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ALASKA BAR ASSOCIATION

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The Alaska BAR RAG

VOLUME 19, NO. 6 — *Dignitas, semper dignitas* — NOVEMBER-DECEMBER, 1995

What do we get for our Bar dues?

By Venable Vermont

Two of the things that were clear to me from the written comments a great many of you made in conjunction with the "Great Malpractice Insurance Survey of 1995" — so-called because of its eye-opening significance to the current Board — were that many of you were still upset about the dues increase to $440 a year, and that many of you don't think you get very much for your money. I have been known to make comments along those lines myself, partly out of resentment at the way the increase was accomplished, and partly out of ignorance at what was going on at the Bar Association. I thought at the time, and still do, that the Board which instituted that change did a poor job of selling to the membership the need for the big jump.

At a recent Board planning session, I asked the question "what do we get for our Bar dues?" Maybe I had a bit of an edge in my voice. Once I emerged from the ensuing gang tackle, I cleared my head long enough to read the lengthy list that resulted as the more civilized portion of the answer. I suggested that maybe the Bar Association might do a better job of selling or justifying itself to its members, perhaps in an article or occasional column in the BarRag. So ... here we are.

Part I in a series

The plan is to run a series of articles entitled "What Do We Get for Our Bar Dues?" A board member, or staff member or knowledgeable Bar member, or some combination thereof, will write an article about one or more topics from the following list that we generated. The idea is to inform you about the various services the Bar Association provides to its members, and their costs, and to identify the people you need to talk to if you want more information. Hey! - like it or not, this is a unified [read: *mandatory*] Bar; you have to pay the money so you might as well know what it goes for. Then you can decide whether or not you are getting your money's worth.

Without further ado, and in no particular order, attached is the list of services provided by the Bar Asso-

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LIKE A BOX OF CHOCOLATES . . .

Ninth Circuit tells insurers to go away; U.S. Supreme Court says, "Right On!"

By Earl M. Sutherland

Federal diversity jurisdiction no longer exists for insurance coverage disputes.

This spring, in *American National Fire Ins. Co. v. Hungerford,* 53 F.3d 1012 (9th Cir. 1995), the Ninth Circuit strongly indicated that diversity-based insurance coverage declaratory judgment actions were a waste of time for federal courts. A couple of months later in *Wilton v. Seven Falls Co.,* 115 S. Ct. 2137 (1995), the U.S. Supreme Court indicated that what the Ninth Circuit had said in *Hungerford* was not an aberration.

On September 13, 1995, in a diversity-based insurance coverage declaratory judgment action out of Oregon, the Ninth Circuit again pulled the lever and flushed a case right down the federal drain. It reversed the trial court judgment and remanded with instruction to dismiss because of lack of federal jurisdiction: *Employers Reinsurance Corp. v. Karussos,* 65 F.3d 796 (9th Cir. 1995).

The *Employers Re* case involved two companies and their mutual insured. The insured got sued. One company defended. The other did not. One company sued the insured and the other company seeking a declaration of whether it had coverage and whether the other company had coverage. Both companies moved for summary judgment; the court granted one and denied the other. The first company appealed.

The parties thought their case presented a question of Oregon insurance law. The circuit court of appeals, however, said, "NOT!" The case raised the court's concern about the propriety of a district court's exercise of federal court jurisdiction over state law questions under the Declaratory Judgment Act. The court's general rule was simple: coverage disputes do not belong in federal court:

> In *Hungerford,* we reaffirmed the general rule that federal courts should:
> ...'decline to assert jurisdiction in insurance coverage and other declaratory relief actions presenting only issues of state law during the pendency of parallel proceedings in state court' unless there are 'circumstances present to warrant an exception to that rule.'

It then documented its view that insurance coverage disputes are solely the business of the states, and that the *Hungerford* rule clearly applies to insurance coverage disputes.

In *Wilton,* the U.S. Supreme Court had said that the district court decision on jurisdiction was committed to the discretion of the trial court. The Ninth Circuit turned this directive into one requiring the district court to determine whether any circumstances warrant an exception to the general rule. Tellingly, the appeals court did not identify any circumstances that would warrant an exception.

In the case, the district court had not even considered the question of jurisdiction. That was because no one was aware there was a question. For the Ninth Circuit this meant that the parties had pointed to "no facts or circumstances" which would warrant federal court jurisdiction:

> *They have also failed to explain how the case before us may be distinguished from the general run of insurance coverage cases in which the exercise of a district court's jurisdiction would be unwarranted.*

Accordingly, any further proceedings in this case would be futile and would

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President's Column

Substance abuse takes toll

One of the most distressing issues confronting any bar association is the problem of substance abuse by some of its members. The abuse of illegal drugs or legal ones such as alcohol, prescription and over the counter medications, takes a tremendous toll on the lawyers abusing the substance, and also on their families, co-workers, friends, and clients.

The Alaska Bar Association, a small bar by comparison to the membership of other states, is not without a sizeable substance abuse problem among its members.

Diane F. Vallentine

See related article on pg. 4

The American Bar Association estimates that perhaps as many as 25% of the members of any given bar association are substance abusers. For our approximately 3000 members that would mean about 750 or so impaired lawyers throughout the state. It's in recognition of this issue, that for the past ten years, the Board of Governors has taken direct steps to confront the problem both from the prevention, as well as from the rehabilitation end. In 1986 the Board created the Alaska Bar Association's Substance Abuse Committee to provide information to the general membership, to steer impaired lawyers into rehab programs, and to provide some assistance and direction to individuals directly affected by the impaired lawyers' behavior. The committee was intended at first as a pilot program but was subsequently given permanent status.

Composed of seven lawyers plus a number of laypersons — all highly dedicated members — the committee has worked hard to reach out to the significant number of impaired lawyers who are known to be actively practicing in Alaska. Relying in part on what other bar associations have done to meet the problem head-on, and on the personal and professional experiences of its members, the committee has carved a path which impaired lawyers can follow to take steps toward treatment and recovery. Sadly, it has not been enough, and the Board is continually exploring other methods to provide lawyer assistance in this area.

Alaska is fortunate to have a significant number of rehabilitation programs for lawyers seeking treatment. These facilities operate primarily out of Anchorage and the Kenai Peninsula and most of them provide both in-patient and out-patient services. Unfortunately, for lawyers residing outside these areas and who just want outpatient care (care not requiring residence at a facility), having to move to a major metropolitan area creates a formidable problem. It means both a loss of time and income since the lawyer cannot continue to practice while undergoing rehabilitation. In spite of this seeming obstacle, it remains the case that lawyers who are abusing drugs, including alcohol, need to consider rehab programs, even if it means geographic dislocation and time away from work. The peace of mind that comes from conquering chemical dependency is worth the price.

For those lawyers who prefer an Outside program, there are numerous rehabilitation programs in the lower 48 which have good track records in providing help and information specifically geared to lawyers. Obtaining information on what resources are available to members is as easy as calling the Bar Association office, where any call about substance abuse will be referred to someone from the Substance Abuse Committee. All inquiries are strictly confidential. No records of calls or conversations are kept. And, committee members do not get involved in a substance abuse problem unless specifically asked to do so by the caller. The members will do as much or as little as the caller requests. It couldn't be simpler.

While the resources to help impaired lawyers are available, the delivery of services has always proven to be the main stumbling block to reaching members that need help. In recognizing this obstacle, the Board two years ago voted to expand the scope of inquiries that committee members could respond to. Calls from clients, non-lawyer friends and opposing counsel would be appropriate inquiries under the guidelines established by the Board, and committee members would get involved if requested by these callers. While increasing, somewhat, the amount of "business" being conducted by the committee, this measure has not resulted in more than a slight increase in the services provided by the committee. The Board felt that something else was needed to get the word out to lawyers and the general public that resources were available to assist a lawyer with a problem.

At its fall meeting, the board took steps to further enhance the scope and abilities of the Substance Abuse Committee. It earmarked a small amount of money in its annual budget for use by the committee to advertise it's existence, function and availability, and to help with some of the costs involved in the committee's efforts to network with Outside groups and associations who provide help for impaired lawyers. In addition, the board, through its CLE program, has scheduled a training session for all of those lawyers who have indicated an interest in participating in the Bar's substance abuse program. The CLE is scheduled for February 1996.

A consensus has developed among the Board members that some additional action is needed to deal with the number of lawyers in Alaska that have serious drug abuse problems. The action is needed not only because impaired lawyers reflect poorly on our Bar membership and on lawyers in general, but also because impaired lawyers wreak havoc on clients who place trust and earnings into their hands. While there is general agreement over the need and methods

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Editor's Column

Get your picture in the paper, make large sums of money

I was visiting New York City a few weeks ago, looking up at the tall buildings on Wall Street and dodging pigeon droppings, when I got a funny look from a pin-striped gentleman proceeding in the other direction. "Hey, wait a minute, buddy," he said, and I, being new to New York City, stopped and waited.

"I'm lost, too," I said apologetically.

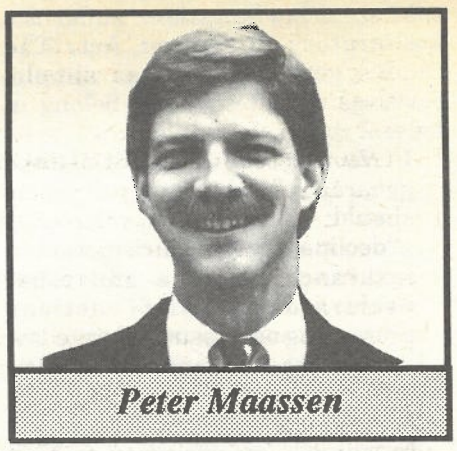
"Don't I know you from somewhere?" he said.

"I'm not carrying any money, either," I said.

"I know! I've seen your picture in the *Bar Rag*!"

As it happened, this man — we'll call him Attorney X (no relation to the Attorney X who is constantly getting private reprimands in the more substantive pages of this newspaper — why don't they just disbar the guy?) — had once clerked in Alaska and taken the bar here. He still received the *Bar Rag* and read it as religiously as it deserves, even though he was now general counsel to a major Hong Kong-based developer. The developer, as it happened, was just getting involved in the Alaska market and needed a Johnny-on-the-Spot.

Attorney X and I had lunch. Over dessert we shook hands on a deal whereby I would receive a monthly retainer in the high six figures, in exchange for which I would hang around the Captain Cook Athletic Club for at least four hours a day and listen in on any gossip that could have ramifications for my new client.



Peter Maassen

As we said good-bye among the ferns and the autographed photos of the power elite in the foyer, he said, "You want to know something funny? This is the fourth time this has happened to me in the last two years. I see some lawyer's picture in the *Bar Rag*, and next thing I know I need an Alaska contact for something big and I see that lawyer on the street. A deal is done. Immense sums change hands. Titans are made. For us movers and shakers, your modest paper is a very dependable source of legal talent. Keep up the good work!"

"Thanks, Attorney X," I said.

Now I'm back in my office, overseeing the delivery of my new Picasso collection and wondering whether the story has any moral. I think it does, and this is it: You can't go wrong if you get your picture in the *Bar Rag*.

Lawyers are known, rightly or wrongly, for their proclivity to self-promote. Yet this paper receives very little self-promotional stuff from the bar membership. Our "Bar People" column is usually culled from change-of-address notices sent to the Bar Association. Most of the photos we run are headshots of the same old regular columnists, who are actually decades older and have less hair, fewer real teeth, and weaker chins than their pictures indicate.

This is wrong. We want your picture here, too. Being low of budget, however, we're not going to send a photographer to your door; the onus is on you. If you form a new firm, send us a picture. If you win a big case, send us a picture. If you win the softball tournament, send us a picture. If you made partner, send us a picture. If you *want* to make partner, send us a picture. If you just learned to tie your bow-tie, send us a picture. If you just want to be able to tell your mother that you got your picture in the paper, send us a picture.

I hear you saying, "Yeah, but who reads the *Bar Rag* anyway? Just other lawyers. It's real-world civilian clients I want to attract, not my fellow predators. If you can get my picture in the *Driller's Guide to the Legal Intelligentsia,* great, I'll pay real money for that."

Good point. But think referrals. Think self-promotion for its own sake. Think how happy you'll make us at the *Bar Rag* feel if we can splash our pages with items of "human interest" (as opposed to "lawyer interest," I guess), like *People* magazine.

And think about Attorney X, cruising Wall Street with million-dollar retainers heavy in his breast pocket, looking for familiar faces.

The Alaska BAR RAG

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Ninth Circuit tells insurers to go away

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only frustrate the interest in judicial economy we identified in *Hungerford.* [Emphasis added.]

The parties did not go down without a fight. But that fight provided the occasion for the appeals panel to hold that the following factors do *not* justify federal jurisdiction:

1. True diversity of citizenship between the parties;
2. No state court action pending, thus expanding *Hungerford;* and
3. A claim for monetary relief in addition to a mere coverage declaration.

The federal court of appeals concluded with a few more disdainful words about "insurance coverage disputes:"

As *Hungerford* and *Robsac* establish, concerns of "practicality" and "wise judicial administration" generally counsel against the exercise of federal-court jurisdiction over claims for declaratory relief that involve only state law questions and are brought during the pendency of a related state court proceeding. Certainly that is the case with insurance coverage disputes.

The reader should bear in mind that Article III, Section 2 of the U.S. Constitution provides that the judicial power of the federal courts shall extend to all cases "between citizens of different states." Along the way, the Congress required an amount in controversy now $50,000 and established some time constraints. But that was about it. If the amount in controversy was over the jurisdictional threshold, and the parties were from different states and timely about the request, they had a ticket into the federal courthouse. That ticket now appears invalid, if one of the citizens is an insurance company.

Certainly, in the Ninth Circuit, a lawyer can no longer guarantee his client that a diversity-based insurance coverage declaratory judgment action will proceed to a final judgment on the merits. In *Hungerford* and *Employers Re,* after several years of litigation and more time on appeal, the parties found themselves back at square one, all rather poorer for the experience.

The court says circumstances can warrant an exception to the general rule. But none have been identified. The district courts have been told that they must look at the jurisdiction issue. When they do, not a single identified reason exists for them to keep the case. The "general rule" is that the court should decline jurisdiction. There are no identified exceptions.

Whether district court judges will embrace with zeal this docket-cleansing opportunity will be seen in the coming days. For policyholders and carriers, however, the lesson clearly to be learned is that the answer to state insurance law questions ultimately must be gotten from the state courts.

