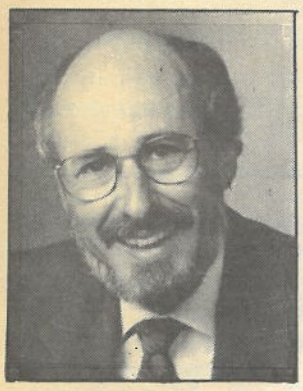
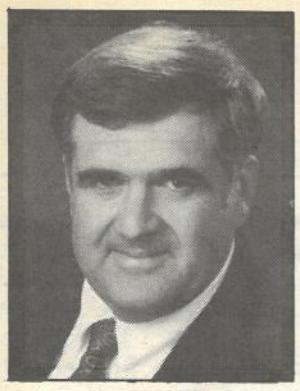
Don't Miss These & Other Convention Speakers

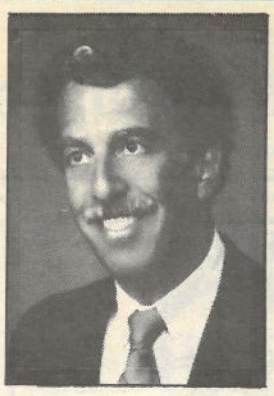


John Strait
University of Puget Sound Law School

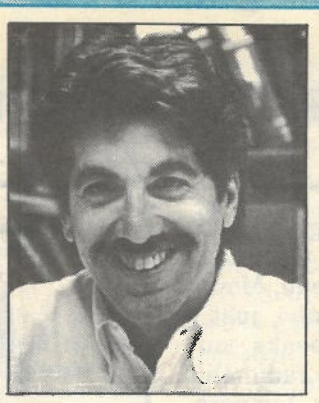


Robert D. Reis
ALPS

Lynne Curry-Swann
The Growth Company



Justice Thomas A. Zlaket
Arizona Supreme Court



Peter Arenella
UCLA Law School

Julian Eule
UCLA Law School

$2.00

The Alaska BAR RAG

VOLUME 17, NO. 3 — *Dignitas, semper dignitas* — MAY-JUNE, 1993

Courts examine gender bias in practice

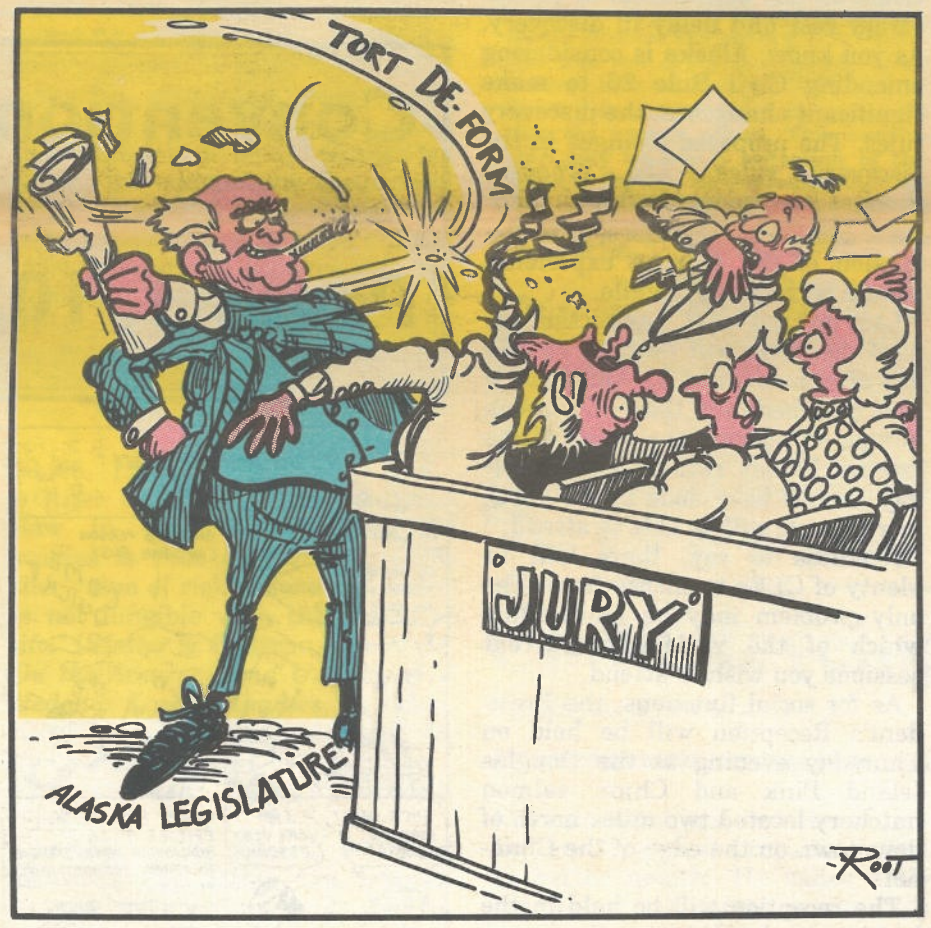
Gender bias task force findings to be reviewed during the convention

BY SUSAN LINDQUIST

Across the nation, there is a quiet rumbling taking place as courts examine gender equality in the legal field. Committees in 39 states are looking at how gender differences affect the treatment of lawyers and litigants, jurors and witnesses, victims of domestic violence, and women prisoners.

This summer in Juneau, the Bar Association and Judges' Conference are presenting a joint program to explore the issue. Federal District Court Judge John C. Coughenour of Washington state, who chaired the Ninth Circuit Gender Bias Committee, is the keynote speaker. Superior Court Judge Karen Hunt will give the National Judicial College presentation on correct, non-biased language. Collin Middleton will moderate a panel and coordinate a video demonstration of gender problems in the legal field.

"TORT REFORM" ISN'T Story, Page 5



The gender equality program developed from the Ninth Circuit's decision to feature the issue at the 1992 Judicial Conference. It created an advisory committee to study gender bias in the courts. The committee conducted a random survey throughout the circuit in 1991 and reported the initial results at the 1992 conference.

Federal District Court Judge James K. Singleton and Middleton, the ABA representative to the Ninth Circuit, assembled an ad hoc task force in April of 1992 to explore the scope of gender bias in Alaska. In addition to Judge Singleton and Middleton, the committee is composed of Superior Court Judges Karen Hunt and Dana Fabe, Stephanie Cole, Deputy Administrative Director of the Alaska Court System, Teri Carns, Senior Staff Associate of the Alaska Judicial Council, Deborah O'Regan and Barbara Armstrong of the Alaska Bar Association, Susan Lindquist, a board member of the Alaska Association of Women Lawyers, and Jacquelyn Luke, an Anchorage attorney.
Anchorage attorney.

The committee distributed a survey at the 1992 Alaska Bar Convention and Judges' Conference. Although the sampled population was

continued on page 20

New model rules coming?

BY KEITH BROWN

At the ABA's annual meeting in New York in August, 1993, the American Bar Association's House of Delegates will be presented with the task of reviewing and approving a new set of model rules designed to take lawyer discipline into the 21st Century.

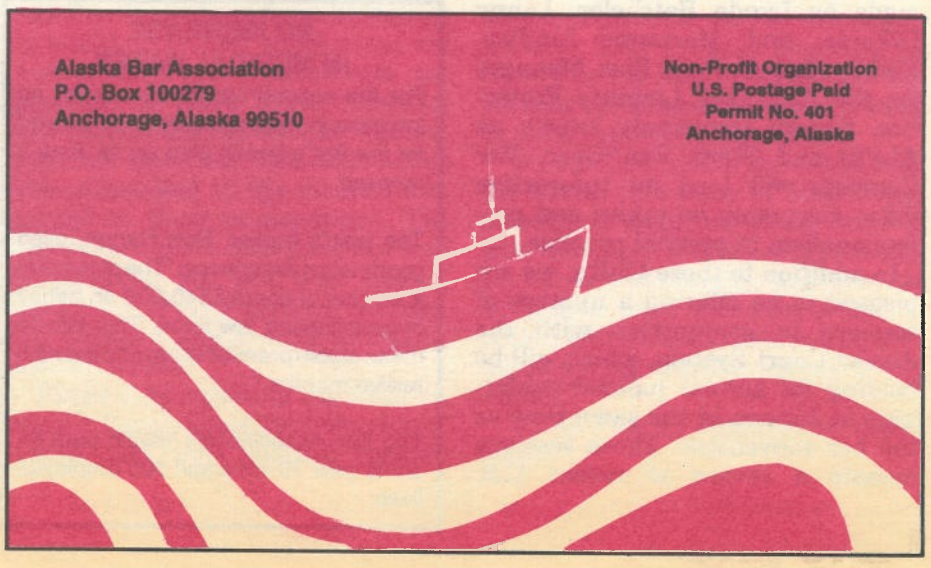
If adopted by the ABA, the Model Rules for Lawyer Disciplinary Enforcement (MRLDE) will doubtless be considered for adoption throughout the country. Given the fundamental changes suggested by the rules, and most particularly the concept that discipline be managed directly by the judiciary, it may be helpful to discuss the genesis for these recommendations before considering their long-term impact upon the state bar.

The primary focus in this discussion is the change from lawyer self-regulation to the managed discipline system envisioned by the proponents for change. Model Rules are just that; they represent a normative proposal that each state is free to consider, accept, reject or modify. Passage of the Model Rules by the House of Delegates simply places the imprimatur of the ABA upon the proposals; it does not require that each state follow suit nor does it impose a timetable upon the process of change. Nonetheless, it is highly likely that the Model Rules will be adopted. They represent the most significant blueprint for

Inside

The TVBA returns; the writers are fired up; the convention schedule is packed (see you in Juneau!); and the *Bar Rag* has a new look.

And thanks to the fortuitous serendipity of press scheduling, this issue of the *Bar Rag* has more colors than usual. Anchorage Printing, Inc. (the *Rag's* official print shop) provided the additional color at no charge.



President's Column

Juneau looks forward to hosting bar

Barbara J. Blasco

The sun is beaming on the sparkling waters of Gastineau Channel and Mount Juneau, Mount Roberts, and Mount Jumbo, just a few of the glistening peaks surrounding our town. The radio this morning was predicting temperatures in the 70's.

The weather is undoubtedly practicing for the upcoming Alaska Bar Convention. Although the rains of Southeast Alaska are legendary (after all, we do live in a rain forest), the months of May and June are, in my 16 years of experience, without question the best weather months of the year (indeed, the webs between our toes even begin to crack). There is quite simply no place on earth as spectacular as Southeast Alaska on a sunny summer day. Given that alone, there is no excuse for not coming to Juneau for the Bar Convention on Thursday, June 10 through Saturday, June 12. And, when you consider the CLEs being offered, the social functions planned, and the camaraderie you will experience, you realize this is a "must" event.

We in Juneau are very excited about the convention. The ad hoc Juneau bar convention committee (Susan Cox, Beth Kerttula, District Judge Peter Froehlich, Jamie Fisher, Sarah Felix, Marian Miller, Bruce Weyhrauch, and myself), worked hard with CLE Director Barbara Armstrong to develop what we believe is a strong CLE agenda.

Our focus in planning the CLE topics was on trial practice skills, stress management (two totally unrelated topics), and professional ethics. Professor John Strait of the University of Puget Sound School of Law will be presenting sessions on direct and cross examination and client interviewing skills; and Lynne Curry-Swann of The Growth Company will be presenting sessions on "Reading the Silent Messages of Jurors" and "Taking the Edge Off Stress."

In addition, Judge Karen Hunt, Gary Foster, and Valerie Van Brocklin have agreed to give a repeat performance of their very popular sessions on demonstrative evidence. This time they will also be joined by Juneau Superior Court Judge Larry Weeks.

The Alaska Shorthand Reporters Association graciously offered to make a presentation entitled "Total Access Courtroom" concerning technology available for making the courtroom and other legal proceedings truly accessible to the disabled. This presentation will be made by Lynda Batchelor, Lenny DiPaolo, and Marianne Lindley. Finally, Robert Reis, Risk Manager for the Attorneys Liability Protection Society (commonly known as ALPS) and Steve Van Goor, Bar Counsel, will lead an interactive video discussion on ethics and professionalism in pretrial practice.

In addition to these CLE's, we are pleased to be offering a number of sessions in conjunction with the Alaska Court System, which will be holding its annual judicial conference in Juneau at the same time as the bar convention. These sessions include a review of recent U.S. Supreme Court opinions presented by Professor Peter Arenella and Associate Dean Julian Eule of the UCLA School of Law, and a presentation by Judge John C. Coughenour, Chair of the Ninth Circuit Gender Bias Task Force, with Judge Karen Hunt, Judge Charles Pengilly, Susan Cox, Susan Burke, William Council, and R. Collin Middleton on gender equality in the justice system. Another important session to attend will be that given by Justice Thomas Zlaket of the Arizona Supreme Court on the elimination of unnecessary cost and delay in discovery. As you know, Alaska is considering amending Civil Rule 26 to make significant changes in the discovery rules. The proposed changes in the discovery rules. The proposed changes are modeled after the Arizona rules and, therefore, this discussion of the Arizona experience should be very worthwhile.

Last but not least, bar section annual meetings will be held on Friday afternoon, June 11. Our hope is that by scheduling these discussion groups on substantive areas of the law for Friday rather than Saturday (as has been done in the past), more people will be able to attend.

Needless to say, there will be plenty of CLEs to choose from. The only problem may be in deciding which of the various concurrent sessions you wish to attend.

As for social functions, the President's Reception will be held on Thursday evening at the Douglas Island Pink and Chum salmon hatchery located two miles north of downtown on the edge of the Channel.

The reception will be held in the hatchery's lovely reception area filled with aquariums of sea creatures of Southeast.

On Friday evening, we will hold the Annual Awards Banquet at Centennial Hall. This is the event at which the Distinguished Service and Professionalism awards are presented, an event you won't want to miss.

We will also have live entertainment by the 20th Century Bluescast, Juneau's own political satire and comedy group, and upbeat music by John Buck & The Casual "T"s" for you dancing fans. In addition, we will be having a luncheon on Thursday with guest speakers Chief Judge H. Russel Holland, United States District Court, and Chief Justice Daniel A. Moore, Jr., Alaska Supreme Court, and a luncheon on Friday with guest speaker Charles Cole, Attorney General. And, of course, there will be the traditional Hospitality Suite hosted this year by the Anchorage Bar Association.

On Saturday, the Juneau Bar Association is hosting a picnic at Sandy Beach in Douglas. A rousing softball game, amongst other activities, is planned. The picnic will be preceded by a Fun Run sponsored by ALPS from the Douglas Bridge to Douglas, approximately two miles. (Juneauites run this race every year on the 4th of July, so expect competition; we will try not to let the general public know that all the runners will be lawyers or people who hang out with lawyers.) The Juneau Bar is sponsoring "Dinner in the Home" and "Stay with Local Families" programs you should also consider checking out. Meet the locals up close and personal. Call Bruce Weyhrauch at 586-2210 for details.

As for other activities, we recommend you take advantage of the mountains, waters, and glaciers surrounding Juneau: there are abundant hiking trails leading out of the downtown area, and lots of friendly folks ready to share their boats, fishing gear, airplanes, bicycles, and roller blades. Just ask, and the Juneau Bar will take steps to provide an adventure for you.

As you can perhaps tell, I am very pleased with how the convention has come together. Now, if we can just pull it off!! We will expect to see you in Juneau on June 10-12 for a successful, educational and, most of all, fun Alaska Bar Convention.

NO INCREASE IN MEDICAL RATES

For the second consecutive year, no increase in medical rates is scheduled for the Bar's health plan on its June 1 renewal.

The plan's broker, Bob Hagen, cited good claims experience: "The plan holds a surplus of about $540,000 on behalf of participating law firms. This should mean stable premiums beyond the next twelve months."

The Bar Association's health plan insures over 70 firms and 500 employee lives.

Convention Highlights:

Pages 1, 10, 11, & 20

The Alaska BAR RAG

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Letters from the Bar

Opposes changes

I am opposed to both of the recent proposals for global expansion of Civil Rule 16.1 fast track and exclusive good faith exchange discovery.

Not all litigation is appropriate for the fast track. Not all parties operate in good faith. In the more recent years my practice has focused upon complex civil litigation, including medical malpractice and products liability. In this type of litigation the issues are complex and the volume of documents is immense. The proposed time restraints would serve to principally prejudice plaintiffs whose only access to critical documents and information is through the discovery process.

Of paramount importance to understand is that major institutional defendants do not produce documents voluntarily. It takes work, time, and most importantly, litigation to get defendants to make production. The stakes are high and the issues are extremely hard fought and time-consuming. Discovery in itself is a major litigation battlefield. To impose artificial and unworkably short deadlines in this type of litigation will, in my view, serve principally to frustrate meaningful discovery and trial preparation rather than serve the public interest.

I also disagree with Judge Johnstone's forecast committee conclusions in the March/April *Bar Rag* where he states:

> Good faith mandatory disclosures would eliminate the need for most discovery. And while there may always be a fear that one side will not be getting as much information as it gives, the threat of sanctions should normally discourage improper disclosure....

Some institutional defendants do not act in good faith. Indeed, some defense counsel have directly stated that it is malpractice to simply voluntarily turn over damaging documents.

