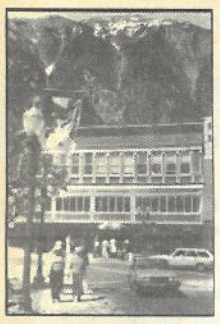

The Light Side

Class president, Southeast town quirks, editor's travel

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The Alaska BAR RAG

VOLUME 19, NO. 2 — *Dignitas, semper dignitas* — MARCH-APRIL, 1995

'Old' and 'new' tort reforms: Under fire

And 1995's bill? It's tort deform

By Michael J. Schneider

I. INTRODUCTION.

Believe me, I'm as tired of writing these articles as all of you are of reading them. Law, logic, hope, and our prayers to the contrary, our brothers and sisters in the legislature are busily dismantling what little is left of the civil justice system. They probably have a better chance in 1995 and '96 of obtaining their ill-considered goals than at any prior time in the state's history. The hopes and dreams of representative Brian Porter, the medical industry, and the insurance industry will be outlined in the paragraphs that follow.

Related story: Page 5

House Bill 158, the omnibus tort deform bill introduced by Representative Porter, has received only two committee assignments (Judiciary and Finance). Porter chairs the Judiciary Committee, and most observers expect a less than thorough analysis of the bill and its implications. House Finance is heavily dominated by members of the majority, and it is conceivable that the bill's tenure there could be equally brief.

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Is "old" Tort Reform Act unconstitutional?

By Jerome H. Juday

While the public's attention is focusing on the new tort reform bill now afoot in Juneau, there remain several open questions about the "old" Tort Reform Act. One open question that has received scant attention is whether the several liability provision of AS 09.17.080(d) violates the Alaska Constitution.

Although few lawyers seem to appreciate it, the existing Tort Reform Act does not apply to tort claims for pure economic losses. The Act only covers claims for personal injury, death or damage to tangible property. The Act therefore creates a classification between types of tort claims and requires that apportionment of fault and the rule of several liability be applied to only one type of claim. This classification raises serious equal protection questions.

Pure Economic Loss Claims Not Covered

The kinds of tort claims covered by the Tort Reform Act are described in the Act as ones for "injury or death to a person or harm to property" (AS 09.17.010), or "for personal injury" (AS 09.17.040), or "for personal injury, death, or damage to property" (AS 09.55.170). This language does not usually denote claims where the plaintiff has suffered only economic

continued on page 13

Alaskans join in search for Shawn Sande at Hatcher Pass

By Dennis G. Fenerty

Something terrible happened earlier this winter. Then, something a little wonderful followed that terrible event.

A 20-year-old honor student at the University of Alaska Anchorage became lost in a snowstorm while trying to get in one quick ski run at Hatcher Pass, and he has not been found. A large group of selfless, knowledgeable and talented people gave their time, energy and skills in an unsuccessful search. And the family of the student displayed extraordinary courage and grace in response to the effort to find their son.

The student, Shawn Sande, is, by all reports, popular, well liked, bright, a hard worker, a good and honest friend, and a capable, multi-disciplined athlete and outdoorsman. He was born and raised in Ketchikan by a man who "earns his living on the sea" and by a woman who teaches school. He has an older brother who, though a little smaller than Shawn, carries the same muscular build that took Shawn out into the harsh mountainous blizzard which, it appears, claimed him. Shawn is an Eagle Scout, by God, in this day and age of cynical youthful rejection of all things wholesome and conventional!

Shawn's venture into the mountains is filled with heart rending irony. The boy (I ask Shawn's peers to forgive this description of Shawn; it seems most fitting to those of us who were reckless in the ways of youth too many years ago) was reasonably possessed of outdoor skills. He was taking a wilderness survival class scheduled to meet at 6:30 p.m. Wednesday night (November 2, 1994), but he wanted to get in a quick ski run just before class, as he had done many times before. His parents, knowing of and applauding his love of outdoor adventure, had given him an emergency locator beacon; it was at home. Shawn, alone, ran into a group of snow-boarders while both he and they were headed high up into Hatcher Pass. They leap-frogged with each other for a time but then parted ways with Shawn headed further in. The snow-boarders turned back because of overwhelming white-out conditions.

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President's Column

Bar wars

In my somewhat younger days when I had contemporaries in some form of military service, I used to joke with them that I slept safe and sound at night knowing they were protecting me from war. I trust you have similar feelings about my recent trips to national and regional bar conferences. Rest assured that I followed that old medical maxim of "first do no harm."

I found it most interesting that at both the National Conference of Bar Presidents meetings and the Western States Bar Conference meetings, the number one topic of discussion was the apparent failure of many attorneys to properly communicate with their clients. This, said those in the know, was a proximate and legal cause of increasing dissatisfaction, and, therefore, of increasing public castigation of attorneys. Just as each of you knows with respect to your own client relationships, I know that I'm not the problem — it must be some other attorneys causing all the problems. So what can we do to make those "other" attorneys come to grips with this problem?

Daniel Winfree

We could start by recognizing at least a little of that "other" attorney in each of our own practices. Make a commitment to focus on your clients — one lawyer at a time making a commitment to clients can make a world of difference. Try some variation of the ABA's "Declaration of Commitment to Clients:"

•To treat you with respect and courtesy.

•To handle your legal matter competently and diligently, in accordance with the highest standards of the profession.

•To exercise independent professional judgment on your behalf.

•To charge a reasonable fee and to explain in advance how that fee will be computed and billed.

• To return telephone calls promptly.

•To keep you informed and provide you with copies of important papers.

•To respect your decisions on the objectives to be pursued in your case, as permitted by law and the rules of professional conduct, including whether or not to settle your case.

•To work with other participants in the legal system to make our legal system more accessible and responsive.

•To preserve the client confidences learned during our lawyer-client relationship.

•To exhibit the highest degree of ethical conduct in accordance with the Model Rules of Professional Conduct.

Recognize the most common complaints about attorneys, and avoid being one of those guilty as charged:

1) They take clients for granted;

2) They don't understand clients' needs;

3) They are condescending;

4) They only tell clients what they want to hear;

5) They tell clients what to do;

6) They cannot be found and they cannot be reached;

7) They speak in legalese;

8) They refuse to admit that they may not be the right attorney for the job;

9) They will not admit they do not know the answer;

10) They send useless bills;

11) They talk too much; and

12) They forget what matters.

Show some appreciation for your clients. Give clients a more personal touch. Have a better bedside manner. Visit their offices. Keep in touch. Learn to listen. Know what clients believe is important. Say what matters. Ask a client's opinion. Be cost-conscious, and even do something for free. Go the extra mile, because just like an unhappy client will tell everyone about the experience, so will a happy client.

Now, aren't you glad I went to those meetings and provided you with all these neat client relationship tips? I thought so. See you at the Bar Convention in Fairbanks, May 11-12.

Editor's Column

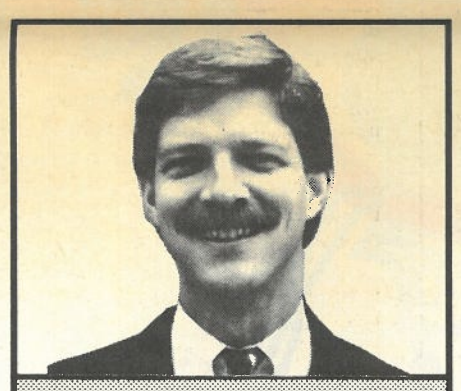
Kudos to the free West Editor Exchange

It's very rare that the Bar Rag gets to break a story, especially one involving the O.J. Simpson trial. Throw in such weighty and diverse elements as cheetahs, former Surgeon General C. Everett Koop, and pickets at the U.S. Supreme Court, and it's hard to believe that the *Daily News* has yet to pick the story up.

But it hasn't, so here goes. All we have to do is remember the four key elements of professional journalism, right? Who, what, where, when, and why. Okay, the five key elements. Oh yeah, and how much. As I said, all we have to do is remember the six key elements of professional journalism.

The "what" is the Editor Exchange, an extravaganza hosted annually by West Publishing Company. The "where" is the Willard Hotel in Washington, D.C. The "when" is February 15-19, though the first 23 hours— the time it took me to get from here to there — seemed a whole lot longer. The "who" is partly me, your editor, lost among 91 other editors of legal publications from across the country, from the *ABA Journal* at one end of the spectrum (in terms of glossiness and substance) to— well, to the *Bar Rag* at the other end. The "who" also includes a dozen West employees to run things, a raft of waiters, bartenders, cooks, and bottlewashers, Professor Arthur Miller, the satirical singing group The Capital Steps, and the press officers of the U.S. Supreme Court, among others.

The "why" of the Editor Exchange, according to West, was to "provide a forum for editors from bar associations and private publishing ventures across the country to discuss issues surrounding their publications and the legal publishing business as a whole." And that's what we did. We oohed, aahed, and gagged over each other's publications. We learned about copyright issues, readership surveys, information sources, and meeting deadlines. We emerged goggle-eyed from fast-fingered demos of new-tech publishing softwear.



Peter Maassen

I was inspired. Oh, what the *Bar Rag* could be with just a little creativity, just a paid reporter or two, just a big slug of dough! Why, we could report hard news! We could buy a press van! We could attract big advertisers! We could shape public opinion, build a big plant, destroy reputations! We could be a monthly, or a weekly, or— shoot, why not— a daily! At next year's Exchange, the *Bar Rag* would be— The Success Story! The proud readership would vote me a salary!

Time heals all seminar-generated enthusiasms, as we know. I have come to grips with the limits of our time, our budget, our mission. But if you notice any incremental improvements in the *Bar Rag* over the next several issues, well, kudos to the West Editor Exchange.

So what else did we do, and, more importantly, did your bar dues pay for it? We ate incredibly well. We met the U.S. Supreme Court's press officers, who briefed us on press/court protocol and kept the gift shop open late so we could buy gavel-shaped pencils and shirts that say "Grandpa argued before the Supreme Court and all I got was this lousy T-shirt." We had dinner at the National Press Club. We took a bus tour of the city and peered through rain-streaked windows at places where our bus driver assured us we would see massive monuments if it weren't so dark. We heard Chuck Rosenberg, former advisor for the TV show "L.A. Law," author of *The Trial of O.J.*, and legal commentator for E! Entertainment Network's O.J. coverage, explain how the Trial of the Century is going to shape people's perceptions of lawyers, the legal system, and American justice for decades to come, and what effect that will have on the jurors you pick for your next trial here in Alaska. We heard Arthur Miller moderate a panel discussion of journalism and ethics, taking head-on the perennial issue of what to do, as a lawyer and a journalist, when someone who once leaked you a story in violation of the attorney-client privilege is put up for the Supreme Court. And the Capital Steps sang political satire for us in their inimicable and fiercely bipartisan style.

So, you ask, what about C. Everett Koop and the cheetahs? I shared an elevator with the former and saw the latter at the National Zoo. Both largely ignored me.

The pickets, however, were another matter. Both the Willard Hotel and the Supreme Court were stalked by members of the American Association of Legal Publishers, an organization combatting West's *de facto* monopoly over legal citation forms. As we came out of the Supreme Court to board the bus, the AALP pickets chanted, in an amicable and slightly bemused way, "Ho ho, hey hey, West is paying for your stay." Which was true. Which was apparently supposed to make us feel sleazy and suborned.

Not me. The *Bar Rag* remains staunchly independent. It is no mere pawn of its advertisers. We can be boondoggled, but we cannot be bought. We show favor to no one.

But gee, West, if any of you are reading this, I sure would like to be invited back next year.

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).

The *Alaska Bar Rag* is published in January, March, May, July, September, and November.

Letters from the Bar

Clark responds

I have read Carmen E. ClarkWeeks response to my piece on domestic violence (*Bar Rag*, Jan.-Feb., 1995). And I feel that a reply is in order. I applaud her department if even one out of three of those prosecuted for domestic violence assault are women. However, according to a network documentary last year, national studies have shown that about as many men are assaulted by women as are women by men. I hope that her numbers are representative of an annual average. But I doubt it, and even if they are, her department has a long way to go before as many women are prosecuted as men. I've never observed so many women being prosecuted for assault. Ms. ClarkWeeks should invite me to observe next time this happens.

Ms. ClarkWeeks accuses me of dividing people "into alienated groups of 'us' and 'them'." Our social fabric began ripping down the middle along gender lines many, many years ago — long before I did my article for the *Bar Rag*. Massive damage has resulted to our society, in which 70 percent of all children now grow up in broken homes, and many without any male influence.

Radical feminists have long touted the philosophy that a father's influence is properly replaceable with child support money or welfare checks. Our major cities have been ravaged with spin-off from this destabilizing philosophy, which has opened our homes to other bad influences such as drugs, alcohol, and sexual and physical abuse. Back when father knew best, we didn't suffer so many problems.

All I did was to point out that domestic violence has no causal connection with gender. It isn't a *male* problem, it is a *people* problem.

And, by the way, ordering men to attend the "Male Awareness" program is a completely sexist approach. "Male Awareness" isn't the problem. Such a title is totally expressive of feminist sexist gender bias. It is also the expression of political dogma from the almost one-party socialist state that recently fell on hard times. Hoorah!

Furthermore, it is inappropriate to subject men to concentration-camp tactics for "re-education" through the "male awareness" program. Any balanced counseling program should not be presented by ultra-feminist political activists such as staffers from certain hateful women's support groups. These programs should be presented by politically gender-neutral counselors or psychologists without ties to the women's movement. Men shouldn't be subjected to hostile antagonists whose sole duty it is to spend eight hours a day bashing their male identities.

The male victims of these group tyrants easily recognize the bias, anger and hate. And incorporating an individual's subjection to political dogma from the socialist left into the requirements of judicial decrees clearly puts our courts on the side of the socialist left. This makes the court itself a "revolutionary tribunal" in such matters, with clearly identifiable loyalties to the socialist left. In the words of my former professor of sociology 20 years ago, "America has been subjected to the very finest form of Communism in the world." It is time to take down the red flag from all of our institutions.

I have no doubt that Ms. ClarkWeeks is shocked that a *man* would dare to publicly arise and speak out on the issue. Most men I know simply seethe in silence. And for good reason. Our society has been terrorized by "gender policemen" whose self-appointed duty is to impose on all of us an unscientific social fiction about sexual differences to support the dogma and agenda of one-party gender politics. And the sanctions have been harsh, ranging all the way from social ostracism to scathing admonitions from seats of power, to even outright political and economic repression — all in a country that has hypocritically called itself an "open" society. And in the midst of all this, men as a class have been systematically belittled through institutionalized group libel.

I see in the same issue of the *Bar Rag* an article entitled "Gender Equality in the Courts: A Preliminary Look."

To quote that article, "the task force defines gender bias as any action or attitude based on preconceived notions about the nature, roles, and abilities of men and women rather than upon evaluations of individuals."

Perhaps prosecuting attorneys should take down all of those posters depicting men as a bunch of drunken, woman-beating baboons. Because such posters obviously express gender bias, according to the definition given by the task force. The reference to "Male Awareness" should also be stricken. Anyway, who authorized our courts and criminal justice systems to become bully pulpits of political "correctness" as defined by the socialist left?

A sizable number of men in society are pretty fed up with the hate campaign that has been launched against us over the last 25 years in an effort to further the women's movement. And why shouldn't we be angry about it after so many years of repression? Many American men are simply tired of being ridiculed and constantly told how "bad" we are. It has never bothered me to see women treated equally in the workplace. But it bothers me to see men repressed.

Finally, Ms. ClarkWeeks accuses me of "resorting to crude stereotypes of southern stupidity," and of advocating that "men should enjoy some preferences." In the first place, I didn't resort to any stereotypes of southern stupidity; I called attention to the fact that a superior court judge did so by entitling his presentation "Billy Bob Wants a Divorce." That was an obvious expression of gender bias.

I challenge Ms. ClarkWeeks to point out one single line in my piece advocating any "preference" for men, I asked for equality. However, if Ms. ClarkWeeks defines "equality" as "preference," then she has made my point. Women have been given preferences in the legal system for long enough, all in the name of "equality." This, while men have been reduced to stooges and courtroom monkeys through gender bias and group libel.

It is unfortunate that I have had to shock the sensibilities of Ms. ClarkWeeks and others like her. But those who disagree with me should remember that there are *always* two sides to every problem. Ultra-feminists, and other die-hard socialists, can't expect to have everything only their way forever, without having some men become fed up and become vocal on the opposing side.

Ms. ClarkWeeks is correct. Society is badly divided. But all I did was call attention to that fact, which is the necessary first step if there is ever to be anything done about it.

— Marvin H. Clark, Jr.

Announcing the "So What Are We, Chopped Liver?" Contest

Need a lawyer? The Alaska Legislature sure did, and pronto, when it decided to intervene in *State of Alaska v. Babbitt*. By last count, there were 2,229 active, in-state members of the Alaska Bar Association. How many of us did our Legislature call before deciding that it had to turn to Robert Bork and his D.C. law firm for representation? Did Drue Pearce call you first? If so, what excuse did you give her?

Send the *Bar Rag* your answer to the question, "Why I turned down the Alaska Legislature," and receive a chance to win an all-expense-paid trip to Juneau (contingent upon the Legislature voting the funds). Responses may be edited for length and decency.