As this article was going to print, the author came upon a direct challenge to the approach of the Court of Appeals for the Ninth Circuit, discussed in this article, authored by United States District Court Judge Singleton in Ryan v. Sea Air, Inc., 1995 WL 610852 (D.Alaska Oct. 16, 1995). In the next issue of the Bar Rag, Mr. Sutherland will analyze this uniquely Alaskan opening salvo from Judge Singleton and will survey the responses of other United States District Court judges in the Circuit as they come to grips with the issues raised by these decisions of the higher courts.

After 13 years in Anchorage practice, Earl Sutherland now practices in Seattle with the Reed McClure firm.

What do we get for our Bar dues?

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ciation that we intend to highlight in these articles:

What do Bar Members Get for Their Bar Dues?

- Discipline Process
- Admissions Process
- CLE Program (includes seminars, video replays, course materials, reference materials, assistance with accreditation in other states)
- Ethics Opinions
- Informal Ethics Advice
- Elected Board of Governors
- Sections (1 st one free)
- Group medical, life and disability insurance programs
- Attorneys Liability Protection Society (ALPS: Bar sponsored malpractice insurance program)
- *Alaska Law Review*
- *Alaska Bar Rag*
- Lawyers' Fund for Client Protection (LFCP)
- Fee Arbitration Process
- Committees (Bar Polls & Elections, CLE, Ethics, Historians, Law Related Education, Statute, Bylaws & Rules, Lawyers' Fund for Client Protection, Conciliation, Discipline, Fee Arbitration. Law Examiners, Substance Abuse, Tutors, Pro Bono Service, Alaska Rules of Professional Conduct, Bar Rag and others as appointed by the Board)
- Lawyer Referral Service
- Group discounts on West CD-ROM and LEXIS
- Alaska Pro Bono Program (Joint project with ALSC)
- Car rental discounts (Hertz, Avis, Dollar)
- Annual meeting and Convention
- Jury Instructions (manual and on disk)
- Bar polls, (9th circuit, ALSC, federal court)
- Mailings for court information
- Conference room meeting space
- Accounting for Bar Foundation and Law Library copiers
- Information to the public about bar functions and referrals to other organizations
- National representation in professional organizations
- Staff: well trained, personalized service, accessible, longevity

The first article is written by John Abbott, longstanding chair of the standing committee on substance abuse. As it happens, John came to the October Board of Governors meeting, seeking money and opportunities to publicize the work of his committee. *Carpe Diem*! We persuaded John to write the first article.

So, we are underway. Sure, this is a P.R. job, but stay tuned, you might learn something, and you might feel better the next time you write that big dues check.

Bar People

Rosa Garner, ombudsman for the Municipality of Anchorage, was elected president of the United States Ombudsman Association (USOA) at its 18th annual conference in Minneapolis in October.

Garner was appointed ombudsman for Anchorage in 1992. The Office of the Ombudsman was established in Municipal Charter to safeguard citizens' rights and promote efficiency and competency in government through its review of complaints against municipal government and the school district.

Garner previously served as deputy ombudsman for the State of Alaska from 1988-92. She is an attorney with 20 years of experience in government and community, including program management, probation services, child support enforcement investigation, domestic violence advocacy, family support services and alternatives for dispute resolution and peacemaking.

The United States Ombudsman Association promotes development, training, and support services for ombudsman organizations throughout the United States, North America, and the international arena.

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The Anchorage Association of Women Lawyers announces the election of its new officers for 1995-1996. **Stephanie Galbraith Moore**, Assistant Municipal Attorney with the Municipality of Anchorage, has been elected president; **Krissell Crandall**, associate with Perkins Coie, has been elected program chair; **Roseanne M. Jacobsen**, associate with Eide & Miller, has been elected secretary; and **Kimberlee A. Colbo**, associate with Hughes Thorsness Gantz Powell & Brundin, has been elected treasurer.

Ann F. Prezyna has been promoted to deputy regional counsel in the U.S. Environmental Protection Agency's Region X office in Seattle....**Larry Davidson**, currently of Portland, OR, has made presentations on transportation law topics this year at conferences in New Orleans, San Diego and Seattle...**Thomas V. Van Flein** has become an associate in the Anchorage office of Clapp, Peterson & Stowers. Originally from Fairbanks, he previously clerked for Alaska Supreme Court Justice Edmond Burke and for Hughes Thorsness Gantz Powell & Brundin and worked for two major law firms in Los Angeles before returning to Alaska this year. Van Flein's practice covers litigation areas in serious personal injury matters and the defense of professional malpractice...**Nathan A. Callahan** is now in sole practice in Waterloo, IA. His e-mail address is N8Callahan@aol.com and his snail-mail address is 318 E. 4th St., Waterloo 50704-2594....*Bar Rag* editor **Peter Maassen's** March, 1995 column enthusing over the West Publishing Co.'s Editor's Exchange seminar in Washington, D.C. has been reprinted in the company's newsletter.

Letters from the Bar

Term expires

During the past seven years, I have had the privilege of serving as the chief judge for the United States District Court for the District of Alaska. Under federal law, my term of office will expire shortly, and, effective December 1, 1995, the Honorable James K. Singleton will succeed to the position of chief judge for the District of Alaska.

—H. Russel Holland

Estate Planning Corner

Creating a nonprofit organization

Suppose you are asked to assist in creating the governing documents for a nonprofit organization. Should you recommend that the entity be formed as a corporation or as a trust?

For this writer, forming a nonprofit organization as a corporation is preferable. My reasons are practical, not substantive. For example, most individuals who participate in forming a nonprofit organization are familiar with the creation and operation of a corporation. They are generally familiar with typical Articles of Incorporation, Bylaws and Minutes, as well as the duties of a Board of Directors. So discussing drafts of corporate documents with them is all the more efficient.

By contrast, individuals are generally less familiar with the creation and operation of trusts. So in forming the nonprofit organization as a trust, the organizers may need to spend a substantial amount of time becoming familiar with trust concepts.

Steven T. O'Hara

Moreover, if one or more of the organizers is already procrastinating in reviewing the proposed organizational documents, a draft of a trust agreement that is perceived as long and unfamiliar territory may only further delay the start-up of the nonprofit organization. A practical advantage of using the corporate form is that the governing documents may be shorter, thus allowing the organizers to focus on important organizational issues. For example, the Articles of Incorporation of a nonprofit corporation will typically have one sentence regarding the corporation's powers. That sentence may provide:

> The Corporation shall have the power to do all lawful acts necessary or desirable to carry out its purposes consistent with the provisions of the Alaska Nonprofit Corporation Act, as from time to time amended, Section 501(c)(3) of the Internal Revenue Code of 1986, as from time to time amended, and these Articles.

If the organizers wish to add or subtract from the general powers enumerated in the Alaska Nonprofit Corporation Act, they may add provisions to that effect in the Articles of Incorporation. Otherwise, the nonprofit corporation will have the powers listed in the Act (AS 10.20.011 & .151(b)).

Alaska Statutes do not contain any listing of the general powers of a trustee. So those powers need to be contained in the nonprofit organization's trust agreement. This need generally results in longer documents and more wordsmithing.

The Alaska Nonprofit Corporation Act also provides that every Alaska nonprofit corporation that is a private foundation is considered to have, in its Articles of Incorporation, provisions that will help the organization avoid taxes on failing to distribute income, as well as taxes on self-dealing, excess business holdings, taxable expenditures, and investments that would jeopardize the carrying out of any of its exempt purposes (AS 10.20.153(a) & (b)). If the organizers wish to add or subtract from these provisions, they may do so in the Articles of Incorporation (AS 10.20.153(c)). Alaska law has no similar provision relating to nonprofits organized as trusts.

Admittedly, none of these reasons for preferring the corporation form may, by itself, be compelling. But in this writer's experience, the process of helping a nonprofit organization get started will, for the foregoing reasons, be easier — and, indeed, economical — if a corporation is used.

Substance abuse Committee helps attorneys

By John W. Abbott

This article is meant to provide a general overview of the Alaska Bar Association's Substance Abuse Committee. Later articles will provide more detailed, in-depth information about the impaired lawyer program, itself.

In 1986, then Board of Governors President Harry Branson contacted John Reese (now a Superior Court judge) with a request that Reese set up an executive committee of bar members to develop a pilot substance abuse program for lawyers. I had the privilege to be a member of that group.

Some wondered then if the Alaska Bar needed such a thing as a substance abuse committee. Were there impaired lawyers actually practicing law in Alaska? If so, how many? The answer to the first question was yes. To the second: Enough to warrant the concern of the Bar whose counsel had handled several discipline cases which were the result of substance abuse on the part of the attorney in question; the concern of judges who had seen their share of mishandled court proceedings involving impaired counsel; and the concern of the entire bar over the media stories of more than one attorney being involved in DWI and other substance-abuse related offenses.

Not to be underestimated was the bar's concern over the number of rumors from law office staff, opposing counsel, spouses, and friends that several attorneys around them were practicing while impaired by the abuse of alcohol, prescription, over-the-counter and even illegal drugs.

The primary concern of the Alaska Bar Association was the effect of the attorney's substance abuse on the performance of his job or business and his clients.

Drawing upon materials and experiences from other bars, the Substance Abuse Committee set out to identify what its basic functions ought to be.

The three main functions identified were information, referral and intervention.

The committee could provide information in response to inquiries by lawyers, their employers, their coworkers, their friends, or their family members and to the general public. Such information would include the availability of various alcohol or drug abuse programs as well as substance abuse screening and referral to specific substance abuse programs. The committee could handle referrals from disciplinary counsel or the criminal justice system when an offense committed was substance abuse related or precipitated. And the committee could provide a group of trained lawyers, capable and willing to participate in interventions involving impaired attorneys.

In the case of referrals form Bar counsel and/or the criminal justice system, the lawyer in question would be involuntarily brought within the jurisdiction of the committee. Information and intervention would involve voluntary requests coming from the lawyer, or from any other person directly involved with the impaired attorney, such as a staff member, other counsel, family or friends.

Once drafted, the pilot was presented to the Board of Governors, who accepted it with some modifications. That program is largely still in place after 10 years.

The committee has not been without its share of growing pains. One of them has centered around referrals, and the extent to which the committee can go to follow up on these. Originally, attorneys convicted of non-serious offenses involving substance abuse were referred to the committee by the Alaska Supreme Court, but their meeting with the committee was strictly voluntary. Neither the court nor the committee could arm-wrestle the attorney into compliance. As a consequence, only a small percentage (approximately 15%) ever agreed to meet with the committee. That has since changed with adoption of Bar Rule 26(h). The Alaska Supreme Court now requires that all attorneys whose cases it refers to the committee actually meet with and cooperate with the committee in doing an assessment of a substance abuse problem, if one exists.

Bar Rule 26 now requires that a lawyer convicted of a non serious offense meet with the committee and comply with its recommendations. Failure to do so could result in scheduling of a show cause hearing with suspension as a sanction until compliance with the rule is accomplished.

Another growing pain involved referrals from Bar counsel. Although the pilot program provided that the committee would take such referrals from that office, confidentiality rules then existing prohibited Bar counsel from making referrals to the committee if the matter involved discipline, as opposed to a non-serious criminal offense, consequently the committee could not get involved in any discipline matter in which drugs or alcohol played a part. To address this problem among others, the BOG submitted proposed confidentiality rule changes to the Alaska Supreme Court; unfortunately, the court has declined to make changes to date. Nevertheless, the committee continues to work with Bar counsel in a coordinated effort to deal with disability matters.

A current function of the committee is to take pre-admission screening referrals from the Alaska Bar when an applicant's history indicates a possible problem with drugs or alcohol. Referrals are made by the executive director of the ABA under Rule 2. The committee then sends a report to the Bar with a recommendation concerning further treatment, if any, and the success an applicant has had in dealing with a drug or alcohol problem.

The committee also provides one-on-one counseling for persons (either substance abusers or persons affected by their actions) who enquire about substance abuse, treatment programs, or dealing with a substance abuser. It also participates in interventions by invitation from a professional substance abuse counselor.

Producing informational seminars or meetings to persons interested in substance abuse and its treatment is also a function of the committee. It is fairly clear that substance abuse is at

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Don't ask for unreasonable assumptions

By David M. Reaume

On occasion attorneys who are seeking my services as an expert economic witness ask me to base my entire testimony on a set of economic or demographic assumptions which I know as a professional to be unreasonable.

More often than not these assumptions would bias my conclusions in their client's favor. I always refuse, being willing to deal with the attorney's assumptions only as purely hypothetical and of secondary relevance. A surprisingly large number of attorneys do not understand why I refuse or why it is really in their client's best interest that experts always refuse.

As a matter of principle, an expert witness should not allow himself or herself to be used simply as a number cruncher or a computing machine. Although hypothetical calculations and hypothetical reasoning often have a place in the courtroom, that place should not be center stage. An expert who does no more than grind out the implications of a particular set of result oriented assumptions crosses an ethical line. Consider the following example. The details are trumped up in order to disguise the players.

Once upon a time I was asked by a plaintiff's attorney in a wrongful death case to calculate lost earning capacity and, in doing so, to assume that the decedent (age 30 at death) would have worked full time until he was 65 years old at the dollar amount he had earned the last full year of his life. I refused to do so because (a) the decedent was an oil field worker and the data show that the median oil field worker retires much earlier than age 65, because (b) activity in the oil fields had slowed considerably since the accident had occurred, and because (c) the decedent had a prior injury that labor force statistics showed would become more debilitating with age.

Under these circumstances the assumptions I was asked to make were within my professional competence to judge, were clearly unreasonable and would produce a loss estimate that was biased in the plaintiff's favor.

The National Association of Forensic Economics has established a code of ethics. One section of that code contains a pledge to offer testimony that is unbiased and objective. Testimony that is knowingly based on unreasonable, result oriented assumptions violates this section of the code because it would not be the testimony offered by that expert witness had he or she been hired by opposing counsel. Such testimony is clearly not unbiased and objective.

Every attorney I have ever met realizes that the ability of an expert to influence a jury depends in no small part on the jury's perception of the expert. Is the expert clean cut and honest looking? Are the main points of testimony clearly stated and justified in terms that the jury can relate to? Does this witness appear confident but not overbearing when speaking? Is she or he trying to bring out the truth? Most importantlym are credentials impressive?

A graduate degree from a prestigious school, many years of research experience and the fact that the witness' scholarly writings have been published in books and reputable professional journals lend considerable credibility to the opinions that are rendered. More to the point, they lend implicit credibility to the assumptions upon which those conclusions are based. Were such witnesses to focus testimony on conclusions that followed from unreasonable assumptions they would violate the implicit bond of trust (however weak) between themselves and the court that was established at the time credentials were presented. The court expects an unbiased and objective opinion from someone testifying on a matter that has been studied for years. To give otherwise is a breach of trust.

