The Alaska BAR RAG

VOLUME 24, NO. 4 | *Dignitas, semper dignitas* | $3.00 | JULY - AUGUST, 2000

Inside:

Court digital recording first in the nation

Alaska's state courts will become the first in the nation to move to statewide digital recording. The Alaska Court System is in the final stages of a project to upgrade recording systems in all courtrooms and grand jury hearing rooms throughout the state. The major innovative component of the upgrade is the installation of digital recording equipment in all superior and district courtrooms and all grand jury hearing rooms. The digital audio recording systems are the final piece to the major renovation of the court's record capture capabilities. The new electronic recording equipment consists of new computer-based digital recorders, amplifiers, speakers, microphones, and record duplication and transcription devices. The new systems are replacing 20 year-old analog tape recording equipment.

In addition to the ability of the equipment to capture a high quality audio record of court proceedings, the new equipment improves the quality of court proceedings in two significant areas. First, the new equipment works in conjunction with infra-red hearing assistance devices, like those used in theaters, to allow court customers with hearing impairments to participate more fully in court proceedings. Second, the new equipment includes improved connectivity to the court's telephone systems and will significantly improve the audio quality of court proceedings in which litigants appear by telephone.

The new digital system records courtroom proceedings simultaneously on a computer and on a compact disk (CD). This system produces precise time indices that allow instant access to a desired passage without cumbersome and time-consuming rewinding and fast forwarding. In addition, a single CD can hold several days of courtroom recordings compared to the 90 minutes held by a cassette tape.

A demonstration of the new recording, duplicating and transcribing equipment will be held on Tuesday, August 1st at 3:30 p.m. in Courtroom 303 of the Nesbett Courthouse. All members of the legal and court reporting and transcribing communities are invited to attend. If you are interested in attending the demonstration, please contact Information Support Systems at 264-8207.

Some of the most frequently asked questions about the digital audio system include:

Which court locations will have the new digital audio systems?

Anchorage, Kenai, Palmer, Kodiak, Dillingham, Homer, Valdez, Ketchikan, Juneau, Sitka, Barrow, Nome, Kotzebue, Fairbanks and Bethel.

How can I listen to a recording of a court proceeding?

You can listen in one of three ways: (1) on a court system listening station; (2) by purchasing a 2-channel cassette tape copy ($10 per cassette); or, (3) by purchasing a duplicate CD ($10 per CD) to use on your own personal computer.

Can I listen to CD recordings of court proceedings on my home or car CD player? No. The CD recording can only be played back on a personal computer equipped with specialized software.

Will I need to purchase specialized software to listen to a duplicate CD on my computer?

Continued on page 11

VOIR DIRE FOR ALL JURORS ALIKE

—*PAGES 18-19*

Uniform Laws wrap-up

Partnerships & Secured Transactions: Major Update

By Arthur H. Peterson

Alaska's 1917 enactment of the 1914 Uniform Partnership Act needed updating. So the Alaska Legislature passed, and the governor signed, CSHB 296(L&C), the Revised Uniform Partnership Act, promulgated in 1994 and amended in 1996 and 1997 by the National Conference of Commissioners on Uniform State Laws. It's now ch. 115, SLA 2000.

The Uniform Commercial Code's Article 9, on secured transactions, not nearly so old, but definitely in need, was also updated. SCS CSHB 239(FIN) presents the NCCUSL's 1999 revision. It's now ch. 113, SLA 2000.

These two enactments try to keep Alaska in the commercial mainstream. As of this date (July 5), we join 29 other jurisdictions having the 1994 partnership Act (25 of them with the 1996 and 1997 amendments, and no bills pending) and 26 others (with 14 pending) in having the revised Article 9. Both Acts adhere very closely to the NCCUSL's "official" version, with some minor drafting-style variations to accommodate Alaska's drafting requirements, and a couple of other changes discussed below.

So, two more products of

Continued on page 20

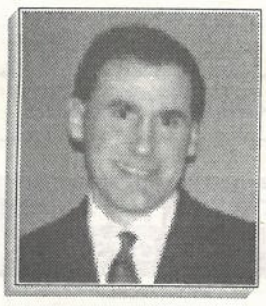
Alaska Bar Association
P.O. Box 100279
Anchorage, Alaska 99510

Non-Profit Organization
U.S. Postage Paid
Permit No. 401
Anchorage, Alaska

President's Column

Principles important to the Board of Governors

☐ Bruce B. Weyhrauch



I believe that the following principles are important to the administration of the Bar Association and to working as an attorney on the Board of Governors:

• Closer communication with all attorneys through local bar associations and a cohesive relationship among all the State's attorneys to maintain strength of representation on the Board.

• Better recognition by the Bar of the efforts of local practitioners on Bar-related activities, sections, committees, and panels.

• Efforts to obtain feedback from the bench and bar on Bar activities.

• Sound management of Bar activities and administration to ensure the wise use of dues balanced against the need for the Bar to be present statewide and excel at representing the entire Bar and its sections.

• A cohesive relationship between the bench and bar to promote the public's confidence in the judiciary and the legal system, and the continuation of an excellent and independent judiciary in Alaska.

Programs that the Bar Association already has, and that it should consider adopting or expanding in the future to implement these general principles, include:

•Promotion and further development of the Bar Association's web site. Contact with judges, attorneys, and nonattorneys with mutual interests can be facilitated through use and improvement of the web site. Local Bar associations should be encouraged to develop web pages with links to the State Bar's web page.

•An outreach program through the schools, civic organizations, and political institutions to inform the public about the judiciary, Alaska's system of judicial selection, and the critical need for an independent judiciary to maintain public confidence in our system of laws and justice.

•The Board should insure that comments and communications from practitioners are carefully considered. Attorneys, lay persons, and judges who serve on Bar sections, committees, and panels must be appropriately recognized. Our time is very valuable, both to clients needing our services and to attorneys who need their own personal time. The Board must make sure that when time is donated to the Bar, that we treat it as the valuable donation it is.

•Attorneys in Alaska must belong to the Bar and pay dues. As a Board, we must insure the management of Bar activities, the Bar's administration is prudent, and that money we receive is used to meet the needs and requirements of the Bar. The essential functions of the bar include (1) Fair and expeditious discipline, (2) Carefully considered ethical opinions, (3) Judicious and careful bar admissions, (4) Promotion of legal services for all citizens, (5) Quick and efficient responses to bench, bar, and public requests for information; and (6) High quality and timely legal education programs.

There is much to do. We will do as much as possible and hope to keep you informed as we do it.

Editor's Column

Latin terminology still formidable in Alaska courts

☐ Thomas Van Flein

The authors of Black's Law Dictionary explain that Latin is in decline "as a working language of scholarship and jurisprudence" but that it still "supplies a formidable stock of legal terms and phrases." On the other hand, music industry wonks claim that Latin music is on the upswing—so to speak. I decided to make a quick check to see just how formidable the stock of Latin terminology is in the Alaska courts. One of the all time leaders is "inter alia," which has appeared in approximately 495 appellate opinions in Alaska. The first recorded use of this term in an Alaska appellate decision appears to be *Goldstein v. Behrends*, 123 F. 399, 401 (9th Cir. 1903) (Alaska), wherein it was stated that "[t]hese protests alleged, ***inter alia***" several grievous wrongs. Most recently, *McCubbins v. State, Dept. of Natural Resources, Div. of Parks and Recreation*, 984 P.2d 501, 503 (Alaska 1999), the court explained that the "state answered on December 16, 1993, asserting, ***inter alia***" various righteous defenses. This phrase seems to be alive and well, and if Julius Caesar returned as a law clerk, he may find some comfort in this, as well as some pride when ordering salad at the Marx Bros. Café.

"Amicus curiae" has a respectable 242 appearances. Not only that, but how nice it is to be "a friend of the court." I looked (not very hard) for a term that would equate to "enemy of the court" but I could not find one. I did find a claimant alleging that the court was his enemy, a claim that Judge Wickersham rejected, finding the allegations "vague, shadowy, and indefinite; good enough for calumny and slander, but wholly lacking in courageous and specific statement of fact." *U.S. v. Richards*, 1 Alaska 613, 617 (D.Alaska 1902). I also found a defendant named "Enemy Boy" who, his moniker notwithstanding was forty seven years old and a high school graduate." *Boy v. McCormick*, 967 F.2d 585 (9th Cir. 1992). This same "Enemy Boy argue[d] that his guilty plea was not knowing and voluntary . . . [because] he was hung over when he signed the plea agreement." I will let you surmise whether Enemy Boy got out of his plea agreement with that argument.

Some Latin phrases reflect doctrines, for example the "doctrine of statutory construction, ejusdem generis," which means, according to the court in *Cable v. Shefchik*, 1999 WL 608004, (Alaska 1999), "the general is controlled by the particular." No doubt there are generals, and perhaps even some rear admirals, who are not controlled by their particulars, but that is not the law. I know this because Black's Law Dictionary said so. *See State Farm Fire and Cas. Co. v. Bongen*, 925 P.2d 1042, 1052 (Alaska 1996) citing Black's Law Dictionary (6th ed.1990) for this definition. But this doctrine is found in only 18 published Alaska appellate decisions, a fraction of the 224 cases where "res judicata" is mentioned. This may reflect the fact that most generals do not question their particulars or the control it has over them.

In some respects, reducing the use of Latin may help to keep briefs brief. For example, we can say that "contracts in violation of public policy are void" or we can say "contractus ex turpi causa, vel contra bonos mores, nulles est." The modern version takes eight words, the Latin version takes 10 words, a 20% reduction in verbiage which converts to a "slim chance" or a "fat chance" (apparently these opposite terms mean the same thing) that your brief will be under the page limit.

Use of the term "replevin" (an action to repossess goods wrongfully taken) seems to be falling out of favor. For instance, in *McGee v. McGee*, 974 P.2d 983, 987 (Alaska 1999), "the parties and the court thereafter referred to [the action] as one for replevin" but the Alaska Supreme Court preferred English and stated that it would "refer to it as her 'tort action' or 'tort suit.'" Is "replevin" now officially replaced, discredited from a legal vocabulary? Some have speculated that the court changed "replevin" to "tort action" because "replevin" is not part of the spell check dictionary. No one at the court would return my calls on this point.

Sometimes it is a challenge to work an old Latin phrase into a brief. Maybe that is one reason our use of Latin is declining. Try using "scientia sciolorum est mixta ignorantia" in your next letter or brief. It is defined as "the knowledge of smatterers is diluted ignorance." Obviously we have all questioned the motives of smatterers, and sometimes we ask "what's the s'matter?" but working the whole Latin phrase into an argument could pose a challenge.

I expected more references to "stare decisis" but found only 46, beginning with U.S. District Court Judge Johnson's explanation in 1898 that "[w]hile the doctrine of stare decisis may not be binding upon this court in this case, yet we think the decisions of the highest court of the state of Oregon in construing the statutes quoted should not be departed from, without the gravest reasons for so doing." *Kohn v. McKinnon*, 90 F. 623, 626 (D.Alaska 1898). This

Continued on page 3

The Alaska Bar Rag

The *Alaska Bar Rag* is published bimonthly by the Alaska Bar Association, 510 L Street, Suite 602, Anchorage, Alaska 99501 (272-7469).

Paralegals perform substantive legal tasks

By Mary Kay Rivera

A glance at the diary of most solo practitioners and attorneys in small firms would reveal appointments, deadlines, follow-ups that would require a 48 hour day to complete. The practice of law has become a business with client satisfaction and retention, overhead, profit margins, public relations and increasing the client base, but a few of the priorities to be monitored daily. To alleviate some of the stresses associated with the practice of law, more and more attorneys are realizing that utilizing paralegals to perform substantive legal tasks affords them the opportunity to meet the ever growing demands on their time and practice.

Did you know that the American Bar Association definition states that a paralegal may perform specifically delegated substantive legal work for which a lawyer is responsible? Absent giving independent legal advice, setting a fee or representing a person in court (unless specifically authorized by statute, court rule or administrative directive), a paralegal may perform those substantive legal tasks directed by an attorney.

The National Federation of Paralegal Associations, a grass roots organization representing over 17,000 paralegals nationwide through its 58 member associations, and a recognized leader in the paralegal profession has promulgated the following: "A Paralegal is a person, qualified through education, training or work experience to perform substantive legal work that requires knowledge of legal concepts and is customarily, but not exclusively, performed by a lawyer. This person may be retained or employed by a lawyer, law office, governmental agency or other entity or may be authorized by administrative, statutory or court authority to perform this work." With regular staff meetings or supervisory follow-ups, paralegals can exercise a certain amount of independent judgment in their duties to allow the attorney the freedom to work on the more complex issues of the caseload.

Paralegals working for small firms or sole practitioners may be assigned any number of substantive legal tasks in the course of a day:

1. Starting a new client intake interview to obtain the pertinent information regarding the client. The attorney usually joins the conference within the first half hour. Often the paralegal is asked to remain to record any impressions and ideas, take "back up" notes from a paralegal's perspective, list the documents needed, the identity of witnesses and other matters that require follow-up.

2. Drafting pleadings on any number of cases. Preparing a notice of petition and petition in a landlord-tenant matter; the drafting of interrogatories, motions, attorney or client affidavits in litigation matters, drafting a will or other estate documents from client intake questionnaires or preparing a separation agreement in a matrimonial action.

3. Real estate transactions are usually assigned from their inception through closing. With scheduled supervisory sessions, real estate is a practice area where paralegals may undertake virtually all aspects of the transaction. Whether the firm represents the purchaser, seller or lender, much of the work is performed by paralegals.

1. 4. Attendance at independent medical examinations is another area where paralegals are often utilized. Accompanying a client to the examination not only affords comfort to the nervous client, it allows the attorney to obtain detailed information regarding the length of the exam, the client's actions, the demeanor of the physician or what the client was asked (or not asked). Thereafter the paralegal may compare his/her notes with the narrative reported rendered by the physician for discrepancies, and the attorney often finds the notes invaluable when cross-examining the physician at trial.

5. Often attorneys assign paralegals legal research on a question of law or statute. The paralegal performs the general research or researches a specific point directed by the attorney. The attorney then has been free to work on other areas of the case while the preliminary research is prepared for review.

6. Client contact, follow-ups and drafting correspondence for the attorney's signature as well as that of the paralegal are done in the normal course of the day. Correspondence signed by paralegals must use the designation "paralegal" or "legal assistant" following their name so as ensure that the client, court and opposing counsel are aware of their non-lawyer status.

7. Paralegals are invaluable during trial preparation, and many attorneys ask paralegals to attend trials and hearings in order to assist with exhibits, note taking and last minute research.

It is important to remember that while paralegals are prohibited from giving independent legal advice, they may impart to clients advice specifically directed by counsel or may advise regarding a specific fee as long as it is pursuant to attorney's instruction.

The benefits of paralegal members of the legal team are many. Using paralegals in a substantive manner allows attorneys (partners and associates) to concentrate on the more complex issues of the case, attend to court appearances, depositions, continuing legal education seminars and client solicitation knowing that clients are receiving the attention they deserve and expect, and that the office is being productive.

It is important to note that courts across the country have recognized and, in many instances, applauded the attorney's billing of paralegal time to the client. The client receives high quality legal services at a more cost effective rate, the attorney realizes a profit and the attorney/paralegal team can work on twice the number of cases in a day, easing the load of the business of practicing law.

For more information regarding NFPA, its history and positions on various issues, see *Statement on Issues Affecting the Paralegal Profession*, which can be found in electronic format at: http://www.paralegals.org or contact: NFPA at P.O. Box 33108, Kansas City, MO 64114-0108. Tel. (816) 941-4000. Fax. (816)941-2725 or Info@paralegals.org.

The author is a general practice registered paralegal in New York and a vice president of the National Federation of Paralegal Associations.

Latin terminology still formidable in Alaska courts

Continued from page 2

has morphed into its present rendition, where the court in *State v. Coon*, 974 P.2d 386, 394 (Alaska 1999), reasoned that the court "will overrule a prior decision only when we are clearly convinced that the rule was originally erroneous or is no longer sound because of changed conditions, and that more good than harm would result from a departure from precedent." In other words, legal precedent is kind of like wedding vows on the Jerry Springer show—till death do us part, or until something better comes along.

Next time we will discuss olde English and the law. I know ye can't wait.

Bar Letters

Pro bono furniture needed

On July 1, 2000 the Alaska Pro Bono Program, Inc. was separated from Alaska Legal Services Corporation. My title changed from Pro Bono Coordinator to Executive Director.

Another big change is the new office location, 3330 Arctic Boulevard, Suite 103B. If you all recognize that address it's because I am subleasing space from the Disability Law Center of Alaska (DLA). DLA made an offer we could not resist and we are all excited about the move. I hope to be moving into the new office space on August 1.

The Alaska Bar Foundation has given us a grant to purchase furniture for the new offices. I need to purchase filing cabinets, small tables, chairs, etc. In order to make the grant money stretch far, I am asking everyone to please look around their offices and see if you have any office furniture you might like to donate to us. I will be happy to visit your offices and/or your storage areas.

