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The Alaska BAR RAG

VOLUME 20, NO. 6 — *Dignitas, semper dignitas* — NOVEMBER-DECEMBER, 1996

State campaign disclosure law changes for 1997

By Jim Kentch

Well, the 1996 elections are over. Time to forget about campaigns for two more years?

Not really. Just when you thought you were safe from the influence of elections in your life and practice, the state campaign disclosure law changes—big time—on the first day of 1997.

There is some good news, however. If you think:

- campaigns are too long, uninformative and too expensive;
- organized special interests might gain undue influence over elected officials because they raise a lot of campaign contributions;
- politicians have great potential for bribery and corruption; or
- penalties for violating the current campaign disclosure law are far too lenient to deter misconduct

...then guess what? The legislature agrees with you!

The legislature made these findings as part of its comprehensive revision of the campaign disclosure law. This article will highlight the major changes which will affect the contributors to state and local races. It will NOT discuss the many important technical changes which will affect candidates and groups. Call the Alaska Political Offices commission (APOC) for more information (276-4176) for topics not discussed here.

Although it is impossible to know all of the many ways the new law will affect campaigns, some general changes are more easily apparent:

Individual contributions will decline in size and number.

No pull tab or bingo revenue will be used as contributions.

And all campaigns will last less than 12 months.

These new restrictions mean campaigns will not cost as much—unless the candidate spends a lot of his or her personal wealth.

The table here highlights the most important changes which will affect particular contributors. The first election in which the new law applies is the Anchorage municipal election (for mayor and three school board seats) on April 15, 1997.

contributions from human beings	$500 each year to a candidate $500 each year to a group $5,000 each year to a political party
contributions from businesses, unions, etc.	Prohibited to both candidates and groups.
contributions from lobbyists	The only legislative candidates to whom for profit lobbyists may contribute (within one year after registering as a lobbyist) are those in the lobbyist's district.
time limits on fundraising	State candidates can start on Jan. 1 of the election year; municipal candidates can start nine months before the election. All fundraising would end 45 days after the candidate's last contested election.
out of state contributions	Only human beings can contribute, up to: $20,000 for statewide candidates $5,000 for Senate candidates $3,000 for House candidates
independent expenditures	About candidates: only human beings & groups may make them. About ballot issues: everyone may make them. Corporations, partnerships, associations, unions, etc. must register with APOC before making independent expenditures.
penalties	Criminal penalties: violations & misdemeanors; civil penalties for all violations of Campaign Disclosure Law with $500 daily maximum.
enforcement powers	Dept. of Law enforces criminal sanction; APOC enforces civil penalties. Private cause of action available if APOC does not investigate expeditiously.
individual reporting requirements	All human beings who contribute to more than one group during the 90 days before the election & whose contributions to groups that year are over $1,000 must file individual contributor reports for all contributions to candidate & groups.

A report on the budget and a dues prognosis

By Venable Vermont

When I first arrived on the Board of Governors, I began asking a bunch of questions about the budget of the Bar Association. In recognition of my purported "interest" - *mirabile dictu* - I was made Treasurer. Whoever first said "silence is golden" must have been a member of a similar organization.

At its October meeting, the Board of Governors adopted a budget for 1997. [See tables and charts at page 3 in this issue]. What I would like to do here is make a few comments about this budget and how it compares with previous budgets, and a few further comments about our general financial health, projected trends, and the inevitable dues increase.

Our projected revenue for 1997 is $1,886,116 [unlike state government, these figures represent actual dollars, not thousands or millions of dollars]; our 1996 projected revenue is $1,887,000, essentially the same.

Our projected expenses for 1997 are $1,734,778; our projected 1996 expenses are $1,709,000.

Thus our projected net gain for 1997 is $151,338; for 1996 it is projected to be $178,000. This is a trend from all budgets in the 90's - we have a net gain for each year but its size is smaller each year.

Remember that this is consistent with the Bar's long range planning behind dues increases. The thinking was to generate a surplus, live off of it for as long as possible, and increase Bar dues reluctantly and infrequently when necessary to avoid a deficit.

Whatever its wisdom—and I think this type of plan is certainly open to criticism—this is what previous boards have decided to do.

The current projection is that our annual budget will break even in 2000, and that, absent a dues increase, we would consume our surplus in 2004. At the time dues were raised to $440 (in January 1993), the original projection showed our break even date as 1995, and our surplus being consumed in the first quarter of 1997. Thus we are far better off than we had expected. We do have a large capital surplus. We have a designated "working capital reserve" of $200,000, which makes sense to get us through the month-to-month fluctuations. But we also project an unappropriated capital reserve of $968,000 by the end of 1997. That's about a million of your dollars, which would be consumed by 2005 if no dues increases are sought. That money, by the way, is invested conservatively, mostly in brokered CD's of no longer than three years maturity. This is pursuant to a formal investment policy passed by the Board in 1988.

From the current budget figures, we can derive bad news and good news.

The bad news is that there is likely to be a dues increase at some point in the 1999 - 2002 range, or when the Board gets too nervous. The good news is that this increase will come much later than previously expected, because of the unanticipated success of several revenue sources, but primarily Civil Rule 81(d) fees levied on out of state attorneys. The Board recommended this little beauty in anticipation of expected investigatory and disciplinary costs which were foreseen as arising from the flood of out of state attorneys joining the *Exxon Valdez* oil spill litigation. It has been a money-maker so far—our collective thanks to Brant McGee and Dan Winfree, its originators.

Turning to the current budget, our expenses are projected to grow this year by 2%. This is fairly close to Anchorage's inflation rate, and is primarily due to salary increases voted

continued on page 3

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President's Column

Outline of responses to poll

Beth Kerttula

I was just in Atlanta, Georgia, this week attending an American Bar Association conference on "Access to Justice" issues. I'll talk a little about the conference later in this article, but while I was there I had a chance to drive around and see the city with friends. While driving I happened to spot an election sign quoting President Truman. The quote was "if Moses had paid attention to polls he never would have left Egypt" (or something similar - it's hard to read at 50 miles an hour). While I realize that the convention poll I included in the last *Bar Rag* isn't exactly in the same league as those President Truman was referring to, I had to laugh. A total of 16 people answered the convention poll, and while I will give you an outline of the responses I sort of doubt their statistical significance. I was warned of this—and knowing my own tendencies it's not surprising. At any rate, my overall impression is that the convention and its future is not a burning issue with the Bar, and although I will try to do my best to have as interesting and as inexpensive a convention as possible this year, in general I don't see any huge change in the convention on the horizon. So—here's the outline of your responses:

Out of the 16 responses, 11 people had attended the convention, three had not, and two did not respond to this question. Out of the 11 who attended, the majority had attended over three conventions, and four had attended seven or more. Making the convention less expensive and having more concurrent CLEs were the two categories listed most frequently as what could be done to improve the convention. The three who had never attended all listed cost as a factor. On the question of whether we should continue to have the convention, 10 people answered "yes," four said "no" and two did not respond. Nine people thought the convention should continue to be held yearly, two thought every other year, and five did not respond. Thirteen people thought that it was valuable to have the interaction between the judiciary and the Bar at the convention and that the convention should continue to be scheduled at the same time as the judicial conference. Two people did not think that interaction with the judiciary was valuable—one of them did not think the convention and judicial conference should be at the same time and one did, and one person did not respond to the question.

The most interesting thing about the responses were the written comments. These ranged from the reasons people liked the convention "*seeing old friends, meeting new friends, interacting with judges, good CLE, awards ceremony*" to how to improve the convention "*improve the quality of attendees. It is really little fun to sit around with a bunch of liberals.*" Collegiality, meeting with other attorneys from around the state, and the interaction with judges were the main reasons people gave as to why they liked the convention. Having different CLEs, "*real CLEs not stress management, etc.,*" was listed by two of the three people who had not attended the convention as one thing that would get them to attend. One person who did attend the convention still responded to the question of "what is the one thing ... that would get you to go?" with the answer of "encourage judges to suggest I attend." This person had 40+ years of admission, and had been to the convention seven or more times. I initially took the response humorously, but I'm not really sure. Maybe we could arrange that!

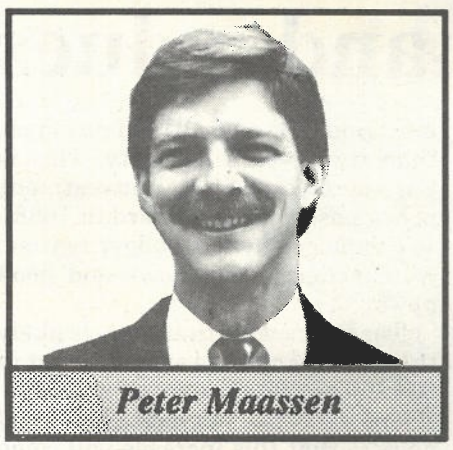
Well, that's it for the convention poll. I'll keep you updated about the 1997 convention, and if you have more suggestions or comments, give me a call. Thanks to those of you who responded. If not statistically sound, at least it was interesting.

Now for the ABA Access to Justice meeting. First, not surprisingly, the concern about "access to justice"—including access to attorneys at an affordable cost—is a concern to all of the states. The most interesting thing about the meeting to me was a presentation about "telelawyering" done by Michael Cane, Esq. from California. His approach involves using a "900" (pay) telephone number where people can dial in for advice. The lawyers who are used are carefully monitored and they do not refer cases to themselves. While this sounded sort of weird to begin with, Washington state is experimenting with the system and it seems that it might have some value in Alaska, especially in our remote areas where there are no attorneys. I have brought back information about this and I may follow up on the idea with more information in a future column. Besides telelawyering, lawyer referral systems, court house information computers, and "unbundling" (providing discrete services to a client rather than doing everything in a case) were all discussed. While I came away from the conference with some good information I was left with the overall perception that we are in the middle of the struggle (unending?) to figure out what can be done to serve all clients, and particularly the poor, better. If anyone is interested in reports on what other states are doing, or on the telelawyering subject, give me a call.

I'll end this column by wishing you all a happy holiday season. It hardly seems possible that it is that time of year already, but to mention a theme I want to write on at some point—quality of life—remember yourself during this period. Best wishes.

Editor's Column

Where's the outrage? Editor answers charges



Peter Maassen

One thing that the other reputable newspapers never told you about this election just past is that the Alaska Judicial Council recommended unanimously against retention of the current *Bar Rag* Editor. The decision to put the position up for a retention vote was reached only days before the election, at a special meeting shrouded in secrecy (to which I wasn't invited, I might add), and it was much too late to change the ballots. The editorship therefore remains firmly in my hands. Ha ha ha ha! I thumb my nose!

However, rumblings of a special election having reached my ears, let me take this opportunity to refute all charges:

The Bar Rag Editor does not earn his seven-digit salary. It may be true that not every tabloid editor would be worth the 92.5% of your Bar dues that now goes to pay my salary, but then how many tabloid editors have the mental wherewithal to distinguish between stories in which Missouri housewives have alien babies, which are unmitigated trash, and stories in which Missouri housewives have alien babies and then file paternity suits, which are of special interest to the family-law sector of our discerning readership? It's the legal acumen that justifies the big bucks, as you're always telling your clients.

The Bar Rag Editor abuses the staff car privilege. This is simply untrue. I no longer have the driver mix my martinis (unless we're stopped for a light), and I never use the siren after 11:00 p.m. except on the highway.

The Bar Rag Editor takes kickbacks from advertisers. And you wouldn't? Who's going to leave a brand-new Italian suit in the box just because it says "Michie Company" over the breast pocket in big red letters? Welcome to the real world, Pollyanna.

The Bar Rag Editor fails to proofread copy. This is nothing but a damnable calumny. Not only do I proofread every single word in this paper, I often find myself in the Pfdshx that she risch not plsnsit o, even late at night.

The Bar Rag Editor makes others do all the work. This is not true either. [Sally: Put in something about how all the staff love me for my Calvinist work habits, etc.]

The Bar Rag Editor has given special positions to family members. To those of you who think that a four-year-old child cannot possibly earn the salary of chief production assistant, let me tell you that the job has always been just a sinecure anyway, even under previous administrations. What better person to fill a do-nothing job than someone who can't do much of anything anyway? It's called "effective personnel management."

The Bar Rag Editor uses too many big words. No I do not. Not one is too big. Not one. Not big. Not too big. No.

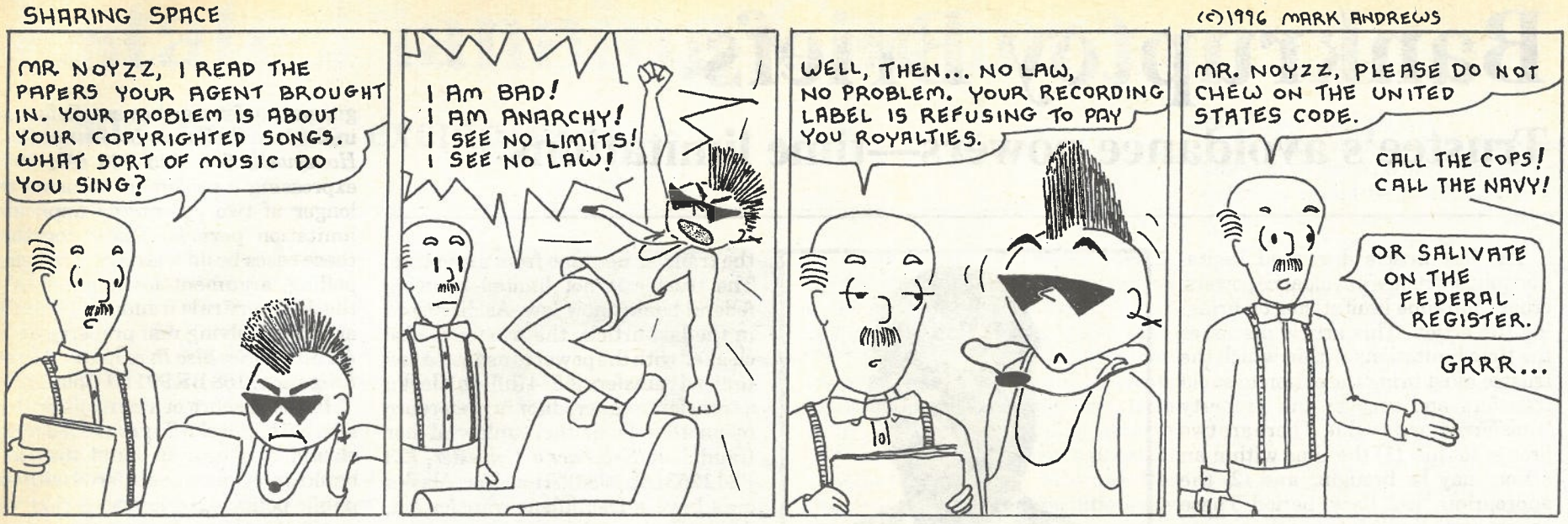
The Bar Rag Editor does not treat his position with the seriousness it deserves. Sure, some of you would use this space to opine thoughtfully on major social issues, as if you were Mike Schneider or Mike Doogan or Mike Royko or Mike Barnacle or Michael Kinsley or somebody. But guys named Mike and others who opine thoughtfully on major social issues inevitably stir up controversy and take rocks through their windows. If that's what you want I demand combat pay, which means another dues increase for you. Is that what you want? Huh?

The Bar Rag Editor never answers his mail. What are you doing here, Mom?

The Alaska BAR RAG

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

SHARING SPACE



A report on the budget

"expenses are fairly predictable"

Continued from page 1

by the Board. Because our revenues are primarily dependent upon the number of people applying for admissions, which we do not control, we are not easily able to raise revenues except by raising the costs of various services. This Board has done that in the past year. On the other hand, expenses are fairly predictable, and consist in large part of professional salaries and associated benefits, which are roughly 50% of each year's expenses. Because the Board has chosen to raise salaries steadily each year (3 to 4% in recent past years, and 2% for 1996 and 1997), our expenses have been growing steadily. For planning purposes, we use a 5% per year increase for expenses and 1% per year for revenues.

Rent continues to be a large expense item. While I have heard some grumbling about the plush offices and the pricey location, our proximity to the courts and the offices of most Anchorage lawyers, and therefore most lawyers in Alaska, is of great benefit to most of us. The rent picture is unlikely to change.

Another large item is the annual "appropriation" for replacing and maintaining the computer system. We are spending a lot of money to replace our Wang system before "Doomsday" (in 2000); but, due to good planning, it will not affect us too badly in any one year.

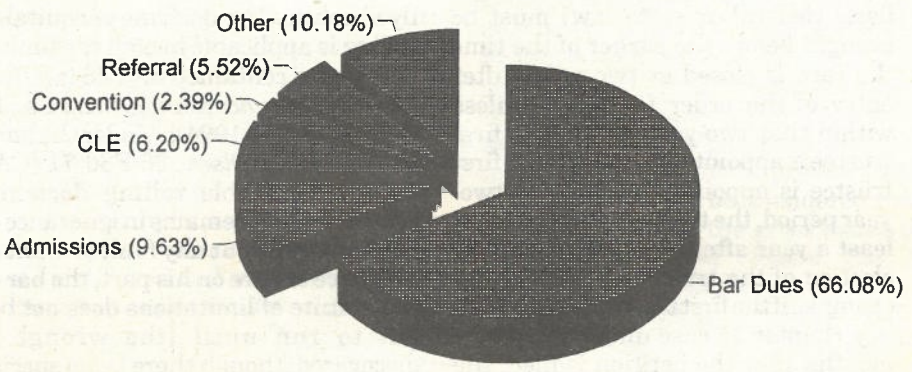
These are just some highlights. Some are issue-laden, others are simply facts of life. Look over the figures and give me or Deborah O'Regan a call if you have comments, questions or suggestions.