Why do attorneys "qualify" their respective expert witnesses before a jury when they could simply stipulate to their expertise? Because something more is at stake than showing that the witness is properly versed in a certain subject. That "something more" is the credibility and trust that allows a judge or a jury of lay persons to base their decision, in part, on the opinions of experts.

Some attorneys habitually go into court with experts whose testimony is result-oriented and whose conclusions are based on unreasonable assumptions. The ease with which such experts can be discredited by a competent professional and, therefore, the ease with which the attorney's entire case can be discredited by association suggests the wisdom of a change in tactics.

That such tactics nevertheless persist suggests, in turn that too few of the offenders have been burned at the stake (so to speak). It also suggests that experts who "deliver on demand" may be unwittingly setting themselves up as defendants in a post-trial malpractice suit of their own should it happen that they are, in fact, burned at the stake.

Editor's note: David Reaume is a Juneau-based economist.

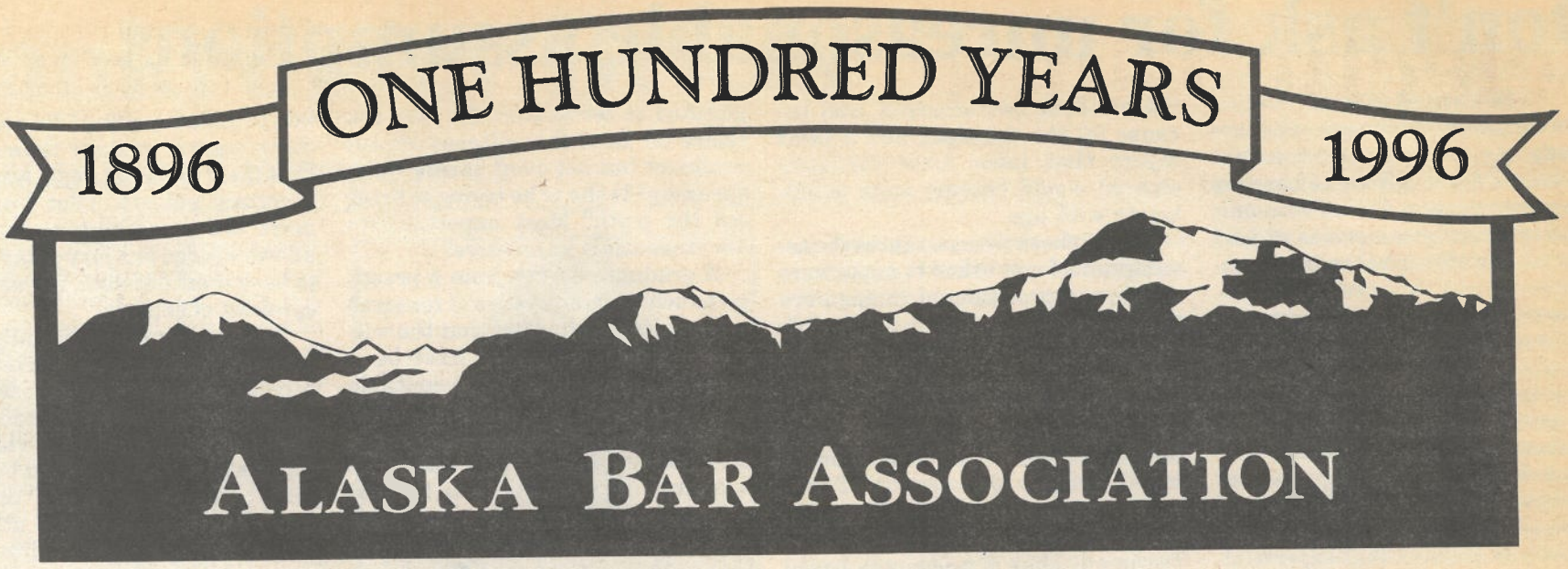
Substance abuse

continued from page 4

the root of many problems involving attorneys and their clients in Alaska. The committee would like to see an increase in its business — the business of helping impaired attorneys. Since the program relies for the most part on the voluntary participation of bar members and the public, we need to make sure that those affected know that we can provide help if asked to do so.

Still, there are other ways in which the Substance Abuse Committee could participate in the criminal justice and discipline process in Alaska. In the criminal process it could approach the state district attorney and municipal prosecutor offices in an effort to have them make referrals to the committee in all criminal cases involving substance abuse by an attorney. This referral would be done prior to sentencing so that a committee recommendation could be taken into consideration by the DA or sentencing authority. While the attorney could not be compelled to meet with the committee and discuss the problem, if any, the degree of cooperation would be a matter of record for the judge to consider.

Recently, the BOG provided for a modest 1996 budget for the committee, to fund advertising and committee attendance at a conference or network event to learn what other bar associations are doing. This reflects a belief by members of the BOG that we need to do more to make known the existence of the program and educate the legal community and general public of what the program can and cannot do when a lawyer is impaired by substance abuse.



An Anchorage lad recalls life during Prohibition

By Russ Arnett

The following is taken from an interview by Russ Arnett with Bruce Staser.

After World War I, my parents returned to Anchorage where I was born in the old railroad hospital on October 27, 1919.

My dad, Harry I. Staser, served in the Territorial Legislature in 1922-23. Two of the issues upon which he campaigned were permitting women to serve on juries and moving the capital from Juneau to Anchorage. Not long after this, women were permitted on juries. He described himself as neither a "wet" nor a "dry" on the question of Prohibition, but said the laws should be enforced.

He served as deputy marshal in Anchorage from 1923-1933. Harvey Sullivan, George Sullivan's father, was Marshal and was stationed in *Valdez.*

Q: What kind of work was he involved with in law enforcement and his other duties as Deputy Marshal?

A: The main item was Prohibition. The town was surrounded with bootleggers in every direction. I remember my dad used to say that they made better booze than was made before Prohibition. You'll see that initially, when my dad was starting out in the Marshal business, he was a little naive. He offered children $5 if they would turn in a bootlegger.

Q: Were any turned in?

A: The town went up in an uproar and he had to rescind that.

Q: Well, how was the bootleg liquor marketed?

A: The main thing was they sold it to bartenders here in Anchorage. That was retail. You would consider the bootlegger the wholesaler. Fourth Avenue was just solid saloons from D Street almost to E Street. There were two blocks, down to C Street.

Q: Well, was this in the middle of Prohibition when there were the saloons?

A: Yeah. Still had it. Saloons were there. You have to think of the environment in Anchorage. I mean, at that time there was absolutely no entertainment whatsoever. Especially when you had so many single men. During this time Anchorage was running with a big preponderance of single men. Many of them worked in the Willow Creek Mining District.

Q: As miners?

A: There were about eight family mines. Yeah, as miners. In fact the Willow Creek District was the only mineralized area in the vicinity of Anchorage.

Q: Was that near what is now Willow, Alaska?

A: That's right. Willow was an entry way into the Hatcher Pass area mines.

Anchorage in 1924. The jail and Marshal's office were downstairs. The Deputy Marshall and family lived upstairs. The Marshall was stationed in Valdez where the District Court was located.

Q: What kind of cases did your father have relating to enforcing Prohibition?

A: It was like Anchorage was divided in half. It was what they called the good side and the bad side. The bad side didn't ever interfere with the good side. In other words, the good people usually stayed west of E Street, even D Street. Ladies were held in good esteem. I know of cases where a woman from the good side, the west side, had to go down there, maybe looking for her husband, and go into a saloon full of men. All the swearing would stop. Somebody would usually go up and say "Can we help you Ma'am?" Actually, women were treated as if on a pedestal.

Q: And from D Street how far East on 4th Avenue did the bar section go?

A: Between C and E.

Q: And how many saloons were there?

A: Quite a few, but the main ones were right down close to C Street. The most important one, I'd say, was on the very corner of C and 4th Avenue. It burned down. The next one to it was the Panhandle. And that was a big one; I mean, Chauncey Peterson was the proprietor all during the '20s and he was my dad's main foe. Chauncey was importing a lot of booze from the bootleggers, buying a lot. He was the head of the bad gang on that end of town. All you could do was drive around Anchorage between lst Avenue and 9th Avenue. A Street was the end of town, with a dairy. That's why the saloons stopped at C Street. The next two blocks were nothing but kind of rural.

We were driving around town on a Sunday in the Model T Ford my dad had acquired. All of a sudden I remember my dad says "There's Chauncey." Chauncey was ahead of us going down 5th Avenue in another Model T Ford loaded with cases of booze, bootleg whiskey, and we really made chase. Here we were — my dad and my mother and three kids all in this Model T Ford — chasing Chauncey Peterson. Now I can't remember truthfully what happened. I don't know whether he let us out and he continued to chase, or whether we watched him or what. I don't know what the results were but I remember that he said "God, Chauncey has a load of bootleg booze in there." He was always chasing him.

But the men, the single men, they came into Anchorage from out in the boondocks and really kept the town loaded because they would spend six months wages in less than two weeks. Just blow it. Then they would go back out to work again, go for another six months. That's exactly the cycle. They wouldn't be in town for more than two weeks. When they were in town for two weeks they wanted to buy drinks for everybody. They wanted to live it up and be big spenders.

And the prostitutes were all located in that one block from C to D in the alley behind Chauncey's saloon and in the alley between 4th and 5th and between C and D. Some were right on C between 4th and 5th.

Q: Were they operated with houses, separate houses run by Madams?

A: Yeah.

Q: And about how many houses were there?

A: Well, I would say five or six, if I remember right. If you wanted to develop something or go get a stake to go prospecting, of the two sources of cash, one was the prostitutes. They had ready cash. They had cash in the bank.

Q: Would that be the Madams that ran the houses?

A: Yeah, right, and some of the girls too. The girls could make a lot of money. Mostly the Madams were nice people, really nice people. They lent these guys money and they wouldn't sign anything. With just a handshake they would give a guy several hundred dollars, which was a lot of money in those days, to get them a winter's supply of food and everything to go out and look for a mine. They'd say, if you find anything we'll split it or something ....

— From an interview in 1990. Bruce Staser was the first child born in the Alaska Railroad Hospital.

NOTICE

The Board of Governors will hold a public hearing during the January 12-13, 1996 Board meeting in Anchorage concerning Ethics Opinion 95-5, Undisclosed Tape Recording of Conversations With Potential Witnesses In A Criminal Case.

The Board would like to hear from both those who support and those who oppose the opinion in its present form. The hearing will be held at 2:30 p.m. Jan. 12, 1996 in the Supreme Court Hearing Room. Written comments are welcome as well. Please send them to Deborah O'Regan, Executive Director, Alaska Bar Association, P.O. Box 100279, Anchorage, AK 99501.

Eclectic Blues

The silver that got away

In early September, Juneau started a slow wet slide into fall and winter. Fat cottonwood leaves yellowed and dropped. Sitka Mountain Ash berries fermented, offering an intoxicant which sent the ravens stumbling around Main Street. Down on South Franklin, the last of bargain-hunting cruise ship passengers cursed the sky and their own kind for blocking access to Uncle Artie's trinket emporium. It was a bittersweet time of year.

Out in the Mendenhall Valley people started spending more time in the malls than in the woods. The river flooded brown past fields of died-back fireweed. Only a month ago, these same flats underlined the blue glass of Mendenhall glacier with thick magenta strokes. The strong red-headed sockeye salmon that climbed small waterfalls to their spawning grounds died off too, leaving angry bears looking for a late season snack. I could relate.

The early fall rains were not all bad. They swept down Juneau's steep streets, carrying off summer's dust and dog droppings.

Trolling for salmon in September is best done in the rain. A good downpour brings up the silver salmon where they might take a herring-draped hook. Fishermen with good rain gear have a fair chance of bringing home some meat.

During this wet time, the sound of a storm falling honestly onto our tin roof woke me up at first light on a Saturday morning. The house was mine to roam while my family slept in.

With public radio chatter in the background I daydreamed about salmon trolling while the warmth of a half-full coffee mug seeped into my hands. I was settling in for a meaningless drift along the caffeine highway when the unpleasant tones of our telephone made me spill french toast over my Carharts.

"Dan," a desperate voice said.

"Wha?" I mumbled.

"Dan, wake up!" the voice said.

Dan Branch

"What?" I responded with more focus.

"Grab your trolling pole, it's silvers time."

I was about to slam down the receiver on this crank call when the words "silvers time" pulled me in like a Big Abe number one flasher.

"Did you say something about silver salmon?" I asked with a sucker's voice.

"There you go, Dan," my buddy confirmed, "I got two trays of Puget Sound herring, a gallon of stand-up coffee, and high cholesterol donuts. All you have to do is stumble onto the boat."

I was pretty much awake at this point. Fishing in the rain in a hard-top boat was the offer. A chance to exchange meaningless insights into philosophy until the drag scream of Penn reels drowns out all conversation. Oh Doctor. My buddy was painting a glorious picture of male bonding in the fish slime. I was halfway to the door when I remembered my class.

"Uh, Bud," I said (using a false name to confuse the innocent), "I'll have to pass ... got school today... sorry."

"School!" he yelled into the phone, "You're 44, which is too old for learning anything more complicated than how to thread slip-tied hooks through a herring's backbone."

Bud hammered on me for ten minutes with promises of 10 pound salmon before dropping the old "next time I'll call someone with their priorities straight" speech.

When I told Bud that he sounded like a bureaucrat, he clicked off. The promise of the peaceful morning was gone, as was my chance to fish with Bud. I clicked on the tube, but all the rabbit ears could pull in was a Saturday morning cartoon. As Papa Smurf turned Brainy into a human canonball, my phone rang again.

"Hello," I answered cautiously.

"Mr. Branch," a professional female voice began, "This is Delores Smith with the college registrar's office."

"Yes," I acknowledged.

"I am afraid that your class has been cancelled today. Steps will be taken to reschedule for a later date."

Wondering if Bud had already pulled into Gastineau Channel, I asked for confirmation.

"You're kidding," I stated.

Delores responded first with silence, followed by the muffled sounds of someone stifling a laugh. She was kidding.

"Nice try." I said, hanging up.

I spent the next couple of hours sorting out my feelings about Bud and Delores, who turned out to be Bud's girlfriend Wendy. I first felt anger, then honor, before settling for something in between.