—Thanks everybody.
Maria-Elena Walsh

Classified Advertising

ESTATE PLANNING CORNER

LLCs and selected tax issues

☐ Steven T. O'Hara

Estate planning means property planning. As property planners, we need to know the law of business organizations because so much of our clients' wealth consists of closely-held interests in corporations, partnerships and, more recently, limited liability companies ("LLCs").

LLCs are generally treated as partnerships for income tax purposes (Treas. Reg. Sec. 301.7701-2(a) and 301.7701-3(b)(1)). So there is generally one level of tax on LLC income and gain, and this tax is payable by the LLC's members (IRC Sec. 701). Similarly, the income and gain of corporations that have elected to be treated as "S Corporations" are generally subject to one level of tax only, and this tax is payable by the S Corporation's shareholders (IRC Sec. 1363(a) and 1366).

On the other hand, income and gain on the sale of assets held by "C Corporations" can be subject to two levels of tax. (C Corporations are corporations that have not elected S Corporation status.) The first tax is at the corporate level when the asset is sold (*cf.* IRC Sec. 311(b) and 336(a)). The second tax is at the shareholder level when the remaining sale proceeds are distributed (IRC Sec. 301 and 331).

LLCs have grown in popularity over the last few years. But they are not free of their own tax issues. For example, the Internal Revenue Service may take the position that each member of an LLC — including "passive investors" — must pay self-employment tax on LLC business income (IRC Sec. 1402(a)). A recent article on this issue quoted an unidentified "East Coast CPA firm" as advising:

> All members, regardless of participation in the LLC, will be subject to self-employment tax on their share of the LLC's business income. LLCs which take any other position should consider attaching Form 8275 ["Disclosure Statement"] or 8275-R ["Regulation Disclosure Statement"] to their tax return to explain their reasoning. Penalties for not notifying the IRS that you are taking a position contrary to current tax law can be substantial. (Raby and Raby, *Partners, LLC Members, and SE Tax, Tax Practice* at 165 (May 8, 2000).)

Another potential LLC pitfall is the LLC may be required to use the accrual method of accounting, rather than reporting income as receipts are actually received (cf. IRC Sec. 446(c)). This result may occur because LLC interests are generally securities under securities regulation laws (AS 45.55.990(12)), and thus the LLC may fall within the definition of a "tax shelter" under the Internal Revenue Code (*see* IRC Sec. 448(d)(3)).

Yet another tax surprise is the LLC will be terminated, for federal income tax purposes, if one or more of its members sells or exchanges LLC interests aggregating 50% or more within a 12-month period (Treas. Reg. Sec. 1.708-1(b)(1)(ii)). Consider an LLC with two equal members. If one member sells today his 50% interest to a third party, the original LLC would be terminated for federal income tax purposes. Here this termination would cause a deemed exchange, for federal income tax purposes, resulting in a new LLC in place of the original LLC (Treas. Reg. Sec. 1.708-1(b)(1)(iv)).

There is no denying, however, that LLCs can offer more flexibility than S Corporations. For example, any other business entity or any trust can hold interests in an LLC without causing the LLC to lose its one-level income-tax treatment.

By contrast, only certain types of trusts can own stock in an S Corporation (IRC Sec. 1361(c)(2), (d) and (e)); and stock in an S Corporation cannot be owned by a partnership or LLC (IRC Sec. 1361(b)(1)(B)). Consider a client whose significant wealth is in a business that is in the form of an S Corporation. The S Corporation provides one-level income-tax treatment. But at the client's death the client generally cannot give the S Corporation stock to a one-pot trust for all his beneficiaries without losing the S Corporation status (*cf.* IRC Sec. 1361(e)).

If the client's business were in the form of an LLC, the client would be free to give his interests in the LLC to a one-pot trust or separate trusts for his beneficiaries. There would be no risk of losing the LLC's one-level income-tax treatment. In addition, during the client's lifetime he could contribute his LLC interests to a family limited partnership or family LLC without losing one-level income-tax treatment.

As another example of LLC flexibility, consider an LLC with two equal members. The LLC owns one asset, which is worth $110,000. The LLC's tax basis in the asset is $10,000; so if the asset were sold there would be $100,000 of gain. Each member's tax basis in his 50% interest is $5,000. Suppose one of the members dies and his surviving spouse becomes a member in his place. Here the surviving spouse would generally receive a step-up in tax basis in her husband's 50% LLC interest equal to its fair market value at the time of her husband's death (IRC Sec. 1014). More significantly, the LLC could, as a result of the member's death, elect to step-up its tax basis with respect to one-half of its asset (IRC Sec. 743(b)). This option to step-up "inside" basis is not available to an S Corporation.

Although the LLC may be more flexible than a corporation, clients familiar with Articles of Incorporation and corporate Bylaws may find the governing documents of an LLC to be too complicated. This problem may occur where the LLC's Operating Agreement contains, or attempts to contain, all the apparent requirements of the Treasury Regulations on the subject of tax allocations.

After reading terms like "Qualified Income Offset" and "Minimum Gain Chargeback," often at the very beginning of the Operating Agreement, the client may abandon the task of reviewing the agreement. The client may think the Operating Agreement is the exclusive territory of the tax attorney and tax accountant.

An alternative approach in drafting Operating Agreements, one that perhaps better encourages client participation, is to provide a simple tax allocation provision like the following:

> *Tax Allocations*. Except as otherwise required by applicable provisions of tax law, Company taxable income and loss shall be allocated to the Members in proportion to their Percentage Interests. (A. Willis, J. Pennell, and P. Postlewaite, *Partnership Taxation* at 22-260 (6th ed. 1997); *cf.* IRC Sec. 704(c).)

This approach works only where it is consistent with the intent of the parties. Consider the following example derived from the Treasury Regulations:

> A and B form [an LLC taxed as a partnership] with cash contributions of $40,000 each, which cash is used to purchase depreciable personal property. . ..*** The [LLC] agreement provides that A and B will have equal shares of taxable income and loss. . . and cash flow [except] that all cost recovery deductions on the property will be allocated to A. The agreement further provides that. . . upon liquidation. . . distributions will be made equally. . . and no [member] will be required to restore the deficit balance in his capital account. . .. In the [LLC's] first taxable year, it. . . [has a] $20,000 cost recovery deduction, which is allocated entirely to A.*** Under [the Treasury Regulations], the allocation lacks economic effect and will be disregarded. The [members] made equal contributions. . ., share equally in other taxable income and loss and in cash flow, and will share equally in liquidation proceeds, indicating that their actual economic arrangement is to bear the risk imposed by the potential decrease in the value of the property equally. Thus, under [the Treasury Regulations] the [members'] interests in the [LLC] are equal, and the cost recovery deduction will be reallocated equally between A and B. (*See* Treas. Reg. Sec. 1.704-1(b)(5)(Example 1(i).)

Thus, if the parties intend to have special tax allocations, then for those special tax allocations to be respected the LLC's Operating Agreement would need to contain the provisions required by the Treasury Regulations. On the other hand, if the parties intend for the tax allocations to be in accordance with their interests in the LLC, then a short provision on tax allocations may work.

LLCs are a favorable development in the law of business organizations. As with the creation and operation of any entity, tax considerations are ever present.

Big Boy Fare

BY WAYNE ANTHONY ROSS

On a recent Northwest Airlines flight from Seattle to Honolulu, I upgraded to First Class. Shortly after takeoff, the Fist Class breakfast menu was circulated. What a disappointment! Here's what it read:

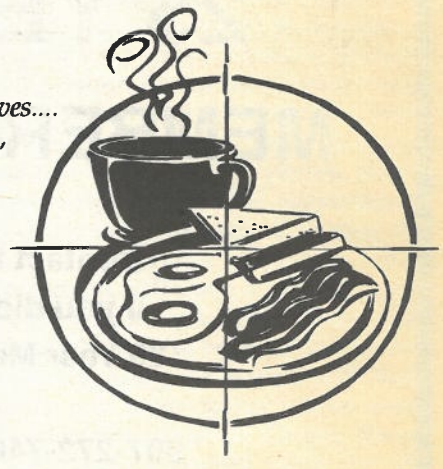
Cheddar Cheese and Egg Croissant Sandwich
Selection of Cold Cereal with Milk
Yogurt
Banana
Selected Breakfast Breads
Assorted Juices
Caravali Gourmet Coffee

Whereupon I wrote this poem and gave it to Marydelle, the fight attendant:

BIG BOY FARE

"The breakfast cart came down the aisle.
Hungry, I waited with a smile.
Start my day, A mighty start!
With a First class breakfast, ala carte.

Marydelle was very kind.
But a 'big boy' meal she couldn't find.
Oh, she had shrubs, some fruit, some leaves....
A croissant sandwich with melted cheese,
Breakfast breads (?) and yogurt too!
(How I hate that insipid goo!)



'Mary! Mary!' I took her arm.
'I really, really, mean no harm.
But I'm a big guy, and glad to be!
And this stuff... It's pansy food to me!
Where's the bacon? Links? Or ham?
Give me a breakfast that's fit for a man!
Breakfast, served without the meat...
Sorry Mary, It's simply too effete!'

Northwest Breakfast?
I'll pass, I think. 'Mary...
Better bring me another drink!"'

(Marydelle liked the poem, read it to the other attendants, and brought me another drink.)

FAMILY LAW

Finding the balance

☐ Steve Pradell

Maintaining a family law practice can be stressful. Many practitioners remember their one and only family law matter and vow to never again practice in this emotionally charged area. For those of us who deal with divorce and custody issues day in and day out, over time there is inherent burn out. Listening to everyone else's misfortunes gradually takes its toll on us, and the stress of our client's complex lives rubs off to some degree.

As I am about to turn 40 and celebrate my 10th cancer-free anniversary, I return from a trip to Homer and reflect on necessary changes to implement over the next decade if I intend to remain healthy and continue to practice primarily in the area of family law. Perhaps my thought process can be of benefit to others.

The most extreme options have been considered: shutting the doors and/or moving out of Anchorage to a more rural Alaskan location These steps would ultimately reduce some stress, but would undermine the building up of a successful practice which took years to occur. Short of these measures are the following resolutions.

First, selecting the right clients at the start of the process appears to be a priority. Can the potential client afford the legal work which may be necessary? Divorces involving custody issues have lives of their own and can remain open for years. Are there red flags which should cause alarm bells to ring? How many lawyers has the potential client already gone through? At the end of the consultation, do I have a migraine? Do our personalities mesh? Are the desires of the potential client realistic? Do I have to help every potential client who walks through the door? Are there other lawyers my firm or otherwise to whom I can refer a client who might not fit ideally into my practice goals?

Second, I am considering changing part of the focus of the practice over the next decade to include more mediation/alternative dispute resolution (ADR) matters. Helping more clients who are attempting to resolve divorces through the dissolution process also fits into this plan. Generally, clients in ADR are goal oriented and able to put aside emotional blocks and concentrate on resolving issues more quickly. The result is often a client who is willing to pay the bill and refer others after a successful resolution is reached without protracted litigation.

Third, changes in the fee arrangements are necessary to streamline the collection process, reduce the number and size of unpaid collectibles and to attempt to have better controls over clients so that clients pay their bills on time. This process includes working with those involved in collections to contact clients more often to insure timely payment and the creation of steps to eliminate clients who can't or won't pay their legal bills.

Fourth, mental and physical health issues must take more of a priority than in the past. Vacations, exercise and pursuit of hobbies are necessary to reduce burnout and recharge batteries. Leaving the office early or coming in late once in a while should not be a taboo. It is too easy to put these important stress relievers on the back burner and keep working all the time on client related matters. There is no apparent lack of potential clients or legal work in this practice area. But burning the candle at both ends all the time reduces a lawyer's ability to give 100% to each particular client and ultimately reduces client satisfaction.

Finally, there are now books and articles written by lawyers about how to have a contented life and still practice law successfully. Professional counselors and coaches are available to assist us in making good choices in decisions which affect our lives. Technological advances lessen the time it takes to produce legal documents for our clients, but also speed up our lives and allows us to fit more clients into our busy days. With the arrival of the new millennium, reflection regarding these deeper issues will hopefully result in a more fulfilling practice during the next decade. Good luck in your endeavors.

Arbitration in the Last Frontier:

Analyzing the Alaskan Arbitration Act in comparison to the Uniform Arbitration Act

BY: CARL D. COOK

INTRODUCTION

A. Arbitration and Alaska Before Statutes

Alaska is often referred to as the Last Frontier. The State is enormous, comprising approximately seventeen-percent of the United States.[1] The lands first occupants were Natives. Studies of Alaska Native groups estimate that approximately 75,000 Natives lived within the territory that is now defined as Alaska.[2] The natives of early Alaska composed five tribes: Inupiat, Yupik, Aleut, Athabascan, and Tlingit.[3] Of all the tribes only the Tlingit, located in Southeast Alaska, utilized a neutral decision-maker during conflicts. The Tlingit called this neutral a "peacemaker".[4] The "peacemakers" were the first Alaskans to make decisions in a process that today would be called arbitration.

B. Defining Modern Arbitration

Arbitration is a mandatory process in which two or more parties present facts and evidence to a neutral individual or panel with the power to render a decision on the matter.[5] A decision rendered in court mandated arbitration is non-binding on the parties. A party can reject the decision expressed by the arbitrator and request a trial de novo. If parties agree to be bound by arbitration the decision rendered by the arbitrator is binding.

THE "PEACEMAKERS" WERE THE FIRST ALASKANS TO MAKE DECISIONS IN A PROCESS THAT TODAY WOULD BE CALLED ARBITRATION.

Arbitration is a word that defines a process that can render a claim or controversy moot without ever seeing the inside of a courtroom. During my second year in law school I enrolled in an arbitration course. I was amazed that an individual, other than a judge, held the power to settle a claim or controversy with a level of diversity, privacy, and finality that circuit court judges do not enjoy. I became interested in the justifications for allowing arbitrators to decide cases in such manners.

In the process of reading the Uniform Arbitration Act of 1955 ("UAA") I became interested in arbitration in the State of Alaska, my home. I decided to compare the UAA to the Alaska Uniform Arbitration Act ("AUAA"). Research as to the alteration of the UAA terminology, to that presented to the House in H.B. 212 (AUAA), is non-existent in any library in the State of Alaska.[6] The concerns of the legislature are undocumented by either text or recording. Interviews with Art Peterson, the Judiciary Committee Counsel in 1968, revealed that Alaska did not keep records or committee minutes until after 1968. Therefore, to complete this paper it was necessary to evaluate the textual differences in the UAA and AUAA, comparing the existing and likely decisions. A question presented by the absence of legislative committee minutes is whether the result of the new terminology in the AUAA was intended. The durability of the statute infers the legislature's approval of the resulting decisions. Therefore, this paper will not address the intent of the drafters.

My main concern, and the nexus of this legislative note, is the statutory obligations of parties submitting their controversy to arbitration under the AUAA, and how those obligations would differ under the UAA. The differences in terms within the two statutes bestow upon the submitting parties very different responsibilities and protections. It is my goal to define the changes and to comment on their results within this paper.

HISTORY OF ARBITRATION STATUTES

Modern arbitration is a creation of statute.[7] New York adopted the first arbitration statute in 1920.[8] The United States adopted the United States Arbitration Act (USAA) in 1925.[9] The USAA is now known as the Federal Arbitration Act (FAA).[10] The FAA remains relatively the same as it did in 1925, with provisions added for foreign arbitration in 1970 and 1990.[11] The National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted two state arbitration statutes.[12] The first was adopted in 1925 and withdrawn in 1954 since only six states adopted it.[13] The second, the UAA, remains today.[14] The UAA was adopted by thirty-seven states with minor changes, and the remaining states have created and enacted their own arbitration statutes.[15]

Originally, arbitration met with opposition from the courts. Judges who were once paid by the case resented the doling of controversies to decision-makers outside of the courtroom. Judges believed that arbitration worked against public policy. The arbitrators were allowed to make decisions on a case-by-case basis and formulated their opinions with testimony, physical evidence, and personal experience within the field of controversy. Court decisions provide precedent through written opinions. Arbitration provides no opinions and does not have to rely on precedent set by courts of law or equity. Opposition by the judges was therefore understandable.

COMPARING THE UAA AND THE AUAA

The approval of the UAA in 1955 by the American Bar Association (ABA) made the statute more attractive to the state legislatures. The act was a general statute, applicable to labor and commercial disputes.[16] Alaska submitted a revised version of the UAA to the Fifth Legislature – First Session, on February 21, 1967. The proposed statute, House Bill Number 212 (H.B. 212), was introduced to the House of Representatives by the Judiciary Committee Chairman Tom Fink.[17] The House and Senate approved H.B. 212 on April 15, 1968, and Governor Walter Hickle signed the Bill into law on May 8, 1968.[18]

The AUAA was nearly a verbatim duplicate of the UAA. The Alaskan version was added to Alaska Statutes Title 9, Code of Civil Procedure, as Chapter 43. Arbitration, Sections .010 through .180.[19] Of the eighteen new sections textual differences were made in the adoption of several UAA sections which result in no change to the applicability of the sections when applied under the AUAA. Textual changes made to the UAA §1, §3 and §5 by the drafters of the AUAA resulted in a statute of varying applicability. The drafters of the AUAA began with the first section of the UAA when tailoring the statute for Alaska's needs. Section .010 of the AUAA is modeled after §1 of the UAA. Both sections are concerned with the validity of the arbitration agreements.