1997 BUDGET OVERALL REVENUE/EXPENSE

	1997 Budget
REVENUE	
Admission Fees - All	181,600
ContinuingLegalEducation	117,000
Lawyer Referral Fees	104,100
The Alaska Bar Rag	34,600
Annual Convention	45,000
100th Anniversary Projects	0
Substantive Law Sections	7,585
Ethics Opinions	2,790
Pattern Jury Instructions	3,680
ManagementSvc LawLibrary	12,000
AccountingSvc Foundation	9,621
Special Projects	0
Membership Dues	1,246,340
Dues Installment Fees	20,000
Penalties on Late Dues	18,000
Disc Fee & Cost Awards	0
Labels & Copying	11,800
Investment Interest	70,000
State of Alaska	0
Miscellaneous Income	2,000
SUBTOTAL REVENUE	1,886,116
EXPENSE	
Admissions	176,581
ContinuingLegalEducation	263,322
Lawyer Referral Service	53,339
The Alaska Bar Rag	43,000
Annual Convention	45,000
100th Anniversary Projects	0
Substantive Law Sections	12,900
Ethics Opinions	1,000
Pattern Jury Instructions	1,800
ManagementSvc LawLibrary	3,644
AccountingSvc Foundation	9,621
Special Projects	3,500
Board of Governors	47,126
Discipline	559,133
Fee Arbitration	47,746
Administration	414,966
Committees	14,800
Duke/Alaska Law Review	36,800
Miscellaneous Litigation	0
Remodeling/Moving Expense	0
Loan Interest/Loan Fees	0
Computer System Training	500
Lobbyist	0
Other/Miscellaneous	0
SUBTOTAL EXPENSE	1,734,778
NET GAIN/LOSS	151,338

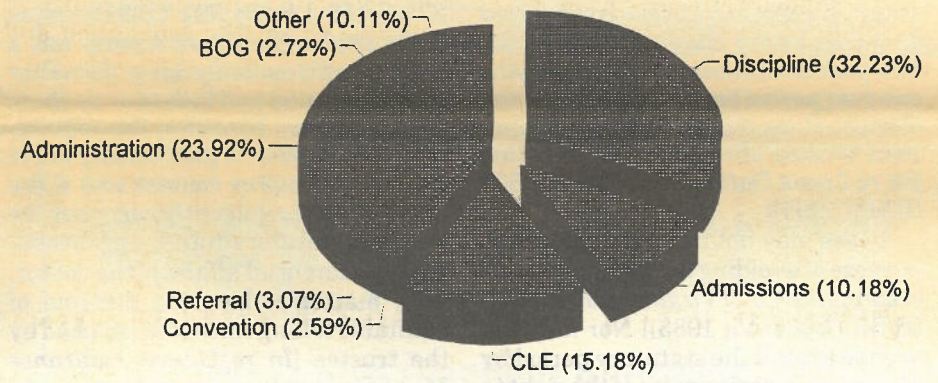
1997 REVENUE BUDGET

$1,886,000



1997 EXPENSE BUDGET

$1,735,000



U.S. Court update

Public Information Access

Effective August 5th, the U.S. District Court "Public Access to Court Electronic Records (PACER)" system will be available to anyone with a Personal Computer and modem. This system will provide access to the following information: 1. Civil case lists, 2. Criminal case lists (after October of 1996), 3. Court calendars, 4. Party name searches, 5. Case number search, 6. Case lists by filling date. Subscription and computer set up information are available by contacting the PACER Service Center at 1-800-676-5556.

Filing of Documents - Effective January 6, 1997

For civil cases originally filed at the Ketchikan or Home divisional offices, subsequent documents may be filed at the main office in Anchorage for transmittal to the divisional office where the original file will be maintained. However, for civil cases filed in Anchorage, Fairbanks or Juneau, subsequent filings are to be made at the original filing location.

Filing Fees

The first of the year, filing fees for civil cases will be increasing from $120 to $150.

LEGAL NOTICE

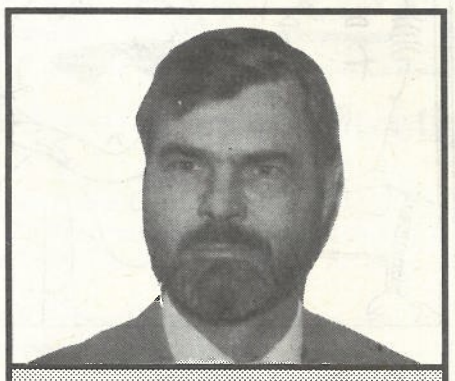
The University of Alaska Anchorage is seeking an Attorney to provide professional general legal counsel on a one-on-one basis with student clients. Any student who has paid a student activity fee shall be eligible to receive legal counseling. Sessions would be scheduled four hours each week for Spring and Fall Semesters. A professional services contract would be issued for one year with options to renew for four additional one year periods at the sole option of the University.

If you are interested in receiving a copy of the Request for Proposal, proposals will need to be received by December 9, 1996 at 4:00 p.m., please contact the UAA Procurement Services department by calling (907) 786-6506, or by stopping by the office located at 4500 Diplomacy Drive, Ste. 405, Anchorage, AK 99508.

Bankruptcy Briefs

Trustee's avoidance powers—time limitations

The last article discussed limitations on the trustee's avoidance powers, other than time limitations, on bringing the action. This article discusses the time limitations within which the trustee must bring the action to avoid transfers and recover the property transferred, or its value. There are two prongs to this: (1) the time within an action may be brought; and (2) the appropriate "look back" period. These are separate limitations on the time to bring the action, and the running of either is fatal to the trustee's avoidance action.



Thomas Yerbich

First, an action to avoid a prepetition transfer, irrespective of the legal basis (federal or state law) must be brought before the earlier of the time the case is closed or two years after entry of the order for relief, unless within that two-year period the first trustee is appointed/elected. If the first trustee is appointed within the two-year period, the time is extended for at least a year after the appointment or election of the trustee [§ 546(a)]. For example, if the first trustee is appointed in a chapter 11 case under § 1104 six months after the petition is filed, the trustee must bring the action within the two-year period; however, if the trustee is not appointed until 18 months after the petition is filed, the trustee has one year from the date of appointment or election to file an avoidance action. If a chapter 11 case is converted to a case under chapter 7 before the two-year limitation period expires, the one year period begins to run upon the election of appointment of the permanent trustee after the § 341 meeting [*In re Lucas Dallas, Inc.,* 185 BR 801 (BAP9 1995)].

A case may not be reopened for the purpose of avoiding a transfer [*Beneficial Finance Co. of Virginia v. Franklin,* 26 BR 636 (D.Va 1983)] Nor may the trustee extend the statutory period by obtaining an assignment of the right to avoid a transfer from a creditor who actually holds such a right [*In re Kemp & Paulucci Seafoods*, 4 ABR 309 (D.Ak 1995)].

An action to avoid an unauthorized postpetition transfer must be commenced within the earlier of two years from the date of the transfer, or before the case is closed [§ 549 (d)]. An action to recover property from a transferee must then be brought within one year of the date the transfer is avoided or the case is closed or dismissed, whichever is earlier [§ 550 (f)].

The limitations periods of §§ 546 (a) and 549 (d) are not, however, necessarily absolute. The doctrine of equitable tolling is applicable to both the limitation period contained in§ 546 (a) [*In re United Insurance Management Co.*, 14 F3d 1380 (CA9 1994)]. Under the and•§ 549 (d) [*In re Olsen*, 36 F3d 71 (CA9 1994)]. equitable tolling doctrine, "where a party remains in ignorance of [a wrong] without any fault or want of diligence or care on his part, the bar of the statute of limitations does not begin to run until [the wrong] is discovered, though there be no special circumstances or efforts on the part of the party committing [the wrong] to conceal it from the knowledge of the other party" [*Lampf,. Pleva, Lipkind, Prupis & Pettigrew v. Gilbertson*, 501 US Equitable tolling is 350, 111 SCt 2773, 115 LEd2d 321 (1991)]. especially applicable where a party has a duty to affirmatively keep the other party informed and fails to so do [*In re Olsen, supral].* However, the requirement of diligence is particularly acute in the bankruptcy context and if the trustee fails to diligently carry out the trustee's statutory duties, e.g., investigate the financial affairs of the debtor, as a matter of law, the doctrine of equitable tolling can not be invoked by the trustee [*In re United Insurance Management, Inc., supral]*

The other limitation, applicable to preferential or fraudulent transfers, relates to the time of the transfer with respect to the date the petition is filed, the "look back" period. In a preferential transfer situation there are two periods: (1) 90 days for all transfers; and (2) one year if the transfer is to or for the benefit of an insider [§ 547 (b)]. In a fraudulent conveyance action brought under § 548, the look back period is one year [§ 548 (a)].

If the transfer occurred more than one year preceding the filing of the petition, does not necessarily render the transfer immune from avoidance. The trustee is not limited to using federal bankruptcy law. As discussed in the last article, the trustee is also cloaked with the power to use state law to avoid transfers [§ 544 (b)] . In Alaska a transfer to one creditor in preference to another is neither unlawful nor fraudulent *[Sylvester v. Sylvester*, 723 P2d 1253 (Ak 1986)]. However, Alaska does have a fraudulent transfer act, AS 34.40.

The limitation period for the recovery of personal property under Alaska law is six years [AS § 09.10.050; *In re Ferrara,* 3 ABR 472 (Bank. Ak 1994)1 and for real property ten years [AS § 09.10.30] Although the Alaska Supreme Court has not determined whether the "tort" two-year limitation or "property recovery" six or ten-year limitation applies to fraudulent transfers, the recent decision in *Breck v. Moore*, 910 P2d 599 (Ak 1996) indicates it would most likely agree with *Ferrara*. In Breck, a malpractice case, the court retreated from its "gravamen of the action" test. In applying the contract limitation period, the court differentiated between "tort" and "contract" on the basis of the nature of the injury—economic loss versus an injury to the person. Purely economic injury is governed by the contract, not tort, limitation period. The same rationale should apply with equal validity to actions to recover property—also an economic, not personal, injury.

A state statute of limitations is also measured from the date the petition is filed. If the state limitations period has not expired by the time the petition is filed, the federal limitation period under § 546 (a) kicks-in and controls; expiration of the state limitation period postpetition is irrelevant [*In re Florida West Gateway, Inc.*, 182 BR 595 (Bank.ED.Fla. 1995); *In re Martin*, 142 BR 260 (Bank.ND.Ill 1992)].

If the transfer involves real property, the look back period may be extended in an action based on AS 34.40. With respect to action involving an interest in real property, and the action is based upon fraud, the limitation period does not commence until the fraud is discovered [AS § 09.10.230]. Whether this applies to actions under § 34.40 has not been decided by the Alaska Supreme Court. However, if presented to the court, in this author's opinion, it most likely would be held that the discovery rule applies. Three cases should be carefully read and analyzed. (1) *Bauman v. Day*, 892 P2d 817 (Ak 1995) extending the discovery rule to common law contract actions and holding the ~ 09.10.230 discovery rule applies to disputes over ownership interests in real property. (2) *Lee Houston & Associates, Ltd.* v. Racine, 806 P2d 848. (Ak 1991) stating that although statutes of limitation are legitimate defenses, they are disfavored in the law. (3) *Safeco Insurance Co. v. Honeywell,* 639 P2d 966 (Ak 1981) expressing a preference to using the longer of two potentially applicable limitation periods. Taken together, these cases build a strong, if not compelling, argument for application of the discovery rule fraudulent transfer actions involving real property under AS 34.40. [*See also In re Kaiser Merger Litigation,* 168 BR 991 (D.Colo 1994)].

In the absence of a controlling decision by the Alaska Supreme Court, one should also bear in mind that in a bankruptcy court one is faced with two public policy considerations that will tend to tip the scales in favor of application of the discovery rule. First, inherent in the Bankruptcy Code is that all creditors be treated equitably and share ratably in the distribution of a debtor's assets. A fraudulent transfer by its very nature is antithetical to and tends to defeat this basic precept of bankruptcy law. Second, in the federal system, the discovery rule has long been read into every statute of limitations [*Holmberg v. Armbrecht,* 327 US 392, 66 SCt 582, 90 LEd2d 743 (1945)].

Under § 544 (b), the trustee has no independent right to bring the action but "stands in the overshoes of the creditor" having the right. If there is no actual creditor holding an allowable unsecured claim in existence as of the date the petition was filed having a right to bring the action, the trustee lacks standing to bring an avoidance action under ~ 544 (b) /AS 34.40 [*In re Agricultural Research & Technology Group, Inc.,* 916 F2d 528 (CA9 1990); *see In re Acequia, Inc.*, 34 F3d 800 (CA9 1994)].

The important issue then, unlike an action brought under § 544 (a) (where actual knowledge or the existence of creditor having a right are irrelevant), is whether the creditor, not the trustee, could invoke the discovery rule [*First Presbyterian Church of Santa Barbara v. Babbitt,* 118 F2d 732 (CA9 1941)].

This is important because the trustee could not have "discovered" the cause of action prior to appointment, which can not occur until after the petition is filed. If the discovery rule applies, and discovery by the trustee was the measuring point, there would be no limitation on the time within which the trustee could "look back" and avoid a fraudulent transfer of real property.

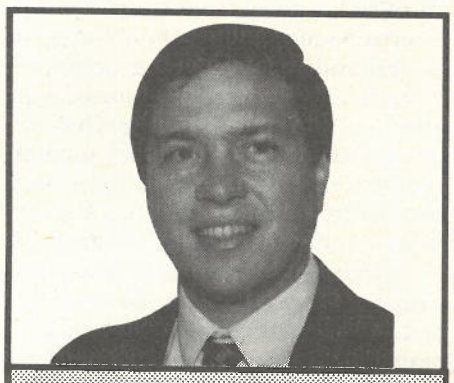
However, it is also important to note that the § 09.10.230 discovery rule, unlike the general discovery rule in Alaska, does not require the fraud victim to have either acted reasonably or exercised due diligence to discover the existence of the cause of action [*Carter v. Hoblit,* 755 P2d 1084 (Ak 1984); *compare Bauman v. Day, supra; Palmer v. Borg-Warner Corp*, 838 P2d 1243 (Ak 1992)]. *Carter v. Hoblit* also raises a serious question as to whether the equitable doctrine of laches would be available, let alone of any assistance, to the transferee.

The Public Laws

Truth in labeling for political candidates

Perhaps I should be embarrassed by the fact, but despite the connection between my work and the election process, I rarely read the voter information pamphlet. Perhaps it is because of my work that I assume that I already know the information it contains and am educated on most of the issues that I will face in the voting booth.

However, this year I chose to peruse that attractive and reasonably priced publication so diligently compiled by the Division of Elections. I was rewarded promptly as the voter's pamphlet surprised me with an initiative proposition which appears on the State ballot regarding term limits. By the time this article appears, the voters will have either approved or rejected this initiative . Regardless of the outcome , the term limit initiative may be a landmark for truth in labeling on election ballots.



Scott Brandt-Erichsen

For those who either did not vote or did not understand the proposition when they voted on it, the ultimate objective of the initiative is to support an amendment to the U.S. Constitution limiting the terms of U.S. Senators and U.S. Representatives. The means to this end, however, offer an ingenious mechanism for placing information regarding the stand of candidates on the ballot next to their names.

Those incumbents failing to take actions to support the amendment would have the statement "violated voter instruction on term limits" placed next to their names on future ballots. For non-incumbents, a "term limits pledge" would be offered, and if declined, would result in the statement "declined to take pledge to support term limits" next to names of those candidates.

Leaving aside the issue of how the division of elections, or whoever is tasked with the duty, will determine whether a candidate has failed to "take actions to support" an amendment to the U.S. Constitution if there is a dispute or a close question, the concept of such "truth in labeling" ballots is a fascinating public policy issue.

Can it be long before ballots are filled with brief labels attached to candidates such as "supports abortion" or "refuses to pledge to end abortion;" "supports capital punishment" or "refuses to pledge to support public hanging"; and "supports handgun registration" or "refuses to pledge to support handgun registration."

Basically, any issue which can generate sufficient signatures for an initiative could end up enshrined on ballots as an issue upon which candidates are forced to take a definitive public stand.

While I have great empathy for the employees of the Division of elections as they could be burdened with longer more complicated ballots and expensive elections, I, for one, will find it very entertaining and informative if I am offered the choice between candidates who "pledge to continue the permanent fund dividend" or "decline to take a pledge to retain a permanent fund dividend."

Perhaps we could achieve a similar ballot entry on the national level for "didn't inhale" or "pledged not to inhale in the future." I will be watching the outcome of Ballot Measure No. 4 with great interest.

NOTICE

Title 28 U.S.C. Article 1914(a) was amended by legislation S.1887, the "Federal Courts Improvement Act of 1996" signed into law by the President October 19, 1996. This amendment raises the filing fee for a Civil action (includes Adversary Complaints) from the current $120.00 to $150.00. The new fee is effective December 17, 1996.

WAYNE W. WOLFE
CLERK OF THE COURT

EXECUTIVE DIRECTOR ALASKA BOARD OF PAROLE

The Alaska Board of Parole is accepting applications for Executive Director. This is a range 23 partially exempt position located in Juneau. The Executive Director is responsible for supervising staff, advising Board members on parole-related matters, implementing Board Policy and representing the Board to the legislature, the public and other state agencies. The position requires extensive travel; working hours often exceed the normal state work week without additional compensation.

Qualifications: Applicants must have at least a bachelor's degree from an accredited institution in public administration, criminal justice, psychology, social work or a related field; candidates with advanced degrees will be given preference. In addition to the appropriate degree, applicants must have a minimum of 4 years of probation, parole, or administrative experience, including at least two years supervising professional staff.

The State of Alaska is an affirmative action/ equal opportunity employer. Applicants requiring special accommodations call (907) 465-3384. Women and minorities are encouraged to apply.

A full job description and information is available upon request. If you are interested in applying you must submit a resume, a State of Alaska employment application and a list of references to:

Alaska Board of Parole
P.O. Box 112000
Juneau, Alaska 99811
Attn: Alonzo Patterson, Chairman
(907) 465-3384

Deadline for postmark of applications is Jan 1, 1997.

Tales from the Interior

Hard boiled

Several years ago, when I was a budding freshman type attorney in the practice of criminal defense law, working for Birch, Horton in Fairbanks on the Teamster criminal defense contract, I was faced with a rather challenging defense. Clearly, recognizing the precedent at stake, the clients insisted upon my services, knowing full well the implications which would exist for the Teamsters Union and its members in the event of the loss.