Shortly after this rainy morning adventure, the skies cleared. Temperatures soared into the high 60's. Salmon fishing around Juneau went south. Bud took up halibut fishing. He called me every Saturday morning in September, just to test my commitment to education.

President's column

continued from page 2

of the program, the views of various Board members have differed in the particulars of the program, giving rise to a healthy and robust discussion of both the problem of and solution to substance abuse by lawyers. No one on the board favors a committee that indiscriminately intrudes into the lives of the bar membership. It has always been a clear mandate from the Board that the committee members should only become involved when asked to do so.

Having been involved in the creation of programs to help impaired lawyers, both as a Board member of the Alaska and of the Anchorage Bar Associations, I am committed to confronting the impaired lawyers problem directly and decisively. I believe that this is one of the most important services that our Bar association can provide to its members and to the general public. I am pleased that this is a goal shared by the other members of the Board of Governors.

Beginning with this issue, the Substance Abuse Committee members will prepare a series of articles for publication in the Bar Rag telling the members what it does, how it does it and assisting the membership in understanding substance abuse and how to recognize it. It is a topic that we should all be interested in.

NEWS FROM THE BAR

Budget Q & A

Dues fund 68% of budget; discipline highest expense

Where does the money come from?

You, mostly, Yes, most bar revenues come from lawyers in the form of dues or fees. Total revenues break down as follows:

Bar dues	68%
Admissions	9%
CLE	7%
Lawyer Referral	7%
Convention	2%
Misc. (e.g. interest, sections)	7%

Where does the money go?

Mostly to pay for the mandatory, regulatory functions required of the bar by the bar rules. The Bar is mandated to administer the admissions process and the discipline system, including a fee arbitration program. CLE is also one of the major bar functions. Each member also contributes $10 of his or her dues to the Lawyers' Fund for Client Protection.

Total expenses break down as follows:

Discipline	32%
Administration	23%
CLE	16%
Admissions	11%
Board of Governors	4%
Lawyer Referral	3%
Convention	2%
Other (Fee Arbitrations, Sections, Committees, Law Review, etc.)	9%

Your dues dollars, which are 68% of the bar's total revenue, go largely for the costs of the Bar's mandated regulatory activities and the related administrative costs. Other programs and services, such as the Bar convention and CLE are supported in part by your dues, and in a large part by the participants.

User fees

At the Board of Governors' October meeting, they reviewed the proposed 1996 budget. The Board made some tough decisions to increase fees for services so that these programs pay their own way, and are not subsidized by bar dues. The Board made several amendments to the budget as listed below.

Bar exam fees

The application fee to take the Alaska Bar Exam will increase, effective with the July 1996 exam, from $700 to $800 for first time takers, and from $400 to $500 for reapplicants.

Lawyer referral fees

Effective January 1, 1996, the cost to sign up for a panel on the Lawyer Referral Service will increase from $20 per category of law to $50. It will cost $20 per panel for renewal on the service, up from $10 per panel. The lawyer will be charged $4 each time his or her name is given as a referral, up from $2. Panel fees had not changed since the lawyer referral service was set up in 1980—15 years ago.

Dues installment fee

The Board has proposed that Active bar members who wish to take the option of splitting their bar dues payment (half by February 1 and the balance by July 1) must pay an installment fee of $25 (up from $10.) This would be effective with the 1997 bar dues. Since this requires a Bylaw amendment, notice of the proposed change is being published in this issue of the *Bar Rag*.

Penalty for late dues payment

The Board is recommending a change to Bar Rule 61, to provide that the weekly penalty for late payment of bar dues would be increased from $5 to $10 a week, effective with the 1997 bar dues. The Bar Rule and Bylaw amendments are published in this issue.

Travel

Even though board members are almost always able to travel using supersaver or other airfare discounts, the budgeted amounts reflected coach airfare. The budget was adjusted to provide for all travel at supersaver airfare rates, a "truth in budgeting" move which reflects more closely our actual travel costs.

Salaries

The Board did not give the professional bar staff any increase in salary; it did vote a 2% increase for the support staff.

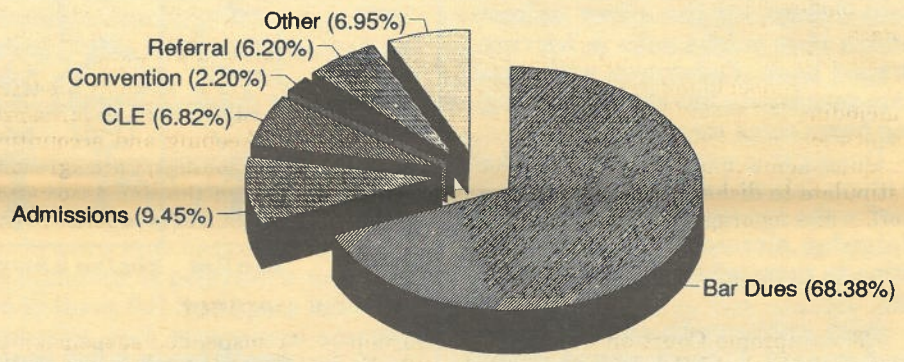
The Bar has many functions, some of them mandatory, some of them only desirable, but all of them are services to its members. (See our new column starting in this issue entitled "What Do You Get For Your Bar Dues?") The next time you go to write that dues check, remember that dues are the price of retaining the privilege of belonging to a self-regulating profession.

Questions?

If you have any questions about the budget, contact Executive Director Deborah O'Regan at 272-7469, or contact your local board member.

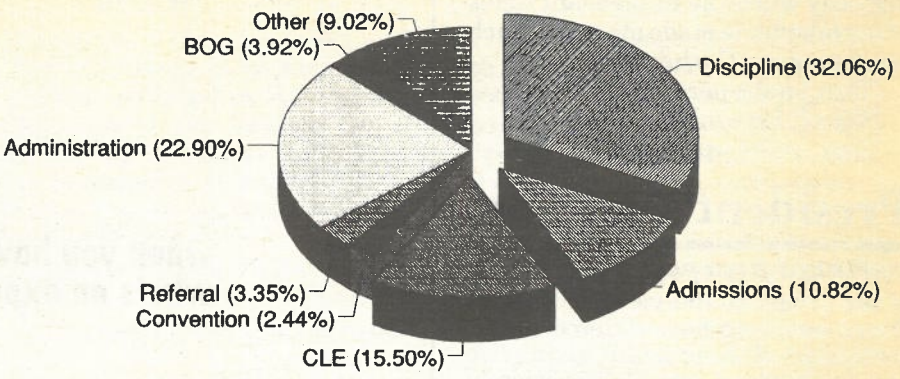
1996 REVENUE BUDGET

$1,819,000



1996 EXPENSE BUDGET

$1,642,000



REVENUE	1996 Budget
Admission Fees - All	171,920
Continuing Legal Education	124,100
Lawyer Referral Fees	112,800
The Alaska Bar Rag	13,600
Annual Convention	40,000
Substantive Law Sections	7,005
Ethics Opinions	1,350
Pattern Jury Instructions	3,000
Management Svc. Law Library	5,600
Accounting Svc Foundation	9,688
Special Projects	0
Membership Dues	1,244,050
Dues Installment Fees	12,375
Penalties on Late Dues	9,380
Disc Fee & Cost Awards	0
Labels & Copying	7,500
Investment Interest	55,000
State of Alaska	0
Miscellaneous Income	2,000
SUBTOTAL REVENUE	**1,819,368**

EXPENSE	1996 Budget
Admissions	177,666
Continuing Legal Education	254,413
Lawyer Referral Service	54,979
The Alaska Bar Rag	34,936
Annual Convention	40,000
Substantive Law Sections	10,800
Ethics Opinions	500
Pattern Jury Instructions	1,100
Management Svc Law Library	3,703
Accounting Svc Foundation	9,688
Special Projects	0
Board of Governors	64,324
Discipline	526,330
Fee Arbitration	44,258
Administration	375,943
Committees	8,885
Duke/Alaska Law Review	33,700
Miscellaneous Litigation	0
Remodeling/Moving Expense	0
Loan Interest/Loan Fees	0
Computer system Training	500
Lobbyist	0
Other/Miscellaneous	0
SUBTOTAL EXPENSE	**1,641,725**
NET GAIN	**177,643**

NEWS FROM THE BAR

At its meeting on October 20 and 21, 1995, the Board of Governors took the following action:

• Approved the budget as amended (see related article in this issue).

• Certified the results of the July Bar Exam and approved reciprocity applicant Keith Glover for admission;

• Adopted Ethics opinions "Attorney's Right to Withhold a Client's File Unless the Client Pays for Copying Files" and "Communications with a Represented Party by an Attorney Acting Pro Se."

• Scheduled the ethics opinion on "undisclosed Tape Recording of Conversations with Potential Witnesses in Criminal Cases" for the January meeting and asked that interested parties be notified, that this matter be held in a larger room and that notice be put in the November Bar Rag;

• Referred proposed Rule 1.4, which would require disclosure of malpractice insurance, to the ARPC committee;

• Approved a stipulation for disbarment;

• Asked Bar Counsel to draft a rule which would provide notification of trust accounts being overdrawn;

• Approved a Bylaw amendment establishing Keller procedures;

• Heard a status report on the database conversion;

• Approved $1,000 for the Substance Abuse Committee;

• Asked the Executive Director to prepare for the January meeting, recommended entry level and top level salaries for exempt staff;

• Vallentine and Brown will solicit contributions for a "Hooray for Hollywood" CLE program to be put on at the 1996 convention;

• Asked that staff write to the court stating that the Bar cannot offer gratis registration to judges and court system employees for CLE seminars, because the Bar Association subsidizes the CLE program;

• Voted to hold the 1997 convention in Juneau May 8 and 9;

• Scheduled on the January agenda a discussion of the future of bar conventions past 1997;

• Agreed to have president Vallentine appoint a committee to review mandatory CLE and to report back to the board in late '96 or '97;

• Agreed to have a committee review Lawyer Referral Service to define a disclaimer, and possibly put together an informational brochure;

• Volland and Brown agreed to work on a Mentor program development committee;

• Vermont agreed to work with the Executive Director on a membership services article for the Bar Rag.

• Adopted all recommendations of the Lawyers' Fund for Client Protection committee;

• Voted to send Bar Rule 12, regarding Hearing Committee appointments, to the supreme court;

• Voted to sell the bar exam research question to the Hawaii Board of Bar Examiners for $1,000;

• Tabled the Law Clerk Study rule until January;

• Agreed to allow vendors and sponsors unlimited use of the 100 year logo;

• Approved the August minutes;

• Decided to review salary ranges for professional staff in January.

Pace disbarred after forging client signature, converting check proceeds

Attorney William C. Pace was disbarred by the Alaska Supreme Court effective October 13, 1995. Pace represented a hunting guide on a trade-out: in return for legal services, Pace would receive a guided hunt and use of the guide's remote cabin. Pace obtained a $14,000 judgment for the guide. However, Pace and the guide had a falling out. Pace contended that he put much more time into the case than the guided hunt and cabin were worth.

The losing party paid the judgment debt to the clerk of court. The clerk issued a check for that amount to the guide and sent it to Pace. Instead of notifying the guide that he had the check, and holding the check or its proceeds pending resolution of the fee dispute, Pace forged the guide's name on the check, negotiated it and kept the money. The guide discovered the conversion over a year later and confronted Pace. Pace agreed to repay the money, but attempted to get the guide to sign a statement that he had authorized Pace to endorse the check in his name.

Bar Counsel found violations of several Disciplinary Rules in effect at the time, including DR 1-102(A)(4), which prohibits deceit, dishonesty, fraud and misrepresentation, and DR 9-102(B), which contains notice, safekeeping and accounting requirements concerning client funds. In lieu of formal proceedings, Pace agreed to stipulate to disbarment. The stipulation may be reviewed in the Bar Association office in Anchorage. Pace will be eligible to apply for reinstatement to practice in five years.

* * *

Schapira disciplined for neglect

The Supreme Court on October 13, 1995 imposed a suspended suspension on attorney Mitchel J. Schapira for his neglect of a client's appeal. Schapira represented a criminal defendant on appeal from a conviction for murder. Schapira twice missed deadlines for filing the appeal brief. After the second time, the Court of Appeals dismissed the case. Schapira did not seek reinstatement of the appeal for several months. Then he associated another attorney to assist him, and explained that personal problems had interfered with his work on the brief. The court reinstated the appeal, which proceeded without prejudice to the client.

Bar Counsel found a violation of Alaska Rule of Professional Conduct 1.3, which requires a lawyer to act with reasonable diligence and promptness. Among several mitigating factors, Schapira's client was not harmed (although Bar Counsel and Schapira disagreed on whether Schapira's medical problems should be considered a mitigating factor). Bar Counsel and Schapira agreed that he should be suspended for six months, with all six months suspended on the condition that he engage in no neglect of client interests between January 1, 1994 and December 31, 1997. A finding of neglect during that period will result in immediate imposition of the six month suspension in the present case. The stipulation may be reviewed at the Bar Association office.

* * *

Reciprocal Discipline: Public reprimands issued to Stephen D. Cramer

At its August 1995 meeting, the Disciplinary Board issued two public reprimands to Stephen D. Cramer based on the imposition of similar discipline on Mr. Cramer by the Washington State Bar Association. Under Bar Rule 27, discipline imposed on a member of the Alaska Bar Association in another jurisdiction will be imposed on that member in Alaska unless justification for not imposing that discipline is found by the Supreme Court. In this case, no objection to identical discipline was filed by Mr. Cramer.

In the Washington action, Mr. Cramer received two letters of censure (equivalent to a public reprimand in Alaska). The first letter of censure was for failing to properly supervise nonlawyer staff in the recording of a warranty deed and deed of trust and for failing to promptly comply with reasonable requests for information concerning these matters. The second letter of censure was for disbursing client funds in violation of a fee contract.

Morrill suspended; Bennett censured

In the disciplinary matter involving Leslie A. Morrill, Nov. 6, 1995

The Alaska Supreme Court AFFIRMS the ABA Disciplinary Board in imposing suspension for one day less than five years. Effective date Nov. 6, 1995.

--ABA File No. 8211135, Supreme Court No. S-5779

•

In the disciplinary matter involving Wilfred D. Bennett, Oct. 30, 1995

On consideration of the Alaska Bar Association's stipulation for discipline by consent pursuant to Alaska Bar Rule 22(h), and the Disciplinary Board's Approval dated Aug. 24, 1995, both filed on Sept. 29, 1995,

IT IS ORDERED:

The stipulation for discipline by consent is APPROVED.

