cause.

MAKING THE TIME TO WIN YOUR CASE

Trial attorneys are often too overloaded to take the added time to prepare witnesses the way each witness needs to be prepared. Yet the approach described above does not add much time to overall trial preparation. The issue is switching the perspective while working with witnesses, not necessarily adding additional time. When you prepare a witness from a psychological standpoint as well as reviewing facts, it cuts directly to the source of problems and makes the process more gratifying and productive. Approaching witness preparation from this perspective gives litigators a powerful trial preparation tool, as well as a better result in the courtroom.

Howard Varinsky is a trial consultant with offices in California.

HI-TECH IN THE LAW OFFICE

"Push technology" has come to the desktop

MarketSpan, Inc. has released Case*Stream*, a software program and subscription service that sweeps federal district court dockets and automatically delivers cases and other information that meets a subscriber's preselected criteria.

Among other things, Case*Stream* can tell an attorney when clients have been sued—generally before the client finds out. This type of information can be valuable to maintain visibility with current clients, and can lead to new business. A request can be as broad as all class actions filed nationally, or as narrow as all product liability cases filed in the Middle District of Pennsylvania.

The service also allows subscribers to follow a specific case, and prompts the user whenever there is any new docket activity. Thus, subscribers can find out when an opponent has filed a Motion *before* it is physically served. In addition to tracking specific cases, companies, and types of cases, subscribers can also track specific law firms and judges.

SUBSCRIBERS CAN FIND OUT WHEN AN OPPONENT HAS FILED A MOTION *BEFORE* IT IS PHYSICALLY SERVED.

Recently, Case*Stream* aligned with Disclosure Incorporated, a leading provider of direct access to court dockets and financial intelligence. With this association, Case*Stream* provides seamless document ordering direct from the desktop. Clients can order court papers, pleadings, reorganization plans, expert testimony and a variety of other public records, including legislative rulings and corporate financial statements, directly through Disclosure's Federal Document Research service.

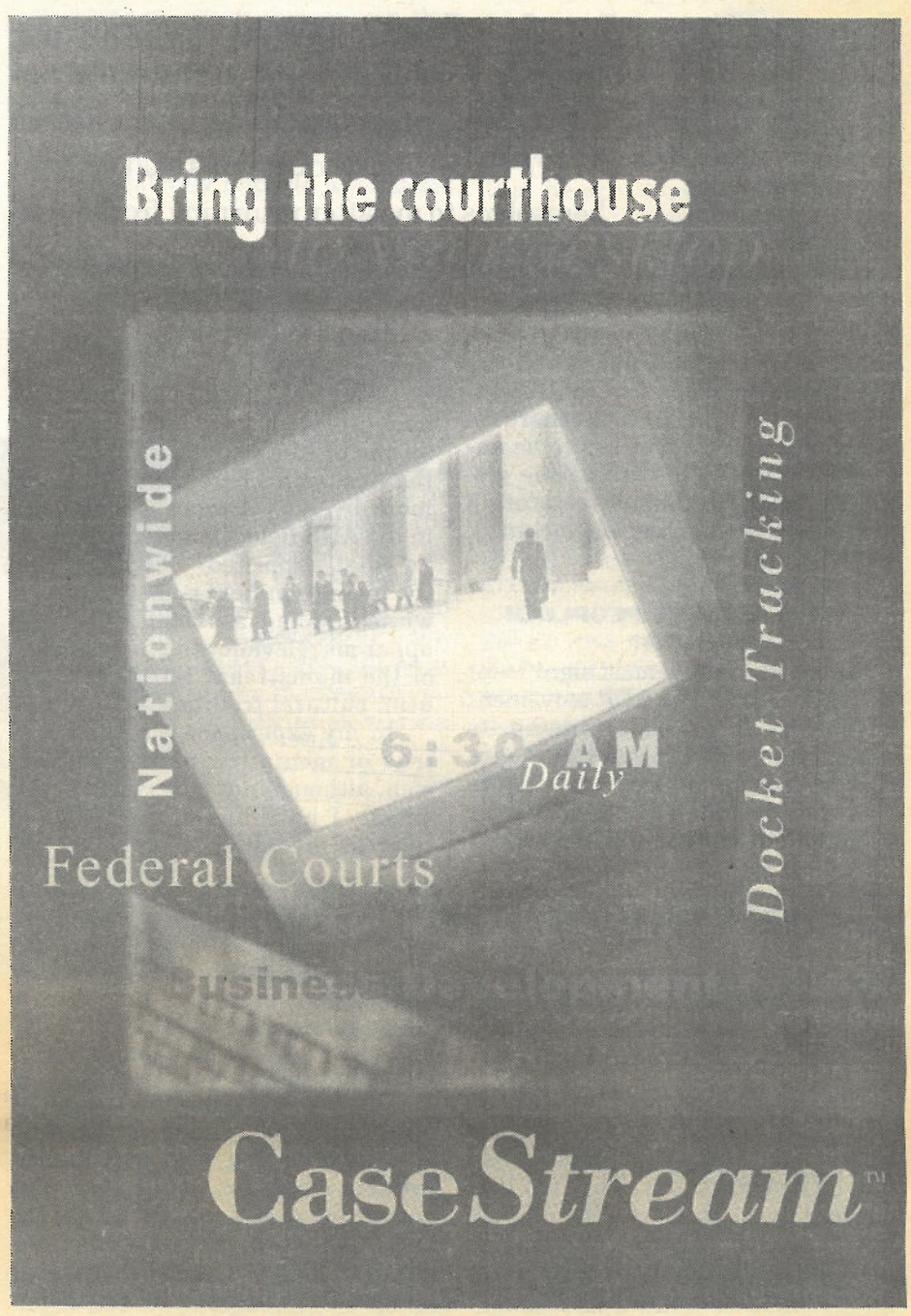
Case*Stream* gets its information from the federal PACER system or Public Access to Court Electronic Records.

Any lawyer can access PACER; however, since the information is not organized in any specific fashion, searches are slow and can eat up substantial personnel time. Also, because each federal court controls its own computer system and information database, available information varies among jurisdictions. Moreover, PACER does not offer automatic notification of anything, or allow searching by class actions, law firms or judges — some of Case*Stream's* most valuable features.

The subscriber sets up a profile (specifying the litigants, cases, law firms, judges, and subject matter of cases they want to follow), and Case*Stream* retrieves that information each night and forwards it to the subscriber's desktop by 6:30 a.m.

Case*Stream* also allows for pass-through billing, by associating client/matter numbers with profile items.

The basic Case*Stream* subscription is $299 per month, for an unlimited number of company users for access to 83 of 94 U.S. District Courts. (Eleven of the courts are not electronically or accessible for downloading). Custom service packages also are available. For more information on Case*Stream*™, contact MarketSpan, Inc. 487 Devon Park Drive, Wayne, PA 19087, 1-800 500-0888. URL: www.casestream.com.



More new products & office releases

Timeslips upgrade

Sage U.S., Inc. has released its Version 8 upgrade of Timeslips® Deluxe For Windows, a time and billing program.

Timeslips Deluxe is designed to help lawyers, accountants and other service professionals track time and expenses, produce customized billing and generate vital management reports that support budgeting and accounting processes. Timeslips Deluxe Version 8 offers several new features, including an updated interface using tabbed dialogues, more billing options, a new "total text" searching system to aid the location of phrases or names, increased ease of use and enhanced reporting capabilities.

Timeslips Version 8 started shipping in late '97 and is available directly from Sage U.S., Inc. at 1-800-235-0999 or tssales@sageus.com. Timeslips Deluxe Version 8 Single-User version retails for $299.95 and records time and expenses for up to eight people. The Network Edition is designed for three users and accommodates the recording of time and expenses for up to 250 people. The Network Edition retails for $699.95; the Network Expansion Kit retails for $199.95.

Sage U.S., Inc. also develops TAL™ Deluxe (Timeslips Accounting Link) to integrate leading PC-based general ledger packages. TAL Deluxe retails for $79.95 and is compatible with leading U.S. general ledger programs including DacEasy, Great Plains Accounting, Peachtree, M.Y.O.B., Solomon and others.

Mergers & acquisitions report goes online

LEXIS-NEXIS Xchange has entered an exclusive agreement with the Bureau of National Affairs (BNA) to offer the *Mergers & Acquisitions Law Report* on the Internet.

Arranged by topic, the LEXIS-NEXIS Xchange on-line BNA report will be offered daily at www.lexis-nexis.com/xchange. Attorneys can access specific information ranging from corporate, secutiries and competition law to related developments in labor and employment law, intellectual property, tax, pension and accounting.

Electronic Filing

West Group and SCT Government Systems have teamed to offer an integrated software system that automates court filings.

The West Group's WestFile Service will link with SCT's Banner Courts for secure electronic filing of court documents in SCT Banner jurisdictions.

For more information on the product: www.westgroup.com or www.sctcorp.com.

EED has solution to deleted data

Electronic Evidence Discovery is offering corporations and law firms what it says is a "total solution" to the litigation problems arising from deleted files oncomputer systems.

EED President John Jessen said the solution will help corporations and law firms limit their litigation liability and significantly reduce the costs of electronic discovery.

"We're helping companies fully erase deleted data so that they are not required to undertake expensive searches for deleted data in discovery, "Jessen said. "When a company deletes data properly, according to an authorized document retention plan, that data should be gone."

"Companies should not be forced to endure the expense of irrelevant and aimless data searches just because the technology exists to conduct them," he said.

At the heart of EED's solution to the problem of deleted data is a software known as "TruErase™, which enables companies and law firms to pre-program their computer systems to erase deleted files on a systematic, scheduled basis. Organizations using TruErase can incur far lower electronic discovery costs by showing that searches for deleted files are unwarranted because, as a matter of policy and practice, all deleted files are truly erased from their computer systems.

EED is the exclusive distributor of TruErase, which is published by the Seattle-based Photon Inc.

In most modern computers deleted computer files actually remain on hard-drives and other magnetic media after deletion. Typically when a file is deleted, the operating system takes no action to actually remove the data contained in the file from the disk or hard drive. It simply instructs the File Allocation Table (FAT) to change the first character of the deleted filename to a special character, which tells the computer that this space on the disk or drive *may* be used in the future.

Thus, deleted files can be retrieved from disks and hard drives until they are actually completely overwritten by new data. TruErase overwrites all aspects of deleted flies to ensure full erasure.

The program also lets users standardize and automate removal and deletion routines; create templates that define and enforce an organization's retention policies; predefine groups of files that need to be deleted; and select files for deletion simultaneously across multiple drives from one window.

For additional information on TruErase call (206) 343-0131, or e-mail to eed@eedinc.com.

Computers and the Year 2000

A review of selected litigation issues

Like many a serious problem, the Year 2000 problem is stated easily but solved with difficulty. The problem is that most computer hardware and software coded the year in a date field by using only two digits - "95" for example. The century designator - "19" - was just assumed. Such a computer may incorrectly recognize the date "00" as the Year 1900, when in fact it was meant to be the Year 2000. When coming across such an ambiguous date code, the computer may shut down or may produce incorrect data.

By now it is clear that the Year 2000 problem will cause substantial problems for a wide array of businesses worldwide. It is also clear, in the United States at least, that the courts may become a battlefield for many potential claims arising out of the Year 2000 problem. Affected persons may sue users; users may sue vendors and advisors, etc. However unprecedented the technical problems and the magnitude of the claims brought on by the Year 2000 problem may be, much of the legal framework by which the Year 2000 claims will be judged is fairly well established. Although undoubtedly some claims cannot be forecast, many disputes will involve typical contract and tort claims and will be met with familiar contract and tort defenses.