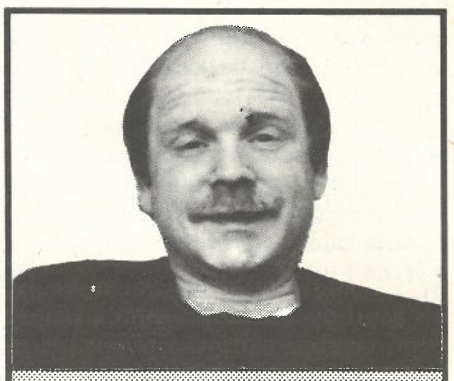
After all, Fairbanks was embroiled in the middle of another Teamsters strike, common during the pipeline days, complete with pickets, signs, protests, and strike-breakers.

This was where the problem developed. Due to the fact that various people were insisting that picket lines not be crossed, other people saw equally fit to try to cross those picket lines. Something about an equal right to work requirement which has never really been recognized in our fair city.

Eventually, following the breaking of more than one nose, as well as other problems, the city police were summoned to restore some semblance of order at the picket line.

Remarkably, the strike had gone into the winter months, with the Teamsters still being rather dedicated to their picket duty. Virtually every day, they would show up outside the freight company yards, carrying their signs, drinking hot coffee and acting essentially jovial until such time as an individual would show up and attempt to run the picket line.

Then the loyal union brothers and sisters would go into their routine, refusing to move out of the path of the incoming vehicles and otherwise causing a ruckus.



William Satterburg

Eventually, one member of the union got the brilliant idea that eggs should be utilized to drive the point home. As a strike-breaker's vehicle would attempt to cross the picket line, the strikers would sullenly part, whereupon an egg would fly out from the crowd at high velocity, its spherical surface impacting the side of the offender's pickup truck causing splatter and other detritus to erupt. Clearly, a case of malicious mischief of the worse sort, which caused the local police department to spring rapidly into action.

Enter a patrolman friend of mine, who at the time claimed that he was merely trying to enforce the law. I should also note that he was not a friend of mine at the time, but actually became a sworn enemy for period of time due to the fact that he ultimately found little humor in my defense.

As the patrolman approached the scene, the strikers, clad in equal identity in their army-green parkas with the fur lined ruffs, parted to allow the patrolman to enter the yard.

Apparently, things were dull on that particular day, and one, if not many, of the strikers decide that there could be a certain amount of levity obtained in underhanding an egg at a police vehicle. In seconds, others followed suit, and the officer was driving what appeared to be a four-wheel omelet. Wintertime had its intended effect, and within seconds, the omelet became a variety of frozen Ford custard.

Needless to say, the officer was not a happy camper. He exited his vehicle to confront the various strikers, demanding to know who had pitched the dastardly egg at his vehicle. Similar to the offending player on a hockey team, all strikers refused to knowledge complicity in the event, maintaining that the egg might have been the result of a constipated chicken.

Undaunted, he decided to arrest one of the individuals to prove his point. Needless to say, in the cold winter months in Fairbanks during January of 1982, entertainment was to be provided to all.

Following the general delays associated with discovery, the case proceeded to trial before the Honorable Steven Kline, then a judge, now a farmer in Utah.

Rather than opt for a jury trial, the decision was made to deal with a bench trial. After all, Teamsters were not the most liked group in Fairbanks, and the city looked bad enough already with egg on its face. Why make matters worse?

During the trial, I purchased one dozen eggs (something about visual effect that I had once read in an F. Lee Bailey novel). I figured the eggs would captivate the jury, as I cavalierly pitched one up and down in the air in my hand during various stages of argument. I forgot that I was doing a bench trial before the judge. Nevertheless, the egg still had its intended purpose.

To this day, I can never explain exactly why I chose to purchase the eggs, but expect that there must have been a reason behind it at the time. Perhaps it was the concept of having then introduced into evidence to sit in a warm evidence locker for a one-year appeal. This was during a period of time when appeals were still taken directly to the Alaska Supreme Court and I, like other defense attorneys, had more than enough reason to want to get even.

Be that as it may, the trial progressed, with the Fairbanks PD patrolman explaining the dastardly deed which took place, much to the chagrin of the courtroom full of Teamsters.

Then it came time for my client's testimony. Professing his innocence loudly, my client maintained that it was not he who threw the egg that splattered the great police vehicle. No, he could not remember who the pitcher was, but he suspected that it might have been another Teamster. Then again, it might have been one of those strike-breakers. He just wasn't sure.

I asked my client to describe what he was wearing that date, and he explained that he was wearing an army olive green jacket, with a fur ruff zipped up. He then remembered that he thought that the person who had thrown the egg might have had a beard. In fact, the more he remembered, the person with the beard might have been another individual sitting in the courtroom, or maybe another.

Miraculously, I produced two other green jackets, and asked each of these individuals in the back of the courtroom to zip up so that his face was contained within the ruff. We had already established that the egg had came from a distance of approximately 35 feet away. I then had my client measure 35 feet, put on his own jacket, zip it up to the ruff, and stand with the other two individuals who had their jackets zipped up and beards showing. I then asked the judge to view the similarity between the three individuals.

Basically, all that one saw were green hooded jackets, grey beards, and beady little eyes. (Ever since the days of Jimmy Hoffa, Teamsters have been known for beady little eyes.)

To cinch the matter, I called the individuals who had lined up in the back of the room to ask them whether or not they had thrown the egg that had decorated the officer's car. Both individuals refused to answer the question on the grounds that it might incriminate them. Ironically, they looked dutifully guilty, looking at their feet on the floor as they shuffled back and forth, and refusing to look the judge in the eye.

At final argument, I stressed to the judge that reasonable doubt was a standard to employ. Although Kline was generally known as a hanging judge, he was also known to be totally unpredictable. Realizing that I had a sure-fire loser of a case, I opted for the unpredictability factor and won. In an eloquent opinion which will probably never be published, Judge Kline, citing various statutes and laws, totally scrambled the case beyond recognition, cracking its shell, and separating it into its parts.

Although I would like to think that my win rested heavily upon my presentation of the law, on balance, I came to the conclusion that Judge Kline, having allowed the box of eggs as evidence, quickly realized the nature of his mistake, acknowledging that, if he were to have ruled against me, I definitely would have appealed.

The prospect of a dozen eggs in a hot evidence storage locker for one year was undoubtedly even too much for him to consider.

Take your daughter to work day

By Sara White

Report of Sara White, 13-year old daugher of Lawyers Varessa White and Michael D. White, from April 1996.

Ms. Foundation for Women
TAKE OUR DAUGHTERS TO WORK

•

Today I spent the day at my parents' offices. They are both lawyers. My step-dad works for a big law firm. My mom works at her own law office.

I spent the morning at my step-dad's office. It was kind of boring. All I did was read but then Michael needed some help. I got to go around the office and write down who was going to a banquet for the firm. At Michael's office, I learned that he represents big companies. He does corporate law.

I went to my mom's office around noon. She is a family lawyer. From there, I walked over to Taco Bell and bought lunch while my mom was meeting with a client. After I ate lunch, my mom showed me how to answer the phones and take messages. I did this for my mom and the other lawyer who works for her. It is not as easy as you think. You have to answer the phone a certain way and know how to put people on hold or take a message with lots of information. It is hard because the people on the phone talk so fast!

My mom had a hearing in court in the afternoon. She and her client went over a little before 2:00. My mom thought the hearing was at 2:00, but it was really at 2:30, so mom, her client and I went to Cafe del Mundo. They had expressos and I had hot chocolate. I also got to see the law library. I was amazed at how many books there were about the law. I asked the librarian and he said that there were over 30,000 books.

We went up to court and when the judge came in, we all stood up. The judge was Judge Gonzalez. The hearing was about a dad who wasn't paying child support. My mom was representing the mother. It was kind of confusing to follow because the lawyers used lots of legal terms that I didn't understand. What I did understand is that my mom won, but I only know that because she told me so. I never would have been able to figure that out from what the lawyers and the judge actually said.

After the hearing, I got to meet Judge Gonzalez in his chambers, which is what they call his office. He was very nice and a lot different from when he was in the court room. In the court room, he was very serious. In his chambers, he was easy to talk to. He said he wanted to be a judge because he wanted to help people.

I asked Judge Gonzales what he does as a judge. He said he reads stuff about the cases that the lawyers write to him and decides what should be done in each case. He said he sometimes does hearings, but he also does trials. He also has to sentence criminals sometimes. Next month, he has to decide how long a murderer will spend in jail. I would be scared to do that job because it would be scary to have to be in the same room as a murderer.

Judge Gonzalez said the worst thing about being a judge was that he felt isolated from the community. He said he would like to be able to help raise money for good causes and do other things for his community. But, because he is a judge, there are laws that say he has to be careful not to show favoritism to any person or any group.

After the hearing, my mom and I came back to the office and I answered many more phone calls. I was surprised at how many phone calls someone could get in such a small office. My mom says she usually spends about 40% of each work day talking on the phone. I like talking on the phone, but not that much!

I really liked spending the day at my parents' offices. My favorite things were watching my mom's hearing and talking to the judge.

Even though it was an interesting and fun day, I still don't want to be a lawyer. There is just too much paper work and boring stuff. I wouldn't want to be a judge, either, because I wouldn't want to have to face those criminals and I wouldn't want to have to make decisions about other people's lives.

In the Kingdom of Juneau

Royal Bar Association of Juneau

Supreme Court candidates appear

The Juneau Bar Association extended an invitation to Supreme Court candidates to speak at bar luncheons in October. The following are excerpts from several of those presentations as recorded in JBA minutes.

Meg Greene

Judge Meg Greene holds a B.S. in math from Wyoming and J.D. with honors from Hanvard. Prior to her 12-year stint as a trial court judge, Judge Greene worked as a trial and appellate P.D. and with the A.G.'s office.

See Bar Poll

—Page 19

Three reasons why she wants to be a supreme court justice: 1) loves appellate practice. 2) an honor to fill seat held by Justice Rabinowitz and 3) has an interest in the administrative side of the judiciary, especially with regards to judicial education and the availability of justice in rural areas of the state. She stated that her reputation as a judicial activist is wrong. She views herself as being rule-oriented, taking a conservative but compassionate approach to the law.

James Parrish

James "Jamo" Parrish is a lifelong Alaskan who began working on appellate briefs for his dad while in law school. The day he was sworn-in to the bar, he argued his first case to the Alaska Supreme Court. He attended both business school and law school at Colorado University. He was in general practice in Fairbanks for the last 21 years and was recently hired as the general counsel for the University of Alaska.

Over the course of his career, he has been involved in 34 cases before the Alaska Supreme Court. He and his family also have several business interests which he enjoys. He has no specific agenda but has some general concerns that he would like to see addressed. He believes that litigation has become too complex and too expensive. He also thinks that the supreme court should be less inclined to retry cases at the appellate level and that it should put more stock in the rulings of the trial court. He believes that the court should spend more time focusing on the specific holding of a case and less time on dicta and secondary issues.

Upon questioning, both candidates indicated that they believe in geographical diversity on the court, but view this vacancy as a Fairbanks seat and Justice Compton as holding the current Southeast seat. Judge Green indicated that she could see this as problematic in that she had heard that some Anchorage lawyers viewed Justice Compton as holding an Anchorage seat. Both candidates indicated that they would strongly oppose or resist their having to move to Anchorage, if appointed.

—Oct. 4, 1996

Terry Thurbon

Terry Thurbon is a lawyer with Robertson Monagle in Juneau. Prior to her approximately six years there, Terry taught basic legal writing and research skills to students from "an ABA accredited law school in California." She stated that there were two concerns that caused her to seek appointment to the court.

First, she sees a need for more clearly articulated. written and reasoned opinions. Too much time is spent on dicta. Second, she believes that the court needs to be more objective in its use of the appeal process. She views the court as prone to relitigating facts on appeal, which reflects a subjective or biased approach to the process. The primary strength that she brings as a candidate is her ability to articulate, through very clear precise legal writing, well reasoned legal analysis.

Terry said that most of her experience has been in major civil litigation with an emphasis on natural resources and administrative law. She has done some pro-bono work in the past but spends so much time on her work for her current clients, when she does have free time, she prefers other non-law related activities.

Dan Winfree

Dan Winfree, a longtime Fairbanks lawyer and former president of the state bar, views his role as a lawyer and as a justice on the court, if appointed, as a problem solver. According to Dan, problem solving can occur in many different ways and the way to which he thinks his talents are best applied is through the creation of well-reasoned precedent.

Dan stated that he has regularly accepted pro bono work and believes that it is an important concern for the bar.

Randy Clapp

Having discovered that the vast majority of those in attendance had already turned in their bar polls, Randy Clapp un-tempered his comments accordingly. Randy is at heart a litigator who estimates that he has tried as many cases before a jury as any other lawyer in the state. As much as he loves trial work, he sees a need for the supreme court to gain a better understanding of the impact that the trial process has on the litigants. He too thinks that the court is too willing to relitigate the underlying facts in order to support a reversal or a remand. He believes that the court should affirm a trial court's findings absent a clear reason not to. If you know anything about Randy Clapp, know this: He believes that *Beaumaster v. Cranston* was wrongly decided.

Randy stated that he is a strong supporter of pro bono work and that he and his firm have always strived to accept pro bono and court appointed cases.

—Oct. 11, 1996

Judge Richard Savell:

Judge Richard Savell was persuaded to come to Juneau after Bruce Weyhrauch told him that no recently appointed justice on the Supremes had been appointed without first speaking to the Juneau Bar Association. He recognized that cavalier disregard for this seemingly meaningless mecca spelled trouble.

His only other near sojourn to Juneau was right after law school, around 1970. He had not previously travelled west of the Garden State and was offered a clerkship by Justice Rabinowitz. Justice Rabinowitz gave him a choice. He could either come to Fairbanks to work with Justice Rabinowitz or he could go to Juneau to work for the newest, yet undetermined, justice on the court (Justice Boocheever). Judge Savell said he looked at a map, saw that Fairbanks was farther from New Jersey than Juneau, and thus selected his home for the next 25+ years.

After clerking, he spent the 1970s in a civil/commercial practice in Fairbanks, some with Charlie Cole and some with his own firm. In 1980, Judge Savell went solo until his appointment to the bench in 1987. After travelling to Bethel one week a month for his first three years on the bench, he was rewarded by being appointed the presiding judge over what was a "dysfunctional" judicial family in the Fourth Judicial District.

He stated that he loves his work and the law and that as a candidate he does not come with an agenda. He would be excited to be part of the new generation of justices on the court and thinks that the next years on the court will be interesting ones. He also indicated that he felt strongly about maintaining his residence in Fairbanks if appointed.

Walter Carpeneti

Judge Walter Carpeneti started out with a little biogaphical sketch. He was a Stanford undergrad and went across the bay for law school. He met Annie and they came to Juneau for his clerkship with Justice Dimond. Annie decided that she too wanted to soar with eagles so they returned to California for another round of law school. The Carpenetis then returned to Juneau and Bud began working for the public defender agency.

On the day they arrived back in Juneau, he decided to check in with his new employer. Just as he stuck his head into the office to say hello, he received a phone call from the apparently clairvoyant Judge Stewart. Within moments of the Carpenetis' return, Judge Stewart had appointed Bud to defend a first degree murder case. A little concerned about his lack of experience in this area, Bud and his client persuaded Judge Stewart to permit them to pick someone from the local bar to assist with the defense. Av Gross helped out for the first 6 months but then abandoned them to become attorney general for Gov. Jay Hammond. Gail Fraties stepped in and together, as we say in the south, they put a hurtin on the State. After a couple days of trial, the State agreed to a plea of manslaughter for time served. (For you civil folks, this mean the defendant walked free.)

After his stint with the P.D.s, he went into practice with Bill Council for three years and was then appointed to the bench. Judge Carpeneti stated that he has been considering applying for the supreme court for some time but was not sure whether he wanted to be a justice or whether he could perform the job. He indicated that a recent two month pro tem stint on the court persuaded him that he would enjoy it and that he could do it.

Judge Carpeneti indicated that he thought geographical diversity on the court was very important, especially for administrative reasons. The court needs to maintain a broad perspective on how its administration impacts different communities within the State. Court administration in Anchorage serves different needs than court administration in smaller communities.

Both Judges Savell and Carpeneti agreed that the supreme court should be sensitive to the fact finding functions of the trial court, especially in divorce and domestic violence cases.

—Oct 18, 1996

Lach Zemp, Secretary

Justice Alex Bryner also appeared before the JBA on Oct. 25, but excerpts of his remarks were not available.

The Board of Governors invites member comments concerning the following proposed amendments to the Alaska Bar Rules:

BAR RULES 28(g) & (h)
PROPOSED AMENDMENTS GIVING THE BOARD THE DISCRETION TO PUBLISH AND DISTRIBUTE PUBLIC NOTICE OF PUBLIC REPRIMANDS

(Additions italicized; deletions bracketed and capitalized)

Rule 28. Action Necessary When Disbarred, Suspended, or Placed on Probation.

. . .

(g) Public Notice.

The Board will cause a notice of the disbarment, suspension, or interim suspension to be published in

(1) a newspaper of general circulation in the cites of Anchorage, Fairbanks, and Juneau, Alaska;

(2) an official Alaska Bar Association publication; and

(3) a newspaper of general circulation serving the community in which the disciplined attorney maintained his or her practice.

The Board may, in its discretion, direct that notice of a reprimand, publicly imposed, be published as provided above.

(h) Circulation of Notice; National Lawyer Regulatory [DISCIPLINE] Data Bank.

The Board will promptly transmit a copy of the order of disbarment, suspension, interim suspension, probation, [OR] public censure, or *reprimand, publicly imposed,* to the presiding judges of the superior court in each judicial district in Alaska; and to the Attorney General for the State of Alaska, together with the request that the Attorney General notify the appropriate administrative agencies. The presiding judges will make such orders as they deem necessary to fully protect the rights of the clients of the disbarred, suspended, or probationary attorney.