UNDER EITHER STATUTE THE MUTUALITY OF THE PARTIES' OBLIGATION TO ARBITRATE WOULD BE EVALUATED TO DETERMINE MUTUAL ASSENT TO THE ARBITRATION PROCESS AND UNCONSCIENABILITY OF THE AGREEMENT. BOTH PARTIES SHOULD BE EQUALLY BOUND.

A. UAA §1 vs. AUAA Section .010. Validity of the Arbitration Agreement

Under §1 of the UAA the agreement to arbitrate is valid in labor-management contracts unless the agreement states otherwise.[20] Federal and state case law precedent demonstrates a presumption of arbitrability in labor-management conflicts.[21] The United States Supreme Court held in *Independent School District No. 88, New*[22] that:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.[23]

In deciding *Independent School District*[24], the Minnesota Supreme Court reasoned that when an arbitration clause in a contract is broadly applicable, the intent to exclude labor-management parts of the contract from arbitration must be clearly stated within the text of the agreement.[25] In contrast, AUAA does not apply to a labor–management contract unless specifically stated within the agreement.[26]

Under the UAA an agreement to arbitrate a general element of a contract would result in the arbitrability of any labor-management issue arising under the agreement, unless specifically stated otherwise in the agreement. Under the AUAA only the non-labor-management issues would be arbitrable, unless labor-management issues were declared arbitable specifically in the agreement. In comparison, under both statutes, a contract including an agreement to arbitrate labor-management conflicts would result in the arbitrability of any conflict affecting the labor-management relationship.[27]

Under both statutes, failure to foresee the applicability of an arbitration clause at the time of agreement would not result in the conflict being held as inarbitrable due to lack of mutuality. Lack of mutuality claims arise when one party claims that his/her understanding of the agreement held a claim or conflict outside the jurisdiction of the arbitration clause within the contract. A unilateral mistake will fail to bar arbitration under both statutes due to the requirements of specific text applying or removing the conflict or issue to or from arbitration.[28] Opponents to arbitration arguing a lack of mutuality due to a unilateral option to arbitrate also fail to invalidate arbitration agreements.[29] The Court in *Willis Flooring*[30] held that arbitration is no more or less fair than litigation, and allowing one party to choose the forum in which to settle the dispute is not unconscionable. An extreme lack of mutuality resulted in a court finding an arbitration clause unconscionable when one party in *Holm*[31] reserved the choice of forum and the right to change forums at any time prior to a current forum issuing a final decision. Under either statute the mutuality of the parties obligation to arbitrate would be evaluated to determine mutual assent to the arbitration process and unconscienability of the agreement. Both parties should be equally bound.

Once an arbitration agreement is held valid under either statute proceedings to stay or compel arbitration proceedings can begin. The UAA covers these proceedings in §2, the AUAA in section .020.

B. UAA §2 vs. AUAA Section .020. Proceedings to Compel or Stay Arbitration

Section 2 of the UAA includes verbiage that can easily be described as legalese.[32] The changes in the UAA text made by the House of Representatives when creating section .020 of the AUAA resulted in the

Continued on page 7

Arbitration in the Last Frontier:

Analyzing the Alaskan Arbitration Act in comparison to the Uniform Arbitration Act

Continued from page 6

substitution of legalese with layman terms.[33] The differences in the text have little effect on the application of the AUAA with the exception of .020(a). The UAA§2 (a) states:

> [T]he court shall proceed summarily to the *issue so raised* and shall order arbitration *if found for the moving party*.[34]

The text in this section indicates that the moving party may fail to prove an agreement to arbitrate if the argument lacks specificity in raising the issue of arbitration. Under the UAA §2 if a court fails to find an agreement to arbitrate within the issue raised the moving party's application would be denied. In contrast, section .020 (a) of the AUAA states:

> [T]he court shall proceed to the determination of the *issue* and if the agreement is found shall order arbitration.[35]

The text within the AUAA allows the court to look into the issue broadly, not just as specifically raised. The court findings need not parallel the moving party's objection, except as to find an agreement in general, which would apply to the contract specifically. The general terminology provides the court with latitude in deciding if an agreement to arbitrate exists because it allows the court to look outside the parties claim to find the agreement. This textual difference could prove invaluable to a moving party as nothing in this section of the UAA or AUAA allows a party to make more than one application to the court for relief.[36]

C. UAA §5 vs. AUAA Section .050. Hearing

These two sections are nearly identical with the exception of subsection (3) of the UAA in comparison to subsection (c) of the AUAA. The UAA states:

> If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals *may continue* with the hearing and determination of the controversy.[37]

In contrast, the AUAA states:

> [I]f, during the course of the hearing , an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals *shall continue* with the hearing and determination of the controversy.[38]

"May continue" as used in the UAA statute leaves the option of continuing with the hearing, as "may" denotes a privilege or discretionary power.[39] The permissive terminology allows the remaining arbitrators to continue but does not require it.[40] "Shall continue" is mandatory language setting forth a duty of obligation in the remaining arbitrators to continue the determination of the conflict.[41] The UAA text leaves the possibility that should an arbitrator cease to act, the remaining arbitrators could decide not to continue, resulting in a delay in a determination of the issue and an increase in costs associated with seeking that determination. The duty imposed by the AUAA provides the parties an assurance that the remaining neutral arbitrators will continue with the hearing and issue a determination.[42]

CONCLUSION

The textual differences in the UAA and that of the Alaska Arbitration Act of 1968 can be explained by the mindset of the drafters of the Alaska version. The Alaska House of Representatives Judiciary Committee of 1967 believed arbitration to be a true alternative to courtroom litigation.[43] During the metamorphosis of the UAA to the Alaska Statute not one drafter was employed by the State as an attorney, all were elected as representatives of the Alaskan people.[44] The representatives believed an employee should have the right to seek a remedy in a court of law, but should be able to choose an alternative means of dispute settlement if desired.[45]

The Act clearly, and plainly, states the requirements of Alaska's Arbitration law and ensures the courts will not be utilized to force the submittal of a labor-management conflicts to arbitration unless it is specifically stated in the agreement, and agreed to by both parties. This provision alone demonstrates the wisdom of our early legislators in drafting an arbitration act that remains intact today.[46]

[1] The United States purchased Alaska in 1867 after William H. Seward, then Secretary of State, convinced Congress the land was rich in resources. The Alaska purchase was then negotiated by Seward, representing the U.S., and Privy Counsellor Edouard De Stoeckl, representing the Emperor of the Russia's. Seward agreed to pay $7.2 million for the land, which comprised approximately 615,233 sq. mi., equaling approximately four cents an acre.

[2] J. CONNORS, T.CARNS, AND S. DI PIETRO, RESOLVING DISPUTES LOCALLY: A STATEWIDE REPORT AND DIRECTORY, ALASKA JUDICIAL COUNCIL (1993) at 5 (*citing* A. FIENUP-RIORDAN, CULTURE CHANGE AND IDENTITY AMONG ALASKA NATIVES: RETAINING CONTROL 2, Institute of Social and Economic Research (1992)).

[3] Id. (Alaskan Natives tribal designation was determined by the primary language that they spoke. Alaskan Natives often traveled in small bands, identifying themselves with their band first and as a member of a larger group last).

[4] J. CONNORS, T.CARNS, AND S. DI PIETRO, RESOLVING DISPUTES LOCALLY: A STATEWIDE REPORT AND DIRECTORY, ALASKA JUDICIAL COUNCIL (1993) at 8

[5] The terminology utilized to describe arbitration in this paper is a hybrid of several sources, textual and non-textual.

[6] Presented in the House of Representative, House Bill 212 set forth the terminology later adopted as the Alaska Uniform Arbitration Act, as desired by the Judiciary Committee.

[7] Lecture by Professor C. Snow, Willamette University, College of Law (August 1999)

[8] STEPHEN K, HUBER, E. WENDY TRACHTE-HUBER, ARBITRATION, CASES AND MATERIALS, 5 (Anderson Publishing Co., 1998)

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] D. ROTHSCHILD, L. MERRIFIELD, AND H. EDWARDS, COLLECTIVE BARGAINING AND LABOR ARBITRATION, 2nd ED., at 297. (Bobbs-Merrill 1979)

[17] House Bill No. 212, In the Legislature of the State of Alaska, Fifth Legislature, Second Session

[18] Laws of Alaska, House Bill No. 212 am FCC, Chapter No. 232. (Added Chapter 43, Sections 010-180, establishing the Alaska Arbitration Act)

[19] *Id.*

[20] Uniform Arbitration Act of 1955, §1. Validity of Arbitration Agreement (The textual difference appears in the last sentence of the section stating: "This act also applies to arbitration agreements between employers and employees or between their respective representatives, unless otherwise provided in the agreement).

[21] In the Matter of Arbitration Between Independent School District No.88, New v. School Service Employees Union Local 284, 503 N.W.2d 104, 107 (1993).

[22] *Id.*

[23] *Id.* (*citing* United Steelworkers of Am. V. Warrior and Gulf Navigation Co., 363 U.S. 574, 582-83 (1960)

[24] *Id.*

[25] *Id.*

[26] AS 9.43.010 (Alaska Uniform Arbitration Act)

[27] Independent School District No.88, at 107

[28] UAA §1, AS 9.43.010(AUAA)

[29] Willis Flooring, INC. v. Howard S. Lease Construction Co. & Assoc., 656 P.2d 1184, 1185 (1983)

[30] *Id.* at 1185-86

[31] Stevens/Lainweber/Sullens, Inc. v. Holm Development and Management, Inc., 795 P.2d 1308 (Arizone 1990)

[32] UAA Proceedings to Compel or Stay Arbitration.(terminology such as "issue so raised", "forthwith and summarily" can be confusing to the non-lawyer and can be classified as legalese, words primarily used and understood in the legal profession).

[33] AS 9.43.020(terminology such as "forthwith and summarily" was changed to "immediately and summarily", "issue so raised" to "issue")

[34] UAA§2 (a)

[35] AS 9.43.020 (a)

[36] Robert A. Besner and Co v. Lit America, Inc., 574 N.E.2d 703

[37] UAA §5 (c)

[38] AS 9.43.050

[39] MANUAL OF LEGISLATIVE DRAFTING, Alaska Legislative Council (August 1967) (This manual has been utilized in analyzing the statutory text within this paper because it was the guide used by the legislators drafting the AUAA).

[40] Board of County Commissioners of Neosha County v. Central Air Conditioning Co., Inc., 683 P.2d 1282 (Kansas 1984).

[41] Integrated Resources Equity Corporation v. Fairbanks North Star Borough, 799 P.2d 295, 299 (Alaska 1990)

[42] *Id.* at 299

[43] Interview with Tom Fink, Chairman of the 1967 Judiciary Committee (November 1999)

[44] Interview with Art Peterson, First Judicial Committee Counsel, hired in 1968 (November 1999)

[45] Interview with Tom Fink (November 1999)

[46] AS 9.43.010 is currently in line with the U.S. Supreme Court view and the growing legal trend that arbitration is a contractual way to resolve disputes, but only those disputes the parties have agreed to submit to arbitration. ARBITRATION, CASES AND MATERIALS, *supra* at 62, (*citing* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995)

Attorney Discipline

LAWYER ADMONISHED FOR NOT ATTENDING TRIAL

Attorney X agreed to represent Client in what appeared to be a straightforward bankruptcy case. At the beginning of the representation, the attorney advised that he could not represent Client in court proceedings because of a medical condition. The lawyer's limitation came to the foreground when a creditor filed an adversary proceeding against Client alleging fraud. Attorney X attempted to find another lawyer for the adversary trial, but Client did not cooperate in the substitution. Shortly before trial the lawyer moved to withdraw; the court denied the motion. Attorney X then convinced Client to consent to the attorney's withdrawal, but at the last moment the client withdrew the consent and insisted that the attorney appear for trial. On the day of trial, Attorney X failed to appear. The court, to avoid prejudice to the other party, refused a continuance. Client represented himself at trial.

Attorney X's doctors confirmed that his medical condition prevented him from representing Client in court. Though the court believed Attorney X could have helped his client at trial, it was not clear that with the attorney present the outcome would have been different. The court denied Client's discharge because of his deceptive conduct, something over which Attorney X did not have control.

Attorney X reasonably and timely limited the scope of his representation, he made reasonable attempts to avoid courtroom work, and he tried to find substitute counsel. His failure to appear for trial was substantially mitigated by his medical condition. Still, Attorney X's duties of diligence and loyalty placed the burden on him to be sure that Client had a lawyer for trial. His failure to do that violated Alaska Rule of Professional Conduct 1.3 and warranted discipline. An Area Discipline Division Member reviewed the file and agreed that Attorney X should receive a written private admonition. The attorney accepted the discipline and Bar Counsel closed his file.

FAIRBANKS LAWYER DENNIS M. BUMP DISBARRED

The Alaska Supreme Court on June 21, 2000 disbarred former Fairbanks lawyer Dennis M. Bump, ABA Membership No. 7410063. The disciplinary action followed Bump's November 1995 felony conviction for theft.

Bump was represented in his divorce by another Fairbanks lawyer, Gerard LaParle. Bump had been putting money from his law practice into bank accounts that his wife did not know about. LaParle counseled Bump to disclose some of these accounts but to close one of them and give the money (over $77,000) to LaParle as a "retainer" for legal services. Bump did so, and when the divorce case ended LaParle subtracted his fee and returned the rest of the money (over $67,000) to Bump. The wrongdoing came out during discovery in an unrelated case.

Bump pleaded no contest to first-degree theft and testified at LaParle's March 1996 trial. LaParle appealed his conviction. In July 1996 the Supreme Court placed Bump and LaParle on interim suspension. Bump's disciplinary hearing committee approved a request to defer proceedings pending LaParle's appeal. The Court of Appeals upheld LaParle's conviction and in October 1998 the Supreme Court denied LaParle's petition for hearing. In March 1999 the court ordered LaParle disbarred.

After proceedings against LaParle ended, Bump stipulated with the Bar Association to be disciplined by disbarment. Under the terms of the stipulation approved by the Disciplinary Board and the Supreme Court, Bump's disbarment is retroactive to the date of his interim suspension; five years after that, he may apply for reinstatement to practice. The public discipline file is available for inspection at the Bar Association office in Anchorage.

SOLID FOUNDATIONS

IOLTA grants for fiscal year 2001 total $367,000

☐ Kenneth P. Eggers

The Board of Trustees of the Alaska Bar Foundation held its annual meeting on May 13 and May 26, 2000. Applications for grants from the IOLTA (Interest On Lawyers' Trust Accounts) funds for the fiscal year 2001 were considered. The following grants totaling $367,000 were made: Alaska Native Justice Center ($10,000); Alaska Pro Bono Program ($280,000); Alaska Women's Resource Center ($5,500); Catholic Social Services to fund the Pro Bono Asylum Project ($30,000); Center for Families Parenting Education ($5,000); The Courtwatch Program ($10,000); High School Mock Trial Competition Committee sponsored by the Young Lawyer Section of the Anchorage Bar Association ($3,500); HRC Adult Education & Literacy Program, Wasilla, AK ($5,000); North Star Youth Court ($5,000); The Resolution Center ($10,000); Youth Court Elective Class, Goldenview Middle School ($3,000). The Board thanks all lawyers and law firms for their participation in the IOLTA program.

Fairbanks attorney J. Foster Wallace was elected to replace Winston S. Burbank on the Board. The Board thanked Winston for his many, many years of devoted service on the Board. The other Board members for the upcoming year are The Honorable Eric T. Sanders (Anchorage Superior Court Judge), Leroy J. Barker (Anchorage attorney), William T. Council (Juneau attorney), Susan Beeler Queary (Certified Public Accountant with the firm of Elgee, Rehfeld & Funk in Juneau), and William Granger (Senior Vice President of the National Bank of Alaska, Anchorage). I was elected to serve as President for the upcoming year.

ALSC . . . and justice for all

☐ Loni Levy

This column inaugurates a new look at ALSC, its peopleand projects.

While more than enough has been said in past columns about the sad state of funding, not enough has been told about the extraordinary work of the ALSC staff and Board. We thought you'd like to know, for instance, that out of a total statewide population of 2,239 active members of the bar, ALSC manages to handle its enormous caseload with only 22 attorneys in its eight offices. We thought you'd also like to know something about those attorneys, so this column will profile a handful of those dedicated folk with diverse backgrounds but a common passion.

WE THOUGHT YOU'D LIKE TO KNOW, FOR INSTANCE, THAT OUT OF A TOTAL STATEWIDE POPULATION OF 2,239 ACTIVE MEMBERS OF THE BAR, ALSC MANAGES TO HANDLE ITS ENORMOUS CASELOAD WITH ONLY 22 ATTORNEYS IN ITS EIGHT OFFICES.