It is naive to think that an institutional defendant whose own tests show that their product is defective will in fact voluntarily disclose this information "in good faith." The artifices and excuses are legion and quite inventive. Many institutional defendants are represented by in-house and outside counsel. The threat of sanctions is abstract and they feel they are representing their employer's best interests. Relying exclusively on their good faith will insure only that noncompliance is never discovered. Only aggressive discovery litigation can hope to produce the information.

The same is true with the factual and scientific issue presented in this type of litigation. Most such cases embrace a broad spectrum of science and expertise. Most information is readily available to defendants but must be generated almost *ab initio* by plaintiffs. Limiting an expert or design engineer deposition to 4 hours will limit meaningful discovery. Often it takes 4 hours to ascertain qualifications.

Finally, it is sometimes forgotten that attorneys have more than one case at one time. The deadlines suggested would cause extreme overload on a small law office with one case and would simply be impossible to meaningfully accommodate with two cases. The financing of such cases involves doing other work. This simple practical reality would not only prevent the small office from handling such cases, but also operate to deny the public access to attorneys of their choice.

The proposed rules are, in my view, quite far-reaching in their impact not only on the practice of law and the quality of justice delivered, but also to actual substantive rights of plaintiffs to due process and meaningful access to the courts. Perhaps the fasttrack and abbreviated discovery would be good in some cases. However, in my view, it would be bad in others.

Robert H. Wagstaff

Johnstone replies

I received and read your April 6, 1993 letter objecting to the Civil Rule 16.1 fast track and, as you phrased it, the "exclusive good faith exchange discovery." As you are no doubt aware, Chief Justice Daniel A. Moore, Jr. has been considering adoption of a uniform track rule statewide. Concurrently, he has appointed a Special Alaska Bar Association Committee to consider rules which would provide for just, efficient, speedy, and inexpensive alternative to the expensive discovery that is now very often taking place. This committee consists of eleven members of the Alaska Bar Association, including two judges. I serve as the chairperson on that committee.

The committee is not involved with uniform track. The committee has, however, proposed rule changes, subject to committee commentary, which will be submitted to the Alaska Civil Rules committee. The proposal is not, as you indicated, an "exclusive good faith exchange discovery." In fact, all discovery tools remain, and in the case of Rule 33, have been expanded.

What has been proposed is an obligation to make a good faith disclosure of information that is then available and continue to do so in the hopes that clients and, in some cases, the lawyers who front the costs, can be spared unnecessary expense.

I agree with you that not all attorneys or parties act in good faith. However, it is my belief that the vast majority of lawyers do follow the rules and do have an interest in providing an inexpensive, speedy, and just determination of their client's dispute. The proposed rules promote cooperation between counsel, penalize those who are unreasonably uncooperative, and, in many cases, will eliminate unnecessary depositions and other formal discovery. By following these rules, there will likely be a significant savings and greater access to the courts.

For those cases that need special treatment, the proposed rules provide for a comprehensive scheduling conference upon the request of a party as a matter of right. At that conference, the judge would be expected to tailor discovery needs to the case.

The proposed rules provide for *mandatory* sanctions for parties and counsel that engage in disruptive or obstructionist behavior or who do not follow the rules.

The committee believed, as do most lawyers, that four hours is a reasonable limitation on depositions. If a more lengthy deposition is needed, attorneys could either cooperate with each other or an application can be made to the court.

The proposal promotes early knowledge of the factual and legal basis for a case before it is filed and the disclosure rule would require counsel to exchange relevant information forty days after the case is at issue. This would promote early resolution of the case and discourage frivolous claims or defenses.

You are correct in stating that the proposed disclosure rules are quite far reaching. They go so far as to attempt to reduce the cost of litigation, promote cooperation between counsel, and make the courts more accessible. And you may be interested to know, that the Alaska proposal is not unique. The federal courts will likely be adopting disclosure and restrictions on discovery by the end of 1993. Local federal district courts have already done so. And, of course, Arizona has adopted comprehensive disclosure/discovery reform.

Finally, I am enclosing a copy of the committee's final proposal. Since your letter predated the committee's last meeting, you did not have the opportunity to review it before commenting. If you have any questions, please let me know.

Karl S. Johnstone
Presiding Judge

Fill this mailbox!

For the fun of it I am undertaking to collect 100 true anecdotes of unusual and humorous events that have occurred in the practice of law in all of our 50 states; the goal being at least two good stories from each state.

I intend to write a book entitled "Tricks of the Trade in the Practice of Law" authored by "We, the Lawyers." Having retired from 50 years of law practice I am not seeking either fame or fortune. To assure you, I will share half of all book royalties with the authors who sign each published anecdote.

So here is how "We, the Lawyers" should get started. Think back to what was funny or unusual that happened to you or a friend since you started practicing law. Then write to me at 205 Berwick Road, Lake Oswego, OR., 97034 or telephone (503) 636-3492.

For the unusual, match the anecdote about the deposition being taken on the telephone in Portland, Oregon of a doctor/witness in Valdez, Alaska which was interrupted for a long time by an earthquake in Alaska.

"Tricks of the Trade" can splice into the history of our American Court system good things that otherwise will be lost forever. Let us "We, the Lawyers" get going.

William F. White

(P.S. Ed. note: Copy the Bar Rag. We'll use what Mr. White doesn't).

Former Congressman writes

I have recently traveled as an official certified observer for elections in Africa — Zimbabwe (Rhodesia), Ethiopia, Angola, Kenya — and I'll likely serve as an observer in other African nations.

Progress in multiparty democracy is painstakingly slow, but the people have a burning desire to vote and have a little say in their government. They are distrustful of their leaders (with just cause) and hence are tense and suspicious at the polling places.

As I perceive it, the Marxist leaders became very concerned at the time the Soviet Union imploded and collapsed, and realized they would be without foreign communist support; thus deciding that they would have to revise their constitutions and single-party election laws if they were to get funding from the West; so they scheduled "democratic" multiparty elections, *but they had no intention of losing* by decision of the electorate — and fraud was rampant and brazenly perpetrated — like opening 300 polling places without informing the opposition parties, and counting the votes alone too, receiving several thousand extra ballots from the Brazilian printer (as a token of good will), opening polling stations very late where the opposition was strong and closing those polls very early, so that thousands of the opposition were disfranchised; and having the special police harass the voters in certain areas so as to create mass confusion, preventing many from voting even when they were in the proper voting areas at the proper time; assisting "handicapped or illiterate votes mark the ballots properly (after their votes were bought and paid for), as well as myriad other things; so that the election process was *seriously flawed.*

It was most unfortunate that the UN, US and UK certified the elections in Angola, for example, as "free and fair" when certainly such was not the case; and then the media worldwide reacted angrily at UNITA President Jonas M. Savimbi for declaring the elections a massive fraud, and made him look like a sore loser when he walked out of a fragile coalition (taking his generals and troops away with him), when, in fact, the elections were blatantly stolen from him and UNITA. Hence, the 18-year-old civil war renewed with much greater intensity.

By all means, print the truth in the Bar Rag.

Likely, hopefully, I'll be an observer a year from now in South Africa, and perhaps in Mozambique one of these days.

Thanks, Deborah, for your advice and help.

Howard W. Pollock

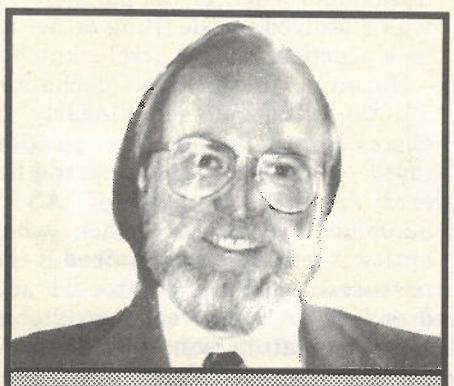
Torts

"Tort deform" strikes in Juneau

An "omnibus tort deform bill," HB292, was introduced April 23, 1993, after floating around Juneau since the middle of the legislative session. The bill's co-sponsors, Representatives Brian Porter, Joe Green, Bill Hudson, Eldon Mulder, Joe Sitton, Bill Williams, and Jerry Mackie, are actively involved in pandering this product of the insurance industry and the medical profession to their colleagues.

Huge Sums Committed to Dismantling the System

As this is being written, there is only about a week left in this legislative session. Nevertheless, proponents of tort deform have committed $300,000 to lobbyists to promote passage of this legislation between now and the end of the next legislative session in May of 1994. The recipients of these monies, Ashley Reed, Sam Kito, Bob Evans, and Jerry Reinwand, are among the most influential lobbyists in Juneau. Anchorage attorney Roger Holmes has provided advice to the group. It can only be assumed that proponents of this legislation are seeking a last-minute introduction of the bill so that the public hearing process can take place before the next legislative session. The bill would be poised for rapid movement through the legislature during the 1994 legislative session.



Michael Schneider

A Slap in the Face to Alaskan Juries

It is common knowledge that defendants in injury and death litigation demand jury evaluation of plaintiffs' damages more often than plaintiffs in these cases. Nevertheless, the proposed legislation is a clear and direct assault on the foundation of our civil justice system: the notion that a jury chosen from the community is the appropriate arbiter of claims and defenses. *Some* of these arbitrary limitations in the bill will be described below.

The proposed bill would:

(a) Eliminate punitive damage claims absent a showing of actual malice or specific intent to harm and cap punitive damage awards at the greater of three times compensatory damages or $200,000.00 (Secs. 7 and 8);

(b) place a $50,000 cap on *pecuniary damages* in wrongful death cases (Sec. 23).

(c) require a plaintiff to disclose all collateral source and insurance information to the *jury* during trial (under current law, this information goes to the judge after verdict). There, of course, is no reciprocal provision requiring disclosure of the defendants' insurance assets (Sec. 14). The jury would see a one-sided picture portraying the plaintiff as insured and taken care of, while plaintiff is compelled to litigate against a defendant represented by an insurance carrier and its retained counsel, but appearing before the court and the jury as a litigant without insurance.

(d) allow defendants to assert the fault of nonparties, whether previously released, and even if never named in the case (Sec. 15).

(e) reduce future damages awards by state and federal income taxes (Sec. 11). This notion has been rejected by a majority of states that have considered it and places the jury in the difficult posture of calculating a tax return for virtually each year of plaintiff's future loss and predicting the often unpredictable changes in life, lifestyle, and other circumstances that would attend any sort of reasonable evaluation of the tax picture.

(f) cap general damages at $500,000 in injury *and death* cases, irrespective of the nature or extent of plaintiff's injuries (Secs. 5 and 6).

(g) reduce the prejudgment interest rate to a floating rate of one percent above the federal discount rate (Sec. 19) and eliminate prejudgment interest on future damages (Secs. 20 and 27).

(h) mandate periodic (structured) payments without providing a guarantee of those payments or an opt-out provision for plaintiffs that wish to control their own destiny (Sec. 12).

Juries in most states, and certainly in Alaska, have been a conservative and moderating force in evaluating litigants' damage claims. Members of the Alaska legislature are prepared to disenfranchise the same people who placed them in office by taking from the jury its discretion to evaluate damages and by placing the plaintiff in an unfair, upstream battle for any measure of justice. All in return for nothing...

The Silver Lining

There isn't one. The medical profession and the insurance industry are in a position to steamroll this bill through the legislature. Those of you who don't believe that the end of an even-handed civil justice system is near may be effectively kidding yourselves; you aren't kidding those who are closely watching developments in our capitol. If you represent claimants in injury or death litigation, or if you appreciate that your friends and family might someday be burdened with a death or injury that was not of their making, you should become involved in this debate.

Odd criminal news items from the Law Department

Comments from the Department of Law's monthly report for February:

"A Nome resident was acquitted by a jury of second-degree sexual assault. We had better luck in the DWI trial of a driver who tried to thwart the prosecution by driving into a utility pole, knocking out power to the entire town, and sending the intoximeter machine off line. However, the jury had sufficient additional evidence of intoxication to convict."

●

In Palmer, a father and daughter moose poaching team recently went to trial. "On the fourth day of the trial, after the father testified; and denied any responsibility, claiming the daughter as an alibi, the daughter suddenly had a change of heart and offered to plead in exchange for testifying against her father. Dad decided that his game was up, and quickly entered a nolo plea to all charges, resulting in a sentence of 90 days."

●

After a guilty verdict in a second-degree assault and harassment case in Kotzebue, several defendants entered changes of plea to felony charges ranging from drugs to sexual abuse of a minor. "Rumor has it that some local defendants monitor the prosecutor's most recent trial performance in deciding whether or not they should plead out."

●

In a investigation conducted by the Kodiak Police Department three defendants were indicted for cocaine-related offenses. "One of the defendants was indicted a day after his brother was sentenced. The police department's confidential informant heard the indicted brother say that he was not as stupid as his brother and would therefore not get caught."

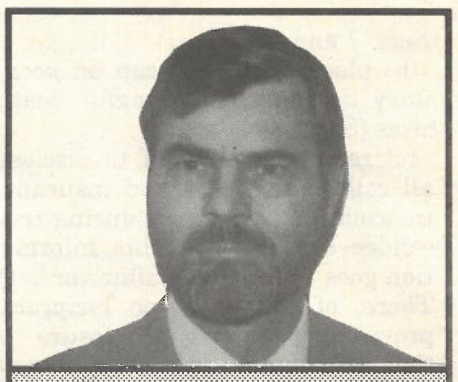
●

A Fairbanks trial with one deaf and one blind juror may make the record books. "The interesting legal issues to be determined are whether the deaf person is allowed to have an interpreter and whether the blind juror must rely on other jurors to read documentary evidence to him. This may be the first jury trial in Alaska with 14 people in the jury room, the jurors plus two interpreters."

●

Bankruptcy Briefs

Consider partnership impacts



Thomas Yerbich

In cases of general partnerships, under § 31(5) of the Uniform Partnership Act ("UPA") the filing of a voluntary or involuntary petition by or against a partner or the partnership causes dissolution of the partnership [AS § 31.05.260(5)]. "Bankrupt" is defined as including "bankrupt under the Federal bankruptcy Act or insolvent under any state insolvent act." [AS § 32.05.390] Thus, whether the petition is filed under chapter 7, 11, 12 or 13 of the Bankruptcy Code dissolution of the partnership occurs [*see In re Philips*, 966 F.2d 926 (CA 5 1992); *but see In re Safren*, 65 B.R. 566 (Bkrtcy.C.D.Cal. 1988) (holding that chapter 11 filing by a partner does not trigger dissolution)]. Moreover, in the event a partner files bankruptcy, the debtor partner lacks the power to bind the partnership [AS § 32.05.300(b)]; he or she ceases to be a partner.

In the case of a limited partnership, under the Alaska Uniform Limited Partnership Act ("ULPA"), bankruptcy of a general partner, dissolves the partnership unless carried on by the remaining general partners under a right stated in the certificate or with the consent of all members. [*See* AS § 32.10.190 (effective through June 30, 1993); § 32.11.370(4) (effective July 1, 1993)] Bankruptcy of a limited partner should not cause the dissolution of the partnership [*See* AS § 32.10.180; § 32.11.330]

The effect on the partnership of dissolution depends upon the terms of the partnership agreement, or, in the absence of an agreement, by the UPA/ULPA. Under the UPA/ULPA, in the absence of an agreement to carry on the partnership business, the sole recourse upon dissolution of a partnership is to wind up its affairs or complete transactions not yet completed and distribute its assets (i.e., liquidate). Thus, having both a formal partnership agreement and making specific provision for the potential bankruptcy of a partner in that agreement is important to protect all partners.

Effect of dissolution

Turning now to the effect of dissolution. When a partnership is dissolved, the rights of the partners, including the trustee or debtor in possession ("DIP") as successor in interest to the debtor partner, are dependent upon the terms of the partnership agreement, if any, or, in the absence of an agreement, the UPA/ULPA.

Unless otherwise agreed, upon dissolution the partners, including the trustee/DIP as successor in interest to the debtor partner, are entitled to have the partnership properties applied to discharge the partnership obligations and the surplus applied to pay *in cash* the net amount owing the respective partners [AS § 32.05.330]. Thus, in the absence of an agreement, the trustee/DIP can "force" termination of the partnership business, liquidation of the partnership assets and distribution of the net cash proceeds. Distribution is generally: (1) to creditors, other than partners; (2) to partner creditors; then (3) to the partners as to capital contributions and undistributed profits in that order [AS §§ 32.05.350; 32.10.220; 32.11.400].

If there is a partnership agreement that permits the surviving partners to carry on the partnership business upon the bankruptcy of a general partner, business operations will continue. However, to be complete, there must also be a provision that provides for the purchase of the interest of the debtor partner. [In the absence of such a provision, if unable to reach an agreement with the trustee/DIP it is entirely possible that the trustee/DIP can nevertheless force the winding up and liquidation of the partnership.] That provision should also contain a mechanism for determining the purchase price and the manner in which the purchase price is to be paid. If it does, as a rule, the trustee/DIP is bound by the terms and conditions of the buy-out provision. In the absence of a predetermined formula, buy-out will have to be negotiated with the trustee/DIP; or, if no agreement can be reached, submitted to the court for determination of the value of the debtor partner's interest in the partnership. In addition, the buy-out will be an all cash transaction. [At least in this situation there should be little, if any, danger of a forced liquidation unless the remaining partners lack the financial wherewithal to cash-out the trustee/DIP.]