Thank You

The Board of Directors and the staff at Alaska Legal Services Corporation would like to thank the following colleagues for their generous contributions to our 1994 fundraising campaign. Thanks to these considerate people, we have raised over $24,000 to assist us in delivering legal services to low-income Alaskans.

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Estate Planning Corner

Powers of appointment

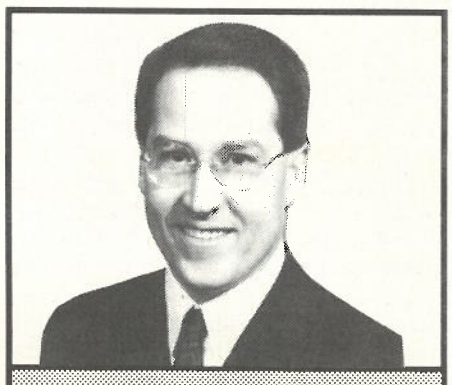
When setting up trusts, clients often give beneficiaries powers of appointment over trust principal. These powers are held in a nonfiduciary capacity and add flexibility to trusts.

For example, suppose a client creates, under his Will or revocable living trust, a trust for his surviving spouse. During the surviving spouse's life, all net income must be distributed to her, and trust principal is available for her health and support. In addition, the surviving spouse has the power to designate who will take any remaining trust principal upon her death. This power may be exercised only under her Will and only in favor of the client's descendants. To the extent the power is not exercised, any remaining trust principal is to be distributed to the client's descendants, *per stirpes*.

Here the client has given his surviving spouse a testamentary special power of appointment. It is called testamentary, and not presently exercisable or *inter vivos,* because it may be exercised only under her Will. It is called special, and not general, because his surviving spouse cannot appoint the property to herself, her estate, or the creditors of either.

Powers of appointment add flexibility into the trust arrangement. For example, suppose after the client dies that one of his children becomes disabled without any disability insurance or other means of support. Under her Will, the surviving spouse could exercise her power of appointment in favor of that child, to the exclusion of other descendants who have adequate means of support.

Powers of appointment also reinforce family bonds. For example, suppose under our facts that the client's children are from a prior marriage. After the client's death, his children may resent having what they perceive as their inheritance in trust for the life of their stepmother. But when they realize that their stepmother



Steven T. O'Hara

could exercise her power of appointment in favor of one of them or a grandchild, to the exclusion of all other descendants, they may think twice before being hostile to her. Indeed, they may decide to visit her, and check on her treatment in the nursing home, more than they otherwise would.

Caution should always be exercised when creating powers of appointment. For example, if the client broadens the power so his surviving spouse could appoint the property to anyone, including her estate, then she will be considered to hold a general power of appointment (IRC § 2041(b) (1)). As a result, the surviving spouse would be considered the owner of the trust for estate and generation-skipping tax purposes (IRC §§ 2041(a) & 2652(a)(1)).

Even where the power of appointment is clearly a special power and not a general power, there are tax traps. For example, the Tax Court has held that the exercise of a presently exercisable special power of appointment by the beneficiary entitled to all the trust's income is a gift by her of her income interest (*Estate of Regester v. Commissioner*, 83 T.C. 1 (1984)). Thus her exercise of the power may generate a gift tax.

The IRS has extended the principle of this case. By private letter ruling, the IRS has said that the exercise of a presently exercisable special power of appointment by a beneficiary entitled to distributions only in the discretion of the trustee is a gift by the beneficiary of her interest in the appointed property (Ltr. Rul. 8535020 (May 30, 1985)). Applying this ruling may be impossible, since the value of the beneficiary's interest would appear to be unascertainable where, as in the ruling, the trustee has unlimited discretion over distributions.

Another trap is even more esoteric. Under the so-called Delaware Tax Trap, the holder of a special power of appointment will be considered to have held a general power, and thus will be subject to gift or estate tax, if the holder exercises the power and creates in another a presently exercisable general power of appointment (*See* IRC §§ 2514(d) & 2041(a) (3), AS 13.06.040 & AS 34.27.055 (effective January 1, 1996)).

Like any trap, the Delaware Tax Trap is only a trap for those who fall into it unwittingly. Intentional use of the trap can minimize transfer taxes by enabling the power holder to elect, in effect, to pay gift or estate tax where such tax would be lower than any otherwise applicable generation-skipping tax (Blattmachr and Pennell, *Using "Delaware Tax Trap" to Avoid Generation-Skipping Taxes, The Journal of Taxation* at 242 (April 1988). While a full explanation may be considered in a future issue of this column, suffice it to say at this juncture that the Delaware Tax Trap is another example of how powers of appointment add flexibility to trusts.

Homer, North Dakota have Symposia

Kenai Peninsula College, in association with Kachemak Heritage Land Trust, will bring Stephen J. Small, to Homer on April 14, to conduct a seminar for professionals who advise clients about decisions relating to their land.

Stephen J. Small has captivated audiences nationwide with his remarkable ability to transfer practical information on complex taxation issues through observations drawn from his extensive practice in income and estate planning. He wrote the IRS regulations concerning the deductibility of conservation easements as an attorney advisor with the IRS. He is the author of *The Federal Tax Law of Conservation Easements* and also *Preserving Family Lands,* which sold more than 50,000 copies in its first edition, virtually by word of mouth.

This all-day seminar covers the legal and tax implications of private land conservancy initiatives.

This seminar has been approved for 5 CLE credits by the Alaska Bar Association and State Bar of California.

Registration deadline is March 30; call KPC at (907)235-7743. Alaska-Siberian Travel and Aurora Travel will offer special airfare, room and Homer tour/ activity packages to conference participants--call them for details at 235-8337 (AST); 235-2111 (Aurora Travel).

•

The *North Dakota Law Review* is coordinating a symposium that will raise and discuss probing legal issues in the areas of land use, resource development, tribal rights, conflicts of interest, and jurisdiction.

The symposium Conference will be held April 20-22, at the University of North Dakota; a law review symposium issue will be published in June 1995.

The project is based on a recent federal court case, *Boyd & McWilliams Energy Group, Inc. v. Tso,* No. 93-C-1083A (D. Utah 1993), and hypothetical variations of the case. The project and hypothetical variations were brought to the attention of the *North Dakota Law Review* by Robert Laurence, Professor of Law at the University of Arkansas, and Sam Deloria, Director of the American Indian Law Center at Albuquerque.

For further information contact Angie Elsperger, Symposium Editor, *North Dakota Law Review*, Box 9003, Grand Forks, ND 58202. (701) 777-2941

The mystery of Alaska's $500,000 damages cap

By Kenneth M. Gutsch

Alaska's $500,000 cap on non-economic damages (AS 09.17.010) has been with us since The Tort Reform Act of 1986. The cap may be of critical import in evaluating serious personal injury cases. Yet, the Alaska Supreme Court has never had the opportunity to clarify the operation of the cap, impelling litigants to debate the critical scope and operation of the cap often at the close of trial, when the court entertains argument on the appropriate instructions for the jury. This article will alert practitioners to some of the prominent issues raised by the $500,000 cap and suggests a common sense application based on the plain language of the statute.

AS 09.17.010 contains sections (a), (b), and (c). Section (a) provides that "in an action to recover damages for personal injury based on negligence, damages for non-economic losses shall be limited to compensation for pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life and other non-pecuniary damage." AS 09.17.010(a)

Section (b) of AS 09.17.010 discusses the cap and provides that "the amount of damages awarded by a court or jury under section (a) may not exceed $500,000 for each claim based on a separate incident or injury." However, section (c) provides an exception, and states that "the limit under (b) of this section does not apply to damages for disfigurement or severe physical impairment."

To apply the cap, some courts have submitted a special verdict form to the jury asking whether the plaintiff suffered disfigurement or severe physical impairment. If the jury answers "yes", then the cap is automatically disregarded by the court.

However, such practice arguably belies the plain language of AS 09.17.010(c). According to subsection (c), "The limit...does not apply to damages for "disfigurement or severe physical impairment." Thus, the court should ask the jury in a special verdict form how much, if any, of the non-economic damages were awarded for "disfigurement or severe physical impairment". The damages identified by the jury in that special verdict would then fall outside the cap.

AS 09.17.010(a) also arguably contemplates the apportionment of damages for disfigurement or severe physical impairment. AS 09.17.010(a) itemizes various categories of non-economic losses: "...damages for non-economic losses shall be limited to pain, suffering, inconvenience, physical impairment, disfigurement, loss of enjoyment of life and other non-pecuniary damage." Thus, "physical impairment" and "disfigurement" are identified as distinct, awardable non-pecuniary damages in AS 09.17.010(a). AS 09.17.010(c) specifies the exception of damages for "disfigurement or severe physical impairment" perhaps to becontrasted and distinguished from those other non-economic damages subject to and itemized in subsection (a).

The supreme court has acknowledged distinctions between various categories of non-economic loss. In *Buoy v. Era Helicopters, Inc.,* 771 P.2d 439, 447 (Alaska 1989), the court acknowledged the distinction between loss of enjoyment of life and pain and suffering. In *Martinez v. Bullock,* 535 P.2d 1200, 1208 (Alaska 1975), the supreme court acknowledged "emotional discomfort traceable to disfigurement."

Further, the supreme court has assumed apportionability of various non-economic losses. *See Shultz v. Travelers,* 754 P.2d 265, 267 (Alaska 1988) ("The parties then engaged an economist, Dr. Richard Solie, to project the plaintiffs' economic losses and stipulated the values of plaintiffs' non-economic losses." (Emphasis Added)

Further, Colorado courts have construed a similar Colorado statute limiting non-economic damages to $250,000, with an exception for damages for physical impairment or disfigurement. In *Herrera v. Jane's Towing,* 827 P.2d 619 (Colo. App. 1992), the Colorado court applied the exception to the cap by requiring that the jury apportion damages separately for physical impairment or disfigurement:

> Here, it is undisputed that plaintiff suffered severe physical impairment and disfigurement from which damages of a non-economic nature could naturally flow. Hence, to harmonize § 13-21-102.5(2) (b) and (3) (a) with (5) and give effect to all three subsections, it is necessary to determine separately damages of a non-economic nature for physical impairment and disfigurement from the non-economic loss or injury defined in § 13-21-102.5(2) (b). By such means, the limitation on recoverable damages contained in § 13-21-102.5(3) (a) and the unlimited recovery for physical impairment and disfigurement as provided for in § 13-21-102.5(5) can be harmonized. *See* CJI-Civ. 3rd 9:40B(1991); *see also Hoffman v. Schafer,* 815 P.2d 971 (Colo. App.

Continued on page 15

Solid Foundations

Constitutional challenges continue

The Washington Legal Foundation (WLF) continues to challenge the constitutionality of Interest on Lawyers' Trust Accounts (IOLTA) programs. It is the most organized opponent of IOLTA programs. Its strategy is to file suits challenging IOLTA programs in several jurisdictions in an attempt to create a split in the circuits, thereby hoping to achieve U. S. Supreme Court review.

In 1993, the WLF sued the Massachusetts Bar Foundation. The First Circuit Court of Appeals rejected both proffered arguments: (1) the court ruled that the deposit of clients' funds into IOLTA accounts does not transform a lawyer's fiduciary obligation

Mary Hughes

to a client into a formal trust with the reserved right by the client to control the beneficial use of the funds; and (2) the court determined that the collection and use of the interest by the IOLTA program was not financial support by the clients and, as a result, the program does not violate the First and Fourteenth Amendments.

Having lost in Massachusetts, the WLF challenged the IOLTA program of the Texas Equal Access to Justice Foundation in 1994. The United States District Court for the Western District of Texas, Austin Division, upheld the constitutionality of the Texas IOLTA program in granting defendants' motion for summary judgment on January 19, 1995.

The court ruled that the Texas IOLTA program does not take client money without due process of the law in violation of the Fifth Amendment because clients have no property interest in the income that IOLTA accounts generate. Because no client property interest exists, the program does not violate the clients' Fifth Amendment free speech or free association rights. Further, the court determined that even if a mandatory IOLTA program does force attorneys to associate with grant recipient organizations, such a compelled association does not violate the First Amendment. The Fifth Circuit Court of Appeals will undoubtedly have an opportunity to also opine on both issues.

Since 1981, the IOLTA program has been unsuccessfully challenged several times. With each suit, the attacking legal arguments become more creative, yet courts rely on the now rather extensive case precedent to uphold the IOLTA program's constitutionality.

The limited liability company in the USA

By William D. Bagley

Alaska has adopted new Limited Liability Company legislation (AS 10.50) which becomes effective July 1, 1995. On April 19, 1995, the Business Law, Estate Planning & Probate, and Tax Law Sections of the Alaska Bar will present a half-day CLE in Anchorage, "Limited Liability Companies: The New Legislation in Alaska." Call the Bar office at 907-272-7469 for details.

Forty-six states and the District of Columbia have now enacted legislation creating the Limited Liability Company ("LLC"), a new business entity in the United States. Within a year all states will have Limited Liability Company Acts.

This important statutory business entity offers the advantages of (l) limited liability; (2) flexibility; and (3) partnership tax treatment. It is the best alternative in most business situations.

How did the LLC revolution in the United States get started? Where did it originate? Where are we now? Where do we go from here?

A. The History of the LLC in the USA

Wyoming in 1977 became the first state to enact a limited liability company statute. This Act was a result of the direct effort of Hamilton Brothers Oil Company, a company involved in international oil and gas exploration using Panamanian limited liability companies. Hamilton was about to embark in a joint venture for oil and gas exploration in the United Kingdom Sector of the North Sea, and preferred to operate through a United States entity. With the assistance of Peat, Marwick, Mitchell and Co. in Dallas, Texas, Hamilton Brothers Oil Company drafted legislation which was presented to the Wyoming Legislature and adopted without amendment.

> *"Each state has a different statutory approach to the formation and operation of LLCs."*

On September 2, 1988, eleven years later, the Internal Revenue Service finally issued its Rev. Rul. 88-76 on a Wyoming LLC, finding and holding that if a company formed under the Wyoming Act avoided two of the four critical corporate characteristics (continuity of life, centralized management, free transferability of interest and limited liability), it would be classified as a partnership for federal tax purposes. The result is a flexible statutory business entity that combines the best features of the corporation and of the partnership.

Prior to the IRS 1988 Wyoming Revenue Ruling, the Florida Limited Liability Company Act was adopted to facilitate its business with Central and South America. Forty-five states have now adopted limited liability company acts. The sequence of state adoption is: 1977 Wyoming; 1982 Florida; 1990 Colorado and Kansas; 1991 Nevada, Texas, Utah, and Virginia; 1992 Arizona, Delaware, Illinois, Iowa, Oklahoma, Maryland, Minnesota, Louisiana, Rhode Island, and West Virginia; and in 1993 Alabama, Arkansas, Connecticut, Georgia, Idaho, Indiana, Michigan, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, South Dakota and Wisconsin, 1994 Washington, Ohio, Tennessee, Mississippi, Kentucky, Maine, Alaska, South Carolina, New York and California.

Though the Internal Revenue Service has not changed its 1988 Revenue Ruling on classification for federal tax purposes, *each state has a different statutory approach to the formation and operation of LLCs.* On November 19, 1992 a subcommittee of the ABA Business Law Section issued its Prototype Limited Liability Company Act. The ABA prototype, and its earlier drafts, generated many provisions now found in state acts. Its text and annotations provide useful legislative history. A "Uniform Limited Liability Company Act" was "promulgated" in the fall of 1994 by the National Conference of Commissioners on Uniform State Laws.

As a result of the "clarification" in the Rulings (see especially Rev. Rul. 93-91 issued for a Utah LLC, and Rev. Proc. 94-46 on "majority in interest") the threshold to avoid free transferability of interest and continuity of life has been relaxed and a "safe harbor" on "majority in interest" is identified. All state statutes are in the process of amendment to reflect this greater flexibility.

B. The IRS: The Common Denominator

In its 1988 Wyoming Ruling the IRS first applied its four factor "resemblance test", under the IRS "Kintner" Regulations, to determine whether the entity was to be classified as a partnership or a corporation for tax purposes. 26 CFR 301.7701-2(a). The practitioner must fit tile window afforded by the Internal Revenue Service *while following the state act.* In many cases, compliance with the state act does not insure favorable tax treatment.

The IRS continues to provide reaffirmation and expansion of the favorable position it took for the Wyoming company on September 2,1988 in Rev. Rul. 88-76. *The seventeen IRS-LLC rulings are:* Wyoming (Rev. Rul 88-76), Germany (Rev. Rul 93-4, a modification of Rev. Rul. 77-214), Virginia (Rev. Rul. 93-5), Colorado (Rev. Rul. 93-6), Nevada (Rev Rul. 93-30), Delaware (Rev. Rul. 93-38), Illinois (Rev. Rul. 93-49), West Virginia (Rev. Rul. 93-50), Florida (Rev. Rul. 93-53), and Rhode Island, (Rev. Rul. 93-81), Utah (Rev. Rul 93-91), Oklahoma (Rev. Rul. 9392), Arizona (Rev. Rul. 93-93), Louisiana (Rev. Rul. 94-5), Alabama (Rev. Rul. 946), Kansas (Rev. Rul. 94-30) and New Jersey (Rev. Rul. 94-51).