The Juneau office is privileged to have the services of **Mark Regan** as supervising attorney. After graduating from Harvard law school *magna cum laude*, Mark clerked for retired Senior Supreme Court Justice Jay Rabinowitz in 1983-84. He then embarked on his 16 year career with Legal Services, first in the Barrow office, then back to Juneau, then on to Los Angeles in 1992 for a 4 year stint with the National Health Law Project, focusing on Medicaid issues. Mark has been back in the Juneau office since 1996. Under his steady hand, that office has racked up a number of victories which will be detailed in a later Bar Rag article.

Dawn Dillard captains the Bethel ALSC office. She has the unique distinction of being the only ALSC employee who previously worked as an underground bituminous coal miner, which probably has made Bethel look like heaven to her. She received her J.D. from the Tulsa College of Law in 1995 and then became a congressional lobbyist for the Resource Council in North Dakota, handling a variety of legal and environmental matters. She served as staff attorney for the Dakota Plains Legal Services on the Rosebud Sioux reservation from 1996-1998. She joined ALSC in Bethel in 1998.

The Anchorage office is under the supervision of **Marcia Rom** who began her ALSC career in Kodiak in 1993. When that office closed due to lack of funding in 1995, Marcia became the ALSC Grant Co-ordinator for the statewide Alaska Commission on Aging. In 1998, she assumed her current mantle, where she oversees a staff of seven attorneys and three paralegals. She is a 1991 graduate of Hamline University Law School, where she coached the Jessup International Moot Court team.

Moving north, we find **Andy Harrington** running the shop in Fairbanks. In addition to his Harvard law sheepskin, Andy holds degrees in physics and business management. After clerking for Justice Rabinowitz Andy joined the Fairbanks office where he became supervising attorney in 1996. Among his many Supreme Court arguments is the landmark case of *John v. Baker*, which established the principle that tribes in Alaska retain jurisdiction to adjudicate internal domestic disputes among tribal members. In his spare time, Andy teaches family law courses at UAF and has been an active and essential member of the ALSC Board/staff committee which created the new, independent pro bono program, APBP, Inc., about which you will be hearing a great deal in the future.

These attorneys and their compatriots will shortly be joined by a small coterie of lawyers, courtesy of the National Association for Public Interest law (NAPIL) which has selected ALSC as one of four nationwide legal services programs to participate in NAPIL's national Housing Assistance Project (HAP). Although ALSC has had a successful history in addressing housing matters, staff layoffs due to budget cuts decimated that caseload. Before receiving this dedicated funding, ALSC has had to turn away the majority of requests for assistance in housing matters.

HAP will bring to Anchorage up to three new attorneys to focus exclusively on assisting those who are homeless, or at risk of becoming so, or who find themselves in unsafe housing to secure safe, reliable shelter. Although HAP will serve all ALSC eligible clients in need of housing assistance, it will target this most vulnerable population. HAP attorneys will act as in-house specialists on landlord/tenant matters, building codes, evictions and foreclosures, and hazardous living conditions in both the private and public sector. We expect them to be extremely busy and much sought after.

Finally, mention must be made of the recent honor accorded to **Robert Hickerson**, Executive Director of ALSC since 1983, who was given the Equal Access to Justice Award at the AkCLU Foundation Liberty Awards dinner for his tireless efforts to address the needs of Alaska's low income citizens in the face of mounting state and federal assaults on legal services programs. The ALSC Board and its new officers, consisting of myself as president, Greg Razo as vice-president and Art Peterson as secretary-treasurer, look forward to a very challenging year working with this wonderful group of attorneys.

Regional center responds to needs of juvenile defenders

The American Bar Association Juvenile Justice Center, the Office of Juvenile Justice and Delinquency Prevention, and the Soros Foundation have recently provided funding to six regional areas within the country. The purpose of each regional center will be to respond to the needs of juvenile defenders, especially those needs unique to each region, and with the goal of providing the highest quality representation for children.

The Defender Association in Seattle, Washington, is spearheading this effort for the northwest region. The greatest challenge will be to pinpoint the needs of the juvenile client populations in its many isolated corners. It will be essential to identify those individuals in each part of the region who are willing to create a community map or outline that represents the defender system in place and the needs of the defenders in the area. The Northwest Regional Center will then use that knowledge to connect the areas through information and resource sharing, and to provide training and technical support to those in the juvenile defense.

We need your help and participation. Our objectives and the current activities to address them are as follows.

IDENTIFY PROBLEMS AND NEEDS UNIQUE TO AREAS WITHIN THE REGION

The NW Regional Juvenile Defender Center has distributed a questionnaire to several hundred people identified with the Juvenile defense system in each of the seven states. The responses will be tabulated and disseminated. If you wish to receive a questionnaire, or if you know of other juvenile defenders in the region we should be in touch with, please contact us.

PROVIDE TRAINING AND TECHNICAL ASSISTANCE TO JUVENILE DEFENDERS

The NW Regional Juvenile Defender Center, in conjunction with the Washington Defender Association and Seattle University School of Law, will be hosting a training conference September 21, 22, and 23. The focus will be on education issues, immigration, competency, capacity and representation of juveniles in the adult system. Participants will be able to break into small groups and discuss issues in on-going cases with a variety of national experts. If you wish to attend the conference, or if you have areas of advocacy in which you would like to receive training, please contact us.

PROVIDE A REGIONAL, INTERACTIVE, E-MAIL IISTSERV

If you are interested in becoming a part of this discussion listserv, please contact us with your e-mail address.

ESTABLISH AN ADVISORY BOARD FOR THE NORTHWEST REGIONAL CENTER

An initial meeting of the Board will be scheduled for late fall. Please contact us if you are interested in being a Board member. Thank you for your cooperation!

Simmie Baer Attorney Supervisor, Juvenile Division Project Director, Northwest Regional Juvenile Defender Center, 810 3rd Avenue, 8th Floor, Central Building, Seattle, WA 98104; (206) 447-3900 extension 670 or 605 (206) 447-4588 (fax) E-mail: simmie.baer@metrokc.gov, Web: www.defender.org

In the Supreme Court of the State of Alaska

In the Disability Matter Involving)
)
) Supreme Court No. S-09570
Kermit E. Barker,Jr.,)
) Order
Respondent)
)
ABA Membership No. 7210040)
) Date of Order: 2/23/2000
)

ABA File No: **200B001**

Before: Matthews, Chief Justice, Eastaugh, Fabe, and Bryner, Justices.
(Carpeneti, Justice, not participating.)

On consideration of the joint motion by bar counsel and the respondent for the respondent's transfer to disability inactive status under Alaska Bar Rule 30, filed on 2/15/2000.

It is Ordered:

1. The joint motion for transfer to disability inactive status under Alaska Bar Rule 30 is **Granted**. Respondent Kermit E. Barker, Jr. is immediately transferred to disability inactive status until further order of this Court. A disability hearing under Rule 30(b) is not required.

2. The Bar Association shall provide the notices required in Rule 30(e) and (f). The respondent may not practice law until reinstated by order of this Court under Rule 30(g).

Entered at the direction of the court.

Clerk of the Appellate Courts
/s/Marilyn May

Oops

The last issue of the *Bar Rag* incorrectly identified Geoff Currall as "Judge Crowe" in the wrap-up of the Bar Presidents' Breakfast at the convention. Our usually acute reporter's ears were out of tune that morning. We trust that no ears turned red in Ketchikan.

Section 727: Trap for the unwary creditor?

☐ Thomas Yerbich

Creditors, quite understandably, are not ecstatic when a debtor files bankruptcy. After all, what creditor welcomes a bad debt write-off? Consequently, creditors often, as they should, seek avenues to prevent discharge of obligations justly due them. The avenues available are § 523 (dischargeability of a particular debt) and § 727 (bar discharge of all debts). Successfully invoking either (or both) can result in the creditor being able to seek recovery of the obligation postbankruptcy. If successful on the § 523 count, the debt owed the creditor who brought the action is not discharged. On the other hand, if successful on the § 727 count, no debts are discharged and all creditors may continue postbankruptcy collection efforts. However, the question is: will it be beneficial to the creditor?

Occasionally, a creditor, believing the debt owed to it is nondischargeable under a provision of § 523, will add a count seeking to bar discharge under § 727. Frequently this is not based on any realistic expectation that the § 727 action has significant merit, but is intended as an *in terrorem* device to coerce the debtor into settling the § 523 count. Should the temptation to resort to the use of § 727 as a tactical device arise, CAVEAT for it may just rise up and bite you.

Bearing in mind that dischargeability actions can be expensive, before deciding to bring an action under either § 523 or § 727, or both, a creditor should ask whether it makes economic sense. Since you have not been able to collect the debt so far, what makes you think you will be able to collect it in the future? Remember, the debtor filed bankruptcy because he could not pay his debts in the past. How will this situation change in the future and how likely is that to occur? Unless philanthropic inclinations include the legal profession, if postbankruptcy collection is doubtful, why throw good money after bad?

Assuming a creditor believes she holds a claim that falls within the provisions of §§ 523(a)(2) [fraud], (a)(4) [fiduciary defalcation, embezzlement, or larceny], (a)(6) [willful and malicious injury] or (a)(15) [nonsupport marital obligations], should she join a count seeking to bar discharge under § 727? Remember, if successful in barring discharge, not only will the creditor bringing the action be entitled to continue postbankruptcy collection activities, but also will all other creditors. In short, other creditors will be able to ride on the coattails of the creditor bringing the action: a free ride! Before embarking on this endeavor, a creditor should:

1. Examine the schedules to determine the nature and extent of (a) presumptively nondischargeable obligations, *e.g.*, taxes, support, student loans (remember the holders of these claims have collection powers that enable them to get to available assets first), and (b) other otherwise dischargeable obligations that will not be discharged if the § 727 action is successful

2. Attend the creditor's meeting to learn why this debtor had to resort to bankruptcy and, most importantly, what are the debtor's realistic future income prospects. Chasing a 68-year old disabled person on social security will not be particularly conducive to improving the bottom line. On the other hand, chasing a temporarily unemployed 35-year old may eventually result in recovery.

Having decided to bring a § 523 action but feeling it may be a little weak and to "encourage" settlement by the debtor, you think about joining a § 727 action with it. Think hard! Then, think harder yet! When it comes time to settle the case, you may believe all you have to do is simply stipulate to a dismissal of the § 727 count and be done with it. Not quite that easy.

Rule 7041, FRBP, specifically provides that a complaint objecting to discharge will not be dismissed at the plaintiff's instance without notice to the trustee, the United States trustee and such other persons as the court may direct, and then only on such terms and conditions the court deems proper. Therein lies the potential problem. A creditor who joins a § 727 claim with a § 523 claim wears two hats: a fiduciary hat for the § 727 claim, which is brought on behalf of all creditors, and an individual hat for the § 523 claim. In settling the litigation, the creditor may not disregard the fiduciary hat. [*In re De Armond*, 240 BR 51 (Bank. CD CA 1999)] A creditor who files a complaint for nondischargeability of a claim under § 523 is free to settle the dispute with the debtor on any mutually agreeable terms, subject to court approval. In considering whether to approve a settlement, the court usually gives no weight to the interests of other creditors. However, in an action brought under § 727, the reverse is true: the interests of the other creditors may become paramount.

The policy underlying § 727 is to protect the integrity of the bankruptcy system by denying a bankruptcy discharge to a debtor who engages in certain specified objectionable conduct of a magnitude broader than injury to a single creditor. Denial of a discharge under § 727 benefits all creditors of the bankruptcy estate equally. The tension between these two kinds of claims, and the duties of the plaintiff arising from filing a § 727 action are particularly important when the plaintiff attempts to feather its own nest by settling the § 523 claim and abandoning the § 727 claim. One cannot shed the fiduciary duties arising from the § 727 claims so easily. There are two approaches to settling actions asserting both § 727 and § 523 claims.

The first approach is that it is never appropriate for a court to approve settlement of an objection to a debtor's discharge. Under this approach, a discharge in bankruptcy is not an appropriate element of a quid pro quo. Tying withdrawal of objections to discharge to settlement of other actions is contrary to public policy. Under no circumstances, even where the intent is innocent, may a debtor purchase repose from objections to discharge. Discharge in bankruptcy depends on the debtor's conduct; it is not an object of bargain. [*In re Moore*, 50 BR 661 (Bank. ED TN 1985); *see also In re Meffert*, 232 BR 71 (Bank. SD NY 1998)] Nothing in the Bankruptcy Code authorizes a trustee to seek funds from a debtor or to release a nondebtor entity as a price for giving up on a discharge complaint. Discharges are not property of the estate and their sale is against public policy. [*In re Vickers*, 176 BR 287 (Bank. ND GA 1994)]

ONE SHOULD GIVE CAREFUL THOUGHT AND CONSIDERATION BEFORE FILING AN ACTION TO BAR DISCHARGE UNDER § 727. IT IS SOMEWHAT LIKE RIDING ON THE BACK OF A TIGER, GETTING OFF COULD BE DANGEROUS.

The language in these opinions strongly indicate that a § 727 complaint should never be dismissed in exchange for the receipt of consideration from the debtor. It is improper for a debtor to offer or for a creditor to receive any consideration for the doing or forbearance of any act. [*See generally* 10 King, *Collier on Bankruptcy* ¶ 7041-3 (15th ed. Rev)] A second line of cases, the majority view, hold that settlement of a § 727 claim is permissible only under those circumstances where the terms of the settlement are fair and equitable, and in the best interests of the estate. [*See, e.g., In re Mavrode*, 205 B.R. 716 (Bank. NJ 1997); *In re Taylor*, 190 BR 413, (Bank. CO 1995); *In re Speece*, 159 BR 314 (Bank. ED CA 1993)] Under this line of cases the court must examine whether the terms of the settlement are fair and equitable and in the best interests of the estate. In addition, the court may impose those terms and conditions the court deems proper.

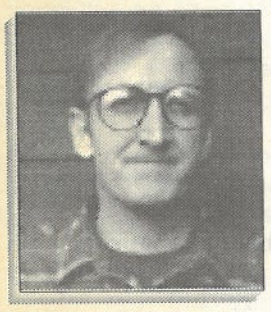
The overriding governing principle is simple. Where a party has fiduciary duties that conflict with the party's own interests, fiduciary duties trump personal interests. Having assumed fiduciary duties to other creditors when it filed the § 727 complaint, a plaintiff may not settle by dismissing the § 727 claim and taking payment individually on the § 523 claim. This conduct violates the fiduciary duty to the other creditors that the plaintiff has undertaken in asserting the § 727 claim. Only turning the settlement over to the trustee for distribution to all creditors cures the fiduciary duty violation and resulting tainted settlement. [*In re De Armond, supra*; *In re Bates*, 211 BR 338 (Bank. MN 1997)] An exception may exist where the § 727 claim has little or no merit and there is no interested party willing to take over prosecuting the § 727 case. [*See In re Hayden*, 246 BR 795 (Bank. SC 1999)]

One should give careful thought and consideration before filing an action to bar discharge under § 727. It is somewhat like riding on the back of a tiger, getting off could be dangerous. In addition, because recovery of costs and attorney's fees from the estate may not be allowed, should the proceeds flow to the benefit of the estate, the creditor may very well have expended more than the creditor will receive as a distribution from the estate.

ECLECTIC BLUES

Existential crisis

☐ Dan Branch



I'm in the water, so is the fish. He looks up at me, past my dirt-brown waders, past my sunglasses to the tip of a graphite rod that bends with his every pull. Does he see the connection between his thrashing and the rod bends? Early morning sun bounces off the water. I reach down, grab the salmon fry fly from his mouth and he is free.

I cast again, ten to two, ten to two. The fly passes out over the tidal stream. It lands near the swirling tracks of a feeding Dolly Varden. I strip in the line. The Dolly strikes. I set the hook. In minutes this fish is also freed. I cast again, asking, "why am I playing with this food?"

Two more casts and I'm heading back to the car, feeling like a child who held his dream toy on Christmas morning, only to learn it couldn't really fly. On the way back to town I pass a happy man, dragging 30 inches of steelhead back to his pickup truck. He did not play with his food.

It had been a long trip to get to this existential fishing crisis, a trip that started with the purchase of a raffle ticket. I won third place and a $100 gift certificate from Western Auto. The store just happened to have an 8-weight fly rod for under $100. There was no turning back. A reel and line had to be bought and casting classes taken.

I left my bed early every Saturday until freeze-up to haul my growing collection of fly gear up mountain trails to lakes or streams where I would stand, in hip boots, until cutthroat trout would strike or my hands would become too numb to cast. Most of the time my hands would numb-up first.