This is a summary of selected legal problems that are likely to arise in litigation concerning the Year 2000 problem. By analysis of how the courts have applied established law in cases that involve computer hardware or software, perhaps we can gain a preview of the eventual resolution of issues likely to arise in Year 2000 litigation.

SELECTED ISSUES IN CONTRACT LITIGATION

The Uniform Commercial Code (UCC) will often be applied to Year 2000 litigation arising from sales of computer software or hardware or mixed packages of software and hardware. Although most software is actually licensed rather than sold, we will use the term "sale" throughout this paper.

Contractual warranties may be express or may be implied in the contract. An express warranty of Year 2000 compliance will obviously be rare. But a court will closely examine the technical specifications contained in the contract or other documentation of the sale to ascertain if any of the documentation created a warranty of Year 2000 compliance. If, as is increasingly likely, both parties to the sale generally knew of the Year 2000 problem at the time of purchase, a court will look to the specific language in the agreement to assess the risk between the buyer and seller.

Under the UCC, a contract for the sale of software contains an implied warranty of merchantability and may contain an implied warranty of fitness for a particular purpose. The implied warranty of merchantability is unlikely to be applied to most Year 2000 litigation because it is easily disclaimed and because it may not be breached if the software is otherwise operable and is similar to other software in the marketplace. If the vendor knew of the buyer's particular purpose in buying the software and knew that the buyer was depending on the vendor to furnish software that would accomplish that purpose, a court could hold that the implied warranty of fitness for a particular purpose was made. In any event, the implied warranty of fitness for a particular purpose is also usually disclaimed. Thus neither of the implied warranties are likely to be of great importance in most Year 2000 litigation.

Many sales contracts contain a clause setting forth the exclusive remedies for breach of that contract, usually repair or replacement of the goods or return of the purchase price, and barring all other remedies. These clauses will be enforced unless they cause the remedy to "fail of its essential purpose" in other words, not to be an effective remedy. Sales contracts often also limit the types of damages which may be obtained in any litigation concerning the contract, typically barring the recovery of consequential damages. Such clauses will often be enforced.

A key issue in much Year 2000 contractual litigation will be the statute of limitations. An action for breach of warranty under the UCC must be brought within four years of the breach. For software unable to handle the Year 2000, this would be within four years from the sale of the software. In the rare circumstances where the sales contract contained a warranty of future performance, the statute of limitations will not begin to run until the Year 2000 problem is discovered.

SELECTED ISSUES IN TORT LITIGATION

Tort claims, especially those alleging negligence, are also likely to be common in Year 2000 litigation. For the most part, courts have refused to allow claims for economic damages against computer sellers, programmers or advisors for professional negligence. Most courts hold that any such claims should be governed by the duties and warranties set forth in the contract between the parties. Some courts, however, have allowed claims against those in the computer industry for ordinary negligence — the failure to exercise ordinary care.

Fraud claims alleging a misrepresentation of Year 2000 compliance or a failure to disclose that the software could not handle the Year 2000 transition are also likely to be common. As these claims are governed by state law, the treatment and validity of such claims will vary from state to state and from case to case.

Certain cross-jurisdiction observations may be made. In some states, negligence or strict liability claims based on software with a Year 2000 problem would be barred if the software caused only economic losses. The damages recoverable in a fraud claim are unlikely to be affected by a sales contract's limitation of damages clause.

Moreover, a fraud claim based on a Year 2000 defect may be barred by the applicable state's statute of limitations. The statute of limitations for fraud will ordinarily begin to run when the buyer discovered, or in the exercise of reasonable diligence, should have discovered that the software or system was not Year 2000 compliant. On the other hand, if the buyer reasonably relied upon a fraudulent assurance or warranty from the seller that the software was Year 2000 compliant, the statute of limitations may not begin to run until the buyer discovers (or in some jurisdictions, should reasonably have discovered) the falsity of that assurance.

— Heller Ehrman White & McAuliffe.

Executive summary of a Year 2000 white paper, reprinted in the Bar Rag with permission.

EZ-Filing introduces version 2.0

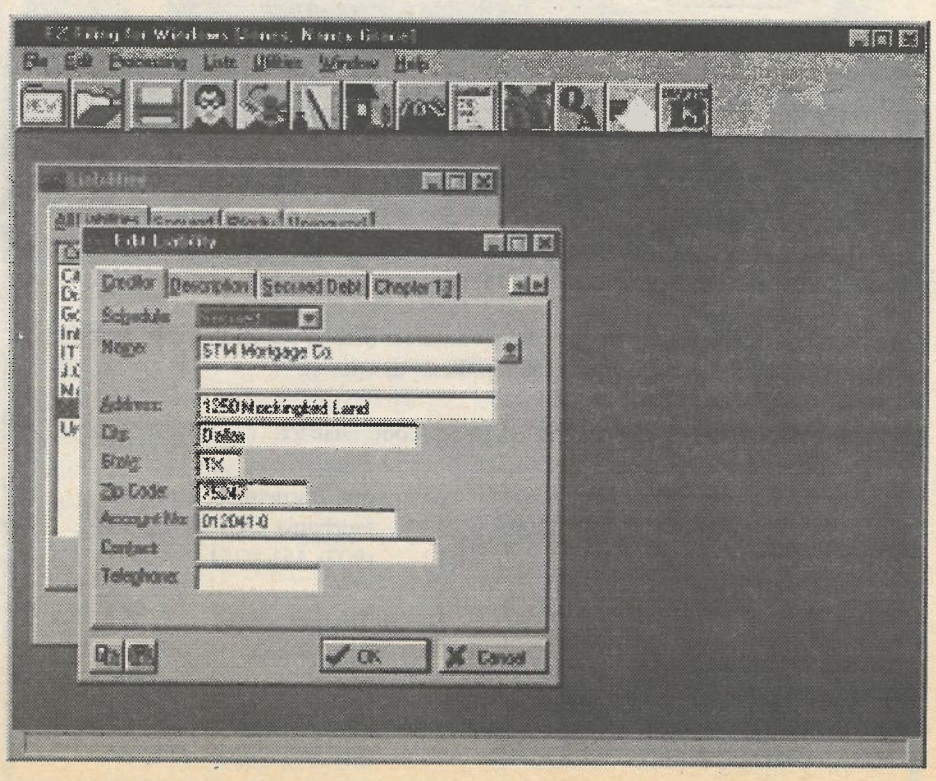
EZ-Filing, a bankruptcy forms preparation software program, has just released version 2.0 for Windows 95/98/NT. This latest version decreases filing times from the 1.0 version.

Martin Mohr, manager of software development at EZ-Filing, claims the program is so simple and intuitive to use that there is no learning curve. "Now individuals preparing bankruptcies can work with state-of-the-art software engendering all of the features and benefits that will help them do bankruptcy petitions in less time, with greater ease, and with more accuracy than ever before," he says.

New features in Version 2.0 include a New Client Default that automatically transfers repetitive information to each new client, including the fee schedule. There is also a Liabilities Schedule that automatically places every creditor into a Standard Creditors' file so a keystroke or two will automatically fill in that creditor's information. EZ-Filing also saves the printing sequence for various chapters within districts. It is estimated that these and many other features offered by Version 2.0 will allow prepares to do a routine Chapter 7 in 29 minutes.

EZ-Filing's Version 2.0 comes with a toll-free support line, and all upgrades and enhancements are free for one year. The software is being introduced with a special price of $249, (regularly $349) for a competitive upgrade. A CD-ROM sample program is available.

EZ-Filing software was developed more than five years ago by a bankruptcy attorney, an accountant and a computer specialist and has been refined, upgraded, and enhanced over the years. Currently, there are more than 1,200 attorneys in 50 states using the program. For more information, call 1-800-998-2424 or visit http://www.ezfiling.com.



HI-TECH IN THE LAW OFFICE

Data backup: Not glamorous, but needed

BY JOSEPH L. KASHI

During our recent 6.4 earthquake, I was in a deposition near the Anchorage bluff.

After 310 K Street stopped shaking, my first thought was to call my own office and see whether or not our computer network was still working or whether the shaking, which was much heavier in the Soldotna area, had crashed our network file server hard disks. Luckily, everything was intact, but my thoughts again turned to the question of safeguarding office data.

Backups are not glamorous, but they are certainly necessary. Over the last 10 years, most law practices have become completely dependent upon the data contained in their computer systems: calendars, docketing, appointments, bookkeeping, billing, case management and litigation support are just a few of the more critical applications.

Were we to lose any of this data, our law practices would be severely hampered or destroyed and, in fact, we might face a client malpractice claim. I have seen some reports indicating that as many as 80 percent of all businesses suffering a catastrophic fire without good data back ultimately go out of business. That's not an abstract concept, either. I've seen this happen to mid-size corporate clients whose premises burned down. Only later did they find that their backups were approximately three months old and it was essentially impossible to reconstruct receivables. Many law firms, I suspect, would be in the same position if a disaster or theft struck their offices.

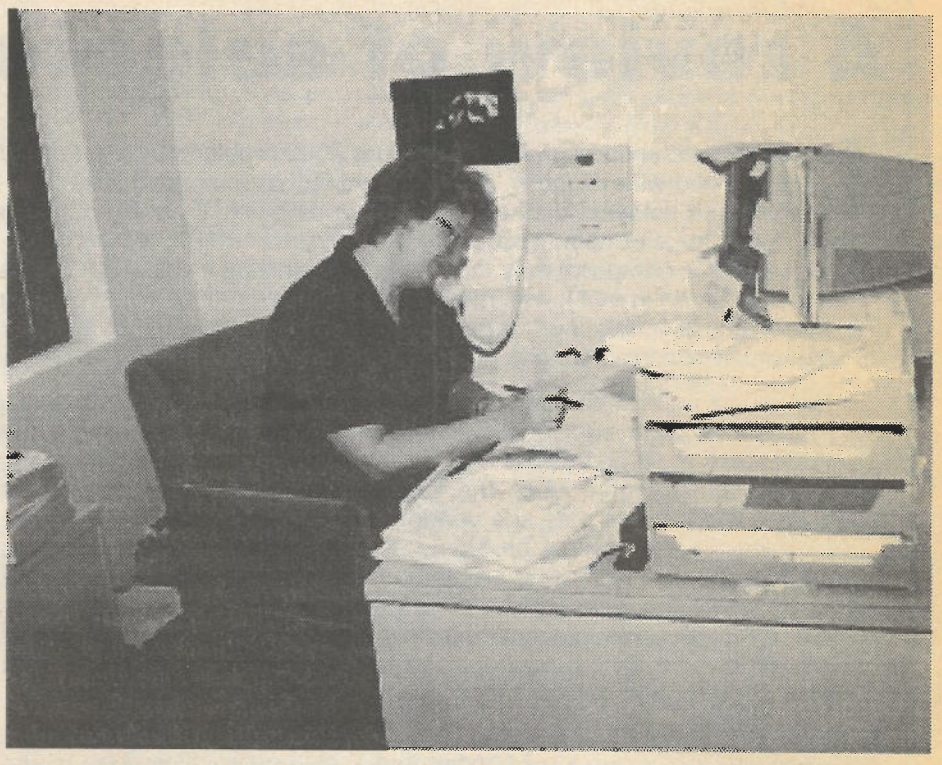
WERE WE TO LOSE ANY OF THIS DATA, OUR LAW PRACTICES WOULD BE SEVERELY HAMPERED OR DESTROYED AND, IN FACT, WE MIGHT FACE A CLIENT MALPRACTICE CLAIM.