Bankrupt partnership

What happens when the partnership itself files bankruptcy. If the petition is under chapter 7, assuming that the requirement of Rule 1004(a) that all general partners consent is satisfied, it is merely a different forum for liquidation and whether the partnership was dissolved by the filing or not is, as a practical matter, irrelevant.

However, in the case of chapter 11, the situation is not nearly as clear. If any bankruptcy petition dissolves the partnership as the literal "plain" language of AS § 32.05.260(5) suggests, then what entity is left to be reorganized if the partnership files a chapter 11 and dissolves? A dissolved partnership must, by statute, wind up its affairs and liquidate; this is plainly inconsistent with the goals of a chapter 11: financial reorganization of the business and rehabilitation of debtor. [The debtor in such case is prevented by the statutory prohibition from continued operations and will soon cease to exist by operation of law.]

Avoiding complications

How, then does one avoid what is patently an absurdity, which, incidentally, violates one of the cardinal rules of statutory construction? This author suggests that there are a couple of routes that might be available.

First, the obvious route is the supremacy clause. Congress in its infinite wisdom extended the provisions of chapter 11 to encompass partnerships in the 1978 Bankruptcy Code ("Code"); a departure from the 1898 Act ("Act"). If one applies the "supremacy clause" approach, a state law must give way where it is in direct conflict with federal law (one can not comply with one without violating the other — a situation that plainly exists by literal application of the UPA), then the dissolution provisions of the UPA must give way to the reorganization-rehabilitation provisions of the Code. A simple and straightforward solution — "what the Feds giveth, the state cannot taketh away."

Second, engage in the legal fiction similar to that used in § 708 of the Internal Revenue Code that although the partnership is dissolved upon filing the petition, immediately thereafter a new partnership is formed composed of the same partners, with the same assets and continuing the same business. The fallacy in this approach is that there is no statutory basis for it whatsoever; in fact, in the absence of a specific provision in the partnership agreement permitting continuation of the partnership business following dissolution, the UPA prohibits it.

Alternatively, one may approach the problem as one of legislative interpretation and take the position that the legislature really did not mean what it said. The support for this approach is that when the UPA was initially promulgated, the Act restricted partnerships to chapter 7 liquidations. Thus, dissolution, winding up and liquidation under the UPA did not conflict with the Act; it merely provided another vehicle for accomplishing that aim [§ 5 of the Act paralleled the UPA in this regard]. A partnership was ineligible for proceedings under either Chapter X (§ 126 of the Act [11 USC § 526] limited it to corporations), chapter XI (§ 306(3) of the Act [11 USC § 706(3)] restricted chapter XI debtors to persons who could be bankrupts under § 4 of the Act [11 USC § 22] and partnerships were governed by § 5 of the Act [11 USC § 23]), or Chapter XII (§ 406(6) of the Act [11 USC § 806(6)] also restricted chapter XII to persons who could be debtors under § 4 of the Act [11 USC § 22]). Moreover, chapters X, XI and XII, unlike the liquidation provisions, used the term "debtor" not "bankrupt." *Ergo*, since the Legislature used "bankrupt" and the term "bankrupt" only applied to liquidations, it could not have intended it extend to "debtors" under chapters X, XI or XII of the Act or their successor, chapter 11 of the Code.

Since a partnership bankruptcy was restricted to liquidation proceedings, the legislature could not have "intended" the dissolution of a partnership by a bankruptcy petition with its necessarily attendant winding up and liquidation except to the extent it "understood" filing of bankruptcy caused liquidation in any event or that the term "bankrupt" meant a person proceeding under Chapter VII (liquidation) not to reorganizations or arrangements.

Although this approach has some logical appeal, one problem with it is that the National Conference of Commissioners on Uniform State Laws has revised the UPA since 1978 and not amended § 31(5). On the other hand, Alaska has not changed the UPA version since it was adopted in 1949 and the argument fails. A second problem is whether this approach takes *casus omissi* beyond its logical end. This is a situation "when the question which is raised on the statute never occurred to [the Legislature]; when what the judges have to is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present." [John Chipman Gray, *The Nature and Source of the Law*, chapter 8, Part II (2nd ed. 1921)] I suspect, in this case, there is more truth than fiction in Professor Gray's observation.

Every rule of statutory construction has weaknesses and, usually, a contrary rule that if applied will result in the opposite result. The outcome is determined by whichever rule the court decides to apply. The conundrum created by the literal language of UPA § 31(5) and its obvious conflict with the Code brings into play what this author has long believed to be the only universally followed rule of statutory construction by the judiciary — "hang your hat on whichever rule reaches the desired result." The desired result in this case, in my opinion, is that a chapter 11 petition is not a "bankruptcy of a partnership" as that term is used in § 31(5) of the UPA.

If all else fails should this matter be placed at issue, equity will suffer no wrong without a remedy; or whatever other legal maxim comes to mind that the court may hang its hat on when the contrary result would be inequitable, unfair and detrimental to the rights of parties before it. Who knows what will work if a court is predisposed your way, or will not work when it is predisposed towards your worthy and learned opponent.

Anchorage debates gay rights ordinance

Following the Anchorage Assembly's approval of a gay rights ordinance, voters were to be presented with an initiative to overturn the action during April municipal elections; the ballot question was nullified by the courts. The new assembly seated earlier this month is expected to rescind the ordinance as one of its first orders of business.

Ross' response

Dear LAD: (LAD??? Intentional, on your part? Or merely a Freudian slip?)

I received your letter of 23 February 1993 regarding the Anchorage homosexual rights ordinance. While I am not surprised to see some of the names on your letterhead, I am most disappointed in other names thereon. I had more respect for some of you than I do now.

I am in favor of repeal of the measure. I see nothing involving civil rights in this matter. We all, heterosexual or homosexual, have certain rights. This bill seems to give extra rights to a group whose lifestyle was a crime only a few years ago, and whose beliefs are certainly immoral in the eyes of anyone with some semblance of intelligence and moral character.

It is a shame that you folks don't have some causes you could become involved in that are of benefit to society in general. Instead, you support degenerates. No wonder the legal profession is treated with less respect than we wish.

If, as you apparently believe, morality is not based on long-standing God-given and God-instilled principles, but is something that changes from time to time based on public perception of right and wrong, then that is even more reason for you to allow this referendum to go to a vote of the people. After all, isn't it your position that public morality is based upon whatever the public decides?

None of you has done anything publicly (to my knowledge) to attempt to protect the millions of lives of innocent children killed each year through abortion, yet you collectively contribute $5,000 to the cause of sexual perversion. It is quite disheartening to me to see my fellow members of our honorable profession display such a lack of proper priorities.

Wayne Anthony Ross

Lawyers form rights group

A steering committee has formed an ad hoc group called "Lawyers Against Discrimination" in response to the petition to overturn Anchorage's recently passed homosexual rights ordinance. We hope that you will join us in opposing repeal of that measure.

The ordinance is very limited in scope. It simply says that our municipal government, and its major contractors, cannot discriminate based on sexual preference. It of course does not preclude disciplinary action based on inappropriate or offensive behavior. What it does forbid is discrimination based on status.

Repeal of this ordinance would inevitably imply that the city can refuse to hire, or can terminate employees, based on status alone. Repeal would not only be mean spirited, but contrary to principles of equal protection and civil liberty we all learned in law school.

One historical role of lawyers has been to stand up for minority groups that are reviled, ridiculed, or ill treated by self satisfied majorities. The gay community faces that kind of threat, and shouldn't have to face it alone.

Even though you may have no particular commonality with gays, will you join with us in standing beside this unpopular group in need of our moral and financial support? We are going to do that in two ways. We will place an ad in the Daily News, listing the lawyers with the courage to lend their names. Secondly, we will contribute to the campaign being organized to counter repeal.

This will surely be an uphill battle. The civil rights issue can easily be distorted into a referendum on the morality of being gay. Injection of this essentially religious issue into civic politics reminds us how intelligent the founding fathers were in mandating separation of church and state.

Let us add a reasonable voice to what is sure to be a corrosive and ugly debate.

Please return this letter with an authorization to use your name, and a contribution. We suggest a check in the amount of your hourly billing rate. Collectively the steering committee members are contributing five thousand dollars.

John Suddock
Chairman

Feldman replies to Ross

Thank you for sending me a copy of your letter of March 19,1993, sharing your thoughts on the efforts of Lawyers Against Discrimination to promote civil rights and fight discrimination in our community. I regret if my support for this effort has caused you to lose respect for me, as I have always enjoyed our personal and professional association.

Your comments suggest that you may not fully understand the ordinance in question. Contrary to the perception of some, the ordinance does not give "extra rights" to any group. It does not guarantee anybody a job, a house, or any other benefit. Rather, it only has the effect of prohibiting discrimination on the basis of sexual preference in connection with a very narrow range of sexual activity: employment by the municipality and by municipal contractors. While it is true, as you say, that "we all, heterosexual or homosexual, have certain rights," it is not true that those rights are equally respected or protected for all of us. Some citizens have been the victims of insidious discrimination and legislative efforts have been required to ferret out the discrimination and redress it. These laws do not give anyone any "extra rights;" they do provide protection and, in this instance, that protection is sorely needed.

Who could quarrel with the notion that a person who happens to be homosexual is still entitled to have a job. What is the alternative? Putting all the homosexuals on welfare? Letting them starve in the street? Condition their employment only on their promise to change their sexual preference? Or conceal or lie about it? The fact that certain sexual practices used to be criminalized does not tell me very much. There were lots of laws, in years past, that rendered all sorts of conduct criminal that we hardly would be willing to punish today. It used to be a crime in Alaska for unmarried adults to cohabit. It used to be a crime to speak ill of the crown. In some parts of the world, it is still a crime for a woman to barely speak at all. So what?

I respect your view, Wayne, but your *ad hominem* attack on the individuals who allowed their names to be used in connection with the effort by Lawyers Against Discrimination is unwarranted. I do not believe that it advances the quality of the debate on this issue to call into question either their intelligence, their moral character, or their willingness to involve themselves in other causes that you might deem to be "of benefit to society in general." If I were not well familiar with your penchant for eccentric and hyperbolic use of rhetoric, I probably would have taken offense, myself, at the characterization.

As much as anything else, at its core, your view is un-Alaskan. Traditionally, Alaskans have shown a high regard for individual freedom and a tolerance for others. Lord knows that the fabric of Alaskan life has been woven by a wide range of colorful, but admittedly odd, individuals who were not able or willing to march to the drummer of life Outside. If there is such a thing as an "Alaskan ethic," it is the willingness to accept people for what they are and who they are, not for where they came from, how much money they have, what school they went to, who their parents were, where they live, or, in this instance, who they sleep with.

I would not expect this letter to persuade you of this view. But I wanted to share my thoughts with you, at least so that you would know that my support for Lawyers Against Discrimination was triggered by careful thought and consideration on my part, not simply by my lack of a "semblance of intelligence and moral character."

Jeffrey M. Feldman

Bar group collects law history

By Leroy J. Barker

We thought it might be of interest to the Alaska Bar Association to have a report of the activities of the Historian's Committee. The Committee is composed of several lawyers, judges and non-lawyers who share an interest in the history of the Alaska Bar Association. We meet informally about every six weeks on a Friday at the noon hour. The meetings are at the Alaska Bar Association's office.

There are three current goals of the committee. The first is to collect documents, photographs and other information as resource materials about the history of the Bar Association. We are presently storing these materials in office space that has been made available to us in the old Federal Court building. We would welcome contributions of any such materials that could be provided to us to preserve the history of the association. For example, we are presently working on obtaining copies of the Tanana Valley Bar Association minutes. We would appreciate it, if there are other bar association minutes available, that the committee could be advised so arrangements can be made to obtain copies of them. We are especially interested in information about the bench and bar during territorial times. We have now collected what we believe to be all the oral history tapes that have been taken of the Alaska Bar Association and we hope to have them transcribed in the near future. We believe the collection and preservation of historical information is the most immediate and critical work effort of the committee. We have done some cataloging of the information in the possession of the Bar Association, including the oral history tapes that were taken of members of the bench and bar several years ago. The committee would appreciate the donation of any legal sized filing cabinets that we could use for storage of documents.

Our second goal is to display photographs and other memorabilia in various locations in Alaska. At the outset, we have met with the Chief Justice and he has indicated that we can work with the court system to make space available in the new Anchorage court building for such displays. We are hopeful of ultimately displaying the materials in other locations such as banks, schools and similar institutions that are visited frequently by the public.

Our third goal is to put together a history of the Alaska Bar Association and a biography of the members of the bench and bar since 1867. This is obviously a very ambitious project and will not be completed in the foreseeable future.

Any thoughts or suggestions would be greatly appreciated.

Film of the Territorial Floating Court

The Historians Committee is trying to locate the film of the Territorial Floating Court. If anyone knows where it is or has any leads on locating it, please contact Leroy Barker at 277-6693 or Deborah O'Regan at the Bar office at 272-7469.

Legal Size Filing Cabinets Needed

The Historians Committee of the Alaska Bar Association is asking for the donation of a couple of legal sized filing cabinets. The committee is collecting memorabilia on the history of the Bar and Bench in Alaska and needs filing cabinets for storage. Please contact Leroy Barker, Chair, at 277-6693 or Deborah O'Regan at the Bar office at 272-7469.

"Another reason I became a lawyer"

By William Satterberg

I'm a criminal. I admit it. Whereas most miscreants deny their guilt, or attempt to blame others, I freely acknowledge my complicity, although I still enjoy blaming others when possible.

My life of crime began when I was in 6th grade, at Woodland Park Elementary School in Anchorage. Recognizing that there was a profound need in the class for a limitless supply of atomic fireballs candy, I became a smuggler. Every noontime recess, while the other kids were playing tetherball, hopscotch, or generally beating each other up, I would sneak through the fence and dash as fast as my fat little body would take me to the Tiptop Grocery Store, some quarter mile distant. Once there, I would take my hard earned lunch money and buy as many fireballs as my pockets and finances could hold. I would then race back to the school, occasionally scattering fireballs on the pavement, but generally making it back in time for the second bell, after which I would proceed to sell my candy surreptitiously in class while the teacher was writing on the blackboard.

The profit was healthy, as much as 500 percent per ball. The demand was there, and the dentists loved me. Had I known more at the time, I might even have insisted upon kickbacks.

Eventually, as usual, all good things came to an end. Perhaps it was a competitor. Perhaps a parent.

All I know is that, on one particular day, I was called into the principal's office. It was clearly explained to me that my entrepreneurship and smuggling must cease. I immediately expressed remorse, recognition of wrongdoing, and offered up my prospects for rehabilitation, including graduation to the 7th grade. All of these must have hit a note with the principal, who was most merciful in his condemnation, even allowing me to take my profits. Although I thought, momentarily, of offering the principal a piece of the action for the continued operation, the wiser side of me prevailed, and I simply closed down shop.

My life through high school was generally uneventful, although Leonard Niemi, my good friend, and I, were once caught sneaking around the utilidors of West High. Nothing would have happened, however, if Dave Thompson hadn't opened the hatch in the history class directly beneath Mrs. Wood, who was less than impressed when she saw his smiling face peering up at her during her lecture. Because I was right behind Dave, and had no place to go, other than to land on Leonard, all three of us got caught. I almost got thrown out of the Honor Society for that one.

Everyone has a childhood friend, and Leonard Niemi was mine. Upon graduation from high school, Leonard announced to me that I had the opportunity to go fishing in Bristol Bay, to operate his father's set nets. The first year, unfortunately, did not turn out as promised, and I ended up working, instead, as a deckhand and longshoreman on a fishing tender, although I quickly found myself in over my head. (The job ceased rather quickly when the tender sank.) Although the tender was eventually re-floated and repaired, I decided that my professional career would best be served doing something else.

The following year, I became a setnet fisherman. The job was exciting; I was young and full of vinegar; and I generally learned a lot. What I did not learn, however, were the regulations.

Setnet fishermen are a sorry lot. While drift fishermen generally chase the fish throughout Bristol Bay — and talk of things such as "highliners" with nets so loaded with fish that they sink — setnet fishermen sit listlessly on the shore and gaze longingly out to sea, waiting for the occasional prop-beaten salmon to get stuck in the net.

It is not that setnetting lacks benefits. When the fish are running, the job can be quite active. But if the fish aren't running, a bored setnetter spends half the time getting his skiff unstuck from the mud when the tide goes out. The other half of time is spent trying to beach the skiff high enough so that the fisherman doesn't have to slog very far to shore before the tide goes out.

My fishing experiences in Bristol Bay took place in the very early 1970s, when fishing permits were simply available for the asking. Because they were so easily available, I asked for all I could get, including both a setnet and a drift permit. Not able to afford the fancy thirty-two foot drifter boats, I was reasonably content, with my little 22-foot skiff, *Numbut II*, named after boats owned by Uncle Frank, of Oroville, Washington. My secret intention to be a drift fisherman still existed.

This is why I picked up the drift permits and why I decided to go drift fishing on one nice day in Bristol Bay. In retrospect, I don't know if it was a mistake or a blessing. What I do know is that my partner, Peter (no relation to the Biblical fisherman), and I, after watching too many successful drift fishermen, resolutely pulled up our nets, threw them in the skiff, and ventured into the mighty three-knot current of the Egegik River.

There are tricks to drifting, which are best defined as knowing how to stay on the edge of the law. These are tricks which neither Peter nor I had mastered, but which became apparent quite quickly.