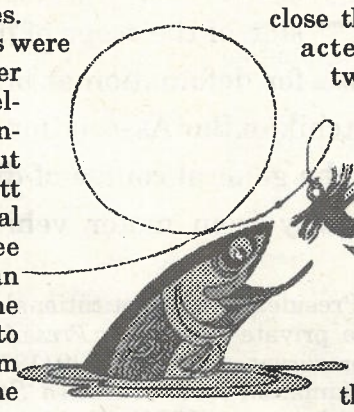
Late in November, I found myself standing in a lake, feeling cold water leak into my hip boots. My line shot forward in a lovely arc, depositing a brown wooly bugger on the edge of some grass. A large cutthroat snatched the fly while I was trying to remember what I had done right with the cast. In minutes it was over. A beautiful 16-inch fish was resting quietly in the water before me.

I remembered my wife's instructions. "You'd better bring back something to eat."

I remembered the instructions from my fly fishing teachers, "Catch and release, catch and release, catch and release." I looked at the fish, so lovely in the muskeg-colored water. I released him and stopped off at the market for some halibut.

I spent the winter hunched over a fly tying vise, tying dozens of woolly buggers, Klauser minnows, and egg-sucking leeches. During breaks, I cruised the Internet auctions looking for good deals on a 5-weight rod and reel. By April I had a good 5-weight set and boxes of flies.

April Saturdays were spent tramping over the snow along steelhead streams to entice sea-going trout with the green butt skunk. On the tidal meadows of Kowee Creek I watched an eagle pulled into the water while trying to lift my steelhead from the water. It was the only fish I saw.



In May I chased dollies in the salt water. After several fruitless trips I experienced by existential crisis. All the work, all the money, all the time spent getting ready for that moment and it left me feeling like the guy in Camus' *The Stranger*.

I tried again this summer, with Dolly Varden and dog salmon. I watched my pink bunny fur fly slide past the dog salmon that would strike the bunny fly with anger and then drag it over to deep water to sulk. It took 30 minutes to coax each one near enough to retrieve the fly. Up close they were as ugly as they acted, with hooked noses, twisted teeth and slime-green skin.

The dollies were feisty and beautiful but brought no joy in the catching until I bonked one on the head and brought it home to eat. It was one of many I caught that night—each one more than 14 inches long.

The Dolly I brought home was fat and tasty with salmon fry. We ate it for supper. The meal filled the stomach and brought a purpose to all this fly-fishing. I thought about my dad who always told me to only take what you could eat and leave the rest. He never had an existential crisis.

Alaska court system upgrades courtroom recording systems

Continued from page 1

Yes. To listen to a duplicate CD, you must purchase and install the specialized software of the digital audio system manufacturer. The software for both listening and transcribing purposes (FTR Player Plus) can be obtained from the vendor or through the vendor's Alaskan representative (see below).

How will digital recordings be transcribed?

Both public and private transcribers will have the option of obtaining copies of proceedings in either two-channel analog tape format or 4-channel CD format. The manufacturer of the digital recording equipment has transcription and playback hardware and software available for sale through dealers in Alaska.

Digital Recording Equipment Vendor and Local Representative

FTR Gold, FTR LTD, 100 West Clarendon, Suite 300, Phoenix, Arizona 85013, (602) 650-0958, http://www.ftr.org, Audio-Video, Inc., Attn: Tim Bitter, 5430 Fairbanks Street, Suite #7, Anchorage, AK 99518, (907) 561-1911

New research reveals jury bias against whiplash lawsuits

Broadsided by a car that ran a stop sign, in pain for the rest of your life. If you haven't lost or broken anything, don't expect much in the way of compensation from a jury of your peers.

A new study by a nationally known expert on jury behavior finds that potential jurors are skeptical of people who file "whiplash" lawsuits.

Valerie Hans, professor of sociology and criminal justice at the University of Delaware, reports early results from ongoing research into the attitudes of potential jurors toward those who file whiplash lawsuits.

In separate articles published in July in the Tennessee Law Review and Trial, the magazine of the Association of Trial Lawyers of America, Hans, working with UD graduate student Nicole Vadino, found that juries are more likely to doubt victims of whiplash than the insurance companies that deny their claims. The Tennessee Law Review study was supported by a grant from the Roscoe Pound Foundation.

These cases involve the blameless victim of a car accident who sustains a soft or connective tissue injury that can't be seen and isn't obviously disabling but has left them in constant pain and unable to resume their normal lives.

Hans concludes that her findings "reinforce the complaints of many plaintiff attorneys that contemporary juries seem hostile to connective tissue injury claims." As a result, Hans writes, "some insurance companies appear to be changing their settlement practices in low-impact car accidents, offering lower settlements or forcing jury trials."

Hans used four focus groups and a national survey to compile these results. She writes, "in the focus groups and national survey, participants voiced substantial doubts about the legitimacy of lawsuits and the credibility of plaintiff claims in connective tissue cases."

Typical responses include: "people try to milk it [the court system] just because they've got a little neck injury," "that kind of lawsuit is why our court system is overloaded and premiums are so high," "it's real easy to claim injury when you're not really hurt and get large amounts from insurance companies." The national survey upheld that attitude showing that 92 percent questioned believed that frivolous lawsuits are common.

According to the journal article, the National Center for State Courts estimates that 60 percent of all tort suits filed are automobile cases.

Defamation, injunctive relief and the KBA

☐ Scott A. Brandt-Erichsen

Earlier this year saw a spirited discussion of the scope of judicial remedies for defamation at one of the regular Ketchikan Bar Association coffee meetings. As the general course of discussion moved its way from motor vehicle accidents of professional athletes to President Clinton's plan to purchase private property for wilderness preserves, news reports regarding a defamation claim brought by the Anchorage School Superintendent against a private party generated some interest.

If the reports related were accurate, the suit seeks injunctive relief rather than monetary damages as a remedy for a defamation claim.

While the news reports provided a launching pad, the specifics of that case were irrelevant to our discussion's focus.

In the ensuing debate, the minority view asserted that injunctive relief is never available as a remedy in a defamation action.

The majority of us present for coffee believed that, in appropriate factual circumstances, injunctive relief could be granted. As is customary in situations where conflicting opinions can likely be resolved with a winner and a loser, a financial bargain was struck.

The matter of the small wager was settled the next day when Attorneys Geoffrey Currall and Mike Holman and Judge Mike Thompson's former law clerk, Mike Mace, came armed with authority supporting the two competing viewpoints.

Attorney Currall relied upon horn book statements from *Liable, Slander, and Related Problems*, § 86.1 Injunctions, which stated in part: "One principal long adhered to in defamation cases is that courts will not enjoin libels." (Footnote omitted). This source also stated, "This is in accord with the more recent line of Supreme Court cases holding such prior restraints to be presumptively unconstitutional." Citations were to *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), *New York Times Co. v. United States*, 403 U.S. 713 (1971), *Organization For a Better Austin v. Keefe*, 402 U.S. 415 (1971), and others.

Attorney Currall also cited to *Kramer vs. Thompson*, 947 F.2d 666, 670 (3d Cir. 1991), wherein the Court referred to the common law precept that, "equity does not have the power to enjoin the publication of defamatory matter." In a related footnote the Court noted that:

> "The origin of this common-law precept is generally traced to Lord Eldon's *dicta* in *Gee v. Pritchard*, 2 Swans. 402, 36 Eng.Rep. 670 (1818), as adopted in the United States in *Brandreth v. Lance*, 8 Paige 24 (N.Y.Ch. 1839). These decisions reflected a distrust of equitable jurisdiction over libel, traceable, in part, to the Star Chamber which once exercised the power of cutting off the ears, branding the foreheads, and slitting the noses of the libellers of important personages ... and [which] was [also] ... in the habit of restraining the publication of such libels by injunction."

Brandeth, 8 Paige at 26. See generally *Kwass v. Kersey*, 139 W.Va. 497, 81 S.E.2nd 237, 242 (1954) (reviewing rationale for evolution of common-law rule). As an outgrowth of *Gee* and *Brandreth*, libel Plaintiffs in the United States generally have been limited to legal relief in the form of monetary damages.

Currall also identified *Newfound Management Corp., General Partner v. Sewer*, 34 F.Supp.2d 305 (D. Virgin Islands 1999), wherein the Court also noted that generally, allegedly defamatory publications may not be enjoined. The Court continued writing "[f]urthermore, in *People v. Rothschild Francis*, 1 VI 66 (DCVI 1925), the court stated that, '[i]ndividuals are free to talk, and the press is at liberty to publish, and neither may be restrained by injunction, but they are answerable for the abuse of this privilege in an action for libel and slander under the common law..." *Newfound Management* at 315-316.

On the other side of the issue, Attorney Holman offered *Dickson v. Dickson*, 529 P.2d 476 (Washington 1974) cert. den. (dealing with an injunction against a former spouse prohibiting the Defendant from saying that the Plaintiff was still his wife unless his matrimonial status statement was modified to clarify that it was only true in accordance with the doctrines of his religion) and *O'Brien v. University Community Tenants Union, Inc.*, 327 N.E.2d 753 (Ohio 1975) (finding that a landlord may, in appropriate circumstances, seek injunctive relief to prevent the future repetition of past defamatory statements made by a defendant.)

AFTER INFUSING THE DEBATE WITH APPROPRIATE LEVITY AND CONSIDERING THE AUTHORITIES OFFERED, THE CONSENSUS WAS, WITH DUE DEFERENCE TO THE STAR CHAMBER, THAT INJUNCTIVE RELIEF COULD, IN APPROPRIATE CIRCUMSTANCES, BE AMONG THE REMEDIES FOR A DEFAMATION CLAIM.

Mr. Holman also brought up *Vondran v. McLinn*, from the Northern District of California in 1995, an unreported opinion in which Plaintiffs moved for a preliminary injunction enjoining Defendants from making further false statements about Vondran's patented process for making fiber reinforced concrete, and about articles Vondran alleges to have written to market it. The Plaintiff's motion for preliminary injunction was granted.

There, the Court noted that:

> An injunction that enjoins speech implicates the First Amendment, which generally prohibits any prior restraint expression." Citing *Organization for a Better Austin and v. Keefe*, 402 U.S. 415,419 (1971), "Not only are such remedies 'extraordinary,' they are presumptively invalid. *Nebraska Press Ass'n v. Stuart* 427 U.S. 539 (1976).... Although defamatory speech is not protected by the First Amendment in *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952), many courts have held that injunctive relief is foreclosed by the availability of an adequate remedy at law. See, e.g., *Community For Creative Non Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987).

This is not to say that injunctive relief is never allowed. Indeed, a handful of courts have suggested that defamatory speech can be enjoined, particularly where it injures business-related interests. See, e.g., *Lothscheutz v. Carpenter*, 898 F.2nd 1200, 1208-09 (6th Cir. 1990), (approving narrow injunction prohibiting defendant for making libelous statements about attorney who represented another party in litigation involving defendant.)

The court continued:

> An injunction enjoining speech cannot issue, however, unless (1) the nonmoving party is given an opportunity to respond, *Caroll v. President and Comm'rs Princess Anne*, 393 U.S. 175, 183, (1968); and (2) the trier of fact has made a finding that the statements sought to be enjoined are libelous or the statements were found to be libelous in a prior preceding. See, e.g., *Lothscheutz*, 898 F.2nd at 1208-09.

For Mr. Mace's contribution, he offered the additional observation that once a statement is determined to be libelous, it is unprotected by the First Amendment.

It was also noted that in *Sanuita v. Common Laborer's and Hod Carriers Union of America,* Local 341 402 P.2nd 199 (Alaska 1965), the Alaska Supreme Court upheld a judgment enjoining appellants from, "using obscene and other offensive language on the premises." A dissent by Justice Rabinowitz arguably supported Currall's position and posited that those portions of the injunction which prohibited appellants, while upon appellee's premises during work call periods, from "using loud, boisterous, obscene, lewd, inflammatory, slanderous, vulgar language" and heckling or interrupting any person making a work call on behalf of said organization" were repugnant to appellants' rights of free speech under Article I, Section 5 of the Alaska Constitution, and under the First and Fourteenth Amendments to United States Constitution.

After infusing the debate with appropriate levity and considering the authorities offered, the consensus was, with due deference to the Star Chamber, that injunctive relief could, in appropriate circumstances, be among the remedies for a defamation claim.

Whether Justice Rabinowitz's view or that of the majority will prevail the next time the issue is presented remains to be seen.

The spirited debate was however, quite entertaining, and arguably worthy of at least some CLE credit. The Ketchikan Bar welcomes visiting attorneys to join in for coffee weekdays at 9:00 a.m. for discussions of topics of interest.

Bar People

Jonathan Ealy rejoins Heller Ehrman

Heller Ehrman White and McAuliffe LLP is pleased to announce the addition of Special Counsel Jonathan Ealy to the Anchorage, AK office.


Jonathan Ealy

Ealy joins the firm's energy group with an extensive background in complex litigation matters in several areas, including antitrust, oil and gas, construction, accountant liability, and real estate. He has also developed practices in energy, corporate transactions and telecommunications.

Prior to joining Heller Ehrman, Ealy was Of Counsel to Tindall, Bennett and Shoup, and Hosie, Frost and Large in Anchorage. He was a founding board member and vice president of Borealis Beverage Company in Anchorage and has served as General Counsel for Borisovich International, Inc. in Los Angeles.

Ealy received his J.D. from Duke University and his A.B. (*cum laude*), from Harvard University. He is a former judicial clerk for the Honorable Karen Hunt of the Alaska Superior Court.

He is a member of the Alaska Bar Association; the Anchorage Bar Association (president, 1993-94); and the Anchorage Youth Court, Inc. (president, 1990-92).

Heller Ehrman White & McAuliffe LLP is a 470-attorney firm with offices in San Francisco, Silicon Valley, Los Angeles, San Diego, New York, Washington, DC, Seattle, Portland, Anchorage, Hong Kong and Singapore.

—Press Release

JUNEAU BAR MEETING HIGHLIGHTS


Superior Court Judge Larry Weeks was honored at the Juneau Bar Association's June 9 meeting at the Baranof Hotel for his outstanding support and service to the JBA over the years.


Alaska Board of Governors president Bruce Weyhrauch and JBA president Sheri Hazeltine presented Judge Weeks with a plaque on behalf of the Juneau Bar Association.

Alaska Bar Association
Fall/Winter 2000 CLE Calendar

Date	Topic	Live in	Time
August 3 #2000-011	Off the Record with the 9th Circuit Court of Appeals Panel	Anchorage Anchorage Museum	4:40 – 6:30 p.m.
September 14 #2000-888	Mandatory Ethics for New Admittees – A Basic Program for New Lawyers	Anchorage Hotel Capt. Cook	1:30 – 4:45 p.m.
September 14 #2000-012	Professional Responsibility – in cooperation with ALPS	Anchorage Hotel Captain Cook	9:00 a.m. – 12:15 p.m.
September 15 #2000-888	Mandatory Ethics for New Admittees – A Basic Program for New Lawyers	FAIRBANKS Westmark Hotel	9:00 a.m.– 12:15 p.m.
September 15 #2000-012	Professional Responsibility – in cooperation with ALPS	FAIRBANKS Westmark Hotel	1:30 – 4:45 p.m.
September 22 #2000-888	Mandatory Ethics for New Admittees – A Basic Program for New Lawyers	JUNEAU Centennial Hall	1:30 – 4:45 p.m.
September 22 #2000-012	Professional Responsibility – in cooperation with ALPS	JUNEAU Centennial Hall	9:00 a.m. – 12:15 p.m.
October 12 #2000-029	Easements: Written & Unwritten -- How to Get There from Here	Anchorage Hotel Captain Cook	8:30 a.m. – 12:30 p.m.
October 12 #2000-032	Estate Planning in Juneau	Juneau Centennial Hall	Times TBA
October 18 #2000-013	13th Annual Alaska Native Law Conference	Anchorage Anchorage Hilton	8:30 a.m. – 5:00 p.m.
October 27 #2000-027	7th Annual Workers' Comp Update	Anchorage Hotel Captain Cook	8:30 a.m. – 12:30 p.m.
November 1 #2000-028	Legal & Tax Issues for Nonprofits	Anchorage Hotel Captain Cook	8:30 a.m. – 4:30 p.m.
November 7 #2000-014	Admiralty Law Essentials: Keeping Your Head Above Water	Anchorage Hotel Captain Cook	8:30 a.m.– 12:30 p.m.
November 15 #2000-034	Integrated Advocacy	Anchorage Hotel Captain Cook	TBA
December 1 #2000-025	Leading & Succeeding in Your Law Office	Anchorage Hotel Capt. Cook	8:30 a.m. – 11:00 a.m.

Mid-year trends in computer hardware

By Joseph L. Kashi

This is a wrap-up of trends in computer hardware in mid-2000, an update on the technology and prices currently on the market.

Most major manufacturers including IBM, HP, Dell and Compaq now use most of the third party brand name components that I'll discuss here. Of the major manufacturers, only IBM makes some of its own CPUs and hard disks, often selling these components to other systems vendors like Dell.

In fact, custom configuration and assembly using the same high quality third party components is fast becoming the single most popular choice for new business computers. Computer system purchase decisions have become mostly a matter of choosing the system that uses the best possible components in a configuration that meets your performance, warranty and budget needs.

Here's the bottom line:

Don't buy more hardware than you need right now.