Bar Counsel will transmit to the National *Lawyer Regulatory* [DISCIPLINE] Data Bank maintained by the American Bar Association, and any jurisdiction to which Respondent has been admitted, notice of all discipline imposed by the Court and all orders granting reinstatement *and reprimand, publicly imposed, by the Board.*

Getting Together

Settlement conferences as mediation

Last year I wrote a *Bar Rag* column which I thought might stir up some controversy. I argued that there was a fundamental difference between settlement conferences and mediation.

The premise of the article was that the emerging "empowering" style of mediation was essentially voluntary, confidential, and non-coercive — some or all of which elements were missing from most settlement conferences.

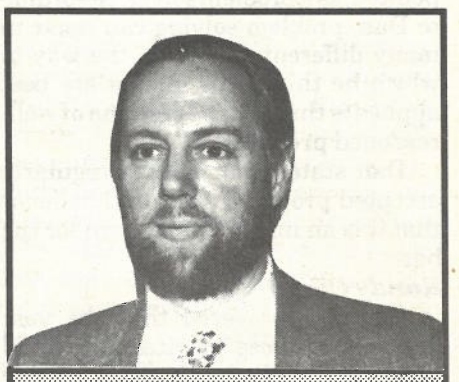
I did receive a few comments on the column, notably from some judge acquaintances, but for the most part the article did not generate much comment.

I thought that I might take another stab at it this month, from the opposite point of view. There is a tendency by many mediators, I believe, to be just as misguided in thinking that they know what is and is not proper mediation as are those of us in the legal profession who equate mediation with settlement conferences.

The subject arises because I have been involved as a member of the Alaska Supreme Court's Mediation Committee in considering a new proposed appellate mediation rule. Such a rule is likely to be recommended to the court in the near future.

A major development in the consideration of the proposed rule by the Mediation Committee was the decision to eliminate the word "mediation' from the proposal, and refer instead to appellate "settlement conferences." Doing so made it more palatable to some members of the committee to recommend that the "mediators" in such cases (referred to as "settlement officers") be predominantly selected from active and retired members of the judiciary.

I initially disagreed with the committee decision, but only because of my personal and self-interest desire to see



Drew Peterson

the word "mediation" spread in the legal vernacular. I readily agreed to the suggested compromise language for the purpose of furthering what I saw as a worthwhile improvement in the appellate procedure. My purpose here is not to complain about the Mediation Committee's decision but to comment on the debate over language and the nature of the mediation movement that is exposed thereby.

One of the problems that all mediators face early in their careers is the fact that most people simply do not understand what it is that we do. As a beginning mediator in the late 1980s, I had to spend a substantial amount of time on the phone with the Yellow Pages people before I could convince them that I wanted to advertise for "mediation" services, instead of "meditation" services. A substantial portion of the public believes to this day that we mediators sit around our offices chanting low monosyllables while using crystals and Eastern music to get in touch with our higher consciousness. (Actually it is only arbitrators who do such things).

Joking aside, a major problem with the word "mediation" is that even people who do have some sense of the meaning of the word regularly confuse it with "arbitration." The Anchorage Daily News, for example, uses the two terms interchangeably, with no indication that it recognizes any difference between them.

Mediation and arbitration are indeed similar in many ways: Both are relatively informal dispute resolution methods in which the parties resolve their differences with the assistance of a neutral third party.

Yet the critical and often overlooked difference between the two methods is that in arbitration the third party makes a binding decision; in mediation the parties, themselves, make the decisions that resolve their problem.

The problem of language is greatly exacerbated by the fact that those of us in the ADR field cannot even reach agreement, ourselves, on what it is that we do, how it should be done, or what to call it. Thus, we use nonsensical terms such as "non-binding arbitration" (properly referred to as "advisory mediation"). If those of us in the field cannot even be consistent in our use of the terminology of ADR, how can we expect anyone else to understand what we are talking about?

The more subtle the distinctions, the more confusing the debate becomes to the public. Such is the case with the distinction between mediation and settlement conferences. Settlement conferences are in fact nonbinding, and as such they are a form of mediation. There are no other distinctions between the two forms of conflict resolution that are universally accepted in the ADR field.

It is noteworthy that the young ADR field is lacking in agreement on many aspects of practice. I have a book on my shelf written by a well respected mediator who asserts that it is malpractice to do a family mediation case without caucusing separately with the parties. I have another book written by an equally respected family mediator who recommends that one should always mediate with the parties together and not separately.

While those of us in the ADR field do not have consensus on many important aspects of practice, we are learning more each day. Instead of resolving the debate as to which are the right and the wrong ways to do mediation, we are learning that some practice methods work better in some contexts and that other methods work better in others.

While an "empowering" style of mediation might effect a full reconciliation between former friends when it comes early in their dispute, a strong-arm, settlement-conference-style mediation enable be very appropriate to resolve the same dispute on the eve of trial. And early neutral evaluation might be appropriate to simplify and expedite things at a mid-range discovery stage in a dispute.

There are many such methods, appropriate for different types and stages of disputes between different disputants. All dispute resolution methods can be placed along a continuum, from avoidance and simply lumping a disagreement on one end, to violence, murder and war on the other. ADR methods are no different.

In my column that asserted that settlement conferences are not mediation, I was of course guilty of exactly the same flaw that I am now criticizing in my ADR colleagues. I can only confess that I have discovered the error of my ways. Settlement conferences are indeed mediation, and a very, effective form of mediation for certain kinds of disputes.

Learning which methods of dispute resolution work best for which kinds of disputes is the most important and exciting challenge currently facing the field of alternate dispute resolution.

1996 CLE Calendar

DATE/CLEs	TITLE	CITY/LOCATION
#40 Nov. 20	Non Profit Issues Part II	Anchorage
6.5 cles		Hotel Captain Cook
#51 Dec. 4	Legal Research Skills/Technology	Anchorage
cles tba		Hotel Captain Cook
#10 Dec. 13	Off the Record (NV)	Anchorage
cles tba		Hotel Captain Cook

SOLICITATION OF VOLUNTEER ATTORNEYS

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

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

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

Second District:
Tom Mize
604 Barnette St. Rm 210
Fairbanks, AK 99701-4576
(907) 451-9251

Third District:
Al Szal
825 W. 4th Ave.
Anchorage, AK 99501-2083
(907) 264-0415

Fourth District:
Ron Woods
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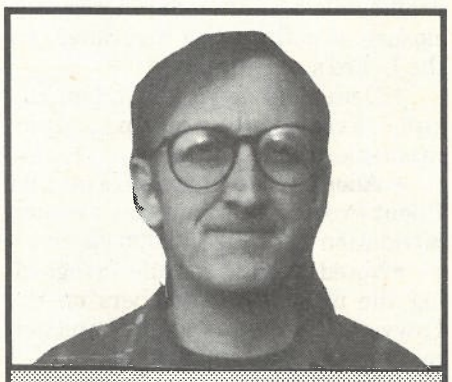
Eclectic Blues

Unique characters

I'd like to think that most members of the Alaska Bar Association enjoy scanning the magazine. It provides some comic relief (like this column) and puts out a lot of important information. Writers like Drew Peterson have worked hard through the years to research and present information of value to Alaska lawyers. No one gets paid for this work. They just do it.

The *Bar Rag* has a pretty open editorial policy. This means it reflects the Alaska legal community—with its unique characters. Not every reader enjoys the mix. Still, the *Rag* has a lot of positive features, even for those who dislike it.

For one thing, it is easy to recycle, unlike those slick magazine-format publications put out by bar associations with money to splurge. For another, it can fire up the indignation that some Alaska lawyers need to make it through to breakup.



Dan Branch

Some of you might remember, with delightful horror, a *Bar Rag* edition that sported a pen and ink illustration of a nude in rear view posing as model in a drawing class. Legend has it that some law office managers gave orders to have all copies of that magazine confiscated and burned.

It is rare that a *Bar Rag* article causes such a strong response. Most don't even merit a letter to the editor. Still, I have the feeling that every time an edition of the magazine is published, some reader sighs quietly to himself and wonders why the Alaska Bar Association can't put out a more professional newsletter, like the one he gets from his home state.

I've been an inactive member of the California Bar since 1976. They periodically sent me a slick legal publication, before they went on a budget-cutting binge. It was full of useless information about the salary scales in L.A. law firms and the latest techniques for automating the sole practitioner office. When it arrived in the mail, I'd flip to the back to see if anyone I knew had been disbarred, then toss it in the trash. Now California sends me a little newsprint publication that looks like the *Bar Rag* but without the character.

Character is something the *Bar Rag* enjoys in large quantity, just like the bar association it serves. Sometimes, all that character won't fit within the walled walkways of political correctness. Back when they still had dairy cows in Matanuska, Gail Roy Fraties wrote about all his trials for the *Bar Rag*. The candid nature of his writing could make a linebacker blush, but he was still picked to serve as Bethel's superior court judge—recommended by a bar association blessed with tolerance and an appreciation for the individual.

In eight years I've written 43 columns for the *Bar Rag*. Most of them avoided the tricky reaches explored by Judge Fraties in his *Bar Rag* column. I've tried hard not to offend anyone (with the possible exception of tourists, who are usually out of the state when the column about them appears).

My goal has always been to entertain and maybe squeeze out a laugh or two. If I do anger anyone, I'd like to think that they will blame me and not the *Bar Rag*.

Maybe they will take the ultimate revenge and write their own column.

The grin of the Cheshire Cat: Now you see it...or don't

By Max F. Grunberg, Jr.

"All right," said the [Cheshire) Cat; and this time it vanished quite slowly, beginning with the end of the tail, and ending with the grin, which remained some time after the rest of it had gone.

Lewis Carroll, Alice's Adventures in Wonderland 62 (N.Y., MacMillan 1963).

Appellate Rule 214(d) provides:

"Summary decisions under this rule are without precedential effect and may not be cited in the courts of this state."

Memorandum Opinions and Judgments, or "MO&J's" as they are popularly known, are reclusive little beasts. They arrive by mail, are discussed only in hushed tones, and are rarely seen by anyone, except the parties and their lawyers.

Except...

Rumors abound that certain large law offices, such as the attorney general, the district attorney, and the state law library maintain files on the little critters, to be dragged out, dusted off, and offered up in appropriate cases—for informal "guidance," if nothing else. It is unknown whether these legal stables maintain an indexing system and, if so, how it is used. Rumor has it that they do.

Until 1980 nothing prevented the citation of unpublished opinions. The attorney general maintained a file on important opinions and orders, citing them only when helpful to the state's cause. One order was quoted so often that the supreme court decided to publish it in the interest of fairness. See *Powell v. City of Anchorage,* 536 P.2d 1228, 1229 asterisked footnote (Alaska 1973, released for publication 1975). Because the practice of citing unpublished orders and opinions had created so much resentment, Appellate Rule 214 was promulgated in 1980. See Alaska Supreme Court Order 439.

Appellate courts, it has been rumored, maintain similar files. This could not be confirmed until *Rudden v. State*, 881 P.2d 328, 332 n.2 (Alaska App. 1994), a sentence appeal. The court had "not previously had occasion to contemplate an appropriate benchmark term for attempted first-degree murder." Indeed, only one other sentence appeal had been published after the crime was made an unclassified felony.

Ah, but now the rub. A number of MO&J's had reviewed sentences for the unclassified felony. *Rudden* cited no less than four unpublished opinions, briefly describing each sentence.

Nodding and grinning at Appellate Rule 214(d), the court admitted that MO&J's, being unpublished, could "have no precedential effect." Therefore, "citation to or reliance on them for any proposition of law would be inappropriate." [emphasis added].

Now the kicker...

> "Nevertheless, viewed collectively as **expressions of historical fact,** our unpublished decisions are reflective of past sentencing practices; like other collections of empirical sentencing data, they can provide the necessary context for a rough estimate of how a given sentence compares to sentences previously imposed for a particular crime. When viewed in this manner, these decisions can play a helpful role as a resource for identifying seemingly exceptional sentences that warrant a heightened level of scrutiny. [emphasis added].

Now they can be cited as *factual* or *statistical*, precedent. This is a pretty fine line, and contrary to the plain language of the rule. What distinguishes legal precedent from factual precedent? Precedent is precedent.

By now you've probably seen the light. If MO&J's can be viewed "collectively as historical fact," "collections of empirical...data," and can "provide a benchmark" in the area of criminal sentencing, what can you use them for? A whole range of possibilities exist.

Family law practitioners can cite them in property divisions and child support cases. Other lawyers can cite them as "statistical evidence" in Rule 82 attorney's fee appeals, etc. I'm sure you can think of other creative uses.

Not to be outdone by the court of appeals, five months ago the Alaska Supreme Court went one step further. A *pro per* litigant sought rehearing of a divorce property division, citing an MO&J. Without even pausing to acknowledge Appellate Rule 214(d), in denying rehearing the court went directly to the merits and distinguished the unpublished opinion. *Musser v. Johnson*, 914 P.2d 1241, *reh. denied*, 1244 (Alaska, April 19, 1996).

One would have thought the court would at least have given the rule a nod.

The notes to Appellate Rule 214 in the 1996-97 Book Publishing Company edition of the Alaska Rules of Court do not cite *Rudden*. Inasmuch as the appellate rule is not even mentioned in Musser, the annotation will probably never cite that case, either.

What then, is left of the rule? MO&J's can be cited for statistical purposes, and maybe if you're a *proper* litigant or simply can get away with it. If *that* is the case, then, as Lewis Carroll would say, all that remains of the rule is the grin.

NEWS FROM THE BAR

At the Board of Governors meeting on October 18 & 19, 1996, the Board took the following actions:

• Certified results of the July 1996 Bar Exam.

• Deferred consideration of several applications pending completion of the character investigation.

• Approved 4 reciprocity applicants for admission

• Asked the Bar President to inquire of the status of the proposed amendments to the fee arbitration rules regarding fee scales.

• Adopted the ethics opinion entitled "Ethical Considerations When Acting as an Arbitrator in One Proceeding and as an Advocate in Another Proceeding.

• Reduced the budget line item for the Communications Committee to $10,000.

• Approved the proposed 1997 budget.

• Rejected the stipulation in a discipline case and suggested alternative discipline which would be acceptable.

• Voted to add an additional 15 minutes at the Mandatory Ethics Course for New Admittees for members of the Substance Abuse Committee to make a presentation.

• Approved a bylaw and Bar Rule amendment to change the name of the Substance Abuse Committee to the Lawyers' Assistance Committee.

• Authorized $1,000 for a Substance Abuse Committee member to go to Fairbanks & Southeast to discuss substance abuse.

• Adopted the findings of the Area Hearing Committee in a discipline case. Voted to send amendments to ARPC 1.7 and 1.8 to the supreme court.

• Took no action ARPC 5.4 & 7. 1.

• Agreed to appoint a committee to study the issue of certification.

• Voted not to publish ARPC 3.8

• Referred ethics opinion 95-5 (regarding surreptitious taping) to the Ethics committee to consider whether an alternate opinion should be drafted.

• Directed the ARPC Committee to draft a rule regarding mandatory disclosure of malpractice insurance, for the Board's consideration.

• Denied a Lawyers' Fund for Client Protection claim, upon reconsideration.

• Adopted the Lawyers' Fund for Client Protection Committee's recommendation to pay a $50,000 claim.

• Voted to send Bar Rule 48 regarding the number of members on the Lawyers' Fund for Client Protection committee to the supreme court.

• Voted on numerous CLE Committee recommendations, including a study of the cost and time for a Homepage. Voted down a motion that Board members could attend the Nonprofit CLE at no cost.

• Voted to send Bar Rules 37©& (e) to the supreme court.

• Voted to publish Bar Rules 28(g) & (h), which would allow publication of public reprimands.

• Referred Bar Rule 15(b), regarding the allowed activities of suspended lawyers, to Bar Counsel for a rewrite, and to include disclosure to clients .

• Approve renewal of the contract with Duke Law School for publication of the Alaska Law Review.

• Adopted an amendment to the Standing Policies of the Board of Governors which would strongly encourage the Bar President to appoint new lawyers to committees, and deleted the proposed exception of the Law Examiners committee.

• Continue to monitor the Lawyer Referral Service number of participants.

• Approved the request of William Sanders to go on retired status.

• Approved the ELAP waiver, which allows a military lawyer to represent military clients in state court.

Triem suspended for neglect, censured for other misconduct

The Alaska Supreme Court, in a written opinion issued October 25, 1996, suspended Petersburg attorney Fred W. Triem for 90 days. The court imposed the discipline after Triem neglected a client's interests in one case. The court also censured Triem for mishandling a client's money in a second case, and censured him for intentional dishonesty to an opposing lawyer in a third case.

In the first case, Triem's client sought to quiet title and recover damages for injury to land. The client prevailed at trial, and the court directed Triem to submit a proposed judgment. Instead, without the client's consent, Triem decided to pursue a different strategy to quiet title, but failed to follow through on this alternate approach. Triem was on disciplinary probation from earlier misconduct when this neglect occurred.

In the second case, Triem represented the purchaser of a fishing permit. Triem held the client's earnest money payment in his trust account. When the sale fell through, Triem failed to promptly return the client's earnest money. Triem also failed to promptly account to the client for the funds, and withheld attorney fees from the funds despite knowing that the client would object.

In the third case, Triem mailed overdue court-ordered discovery to the opposing lawyer. Then he faxed a letter to the lawyer stating that he had mailed his responses and would fax them on request. The lawyer took Triem up on this. Instead of faxing the discovery, however, Triem went to the post office and retrieved the package he had mailed. He did not notify the opposing lawyer that he would not send the discovery by mail or by fax.

Although a disciplinary hearing committee found misconduct in the second case, including that Triem testified falsely to the committee, the Disciplinary Board of the Bar dismissed the case because unspecified procedures and conduct created potential prejudice. The Supreme Court reinstated the second case and addressed various due process concerns raised by Triem. Among other things, the court held: that Bar Counsel may appeal decisions of the Disciplinary Board; that the finding of a lawyer's dishonesty at hearing does not require a separate trial, but may be considered as an aggravating factor at that time, especially when the lawyer is allowed to rebut the finding; that absent any predisposition it is proper for a hearing committee itself to call and examine witnesses; that witnesses may appear telephonically at discipline proceedings; that an offer from Bar Counsel to settle a case by private discipline does not amount to a prejudicial "adjudication" of misconduct; that delay of discipline proceedings, absent prejudice, does not warrant dismissal; and that reference during hearing to a lawyer's other disciplinary proceedings is not prejudicial.