Soon after entering the river, we rapidly came upon our first problem — a large, camouflaged-grey drifter out of Monterey, California. Whereas Peter and I were drifting complacently down the main channel of the river, having a good time, and generally oblivious to everything, this nefarious drifter had stretched his net from bank to bank. Moreover, the guy was literally walking along one bank slowing the downstream progress of his boat by holding the nose. Peter and I soon realized that we were going to fireball right through the middle of his net absent major changes in our plan of operations.

Since pulling the net was simply out of the question and would connote weakness to all who saw us, I made a command decision and threw out the anchor. Big mistake. The anchor immediately caught hold, and the boat, with 50 fathoms of laden net trailing, promptly turned into the current. At the time, Peter and I did not think of it as anything distressing. We figured that all we would have to do would be to pull in our net, empty it of the fish which were clogging virtually every hole, and simply proceed onward.

The net and fish had minds of their own, however, and for the next three hours, we drug the net, inch by inch, into the boat. In fact, it really wasn't until slack tide that we were able to finally pull the net on board. This was because, to the same degree that the current was pulling the boat downstream from the anchor, the net was being pulled downstream from the boat.

Pulling the anchor, furthermore, was simply out of the question, since it was one of those fancy Danforth ones that digs deeper and deeper the harder the current pulls. As far as cutting the anchor rope went, forget it. The anchor had cost us over $30.

So how did this begin my life of crime?

During this entire debacle, a little yellow Supercub which would occasionally circle us. On one pass, when it got low enough, I looked in the back seat and saw a good friend from high school, Craig, who was taking my picture and waving happily at me. Recognizing our old friend, both Peter and I stood up in the boat and waved back at Craig. We even held up a couple of king salmon for him to see, to which he smiled, pointed, and took even more photographs.

What we didn't know is that Craig had gone to work for the Department of Fish and Game as an enforcement officer, and was documenting the fact that we had anchored our boat in the middle of the river. Fishing from an anchored drift boat is apparently a crime, of the misdemeanor variety, and Peter and I were not only smack dab in the middle of it, but from all appearances from the photographs, had absolutely no remorse, but were actually proud of our transgressions!

It was not until after the season had concluded that I received a summons in the mail, ordering me to appear before the Magistrate in Anchorage for arraignment.

As I read the summons, the reality of the crime which I had committed sank in. I saw my life pass before me. My college career, married life, and quest for the United States Presidency were ruined. In desperation, I began to research the legal aspects of my case. I found that I might actually have a valid defense in my failure to have any intent to formulate such a heinous crime. After all, what type of idiot would stand up and wave to the police officers and hold up salmon to be photographed? I could think of no one.

On the day of the big arraignment, both Peter and I went before the judge to plead our cases. The judge knew my mother and recused himself. Peter, on the other hand, was sentenced to a suspended imposition of sentence, thus allowing him to continue with his career as a philosopher king and psychologist. Seizing the moment, I told the judge who was later assigned to my case that "what was good for the goose was good for the gander." I should receive no greater nor lesser sentence than Peter. The judge must have been up to the proposal. Much to the dismay of the district attorney, I received the same sentence.

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The Public Laws

Are fee awards fair?

Alaska departs from the American Rule regarding attorneys fees through Alaska Rule of Civil Procedure 82. The purpose of Rule 82 attorneys fees is to partially compensate the prevailing party for the costs and fees incurred where such compensation is justified. *Malvo v. J.C. Penny Co., Inc.,* 512 P.2d 575 (Alaska 1974).

Recognizing the financial burden placed on a plaintiff seeking to vindicate some perceived legal impropriety where there is little or no financial incentive to pursue the matter, the court has recognized certain exceptions to the mandatory attorney fee provisions of Rule 82. One such exception was developed in the case of *Gilbert v. State,* 526 P.2d 1131, 1136 (Alaska 1974), where the court recognized that a losing party, who has in good faith raised a question of genuine public interest before the court, should not be held responsible for an attorneys fees award under Rule 82. Another aspect of public interest litigant status is that the successful public interest litigant may receive its full attorneys fees against a public or governmental agency and substantial fees against private litigants.

In the two decades since *Gilbert,* this public interest litigant exception has been applied in numerous contexts and expanded to the point where it appears that almost any claim relating to legislation, elections, controversial public policy issues such as environmental issues, or any exercise of governmental functions may qualify as public interest

Scott Brandt-Erichsen

litigation. As the Public Interest Litigant Doctrine is expanded to apply to a greater range of suits, the burden upon the defendants in such suits to defend these cases will continue to increase regardless of whether the defendant resists the litigation in good faith.

If a plaintiff is guaranteed recovery of attorneys fees with no corresponding risk for litigating over minor or technical errors by a defendant, then the Public Interest Litigant Doctrine as currently interpreted is open to abuse.

In some situations a defendant may defend a good faith interpretation of the applicable statutes only to find that that interpretation is different than the interpretation utilized by the courts. Where the opposing party is a "public interest litigant" the defendant may be required to pay substantial attorneys fees regardless of the economic resources of the "public interest" party and regardless of the defendant's good faith.

For some smaller business or governmental bodies the threat to the economic health of the defendant from costs of attorneys incurred for even successfully defending against "public interest" litigation may limit the options considered. Where claims by "public interest" groups require costly defense without the possibility for recovery unless the claims are declared frivolous (a result unlikely to occur with contentious political issues), a legal doctrine that was originally developed to serve the "public interest" may in practical application retard the ability of businesses prone to citizens' suits to make practical operating decisions and limit the ability of public bodies to address controversial public issues.

When used as a shield from responsibility for attorneys fees, the expanded application of the public interest litigant doctrine may serve a legitimate public purpose. However, it is counter-productive when used as a sword by successful plaintiffs to obtain full attorneys fees regardless of whether the losing party was substantially justified in resisting the case. Application of the Public Interest Litigant Doctrine in this manner encourages wasteful and petty litigation.

A better approach may be seen from the Equal Access To Justice Act, 28 s USC 2412, which allows recovery of attorneys fees against the United States only where the position of the United States is not substantially justified. Thus, the United States government is not penalized, beyond its defense costs, for taking a position which, although ultimately found to be incorrect, is reasonable based upon the facts or law.

The Equal Access To Justice Act also has a limitation based upon the ability of a plaintiff to employ counsel. A limitation such as this would be appropriately applied to the Public Interest Litigant Doctrine as well. The public interest litigant exception should be limited to those who, but for their public interest status, would not be able to bring their case.

Where individuals or organizations have sufficient resources to pursue a matter in the absence of the public interest litigant doctrine, the fee shifting is not justified.

In the most recent legislative session, Sen. Robin Taylor introduced SB 172 regarding awarding of attorneys fees and costs in civil actions brought to effectuate or vindicate a public policy of the state. The apparent intent of the bill would be to hold individuals responsible for prevailing party attorneys fees regardless of public interest statue.

While this bill would certainly remove the invitation to litigate presented by the public interest litigant doctrine, its critics point out that it would also reverse the public policy set out in *Gilbert.*

A middle ground would be one which approaches the issue like the Equal Access to Justice Act.

A more appropriate rule would be one which is designed to prevent the potential responsibility for attorneys fees from influencing good faith policy decisions and which limits the applicability of the public interest litigant doctrine to those without sufficient economic means to pursue their claims without risking financial ruin.

Pre-law fish tale

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I should have kept my mouth shut. At my sentencing, I felt a chance to expound eloquently about my errant ways. I pointed out to the judge that I really was not a drifter fisherman after all, but only had decided to go drifting out of boredom. The judge found my explanation plausible. He even indicated to me that I might have a career as an attorney at some point in life. The Fish and Game cop, however, was not amused at all, and clearly sensed an opportunity to bust me again.

Six weeks later, I received another summons in the mail. This one indicated that I had failed to transfer my setnet permit to drift status, after the prescribed 48-hour waiting period.

Again, my legal research began in earnest. In time, I located a case which had recently been decided by the U.S. court that said that I could not be held responsible for double jeopardy. I wrote a legal brief, complete with one legal citation, and submitted it to the Court. The judge reluctantly dismissed my case, muttering something in the process about "in the interests of justice." And thus began my budding legal career.

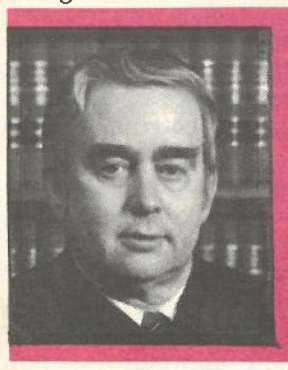
If the judge had known then how the interests of justice would be so served, I would probably be coming out of jail just about now.

convention highlights

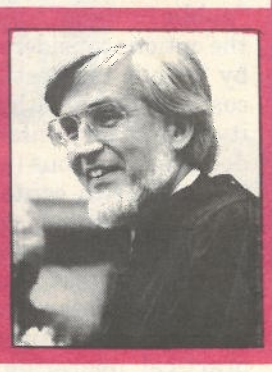
thursday, june 10

"Gender Equality: A Challenge to the Justice System"

Gender equality — what is it and why should you care? U.S. District Court Judge John C. Coughenour, Chair of the Ninth Circuit Gender Bias Task Force, joins Judge Karen Hunt, Judge Charles Pengilly, Susan Burke, William Council, Susan Cox, and R. Collin Middleton in a program that looks at gender equality issues facing the bench and bar today.



Daniel A. Moore, Jr.



H. Russel Holland

thursday, june 10

"State of the Judiciary" Lunch Address

U.S. District Court Chief Judge H. Russel Holland and Alaska Supreme Court Chief Justice Daniel A. Moore, Jr. make their joint "State of the Judiciary" address at lunch.

thursday, june 10

"Reading the Silent Messages of Jurors"
and
"Taking the Edge Off Stress"

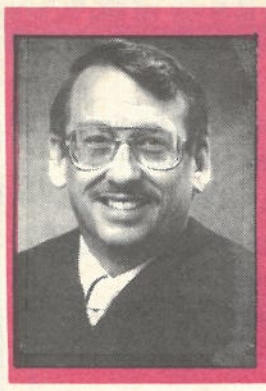
Jury selection: art or science or both? Lynne Curry-Swann, a well-known trainer and a consultant to several Alaska law firms, gives an overview of techniques and strategies for deciphering a juror's "silent message" during voir dire and trial.

In a program that is "Not Just Another Stress Session," Dr. Curry-Swann provides an information-packed presentation with a fresh approach to stress management in your personal and professional life. Need a breather from convention overload? Come on in!

thursday, june 10

"Review of Recent Supreme Court Opinions"

Two nationally recognized criminal and constitutional law scholars, Peter Arenella and Julian N. Eule, both of UCLA Law School, give a "hot off the presses" review of U.S. Supreme Court Opinions. This program touches on a variety of issues affecting the practice of law today.



Larry Weeks

Karen Hunt

thursday, june 10

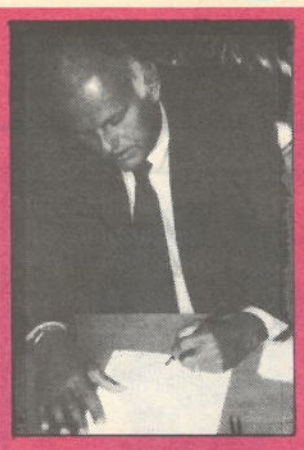
"Demonstrative Evidence Revisited"

How and why demonstrative evidence can make or break your client's case. This CLE is a follow-up to the previous demonstrative evidence seminars presented by Judge Karen Hunt, Valerie Van Brocklin, and Gary Foster. Judge Larry Weeks joins this panel in Juneau to discuss how to tell your client's story in pre-settlement conferences and at trial using affordable a/v techniques and technology. Representatives from 3M and Digital Graphics will also be on hand to demonstrate technology and services that are available in Alaska.

Barbara Blasco

thursday, june 10

President's Reception
sponsored in part by
Butterworth Legal Publishers
7:00 p.m. - 8:30 p.m.
DIPAC



John C. Coughenour

Charles E. Cole

friday, june 11

Luncheon Address by Attorney General Charles E. Cole

friday, june 11

"From Discovery to Disclosure:
The Elimination of Unnecessary Cost & Delay"

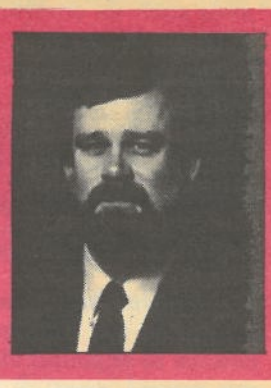
Justice Thomas A. Zlaket of the Arizona Supreme Court discusses the new Arizona Rules of Civil Procedure and Uniform Rules of Practice of the Superior Court which reflect discovery reform. The Arizona Rules are being examined by a Special Alaska Bar Association Committee appointed by Chief Justice Moore to study and investigate discovery reform for Alaska.

friday, june 11

"Client Interviewing Skills"
and
"Direct and Cross Examination"

This program by Professor John Strait of University of Puget Sound School of Law highlights useful techniques and strategies for lawyers in all types of practice who have regular contact with clients. Good client interviewing skills are one of the foundations for building and keeping a practice — and are the keystone for avoiding some of the most common attorney grievances filed by clients.

Knowing what to ask and how to ask it are the key elements of successful direct and cross examination. Professor Strait discusses witness preparation, the mindset of a witness under direct and cross, examination techniques to allow the witness to tell his/her story in an effective and accessible manner for a jury. Effective cross examination begins with good control of the witness. Techniques of control and organization of cross to tell YOUR client's story will be covered.



Stephen J. Van Goor

friday, june 11

"Ethics and Professionalism in Pretrial Practice"

This interactive video-based program involves you in the discussion and resolution of ethical problems presented in a video vignette. Robert Reis, ALPS Risk Manager, and Stephen Van Goor, Alaska Bar Counsel, lead the discussion with commentary by Mr. Van Goor relating the ethical issues in the vignette to the newly approved Alaska Rules of Professional Conduct.

friday, june 11

Awards Reception
Sponsored by The Michie Co.

Awards Banquet

Join the bench and bar Friday night at Centennial Hall to honor 25-year members of the Bar and the recipients of the Board of Governors Distinguished Service and Professionalism Awards. And don't miss the heartwarming "Passing of the Gavel" ceremony!

The 2Oth Century Bluescast (Juneau's Answer to The Capitol Steps) provides a satirical touch to the evening, followed by the great sounds of the "John Buck and the Casual 'T's'."

friday, june 11

"Total Access Courtroom = Equal Justice for the Handicapped"

In response to the passage of the American with Disabilities Act (ADA), the National Court Reporters Association (NCRA) has developed the Total Access Courtroom. This presentation by Lynda Batchelor, Lenny DiPaolo, and Marianne Lindley of the Alaska Shorthand Reporters Association demonstrates the various components of the Total Access Courtroom including computer-aided transcription, real-time technology, litigation support software, captioned video, computer searchable text and video and braille transcripts.

convention highlights

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saturday, june 12

Fun Run
Sponsored by Attorneys Liability Protection Society, A Mutual Risk Retention Group (ALPS)
11:30 a.m. - 12:00 noon

Picnic at Sandy Beach
Sponsored by the Juneau Bar Association
12:00 noon - 4:00 p.m.

Call the Bar Office at 272-7469 for more information. Centennial Hall is the site of the CLE programs, lunches, and awards banquet. Guest rooms have been reserved for bar members at the Westmark Juneau and the Westmark Baranof.

exhibitors

Alaska Journal of Commerce
Alaska Shorthand Reporters Association
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A Mutual Risk Retention Group (ALPS)
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Resolution No. 1

RESOLVED, that the Alaska Bar Association propose an amendment to the Alaska Supreme Court that it amend the Alaska Code of Professional Responsibility by adopting Model Rule 6.1 Voluntary Pro Bono Publico Service in the following form:

Rule 6.1 Voluntary Pro Bono Publico Service

A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

Submitted by Juneau Bar Association

Resolution No. 2

The Juneau Bar Association requests that the Board of Governors consider the following resolution:

WHEREAS:

1. Current law requires everyone engaged in a trade or business to report to the IRS on form 1099 the amount paid for services to anyone (except a corporation) if it is $600 or more in a calendar year when the payment was made in the course of one's trade or business.

2. The report must go to the recipient of the money (presumably as a reminder to report the income) and a copy to the IRS for use against those who fail to so report.

3. The burden is about to become much worse if a Clinton administration tax proposal becomes law — a burden that will generate literally tons of paper. (Wall Street Journal April 7, 1993, copy annexed.) The new proposal would require 1099s for all service providers structured as corporations greatly increasing the burden on businesses.

4. For example, this change would require Aluminum Co. of America to increase its 1099 mailings from 3,000 to 35,000 annually. (See attachment) The cost to businesses, large and small, will exceed the amount the IRS expects to gain, according to the article. Other large companies make similar complaints.

5. The Clinton plan would place a "terrible burden on all of corporate America just to coerce a group of small corporations to properly report." (Article attached, last paragraph.)

6. Smaller companies, including law firms, already have their hands full coping with present 1099 reporting requirements. Costs associated with yet a further intrusion on our time may well be prohibitively expensive.

Resolved the Alaska Bar Association opposes any plan to expand reporting requirements (1099 reports) to cover corporations be amended such that it apply only to transactions of $2,000 per year. Further resolved that copies of this resolution will be sent to Alaska's Congressional Delegation.