Avoid advertising-driven computer consumerism. You are buying a business tool, not a hobby whose main purpose is emotional satisfaction, even though we all recognize and enjoy the latter. Typically, online and retail dealers push their most expensive, highest margin units. The extra cost of higher-priced computers derives primarily from highly-touted consumer features that have little benefit to any office.

Historically, system performance increases rapidly while prices simultaneously plummet. For example, in July 2000, $1,400 would buy a computer system that was 150% faster, with four times as much (and faster) SDRAM memory and hard disk storage, and a larger 19" monitor, compared to $2,000 to $2,500 in March 1998. There's no immediate end in sight to either trend: in fact, this month's column will probably be obsolete by the time that you read it!

Make your purchasing decisions based upon current needs rather than upon perceptions of what you might need in a year or two. Cutting edge technology is typically over-priced, immature and unreliable, while it's still fashionable. Many manufacturers try to sell you their higher margin, top of the line systems and fastest components by promising that purchasing marginally more computing power ostensibly avoids the need to upgrade hardware as often. That's false economy at best, and it's probably not true.

It's most sensible to buy good quality, mature technology that's about 1a half-generation behind the current top of the line. For example, Intel and AMD both shipped 1 Gigahertz processors in March 2000, and these CPUs then cost almost $1,000. During the same time, a 700-800 MHz Intel or AMD CPU cost under $350, wit nearly equivalent performance.

Buying about one-half generation behind the leading edge saves you a lot of money while providing more reliable technology with enough performance to work satisfactorily for at least two years. These cost savings alone should allow you to regularly upgrade the core computer system containing the CPU, SDRAM and hard disk or to replace the system more often—a policy that both saves money and keeps your hardware more generally current for the overall life of the system.

I usually recommend a two-year replacement cycle (although you might want to make partial upgrades more frequently, given today's very low component prices). Two years is just about the time that your warranty runs out and by then you'll want a substantially faster system to keep up with demanding new software. It's false economy to retain or to not upgrade a too-slow system until it's been fully depreciated based upon an artificially long depreciation schedule. Remember, modern computer and communications technology are now the basic tools and lifeblood of any law practice. No craftsman stints on buying the correct tools and replacing them when necessary.

REMEMBER, MODERN COMPUTER AND COMMUNICATIONS TECHNOLOGY ARE NOW THE BASIC TOOLS AND LIFEBLOOD OF ANY LAW PRACTICE. NO CRAFTSMAN STINTS ON BUYING THE CORRECT TOOLS AND REPLACING THEM WHEN NECESSARY.

PROCESSORS

Current Intel Pentium III and AMD Athlon processors, the current standards for higher end business computers, work tremendously faster than early Pentium and 486-100 computers purchased only five years ago and their faster performance is needed for today's demanding (some say bloated) software.

Both the Athlon and the top-end Pentium IIIs are excellent processors that combine more than adequate performance, reliability and compatibility. Although Intel has been the traditional favorite, AMD's processors are at least as fast, compatible and reliable, and are usually less expensive. As I said, avoid the fastest processor on the market. I recommend a **mid-range** AMD K7 Athlon processor with a processor speed of at least 700-800 MHz—preferably one of the newest AMD models that finally places the crucial L2 cache directly inside the processor and runs it at full processor speed.

AMD recently started shipping a third processor line, named Duron, that's actually an Athlon processor with not quite as many performance-enhancing features as the newest Athlon models. Either of these AMD processors will be more than adequate.

AMD continues to ship ever-faster versions of its venerable K6-2 processor line and these very inexpensive processors are more than adequate for all but the most demanding work. They're particularly useful as a cost-effective upgrade for older computers when used with a new, compatible system board and faster SDRAM. As the top end Athlon and Pentium III processors become faster, the cost-effective midpoint will, of course, likewise become faster.

Be sure, though, that any system, whether inexpensive or high end, has enough memory, not less than 64MB for Windows 95/98 and not less than 128 MB SDRAM for Windows NT/2000, and preferably double these minimum amounts. However, increasing Windows 95/98 memory beyond 128 MB and Windows NT/2000 memory beyond 256 MB wastes money. Don't let vendors cut the price of less expensive systems by skimping on memory. Installing an adequate amount of memory is the least expensive and most effective way to increase the performance of any computer system.

The real-world performance of any computer system is ultimately limited by two bottlenecks, the performance of the SDRAM main memory and of the hard disk. Overall system performance does not increase linearly with increasing clock speed—performance typically improves more slowly than any increase in the nominal CPU clock speed.

Many modern system boards often readily accommodate faster processors of the same family and this can be an easy and useful system upgrade. For example, I increased the speed of my paralegal's computer by simply resetting the system board switches and swapping a 350MHz AMD K6-2 for a 500 MHz K6-2 processor, at a total cost of less than $80 and saw a useful performance improvement. Some system boards automatically detect the faster processor and adjust accordingly while others require that you reset some jumper switches as shown in your system board manual. Before you exchange your CPU, though, check the manual and be sure that the installed system board can run that faster processor at the CPU's full rated speed. Sometimes, it cannot and must be replaced.

New CPUs and advanced system boards are improving so rapidly and prices are dropping so quickly that there's little or no economic benefit to purchasing significantly more expensive systems that promise the ability to plug in the next generation CPU a few years down the road. This sort of "upgradable" system tends to be more expensive, more compromised, usually has compatibility and obsolescence problems, and doesn't perform as well as a complete system board and CPU replacement later.

MONITORS

It's sensible to buy a high quality 17" or 19" monitor and to retain it as long as it works well. Monitor capabilities do not change nearly as rapidly as processor and hard disk technologies - a high quality, large screen monitor should be quite adequate for five or six years. In fact, I have used a six year old 17" ViewSonic monitor with a very fast Athlon system and the older monitor was quite adequate. Realistically, there's a practical limit to increasingly fine video resolutions: human eyesight. Investing a little more in a good monitor is usually money well spent and may, in itself, be a suitable upgrade. A good monitor can be surprisingly inexpensive. I recently purchased a nice, entirely adequate Princeton Graphics 17" monitor for a mere $199 at Costco and later bought my current 19" Sylvania F91 monitor for $359, again at Costco. A first tier ViewSonic, NEC or Sony 17" monitor should not cost more than about $350 to $400 and not more than $450 to $500 for a 19" monitor. I strongly recommend a large monitor: it's easier to work with and clients can comfortably read it as you work together.

Flat panel monitors have a certain cachet, take up very little room on your desk and do look avant garde. However, flat screen monitors are only now becoming a mature product and they cost about three to four times as much as an equivalent CRT monitor. Unless you badly need the desktop space, I suggest that anyone on a budget stick with traditional monitors for the time being.

SYSTEM CASE

The case that protects your electronics may not seem very important, but it is. Far too many vendors put much of their design effort into making a visual statement with consumer impact. That's not what business computing is about. You need reliability and expandability.

Modern computer systems run very hot and heat is the deadly enemy of system reliability. I recommend that you look for a vertical ATX mid-tower case with plenty of internal room; these run inherently cooler than tightly packed horizontal "desktop" cases and are much easier to upgrade without breaking the bank. Look for a system with extra cooling fans in the case and a really high quality ball bearing fan on the CPU itself. Ideally, all of these fans will be plugged into the system board itself and monitored by the main computer system board, sounding an alarm and shutting down the system in the event of fan failure.

Unlike older AT computer cases that used very fragile, unreliable ribbon cables to connect the computer to peripherals like a printer, mouse, USB port or serial port, modern ATX cases hard wire these external connections directly into the system board, a much more reliable method. This may seem trivial until you've spent, as have I, several hours trying to find a ribbon cable that actually works.

Because ATX computer cases are physically different and use different keyboard and mouse connectors, be sure that everything matches. You can't use ATX cases with older AT style system boards and keyboards or vice versa. Get a good mouse like a Microsoft or Logitech PS/2 mouse and a good keyboard. I've found that Fujitsu keyboards have the best feel and reliability, and they only cost about $20 more than a poor quality keyboard.

MEMORY

Avoid any computers whose CPU uses older, slower 66 MHz SDRAM rather than faster PC100 or PC133memory - faster memory probably has as much impact upon overall system performance as the CPU itself. AMD's Athlon processor uses PC100 memory to good effect while the fastest Pentium III processors use significantly more expensive, non-interchangible RAMBUS memory. Newer versions of the AMD Athlon and Duron processors and of Intel's Pentium III can use inexpensive PC133 SDRAM and you should buy that option if available.

Intel's use of RAMBUS memory has been controversial. Although RAMBUS theoretically should perform better, that's not proven consistently true in practice and Intel has

Continued on page 15

HI-TECH IN THE LAW OFFICE

Mid-year trends in computer hardware

Continued from page 14

experienced troublesome compatibility problems as well. In fact, Intel has had to recall system board components because of compatibility problems with both RAMBUS and PC133 memory.

32 BIT OPERATING SYSTEMS

Most new systems are shipping with Windows 98 Second Edition, which has proven fairly stable in daily practice. Windows NT 4.0 has proven even more stable, at least if Service Pack 6a or later is installed. Windows 2000 has been shipping for some time but, as with all new operating systems, it will take some time to work out the most salient bugs and we suggest that you defer use of Windows 2000 until at least the first quarter of 2001. Both Windows NT and Windows 2000 require more memory and faster hardware than Windows 98, at least for equivalent performance. Microsoft promised a new version of Windows 98SE for the latter part of 2000. As of press time, neither I nor any other reviewer had yet received a copy of Microsoft's so-called Millennium Edition (Shortened to Windows ME, by the way. That says it all). Again, you should give this newest operating system variant some time to mature. In the meantime, Windows 98 SE is probably the most sensible choice for your desktop.

HARD DISKS

CPU processors are not the only component where today's average performance leaps ahead of last year's premium products. Hard disks seem to become larger, faster and cheaper by the day. A hard disk upgrade may be all that your existing systems need and it's easy to accomplish with PowerQuest's DriveImage utility program or comparable Symantec programs.

SCSI hard disks come in several variants and are typically used in more expensive computers like central network file servers. SCSI hard disks are overkill for most desktop computers although I confess to departing from my own conservative advice and recently installing a top of the line 10,000 rpm IBM Ultra2SCSI hard disk in my own personal computer. Expensive but FAST.

Almost all new hard disks use UltraDMA electronics, an improved version of the EIDE hardware interface. UDMA not only has a higher maximum transfer rate, 33 to 66 megabytes per second, but also doesn't place EIDE's heavy demands upon the computer's CPU. Instead, UDMA hard disks, like Ultra2SCSI drives, transfer data directly to the system's DRAM. UDMA hard disks perform very well when used with system boards that support their maximum transfer speed, although not as fast as Ultra2SCSI.

Your hard disk's performance depends primarily upon its sustained data transfer rate rather than the hard disk's maximum electronic transfer capabilities. The most important factors affecting sustained data transfer rate are mechanical: how fast the disk spins and how tightly the data is packed upon the rotating disk platters.

Mechanical limitations are always the bottleneck. All modern electronic interfaces can transfer data to the computer far faster than the spinning hard disk platters serve it up.

All other things being equal, UDMA hard disks that have a higher storage capacity (i.e., 16 gigabytes and up) and that have a faster rotational speed (i.e., 7200 or 10,000 rpms) will exhibit a better sustained data transfer rate. Quite simply, more data is moved under the read-write heads in a given period of time. There are only a few hard disk vendors on the market at this time. Although hard disk performance is obviously important, reliability is crucial. I prefer IBM, Western Digital and Fujitsu UDMA hard disks for desktop systems and IBM Ultra2 SCSI hard disks for higher end computers, like network file servers or MY own desktop system. IBM drives combine excellent performance and reliability at a moderate price point, and they're widely available through brand name manufacturers and third party vendors. In fact, IBM supplies most of the hard disks used by other major system vendors like Dell.

VIDEO AND SOUND CARDS

Another determinant of apparent computer system performance is the speed of your video card. It's actually less important than you might believe, though, unless your work consists mainly of action games, 3-D engineering or live desktop conferencing. In fact, for the average attorney, video performance is not really that important. Whether the screen repaints itself in .10 second or .05 second is rarely even discernable by the human eye. The quality and stability of the video card's driver software are more important. Buy a name brand AGP video card with at least 8 MB video RAM and a maximum screen resolution of at least 1280 X 1024 pixels and you should be satisfied. I recommend ATI for consistent quality and stable driver software.

Just about all new computers include sound cards. For some, these devices are purely recreational. However, as the legal profession moves toward voice recognition, sound card compatibility will become a major issue. Many excellent sound cards work very well with Windows in a general purpose mode but their compatibility with voice recognition programs cannot be assured in advance. For this reason, I recommend sticking with Creative Labs SoundBlaster, preferably the best model available. Sound card quality is one area where skimping on price and quality is not a good idea. Don't worry about the speakers or microphone that might come with the system. Voice recognition vendors include a matched mike/audio headset with their programs. Independently amplified headsets are best.

Next Issue: Software tips & recommenations.

Will attorneys vote themselves out of the competition?

By Caryn Langbaum

Despite being highly competitive by nature, lawyers may be putting themselves at a distinct competitive disadvantage in the legal marketplace. While bar associations debate the merits and evils of multidisciplinary practices (MDPs), the large accounting firms are developing and expanding their already-flourishing MDPs. From a marketing perspective, it looks like law firms need to jump on this bus; indeed, it looks like law firms may be in danger of missing it. But like any good legal issue, this one too has more than one side. Those not in favor of lawyers participating in MDPs implicate codes of professional ethics, tradition and the "core values of the legal profession."[1] But isn't there a way to compete in the marketplace as it exists today while still maintaining those "core values?" Traditionalists should not forget that law firms are businesses and that sometimes they have to act like them.

FROM A MARKETING PERSPECTIVE, IT LOOKS LIKE LAW FIRMS NEED TO JUMP ON THIS BUS; INDEED, IT LOOKS LIKE LAW FIRMS MAY BE IN DANGER OF MISSING IT.

Staunchly defending ethical barriers to participating in MDPs, rather than trying to craft more current and flexible ethical canons that allow lawyers to join in the competition so alive in today's legal marketplace, simply does not make sense for the profession. Lawyers are so good at changing laws to better represent what's going on in the world. As technology plays a greater role in society, lawyers play their part in developing new laws and in molding existing laws to accommodate it. When regulations restricting affiliations between certain types of financial institutions became too limiting for these industries in the current economic landscape, lawyers participated in liberating them.[2] Is it because MDPs so intimately affect them that lawyers are taking such a myopic view? Is it because they fear the increased competition promised by, among others, large accounting firms?

Reasons aside, in August 1998, the American Bar Association (ABA) created a Commission on Multidisciplinary Practice (the Commission) to gather, study and analyze the issues surrounding MDPs and legal practice. Despite numerous hearings, many interviews with and communications from anyone even tangentially impacted by MDPs, and a 1999 report by the Commission advising the ABA to change some of the Model Rules of Professional Conduct (the Model Rules),[3] the ABA decided to put off the decision for another year.[4]

But now, the time is approaching for yet another review of this issue. After hearing additional information gathered by the Commission, the ABA House of Delegates is set to vote on whether or not it should change the Model Rules to allow lawyers to share fees and enter into MDPs with non-lawyer professionals.[5] The remainder of this article will discuss concerns about MDPs, the Model Rules implicated, the current legal climate with regard to MDPs and the reasons why the ABA House of Delegates should vote a wholehearted "yes" to MDPs in the legal profession.

MDPS – WHY NOT?

In August 1999, the Commission on Multidisciplinary Practice proposed changes to the Model Rules of Professional Conduct in order to allow for MDPs in the legal profession.[6] The ABA House of Delegates voted not to change the Model Rules. In doing so, the delegates represented the many lawyers and bar associations also hesitant to "whittle away" at the ethical guidelines lawyers have followed for so long. This "delegation" of MDP naysayers cites several Model Rules as the reason for its position.

CURRENTLY, MDPS COMPRISED ONLY OF NON-LAWYER PROFESSIONALS FREQUENTLY ARE ACCUSED OF CROSSING THE LINE INTO THE UNAUTHORIZED PRACTICE OF LAW.

The Model Rule most impacted by allowing MDPs certainly would be Rule 5.4, Professional Independence of a Lawyer (all states have adopted the Model Rules in one form or another). Allowing MDPs would render obsolete the basic tenet of this rule – "A lawyer or law firm shall not share legal fees with a nonlawyer . . . ."[7] The essence of most types of MDPs is permissible fee sharing between lawyer and non-lawyer professionals.