In Alaska, any number of disasters can strike. There are the usual building fires and thefts, of course. But, your hard drive and data could be damaged or destroyed in a strong earthquake or fail in the event of volcanic eruption (volcanic ash is highly corrosive and conductive). Burst pipes during cold spells or flood and wildfire in some parts of the state could also threaten your data.

What are the best practices approaches to protecting valuable data? In the first instance, you should always back up that data every night. Some may consider daily backups to be an unnecessary burden, but is the "saved" time worth even one day's lost receivables and the time involved in reconstructing lost work? What about the liability in missing a filing deadline if your electronic calendar files are unavailable?

You will notice that in listing these hazards, I haven't even mentioned the two most common causes of lost data: inadvertent user error that results in the deletion or corruption of a file and hard drive crashes. These are very real hazards.

User error probably accounts for 80% of data loss. In fact, I've accidently deleted my own billing files on one occasion but was able to restore it immediately from a full tape backup made only hours earlier.



CHOOSE GOOD DRIVES

Hard drives tend to fail mechanically rather more often in the real world than manufacturers inflated reliability ratings suggest. Even with high-end SCSI hard drives, our own office has sustained several hard disk failures.

Because of careful data protection, our own office has managed to avoid any data loss and work interruptions. The most appropriate approach to any backup is a defense in depth, a layered approach that combines several mutually complementary ways of protecting your data against the many hazards lurking out there.

In the first instance, you should implement redundant hardware protection. Buy the most reliable drives available for the computers storing critical data. Typically, these tend to be the more expensive Ultra Wide SCSI hard drives. I find that Western Digital and IBM tend to be among the most reliable commonly available drives. I've never had an IBM SCSI drive fail in a network file server. For user desktop computers, I prefer Western Digital's Ultra IDE hard drives. They tend to cost a bit more, but have a superior track record for reliability.

Next, rather than scattering data on many users' desktop computers, store all of your data on one higher-end central computer, which should be your office network's file server. Storing all of your data in one location makes it easier to ensure that complete data backups are made.

Some network operating systems, particularly Novell's Netware, inherently provide an ability to operate multiple hard disks in parallel. If either of these parallel hard disks fails, then the other drive carries on without interruption. This allows you to stay in business, safely back up the data, and make less frantic arrangements to repair the failed hard drive.

There are two approaches to running network hard disks in parallel: mirroring, in which two hard drives operate in parallel from the same hard disk controller card, and duplexing, in which two physical drives also mirror each other but where each disk operates on a separate hard disk controller. Duplexing is slightly more expensive, because you'll need to buy a second hard disk controller card, but it is much more reliable: when you use separate controller cards, then there's no single point of failure.

Some commentators also suggest RAID driver arrays as a means of protecting data, but I don't recommend these for small to medium law offices. There are several reasons: first, a RAID drive array is like the mirror drives running off a single controller: the RAID controller remains a single point of failure which, in the event of failure, scrambles all the data and all the drives. That's why duplexing hard drives, where each operates from its own controller, is inherently both safer and faster. Second, most RAID drive arrays seem to be more expensive, particularly in an era where very reliable, high performance IBM Ultra Wide SCSI 9 gigabyte hard drives cost $700 to $800 apiece. Finally, RAID arrays usually exhibit lower performance than duplexed systems. There seems to be little reason or benefit in purchasing RAID arrays.

PREVENT USER ERRORS

Using high reliability, redundant hard disks on your network is your first layer of protection. However, high reliability duplexed drives only protect you from hardware failure, not from any other peril. Careless users can still destroy data and there's no protection against physical damage, building fire, theft or careless users.

Let's now examine the another common cause of data loss, careless users. Unfortunately, there is no magic bullet to prevent that sort of data threat. You can, however, minimize user damage by careful training and careful implementation of network rights for controlling file deletion and inadvertent file overwrites. Setting network attributes so as to prevent inexperienced or unauthorized users from deleting or overwriting critical files should be left to an experienced system administrator, but you should implement it wherever possible.

BACKUP HARDWARE

Several types of hardware can be used to backup data: traditional tape drives, CD-RW (re-writable) CD-ROM drives, backing up to another computer's hard disk over a local area network, removable media hard drives, and ZIP drives. I believe that only traditional tape backup makes much sense. Here's why.

- ZIP drives and other large capacity floppy disks have far too low a capacity to be really usable, only on the order of about 100 megabytes or so. This is good for backing up small amounts of data, but it's not large enough to fully back up most computer systems. ZIP drives also tend to be quite fragile.
- Backing up to the hard disk of another computer on the same local area office network can work as a secondary means of protecting your data from hardware failure, if the second hard disk is big enough, but doesn't protect against physical damage to your building, catastrophe or theft. CD-RW drives have the same relatively small capacity limitations as ZIP drives and are typically slower than a good high speed SCSI tape drive.
- Removable hard disk media like JAZ or SyQuest drives are somewhat useful, but you'll need enough of the relatively expensive removable hard disk media to maintain several different backups in rotation. In addition, you'll have the same 1 to 2 gigabyte limitation that may preclude you from backing up the full capacity of your hard disk or file server.

(Why should you even be con-

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SOLICITATION OF VOLUNTEER ATTORNEYS

The court system maintains lists of attorneys who volunteer to accept court appointments. The types of appointments are listed in Administrative Rule 12(e)(1)-(e)(2). Compensation for these services is made pursuant to the guidelines in Administrative Rule 12(e)(5).

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

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

Second District:
Tom Mize
604 Barnette St. Rm 228
Fairbanks, AK 99701-4576
(907) 451-9251

Third District:
Wendy Lyford
825 W. 4th Ave.
Anchorage, AK 99501-2004
(907) 264-0415

Fourth District:
Ron Woods
604 Barnette St. Rm 202
Fairbanks, AK 99701-4576
(907) 452-9201

HI-TECH IN THE LAW OFFICE

Data backup: Not glamorous, but needed

Continued from page 16

cerned about backing up the entire hard drive? After all, you may still have your program disks available to reload applications and the operating system in the event of a hard disk failure. That question answers itself: if only data is backed up, you'll spend many hours reinstalling any modern operating system such as Windows 95/98 and configuring your computer. In addition, there is always the possibility that you may have installed service packs or other incremental bug fixes and upgrades, all of which would need to be again installed. Without a complete system backup, you'll waste many hours reconfiguring the system in the event of a hard disk failure. If you keep your programs and operating system disks on premises, they will not be protected against physical loss, catastrophe or theft.)

• That leaves only one sensible approach to backing up: using a modern, high-speed tape drive whose uncompressed capacity is equal to the entire capacity of your hard disk. You'll definitely want to avoid using an old tape drive with a smaller capacity. If you have to sit around swapping tapes, you'll find backup to be an irritating hassle, so much so that you're unlikely to backup as often as you should. Not only should you back up daily, but you should take each daily tape off the premises so that the data is physically protected from catastrophes that might affect your office.

Backups, in order to be useful, should be made daily. You'll want to have enough backup tapes or other media so that you can rotate each tape, using one tape for each work day, a sixth tape for a full weekly backup, and a seventh tape to be used as a monthly backup. Often, problems corrupt files insidiously or a file deletion may not be noticed for a few weeks. Thus, you may need to go use an earlier backup in order to restore uncorrupted data. While you're at it, be sure that you replace your tapes fairly regularly; they wear out rather quickly. You'll need to regularly reformat these tapes in your tape drive in order to increase reliability. Clean your tape drive with a tape cleaning kit regularly, just as you do with VCRs and audio tape decks.

MANAGING YOUR BACKUPS

Many people believe that their backup tapes are safe in a fireproof safe on premises. That is false. A fireproof safe provides little or no protection to magnetic media, which is damaged at a temperature far lower than paper. (The typical measure of a fireproof safe's protection level is based on the temperature at which paper chars.) Further, a fireproof safe provides no protection against theft or other building loss or catastrophe. So-called "media" safes may be a little bit better, but again the level of protection that they provide is unpredictable at best. It is cheapest, easiest and safest to simply take the magnetic tapes off premises from time to time and rotate them as necessary.

Backing up your office data takes time and temporarily diminishes the performance of any computer or network. Further, most tape backup programs will not make a copy of any file that is currently in use. As a result, if your timeslip file or your calendaring file is open while the backup occurs, then there is a pretty fair chance that it won't be backed up. You may not even be aware that your most critical data may have been skipped.

There are several ways around these problems.

• One approach is to manually start a tape backup of your standalone desktop computer or of your network after hours when people are gone and critical application programs are closed. To capture all of the data, you'll need to use a computer with a sufficiently large tape drive and be logged in as the administrator or supervisor with full system-wide privileges. This is an important point: if the user running the tape backup doesn't have full system-wide privileges, then some files won't even be seen by that computer, let alone backed up.

THIS IS AN IMPORTANT POINT: IF THE USER RUNNING THE TAPE BACKUP DOESN'T HAVE FULL SYSTEM-WIDE PRIVILEGES, THEN SOME FILES WON'T EVEN BE SEEN BY THAT COMPUTER, LET ALONE BACKED UP.

• Alternatively, many tape backup programs allow you to schedule the job to start automatically in the middle of the night, eliminating the need for manual intervention aside from remembering to replace the tape into your drive each morning.

This approach at least eliminates most cases of forgetfulness. But, again, you'll need to ensure that the computer housing the tape drive is turned on overnight and logged in as the highest level system administrator. This approach does work well, however, for conscientious users.

• The third and most automatic approach to tape backup almost completely eliminates the need for manual intervention. In this case, you'll install a large capacity SCSI tape drive on your file server and, using special file server-specific software, schedule backups to occur every night at say, one minute after midnight. In that case, your system will backup every night at a time when all files are theoretically closed. The only real disadvantage, from my prospective, is that you'll need to periodically ensure that the tape drive is working properly. Setting up hardware and software of this sort, however, requires an experienced network engineer. Generally, setting up file-server-based backup is too difficult for the average computer-literate attorney. One other benefit of file-server-based backup is that you can actually backup individual users' computers over the network, thus protecting any data stored on someone's desktop computer.

We use a combination of nightly automatic file server-based tape backup and periodic manual tape backups which I start regularly from my own desktop. We also use redundant duplexed hard drives in our Novell Netware file server. The combination of these three methods generally ensures that we have a very high level of data protection. The file server-based tape backup and the duplexed drives, once installed, require no further intervention and are essentially invisible.

ARCHIVING DATA

Before concluding our discussion of general issues involving data protection, we should differentiate between short-term data backup as a hedge against catastrophic loss and long term data archiving.

A backup is intended to be short-term storage allowing retrieval of data in the event of either disaster or user damage to files. An archive, in contrast, is intended as long-term storage of important information. The distinction is important: we use different methods and different media to make either a backup or an archive. Archives typically require long-lasting media such as a custom made write-once CD-ROM using special equipment and software.

There are only a few media that will be suitable for long-term data archiving. My own personal archiving preference is standard write-once CD-R disks made in house. Ideally, for long-term readability for hardware and software of the future, any data on these CD-ROM disks should be entirely written in a single session, with the CD-ROM then closed to further recording.