Triem has moved for rehearing; a decision is pending at the Supreme Court. Absent other order by the court, Triem's suspension will be effective November 24, 1996. The court ordered the first case remanded to the Disciplinary Board for imposition of probation terms. The probation is expected to be taken up by the Board at its meeting around January 10-11, 1997. The public files in these cases may be reviewed at the Bar Association offices in Anchorage.

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Disciplinary Board reprimands Maryann E. Foley

Anchorage lawyer Maryann E. Foley received a public reprimand from the Disciplinary Board for a combination of client neglect and failing to answer grievances.

The Bar opened investigations of four grievances against Foley. For over six months she did not respond to repeated requests for information. Finally, a short time after a meeting with Bar Counsel, Foley submitted responses in all four grievances, though she did not explain the original delay. Foley responded promptly to requests for copies of her client files, but later delayed in her responses to additional requests for information and again offered no explanation.

Foley and Bar Counsel stipulated that she should be disciplined for failing to answer the charges against her (a violation of Bar Rule 15(a)(4)) and in one grievance for neglect and failure to advise a client of the status of a case (in violation of Alaska Rules of Professional Conduct 1.3 and 1.4). In the neglect case, despite her client's repeated urging, Foley did not oppose a motion to modify child custody. The court indicated that it would grant the unopposed motion. Foley still filed nothing, and ignored her client's requests for information. Ultimately her client fired her. Only then did Foley take steps to oppose the motion, by requesting an extension of time.

The public reprimand was imposed instead of more serious discipline because of mitigating factors. Foley suffered from depression during the relevant period, she eventually responded to the charges, and it appeared that the court would have ultimately granted the custody modification even if Foley had filed a timely opposition. The stipulation is available for review at the Bar Association office.

Attorney X receives private reprimand for discussing inadmissible evidence at trial

Attorney X, the prosecutor in a criminal trial, received an in-person private reprimand from the Disciplinary Board for moving the introduction of evidence that the lawyer knew was inadmissible.

During pretrial proceedings, defense counsel asked for a protective order barring the introduction of certain evidence. Attorney X assured the court that the evidence was inadmissible and would not be used. The court issued no protective order. Attorney X did not advise the relevant witness that the evidence was inadmissible. When the witness mentioned the inadmissible evidence, Attorney X steered the witness away from the matter, then returned to it and moved admission of the evidence in the jury's presence, forcing opposing counsel to object. After the court excused the jury, Attorney X explained that the evidence was indeed inadmissible, but because the witness had inadvertently mentioned it the jury needed an explanation of why the evidence would not be offered. Attorney X believed that the prosecution would be prejudiced otherwise, and that there was no prejudice to the defendant. The court granted a mistrial.

Attorney X stipulated to a violation of ARPC 3.4(e), which provides that a lawyer shall not in trial allude to a matter that will not be supported by admissible evidence.

Cell phones and confidentiality

A concerned lawyer called Bar Counsel's office to relate that at a recent social event a guest bragged about eavesdropping on a cellular phone call between a client and a well-known lawyer. The eavesdropper, an electronics hobbyist, intercepted the call using a scanning device that he owned.

Alaska Rule of Professional Conduct 1.6 requires a lawyer to maintain the confidentiality of information relating to the representation of a client. As the concerned lawyer noted, this obligation is at odds with a fundamental impulse of current technologies, which is to make information more readily available — in effect, to destroy confidentiality.

Legal ethics authorities are divided about the disciplinary consequences of inadvertent disclosure of confidential information through cell phone interceptions. Some authorities believe that because confidentiality is a lawyer's core obligation, if a cell phone call about a representation is intercepted it is a violation of Rule 1.6 . Other authorities are against a per se rule: the risk of interception of a cell phone call is too low. The issue has not been presented to ethics authorities in Alaska . Apart from the question of whether a cell phone interception should result in professional discipline, most ethics authorities agree that confidential information should be avoided in cell phone calls unless the signal is encrypted or until more secure technology is generally available.

A short time ago the usual breach of confidentiality involved some sort of conscious action by a lawyer (often in connection with a conflict of interest). Recent technologies have created new possibilities for inadvertent disclosures. Cordless (radio) telephone interceptions and misdirected faxes were early examples. Now, ethics authorities are also concerned about the lack of privacy in Internet e-mail and unauthorized access to law firm computer records. When technology used by a lawyer to advance client interests can be turned against the client, the lawyer is responsible to prevent it. The day is gone when the duty of confidentiality can be discharged merely by refraining from talking to somebody else about a client's case.

NEWS FROM THE BAR

ALASKA BAR ASSOCIATION ETHICS OPINION NO. 96-6 Ethical Considerations When Acting As An Arbitrator In One Proceeding And As An Advocate In Another Proceeding

The Committee has been asked to resolve ethical questions which may arise when an attorney who normally acts as an advocate on behalf of clients is asked also to serve as an arbitrator. In the factual situation presented to the Committee, the arbitration involves a dispute between an insurance company and its insured. Pursuant to the uninsured motorist provisions of the insurance policy each side chooses an arbitrator. The two arbitrators thus chosen will choose a third arbitrator to complete the panel. The attorney in question has been asked to serve as one party's arbitrator.

The attorney represents other parties in similar uninsured motorist arbitrations and sometimes litigates against the insurance company. Some of the legal issues to be decided by the attorney as arbitrator may be similar or identical to issues for which the attorney is acting as advocate before other arbitration panels. The question asked of the Committee is whether the attorney can ethically serve as an arbitrator under these circumstances. If so, what are the attorney/arbitrator's ethical responsibilities in this situation? The Committee concludes that, absent evidence of facts which suggest that the attorney has a conflict relating to the specific matter at hand, and is therefore unable to act fairly and in good faith as a member of the arbitration panel, the attorney is not ethically barred from acting as arbitrator.

This question raises issues in two directions. First, an attorney who represents clients before other arbitration panels may not accept employment as an arbitrator if the employment would result in a conflict of interest with his present clients. Rule 1.7 of the Alaska Rules of Professional Conduct states as follows:

> *CONFLICT OF INTEREST: GENERAL RULE*
> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client in the same or a substantially related matter, unless:
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
> (2) each client consults after consultation.
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyers' own interests, unless:
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, a consultation shall include explanation of the implications of the common representation and the advantages and risks involved.
> (c) A lawyer shall act with reasonable diligence in determining whether a conflict of interest, as described in paragraphs (a) and (b) of this rule, or Rules 1.8, 1.9 and 1.10 exists.

There is nothing inherent in the situation of the attorney acting as arbitrator that creates an insurmountable conflict. The attorney's service as arbitrator would not require the attorney to modify or change positions being advanced on behalf of other clients in other arbitrations or other forums. The attorney acting as arbitrator cannot render a decision in one arbitration which would have a binding, precedential affect on another panel or a different forum. Similarly, the attorney arbitrator is free to make decisions in the context of the arbitration without fear that these decisions will adversely impact other clients' interests.[1]

The situation ethically is similar to the situation in which the attorney represents different clients and argues conflicting rules of law before different tribunals. Although the attorney must be careful to avoid conflict, there is nothing inherently improper about the situation. *See* ALASKA RULES OF PROFESSIONAL CONDUCT Rule 1.7 and commentary (a lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected).; ABA Formal Opinion 93-377 (October, 1993) (if lawyer reasonably believes representation will not have a significant impact on resolution of issue in second case and will not cause lawyer to "soft pedal" representation of one client in favor of another, dual representation is permitted upon full disclosure and with both clients' permission.)

The other ethical question that must be resolved is the attorney/arbitrator's ethical responsibilities as a member of the arbitration panel.

As an arbitrator, an attorney has an obligation to act fairly and to avoid either impropriety or the appearance of impropriety in reaching conclusions. In *City of Fairbanks Municipal Utility System v. Lees*, 705 P.2d 457, 463 (Alaska 1985), the Alaska Supreme Court noted that arbitrators should "avoid the appearance of impropriety by following the American Arbitration Association Guidelines, which call for disclosure of any contacts or associations with either party." However, the obligation to avoid impropriety is not the same as an obligation to hold no opinion in the general subject matter area of the arbitration. Indeed, one of the advantages of arbitration is that arbitrators presumably will be drawn from those who have some expertise and knowledge in the area:

> As arbitrators are usually knowledgeable individuals in a given field, often they have interests and relationships that overlap with the matter they are considering as arbitrators. The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator.

Florasynth v. Pickholz, 750 F.2d 171, 173-74 (2nd Cir. 1984). *See Commonwealth Coatings Comp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed. 2d 301 (1969) (White, J., concurring) (Arbitrators are not held to standard of judges; it is often because they are men of affairs that they are effective adjudicators.) This consideration is even stronger in circumstances such as those presented to the committee, in which each side is directed to appoint an arbitrator and a third arbitrator is chosen by the first two. Although all the arbitrators must avoid impropriety and direct bias, there is no ethical requirement that the arbitrators chosen by one or the other of the parties to the dispute be complete strangers to the legal issues involved. Indeed, in many situations the expectation is to the contrary. Courts which have been asked to resolve the issue presented to the Committee today have recognized the practical realities of this situation. In *Society for Good Will to Retarded Children v. Carey*. 466 F.Supp. 722 (E.D.N.Y. 1979), for example, the court declined to disqualify an attorney representing mentally retarded clients in litigation before the court. The alleged "conflict" was that the attorney had also been appointed by the court to serve on a review panel responsible for implementing a consent decree for similarly situated clients at a different institution. In denying the motion for disqualification the court held that no ethical impropriety had occurred and took judicial notice that arbitrators may properly serve even if they have previously expressed opinions or represented clients in related matters.

The closest analogy to Mr. Schnep's role in the Willowbrook case is that of an adversary representative on a tripartite arbitration panel. No one expects neutrality from such a person. No one imagines that a lawyer in that position will refrain from representing similar clients in other litigations. It is a matter of common professional knowledge that lawyers associated with employers or union members, for example, sit on such panels and then litigate against each others clients. Fed. R. Ev. Rule 201.

In "tri-partite arbitration ... each party's arbitrator 'is not individually expected to be neutral.'" Matter of Astoria Medical Group (Health Ins.), 11 N.Y. 2d 128, 134, 227 N.Y.2d 401, 405, 182 N.E.2d 85, 87 (1962) (Fuld, J.). Cf., e.g., 9 U.S.C. ° 10(b); N.Y. CPLR ° 7511(b)(1)(ii). All that is required is that the arbitrator's possible bias through connections with the appointing authority be revealed.
466 F.Supp, *supra*, at 728.

This is not to suggest that an arbitrator selected by one or the other party to the arbitration has no ethical obligations. To the contrary,

> The fact that party selected arbitrators are not expected to be 'neutral', however, does not mean that such arbitrators are excused from their ethical duties and the obligation to participate in the arbitration process in a fair, honest and good faith manner. The New York Court of Appeals expanded on the ethical obligations of party-appointed arbitrators stating:
>
> Partisan he may be, but not dishonest. Like all arbitrators, the arbitrator selected by a party must (unless the requirement is waived) take the prescribed oath that he will "faithfully and fairly ... hear and examine the matters in controversy and ... make a just award according to the best of [his] understanding." And, if either one of the party-appointed arbitrators fails to act in accordance with such oath, the award may be attacked on the ground that it is the product of "evident partiality or corruption." Such an attack, however, must be based on something overt, some misconduct on the part of an arbitrator, and not simply on his interest in the subject matter of the controversy or his relationship to the party who selected him.

Metropolitan Property and Casualty v. J.C. Penney Casualty, 780 F.Supp. 885, 892 (D.Conn. 1991), quoting *Astoria Medical Group v. Health Insurance Plan of Greater New York*, 11 N.Y.2d 128, 227 N.Y.S. 2nd 401, 407; 182 N.E.2d 85, 89 (N.Y. Court of Appeals 1962) (citations and italics omitted).

This distinction is recognized even in the Alaska Rules of Professional Conduct. Rule 1.12 prohibits a former judge or arbitrator from representing anyone in connection "with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk... ." A specific exception exists, however, in that "an arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party." A.R.P.C. 1.12 (d).

In summary, an attorney acting as arbitrator must be willing and able to hear the evidence presented and to make decisions based on that evidence free of specific bias or prejudice toward the parties or the facts. An arbitrator who is aware of circumstances or relationships which raise questions about the ability to be fair and impartial should notify the parties. If the arbitrator in good faith believes that he or she cannot meet the standard of fairness required of all members of an arbitration panel, the arbitrator should refuse to serve. An arbitrator is not automatically disqualified from serving merely because the arbitrator has knowledge, experience or opinions in the relevant field, and specifically, is not automatically disqualified because he or she represents clients in similar but unrelated matters.

CONCLUSION

For these reasons, and given the facts outlined to the Committee there is nothing inherently unethical about an attorney serving as an arbitrator under the circumstances outlined.

Approved by the Alaska Bar Association Ethics Committee on September 5, 1996.

Adopted by the Board of Governors on October 18, 1996.

1. This opinion deals only with the question whether the situation raised inherently creates a conflict. Specific facts might change the situation. For example: a different issue might exist if the attorney acting as arbitrator was sitting on a panel which included persons who are also arbitrators in cases in which the attorney acts as an advocate. Under those circumstances, the possibility of improper conflict is more direct. An arbitrator who does work for an insurance company may face a direct financial conflict because of a perception that the ability to obtain future insurance related work may depend on whether the arbitrator rules favorably to the insurance company's interest in a particular arbitration proceeding. See Donegal Ins. Co. v. Longo, 610 A.2d 466,468 (Pa. Super. 1992) (Undisclosed representation of insurance company by attorney/arbitrator of insurance company made arbitration proceeding basically unfair and biased.)

2. The Committee takes no stand as to whether an arbitrator under the circumstances outlined in this opinion qualifies as an "impartial" or "neutral" arbitrator under the provisions of an insurance contract. That issue raises matters of contract interpretation and law which are appropriately addressed elsewhere.

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

The Advisory Committees on Bankruptcy, Criminal and Magistrate Rules have proposed amendments to the local Bankruptcy Rules, Criminal Rules and Magistrate Rules.

Written comments on the proposed rules are due no later than January 31, 1997

Address all communications on rules to:
Clerk. U.S. District Court
Attention: Local Rules Oversight Communications
Federal Building-U.S Courthourse, Room 229
222 West Seventh Avenue, Box 4
Anchorage, Alaska 99513-7564

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

Rumpole & the equal opportunity harasser (or Judge Bork's revenge)

By Douglas S. Miller *

Scene I

The year is 1985. The place is the District of Columbia. In the course of deciding some subsidiary issues, a panel of the United States Court of Appeals has reaffirmed its earlier holding that "environmental" sexual harassment can constitute employment discrimination within the meaning of Title VII.[1] There is a suggestion of rehearing en banc.[2] The suggestion is denied, but three judges dissent: Judges Kenneth Starr, Antonin Scalia, and Robert Bork.[3] Writing for all three judges, Judge Bork suggests, *inter alia*, that the statute cannot be stretched to mean what the panel has said it means.[4] Among the reasons offered by Judge Bork is the argument that by its literal terms, the statute would not apply to one who harasses members of both sexes equally, and Congress could not have intended such a bizarre result.[5] Two previous decisions of the same circuit had already noted that, in Judge Bork's phrase, "only the differentiating libido runs afoul of Title VII."[6]

The United States Supreme Court ultimately agrees with the original panel that "environmental" or "hostile environment" sexual harassment can equal discrimination under the statute.[7] However, the Court does not address the "differentiating libido" point made in Judge Bork's dissenting opinion.[8]

Scene II

Ten years later. London. Our hero finds himself reporting the strange events surrounding a recent case ....

I don't often find much from our American cousins that I feel is worth borrowing, but I was reminded recently that few trees are so barren that they do not yield fruit occasionally. It was particularly odd that I ended up seeking wisdom across the Atlantic in a case involving one of the Timsons, a family of quintessentially English villains that has long provided not only the chops and cheese, but also the Chateau Thames Embankment (or in Hilda's case, the gin and tonic) of our life in Froxbury Mansions, Gloucester Road. It was in those same Froxbury Mansions that on a recent morning I arose from my toast with more than my usual glee. "Off to fight the good fight, Hilda!"

"I can't imagine what you mean, Rumpole, but don't forget to ask your Head of Chambers if he's decided about the date for this year's Chambers Dinner. Daddy never had it earlier than May."

Even the highest of spirits must yield in the face of such stonefaced neglect. "I'm certain that Soapy Sam Ballard, Q.C., has them all planned, right through 'til his retirement or Doomsday, whichever might come first. Anyway, the good fight for this week will be on behalf of the Clan Timson. My clerk tells me there's a Timson brief waiting on my desk and Mr. Bernard hovering nearby." I bid farewell to She Who Must Be Obeyed and strode off down the Gloucester Road.

"All right, Bernard, what's it to be, then? Housebreaking?" I said to the solicitor waiting at the door to my room in chambers.

"No, Mr. Rumpole. You see—"

"Straight out thieving? Receiving nicked goods for a bit of the ready? Don't tell me this is a grievous bodily harm. That's just a bit beyond any Timson, I would have thought."

"Well, Mr. Rumpole, this is what you might call a departure for the Timsons. You'll be acting for Mr. Gerald Timson. He's being sued for harassment under the new Sex Discrimination Act."

"Good God! You don't mean that bit of flummery they ran through Parliament the other year after Squiggly Poppingale admitted to keeping a fold-out sofabed in the back room of his office in the City for the sole purpose of entertaining his secretaries?"

"Perhaps if Lord Poppingale had got rid of the sofabed, he would have been able to keep a secretary longer than two months, and we wouldn't have this statute, Mr. Rumpole, but as it is Mr. Timson is facing very serious damages, and the evidence seems quite strong, I'm afraid."