But the remaining provisions of Rule 5.4, as well as the accompanying comments to the rule, hint at some of the reasoning behind the basic tenet of the rule. For instance, 5.4(b) says that "A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." And 5.4(d) says, "A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: (1) a nonlawyer owns any interest therein . . .; (2) a nonlawyer is a corporate director or officer thereof; or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer."[8]

The Model Rule drafters apparently feared that if a non-lawyer professional — one who does not have to comply with the Model Rules — had any type of financial or business interest or control over a lawyer partner, that lawyer partner could lose his or her independent judgment. It is true that a non-lawyer boss may be bound by a completely different set of ethical standards and interests. And it follows that a non-lawyer boss paying a lawyer's salary may exercise the authority of a boss and may therefore impact a lawyer's judgment. Those opposing MDPs for the legal profession find this obstacle to be unconquerable; exercise of a lawyer's judgment should not be compromised for mere economic or business objectives.[9]

In reality, rather than compromising lawyers' professional judgment, having such close access to non-lawyer professionals could universally enhance lawyers' judgment. For instance, suppose a family lawyer handling a client in a divorce case works in an MDP with a social worker who counsels this same client. Discussing the case with the social worker (with the client's knowledge of course), accessing the tools of an another trade and learning from the non-lawyer can only assist the lawyer in rendering more appropriate and fully informed advice about the case. Even in a non-case-specific sense, working so closely with another professional only affords lawyers added information and tools to better assist them in zealously advocating for their clients.[10]

Those opposing MDPs also point to Model Rule 5.5 (b) as a deal breaker. It says, "A lawyer shall not . . . (b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."[11] Apparently, those espousing this argument against the use of MDPs believe that allowing lawyers to share fees and business decisions with non-lawyer professionals creates a greater risk that the lawyers will assist those non-lawyer professionals in activities that really constitute practicing law.

This point is amusing in a sense because the inverse of the argument seems more apparent than the argument itself. If lawyers are able to join MDPs and perform legal services for the clients of the MDPs wouldn't the instances of unauthorized practice of law actually decrease? Currently, MDPs comprised only of non-lawyer professionals frequently are accused of crossing the line into the unauthorized practice of law. Adding lawyers to these MDPs would almost certainly leave the non-lawyer professionals free to do the types of work that more appropriately fall into their realms, leaving the legal work to the lawyers.

Other concerns include the impact of MDPs on attorney client privilege and confidentiality, increasing instances of conflicts of interest, the duty to provide pro bono services and handling client funds.[12]

For a group of people accustomed to making and overruling rules and laws, taking this position on the unalterable nature of the Model Rules seems strangely incongruous. Opponents basically are saying that MDPs will compromise the Model Rules, as written. Rather than ruling out the idea of MDPs all together, couldn't lawyers agree to allow MDPs in the legal practice and simply implement some new rules to ensure that the moral obligations implicit in the current Model Rules remain intact?

In fact, to some extent the Commission has done exactly that. Recognizing the importance of ensuring independent judgment, for example, but not tied to the present wording and method of ensuring such independent judgment, the Commission recommends requiring the MDP to certify to the State Supreme Court "that it will not interfere with the lawyer's independence of judgment and exercise of professional judgment."[13] Such a rule would, in essence, accomplish the same thing as disallowing the associations all together. The rule also would put MDPs on alert that maintaining lawyers' independence is critical and is something that the State Supreme Court will monitor.

State Supreme Courts should

Continued on page 17

Will attorneys vote themselves out of the competition?

Continued from page 16

implement similar requirements concerning the unauthorized practice of law. If MDPs certify that the lawyers will not assist the non-lawyers to practice law, it should accomplish the same thing as requiring lawyers themselves not to assist non-lawyers in practicing law. Again, requiring certification would bring the issue of unauthorized practice of law to the forefront and would encourage MDPs to be diligent in monitoring for violations.

The State Supreme Courts could implement similar rules and regulations to combat issues that arise with regard to handling funds, the attorney client privilege and confidentiality. Yes, conflicts of interest may occur with more frequency, but aside from the inconvenience posed by having to be painstakingly attentive to more conflicts, this argument does not offer a reason to disallow MDPs.

Keep in mind that lawyers are not the only profession with a code of ethics. "In fact, virtually every other profession (at least those with which MDP relationships are likely) has its own code, disciplinary system and traditions. Deceptive advertising, self-dealing and practicing beyond one's competence are widely condemned; integrity, public service and continuing education are widely encouraged, if not required."[14] Studies have found that these codes resemble the Model Rules so closely that "the only irreconcilable difference [identified] is the confidentiality obligations of lawyers vs. the public disclosure obligations of auditors."[15] The practical solution for this problem is not a sweeping prohibition of MDPs for lawyers, but rather a narrow limitation disallowing MDPs with both lawyers and auditors for one client.

WHAT'S MORE IS THAT LAWYERS AND LAW FIRMS ARE NOT POPULAR. THE AMERICAN ASSOCIATION OF RETIRED PERSONS FOUND IN A STUDY THAT A HIGH PERCENTAGE OF PEOPLE WHO COULD USE A LAWYER DO NOT CONSIDER USING ONE.

MDPS – WHY?

The answers to this question should be obvious. Most importantly, clients want it. What consumer wouldn't want the option to have its multiple needs met by one provider? The potential professional combinations are endless.[16] Family lawyers and social workers; environmental lawyers and geologists; business or estate planning lawyers and accountants or financial consultants; antitrust lawyers and economists; medical malpractice litigators and medical illustrators; technology lawyers and information technology consultants or systems analysts; intellectual property lawyers and engineers; health care lawyers and doctors.

The Big Five accounting firms are already offering it, so the consumers must want it. Accounting firms like PriceWaterhouseCoopers and Arthur Andersen already have taken over a good portion of the European legal market, "avidly acquiring law firms in dozens of cities in Europe."[17] And large European legal consumers have given them rave reviews. For instance, one large venture capitalist using an MDP said that he has saved 20% in legal, tax and audit fees over the course of the six years it has been using the MDP.[18] European clients have cited efficiency and cost savings as the most significant reasons to use MDPs over traditional law firms. Studies have shown that using one MDP for a variety of needs eliminates the "getting to know you" time factor associated with employing a number of different practitioners from a number of different firms. The MDP and all of its professionals will understand the client and its way of doing business. MDPs can therefore provide clients with more seamless service.[19]

The new "hybrid operations" in Europe provide "a broad array of legal services, including counseling on such high-end matters as corporate finance and mergers and acquisitions."[20] They already provide a range of services including employment law audits, training on legal requirements and "regulatory compliance.[21] The Big Five are slowly slipping their MDP approach into the United States, recruiting lawyers from large U.S. firms. These lawyers officially do not practice law, but ask any tax lawyer where the competition for clients is coming from and one of the answers is sure to be "accounting firms."

But if competition from the Big Five accounting firms is not enough reason to allow lawyers to join MDPs, the potential boost to client service is. As one writer noted, "Governments and corporations often employ lawyers and other professionals under the same roof within the same unit. These organizations have discovered a lesson that is more broadly applicable – that coordination, teamwork and fully-considered strategic planning are often fostered when professionals from different disciplines work within one service organization for the same clients."[22] Clients will benefit from access to the various disciplines. Their legal problems, once considered in a virtual legal vacuum, can be approached multi-dimensionally, within a fuller context.

What's more is that lawyers and law firms are not popular. The American Association of Retired Persons found in a study that a high percentage of people who could use a lawyer do not consider using one. These people seek out other professionals for the advice they need.[23] Another study indicated that consumers are intimidated by lawyers and worry that they will be taken advantage of and pay for inefficient work. Often, lawyers are used merely as a last resort; this negative public perception and hesitance to engage lawyers results in many missed business opportunities. This same study, conducted by the Consumers Alliance of the Southeast, demonstrated that "MDPs offer an opportunity to recast the legal profession as part of a problem-solving team whose primary goal is finding integrated efficient and effective solutions to the everyday problems that confront all consumers . . . ."[24]

VOTE "YES" ON MDPS

The MDP debate brings to mind a joke recently told on a television drama. The National Guard issued a flood warning in the area where John Doe lived. John Doe's house was in particular danger and the news recommended that everyone in his area evacuate. He stayed in his house. As the storm began to get serious, the National Guard knocked on his door and told him that he should evacuate. He refused saying, "God will save me." A few hours later, after the flood had become much more serious, the National Guard rowed in a boat to John's door and told him to evacuate. But he said that he would stay because he trusted that "God would save" him. The flood got even worse and the National Guard again tried to save John, this time in a helicopter. He refused once again saying, "I trust God will save me." John drowned. When he went to heaven and met with God he asked, "Why didn't you save me? I put all of my faith in you and you let me drown. What happened?" God said, "I sent you the National Guard, a boat and a helicopter; what more did you want?"

Here's how the joke relates. Lawyers regulate themselves. They also have the know-how to fashion regulations and rules to best accomplish certain objectives. So they have in their hands the tools necessary to compete in today's marketplace, just like John Doe had the tools to save himself from drowning in the flood. Lawyers cannot hide behind the high ideals of the Model Rules of Professional Conduct and hope that ethics alone will help them to survive the competition. They have the tools and now is the time to use them so that the profession can continue to thrive. The ABA House of Delegates should let lawyers use the tools to rework the Model Rules to fit today's legal marketplace — to uphold the underlying ethical canons while at the same time allowing lawyers to compete on new frontiers and against new challengers. In adjusting the Model Rules to allow MDPs, lawyers would not be releasing their professional ethics to other hands; they would be "entrusting those core values to the same people who have always been responsible for their protection: lawyers."[25]

The author is a Maryland attorney.

[1] Carol McLean Brewer, Joan Hume, Michael Nachwaiter and Katherine Silverglate, *Facing The Tide of Change*, 74-Mar Fla. B. J. 13 (2000).

[2] Public Law 106-102, 113 Stat. 1338

[3] The Report of the Commission on Multidisciplinary Practice to the ABA House of Delegates, reported in the Spring 1999 Issue of The Professional Lawyer.

[4] Nick Badgerow, 69-Mar J. Kan. B. A. 12, 13 (2000).

[5] Many state and local bar associations have rejected resolutions proposing permissible MDPs. But just this past month, the Philadelphia Bar Association became the first of the regional bar associations to approve a resolution recommending MDPs. The resolution limits the approval only to lawyer-controlled MDPs. The Pennsylvania Supreme Court must approve the resolution. Washington, D.C. is currently the only region that permits MDPs, albeit on a limited basis. *Philly Bar Okays MDPs*, 5/1/00 Prac. Acct. Mag. 6.

[6] The Report of the Commission on Multidisciplinary Practice to the ABA House of Delegates, reported in the Spring 1999 Issue of The Professional Lawyer.

[7] Model Rules of Professional Conduct 5.4 (1995).

[8] *Id.*

[9] Nick Badgerow, 69-Mar J. Kan. B. A. 12, 16 (2000).

[10] Michael Gerrard, Statement of Position of Multidisciplinary Practice, Executive Committee of the Association of the Bar of the City of New York, 595 PLI/PAT 75, 80 (2000).

[11] Model Rules of Professional Conduct 5.5 (1995).

[12] Nick Badgerow, 69-Mar J. Kan. B. A. 12, 16 (2000).

[13] *Id.* at 15.

[14] Michael Gerrard, Statement of Position of Multidisciplinary Practice, Executive Committee of the Association of the Bar of the City of New York, 595 PLI/PAT 75, 87-88 (2000).

[15] *Id.*

[16] Margaret Jacobs, *Hybrid Law Practices In U.S. Debated*, Wall St. J. Eur., May 31, 2000 at 6.

[17] *Id.*

[18] *Id.*

[19] Abigail Townsend, *Lovells Lures KLegal Director In Shake-Up*, The Lawyer, May 8, 2000 at 1; 2/14/00 Nat'l L.J. A21 (col.5); 12/13/99 N.Y.L.J. 5 (col. 1).

[20] Margaret Jacobs, *Hybrid Law Practices In U.S. Debated*, Wall St. J. Eur., May 31, 2000 at 6.

[21] Nick Badgerow, 69-Mar J. Kan. B. A. 12, 16 (2000).

[22] Michael Gerrard, Statement of Position of Multidisciplinary Practice, Executive Committee of the Association of the Bar of the City of New York, 595 PLI/PAT 75, 80 (2000).

[23] Alfred M. Butzbaugh, *On Solos, Small Firms and MDPs*, 79 Mich. B.J. 314 (2000).

[24] *Id.*

[25] *Multidisciplinary Practices: Smart Marketing Tool or An Ethical Question*, 35 No. 22 Bankr. Ct. Dec. (LRP) 1 (April 18, 2000).

Voir dire

☐ William Satterberg

Voir dire really is Latin for "open mouth, insert foot." In the context of jury selection, it is an experience.

Juries are selected for their ignorance. The ideal jurist knows nothing about anything, unless the attorney happens to know them, whereupon the attorney hopes that they will keep their mouth shut about anything they do know.

Smart jurors long ago figured out how to escape jury duty, while still retaining their Alaska Permanent Fund Dividend.

In Fairbanks, one only needs to belong to the informed jurors league. In the alternative, one can be a claimed friend of local juror's rights advocate, Frank Turney. (Frank ordinarily may be reached at 1-800-tell-jury.) Remarkably, simply muttering the incantation of "Tell Jury" virtually guarantees a lifetime exemption from jury service.

The not-so-smart jurors are the ones who do not make the initial cut. Those jurors are divided into two groups:

1) Those with an agenda, and 2) those without any agenda.

The jurors with an agenda are usually readily identifiable. They look, dress, talk, and act the same. In response to probing questions by counsel, they invariably will finish their discourse with the statement, "But I can be fair. . ." unless their agenda is to get off the jury, whereupon they whine and complain about everything. No matter how biased the juror who wants to get onto a jury is at questioning, all bias is immediately removed by muttering the magic words. Once the phrase is invoked, the judge's eyes severally roll back into the judge's head. Any further arguments about disqualification for cause are lost on deaf ears.

For years, I viewed that my task as counsel was to explore bias among the juries. My goal was to eliminate jurors with obvious bias. In time, I gave up on that notion. Too idealistic and not in accordance with my NITA training. Cold, hard experience was my teacher, as well as a bunch of unexplained losses.

I remember one case where a juror preached on about his "church" activities, "church" affiliations, and "church" beliefs. Normally, this classic type of juror delivers their revelations in a long southern drawl, and lives in North Pole. Because I was encouraged by my NITA classes to establish identification with the jurors, I politely asked the church juror about his church. I was hoping to further draw him into a discussion about his religious preferences, and thereby establish some sort of kinship, despite my obviously sinful nature. My plan immediately backfired. Righteously indignant, the juror stiffened in his chair and quickly fired back, "Sir! My religion is not on trial here. It is your client who committed the crime!"

I sensed a disqualification for cause. Seizing the moment, I made my motion. I pointed out to the court that the juror had stated that it was my client who had *committed* the crime. I argued that the juror was obviously quite biased. Obviously, the juror had already made up his mind with respect to such minor nuisances as preordained guilt. Predictably, the court asked the juror what was meant by the statement. The juror again was quick to respond, "I meant, *alleged*, Your Honor! *ALLEGED* to have committed the crime." He then smiled smugly at me, obviously pleased with his ability to outsmart the sleazy defense attorney. This juror was clearly a smart one. The court ruled that no bias existed, despite the juror's continuing glare following my arguments. The trap sprung, I shot one of my preempts in his direction.

The key to jury selection is to let the judge do the examination for bias. By the time the court has announced to the jury the dastardly nature of my client's alleged crime, which is usually done before the jurors have even assumed their seats, and has furthermore asked people whether or not they can be fair, sit through a three day trial, or have any bias against the attorneys, the qualifications and disqualifications for cause have essentially been explored. True, there is occasionally the juror who misses the cut, or perhaps was sleeping when the questions were asked. Ordinarily, however, once the jurors have answered the judge's questions, and have gone through the standard questions on the board, there is little left to do by way of disqualification for cause. The goal, at that point is to determine who you are going to preempt. Surprisingly, I usually know even by that time who I will be cutting out of the jury, more likely than not. This most important decision, of course, is made by the quality of their shoes. Once again, my job is to get rid of the jurors who have an agenda, unless their agenda is mine. The shoes usually tell me the answer when all else fails.

The second class of jurors are the jurors who have no agenda whatsoever, except to get done with jury duty. In many respects, these are the better jurors. The job, at that point, is to educate the jury as best as possible so that their agenda becomes my agenda.

In trying to create a juror's agenda, I abandoned the technique of asking about favorite books or bumper stickers a long time ago. In fact, the one time that I asked a juror about the most recent book which he had read, the response was that it was an army field manual on the construction of combat bridges. Recognizing that there was not much insight in that particular question or answer, I later tried bumper stickers. But, I gave up bumper stickers soon after one juror responded that her favorite bumper sticker was "Visualize Whirled Peas," and another claimed to own a car which boasted "My Kid Can Beat Up Your Honor Student." Typical bipolar Fairbanks.

I now confine myself to the more educational, Socratic approach of jury selection. Quite often, in criminal trials, I will adopt a technique given to me by attorney John Franich, in which the jurors are first asked whether or not they could fill out a blank jury form at the jury selection stage of the case. Following John's pedantic style, I ask for a show of hands for the number of people who believe that they can fill out the form. Hardly anyone ever raises their hand to the question, priding themselves on their impartiality. I then chastise them, stressing that the presumption of innocence, alone, requires that they check the not guilty box without hesitation. This initial step goes a long way towards making friends with the jury.