Entered by direction of the Court at Anchorage, Alaska on Oct. 30, 1995

--ABA File No. 1994D082. Supreme Court No. S-7302

PROPOSED AMENDMENTS TO BAR RULE 61 AND ARTICLE III, SECTION 3 OF THE BYLAWS, PROVIDING FOR PAYMENT OF PENALTY FOR DELINQUENT BAR DUES

(Additions Italized; deletions bracketed and capitalized)

Rule 61. Suspension for Nonpayment of Alaska Bar Membership Fees and Fee Arbitration Awards.

* * *

(b)(1) Any member who has been suspended for less than one year, upon payment of all accrued dues, in addition to a penalty of [$5.00] *$10.00* per week of delinquency (each portion of a week to be considered a whole week) but not exceeding a total of $160.00 in penalties shall be reinstated upon certification by the Executive Director to the Supreme Court and the clerks of court that the dues and penalties have been paid.

* * *

Article III. Membership Fees and Penalties

Section 3. Delinquent and Suspended Members

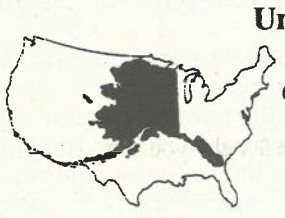
(a) Delinquent Payment Penalties. Any member failing to pay his or her membership fees when due shall, during the period of time in which the fees remain unpaid, be subject to a penalty of ($5.00) *$10.00* per week of delinquency. For purposes of determining the appropriate penalty assessment, each fraction of a week shall be considered a whole week. In no instance may the penalty assessed for delinquent payment exceed $160.00.

PROPOSED AMENDMENT TO ARTICLE III, SECTION 2 OF THE BYLAWS, PROVIDING FOR PAYMENT OF DUES IN TWO INSTALLMENTS AND THE INSTALLMENT FEE

Article III. Membership Fees and Penalties.

Section 2. Payment of Fees; Dues Dates.

Annual membership fees are due and payable on or before February 1 of each year; however, an active member, who does not qualify for reduced dues under section 1(a), may pay his or her annual membership fee in two installments. The first installment is due and payable on or before February 1 and the second installment is due and payable on or before July 1. A ($15.00) *$25.00* charge shall be assessed against the active member for the installment service and shall be included in the amount of the first payment.



United States Bankruptcy Court
District of Alaska
605 West Fourth Avenue, Suite 138
Anchorage, Alaska 99501-2296
Phone: (907) 271-2655

NOTICE OF
REVISED LOCAL BANKRUPTCY RULES
U.S. BANKRUPTCY COURT, DISTRICT OF ALASKA

Pursuant to the provisions of Rule 83, federal rules of civil procedure, and the federal rules of bankruptcy procedure, notice is hereby given of the intent of the United States Bankruptcy Court for the District of Alaska to adopt amended local rules.

Notice is further given that the public comment period will run through close of business, December 15, 1995. Public comments should be sent to the United States Bankruptcy Court at the address listed above. The effective date for implementation of the rules will be January 1, 1996.

Dated: October 16, 1995

BY ORDER OF THE COURT:
/s/Jamilia A. George, Chief Deputy for
Wayne W. Wolfe, Clerk of Court

Protecting your computer data from loss

By Joseph L. Kashi, J.D.

Data protection and security are crucial for any business, particularly a law office which is the custodian of a great deal of confidential client produced work product. This month, we'll discuss how to protect your network data from theft and casualty. Many of the same concepts apply, with minor changes, to protecting the data stored in desktop workstations as well.

AVOIDING NETWORK CATASTROPHES

Networks can fail catastrophically. Unfortunately, most organizations fail to take appropriate protective measures before failure occurs.

Preventive moral #1: Change network drives at least every 2 years.

Network file-server hard disks are used far more intensively than any workstation disk drive. They serve the data needs of five, or 50, people on the network and run 24 hours a day. Many network specialists recommend that the file server's hard drives be replaced every 18 months to two years. If changed regularly, the replaced drives can be used in a local workstation and will probably keep going for several more years under this far lighter duty. Compared to unexpected catastrophic failure in the middle of a working day, it's always better and cheaper to replace the drives on a routine maintenance basis. Do this on a weekend, first thoroughly backing up the network twice and verifying each backup.

Preventive moral #2: You need hardware redundancy!

The most basic and important protection is hard disk redundancy. Even if the server system board fails, your data is safe if the hard disks have not been scrambled. Guarding against hard disk failure typically occurs by running two equal sized hard disks in parallel. Most high-end networking systems, like LAN Server 4.0 Advanced Version, Windows NT or Netware 3.12 and 4.1, include file server hard disk mirroring and duplexing capabilities as part of the basic operating system. In its most basic form, two hard disks run in parallel from a single controller. This is called disk mirroring.

Data, programs and network rights on each drive should remain current and consistent. Disk duplexing is a similar but safer process. Here, two hard disks each operate from their own separate hard disk controllers, reading and writing in a parallel, synchronized fashion. Simple disk mirroring using only one hard disk controller results in a unprotected single point of failure, the disk controller board. Duplexing runs the backup disk on a different hard disk controller and thus provides a second level of protection. Given the minimally greater cost of buying a second controller, duplexing provides excellent disaster protection. To the best of my knowledge, no DOS-based network operating system supports disk duplexing out of the box. Inherent duplexing is a powerful reason to use a more advanced network operating system, such as Novell Netware, for your critical office network. Mirroring hard disks is not really feasible for desktop computers running DOS/Windows.

RAID disk arrays. The other approach to hardware redundancy is a RAID disk array, a more expensive solution used primarily for larger networks, where zero downtime is critical, or high-performance desktop workstations contain critical data on the local hard disk. RAID works by redundantly storing portions of your data on at least three different disk drives that work cooperatively and that can rebuild the array after a replacement disk is installed. When one disk fails, the RAID array continues to operate, although continuing on blithely is certainly not recommended for the prudent. A RAID disk array is the data protection solution of choice for DOS and OS/2 file servers, but not necessarily for most networks. Disk duplexing is more economical for Novell networks.

Duplicating file servers. Using constantly duplicated file servers for ultimate data protection is implemented in Netware 4.1 if you pay for the optional SFT Level III file server redundancy. This is the most comprehensive approach to always having a backup file server ready to go. You could have a second file server idling off line, though, and ready to manually take over in the event that the primary server fails. Keep your backup server current by copying all new and changed data files to it a few times a day.

Uninterruptible Power Supplies. Every network file server should be protected against power problems by a good surge protector like the Isobar or APC, then a line conditioner and finally by an uninterruptible power supply (UPS). Power problems are among the most significant cause of unexplained network difficulties.

Surge protectors act like a fast switch to short out damaging high voltages. Use one of these between the wall plug and any other power-conditioning equipment. Surge protectors are inexpensive compared to everything else in the computer system and will minimize expensive voltage spike damage. Don't forget to surge protect each desktop computer, any telephone lines connected to computers, and the network cabling itself where connected to the file server.

A line conditioner smooths out the voltage fluctuations common to electrical utility power. These voltage fluctuations tend to reduce the long term reliability of any computer components, particularly in hard working computers like file servers. A surge protector does not provide this protection. It only shorts out very high AC power line voltages that would otherwise blow out the computer system catastrophically.

The UPS includes a large battery and circuitry to ensure a steady source of power to a computer in the event of electrical power loss. An unplanned file server shutdown due to power loss or voltage sags will often cause disaster because file servers are more susceptible to power loss than regular desktop computers and network data files often suffer greater damage from unexpected shutdowns than regular desktop computers. The UPS will power your file server and monitor for a relatively short time so that you can avoid data loss during unexpected power interruptions. Make sure that you get a UPS that's more than large enough to power your file server, the file server's monitor, and the network hubs for at least 15 minutes. For an Intel 486 computer with a few large hard disks, a 600 watt-second output UPS should do nicely.

Remember that any desktop computers that work with database programs, such as time and billing systems, should also be protected with inexpensive uninterruptible power supplies. If the power fails, even momentarily, while a desktop user is working with a database program, the database will often be severely damaged even if the file server itself is unaffected.

While you're at it, check the cooling fans on the computers. Are they still running properly? Are they noisy? Cooling fan bearings fail often, resulting in a heat build up that destroys computer components, particularly power supplies. In fact, file server power supplies fail more often than any other component. If you are using a generic computer as a file server or otherwise storing critical data on it, then do yourself a favor and replace its power supply with a really good one like the heavy duty ones made by PC Power and Cooling, Carlsbad, California. This company also sells heat sensors, CPU cooling fans, and auxiliary cooling fans.

Preventive moral #3: Backup daily!

Backup everything regularly, and make sure that the backup tapes are verified as accurate. Given how easy it is to use a tape backup these days, the standard of practice is probably two to three full backups a week for networks and computers storing critical data on a local hard disk. Store back up tapes off-premises, away from permanent magnets and electrical motors. You'd be surprised at how many people overlook the effects of electrical motors on data until their hard disk has failed and the hastily retrieved backup tapes seem to be recorded in Hungarian. Unfortunately, the backup tapes rested on top of a large fan whose motor produced a strong electrical field that erased about every other byte on each tape.

Luckily, electronic data can be copied and stored off premises far more easily and cheaply than paper documents. There is no excuse for failing to do this. Although some business insurance policies, when carefully chosen, provide coverage for the cost of recovering electronic data, many carriers explicitly exclude such coverage.

Examine how fail-safe your own office procedures are. Several years ago, I had a major network failure caused by careless workmen in the floor below our office. It turned out that I had failed to make a current backup for a few weeks. That's when my earlier investment in redundant duplexed hard disks and advance planning paid off. I was able to get one of the duplexed hard disks working (only the primary drive actually failed) and then made two complete sets of backup tapes from the working drive. After the data was retrieved, I was able to shut down the system for a few days and repair the hardware. But first, remember to backup completely and daily. If you're properly backed up, a hardware failure is a mere inconvenience, not a disaster.

When I post-mortemed our failure to regularly backup the network, I noticed several procedural failings, my own chief among them. I had recently converted my own office work station from DOS on Netware 3.11 to OS/2 version 2.1 running on the same network. Converting to a different interface always takes some transitional time while I work out bugs and become generally familiar with the program. During my transition, I somehow was so interested in experimenting with OS/2 that I forgot to install and use the tape backup software on my OS/2 Desktop. I thought that one of my office staff was backing up the accounting data, but unfortunately that wasn't the case.

If you are using a network, you might consider installing either automatic backup software on the file server, such as Cheyenne Software's ArcServe NLM, or backup scheduling software on the supervisor's workstation. Tape drives are now very reasonably priced, at least in the 350 to 1,000 megabyte range. Install two in separate workstations and make sure that both employees are instructed to back up the entire system daily and in fact really do so. Desktop computers storing critical data on a local hard disk should have their own tape backup and the user instructed to make frequent, verified backups.

Preventive moral #4: Make sure that backup tapes are good!

One shouldn't overlook the importance of insuring that your backup tapes are in fact useable if recovery is necessary. Programs and data stored on tape tend to fade remarkably fast compared to other magnetic media such as hard disks. Tape backup is not useful for long term storage. The tapes themselves are easily damaged by small surrounding magnetic influences such as electric fan motors. As always, store tapes off-premises and far from any magnetic or electrical fields such as those caused by electrical motors, 110 volt power mains, or fluorescent lights.

For maximum reliability each backup tape should probably be reformatted from scratch every four to six months or so. Never assume that a single tape backup, even if verified after made, will remain useable two or three months later. They often are not useable and sometimes totally fail. That's why making several backups on separate tapes is very wise. Always make two complete, simultaneous, verified backups before someone starts tinkering with your network.

Use rotating sets of tapes so that you always have at least one tape that's one month old, a tape that's one week old, and a currently used tape set. If you rotate your tapes in this fashion, you should always be able to find and restore a file that may have been deleted last week and always have a clean copy of the entire network operating system and programs in case a virus or other corruption has recently penetrated your system to cause havoc. Because of the likelihood that we'll all forget to backup the network from time to time in a manual system, I

continued on page 11

Solomon to lawyers: "You will be assimilated. Resistance is futile."

We are a group of computer scientists and attorneys specializing in the field of artificial intelligence. For the past seven years, we have focused our attention on the process of American civil and criminal jurisprudence.

Like many other experts, pundits and ordinary citizens, we are dismayed by what we see. Our centuries-old model of constitutional law, brilliantly designed to protect individual rights and liberties, has defaulted on the promise of equal protection for all the people.

Unlike many who share our view, however, we refuse to wring our hands and walk away. In short, we believe we have a solution to the crisis.

It is admittedly a radical solution, for nothing less will lead us out of the mire in which we find ourselves. We have concluded that a drastic revamping of the current legal system is imperative. The American people have lost confidence in the judicial system, and with reason. From cross disparities in sentencing to the skyrocketing, costs and excessive length of trials, mistrials, hung juries, and trials *de novo,* not to mention frivolous lawsuits, we have grievously tarnished the dream of swift and impartial justice.

Enter the Solomon Project

The ultimate practical application of artificial intelligence, *Solomon* is a distributed program running on a set of super computers. Judge and jury both, it is uniquely capable of accessing the entire corpus of legal literature and fairly applying legal constructs and principles of equity and fairness to the factual information it is fed.

Our courtroom is virtual. Our justice is actual. *Solomon* combines the wisdom of the ages with a thorough knowledge and understanding of the Judicial process. It is essentially an interactive library of all statutory, regulatory, and case law (constantly updated); ethics and equity principles; and factual precedent.

Solomon works as follows: In simple cases, attorneys enter all admissible evidence into *Solomon* under the supervision of a judge. The judge may make rulings regarding the admissibility of the evidence but does not otherwise participate in the process. All participants, i.e. attorneys, defendants and witnesses, are tested using advanced polygraph equipment, sodium pentothal and newer technologies that guarantee the accuracy and the truth of all input.

Solomon may ask for clarification or make requests for further information to be provided. *Solomon* then accesses all existing law pertinent to the factual circumstances and relevant evidence and deliberates, utilizing not only the body of evidence and all existing law applicable in the jurisdiction, but also a complex mapping of ethics input by a highly esteemed board of ethicists. *Solomon* then provides a judgement and, where indicated, an appropriate written order or opinion.

Where the facts are in dispute *Solomon* participates in the deposition of witnesses. As questions are asked to the witnesses for both sides, voice recognition software allows *Solomon* to understand the examination. Furthermore, *Solomon's* unique fuzzy logic allows it to weigh the answers by using voice stress analysis and the inputs from polygraph telemetry in addition to the spoken word. This allows *Solomon* to act as a jury and weigh the veracity and credibility of witness.