> *. . . "He's being sued for harassment under the new Sex Discrimination Act."*

"I'll be the judge of that, Bernard! Or rather, the jury will. There is a Golden Thread that runs through the whole of—"

"Wrong court, Mr. Rumpole. This is the civil side. No presumption of innocence here, and no jury on this case, come to that. But do the best you can. I'll let myself out. Meet you here this afternoon with Gerry Timson."

And so it was that I found myself seeking the advice of my former pupil, Mizz Lit Probert, who was taking on the aspect of a courtroom firebrand of late, thanks to my guidance, and despite a rather shaky start.

"Look, Lit, can it be that the law objects to this sort of thing so strenuously? So far as I can tell, Gerry Timson is an otherwise straight arrow, and for that reason the black sheep of the Timson family—never been convicted, never even been arrested. Claims he wouldn't know Old Bill from Old Granddad. The other Timsons apparently keep their distance. So what if he made a bit free with his counter help at the off-license? I always thought that was one of the emoluments that flow from owning one's own business."

"Rumpole, you are positively neanderthal. Have you really been able to ignore this area of modern life, when it is the subject of every other Guardian editorial, and every third BBC special program? Anyway, I'd better warn you not to say any more, as I'm acting for the plaintiff, Miss Berola Mughtai. Though I must say you seem to be near the mark about your client, Rumpole—he is Timsona non grata at present. Of course, 'straight arrow' may be putting it a bit too—"

I walked off before she could finish. To be so ill-used by my own former pupil! It was almost beyond endurance. The next two weeks were a dizzying turmoil of lawbooks, strong coffee, and a strict regimen of no plonk until ten o'clock, no matter what. But it paid off as I rose to my hind legs to address the Honorable Phillida Erskine-Brown, sitting by special assignment to the Industrial Tribunal. Phillida is the former Portia of our Chambers, and wife of the Senior Sycophant of Number 3 Equity Court, Claude Erskine-Brown. I well knew that she would take a dim view of the matter, if proven, yet I held my ground.

"We acknowledge that the charges leveled against my client are serious, Your Honor. My learned opponent and her instructing solicitor appear to have left no stone unturned in their efforts to build a case against my client, and

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Rumpole & the equal opportunity harasser (or Judge Bork's revenge)

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as Miss Probert has been so quick to point out, the evidence now appears to include not only the statements by Mr. Timson's most recent assistant, the plaintiff Miss Mughtai, but also statements from the previous holder of that position, Miss Lenille Sandringham, to the effect that this is not a new game for Mr. Timson."

"If your client thinks this was a game, Mr. Rumpole, he'll soon find that the stakes were more than he bargained for." The Honorable Phillida Erskine-Brown leaned forward and peered down ominously at poor Gerry Timson, who was no doubt wishing he had gone into housebreaking, like his brothers and cousins, rather than saving up his money for an offlicense. Bernard appeared to be reconsidering his own choice of careers as well.

"May it please the court, I misspoke myself if I used that word. I was merely attempting to summarize the allegations brought forward by the plaintiff in this case. Miss Sandringham, like her successor, claims to have resigned her high office because of improper conduct by her employer, my client. In our pleadings, we have denied any improper conduct, and if the need arises, we intend to make the plaintiff prove her case, which she cannot do. But today we go further, and ask that the entire case be dismissed, on grounds that even if every single statement made by these witnesses were true, it would signify nothing in the eyes of the law."

The response from our fair Portia showed that she was intrigued, but I knew that one slip-up and she'd soon

> . . . *"Even so restricted a practice as your own, Mr. Rumpole, must have gained you at least a passing acquaintance with the cases interpreting the Sex Discrimination Act,"*

be giving damages that would likely put Gerry Timson in the poorhouse, off-license or no. "Even so restricted a practice as your own, Mr. Rumpole, must have gained you at least a passing acquaintance with the cases interpreting the Sex Discrimination Act, such as *Porcelli* against Strathclyde Regional Council. The kind of conduct described by these witnesses in their sworn statements falls squarely within the tests set out in *Porcelli* and its progeny, particularly the disgusting bit of business with the feather duster behind the Woodpecker Cider display. Even though the statute is couched in terms of 'discrimination,' the cases make it clear that repeated unwanted sexual advances and touching constitute discrimination on the basis of sex."

"I am indeed gratified that the court has seen fit to take notice of the bounds of my humble practice, and that the court is so well-versed in the intricacies of the Act. I have an argument to make in that connexion, but as a point of clarification, may I inquire of the court whether a challenge to the admissibility of the testimony of Miss Sandringham, the previous employee, might be well taken?"

"It would not, as you well know, Mr. Rumpole." Phillida looked as though she might be beginning to lose patience, despite our long acquaintance. Miss Lit smiled, magnanimous now in anticipation of The Long Awaited Humbling of Horace Rumpole.

"'Then I offer for the court's consideration the sworn statement of Mr. Asplendi Pinhar, a young man who preceded Miss Sandringham in the position of shop assistant. Mr. Pinhar states unequivocally that during his tenure at the off-license, my client got up to exactly the same sort of overzealous hilarity described so colorfully by the other two witnesses in this case."

"And this evidence is supposed to help your client, Mr. Rumpole? It seems to me that this new statement can only hurt in a discrimination action like the one at bar."

"I am grateful to the court for keeping the language of the Act at the forefront of our consideration today. You see, 'discrimination' is one thing of which Gerry Timson cannot be accused. There is irrefutable evidence that my client is bisexual. He did not discriminate in the hiring of his assistants, and he certainly did not discriminate in his affections toward them: he appears to have been attracted to them all. One might say that he loved not wisely, but too widely. As this court well knows, this Act was modeled on an American statute of some antiquity, at least by their standards, and we can safely turn to the courts who have had greater experience in this sensitive area. I refer the court to the opinion by the eminent jurist J. Skelly Wright in case of Bundy against Jackson, and to the slightly earlier case of Barnes against Costle in the same court, in which a judge stuck with the unlikely moniker of Spottswood Robinson, III, wrote that "In the case of a bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and females employees alike."[9]

Our triumph was complete. After receiving the congratulations of Mr. Bernard and Gerry Timson (and one or two odd Timsons who were apparently willing to forgive and forget, now that Gerry had at least been haled into court, however spurious the charge), I repaired to Pommeroy's Wine Bar for a cheroot and a well-earned glass of Chateau Fleet Street, though it was nowhere near ten o'clock.

"Rumpole, you're insufferable!" The plaintive wail of my defeated opponent reached me from across the crowded saloon. As she drew near, Mizz Lit expanded on her theme. "And to think of the hours I spent making certain my witnesses could withstand your insidious cross-examination, only to have you snatch the whole thing away from me before the first witness was sworn, on a point of pure law, for God's sake."

Her eyes narrowed. "And that's another thing, Rumpole. Where did you get your hands on some loopy American case law? You didn't know enough about the Sex Discrimination Act to fill Sam Ballard's egg cup when I talked to you a fortnight ago. Don't tell me you've learned how to do legal research since I flew out from beneath your wing! You'd be hard pressed to *find* a law library, let alone use one in any serious sort of way."

The sound that punctuated this peroration can only be described as a snort, and I did not take it particularly well. "I can hold my own with any of those bespectacled denizens of the dank cavern we know as the Bar Library, if the need arises, but it doesn't, you see. If you must know, I bumped into this bearded American chap down the Old Bailey one morning last week. Goodwill mission or similar fiddle. He remarked that he used to be some sort of judge or other, and as we listened to old Mr. Justice Bullingham make his hideously ponderous way through a simple fraud case, I happened to mention this load of codswallop launched at poor Timson. Fellow put me onto these cases straight away. I tipped my hat to him, then toddled away to find the damned things. The Bar Library was no help at all. Wheezing septuagenarian in there kept asking if Uncle Tom were still around, then suggesting that I should be looking for Phipson on Evidence instead, all the time winking like some Leicester square pence. I told the geezer that I bloody well wouldn't be bothering him for Phipson, as I prefer

> . . . *"And that's another thing, Rumpole. Where did you get your hands on some loopy American case law?"*

a treatise from the current century, and have Murphy open on my desk half the time. Anyway, I finally got the opinions sent across on some sort of Electronic Trans-Atlantic what-you-may-call-it probably never intended to benefit Old Bailey hacks. We already had statements from as many of Gerry's previous assistants as we could find, but I hadn't really noticed that some of them were men. The penny dropped when this Yank described the cases and I suddenly remembered your remark about Gerry not being exactly a 'straight arrow.' We had to lean on Gerry a bit to allow us to try this defense, but he finally agreed, and the rest, as they say, is history."

"Yes, but Rumpole, what day was this conversation in the Old Bailey, and did you catch the fellow's name?"

"Bark or Birk or some such noise. Last Tuesday, I believe it was. Does it matter, old darling? I would have expected a bit more grace in defeat on your part. Could have picked it up from Claude, if not from me; he's certainly had enough of them. Defeats, I mean."

"Rumpole, you dolt. That was Mr. Robert Bork, who was very nearly on the United States Supreme Court, and he would have been, too, but for a few home truths offered up by the liberals in the Senate. He was here last week to address the Tory conference on the subject of 'How To Avoid an Over-Regulated Society,' talking about the American 'litigation explosion,' as he calls it. He took a tour of Chambers Tuesday afternoon while you were out, and when he came to your room Erskine-Browne apologized for your absence, and remarked that you were possibly detained on the Timson sexual harassment case. I said I thought it unlikely, as I was appearing opposite you in that matter, and it wasn't on the docket yet. I stupidly added that in any event you weren't likely to be spending much time on it, as you hadn't much of a case. This fellow Bork looked at me and laughed like he'd gone 'round the bend, but wouldn't explain the joke to anyone."[10]

Ah, sweet serendip, my only muse.

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1. Vinson v. Taylor, 753 F.2d 141, 145 (D.C. Cir. 1985).
2. Vinson v. Taylor, 760 F.2d 1330 @.C. Cir. 1985).
3. *Id.*
4. *Id.* at 1333 n.7.
5. *Id.*
6. *Id.* (citing Barnes v. Costle, 561 F.2d 983. 991 n.55 (D.C. Cir. 1977) and Bundy v. Jackson, 641 F.2d 934, 942 n.7 @.C. Cir. 1981)).
7. Meriter Savings Bank FSB v. Vinson, 477 U.S. 57 (1986).
8. *Vinson*, 760 F.2d at 1333 n.7.
9. Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).
10. *See* Vinson v. Taylor, 760 F.2d 1330 (D.C. Cir. 1985) (Bork, J., joined by Scalia, J., and Starr, J., dissenting from denial of suggestion for rehearing *en bane*) ("[T]his court holds that only the differentiating libido runs afoul of Title VII, and bisexual harassment, however blatant and however offensive and disturbing, is legally permissible."), *aff'd*, Meriter Savings Bank FSB v. Vinson, 477 U.S. 57 (1986). *See also* Saulpaugh v. Monroe Community Hosp., 4 F.3d 134, 135 (2d Cir. 1993) ("Perhaps some... employers sexually harass both men and women, but until an employer has the audacity to advance such a defense, sexual harassment of women constitutes disparate treatment because of gender, and is actionable."); Ruth Colker, A *Bisexual Jurisprudence*, 3 Law & Sexuality 127. 136 (1993) (Because "courts don't believe that bisexuals exist," the "bisexual harasser exception" doctrine "is actually a joke"; moreover, "I cannot imagine a [defense] lawyer advising her client to use it" because the bisexual harasser could, under current law, be fired in turn on grounds of the admitted bisexuality, without any Title VII recourse). *But see* Ryczek v. Guest Services, Inc., 877 F. Supp. 754, 762 (D. D.C. 1995). In *Ryczek*. for procedural reasons, the court did not rule on the defendant's argument that she was an "exempt" harasser because she is bisexual. *Id*. However, the court noted that her argument "presents a rather interesting Title VII problem" and that the prospect of developing standards for proof of bisexuality was "a rather unpleasant one." Id. The court concluded that "[g]iven that the Supreme Court has clearly rejected Judge Bork's (main] argument..., the courts must now struggle with the conflict between the language of the statute... and the realities of modern sexual politics." *Id*.

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Hi-Tech in the Law Office

How to discover computerized records

By Joseph L. Kashi
Part 2

In the last issue of the *Bar Rag*, the author discussed general pointers on electronic media discovery.

Detecting altered records

Where appropriate, our expert can instruct the respondent's own operators to perform searches or analyses of data using their regular application programs, to use file undeletion programs, to restore and examine earlier versions of data files, and to run text search utilities that seek all instances of a specified text string anywhere in the respondent's entire computer system. Document comparison programs (redlining programs) can be used to check the evolution of earlier versions found on restored backup tapes.

It's important to check carefully for apparently deleted, altered or revised data files. Crucial changes, including attempts to hide tampering, may be evident upon careful technical inspection of files by an expert even if such changes are not superficially apparent to more casual users. Thus, it's important that the person you choose as an expert knows what you are looking for and how to detect tampering or hidden alterations.

One can recollect litigation circumstances where important data has been altered or deleted. Oliver North's mistaken belief that he had deleted all of the apparently damaging electronic mail messages from the White House PROFS mainframe Email system comes most readily to mind. Unknown to North, the White House retained copies of the messages on the backup tapes ultimately obtained by the Special Prosecutor.

Your expert should look for a number of suspicious indicators, including any files which have been deleted but not yet overwritten by DOS. The undelete program found in DOS 6.22 or Norton Utilities will sometimes suffice for this task. A list of all deleted, recoverable files should be made before recovery starts. Then, undelete and examine them. Immediately move any undeleted files to a temporary directory and be sure that you don't accidently overwrite an active file with an undeleted one. In many cases, complete recovery will not be possible since some parts of the file will have been overwritten. You can, however, often restore at least part of the file using a manual process. Who knows, the data you want may be in that partially recoverable file. Unless you are extremely familiar with it, never use the DOS Recover command on an original hard disk or even your original authenticated copy. Recover can reconstruct partially destroyed files, but more often fatally scrambles the entire hard disk!

Novell Netware contains a salvage command that will uncover an amazing number of apparently deleted versions of the same document. Netware does not lose earlier versions until the hard disk totally runs out of space, only then reclaiming apparently deleted files. If a Netware file volume contains few or no salvagable files, then the purge command has probably been run deliberately and, if done recently enough, might be the grounds for alleging spoliation.

Next, check for different versions of the same documents by checking your opponent's different backup sets for different versions of the same records. Often, work in progress will be captured at various phases by routine backup procedures. Versions can be ascertained by their file date. This DOS-established date shows the last time that the file was altered, an event that especially interesting if the dates don't match the paper trail. Be aware, however, that any moderately computer literate person can go into the system, reset the date on the computer to some earlier, appropriate date, pull up the data file, make a minor change, such as inserting a space, and then deleting it, and then re-saving it with the earlier tampered date. This does not, however, alter any internal file creation and edit information contained in the file header. Unfortunately, such information is not accessible to a casual user and you will need a real expert to make these investigations and determinations. Otherwise, you may need to deal with tampering issues through traditional discovery and depositions. If file dates have not been tampered, however, you can readily construct a quick sequence of modifications to important documents by date.

Some other technical indicators of tampering might be found in backup program logs. These often show files that were on system at one time but are now deleted.

Thus, your EMD battle plan must take into account the possibility of alteration or deletion by your opponent, the need to detect such changes, the opportunity to trace earlier versions of a record, and avoiding any charges that you yourself may have destroyed, damaged or tampered with the opponent's primary data.

Some practical suggestions for discovering computerized records

1. Determine each and every computer device where the client may have stored either records or back-up data.

2. Determine which desktop and network operating systems are used. These include DOS, Windows, Novell or comparable networks, Unix, OS/2, or Macintosh operating systems. It's important to determine which versions are used. For example, Windows 3.1, Windows 95 and Windows NT are very different systems indeed.

3. Determine the exact physical location of each and every computer where records may have been stored at any time, including both network file servers, mainframes, minicomputers and local PC workstations. Often, a person will copy old but potentially important files to a local hard disk and then erase them from the network file server. Know each of the specific file names admitted to contain relevant data.

4. Be sure that you have legitimate copies of each of the opponent's application programs so that you can actually view and use the discovered records after you bring computer format copies back to your office. This is particularly important where the opponent uses a unique program developed in-house or a special proprietary program. Make sure that they give you complete working copies and copies of the technical manuals.

5. You'll also want copies of good text search and document comparison programs for the particular operating system so that you can find any instances of a particular text string, such as the client's name, and to compare each document from version to version to track changes.

6. You'll need to know how the particular computer application program works. For example, some widely used accounting systems close out each month by flushing the detailed information, retaining only summary data. Such programs often compress the files even more at the end of the year. You'll obviously have more difficulty using clumsy programs like this but they are common. As a result, you'll need to know ahead of time what application programs are to be searched and any quirks about them. Consult someone who really knows the particular program. If you're not able to readily find such a person, then contact the publisher and ask for the names of certified consultants in your area.

7. Establish which devices and programs your opponent uses to back up the different parts of their computer systems and the type of media they use for back-up. It's obviously easier when you can use already installed backup hardware rather than temporarily installing your own. Some backup and data storage devices are uncommon, however. For example, larger mainframe and minicomputers often use nine track reel-to-reel tape, an old, but reliable, high capacity medium.

8. Smaller computers and networks will use either four or eight millimeter digital audio tape (DAT), Travan tapes, DC600 tapes, or common DC2000 QIC-40 or QIC-80 tapes. You must bring an ample supply of the appropriate backup media with you to the premises and have the hardware to use your backup media at your office. Original backup tapes and reel to reel tapes will probably be duplicated off-premises by a specialized vendor. Floppy disk backup sets can usually duplicated on premises using the DOS Diskcopy command, with the duplicate disks later verified for accuracy using the DOS Diskcomp command. Although a bit crude and useful only for small data files, small data files can be backed up with their floppy disk drive. Be sure you know the size and capacity of the floppy disk drives and bring enough virus-tested diskettes with you to copy all pertinent data files.