C: A Business Tool

The LLC is a statutory business entity that fits between the corporation and the partnership. It fills the business need recognized, but not satisfied, by the S corporation and the limited partnership. The LLC advantages are causing it to replace the general partnership, the limited partnership, the S corporation, and the closely held corporation. It is also the vehicle of choice for estate planning and for joint ventures, especially corporate joint ventures.

CONCLUSION

The joy of the LLC is total contractual flexibility. This allows the lawyer an opportunity to tailor an entity to meet the special needs of each client. Situations not specifically addressed by the state statute may result in some uncertainty because LLCs are new to the USA, yet this is an advantage in cases where flexibility is important. Relevant concepts from partnership and corporate law provide direction that can be drafted into the Articles of Organization or the Operating Agreement. As a result of its flexibility, limited liability, and partnership tax treatment, the LLC is a better alternative in most *business situations.*

A practicing attorney in Cheyenne, Wyoming, Mr. Bagley is co-editor of the *Limited Liability Company Reporter* and co-author of *The Limited Liability Company,* Second Edition, James Publishing Company 1994. He is a member of the *Committee on Partnerships & Unincorporated Organizations,* and of the *Subcommittee on Limited Liability Companies* of the *ABA Section of Business Law.* His telephone number is (307) 634-0446.

Getting Together

Settlement conferences are not midiation

Have you ever noticed that parties are unable to distinguish between the results from a trial and the outcome of a court-based settlement conference?

In both cases, people often feel that the end result was something that was "done to them" at the courthouse, with little participation on their own part. They have little investment in the outcome of the process, except to feel obligated to follow the order of the court because the law requires them to do so. Indeed, more than a few parties attempt deliberately to sabotage the court's orders, because they feel that the orders were made arbitrarily and without considering their unique circumstances.

Of all of the myths and misconceptions about mediation, the one that is the most pervasive — especially among attorneys and judges — is that mediation is simply a form of private settlement conference. The myth is a difficult one to overcome, because it contains a modicum of truth.

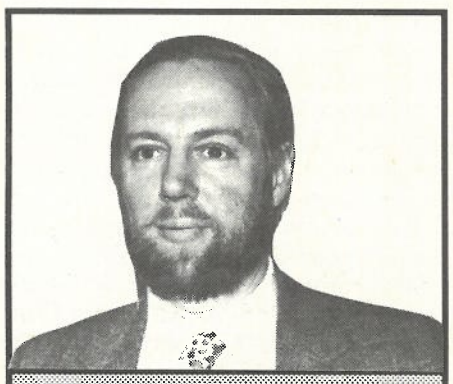
It is important to understand the differences between the two processes.

Mediation has much to offer for disputing parties beyond the mere legal resolution of their dispute. Many modern mediators consider a mediation outcome that does no more than to merely resolve the legal dispute between parties (as many successful settlement conferences will do) to be a failure rather than a success.

The Elements of Mediation

There are a number of elements to a successful mediation in the modern style:

- A structured negotiation process. The mediator must be trained and experienced at guiding the disputing parties through a formally structured bargaining process.
- A voluntary process. Where any party can withdraw at any time.
- Facilitated by a neutral third party. The mediator must be perceived by all parties as neutral and fair.
- Confidential. Where parties can discuss their concerns candidly, without fear of the information being later used against them.
- Non-coercive. The parties must make decisions on their own, with no element of force or arm-twisting, certainly not by the mediator.



Drew Peterson

Settlement Conferences are not Mediation

Settlement conferences can fail to meet the tests of a successful mediation on all counts, most significantly the last one. Some examples show why.

Structured Negotiation . Most judges have not been trained at guiding disputants through a structured negotiation process. They tend to jump right to the bottom line, without allowing time for the parties to familiarize themselves with each other's point of view, and to seek options for mutual gain. Judges are extremely busy and have little time for the niceties of a collaborative negotiation process, even when they have been trained in its dynamics. They simply do not have sufficient time to make the full mediation process work.

Voluntariness. While settlement conferences may indeed be voluntary, they often do not feel voluntary to the parties as they go through the process. Parties may be formally ordered to appear. Some settlement conferences are actually held in the courtroom, with the judge on the bench in black robes. Even if held in chambers with the judge in shirtsleeves, the trappings of the court's power are omnipresent. Voluntariness of the process is often not discussed. Many parties simply do not feel that their presence is voluntary and that they can withdraw without consequence, even though that is probably the case.

Neutrality and Impartiality. In many ways judges are not neutral facilitators. They also may not be perceived as being fair and impartial. Judges have a vested institutional prejudice in favor of efficient management of cases, because of the crush of their calendars. Judges are often perceived by parties to be more concerned about judicial efficiency than in the fairest resolution of their case.

Similarly, the judges are not always perceived as neutral and impartial. The attorneys have their own opinions of the judges, not always favorable. Settlement conference judges are often not freely selected by the parties, and the parties and their attorneys may not be pleased with the judge chosen. While judges are held in high esteem by the bar and public in general, this is not always true in a particular case.

Confidentiality. Settlement conferences also may not be confidential. Some settlement conferences are held with the assigned trial judge. Such cases are likely to be limited for the parties to candidly discuss the merits and demerits of their case. Candor is critical to discovering mutual gain-solutions which can satisfy the interests of both parties. The parties need to be willing to go behind their formal positions to explore the broad goals and interests underlying their posturing for trial. Even where confidentiality of the settlement conference process does exist, it is not always made clear to the parties.

Coerciveness. Finally, settlement conferences tend to be coercive in their resolution of disputes. This is the element of settlement conferences that most leads to their being perceived by parties as something that is "done to them" in the courthouse. Judges have great power and are sophisticated in the use of that power. They can bring much pressure to bear on parties to resolve their case. The use of certain techniques such as separate caucuses with the parties can increase the pressure. Attorneys also play a major role in the application of pressure in settlement conferences. The judges and attorneys often do most of the talking. In the end, the parties feel under great pressure to settle the case. But they often have buyers remorse when looking back a few days later on the resolution reached through the settlement conference process. That is exactly why the settlements are put on the record immediately as soon as they are made: So the litigants cannot later change their minds.

The Value of Settlement Conferences

By no means is any of this to imply that settlement conferences are not valuable to the litigation system. Most cases should be settled, or the system would collapse under to the crush of cases. Good settlement judges are highly valued by the bar and general public. And some settlement judges incorporate more of the above elements of modern mediation than do others.

Yet it remains true that there is a substantial difference between settlement conferences and mediation. Mediation in the modern style often can generate better satisfaction of litigants with the resolution of their disputes than can settlement conferences. That is exactly what studies of successful mediation have found. Disputants are better satisfied with their own resolution of disputes. They are also more likely to comply with the terms of an agreement which they have reached on their own, without pressure. This will further reduce the pressures on the court down the line.

Mediation does not always work. People are not always willing to engage in a structured collaborative process. Settlement conferences will always be necessary and appropriate in many cases. When it does work, however, mediation is a valuable tool for the bench and bar.

Step out, belly up and help Bean's Cafe

By Joyce Weaver Johnson

Want to find out why country and western music is winning so many new converts? Try line dancing? Eat some great barbecue? You can have a great evening out doing all this — and help Bean's Cafe at the same time.

Bean's, which feeds Anchorage's hungry and homeless, will put on its third annual Beans & Jeans Spring Dance with the help of the Young Lawyers' Section of the Anchorage Bar Association. It's time now to invite a date for the event scheduled from 6:30 to 11:30 p.m. Saturday, April 1, at the ARCO Atrium, 700 G Street.

Buy your tickets ($25 donation each) from a young lawyer, or stop by Metro Music and Books, 530 East Benson Boulevard, or Brewster's Department Stores, 3825 Mountain View Drive and 1320 Huffman Park Drive. Or call Bean's at 274-9595.

The Western-theme dinner includes all-you-can-eat barbecued chicken and ribs, along with baked beans, corn on the cob, cole slaw, corn bread and cobbler for dessert. A no-host bar will offer beer and wine, and non-alcoholic beverages will be offered at no charge.

The Bobby Mitchell Band will play; line dance instruction will make this a terrific opportunity for timid dancers to give it a try.

Live and silent auction items will range from the very practical — such as automotive oil changes — to the pure fun, such as fly-in fishing trips.

Last year's event raised $24,000 and helped Bean's diversify its funding base, helping Bean's needy clients weather tough times.

Bean's provides hot, nutritious meals and a warm and safe day shelter for homeless individuals and families. Last fiscal year, Bean's served more than 200,000 meals to almost 4,000 persons. Bean's also provides referrals to social services and medical help needed by its clients. Most of the program's food is donated by the local community. Bean's relies heavily on the public, as well as clients, to provide daily volunteer assistance.

(Editor's note: Joyce Weaver Johnson is a associate at Richmond and Quinn and board member of the Young Lawyer's Section. She does not know how to line dance — yet.)

Computer litigation support for small to medium lawsuits

By Joseph L. Kashi

Litigation essentially involves the gathering, storing, retrieving and analyzing of testimony and factual patterns. Traditionally, litigation support was tedious work done by brute human force. We employed many associates and paralegals and we worked too many hours. Our basic litigation support tools were the written deposition summary and a list of exhibits.

"In order to use litigation support efficiently throughout your office, so that the efforts of everyone build upon each other's work, you really need to network your computers and use networked programs."

Litigation support can be either simple or unbelievably complex and expensive. In order to be useful and cost effective, it must be scaled to the size of the particular case that we are using. A simple, searchable note program may be all that we need in a small matter. On the other hand, nothing short of a huge database of exhibits coupled with CD-ROM imaging will work in a case the size of the Exxon Valdez litigation. In order to use litigation support efficiently throughout your office, so that the efforts of everyone build upon each other's work, you really need to network your computers and use networked programs.

There are many programs that provide support for large, heavily litigated cases involving scores of depositions and thousands of documents. But, how can we economically bring the power of desktop computing to the small cases that we might otherwise continue to prepare with pen and paper? We probably already have appropriate tools at hand.

Outlining Programs

On the simplest level, outlining programs are indispensable for litigation support. We all attempt to structure our cases in a logical and straightforward way. As school children, we did this by making outlines. That key to logical flow and organization still holds true now, but we have computers to assist us. An old shareware program, PC-Outline, still works well for DOS users. You can find it on bulletin boards. As a shareware program, you can copy it and distribute it, paying for it only if you actually use the product. Newer versions of word processing programs such as Microsoft Word and WordPerfect contain powerful outliners integrated with their word processing capabilities, and these outlining tools are something you really should use on a regular basis. A few low-end litigation support programs like Gravity Verdict also include outliners. I cannot comprehend why more expensive ligation support programs do not include outliners.

Storing and Searching

Although outlining is useful in all cases, you'll need some way to retrieve specific bits of information or deposition testimony. One useful way to retrieve data is to get floppy disk copies of every deposition in a case from the court reporter in an easily searchable format such as WordPerfect 5.1 or WordPerfect 6.x. Put these electronic deposition transcripts in a separate subdirectory on your computer network and as time permits, index them by inserting in brackets appropriate search terms and vocabulary. Often as we know, witnesses do not use precise language or the same terms we would use, so adding some index terms to be found in a later search is probably more important than basic full-text searching of the actual transcript.

In order to search through several documents at once, you will need to use a text search program. One rather good one is the quick index and document search feature in later versions of WordPerfect 6.0 for DOS and WordPerfect for Windows. This Quick Finder is among the better text search products on the market, although there are some dedicated ones such as ZyIndex. I still like an older product no longer on the market, Lotus Magellan, but it does not work with WordPerfect 6.x. If you are using IBM's advanced OS/2 operating system, then you could look into their products SearchMaster/2, which allows you to search not only for a specific term, but to build a dictionary of synonyms which will also be searched when you ask for any documents using the primary term. This is a very useful and powerful concept.

"Fuzzy" searching, where partial matches are sought, is a particularly useful tool. PowerSearch, Magellan and some other products allow fuzzy searching. There are several other text search programs on the market that would be useful in connection with indexing, including Isys and the basic text search programs built into Norton Utilities or OS/2. Where possible, use a product that indexes documents, rather than making a simple linear search. Indexing is much faster.

Indexing

Because computers can only find the indexing terms actually in the document, it's crucial that both the litigator and the person indexing depositions use the same indexing terms and definitions. That consistency is the key to any litigation support system, whether manual or computerized, regardless of complexity. Everyone must use a particular word in the same way, with the same meaning. Only an approved list of issues and factual index terms should be used. The list should be agreed upon before litigation support starts. Otherwise, you will have difficulty finding anything in either a manual or a computerized system. Consistency is the key. Indexing for highly specific factual points, rather than traditional general "issues," also helps find a needed reference more quickly. Issue indexing is frequently too general.

Using Databases

Beyond using the outliners and text search tools already in our word processing programs, we might use a litigation support database. Even a fairly simple do-it-yourself effort using a consumer database program may be quite useful. Many people like Microsoft Access 2.0 for Windows or Lotus Approach for Windows. Using such products, you can input and later retrieve references to pertinent sections of testimony or of documents. Structured databases are more useful at finding documents than retrieving deposition sections.

Most simple database products can include fields for both index terms and comments. You could design database records that include such items as fact and issue terms, author, recipient, date and the like. When you have a few hundred to a few thousand documents in a particular case, this approach makes sense.

If you are more technically adept or have a larger case, then you may consider a more powerful relational or SQL database. These will take longer to learn, but can produce more powerful, focussed and useful results. Our own office, at the moment, is experimenting with IBM's high end OS/2 database DB2/2. One advantage of the higher end databases such as DB2/2 is that they can be used both as a database and as the retrieval mechanism for some imaging products like Cirrus Technology's Unite Objects image scanning, storage, and retrieval system. Theoretically, this approach allows you to have both a searchable record for every document and the ability to actually retrieve the image of that document as necessary. This is the direction in which our own office is slowly tending.

Trail Notebooks

Some programs are particularly useful for constructing trial notebooks. My favorite, Lotus Agenda, is unfortunately no longer available. If you have a copy, hang on to it. Agenda 2.01 is much easier to use than early versions. It has the ability to take short items of information, categorize them, and reuse them in almost any way imaginable. There are no exact equivalents to Agenda remaining on the market but you might try WordPerfect's InfoCentral or Ecco Professional. These programs have some of Agenda's features.

There are commercial litigation support products available. I have looked at several including Summation, Summation Blaze with Imaging, Gravity Verdict, and Discovery Pro for Windows. Discovery Pro is primarily oriented toward deposition transcript retrieval. It is useful, but I found its interface somewhat confusing. The other products tend to be databases that include transcript support. I find them somewhat inflexible and hard to customize, but, at the same time, their structured approach makes them useful for larger cases where several people are working with the same data. Gravity Verdict is inexpensive relative to the others and is worth a look for small to medium cases. Summation is more oriented toward networking and thus makes sense for the larger networked office.

Optical Imaging

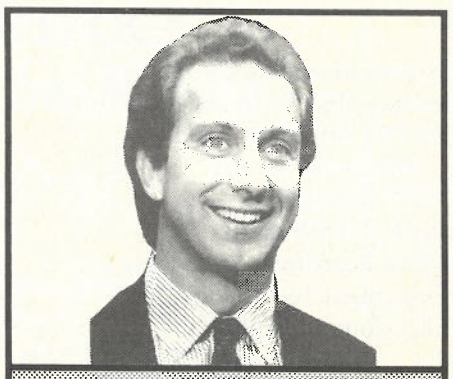
Optical imaging of documents in a case is now becoming quite popular. Imaging systems for the average law office are still rather expensive and complex to install and learn. They mostly work with Microsoft Windows. I do not believe that these products have fully matured. I have looked at several mid-range products lately and find that each still lacks some features that would be useful in a law office. If you are interested in a small product that produces a useful personal filing cabinet for a small to medium project, then consider PaperMaster from DocuMagix. If you are on a Novell network, LaserFiche is useful. File Magic likewise has some nice searching features but only allows you to use a single large document database, throwing every case together. Unless you have a large case that requires document imaging NOW, I recommend that you wait a bit longer, until products mature and prices drop.

Juris Prudence

Changes designed to rein in the costs of litigation

The Alaska Supreme Court recently adopted changes to the Rules of Civil Procedure which are designed to rein in the costs of litigation. These reforms will go into effect in July 1995 across the state.

Last year, Chief Justice Moore appointed a special committee to make recommendations toward eliminating unnecessary and costly discovery practices, speeding up the litigation process and making the courts more accessible. The State of Arizona has already implemented litigation reforms along the same lines. The rule changes in Alaska, however, are modeled on 1993 amendments to the Federal Rules of Civil Procedure, with some differences.



Daniel Patrick O'Tierney

As a result of the efforts of the special committee and the standing Civil Rules Committee of the Alaska Bar Association, the Supreme Court has adopted significant changes in four primary areas.

• Automatic Disclosure

First, the new rules will require automatic disclosure of basic information early in the lawsuit. Consequently, the factual bases of claims and defenses, possible witnesses, relevant documents and agreements, and evidence of damages will be on the table nearer the outset of the case. Also, a written report from each independent expert who may be used at trial must be automatically disclosed to the other party, as well as witness and exhibit lists.