There is no good assurance that multi-session CD-ROM recordings, re-writable optical laser disks (MO drives) or rewritable CD-RW disks will have long-term usability as archival media. In order to minimize future hardware and software compatibility problems that we can't yet envision, I believe that you should digitally archive data only on CD-R disks. This is not a hypothetical concern: even NASA has difficulty finding hardware to read old 9-track mainframe computer magnetic tapes that store data from early planetary exploration missions. Only CD-R disks made with the highest quality gold dye media and written to the lowest common denominator ISO 9660 CD-ROM standards have any realistic chance of being usable 10 or 20 years from now.

There are a few limitations to using CD-ROM drives as archiving media, primarily their relatively limited storage capacity. A CD-R disk should last for about 15 to 25 years before becoming physically unreadable. CD-ROM disks can store a maximum of about 650 megabytes. That might preclude you from using a recordable CD-ROM disk as an archive media for very large databases. In that case, you might consider using the emerging DVD disks, but be forewarned: there are competing incompatible DVD standards and no one knows which DVD drives will be available next year, let alone 10 years from now.

In the next issue of the *Bar Rag*, I'll discuss specific tape backup programs, different types of tape drives and how to ensure that your data is, in fact, being accurately copied and correctly restored.

The power of the truth

An honest attorney's guide to winning jury trials in a dishonest world

BY STEPHEN D. EASTON

There is a vague popular belief that lawyers are necessarily dishonest . . . . Let no young man choosing the law for a calling for a moment yield to the popular belief—resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer.

Abraham Lincoln

They do not like us. The term "they," of course, includes everybody but us. They also do not trust us. They believe we are willing to deceive, spin, manipulate, cover up, intimidate, distort, and just flat out lie to enrich ourselves and benefit our clients.

The unfortunate reality is that "they" are people who sit on juries. As a result, every time you walk into a courtroom on the first day of trial, you are facing a group of people who question your motives and assume that they cannot believe a word you say.

This belief is both common and strong. In a recent study, a jury research firm asked potential jurors if they thought an attorney would lie in court to promote his cause. Sixty-two percent of those potential jurors believed it was likely that an attorney would lie to them.

Much as we hate to admit it, they are often right. Many trial attorneys seem to believe that their duty to zealously represent their clients requires them to be aggressive, fervent, ruthless, and, if necessary, tricky and deceitful. This belief causes them to stretch their otherwise strong points beyond believability, vigorously object to every item of evidence that might hurt them, and fight about every issue, no matter how trivial.

When jurors see an attorney pursuing this "win at any cost" strategy, they correctly assume the attorney will not let the truth stand in the way of victory. If your opponent engages in these all too common tactics, she is giving you a wonderful opportunity to gain a significant advantage over her.

A trial, after all, is a credibility contest. Look at a trial from a juror's perspective: The two lawyers are trying to establish diametrically opposed propositions. "He is guilty" versus "He is not guilty" or "They should pay" versus "It is not our fault." At least one of the lawyers must be lying, right? Maybe both of them. You know how those lawyers are.

If you can establish that you are the one attorney in the room who should be trusted, it follows that your opponent cannot be trusted. If the jurors believe in you, you will win almost every time, even if the emotional appeal of the case favors your opponent.

Of course, there is no magic wand of credibility that you can simply wave at the start of trial to make yourself believable to jurors. Instead, you have to build credibility slowly, one small but important step at a time. Several of the techniques needed to establish your credibility are somewhat unpleasant, especially when your client is sitting in the chair next to yours. Some seem counterintuitive, because they require "admissions against interest." Furthermore, these techniques require constant attention and sustained effort, because one misstep can irreversibly destroy the credibility you have worked to establish.

ALWAYS TELL THE TRUTH

The first rule of establishing credibility is obvious and easy to state: Never tell a lie. Surprisingly, this rule is rarely followed. During most trials, attorneys tell several lies.

Think about all the untrue statements you have heard from lawyers during trial. Many piously proclaim that "voir dire is just a process attorneys use to pick a fair jury." Whom are we kidding? No attorney really wants a "fair" jury. Do we really think jurors are not smart enough to figure out that we are trying to get a jury that is as biased toward our side of the case as possible? Other classic "little white lies" include: "I only have a few questions for this witness, Your Honor"; "I hate to interrupt (but I have to object)"; and "I am not trying to confuse you with this question, Mr. Witness."

Many would argue that these are harmless little mistruths that are no different than those common in ordinary social situations (like "that was a wonderful meal, Mrs. Mother-In-Law"). "Many" are wrong. You are not in an ordinary social situation. You are in a trial before a group of people who are predisposed to believe that you are willing to deceive them simply because you are a lawyer. Why give them any evidence to support this belief?

You cannot afford to lie about anything. Resolve that every statement that comes from your lips during trial will be completely accurate, even when the truth causes you some temporary discomfort.

PREPARE, PREPARE, PREPARE

Honesty alone is not credibility. A perfectly honest person who knows little or nothing about a subject has little credibility about that subject. Credibility requires equal parts of both honesty and knowledge.

Integrity without knowledge is weak and useless, and knowledge without integrity is dangerous and dreadful.

—Samuel Johnson

Mastering the facts, the technical concepts, and the legal issues in a case does not come easily. Before the trial begins, you should prepare, prepare, prepare! There is no shortcut. Every statement you make during trial must be correct, and this can happen only when your preparation has been exhaustive. Nothing says "this lawyer cannot be believed" like a factual mistake.

"YA GOTTA BELIEVE"

You cannot be an effective advocate if you do not believe, in your gut, that your client's position is just, correct, and fair. If you do not believe that a verdict against your client would be a manifest injustice, you are in serious trouble.

This does not mean you should believe that your client is perfect or that he made no mistakes. But if you do not believe your client should and must win the trial, you should find someone else to try the case or urge your client to settle. The jurors need to see and feel the strength of your conviction.

ADMIT THE WEAKNESSES IN YOUR CASE

Despite the strength of your conviction, you have to admit the weaknesses of your case. No case that reaches a jury is perfect. If your opponent did not have something to talk about, you would not be in trial.

The best way to defuse your opponent's strengths is simply to admit them. Once you concede a point, your opponent looks silly if she continues to press it. At the same time, your willingness to admit the warts in your case shows the jurors they can trust your judgment about the real issues in the case.

FIGHT BATTLES YOU CAN WIN

The most important battle in any trial is the battle over where the war will be fought. Never let your opponent define the terms of the debate. Focus the jurors' attention on an issue you can win, and win decisively.

Don't take the wrong side of an argument just because your opponent has taken the right side.

Oraculo Manual

In any lawsuit, there are several potential issues. In a civil or criminal suit, there are usually about five elements of a *prima facie* case. Each of those five elements presents a possible battleground at trial. Pick the best of these issues, and fight hard on this issue. Offer no resistance on other issues. By conceding these other issues and focusing on the issue you have chosen, you are increasing your credibility in the eyes of the jurors. You are also sending a direct message identifying the real issue in the trial.

INSTRUCT EVERY WITNESS TO TELL THE TRUTH

Every time you meet with a witness to prepare for testimony, you should beat one phrase into the witness's head: Tell the truth! You should say this so often that the witness thinks you have a screw loose. About this point, you do! You should show the witness that you mean this, by demanding truthful, not tricky, answers to questions that you cover while preparing him for his testimony.

Your case will be presented largely through witnesses. If the witnesses are not credible, you have no chance of establishing your own credibility. Jurors see right through witnesses who are trying to help the case with cute, incomplete, or otherwise tricky answers. Very few people are good at lying or attempting to deceive through incomplete answers. Tell your witnesses that, even if they are among the very few people who can lie with a straight face, your own reaction will probably give them away!

BE LIKEABLE

Jurors, like all other human beings, tend to favor the people they like. Consequently, to be effective in the courtroom, you must be likeable.

In most cases, you will not be liked at the start of trial. You are, after all, a lawyer. Furthermore, you may be representing a person accused of a monstrous crime or a "deep pocketed" corporation sued by a horribly injured, fire, or allegedly defamed plaintiff.

Work to win over the jurors. Keep the case interesting. Be aware that the trial is a tremendous imposition upon the time of the jurors, and work to get the case to them as soon as possible.

Keep your ego hidden. Show the jurors your personality. Use self-deprecating humor (while being careful not to overdo it). Be yourself!

HIRE EXPERTS WITH INTEGRITY

In many cases, the most important witnesses are experts. More than any other witnesses, experts are a reflection of you. After all, you choose them.

Unfortunately, the world of experts is inhabited by many professional witnesses who are willing to hire themselves out to say almost whatever an attorney wants them to say. Never hire these experts. Instead, hire actual experts who have the integrity to tell you if your case does not have merit.

AVOID SENDING THE WRONG SIGNALS "OFF THE RECORD"

From the time you head toward the courtroom on the first day of trial until the verdict is read, jurors will be watching you. Be careful about the messages you send.

The jurors will watch how you interact with other people during the trial. Treat the judge, the witnesses, and the other members of your trial team with courtesy and respect.

If possible, do not prepare your witnesses in the courthouse, where the jurors might see you. There is nothing wrong with preparing your witnesses. It might be malpractice not to prepare them. Nonetheless, jurors might get the wrong impression if they see you doing it. Remember that they are inherently suspicious of lawyers. It is a short logical leap for a juror to conclude that you are putting words into the mouth of a witness.

FORGET ABOUT FALSE FLATTERY

Somewhere the notion got started that trial attorneys are required to tell jurors that their service on the jury is a sacrifice of untold

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An honest attorney's guide

Continued from page 16

proportions and that the attorneys and their clients will be eternally grateful to them for their attention. Jurors recognize this obviously overstated praise for what it is: A phony attempt to generate bias in favor of the flatterer. Be courteous and respectful, but forget the apple polishing. A brief "thank you for your attention" during final argument is sufficient.

AVOID ASKING YOUR WITNESSES LEADING QUESTIONS

Despite the evidentiary doctrine that theoretically limits the practice, you can generally ask leading questions if you so desire. Except as a timesaving device on preliminary matters such as a witness's background, though, you should avoid using leading questions with your witnesses.

Jurors are impressed by a witness who responds to an open-ended question by reciting relevant details. Detail is often interpreted as accuracy. When the detail is recited in the question by the attorney and simply adopted by the witness with a "yes" answer, though, jurors assume the attorney is putting words in the witness's mouth. Prepare your witness to answer open-ended questions.

BE PASSIONATE

Honest emotion is a very powerful force in the courtroom. [Fake emotion, on the other hand, always backfires.] Never concede all emotional power to your opponent.

Regardless of whether you are representing a plaintiff, a civil defendant, the government, or a criminal defendant, there is a great deal for you to be passionate about in trial. You should not be in court unless you believe your opponent is seeking an unjust verdict against your client.

As a trial attorney, you have dedicated your life to fighting injustice. The very possibility of an injustice (not just a loss, but the injustice of a loss) should keep you awake at night. Let the jurors see how you feel!

Legendary football coach Vince Lombardi reportedly said, "Winning isn't everything. It's the only thing." In the courtroom, credibility is not everything, it is the only thing. Without it, you cannot hope to win. With it, you will usually win, even when the odds and emotional appeals are against you. Credibility can be secured only through tireless and difficult effort, but the prize is well worth the sacrifice.