9. Document imaging programs are used increasingly often for general document retention and management. Such programs typically use many gigabytes of data and are often stored on optical hard disks or optical jukebox drives. Your first problem will be to search through all of those records, copying only what you need and copying as well the indexing database that makes searching such records feasible in the first place. Some imaging programs allow you to extract and use only the pertinent records; these are obviously more efficient programs and the preferred approach. You may need to use the respondent's high capacity backup device or an optical hard disk using removable disks to backup the huge amounts of data on an actively used optical imaging system.

10. Some companies use optical drives as their backup media, either CD-ROM, WORM (write once read many times) archival optical disks or re-writable optical media. WORM and rewritable optical drives are less standardized than other media. Unlike an ordinary fixed hard disk, rewritable optical drives use high capacity removable media, allowing one optical drive to store many times its basic capacity. Be sure that you know the specific brand and model optical drive and the specific optical disks that it requires if you intend to use the respondent's own optical drive to make the backup copies. Remember, though, that if you use the respondent's optical drive, you'll need an identical drive at your own office and rewritable optical hard disks are quite expensive. They also tend to break down. I like HP's optical drives myself. They seem to be among the more reliable ones and the single stand-alone drives come in 1.3 and 2.6 gigabyte capacities.

11. If your respondent uses a CD-ROM maker to archive their data, then find out which CD-ROM maker they use and bring enough unused blank CD-R (CD-Recordable) disks to copy existing and archival data. Let them know ahead of time that you intend to copy their archival CD or optical disks.

12. Tape drives often use either their own proprietary program or a general third party program. Because backup tape programs usually write the data in a proprietary format, you'll need the same tape drive and tape drive program back at your office if you use the respondent's own tape drive to make your discovery copies.

13. I very much prefer to bring my own portable high capacity tape drive that attaches to the desktop system's parallel printer port because you can avoid opening the computer and thus run little or no risk of hardware or data damage, of inadvertent introduction of viruses to the respondent's computer system or of hardware incompatibility. Just attach the portable tape drive to a computer back at the office to search the files at a more thorough rate. The Colorado Memory Systems parallel port tape drives in external case will nicely fill this need for under $500.00. Bring enough tapes. You can then move from computer to computer, backing up and verifying as you go.

14. There is a very real possibility that the respondent's computer system may have virus infections or "logic bombs" that may damage your own computer system later. Therefore, it makes excellent sense to restore the respondent's discovered data only to a computer that has up to date virus protection, is NOT connected to any other computer or computer network, and that has no other vital information on it. Just in case.

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HI-TECH IN THE LAW OFFICE

How to discover computerized records

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15. Establish the regular backup schedule used for each targeted hard disk or network file server. The schedule may be entirely random, done whenever the mood strikes someone, or backups may follow a set schedule. Larger companies will ordinarily have a strict schedule rotating several tapes, so that several older backups are always available in case data or programs become corrupted. Periodic archival tapes or CD-ROM disks are made by some larger companies. Make sure that you get copies of all existing backup materials and a copy of the backup rotation schedule so that you can establish if anything is missing. Remember, Oliver North got caught because he forgot to erase the backup tapes.

16. Use write-protect tabs on each backup disk or tape so that your data cannot be inadvertently erased or damaged. Make sure that you add the write protect file attribute (which makes the files read-only) to any unique data in your opponent's possession before anyone begins to copy or view the data. Your opponent's computer expert should do this and later change it back to read-write before you have left the premises.

Take steps to ensure authentication of document

17. To ensure that your opponent cannot claim that you inadvertently introduced a computer virus, you should use new, unformatted tapes and floppy disks for your data backup sessions and use only those backup programs already on your opponent's computer systems. Tape drives, particularly parallel port versions, are safer; they are much less likely to introduce any sort of virus or damage data. In that case, the only plausible virus source would be any tape drive program that you install on the respondent's computer. If you must introduce your own backup program, first scan it for viruses before you leave your office with the newest version of a recognized anti-virus program such as those published by McAfee, Central Point, or Norton.

18. Be sure that your computer expert has complete supervisor rights to view and copy files in all parts of the opponent's computer system. For example, if your opponent logs your expert in with less that full supervisory rights to a Novell network, your client may not be able to access any directories or files where he or she has not been previously granted access and read rights. In that case, the directory will appear to contain no files at all even if the smoking gun is actually there. Have them introduce a temporary system wide password providing access to all applicable directories and then change it again after your expert leaves the premises to avoid any later claims. This procedure should be in your written EMD ground rules. Have your expert verify that he or she has full rights to all directories. When using Novell Netware, he or she can simply type "whoami" and determine if they are logged in as the supervisor.

19. Many backup programs supporting a wide variety of disk and tape drives are available on the open market, although certain tape drives require the manufacturer's own program. If the backup program used by your opponent is not readily obtainable, then you may have a problem examining their archival tapes containing data already removed from active hard disk storage. You may need a copy of the original backup program in order to examine any original or duplicated backup tapes or restore them if the storage is in a proprietary format. Unfortunately, if you cannot reasonably purchase a legitimate copy of a proprietary program, then you must ask the court to order your opponent to provide you with a legitimate program copy since the lack of the restore program obvious renders the electronic discovery meaningless. Such an order might fall under Rule 34's data translation device provision. Secondly, you might be able to write to the manufacturer and obtain a copy or permission to make a copy for a limite
d purpose.

20. When examining older data stored only on archival tapes, you'll need to find a specialized vendor that will take your opponent's original tape backups and copy them bit by bit. Don't try to do this yourself. Then, you must restore the tapes (perhaps, if necessary, by purchasing a compatible tape drive) to a very large, fast hard disk in your office and examine the data on a more thorough basis. For lengthy searches, consider using a indexed search program like Isys or ZyIndex that shows every instance of the search term in proper context. You can also use the QuickFinder feature of WordPerfect for Windows.

21. Do not be misled into thinking that only the current copy of the record is pertinent. Often, the data will have been changed, either inadvertently or deliberately. Make sure that your opponent lists each and every copy of every pertinent back-up, identified by date of back-up and machine. Your opponent must understand that you will claim spoliation of evidence if they reuse any backup tapes between the request for production and the date that EMD is actually effected. Usually, most individuals have a limited number of back-up tapes and rotate them on a set schedule. Make sure that this does not happen in your case.

22. When you first enter the premises, have your expert firstly make a complete and verified copy of each actively used hard disk and network storage suspected of containing pertinent information. Make sure that the backup is totally verified. Verification of your own backup is crucial so that files can be authenticated, compared or restored in the event that there is an argument as to whether or not something was changed or inadvertently damaged. With a verified backup, you can always recreate any lost or damaged material. If you do such a restoration, make sure that you verify that the restoration is identical to the backup tape.

22. Using both verified backup and verified restoration, there is little chance that you will not be able to authenticate your copy of the data for evidentiary purposes. Seal the originals of each backup tape or diskette set, have your expert record an appropriate chain of custody, and ensure that your expert can then make an exact, verified copy of the active storage backup originals which he or she has made. As noted above, tapes or optical media storing older documents should probably be duplicated by a specialized vendor.

23. All record examinations should be performed using a second verified copy made from the verified original. Compare any interesting information again to your verified original duplicate for authentication.

24. If you wish to be doubly safe about authentication, make a verified copy of the original backup made and verified on the opponent's premises, write-protect the original backup and then use the verified second-generation copies for investigative purposes, authenticating the final reconstructed data back to the first-generation verified backup. As long as verification is thorough, you can feel comfortable that the magnetic data retains its authenticity despite multiple generations. This is true whether you are using floppy disks, optical media, or tape drives. The exact method of making an exact, verified back-up will vary from system to system.

25. Older image format backup tapes present a different problem. Most small tape drives now back up data file by file regardless of where each piece of the file is located on the hard disk. An image backup, in contrast, writes an exact image of the source hard disk, including any areas skipped because of physical imperfections. The hard disk used for restoring an image backup must contain no imperfections visible to DOS. Before restoring an image backup, check your own hard disk for bad sectors with the DOS "chkdsk" command and then use, preferably, a media surface testing program such the DOS "scandisk" command or the more comprehensive Norton Utilities.

26. Image format backups are often very useful because they may allow you to find and reconstruct apparently deleted files that are no longer shown in a file directory and thus not copies in a file by file backup. It's hard, though, to find an off the shelf image backup program anymore.

27. Backup tapes are often password protected or otherwise encrypted. Be sure that your opponent supplies you with all passwords and decryptions necessary to review the back-up tapes, local hard disks, and other data files. Many programs allow the use of a password to ensure data security. Unless you know the password or decryption key, you will not be able to use the results of your EMD search.

Conclusion

Discovery of electronic records is not qualitatively different from traditional discovery concepts. Find a good expert, establish ground rules ahead of time, take precautions that you cannot be accused of tampering or destroying evidence, and make verified copies of everything that could possible contain data pertaining to your case. Take steps to ensure authentication of documents. Think of a portable tape drive as a smaller, lighter photocopier for making your own copies of the records to be discovered. Then, make sure that you have the programs, passwords, and computer facilities needed to read and thoroughly examine verified copies of the initial authenticated electronic media discovery. Once you've made your verified copies, traditional discovery and trial preparation again reigns.

A note from the Anchorage Clerk of Court

By Charlene Dolphin

Sometimes progress seems like two steps forward and one step back, but I think we are getting closer to some of our goals!

RECORDS. As many of you probably noticed, we have had considerable trouble with records requests and a backlog in matching papers to files since moving. Many factors have contributed to the problems (including staffing and the physical layout of the new building). We have changed layout and procedures for the customer service area several times, and that area currently is working fairly well. You will, no doubt, see other changes in the near future as we continue to identify ways to streamline procedures and make the area work better for staff and our customers.

Another on going problem is staff turn over. Working the customer service counter is probably the most stressful job in the court. It never ceases to amaze me how our clerks can bounce back day after day to deal with not only the incredible volume of traffic but also with the many challenging and difficult problems they face from customers.

In early August, matching in coming paperwork to files was seriously back- ogged and not being done in a timely manner. Too often the papers were forwarded from one office to another trying to "catch up" with the file as it travelled through the court. So we implemented emergency procedures to work the backlog. They turned out so successful that staff unanimously agreed to make them permanent. We are now matching most papers to the files no later than the day after we receive them in civil and criminal cases.

CIVIL. As you may recall from my previous article, civil cases are now assigned to civil case managers based on the last digit of the case number (e.g., case manager #1 is assigned to all cases with case numbers ending in 1 and 2, etc.) Motions are now being worked by the civil case managers and legal technicians within 3-5 days after filing. We have also transferred the entry of defaults to the civil case managers, and we are usually processing those within that same timeframe. We continue to shoot for our 3-day goal, but it can take a little longer depending on staffing, volume of paperwork filed and availability of the file. We have also implemented new procedures for expedited motions, with the goal of having those routed to the assigned judge within a day of filing.

This is not to say that we don't have occasional glitches. If you have concerns about the status of a civil motion, you should now contact one of the civil case managers:

For cases ending in 1 or 2, call Susan at 264-0484

For cases ending in 3 or 4, call Jim at 264-0668

For cases ending in 5 or 6, call Cortney at 264-0485

For cases ending in 7 or 8, call Debby at 264-0482

For cases ending in 9 or 0, call Rita at 264-0483

The case manager will check the motions tracking program and advise you as to its status. However, once a file has been routed to chambers, the case managers really do not have access to any information on what may be causing a delay. If there is an emergency or if there has been a substantial delay, you can ask to speak to the judge's secretary.

TCA. Lots of changes are also happening in Trial Court Accounting (TCA). TCA has taken on the responsibility of issuing writs of execution. TCA also established a new policy regarding the return of bonds in civil cases. These are now worked on a priority basis, and TCA usually cuts a check within a day of receiving the file or order from chambers. TCA has also been reorganized so each accounting clerk works cases based on the last digit of the case number.

The division has also been working very hard at identifying ways to streamline the processing of PFD monies, and they are doing a terrific job! Last year, TCA processed 2,850 checks from the PFD totalling nearly $2 million. This is in addition to their normal activities involving a monthly average of $764,000 in deposits and in disbursements. (And remember, we still do not have a computerized accounting system.) This year, our goal is to have all PFD monies released by February 1. Keep your fingers crossed!

TRAFFIC. The Traffic Division deserves a special round of applause and thanks. With two new groups of police academy graduates hitting the Anchorage streets this year, we have seen an increase of about 8,000 citations more this year than last — and that doesn't include photo radar citation!

MISCELLANEOUS. We are working on many other projects, including streamlining other procedures, computerizing more of our functions, improving communication between staff, and developing more training, just to name a few. The number of closed cases reactivated because of child support issues continues to increase. Hundreds of cases are reactivated each week, and with the new law regarding license revocations for obligors in arrearages going into effect in December, we are expecting an even greater increase in activity. Presiding Judge ? Andrews is committed to and has been helping us to find ways to deal more efficiently with these reactivated cases.

FACILITIES: Remodeling of the Boney Courthouse continues. The Traffic Division is now located in its new offices on the main floor of the Boney where the Clerk's Office use to be. The Probate Office is located on the second floor of the Boney, and the Vital Statistics Office is in the basement of the Boney. All V.S. functions, except the issuance of marriage licenseS, have been officially transferred to the Dept. of Health and Social Services. The court continues to issue marriage licenses at the Customer Service Division of the Nesbett. Though the Boney lobby is still an eyesore, we have been promised that we will soon see an improvement with new carpeting. Painting and other upgrades to the Boney are planned for the next year or so, depending on funding. Demolition of the old District Court Building facing Fourth Avenue is scheduled for next spring, and a beautiful plaza is planned for that site.

SERVICE: Finally, I want to again assure you that we are committed to improving our service. I believe our staff has made some remarkable progress in the last few months, but as you can imagine, some problems take a bit of time and we are not always successful in our first attempt. We are also always struggling to provide the necessary training to our staff. I tell you this not as an excuse but to ask for your patience and assistance.

First, if any court employee gives you less than satisfactory assistance, we want to know. Please ask for the employee's name and the division/office where the employee works. Then, let the supervisor or myself know. We will provide the additional training to the employee so that he/she can provide better service next time. Also, let us know if you or your staff identify any procedural problems or if the way we do things seem cumbersome or bureaucratic. I promise we will look into it.

Estate Planning Corner

$1,000,000 GST exemption

Every individual has a $1,000,000 GST exemption, which shelters up to $1,000,000 in transfers from the generation skipping transfer tax (IRC § 2631 and Treas, Reg. § 26.2663-2(a)). In contrast to the $600,000 unified credit equivalent, which applies automatically against taxable gifts and against estate taxes at death, the GST exemption generally applies only when allocated by the transferor or his personal representative (IRC § 2632).

There are two exceptions to the general rule that the GST exemption applies only when allocated by the transferor or his personal representative. First, the GST exemption is deemed allocated to so-called direct skips that an individual makes during his lifetime, unless the individual elects otherwise on a timely-filed gift tax return (Treas. Reg.§ 26.2632-1(b) (1)). As discussed in previous issues of this column, a direct skip is a transfer subject to gift or estate tax by an individual to another considered two or more generations younger (IRC § 2612 (c) (1)).

Steven T. O'Hara

Second, upon an individual's death, the decedent's unused GST exemption is deemed allocated pro rata to direct skips treated as occurring at that time. Any remaining GST exemption is then deemed allocated pro rata to trusts funded by the individual and from which a generation-skipping transfer might occur. The decedent's personal representative may allocate the decedent's GST exemption differently on a timely-filed estate tax return (Treas. Reg. § 26.2632-1(d) (2)).

A limitation on the authority of a transferor to allocate GST exemption is imposed during the so-called estate tax inclusion period ("ETIP"). This is the period during which, should death occur, the transferred property would be includable in the gross estate of either the transferor or his spouse, other than by reason of the three-year rule of Code Section 2035 (Treas. Reg. § 26.2632-1 (c) (2)).

For example, suppose a client creates an irrevocable trust for the benefit of his children and grandchildren and gives the trustee absolute discretion in making distributions. Suppose the client names himself as trustee. Here the value of the trust would be includable in the client's gross estate because of his retained powers over the trust (IRC §§ 2036 (a) (2) and 2038 (a) (1)). Thus the trust is subject to an ETIP, which prevents an effective allocation of the client's GST exemption until the ETIP has terminated by, for example, the client's resignation as trustee (Treas. Reg.§ 26.2632-1 (c) (1)).

As mentioned, an ETIP is also considered to exist where transferred property would be includable in the gross estate of the transferor's spouse. Consider, for example, whether an insurance trust created by a client for the benefit of his spouse and descendants could be subject to an ETIP. Suppose the client does not name himself as trustee. But suppose the trust provides each beneficiary with a so-called Crummey power in order to qualify the client's transfers to the trust for the gift-tax annual exclusion of up to $10,000 per beneficiary. (As discussed in a previous issue of this column, a Crummey power is a right to demand a certain amount for a limited period and is named after the case that affirmed its effectiveness, *Crummey v. Commissioner*, 397 F.2d 82 (9th Cir. 1968).) As long as his spouse's Crummey power is limited to the greater of $5,000 or five percent of trust principal, and as long as his spouse's Crummey power terminates no later than 60 days after the transfer to the trust, new regulations provide that the trust would not be considered subject to inclusion in the gross estate of the client's spouse (Treas. Reg. § 26.2632-1 (c) (2) (ii) (B)).

The GST exemption is another example why all working in the estate planning field need to be familiar with the generation-skipping transfer tax. From the call by the client who is contemplating an outright gift to a question about Crummey powers and other typical estate planning, opportunities to maximize the client's GST exemption should be considered.

Bar People

The Alaska Defense Counsel, a statewide organization of civil tort and insurance defense trial attorneys, has announced the selection of new officers for the 1996-1997 year.

President is **Gary A. Zipkin**, a shareholder in the law firm of Guess & Rudd. He has practiced in Anchorage since 1975.

Vice-president, and president-elect for the 1997-1998 year is **James M. Powell**. He is a member of the law firm of Hughes Thorsness Powell Huddelston & Bauman LLC and has practiced in Anchorage since 1965.