One of *Solomon's* unique capabilities is to scan trial transcripts and detect obvious miscarriages of justice. Because of scanning software, a *Solomon* review can be conducted for less than the cost of a single billable hour charged by most attorneys.

If necessary, in the criminal context, *Solomon* will enter a sentence, fine or other criminal penalty. All orders, judgments, sentences or other actions taken by *Solomon* are binding and not subject to further review.

This process effectively eliminates the need for juries as well as for most judicial duties. Due process and equal justice are served immediately based on unbiased evaluation of facts and law, tailored to each litigant or criminal defendant. The role of attorney and judge is permanently altered, for they no longer have to preside over long, complicated and costly trials. Their functions become that of overseeing, the entry of data into *Solomon*.

The clear winner is the public. Justice is swift and blind, with minimum cost.

As part of our developmental process, we have successfully retried some of the most highly visible American legal cases of recent years, i.e., Mike Tyson, William Kennedy-Smith, the Menendez Brothers, Susan Smith, Heidi Fleiss, Amy Fisher, Klaus Von Bulow and Rodney King. The results are of great interest and are available from our office. We will re-try the O.J. Simpson case now that the trial is over and will be announcing a public demonstration in the near future.

The purpose of this letter is to solicit support and commentary from a wide range of legal professionals as well as criminal and law enforcement specialists throughout the judicial and legislative branches of government. We would like to know what you think of *Solomon* as a solution to our country's dire legal situation. Do you feel *Solomon* represents a viable alternative? If not, why not? If so, may we use your name on our list of professionals who support our activities?

Please let us know what you think. If you would like to see a demonstration of *Solomon*, let us know that as well. Thank you for your time and consideration.

—*Joseph Bonuso, Ph.D.*
Research Fellow and Founding Director
The Solomon project
NYU Law Artificial Intelligence Research
127 MacDougal St. Box 992
New York, NY 10012
(212-598-4919)

Protecting your computer data

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recommend the use of more sophisticated automatic backup software.

If you do have a system crash, you may need to recover as much data as you can from the file server. Netware includes a basic Vrepair file utility. If it doesn't work, then consider the more sophisticated Net-Utils 3 from On-Track, Eden Prairie, Minnesota.

On-Track and certain other vendors can actually disassemble, repair and partially recover data from failed hard disks.

However, this is the counsel of desperation. Periodic computer maintenance, good planning, and frequent data backup should prove adequate.

Alaska Legal Resources Center offers expanded Internet coverage

The Internet's Alaska Legal Resource Center—a definitive tool for attorneys and others involved in Alaska legal issues—is now offering expanded coverage of state and national legal resources on the World Wide Web. In addition to its same day coverage of Alaska Supreme Court and Court of Appeals decisions, the Alaska Legal Resource Center now offers Alaska Statutes; the Alaska Administrative Code; and United States District Court Local Rules, including the Local Bankruptcy Rules.

The Court Opinions, Statutes and Administrative Code all have key word searching capabilities. The Alaska Supreme Court Opinions, which offer coverage back to 1991, have also been indexed by subject matter.

Burgess Allison, author of *The Lawyer's Guide to the Internet*, has described the Alaska Legal Resource Center as "a terrific model for the way substantive information can get put on the net." For example, the full text of the new amendments to the Alaska Native Claims Settlement Act were made available the same day they were reported in the media.

In addition to legal resources, the Alaska Legal Resource Center home page also includes various other items of Alaskan interest. All of these resources are offered as a free service of Touch N' Go Systems, Inc., a computer consulting and software company founded by Anchorage attorney Jim Gottstein. The legal resource center is among several of the company's services on the 'Net and can be found at: http://touchngo.com/lglcntr/lglcntr.htm

Touch N' Go Systems also maintains a Federal Legal-Related Resources Web Page, which offers links to federal court opinions, statutes, court rules, and congressional bills, as well as federal agency information. In addition, their List of Legal Lists provides links to the wide variety of other legal resources available on the Internet.

Touch N' Go Systems also has recently released Touch N' Go™, The Electronic In and Out Board. This innovative mass-market software allows everyone in your office to check in and out of the office, and to instantly know the whereabouts of their co-workers at the touch of a button. A special 30-day free demo of Touch N' Go, is available for download on the Internet at:
http://touchngo.com/tng/tng.htm

Touch N' Go Systems specializes in Windows, Windows 95 and Windows NT applications. In addition to its software line, Touch N' Go Systems offers individualized assistance in:

- Windows 95, Windows, Windows for Workgroups & Windows NT, including networks.
- Internet World Wide Web home page preparation and storage.
- Windows NT Server Applications, including Internet server applications.
- Troubleshooting; file conversions, including mainframe to PC; and scanning Services
- Custom programming in Microsoft Access, Visual Basic, SQL and other Windows programs.

Gottstein says his company evolved from litigation in the Mental Health Trust Lands case. Once the lengthy case was settled, Gottstein and computer consultant Steve Snyder decided to put to work the knowledge they accumulated in their extensive use of computer database analysis in the complex lands issue. "Long term, our teaming up (in the Touch 'N Go business) may be the best thing to come out of that litigation," says Gottstein.

For more information, visit Touch N' Go Systems' home page at http://touchngo.com/index.html; e-mail at touchngo@touchngo.com; mail to 406 G Street, Suite 210, Anchorage, Alaska 99501; or contact: Jim Gottstein at (907) 264-6333 (Jimgotts@touchngo.com).

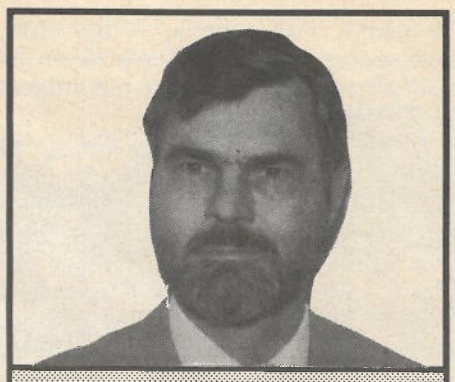
Bankruptcy Briefs

Delinquent taxpayers II

In the last article problems associated with individual debtors who fail to file tax returns timely were discussed. As noted in that article, failure to file a return results in a bar of discharge in a chapter 7 or 11, but not necessarily in a chapter 13. The focus of this article is on use of chapter 13 in situations where tax returns have not been filed or were untimely filed within 2 years of the date the case was, or is to be, commenced.

BC § 1328(b) is frequently referred to as the "superdischarge" section for good reason. The exceptions to discharge under § 1328 are very limited - generally, support obligations, student loans, DUI obligations, and restitution orders or criminal fines included in a criminal conviction. All other unsatisfied obligations are discharged when the debtor successfully completes payments under the plan. Although BC § 523(a)(1)(b) bars discharge of tax deficiencies resulting from a failure to file a return (or filing an untimely return within 2 years of the petition date) in a chapter 7 or 11, BC § 1328(a) contains no such limitation. Thus, whenever faced with a non- or late-filer situation, a chapter 13 is frequently the preferred option: if eligible and a plan complying with the requirements of BC §§ 1322 and 1325 can be formulated.

First, of course, one must overcome the initial hurdle of basic eligibility: an individual with a regular source of income having noncontingent liquidated unsecured obligations less than $250,000 and contingent liquidated secured debts less than $750,000. [BC § 109(e)] Determination of basic eligibility, except for the question of whether a particular debt is noncontingent and



Thomas Yerbich

liquidated or the extent to which an obligation is secured, is usually a fairly straightforward, simple process one simply totals up the debt in each category. [Practice note: If ineligible, consider the possibility of a "chapter 20."]

Initial evaluation of a confirmable chapter 13 plan involves essentially determining "disposable income" and whether that income is sufficient to make the *minimum* payments required by the Code. To determine "disposable income," expenses associated with maintaining an "average standard of living" are deducted from projected gross income. [*See generally* 5 King, *Colliers on Bankruptcy,* ¶ 1325.08[4] (15th ed)] If disposable income is sufficient to pay in full all obligations of the debtor (unlikely in most instances), chapter 13 is not only feasible but also, under the "substantial abuse" provision of BC § 707(b), may be mandated in a consumer case. [*In re Kelly,* 841 F2d 908 (CA9 1988)]

Assuming, as is most likely the case, that a full payment plan is not possible, the next step involves determining the liquidation value of all non-exempt assets of the debtor. As a minimum, other than a full payment plan, creditors must receive under the chapter 13 plan payments having a value as of the effective date of the plan, not less than would be received if a liquidation occurred in a chapter 7. [BC § 1322(a)(4)] If disposable income is insufficient to pay at least this amount, a chapter 13 plan can not be confirmed.

Once the liquidation value hurdle is successfully overcome, it becomes necessary to determine whether disposable income will permit payment of the *minimum* payments required: essentially payment in full of obligations entitled to priority under BC 507 [BC § 1322(a)(2)] and secured claims [BC § 1325(a)(5)]. Two points here: (1) priority claims need not be paid interest during the life of the plan [5 King, *Collier on Bankruptcy,* ¶ 1322.03 (15th ed)]; and (2) payments to holders of allowed secured claims (as determined under BC § 506) must meet a "present value" test [BC § 1325(a)(5)(B)(ii)], *i.e.,* interest at market rates [5 King, *Collier on Bankruptcy,* ¶ 1325.06 [41 [b] [iii] [B] (15th ed)].

This phase is a two-step process. First, determine payments required to be made to secured creditors through the plan. These are normally payments to cure any arrearage, *e.g.,* house and car payments, and payments made through the plan, *e.g.,* federal tax liens [do include regular monthly payments being made outside the plan (*e.g.,* house and car payments) that constitute part of the expenses deducted from gross income to determine disposable income]. [Practice note: Remember the lien avoidance powers of a debtor under BC § 522(f).] After the payments required to be made to secured creditors are deducted, the balance is available for distribution to unsecured creditors, including those claimants entitled to priority. [Practice note: Do not forget administrative expense claims, including the 10 percent paid the trustee, must be paid in full.] If the remaining balance is insufficient to pay the priority claimants over the life of the plan (maximum 5 years), a chapter 13 is a "no-go." It is, therefore, critical that calculation of the claims entitled to priority be correct; including, inclusion of only those tax claims actually entitled to priority. It is, therefore, imperative that each segment of the tax liability be examined as to its nature and tax period covered.

If the tax secured by a lien, then to that extent it is included as a secured obligation and excluded from those claims entitled to priority. [Practice note: BC § 506 "strip-down" is an important consideration in this area - it could make or break a chapter 13 either by destroying eligibility (undersecured portions of secured claims are counted as unsecured obligations for this purpose) or by increasing the total "minimum" payments required to a point beyond the amount disposable income can repay. In the later case, the debtor may well be forced with the Hobsonian choice of continued living with the current situation or voluntarily reducing his or her standard of living for the life of the plan.]

If the tax liability results from a tax that is collected, *e.g.,* sales taxes or employee withholdings, for which the debtor is liable, irrespective of the tax period involved or the capacity of the taxpayer, it is entitled to priority [BC § 507(a)(8)(C)] and, of course, must be paid in full.

If, as is usually the case with individuals, the tax deficiency relates to income tax, the tax period involved is critical. There are 3 situations under which income tax obligations are entitled to priority. [BC § 507(a)(8)(A)] (1) The return was last due, including extensions, within 3 years of the date the petition was filed. (2) The tax was assessed within 240 days (as extended by an offer in compromise, if applicable) of the date the petition was filed. (3) It is a tax, other than a tax related to an unfiled return or untinmely return filed within 2 years [BC § 523(a)(1)(B)] or a fraudulent return [BC 523(a)(1)(C)], that has not been assessed but is still assessable after the commencement of the case.

Also, remember that pre-petition interest on priority tax claims are entitled to the same priority as the underlying tax claim. [*Matter of Garcia,* 955 F2d 16 (CA5 1992)] However, generally tax penalties are consider "non-pecuniary" and are not entitled to priority under BC § 507(a)(8)(G). [*In re Cassidy,* 983 F2d 161 (CA10 1992); *In re Standard & Johnson Co., Inc.,* 90 BR 41 (Bnkr.EDNY 1988)]

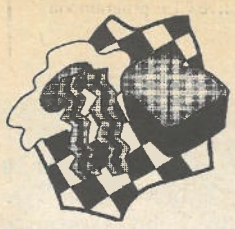
If presented with a situation falling within § 523(a)(1)(B) or (C), pre-petition investigation and evaluation are important to determine the appropriate chapter. However, if as is only too frequently the case, exigencies mandate immediate filing, file a chapter 13; if wrong, it can always be converted or dismissed as a matter of right - there is no dismissal "of right" in a chapter 7 or 11.

It is recommended the following be obtained and examined.

1. Federal tax lien(s) filed. This will provide assessment date, the nature and periods covered by the tax liability covered by the FTL and a rough estimation of the tax due, exclusive of any additional interest accrual. It also serves as a springboard for determining the extent of the secured claim governed by § 1325(a)(5), the advisability or necessity for a § 506 motion and what tax liability may fall within § 507(a)(8) or § 523(a)(1)(B) or (C). [Practice notes: (1) The FTL reaches *all* property of the taxpayer/debtor, without exception, exemption or limitation [IRC § 6321; *U.S. v. Barbier,* 896 F2d 377 (CA9 1990)1; (2) collection of the tax and the lien may have expired by operation of law if the assessment date is more than 10 years old [IRC §§ 6322; 6502(a)]; and (3) payments on the secured claim are generally applied to tax, penalty and interest, in that order, starting with the earliest collectable year [Rev.Rul. 73-305, 1973-2 CB 431.]

2. All demands for payment and notices (*e.g.,* assessment, intent to levy, or levy) received. These will provide the current status of collection efforts, at least a rough estimation of the tax due, and can provide valuable background for making a determination of whether to object to the claim filed by the IRS or requesting a determination of the tax liability under BC 505.

3. A copy of the debtor's transcript from the IRS for each tax year in question. This can be a veritable gold mine of relevant information, including, assessment dates, payments received and credited, penalties and interest assessed and the current balance due. Rarely, if ever, does the debtor have this information and estimates based on incomplete and/or out-of-date information can lead to disappointment, if not disastrous results.