I next ask the jurors whether or not they have ever heard of anyone who was charged in a case and "got off" because they had a good defense attorney. Once again, the hands fly up. Again, I chastise them by pointing out that a good defense attorney never gets anyone off and that it is the state's burden "to get somebody on." By now, I usually have earned the respect of everyone.

The crowning touch is my O.J. Simpson trilogy. I ask the jurors whether or not they believe what they read in the newspaper, hear on the radio, or watch on television. By then, all hands are flying up quickly indicating that they do not believe any of those three news sources. I next ask the jurors to raise their hands if they can keep an open mind. Once again the hands fly up. By then, the trap is set. I then ask the jurors for a show of hands if they believe that "O.J. did it." Usually, but not always, a chuckle will arise in the courtroom. It is a valid technique, which goes to impress upon the jurors their need to keep an open mind, and judge a case only on the evidence presented, and not upon public opinion, sentiment, or press releases. By now, I assume that they are all my friends.

Occasionally, I run into an irascible juror, such as the one who lectured me upon religious beliefs. Recently, in a serious case, I asked the jurors whether or not they could understand that they had the most important job in the courtroom. I impressed that I had the least important job. I stressed that I literally could sit throughout the entire trial and read the newspaper, and do nothing until the close of the state's case, and then rest. I asked the jurors whether or not they would hold that against my client. In response, they indicated that they would blame my client. I felt satisfied, until one juror wanted to know how much my client was paying me. He questioned whether or not I was earning my money. Exhibiting wolf pack psychology, another juror joined in, pointing out that, although he would not hold such behavior against my client, he also would be happy to report me to the Bar Association for dereliction of duty. Yet, another juror, apparently on my side, remarked that she would be inclined to presume that, if I were reading a stack of magazines or newspapers, I must be exceptionally confident in my case which is why I was not looking worried. The state preempted that juror. In retaliation and partially in self-defense, I did away with the one that said that he would report me to the Bar Association.

Recently, the state preempted a juror upon whom I had set my sights. This juror voluntarily announced that she would try to be fair. As she scanned the courtroom, she assured us that the witness "auras" probably would not show up that clearly under the court's florescent lights, and that she would try to ignore the auras if they did appear.

Fairbanks is a small town, even if it is Alaska's second largest city. Because of the town's size, invariably, either myself or my staff often will know people who are sitting on the jury. Sometimes these individuals are clients. Sometimes they are on the opposing side. They also may merely be acquaintances.

Recently, as is often the case, a juror indicated that he knew me. Surprisingly, the juror did not look familiar. I began to cringe as the juror decided to discuss his opinion of me before the jury, the court, and the courtroom peanut gallery. Fortunately, this particular juror felt that I was a worthwhile human being. I plan to have that brief, yet incredulous monologue transcribed and framed. Predictably, the state preempted that juror, as well.

In other cases, the jurors have not been so gentle. Due to the nature of the case, the clients represented, or the size of the town, I have occasionally found myself the subject of criticism, if not outright lambasting, in the back room. Fortunately, with age, I have generally become able to recognize that style of juror before they begin to speak publicly. They are usually apparent by the deep, vicious glare, uncontrollable twitching of the neck, and the not-so-subtle lip movements. More often than not, they are either a client or a relative.

Eventually, the jury selection process turns to preemptory challenges. This is when the attorneys can get even for all of the slander that has gone on for the past two hours. To try to lessen the pain of rejection, the court takes efforts to explain that the jurors are to take nothing personally by being preempted. In fact, experience has shown that the jurors later tend to be more personal if they are not preempted. After all, by then the jurors have done virtually everything in their power to try to convince the attorneys that they are the last person to be qualified for a jury. They have told unsolicited stories about similar crimes. They have talked about their illegitimate lawyer siblings. They have made strange body movements throughout the entire process. Or they have tried to sleep their way through the ordeal. In short, during the two hours of voir dire examination, it often becomes open competition to see who stands the best chance of getting off the jury. A courtroom version of the X-Games.

Each side is given a number of peremptory challenges to exercise. I liked the old days in criminal defense trials, when I got a bunch more than the state. But those days have changed. Now, we can both throw out a whole passel of jurors, which simply means that the courtroom is that much more packed during the initial selection process. But Fairbanks will have a newer, larger courthouse soon, to which the judges always hasten to remind us. Unfortunately, the jury rooms will most likely not have corner views overlooking the majestic Chena River. Those were reserved early for the most senior of the judiciary.

I personally believe that the peremptory challenge phase of the case is when meaningful jury selection

Continued on page 19

Voir dire

Continued from page 18

really takes place. It is during this final phase of the process when the attorneys have the opportunity to attempt to constitute the jury so that it will fairly prejudice their case. There is an art to preemptory challenges. I would like to explain it at this time. Unfortunately, since I do not understand it, I will not explain it. Regardless, one should strive to structure the panel in a most favorable manner. (After all, isn't that what impartial justice is all about?)

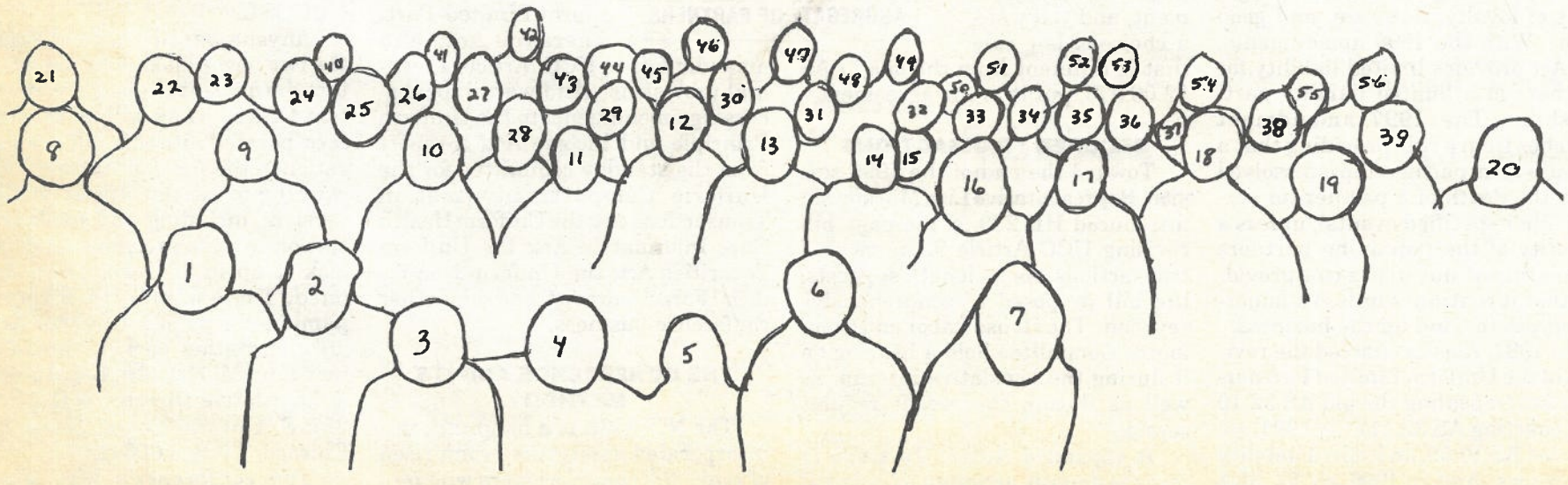
Under the new rules, the alternate juror is unknown until the conclusion of the case when the name is drawn. Under this approach, all jurors have an equal obligation to stay awake during the case. In the old days, it was only the alternate who ever really paid attention. Traditionally, after the alternate juror is excused, both sides often rush to debrief the alternate.

One final word of caution about the alternate juror, however. Never believe them. For whatever reason, whenever the alternate juror has been interviewed by me with respect to their opinion of the case, the jury has usually gone the opposite direction. A justifiably superstitious lawyer, who would like to chant mantras and light candles and incense in the courtroom, if allowed, I usually find myself hanging on every word of the alternate. As a result, I end up either making excuses or bragging about the case outcome long before the other twelve people choose to deliver the verdict. All too often, I am embarrassed when I have to recant my braggadocio because the jury simply did not agree with the alternate.

This phenomenon leads me to my last logical conclusion. Attorneys should select a jury of "peers," do the trial, and then excuse twelve of them as alternates, leaving only one behind to deliberate. After the twelve "alternates" have been excused, only then should we ask them what their verdict would have been, and forget about what the one survivor thinks about the case. That way, we will get a predicable verdict with which at least I can be happy.

Juneau Bar Association, Group Photograph, June 9, 2000

1. Justice Walter (Bud) Carpeneti
2. Judge Tom Stewart
3. Judge Larry Weeks
4. Barbara Carver
5. James Crawford
6. Joe Sonneman
7. Anne Carpeneti
8. Dan Wayne
9. Kathryn Hilst
10. Mie Chinzi
11. Jennifer Beardsley
12. Dawn Collinsworth
13. State Representative Beth Kerttula
14. Vince Usera
15. Gayle Horetski
16. Susan Cox
17. Kelly Henricksen
18. Keith Levy
19. Sara Acharya
20. Colby Smith
21. Tom Meyer
22. Gerry Davis
23. Steve Weaver
24. Mark Regan
25. Gordan Evans
26. Jim Ustasiewski
27. Ken Truitt
28. Mary Alice McKeen
29. Debbie Holbrook
30. Doug Mertz
31. Tom Wagner
32. Judge Patricia Collins
33. Ann Giggord
34. Elizabeth Ziegler
35. Barbra Nault
36. Doug Gregg
37. Shelley Higgins
38. Eric Lode
39. Ethan Schutt
40. John Hartle
41. Av Gross
42. Bruce Weyhrauch
43. Sheri Hazeltine
44. Julie Willoughby
45. Andy Hemenway
46. Roger Snippen
47. Steve Hempel
48. Art Peterson
49. Fred Baxter
50. Stacie Kraly (hidden)
51. Sarah Felix
52. Lach Zemp
53. Eric Kueffner
54. Tony Sholty
55. Dan Bruce
56. Mike Lessmeier



Uniform Laws wrap-up

Continued from page 1

the National Conference of Commissioners on Uniform State Laws (Uniform Laws Conference, for short) have become law in Alaska. Our state has been an active participant in the conference since 1912 and a major beneficiary of its work product, with something like 78 uniform laws enacted.

The conference's motto, "Diversity of Thought – Uniformity of Law," adopted at its centennial in 1992, 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.

THE CONFERENCE'S MOTTO, "DIVERSITY OF THOUGHT -- UNIFORMITY OF LAW," ADOPTED AT ITS CENTENNIAL IN 1992, 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.

Here's a synopsis of recent uniform laws activity in Alaska:

PARTNERSHIP

The NCCUSL's 1994 Uniform Partnership Act, with its 1996 and 1997 amendments, is a major improvement of our law. As mentioned above, Alaska still has the 1914 version, and it was time to update it.

The 1994 Act is a comprehensive revision. The 1996 amendments to the 1994 version include the NCCUSL's limited liability partnership provisions (see, especially, the new AS 32.06.911 – 32.06.925), and the 1997 amendment responds to a 1997 change in the Internal Revenue Service regulations (see the new AS 32.06.801(2)(A), regarding dissolution of a definite-term partnership).

The drafters of HB 296 could not be persuaded to keep the general provisions, including the definitions, at the front of the Act, as in the official version. Employing the Alaska approach, they put them at the back end. So, if you're doing some national research involving this Uniform Act, watch out for this organizational difference. We have the definitions; they're just in a different place.

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 ramifications of this basic change appear throughout the Act.

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 addresses 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. The 1997 amendment switches from a rule providing that a definite-term partnership is dissolved after the death of a partner (or certain other specified events), unless a majority of the remaining partners agrees to continue it, to a rule providing that it continues unless a majority agrees to wind up the business.

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 ch. 115, SLA 2000. The Uniform Act's provisions on limited liability partnerships achieve the interstate benefits of the national version. Partnership activities do not rely on state boundaries.

The House Labor and Commerce Committee made two changes in the "official" NCCUSL version. It changed the "annual" reporting requirement to a "biennial" one, at the request of the Department of Community and Economic Development; and it changed the five-year transition period to a three-year one, at the request of an Anchorage attorney. Both changes were concurred in by the uniform law commissioners.

After CSHB 296(L&C) passed both houses of the Legislature, two Anchorage attorneys raised a question about the provision on page 40 that sets out the fall-back choice-of-law rule. The new AS 32.06.975 says

"(a) Except as otherwise provided in (b) of this section, the law of the jurisdiction where a partnership has its chief executive office governs the relations between and among the partners and between the partners and the partnership.

"(b) The law of this state governs relations between and among the partners and between the partners and the partnership and the liability of partners for an obligation of a limited liability partnership."

And the new AS 32.06.960 provides in part

"(a) Except as otherwise provided in (b) of this section, relations between and among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, this chapter governs relations between and among the partners and between the partners and the partnership."

AS 32.06.960(b) then lists some rights and duties, such as the right to access to records and the duties of loyalty and care, etc., that may not be varied by the agreement. So, if you're drafting a partnership agreement, and you want a choice-of-law rule that is different from the one in AS 32.06.975, put it in the agreement.

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.

SECURED TRANSACTIONS

Toward the end of the 1999 session, Representative Lisa Murkowski introduced HB 239, a 134-page bill revising UCC Article 9, on secured transactions. As its length suggests, the bill proposed a comprehensive revision. The House Labor and Commerce Committee held a hearing on it during the legislative interim, as well as during the recent regular session.

It expanded Article 9's scope to include deposit accounts as original collateral (except in consumer transactions), most sales of "payment intangibles," and certain receivables, liens, etc. It also expanded on the duties of secured parties, expanded the definition of "proceeds," re-defined "good faith" to include not only "honesty in fact" but also "the observance of reasonable commercial standards of fair dealing," and dealt with perfection, priority, filing, default, and enforcement, along with other matters. The bill included conforming amendments in other UCC articles.

NOTE that, in the final version of the bill, the location of UCC Article 9 was changed from AS 45.09 to AS 45.29. This relocation responded to a suggestion of the revisor of statutes, to avoid the confusion that might result from re-using old section numbers on subjects different from those in this comprehensive revision. Besides this change and some drafting variations referred to above, the Alaska version differs from the national version in two respects. First, at the suggestion of the state recorder, a number of changes were made in the article (AS 45.29.501 – 45.29.525) dealing with filing of the financing statement, primarily to recognize that Alaska has a statewide, centralized filing system. Second, at the suggestion of a bond counsel, AS 45.29.109(d)(14) was added, to exempt, from AS 45.29, transfers by a government or governmental subdivision or agency (cf. old AS 45.09.104(12)), and some conforming amendments were also made.

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.

UP FOR DEBATE AT ANNUAL MEETING

This year's annual NCCUSL meeting, it's 109th, will be in St. Augustine, Florida, July 28 – August 4. Without going into detail, I'll just mention the proposed Acts that will be up for discussion and debate.

We will be considering the following Acts for promulgation: Uniform Interstate Enforcement of Domestic Violence Orders Act; Uniform Trust Code; revision of the Uniform Arbitration Act; revision of the Uniform Parentage Act; Uniform Money Services Business Act; revision of UCC, Article 2A, leases; and Uniform Athlete Agents Act.

Also on the agenda, for a discussion "reading," are: revision of the Uniform Limited Partnership Act; and amendments to UCC, Article 1, general provisions. And we will be discussing amendments to the Uniform Principle and Income Act; a report from the standby committee for the Uniform Computer Information Transactions Act; the Uniform Health Care Information Act; the Uniform Securities Act; the Uniform Non-judicial Foreclosure Act; and some other conference business.

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. The conference also produces "model" Acts – ones that are not seen as requiring uniform enactment in the various jurisdictions, but merely offer well-drafted, thoroughly analyzed, current thinking by scholars, judges, and legal practitioners.

In conjunction with the American Law Institute and the American Bar Association and various scholars and advisers representing a wide variety of interests and offering great expertise, the NCCUSL does the research and drafting. The conference's constitution requires *at least* a two-year process, and often the drafting takes five or more years. This work is done by means of drafting committees that are a cross-section of the country's legal profession. Advisers and liaisons from organizations such as the American Bar Association participate in the drafting.

Committee 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.

Before and after introduction of a bill, the Alaska commissioners contact the appropriate sections of the Alaska Bar Association, as well as other organizations that might be interested in a particular bill. A few years ago, I proposed to the Board of Governors of the Alaska Bar the creation of a section, or at least a committee, the responsibility of which would be to review the annual product of the NCCUSL and then make recommendations or refer the Acts to other sections. The BOG did not like the idea, simply referring me back to the existing sections.

MORE DETAIL

As with my previous reports, this synopsis does not do justice to any of the Uniform Acts mentioned here – neither the ones that passed nor the others. And, of course, the 1999/2000 enactments in Alaska are just a small percentage of the product of the NCCUSL.

Anyone wanting to read either of the two new Alaska Acts should contact the nearest Legislative Information Office. They will, of course, be incorporated into this fall's re-publication of the Alaska Statutes. Folks 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.

The conference's Web site is: www.nccusl.org.