This article is excerpted from Stephen D. Easton's new book, How To Win Jury Trials: Building Credibility with Judges and Jurors, published by the American Law Institute-American Bar Association Committee on Continuing Legal Education. The book is available for $83.00 (including shipping and handling) from ALI-ABA, Customer Service Department, 4025 Chestnut Street, Philadelphia, PA 19104-3099; phone number 1-800-CLE-NEWS, ext. 7000; fax number (215) 243-1664; website http://www.ali-aba.org.

Asthmatic camp

Although asthma is a chronic lung disease, children with well controlled asthma need not miss school, have frequent night time disturbances with asthma symptoms, or be able to exercise all they desire. Work with your health care provider to not let asthma control your lives.

Champ Camp, an asthma camp for kids and teens, is now accepting applications. Contact the American Lung Association at 1-800-LUNG-USA.

Attorney Discipline

JACALYN L. BACHLET DISBARRED

The Alaska Supreme Court in a May 19, 1998, Order disbarred Jacalyn L. Bachlet (ABA Membership No. 9206017) from the practice of law, effective October 21, 1997, for criminal misconduct.

Ms. Bachlet was an assistant public defender appointed to represent a client who had been charged with several marijuana offenses and one possession of cocaine offense. The client began giving Ms. Bachlet marijuana for her personal use and also paid for expensive dinners and a getaway weekend. Ms. Bachlet alleged that she and her client were involved in a romantic relationship. The client alleged that he was compelled to provide the extra compensation to avoid jeopardizing his legal defense.

After entry of a no contest plea on a single felony count, the client revealed his relationship with his attorney. After this disclosure, Ms. Bachlet allegedly demanded compensation from her client because his revelation of their personal relationship put her job in jeopardy.

During a taped conversation, the client and Ms. Bachlet discussed the worth of her now-threatened legal career. In the ensuing discussion Ms. Bachlet requested the client to set up three marijuana growing operations estimated to net approximately $100,000; to loan her $5,000 immediately for a trip; and to build her a cabin in the woods. Ms. Bachlet also requested an immediate delivery of marijuana.

The client delivered the marijuana to Ms. Bachlet at a pre-arranged site. Troopers apprehended Ms. Bachlet as she began to drive away and arrested her.

On December 13, 1994, a jury convicted Ms. Bachlet of two felony counts of receiving a bribe and one misdemeanor marijuana possession. On May 23, 1995, the Alaska Supreme Court ordered her interim suspension because of her felony conviction. Ms. Bachlet exhausted her appeal rights on August 26, 1997, and final disciplinary proceedings began.

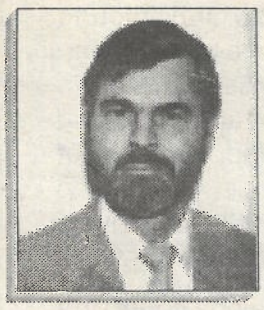
Ms. Bachlet violated Alaska Rule of Professional Conduct 8.4 which states in part that it is professional misconduct to commit a criminal act that reflects adversely on a lawyer's honesty , trustworthiness or fitness as a lawyer and prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. Ms. Bachlet violated ARPC 1.8 which as a general principle requires that transactions between a client and a lawyer be fair and reasonable. She also violated ARPC 1.16(a)(1) which requires that a lawyer withdraw from representing a client when the lawyer's own conduct will violate the rules of professional conduct or other law.

Ms. Bachlet and Bar Counsel stipulated that she be disbarred, effective October 21, 1997, the date Ms. Bachlet began serving a six-month sentence imposed by the trial court. The Disciplinary Board adopted the recommendation and the Alaska Supreme Court approved it.

The public file is available for inspection at the Bar Association office in Anchorage.

Who's the donor?

☐ Thomas Yerbich



In June the Religious Liberty and Charitable Donation Protection Act of 1998 ("RLCDPA") was enacted, amending the Bankruptcy Code effective for cases filed on or after June 19, 1998. RLCDPA effectively makes unsecured creditors involuntary donors to charities and churches.

RLCDPA § 3 amends § 548(a)to except contributions made to qualified recipients from avoidance as fraudulent transfers. Excepted are contributions to qualified organizations that do not exceed 15% of the debtor's gross annual income for year in which the transfer was made or, if the contribution exceeds the 15% ceiling, the transfer was consistent with the practices of the debtor in making charitable contributions. A corresponding amendment was made to § 544(b), limiting the strong-arm powers of the trustee to utilize non-bankruptcy law in avoiding similar transfers and preempts any action commenced prepetition to recover a qualified contribution under non-bankruptcy law.

RLCDPA EFFECTIVELY MAKES UNSECURED CREDITORS INVOLUNTARY DONORS TO CHARITIES AND CHURCHES.

RLCDPA § 4 amends § 1325(b)(2)(A) to provide that disposable income does not include contributions to a qualified recipient to the extent they do not exceed 15% of the debtor's gross income in any year. The same section amends § 707(b) of the Code to provide that in making a substantial abuse determination, the court may not take into consideration whether the debtor has made or will continue to make qualified contributions.

RLCDPA § 2 amends § 548(d) by adding two new paragraphs, (3) and (4), defining qualified contributions. First, the contribution must be made by an individual and is limited to a financial instrument as defined in § 731(c)(2)(C) of the Internal Revenue Code (stocks and other equity interests, evidences of indebtedness, options, forward or futures contracts, notional principal contracts, and derivatives) or cash. [§548(d)(3)] Second, a qualified recipient is an organization defined in § 170(c)(1) or (c)(2) of the Internal Revenue Code, i.e., the contribution must be a tax deductible religious or charitable contribution. [§ 548(d)(4)]

RLCDPA is Congressional response to judicial hostility to the Religious Freedom Restoration Act of 1993 ("RFRA") in the bankruptcy setting. Bankruptcy courts have almost unanimously held that RFRA either (1) is unconstitutional on 1st Amendment grounds or (2) does not implicitly amend the Bankruptcy Code (both arguments were rejected in *In re Young*, 141 F3d 854 (8th Cir. 1998), the only Court of Appeals decision on the subject). RLCDPA effectively undercuts both grounds.

By its broad application to include secular and non-secular organizations, RLCDPA avoids the First Amendment attack.

Congressional power to amend the Bankruptcy Code is beyond cavil. Congress unquestionably has the power to define those transactions avoidable by the trustee. Congress creates the powers of the trustee and may, therefore, limit those powers as Congress, in its discretion, deems appropriate. This is precisely what Congress has done: nothing more, nothing less.

The principal and most obvious effect of RLCDPA is to make unsecured creditors involuntary underwriters of an individual debtor's charitable proclivities and/or religious practices. [MasterCard and VISA, where were you as this bill wended its way through Congress? For all your hoopla and grousing about debtor's ripping off creditors and pushing for "needs based" bankruptcy, why were you not lobbying against this creditor "rip-off"? Could it be because charities and religious organizations are not as defenseless as debtors?]

In operation, RLCDPA insulates every contribution of a financial instrument or cash to a qualified recipient not in excess of 15% of the debtor's gross income. Thus, if a debtor having gross income of $35,000 contributes $5,250 cash, stock or a negotiable instrument to a qualified recipient, that contribution may not be recovered. But if the same debtor contributes real or tangible personal property (e.g., an automobile) having a value of $5,000, that transfer may be avoided. In Chapter 13 cases, contributions of up to 15% of gross annual income to a qualified recipient are excluded from "disposable income."

Is 15% of the gross income a cap on contributions in the aggregate? I think not. Under § 548(a)(2)(A), as amended by RLCDPA, the 15% of gross income is applied to each recipient. Transfers "to a qualified [recipient] * * * the amount of that contribution does not exceed 15 percent of the gross annual income." (Emphasis added.) Each recipient is entitled to receive 15% of the debtor's gross annual income; thus, three recipients could, in the aggregate, receive up to 45% of the debtor's annual income, none of which recoverable by the trustee. [Although there is no committee report accompanying S. 1244, H.R.Rep. 105-556 accompanying H.R. 2604 (the House companion) states the cap applies in the aggregate (p. 9), but in a context that it is applicable to any recipient, not all recipients. Moreover, the plain language of the act is contrary.] Nothing quite like being "the goose laying the golden egg," using someone else's gold!

Even more pernicious is the amendment to § 1325(b)(2)(A) excluding from disposable income "charitable contributions (that meet the definition of 'charitable contribution' under section 548(d)(3)) to a qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)) in an amount not exceed 15 percent of the gross income of the debtor for the year in which the contributions are made." Does the 15% cap apply to each contribution or in the aggregate? The key is use of the term "to a * * * entity or organization." Although the sentence uses contributions (in the plural) the recipient is in the singular. The rules of grammatical construction compel the conclusion that it encompasses multiple contributions to each qualified recipient as long as the contributions to any qualified recipient do not exceed the 15% ceiling. Had Congress used the term "to qualified * * * entities or organizations," clearly the 15% ceiling would apply in the aggregate. [While H.R.Rep. 105-556 does not address this point, H.R.Rep 105-540 accompanying H.R.3150, which contains a similar provision, appears to indicate Congress intended the limitation to be in the aggregate. However, the grammatical construction of the H.R. 3150 counterpart differs, containing a comma immediately before the phrase "but not to exceed 15 percent." Omission of the comma in RLCDPA significantly changes its grammatical construction.] If, as I suspect, it is 15% to each qualified recipient, a debtor could theoretically contribute his or her entire otherwise disposable income at the expense of unsecured creditors!

Even assuming that the 15% limitation is in the aggregate, the amendment to § 1325(b)(2)(A) is fraught with potential for abuse. What debtor's attorney worth his salt is not going to recommend providing for charitable or religious contributions in a chapter 13 plan equal to 15% of the projected gross annual income? They cost the debtor nothing! If the debtor did not make the contribution it would be included in disposable income paid to the trustee for distribution to creditors. The result is a cost to someone other than the donor and donee: unsecured creditors receive less in distributions, the government receives less in tax revenue (the contribution must, by definition, be tax deductible), and the trustee receives a smaller fee. Nor could the plan be attacked for not being proposed in good faith. How is it not in good faith to do that which Congress has specifically sanctioned and accorded preferential treatment.

Moreover, as my wife observed, what is going to prevent debtors from submitting a plan providing for charitable/religious contributions and then simply not make them, effectively pocketing the excess? The system does not require debtor's to account for expenditures during the life of a plan; a debtor's expenses are estimated, not written in blood or cast in concrete. To monitor compliance would require each debtor to file periodic income and expense reports, not required by the Code. I am sure chapter 13 trustees would appreciate the added workload at the same time the fee is being reduced if such a requirement were imposed [which it will be if H.R. 3150 becomes law (shudder at the very thought!)]. Suppose a debtor does not make the charitable contribution in a given year, has the debtor "defaulted" any more than if the debtor does not spend the projected $X in food expenses, or otherwise economizes in one area to increase available resources in another? Assuming the debtor does not make a contribution and an interested party complains, what might excuse a debtor from the "obligation" to make the contribution? Would a simple "I changed my mind" suffice or is a change in circumstances necessary, *e.g.*, an unanticipated expense for a necessity of life?

RLCDPA creates a situation fraught with potential for abuse. It has all the earmarks of a knee-jerk political response to a perceived problem. It is one thing to expect creditors to underwrite sustenance of the body but quite another to expect them to underwrite sustenance of the soul or conscience. While the religious liberty of debtors may be preserved, that of creditors is obliterated in the process. While one is, and should be, free to contribute one's own wealth as one sees fit, contrary to what Congress may think, one is not, and should not be, free to contribute the wealth of another. This writer always thought the biblical requirement for tithing was supposed to be from the tither's resources, not that of someone else.