For a copy of the Wall Street Journal article referenced in this resolution, call Deborah O'Regan at the Bar office or Juneau Bar president Bruce Weyhrauch, 586-2210. *Submitted by Juneau Bar Association*

Resolution No. 3

WHEREAS:

1. The Alaska Legal Services Corporation (ALSC) does an excellent job of representing qualified, indigent applicants who request and need legal representation; and

2. The Alaska Pro Bono Program does an excellent job of administering the Pro Bono program in Alaska; and

3. Staff attorneys with the ALSC are restricted from providing any attorney referral services or endeavoring to secure legal counsel to those applicants who are otherwise qualified applicants for representation by ALSC when a conflict exists that precludes ALSC from representing that applicant; and

4. The pro Bono program is restricted from providing any referral services or endeavoring to secure legal counsel for otherwise qualified applicants when a conflict exists that precludes the Pro Bono program or ALSC from representing that applicant; and

5. The present system for securing legal counsel to applicants who qualify the ALSC or Pro Bono program assistance but who cannot obtain representation through the ALSC or the Pro Bono program because a conflict exists is not meeting the needs of all such applicants; and

6. The present system presents a disproportionate burden to attorneys of the Alaska Bar who voluntarily work with ALSC and the Pro Bono program in obtaining conflicts counsel because the present system for securing conflicts counsel relies on ad hoc volunteer efforts of attorneys in the private bar who have not been formally designated as a "conflicts council committee or contact" and who are repeatedly unable to secure conflicts counsel for otherwise qualified applicants; and

7. The present system for securing legal counsel for such otherwise qualified applicants results in an unequal distribution of the burden of representing them because, more often than not, the attorney who accepts the responsibility of attempting to secure conflicts counsel is the attorney who must ultimately represent the applicant, if any representation is provided;

8. Alaska needs a formal system or method for obtaining conflicts counsel for qualified individuals that does not unduly burden members of the Alaska Bar and the courts.

IT IS THEREFORE RESOLVED THAT:

1. The Alaska Bar Association strongly requests the Alaska Legal Services Corporation and the Alaska Pro Bono Program take all necessary actions in conjunction with state and local bar associations to formalize conflict counsel contacts in each judicial district so that contact will be responsible for providing conflicts referrals for otherwise qualified applicants for ALSC or Pro Bono representation within that Board member's respective judicial district, and/or for recruiting independent "conflict council" committees to provide this attorney referral service.

Background To Resolution No. 3

Those who have not been involved in the search for counsel for individuals who fall through the conflict crack in Alaska's pro bono program and Alaska Legal Services Corporation (ALSC) coverage may not be aware of how easily this can happen. The following scenario in Juneau is one example.

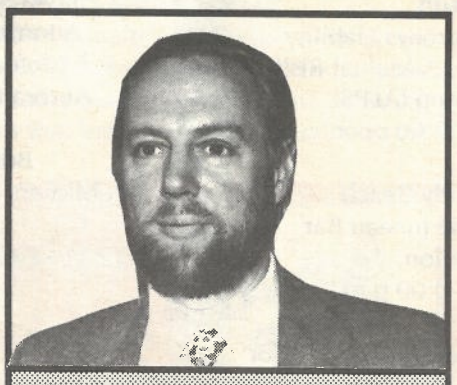
Recently, the unmarried parents of a child began disputing who had custody of the child. The parents had never lived together, and their finances were entirely separate. The father approached ALSC to apply for representation and completed an initial interview. At that time, neither parent had filed a complaint for custody and the program declined representation of the father. Subsequently, the mother applied for representation at ALSC after the father's interview, but ALSC determined that a conflict existed that barred further consideration or referral of her case.

ALSC called an attorney in Juneau who presently volunteers to attempt to obtain conflict counsel for ALSC when a conflict exists. That attorney was

continued on page 19

Getting Together

World views change in 90s



Drew Peterson

Have you noticed a change over your lifetime in the way people look at the world? The Berlin Wall has fallen. We are living in an increasingly global marketplace. Computers are becoming part of our daily experience. Widespread famines are becoming a thing of the past. We have learned how to rapidly mobilize the world's economic and humanitarian forces. Will such dramatic changes continue into the future, or are they just a temporary fluke of history?

A strange thing has happened to me since I have become involved with the fields of mediation and alternate dispute resolution. I have become theoretical. It is not a normal condition for those of us engaged in the practice of law. The practice of law is the ultimate pragmatic profession. We do not engage in the speculative; we focus on the here and now. We look for immediate solutions for our individual clients, not for the rest of society. Yet the individual solutions which we find can have a great impact on society as a whole.

I have been particularly enamored by the theoretical framework of Edgar H. Auerswald, a psychiatrist and family therapy theorist in San Francisco. Auerswald believes we are experiencing a fundamental shift in the way that we think about things. A shift to a more "ecological" way of looking at the world. Successful completion of such a shift in consciousness, in Auerswald's opinion, is essential to our continued existence as a species in the nuclear age.

The old ways of thinking in western society Auerswald calls "mechological." Mechological thinking is based upon absolute concepts of right or wrong, good or bad, righteous or evil, just or unjust, necessary or unnecessary. There is a single fixed reality to the world. Reality is an objective experience. There is a natural hierarchy to the world, and a proper place for everything in that hierarchy. Truth is absolute and there is no place for paradox.

In contrast, Auerswald describes the new ecological kind of thinking. Ecological thinking is relative, not absolute. It postulates multiple, evolving realities. It focuses on the emergence of discernible patters in our complex reality. As different patterns emerge, relationships between them become crucial, as we try to establish stable ecosystems. Patterns of thinking are both/and instead of either/or. Truth is impermanent; it exists only within the pattern that generated it. Paradox is welcome, as a signal to expand the field of thought.

Even issues of ethics and morality are viewed differently by the different kinds of thinking. Mechological thinking is premised upon absolutes; it rejects anything that does not fit the predetermined mold. Anything can be rationalized as long as it meets with pre-established criteria. Even an Auschwitz can be rationalized, and was. Ecological thinking, in contrast, postulates a morality based upon coexistence and respect for life and the unknown. We are each allowed to "do our own thing," as long as our thing does not bring harm to others.

There is evidence all around us of such a switch to a more ecological way of thinking about the world. Even McDonalds and Exxon are now boasting of their new environmental sensitivities. Ecological thinking is emerging in areas as diverse as medicine (the wellness movement), corporate structure (total quality management), architecture (Buckminster Fuller's concepts of "doing more with less"), and the law (alternate dispute resolution).

On the other hand, there is ample evidence that the old mechological modes of thinking are still alive and well. Our society remains organized with rigid systems of blame and punishment and hierarchal structures. When stuck in our dealings with each other, we resort to sources of higher authority to tell us who is right and who is wrong. As a society we continue to accept moral absolutes and social and religious dictates. On a global scale we continue to experience Bosnias and Somolias, without knowing how to deal with them. We allow huge portions of the world's population to live in conditions of abject poverty, and feel powerless to do anything about it.

The legal profession sits right at the center of this shift in worldview. On the one hand we are deeply involved in the various mechological structures that have been created in the old world order. The court system is the ultimate model for decision making by reference to higher authority, including numerous hierarchical levels of such authority until we finally reach a court of last resort. The legal profession is an integral part of many of the best established systems of blame and punishment in our society. We seem driven as a profession by the need to show who is right and who is wrong, from the smallest controversies in small claims court to the biggest controversies in the biggest cases in the country.

On the other hand, the legal profession is also well suited to help with the transition to a new and more ecological way of looking at the world. Unlike the medical and other scientifically oriented professions, we have resisted the tendency towards micro-specialization. We have continued to emphasize a broader view that involves looking at the forest and not just the trees. And we have established our influence at all levels of society. We are uniquely situated to have a positive influence on the changes that are occurring in our modern world.

Some would say that the extent of the legal profession's current involvement in all aspects of American society is a big part of the problem, and is more like a stranglehold. I prefer to think of it as a unique opportunity to be involved in the shaping of our future. Our professional integration into virtually all aspects of society is a fact of life which cannot be denied. It remains for us to become involved as a profession in the cutting edge of positive changes to that society. We have done so in the past. The example of the civil rights movement is perhaps the most dramatic. We can do so in the future as well. I believe that becoming involved in the growing field of alternate dispute resolution provides the best opportunity for us to make such a positive impact on the future.

There is a poem by the East Indian poet Rumee on the subject. It goes:

Out beyond notions of right-doing
and wrong-doing
There is a field.
Will you meet me there?

We in the legal profession have a unique opportunity in our lifetime to assist in a shift of consciousness towards a more ecological way of looking at the world. Let's all meet together in that field to work together to improve the world rather than trying to demonstrate who is right and who is wrong.

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Watch for the brochure in the mail. Call the Bar Office at 272-7469 for more information.

Ketchikan gets first judge from home

A GATHERING OF JUDGES IN ALASKA'S FIRST CITY

Newly appointed Superior Court Judge Michael Thompson laughs as Ketchikan District Court Judge George Gucker puts an English periwig on his head after the swearing-in ceremony Mar. 26. Thompson is the first Ketchikan attorney to be appointed to the bench in Ketchikan. From left to right are judges Larry Weeks, of Juneau, First Judicial District presiding judge; Henry Keene, Ketchikan Superior Court judge; Thomas Schulz, retiring Ketchikan Superior Court judge; Thompson; George Gucker, Ketchikan District Court judge; Thomas Jahnke, Ketchikan Superior Court judge; Walter Carpeneti, Juneau Superior Court judge; and Larry Zervos, Sitka Superior Court judge.
Photo by Hall Anderson, courtesy of the Ketchikan Daily News.

BY BARBARA KISSNER

He was the kind of prosecutor who did his best to put the bad guys away. Then he became the kind of criminal defense attorney who put them back on the street. Above all, he was a talented litigator and advocate who was (and is) well-respected by the legal community. Now that Michael Thompson has been appointed to the bench, one cannot help but wonder what kind of judge he will be. According to the folks in Ketchikan, he'll be a good one.

Thompson came to Ketchikan in 1975 fresh out of the University of Arkansas law school (where, by the way, his admiralty professor was none other than President Bill Clinton). His first job was that of assistant district attorney. Thompson served as a prosecutor until 1982, when he ventured into private practice. There, he practiced a variety of civil matters from personal injury to divorce. When the Office of Public Advocacy was established in the mid-1980s, Thompson was awarded the contract to handle their cases in Ketchikan. Since OPA represents many of those persons whom the Public Defender Agency cannot represent due to conflicts of interest, Thompson gained plenty of criminal defense experience to balance that gained in the District Attorneys' office.

In January, Gov. Walter J. Hickel appointed Thompson to the superior court, replacing the retired Judge Thomas Shulz. In March, Thompson was officially installed on the bench.

While the actual installation ceremony was serious, the mood quickly turned light-hearted when the observers were given the opportunity to comment on Gov. Hickel's selection of Thompson. From the District Attorneys Office to the criminal defense lawyers, from the Ketchikan Bar Association to the visiting judges, everyone had positive comments welcoming the new "Judge Thompson." It was more than a feeling of "local boy makes good," and the entire legal community was genuinely pleased that a quality lawyer like Michael Thompson was now going to sit behind the bench.

There's more to Thompson than his legal abilities, however. Thompson is also known for his charisma and sense of humor. When the Ketchikan Bar Association encouraged its members to bring their staff to the Christmas Party, Thompson showed up with his "staff"...a walking stick. He's also been known to fax cartoons to the court clerk's office, or just stop by offices in the courthouse building to tell a story and create some laughter.

Thompson didn't waste his humor outside the courtroom. According to Ketchikan Superior Court Judge Thomas Jahnke, Thompson was known for using his humor to "get the jury going" from *voir dire* through closing argument. While the judges needed to remind him to maintain acceptable courtroom decorum, the juries seemed to love it. "He was a pleasure to watch," said attorney Mary Trieber, "because he was so smooth; he'd have the jury eating out of the palm of his hand."

Almost everyone in the Ketchikan courthouse has a story or two about Michael Thompson. Like the time he appeared with fresh dahlias during a murder trial and placed them on the defense table. He then brought in some more and gave them to the clerk. "They were in bloom at the right time," said Thompson. "Otherwise, they would have wilted in my garden. Unfortunately, trial ended before I was able to bring any for the prosecutor."

The common denominator in all the stories about Michael Thompson is that he is dedicated to his job and maintains a great sense of humor. He's often characterized as being calm, cool and collected, even when you know he's got more things going than one can probably handle. Since being appointed to the bench, Thompson seems to be maintaining his coolness.

When asked how he liked his new position, Thompson said, "So far, it's interesting. I'm doing a lot of different things...It's a good change."

Solid Foundations

Interest rates harm IOLTA

Mary Hughes

The decrease in interest rates and the shrinking of lawyer trust accounts have combined to provide minimal funding for the Alaska Bar Foundation's 1993-4 IOLTA grant year. Four organizations, all previous IOLTA recipients, have applied for over $320,000 in grant funds. As of March 31, 1993, $146,000 was available for disbursement. The decrease is dramatic—a drop of nearly **$100,000** from March of 1992.

An historical review of Alaska Bar Foundation IOLTA funding demonstrates the crisis befalling Alaska IOLTA-funded organizations:

Date	Monies available	Grants
March, 1990	$174,467	$126,625
March, 1991	$250,603	$260,250
March, 1992	$242,124	$232,090
March, 1993	$146,972	undecided

Approximately $13,000/month in interest has been earned on IOLTA accounts in 1993. Assuming that amount remains constant, funding will continue at the $140,000-$150,000 per year level. However, neither interest rates nor the amount of dollars in lawyers' trusts accounts may remain at present levels. The funding crisis is one of national concern. IOLTA experts do not believe the decline in dollars will be short-lived and encourage all IOLTA funded programs to search for funding elsewhere.

The trustees of the Alaska Bar Foundation are extremely distressed since many of the programs supported have been totally funded by IOLTA monies. The inability to fund could mean the demise of the program. Thus, it becomes imperative for Alaska lawyers, law firms, local bar associations and philanthropic organizations to fund programs which were once IOLTA supported. Without such monies, good programs providing superb legal support to Alaskans will not survive.

The Bar Rag welcomes
articles from its readers

Man's best friend — and foe — foils romance

By Dan Branch

I've been around dogs in my life. With the exception of a miniature French poodle named Piddling Pierre, most of them were smart in a self serving way. We never owned a pup, like Lassie, who applied her intelligence in a selfless manner. Most of our dogs used their brains to promote their own interests.

My first dog was a terrier mix called Pepper. He was a cunning escape artist, able to climb a chicken wire fence by shoving his paws through the wire and pulling himself over the top. Once, after vaulting himself to safety, Pepper impregnated a neighbor's purebred Doberman pincsher. I had to pay for the abortion out of my paper route money and build a cooler for the dog. Pepper ran away from home before I could complete it.

Sled dogs were the same way. I once borrowed an old lead dog named Crazy Dog. He turned left when asked to go right. Reverse psychology worked until he heard me explaining it to my mushing partner. After that he just went straight ahead when asked to turn.

One dog demonstrated both intelligence and discretion. Morris, was a full bred basset hound born and raised in San Diego. In theory Morris belonged to one of my law student roommates. In many ways he possessed more intelligence and judgment than his owner.

Morris fine-tuned his ears to pick up helpful noises only. The sound of a can opener slicing open a Kal Kan tallboy would reach him across three city blocks. Minutes later, he couldn't hear my loud demands to remove himself from under the kitchen table.

Members of our college household spent their evenings in different ways.

I remained cloistered in my cell with nothing but my first year texts for company. Robert and Tom, both second-year men, put their time to better use.

Robert took up residence in an overstuffed chair, sipping whiskey and reverse-reading last year's text books. When asked, he would explain that he was attempting to unlearn everything he picked up in his first-year courses.

Tom would give his Gilbert's law outlines a quick once-over before heading for Margaret's house. She was holding down a second-row seat in my Torts class. I had feelings for Margaret, but my first-year study burden kept me on house arrest. Tom's attitude about law school left him free to pursue Margaret's affections.

After dinner Morris would sleep the sleep of the dead, spread-eagled up against the wall where we kept his leash. The slight jousting of this leather strap would raise him. We never found any other way to wake him, until the night that Tom brought Margaret home.

Tom had been tube feeding her spiked Shirley Temples all evening. Without my intervention, she would be locked into a relationship with Tom before the next morning. Assuming me a willing accomplice, Tom suggested that I keep Margaret spellbound with The Rule Against Perpetuities while he made ready the bathroom for a romantic evening.

With the sound of warm water filling our bathtub as a cover, I tried to convince Margaret to wait for me. "After finals week, you should take some time to get to know me. Before law school I was a fun guy." I couldn't break through before Tom emerged from the bathroom wearing a department store robe and flip flops. The glow of two dozen candles reflecting off the bath water gave him a visible aura. Margaret willingly answered his call.

Resigned, I took a seat next to Morris, taking care not to wake him by jiggling the leash. There I reviewed Calimari's contracts hornbook while classical music covered all human activity in the bathroom.

Professor Calimari's surprisingly frank description of avoidable consequences took my mind off Tom and Margaret until Morris came to life.