Moreover, initial disclosures must be supplemented at appropriate intervals during the case. In 'fast-track' cases, the initial disclosures must be updated within thirty days. Domestic cases in family court are exempt from the mandatory disclosure provisions, however, at this writing.

• Discovery Limitations

As of July 1995, there will also be a limit on the number of depositions that can be unilaterally taken by a party in a civil case. Further, depositions of parties, experts and treating physicians will be limited to six hours; all other depositions will be limited to four hours.

• Pre-trial Procedure

Under the amended rules, a mandatory meeting of the parties will occur to discuss and exchange disclosures and to formulate a plan for further discovery. The parties must file a report outlining their plan to the Court within ten days after their meeting.

Also, the pre-trial conference has been moved considerably forward in the process and must be held within ninety days after the last answer is filed in the case. Likewise, trial dates will be scheduled earlier than before. As a result, the judge will have more of an opportunity to actively intervene in a case and assist in sorting out any discovery problems, framing issues, and facilitating settlement, among other things.

• Sanctions

The revised civil rules provide punitive enforcement measures. Failure to disclose (or completely disclose) information will result in presumptive inability to use the information in the case, unless the failure was harmless or justified. Unreasonable or obstructionist conduct is also sanctionable. The new rules now list specific factors for the judge to consider before imposing sanctions which should yield some uniformity and consistency in results, not to mention likelihood of being upheld on appeal.

In addition to the implementation of these formal civil rule changes, Anchorage Presiding Judge Johnstone is exploring numerous other initiatives to promote efficient administration of law practice before the Anchorage trial courts.

Alaska is taking a bold step forward by attempting to impose some additional parameters on the manner in which parties to a lawsuit litigate their disputes via their attorneys. Stay tuned for the early returns on whether the new discovery and disclosure rules actually do save everyone headache and expense.

Reprinted with permission of Alaska Business Monthly for which the author has written a regular column on legal matters of interest to the business community since 1986.

Alaska Appellate slip opinions now available electronically

The Alaska Court System is pleased to announce the Alaska Appellate Courts Bulletin Board System (AAC-BBS). Anyone with a computer, modem and communications software can access electronic versions of Supreme Court and Court of Appeals opinions, and Court of Appeals MOJs. Callers may select the files of opinions issued in the last week or files of all opinions issued in the last 90 days. Coverage begins with opinions issued in February 1995.

There is no charge to access this bulletin board other than long distance phone charges of users calling from outside the Anchorage area. The phone number for AAC-BBS is (907) 264-0721. Opinions are available for downloading only. Callers will not be able to read opinions while connected to AAC-BBS.

Users should set their communication software to 8 data bits, 1 stop bit, and no parity. Callers should know what downloading protocol (e.g. XMODEM, YMODEM, ZMODEM or KERMIT) they will be using. New users will be asked for some basic account information the first time they sign on.

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MEDICAL PREMIUMS HOLD AGAIN

The Bar's health insurance plan announced its fourth consecutive year of no premium increases on February 1. The plan's reserves have held steady at about $1,300,000, despite last year's 24% premium decrease.

"We expected that last year's decrease would begin to decrease the surplus," said Association Controller Geraldine Downes. "This is another pleasant surprise.

The plan's administrator, Bob Hagen, concurred, "This is exactly how an experience" rated plan is supposed to work. It has the advantages of self-insurance without the liabilities.

Under the Bar Association's plan, premium surpluses are held on behalf of participating firms to offset rates. There is no contractual liability for deficits. Participants range in size from sole practitioners to some of Alaska's largest firms.

The past year also saw the introduction of a preventive care option and electronic billing by pharmacies.

Information about the plan may be obtained from Hagen Insurance at 561-8040 or, outside Anchorage, (800) 561-8040.

BAR LIFE PLAN MOVES

The group life plan sponsored by the Alaska Bar Association changed its underwriter from Safeco Life to States West Life on January 1.

The switch allowed further premium decreases beginning at age forty, the addition of terminal illness coverage, and an increase in the maximum benefit to $250,000. States West has also has agreed to forgo physical exams.

About seven hundred members of the Alaska Bar and their employees participate in the plan. An information packet about the plan may be obtained from Hagen Insurance at 561-8040.

'95 Alaska Bar Co

SPONSORS

Alaska Court System
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Northwestern School of Law of Lewis & Clark College
Shepard's McGraw-Hill
Sytec
WEST Publishing

SEMINAR HIGHLIGHTS

May 10, Wednesday

Joint Bench/Bar Meeting
2:30 p.m. - 5:30 p.m.
Communicating Across Cultures *(Jade Room)*
Father Michael J. Oleksa, Outreach Coordinator, Language & Cultural Studies, Sealaska Heritage Foundation
This program begins to explore how to communicate across the frontiers of race, religion, culture, sex, age and background, and provides background for the seminar "Courtroom Communication for Judges & Lawyers" on May 12.

May 11, Thursday

7:30 a.m.
Local Bar Presidents Breakfast *(Edgewater Dining Room)*

8:00 a.m.
Registration Area Opens *(Upper Level)*
Exhibits Open *(Lower & Upper Level)*
Coffee Service Compliments of Midnight Sun Court Reporters (Marble Room)
Note: *All coffee services will be in Marble Room.*

8:30 a.m. - 12:00 noon
Review of Recent U.S. Supreme Court Opinions *(Copper Room)*
Professor Peter Arenella, University of California at Los Angeles, School of Law and *Professor Erwin Chermerinsky*, University of Southern California Law Center

12:00 noon
Hospitality Suite Opens *(Sterling Suite)*

12:00 - 1:30 p.m.
Lunch - Bench/Bar *(Jade Room)*
Alaska Bar Association Business Meeting
Reception Compliments of R & R Court Reporters

1:30 - 1:45 p.m. Break

Joint Bench/Bar Afternoon
1:45 p.m. - 2:30 p.m. *(Copper Room)*
Judicial Address
Chief Judge H. Russel Holland, United States District Court and
Chief Justice Daniel A. Moore, Jr., Alaska Supreme Court
Report of the Joint Federal/State Gender Equality Task Force
Judge James K. Singleton, U.S. District Court and *Judge Karen L. Hunt*, 3rd Judicial District Superior Court

2:30 - 2:45 p.m. Break
Afternoon Coffee Service Compliments of Hagen Insurance (Marble Room)

2:45 - 5:15 p.m.
Joint Federal and State Discovery Rules *(Copper Room)*
Chief Judge H. Russel Holland, U.S. District Court
Presiding Judge Karl Johnstone, 3rd Judicial District
Presiding Judge Richard Savell, 4th Judicial District
Deputy Presiding Judge Dana Fabe, 3rd Judicial District
Christine Johnson, Court Rules Attorney
James Gilmore, Collin Middleton, Eric Sanders, Robert Groseclose, Ann Vance
Topics include similarities and differences between state rules and proposed local federal rules, mandatory disclosure, pretrial procedure, judges' expectations, implications of early judicial intervention, experience in other jurisdictions, and sanctions.

Panel
5:15 - 6:15 p.m.
Northwestern School of Law of Lewis & Clark College Alumni Reception *(Dockside Lounge)*

6:15 p.m.
Buses leave from front of Princess Hotel for President's Reception

6:30 - 8:30 p.m.
President's Reception, University of Alaska Museum
Sponsored in part by ALPS — Attorneys Liability Protection Society

8:30 p.m.
Buses leave for Princess Hotel

May 12, Friday

8:00 a.m.
Registration Area Opens
Exhibits Open
Coffee Service Compliments of Brady & Company (Marble Room)

Concurrent Sessions
8:30 - 12:00 noon
Joint Bench/Bar Meeting
Courtroom Communication For Judges & Lawyers *(Jade Room)*
The Honorable *Linda Thomas*, Chief Justice, Fifth District Court of Appeals; and *Leslie J. Farias*, Communication Specialist and Consulting Faculty, National Judicial College, Reno
Special emphasis will be provided on the "efficient vs. effectiveness" problem, nonverbal demeanor, verbal clarity, and dialogue management with laypeople. The problem of public perception of judge-lawyer communication will be developed, including special expectations of the lawyer as both representative of a client and officer of the court.

Bar Session
9:00 a.m. - 12:00 noon *(Copper Room)*
Raising Lawyers for Fun & Profit OR Training Lawyers: A Contact Sport
Richard N. Feferman, Attorney at Law, Albuquerque, New Mexico
This program, designed for lawyers who manage others, presents strategies for changing your focus from a "case handler" to a "case manager," assigning work clearly so it's done right the first time, finding time to supervise, using feedback to improve your lawyers' skills, creating and limiting access to you, and motivating and retaining your lawyers.

12:00 noon - 1:30 p.m.
Joint Bench/Bar Lunch *(Edgewater Dining Room and Launch Cafe)*
Reception Compliments of Dean Moburg & Associates, Court Reporters - Seattle

Bar Session
1:30 - 4:30 p.m.
Too Many Lawyers, Too Little Work: "Service" as the Key to Success *(Copper Room)*
Richard N. Feferman
We practice in an era of fierce competition for business. The level of SERVICE you offer may be more important than the results you obtain or the cost of your work. Learn how to provide "knock their socks off" client service and maintain your mental health in today's law practice.

2:30 - 2:45 p.m. Break

6:00 p.m.
Board buses to Carlson Center for Awards Banquet

6:30 - 7:30 p.m.
Awards Banquet Reception, The Prow, Carlson Center
Hosted by Michie Butterworth

7:30 - 10:00 p.m.
Awards Banquet, Pioneer/North Star Rooms, Carlson Center
Presentation of Awards: Professionalism, Distinguished Service, Pro Bono, Anchorage Bar Association Service, Twenty-five year Certificates
Passing of the Gavel

10:00 p.m.
Board buses for return to Princess Hotel

vention: Fairbanks

A Word from the Bar President

The 1995 Alaska Bar Association Annual Convention is being held in conjunction with the 1995 Alaska Judicial Conference. In an effort to create as much opportunity as possible for a meaningful bench/bar exchange, the majority of this year's programs have been designed as *joint* bench/bar seminars.

Therefore, the bar has been invited to attend the seminar, "Communicating Across Cultures," by Father Michael Oleksa on Wedneday, May 10, the first day of the Alaska Judicial Conference.

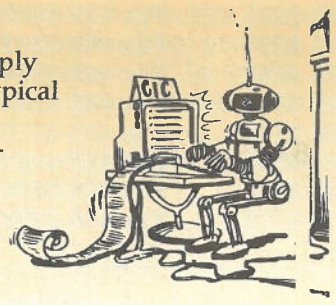
We hope you will find this year's convention to be valuable and useful, and we welcome your suggestions for future convention offerings.

Joint Bench/Bar Programs

ommunicating Across Cultures"
n Father Michael J. Oleksa of the Sealaska Heritage Foundation in exploring w to communicate across the frontiers of race, religion, culture, sex, age, and kground.

ederal and State Discovery Rules" and
eview of Recent U.S. Supreme Court Opinions"
o programs present a review of significant developments in State and Federal actice. A panel of local judges and attorneys outlines the most significant nges to Federal and State Discovery Rules. And UCLA professor Peter enella and USC Professor Erwin Chermerinsky return to present a review of year's most important U.S. Supreme Court decisions.

ourtroom Communication for Judges & Lawyers"
arn to assess your own communication styles and to apply nmunication principles and legal procedural rules to typical rtroom events. Chief Justice Linda Thomas of the Fifth trict Court of Appeals, Texas, and Leslie J. Farias, Conting Faculty, National Judicial College, Reno present ic methods for getting communication tasks done ectively and efficiently.



Bar Programs

aising Lawyers for Fun & Profit OR Training Lawyers: A Contact Sport" and
oo Many Lawyers, Too Little Work: 'Service' as the Key to Success"
ese seminars focus on law practice management issues in today's era of fierce npetition. Richard N. Feferman, Esq., a law practice management consultant, sents strategies for successful collaboration among lawyers, a tactic that oduces better quality work, better client service, and more productive lawyers, d he describes techniques for satisfying your clients and maintaining your ntal health.

PROPOSED RESOLUTIONS FOR CONVENTION

Resolution No. 1

Resolved, by the 1995 Alaska Bar Association convention: That the Executive Director of ABA be directed to refund to any "active bar member" not less than 70 percent of the annual regular license fee for any year that said member can document devoting not less than 400 hours of pro bono professional time to pro bono work.

BE IT FURTHER RESOLVED: that the refund specified herein shall extend to not more than 5 of the most qualified applicants of the ABA for an initial pilot program to expire on 12/31/96.

Justification for resolution:

1. This would be a very tangible encouragement of individual lawyers to enhance commitment to pro bono.
2. It should increase resource of retired lawyers, who would be encouraged and rewarded in symbolic and tangible fashion, to continue and increase pro bono contributions to our crisis stricken Alaskan neighbors.
3. A certification of, and for the pro bono licensing award, could be monitored by the Alaska Bar's Pro Bono Program, avoiding any new expense.
4. There are already at least one, two or three senior lawyers who could qualify from Southeast Alaska and there are probably more willing to do so from over the state.
5. Precedent: Such precedents should be established to encourage and expand pro bono publico on behalf of the Bar.
6. Demand upon Alaska Bar Association's Pro Bono Program: The requests would probably not exceed 5-10 in any one year.
7. Existence of such an award/incentive program should provide an excellent "role model" for other professions.
8. How would time documentation be compiled? By using the same time accounting procedures with which all private lawyers are, or should be familiar.

(Submitted by Juneau Bar Association 2/24/95)

Resolution No. 2

Opposition to reinstatement of the death penalty in Alaska

WHEREAS, the membership of the Alaska Bar Association is concerned with the fair and equitable administration of justice in Alaska; and

WHEREAS, numerous statistical analyses prove beyond doubt that the use of capital punishment in this country is biased by race and economic status - both that of the defendant and that of the victim; and

WHEREAS, Alaska is no exception to the national pattern as demonstrated by the fact that from 1900 to 1957, 75% of persons executed were people of color even though most homicides were committed by Caucasians; and

WHEREAS, a 1977 Alaska Judicial Council study demonstrated a clear pattern of racial sentencing practices which caused the Alaska Legislature to reform sentencing statutes; and

WHEREAS, the 1994 report of the Alaska Natives Commission documents that Alaska Natives are disproportionately represented in the Alaska prison system at a rate of almost three to one and that patterns of charging, negotiation, conviction rates and sentencing all indicate racial and cultural bias against Alaska Natives and there is every indication that these biases will continue in capital cases if the death penalty becomes law in Alaska;

WHEREAS, capital punishment wastes limited public resources, since it costs an average 3 to 6 times more money to execute a person than to incarcerate him or her for life and that rural court systems in Alaska could not absorb the extra expenditures involved in capital cases; and

WHEREAS, extensive research demonstrates that the death penalty, whatever the real motives for its use, has no deterrent effect and may actually increase the rate of violent crime; and

WHEREAS, during the 20th century at least 24 innocent persons have

Continued on page 20

TRAVEL
JAY MOFFETT at World Express Travel, 907-786-3274, is our official convention travel agent. Please contact Jay for assistance in making your travel reservations.

ALASKA AIRLINES
Alaska Airlines has extended special rates to Bar members traveling to Fairbanks for the convention. Please check with the airlines or Jay Moffett.

CAR RENTAL
AVIS RENT A GAR is the official convention car rental agent. Special car rental rates are available for all bar members. Call AVIS in state at 907-474-0900 and out of state at 800-331-1212 or Jay Moffett at 907-786-3274 to reserve a car. Be sure to indicate you are with the Alaska Bar Association group and give the Alaska Bar reference number A677400.

HOTEL GUEST ROOMS
The Fairbanks Princess Hotel is the site of the convention. The Bar Association has reserved a block of rooms at the Princess Hotel-- 4477 Pikes Landing Road, Fairbanks, AK 99709 ph 907-455-4477/fax 907-455-4476.

PLEASE MAKE YOUR RESERVATIONS BY APRIL 1.

The room rate is $88 single or double plus tax. **To make a reservation, please call Princess Tours at 1-800-426-0500 and be sure to state you are with the Alaska Bar Association. Please make reservations through the 800 number only.**

SHUTTLE SERVICE
When you arrive at the Fairbanks Airport, call the Princess Hotel at 455-4477 to request free shuttle service. You may request shuttle service in advance by calling the hotel and leaving your name, date and time of arrival, and flight number.

HOSPITALITY SUITE
The Hospitality Suite will be located in the Sterling Suite at the Fairbanks Princess Hotel. The Hospitality Suite will be open daily from 12:00 noon starting Thursday, May 11.

Convention Registration Fees:

Full Convention, May 11 & 12 — $175
(includes "Communicating Across Cultures," May 10)
Any Full Day — $90
Any Half Day — $50

Lunch: May 11 — $15
May 12 — $15

President's Reception, May 11: $25

Awards Banquet, May 12: $35

HB158: What's wrong, from A-Z (almost)

continued from page 1

II. MAJOR PROVISIONS OF HB158.

A. *Section 1, Findings and Purpose.*

This contains an irrational, unfounded diatribe against the civil justice system and Alaskans as jurors. Not recommended reading for the faint of heart or logical of mind.