NOTICE OF PROPOSED RULES U.S. BANKRUPTCY COURT, DISTRICT OF ALASKA

The Advisory Committee on Bankruptcy Rules has proposed amendments to the local Bankruptcy Rules [1004-1; 1005-1; 2016-1; 2016-2; 2016-3 (new); 3016-1; 9001-1; 9010-1; and 9013-2] and Bankruptcy Forms [2, 3, 6, 10, 11, 13, 18, 19, 20, 21, 25, 27, 28, 31 and 33 (new)].

Written comments on the proposed amendments to the rules and local forms are due no later than September 4, 1998

Address all communications on rules to:
Clerk, U.S. Bankruptcy Court
Attention: Bankruptcy Rules Advisory Committee
Historic Courthouse, Room 138
605 West Fourth Avenue
Anchorage, Alaska 99501-2296

The proposed amendments to the rules may be reviewed at: State Court Libraries in Anchorage, Juneau, Fairbanks and Ketchikan; U.S. Courts Library in Anchorage; U.S. District Court Clerk's Office in Anchorage, Fairbanks, Juneau, Ketchikan, and Nome; U.S. Bankruptcy Court Clerk's office in Anchorage; or on the web at the Alaska Legal Center Page http://www.touchngo.com/lglcntr/usdc/usdcak.htm.

Excerpts from the JBA Minutes

June 5, 1998

Announcements: The Juneau Bar Association Summer Picnic will be held on August 2. Contact Sheri at 465-2688 if you have any ideas for this summer get together...Mark Choate said that he was opening two new offices in San Diego and Maui.

Old Business: Pending Motion from Art Peterson for JBA to donate $2,000 to Alaska Legal Services Corporation: Art spoke briefly about his motion, and stated that the federal government had drastically reduced funding for ALSC. The State legislature raised funding only slightly this year, and that amount is way down from what it used to be. ALSC is down from 14 offices to only 5½ in Alaska. Also, there are more restrictions on the kind of cases they can accept.

Any money that JBA donates to ALSC will go to the Juneau ALSC office, which covers all of Southeast. Steve Weaver said that our JBA membership numbers were down this year from last year, and speculated that it could be due to persons objecting to their dues going to the ALSC. Mark Choate said he would donate $100 to the JBA and encouraged other firms to do so. Steve said that our JBA picnic cost $710 alone last year.

Bruce Weyhrauch said that we could approve $1,000 now, with another $1,000 donation in November, with the Alaska Bar Association possibly matching the contribution. Ann Gifford suggested that we make a $1,000 donation now, with the second installment of $1,000 paid in January 1999 contingent upon us having the funds available in our account.

Janine Reep spoke to Steve's earlier comment about lower membership, and said that efforts should be made by the JBA to get new members. Steve said this may be speculation, but he believed some persons thought the JBA had turned into a pass-through organization for the ALSC. Mie Chinzi objected, stating that she knew of only one person who had objected and said we were too free with our money. (Another person was no longer a member because all we do is talk about other people.) Beth Leibowitz said that she had renewed her JBA membership just today because she wanted to make sure she could vote on this motion. She believed that donating funds to the ALSC was a proper function of the JBA.

Art said that he opposed Ann's motion because it would result in the funding getting to the ALSC one year behind. Art stated that he could not conceive that people buying liquor for Christmas parties was on an equal par with helping poor people get access to legal aid. Bart Rozell said he had been a longtime supporter of the JBA and ALSC. He felt the JBA was important because it allowed us to have a relationship with each other outside the litigation atmosphere. Bart said that he thought we had to give something less to the ALSC, citing fiscal responsibility to the JBA.

Steve said that as our treasurer, he was not opposed in principle to donating to the ALSC. But when a request was made to drain our bank account and deny us the ability to hold our activities, he had to object. His concern was with the amount of money being asked for, and that it did not fit with the function of our organization. Mark Choate said, "Bart and I would fight a lot more if we didn't have lunch together once in awhile. Let's contribute to the JBA."

A vote was held on Ann's amendment to Art's motion and it failed. A vote was held on Art's original motion and it too failed. A new motion was made to donate $1500 to ALSC. Mie asked our resident Robert's Rules expert, Joe Sonneman, if there was a problem making a new motion without noticing our members. Joe said no. Dan Wayne agreed, "It is a lesser-included amendment." Art also agreed. Ann noted that if our membership numbers were down, that did not translate into a reduction in expenses for the JBA. Dan Wayne said, "We need to raise money for the JBA. We need to remind people to pay their dues. If I need to raise money to fix my tires, I know how to do that." And with that, the motion to donate $1500 to ALSC was voted on, and it passed 14 for, and 9 against.

Sheri L. Hazeltine, Secretary

June 19, 1998

Guest: Deborah Vogt, Deputy Commissioner of the Alaska Department of Revenue.

Judge Froehlich announced that Kris Waugh, secretary for the District Court, recently retired after 18 years of service. The District Court is now recruiting for the position. Judge Froelich suggested that if anyone had any extra legal secretaries loitering around their office, they should direct them to District Court. The Judge also warned that rulings from the Court may take a bit longer until the position is filled.

Newly elected President Lach Zemp announced that the officers would be following up with 1997 JBA members who failed to renew their memberships in 1998. When I discretely inquired of former JBA Secretary Gerry Davis whether I should mention which members of the bench had forgotten to renew their memberships, he suggested I use the tried and true "Do-I-have-anything-pending-in-front-of-that judge" test. After considering that sage advice, I am happy to announce that I will not identify that member of the bench who forgot to pay his dues...not that any such judge exists...just hypothetically speaking...at least until he rules on that, er, hypothetical motion.

New Business:

President Zemp discussed a plan to gauge community interest in establishing a community-based Youth Court, much like they have in Anchorage—though a bit scaled down. Apparently our Youth Court is like a GM compared to Anchorage's Lexus or Jaguar. Anyone who is interested in this project and especially those who take pride in American-made automobiles should contact Lach Zemp, Judge Froelich, Barb Murray, or Laury Scandling.

Speaker:

Deborah Vogt spoke about new judicial and legislative developments in the four divisions of the Department of Revenue that she oversees. (One of which is no longer a division.)

Tax Division: (1) Formal hearings have been transferred to the Office of Tax Appeals in the Department of Administration. (2) Recently the Supreme Court upheld a decision regarding taxing foreign-owned ships. The Department of Revenue argued that the State could tax and the court agreed. The Legislature did not like the ruling and changed the law.

Child Support Enforcement Division: The biggest controversy with respect to this division was federal welfare reform. The State was at risk of losing approximately $72 million in federal funding for the CSED and welfare programs, but the legislature did in fact pass a bill conforming with federal standards. This did not happen, however, without a lot of controversy. Allegedly Sen. Rick Halford asked that the bill be referred to the Natural Resources Committee (of which he is chair). This made perfect sense to Joe Sonneman, who pointed out that children are our most important natural resource.

Permanent Fund Division: The biggest news in the Permanent Fund Dividend arena is that the State may now pay PFDs to spouses of residents out of the state on an allowable absence. (Formerly, only the allowably absent spouse and any children were eligible for PFDs).

Charitable Gaming: ...is no longer a division, but has been merged as a section into the Income, Excise, and Audit Division. Presently, the process for calculating fees from charitable gaming establishments is very labor intensive. The legislature did not pass a bill which would have made the payment a straight percentage of gross revenues.

Answers to Questions:

- The Department of Revenue will not decide which parent can apply for a child's permanent fund. They will accept the agreement of the parties or a court order.
- There was really no answer to a question regarding CSED not accepting a request for modification of child support while the previous CSED determination is being appealed. The only advice was to drop the appeal.
- The most difficult thing that CSED struggles with regarding calculation of child support is the oft-argued "deliberate underemployment" by an obligor parent.

Upcoming Speakers:

House candidates Rosemary Hagevig and Beth Kerttula will speak in early July (Candidate Amy Skilbred has been invited, but has not confirmed). Tentatively, we hope to also have candidates McKie Campbell, Don Abel, Jr., Bill Hudson, and John Clough later in July. John Gaguine has agreed to speak at an upcoming JBA meeting regarding same-sex marriages. Mark Regan has also agreed to discuss a recent 5th Circuit opinion regarding IOLTA.

New Officers of the Juneau Bar Association:

President: Lach Zemp, Vice-President: Sheri Hazeltine, Secretary: Dawn Collinsworth, Treasurer: Mark Regan

—Dawn Collinsworth, Secretary

June 26, 1998

Next week's meeting: CANCELLED (Happy 4th of July!)

Guests:

Stephanie Wolff, Dan Wayne's intern.
Sandra Wong, Dan Wayne's intern.
(Dan: We're the firm of Wayne, Wolff, and Wong?)
Isidore, Mie Chinzi's 5 month-old son (Izzy is a regular and frequent guest of the JBA, but rarely is noted in the minutes)

Cheers & Jeers (aka Announcements):

CHEERS—The World Affairs Council got the financial support necessary to bring a Grand Master of chess to Juneau for a lecture and demonstration.

JEERS— Princess Cruises cancelled the Grand Master's cruise. There will not be a lecture and demonstration next Tuesday.

CHEERS—The 9th Circuit Off-The-Record CLE in Anchorage will be video-taped for those of us not able to attend.

New Business:

Those present at the meeting (a suprisingly good turnout for a sunny day) voted to cancel the July 3 meeting. I took a bit of good-natured ribbing when I told everyone I'd already put it in the minutes. They asked if there was any other decision I'd made without telling anyone. Let me think.....hmmm...nope, that was it.

Does anyone know someone who knows someone who knows John Sayles? We are interested in having the director of Limbo speak at an upcoming JBA meeting.

—Dawn Collingsworth, Secretary

West Group, ACCA strengthen alliance

West Group has entered a partnership agreement, with the American Corporate Counsel Association (ACCA) to capitalize on an existing relationship between the premier provider of legal information and the country's leading organization for corporate counsel. The highlight of the agreement is West Group's involvement in the ACCA Alliance program, which will allow ACCA members to earn vouchers for ACCA-related services when they purchase new West Group products.

Through the Alliance program, ACCA members are able to choose from West Group's print, CD-ROM and online products and services to customize a package that suits their company's needs. With each new purchase, members earn "ACCA Dollars" that can be used toward any ACCA-related purchase, such as membership dues or registration fees for local or national ACCA meetings. For more details, members can consult with their local chapters or call their dedicated local West Group Corporate Representative at 1-800-762-5272.

West Group is the preeminent provider of information to the U.S. legal and regulatory markets. Headquartered in Eagan, Minnesota, West is a division of The Thomson Corporation. More information on West Group is at www.westgroup.com.

The American Corporate Counsel Association is the only national bar association dedicated exclusively to serving in-house attorneys. Its web site is at www.acca.com.

The defendant wore tennis shoes

☐ William Satterberg

I recently had the delight of doing a most intriguing probable felony trial. My client, a throw-over from the 1960s-70s, was a self-admitted horticulturist.

Based upon the proverbial "anonymous tip," members of the local narcotics squad had arrived at my client's house for what is now termed a "knock and talk." To the same degree that I am still trying to find out who Anonymous Tip is, I am also trying to figure out what a "knock and talk" is. Until recently, I thought it was some toy for a 4-year-old. Apparently, my client thought so, as well.