I am not sure what brought the dog back to life. Ravel's Bolero was the only sound I could hear coming from the bathroom. Suddenly, in seconds he was on four legs, dashing through the bathroom door. There was a scream, then a splash as the dog leaped into the tub. The resulting tsunami extinguished Tom's candles and Margaret's interest in my roommate.

I offered to take Morris for a walk. Tom misinterpreted this as an act of kindness. I wanted to give the dog reinforcement, not punishment.

CLARIFICATION

The last issue of *The Alaska Bar Rag* contained a story by Dan Branch about a friend named Mike and a little problem he ran into during winter war games near Fairbanks. According to the story Mike's squad was able to repel an enemy attack in spite of the fact that Mike, their leader, was walking about with a five-gallon plastic pail frozen to a tender portion of his anatomy. After reading the story, Mike asked Dan to make a correction. Mike's squad was overrun. Apparently the men found his predicament humorous. Their laughter gave away the squad's position to the enemy and they were wiped out in a war games kind of way.

Dan Branch

Estate Planning Corner

The Qualified Disclaimer

Steven T. O'Hara

In the estate planning area, there is no substitute for planning in advance. But when an individual dies having done little or no estate planning, the qualified disclaimer may help his family reduce any lost-opportunity cost.

Consider a mother and father domiciled in Alaska. They are married and both U.S. citizens. They have no assets outside Alaska, and they have no material debts. They have three adult children.

Both mother and father have done minimal estate planning. Although each has separate assets of $600,000, they have basic wills, giving all assets to the surviving spouse outright and to the children when there is no surviving spouse.

Mother and father believed they did not need to consider anything beyond basic Wills because they had heard that they each may pass, at death, as much as $600,000 to their descendants without estate taxes (I.R.C. Sec. 2010). So they figured with combined assets of no more than $1,200,000, or $600,000 apiece, their estates would never be subject to estate taxes.

Father has recently passed away. Mother now realizes that with assets of $1,200,000 (being the total value of her assets plus the assets to which she is entitled under father's Will), her estate will owe $235,000 in estate taxes upon her death (I.R.C. Sec. 2001(c) & A.S. 43.31.011).

Under such circumstances, with a view to eliminating all estate taxes otherwise payable upon her death, mother should consider making a qualified disclaimer of part or all of father's assets.

Also known as a renunciation, a disclaimer is a document by which mother refuses to accept part or all of father's assets, with the result that the disclaimed assets pass under father's Will as if mother had predeceased him (A.S. 13.11.295). The disclaimer generally must be filed in the court having jurisdiction over father's estate (*Id.*).

If the disclaimer is qualified, mother will **not** be subject to gift tax, by reason of the disclaimer, as if she had first received the assets from father and then transferred them to her children (I.R.C. Sec. 2518).

In order to be qualified, the disclaimer must be filed, in general, within nine months after father's death and mother cannot have previously accepted any part of the disclaimed assets (*Id.*). If she files the disclaimer more than nine months after father's death or after accepting the assets, mother would be considered to have made a gift for gift tax purposes.

Suppose under our example that mother makes a qualified disclaimer of all of father's assets. Then all of father's assets, being $600,000 plus post-death appreciation, would pass to the children at no tax cost. This disclaimer may save at least $235,000 in estate taxes upon mother's death, but the savings may not justify the loss of control incurred by mother.

For example, if one of the children predeceases mother, one-third of father's assets could then be owned, depending on the circumstances, by the child's spouse or minor children, neither of which may be intended or desirable. The bankruptcy or divorce of one of the children could also disrupt the family's postmortem plan for father's assets.

So, while helpful in many circumstances, the qualified disclaimer is generally a poor substitute for planning in advance. Had father planned in advance, he could have signed a Will or Living Trust that, upon his death, would distribute his assets to a trust that would be available to mother, but which would not be included in her gross estate upon her death.

With planning, father could thus have assured that his assets would be there in the event mother needs them, without having needlessly subjected the assets to estate taxes upon her death.

Bar People

Karin Bagn, formerly with Gruenberg and Clover, has opened her own law office in Anchorage.....**Barbara Fullmer**, formerly with Guess & Rudd, is now with the Oil, Gas & Mining Section of the A.G.'s office.....**Peter Gamache**, formerly with the D.A.'s office in Kodiak, has relocated to Anchorage.....**John Hartle**, former law clerk to Judge Weeks, is now an assistant City-Borough Attorney in Juneau.

Bill Reeves is now residing in Girdwood.....**Lanning Trueb**, formerly with Bliss Riordan, is now with LeGros, Buchanan, Paul, Prescott & Whitehead.....**Martin Barrack**, formerly with Heller, Ehrman, et.al., is now with Condon, Partnow & Sharrock.....**Blake Call** has transferred from the Anchorage office of Guess & Rudd to their Fairbanks office.

Harry Branson, recently appointed U.S. Magistrate Judge, was selected as UAA's Adjunct Professor of the Year for his litigation course.

Bogle & Gates has elected **Rich Wallis** to the position of managing Partner, effective April 1, 1993.

Wallis, a litigation partner with the firm since 1987, has chaired the firm's Client Relations Committee for the past two years. He succeeds **James F. Tune,** who served as the firm's managing partner since July, 1986.

Wallis, 38, joined the firm as an associate in 1979. He is a *magna cum laude* graduate of Duquesne University in Pittsburgh (1976), and received his J.D. from the University of Pittsburgh School of Law (1979), where he was also graduated *magna cum laude.*

Louise R. Driscoll of Anchorage has been named a partner of Lane Powell Spears Lubersky. The law firm has also named as associates in Anchorage **Stephan D. Brady, Brian K. Clark** and **Glen E.M. Yaguchi**.

Driscoll practices in the areas of labor and employment law, negligence litigation, professional liability and corporate law and litigation.

Brady practices in the area of products liability, insurance defense and professional malpractice.

Clark practices in the area of insurance and tort, and Yaguchi practices in the areas of insurance and tort, commercial law and environmental litigation.

Correction to March Bar People

Joseph Bottini is not only still with the U.S. Attorney's office (contrary to the report in the March Bar Rag that he was in private practice), he is currently the Interim U.S. Attorney.....**Eric Johnson** is still with the Office of Special Prosecutions and Appeals, and not in private practice.....Our apologies to both -- we must have been dreaming. Their good natured response to the errors was appreciated.

The lawfirm of Sonosky, Chambers, Sachse, Miller, Munson & Clocksin announced the recent addition of former legislator **Don Clocksin** as a partner in the firm. Clocksin was House Majority Leader in 1985-86; his practice will focus on labor, employment, Native law, and government affairs.

Colleen Newgaard (left) and Daniel Patrick O'Tierney show off their duds at the Anchorage Fur Rendezvous Miners & Trappers Ball for Robert P. Owens, who noted that he and his spouse "were particulary impressed by the strong showing of the legal community in the fashion competition."

Wallace appointed D.A. in Kodiak

Attorney General Charlie Cole has appointed **Steve Wallace** as District Attorney in Kodiak. "Mr. Wallace has many years of criminal justice experience in Alaska, both as a prosecutor and as a police officer, and that experience will serve him well in Kodiak," said Cole.

Wallace replaces Peter Gamache, who has transferred to Anchorage as head of the Human Services section in the Attorney General's office there. Wallace is a 1988 graduate of the University of Oregon School of Law. He has been a prosecuting attorney in Alaska since 1989 in Palmer, Bethel, and most recently in Anchorage.

Before going to law school, Wallace spent three years as an officer with the Kodiak Police Department. He will supervise an office that has one other attorney and that is responsible for criminal prosecution on Kodiak Island.

The Perfect Title Search

The Post Office Department at Washington, making a careful investigation of the titles to proposed post office sites in Louisiana, received title proof as far back as 1803, but not satisfied, wrote for evidence as to prior titles. An attorney replied: "I note your comment upon the fact that the record of title sent to you as applying to lands under consideration, dates only from the year 1803, and your request for an extension of the record prior to that date."

"Please be advised that the Government of the United States acquired the Territory of Louisiana, including the tract to which your inquiry applies, by purchase from the Government of France in the year 1803. The Government of France acquired the title by conquest from the Government of Spain; the Government of Spain acquired the title by discovery of one Christopher Columbus, traveler and explorer, who by agreement concerning the acquisition of title to any lands discovered, traveled and explored under the sponsorship and patronage of Her Majesty, the Queen of Spain. The Queen of Spain had verified her arrangement and received sanction of her title by consent of the Pope, a resident of Rome, Italy, an ex-officio representative and vice-regent of Jesus Christ. Jesus Christ is the Son and Heir Apparent of God. God made Louisiana."

"I trust this complies with your request."

Ethics opinion approved, rules pending

Ethics Opinion No. 93-1
Preparation of a Client's Legal Pleadings in a Civil Action Without Filing An Entry of Appearance

The Ethics Committee has been asked whether the preparation of legal pleadings in civil litigation for pro se litigants constitutes the unethical practice of law. In the committee's opinion, a lawyer may ethically limit the scope of his representation of a client, but the lawyer should notify the client clearly of the limitation of representation and the potential risks the client is taking by not having full representation. When an attorney limits the scope of his representation, an attorney-client relationship is still created between the attorney and the client. Disclosure of the attorney's assistance must be made to the court and to opposing counsel unless the attorney is merely assisting the client in filling out forms designed for pro se litigants.

The attorney requesting the ethics opinion states that he is helping many pro se litigants prepare their own child support modification motions.[1] Many of these litigants, he states, are unable to obtain legal counsel due to their poor financial condition. Assistance with their self-help efforts presents one of their few options for access to the courts. EC 2-33 stresses the legal profession's commitment to making high quality legal services available to all. Attorneys are encouraged to cooperate with qualified legal assistance organizations to provide pro bono legal services on behalf of the poor. Canon 6 of the Code of Professional Responsibility further provides that a lawyer should represent a client competently and zealously. When an attorney undertakes the representation of any client, that client should receive a high quality of legal service. The Committee is essentially asked to address the interplay between these ethical and professional considerations when a lawyer provides legal services to a pro se litigant without entering an appearance in the litigation in question. The Committee concludes that such assistance is not unethical when conducted under the guidelines set forth below.

According to the facts before the committee, the attorney assists in the preparation of pleadings only after fully describing this limited scope of his assistance to the client. With this understanding, the client then proceeds without legal representation into the courtroom for the hearing. The client may then be confronted by more complex matters, such as evidentiary arguments concerning the validity of the child support modification, or new issues such as child custody or visitation to which he may be ill-prepared to respond. The client essentially elects to purchase only limited services from the attorney, and to pay less in fees. In exchange, he assum es the inevitable risks entailed in not being fully represented in court. In the Committee's view, it is not inappropriate to permit such limitations on the scope of an attorney's assistance.

A non-profit legal assistance organization may limit the scope of representation to its clients. For example, non-profit legal assistance organizations that provide free legal services to low income clients may offer, in lieu of representation in court, a class on pro se divorce to individuals seeking simple uncontested divorces and may also offer such classes to individuals with more complicated divorce matters provided that all clients are fully advised of risks involved in pro se representation. ABA Opinion 90-18 (July 31, 1990).

Also, the Virginia Bar Association has recognized that a lawyer may assist pro se litigants in the preparation of discovery requests, pleadings or briefs without entering an appearance.[2] (Virginia 1988), Such assistance creates an attorney-client relationship, however, and the attorney must therefore comply with the Code of Professional Responsibility. The attorney is responsible to the client for the attorney's conduct during the course of the professional relationship, however limited. Within the agreed scope of the representation, the attorney must provide the client with all counseling necessary to make informed decisions.

Amended by the Alaska Bar Association Ethics Committee on March 4, 1993.

Adopted by the Board of Governors on March 19, 1993.

1 The Committee is aware that attorneys may get involved in preparing pleadings and filings for clients outside the area of domestic relations, and for purposes which are not as worthy. Behind the veil on anonymity, an attorney can assist in "ghostwriting" matters for the client without the apparent threat of sanction. However, if an attorney "ghostwrites" something for a client which the attorney could not ethically sign, either because of constraints of the civil rules or the Professional Canons, he or she has engaged in unethical behavior. DR 1-102(A)(2) prohibits an attorney from circumventing a disciplinary rule "through actions of another." Subsection (A)(4) prohibits an attorney from engaging "in conduct involving dishonesty, fraud, deceit or misrepresentation." *See also* 7-102(A)(1)-(7). If an attorney prepares or assists in the preparation of a pleading to be signed by a pro se litigant, they are under the same ethical constraints as if they were to sign the pleading with their own name.

2 Some jurisdictions require an attorney who prepares pleadings or documents for a pro se litigant to disclose his or her assistance to opposing counsel and the court on the face of the document. *See* N.Y. Bar Assoc. Opinion 1987-2 (1987). The requirement is premised on the belief that non-disclosure of such assistance would be misleading because pro se litigants may, and often times do, receive preferential treatment from the court. Upon reflection, the Committee is not certain that this belief is well founded. The committee believes that judges are usually able to discern when a pro se litigant has received the assistance of counsel in preparing or drafting pleadings. In that event, the Committee believes that any preferential treatment otherwise afforded the litigant will likely be tempered, if not overlooked.

Fee arb rules reach board

The Board of Governors is considering the following amendments to the fee arbitration rules and welcomes comments or suggestions by interested persons. Final review is scheduled for the September 1993 Board meeting in Anchorage.

PROPOSED AMENDMENTS TO BAR RULES 40 AND 61 ESTABLISHING FEE FOR COSTS OF FEE ARBITRATION PROCEEDINGS

(Additions italicized; deletions bracketed and capitalized)

Rule 40. Procedure.

(a) **Petition for Arbitration of Fee Disputes *and Fee for Costs of Fee Arbitration.***

• • •

At the time the petition is filed, the petitioner will pay a fee to the Alaska Bar Association for costs of the fee arbitration according to the following schedule:

(i) $60.00 if the amount in dispute is $10,000 or less;

(ii) $100.00 if the amount in dispute is $10,001 to $500,000; or

(iii) $200.00 if the amount in dispute is more than $500,000.

In addition, reasonable costs of administration and arbitration may be required under Rule 34(h)(2) if a dispute involving more than $50,000 is determined to be a complex arbitration.

• • •

(b) **Petition Review.**

Bar Counsel will review each petition to determine if:

(1) the petition is properly completed;

(2) the petitioner hes made adequate attempts to informally resolve the dispute[, AND];

(3) the petition, in accordance with Rule 36(a)(4) should be denied, *and;*

(4) the petitioner has paid the fee for costs of arbitration required by Rule 40(a).

Bar Counsel may return the petition to the petitioner with en explanation if (s)he determines that the petitioner has not adequately attempted to resolve the dispute or if the petition is otherwise incomplete. The counsel will specify to the petitioner what further steps need to be taken by him or her to attempt to resolve the matter informally or what portions of the petition require additional clarification or information before the Bar will accept the petition. If Bar Counsel determines that the petition should be denied, (s)he will promptly notify the petitioner *and the fee for costs of fee arbitration required by Rule 40(a) will be refunded to the petitioner.*

(q) **Decision of the Arbitrator or Arbitration Panel**

(4) a specific finding as to whether the matter should be referred to Bar Counsel for appropriate disciplinary proceedings; [AND]

(5) the award, if any, *and:*

(6) a specific finding declaring the prevailing party in the matter. If the petitioner is the prevailing party, the panel will order the respondent to pay the petitioner the fee for costs of fee arbitration required in Rule 40(a) in addition to any award.

(t) **Confirmation of an Award *or Fee for Costs of Fee Arbitration***

Upon application of a party, and in accordance with the provisions of AS 09.43.110 and AS 09.43.140, the superior court will confirm an award *or fee for costs of fee arbitration,* reducing it to a judgment, unless within ninety days either party seeks through the superior court to vacate, modify or correct the award *or fee for costs of fee arbitration* in accordance with the provisions of AS 09.43.120 through 140.

• • •

(v) **Suspensions for Nonpayment of an Award *or Fee for Costs of Fee Arbitration***

Failure to pay a final and binding award *or the fee for costs of fee arbitration* will subject the respondent attorney to suspension for nonpayment as prescribed in Alaska Bar Rule 61(c).

Rule 61. Suspension for Nonpayment of Alaska Bar Membership Fees. [AND] Fee Arbitration Awards, *and Fee for Costs of Fee Arbitration*

(c) Any member who without good cause fails to pay a final and binding fee arbitration award *or the fee for costs of fee arbitration* within 30 days after it is final and binding shall be notified in writing by certified or registered mail that the Executive Director shall, after 30 days, petition the Supreme Court of Alaska for an order suspending such member for nonpayment of a fee arbitration award *or the fee for costs of fee arbitration.* Upon suspension of the member for nonpayment of a fee arbitration award *or the fee for costs of fee arbitration,* the member shall not be reinstated until the award is paid or otherwise satisfied and the Executive Director has certified to the Supreme Court and the clerks of court that the award has been paid.

Disability reinstatement rule proposed

The Board of Governors is considering the following amendments to the Bar Rule regarding reinstatement from disability inactive status and welcomes comments or suggestions by interested persons. Final review is scheduled for the September 1993 Board meeting in Anchorage.

PROPOSED AMENDMENT TO BAR RULE 30(g) REINSTATEMENT FROM DISABILITY INACTIVE STATUS

(Additions italicized; deletions bracketed and capitalized)

Rule 30. Procedure: Disabled, Incapacitated or Incompetent attorney.