Marc G. Wilhelm was elected Treasurer. He is with the firm of Richmond & Quinn and has practiced for 12 years in Alaska.

The state representative from the Alaska Defense Counsel to the national organization, the Defense Research Institute, Inc., is **John B. Thorsness**, a member of the firm of Hughes Thorsness Powell Huddelston & Bauman LLC. Mr. Thorsness has practiced in Alaska since 1982.

The Alaska Defense Counsel provides educational and resource support to trial attorneys who represent insurance, manufacturing, corporate and professional interests in civil litigation.

Attorneys join Anchorage office

The Law Offices of Keesal, Young & Logan are pleased to announce that attorneys **John A. Treptow** and **Susan Wright Mason** have joined their Anchorage office.

John Treptow

Attorney Treptow, formerly with Atkinson, Conway & Gagnon, has been practicing law in Alaska since 1976 and is also licensed to practice in California. His practice focuses on general litigation, health care, labor law, professional responsibility, insurance law and admiralty law. In addition, he serves as a mediator in similar matters.

Attorney Mason, also formerly with Atkinson, Conway & Gagnon, has been practicing law in Alaska since 1979. Her practice focuses on health care, employment law, administrative proceedings, and appellate work.

"We are thrilled to have John and Sue join us," said Al Peacock, the managing shareholder of the firm's Anchorage office. "They are first-rate attorneys who will complement our maritime practice as well as help us satisfy our non-maritime clients' diverse needs."

Susan Mason

Keesal, Young & Logan has offices in Anchorage,

Seattle, San Francisco and Long Beach, as well as a Ketchikan office during the summer cruise season. The firm lists among its clients [in Alaska] American Express, Crowley Maritime, Providence Health System, Alaska State Hospital & Nursing Home Association, Paine Webber, Prudential Bache, Unocal, U.S. Oil, Princess Cruises and Holland America Line Westours.

The Bar Rag welcomes articles from its readers

STATE COURT NEWS

Statewide administrative offices relocate

On October 26, court administrative offices moved into the renovated *Anchorage Times* building at 820 W. Fourth Avenue, directly across from the new Nesbett Courthouse in Anchorage. The court purchased this building in 1994 to house all statewide administrative functions. For more than two years, the statewide administrative offices have been housed in a small building leased from the Alaska Railroad Corporation and in a variety of other, separate temporary locations.

The renovated facility, now called the "Alaska Judiciary Statewide Administrative Offices," also houses a training center for court conferences and meetings. The statewide Personnel Office will be located directly off Fourth Avenue, on the first floor. Most administrative office phone numbers will not change, but there will be some changes in fax numbers.

Court Rule Changes

The Civil Rules Committee will begin a comprehensive review of the Discovery and Disclosure rules in November. The review is anticipated to take two to three months. Justice Dana Fabe will be sending a letter to all bar members inviting comment.

The Criminal Rules Committee has completed a proposed revision of the rules with regard to felony sentencing. These proposed changes will circulate to bar members in November.

For more information, contact Rules Attorney Christine Johnson at 264-8239.

New Procedures for Temporary Property Custodian

As part of the transition to the new comprehensive State Medical Examiner system, the court has adopted new rules and forms which allow members of the public to serve as temporary custodians for the property of deceased persons. Persons seeking to become custodians either execute a simple affidavit or apply to the district court for an appointment as temporary property custodian. These new procedures and forms will facilitate the protection and preservation of property in the absence of the local coroner system, which was abolished by statutory changes during the 1996 legislative session. For more information, call Janna Stewart at 264-8237.

Anchorage Law Library Remodeling

The Anchorage law library began its first phase of remodeling in October. The reading room on the main floor was recarpeted, computer workstations were moved to the northwest corner of the library and the majority of the books were rearranged.

The relocation of the computer workstations has renewed interest in the library's electronic resources, which include Westlaw access for those with Westlaw accounts, and CD-ROM products available to everyone.

The library subscribes to more than 15 different CD-ROMs. These include West's Alaska CD, which provides statutes, administrative regulations, cases, court rules and attorney general opinions; West's ninth circuit cases; and LegalTract, an index to legal periodicals. A complete listing of the CDs available at the library is provided at the pamphlet stand near the reference desk. There is no charge to use the CD-ROMs.

Indigency Guidelines Committee

Chief Justice Allen Compton has appointed a committee of judges and magistrates to develop standards for judges to apply in determining whether a person is eligible for court-appointed counsel. The supreme court's goal is to insure that all judicial officers make indigency determinations using the same standards, particularly with regard to the types of assets they consider, whether they count income and assets of a spouse, and the income and asset level required for an appointment. The committee is expected to complete its work and submit its recommendations to the supreme court by the end of the year.

Judicial Conferences on New Legislation

On October 10 and 11, judges from throughout Alaska attended a unique short conference focusing on the changes in the law which occurred during the 1996 legislative session. Much of the agenda was devoted to the major changes in the domestic violence laws, both civil and criminal. The conference was funded by federal Violence Against Women Act funds.

Most of the topics addressed by the judges in this conference were repeated for Alaska's magistrates in their biennial week-long statewide magistrates conference, held in Anchorage on October 21-25.

Alaska Court System Home Page

You may visit the Alaska Court System Home Page on the Internet at http://www.alaska.net/-akctlib/homepage.htm. You can also reach the home page via Alaska's Statewide Library Electronic Doorway (SLED).

The following items are currently available on the Alaska Court System Home Page:

- Alaska Supreme Court and Court of Appeals slip opinions
- Alaska Court of Appeals MOJs (last three months) Note: Slip opinions and MOJs are generally available within two hours of their release (MOJs - Wednesday afternoons; slip opinions - Friday afternoons). Opinions are removed from the home page once published in the Pacific Reporter, the official source of Alaskan appellate opinions. MOJs are removed after three months.
- Alaska Rules of Court
- Supreme Court Orders
- Alaska Court Libraries - Hours and Addresses
- Anchorage Law Library - General Information
- Directory of Mediators
- Profile of the Alaska Court System
- Alaska Court System Recruitment Bulletins
- Alaska Court System Press Releases
- Alaska Bar Association Ethics Opinions (1990-present)
- Alaska Bar Association 1996 CLE Calendar, Board of Governors, Bar Exam information, Section Chairs and Section News
- Alaska Statutes, Administrative Code and Administrative Journal
- Alaska Legislative Information
- U.S. Supreme Court and Circuit Courts of Appeal decisions
- U.S. Bills and Congressional Record
- Federal Register

Contact Jessica Van Buren (907) 264-0585 or akctlib@alaska.net for more information.

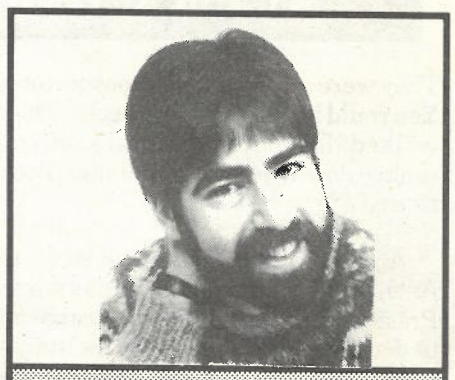
—*Stephanie Cole*

Family Law

Survival skills for family law practitioners

A recent decision of the Alaska Supreme Court may be the first case in the country to address the issue of whether punitive damage awards recovered in tort are divisible as marital property, to be divided in the same manner as the underlying compensatory damages.

In *Lundquist v. Lundquist,* No. S-6761, August 16, 1996, the Court was asked to review a judgment in a divorce proceeding which divided the property of a commercial fisherman who was one of many plaintiffs to recover both compensatory damages and a portion of the $5 billion punitive damages in the *Exxon Valdez* oil spill litigation. Mr. Lundquist argued on appeal that the trial court erred by holding that these funds were marital property.



Steve Pradell

Compensatory Damages

On appeal, the Court separately reviewed the compensatory and punitive damage awards made by the trial court. In dividing personal injury awards, the Court noted that a tort recovery is first classified according to what it is intended to replace.

In *Bandow v. Bandow*, 794 P. 2d 1346 (Alaska 1990), the Court set forth the standard for how compensatory damages are characterized. When an award compensates for losses to the marital estate, it is marital property. To the extent the recovery compensates for losses to a spouse's separate estate, it is his or her separate property. Id. At 1348.

Funds which remain separate property include non-economic loss such as pain and suffering, either before or after the divorce, and post-divorce economic losses. In *Lundquist*, the Court upheld the trial court's characterization of the compensatory damages collected from Exxon as marital property, as the evidence presented indicated that the award replaced lost fishing income during the time when the parties were married.

Punitive Damages

In reaching its holding on the issue of the division of punitive damages, the Court noted that Bandow is not controlling, because punitive damages are not compensation for personal or pecuniary loss, citing *Barber v. National Bank of Alaska*, 815 P. 2d. 857, 864 (Alaska 1991).

Instead, the Court stated that punitive damages are awarded for the impact they have on the wrongdoer, not the wrongfully injured party. Noting an absence of relevant decisions from other jurisdictions, the Court rejected the arguments that punitive damages recovered during the marriage always are separate property, or a bright line rule that they are always marital property. The Court observed that there is a link between payment of compensatory and punitive damages, and determined that if the underlying compensation damages would be marital property, it would be improper to award all of the punitive damages as separate property.

After analyzing case law and commentary, the Court decided to create an equitable solution and adopted a case-by-case analytical approach in classifying whether punitive damages are marital. The Court held that punitive damages can be partially marital and partially separate, or even entirely one or the other, depending on the facts. Relying on the approach set forth in *Bandow*, the Court held that a punitive damage award should be apportioned in the same manner as the underlying compensatory damages award. A Superior Court judge would first determine what proportion of compensatory damages are marital. This would determine the marital proportion of the punitive damages. As a result, the Court upheld the trial court's characterization that the punitive damages awarded to Mr. Lundquist in the *Exxon Valdez* oil spill litigation were marital.

This case may be the first such ruling in the country and it has broad implications for all couples when a tort occurs during a marriage. The case has received national attention, and is discussed in the September 23, 1996 edition of *Lawyer's Weekly USA,* at page 9.

Alaska Supreme Court judicial candidates evaluated

The tabulation of survey scores from members of the Alaska Bar Association evaluating judicial candidate for the supreme court and public defender positions was released Nov. 12, Alaska Judicial Council. The Council is evaluating nine candidates for the supreme court vacancy and four candidates for the public defender position.

The candidates' average scores appear below. Candidates for the supreme court were rated on professional competence, integrity, fairness. judicial temperament, suitability of this candidate's experience for this vacancy, and overall performance. Candidates for public defender were rated on professional competence, integrity, administrative skills, temperament, suitability of experience, and overall performance. The fourth candidate for public defender, John P. Sharp, was not included in the Bar survey results because he was evaluated by too few respondents. Candidate evaluations are summarizers in five ranges: Excellent (4.0 - 5.0), Good (3.5 - 3.9), Acceptable (3.0 - 3.4), Below Acceptable (2.5 - 2.9), and Poor (0 - 2.4). Copies of the surveys are available, upon request, from the Judicial Council.

In nominating candidates to send to the Governor for the final selection, the Judicial Council considers various sources of information in addition to the attorney survey. The Council checks each candidate's references, any criminal or disciplinary charges that might have been brought against the candidate, the candidate's credit history and any court cases in which the candidate has been involved. The Council also interviews each candidate and holds a public hearing to allow public comments.

A public hearing on the supreme court and public defender candidates will be held on December 6, 1996 at 4:30 p.m. in Anchorage, Juneau and Fairbanks.

Following its public hearing, the Judicial Council will meet in Fairbanks and Anchorage on December 8-9 to interview the candidates. Following the interviews, the Council will nominate two Or more Persons for each vacancy to the Governor, who will then have 45 days to make his appointments.

The public is encouraged to participate and comment on the judicial selection process, the evaluation of judges up for retention, the courts, and any other aspect of the administration of justice.

Public comment on the qualifications of any of the candidates is invited. Comments should be submitted in writing to the Alaska Judicial Council, 1029 West Third Avenue, Suite 201, Anchorage, Alaska 99501-1981

SUPREME COURT & PUBLIC DEFENDER POLL

November 12, 1996

Candidate	Professional Competence	Integrity	Fairness	Judicial Temperament	Suitability of Experience	Overall Professional Performance
Alexander O. Bryner	4.4	4.4	4.1	3.8	4.1	4.2
Walter L. (Bud) Carpeneti	4.5	4.6	4.5	4.5	4.5	4.5
Marcus Randolph Clapp	3.9	3.6	3.5	3.6	3.5	3.6
Mary E. Greene	4.1	4.1	3.6	3.2	3.8	3.7
James A. (Jamo) Parrish	3.8	3.8	3.6	3.7	3.5	3.6
Richard D. Savell	3.8	3.8	3.6	3.3	3.7	3.6
D. Rebecca Snow	3.9	4.0	3.6	3.5	3.4	3.7
Terry L. Thurbon	3.5	3.6	3.5	3.2	2.5	3.2
Daniel E. Winfree	3.8	3.9	3.8	3.8	3.5	3.7

Public Defender

November 12, 1996

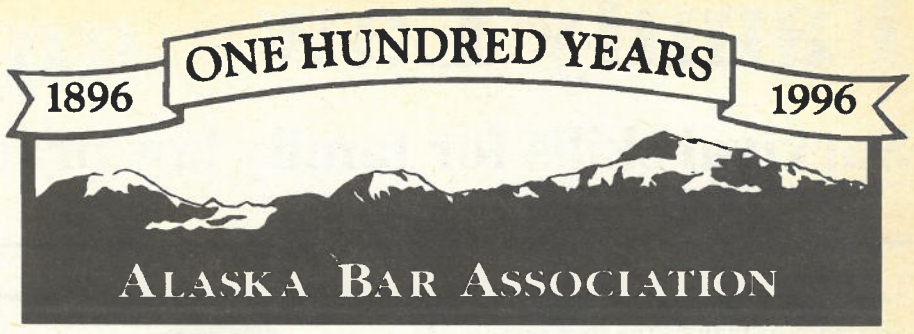
Candidate	Professional Competence	Integrity	Administrative Skills	Temperament	Suitability of Experience	Overall Professional Performance
Sidney Kay Billingslea	4.1	4.0	3.5	3.6	3.8	3.9
Barbara K. Brink	4.4	4.2	4.2	4.2	4.4	4.3
Cynthia L. Strout	4.1	4.1	3.6	3.9	3.7	3.9

January 1, 1997

is the deadline to transfer to inactive status.

For more information, or to receive an affidavit to transfer to inactive status, contact the Alaska Bar Association P.O. Box 100279 Anchorage, AK 99501 or 510 L Street, Suite 602 272-7469 Fax: 272-2932

Territorial Survival Skills



BY RUSS ARNETT

The following was an edited interview of Bruce Staser by Russ Arnett in 1990. Bruce was born in Anchorage in 1919 and he grew up there.

As a young kid some things stick in your mind. One of the first was that there was a bank robbery. It was the 1920's. My dad was Deputy Marshal and I became interested in such things. It was the middle of summer. The bank was on the corner of Fourth and E where the present National Bank of Alaska is located. It was a little hole-in-the-wall building, but it contained a fairly large safe.

It was about noon. The doors were wide open and the safe was open. Two or three people, including the tellers, were in the bank. Two strangers in town became aware of the situation. They held up the bank, took the money, and locked those who were in the bank in the safe. I am not sure how much was taken but the figure of $25,000 is in the back of my mind.

The two men escaped with the money. At the time there were only two entrances [or exits] to this part of Alaska: Seward and Valdez. When the robbery was reported to my dad he phoned Seward and Valdez, reporting the robbery and requesting they look out for the two strangers. There were no highways at all, only the railroad. There was one train a week from Anchorage to Seward with maybe a dozen passengers for the boat. There was hardly anybody moving through those towns in those days and then only when the boat arrived. My dad had them closed off, really, from escape.

After a while my dad figured they had gone up the railroad. He didn't go chasing them He had been 17 and on his own when he arrived in the Territory and he knew it well. Some of the townspeople came down on him. He was sitting with his feet on the desk in the Marshal's office when they came and told him he had to go chase them. My dad told them "I'm not going after them. They'll come back."

About a week later they came back. They were all eaten up by mosquitoes. You could hardly see their necks. They walked into the Marshal's office, conked down the money and said "Lock us up."

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An Army contingent was sent to Anchorage to guard the railroad when President Warren B. Harding came up to dedicate it. They feared the Industrial Workers of the World, or the Wobblies, who had threatened to strike and shut down the railroad to prevent finishing it. There were never more than 100 soldiers. They participated in boxing and other community activities. The troops stayed in Anchorage after the dedication until 1927 or 1928. The last remaining officer was a major. He went to Seattle and when he was being interviewed he said that bootleg booze was available in sixteen different places in Anchorage and that the Marshal was not enforcing the law.

This got back to four senators in the legislature in Juneau who were named in the newspaper articles. Since the Deputy Marshal's job was political the senators wanted my dad out and one of them or their cronies in. (My dad had been in the legislature and was of the opposite party from the senators.)

Anyway, the word was sent from Juneau back to Washington D.C. and back comes a telegram relieving dad of his job without a hearing or anything. He was out of office only a matter of days before he was reinstated. Local newspaper editorials discussed the controversy. Three years later a grand jury cleared him and said he had been a victim of those four senators down in Juneau. Somebody must have gone to bat for him. It might have been Tony Dimond. Even though he was of the other political party from my dad. He was a close friend. When Tony would come to town he would always come over and have dinner with us. He probably was a member of the legislature at that time and later became delegate to Congress and district Judge.

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The biggest problem of the Deputy Marshal was brawls. Norwegians and Swedes were often in the bar fights. They were big, strong, hard working men, but if they thought they had been cheated, they would tear the place apart. There was always a card game going on in the saloons. They were rough guys but they never bothered kids or women. There was a lot of gentleness about them.

One night, dad got a report that a big fight was in progress at Chauncey's saloon. He got into a big fight with this guy. I remember my dad broke all the fingers on his right hand. They were put into splints. I remember him bringing the brawler into the jail, crashing and shaking the walls. It was all man-handle.