Upon reaching my client's abode, the troopers made contact with a resident who subsequently called my client at work and told him that the troopers were at his house. Not wanting to be viewed as having any lack of public duty, my church-going client promptly returned home and met the troopers. Upon initial request, he politely answered that, of course, he had various marijuana plants growing in his house. Didn't everyone? Would they like to see them?

Although the troopers refused coffee, they nevertheless did come in to take my client's tea. Following an ushered visit of the house, with all questions politely answered, the troopers seized close to 100 marijuana plants, and a bag of processed goodies which my client almost forgot to give them only because it slipped his mind. Fortunately, however, he remembered before the troopers left and went to his bedroom to give them that bag as well. In many respects, my client was much like my golden retriever, who tends to usher burglars around the house.

In total, the troopers had approximately 25 or 26 large plants, and another 70 plants or so which were clearly babies. The total product when processed, fell into the Class A misdemeanor range of one-half to one pound of marijuana.

There was a glitch, unfortunately. Alaska law (due to the legislature's zeal to amend the statutes applying to the heinous nature of that crime involving killer weed) has two ways that a person can be charged with felony possession.

One is to have more than one pound of useable product. Although connoisseurs will argue vehemently that useable product is only the "bud," and that sticks, stems, leaves and other stuff is essentially trashed, the legislature has ruled, instead, that virtually any part of the marijuana plant is smokable and is part of the product. Although my client had no "bud," there certainly were more than enough sticks, stems and leaves to lead one to believe that there was something to be smoked.

The second way to earn a felony charge is by having more than 24 plants. As our wise legislature has written the law (realizing that marijuana-growing leads to much more serious offenses and possibly even sterility, even if the plants are merely a quarter-inch high), if there are 25 quarter-inch plants, watch out, because you are bound for felony land as opposed to misdemeanorville.

Although the trooper announced at the scene that my client would most likely be charged with a misdemeanor offense of the Class A level for the amount of marijuana which was seized, the district attorney's office, in its own zeal, thought otherwise. Now was clearly the time to eradicate this heinous menace, according to the higher power.

My client had been picked up in the early summer months of 1997, and had voluntarily turned over the product and had been advised by the troopers that they would be back in touch with him. At the time, little did he realize that, in the fall, he would be arrested and placed in jail on a $25,000 cash-only bond.

Although other people are being arrested on $10,000 bonds for possession of one-half pound of methamphetamines, clearly, the possession of one-half pound of marijuana is far more egregious, especially recognizing that my client was a flight risk—he could easily sell his home, pull his kids out of school, quit attending his church, quit his job and flee Fairbanks at any moment in fear of the repercussion in the forthcoming misdemeanor prosecution for the marijuana which he voluntarily turned over six months previously.

In time, my client bailed out. Even that was not an easy task, since he had to pledge to follow the law and to give up smoking the product. I reminded him, upon leaving the courtroom, that brownies were definitely out, also.

Case preparation was rather interesting. I particularly enjoyed viewing the evidence, and was surprised to learn the Alaska State Troopers had not only pulled up the plants, but proceeded to process them by drying, stripping the stalks, and bagging the arguably useable/unusable product, depending on your viewpoint. Clearly, these guys had both talent and experience in the field.

Realizing that an expert would be in order, I employed a person to assist me in the case. Whereas, ordinarily, individuals employ experts based upon their great qualifications and publications, I elected to go with somebody with proven street knowledge. I selected one of the individuals who had been a defendant in a major marijuana case in Fairbanks. After all, I reasoned, if this person was involved with the Collettes on probably one of the biggest greenhouse grows ever, this person, as well, would be well suited to judge not only the quality of the product in this particular case, but also would be qualified to determine whether or not the venture was a commercial versus a non-commercial grow.

Although my expert maintained that he had sworn off using the product, he was still delighted to serve in the capacity. Moreover, where some claim to have never inhaled, he claimed to have never exhaled.

His qualifications read like something right out of a Cheech and Chong movie. Not only was he familiar with the product itself, he had knowledge of a vast array of literature, including *High Times* magazine issues from the beginning of time, as well as studies by other knowledgeable institutions and his own history of elaborate experimentation. He was, by far, the most qualified expert in the courtroom on the subject.

The state trooper, on the other hand, stated that he had never smoked the product, but could go by what he had read.

An evidentiary hearing was held to determine whether or not the grow was a personal or a commercial grow. I brought a motion to dismiss the case based upon the decision of the Alaska Supreme Court in *Ravin v. State*, 537 P.2d 494,(Alaska 1975), maintaining that the *Ravin* case was still good constitutional law, notwithstanding the attempt by the legislature to declare otherwise.

The evidence that was introduced at the hearing clearly supported the argument that this was a personal grow only. Surprisingly, even the trooper agreed with me, but was similarly impressed with the qualifications of my expert. That did not seem to matter, however, since the court ruled, without opinion, that the motion for dismissal was denied, paving the way for an appeal.

Rather than pursuing an interlocutory appeal, my client elected to try the case. We reasoned that we should at least take a shot at the trial, to avoid the felony implications of having more than 24 plants in possession. Furthermore, because review is discretionary on a petition for review format, whereas appeals from a judgment are mandatory, we reasoned that it would make little economic sense to waste time taking a petition for review, when the same amount of money could be spent on a trial with a guaranteed appeal in the event of a loss.

I expected the case to take slightly more than one day. Because I have a reputation for taking a rather long period of time in my trials, I believe the court was rather surprised when I announced that I expected the actual trial to take less time than jury selection. "We'll see, Mr. Satterberg," was Judge Steinkruger's reasoned response.

The big day of trial approached. I explained to my client that he would need to get a haircut and be properly dressed for trial. I pointed out to him that jurors are impressed when a person dresses up for court, especially recognizing that most people nowadays do not do so, in light of their "individuality," but wear nose rings, instead. He assured me that he would wear a suit for trial.

When my client arrived at my office on the first day of trial, he had done as promised, and was wearing a nice suit. It was a great ensemble, complete with a white shirt and a relatively conservative tie. It was nicely offset by the white tennis shoes that he wore, as well.

When I noticed the tennis shoes on his feet, I remembered an article I had written years ago regarding jury selection and judging somebody by the type of shoes they wore. If I judged the jurors by the type of shoes they wore, I began to panic, realizing that the jurors could also judge my client by the type of shoes that he wore, as well. Tennis shoes sent a wrong message: in short, he wasn't planning to hang around after trial.

I thought about it and debated on whether or not I should go to JC Penney and buy a pair of shoes to accent his outfit with the proper accessories. I then decided that the shoes could send another message, as well. After all, he was a throwback to the 60's, who, despite doing his best to comply with court decorum, still had a certain amount of individuality to express. At least it beat a nose ring. I suggested to him that he simply wear his shoes both days in a row, rather than changing midstream. He seemed quite pleased with this acceptance on my behalf, and assured me that he would not embarrass me by dashing out of the courtroom at any particular time.

Trial voir dire took approximately 3 1/2 hours and was a most interesting experience. Virtually every juror had something to say about the marijuana laws. It soon became apparent to the state that most of the jurors felt that the trial was a complete waste of time and money if the argument was for possession only and nothing more.

One juror even remarked that she had come from "the same generation as Clinton. I didn't inhale either."

Another juror, who appeared to be a classic "state's juror" with a strict appearance and a no-nonsense attitude, declared that "This entire trial is a complete waste of money. The State's got better things to do than prosecute marijuana smokers." This juror did not survive a challenge for cause, for some unexplained reason.

Perhaps the best juror was the juror who announced that he had certain distinct views favoring the legalization of marijuana. After every question, however, he would stress, "But I can be fair and follow the law in this trial." I still do not know if it was the earring in his ear or the long ponytail that prompted the state to preempt. As he left the box, he walked past my client, giving a hearty thumbs-up sign and announcing loudly enough for everyone to hear, "Good luck, man." The jury erupted in laughter and several jurors nodded their heads in what I could only assume was a reflex response. These jurors remained on the jury, and were not preempted by the state's attorney, who might have missed the body language, in retrospect.

During the jury selection process, I reminded the jurors that they should decide the case individually. I recalled for them a Norman Rockwell painting, depicting a woman juror who's surrounded by 11 men in a smoke-filled jury room. I pointed out to them that this woman was making her own decision, uninfluenced by the pressure brought upon her by anyone else. I also hastened to add that there should not be any smoke-filled jury rooms in this particular case.

Following jury selection, the courtroom adjourned with the understanding that trial would commence the following day and proceed until completed.

Opening statements on day two were quick. I pointed out to Judge Steinkruger during a break that she might wish to think about deliberations. Realizing that the evidence (consisting of approximately one-half pound of marijuana as well as stalks) would undoubtedly go into the jury room with the jury, it appeared that a larger lunch might be ordered, along with some other snacks, munchies, and related sustenance. This could be a very hungry jury before the day was over.

Continued on page 23

TALES FROM THE INTERIOR

Continued from page 22

The state called its first of two witnesses. The investigating officer looked far more the hippie/freak/long hair/pot-head/druggie/Canadian snowboarder than anyone else who took the stand that day. Resplendent with a cute little gold earring in his right ear, the long-haired officer tossed his locks and proceeded to explain to the jury how he had arrived at my client's house with another officer and had engaged in a "knock and talk" with a female occupant.

The officer testified that my client had arrived home from work in short order, and had kindly escorted the officer and his companion through the entire house, proudly showing the various marijuana plants in differing stages of growth, and capping off the visit with an innocent discussion of how he did not know it was illegal to grow dope. During the visit, the officers, apparently fearful of something, had called in the National Guard and other backup units. I could not help but reminisce about the famous "Alice's Restaurant" song by Arlo Guthrie and the infamous Officer Obie. Although the years had gone by, the times certainly had not changed, at least with respect to this officer's procedures.

Following a two-hour search of my client's residence, the National Guard carted off one plastic milk crate of 18-inch-high marijuana plants.

After processing, the weight came to slightly more than one-half pound.

To the officer's credit, he told my client at the time that only a misdemeanor charge would probably be forthcoming. In all fairness, it appeared that the officer had been given some bum information that a major commercial marijuana grow was in existence. Obviously, he must have been saddened to realize that all these resources had been wasted on approximately one-half pound of very low quality ragweed.

Upon cross-examination, the officer readily concluded that the grow appeared to be a personal grow only. Moreover, because he lacked expertise in the toxicity of the product, (having never smoked any of it himself, of course), he was unable to offer any opinion on the quality of the material. Nor was he qualified as an expert at trial, regardless. Although this non-expert officer had never run into any other products which imitated marijuana, he did reluctantly concede that other plants can imitate marijuana, including parsley, oregano, and other things which I always seemed to end up buying in my own college days. I should have become a chef.

The next and final witness to appear was the state chemist from Anchorage who had been flown up especially for the trial. After explaining the elaborate security precautions that surround evidence-building in Anchorage, the expert testified that he had analyzed a minute portion of the product and had found it to be, indeed, of the genus Cannabis. "No," he had not tested all the product, but he had assumed that it was all marijuana. "Yes," he also agreed that various plants can masquerade as marijuana, but this was not his job to note the difference. He confirmed the weights, and then left.

The defense had no witnesses to present. As such, the entire trial took 2 1/2 hours, which was less than the time to select the jury. Judge Steinkruger was amazed at my brevity.