B. *Section 2, Eight Year Statute of Repose.*

Personal injury, death, and property damage claims have an eight-year statute of repose. The clock starts running from the date of substantial completion and exceptions are limited to gross negligence, intentional conduct, fraud, fraudulent misrepresentation, or breach of an express warranty or guaranty. The presence of an undiscovered foreign body as a result of a medical procedure is also excepted from this provision. Of course, if you aren't dead in eight years and the removal operation doesn't kill you, the viability of such a claim is questionable in any event . . . . Minors must also bring their actions within this time period or be barred.

C. *Section 3, Limitation of Action Against Health Care Providers.*

If the negligence occurred before the minor was six years old, the minor has until the minor's eighth birthday to bring a claim. Fraud, intentional concealment, presence of a foreign body, and influence of the devil are, as always, exceptions to this Draconian provision.

D. *Section 4.*

This section reaffirms that tort causes of action have a two-year statute of limitations.

E. Section 5, Statute of Limitations Regarding Injury to Person or Property.

Personal injury, death, and property damage actions must be brought within two years by all, *including minors.*

F. *Section 6, Non-Economic (General) Damages.*

Non-economic (general) damages are capped at $300,000. It appears that the $300,000 must include any derivative consortium claims. But, those fortunate enough to be rendered hemiplegic, paraplegic, or quadriplegic, *and* who have permanent functional loss of one or more limbs resulting from injury to the spine or spinal chord, or those fortunate people with permanently impaired cognitive capacity to the extent of being "incapable of making independent, responsible decisions, *and* [that are] permanently incapable of independently performing the activities of normal, daily living," may collect the magnanimous sum of $500,000. These limits don't apply when the defendant was attempting to commit or committing a felony. For nonfelonious wrongdoers, the season is open. . . .

G. *Section 7, Punitive Damages.*

Absent clear and convincing evidence of "malice or conscious acts showing deliberate disregard of another person by the person from whom the damages are sought," there will be no punitive-damage recovery. This section can be read to eliminate *respondeat superior* liability for punitive damages.

H. *Section 8, Further Limitations on Punitive Damages.*

Punitive damages can't exceed the greater of $300,000 or three times compensatories. This limitation doesn't apply to felons, but, under Section 7, they'd better be well insured for their felonious conduct, or this exception is just as meaningless as the drafters clearly intended it to be.

Another most interesting and dramatic change grants to the general fund of the state one-half of any punitive damage award, while at the same time making sure the state stays out of litigation that might cost it directly or indirectly through Civil Rule 82 by making it apparent that the section does not grant the state a right to file or join a civil action seeking punitive damages.

I. *Section 9, State and Federal Income Taxes.*

Economic awards in personal injury and death actions must be reduced by past and future state and federal tax exposure. Might as well pass the savings onto the wrongdoer . . . .

J. *Section 10, Periodic Payments.*

Judgments in excess of $100,000 are to be paid in periodic payments at the request of the defense. Attorney's fees, shall, however, be paid in a lump sum.

K. *Section 11, Security for Periodic Payments.*

Members of the superior court bench looking for things to occupy their free moments will be pleased with this section. It burdens the court with the matter of requiring security for these periodic payments, which must of necessity embroil the court in fairly complex analyses of life expectancies, payment terms, and appropriate security to ensure future payments.

L. *Section 12, More About Periodic Payments.*

This section includes a definition that ties the concept of "inflation" to the Consumer Price Index For Anchorage (and to hell with anybody who has the temerity to live or aspire to live anywhere else . . .).

M. *Section 13, Collateral Benefits.*

Unless the collateral source is a federally funded program that must seek subrogation under federal law, or in the case of life insurance death benefits, claimants will be pleased to know that, in the future, their insurance benefits will go to those that injured them and insurers will be pleased to know that they will be without a right of subrogation. This is supposedly because of all that nasty "double recovering" that is going on out there. The jury gets to hear this long, involved fight about collateral benefits, and the plaintiff bears both the burden of proving future receipts and the risk that any proof may be inaccurate.

N. *Sections 14 and 15, Apportionment of Fault.*

These brilliantly crafted changes will ensure that no multi-party case ever settles pretrial or pre-global settlement. The fault of employers, nonparties, and legally inaccessible parties will be considered and evaluated by the jury. Nonparties may be assessed a percentage of fault, but a judgment may not be entered against them, and there is no collateral estoppel effect associated with the finding of fault in subsequent litigation.

O. *Section 16, Effect of Release.*

This is another section that makes it unlikely that multi-defendant cases will settle pretrial or pre-global settlement. Instead of providing plaintiff the benefit of any agreement made with an individual party and leaving plaintiff to collect from other parties their assessed percentage of fault times any judgment awarded in plaintiff's favor, this section would cause each dollar received by plaintiff to be a credit against the exposure of other parties, even though their assessed percentage of fault is independent of that of the settling party.

P. *Section 17, Offers of Judgment.*

If one side or the other fails to beat an offer of judgment, "all reasonable attorney's fees incurred by the offeror from the date of the offer" are taxed against that party in addition to the costs allowed under the rules.

Q. *Section 18, Prejudgment Interest.*

The rate has changed to three percentage points above the Twelfth Federal Reserve District discount rate in effect on January 2 of the year in which the judgment or decree is entered.

R. *Section 19, Prejudgment Interest on Future Damages.*

No prejudgment interest will be awarded on any element of future damages or for punitive damages.

S. *Section 21 and 22, Medical Expert Witness Qualifications.*

This section imposes qualifications upon medical experts that far exceed those set forth in Evidence Rule 702. It also subjects these folks to the oversight of the state medical board, just in case they say too many bad things about local doctors . . . . Portions of these sections preclude the introduction of medical testimony if a medical expert or an organization providing the medical expert receives a contingent fee for the testimony.

T. *Section 23, Contingency Fee Agreements.*

No contingency fee is allowed on the portion of the punitive damage award that goes to the State of Alaska.

U. *Section 24, No Hospital Liability for Independent Contractors.*

This section overrules *Jackson v. Powers* by immunizing hospitals for acts of "independent contractor" providers of services, whether or not the patient plays any role in choosing these providers or services, and without any provision for mandatory insurance on the part of those independent contractors.

V. *Section 25, Damages Resulting From Commission of a Crime.*

No damages for personal injury by anyone engaged in a felony.

W. *Section 26, Signing of Pleadings and Sanctions.*

For all you frivolous pleading filers, the court is vested with the discretion to sanction you in an amount not to exceed $10,000 for your evil transgressions.

X. *Section 34, Severability Clause.*

Y. *Section 35 and 36, Applicability.*

The act applies to all causes of action accruing on or after July 1, 1995.

III. CONCLUSION.

This bill has a significant chance of passage this session. It is the end of due process as understood by most civilized people and embodies some of the most ill-considered, mean-spirited provisions yet directed at Alaska's civil justice system, already substantially dismantled by legal changes in 1986 and by Proposition 2 imposing several liability in early 1989. Information follows on how to reach those who will pass upon this bill. For information on how you can assist in opposing this legislation, contact the Alaska Academy of Trial Lawyers at 258-4040.

How to contact Juneau

Senator _____
Alaska State Senate
Alaska Capitol
Juneau, Alaska 99801-1182

Representative _____
Alaska State House of Representatives
State Capitol
Juneau, Alaska 99801-0082

House Judiciary Committee:

Rep. Brian Porter, Chair	(907) 465-4990	Fax 465-3834
Rep. Joe Green, Vice Chair	(907) 465-4931	Fax 465-4316
Rep. Con Bunde	(907) 465-4843	Fax 465-3871
Rep. Cynthia Toohey	(907) 465-4919	Fax 465-2137
Rep. Al Vezey	(907) 465-3719	Fax 465-3258
Rep. David Finkelstein	(907) 465-2435	Fax 465-2294
Rep. Bettye Davis	(907) 465-3875	Fax 465-4588

House Finance Committee:

Rep. Mark Hanley, Co-Chair	(907) 465-3757	Fax 465-2418
Rep. Richard Foster, Co-Chair	(907) 465-3757	Fax 465-3242
Rep. Eldon Mulder	(907) 465-2647	Fax 465-3518
Rep. Sean Parnell	(907) 465-2995	Fax 465-6592
Rep. Pete Kelly	(907) 465-2327	Fax 465-5241
Rep. Gene Therriault	(907) 465-4797	Fax 465-3884
Rep. Terry Martin	(907) 465-3783	Fax 465-2293
Rep. Vic Kohring	(907) 465-2186	Fax 465-3818
Rep. Kay Brown	(907) 465-4998	Fax 465-4419
Rep. Ben Grussendorf	(907) 465-3824	Fax 465-2278
Rep. Mike Navarre	(907) 465-3779	Fax 465-2278

Is the current Tort Reform Act unconstitutional?

continued from page 1

losses with no accompanying physical injury, death or property damage. In fact, the Alaska Supreme Court ruled that the similar phrase "injuries or damages to persons or property" found in the indemnity clause of a professional services contract did not encompass claims for pure economic losses. Instead, the Court said the language covered only "claims and liability based on physical injury or damage to *tangible* property." *Fairbanks North Star Borough v. Roen Design Associates. Inc.,* 727 P.2d 758, 760 (Alaska 1986).

This is not to say that the Tort Reform Act is unconcerned with economic damages for such things as wage losses or medical expenses. The Act plainly deals with those economic losses in AS 09.17.040. However, the Act addresses economic losses only in the context of claims "for personal injury"; it does not deal with the situation where a plaintiff suffers pure economic losses with no accompanying personal injury.

Distinguishing between claims for pure economic losses and other types of tort claims is of particular importance in Alaska.

Like other provisions of the Tort Reform Act, the apportionment statute with its several liability provision is tied to claims for physical injury or property damage, not pure economic losses. Although AS 09.17.080 does not directly use the phrase "injuries or damages to persons or property," the apportionment statute is keyed to "fault." "Fault," in turn, is defined in AS 09.17.090 by reference to harm caused to "the person or property of the actor or others." This language again denotes personal injury or property damage, not pure economic losses.

The limited application of the Tort Reform Act and the apportionment statute is confirmed by the Uniform Comparative Fault Act. As the Alaska Supreme Court recognized in *Benner v. Wichman,* 874 P.2d 949 (Alaska 1994), the Tort Reform Act was derived from and "is substantially similar to the Uniform Comparative Fault Act." 874 P.2d at 958 n.19. In fact, the Alaska definition of "fault" is taken verbatim from Section 1 of the Uniform Act. The official comment to Section 1 of the Uniform Act states that the Act is "confined to physical harm to person or property.... It does not include matters like economic loss resulting from a tort such as negligent misrepresentation, or interference with contractual relations or injurious falsehood, or harm to reputation resulting from defamation." Unif. Comparative Fault Act § 1 cmt., 1977 Act, 12 U.L.A. 44-45 (Supp. 1994).

Distinguishing between claims for pure economic losses and other types of tort claims is of particular importance in Alaska. Unlike most states, Alaska permits a plaintiff who suffers only pure economic losses to maintain an ordinary negligence action against the parties responsible. *Mattingly v. Sheldon Jackson College,* 743 P.2d 356, 359-61 (Alaska 1987). Consequently, there is a potentially large class of tort claims outside the operation of the Tort Reform Act. As to these claims, the governing rules must necessarily be those of the common law, including the common law rule of joint and several liability.

Equal Protection May Be Violated

The disparate treatment of tort claims that is required by the Tort Reform Act raises obvious equal protection questions. Under Alaska's equal protection "sliding scale" test, a greater or lesser burden is placed on the party seeking to uphold a statutory classification, depending on the importance of the individual right involved. The proper level of scrutiny applicable to the Tort Reform Act is debatable, but even at the lowest level of scrutiny the classification created by the Act is in trouble. Subjecting one type of tort claim to apportionment of fault and the rule of several liability while preserving joint and several liability for another type of claim does not seem to rest "upon some ground of difference having a fair and substantial relationship to the object of the legislation." *Herrick's Aero-Auto-Aqua Repair Service v. State,* 754 P.2d 1111, 1114 (Alaska 1988).

Only one purpose was given for the several liability provision of AS 09.17.080(d) when it was presented to the voters in 1988. That purpose was fairness to civil litigants. The proponents stated in the voters pamphlet that "Ballot Measure No. 2 will make the civil justice system more fair."

"The current law — called joint and several liability — is simply unfair."

But AS 09.17.080(d) actually creates unfairness for civil litigants because it allows some litigants to have the benefit of the joint and several liability rule while simultaneously restricting others to a several liability recovery. The dividing line is the simple fortuity of whether a plaintiff has suffered economic damages alone or whether some personal injury or tangible property damage was also inflicted. One can easily postulate a case where the exact same conduct by the defendants leads to one plaintiff suffering economic losses along with a personal injury while another plaintiff suffers just pure economic losses. What rationale is there for restricting the first plaintiff to a several liability recovery when the second plaintiff is entitled to hold all the defendants jointly and severally liable?

The classification the Tort Reform Act creates cannot be defended on the ground that distinguishing between economic damages and other types of damages is legitimate. *Cf, Evangelatos v. Superior Court,* 753 P.2d 585, 594 (Cal. 1988) (upholding California tort reform law on this basis). The Act effectively authorizes treating the recovery of economic damages two different ways. The same economic damages may be recoverable under the rule of joint and several liability or the rule of several liability, depending on whether the economic damages were accompanied by physical injury or damage to tangible property.

The potential for unfairness is, of course, not limited to plaintiffs. A tort defendant may find that the same conduct makes it liable for all a plaintiff's damages or just some portion of those damages, depending on the happenstance of an accompanying physical injury. This differing treatment is not any more fair to the defendant than it is to the plaintiff. *Cf. Turner Construction Co. v. Scales,* 782 P.2d 467, 471-72 (Alaska 1988) (disparate treatment of tort defendants unconstitutional).

The classification the Tort Reform Act creates cannot be defended on the ground that distinguishing between economic damages and other types of damages is legitimate.

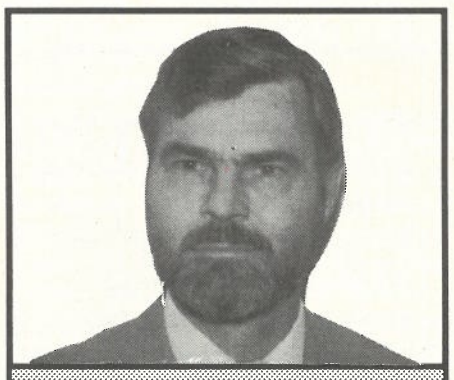
The Alaska Supreme Court's recent decision in *Gilmore v. Alaska Workers' Compensation Board,* 882 P.2d 922 (Alaska 1994) may presage how the Court would treat the equal protection issues raised by the AS 09.17.080(d). In *Gilmore,* the Court used the lowest level of scrutiny to strike down the section of the Workers' Compensation Act that required benefits to be based on a rigid formula. One of the purposes behind the statute was fairness, but the Court found that the statute was unconstitutional because it was unfair to one class of claimant. The Court observed that alternatives existed for achieving the efficiency the statute sought without creating unfairness for any claimant. 882 P.2d at 928-29.

As in *Gilmore,* the proponents of tort reform did not need to create unfairness in order to revise the rule of joint and several liability. The Tort Reform Act could have provided that all tort claims, including those for pure economic losses, would be subject to the same rules. The Tort Reform Act also could have been written to allow a joint and several recovery for all economic losses suffered by tort plaintiffs while limiting the rule of several liability to a plaintiff's noneconomic losses. Other jurisdictions have adopted that approach. Cal. Civ. Code § 1431.2; Ohio Rev. Code § 2315.19(D)(1)(b) & (c); Neb. Rev. Stat. § 25-21,185,10. Under *Gilmore,* these readily available, even-handed alternatives indicate that AS 09.17.080(d) may run afoul of the equal protection clause.

It remains theoretically possible that the Alaska Supreme Court could sidestep the equal protection problem by judicially abandoning the common law rule of joint and several liability and embracing apportionment of fault and the several liability scheme for all torts. However, the Alaska Supreme Court has long adhered to the view that joint and several liability is the preferable rule of law. *Arctic Structures, Inc. v. Wedmore,* 605 P.2d 426, 429-35 (Alaska 1979). Deviating from that view now would mean the Court would have to turn its back on its own prior decisions, as well as centuries of common law precedent, just to save a statute that the Legislature hastily cobbled together, that an ill-informed electorate revised, and that even the most learned of judges has had difficulty interpreting and applying. Such a result does not seem likely.

Bankruptcy Briefs

Protection of support payments



Thomas Yerbich

The last article discussed changes to the Bankruptcy Code (hereinafter "BC") regarding discharge of certain property settlements arising out of a divorce or separation engendered by § 304(e) of the Bankruptcy Reform Act of 1994 [PL 103-394] (hereinafter "BRA 94"). This article explores other significant changes engendered by BRA 94 § 304 (entitled "Protection of Child Support and Alimony") affecting family law practitioners.