(g) **Reinstatement**

No attorney transferred to disability inactive status under the provisions of this Rule may resume active *or inactive* status until reinstated by order of the Court. Any attorney transferred to disability inactive status under the provisions of this Rule will be entitled to apply for reinstatement to active *or inactive* status once a year, but initially not before one year from the date of the Court order transferring him or her to disability inactive status, or at such shorter intervals as the Court may direct in the order transferring the Respondent to inactive status or any modification thereto.

The attorney seeking transfer from disability inactive status shall file a verified application for reinstatement with the Court, with a copy served upon the Director. In the application, the attorney will

(1) state that (s)he has met the terms and conditions of the order transferring him or her to disability inactive status;

(2) state the names and addresses of all his or her employers during the period of disability inactive status;

(3) describe the scope and content of the work performed by the attorney for each such employer;

(4) provide the names and addresses of at least three character witnesses who had knowledge concerning the activities of the attorney-during the period of disability inactive status;

(5) provide the names and addresses of any physicians, psychiatrists, psychologists, hospitals or other institutions by whom or in which the attorney has been examined or treated since his or her transfer to disability inactive status.

(6) state that the disability or incapacitating condition has been removed and attach the expert opinion of a physician, psychiatrist or psychologist that the disability or incapacity has been removed.

(7) state whether any of the incidents listed in Rule 2(1)(d)(1)-(10) have occurred during the period of disability inactive status.

Upon receipt of the application for reinstatement, the Director will refer the application to a Hearing Committee in the jurisdiction in which the attorney maintained an office at the time of his or her transfer to disability inactive status; the Hearing Committee will promptly schedule a hearing to take place within 30 days of the filing of the application; at the hearing, the attorney will have the burden of demonstrating that the attorney's disability has been removed and (s)he meets the standards and character and fitness contained in Rule 2(1)(d); within 30 days of the conclusion of the hearing, the Hearing Committee will issue a report setting forth its findings of fact, conclusions of law, and recommendation; the Committee will serve a copy of the report upon the attorney and Bar Counsel, and transmit it, together with the record of the hearing, to the Board; any appellate action will be subject to the appellate procedures set forth in Rule 25.

Within 45 days of its receipt of the Hearing Committee's report, the Board will review the report and the record; the Board will file its findings of fact, conclusions of law, and recommendation with the Court, together with the record and the Hearing Committee report; the application will be placed upon the calendar of the Court for acceptance or rejection of the Board's recommendation within 60 days after receipt by the Court of the Board's recommendation.

In all proceedings concerning an application for reinstatement from disability inactive status, Bar Counsel may cross-examine the attorney's witnesses and submit evidence in opposition to the application.

The application will be granted by the Court upon a showing that the attorney's disability has been removed and (s)he is fit to resume the practice of law. Upon application, the Court may take or direct any action it deems necessary to determine whether the attorney's disability or incapacity has been removed, including an order for an examination of the attorney by qualified medical and/or psychological experts that the Court may designate. In its discretion, the Court may order that the expense of the examination be paid by the attorney. *In addition, the Court may direct that the necessary expenses incurred in the investigation and processing of any application for reinstatement from disability inactive status be paid by the attorney.*

Prior to reinstatement, the attorney must pay to the Bar, in cash or by certified check, the full active membership fees due and owing the Association for the year in which (s)he is reinstated.

ABA Model rules

continued from page 1

change our profession has seen in recent memory.

The impetus for the proposed new system of lawyer regulation finds its origins in what has been labelled the McKay Commission report for its first chair, the late Robert B. McKay, Professor Emeritus at New York University School of Law. The Commission on Evaluation of Disciplinary Enforcement was created in February 1989 and charged with conducting a nationwide evaluation of lawyer disciplinary enforcement as well as providing a model for regulation of the profession into the next century. Specifically the charge to the Commission was to:

> (1) study the functioning of professional discipline systems; (2) examine the recommendations of the ABA Special Committee on Evaluation of Disciplinary Enforcement (the Clark Committee) and the results of later reforms; (3) conduct original research, surveys and regional hearings; (4) evaluate the state of disciplinary enforcement; and (5) formulate recommendations for action.

The Commission's draft report was circulated to members of the ABA House of Delegates in May 1991 and the final report was adopted on February 4, 1992. An understanding of the McKay Commission's findings is central to appreciating the basis for the newly prepared Model Rules for Lawyer Disciplinary Enforcement. The findings of the McKay Commission are set forth in *Lawyer Regulation for a New Century, Report of the Commission on Evaluation of Disciplinary Enforcement* (1992) which is available from Publications Planning and Marketing, American Bar Association, 750 Lake Shore Drive, Chicago, Illinois 60611.

The Commission's report is required reading for anyone undertaking a serious review of the proposed rules. The Commission's product consists of 22 recommendations grouped under 10 broader headings. The Commission's investigation identified broad categories of needs which it proposed to address with the adoption of a new system of lawyer regulation. Despite the apparent progress made by state bars in the more than 20 years since the profession's last assessment by the 1970 Clark Commission, a number of problems remain inherent in the various discipline systems now in operation.

From a parochial viewpoint, perhaps the most significant feature of the McKay Commission's findings is its identification of a need to strengthen regulation of the profession by the judiciary coupled with what it identified as the need for direct and exclusive judicial control of lawyer discipline.

In Alaska, as in many states, the integrated or unified bar administers lawyer discipline with ultimate authority for the imposition of discipline resting with our state supreme court. The concept of self-regulation of the profession is at the very heart of the concept of a unified bar. It distinguishes our profession from many others. It is also a concept that is misunderstood by many lawyers and laypersons alike. The McKay Commission noted that secret disciplinary proceedings generate the most criticism of the system. Unlike many jurisdictions, Alaska provides for relatively liberal public access to disciplinary proceedings with hearings open to the public by the terms of Alaska Bar Rule 21. Confidentiality is preserved for the investigation which is conducted prior to the initiation of formal proceedings under Bar Rule 22(b).

The McKay Commission's members identified the need to open this process much further than most states have been willing to consider noting that closed proceedings are inconsistent with the notion of a free society. Although retaining the concept that the courts and not the legislatures must regulate the legal profession, the form of control envisioned by the Commission is far more direct than is presently the case. In short, the Commission has jettisoned the concept of self-regulation and suggests adoption of a disciplinary system controlled and managed exclusively by the state's highest court, not by the bar association.

> This is necessary for two primary reasons. First, the disciplinary process should be directed solely by the disciplinary policy of the Court and its appointees and not influenced by the internal politics of bar associations. Second, the disciplinary system should be free from even the appearance of conflicts of interest or impropriety. When elected bar officials control all or parts of the disciplinary process, these appearances are created, regardless of the actual impartiality of the system.

Id. at 23.

To characterize the focus of the McKay Commission's report solely in terms of the control and management of the process of administration is to grossly understate the importance of its findings and recommendations. The report is an impressive, comprehensive road map for reform, most of which is not only desirable but long overdo. The recommendations are designed to increase public confidence in lawyer discipline, to expedite and facilitate the process of discipline, to improve the quality of decisions in the disciplinary process. It includes a mandate to adequately fund lawyer discipline as well as a number of specific measures designed to increase the effectiveness of the process including random audit of trust accounts.

Following adoption of the McKay Commission report the ABA set about to draft a regulatory system to implement the McKay proposals. The ABA's Model Rules of Disciplinary Enforcement have been drafted by the ABA's Standing Committee on Professional Discipline. Every effort has been made by the Committee to conform the MRLDE to the recommendations of the Commission on Evaluation of Disciplinary Enforcement. The MRLDE have been circulated to all ABA Sections and Divisions, all ABA Standing and Special Committees and Commissions, to Disciplinary board Chairs, to disciplinary counsel, state bar associations and all local bar associations of over 300 members.

As you might expect, the proposed rules are attracting widespread comment. The original goal of the Standing Committee on Professional Discipline was to submit the MRLDE to the House Delegates in time for adoption at the February, 1993 mid-year meeting. It soon became apparent that would not be feasible given the sheer size of the undertaking. It is possible that the entire project will carry over from the ABA's annual meeting until the 1994 mid-year meeting but it will certainly be considered by the House within the next year. Given the favorable treatment extended to the McKay Commission's recommendations in 1992, it is likely the MRLDE will be adopted in the very near future.

Adoption of the MRLDE will likely require reappraisal of our present system of discipline. Does our system of lawyer discipline adequately address the concerns identified by the McKay Commission? Is the concept of self-regulation an antiquated notion no longer worthy of support? Are there functions such as admissions, fee arbitration, voluntary arbitration, mediation, and lawyer education which can and should be most efficiently discharged by a unified state bar?

It should be noted that the McKay Commission specifically found that unified state bars still have an important role to play in professional discipline but not in prosecution and adjudication functions. *Id.* at 25-26. Although the McKay report pays lip service to the idea that lawyer discipline must be adequately funded and staffed, there are no concrete suggestions as to how this should be accomplished other than to observe that the highest court of each state should asset its inherent powers of regulation to assure adequate funding. *Id.* at 71. The practical impact of these proposals may be beyond the means of many jurisdictions. Bar dues cannot be increased without limitation. the MRLDE represent a laudable, well-considered effort to respond to public criticism of lawyer discipline nationwide. They do provide a platform for improvement of lawyer discipline but the costs inherent in this process have yet to be fully defined. The adoption of the proposed rules on a state-by-state basis will likely present an instructive illustration in the practical problems of implementation. As this process unfolds, we should consider how our system may be improved to better serve the public. Are the goals of the McKay Commission largely met by the system we now have in place? What price must be paid?

Nutrition a prime factor in child development

By Mary Jane Sutliff

The brain of a child who has died of malnutrition during the first year of life has fewer brain cells compared to normal children. Dr. Restak in *The Brain: The Last Frontier* states: "for optimum development of the brain, an adequate supply of both nutrients and external stimuli during decisive periods is essential...The key question, of course, is whether subsequent good nutrition can entiely make up for deficiencies incurred during the crtical first two years of life. This is a particularly agonizing question, since scientists are suggesting already that behavioral abnormalities of malnutrition in one generation may carry over two or even three generations, despite the eventual introduction of an adequate diet!" (The emphasis was supplied by the doctor.)

What is good nutrition? This is not an easy question to answer. In Alaska what isn't provided by nature better be poured on by the pound if you want a plant to grow and flowers to bloom during the three months of summer. Our soils have no lime. As a society we know good nutrition is needed to grow healthy plants. What we haven't stressed but must begin to emphasize is how to provide optimum nutrition for the growing young.

In Barrow, Alaska during the winter there are over 60 days of consecutive darkness. Children in Alaska are more disposed to vitamin D deficiencies and the resulting abnormalities. To insure adequate bone growth they need vitamin D supplements or artificial full spectrum light so that their bodies can produce it.

Concerning brain development and nutrition for the very young a passage from *Evolutions End* is enlightening: "Nobel Prize winner Nikos Tinberger and his team of English ethologists found that our newborn is designed by nature to feed between 45 and 60 times a day, a conclusion based on actual averages and on an analysis of mother's milk and the nature of infant metabolism. Human milk is the 'poorest' of all mammalian milk, lowest in fats and proteins, and human metabolism is designed only for such nutrition, making feeding about every 20 minutes necessary." Nature can make very rich milk. Rabbit milk is so rich that they need to feed only once a day, leaving the remainder of the day left for foraging. Is a human mother's milk insufficient?

The answer is no. Feedings not only supply the nutrition but also the handling that is equally necessary for full mental development. The connection between what children need to eat and the socialization that takes place around food is important to the brain.

What does this information tell you about a toddler's style of snacking? What happens to their development if snacks are not provided or are inadequate?

Breast feeding has once again become the norm but what of the stages of growth and development after breast feeding stops? Later stages of childhood include gains in height and weight. The teenage years include reproductive development. What are the current nutritional guidelines for these stages of growth? Once again we find we have learned a lot but what we have learned is not well known. The new food triangle is, ironically, the tip of the iceberg.

Advances in farming through nutritional supplementation are applied with equal force to animal husbandy but not people. In a recent talk with a local veterinarian I asked him about vitamin supplementation for my elderly dog and its application to people. In his life-long work with animals he mentioned that he never paid attention to the nutritional aspects of veterinarian care—that is until his own health was in disrepair. Now he applies what he

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TANANA VALLEY BAR

Due to the Changing of the Guard at the Tanana Valley Bar, our readers missed the TVBA minutes last issue. Readers should be aware that the TVBA is, in fact, still meeting for its weekly luncheons on Fridays, still complaining about the food. We rejoin the bench & bar in Fairbanks as the ice fog descends upon the Golden Heart City.

□

Bob Groseclose is a member of the Special Litigation Abuse Committee, or is that Special Abuse Litigation Committee? Anyway, it is apparent that he is in favor of abusing litigation or abusive litigation and that he wished to further attempt to abuse the TVBA by soaking them for a free trip to Arizona in order to study the new abusive system that will superimpose yet another new unworkable timeframe upon the many other unworkable timeframes currently in place in our abusive litigation system...

reflexes caused him to switch off the ignition. Of course, in order to prevent car theft, this immediately locks the steering wheel...He eventually managed to idle it down to its mechanic.

Jan. 22, 1993

□

Bob Noreen reported that a mystery package arrived via DHL courier, who required two picture IDs and a signature for a package marked "dry ice, caution, smoke, danger, fragile, be careful, you'll regret opening this." Inside was our beloved sheep "Caressable Ewe." He mumbled something else about Phil Graves' alligator having been in the running for the new TVBA mascot position and how disappointed he was at having the sheep back.

Feb. 26, 1993

□

(Judge) Mark Wood reported that during the first few days on the bench he encountered difficult and surprising problems. It seems that it is very difficult to avoid getting your skirt caught; ie. the wheels on the chairs keep snagging the judicial robes.

Many other members and former members of the judiciary present came out of the closet and admitted that this was indeed a continuous problem; however, the more seasoned judges indicated that the **real** problem was not getting the robe under the rollers, but rather trying to look dignified when removing them or falling over....

Dick Burke reported in Foodland today that he owns Fairbanks Memorial Hospital, where he resided for 10 days and was billed $50,000. The Foreign Relations Committee report is that the man arrested for the World Trade Center bombing didn't do it.

Mar. 5, 1993

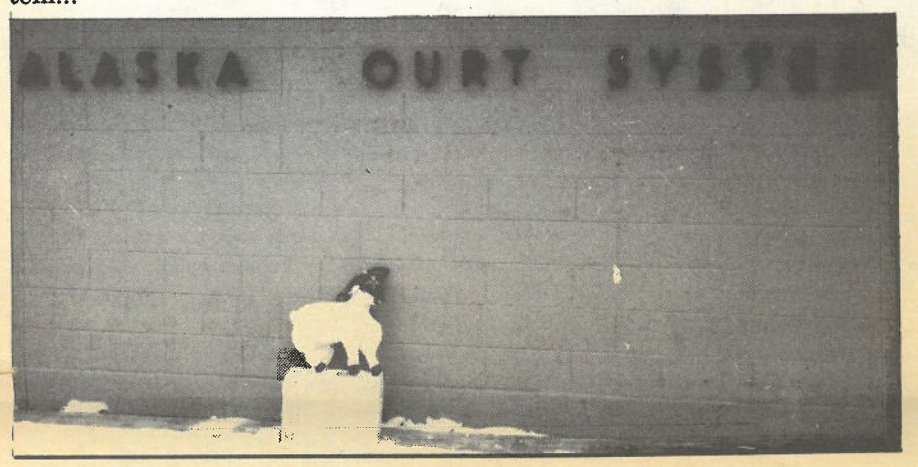
□

R.D. Burke: Foreign Relations Committee report. He stated that he had said Yeltsin would last, and he won't. Further, that Hussein would not last, and he did. However, he says now there is a 50-50 chance the communists will come back but the military will not. He further issued a grave warning that the TVBA should stay out of Bosnia; Bosnia is a 1,000-year-old mess...Furthermore, if there are problems in Macedonia, Greece and Turkey could become involved; as NATO nations obviously they would be on the opposite sides of the fence....

The TVBA has endorsed Anita Hill to replace retiring Supreme Court Justice Byron White (and so informed President Clinton of said action.)

Mar. 19, 1993

Submitted by Kenneth J. Covell



She's Baaaack

Given the outdoor temperature, approximately -45 or colder, Judge Kleinfeld said he now understands why most Ninth Circuit judges from Alaska were forced to locate their chambers in Pasadena....

Resident President Magistrate Smith asked Mr. Madson if he had encountered any problems of navigation lately. Madson related an incident of the prior morning, where on the way to work in the ice fog, his accelerator stuck and he found hmself proceeding down the Steese Highwy at approximately 100 mph. Thinking it a prudent concept to stop, his lightning-quick thought processes and

SOLICITATION OF VOLUNTEER ATTORNEYS

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

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

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

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

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

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

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unable to secure an attorney referral for her. Meanwhile, the father secured private counsel and filed a complaint for custody. At that point, the mother, who was not on welfare and had not worked in three years was unrepresented, lacked access to the pro bono program due to the conflict with the mother (because ALSC administers the pro bono program), had no right to court appointed counsel under Alaska Administrative Rule 12. Had ALSC accepted the father's case, the mother would have received court appointed counsel as a matter of course. At last account, time had expired for answering the complaint and the father's private counsel had filed for default.