OFF THE RECORD:

An Informal Bench/Bar Exchange at Breakfast

Presented in cooperation with the Anchorage Bar Association

Friday, Dec. 1 7:30-10:00 a.m. Hotel Captain Cook

New Rules, New Courthouse, New Questions

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1995-1996 CLE Calendar

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#02 February 8	Finding the Fires Before They Start: Legal and Tax Issues for Non-Profit Corporations	Anchorage Hotel Captain Cook
#03 February 13	Court Merger/Family Law	Anchorage Hotel Captain Cook
#11 February 23	Substance Abuse Training	Anchorage Hotel Captain Cook
#88 March 14 3.0 cles	Mandatory Ethics for Applicants	Anchorage Hotel Captain Cook
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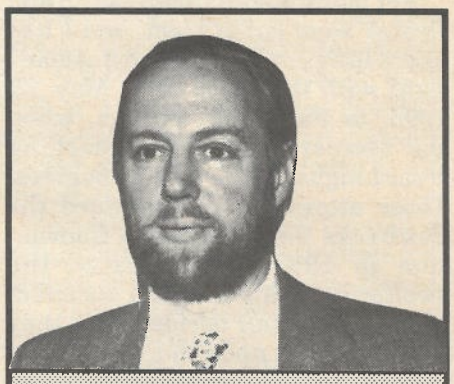
#88 March 26 3.0 cles	Mandatory Ethics for Applicants	Juneau Centennial Hall
#06 March 28	Family Law Advocacy	Anchorage Hotel Captain Cook

Getting Together

In praise of venting



Drew Peterson

The story is told of an American professor of comparative religion who went to Japan to meet a famous Zen master.

The professor was thrilled at the opportunity to meet the master and discuss the nature of Zen.

After listening to him for some time, the master asked the professor if he would like some tea. The professor interrupted his conversation long enough to agree. The master began pouring. The professor continued talking. The master continued pouring. The tea filled the cup and began spilling on to the table. Still, the professor continued. Finally the professor could stand it no longer. "Master," he said, "The cup is full!"

"You are like the cup," replied the Zen master. "You are too full of information. You have no room for the additional information that you seek. First you must make some room in the vessel."

Such a phenomenon occurs in virtually every conversation involving high conflict. The parties' cups overflow. They have no room for new information about another point of view. One of the most valuable things that can be done to help the parties resolve conflict is to gently help them to make some more room in the cup.

Venting is a controversial subject in the mediation community, however. Many mediators would say that their job is not to let disputing parties vent their emotional overload. Venting leads to escalations of anger that make a conflict worse, not better, they would assert. The mediator's job is to help calm things down, not stir them up.

I would like to take sides firmly in the pro-venting camp. I believe that venting is an essential part of the effective conflict resolution process. The Zen master was right. We cannot help people to resolve conflict in empowering ways unless we help them to make room for consideration of the point of view of the other side to the dispute.

The flip-side of venting is active listening. When other people vent we can listen to them, or help others to listen to them, in a respectful and empathetic manner. We honor and respect them by listening to what they have to say during the venting process. The process of venting is a very physical process. You can actually feel the build-up and then release of tension which venting involves. If you have any doubt about this, ask a group of ten or more participants in a workshop to break into pairs. Have half of the pair vent on any subject, while the other person listens to what they have to say, using active listening techniques. Then observe the entire group. In a short period of time, usually within less than two minutes, you can actually feel the physical energy in the room subside.

Encouragement of venting is a powerful conflict management technique. Failure to allow and actually encourage the venting process to occur can be fatal to the effective resolution of a dispute. If they are not allowed to vent, parties may never make enough room to consider the point of view of the other.

To say that venting is critical to the effective resolution of disputes, however, is not to say that parties should always do so right in each other's face and without any effort to control the process. When they are venting parties often say and do things that they might not in calmer moments. They hit below the belt. Name calling, discounting, insults, and blaming are common. Such negative venting can be hurtful. It can and often does lead to a discount-revenge cycle that makes the conflict worse rather than better.

Such negative aspects of the venting process can be effectively challenged.

Mediators have many techniques that can be used to help avoid the negative effects of venting. They can reframe blaming comments into neutral terms. They can distract the subject or divert the conversation when the venting is getting out of hand. They can take a break. They can enforce rules of venting which allow it to occur only under limited conditions; rules like no name calling, or no verbal abuse. They can physically separate the parties to allow them to vent in private, where the other party will not hear what is being said. There are many other techniques which a mediator, other people in the room, or the parties themselves can use to stop the venting process from becoming destructive.

But it remains true that venting is an essential part of the process of effective dispute resolution. Without being able to vent their strong feelings, disputing parties will stay agitated. They will not have room to hear the point of view of the other.

The Zen master was right. Only after we empty our own vessel of strong emotions are we able to solve problems in effective, mutually beneficial ways.

SOME NOTES ABOUT ALASKA BAR ASSOCIATION CONTINUING LEGAL EDUCATION (CLE) PROGRAMS

1. The Alaska Bar Association presents live CLE programs in Anchorage, Juneau and Fairbanks each year. The majority of live CLE programs are presented in Anchorage and videotaped for regularly scheduled group video replay in Juneau, Fairbanks, Ketchikan, Kodiak and Dillingham. Whenever possible, a local practitioner acts as a discussion leader for the replay.
2. In addition to the live CLE programs and group video replays, videotapes of Alaska Bar CLE programs are available for individual purchase or rental. Course materials are also available for purchase.
3. The Bar office ONLY keeps a record of your attendance at Alaska Bar Association live and video replay CLE programs, and can provide you with a copy of your CLE credits. **No CLE credits record is kept of individual rental or purchase of CLE programs OR of attendance at CLE programs sponsored by other organizations.**
4. Alaska Bar members who participate as faculty at an Alaska Bar CLE receive CLE credit and a record is kept by the Bar of their participation.
5. Alaska is not a mandatory CLE jurisdiction and does not currently have any minimum continuing legal education requirements. However, if you are a member of another jurisdiction that has minimum CLE credits, and require a copy of your Alaska CLE credits for another bar, please call us.
6. Alaska is an approved provider for California Minimum Continuing Legal Education credit and for the South Carolina Commission on Continuing Legal Education.
7. There is a 50% registration discount offered to Bar members who travel to a live CLE program via a commercial air carrier. Only one discount category may be used.
8. There is a 10% discount in fees if 2 people from the same organization register for a live CLE, and a 20% discount if 3 or more people from the same organization register. Only one discount category may be used.
9. The CLE Program Cancellation Policy is as follows:

   Registration fees minus a $10 processing fee will be refunded to registrants who cancel 72 hours prior to the program date. Registration fees minus a $25 processing fee will be refunded to registrants who cancel 24 hours prior to a program. **No refunds can be given for cancellations the day of or after the program.**
10. The CLE Library is open to all Bar members. Materials are available for reference, rental and purchase. A listing of library materials is noted below.

HERE'S WHAT YOU CAN FIND AT YOUR CLE LIBRARY!

Open 8:00 a.m. - 5:00 p.m. Mon - Fri at the Bar Office, 510 L St. Ste. 602, Anchorage. Phone: 907-272-7469/fax 907-272-2932

- Videotapes of CLE programs
- Audiocassettes of CLE programs (on request)
- CLE Course Materials - including the "Practicing Law In Alaska" Series
- Reference materials on substantive law areas
- Convention CLE materials
- Annual Section Updates
- "Alaska Attorney Desk Manual": Real Estate Law Issues, Employment Law Issues (Forthcoming: Family Law Issues and Business Law Issues)

Tapes and materials are available for rental and/or purchase. Facilities in the Bar office are also available to review tapes and materials. We are happy to mail tapes and materials to members outside of Anchorage. **The Bar also publishes a Library Catalog which is distributed to Bar members.**

FOR CLE QUESTIONS: Please call Barbara Armstrong, CLE Director; Rachel Tobin, CLE Assistant; and Ingrid Varenbrink or JoAnne Baker, CLE Library; at 907/272-7469. Call 800/478-7878 for recorded information on upcoming programs.

EDUCATION BY THE BAR FOR THE BAR

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ATTENTION! MEMBERS OF THE LEGAL PROFESSION VISITING ATLANTA FOR THE 1996 OLYMPIC GAMES

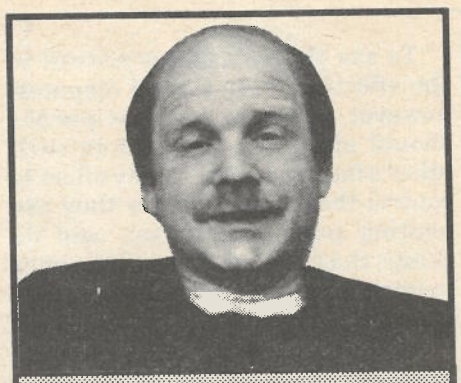
If you are considering visiting Atlanta during the 1996 Olympics, the Atlanta Bar Association would like to know of your interest in participating in educational and social activities during your visit. Please contact your Bar Association to obtain a questionnaire to submit to the Atlanta Bar Association's Coordinating Committee for the Olympics. The questionnaires should be returned to the Atlanta Bar Association by December 15, 1995. The Atlanta Bar Association will use the information you provide to determine what activities and services may be of interest to lawyers and judges. If you prefer, you can contact the Atlanta Bar Association by telephone at (404) 521-0781 or facsimile at (404) 522-0269 for more information.

NOTICE

The Anchorage Trial Courts are scheduled to move to the new Nesbett Courthouse the week of March 25-29, 1996. During the move week the court will generally conduct mandatory or emergency court proceedings only. Court proceedings will also be reduced the preceding week of March 18-22 and the following week of April 1-5. Additional details on the move schedule will be published as plans are developed further.

Tales from the Interior

A Tanana Valley Alaska fish tail



William Satterburg

Over the years, I have had to contend with the presence of two attorneys, Don Logan and Marc Grober. In many respects, the two are inseparable, although both seem to deny significantly any association with the other. More than one judge has confused the two in court. Those who know them both will understand. Those who don't will never comprehend the equation. Let's simply call it the Logan/Grober phenomenon, or L/G syndrome.

It's not that these two individuals are particularly unkind. In fact, when Logan is attempting to be overly courteous, that's when people despise him the most. After all, they expect a certain behavioral pattern from Logan.

So, too, does Grober have his idiosyncrasies. And when Grober is trying to be overly solicitous, problems also arise. When Grober is behaving as Grober does, all is right with the world. And as long as Logan and Grober do not stay in touch with each other, the cosmic balance remains largely undisturbed. If the two should ever collide, like matter and antimatter coming together, it might well be the end of life on planet Earth as we know it.

Several months ago, Logan left Fairbanks for parts unknown. Fed up with the day-to-day drudgery of running life out of his house trailer, Logan opted for the traveling life with a lady known as Maureen (whom I affectionately dubbed the "leather lawyer" due to her proclivity and propensity to wear leather clothing).

Grober, as well, ultimately departed Nenana, also for parts south, leaving his cabin on the side of the highway with its soiled dog lot, and attempting to gain respectable existence in the mighty city of Anchorage. The Tanana Valley clearly would never be the same.

Before Grober left, in a rare show of generosity, he brought to my office a large king salmon. I was not there to accept the gift and never got the message that it had arrived the day that he brought it. The fish was accordingly placed in the freezer of the office building next door which is leased out to attorney Robert Sparks. Robert, as well, has his own idiosyncrasies, as does everyone else except myself.

For many months, both Logan and Grober were out of town, and I had heard little out of Sparks. All seemed right with the world until May 12, 1995, in Fairbanks, Alaska, when the temperatures were reaching record highs, in the mid-80 degrees. Those attorneys who attended the Fairbanks Bar Association Convention in 1995 can attest to the sweltering weather which occurred.

My office staff decided that they would embark upon their ambitious once-a-year spring cleaning project to attempt to clean up Sparks' office next door. The basement level of the office is used largely for storage and, also houses the freezer. Two days earlier, one of my staff had determined that the freezer had become unplugged some time during the one and one-half years that the king salmon had been in residence. Although the salmon was no longer recognizable, numerous other little critters had begun to grow in the ice box. In short, it looked like somebody had spilled a large bag of white rice inside. Immediately following the discovery, the door was quickly shut and the freezer plugged back in. After some deliberation, the decision was collectively made to allow the contents to freeze solid and then attempt to remove the freezer from the building, but not to unnecessarily trouble Bob Sparks with the discovery.

Accordingly, Bob Sparks remained essentially oblivious to the monster growing beneath his feet, and must have simply assumed that the smell that was permeating his office came from old files, or maybe one of the many buried bodies in Fairbanks.

On Friday, the 12th of May, my staff asked me to bring my pickup truck to the office along with a hand cart. This was to be the day that the freezer would be removed. Because none of us particularly wanted to deal with the issue, we hired an individual who agreed to handle the removal process. The individual, as well, was a rather unique sort of person, who looked like Leon Spinks, missing all of his front teeth. He regularly entertained our office staff that day, talking about the reality of UFOs and other philosophical and scientific concepts largely unknown to rational thinking people. As fate would have it, the compressor motor had once again broken down and the frozen contents were once again thawed. Unfortunately, no one told our laborer that we wanted the entire icebox thrown out. Instead, he understood his assignment to be one of simply cleaning out the inside as best as possible.

My clean up man, Bill, was actually a fairly nice gentleman. He was rather opinionated on matters, however, as I discovered when I drove him to the bank late that hot afternoon.

As he explained to me, he felt that his First Amendment rights were being violated because he had recently been arrested and handcuffed for discussing UFOs on the military base.

"Why," he queried, "can someone not be arrested for discussing UFOs on television or with G. Gordon Liddy, and I get arrested simply for talking about UFOs on a military base?

"After all, I've only ever seen one UFO. But so did the Secretary of Defense."

Scanning the skies cautiously, I commented to him that there might some validity to his argument, although I felt that better arguments could be made around the Shroud of Turin.

Back to my story. . .

During that same morning, rather than attending the Bar Association Convention, I was involved in meetings with attorney Ed Niewohner regarding a case. We were discussing the various options available to us, when I happened to look up through my open door and saw attorney Robert Sparks standing outside my office in his usual white shirt, suspenders, and power tie. For a period of time, Bob just stood there and shook, pointing his fingers in various directions in an attempt to communicate with me his disappointment about something. Not wanting to be outdone, I responded in kind, wondering if we were engaged in some sort of profane semaphore language.

Just when I thought everything was under control, Bob demanded to know why my office had chosen this particular day to clean out the freezer in the basement of his office. I explained to him how the problem had developed, and assured him that the freezer was being removed from his office per my plans, to be disposed of at the city dump. Bob strongly corrected me, disclosing that the freezer doors had been open for some time, and that his office was now the subject of a smell which had rendered the entire premises, in his estimation, uninhabitable.