Closing arguments were also remarkably brief. My arguments addressed evidentiary issues, using various puns that I was able to cultivate about things like how the district attorney had not let any grass grow under his feet. It was a fertile field.

All and all, it was a fun trial. Admittedly, no felony trial is a walk in the park, but at least this particular case had no victim, no blood, no guts, and, most importantly, the client had paid all of his fees in advance.

After instructions, the jury eagerly took the marijuana and retired to the jury room to deliberate. The court then announced to counsel that the court wanted permission to supply the jury with anything that it might need, including pens, pencils, and papers. This brought a rise out of the district attorney of "Papers?" Sensing concern, the court quickly announced, "I mean butcher paper, in case they want to lay the stalks out."

The whispered response to me from the district attorney was somewhat predictable. "Bet they're going to roll a big one."

Deliberations were quick. In fact, the jury returned a verdict in approximately 59 minutes, give or take a few seconds.

The verdict, as I expected, was "Not Guilty" on the felony. The jury had already made it quite clear that, although they did not agree with jury "mummification," they also did not necessarily agree with the law, although they all previously had pledged that they could "follow the law."

Still, my client did not walk away scott free. The jury did convict him of a misdemeanor, which was my suggestion in final argument. The court, wisely recognizing that misdemeanor possession for marijuana was not the crime of the century and given my client's clean prior record, sentenced him to a nine month SIS. All is well that ended wall. But it was not over.

Recognizing that the issue of *Ravin v. State* has yet to be appealed, and that I was on a roll (so to speak), my client authorized taking the case to the Court of Appeals to discuss the legality of the marijuana decision. Hopefully, the forest will be able to be separated from the leaves, and the issue put to bed once again. And I will be able to keep many of my clients out of the joint.

ALASKA BAR ASSOCIATION 1998 CLE CALENDAR

(NV) denotes No Video

Program #, Date & CLE Credits	Program Title	Program Location	In Cooperation With	Section
#44 August 4 3.25 CLE Credits 3.0 CPA Credits	The New Alaska Community Property Act and Other Important Changes that Affect Our Clients	Anchorage Hotel Captain Cook	Alaska Society of CPAs, Real Estate Commission	Estate Planning & Probate, Tax Law, Family Law
#46 August 11 3.0 CLE Credits Half Day (includes lunch)	National Planned Giving Conference	Anchorage PepperMill Restaurant	AK Planned Giving Council, Anch. Estate Planning Council, AK Community Foundation	Estate Planning & Probate Law, Tax Law
#07B September 11 CLEs tba Half Day (p.m.)	"In Jason's Best Interest:"-- Video Vignettes/Ethics (NV)	Juneau Centennial Hall	ALPS	
#88 September 11 3.0 CLEs Half Day (a.m.)	Mandatory Ethics: Professionalism in Alaska (NV)	Juneau Centennial Hall		
#88 September 14 3.0 CLEs Half Day (a.m.)	Mandatory Ethics: Professionalism in Alaska	Anchorage Hotel Captain Cook		
#07A September 14 CLEs tba Half- Day (p.m.)	"In Jason's Best Interest:"-- Video Vignettes/Ethics (NV)	Anchorage Hotel Captain Cook	ALPS	
#88 September 18 3.0 CLEs Half Day (a.m.)	Mandatory Ethics: Professionalism in Alaska (NV)	Fairbanks Regency Hotel		
#07C September 18 CLEs tba Half Day (p.m.)	"In Jason's Best Interest:"-- Video Vignettes/Ethics (NV)	Fairbanks Regency Hotel	ALPS	
#27 September 23 CLEs tba Full Day	Do's and Don'ts of Complex Deposition Practice	Anchorage Hotel Captain Cook		
#20 October 1 CLEs tba Half Day (a.m.)	1998 Probate in Alaska	Anchorage Hotel Captain Cook		Estate Planning & Probate
#42 October 2-3 8.0 CLE Credits	Defense Counsel Seminar	Louisiana	NCMIC	
#45 October 13 4.0 CLE Credits	Maximizing Your Ministry & Minimizing Your Legal Risk (NV)	Anchorage Baptist Temple	Christian Law Association	
#05 October 14 CLEs tba Full Day	11th Annual Alaska Native Law Conference	Anchorage Hilton Hotel		Alaska Native Law
#30 October 22 CLEs tba Half Day	The Most Important – And Misunderstood – Evidence Rules for a Trial Lawyer in Alaska	Anchorage Hotel Captain Cook		
#38 October 30 CLEs tba Morning	Probate/Mediation Rule Update	Anchorage Hotel Captain Cook		Estate Planning & Probate
#29 November 5 CLEs tba Half Day	Real Estate Issues	Anchorage Hotel Captain Cook		Real Estate Law

Dedication planned in memory of Jan Hansen

Continued from page 1

perimenting with new transcript formats.

Jan is described by her staff as being a hard worker who gave everything she had to her job, often arriving early, working through lunch, leaving late, and working on Saturdays. It was not uncommon for her to work more than 60 hours per week. Jan was dedicated to her staff, and donated her Permanent Fund check to buy a refrigerator, microwave, dishes and silverware for the office kitchen. She was also known for her well-stocked candy drawer, which she claimed was her way of sweetening up the people she worked with.

Despite her long hours at the court, Jan found time for her other passions: reading, gardening, artwork, music and her church. Jan was an avid reader who often fell asleep with a book in her hands, and who listened to books on tape while walking or riding the bus. Jan loved flowers, particularly tiger lilies, and looked forward to the time she spent in her garden. She also loved to visit greenhouses and gardening stores. Jan loved music. She sang with her church music group Alaskappella, which performed several times a year. She purchased a white piano about a year ago, after agonizing between buying it or a car. She had recently begun taking piano lessons.

For years Jan did not own a car, and instead walked or rode the bus because she wanted to help to reduce pollution. Earlier this year, citing inconvenient bus schedules, poor sidewalk conditions and achy joints she did buy a car, taking care to choose a fuel-efficient model. Jan lived according to her beliefs.

As busy as Jan was with work, the Mormon Church was the center of her life. She spent hours each week preparing for the Wednesday night and Sunday school classes she taught. She eagerly anticipated the construction of the Anchorage Alaska Temple, and made a habit of visiting the temple site each week to observe its progress. She looked forward to serving as a missionary for the Church when she retired.

A committee is organizing the dedication of a memorial plaque and planting of a tree in Jan's memory in the Boney Courthouse plaza. The committee will announce plans for the dedication ceremony once they are finalized. Everyone is welcome to attend.

Jan's devotion to her work and church, her high expectations of herself and others, and her warmth and understanding have left deep impressions on many people. She was loved and respected and is sorely missed.

I would like to acknowledge the generous assistance of Adam Petersen and Trinidad Whitman. — Jessica Van Buren, Public Services Librarian, Alaska State Court Law Library.

Jan Hansen - Clerk of the Appellate Courts of the State of Alaska.

New rule imporves enforcement for traffic infractions & minor offenses

Effective July 15, 1998, the Alaska Court System will implement a new rule that will change the consequences for failing to respond to citations for traffic infractions and other minor offenses. The new rule, approved by the Alaska Supreme Court earlier this year, means the state courts have an additional option to deal with those who receive — but disregard — a traffic ticket. The courts will be able to enter a monetary judgment against those who ignore tickets for traffic infractions and minor offenses. The judgment will be for the maximum fine permitted, usually between $30 and $300, and any points allowed for the offense will be applied against the driver's license of the offender. In addition, up to $50 in collection costs can be added to cover the administrative costs associated with tracking down violators who don't pay their fines.

Once a judgment is entered, the state and local governments can take steps to collect the fine owed, including seizure of the offender's permanent fund dividend.

Court officials said the prior system of issuing arrest warrants for those who received, but disregarded, citations was ineffective for two reasons. Police officers do not have the time to arrest everyone who ignores a minor offense citation and the state jail facilities cannot accommodate minor offense violators due to the large number of persons incarcerated for more serious offenses. "The problem stems from the fact that traffic warrants are often not pursued and offending drivers knew they could pile up multiple offenses with little chance of getting caught," said Judge Elaine Andrews, Presiding Judge of the Third Judicial District.

A recent push to serve outstanding warrants by the Municipality of Anchorage uncovered several hundred individuals who have three or more outstanding traffic warrants. Court officials estimate that under the old procedure thousands of citations have not been pursued.

The change in procedures will provide a way to deal with "scofflaws" who do not respond to citations, reduce jail overcrowding and save the State Troopers, city police, and the courts hundreds of hours of work every year. Court officials also believe that the change will have a positive effect on response rates.

In appropriate cases, the courts still will have the ability to issue arrest warrants for violators who do not respond to citations for traffic infractions and minor offenses.

QUESTIONS & ANSWERS ON THE COURTS NEW FINE COLLECTION PROCEDURE

WHAT'S CHANGING?

Under current court rules, an individual has between five and ten days to respond to a traffic citation by either admitting the offense and paying the fine due or pleading not guilty and requesting a trial. The courts issue an arrest warrant for those who do not respond. The Anchorage court alone issues approximately 12,000 warrants a year. In many cases, no action is taken on an outstanding warrant.

Under the new rules, a defendant still has between five and ten days to respond to a ticket with a plea of "no contest" or "not guilty." However, the courts now will enter a monetary judgment against those who ignore the ticket. The judgment will be for the maximum fine allowed for the offense, and will include the imposition of points against the operator's license, where provided for by law. The state or locality then can initiate efforts to collect the fine owed, up to and including seizure of the defendant's permanent fund dividend.

WHY HAS THE PROCEDURE CHANGED? ISN'T THE THREAT OF ARREST ENOUGH TO GET PEOPLE TO OBEY THE LAW?

Issuing warrants is an expensive and time consuming process, demanding hundreds of hours of clerical time for the courts and law enforcement agencies, as well as the time required of police and judicial officers when they do result in an arrest. Police do not have the manpower needed to regularly make arrests on minor traffic offense warrants. Some of the state's worst drivers, individuals with multiple prior offenses, have learned that the odds are good that they can ignore a ticket without any consequences.

Before the Municipality of Anchorage launched a major push to enforce traffic warrants two months ago, the Anchorage court alone had almost 20,000 warrants outstanding, representing several hundred thousand dollars in unpaid fines. In many cases, warrants are never served, with the result that the citation was dismissed without payment after about two years.

WHY WILL OFFENDERS PAY UP UNDER THE NEW POLICY?

The new process allows for the simple entry of a judgment after issuance of a warning letter. The hope is that the warning will be enough to encourage most individuals to respond to the citation as required by law. For those that do not respond to the notice, a judgment can be entered and up to $50 in additional costs can be assessed. The additional costs represent a small portion of the expense the justice system incurs to pursue those who ignore the law.

DOES THIS POLICY MEAN POLICE WILL SPEND LESS TIME ON TRAFFIC VIOLATIONS?

Yes. The police will have more time to enforce traffic rules because they will spend less time serving and responding to warrants for minor offenses. In addition, police agencies will save many hours of clerical time now devoted to the warrant process.

WHAT TYPES OF OFFENSES WILL THESE NEW RULES APPLY TO?

The new process applies to all "minor offenses," including traffic tickets, some fish and game violations, municipal violations, and citations issued by parks and recreation, university, and airport police. Some violations such as commercial traffic offenses still will require an appearance by a defendant and will result in issuance of a warrant for non-compliance.