First, BRA 94 § 304(b) amended BC § 362(b) (2) to except from the automatic stay commencement or continuation of actions to establish paternity or establish or modify alimony, maintenance or support; retaining the existing limitation on collection of such support payments only from property that is not property of the estate. Thus, it is no longer necessary to obtain relief from stay to continue state court actions establishing paternity or support payments; those actions are not stayed. Caveat: this amendment does not affect actions involving property or other nonsupport issues; relief from the automatic stay will have to be obtained from the bankruptcy court before proceeding with those segments of the action. [Hopefully, state court judges will understand that an intervening bankruptcy effectively bifurcates the divorce case: the court may continue to resolve the support issues but the nonsupport issues, *i.e.*, property division, can not proceed until relief from stay is obtained.]

Second, BRA 94 § 304(c) amended BC § 507(a) adding support payments to a spouse, former spouse or child as a seventh-tier priority claim (just ahead of taxes).

Third, BRA 94 § 304(d) amended BC § 522(f) (1) (A) to deny the debtor power to avoid, as impairing exemptions, a judicial lien securing a support obligation to a spouse, former spouse or child.

Fourth, BRA 94 § 304(f) amended BC § 547(c) to exclude prepetition support payments to a spouse, former spouse or child from those transfers classified as preferential. Thus, a trustee may not avoid, as a preferential transfer, payments on, or security interests given to secure payment of, support obligations.

The provisions added by BRA 94 § 304(c), (d) and (f), contain an important exception: they do not apply if the right to receive the payments has been assigned, whether voluntarily, involuntarily or by operation of law. It should also be noted that, unlike the nondischarge provision of BC § 523(a) (5), there is no exception to the assignment exception for assignments under the Social Security or to a governmental agency. Thus, *e.g.*, while support claims assigned to CSEA may be nondischargeable, they are not entitled to priority payment, the debtor may avoid a judicial lien securing such obligations to the extent exemptions are impaired, and prepetition transfers to CSEA, whether in the nature of liens or payments, may be avoided by the trustee as preferential transfers.

The other "qualifier" in § 304(c), (d) and (f) is that, notwithstanding the nomenclature ascribed to the obligation, it must be "actually in the nature of alimony, maintenance or support." This language is identical to the existing language of BC § 523(a) (5) and case law interpreting that paragraph is equally applicable to the amendments to BC §§ 362(b), 522(f) and 547(c)

Whether an obligation is actually in the nature of nondischargeable alimony, support or maintenance is a question of federal not state law; the bankruptcy court must look beyond the labels that state courts-or the parties themselves-give obligations. [*In re Shaver,* 736 F2d 1314 (CA 9 1984)] If an obligation has the characteristics of a support obligation, it is a support obligation whether denominated alimony, support, maintenance or a property division. Conversely, if it does not have the characteristics of a support obligation it is not a support obligation, again irrespective of the label given by the state courts or the parties.

If a decree or agreement fails to explicitly provide for spousal support, a court may nevertheless presume that a so-called "property division" or "property settlement" is intended for support when the circumstances of the case indicate the recipient spouse needs support. Factors considered in making this determination include: (1) presence of minor children; (2) imbalance of relative income of the parties; (3) whether obligation terminates on death or remarriage of the recipient spouse; and (4) nature and duration of the obligation. [*In re Shaver, supra; In re Giovis,* 170 BR 675 (BAP9 1994)]

One issue that frequently arises is the effect of a prior determination of a state court as constituting collateral estoppel, preventing the party from relitigating the nature of the obligation ("issue preclusion"). As a rule, collateral estoppel applies in bankruptcy discharge proceedings. [*Grogan v. Garner,* 498 US 279 (1991)]. However, the mere fact that a prior judgment exists does not preclude an inquiry by the bankruptcy court into the true nature of the obligation and ruling contrary to the holding of the first court, if necessary, in applying federal bankruptcy law. [*Brown v. Felsen,* 442 US 127 (1979)]

Matter of Dennis [25 F3d 274 (CA 5 1994)], a case arising out of Texas, which, like Alaska, does not favor permanent alimony, is very illustrative of the tensions existing between state domestic relations law and federal bankruptcy law. *Dennis* involved characterization of the debtor's agreement to pay the taxes on the one-half of a military pension awarded to the wife as part of the property settlement. Unknown to the wife, the debtor had deducted the payments as alimony on his income tax and the wife did not report a corresponding income. The IRS, of course, took a dim view of this and assessed the wife additional taxes. The wife took the matter to the Texas courts contending the payments constituted part of the property division, not support. The Texas court sided with the wife. The debtor then filed bankruptcy and the wife sought to except the obligation from discharge under § 523(a) (5). The bankruptcy court held in favor of the wife and the Fifth Circuit affirmed, notwithstanding the prior "inconsistent" position of the wife and contrary determination by the Texas court, holding that under Texas law it was indeed a "property division" but that under federal law it was a "support obligation." The critical point to bear in mind is that collateral estoppel only applies when both the facts and legal issues are identical; if the law to be applied is different, the determination made in the prior decision is not determinative of the outcome in a subsequent case-collateral estoppel does not apply.

On the other hand, it has been held that a debtor who claimed payments as deductible alimony on his federal tax returns was equitably estopped from later asserting the payments were dischargeable property obligations. [*In re Robb,* 23 F3d 895 (CA4 1994)]

Finally, the parties should not overlook the interaction between the several BC sections dealing with the characterization of obligations between support and property amended by BRA 94 § 304. For example, characterization of a payment obligation as "support" gives it a priority status (only of benefit in an asset case), immunizes liens securing it from avoidance under BC § 522(f) and prepetition payments are not avoidable as preferential transfers. Also, all such obligations are "unconditionally" nondischargeable. Characterization as "property" results in: (1) a nonpriority obligation; (2) potential lien avoidance under § 522(f) [subject to *Farrey v. Sanderfoot,* 500 US 291 (1991)]; (3) possible avoidance of prepetition transfers as preferential; and (4) "conditional" nondischargeablility.

In many, if not most, cases arising out of Alaska divorces, the obligations will have characteristics of both support and property division. To the extent the obligation is a support obligation both the debtor's ability to pay and the detriment to the non-debtor spouse are decreased, weighing in favor of discharge of property division obligations. On the other hand, to the extent that the debtor spouse is discharged from property division obligations, the ability of the debtor to pay and the need of the non-debtor spousal for support are increased, probably the most significant factor to be considered in determining whether the nature of the payment is "support" or "property division." [*See In re Siraqusa,* 27 F3d 406 (CA9 1994)]

Moreover, there are significant federal tax implications that should not be overlooked. Spousal support is deductible to the payor (debtor) and taxable income to the recipient. Property divisions generally have no such tax implications. Therefore, characterization as "support" or "property division" may have favorable or adverse tax consequences to one party or the other, or, perhaps, both. In any event the tax consequences should not be forgotten or ignored.

BRA 94 § 304 has injected a whole new dimension into bankruptcy proceedings following the termination of a marriage. Before the issue was relatively clear-cut and the respective positions of the parties relatively easy to elect: the debtor — property division; the recipient spouse -- support. It is now a multi-dimensional, complex decision, with additional factors to be considered with respect to which position to take. Taking the wrong position could be hazardous to the financial health of either or both parties. Both parties need to carefully analyze and consider the potential "bottom line" economic effect on the parties, individually and collectively, of characterization.

For the parties: (1) remember the only relevant issues are economic, not who was the "bad guy"; and (2) NEGOTIATE. If an agreement can not be reached, be prepared to present to the court detailed evidence of the individual and collective economic consequences of the particular characterization you ascribe to the obligation(s), *i.e.*, who gets burned and how badly. Forcing the court to make its own economic analysis and ultimate determination without getting a strong, cogent argument for your position could be hazardous to one's economic health. In short, you may not like the result!

The mystery of Alaska's $500,000 damages cap

Continued from page 5

1991).

Herrera, 827 P.2d at 620, 621.

Moreover, if the legislature had intended that a finding of "disfigurement or severe physical impairment" negate the cap as many courts have ruled, the legislature could easily have said: "the limit under (b) of this section ***does not apply to suits involving claims*** for disfigurement or severe physical impairment." However, the legislature did not do that, but instead provided that "The limit does not apply to damages for disfigurement or severe physical impairment."

The small amount of legislative history available arguably supports this interpretation of the plain language of the statute. Comparing the proposed House version of this section of the statute, the proposed Senate version, and the compromised conference version, (Found in the law library or Alaska Legislature Committee files 1985-1986, microfiche No. 3420, HJUD SB 377/HB 532, file 2: Bills, Fiscal Notes & Amendments) is instructive. The House version would have limited non-economic damages to $1 million for each person injured, with an exception for damages for severe physical impairment or disfigurement. The more restrictive Senate version put a $500,000 cap on non-economic damages, with no exception whatsoever for damages for severe physical impairment or disfigurement.

The compromise version (1) adopts the smaller dollar amount of $500,000 and (2) provides for a limited exception to the cap only for damages for severe physical impairment or disfigurement. If the statute were read to allow negation of the cap where the jury found disfigurement or severe physical impairment, the compromise would be more liberal than the most liberal of the two proposed versions, and would be no compromise at all.

Thus, there are strong arguments that to correctly apply the non-economic damages cap of AS 09.17.010, the jury must identify by special verdict the portion of its non-economic award attributable to the plaintiff's "disfigurement or severe physical impairment". Arguably, that amount would fall outside the $500,000 non-economic damages cap.

The death penalty: Bad public policy for Alaska

By Rachel King
Executive Director for Alaskans Against the Death Penalty

Members of the Bar Association should be aware that there are two bills pending which would reinstate capital punishment in Alaska: Senate Bill 52 and House Bill 45. The experiences of other states have conclusively demonstrated that the death penalty is a failed public policy. Instead of repeating these mistakes, Alaskans should learn from them. Alaskans Against the Death Penalty is a non-profit corporation whose purpose is to educate Alaskans about the death penalty. To that end, this brief synopsis is offered in support of the proposed bar resolution which opposes reinstatement of the death penalty in Alaska.

1. The death penalty is too costly

Every state that has studied the issue of the cost of the death penalty has concluded that implementation of the death penalty is more expensive than live imprisonment. For example, Texas spends $2.3 million per execution, as opposed to $750,000 to imprison someone in a single cell at the highest level of security for 40 years. North Carolina spends an average of $2.16 million, Florida spends $3.2 million and California averages $15 million per execution. Although it is counter-intuitive that the death penalty would be more expensive than life imprisonment, there are associated costs which stem from capital litigation. First of all, death penalty trials are bi-furcated: one trial to determine guilt and a second trial to determine punishment. Death cases usually involve very lengthy jury selection processes and extensive per-trial motion work. Death trials frequently last for months. These lengthy trials will clog the Alaska court systems, especially in rural Alaska where there is often only one judge, one prosecutor, one public defender and a small police force. Death penalty cases also involve lengthy appellate processes which tie up appellate courts: the supreme courts of both Florida and California report that more than half of their appellate cases are death cases. Apart form the litigation costs, Alaska would have to develop and maintain a death facility which is more expensive than other forms of custody. At a time when Alaska is shipping inmates outside because of overcrowding problems, and cannot afford to adequately fund the Department of Law or the Public Defender Agency, the state cannot afford the expense instituting a death penalty system.

2. Application of the death penalty is racially biased

Racial bias in death penalty sentencing is well-documented. In 1990, a U.S. Government Accounting Office (GAO) issued a report summarizing capital punishment studies which confirmed a "consistent pattern of evidence indicating racial disparities in the charging, sentencing and imposition of the death penalty." During territorial days in Alaska, 75 percent of those sentenced to death were people of color (primarily Alaska Natives) even though most homicides were committed by Caucasians.

3. Risk of executing innocent people

According to a report prepared by the Judiciary Committee of the 103rd Congress issued in 1993 there have been at least 48 people sentenced to death after 1973 who were later proven to be innocent. At least 24 innocent people have been executed this century, most recently Jesse Jacobs was executed by the state of Texas on January 4, 1995, after the prosecutor who sought Jacobs conviction (and subsequently obtained another conviction for the same murder) admitted that Jacobs was not the killer.

4. The death penalty is not a deterrent to murder

Death penalty states as a group do not have lower rates of criminal homicide than non-death penalty states. During the 1980's, death penalty states averaged an annual rate of 7.5 homicides per 100,000 people — non death penalty states averaged a rate of 7.4 homicides. One study concluded that during the months immediately following an execution, there was an overall net increase of two additional homicides.

5. The death penalty is not necessary to protect Alaskans

Alaska has some of the toughest sentencing laws in the country. According to the Alaska Judicial Council, the average sentence imposed for first-degree murder is between 62 and 87 years. However, it is very common for judges to impose sentences for 99 years for first-degree murder. (Ninety-nine year sentences are mandatory if the person killed is a police officer, fire fighter, correctional officer or has a prior conviction for first or second-degree murder). Judges also have the power to restrict parole eligibility and frequently use that power in serious cases. Unlike other states where convicted murderers are released after short sentences, most persons convicted in Alaska of first-degree murder will die in prison. Further, nation-wide opinion polls show that most Americans do not support the death penalty when given the option of lengthy prison sentences and mandatory restitution to the victim's family. Alaska already has stiff sentencing laws and does not need the death penalty to protect against violent criminals.

Conclusion

Alaska has the opportunity to learn from the experiences of other states and its own history. We do not need a death penalty law to protect ourselves from dangerous people. The resources spent on implementing a death penalty divert limited resources away from other programs and services which could positively impact crime. While it is tempting for politicians to publicly support a death penalty claiming that they are "tough on crime" the opposite is actually true. The death penalty is an empty promise which does not prevent crime, but diverts resources away from other measures and which could actually prevent crime and improve living conditions for Alaskans.

For more information or to make contributions contact:
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The Bar Rag welcomes articles from its readers

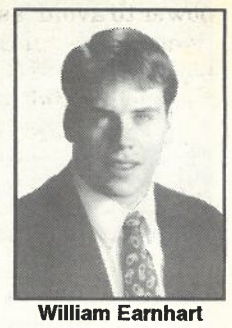
Lane Powell Spears Lubersky opens Fairbanks office

The law firm of Lane Powell Spears Lubersky opened an office in Fairbanks, in January.

The new office will initially have two attorneys. Ann Stoloff Brown, who will concentrate her practice in employment law and insurance defence, will be leading the office with the assistance of associate Brad Ambarian, who will concentrate his practice in commercial and corporate law. Both were formerly with the law firm of Guess & Rudd in Fairbanks.

Michael K. Nave has been elected a partner at the law firm of Lane Powell Spears Lubersky, concentrating his practice in aviation law and in the areas of product liability and subrogation law.....**Rick Johannsen**, a partner in the Anchorage office of Perkins Coie, has accepted an appointment as a foreign service officer with the United States Department of State and is moving to Washington, D.C. and then abroad.

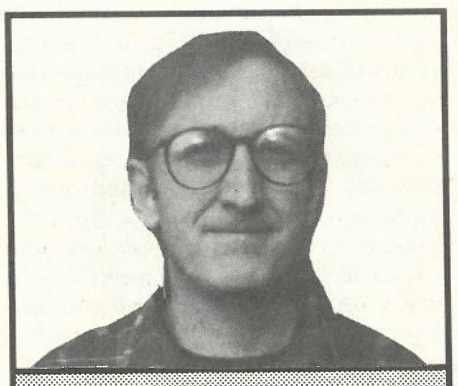
William A. Earnhart has joined the firm of Lane Powell Spears Lubersky in Anchorage as an associate and will concentrate his practice in insurance defense and employment litigation. Earnhart received his law degree from the University of Washington School of Law, and his undergraduate degree from Willamette University. He is a 20-year resident of Alaska, having grown up in Anchorage.


William Earnhart

Lane Powell Spears Lubersky has offices in Anchorage, Fairbanks, Seattle, Olympia, Mount Vernon, Portland, Los Angeles, San Francisco and London.

Eclectic Blues

Town quirks in Southeast

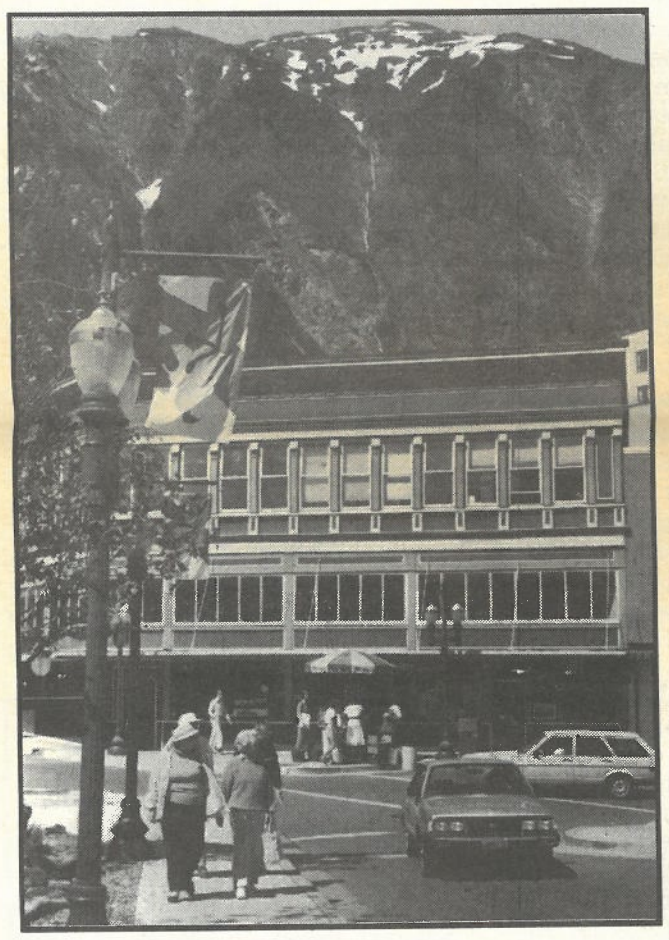


Dan Branch

It was tough getting around Wrangell last January. Rain falling on the icy sidewalks forced me into the streets to dodge puddles. Thanks to the general streak of consideration shown by Wrangell drivers, I made it to court without a soaking.