Recognizing that Bob was becoming increasingly harder to deal with, with his pointing, shaking, and rather descriptive terminology in the presence of one of my clients, I adopted one of the tried and proven Bob Sparks techniques, used recently against the infamous Warren Taylor.

"Bob," I announced forcefully. "You're in trespass. Please leave my premises, or I will be forced to call the police department."

Recognizing the profound force and precedential effect of my magical incantation, Bob immediately ran up the steps, yelling something about 30-day notice, liability, and the loss of his only client.

Nevertheless, in an attempt to humor Bob, who had announced that he was terminating his tenancy, and probably contemplating all sorts of evil things against me, I walked out into the backyard of my office.

Scarcely had I stepped down from the back steps, when I realized the source of Bob's complaint. The entire backyard of my office, located adjacent to Bob's backyard, was distinctly pungent. To say that the atmosphere was intolerable would be somewhat understating the problem. Rarely have I encountered a smell that actually brought tears to my eyes, spontaneously bringing on the gag reflex, but this was an exception to the rule. Immediate action was called for.

I should add at this point that Logan had returned from his travels and with a caveat that he was unemployed, he was "practicing" sexual harassment on my secretaries. He was in the office on this particular date and, despite his questionable credibility as a witness, will occurred.

Recognizing the extreme degree of noxious odors cascading from Bob's office, which were more than usual, my staff generously agreed to help us remove the freezer from the building. Following much grunting and griping, during which the freezer drooled a hideous slime continuously

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The Public Laws

Benefits of changing pace

In *The Hobbit,* by J.R.R. Tolkien, Bilbo stumps Golum with the riddle "What have I got in my pocket?" In the past year at either the state or federal courthouse in Anchorage, Golum could have merely waited by the door to find out as Bilbo entered the building.

I have recently changed jobs, and with it changed judicial districts. Apart from the absence in Ketchikan of Costco and, thankfully, Walmart with its insufferably cheerful staff, the most striking change I have noticed was the level of trust I have observed in the integrity of attorneys.

Scott Brandt-Erichsen

I was surprised when I arrived at my new job to find an envelope labeled "Attorney's Key," containing a key which would, I thought, open the door of the building which houses my office. When I tried it on my first Saturday visit to work, however, the key did not work. I obtained the correct key from a co-worker, but could not obtain an explanation as to the purpose for the "attorney's key".

Being curious by nature, I called another attorney in town and asked what she thought "attorney's key" might mean. She informed me that it was a key to the courthouse and law library. Apparently the law library hours are limited, so the attorneys have keys issued to them. I was struck by the marked difference in the attitude between my new home and the one which I had recently left. In recent articles and letters to the editor, I have read the complaints of practitioners who would like a special pass to avoid the relatively new security system at the Anchorage state courthouse. Having spent more than half of my life in the post-hijacking world (i.e., post-1972), where airport security was the norm, I never thought much about the security measures at the courts in Anchorage. Then again, I don't have a belt buckle the size of a discus.

For a veteran of electronic detection and x-rays of personal belongings, I felt a bit like a naughty child sneaking where I did not belong when I first used my key. I admit I even thought about carrying in some nondescript metal object, which would surely have set off the sensors in Anchorage, simply because I could. Instead, I just went to the library and looked up the things I needed, reshelved my books and returned to my office. No hanky panky, no bombs, no bloodshed. And as I walked back I thought how nice it is to be able to walk to the law library and maintain my dignity, keeping the privacy of the contents of my pockets intact.

An Alaska fish tail

continued from page 14

up the steps, we were able to load the object into the back of my truck. Bob, meanwhile, had deserted his office, presumably to prepare his complaint.

At lunch time, Logan and I took off for the dump, figuring that we would deposit the freezer unceremoniously at the dump, and then quietly steal away for a meal.

As we pulled up to the scale, we were met by a long-haired, bearded Dumpmaster, who inquired what I had in the truck. I looked at him, innocently enough, and stated that I had some trash, some old computer parts, Logan, and some newspapers and, as well, a freezer that I wanted to get rid of. He announced to me, "I can see that. What do you have in the truck?"

I repeated myself, looking even more innocent, as Logan stared straight ahead and tried not be recognized behind his dark eyeglasses.

Following my repetition of the contents of the truck, the Dumpmaster looked at me once more and said, **"I mean it. What do you have in the truck?"** I responded that it was not Joe Vogler since Joe had been found several months before. I explained the Grober factor, with respect to the Logan/Grober syndrome, and how this fish had come to rest in my vehicle.

Satisfied, the Dumpmaster smiled, and directed that the freezer was to go into the freezer pile, the salmon was to be thrown directly onto the conveyor belt as quickly as possible, and that the computer parts could be set near his personal truck.

As I swatted at a growing horde of hornets, he also politely informed me that I was the cause of these little flying predators, and requested that I promptly move my truck into the baler building. I quickly complied.

Following the purging of the various elements of trash, Logan and I decided that it was time to celebrate with something to eat. Acknowledging that we were perhaps noticeable with our aftershave, we chose to go to the only local drive-in, as opposed to any interior type of fine dining.

I parked the truck outside of CJ's Drive-In but it wasn't long before our hornets found us once again. Their insistent presence, coupled with the smell emanating from the truck, apparently convinced many customers to leave. Eventually the waitress, swatting away at the insects, explained to us that it would probably be better that we order something on a take-out basis.

Clutching our milkshakes eagerly in our hands, we drove off full speed for the office, to park the truck once more in the backyard. The crisis was over.

Epilogue

As a closing note, it appears that everyone lived happily ever after. Bob Sparks reluctantly decided to remain as a tenant in the office next door, much to my surprise.

Fortunately, the Bar Association also was spared. You see, they were having a big luncheon banquet at the Princess Hotel that day. Logan and I had seriously considered going to the banquet and parking the truck upwind of the hotel. After all, we wanted to make their stay memorable, didn't we? And if people were looking for an excuse to turn their noses up at Fairbanks, we'd give them one. But it was mentioned to me that the manager of the hotel apparently didn't have much of a sense of humor, and had actually threatened to throw out Bob Sparks as a guest once, when Bob brought his rude male toy poodle, Buckwheat, to a Rotary breakfast. So much for the rotten fish. Let's just simply say that it was a problem of a different scale. Now you know the rest of the story. Good day.

Family Law

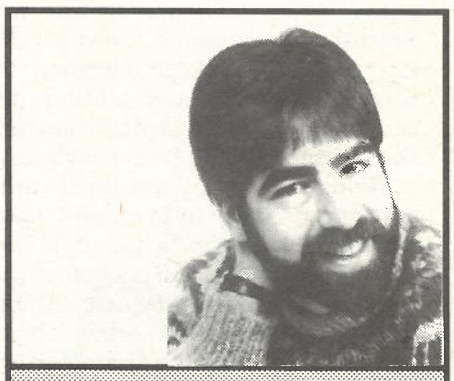
Prenuptial and postnuptial agreements in Alaska

The Alaska Supreme Court has recognized both prenuptial and postnuptial agreements as effective contractual arrangements between couples. Generally, principles of contract law apply to the enforcement of such agreements, but the relationship of husband or wife can change the position of the parties and cause the court to question such agreements to insure that they are fair and equitably enforced. This article addresses a landmark case regarding prenuptial agreements, and a recent Alaska Supreme Court decision rescinding a postnuptial agreement due to a breach of contract.

A. PRENUPTIAL AGREEMENTS

The Alaska Supreme Court addressed the validity of prenuptial agreements in *Brooks v. Brooks,* 733 P.2d 1044, 1050 (Alaska 1987):

> [T]he idea that prenuptial agreements induce divorce is anachronistic. Today, a divorce is a common-place fact of life. *Posner,* 233 So.2d at 384. As a result there is a concurrent increase in second and third marriages-often of mature people with substantial means and separate families from earlier marriages. The conflicts that naturally inhere in such relationships make the litigation that follows even more uncertain, unpleasant and costly. Consequently, people with previous 'bad luck' with domestic life may not be willing to risk marriage again without the ability to safeguard their financial interests. In other words, without the ability to order their own affairs as they wish, many people may simply forgo marriage for more 'informal' relationships.
>
> Prenuptial agreements, on the other hand, provide such people with the opportunity to ensure predictability, plan their future with more security, and, most importantly, decide their own destiny. Moreover, allowing couples to think through the financial aspects of their marriage beforehand can only foster strength and permanency in that relationship. In this day and age, judicial recognition of prenuptial agreements most likely 'encourages rather than discourages marriage.' *Gant,* 329 S.E.2d at 112-13.
>
> In sum both the realities of our society and policy reasons favor judicial recognition of prenuptial agreements. Rather than inducing divorce, such agreements simply acknowledge its ordinariness. With divorce as likely an outcome of marriage as permanence, we see no logical or compelling reason why public policy should not allow two mature adults to handle their own financial affairs. Therefore, we join those courts that have recognized that prenuptial agreements legally procured and ostensibly fair in result are valid and can be enforced. "The reasoning that once found them contrary to public policy has no place in today's matrimonial law."



Steve Pradell

The court listed three criteria to be used in judging the fairness of a given prenuptial agreement:

> 1. Was the agreement obtained through fraud, duress or mistake, or misrepresentation or nondisclosure of material fact?
> 2. Was the agreement unconscionable when executed?
> 3. Have the facts and circumstances changed since the agreement was executed, so as to make its enforcement unfair and unreasonable?

Id. at p. 1049. If none of the above factors are present, prenuptial agreements are generally accorded judicial recognition, *Id.*

The *Brooks* court continued by explaining that modern thinking on prenuptial agreements is reflected in the Uniform Premarital Agreement Act (UPAA). Under the UPAA, prenuptial agreements in writing and signed by both parties are presumed valid. The presumption can be rebutted, however, if the party seeking invalidation of the prenuptial agreement proves that:

> (1) that party did not execute the agreement voluntarily; or
> (2) the agreement was unconscionable when it was executed and, before execution of the agreement, that party;
> (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
> (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
> (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the other property.

Id. at pp. 1049-1050.

In *Brooks,* the Alaska Supreme Court held that a prenuptial agreement that failed to disclose either party's premarital assets, even though neither party fully disclosed his or her respective assets, was not void *ab initio. Id.* at p. 1050. The court then remanded the case for reconsideration by the trial court consistent with the three criteria and UPAA factors. *Id.* at p. 1058.

B. POSTNUPTIAL AGREEMENTS

In May of 1995, the Alaska Supreme Court again reiterated its view that estate-planning agreements by married couples are valid contracts, in *Estate of Lampert Through Thurston v. Estate of Lampert Through Stauffer,* 896 P. 2d 214 (Alaska 1995). *See, also,* AS 13.11.085, which provides that married couples may waive all rights of the surviving spouse by written contract executed before or after marriage, and *McBain v. Pratt,* 514 P2d 823, 826 (Alaska 1973), holding as enforceable a contract to make a specific devise or bequest. In enforcing such agreements, the usual rules of contract construction apply.

In *Estate of Lampert,* the court was asked by a husband's estate to rescind a postnuptial agreement a because a deceased wife had secretly changed her estate plan by altering her will to remove the gift of a life estate in the marital residence to her husband. The postnuptial agreement required that the husband forbear his claim to an elective share as a surviving spouse. The trial court entered summary judgment, refusing to rescind the postnuptial agreement. However, the Alaska Supreme Court reversed the lower court, holding that the wife's unilateral unraveling of the agreed-upon estate plan nullified the contract. The court discharged the husband's duty to forbear from claiming the rights of the surviving spouse, and title of the marital residence was awarded to the husband's estate, restoring it to the pre-contract position.

In the Kingdom of Juneau

Minutes: Royal Bar Association of Juneau

Guests: None
Rarely Seen Members: Peter Putzier
Out of Town Members: Fred Triem
Judicial Members: Larry Weeks
Presidents Emeritus: Barbara Craver, Margot Knuth, Eric Kueffner (not since Nixon's funeral.)
ANNOUNCEMENTS:

Leslie Longenbaugh will be participating in a seminar in Anchorage on how to survive in tough times. Leslie asks for ideas from anyone who might have them. She is not sure why she was asked to be a presenter (the sardonic humor of Anchorage Birch Hortonites?).

OLD BUSINESS

President Ann Vance presented the slate of candidates to fill the JBA offices from the coming term.

Most of the nominees were absent. Sarah Felix, nominee for president, was reported to be in Paris. Gerry Davis, our next vice-president, was in Las Vegas, trying out a surefire system called doubling the sum of your losses. Really, it does work. Dan Wayne, past treasurer, nominee for secretary, has not been seen for months, since shortly after his report on our cash surplus. Maybe Gerry will run into him in Las Vegas. Nonetheless, the nominees were elected unanimously.

Mie Chintzi, alone among the nominees, was present, and she took advantage of this. Immediately upon having been elected treasurer, the entry level post, she assumed the reins of acting president and daringly opened the floor to movie reviews, often a controversial topic.

Margo Knuth saluted Ann's service as Juneau Bar President, in which we all wholeheartedly joined.

After business, various discussions occurred at the various tables. One person applauded Tom Batchelor for his many, thoughtful, expert, and insightful questions and discourses at every CLE he attends. This brought to the fond memory of many of us our law school days and the one or two students in each class whom we admired for their many, thoughtful, expert, and insightful questions and discourses. Perhaps Tom would do a CLE for us on effective participation in a CLE.

At another table. Lach Zemp admitted to his criminal past. Eric Kueffner wondered whether Lach might benefit from a stay at Lemon Creek. Lach said it would not help him. Margot Knuth, showing off her prosecutorial past and judicial potential, explained that depended on whether the goal was rehabilitation or deterrence.

James Crawford pronounced the constitution a "living, breathing document." It is not known why he said this.

Eric Kueffner received the good wishes of those in attendance on the eve of the Around Admiralty Boat Race. He, Ketchikan lawyer Keith Stump, and Ketchikan wannabe Tricia Collins will captain competing boats. Eric revealed that he will be taking as equipment a whip, gun, and for those moments of tension and anxiety, several small steel balls.

In a mini-sports law seminar, the rules of the Iditarod were compared to the Admiralty race rules. Apparently, according to Barbara Craver, the boat is scratched from the race if a crew member dies. Judge Weeks added that crew members are shot if they break a leg. But that would mean the boat would then be eliminated from the race. Maybe the new vice president could be assigned to harmonize these rules.

—Anthony M. Sholty
Acting Secretary

January 1 is the deadline to transfer to inactive status. For more information contact the Bar office at 272-7469.