RESOLUTION NO. 4

WHEREAS:

1. The Alaska Pro Bono Program and Alaska Legal Services Corporation often recognize attorneys who have donated money to these programs or signed up as volunteers of the Pro Bono program; and,

2. Many attorneys donate time to the ALSC and the Pro Bono program; and

3. In ads and program announcements, the ALSC and Pro Bono programs usually recognize those attorneys who donate money and do not recognize the attorneys who donate many hours of work to the ALSC and Pro Bono program; and,

4. Attorney time is very valuable.

BE IT RESOLVED:

1. The Alaska Bar Association strongly suggests that the Alaska Legal Services and Pro Bono Program recognize the valuable contributions that individual attorneys give to these respective programs by donating time in lieu of money;

2. The ALSC and Pro Bono program give as much recognition to those attorneys who give of their time as those individuals who donate money.

Submitted by Juneau Bar Association

RESOLUTION NO. 5

WHEREAS, the Alaska Journal of Commerce publishes a weekly section devoted to the news of the Alaska legal profession entitled the Alaska Journal of Law, and

WHEREAS , the Alaska Bar Association disseminates information to its members by mail at least on a monthly basis, and

WHEREAS, The Alaska Bar Rag is only distributed on a bimonthly basis, and

WHEREAS, the Alaska Journal of Commerce is willing to print one page a month of Alaska Bar Association news in the Journal of Law section and distribute it to all members of the Alaska Bar Association, and

WHEREAS, the members of the Anchorage Bar Association are also members of the Alaska Bar Association, and as such are interested in having the Alaska Bar Association save money and increase efficiency, therefore

BE IT RESOLVED that the Anchorage Bar Association encourages the Alaska Bar Association to consider working with the Alaska Journal of Commerce to explore publishing as much Alaska Bar Association news as possible in the Journal of Law section in an effort to save resources of the Alaska Bar Association currently used to copy and mail this information.

Submitted by Anchorage Bar Association

RESOLUTION NO. 6

WHEREAS, the membership of the Alaska Bar Association has read and considered the resolution of the Anchorage Bar Association relative to publication of Alaska Bar news by the Alaska Journal of Commerce, therefore

BE IT RESOLVED that the Board of Governors of the Alaska Bar Association is encouraged to explore methods of working with the Alaska Journal of Commerce in furtherance of the goals set forth in the Anchorage Bar Association's resolution.

Submitted by Anchorage Bar Association

'Hedonic damages' emerge as issue in U.S.

By Kenneth M. Gutsch

There has been a growing trend towards the plaintiff's use of expert economic testimony to prove damages for loss of enjoyment of life, also known as "hedonic damages." The plaintiff's proffered expert economist will typically examine studies of how much society is willing to pay to reduce risk e.g. (1) consumer purchases of safety devices; (2) wage-risk premiums to workers; and (3) cost-benefit analysis of regulations.

For example, one consumer-safety study may analyze the cost of smoke detectors and the life-saving reduction associated with them. A wage-premium study may examine salary differentials and the relationship between mortality and pay rate. From these types of "willingness-to-pay" studies, the hedonic damages expert extrapolates a range for the value of the average statistical individual's enjoyment of life.

Hedonic damages experts often testify that an average statistical individual's enjoyment of life is worth between $1.5 million and $3 million. (See, e.g. Smith, *Hedonic Damages In The Courtroom Setting - A Bridge Over Troubled Waters*, Vol. III, J. of Forensic Economics 41-51 (1990).)

The economist adjusts the average of the range upwards or downwards depending on the plaintiff's age, and level of physical impairment (In a wrongful death case, the amount of impairment would be 100 percent). Thus, in a case where health care providers assess a plaintiff's physical impairment at 30 percent and the average of the value-of-life range is $2.3 million, the economist would estimate the plaintiff's loss at $690,000, and then adjust for age-expectancy. Such testimony would allow plaintiffs to expose the jury to evidence of very large non-economic damages, with the aura of scientific authority. Given the large numbers presented to the jury, the admission of such evidence has been vigorously contested.

The Watershed Case of Sherrod v. Berry

The watershed case for hedonic damages was *Sherrod v. Berry*, 629 F.Supp. 159 (N.D. Ill. 1985). There, Ronald Sherrod had been killed by a policeman. The Sherrod estate sued the policeman and offered the testimony of an economist, Stanley V. Smith, as evidence of Sherrod's lost value of life. Smith summarized the value of life literature for the jury, and testified as to the range of values computed. Smith testified that the value-of-life was considerably greater than the "human capital measure." Smith termed this excess over the human capital measurement as "hedonic damages," to distinguish it from the lost earnings measure of economic damages.

Although the Seventh Circuit reversed, it approved the trial court's admission of Smith's testimony because it helped the jury determine the damages recoverable for the hedonic value of Berry's life. *Sherrod v. Berry*, 856 F.2d 802 (7th Cir. 1988). *Sherrod*, 827 F.2d at 206. *Sherrod* effectively created a new area for expert testimony which, if admitted, could enable plaintiffs to expose the jury to evidence of very large numbers for non-economic damages such as pain and suffering, inconvenience and loss of enjoyment of life.

Criticisms

Hedonic damages testimony has been highly criticized for several reasons. The primary arguments against admission of such testimony are that it does not help the jury and that any probative value is outweighed by the prejudicial impact of exposing the jury to such large numbers.

Another criticism is that there is no way for the underlying studies to isolate what an individual or society is willing to pay for enjoyment of life from other factors which may affect an entity's willingness to pay for the safety device. For example, an individual may purchase a smoke detector, not only to reduce the risk of death, but also for financial reasons such as obtaining a premium discount on homeowner's insurance, or to preserve property. A person may purchase certain tires for reasons other than safety such as visual appeal or greater handling ability.

Further, an individual's enjoyment of life arguably may bear only an indirect correlation to physical impairment because plaintiffs may adjust their lifestyle to maintain their enjoyment of life.

Finally, it has been argued that the value of life is unique and inherently priceless, and that no economic manipulation of data from spending decisions may monetarize such a priceless commodity.

Several economists have openly criticized the theoretical basis for the "willingness-to-pay" studies because the underlying behavioral model is wrong, there is imperfect information about job hazards, and labor markets do not look like the perfectly competitive model on which the theory depends for its conclusions. (See e.g. Dickens, *Assuming the Can Opener; Hedonic Wage Estimates and the Value of life*, 3 J. of Forensic Economists 51, 57, 58, (1990).)

Other economists note that the flaw in the "willingness-to-pay" studies is that they really reflect the "value of risk reduction," which is not fungible with the "value of life." (Staller & Sullivan, *Comment: On the Accuracy and Usefulness of Hedonic Loss Estimates*, A Hedonics Primer For Economists and Attorneys 187 (1992).)

The Seventh Circuit's About-Face

In *Mercado v. Ahmed*, 974 F.2d 863 (7th Cir. 1992), the Seventh Circuit revisited the issue of hedonic damages. *Mercado* involved an 11-year-old plaintiff who suffered brain damage after being hit by a car. The trial court excluded Stanley Smith's proffered testimony on hedonic damages. See, *Mercado v. Ahmed*, 756 F. Supp. 1097 (N.D. Il. 1991). On appeal the Seventh Circuit Court of Appeals affirmed the exclusion of Smith's testimony and expressed "serious doubts" whether the "willingness-to-pay" studies actually measure how Americans value life:

> For example, spending on items like air bags and smoke detectors is probably influenced as much by advertising and marketing decisions made by profit-seeking manufacturers and by government-mandated safety requirements as it is by any consideration by consumers of how much life is worth. Also, many people may be interested in a whole range of safety devices and believe they are worthwhile, but are unable to afford them. More fundamentally, **spending on safety items reflects a consumer's willingness to pay to reduce risk, perhaps more a measure of how cautious a person is than how much he or she values life.** Few of us, when confronted with the threat, "your money or your life!" would, like Jack Benny, pause and respond, "I'm thinking, I'm thinking." Most of us would empty our wallets. Why that decision reflects less the value we place on life than whether we buy an air bag is not immediately obvious.
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> **To say that the salary paid to those who hold risky jobs tells us something significant about how much we value life ignores the fact that humans are moved by more than monetary incentives.** For example, someone who believes police officers working in an extremely dangerous city are grossly undercompensated for the risks they assume, might nevertheless take up the badge out of a sense of civic duty to their home town. Finally, government calculations about how much to spend (or force others to spend) on health and safety regulations are motivated by a host of considerations other than the value of life: is it an election year? How large is the budget deficit? On which constituents will the burden of the regulations fall? What influence and pressure have lobbyists brought to bear? What is the view of interested constituents? and so on.

Id. at p. 871 (emphasis added).

Finally, the Seventh Circuit emphasized the impossibility of valuing life:

> Smith has taken up a daunting task: to develop a methodology capable of producing specialized knowledge to assist jurors in determining the monetary value of being alive. The district court ruled that, in spite of Smith's training, extensive research and countless calculations, his testimony would not aid the jury in evaluating the evidence and arriving at its verdict (the true test of expert testimony under Federal Rule of Evidence 702) because Smith was no more expert in valuing life than the average person. **This conclusion may be less a reflection of the flaws in Smith's methodology than on the impossibility of any person achieving unique knowledge of the value of life.**

Id. (emphasis added).

Thus, the Seventh Circuit reversed its earlier position on hedonic damages testimony and opined that such testimony is not helpful to a jury because an expert economist cannot evaluate the enjoyment of life any better than the jury.

While there are few published opinions on hedonic damages, at least two other courts have excluded such testimony. See *Fetzer v. Wood*, 569 N.E.2d 1237 (Ill. App. 1991) (Trial court refused to allow hedonic damages testimony on the decedent's loss of enjoyment of life); *South Lake Limousine v. Brock*, 578 N.E.2d 677 (Ind. App. 1991). (The court excluded hedonic damages testimony because it invades the province of the jury and would help the jury).

In a pending case in Alaska, *Robinson v. U-Haul*, No. A90-467 Civ., the Hon. James Singleton has followed the Seventh Circuit's reasoning and held that such expert testimony would not help the jury: "...since the average juror is in as good a position as an economist to determine the impact of given injuries on the enjoyment of life. I am unaware of any statistics that economists enjoy life more fully than average people. . . the risk of jury confusion and speculation outweighs any possible relevance of this evidence. Minute Order 1-15-93, *Robinson v. U-Haul Company, et al.*, No. A90-467 Civ.

Conclusion

In 1988 *Sherrod v. Berry* portended a growing tend towards the use of hedonic damages "experts." This is significant because such testimony allows plaintiffs to expose the jury to evidence of enormous non-economic damages with the aura of scientific reliability. Predictably, the use of hedonics damages experts has been vigorously contested by defendants. The Seventh Circuit's extensive opinion of *Mercado v. Ahmed* condemned the use of such testimony as unhelpful and highly prejudicial. The Seventh Circuit in effect found that, when confronted with the question "Your money or your life," most people would defer negotiation of their fair market value. The *Mercado* decision will assuredly influence other courts and may reverse the surging tide of such experts in the future.

Child development

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knows about animal nutrition to himself and he says the resulting effect is better health. He takes daily supplements. He called taking daily supplements a "common sense" approach to health.

I am not advocating nutritional supplement abuse. But what is appropriate supplementation? What circumstances warrant it? What are the signs of nutritional deficiencies? Opportunites to document nutritional deficiencies and resulting gains in health in human populations are numerous. Food supplements are provided to Third World countries and places ravaged by war. The nutritional aspects of food deprivation are understood by the medical personnel in these communities. The answers to these questions are well documented but not well known among the general medical community because they are not taught in medical school.

Could it be anything but futile to begin a discussion of the reduction of health care costs without concurrently requiring nutritional education for doctors? Brain development for the very young requires nutritional adequacy and so does the health of the rest of us.

Some of us garden, some of us have raised a pet or two on new scientific forumlas for our animals who have been steadily making strides in longevity. It is our responsibility as parents to investigate nutritional possibilities for our children, our parents, ourselves and our society. This critical thinking is closely tied to Mrs. Clinton's call for personal responsibility as a citizen in reducing health care costs.

We can be a part of the solution to the health care issue by advocating preventive medicine in the form of good nutrition. It is the economically sound and medically appropriate thing to do since "an adquate supply of both nutrients and external stimulation during decisive periods is essential."

To do less is, apparently, inhumane.

BONNIE HENKEL
Vice President, Claims Manager

CLAIMS & WAR STORIES

THERE, BUT FOR THE GRACE OF GOD, GO I...

In the Bankruptcy arena:

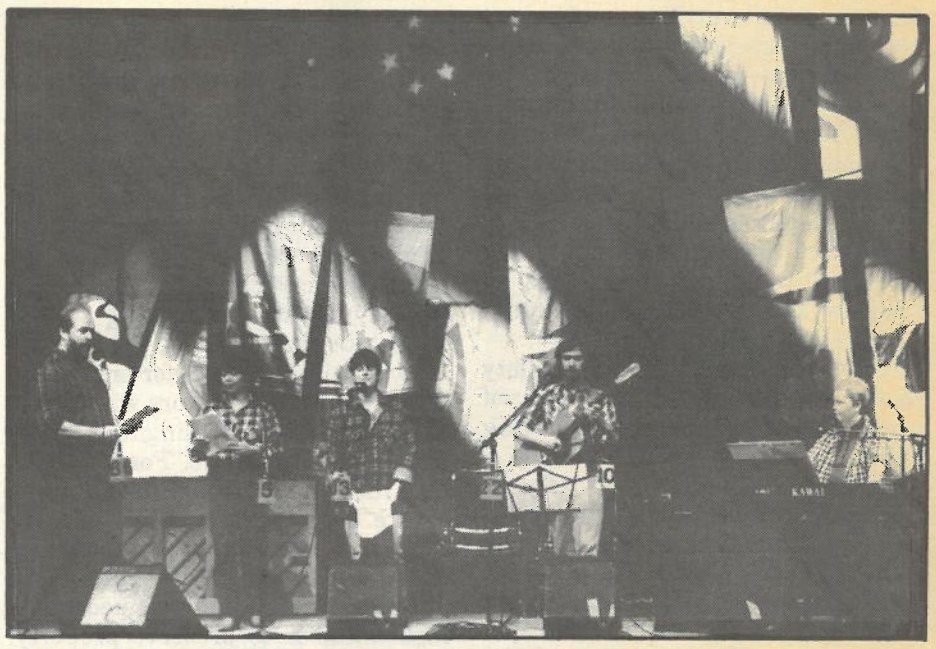
- Client alleged the Insured Attorney failed to schedule the Client's contingent liability for a joint and several partnership. Third parties who sued the partnership filed an Adversary Proceeding claiming the debt was non-dischargeable because of lack of notice to them as a Creditor.

- Insured Attorney advised Client that it was too late to file for Chapter 12 Re-organization after entry of foreclosure judgment, but prior to sheriff's sale. Client filed Chapter 7 and sued Attorney for improper advice that allegedly resulted in loss of the family farm.

- Insured Attorney's secretary filed Client's Chapter 7 Petition prior to filing Homestead Exemption, and the Client's exemption was disallowed by the Trustee.

- Attorney represented Creditor in a foreclosure sale. Bankruptcy Court deemed the sale unreasonable and voided the Creditor's deficiency judgment. Client sued Attorney alleging failure to properly notify Debtor or properly advertise the sale.

Entertainment, hospitality & awards featured in June



The 20th Century Bluescast troupe warms up for the Bar convention. From left are Ron Clarke, Glenda Carino, Laury Roberts-Scandling, Jeff Brown, and J. Althea.

The Lawyer's Almanack

by Peter Zinman

Observations and comments on our profession as set forth in American almanacs of the eighteenth and nineteenth centuries

Argumentative. —The Vermont Mercury has the following excellent defence lately made to an action, by a down east lawyer: —"There are three points in the cause, may it please your honor," said the defendant's counsel. "In the first place, we contend that the kettle was cracked when we borrowed it; secondly, that it was whole when we returned it, and thirdly, that we never had it."

—The Farmer's Almanac, for the Year of our Lord and Savior 1841.
By Thomas Spofford, New York.

Gender bias

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small and did not include practitioners from all the geographic regions in Alaska, the results mirrored those expressed in the Ninth Circuit survey. Both surveys found that women observe and experience gender bias much more frequently than men. The problems are most common among lawyers relating to other lawyers and is commonly reflected in the use of language that is less formal or demeaning when addressing women attorneys.

In addition to organizing the ABA program, the committee plans to seek funding to support a state-federal task force to take further action on gender bias problems. Committees from other states which have identified gender inequalities have already instituted education programs.

New Jersey's committee created a video tape "Economic Aspects of Homemaking in Damages and Divorce." In New York, new judges routinely hear a presentation on gender bias in the courts and a lecture on equal distribution.

In Maryland the committee made over 20 recommendations concerning court administration and now provides training for all court personnel in avoiding gender biased verbal and non-verbal behavior. In Florida, the committee studied mutual restraining orders, found that they were ineffective and not enforced by law enforcement officers, and made recommendations. In addition, now one of the three nominations from the judicial committee for judge positions must be a racial/ethnic minority or a woman. Some states have recommended plans to promote gender equality in law school admissions and bar exams.

With the Bar program on gender equality, Alaska is joining other Bar associations and court commissions to promote gender neutral treatment of all people in court.