The icy conditions focused my attention on shoes and the failure of mine to find any purchase on the sidewalk. When I could, during the visit, I surveyed the shoewearing habits of the Stikine people. Most male adults wore some kind of running shoe.

I've noticed that with few exceptions, folks in Southeast follow Lower 48 shoe fashions as long as they don't have to sacrifice too much comfort to do it. Some, including a senior district court judge, enjoy the light grace of Birkenstock slip-ons. But there isn't much remarkable about footwear displayed by other members of the Ketchikan Bar now that former district attorney Mark Ells took his rubber-wrapped cowboy boots to Washington, D.C.



One thing you rarely see during the winter in downtown Ketchikan are cannery boots. Those who do wear them usually live on Pennock Island or work for the Forest Service. If these guys are wearing Extra Tuffs you can bet that they won't have on a tie. The same cannot be said for Juneau folk when they leave Gastineau Channel.

When government workers leave home to visit the farthest reaches of state government, they are usually wearing cannery boots. I am not just talking about Whale Pass or Meyer's Chuck Even in Ketchikan, well-dressed Juneau visitors sporting ties and expensive haircuts can be seen at Annabelle's or the Five Star wearing rolled-down Extra Tuff rubber boots. This leads many of Ketchikan's children to believe there are no paved streets in our capital city. (For those readers who have never visited our capital, I can assure you that Juneau received its share of the Department of Transportation asphalt budget).

On the day of my January Wrangell visit, locals were wondering about the streets of the Capital City. I was halfway through a high-fat cheeseburger at the Diamond C Cafe when three carefully dressed Juneau bureaucrats hung their expensive overcoats on the coat rack, revealing for the entire lunch crowd to see three immaculate pairs of rolled-down cannery boots. One of the locals mumbled something about the guests being "fresh off the boat" and all returned to their french fries.

There has been some recent downsizing of state government in the capital city, but I doubt that Juneau bureaucrats can't afford real shoes. The whole thing is a bit of a mystery. Maybe Juneau folks set themselves apart by melding business dress with clam-digging gear.

It seems like the residents of every Southeast town share some little quirks that set them apart.

Take Petersburg, for example. Norwegian blood runs strong in that fishing town. People work hard, keep up their yard, and support a decent French bakery. They also us the phrase "*Uff da*" quite a bit. These words are used to show sympathy with another's plight. For example, you might say "*Uff da*" after the guy sitting next to you at the Homestead Cafe tells you that his first born has decided to sell his fishing permit to buy a foreign car. "Uff da" is also used as a polite alternative to foul expletives following personal mishaps. "Uff da!" Tom said after striking his thumb with a framing hammer.

Just down the Narrows, the people of Wrangell express town unity by exhibiting a non-judgmental attitude. As a result, the hillside that rises up from the town's main street has something for every taste. They also have a spiffy hardware store.

Sitkans probably have some unique characteristics, but I haven't spent enough time there to discover them. It is a pretty place with a very small bowling alley. On team night, spectators are discouraged from watching because it makes the guys nervous. Maybe they're a shy bunch over there.

Since I spend most of my time in Ketchikan, you would think that I would have a lot to say about the community-wide characteristics of Alaska's First City. I don't. Everyone in this town seems pretty straightforward to me. We have a mall with Kenney Shoes, Bon Marche and a Zales. Next door at the bowling alley myopic fans can watch football on a wall-sized TV. You can buy espresso in the parking lot in front of Bernie's Appliance Store or just about any other place in town. Take away 13 feet of annual rainfall and there really isn't much setting us apart from folks in Seattle except the jackets.

One out of every five male adults in Ketchikan walks around town wearing a polar fleece jacket with the name of a local air carrier in small letters on the front. A big float plane flies across the back When I first spotted the trend, I thought the air charter outfits were giving jackets away. In fact they were selling them for a pretty high price.

These advertising jackets seemed pretty silly to me at first. As with most fads, I eventually joined the gang and bought a nice forest green parka decorated on the back with the picture of a red and white Turbo Beaver.

Walking around town with my new cool-guy coat, I figured someone would give me a secret handshake or invite me to join the Eagles. Nothing like that happened. I didn't even broaden my circle of friends.

Puzzled, I studied the situation, discovering in the process that everyone in town but me was wearing another air carrier's jacket. I was advertising brand "X." No wonder it was on sale.

Verdict and Settlements

TYPE OF ACTION: Insurance Bad Faith/Personal Injury

COURT CASE: Monaghan, individually and as assignee of Maltby Tank & Barge, Inc., Tankco Fabricating & Leasing, Inc., Bob Birdseye, Steve Adolphsen, and Bruce Carse VS Admiral Insurance Company, Wausau Insurance Company.

CASE NUMBER: Ninth Circuit Court of Appeals number 92-35236

JUDGE: Appeal from decision by U.S. District Court Judge Andrew J. Kleinfeld; Ninth Circuit court Judges Schroeder, Fletcher and Alarcon.

ATTY FOR PLAINTIFF: Douglas C. Perkins for plaintiff/appellant

ATTY FOR DEFENDANT: James Blair/Thomas Matthews for appellee Admiral Insurance Company; William Brattain for appellee Wausau Insurance Company.

DAMAGES AWARDED OR SETTLED: $1.5 million paid to Monaghan by Admiral

HIGHEST PREVIOUS OFFER BEFORE APPEAL: $150,000 by Admiral; $1 million by Monaghan

OTHER USEFUL INFORMATION: This appeal arose from a decision by Judge Kleinfeld dismissing Monaghan's individual and assigned bad faith claims against Admiral and Wausau, based upon their alleged failure to defend and indemnify their insureds in the underlying state court tort action brought by Monaghan against his employer, Tankco, and Tankco's parent corporation, Maltby, for personal injuries sustained by Monaghan during a time when Tankco had failed to procure workers' compensation insurance for Monaghan.

Kleinfeld dismissed Monaghan's claims, ruling that the insured assignors breached the "cooperation" and "no action" clauses of the insurance policies when they confessed judgment in favor of Monaghan in the amount of $2 million.

The Ninth Circuit **AFFIRMED** the judgment as to Wausau, which was the workers' compensation insurer, but **REVERSED** the judgment in favor of Admiral , the general liability insurer, determining that Admiral had failed to defend and indemnify its insureds, breaching the covenant of good faith and fair dealing.

Following appeal, Admiral settled the remanded claims by paying $1.5 million to Monaghan.

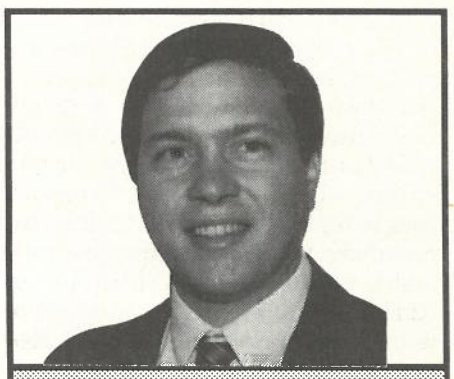
The Public Laws

Thoughts on the jury selection process

In early December I was called in as a potential juror in a felony case involving sexual abuse of a minor. It was my first jury summons in five years, and I wanted to serve. As a former prosecutor I was fairly certain that I would be rejected, however. As the process unfolded the case ended up settling with a change of plea after five hours of my jury time. The individual questioning of jurors, had resulted in only four jurors of a 14-member panel being passed for cause. My estimation is that it would have taken two to three court days (not counting time for peremptory challenges) to pick a panel at the rate things were going.

Looking around at the other members of my pool I counted approximately 55 people when we started. For the five hours we were at it, the time required represented $4,125 in jurors' lost wages or productive industry at an estimate of $15 per hour. If three court days were required to pick a panel, the cost of selection time for the members of the jury, alone, could easily have exceeded $10,000 even with a declining pool of potential jurors. All of this prior to the start of the trial. (I wonder whether, in some cases, the process for determining guilt is more time-consuming and expensive—even for the defendant--than the penalty for the offense.)

One of the most frustrating aspects was the lack of credit given to the jurors' ability to understand what was going on and to assist in the process when informed of what was expected of them. Several lay members of the jury pool were discussing the process in the back row as the selection unfolded. They offered predictions on whether people would be removed and predictions as to the defendant's increased interest in a plea arrangement as more and more jurors were excused for cause.



Scott Brandt-Erichsen

One of the most frustrating aspects was the lack of credit given to the jurors' ability to understand what was going on and to assist in the process when informed of what was expected of them.

It occurred to me that the process could have gone much more smoothly and quickly, if the prosecution and defense had submitted a written description to the jurors outlining the areas of inquiry, with sample questions. The jurors could then respond without the lengthy delays, they'd be given credit for their intelligence, and the process would weed out removals for cause.

When I suggested this to a retired geologist seated next to me, he pointed out the obvious weakness that sometimes people don't remember things which might be relevant or significant until they hear someone else mention a similar experience. The response to this argument is that the attorney can identify what is thought to be relevant and may still inquire, but on a more abbreviated timetable.

Using a hypothetical DWI case as an example, this jury selection format could proceed something like this:

The judge would introduce the case, the parties and the charge(s). The judge would also give an overview of the trial process (e.g. picking a jury, opening statements, the plaintiff presents case, defendant presents case, rebuttal cases if appropriate) and the estimated time for the trial. The court would then provide a list of reasons jurors are removed the for cause, and state that these are reasons also, can be the basis for a juror to be excused from the panel. The court would ask: "Do you have questions about what any of these reasons mean?" followed by answers from the court to any questions. The court would then ask: "Looking through the list, and knowing the charges involved here, do any of these apply to you?"

I know that some would argue that letting the jurors know what will get them off jury duty is a mistake because many will try to get off. However, if we charge these same citizens with constructive knowledge of the law and the rules of court, why should we not give them actual knowledge? Further, if a potential juror has enough disrespect for the truth and the importance of the jury system to mislead the court in an attempt to get off of the jury, is that the sort of juror we want protecting the integrity of our system of justice?

After the instruction by the court, the next step would be delivery of written questions from the prosecution and defense. Below is a sample prosecution list:

1. The prosecution must prove its case beyond a reasonable doubt. The court will instruct you as to what that is and indicate that it is not proof to an absolute certainty. Do you feel that you would have to be absolutely certain before you could find the defendant guilty?

2. There is a concept popular with some people that a jury has the power to find an individual "not guilty," not because they don't believe beyond a reasonable doubt that the person committed the offense, but because they don't think the conduct should be a crime. This is commonly known as jury nullification. In Alaska the court system relies upon jurors to follow the court's instructions and not decide a case based upon a juror's philosophical beliefs about the law. Can you follow the court's instructions, or are there circumstances in which your personal philosophy about drinking and driving would prevent you from following the court's instructions?

3. The prosecution wants jurors who can be fair and impartial. Different people often have different perceptions of what may or may not create a bias on the part of someone else. Some common things which may relate to the ability of jurors to be fair are things such as:

Have you, a friend or a family member been charged, convicted or touched by a similar offense? Do you have a lot in common with the defendant, such as type of work, clubs, military, etc? Do you know anyone involved in the case personally or have opinions or preconceived ideas about them which might effect your judgment? Do you drink? Do you have preconceived ideas, favorable or unfavorable, about the reliability of police testimony or about police in general? Are there any things about you which might create a mistaken impression, or which someone might misinterpret to think that you are biased?

After identifying your potential biases, can you disregard them and approach this case and the testimony and evidence you will hear with an open mind?

4. If you were the prosecuting attorney, and you were trying to pick a jury that was fair, and one that would not be predisposed to acquit or convict the defendant, but which could hear the evidence and evaluate it following the court's instructions, would you want yourself on the jury? If not, Why not?

5. The prosecution sees that the primary role of the jury is to evaluate the evidence and decide what happened at a particular place at a particular time. A large part of that job is making decisions about what or who to believe in making that determination. Sometimes people see the same thing and perceive it differently, (like the question of whether the glass is half full or half empty; or more directly conflicting, the correct interpretation of an optical illusion line drawing which has multiple plausible interpretations). Sometimes differences are so directly in conflict that the interpretations are mutually exclusive (such as a referee's call in or out of bounds or two children saying "did too", "did not".)

Are you comfortable with making choices between conflicting stories? Is it something you have had to do in the past? What are some of the things on which you base your choice? Consistency with others or with statements by the same person, appearance, manner, logic or common sense?

Following the narrative responses to such questions each side could be given 30 minutes for questions to any one of the panel and an additional five minutes for any replacement members.

I do not know what the ultimate effect on trial outcomes would be, although I suspect that over a year the difference would be statistically insignificant. Such a system would, however, treat jurors more respectfully as intelligent and perceptive members of society, and would reduce the societal cost of tying up large pools for long periods of time for jury selection.

The search for Shawn Sande at Hatcher Pass

continued from page 1

All of us want to stop this story at every point and change it. Shawn goes to his class instead of to the mountain. Shawn goes to the mountain with friends, not alone. Shawn takes the beacon with him. Shawn joins the snow-boarders. Shawn turns back because of the conditions. No one wants to change the story more than Shawn's mother, father, brother and friends. But the very attributes which make Shawn so attractive as a young man—his strength, his daring, his love of life—took him further onto the mountain alone.

Shawn's roomates realized he was missing that night. He was expected home and would have been there if not for trouble. They looked in several places in Anchorage, then called the authorities.

At that point, our societal lack of expectations took over and his roommates were told to check the drunk-tanks, police stations and emergency rooms. Knowing Shawn, his friends were offended, and they were outraged at the refusal to believe the truth about Shawn: he was not drunk or stoned; he was lost and perhaps in danger.

Finally, Shawn 'a friends went to his favorite ski place, Hatcher Pass, and found his pick-up truck at about 3 a.m. By sunrise, they had gathered friends and equipment, had involved the local state parks ranger and state trooper, and started the search.

The wonderful thing which came out of this terrible event started then. The search effort grew as word got out, on Thursday afternoon, then more on Friday. By Saturday, the third day of the search, more than 100 caring souls were on the mountain, searching, giving Shawn the only chance he had.

Some of the searchers were extraordinarily knowledgeable and well-trained, others were merely willing. UAA wilderness survival course teachers, National Ski Patrol members, trained avalanche searchers, ski club members, Mat-Su and Anchorage snowmobile association members, Alaska Search and Rescue, hosts of friends, several search-trained dogs and their masters, and Shawn's brother, mother and father, these, and others who have no affiliation, took to the mountain.

Shawn's survival class met, as previously scheduled, Saturday morning at Hatcher Pass, with an immediacy and purposefulness that no one wanted. They too took to the mountain to assist in the search.

Teams of six to 10, each led by a well-credentialed team leader, some on skis, some on snow shoes, all carrying shovels and survival gear, performed the burdensome task of trudging through snow which was at times and in places more than a dozen feet deep—deeper than their probes were long—poking with hope into the mountain. Skiers with the same love of the mountain which took Shawn to Hatcher Pass plotted and planned the search, thinking like skiers, trying to deduce Shawn's likely path.

Snowmobilers supported the effort, taking the searchers to the mountain with less fatigue than if they had skied. They repositioned the teams frequently, quicker than the teams could have moved without motor transport. The snowmobiles also provided a quick-escape safety valve if the weather turned.

Precise military radio communications ruled the effort. The fallibility of batteries , the mountainous terrain and weather sometimes conspired to frustrate those in charge, reminding the experienced ones of search efforts years ago that were carried on with far more primitive equipment. On balance, they agreed, the current communications systems were effective.

Overhead, the state trooper helicopter buzzed noisily, seeking a glimpse of Shawn's bright yellow parka and looking for possible unchecked probe areas.

The four-day search, employing techniques and strategies which have been refined over the years to a science, blanketed Hatcher Pass, systematically and methodically, with a human horde. At "debriefing" sessions at the end of each search day, the day's efforts were described aloud by anyone who wished to speak so that no piece of information would fail to reach someone who needed it and no theory would go unconsidered. Those most knowledgeable listened and designed the next day's effort.

Then, with the search leaders believing, with good reason, that the job had been as thoroughly pursued as nature would permit, the search was officially ended on Sunday evening. Shawn was not found.

Did you know such valuable resources exist? Did you know so many talented people care so much ?

We will never protect our kids from the folly, the reckless abandon of youth. How does a parent foster and encourage the energy, curiosity and daring which makes Shawn Sande the attractive "boy" he is, while protecting him from the risks brought on by those very same attributes? Is there a balance we can strike between lighting the fire of the love of life even while preventing the blaze from consuming the kids who embrace it? Shawn's father and mother tried.

At the debriefing session following the last day of the search, Shawn's father spoke to the group, describing himself as a man who made his living on the sea and one who had participated in sea rescues, trying to offer assurances and comfort to the searchers, telling them that he knew what they had done and that he loved them for it, despite the outcome.

But more. He told the searchers that things happen for a reason. His boy was still on the mountain, he said, so that other kids would learn from Shawn's mistakes. He implored us to teach what we had learned from the terrible thing that happened to his boy, so that it might not happen to others. He did not ask that we stop kids from going to the mountain; he asked that we teach them to survive when they go there,

Shawn's family has suffered a horribly painful loss. Yet even in their grief, they have shown great courage and grace. In doing so, they have offered tremendous understanding of youth and quiet insight into one family's attempt to protect a child, while still nurturing the lust for life which made Shawn such a fine young man. We should all—young and old—listen and learn.

Alaska Bar Association Spring 1995 CLE Calendar

#88 March 21 2.5 cles	Mandatory Ethics for New Admittees	Hotel Captain Cook Anchorage
#04 March 23 3.75 cles	Admiralty Lawyers Are From Mars - Bankruptcy Lawyers Are FromVenus: Exploring Each Other'sWorlds	Hotel Captain Cook Anchorage
#88 March 24 2.5 cles	Mandatory Ethics for New Admittees (NV)	Westmark Hotel Fairbanks
#24 March 31 3.25 cles	Interactive Trial Practice Cross-Examination (NV)	Westmark Hotel Fairbanks
#88 March 31 2.5 cles	Mandatory Ethics for New Admittees (NV)	Centennial Hall Juneau
#25 March 31 - April 2 13.5 cles	Jewish/Contemporary Law (NV)	Newport Beach, CA
#23 April 5 2.0 cles	Off the Record: Kodiak(NV)	Westmark Hotel Kodiak
#02 April 7 2.75 cles	Federal/State Discovery Rules	Hotel Captain Cook Anchorage
#26 April 8 & 9 14.25 cles	Advanced Cross Examination AK Action Trust (NV)	Regal Alaskan Hotel Anchorage
#16 April 11 3.0 cles	ADA & Sexual Harassment Issues	Hotel Captain Cook Anchorage
#05 April 14 6.5 cles	Preserving Family Lands Kachemak Land Trust (NV)	Homer
#03 April 19 2.75 cles	Limited Liability Companies: The New Legislation in AK	Hotel Captain Cook Anchorage
#21 April 21 3.5 cles	Ethics & the Rules of Professional Conduct	Courthouse Kenai
#27 April 25 or 26 2.0 cles	Telephonic Seminar - American Bar Association: Custody Evaluation/ Family Law	Telephonic
#24 April 28 3.25 cles	Interactive Trial Practice Cross Examination (NV)	City Cncl Chambers Juneau

Annual Convention CLE Schedule

May 10 2.75 cles	Bench & Bar Communicating Across Cultures	Princess Hotel Fairbanks
May 11 2.25 cles	Bench & Bar Joint Federal/State Discovery Rules	
May 11 3.25 cles	Bench & Bar Review of U.S. Supreme Court Opinions	
May 12 3.25 cles	Bench & Bar Courtroom Communication for Judges & Lawyers	
May 12 2.75 cles	Bar Only Raising Lawyers for Fun & Profit - or - Training Lawyers: A Contact Sport	
May 12 2.75 cles	Bar Only Too Many Lawyers, Too Little Work	

Class president

Running for office: promises, promises

By William Satterberg

Law school is generally a three-year ordeal for most students, during which neurotic individuals study interminable hours to learn the elusive concept known as "the law" and, more importantly, ready themselves for entry into the job world, so that they may be able to repay horrendous student loans, satisfy beaming grandparents, and impress potential mates.

During the three or more years of hazing which ordinarily exist, the students adopt various approaches for finding the ever-important job upon graduation.

"Some prefer the straightforward approach, diligently studying for a degree."

Some prefer the straightforward approach, diligently studying for a degree, with the ridiculous idea that hard work and grades will do the job. Others hope that the prestigious name of the institution, i.e., overhead Door Night Law Academy, will carry them. Still other students opt for various extra curricular activities reputed to influence future work, such as moot court, trial advocacy classes, law review, internships, special programs, and multiple degrees. And finally , there are those practical students who know that their mom or dad will offer them a job with the family's law firm, if they ever pass the bar. Certainly, they are the luckiest.

During my first year of law school, I had no idea just how important the ultimate job search would be. After all, I had always planned to be a ticket agent for Alaska Airlines, or maybe a tank driver for the Army. The idea of studying to become a proficient practitioner of "the law," a respected trial advocate, a brash barrister, a sly solicitor, or whatever, had simply not occurred to me. I was attending law school because I did not know what to do after I had graduated from college and because I needed a little extra help in meeting girls.

By the end of my first year of law school, I realized that I was going to have to do something to become an employable individual. Furthermore, law school was ruining my sex life, which was nil to begin with. The idea of writing for hours on end for law review, or babbling incessantly in moot court, simply did not appeal to me, despite my admitted gift of babble. I was happier playing pinball a the Orangetown Bar and Grill.

No, I had to do something different. Something that would distinguish me from all of the other students in my class, prove that I was a leader, and make me, above all else, employable to some prestigious Wall Street law firm, or maybe even as sole practitioner in Fairbanks, Alaska, with offices in Tok.

It soon came to my attention that the first year class would be electing a president for the second year of law school. It didn't take long for me to seize upon this opportunity as my key to financial and academic fame. I would simply run for president of the class, get elected, and then everything else would fall into place. (Besides, they couldn't flunk out the next year's class president, could they?)

Recognizing that nobody had announce their candidacy for this most prestigious position, probably because they all clearly felt inadequate, I was quick to announce that I was running my own campaign for president of the second year class. I did this by typing up a 48-inch platform on legal paper, explaining my primary goals.

In addition to the standard baloney about representing the students competently with the administration, I threw in such other appealing issues as obtaining a new vending machine for the third floor, and legalizing streaking in our international law professor's class. (On a previous occasion, a man had streaked through the international law class, much to the consternation of Professor Emeritus L.F.E. Goldie, who promptly banned such activity).

I figured I had a 50 percent chance of winning the election, especially since I was running unopposed. All appeared well, until approximately one week later, when a young man out of Long Island, New York, announced that he also intended to run for president. Remarkably, he had actually read my platform (something no one else had done) and decided that I was not fit to lead such a group of young academics. A challenge was issued to me. I was asked to respond to some or all of the frivolity of my platform, including my proposals to abolish moot court, law review, trial advocacy, joint degree programs, and grades.

"In the final exchange, I decided that honesty was, clearly, the best policy."

A literary debate began on the school bulletin board. My opponent never agreed to face me in the public debate I offered before the students of our class. In retrospect, this decision was probably good, since I later learned that nobody planned to attend, anyway. Still, we did find after a period of time that people were reading the hotly drafted platforms which both warring candidates would pin to the bulletin board during the dark of night, while the perpetual bridge game blazed on hotly in the corner of the lounge.

Ultimately, it became apparent that the election would be upon me in very short order, and that something had to be done to overcome the threat to my candidacy. Surprisingly enough, this particular individual actually had been able to garner a certain degree of support through more short-sighted, practical-minded students, who apparently disagreed with my proposal to drop the old vending machine down the stairwell. If, indeed, his campaign continued with the same momentum as I expected, it would not be long before I might actually lose the election, once again relegated to hanging my head in shame.

In the final exchange, I decided that honesty was, clearly, the best policy. I would lay it on the line and challenge him directly.

At one point in time, my opponent had callously asked whether or not I was truly sincere in my intentions to run for class president, or did I have other, more selfish, motives in mind.

The question seemed reasonable enough. Self-examination that night at the local campus bistro led me to believe that I had better square with my student class, lest they resent me forever, and not just for the forthcoming year.

The next day, I published the final plank of my platform. I announced that I had but one primary goal, and that was to get elected. I explained to my beloved students that they should pity me. After all, I was from Alaska, and after one year of studies still could not find my way around the East Coast. My parents were not rich, and I still did not know how to tie a necktie without it twisting so that the label from J.C. Penney would show.

In completing my platform, I explained to the readers that I desperately needed to be class president. Grades were soon coming out, and it was woefully apparent that I had to have something to put on my resume if I ever expected to get a job. I explained how important most Alaskans thought that any presidency from the East Coast would be, and how most Alaskans had no idea what law review, moot court, or a joint degree really was. President of the Second Year Law Class, I reasoned, would really mean something to somebody, however. The tear-jerking clincher was that my parents could finally be proud of me and brag all over Houston (Alaska) about their famous son, the president.

At about the time I was prepared to post my platform, it was pointed out to me that perhaps I was being somewhat selfish in my candidacy. Somewhat? My plan was to be totally selfish! After all, if there could only be one class president, why shouldn't I be it? I then hit upon an even greater idea. There could be room for everyone. We all should have titles to put on our resumes. Why not? If the United States President truly had executive powers, and could declare things such as Vietnam wars, Angola wars, Grenada wars, Haitian wars Korean wars, have affairs, and do all sorts of other executive things, why couldn't I? It made common sense.

I promptly announced that if I were to be elected president of the class, I immediately would create 150 vice-president positions.

I explained that the only office positions which could not be touched, but which would have to be selected still through democratic elections (which I intended to abolish also), would be the position of class vice-president, class secretary, and treasurer. Otherwise, however, since it did appear that I might actually be able to declare myself dictator for life, my door would be open to appoint any and all students to a vice-president position within my student government. The end result would be that everybody, including my opponent, would be able to put something on their resume. This appealed to almost everyone, except the two vice-president candidates.

"On the day of the election, I was overwhelmingly elected to my position as president of the second year class."

In fact, little did I realize just how successful my proposal was. Surprisingly enough, there was truly a silent majority among law students, who did not write for law review, babble away at moot court, or even take the suggested regimen of courses which would prepare them for a suit and tie job in New York City. Like myself, they, too, were worried about their future employability, and probably had contemplated jobs as ticket agents for U.S. Air.

On the day of the election, I was overwhelmingly elected to my position as president of the second year class. My honor restored, I happily departed law school to return to Anchorage that summer, to the ignoble task of digging an outhouse hole on the homestead. Fortunately, it was during that same summer that I received notification that I was accepted to study at an overseas law program in London, England. I was faced with a true dilemma. Should I resign my position, be impeached (which was becoming most fashionable in 1975), or rule as president *in absentia* from exile (also fashionable?)

Ultimately, my decision was reached. It was with deep sadness, reminiscent of my hero Richard Nixon, that I authored my last paper to my class, resigning my post, commencing: "My fellow law students, it is with a heavy heart..."

Still, I have always been able to put my short-lived presidency on my resume, which has probably served to impress someone, somewhere, sometime.

NEWS FROM THE BAR

At the Board meeting on January 13 and 14, 1995, the Board of Governors took the following action:

• Rejected a stipulation for a three year suspension in a discipline matter stating that there was not enough to justify mitigation to three years;

• Held over the remand in the Beconovich matter until the March meeting and gave respondent's attorney 30 days to submit a brief on the sanctions;

• Granted a request to waive the deadline to transfer to inactive status;

• Set up board subcommittees to make recommendations for the Distinguished Service and Professionalism awards;

• Reviewed correspondence with Chief Judge Holland about the selection of the 9th Circuit lawyer representatives; the president will appoint a committee to make nominations to the court;

• Asked the executive director to follow up with the federal court to see if they needed anything else regarding the proposed rule change to charge a fee to Outside counsel to appear in federal court;

• Granted a request for a waiver of inactive bar dues;

• Approved the requests to go on active status by Robin Bronen, Susan Paterson, James Oswald and Andrew Lebo, and the resignation requests of Pat Owens and Michael Thomas;

• Approved the minutes of the October board meeting;

• Considered a request for the sale of the membership roster list and asked the executive director to find out what the state charges for similar lists and determine a reasonable cost for a hard copy of the roster and the roster on disk.

• Considered a request from a private company that wanted to sell the jury instructions on CD-ROM, which would also contain the Alaska statutes. The Board believed that the Bar should not get involved in distribution of the instructions with a private company, but they should be referred to the court;

• Adopted a stipulation for a public censure;

• Adopted a stipulation for reinstatement;

• Met telephonically with local bar presidents, Bob Cowan of Kenai, and Ben Hancock of Kodiak and discussed several issues, including CLE;

• Approved guidelines for charging other organizations a $35 fee for accrediting their CLE programs;

• Heard a report from the CLE director in which she reported that attendance at CLE programs was up in 1994, to 967 attorneys and 397 non-attorneys attending seminars, and that in 1994, revenue from CLE programs was $126,000 and direct expenses were $104,000 (this does not include overhead, such as salaries, etc.);

• Approved a request to form an Education Law Section;

• Heard public comment from Tom Obermeyer and Theresa Nangle Obermeyer;

• Heard a report from Jeff Friedman of the Pro Bono Service Committee and approved a committee request for $500 for a managing partner's breakfast to promote pro bono;

• Heard reports on section activities from the following section chairs: Steve Shamburek (Admiralty), Margaret Stock (Immigration), Teresa Williams (Administrative) and Dick Thwaites (Elder Law);

• Declined to grant a request from Robert Hickerson of ALSC to allow ALSC lawyers to pay half bar dues;

• Tabled until the March meeting a request by the Joint State Federal Gender Equality Task Force for $5,000 and directed Bar Counsel to give an opinion as to whether the Board has the authority to make such grants and other guidelines;

• Adopted two ethics opinions, "Government Employee Entering the Private Practice of Law with a Firm Handling Litigation Against the Attorney's Former Agency", and "Propriety of Shop Talk and Courtesy Copies under ARPC 1.6 (Confidentiality of Information);" referred the opinion "Attorney's Right to Charge Client for Copying Files" back to the Ethics Committee with instructions;

• Reviewed a letter from the Alaska Law Review editor and declined to create an annual award for best article, but asked the executive director to see if the current liaisons to the Law Review were interested in continuing;

• Considered a request from ABA President George Bushnell for appointments to an ABA steering committee to do grassroots lobbying on behalf of Legal Services Corporation and asked the executive director to get suggestions for appointments;

• Reviewed letter from Phillip Weidner and James Doogan about the courthouse security systems and asked the executive director to respond that the board has been discussing this issue and members of the board have had communication with the court;

• Discussed a proposed ethics opinion, "Unconsented Recording of Conversations" and referred it back to the ethics committee with instructions;

• Approved payment of $5,000 to Perkins Coie for acting as Trustee Counsel in the George Weiss matter;

• Approved a Lawyers' Fund for Client Protection Committee request to consider claims in a LFCP matter before completion of the disciplinary process;

• Advised an attorney requesting a rule change that the Board can't require clients to participate in fee arbitrations and suggested that if attorneys want arbitration, they should put it in their fee agreements;

• Voted to publish a proposed amendment to Rule 47(a) which would delete the requirement to serve a copy of a LFCP claim on the Board;

• Voted to publish proposed amendments to the Bylaws which would make the Alaska Rules of Professional Responsibility Committee and the Substance Abuse Committee standing committees;

• Discussed the issues of random audits of trust accounts and notification of trust account overdrafts and put this issue over until the March meeting;

• Reviewed the *Keller* issues regarding mandatory bar association;

• Voted to survey the membership to determine who has malpractice insurance and to ask what members think about the various options regarding mandatory malpractice insurance or mandatory disclosure of insurance;

• Voted to publish an amendment to Rule 26(h) regarding Supreme Court referrals to the Substance Abuse committee;

• Heard a report from the subcommittee on public relations who said they would be looking to board members to write articles and would also be looking for speaking opportunities;

• Heard a report from the Unauthorized Practice of Law committee and decided to take up this issue in March and at that time come to a decision regarding the form of the rule and republish it;

• Reviewed the status of the board's goals for the year.

Resolutions

Continued from page 11

been "mistakenly" executed and several hundred have been wrongfully convicted of capital crimes this century including most recently Jesse Jacobs who was executed in Texas, January of 1995;

THEREFORE, BE IT RESOLVED THAT, the membership of the Alaska Bar Association opposes reinstatement of the death penalty in Alaska and believes that reinstatement would be damaging to the administration of justice in Alaska.

Dated 3/10/95

Signed by 14 Alaska Bar Association Members

Resolution No. 3

WHEREAS Congress currently faces proposals to cut the amount of federal appropriations for public broadcasting; and

WHEREAS federal money has been the foundation for a wide variety of outstanding programs and news coverage; and

WHEREAS public broadcasting is of vital importance in Alaska, being the sole or main source of legal and other public notices and information — especially in rural areas; and

WHEREAS Alaska's congressional delegation has supported public broadcasting in the past, which support has been greatly appreciated by its constituency; and

WHEREAS Alaska's congressional delegation enjoys leadership roles in Congress, and is in a position to help prevent the threatened cuts in federal funding;

BE IT RESOLVED that the Alaska Bar Association strongly urges Alaska's congressional delegation to do its utmost to prevent any cut in federal funding of public broadcasting.

COPIES of this resolution shall be sent to the Honorable Ted Stevens and Frank Murkowski, United States Senate, and the Honorable Don Young, United States House of Representatives.

Submitted by the Juneau Bar Association.